

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
vs.)	No. ED 100807
)	
JEFFREY WEINHAUS,)	
)	
Appellant.)	

APPEAL TO THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
FROM THE CIRCUIT COURT OF FRANKLIN COUNTY
TWENTIETH JUDICIALCIRCUIT
THE HONORABLE KEITH SUTHERLAND, JUDGE

APPELLANT’S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Appellant, Jeffrey Weinhaus, was convicted by a Franklin County jury of: Possession of morphine and marijuana (Cts.I&III), §195.202;¹ Assault first-degree of a law enforcement officer (Ct.IV), §565.081; and Armed criminal action (Ct.V), §571.015.

The Honorable Keith Sutherland acquitted Jeff of: Tampering with a judicial officer (Ct.II), §565.084; and Resisting arrest (Ct.VIII), §575.150. The jury also acquitted Jeff of: Assault first-degree of a law enforcement officer (Ct.VI), §565.081; and Armed criminal action (Ct.VII).

Judge Sutherland sentenced Jeff concurrently to: (Count I)—two years imprisonment; (Count III)—one year in jail; (Counts IV & V)—thirty years imprisonment (Lf.212-214).² This appeal involves no issue under the exclusive appellate jurisdiction of the Missouri Supreme Court, and jurisdiction lies in this Court. Art.V,§3, Mo.Const. (as amended 1982);§477.050.

¹ Statutory references are to RSMo 2000.

² The record is a two-volume legal file (Lf.), pretrial transcripts (PTr.), trial transcript (Tr.), sentencing transcript (Sent.TR.), and exhibits (Ex.).

STATEMENT OF FACTS

On August 18, 2012, Missouri Highway Patrol Sgt. James Folsom received a telephone call from Judge Kelly Parker (Tr.168). Judge Parker had concerns about a YouTube video that had been posted by Jeffrey Weinhaus, Appellant (Tr.168-169; Ex.1&1A). Judge Parker felt that Jeff's video threatened some judicial officers, including Parker, and he asked Sgt.Folsom to investigate (Tr.169; Ex.1A).³

Jeff is a citizen-journalist who has published papers and broadcast videos since 1996 (Lf.75,129-132). His "Bulletinman" publications are critical of the government, law enforcement and the judiciary (Lf.75,95-96,129-132; Ex.1A). His media addresses matters of public concern, and is aimed at exposing the corruption of elected officials and law enforcement officers (Lf.75,129-132). Jeff has claimed that a sovereign People, pursuant to the Constitution, have a right to "fire" elected officials, try them for treason, and execute them if they are found guilty (Lf.75,129-132). Jeff was running for the office of Crawford County

³ This video without captions (Ex.1) is on the YouTube internet site at:

<http://www.youtube.com/watch?v=dDJsCaGvw9w> (last visited 7/25/14). The

video with captions (Ex.1A) is on the YouTube internet site at:

<http://www.youtube.com/watch?v=qHw0sDThkN8&list=UUzc6JzO6mcusCX-YtNj02ug&index=7> (last visited 7/25/14).

Coroner in 2012, in order to expose corruption that he believed was occurring there (Ex.1A). While Jeff's publications often contained offensive, critical statements against elected officials, he has no record of violence and no criminal history other than minor traffic violations (Lf.75-76,129-132).

Sgt.Folsom met with other officers to "determine the validity of the threats" contained in Jeff's video (Tr.171).⁴ They determined that most of the comments Jeff made in the video constituted free speech (Tr.171). However, they decided to contact Jeff to discuss the video and determine if he actually intended to harm anyone or himself (Tr.171).

Sgt.Folsom and Corp. Scott Mertens went to Jeff's home in Franklin County (Tr.173). They knocked and Jeff opened the door (Tr.173). Folsom testified that he smelled a strong odor of marijuana coming from the house and from Jeff (Tr.173). Folsom asked Jeff to step down from the porch to a carport area (Tr.174).

Jeff spoke with the officers for approximately 25-30 minutes (Tr.174). He assured them that he was a peaceful person who was trying to call people to arms and wake up America (Tr.174). He said that he was planning to remove corrupt officials in a peaceful manner; however, he also said that this is what the 2nd Amendment was created for (Tr.175). According to Folsom, Jeff would waver

⁴ Jeff routinely asks that officials step down on Constitution Day, as he also did in a July 14, 2009, Bulletinman publication (Lf.132).

between peaceful statements and statements that his Army was going to take over America because the Constitution had failed (Tr.175). He made radical statements about the government and his beliefs (Tr.175). He accused several officials of treason and asked Folsom and Mertens if they knew that the punishment for treason was death (Tr.175). Jeff gave the officers a copy of his "Bulletin" and he explained his personal beliefs about the Lord Jesus Christ (Tr.176).

When Jeff turned towards his home, Folsom asked him to stop stating that he smelled "pot" (Tr.176). Folsom asked Jeff if there was pot in the house and Jeff denied it (Tr.176). Jeff tried to step around Folsom, but Folsom blocked him and told him to turn around to be handcuffed (Tr.176). Jeff immediately submitted to being placed in handcuffs, holding his wrists out (Tr.176). Folsom told Jeff that it was for safety, and that he was going to apply for a warrant (Tr.176).

Jeff shouted for someone in the house to help him, saying that the cops were going to search the house for drugs (Tr.177). Jeff's wife came to the door and Mertens contacted her (Tr.177,378). She denied that there was anything illegal in the house (Tr.378). When additional officers arrived, Folsom removed Jeff's handcuffs and told him that he was free to leave, but that he could not reenter the house (Tr.177). Folsom left to apply for a warrant (Tr.177,379).

Folsom returned with the search warrant and showed it to Jeff (Tr.179). During the search, officers seized laptop equipment and video cameras (Tr.180). They found a loaded handgun in a nightstand drawer in the master bedroom, along

with paperwork indicating that Jeff's wife owned the gun (Tr.180). A green Army holster was with the gun (Tr.180,380; Ex.3&4). The officers did not seize this gun because it was legally registered, it was not evidence of a crime, and it was legal to have in the home (Tr.181).

In a common area of the basement sat a desk with a computer and cameras and banners behind it (Tr.183,269). This was where Jeff's videos were made (Tr.183,381; Ex.5). Also in the basement was a bedroom belonging to Jeff's teenaged son (Tr.266-267). Inside a desk drawer, the officers located drug paraphernalia, a set of scales, and a container of marijuana (Tr.184,384; Ex.6&7). They also found a small metal tin which contained 1½ morphine pills (Tr.185, 196-197,200,204-205; Exs.8&31).

Sgt.Folsom provided Jeff with the search inventory, along with Folsom's business card (Tr.206). Thereafter, Jeff began emailing Folsom asking for his computer back (Tr.207). He asked Folsom for the name of his attorney where he could serve a writ of replevin to get his computers back (Tr.207,272). Folsom claimed that Jeff posted a video denouncing Folsom, and that Jeff had called Folsom's supervisors to complain that Folsom had stolen items from his home (Tr.209-210,273). Jeff referred to Corporal Mertens, however, as "a very professional officer." (Tr.397).

On September 10, 2012, the highway patrol determined that they would arrest Jeff on drug and tampering charges (Tr.207). They decided to take him into custody before September 17 –the date mentioned in the YouTube video for the

removal of public officials (Ex.1A). Folsom did not want to be involved in the arrest because he felt that Jeff was personally agitated with him for taking his computers (Tr.274). Folsom said it was not his idea to arrest Jeff and he did not believe it was an appropriate under the circumstances, but he was just following orders (Tr.274,276). Folsom obtained an arrest warrant (Tr.208,274).

September 11, 2012

Folsom and Mertens devised a ruse where they would tell Jeff that they wanted to meet with him to return his computers, but they would take him into custody instead (Tr.208,385). They called Jeff and arranged to meet in public— at an MFA gas station near Jeff’s home (Tr.209-210).

Jeff tried to find someone to accompany him to the MFA station (Ex.15).⁵ He contacted some pastors in the area, but could find no one to accompany him (Ex.15). He spent time praying and singing hymns on the way to meet the officers (Ex.15).

Folsom and Mertens were not expecting any trouble from Jeff (Tr.216). They did not think Jeff was a dangerous or violent person, and Folsom described him as “a non-confrontational philosophical religious man” (Tr.286,293). While

⁵ Unbeknownst to the officers, Jeff wore a video camera watch on his left wrist (Tr.229; Ex.15). The entire twelve second interaction between Jeff and the officers is on this video, as well several minutes before and after (Tr.229;Ex.15).

Jeff had a history of making ultimatums, he had never used violence against anyone (Tr.294,401). Folsom and Mertens did not wear bullet-proof vests because they did not deem Jeff to be a threat (Tr.216,295,389). They were not afraid of him (Tr.372).

As Jeff pulled into the parking lot, Folsom and Mertens got out of their car (Tr.213,217). Folsom told Mertens to go to their trunk and open it in order to maintain the ruse that they had Jeff's computer equipment (Tr.218,390).

Jeff exited his car wearing a shirt and tie, and Folsom observed that both of Jeff's hands were empty; he also observed that Jeff was openly carrying a holstered gun on his hip, which he is legally entitled to do (Tr.219,304,403). Folsom unholstered his own weapon and questioned Jeff about his gun (Tr.219,317; Ex.15). Jeff replied by asking Folsom what Folsom was doing with a gun (Tr.220,317,317; Ex.15). Folsom told Jeff that he was authorized to have a gun, and Jeff replied that he also was authorized to have a gun (Tr.220,317;Ex.15). Folsom thought Jeff was being a smart-aleck (Tr.318).

According to Folsom, Jeff manipulated the flap of the holster with his right hand (Tr.220). Folsom was familiar with the holster because he used one in the Army; it is designed for 100% retention of the weapon and it is very difficult to open (Tr.220,306-308). Folsom stated that Jeff pulled down on the safety ring to disengage the flap, swept the flap up and placed his hand on the butt of the gun (Tr.221).

Mertens saw Jeff reach down and pull on the flap of the holster, which released it (Tr.391). Then he saw Jeff put his hands straight down to his side and he had a tremor (Tr.391). Then Mertens saw Jeff put his hand under the holster and grab the butt of the gun (Tr.392).

Folsom and Mertens ordered Jeff to the ground (Tr.222,329,392,414). According to Folsom, Jeff started shaking and said, “you’re going to have to shoot me,” and he began to pull the weapon from the holster (Tr.223,321,327). The gun never came free of the holster (Tr.421).

Three seconds after ordering him to the ground, before Jeff had removed his gun, Folsom shot Jeff twice in the chest and twice in the head (Tr.223,227,330,339,349; Ex.15).⁶ After Folsom began shooting, Mertens also shot Jeff (Tr.393). Jeff fell to the ground and Folsom and Mertens were certain that he was dead (Tr.224,394).

Folsom went to Jeff and rolled him over (Tr.228). Folsom said the gun was lying underneath Jeff, just out of the holster, and that Jeff’s hand was not near the trigger (Tr.228). Folsom said he put the gun back into the holster to secure it (Tr.228). Mertens did not see Folsom put the gun back in the holster (Tr.432-433). Mertens saw Folsom throw the gun with the holster in it behind him

⁶ Folsom is a disabled veteran who had a nerve injury that gave him partial paralysis (Tr.365). This disability makes him shake, and his tremors are worse in the presence of adrenaline (Tr.365).

(Tr.433-434). Folsom handcuffed Jeff (Tr.229). Folsom received a written reprimand for this incident and is no longer allowed to work as a State Trooper (Tr.254-255).

When Jeff's car was inventoried, other weapons were found lying in plain view, including a loaded shotgun and handgun (PT2 101). Jeff was not charged with anything related to these weapons (PT2 101). Jeff moved to exclude evidence of these weapons, arguing that they had nothing to do with the incident, the officers were unaware of the weapons and there was nothing illegal about having them (Lf.141-143; PT2 101-102; Tr.14-17). The trial court denied the motion, stating that it is not inappropriate for the State to introduce evidence of a search (Tr.17).

Jeff was charged with the following eight counts:

Count I – Possession of a Controlled Substance–Morphine

Count II – Tampering with a Judicial Officer

Count III – Misdemeanor Possession–Marijuana

Count IV – Attempted Assault 1st on a Law Enforcement Officer

Count V – Armed Criminal Action

Count VI – Attempted Assault 1st on a Law Enforcement Officer

Count VII – Armed Criminal Action

Count VIII – Resisting Arrest for a Felony

(Lf.23-25).

Before trial, Jeff moved to sever the tampering, drug and assault charges into three separate cases (Lf.60-71; PT2 39-43,83-87). He asserted the separate charges occurred weeks apart, had no common victims, and it would be substantially prejudicial to submit them to a single jury (Lf.60-71; PT2 83-87). The defense was concerned that the jury would see the YouTube video, which was the only evidence to support the judicial tampering charge, and it would prejudice the other counts (PT2 84-85). Specifically, the defense was concerned that Jeff would be put on trial for his controversial views and his outrageous speech, that the jury would find his speech repugnant and reprehensible and convict on the other charges for that reason (PT2 85). The trial court denied the motion to sever, stating that the charges were a “sequence of events” (PT2 87).

Jeff also moved to dismiss the judicial tampering charge, asserting that his political speech is protected by the First Amendment and that his words did not rise to the level of a threat (Lf.72-140; PT2 73-82). Additionally, Judge Parker’s name was never spoken by Jeff, and it was not established who provided the captions to the YouTube video that listed Judge Parker’s name, among others, as corrupt officials (Lf.72-140).

The trial court initially denied the motion to dismiss (PT2 82), and allowed the YouTube video—which was only relevant to the judicial tampering charge—to be played for the jury (Tr.169-171). However, at the close of the State’s case, the trial court granted defense counsel’s motion for judgment of acquittal on the judicial tampering and resisting arrest counts (Tr.544-545).

As to the judicial tampering count, the Court noted that the YouTube video was “offensive, rude and a lot of other things” but that Jeff had First Amendment rights to say the things he said (Tr.544-545). Further, the Court noted that, “there just isn’t anything there to support the charge” without more than the YouTube video (Tr.545). The trial court instructed the jury that the counts of tampering with a judicial officer and resisting arrest “are no longer an issue in this case” (Tr.562). It did not instruct that they could not consider the YouTube video.

In order to find Jeff guilty of first-degree assault on a law enforcement officer, the jury instructions required the jury to find that “the defendant attempted to cause serious physical injury to (Folsom)/(Mertens) by shooting him” (Lf.178, 180). While deliberating, the jury asked for a definition of assault in the first-degree (Lf.193; Tr.645). The trial court told them that he cannot tell them more than what is in the instructions, and that the charge is defined in the instructions (Tr.645).

The jury also wanted to see the “still photos” from the watch video that the defense used as demonstrative evidence during trial (Tr.340-347), the watch video itself (Ex.15), and a transcript of Folsom’s and Mertens’ testimony regarding the placement of Jeff’s gun before and after the shooting (Tr.642; Lf.194). The jury found Jeff not guilty of the first-degree assault of Corp. Mertens and the accompanying armed criminal action (Lf.199-200; Tr.652). The jury found Jeff guilty of the first-degree assault of Sgt.Folsom, the accompanying armed criminal action count and both drug possession counts (Lf.195-198; Tr.651).

After a sentencing phase, the jury returned verdicts, which the Court imposed, sentencing Jeff to concurrent terms of two years imprisonment (Count I), 1 year in jail (Count III), and thirty years imprisonment (Counts IV & V) (Lf.212-214; Sent.Tr.43-44). Jeff timely appealed (Lf.215-216), and this appeal follows.

POINTS RELIED ON

I.

The trial court erred in overruling Jeff's motion for judgment of acquittal at the close of evidence, and entering judgments and sentences against him for assault of a law enforcement officer in the first-degree and the corresponding armed criminal action, violating his right to due process of law as guaranteed by U.S.Const., Amend XIV and Mo.Const., Art.I, §10, because the state's evidence was insufficient to sustain a finding of guilt beyond a reasonable doubt in that it failed to establish that Jeff attempted to kill or cause serious physical injury to Sgt.Folsom, since the evidence only showed that the officers did not consider Jeff a threat, he does not have a criminal history, he thought he was getting his computers back, he prayed for a peaceful interaction on the way to the gas station, he issued no verbal threats to the officers in the seconds between exiting his vehicle and being shot four times; rather, the evidence showed that, when questioned about why he had a gun—which he lawfully wore openly—Jeff manipulated the flap of his holster, told the officers they would have to shoot him, put his hand on the stock and began to remove it, which conduct may have placed the officers in apprehension of immediate physical injury, giving them the right to shoot him, but their reaction does not evince an attempt by Jeff to kill or cause serious physical injury to them.

State ex rel. Verweire v. Moore, 211 S.W.3d 89 (Mo.banc2006);

State v. Dublo, 243 S.W.3d 407 (Mo.App.W.D.2007);

State v. Chambers, 998 S.W.2d 85 (Mo.App.W.D.1999);

State v. Fincher, 655 S.W.2d 54 (Mo.App.W.D.1983);

U.S.Const.,Amend.XIV;

Mo.Const.,Art.I,§10; and

§§ 556.061, 565.081 and 565.083.

II.

The trial court erred in overruling Jeff's motion for judgment of acquittal at the close of evidence, and entering judgments and sentences against him for assault of a law enforcement officer in the first-degree and the corresponding armed criminal action, violating his right to due process of law as guaranteed by U.S.Const., Amend XIV and Mo.Const., Art.I,§10, because the state's evidence was insufficient to sustain a finding of guilt beyond a reasonable doubt in that Instruction 8—the verdict director for first-degree assault of Sgt.Folsom—required the jury to find that Jeff attempted to kill or cause serious physical injury to Sgt.Folsom “by shooting him,” and there was no evidence that Jeff actually shot Sgt.Folsom.

State v. Smith, 353 S.W.3d 100 (Mo.App.W.D.2011);

State v. Herndon, 224 S.W.3d 97 (Mo.App.W.D.2007);

State v. Young, 172 S.W.3d 494 (Mo.App.W.D.2005);

U.S.Const., Amend XIV; and

Mo.Const.Art.I,§10.

III.

The trial court plainly erred in submitting Instruction 8—the verdict director for first-degree assault of Sgt.Folsom—because this instruction required the jury to find that Jeff actually shot at Sgt.Folsom, and violated his right to due process and a fair trial under the U.S.Const.,Amends VI&XIV and Mo.Const., Art.I,§§10&18(a), in that there was no evidence that Jeff shot at Sgt.Folsom and the only evidence was that Jeff manipulated the flap on the holster, placed his hand on his weapon and began to pull it up, but the jury, already confused about the definition of first-degree assault, convicted Jeff of actually shooting Sgt.Folsom, which evidence did not exist, without having to evaluate whether his actual conduct constituted a substantial step sufficient to convict Jeff of first-degree assault.

State v. January, 176 S.W.3d 187 (Mo.App.W.D.2005);

State v. Wilhelm, 774 S.W.2d 512 (Mo.App.W.D.1989);

State v. Wurtzberger, 40 S.W.3d 893 (Mo.banc2001);

U.S.Const.,Amend.VI&XIV;

Mo.Const.,Art. I,§§10&18(a).

IV.

The trial court erred in overruling Jeff's motion for judgment of acquittal at the close of all the evidence and in accepting the jury's guilty verdict for possession of a controlled substance (Count I), and sentencing him upon that conviction, because these rulings violated his right to due process of law as guaranteed by U.S.Const., Amend XIV and Mo.Const., Art.I,§10, in that the evidence was insufficient to establish beyond a reasonable doubt that Jeff possessed the morphine pills that were found in a jointly-controlled area of the home he shared with other people.

State v. Reynolds, 669 S.W.2d 582 (Mo.App.E.D.1984);

State v. Cushshon, 218 S.W.3d 587 (Mo.App.E.D.2007);

State v. West, 21 S.W.3d 59 (Mo.App.W.D.2000);

U.S.Const., Amend. XIV;

Mo.Const., Art. I, §10; and

§195.202.

.

V.

The trial court erred in overruling Jeff's motion for judgment of acquittal at the close of all the evidence and in accepting the jury's guilty verdict for possession of a controlled substance (Count III), and sentencing him upon that conviction, because these rulings violated his right to due process of law as guaranteed by U.S.Const., Amend XIV and Mo.Const., Art.I,§10, in that the evidence was insufficient to establish beyond a reasonable doubt that Jeff possessed the marijuana that was found in a jointly-controlled area of the home he shared with other people.

State v. Reynolds, 669 S.W.2d 582 (Mo.App.E.D.1984);

State v. Cushshon, 218 S.W.3d 587 (Mo.App.E.D.2007);

State v. West, 21 S.W.3d 59 (Mo.App.W.D.2000);

U.S.Const., Amend.XIV;

Mo.Const., Art. I, §10; and

§195.202.

VI.

The trial court abused its discretion in overruling Jeff's motion to sever the count of judicial tampering from the remaining counts and erred in joining these counts for trial, violating Jeff's rights to due process of law and a fair trial guaranteed by U.S.Const.,Amends.VI, XIV and Mo.Const., Art.I,§10,18(a), in that Jeff was substantially prejudiced since the jurors were likely to consider the evidence for the tampering count—namely, the inflammatory YouTube video—on the other counts, and because the YouTube video would not have been admissible in a trial of the other charges, it was highly prejudicial to Jeff's right to a fair trial on those charges.

State v. Holliday, 231 S.W.3d 287 (Mo.App.W.D.2007);

State v. Kelly, 956 S.W.2d 922 (Mo.App.W.D.1997);

State v. Howton, 890 S.W.2d 740 (Mo.App.W.D.1995);

U.S.Const.,Amends.V,VI&XIV;

Mo.Const.,Art. I, §§10&18(a); and

§545.041.

VII.

The trial court plainly erred in failing to declare a mistrial *sua sponte* after it granted Jeff's motion for judgment of acquittal of judicial tampering, or instruct the jury that it could not consider the YouTube video as evidence of Jeff's guilt on any charge, and these omissions denied Jeff his rights to due process and a fair trial before an impartial jury guaranteed by U.S.Const., Amends.VI, XIV and Mo.Const., Art.I,§10,18(a), in that the YouTube video was a bell that could not be unrung after the trial court granted judgment of acquittal as to the only charge to which the video was relevant, and Jeff could not be guaranteed a fair trial on the remaining charges at all, especially where the trial court did not instruct the jury to disregard the YouTube video for all purposes, and it served to paint Jeff as an extremist who is capable of violence, which resulted in manifest injustice on the charge of first-degree assault on a law enforcement officer.

State v. Barriner, 34 S.W.3d 139 (Mo.banc2000);

State v. Shepard, 654 S.W.2d 97 (Mo.App.W.D.1983);

State v. Bernard, 849 S.W.2d 10 (Mo.banc1993);

U.S.Const.,Amends V,VI&XIV; and

Mo.Const.,Art. I, §§10,17&18(a).

VIII.

The trial court abused its discretion in overruling Jeff's objections and allowing the State to present testimony and evidence concerning other weapons and ammunition unrelated to the crime for which Jeff was being tried, because this denied Jeff his rights to due process, a fair trial, and to be tried for the offense with which he was charged, as guaranteed by U.S.Const.,Amends.VI, XIV and Mo.Const., Art.I,§10,18(a), in that these weapons and ammunition were not directly connected to the crime, they were inherently prejudicial, and had no probative value since they could not assist the jury in deciding any of the issues presented in the case, and Jeff's possession of weapon and ammunition that were not involved in the crime were neither logically nor legally relevant and served only to color Jeff's character as someone tending to possess dangerous weapons.

State v. Holbert, 416 S.W.2d 129 (Mo.1967);

State v. Krebs, 106 S.W.2d 428 (Mo.1937);

State v. Perry, 689 S.W.2d 123 (Mo.App.W.D.1985);

U.S.Const., Amends V,VI&XIV; and

Mo.Const.,Art. I, §§10&18(a).

ARGUMENT

I.

The trial court erred in overruling Jeff's motion for judgment of acquittal at the close of evidence, and entering judgments and sentences against him for assault of a law enforcement officer in the first-degree and the corresponding armed criminal action, violating his right to due process of law as guaranteed by U.S.Const., Amend XIV and Mo.Const., Art.I, §10, because the state's evidence was insufficient to sustain a finding of guilt beyond a reasonable doubt in that it failed to establish that Jeff attempted to kill or cause serious physical injury to Sgt.Folsom, since the evidence only showed that the officers did not consider Jeff a threat, he does not have a criminal history, he thought he was getting his computers back, he prayed for a peaceful interaction on the way to the gas station, he issued no verbal threats to the officers in the seconds between exiting his vehicle and being shot four times; rather, the evidence showed that, when questioned about why he had a gun—which he lawfully wore openly—Jeff manipulated the flap of his holster, told the officers they would have to shoot him, put his hand on the stock and began to remove it, which conduct may have placed the officers in apprehension of immediate physical injury, giving them the right to shoot him, but their reaction does not evince an attempt by Jeff to kill or cause serious physical injury to them.

Standard of Review & Preservation

The due process clause protects a defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970). In reviewing a challenge to the sufficiency of the evidence, this Court accepts as true all evidence and inferences in a light most favorable to the verdict. *State v. Botts*, 151 S.W.3d 372, 375 (Mo.App.W.D.2004). This Court disregards contrary inferences, unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. *State v. Grim*, 854 S.W.2d 403, 411 (Mo.banc1993). But this Court may not supply missing evidence, or give the State the benefit of unreasonable, speculative or forced inferences. *State v. Whalen*, 49 S.W.3d 181, 184 (Mo.banc2001). This same standard of review applies when this Court reviews a motion for a judgment of acquittal. *Botts*, 151 S.W.3d at 375.

Jeff moved for acquittal on all counts at the close of the State's evidence and renewed his arguments at the close of all the evidence (Tr.541-549, 604). The trial court dismissed the judicial tampering and resisting arrest charges, finding that the State had not met its burden (Tr.544-549). It found that the evidence on both drugs charges was "weak," but allowed them to go forward (Tr.543). Defense counsel was unsure if the State was trying to submit assault or attempted assault, but argued that the evidence was insufficient and that attempt would have to be defined (Tr.546-548). The trial court denied the motion as to the assault and armed criminal action counts (Tr.547).

The jury acquitted Jeff of the attempted assault of Corp. Mertens (Count VI), and the armed criminal action count (Count VII) (Lf.199-200). Jeff filed a post-trial motion for acquittal, again challenging the sufficiency of the evidence on the attempted assault of Sgt.Folsom (Lf.153-162). This issue is properly preserved for appeal. *See Rule 29.11(d)*.

First-degree Assault

A person commits the crime of first-degree assault of a law enforcement officer if such person attempts to kill or "knowingly causes or attempts to cause serious physical injury to a law enforcement officer or emergency personnel."

§565.081.1. There is no question that Sgt.Folsom was a law enforcement officer. *See §556.061(17)*.

Assault in the first-degree requires proof of a very specific intent on the part of the actor to cause serious physical injury. *State v. Chambers*, 998 S.W.2d 85, 90 (Mo.App.W.D.1999). "Assault in the first-degree, without injury to the victim, requires proof of a very specific intent on the part of the actor to cause serious physical injury. The intent element, however, is generally not susceptible of proof by direct evidence; and may be shown by circumstantial evidence." *State v. Schnelle*, 7 S.W.3d 447, 451 (Mo.App.W.D.1999) (quoting *State v. Burton*, 863 S.W.2d 16, 17 (Mo.App.E.D.1993)). "Serious physical injury" is defined as "physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body..." **§556.061(28)**.

An “attempt” to commit a crime has two elements: (1) Appellant has to have the purpose to commit the underlying offense, and (2) Appellant must perform an act that is a substantial step toward the commission of that offense. In *State ex rel. Verweire*, 211 S.W.3d 89, 91-93 (Mo. banc 2006), the Court held that a defendant's conduct in grabbing the victim while holding a loaded .25 caliber handgun to the victim's side and cheek while saying that he would “blow his [f-ing] head off” did not constitute a substantial step toward commission of the offense of first-degree assault, which charged that the defendant attempted to cause serious physical injury to the victim.

The Court found that although it was undisputed that the defendant aimed the loaded pistol at the victim, he did not pull the trigger and he retreated from the altercation without ever having attempted to fire the pistol. *Id.* at 92. Under those circumstances, he did not have the intent to cause serious physical injury, but merely threatened to do so. *Id.* Thus, it was unlike cases where the defendant would have injured the victim but for the malfunctioning of his weapon or the intervention of law enforcement. *Id.* And it was also unlike cases where the defendant attempted to cause serious physical injury but only caused minor injuries. *Id.*

The Court rejected the State's argument that the defendant's threat to “blow” the victim's “head off,” provided the necessary intent for first-degree assault, stating “a mere threat with the ability to carry out that threat does not necessarily constitute an attempt to commit a crime.” *Id.* Instead, there must be

strongly corroborating evidence that it was the defendant's conscious object to carry out the threat." *Id.* There was insufficient evidence to establish the mental element that the defendant attempted to cause serious physical injury. *Id.* at 93.

In *State v. Dublo*, 243 S.W.3d 407 (Mo.App.W.D.2007), the defendant was convicted of seven counts, including two counts of first-degree assault and two counts of related armed criminal action charges. *Id.* at 409. The assault charges were based on the defendant holding a knife to the throats of two victims. He was charged with attempting to cause serious physical injury to them. *Id.* The defendant pushed the first victim against a counter, grabbed him by the neck, held a knife close to his neck, and told him that he was going to go with the defendant. *Id.* at 408. The defendant grabbed the second victim, put the knife to his throat, said, "I'm taking him with me," and that victim said that the defendant also threatened to kill him. *Id.*

This Court reversed both first-degree assault convictions, as well as the related armed criminal action counts, finding that there was insufficient evidence to convict. *Id.* at 409-410. The mere threat with the ability to carry out that threat did not constitute an attempt to commit the assault without strongly corroborating evidence that it was the defendant's conscious object to carry out the threat. *Id.* The Court found the record devoid of any strong corroborating evidence to support an attempt to cause serious harm even though the defendant had put a knife to both victims' throats and had threatened to kill one of them. *Id.* at 408, 410.

Similarly, here, the evidence was insufficient to prove that Jeff attempted to kill or cause serious physical injury to Sgt.Folsom. Indeed, on the same facts, the jury acquitted him of the charges against Corp.Mertens. And the jury had questions about the definition of first-degree assault (Tr.645; Lf.193). The only difference between Mertens and Folsom is that Jeff never made eye contact nor spoke directly to Mertens; in all other respects, Jeff's conduct was the same.

One does not "attempt to commit a crime by negligently endangering the person or property of another however great the danger or extreme the negligence." *Whalen*, 49 S.W.3d at 187 n. 5 (quoting R. Perkins, *Criminal Law*, 573–74 (2d ed.1969)). When determining a defendant's mental state, the Court may look to the defendant's conduct before, during and after the act. *State v. Hineman*, 14 S.W.3d 924,927–28 (Mo.banc1999).

Jeff routinely carries a pistol on his side because he believes in his Constitutional right to do so (PTr.54). He did not exit his car brandishing the weapon; rather, he had it secured in its holster and his hands were at his sides (Tr.220). Indeed, he believed that he was meeting the officers at that location to retrieve the computers that they had seized from him earlier (Ex.15; Tr.291). He searched for a pastor to accompany him to the gas station, and he prayed and sang praises to the Lord on the way (Ex.15). The officers testified that they did not consider Jeff to be a threat or a dangerous person, they did not expect any trouble from him, and they felt no need to wear their available bullet-proof vests (Tr.216, 286).

Immediately upon Jeff exiting his vehicle, Sgt.Folsom questioned him about his gun. Knowing he could lawfully carry a gun, Jeff asked Folsom about Folsom's gun. Jeff did not brandish his weapon nor make any threats, nor did he exit the vehicle with any other weapon which was in plain view in his car. Rather, in an interpretation most favorable to the verdict, the videotape reflects that Jeff told Sgt.Folsom that Folsom would have to shoot him (Ex.15). But again, this was not a threat of harm to the officers, nor did it show a purpose to injure Folsom. Even if the jury believed that Jeff placed his hand on his weapon or began to pull it from its holster, there was no evidence that he intended to aim it at the officers or do anything but throw it to the ground. Sgt.Folsom said that the weapon was never pointed at them (Tr.223). This evidence is far from the "strongly corroborating evidence" necessary to show a specific intent to commit first-degree assault. *Verweire*, 211 S.W.3d at 92.

That is not to say that Jeff did not commit some other assault offense, such as third degree assault of a law enforcement officer by "purposely plac[ing] a law enforcement officer in apprehension of immediate physical injury." *See* §565.083.1(3). It is not contested here that the officers had a reasonable apprehension of harm such that they were authorized to shoot at Jeff – indeed, the evidence presented about their training suggests that they were within their right to do so (Tr.491-493). But whether the officers had the right to shoot Jeff when they did does not transform Jeff's conduct into a first-degree assault. Rather, Jeff's

conduct amounted to third-degree assault, not first-degree, and this Court should remand for the entry of such lesser conviction.

As Jeff's felony conviction for first-degree assault of a law enforcement officer (Ct.IV) must be reversed for insufficient evidence, this Court must also reverse his conviction for armed criminal action (Ct.V), as there is no basis for that conviction without a conviction for a felony. *Dublo*, 243 S.W.3d at 410.

II.

The trial court erred in overruling Jeff's motion for judgment of acquittal at the close of evidence, and entering judgments and sentences against him for assault of a law enforcement officer in the first-degree and the corresponding armed criminal action, violating his right to due process of law as guaranteed by U.S.Const., Amend XIV and Mo.Const., Art.I,§10, because the state's evidence was insufficient to sustain a finding of guilt beyond a reasonable doubt in that Instruction 8—the verdict director for first-degree assault of Sgt.Folsom—required the jury to find that Jeff attempted to kill or cause serious physical injury to Sgt.Folsom “by shooting him,” and there was no evidence that Jeff actually shot Sgt.Folsom

Standard of Review and Preservation

The due process clause protects a defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358,364 (1970). In reviewing a challenge to the sufficiency of the evidence, this Court accepts as true all evidence and inferences in a light most favorable to the verdict. *State v. Botts*, 151 S.W.3d 372,375 (Mo.App.W.D.2004). This Court disregards contrary inferences, unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. *State v. Grim*, 854 S.W.2d 403,411 (Mo.banc1993). But this Court may not supply missing evidence, or give

the State the benefit of unreasonable, speculative or forced inferences. *State v. Whalen*, 49 S.W.3d 181,184 (Mo.banc2001). This same standard of review applies when this Court reviews a motion for a judgment of acquittal. *Botts*, 151 S.W.3d at 375.

Jeff moved for acquittal on all counts at the close of the State's evidence and renewed his arguments at the close of all the evidence (Tr.541-549, 604). The trial court dismissed the judicial tampering and resisting arrest charges, finding that the State had not met its burden (Tr.544-549). It found that the evidence on both drugs charges was "weak," but allowed them to go forward (Tr.543). Defense counsel was unsure if the State was trying to submit assault or attempted assault, but argued that the evidence was insufficient and that attempt would have to be defined (Tr.546-548). The trial court denied the motion as to the assault and armed criminal action counts (Tr.547).

The jury acquitted Jeff of the attempted assault of Corp. Mertens (Count VI), and the armed criminal action count (Count VII) (Lf.199-200). Jeff filed a post-trial motion for acquittal, again challenging the sufficiency of the evidence on the attempted assault of Sgt.Folsom (Lf.153-162).

However, Jeff did not specifically argue that the State failed to prove that he shot Sgt.Folsom, as required by the verdict director for Count IV. (Lf.178). In an abundance of caution, Jeff requests plain error review. *Rule 30.20*. The Missouri Supreme Court has stated that "it is always the State's burden to establish a factual basis for elements of the crime charged." *State v. Self*, 155

S.W.3d 756, 762-63 (Mo. banc 2005), citing **Rule 24.02(e)**. The Missouri Supreme Court has further stated that “[i]f the evidence is insufficient to sustain a conviction, plain error affecting substantial rights is involved from which manifest injustice must have resulted.” *Id.*, quoting *State v. Withrow*, 8 S.W.3d 75,77 (Mo.banc1999).

INSTRUCTION NO. 8

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

First, that on or about September 11, 2012, in the County of Franklin, State of Missouri, the defendant attempted to cause serious physical injury to Sgt.Folsom *by shooting him*, and

Second, that Sgt.Folsom was a law enforcement officer,

Third, that defendant was aware Sgt.Folsom was a law enforcement officer, then you will find the defendant guilty under Count IV of assault of a law enforcement officer in the first-degree under this instruction.

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 under this instruction.

(Lf.178) (emphasis added).

Analysis

Jeff's first point relied on challenged the sufficiency of the evidence as it related to how the offense was charged. The evidence was similarly insufficient as it related to how the offense was presented to the jury in Instruction No. 8.

"Jurors are presumed to know and follow the instructions they are given when deciding the issue of a defendant's guilt or innocence." *State v. Zink*, 181 S.W.3d 66,73 (Mo.banc2005). The State must prove "[t]he facts as alleged and submitted to the jury by the state." *State v. Smith*, 353 S.W.3d 100,109 (Mo. App.W.D.2011), citing *State v. Herndon*, 224 S.W.3d 97,100 (Mo.App.W.D.2007). "[T]o allow a conviction on a method of the charged offense never submitted to the jury would be to effectively deny the defendant of his right to a jury trial." *State v. Young*, 172 S.W.3d 494,499 (Mo.App.W.D.2005).

Here, there was no evidence that Jeff attempted to cause Sgt.Folsom serious physical injury "by shooting him." In fact, Folsom said that the weapon was never even pointed at them (Tr.223). Because there was no evidence that Jeff shot Folsom, and because the State assumes the burden of proving what is alleged in the jury instructions, Jeff's conviction for first-degree assault of a law enforcement officer and the corresponding conviction for armed crimination action must be reversed for insufficient evidence.

III.

The trial court plainly erred in submitting Instruction 8—the verdict director for first-degree assault of Sgt.Folsom—because this instruction required the jury to find that Jeff actually shot at Sgt.Folsom, and it violated his right to due process under the U.S. Const., Amend XIV and Mo.Const., Art. I, §10, in that there was no evidence that Jeff shot at Sgt.Folsom and the only evidence was that Jeff manipulated the flap on the holster, placed his hand on his weapon and began to pull it up, but the jury, already confused about the definition of first-degree assault, convicted Jeff of actually shooting Sgt.Folsom, which evidence did not exist, without having to evaluate whether his actual conduct constituted a substantial step sufficient to convict Jeff of first-degree assault.

Instruction No. 8⁷, the verdict director for first-degree assault of Sgt.Folsom, excused the State from its burden of proving all elements and from submitting all fact issues to the jury, resulting in plain error. *State v. Ferguson*, 887 S.W.2d 585, 587 (Mo.banc1994); *State v. Cooper*, 215 S.W.3d 123, 125 (Mo.banc2007).

⁷ Undersigned counsel has verified with Franklin County Circuit Clerk Bill Miller that the Instruction No. 8 contained in the Legal File is the only Instruction No. 8 contained in the court file.

Standard of Review & Preservation

Because trial counsel did not object to Instruction No. 8, Jeff requests plain error review. **Rule 30.20**. The Missouri Supreme Court has held that claims of error not preserved under **Rule 28.03** may still be reviewed for plain error if manifest injustice would otherwise occur. *State v. Wurtzberger*, 40 S.W.3d 893, 898 (Mo. banc 2001). Instructional error rises to the level of plain error if the trial court so misdirected or failed to instruct the jury as to cause manifest injustice or miscarriage of justice. *State v. Doolittle*, 896 S.W.2d 27, 29 (Mo. banc 1995). It must be apparent to this Court that the instructional error affected the jury's verdict. *Cooper*, 215 S.W.3d at 125. As a general rule, an instructional error that results in the State's being relieved of proving a disputed element of its case is plain error, requiring reversal. *State v. January*, 176 S.W.3d 187, 198 (Mo. App. W.D. 2005). "Otherwise, in violation of due process, the State could obtain a conviction without the jury deliberating on and determining a contested proof element." *Id.*

Analysis

Lacking evidence that Jeff attempted to cause serious physical injury by "shooting" Sgt. Folsom, instructing on this theory of attempted first-degree assault of a law enforcement officer under Instruction No. 8 was manifestly unjust. The instructions did not comport with the evidence and confused the jury, requiring reversal of the judgment below.

Instruction 8 read:

INSTRUCTION NO. 8

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

First, that on or about September 11, 2012, in the County of Franklin, State of Missouri, the defendant attempted to cause serious physical injury to Sgt.Folsom *by shooting him*, and

Second, that Sgt.Folsom was a law enforcement officer,

Third, that defendant was aware Sgt.Folsom was a law enforcement officer, then you will find the defendant guilty under Count IV of assault of a law enforcement officer in the first-degree under this instruction.

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 under this instruction.
(Lf.178) (emphasis added).

While the transcript reflects that the trial court, when reading Instruction No. 8 to the jury, stated, “the defendant attempted to cause serious physical injury to Sgt.Folsom *by trying to draw a weapon to shoot* Sgt.Folsom” (Tr.609), the only version of Instruction No. 8 contained in the court file reflects the original wording of the Indictment—that Jeff committed the offense “by shooting him” (Lf.20-21, 178). This instruction has the number “8” handwritten on it, as with the other instructions, which must have occurred during the instruction conference, as the

court acquitted Jeff of two of the charges before they were submitted to the jury. There is no indication that a different Instruction No. 8 was given to the jury. See **Rule 28.02(e)** (“The original of all numbered instructions...shall be returned to the court and filed at the conclusion of the jury’s deliberation.”) This is the only Instruction No. 8 contained in the Court file. The fact that the trial court used different wording when reading the instruction does not cure the error in the written instruction. After all, there is no requirement that the trial court orally read the instructions aloud to the jury; it is only required to instruct the jury in writing. **Rule 28.02(a); State v. Smith**, 80 Mo. 516, 519 (Mo.1883). The jury uses the written instructions during its deliberations. **Rule 28.02(e)**.

The jury was guided by the Instructions submitted to them, and Instruction No. 8 required them to find that Jeff attempted to cause serious physical injury to Sgt.Folsom “by shooting him” (Lf.178). No evidence supported this theory, and the jury indicated its confusion when it sent a note to the Court asking, “What is the definition of assault in the first-degree?” (Lf.193). This erroneous instruction absolved the jury of deliberating on the only real contested question in this portion of the trial—whether Jeff’s conduct in manipulating the flap of the holster, placing his hand on the gun, and starting to lift it up, along with all the other evidence of his intent—both positive and negative—was sufficient to convict him of first-degree assault. It is completely unclear what actions the jury deliberated upon, given that the only conduct listed in Instruction No. 8 never occurred.

In *State v. Wilhelm*, 774 S.W.2d 512 (Mo.App.W.D.1989), the defendant was charged with, and convicted of, acting with another to commit two counts of first-degree assault. *Id.* at 513-16. The Court held that sufficient evidence supported Wilhelm's convictions, but the verdict director, “which allowed the jury to find that either appellant or another shot the victims was error because there was insufficient evidence that another shot them” and “insufficient evidence to show that appellant had an accomplice in the commission of the crime.” *Id.* at 516-17.

Reversing, the Court concluded that the prejudice from the submission of the verdict directing instructions was that the instructions allowed the jury to find appellant guilty even if they did not find that he committed the elements of [the charged offenses] and there was insufficient evidence to support the charge that he acted together with or aided another in committing the offense. *Id.*

Here, Instruction No. 8 resulted in manifest injustice because, even if this Court concludes that the evidence was sufficient at all (see Point I), Instruction No. 8 allowed the state to obtain a conviction based on insufficient evidence—an event that never happened—and it is unclear upon what circumstances the jury deliberated. It is sheer speculation that they deliberated upon whether Jeff “attempted to cause serious physical injury to Sgt.Folsom by trying to draw a weapon to shoot Sgt.Folsom.” This is not how they were instructed, and they were confused about the instructions and what constituted first-degree assault (Lf.193). The misdirection here is so clear and so substantial that it must be

“apparent to the appellate court that the instructional error affected the jury's verdict.” *State v. Lemons*, 294 S.W.3d 65, 71 (Mo.App.S.D.2009).

Unsupported by evidence, the instruction misdirected the jury and violated Jeff's right to due process. U.S.Const., Amend. XIV; Mo.Const., Art. 1, §10. This Court must reverse.

IV.

The trial court erred in overruling Jeff's motion for judgment of acquittal at the close of all the evidence and in accepting the jury's guilty verdict for possession of a controlled substance (Count I), and sentencing him upon that conviction, because these rulings violated his right to due process of law as guaranteed by U.S.Const., Amend XIV and Mo.Const., Art.I, §10, in that the evidence was insufficient to establish beyond a reasonable doubt that Jeff possessed the morphine pills that were found in a jointly-controlled area of the home he shared with other people.

In ruling on Jeff's motion for judgment of acquittal at the close of the State's case, the trial court had mixed feelings about the sufficiency of the evidence to support both of the drug charges (Tr.543). The trial court called the evidence "weak," but it denied Jeff's motion (Tr.543). This ruling was erroneous because the evidence was insufficient to sustain Jeff's conviction.

Standard of Review & Preservation

The due process clause protects a defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970). In reviewing a challenge to the sufficiency of the evidence, this Court accepts as true all evidence and inferences in a light most favorable to the verdict. *State v. Botts*, 151 S.W.3d 372, 375 (Mo.App.W.D.2004). This Court disregards contrary inferences, unless

they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. *State v. Grim*, 854 S.W.2d 403, 411 (Mo.banc1993). This Court may not supply missing evidence, or give the State the benefit of unreasonable, speculative or forced inferences. *State v. Whalen*, 49 S.W.3d 181, 184 (Mo.banc2001). This same standard of review applies when this Court reviews a motion for a judgment of acquittal. *Botts*, 151 S.W.3d at 375.

Jeff moved for judgment of acquittal on all counts at the close of the State's evidence and renewed the same argument at the close of all the evidence (Tr.541,604; Lf.151-156). He argued that other people lived in the home and nothing pointed to Jeff having constructive possession over the drugs.

After the jury found Jeff guilty on Ct. I, he challenged the sufficiency of the evidence in his post-trial motion for judgment of acquittal (Lf.153-156). See *Rule 29.11(d)*. This issue is properly preserved for appeal.

Analysis

Jeff was charged with possession of morphine, §195.202 (Lf.23). In order to prove that Jeff possessed the 1½ morphine tablets contained in a small metal tin inside a desk drawer in the basement (Tr.184), the State was required to prove that he 1) had conscious and intentional possession of the pills, either actual or constructive, and 2) was aware of the presence and nature of the substance. *State v. Hendrix*, 81 S.W.3d 79, 83 (Mo.App.W.D.2002). In other words, the State had to prove that Jeff knew that there were morphine pills in the tin and that he

exercised control over them. *State v. Ingram*, 249 S.W.3d 892 (Mo.App.W.D.2008); *State v. Bowyer*, 693 S.W.2d 845, 847 (Mo.App.W.D.1985).

Although exclusive possession of the premises raises an inference of possession and control, this is a case of joint possession of premises, and further evidence was necessary to connect Jeff to the drugs. *State v. Withrow*, 8 S.W.3d 75, 80 (Mo.banc1999). The State had to present evidence of some incriminating circumstance that raised the inference of knowledge *and control* over the substance. *State v. West*, 21 S.W.3d 59, 63 (Mo.App.W.D.2000). “Such evidence may include statements or actions indicating consciousness of guilt, routine access to the place where the drugs were found, commingling of the drugs with the defendant’s personal belongings, a large quantity of drugs, or the drugs were in plain view.” *State v. Driskell*, 167 S.W.3d 267, 269 (Mo.App.W.D.2005). *In accord*, *State v. Moses*, 265 S.W.3d 863, 866 (Mo.App.E.D.2008).

Here, Jeff’s presence on shared premises was not enough to connect him with the pills. *State v. Yarber*, 5 S.W.3d 592, 594 (Mo.App.S.D.1999). The desk was located in a common area of the basement where another family member also lived (Tr.267-269). The pills were not in plain sight (Tr.184-185). Further, proximity to the contraband, alone, even as to a substance in plain sight, does not tend to prove ownership or possession as among several persons who share the premises. *Bowyer*, 693 S.W.2d at 847. The question presented here is whether there were sufficient facts to demonstrate not only that Jeff had knowledge of the

presence of the hidden pills, but that he also had conscious and intentional control over them.

In *State v. Nobles*, 699 S.W.2d 531 (Mo.App.E.D.1985), police found drugs in numerous places inside a house that the defendant shared with other people. The defendant was convicted of possession based on the fact that he lived at the house and was present when the drugs were found, but this Court reversed the conviction because no additional evidence showed the defendant intended to possess them. *Id.* at 533-534.

In *State v. Reynolds*, 669 S.W.2d 582 (Mo.App.E.D.1984), the defendant was a joint tenant in a house where drugs were found concealed in a bag. No other evidence suggested that the defendant knew about the drugs, but a jury found him guilty of possession. *Id.* at 584. The conviction was reversed on appeal because of the lack of any further evidence showing knowledge. *Id.*

In *State v. Cushshon*, 218 S.W.3d 587, 591-93 (Mo.App.E.D.2007), the appellate court found the evidence was insufficient to convict the defendant of possessing marijuana that was found in his mattress in his jail cell. *Id.* The State failed to present sufficient evidence that the defendant had knowledge of the presence of marijuana and control over it, even though the defendant was present in another inmate's cell when that inmate took a piece of foam from the mattress, defendant then took the mattress to his own cell, marijuana was found wrapped in the mattress foam that had been removed, and loose marijuana remained inside the

Defendant's mattress. *Id.* at 592. The evidence was insufficient to show that the defendant knowingly possessed the marijuana that remained in the mattress. *Id.*

In *State v. West*,²¹ S.W.3d 59,61 (Mo.App.W.D.2000), officers searched the home of the defendant and a Mr. Shelton. West was home when the officers searched. *Id.* She gave the officers some marijuana that she had in her purse. *Id.* at 62. When officers asked her if the house contained any other illegal items, she directed the officers to an office in the house that she identified as Shelton's room, her joint tenant. *Id.* She said that if anything illegal were present in the house it would be in that office. *Id.* The officers found approximately two hundred bottles of pseudoephedrine, \$4,000.00 in cash, and numerous drug-related paraphernalia in a locked filing cabinet in the room, to which West had directed them. *Id.* About 100 feet from the house was a shed that contained a methamphetamine lab. *Id.* Later, officers found a jar of black liquid partially hidden in the back of the freezer inside the house. *Id.* A test on the liquid revealed chemicals related to methamphetamine and its production. *Id.* In reversing, the court found that although there was sufficient evidence to show West had knowledge of the methamphetamine and manufacturing equipment, there was insufficient evidence to prove that West intended to or did, in fact, exercise any control over it. *Id.* at 65-67.

In *State v. Smith*,³³ S.W.2d 648,651 (Mo.App.W.D.2000), when officers searched a farm on which Smith had lived for ten years, they found in an outbuilding several items commonly used in the production of methamphetamine.

In Smith's shared bedroom, they found a spoon with methamphetamine residue on it, a razor blade with methamphetamine powder on it and pseudoephedrine. *Id.* at 652. More related items were in the kitchen. *Id.* at 654. But the appellate court held that there was not sufficient evidence to convict Smith of either possessing or manufacturing methamphetamine:

The evidence strongly suggests that Smith was involved with the production of methamphetamine and/or that his girlfriend [Schultz] was involved. The evidence also strongly suggests that Schultz's ex-husband, Latrelle, was also involved. Thus, either Smith was guilty of the crime charged or he was guilty of bad choices in his associates. Making bad choices in companions is not a crime.

Id. at 655.

Here, the State proved that Jeff shared a house with his wife and teenaged son, and that drugs were found hidden in a desk drawer in a common area of the basement. But even if Jeff sat at this desk, proximity to the contraband, alone, does not tend to prove ownership or possession as among several persons who share the premises. *Bowyer*, 693 S.W.2d at 847.

In *Moses*, 265 S.W.3d at 866, the defendant was present at a trailer where drugs were found, and he had routine access to the residence. Additionally, the defendant made admissions indicating his knowledge of the presence of the cocaine, but he did not admit to possessing it. *Id.* The court found that this was not

sufficient evidence of dominion and control over the drugs to conclude that the defendant constructively possessed the drugs. *Id.*

The same is true here. At most, the evidence shows that Jeff knew that there were drugs in the house because, when he was handcuffed, he shouted to someone in the house that the cops were going to search the house and they were looking for drugs (Tr.177). But the evidence was insufficient to show that Jeff, and not the co-occupant of the home, exercised dominion and control over those drugs at the time the search warrant was executed. This court must reverse.

V.⁸

The trial court erred in overruling Jeff's motion for judgment of acquittal at the close of all the evidence and in accepting the jury's guilty verdict for possession of a controlled substance (Ct. III), and sentencing him upon that conviction, because these rulings violated his right to due process of law as guaranteed by U.S.Const., Amend XIV and Mo.Const., Art.I,§10, in that the evidence was insufficient to establish beyond a reasonable doubt that Jeff possessed the marijuana that was found in a jointly-controlled area of the home he shared with other people.

The trial court felt the evidence to support the drug charges was "weak," but it denied Jeff's motion for acquittal (Tr.543). This ruling was erroneous because the evidence was insufficient to sustain Jeff's conviction.

Standard of Review & Preservation

The due process clause protects Jeff against conviction except upon proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). In reviewing the sufficiency of the evidence, this Court accepts as true all evidence and inferences in a light most favorable to the verdict. *State v. Botts*, 151 S.W.3d 372, 375 (Mo.App.W.D.2004). This Court disregards contrary inferences, unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. *State v. Grim*, 854 S.W.2d 403, 411

⁸ This point is identical to Point III, but with a different drug.

(Mo.banc1993). This Court may not supply missing evidence, or give the State the benefit of unreasonable, speculative or forced inferences. *State v. Whalen*, 49 S.W.3d 181,184 (Mo.banc2001). This same standard of review applies when this Court reviews a motion for a judgment of acquittal. *Botts*, 151 S.W.3d at 375.

Jeff moved for an acquittal on all counts at the close of the State's evidence, at the close of all the evidence and post-trial (Tr.541,604; Lf.151-156). *See Rule 29.11(d)*.

Analysis

Jeff was charged with possessing marijuana, §195.202 (Lf.23). To prove Jeff possessed the container of marijuana inside a desk drawer in the basement (Tr.184), the State was required to prove he: 1) had conscious and intentional possession, either actual or constructive; and 2) was aware of the presence and nature of the substance. *State v. Hendrix*, 81 S.W.3d 79,83 (Mo.App.W.D.2002). In other words, the State had to prove that Jeff knew that there was marijuana in the desk and that he exercised control over it. *State v. Ingram*, 249 S.W.3d 892 (Mo.App.W.D.2008); *State v. Bowyer*, 693 S.W.2d 845,847 (Mo.App.W.D.1985).

This is a case of joint possession of premises case, and further evidence was necessary to connect Jeff to the drugs. *State v. Withrow*, 8 S.W.3d 75,80 (Mo.banc1999). The State had to present evidence of some incriminating circumstance that raised the inference of knowledge *and control* over the substance. *State v. West*, 21 S.W.3d 59,63 (Mo.App.W.D.2000). "Such evidence may include statements or actions indicating consciousness of guilt, routine access

to the place where the drugs were found, commingling of the drugs with the defendant's personal belongings, a large quantity of drugs, or the drugs were in plain view.” *State v. Driskell*, 167 S.W.3d 267, 269 (Mo.App.W.D.2005). *In accord*, *State v. Moses*, 265 S.W.3d 863, 866 (Mo.App.E.D.2008).

Here, Jeff's presence on shared premises was not enough to connect him with the marijuana. *State v. Yarber*, 5 S.W.3d 592, 594 (Mo.App.S.D.1999). The desk was located in a common area of the basement (Tr.267-269). The drugs were not in plain sight (Tr.184-185). Further, proximity to the contraband, alone, even as to a substance in plain sight, does not tend to prove ownership or possession as among several persons who share the premises. *Bowyer*, 693 S.W.2d at 847. The question presented here is whether there were sufficient facts to demonstrate not only that Jeff had knowledge and an awareness of the presence of the marijuana, but that he also had conscious and intentional control over it.

In *State v. Nobles*, 699 S.W.2d 531 (Mo.App.E.D.1985), police found drugs in numerous places inside a house that the defendant shared with other people. The defendant was convicted of possession based on the fact that he lived at the house and was present when the drugs were found, but the court of appeals reversed the conviction because no additional evidence showed that the defendant intended to possess them. *Id.* at 533-534. *See also State v. Reynolds*, 669 S.W.2d 582 (Mo.App.E.D.1984).

In *State v. Cushshon*, 218 S.W.3d 587, 591-93 (Mo.App.E.D.2007), the appellate court found the evidence was insufficient to convict the defendant of

possessing marijuana that was found in his mattress in his jail cell. *Id.* The State failed to present sufficient evidence that the defendant had knowledge of the presence of marijuana and control over it, even though the defendant was present in another inmate's cell when that inmate took a piece of foam from the mattress, defendant then took the mattress to his own cell, marijuana was found wrapped in the mattress foam that had been removed, and loose marijuana remained inside the Defendant's mattress. *Id.* at 592. The evidence was insufficient to show that the defendant knowingly possessed the marijuana that remained in the mattress. *Id.*

In *State v. West*,²¹ S.W.3d 59,61 (Mo.App.W.D.2000), officers searched the home of the defendant and a Mr. Shelton. West was home when the officers searched. *Id.* She gave the officers some marijuana that she had in her purse. *Id.* at 62. When officers asked her if the house contained any other illegal items, she directed the officers to an office in the house that she identified as Shelton's room, her joint tenant. *Id.* She said that if anything illegal were present in the house it would be in that office. *Id.* The officers found approximately two hundred bottles of pseudoephedrine, \$4,000.00 in cash, and numerous drug-related paraphernalia in a locked filing cabinet in the room, to which West had directed them. *Id.* About 100 feet from the house was a shed that contained a methamphetamine lab. *Id.* Later, officers found a jar of black liquid partially hidden in the back of the freezer inside the house. *Id.* A test on the liquid revealed chemicals related to methamphetamine and its production. *Id.* Reversing, the court found that although sufficient evidence showed West's

knowledge of the methamphetamine and manufacturing equipment, there was insufficient evidence to prove that she exercised any control over it. *Id.* at 65-67.

In *State v. Smith*, 33 S.W.2d 648, 651 (Mo.App.W.D.2000), when officers searched a farm on which Smith had lived for ten years, they found in an outbuilding several items commonly used in the production of methamphetamine. In Smith's shared bedroom, they found a spoon with methamphetamine residue on it, a razor blade with methamphetamine powder on it and pseudoephedrine. *Id.* at 652. More related items were in the kitchen. *Id.* at 654. But the appellate court held that there was not sufficient evidence to convict Smith of either possessing or manufacturing methamphetamine:

The evidence strongly suggests that Smith was involved with the production of methamphetamine and/or that his girlfriend [Schultz] was involved. The evidence also strongly suggests that Schultz's ex-husband, Latrelle, was also involved. Thus, either Smith was guilty of the crime charged or he was guilty of bad choices in his associates. Making bad choices in companions is not a crime.

Id. at 655.

Here, the State proved that Jeff shared a house with his wife and teenaged son, and that drugs were found hidden in a desk drawer in a common area of the basement. But even if Jeff sat at this desk, proximity to the contraband, alone, does not tend to prove ownership or possession as among several persons who share the premises. *Bowyer*, 693 S.W.2d at 847. Nor does the fact that the officers

smelled marijuana in the home (Tr.173) suffice to show possession, even if it shows awareness that drugs are being used in the home.

In *Moses*, 265 S.W.3d at 866, the defendant was present at a trailer where drugs were found, and he had routine access to the residence. Additionally, the defendant made admissions indicating his knowledge of the presence of the cocaine, but he did not admit to possessing it. *Id.* The court found that this was not sufficient evidence of dominion and control over the drugs to conclude that the defendant constructively possessed the drugs. *Id.*

The same is true here. At most, the evidence shows that Jeff knew that there were drugs in the house because, when he was handcuffed, he shouted to someone in the house that the cops were going to search the house and they were looking for drugs (Tr.177). But the evidence was insufficient to show that Jeff, and not the other occupants, exercised dominion and control over those drugs. This court must reverse.

VI.

The trial court abused its discretion in overruling Jeff's motion to sever the count of judicial tampering from the remaining counts and erred in joining these counts for trial, violating Jeff's rights to due process of law and a fair trial guaranteed by U.S.Const.,Amends.VI, XIV and Mo.Const., Art.I,§10,18(a), in that Jeff was substantially prejudiced since the jurors were likely to consider the evidence for the tampering count—namely, the inflammatory YouTube video—on the other counts, and because the YouTube video would not have been admissible in a trial of the other charges, it was highly prejudicial to Jeff's right to a fair trial on those charges.

Before trial, Jeff moved to sever the tampering charges, drug charges and assault charges into separate cases (Lf.60-71; PT2 39-43,83-87). He asserted that the separate charges occurred weeks apart, had no common victims, and that it would be substantially prejudicial to submit them to a single jury (Lf.60-71; PT2 83-87). The defense was concerned that the YouTube video (Ex.1&1A), which was the only evidence to support the judicial tampering charge, would cast unfair prejudice onto the other counts (PT2 84-85). Specifically, the defense was concerned that Jeff would be put on trial for his controversial views and his outrageous speech, that the jury would find his speech repugnant and reprehensible and convict on the other charges for that reason alone (PT2 85). The

trial court denied the motion to sever, stating that the charges were a “sequence of events” (PT2 87).

Jeff also moved to dismiss the judicial tampering charge altogether, asserting that his political speech is protected by the First Amendment and that his words did not rise to the level of a threat (Lf.72-140; PT2 73-82). Additionally, Judge Parker’s name was never spoken by Jeff, and it was not established who provided the captions to the YouTube video that listed Judge Parker’s name, among others, as corrupt officials (LF 72-140).

The trial court initially denied the motion to dismiss (PT2 82), and allowed the YouTube video – which was only relevant to the judicial tampering charge – to be played for the jury (Tr.169-171). However, at the close of the State’s case, the trial court granted defense counsel’s motion for judgment of acquittal as to the judicial tampering count, as well as the resisting arrest count (Tr.544-545).

As to the judicial tampering count, the Court noted that the YouTube video was “offensive, rude and a lot of other things” but that Jeff had First Amendment rights to say the things he said (Tr.544-545). Further, the Court noted that, “there just isn’t anything there to support the charge” without more than the YouTube video (Tr.545).

Jeff sought to protect himself and his right to a fair trial by having the judicial tampering charge severed from the other counts, but the trial court put judicial economy over his right to a fair trial.

Standard of Review and Preservation

Jeff filed a motion to sever, litigated it before trial, and renewed this issue in his motion for new trial (Lf.49-52,60-65,207; PT2 83-87). It is preserved for appellate review. **Rule 29.11(d)**.

Review of claims for improper joinder and failure to sever charges involves a two-step analysis. **State v. Holliday**, 231 S.W.3d 287,292 (Mo.App.W.D.2007). First, this Court must determine whether joinder of the charges was proper as a matter of law. **State v. Simmons**, 270 S.W.3d 523,528 (Mo.App.W.D.2008). If joinder was not proper, then prejudice is presumed from a joint trial and severance of the charges is mandatory. **Holliday**, 231 S.W.3d at 292. However, if joinder is deemed proper, this Court must then determine whether the trial court abused its discretion in denying Defendant's motion to sever. **Id.** "Severance assumes that joinder is proper, but gives discretion to the trial court to decide whether trying the charges together would result in substantial prejudice." **Id.** Once a finding is made that joinder is proper, the trial court's decision will not be reversed absent a showing of both an abuse of discretion and a clear showing of prejudice. **Simmons**, 270 S.W.3d at 528. The issue of whether joinder is proper is a question of law, while severance is within the trial court's discretion. **State v. Butchee**, 255 S.W.3d 548, 550 n.6 (Mo.App.S.D.2008).

Joinder

Joinder of offenses is governed by **§545.041** and **Rule 23.05**. Joinder is proper where the offenses are of "the same or similar character," or are based on the same act or transaction, or on two or more transactions that are part of a

common scheme or plan. *State v. Forister*, 823 S.W.2d 504,509 (Mo.App.E.D.1992). The State denied that it had charged these offenses as a “common scheme or plan” – and indeed they are not – but argued instead that the causes were properly joined against Jeff because it was necessary “to paint a complete and coherent picture of the events in question” (PT2 86). The trial court denied the motion because it considered this “a sequence of events” that were all related to the initial YouTube video (PT2 87). But even if the officers were at the house to talk to Jeff about the YouTube video when they smelled drugs and searched the home, and even if they ultimately planned to arrest him because of their concerns about the YouTube video, this would not automatically make the YouTube video admissible in a separate assault trial, for events that occurred weeks before.

Contrary to the trial court’s finding, it would not be admissible as a “sequence of events.” See *State v. Pennington*, 24 S.W.3d 185,190-91 (Mo.App.W.D.2000) (Such evidence of other crimes is only legitimately admitted to present a complete and coherent picture where it is part of the *res gestae* of the charge being tried, or where it was “a continuation of a sequence of events” that occurred within hours.)

“To find a common scheme or plan the offenses charged must be the product of a single or continuing motive.” *State v. Stoer*, 862 S.W.2d 348,352 (Mo.App.S.D.1993). The defendant in *Stoer* was convicted of burglary, robbery, assault, armed criminal action, and resisting arrest, after escaping from an honor

center, breaking into a house, beating the homeowner and stealing a car, running from the police, and fighting with them when caught. *Id.* at 349-350. Each act was part of a common motive because they all were committed for the purpose of effecting his escape from custody. *Id.* at 352.

The same cannot be said for the acts charged against Jeff. The only possible connection between the judicial tampering charge, the drug charges, and the assault/resisting arrest charges, was that it explained why the police were interacting with Jeff at his house and at the MFA station. They were present at his house to investigate the tampering charge – to talk to him about the YouTube video – when they smelled, searched and found drugs. The officers seized his computers during that search, and later created a ruse to return the computers at the MFA station, where the alleged assaults occurred.

If any of the charges could be joined, it was possibly the drug and assault charges; however, the tampering charge had nothing to do with the other two, except to explain why they came to Jeff's house in the first place. There is no single or continuing motive that encompasses the eight separate acts with completely dissimilar victims charged by the State. The joinder on the State's theory was improper. Prejudice is presumed, and the severance was mandatory.

Severance

Even if this Court were to determine that joinder was proper, the inquiry does not end there. Whether offenses should be severed is within the discretion of the trial court. *State v. Kelly*, 956 S.W.2d 922,925 (Mo.App.W.D.1997). The trial

court should weigh the benefits of judicial economy against the potential prejudice to the defendant. *State v. Davis*, 738 S.W.2d 517,518 (Mo.App.S.D.1987). Here the trial court believed that judicial economy prevailed over the resulting prejudice to Jeff, yet, when it later granted Jeff’s judgment of acquittal on the judicial tampering charge, it noted how “offensive” and “rude” the video was (Tr.544). This made poignantly clear the prejudice advanced by defense counsel in the earlier motion to sever hearing – if this jury saw this video, it would cast a shadow over everything else, and Jeff would be at risk for conviction of the assaults and drugs based on his views and his outrageous, even repugnant, speech, rather than the evidence (Tr.85).

Prejudice is a bias or discrimination which is actual or real, and not merely illusionary or nominal. *State v. Howton*, 890 S.W.2d 740,745 (Mo.App.W.D.1995). The prejudice to Jeff was quite real, a fact implicitly recognized by the trial court. But it nonetheless refused to sever the offenses.

Severance of jointly charged offenses is not required even if evidence inadmissible to some counts is admitted on others. *Howton*, 890 S.W.2d at 696. *Howton* recognized that the ability of the jurors to separate the evidence between counts and apply the law fairly to each offense may overcome the prejudice to the defendant and is a proper consideration for the trial court. *Id.* The evidence in Jeff’s case was not such that it could be confined only to the judicial tampering charge. But, even worse, the trial court ultimately realized that the State’s evidence was insufficient to sustain the judicial tampering charge at all, and the

prejudicial video never should have come before this jury in the first place. The prejudice remained because the jury was not instructed to disregard the video after that count was thrown out.

Had the trial court granted severance in the first place, Jeff's jury would never have seen the video. Without the video, the jury may have viewed Jeff in a much different context. In other words, they would have judged him on his conduct at the MFA station, rather than the acerbic content of his video. The YouTube video – that never should have been admitted – prejudiced Jeff on all counts. The trial court erred in joining the charges for trial and clearly abused its discretion in failing to sever them. Jeff's assault, armed criminal action and drug convictions must be reversed and remanded for a new trial.

VII.

The trial court plainly erred in failing to declare a mistrial *sua sponte* after it granted Jeff's motion for judgment of acquittal of judicial tampering, or instruct the jury that it could not consider the YouTube video as evidence of Jeff's guilt on any charge, and these omissions denied Jeff his rights to due process and a fair trial before an impartial jury guaranteed by U.S.Const., Amends.VI, XIV and Mo.Const., Art.I,§10,18(a), in that the YouTube video was a bell that could not be unrung after the trial court granted judgment of acquittal as to the only charge to which the video was relevant, and Jeff could not be guaranteed a fair trial on the remaining charges at all, especially where the trial court did not instruct the jury to disregard the YouTube video for all purposes, and it served to paint Jeff as an extremist who is capable of violence, which resulted in manifest injustice on the charge of first-degree assault on a law enforcement officer.

Before trial, Jeff moved to sever the tampering charges, drug charges and assault charges into separate cases (Lf.60-71; PT2 39-43, 83-87). The defense was concerned that the jury would see the YouTube video (Ex.1&1A), which was the only evidence to support the judicial tampering charge, and that it would cast prejudice onto the other counts (PT2 84-85). Specifically, the defense was concerned that Jeff would be put on trial for his controversial views and his outrageous speech, and that the jury would find his speech repugnant and

reprehensible and convict on the other charges for that reason alone (PT2 85). The trial court denied the motion to sever, stating that the charges were a “sequence of events” (PT2 87). Jeff also moved to dismiss the judicial tampering charge altogether, asserting that his political speech is protected by the First Amendment and that his words did not rise to the level of a threat (Lf.72-140; PT2 73-82).

The trial court initially denied the motion to dismiss (PT2 82), and allowed the YouTube video – which was only relevant to the judicial tampering charge – to be played for the jury (Tr.169-171). However, at the close of the State’s case, the trial court granted defense counsel’s motion for judgment of acquittal as to the judicial tampering count (Tr.544-545).

As to the judicial tampering count, the Court noted that the YouTube video was “offensive, rude and a lot of other things” but that Jeff had First Amendment rights to say the things he said (Tr.544-545). Further, the Court noted that, “there just isn’t anything there to support the charge” without more than the YouTube video (Tr.545).

The trial court instructed the jury that the counts of tampering with a judicial officer and resisting arrest “are no longer an issue in this case” (Tr.562). The trial court did not, however, instruct the jury to disregard the YouTube video and to not consider it during its deliberations. And because the jury likely could not have ignored the YouTube video, even if it was instructed to do so, the trial court should have granted a mistrial on the remaining counts, after it granted the judgment of acquittal on the judicial tampering count. Allowing the trial to

continue, and allowing the jury to consider the video, was tantamount to allowing the jury to convict Jeff on the highly prejudicial evidence of uncharged crimes.

Standard of Review & Preservation

Jeff's trial counsel failed to request a mistrial on the remaining charges after the trial court granted the judgment of acquittal on the judicial tampering charge. Nor did counsel request the less drastic remedy of instructing the jury to disregard the YouTube video after the court told the jury that the tampering charge was no longer at issue. This issue was raised in the motion for new trial, where counsel argued that the court could not "unring the bell" from the admission of the YouTube video, that severance should have been granted at the outset, and a new trial was required. That may have been sufficient to preserve the issue, but in an abundance of caution, Jeff requests plain error review. ***Rule 30.20.***

To be entitled to relief under a plain error standard, Jeff must show that the trial court's error so substantially affected his rights that manifest injustice will occur if the error is left uncorrected. ***State v. Barriner***, 34 S.W.3d 139, 145 (Mo. banc 2000). "[T]he existence or non-existence of plain error must be coped with on a case to case basis and rebalanced each time against the particular facts and circumstances of each case." ***State v. Miller***, 604 S.W.2d 702, 706 (Mo. App. W.D. 1980)). For this reason, identical claims of "prejudicial error" may rise to the level of "plain error" in one case but not in another because of variant facts and circumstances. ***Id.*** Plain and manifestly prejudicial error infected this

case from the start, and the facts and circumstances reveal that Jeff did not receive a fair trial.

Analysis

Because the trial court finally realized that the State had insufficient evidence to support the judicial tampering charge, it granted an acquittal at the close of the State's evidence (Tr.545). By then, it was too late for Jeff to receive a fair trial. The jury had already been exposed to the YouTube video – the only evidence the State had to support its defunct charge. The trial court acknowledged that this video was “offensive” and “rude.” Indeed, the prejudice from the video is apparent upon watching it, and there was no way to unring that bell – nothing short of a mistrial could cure it. *State v. Shepard*, 654 S.W.2d 97,101 (Mo.App.W.D.1983).

Well-established law requires the State to try a defendant only for the offense for which he is on trial. *State v. Ellison*, 239 S.W.3d 603,606 (Mo.banc2007) (citing Art. I, §§17 & 18(a)). This precludes the State from unjustifiably introducing evidence of a defendant's prior, uncharged crimes or bad acts. *Id.* After Jeff was acquitted of tampering, the YouTube video constituted an uncharged and highly prejudicial bad act.

Significant risks attend such evidence: (1) [T]hat [it] will mislead or confuse the jury, (2) that the jury will give undue weight to the “if he did it once, he'll do it again” inference, (3) that the defendant will be made to defend, not just against the charges brought, but against all of his prior, similar behavior which, for

whatever reason, was not prosecuted by the State, and (4) that the jury, in its rush to punish the defendant for his past acts—which the jury must infer have gone unpunished—may overlook the fact that the State has failed to prove the defendant was guilty of the charges brought. *State v. Berwald*, 186 S.W.3d 349, 358 (Mo.App.W.D.2005) (quoting *State v. Bernard*, 849 S.W.2d 10, 22 (Mo.banc1993)).

Evidence of prior bad acts is justified when it is offered for purposes other than to establish the defendant's propensity to commit the crime with which he is charged. *Ellison*, 239 S.W.3d at 607. These purposes include establishing motive, intent, absence of mistake or accident, identity, or a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other. *Id.* But evidence of prior criminal acts may be admissible for these alternate purposes only if that evidence is both “logically relevant, in that it has some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial, and if the evidence is legally relevant, in that its probative value outweighs its prejudicial effect.” *Id.* (quoting *State v. Burns*, 978 S.W.2d 759, 761 (Mo.banc1998)).

As fully discussed in Point V, *supra*, the trial court, in denying the motion to sever, stated that all of the crimes were a “sequence of events” and that evidence of the other crimes would come in at separate trials (PT2 87). This is false. There is no logically or legally relevant reason why a video of a separate judicial tampering crime would be admissible in a severed assault of a law enforcement

trial. This is especially true considering the officers' testimony that they did not expect any trouble from Jeff when they met with him on September 11, 2012 (Tr.216). The video has no legitimate tendency to establish Jeff's guilt of assault, and its prejudicial value far outweighs its prejudicial effect. The trial court should have granted a mistrial after it finally realized that the State could not make a tampering case against Jeff. At the very least, it should have instructed the jury to disregard the video entirely. *See Barriner*, 34 S.W.3d at 148 (Evidence of defendant's death threat against a different person was legally irrelevant to his motive to kill the present victims and was highly prejudicial).

While a mistrial is a drastic remedy and should be employed only in extraordinary circumstances, *see State v. Sidebottom*, 753 S.W.2d 915, 919-920 (Mo. banc 1988), it was the only remedy that could cure the error here. Once Jeff's extremist views were aired to the jury, it tainted all of the charges. Because the count should have been dismissed or severed before trial, allowing the jury to consider the video was manifestly unjust to Jeff's ability to receive a fair trial on the remaining charges. Indeed, the evidence on the remaining counts was weak (See Points I, II, III, IV), which made the prejudice even greater. The trial court should have declared a mistrial, *sua sponte*, once it realized that the judicial tampering charge was unfounded, or after it was requested at the motion for new trial hearing. At the very least, the trial court should have instructed the jury to disregard the YouTube video before it deliberated. Instead, all it told the jury was that the charges of tampering with a judicial officer and resisting arrest were "no

longer an issue in this case” (Tr.562). The court should have instructed the jury that it could not consider the YouTube video for any purpose whatsoever. This Court must reverse Jeff’s convictions and remand for a new trial on the remaining four counts.

VIII.

The trial court abused its discretion in overruling Jeff's objections and allowing the State to present testimony and evidence concerning other weapons and ammunition unrelated to the crime for which Jeff was being tried, because this denied Jeff his rights to due process, a fair trial, and to be tried for the offense with which he was charged, as guaranteed by U.S.Const.,Amends.VI, XIV and Mo.Const., Art.I,§10,18(a), in that these weapons and ammunition were not directly connected to the crime, they were inherently prejudicial, and had no probative value since they could not assist the jury in deciding any of the issues presented in the case, and Jeff's possession of weapon and ammunition that were not involved in the crime were neither logically nor legally relevant and served only to color Jeff's character as someone tending to possess dangerous weapons.

Facts and Preservation

Jeff filed moved *in limine* to prohibit evidence of the other guns found in his car because there was no evidence that they had anything to do with the events at the gas station, there was nothing illegal about having them, and the officers had no knowledge of them (Lf.141-143; Tr.14-17). The trial court overruled the motion, stating that the State can introduce evidence of a search (Tr.17).

At trial, Jeff objected when the State introduced testimony and photographs of the loaded shotgun and pistol found in Jeff's car (Tr.452-458; Exs.23-28).

Perry Smith, the officer who seized the weapons, testified that he found a .22 caliber black and white pistol loaded with six rounds, and a 12-gauge shotgun loaded with shells (Tr.454-458). Smith testified that the weapons were not concealed and they were readily apparent (Tr.481). He also testified that having these firearms in the car was not illegal, Folsom and Mertens were totally unaware of any weapons inside the car, Jeff did not say anything to Folsom and Mertens about the weapons, and there was no evidence that Jeff ever tried to “go for” any of those weapons (Tr.474-476).

In Jeff’s timely motion for new trial, he again challenged the evidence concerning these firearms (Lf.209). This issue is preserved. **Rule 29.11(d)**.

Standard of Review

This Court reviews the trial court’s admission of evidence for an abuse of discretion. ***State v. Anderson***, 76 S.W.3d 275, 276 (Mo.banc2002). It will reverse if the error was so prejudicial that it deprived the defendant of a fair trial. ***Id.*** at 277. Evidentiary decisions of the trial court are reviewed in the context of the whole trial. ***State v. Walkup***, 220 S.W.3d 748, 756 (Mo.banc2007).

Analysis

Firearms that were not used in the alleged crime were not legally relevant. For physical evidence to be admissible in a criminal trial, it must be connected with both the crime and the defendant. ***State v. Gallimore***, 633 S.W.2d 232, 235 n.5 (Mo.App.W.D.1982). When the physical evidence is a weapon, Missouri courts “with notable consistency have recognized that weapons unconnected with

either the accused or the offense for which he is standing trial lack any probative value and their admission into evidence is inherently prejudicial and constitutes reversible error.” *State v. Grant*, 810 S.W.2d 591, 592 (Mo.App.S.D.1991), quoting *State v. Perry*, 689 S.W.2d 123, 126 (Mo.App.W.D.1985). The sight of deadly weapons “tends to overwhelm reason and to associate the accused with the atrocity without sufficient evidence.” E.g., *State v. Wynne*, 353 Mo. 276, 182 S.W.2d 294, 299-300 (1944) and *Anderson*, 76 S.W.3d 275 (defendant charged with robbery and armed criminal action – a brochure of a handgun found in the defendant’s home was not legally relevant and unfairly prejudiced him).

The admissibility of evidence requires both logical and legal relevance to the offense for which the defendant is standing trial. *Anderson*, 76 S.W.3d at 276. “Evidence is logically relevant if it tends to make the existence of a material fact more or less probably.” *Id.* But logically relevant evidence is admissible only if legally relevant. *Id.* “Legal relevance weighs the probative value of the evidence against its costs – unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness.” *Id.* Logically relevant evidence is excluded if its costs outweigh its benefits. *Id.* “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.” *State v. Black*, 50 S.W.3d 778, 786 (Mo.banc2001).

In *State v. Holbert*, 416 S.W.2d 129, 132-133 (Mo.1967), the Court found reversible error to introduce into evidence two guns found in Holbert’s possession

when he was arrested on a charge of carrying a third gun as a concealed weapon. The Court held that the other guns were evidence of other offenses, and that they were not legally relevant to the crime charged since they were in no way connected with the charged offense. *Id.*

In *State v. Krebs*, 106 S.W.2d 428 (Mo.1937), an armed robbery case, the State presented testimony that when Krebs was arrested, a revolver and rifle were found on or near him. No evidence had been presented that a rifle had been used in the robbery, nor was there evidence that the revolver found on Krebs resembled the one used during the robbery. *Id.* at 428-429. The Court held that evidence that Krebs had possession of weapons, not connected with the charged crime, was of no probative value in connecting him with the robbery, and it reversed for a new trial. *Id.* at 429.

In *Perry*, 689 S.W.2d at 124-125, the court reversed a conviction where the prosecutor introduced evidence of a shotgun in a case where the crime had been committed with a handgun. The police found the shotgun wrapped in a blanket in the backseat of a car in which the defendant was a passenger. *Id.* The shotgun had no conceivable relevance and served only to color the defendant's character as someone tending to possess dangerous weapons. *Id.* at 126.

Here, Jeff did not exit his car with the weapons at issue, and there was no evidence that the guns in the car were used by Jeff during the incident. His possession of other firearms was not legally relevant. The trial court abused its discretion in allowing the State to present evidence concerning these unrelated

weapons. They were not admissible simply because they were found in a search, which was the reason given by the trial court (Tr.17).

The admission of inadmissible evidence creates a presumption of prejudice. *State v. Samuels*, 965 S.W.2d 913, 920 (Mo.App.W.D.1998). Error is presumed prejudicial unless it is not prejudicial beyond a reasonable doubt. *Id.* This Court is required to assume that the jury considered the improperly-admitted evidence as it reached its verdict. *State v. Robinson*, 111 S.W.3d 510, 514 (Mo.App.S.D. 2003). This is particularly true with weapons not connected to the crime because such evidence introduces unfair prejudice into the trial.

There was no other reason to introduce the guns in the car other than to purposefully influence the jury to fear that Jeff was a dangerous person. That would make it easier for the jury to convict him. The trial court abused its discretion in allowing these unrelated weapons and ammunition into evidence and thereby denied Jeff's right to due process of law and to a fair trial. This Court should reverse Jeff's convictions and remand for a new trial.

CONCLUSION

Under Points I, II, IV and V, Jeff must be discharged from his convictions.

Under Points III, VI, VII and VIII, Jeff must have a new trial.

Respectfully submitted,

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Certificate of Compliance

I, Amy M. Bartholow, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, table of contents, table of authorities, signature block, this certificate of compliance and service, and appendix, the brief contains **15,499** words, which does not exceed the 15,500 words allowed for an appellant's brief.

On this 25th day of July, 2014, electronic copies of Appellant's Brief and Appellant's Brief Appendix were placed for delivery through the Missouri e-Filing System to Shaun Mackelprang, Assistant Attorney General, at Shaun.Mackelprang@ago.mo.gov.

/s/ Amy M. Bartholow

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