No. SC94324

In the Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

MICHAEL E. AMICK,

Appellant.

Appeal from the Circuit Court of Oregon County
Twenty-Seventh Judicial Circuit
The Honorable J. Max Price, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Defendant was convicted following a jury trial in the Circuit Court of Oregon County of second-degree murder and second-degree arson (Tr. 1063-1064). Pursuant to a pre-verdict agreement, Defendant was sentenced by the Court to concurrent sentences of life imprisonment for murder and 7 years for arson (Tr. 1092).

The sufficiency of the evidence to convict is not at issue. Viewed in the light most favorable to the verdict, the evidence and reasonable inferences therefrom at trial established the following facts:

On December 2, 2008, Defendant shot his wife's grandmother ("Victim") six times in the head with a .22 caliber revolver, killing her (Tr. 388, 396-398, 463, 465-467, 469, 470, 471, 557, 597-599, 600, 610-612, 632, 633, 634-643, 645, 685, 704, 708). As Victim lay dead from the gunshot wounds in the house she shared with her daughter and grandchildren, it burned to the ground (Tr. 260, 300-304, 306, 366, 368-370, 372, 373, 396-398, 410, 415, 416, 419-420, 452-453). Law enforcement officers found Victim's body in the fire (Tr. 372, 385, 410, 416, 452-453). What remained of Victim's body had six bullets inside the brain (Tr. 392-398). Victim died of her gunshot wounds prior to the body being burned (Tr. 396-398).

Victim was a regular customer of the Bank of Thayer (Tr. 711). On March 7, 2008, Victim entered into a car loan arrangement with the bank to

purchase a van which was originally owned free and clear by Defendant and his wife (Tr. 711, 713, 722, 725-726). Of the loan amount of $20,637.80, just under $5,000 went to consolidate another loan while two checks, one for $10,000 and one for $5,053.32 were paid to the order of Defendant (Tr. 714). The loan was secured with a 2007 Honda van belonging to Defendant and his wife (Tr. 715). Victim purchased credit life insurance that would pay off the loan in the event she died and provided that the loan would be paid in full by an insurance company regardless of the manner in which she may die (Tr. 716).

Scheduled payments were made either in cash or by checks signed by Defendant during the months of May through October, but the bank never received a November or December payment (Tr. 717-719).[1] A bank vice-president called Victim and reminded her that the November payment had not been made in late November; Victim apologized and said she would get the payment made (Tr. 719, 720).

On the same day that the bank vice-president had heard on the news that Victim had died in a fire, he got a phone call from Defendant, whose voice he recognized (Tr. 720-721). Defendant asked the bank official if there

[1] As will be noted *infra*, the loan apparently was for the benefit of Defendant and received under false pretenses.

was credit life insurance on the loan, and he told him yes, that the loan would be paid in full (Tr. 721). $18,591.99 was still owed on the loan (Tr. 721). In addition to the $15,000 Defendant received initially from the process, Defendant got to keep the van (Tr. 725). Contrary to the way the arrangement was supposed to work, title was never transferred from Defendant and his wife's name, which meant that the loan was received under false pretenses (Tr. 725-726).

Approximately a month and a half to two months prior to the murder and fire, Victim had been staying in a trailer behind Defendant and his wife's (Victim's granddaughter's) house, but she had recently moved into her daughter's house because of family turmoil issues (Tr. 260, 359-363).

On the day of her death, Victim's son-in-law (an over-the-road truck driver who was in Louisiana at the time) called and spoke with Victim in a phone call the son-in-law described as uncharacteristically short for Victim; the call took place at 10:56 or 10:57 a.m. (Tr. 264-267, 274).

Around or shortly after 11:00 a.m., Jake Mayberry, who lived about a mile from the house in which Victim's burned body was found, left to go to the store, drove past Victim's residence and observed Defendant's truck parked right beside the house (Tr. 289, 293, 296-298, 299). After Jake drove approximately six miles to the store, got gas and purchased a few items, he left the store at approximately 11:21 a.m. and drove back home, again going

past Victim's residence (Tr. 293, 299-300, 302, 303). Jake noticed a lot of smoke coming from in between the tin pieces of the roof, from each of the tin overlaps and "like everywhere" (Tr. 303-304).

After pulling into the driveway and ascertaining there was nothing he could do alone, Jake informed his father, Manny Mayberry, who went to try to fight the fire while Jake notified Victim's daughter, Jackie Risner, and grandson, Josh Lane, at the store where they were working (Tr. 304-307). Jake and Josh returned to the house, where Manny was trying to fight the fire, and Jackie followed (Tr. 306-308). Jake and Josh ran around breaking windows and calling out Victim's name, while Jackie used a neighbor's phone to have her store call the fire department (Tr. 368-370). The call log indicated that Jackie Risner's home fire was first reported to law enforcement at 11:45 a.m. (Tr. 480).

Because Jake had mentioned that he'd seen Defendant's truck there on his way to town, Jackie was hopeful that Victim might be with Defendant, but no one answered when she called Defendant's house and, when she went some places looking for them, she never found Defendant or Victim (Tr. 370-372). Jackie drove to Defendant and his wife, Sara's house to see if Victim was there and maybe they weren't answering the phone (Tr. 377).

The State Fire Marshal investigated but the investigation was hampered by the fact that all the appliances were so heavily damaged (Tr.

409-410). More than 95% of the house was burned down completely to floor level or below (Tr. 410). Heavy wind that day pushed the fire through the house very quickly (Tr. 411). An adjacent camper where Victim was to live was also burned and all that was left were the springs, the metal wheels, and some of the metal siding (Tr. 413). The Fire Marshal was not able to tell where or how the fire started because of the extensive nature of the fire (Tr. 415-416). The Fire Marshal was able to rule out a fireplace as a cause of the fire (Tr. 416).

As an investigator, the Fire Marshal testified that if he factors in that someone was shot in the head inside there, that would lead him to believe that there was a criminal act which occurred and "it's quite a coincidence that the fire would occur at the same time." (Tr. 416).

Ellen Nelson went to the scene of the fire to see what was going on (Tr. 444). After she left at about 1:10 p.m., she was talking to a friend in the road for a few minutes when she saw Defendant's truck approaching (Tr. 444-447). As Ms. Nelson started to pull away, Defendant stuck his hand out the window and waved (Tr. 447). Defendant asked Ms. Nelson what was going on as if he didn't know what was going on (Tr. 448). Ms. Nelson told him that Jackie's house had burned to the ground and that her mother was in it (Tr. 448). She also told Defendant that she heard his truck had been seen down there (Tr. 448, 449). Defendant responded he was "nowhere near the fucking

place." (Tr. 449). As she glanced in her mirror, it looked like Defendant was turning around in the middle of the road so that he was now headed back away from the burned house (Tr. 450). This took place at about 1:15 p.m. (Tr. 450).

On December 4, Sheriff Tim Ward went by Defendant's house when he failed to appear at the scheduled time for an interview to see if he was coming; the Sheriff knocked on his carport door but no one answered (Tr. 596, 597, 609). Sheriff Ward noticed the pickup truck licensed to Defendant was sitting in the garage with an orange chainsaw, a cutting torch partially covered up in the bed of the truck but sticking out of the truck, a green oxygen tank, and a red acetylene tank (Tr. 597, 598, 610-612).

On the following day, December 5, Sheriff Ward returned with a search warrant to search the field behind Defendant's house (Tr. 598). At the edge of a pond a quarter to a half-mile southwest or west of Defendant's house, the Sheriff found a spot that looked like somebody had used a cutting torch to cut metal up and saw what he thought was the spur of a pistol hammer (Tr. 598-599). The Sheriff suspected that the gun would be cut up and probably thrown in the pond (Tr. 599).

Using a boat, magnet, and rope, the Sheriff's party found three pieces of a revolver in the pond (Tr. 599, 600). Grass nearby had been pushed down from a vehicle in a manner discernible to the naked eye (Tr. 602). The spot

where the metal had been cut was burned, although the ground was frozen and hard (Tr. 618). The burned spot was approximately ten feet from the pond (Tr. 620).

An expert from the Missouri Highway Patrol Crime Lab Firearm and Tool Mark section testified that all six bullets recovered from the body were consistent with .22 caliber bullets (Tr. 632). The intact cylinder appeared to be in good shape and was compatible with .22 caliber rim-fired cartridges (Tr. 635-636). The portion of a hammer spur was consistent with a revolver (Tr. 634). The barrel damage was pretty consistent with being cut with a torch (Tr. 637). A portion had been cut off on each side and the barrel was split open like a hot dog (Tr. 638). The barrel was indicative of what one would expect to find on a .22 caliber firearm (Tr. 638). The expert could not rule out that they were once part of the same gun, although because of the damage he could not tell whether the cylinder fit into that gun (Tr. 639). Nothing told the expert that the barrel was from another gun (Tr. 639-640).

The bullets from the autopsy were .22 caliber, the cylinder was .22 caliber, and the barrel appeared to be .22 caliber (Tr. 640). Assuming the three parts came from the same gun, the back portion of the trigger guard on the frame, part of the front portion of the knuckle of the frame, and the back strap or final part of the handle of the frame survived for limited identification purposes (Tr. 641). The type of revolver consistent with those

parts is a .22 H&R Revolver (Tr. 641). The bullets from the autopsy could be consistent with a .22 H&R Revolver although the gun was not capable of firing because of the damage (Tr. 643, 645).

A cellmate of Defendant's who shared a room with him during the first week of December 2008 at the county jail testified that when he first came into the jail, Defendant said, "They're accusing me of killing that crazy bitch. And fuck her, she owes me anyway. She owed me for it anyway." (Tr. 683). Defendant said the Victim owed him money for a camper or motor home and that he brought her down there from out of town and she should have taken care of him a long time ago (Tr. 685). Defendant said the bitch had it coming a long time ago (Tr. 685). Defendant said she "[s]hould've got it a long ago." (Tr. 685). Defendant made such statements a few times while pacing back and forth and continued to make the same or similar type of statements for a while (Tr. 686).

Defendant said, "That bitch should've been dealt with long ago." (Tr. 708). Defendant referred to Victim as "[o]ld bitch" (Tr. 707). Defendant denied committing the crime to the cellmate, but said if he did, it wasn't his fault (Tr. 705-707).

Defendant also said he threw a gun in a pond (Tr. 704).[2]

Chief Deputy Eric King, who headed up the homicide investigation, testified that the department had made attempts to try to find the truck from the Amick family since the crime had occurred, and that they had not been forthcoming with where it was (Tr. 452, 459). On rebuttal, the State played a tape for the jury in which Defendant's sister tells Defendant, "I'm glad we made that truck disappear" or words to that effect (State's Exhibit 43, Tr. 928-929). Defendant's brother testified that the truck had been moved to the house of a friend of his in Pocahontas, Arkansas approximately a year before the trial (Tr. 924, 927), but Deputy King testified it had not been seen since the day the search warrant was served and the gun found (December 5) (Tr. 554-556).

Deputy King testified that multiple rounds of .22 caliber ammunition were found at the Amick residence (Tr. 465-467). Items found in a field by a

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[2] The cellmate acknowledged that if defense counsel said he had said this in a previous statement, he had (Tr. 704). By the time of trial, the cellmate thought Defendant had said "we" threw the gun in a pond (Tr. 704). Once told that the gun had been found in the pond, Defendant claimed that they had put the gun there for a different reason (Tr. 687, 688).

pond behind the house on Defendant's outlying property, in a burned spot approximately one to two feet in diameter, included metal drippings or slag and a hammer spur from a revolver found on the bank of the pond (Tr. 469-470, 477). The burn marks appeared to be from somebody cutting something up with a cutting torch (Tr. 470). Three metal pieces found with a magnet in the pond appeared to be the grip and frame of a revolver, the cylinder where the bullets go in a revolver, and a portion of the barrel which had been cut and then sliced lengthwise (Tr. 470). The cylinder did not appear to have been cut, but the handle and barrel appeared to have been cut with a cutting torch (Tr. 471).

On December 4, Defendant made a voluntary statement after waiving his *Miranda* rights (Tr. 485-486). Defendant said he had dropped his son off at his mother's house in the morning, and returned to pick him up after lunch (Tr. 490-492). His brother and Nathan Roberts had arrived a few minutes after his arrival at 12:20 or 12:25 p.m. and told him that Jackie's house had burned down (Tr. 490-492). They went to see, but turned around in the dirt road before Jackie's house and went back to his mom's house, where they stayed and talked to his mom for a few minutes, following which he took his son to the Flash Market to get something to eat or drink (Tr. 490-492). Defendant then went to see if anyone was hurt in Jackie's house but met the owner of the bar in the middle of a dirt road who told him that Victim had

died in the fire (Tr. 490-492). Defendant then turned around in the dirt road and went to the school to pick up his daughter (Tr. 490-492).

After Defendant was served with a search warrant and told that law enforcement had found a gun they believed implicated him in the crime, Deputy King asked Defendant if he would need to talk to them and change his story; Defendant said, "I told you my fucking story." (Tr. 551). Deputy King did not believe Defendant had cooperated after he told him about the .22-caliber revolver (Tr. 557).

Defendant declined to testify at trial but called his mother, his brother, the town postmaster, a transportation worker, a worker on a job at his sister's house, and two café guests and a waitress in an attempt to establish an alibi.

The jury found Defendant guilty of arson in the second degree and of the lesser included offense of murder in the second degree (Tr. 1063-1064). Pursuant to an agreement between the parties, the Court sentenced Defendant to concurrent terms resulting in a total of life imprisonment (Tr. 1092).

ARGUMENT

I.

Defendant failed to preserve his claim that the substitution of an alternate juror for an ill juror who was unable to continue deliberations violated a state statute. Defendant affirmatively waived any constitutional objection to the replacement by objecting to the State's proposal to instruct the jury to begin deliberations anew. In any event, the statute is merely directory and Defendant failed to meet his burden to show prejudice where 12 fully qualified jurors who sat through the entire trial were instructed by the court, deliberated together, and unanimously rendered verdicts of guilty, and where the Court took proper procedural measures to ensure the alternate had not discussed the facts of the case prior to being recalled.

Defendant's first point contends that the trial court violated a state statute, and that his federal and state constitutional rights were violated, when the court replaced a juror, who was too ill to continue deliberations, with an alternate juror. Defendant expressed concern about the ill juror at the time and insisted the court not instruct the jury to begin deliberations anew once the alternate replaced him. Moreover, in contrast to the out-of-state law cited by Defendant, Missouri places the burden of establishing

prejudice for violation of the merely directory statute on Defendant, and he has failed to meet that burden.

A. Diabetic juror becomes ill, court inquires and instructs jury to continue deliberations.

After the jury had been deliberating for between four and five hours, the bailiff reported to the Court in the presence of counsel that:

> Juror No. 12 came out to use the restroom. On his way back in, he stopped and said he was feeling kind of weak, kind of dizzy, stated that he was a diabetic and said that he had pills that he took for it, but he didn't know if they would help at this time. And he said that he didn't know, in the condition that he's in, if he would be able to make a decision or not, with the arguing going back and forth.

(Tr. 1032).

The Court asked for suggestions from counsel and the State suggested that they inquire of the juror in the presence of the entire jury and, if necessary, get him medicine (Tr. 1033-1034). The Court also observed that if he needed something to eat or drink, the bailiff could take care of that (Tr. 1033). Defense counsel agreed and said they needed to figure out whether the juror could continue (Tr. 1035). Defense counsel suggested that they inquire of the jury as a whole to see if they felt like they will reach a verdict if they continued deliberating, "or to find out from that particular juror whether

he can continue deliberating. Because he may be just sitting in there not participating at all right now because he's feeling weak and tired, **and we don't want that**." (Tr. 1035) (emphasis added).

The Court then brought the jury in and inquired of Juror No. 12 as follows:

> . . . Ladies and gentlemen of the jury, the bailiff told me that, I believe it was Juror No. 12 --
>
> JUROR NO. 12: Yes.
>
> THE COURT: -- you're a diabetic, sir?
>
> JUROR NO. 12: Yes.
>
> THE COURT: And you're having some problems?
>
> JUROR NO. 12: Well, I just feel like I'm going to pass out. I'm dizzy. You know, it's – I usually eat around 5:00 or so, and I take pills, and it's just, I don't know, my nerves, I guess, arguing, and I'm just – I just feel like I'm going to pass out, you know.
>
> THE COURT: Do –
>
> JUROR NO. 12: I don't feel like I can make a decision either way, really.
>
> THE COURT: Do you have medication with you?
>
> JUROR NO. 12: Yes.

THE COURT: If you had a particular type of food or liquid, would that help you, sir?

JUROR NO. 12: Well, the pills are slow-acting. I take them three times a day, and they don't – they're not anything that reacts right away, you know.

THE COURT: Do you think if – That's the reason I want to talk to all of you. Do you think if you went back in the jury room and if you want some type of liquid or a sandwich, if that would help you, we'll arrange for that, if –

JUROR NO. 12: I really don't think it would.

THE COURT: Can you participate with the other jurors in there? Have you been able to participate with their deliberation?

JUROR NO. 12: Well, yeah, but I'm just awful nervous. I feel like I'm going to pass out, you know. Just I'm not used to all the arguing and everything.

THE COURT: Well, this Court isn't either. I'm not used to that.

JUROR NO. 12: Yeah, I understand that.

THE COURT: We don't want to put you in any—any jeopardy with your health, sir. That's not our concern at all. But as you know, there's been a lot of expense involved. We've been here five days. And – But first of all, the Court is concerned about your health and welfare. Do

you feel you could go back and sit there for a little – Are you making progress?

UNIDENTIFIED JUROR: You, are you making any progress?

JUROR NO. 12: Well, I haven't changed my mind any, to start off with –

THE COURT: Wait. Wait. Well, wait, wait. I don't want you all to start deliberating out here. I don't want that.

JUROR NO. 12: I'm sorry.

THE COURT: I don't want that, sir. You recall the instruction. That's up to you 12 people to do that back there. It's twenty minutes till 5:00. If – Would it help if you – water or a soda, a sandwich, would that help you, a few more minutes back there and give it a little try?

JUROR NO. 12: Well, I can probably stand it a little longer without passing out.

THE COURT: Well, we don't want you to pass out.

JUROR NO. 12: But I just – I just don't feel good, that's all. That's what I was trying to say.

THE COURT: Okay. Do you feel like you could go back and work a little longer, without putting yourself in any jeopardy?

JUROR NO. 12: I suppose.

THE COURT: All right. Now, would you like for the bailiff to bring you something, water, soda?

JUROR NO. 12: No, there's water back there.

THE COURT: Sandwich?

JUROR NO. 12: No, not – not unless we're going to be way later or something, then I'd probably want to eat, and probably everyone else would, too, you know.

THE COURT: Okay. So you feel you can go back safely for a little while longer?

JUROR NO. 12: I suppose, yeah.

THE COURT: All right, sir.

JUROR NO. 12: But I'm still going to feel –

THE COURT: I understand that.

JUROR NO. 12: -- the way I feel, yeah.

THE COURT: Yes. Well, if you feel you can for a little while, I'm going to send you all back to deliberate for a while. Now, if you get to feeling like you're going to faint or something, let the bailiff know. We don't want your health to be put in jeopardy. All right, sir?

JUROR NO. 12: Well, I feel that way right now. But I can probably put up with it for a while, yeah, but I – I do feel bad. Whether it's in here or in the other room, either one, you know, I – my nerves is just – I just

– yeah, I don't know. But if you want me to go back, I'll go back, whatever.

THE COURT: Sir, I'm trying to leave the decision up to you. But if you would be kind enough to do that. And if you have a problem, let the bailiff know, then we'll take immediate action. All right, sir?

JUROR NO. 12: Thank you.

THE COURT: Thank you, sir.

(Tr. 1037-1040).

B. Defendant argues Juror No. 12 unable to deliberate

Once the jury was out of the courtroom, the Court asked for comments from counsel. The prosecutor suggested that the jury be provided with a smoke break within the next hour so they could get a break from arguing, and that the Court consider ordering pizzas so the jury could eat (Tr. 1040-1041).

However, **defense counsel** expressed concern about the juror as follows:

MR. WOODY: Well, Judge, I'm concerned in the fact that I'm not sure that [Juror No. 12] is going to be a meaningful – is going to be able to meaningfully participate in deliberations at this time. I mean, he said that's he's ill. He said he hasn't changed his mind one way or the other before going in. He said he could pass out any minute. He already –

> You said, "We don't want to put your health in jeopardy." And he said, "I think I'm already there," and explains that. I'm concerned about – about Mr. Switzer. I'm concerned about Juror No. 12.

(Tr. 1041).

Defendant was the party which most vocally opined that Juror No. 12 was unable to continue deliberations, thus setting in motion the process which he now claims was error.

C. Court also concerned Juror should not make decision based on his health.

The Court responded, "The Court is also concerned about it, and I'm thinking about it for more reasons than has come out here. I don't want any juror to make a decision because of their health reasons. That is concerning me." (Tr. 1041). The Court then said it was considering calling the juror it excused and substituting her, but hadn't made that decision yet.[3]

[3] The prosecutor suggested that perhaps food or snacks could be provided, but the Court observed that it had asked the question multiple ways about whether the juror would like liquid, water, or a sandwich, but didn't make much progress (Tr. 1042).

D. Court inquires twice of alternate juror in presence of counsel and ensures she was not contaminated by outside influences.

Defense counsel stated that calling back Juror No. 14 would create error because she had been gone for 4-4½ hours and hadn't participated in deliberations, and preferred another alternative (Tr. 1042).

The Court stated it wanted a fair and impartial trial as Defendant was entitled to under the U.S. and Missouri Constitutions (Tr. 1042). The Court also said, "But I don't want a juror put in a lot of jeopardy." (Tr. 1042-1043). The Court further expressed concern about the amount of time and resources the Court and counsel had invested in trial (Tr. 1043).

The Court observed that it was 4:45 p.m. and that it was going to give it a few minutes and do some thinking (Tr. 1043).

Five minutes later, the Court contacted Juror No. 14 by telephone in the presence of the court reporter and counsel (Tr. 1043). The Court stated in relevant part as follows:

THE COURT: And we have information from one of the jurors that's a diabetic not feeling too well.

JUROR NO. 14: Oh, my.

THE COURT: And you know I excused you.

JUROR NO. 14: Yes.

THE COURT: Because I can only send 12 back to the jury room. I need to ask you some questions. Have you discussed this case, since you left, with anyone?

JUROR NO. 14: Somewhat, but not anything pertinent. My son called me to ask me if I was still in, and I told him I was an alternate and had been released.

THE COURT: Is that it?

JUROR NO. 14: And the girl I work for, I let her know –

THE COURT: That you'd been –

JUROR NO. 14: -- that I was released.

THE COURT: And that's all?

JUROR NO. 14: That's correct. And I did call a friend and asked them to let me know when they heard the results.

THE COURT: Okay. Anything else?

JUROR NO. 14: I don't know of anything else that I've said that would hurt the case.

(Tr. 1044).

The Court then instructed the juror to return to the courthouse and instructed the juror not to discuss the case with anyone and she assured the Court she wouldn't (Tr. 1044-1045).[4]

Once the juror returned, the Court again inquired of the juror in the presence of counsel and the court reporter as follows:

THE COURT: You're Ms. Alice Rolen?

JUROR NO. 14: That's correct.

THE COURT: Ma'am, do you remember earlier today when we had selected a jury you were an alternate and this Court released you?

JUROR NO. 14: Right.

THE COURT: And we've had some problems since then. I won't go into details other than tell you we have a juror that's not feeling well. And do you recall – it is twenty-five till 6:00 now – about, give or take a little, 35 minutes ago I had the clerk to call you?

JUROR NO. 14: Correct.

* * *

THE COURT: And I asked you if you had talked to anyone about the case since you had been excused. And would you go ahead and repeat

[4] The juror did observe in passing, "This is my worst nightmare." (Tr. 1045).

that again? Someone—I believe you said that someone was asking you and you said you had been excused?

JUROR NO. 14: I told my boss I'd been excused, what a relief.

* * *

JUROR NO. 14: And my son called to see if I – because he saw my car at home.

THE COURT: Yes, ma'am. **Now, have you discussed with anyone about any of the facts in this case?**

JUROR NO. 14: No.

THE COURT: You have not?

JUROR NO. 14: No, I have not, because the jurors were still deliberating.

(Tr. 1047-1048) (emphasis added).

E. Defendant did not object to use of the alternate based on § 494.485.

After the juror left the courtroom, but prior to swearing her and the rest of the jury in again together so they would feel like a new unit, the Court permitted defense counsel to make a record in the presence of Defendant (Tr. 1048-1057). Defense counsel indicated that Defendant had been told that they had asked for the alternate to come back and had been briefed on the questions that the Court had asked her (Tr. 1049-1050). Defense counsel also

explained to Defendant that they had a juror that was a diabetic and talked to him about his situation (Tr. 1050).

Defense counsel argued that Juror Switzer had failed to disclose his serious health issue during jury selection; the prosecutor responded that he had disclosed that he was a diabetic during voir dire (Tr. 1050, 1053). The Court did not recall independently what he had said, but did recall that a lot of questions were asked about his health and thinks that the Court also inquired about it (Tr. 1055).

Defense counsel's second comment had to do with his trial strategy during jury selection (Tr. 1050-1051). Defense counsel said:

> When we went through the jury selection process—The term, "jury selection," obviously, is not really selecting a jury, it's selecting who you don't want on there. But we carefully went through each and every prospective juror. We did it with Mr. Amick present, with his family present. Mr. Wampler and I both participated. There were, I think, five members of Mr. Amick's family that were present during that jury selection process. We went through and carefully selected the jury that we wanted.
>
> When we went through that process, we wanted older men that had experience, who were intelligent men, who had been around. That is the type of juror that we wanted for this particular case. In fact, we

wanted to steer away from older women, quite frankly, who would . . . potentially sympathize or empathize with Maxine Vaughan. That was our entire theory surrounding our voir dire and jury selection process.

Had Mr. Switzer made this known at that time, we would have most certainly taken that into consideration during your jury selection process. Had he made it known at the time that he was a diabetic and at times he gets lightheaded or dizzy, we obviously would have taken that into consideration, and this Court may have even struck him for cause. Then we would have been able to take those numbers afterwards into account when we were still selecting our jury.

(Tr. 1050-1051).

Defense counsel continued:

As this Court is well aware, the jury selection process is one of the most critical aspects of the trial process. And at this juncture, the last day of trial, after the jury has been deliberating for five and a half hours, for a juror to come to us with a health issue, that was obviously a preexisting health issue . . . as much as it pains me to say, that's not something that we can just substitute in somebody else. It pains me to say that's a mistrial.

(Tr. 1051).[5]

Defense counsel then said, "I understand that she said she hasn't spoken with anyone about the facts of the case. She called a few people to say that she was released." (Tr. 1051). However, counsel argued that Juror No. 14 had not been privy to the deliberations that had taken place to that point (Tr. 1051-1052).

Defense counsel requested either a mistrial or that jurors be sent home and reconvene after the Fourth of July holiday weekend, with the hope that Juror Switzer would have his health back (Tr. 1051-1052). Counsel stated:

> But that or a mistrial . . . are the only two options that would give my client a right to a fair trial and a trial before 12 fair and impartial jurors who have listened to the evidence and who have deliberated on that evidence.

(Tr. 1052).

Counsel further argued that Juror No. 14 had not been given the instruction not to discuss the case after she was released (Tr. 1052-1053).

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[5] Defendant makes no argument based on any defect in the jury selection process or based on prejudice to his trial strategy on appeal. Had Defendant not permitted Juror Switzer to serve, the same alternate juror would have been on the jury the entire time, so there is no prejudice.

The prosecutor responded that the scenario was the entire reason for picking an alternate juror, that substitution was appropriate when a juror got sick or refused to deliberate, and that the Court should replace the juror with the alternate and simply instruct the jury to then start anew (Tr. 1053, 1054). The prosecutor further observed that the juror candidly said she had spoken to three people about being released and that the most telling thing about her ability not to have been compromised was her response that she didn't think she was supposed to talk to anyone about the facts of the case until the jury was done deliberating (Tr. 1054).

Defense counsel stated that alternates that might be used during deliberations are usually kept in the building and put in a separate room (Tr. 1054). Defense counsel also stated that the alternate's son had been on the original panel for voir dire and said he was lifelong friends with Defendant (Tr. 1055). The son had been struck by the State and the alternate had mentioned speaking with her son, although not about the facts of this case; defense counsel did not know which way this would cut, but thought, "it's just too dangerous" and Defendant wouldn't be ensured of a fair and impartial jury (Tr. 1054-1055).[6]

[6] The Court refused the prosecutor's motion to strike the son for cause; the State struck him peremptorily (Tr. 135, 205, 225).

Defense counsel made no mention, then or ever during trial, of Section 494.485, RSMo. Defendant acknowledges in his brief that, "It is true that defense counsel did not specifically mention these provisions below." Appellant's Substitute Brief at 39. Such a claim is therefore unpreserved.[7]

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[7] Defendant cites four statements made by defense counsel that he says apprised the court with sufficient specificity of the grounds for the objection. None of them was specific or stated any grounds whatsoever. Defendant contended that "to call back Juror No. 14 would create an enormous amount of error at this point" without citing why it would be error; the second, "that's not something that we can just substitute in somebody else. It pains me to say that's a mistrial" similarly cites no grounds. (Tr. 1051). The third cited other remedy options (mistrial or reconvening after the holiday weekend) but no grounds for objection. (Tr. 1052). The fourth claimed that "after five and a half or six hours of deliberation, we can't just throw somebody else into the ring. That's not the way it's done, and I think it's either a mistrial or we can break and reconvene on Tuesday morning." (Tr. 1052). Defendant cites no case for the proposition that "[t]hat's not the way it's done" is a legally sufficient ground for objection. The remainder of the statement is just a remedy suggestion. None of these objections invoke the grounds cited on appeal.

F. Defendant affirmatively waived his constitutional claim by objecting to an instruction to the jury proposed by the State to begin deliberations anew once the jury was resworn with the alternate included.

The Court responded that the Court was trying to ensure that Defendant got a fair and impartial jury, and stated as follows:

> This lady is not a substitute. She sat through all of the evidence. She heard all the evidence. She heard the jury instructions read to all the panel. She heard all the closing arguments. At the finish of the closing arguments, that's when this Court released her. But she sat through all the evidence, all the instructions of the Court. And this is unusual . . . But we're not "substituting," to use that word. This lady was one of the members of the panel that was selected. But it turned out she was an alternate, and I can only send 12 back to the jury room.
>
> . . . But this lady appears to be a good citizen. Both sides agreed that she could sit on the jury. Both of you agreed she could sit on the jury, all the way up to when we went to the jury room.

(Tr. 1055-1056).[8]

The Court announced that it intended to replace Mr. Switzer with Ms. Rolen (Tr. 1056). The Court then discussed whether the jury should be given any additional instructions and opined that it should not, because the jury had written instructions "and I think the Court would be getting way out giving oral instructions." (Tr. 1056). **The Court asked defense counsel's position and defense counsel twice said he agreed with that** (Tr. 1056). The prosecutor had urged that the jury be instructed to begin anew, as the Court acknowledged, but defense counsel **expressly told the Court that it did not want the Court to so instruct the jury twice.** (Tr. 1056).

G. New jury with alternate resworn after Juror No. 12 confirms inability to focus or deliberate.

Everyone agreed that the jury should be brought in and resworn with Ms. Rolen on it so that, in the prosecutor's words, "they feel like they're a new group…." (Tr. 1056-1057).

The following colloquy then took place in the presence of the jury at 5:55 p.m.:

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[8] The Court said that if a mistake had been made it was in failing to keep the alternate isolated until it found out whether any of the jurors were sick (Tr. 1056).

> Let the record reflect now we have all 12 jurors back in the jury box. . . . And we also have called Ms. Rolen, who was excused by this Court after the Court had read the instructions to the jury and the closing arguments were concluded.
>
> The Court learned some time ago, and we've all got times down on it, that Mr. Switzer . . . told the bailiff that he wasn't feeling well and we brought the whole panel in and talked to Mr. Switzer. How are you feeling now, sir?
>
> JUROR NO. 12: No better. . . . Everything is just blurred that you're talking about. You know, I can't focus on any of it, really.

(Tr. 1057-1058).

The Court then excused the juror based on his medical condition and announced that Juror No. 14 would join the jury, asked the clerk to swear all 12 of the reconstituted jury, and sent them "back to continue your deliberation." (Tr. 1058-1059).

After the jury had left, the Court observed that it did not think it could give oral instructions and that was why it did not give oral instructions (Tr. 1059). The jury had written instructions (Tr. 1059). The Court also observed that both sides had spent a lot of time over five days and in fairness to both sides, it would like to finish the case if it could (Tr. 1059-1060). There was no instruction available for this situation (Tr. 1060). The Court concluded:

> So all I can do is do what I feel as a judge, with a lot of years' experience, would be fair and impartial to both sides that's trying to get this matter before a jury to consider the evidence. And in fairness to the Defendant, this lady did hear all the evidence. She did sit through the entire trial. She did hear all the Court's instructions. She did hear closing arguments. So she's not a total substitute.

(Tr. 1060). Defense counsel was offered another opportunity to comment but said nothing (Tr. 1060).

Defense counsel expressly stated (twice) that the Court should not instruct the jury, as suggested by the State, to begin deliberations anew, so any constitutional claim that rests on that premise (as discussed further *infra*) has been affirmatively waived. *See*, *United States v. Olano*, 507 U.S. 725, 732-733 (1993) (both deviations from legal rules and constitutional rights are waivable—for example, conviction without trial is not "error" if guilty plea).

H. Defendant failed to preserve both the statutory claim and any claim pertaining to the failure to instruct the jury to begin deliberations anew by not including them in his Motion for New Trial.

Defendant not only failed to object based on the statute or failure to instruct the jury to begin deliberations anew at trial; his motion for new trial

failed to preserve these issues, as well. Defendant's motion for new trial did not cite § 494.485 at all (L.F. 243-244). Defendant argued only that the length of deliberation after the replacement of the ill juror by the alternate indicated that the deliberations were a sham (L.F. 243-244). Defendant did not fault the failure to instruct the jury to begin deliberations anew in the Motion for New Trial, perhaps because he affirmatively consented to it (L.F. 243-244).

I. Defendant did not seek plain error review of his claim in the Court of Appeals and did not allege manifest injustice or miscarriage of justice, thereby failing to meet his burden even under plain error review, and may not raise a new basis for his claim in this Court under Rule 83.08(b).

An appellant is bound by the issues raised and the arguments made in the lower court and may not raise new and totally different arguments on appeal. *State v. Winfield*, 5 S.W.3d 505, 515 (Mo. banc 1999); *State v. Davis*, 482 S.W.2d 486, 489 (Mo. 1972). A new ground for error may not be asserted for the first time in the appellate court. *State v. Jones*, 515 S.W.2d 504, 506 (Mo. 1974). "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States v.*

Olano, 507 U.S. 725, 731 (1993) (quoting *Yakus v. United State*s, 321 U.S. 414, 444 (1944)).[9]

The underlying policies requiring contemporaneous objection run contrary to appellant's present claim of error. *See*, *State v. Borden*, 605 S.W.2d 88, 90 (Mo. banc 1980). Timely objection to putative error affords the trial court an opportunity to invoke remedial measures rather than relegating appellate courts to the imprecise calculus of determining whether prejudice resulted. *Id.* Moreover, requiring timely objection minimizes the incentive for "sandbagging," an improper tactic sometimes employed to build an error for exploitation on appeal should an unfavorable verdict be obtained. *Id.* Under these circumstances, it is settled that an appellant will not be

[9] Under the lexicon of *Olano*, Defendant has done more than forfeit his constitutional claim by failing to raise it—he has affirmatively waived it by affirmatively opposing the proposed trial court instruction that would have prevented such error. Affirmative waivers do not preserve the right to plain error review, as *Olano* held to be the rule in federal court and as decisions of this Court hold is also true in Missouri courts. *See, e.g., State v. Johnson*, 284 S.W.3d 561, 582 (Mo. banc 2009) (plain error review is waived when counsel has affirmatively acted in a manner precluding a finding that the failure to object was a product of inadvertence or negligence).

heard complaining such error. *Id.* Defendant should not be granted plain error review where he waived his claim of error because he "should not be allowed to 'sandbag' the finality of the trial by first voicing an objection after a verdict of guilty." *Ogle v. State*, 807 S.W.2d 538, 545 (Mo. App. S.D. 1991).

Defendant does not acknowledge the error is unpreserved, did not request plain error review under Rule 30.20 in the Court of Appeals, and did not allege a "miscarriage of justice" or "manifest injustice." *State v. Goudeau*, 85 S.W.2d 126, 130 (Mo. App. S.D. 2002). While Defendant contends for the first time in the Supreme Court[10] that he is entitled, in the alternative, to plain error review, where there is not even a conclusory allegation that a manifest injustice of miscarriage of justice has resulted, but merely a claim that admission of evidence was "prejudicial," a defendant fails to meet his burden on appeal of showing plain error. *Id.* Plain error and prejudicial error are not synonymous terms and mere allegations of error and prejudice will not suffice for reversal under plain error review. *Id.*

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[10] The new, plain-error basis for relief claimed for the first time in the Missouri Supreme Court violates Rule 83.08(b), which provides that a substitute brief in this Court "shall not alter the basis of any claim that was raised in the court of appeals brief . . . ." Supreme Court Rule 83.08(b) (2014).

"The plain error rule should be used sparingly and does not justify a review of every alleged trial error that has not been properly reserved for appellate review." *State v. Collins*, 290 S.W.3d 736, 743-744 (Mo. App. E.D. 2009). "In determining whether to exercise our discretion under the plain error rule, we look to determine whether on the face of the defendant's claim substantial grounds exist for believing the trial court committed a 'plain error' which resulted in manifest injustice or miscarriage of justice." *Id.* at 744. The defendant bears the burden of showing that an alleged error has produced such a manifest injustice. *State v. Isa*, 850 S.W.2d 876, 884 (Mo. banc 1993). Mere allegations of error and prejudice will not suffice. *Id. See also, State v. Garth*, 352 S.W.3d 644, 652 (Mo. App. E.D. 2011).

In the case at bar, Defendant did not cite the statute he now claims was violated before the trial court, when the alleged error might have been prevented. Moreover, he expressly agreed with the trial court that the jury should not be instructed to begin deliberations anew. Only after receiving a guilty verdict did he assert on appeal that this was error. This is a quintessential case of sandbagging and this Court should decline to address both of those claims. *See, Ogle*, 807 S.W.2d at 545.

J. The Missouri statute on alternate jurors.

Section 494.485 states as follows:

> If in any case to be tried before a jury it appears to the court to be appropriate, the court may direct that a number of jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors, in the order in which they are called, shall replace jurors, who, prior to the time the jury retires to consider its verdict, become or have found to be unable or disqualified to perform their duties. Alternate jurors shall be selected in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the principal jurors. Alternate jurors who do not replace principal jurors shall be discharged after the jury retires to consider its verdict. Each side is entitled to one preemptory challenge in addition to those otherwise allowed by law for each two alternate jurors to be impaneled. The additional preemptory challenge may be used against an alternate juror only, and the other preemptory challenges allowed by law shall not be used against the alternates.

Id.

K. The statute is merely directory and, had the error been preserved, the burden was on Defendant to demonstrate prejudice.

In *State v. Friend*, 607 S.W.2d 902 (Mo. App. S.D. 1980), this Court held, "Statutory provisions detailing the methods by which services of additional or substitute jurors are obtained are directory. Unless defendant demonstrates he has been prejudiced or that his interests have been adversely affected by the court's failure to follow the statutory provisions, he is entitled to no relief." *Id.* at 903.

In contrast to the foreign jurisdictions from which Defendant cites case law, in Missouri, "relief will not be granted for violation of the statue unless appellant can demonstrate prejudice." *State v. Williams,* 659 S.W.2d 298, 300 (Mo. App. E.D. 1983) (reviewing predecessor statute to § 494.485 with identical language regarding replacing jurors with alternates). In *Williams*, the court held an alternate does not necessarily lose his or her status merely by being technically discharged before being recalled. *Id.* at 300.[11]

[11] In *Williams*, the alternate had been discharged but was still present in the courthouse when a regular juror became ill and the court replaced the ill juror with the alternate within minutes after the jury retired. *See*, *id.* at 299-300. The jury had gone to lunch before beginning deliberations. *Id.* at 300.

"The overriding intent of § 494.485 is to provide for the use of alternate jurors so as to prevent mistrials caused by the loss of a regular juror." *State v. Johnson*, 968 S.W.2d 123, 132 (Mo. banc 1998).[12] In *Johnson*, the Missouri Supreme Court held that the legislature intended to afford the same protection against mistrials in bifurcated cases that is afforded in non-bifurcated cases; therefore, alternate jurors could properly serve in penalty phase deliberations in cases involving the death penalty. *Id.*[13]

In *State v. Reynolds*, 422 S.W.2d 278 (Mo. 1967), the Missouri Supreme Court found no prejudicial error where, while the defendant argued that hypothetically an alternate juror who replaced a regular juror could have

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Nonetheless, as in the case at bar, the alternate was technically discharged before being recalled.

[12] At common law, the use of alternate jurors was not permitted and, in the event that a juror had to be replaced, the 11 remaining jurors were recalled and a twelfth juror selected, after which the entire trial was heard again.

[13] The *Johnson* court did state, "the only statutory exception to the use of alternate jurors applies when deliberations have already begun." *Id.* Admittedly, the Supreme Court relied, in *Johnson*, on the view that the penalty phase deliberations were separate deliberations from the guilt phase deliberations.

been influenced by discussions with others on the jury panel when returning to the jury room and carried such prejudice into the jury box, there was no contention any unauthorized discussion took place "and the record discloses no basis for finding or even assuming that the alternate juror was prejudiced against appellant." *Id.* at 284. The defendant thus failed to meet his burden to demonstrate prejudicial error. *Id.*

L. The trial court is in the best position to exercise discretion on a juror's fitness to continue deliberations and on whether to adopt the "drastic remedy" of a mistrial.

Because the trial court is in the best position to assess a juror's ability to effectively discharge his duties, "the substitution of an alternate juror for a regular juror during trial is a matter entrusted to the discretion of the trial court." *Yaeger v. Olympic Marine Co.*, 983 S.W.2d 173, 187 (Mo. App. E.D. 1998).

"Because the trial court observes firsthand what occurs in the courtroom, the trial court has considerable discretion in deciding whether to grant a mistrial." *State v. Brooks*, 960 S.W.2d 479, 491 (Mo. banc 1997). "Declaration of a mistrial… is a drastic remedy which should be granted only in extraordinary circumstances where the prejudice to the defendant cannot be removed by any other means." *State v. Berry*, 916 S.W.2d 389, 393 (Mo. App. S.D. 1996). "To constitute reversible error, there must be both an abuse

of discretion by the trial court and prejudice to the defendant as a result." *Id.* "Appellate courts are loath to reverse judgments for failure to declare a mistrial unless they are convinced the trial court abused its discretion as a matter of law in refusing to do so." *State v. Bringleson*, 905 S.W.2d 882, 888 (Mo. App. S.D. 1995).

M. Missouri's statute is modeled on former Federal Rule 24(c), a violation of which did not require reversal if no prejudice.

In the case at bar, the trial court was faced with balancing the policy against mistrials in a lengthy trial that had consumed a lot of resources against the absence of prejudice where an alternate juror who was uncontaminated was available and Defendant did not object based on the statute.

The court's decision is consistent with the evolution of the law under a similar Rule in the federal courts that formed the model for such state statutes. *See, Alcade v. State of Wyoming*, 74 P.3d 1253, 1258 (Wyo. 2003) (Wyoming statute substantially identical to Missouri's in the language pertinent here was identical to former Rule 24(c) through 1999; federal courts applied a harmless error standard and would reverse a conviction only if prejudice results from the substitution; and the majority of state courts to consider the issue have adopted the federal approach).

Former Federal Rule 24(c) stated that an "alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." *United States v. Evans*, 635 F.2d. 1124, 1127 (4th Cir. 1980), *cert. denied*, 452 U.S. 943 (1981).

In *Evans*, the Court held, "the rule does purport, however, to deny power to the trial court to reconstitute someone as a juror who has previously been discharged." *Id.* The Court further held that the discharge of the alternate was not actually mandated in the *Evans* case by the language of the rule "inasmuch as she did, in fact, replace a regular juror." *Id.* The Court held that it was satisfied "that the jury in the end was made up of twelve people who properly could dispose of the case. There would be no question had the first alternate juror been added to the jury before it retired. During the time she was discharged, no contamination of her state of mind took place." *Id.*[14]

The *Evans* court also rejected the defendant's claim "that the jury was only told to continue its deliberations, and not specifically to begin them entirely anew." *Id.* at 1128. No objection was raised to the point, just as in the case at bar. *Id.* Nothing precluded the jury from starting from the very

[14] Admittedly, in *Evans*, the defendant consented to the replacement of the juror with the alternate.

beginning and the "speculative assertion of prejudice from the unexceptional instruction, to which no objection was raised, was insufficient to justify reversal." *Id.*

The *Evans* case was one of several that the Federal Circuit Courts of Appeal addressed when the Federal Rule was similar to the Missouri Statute. In discussing the seminal case of *United States v. Phillips*, 664 F.2d 971 (5th Cir. Unit B 1981), the 11th Circuit observed in *United States v. Acevedo*, 141 F.3d 1421 (11th Cir. 1998) that:

> The District Court in *Phillips*, therefore, was faced with a Hobson's choice: risk warranting a mistrial by purposefully violating Rule 24(c) and keeping an alternate "in reserve" during deliberations, or risk being forced to grant a mistrial if a juror was excused before the jury returned its verdict. The *Phillips* court's holding on appeal – that a violation of a Rule 24(c) is curable – eliminated this dilemma by allowing a district court to hold an alternate in reserve without fear of automatic mistrial.

Id. at 1425 n.7.

The *Acevedo* court held that a mistrial was only warranted if there is a reasonable possibility that the district court's violation of Rule 24(c) actually prejudiced the defendant by affecting the jury's final verdict. *Id.* at 1424. *See also, United States v. Allison*, 487 F.2d 339 (5th Cir. 1973). In *Phillips*, before

adding the alternate to the jury, the court questioned the alternate concerning her exposure to outside influences after the case was submitted to the jury. *Acevedo*, 141 F.3d at 1425. The court then substituted the alternate for the excused juror and instructed the jury to begin deliberations again. *Id.* In the case at bar, the defense interfered with the prosecutor's attempt to have such an instruction given, explicitly consented twice to the judge's decision not to give such an oral instruction, and thereby affirmatively waived any claim of error resulting from the failure to give that instruction. *See Evans*, *supra.* However, the court did question the alternate juror and establish that she had not been subject to any outside influences. Therefore, as in *Phillips* and *Acevedo*, adequate curative measures were taken and Defendant fails to establish prejudice.

In *United States v. Olano*, 507 U.S. 725 (1993), the United States Supreme Court held that the presence in the jury room during deliberation of alternates who had been instructed they could sit in on the deliberations but were not to participate was a violation of Rule 24(c) but that is was not plain error because it did not affect the substantial rights of the defendant. *Id.* During trial, one of the alternates was dismissed, but the other remained in the jury room until the jury returned with its verdict. *Id.* at 729. The court held that due process required a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent

prejudicial occurrences and to determine the effect of such occurrences when they happen. *Id.* at 738 (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)). The court further held that the presence of alternate jurors during jury deliberations is not the kind of error that affects substantial rights independent of its prejudicial impact. *Id.* at 737. Nor had the defendant made a specific showing of prejudice. *Id.* The United States Supreme Court saw no reason to presume prejudice. *Id.* As stated by the United States Supreme Court, "Until the close of trial, the 2 alternate jurors were indistinguishable from the 12 regular jurors. Along with the regular jurors, they commenced their office with an oath, …received the normal initial admonishment, …heard the same evidence and arguments, and were not identified as alternates until after the district court gave a final set of instructions… ." *Id.* at 740. The Court further held that the almost invariable assumption of the law is that jurors follow the instructions. *Id.*

Because it was a plain error case, the burden was on the defendant to persuade the appellate court that the deviation from Rule 24(c) was prejudicial. *Id.* at 741. The conceded error in the case did not affect substantial rights and the Court of Appeals had no authority to correct it because the defendants had failed to demonstrate prejudice. *Id.* The defendants had made no specific showing that the alternate jurors participated in the jury's deliberations or had chilled deliberations by the

regular jurors. *Id.* at 739. Moreover, the defendants had never requested a hearing and thus the record before the court contained no direct evidence that the alternate jurors influenced the verdict. *Id.* at 740. On such a record, the court was not persuaded that the violation of Rule 24(c) was actually prejudicial. *Id.*

As in *Olano*, there is no plain error affecting substantial rights and the defendant has failed to meet his burden to establish prejudice, let alone manifest injustice or miscarriage of justice. The jury is presumed to have followed the court's instructions and to have reached its verdict based on the evidence which all 12 jurors heard and the court's instructions. Until the close of trial, the alternate juror was indistinguishable from the 12 regular jurors, commenced her office with an oath, received the normal initial admonishment, heard the same evidence and argument, and indicated that she felt bound by the court's instruction not to discuss the facts of the case until the jury reached its verdict.

N. Defendant relies on foreign cases which do not use the Missouri test.

While Defendant cites case law from other states holding, under their state constitutions, that juror substitution during deliberations is *per se*

prejudicial or subject to a presumption of prejudice,[15] that is not the rule in Missouri,[16] just as it was not the rule under the Federal Rule which formed the basis for Missouri statute.[17]

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[15] Defendant's Connecticut case has been superseded by statute. *See*, *State v. Cummings*, 789 A.2d 1063, 1066 n.5 (Conn. App. 2002). For examples of other state cases that support the State's position here, *see*, *Perry v. State*, 339 S.E. 2d 922, 925 (Ga. 1986); *Tanner v. State*, 249 S.E.2d 238, 240 (Ga. 1978); *Commonwealth v. Olavarria,* 885 N.E.2d 139, 145 (Mass. App. 2008); *Lloyd Noland Hospital v. Durham*, 906 So.2d 157, 167-168 (Ala. 2005) (noting state courts are increasingly willing to allow substitution during deliberation of an alternate kept separate from other jurors).

[16] Nor do Defendant's cases apply the Missouri plain-error standard, which places the burden on Defendant to show that the error was outcome-determinative, and that a manifest injustice or miscarriage of justice resulted. *State v. Baxter*, 204 S.W.3d 650, 652 (Mo. banc 2006).

[17] While Defendant argues that this Court should classify violation of this state statute as "structural error," that is a term of art that the United States Supreme Court reserves for a "very limited class of cases" involving fundamental **constitutional** violations such as complete denial of counsel, biased trial judge, racial discrimination in grand jury selection, denial of

In Missouri, the burden is on the defendant to establish prejudice. In *State v. Williams*, 659 S.W.2d 298 (Mo. App. E.D. 1983), the Court of Appeals explicitly held, "We disagree that such a deviation is *per se* prejudicial. Such an interpretation would frustrate the purpose of selecting an alternate juror, which is to avoid a mistrial and the result in a waste of resources and re-trying the case." *Id.* at 300. The court held, "Relief will not be granted for violation of the statute unless appellant can demonstrate prejudice." *Id.* The court further stated that an alternate juror is selected and qualified in the same manner as a regular juror. *Id.* There was no evidence in this case that the alternate's impartiality had been tainted by any out-of-court conversations between the time of her 'discharge' and her recall a few minutes later." *Id.* The alternate did not lose her status as an alternate

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public trial, and defective reasonable-doubt instructions. *See*, *Neder v. United States*, 527 U.S. 1, 8 (1999). "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." *Id.* (quoting *Rose v. Clark*, 478 U.S. 570, 579 (1986)). The absence of the qualifier "constitutional" in the original *Rose* opinion suggests that non-constitutional errors are subject to harmless-error analysis. *See*, *Rose* at 578-579.

merely because she was technically "discharged" prior to her recall. *Id.* Assuming without deciding that there was a need for questioning of the alternate's continued competence, this had adequately been done by the court. *Id.* The record revealed no indication of any improper communication with the juror. *Id.* The court held that the appellant had failed to demonstrate prejudice. *Id.*

Similarly, in the case at bar, the alternate was selected and qualified in the same manner as a regular juror. There was no evidence that the alternate's impartiality had been tainted by any out-of-court conversations and, indeed, two series of thorough questions from the court in the presence of counsel established that she had not been so tainted. While the alternate had been excused to leave the courthouse, she was not technically "discharged" and even if she was, under *Williams*, she arguably did not lose her status as an alternate. *See*, *id.* In any event, the Defendant has failed to demonstrate prejudice. *Id. See also, Williams v. State*, 558 S.W.2d 671, 675 (Mo. App. K.C.D. 1977) (replacement of underage juror prior to the end of the trial in violation of governing statute upheld on grounds that defendant had burden to demonstrate prejudicial error in the seating of an alternate juror and failed to show prejudice). *See also, State v. Reynolds,* 422 S.W.2d 278, 284 (Mo. 1967) (rejecting claim that return of excused alternate juror to the jury room provided opportunity to discuss case with other jurors where there was

no contention that any unauthorized discussion took place and the records disclosed no basis for finding or assuming that the alternate juror was prejudiced against the defendant on the grounds that defendant had failed to meet his burden to demonstrate prejudicial error).

Defendant has therefore failed to meet his burden under the even higher standard of plain-error review, which requires that he demonstrate that any error was outcome-determinative and created a manifest injustice or miscarriage of justice. *Deck v. State*, 68 S.W.3d at 427-428.[18]

O. Use of alternate juror during deliberations does not violate the U.S. Constitution.

Assuming, *arguendo*, that Defendant properly preserved a claim with respect to the United States Constitution despite the absence of citations to

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[18] This would remain the case even if the Court were to adopt a "presumption of prejudice" framework for analysis. "[A] determination of manifest injustice or miscarriage of justice is a 'benchmark higher than that required for a showing of mere prejudice.'" *State v. Galbreath*, 244 S.W.3d 239 (Mo. App. S.D. 2008) (quoting *State v. Tripp*, 168 S.W.3d 667, 671 (Mo. App. W.D. 2005)). Certainly "a finding of a lack of prejudice *ipso facto* is a finding of a lack of manifest injustice or miscarriage of justice." *Galbreath*, 244 S.W.3d at 254 n.13.

any such provision of the Constitution in the motion for new trial (L.F. 243-244), the Federal Courts have rejected the contention that the substitute of an alternate juror during deliberations rises to constitutional dimensions where good cause has been shown for the substitution and where adequate safeguards have been taken. *United States v. Guevara*, 823 F.2d. 446, 448 (11th Cir. 1987) ("the language of Rule 24(c) concerning the substitution of alternate jurors prior to the jury's retirement is not constitutionally mandated"); *United States v. Phillips*, 664 F.2d. at 992. *See also, United States v. Kopituk*, 690 F.2d 1289, 1309 (11th Cir. 1982).

In *United States v. Hillard*, 701 F.2d 1052, 1056 (2nd Cir. 1983), the Court held that the test of the constitutionality of the substitution procedure is whether it preserves the "essential feature" of the jury, as defined by the United States Supreme Court. *Id.* That "essential feature" is defined as:

> the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence.

Id. (quoting *Williams v. Florida*, 399 U.S. 78, 100 (1970)).

The court found the "essential feature" was preserved where the alternates were chosen along with the regular jurors by the same procedures, they heard all of the evidence and the law with the regular jurors, the

alternate reaffirmed his ability to consider the evidence and deliberate fairly and fully, and the alternate (who had discussed the case with the other alternate) indicated that his discussions with the other alternate did not change his view of the case. *Id*. at 1056-1057.[19]

Thus, the federal Constitution does not proscribe the substitution of an alternate juror after deliberations have begun. *Hillard* at 1056. *See also, Henderson v. Lane*, 613 F.2d 175, 177-179 (7th Cir. 1980), *cert. denied*, 446 U.S. 986 (1980).

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[19] The *Hillard* court also noted that the jury had been instructed to begin deliberations anew, but any constitutional issue that the absence of such an instruction raises has been affirmatively waived in this case; Defendant explicitly urged the Court not to give such an instruction twice. The Court of Appeals in the case at bar observed that Defendant conceded in that forum that "a trial court subjects itself to the possibility of reversible error by giving oral instructions to the jury. *See* ***State v. Cross*****,** 594 S.W.2d 609, 610 (Mo. banc 1980)." *Amick*, No. SD31570, slip op. at 26 n.13 (bold original). The *Hillard* court also noted the length of deliberations on the question of prejudice but did not state that observation as a constitutional requirement.

P. No violation of Missouri Constitution

While no claim under the Missouri Constitution is preserved, even if one had been, there is no violation of the Missouri Constitution.

In *State v. Hadley*, 815 S.W.2d 422 (Mo. banc 1991), this Court held that the state constitutional right to trial by jury in a criminal proceeding included (1) twelve impartial jurors, (2) a jury summoned from the venue in which the crime was allegedly committed, (3) the jury's unanimous concurrence in the verdict, and (4) the juror's freedom to act in accord with their own judgment. *Id.* at 425. The Defendant does not explain how any of these four requirements were absent in this case. *See also, State v. McGee*, 447 S.W.2d 270 (Mo. banc 1969) (where defendant agrees to a jury verdict of 11 citizens, it does not violate Missouri's Constitution).

Thus, there is no constitutional error under either constitution justifying reversal.

Q. Defendant suffered no prejudice, let alone manifest injustice or a miscarriage of justice.

In the event that this Court nevertheless chooses to review the claims for plain error, plain error review involves two steps: the court must first determine whether defendant's claim, on its face, establishes substantial grounds for believing that "evident, obvious and clear" error has resulted in manifest injustice or miscarriage of justice; if so, the court exercises its

discretion to review defendant's claim to determine "whether the claimed error resulted in manifest injustice or a miscarriage of justice." *State v. Baumrauk*, 280 S.W.3d 600, 607-608 (Mo. banc 2009); Rule 30.20.

Plain error cannot serve as a basis for granting a new trial unless the error was "outcome determinative." *Deck v. State*, 68 S.W.3d 418, 427 (Mo. banc 2002); *State v. Shaffer*, 251 S.W.3d 356, 358 (Mo. App. S.D. 2008).

Defendant contends that he was prejudiced because the juror had left the courthouse and discussed the case with others. As noted above, the court found that the juror was subject to no improper outside influences and thus there was no prejudice.

Defendant also contends that he was prejudiced because the alternate juror expressed relief to the court and to her boss when she was discharged and when told she might rejoin the jury she said it was her worst nightmare; Defendant fails to explain how the juror's subjective feelings constituted prejudice to Defendant.

Third, Defendant contends that he was prejudiced because the court did not instruct the new jury to deliberate anew but told them to "continue their deliberation[s]." However, Defendant's attorney twice told the court it was his position the jury should not be so instructed and thus Defendant has affirmatively waived his claim. *Olano*, 507 U.S. at 732-733; *State v. Johnson*, 284 S.W.3d at 582 (Mo. banc 2009) (plain error review is waived when

counsel has affirmatively acted in a manner precluding a finding that the failure to object was a product of inadvertence or negligence).

Finally, Defendant says he was prejudiced because the new jury allegedly reached a verdict in about 10 minutes and the alternate said, "I pretty much remembered everything that was going on and I really knew how I felt when I came back." This statement was made in response to a post-verdict question from the court asking whether she had sufficient time to go over all the instructions, the evidence, and to discuss it fully with all the other 11 jurors (Tr. 1064-1065). However, Defendant cites to nothing in the record to demonstrate the length of the deliberations except the statements of his own attorneys (Tr. 1075, 1076; L.F. 244). These statements are internally inconsistent as at one point trial counsel argues to the court that it had been 10 minutes, whereas in the motion for new trial, counsel argues it was 8 minutes, and both are devoid of citation to the record even though the trial judge remarked, as noted in the colloquies, that all parties had the times marked, including the court. The transcript does not include a time stamp for when the jury was brought in to render its verdict (Tr. 1061).

The trial court held the conference at which it replaced the juror at 5:55 PM (Tr. 1057)[20] and the verdict was stamped in at 7:05 PM. *See, State v. Amick*, No. SD31570 (Mo. App. S.D. June 11, 2014), slip op. at 23 n. 11.[21] The state and the defense had had the time to reach an agreement that sentencing would be done by the court and would be concurrent (Tr. 1061-1062).

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[20] Defendant cites the judge's statement after the jury had been sent back that, "It's now 6:00 on the Fourth of July weekend." (Tr. 1060).

[21] After the jury rendered their verdicts and was polled, and the Court confirmed that Ms. Rolen had had sufficient time to "go over all of the instructions, the evidence, and discuss it fully with all the 11 other jurors" because she "pretty much remembered everything that was going on and I really knew how I felt when I came back[,]" (Tr. 1064-1065), the court discharged the jury; discussed the PSI, the agreement of the parties for concurrent sentencing, bond, extra time for the filing of the motion for new trial, disposition of exhibits, and the right of jurors to speak or not speak to anyone with counsel; remanded Defendant to custody; and asked the clerk to stamp the verdicts. (Tr. 1066-1073). A recess was taken to go back to chambers for Defendant to make a record, and that proceeding convened at "[f]ive after 7:00." (Tr. 1074).

Defense counsel's failure to file anything in the record to document his assertion of prejudice other than counsel for the Defendant's self-serving statements—particularly where all agreed that all parties and the court had a record of when everything had taken place—fails to meet his burden to establish prejudice, let alone manifest injustice or miscarriage of justice.

Moreover, the defendant may not impeach a verdict based on the length of deliberations because jurors have heard the trial and the evidence, are the best judges of what deliberation is required, and to do so would infringe on the independence of the jury. *State v. Richmond*, 12 S.W.2d 34, 36 (Mo. 1928); *State v. Payne*, 342 S.W.2d 950, 955 (Mo. 1961).

In fact, this Court specifically rejected a claim that "the jurors acted too quickly because only eight minutes elapsed from the time when the case was submitted and when the jury rendered its verdict" and that "this did not give them time to intelligently read the instructions and to properly deliberate and consider the case" in *State v. Peck*, 429 S.W.2d 247, 251-252 (Mo. banc 1968). This Court held that there was nothing in the record to establish the correctness of the allegation as to the time during which the jury deliberated "but even if there were, we would not find that this would raise a presumption that the jurors failed to heed the court's instructions and to properly consider the case. The court had read the instructions to the jury.

The amount of time to be spent in deliberations is a matter for the jury to determine." *Id*. at 252 (citing *Richmond*, *supra*, and *Payne, supra*).

The only evidence in the record is that the juror in question did not feel coerced and the court conscientiously inquired into that possibility and clearly found the juror credible when it denied the motions for mistrial and post-trial motion for judgment of acquittal on this issue (Tr. 1025-1026, 1077).[22]

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[22] Nor was the juror dismissed a "holdout," but rather a juror who said he could not deliberate and therefore had to be dismissed, with or without the health concerns. *See*, *Commonwealth v. Olavarria*, 885 N.E.2d 139, 145 (Mass. App. 2008) (dismissed juror happened to be a hold-out but "nothing in the record to suggest that the reason for the dismissal was the juror's hold-out status"). It is doubtful whether the juror in this case was a holdout as he cited his inability to make a decision with "the arguing going back and forth" suggesting disagreements among other jurors. (Tr. 1032, 1038). Even if, *arguendo*, he was a holdout, there is no reason to believe it was for acquittal, as opposed to the charged offense of first-degree murder. The juror said he was "kind of dizzy," felt like he was "going to pass out," everything was "blurred," he "can't focus on any of it," and that he therefore could not "make a decision either way, really." (Tr. 1032, 1037, 1038, 1058).

Defendant had a jury of 12 peers that he helped select, who heard all of the evidence and all of the instructions, were re-sworn after the installation of the alternate which resulted after **Defendant** contended Juror No. 12 was unfit to deliberate further, and urged the Court not to instruct the jury to begin deliberations anew, thus affirmatively waiving any claim of error, prejudice, manifest injustice, or miscarriage of justice on that score. The jury unanimously found him guilty of second-degree murder and second-degree arson.

Moreover, any error did not affect the verdict and was not outcome determinative as required by *Deck*, *supra*. Defendant's truck was identified at the scene just before the fire and gone just after the fire; compatible gun parts were found broken up and thrown in the pond (as he reported he had done to his cellmate) on his property; the equipment to cut up the gun was seen in his truck by law enforcement; Defendant's family moved the truck to Arkansas after law enforcement executed the search warrant; and Defendant benefitted financially from Victim's death, and indeed was on the phone to victim's bank inquiring about the financial benefit from a "credit life insurance" claim that he would receive as a result of the murder on the very day of the murder. Moreover, Defendant pretended not to know about the fire when he encountered a woman who later testified on the road, even though his statement to police indicated he knew about it by then. In addition,

Defendant suggested to his wife in a taped phone conversation that she "aim for the mid-section" if she saw a particular witness again.

Defendant's first point should be rejected.

II.

The trial court did not plainly err by not intervening *sua sponte* to declare a mistrial during closing argument when the prosecutor argued the defense was hiding Defendant's truck in Arkansas and trying to pass off photos of a different truck as his truck where there was evidence to support the prosecutor's theory and the defense apparently made a strategic choice not to highlight the argument or its alleged impropriety by objecting at trial.

Defendant's second point complains that the judge should have intervened (although the defense chose not to) to declare a mistrial it did not request because the prosecutor made various closing arguments that cast Defendant, his family, and his defense team in a bad light. The complaint focuses on argument surrounding the identification of Defendant's truck. It was undisputed Defendant's family had moved the truck to Arkansas and refused to produce it voluntarily when requested to do so by the Sheriff. Defendant concedes the point was not preserved and requests plain error review under Rule 30.20.

A. Standard of Review

Although plain errors affecting substantial rights may be considered when the court finds that a manifest injustice or a miscarriage of justice has resulted therefrom, such consideration is in the appellate court's discretion.

Rule 30.20. The plain error rule is to be used sparingly and does not justify a review of every point that has not been preserved properly. *State v. Tokar*, 918 S.W.2d 753, 769 (Mo. banc 1996). Plain errors are evident, obvious, and clear based on the facts and circumstances of the case. *State v. Louis*, 103 S.W.3d 861, 864 (Mo. App. E.D. 2003). A claim of plain error must establish on its face substantial grounds for the Court to believe that a manifest injustice or a miscarriage of justice occurred; otherwise, the Court will decline to review for plain error. *Tokar*, 918 S.W.2d at 770.

"[P]lain error relief as to closing argument should rarely be granted and is generally denied without explanation." *State v. Vorhees*, 342 S.W.3d 446, 451 (Mo. App. S.D. 2011) (quoting *State v. Hall*, 319 S.W.3d 519, 523 (Mo. App. S.D. 2010)). Plain error relief seldom is granted on assertions of error relating to closing arguments because absence of an objection and request for relief during closing arguments mean that any intervention by the trial court would have been uninvited and may have caused increased error. *State v. Perry*, 275 S.W.3d 237, 245 (Mo. banc 2009). Indeed, the failure of defense counsel to object to improper argument is often strategic in nature, and the taking of uninvited action by the court in such a way simply may emphasize the matter in a way defendant chose not to do. *Id.* A holding that would require the trial court to interrupt counsel would present myriad problems. *State v. Brooks*, 158 S.W.3d 841, 853 (Mo. App. E.D. 2005). A party cannot

fail to request relief, gamble on the verdict, and then, if adverse, request relief for the first time on appeal. *State v. Bennett*, 201 S.W.3d 86, 88 (Mo. App. W.D. 2006).

For these reasons, an appellate court will only reverse for unobjected-to error in closing argument if defendant shows "there is a sound, substantial manifestation, a strong, clear showing, that injustice or miscarriage of justice will result if relief is not given." *Perry* at 245 (*quoting State v. Wood*, 719 S.W.2d 756, 759 (Mo. banc 1986)). Defendant bears the burden of proving the improper argument had a decisive effect on the jury's determination. *Perry* at 245; *State v. Wren*, 643 S.W.2d 800, 802 (Mo. banc 1983).

Prosecutors and defense attorneys are allowed substantial latitude in closing argument, including suggesting reasonable inferences to be drawn from the evidence. *State v. Albanese*, 9 S.W.3d 39, 56 (Mo. App. W.D. 2000). Furthermore, it is well-settled that counsel may draw non-evidentiary conclusions in closing argument if those conclusions are fairly justified as a matter of inference from the evidence. *West v. State*, 244 S.W.3d 198, 202 (Mo. App. E.D. 2008). In making closing argument, the prosecutor can draw any inference from the evidence that he believes in good faith to be justified. *State v. Delaney*, 973 S.W.2d 152, 156 (Mo. App. W.D. 1998). "The State may 'argue the evidence, the reasonable inferences from the evidence, and the

credibility of the witnesses.' " *State v. McFadden*, 369 S.W.3d 727, 749 (Mo. banc 2012) (quoting *Glass v. State*, 277 S.W.3d 463, 474 (Mo. banc 2007)).

B. Prosecution theory that Defendant hid and misidentified truck.

At trial, Jake Mayberry testified that he was friends with Defendant's family, had known them quite awhile, had never had any problems with the family, had seen and knew what Defendant's truck looked like, and that there was no doubt in his mind that it was Defendant's truck he saw parked right beside the house where the murder and arson occurred as he drove by (Tr. 290, 297-298). The truck had a black brush guard on the front (Tr. 298).

Chief Deputy Eric King testified that the Sheriff's Department had made attempts to try to find the truck from the Amick family since the crime occurred and that they had not been forthcoming with where it is (Tr. 459).

At a bench conference concerning two exhibits the defense said they would offer later in the trial, the prosecutor asked, "You're planning on offering photographs that is not Michael Amick's truck?" and defense counsel replied, "Yes." (Tr. 483).

Deputy King had looked for the truck but did not recall seeing that truck anywhere since the date he served the search warrant, December 5 (Tr. 553-556). A few months prior to trial, Sheriff Underwood had spoken with someone about bringing the truck in, but Deputy King did not believe Defendant had cooperated after being told about the .22 revolver (Tr. 556-

557). Because they had no information as to where the truck was, it was impossible to get a search warrant (Tr. 559).

At a bench colloquy complaining of the fourth piece of evidence Defendant had offered that had not been disclosed to the prosecution, the prosecutor remarked, "Now, two of these were photocopies of a truck that they have purported and tried to get a witness to say is Michael Amick's truck. It's not. In depo—and I'll tell you by way of history, which I think is absolutely dirty pool, they switched that license plate from Michael Amick's truck to another truck trying to get a witness to say that's the truck. Okay? It's the wrong truck, and I think that's dirty pool to begin with." (Tr. 561).

Sheriff Tim Ward testified he saw a pickup truck licensed to Defendant sitting in the garage or carport of his house when he checked on December 4 to see if Defendant was coming in for his scheduled interview (Tr. 597, 609). While they had not yet found the cut-up gun, so it did not register as important at the time, he had observed an orange chainsaw and a cutting torch partially covered up in the bed of the truck with a green oxygen tank and a red acetylene tank (Tr. 597-8, 611-612). According to Deputy King, the truck had not been seen since the search warrant was served the next day.

During the defense case, Christopher Amick, Defendant's brother, testified that he was familiar with Defendant's truck and claimed Exhibits Q and R were Defendant's truck (Tr. 910-911). On cross-examination, the

brother admitted Exhibits Q and R were pictures taken after Victim was murdered (Tr. 926).

On cross-examination, Defendant's brother also testified that at the time of trial, the truck was in Pocahontas, Arkansas, sitting at the house of a friend of his (Tr. 924). He thought the gun had been found on December 5 (Tr. 930). The brother testified that the truck had been in his possession since the crime, and that he did not have an exact date when it went to Arkansas but he would say a year earlier (Tr. 927). He admitted Sheriff Underwood had asked him in person about looking at the truck, but on the advice of defense counsel's office, he would not just bring it out without a court order (Tr. 925-926).

On rebuttal, the prosecution played Exhibit 43, a recorded phone call between Defendant's sister and Defendant in which the sister said she was glad they had made the truck disappear (Tr. 976-977). The State also put into evidence Exhibit 32, a certified copy of the Missouri Department of Revenue record containing the Vehicle Identification Number of Defendant's truck as found in State's Exhibit 9 (Tr. 977).

C. Disputed Closing Argument

Defendant complains of the following portions of the State's closing argument, none of which his highly experienced and aggressive defense team saw fit to object to at the time (with additional portions added for context):

Down here in these parts, you know, there aren't all these mysterious trucks driving around. People know people by their vehicles when they see them off in a distance. And what Jake Mayberry said is, "It was his truck. I knew it when I saw it."

Now, let's talk about his description of it. . . .

Jake said there's a brush guard on the front, and there is. Jake said the rims were shiny. And you know what, I guess they're not. It depends on where you look at them. Actually, there are portions that are shiny, but they're dirty. But if you were really listening carefully to Jake, not me and Mr. Wampler, what Jake said was, "I've seen it before. It had shiny rims."

And I asked him, "Well, did you see the rims that day and pay attention?"

"No, I just remembered it had shiny rims."

So now he's lying because on this date this photo doesn't show a completely shiny rim. That's—That's not lying. Jake said it had an extended cab. They say it had four doors. I don't know what it has. And we'll get to that in a minute, because the photos they have, you haven't had a chance to look at. Ladies and gentlemen, they're creating a fraud in this court. That isn't their truck. That isn't the truck. And I'll—I'll give you these photos and let you look at it and you can see for yourself,

different truck. They changed the plates. And if they wanted to prove it was the truck, show me a vehicle identification number that matches up.

(Tr. 993-995).

In a similar vein, Defendant complains of the following argument:

But they want to talk about sloppy police work. And, quite frankly, there's several of these officers around here. . . . Are there things they should have done better? Yeah. And if you ask them, is hindsight 20/20, they'll tell you yeah. But they're not corrupt. . . . Sloppy police work means you don't find the gun. Okay? But we found it. You know what, though? They aren't corrupt. They aren't deceitful. But there is some people in here that have been corrupt and deceitful, and it's his family.

Ladies and gentlemen, we've talked about this truck.

May I see your exhibits of the truck, please?

Deanna has it all wrong. We're not wanting photos of the truck to go show our witness to get a story right. His story is what it is. It's written down and it's documented in a transcript. We're not trying to change that. What we want to know is why, back in May of '09, they're showing photos of a truck with Michael's license plate that is not Michael's truck. That's called tampering with evidence, ladies and gentlemen. It's a crime. Hindering prosecution is a crime. Because way, way back then, these photos are being shown to witnesses in this case, and they're going to be

shown to you, and Chris Amick sat here and vouched for him that this was his truck. But you know what? Where's the VIN number to prove it? Where's the VIN number to prove it?

* * *

Now, ladies and gentlemen, if you'll look really closely, this is the wheel of that truck that was taken that night. I don't know what you call it, but there's a black—and I wish they had taken better photos, but they didn't—there's a black fender well here, molding. Okay? That's his truck, taken that night at his house. His license plate.

When you get back and look at Q and R, all four wheels pristine fender wells, nothing on there black. You can't pull that off without tearing it. You've got to go fix it all, Okay? These have been altered. And you say, well, Zoellner, it's no big thing, they took off the black to make it look better, they liked it better. Well, fine. That's fine. Okay.

You don't hide it in Arkansas, like you heard from Deanna. They're hiding it. She's proud of the fact that her and her family hid it. Would do it again to protect one of their own. But you know what? If you look really closely, there's molding up here high on the door that runs the length of it that doesn't match up to the little bit of molding and shape here. And you can take these back in your jury room and look at them.

> Ladies and gentlemen, he's guilty, they know it, and they're trying to cover it up and they're trying to get witnesses like Jake Mayberry—remember when they tried to show them some other photos that aren't even in evidence now and confuse him? Ladies and gentlemen, this is—the cops aren't corrupt. The Defendant and his family is.

(Tr. 997-999).

This argument was a fair inference from the evidence offered by the State. Mayberry testified he was familiar with Defendant's truck, that Defendant's truck had a black brush guard, and that photos offered into evidence by the State were Defendant's truck and contained a black brush guard. Mayberry further testified that defense Exhibits A and B were not Defendant's truck (Tr. 325-326). The State further proved up Defendant's vehicle identification number, established that defense Exhibits Q and R were taken after the crime, that Defendant's truck had been "made to disappear" by being moved to Arkansas immediately after the gun was found during the search warrant, that Defendant's family was happy the truck had been "made to disappear," and that the photos Defendant offered that claimed to be Defendant's truck were not because the same plates had been shifted to a truck without a black brush guard (and the defense said the truck had not been altered in any way—Tr. 926). Defendant's family refused to produce the truck to clear up the dispute raised by the brother who testified it was a different truck and

also testified that he knew where Defendant's truck had been "sitting" in Arkansas, when asked to do so by the Sheriff's Department (Tr. 925-926).

Defendant understandably did not object because an objection would have been overruled. Rather, as a matter of trial strategy, Defendant chose to respond during its argument with a spin of his choosing, arguing that Mayberry had described the wrong number of doors on the truck and that the rims weren't shiny (Tr. 1008-1009). The jury had all of the evidence and both arguments before it and made its decision. There was no error, plain or otherwise, in this argument.

Defendant also complains of the following portion of the State's rebuttal argument:

> The reality of the case is what's coming from the witness stand, not from these fellows' mouths. And, quite frankly, I am kind of tired of them misleading you and not telling you everything. "Where's Kass Brazeal? Where's Kass Brazeal?" Well, Eric King told you he and Kass were there, they were looking at the scene. Kass took those photographs, and those are the photographs. Well, we should have produced Kass. Well, under the law we don't have to. Actually, we could still be here with witnesses going through all this minutia [sic] if they want us to. But Eric said these are the photographs. But Kass has been out in the hall for three days, under their subpoena. And you know what, Kass was the one here that

they were going to start this nonsense with about this truck. This—These are from his depo way—and the photographs were taken way back in May of '09. That's why Kass didn't get to the stand, because they got caught with their pants down.

Now, I don't know if Mr. Woody and Mr. Wampler were in on this fraud, but I know the Amick family is. And it's about time the defense attorneys tell you the full truth, which they have yet to do. Kass Brazeal is not here. Why didn't they bring Kass? We didn't need to. We brought you the witnesses we could bring you to show you what happened, without all this confusing nonsense and noise.

(Tr. 1020-1022).

Defendant complains that defense counsel's feelings were hurt and that there was no evidence to support the argument. However, as previously demonstrated, there was evidence to support a fair inference that Defendant's family hid the truck Defendant drove to the crime scene in Arkansas and showed photographs to witnesses, including Jake Mayberry at trial, of another truck with Defendant's plates that was not Defendant's truck. Defendant did not quarrel then, and does not quarrel now, with the prosecutor's assertion that these exhibits were first unveiled at Brazeal's deposition and that Brazeal was under a defense subpoena at trial but not called by the defense. The prosecutor expressly stated that he did not know

that defense counsel were involved, but did opine that what they were offering was not the full truth. This was fair argument, and there was no error, plain or otherwise.

Finally, Defendant complains of the following argument during summation:

> Ladies and gentlemen, you are the voice of the community. Mr. Wampler's opinion and my opinion and Mr. Dowdy's, Fred's, opinion, [sic] they don't matter. Sheriff Moore, Sheriff Underwood now, Eric King, Kass Brazeal, their opinion doesn't matter. Chris Amick, his mom, their witness, their opinions don't matter. The 12 of you opinion [sic] matter. The 12 of you will stand in place of our community, this community, and decide whether we're going to tolerate fraudulent behavior on the Court like this and whether we're going to tolerate crimes like this.

(Tr. 1024).

This was no more than a plea to the jury to reject the evidence of the second truck and do its duty to the community by convicting a guilty Defendant. The argument was a fair inference supported by the evidence and there was no error, plain or otherwise.

Defendant's second point should be rejected.

III.

The trial court did not plainly err and no manifest injustice or miscarriage of justice resulted when the court explained, in the course of sustaining a defense objection on one ground but not another, that the prosecutor was not rehabilitating a witness because he had "answered consistently each time." Nor did the court plainly err by explaining to the prosecutor (after the defense requested following a sustained objection that he be admonished not to ask repetitive questions) that the witness had "established he can describe the vehicle" as grounds for why he should move on.

Defendant's final point complains of two remarks the court made in the course of sustaining two of its objections which it contends were inherently prejudicial comments on the evidence that resulted in manifest injustice. Defendant did not object to either at trial, and the comments were made as the court was ruling in his favor both times. In context, the court was doing no more than explaining its rulings on the objections and reacting to requests from defense counsel; in fact, defense counsel thanked the court after the remarks at the time (Tr. 299).

Defendant admits the error is unpreserved and seeks plain error review under Rule 30.20. Appellant's Substitute Brief at 74.

A. Standard of review

An appellant is bound by the issues raised and arguments made in the lower court and may not raise new and totally different arguments on appeal. *State v. Winfield*, 5 S.W.3d 505, 515 (Mo. banc 1999). A party cannot fail to request relief, gamble on the verdict, and then, if adverse, request relief for the first time on appeal. *State v. Bennett*, 201 S.W.3d 86, 88 (Mo. App. W.D. 2006).

While Rule 30.20 permits discretionary review for plain errors affecting substantial rights when the court finds that manifest injustice or miscarriage of justice has resulted therefrom, the Missouri Supreme Court has emphasized:

> [T]he rule does not cover all trial error, should be exercised sparingly, cannot be used as a vehicle for review of every alleged error…and is limited in its application to cases where there is a manifestation and showing that injustice or miscarriage of justice results if the rule is not invoked.

State v. Murphy, 592 S.W.2d 727, 732 (Mo. banc 1979).

Plain error review is limited to those cases where there is a "strong, clear demonstration of manifest injustice or miscarriage of justice." *State v. Hernandez*, 880 S.W.2d 336, 338 (Mo. App. W.D. 1994) (quoting *State v. Collis*, 849 S.W.2d 660, 663 (Mo. App. W.D. 1993)). The defendant bears the

burden of showing that an alleged error has produced such a manifest injustice. *State v. Isa*, 850 S.W.2d 876, 884 (Mo. banc 1993); *State v. Garth*, 352 S.W.3d 644, 652 (Mo. App. E.D. 2011). Mere allegations of error or prejudice will not suffice. *Garth* at 652. Where the evidence of guilt is overwhelming, there is no injustice or miscarriage of justice in not applying the rule. *Collis* at 663.

Plain error review involves two steps: the court must first determine whether defendant's claim, on its face, establishes substantial grounds for believing that "evident, obvious and clear" error has resulted in manifest injustice or miscarriage of justice; if so, the court exercises its discretion to review defendant's claim to determine "whether the claimed error resulted in manifest injustice or a miscarriage of justice." *State v. Baumrauk*, 280 S.W.3d 600, 607-608 (Mo. banc 2009); Rule 30.20.

Plain error cannot serve as a basis for granting a new trial unless the error was "outcome determinative." *Deck v. State*, 68 S.W.3d 418, 427 (Mo. banc 2002); *State v. Shaffer*, 251 S.W.3d 356, 358 (Mo. App. S.D. 2008).

The standard of review for examining the conduct of a trial judge is whether the trial court's conduct is such as to prejudice the minds of the jury against the defendant thereby depriving defendant of a fair and impartial trial. *State v. Jackson*, 836 S.W.2d 1, 6 (Mo. App. E.D. 1992). A trial court must maintain a position of absolute impartiality, avoid any conduct which

might be construed as indicating a belief on the part of the judge as to the guilt of the defendant, maintain a neutral attitude, and avoid any demonstrated hostility which might impair the appearance of impartiality. *Id.* Whether there was prejudice depends on the context and words in each case. *Id.*

This does not mean, however, that the trial judge may not correct counsel, when necessary, as long as it is not done in a contemptuous manner, or that he may not summarize evidence in explaining a ruling, as long as it is not a statement of facts as a matter of law. *Id.* at 6-7.

B. The Court's comments in context

Defendant's complains of the Court's comments explaining its rulings in the context of the following examination of Jake Mayberry by the prosecution on the question of his ability to identify Defendant's truck at the scene of the crimes just prior to the crimes:

> Q. Okay. And as you drive by Jackie Risner's residence, is there something that-or, for some reason do you look over at the residence?
>
> A. Yes. I always look up there because they're friends.
>
> Q. Just kind of look up to see what, if anything, is going on?
>
> A. Right.
>
> Q. And when you looked up there on this occasion, did you see any vehicles?

A. Yes, Michael Edward Amick's truck is there.

Q. You saw Michael Amick's truck there?

A. Yes, sir.

Q. Now, you said his truck is there. Had you seen him in his truck before on various occasions?

A. Oh, yes.

Q Around town?

A Yeah.

Q And you knew what his truck looked like?

A Yes, sir.

Q And we'll come back to that in a little bit. But is there any doubt in your mind that the truck you saw at the house was his truck?

A No, sir.

Q And where was this truck located in relationship to the house?

A Parked right beside the house.

* * *

Q And I'll ask you this, is there something on the front that he has, an attachment, so to speak?

A Yes, a black brush guard.

Q And when you drive by this truck, I mean, are you staring at it intently trying to mark every dent and discoloration, or are you just looking at it real quick as you drive by?

A No, sir. I was just looking at it and noticed the truck.

Q But you know without a doubt in your mind it was his truck?

MR. WAMPLER [defense counsel]: He's leading this witness, and also that's a cumulative, repetitive question, Your Honor.

THE COURT: As to leading, sustained.

MR. WAMPLER: Thank you.

Q (By Mr. Zoellner) Was there any doubt in your mind as you drove by—

MR. WAMPLER: Asked and answered three times now, Your Honor. It's repetitious **and he is basically trying to rehabilitate his own witness by asking three times.**

THE COURT: He's answered consistently each time **so he's not rehabilitating**, but your objection is sustained.

MR. ZOELLNER: Judge, I'll move on. I'm not trying to delay things here.

MR. WAMPLER: Well, the objection is sustained, Your Honor. **Ask that the prosecutor be asked not to ask these questions over and over again.**

THE COURT: He's established he can describe the vehicle.

MR. WAMPLER: **Thank you**.

THE COURT: Proceed.

(Tr. 297-299) (emphasis added).

With the context added, it is plain that the Court in the first instance was merely ruling on Defendant's objection that the prosecutor was trying to rehabilitate his own witness, while sustaining his objection on the alternative ground that the question had been leading. In the second instance, since the defense was not content to win its objection but gratuitously requested further chastisement of the prosecutor to not inquire further on the topic of the witness's ability to identify Defendant's truck, the Court gave him what he asked for, albeit with an explanation to the prosecutor that he had made his point and needed to proceed to other topics.

Far from demonstrating bias or prejudice against Defendant, the words in context demonstrate that the Court ruled in favor of the defense on each objection and merely explained the bases of its rulings. The first comment, "He's answered consistently each time so he's not rehabilitating, but your objection is sustained" explained that one objection was meritorious and the other wasn't. The second comment, "He's established he can describe the vehicle. . . . Proceed" was in response to a defense request after his objection was sustained that the prosecutor be told to move on from that topic.

Neither demonstrated the remotest bias in context, *State v. Jackson*, 836 S.W.2d at 6, and the Court is permitted to summarize evidence in explaining a ruling (in this case, what subject was not to be further inquired about). *Id.* at 6-7.

Nor is there manifest injustice or a miscarriage of justice where a gun consistent with the murder weapon was found deliberately destroyed and thrown in the pond on Defendant's property (as he had told his cellmate he had done), torch equipment to perform such a destruction was seen in Defendant's truck in his car port or garage, Defendant's truck was admittedly moved to Arkansas where it was "sitting" to avoid inspection from the time the gun was found, Defendant benefitted financially from Victim's death and indeed inquired about his "credit life insurance" claim on the day of the murder, Defendant told a cell mate Victim had this coming for a long time because she owed him, and Defendant suggested to his wife in a taped phone conversation that she "aim for the mid-section" if she saw a particular witness again.

Defendant's final point should be rejected.

CONCLUSION

Defendant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 18,895 words, excluding the cover and certification, as determined by Microsoft Word 2010 software; and

2. That a copy of this notification was sent through the eFiling system on this 11th day of December, 2014, to:

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