



**In the
Missouri Court of Appeals
Western District**

STATE OF MISSOURI,
Respondent,
v.
DANZEL REESE,
Appellant.

WD83362
OPINION FILED:
AUGUST 3, 2021

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Joel P. Fahnestock, Judge

Before Division One: Anthony Rex Gabbert, Presiding Judge,
Edward R. Ardini, Jr., Judge, Thomas N. Chapman, Judge

Danzel Reese appeals from a judgment entered upon a jury verdict convicting him of involuntary manslaughter in the first degree under Section 565.024,¹ and robbery in the first degree under Section 569.020. Reese contends the circuit court, 1) plainly erred in overruling Reese's motion to strike Venireperson #33, arguing Venireperson #33 was a biased juror, 2) erred in failing to order further jury deliberations and accepting the jury's verdict and sentencing Reese for robbery in the first degree, arguing the jury issued inconsistent verdicts, 3) erred in accepting the jury's

¹ All statutory references are to the Revised Statutes of Missouri, as updated through 2010, unless otherwise noted.

verdict and sentencing Reese for robbery in the first degree in violation of Reese's right to be free from double jeopardy, 4) plainly erred in failing to *sua sponte* give a limiting instruction or declare a mistrial during the State's closing argument, arguing the State injected and argued facts not in evidence, and 5) plainly erred in submitting an erroneous verdict directing instruction for involuntary manslaughter in the first degree. We affirm.

Background and Procedural Information

Reese was charged by way of information on November 8, 2017, with one count of murder in the second degree for the shooting death of Lance Rutter, and one count of robbery in the first degree for, while acting alone or in concert with another, forcibly stealing a wallet from Christopher Chavez while Reese or another participant in the crime was armed with a deadly weapon. An amended information was filed on August 5, 2019, also charging Reese as a prior offender under Section 558.016. The case proceeded to jury trial on August 5, 2019. On August 8, 2019, the jury found Reese guilty of the lesser included offense of involuntary manslaughter in the first degree, and robbery in the first degree. On November 14, 2019, the court sentenced Reese to concurrent terms of seven years for involuntary manslaughter, and twenty years for the robbery. Reese does not challenge the sufficiency of the evidence to support his convictions. Trial evidence will be discussed as necessary below to address Reese's points on appeal.

Point I – Motion to Strike Venireperson #33

In his first point on appeal, Reese contends the circuit court plainly erred in overruling his motion to strike Venireperson #33. He contends he was denied a fair and impartial jury when Venireperson #33 was not struck as a juror, arguing that Venireperson #33 was unable to evaluate the evidence fairly and impartially. Reese contends that a manifest injustice resulted when he was found guilty by a jury that Venireperson #33 was part of.

Reese concedes that this issue was not included in his motion for new trial and is, therefore, unpreserved. He requests plain error review. “Issues that were not preserved may be reviewed for plain error only, which requires the reviewing court to find that manifest injustice or a miscarriage of justice has resulted from the trial court error.” *State v. Baumruk*, 280 S.W.3d 600, 607 (Mo. banc 2009). “Review for plain error involves a two-step process.” *Id.* “The first step requires a determination of whether the claim of error facially establishes substantial grounds for believing that manifest injustice or miscarriage of justice has resulted.” *Id.* (internal quotation marks and citation omitted). “If plain error is found, the court then must proceed to the second step and determine whether the claimed error resulted in manifest injustice or a miscarriage of justice.” *Id.*; *See* Rule 30.20. All prejudicial error is not plain error, “and plain errors are those which are evident, obvious and clear.” *Baumruk*, 280 S.W.3d at 607 (internal citations and quotation marks omitted). Plain error review under Rule 30.20 is discretionary. *State v. Brandolese*, 601 S.W.3d 519, 526 (Mo. banc 2020). The appellant bears the burden of facially establishing substantial grounds for believing that manifest injustice or miscarriage of justice has occurred. *Id.* Without this showing, an appellate court should decline plain error review. *Id.*

‘The critical question in a bias challenge is whether the venireperson unequivocally indicated an ability to evaluate the evidence fairly and impartially’ *State v. Clark*, 55 S.W.3d 398, 404 (Mo. App. 2001) (citation omitted). Where a potential juror equivocates about his or her ability to be fair and impartial, a trial court has a duty to make an independent inquiry. *Id.*; *State v. Wheat*, 775 S.W.2d 155, 158 (Mo. banc 1989) (trial court’s duty of independent inquiry arises only where a venireperson equivocates about ability to be fair and impartial). ‘Where a venireperson’s answer suggests a possibility of bias, but upon further questioning that person gives unequivocal assurances of impartiality, the bare possibility of prejudice will not disqualify such rehabilitated juror nor deprive the trial court of discretion to seat such venireperson.’ *State v. Bishop*, 942 S.W.2d 945, 949 (Mo.App.1997). Nonetheless, ‘[w]here a juror gives equivocal answers which reveal uncertainty as to his ability to be impartial, the absence of independent examination by a trial judge justifies a more searching review by an appellate court

of the challenged juror's qualifications.' *State v. Roark*, 784 S.W.2d 194, 197 (Mo. App. 1989).

State v. Clark-Ramsey, 88 S.W.3d 484, 488-489 (Mo. App. 2002).

The qualifications of a prospective juror are not determined conclusively by a single response, but are made on the basis of the entire examination. The trial court is in the best position to evaluate a venireperson's commitment to follow the law and is vested with broad discretion in determining the qualifications of prospective jurors. The ruling will not be disturbed on appeal unless it is clearly against the evidence and is a clear abuse of discretion.

Id. at 486 (internal quotation marks and citations omitted).

Here, during *voir dire* for Reese's trial, the prospective jurors were asked by the State if anyone or someone close to them had been a victim of a violent crime, including robbery and murder. Venireperson #33 stated that approximately five years prior, her daughter's boyfriend was murdered during a robbery in Oklahoma. Venireperson #33 and all other jurors who responded that they or someone close to them had been impacted by a violent crime were asked to raise their number card if they believed these prior events would affect their ability to be fair in Reese's case, or if they were not confident they could be "fair and impartial and put aside whatever their experiences were with their own victimization or the victimization of somebody close to them." Venireperson #33 did not raise her card, thereby indicating that she was confident that she could be fair and impartial in Reese's case. Venireperson #33 also indicated during *voir dire* that she presumed Reese was innocent of the crimes for which he was charged.

During defense counsel's examination of potential jurors, the following colloquy took place between defense counsel and Venireperson #33:

[DEFENSE COUNSEL]: ... Juror Number 33, would you please stand? You know someone or you were personally affected by a violent crime?

[VENIREPERSON 33]: Yes, it was my daughter's boyfriend.

[DEFENSE COUNSEL]: Daughter's boyfriend. And how long ago was that?

[VENIREPERSON 33]: It was about five years ago.

[DEFENSE COUNSEL]: I would imagine that you love your daughter and you feel for her when she suffered that loss, right?

[VENIREPERSON 33]: Right

[DEFENSE COUNSEL]: I imagine that was a traumatic experience for your daughter, right?

[VENIREPERSON 33]: Yes.

[DEFENSE COUNSEL]: And I imagine that's therefore, a traumatic experience for you, right?

[VENIREPERSON 33]: Yes.

[DEFENSE COUNSEL]: So would you be thinking about that when you're listening to the evidence in this case?

[VENIREPERSON 33]: Yes, I probably would.

[DEFENSE COUNSEL]: Because there is no dispute that there was a murder that occurred, okay? So that may invoke some emotions that you may remember with your daughter, correct?

[VENIREPERSON 33]: Yes.

[DEFENSE COUNSEL]: And that would impact your ability to consider the evidence in this case, right?

[VENIREPERSON 33]: It's hard to answer that because I was there for parts of it to support my daughter, but I don't know the particulars of the whole case. So I mean, I listened to things and hear things back and forth and it makes me maybe consider, think about that case and maybe what had happened, but to me it's sort of different, but then it's also removed from me a little bit.

[DEFENSE COUNSEL]: Do you think it would be fair to my client for you to be considering these things while you're considering the evidence in this case?

[VENIREPERSON 33]: Can you say that again?

[DEFENSE COUNSEL]: Yeah, that wasn't a very good question. I do that a lot. And if at any time I ask another bad question, which will happen, please stop and let me know, and I will do my best to reword it so we all have an understanding. Everybody okay with that? All right.

So would it be fair to Danzel Reese who is pleading not guilty, and he is presumed to be innocent, would it be fair for you to be thinking about your daughter's case, or your daughter's trauma and considering that while you're considering the evidence in this case?

[VENIREPERSON 33]: It would not be fair to him, correct.

[DEFENSE COUNSEL]: Thank you so much.

At the close of *voir dire*, the parties requested that various potential jurors be struck for cause. The defense requested that Venireperson #33 be struck for cause, and the State objected. The court denied defense counsel's request reasoning, "She was saying that she felt this is a very different scenario." Reese did not exercise a peremptory strike to exclude Venireperson #33 from the jury, and Venireperson #33 served on Reese's jury.

On appeal, Reese argues that the circuit court plainly erred in denying his motion to strike Venireperson #33 because Venireperson #33's responses to questions during *voir dire* "clearly suggest a possibility of bias and prejudice." Further, that Venireperson #33 concluded during *voir dire* "that it would not be fair to appellant for her to serve as a juror in his case considering that appellant was presumed to be innocent and that she would be thinking of the other case and her daughter's trauma during the presentation of the evidence in appellant's case." Further, that

“[Venireperson #33] clearly stated that it would not be fair to appellant for her to serve as a juror on his case while she was thinking about the facts of the other case and her daughter’s trauma.”

With regard to Venireperson #33’s past experiences, Venireperson #33 unequivocally indicated that those experiences would not impair her ability to be fair in Reese’s case, and that she could be fair and impartial and put aside those prior experiences. Her later responses to defense counsel’s questioning wherein she stated that she would “probably” be thinking about her daughter’s boyfriend’s case when listening to the evidence in Reese’s case did not negate her prior unequivocal response or convert it to equivocal. Likewise, Venireperson #33’s indication that it would be unfair to Reese “to be to be thinking about [her] daughter’s case, or [her] daughter’s trauma *and* considering that *while* [she was] considering the evidence in this case” did not negate her unequivocal indication that she could be fair and impartial in Reese’s case. To merely be thinking about an event because it has similarities to another event is not the same as allowing opinions regarding the first to influence opinions regarding the second. While Venireperson #33 stated she would “probably” be *thinking* about her daughter’s boyfriend’s case while *listening* to the evidence in Reese’s case, she expressed that she could not say that it would impact her ability to consider the evidence in Reese’s case due to the situations being different, the fact that she did not know the particulars in her daughter’s boyfriend’s case, and because her daughter’s boyfriend’s case was “removed” from her a little bit. She recognized, however, that it would be unfair to Reese to allow any consideration of her daughter’s boyfriend’s case to affect her considerations in Reese’s case. Contrary to Reese’s averments on appeal, Venireperson #33 never stated that this would occur. Further, Venireperson #33 never told the court that that “it would not be fair to appellant

for her to serve as a juror in his case” as Reese contends.²

We find that Reese fails to make a threshold showing that the circuit court plainly erred in overruling Reese’s motion to strike Venireperson #33. Reese claims on appeal that Venireperson #33 stated during *voir dire* that it would not be fair to Reese for her to serve as a juror; Venireperson #33 never made this statement. Reese fails to mention or acknowledge in any fashion on appeal Venireperson #33’s unequivocal indication during *voir dire* that her prior experiences would not impair her ability to be fair in Reese’s case, and that she could be fair and impartial and put aside those prior experiences. Reese fails to then explain how the statements Venireperson #33 actually did make during *voir dire* negated Venireperson #33’s indication that she could remain fair and impartial despite her prior experiences.³

Point I is denied.

Point II – Inconsistent Verdicts

In his second point on appeal, Reese contends that the circuit court erred in failing to order further jury deliberations, accepting the jury’s verdict and sentencing Reese for robbery in the first degree. He argues that the jury’s guilty verdict on the charge of robbery in the first degree, and not guilty verdict on the charge of felony murder in the second degree, were fundamentally inconsistent and allowed Reese to be found guilty without requiring the jury to find every element

² While Reese argues on appeal that reversal is required because Venireperson #33’s statements suggested a possibility of bias and prejudice and she was never “rehabilitated” by the State or through direct examination by the court, there was no need for rehabilitation where the responses elicited by defense counsel never contradicted Venireperson #33’s prior indications that she could be impartial, unbiased, and presumed Reese’s innocence in spite of her prior experiences.

³ “Under plain error review, the [appellant] still bears the burden of establishing manifest injustice if an unqualified juror serves on a jury.” *Brandolese*, 601 S.W.3d at 530. “It is not the duty of this Court to become an advocate for the appellant and comb through the entire record searching for the basis of claimed error.” *State v. Bradley*, 8 S.W.3d 905, 906 (Mo. App. 2000).

of the offense of robbery beyond a reasonable doubt. Reese contends that, in “acquitting” him of felony murder, the jury necessarily found that the State had failed to prove at least one of the elements beyond a reasonable doubt. Further, due to the language of the felony murder instruction and Reese’s concession as to two of the central elements of this offense, the State’s failure to prove all elements of the felony murder charge meant the jury also found that the State failed to prove robbery in the first degree beyond a reasonable doubt. Reese argues that a conviction of robbery in the first degree was, therefore, dependent on him also being convicted of second-degree felony murder.

“A claim of inconsistent verdicts requires an appropriate objection to be preserved for appeal. To be preserved, the objection must be raised before the jury is discharged.” *State v. Young*, 597 S.W.3d 214, 219-220 (Mo. App. 2019). Reese did not object to the verdicts at trial, either before or after the jury was discharged. His claim is, therefore, unpreserved and may only be reviewed for plain error. *Id.* As discussed above, Reese bears the burden of facially establishing substantial grounds for believing that manifest injustice or miscarriage of justice has occurred so as to warrant plain error review. *State v. Nickels*, 598 S.W.3d 626, 635 (Mo. App. 2020).

We first note that Reese fails to acknowledge, much less attempt to distinguish, *State v. Young*, 597 S.W.3d 214 (Mo. App. 2019) and cases cited therein which are highly instructive if not dispositive of Reese’s claim.⁴ In *Young*, appellant Young claimed that the circuit court erred in accepting the jury’s verdict as to unlawful use of a weapon and armed criminal action because they were inconsistent with the jury’s decision to convict Young of involuntary manslaughter rather

⁴ Reese makes no mention of these cases in his appeal brief. Although the State cites these cases in its brief and argues they are dispositive of Reese’s claim, Reese filed no reply brief to address the State’s arguments. Reese was permitted to file a reply brief under Rule 84.04(g), as made applicable by Rule 30.06(a).

than second-degree murder. *Id.* at 220. Like Reese, Young contended that the jury's verdict of involuntary manslaughter "constituted an affirmative finding of not guilty as to murder in the second degree and this was inconsistent with finding of guilt as to [the other counts] which contained similar elements." *Id.* After setting forth the particular jury instructions given, we explained:

The charge of felony murder in the second degree, as charged and instructed in this matter required the jury to find that Hutson was killed as a result of the unlawful use of a weapon. However, involuntary manslaughter, which the jury determined Young was guilty of, did not require such a finding. Young posits that by finding Young guilty of involuntary manslaughter, the jury had to have first affirmatively acquitted him of murder in the second degree. The key difference between the instruction for felony murder in the second degree and the instruction for involuntary manslaughter was the element that Hutson's death resulted from unlawful use of weapon. Young argues that because the jury acquitted him of murder in the second degree, the jury necessarily acquitted him of both the unlawful use of a weapon charge and the armed criminal action charge that was based on the unlawful use of a weapon charge. Therefore, Young asserts that the jury's decision regarding the instructed offenses charged under Count I was inconsistent with its findings of guilt as to Count III and IV. Thus, Young argues that the finding of guilty as to Counts III and IV must be reversed.

This argument both misconstrues the nature of a finding by a jury of guilt for a lesser included offense and also the deference to which we give jury verdicts. As the State notes, Missouri's instruction for murder in the second degree is not 'acquittal first.' *State v. Johnson*, 284 S.W.3d 561, 574 (Mo. banc 2009). Missouri's instructions allow for the jury to consider a lesser offense if it does 'not find the defendant guilty of the greater offense.' *Id.* There are multiple reasons why this may happen: the jury is deadlocked on guilt as to the greater offense, it may be the result of compromise, or an exercise of lenity by the jury.

Although the jury considered the greater offense of murder in the second degree, it was not required to unanimously find that the State failed to prove all of the elements of that charge beyond a reasonable doubt and 'acquit' Young of that offense before it could consider the lesser-included offenses of voluntary and involuntary manslaughter. Instead, the jury instructions stated that 'if you do not find the defendant guilty of' the preceding greater offense, 'you must consider whether he is guilty of' the lesser offense. Thus, Young is incorrect in his premise that the verdicts were inconsistent based on his argument that the jury had affirmatively found him not guilty or acquitted him of unlawfully using a deadly weapon in failing to find him guilty of felony murder under Count I. Therefore, it

was not inconsistent for the jury to find him guilty of that offense in Count III and additionally Count IV which relied on the conviction under Count III. To the extent this appears logically inconsistent, our courts have accepted such a result as manifestations of jury members reaching a compromise or exercising lenity.

Id. at 221.

In *Young*, we also distinguished the two cases relied on by Reese in making this claim -- *State v. Owens*, 270 S.W.3d 533 (Mo. App. 2008), and *State v. Flemons*, 144 S.W.3d 877 (Mo. App. 2004) -- on the grounds that the juries in *Owens* and *Flemons* issued clear acquittals of the predicate offenses. *Young*, 597 S.W.3d at 224. We explained that findings of guilt for unlawful use of a weapon and armed criminal action were not dependent upon a finding of guilt as to murder in the second degree. *Id.* No element of unlawful use of a weapon and armed criminal action required a finding of guilt as to murder, and no instruction required the jury to find that those charges could only be considered if Young was found guilty of murder in the second degree. *Id.* We concluded that, while there may have been “intellectual inconsistency,” that did not prevent the verdict from being entered and could easily be explained by jury compromise or lenity. *Id.* at 223-224. “Missouri courts have continually found that when a defendant is tried on a multiple count charge involving crimes with different elements, the jury’s verdict does not have to be logically consistent.” *Id.* at 223 (internal quotation marks and citations omitted).

The rationale of *Young* applies here. Because the jury was not obligated to first acquit Reese of second-degree murder before considering lesser included offenses, we cannot conclude that the jury’s conviction on the lesser included offense of first-degree involuntary manslaughter

means that the jury found the State failed to prove an element of second-degree murder; the jury had the option of exercising leniency.⁵

We find that Reese fails to make a threshold showing that the circuit court plainly erred in failing to order further jury deliberations and accepting the jury's verdict of robbery in the first degree. He fails to show that the jury's guilty verdict on the charge of robbery in the first degree, and not guilty verdict on the charge of felony murder in the second degree, were inconsistent necessitating *sua sponte* intervention by the court.

Point II is denied.

Point III – Double Jeopardy

In his third point on appeal, Reese contends the circuit court erred in accepting the jury's verdict and sentencing him for first-degree robbery in violation of Reese's right to be free from double jeopardy. Reese argues that the jury's decision to acquit him of second-degree felony

⁵ Even if Reese had "conceded" the second and third elements of second-degree murder, as Reese contends on appeal but the record does not necessarily reflect, the jury was still asked to independently consider these elements in relation to the evidence; the jury was under no obligation to accept Reese's concessions or the State's position as to how the evidence related to any element. *State v. Stewart*, 560 S.W.3d 531, 533 (Mo. banc 2018).

The jury could have also concluded that the State did not prove that Lance Rutter was killed "as a result of the perpetration" of the robbery. The evidence at trial, in the light most favorable to the verdicts, was that Lance Rutter and Christopher Chavez were sitting on the front porch of their residence in the early morning hours of August 7, 2010, relaxing after work and waiting for their laundry to finish. Reese, and a man identified by witness Terrell Lewis as Jamaal Young, jumped onto the porch. Young held a gun in Chavez's face and Reese held a gun in Rutter's face, demanding that Chavez and Rutter hand over any money they had. Chavez gave his wallet, which included approximately \$15, to Young. Rutter had nothing to give. Reese and Young then demanded that Chavez and Rutter take them into the residence. Chavez was "frozen" and "didn't really know what to do at that point in time." Rutter told Reese and Young that he was not taking them into the house. Chavez testified that Rutter was "getting really loud, like loud enough to alert the neighbors," and Chavez hoped that Rutter's loudness would scare the gunmen away. Chavez testified that Young "took off." Thereafter, Reese "started backing away from [Rutter], but still had his gun trained on him." Reese "kept looking from where [Young] took off and back at [Rutter], and then he finally looked away and shot. And then he [took] off running." Given this evidence and the jury instructions, the jury could have concluded that the robbery was complete when Young began running and Reese began backing away, and that Rutter's death did not *result* from the perpetration of the robbery but, rather, *resulted* from Reese's reckless act of looking away and shooting in Rutter's direction.

murder precluded the same jury from later convicting him of robbery in the first degree which he contends constituted the same offense for double jeopardy purposes.

Reese failed to raise this claim at trial or in his motion for new trial. As constitutional claims are waived if not raised at the first opportunity, we may only review for plain error. *State v. Moore*, 414 S.W.3d 580, 582 (Mo. App. 2013).

‘A criminal defendant's right to be free from double jeopardy is derived from the Fifth Amendment of the United States Constitution and applies to the states through the Fourteenth Amendment.’ *State v. Reynolds*, 502 S.W.3d 18, 25 (Mo. App. E.D. 2016); U.S. CONST. amends. V and XIV. ‘The proper test for assessing whether successive prosecutions violate double jeopardy is the *Blockburger* test, also known as the “same-elements” test.’ *State v. Daws*, 311 S.W.3d 806, 808 (Mo. banc 2010). Two charges constitute the same offense for double jeopardy purposes unless ‘each provision requires proof of a fact which the other does not.’ *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Article I, section 19 of the Missouri Constitution specifically protects against a defendant being retried for the same offense after acquittal. *State v. Johnson*, 245 S.W.3d 288, 293 (Mo. App. W.D. 2008).

Young, 597 S.W.3d at 225.

Reese’s claim that he was subjected to double jeopardy hinges on the premise that he was “acquitted” of second-degree felony murder. For the reasons explained above, he was not. Although a conviction on the offense of involuntary manslaughter in the first degree, rather than second-degree felony murder which was an option given the jury, would be considered an “implied acquittal” on the second-degree murder charge for purposes of a retrial,⁶ this does not translate to an actual acquittal in a case involving a single prosecution with multiple counts within the context of one trial where the jury was not required to acquit on the greater offense before considering the lesser.

⁶ See *Green v. United States*, 355 U.S. 184, 190-191 (1957).

In *State v. Young*, discussed above in Point II, Appellant Young also argued that he was “acquitted” of a charge of murder in the second degree when the jury returned a guilty verdict of involuntary manslaughter instead. *Id.* at 220. He then argued that the court erred in accepting the jury’s verdict as to unlawful use of a weapon and armed criminal action, contending that the jury finding him guilty of these offenses after his “acquittal” constituted double jeopardy because “unlawful use of a weapon” was an element of second-degree murder. *Id.* at 225. In our Opinion addressing Young’s claims, we reiterated that the jury was not required to acquit Young of the greater charge of second-degree murder, or the specific elements within that charge, before it could consider the lesser-included offense of involuntary manslaughter. *Id.* at 226. Further, that “[w]hile murder in the second degree had within it the element of ‘unlawful use of a weapon’ there were other elements not present in the elements of the crimes of unlawful use of a weapon or armed criminal action making them factually distinct and, consequently, double jeopardy does not bar punishment for both.” *Id.* We also expressly questioned the applicability of a successive prosecution claim in cases involving a single prosecution with multiple counts within the context of one trial. *Id.* at 225.

The same rationale applies here.⁷ Reese does not address *Young* in his appeal, and declined to file a reply brief addressing the State’s claim that the defendant in *Young* cited the same cases Reese cites for support, with this court finding all such cases “easily distinguishable” from a case where there was no true acquittal or retrial. *Young*, 597 S.W.3d at 226. Consequently, Reese fails

⁷ While Reese contends that the offense of second-degree felony murder and first-degree robbery “constitute the same offense under *Blockburger*,” in part because “the only contested element of the second-degree felony murder charge was the underlying felony of robbery in the first degree,” we noted in response to Reese’s second point on appeal that the record does not necessarily reflect “concessions” as to the other two elements.

to make a threshold showing that he was exposed to double jeopardy and that a manifest injustice occurred in his case.

Point III is denied.

Point IV – Closing Argument

In his fourth point on appeal, Reese contends that the circuit court plainly erred in failing to *sua sponte* give a limiting instruction or, alternatively, declare a mistrial during the State's closing argument. Reese contends that the State injected and argued facts not in evidence regarding the DNA evidence developed from the scene, and there is a reasonable possibility that Reese would not have been convicted had the prosecutor not done so. This, Reese contends, resulted in manifest injustice. Reese concedes that the prosecutor's statement was not objected to at trial and may only be reviewed for plain error.

Courts especially hesitate to find plain error in the context of closing argument because the decision to object is often a matter of trial strategy, and in the absence of objection and request for relief, the trial court's options are narrowed to uninvited interference with summation and a corresponding increase of error by such intervention. A conviction will be reversed based on plain error in closing argument only when it is established that the argument had a decisive effect on the outcome of the trial and amounts to manifest injustice.

Moreover, both the state and the defense are entitled to argue reasonable inferences from the evidence. A trial court maintains broad discretion in the control of closing arguments. An argument does not require reversal unless it amounts to prejudicial error. Closing arguments must be interpreted with the entire record rather than in isolation.

State v. Edwards, 116 S.W.3d 511, 536-537 (Mo. banc 2003) (internal quotation marks and citations omitted).

At trial, the State presented the testimony of Terrell Lewis, who came forward after being charged federally and informed law enforcement that he was with Reese the night Reese shot Rutter. Lewis agreed to testify against Reese in exchange for a plea offer. Lewis testified that he

was with Reese and two other people (Jamaal Young and Lavance Jones) on the night of the murder, and the four of them planned to rob a drug dealer known to Reese. Reese was carrying a semi-automatic handgun that fired Colt .45 auto rounds and had a laser sight and an extended magazine. The four traveled to a place near a club at 38th and Main in downtown Kansas City to meet the drug dealer and to rob him. The drug dealer never arrived. Lewis and Jones grew tired of waiting and headed back to their car which was parked at the intersection of 38th and Baltimore. As they waited, Reese called Lewis and advised that he and Young were going to find someone else to rob. From his location in the parked car, Lewis observed Reese and Young approach two people who were sitting on a porch down the street. Lewis observed one of the people hand something to Reese, and then saw Reese shoot the person on the left side of the porch. Reese and Young ran back to the car and Reese said: “[G]o, go, I shot him.” Reese later stated that the shooting victim “didn’t cooperate.”

The police collected evidence from the scene which included a laser sight. Reese’s DNA was found on that laser sight. Jennifer Howard, a DNA analyst at the Kansas City Police Crime Laboratory, testified that Reese was the person who left the majority of the DNA on the laser sight. She testified that while she could not determine when a person deposited DNA on an object, the most common reason for DNA to be absent from an object after a person touches it is physical removal from being wiped off, becoming wet, or being brushed up against. She testified that although there was no way for her to definitively determine who the last person to touch the laser sight was, it was possible that the last person to touch an item would have their DNA remain on the item.

In closing, defense counsel argued that the jury was being asked to assume what Terrell Lewis knew, but no one could truly know because “you can’t trust a single thing that that man

says.” The defense argued that Lewis’s testimony against Reese could not be trusted because it was only being given to secure a lighter sentence for himself. The defense argued that, before the jury ever considered the DNA evidence, it first needed to believe Terrell Lewis’s testimony, which was impossible to believe. With regard to the DNA evidence, the defense argued:

We learned from Jennifer Howard that there’s no test to determine how long someone’s DNA has been on an item. We learned from Jennifer Howard that DNA can stay on an item for a significant period of time. We learned from Jennifer Howard that one person can handle an item for an extended period of time and leave little to no DNA. And one person can handle an item for a short period of time and leave all kinds of DNA. There is no way to test to see if an item was handled by a specific person on a specific date.

There’s no way to determine how someone’s DNA got on a specific item. We know that there are a minimum of four different people’s DNA on that laser sight, four. And that’s a minimum. And that’s only the stuff, the people that left DNA on them. We don’t know how many people touched that laser sight.

Finally, finally, we learned from Jennifer Howard that Danzel Reese’s DNA was found nowhere else on the scene. Nowhere else on the scene was his DNA found.

During rebuttal, the prosecutor argued:

Probably the most damaging to the defense and the most powerful is the DNA on that laser sight. Because when Danzel Reese – excuse me, when Terrell Lewis gives his statement initially to the police in April of 2011, he doesn’t know that DNA has actually already linked the defendant to this crime. And he didn’t know when he testified yesterday.

He probably didn’t even realize that the laser sight was left behind. And we talk about what significance we can attach to that DNA evidence being found on the laser sight. The defense is correct. Ms. Howard is a scientist testified that she can’t say when DNA was put on an object. But Jennifer Howard, just like Terrell Lewis, is sitting in a witness chair. She doesn’t get to do what you all do.

She doesn’t get to listen to the testimony of other witnesses, she doesn’t get to go to the crime scene, she doesn’t get to examine the photographs and things like that and make these decisions and say, you know what, I think the reason the DNA is on there is because the defendant’s guilty. That’s not her responsibility, and frankly, she wouldn’t be allowed to do that even if she wanted to.

But you folks are armed with the facts of the case. And the reality is, is a gun and a laser sight attached thereto that's used in a murder and a robbery is not a gun that's going to be preserved in laboratory-like conditions, right? This gun is going to be shoved in people's shirts, in their pockets, shoved down their pants, shoved down the seat of a car, thrown in a trunk, under a mattress, under a pillow. These guns aren't being preserved so that if somebody touches it a week ago, that DNA is going to remain pristine and there when it's left at a crime scene, that's not reality.

Reason and commonsense tells us that. Reason and commonsense tell us, as Jennifer Howard explained, the most likely way that DNA gets wiped away is from being rubbed up against things, right? And there's no question that laser sight and that gun had been all over the place. And the significance of that is the fact that the defendant's DNA is the majority of the DNA on that laser sight tells you that the defendant was one of the very last people to touch that item.

And when you couple that and what I mean by that is, if the claim is that the defendant touched something and then later on it's taken somewhere else and left behind and ten people touched it between him and the scene, that can't be true in real world circumstance where the gun is getting rubbed around and rubbed off.

That means when the gun was produced, the last person to touch it is most likely the person that is going to have the majority of the DNA. And at the end of the day, ladies and gentlemen, it is not a coincident that 1 in 1.7 quintillion people, this is the one person whose DNA is the majority of the DNA on that sight. And that person just happens to be the individual that Terrell Lewis describes from the word go. Just like it's not a coincidence that Terrell recites these facts that are independently corroborated by these other witnesses.

At the end of the day, ladies and gentlemen, the reason that this evidence proves the defendant guilty is because there is no reasonable explanation for how Terrell Lewis could know the things he knew and how the physical evidence could continue to corroborate his account.

Reese contends that the State's closing argument was improper because there was no evidence presented that the laser sight found at the crime scene had been handled in a manner in which DNA would have been destroyed. Further, this "false premise" was used to "bolster the prosecution's further unsupported argument that it cannot 'be true in the real world circumstance' that appellant had earlier touched the laser sight and that his DNA remained on the item." Reese

argues that the prosecution also improperly argued that the last person who touched the laser sight would leave the majority of the DNA on the sight. Reese contends that his substantive rights to due process and a fair trial were violated by the State's improper closing argument because he was unable to present expert testimony to combat these unsupported assertions or rebut these contentions in any manner. Consequently, the trial court's failure to *sua sponte* issue a limiting instruction to the jury or, alternatively, declare a mistrial was manifestly unjust, and the weakness of the State's case and the importance of the DNA evidence in the case results in the reasonable probability that the verdict would have been different had the error not been committed. We disagree.

When Reese waited outside the club for the drug dealer he had arranged to meet and rob, it can be inferred that he intended to rob the drug dealer in the same manner he robbed Rutter and Chavez – by using his gun to compel compliance. As this was to be a surprise robbery, it is unreasonable to believe that Reese had his gun drawn and not concealed in some fashion while waiting for the dealer. The men were on foot after parking their car a few blocks from where the robbery was to take place. According to Howard, rubbing and brushing against an item can destroy surface DNA, as can the item getting hot or wet or being handled a lot. And, despite Howard testifying that it is possible to handle an item for an extended period of time and leave no DNA, she also testified that, “the longer you handle something the more likely you are to leave a profile.” She testified that it was possible that DNA from one person on an item could be removed through handling the item and the DNA of the last person who touched the item would remain; she testified that the opposite could also be true. Despite Howard testifying that the opposite could also be true, the State's argument that Reese as the majority DNA contributor on the laser sight suggested that he was the last to touch the laser sight was a reasonable inference drawn from Howard's testimony.

Regardless, the real significance of the DNA was its actual presence on the laser sight that was left at the scene of the crimes. Reese suggested to the jury that the State had not proven its case because there was no way to tell when or how the DNA got on the laser sight, and there was a minimum of four people's DNA on that laser sight. Reese argued in closing that the jury first had to believe Terrell Lewis before even considering the DNA, and suggested that the DNA was insignificant without Terrell Lewis's testimony. While this was not true, the State's argument in rebuttal explained that Reese's DNA on the laser sight corroborated Lewis's testimony that Reese was in possession of a gun with a laser sight and shot Rutter. Moreover, even if the prosecutor's statements in closing regarding the handling of the gun and the implications that could be drawn from Reese being the majority contributor of the DNA on the laser sight were improper, Reese fails to explain how these statements negated the significance of Reese's DNA on the laser sight found at the scene of the crime, that Lewis observed Reese to be in possession of a gun with a laser sight, and that Lewis observed Reese shoot someone with his gun. Consequently, he fails to show that, even if the statements were improper, they had a decisive effect on the outcome of the trial.

We find that Reese fails to show that the prosecutor's statements in closing were not reasonable inferences drawn from the evidence, or that even if they were not, the statements had a decisive effect on the outcome of the trial.

Point IV is denied.

Point V – Involuntary Manslaughter Instruction

In Reese's fifth point on appeal, he contends the circuit court plainly erred to his prejudice in submitting an erroneous verdict directing instruction for involuntary manslaughter in the first degree, arguing that the instruction failed to define "recklessly" as required by MAI-CR 3d 313.10.

Reese was convicted of one count of involuntary manslaughter in the first degree. The verdict directing instruction for this offense was patterned after MAI-CR3d 313.10 and incorporated accessory liability under MAI-CR3d 304.04. Instruction No. 13 read:

As to Count I, if you do not find the defendant guilty of murder in the second degree as submitted in Instruction No. 9 or Instruction No. 11, you must consider whether he is guilty of involuntary manslaughter in the first degree.

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about August 7, 2010, in the County of Jackson, State of Missouri, the defendant or another person caused the death of Lance Rutter by shooting him, and

Second, that defendant or another person recklessly cause the death of Lance Rutter,

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

Third, that with the purpose of promoting or furthering the commission of that involuntary manslaughter in the first degree, the defendant aided or encouraged another person in committing the offense,

then you will find the defendant guilty under Count I of involuntary manslaughter in the first degree.

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

This instruction did not include the portion of MAI-CR3d 313.10, which defines “recklessly” as follows:

In determining whether the defendant recklessly caused the death of [name of victim], you are instructed that a person acts recklessly as to causing the death of another person when there is a substantial and unjustifiable risk he will cause death and consciously disregards that risk, and such disregard is a gross deviation from what a reasonable person would do in the circumstances.

Rule 28.02(c) provides that, whenever there is an MAI-CR instruction or verdict form applicable under the law and Notes on Use, the MAI-CR instruction or verdict form shall be given or used to the exclusion of any other instruction or verdict form. Rule 28.02(f) provides that, the failure to give an instruction or verdict form in violation of Rule 28.02 constitutes error, with the error's prejudicial effect to be judicially determined, provided that an objection was timely made under Rule 28.03. Rule 28.03 states that no party may assign as error the giving or failure to give instructions or verdict forms unless a specific objection is made, "stating distinctly the matter objected to and the grounds of the objection." Further, the objections must be raised in a motion for new trial. Here, Reese's claim that the verdict directing instruction for involuntary manslaughter in the first degree failed to define "recklessly" as required by MAI-CR 3d 313.10 was not raised at trial or in Reese's motion for new trial. Reese concedes that this claim is, therefore, unpreserved and may be reviewed for plain error only.

"Instructional error rarely rises to the level of plain error." *State v. Scott*, 278 S.W.3d 208, 212 (Mo. App. 2009). For a defendant to establish plain error from an instructional error, he "must show more than mere prejudice and must show that the circuit court has so misdirected or failed to instruct the jury that it is apparent to the appellate court that the instructional error affected the jury's verdict, and caused manifest injustice or miscarriage of justice." *Id.* (internal citation and quotation marks omitted). The appellant bears the burden of facially establishing substantial grounds for believing that manifest injustice or miscarriage of justice has occurred. *Brandolese*, 601 S.W.3d at 526.

We find that Reese fails to show substantial grounds for believing that manifest injustice occurred in his case when the parties and the court omitted the MAI-CR 3d definition for

“recklessly” from the instruction for involuntary manslaughter in the first degree. While he cites *State v. Ludwig*, 18 S.W.3d 139 (Mo. App. E.D. 2000), as “instructive” and argues that “[h]ere, as in *Ludwig*, the statutory definition of ‘recklessly’ substantially differed from its common usage definition,” he makes no mention of *State v. Matheson*, 919 S.W.2d 553, 558 (Mo. App. 1996), a case from this court that was distinguished in *Ludwig*, and makes no attempt to explain how manifest injustice resulted on the facts of his case.

Ludwig involved a defendant who elbowed an intoxicated man in the mouth causing him to fall onto a picnic table and then to the ground. *Ludwig*, 18 S.W.3d at 141. The defendant then punched the victim several times and grabbed him by the throat. *Id.* Just prior to this, the defendant’s son advised that the intoxicated man had a gun. *Id.* The defendant told his son to get the gun from the victim, and the son got on top of the victim. *Id.* The gun fired, killing the victim. The defendant was charged with voluntary manslaughter. *Id.* At trial, the defendant asserted defenses of both self-defense and accident. *Id.* Instructions were submitted to the jury on voluntary manslaughter, involuntary manslaughter, and self-defense. *Id.* The jury returned a guilty verdict of involuntary manslaughter. *Id.* at 142. The jury was not instructed as to the definition of “recklessly” in the involuntary manslaughter instruction. *Id.*

The *Ludwig* court acknowledged the well-settled principle that, if an instruction uses a word in its ordinary, common-sense meaning, then no confusion occurs simply because the word is not defined. *Id.* at 143 (citing *State v. Digheira*, 617 S.W.2d 524, 534 (Mo. App. 1981)). *Ludwig* also recognized that in *State v. Matheson* this court found that the definition of “recklessly” in the MAI-CR 3d Notes on Use “is fully consistent with the lay definition of that word which defines ‘reckless’ as ‘lacking in caution’ and ‘marked by a lack of foresight or consideration: improvident, negligent.’” 919 S.W.2d 553, 558 (Mo. App. 1996). (We further stated in *Matheson* that this

conclusion was buttressed by the fact that MAI-CR 2d, in effect until 1987, did not define the term “recklessly,” and no court ever found that the word should be defined because its use without definition could confuse the jury. *Id.*) *Ludwig* distinguished *Matheson* on the facts present in Ludwig’s case; the *Ludwig* court found manifest injustice when the jury was not instructed as to the definition of “recklessly” in the involuntary manslaughter instruction because the failure to give the instruction “would allow the jury to find defendant guilty of involuntary manslaughter if his conduct was no more than carelessness or negligence.” *Ludwig*, 18 S.W.3d at 143.

The same is not true here. Reese made no claim of accident or self-defense; Reese claimed to have had no part in the robbery or shooting that killed Lance Rutter. He acknowledged in opening argument, nevertheless, that “there’s no question Lance Rutter was killed during the commission of a robbery.” Given the evidence, in convicting Reese of involuntary manslaughter in the first degree, the jury concluded that Reese or his accomplice shot and killed Rutter; the evidence showed that Reese was the trigger man. Significantly, the jury here actually had the option of convicting Reese of involuntary manslaughter in the second degree, which contains the element of criminal negligence. In that instruction, the jury was to, 1) first find that the defendant or another person caused the death of Lance Rutter by shooting him, 2) second determine whether “defendant or another person exhibited in the presence of one or more persons a weapon readily capable of lethal use in an angry or threatening manner,” and 3) third, “that defendant or another person was thereby criminally negligent.” “Criminally negligent” was defined as the “failure to be aware of a substantial and unjustifiable risk that circumstances exist or a result will follow and such failure constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.” Unlike in *Ludwig*, there is no danger that the jury convicted Reese of involuntary manslaughter in the first degree based on the lower mens rea found in negligence

because the jury was presented this option and rejected it in favor of recklessness. To have found Reese guilty of second-degree manslaughter, the jury would have had to conclude that Reese was *unaware* that exhibiting the gun in an angry or threatening manner and shooting the gun in Rutter's direction presented a substantial and unjustifiable risk of death. By rejecting this option, we can infer that the jury believed Reese to be *aware* that exhibiting the gun in an angry or threatening manner and shooting the gun in Rutter's direction presented a substantial and unjustifiable risk of death. As "recklessly" is defined as there being a substantial and unjustifiable risk of death and a *conscious disregard* for that risk, the lay definition of "lacking in caution" and "marked by a lack of foresight or consideration" is still applicable. By rejecting the proposition that Reese was unaware that his actions presented a substantial and unjustifiable risk of death, the jury essentially determined that Reese was aware of the risk and disregarded it. We find no manifest injustice obvious on the facts of this case, because there was no danger of the jury improperly convicting Reese of involuntary manslaughter in the first degree based on a mens rea consistent with a lesser offense.

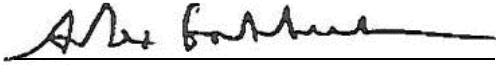
Point V is denied.

Conclusion

We conclude that Reese fails to make a threshold showing that the circuit court plainly erred in overruling Reese's motion to strike Venireperson #33. Reese fails to explain how the statements Venireperson #33 made during *voir dire* negated Venireperson #33's indication that she could remain fair and impartial despite her prior experiences. Reese also fails to make a threshold showing that the circuit court plainly erred in failing to order further jury deliberations. Reese fails to show that the jury's guilty verdict on the charge of robbery in the first degree, and not guilty verdict on the charge of felony murder in the second degree, were inconsistent necessitating *sua*

sponte intervention by the court. Reese additionally fails to make a threshold showing that he was exposed to double jeopardy when the jury chose to convict him of first-degree involuntary manslaughter rather than second-degree felony murder, and proceeded to convict him of robbery in the first degree. We further find that the circuit court did not plainly err in failing to *sua sponte* give a limiting instruction or declare a mistrial during the State's closing argument. Reese fails to show that the prosecutor's statements in closing were not reasonable inferences drawn from the evidence, or that the statements had a decisive effect on the outcome of the trial. Finally, we find no manifest injustice in the verdict directing instruction for involuntary manslaughter in the first degree that was submitted to the jury.

The circuit court's judgment is affirmed.



Anthony Rex Gabbert, Judge

All concur.