IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC95194
	)	
LUIS E. ZETINA-TORRES,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF SALINE COUNTY, MISSOURI
15TH JUDICIAL CIRCUIT
THE HONORABLE DENNIS A. ROLF, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Luis E. Zetina-Torres, appeals his conviction by a Saline County jury for the class A felony of trafficking in the second degree, § 195.223.9.[1] On March 24, 2014, the Honorable Dennis A. Rolf sentenced Mr. Zetina-Torres to twenty years in prison, as recommended by the jury (S.Tr. 6; LF 39-41). Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Western District. Article V, § 3, Mo. Const. (as amended 1982); § 477.070. This Court granted Respondent's application for transfer after the Western District Court of Appeals' opinion reversing Mr. Zetina-Torres' conviction and discharging him. This Court now has jurisdiction of this appeal. Article V, § 10, Mo. Const. (as amended 1976), and Rule 83.04, Missouri Supreme Court Rules (2015).

[1] Statutory references are to RSMo 2000, with the exception of §§ 195.010 and 195.223, which are to RSMo Supp. 2009. References to the record on appeal are to a legal file (LF), hearing transcripts for 7/22/13 (7/22/13 Tr.) and 8/5/13 (8/5/13 Tr.), a trial transcript (Tr.), and a sentencing transcript (S.Tr.).

STATEMENT OF FACTS

Appellant Luis Zetina-Torres was indicted for trafficking in the first degree, § 195.222 (LF 5), but he was convicted of the lesser-included offense of the class A felony of trafficking in the second degree, § 195.223.9, after his first jury trial. ***State v. Zetina-Torres***, 400 S.W.3d 343, 346 (Mo. App. W.D. 2013). After the Court of Appeals reversed Mr. Zetina-Torres' conviction because of a discovery violation by the state, ***id***. at 357, a second jury trial was held where the following evidence was presented:

On July 16, 2010, Missouri State Highway Patrol Trooper Brooks McGinnis was working a "ruse drug checkpoint" at the Route EE and K exit on Interstate 70 (I-70) in Saline County (Tr. 152-153). At this checkpoint, the Highway Patrol placed signs on the interstate advising that there was a drug checkpoint ahead when, in fact, no such checkpoint existed (Tr. 153). There was a second set of signs stating that a drug dog was in use; the signs were in Spanish and English (Tr. 153). Flares were placed in front of the signs (Tr. 154-155). An unoccupied patrol car was parked in the median with its lights activated (Tr. 155). The purpose of the ruse checkpoint was to cause those involved in drug trafficking to exit the highway prior to reaching what they believed to be a drug checkpoint, and by doing so, draw attention to themselves (Tr. 153). The location was chosen because it was an exit that had no services for motorists (Tr. 153).

While the ruse checkpoint was in place, a black Nissan pickup truck passed the checkpoint signs and exited the interstate onto EE (Tr. 156). Trooper McGinnis followed the truck onto EE and continued to follow after it turned east on Highway 20 toward the City of Marshall (Tr. 157-158). While McGinnis was following the truck, he conducted a routine computer check of it and learned that the registered owner of the truck was "Benitez Mardonio Cardova" or "Mardonio Cardova Benitez," 7100 Longview Road, Kansas City, Missouri (Tr. 199, 217-218, 228-229, 241).[2]

After Trooper McGinnis followed the truck for more than thirteen miles, the truck's driver committed a traffic violation, giving McGinnis justification for stopping it (Tr. 158, 228, 230). When the speed limit changed from 60 to 45 miles per hour (m.p.h.), the truck neglected to slow down, so McGinnis stopped it for going 52 m.p.h. in a 45 m.p.h. zone (Tr. 158, 160, 208). McGinnis activated his emergency lights and siren and stopped the truck (Tr. 159).

There were two men inside (Tr. 159). The driver, Mr. Zetina-Torres, apologized for speeding (Tr. 162). Zetina-Torres did not have a driver's license,

[2] The order of the names in the transcript changes, and also sometimes the transcript reads "Cordova" instead of "Cardova." Appellant refers to this person as "Benitez" throughout the rest of the brief as that is the name used by the Court on direct appeal of Appellant's first trial. ***Zetina-Torres***, 400 S.W.3d at 349-50.

but gave McGinnis an identification card from Mexico (Tr. 162, 169-170, 220, 233). He also gave McGinnis the vehicle insurance card, which listed Benitez and Hugo Rivera as the insured parties (Tr. 163, 210, 216-217, 241-242). Roberto Maldonado was the passenger, and he provided a Mexico "consular" card to McGinnis (Tr. 164).[3]

Both Zetina-Torres and Maldonado appeared nervous and avoided eye contact with the trooper (Tr. 163-165). McGinnis noticed a strong odor of cologne-scented air freshener coming from inside the pickup (Tr. 165). McGinnis also noticed that there was a single key in the ignition; in his experience, drug traffickers often use only a single key because they do not want their house or personal keys passed off when they deliver the vehicle to another (Tr. 205).

McGinnis talked to Zetina-Torres in the patrol vehicle (Tr. 166). Zetina-Torres told McGinnis that he borrowed the truck from a friend, "Mardonio" (Tr. 163). He said that he and Maldonado were traveling to get a Ford pickup from a

[3] Maldonado's full name is Roberto Maldonado-Echeverria. *See,* ***State v. Roberto Maldonado-Echeverria***, 398 S.W.3d 61 (Mo. App. W.D. 2013), where the Court, analyzing this same traffic stop, found that the evidence was insufficient to support Maldonado's conviction for trafficking based on joint control of the truck where the drugs were found. Appellant refers to his co-defendant as "Maldonado" as that he is how he is referred to in the transcript of this trial.

friend, and that they were going to work on its engine in Kansas City (Tr. 167-168). McGinnis asked which city they were visiting and the name of the friend they were to meet (Tr. 167). McGinnis testified that Zetina-Torres mumbled and delayed before saying that he was going to Marshall; he never identified the name of the friend (Tr. 167-168, 171, 250). McGinnis noticed that Zetina-Torres would not make eye contact when he talked and there seemed to be a delay in his responses even though McGinnis believed that Zetina-Torres had no trouble understanding and speaking English (Tr. 164-165, 250).[4] McGinnis also noticed that Zetina-Torres was wearing nicer clothing than McGinnis would expect him to be wearing for working on a vehicle's engine, and that Maldonado was wearing sandals (Tr. 169). But McGinnis conceded on cross-examination that Zetina-Torres did not say that they were going to work on the truck "then" (Tr. 234-35).

Zetina-Torres told McGinnis that he had known Maldonado for about a year, but he was not able to give any additional information about Maldonado and did not even give Maldonado's last name, referring to him only as "Berto" (Tr. 168-169). McGinnis informed Zetina-Torres that Maldonado's license was

[4] Zetina-Torres was provided a translator at trial and sentencing (Tr. 6-9, 324-26; S.Tr. 3-4).

suspended and that there was a warrant for his arrest (Tr. 170). Zetina-Torres said that Maldonado had just come along for the ride (Tr. 170).

All during the conversation, Zetina-Torres avoided eye contact with McGinnis, continued to look out the window, and gave delayed responses to questions (Tr. 171). McGinnis asked Zetina-Torres whether he possessed any drugs or weapons, and Zetina-Torres replied, "no, you can check" (Tr. 172). McGinnis clarified that Zetina-Torres was giving consent to search the truck (Tr. 172).

Before searching the truck, McGinnis asked Maldonado where they were going (Tr. 173). Maldonado told McGinnis they were going to Sedalia to see friends of Zetina-Torres (Tr. 173-174). Maldonado did not know the name of Zetina-Torres' friends (Tr. 176). Maldonado also said that he had known Zetina-Torres for only two or three months (Tr. 175).

When McGinnis searched the truck, he noticed that the tailgate was locked (Tr. 177, 200-201). Also, the bed liner of the pickup truck was "sticking outside of the rail lip, so to speak" (Tr. 177, 201). When McGinnis pulled the bed liner back, he noticed that there was a package down behind the bed liner (Tr. 177). It was a plastic bag that contained 438.74 grams of a substance containing methamphetamine (Tr. 177-178, 201, 203, 293-295, 298, 300). The substance

appeared to be wet, so McGinnis believed that it was "fairly fresh," but he could not say how long it had been in the truck (Tr. 178, 246).

Both men were placed under arrest and the remainder of the truck was searched (Tr. 179). Maldonado became extremely agitated (Tr. 179-180). A GPS device was seized from the passenger side of the truck; it was in a position to be viewed by Maldonado (Tr. 180). It displayed a Sedalia address along with the address 7100 Longview Road, Kansas City, Missouri, which was the address of the vehicle's registered owner, Benitez (Tr. 180, 184, 204). A text message on Zetina-Torres' prepaid cell phone, which was seized, also contained the same Kansas City address (Tr. 214).

Zetina-Torres carried a wallet, which contained a "Money Gram rewards card," bearing the name "Mardonio Cordova-Benitez" (Tr. 220-221, 243). At trial, a Kansas City police detention facility officer identified a booking photograph of Benitez taken on February 26, 2010 (Tr. 254-255, 261). A fingerprint was also made from this person during the booking procedure (Tr. 256-257). A criminalist examined the fingerprint, compared it to a set of Zetina-Torres' fingerprints, and concluded that Zetina-Torres' right index fingerprint matched that of Benitez (Tr. 284-288).

At the jury trial, when Zetina-Torres moved for judgment of acquittal at the close of this evidence, the trial court overruled the motion (Tr. 322-323; LF 14-

15). Zetina-Torres was again found guilty of trafficking in the second degree at this second jury trial (Tr. 371; LF 31). After a penalty phase without additional evidence presented, the jury recommended a twenty-year prison sentence (Tr. 389; LF 36).

On direct appeal, the Western District Court of Appeals reversed Zetina-Torres' conviction. ***State v. Zetina-Torres***, WD77424 (Mo. App. W.D. June 9, 2015). The Court found that based on the "unique circumstances of this case," there was insufficient evidence presented at trial for the jury to convict Zetina-Torres given the verdict director that was submitted to the jury. ***Id.*** at *4. On Respondent's application, this Court granted transfer.

POINTS RELIED ON

I.

The trial court erred in overruling Zetina-Torres' motion for judgment of acquittal at the close of the evidence, and in entering judgment and sentence on the jury's guilty verdict against him for trafficking in the second degree, § 195.223.9, because the state did not prove his guilt beyond a reasonable doubt, thereby depriving him of his right to due process, guaranteed by the 14th Amendment to the United States Constitution and Article I, § 10 of the Missouri Constitution, in that there was insufficient evidence that Zetina-Torres possessed, knew of, or was aware of the presence of the methamphetamine hidden under the bed liner of the truck that he and Maldonado were in, or that Zetina-Torres acted together with or aided Maldonado in committing trafficking in the second degree.

Jackson v. Virginia, 443 U.S. 307 (1979);

State v. Miller, 372 S.W.3d 455 (Mo. banc 2012);

State v. Driskell, 167 S.W.3d 267 (Mo. App. W.D. 2005);

State v. Johnson, 81 S.W.3d 212 (Mo. App. S.D. 2002);

U.S. Const., Amend. 14;

Mo. Const., Art. I, § 10;

§§ 195.010 and 195.223, RSMo Supp. 2009;

Rule 29.11; and

MAI-CR 3d 302.01, 302.03.

II.

The trial court plainly erred in giving Instruction No. 6, which alleged in Paragraph First that Roberto Maldonado-Echeverria possessed the methamphetamine, and which also alleged in Paragraph Third, that Zetina-Torres "acted together with or aided Roberto Maldonado-Echeverria in committing that offense," because there was no evidence to support either of these propositions, violating Zetina-Torres' rights to due process of law and a fair trial before a fair and properly-instructed jury, guaranteed by the 6th and 14th Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that Instruction No. 6 had the potential for misleading and confusing the jury because there was no evidence that Zetina-Torres "acted together with or aided Maldonado-Echeverria in committing" the offense of second degree trafficking, and nine months before his trial, the Court of Appeals found that there was insufficient evidence that Maldonado possessed the methamphetamine on substantially similar evidence. A manifest injustice has resulted because the jury was allowed to convict Zetina-Torres upon a theory that was unsupported by the evidence (that Maldonado possessed the methamphetamine, and Zetina Torres was guilty because he acted together with or aided Maldonado in the commission of that crime).

State v. Lusk, 452 S.W.2d 219 (Mo. 1970);

State ***v. Wilhelm***, 774 S.W.2d 512 (Mo. App. W.D. 1989);

State v. Thompson, 112 S.W.3d 57 (Mo. App. W.D. 2003);

State v. Scott, 689 S.W.2d 758 (Mo. App. E.D. 1985);

U.S. Const., Amends. 6 and 14;

Mo. Const., Art. I, §§ 10 and 18(a);

Rules 28.03 and 30.20; and

MAI-CR 3d 304.04, 325.14.

ARGUMENT

I.

The trial court erred in overruling Zetina-Torres' motion for judgment of acquittal at the close of the evidence, and in entering judgment and sentence on the jury's guilty verdict against him for trafficking in the second degree, § 195.223.9, because the state did not prove his guilt beyond a reasonable doubt, thereby depriving him of his right to due process, guaranteed by the 14th Amendment to the United States Constitution and Article I, § 10 of the Missouri Constitution, in that there was insufficient evidence that Zetina-Torres possessed, knew of, or was aware of the presence of the methamphetamine hidden under the bed liner of the truck that he and Maldonado were in, or that Zetina-Torres acted together with or aided Maldonado in committing trafficking in the second degree.

Standard of Review & Preservation

The due process clause protects a defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. ***In re Winship***, 397 U.S. 358, 364 (1970). In reviewing a challenge to the sufficiency of the evidence, this Court accepts as true all evidence and inferences in a light most favorable to the verdict. ***State v. Botts***, 151 S.W.3d 372, 375 (Mo. App. W.D. 2004). This Court disregards contrary

inferences, unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. ***State v. Grim***, 854 S.W.2d 403, 411 (Mo. banc 1993). This Court may not supply missing evidence, or give the state the benefit of unreasonable, speculative, or forced inferences. ***State v. Whalen***, 49 S.W.3d 181, 184 (Mo. banc 2001). This same standard of review applies when this Court reviews a motion for a judgment of acquittal. ***Botts***, 151 S.W.3d at 375.

At trial, Appellant Luis Zetina-Torres moved for judgment of acquittal at the close of the evidence, and the motion was overruled (Tr. 322-23; LF 14-15). He filed a motion for a new trial, which included allegations that the trial court erred when it overruled his motions for judgment of acquittal (LF 37-38). This issue is properly preserved for appeal. ***Rule 29.11***.

Facts

Mr. Zetina-Torres was indicted for trafficking in the first degree, § 195.222.8(2) (LF 5), but he was convicted of trafficking in the second degree, § 195.223.9, in his first jury trial.[5] ***State v. Zetina-Torres***, 400 S.W.3d 343, 346 (Mo. App. W.D. 2013). The Court of Appeals reversed Mr. Zetina-Torres'

[5] First-degree trafficking requires a person to "distribute, deliver, manufacture, or produce" (or attempt to) more than thirty grams of methamphetamine.

conviction because of a discovery violation by the state. ***Id***. at 357. Shortly thereafter, the Court of Appeals reversed the conviction of Roberto Maldonado, Zetina-Torres' co-defendant. ***State v. Maldonado-Echieverra***, 398 S.W.3d 61 (Mo. App. W.D. 2013).

Maldonado was convicted of second-degree trafficking after a bench trial. ***Id.*** at 64. The trial court noted that it found nothing directly tying Maldonado to the methamphetamine, but the GPS was completely over on his side of the truck near the end of the window. ***Id.*** Maldonado and Zetina-Torres gave inconsistent statements about their destination, the purpose of the trip, and the length of their acquaintance. ***Id.*** The court found it unreasonable that these men would know each other for three to twelve months and not be added to each other's cell phone, but would be trusted to transport $43,000 worth of methamphetamine.

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§ 195.222.8. If the quantity is ninety grams or more, it is a class A felony and the sentence must be served without probation or parole. ***§ 195.222.8(2).*** Second-degree trafficking, as relevant here, requires that a person possess or have under his control at least thirty grams of methamphetamine. ***§ 195.223.9***. If the quantity is ninety grams or more but less than four hundred fifty grams, the person is guilty of a class A felony. ***§ 195.223.9(2)***. *See* Appellant's Appendix at A-15.

Id. Therefore, the trial court found Maldonado guilty of acting together with Zetina-Torres to possess the methamphetamine. ***Id.***

On direct appeal, Maldonado's conviction was reversed for insufficient evidence. ***Id.*** at 67. The appellate court analyzed the case as a "joint possession case" and found there was insufficient evidence of additional incriminating circumstances to support an inference that Maldonado had knowledge of and control over the methamphetamine. ***Id.*** at 67-68.

About ten months after the reversal of Maldonado's conviction for insufficient evidence, Mr. Zetina-Torres' second trial was held. On retrial, no amended charge was filed (LF 1-2; 7/22/13 Tr. 2-4; 8/5/13 Tr. 2-3), but the venire was informed before *voir dire* that Mr. Zetina-Torres was charged with trafficking in the second degree (Tr. 17).[6]

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[6] The indictment filed in 2010 alleged that Mr. Zetina-Torres "acting either alone or knowingly in concert with another person or persons, transported a controlled substance on I-70…, and such conduct was a substantial step toward the commission of the crime of trafficking in the first degree: methamphetamine, by attempting to distribute to Sedalia, Missouri 90 grams or more of … methamphetamine, a controlled substance, and was done for the purpose of committing such trafficking in the first degree" (LF 5).

The state submitted its case to the jury on a theory of accomplice liability. ***State v. Zetina-Torres***, WD77424 *6 (Mo. App. W.D. June 9, 2015). The Court below noted that the state used the accomplice liability theory to introduce at trial Maldonado's hearsay statements to Trooper McGinnis. ***Id.*** Maldonado's statements were admitted as "statements by the co-conspirator." ***Id.*** (Tr. 174-175). Trooper McGinnis testified that Maldonado's statements were contrary to what Zetina-Torres told him about the destination and purpose of their trip (Tr. 174). Maldonado told the trooper that he had known Zetina-Torres for less time than Zetina-Torres reported (Tr. 175).

At the close of all evidence, Zetina-Torres' motion for judgment of acquittal was overruled (Tr. 322-323; LF 14-15). The jury was instructed:

INSTRUCTION NO. 6

A person is responsible for his own conduct and he is also responsible for the conduct of another person in committing an offense if he acts with the other person with the common purpose of committing that offense or if, for the purpose of committing that offense, he aids or encourages the other person in committing it.

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about July 16, 2010, in the County of Saline,

State of Missouri, the defendant or Roberto Maldonado-Echeverria possessed 90 grams or more of any material or mixture containing any quantity of methamphetamine, a controlled substance, and

Second, that defendant knew or was aware of the presence and nature of the controlled substance,

then you are instructed that the offense of trafficking in the second degree has occurred, and if you further find and believe from the evidence beyond a reasonable doubt:

Third, that with the purpose of promoting or furthering the commission of that trafficking in the second degree, the defendant acted together with or aided Roberto Maldonado-Echeverria in committing that offense,

then you will find the defendant guilty of trafficking in the second degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

As used in this instruction, the term "possessed" means either actual or constructive possession of the substance. A person has

> actual possession if he has the substance on his person or within easy reach and convenient control. A person who is not in actual possession has constructive possession if he has the power and the intention at a given time to exercise dominion or control over the substance either directly or through another person or persons. Possession may also be sole or joint. If one person alone has possession of a substance, possession is sole. If two or more persons share possession of a substance, possession is joint.

(LF 22).

After nearly two hours of deliberation, the jury found Zetina-Torres guilty (Tr. 365-371; LF 25-31). On direct appeal to the Missouri Court of Appeals, his conviction was reversed for the state's failure to prove the third element contained in the verdict director – that Zetina-Torres "acted together with or aided Roberto Maldonado-Echeverria in committing that offense." ***Zetina-Torres***, WD77424 at *3-4, 6-7. The appellate court held that "based on the unique circumstances of this case, there was insufficient evidence to convict Zetina-Torres given the specific verdict director that was submitted to the jury." ***Id.*** at *4.

In its application for transfer, Respondent presents the questions: 1) whether the evidence was insufficient because it did not conform to the manner

in which the jury was instructed; and 2) whether transfer is warranted because the holding in the present case conflicts with previous decisions distinguishing between sufficiency of the evidence and an instructional error.

Sufficiency of the Evidence

In ***Jackson v. Virginia***, 443 U.S. 307, 318 (1979), the United States Supreme Court stated that the critical inquiry in reviewing the sufficiency of the evidence to support a criminal conviction is both to determine whether the jury was properly instructed, and whether the evidence of record could reasonably support a finding of guilty beyond a reasonable doubt. The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ***Id.***

Juries make findings on the elements of a crime by following the instructions of law given them by the court. They are instructed that they are to follow the law as the court gives it to them in the instructions (LF 16, 19). ***MAI-CR 3d 302.01 & 302.03***. Therefore, on review of the sufficiency of the evidence to support a conviction, this Court reviews the verdict-directing jury instruction to determine whether, in light of the evidence most favorable to the state, any rational fact-finder could have found the essential elements of the crime beyond a reasonable doubt. ***State v. Miller***, 372 S.W.3d 455, 463 (Mo. banc 2012). It is in

this way that jury instructions play a role in a court's review of whether the evidence submitted at trial proved beyond a reasonable doubt all of the elements of the offense.

Respondent's Argument

Respondent alleges that the Court of Appeals reversed Zetina-Torres' conviction despite finding that there was sufficient evidence to support his conviction, and did so on the basis that the state's proof at trial did not conform to the instruction submitted to the jury (Respondent's Application for Transfer, p. 5). Respondent mischaracterizes the holding below. What the court held was that Zetina-Torres was charged with acting either alone or knowingly in concert with Maldonado, but the state proceeded at trial on the theory of accomplice liability. ***Zetina-Torres***, WD77424 at *6-7. Moreover, the state used the accomplice-liability theory to its advantage in arguing the admissibility of Maldonado's hearsay statements at trial as statements of a "co-conspirator." ***Id.*** at *6. By choosing to prosecute Zetina-Torres as Maldonado's accomplice, and instructing the jury to find him guilty only if they believed beyond a reasonable doubt that he "acted together with or aided" Maldonado, the state created the requirement that it prove that element of the offense. ***Id.*** at *6-7. The Court of Appeals found insufficient evidence that Zetina-Torres acted together with or

aided Maldonado in the commission of the offense and discharged him on that basis. ***Id.***

"Conflicting" Decisions

Respondent alleges that the Court of Appeals' decision in this case is in conflict with existing law (Resp. App. for Trans. p. 7). Respondent argues that in ***State v. Jones***, 296 S.W.3d 506 (Mo. App. E.D. 2009), the court declined to review a claim that the evidence was insufficient to support the defendant's robbery and armed criminal action convictions because the jury instructions improperly submitted the question of accomplice liability (Resp. App. for Trans. p. 7).

The defendant in ***Jones***, like Mr. Zetina-Torres, raised separate claims of insufficient evidence and plain error in the jury instructions, and the court addressed them separately. ***Jones***, 296 S.W.3d at 509-510. The court found that there was sufficient evidence to prove that Jones acted as an accomplice in committing the crimes he was convicted of because he drove the "getaway" truck after his co-defendant robbed the victim at gunpoint. ***Id.*** at 510. When police followed the truck, Jones drove at a high rate of speed, slowing down only so his co-defendant could throw his gun out the window. ***Id.*** When he was finally caught by the police and before they asked him any questions, Jones stated, "I didn't rob anybody." ***Id.*** This evidence was held to be sufficient to support his conviction as the robber's accomplice. ***Id.***

The ***Jones*** court next considered, and rejected, the claim of plain error in the jury instructions. ***Id.*** at 510-511. Although the verdict-directing instructions failed to comply with this Court's approved instruction on accomplice liability, a separate instruction describing accomplice liability was given. ***Id.*** The court found there was no manifest injustice because Jones could not show that the instructional error affected the jury's verdict. ***Id.*** at 512. The separate instruction properly set out the accomplice liability instruction, and the court found that the jury had a proper understanding of what it needed to believe in order to find Jones guilty. ***Id.*** at 512-513.

Contrary to the implication in the state's application for transfer, ***Jones*** did not "decline to find insufficient evidence based on instructional error" (Resp. App. for Trans. p. 7). It analyzed Jones' claims of error separately and found sufficient evidence to support his convictions under the unique facts of his case. It also found no instructional error, again based on the unique facts of the case.

Likewise, the holding in ***State v. Cates***, 3 S.W.3d 369 (Mo. App. S.D. 1999), also cited by Respondent in the transfer application, has no bearing on this case. Cates was convicted of attempted manufacture of methamphetamine and raised both sufficiency of the evidence and instructional error on appeal. ***Id.*** at 370. The evidence at trial was that Cates accepted two hundred dollars to allow Guess and Robertson to manufacture methamphetamine in his apartment. ***Id.*** While

his friends cooked the drug, Cates visited his neighbor, who later became sick from the fumes emanating from Cates' apartment. ***Id.*** The neighbor's roommate called the police, who found Guess, Robertson, and Cates loading methamphetamine-manufacturing materials into Cates' car. ***Id.***

On appeal, Cates claimed plain error in the court's submission of a verdict-directing instruction that ascribed the mental state of "recklessly" to Guess and Robertson rather than "knowingly" with respect to their attempted manufacture of methamphetamine. ***Id.*** at 371. But the mental state of Guess and Robertson in attempting to manufacture the drug was not in dispute at trial. ***Id.*** at 372. Cates' defense was that he was not involved as an accomplice in making the drug; his defense was *not* that Guess and Robertson were not culpable. ***Id.*** Because Cates implicitly conceded that Guess and Robertson were knowing participants in the attempted manufacture of methamphetamine, there was no manifest injustice or miscarriage of justice resulting from the instructional error. ***Id.***

As for Cates' claim of insufficient evidence to support the verdict, he claimed that there was insufficient evidence that Guess and Robertson acted "recklessly" in attempting to manufacture methamphetamine. ***Id.*** at 373. The court acknowledged that recklessly attempting to manufacture methamphetamine is not a crime, so even if evidence of such were available, it would be useless for the state to present such evidence because it would not have

constituted a crime. ***Id.*** The court characterized Cates' sufficiency claim as "a circular attack on the verdict director," which was raised in his first point and rejected as described above. ***Id.***

Zetina-Torres' claims of insufficient evidence and instructional error do not match the facts of ***Cates***. While the ***Cates*** court upheld the sufficiency of the evidence to support the conviction despite a verdict director that submitted an incorrect mental state, that was the result, in part, because the mental state was not in serious dispute at trial. ***Id.*** at 372. By contrast, whether Zetina-Torres or Maldonado possessed the methamphetamine was a disputed element at trial, as was whether they were acting together to commit the offense of trafficking. The appellate court's finding of insufficient evidence had nothing to do with the instructional error alleged in the direct appeal; in fact, the court specifically noted that it did not address the instructional error because the sufficiency claim was dispositive. ***Zetina-Torres***, WD77424 at *7, n. 2. Under the unique facts of the case, including Maldonado's acquittal as an "aider and abettor" in this offense, the appellate court found insufficient evidence from which a reasonable fact finder could find beyond a reasonable doubt that Zetina-Torres acted together with or aided Maldonado in committing trafficking in the second degree. ***Id.*** at *6-7.

The other cases cited by Respondent in its application to this Court for transfer are likewise distinguishable. The court in ***State v. Thompson*** did not discharge the defendant upon finding error in an erroneous jury instruction because discharge is not the proper remedy for such error. 112 S.W.3d 57 (Mo. App. W.D. 2003). The Court of Appeals did not find instructional error in Zetina-Torres' case. The court found insufficient evidence, and discharge was the proper remedy.

Respondent cites ***State v. Johnson***, 316 S.W.3d 491 (Mo. App. W.D. 2010) for the principle that "the question of the sufficiency of the evidence arises before the case is submitted to the jury," and implies that how the jury is instructed should not be a consideration in making a sufficiency of the evidence determination (Resp. App. for Trans. p. 10). Yet even the court in ***Johnson*** analyzed the verdict-directing instruction in determining whether the evidence presented at trial was sufficient to support the jury's verdict. ***Id.*** at 496-497. The Court of Appeals' decision below does not conflict with prior decisions of the courts of this state regarding sufficiency of the evidence.

Trafficking in the second degree

§ 195.223.9 provides that a person commits the crime of trafficking drugs in the second degree if he possesses or has under his control more than thirty grams of methamphetamine, its salts, isomers and salts, or its isomers. If the

quantity of this substance is ninety grams or more, but less than four hundred fifty grams, the crime is a class A felony. ***Id***.[7]

Section 195.010(34), provides that the terms "possessed" and "possessing a controlled substance" mean

> [A] person, with the knowledge of the presence and nature of a substance, has actual or constructive possession of the substance. A person has actual possession if he has the substance on his person or within easy reach and convenient control. A person who, although not in actual possession, has the power and the intention at a given time to exercise dominion or control over the substance either directly or through another person or persons is in constructive possession of it. Possession may also be sole or joint. If one person alone has possession of a substance possession is sole. If two or more persons share possession of a substance, possession is joint.

Possession

Neither Zetina-Torres nor Maldonado actually possessed the methamphetamine; it was hidden under the bed liner of the truck, and thus was not on their person or within easy reach and convenient control. ***§ 195.010(34), RSMo Supp. 2009***. Where actual possession is not present, the state must prove

[7] The methamphetamine found here weighed 438.74 grams (Tr. 177-78, 201, 203, 293-95, 298, 300).

constructive possession. ***State v. Purlee***, 839 S.W.2d 584, 587 (Mo. banc 1992). A person has constructive possession of a substance when he has the power and the intention at a given time to exercise dominion or control over the substance either directly or through another person or persons. ***State v. Metcalf***, 182 S.W.3d 272, 274-75 (Mo. App. E.D. 2006). *Also see*, ***§ 195.010(34).***

Exclusive possession of the premises where drugs are found raises an inference of possession and control. ***State v. Withrow***, 8 S.W.3d 75, 80 (Mo. banc 1999). Since this is a case of joint possession of the truck, further evidence was necessary to connect Zetina-Torres to the methamphetamine; there must be more evidence than just presence in a shared vehicle for Zetina-Torres to "possess" the drugs. ***State v. Yarber***, 5 S.W.3d 592, 594 (Mo. App. S.D. 1999). Proximity to the contraband alone, even as to a substance in plain sight, does not tend to prove ownership or possession as among several persons who share the premises. ***State v. Bowyer***, 693 S.W.2d 845, 847 (Mo. App. W.D. 1985).

When a person is present where drugs are found, but does not have exclusive use or possession of that place, it may not be inferred that the person had knowledge of the presence of the drugs or had control over them, so no submissible case is made. ***State v. West***, 21 S.W.3d 59, 63 (Mo. App. W.D. 2000). Since there was joint control over the place where the drugs were found, the state was required to present evidence of some incriminating circumstance that raised

the inference of Zetina-Torres' knowledge and control over the substance. ***Id***. "Such evidence may include statements or actions indicating consciousness of guilt, routine access to the place where the drugs were found, commingling of the drugs with the defendant's personal belongings, a large quantity of drugs, or the drugs were in plain view." ***State v. Driskell***, 167 S.W.3d 267, 269 (Mo. App. W.D. 2005).

The verdict director submitted by the state required the state to prove beyond a reasonable doubt that: (1) Zetina-Torres *or* Maldonado possessed 90 grams or more of methamphetamine; (2) Zetina-Torres knew or was aware of the presence and nature of the methamphetamine; and, (3) with the purpose of promoting or furthering the commission of trafficking in the second degree, Zetina-Torres acted together with or aided Maldonado in committing that offense (LF 22).

In ***State v. Maldonado-Echeverria***, *supra*, the Court of Appeals addressed this same traffic stop and "substantially similar" evidence[8] and found that the evidence was insufficient to support Maldonado-Echeverria's conviction based on joint control of the truck. 398 S.W.3d at 65-68. The methamphetamine was not in plain view but was hidden in the left, rear corner of the bed liner of the truck; it was not in close proximity to or easily accessible by Maldonado in the

[8] ***State v. Zetina-Torres***, WD77424 at *3.

passenger seat inside the truck; Maldonado's personal belongings were not found with the drugs; he did not own the truck, and no evidence was presented on how long he had been in it, whether he frequently rode in it, or if he had ever been in it before. 398 S.W.3d at 67.

In Zetina-Torres' trial, the methamphetamine was likewise hidden from his view, was not in close proximity to him or easily accessible by him from inside the truck, and was not found with his personal belongings. Both Zetina-Torres and Maldonado appeared nervous and avoided eye contact with Trooper McGinnis, and a strong odor of cologne-scented air freshener was coming from inside the truck (Tr. 163-165). Both men reported knowing each other for different amounts of time (Tr. 168-169, 175).

A single key was in the ignition, and the trooper testified that drug traffickers often use a single key because they do not want their house or personal keys passed off when they deliver the vehicle to another (Tr. 205). Zetina-Torres told McGinnis that he borrowed the truck from "Mardonio," a friend who was the registered owner of the truck (Tr. 163, 199, 217-218, 228-229, 241). It was later determined that Zetina-Torres and "Mardonio" were the same person (Tr. 254-257, 261, 284-288). Zetina-Torres' answers to McGinnis' questions seemed to be delayed as though he were trying to remember (Tr. 250).

Zetina-Torres gave McGinnis consent to search the truck for drugs and weapons (Tr. 172).

The most potentially incriminating factors linked to Zetina-Torres' knowledge and control over the methamphetamine found in his truck are that he lied about his ownership of the truck; he was driving the truck using only a single key; and he gave delayed answers to McGinnis' questions.

Delayed answers are, at worst, nothing more than another form of consciousness of guilt (such as looking out of the window and nervousness, which equally applied to Maldonado). This factor does not add weight to there being sufficient evidence of Zetina-Torres' knowledge of and control over the methamphetamine.

Possessing a single key to the truck also does not prove possession of the methamphetamine hidden under the truck bed lining. Although McGinnis testified that in his experience, drug traffickers often use only a single key because they do not want their house or personal keys passed off when they deliver the vehicle to another, that scenario would not apply here if, as the state also asserted, the truck belonged to Zetina-Torres. If the truck were indeed his, he would not be passing off his keys to another person, and this would therefore eliminate the single key as being evidence of his knowledge of the drugs or his intention to exercise dominion or control over them. On the other hand, if use of

a single key indicated that the truck was used for drug trafficking by multiple drivers, this might also indicate that Zetina-Torres did not have exclusive use or control of the vehicle and weighs against the inference that he would have knowledge of its contents. *See* ***State v. Ingram***, *infra*.

What this case really comes down to is whether evidence that Zetina-Torres owned the truck and lied about it was enough for the jury to conclude beyond a reasonable doubt that Zetina-Torres had knowledge of the presence and nature of the methamphetamine and the power and intention to exercise dominion or control over it. The mere fact that the driver of a vehicle is also an owner of the vehicle has been found not to be enough to support a conviction in a joint possession case. For instance, in ***Driskell***, *supra*, the defendant was convicted of two counts of possession of a controlled substance. 167 S.W.3d at 268. Driskell was sitting in the driver's seat of a parked car when he was approached by officers and arrested for an unrelated traffic violation. ***Id***. A search of the Department of Revenue records showed Driskell to be a *co-owner* of the vehicle. ***Id***. Officers searched the car and found a syringe, methamphetamine, and marijuana in the center console. ***Id***. The facts that Driskell was a co-owner of the vehicle and was also seated next to the closed console did not indicate that he was aware of the hidden contraband. ***Id***. at 269.

In ***State v. Johnson***, 81 S.W.3d 212 (Mo. App. S.D. 2002), the Southern District of the Court of Appeals found insufficient evidence existed that the defendant had knowledge of the presence of marijuana and control over it sufficient to support a conviction for drug possession with intent to distribute. Such was the ruling even though the defendant was nervous and had difficulty with his speech while speaking to the officer during the traffic stop that led to the search of the vehicle, and the *defendant had rented the vehicle*. ***Id.*** Approximately 38 pounds of marijuana were hidden from view inside factory voids of vehicle, including the ceiling, seat belt holes, jack storage area, and left rear panel of vehicle. ***Id.*** Two other occupants had access to the vehicle and there was no evidence of any discernible odor from marijuana. ***Id.***

In ***State v. Ingram***, 249 S.W.3d 892 (Mo. App. W.D. 2008), Officer Crum made a traffic stop of a vehicle that Ingram was driving with an acquaintance, Washington. ***Id***. at 894. *Ingram said that the car was hers*, although later evidence established that she merely used the car, as did others. ***Id***. at 894-95. After Washington was handcuffed, she asked for her purse. ***Id***. at 894. Officer Crum returned to Ingram's car and asked her to hand him the purse. ***Id***. Ingram picked up the contents of the purse that were scattered on the passenger-side floor, placed them in the purse, and handed the purse to the officer. ***Id***. Later, Officer Crum returned to Ingram's car and observed a small, pebble-like piece of

crack cocaine on the driver's seat where Ingram had been sitting. ***Id***. In addition, two rocks of crack cocaine were recovered from Washington's purse. ***Id***.

Ingram was charged with possession of the crack cocaine found on the driver's seat. ***Id.*** at 893-94. On appeal, Ingram contended that the evidence was insufficient to prove beyond a reasonable doubt that she knowingly possessed the rock of crack cocaine found in the vehicle. ***Id***. at 894. In reversing, the Court of Appeals held that because the evidence did not establish that Ingram had exclusive control of the car, there was insufficient evidence to show she actually possessed the small piece of crack found on the seat; the state was required to show – and failed to show – that Ingram had constructive possession of the cocaine. ***Ingram***, 249 S.W.3d at 895-96.

The jury here could have concluded that it was Zetina-Torres' truck and convicted him on that basis. But as the cases show, the mere fact that he owned the truck was not enough to prove his possession of the drugs when there is more than one person present when drugs are found. E.g., ***Driskell***, *supra*, ***Ingram***, *supra*. Zetina-Torres made no statements indicating consciousness of guilt. The drugs were not commingled with any of his belongings and were not in plain view. He was no more nervous than Maldonado, and he consented to a search of the truck.

Considering the totality of the circumstances, this Court should find that the evidence was insufficient to find that Zetina-Torres possessed the methamphetamine. And since the court of appeals has already found that the evidence was insufficient to prove that Maldonado possessed the same methamphetamine based on substantially similar evidence, ***Maldonado-Echeverria***, 398 S.W.3d at 66-68, the state failed to prove the first element of the verdict director – that "the defendant or Roberto Maldonado-Echeverria possessed" the methamphetamine (LF 22). For the same reasons, the state failed to prove the second element, that "defendant knew or was aware of the presence and nature of the controlled substance" (LF 22).

Additionally, the state failed to prove sufficient evidence from which the jury could find or reasonably infer the third element, "that with the purpose of promoting or furthering the commission of that trafficking in the second degree, the defendant acted together with or aided Roberto Maldonado-Echeverria in committing" trafficking (LF 22). Other than the fact that the two were in the truck together, there was no evidence that they acted in concert concerning the methamphetamine. There was no evidence that there was an agreement between the two men to transport the methamphetamine or that the drug had passed from one man to the other, or that one of the men even told the other that the drug was there. Although Trooper McGinnis testified that he seized both mens'

cell phones, there was no testimony that those phones contained evidence that they were acting together to commit trafficking (Tr. 180, 211). Even the text messages retrieved from the phones did not make any references to anything that could be reasonably inferred to deal with trafficking (Tr. 212-214).[9] Neither man made statements indicating their involvement in a criminal enterprise. The state failed to sustain the third element that it elected to prove.

In Zetina-Torres' first appeal, the appellate court held that because the verdict director was in the disjunctive – stating that Zetina-Torres was guilty of acting alone or in concert with another –it did not matter whether the state proved that he acted in concert with Maldonado since the jury could have determined that Zetina-Torres acted alone in possessing the methamphetamine. ***Zetina-Torres***, 400 S.W.3d at 359-60. In his second trial, while paragraph First was submitted in the disjunctive, paragraph Third did not allege that Zetina-Torres acted alone; it alleged that he acted together with or aided Maldonado in committing trafficking (LF 22). Under that instruction, the jury could not find

[9] Trooper McGinnis testified that the only "significance" to the text messages was that one contained the address to the Kansas City address that was listed on the GPS address, "7100 Longview Road," which was the home address listed for "Mardonio Cardova Benitez," later discovered to be Mr. Zetina-Torres (Tr. 199, 214, 285-288).

that Zetina-Torres acted alone in possessing the methamphetamine. As noted by the Court of Appeals below, "the State proceeded with a theory of accomplice liability on an 'accomplice' who had already been determined to be non-complicit. The State may not change its theory of criminal responsibility on appeal." ***Zetina-Torres***, WD77424 at *7. Where the act constituting the crime is specified in the verdict director, the state is held to proof of that act. ***State v. Jackson***, 896 S.W.2d 77, 82-83 (Mo. App. W.D. 1995). The state is required to prove the offense it charged, not the one it might have charged. ***State v. Miller***, 372 S.W.3d 455, 466-67 (Mo. banc 2012).

Additionally, the way the verdict director was submitted to the jury, it might have found that Zetina-Torres was guilty under an accessory liability theory, finding that the state proved that: (1) Maldonado possessed the methamphetamine; (2) Zetina-Torres knew or was aware of the presence and nature of the drug; and (3) Zetina-Torres acted together with or aided Maldonado in committing the offense of second-degree drug trafficking (LF 22). Yet there was no more evidence of Maldonado's knowledge and control of the drugs than there was of Zetina-Torres'. Because all elements must be submitted to the jury and proven beyond a reasonable doubt, ***Apprendi v. New Jersey***, 530 U.S. 466 (2000), and because the jury thus might have found Zetina-Torres guilty under a theory submitted by the state that was not proven beyond a reasonable

doubt (that the two men acted in concert), then this Court should find that the state failed to prove what it elected to prove to the jury. To do otherwise would risk that the jury found Zetina-Torres guilty based upon a theory unsupported by the evidence.

The evidence was insufficient to prove that Zetina-Torres possessed or knew or was aware of the presence of the methamphetamine hidden under the bed liner of the truck that he and Maldonado were in, or that Zetina-Torres acted together with or aided Maldonado in committing trafficking in the second degree. He should be discharged.

II.

The trial court plainly erred in giving Instruction No. 6, which alleged in Paragraph First that Roberto Maldonado-Echeverria possessed the methamphetamine, and which also alleged in Paragraph Third, that Zetina-Torres "acted together with or aided Roberto Maldonado-Echeverria in committing that offense," because there was no evidence to support either of these propositions, violating Zetina-Torres' rights to due process of law and a fair trial before a fair and properly-instructed jury, guaranteed by the 6th and 14th Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that Instruction No. 6 had the potential for misleading and confusing the jury because there was no evidence that Zetina-Torres "acted together with or aided Maldonado-Echeverria in committing" the offense of second degree trafficking, and nine months before his trial, the Court of Appeals found that there was insufficient evidence that Maldonado possessed the methamphetamine on substantially similar evidence. A manifest injustice has resulted because the jury was allowed to convict Zetina-Torres upon a theory that was unsupported by the evidence (that Maldonado possessed the methamphetamine, and Zetina Torres was guilty because he acted together with or aided Maldonado in the commission of that crime).

Facts

Instruction No. 6, the verdict director for trafficking in the second degree, submitted the following:

INSTRUCTION NO. 6

A person is responsible for his own conduct and he is also responsible for the conduct of another person in committing an offense if he acts with the other person with the common purpose of committing that offense or if, for the purpose of committing that offense, he aids or encourages the other person in committing it.

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about July 16, 2010, in the County of Saline, State of Missouri, the defendant or Roberto Maldonado-Echeverria possessed 90 grams or more of any material or mixture containing any quantity of methamphetamine, a controlled substance, and

Second, that defendant knew or was aware of the presence and nature of the controlled substance,

then you are instructed that the offense of trafficking in the second degree has occurred, and if you further find and believe from the evidence beyond a reasonable doubt:

Third, that with the purpose of promoting or furthering the commission of that trafficking in the second degree, the defendant acted together with or aided Roberto Maldonado-Echeverria in committing that offense,

then you will find the defendant guilty of trafficking in the second degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

As used in this instruction, the term "possessed" means either actual or constructive possession of the substance. A person has actual possession if he has the substance on his person or within easy reach and convenient control. A person who is not in actual possession has constructive possession if he has the power and the intention at a given time to exercise dominion or control over the substance either directly or through another person or persons. Possession may also be sole or joint. If one person alone has

possession of a substance, possession is sole. If two or more persons share possession of a substance, possession is joint.

(LF 22).

This submission was based on ***MAI-CR 3d 325.14*** as modified by ***MAI-CR 3d 304.04*** (LF 22).[10] The MAI-CR 3d 304.04 notes on use provide guidance on the use of the form to modify a verdict-directing instruction when a defendant's liability is based on his being an "aider and abettor." ***MAI-CR 3d 304.04, Notes on Use 2.*** The instruction should not be used when the evidence shows that the defendant, by his own conduct, committed all the elements of the offense and there is evidence that another person was involved. ***Id.***, Notes on Use 4 and 5(d). In such a case, the ordinary verdict director for the offense should be used. ***Id.***

Instruction 304.04 is used: 1) where the conduct elements are committed entirely by another person; 2) where the defendant and another person are joint actors in the commission of the offense; or 3) where it is not clear whether the conduct elements were committed by the defendant or another person. ***Id.***, Notes on Use 5. Instruction No. 6 here appears to have been modeled under either the second or third scenario.

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[10] Instruction No. 6 does not note that it includes modifications based on MAI-CR 3d 304.04, but does contain the language proposed by that instruction.

Standard of Review

Zetina-Torres concedes that he did not object to this instruction. Therefore, this point is not properly preserved for appeal. *See* ***Rule 28.03***. Nonetheless, this Court can still review his point for plain error. *See* ***State v. Reynolds***, 72 S.W.3d 301, 305 (Mo. App. S.D. 2002); ***State v. Derenzy***, 89 S.W.3d 472 (Mo. banc 2002). Unpreserved claims of plain error may still be reviewed under ***Rule 30.20*** if manifest injustice would otherwise occur. ***Derenzy***, 89 S.W.3d at 475.

Rule 30.20 provides, in pertinent part, that "plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." Zetina-Torres must show that the trial court's error so substantially violated his rights that manifest injustice or a miscarriage of justice would result if the error is left uncorrected. ***Reynolds***, 72 S.W.3d at 305. Plain error review of instructional error is warranted where an error so substantially affects the rights of the defendant that manifest injustice results if it is left uncorrected. ***Reynolds***, 72 S.W.3d at 305.

Analysis

For an instruction to be submitted, it "must be supported by substantial evidence and [the] reasonable inferences to be drawn therefrom." ***State v.***

Howard, 896 S.W.2d 471, 492 (Mo. App. S.D. 1995); *quoting*, ***State v. Daugherty***, 631 S.W.2d 637, 639 (Mo. 1982). A court can instruct a jury on alternative theories as long as each is supported by evidence. ***State v. Howard***, 896 S.W.2d at 492; *see also*, ***State v. Puig***, 37 S.W.3d 373, 377 (Mo. App. S.D. 2001). This Court has held that when a crime may be committed by any of several methods, disjunctive methods submitted in the verdict-directing instruction must each be supported by evidence. ***State v. Lusk***, 452 S.W.2d 219, 223 (Mo. 1970).

There was not substantial evidence from which a reasonable inference could be drawn that Maldonado possessed the methamphetamine. In fact, nine months before the trial below, the court of appeals reversed Maldonado's conviction for trafficking because the state failed to present evidence sufficient to support his conviction based on the two occupants' joint control of the truck during this same traffic stop. ***State v. Roberto Maldonado-Echeverria***, 398 S.W.3d 61 (Mo. App. W.D. 2013). In its decision below, the appellate court noted that the evidence presented in Zetina-Torres' case was "substantially similar to the evidence presented" at Maldonado's trial. ***State v. Zetina-Torres***, WD 77424 *3 (Mo. App. W.D. June 9, 2015). The portion of the disjunctive submission in Paragraph First submitting that Maldonado possessed the methamphetamine was not supported by the evidence. Moreover, the submission was in direct contradiction of the appellate court's finding that there was insufficient evidence

from which a reasonable fact finder could find beyond a reasonable doubt that Maldonado possessed the methamphetamine under substantially similar evidence as that presented at Zetina-Torres' trial. ***Id.*** at *2-3. The state should have been more careful in its submission of this offense to the jury at Zetina-Torres' second trial.[11]

Additionally, as discussed in Point I of this brief, there was insufficient evidence from which a reasonable fact finder could conclude that Zetina-Torres acted together with or aided Maldonado in possessing the methamphetamine as submitted in Paragraph Third. Thus, the jury was allowed to convict Zetina-Torres upon a theory that was unsupported by the evidence: that Maldonado possessed the methamphetamine, and Zetina-Torres was guilty because he acted together with or aided Maldonado in the commission of that crime.

An instruction that violates applicable Notes on Use constitutes error. ***State v. Isa***, 850 S.W.2d 876, 902 (Mo. banc 1993). By the time Mr. Zetina-Torres' case returned for its second trial, Maldonado was acquitted of possessing the

[11] Our criminal system is poorly served when a prosecutor stacks the deck in his favor. ***Bankhead v. State***, 182 S.W.3d 253, 258 (Mo. App. E.D. 2006) (state's use of factually-contradictory theories to secure convictions against three defendants in prosecutions for the same offenses arising out of the same event violated the principles of due process).

methamphetamine on "nearly identical" evidence as that produced at Zetina-Torres' trial. ***Zetina-Torres***, WD77424 at *6. Because there was insufficient evidence to submit that Maldonado committed the offense, there was no need to use MAI-CR 3d 304.04, and the ordinary verdict directing instruction for second-degree trafficking should have been used. ***MAI-CR 3d 304.04, Notes on Use 5(d).***

A defendant is prejudiced by an erroneous instruction where the potential exists for misleading or confusing the jury. ***Puig***, 37 S.W.3d at 378. Instruction No. 6 allowed Zetina-Torres to be convicted based upon a theory not supported by the evidence, and upon a theory of accomplice liability with an accomplice who was already determined to be non-complicit. ***Zetina-Torres***, WD77424 at *7. For example, if the jurors believed that Maldonado possessed the drugs hidden in the truck bed liner – even if they were not convinced beyond a reasonable doubt that Zetina-Torres had the power and intention to exercise dominion or control over the drugs – they could convict Zetina-Torres by finding that he was aware of the presence and nature of the drugs and acted together with or aided Maldonado by owning and driving the truck containing the drugs (LF 22). As discussed in Point I, Zetina-Torres' knowledge of the presence of the drugs, even had they been in plain view, would be insufficient evidence to convict him of possessing them if he had no intention to exercise dominion or control over the drugs. *See, e.g.,* ***State v. Bowyer***, 693 S.W.2d 845 (Mo. App. W.D. 1985)

(proximity to contraband, even in plain sight, does not prove ownership or possession as among several persons sharing premises); ***State v. West***, 21 S.W.3d 59 (Mo. App. W.D. 2000) (no inference of defendant's knowledge of presence of drugs or control over them when he does not have exclusive use or possession of location where drugs are found); ***State v. Johnson***, 81 S.W.3d 212 (Mo. App. S.D. 2002) (no inference defendant had knowledge of presence and control over marijuana found hidden in car he rented where two passengers had access to the vehicle). Instruction No. 6, submitting accomplice liability, prejudiced Zetina-Torres because the jury may have been adversely influenced by it. ***Isa***, 850 S.W.2d at 902.

In ***State v. Thompson***, 112 S.W.3d 57 (Mo. App. W.D. 2003), the defendant was convicted of first degree murder. Paragraph First of the verdict director stated that the jury could find the defendant guilty if it found "the defendant or other persons caused the death of [the victim] by striking him, kicking him and cutting his throat." ***Id***. at 66-67. Paragraph Fourth also required, among other things, that the jury find "the defendant aided or encouraged other persons in causing the death" of the victim. ***Id***.

In reversing, the Court of Appeals held that the state only presented evidence that showed the defendant *aided* others in carrying out the crime, but did not himself cause the death of the victim by striking and kicking him and

cutting his throat. ***Id***. at 68-71. There was no evidence that Thompson committed any of the conduct elements of first degree murder. ***Id.*** at 71. Rather, the evidence was that Thompson aided those who committed those acts by transporting the victim and his attackers from the location where the victim was beaten and kicked to the place where his throat was cut. ***Id.*** at 69. The court noted, "The basic principle applicable to the submission of instructions is that they should not be given if there is no evidence to support them. Instructions must be supported by substantial evidence and reasonable inferences to be drawn therefrom." ***Id.***, *quoting* ***Daugherty***, 631 S.W.2d at 639-640. The disjunctive submissions in Paragraph First alleging that Thompson committed the acts upon the victim were not supported by the evidence. ***Id.*** at 71. Thompson was prejudice by the improper instruction because all of the evidence was contrary to the submission that Thompson had any involvement as a principal or abettor in the act that was fatal to the victim. ***Id.*** at 71-72. His case was remanded for a new trial. ***Id.*** at 72.

In ***State v. Scott***, 689 S.W.2d 758 (Mo. App. E.D. 1985), the defendant was convicted of capital murder. Although the defendant was charged with "acting with another," all the evidence showed that defendant's companion killed the victim. ***Id***. at 760. The verdict director, however, disjunctively hypothesized "the defendant or [companion]" killed the victim. ***Id***. In reversing, the Eastern

District Court of Appeals found that there was no evidence to support a submission hypothesizing that the defendant killed the victim, and he was prejudiced by the state's speculative argument that if the companion had testified at trial, he surely would have accused the defendant of the shooting. ***Id***.

In ***State v. Wilhelm***, 774 S.W.2d 512 (Mo. App. W.D. 1989), the defendant was convicted of assault in the first degree and assault in the second degree for shooting two people. Paragraph First of the verdict directors allowed the jury to find that "the defendant or another person" shot each victim. ***Id***. at 516-17. Paragraph Second also required, among other things, that the jury find that "the defendant acted together with or aided another person in committing" those offenses. ***Id***. In reversing, the Western District Court of Appeals found that the disjunctive submission allowing the jury to find that either defendant *or* another shot the victims was error because there was insufficient evidence that another shot them. ***Id***. at 517. Further, there was insufficient evidence to show that the defendant had an accomplice in the commission of the crimes. ***Id***. To the contrary, the state's evidence showed that the defendant was unsuccessful in his attempt to obtain the assistance of an accomplice, so he shot the victims himself. ***Id***. The defendant was prejudiced because the instructions allowed the jury to find him guilty even if they did not find that he committed the elements of

assault, and there was insufficient evidence to support the charge that he acted together with or aided another in committing the offenses. ***Id***.

Similarly here, under Instruction No. 6, the jury could have found that Maldonado possessed the methamphetamine and that Zetina-Torres was guilty because he acted together with or aided Maldonado in that possession, even though there was insufficient evidence to support both of those propositions. Because there was insufficient evidence to support these findings, a manifest injustice has resulted. This Court must reverse Zetina-Torres' conviction and remand for a new trial.

CONCLUSION

Because the evidence was insufficient to prove that Zetina-Torres possessed or knew or was aware of the presence of the methamphetamine hidden under the bed liner of the truck that he and Maldonado were in, or that Zetina-Torres acted together with or aided Maldonado in committing trafficking in the second degree, he should be discharged (Point I).

Because Instruction No. 6 allowed the jury to find that Maldonado possessed the methamphetamine and that Zetina-Torres was guilty because he acted together with or aided Maldonado in that possession, even though there was insufficient evidence to support both of those propositions, this Court must reverse Zetina-Torres' conviction and remand for a new trial (Point II).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Margaret M. Johnston, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Book Antiqua size 13 point font, which is no smaller than Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 11,051 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On this 7th day of October, 2015, electronic copies of Appellant's Brief and Appellant's Brief Appendix were placed for delivery through the Missouri e-Filing System to Dora A. Fichter, Assistant Attorney General, at Dora.Fichter@ago.mo.gov.

/s/ Margaret M. Johnston

Margaret M. Johnston