**No. SC89390**

---

IN THE

# Supreme Court of Missouri

---

**STATE OF MISSOURI,**

*Respondent*,

v.

**JAMIE AVERY,**

*Appellant*.

---

Appeal from the Webster County Circuit Court
Thirtieth Judicial Circuit
The Honorable John W. Sims, Judge

---

## SUBSTITUTE RESPONDENT'S BRIEF

---

**JEREMIAH W. (JAY) NIXON**
Attorney General

**SHAUN J MACKELPRANG**
Assistant Attorney General
Missouri Bar No. 49627

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

*Attorneys for Respondent*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Statutes**



**Constitutional Provisions**

## JURISDICTIONAL STATEMENT

This appeal is from convictions of voluntary manslaughter, § 565.023, RSMo 2000, and armed criminal action, § 571.015, RSMo 2000, obtained in the Webseter County Circuit Court, the Honorable John W. Sims presiding. For those offenses, appellant was sentenced to concurrent terms of fifteen years and thirty-five years in the Missouri Department of Corrections. After an opinion by the Court of Appeals, Southern District, this Court granted respondent's application for transfer pursuant to Rule 83.04; thus, this Court has jurisdiction. MO. CONST., Art. V, § 10.

## STATEMENT OF FACTS

Appellant, Jamie Avery, was charged in Webster County with committing murder in the second degree, § 565.021, RSMo 2000, and armed criminal action, § 571.015, RSMo 2000 (L.F. 9-10). On July 18, 2005, the case was tried before a jury (Tr. 7). The facts of appellant's crimes were as follows:

In late September or early October, 2000, appellant became involved in a romantic and intimate relationship with John Hamilton, and she moved in with him (Tr. 447-448, 452, 694-695). Shortly after she moved in with Mr. Hamilton, appellant became involved in a sexual relationship with Bruce Paris (Tr. 453, 458-459, 699). Appellant had been introduced to Mr. Paris by a friend, Regina Buckner (Tr. 451). Mr. Hamilton found out about appellant's relationship with Mr. Paris, and he told appellant that she could not see Mr. Paris or Ms. Buckner anymore, and that they were not welcome in Mr. Hamilton's home (Tr. 701).

At some point during these events, Mr. Paris invited Ms. Buckner to move back to Chicago with him (Tr. 454-455). When appellant heard about the plan to go to Chicago, she "perked up" and said that she wanted to go along (Tr. 454-455). Mr. Paris agreed and said, "that's fine let's go" (Tr. 455). Ms. Buckner and appellant packed some personal belongings, and they left with Mr. Paris (Tr. 456-457). They all drove to Mr. Paris's house in Pleasant Hope (Tr. 457). But later that night, when Ms. Buckner discovered appellant and Mr. Paris having sexual intercourse, Ms.

Buckner left and returned to her home (Tr. 458-459).

The next day, Ms. Buckner returned to Mr. Paris's home to obtain her belongings, and she confronted Mr. Paris and called him "a bunch of names" (Tr. 459-460). Ms. Buckner was upset, and, later, she told Michelle Morlan (Mr. Paris's occasional girlfriend) and Becky Gibbs about Mr. Paris's plan to move to Chicago with appellant (Tr. 460-461).

Later that day, Mr. Paris called Ms. Morlan; Mr. Paris asked Ms. Morlan to help him get appellant out of his house (Tr. 513). Mr. Paris no longer wanted appellant to go to Chicago with him (Tr. 516). Ms. Morlan and Mr. Paris met in Marshfield and then returned to his house (Tr. 514). When they arrived at Mr. Paris's house, appellant and some of Mr. Paris's friends (Chris Irick and his wife) were there (Tr. 514). Appellant ran up to Mr. Paris and told him that she had sold a van to Mr. Irick to finance their trip to Chicago (Tr. 514-515). Ms. Morlan told appellant that she was not going to Chicago with Mr. Paris, and that they would take her home (Tr. 517-518). Ms. Morlan then told appellant that she and Mr. Paris were "going to try and get back together and reconcile" (Tr. 518). Appellant became upset and she screamed and yelled (Tr. 518).

Mr. Paris and Ms. Morlan then drove appellant home, but on the way, they had to stop at a rock quarry so that appellant could vomit (Tr. 519). Appellant had been drinking alcoholic beverages that night, and she was intoxicated (Tr. 519-520).

While they drove, appellant was "highly upset," and she screamed, "threatening to kill [Mr. Paris], herself, and if she couldn't, she would find somebody to do it" (Tr. 522). Appellant said that "it was going to be for punishment for what he had done to her, and what every other man had done to her in her past, that he was going to pay for that" (Tr. 522).

At appellant's home, Ms. Morland helped appellant to the front porch (Tr. 522). Appellant was so intoxicated that "She was unable to stand on her own" (Tr. 522). Appellant could not find her keys, so Mr. Paris and Ms. Morlan left appellant on the front porch (Tr. 522, 525-526). (Appellant later told Mr. Hamilton that she had decided not to go with Mr. Paris to Chicago, because she "realized that she was going to lose the best thing [Mr. Hamilton] that she ever had" (Tr. 714-715).)

A couple of days after they dropped appellant off on the porch, Mr. Paris and Ms. Morlan went to North Carolina and stayed there for ten days (Tr. 526). Mr. Paris then returned to Missouri and went to Chicago alone (Tr. 527). Mr. Paris stayed in Chicago for about a month, and then he returned to Missouri in the first week of December (Tr. 462, 527). Mr. Paris stayed with his friend, Chris Irick (Tr. 462).

On December 5, 2000, appellant contacted Ms. Buckner and asked her to meet him (Tr. 462). Mr. Paris asked Ms. Buckner if she had seen appellant, and he told Ms. Buckner to contact appellant and have her "ride along" if appellant wanted to (Tr. 463). Mr. Paris did not explain exactly why he wanted to see appellant, but he

said that he had "some things I want to say to her" (Tr. 463).

The next day, December 6, 2000, Ms. Buckner found appellant at the Hickory House bar (Tr. 464). When appellant heard that Mr. Paris wanted to see her, appellant was livid and she yelled that she did not want to see him, and that he had "almost caused [her] life to go to hell" (Tr. 466). She also stated, "let him come to Hickory County, you let him come back, I've got guns waiting" (Tr. 466). The owner of the bar and a waitress heard appellant state that Mr. Hamilton had given her permission to "blow [Mr. Paris's] ass off" if he got near her (Tr. 675, 689). The waitress also heard appellant say she was going to kill Mr. Paris, and, with respect to that statement, appellant said, "I mean it. I will blow his head off" (Tr. 698).

After Ms. Buckner and appellant played darts and drank some beer (appellant drank seven to ten beers at the bar), they went to Mr. Hamilton's house and drank some mixed drinks (Parrot Bay coconut rum and pineapple juice) (Tr. 465, 467, 496). Eventually, Ms. Buckner decided to leave and meet Mr. Paris (Tr. 469). At first, appellant stated that she did not want to go, but she quickly changed her mind (Tr. 469). Appellant asked Ms. Buckner if she could take a gun with them; Ms. Buckner said "no" (Tr. 470).

They drove to a store where Mr. Paris was supposed to meet them, and they waited in the car for him (Tr. 471). When Ms. Buckner went inside to go to the restroom, Mr. Paris arrived and got into the passenger seat next to appellant (Tr.

471-472). Ms. Buckner returned to the car and the three then "drove around" (Tr. 473). They stopped at one point and bought some beer (Ms. Buckner bought a bottle of Peachtree schnapps), and appellant and Mr. Paris drank the beer (Tr. 474, 501). Ms. Buckner and Mr. Paris also smoked some marijuana (Tr. 474). As they drove around, Ms. Buckner observed that appellant and Mr. Paris were playful and flirtatious with each other; at one point, Mr. Paris grabbed appellant's breast (Tr. 475). Eventually they went to appellant's house (Tr. 476).

At appellant's home, Ms. Buckner called her friend, Becky Gibbs, to let her know that she was on her way over and would be there in a minute (Tr. 478-479). Ms. Buckner then asked appellant to drive her to her car, which was at a gas station (Tr. 480). Appellant appeared to be happy, and she drove Ms. Buckner to her car (Tr. 482). When Ms. Buckner got to her car, she told appellant that she would "meet them in a bit" (Tr. 482). They were all supposed to meet at the Hickory House bar later that evening (Tr. 480). Ms. Buckner then drove to Ms. Gibbs's home (Tr. 482).

At about 5:00 p.m. in the state of California (or about 7:00 p.m. in Missouri), Mr. Hamilton received a call from Ms. Gibbs (Tr. 703). After talking to Ms. Gibbs, Mr. Hamilton called appellant and confronted her about Mr. Paris being in Mr. Hamilton's car (Tr. 704). Mr. Hamilton was upset, and he asked two or three times, "what was Bruce [Paris] doing in my F-ing car?" (Tr. 704-705). Appellant told Mr. Hamilton that she had gone with Ms. Buckner to talk to Mr. Paris about "leaving

[them] alone" (Tr. 705). The call ended when Mr. Hamilton wanted to call Ms. Gibbs again to get more information (Tr. 705).

After talking to Ms. Gibbs again, Mr. Hamilton called appellant back and asked, "is he there, is he in my home?" (Tr. 708). Appellant said "no," but she explained that "He had been, but he was not at that time" (Tr. 709). Then, as Mr. Hamilton talked to appellant, he received another call from Ms. Gibbs (Tr. 709). Mr. Hamilton told appellant that he had another call from Ms. Gibbs, and that he needed to talk to her (Tr. 709). Appellant asked, "are you going to believe those two lying bitches or are you going to believe me?" (Tr. 709). Mr. Hamilton said he was "just trying to find out what the truth really was" (Tr. 709).

At about 7:30 p.m., Mr. Hamilton talked to appellant again on the telephone (Tr. 710-711). Mr. Hamilton knew that Mr. Paris had been in his home, and he was "very upset" (Tr. 711). Mr. Hamilton was not sure what to believe, and he was "trying to determine what [appellant's] state of mind, or what her feeling[s] were at the time" (Tr. 711). Mr. Hamilton asked appellant if she "still loved [him]" (Tr. 711). Appellant said "yes," but she asked if Mr. Hamilton wanted her to leave (Tr. 711). Mr. Hamilton said "no, but I'm trying to figure out what really happened" (Tr. 711). Appellant then asked, "do you want me to kill him?" (Tr. 711). Mr. Hamilton said, "God, no," and then he said, "I will deal with Bruce [Paris] when I get back home" (Tr. 711).

At 8:00 p.m., Mr. Paris called Ms. Morlan from appellant's home and briefly spoke to Ms. Morlan (Tr. 524). Ms. Morlan could hear a woman screaming in the background, and then the call got disconnected (Tr. 524). About fifteen to twenty minutes later, at about 8:20 p.m., Mr. Paris called Ms. Morlan again, and they had a conversation about exchanging a car title (Tr. 525). During this conversation, Mr. Paris referred to appellant as a "psycho bitch" (Tr. 534). Ms. Morlan asked Mr. Paris why he was back with appellant, and Mr. Paris said, "I've made my bed. I'll sleep in it" (Tr. 525). To make the second telephone call, Mr. Paris apparently left appellant's house and used a payphone (Tr. 534).

Mr. Paris then returned to appellant's house, and, at about 9:00 p.m., appellant shot and killed Mr. Paris under the influence of sudden passion (Tr. 226-229, 399, 414, 591, 712, 762, 814; State's Ex. P84).[1] At the time of the shooting, Mr. Paris was standing in or near the doorway of appellant's home (Tr. 242-243). The bullet passed through the victim's trachea and severed the victim's carotid artery and jugular vein (Tr. 639, 642). The victim probably died from the loss of blood within minutes (*see* Tr. 639-640, 651).

At 9:09 p.m. appellant called the Hickory County Sheriff's Department (Tr.

[1] Appellant gave varying accounts about the shooting. Given the verdict (voluntary manslaughter), the jury apparently credited appellant's statements wherein she said that Mr. Paris threatened her with violence and grabbed the gun.

226-227). Appellant was hysterical, and she said "I have shot an intruder" (Tr. 226-227). She then stated, "I shot him. He was coming through the door. I shot him with my boyfriend's gun." (Tr. 229).

The police arrived at the house by 9:17 p.m., and they found Mr. Paris dead and slumped in a sitting position against the open front door (Tr. 242-244, 333, 335, 338). There was a significant amount of blood in the doorway and outside on the porch (Tr. 340-341, 584). There was also blood on the carpet and the couch (Tr. 243, 345, 584). Mr. Paris had no pulse and was not breathing (Tr. 244).

When the police arrived, appellant was on the telephone, talking to Mr. Hamilton (Tr. 355, 712). Appellant had told Mr. Hamilton, "Oh my God I shot him" (Tr. 712). After the officers arrived, appellant repeatedly asked the officers if the intruder was dead, and, when asked, appellant lied and said that she did not know who the intruder was (Tr. 253, 281).

The police found a .38 caliber revolver sitting on the corner of the coffee table in the living room, and the revolver held three live rounds, one empty chamber, and one spent shell casing (Tr. 307, 347, 353-354). Another live cartridge was found on the carpet (Tr. 264). There were three beer bottles, three glasses, a can of pineapple juice and a bottle of Parrot Bay rum in the living room (Tr. 294, 298-299). In one of Mr. Paris's pockets the police found a picture of appellant (Tr. 263, 266). On the back of the photograph appellant had written "To Bruce, Love ya naked. Love always,

Jamie" (Tr. 328).

Sheriff Ray Tipton took appellant to the station, and appellant told him multiple times that she "killed him" (Tr. 257, 399). The sheriff advised appellant of the *Miranda* warnings, and appellant gave a statement (Tr. 402). Appellant then admitted that she knew Mr. Paris, and she said that he was her friend (Tr. 410). She said that she had been drinking at the Hickory House when Ms. Buckner came in, that they met Mr. Paris and drove around, and that she left Mr. Paris back at the Hickory House parking lot and went home (Tr. 410-413). Appellant said that she then grabbed her gun and took the dog for a walk (Tr. 414). She stated that while she was outside, she heard a noise, got scared, ran inside and failed to shut the door behind her (Tr. 414). She said that Mr. Paris entered the house, and that she pointed the gun at him (Tr. 414). Appellant stated that Mr. Paris told her to put the gun down or he would hurt her (Tr. 414). Appellant said she turned away, and that, as she did so, she pulled the trigger (Tr. 414). She said that she saw lots of blood and that it sounded like water (Tr. 415). She claimed that she tried to call Mr. Hamilton, and that she then called information to get the sheriff's department's telephone number (Tr. 415). Appellant claimed that she hid in the bathroom to wait for the police to arrive (Tr. 415). Appellant made a written statement about the murder, and in that statement, appellant described how Mr. Paris threatened to beat her and grabbed the gun immediately before she pulled away and pulled the trigger (State's

Ex. P85).[2]

Later that night, appellant was interviewed by Miles Parks of the Missouri State Highway Patrol (Tr. 582). Appellant told Officer Parks that she had drunk about eight beers that evening and that when Mr. Paris walked in the door, he said to put the gun down or he would "beat her ass" (Tr. 583). She said she was holding the gun in her left hand, and that Mr. Paris grabbed the gun with his right hand (Tr. 582, 591, 593).

In a second interview that night, appellant told Officer Parks that she had been shopping earlier in the day and had gone to the Hickory House bar to drink and play darts (Tr. 586-587). According to appellant, she, Mr. Paris, and Ms. Buckner got together that night and went to the Hickory House bar together (Tr. 587-588). Appellant stated that Ms. Buckner left the bar and said she would be back in a few minutes (Tr. 587). Appellant said that when Ms. Buckner did not return after a few minutes, she told Mr. Paris to leave, and that she went home (Tr. 588). Appellant stated that after she got home, she received a telephone call from Mr. Hamilton, and that he was upset with her because he had heard that Mr. Paris had been at the house (Tr. 588-589). Appellant also stated that she gave Mr. Paris one of her pictures and signed it, "Love you naked, love Jamie" (Tr. 589). With regard to the shooting,

---

[2] This written statement was published to the jury at the conclusion of Sheriff Tipton's testimony (Tr. 429).

appellant said that she knew it was Mr. Paris when he arrived in the front door (Tr. 590). Appellant also stated that they had had sex one time previously (Tr. 590). She said that Mr. Paris reached for the gun, she pulled back, and the gun went off (Tr. 591). She said she believed she had used her right hand (Tr. 593).

The next day, in an interview with Officer George Knowles of the Missouri State Highway Patrol, appellant was again advised of the *Miranda* warnings, and she stated that she had not been truthful with the other officers (Tr. 611, 616). She said that she knew who Mr. Paris was when he came to the house (Tr. 616). She also stated that they had had a prior sexual relationship (Tr. 617). This time she claimed that Mr. Paris had been an invited guest in her house, and that she asked him to leave but he refused (State's Ex. P84). She explained that she had asked him to leave because she had talked to her boyfriend, Mr. Hamilton, who was very upset that Mr. Paris was in the house (State's Ex. P84). When Mr. Paris would not leave, she said she went into her bedroom and got a handgun (State's Ex. P84). Mr. Paris then left, but appellant stated that when she later took the dog outside, she saw movement and Mr. Paris came back up to the house (State's Ex. P84). She then claimed that she pointed the gun at him and told him to leave (State's Ex. P84). She said that Mr. Paris told her to put the gun down, that he moved toward her, that she backed away, and that the gun fired (State's Ex. P84).

Appellant was held in the Webster County jail, and she shared a cell with

Jammie Seitz and Tanya Honeycutt (Tr. 757, 779, 790). Appellant spoke to Ms. Seitz and Ms. Honeycutt about the murder (Tr. 792, 794, 812-813). Appellant told Ms. Honeycutt that she had planned to get Mr. Paris to come to her house so that she could kill him (Tr. 812). Appellant said that the plan had worked, and she described how she had called 911, claimed to have shot an "intruder," and "made herself cry and act upset" (Tr. 812-813). Appellant told Ms. Honeycutt that the plan "went perfect" (Tr. 813). Appellant also stated that a waitress at the bar had overheard the plan, but that her attorney had some "dirt" on the waitress, and that they would get her statement discredited (Tr. 814). Appellant laughed and bragged about killing Mr. Paris, and she said that it was exciting and a thrill (Tr. 815). Appellant stated that she was sure she was going to get off (Tr. 815).

Two jailers heard a portion of this discussion over the jail monitoring system (Tr. 759). Appellant stated that she shot Mr. Paris in the jugular vein, and that blood came shooting out, that he gurgled on the blood, and that she just shut the door afterward (Tr. 762). Appellant was laughing as she told the story (Tr. 761-762, 781). Appellant also stated, "what do you do with a guy like that? What do you do, you just shoot him" (Tr. 761-762).

Appellant's trial began on July 18, 2005 (Tr. 7).[3] At trial, appellant did not

[3] This was appellant's second trial on these charges. Appellant was previously convicted of murder in the second degree and armed criminal action, but these

testify during the guilt phase, but she presented evidence that one of her hairs was found on the victim's hand, and that there was no gunshot residue found on her hands (Tr. 832, 839). She also presented testimony that Mr. Paris had a reputation for violence (Tr. 858). Appellant was found guilty of voluntary manslaughter and armed criminal action (Tr. 977).

In the penalty phase, Mr. Paris's brother testified about the impact of his brother's death on the family (Tr. 984-987). Appellant called four witnesses and testified on her own behalf (Tr. 987-1021). The jury recommended sentences of fifteen years for manslaughter and forty years for armed criminal action (Tr. 1040).

On October 4, 2005, appellant was sentenced to concurrent terms of fifteen years for manslaughter and thirty-five years for armed criminal action (Tr. 1052; L.F. 71-73). On October 6, 2005, appellant filed her notice of appeal (L.F. 75-76).

---

convictions were reversed due to instructional error. *State v. Avery*, 120 S.W.3d 196 (Mo. banc 2003).

## ARGUMENT

### I.

**The trial court did not err in submitting Instruction No. 6, the voluntary intoxication instruction (MAI-CR 3d 310.50).**

Appellant asserts in her first point that the trial court erred in submitting MAI-CR 3d 310.50, the voluntary intoxication instruction (App.Br. 20). She asserts that "there was no evidence that [she] was in an intoxicated condition," and she argues that she was prejudiced "because it likely confused the jury or misled them to believe that [she] admitted to some wrongdoing and was attempting to escape liability based on intoxication and that she was, in fact, intoxicated, which would negatively affect her credibility" (App.Br. 20).

But because there was substantial evidence to support an inference that appellant was voluntarily intoxicated, the submission of the instruction was proper, and the trial court did not err. Additionally, in arguing that she was prejudiced, appellant fundamentally misunderstands the purpose and effect of submitting the voluntary intoxication instruction to the jury. The instruction carried with it no suggestion that appellant had admitted wrongdoing, that appellant was attempting to escape liability based on her intoxication, or that appellant was, in fact, intoxicated; thus, the various bases for claiming prejudice simply do not exist.

**A. The standard of review**

"The giving or failure to give an instruction . . . in violation of this Rule 28.02 or any applicable Notes On Use shall constitute error, the error's prejudicial effect to be judicially determined . . . ." Rule 28.02(f); *see State v. Cooper*, 215 S.W.3d 123, 125 (Mo. banc 2007). "On claims of instructional error, '[a]n appellate court will reverse only if there is error in submitting an instruction and prejudice to the defendant.' " *State v. Forrest*, 183 S.W.3d 218, 229 (Mo. banc 2006). "MAI instructions are presumptively valid and, when applicable, must be given to the exclusion of other instructions." *Id*.

**B. Because there was substantial evidence giving rise to an inference that appellant was intoxicated, the voluntary intoxication instruction was properly submitted to appellant's jury**

Section 562.076, states, in part, that evidence of voluntary intoxication is not "admissible for the purpose of negating a mental state which is an element of the offense." § 562.076.3, RSMo 2000. Such evidence of voluntary intoxication "may be admissible when otherwise relevant on issues of conduct." *Id*. But to ensure that such evidence is not considered for the improper purpose of negating a culpable mental state, the statute provides: "In a trial by jury, the jury shall be so instructed when evidence that a person was in a voluntarily intoxicated or drugged condition has been received into evidence." *Id*.

Here, there was substantial evidence from which rational jurors might have

inferred that appellant was intoxicated at the time of the murder. For instance, Regina Buckner testified that on the afternoon before the shooting, appellant had three to four beers prior to Ms. Buckner arriving at the Hickory House bar, and that she then observed appellant drink four to six more beers over the course of an hour or an hour and a half (Tr. 465, 467).[4] After leaving the bar, Ms. Buckner testified that she and appellant went to appellant's house for "another drink" (Tr. 467). Ms. Buckner testified that they drank mixed drinks – rum and pineapple juice – at appellant's home (Tr. 468).[5] Then, after about an hour, Ms. Buckner and appellant

---

[4] Appellant asserts that Ms. Buckner "speculated" that appellant had four to six beers, but, in fact, while she indicated some uncertainty about the number, her testimony was that she "witness[ed]" appellant drink four to six beers (Tr. 465).

[5] Appellant asserts that Ms. Buckner "did not testify as to what [appellant] might have drunk" at her home (App.Br. 21). But the evidence gave rise to a fair inference that appellant drank rum and pineapple juice with Ms. Buckner. The two traveled together to appellant's home to have "another drink," the prosecutor asked Ms. Buckner what "you" were drinking (and "you" can be plural), and the police seized three glasses along with the rum bottle and pineapple-juice can (Tr. 294, 298-299, 467-468). It is also possible that appellant drank rum and pineapple juice later with Mr. Paris (thus accounting for the three glasses), but in either event, appellant drank at least one mixed drink.

went to meet Mr. Paris (whom they met at about 6:30 p.m.), and, while driving around with Mr. Paris, Ms. Buckner thought she recalled appellant having another beer (Tr. 468, 471, 474). Finally, in one of her statements to law enforcement, appellant said that she opened another beer after she returned home (State's Ex. P85) (Appellant's various out-of-court statements also confirmed that appellant drank a number of alcoholic beverages in the hours leading up to the murder (*see* Tr. 410-411, 582; State's Ex. P85).)

From this testimony rational jurors could have inferred (1) that between about 4:00 p.m. and 6:30 p.m.,[6] appellant drank six beers and at least one mixed drink; (2) that between about 2:30 p.m. and 4:00 p.m. (while at the bar), appellant also drank four beers; [7] (3) that appellant drank yet another beer after 6:30 p.m, while driving

---

[6] Ms. Buckner testified that they met Mr. Paris as late as about 6:30 pm., that it took them about 30 minutes to drive to the meeting place, that they spent about an hour at appellant's house, and that they spent as little as an hour at the bar (Tr. 467-468, 471). Thus, based on this testimony, Ms. Buckner would have arrived at the bar at about 4:00 p.m.

[7] In one of her statements to law enforcement, appellant confirmed that she arrived at the bar sometime after 2:00 p.m., and that she drank four beers before Ms. Buckner arrived (State's Ex. P85). It was probably at least 2:30 p.m. before appellant arrived at the bar, as she arrived home from shopping at about 2:00 p.m., spent

around with Mr. Paris and Ms. Buckner; and (4) that appellant drank a final beer at home, shortly before the murder (three beer bottles were seized at the scene, in addition to the items related to the mixed drinks (Tr. 294, 298-299)).

The murder occurred at about 9:00 p.m. (Tr. 226-227); thus, there was evidence that in the five hours prior to the murder (from 4:00 p.m. to 9:00 p.m.), appellant drank as many as eight beers and at least one mixed drink – a total of nine alcoholic beverages. Additionally, if appellant's first four beers are taken into account, then, in the six hours (approximately) prior to the murder, appellant drank as many as twelve beers and at least one mixed drink – a total of thirteen alcoholic beverages.

From this evidence, rational jurors could have reasonably inferred (and probably were inclined to infer) that appellant was intoxicated at the time of the murder. Moreover, the prosecutor suggested to the jury that appellant was intoxicated on the night of murder, or, as the prosecutor argued in closing, that appellant was "in the same frame of mind" as a previous night when appellant had been intoxicated (Tr. 900-901).

Accordingly, inasmuch as there was substantial evidence from which rational jurors might have reasonably inferred that appellant was intoxicated, and inasmuch

---

some time talking on the telephone and decorating her Christmas tree, and then decided to go to the bar (State's Ex. P85).

as the prosecutor relied on that evidence of intoxication in an attempt to partially explain why appellant would engage in the charged conduct, it was incumbent upon the trial court to instruct the jury as mandated by § 562.076. For, while it was proper to allow the jury to consider appellant's intoxication as it bore upon her "conduct," the trial court was under an affirmative obligation to ensure that the jury did not rely on such evidence to negate a mental state.

Very few cases discuss the quantum or quality of evidence that must be present before the voluntary intoxication instruction can be submitted to the jury. Citing a line of cases from the Court of Appeals – *State v. Bristow*, 190 S.W.3d 479 (Mo.App. S.D. 2006); *State v. Kehner*, 886 S.W.2d 130 (Mo.App. E.D. 1994); and *State v. James*, 869 S.W.2d 276 (Mo.App. E.D. 1994) – appellant argues that there must be evidence of alcohol-related "impairment" before the voluntary intoxication instruction can be submitted over a defendant's objection (App.Br. 25-30).[8] She then points out that no one testified that she was impaired (App.Br. 22, 30).

But this Court's precedents indicate that the evidence of intoxication can be minimal, and that it is not necessary to present evidence that the defendant exhibited signs of alcohol-related impairment. Indeed, this Court has upheld the submission of the instruction based upon less, or similar, evidence of voluntary

[8] Appellant also discusses the Court of Appeals opinion in her own case (App.Br. 30-33), but, of course, that opinion has no precedential value.

intoxication, and the Court has never premised the submission of the instruction upon evidence of alcohol-related "impairment." *See State v. Owsley*, 959 S.W.2d 789, 795 (Mo. banc 1997) (defendant said in his confession that he drank a pint and a half of gin before the murder); *State v. Taylor*, 944 S.W.2d 925, 936 (Mo. banc 1997) ("the evidence of intoxication was limited to the defendant's statement in a videotaped statement that he and his two associates 'had been 'ridin' around, drinking a little bit' when they decided to rob someone."). Accordingly, *Bristow*, *Kehner* and *James* conflict with this Court's precedents and should not be followed.

Additionally, of the three cases, only one – *Bristow* – actually analyzed MAI-CR 3d 310.50 as it is currently drafted. In *James* and *Kehner*, the former Notes On Use to the MAI expressly required evidence of intoxication-related impairment. In fact, the note stated, "Even though there is evidence of consumption of alcohol or drugs, if there is no evidence from which such impairment could be inferred, this instruction may not be given over the objection of the defendant." *See State v. Kehner*, 886 S.W.2d at 133. This language has since been removed from the Notes On Use, and now the instruction only requires "evidence of intoxication," without any reference to any degree of impairment. This change indicates not that impairment is still a requirement, but, rather, that impairment is no longer a requirement. Thus, instead of reviving the "impairment" requirement, the court in *Bristow* should have recognized that impairment was not required, and that the Note On Use had been

modified to bring the MAI into conformity with the substantive law as it is set forth in § 562.076, RSMo 2000. *See State v. Richardson*, 910 S.W2.d 795, 797 (Mo.App. E.D. 1995), *overruled on other grounds State v. Carson*, 941 S.W.2d 518 (Mo. banc 1997) (rejecting a claim that the voluntary intoxication instruction should not have been given absent evidence of "impairment," and pointing out that the old Note On Use had been changed to eliminate the impairment requirement in favor of "relevant evidence of voluntary intoxication"); *see also State v. Gary*, 913 S.W.2d 822, 828-829 n. 3 (Mo.App. E.D. 1995), *overruled on other grounds State v. Carson*, 941 S.W.2d 518 (Mo. banc 1997) (noting the revised Note On Use "eliminating the requirement of evidence to infer impairment").

In fact, given the purpose underlying the voluntary intoxication instruction, it makes sense to allow its liberal submission to the jury in any case where there is evidence which could lead the jury to believe, infer or conclude that the defendant was intoxicated. The purpose of the instruction is to ensure that the jury is properly instructed on a potentially counter-intuitive aspect of Missouri evidentiary law, namely, that drunkenness or intoxication is no excuse for making bad choices. This is a concept that many lay people will not necessarily understand. Many people commonly think that intoxication is something that impairs judgment and, thus, diminishes culpability. But, while intoxication certainly does impair judgment and affect conduct, Missouri has elected not to allow intoxication to negate a culpable

mental state. Accordingly, if there is any risk that a jury might infer or believe, or even speculate, that a defendant was intoxicated, any consideration along those lines must be properly channeled and brought in line with Missouri law. That is the purpose of the instruction. *See generally State v. Johnson*, 207 S.W.3d 24, 44 (Mo. banc 2006) ("Given that this evidence [of drugs and alcohol use] was presented, however, the trial court did not err, plainly or otherwise, in providing an instruction to clarify the jury's consideration of that evidence.").

Appellant points out that in *State v. Taylor*, the instruction was proper because the defendant stated that he was "nervous and drinking," and that this caused the gun to discharge accidentally (App.Br. 31). Thus, in *Taylor*, the Court stated, "Because evidence of intoxication had been submitted as a potential explanation for the shooting, the trial court submitted this instruction so that the evidence would not be improperly used to negate Taylor's mental intent." 944 S.W.2d at 936.

While it is true that the defendant in *Taylor* attempted to escape liability by relying on the fact that he was voluntarily intoxicated, that circumstance does not change the fact that *Taylor* upheld the submission of the instruction based on very little evidence of intoxication, and no evidence of actual impairment. In other words, in *Taylor*, the bare possibility that the defendant was intoxicated – even absent any substantial evidence of that intoxication – was sufficient to trigger the need for the voluntary intoxication instruction. And if such minimal evidence is sufficient to

warrant the instruction – "so that the evidence would not be improperly used to negate [the defendant's] mental state" – then the extensive evidence of alcohol consumption in appellant's case was also sufficient to trigger the need for the voluntary intoxication instruction.

In short, the relevant consideration is not necessarily whether the defendant has attempted to rely on her voluntary intoxication to escape liability, whether the defendant was grossly intoxicated, or whether there was evidence of alcohol-related impairment. Any one of these circumstances would certainly warrant the submission of the instruction, but the submission of the instruction simply cannot be limited to these circumstances. Rather, the relevant consideration must be whether there is a possibility that the jury will infer or believe, based on even slim evidence of intoxication, that the defendant was intoxicated; for, if there is a basis for the jury to infer intoxication, then there is a distinct possibility that the jury will misuse that evidence to incorrectly negate culpability if it is not properly instructed.

This comports with Missouri's substantive law, as § 562.076 does not require any particular degree of intoxication or any evidence of alcohol-related impairment. Instead, it merely states that if there is evidence of "intoxication," the jury shall be instructed that such evidence cannot negate a mental state. Thus, in any case where there is evidence from which rational jurors could infer that a defendant is "in a voluntarily intoxicated . . . condition," the trial judge must submit the voluntary

intoxication instruction.

Appellant argues that "if the State was so worried that such an inference might unreasonably be made by jurors, then it should not have introduced evidence regarding what and how much Ms. Avery had been drinking" (App.Br. 33). But this argument must be rejected. The state was entitled to present all relevant evidence surrounding the murder, including evidence that bore upon appellant's judgment and conduct, and, along with the presentation of that evidence, the state was entitled to have the jury properly instructed on how to consider that evidence. To suggest that the state can only have the jury properly instructed on the issue of voluntary intoxication if the evidence of intoxication is submitted by the defense is an untenable and unfair argument. The trial court did not err in submitting the voluntary intoxication instruction in this case.

**C. Because the voluntary intoxication instruction neither misleads the jury nor assumes any fact as true, a liberal rule allowing its submission to the jury will not prejudice defendants**

Appellant also argues that he was prejudiced by the voluntary intoxication instruction. He argues that "As in *Bristow*, *James* and *Kehner*, it was likely that the jury was confused or misled because [appellant] did not attempt to defend the charges against her by arguing she was intoxicated" (App.Br. 33). Thus, appellant argues that "the jury was led to believe two things: (1) that the defendant was

attempting to escape liability based on intoxication, i.e., defendant implicitly admitted some wrongdoing, and (2) that defendant was, in fact, intoxicated which would negatively affect the defendant's credibility, i.e., the key issue at trial" (App.Br. 33-34). But these arguments are not well taken, and they reveal a fundamental misunderstanding about the purpose and effect of submitting the voluntary intoxication instruction to the jury.

The submission of MAI-CR 3d 310.50, alone, does not carry with it any suggestion that the defendant is attempting to escape liability based on intoxication, or that the defendant was, in fact, intoxicated. Indeed, while the instruction could certainly be submitted to counter such claims when they are made by the defendant (as in *Taylor*), the instruction is designed to instruct the jury on the law generally, in any case where there is evidence that the defendant was in a voluntarily intoxicated condition. In other words, the instruction simply provides guidance on a question of Missouri evidentiary law – i.e., that voluntary intoxication does not relieve a person of responsibility.

To suggest, as did the Court of Appeals, that the instruction also informs the jury that the defendant is attempting to rely on voluntary intoxication to excuse her actions, is to suggest that the instruction leads the jury to decide the case based on something other than the evidence presented to it. Indeed, unless the defendant testifies to that effect (or makes pre-trial statements along those lines), or unless

defense counsel makes such arguments in closing, it should not be concluded that the jury will imagine – in the absence of evidence or argument – that the defendant is relying on such a "defense."

In fact, MAI-CR 3d 310.50 is wholly independent from any other instruction, and it is not tied to any particular defense. *See State v. Ervin*, 848 S.W.2d 476, 483 (Mo. banc 1993) ("MAI-CR3d 310.50 does not purport to be connected to any other instruction. It stands by itself as a comment on the evidence of intoxication."). As discussed above, the instruction simply seeks to insure that the jury will not erroneously conclude that evidence of voluntary intoxication is relevant to determining whether an actor had the requisite mental state. Additionally, the instruction does not suggest that the defendant was, in fact, intoxicated; rather, the instruction merely instructs the jury on how to consider evidence that gives rise to an inference or conclusion that the defendant is intoxicated.

In short, the effect of appellant's argument is to suggest that the voluntary intoxication instruction should only be given in those cases where the defendant actually relies on his or her intoxicated condition to excuse his or her conduct. For if the defendant does not rely on such a "defense," then the prejudice identified by appellant will arise even if there is substantial evidence of gross intoxication (along with evidence of impairment). *Cf. State v. Gateley*, 907 S.W.2d 212, 216-219 (Mo.App. S.D. 1995) (where the defendant attempted to escape liability based on his voluntary

intoxication, the error in submitting the instruction was harmless).[9]

**D. Conclusion**

In sum, because there was evidence of substantial alcohol consumption in appellant's case, and because a rational juror could have reasonably concluded that appellant was intoxicated, the trial court was obligated to properly instruct the jury on the law. Indeed, in any case where there is some relevant evidence giving rise to an inference of intoxication, the trial court should be allowed to submit the instruction and ensure that the defendant's jury is properly instructed.

Moreover, the instruction should be submitted liberally, as there is little or no possibility of prejudice flowing from the instruction. The instruction does not mislead the jury, and it does not assume any fact as true; rather, it simply instructs the jury on a principle of evidentiary law. Finally, inasmuch as the Court of Appeals in *Bristow* departed from the law and injected an additional evidentiary requirement into the law (evidence of "impairment"), *Bristow* should not be followed. This point should be denied.

---

[9] The *Gateley* opinion analyzed the question under the old MAI that required evidence of "impairment." 907 S.W.2d at 217.

## II.

**The trial court did not plainly err in refusing to admit evidence that Mr. Paris, the murder victim, was a registered sex offender.**

In his second point, appellant asserts that the trial court erred in sustaining the state's objection to the admission of evidence that Mr. Paris, the murder victim, was a registered sex offender (App.Br. 36). Appellant argues that such evidence was admissible to demonstrate whether the victim was the initial aggressor (appellant claimed self-defense at trial) (App.Br. 36). Additionally, for the first time, appellant argues that the evidence also should have been admitted to rebut the State's character evidence that Mr. Paris was a "good guy" (App.Br. 36).

### A. Preservation

Prior to the testimony of defense witness Brenda Evans, the parties discussed whether appellant would be allowed to introduce the fact that appellant was a registered sex offender (Tr. 846). (Ms. Evans was one of Mr. Paris's former girlfriends (Tr. 846).) Appellant stated that she wanted to introduce this evidence to demonstrate that Mr. Paris was the initial aggressor (Tr. 846-849). The trial court denied appellant's request (Tr. 851). The court ruled that the evidence was not admissible under *State v. Gonzales*, 153 S.W.3d 311 (Mo. banc 2005), for appellant's stated purpose (Tr. 851).

In an offer of proof, Ms. Evans testified that she became aware, prior to Mr.

Paris's death, that he was a registered sex offender (Tr. 854). She did not identify the source of her knowledge, and she did not testify that she knew anything about the prior conviction that resulted in Mr. Paris's registration (Tr. 854). The trial court refused the offer of proof (Tr. 855).

On this record, neither of appellant's claims was adequately preserved for review. With regard to the first claim – that appellant should have been allowed to admit this evidence as proof that Mr. Paris was the initial aggressor – appellant's offer of proof was deficient, as will be discussed below, and "When an inadequate offer of proof is made, the alleged error is not preserved and the claim can only be reviewed for plain error." *State v. Childs*, 257 S.W.3d 655, 659 (Mo.App. W.D. 2008).

With regard to appellant's second claim – that appellant should have been allowed to present this evidence to rebut the state's good character evidence about Mr. Paris – the record shows that appellant made no argument along those lines at trial. Thus, this new allegation of error was not preserved. *See State v. Irby*, 254 S.W.3d 181, 188 (Mo.App. E.D. 2008) ("To preserve an alleged error, a party must make a timely and specific objection at trial. The objection cannot be broadened by arguing a new theory on appeal." (citations omitted)).

**B. The standard of review**

Ordinarily, in reviewing preserved error, a trial court is vested with broad discretion in ruling on questions of admissibility of evidence and, absent a clear

showing of an abuse of that discretion, the appellate court should not interfere with the trial court's ruling. *State v. Dunn*, 817 S.W.2d 241, 245 (Mo. banc 1991). For errors that are not preserved, review is for plain error.

Plain error review is discretionary, and "this Court has discretion to review for plain error 'when the court finds that manifest injustice or miscarriage of justice has resulted[.]' " *State v. Baxter*, 204 S.W.3d 650, 652 (Mo. banc 2006). Under Missouri law, plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative. *Id*. "Manifest injustice is determined by the facts and circumstances of the case, and the defendant bears the burden of establishing manifest injustice." *Id*.

**C. Appellant's offer of proof was insufficient, as it failed to demonstrate how the evidence would have been admissible at trial**

"The party who is precluded from presenting evidence bears the burden of proof to show that the evidence is relevant and admissible." *State v. Childs*, 257 S.W.3d at 658. "An offer of proof must be sufficiently specific to apprise the trial court of the specifics of the proposed evidence and demonstrate its admissibility." *Id*. Here, appellant's offer of proof was deficient in two respects.

First, to the extent that the evidence was a class of admissible evidence at all, appellant failed to show that Ms. Evans's testimony was anything other than hearsay. In the offer of proof, Ms. Evans simply affirmed that she had "become

aware" that Mr. Paris was a registered sex offender (Tr. 854). This testimony did not demonstrate that her knowledge was based on anything other than hearsay; thus, had she been allowed to testify, the state still could have objected on those grounds during the presentation of evidence. "Hearsay is testimony containing an out-of-court statement, not made by declarant nor under oath, offered to prove the truth of the matter asserted." *State v. Shaw*, 847 S.W.2d 768 (Mo. banc 1993).

Citing *Travis v. Stone*, 66 S.W.3d 1, 4 (Mo. banc 2002); and *State v. Crawford*, 68 S.W.3d 406, 408 (Mo. banc 2002), appellant avers that the state's failure to lodge a hearsay objection during the offer of proof precludes the state from pointing out the hearsay now (App.Br. 45). But neither of the cited cases actually stands for the proposition that a party must lodge all relevant objections to evidence that is the subject of an offer of proof. The *Travis* case stands for the unremarkable proposition that a party must make a specific objection during the presentation of evidence, 66 S.W.3d at 4, and the *Crawford* case stands for the well-settled proposition that hearsay statements that are admitted into evidence without objection can be considered by the trier of fact for their truth. 68 S.W.3d at 408. The cases simply do not hold that an offer of proof containing apparent hearsay is sufficient if there is no objection by the opposing party to that hearsay. And, indeed, such a holding would be contrary to the well-settled rule that an offer of proof must be specific and show that the proffered evidence is admissible.

In any event, appellant's offer of proof was deficient in another respect, namely, that Ms. Evans did not identify or testify about the underlying sexual offense that led to Mr. Paris's registration. As will be discussed below, this fact was critical, because without such information, the mere fact of sex-offender registration was of no probative value in determining who was the initial aggressor. In fact, tellingly, appellant attempts to supplement the offer of proof that was made at trial by going outside the record in an attempt to show that Mr. Paris's conviction was for sodomy (App.Br. 37, n. 9). More specifically, appellant cites to an internet site purporting to show that Mr. Paris registered for the offense of sodomy (App.Br. 37). Of course, none of this information was provided to the trial court, and it certainly was not part of appellant's offer of proof; thus, this information must be ignored. "Defendant is limited to the record made in the trial court and motion court, and we are limited to consideration of the evidence in the record." *State v. Myers*, 997 S.W.2d 26, 32 (Mo.App. S.D. 1999).

**D. Evidence that Mr. Paris was a registered sex offender was not relevant to show who was the initial aggressor**

The offer of proof in this case did not demonstrate that appellant knew about Mr. Paris's status as a registered sexual offender; thus, the evidence was not admissible as reputation evidence "offered for the purpose of showing the reasonableness of the defendant's fear of the victim." *See State v. Gonzalez*, 153

S.W.3d at 313. Additionally, because the offer of proof did not demonstrate that appellant knew about any specific act of violence associated with the sex-offender registration (indeed, the offer of proof did not identify the crime at all), the evidence was not admissible as a specific act of violence under the principles of *State v. Waller*, 816 S.W.2d 212 (Mo. banc 1991), as appellant concedes (App.Br. 40-41).

But appellant nevertheless asserts that evidence of the victim's sex-offender registration was the type of reputation evidence that the Court identified in *Gonzales* as being admissible to prove who was the initial aggressor, even if the reputation is not known to the defendant (App.Br. 41). But appellant is incorrect.

In *Gonzales*, the Court re-affirmed that a victim's reputation for violence – even if not known to the defendant – is admissible "to prove that the victim was the initial aggressor." 153 S.W.3d at 312. Thus, in Gonzales, the Court reversed the defendant's conviction after the trial court refused to admit evidence of the victim's reputation for violence, turbulence and bizarre behavior.

Here, appellant's offer of proof did not involve evidence of the victim's reputation for violence, turbulence or bizarre behavior. In fact, it did not involve any testimony about the victim's general reputation for any particular trait (Tr. 854). Thus, the evidence – which was, at most, proof that the victim had committed some specific act of unidentified misconduct in the past – was simply not relevant to prove that the victim was the initial aggressor.

Appellant asserts that "arguably evidence that Mr. Paris was a registered sex offender involves reputation evidence and therefore it is admissible under *Gonzales*" (App.Br. 42). But appellant fails to cite any authority for this assertion, and appellant fails to identify what type of reputation (e.g., for violence) a registered sex offender would have (App.Br. 42). In any event, Ms. Evans did not suggest that she knew anything about appellant's reputation as a result of his status as a registered sex offender; thus, her testimony simply did not fit the bill.

Finally, appellant argues alternatively that this evidence of a "specific act" of unidentified misconduct ought to be admissible as "a logical extension of *Waller* and *Gonzales*" (App.Br. 42). But even if the Court were to entertain an additional expansion of the rules governing the admission of such evidence, the evidence as set forth in appellant's offer of proof did not show a specific prior act of violence. As set forth above, Ms. Evans's testimony in the offer of proof only identified the fact that Mr. Paris was a registered sex offender. She did not identify any specific act of violence, and there was no way of determining whether the unidentified prior act of sexual misconduct had any probative value in determining whether Mr. Paris was the initial aggressor.

**E. Because the state did not attempt to prove that Mr. Paris was a "good guy," there was nothing for appellant to rebut with regard to Mr. Paris's general character**

Lastly, appellant claims that Ms. Evans's testimony was also admissible to rebut the state's evidence that the victim was a "good guy" (App.Br. 44). But, as stated above, appellant never attempted to introduce this evidence for this purpose; and, thus, this issue was never presented to the trial court. A trial court should not be convicted of plain error when an issue has not been presented to it. *See State v. Evenson*, 35 S.W.3d 486 (Mo.App. S.D. 2000).

In any event, this claim, too, is without merit. First, as discussed above, Ms. Evans's testimony about Mr. Paris's status as a registered sex offender was apparently hearsay and, thus, was not admissible.

Second, the "good guy" testimony by Ms. Buckner was not elicited by the state in an attempt to prove the victim's general good character. *Cf. State v. Gonzales*, 153 S.W.3d at 314 (the state portrayed the victim as a "gentle giant"). The line of questions the prosecutor was asking at that point of the trial were designed to show the relationships between Mr. Paris, Ms. Buckner, and appellant (Tr. 450). The prosecutor was, in essence, simply asking Ms. Buckner what she had told appellant about Mr. Paris (Tr. 450). The response that Ms. Buckner gave – that Ms. Buckner had "Just basically" told appellant that Mr. Paris "was a good guy" – was simply Ms. Buckner's way of expressing the fact that she had not told appellant much of anything about Mr. Paris.

Third, even if Ms. Buckner's brief comment opened the door to some rebuttal

character evidence, appellant cannot show that she suffered a manifest injustice from her inability to elicit from Ms. Evans the fact that Mr. Paris was a registered sex offender. Appellant was ultimately able to present strong evidence impugning Mr. Paris's character. For instance, Ms. Evans testified that Mr. Paris could be violent, and that he was very aggressive toward people, including women (Tr. 858). Ms. Evans also testified that Mr. Paris had a reputation for violence, aggressiveness and turbulence (Tr. 858). Ms. Morlan also testified that Mr. Paris had a reputation for violence and turbulence, and that he was known to have "fights with past women" (Tr. 537). Moreover, in light of the extensive evidence of Mr. Paris's philandering, and his drinking and drug use, there is little reason to believe that the jury was left with any sort of impression that Mr. Paris was just a "good guy." Indeed, the state made no effort to portray him in that fashion. Thus, appellant cannot demonstrate that he suffered a manifest injustice from the exclusion of this evidence. This point should be denied.

## CONCLUSION

Appellant's convictions and sentences should be affirmed.

Respectfully submitted,

**JEREMIAH W. (JAY) NIXON**
Attorney General

**SHAUN J MACKELPRANG**
Assistant Attorney General
Missouri Bar No. 49627

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

*Attorneys for Respondent*

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Rule 84.06(b) and contains 9,545 words, excluding the cover, this certification, the signature block, and the appendix, as determined by Microsoft Word software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this _____ day of October, 2008, to:

CRAIG A. JOHNSTON
Woodrail Centre, Bldg. 7
1000 W. Nifong, Suite 100
Columbia, MO 65203
(573) 882-9855
Fax: (573) 882-9468

**JEREMIAH W. (JAY) NIXON**
Attorney General

**SHAUN J MACKELPRANG**
Assistant Attorney General
Missouri Bar No. 49627

P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321
Fax: (573) 751-5391

shaun.mackelprang@ago.mo.gov