IN THE SUPREME COURT OF MISSOURI

No. SC84035

STATE OF MISSOURI,

Respondent,

vs.

CORNEALIOUS M. ANDERSON,

Appellant.

Appeal from the Circuit Court of St. Charles County

Hon. Lucy D. Rauch, Judge

APPELLANT'S REPLY TO RESPONDENT'S SUBSTITUTE BRIEF

Alan Kimbrell, # 18397
18238 Hager Lane
Chesterfield, MO 63005
(636) 536-9625

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ARGUMENT

I

THE COURT ERRED IN OVERRULING DEFENDANT'S OBJECTIONS TO INTRODUCTION IN EVIDENCE OF "A BERETTA MAGAZINE BROCHURE FOR SEMI-AUTOMATIC HANDGUNS," IN THAT THERE WAS NOT THE SLIGHTEST EVIDENCE THAT ANY GUN ADVERTISED IN THAT BROCHURE, OR ANY GUN EVEN REMOTELY RESEMBLING ANY GUN ADVERTISED IN THAT BROCHURE, WAS USED IN THE ROBBERY, AND THE EXHIBIT WAS TOTALLY IRRELEVANT AND ITS INTRODUCTION INTO EVIDENCE WAS HIGHLY PREJUDICIAL; APPELLANT WAS PREJUDICED BY INTRODUCTION OF THE BROCHURE BECAUSE: (A) IT WAS INTENDED, AND WAS SUSCEPTIBLE TO MISUSE BY THE JURY, TO CONTRADICT DEFENDANT'S TESTIMONY THAT HE DID NOT HAVE A GUN, AND THE TESTIMONY OF THE ST. CHARLES POLICE THAT THE VICTIM HAD REPORTED THAT ONLY ONE OF THE ROBBERS HAD A GUN; (B) IT IMPLIED TO THE JURY, AND PERMITTED THE JURY IMPROPERLY TO INFER, THAT ONE OR MORE SEMI-AUTOMATIC HANDGUNS HAD BEEN USED IN THE ROBBERY, WHEN THERE WAS NO ADMISSIBLE EVIDENCE TO SUPPORT SUCH AN HYPOTHESIS; (C) THE BROCHURE WAS SUBJECT TO MISUSE BY THE JURY TO CONTRADICT APPELLANT'S TESTIMONY THAT THE ROBBERY HAD NOT BEEN PLANNED, AND THAT HE HAD NO KNOWLEDGE THAT HIS STEP-BROTHER INTENDED TO COMMIT A ROBBERY

A. The Brochure Was Not Relevant To The Crimes With Which Appellant Was Charged

Respondent argues that there are three ways in which "[t]he gun brochure police found at Appellant's apartment was relevant to prove the charges against him." Resp. Subst. Br. 18-19.

(1) "The gun brochure tended to corroborate the victim's testimony that during the robbery Appellant used a handgun of that type [semi-automatic pistols in which the ammunition goes into the handle]." *Id.* at 19. This is so because "[t]he brochure showed that Appellant was familiar with semi-automatic pistols in which the ammunition clip goes into the handle." *Ibid.* There are a number of unspoken assumptions contained in this attempt to create a logical connection between the finding, in an apartment which appellant once had occupied, of a brochure depicting automatic pistols, and the conclusion that appellant used an automatic pistol in the robbery charged: the brochure belonged to appellant (or, at the least, that he had looked through it); he acquired it (or, at least, looked through it) before the robbery; he did so for the purpose of selecting a gun to use in a robbery; after looking through the brochure, he acquired an automatic pistol; after he acquired an automatic pistol, he used it in the robbery.

To leap from the fact that a brochure for automatic pistols was found in an apartment once occupied by appellant to the conclusion that appellant used an automatic pistol in the robbery requires each of the above assumptions, plus the assumptions stated by respondent, to be an inference logically deducible from the prior assumptions. In his Reply Brief below,

appellant cited three cases for the proposition that it is impermissible to stack an inference upon an inference, *i.e.*, State v. Polk, 529 S.W.2d 490, 493 (Mo. App. St. L. Dist. 1975); State v. Mayabb, 2001 WL 300590 (Mo. App. S.D. March 28, 2001); State v. Brown, 542 S.W.2d 789 (Mo. App. Springf. Dist. 1976). App. Reply Br. 7. Yet, this is precisely what the Eastern District panel did in its decision below, what respondent does in its Substitute Brief, and what it asks this Court to do—without admitting that it is doing so. Neither respondent nor the court below has mentioned these cases, or the proposition for which they stand. Neither has attempted to explain how they leap from the brochure in an apartment which appellant once had rented to appellant's use of an automatic pistol in the robbery *without* piling inferences upon inferences.

The basic problem is that respondent and the Court below are attempting to establish the logical relevancy of the brochure by fiat, not by demonstrating a chain of reasoning which leads to such a conclusion. If this leap of faith establishes relevance, it would be equally plausible to prove that defendant used an automatic pistol in the robbery by testimony that, at an unspecified time before the robbery, he was seen in a sporting goods store in the vicinity of a display case which contained automatic pistols, or that he had attended a gun show. Perhaps a lay person could be excused for leaping to such a conclusion, but such departure from logical reasoning does not constitute "thinking like a lawyer."

In support of its argument that the brochure was relevant, respondent cites one case which it did not cite below, State v. Friend, 822 S.W.2d 938, 944 (Mo. App. S.D. 1991), and an opinion by this Court which was handed down after respondent's brief was filed below, State

v. Black, 50 S.W.3d 778 (Mo. 2001 (En Banc). Resp. Subst. Br. 17, 20.

In the former case, the court held that a weapon may be admitted into evidence if it "'appeared to be of the same type,' 'was very similar,' and was 'approximately like' the one used in the offense." 822 S.W.2d at 944. The victim in that case was a police officer who was shot at by the driver of 1975 Cordoba. An "unexpended .22 caliber magnum cartridge" was found in the Cordoba. A "loaded .22 caliber magnum revolver" was found in the apartment in which defendant was arrested. A witness testified that, the day before the assault, defendant was engaging in target practice with a "'[b]lue steel with round plastic handles, long barrel .22 automatic.'" *Id.* at 941-42. The court held that the gun seized from the apartment had been sufficiently identified to justify its admission. By contrast, in the instant case, no one ever asked the victim if the gun he claimed to have seen in defendant's possession resembled any of the guns depicted in the brochure.

This Court's opinion in State v. Black is actually contrary to respondent's position that the commonality between the victim's identification of the pistol as the type which uses an inserted clip and the depiction in the brochure of pistols using an inserted clip is sufficient identification to render the brochure relevant and admissible. In that case, "Dr. Meier testified that the knife blade that inflicted the victim's wound was 4.5 to 5.0-inches long and guessed that it was 1.0 to 1.5-inches wide." When defendant was arrested, an empty knife sheath was found in his car. Based on a statement from defendant's girl friend that defendant had thrown a knife out of his car window, the police found a knife in a grassy area 20 blocks from the crime scene. The knife was admitted as Exhibit 10. "According to Meier, Exhibit 10 'could

have' been the knife that wounded the victim. Meier did not testify that Exhibit 10 was distinguishable from any other non-serrated knife about 5 inches long and 1 inch wide." This Court held: "The trial court erred in finding that Sergeant Goodwin's testimony—with Dr. Meier's testimony and the admission of the knife sheath—was sufficient foundation to admit the knife as the murder weapon." *Id.* at 784, 786.

B. The Brochure Did Not Relate To The Crime Charged.

In a section headed "Weapons Are Admissible When They Relate To The Crimes Charged," respondent cites nine cases, including State v. Friend and State v. Black, which were not cited to the court below. The two cases just named already have been discussed. Five of the remaining seven are easily dispatched, namely: State v. Silvey, 894 S.W.2d 662, 665-69 (Mo. 1995((En Banc); State v. Nelson, 484 S.W.2d 306, 307 ((Mo. 1972); State v. Douthit, 846 S.W.2d 761, 762-63 (Mo. App. E.D. 1993); State v. Huff, 831 S.W.2d 752, 754(Mo. App. E.D. 1992); and State v. Woods, 637 S.W.2d 113, 117 (Mo. App. E.D. 1982). Resp. Subst. Br. 21-22. In all of these cases, the weapons were used as demonstrative evidence. Unlike the instant case, where the gun brochure was offered as substantive evidence of defendant's guilt, the weapons in the above five cases were used strictly for illustrative purposes. In fact, weapons used as demonstrative evidence need not even be marked as exhibits or offered into evidence:

> "Because the weapon was used solely for demonstrative purposes and was not the actual weapon used in commission of the crime, it was not required that the knife be admitted into evidence. See *State v. Douthit,* . . . (no requirement that prosecution

> offer or admit into evidence shotgun unconnected with the defendant used solely by the prosecution for demonstrative purposes); *State v. Huff*, . . . (No requirement that prosecution offer or admit into evidence three shotguns unconnected with the defendant solely by the prosecution for demonstrative purposes)."

State v. Silvey, 894 S.W.2d at 666 n.1.

Although the holdings in these five cases are totally irrelevant to the issues herein, the language in one of these cases supports appellant's position: "The courts of this state have continually enforced the general proposition that weapons unconnected with either the accused or the offense lack any probative value and *their admission is prejudicial and reversible error."* State v. Huff 831 S.W.2d at 754.

Another case which respondent cites in this point, which was not cited to the court of appeals, is State v. Crowley, 571 S.W.2d 460 (Mo. App. St. L. Dist. 1978). In that case, defendant used a sawed-off double-barreled .12 gauge shotgun in a robbery which occurred in a lounge. The police saw him leaving the scene of the robbery. The shotgun was found at the rear of the lounge, along with the purse of one of the victims. One witness "testified that the shotgun exhibited at trial appeared to be the same type of weapon used in the robbery." Another witness "stated that the exhibit was very similar to the one used that night." *Id.* at 463. The court stated that "[t]he shotgun along with a victim's handbag was found in a place to which appellant retreated after being spotted by police." *Id.* at 464. The court held that "[t]his evidence more than adequately substantiates the linkage between defendant and the shotgun

necessary to sustain admissibility." *Id.* at 463. Contrast this to the instant case, where no one ever saw defendant with the brochure, and the victim did not identify any of the guns depicted therein as being "similar to the one" he claimed to have been used against him.

Respondent's final new case in this subsection comes from New Jersey. In State v. Koskovich, 776 A.2d 144, 156-57 (N.J. 2001), the state argued that the two murders with which defendant was charged were "'thrill'" killings. A witness testified that "defendant had stated that he wanted to join the Mafia and be a 'hit-man,' that he thought it would be easier to get into the mob if he killed someone, . . ." *Id.* at 156. The police seized fourteen gun magazines and two empty .22 caliber cartridge boxes from defendant's bedroom. They had titles such as "'Combat Handguns,' 'Handgunning,' and 'Guns and Weapons.'" The court admitted photocopies of the magazines' covers. The convictions were affirmed: "[T]he gun magazines were relevant because they helped to establish that defendant intentionally and purposefully murdered the victims and understood that by shooting them, death would result. . . . [T]he State offered the gun magazines not only to show that defendant was interested in guns, but also to demonstrate defendant's proficiency with weapons, which helped prove that shooting of Giordano and Gallara was purposeful and knowing." *Id.* at 163. If possessing gun magazines makes one "proficient with weapons," then subscribers to Sports Illustrated and ESPN The Magazine, and couch potatoes who spend their weekends watching sports, thereby should become more "proficient athletes." Tenuous as this justification is, Koskovich is simply a far different case from this one.

In its attempt to distinguish the cases relied on by appellant, respondent states that they

"are inapposite in that they all involve weapons wholly unrelated *to* either *the defendant* or the crime charged." Resp. Subst. Br. 24-25 (Emphasis added.). The very synopses appended by respondent to its citations of these cases belie respondent's claim that they "all involve weapons wholly unrelated to . . . the defendant . . . .": "a .32 caliber gun found in defendant's home" (State v. Richards, 67 S.W.2d 58 (Mo. 1933)); "weapons found in defendant's possession at arrest" {State v. Krebs, 106 S.W.2d 428 (Mo. 1937)); "guns found in defendant's wife's purse at the time of his arrest" (State v. Smith, 209 S.W.2d 138 (Mo. 1948)); "guns found near defendant at the time of arrest" (State v. Holbert, 416 S.W.2d 129 (Mo. 1967)); "Guns found in defendant's house" (State v. Baker, 434 S.W,.2d 583 (Mo. 1968)); "gun found on defendant at arrest improperly admitted when no showing that it was same or similar to gun used to commit the crime charged" (State v. Jones, 583 S.W.2d 212 (Mo. App. W.D. 1979)); "the court improperly allowed a gun to be shown to the jury that was not the one shown to the crime victims" (State v. Fristoe, 620 S.W.2d 421 (Mo. App. W.D. 1981)); "gun that the robbery victim testified was not the one defendant used to commit crime improperly admitted" (State v. Moore, 645 S.W.2d 109 (Mo. App. W.D. 1982)). Resp. Subst. Br. 24-25.

In all of these cases, admission of the weapons caused reversal because the weapons were not shown to have been used in the crime. Where the victim in the instant case was not even asked to identify the weapons in the brochure, the fact that the gun he said defendant had was the type where a gun clip is inserted in the handle, and that all of the weapons in the brochure are automatics which are loaded in a similar fashion, does not even come close to the type of identification of the weapon offered with that used in the commission of the crime

which this Court and other courts always have required.

Admission of The Brochure Is Presumed Prejudicial

Respondent argues that, "even if the brochure was irrelevant, its admission did not constitute reversible error." Resp. Subst. Br. 26. The error in the instant case was admission of a weapons brochure not connected to the crimes charged. State v. Huff, one of the very cases relied on by respondent under the heading "Weapons Are Admissible When They Relate To The Crimes Charged" (Resp. Subst. Br. 22), states that "[t]he courts of this state have continually enforced the general proposition that weapons unconnected with either the accused or the offense lack any probative value and *their admission is prejudicial and reversible error."* 821 S.W. 2d at 754 (Emphasis added.).

Respondent cites State v. Richardson, 923 S.W.2d 301 (Mo. 1996)(En Banc), for the proposition that "[i]n reviewing for 'prejudice,' reversal is warranted 'only if the admitted evidence was so prejudicial that it deprived the defendant of a fair trial."
Resp. Subst. Br. 26. Richardson involved the admission, in the guilt phase of the trial, "of testimony and various items of evidence that appellant contends were inadmissible hearsay." 923 S.W.2d at 311. It did not involve admission of a firearm unrelated to the crime charged.

Respondent relies on State v. Stoner, 907 S.W.2d 360 (Mo. App. W.D. 1995), for the proposition that "[a]bsent a showing that the evidence inflamed the jury or diverted its attention from the issues to be resolved, admitted evidence, even if immaterial or irrelevant, will not constitute prejudicial error." Resp. Subst. Br. 26. In Stoner, the error claimed was "that the trial court erred in allowing" a police officer "to testify, over . . . objection, whether he had

ever experienced an occasion when displaying a photographic array that a prospective witness was unable to positively identify a suspect." 907 S.W.2d at 362-63. It did not involve admission of a firearm unrelated to the crime charged.

Respondent cites State v. Barriner, 34 S.W.3d 139, and State v. Black, 50 S.W.3d 778, for the proposition that, "[i]n determining whether the improper admission of evidence is harmless error this Court employs the 'outcome-determinative' test." Resp. Subst. Br. 27. In Barriner, this Court *reversed* a conviction because of the admission of testimony and depictions of the defendant involved in consensual sexual acts with a former girlfriend.

Admission of a weapon which was not shown to have been used in the crime charged has caused reversal in the following cases: State v. Merritt, 460 S.W.2d 591 (Mo. 1970); State v. Wynne, 182 S.W.2d 294 (Mo. 1944); State v. Krebs, 106 S.W.2d 428 (Mo. 1937); State v. Richards, 67 S.W.2d 58 (Mo. 1933); State v. Grant, 810 S.W.2d 591 (Mo. App. S.D. 1991); State v. Reyes, 740 S.W.2d 257 (Mo. App. W.D. 1987); State v. Perry, 689 S.W.2d 123 (Mo. App. W.D. 1985); State v. Moore, 645 S.W.2d 109 (Mo. App. W.D. 1982); State v. Fristoe, 620 S.W.2d 421 (Mo. App. W.D. 1981); State v. Jones, 583 S.W.2d 212 (Mo. App. W.D. 1979); State v. Charles, 572 S.W.2d 193 (Mo. App. K.C. Dist. 1978); State v. Williams, 543 S.W.2d 563 (Mo. App. K.C. Dist. 1976). ***None of these cases engaged in a "harmless error" analysis***.

In State v. Merritt, 460 S.W.2d at 595-96, this Court held that introduction of a gun that was not connected with the defendant "or the offense charged" was "manifestly prejudicial to the appellant's right to a fair trial." In State v. Smith, 209 S.W.2d 138, 141-43 (Mo. 1948),

this Court stated: "That the introduction in evidence . . . of these lethal weapons, under the circumstances, was erroneous and prejudicial is self-evident."

The Southern District stated, in State v. Grant, 810 S.W.2d at 592, that "[l]ethal weapons unrelated to the offense for which an accused is charged have prejudice seldom attached to other demonstrative evidence." Likewise, in State v. Perry, 689 S.W.2d at 125-26, the Western District stated that "the dangerous tendency and misleading effect of" introduction of "weapons unconnected with either the accused or the offense for which he is standing trial" "cannot be minimized." In State v. Jones, 583 S.W.2d at 213-16, the court stated that "[t]he inherent prejudicial nature of demonstrative evidence of weapons not connected with the crime has been frequently recognized." In State v. Charles, 572 S.W.2d at 197-98, the court stated: "Lethal weapons completely unrelated to and unconnected with the criminal offense for which an accused is standing trial have a ring of prejudice seldom attached to other demonstrative evidence, and the appellate courts of this state have been quick to brand their admission into evidence . . . as prejudicial error."

The sole ground on which appellant sought transfer to this Court was that the opinion below was contrary to State v. Grant, 810 S.W.2d 591, State v. Davis, 530 S.W.2d 709 (Mo. App. St. L. Dist. 1975), State v. Merritt, 460 S.W.2d 591, State v. Wynne, 182 S.W.2d 294, and State v. Krebs, 106 S.W.2d 428. In its Substitute Brief, respondent attempted to distinguish these cases (and the others cited above) on the grounds that they "are inapposite in that they all involve weapons wholly unrelated to either the defendant or the crime charged which were admitted into evidence." Resp. Subst. Br. 24-25. However, respondent did not even mention

these cases in its section headed "Admission of the Brochure Was Not Prejudicial." Resp. Subst. Br. 26-28.

The cases cited above prove that, at least up to the time this case was submitted to the court of appeals below, the courts of this state uniformly held that introduction of weapons unconnected with the crime charge was *per se* reversible error, without any necessity for the appellant to demonstrate any prejudice other than the introduction of the weapons themselves. Even in its Substitute Brief, respondent is silent on this issue.

However, the question arises whether State v. Black, 50 S.W.3d 778, effectively has overruled all of the foregoing cases. Black received the death penalty for first degree murder. As discussed at p. *supra,* the prosecution introduced, as the murder weapon, a knife which fit the treating physician's description of the murder weapon. This Court held that "[t]he trial court erred in finding that" there was a "sufficient foundation to admit the knife as the murder weapon." *Id.* at 786. This Court held that "the error in admitting the knife as the murder weapon is harmless beyond a reasonable doubt." *Ibid.* The critical discussion is as follows:

> "A conviction may be reversed when a weapon admitted into evidence is unconnected to the crime and not similar to the weapon involved in the crime. See *State v. Wynne*, . . . ; *State v. Perry*, . . . ; *State v. Grant*, ... This case is distinguishable from that line of cases because here the evidence during the guilt phase, particularly Dr. Meier's testimony, demonstrates that Exhibit 10 is similar to the weapon used to kill the victim. See *State v. Rehberg*, 919 S.W.2d 543, 551 (Mo.App.1995), citing *State v. Silvey*, 894 S.W.2d 662, 667-68 (Mo. banc 1995).

> "The evidence is overwhelming that defendant stabbed the victim. In fact, defense acknowledged the stabbing in closing argument but claimed self-defense. Because there is no reasonable probability that the jury would have acquitted but for the erroneously admitted evidence, the error in admitting the knife as the murder weapon is harmless beyond a reasonable doubt."

50 S.W.3d at 786.

In State v. Rehberg, 919 S.W.2d 543, 551 (Mo. App. W.D. 1995), a stealing case, the items which had been stolen had been returned to the victim. "[I]tems" which "were identical to the ones connected with appellant and the crime charged" were marked for identification. "The record is clear that the items were never represented by the State as 'real' evidence, actual evidence connected with the crime charged, but only as demonstrative evidence." In the instant case, the Beretta Magazine Brochure for semi-automatic weapons was offered as "real evidence," not as "demonstrative evidence." Moreover, there was no evidence that any of the guns in the brochure "were identical to" either of the guns which the victim testified about.

In State v. Silvey, 894 S.W.2d at 666, the weapon used was a butterfly knife. The trial court allowed the prosecution to use a "look-a-like butterfly knife" to demonstrate to the jury how the knife worked because, "[a]s the reader will surely note, a butterfly knife is a unique weapon that nearly defies an accurate oral or written description of its design and how it is opened and closed." *Id.* at 665-66. Again, in the instant case, the brochure was not used as "demonstrative evidence."

Thus, the line of cases cited by appellant holding that admission of a weapon which has not been identified as having been used in the crime charged, other than as demonstrative evidence, is prejudicial and reversible error, without any requirement for "harmless error" analysis, are still the law. To affirm this conviction on the grounds of "harmless error" would require overruling that entire line of cases.

Finally, respondent cites State v. Roberts, 838 S.W.2d 126, 131 (Mo. App. E.D. 1992), for the proposition that "'[e]rror which in a close case might call for a reversal may be disregarded as harmless when the evidence of guilt is strong.'" Resp. Subst. Br. 27-28. In that case, the error complained of involved "[t]he prosecutor's requests to the jurors to place themselves in the place of the victim." The court noted that "we have not adopted a *per se* rule of mandatory reversal in all cases in which objectionable comments are made by a prosecutor." On the other hand, that is exactly what the courts of this state have done with regard to the introduction into evidence of weapons, as "real evidence," which have not been identified as having been used in the crime charged.

CONCLUSION

For the foregoing reasons, the conviction should be reversed and the cause remanded for a new trial.

Alan Kimbrell # 18397
18238 Hager Lane
Chesterfield, MO 63005
(636) 536-9625
Fax (636) 536-9654
Attorney for appellant

CERTIFICATE OF COMPLIANCE

I hereby that the foregoing includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 409 lines of monospaced type, and that the disk filed herewith has been scanned for viruses and is virus free.

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