IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC 94324
	)	
MICHAEL E. AMICK,	)	
	)	
Appellant.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF
OREGON COUNTY, MISSOURI
THIRTY-SEVENTH JUDICIAL CIRCUIT
THE HONORABLE J. MAX PRICE, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant adopts the Jurisdictional Statement from his initial brief.

STATEMENT OF FACTS

Appellant adopts the Statement of Facts from his initial brief.

ARGUMENT

I. The trial court erred in replacing Juror No. 12 with an alternate juror after the jury had been deliberating for several hours

A. Preservation

Mr. Amick argued in his initial brief that substituting Juror No. 12 with an alternate juror after the jury had been deliberating for nearly six hours violated the plain language of section 494.485. (App. Sub. Brf. 43). The State argues that this claim is not preserved for appeal. (Rsp. Sub. Brf. 35). There are two key facts that go the heart of whether this issue is preserved for review. First, counsel for Mr. Amick objected numerous times before Juror No. 12 was replaced and called for a mistrial before the jury reached a verdict. (TR 1042, 1051-1052). Second, although counsel for Mr. Amick made it clear through his objections that the trial court was following a flawed procedure, he failed to mention section 494.485.

The State implicitly argues that because Mr. Amick did not specifically mention section 494.485, his claim on appeal *cannot* be preserved. (Rsp. Sub. Brf. 35). However, this fact should not end the matter. As stated in Mr. Amick's initial brief, a defendant must object "with sufficient specificity to apprise the trial court of the grounds for the objection." *State v. Gustin*, 826 S.W.2d 409, 413 (Mo. App. S.D. 1992), citing *State v. Stepter*, 794 S.W.2d 649, 655 (Mo. banc 1990).

The question of whether the trial court was sufficiently apprised of the grounds for the objection should be decided on a case-by-case basis. Here, once defense counsel objected to this procedure, the trial court was on notice that it was required to properly

follow the relevant Missouri statutes and constitutional provisions. The Western District Court of Appeals stated the following in *State v. Pointer*:

> Our rules for preservation of error for review are applied, not to enable the court to avoid the task of review, nor to make preservation of error difficult for the appellant, but, to enable the court—the trial court first, then the appellate court—to define the precise claim made by the defendant.

887 S.W.2d 652, 654 (Mo. App. W.D. 1994).

In the present case, the State is essentially asking this Court "to avoid the task of review." *Id.* Counsel for Mr. Amick agrees with the State that defendants should not be allowed to "sandbag" the trial court by waiting for a verdict before objecting. (Rsp. Sub. Brf. 41). In a recent opinion issued by the Western District Court of Appeals, for instance, the defendant learned while the jury was deliberating that the prosecutor had displayed an improper image of the defendant during closing argument. *State v. Walter*, Slip Opinion, WD7655, *36 (Mo. App. W.D., October 7, 2014)(transfer currently pending before this Court in SC94658). The Western District properly faulted defense counsel for waiting to object until the jury returned a guilty verdict despite knowing about the improper image earlier. *Id.*

Here, Mr. Amick objected to the procedure employed by the trial court, he moved for a mistrial, he later orally moved for a new trial, and then later included the claim of error in his written motion for new trial. Mr. Amick gave the trial court at least three opportunities to rule on the matter. He made it clear that if the court allowed the discharged alternate juror (Juror No. 14) to substitute for Juror No. 12, it would deprive

him of his rights to a fair trial and a trial before twelve fair and impartial jurors who had fully deliberated on that evidence. (Tr. 1052). The claim of error on appeal is that the trial court erred in overruling Mr. Amick's objections and requests for a mistrial when it substituted alternate Juror No. 14, who had left the courthouse for hours while the jury was deliberating, for Juror No. 12 after the jury deliberated for almost six hours without her. This issue *is* properly preserved for appellate review. Rule 29.11(d).

In his initial brief, Mr. Amick asked for this claim to be reviewed for plain error if this Court finds his claim is not preserved. (App. Sub. Brf. 41). The State argues that Mr. Amick did not seek plain error review in the Court of Appeals, and that plain error review is therefore not available in this Court. The State's position is without merit first because Rule 30.20 states that "[w]hether briefed or not, plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." It is clear from this rule that this Court may always review a claim for plain error, regardless of whether plain error was requested in the Court of Appeals.

The State's position is also without merit because Mr. Amick *did* request plain error review in the Court of Appeals. In Mr. Amick's reply brief in the Southern District Court of Appeals, Mr. Amick stated the following:

> Out of an abundance of caution, if this Court believes that despite [Mr. Amick's] several objections made on the record and the inclusion of the issue in his motion for new trial that the issue is not properly preserved for appeal, he requests this Court to review for plain error under ***Rule 30.20***.

(App. Reply Brf. 5, n.1). As discussed earlier, Mr. Amick's claim on appeal is preserved for review. If this Court determined otherwise, though, this Court should reject the State's position that by waiting until the reply brief to request plain error review in the Court of Appeals, an appellant has waived plain error review in this Court. *See State v. Anderson*, 259 S.W.3d 91, 94 (Mo. App. S.D. 2008)(analyzing a claim for plain error when plain error was first requested in a reply brief).

The State also claims that the specific issue of the trial court failing to instruct the jury to begin deliberations new was affirmatively waived by Mr. Amick. (Rsp. Sub. Brf. 39). The record is ambiguous. Although defense counsel agreed, upon prompting by the trial court, that the court should give the jury "oral instructions," something that is generally wise not to do, see, *State v. Cross*, 594 S.W.2d 609 (Mo. banc 1980), defense counsel certainly did not specifically tell the court or agree that he did not want to the court to instruct the jury that they should begin their deliberation anew. On transcript page 1053, during a lengthy statement covering thirty-two lines of transcript. (Tr. 1053-1054), the State did say, "[y]ou simply instruct them to start anew. Okay? And they start anew." (Tr. 1053).

Sixty-four lines of transcript later, the trial court, ambiguously, states, "[n]ow, gentlemen, I don't feel the Court should give additional instructions. The jury has their written instructions, and I think the Court would be getting way out giving oral instructions. I think you will agree with that, Mr. Woody [defense counsel]? Do you agree with that?" (Tr. 1056). Defense counsel agreed with that general proposition. (Tr. 1056). But the trial court then noted that the State had asked that the court bring the jury

"all in and start over again," the State responded that the jurors, other than the excused one, should be brought into court and told, "I'm not telling you what to do, but [the alternate juror] is now a juror, go deliberate," to which defense counsel replied, "I agree with that. I think we need to bring them in again, though, with [the alternate juror] present so that they can be here and then return to the jury room." (Tr. 1056-1057).

The State then opined that the new jury should be sworn and the court "tell them what they're going to do." (Tr. 1057), to which the court said, "[y]es, we can do that," and the State said that the new jury needs to feel "like they're a new group." (Tr. 1057). Defense counsel made no objection to this procedure. The court then did give the jury additional oral instructions, including that "I'm going to ask the clerk to swear all 12 of you again and send you back to *continue* your deliberation" (Tr. 1058-1059; emphasis added), which is the opposite of instructing the jury to begin its deliberation anew.

There is no waiver of this claim. The claim of error, again, is the erroneous denial of the request for mistrial and overruling of Mr. Amick's objection to the substitution of the alternate juror. The issue of whether or not the jury was instructed to start its deliberations anew only comes into play with whether Michael was prejudiced by the substitution of jurors after deliberation had already begun.

B. Prejudice

The State asserts section 494.485 is modeled after the former Federal Rule 24(c). (Rsp. Brf. 48). The State additionally cites *Alcade v. State of Wyoming*, 74 P.3d 1253, 1258 (Wyo. 2003) for the proposition that "the majority of state courts to consider the

issue have adopted the federal approach" of applying "a harmless error standard." (Rsp. Brf. 48). This paragraph in the State's substitute brief leaves the impression that the Wyoming Supreme Court would have affirmed Mr. Amick's conviction using the federal standard. When reading the actual case, though, it is clear that this is not true.

In *Alcalde*, the alternate juror was dismissed when deliberations began. *Id.* at 1256. The jury deliberated the rest of the day, but they were sent home when they failed to reach a verdict. *Id.* at 1257. The next morning, a juror sought to be excused from the panel for medical reasons. *Id.* After consulting with the juror's doctor, the court dismissed the juror and replaced him over objection with the alternate juror dismissed the previous day. *Id.* The alternate juror was questioned as to whether he discussed the case with anyone, and the trial court was satisfied that he had not. *Id.* The jury reached a verdict approximately fifty minutes after the substitution took place. *Id.*

The Wyoming Supreme Court stated that "federal courts adopted the view that the substitution of an alternate juror during mid-deliberations violated the plain language of" Federal Rule 24(c). *Id.* at 1257-58. The Wyoming Supreme Court then stated that federal courts look to the following factors to determine if violating this rule caused prejudice: 1) the length of the jury's deliberations before and after substitution of the alternate; 2) the district court's instructions to the jury upon substitution charging the jury to begin its deliberations anew; and 3) whether or not the trial court had ensured that the alternate juror had not discussed the case with anyone nor been exposed to extrinsic information about the case in the interim between his discharge and the time of substitution. *Id.* at

1258, citing *United States v. Quiroz-Cortez*, 960 F.2d 418, 420 (5th Cir. 1992); *United State v. Guevara*, 823 F.2d 446, 448 (11th Cir. 1987).

The Wyoming Supreme Court determined that the substitution of an alternate juror once deliberations have commenced "raises a presumption of prejudice to a defendant that can, however, be rebutted upon a showing that adequate procedural safeguards were undertaking by the trial court to ensure that the defendant received a fair trial." *Id.* In *Alcalde*, the Court determined that "adequate procedural safeguards were not taken." *Id.* at 1259. The Court pointed that the "[t]he reconstituted jury was not instructed to begin deliberations anew. Nor was there an inquiry as to whether or not the remaining regular jurors could set aside their previous deliberations and any opinions formed during those deliberations." *Id.* Significantly, the Court also held the following:

> The potential for prejudice in this situation is evidenced by the fact that the original jury deliberated for the previous afternoon without reaching a verdict but managed to reach a verdict with the participation of the alternate juror in less than an hour. Accordingly, we must reverse Alcalde's conviction and remand for a possible new trial.

Id.

In the present case, the court did not instruct the jury to deliberate anew, and in fact did the opposite and told the jury to "*continue* your deliberation." (TR 1059-1060). The trial court also did not question the remaining regular jurors. Finally, as stated in Mr. Amick's initial brief, the first jury deliberated for five and a half hours, then the substitution of jurors was made, and the verdict by the newly constituted jury was

rendered in approximately ten minutes.[1] (TR 1051, 1076). Under *Alcalde* (which the State implicitly urges this Court to follow), Mr. Amick was prejudiced by the substitution of Juror No. 12, and his conviction should be reversed.

The State cites no similar case that has been affirmed on appeal. Instead, the State relies on a series of inapposite cases to argue that Mr. Amick suffered no prejudice.

State v. Friend, for instance, is inapposite because it concerned the manner in which the jury panel was selected and had nothing to do with alternate jurors. 607 S.W.2d 902 (Mo. App. S.D. 1980) (Rsp. Sub. Brf. 45).

The State cites *State v. Williams*, 659 S.W.2d 298 (Mo. App. E.D. 1983) (Rsp. Sub. Brf. 45, 55). But in that case, the court found no prejudice because the alternate was not shown to have been tainted by any out-of-court conversations and because although the jurors had "retired," they had not retired to consider their verdict, and thus the defendant still had the benefit of the full deliberation of twelve qualified and impartial jurors. In contrast, in Mr. Amick's case, the jury had been deliberating for about five and

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[1] The State accused counsel for Mr. Amick of citing to "nothing in the record to demonstrate the length of the deliberations except the statement of his own attorneys." (Rsp. Sub. Brf. 62). The State overlooks the lengthy footnote found on pages thirty-eight and thirty-nine of Mr. Amick's substitute brief. The facts cited in the footnote show that based on the number of significant activities that took place between 6:00 p.m. and 7:05 p.m., the jury's deliberation after the substitution must have been very short.

a half hours before the alternate was allowed to replace one of the jurors (Tr. 1051, 1075).

Williams v. State is inapposite because it involved seating an alternate juror during the trial instead of during deliberation. 558 S.W.2d 671 (Mo. App. K.C.D. 1977)(Rsp. Sub. Brf. 56).

In *State v. Reynolds*, the opinion is unclear, but it appears that the alternate juror replaced a regular jury member before deliberations, and thus that case does not control ("An alternate juror was selected, and during the trial one of the members of the regular jury was excused, and the alternate juror participated in the determination of the verdict."). 422 S.W.2d 278, 284 (Mo. 1967)(Rsp. Sub. Brf. 46-47, 56).

The cases from other jurisdictions cited by the State are similarly inapposite. In *United States v. Guevara*, for instance, the parties agreed that an alternate juror would be impaneled to continue deliberations after a juror became ill, the trial judge questioned the alternate to make sure that he had not made up his mind about the case, all defendants accepted the alternate, each defendant, including Guevara, demanded that the alternate juror be impaneled, the trial court polled each of the remaining regular jurors, who all agreed that they could begin deliberations anew, and the newly constituted jury deliberated for more than four and one-half days before announcing they were deadlocked as to some counts, but the jury returned guilty verdicts on seven counts and not guilty on six others. 823 F.2d 446, 447 (11th Cir. 1987)(Rsp. Sub. Brf. 58).

Respondent cites to *United States v. Evans*, 635 F.2d 1124 (4th Cir. 1980) (Rsp. Sub. Brf. 49-50). But in that case, the judge told the defendant that he had the alternative

of insisting on a mistrial or of electing to proceed with the eleven remaining jurors, and it was the defendant who made clear that he preferred an alternative which would permit the case to continue, and that he did not want a mistrial. *Id.* at 1126. The defendant expressed himself unequivocally in favor of proceeding with a twelve member jury comprised of the original eleven, with the first alternate added. *Id.* at 1127. That the court did what the defendant requested makes it a totally different scenario than Mr. Amick's case, and involves principles of waiver. Also, unlike the present case, the alternate juror in that case did not discuss the case with anyone. *Id.*

United States v. Phillips has these distinguishing facts: the alternate juror was separately sequestered and did not leave the courthouse, the alternate assured the court that he had not discussed the case with anyone and assured the court he would work with the others from a clean slate, each juror assured the court that they could and would wipe form their minds the deliberations of the two previous days and start fresh and anew, the court instructed the jury on its duty to start its deliberations anew, and the newly constructed jury deliberated for six days – not mere minutes – until reaching a verdict. 664 F.2d 971, 990-991 (5th Cir. Unit B 1981) (Rsp. Sub. Brf. 50, 52, 58).

United States v. Acevedo involved a totally different situation wherein two alternatives were inadvertently allowed to deliberate with the other twelve jurors, all fourteen found the defendant guilty, and when the trial court found out that the alternates were allowed to deliberate, the court instructed the twelve regular jurors to commence deliberations as if anew, which they did and again found the defendant guilty. 141 F.3d 1421, 1422-23 (11th Cir. 1998) (Rsp. Sub. Brf. 50-51).

In *United States v. Allison* "[n]ever, throughout all of the proceedings in chambers, in open court, and after the verdict was rendered, did any of the defendants or their attorneys voice the slightest objection to the jury procedure." 481 F.2d 468, 470 (5th Cir. 1973) (Rsp. Sub. Brf. 50).[2] In that case, the parties stipulated and urged upon the court that the alternate be allowed to sit-in on the jury deliberations, and the alternate was expressly instructed not to participate in any way, not to say anything, not to vote, or otherwise do anything except be available in case the court found it necessary to substitute him for the ill juror, which never became necessary. *Id.* at 472. Even then, the Allison court remanded for a hearing to inquire whether the alternate participated in any way in the deliberations, and if so, then the defendant might be entitled to a new trial. *Id.*

United States v. Olano involved the very different situation wherein two alternates were allowed to attend jury deliberation but were instructed to not participate without objection by defense counsel. 507 U.S. 725, 729 (1993)(Rsp. Sub. Brf. 51-52).

Finally, *United States v. Hillard,* is distinguishable because in that case, the defendant would not agree to a continuance to allow the ill juror to possible get better[3],

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[2] The State cites this case as *United States v. Allison,* 487 F.2d 339 (5th Cir. 1973). The citation information in the present brief refers to a "supplementing opinion" filed by the Fifth Circuit Court of Appeals.

[3] In the present case, one of defense counsel's suggestions was to have the jury reconvene after the Fourth of July weekend, so that Juror 12 possibly could be ready to continue deliberation (Tr. 1052-1053).

the alternates remained in attendance, although kept separated from the regular jurors except to hear testimony reread or to receive additional jury instructions, the trial court instructed the jury to begin their deliberations "from scratch," and the jury deliberated an additional two days. 701 F.2d 1052, 1055-1056, 1058-1059 (2nd Cir. 1983)(Rsp. Sub. Brf. 58).

It is clear from the cases cited in Mr. Amick's initial brief that he was prejudiced by the substitution of Juror No. 12 with an alternate juror. No case cited by the State refutes this. This Court should therefore reverse Mr. Amick's conviction and remand for a new and fair trial.

C. Mr. Amick was denied his right to a unanimous verdict of 12 jurors

Respondent cites to *State v. Hadley*, 815 S.W.2d 422, 425 (Mo. banc 1991), for the proposition that Missouri's constitutional right to trial by jury in a criminal proceeding includes: (1) twelve impartial jurors, (2) a jury summoned from the venue in which the crime was allegedly committed, (3) the jury's unanimous concurrence in the verdict, and (4) the juror's freedom to act in accord with their own judgment (Rsp. Sub. Brf. 60). The State then argues that Mr. Amick does not explain how any of these four requirements are absent in this case (Rsp. Brf. 60).

In *People v. Collins*, 17 Cal.3d 687, 552 P.2d 742, 131 Cal.Rptr. 782 (1976), cited in the *Phillips* case, *supra*, the California Supreme Court held:

> Petitioner contends that the foregoing elements of the right to a trial by jury are part of the broader right which additionally requires each juror to have engaged in

> all of the jury's deliberations. We agree. The requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them. It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11. Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint. The result is a balance easily upset if a new juror enters the decision-making process after the 11 others have commenced deliberations. The elements of number and unanimity combine to form an essential element of unity in the verdict. By this we mean that a defendant may not be convicted except by 12 jurors who have heard all the evidence and argument and who together have deliberated to unanimity.

Collins, 131 Cal.Rptr. at 786; 552 P.2d at 746.

Because Juror No. 14 only deliberated approximately ten minutes of about six hours, Michael did not really get the jury of twelve to which he was entitled; he did not truly get twelve persons who reached a unanimous verdict.

In Michael's case, the first jury deliberated for almost six hours, then the substitution of jurors was made, and the verdict by the newly constituted jury was rendered in ten minutes or less. The alternate had not been retained during deliberations, rather had been sent home where she talked to three people about the case, although not

the "facts" of it (Tr. 1044, 1048).[4] When initially discharged as an alternate, this juror had told the court that she was "pleased to be dismissed." (Tr. 1025). When she was told that she would have to drive back to the courthouse, she told the court, "this is my worst nightmare." (Tr. 1045). After the verdict, when the alternate juror was asked whether she had sufficient time to go over all the instruction, the evidence, and discuss it fully with the other eleven jurors, she stated, "I *pretty much* remembered everything that was going on and I really knew how I felt when I came back." (Tr. 1064-1065). The trial court's measures here were not sufficient to protect Mr. Amick's right to trial by jury.

Mr. Amick was denied the full panel of the twelve jurors to which he was entitled, with full deliberation of the same twelve jurors throughout the case as required under the constitution and section 494.485. The State has not proven the error harmless, and the trial court did not take sufficient precautions to avoid prejudice. Mr. Amick must receive a new trial.

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[4] The fact that she did not talk about "the facts" is not sufficient. *See MAI-CR3d 300.04* (LF 183-184), where at first recess or adjournment the jury is instructed, in part: "Until this case is given to you to decide, you must not discuss any subject connected with the trial among yourselves, or form or express any opinion about it, and, until you are discharged as jurors, you must not talk with others about the case, or permit them to discuss it with you or in your hearing. You should not . . . use any other form of communication regarding the case or anyone involved in the case until the trial has ended and you have been discharged as a juror." (LF 183).

II. The trial court erred in not *sua sponte* declaring a mistrial after the Assistant Attorney General accused defense counsel and Mr. Amick's family of "creating a fraud in this court."

The State asserts that counsel for Mr. Amick complains because trial counsel's "feelings were hurt." (Rsp. Sub. Brf. 79). The State is attempting to downplay the significance of accusing an attorney of knowingly committing a fraud in front of the jury. Obviously defense counsel's "feelings" were not discussed in Mr. Amick's initial brief. Instead, as this Court stated in *State v. Spencer*, comments that convey the idea that defense counsel has acted improperly and tend to degree the defense are "highly improper." 307 S.W.2d 440, 447 (Mo. 1957).

The State relies heavily on the fact that Mr. Amick's family had refused to voluntarily produce the truck. (Rsp. Sub. Brf. 68, 73, 77). The State ignores, however, that it neglected to file any motion under Rule 25.05, Rule 25.06, or otherwise to have the family or defense counsel produce the truck. The fact that Mr. Amick's family did not comply with a simple request from the Sheriff does not mean that they were committing a fraud on the court. Counsel for Mr. Amick made this same point at trial, stating first during a bench conference and then during closing argument that the State had failed to apply for a court order and require the Defendant or his attorneys to produce the truck. (TR 952, 1014).

Furthermore, it was clear that the family moved the truck to Arkansas to keep Mr. Mayberry from seeing it again and lying to make his description fit the actual description of the truck. In the recorded conversation between Mr. Amick and his sister, his sister

stated, for instance, "I know that the alleged eye witness said that he'd seen that truck but twice has failed to give an accurate description of that truck." (Ex. 43, 14:15:30). Later she stated, "what I find very funny is that you're standing on my doorstep two and a half years after the fact because the State needs pictures of that truck so their eye witness can study them and maybe get his description right the third or the fourth time." (Ex. 43, 14:18:55). Later, she stated that the truck needed to disappear because "if they can't . . . identity it with an accurate statement . . . then that sucker needs to disappear . . . because that way it didn't, it wasn't sitting around for God and everybody to be able to study it." (Ex. 43, 14:23).

The State asserted during closing argument that Mr. Amick's sister "has it all wrong. We're not wanting photos of the truck to go show our witness to get a story right." (TR 998). Even if Mr. Amick's sister was wrong about the State's intentions, she was clearly stating her true feelings during the phone call. Furthermore, even if her suspicions were incorrect, they were certainly not unreasonable. She was not trying to commit a fraud upon the court. Instead, ironically, she was attempting to prevent *Mr. Mayberry* from committing a fraud upon the court.

There was no basis for accusing Mr. Amick, his family, and his defense attorney of purposefully committing fraud upon the court. Defense counsel was never caught with his "pants down" as alleged by the State. (TR 1022). Mr. Amick respectfully requests that this Court reverse his convictions and remand this case for a new and fair trial.

III. The trial court plainly erred by injecting itself in the proceeding and commenting that Mr. Mayberry had "answered consistently each time" and had "established he can describe the vehicle."

The State argues that this Court should reject this claim because "[a] party cannot fail to request relief, gamble on the verdict, and then, if adverse, request relief for the first time on appeal." (Rsp. Sub. Brf. 82), citing *State v. Bennett*, 201 S.W.3d 86, 88 (Mo. App. W.D. 2006). However, it is clear that counsel for Mr. Amick was not gambling on the verdict here.

Counsel for Mr. Amick first requested a mistrial on page 277 of the transcript. Counsel for Mr. Amick next asked for a mistrial on page 361 of the transcript. Next, counsel for Mr. Amick asked for a mistrial on page 777 of the transcript. Counsel for Mr. Amick again asked for a mistrial on page 805 of the transcript. Next, counsel for Mr. Amick asked for a mistrial on pages 954, 960, and 979 of the transcript. Finally, counsel for Mr. Amick asked for a mistrial during jury deliberation on pages 1051 and 1052 of the transcript.

Each of these requests for a mistrial was made before the jury reached a verdict. Counsel for Mr. Amick therefore was not gambling on the verdict. This claim should be reviewed for plain error.

The State argues that "in context," each of the comments made by the trial court during Jake Mayberry's testimony was proper. (Rsp. Sub. Brf. 88-89). The State claims that the trial court stating "[h]e's answered consistently each time so he's not

rehabilitating" was proper because the court "was merely ruling on Defendant's objection that the prosecutor was trying to rehabilitate his own witness . . ." (Rsp. Sub. Brf. 87).

This very well may have been the trial court's intent, but there was absolutely no reason for the trial court to state that Mr. Mayberry had "answered consistently each time." This comment inappropriately bolstered Mr. Mayberry's testimony and made it seem as though the trial court was supporting Mr. Mayberry's credibility. *State v. Bearden*, 748 S.W.2d 753, 756 (Mo. App. E.D. 1988).

Next, the State claims that the trial court stating "[h]e's established he can describe the vehicle" was made "in response to a defense request after his objection was sustained that the prosecutor be told to move on from that topic." (Rsp. Sub. Brf. 87). The State further claims that the court was merely explaining "the bases of its ruling." (Rsp. Sub. Brf. 87). Counsel for Mr. Amick fails to grasp how stating "[h]e's established he can describe the vehicle" was necessary to explain the trial court's ruling. Instead, the trial court was inappropriately summing up and commenting on the evidence. *See State v. Lomack*, 570 S.W.2d 711, 713 (Mo. App. St.L.D. 1978)("It is fundamental that the trial court in a criminal case shall not sum up or comment on the evidence").

This Court recently reiterated in *State v. Jackson* the importance of the trial court maintaining neutrality. 433 S.W.3d 390, 401 (Mo. banc 2014). This Court stated, "[w]e have held that in criminal cases 'no court in Missouri has the power or right to direct a verdict of guilty in the face of our constitutional guaranty of trial by jury, our statute forbidding the judge to sum up on comment on the evidence." *Id.*, quoting *State v. Shelby*, 64 S.W.2d 269, 275 (Mo. banc 1933); *See also* Rule 27.06 ("In the trial of any

criminal case the court shall not, in the presence of the jury, sum up or comment on the evidence"); Section 546.380.

When both comments by the trial court in the present case are considered together, the jury would have been under the impression that the trial court was supporting both the State's case and the credibility of Mr. Mayberry. These comments were therefore "inherently prejudicial." *Bearden*, 748 S.W.2d at 756. As stated in Mr. Amick's brief, Jake Mayberry's testimony that he saw Mr. Amick's truck at the victim's home minutes before the fire started was crucial to the State's case. (Tr. 297, 312). The State's case was dependent upon Mr. Mayberry correctly identifying Mr. Amick's truck; without this identification, the evidence would have been insufficient to support Mr. Amick's convictions since there was no other evidence placing him at the scene. In fact, if the truck Mr. Mayberry saw was *not* Mr. Amick's truck, no jury would have convicted Mr. Amick of these crimes.

Mr. Amick's convictions must be reversed and the cause remanded for a new trial.

CONCLUSION

A new trial is required because an alternate juror was allowed to join the jury after she had been excused, left the courthouse for hours, talked to others about the case, and only deliberated for approximately ten minutes of the total six hours of deliberation, even though under § 494.485, alternate jurors must be *discharged* after the jury retires to consider its verdict and the statute only allows the replacement of a juror with an alternate juror "*prior to the time the jury retires to consider its verdict."* (Point I).

Mr. Amick is entitled to a new trial because the state, without evidence to support the argument, accused defense counsel and Mr. Amick's family of "creating a fraud in this court," being "corrupt and deceitful," "tampering with evidence," committing "a crime," "hindering prosecution," engaging in "fraudulent behavior, "misleading" the jury, and not telling the jury "the full truth." (Point II).

Mr. Amick is entitled to a new trial because the trial court abandoned its duty of neutrality and injected itself in the proceeding when it commented in the jury's presence that the state's only eyewitness (Jake Mayberry) had "answered consistently each time" he had been asked to describe the truck he saw at the victim's home, which was the sole means of identification, and that Mayberry had "established he can describe the vehicle." (Point III).

Respectfully submitted,

/s/ Samuel Buffaloe

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Certificate of Compliance and Service

I, Samuel Buffaloe, 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, the signature block, and this certificate of compliance and service, the reply brief contains 6,080 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

On this 31st day of December, 2014, electronic copies of Appellant's Substitute Reply Brief were placed for delivery through the Missouri e-Filing System to Gregory Barnes, Assistant Attorney General, at greg.barnes@ago.mo.gov.

/s/ Samuel Buffaloe
_____
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