No. SC96087

In the Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

JOSEPH FOUNTAIN PERRY,

Appellant.

Appeal from Livingston County Circuit Court
Forty-Third Judicial Circuit, Division Twenty
The Honorable Thomas Nicholas Chapman, Judge

RESPONDENT'S SUBSTITUTE BRIEF

JOSHUA D. HAWLEY
Attorney General

ROBERT J. (JEFF) BARTHOLOMEW
Assistant Attorney General
Missouri Bar No. 44473

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

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

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STATEMENT OF FACTS

Appellant was charged as a prior and persistent offender in the Circuit Court of Livingston County with the class B felony of possession of a controlled substance with intent to distribute. (L.F. 18). Appellant was convicted of the class C felony of possession of a controlled substance following a jury trial held March 13, 2015. (Tr.4-263).

Appellant does not contest the sufficiency of the evidence to support his conviction. Viewed in the light most favorable to the verdict, the evidence at trial showed the following:

On October 24, 2013, Chillicothe Police Officer Jodi Huber was on patrol when she saw Appellant pulling out of his driveway in a blue truck. (Tr. 129-130). Based on a prior discussion with another officer, Officer Huber believed that Appellant's driver's license might have been suspended, so she asked the dispatcher to check on Appellant's driving status. (Tr. 133-135). Officer Huber followed the truck driven by Appellant, which she confirmed was registered to him. (Tr. 134).

Before Officer Huber received information from the dispatcher, Appellant parked his vehicle in the driveway of his fiancée, Angela Stock. (Tr. 138). Officer Huber parked her car, got out, asked Appellant if she could talk to him, and asked him if he had a driver's license because she believed his license had been suspended. (Tr. 136-139). Appellant responded that he had

not been suspended and then gave Officer Huber his driver's license. (Tr. 139-140).

Officer Huber attempted to re-contact dispatch on her radio to run Appellant's license number, but she was unable to contact them due to an equipment malfunction. (Tr. 140). At this point, Appellant began turning away from Officer Huber, who was out of her car, and began to remove a plastic bag from his pocket, holding it in his clenched fist. (Tr. 140-141). When Officer Huber told Appellant to come over, Appellant ignored her and began moving a bicycle out of the back of his truck, trying to put distance between himself and Huber. (Tr. 141-142).

When Officer Huber repeated her request for Appellant to come over, Appellant threw down the bike and took off running, the plastic bag clenched in his hand. (Tr. 142). Appellant ran down a sidewalk, turned down the edge of a yard, and ran alongside a fence. (Tr. 144). Officer Huber pursued Appellant on foot and during the chase, Officer Huber told Appellant to stop running. (Tr. 144).

As Appellant came to an intersection of chain link fences, he hesitated and bent over the fence before he jumped. (Tr. 144-147). Once over the fence, Appellant unclenched his fist and walked a few more steps until he saw Sheriff Steve Cox's vehicle, whereupon he turned himself in to Sheriff Cox, who placed Appellant under arrest. (Tr. 147-148, 200). After assisting Officer

Huber, Officer Dustin Southard showed Officers John Valbracht and Officer Huber a clear plastic baggie with a white crystalized substance in it that had been stashed into the top of a hollow piece of the chain-link fence. (Tr. 110-112, 149-150, 178-179, 186-188). The baggie appeared clean and new. (Tr. 110-112, 149-150, 178-179). Officer Huber took the bag into evidence. (Tr. 149-150). The baggie tested positive for methamphetamine. (Tr. 150-151, 226-227).

Following his arrest, Officer Huber took Appellant to the police department, where he was given *Miranda*[1] warnings, which Appellant indicated he understood by signing a form. (Tr. 154-156, 200). Appellant made no admissions while in custody, except for the statement to Officer Huber, "You already found everything." (Tr. 156).

Appellant did not testify or present any evidence. (Tr. 233-235). After hearing all of the evidence, receiving instruction, and hearing argument, the jury found Appellant guilty of possession of a controlled substance. (Tr. 259, L.F. 52). Prior to trial, Appellant was found to be a prior and persistent offender. (Tr. 5-8). The court sentenced Appellant to eight years imprisonment. (Sent. Tr. 100-101, L.F. 57-59).

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

On direct appeal, the Court of Appeals, Western District, held that the trial court erred in overruling Appellant's motion to suppress and reversed Appellant's conviction and sentence on October 18, 2016. *State v. Perry*, 2016 WL 6081854 (Mo. App. W.D. 2016). This Court ordered this cause transferred on May 30, 2017.

ARGUMENT

I.

The trial court did not err in overruling Appellant's motion to suppress the baggie of methamphetamine because the evidence was obtained after it had been abandoned by Appellant following a consensual encounter with Officer Huber, not a seizure, and thus Appellant lacked standing to challenge the admissibility of the evidence.

A. Evidence at suppression hearing and trial.

On May 6, 2014, the trial court heard Appellant's motion to suppress the evidence found in a plastic bag inside the fence post. (L.F. 14-16, 21-30, Tr. 12-65). Chillicothe Police Officer Jodi Huber testified that she was on patrol on October 24, 2013 when she saw Appellant pulling out of his driveway in a blue truck. (Tr. 17-20). Officer Huber followed the truck driven by Appellant, which she confirmed was registered to Appellant. (Tr. 21). Based on a prior discussion with another officer, Officer Huber believed that Appellant's driver's license might have been suspended, so she asked the dispatcher to check on Appellant's driving status. (Tr. 21). Before Officer Huber received information from the dispatcher, Appellant parked his vehicle in the driveway of his fiancée, Angela Stock, so Officer Huber parked her car, got out, asked Appellant if she could talk to him, and asked him if he had a

driver's license because she believed his license had been suspended. (Tr. 25-27). Appellant responded that he had not been suspended and then gave Officer Huber his driver's license. (Tr. 27, 46, 138).

Officer Huber attempted to re-contact dispatch on her radio to run Appellant's license number, but she was unable to contact them due to an equipment malfunction. (Tr. 28). At this point, Appellant began acting suspiciously by turning away from Officer Huber, removing a plastic bag from his pocket, and holding it in his clenched fist. (Tr. 29). When Officer Huber told Appellant to come over, Appellant ignored her and began moving items from the back of his truck, trying to put distance between Huber and himself. (Tr. 29). Appellant said, "Hey, Norm, come get this," pushing the bike along and keeping his hand clenched. (Tr. 29).[2] When Officer Huber again told Appellant to come over, Appellant threw down the bike and took off running. (Tr. 29).

Appellant ran down a sidewalk, turned down the edge of a yard and ran alongside a fence. (Tr. 29). Officer Huber pursued Appellant on foot. (Tr. 30). As Appellant came to an intersection of chain link fences, he hesitated and

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[2] Norm was identified as Norman Graf, who was seen coming out of the house. (Tr. 141).

bent over the fence before he jumped. (Tr. 30-32). Once over the fence, Appellant unclenched his fist and walked a few more steps until he saw Sheriff Steve Cox's vehicle, whereupon he turned himself in to Sheriff Cox. (Tr. 32-33, 52-54). The court overruled Appellant's motion to suppress. (L.F. 5-6).

At trial, Chillicothe Police Officer Jodi Huber testified that she was on patrol when she saw Appellant pulling out of his driveway in a blue truck. (Tr. 129-130). Based on a prior discussion with another officer, Officer Huber believed that Appellant's driver's license might have been suspended, so she asked the dispatcher to check on Appellant's driving status. (Tr. 133-135). Officer Huber followed the truck driven by Appellant, which she confirmed was registered to Appellant. (Tr. 134).

Before Officer Huber received information from the dispatcher, Appellant parked his vehicle in the driveway of his fiancée, Angela Stock. (Tr. 138). Officer Huber parked her car, asked Appellant if she could talk to him, and asked him if he had a driver's license because she believed his license had been suspended. (Tr. 136-139). Appellant responded that he had not been suspended and then gave Officer Huber his driver's license. (Tr. 139-140).

Officer Huber attempted to re-contact dispatch on her radio to run Appellant's license number, but she was unable to contact them due to an equipment malfunction. (Tr. 140). At this point, Appellant began turning

away from Officer Huber, who was out of her car, and began to remove a plastic bag from his pocket, holding it in his clenched fist. (Tr. 140-141). When Officer Huber told Appellant to come over, Appellant ignored her and began moving a bicycle out of the back of his truck, trying to put distance between Huber and himself. (Tr. 141-142).

When Officer Huber again told Appellant to come over, Appellant threw down the bike and took off running, the plastic bag clenched in his hand. (Tr. 142). Appellant ran down a sidewalk, turned down the edge of a yard, and ran alongside a fence. (Tr. 144). Officer Huber pursued Appellant on foot and during the chase, Officer Huber told Appellant to stop running. (Tr. 144). As Appellant came to an intersection of chain link fences, he hesitated and bent over the fence before he jumped. (Tr. 144-147). Once over the fence, Appellant unclenched his fist and walked a few more steps until he saw Sheriff Steve Cox's vehicle, whereupon he turned himself in to Sheriff Cox, who placed Appellant under arrest. (Tr. 147-148, 200). After assisting Officer Huber, Officer Dustin Southard showed Officers John Valbracht and Officer Huber a clear plastic baggie with a white crystalized substance in it that had been stashed inside the top of a hollow piece of the chain-link fence. (Tr. 110-112, 149-150, 178-179, 186-188). The baggie appeared clean and new. (Tr. 110-112, 149-150, 178-179). Officer Huber took the bag into evidence. (Tr. 149-150).

B. Standard of review.

When reviewing a trial court's ruling on a motion to suppress, the inquiry is limited to whether the court's decision is supported by substantial evidence. *State v. Rousan*, 961 S.W.2d 831, 845 (Mo. banc 1998). The Court of Appeals views the facts and any reasonable inferences therefrom in a light most favorable to the ruling of the trial court and disregards any contrary evidence and inferences. *State v. Kampschroeder*, 985 S.W.2d 396, 398 (Mo. App. E.D. 1999). The trial court's ruling on a motion to suppress will be affirmed unless it is clearly erroneous. *State v. Woolfolk*, 3 S.W.3d 823, 828 (Mo. App. W.D. 1999). If the ruling is plausible, in light of the record viewed in its entirety, the reviewing court will not reverse, even if convinced it would have weighed the evidence differently. *Id*.

"While '[a] trial court's ruling on a motion to suppress will be reversed only if it is clearly erroneous,' a determination as to whether conduct violates the Fourth Amendment is an issue of law that this Court reviews *de novo*." *State v. Sund*, 215 S.W.3d 719, 723 (Mo. banc 2007).

C. Officer Huber had a consensual encounter with Appellant.

"There are three categories of police-citizen encounters: (1) an arrest requiring probable cause, (2) an investigative detention requiring only reasonable suspicion based upon specific articulable facts, and (3) a consensual encounter." *State v. Johnson*, 427 S.W.3d 867, 872 (Mo. App. E.D.

2014).

"[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." *Florida v. Bostick*, 501 U.S. 429, 434 (1991). The United States Supreme Court has made clear that, for purposes of the Fourth Amendment, a seizure does not occur simply because a police officer approaches an individual and asks a few questions. *State v. Lammers*, 479 S.W.3d 624, 631 (Mo. banc 2016) (citing *Bostick*, 501 U.S. at 434). "So long as a reasonable person would feel free 'to disregard the police and go about his business,' the encounter is consensual and no reasonable suspicion is required." *Bostick*, 501 U.S. at 434. "The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature." *Id*.

Here, Officer Huber had a consensual encounter with Appellant. Officer Huber followed the truck driven by Appellant, and after Appellant parked his vehicle in the driveway of his fiancée, Officer Huber parked on the street, got out, asked Appellant if she could talk to him, and asked him if he had a driver's license. Appellant responded that he had not been suspended and then gave Officer Huber his driver's license, whereupon Officer Huber

attempted to verify the status of Appellant's license up until the point Appellant took off running.

Consensual encounters can become detentions (thereby implicating the Fourth Amendment) if "the individual no longer has a reasonable belief that he or she could terminate the encounter or refuse to answer questions." *State v. Johnson*, 427 S.W.3d at 872-873. "When that occurs, a seizure has taken place and the encounter moves into the second category of an investigatory detention: a *Terry*[3] stop." *Id.* at 873. In *Terry*, the Supreme Court held that it is "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen . . . that a 'seizure' has occurred." *Terry*, 392 U.S. at 19 n.16.

Since the record demonstrates that Officer Huber never laid hands on Appellant, a seizure could only have arisen by a "show of authority." In *California v. Hodari D.*, 499 U.S. 621 (1991), the Unites States Supreme Court reaffirmed that the test for existence of a "show of authority" is an objective one: "not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person." *Hodari D.*, 499 U.S. at 628. The *Hodari D.* Court concluded that if it were assumed that a police officer's

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[3] *Terry v. Ohio*, 392 U.S. 1 (1968).

pursuit constituted a "show of authority" enjoining the defendant to halt, the fact that the defendant did not comply with that injunction meant that he was not seized until he was tackled:

> [t]he word "seizure" readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful . . . It does not remotely apply, however, to the prospect of a policeman yelling "Stop, in the name of the law!" at a fleeing form that continues to flee. That is no seizure.

Id. at 629. The Court further held that drugs abandoned by a defendant while he was running from the police were not subject to protection under the Fourth Amendment since the defendant's refusal to submit to the purported show of force by the police meant that there had been no seizure. *Hodari D.*, 499 U.S. at 629. The Supreme Court of Missouri has found *Hodari D.* to be controlling, and that a person is not seized until the police subject the person to physical force or the person submits to a show of police authority. *See State v. Hosier*, 454 S.W.3d 883 (Mo. 2015).

Like *Hodari D.*, the present case involves a defendant who refused to yield to the officer's request and instead ran away. As there was no submission by Appellant to the authority of Officer Huber, there was no seizure, even if there had been a "show of authority" by Officer Huber. Appellant's initial cooperation with Officer Huber (handing her his driver's

license and answering questions) are best characterized as Appellant's cooperation with the officer's request during a consensual encounter and not as a submission to any show of authority.

Moreover, when Officer Huber engaged in a show of authority by telling Appellant to "Come here for a minute," (Tr. 141-142), there was still no seizure, due to Appellant's refusal to comply and his running away while clutching a plastic bag in his hand. The initial encounter between Officer Huber and Appellant was consensual, and the show of authority by Officer Huber resulted not in submission by Appellant but rather in defiance of the authority. As there was no submission by Appellant to Officer Huber's show of authority, there was never a seizure. Regardless of how the encounter between Appellant and Officer Huber is characterized, it ended before it became a seizure when Appellant ran away.

D. The abandonment doctrine allows for the admission of the bag of methamphetamine, and Appellant lacked standing to challenge its admission.

The Fourth Amendment to the United States Constitution protects against "unreasonable searches and seizures[.]" U.S. Const. amend. IV. "Missouri's constitutional prohibition of unreasonable searches and seizures, set forth in article I, section 15 of the Missouri Constitution, is interpreted

consistently with the Fourth Amendment to the United States Constitution." *State v. Jones*, 384 S.W.3d 357, 362 (Mo. App. S.D. 2012).

"A person has no standing to complain of the search or seizure of property that he has voluntarily discarded, left behind, or otherwise relinquished his interest so that he no longer retains a reasonable expectation of privacy with regard to it at the time of the search or seizure." *State v. Mosby*, 94 S.W.3d 410, 418 (Mo. App. W.D. 2003). It is well established that the Fourth Amendment gives no protection as to abandoned property. *State v. Primm*, 62 S.W.3d 463, 465 (Mo. App. E.D. 2001). Contraband discarded by a subject while fleeing from police is considered abandoned property and no cause to search or seize the contraband is required if the subject has not been seized. *See California v. Hodari D.*, 499 U.S. 621, 629 (1991); *State v. Johnson*, 863 S.W.2d 361, 362-363 (Mo. App. E.D. 1993) (seizure of cocaine dropped by the defendant did not violate the Fourth Amendment because he abandoned it when he dropped the cocaine while walking away from the officers).

In *Primm*, the Eastern District found that the defendant abandoned a cigarette case that officers had seen him holding, but that was no longer on his person when officers took him into custody. 62 S.W.3d at 464-465. Officers later located the cigarette case in the yard next door, about ten feet from where the defendant was taken into custody. *Id.* at 465. In *State v. Morgan*,

406 S.W.3d 490 (Mo. App. E.D. 2013), the Eastern District held that when a defendant, having noticed two police officers, dropped a backpack and its contents into a stairwell at a house where he did not live and where he had no right to enter, the defendant had no reasonable expectation of privacy in the bag or its contents when police seized and searched the bag.

Because Appellant abandoned the plastic baggie, he had no reasonable expectation of privacy with regard to it. "[I]n order for [the defendant's] Fourth Amendment rights to be violated or for the defendant to have standing to assert a violation of the rights guaranteed by Art. I, sec. 15 of the Missouri Constitution, defendant must have a legitimate expectation of privacy in the place or thing searched." *State v. Stillman*, 938 S.W.2d 287, 291 (Mo. App. W.D.1997). In order to have standing to complain of the search or seizure of property, a defendant must have a reasonable expectation of privacy related to that property at the time of the allegedly improper search or seizure. *State v. Immekus*, 28 S.W.3d 421, 429 (Mo. App. S.D. 2000).

It is well established that a warrantless search or seizure of abandoned property does not violate the Fourth Amendment. *State v. Qualls*, 810 S.W.2d 649, 652 (Mo. App. E.D.1991) "When property is abandoned, the constitutional protections against unreasonable search and seizure no longer apply, because those protections are designed to protect one's person and dwelling." *Primm*, 62 S.W.3d at 465. Therefore, "[a] person has no standing to

complain of the search or seizure of property that he has voluntarily discarded, left behind, or otherwise relinquished his interest so that he no longer retains a reasonable expectation of privacy with regard to it at the time of the search or seizure." *Immekus*, 28 S.W.3d at 429.

In accord with the above cases, Appellant lacked standing to challenge the admission of the methamphetamine because he abandoned the baggie inside the fence and thus relinquished his interest and any reasonable expectation of privacy at the time it was seized. Consequently, as the recovery of the evidence at issue here did not derive from Appellant's stop or detention, *State v. Mosby*, 94 S.W.3d 410, 419 (Mo. App. W.D. 2003), this point should be denied.

ARGUMENT

II.

The trial court did not plainly err in sentencing Appellant to eight years imprisonment for the class C felony of possession of a controlled substance (with enhancement as a prior and persistent offender) because it is not evident, obvious, and clear that the trial court imposed its sentence on Appellant based upon any misunderstanding of the law and Appellant has not demonstrated manifest injustice.

A. Background.

Appellant was charged as a prior and persistent offender with the class B felony of possession of a controlled substance with intent to distribute. (L.F. 18). Appellant was convicted of the class C felony of possession of a controlled substance following a jury trial. (Tr. 259, L.F. 52). Prior to trial, Appellant was found to be a prior and persistent offender, (Tr. 5-8). At sentencing, the prosecutor made the following statement:

> Your Honor, this case was originally charged as possession with intent with prior and persistent. He was facing 10 to life on that.
>
> The jury found [Appellant] guilty of the lesser included of the Class C felony of possession. It's methamphetamine. [Appellant] has several felonies in the past. The range of punishment in this case

enhanced to the B range is 5 to 15 years in the Department of Corrections.

(Sent. Tr. 97). The prosecutor announced that the State was recommending a sentence of eight years imprisonment, (Sent. Tr. 98), after which the following occurred:

THE COURT: I did want to note one thing. Thank you, [Prosecutor]. It looks like the offense says, possession of a controlled substance with intent to distribute. That is not what he was convicted of.

PROSECUTOR: It was not.

THE COURT: He was convicted of possession of a controlled substance.

PROSECUTOR: Correct.

THE COURT: But he has the enhanced range of penalties which are --

PROSECUTOR: It is still is 5 to 15.

THE COURT: -- 5 to 15, it was just wrong on that. Does that sound right?

APPELLANT'S COUNSEL: That's correct, your Honor.

(Sent. Tr. 98). The court sentenced Appellant to eight years imprisonment. (Sent. Tr. 100-101, L.F. 57-59).

B. Standard of review.

As Appellant concedes in his brief, his claim may only be reviewed for plain error because Appellant did not object when the court pronounced

sentence. (App. Br. 28). Any infirmities in sentencing are matters to be raised in the trial court at the grant of allocution. *State v. Olney*, 954 S.W.2d 698, 700 (Mo. App. W.D. 1997); *Arbeiter v. State*, 738 S.W.2d 515, 516 (Mo. App. E.D. 1987). Where a defendant does not raise the issue of infirmities in the sentencing process at the time the sentence is imposed, nothing is preserved for appellate review. *Olney*, 954 S.W.2d at 700; *State v. Feeler*, 634 S.W.2d 484, 487 (Mo. App. S.D. 1981). "A defendant will prevail on plain error review where it is shown that the trial court's error so substantially violated his rights that a manifest injustice or miscarriage of justice will occur if the error goes uncorrected." *Olney*, 954 S.W.2d at 700.

The error must be plain - that is, evident, obvious, and clear. *State v. Bailey*, 839 S.W.2d 657, 661 (Mo. App. W.D. 1992). The failure to correct the error must produce a manifest injustice or miscarriage of justice. *State v. Brethold*, 149 S.W.3d 906, 909 (Mo. App. E.D. 2004). The error must have affected the defendant's substantial rights - that is, it must have been outcome determinative. *Deck v. State*, 68 S.W.3d 418, 427 (Mo. banc 2002); *State v. Presberry*, 128 S.W.3d 80, 85 (Mo. App. E.D. 2003). An assertion of plain error places a much greater burden on a defendant than when he asserts claims of error which were properly raised before the trial court. *State v. Hunn*, 821 S.W.2d 866, 869 (Mo. App. E.D. 1991).

C. The record at sentencing does not support Appellant's claim.

Possession of a controlled substance is a class C felony. *See* § 195.202.2, RSMo, 2000. Appellant was both charged as and found by the court to be a prior and persistent offender, or one who has pleaded guilty to or has been found guilty of two or more felonies committed at different times. *See* § 558.016.3, RSMo. Pursuant to § 558.016.7(3), RSMo, the total authorized maximum terms of imprisonment for a persistent offender guilty of a class C felony is any sentence authorized for a class B felony.

The authorized term of imprisonment for a class C felony is "a term of years not to exceed seven years." *See* § 558.011.1(3), RSMo. But because Appellant was also found to be a prior and persistent offender under § 558.016.3, RSMo, he faced an authorized maximum term of imprisonment for any sentence authorized for a class B felony, which is "a term of years not less than five years and not to exceed fifteen years." *See* § 558.011.1(2), RSMo.

In the present case, the record does not support Appellant's claim that the trial court based its sentence on a materially false foundation. Indeed, the record reflects that after the prosecutor announced that the State's recommended sentence of eight years, which was the midpoint of the range of

punishment of zero to fifteen years imprisonment[4], the court made a point of noting that Appellant had been convicted of the lesser offense of possession of a controlled substance, rather than possession of a controlled substance with intent to distribute. (Sent. Tr. 98). Following the discussion regarding the clarification of the crime for which Appellant had been convicted, the court observed, "But he has the enhanced range of penalties which are - - - ," whereupon the prosecutor stated, "It is still is 5 to 15," to which the court responded "- - - 5 to 15, it was just wrong on that. Does that sound right?" and Appellant's counsel said, "That's correct, your Honor." (Sent. Tr. 98).

The above exchange thus demonstrates that the court understood that Appellant, as a prior and persistent offender, faced the range of punishment for a B felony of five to fifteen years. Importantly, it does not show that the court was under the mistaken belief that the range of punishment for a C felony of zero to seven years was unavailable – and thus does not support Appellant's claim that his sentence was based on any mistaken belief regarding the minimum sentence available to the court. In the absence of a record reflecting that the court believed that Appellant faced *only* a range of punishment of five to fifteen years, rather than the full zero to fifteen years, the presumption that the judge knew and followed the law in sentencing has

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[4] This was the range of punishment Appellant was facing.

not been rebutted. *See State v. Roll*, 942 S.W.2d 370, 374 (Mo. banc 1997); *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."). Appellant 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. *See State v. Kohser*, 46 S.W.3d 108, 114 (Mo. App. S.D. 2001); and *State v. Vanlue*, 216 S.W.3d 729, 734 (Mo. App. S.D. 2007).

Even if it is assumed, for the sake of argument, that the court was under a mistaken belief regarding the range of punishment, the record shows that Appellant's counsel reaffirmed the statements made by the court and the prosecutor. After the court stated that Appellant was subject to the enhanced range of penalties of five to fifteen years and asked if that sounded right, Appellant's counsel responded with, "That's correct, your Honor." (Sent. Tr. 98). To the extent that Appellant is claiming that the above exchange demonstrated a mistaken understanding of the range of punishment by the trial court, Appellant should not gain a benefit from an error or misunderstanding which Appellant's counsel agreed with or affirmatively failed to correct. A party may not take advantage of self-invited error. *Taylor*

v. State, 173 S.W.3d 359, 367 (Mo. App. S.D. 2005); *State v. Collier*, 892 S.W.2d 686, 691 (Mo. App. W.D. 1994); *State v. Kelly*, 689 S.W.2d 639, 640 (Mo. App. E.D. 1985).

D. Appellant has not shown 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 742-743. "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, 262-264 (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, 742-743 (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). But here, Appellant was not improperly sentenced to an unauthorized sentence as a prior and persistent offender.

Appellant cites *State v. Cowan*, 247 S.W.3d 617 (Mo. App. W.D. 2008), in support of his argument. (App. Br. 29). But *Cowan* is distinguishable. In *Cowan*, the court held that § 558.016 only extends the maximum sentence but does not alter the minimum sentence. The court explicitly rejected a plain-error standard of review, noting that while the defendant failed to mention sentencing error in his motion for new trial, he brought the issue to the court's attention during the sentencing hearing. *Cowan*, 247 S.W.3d at 618-619. Additionally, the trial court 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, Appellant

raised no issue regarding his sentence during the sentencing hearing, so his burden is much higher under plain-error review to demonstrate error and manifest injustice. And here, there is no indication that the court's sentence was affected by a misunderstanding regarding the minimum sentence Appellant faced. This is readily apparent when considering that Appellant received an eight-year sentence, well above the minimum sentence of five years for a class B felony, and the midway point of the entire sentence range to which he was subject.

Appellant also cites *State v. Troya*, (App. Br. 29), but this case is also distinguishable. 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, 697-698 (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 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. Unlike *Troya*, where the defendant received the *minimum* sentence of the *mistaken* range, Appellant received an eight-year sentence, well above the minimum sentence of five years for a class B felony.

Here, nothing in the record reflects that the trial court imposed Appellant's sentence based on any misunderstanding of the law. Instead, the record at sentencing showed that the court understood that Appellant, as a prior and persistent offender, faced the range of punishment of zero to fifteen years and followed the State's sentencing recommendation of eight years imprisonment, which was well above the minimum sentence of five years for a class B felony, and the midway point of the entire sentence range. Appellant 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. *State v. Wrice*, 389 S.W.3d 738, 743 (Mo. App. E.D. 2013). This point should be denied.

CONCLUSION

The trial court did not commit reversible error in this case. Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

JOSHUA D. HAWLEY
Attorney General

/s/ Robert J. (Jeff) Bartholomew
ROBERT J. (JEFF) BARTHOLOMEW
Assistant Attorney General
Missouri Bar No. 44473

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-332l
Fax: (573) 751-5391
jeff.bartholomew@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 6,172 words as calculated pursuant to the requirements of Supreme Court Rule 84.06(b) as determined by Microsoft Word 2010 software; and

/s/ Robert J. (Jeff) Bartholomew
ROBERT J. (JEFF) BARTHOLOMEW
Assistant Attorney General
Missouri Bar No. 44473
P. O. Box 899
Jefferson City, MO 65102
Phone: 573-751-332l
Fax: 573-751-5391
Jeff.Bartholomew@ago.mo.gov
ATTORNEY FOR RESPONDENT
STATE OF MISSOURI