

No. ED100807

IN THE
Missouri Court of Appeals
Eastern District

STATE OF MISSOURI,

Respondent,

v.

JEFFREY R. WEINHAUS,

Appellant.

Appeal from the Franklin County Circuit Court
Twentieth Judicial Circuit
The Honorable Keith Sutherland, Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Mr. Weinhaus appeals his convictions of the class C felony of possession of a controlled substance, § 195.202, RSMo Cum. Supp. 2013, the class A misdemeanor of possession of thirty-five grams or less of marijuana, § 195.202, RSMo Cum. Supp. 2013, the class A felony of assault of a law enforcement officer in the first degree, § 565.081, RSMo Cum. Supp. 2013, and the unclassified felony of armed criminal action, § 571.015, RSMo 2000.

* * *

On August 18, 2012, Judge Kelly Parker contacted Sergeant Henry Folsom about a YouTube video that had been posted by Mr. Weinhaus, in which Mr. Weinhaus “allegedly threatened some judicial officers” (Tr. 168-169). Judge Parker felt threatened by the video (Tr. 169). Sergeant Folsom viewed Mr. Weinhaus’s videos and made copies of them (Tr. 169).

In the video, which was recorded on August 16, 2012, Mr. Weinhaus recited various societal problems and stated, “The America that I grew up in is long gone” (State’s Ex. 1). He then stated that the “good news” was that America could be restored (State’s Ex. 1). He stated that it could be done peacefully, but he also referred to his “right to go in there and blast you motherf---ers out of there if we have to” (State’s Ex. 1). He then cited specific examples of perceived injustice and said, “You’re motherf---ers, and you’re going down one way or another” (State’s Ex. 1). He stated that he did not

want to use force, and he said he did not intend to go out and kill them, but he warned the prosecutor, the judges, and everyone down to the dispatcher, that he was not “playing games” (State’s Ex. 1). He stated that he had a right to throw off government, and that the people had a right to establish a new government and remove government officials by “whatever means necessary” (State’s Ex. 1).

Then, after discussing perceived problems with the criminal justice system (and society in general), Mr. Weinhaus issued an ultimatum, stating that the state court’s administrator, the circuit judge, lawyers, judges, and police officers were “fired” and had to “stand down” by September 17, 2012—Constitution Day (State’s Ex. 1). He stated that he would like to see them “go peaceably,” but he stated that if they wanted to resist, they would meet their “fate” and be tried and “executed for the crimes [they had] committed against the American people” (State’s Ex. 1). He concluded by saying, “This is the bulletin man. I love you enough to tell you the truth. The gig is up, the news is out, we finally found you. You thought you had it made. Well, the party’s over. See ya” (State’s Ex. 1). Mr. Weinhaus delivered his message in a soft-spoken voice, smiling at various times (State’s Ex. 1).

Sergeant Folsom also viewed another version of the same video that had captions added to it (Tr. 169). At the point where Mr. Weinhaus talked about his right to “blast you motherf---ers,” a caption included the following:

“The Courtroom is the battle ground. The Judge, Pa are the enemy and your lawyer is the enemy spy” (State’s Ex. 1A). Another caption stated, “Sorry though that is the reason why we have the right to keep and bare [sic] arms. It is the last resort” (State’s Ex. 1A). As Mr. Weinhaus discussed the right to use force, a caption stated, “Be peaceful, be courteous, obey the law, respect everyone; but if someone puts his hand on you, send him to the cemetery” (State’s Ex. 1A).

When Mr. Weinhaus listed the officials who had been “fired,” a caption listed various people, including Judge Kelly Parker (State’s Ex. 1A). When Mr. Weinhaus issued his September 17 ultimatum, a caption stated, “The Last Day for the Defacto Court and Police will be Friday September 14th (State’s Ex. 1A). A caption shortly thereafter stated, “The People’s Court will be convened after Labor Day. The Redress and Revocation Petition will be recorded on 9-11-12” (State’s Ex. 1A).

After viewing the videos, Sergeant Folsom consulted with various state, federal, and county law enforcement officers to assess the validity of Mr. Weinhaus’s threats (Tr. 171). He learned that some of them had heightened their security in response to Mr. Weinhaus’s actions and threats (Tr. 171). They concluded, however, that “most of the things that [he] had said were under the free speech,” and they decided that Sergeant Folsom would contact Mr. Weinhaus to “discuss with him the video and see if he had actually

intended to harm anyone or himself,” or whether he “possibly was a danger to anyone” (Tr. 172).

On August 22, Sergeant Folsom and Corporal Scott Mertens located Mr. Weinhaus at his home in Piney Park (Tr. 173, 375-376). Mr. Weinhaus stepped outside to speak to the officers, and Sergeant Folsom smelled marijuana (Tr. 173, 377). There was a very strong odor of marijuana coming from the house and from Mr. Weinhaus (Tr. 173). They walked over to the carport and talked about the videos that Mr. Weinhaus had posted on YouTube and the threats he had made (Tr. 174, 376-377). Mr. Weinhaus said that he was “a peaceful person,” but he also said that “a situation like this was exactly what the Second Amendment was created for” (Tr. 174-175). He also accused several judicial officials of treason, and he stated that “death is the punishment for treason” (Tr. 175).

After they had talked to him about the videos, Sergeant Folsom asked if there was marijuana in the house, and Mr. Weinhaus said there was not (Tr. 176). Mr. Weinhaus tried to step around Sergeant Folsom and go toward the house, but Sergeant Folsom stepped in front of him and told him to turn around because Sergeant Folsom was going to handcuff him (Tr. 176). Mr. Weinhaus complied, and Sergeant Folsom put him in handcuffs (Tr. 176). As Sergeant Folsom put him in handcuffs, Mr. Weinhaus “was screaming for someone in the house to come and help him, that the cops were going to

search the house, they were looking for drugs” (Tr. 177). Sergeant Folsom then obtained a search warrant and searched the house (Tr. 177-180, 378).

During the search of the main floor and master bedroom, the officers observed computer equipment, video cameras, and a nine millimeter handgun with paperwork indicating that it belonged to Judy Kropf Weinhaus (Mr. Weinhaus’s wife) (Tr. 180, 379-380). Because the gun was legally registered, it was not seized (Tr. 181, 380).

The basement was “cluttered with boxes” and there was “a lot of personal belongings” (Tr. 182). On the right side of the main part of the basement, there were cameras, a desk with a computer, and “a lot of the banners and things that [were] in the video where Mr. Weinhaus was running for coroner and the backdrop basically for where he had made the videos” (Tr. 183, 381). Mr. Weinhaus described that area as his “command center” (Tr. 183).

In the desk in the “command center,” Sergeant Folsom found “some drug paraphernalia, a set of scales, rubber type Tupperware tub containing some marijuana as well as smoking pipes and other instruments” (Tr. 184, 382-383). There was also “a small Camel tin . . . like a tin that Sucrets or something comes in, a small metal tin” (Tr. 184, 383). The tin contained a pink pill and pieces of two other pills (Tr. 185). Subsequent testing revealed that the pills were morphine (Tr. 196, 204-205). Just outside the “command

center” the officers also found another bag of marijuana (Tr. 384).

After conducting the search, Sergeant Folsom gave Mr. Weinhaus a business card that had his email address on it (Tr. 206). Mr. Weinhaus then began sending emails asking where he could serve Sergeant Folsom with papers (Tr. 207). Mr. Weinhaus also sent him a writ of replevin asking for the return of his computers (Tr. 207).

On September 10, 2012, Sergeant Folsom met with his supervisors at the highway patrol (Tr. 207). They decided to arrest Mr. Weinhaus for the drugs and for tampering (Tr. 207). They also discussed whether to arrest Mr. Weinhaus immediately or whether to “further monitor his movements before September 17th” (Tr. 207). After obtaining an arrest warrant, Sergeant Folsom contacted the Franklin County Sheriff’s Department, but they were too busy to assist with the arrest (Tr. 208). Sergeant Folsom then contacted two FBI agents and obtained their assistance (Tr. 208, 385). They wanted to arrest Mr. Weinhaus before September 17—the day Mr. Weinhaus had said he was going “to occupy the courthouse” (Tr. 385-386).

On September 11, 2012, Sergeant Folsom contacted Mr. Weinhaus to set up a meeting for the ostensible purpose of returning Mr. Weinhaus’s computer equipment to him (Tr. 209, 218, 385; *see* State’s Ex. 15). Mr. Weinhaus expressed his distrust of Sergeant Folsom and said he wanted to meet in a public place (Tr. 209, 218). They agreed to meet at an MFA gas

station on Highway K (Tr. 209-210). Although Sergeant Folsom believed Mr. Weinhaus was at home, he did not want to go there to arrest him because Mr. Weinhaus had previously “made several threats against” Sergeant Folsom (Tr. 209). In one internet video, Mr. Weinhaus had said he “should have placed a bullet in [Sergeant Folsom’s] head” (Tr. 209). Mr. Weinhaus had also said in one of his videos that he was “at home with his guns loaded on Def-Con 4” (Tr. 210).

The officers arrived at the gas station before Mr. Weinhaus (Tr. 210). Sergeant Folsom and Corporal Mertens parked their vehicle in a highly visible place (Tr. 210). When Mr. Weinhaus arrived, he passed the officers at a high rate of speed (Tr. 213). He then he turned around and “slid on the gravel to a stationary position” (Tr. 213). As Mr. Weinhaus drove by the officers, he was removing his seatbelt and it “looked that he was in a hurry to get out” (Tr. 214).

Sergeant Folsom exited his vehicle and told Corporal Mertens to go to the trunk and open it in an attempt to suggest to Mr. Weinhaus that they had brought the computer equipment (Tr. 218, 390). Sergeant Folsom had a folder in one hand, which contained a copy of the arrest warrant, and he went around to talk to Mr. Weinhaus (Tr. 217, 391).

When Sergeant Folsom came around the car, he saw Mr. Weinhaus standing sideways (Tr. 219). Mr. Weinhaus was wearing a large green Army

holster on his hip, and he had a gun in the holster (Tr. 219). Sergeant Folsom asked Mr. Weinhaus what he was doing with that gun (Tr. 219, 391; State's Ex. 15). When Corporal Mertens heard that, he drew his own weapon and held it at "high ready" (Tr. 391). Sergeant Folsom removed his gun and placed it at "the low ready," meaning it was down by his side, in front of his hip (Tr. 220). Mr. Weinhaus said he was authorized to have the gun, or words to that effect (Tr. 220; State's Ex. 15). Sergeant Folsom stated that he was also authorized, or words to that effect (Tr. 220; State's Ex. 15).

Mr. Weinhaus then reached down and "manipulated the flap on the holster that he was wearing" (Tr. 220, 391). Mr. Weinhaus disengaged the "safety ring" of the holster, opened the flap, and "placed his hand on the buttstock of the weapon" (Tr. 221). Corporal Mertens observed Mr. Weinhaus tremble, like he had experienced a "cold chill," and Corporal Mertens thought, "this is bad" (Tr. 391-392). Sergeant Folsom told Mr. Weinhaus to get down on the ground, but Mr. Weinhaus turned toward Sergeant Folsom and stood "squared face to face" (Tr. 221). Corporal Mertens aimed his gun at Mr. Weinhaus's head (Tr. 392).

Sergeant Folsom raised his weapon, thinking that Mr. Weinhaus was going to draw his weapon (Tr. 221-222). Sergeant Folsom saw that his line of fire might endanger people at the gas station, so he stepped to the left to change his "angle of contact with Mr. Weinhaus" (Tr. 222). Mr. Weinhaus

continued to manipulate the holster (Tr. 222). Sergeant Folsom again told Mr. Weinhaus to get down on the ground, and Mr. Weinhaus said, “You’re going to have to shoot me” (Tr. 222). Mr. Weinhaus “continued to draw the weapon out,” and he lowered his center of gravity, like he was going into “a firing position” (Tr. 222-223, 324-325).

When Mr. Weinhaus’s gun was almost out of the holster, Sergeant Folsom “fired two shots to his chest and one to his head to incapacitate him” (Tr. 223). When Sergeant Folsom fired the shot at his head, Mr. Weinhaus was holding his gun in his right hand (Tr. 227). Corporal Mertens also fired his gun when he saw Mr. Weinhaus pulling out his gun (Tr. 393). Corporal Mertens thought that Mr. Weinhaus presented a threat to Sergeant Folsom (Tr. 428). When Sergeant Folsom heard Corporal Mertens’s shot, he fired another shot at Mr. Weinhaus (Tr. 227, 332). Mr. Weinhaus “flinched back and he dropped violently straight towards the ground” (Tr. 227). Sergeant Folsom thought he had killed Mr. Weinhaus (Tr. 224).

Sergeant Folsom asked one of the FBI agents to “cover him” as he moved forward and rolled Mr. Weinhaus over (Tr. 228, 393; State’s Ex. 15). The gun was beneath Mr. Weinhaus, “just out of the holster” (Tr. 228). The butt of the gun was still in Mr. Weinhaus’s fingertips, but none of his fingers was near the trigger guard (Tr. 228). Sergeant Folsom said, “he still has his hand on the gun,” or words to that effect (Tr. 393; State’s Ex. 15). Sergeant

Folsom picked up the gun and “jammed it down into the holster” to secure it (Tr. 228). He then removed the holster and threw it away from Mr. Weinhaus (Tr. 229, 393). He handcuffed Mr. Weinhaus (Tr. 229, 394). Corporal Mertens called an ambulance, but he initially thought Mr. Weinhaus was dead (Tr. 394). Mr. Weinhaus was wearing a hidden camera in his watch that recorded the incident (Tr. 229-230; State’s Ex. 15). Mr. Weinhaus started to regain consciousness at the scene, and some medical aid was provided to him there (Tr. 356-358; *see* State’s Ex. 15).

A search of Mr. Weinhaus’s car revealed that he had other weapons in his car, including a loaded .22 caliber pistol, and a loaded 12-gauge shotgun (Tr. 454-455). The gun Mr. Weinhaus had been wearing was seized, and subsequent testing revealed that the gun was functional (Tr. 456, 471). All of Mr. Weinhaus’s guns were legally owned (Tr. 480).

The State charged Mr. Weinhaus with the class C felony of possession of a controlled substance (morphine), the class C felony of tampering with a judicial officer, the class A misdemeanor of possession of up to thirty-five grams of marijuana, the class A felony of assault of a law enforcement officer in the first degree, the class A felony of attempted assault of a law enforcement officer in the first degree, two counts of the unclassified felony of armed criminal action, and the class D felony of resisting arrest (LF. 23-24).

At trial, after the State had presented its case-in-chief, the trial court

granted Mr. Weinhaus's motion for judgment of acquittal as to two counts—the class C felony of tampering with a judicial officer, and the class D felony of resisting arrest (Tr. 544-545, 548-549). The trial court concluded that Mr. Weinhaus's video threats against Judge Kelly were not sufficient, without something more, to support the charge of tampering (Tr. 544-545). The court also concluded that there was no evidence that Mr. Weinhaus knew that he was being arrested at the time he met the officers (Tr. 548-549).

Mr. Weinhaus presented the testimony of three witnesses (Tr. 563, 581, 593). Marty Leach, who was present at the scene of the shooting, testified that he saw Mr. Weinhaus falling after the first shot, that his hands were down at his sides, and that he did not see a gun in Mr. Weinhaus's hand (Tr. 569-570). Steve Everhart, who was also present, testified that he heard five or six shots (Tr. 587). He said that when he turned to look, "it was already over" (Tr. 587). Heather Clark, the gas station attendant, testified that she saw Mr. Weinhaus falling after the first shot, that his hands were "in the air pointing towards the store," and that he did not have a gun in his hands (Tr. 598-599). She testified that after Mr. Weinhaus was on the ground, "then the officer took a couple of steps and shot him six more times while he was laying there" (Tr. 599).

The jury found Mr. Weinhaus guilty of possession of a controlled substance (morphine), possession of not more than thirty-five grams of

marijuana, assault of a law enforcement officer in the first degree (against Sergeant Folsom), and armed criminal action (Tr. 651-652; L.F. 195-197). The jury found Mr. Weinhaus not guilty of the other count of assault of a law enforcement officer (against Corporal Mertens) and its associated count of armed criminal action (Tr. 652).

In the penalty phase, the State presented the testimony of Sergeant Folsom, who testified about the detrimental consequences in his life—both to himself and his family—that had come from the incident (Tr. 665-671). Mr. Weinhaus presented the testimony of his former wife, Judy Kropf, who testified that Mr. Weinhaus was not violent, that he was sometimes “verbally abusive,” but that “most people didn’t take him seriously (Tr. 671-672). She testified that he was a good, concerned father (Tr. 672). She said that Mr. Weinhaus had suffered “anorexic brain damage” from the shooting (Tr. 673). She said that Mr. Weinhaus is “a good and decent man,” and that the incident at the gas station was not “in character” for him (Tr. 674).

The jury recommended sentences of two years for possession of morphine, one year for possession of marijuana, thirty years for assault of a law enforcement officer in the first degree, and thirty years for armed criminal action (Tr. 682-683).

On November 25, 2013, the trial court sentenced Mr. Weinhaus to two years for possession of a controlled substance—morphine (Count 1), one year

for possession of 35 grams or less of marijuana (Count 3), thirty years for assault of a law enforcement officer in the first degree (Count 4), and thirty years for armed criminal action (Count 5) (Sent.Tr. 43-44). The court ordered the sentences to run concurrently (Sent.Tr. 44).

ARGUMENT

I.

The evidence was sufficient to support Mr. Weinhaus's various convictions. (Responds to Points I, IV, and V of appellant's brief.)

In Points I, IV, and V, Mr. Weinhaus challenges the sufficiency of the evidence to support his convictions (App.Br. 28, 46, 53).

In Point I, he challenges the sufficiency of the evidence to support his convictions for assault of a law enforcement officer in the first degree and armed criminal action (App.Br. 28, 36). In Points IV and V, he challenges the sufficiency of the evidence to support his convictions for possession of morphine and marijuana (App.Br. 46, 53).

A. The standard of review

“This Court's review is limited to determining whether there was sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt.’” *State v. Miller*, 372 S.W.3d 455, 463 (Mo. 2012). “The evidence and all reasonable inferences therefrom are viewed in the light most favorable to the verdict, disregarding any evidence and inferences contrary to the verdict.’” *Id.*

“This is not an assessment of whether the Court believes that the evidence at trial established guilt beyond a reasonable doubt but rather a question of whether, in light of the evidence most favorable to the State, any

rational fact-finder could have found the essential elements of the crime beyond a reasonable doubt.’” *Id.* “When reviewing the sufficiency of evidence supporting a criminal conviction, the Court does not act as a ‘super juror’ with veto powers.” *Id.*

“In such cases, this Court gives great deference to the trier of fact.” *Id.* “‘A jury may accept part of a witness’s testimony, but disbelieve other parts.’” *State v. Jackson*, 433 S.W.3d 390, 398 (Mo. 2014) (quoting *State v. Pond*, 131 S.W.3d 792, 794 (Mo. 2004)).

B. Assault and armed criminal action

As relevant in this case, “[a] person commits the crime of assault of a law enforcement officer . . . in the first degree if such person . . . attempts to cause serious physical injury to a law enforcement officer[.]” § 565.081, RSMo Cum. Supp. 2013. “A person is guilty of attempt to commit an offense when, with the purpose of committing the offense, he does any act which is a substantial step towards the commission of the offense.” § 564.011, RSMo 2000. “A ‘**substantial step**’ is conduct which is strongly corroborative of the firmness of the actor’s purpose to complete the commission of the offense.” *Id.* “A person ‘**acts purposely**’, or with purpose, with respect to his conduct or to a result thereof when it is his conscious object to engage in that conduct or to cause that result.” § 562.016, RSMo 2000.

Here, the evidence was sufficient to support Mr. Weinhaus’s conviction

for assault of a law enforcement officer in the first degree.

First, the evidence showed that, in the days leading up to the assault, Mr. Weinhaus had posted inflammatory comments on the internet (in his YouTube video) about law enforcement officials (State's Exs 1, 1A). He talked about restoring America and his "right to go in there and blast you motherf---ers out of there if we have to" (State's Ex. 1). He then cited specific examples of perceived injustice and said, "You're motherf---ers, and you're going down one way or another" (State's Ex. 1). He stated that he did not want to use force, and he said he did not intend to go out and kill them, but he warned the prosecutor, the judges, and everyone down to the dispatcher, that he was not "playing games" (State's Ex. 1). He stated that he had a right to throw off government, and that the people had a right to establish a new government and remove government officials by "whatever means necessary" (State's Ex. 1). Mr. Weinhaus also issued an ultimatum telling the police that they had to "stand down" by September 17, 2012—a date that was less than a week after the assault (State's Ex. 1).

In addition to his general threats, Mr. Weinhaus made several specific threats against Sergeant Folsom (Tr. 209). In one video, Mr. Weinhaus had said he "should have placed a bullet in [Sergeant Folsom's] head" (Tr. 209). Mr. Weinhaus had also said in one of his videos that he was "at home with his guns loaded on Def-Con 4" (Tr. 210).

In light of this evidence, rational jurors could have inferred that Mr. Weinhaus was serious about his threats, and that he intended to act in accordance with them in light of the perceived injustice he had suffered at the hands of the police, and specifically Sergeant Folsom (namely, the seizure of his computers). Rational jurors could have inferred from the evidence that Mr. Weinhaus believed he was a victim of injustice at the hands of the police, and that he went to the meeting intending to engage in violence. Indeed, the evidence showed that Mr. Weinhaus took three loaded guns to the meeting and that he quickly opened his holster and started to draw his weapon after he arrived at the scene (*see* State's Exs. 1, 1A, 15; Tr. 219, 391, 454-456).

Second, Mr. Weinhaus's conduct at the scene supported the conclusion that he had the purpose to cause serious physical injury to Sergeant Folsom. The evidence showed that Sergeant Folsom asked Mr. Weinhaus about his weapon, and that Sergeant Folsom drew his own weapon and held it in the "low ready" position (Tr. 219-220, 391). The evidence showed that, in response to Sergeant Folsom's actions, Mr. Weinhaus opened his holster and put his hand on his gun (Tr. 221). The evidence showed that Mr. Weinhaus also experience a "cold chill" at that time (Tr. 221).

Additionally, the evidence showed that Sergeant Folsom told Mr. Weinhaus to get down on the ground, but that Mr. Weinhaus instead turned toward him and stood "squared face to face" (Tr. 221). Then, when Sergeant

Folsom raised his weapon and pointed it at Mr. Weinhaus, Mr. Weinhaus said to Sergeant Folsom, “You’re going to have to shoot me” (Tr. 222). And, finally, Mr. Weinhaus “continued to draw the weapon out,” and he lowered his center of gravity, like he was going into “a firing position” (Tr. 222-223, 324-325).

Rational jurors could have readily concluded, based on the foregoing, that Mr. Weinhaus was determined to shoot Sergeant Folsom, and that he took a substantial step toward doing so by drawing his gun out of his holster and taking actions consistent with ultimately firing his gun at Sergeant Folsom. Rational jurors also could have readily inferred that Mr. Weinhaus was firm in his purpose to shoot Sergeant Folsom inasmuch as Mr. Weinhaus committed this substantial step while facing the real and immediate prospect of being shot by Sergeant Folsom and Corporal Mertens. Indeed, it was the apparent firmness of his purpose that convinced both Sergeant Folsom and Corporal Mertens that they had to shoot Mr. Weinhaus in order to protect Sergeant Folsom.

In short, the evidence strongly indicated that Mr. Weinhaus was about to draw his weapon and shoot Sergeant Folsom and that the only reason he did not do so was because the officers managed to shoot him first. Under such circumstances, the evidence was sufficient to show that Mr. Weinhaus was guilty of assault of a law enforcement officer in the first degree. *See generally*

State v. Rollins, 321 S.W.3d 353, 361 (Mo.App. W.D. 2010) (“ . . . if circumstances were sufficient to strongly indicate that the defendant had a firmness of purpose to pull the trigger and kill or seriously injure the victim, but the act, for some reason, was not completed, then the defendant could be convicted of first-degree assault or attempted murder. If, for instance, . . . the evidence showed that the defendant stopped short of pulling the trigger only because the police suddenly arrived, or because the gun malfunctioned, then the defendant ordinarily could be convicted of attempted murder.”).¹ *See also State v. Jordan*, 404 S.W.3d 292, 298 (Mo.App. E.D. 2012) (“Intent to cause serious physical injury can be inferred from the use of a deadly weapon.”).

Citing *State ex rel. Verweire v. Moore*, 211 S.W.3d 89 (Mo. 2006), and *State v. Dublo*, 243 S.W.3d 407 (Mo.App. W.D. 2007), Mr. Weinhaus argues that the evidence did not show that he had the requisite purpose to cause serious physical injury to Sergeant Folsom. But Mr. Weinhaus’s reliance on those cases is misplaced.

In *Verweire*, an intoxicated man was involved in a confrontation with

¹ Mr. Weinhaus does not contest the fact that he committed his offense with a deadly weapon; thus, inasmuch as the evidence showed that Mr. Weinhaus used a deadly weapon (namely, a gun), the evidence was also sufficient to support his conviction of armed criminal action.

some juveniles at an arcade. 211 S.W.3d at 91. The man pulled out a loaded semi-automatic pistol, grabbed one teen, jabbed the pistol in his side and his cheek, and told him that he would blow his “head off.” *Id.* However, the man then voluntarily put the pistol away, left the arcade, and was arrested shortly thereafter in possession of the loaded pistol. *Id.* The man pleaded guilty to assault in the first degree “by attempting to cause serious physical injury” to the juvenile. *Id.*

Later, however, the defendant asserted that there was no factual basis for his plea because the facts did not demonstrate a “substantial step” toward the commission of the offense of causing serious physical injury or death. *Id.* The Missouri Supreme Court agreed and stated that the threat to blow the victim’s “head off” was not sufficient to show that the defendant had the intent to cause serious physical injury. *Id.* at 93. The Court observed that a threat, without more, was not sufficient to show the requisite intent. *Id.* The Court pointed out that the defendant voluntarily withdrew from the altercation, and that he did so without intervention by any person or circumstance. *Id.* Thus, the Court concluded that, without more, there was no factual basis to support the conclusion that the defendant had the conscious object to cause serious physical injury. *Id.* Similarly, in *State v. Dublo*, the defendant held a knife to the throats of two victims, but then the defendant withdrew the knife and there was no additional evidence showing the

firmness of the defendant's intent to cause serious physical injury. 243 S.W.3d at 409-410.

Here, by contrast, the evidence showed that Mr. Weinhaus was firm in his purpose to shoot Sergeant Folsom, and that the reason he did not do so (unlike in *Verweire* and *Dublo*) was because the police shot Mr. Weinhaus before he could complete his actions. This was the sort of case hypothesized by the Court in *Rollins*, where the Court observed, "If, for instance, . . . the evidence showed that the defendant stopped short of pulling the trigger only because the police suddenly arrived, or because the gun malfunctioned, then the defendant ordinarily could be convicted of attempted murder." *Rollins*, 321 S.W.3d at 361; *see also In re J.R.N., Jr.*, 687 S.W.2d 655 (Mo.App. S.D. 1985) (juvenile carrying lug wrench intending to commit assault stopped by a police officer); *State v. Perkins*, 826 S.W.2d 385 (Mo.App. E.D. 1992) (shoplifter realized he had been spotted, dropped items inside store; held guilty of attempt).

Mr. Weinhaus points out that the jury acquitted him of the assault against Corporal Mertens (App.Br. 33). But that fact does not undermine the jury's guilty verdict for the attempted assault of Sergeant Folsom. As Mr. Weinhaus points out in his brief, the evidence showed that Mr. Weinhaus "never made eye contact nor spoke directly to Mertens" (App.Br. 33). Accordingly, it appears that the jury simply concluded that Mr. Weinhaus did

not have the requisite intent to cause serious physical injury to Corporal Mertens. And, in light of the evidence outlined above—showing that Mr. Weinhaus squared up with Sergeant Folsom and started to crouch into a firing position facing Sergeant Folsom—the jury’s conclusion was rational.

Mr. Weinhaus also points out that “[h]e did not exit his car brandishing the weapon; rather, he had it secured in its holster and his hands were at his sides” (App.Br. 33). He also points out that “he believed that he was meeting the officers at that location to retrieve the computers that they had seized from him earlier” (App.Br. 33). He observes that “[h]e searched for a pastor to accompany him to the gas station, and he prayed and sang praises to the Lord on the way” (App.Br. 33). And, finally, he observes that “[t]he officers testified that they did not consider [him] 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” (App.Br. 33).

But Mr. Weinhaus’s reliance on evidence and inferences that purport to undermine the verdict is misplaced. Under the standard of review, only evidence and inferences that support the verdict are considered, and other inferences must be rejected. It should also be noted that some of the facts identified by Mr. Weinhaus could support the verdict (if other inferences are drawn, *e.g.*, that Mr. Weinhaus prayed for protection because he knew that he was going to engage in violence), and that some of the facts do not

undermine the jury's verdict at all. Indeed, while the officers were not expecting Mr. Weinhaus to show up and shoot them, their view quickly changed when Mr. Weinhaus flouted their authority, drew his gun, and started to get into a firing position in an attempt to shoot Sergeant Folsom.

In sum, the evidence was sufficient to show that Mr. Weinhaus took a substantial step toward causing serious physical injury to Sergeant Folsom by shooting him. Point I should be denied.

C. Possession of controlled substances

“Except as authorized by sections 195.005 to 195.425, it is unlawful for any person to possess or have under his control a controlled substance.” § 195.202, RSMo Cum. Supp. 2013. “[A] person, with the knowledge of the presence and nature of a substance, has actual or constructive possession of the substance.” § 195.010(34), RSMo Cum. Supp. 2013. “A person has actual possession if he has the substance on his person or within easy reach and convenient control.” *Id.* “A person who, although not in actual possession, has the power and the intention at a given time to exercise dominion or control over the substance either directly or through another person or persons is in constructive possession of it.” *Id.* “Possession may also be sole or joint.” *Id.* “If one person alone has possession of a substance possession is sole.” *Id.* “If two or more persons share possession of a substance, possession is joint[.]” *Id.*

Here, Mr. Weinhaus did not have actual possession of the drugs that

were found in his “command center” in his basement (*see* Tr. 184-185, 382-383). Thus, the question is whether he had constructive possession.

The evidence showed that Mr. Weinhaus had what he referred to as his “command center” in his basement (Tr. 183). The command center was on the right side of the main part of the basement, and in it were cameras, a desk with a computer, and “a lot of the banners and things that [were] in the video where Mr. Weinhaus was running for coroner and the backdrop basically for where he had made the videos” (Tr. 183, 381). A search of the desk revealed drug paraphernalia, a set of scales, rubber type Tupperware tub containing some marijuana as well as smoking pipes and other instruments” (Tr. 184, 382-383). There was also “a small Camel tin . . . like a tin that Sucrets or something comes in, a small metal tin” (Tr. 184, 383). The tin contained a pink pill and pieces of two other pills (Tr. 185). Subsequent testing revealed that the pills were morphine (Tr. 196, 204-205). Just outside the “command center” the officers also found another bag of marijuana (Tr. 384).

In addition, immediately before the house was searched, Mr. Weinhaus had talked with Sergeant Folsom and Corporal Mertens (Tr. 173, 377). When Mr. Weinhaus stepped out of his house, there was a very strong odor of marijuana coming from the house and from Mr. Weinhaus (Tr. 173). When Sergeant Folsom asked if there was marijuana in the house, Mr. Weinhaus said there was not, and he tried to go back inside the house (Tr. 176). When

Sergeant Folsom handcuffed him, Mr. Weinhaus started “screaming for someone in the house to come and help him, that the cops were going to search the house, they were looking for drugs” (Tr. 176).

In light of this evidence, rational jurors could have inferred that Mr. Weinhaus constructively possessed the drugs found in his command center. “Constructive possession of a controlled substance exists when a person ‘although not in actual possession, has the power and the intention at a given time to exercise dominion or control over the substance either directly or through another person or persons.’” *State v. Riley*, 440 S.W.3d 561, 564 (Mo.App. E.D. 2014). “To prove constructive possession, the State must show at a minimum the defendant had access to and control over the premises where the substance was found.” *Id.*

“‘Where there is evidence of joint control over the premises where a controlled substance is located, the State must present additional evidence that connects the defendant to the controlled substance.’” *Id.* Such evidence might include routine access to the area where the substances are kept, the presence of large quantities of the substance at the arrest scene, admissions by the accused, being in close proximity to the substances or drug paraphernalia in plain view of the law enforcement officers, the mixing of defendant’s personal belongings with the drugs, or flight by a defendant upon realizing the presence of law enforcement officials.” *Id.*

Here, the evidence plainly showed that Mr. Weinhaus had routine access to, and control over, the “command center” desk where the drugs were found. Mr. Weinhaus’s videos showed him sitting in the “command center,” surrounded by various personal items that plainly belonged to Mr. Weinhaus (e.g., his political campaign signs). In addition, on the day of the search, there was evidence showing (or supporting an inference) that Mr. Weinhaus was smoking marijuana (or handling it) when the police arrived at his house (*i.e.*, that he exercised control over it). “The jury could reasonably infer from [his] marijuana possession that [Mr. Weinhaus] had a familiarity with illegal substances and had the intent to possess illegal drugs.” *See State v. West*, 21 S.W.3d 59, 65 (Mo.App. W.D. 2000). Mr. Weinhaus also showed his consciousness of guilt when he initially denied that there was any marijuana in the house.

The evidence also gave rise to an inference that Mr. Weinhaus attempted to exercise control over the drugs indirectly. The evidence showed that when the police placed him under arrest, Mr. Weinhaus screamed to his wife that the police would be looking for the drugs (Tr. 176). Rational jurors could have inferred that Mr. Weinhaus was trying to warn her so that she could conceal or destroy the drugs before they were found.

In short, the evidence showed that the drugs were found in a desk in the “command center” and that the command center was Mr. Weinhaus’s

base of operations for political activities. The evidence showed that the “command center” was replete with Mr. Weinhaus’s personal items, and that Mr. Weinhaus had routine (and probably superior) access to the area. The evidence also showed that Mr. Weinhaus was using or handling marijuana on the day of the search, that Mr. Weinhaus was aware of the presence of drugs in the house, that he lied about their presence, and that he warned his wife that the police would be looking for the drugs. On this record, rational jurors could have concluded that Mr. Weinhaus constructively possessed the drugs found in the desk in his “command center.”

Citing several cases, Mr. Weinhaus asserts that the evidence in his case was not sufficient to support a finding that he constructively possessed the marijuana and morphine (App.Br. 49-52, 55-58). But none of the cases he cites compel reversal here. In none of those cases did the evidence show the various circumstances that were present in Mr. Weinhaus’s case.

For example, in *State v. Nobles*, 699 S.W.2d 531 (Mo.App. E.D. 1985), the defendant had a key to a residence and received mail there. Drugs were found in a closet and on a table, but they were not found with the defendant’s personal items. *Id.* at 531-532. Ten other people also had access to the house, and there was no evidence showing when the drugs were brought into the house or “how long defendant had been away before being stopped outside of the house.” *Id.* at 532. The defendant also made no statement to the police.

Id. at 533.

The differences between the *Nobles* case and Mr. Weinhaus's case are evident. Here, Mr. Weinhaus lived at the house, and the drugs were found in Mr. Weinhaus's "command center," which contained a large amount of Mr. Weinhaus's personal belongings. Mr. Weinhaus was apparently using or handling marijuana immediately before the police arrived to talk to him, and he lied about the presence of marijuana inside the house. He then made an apparent attempt to have his wife exercise control over the drugs by warning her that the police would be looking for them.

The other cases Mr. Weinhaus cites are similarly distinguishable. *See State v. Cushshon*, 218 S.W.3d 587 (Mo.App. E.D. 2007) (the fact that there was contraband inside the defendant's prison mattress, after that mattress had been in another inmate's cell, was not sufficient, without more, to show that the defendant possessed the contraband); *State v. West*, 21 S.W.3d 59 (the evidence showed the defendant knew about the contraband, but there was no evidence the defendant exercised any control over it—"The state provided no evidence that Ms. West had a key to the filing cabinet in the office or to the shed [where the contraband was found]. ... There was no evidence that [the defendant's] personal belongings were commingled with any of the illegal materials seized or that the materials were located within close proximity to her."); *State v. Smith*, 33 S.W.3d 648 (Mo.App. W.D. 2000)

(the defendant was not present when the contraband was found, and other people had been present in the residence while the defendant was gone; no evidence showed that the items were found in places the defendant uniquely controlled, or that the items were among the defendant's personal items); *State v. Moses*, 265 S.W.3d 863, 866 (Mo.App. E.D. 2008) (while there was evidence of knowledge, there was no evidence that the defendant exercised control over the drugs). Points IV and V should be denied.

II.

The evidence was sufficient to support a conviction for assault of a law enforcement officer in the first degree as submitted to the jury in Instruction No. 8, and the trial court did not plainly err in submitting that instruction. (Responds to Points II and III of appellant's brief.)

In his second point, Mr. Weinhaus asserts that the trial court erred “in overruling [his] motion for judgment of acquittal . . . 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 [Mr. Weinhaus] attempted to kill or cause serious physical injury to Sgt. Folsom ‘by shooting him,’ and there was no evidence that [he] actually shot Sgt. Folsom” (App.Br. 36). Because this alleged discrepancy between the evidence and the instruction was not raised at trial, Mr. Weinhaus requests plain error review (App.Br. 37).

Similarly, in his third point, Mr. Weinhaus asserts that 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 [Mr. Weinhaus] actually shot at Sgt. Folsom,” and “there was no evidence that [Mr. Weinhaus] shot at Sgt. Folsom” (App.Br. 40).

But contrary to Mr. Weinhaus’s assertions, there was no error, plain or

otherwise, as asserted in Points II and III of his brief. Both of Mr. Weinhaus's claims are based on the copy of an "Instruction No. 8" that is included in the legal file (App.Br. 38, citing L.F. 178). But Mr. Weinhaus admits in his third point that the transcript does not reflect that the verdict director contained in the legal file was submitted to the jury (App.Br. 42).

The verdict director that was read (and apparently submitted) to the jury was drafted as follows:

Instruction No. 8, as to Count 4, if you find and believe from the evidence beyond a reasonable doubt; first, that on or about September 11th, 2012 in the County of Franklin, State of Missouri, the defendant *attempted to cause serious physical injury to Sergeant Folsom by trying to draw a weapon to shoot Sergeant Folsom*; and second, that Sergeant Folsom was a law enforcement officer; and third, that the defendant was aware that Sergeant Folsom was a law enforcement officer, then you will find the defendant guilty under Count 4 of assault of a law enforcement officer in the first degree under this instruction.

(Tr. 609) (emphasis added).

As is evident, this offense was not submitted as alleged by Mr. Weinhaus in his second and third points. Rather, the instruction matched the evidence presented at trial, and, as discussed above in Point I, the evidence

was sufficient to support the jury's verdict. Thus, neither of Mr. Weinhaus's claims has merit.

Mr. Weinhaus states in a footnote that he 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" (App.Br. 40 n. 7). But even if true, that fact is irrelevant. The circuit court's file could be incomplete (and it appears to be so in light of the transcript), and the absence of another "Instruction No. 8" does not mean that the "Instruction No. 8" that is in the file was actually submitted to the jury.

Moreover, the record does not support Mr. Weinhaus's claim that the "Instruction No. 8" in the legal file was submitted to the jury. Mr. Weinhaus suggests that the trial court may have simply "used different wording when reading the instruction" (App.Br. 43). But this sort of speculation should not be indulged. There is no reason to believe that the trial court would have unilaterally deviated from the written instructions and improvised a new instruction while reading the instructions to the jury. The logical inference to be drawn from the transcript is not that the court attempted to orally revise the instruction, but that the written instruction that was actually submitted to the jury was not the same as the instruction in the legal file.

In short, the transcript is not proof that the trial court corrected or misread the instruction; rather, the transcript is proof that the "Instruction

No. 8” included in the legal file is not the final instruction that was submitted to the jury. The transcript also shows, for instance, that Instruction No. 10 (the verdict director for the other assault) also does not match the purported written “Instruction No. 10” in the legal file (*see* Tr. 609-611; L.F. 180). Thus, it appears that the instructions contained in the legal file are merely draft instructions that ultimately were not given to the jury.

Indeed, it seems apparent that the instructions in the legal file are *not* the final instructions that were given to the jury. They are each labeled as “Submitted by the State” (*see* L.F. 178), indicating that they are working copies, and none of them bears any notation indicating that they were submitted to the jury or used at trial.

In short, the available record does not show that the trial court committed the error attributed to it in Points II and III. To the contrary, the record supports the conclusion that the trial court did not commit the error alleged by Mr. Weinhaus. Points II and III should be denied.

III.

The trial court did not err in joining the judicial tampering charge, and it did not abuse its discretion in refusing to sever that charge. (Responds to Point VI of appellant's brief.)

In his sixth point, Mr. Weinhaus asserts that “[t]he trial court abused its discretion in overruling [his] motion to sever the count of judicial tampering from the remaining counts and erred in joining these counts for trial” (App.Br. 59). He asserts that he 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” (App.Br. 59).

A. Joinder was proper

“Whether joinder is proper is a question of law.” *State v. McKinney*, 314 S.W.3d 339, 341 (Mo. 2010). “Liberal joinder of criminal offenses is favored.” *Id.*

Joinder of offenses is governed by Rule 23.05; it states:

All offenses that are of the same or similar character or based on two or more acts that are part of the same transaction or on two or more acts or transactions that are connected or that constitute parts of a common scheme or plan may be charged in the same

indictment or information in separate counts.

See also § 545.140.2, RSMo 2000 (“[T]wo or more offenses may be charged in the same indictment or information ... if the offenses charged ... are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.”).

Mr. Weinhaus asserts that his charges were not properly joined because the offenses were not “of ‘the same or similar character,’ or . . . based on the same act or transaction, or on two or more transactions that are part of a common scheme or plan” (App.Br. 61-62). But in making this argument, Mr. Weinhaus fails “to give effect to all the provisions for joinder under Rule 23.05 and section 545.140.2.” *State v. McKinney*, 314 S.W.3d at 341.

Specifically, Mr. Weinhaus fails to acknowledge that both the rule and the statute permit joinder where offenses are “connected.” Offenses can be connected “‘by their dependence and relationship to one another.’” *Id.* For purposes of joinder, “‘Connected’ is defined as: ‘[j]oined; united by junction, by an intervening substance or medium, by dependence or relation, or by order in a series.’” *Id.* It is also “defined as: ‘joined or linked together [in] a series, having the parts or elements logically related....’” *Id.*

Here, Mr. Weinhaus’s various crimes were connected so as to permit joinder. The YouTube video—with its threats against various government

officials (including Judge Parker)—set in motion an investigation that led the police to Mr. Weinhaus’s home on August 22 (Tr. 168-169, 172-173). At that time, the officers talked to Mr. Weinhaus about his threats, obtained further information about his views, and obtained probable cause to search Mr. Weinhaus’s home for evidence of criminal activity (*see* Tr. 173, 176-180). The officers then executed a search warrant, found the “command center” where Mr. Weinhaus had created his YouTube videos, and found drugs in (and near) the command center (Tr. 182-185, 383-384).

Shortly thereafter (less than three weeks), law enforcement decided that Mr. Weinhaus should be apprehended before September 17, 2012—the ultimatum date Mr. Weinhaus had stated in his YouTube video, and they used the computers they had seized during the search of Mr. Weinhaus’s home to lure Mr. Weinhaus to a meeting (where they intended to arrest him) (Tr. 209, 218, 385-386). It was at that meeting, of course, that Mr. Weinhaus attempted to assault Sergeant Folsom.

As is evident, the various crimes in this case were all intertwined. The evidence overlapped in various ways, the offenses occurred within a short period of time, and Mr. Weinhaus’s YouTube proclamation served as both a catalyst and continuing influence in the case. But for the YouTube video, there would not have been an investigation, a search, or an eventual arrest operation before the date of Mr. Weinhaus’s ultimatum. Thus, the trial court

did not err in concluding that the offenses were sufficiently connected so as to permit joinder. *See McKinney*, 314 S.W.3d at 341 (rejecting the defendant's claim that his attempted escape from jail nine weeks after two murders was improperly joined with the murders).

B. The trial court did not abuse its discretion in denying Mr. Weinhaus's motion for severance

"Even where joinder is proper, . . . severance may be necessary to prevent substantial prejudice to the defendant that could result if the charges are not tried separately." *Id.* at 342. "Whether to grant severance is a decision left to the trial court's sound discretion." *Id.*

"The trial court's decision overruling [a] motion to sever will be reversed if the trial court abused its discretion in overruling the motion and if there was a clear showing of prejudice." *Id.* "A trial court abuses its discretion if its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Id.*

"In considering whether severance is required, the court considers 'the number of offenses joined, the complexity of the evidence, and the likelihood that the jury can distinguish the evidence and apply it, without confusion, to each offense.'" *Id.* "Severance is proper only after the defendant 'makes a particularized showing of substantial prejudice if the offense is not tried

separately’ and after the ‘court finds the existence of a bias or discrimination against the party that requires a separate trial of the offense.’” *Id.* “Any prejudice from joinder ‘may be overcome where the evidence with regard to each crime is sufficiently simple and distinct to mitigate the risks of joinder.’” *Id.*

Here, the evidence was sufficiently simple, and there was no great number of offenses. It would have been a simple thing for the jury to consider the alleged tampering charge separately from the charges of drug possession and assault and resisting arrest.

In addition, Mr. Weinhaus’s claim of prejudice is not well taken. He argues that the YouTube video never should have been presented to the jury, and that it would not have been admitted if the tampering charge had been severed (App.Br. 64-65). But that is not correct.

Even if the tampering charge had been severed, the State would have been able to introduce the YouTube video in a separate trial to provide a complete and coherent picture of the investigation, to prove Mr. Weinhaus’s intent to harm law enforcement officers (including Sergeant Folsom), and to provide context for the officers’ actions in using force against Mr. Weinhaus. The YouTube video’s relevance went far beyond the tampering charge. It explained why Mr. Weinhaus was investigated in the first place, it explained why the officers went to Mr. Weinhaus’s home, it explained why the officers

seized Mr. Weinhaus's computers, it explained why the officers wanted to arrest Mr. Weinhaus before September 17, it tended to prove that Mr. Weinhaus had the purpose to cause harm to Sergeant Folsom when he started to draw his gun, and it was relevant on the issue of the officers' use of force against Mr. Weinhaus.

Accordingly, Mr. Weinhaus cannot claim that he was unfairly prejudiced by a single trial. *See State v. Williams*, 603 S.W.2d 562, 568 (Mo. 1980); *State v. Morant*, 758 S.W.2d 110, 115-116 (Mo.App. E.D. 1988). As the Court stated in *Morant*:

In this case, even if severance had been granted the same evidence could have been offered in each of two separate trials. Such evidence of other crimes could be admitted to establish motive, intent, the absence of mistake, a common scheme or plan, or the identity of the person charged with the commission of the crime on trial. *State v. Allen*, 674 S.W.2d at 608[5].

. . . As we have shown earlier, the charge of assault arising out of the car chase is admissible evidence of an attempt to escape arrest, which goes to show consciousness of guilt. *See State v. Wallace*, 644 S.W.2d at 384[1]; *State v. Valentine*, 646 S.W.2d 729 (Mo.1983). Any prejudice to the appellant that results from this single trial would also result in separate trials.

758 S.W.2d at 116. The same is true in Mr. Weinhaus's case.

Finally, in light of the outcome at Mr. Weinhaus's trial, no prejudice is apparent. The trial court ultimately granted a motion for judgment of acquittal on the tampering charge and the resisting-arrest charge, and the jury found that Mr. Weinhaus was not guilty of attempting to assault Corporal Mertens. Thus, contrary to Mr. Weinhaus's argument, it does not appear that the jury was inflamed by the video or driven by passion to find Mr. Weinhaus guilty based on any improper consideration of the video. Point VI should be denied.

IV.

The trial court did not plainly err in failing to declare a mistrial *sua sponte* after it granted Mr. Weinhaus's motion for judgment of acquittal on the tampering charge, and it did not plainly err in failing to instruct the jury to disregard the YouTube video. (Responds to Point VII of appellant's brief.)

In his seventh point, Mr. Weinhaus asserts that the trial court "plainly erred in failing to declare a mistrial *sua sponte* after it granted [his] motion for judgment of acquittal of judicial tampering, or instruct the jury that it could not consider the YouTube video as evidence of [his] guilt on any charge" (App.Br. 66). He asserts that he did not receive a fair trial on his remaining charges because the YouTube video "served to paint [him] 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" (App.Br. 66).

A. The standard of review

"Plain errors are those that are evident, obvious and clear." *State v. Lucy*, 439 S.W.3d 284, 293 (Mo.App. E.D. 2014). "Plain error review is to be used sparingly, and an appellate court has total discretion whether or not to review an unpreserved matter for possible plain error." *Id.*

" '[U]nder Missouri law, plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative[.] ' "

State v. Baxter, 204 S.W.3d 650, 652 (Mo. 2006). “Manifest injustice is determined by the facts and circumstances of the case, and the defendant bears the burden of establishing manifest injustice.” *Id.*

B. A *sua sponte* mistrial or instruction was not warranted

As the record shows, the trial court granted Mr. Weinhaus’s motion for judgment of acquittal on the tampering charge (Tr. 544-545). Defense counsel made no request for a mistrial at that time (two of eight charges had just been disposed of), and there is nothing in the record to suggest that defense counsel would have *wanted* a mistrial at that time.

This Court should be “wary of claims that a trial court erred in failing to declare a mistrial *sua sponte* in a criminal case.” *State v. Weeks*, 982 S.W.2d 825, 838 n. 13 (Mo.App. S.D. 1998). “That is because generally, the double jeopardy clause of the Fifth Amendment to the Constitution of the United States bars retrial if a judge grants a mistrial in a criminal case without the defendant’s request or consent.” *Id.* (citing *State v. Tolliver*, 839 S.W.2d 296, 299 (Mo. 1992)). “Reversing convictions because trial courts fail to declare mistrials *sua sponte* allows defendants to remain mute when incidents unfavorable to them occur during trial, gamble on the verdict, then obtain a new trial if the verdict is adverse.” *Id.* “This puts trial courts in an untenable position and is contrary to the principle that an appellate court will not, on review, convict a trial court of error on an issue which was not

put before it to decide.” *Id.*

This Court should decline to convict the trial court of plain error for failing to declare a mistrial in this case, particularly where neither a mistrial nor an instruction to disregard the YouTube video was warranted.

The mere fact that the tampering charge had been dismissed did not render the YouTube video irrelevant evidence of uncharged crimes. As discussed above in Point III, the YouTube video had relevance far beyond the charge of judicial tampering.

As a general matter, “[e]vidence of uncharged crimes has a ‘legitimate tendency to prove the specific crime charged’ when the prosecution uses it to establish: ‘(1) motive; (2) intent; (3) the absence of mistake or accident; (4) 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; [or] (5) the identity of the person charged with the commission of the crime on trial.’” *State v. Young*, 367 S.W.3d 641, 645 (Mo.App. E.D. 2012) (quoting *State v. Bernard*, 849 S.W.2d 10, 13 (Mo. 1993)). “These exceptions, however, are not exhaustive, and uncharged crimes evidence may be admitted even if it does not fall within an enumerated exception so long as it is both logically and legally relevant.” *Id.* “For example, evidence of uncharged crimes may be admitted “to present a complete and coherent picture of the events that transpired.” ’” *Id.*

Here, the YouTube video was relevant to provide a complete and coherent picture of the investigation, to prove Mr. Weinhaus's intent to harm law enforcement officers (including Sergeant Folsom), and to provide context for the officers' actions in using force against Mr. Weinhaus. The YouTube video explained why Mr. Weinhaus was investigated in the first place, it explained why the officers went to Mr. Weinhaus's home, it explained why the officers seized Mr. Weinhaus's computers, it explained why the officers wanted to arrest Mr. Weinhaus before September 17, it tended to prove that Mr. Weinhaus had the purpose to cause harm to Sergeant Folsom when he started to draw his gun, and it was relevant on the issue of the officers' use of force against Mr. Weinhaus.

In short, it would have been incorrect to "instruct the jury to disregard the YouTube video and to not consider it during its deliberations" (App.Br. 67). The video was probative in several ways, and it was not plain error to permit the jurors to consider it. Point VII should be denied.

V.

The trial court did not abuse its discretion in admitting evidence of the two other guns Mr. Weinhaus had in his car on the day he attempted to assault Sergeant Folsom. (Responds to Point VIII of appellant's brief.)

In his eighth point, Mr. Weinhaus asserts that the trial court abused its discretion in admitting “evidence concerning other weapons and ammunition unrelated to the crime for which [Mr. Weinhaus] was being tried” (App.Br. 73). He asserts that the evidence had no probative value and “served only to color [Mr. Weinhaus’s] character as someone tending to possess dangerous weapons” (App.Br. 73).

A. The standard of review

“A trial court has considerable discretion in deciding whether to admit evidence at trial.” *State v. Howery*, 427 S.W.3d 236, 249-250 (Mo.App. E.D. 2014). This Court gives great deference to the trial court and reviews its ruling as to the admission of evidence only for an abuse of discretion. *Id.* at 250. This Court presumes that “the trial court’s finding is correct, and will reverse only when it makes a ruling that is ‘clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration.’” *Id.*

The Court will not reverse unless it also finds that “the trial court’s

error is ‘so prejudicial that it deprived the defendant of a fair trial.’” *Id.* “Error is not prejudicial unless there is a reasonable probability that it affected the outcome of the trial.” *Id.* “The burden is on the defendant to show both the error and the resulting prejudice.” *Id.*

B. The trial court properly admitted evidence of the guns

After the attempted assault, a search of Mr. Weinhaus’s car revealed that he had other weapons in his car, including a loaded .22 caliber pistol, and a loaded 12-gauge shotgun (Tr. 454-455). All of Mr. Weinhaus’s guns were legally owned (Tr. 480).

Mr. Weinhaus asserts that these guns “were not directly connected to the crime” (App.Br. 73). Along with general cases supporting the proposition, Mr. Weinhaus cites *State v. Holbert*, 416 S.W.2d 129 (Mo. 1967), *State v. Krebs*, 106 S.W.2d 428 (Mo. 1937), and *State v. Perry*, 689 S.W.2d 123 (Mo.App. W.D. 1985), as examples of cases where unrelated guns have resulted in reversal (App.Br. 75-76). But while the evidence in these cases lacked sufficient probative value (and, thus, resulted in reversal), these cases confirm (or at least acknowledge) that evidence of other guns can be admissible if the guns tend to prove a legitimate issue in the case. *See Holbert*, 416 S.W.2d at 132 (“If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime.”); *Krebs*, 106

S.W.2d at 60-61 (“The general rule does not apply where the evidence of another crime tends directly to prove guilt of the crime charged. Evidence which is relevant is not rendered inadmissible because it tends to prove him guilty of some other crime.”); *State v. Perry*, 689 S.W.2d 123 (Mo.App. W.D. 1985) (acknowledging a Supreme Court case that indicated “that ‘[a]rticles showing motive, or malice, or intent, or knowledge or preparation, may be received in evidence *if shown to be connected with the crime or the accused*’”).

Here, the trial court did not abuse its discretion, both because the guns were connected to the case, and because they legitimately tended to prove Mr. Weinhaus’s guilt of the charged assault. “A weapon found at or near the scene of a crime is usually held admissible if it ‘throws any relevant light upon any material matter in issue.’” *State v. Roller*, 31 S.W.3d 152, 159 (Mo.App. S.D. 2000) (quoting *State v. LaRette*, 648 S.W.2d 96, 103-104 (Mo. 1983)). “Generally, it may be said that any legally competent evidence which, when taken alone or in connection with other evidence, affords reasonable inferences upon the matter in issue, tends to prove or disprove a material or controlling issue or to defeat the rights asserted by one or the other of the parties, and sheds any light upon or touches the issues in such a way as to enable the jury to draw a logical inference with respect to the principal fact in issue is relevant and admissible.” *Id.*

Here, the fact that Mr. Weinhaus brought three loaded guns to his

meeting with the police was relevant on the issue of his intent to commit an assault. As discussed above in Point I, to prove that Mr. Weinhaus was guilty of attempted assault, the State had to prove that he had the purpose to cause serious physical injury to Sergeant Folsom. As such, the steps Mr. Weinhaus took in preparing for his meeting—particularly when viewed together with his actions at the meeting—were relevant on the issue of intent. It makes no difference that the officers did not see the guns; the relevance of the guns lay in what they revealed about Mr. Weinhaus’s mental state, namely, that he was prepared for, and intended, violence.

Additionally, defense counsel attempted to suggest that Mr. Weinhaus was not trained with weapons and would have had a difficult time drawing his weapon quickly (*see* Tr. 307-310, 339-340, 410, 514-515). As such, evidence that tended to prove that Mr. Weinhaus was familiar with firearms had further relevance in this case. *See State v. Roller*, 31 S.W.3d at 158-159 (evidence of the defendant’s level of skill in handling firearms was relevant on the issue of whether the defendant intentionally, as opposed to recklessly, shot the victim).

In sum, the guns found in Mr. Weinhaus’s car were connected to the charged offenses. Mr. Weinhaus brought those loaded guns with him to the meeting with the police, and they were relevant to prove Mr. Weinhaus’s mental state and familiarity with guns. Point VIII should be denied.

CONCLUSION

The Court should affirm Mr. Weinhaus's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that the attached brief complies with Rule 84.06(b) and Eastern District Rule 360 and contains 11,242 words, excluding the cover, the table of contents, the table of authorities, this certification, and the signature block, as counted by Microsoft Word; and that an electronic copy of this brief was sent through the Missouri eFiling System on this 14th day of November, 2014, to:

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