No. SC95280

IN THE

Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

NATHAN WAYNE JENSEN,

Appellant.

Appeal from the Pulaski County Circuit Court
Twenty-fifth Judicial Circuit
The Honorable D. Gregory Warren, Judge

RESPONDENT'S SUBSTITUTE BRIEF

CHRIS KOSTER
Attorney General

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent

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STATEMENT OF FACTS

Mr. Jensen appeals his convictions of murder in the second degree, § 565.020, RSMo 2000, armed criminal action, § 571.015, RSMo 2000, and abandoning a corpse, § 194.425 (L.F. 118). Mr. Jensen asserts four claims on appeal: (1) that the trial court erred in refusing his proffered instruction for the included offense of involuntary manslaughter, (2) that the trial court abused its discretion in not declaring a mistrial after a witness said that Mr. Jensen was "messing with [his] 16-year-old cousin" and was "too old to be with [his] 16-year-old cousin"; (3) that the trial court plainly erred in failing to declare a mistrial *sua sponte* when the prosecutor said that Mr. Jensen "had 'gangster tattoos all over him' " during a sidebar that could be heard by the jury; and (4) that the trial court abused its discretion in not declaring a mistrial after the victim's mother had an emotional outburst on the stand (App.Sub.Br. 28-31).

* * *

In December, 2011, Mr. Jensen was "couch crashing" periodically at Christopher Jorgensen's house in Ava, Missouri (Tr. 306). Mr. Jensen was twenty-six or twenty-seven years old (Tr. 307).

Mr. Jensen "always had trouble with people," and around the beginning of December, he had some trouble with two boys—Shon Gossett and Kenny Stout (Victim) (Tr. 315). They got into a "texting war," and there were

"threats made back and forth" (*see* Tr. 219, 315). Mr. Gossett acted like he was "a big, tough guy," and Mr. Jensen texted messages back (Tr. 221). The text "war" included "threats of fighting that was gonna occur in the future" (Tr. 221). Mr. Gossett also talked to Mr. Jensen on the telephone for a couple of minutes, and they agreed to fight (Tr. 222, 230). Around December 1, Mr. Gossett also received a message that included a picture of genitals, and the message was "bragging" that the genitals were Mr. Jensen's genitals (Tr. 223). A picture of genitals was also sent to Mr. Jensen's phone (Tr. 317-318).

On December 13, Mr. Gossett went to the gym, and when he returned home, Victim was gone (Tr. 224). Mr. Gossett and Victim had decided to sell some synthetic marijuana or K2 for $20, and Mr. Gossett knew that Victim was going to try to sell it to someone (*see* Tr. 224-225, 227, 272). Mr. Gossett sent Victim a text to find out where he was, and Victim texted back, "with Mase now" (Tr. 226). "Mase" was a name used by Mr. Jensen (Tr. 209-211, 306). Mr. Gossett later told the police that the intended drug deal with Mr. Jensen involved "fake" drugs—that Victim "went to meet Mase and rip him off on a drug deal" (Tr. 228, 269).

Text messages sent from Victim's phone to Mr. Jensen's phone showed that Victim had asked Mr. Jensen if he wanted to buy some K2 (Tr. 685). Victim had also asked Mr. Jensen if he knew anyone who wanted to buy some K2 (Tr. 685). Victim identified himself and Mr. Gossett as the sellers and said

that they wanted $20 for 2.5 grams (Tr. 685). Victim eventually asked if Mr. Jensen wanted to meet at Casey's, and later text messages said, "I'm here" and "all right, man," and "I'm sitting on the side" (Tr. 686). It was 4:19 p.m. when Victim sent the text message to Mr. Gossett that said, "with Mase now" (Tr. 687).

Before meeting with Victim, Mr. Jensen had asked Mr. Jorgensen to go with him to meet Victim at Casey's (Tr. 219). Mr. Jensen said he had "found the guy that had been causing all the trouble and made the phone calls" and that he "wanted to take him out and beat him up" (Tr. 319).

At Casey's, Victim got into Mr. Jorgensen's car and sat behind Mr. Jorgensen, who was driving (Tr. 320).[1] Mr. Jensen was sitting in the front passenger seat (Tr. 320). They left Casey's, and Mr. Jensen directed Mr. Jorgensen to drive to "a spot that he knew of" (Tr. 321). They drove on a dirt road and came to a path that led to some woods (Tr. 323).

When they got out of the car, Victim handed Mr. Jensen a bag of K2 (Tr. 325). Mr. Jensen and Victim "had a few words and started – kind of started off" (Tr. 326). They struggled with each other (Tr. 326). Mr. Jorgensen then went around the car and hit Victim with a left-handed uppercut on the

[1] A video obtained from Casey's showed Victim getting into the car (Tr. 235-236, 323-324).

jaw (Tr. 326). Before hitting Victim, Mr. Jorgensen said, "I told you I'd find you" (Tr. 436). Victim fell to the ground unconscious (Tr. 328). Victim "folded up like an accordion and – and started shaking and stuff, like convulsions" (Tr. 328). Mr. Jorgensen and Mr. Jensen then stomped on his chest and midsection and face (Tr. 329-330). They also hit him with their fists (Tr. 330).

Mr. Jensen told Mr. Jorgensen to "pop the trunk" (Tr. 331). Mr. Jensen retrieved two aluminum baseball bats from the trunk (Tr. 331). They then struck Victim "numerous times . . . in the chest and midsection" (Tr. 332).

After beating Victim, they dragged Victim up a hill and left him near a pile of brush (Tr. 335-337). They dragged him twenty to thirty feet and left him for dead (Tr. 339). One of Victim's shoes came off (Tr. 345). They left him lying on his back (Tr. 349). They then returned to Mr. Jorgensen's house (Tr. 345, 349-350). The place where they left the body was only a few minutes away from Mr. Jorgensen's house (Tr. 350; *see* Tr. 263).

When they arrived at Mr. Jorgensen's house, they both had blood on them (Tr. 350). Mr. Jorgensen put their bloody clothing into a plastic bag and put the bag in the trunk of his car (Tr. 350-351).

Later that evening, Kayla Berry contacted Mr. Jensen "[t]o smoke" (Tr. 289). She asked Mr. Jensen if he had some K2, and Mr. Jensen said that he did (Tr. 289). They agreed to meet at a Casey's, but Mr. Jensen was late (Tr. 290). Mr. Jensen was "acting kind of weird," and he "kept watching his

mirrors" (Tr. 290). Mr. Jensen asked where she wanted to go, and Ms. Berry told him to "hit a dirt road" (Tr. 290). They ended up at a cemetery west of Ava, and they "smoked" some K2 and had sex (Tr. 290). Afterward, Mr. Jensen dropped off Ms. Berry at the Casey's (Tr. 291).

On the day of the murder, Victim's grandparents had planned to have dinner with Victim at Larkins Roadhouse (Tr. 185-187). They became concerned when he did not arrive (Tr. 187). They called law enforcement and the local ambulance service, but they did not learn anything (Tr. 187-188). They called Victim's mother, and they eventually learned that Victim had sent the text message to Mr. Gossett saying that he was "[w]ith Mase now" (Tr. 224, 675; *see* Tr. 189-190, 196-197).

Mr. Gossett told the police later that night that he had seen Victim's car at a residence (Tr. 243). Officer Tiffany Neill and Mr. Gossett went to that residence (Tr. 244). It was about 10:30 p.m. (Tr. 244). Officer Neill went to the door, and Mr. Jorgenson answered (Tr. 245, 351). Officer Neill said that she was there to see Mr. Jensen, and Mr. Jorgenson told her that he would have Mr. Jensen meet her around the side of the house (Tr. 245).

Officer Neill met Mr. Jensen on the side of the house and asked him if he had been texting Victim (Tr. 246). Mr. Jensen said he had not (Tr. 246). Mr. Jensen said he did not know Victim (Tr. 246). Officer Neill also asked Mr. Jorgensen if he had seen Victim, and Mr. Jorgensen said he had not (Tr. 353).

Mr. Jorgensen said he did not know Victim (Tr. 247, 353).

After Officer Neill left, Mr. Jorgensen told Mr. Jensen to go check on the body (Tr. 354). Mr. Jensen left the house (Tr. 354). Mr. Jensen sent multiple texts to Mr. Jorgensen, and he told Mr. Jorgensen he had gone and checked on Victim (Tr. 354). Meanwhile, Mr. Jorgensen went to Judy Greuter's farm and disposed of some of the evidence (Tr. 361-364). He put the two bats into a pond, and he burned the bloody clothes in a barrel (Tr. 364). Mr. Jorgensen returned home the next morning (Tr. 366).

The next day, December 14, Victim's parents went to Ava and picked up Mr. Gossett (Tr. 197, 209). Mr. Gossett directed them to Mr. Jorgensen's house (Tr. 197-198, 209-210). A woman at the house told them that Mr. Jensen would meet them on the side of the house (Tr. 198-199; *see* Tr. 210). Victim's father and Mr. Jensen talked, and Victim's father demanded to know where his son was (Tr. 210).

Mr. Jensen initially stated that Victim was supposed to meet him but that Victim did not show up (Tr. 211). Victim's father said that they had received a text indicating that Victim was with him, and Mr. Jensen said that he had met with Mr. Gossett and did not know Victim (Tr. 211). Victim's father said he was "gonna give him to the count of four to tell [him] where he was" (Tr. 211). He counted to four and hit Mr. Jensen four times in the head (Tr. 211-212; *see* Tr. 199-200, 357). Mr. Jensen "[k]ind of got teared up,

started getting a whiny voice, [and asked,] what was that for?" (Tr. 469).

Mr. Jorgensen intervened and said that he "didn't want that going on in front of [his] son in [his] yard" (Tr. 358). Victim's parents then left, saying that they would be back, and that they were going to contact the sheriff (Tr. 206, 212, 358).

After Victim's parents left, Mr. Jorgensen asked Mr. Jensen about Victim, and Mr. Jensen said he was "still there" (Tr. 358). Mr. Jorgensen asked if he was alive or dead, and Mr. Jensen said, "I don't know" (Tr. 358). Mr. Jorgensen told Mr. Jensen he had to "leave for a little while" (Tr. 369). About an hour or two later, Mr. Jensen returned to the house (Tr. 369). Mr. Jorgensen asked again about Victim, and Mr. Jensen said he was still there and that he did not know if he was alive or dead (Tr. 370).

They then drove out to the place where they had left Victim (Tr. 370-371). They were "gonna make sure he was gone," *i.e.*, dead (Tr. 375). Mr. Jorgensen had a hunting knife (Tr. 372-373).

When they arrived, Victim was on his side, and he was still breathing (Tr. 375). They both stabbed Victim with the knife (Tr. 377). Mr. Jensen stabbed him first (Tr. 377). He stabbed Victim in "[t]he back and numerous places" (Tr. 377). He stabbed him six or seven times (Tr. 377). Mr. Jorgensen then took the knife and "attempted to just end it quickly" (Tr. 377). He tried to cut Victim's throat, but Victim pulled away from him (Tr. 377-378). Mr.

Jorgensen then stabbed him in the ribs a couple of times (Tr. 378). They then drove back to Mr. Jorgensen's house (Tr. 387).[2]

Back at the house, Mr. Jorgensen put their bloody clothes and the knife into a bag (388, 391). He also collected some drug paraphernalia and gave it to Mr. Jensen (Tr. 388). He told Mr. Jensen to go to James Watson's house in Mansfield (Tr. 389-390; *see* Tr. 493, 525). Mr. Jorgensen then went back to Ms. Greuter's house and burned the bloody clothing (Tr. 391, 396). He threw the knife into the middle of the pond (Tr. 395). After "smok[ing] a bowl" of

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[2] In his Statement of Facts, Mr. Jensen asserts, "Law enforcement agreed that it was not possible for [Mr. Jensen] to be with Jorgensen killing [Victim] on the afternoon of December 14th, because [Mr. Jensen] was at the Watson residence" (App.Sub.Br. 17, citing Tr. 772). But what Sheriff Degase testified to was that Mr. Jensen *said* he went to the Watsons' residence around noon, and that Mr. Jensen's account was inconsistent with Mr. Jorgensen's account (Tr. 771-772). Defense counsel suggested it "wasn't possible" for Mr. Jensen to be killing Victim after Victim's parents confronted him because "he went to the Watsons,' " and Sheriff Degase said, "Right. Cuz [Mr. Jensen] had already said that it happened the night before" (Tr. 772). Thus, Sheriff Degase agreed that it was not "possible" according to Mr. Jensen's account. He then agreed, however, that "that's not what Chris Jorgensen says" (Tr. 772).

"weed" with Ms. Greuter, Mr. Jorgensen returned home (Tr. 396-397).

When he returned home, Mr. Jorgensen told his wife that he would not be back until late that night or the next morning (Tr. 398). He then went to Mr. Watson's house in Mansfield (Tr. 398). Mr. Watson asked him, "what's wrong with Mase, he's acting weird" (Tr. 399). Mr. Jorgensen did not give him direct answers (Tr. 399). He told Mr. Watson that he was going to Ms. Greuter's house, and that he was "gonna take Mase off his hands" (Tr. 399). Mr. Watson asked to go along (Tr. 399).

They then drove in two separate vehicles to Ms. Greuter's house (Tr. 400, 494). Mr. Jensen drove his own vehicle, and Mr. Watson rode with Mr. Jorgensen (Tr. 400, 494). Mr. Jorgensen had told Mr. Jensen that he could hide out at Ms. Greuter's place, but he was thinking of "[g]etting rid of [Mr. Jensen]" by killing him (Tr. 401). Mr. Jorgensen "didn't think he could hold it, keep his mouth shut" (Tr. 401). On the way over to Ms. Greuter's house, Mr. Jorgensen told Mr. Watson that he was going to kill Mr. Jensen, and that Mr. Watson was going to dig his grave (Tr. 496).

At Ms. Greuter's house, they smoked some "pot" (Tr. 402). Ms. Greuter then asked Mr. Jorgensen what was going on, and he told her about "the death of [Victim] and what all had went down the past two days" (Tr. 403). Ms. Greuter said, "I don't think he's gonna be quiet," and she reminded Mr. Jorgensen that she had a backhoe (Tr. 403). She also told Mr. Jorgensen

"where she kept her .25" (Tr. 404).

Mr. Jorgensen and Mr. Jensen then moved Mr. Jensen's car (a green Mustang) into a shed (Tr. 404, 495-496). Having decided to kill Mr. Jensen, Mr. Jorgensen went back inside and obtained Ms. Greuter's gun (Tr. 409). When he went back outside, he told the others that he had dropped the keys to the gate (Tr. 410). They started looking on the ground, and Mr. Jorgensen pulled out the gun, put it behind Mr. Jensen's head, and pulled the trigger (Tr. 411). The gun did not fire; it merely clicked (Tr. 411, 496).

Mr. Jensen said, "what the f---, man" and fled (Tr. 496). Mr. Jorgensen tried to fire the gun again (Tr. 411). Mr. Jensen jumped over a fence and ran off into the woods (Tr. 412, 497). Mr. Jorgensen eventually fired the gun two or three times in Mr. Jensen's direction (Tr. 412, 414-415). Mr. Jorgensen told Mr. Watson to run after him (Tr. 415). Mr. Watson soon returned and said, "I can't catch him. I don't know where he's at" (Tr. 416, 497). Mr. Jorgensen gave his car keys and the gun to Mr. Watson and told him to go back up the road and "take a lookout for him" (Tr. 417). He instructed Mr. Watson to "[s]hoot him or run him over" (Tr. 417).

Mr. Jorgensen then obtained a rifle from Ms. Greuter's house (Tr. 417, 497). He took Ms. Greuter's truck and went looking for Mr. Jensen (Tr. 417). They did not find Mr. Jensen, and they eventually returned to Ms. Greuter's house (Tr. 418-419). Mr. Jorgensen put away the rifle and took the .25 caliber

handgun from Mr. Watson (Tr. 419). They then looked for a place to get rid of Mr. Jensen's car (Tr. 419-421, 499). They eventually left the car in a parking lot next to a McDonald's in Houston, Missouri (Tr. 407, 422, 499-500). They took Mr. Jensen's computer, clothes, and wallet (Tr. 422).

After leaving Houston, Mr. Watson took the battery out of Mr. Jensen's telephone and threw it out the window (Tr. 425). He also threw the telephone out the window (Tr. 425). They got rid of Mr. Jensen's computer and wallet at Austin Lake (Tr. 425-426; *see* Tr. 500-501). In Norwood or Macomb, Mr. Jorgensen put the handgun into a garbage can (Tr. 427, 501-502). When they returned to Mr. Watson's home in Mansfield, Mr. Jorgensen found Mr. Jensen's hoody in the car, so he threw it into a dumpster (Tr. 428, 502).

Mr. Jorgensen and Mr. Watson "smoked a bowl of weed," and Mr. Watson asked what they were going to do (Tr. 429). Mr. Jorgensen said, "Mum's the word. Be quiet, you know" (Tr. 430). Mr. Jorgensen then changed out of his boots and pants and threw them into the dumpster (Tr. 430). He returned home in the early morning hours of December 15 (Tr. 431-432).[3]

[3] Mr. Jorgensen later agreed to testify against Mr. Jensen, and he pleaded guilty to murder in the second degree and armed criminal action (Tr. 305). In exchange for his cooperation and guilty plea, the State agreed to a twenty-year sentencing cap and to not file other charges (Tr. 454-455, 461-462).

Meanwhile, after running from Mr. Jorgensen, Mr. Jensen had banged on someone's door, and the resident had called 911 (Tr. 511-512). Officer Scott Nelson received a call from the Texas County Sheriff's Department, and he responded to the call (Tr. 512). Officer Nelson and a deputy sheriff made contact with Mr. Jensen (Tr. 513).

Mr. Jensen told Officer Nelson that someone had tried to kill him (Tr. 514). Mr. Jensen said he did not know why (Tr. 514). Mr. Jensen then stated, "I think I have some information about a missing boy in Ava" (Tr. 514). Mr. Jensen gave Victim's first name (Tr. 514). The deputy transported Mr. Jensen to the sheriff's department (Tr. 514).

At the station, Mr. Jensen said that someone put a gun to his head and pulled the trigger, that the gun went click, and that he ran off through the woods until he thought he was far enough away and knocked on a door (Tr. 516). He again stated that he did not know why someone would try to kill him (Tr. 516). Officer Nelson asked Mr. Jensen if he knew the missing boy in Ava, and Mr. Jensen said he had "never met him" (Tr. 517).

Later, Sergeant Casey Jadwin interviewed Mr. Jensen, and Mr. Jensen said that Mr. Jorgensen had tried to kill him (Tr. 551). He said they had been looking for a lock on the ground, and that Mr. Jorgensen had tried to shoot him in the head (Tr. 552). He said he ran and ended up at a neighboring residence (Tr. 553). Mr. Jensen led a group of law enforcement officers out to

Ms. Greuter's farm (Tr. 553-554). When Sergeant Jadwin asked why Mr. Jorgensen would try to kill him, Mr. Jensen said that "it had something to do possibly with [Victim]" (Tr. 557). Mr. Jensen said that he "barely knew [Victim]" (Tr. 558).

While at the farm, Mr. Jensen also alluded to the fact that Victim might be dead (Tr. 695). Sheriff Chris Degase overheard him and asked if he "could get [him] back to the location where he thought [Victim] might be" (Tr. 695-696). Mr. Jensen agreed (Tr. 696). Mr. Jensen then led Sheriff Degase to the location of Victim's body (Tr. 697-698).

Victim's body was found on the morning of December 15 (Tr. 481, 526, 674, 697-699). The body was facedown (Tr. 484, 700). Sheriff Degase found a cigarette butt on the ground, and he mentioned to Mr. Jensen that there was a possibility they could find DNA on it (Tr. 705). At that point, Mr. Jensen admitted that he had gone up the road where the body was found—a fact he had denied up until that time (Tr. 705-706). Mr. Jensen was transported to the Ava Police Department (Tr. 710).

Later that afternoon, Sheriff Degase questioned Mr. Jensen and told him that they had found blood in his car (Tr. 716). Mr. Jensen initially denied that he and Mr. Jorgensen picked up Victim at Casey's, but he later admitted that they had (Tr. 718). Mr. Jensen also initially denied being involved in beating and stabbing Victim (Tr. 722). Mr. Jensen did not immediately admit

that he was present, but then he admitted that he was there, and he said that Mr. Jorgensen knocked out Victim with an uppercut (Tr. 723). He said that Mr. Jorgensen then kicked Victim all over his body (Tr. 723). He stated that Mr. Jorgensen then obtained two baseball bats and told Mr. Jensen to hit Victim (Tr. 723). He said that Mr. Jorgensen repeatedly hit Victim in the head and chest (ten to twenty times), and he admitted that he also hit Victim "one time in the stomach" (Tr. 723, 732).

Mr. Jensen initially denied moving Victim, but he later admitted that he helped drag Victim over to the brush pile (Tr. 738-739). Later, Mr. Jensen said Mr. Jorgensen had forced him to do everything he had done (Tr. 742). Mr. Jensen denied going back to Victim, but he later said that he had driven over and then turned around on that road (Tr. 744-745). Mr. Jensen ultimately admitted that he was present when Victim was stabbed (Tr. 745). He stated that they went "back out to make sure," but he denied stabbing Victim (Tr. 746). He said that he sat in the car while Mr. Jorgenson went into the woods and appeared to stab Victim (Tr. 785; *see* Tr. 812).

An autopsy was performed on the evening of December 15 (Tr. 482, 723). Victim had a superficial sharp-force injury to his neck (Tr. 902). Victim had a contusion on the right side of his face, and a blunt force injury to his lower lip and right jaw (Tr. 904-905). Victim suffered a fracture at the base of his skull, and he suffered brain swelling (Tr. 906-907). Victim also had "a

series of at least four pattern abrasion contusions to his chest and upper abdomen" (Tr. 914). Victim also had sharp force injuries, or stab wounds (Tr. 916). Victim suffered four horizontal stab wounds on his right flank, two vertical stab wounds on his right side of his lower back, two vertical stab wounds on the left side of his lower back, a stab wound on his right upper chest, and a stab wound on his upper abdomen or lower chest (Tr. 916-917). The stab wounds entered the chest cavity, damaged ribs and blood vessels under the ribs, punctured a lung, and damaged Victim's liver (Tr. 917).

The doctor who performed the autopsy concluded that Victim died from "sharp force injuries resulting in exsanguination" (Tr. 924). Another expert opined that the blunt force injuries would have been fatal eventually but that the stab wounds would have "interrupted that process and resulted in his death fairly quickly" (Tr. 924).

A blood stain was found inside Mr. Jensen's car on the passenger seat (Tr. 561-563). The blood was Victim's blood (Tr. 563, 616, 827). Two bats were found in Ms. Greuter's pond (Tr. 569-570, 596, 635). One bat was floating near the edge of the pond, and one bat was submerged (Tr. 596, 635). A knife was also found in the pond (Tr. 570-571, 596, 635). Victim's blood was found on the partially submerged bat (Tr. 574, 597, 828). Victim's wallet was found at Austin Lake (Tr. 645, 647).

The State charged Mr. Jensen, as a persistent offender, with murder in

the first degree, armed criminal action, and abandonment of a corpse (L.F. 23-25). Trial commenced on October 28, 2013 (Tr. 2).

Mr. Jensen presented the testimony of Ms. Greuter, who testified that Mr. Jorgensen told her that he had killed someone (Tr. 937). She admitted on cross-examination that she had pleaded guilty to the class D felony of tampering with evidence (Tr. 942).

As to count I (the murder), the trial court instructed the jury on murder in the first degree and the included offenses of murder in the second degree and voluntary manslaughter (L.F. 73-81). The court refused Mr. Jensen's proffered instruction for the included offense of involuntary manslaughter (Tr. 1034-1035; L.F. 101). The court concluded that the refused instruction was not supported by the evidence (Tr. 1035).

The jury found Mr. Jensen guilty of murder in the second degree, armed criminal action, and abandonment of a corpse (Tr. 1062).

On February 14, 2014, after hearing testimony from Mr. Jensen, Mr. Jensen's mother, and Victim's mother, and after hearing argument from the parties, the court sentenced Mr. Jensen to life imprisonment for murder in the second degree, five years' imprisonment for armed criminal action, and four years' imprisonment for abandonment of a corpse (Sent.Tr. 53-54). The court ordered the five-year sentence to run concurrently with the life sentence and the four-year sentence to run consecutively (Sent.Tr. 54).

ARGUMENT

I.

The trial court did not commit reversible error in refusing to submit Mr. Jensen's proffered Instruction OO for the lesser included offense of involuntary manslaughter.

In his first point, Mr. Jensen asserts that the trial court erred in refusing to submit his proffered instruction for the included offense of involuntary manslaughter (App.Sub.Br. 32). He asserts that the trial court was obligated to submit his proffered instruction "since recklessness is automatically established through knowing conduct under Section 562.021, and the jury could have found that [Mr. Jensen] acted recklessly rather than knowingly, especially when the issue of duress may be considered by the jury under the manslaughter, but not the murder, instructions" (App.Sub.Br. 32).

A. The standard of review

"This Court reviews *de novo* a trial court's decision whether to give a requested jury instruction under section 556.046, RSMo . . .,[ ] and, if the statutory requirements for giving such an instruction are met, a failure to give a requested instruction is reversible error." *State v. Jackson*, 433 S.W.3d 390, 395 (Mo. 2014) (footnote omitted).

As a general matter, "[a]n appellate court will not remand for a new trial on the basis of an error that did not violate a defendant's constitutional

rights unless 'there is a reasonable probability that the trial court's error affected the outcome of the trial.' " *See id*. at 395 n. 4. Thus, for instance, the Court has held that "[t]he failure to give a different lesser-included offense instruction is neither erroneous nor prejudicial when instructions for the greater offense and one lesser-included offense are given and the defendant is found guilty of the greater offense." *State v. Johnson*, 284 S.W.3d 561, 575 (Mo. 2009). However, in resolving claims of trial-court error in refusing to instruct down, the Court has also held that "prejudice is presumed when a trial court fails to give a requested lesser included offense instruction that is supported by the evidence." *See Jackson*, 433 S.W.3d at 395 n. 4 (citing *State v. Redmond*, 937 S.W.2d 205, 210 (Mo. 1996)).

B. The trial court erred in refusing to instruct the jury on the included offense of involuntary manslaughter, but Mr. Jensen was not prejudiced

1. The trial court erred in refusing the instruction

"A defendant may be convicted of an offense included in an offense charged in the indictment or information." § 556.046.1, RMSo Cum. Supp. 2013. Involuntary manslaughter based on "recklessly" causing the death of another person is an "included offense" of murder in the first degree. *See* § 565.025.2(1)(c), RSMo 2000.

The trial court is obligated to instruct on an included offense when

three conditions are met: "[1] a party timely requests the instruction; [2] there is a basis in the evidence for acquitting the defendant of the charged offense; and [3] there is a basis in the evidence for convicting the defendant of the lesser included offense for which the instruction is requested." *State v. Jackson*, 433 S.W.3d at 396. Additionally, under § 556.046, "[t]he court shall be obligated to instruct the jury with respect to a particular included offense only if there is a basis in the evidence for acquitting the defendant of the immediately higher included offense and there is a basis in the evidence for convicting the defendant of that particular included offense." § 556.046.3, RSMo Cum. Supp. 2013.

Here, the record shows that Mr. Jensen timely requested an instruction for the included offense involuntary manslaughter (Tr. 1034-1035). Thus, the first condition for submission was satisfied.

There was also a basis to acquit Mr. Jensen of voluntary manslaughter, which was "the immediately higher included offense" that was submitted to the jury. The instruction for voluntary manslaughter (in conjunction with the second-degree murder instruction) required the jury to determine whether (1) "defendant and Christopher Jorgensen caused the death of [Victim] by beating and stabbing him," (2) "defendant and Christopher Jorgensen knew or was aware that their conduct was practically certain to cause the death of [Victim]," (3) defendant and Christopher Johnson caused Victim's death

under the influence of sudden passion arising from adequate cause, and (4) with the purpose of promoting or furthering the commission of the offense, "the defendant acted together with or aided Christopher Jorgensen in committing the offense" (L.F. 79; *see also* L.F. 76).

Thus, for instance, the jury could have acquitted of voluntary manslaughter by concluding that Mr. Jensen and his co-actor did not cause Victim's death by "beating" him. (The proffered instruction for involuntary manslaughter omitted "beating" and posited that "defendant or Christopher Jorgensen caused the death of [Victim] by stabbing him" (L.F. 101).) The jury also could have believed that there was no sudden passion arising out of adequate cause and that Mr. Jensen or his co-actor did not "knowingly" cause Victim's death. In short, there was at least one basis for acquitting Mr. Jensen of voluntary manslaughter.

As the Court stated in *Jackson*, "the jury's right to disbelieve all or any part of the evidence and its right to refuse to draw needed inferences is a sufficient basis in the evidence—by itself—for a jury to conclude that the state has failed to prove the differential element" of the greater offense. *State v. Jackson*, 433 S.W.3d at 399. Consequently, there was a basis to acquit of the immediately higher offense of voluntary manslaughter, and the second condition of submission was satisfied.

The question, then, is whether there remained a basis to convict Mr.

Jensen of involuntary manslaughter as submitted in Mr. Jensen's proffered instruction. The refused instruction would have required the jury to find (1) that "the defendant or Christopher Jorgensen caused the death of [Victim] by stabbing him," (2) "that defendant or Christopher Jorgensen recklessly caused the death of [Victim]," and (3) "that with the purpose of promoting or furthering the commission of that involuntary manslaughter, the defendant acted together with or aided Christopher Jorgensen" (L.F. 101).

Respondent concedes that there was evidence to support each of these propositions, even if it was not reasonably probable under the facts of this case that the jury would have concluded that Mr. Jensen or his co-actor was merely reckless in causing Victim's death. In *State v. Roberts*, 465 S.W.3d 899, 902 (Mo. 2015), this Court held that § 562.021.4, RSMo 2000, provides "that 'knowingly' engaging in criminal conduct establishes that the conduct was also reckless." *See also State v. Randle*, 465 S.W.3d 477, 480 (Mo. 2015) ("if [defendant] 'knowingly' inflicted physical injury, he necessarily engaged in conduct sufficient to establish that he 'recklessly' inflicted physical injury"). Consequently, because there was a basis to convict Mr. Jensen of involuntary manslaughter, the third condition for submission was met, and the trial court erred in refusing the instruction.

2. The Court should not presume prejudice

Citing *Roberts*, 465 S.W.3d at 901, Mr. Jensen asserts that the trial

court's error "requires a new trial" (App.Sub.Br. 38). But while the Court has stated in some cases that such error is "reversible error" or that prejudice is "presumed when a trial court fails to give a requested lesser included offense instruction that is supported by the evidence," *see Jackson*, 433 S.W.3d at 395 & 395 n. 4, the Court has also recognized that a trial court's failing to give an included offense instruction that was supported by the evidence is not *always* prejudicial, reversible error. *See State v. Johnson*, 284 S.W.3d at 575.

Thus, rather than presuming prejudice when analyzing a trial court's failing to give a non-mandatory lesser included instruction, the Court should look to Rule 28.02, which provides that "[t]he giving or failing to give an instruction . . . in violation of this Rule 28.02 . . . shall constitute error, *the error's prejudicial effect to be judicially determined*[.]" Rule 28.02(f) (emphasis added). This Court recently observed in *State v. Blurton*, 484 S.W.3d 758, 768 n. 7 (Mo. 2016), that "[a] non-mandatory lesser included instruction is governed by Rule 28.02(b)[.]" Accordingly, under the terms of Rule 28.02(f), prejudice should be "judicially determined"—and not presumed—when a trial court errs in failing to give a requested, included offense instruction.

Generally, "[w]hen reviewing claims of instructional error, this Court will reverse the circuit court's decision only if the instructional error misled the jury and, thereby, prejudiced the defendant." *State v. Zetina-Torres*, 482 S.W.3d 801, 810 (Mo. 2016). " '[R]eversal is only warranted when the

instructional error is so prejudicial that it deprived the defendant of a fair trial.' " *Id.* "Prejudice occurs when an erroneous instruction may have influenced the jury adversely." *Id.* In other words, the Court should "not remand for a new trial on the basis of an error that did not violate a defendant's constitutional rights unless 'there is a reasonable probability that the trial court's error affected the outcome of the trial.' " *Jackson*, 433 S.W.3d 395, n. 4 (quoting *State v. Forrest*, 183 S.W.3d 218, 224 9Mo. 2006)).

3. Mr. Jensen was not prejudiced

Here, a review of the record reveals several circumstances that dispel any reasonable probability that the trial court's error affected the fairness of Mr. Jensen's trial.[4]

a. The general rule. First, a longstanding rule in Missouri has been that "[t]he failure to give a different lesser-included offense instruction is neither erroneous nor prejudicial when instructions for the greater offense and one lesser-included offense are given and the defendant is found guilty of the greater offense." *State v. Johnson*, 284 S.W.3d at 575 (citing *State v. Glass*, 136 S.W.3d 496, 515 (Mo. 2004); *State v. Johnston*, 957 S.W.2d 734,

[4] Alternatively, if the Court concludes that the trial court's error gave rise to a presumption of prejudice, respondent submits that the facts of this case rebut that presumption.

751-752 (Mo. 1997)); *see State v. Jones*, 979 S.W.2d 171, 185 (Mo. 1998); *State v. Six*, 805 S.W.2d 159, 164 (Mo. 1991); *Fisher v. State*, 359 S.W.3d 113, 122 (Mo. App. W.D. 2011); *State v. Ryan*, 229 S.W.3d 281, 289 (Mo. App. S.D. 2007).

Accordingly, here, inasmuch as Mr. Jensen was found guilty of murder in the second degree, and inasmuch as the trial court submitted an instruction for the included offense of voluntary manslaughter (*i.e.*, the jury had a lesser option if it was not convinced beyond a reasonable doubt of Mr. Jensen's guilt), it cannot be said that Mr. Jensen was prejudiced by the absence of yet another lesser included offense instruction.

Mr. Jensen asserts that "the obvious error in this logic is that voluntary manslaughter is not a 'nested' lesser offence because the mental state is not the differential element between voluntary manslaughter and second degree murder" (App.Sub.Br. 39). He asserts that, "[s]tated another way, the voluntary manslaughter instruction did not test the mental state element of the second degree murder instruction in the same way that an involuntary manslaughter instruction would have done" (App.Sub.Br. 39).

Respondent agrees that voluntary manslaughter is not a "nested" included offense of murder in the second degree, inasmuch as it requires proof of additional facts not required for murder in the second degree. *See State v. Davis*, 474 S.W.3d 179, 187 (Mo.App. E.D. 2015) ("While second-

degree assault based on sudden passion is a lesser-included offense of first-degree assault, it is not a "nested" lesser-included offense. Second-degree assault based on sudden passion is not a subset of the elements of first-degree assault and it is not "impossible to commit" the higher offense without necessarily committing the lower offense.").

But the question of whether an offense is "nested" within a greater offense—while significant in analyzing whether there is a basis to acquit of the greater offense and to convict of the lesser offense—is of little or no consequence in analyzing prejudice. A jury will not know whether an offense is a "nested" offense; a jury will simply evaluate the facts in light of the instructions submitted to it. Thus, the more pertinent question is whether, in light of the instructions submitted to the jury, there is any reasonable probability that the submission of an *additional* lesser included offense would have resulted in a verdict on that offense instead of the greater offense.

Mr. Jensen relies on *State v. Frost*, 49 S.W.3d 212, 221 (Mo.App. W.D. 2001), and *State v. Nutt*, 432 S.W.3d 221 (Mo.App. W.D. 2014), to support his argument that the voluntary manslaughter instruction submitted in his case did not sufficiently test the firmness of the jury's finding that he was guilty of murder in the second degree (App.Sub.Br. 39-40). Respondent submits, however, that the analysis in cases like *Frost* and *Nutt* should be reexamined; and, in any event, that cases like *Frost* and *Nutt* are distinguishable from Mr.

Jensen's case in important respects.

In *Frost*, the Court of Appeals pointed out that the only difference between the offenses submitted to the jury, namely, murder in the second degree and voluntary manslaughter, was the element of "sudden passion." *Id.* at 219, 221. In other words, the greater offense and lesser offense submitted to the jury had the same mental state of "knowingly," and the jury's verdict merely revealed that the jury did not believe that the murder was committed under the influence of "sudden passion." *Id.*

The Court of Appeals then pointed out that the lesser offense that was *not* submitted to the jury (involuntary manslaughter) was also "consistent with a purposeful homicide" in light of the defendant's claim that he had acted in imperfect self-defense. 49 S.W.3d at 220 (citing *State v. Beeler*, 12 S.W.3d 294, 298 (Mo. 2000)). In other words, in a case involving imperfect self-defense, a potential guilty verdict on involuntary manslaughter was "not foreclosed" because "[t]he conduct of [the defendant] could still have been consistent with a purposeful homicide[.]" *Id.*

In short, because the evidence of guilt was consistent with a conviction of the greater offense or the refused lesser offense, and because the firmness of the jury's guilty verdict on the greater offense could have been further tested by an involuntary manslaughter instruction, the Court of Appeals concluded that it could not "say that the jury was adequately tested on the

elements of second-degree murder to the extent that submission of involuntary manslaughter would have made no difference." *Id*.

Respondent submits, however, that the testing of the jury's verdict in *Frost* was more rigorous than the Court of Appeals acknowledged. First, while murder in the second degree and voluntary manslaughter both carry the culpable mental state of "knowingly," the culpable mental state for voluntary manslaughter is a *mitigated* culpable mental state, in that it is under the influence of "sudden passion" arising from adequate case. In other words, a voluntary manslaughter instruction does test the firmness of the jury's belief that a defendant acted with a non-mitigated (or more culpable) culpable mental state of "knowingly."

Accordingly, the question of whether Mr. Jensen was prejudiced should not turn on whether the jury had the opportunity to consider specifically whether Mr. Jensen or his co-actor acted "recklessly" in causing Victim's death. Rather, the question should turn on whether the jury was firm in its belief (*i.e.*, convinced beyond a reasonable doubt) that Mr. Jensen or his co-actor acted "knowingly" in causing Victim's death (and not under the influence of sudden passion) as set forth in the verdict director for murder in the second degree. That finding certainly could have been tested *further* by a verdict director that posited a reckless mental state, but the testing provided by the voluntary manslaughter instruction was sufficient to confirm that the

jury was convinced beyond a reasonable doubt that Mr. Jensen or his co-actor acted knowingly.

In addition, a prejudice analysis should not focus on whether every element of the greater offense was individually "tested" by an included offense instruction that specifically omitted each differential element of the greater offense. Rather, the Court should recognize that when a lesser included offense is submitted to the jury, and when the jury finds the defendant guilty of the greater offense, the presence of that lesser included offense (along with the option to acquit) necessarily—and adequately—tests the reliability of the jury's verdict, so as to remove any reasonable probability of a different result.

Indeed, the ordinary presumption is that the jury will conscientiously follow the law in rendering its verdict, *i.e.*, that it will not find the defendant guilty unless it is convinced beyond a reasonable doubt that each and every element of the offense has been proved. If the jury is not convinced beyond a reasonable doubt, it can always acquit the defendant. In other words, the option to acquit the defendant generally tests each and every element of the offense, and if the jury has a doubt about any element, the jury can acquit. It is not necessary, therefore, for a lesser-included-offense instruction to provide "individualized testing" for each element of the greater offense.

Of course, courts have recognized that, practically speaking, juries do

not always adhere to theory. In other words, as a practical matter, the potential for an unreliable verdict can arise when the jury might be unconvinced of the defendant's guilt of the charged offense but is unwilling to acquit because the defendant is plainly guilty of something. *See Beck v. Alabama*, 447 U.S. 625, 634 (1980). In such cases, if there is no lesser included offense for the jury to consider—*i.e.*, no "third option"—the concern is that the jury will simply convict the defendant of the charged offense to avoid the perceived injustice of an outright acquittal. *Id.*

But where the jury is given a "third option" of a lesser included offense, and where the jury then finds the defendant guilty of the greater offense, there is no reason to doubt the reliability of the verdict. To doubt the firmness of the verdict here, for instance, leads to the conclusion that the jury—unconvinced that Mr. Jensen was guilty of murder in the second degree or voluntary manslaughter (but unwilling to acquit him completely because he was plainly guilty of something)—chose the more serious offense of second-degree murder rather than voluntary manslaughter as a means of punishing his less culpable criminal conduct. This makes no sense from a practical standpoint, and if the possibility of nullification is going to be indulged, it should at least be presumed that the jury is not irrational. *See generally Schad v. Arizona*, 501 U.S. 624, 648 (1991) ("Because we can see no basis to assume such irrationality, we are satisfied that the second-degree

murder instruction in this case sufficed to ensure the verdict's reliability.").

Finally, the general rule—that there is no prejudice when one lesser included offense is submitted and the jury finds the defendant guilty of the greater offense—also recognizes that the manner in which lesser included offenses are submitted to the jury precludes a finding of prejudice. Lesser included offenses are submitted in descending order, and each included-offense instruction begins with the instruction, "If you do not find the defendant guilty of [the preceding, greater offense], you must consider whether he is guilty of [the included offense]." *See State v. McCullum*, 63 S.W.3d 242, 252 (Mo.App. S.D. 2001). Consequently, when the jury finds the defendant guilty of the greater offense and does not "take the first step in reducing the offense," any error in failing to submit another lesser included offense is not prejudicial. *Id.* at 252-253 (" 'The jury, by finding [Defendant] guilty of first degree assault, did not take the first step in reducing the offense to second degree assault. Under these circumstances, the jury could not have considered a third degree assault instruction, even if it had been given.' ") (quoting *State v. Householder*, 637 S.W.2d 324 (Mo.App. S.D. 1982)).

In sum, because the trial court submitted a lesser included offense to the jury and the jury nevertheless found Mr. Jensen guilty of the greater offense of murder in the second degree, there is no reasonable probability that submitting an additional lesser included offense would have resulted in

a different verdict. The Court should reaffirm the general rule and hold that the submission of any lesser included offense, along with the option to acquit, is sufficient to test the firmness of a jury's finding of guilt on the greater offense.

b. Cases like *Frost* are distinguishable. Even if the Court does not re-affirm the general rule and re-examine the analysis in *Frost*, the Court should nevertheless find that Mr. Jensen was not prejudiced under the facts of his case. In *Frost*, the critical fact that gave rise to a finding of prejudice was the fact that the defendant claimed to have been acting purposely in self-defense (albeit imperfectly). 49 S.W.3d at 220. In other words, because the evidence of the defendant's culpable mental state for the greater offense was also consistent with the defendant's claimed defense of imperfect self-defense, there was arguably a reasonable probability that the jury would not have found the defendant guilty of murder in the second degree and would have found him guilty of involuntary manslaughter (based on the theory of imperfect self-defense). *See id.*

Here, by contrast, Mr. Jensen did not assert that he or his co-actor was acting in self-defense (imperfect or otherwise) when he or his co-actor stabbed Victim multiple times. Accordingly, the evidence that supported the finding that Mr. Jensen and his co-actor knowingly caused the victim's death by beating and stabbing Victim (and that Mr. Jensen acted together with his co-

actor) was not similarly "consistent" with the conclusion that Mr. Jensen and his co-actor merely recklessly caused Victim's death by stabbing him. Thus, unlike in *Frost*, there was no reasonable probability that the evidence that Mr. Jensen and his co-actor knowingly caused Victim's death by beating and stabbing would have led the jury to conclude that Mr. Jensen or his co-actor merely recklessly caused Victim's death by stabbing.[5]

To the contrary, the evidence that supported the jury's guilty verdict for murder in the second degree showed that Mr. Jensen and his co-actor stomped on Victim, beat him with their fists, and beat him with baseball bats before leaving him for dead (Tr. 329-339). They then returned the next day (after Victim had been exposed to the elements overnight, in December) and stabbed Victim to death (Tr. 377). Mr. Jensen's co-actor testified that Mr. Jensen stabbed Victim first, and that Mr. Jensen stabbed Victim in "[t]he

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[5] In *State v. Nutt*, there was no claim of self-defense; thus, that case differed significantly from *Frost*. Arguably, however, the evidence that produced the guilty verdict on the greater offense in *Nutt* was equally consistent with finding either that the defendant *attempted* to inflict serious physical injury (the greater offense) or that the defendant *attempted* to inflict physical injury (the lesser offense), since the difference between the two was only a matter of degree between the intended results. *See* 432 S.W.3d at 224-225.

back and numerous places" (Tr. 377). He said that Mr. Jensen stabbed Victim six or seven times (Tr. 377).[6]

There is no reasonable probability that the jury—which apparently credited the evidence showing that Mr. Jensen and his co-actor beat and stabbed Victim (and that Mr. Jensen acted together with his co-actor for the purpose of committing murder)—would have found that they recklessly causing Victim's death. Missouri courts have long recognized that some acts of violence, when viewed in relation to the charged result, transcend recklessness and do not give rise to a reasonable inference of recklessness. *See*, *e.g.*, *State v. Lowe*, 318 S.W.3d 812 (Mo.App. W.D. 2010) ("Because a person is presumed to have intended for death to follow from acts that are likely to produce that result, a defendant's intentional use of a deadly weapon on a vital part of a victim's body to inflict a fatal injury transcends recklessness so that no rational fact finder could conclude that he did not act knowingly."); *State v. Stidman*, 259 S.W.3d 96, 104 (Mo.App. S.D. 2008) (shooting the victim seven times in the head transcended recklessness); *State v. Newberry*, 157 S.W.3d 387, 391-392, 397 (Mo.App. S.D. 2005) (striking the victim in the head with the claw end of a hammer with sufficient force to break the skull and penetrate two inches into the brain transcended

[6] Mr. Jensen denied stabbing Victim altogether (Tr. 746).

recklessness).

Although these sorts of "transcend recklessness" cases cannot be relied on after *Jackson* to justify a trial court's refusing to submit a lesser included offense (*i.e.*, they cannot be cited to suggest that there was no error), the logic of the cases still has force in analyzing the probability of a different verdict in a given case. In short, where the evidence supporting the verdict overwhelmingly shows that a homicide was not reckless, it is permissible for a reviewing court to consider the strength of the evidence in making the judicial determination of whether the trial court's error was prejudicial and deprived the defendant of a fair trial.

Mr. Jensen asserts that it was important to submit an involuntary manslaughter instruction "because [he] presented a legitimate case that he acted under duress"—a defense that the jury could not consider in determining whether he was guilty of murder in the first degree and murder in the second degree (App.Sub.Br. 43). But this argument does not show that Mr. Jensen was prejudiced (*i.e.*, it does not cast doubt on the reliability of the verdict); it merely points out that the jury was not given the opportunity to consider the inapplicable defense of duress in relation to the lesser offense of involuntary manslaughter.

In any event, there is no reasonable probability that being given the opportunity to consider the defense of duress in relation to the offense of

involuntary manslaughter would have produced a different verdict. The defense of duress was submitted in the voluntary manslaughter instruction, the three armed criminal action instructions, and the abandoning a corpse instruction to no avail (L.F. 79-80, 82, 84, 86, 88-89), as the jury nevertheless found Mr. Jensen guilty of armed criminal action associated with murder in the second degree and abandoning a corpse.

In sum, the evidence showed that Mr. Jensen and his co-actor beat Victim until he was incapacitated; that, the next day, they stabbed Victim six or seven times in a vital area; and that the stab wounds entered the chest cavity, punctured Victim's lung, damaged ribs and blood vessels, and damaged Victim's liver. Such evidence certainly could have supported a conviction of involuntary manslaughter—and the trial court erred in refusing to submit the requested instruction—but there is no reasonable probability that the jury, having found Mr. Jensen guilty of murder in the second degree, would have found him guilty of involuntary manslaughter if an instruction for that offense had been submitted to it. This point should be denied.

II.

The trial court did not abuse its discretion in denying Mr. Jensen's request for a mistrial after Mr. Gossett testified that Mr. Jensen was "messing with [his] 16-year-old cousin" and that he was "too old to be with [his] 16-year-old cousin."

In his second point, Mr. Jensen asserts that "[t]he trial court abused its discretion in not declaring a mistrial and allowing the jury to consider, over objection, Shon Gossett's testimony that [Mr. Jensen] was 'messing with my 16-year-old cousin' and that he was 'too old to be with my 16-year-old cousin' " (App.Sub.Br. 44). He asserts that this testimony was evidence of "uncharged misconduct . . . introduced to try and convince the jury that [Mr. Jensen] was a person of bad character who was more likely to commit the crime with which he was charged" (App.Sub.Br. 44).

A. The standard of review

"A mistrial is a drastic remedy to be used only in the most extraordinary circumstances when there is a grievous error which cannot otherwise be remedied." *State v. Perry*, 447 S.W.3d 749, 754-755 (Mo.App. E.D. 2014). This court "review[s] the trial court's refusal to declare a mistrial on an abuse of discretion standard because the trial court is in a superior position to determine the effect of improper remarks, and what, if anything, must be done to cure the problem." *Id*.

B. A mistrial was not warranted

" 'Other uncharged misconduct is generally inadmissible to prove the defendant's propensity to commit the current charged crime.' " *State v. Key*, 437 S.W.3d 264, 270 (Mo.App. W.D. 2014) (quoting *State v. Slagle*, 206 S.W.3d 404, 410 (Mo.App. W.D. 2006)). "This is because '[e]vidence of uncharged crimes, when not properly related to the cause on trial, violates a defendant's right to be tried for the offense for which he is indicted.' " *Id.* (quoting *State v. Burns*, 978 S.W.2d 759, 760 (Mo. 1998)).

"The defendant's association with other crimes must be clear and definite to run afoul of the general rule of inadmissibility." *Id.* "Additionally, '[v]ague references to other uncharged crimes are insufficient to warrant reversal for trying a defendant for uncharged crimes.' " *Id.* "The necessary nexus between the defendant and the uncharged crime does not exist when the defendant's involvement in the other crime is speculative." *State v. Briscoe*, 913 S.W.2d 812, 814 (Mo. App. W.D. 1995).

During its case-in-chief, when the prosecutor questioned Mr. Gossett about the "texting war" that preceded the murder, Mr. Gossett stated, "He [Mr. Jensen] was messing with my 16-year-old cousin and –" (Tr. 219). Defense counsel objected to any evidence of "prior bad acts," and the prosecutor stated that he would move on (Tr. 219). The trial court sustained the objection, and no further evidence on the issue was adduced (Tr. 220).

The defense requested no further relief (Tr. 220).

Later, when asked whether he knew how old Mr. Jensen was at the time of the crime, Mr. Gossett said, "I knew that he was too old to be with my 16-year-old cousin" (Tr. 232). Defense counsel started to object, but before the objection could be finished, the prosecutor asked if Mr. Gossett knew how old Mr. Jensen was, and Mr. Gossett said, "I don't know" (Tr. 232). Defense counsel then objected and, after approaching the bench, asked for a mistrial (Tr. 232). The trial court denied the request for mistrial and ruled that it would instruct the jury to disregard (Tr. 233). The trial court then instructed the jury as follows: "Defense counsel's objection is sustained. The jury will disregard the last statement by the witness in total, the last sentence that he made" (Tr. 233).

On this record, the trial court did not abuse its discretion for multiple reasons. First, while Mr. Jensen characterizes this testimony as evidence of uncharged misconduct, he does not identify what sort of misconduct this testimony allegedly showed. In his motion for new trial, Mr. Jensen alleged that "[i]t could have been inferred by the jury that [Mr. Jensen] sexually harassed a teenage cousin" (L.F. 107). But Mr. Gossett did not explain what he meant by "messing with" or "be[ing] with" his cousin (Tr. 219, 232). There was no testimony that Mr. Jensen actually engaged in any sexual activity with Mr. Gossett's cousin, or that he did anything more than spend time with

Mr. Gossett's cousin or treat Mr. Gossett's cousin in some way that Mr. Gossett did not appreciate.

In short, any reference to uncharged misconduct was too vague to run afoul of the general rule prohibiting such testimony. Thus, the cases cited in Mr. Jensen's brief are inapposite, and the trial court did not abuse its discretion in sustaining Mr. Jensen's objections and denying his request for a mistrial. *Cf.*, *e.g.*, *State v. Waston*, 968 S.W.2d 249, 253 (Mo.App. S.D. 1998) (where defendant was charged with leaving the scene of an accident, evidence that the defendant had assaulted his wheelchair-bound mother was not relevant and prejudicial); *State v. Taylor*, 739 S.W.2d 220, 223 (Mo.App. S.D. 1987) (where defendant was charged with manufacturing and possessing marijuana, detailed evidence about repeated assaults or a prolonged assault against his girlfriend was not relevant and prejudicial).

Second, the trial court exercised its discretion to limit this testimony by telling the jury that defense counsel's objection was sustained and instructing the jury to "disregard the last statement by the witness in total, the last sentence that he made" (Tr. 233). " 'Ordinarily a trial court cures errors in matters presented to the jury by instructing the jury to disregard the offending matter.' " *State v. Bell*, 66 S.W.3d 157, 167 (Mo.App. S.D. 2001).

Mr. Jensen points out that Mr. Gossett's last statement or sentence was "I don't know," and he asserts therefore that the trial court's effort to

cure the alleged error was ineffectual (App.Sub.Br. 51). But it was apparent that defense counsel started to lodge an objection as soon as Mr. Gossett mentioned his 16-year-old cousin (Tr. 232). Thus, the jury would have understood that the trial court was referring to all of Mr. Gossett's testimony related to Mr. Jensen's age. And, tellingly, at trial defense counsel did not complain that the court's instruction was insufficient.

Third, even if the court's instruction were not sufficient to conclude that the jury disregarded the second instance, and even if the jury concluded that Mr. Jensen was somehow improperly involved with Mr. Gossett's cousin, the testimony was not the sort of propensity evidence that would have led the jury to think, "if he did it once, he'll do it again" (*see* App.Sub.Br. 51). Mr. Jensen was charged with murder in the first degree, armed criminal action, and abandoning a corpse. The fact that he might have been with a sixteen-year-old was not the sort of bad conduct that would lead the jury to conclude that he was a violent person who was more likely to commit violent offenses, *i.e.*, it was not evidence showing any propensity to commit murder.

Finally, even if Mr. Jensen's unspecified interactions with Mr. Gossett's cousin reflected poorly on Mr. Jensen's character, it cannot be said that Mr. Jensen was prejudiced by Mr. Gossett's testimony in light of all of the other evidence. There was ample evidence of Mr. Jensen's questionable character, including that he agreed to a drug deal, that he smoked marijuana, that he

possessed drug paraphernalia, and that (in the hours immediately after leaving Victim for dead) he met up with a woman who did not "really know him that well" so they could smoke K2 and engage in sexual intercourse in a cemetery (*see* Tr. 228, 269, 290-291, 388, 402, 695). All of this evidence, along with the substantial evidence of his guilt, rendered Mr. Gossett's passing references to his cousin inconsequential.

In sum, Mr. Gossett's testimony did not constitute evidence of uncharged misconduct, and the alleged error was not so egregious as to warrant the drastic remedy of a mistrial. The trial court properly exercised its discretion in sustaining defense counsel's objections and instructing the jury to disregard Mr. Gossett's second reference to his cousin. This point should be denied.

III.

The trial court did not plainly err in failing to declare a mistrial *sua sponte* after the prosecutor stated during a sidebar discussion that Mr. Jensen had "gangster tattoos all over him."

In his third point, Mr. Jensen asserts that the trial court plainly erred in failing to declare a mistrial *sua sponte* after the prosecutor stated during a sidebar discussion that Mr. Jensen had "gangster tattoos all over him" (App.Sub.Br. 52). He asserts that "the trial court determined that the sidebar wherein the prosecutor [made the statement] could be heard by the jury," and he asserts that this reference to "uncharged misconduct was not legally relevant to [his] guilt but was the type of information that could convince the jury that [he] was a person of bad character who was more likely to commit the crime with which he was charged" (App.Sub.Br. 52).

A. The standard of review

Mr. Jensen concedes that he did not preserve this claim of error with a timely request for mistrial (App.Sub.Br. 53). Thus, review, if any, is limited to plain error review.

"Plain errors are those that are evident, obvious and clear." *State v. Lucy*, 439 S.W.3d 284, 293 (Mo.App. E.D. 2014). "Plain error review is to be used sparingly, and an appellate court has total discretion whether or not to review an unpreserved matter for possible plain error." *Id.*

" '[U]nder Missouri law, plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative[.]' " *State v. Baxter*, 204 S.W.3d 650, 652 (Mo. 2006). "Manifest injustice is determined by the facts and circumstances of the case, and the defendant bears the burden of establishing manifest injustice." *Id.*

B. The trial court did not commit plain error, and plain error review is not warranted

During Mr. Jorgensen's testimony, defense counsel asked to approach the bench and objected to the prosecutor questioning him about Mr. Jensen's interactions with other young people at a park (Tr. 312). Defense counsel was concerned that the prosecutor was asking about prior bad acts or character (Tr. 312). The prosecutor stated that he intended to ask if Mr. Jensen "acted or portrayed himself as a gangster down there" (Tr. 313). The prosecutor stated, "He's got gangster tattoos all over him" (Tr. 313). The trial court did not permit the questioning (Tr. 313-314).

During a subsequent recess, one of Mr. Jensen's attorneys stated that he had stayed at counsel table during the earlier sidebar, and he opined that "it was very loud and clear to the jury [the prosecutor's] mention of my client having gang tattoos" (Tr. 341). He stated that he thought he saw "jurors taking notes at that time as well" (Tr. 341). He stated that he thought the prosecutor's comment was "improper and . . . prejudicial" (Tr. 341).

The prosecutor stated that he did not "think it happened that way" (Tr. 342). The prosecutor said that he would be more careful in the future, and he pointed out that the jury had already been instructed that sidebars were not evidence (Tr. 342).

The court observed that both sides had spoken too loudly on occasion, and it stated its concern that "comments from both sides have been loud enough that the jury on occasion could hear" (Tr. 342). The court pointed out that they did not have a good alternative place to hold sidebar discussions, and the court urged the parties to be as quiet as possible (Tr. 343).

In terms of any curative action to be taken, the court stated its concern that asking the jury about any specific comment would have the effect of emphasizing it (Tr. 343). Defense counsel agreed and said he "certainly wouldn't want that" (Tr. 343). The court stated that it would remind the jurors that bench conferences were not evidence and instruct them to disregard anything they might have overheard (Tr. 343). Defense counsel stated his appreciation (Tr. 343). When the jury returned, the court reminded the jurors that anything said during discussions at the bench was not evidence (Tr. 344).

The trial court did not plainly err for several reasons. First, contrary to Mr. Jensen's claim on appeal, the trial court did not determine that the jury actually heard the prosecutor's comment about "gangster tattoos" (*see* Tr.

342). As such, it remains a matter of speculation whether the jury heard the comment, and this is not a case where there was evident, obvious, and clear error that could have resulted in manifest injustice.

Second, even if the jury did hear the prosecutor's comment, "mere evidence of gang membership, without more specific evidence, is too vague to constitute evidence of prior crimes or bad acts." *State v. Turner*, 242 S.W.3d 770, 778 (Mo.App. S.D. 2008). It is well settled that " '[t]o violate the rule prohibiting evidence of other crimes or misconduct by the accused, the evidence must show the accused committed, was accused of, was convicted of, or was definitely associated with, the other crimes or misconduct.' " *Id.* Here, the mere fact that Mr. Jensen had apparent "gangster tattoos" was not evidence of uncharged misconduct, and it did not show that Mr. Jensen had any propensity to commit murder, armed criminal action, and abandonment of a corpse. *Cf. State v. Driscoll*, 55 S.W.3d 350, 353-354 (Mo. 2001) (the State presented evidence that the defendant had Aryan Brotherhood tattoos and was a member of that gang, that the gang was a prison gang that killed and murdered "all the time," and that the defendant said "you have to kill a black man to join").

Third, even assuming the jury heard the comment, the jury was instructed that comments made by the attorneys were not evidence, and the trial court again instructed the jurors that they should disregard any

comments made during discussions at the sidebar. " 'Ordinarily a trial court cures errors in matters presented to the jury by instructing the jury to disregard the offending matter.' " *State v. Bell*, 66 S.W.3d 157, 167 (Mo.App. S.D. 2001).

Fourth, defense counsel expressed his agreement with the trial court's proposed remedy when he expressed his appreciation to the court and did not request any other relief (*see* Tr. 343). *See State v. Simrin*, 384 S.W.3d 713, 721 (Mo.App. S.D. 2012) (where the defendant requests a curative instruction and does not request any other relief, that fact " 'dulls any inclination' to find any abuse of discretion on the part of the trial court"). *See also State v. Hogsett*, 450 S.W.3d 420, 424-425 (Mo.App. S.D. 2014) ("[a] trial court should avoid granting a mistrial on its own motion because a defendant has the right to have his trial completed by the jury that was sworn to hear his case and a retrial would be barred by the Double Jeopardy Clause if any prejudice could have been cured by a less drastic remedy"); *State v. Thompson*, 401 S.W.3d 581, 587 (Mo.App. E.D. 2013) ("an affirmative agreement to a trial court's proposed course of action regarding a jury also waives subsequent appellate review of the trial court's judgment).

Mr. Jensen suggests that the trial court should have, "at the very least, questioned the panel about what they heard" (App.Sub.Br. 55). But defense counsel did not request that course of action, and he expressed concern about

potentially highlighting the prosecutor's comment when he said that he "certainly wouldn't want" the trial court to ask about any specific comments (*see* Tr. 343). Thus, the trial court should not now be convicted of plain error for failing to ask more questions. In any event, no additional remedy beyond instructing the jurors to disregard the overheard comment would have been warranted.

Finally, in light of all of the other evidence in this case, it cannot be said that the prosecutor's passing reference to apparent "gangster tattoos" resulted in manifest injustice, *i.e.*, that it constituted outcome-determinative error. As outlined above, there was substantial evidence of Mr. Jensen's involvement with questionable activities, including that he agreed to a drug deal, that he smoked marijuana, that he possessed drug paraphernalia, and that (in the hours immediately after leaving Victim for dead) he met up with a woman who did not "really know him that well" so they could smoke K2 and engage in sexual intercourse in a cemetery (see Tr. 228, 269, 290-291, 388, 402, 695). This point should be denied.

IV.

The trial court did not abuse its discretion in denying Mr. Jensen's request for a mistrial after Victim's mother had an emotional outburst on the first day of trial.

In his fourth point, Mr. Jensen asserts that the trial court abused its discretion in denying his request for a mistrial after Victim's mother "screamed from the witness stand, 'Oh my God!' and burst into tears and had a 'very big reaction in front of the jury' when the prosecutor showed her a graphic split-screen picture of her son alive and dead" (App.Sub.Br. 57). He asserts that the outburst "was caused by the prosecutor's apparent failure to prepare [Victim's mother] before showing her the picture on the witness stand, to purposefully evoke an emotional response from her" (App.Sub.Br. 57). He asserts that the outburst "prevented the jury from listening to further evidence and deciding the case in an objective fashion" (App.Sub.Br. 57).

A. The standard of review

"A mistrial is a drastic remedy to be used only in the most extraordinary circumstances when there is a grievous error which cannot otherwise be remedied." *State v. Perry*, 447 S.W.3d 749, 754-755 (Mo.App. E.D. 2014). This court "review[s] the trial court's refusal to declare a mistrial on an abuse of discretion standard because the trial court is in a superior position to determine the effect of improper remarks, and what, if anything,

must be done to cure the problem." *Id*.

B. Victim's mother's emotional outburst on the first day of trial did not warrant a mistrial

"Although emotional outbursts are to be prevented insofar as possible, the trial court exercises broad discretion in determining the effect of such outbursts on the jury." *State v. Deck*, 994 S.W.2d 527, 539 (Mo. 1999). This Court "has held that '[i]n determining whether to declare a mistrial, the trial court may consider the spontaneity of the outburst, whether the prosecution was at fault, whether something similar, or even worse, could occur on retrial, and the further conduct of the trial.' " *Id*.

Here, the record does not reveal an abuse of discretion. On the first day of trial, during Victim's mother's testimony, the prosecutor showed her a side-by-side set of pictures of Victim, for the purpose of identifying Victim (Tr. 200; *see* Tr. 204-205). Upon viewing the exhibit, Victim's mother said, "Oh, my God" and began to cry (Tr. 200, 203). The prosecutor apologized, and the trial court recessed (Tr. 200).

Defense counsel requested a mistrial and stated, "I believe [the exhibit] was purposely used to evoke an inflammatory response" (Tr. 201). Defense counsel argued that the jury "has now seen that response and has been tainted as a result of that response" (Tr. 201). The prosecutor responded that he did not intend to show any other pictures to Victim's mother, and that

there were worse pictures that could have been used (Tr. 202). The court observed that a witness needed to identify Victim and denied the request for a mistrial (Tr. 202). The court did not find that the prosecutor had used the photograph to evoke an emotional response (Tr. 202).

Before resuming the trial, defense counsel made an additional record and stated that Victim's mother had "burst into tears" and had "a very big reaction in front of the jury" (Tr. 203). The prosecutor stated that he would not show her the picture again and would simply question her about what she had already observed in the picture (Tr. 203-204).

Victim's mother then testified that one picture showed Victim in life, and the other picture showed him in death (Tr. 204). She testified that Victim was wearing the same shirt in both pictures (Tr. 204-205). She identified Victim in both pictures and testified that the picture in which Victim was deceased was an accurate depiction of him on or about December 13, 2011 (Tr. 204-205). Victim's mother then apologized for her outburst, stating, "I'm sorry. I thought I could do this" (Tr. 205).

This record does not show that the prosecutor purposely used the photograph to evoke an emotional response. To the contrary, the trial court recognized that there was a legitimate basis for showing Victim's mother the exhibit, and the prosecutor said that he had picked a less graphic photograph and intended to show Victim's mother only the one exhibit (Tr. 202). The trial

court did not abuse its discretion in concluding that the prosecutor's use of the photograph was not a purposeful tactic.

The record also shows that the outburst was spontaneous. Victim's mother cried "Oh, my God!", and the prosecutor apologized when she began to cry (Tr. 200). The record shows that Victim's mother had "thought [she] could do this" (Tr. 205), indicating that she had attempted to prepare herself mentally and emotionally before trial. That she was unable to contain her emotions was unexpected, and, contrary to Mr. Jensen's argument on appeal, there was no evidence that Victim's mother was shown the exhibit "without any prior warning" (App.Sub.Br. 60). To the contrary, to the extent that she had apparently tried to prepare herself, it seems she must have known that such evidence was forthcoming.

The record also shows that the trial court took appropriate steps to ameliorate the situation and minimize any potential prejudice. The record shows that the trial court immediately recessed and allowed Victim's mother to compose herself (Tr. 200). The record shows that Victim's mother was not shown the photograph again, and that she testified thereafter based on her memory of the exhibit (Tr. 204-205). Thus, Mr. Jensen's reliance on *State v. Connor*, 252 S.W. 713, 722 (Mo. 1923)—where the unrestrained emotions and "griefs" of the victim's parents were "paraded before the jury" (App.Sub.Br. 59-59)—is misplaced. Rather, here, the outburst was spontaneous and brief,

and the trial court took steps to avoid "parading" Victim's mother's grief. *See State v. Brooks*, 960 S.W.2d 479, 491 (Mo. 1997) (where victim's mother screamed during trial, "You are going to burn in hell," and was removed from the courtroom, the trial court did not abuse its discretion in denying a mistrial, in that the outburst was spontaneous and lasted less than a minute, and the trial court took steps to keep the victim's mother out of the courtroom during any other testimony that might provoke emotions).

In addition, given the acute loss that parents naturally feel when their children are brutally murdered, it is possible that something similar, or even worse, could occur on retrial. It was apparent at sentencing, for instance, that Victims father was still in a highly charged emotional state (*see* Sent.Tr. 15, Victim's father erupted during Mr. Jensen's testimony and said, *inter alia*, before he was restrained and escorted out of the courtroom, "You a--hole. I'm gonna kill you, you motherf---er. I'll kill you if it's the last f---ing thing I do").

Finally, there is no reason to believe that Victim's mother's brief outburst caused the jury to be unable to fairly consider the evidence in this case. Victim's mother was an introductory witness, and, by recessing briefly and allowing Victim's mother time to compose herself, the trial court took appropriate steps to minimize or eliminate any prejudice from her outburst. There was no attempt by the State to parade Victim's mother's emotions before the jury, and she concluded her testimony without further incident.

The jury had also been instructed to consider the bias or prejudice a witness might have, and the jury had been instructed to perform its "duties without prejudice or fear, and solely from a fair and impartial consideration of the whole case" (L.F. 67-69). The jury had also been instructed to maintain an "open mind" and to not decide the case before hearing all of the evidence (L.F. 69). And, inasmuch as the jury found Mr. Jensen guilty of the lesser included offense of murder in the second degree, it is apparent that the jury's deliberations—which lasted more than five hours (Tr. 1054, 1061)—were not driven by passion engendered by Victim's mother's outburst. If the jurors had been driven by passion or prejudice, they undoubtedly would have quickly concluded that Mr. Jensen was guilty of murder in the first degree.

In sum, the trial court did not abuse its discretion in denying Mr. Jensen's request for a mistrial. The trial court took appropriate steps to eliminate any potential prejudice, and there is no reason to believe that Victim's mother's emotional outburst affected the fairness of Mr. Jensen's trial. This point should be denied.

CONCLUSION

The Court should affirm Mr. Jensen's convictions and sentences.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Shaun J Mackelprang

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that this brief complies with Rule 84.06(b) and contains 13,458 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word; and that an electronic copy of this brief was sent through the Missouri eFiling System on this 22nd day of July, 2016, to:

AMY M. BARTHOLOW
Woodrail Centre
1000 W. Nifong, Bldg. 7, Suite 100
Columbia, Missouri 65203
Tel.: (573) 777-9977
Fax: (573) 777-9974
amy.bartholow@mspd.mo.gov

CHRIS KOSTER
Attorney General

/s/ Shaun J Mackelprang

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent