No. SC96095

In the
Missouri Supreme Court

STATE OF MISSOURI,

Respondent,

v.

BRYAN M. PIERCE,

Appellant.

Appeal from Jackson County Circuit Court
Sixteenth Judicial Circuit
The Honorable Brent Powell, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Appellant (Defendant) was charged in Jackson County Circuit Court with possession of child pornography under section 573.037, RSMo,[1] occurring on or about June 18, 2013. (L.F. 44-49). Having pleaded guilty to second-degree burglary in 1984, first-degree sexual abuse in 1988, third-degree sexual abuse in 2000, lascivious acts with a child in 2000, and second-degree domestic assault in 2009, Defendant was charged as, and found to be, a persistent offender. (L.F. 48-49, 54; Tr. 80-81). Defendant waived his right to a jury trial on the record. (L.F. 37; Tr. 66-67). After a bench trial, Defendant was found guilty as charged. (L.F. 54-58; Tr. 237-47). Defendant was sentenced to 15 years' incarceration. (L.F. 57-58; Tr. 286). Viewed in the light most favorable to the verdict, the evidence at trial showed:

On June 18, 2013, Officer Robert Erpelding responded to a call that Defendant made stating that Defendant was hearing voices telling him to stab himself in the heart with a knife and that his cat also wanted him to stab himself in the heart with a knife. (Tr. 31, 37, 183, 192). Defendant thought that someone or something was after him. (Tr. 109). Officer Erpelding offered to clear Defendant's residence to make sure it was safe. (Tr. 31). Defendant asked Officer Erpelding to clear the residence. (Tr. 32).

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[1] All statutory references are to RSMo 2000 as supplemented.

Officer Paul Russo and Sergeant Patrick Kelly cleared the house, going from room to room to ensure that no one was hiding who could commit a crime, and to ensure that there were no other threats. (Tr. 32, 38). Officer Erpelding remained outside and called for an ambulance. (Tr. 32-33, 38). When the ambulance arrived, medical staff inspected Defendant. (Tr. 33). After the inspection, Defendant was placed in the ambulance. (Tr. 33).

While clearing the house, Officer Russo and Sergeant Kelly found in plain view in one of the rooms a computer running a slideshow of images of children, including images of naked children and children exposing their genitals. (Tr. 35, 43-44).

ARGUMENT

Point I (sentencing).

The trial court did not plainly err in sentencing Defendant to 15 years' incarceration for the class B felony of possession of child pornography because it is not evident, obvious, and clear that the trial court erred, in that the trial court issued Defendant's sentence based on independent considerations and not on any misunderstanding of the law. Additionally, Defendant has not demonstrated manifest injustice.

A. Facts

Defendant was charged with class B felony possession of child pornography. (L.F. 44). After a bench trial, Defendant was found guilty as charged. (L.F. 54-58; Tr. 237-47).

Having pleaded guilty to second-degree burglary in 1984, first-degree sexual abuse in 1988, third-degree sexual abuse in 2000, lascivious acts with a child in 2000, and second-degree domestic assault in 2009, Defendant was charged as, and found to be, a persistent offender. (L.F. 48-49, 54; Tr. 80-81).

During the sentencing hearing, the trial court asked, "[H]aving proven the defendant up as a prior and persistent offender, it's my understanding that the defendant, his range of punishment was, pursuant to statute,

extended to ten to 30 years, is that correct, [prosecutor]?" (Tr. 249). The following exchange immediately occurred:

> [Prosecutor]: We had agreed to a lid of 20, Your Honor.
>
> The Court: A lid of 20 in exchange for the waiver of the jury trial, is that correct?
>
> [Prosecutor]: Yes, Your Honor.
>
> [Defense counsel]: Correct.

(Tr. 249). Section 558.016 increases the maximum sentence of a class B felony to that of a class A felony, but it does not increase the minimum sentence. Section 558.016.7. The sentencing range for a class A felony is 10 to 30 years, and the range for a class B felony is 5 to 15 years. Section 558.011.1.

Defendant was sentenced to 15 years' incarceration. (L.F. 57-58; Tr. 286). During the sentencing hearing, the trial court provided detailed rationale—spanning approximately 5.5 transcript pages—for Defendant's sentence. (Tr. 273-79). The trial court referenced Defendant's ability to be rehabilitated, Defendant's likelihood of re-offending, and "retribution or punishment." (Tr. 273-79). The trial court explicitly noted that "those factors . . . are what drive my sentence in this case." (Tr. 280). The court did not reference Defendant's status as a persistent offender or any potential sentence enhancement. (Tr. 273-280).

The judgment did not indicate that Defendant was found to be a persistent offender or that the sentence was enhanced due to Defendant's status as a persistent offender. (L.F. 55-58).

B. Preservation and Standard of Review

Defendant did not object to the trial court's remark regarding the range of punishment during the sentencing hearing. (Tr. 249). Defendant concedes that the issue has not been preserved for appellate review. (Appellant's Br. 12).

As such, the issue is subject to, if any review, plain error review. *State v. Duncan*, 385 S.W.3d 505, 508 (Mo. App. S.D. 2012). "Plain error review is used sparingly and is limited to those cases where there is a strong, clear demonstration of manifest injustice or miscarriage of justice." *State v. Vanlue*, 216 S.W.3d 729, 733 (Mo. App. S.D. 2007). "Claims of plain error are reviewed under a two-prong standard." *Id.* "In the first prong, we determine whether there is, indeed, plain error, which is error that is evident, obvious, and clear." *Id.* at 734. "If so, then we look to the second prong of the analysis, which considers whether a manifest injustice or miscarriage of justice has, indeed, occurred as a result of the error." *Id.* "A criminal defendant seeking plain error review bears the burden of showing that plain error occurred and that it resulted in a manifest injustice or miscarriage of justice." *Id.* "Manifest injustice is determined by the facts and circumstances of the case, and the

defendant bears the burden of establishing manifest injustice." *State v. Baxter*, 204 S.W.3d 650, 652 (Mo. banc 2006).

Plain error review imposes a "heavy burden" on a defendant to demonstrate error and manifest injustice. *State v. Kohser*, 46 S.W.3d 108, 114 (Mo. App. S.D. 2001). "The outcome of plain error review depends heavily on the specific facts and circumstances of each case." *Vanlue*, 216 S.W.3d at 734.

C. It is not evident, obvious, and clear that the trial court erred.

"A sentence passed on the basis of a materially false foundation lacks due process of law and entitles the defendant to a reconsideration of the question of punishment in the light of the true facts, regardless of the eventual outcome." *State v. Troya*, 407 S.W.3d 695, 700 (Mo. App. W.D. 2013). The trial court explained—in substantial detail—its rationale for Defendant's sentence, with an explanation spanning approximately 5.5 transcript pages that it considered Defendant's ability to be rehabilitated; retribution or punishment and society's expectation of a harsh punishment; and Defendant's high likelihood of re-offending. (Tr. 273-79). The court explicitly noted that "*those* factors . . . are what drive my sentence in this case." (Tr. 280) (emphasis added). As such, it is not evident, obvious, and clear that the trial court issued Defendant's sentence based on a materially false foundation rather than based on the factors on which it stated it was basing Defendant's sentence.

"When the record demonstrates that the trial court imposed consecutive sentences based on a misunderstanding of the statute, the defendant is entitled to re-sentencing." *State v. Scott*, 348 S.W.3d 788, 800 (Mo. App. S.D. 2011) (abrogated on other grounds by *State v. Sisco*, 458 S.W.3d 304 (Mo. banc 2015)). "This may occur, for example, where the prosecutor states an erroneous interpretation of the statute and the judge imposes consecutive sentences *without further discussion or comment*." *Id.* (emphasis added). "Where, on the other hand, the record demonstrates that the judge's decision to impose consecutive sentences was based on valid considerations, such as independent consideration of the severity of the crimes, no error will be found." *Id.*; *see also State v. Elam*, 493 S.W.3d 38, 43 (Mo. App. S.D. 2016) ("[W]hen the record indicates that the trial court's sentence was a product of the trial court's own valid considerations and not a mistaken apprehension of what was required under the law, our appellate courts have refused to reverse for new sentencing.").

The trial court here provided detailed rationale for Defendant's sentence. (Tr. 273-79).

The trial court first discussed its consideration of Defendant's ability to be rehabilitated:

> The first factor that I usually consider is your ability to be rehabilitated. Is there some chance for rehabilitation here, and should

we give you that opportunity. Sounds like at least from some of the evidence I heard today, at least for a period of time you did fairly well. . . .

However, had a lot of opportunities . . . for rehabilitation in the past, and you've obviously failed, and many, many convictions over the years. And so that factor is kind of a wash to be honest, and to be frank, you've got some positive aspects and some negative aspects.

(Tr. 274-75).

The trial court also discussed "retribution or punishment" as a consideration, explaining:

These type of offenses that now you've been found guilty of and you've been found guilty of in the past I think are considered vile by our community. . . . And so *society expects a pretty harsh punishment*.

And while I'm not bound by societal pressures or community demands, it's definitely something that I think is important to at least consider, because I am, in essentially certain respects, a representative of our community when it comes to assessing punishment. And if I'm not following the community and social norms. Then when it comes to sentencing, at least since it's not necessarily a legal determination, then *I think I would be remiss in my job*.

So it's a factor that you consider *and that's not a factor that favors well for you*.

(Tr. 275-76) (emphases added).

The trial court also considered Defendant's likelihood of re-offending, finding it to be such a significant factor in this case that it explicitly skipped discussing the factor at first, returning to it at the close of its comments. (Tr. 275, 277).

> The last factor that I consider is re-offending. So it's rehabilitation, retribution, and re-offend. [The prosecutor] referred to it as dangerousness to the community, will you re-offend. And it is, *it's a big issue in this case*. There have been a long time ago, 1988 and 2001, I think is what I recall, *but they are awful, awful crimes*. And if it's true that you were a victim of those type of crimes, then you know first-hand what kind of crimes they are.
>
> . . .
>
> And while the people that perpetrated those type of crimes against you may have gone unpunished, *it's important that when I have someone in front of me that commits those type of crimes that I am sure that they don't happen to future victims* because I don't want them to become perpetrators later in life and those potential future victims to become -- I don't want them to happen to them, one, that no one would

ever want anything like that to happen to someone, but let alone it would potentially -- those folks are likely to become offenders in the future and just perpetuates itself.

And again, if you are a victim of those type of crimes, I'm sorry. It's awful. *So it's a serious a big issue for me. If I knew that you went free from this court to abuse another child, it would be very difficult for me to live with myself for that reason*. So I always am concerned about that issue, regardless of whose in front of me, but for someone who maybe have previously committed those type of offenses and arguably has those type of tendencies, then it is something that sincerely concerns me and will probably drive my decision in this case more so than anything else.

That is the factors I consider and kind of an overview of my thoughts with respect to each of those factor, and I'm prepared to impose sentence at this time. [all sic]

(Tr. 277-79).

During argument at the sentencing hearing, the prosecutor highlighted that Defendant's prior offenses "run . . . three and a half pages, Your Honor; three and a half pages, which is fairly unprecedented. Also, as you'll note, he will admit that he was offered sexual offender treatment while incarcerated in Iowa. He declined to do it. There he was given the ability to have some

rehabilitation and chose not to do it, chose not to do it." (Tr. 268-69). As evidenced by the trial court's comments above, the trial court made clear that its sentence would reflect its serious concerns that Defendant would re-offend if given a light sentence.

The trial court *explicitly* stated—twice—that these factors are what drove its sentencing decision, and not Defendant's status as a persistent offender or the possibility of an enhanced sentence: "That is [sic] the factors I consider." (Tr. 279). "[T]hose factors, regardless of my views of whether [Defendant's] a good or bad [person], are what drive my sentence in this case so I meant to mention that before." (Tr. 280).

Thus, this is not an instance where a sentence was imposed after a potential misinterpretation of the law without further discussion or comment. *See Scott*, 348 S.W.3d at 800 (noting that reversal may be appropriate when there is an erroneous statement of the law and then "the judge imposes consecutive sentences *without further discussion or comment*." (emphasis added)). The trial court engaged in extensive discussion of its rationale, and then it explicitly stated that its sentencing decision was based on that extensive discussion. The *Scott* court explicitly noted that "[w]here . . . the record demonstrates that the judge's decision to impose consecutive sentences was based on valid considerations, *such as independent consideration of the severity of the crimes*, no error will be found." *Scott*, 348 S.W.3d at 800

(emphasis added). Here, the trial court noted that Defendant had committed "awful, awful crimes." (Tr. 278). Moreover, the trial court also relied on other, independent considerations.

The facts here are similar to those in *Elam*. In *Elam*, the prosecutor mistakenly asserted that any sentences must run consecutively, and neither the trial court nor the defendant questioned that statement. *Id.* at 41. When issuing the defendant's consecutive sentences, the trial court explained that it reviewed the defendant's history of criminal behavior, the disturbing nature of the charges, the fact that the conduct was an ongoing course of conduct, and the defendant's record. *Id.* The *Elam* court stated that the trial court did not plainly err when it issued consecutive sentences because the trial court "described its rationale for issuing the sentences" and because "the sentences were based on valid considerations" and "there [was] no indication that the trial court's sentences were based on a misapprehension of the applicable law." *Id.*

Similarly, in *State v. Adams*, 350 S.W.3d 864 (Mo. App. E.D. 2011), the appellate court found no plain error even though the trial court erroneously indicated that the defendant was a persistent offender. The trial court correctly found defendant to be a prior offender, but in its written judgment, the trial court indicated that the defendant was a persistent offender. *Adams*, 350 S.W.3d at 868. The defendant conceded that he was sentenced within the

unenhanced statutory range, and as such, the court found no plain error. *Id.* Here too, Defendant was sentenced within the unenhanced statutory range, and so the trial court did not plainly err.

State v. Seaton demonstrates that the trial court's comments need not even be extensive in order to explain that a sentence is being issued for valid reasons rather than a misunderstanding of the law. In that case, the prosecutor had recommended consecutive terms, mistakenly stating that Missouri law required the sentences to run consecutively. *State v. Seaton*, 815 S.W.2d 90, 91-92 (Mo. App. E.D. 1991). The trial court made only brief comments, which are nearly identical to those made by the trial court here:

> [N]ot by the wildest extent of the imagination could I feel that you are not guilty of the crimes for which you are charged today. And I certainly believe that you were probably guilty of the other crimes as well.
>
> I'm going to follow the State's recommendation. As a practical matter I really don't have any idea when you might get turned loose. We've got such a crunch of people in the system, in the Department of Corrections, that—probably a lot of people that shouldn't be turned loose are turned loose. So you may be free a lot sooner than a lot of people would like to see you turned loose. But at least I'm going to try to sort of send a little message to the people in the Department of

> Corrections, that at least I think the crime that you committed is *very, very serious* and that I think the punishment should be *very severe*.
>
> . . .
>
> [E]verything is consecutive. And all six of these are consecutive with whatever time you are now doing.

Id. at 92 (ellipses in original) (emphases added). Despite this sparse rationale, the *Seaton* court found no error, noting that the trial court had "expressed a desire to impose the maximum sentence." *Id.* Defendant distinguishes *Seaton* by noting that no such desire was expressed here. (Appellant's Br. 19). But no such desire was explicitly stated in *Seaton*, either. *Seaton*, 815 S.W.2d at 92. There, the trial court merely noted that the defendant's crime was "very, very serious" and that the punishment should be "very severe," which the *Seaton* court *interpreted* as a desire to impose the maximum sentence. *Id.* Here, the trial court engaged in significantly more discussion, using nearly identical language:

- "awful, awful crimes" and "society expects a pretty harsh punishment" (Tr. 276, 278)
- "very, very serious [crimes]" and "punishment should be very severe" *Seaton*, 815 S.W.2d at 92

Under *Seaton*, if the trial court here had imposed the maximum sentence, the trial court's nearly-identical comments would be interpreted as a desire to

impose the maximum sentence. Nevertheless, the trial court imposed less than the maximum sentence, and it is apparent that the court issued Defendant's sentence based on the lengthy rationale it provided.

Like in *Elam*, *Adams*, and *Seaton*, the trial court here issued its sentence not based on any misunderstanding of the law, but on valid, independent considerations. "The outcome of plain error review depends heavily on the specific facts and circumstances of each case." *Vanlue*, 216 S.W.3d at 734. The following specific facts and circumstances of this case indicate that Defendant's sentence was issued based on independent considerations and not any potential misunderstanding of the law: (1) the trial court's extensive comments detailing its rationale for Defendant's sentence, (Tr. 273-79); (2) the fact that the court explicitly stated that Defendant's sentence was based on those extensive comments instead of Defendant's status as a persistent offender or any potential sentence enhancement, (Tr. 279, 280); and (3) the fact that the trial court did not indicate in the judgment in any way that Defendant was sentenced as or even found to be a persistent offender, (Tr. 55-58). Defendant has not met his "heavy burden" to demonstrate that the trial court evidently, obviously, and clearly issued his sentence based on a misunderstanding of the law rather than the extensive discussion it engaged in. *See Kohser*, 46 S.W.3d at 114; *Vanlue*, 216 S.W.3d at 734.

The facts here are distinguishable from *State v. Williams*, 465 S.W.3d 516 (Mo. App. W.D. 2015), where the trial court *explicitly confirmed* the prosecutor's mistaken belief that the enhanced range of punishment for a class B felony was 10 to 30 years, or life. In *Williams*, the prosecutor stated, "The state . . . presented evidence to this Court and this Court found the defendant guilty of being a . . . persistent felony offender before any facts were presented to the jury, which raises the range of punishment from ten to life, or 30 years." *Williams*, 465 S.W.3d at 518. The trial court responded, "[the State] is right. My hands are tied under the law. The range of punishment that is only available to me in this case is a Class A felony, which is a minimum of ten years and a maximum of life on the driving-while-intoxicated count." *Id.* at 520.

The trial court in *Williams* not only explicitly confirmed its misunderstanding of the proper range of punishment, it also mistakenly asserted that it was bound by the incorrect range of punishment. Here, the parties did not confirm the trial court's apparent misstatement. The trial court asked whether the persistent-offender statute *extends* the range of punishment to 10 to 30—but it did not receive an answer. (Tr. 249). Rather than confirming an incorrect range of punishment, the prosecutor and defense counsel explained that they had agreed to a maximum sentence of 20 years in exchange for Defendant's jury-trial waiver. (Tr. 249). Additionally,

the plain language of the trial court's question here asked how far Defendant's sentence might be *extended*, and so the trial court might have simply misspoke rather than intend to implicate the minimum sentence of 5 years at all with its question. Thus, Defendant cannot demonstrate on this record that the trial court actually misunderstood the proper range of punishment. Plain error must be evident, obvious, and clear, *Vanlue*, 216 S.W.3d at 734, but Defendant has not carried his burden of proving that it was evident, obvious, and clear that the trial court misunderstood the range of punishment. Furthermore, as discussed below, the trial court does not appear to have issued an enhanced sentence.

D. Defendant has not demonstrated manifest injustice.

"Plain error and prejudicial error are not synonymous terms." *State v. Wrice*, 389 S.W.3d 738, 742 (Mo. App. E.D. 2013). "A defendant asserting plain error faces a much greater burden than one asserting prejudicial error." *Id.* at 742-43. "To show plain error, an appellant must demonstrate the trial court's error so substantially violated his rights that manifest injustice or a miscarriage of justice would result if the error were allowed to remain." *Id.* at 743.

Missouri courts have repeatedly found sentencing errors not to involve manifest injustice, and thus not to amount to plain error. *See, e.g.*, *State v. Drudge*, 296 S.W.3d 37, 41 (Mo. App. E.D. 2009) (finding error but no

manifest injustice when trial court found defendant to be prior offender when State did not plead essential facts warranting prior-offender finding); *State v. Martin*, 103 S.W.3d 255, 262-64 (Mo. App. W.D. 2003) (finding error but no manifest injustice; State relied on prior DWI to enhance sentence, but court concluded that defendant's prior DWI was not a "prior alcohol related enforcement contact" for sentence-enhancement purposes, but record also indicated that defendant's license had previously been revoked for refusal to submit to chemical testing under implied consent law); *State v. Wrice*, 389 S.W.3d 738, 742-43 (Mo. App. E.D. 2013) (finding no manifest injustice when defendant alleged that persistent-offender finding occurred after submission of case to jury, when defendant had sufficient notice he would be sentenced as persistent offender).

"Where it appears that the trial court *improperly* sentenced the defendant as a prior or persistent offender, plain-error review is appropriate because an unauthorized sentence affects substantial rights, resulting in manifest injustice." *State v. Williams*, 306 S.W.3d 183, 185 (Mo. App. E.D. 2010) (emphasis added). Here, Defendant was not improperly sentenced to an unauthorized sentence as a persistent offender. Rather, it does not appear that Defendant was sentenced as a persistent offender at all. Defendant's sentence would have been an authorized sentence even if he had not been found to be a persistent offender. Section 558.011 provides for a range of 5 to

15 years for class B felonies, and 10 to 30 years, or life, for class A felonies. Section 558.011.1. Defendant's sentence of 15 years falls within the unenhanced statutory range. As such, Defendant cannot demonstrate manifest injustice. *See Adams*, 350 S.W.3d at 868 (discussed above).

Furthermore, the judgment in no way indicates that Defendant was found to be a persistent offender or that the sentence was enhanced due to Defendant's status as a persistent offender. (L.F. 55-58). In *State v. Blackburn*, 168 S.W.3d 571 (Mo. App. S.D. 2005), the court noted that the judgment correctly reflected the defendant to be a persistent offender. *Blackburn*, 168 S.W.3d at 577. The trial court had issued a sentence higher than the unenhanced maximum sentence, but the judgment was affirmed because the sentence imposed was within the authorized enhanced range. *Id.* Here, the trial court did not indicate in its judgment that Defendant was a persistent offender, and it issued a sentence within the unenhanced statutory range. Section 558.011.1. Thus, *Blackburn* further illustrates that Defendant has not demonstrated that the trial court issued its sentence based on any misunderstanding of the law.

Defendant cites *State v. Cowan*, 247 S.W.3d 617 (Mo. App. W.D. 2008), in support of his argument. (Appellant's Br. 16-17). But *Cowan* is distinguishable. The *Cowan* court explicitly rejected a plain-error standard of review and instead reviewed *de novo*. *Cowan*, 247 S.W.3d at 618-19.

Additionally, the trial court had sentenced the defendant to the *minimum* sentence of the *mistaken* range of punishment, indicating a clear misunderstanding of the correct range of punishment. *Id.* Here, Defendant's burden is much higher under plain-error review to demonstrate error and manifest injustice. Additionally, as discussed, the sentence issued was within the range of the unenhanced range of punishment, providing no indication that the trial judge misunderstood the appropriate range of punishment.

Defendant also cites *State v. Troya*, (Appellant's Br. 16), but this case is also distinguishable because it is similar to *Cowan*. The defendant in *Troya* was convicted of a class B felony and was found to be a persistent offender. *State v. Troya*, 407 S.W.3d 695, 697-98 (Mo. App. W.D. 2013). The First Substitute Information asserted that the defendant was subject to 10 to 30 years or life in prison, "such as that of a class A felony." *Id.* at 698. The trial court confirmed this misstatement of the law: "All right, and this enhances, the State is seeking leave to file this to enhance the range of punishment to a Class A Felony level, is that right?" *Id.* The prosecutor responded affirmatively, and the trial court again confirmed the misunderstanding, stating that the defendant's persistent-offender status had the effect of "elevating the range of punishment to a Class A Felony." *Id.* During sentencing, the prosecutor again stated that the full range of punishment had been elevated to the A-range of punishment. *Id.* at 698, 701. Also during

sentencing, the trial court twice defined the sentencing range as an "A-range of punishment." *Id.* at 701. Furthermore, the recommendation in the sentencing assessment report was 10 years, the minimum range for a class A felony. *Id.* at 699. The defendant received a 10-year sentence, the minimum sentence under the mistaken "range" of punishment for a class A felony. *Id.* at 699.

Thus, in *Troya*, it is apparent that all individuals save perhaps the defendant were under a mistaken understanding of the minimum sentence. The trial court, as well as the prosecutor, *repeatedly* misstated that the defendant was subject to the A-range of punishment. Even the Department of Corrections appeared to misunderstand the minimum sentence, as the sentencing assessment report recommended the mistaken minimum sentence of 10 years. In contrast, here, the parties did not repeatedly misstate the law, nor did the charging document include any misstatement. Neither party confirmed the trial court's single, isolated statement. And unlike in *Troya*, where the defendant received the *minimum* sentence of the *mistaken* range, Defendant here received a 15-year sentence, well above the minimum sentence of 10 years for a class A felony.

Finally, Defendant argues that the trial court did not consider the unenhanced minimum sentence when sentencing Defendant. (Appellant's Br. 19-20). But even assuming that the trial court affirmatively misunderstood

the correct minimum sentence, such misunderstanding is not alone sufficient to establish manifest injustice.

Defendant's sentence must have been *based on that misunderstanding* in order to warrant reversal: "When the record demonstrates that the trial court imposed consecutive sentences *based on a misunderstanding of the statute*, the defendant is entitled to re-sentencing." *Scott*, 348 S.W.3d at 800. "Where, on the other hand, the record demonstrates that the judge's decision to impose consecutive sentences was *based on valid considerations*, such as independent consideration of the *severity of the crimes*, no error will be found." *Id.* (emphases added). Defendant has not demonstrated that his sentence was based on the trial court's alleged misunderstanding of the minimum sentence. On the contrary, as discussed, his sentence was based on the lengthy rationale provided by the trial court, which included the "severity of the crimes." *Scott*, 348 S.W.3d at 800.

As discussed above, the trial court was disturbed by the "awful, awful" nature of Defendant's crimes; it noted Defendant's high likelihood of re-offending; and it noted that society expected a harsh punishment. The court issued Defendant's sentence based on independent considerations, not any misunderstanding of the law. Defendant has failed to meet his heavy burden of demonstrating that the trial court's error "so substantially violated his

rights" that manifest injustice would result if his sentence were to remain. *Wrice*, 389 S.W.3d at 743. Defendant's point should be denied.

Point II (suppression of evidence).

The trial court did not plainly or clearly err in denying Defendant's motion to suppress because Defendant's consent to search was valid, because exigent circumstances warranted entry into Defendant's home, and because the exclusionary rule should not apply even if the entry was unlawful.

A. Facts

Defendant filed a motion to suppress evidence on February 19, 2015. On April 6, 2015, the trial court held a hearing on the motion. (L.F. 8; Tr. 16). At trial, Defendant objected to admission of the computer evidence of child pornography, generically renewing his motion to suppress. (Tr. 84).

On June 18, 2013, Officer Robert Erpelding responded to a call that Defendant made stating that Defendant was hearing voices telling him to stab himself in the heart with a knife and that his cat also wanted him to stab himself in the heart with a knife. (Tr. 31, 37, 183, 192). Defendant thought that someone or something was after him. (Tr. 109).

Officer Erpelding offered, "sir, you know, if you'd like, we can go ahead and we can clear your residence, make sure there's nobody inside and -- you know, if that works for you, that way give you a little peace of mind." (Tr. 100, 31). Defendant asked Officer Erpelding to clear the residence. (Tr. 32).

Officer Paul Russo and Sergeant Patrick Kelly cleared the house, going from room to room to ensure that no one was hiding who could commit a crime, and to ensure that there were no other threats. (Tr. 32, 38). Officer Erpelding remained outside and called for an ambulance. (Tr. 32-33, 38). When the ambulance arrived, medical staff inspected Defendant. (Tr. 33). After the inspection, Defendant was placed in the ambulance. (Tr. 33).

While clearing the house, Officer Russo and Sergeant Kelly found in plain view in one of the rooms a computer running a slideshow of images of children, including images of naked children and children exposing their genitals. (Tr. 35, 43-44).

The trial court denied Defendant's motion on April 8, 2015. (L.F. 40-43). The trial court concluded that Defendant's consent to search was not valid. (L.F. 41). The trial court did, though, find that exigent circumstances justified entry into the residence. (L.F. 41).

> The officers who responded to Defendant's call were attempting to assist Defendant who was in distress. Defendant told the officers that he was hearing voices telling him to use a knife to stab himself. Under these circumstances, the officers reasonably believed that someone could be in the residence who could harm Defendant or themselves. The officers were justified under this emergency situation to sweep or "clear the residence" and determine if anyone was in the home.

(L.F. 41).

B. Preservation and Standard of Review

Defendant filed a motion to suppress evidence on February 19, 2015, apparently arguing that the search of Defendant's home was unconstitutional because police did not obtain a warrant. (L.F. 7, 25-28). The motion contained "Facts" and "Law in Support" sections, but no argument. (L.F. 25-28). Defendant did not argue that his consent was not voluntarily given. (L.F. 25-28). Defendant did not argue that exigent circumstances did not justify the search. (L.F. 25-28).

On April 6, 2015, the trial court held a hearing on defendant's motion. (L.F. 8; Tr. 16). On April 8, 2015, the trial court denied Defendant's motion in a four-page written order. (L.F. 40-43).

During the motion hearing, Defendant did not argue that the police entry into Defendant's house was unconstitutional; rather, Defendant argued that the search only became unconstitutional at "th[e] moment" Sergeant Kelly touched the mouse on Defendant's computer. (Tr. 59). Defendant argued that at that point, the computer had been seized, and so Sergeant Kelly was required to obtain a warrant before searching the computer. (Tr. 59). Defendant did not argue that exigent circumstances were lacking. (Tr. 58-61).

Defendant conceded at the hearing that he consented for police to "clear" his house of any potential danger, but Defendant at the same time asked, "How could he have voluntarily given consent to even clear the residence, much less search the residence?" (Tr. 59-60).

The trial court stated, "[I]t's almost not even a consent issue. It's really almost an exigent exchange situation, that they've got someone who is emotionally disturbed who's claiming there's voices and they may have to clear or look through the residence to make sure there's not -- you know, there's not a safety issue in the house. What's your response to that, [defense counsel]?" (Tr. 63-64). Defendant then briefly stated that there would be no need to clear the residence because an ambulance had been called. (Tr. 64). At trial, Defendant objected to admission of the computer evidence, generically renewing his motion to suppress but not stating that his consent was involuntary or that exigent circumstances were lacking. (Tr. 84).

"A point on appeal must be based upon the theory voiced in the objection at trial and a defendant cannot expand or change on appeal the objection as made." *State v. Goins*, 306 S.W.3d 639, 647 (Mo. App. S.D. 2010); *see also State v. Sheridan*, 188 S.W.3d 55, 64 (Mo. App. E.D. 2006) ("In light of the fact that the point raised on appeal is not based upon the objection made at trial, our review is limited to plain error.").

Defendant's theories on appeal are that he was incapable of consenting to a search and that there were no exigent circumstances warranting entry into his home. (Appellant's Br. 22-36). Defendant did not put forth these theories in his motion to suppress evidence. (L.F. 25-28). During the motion hearing, Defendant only briefly addressed these theories, asking how Defendant could have voluntarily given consent to clear or search the residence, and briefly stating that officers initiated the idea to clear the residence and that there was no need to clear the residence. (Tr. 58-61, 64).

At trial, Defendant objected to admission of the computer evidence, generically stating that he "would like to renew [his] suppression motion," without arguing that his consent was involuntary or that there were no exigent circumstances. (Tr. 84). On appeal, Defendant cannot change the theory on which his objection at trial is made. *Goins*, 306 S.W.3d at 647. Defendant did not put forth these theories in his motion to suppress evidence. (L.F. 25-28).

As such, the issue is subject to, if any review, plain error review. *State v. Duncan*, 385 S.W.3d 505, 508 (Mo. App. S.D. 2012). "Plain error review is used sparingly and is limited to those cases where there is a strong, clear demonstration of manifest injustice or miscarriage of justice." *State v. Vanlue*, 216 S.W.3d 729, 733 (Mo. App. S.D. 2007). "Claims of plain error are reviewed under a two-prong standard." *Id.* "In the first prong, we determine

whether there is, indeed, plain error, which is error that is evident, obvious, and clear." *Id.* at 734. "If so, then we look to the second prong of the analysis, which considers whether a manifest injustice or miscarriage of justice has, indeed, occurred as a result of the error." *Id.* "A criminal defendant seeking plain error review bears the burden of showing that plain error occurred and that it resulted in a manifest injustice or miscarriage of justice." *Id.* "Manifest injustice is determined by the facts and circumstances of the case, and the defendant bears the burden of establishing manifest injustice." *State v. Baxter*, 204 S.W.3d 650, 652 (Mo. banc 2006).

Plain error review imposes a "heavy burden" on a defendant to demonstrate error and manifest injustice. *State v. Kohser*, 46 S.W.3d 108, 114 (Mo. App. S.D. 2001). "The outcome of plain error review depends heavily on the specific facts and circumstances of each case." *Vanlue*, 216 S.W.3d at 734.

If this Court finds that the issue has been preserved for review, the issue will be reviewed under a clearly-erroneous standard. "A trial court's ruling on a motion to suppress will be reversed on appeal only if it is clearly erroneous." *State v. Sund*, 215 S.W.3d 719, 723 (Mo. banc 2007). "The inquiry is limited to whether the decision is supported by substantial evidence, and it will be reversed only if clearly erroneous." *State v. Oliver*, 293 S.W.3d 437, 442 (Mo. banc 2009). In making this determination, a reviewing court "will

consider evidence presented at a pre-trial hearing as well as any additional evidence presented at trial." *Id.*

"This Court defers to the trial court's factual findings and credibility determinations and considers all evidence and reasonable inferences in the light most favorable to the trial court's ruling." *Sund*, 215 S.W.3d at 723. (citation omitted). "Evidence and inferences contrary to the order are to be disregarded." *State v. Hutchinson*, 796 S.W.2d 100, 104 (Mo. App. S.D. 1990).

"Whether conduct violates the Fourth Amendment is an issue of law that this Court reviews *de novo*." *Sund*, 215 S.W.3d at 723.

C. Defendant's consent was valid.

The trial court concluded that Defendant's consent to search was not valid. (L.F. 41). But "[w]hether conduct violates the Fourth Amendment is an issue of law that this Court reviews *de novo*." *Sund*, 215 S.W.3d at 723. Defendant's consent to search was valid.

> Voluntariness of the consent [to search] is determined by looking at the totality of the circumstances. Consent is freely and voluntarily given if, considering the totality of the circumstances, the objective observer would conclude that the person giving consent made a free and unconstrained choice to do so. This determination involves a consideration of a number of factors, including, but not limited to, the number of officers present, the degree to which they emphasized their

> authority, whether weapons were displayed, whether the person was already in custody, whether there was any fraud on the part of the officers, and the evidence of what was said and done by the person consenting.

State v. Selvy, 462 S.W.3d 756, 769 (Mo. App. E.D. 2015) (internal citations and quotation marks omitted).

1. Mental condition cannot by itself render consent involuntary.

The United States Supreme Court has adopted the "traditional definition" of voluntariness for consent searches, which "has always taken into account evidence of minimal schooling, low intelligence, and the lack of any effective warnings to a person of his rights." *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973). "[W]hen the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." *Id.*

"[T]he cases considered by this Court over the 50 years since *Brown v. Mississippi* have focused upon the crucial element of police overreaching." *Colorado v. Connelly*, 479 U.S. 157, 163 (1986). "Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." *Id.*

at 164. "[W]hile mental condition is surely relevant to an individual's susceptibility to police coercion, mere examination of the confessant's state of mind can never conclude the due process inquiry." *Id.* at 165.

"The fact that a defendant suffers a mental disability does not, by itself, render a waiver [consenting to a search] involuntary; there must be coercion by an official actor." *United States v. Barbour*, 70 F.3d 580, 585 (11th Cir. 1995) (citing *Connelly*, 479 U.S. at 169-70). "Absent any evidence of psychological or physical coercion on the part of the agents, there is no basis for declaring [the defendant's] statements and consent to search involuntary." *Id.* When determining whether a consent to search is voluntary, "when a court focuses exclusively on a defendant's characteristics and perceptions, and fails to determine whether police conduct was objectively coercive in relation to the defendant's subjective state, it applies an erroneous legal standard." *People v. Magallanes-Aragon*, 948 P.2d 528, 531 (Colo. 1997).

2. There is no evidence of coercion in the record.

"A consent to search is valid only if it is freely and voluntarily given." *State v. Hyland*, 840 S.W.2d 219, 221 (Mo. banc 1992) (citing *Schneckoth*, 412 U.S. at 222-23). "Consent is freely and voluntarily given if, considering the totality of all the surrounding circumstances, the objective observer would conclude that the person giving consent made a free and unconstrained choice to do so." *Id.* (internal citation omitted). "[A] court's evaluation of the totality

of the circumstances is based, not on the perceptions of the individual searched, but on the coerciveness of the officer's conduct in obtaining the consent." *United States v. Quezada*, 944 F.2d 903 (4th Cir. 1991) (citing *Connelly*, 479 U.S. at 163-67); *see also United States v. Rosario-Diaz*, 202 F.3d 54, 69 (1st Cir. 2000) (finding consent to search valid, stating that "there was no evidence whatsoever of physical coercion or intimidation, nor was there any indication of conduct by the law enforcement agents that would amount to psychological coercion or intimidation").

Defendant's consent for police to enter his home to ensure his safety was "freely and voluntarily given." *Hyland*, 840 S.W.2d at 221. Defendant felt that he was in danger, and he voluntarily called for emergency services. (Tr. 183, 192). Defendant expressed to police what his concerns were. (Tr. 31, 37, 109, 183, 192). Officer Erpelding offered to clear Defendant's residence to make sure it was safe, making clear that it was entirely Defendant's decision. (Tr. 31, 100). Defendant then freely and voluntarily asked Officer Erpelding to clear the residence (Tr. 32). There is no indication that any officer desired to exploit Defendant's situation. *Every* indication is that police offered to clear Defendant's home in order to make Defendant feel safe, *not* to search the home in the hopes of finding any criminal wrongdoing by Defendant. (Tr. 31-32, 38, 42-43, 50-51, 109-10). There is no indication whatsoever that any officer exerted any coercion upon Defendant or engaged in any other

misconduct in order to obtain Defendant's consent to clear his residence for his own safety.

Absent police misconduct, "there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." *Connelly*, 479 U.S. at 163. Defendant made a free and unconstrained choice for officers to clear his residence for his safety. *Hyland*, 840 S.W.2d at 221. Defendant's consent was valid.

3. Defendant was cooperative and lucid.

Defendant was lucid enough to recognize that he needed assistance and call a suicide hotline to secure it. (Tr. 182-83). He was able to explain to police why he was upset. (Tr. 31). He was able to effectively express his desire for police to clear his residence. (Tr. 32). He was able to answer the officers' questions, including whether anyone lived with him. (Tr. 32). Nothing in the record indicates that Defendant's comments to the officers were unintelligible or unrelated to the officers' inquiries. Additionally, police felt no need to physically restrain Defendant. (Tr. 100).

Defendant was cooperative and lucid. Defendant gave myriad indications that he was fully capable of understanding the nature of the officer's offer to clear his residence and that he was fully capable of consenting to that offer. "[A]bsent a showing that [one's] emotional distress was so profound as to impair her capacity for self-determination or

understanding of what the police were seeking, it is not enough to [make her consent] involuntary." *United States v. Duran*, 957 F.2d 499, 503 (7th Cir. 1992). Any emotional distress or mental impairment Defendant was suffering was not so profound as to impair his capacity for self-determination. Additionally, under these circumstances, it cannot fairly be said that the officers "had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Herring v. United States*, 555 U.S. 135, 143 (2009).

4. The *Selvy* factors demonstrate valid consent.

The determination of whether consent is valid involves a consideration of a number of factors, including, but not limited to, "the number of officers present, the degree to which they emphasized their authority, whether weapons were displayed, whether the person was already in custody, whether there was any fraud on the part of the officers, and the evidence of what was said and done by the person consenting." *Selvy*, 462 S.W.3d at 769.

All of these factors indicate that Defendant's consent was valid.

Officer Erpelding was apparently the only officer speaking with Defendant when Defendant consented to the search.[2] (Tr. 42).

Officer Erpelding did not exert, let alone emphasize, his authority. Rather, he said, "sir, you know, *if you'd like*, we can go ahead and we can clear your residence, make sure there's nobody inside and -- you know, *if that works for you*, that way give you a little peace of mind." (Tr. 100) (emphases added).

Nothing in the record indicates Officer Erpelding's weapon was drawn, and it is unlikely that it would have been draw.

Defendant was not in custody. Defendant was sitting on his porch when Officer Erpelding approached him and offered to clear his residence. (Tr. 184).

As discussed, the police did not engage in any fraud or coercion.

Moreover, as discussed, Defendant was cooperative and lucid. Defendant voluntarily consented to the search of his residence after police offered. Officer Erpelding did not even indicate that he wanted to search the residence or that he wanted Defendant to consent to a search. Nor did he

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[2] Officer Russo was present and heard Defendant's request to clear the residence, but he testified that it was Officer Erpelding who first contacted Defendant. (Tr. 42).

suggest that Defendant should accept his offer to clear the residence. Rather, he merely made the offer, stating, "if you'd like," police could clear the residence, "if that works for you." (Tr. 100).

As illustrated, all of the *Selvy* factors indicate that Defendant's consent was valid. Additionally, police did not engage in any coercive behavior. Every indication is that they offered to clear Defendant's residence for his safety and peace of mind, not to search for evidence of any crime. Defendant's point should be denied.

D. The trial court did not err in finding exigent circumstances.

"One well-recognized exception [to the warrant requirement] applies when the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." *Kentucky v. King*, 563 U.S. 452, 460 (2011). "Exigent circumstances exist where law enforcement officers have a legitimate concern for the safety of themselves or others." *United States v. Kuenstler*, 325 F.3d 1015, 1021 (8th Cir. 2003) (internal quotation marks omitted).

"Determinations as to the level of protection afforded an individual by the Fourth Amendment from governmental intrusion are inevitably contextually driven and require the Court to balance privacy rights against the government's interest in enforcing the law." *State v. Rodriguez*, 877 S.W.2d 106, 108 (Mo. banc 1994). "[T]he key principle of the Fourth

Amendment is reasonableness—the balancing of competing interests." *Michigan v. Summers*, 452 U.S. 692, 701 n.12 (1981).

People who make emergency calls have a diminished expectation of privacy. *State v. Pearson-Anderson*, 41 P.3d 275, 279 (Idaho Ct. App. 2001) ("[W]e cannot ignore the fact that by making the 911 call, Pearson–Anderson herself diminished her reasonable expectation of privacy within her home by summoning police officers to the premises with an implied representation that an emergency was occurring."); *see also Thacker v. City of Columbus*, 328 F.3d 244, 254 (6th Cir. 2003) (stating that a homeowner who seeks aid "from an emergency team," including paramedics, "clearly" has a "diminished" expectation of privacy in areas of home needed to render assistance); *State v. Flippo*, 575 S.E.2d 170, 182 (W. Va. 2002) ("[C]onsent given by a person who summons the police for help means that the person relinquishes his/her constitutionally protected right to privacy, to the extent necessary for the police to effectively respond to facts presented by the call for help.").

Defendant called for assistance. (Tr. 183, 192). Defendant told police that he believed he was in danger. (Tr. 109). He heard voices telling him to stab himself in the heart with a knife, and he thought that someone or something was after him. (Tr. 31-32, 37, 109). Such concerns voiced directly by Defendant provided officers a legitimate concern for the safety of Defendant and themselves. *Kuenstler*, 325 F.3d at 1021.

Having called from inside his home for emergency services, Defendant's privacy rights were diminished. Defendant's privacy rights were further diminished when he expressed concerns for his safety and that someone or something was after him. The government's interest in ensuring the safety of the public and of specific individuals is tremendous. In balancing Defendant's privacy rights against the government's interests, *Rodriguez*, 877 S.W.2d at 108; *Summers*, 452 U.S. at 701 n.12, the search conducted here was reasonable and did not violate the Fourth Amendment. The trial court did not err, plainly or otherwise.

The Sixth Circuit found there to be exigent circumstances under facts similar to those here:

> In *Thacker v. City of Columbus,* 328 F.3d 244 (6th Cir.2003), officers responded to a 911 call from a resident reporting a "cutting or stabbing." *Id.* at 249. Although EMS had already arrived, the officers had to secure the scene before EMS would enter the residence. The officers knocked, and when the defendant answered the door, they saw that his hand was bleeding profusely. The defendant rebuffed the police, however, exclaiming that he had called for the paramedics, not the police. The officers entered the house anyway. *Id.* We held that the combination of the 911 call, the uncertain nature of the emergency, and the need to safeguard EMS while tending to the defendant made for

> exigent circumstances. *Id.* at 254. We reasoned that the 911 call was made at the defendant's behest, "solicit[ing] a response from an emergency team"; and while we declined to consider the call itself "consent justifying the search," we held that "it clearly weighs in favor of finding that plaintiffs' expectation of privacy in their home was diminished."

Stricker v. Township of Cambridge, 710 F.3d 350, 359 (6th Cir. 2013) (citing *Thacker v. City of Columbus,* 328 F.3d 244 (6th Cir. 2003)). Similarly, police here were responding to an emergency call made by Defendant himself. (Tr. 183, 192). Due to Defendant's condition when police arrived, it was unclear whether Defendant was under any danger, and so police offered to perform a sweep of the residence for Defendant's safety. (Tr. 31, 37). And unlike in *Stricker*, where that defendant rebuffed the police, Defendant here accepted the police's offer "because he thought that someone or something was after him." (Tr. 32, 109).

Defendant alleges that officers here did not subjectively fear any danger.[3] (Appellant's Br. 26-30). Defendant also concedes that reasonableness

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[3] Despite Defendant's apparent assertion to the contrary, (Appellant's Br. 29-30), it is clear that the officers were concerned for Defendant's safety and wanted to ensure that he was safe. (Tr. 31-32, 38, 42-43, 50-51, 109).

determinations are not subjective. (Appellant's Br. 30). Indeed, "[a]n action is reasonable under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed objectively, justify [the] action." *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404 (2006) (emphasis removed) (internal quotation marks omitted). The trial court found that the officers could reasonably have believed that someone could be in the residence capable of harming Defendant or themselves. (L.F. 41). The trial court did not plainly err in this determination, nor is this conclusion clearly erroneous. Defendant was so concerned with his safety that he called for emergency services. (Tr. 183, 192). When police arrived, Defendant explained that people were telling him to stab himself in the heart with a knife. (Tr. 31). Officers believed that there was the possibility that a weapon was involved. (Tr. 50). Defendant also stated that he thought someone or something was after him. (Tr. 109). Under these circumstances, it was reasonable for police to believe that a threat to Defendant, the public, or the officers themselves existed inside the house.[4]

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[4] At the motion hearing, Defendant argued that there would be no need to clear the residence because an ambulance had been called. (Tr. 64). But if any threat existed inside the house, the dangerous individual could have walked outside and harmed Defendant, the officers, or the public before the

E. The exclusionary rule should not apply.

1. There is no deterrence benefit here.

Even if entry into Defendant's home violated the Fourth Amendment, the exclusionary rule should not apply. "The general rule is that evidence obtained as a direct result of an unlawful search or seizure is considered 'fruit of the poisonous tree' and is inadmissible at trial." *State v. Robinson*, 454 S.W.3d 428, 442 (Mo. App. W.D. 2015). But the United States Supreme Court has "long rejected" a "wide scope for the exclusionary rule." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006). "[T]he significant costs of [the exclusionary] rule have led us to deem it applicable only . . . where its deterrence benefits outweigh its substantial social costs." *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016) (internal quotation marks omitted). "Suppression of evidence . . . has always been our last resort, not our first impulse." *Id.*

"[T]he [exclusionary] rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its]

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ambulance arrived. Additionally, there is no indication whatsoever that it was inevitable that Defendant would eventually be taken away by ambulance. Medical staff may have told Defendant it was medically safe for him to return to his home. *See* (Tr. 33).

application." *State v. Wilbers*, 347 S.W.3d 552, 561-62 (Mo. App. W.D. 2011) (quoting *Parole v. Scott*, 524 U.S. 357, 365 (1998)).

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.

Wilbers, 347 S.W.3d at 562 (quoting *Herring v. United States*, 555 U.S. 134, 143-44 (2009)). "The proper inquiry [as to application of the exclusionary rule involving questionable mental capacity] focuses upon the objective facts, as presented to a reasonable inquirer, that would reasonably put him or her on notice that a voluntary consent could not be given." *United States v. Grap*, 403 F.3d 439, 445 (7th Cir. 2005).

"[T]he exclusionary rule has never been applied except where its deterrence benefits outweigh its substantial social costs." *Hudson v. Michigan*, 547 U.S. 586, 594 (2006) (internal quotation marks omitted). Application of the exclusionary rule here would part from this precedent, incurring tremendous social costs with virtually—or perhaps literally—no deterrence benefit. Police must be able to act in emergency situations without an unreasonable fear that any evidence they find will be excluded. A

constricting of the exigent-circumstances doctrine may lead officers not to act when an individual, the police, or the general public may be in grave danger. The social costs of exclusion here would be great.

In contrast, the deterrence benefits of exclusion would be nil. The police were concerned only with Defendant's safety. Officer Erpelding offered to check out Defendant's residence to make sure it was safe, but he did not affirmatively request that he be able to search the residence. (Tr. 31, 42-43). Defendant himself explicitly requested that the officers search his home to ensure that it was safe "because [Defendant] thought that someone or something was after him." (Tr. 32, 42-43, 109). There was absolutely no indication that any officer desired to exploit Defendant's situation by going on a fishing expedition in an attempt to uncover any illegal activity by Defendant. *Cf. State v. Grayson*, 336 S.W.3d 138, 148 (Mo. banc 2011) ("Such a fishing expedition is precisely the sort of overreaching police behavior that the exclusionary rule is intended to deter.").

When police respond to a call involving an emotionally disturbed person, (Tr. 31, 42), preventing responding officers from attempting to calm the individual down by making him or her feel safe would serve no beneficial deterrent purpose. The officers' actions here were objectively reasonable. Defendant told police that he thought someone or something was after him. (Tr. 109). Defendant was distressed, and officers took reasonable steps in

efforts to help relieve Defendant's distress and make him safe. The exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *United States v. Leon*, 468 U.S. 897, 919 (1984).

2. The officers were not reckless or grossly negligent.

There was no reckless or grossly negligent conduct here. *Wilbers*, 347 S.W.3d at 562 (quoting *Herring*, 555 U.S. at 143-44). Even if the officers' conduct was unlawful, "when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force, and exclusion cannot pay its way." *Davis v. United States*, 564 U.S. 229, 238 (2011) (internal citations and quotation marks omitted).

Even if Defendant had recently experienced hallucinations, he was lucid and cooperative with the officers, as discussed above. Defendant gave myriad indications that he was fully capable of understanding the nature of the officer's offer to clear his residence and that he was fully capable of consenting to that offer. The officers here could not have known that clearing a house for Defendant's own safety under such circumstances, at Defendant's own request due to his belief that someone or something was after him, was not lawful. Under these circumstances, it cannot fairly be said that the officers "had knowledge, or may properly be charged with knowledge, that the

search was unconstitutional under the Fourth Amendment." *Herring*, 555 U.S. at 143.

Furthermore, "[a]bsent any evidence of psychological or physical coercion on the part of the agents, there is no basis for declaring [the defendant's] statements and consent to search involuntary." *Barbour*, 70 F.3d at 585. As discussed, the officers here did not even indicate to Defendant that they wanted to clear the residence; rather, they merely offered their services.

Defendant emphasizes that it was the police who initially raised the possibility of clearing the residence. (Appellant's Br. 31, 34). It is true that the initial offer to clear the residence came from Officer Erpelding and not Defendant; however: (1) Officer Erpelding did not ask for consent to search the house and instead merely offered to clear the residence, and did not even suggest that the police should in fact clear the residence; and (2) consent is typically obtained after a request from police, and so this in no way makes Defendant's consent invalid. Additionally, the officer's offer to clear Defendant's residence served an important law enforcement purpose—to ensure that Defendant would be safe in his home and to make Defendant feel safe in his home.

Defendant further argues that the officers knew that Defendant was not lucid enough to consent to clear the residence because the officers "knew [Defendant] would be leaving in the ambulance" and because the officers

chose to have Defendant taken to the hospital based on Defendant's state of mind. (Appellant's Br. 31-32, 35). The record does not support these assertions. Although an ambulance had been called, there is no indication that the ambulance was inevitably going to take Defendant away, as medical staff may have told Defendant it was medically safe for him to return to his home. *See* (Tr. 33). And, as discussed, Defendant gave myriad indications that he was fully capable of understanding the nature of the officer's offer to clear his residence and that he was fully capable of consenting to that offer. Additionally, there is no indication in the record that the police made the decision for medical staff to take Defendant to the hospital. Such a scenario seems unlikely, as such decisions are far more likely to be made by medical staff and the patient.

The officers were not reckless or negligent in any way. But even if their conduct could be said to constitute simple, isolated negligence, "when [police] conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force, and exclusion cannot pay its way." *Davis*, 564 U.S. at 238.

The officers were acting in good faith to serve Defendant during his time of need. The good-faith exception to the exclusionary rule precludes the rule's application under various circumstances, even when officers are acting *against* a defendant's interests. For example, in *United States v. Leon*, the

U.S. Supreme Court held that the police's "objectively reasonable reliance on a subsequently invalidated search warrant" will not result in application of the exclusionary rule. *United States v. Leon*, 468 U.S. 897, 922 (1984). In *Illinois v. Krull*, the Court held that the exclusionary rule will not be applied where there is objectively reasonable reliance on a statute. *Illinois v. Krull*, 480 U.S. 340, 349 (1987). In *Davis v. United States*, 564 U.S. 229 (2011), the Court held that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." *Davis*, 564 U.S. at 232. In *Herring v. United States*, 555 U.S. 135 (2009), the court held that the good-faith warrant exception still applies when police make recordkeeping errors. *Herring*, 555 U.S. at 142-46.

Courts have repeatedly refused to apply the exclusionary rule in cases involving good-faith reliance on questionable consent. In *Flanagan v. State*, 440 So. 2d 13 (Fla. Dist. Ct. App. 1983), the court refused to apply the exclusionary rule when officers relied in good faith on the consent of an individual who did not have actual authority to consent to a search. When the police arrived at a trailer in which the defendant was an overnight guest, a man told the police that he had authority to grant or deny entry into the trailer. *Flanagan*, 440 So. 2d at 14. The man gave the officer authority to enter the trailer under the condition that the officer not search the trailer and arrest only the defendant. *Id.* The court held that although the man did

not have actual authority to consent to the search, the officer's good-faith reliance on the man's apparent authority to consent to the search precluded application of the exclusionary rule. *Id.* at 15.

In *People v. Downing*, 40 Cal. Rptr. 2d 176 (Cal. Ct. App. 1995), the terms of the defendant's probation had included a Fourth Amendment probation waiver or consent. *Downing*, 40 Cal. Rptr. 2d at 178. Although the consent had expired, police records indicated that the consent was still valid. *Id.* Pursuant to the invalid consent, police searched the defendant's apartment and found incriminating evidence. *Id.* at 179. The court refused to apply the exclusionary rule, holding that "the investigating officer here acted in objectively reasonable good faith and that to apply the exclusionary rule in this case would not serve to promote its purpose of deterring unlawful police conduct." *Id.* at 187.

In *United States v. Balanquet-herrera*, the defendant had sexually assaulted the victim. *United States v. Balanquet-herrera*, No. 14-278, 2016 WL 164543 at *3 (W.D. Pa. Jan. 14, 2016). After the defendant was arrested, the defendant's wife had ongoing concerns about the whereabouts of her firearm, which she lawfully owned. *Id.* The defendant's wife gave consent for officers to locate the gun inside the marital residence. *Id.* An officer located the gun, alongside illegal drugs, inside a safe in the residence. *Id.* at *5. The officer's motive for opening the safe was to locate the gun. *Id.* The court

stated that even if the consent was invalid, exclusion would serve no deterrent purpose. *Id.* at 13.

The good-faith exception should likewise apply here.[5] Suppression of evidence is a last resort. *Strieff*, 136 S. Ct. at 2061. The exclusionary rule's "costly toll" poses too "high [an] obstacle" for application here. *Wilbers*, 347 S.W.3d at 561-62. The deterrence benefits here do not outweigh the substantial social costs. *Hudson*, 547 U.S. at 594. There is no deliberate, reckless, or grossly negligent misconduct. *Wilbers*, 347 S.W.3d at 562. Police were acting on Defendant's behalf, not against his interests. Police were concerned with Defendant's own safety and cleared his residence—not for purposes of finding incriminating evidence, but because Defendant himself did not feel safe and thought that someone or something was after him. Defendant's point should be denied.

Society cannot expect police to have immediately dismissed Defendant's strongly-felt concerns simply because of concerns about his mental health.

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[5] The State does not assert that all later-invalidated consent searches should warrant application of the good-faith exception. Where it is clear that consent is obtained by deliberate, reckless, or grossly negligent misconduct, deterrence benefits may weigh in favor of exclusion. But there is no evidence of any misconduct here.

Defendant was obviously frightened, and the law should not expect police officers to make an inquiry into Defendant's mental status. Defendant's articulation of fear that someone was trying to harm him, no matter how that fear was articulated, made it reasonable for officers to ask if Defendant wanted them to "clear" his residence.

CONCLUSION

Defendant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 11,094 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2010 software.

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