No. SC87902

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

ROBERT D. MARCH,

Appellant.

Appeal from the Circuit Court of Butler County, Missouri
Thirty-Sixth Judicial Circuit
The Honorable Mark L. Richardson, Judge

RESPONDENT'S SUBSTITUTE BRIEF

JEREMIAH W. (JAY) NIXON
Attorney General

LISA M. KENNEDY
Assistant Attorney General
Missouri Bar No. 52912

P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321
Fax (573) 751-5391
lisa.kennedy@ago.mo.gov
Attorneys for Respondent

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JURISDICTIONAL STATEMENT

This appeal is from a conviction for trafficking in the second degree, Section 195.223,[1] obtained in the Circuit Court for Butler County, the Honorable Mark Richardson presiding. Judge Richardson sentenced appellant as a prior offender to fifteen years in the Department of Corrections. The Missouri Court of Appeals, Southern District, affirmed appellant's conviction on June 30, 2006. This Court took transfer of this case on appellant's application, and therefore has jurisdiction. Article V, §10, Missouri Constitution (as amended 1982).

[1]All statutory citations are to RSMo 2000 unless otherwise indicated.

STATEMENT OF FACTS

Appellant, Robert March, was charged by second amended information as a prior offender in the Circuit Court of Butler County with trafficking in the second degree (L.F.11). Appellant's jury trial took place on May 12, 2005, before the Honorable Mark Richardson Tr. 20).

Appellant does not contest the sufficiency of the evidence. Viewed in the light most favorable to the verdict, the facts adduced at trial are as follows: On September 5, 2002, Officer Jason Morgan with the Poplar Bluff Police Department was conducting a narcotics investigation and watching a house at 932 Harper Street where appellant and Keva Davis lived (Tr. 155-156, 216). Officer Morgan saw vehicles drive up to the house and stop while people went inside the house for a short time before coming back out and driving off (Tr. 156). Based on his training and experience, Officer Morgan believed there were drug transactions going on inside the house (Tr. 156). Officer Morgan got a warrant to search the house (Tr. 157).

Officers entered appellant's house in the early morning hours of September 6 (Tr. 157, 198, 217). They went directly to the master bedroom where appellant and Ms. Davis were in bed sleeping (Tr. 157, 198, 217). The officers told them to put their hands above the covers, but before they did so, Officer Morgan noticed "some movement underneath the covers between the two" (Tr. 157, 218). Appellant and Ms. Davis were ordered to get out of the bed (Tr. 157, 218). The officers handcuffed

appellant after he put on a pair of blue jeans (Tr. 157-158, 166, 199). Ms. Davis was given a robe to wear before getting out of the bed (Tr. 157, 199, 218-219). There was nothing in the robe when officers handed it to her (Tr. 158). Detective Gary Pride noticed a small object fall from Ms. Davis' hand or waist area to the ground (158, 199). Officer Morgan did not see anything in plain view on the floor (Tr. 158).

As the officers moved Ms. Davis from the bedroom into the living room, they noticed that she was walking with an unusual gait (Tr. 158, 200, 220-221). Officer Morgan and Detective Pride saw that Ms. Davis had her toes clinched (Tr. 158, 200, 220-221). They found a clear baggy containing an off-white residue clinched in her toes (Tr. 158-159, 201). Officer Morgan had five years of experience dealing with narcotics, including crack cocaine, and believed that the substance in the baggy was crack cocaine (Tr. 160-161). Detective Pride also testified that he believed the substance to be crack cocaine (Tr. 201). The substance later field-tested positive for crack cocaine (Tr. 158). There were fourteen wrapped rocks and one unwrapped rock inside the baggy (Tr. 171).

Officer Morgan believed that the rocks found in the baggy were worth forty dollars a piece (Tr. 161). Crack cocaine is most commonly sold in twenty-dollar rocks, which weigh about a tenth of a gram (Tr. 161-162). There were 2.7 grams of cocaine base in the baggy (Tr. 289, 291, 294-295). Based on the amount of crack cocaine in the baggy, Officer Morgan believed that it was worth about $540 (Tr. 162). This was not a normal amount for someone to possess for their own personal use

(Tr. 162). Officer Morgan also did not find a crack pipe or needles that could have been used to smoke or shoot up the crack cocaine (Tr. 162).

Officers found $1415 in cash wrapped up in a surgical glove in a pair of appellant's blue jeans that appellant put on when the officers ordered him out of the bed (Tr. 166, 180). Officer Morgan assumed the money was drug money (Tr. 181). In the kitchen, officers found digital scales, sandwich baggies, a wood cutting board, and a razor utility knife (Tr. 166). Digital scales are commonly used to measure illegal drugs for sale and Officer Morgan believed them to be drug paraphernalia (Tr. 168, 170). A rock of crack cocaine is often put in the corner of a plastic sandwich baggy and then the bag is twisted and knotted (Tr. 196).

During the search of appellant's house, Officer Morgan and Detective Pride overheard appellant telling Ms. Davis to "take the rap" because he couldn't take the "weight" (Tr. 173-174, 204). Officer Morgan and Detective Pride believed that appellant meant that he was concerned about the weight of the drugs found in his house and the consequences of possessing a larger weight of drugs (Tr. 176, 204, 207). After the search, appellant and Ms. Davis were taken to the justice center and incarcerated (Tr. 173). When they were released and went back home, appellant told Ms. Davis that he knew that the police knew the drugs were his (Tr. 228). Appellant told Ms. Davis the names of people who came to the house that day that might have "ratted him out" (Tr. 228-229).

At trial, Ms. Davis testified that she did not know that there was any crack cocaine in the house (Tr. 221). Ms. Davis testified that when she put on the robe in her bedroom, she saw the baggy of crack cocaine on the floor, recognized what it was, and put her foot over it (Tr. 220-221). Ms. Davis testified that appellant was unemployed and complained about being broke, and that she was not aware that appellant had over one-thousand dollars in cash in his pants (Tr. 224-225).

Appellant called his step-father, Jake Jacobs, to testify at trial (Tr. 301). Mr. Jacobs testified that in September 2002, he paid appellant to install a stereo system in his car (Tr. 304). Mr. Jacobs said he paid appellant close to $1000 in cash in September and was going to pay him the rest later (Tr. 305).

After the close of the evidence and arguments by counsel, the jury found appellant guilty of trafficking in the second degree (Tr. 341; L.F. 55-57). On June 21, 2005, Judge Richardson sentenced appellant, as a prior offender, to fifteen years in the Department of Corrections (Tr. 357; L.F. 55-57). This appeal follows.

ARGUMENT

I.

The trial court did not err in admitting the lab report of criminalist Dr. Robert Briner and the testimony of Pam Johnson regarding the contents of Dr. Briner's lab report because that evidence was not barred under the Confrontation Clause in that the lab report was non-testimonial and was admissible under the business records exception to the hearsay rule.

Appellant contends that the trial court erred in admitting criminalist Dr. Robert Briner's lab report because Dr. Briner's statements contained in the report were allegedly barred under the Confrontation Clause in that the state did not show that Dr. Briner was unavailable as a witness and appellant was not given a prior opportunity to cross-examine him (App. Br. 18).

A. Standard of review.

Denials of confrontation clause objections are reviewed de novo. *United States v. Chapman*, 356 F.3d 843,846 (8th Cir. 2004). However, if any evidence was admitted in violation of a defendant's confrontation rights, reviewing courts consider whether the error was harmless beyond a reasonable doubt. *Id*.

B. Relevant Facts

After the police entered the master bedroom where appellant and Ms. Davis were sleeping and ordered them to get out of the bed, officers seized a plastic baggy containing a substance that appeared to be crack cocaine from underneath Ms.

Davis' foot (Tr. 157, 198, 217, 158-159, 201). Ms. Davis had the baggy clinched in her toes (Tr. 158-159, 201). The baggy was turned over to the Southeast Missouri Regional Crime Lab for analysis (Tr. 273-274). The director of the crime lab, Dr. Briner, performed the analysis and determined that the substance was crack cocaine and that it weighed 2.7 grams (Tr. 287-289; State's Exhibit 8).

At the time of trial, Dr. Briner was no longer working at the lab and had moved to North Carolina (Tr. 211, 283). The state planned to call the new director of the crime lab, Pam Johnson, who had been Dr. Briner's chief criminalist when Dr. Briner had prepared his report (Tr. 211). The state said that it planned on admitting Dr. Briner's lab report under the business record exception and have Ms. Johnson, the custodian of the lab's records, testify about the report (Tr. 212). Appellant objected on the basis that the state had not laid a proper foundation for the lab report and that the admission of the report was barred by the Confrontation Clause in that the state did not show that Dr. Briner was unavailable as a witness and appellant was not given a prior opportunity to cross-examine him (Tr. 213). The court overruled appellant's objection, and allowed appellant to voir dire Ms. Johnson (Tr. 215, 279-285).

Pam Johnson testified that she had been a chemist for the Southeast Missouri Regional Crime Lab since June of 1988, and acted as the Interim Director from November 2003 until January 2004, when she became the Director (Tr. 286-287). She held a bachelor's degree in chemistry (Tr. 286-287). Her duties were to

examine and analyze all types of physical evidence submitted by law enforcement, prepare an official laboratory report concerning the findings, and then send the report to the agency that submitted the evidence (Tr. 287-288).

Pam Johnson worked with other chemists, including Dr. Robert Briner (Tr. 289). Dr. Briner was the director of the crime lab until he left in 2003, and was Ms. Johnson's supervisor (Tr. 289). Dr. Briner held a bachelor's degree and Ph.D. in chemistry and had been the director of the crime lab for thirty-one years (Tr. 289).

Ms. Johnson identified the official laboratory evidence bag containing State's Exhibit 1 (crack cocaine) and testified that the number on the bag matched the number on Dr. Briner's lab report (Tr. 288). Ms. Johnson testified that the report noted that the substance inside the baggy weighed 2.7 grams and tested positive for cocaine base (crack cocaine) (Tr. 289-291). Ms. Johnson explained the standard practices of the lab in analyzing evidence, including the tests Dr. Briner used to determine the nature and weight of the substance (Tr. 289-292). Ms. Johnson testified that Dr. Briner concluded on the lab report that State's Exhibit 1 contained more than two grams but less than six grams of cocaine base (Tr. 291).

When the state moved to admit the lab report into evidence, appellant renewed his earlier objections and asked that Ms. Johnson's testimony be stricken (Tr. 292). The trial court again overruled appellant's objection (Tr. 292). Dr. Briner's lab report was admitted into evidence as State's Exhibit 8 under the business records exception (Tr. 212-213, 292-293).

During cross-examination, appellant elicited Ms. Johnson's testimony that she did not test the drugs and that Dr. Briner did all the testing (Tr. 293-295).

C. Legal Background

Appellant contends that Dr. Briner's lab report was not admissible because it was barred by the Confrontation Clause per the holding of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (App. Br. 18). He is incorrect. *Crawford* is not applicable in this case because Dr. Briner's lab report was non-testimonial hearsay and was admittable under the business record exception to the hearsay rule.

1. *Crawford* and the Scope of "Testimonial" Evidence

Crawford holds that admission of testimonial hearsay violates a defendant's rights to confront and cross-examine witnesses, unless the witness was unavailable and the defendant had a prior opportunity to cross-examine the witness. *Id*. at 59, 68. The Supreme Court, however, made clear that the right to confrontation only extends to testimonial statements, or, put differently, the Confrontation Clause simply has no application to nontestimonial statements. *Davis v. Washington*, 126 S.Ct. 2266, 2274 (2006) (holding that the limitation with respect to testimonial hearsay is "so clearly reflected in the text" of the Confrontation Clause that it "must . . . mark out not merely its 'core,' but its perimeter"). So, to determine whether the admission of hearsay statements violates the Confrontation Clause depends on whether the statements are testimonial or not.

The *Crawford* Court did not "spell out a comprehensive definition of 'testimonial.'" *Crawford*, 541 U.S. at 68. It did, however, offer a number of observations that suggest the contours of that definition. First, the Court noted that both the historical background and text of the Confrontation Clause indicate that "the principal evil at which [it] was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused." *Id*. at 50. According to the Court, "the Sixth Amendment" and, presumably the term testimonial as well, "must be interpreted with this focus in mind." *Id*. at 50. Consistent with that approach, the Court suggested that an "off-hand, overheard remark" would not be testimonial under the Sixth Amendment because "it bears little resemblance to the civil-law abuses the Confrontation Clause targeted." *Id*. at 51. Along the same lines, the Court indicated that a statement produced through the "[i]nvolvement of government officers" and with an "eye towards trial" is testimonial because it "presents [a] unique potential for prosecutorial abuse – a fact borne out time and again through a history with which the Framers were keenly familiar." *Id*. at 56 n. 7.

Second, the Court noted that "[v]arious formulations of th[e] core class of 'testimonial' statements exist," but declined to adopt any of them. *Id*. at 51. The defendant in *Crawford*, in his brief, considered ex parte in-court testimony or its functional equivalent, such as affidavits, custodial examinations, prior testimony that

the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially. *Id*. at 51. In *White v. Illinois*, the Supreme Court considered "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." *Crawford*, 541 U.S. at 51-52. The *Crawford* court also cited to the amicus brief filed by the National Association of Criminal Defense Lawyers, which apparently defined testimonial statements as "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id*. at 52. While noting that these three formulations "all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it," *Crawford*, 541 U.S. at 52, the Court "found it unnecessary to endorse any of them, because 'some statements qualify under any definition,'" *Davis*, 126 S.Ct. at 2273 (quoting *Crawford*, 541 U.S. at 52). With these criteria in mind, it appears that the common nucleus shared by all of the aforementioned types of statements is that they all involve formal out-of-court statements, made in response to questioning by a government agent acting in an essentially prosecutorial capacity (that is, to enforce the criminal code) for the purpose of producing a statement to be used at a criminal trial, and which the declarant would reasonably believe would subsequently be used in a criminal trial. Again, the Court did not adopt any of these formulations.

The Court revisited the issue of what constitutes testimonial hearsay in *Davis v. Washington*, 126 S.Ct. 2266, 2273-2274 (2006). Again, the Court did not adopt any of the formulations mentioned in *Crawford* and recognized that the mere fact that a statement was made to law enforcement does not make it testimonial. *Id*. Rather, the Court, recognizing that in certain circumstances statements may be made for dual purposes, held that statements made in response to police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency are non-testimonial. *Id*. Statements are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Id*. at 2274.

Third, to the extent the Court in *Crawford* said what constitutes testimonial hearsay, it is this: "Whatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Crawford*, 541 U.S. at 68. The Court reasoned that "[t]hese are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Id*. In contrast, the Court stated that "[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial–for example, business records or statements in furtherance of a conspiracy." *Id*. at 56. *See also* the dissenting opinion in *Crawford*, 541 U.S. at 76

("To its credit, the Court's analysis of 'testimony' excludes at least some hearsay exceptions, such as business records and official records").

2. The Business Record Exception in the Wake of *Crawford*

Crawford's reference to business records as non-testimonial statements has led many jurisdictions to hold that business records, by their nature, are non-testimonial and thus are exempt from Confrontation Clause scrutiny. *See United States v. Lee,* 374 F.3d 637, 644 (8th Cir. 2004) (citing *Crawford* as authority that business records are not testimonial); *Commonwealth v. Verde*, 827 N.E.2d 701, 705-706 (Mass. 2005) (certificates of chemical analysis showing weight and composition of controlled substance are public records admissible under *Crawford*); *State v. Dedman*, 102 P.3d 628, 635 (N.M. 2004) (blood alcohol report was public record, was not testimonial, and its admission did not violate Confrontation Clause); *State v. Cao*, 626 S.E.2d 301, 305 (N.C. App. 2006)[2] (lab reports prepared for use in a criminal prosecution are business records when the testing is mechanical and the information contained in the documents are objective facts not involving opinions drawn by analyst and thus are non-testimonial); *People v. Johnson*, 121 Cal.App. 4th

[2]The North Carolina Supreme Court denied the defendant's motion to review the decision of the North Carolina Court of Appeals. *See State v. Cao*, 634 S.E.2d 537 (N.C. 2006).

1409, 1411-1413 (Ca. App. 2004) (lab report analyzing rock of cocaine is routine documentary evidence that does not violate confrontation clause); *Rollins v. State*, 897 A.2d 821, 845-846 (Md. 2006) (holding that routine, descriptive, and non-analytical findings in an autopsy report of the physical condition of a decedent may be received into evidence without the testimony of the medical examiner who prepared the report); *People v. Hinojos-Mendoza*, 140 P.3d 30, 35- (Co. App. 2005)[3] (holding that lab report showing quantity and composition of controlled substance was a business record, non-testimonial, and thus admissible because it did not "raise the evils at which the Confrontation Clause was directed"); *State v. Forte*, 629 S.E.2d 137, 143 (N.C. 2006) (report detailing chain of custody of DNA material and agent's DNA analysis was business record and non-testimonial); *State v. Thackaberry*, 95 P.3d 1142, 1145-1146 (Or. App. 2004)[4] (declining to decide whether a laboratory report of a toxicology test performed on a urine sample is testimonial in nature because plain error review, but stating that lab report of urinalysis was "analagous to – or arguably even the same as – a business or official record," which *Crawford* suggested would not be subject to its holding); *People v.*

[3]The Colorado Supreme Court agreed to review this case. *See Hinojos-Mendoza v. People*, 2006 WL2338141 (August 14, 2006).

[4]The Oregon Supreme Court declined to review this case. *See State v. Thackaberry*, 107 P.3d 27 (Or. 2005).

Durio, 7 Misc.3d 729, 794 N.Y.S.2d 863 (N.Y. Sup. Ct. 2005) (found that *Crawford* exempted business records because they are not testimonial in that they are prepared in ordinary course of business and by their nature not prepared for litigation); *People v. Brown*, 9 Misc.3d 420, 423-425, 801 N.Y.S.2d 709 (N.Y. Sup. Ct. 2005) (DNA testing records were business records and were non-testimonial); *Moreno Denoso v. State*, 156 S.W.3d 166, 182 (Tex. App. 2005) (autopsy report did not fall within categories of testimonial evidence described in *Crawford* and so was non-testimonial in nature); *Mitchell v. State*, 191 S.W.3d 219, 221-222 (Tex. App. 2005) (autopsy report is business record and per *Crawford*, non-testimonial); and *Perkins v. State*, 897 So.2d 457, 464 (Ala. App. 2004) (autopsy report is business record and non-testimonial).

Appellant, however, urges this Court to follow cases that treat as testimonial under *Crawford* various documents prepared at the behest of law enforcement. *See, e.g. State v. Caulfield*, 722 N.W.2d 304 (Minn. 2006) (lab report detailing composition of controlled substance was testimonial); *Commonwealth v. Carter*, 861 A.2d 957, 969 (Pa. Super. 2004)[5] (lab report identifying substance as cocaine prepared by lab under aegis of state police in anticipation of prosecution was

[5]The Pennsylvania Supreme Court agreed to review this case in June of 2005. *See Commonwealth v. Carter*, 877 A.2d 459 (Pa. 2005).

testimonial and not a business record); *Johnson v. State*, 929 So.2d 4 (Fla. App. 2005)[6] (law enforcement lab report establishing illegal nature of substances was testimonial); *People v. Lonsby*, 707 N.W.2d 610 (Mich. App. 2005)[7] (notes and lab report of non-testifying crime lab serologist were not admissible as business record as they were adversarial and prepared with ultimate goal of uncovering evidence against defendant and successfully prosecuting him); *State v. Crager*, 844 N.E.2d 390, 397 (Ohio Ct. App. 2005)[8] (DNA report was testimonial because prepared as part of police investigation and reasonable person could conclude report would later be available for use at a trial); *Smith v. State*, 898 So.2d 907 (Ala. Crim. App. 2004)[9] (admission of victim's autopsy report containing manner of death without testimony of medical examiner who performed autopsy violated Confrontation Clause because

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[6]The Florida Supreme Court agreed to review this case. *See Johnson v. State*, 924 So.2d 810 (Fla. 2006).

[7]The Michigan Supreme Court declined to review this case. *See People v. Lonsby*, 720 N.W.2d 742 (Mich. 2006).

[8]The Ohio Supreme Court agreed to review this case. *See State v. Crager*, 846 N.E.2d 533 (Ohio 2006).

[9]The Alabama Supreme Court denied certiorari on this case in October 2004. *See Smith v. State*, 898 So.2d 907 (Ala. Crim. App. 2004).

the manner of victim's death was "crucial element" of charge against defendant); *People v. Rogers*, 780 N.Y.S.2d 393 (N.Y. App. 2004) (report of blood test requested by law enforcement for the purpose of prosecution was testimonial). Many of the cases cited by appellant emphasize that the documents at issue were purportedly prepared for the purpose of litigation and thus were testimonial. In contrast, to be admissible as a business record, a document must have been prepared in the regular practice of that business activity. Several other cases cited by appellant emphasize that the documents at issue were affidavits. *See City of Las Vegas v. Walsh*, 124 P.3d 203 (Nev. 2005); *People v. Pacer*, 796 N.Y.S.2d 787 (N.Y. App. 2004); *Belvin v. State*, 922 So.2d 1046 (Fla. App. 2006); and *Shiver v. State*, 900 So.2d 615 (Fla. App. 2005). The majority in *Crawford* identified affidavits as a specific category of testimonial evidence. *Crawford*, 541 U.S. at 51-52. As will be explained below, a laboratory report properly admitted as a business record is, by its nature, not testimonial. Therefore, the admission of a laboratory report at trial without the testimony of the preparer of the report does not violate the Confrontation Clause.

D. The Admission of Dr. Briner's Laboratory Report and Testimony about his Findings at Trial did not Violate the Confrontation Clause.

1. A Laboratory Report Admitted as a Business Record is not Testimonial in Nature

Testimonial statements within the meaning of *Crawford* would not qualify as business records. Stated differently, a statement properly admitted as a business record under §490.680 cannot be testimonial because a business record is fundamentally inconsistent with what the Supreme Court has suggested comprise the defining characteristics of testimonial evidence.[10]

In Missouri, a business record is a "record of an act, condition or event" that "shall, insofar as relevant," be considered competent evidence

> if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

§490.680. The term "business" includes "every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not."

[10]In this appeal, appellant does not suggest that Dr. Briner's laboratory report was not a business record or that there was an inadequate foundation laid for its admission as a business record.

§490.670. The term "regular course of business" as used in section 490.680 "must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business." *State ex rel. Hobbs v. Tuckness*, 949 S.W.2d 651, 655 (Mo. App. W.D. 1997). Because §490.680 requires business records to be kept in the regular course of a business activity, records created in anticipation of litigation do not fall within its definition.

Crawford itself suggests that the very same characteristics that preclude a statement's classification as a business record are likely to render the statement testimonial. *See Crawford*, 541 U.S. at 56 n. 7 (describing as testimonial, statements produced through the "[i]nvolvement of government officers" and made "with an eye towards trial"). Indeed, "[t]he essense of the business record exception contemplated in *Crawford* is that such records or statements are not testimonial in nature because they are prepared in the ordinary course of regularly conducted business and are 'by their nature' not prepared for litigation." *People v. Durio*, 7 Misc.3d 729, 794 N.Y.S.2d 863, 867 (N.Y. Sup. Ct. 2005)(quoting *Crawford*, 541 U.S. at 56). *See also State v. Forte*, 629 S.E.2d 137, 143 (N.C. 2006) (stating that the "distinction between business records and testimonial evidence is readily seen. Among other attributes, business records are neutral, are created to serve a number of purposes important to the creating organization, and are not inherently subject to manipulation or abuse").

The fact that a business record *may* come into evidence at a trial does not take that business record out of the rubric of the business record exception. For example, in *State v. Powell*, a store manager who had been robbed provided evidence at trial of the amount of cash that was missing by way of cash register tapes on which he had written the amount of cash that was in the clerk's register at the start of the day. *Powell*, 648 S.W.2d 573, 575 (Mo. App. E.D. 1983). The manager explained that he copied that figure from a journal, which he prepared in the ordinary course of business. *Id*. The Missouri Court of Appeals, Eastern District, held that the cash register tape was properly admissible as a business record as it was prepared in the ordinary course of business, even though it was prepared to determine how much cash had been stolen, and the manager might have anticipated using that information at a trial. *Id.* at 575-576. The court stated that the "relevant inquiry is whether the record was made in the ordinary course of business." *Id*. at 576.

Likewise, practical norms may lead a criminalist to reasonably expect that lab reports he or she prepared that detail the quantity and composition of a controlled substance may be available for use at trial, but this practical expectation alone cannot be dispositive on the issue of whether those reports are business records and non-testimonial, or instead are testimonial. This is because the notes and records of a criminalist or other lab technician are not made for investigative or prosecutorial purposes but rather are made for the routine purpose of ensuring the

accuracy of the testing done in the laboratory. *See People v. Brown*, 9 Misc.3d 420, 423-425, 801 N.Y.S.2d 709 (N.Y. Sup. Ct. 2005) (finding that the notes and records of the laboratory personnel who conducted four steps of DNA profiling on samples from sexual assault kits received from the New York City Police Department were made during a routine, non-adversarial process meant to ensure accurate analysis and not specifically prepared for trial); *State v. Forte*, 629 S.E.2d 137, 143 (N.C. 2006) (acknowledging that while reports detailing chain of custody of DNA material and agent's DNA analysis were prepared with the understanding that eventual use in court was possible or even probable, reports were non-testimonial because they were business records, were not prepared exclusively for trial, and preparer had no interest in the outcome of any trial in which records might be used).

Although not discussing the issue in terms of testimonial and non-testimonial hearsay, Missouri courts have previously held that properly admitted business records pose no threat to the Confrontation Clause. *State v. Taylor*, 486 S.W.2d 239, 242 (Mo. 1972) (lab report admitted as a business record also defeated Confrontation Clause objection); *Allen v. St. Louis Pub. Serv. Co.*, 285 S.W.2d 663, 666 (Mo. 1956) (hospital record admitted as business record and thus no violation of Confrontation Clause); *Thebeau v. Dir. of Revenue*, 945 S.W.2d 674, 675-676 (Mo. App. E.D. 1997) (arresting officer's report admitted, via officer's affidavit, as business record and therefore, not in violation of Confrontation Clause); *State v. Hall*, 750 S.W.2d 637, 638-639 (Mo. App. E.D. 1988) (lab report showing a controlled

substance admitted as a business record and, thus, no Confrontation Clause violation).

Many other jurisdictions have determined that laboratory reports are business records, and thus not testimonial hearsay, because the reports are prepared in the regular course of the business and objectively state the results of well-recognized scientific tests, follow a routine manner of preparation that is made to ensure an accurate measurement, and do not contain subjective opinions or conclusions drawn by the analyst. In *Verde*, the court referred to the *Crawford's* suggestion in dictum that a business or official record would not be subject to its holding and stated that this suggestion mirrored Massachusett's long acknowledged exception to confrontation requirements for public records. *Commonwealth v. Verde*, 827 N.E.2d 701, 705 (Mass 2005). The *Verde* court reasoned that certificates of chemical analysis were public records, and thus not subject to *Crawford's* holding, because they "are neither discretionary nor based on opinion; rather, they merely state the results of a well-recognized scientific test determining the composition and quantity of the substance." *Id*. The court also noted that the certificate is admissible only as prima facie evidence of the composition, quality, and weight of the controlled substance, "which a defendant may rebut if he doubts its correctness." *Id*.

In *Dedman*, the court found that a blood alcohol report prepared by a toxicologist employed by a division of the New Mexico Department of Health was a public record. *State v. Dedman*, 102 P.3d 628, 635-636 (N.M. 2004). The court

stated that a blood alcohol report is a public record, and not testimonial evidence, because the report "is neither investigative nor prosecutorial," and "follow[s] a routine manner of preparation that guarantees a certain level of comfort as to their trustworthiness." *Id*. The reports are made to "ensure an accurate measurement." *Id* at 636. The court stated that a blood alcohol report was "very different" from the examples of testimonial hearsay evidence listed in *Crawford*, and concluded that the report was not testimonial evidence. *Id*.

In *Cao*, the court held that laboratory reports or notes of a laboratory technician prepared for use in a criminal prosecution are business records, and thus non-testimonial, when the testing is mechanical and the information contained in the documents are objective facts not involving opinions or conclusions drawn by the analyst. *State v. Cao*, 626 S.E.2d 301, 305 (N.C. App. 2006). The court found that the laboratory reports in that case, which specified the weight of the substances at issue, "would likely qualify as an objective fact obtained through a mechanical means." *Id*. The court stated that the record before it did not contain enough information, however, about the procedures involved in identifying the presence of cocaine in a substance to allow it to determine whether that portion of the testing met the same criteria. *Id*. The court went on to find that even assuming error by the trial court in the admission of the laboratory reports concluding that the substances obtained from the defendant were cocaine, any error was harmless beyond a

reasonable doubt because the defendant never disputed that the material was cocaine. *Id*.

In *Rollins*, the court determined that although an autopsy report may be classified as a business and a public record, the contents of the report must nonetheless be scrutinized in order to determine the propriety of its admission into evidence without the testimony of its preparer. *Rollins v. State*, 897 A.2d 821, 845 (Md. App. 2006). The court held that routine, descriptive, and non-analytical findings in an autopsy report of the physical condition of a decedent may be received into evidence without the testimony of the medical examiner who prepared the report and without violating the Confrontation Clause if those findings are also generally reliable and are afforded an indicium of reliability. *Id*. at 845-846. The court held that if the report contained statements that could be categorized as contested opinions or conclusions, or that were central to the determination of the defendant's guilt, those statements were testimonial and trigger the protections of the Confrontation Clause. *Id*. at 846.

2. Dr. Briner's lab report was admissible as a business record.

In this case, Dr. Briner's lab report qualified as a business record under §490.680. There is no question that the Southeast Missouri Regional Crime Lab is a "business" within the definition provided in the Uniform Business Records as Evidence Law. §490.670. The crime lab's business is to analyze items submitted by law enforcement agencies, prepare reports detailing the results of the analysis, and

then send the reports back to the agencies that submitted the items (Tr. 287-288). Lab reports detailing results of evidence analysis are made in the regular course of the business of the crime lab, as evidenced by the fact that lab reports are made on *every* drug tested by the lab regardless of whether there will be a trial (Tr. 287-288).

The information contained in Dr. Briner's lab report also objectively stated the results of well-recognized scientific tests, followed a routine manner of preparation that was made to ensure an accurate measurement, and did not contain subjective opinions or conclusions drawn by the analyst. Specifically, the lab report contained the weight of the cocaine – 2.7 grams (State's Exhibit 8). Weighing incoming material to be tested is a routine laboratory procedure (Tr. 289). In this case, Pam Johnson testified that the standard practice at the lab was to weigh drugs that were submitted for testing (Tr. 289). Ms. Johnson testified that if the drugs were packed in containers and could not be removed, the weight of the container was subtracted from the weight of the drugs so that just the weight of the drugs was listed in the report (Tr. 289-290). *See People v. Hinojos-Mendoza,* 140 P.3d 30, 37 (Co. App. 2006); *Commonwealth v. Verde*, 827 N.E.2d 701, 705 (Mass. 2005); *People v. Johnson*, 121 Cal.App.4th 1409, 1413 (Cal. App. 2004); *State v. Cao*, 626 S.W.2d 301, 305 (N.C. App. 2006) (standing for general proposition that determining the quantity of drugs is a routine, mechanical, and objective act).

Likewise, the procedures involved in identifying the presence of cocaine in a substance are routine laboratory tests (Tr. 291). Ms. Johnson testified that

screening tests are done on substances submitted to the lab, including a color and odor test (Tr. 290). Ms. Johnson said that if the color – Cobalt thiocycanate – test is positive, the substance contains cocaine in salt or base form (Tr. 290). Another test for cocaine is the methyl benzoate, or odor, test (Tr. 290). A criminalist puts a small amount of the suspected drug in a small pot and adds the liquid (methyl benzoate) (Tr. 290). If there is a very sweet odor similar to Bazooka bubble gum, the substance contains cocaine (Tr. 290). Dr. Briner's lab report showed that these two routine screening tests were conducted on the white material seized from appellant and Keva Davis (State's Exhibit 8). The lab report showed that the two screening tests were positive for the presence of cocaine (State's Exhibit 8).

Ms. Johnson also testified that there is an analytical instrument the laboratory uses in order to "verify what the screening tests tell [them]" (Tr. 290). This is the "definitive test" and tells a criminalist exactly which drug is present in a sample (Tr. 291). In this case, the analytical instrument (GC/MS) indicated the presence of cocaine and therefore confirmed the results of the screening tests (Tr. 290-291; State's Exhibit 8). These procedures and analytical tests are the "standard practices of the laboratory that an analyst would use" (Tr. 291). Based on the objective facts that the white material tested weighed 2.7 grams, tested positive for cocaine in two screening tests, and was definitively identified as cocaine base by the analytical test, Dr. Briner concluded in his report that "Sample 1 contains cocaine base Schedule II more than 2 g. but less than 6 g." (State's Exhibit 8). Making of the report was

routine to the business of the crime lab; it related to activities that were inherent in, typically engaged in, or an integral part of that business, and the maker of the report had a duty to his business to be precise in gathering and reporting the data in the record or report. It was certainly within the business interests of the crime lab to keep accurate and precise records of the tests performed and the results thereof, particularly if the lab wished to keep its accreditation and remain in business.[11]

Because Dr. Briner's laboratory report was made in the regular course of business of the crime lab, and contained the results of routine and objective tests

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[11] One of the goals listed on the website for the Southeast Missouri Regional Crime Lab is: "Ensure quality, integrity, and accuracy of laboratory examinations through the use of external, intralaboratory, and interagency proficiency testing." *See* http://www.mshp.dps.mo.gov/MSHPWeb/PatrolDivisions/CLD/GeneralInformation/MissionStatement.html

that were the "standard practices of the laboratory," the report was a business record. Because the report was properly admitted into evidence as a business record, the report was not testimonial and its admission did not violate the Confrontation Clause. *See Crawford*, 541 U.S. at 56, 76; *Verde*, 827 N.E.2d at 705; *Johnson*, 121 Cal.App.4th at 1413; *Cao*, 626 S.W.2d at 305.

This Court should not ignore the practical implications that would follow from treating laboratory reports detailing the quantity and composition of controlled substances as inadmissible testimonial hearsay. Years may pass between the testing of a controlled substance and a defendant's trial or re-trial. This passage of time can easily lead to the unavailability of the criminalist who prepared the report. Also, some types of controlled substances are regularly destroyed after testing due to the danger of storing the substance. *See State v. Smith*, 157 S.W.3d 687 (Mo. App. W.D. 2004) (where officers destroyed ether and anhydrous ammonia seized from a meth lab); *State v. McNaughton*, 924 S.W.2d 517 (Mo. App. W.D. 1996) (where clothing was destroyed for safety reasons because it was soaked in an unknown liquid). Moreover, criminalists who regularly test substances to determine their weight and composition are unlikely to have an independent recollection of the report at issue in a particular case and in testifying invariably rely entirely on their report. *See People v. Johnson*, 121 Cal.App. 4th 1409, 1412 (Ca. App. 2004); *People v. Durio*, 7 Misc.3d 729, 736-737 (N.Y. Sup. Ct. 2005) and *Rollins v. State*, 897 A.2d 821, 845 (Md. App. 2006) (discussing autopsy reports).

In *People v. Johnson*, the court found that a laboratory report analyzing a rock of cocaine did not "bear testimony," or function as the equivalent of in-court testimony. *Johnson*, 121 Cal.App. 4th 1409, 1412 (Ca. App. 2004). In reaching that conclusion, the court found that if the preparer of the report had appeared to testify at the defendant's hearing, he would merely have authenticated the document. *Id*. at 1412. The court stated that a witness's demeanor was not a significant factor in evaluating foundational testimony relating to the admission of evidence such as laboratory reports, "where the purpose of the testimony simply is to authenticate the documentary material, and where the author of the document ordinarily would be unable to recall from actual memory information relating to the specific contents of the writing and would rely instead upon the record of his own action." *Id*. at 1413. Certainly it would be against society's interests to permit the unavailability of the criminalist who prepared the report to preclude the prosecution of a drug case.

In sum, inasmuch as the lab report at issue was a properly admitted business record and was non-testimonial, and *Crawford* does not apply to business records or non-testimonial evidence, *Crawford* did not render the lab report inadmissible.

E. Admission of Dr. Briner's Laboratory Report was Harmless Error

Even assuming error by the trial court in the admission of the laboratory report concluding that the substance weighed 2.6 grams and was cocaine base without the testimony of Dr. Briner, any error was harmless. Violations of the Confrontation Clause are subject to harmless-error analysis. *United States v. Chapman*, 356 F.3d

843, 846 (8th Cir. 2004); *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). Appellant never disputed that the material was cocaine and weighed 2.6 grams. He chose not to defend on that basis, but rather argued that the cocaine belonged to his girlfriend, Keva Davis, because it was found curled in her toes (Tr. 325-328, 332-333). Appellant argued that the State had not proven that he possessed the drugs because there was no evidence that he had knowledge of, or control over, the cocaine under Ms. Davis' foot (Tr. 332-333). Appellant argued that Ms. Davis' testimony that the cocaine actually belonged to him was not credible because she did not tell the police that the drugs were really appellant's until two-and-a-half years after the drugs were found and she received a deal for her testimony (Tr. 327-328). Appellant also argued that the officers who testified that they heard appellant make an incriminating statement to Ms. Davis could not be believed because they had not recorded his alleged statement in their reports (Tr. 325-326).

The only mention of the laboratory report in appellant's closing argument was when defense counsel told the jury that he had not planned on arguing about the report (Tr. 331). Defense counsel said that the only reason he was bringing the report up was because he was "surprised" that the "lab technician [who] actually tested the drugs" did not appear (Tr. 331). Defense counsel said he "would like to hear how [Dr. Briner] test[ed] the drugs" but did not dispute Dr. Briner's findings or even argue that the jury should question the lab report because Dr. Briner did not

personally testify as to his conclusions (Tr. 325-335). Appellant's closing argument makes it apparent that his defense strategy never included challenging Dr. Briner's conclusions that the substance weighed 2.6 grams and was cocaine base. Instead appellant's defense focused on challenging the evidence that the drugs belonged to him rather than Ms. Davis.

Since the identity and quantity of the substance was not challenged by appellant, the admission of Dr. Briner's laboratory report containing that information was harmless error beyond a reasonable doubt. *See State v. Cao*, 626 S.E.2d 301, 305 (N.C. App. 2006) (finding any error in the admission of a lab report concluding that substances obtained from defendant were cocaine was harmless because defendant never disputed that material was cocaine and presented different defense at trial).

For the foregoing reasons, admission of the lab report did not violate the Confrontation Clause. Even if this Court finds that the Confrontation Clause was violated, admission of the lab report was harmless error because appellant never disputed the quantity or composition of the substance. Appellant's claim should be denied and his conviction should be affirmed.

II.

The trial court neither erred nor abused its discretion in overruling appellant's motion for mistrial when Keva Davis volunteered that appellant was a woman beater because the extreme remedy of a mistrial was not necessitated in that the trial court removed any potential prejudice by instructing the jury to disregard the comment.

Appellant contends that the trial court erred and abused its discretion when it overruled his motion for a mistrial after Keva Davis volunteered that appellant was a "woman beater" (App. Br. 28).

A. Relevant Facts

Police entered the master bedroom where appellant and Ms. Davis were sleeping and ordered them to put their hands above the covers (Tr. 157, 198, 217). Before they did so, Officer Morgan noticed "some movement underneath the covers between the two" (Tr. 157, 218). Appellant and Ms. Davis were ordered to get out of the bed (Tr. 157, 218). After officers noticed that Ms. Davis was walking oddly, they seized a plastic baggy containing a substance that appeared to be crack cocaine from underneath Ms. Davis' foot (Tr. 157, 198, 217, 158-159, 201). Ms. Davis had the baggy clinched in her toes (Tr. 158-159, 201). The substance was later determined to be 2.7 grams of crack cocaine (Tr. 287-289; State's Exhibit 8). Officer Morgan and Detective Pride overheard appellant telling Ms. Davis to "take the rap" because he couldn't take the "weight" (Tr. 173-174, 204).

Ms. Davis was charged in relation to this search (Tr. 231). She pled guilty to the class C felony of possessing cocaine (Tr. 231-232). Ms. Davis pled guilty pursuant to a plea bargain wherein the prosecutor agreed to recommend that she be placed on probation (Tr. 232). Ms. Davis also had to testify truthfully at appellant's trial (Tr. 232). Ms. Davis lost her medical assistant license as a result of her guilty plea (Tr. 233).

At trial, Ms. Davis testified in part that when she and appellant were released from the justice center and went back home, appellant told her that he knew that the police knew the drugs were his (Tr. 228). Ms. Davis testified that appellant told her the names of people who came to the house that day who might have "ratted him out" (Tr. 228-229). At trial, Ms. Davis also testified that she did not know that there was any crack cocaine in the house (Tr. 221). Ms. Davis testified that when she put on the robe in her bedroom, she saw the baggy of crack cocaine on the floor, recognized what it was, and put her foot over it (Tr. 220-221). Ms. Davis testified that appellant was unemployed and complained about being broke, and that she was not aware that appellant had over one-thousand dollars in cash in his pants (Tr. 224-225).

On cross-examination, defense counsel questioned Ms. Davis about the plea offer she received from the State in exchange for her plea of guilt in an attempt to cast doubt on Ms. Davis' credibility (Tr. 246-248). Defense counsel confirmed that Ms. Davis' testimony was that appellant had basically admitted to her that the drugs

were his (Tr. 250). Then defense counsel asked Ms. Davis if she had ever gone to the police with this information or said anything about appellant's confession from September 2002, until her deposition just before appellant's trial; she said she had not (Tr. 250, 252). Ms. Davis said that she pled guilty a "couple of weeks" before appellant's trial (Tr. 252-253). Counsel elicited that even when the police told Ms. Davis on the night of the search that they believed the drugs were appellant's, Ms. Davis did not say anything to them because she was "concerned about [her] personal safety" (Tr. 251).

On re-direct examination, the prosecutor attempted to rehabilitate Ms. Davis' credibility. He elicited from Ms. Davis that she had been advised by her attorney not to talk to anyone about the case (Tr. 258). The prosecutor elicited that Ms. Davis pled guilty because she knew she *was* guilty of possessing the cocaine and trying to hide it from the police (Tr. 258-259). The prosecutor asked Ms. Davis if she knew why she covered the cocaine with her foot (Tr. 259). Ms. Davis said "[a] lot of fear was in there" (Tr. 259). The prosecutor then referred to appellant's cross-examination wherein defense counsel had insinuated that Ms. Davis only told someone that appellant confessed to her that the drugs were his when she got a plea bargain from the State (Tr. 260). The prosecutor asked if there was any other reason why she wanted to get the "whole ordeal" behind her other than getting her own court proceedings behind her (Tr. 260). Appellant objected to this question and a discussion was held at sidebar (Tr. 260-263).

Defense counsel argued that any evidence regarding domestic issues between appellant and Ms. Davis was irrelevant and inadmissible evidence of prior uncharged bad acts (Tr. 260). The prosecutor argued that defense counsel opened the door to the evidence because he was trying to imply that Ms. Davis did not say anything about appellant's confession for two and a half years because she was really the guilty party (Tr. 261). The trial court said that appellant "clearly did open the door" and that he thought the prosecutor had a "right to go there," but left it up to the prosecutor to decide if he wanted to elicit that evidence (Tr. 262). The prosecutor said he would ask questions that would limit Ms. Davis' testimony to any threats she received between the crime and the time she pled guilty (Tr. 262-263). The prosecutor stated that he believed that Ms. Davis would say that she "dummied up" because she was threatened by appellant or by people acting for him (Tr. 262). The prosecutor said that he would not get into any prior incidents between appellant and Ms. Davis (Tr. 263). The court overruled appellant's objection (Tr. 263).

The prosecutor proceeded to ask Ms. Davis if there was any other reason she "stayed quiet" from the time she was arrested until she pled guilty other than the fact that her lawyer told her not to say anything (Tr. 264). Ms. Davis said that she was getting threats, but not directly from appellant (Tr. 264-265). The prosecutor continued to ask Ms. Davis about the fact that she had not told anyone that appellant had confessed to her that the drugs belonged to him (Tr. 265). The following exchange then occurred:

Q. [By prosecutor] And for the love of it you can't figure out why you didn't say anything and why you covered up those drugs that night?

A. I know why I didn't say anything.

Q. Why?

A. Robert is a woman beater –

[Defense counsel]: Object, Judge –

A. Well, he is.

The Court: Sustained. The objection is sustained. The answer will be stricken and the jury will be instructed to disregard it.

(Tr. 265-266).

After defense counsel asked Ms. Davis one question on recross-examination, a lengthy discussion was held in chambers (Tr. 267-271). Defense counsel asked for a mistrial due to Ms. Davis' reference to appellant as a woman beater (Tr. 267). The trial court overruled appellant's motion for mistrial, saying that it thought that the admonishment to the jury was sufficient (Tr. 271). Appellant raised this issue in his motion for new trial (L.F. 51-52).

B. Standard of Review

Mistrial is a drastic remedy. *State v. Smith*, 32 S.W.3d 532, 552 (Mo. banc 2000). The grant of a mistrial is restricted to extraordinary circumstances in which it is the only way to remove the prejudice to the defendant. *State v. Williams*, 922 S.W.2d 845, 850 (Mo. App. W.D. 1996), *cert. denied*, 519 U.S. 974 (1996). "The

decision whether to grant a mistrial is left primarily to the trial court, which is in the best position to determine whether the complained-of incident had any prejudicial effect on the jury." *Smith,* 32 S.W.3d at 552. The appellate courts will reverse a conviction only if the challenged comments or conduct had a decisive effect on the jury verdict, meaning that there is a reasonable probability that, in the absence of the comments, the verdict would have been different. *Id*.

C. Extraordinary relief of mistrial not necessary.

In analyzing the prejudicial effect of an uninvited reference to other crimes evidence, the appeals court examines five factors: (1) whether the statement was, in fact, voluntary and unresponsive to the prosecutor's question; (2) whether the statement was singular and isolated, and whether it was emphasized or magnified by the prosecution; (3) whether the remarks were vague and indefinite, or whether they made specific reference to crimes committed by the accused; (4) whether the court promptly sustained defense counsel's objection to the statement and instructed the jury to disregard; and (5) whether in view of the other evidence presented and the strength of the State's case, it appeared that the comment played a decisive role in the determination of guilt. *State v. Costa*, 11 S.W.3d 670, 677 (Mo. App. W.D. 1999).

Applying these factors to the case at bar, it is clear that the statement made by Ms. Davis was not prejudicial to

> appellant and a mistrial was not warranted. First, Ms. Davis' statement that appellant was a woman beater was unresponsive to the prosecutor's question:
>
> *Q.* And for the love of it you can't figure out why you didn't say anything and why you covered up those drugs that night?"
>
> A. I know why I didn't say anything.
>
> Q. Why?
>
> A. Robert is a woman beater –

(Tr. 265-266). The prosecutor's question was not intended to elicit evidence about any prior bad acts committed by appellant or his general reputation. Rather, the prosecutor was attempting to elicit testimony from Ms. Davis regarding threats she received between the crime and the time she pled guilty that caused her to keep quiet about appellant's confession. The prosecutor had previously told the court that he would ask questions that would limit Ms. Davis' testimony to any *threats* she received between the crime and the time she pled guilty and would not get into any prior incidents between appellant and Ms. Davis (Tr. 262-263). The prosecutor stated that he believed that Ms. Davis would say that she "dummied up" because she was threatened by appellant or by people acting for him (Tr. 262).

Ms. Davis' statement was the only mention during appellant's trial of any prior bad acts of appellant and the prosecutor did not emphasize or magnify the statement in any way.[12] Unresponsive voluntary testimony indicating an accused was involved in an offense other than the one for which he is being tried does not mandate a mistrial. *State v. Mackin*, 927 S.W.2d 553 (Mo. App. S.D. 1996).

Appellant's counsel promptly objected to the statement and the jury was instructed to disregard the statement (Tr. 266). An instruction to disregard normally cures prejudice from an unsolicited statement. *See State v. Elghinger*, 931 S.W.2d 835, 841 (Mo. App. W.D. 1996).

In sum, Ms. Davis' testimony was one unsolicited statement. The trial court took prompt corrective action, and jurors are presumed to follow the court's instructions. *State v. Hahn*, 37 S.W.3d 344, 354 (Mo. banc 2000). Accordingly, the court's instruction to the jury to disregard the testimony was sufficient to remove any prejudice from the statement. *See State v. Costa,* 11 S.W.3d at 676.

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[12]While the prosecutor asked the jury in his closing argument to think about the "situational life of Miss Davis" (Tr. 339), this vague statement did not highlight or put emphasis on Ms. Davis' testimony that appellant was a "woman beater."

Furthermore, in light of the strength of the State's case, it is unlikely that this statement played a decisive role in the determination of guilt. *See State v. Viviano*, 882 S.W.2d 748, 753 (Mo. App. E.D. 1994) (the strength of the State's case is relevant even where the jury is exposed to improper evidence). The information charged that appellant, "either acting alone or knowingly in concert with another," committed the crime of trafficking in the second degree for possessing "more than 2 grams of a mixture or substance containing cocaine base, a controlled substance, knowing of its presence and nature" (L.F. 11). The evidence adduced at trial showed that officers believed drug transactions were going on inside the house where appellant and Ms. Davis lived (Tr. 155-156). After getting a search warrant, officers entered the master bedroom where appellant and Ms. Davis were sleeping and ordered them to put their hands above the covers (Tr. 157, 198, 217). Before they did so, Officer Morgan noticed "some movement underneath the covers between the two" (Tr. 157, 218). Appellant and Ms. Davis were ordered to get out of the bed (Tr. 157, 218). After officers noticed that Ms. Davis was walking oddly, they seized a plastic baggy containing a substance that appeared to be crack cocaine from underneath Ms. Davis' foot (Tr. 157, 198, 217, 158-159, 201). Ms. Davis had the baggy clinched in her toes (Tr. 158-159, 201). The substance was later determined to be 2.7 grams of crack cocaine (Tr. 287-289; State's Exhibit 8). This amount was more than a person would possess for their own personal use, and was worth about $540 (Tr. 162).

Officer Morgan and Detective Pride overheard appellant telling Ms. Davis to "take the rap" because he couldn't take the "weight" (Tr. 173-174, 204). At trial, Ms. Davis testified that when she and appellant were released from the justice center and went back home, appellant told her that he knew that the police knew the drugs were his (Tr. 228). Ms. Davis testified that appellant told her the names of people who came to the house that day who might have "ratted him out" (Tr. 228-229). In view of this evidence, Ms. Davis' reference to appellant being a woman beater did not likely play a decisive role in the jury's determination that appellant was guilty of trafficking in the second degree.

Therefore, the trial court did not abuse its discretion in denying appellant's request for a mistrial.

CONCLUSION

For the foregoing reasons, respondent asks this Court to affirm appellant's conviction and sentence.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

LISA M. KENNEDY
Assistant Attorney General
Missouri Bar No. 52912

P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321
Fax (573) 751-5391
lisa.kennedy@ago.mo.gov
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains 10,517 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

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

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ___ day of December, 2006, to:

Amy M. Bartholow
2101 Chapel Plaza Court, Suite 13
Columbia, Missouri 65201
(573) 875-1571

JEREMIAH W. (JAY) NIXON
Attorney General

LISA M. KENNEDY
Assistant Attorney General
Missouri Bar No. 52912

P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-3321
Fax (573) 751-5391
lisa.kennedy@ago.mo.gov
Attorneys for Respondent

RESPONDENT'S APPENDIX