No. SC94081

IN THE

Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

CHRISTOPHER ERIC HUNT,

Appellant.

Appeal from the Montgomery County Circuit Court
Twelfth Judicial Circuit
The Honorable Keith Sutherland, 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
(573) 751 3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

STATEMENT OF FACTS

Mr. Hunt appeals his convictions for burglary in the first degree, § 569.160, RSMo 2000; property damage in the second degree, § 569.120, RSMo 2000; and assault in the third degree, § 565.070, RSMo 2000 (*see* L.F. 164). Mr. Hunt contests the sufficiency of the evidence, the adequacy of the instructions submitted to the jury, and two evidentiary rulings by the trial court (App.Sub.Br. 31-40).

Most of Mr. Hunt's points of error revolve around his claim that he was engaged in his duties as a law enforcement officer when he committed the acts that gave rise to his convictions. Two *amici curiæ*—the Laborers' International Union of North America, Local 42 (LIUNA); and the Missouri Fraternal Order of Police (MFOP)—filed briefs in support of Mr. Hunt. These briefs express the concern that, if Mr. Hunt's convictions are permitted to stand, law enforcement officers may be hampered in their ability to effectively carry out their duties in protecting and serving the public (*see* LIUNA Br. 7; MFOP Sub.Br. i, 8). Respondent is cognizant of the legitimate issues raised by Mr. Hunt's convictions and agrees that law enforcement officers must be allowed to carry out their duties reasonably and without fear that an honest mistake or mere error in judgment, in difficult and sometimes dangerous situations, will subject them to criminal liability.

* * *

In February, 2009, Detective Chad Fitzgerald of the Warren County Sheriff's Department was conducting investigation into methamphetamine related activities (Tr. 240-241).[1] Detective Fitzgerald knew Phil Alberternst, and he was attempting to locate him for some outstanding warrants (Tr. 241). He had been working with two informants—Sheila Singleton and Ruth Blake—to find Mr. Alberternst (Tr. 241).

Ruth Blake had known Mr. Alberternst for about six years (Tr. 178). She knew that he had active warrants for his arrest (Tr. 178, 241). Ms. Blake had heard that there was "a threat of shoot to kill" Mr. Alberternst, and she was afraid that Mr. Hunt was going to hurt him (Tr. 179).

Mr. Hunt and Mr. Alberternst had had some prior dealings with each other (*see* Tr. 367-369). Mr. Hunt had previously arrested Mr. Alberternst, and while Mr. Alberternst had been handcuffed, Mr. Hunt had "[b]ackhanded [Mr. Alberternst] in the mouth" (Tr. 368, 374). Mr. Hunt had then had Mr. Alberternst transported to jail, and, while he was in jail, Mr. Hunt had told him that "if [he] wanted to go home [Mr. Alberternst] could work with him on

---

[1] The facts are stated here in a light that is favorable to the verdict. *See State v. Strong*, 142 S.W.3d 702, 710 (Mo. 2004). Due to the various accounts offered at trial, several narratives could be constructed out of the evidence to support the jury's verdicts.

a later date" (Tr. 369). Mr. Alberternst agreed to be an informant for Mr. Hunt, but then Mr. Alberternst did not follow through (Tr. 392-393). He had merely told Mr. Hunt "whatever he wanted to hear so [Mr. Alberternst] could get out" (Tr. 393).

Because of her fear that Mr. Alberternst would be harmed, Ms. Blake contacted law enforcement officers in O'Fallon to "set up an arrangement to meet," so that she could "take them to [Mr. Alberternst] so that he wouldn't get hurt" (Tr. 179). Ms. Blake was afraid for his safety (Tr. 179; *see* Tr. 242).

On February 5, 2009, Ms. Blake and Ms. Singleton met with Detective Fitzgerald (Tr. 180-181, 240-241). Also present were Detective Josh Mitchell from Warren County and Officer Deric Dull from St. Charles County (Tr. 181, 241-242). Ms. Blake agreed to let the officers know where Mr. Alberternst was (Tr. 180, 242). At that time, Ms. Blake believed he was in Middletown, but she did not give the officers the address (Tr. 180). She was not forthcoming about his location because she "didn't want them showing up right behind [her]" (Tr. 180). She "wanted to make sure [Mr. Alberternst] was safe . . . and . . . okay before the officers arrived" (Tr. 180; *see* Tr. 241-242).

Ms. Blake told them that she feared that "[Mr. Alberternst] may end up getting hurt" (Tr. 242). She made it clear that she did not want Mr. Hunt present (Tr. 181, 242-243). She did not want him present because "[s]he was scared of violence" (Tr. 243).

The officers assured Ms. Blake that "[Mr. Hunt] absolutely would not be present" (Tr. 243). Detective Fitzgerald had been told by the St. Charles County officers that "[Mr. Hunt's] wife was sick in the hospital so he wouldn't be working anyway, he was at the hospital with his wife" (Tr. 243). Detective Fitzgerald told Officer Dull to tell Mr. Hunt not to be there (Tr. 243-244).

As part of their plan to apprehend Mr. Alberternst, the officers gave Ms. Blake four boxes of pseudoephedrine "because she was supposed to be delivering the pills to [Mr. Alberternst]" (Tr. 180-181, 244). Unbeknownst to Ms. Blake, Detective Fitzgerald put a vehicle tracker on her vehicle (Tr. 181-183, 244). Officer Dull put a tracker on Ms. Singleton's vehicle (Tr. (244). The trackers used cell phone towers to transmit information (Tr. 246).

They told Ms. Blake to call Officer Dull "once every hour until she got a call from [Mr. Alberternst] telling [her] . . . where she was supposed to go" (Tr. 244). Ms. Blake had told the officers that Mr. Alberternst "routinely would call her and tell her to drive one direction and turn and drive another direction," "to make sure that they weren't followed" (Tr. 244-245).

After the meeting, Ms. Singleton went home (Tr. 247). Ms. Blake "proceeded to go all over the place" (Tr. 182). The officers tracked Ms. Blake's vehicle in the O'Fallon and Lake St. Louis areas (Tr. 247). At some point, Ms. Blake called Officer Dull and told him that "[Mr. Alberternst] told her to start driving" north toward Troy (Tr. 247). Ms. Blake went north on Highway 61

(Tr. 247). The officers followed at a distance (Tr. 247).

After stopping at Walmart, Ms. Blake eventually "head[ed] out toward Montgomery County" (Tr. 248). At the intersection of Highway T and Ware Road, the tracker disappeared; the officers had "lost all service" (Tr. 248). It was around 5:00 or 6:00 p.m. (Tr. 248).

During this time, the officers maintained contact with the Montgomery County Sheriff's Department (Tr. 249; *see* Tr. 313). Detective Fitzgerald also contacted Sergeant Eric Luechtefeld of the East Central Drug Task Force (ECDTF) (Tr. 126-127). Detective Fitzgerald informed Sergeant Luechtefeld of their efforts, and he said he would call "if [Mr. Alberternst] was in [their] Task Force location" (Tr. 126-127).

The officers then drove back out to the intersection where they had lost track of Ms. Blake's vehicle (Tr. 250). They checked the intersection to see if "the tracker might [have] fallen off" (Tr. 250). Officer Dull then got a call from Cindy Burke, who told him that Ms. Blake was at "Carla Reed's trailer outside of Middletown" (Tr. 250).

When Ms. Blake had arrived at Carla Reed's home, Chucky Reed was there (Tr. 183). After he left, Ms. Blake locked the doors (Tr. 183). Later, after Mr. Alberternst fell asleep, Ms. Blake called Cindy Burke to relay her message to Officer Dull (*see* Tr. 184, 250, 475-476).

Ms. Blake then sat on the couch where Mr. Alberternst was sleeping

(Tr. 184). The lights were off (Tr. 184). Ms. Blake was scared and nervous, and she thought the police would arrive "fairly soon," but she waited for a couple of hours (Tr. 190-191).

After learning Ms. Blake's location, Detective Fitzgerald sent a text message to Detective Jeff Doerr in Montgomery County, Lieutenant Scott Shoenfeld in Warren County, and another officer in Warren County, to obtain Ms. Reed's address (Tr. 251). Ms. Reed's address was 92 Highway T (Tr. 251).

Detective Fitzgerald called the Montgomery County Sheriff, and they put him in touch with Deputy Tom Mayes (Tr. 251-252). Deputy Mayes suggested that they meet outside Middletown (Tr. 251). The officers used that location as a staging area (Tr. 251). In addition to Deputy Mayes, Lietenant Schoenfeld and Detective Doerr went to the staging area (Tr. 251-252, 411; *see* Tr. 128-129).

Detective Fitzgerald also contacted Sergeant Leuchtefeld (Tr. 128). It was about 8:00 p.m. (Tr. 128). Sergeant Leuchtefeld, Robert Menconi, and Officer Aaron Sutton of the ECDTF went to the staging area (Tr. 128, 252; *see* Tr. 411). Three officers from St. Charles County were present—Officer Dull and Officers Bill Rowe and Dion Wilson (Tr. 252, 411; *see* Tr. 128-129). During these preparations, no one ever mentioned Mr. Hunt, and none of the St. Charles County officers told Detective Fitzgerald that Mr. Hunt was going to participate (Tr. 252-253, 427).

Deputy Mayes thought he knew the location of Ms. Reed's trailer (Tr. 253). Officers Dull and Wilson "decided to go close to the area and see if they could walk in on foot to see if they can observe the area or see if they could see the trailer" (Tr. 253; *see* Tr. 129). They were unsuccessful (*see* Tr. 131, 254). The officers then moved to a second staging area (Tr. 131, 254). Mr. Hunt was not present at the second staging area (Tr. 254, 426, 457).

The officers then figured out where Ms. Reed's trailer was located (Tr. 131, 255, 413). They had driven past it several times, but it was back some distance from the road (Tr. 255). Due to a lack of information, the officers decided to "do a knock and talk investigation" (Tr. 131, 255, 413; *see* Tr. 436, 457). The officers did not have a search warrant, they felt that they did not have probable cause for a search warrant, and they "didn't know for sure the exact location" (Tr. 131-132, 255, 426). They "hadn't been able to talk to the informant that was supposedly with [Mr. Alberternst], so [they] didn't have – [they] didn't have enough exact details to go on but [they] had enough information to basically further it by going to the residence, knocking on the door and basically talk to people inside and see what's going on" (Tr. 255-256; *see* Tr. 413-414, 457). The house belonged to Carla Reed, and the officers had "no reason to believe that he was living there at all" (Tr. 414; *see* Tr. 457).

The plan was for Deputy Mayes, who was in uniform, to approach the door and knock (Tr. 132, 256; *see* Tr. 319, 413, 426). Two of the ECDTF

agents were going to go with him (Tr. 256). The rest of the officers were going to provide perimeter security (Tr. 256; *see* Tr. 414).

Shortly before the police arrived at the trailer, Ms. Blake received a telephone call from Chucky Reed (Tr. 192). He asked if he could come back up to the house; she told him he could (Tr. 192-193). Ms. Blake then saw headlights pull into the driveway, and she looked out the window (Tr. 193). She saw a line of cars coming (Tr. 193). Ms. Blake did not have any lights on; she "was too afraid to turn any on" (Tr. 195).

Ms. Blake had not expected "that many cops" (Tr. 196). The number of officers scared her, and she woke up Mr. Alberternst, telling him "the cops were there" (Tr. 196, 362). Mr. Alberternst was wearing only a towel (Tr. 196, 362). He got up and went straight to the bathroom without stopping to look out any windows (Tr. 197; *see* Tr. 362). Ms. Blake remained on the couch with a blanket over her head because she was "so afraid" (Tr. 197).

As the officers pulled in, the lead vehicle turned on its lights and drove quickly across the yard (Tr. 133, 257, 320, 458). The lead car had stopped a "truck that had been like right in front of the trailer and . . . was [apparently] taking off as [the officers] were pulling in" (Tr. 133, 257, 320; *see* Tr. 414-415, 458). Ms. Blake's vehicle was also at the residence (Tr. 257).

Detective Fitzgerald approached the house with his flashlight mounted on his AR-15 assault rifle (Tr. 258). He illuminated the building, and he

looked around for any movement (Tr. 258). Sergeant Luechtefeld went to the front door and "bang[ed] on the door of the porch" (Tr. 258, 415; *see* Tr. 133). Sergeant Luechtefeld loudly announced, "Sheriff's Department, answer the door" (Tr. 133). Detective Fitzgerald shined his light into the porch, but they did not see anyone (Tr. 258). There was "stuff piled up on the porch, men's clothing in bags, but all the windows [were] pretty much shuttered" (Tr. 258). Detective Fitzgerald did not see an active methamphetamine lab (Tr. 261). He did not smell anything that smelled like an active lab (Tr. 262). Sergeant Luechtefeld told Detective Fitzgerald that he thought no one was home (Tr. 140). There were no lights visible inside the trailer (Tr. 134, 264, 320, 427).

When no one answered the door, Lieutenant Shoenfeld went to a perimeter position at the back of the residence (Tr. 415). He maintained his perimeter position but, at that point, he did not believe "anyone was even in the house" (Tr. 415). "There had been nothing to indicate that there was anybody in the house before that point" (Tr. 416).

Detective Fitzgerald looked around the trailer and then "basically back[ed] off" (Tr. 263). There was an open shed nearby, and Detective Doerr went over by the shed; Detective Fitzgerald checked the shed with him (Tr. 263). They then walked away from the residence (Tr. 263). Detective Fitzgerald had not seen anything inside the trailer; the front windows had been covered (Tr. 264).

Inside the trailer, Ms. Blake had heard the police knocking on the door, and she had heard them say that the police were there (Tr. 197). Ms. Blake had remained quiet (Tr. 197). Ms. Blake did not intend to open the door "at that point" (Tr. 198). But after a few minutes, she heard them "breaking in the door" (Tr. 198).

Detective Fitzgerald had moved back to the perimeter, and he and the other officers were watching the house when Mr. Hunt arrived (Tr. 264-265).[2] Mr. Hunt pulled up in his truck and "came to a skidding stop in front of the house" (Tr. 415, 426-427; *see* Tr. 140-141, 265). Mr. Hunt looked at Detective Fitzgerald, did "the head nod thing," put on a tactical vest, walked up to the door, tried it, and "kick[ed] the door open" (Tr. 266; *see* Tr. 141, 415). Mr. Hunt did not walk around and look in any windows before kicking in the door (Tr. 266). Mr. Hunt did not approach any officers and ask what was going on (Tr. 266-267). Mr. Hunt did not say that he had seen Mr. Alberternst inside, or that he had detected an active methamphetamine lab (Tr. 274).

After kicking the door open, Mr. Hunt entered the porch area (Tr. 267).

---

[2] Officer Dull, who testified for the defense, testified that he thought Officer Wilson called Mr. Hunt (Tr. 481). Officer Dull admitted that his supervisor, Sergeant Bargen, had told Officer Dull to take along Officers Wilson and Rowe, and that he had not told him to take Mr. Hunt (Tr. 488-489).

Once inside the porch, Mr. Hunt tried the doors that led into the interior of the trailer (Tr. 267). Deputy Mayes also entered the porch, and he saw Mr. Hunt trying to make entry into the house (Tr. 322-323). Officer Rowe was also on the porch (Tr. 323). Mr. Hunt asked Deputy Mayes for a knife, but Deputy Mayes lied and said that he did not have one (Tr. 323). Deputy Mayes was "kind of feeling uncomfortable with the situation cause nobody else was there to enter the residence with us" (Tr. 323). Deputy Mayes left the porch (Tr. 323-324).

Mr. Hunt then "came up with a butter knife" and pried open the front door (Tr. 268). Mr. Hunt and the other St. Charles County officers, Deric Dull, Bill Rowe, and Dion Wilson, all ran inside (Tr. 268). As they ran inside, they yelled and screamed "police" and "all that kind of stuff" (Tr. 268). Detective Fitzgerald followed them (Tr. 268).

Sergeant Luechtefeld was concerned about the legality of the officers' entry into the trailer, and he asked Lieutenant Shoenfeld if he had "any idea why the house was entered" (Tr. 142; *see* Tr. 167). Sergeant Luechtefeld had not observed any exigent circumstances (Tr. 167). Then he and Lieutenant Shoenfeld heard "screaming coming from inside the trailer (Tr. 142, 416). It sounded like "someone was getting beat up" (Tr. 416). Deputy Mayes heard "a lot of screaming and yelling and commands being given inside the residence," so he ran inside the trailer (Tr. 324). At that point, Deputy Mayes believed

there were exigent circumstances to justify his entry (Tr. 324). Spurred on by the commotion, Sergeant Luechtefeld, Lieutenant Shoenfeld, and Detective Doerr all eventually entered the trailer (*see* Tr. 142, 308, 416).

When the St. Charles County officers entered the trailer, Mr. Alberternst was still in the bathroom, and Ms. Blake was on the couch in the living room (Tr. 198). Ms. Blake was covered with a blanket; she had her hands up and was yelling "don't hurt me" (Tr. 268). Officer Rowe was yelling, "show me your hands" or "get down" (Tr. 268). He then took Ms. Blake by the wrists and directed her to the floor (Tr. 268). He was "yelling where's [Mr. Alberternst]" (Tr. 268). Ms. Blake said he was there (Tr. 199, 268).

Detective Fitzgerald looked behind another couch, and then he heard more yelling (Tr. 268-269). The St. Charles County officers (Mr. Hunt and Officers Rowe and Wilson) had found Mr. Alberternst, and they were yelling, "show me your hands, show me your hands, get down" (Tr. 269; *see* Tr. 293, 310, 312, 325). Detective Fitzgerald checked the last room in the house, and, believing that the St. Charles County officers had the situation under control, he left the trailer and went to retrieve the tracking device from Ms. Blake's vehicle (Tr. 272). As Detective Fitzgerald left, he saw some tubing sticking out of a bag in the porch area, so he opened the bag and saw "jars and filters and everything associated with basically a mobile meth lab" (Tr. 273). The bag was beneath a window up against a wall (Tr. 273). It had not been visible

from outside (Tr. 274).

In the bathroom, Mr. Alberternst had heard Mr. Hunt say they were coming in (Tr. 362-363). Mr. Alberternst recognized Mr. Hunt's voice, and "[Mr. Alberternst] was scared and in a panic mode and sick a little bit" (Tr. 363). Mr. Alberternst could not find his clothes (Tr. 363). Mr. Hunt yelled at him to get out of the bathroom (Tr. 363; *see* Tr. 308). The St. Charles County officers were yelling at Mr. Alberternst and telling him to "get on the ground and stop resisting" (Tr. 312; *see* Tr. 293).

Mr. Alberternst stuck his hands out into the hallway (Tr. 363; *see* Tr. 308, 312). He put out his hands so that the officers could handcuff him (Tr. 394). To Detective Doerr, it appeared that Mr. Alberternst "had his hands out in a surrender motion" (Tr. 317; *see* Tr. 394). Mr. Hunt grabbed Mr. Alberternst and took him down to the floor (Tr. 308, 311, 363; *see* Tr. 325).

To Deputy Mayes it appeared that Mr. Alberternst was "passively resisting" the officers because he did not want to be arrested (Tr. 325). But Mr. Alberternst was not "trying to strike the officers or anything" (Tr. 325). Mr. Alberternst did not try to hit Mr. Hunt, or grab his arm, or pull on him (Tr. 326). Once Mr. Alberternst was on the ground, he screamed and kicked his legs, and Deputy Mayes took control of his left leg (Tr. 326). Mr. Alberternst then said, "okay, okay. You've got me, I give up" (Tr. 326). But, as Deputy Mayes later testified, "the, uh, control tactics continued" (Tr. 326).

Instead of handcuffing Mr. Alberternst, the St. Charles County officers started "[b]eating [him]" (Tr. 363). Mr. Alberternst was naked, and the three St. Charles County officers were on top of him (Tr. 272). They were yelling, "give me your hands, give me your hands" and "show me your hands, stop resisting" (Tr. 272, 417-418). Mr. Hunt was punching him in the head (Tr. 364). Mr. Hunt punched Mr. Alberternst "[e]verywhere" on his head (Tr. 364).

Deputy Mayes observed "some strikes being made" on Mr. Alberternst's "upper area, shoulders and head area" (Tr. 326). Lieutenant Shoenfeld saw Mr. Hunt "striking [Mr. Alberternst] in the back of the head and kind of in the soft spot on the back of your head here with his fist" (Tr. 418). Mr. Hunt struck "straight down on the back of his head . . . several times" (Tr. 419). Officer Rowe was standing on Mr. Alberternst's "leg, back side area" (Tr. 327). At times, Officer Rowe had two feet on Mr. Alberternst—one on his leg and one on his back (Tr. 327-328). Officer Rowe was "[s]tanding on him, jumping on him, on his legs" (Tr. 328; *see* Tr. 144, 418). Mr. Alberternst's arms were under his body (Tr. 329). Deputy Mayes realized there was a problem; he thought the arrest had "turned into a torture situation" (Tr. 328). Due to the confined space, "[Mr. Alberternst] was unable to comply with whatever orders they were giving him" (Tr. 329).

From where she lay on the floor, Ms Blake saw Mr. Alberternst "gettin' beat" (Tr. 199). Mr. Alberternst was "between the hallway of the bathroom

and that little area" (Tr. 200). Mr. Hunt was hitting Mr. Alberternst with his fists and feet (Tr. 200). When the beating started, Ms. Blake could see Mr. Hunt, but then they moved, and Ms. Blake could no longer see them (Tr. 203). She could only hear the beating (Tr. 203). Mr. Alberternst was "asking them to stop and then he was crying" (Tr. 217).

Ms. Blake felt "really hurt because . . . there wasn't nobody supposed to get hurt" (Tr. 200). Ms. Blake heard someone comment that Mr. Alberternst "ought to be killed by [Mr. Hunt]," and she heard Mr. Hunt say that Mr. Alberternst "ought to be killed" (Tr. 200). Ms. Blake said something back to Mr. Hunt, and Mr. Hunt told Ms. Blake to "shut [her] mouth or he'd come in there and punch [her]" (Tr. 201). Ms. Blake "knew it wasn't right" (Tr. 202).

As Mr. Hunt hit Mr. Alberternst, Mr. Hunt kept yelling "give me your hands, stop resisting," and Mr. Alberternst said, "I'm trying, I'm trying to give you my hands" (Tr. 419). Detective Shoenfeld saw that Mr. Alberternst was "trying to comply, trying to give him his hands" (Tr. 420). Detective Shoenfeld then backed out of the trailer "to make sure that none of [his] people were involved in what was going on inside [the] trailer and to tell them go back to [their] perimeter position[s]" (Tr. 420-421). Based on what he saw, Sergeant Luechtefeld did not think Mr. Alberternst was "resisting"—he was not "resisting, but he wasn't following their commands" (Tr. 144). Instead, Mr. Alberternst was "trying to protect his head or curl up" (Tr. 144).

Mr. Alberternst's hands were "flailing," and "[i]t looked defensive" (Tr. 144). Mr. Alberternst was "trying to prevent himself from being hit" (Tr. 145).

Sergeant Luechtefeld exited the trailer and told his supervisor what had transpired (Tr. 145). His supervisor, Corporal Travis Hitchcock, suggested that they should "leave the residence" (Tr. 145). At around that time, Deputy Mayes said that they needed to handcuff Mr. Alberternst, and they did (Tr. 347). The physical blows ceased (Tr. 347; *see* Tr. 364).

After retrieving the tracking device and putting away his rifle, Detective Fitzgerald went back inside the trailer (Tr. 274). He could still hear yelling, and he saw Mr. Hunt kneeling on the ground in front of Mr. Alberternst (Tr. 275). Mr. Alberternst had been "pulled out in the hallway and [Mr. Hunt was] kneeling with his face like right in [Mr. Alberternst's face]" (Tr. 275). Mr. Hunt screamed, "you want to kick my ass now mother fucker" (Tr. 275). Mr. Hunt was "still on top of [Mr. Alberternst]" (Tr. 275). Mr. Alberternst was on the ground and laying [sic] there naked" (Tr. 276). Deputy Mayes heard "a lot of personal comments being" made, and he later concluded that "there was obviously some kind of a personal issue between Hunt and [Mr. Alberternst]" (Tr. 349).

After telling his people "to go back to their perimeter positions," Lieutenant Schoenfeld re-entered the trailer and told Detective Fitzgerald to get out of the residence (Tr. 276; *see* Tr. 421-422). Detective Fitzgerald

complied (Tr. 276).

At around that time, Sergeant Luechtefeld told Officer Sutton (one of the other ECDTF officers) to go down to the house and see what was going on (Tr. 459). Officer Sutton found Deputy Mayes and Mr. Hunt standing near the trailer door (Tr. 459). Officer Sutton asked what had happened, and Mr. Hunt said that "he came to the house, [and] knocked on the door" (Tr. 460). Mr. Hunt said that the door "was partly ajar," and that "[i]t came open and he heard a female's voice answer while [he was] knocking [and] telling him to come in" (Tr. 460). Deputy Mayes reacted in a manner that caused Officer Sutton to question the truthfulness of Mr. Hunt's account (Tr. 460).

Officer Sutton went inside and saw Mr. Alberternst on the floor (Tr. 460). Officer Sutton asked the others to pick up Mr. Alberternst and put some clothes on him (Tr. 460; *see* Tr. 364). Mr. Alberternst was bleeding, he was naked and in handcuffs, and he had kitty litter and cat urine and feces on him (Tr. 461-462; *see* Tr. 422). His head had been in a kitty litter box during the incident (Tr. 422). The other officers put clothes on Mr. Alberternst and put him in a chair (Tr. 202, 347, 364). Officer Sutton did not smell any chemicals associated with methamphetamine production (Tr. 462).

Mr. Alberternst had "cuts on his face" (Tr. 422). There was blood on his face and soaking through his jeans (Tr. 277, 329-330). Mr. Alberternst was groggy and limping (Tr. 277). Deputy Mayes took Mr. Alberternst to the

hospital (Tr. 344). Mr. Alberternst later said, "I was hurt. I mean they give me a good beatin', but the worst part . . . was not knowing if I was gonna leave there or not" (Tr. 366). A series of photographs documented Mr. Alberternst's injuries (Tr. 369-371; State's Exs. 23-24, 26-33).

Afterward, Mr. Hunt approached Lieutenant Shoenfeld (Tr. 422). Mr. Hunt was "pretty frustrated" (Tr. 423). Mr. Hunt said he had asked the ECDTF officers "to assist him in getting a search warrant for the residence," but "they wouldn't do it" (Tr. 423). Mr. Hunt told Lieutenant Shoenfeld that he had "seen a meth lab inside the trailer and that was why he went inside" (Tr. 423). Mr. Hunt showed Lieutenant Shoenfeld a backpack and items placed outside the backpack near the first door going into the porch, but Lieutenant Shoenfeld did not believe Mr. Hunt's story (Tr. 424). Lieutenant Shoenfeld had seen that backpack when he entered the trailer, and it had been "zipped up," and the "other stuff" had not been lying around (Tr. 424).

Mr. Hunt then said that he wanted Lieutenant Shoenfeld "to get a search warrant for him for the residence that had already been searched" (Tr. 423). Lieutenant Shoenfeld declined and said that his agency was going to leave (Tr. 423). Lieutenant Shoenfeld did not think Mr. Hunt was telling the truth (in light of his earlier observation of the backpack), and he "didn't want to . . . [go] . . . to the court and submit a false affidavit to the judge" (Tr. 423).

Mr. Hunt was "angry" and "upset" when Lieutenant Shoenfeld refused,

and he "seemed frustrated that no one was gonna go do this for him and that we were leaving" (Tr. 424). Mr. Hunt said, "fuck it, fuck this, I'm gonna take this to the Feds and they'll take care of it, if you guys aren't going to do anything they'll take care of it" (Tr. 425).

Later, Sergeant Luechtefeld returned to the trailer with Corporal Hitchcock, Officer Menconi, and Officer Sutton (Tr. 145-146). Corporal Hitchcock photographed the front door (Tr. 146). The top lock was a deadbolt (Tr. 147). The door frame had been broken (Tr. 147). The frame had not been broken when they had arrived to do the knock and talk (Tr. 147).

The state filed a complaint seeking charges for the class B felony of burglary in the first degree, § 569.160, RSMo 2000; the class B misdemeanor of property damage in the second degree, § 569.120, RSMo 2000; the class A misdemeanor of assault in the third degree, § 565.070, RSMo 2000; and the class B misdemeanor of making a false report, § 575.080, RSMo Cum. Supp. 2012 (L.F. 29-30). After a preliminary hearing, the state filed an information charging Mr. Hunt with the same four offenses (L.F. 62-63). The state later dismissed the charge of making a false report (L.F. 75-76).

In July, 2012, the case went to trial (Tr. 11). The jury found Mr. Hunt guilty on all counts (L.F. 115-117). The trial court sentenced Mr. Hunt to five years' imprisonment for burglary, three months for property damage, and six months for assault (Tr. 827-828).

ARGUMENT

I.

The evidence was sufficient to support Mr. Hunt's convictions for burglary and property damage. (Responds to Points VII, VIII, and IX of Mr. Hunt's brief.[3])

In his seventh, eighth, and ninth points, Mr. Hunt challenges the sufficiency of the evidence to support his convictions for burglary and property damage (App.Sub.Br. 97, 106, 118).

In his seventh point, he asserts that his conviction for burglary cannot stand because the State failed to prove that he knowingly entered Carla Reed's home unlawfully (App.Sub.Br. 97). In his eighth point, he asserts that

---

[3] In his substitute brief, Mr. Hunt has substantially changed the order of, and added new claims to, the claims that he asserted in the Court of Appeals. Respondent will first respond to Mr. Hunt's sufficiency-of-the-evidence claims (instead of his instructional-error claims) because " '[t]he question of sufficiency arises before the case is put to the jury and is really an issue of whether the case should have been submitted to the jury.' " *See State v. Johnson*, 316 S.W.3d 491, 498 (Mo.App. W.D. 2010). Moreover, if the Court were to conclude that the evidence was insufficient on any count, that would render moot any associated claims of instructional error.

his burglary conviction cannot stand because the State also failed to prove that he had the purpose to assault Mr. Alberternst when he unlawfully entered Ms. Reed's home (App.Sub.Br. 106).

In his ninth point, Mr. Hunt asserts that his conviction for property damage cannot stand because Mr. Hunt "held legal authority to use force to enter . . . in that § 544.200 authorized Deputy Hunt to 'break open any outer or inner door' to arrest Phillip Alberternst, for whom judicial officers had issued two felony arrest warrants" (App.Sub.Br. 118).

A. The standard of review

" 'This Court's review is limited to determining whether there was sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt.' " *State v. Miller*, 372 S.W.3d 455, 463 (Mo. 2012). " 'The evidence and all reasonable inferences therefrom are viewed in the light most favorable to the verdict, disregarding any evidence and inferences contrary to the verdict.' " *Id*.

" 'This is not an assessment of whether the Court believes that the evidence at trial established guilt beyond a reasonable doubt but rather a question of whether, in light of the evidence most favorable to the State, any rational fact-finder could have found the essential elements of the crime beyond a reasonable doubt.' " *Id*. "When reviewing the sufficiency of evidence supporting a criminal conviction, the Court does not act as a 'super juror'

with veto powers." *Id.* "In such cases, this Court gives great deference to the trier of fact." *Id.* " 'A jury may accept part of a witness's testimony, but disbelieve other parts.' " *State v. Jackson*, --- S.W.3d ----, 2014 WL 2861550, *6 (Mo. 2014) (quoting *State v. Pond*, 131 S.W.3d 792, 794 (Mo. 2004)).

B. The evidence was sufficient to support Mr. Hunt's convictions for burglary and property damage

A substantial portion of Mr. Hunt's brief is predicated upon what he refers to as "the State's concession that Hunt had authority to arrest Alberternst" (App.Sub.Br. 99). He relies on a quote from the brief the State filed in the Court of Appeals, wherein the State said, "There is little question that Mr. Hunt, a deputy sheriff in St. Charles County, and a member of a multi-jurisdictional enforcement group, had (in the general sense) legal authority to arrest Mr. Alberternst. *See* § 195.505, RSMo Cum. Supp. 2012" (App.Sub.Br. 41, citing Resp.Br. 25).

But Mr. Hunt's reliance on the State's purported concession in arguing the sufficiency of the evidence is misplaced. The State's use of the phrase "There is little question," makes plain that the State was not completely conceding the issue, but, rather, that the State was commenting on the strength of the evidence, which tended to support the conclusion that Mr. Hunt was a St. Charles County Deputy and a member of a multi-jurisdictional enforcement group—*i.e.*, that Mr. Hunt was a law enforcement

officer with authority to make arrests.

The strength of the evidence on that point, however, did not *require* the jury to draw that same conclusion. To the contrary, under the standard of review, the jury could disregard or disbelieve any part of the evidence, no matter how compelling that evidence might be. *See State v. Jackson*, 2014 WL 2861550 at *8 ("No matter how strong, airtight, inescapable, or even absolutely certain the evidence and inferences in support of the differential element may seem to judges and lawyers, no evidence ever proves an element of a criminal case until all 12 jurors believe it, and no inference ever is drawn in a criminal case until all 12 jurors draw it."). In other words, by relying on a statement the State made in its brief in the Court of Appeals, Mr. Hunt has relied on an irrelevant fact. "The relevant question is not what arguments the prosecutor made; rather the relevant question is what evidence could the jury have credited and what reasonable inferences could the jury have drawn from that evidence." *State v. Johnson*, 316 S.W.3d 491, 498 (Mo.App. W.D. 2010).

In short, while the State acknowledged for the sake of arguing this case on appeal that there was "little question" about Mr. Hunt's status as a police officer and member of a multi-jurisdictional team with authority to make arrests, the jury was not required to draw that conclusion. The jury could have concluded, rather, that Mr. Hunt was not a licensed law enforcement officer, or that he was not a member of the multi-jurisdictional team. In

which case, all of Mr. Hunt's arguments about the purported legitimacy of his actions in arresting Mr. Alberternst are entirely without merit, and the evidence presented at trial was sufficient to support his convictions for burglary in the first degree and property damage in the second degree.

C. Even if it is assumed that the jury believed Mr. Hunt had authority to arrest, the evidence was sufficient to support Mr. Hunt's convictions

1. There was sufficient evidence that Mr. Hunt entered Ms. Reed's trailer unlawfully (Point VII)

"A person commits the crime of burglary in the first degree if he knowingly enters unlawfully . . . a building or inhabitable structure for the purpose of committing a crime therein, and when in effecting entry or while in the building or inhabitable structure . . . [t]here is present in the structure another person who is not a participant in the crime[.]" § 569.160, RSMo 2000. Here, there was sufficient evidence for the jury to conclude that Mr. Hunt's entry into Ms. Reed's trailer was unlawful, and that he knew it was unlawful—even if he had authority to make an arrest.

The authority to make an arrest was related to, but not determinative of, the lawfulness of Mr. Hunt's entry into Ms. Reed's home. As defined in § 569.010(8), RSMo 2000, "a person 'enters unlawfully or remains unlawfully' in or upon premises when he is not licensed or privileged to do so." A person

acts knowingly "[w]ith respect to his conduct or to attendant circumstances when he is aware of the nature of his conduct or that those circumstances exist." § 562.016.3, RSMo 2000.

Here, Mr. Hunt asserts that he was privileged to enter Ms. Reed's trailer to effectuate an arrest of Mr. Alberternst based on outstanding arrest warrants. But even assuming Mr. Hunt had authority as a member of a multi-jurisdictional enforcement group to make arrests, that fact alone did not give him authority to enter Ms. Reed's trailer, and the jury could have concluded that he entered her trailer unlawfully.

a. A police officer may not enter a residence without a search warrant except in certain limited circumstances

The evidence showed that the officers seeking to arrest Mr. Alberternst did not have a search warrant for Ms. Reed's trailer (Tr. 131-132, 255, 426; *see* Tr. 457). It is unlawful under the Fourth Amendment for police officers to enter a residence without a search warrant. "Except in such special situations [involving consent or exigent circumstances], we have consistently held that the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant." *Steagald v. United States*, 451 U.S. 204, 211 (1981); *see Payton v. New York*, 445 U.S. 573, 590 (1980) ("In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a

firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.").

Here, because there was evidence that the officers did not have a search warrant for Ms. Reed's trailer, the jury could have concluded that Mr. Hunt's entry into Ms. Reed's trailer was unlawful. The jury did not have to believe that there were any exigent circumstances permitting entry without a search warrant (and there was evidence showing that there were no exigent circumstances), and there was no evidence that Ms. Reed (or any other person with apparent authority) gave Mr. Hunt consent to enter the trailer. In short, the jury could have reasonably concluded that there was no search warrant, and that there was no other legal basis for any officer to enter Ms. Reed's home—*i.e.*, that Mr. Hunt entered the trailer unlawfully.

It is true that there was evidence indicating that the officers had a warrant for Mr. Alberternst's arrest (*see e.g.* Tr. 241). But the jury did not have to credit evidence along those lines. And even if it is assumed that the jury believed there was an active arrest warrant, there was still sufficient evidence that Mr. Hunt entered Ms. Reed's residence unlawfully.

A search warrant and an arrest warrant serve different purposes and the existence of an arrest warrant does not eliminate the need for a search warrant if the police want to enter a residence owned by a third party. *See Steagald*, 451 U.S. at 212-213. And, here, there was substantial evidence

showing that the trailer belonged to a third party (Ms. Reed), and that Mr. Alberternst was only a guest in her home.

Detective Fitzgerald testified that the address was Ms. Reed's address (Tr. 251). Detective Shoenfeld testified that the house belonged to someone else and that it was not Mr. Alberternst's house (Tr. 413-414). Detective Shoenfeld stated, "I had no reason to believe that [Mr. Alberternst] was living there at all" (Tr. 414). Officer Sutton testified that the residence belonged to Ms. Reed (Tr. 457).

Mr. Alberternst confirmed that the trailer was Ms. Reed's house, and he said that he had been hiding there for three or four days (Tr. 361-362). Mr. Alberternst testified that although he had been staying there, he received his mail at Ms. Blake's residence (Tr. 376). Mr. Alberternst testified that he did not change his address or have his mail sent to Ms. Reed's house (Tr. 376). He said that he had been living with Ms. Blake in St. Charles County, and that he "was just scared and [he] just went out there [to the trailer] where they wouldn't expect where [he] went and was hiding out" (Tr. 376-377). On cross-examination, Mr. Alberternst stated that he was not living at Ms. Reed's house (Tr. 386). He stated that he was "just hidin' out there," that he was "in and out," and that he "wasn't there the whole time" (Tr. 386).

Based on this evidence, the jury could have readily concluded that the trailer belonged to Ms. Reed, that Mr. Alberternst was merely a guest who

had permission to be in the trailer, and that Mr. Alberternst merely spent some time there intermittently in the days preceding the arrest. In short, the evidence supported the conclusion that it was unlawful for Mr. Hunt to enter Ms. Reed's trailer without a search warrant (or some other exception to the warrant requirement).

In *Steagald*, law enforcement officers had an arrest warrant for a man named Ricky Lyons, and they entered the home of another person to effectuate the arrest. *Id.* at 213. The United States Supreme Court observed that "the [arrest] warrant embodied a judicial finding that there was probable cause to believe that Ricky Lyons had committed a felony, and the warrant therefore authorized the officers to seize Lyons." *Id.* But the Court pointed out that "the agents sought to do more than use the warrant to arrest Lyons in a public place or in his home; instead, they relied on the warrant as legal authority to enter the home of a third person based on their belief that Ricky Lyons might be a guest there." *Id.* The Court observed, "Regardless of how reasonable this belief might have been, it was never subjected to the detached scrutiny of a judicial officer." *Id.* The Court noted that the only protection against a Fourth Amendment violation in those circumstances was the "the agent's personal determination of probable cause." *Id.* The Court observed, "In the absence of exigent circumstances, [it had] consistently held that such judicially untested determinations are not reliable enough to justify

an entry into a person's home to arrest him without a warrant, or a search of a home for objects in the absence of a search warrant." *Id*. The Court stated that the same held true when the "object" the officers entered the house to find was a person they wanted to arrest. *Id*.

Although it is important for officers to be able to execute arrest warrants, the Court explained why there must be limits upon an officer's ability to enter the houses of third parties. "A contrary conclusion—that the police, acting alone and in the absence of exigent circumstances, may decide when there is sufficient justification for searching the home of a third party for the subject of an arrest warrant—would create a significant potential for abuse." *Id*. at 215. "Armed solely with an arrest warrant for a single person, the police could search all the homes of that individual's friends and acquaintances." *Id*. "Moreover, an arrest warrant may serve as the pretext for entering a home in which the police have a suspicion, but not probable cause to believe, that illegal activity is taking place." *Id*.

Here, because there was evidence showing that the trailer belonged to Ms. Reed, and that the trailer was not Mr. Alberternst's residence, the evidence supported the conclusion that Mr. Hunt's entry was unlawful—even if there was an arrest warrant for Mr. Alberternst.

Although he does not make the same argument in his Point VII, Mr. Hunt argues in his Point I (and seemingly implies in his Point VII) that

Steagald does not apply because it analyzed whether the third party's rights were violated. He asserts that the Court in *Steagald* did not find that the entry into the house was unlawful (App.Sub.Br. 56). But the Court in *Steagald* plainly concluded that the arrest warrant for one suspect was "not reliable enough to justify an entry into" the home of a third party. 451 U.S. at 213. And, here, for purposes of determining whether Mr. Hunt was guilty of burglary, it was the unlawfulness of Mr. Hunt's entry into the trailer that was pertinent.

Citing *United States v. Gay*, 240 F.3d 1222, 1227 (10th Cir. 2001) (quoting *Valdez v. McPheters*, 172 F.3d 1220, 1227 (10th Cir. 1999)), Mr. Hunt asserts that, "[f]or purposes of Fourth Amendment analysis, all that [was] required to permit lawful entry [was] a reasonable belief in Hunt and the other officers that Alberternst was in the trailer" (App.Sub.Br. 102). But that is not correct.

In cases like *Gay* and *McPheters*, courts have expressly recognized that "the Supreme Court held in *Steagald* that absent exigent circumstances or consent, law enforcement officers could not legally search for the subject of an arrest warrant in the home of a third party without first obtaining a search warrant." *Gay*, 240 F.3d at 1226. Here, as discussed above, there was evidence that the officers (including Mr. Hunt) did not have a search warrant for Ms. Reed's home.

It is only when the residence is the suspect's residence (or the officers have an objectively reasonable belief it is the suspect's residence) that courts have held that officers have "limited authority" to enter the residence to arrest the subject of an arrest warrant. *Id*. (quoting *Payton*, 445 U.S. at 603). As the court stated in *Valdez v. McPheters*, "under *Payton*, police officers entering a residence pursuant to an arrest warrant must demonstrate [1] a reasonable belief that the arrestee lived in the residence, and [2] a reasonable belief that the arrestee could be found within the residence at the time of the entry." 172 F.3d 1220. The officers' belief must be "objectively reasonable at the time of entry." *Id*. at 1225.

Here, as set forth above, the evidence supported the conclusion that the officers and Mr. Hunt did not have a reasonable belief that Mr. Alberternst resided at Ms. Reed's trailer. Moreover, the evidence also supported the conclusion that they did not have a reasonable belief that Mr. Alberternst was inside the trailer when Mr. Hunt entered.

When the officers went to Ms. Reed's trailer, it was partly due to a lack of information (in addition to the lack of a search warrant) that the officers decided to conduct a "knock and talk" (Tr. 131, 255, 413; *see* Tr. 436, 457). As Detective Fitzgerald said, they "hadn't been able to talk to the informant that was supposedly with [Mr. Alberternst], so [they] didn't have . . . enough exact details to go on but [they] had enough information to basically further it by

going to the residence, knocking on the door and basically talk to people inside and see what's going on" (Tr. 255-256; *see also* Tr. 413-414, 457).

Also, when the officers arrived at the trailer, the information they had received through the conduit of Cindy Burke was some hours old. When Detective Fitzgerald and Sergeant Luechtefeld went to the front door of the trailer, there were no visible lights inside the trailer, and several officers confirmed that there were no visible lights inside (Tr. 134, 264, 320, 427). After knocking on the door and receiving no response, Sergeant Luechtefeld told Detective Fitzgerald that he thought no one was home (Tr. 140). Lieutenant Shoenfeld, likewise, did not believe "anyone was even in the house" (Tr. 415). He stated, "There had been nothing to indicate that there was anybody in the house before that point" (Tr. 416). Then, when Mr. Hunt arrived shortly thereafter, Mr. Hunt went straight to the front door and kicked it in; he did not pause to talk to any of the other officers at the scene, and he did not pause to look in any windows (see Tr. 141, 266-267, 415).

Based on this record, the evidence supported the conclusion that the officers, including Mr. Hunt, did not reasonably believe that Mr. Alberternst was inside the trailer when Mr. Hunt entered. The evidence certainly supported an inference that Mr. Hunt subjectively suspected or hoped that Mr. Alberternst was inside (as shown by the evidence supporting an inference that he intended to assault Mr. Alberternst if he found him inside), but there

was substantial evidence supporting the conclusion that the officers and Mr. Hunt lacked any objective, reasonable belief that Mr. Alberternst was inside.

Mr. Hunt points out that Cindy Burke had informed Officer Dull that Mr. Alberternst was at the trailer "taking a bath," and he points out that Ms. Blake's vehicle was at the trailer when the officers arrived (App.Sub.Br. 101). Mr. Hunt also points out that no one told him not to come to the scene, and that he had had some involvement in the case before the arrest operation (App.Sub.Br. 99-100). Finally, he points out that it was possible that the officers at the scene could have thought that Mr. Alberternst might have been "attempting to conceal his whereabouts" (App.Sub.Br. 102). But Mr. Hunt's reliance on facts and inferences that do not support the verdict is contrary to the standard of review. While contrary inferences could be drawn, they must not be drawn in evaluating the sufficiency of the evidence.

"The evidence and all reasonable inferences therefrom are viewed in the light most favorable to the verdict, disregarding any evidence and inferences contrary to the verdict." *State v. Belton*, 153 S.W.3d 307, 309 (Mo. 2005). This Court "does not act as a 'super juror' with veto powers," but "gives great deference to the trier of fact." *State v. Miller*, 372 S.W.3d at 458. The finder of fact "is the sole determiner of the credibility of all witnesses, and [this Court] regards any conflicts in the witnesses' testimony to have been resolved by the jury in a manner consistent with its verdict." *State v. Pond*,

131 S.W.3d 792, 794 (Mo. 2004). "A jury may accept part of a witness's testimony, but disbelieve other parts." *Id*.

Moreover, the information from Ms. Burke was hours old, and the presence of Ms. Blake's car did not require the jury to conclude that any officer had a reasonable belief that Mr. Alberternst lived at, or was then present inside, Ms. Reed's trailer. Mr. Alberternst had not traveled with Ms. Blake to Ms. Reed's residence, and he could have left long before the officers arrived. In short, the facts identified by Mr. Hunt are irrelevant under the standard of review, and they would not have compelled the jury to conclude that Mr. Hunt reasonably believed that Mr. Alberternst lived at, or was inside, the trailer.

b. Section 544.200 did not justify Mr. Hunt's entry

Mr. Hunt next asserts that § 544.200 made it legal for him to forcibly enter Ms. Reed's trailer (App.Sub.Br. 102-103). That statute provides: "To make an arrest in criminal actions, the officer may break open any outer or inner door or window of a dwelling house or other building, or any other enclosure, if, after notice of his office and purpose, he be refused admittance." § 544.200, RSMo 2000; *see also* § 105.240, RSMo 2000.

Mr. Hunt asserts that the section "does not limit its grant of authority to officers to use force to enter only the dwelling of the person named in an arrest warrant" (App.Sub.Br. 103). He argues that "[t]he authority given by

the statute is more broad than that," and that officers need only have "a subjectively reasonable" belief that the subject of an arrest warrant is inside the dwelling (App.Sub.Br. 103). He argues that to require an objectively reasonable belief on the part of the officers "is to rewrite the statute – a task properly left to the legislature, not a court" (App.Sub.Br. 104).

But permitting officers to make entry into any home based on their subjective beliefs is contrary to the holding of *Steagald*, and it would give rise to the sorts of "abuse" identified in *Steagald*. Section 544.200 does not trump the Fourth Amendment to the Constitution of the United States (or the analogous provisions of the Missouri Constitution), and, contrary to Mr. Hunt's assertion, it is not "the only law that informs a Missouri law enforcement officer of his/her authority to arrest a person in a dwelling house" (App.Sub.Br. 103). In fact, while the statute permits officers to break open doors and windows, it does not authorize *entry*. If officers are to enter a person's home, they must have other lawful grounds (*e.g.*, a search warrant) to do so.

The Fourth Amendment to the United States Constitution guarantees that people will be "secure in their persons, houses, papers and effects against unreasonable searches and seizures," and § 544.200 cannot make

lawful what was unlawful under the constitution.[4] "The apparent purpose of [section 544.200] is to reduce unnecessary damage to property caused by overzealous police officers seeking to make an arrest." *State v. Gibbs*, 224 S.W.3d 126, 136 (Mo.App. W.D. 2007). The statute is not intended to give "overzealous police officers" a license to disregard the Constitution, and it should not be read to expand police powers in the unconstitutional manner suggested by Mr. Hunt.

In addition, there was evidence supporting the conclusion that Mr. Hunt did not comply with the requirements of § 544.200, which requires an officer to give "notice of his office and purpose" and "be refused admittance" before breaking down the door. Here, there was evidence showing that Mr. Hunt walked straight to the outer door, and kicked the door open, without giving notice of his office and purpose (Tr. 266-267, 289-290, 298, 320-322, 415). Additionally, Mr. Hunt cannot rely on the fact that a different officer knocked on the door, because there was evidence that the officers who first approached the trailer to conduct the "knock and talk" were not proceeding under § 544.200, in that, after knocking, they concluded no one was inside

[4] The Missouri Constitution uses almost identical language, guaranteeing "[t]hat the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures[.]" MO. CONST., Art. I, § 15.

and moved away from the door without breaking it open.

There was also evidence that the other officers failed to give notice of their office and purpose. While Sergeant Luechtefeld said that he knocked and announced, "Sheriff's Department, answer the door" (Tr. 133), he did not testify that he also announced his purpose to effectuate the arrest of Mr. Alberternst. In short, there was evidence that the statute was not relied on by the officers conducting the arrest operation, and that it was not complied with in any event.

In sum, there was sufficient evidence to support the conclusion that Mr. Hunt entered Ms. Reed's trailer unlawfully, even assuming the jury believed he was a law enforcement officer armed with an arrest warrant. There was evidence that the officers did not have a search warrant for Ms. Reed's trailer, that there were no exigent circumstances to permit entry, that the officers did not have consent to enter Ms. Reed's trailer, and that the officers did not have an objective belief that Mr. Alberternst lived at the trailer or was present when Mr. Hunt kicked open the outer door to the porch and forcibly entered Mr. Reed's home.

2. There was sufficient evidence that Mr. Hunt knowingly entered unlawfully (Point VII, cont.)

In addition to the evidence outlined above, the evidence and reasonable inferences from the evidence showed that Mr. Hunt knew that the entry into

the trailer was unlawful. The circumstances of the entry itself—inasmuch as the entry did not comply with the Fourth Amendment—gave rise to an inference that Mr. Hunt (a trained law enforcement officer and member of a multi-jurisdictional drug task force) knowingly entered unlawfully. In fact, some of the other officers recognized that the entry was unlawful, and a rational finder of fact could have inferred that Mr. Hunt would have recognized the same thing.

Sergeant Luechtefeld testified that he "thought that the entry into the trailer was not legal" (Tr. 167). He testified that he "did not believe that there were any exigent circumstances to enter the residence" (Tr. 167). Based on his observations, he did not think Mr. Hunt saw Mr. Alberternst inside the residence; he stated, "I stood there for a certain amount of time, longer than anyone else, and I never saw anything" justifying entry (Tr. 167). He stated that Mr. Hunt went straight up to the door, and that he did not see Mr. Hunt look into any windows (Tr. 167). Detective Fitzgerald and Deputy Mayes confirmed that Mr. Hunt got out of his vehicle, walked straight to the door, and kicked the door open (Tr. 266-267, 289-290, 298, 320-322, 415).[5] Officer

[5] Mr. Hunt, by contrast, claimed that he did not go straight to the door, but that he first talked to Officer Wilson and confirmed everything that had happened, and that he then looked through the porch windows (Tr. 524-525).

Sutton stated that he did not "believe that anyone had any permission or authority to enter the residence" (Tr. 457).

More damning was the evidence showing Mr. Hunt's consciousness of guilt. There was evidence supporting the conclusion that, after the arrest, when Officer Sutton talked to Mr. Hunt, Mr. Hunt lied about the circumstances of his entry (Tr. 460). Mr. Hunt said that "he came to the house, [and] knocked on the door" (Tr. 460). He said that the door "was partly ajar," and that "[i]t came open and he heard a female's voice answer while [he was] knocking [and] telling him to come in" (Tr. 460). A rational finder of fact could have concluded that this account was false in light of the other officers' testimony. Indeed, the evidence showed that when Mr. Hunt gave that account to Officer Sutton, Deputy Mayes reacted in a manner that caused Officer Sutton to question the truthfulness of Mr. Hunt's account (Tr. 460).

There was evidence that Mr. Hunt also lied to Lieutenant Shoenfeld about the circumstances of the entry (Tr. 423-424). Mr. Hunt told Lieutenant Shoenfeld that he had "seen a meth lab inside the trailer and that was why he went inside" (Tr. 423).[6] Mr. Hunt showed Lieutenant Shoenfeld a

[6] Mr. Hunt claimed that he had seen the lab through a side window (Tr. 525-526). He also claimed to have seen Mr. Alberternst look out a window, and he said that the lights were on inside the trailer (Tr. 527-528).

backpack and items placed outside the backpack (Tr. 424). But Lieutenant Shoenfeld had seen that backpack when he entered the trailer, and it had been "zipped up," and the "other stuff" had not been lying around (Tr. 424). Other officers also confirmed that no methamphetamine lab was visible from outside the porch, and that no active lab was apparent (Tr. 173-174, 261-262, 462; *see* Tr. 274, 297).

Mr. Hunt's efforts in attempting to hide his culpable actions, his false statements to other police officers, and his false testimony at trial all showed his consciousness of guilt. *See State v. Cole*, 384 S.W.3d 318, 327-328 (Mo.App. S.D. 2012); *State v. Woods*, 284 S.W.3d 630, 640-641 (Mo.App. W.D. 2009) ("[T]he factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt."). A rational finder of fact could have concluded that Mr. Hunt's stories were false, and that he went so far as to stage a methamphetamine lab either to support a belated claim of exigent circumstances, or to attempt to provide probable cause for a search warrant after the fact. A rational finder of fact confronted with such facts could have concluded that Mr. Hunt was conscious of his guilt, and that he knew he was entering the trailer unlawfully when he kicked down the door in the absence of a search warrant, exigent circumstances, consent, or a reasonable belief that Mr. Alberternst was residing in the trailer and present.

Citing § 105.240, RSMo 2000, amicus MFOP asserts that Mr. Hunt's

burglary conviction should be reversed "because it cannot be reconciled with governing law" (MFOP Sub.Br. 8). Section 105.240 states: "Every officer may break open doors and enclosures to execute a warrant or other process for the arrest of any person, or to levy an execution, or execute an order for the delivery of personal property, if, upon public demand and an announcement of his official character, they be not opened." Amicus MFOP also points out that "Missouri common law *presumes* that a police officer taking such action is acting lawfully when making or attempting an arrest" (MFOP Sub.Br. 9).

Amicus MFOP asserts that, in light of § 105.240 and Missouri case law, "every police officer knows that he is cloaked with both the statutory authority to 'break open doors' . . . [and] the common law presumption that his or her action in making a warranted arrest is lawful" (MFOP Sub.Br. 9). Accordingly, amicus MFOP suggests that the Court should "hold that it is impossible as a matter of law to prove the element of 'knowingly . . . unlawful entry' by a law enforcement officer who (a) has a warrant for the arrest of an individual whom he knows or believes to be inside a building, (b) fails to gain entry by announcing his presence and his authority, and (c) elects to break into that building" (MFOP Sub.Br. 9).

But if police officers know about § 105.240 and the common law (as interpreted by Missouri case law), they also know about the United States Constitution, the Missouri Constitution, and controlling case law delimiting

the bounds of their statutory authority. Neither section § 105.240 nor the common law presumption of lawfulness can suspend the protections of the Constitution and make unlawful police conduct lawful. While § 105.240 permits officer to break open doors, it does not authorize entry. Thus, if an officer runs afoul of the Constitution in entering a residence, that officer can be guilty of burglary—provided that the officer knew his entry was unlawful, and that the officer had the purpose to commit a crime therein.

And, here, as set forth above, there was sufficient evidence supporting the conclusion that Mr. Hunt knew he entered the trailer unlawfully. Some of the other officers provided testimony showing that they knew the entry was not legal, and there was evidence showing that Mr. Hunt lied to other officers about the circumstances of the entry and tried to justify a search warrant after the fact by staging evidence of a methamphetamine lab. A rational finder of fact could have concluded that Mr. Hunt did those things because he knew that he had entered Ms. Reed's trailer unlawfully and wished to cover up his wrongdoing.

Amicus MFOP asserts that allowing an officer to be convicted for burglary in cases like this will "reduce the frequency and effectiveness with which the law gets enforced" (MFOP Sub.Br. 8). Amicus MFOP asserts that officers will fear that they "may end up spending years in prison on account of the *post hoc* analysis" of whether the entry was unlawful (MFOP Sub.Br.

8). But this concern should not be overstated or given too much weight for at least two reasons.

First, officers *should* be concerned about abiding by the Constitution, and, except when exigent circumstances dictate otherwise, officers should take the time to follow proper, lawful procedures in carrying out their duties. Sections 105.240 and 544.200 both embody that principle, in that they require officers to make public demands and state their authority, or to announce their office and state their purpose before breaking down doors. Again, these statutes are not designed to give officers license to ignore the Constitution; they are designed to authorize and provide certain procedures that officers should follow in carrying out their duties within the law.

Second, officers need not fear that a technical violation of the law (or even an egregious violation) in making an entry into a residence will result in a burglary conviction. To be guilty of burglary, a person must knowingly enter a building or habitable structure unlawfully *and* the person must do so "for the purpose of committing a crime therein[.]" § 569.160, RSMo 2000. It will only be in those cases where an officer knowingly enters unlawfully *and* has the separate culpable mental state of having the purpose to commit another crime that he or she will be subjected to criminal liability. In short, law enforcement officers who carry out their duties reasonably—even if they make mistakes—will not be subject to criminal liability for breaking open

doors and making arrests.

3. There was evidence that Mr. Hunt entered for the purpose of committing an assault on Mr. Alberternst (Point VIII)

There was also sufficient evidence that Mr. Hunt had the purpose to assault Mr. Alberternst when he entered the trailer. There was evidence showing that when Mr. Hunt arrived on the scene he moved with the singular purpose of confronting Mr. Alberternst in a violent fashion. There was evidence that Mr. Hunt had not been present at any of the briefings that evening, and, yet, even though he was off duty and home with his wife who had just been released from the hospital (*see* Tr. 584-586), he responded to a call from one of the other St. Charles County officers and drove from St. Charles County to inject himself into an ongoing operation. When he arrived, he drove inside the perimeter established by other officers and "came to a skidding stop in front of the house" (Tr. 426-427). He then put on a tactical vest and went straight to the front door and kicked it open (Tr. 266-267, 289-290, 298, 320-322, 415).

Once inside, the evidence showed that Mr. Hunt had an opportunity to handcuff Mr. Alberternst, but instead he took Mr. Alberternst to the ground and started hitting him. The evidence showed that Mr. Alberternst put his hands out the bathroom door into the hallway so that the police could handcuff him (Tr. 363, 394; *see* Tr. 308, 312). Mr. Alberternst "had his hands

out in a surrender motion" (Tr. 317; *see* Tr. 394). But instead of putting on the handcuffs, Mr. Hunt grabbed Mr. Alberternst and took him down to the floor (Tr. 308-311, 363; *see* Tr. 325).

From this evidence, a rational finder of fact could have readily inferred that Mr. Hunt's purpose in going to the trailer and forcing his way inside was to assault Mr. Alberternst. In the light most favorable to the verdict, there was no other reason for kicking open the front porch door and forcing open the inner door. Moreover, when Mr. Hunt had the opportunity to handcuff Mr. Alberternst, he opted instead to throw him down to the floor and beat him. A rational finder of fact could have concluded that Mr. Hunt was simply carrying out his intended purpose of assaulting Mr. Alberternst.

Additionally, there was evidence that Mr. Hunt had a motive, and that Mr. Hunt bore significant animus toward Mr. Alberternst. Mr. Hunt had previously arrested Mr. Alberternst, and at that time, while Mr. Alberternst had been handcuffed, Mr. Hunt had "[b]ackhanded [Mr. Alberternst] in the mouth" (Tr. 368, 374). Mr. Hunt had then had Mr. Alberternst transported to jail, and, while Mr. Alberternst was in jail, Mr. Hunt had told Mr. Alberternst that "if [Mr. Alberternst] wanted to go home [Mr. Alberternst] could work with him on a later date" (Tr. 369). Mr. Alberternst agreed to be an informant for Mr. Hunt, but then Mr. Alberternst did not act as an informant (Tr. 392-393). Mr. Alberternst had merely told Mr. Hunt "whatever

he wanted to hear so [Mr. Alberternst] could get out" (Tr. 393). Rational jurors could have concluded that Mr. Hunt was angry with Mr. Alberternst for reneging on their deal.

There was also evidence that, from the beginning, Ms. Blake was concerned that Mr. Hunt would harm Mr. Alberternst if Mr. Hunt were involved in the arrest (Tr. 179). Ms. Blake had heard that there was "a threat of shoot to kill" Mr. Alberternst, and she was afraid that Mr. Hunt was going to hurt Mr. Alberternst (Tr. 179). (Contrary to Mr. Hunt's suggestion on appeal, this did not mean that there would have been a departmental "shoot to kill" order—Ms. Blake plainly feared something less public.) Additionally, during the incident, Deputy Mayes heard "a lot of personal comments being" made, and he later concluded that "there was obviously some kind of a personal issue between Hunt and [Mr. Alberternst]" (Tr. 349). Detective Fitzgerald witnessed Mr. Hunt screaming into Mr. Alberternst's face, saying, "you want to kick my ass now mother fucker" (Tr. 275). Ms. Blake heard Mr. Hunt say that Mr. Alberternst "ought to be killed," and she heard someone else say that Mr. Alberternst "ought to be killed by [Mr. Hunt]" (Tr. 200). In light of this evidence, a rational finder of fact could have reasonably inferred that Mr. Hunt bore significant animus toward Mr. Alberternst, and that Mr. Hunt used the arrest operation as an opportunity to find and assault Mr. Alberternst.

Mr. Hunt points out that the State's evidence of his intent was circumstantial, and he asserts that "[f]or circumstantial evidence to support a criminal conviction, it must preclude all other *equally* reasonable hypotheses of innocence" (App.SubBr. 109, citing *State v. Biddle*, 599 S.W.2d 182, 192 (Mo. 1980)). He asserts, "Thus, circumstantial evidence claiming to show that Hunt had the intent to assault Alberternst . . . must be such that it also rules out all other possible motives" (App.Sub.Br. 109). But the circumstantial evidence rule cited in *Biddle* has been explicitly disaffirmed. *State v. Freeman*, 269 S.W.3d 422, 424 n. 4 (Mo. 2008).

Despite his apparent reliance upon it, Mr. Hunt states that he is not, in fact, relying upon the circumstantial evidence rule; rather, he asserts that he is relying on the standard this Court stated in *State v. Chaney*, 967 S.W.2d 47, 54 (Mo. 1998) (App.Sub.Br. 111). He outlines various pieces of evidence, and then argues that where there are "equally plausible inferences" that can be drawn from the evidence, a conviction cannot rest on the inference that would support guilt (App.Sub.Br. 111-112). He asserts that, in his case, "an equally plausible, reasonable inference arises from the fact[s]," namely, "that Hunt was a conscientious police officer who took his anti-drug law enforcement duties seriously" (App.Sub.Br. 110). But by drawing supposed equally valid inferences, Mr. Hunt again ignores the standard of review and relies on a rule that is no longer valid, as this Court made plain in *Chaney*.

See State v. Freeman, 269 S.W.3d 424 n. 4 ("In *Chaney*, this Court expressly abrogated the 'equally valid inferences rule' . . . .") (citing *State v. Chaney*, 967 S.W.2d at 54).

Mr. Hunt also cites other testimony that could arguably be construed in a manner contrary to the verdict (App.Sub.Br. 112-117). But evidence and inferences unfavorable to the verdict must be disregarded under the standard of review. *See State v. Freeman*, 269 S.W.3d at 425.

In sum, there was sufficient evidence to support the conclusion that Mr. Hunt entered the trailer for the purpose of assaulting Mr. Alberternst. The evidence of the events that night, and of Mr. Hunt's actions before the assault (including his animus toward Mr. Alberternst), supported an inference that Mr. Hunt injected himself unnecessarily into an ongoing arrest operation for the purpose of assaulting Mr. Alberternst.

4. There was sufficient evidence that Mr. Hunt knowingly damaged property of another (Point IX)

In his ninth point, Mr. Hunt asserts that his conviction for property damage cannot stand because "§ 544.200 authorized [him] to 'break open any outer or inner door' to arrest" Mr. Alberternst (App.Sub.Br. 118). He again relies on the State's "concession" and also points out that the State indicated in its brief in the Court of Appeals that "[t]here is really no question that Mr. Hunt could use force and break down the door pursuant to the provisions of

§ 544.200—so long as it was lawful for him to enter at all" (App.Sub.Br. 119, citing Resp.Br. 59).

But because there was evidence showing that Mr. Hunt did not enter lawfully, § 544.200 did not provide any justification for Mr. Hunt to break down the door. Additionally, because there was evidence that Mr. Hunt and the officers did not comply with the provisions of § 544.200, the evidence was sufficient to support Mr. Hunt's conviction.

As set forth above, § 544.200 requires an officer to give "notice of his office and purpose" and "be refused admittance" before breaking down the door. Here, there was evidence showing that Mr. Hunt walked straight to the outer door, and kicked the door open, without giving notice of his office and purpose (Tr. 266-267, 289-290, 298, 320-322, 415).

There was also evidence showing that the officers who first approached the trailer were not proceeding under § 544.200, in that, after knocking on the door, they concluded no one was there and moved away from the door without breaking it open. There was also evidence that Sergeant Luechtefeld knocked and announced, "Sheriff's Department, answer the door" (Tr. 133), but that he did not announce any purpose to arrest Mr. Alberternst. In short, there was evidence that the officers who knocked on the door were not relying on § 544.200, and that the statute was not complied with in any event. The evidence was sufficient to support Mr. Hunt's convictions.

II.

The trial court did not plainly err in refusing Mr. Hunt's proffered Instruction C, but the trial court did not define "enter unlawfully" in Instruction No. 5 and left the jurors without complete guidance on the law in light of the evidence presented in this case (Responds to Points I, II, and III of Mr. Hunt's brief.)

In his first three points, Mr. Hunt asserts that the trial court "erred and plainly erred" in instructing the jury on the burglary count.

In his first point, Mr. Hunt points out that Instruction No. 5 "did not instruct the jury that Deputy Hunt was clothed in the privileges of a law enforcement officer and that it could not convict Deputy Hunt unless it found that Deputy Hunt knowingly entered Alberternst's residence unlawfully" (App.Sub.Br. 47).

In his second point, Mr. Hunt asserts that Instruction No. 5 did not instruct the jury that "he could only be convicted of burglary if the jury believed that he entered the Alberternst dwelling with the predicate purpose of using more force than he believe[d] was reasonably necessary to make the arrest" (App.Sub.Br. 66).

In his third point, Mr. Hunt asserts that the trial court should have submitted his proffered Instruction C, which included a paragraph "Fourth" that would have instructed the jury to determine "that the defendant did not

act as a law enforcement officer lawfully using force to make an arrest as submitted in Instruction No. ____" (*see* L.F. 114).

A. Preservation and the standard of review

Mr. Hunt's first and second allegations of instructional error (Points I and II) were not raised in the Court of Appeals. Thus, they are asserted here in violation of Rule 83.08(b), which states that a "substitute brief . . . shall not alter the basis of any claim that was raised in the court of appeals brief[.]" As such, they were not preserved for review. *State v. Moore*, 303 S.W.3d 515, 523 (Mo. 2010). In addition, Mr. Hunt's first two claims of instructional error also were not asserted at trial (*see* Tr. 697-698).

Mr. Hunt did proffer Instruction C to the trial court (Tr. 697-698). However, while the defense proffered Instruction C, this claim of error was not included in Mr. Hunt's motion for new trial (L.F. 135-152). Thus, Mr. Hunt's claims were not preserved for review, and if the Court grants any review, the Court should "review only for plain error." *State v. Arnold*, 397 S.W.3d 521, 528 (Mo.App. S.D. 2013).

"The giving or failure to give an instruction . . . in violation of this Rule 28.02 or any applicable Notes On Use shall constitute error, the error's prejudicial effect to be judicially determined . . . ." Rule 28.02(f); *see State v. Cooper*, 215 S.W.3d 123, 125 (Mo. 2007). "On claims of instructional error, '[a]n appellate court will reverse only if there is error in submitting an

instruction and prejudice to the defendant.' " *State v. Forrest*, 183 S.W.3d 218, 229 (Mo. 2006). "MAI instructions are presumptively valid and, when applicable, must be given to the exclusion of other instructions." *Id.*

"For instructional error to constitute plain error, the defendant must demonstrate the trial court so misdirected or failed to instruct the jury that the error affected the jury's verdict." *State v. Tisius*, 362 S.W.3d 398, 411 (Mo. 2012). In reviewing plain-error instructional claims, the Court is "warranted in adopting a more practical view of the result of failing to give" a proper instruction. *See State v. Howard*, 896 S.W.2d 471, 494 (Mo.App. S.D. 1995) (citing *State v. Sanders*, 541 S.W.2d 530, 533-534 (Mo. 1976)).

" '[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 plainly err in failing to instruct the jury in the various ways suggested by Mr. Hunt

1. The trial court correctly refrained from instructing the jury *sua sponte* that "Deputy Hunt was operating under the full authority of the law when he arrested Alberternst" (Point I)

In his first point, Mr. Hunt again relies on the State's concession that

there was "little question" that Mr. Hunt had authority, as a law enforcement officer to make arrests (App.Sub.Br. 49). And, proceeding on the assumption that Mr. Hunt was a law enforcement officer with authority to arrest, he then points out (1) that § 195.505 permits members of multi-jurisdictional enforcement groups to arrest suspects in any county; (2) that § 544.200 permits officers to break down doors of any dwelling when making an arrest; (3) that officers can enter a person's home to execute an arrest warrant of that person so long as the officers reasonably believe that the person lives there and is present at the time of entry; and (4) that § 563.021 provides that "conduct which would otherwise constitute an offense is justifiable and not criminal when such conduct is required or authorized by a statutory provision or by a judicial decree" (*see* App.Sub.Br. 52-62).

In addition to outlining these general legal principles, Mr. Hunt also outlines various pieces of evidence that, in his view, support the following factual conclusions: (1) that there were warrants for Mr. Alberternst's arrest, (2) that Mr. Hunt was a member of a multi-jurisdictional enforcement group, (3) that Mr. Hunt "led a group of fellow MEG members into Alberternst's trailer and arrested him," (4) that Mr. Hunt was "advised of the MEG's activities on February 5 and that Dion Wilson guided Hunt to Alberternst's trailer by cell phone that evening," (5) that the first officers to approach the trailer knocked on the door and announced their identify but were "refused

admittance," (6) that Mr. Hunt and the other officers had "a reasonable belief that Alberternst was in the trailer," (7) that the trailer was Mr. Alberternst's residence or the officers reasonably believed it was his residence, (8) and that Mr. Hunt believed that he had authority to arrest Mr. Alberternst (*see* App.Sub.Br. 51-64).

In light of the foregoing legal principles and factual conclusions, Mr. Hunt asserts that "[i]t was error and plain error for the trial court to fail to instruct the jury that Deputy Hunt was operating under the full authority of the law when he arrested Alberternst and to fail to instruct the jury on the privileges that cloak such a law enforcement officer" (App.Sub.Br. 64-65). He asserts that even though there were factual questions "§ 536.026.2 makes the issue of justification a question for the court to rule 'as a matter of law' when the circumstances establish justification" (App.Sub.Br. 64 n. 5).

But Mr. Hunt is incorrect. Even though the State agrees that some (but certainly not all) of the factual conclusions outlined above were supported by very strong evidence—*i.e.*, evidence that left "little question"—there were still facts that the trial court should not have assumed as true in instructing the jury. Indeed, unless the parties agree to stipulate to certain facts at trial, instructions generally should not assume material facts as true; rather, instructions should instruct the jury on the law and leave the fact-finding to the jury. In other words, trial courts must resist "[t]he temptation to deprive

the jury of the right to disbelieve all or any part of the evidence[.]" *See State v. Jackson*, --- S.W.3d ---, 2014 WL 2861550, *8 (Mo. 2014).

Mr. Hunt does not outline exactly what language he believes the trial court should have included in Instruction No. 5 *sua sponte*, but it would have been manifestly wrong for the trial court to make all of the factual assumptions outlined by Mr. Hunt and to broadly instruct the jury that Mr. Hunt was "operating under the full authority of the law when he arrested Alberternst" (App.Sub.Br. 64-65).[7] Whether Mr. Hunt knowingly entered the trailer unlawfully involved questions of fact for the jury to resolve.

In short, there were fact questions that had to be resolved, and in a criminal case, the facts giving rise to criminal culpability must be submitted to the jury. This is a bedrock principle of the criminal justice system.

It is true that there are some legal defenses, *e.g.*, double jeopardy, that are decided by the judge. But justification defenses are routinely submitted, and must be submitted, to the jury, as those types of defenses involve factual questions that must be resolved by the jury, *e.g.*, whether the person held a reasonable belief. There are, of course, some issues that are presented to the

[7] Mr. Hunt also asserts that it was plain error to "fail to instruct the jury on the privileges that cloak a law enforcement officer" (App.Sub.Br. 65). This aspect of Mr. Hunt's claim is discussed below.

judge in the first instance and then *also* submitted to the jury, *e.g.*, the voluntariness of a defendant's confession. But whether Mr. Hunt "knowingly entered unlawfully"—a necessary element of the burglary—was a factual finding that had to be made by the jury.

2. The trial court correctly refrained from modifying *sua sponte* the definition of assault in Instruction No. 5 (Point II)

In his second point, Mr. Hunt focuses on the fact that he had to have the purpose to commit an assault when he entered the trailer (App.Sub.Br. 67). He then points out that under § 563.046.1, RSMo 2000, an officer can use "such physical force as he reasonably believes is immediately necessary to effect the arrest or to prevent the escape from custody." (App.Sub.Br. 68). Accordingly, he argues that the definition of assault that was included in Instruction No. 5 was incorrect because it did not require the jury to find that Mr. Hunt had the purpose to use more force than he reasonably believed was necessary to make the arrest or prevent escape (App.Sub.Br. 68).

Instruction No. 5 required the jury to find, *inter alia*, that Mr. Hunt unlawfully entered the trailer and "did so for the purpose of committing the crime of assault therein" (L.F. 100). The instruction then defined assault as occurring "when a person knowingly or recklessly causes or attempts to causes [sic] physical injury to another person, or purposely places another person in apprehension of immediate physical injury, or knowingly causes

physical contact with another person knowing the other person will regard the contact as offensive or provocative" (L.F. 100). This aspect of Instruction No. 5 was correct, and the trial court did not plainly err in failing to modify the definition of assault in the general manner suggested by Mr. Hunt.

By requiring the jury to find that Mr. Hunt's purpose in entering the trailer was to commit an assault, the jury necessarily found that Mr. Hunt's purpose was *not* to make an arrest. Thus, any justification defense that may have attached to an attempt to make an arrest was irrelevant for purposes of determining whether Mr. Hunt was guilty of burglary.

In other words, the crime of burglary was not dependent upon an actual assault; rather, it was dependent upon a finding that Mr. Hunt's *purpose* was to commit a crime. If the jury had believed that Mr. Hunt's purpose in entering the trailer was to make an arrest (as he claimed at trial), then Mr. Hunt would have been acquitted, and, for purposes of determining whether he was guilty of burglary, there would have been no need for the jury to consider further whether Mr. Hunt also intended only to use such force as he reasonably believed would be necessary to make the arrest. That consideration was simply irrelevant to the question of whether Mr. Hunt was guilty of burglary.

Additionally, even if the definition of assault should have been modified in some fashion, this alleged error did not result in manifest injustice. The

jury also found Mr. Hunt guilty of assault, and with regard to the assault, the jury was required to determine whether Mr. Hunt used lawful force (*see* L.F. 102-103). Paragraph "Fourth" of the assault verdict director required the jury to determine whether Mr. Hunt "did not act as a law enforcement officer lawfully using force to make an arrest as submitted in Instruction No. 8" (L.F. 102). Instruction No. 8 then informed the jury that "the use of force by a law enforcement officer in making an arrest is lawful in certain situations" (L.F. 103). The instruction then told the jury that

> A law enforcement officer can lawfully use force to make an arrest . . . if he is making a lawful arrest or an arrest which he reasonably believes to be lawful. An arrest is lawful if the officer had reasonable grounds to believe that the person being arrested had committed a crime or was acting under an arrest warrant which he believed to be valid.

(L.F. 103). The instruction then informed the jury that "[i]n making a lawful arrest . . . a law enforcement officer is entitled to use such force as reasonably appears necessary to effect the arrest[.]" (L.F. 103). The instruction also stated that "[a] law enforcement officer in making an arrest need not retreat or desist from his efforts because of resistance or threatened resistance of the person being arrested" (L.F. 103).

Here, because the jury found both that Mr. Hunt's purpose in entering

the trailer was to commit an assault, and that Mr. Hunt assaulted Mr. Alberternst (and used more force than reasonably appeared necessary to make an arrest), there is no reason to believe that modifying the definition of assault in Instruction No. 5 would have affected the jury's verdict. There was substantial evidence showing Mr. Hunt's disregard of the law in entering the trailer, and there was substantial evidence showing that Mr. Hunt had the purpose to, and did, assault Mr. Alberternst.

3. The trial court did not plainly err in refusing Mr. Hunt's proffered Instruction C (Point III)

In his third point, Mr. Hunt argues that the trial court plainly erred in refusing his proffered Instruction C (App.Sub.Br. 71). Instruction C included a modification to the burglary verdict director that is not included in the applicable MAI or its Notes on Use (MAI-CR 3d 323.52). Specifically, Instruction C included a paragraph "Fourth" requiring the jury to determine whether "defendant did not act as a law enforcement officer lawfully using force to make an arrest as submitted in Instruction No. ____" (L.F. 114). This paragraph "Fourth" was identical to the paragraph that was added to the assault verdict director (except that in the assault verdict director, the paragraph expressly referenced Instruction No. 8).

Mr. Hunt argues that the burglary instruction should have referenced the "use of force" justification instruction (Instruction No. 8) because he was a

member of a multi-jurisdictional enforcement group and had authority to arrest Mr. Alberternst (App.Sub.Br. 72-73). He asserts that he "had authority under § 544.200 and § 195.505 to enter the dwelling to make the arrest" (App.Sub.Br. 75). He also asserts that the State "now concedes on appeal" that Mr. Hunt "was acting under authority of the law" when he entered the trailer (App.Sub.Br. 72).

But Mr. Hunt has again overstated the State's concession, which was that there was "little question" (*i.e.*, essentially uncontroverted evidence) that Mr. Hunt was a law enforcement officer who had authority to make arrests. The State has never conceded that Mr. Hunt was acting lawfully when he entered Ms. Reed's trailer (or that he was "acting as a police officer"). To the contrary, at trial the prosecutor argued that Mr. Hunt was "not acting like a police officer" (Tr. 722-723), and, in the Court of Appeals, the State made plain, "In making these observations, the state does not in any fashion concede that Mr. Hunt's actions in this case were lawful" (Resp.Br. 63-64).

The fundamental error in Mr. Hunt's analysis is his conclusion that his status as a law enforcement officer—with the concomitant authority to make arrests and break down doors—rendered his entry into the trailer lawful as a matter of law. He asserts: "The question of Hunt's authority to act pursuant to statute is a legal question that the trial court should have resolved on a motion for judgment of acquittal at the close of the evidence" (App.Sub.Br.

75). But in making this argument, Mr. Hunt wrongly suggests that material facts should be removed from the jury's determination, and he wrongly conflates the statutory authority to make arrests and break down doors with the lawfulness of a police officer's entry into a citizen's home.

The question presented to the jury in the burglary verdict director was whether Mr. Hunt's entry (forcible or not) was lawful or unlawful. That was the relevant contested issue here, and Instruction C would not have aided the jury in determining whether the *entry* was lawful. There is really no question that a law enforcement officer can use force and break down doors pursuant to the provisions of § 544.200—so long as it was lawful for the officer to enter at all (and so long as the officer complies with the requirements of § 544.200). But as discussed above in respondent's Point I (part C.1.b.), the use of force authorized by § 544.200 does not authorize an officer to enter a citizen's home, or to enter it unlawfully. Thus, Instruction C would not have aided the jury in determining whether Mr. Hunt's *entry* was unlawful.

C. The trial court erred in failing to instruct the jury on the meaning of "enter unlawfully"

Given the important policy considerations that are present in this case—*i.e.*, the need to balance society's interests in punishing the guilty and maintaining control over its law enforcement agents and society's competing interest in ensuring that its law enforcement agents can fully carry out their

duties without fear of unreasonably incurring criminal liability—respondent acknowledges the critical importance of ensuring that the jury is properly instructed on the law. Providing proper guidance to the jury helps to maintain an appropriate balance between these competing interests.

The *amici curiæ* assert or suggest that the burglary instruction was deficient because it failed to properly instruct the jury on the issue of whether the entry was unlawful. Amicus MFOP suggests in a footnote that "[a]t the very least, the jury should have been instructed . . . that under Missouri law the conduct of a police officer in making or attempting to execute an arrest warrant is presumed to be lawful" (MFOP Sub.Br. 9 n. 3). But this suggestion misses the mark because it focuses on the lawfulness of the arrest instead of the lawfulness of the entry.

More to the point, amicus LIUNA points out that the notes on use to the applicable MAI state that the phrase "enter unlawfully" may be defined in the verdict director (LIUNA Br. 12-13). Amicus MFOP similarly asserts that "by failing to define knowing unlawful entry, the court left jurors free to decide according to their own standards whether the officer's presence in the fugitive's home was authorized or criminal" (MFOP Sub.Br. 15).

In respondent's view, defining the phrase "enter unlawfully" is the appropriate means to address the legitimate concerns raised by Mr. Hunt's conviction for burglary. The applicable note on use states that the phrase

"enter unlawfully" "may be defined by the Court on its own motion and must be defined upon written request in proper form by the state or by the defendant[.]" MAI-CR 3d 323.52, Note on Use 2(b).

Here, Mr. Hunt did not request in writing that the court define the term. Had such a request been made, it would have been incumbent upon the trial court to define the term. Such a definition would have necessarily included the statutory definition of "enter unlawfully." Under § 569.010(8), RSMo 2000, "a person 'enters unlawfully or remains unlawfully' in or upon premises when he is not licensed or privileged to do so." The statute then goes on to discuss entry into places open to the public and buildings that are only partly open to the public. § 569.010(8), RSMo 2000.

As relevant here, the definition would have informed the jury that if Mr. Hunt were licensed or privileged to enter, his entry would be lawful. But beyond that, a definition of "enter unlawfully" in a case like Mr. Hunt's case might also need to explain to the jury when a law enforcement officer might be privileged to enter. To that end, the definition could have informed the jury that in certain situations, it is lawful for a law enforcement officer to enter a residence without a search warrant, and that such situations include, for example, (1) when there are exigent circumstances, (2) when the owner of the residence consents to the entry, or (3) when there is an arrest warrant for a person and the officers reasonably believe the person lives at the residence

and is present in the residence. At least one of these circumstances was implicated by the factual controversies in Mr. Hunt's case, and, thus, upon request by either of the parties, it would have been the trial court's duty to include a definition of "enter unlawfully."

Including a definition that instructed the jury on these legal principles would have been consistent with the law, and it would have served to balance society's competing interests in this case. Put simply, law enforcement officers must be allowed to carry out their duties under the law, but law enforcement officers are also not above the law.

This prompts the question of whether the trial court should have *sua sponte* opted to define the phrase "enter unlawfully" in the verdict director. A secondary question is whether the trial court also should have *sua sponte* gone beyond the statutory definition of "enter unlawfully" to include the possibilities outlined above. Mr. Hunt has not expressly asserted in any of his points relied on that the trial court plainly erred in failing to define "enter unlawfully," but he states at the conclusion of his first point that "[i]t was error and plain error for the trial court . . . to fail to instruct the jury on the privileges that cloak . . . a law enforcement officer (App.Sub.Br. 65).

Ordinarily, "[a]llegations of error that are not briefed or are not properly briefed on appeal shall not be considered by the appellate court except errors respecting the sufficiency of the information or indictment,

verdict, judgment, or sentence." Rule 30.20. Of course, "[w]hether briefed or not, plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." Rule 30.20.

Here, in light of the evidentiary controversies raised by the evidence presented at Mr. Hunt's trial, there is a risk that the jury did not accurately ascertain whether Mr. Hunt's entry into the trailer was lawful. In other words, absent specific guidance about the law governing law enforcement officers' actions in entering private residences, the jury may not have accurately discerned whether Mr. Hunt's entry into the trailer was lawful.

In a case like this—where competing, and legitimate, societal interests clash—care must be taken to ensure that law enforcement officers are not convicted in the absence of proper instruction. Law enforcement officers must not be arbitrarily placed at risk while carrying out their duties, and, thus, in cases where a law enforcement officer is charged with burglary, trial courts should be required to define the phrase "enter unlawfully." This will require that the applicable MAI be modified to provide for the sorts of situations that entitle law enforcement officers to enter a home when other citizens would not have similar privileges.

In making these observations, the state does not in any fashion concede that Mr. Hunt's actions in this case were lawful. To the contrary, there was

substantial evidence of Mr. Hunt's guilt, including substantial evidence that he knowingly entered Ms. Reed's trailer unlawfully. Moreover, the jury's verdicts show both that the jury believed Mr. Hunt knowingly entered unlawfully, that he entered with the purpose to commit a crime, and that he was not acting lawfully as a police officer when he assaulted Mr. Alberternst.

Nevertheless, because it is critically important that law enforcement officers be able to carry out their duties without fear of being arbitrarily or improperly convicted of a crime, and because it is important that every defendant receive due process, the State concedes that the burglary verdict director in this case failed to include language that should be included in cases where the lawfulness of a law enforcement officer's actions in entering a home must be decided by a jury. Respondent leaves to this Court's review and determination the question of whether this apparent error warrants a new trial. *See State v. Hardin*, 429 S.W.3d 417, 421 n. 4 (Mo. 2014) ("The State conceded this point in its brief. Nevertheless, parties cannot stipulate to legal issues, and this Court is not bound by the Attorney General's confession of error.").

III.

The trial court did not plainly err in submitting Instruction No. 6, the verdict director for property damage in the second degree (Responds to Point IV of Mr. Hunt's brief.)

In his fourth point, Mr. Hunt asserts that the trial court plainly erred in submitting Instruction No. 6 because it "failed to instruct the jury that Deputy Hunt could employ force to break property to make an arrest" (App.Sub.Br. 77). Mr. Hunt points out that § 544.200 permits officers to break open doors in making arrests (App.Sub.Br. 77).

A. Preservation and the standard of review

The claim asserted in this point was not raised in the Court of Appeals; thus, it is asserted here in violation of Rule 83.08(b), and it was not preserved for review. *State v. Moore*, 303 S.W.3d 515, 523 (Mo. 2010). In addition, this claim was not asserted at trial; rather, defense counsel stated that he had "No objection" to Instruction No. 6 (*see* Tr. 693), and this claim was not included in Mr. Hunt's motion for new trial (L.F. 135-152).

"For instructional error to constitute plain error, the defendant must demonstrate the trial court so misdirected or failed to instruct the jury that the error affected the jury's verdict." *State v. Tisius*, 362 S.W.3d 398, 411 (Mo. 2012). In reviewing plain-error instructional claims, the Court is "warranted in adopting a more practical view of the result of failing to give" a proper

instruction. *See State v. Howard*, 896 S.W.2d 471, 494 (Mo.App. S.D. 1995) (citing *State v. Sanders*, 541 S.W.2d 530, 533-534 (Mo. 1976)).

" '[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 properly refrained from modifying Instruction No. 6 *sua sponte*

Section 544.200 provides:

> To make an arrest in criminal actions, the officer may break open any outer or inner door or window of a dwelling house or other building, or any other enclosure, if, after notice of his office and purpose, he be refused admittance.

Mr. Hunt does not outline how the trial court should have modified the instruction to account for this statute. However, respondent notes that Note on Use 3 to MAI-CR 3d 323.72 makes provision for a "claim of right" as a defense to property damage. A similar modification could be employed to account for § 544.200.

In any event, the trial court correctly refrained from modifying the verdict director to take into account § 544.200 because there was insufficient

evidence to support such a modification. Under the statute, an officer is permitted to break down doors, but only after he gives "notice of his office and purpose." Here, there was evidence that Sergeant Luechtefeld knocked on the door and said, "Sheriff's Department, answer the door" (Tr. 133), but there was no evidence that he announced his purpose.

A substantial amount of evidence showed that Mr. Hunt went straight to the door and kicked it open without knocking or announcing anything (Tr. 266-267, 289-290, 298, 320-322, 415). Mr. Hunt's own testimony showed that he neither knocked nor announced anything before he kicked open the door (Tr. 528-529). In short, there was no evidence that any officer complied with the requirements of § 544.200 before Mr. Hunt kicked open the door. (Of course, the officers who first arrived had no need to comply with the statute; the evidence showed they were there to conduct a "knock and talk." And when no one answered the door, they decided to move away from the door, not break it down.)

Mr. Hunt implies that the State has conceded that "[a]ll of the statutory conditions for a forceful entry were met" (App.Sub.Br. 79). He points out that the State indicated in its brief in the Court of Appeals that "[t]here is really no question that Mr. Hunt could use force and break down the door pursuant to the provisions of § 544.200—so long as it was lawful for him to enter at all." Of course, the State did not concede that it was lawful for

Mr. Hunt to enter. More to the point, however, the State merely indicated that Mr. Hunt would have been authorized to break down the door *pursuant to the provisions* of the statute, meaning that he would have had to comply with the provisions of the statute.

C. There was no manifest injustice from this alleged error

Even if Instruction No. 6 should have been modified in some fashion to account for § 544.200, Mr. Hunt did not suffer a manifest injustice from this alleged error. A modification instructing the jury on an officer's right to break open doors would have necessarily informed the jury that the officer had that right "[t]o make an arrest in criminal actions."

Here, while there was some evidence to support Mr. Hunt's claim that he was merely making an arrest, there is no reason to believe that the jury would have credited that evidence and concluded that Mr. Hunt had the right to break down the door. In finding Mr. Hunt guilty of burglary, the jury found that Mr. Hunt's purpose in entering the trailer was to commit an assault (*see* L.F. 100). As a consequence, there is no reason to believe that the jury would have found that Mr. Hunt was justified in breaking down the door. Section 544.200 does not authorize law enforcement officers to break down doors to commit an assault. This point should be denied.

IV.

The trial court did not plainly err in submitting Instruction No. 7, the verdict director for assault in the third degree. (Responds to Points V and VI of Mr. Hunt's brief.)

In his fifth point, Mr. Hunt asserts that the trial court plainly erred in submitting Instruction No. 7, the verdict director for assault in the third degree (App.Sub.Br. 81). He asserts that "the State has conceded that Deputy Hunt had authority to arrest Alberternst and Instruction 7 did not require the jury to find that Deputy Hunt used more force than he reasonably believed was necessary to make the arrest" (App.Sub.Br. 81).

In his sixth point, Mr. Hunt asserts that "even if the assault instruction was arguably correct," the trial court's other alleged errors in Instruction No. 5 "created a manifest injustice in the jury's consideration of the assault charge" (App.Sub.Br. 91).

A. Preservation and the standard of review

These two claims of instructional error were not asserted in the Court of Appeals; thus, they are asserted here in violation of Rule 83.08(b), and they were not preserved for review. *State v. Moore*, 303 S.W.3d 515, 523 (Mo. 2010). In addition, these claims was not asserted at trial (*see* Tr. 693-698), and they were not included in Mr. Hunt's motion for new trial (L.F. 135-152).

"For instructional error to constitute plain error, the defendant must

demonstrate the trial court so misdirected or failed to instruct the jury that the error affected the jury's verdict." *State v. Tisius*, 362 S.W.3d 398, 411 (Mo. 2012). In reviewing plain-error instructional claims, the Court is "warranted in adopting a more practical view of the result of failing to give" a proper instruction. *See State v. Howard*, 896 S.W.2d 471, 494 (Mo.App. S.D. 1995) (citing *State v. Sanders*, 541 S.W.2d 530, 533-534 (Mo. 1976)).

" '[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. Instruction No. 7 was properly drafted (Point V)

Mr. Hunt asserts in his fifth point that "[t]he issue whether Deputy Hunt had the legal authority to use force against the person of Phillip Alberternst to arrest and enter the dwelling is necessarily conceded by the State when it admits that Deputy Hunt had legal authority to make the arrest" (App.Sub.Br. 81-82). He then asserts that "Instruction 7, the assault verdict directing instruction, simply failed to instruct the jury that that legal conclusion (Deputy Hunt's authority) is the legal premise from which it must determine whether Deputy Hunt used more force than he (Hunt) reasonably believed was necessary to arrest Alberternst" (App.Sub.Br. 82).

But as stated above, the State conceded merely that there was "little question" that Mr. Hunt was a law enforcement officer with authority to make arrests, *i.e.*, there was strong evidence to support those conclusions, and the State was willing to assume for the sake of argument on appeal that Mr. Hunt was a law enforcement officer. The mere fact that Mr. Hunt was a law enforcement officer with authority to arrest, however, did not mean that Mr. Hunt had legal authority to "enter the dwelling." It also did not mean that Mr. Hunt had legal authority to use force on Mr. Alberternst.

Under § 563.046, Mr. Hunt would only be allowed to use force if, in fact, his intent was to make an arrest. But the State has never conceded that Mr. Hunt's purpose in entering the trailer was to make an arrest; rather, the State's theory of the case was, and has remained, that Mr. Hunt's purpose was to assault Mr. Alberternst—both when he entered the trailer and while he was inside.

In other words, even assuming Mr. Hunt was a law enforcement officer, he was not acting as a law enforcement officer when he unlawfully entered Ms. Reed's trailer with the purpose of committing an assault upon Mr. Alberternst. The fact that a person *is* a law enforcement officer does not mean that he or she is always *acting* as a law enforcement officer (or acting lawfully); thus, it is manifestly incorrect to assert, as Mr. Hunt does in his substitute brief, that "[t]he State has conceded that Deputy Hunt was acting

as a police officer when he arrived at the Alberternst [sic] trailer" (App.Sub.Br. 82). The State has never conceded that Mr. Hunt was acting as a police officer.

Admittedly, there was substantial evidence leaving "little question" that Mr. Hunt was a law enforcement officer with authority to make arrests. But the appropriate response to the existence of such evidence was not to direct a verdict for Mr. Hunt or to assume as true, and instruct the jury, that "[t]he arrest that followed was an arrest made by Hunt cloaked in full legal authority" (App.Sub.Br. 82). It would have been incorrect to instruct the jury along those lines, as that would have removed a material element (Mr. Hunt's *mens rea*) from the jury's consideration. It was for the jury to determine whether Mr. Hunt was attempting to arrest Mr. Alberternst or attempting to assault Mr. Alberternst.

Accordingly, in addition to requiring the jury to determine whether Mr. Hunt was attempting to cause physical injury to Mr. Alberternst, Instruction No. 7 required the jury to determine whether Mr. Hunt "did not act as a law enforcement officer lawfully using force to make an arrest as submitted in Instruction No. 8" (L.F. 102). And, consistent with § 563.046, Instruction No. 8 then informed the jury that "the use of force by a law enforcement officer in making an arrest is lawful in certain situations" (L.F. 103). The instruction stated:

> A law enforcement officer can lawfully use force to make an arrest . . . if he is making a lawful arrest or an arrest which he reasonably believes to be lawful. An arrest is lawful if the officer had reasonable grounds to believe that the person being arrested had committed a crime or was acting under an arrest warrant which he believed to be valid.

(L.F. 103). The instruction then informed the jury that "[i]n making a lawful arrest . . . a law enforcement officer is entitled to use such force as reasonably appears necessary to effect the arrest[.]" (L.F. 103). The instruction also stated that "[a] law enforcement officer in making an arrest need not retreat or desist from his efforts because of resistance or threatened resistance of the person being arrested" (L.F. 103). The instruction also defined "reasonable belief" (L.F. 103).

With regard to the facts of Mr. Hunt's case, the instruction also included the following:

> If the defendant was a law enforcement officer making or attempting to make a lawful arrest or what he reasonably believed to be a lawful arrest of [Mr. Alberternst] for the crimes of Endangering the Welfare of a Child and Manufacturing Methamphetamine and used only such force as reasonably appeared to be necessary to effect the arrest or to prevent the

escape of [Mr. Alberternst], then his use of force was lawful.

(L.F. 103). And, finally, the instruction stated that the state bore the burden of proving beyond a reasonable doubt that "defendant was not entitled to use force as a law enforcement officer" (L.F. 104).[8]

In short, in light of the evidence presented in this case, Instruction No. 7 was exactly correct. It did not improperly assume as true any material fact that the jury had to determine, and, consistent with § 563.046, it

---

[8] Without citation to the record, Mr. Hunt asserts that defense counsel's failure to object to this instruction was "a function of the hard line the trial court had drawn on the issue of Hunt's authority after the trial court adopted the State's position that Hunt was acting without authority" (App.Sub.Br. 85 n. 9). But while the trial court showed no inclination to grant a motion to dismiss as a matter of law (*see* L.F. 41) or to grant a motion for judgment of acquittal based on Mr. Hunt's legal arguments (*see* L.F. 86-87; Tr. 691-692), the instructions conference does not reveal any unwillingness on the part of the trial court to consider requested instructions (*see* Tr. 692-698; L.F. 109-114). To the contrary, the trial court considered three instructions submitted by the defense (L.F. 109-114; Tr. 692-698). In short, in light of Instruction Nos. 7 and 8, it appears that the trial court simply preferred to let the jury make the factual findings.

permitted the jury to consider whether Mr. Hunt was a law enforcement officer acting within the bounds of the law.[9]

C. The alleged errors in Instruction No. 5 did not affect the jury's determination of guilt under Instruction No. 7 (Point VI)

In his sixth point, Mr. Hunt acknowledges that Instruction No. 7 might have been correctly drafted, but he asserts that the trial court committed "cumulative error because it failed to instruct the jury [in Instruction No. 5] on Deputy Hunt's legal authority to arrest Alberternst and the privileges that attach to that authority" (App.Sub.Br. 91). He asserts that "Instruction 5 created a manifest injustice in the jury's consideration of the assault charges" (App.Sub.Br. 91).

---

[9] Mr. Hunt outlines various facts and inferences that, in his view, justified his use of force against Mr. Alberternst (App.Sub.Br. 86-90). But this recitation of facts (which is stated in a light favorable to concluding that Mr. Hunt used lawful force), merely reveals that the trial court correctly instructed the jury in Instruction Nos. 7 and 8 to consider whether Mr. Hunt was acting as a law enforcement officer using lawful force to make an arrest. When stated in a light favorable to the verdict, there was substantial evidence showing that Mr. Hunt was guilty of the assault, and, tellingly, Mr. Hunt does not contest the sufficiency of the evidence to support his assault conviction.

Mr. Hunt first points out (as he did in his Point II) that "Instruction 5 defined 'assault' without reference to any law enforcement exception" (App.Sub.Br. 92). But as stated above in response to Mr. Hunt's second point, it was not necessary in Instruction No. 5 to define assault in a manner that would have allowed conviction for an assault. The relevant determination for the jury in considering whether Mr. Hunt was guilty of burglary was whether Mr. Hunt entered the trailer for the purpose of committing a crime. Had the jury concluded instead that Mr. Hunt had entered for the purpose of making an arrest, the jury would have acquitted Mr. Hunt of burglary and any further definition of assault would have been irrelevant to the question of whether he was guilty of burglary.

Mr. Hunt asserts that the lack of a complete definition in Instruction No. 5 prejudiced him because "the jury was required to find as part of the burglary submission – *before* it ever considered the actual third-degree assault submission – that Hunt intended to assault Alberternst – all without any reference to the law's privileges that attached to Deputy Hunt under 563.046.1, RSMo" (App.Sub.Br. 92). But this is incorrect. The trial court read all of the instructions to the jury before the jury began its deliberations; thus, the jury was fully apprised—before it considered whether Mr. Hunt entered for the purpose of committing an assault—of what it would have to find to conclude that Mr. Hunt was actually guilty of assault (*see* Tr. 700).

Additionally, the jury was specifically instructed, "You must not single out certain instructions and disregard others or question the wisdom of any rule of law" (L.F. 98). Thus, there is no reason to believe that, in finding Mr. Hunt guilty of assault under Instruction No. 7, the jury ignored all of Instruction No. 7's express provisions to consider whether Mr. Hunt was justified in using force to make an arrest once he was inside the trailer. "We presume . . . that the jury properly followed the court's instructions, including Instruction No. 3 (MAI–CR3d 302.03) that told the jury it 'must not single out certain instructions or disregard others.' " *State v. Fewell*, 198 S.W.3d 691, 697 (Mo.App. S.D. 2006).

Mr. Hunt next asserts that "[t]he trial court refused to accept for purposes of any ruling it made on the evidence or on any disputed legal matters, or to instruct the jury what the State has now conceded – that Deputy Hunt had legal authority to arrest Alberternst" (App.Sub.Br. 94). But the record belies this assertion. Instruction No. 7 cross-referenced Instruction No. 8, which plainly instructed the jury on a law enforcement officer's use of lawful force in making an arrest.

Mr. Hunt complains that "Instructions 7 & 8 invited the jury to determine as a disputed fact what the State now says is not disputed – that Deputy Hunt had legal authority to arrest Alberternst" (App.Sub.Br. 94). But the mere fact that there was "little question" about Mr. Hunt's status as a

law enforcement officer did not require the trial court to modify the MAI and assume that fact as true in instructing the jury. It was not error for the trial court to follow the MAI and for the trial court to require the jury to make the requisite factual findings.

The one discernible instructional error in Instruction No. 5 was the absence of a definition of "enter unlawfully," as discussed above. But in giving the jury a definition of assault in Instruction No. 5 that was consistent with Instruction No. 7 (minus the special provisions contained in Instruction No. 8), it cannot be said that the trial court "so misdirected or failed to instruct the jury that the error affected the jury's verdict" on the assault count. *State v. Tisius*, 362 S.W.3d at 411. Instruction No. 7 included every element of assault in the third degree, and it further required the jury to consider whether Mr. Hunt used lawful force during the assault. *See generally State v. Sandles*, 740 S.W.2d 169, 173 (Mo. 1987) ("The established principles which govern review of an alleged error of omission are that instructions must be considered together and that absence of language in a particular instruction does not prejudice the defendant if the subject matter is covered and provided elsewhere in the instruction[s].").

If anything, Instruction Nos. 7 and 8 tended to cure any instructional error that occurred in Instruction No. 5. Instruction No. 8 had the effect of reminding the jury that there was evidence showing that Mr. Hunt might

have been a law enforcement officer making an arrest (a fact that could have been relevant to determining what his purpose might have been in entering the trailer), and it provided the jury a complete framework for determining whether Mr. Hunt (in his interactions with Mr. Alberternst) used force that he reasonably believed was necessary during an arrest.

Finally, there was no manifest injustice in the assault verdict. The evidence of Mr. Hunt's guilt was very strong. Substantial evidence showed (and the jury found) that Mr. Hunt had the purpose to assault Mr. Alberternst when he entered the trailer (*i.e.*, that it was *not* Mr. Hunt's purpose to make an arrest). In brief, there was evidence that, when Mr. Hunt arrived at the scene, he drove inside the perimeter established by other officers and "came to a skidding stop in front of the house" (Tr. 426-427). He then put on a tactical vest and went straight to the front door and kicked it open (Tr. 266-267, 289-290, 298, 320-322, 415).

There was also evidence that, once inside, Mr. Hunt had an opportunity to put handcuffs on Mr. Alberternst, but instead he took Mr. Alberternst to the ground and started hitting him. The evidence showed that Mr. Alberternst put his hands out the bathroom door so that the police could handcuff him (Tr. 363, 394; *see* Tr. 308, 312). The evidence showed that Mr. Alberternst "had his hands out in a surrender motion" (Tr. 317; *see* Tr. 394). But instead of putting on the handcuffs, Mr. Hunt grabbed Mr. Alberternst,

took him to the floor, and started hitting him (Tr. 308 311, 363; *see* Tr. 325).

In addition, even if Mr. Hunt had entered for the purpose of making an arrest, there was substantial evidence that Mr. Hunt did not use such force as reasonably appeared necessary to effect the arrest. As stated above, Mr. Alberternst had put his hands out in a "surrender motion," and there were several officers in the hallway.

There was also evidence that Mr. Alberternst was not "trying to strike the officers or anything" (Tr. 325). Mr. Alberternst did not try to hit Mr. Hunt, or grab his arm, or pull on him (Tr. 326). Once Mr. Alberternst was on the ground, he screamed and kicked his legs, and Deputy Mayes took control of his left leg (Tr. 326). Mr. Alberternst then said, "okay, okay. You've got me, I give up" (Tr. 326).

But instead of putting handcuffs on Mr. Alberternst, the evidence showed that Mr. Hunt and his associates started "[b]eating [him]" (Tr. 363). Mr. Alberternst was naked, and the three St. Charles County officers were on top of him (Tr. 272). Mr. Hunt was punching him in the head (Tr. 364). Mr. Hunt punched Mr. Alberternst "[e]verywhere" on his head (Tr. 364).

Deputy Mayes observed "some strikes being made" on Mr. Alberternst's "upper area, shoulders and head area" (Tr. 326). Lieutenant Shoenfeld saw Mr. Hunt "striking [Mr. Alberternst] in the back of the head and kind of in the soft spot on the back of your head here with his fist" (Tr. 418). Mr. Hunt

struck "straight down on the back of his head . . . several times" (Tr. 419).

The evidence also showed that Deputy Mayes realized that there was a problem; he thought the arrest had "turned into a torture situation" (Tr. 328). Additionally, Detective Shoenfeld described blows by Mr. Hunt that were not consistent with control tactics (Tr. 418-419), and Deputy Mayes testified that, while the blows could have been control tactics, "when you look at [Mr. Alberternst's] face they could maybe not have been so" (Tr. 343).

In short, there was substantial evidence showing that the repeated and prolonged violence was not "such force as reasonably appear[ed] necessary" to make an arrest. Moreover, because the jury was properly instructed on the law in Instruction Nos. 7 and 8 (including the lawful use of force by an officer making an arrest), there is no reason to believe that any alleged error in Instruction No. 5 affected the jury's verdict on assault.

V.

The trial court did not plainly err in limiting the testimony offered by Corporal Brian Clay. (Responds to Point X of Mr. Hunt's brief.)

In his tenth point, Mr. Hunt asserts that the trial court erred in sustaining the state's objection to part of Corporal Clay's testimony (App.Sub.Br. 121). He asserts that Corporal Clay "was prepared to testify that Deputy Hunt struck Alberternst only in the places law enforcement officers are trained to strike resisting arrestees" (App.Sub.Br. 121). He asserts that Corporal Clay's testimony "would have shown that Deputy Hunt only struck Alberternst in a pattern consistent with subduing an arrestee" (App.Sub.Br. 121).

A. Preservation and the standard of review

"The trial court has broad discretion to admit or exclude evidence during a criminal trial, and error occurs only when there is a clear abuse of this discretion." *State v. Hart*, 404 S.W.3d 232, 248 (Mo. 2013). While preserved errors are reviewed for an abuse of discretion, here, Mr. Hunt did not preserve his claim for appellate review.

"To preserve a claim that evidence was improperly excluded, the party offering the evidence must attempt to present the evidence at trial, and if an objection is sustained, the proponent must then make an offer of proof." *State*

v. Gittemeier, 400 S.W.3d 838, 844-845 (Mo.App. E.D. 2013). Here, Mr. Hunt did not make an adequate offer of proof (*see* Tr. 641, 643-656). Accordingly, "review is for plain error." *Id.* at 845.

"This Court will exercise its discretion to conduct plain error review only when the appellant's request for plain error review establishes facially substantial grounds for believing that the trial court's error was 'evident, obvious, and clear' and 'that manifest injustice or miscarriage of justice has resulted.' " *State v. Jones*, 427 S.W.3d 191, 195 (Mo. 2014). " '[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. Mr. Hunt's offer of proof was inadequate, and the trial court did not plainly err in excluding part of Corporal Clay's testimony

"An offer of proof must be sufficiently specific to inform the trial court what the evidence will be, the purpose and object of the evidence, and the facts necessary to establishing admissibility of the evidence." *State v. Gittemeier*, 400 S.W.3d at 845. "Evidence or testimony made during a pretrial hearing on a motion in limine does not ordinarily constitute an offer of proof and, thus, does not preserve anything for appellate review." *Id.*

Here, in arguing for the admission of Corporal Clay's excluded testimony, defense counsel did not make an adequate offer of proof. Defense counsel did not present Corporal Clay's additional proposed testimony, and he did not outline with specificity what Corporal Clay's additional testimony would be. In relevant part, defense counsel merely stated the following:

> He is going to come in and speak as to the training of the officers and how they are trained to deal with situations that involve individuals that are not compliant and as to their training as to how to handle those situations *and then I think he is going to review the photos and see if those photos and the injuries depicted in them are consistent with his training*.

(Tr. 641) (emphasis added). Counsel opined that such testimony "needs to go to the jury to show that it was consistent with the training that the officers received" (Tr. 641).

Without an offer of proof from Corporal Clay, it is not apparent what he would have said. And even if defense counsel's informal offer is considered, it, too, was inadequate.

The emphasized portion of counsel's statement highlights the part of Corporal Clay's testimony that the trial court excluded, and that part of counsel's offer of proof did not show that the testimony would have been admissible and relevant. Counsel did not say that Corporal Clay would testify

that every injury depicted in the photographs was consistent with Mr. Hunt's training, or even that *any* of the injuries were consistent. Rather, defense counsel expressed uncertainty and made no assertion that Corporal Clay would correlate any of the depicted injuries with training: "*I think* he is going to review the photos and see *if* those photos and the injuries depicted in them are consistent with his training" (emphasis added). By failing to state which photographs Corporal Clay had (or would) review, and by failing to state that Corporal Clay would actually testify that the injuries in those photographs were consistent with Mr. Hunt's training, the offer of proof provided no basis for admitting the testimony. *See State v. Gardner*, 8 S.W.3d 66, 72-73 (Mo. 1999) (the trial court did not abuse its discretion where "[t]he offer of proof was vague and inconclusive as to the testimony itself.").

C. Mr. Hunt did not suffer manifest injustice

Mr. Hunt also did not suffer manifest injustice from this alleged error. Mr. Hunt testified that he delivered strikes as he had been trained to do (Tr. 552). Mr. Hunt testified that Mr. Alberternst did not comply with commands, and that he tried to shut the bathroom door (Tr. 539). Mr. Hunt testified that when he took Mr. Alberternst to the ground, Mr. Alberternst resisted by trying to push up off the ground with his hands (Tr. 551). He then described how he delivered "strikes to just below the shoulder blade here," where "[t]here's like a muscle group that's right there" (Tr. 551). Mr. Hunt stated

that "[w]hen you strike it it temporarily immobilizes the muscle in their arms" (Tr. 551). Mr. Hunt also described strikes to the back of Mr. Alberternst's biceps (*i.e.*, his triceps) and his forearm (Tr. 554). Mr. Hunt testified that he was hitting Mr. Alberternst "[a]s hard as [he] possibly could" (Tr. 555).

Corporal Clay corroborated aspects of Mr. Hunt's testimony about officer training, and he offered testimony that supported the defense theory that Mr. Hunt used lawful force. Corporal Clay testified that he trained Mr. Hunt, and that he trains officers to use one level of force higher than the force used by a person resisting arrest (Tr. 645, 647-648). He testified that "passive resistance" warrants hard, empty-hand force, including blows (Tr. 648-649). He testified that "defensive resistance" warrants the use of intermediate weapons, including tasers, mace, and impact weapons (Tr. 649). He testified that a person who does not comply with commands is offering verbal non-compliance and passive resistance (Tr. 650). He testified that a person keeping his hands under his body and kicking his legs is offering defensive resistance and borderline assaultive behavior (Tr. 650).

Corporal Clay testified that striking a person with a fist is a type of hard, empty-hand control (Tr. 650-651). He testified that an officer facing defensive resistance and borderline assaultive behavior would be authorized to use more than hard, empty-hand control tactics (*i.e.*, intermediate

weapons) (Tr. 651; *see* Tr. 649). He confirmed that officers are trained to strike nerve motor points, including the "super scapula area" ("in the shoulders near the base of the neck"), the triceps, the radial and medial nerve points on the arms, the peroneal nerve point on the back of the leg, the femoral nerve point on the inside of the thigh, the tibial nerve point on the back of the calf, and the superficial point (where the shin meets the foot) (Tr. 652, 654-655). He testified that officers are taught to strike as hard as they can, and to keep on hitting until the resistive behavior stops (Tr. 656).

In short, Corporal Clay confirmed that the events described by Mr. Hunt were consistent with his training. Moreover, assuming the facts described by Mr. Hunt, Corporal Clay's testimony tended to suggest that Mr. Hunt could have used more force than he did in light of Mr. Alberternst's defensive resistance and borderline assaultive behavior. Mr. Hunt highlights this correlation in arguing his fifth point (in which he asserts that he was entitled to use force to effect an arrest) (App.Sub.Br. 88-90), and he argued it to the jury in closing argument (Tr. 706-707). Thus, the limitation placed on Corporal Clay's testimony did not result in manifest injustice, particularly because no offer of proof showed what his testimony would have added.

Evidence about control tactics was also potentially irrelevant because there was evidence showing that the arrest could have been made without the use of force. There was evidence that Mr. Alberternst put his hands out

the bathroom door so that the police could handcuff him (Tr. 363, 394; *see* Tr. 308, 312). The evidence showed that Mr. Alberternst "had his hands out in a surrender motion" (Tr. 317; *see* Tr. 394).

In other words, the need to use force at all was dependent upon the jury concluding that Mr. Alberternst resisted an arrest instead of surrendering. But because there was evidence showing that Mr. Alberternst tried to surrender before Mr. Hunt took him to the ground, the jury could have concluded that no force was necessary, and it would not have mattered that the injuries were consistent with Mr. Hunt's training. Additionally, because the jury expressly found that Mr. Hunt's purpose in entering the trailer was to commit an assault, there is no reason to believe that the jury would have concluded that Mr. Hunt was acting in a manner consistent with his training. Mr. Hunt has failed to carry his burden of proving manifest injustice.

VI.

The trial court did not plainly err in permitting Sergeant Travis Hitchcock to testify that he thought the officers' entry into the trailer was unlawful. (Responds to Point XI of Mr. Hunt's brief.)

In his eleventh point, Mr. Hunt asserts that the trial court plainly erred in permitting Sergeant Travis Hitchcock to testify on rebuttal that it was unlawful for Mr. Hunt to enter the trailer (App.Sub.Br 125). Mr. Hunt argues that Sergeant Hitchcock was not qualified to offer the testimony, and that his rebuttal testimony encroached on issues reserved for the trial court and misled the jury (App.Sub.Br. 125).

A. Preservation and the standard of review

"The trial court has broad discretion to admit or exclude evidence during a criminal trial, and error occurs only when there is a clear abuse of this discretion." *State v. Hart*, 404 S.W.3d 232, 248 (Mo. 2013). While preserved errors are reviewed for an abuse of discretion, here, as Mr. Hunt concedes (App.Sub.Br. 126 n. 17), he did not preserve this claim for review.

Mr. Hunt challenges two parts of Sergeant Hitchcock's testimony: (1) when he testified that, after hearing Sergeant Luechtefeld's account, he thought there was something "desperately wrong;" and (2) when he testified that, after talking to his officers at the scene, he instructed them not to seize any evidence from the trailer, ostensibly because he believed there had been

an "unlawful entry" that would make it illegal to seize the evidence (App.Sub.Br. 126-127, 130-131).

Before the first of these two challenged portions of testimony, defense counsel objected and asserted that the testimony "call[ed] for hearsay" (Tr. 662). Before the second, defense counsel objected on the grounds that "This is not rebuttal testimony. This should have been presented in the case in chief" (Tr. 668). (The motion for new trial likewise alleged that Sergeant Hitchcock's testimony was not proper rebuttal testimony (L.F. 148)). Neither of these objections stated the grounds now asserted on appeal; thus, there was no contemporaneous objection preserving the claim now asserted on appeal. "A point on appeal must be based upon the theory voiced in the objection at trial and a defendant cannot expand or change on appeal the objection as made." *State v. Ware*, 326 S.W.3d 512, 523 (Mo.App. S.D. 2010).

Accordingly, teview, if any, is limited to plain error review. "This Court will exercise its discretion to conduct plain error review only when the appellant's request for plain error review establishes facially substantial grounds for believing that the trial court's error was 'evident, obvious, and clear' and 'that manifest injustice or miscarriage of justice has resulted.' " *State v. Jones*, 427 S.W.3d 191, 195 (Mo. 2014). " '[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 plainly err in admitting the testimony

Mr. Hunt is correct in asserting that expert testimony about the law is generally inadmissible. When it comes to the law, the jury is instructed on the law by the trial court. But even assuming that Sergeant Hitchcock's testimony ran afoul of this rule, Mr. Hunt did not suffer a manifest injustice.

" 'If evidence is improperly admitted, but other evidence establishes essentially the same facts, there is no prejudice to the accused and no reversible error.' " *State v. Hadley*, 357 S.W.3d 267, 270 (Mo.App. E.D. 2012). Here, Sergeant Hitchcock's testimony did not result in manifest injustice because other virtually identical testimony was admitted earlier in the trial.

Sergeant Hitchcock testified on rebuttal that, based on what Sergeant Luechtefeld had told him, he knew there was "something desperately wrong" (Tr. 659, 662).[10] He further testified, based on what his officers had told him

[10] Although not included in his point relied on, Mr. Hunt makes the additional claim that the "desperately wrong" testimony was based on hearsay (App.Sub.Br. 131). But Sergeant Hitchcock's mental impression was

(and what he had observed at the scene), that he instructed his men not to seize any evidence, ostensibly because he believed that there had been an "unlawful entry" (*see* Tr. 668). This limited testimony was not outcome determinative, particularly in light of the evidence presented at trial.

In the State's case in chief, Sergeant Luechtefeld testified that he was concerned about the entry (Tr. 142). On cross-examination, defense counsel asked a series of questions designed to highlight alleged circumstances that might have justified entry into the trailer (Tr. 153-157, 159-162). Defense counsel asked whether a verified arrest warrant authorized him to make an arrest, and he elicited the fact that Sergeant Luechtefeld was hoping to see Mr. Alberternst inside the trailer so that they could "enter the residence if he didn't come to the door and we could arrest him for his active warrant" (Tr. 154, 160). Counsel also elicited that Sergeant Luechtefeld would have forced open the door if he had seen Mr. Alberternst inside (Tr. 160).

On re-direct examination, the state referred back to those questions, and Sergeant Luechtefeld testified that defense counsel's questions had not changed his opinion about what had happened on the night of the arrest (Tr. 166). He testified that he "thought that the entry into the trailer was not

---

not hearsay, and the reference to out-of-court statements was made to explain subsequent conduct.

legal" (Tr. 167).[11] He testified that he "did not believe that there were exigent circumstances to enter the residence" (Tr. 167). He testified that he did not believe Mr. Hunt saw Mr. Alberternst inside the trailer because he had looked in the windows and he had "stood there for a certain amount of time, longer than anyone else, and [he] never saw anything" (Tr. 167). Officer Sutton similarly testified that he did not "believe that anyone had any permission or authority to enter the residence" (Tr. 457).[12] In light of this testimony from two officers involved in the incident, there was no manifest injustice from the similar rebuttal testimony offered by Sergeant Hitchcock. *See State v. Draman*, 797 S.W.2d 575, 577 (Mo.App. S.D. 1990) (citing *State v. Zagorski*, 632 S.W.2d 475, 478 n. 2 (Mo. 1982) ("It is well settled that if evidence is improperly admitted, but other evidence before the court establishes the same fact or facts, there is no prejudice to defendant and no reversible error.").

Mr. Hunt asserts that the jury took Sergeant's Hitchcock's limited testimony "as gospel when it was asked to decide whether Hunt 'knowingly entered unlawfully' " (App.Sub.Br. 130). But this speculative hyperbole does

---

[11] Defense counsel objected to this testimony, but he stated no basis for his objection (Tr. 167).

[12] Defense counsel objected, stating, "It's not within his knowledge" (Tr. 458).

not comport with the record, as Sergeant Hitchcock did not testify that Mr. Hunt *knowingly* entered unlawfully or, in point of fact, that Mr. Hunt entered unlawfully (Tr. 668). Sergeant Hitchcock also did not state that Mr. Hunt was guilty of burglary (Tr. 668). Rather, he merely stated, given the facts described to him (and in light of his own observations at the scene), that he thought the entry was unlawful. It was up to the jury to decide whether Mr. Hunt acted knowingly.

Additionally, it appears that the defense intended to elicit this sort of testimony for the jury's consideration. In opening statement, defense counsel stated that Mr. Hunt was a deputy sheriff and a member of a drug task force and, thus, had "authority throughout the State of Missouri" (Tr. 121). Defense counsel then outlined facts intended to suggest that Mr. Hunt could lawfully enter the trailer (Tr. 121-124).

When Mr. Hunt later took the stand, he offered testimony along the same lines. He testified that he had legal "authority" to kick open the porch door because of Mr. Alberternst's arrest warrants and the circumstances preceding the arrest, including Mr. Hunt's alleged fear that Ms. Blake was in danger inside (Tr. 529-530). Mr. Hunt testified that he "[a]bsolutely" believed that he had legal authority to pry open the inner door to enter the trailer (Tr. 531). And, finally, he testified that "there was no issue with the entry" into the trailer (Tr. 573). In light of Mr. Hunt's testimony, Mr. Hunt should not be

heard to claim plain error based on the state's subsequent presentation of Sergeant Hitchcock's testimony.[13]

In any event, even if it was error to permit the testimony, there was no manifest injustice in light of the other similar testimony and the overwhelming evidence showing that Mr. Hunt's entry into the trailer was not lawful. Several officers testified about the events preceding the entry, and none of them identified circumstances that allowed the officers to enter the trailer. Mr. Hunt's after-the-fact attempts to justify his conduct showed his consciousness of guilt, and his self-serving testimony was greatly outweighed by the testimony of the several other officers who were at the scene. This point should be denied.

---

[13] On cross-examination, defense counsel treated Sergeant Hitchcock as an expert and posed hypothetical questions designed to suggest that the entry was lawful (Tr. 671, 673-674). Mr. Hunt never complained about any lack of qualifications (thus any claim along those lines was waived), and in light of the cross-examination, it is apparent that the defense had no qualms about eliciting this sort of testimony. Also, in closing argument, the state did not mention Sergeant Hitchcock's testimony until after defense counsel argued that Sergeant Hitchcock had initially said the entry "was lawful" but then changed his opinion at trial to say that it "wasn't lawful" (Tr. 715-716, 724).

CONCLUSION

The Court should affirm Mr. Hunt's convictions and sentences for property damage in the second degree and assault in the third degree, and the Court should determine whether instructional error in Instruction No. 5 warrants relief and a new trial.

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 the attached brief complies with Rule 84.06(b) and contains 24,581 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 28th day of July, 2014, to:

Edward D. Robertson Jr.
Mary D. Winter
Anthony L. DeWitt
BARTIMUS FRICKLETON
ROBERTSON & GORNY
715 Swifts Highway
Jefferson City, MO 65109
Tel.: (573) 659-4454
Fax: (573) 659-4460
chiprob@earthlink.net

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