On Point News

EVANS PARTNERSHIP
ATTORNEYS & COUNSELORS ST. LOUIS

STEPHEN B. EVANS
KATHERINE R. SCHIERHOLZ
OF COUNSEL
STEPHEN G. EVANS
MEMBER OF ILLINOIS BAR

FILED
AUG 5 2010
MARIANO V [illegible] ZA
CLERK, CIRCUIT COURT
BY [illegible] DEPUTY

August 3, 2010

The Honorable Mariano Favazza
Clerk of the St. Louis City Circuit Court
St. Louis City Courthouse
ATTN: Mary, Division 7, Courtroom Clerk
10 N. Tucker
St. Louis, MO 63101

Re: **Jane Doe v. Mantra Films, Inc., et al.**
City of St. Louis Case No. 0822-CC01561

Dear Mr. Favazza:

Please find enclosed the following pleading in the above referenced cause:

PLAINTIFF'S MOTION FOR NEW TRIAL

Pursuant to this Certificate of Service, copies of this pleading have been forwarded to counsel of record.

Thank you for your assistance. If you have any questions, please contact me.

Very truly yours,

EVANS PARTNERSHIP

Stephen B. Evans
SBE/keh
Enclosures
cc: David Dalton

2245 South [illegible] Blvd., Ste. [illegible] St. Louis, Missouri [illegible] Telephone [illegible] Facsimile [illegible] [illegible]

On Point News

IN THE CIRCUIT COURT FOR THE CITY OF ST. LOUIS
TWENTY SECOND JUDICIAL CIRCUIT
STATE OF MISSOURI

JANE DOE,	)	
Plaintiff,	)	Case No. 0822-CC01561
v.	)	Div. No. 7
MANTRA FILMS, INC. ET AL.,	)	
Defendants.	)	

FILED
AUG 5 2010
MARIANO V. FAVAZZA
CLERK, CIRCUIT COURT
BY ______ DEPUTY

PLAINTIFF'S MOTION FOR NEW TRIAL

COMES NOW Plaintiff Jane Doe, and, pursuant to Missouri Supreme Court Rule 78.01 and Rev. Stat. Mo. Sec. 510.330, seeks a new trial on the following grounds:

1. On July 22, 2010 the jury found for Plaintiff on Count II of her Third Amended Petition for Damages but awarded her no damages thereon, and found for the Defendants on Counts I, III, IV, and V of Plaintiff's Third Amended Petition for Damages against Defendants Mantra Films, Inc. and MRA Holdings, LLC.

2. The verdicts on Counts I, III, IV, and V (Negligence, Unreasonable Publicity, False Light, and Wrongful Commercial Appropriation of Plaintiff's Image, respectively) should be set aside by the Court because they are against the weight of the evidence, and granting a new trial would prevent a miscarriage of justice.

3. Based on public comments made by the jury foreperson following the verdicts, the jury found for the Defendants on Counts I, III, IV, and V because they believed the Plaintiff had impliedly consented to the Defendants filming her bare breasts and placing those images of her bare breasts on the Sorority Orgy DVDs produced and sold by the Defendants.

4. Based on the above public comments, the jury determined that this implied consent occurred when Plaintiff was dancing in front of one of the Defendants' cameramen at Rum Jungle, just prior to when Crystal McDaniel Mincemeyer pulled down her shirt, exposing her breasts to the cameraman.

I. The Evidence Presented at Trial Did Not Allow a Jury to Find that Plaintiff Impliedly Consented to the Defendants Placing images of her Bare Breasts on a DVD Sold to the Public and Containing Pornographic Images.

5. The jury's determination that the Plaintiff consented to images of her bare breasts being placed on the Sorority Orgy DVDs was not supported by the evidence presented at trial.

6. The Defendants were negligent in placing the video footage of the Plaintiff in the Sorority Orgy DVD series when it was clear from her actions and words that the Plaintiff did not consent to having images of her bare breasts published on a video series sold to the public.

7. The placement of the Plaintiff's photos and image in the Sorority Orgy DVDs by the Defendants damaged the Plaintiff because it placed her private image on a DVD series that contains hard core pornographic images.[1]

8. The damage to the Plaintiff's image is results from being placed on the Sorority Orgy DVDs, which caused and will cause the public to believe the Plaintiff to be a person who knowingly consented to bare her breasts, and to be put on a pornographic film such as the Sorority Orgy DVDs.

9. There was no implied consent by the Plaintiff to the placement of her image in the Sorority Orgy DVDS because the hard core pornographic scenes that are

[1] Merriam Webster defines hard core porn as containing explicit descriptions of sex acts or scenes of actual sex acts.

On Point News

depicted on the Sorority Orgy DVDs were not filmed inside Rum Jungle (and did not occur in Rum Jungle) on the night that the Plaintiff was photographed, therefore the Plaintiff was unaware of the presence of such footage in the Sorority Orgy DVD series.

10. The jury's determination that the Plaintiff gave her implied consent to images of her bare breasts being placed on the Sorority Orgy DVDs is therefore against the manifest weight of the evidence.

11. Implied consent can be inferred from surrounding circumstances that indicate that the party *knowingly agreed* to the act/conduct of the other party. *State v. Martinelli, 972 S.W.2d 424 (Mo. App. ED 1998).*

12. There was no evidence placed in the record upon which it could be inferred that the Plaintiff knowingly agreed to have images of her bare breasts placed on a DVD with hard core pornographic images and scenes.

13. Through their Answers and Admissions, Defendants admitted, that:

(a) Plaintiff did not consent either orally or in writing to be filmed while her breasts were exposed; and

(b) Plaintiff did not consent either orally or in writing for her images and photos to be used in the Sorority Orgy DVDs;

(c) Defendants' policies prohibit their employees and contractors from pulling women's tops down without consent at Girls Gone Wild events. And,

(d) Plaintiff's image was placed in DVDs that were produced, marketed, and sold by Mantra Films, Inc., marketed under the "Girls Gone Wild" name, entitled "Sorority Girls Orgy 1," "Sorority Girls Orgy 2," "Sorority Girls Orgy 3," and "Sorority Girls Orgy 4" (Sorority DVDs) for profit.

14. The surrounding circumstances relevant and material to the issue of implied consent by the Plaintiff that are contained in the record are as follows:

On Point News

(a) The Plaintiff testified that the cameraman at Rum Jungle in May of 2004 on the night that she was filmed did not have any identification about his person identifying him as a photographer for the Defendants or for the Defendants' trade name, Girls Gone Wild.

(b) At the time of the incident, the Plaintiff testified that she was unaware of the hard core pornographic nature of the Girls Gone Wild video series.

(b) The Plaintiff further testified that she did not learn that her images were on the Sorority Orgy DVD until September of 2007.

(c) Thereafter, the Plaintiff filed her lawsuit against the Defendants in April of 2008 after having retained counsel to represent her.

(d) The Plaintiff testified that it was not until January of 2009 that the Plaintiff learned that she was also on Sorority Orgy volumes 2, 3 and 4.

(e) The Plaintiff testified that she did not see any "area release" allegedly posted by Defendants at Rum Jungle on the night of the incident.

(f) That while being filmed at Rum Jungle in May of 2004, the Plaintiff clearly shakes her head and repeatedly says "no" to requests to bare her breasts.

(g) That after her shirt is pulled down by Crystal McDaniel Minceemeyer, the Plaintiff clearly attempts to cover her exposed breasts, and turns away from the cameraman.

(h) That on outtake footage, audio of the Plaintiff can be heard where P repeatedly says no to being filmed by the cameraman.

15. The conduct of the Plaintiff on the night in question, as presented to the jury, consisted of the Plaintiff dancing in Rum Jungle, looking at the camera, smiling at the camera, shaking her chest at the camera, dancing before the camera, repeatedly saying "No" when asked to "flash" the cameraman, and having her top pulled down by another individual after she repeatedly said "No" to requests to bare her breasts.

16. The Defendants thereafter edited out the parts of the footage where Plaintiff is repeatedly saying "No" when asked to "flash" the cameraman, as well as the part where Plaintiff's top is pulled down by another individual despite repeated refusals to bare her breasts for the camera.

17. The effect of the above mentioned editing depicts Plaintiff as having willingly exposed her breasts to the cameraman of her own volition, a result that is both entirely inaccurate and substantively misleading.

18. There is no competent evidence from which the jury could have reasonably inferred that by dancing in front of the camera, the Plaintiff "knowingly agreed" to have images of her bare breasts placed on the Sorority Orgy DVDs that contain hard core pornographic images and scenes.

19. The record does not give rise to an inference that the Plaintiff was given any notice by the cameraman (or anyone else present at Rum Jungle on the night in question) that her images and photo were going to be placed by Defendants on DVDs containing hard core pornographic scenes and images. There is nothing in the record showing that the Plaintiff had notice that simply by being inside Rum Jungle and dancing for a cameraman, that images of her bare breasts would be placed on a DVD for public sale containing hard core pornographic scenes.

20. Absent such notice, there can be no finding that the Plaintiff gave her implied consent for images of her bare breasts to be on such a DVD. (Deficient notice will almost always defeat a claim of implied consent. *State v. Martinelli*, 972 S.W.2d 424, 431(Mo. Ct. App. E.D. 1998)(quoting *United States v. Lanoue*, 71 F.3d 966, 981 (1st Cir. 1995)))

On Point News

21. This is particularly so when the Plaintiff can be seen repeatedly saying "No" to "flashing" the cameraman at Rum Jungle. By saying "No" to "flashing," it necessarily follows that the Plaintiff also said "No" to having images of her bare breasts placed on a DVD containing hard core pornographic images and scenes.

22. A conclusion otherwise is illogical and unreasonable.The jury's determination that the Plaintiff impliedly consented was not based on the evidence presented at trial.

23. Further, the Defendants can not be allowed to bootstrap their activity from the proscribed to the permitted by merely creating a generalized suspicion that the Plaintiff's image was being captured on film for Defendants' use at some future point under some pretense that "she knew or should have known" when the hard core pornographic images and scenes are substantively distinct from Plaintiff's conduct and the other activities taking place at Rum Jungle on the night in questions.

24. Allowing such bootstrapping defeats the purpose behind the common law consent requirement. *See Martinelli*, 972 S.W.2d at 431, rejecting such a bootstrapping argument under Missouri law. *Id.*

II. That an Area Release was Posted at Rum Jungle on the Night in Question was not Established by Sufficient Foundation, and Therefore Should Not Have Been Admitted Into Evidence.

25. In addition, the Area Release should not have been allowed into evidence because the Defendants failed to lay a sufficient foundation for its admission, in that:

(a) The Defendants admitted that their file for the event at Rum Jungle in May of 2004 could not be located and that they had very little information pertaining to that event.

On Point News

(b) The Defendants produced what they identified as an "Area Release" which the Defendants claim was posted at events similar to the one held in Rum Jungle, but the Defendants could not produce a copy of the specific notice which was allegedly placed at the Rum Jungle event in May of 2004.

(c) The Area Release produced by the Defendants was photographed as it was posted on a wall next to a sign that read "Rick's" instead of "Rum Jungle."

(c) The Defendants produced no credible testimony that the Area Release was posted at Rum Jungle on the night in question in an area that the Plaintiff would have seen it.

(d) Crystal McDaniel Mincemeyer testified that she recalled seeing "Area Releases" at a Girls Gone Wild event at Rum Jungle. However, she also testified that this particular event was held during the winter time because she remembers it was cold outside. This testimony is inconsistent with the admissions of the Defendants wherein they admitted that the event at Rum Jungle where the Plaintiff was filmed occurred in May of 2004.

(e) Ms. Mincemeyer also testified that there were six to seven cameramen at the event at Rum Jungle when she recalled seeing the Area Release. This testimony is inconsistent with the admissions of the Defendants wherein they admitted that only one cameraman was present at the May 2004 event at Rum Jungle.

(f) Ms. Mincemeyer further testified that she had consumed five to six beers in the hours prior to her arrival at the Girls Gone Wild event at Rum Jungle in May of 2004, and was "buzzed," raising the issue of whether she was competent to recall anything accurately because she was under the influence of alcohol.

26. Due to the above inconsistencies and her admitted intoxication, Ms. Mincemeyer's testimony regarding her memory of the night in question is clearly unreliable and should be given little, if any weight, as foundation for the admission of the Area Release.

27. Furthermore, the Defendants presented no evidence that the Plaintiff saw the Area Release before entering or while inside Rum Jungle in May of 2004. The

Plaintiff testified that she did not see the Area Release before entering Rum Jungle through a side door, nor did she see it during the time she was inside Rum Jungle.

28. For the above reasons, there was an insufficient basis for the admission of the Area Release at trial.

III. Missouri Law Supports the Grant of a New Trial in the Above Case.

29. Missouri courts overturn judgments when they are against the weight of the evidence. The weight of the evidence is its "weight in probative value, not the quantity or amount of evidence. The weight of the evidence is not determined by mathematics, but on its effect in inducing belief." *State v. Carter*, 125 S.W.3d 377, 381 (Mo. Ct. App. W.D. 2004).

30. Though a jury is entitled to draw a reasonable inference from facts in the record, a reasonable inference is a logical *a priori* conclusion[2] drawn by reason from proven facts. A reasonable inference is more than mere surmise or conjecture. A reasonable inference is not a possibility that something could have happened or the probability that something may have occurred. *State v. Carter*, 125 S.W.3d 377, 381(Mo. Ct. App. W.D. 2004).

31. Even if Plaintiff impliedly consented to being filmed by a cameraman as she was dancing in Rum Jungle, that consent was limited to that encounter and that activity of the Plaintiff. It did not extend to allowing the Defendants to place Plaintiff's images and photos on a hard core pornographic DVD.

32. Therefore, even if there was an implied consent to certain activity, the Defendants exceeded the scope of that consent in that the Defendants used images of Plaintiff's bare breasts clearly obtained against her will in a pornographic film titled

[2] An *a priori* conclusion is only valid if the premise upon which it is based can be proven or is in fact true.

On Point News

"Sorority Orgy." The Plaintiff testified that such a use was never contemplated by her, thus the Plaintiff could not impliedly consent to something she was not aware of.

33. Moreover, the fact that Plaintiff may have given her implied consent to be filmed on the night in question does not forfeit for the Defendants' profit so much of Plaintiff's privacy as she has not relinquished. The Defendants had no right to commercially appropriate images of Plaintiff's bare breasts merely because Plaintiff may have, through her conduct, consented to being filmed while dancing that evening in Rum Jungle.

34. The law provides a cause of action to plaintiffs against defendants who exceed the consent expressly or impliedly given – consent must be as expansive or inclusive as the appropriation complained of.

35. Here, Defendants use of Plaintiff's image in a sexually explicit adult pornographic film goes above and beyond any alleged consent that the Defendants claimed they may have received from Plaintiff through her conduct on the night in question.

36. If consent can be inferred from the fact that Plaintiff, along with several others, was dancing in a nightclub while a camera was operating, the law provides that such consent is strictly confined to those acts which are substantially the same as the acts consented to.

37. Thus, Defendants use of Plaintiff's image in the Sorority Orgy DVD's differs materially in kind and in extent from that contemplated by the Plaintiff from her actions – Plaintiff in no way contemplated that her shirt would be pulled down and her

On Point News

exposed breasts would be filmed and placed on the Sorority Orgy DVDs, which contain numerous sexually lewd and offensive scenes that involve young women.

38. A verdict for the Defendants goes against the weight of the evidence and, accordingly, a new trial is warranted.

39. The Plaintiffs reserve the right to modify this Motion for New Trial, and even add new theories of error, after the transcript of the trial becomes available.

WHEREFORE, for these reasons, Plaintiff respectfully move this Honorable Court for an Order granting Plaintiff's Motion for New Trial on all matters in this case, and for such other relief as this Court deems just and proper.

Respectfully submitted,

EVANS PARTNERSHIP

By: ______________________

Stephen B. Evans, No. 40305
Katherine B. Schierholz, No. 62109
Attorney for Plaintiff
8000 Maryland Avenue, Suite 640
St. Louis, Missouri 63105
Telephone: (314) 721-1024
Facsimile: (314) 721-1741
Steve@EvansLaw-stl.com

CERTIFICATE OF SERVICE

This is to certify that the foregoing pleading was delivered via email and U.S. Mail in an envelope securely sealed and legibly addressed to the following:

David A. Dalton
US Bank Building
One Mid Rivers Mall Dr., Ste. 200
St. Peters, MO 63376

This 4 day of August, 2010.

____

Although Smithville offers an interesting interpretation of the statute, its interpretation is not a strict construction of that statute. An argument similar to Smithville's has been rejected in Missouri before. In *City of Kirkwood*, 896 S.W.2d at 946, Kirkwood sought to condemn Union Electric's electric distribution facility. Kirkwood argued that it had specific authority to condemn an existing electric light plant for an identical use under § 91.450. *Id.* at 947. That statute authorizes a city "to construct, maintain and operate a waterworks and to acquire real estate and personal property for that purpose by purchase, donation or eminent domain." *Id.* Kirkwood's argument was based on the fact that it had implied authority to condemn an existing waterworks because of its express authority to maintain such a facility under this statute. *Id.*

In rejecting this argument, the *Kirkwood* court declined to extrapolate an implied authority to condemn from the language of the statute concerning Kirkwood's authority to maintain a waterworks. It held that, under *Mo. Cities Water*, specific and express statutory authorization is required before a municipality can condemn an existing facility which is devoted to a public use. *Id.* The *Kirkwood* court relied on *Mo. Cities Water's* statement that "[a] municipality's condemnation of an entire public utility ... for the same use, is an extraordinary exercise of the power of eminent domain." *Id.* (quoting *Mo. Cities Water*, 875 S.W.2d at 826). Therefore, because there was no express statutory authority for the condemnation, the *Kirkwood* court entered judgment against the City of Kirkwood. Id. at 947–48.

[13] This court finds *Kirkwood's* interpretation of specific authority persuasive in this case. Here, as in *Kirkwood*, Smithville argues that it has implied authority to condemn an existing hospital for the same use as a result of its authority to regulate hospitals under § 72.300. Smithville's proposed interpretation of the statute is strained and involves a liberal construction rather than an appropriate strict construction of the statutory language. This court finds that a proper construction of the statute reveals no specific and express statutory authority for Smithville's proposed condemnation of an existing hospital. Nothing in the language of § 72.300 specifically or expressly authorizes Smithville to condemn an existing hospital in order to operate it for the same use. Point III is denied.

IV. Conclusion

Therefore, because St. Luke's use of the hospital constitutes a prior public use and Smithville's condemnation of that facility would totally destroy or materially impair or interfere with St. Luke's use, specific and express statutory authority to condemn the hospital is necessary. Smithville lacks specific and express statutory authority to condemn the hospital, so the trial court did not err in granting St. Luke's motion to dismiss, or in the alternative for summary judgment. The judgment of the trial court is affirmed.

All concur.

STATE of Missouri, Plaintiff-Respondent,

v.

Bryan W. MARTINELLI, Defendant-Appellant.

No. 72122.

Missouri Court of Appeals, Eastern District, Division One.

April 21, 1998.

Motion for Rehearing and/or Transfer to Supreme Court Denied July 8, 1998.

Application for Transfer Denied Aug. 25, 1998.

Defendant was convicted in the Circuit Court, St. Louis County, Philip J. Sweeney, J., of first-degree murder, armed criminal action, and 13 counts of wiretapping. He appealed. The Court of Appeals, Grimm,

P.J., held that: (1) evidence supported finding that defendant intentionally caused the death of victim by shooting her with a shotgun after deliberation; (2) evidence supported conviction for wiretapping; (3) juror's intentional failure to disclose criminal record during voir dire warranted new trial; and (4) evidence of defendant's reputation for truth, honesty and veracity was inadmissible as irrelevant.

Reversed and remanded.

1. Homicide ⇔253(3)

There was sufficient evidence that defendant knowingly caused the death of victim by shooting her with a shotgun after deliberation to support his conviction of first-degree murder, in light of defendant's conflicting statements and explanations to the police as to how shooting occurred and his actions afterwards, his letter to victim that he was reaching his "break point," his comments to coworker that he would not allow victim to divorce him, his covert recordings of victim's phone conversations, and evidence that he left recordings with friend, he went to his parent's home to borrow gun, and victim was shot shortly afterwards. V.A.M.S. § 565.020, subd. 1.

2. Homicide ⇔253(3)

Intent and deliberation are elements of first-degree murder most often proved by indirect evidence and inferences reasonably drawn from the circumstances surrounding the slaying.

3. Homicide ⇔288

Defendant was not entitled to be acquitted of murder merely because the evidence supported two equally valid inferences, one pointing to guilt, the other pointing to innocence.

4. Telecommunications ⇔497

There was sufficient evidence that victim did not give her implied consent to telephone surveillance to support defendant's conviction of wiretapping, where defendant admitted hooking up a voice activated tape recorder to telephone jack without his wife's knowledge and in concealed area, and he testified that after he told victim that he was tape recording her telephone conversations, she became upset, so he told her that he would remove device, and after that, he moved recorder to basement telephone jack and continued recording her conversations without her consent. V.A.M.S. § 542.402, subd. 1.

5. Criminal Law ⇔39

Deficient notice will almost always defeat a claim of implied consent as defense to charge of wiretapping.

6. Telecommunications ⇔494.1

Interception of victim's conversations on cordless telephone was not merely of radio communications, which would not be protected under the wiretapping act, where voice-activated recorder was directly plugged into a telephone jack in defendant and victim's home, the recording which took place came from the telephone jack and the conversation carried over the telephone line, and nothing in the record indicated that the recording that took place was directly received from the radio transmission from the cordless telephone. V.A.M.S. § 542.402, subd. 1.

7. Criminal Law ⇔923(1)

Juror's intentional failure to disclose prior felony convictions during voir dire warranted new trial in murder case, where prosecutor specifically asked whether any potential juror had been accused of any crimes, juror responded only that he had been accused of shoplifting, and there was no indication that defense counsel had knowledge of juror's deception.

8. Criminal Law ⇔923(1), 924(1)

The grant of a new trial based upon a juror's failure to answer a question asked during voir dire or on a juror's concealment of a fact lies within the sound discretion of the trial court.

9. Criminal Law ⇔925(1)

Not every failure by a potential juror to respond to a question during voir dire entitles a defendant to a new trial.

10. Criminal Law ⇔923(1)

A new trial based on juror misconduct is merited where: (1) the basis for disqualification is investigated during voir dire, (2) con-

On Point News

plaining counsel does not have knowledge of the juror's deception, and (8) the juror's concealment of the truth is intentional.

11. Homicide ⟹163(1)

Testimony as to defendant's good reputation for truthfulness did not establish defendant's good reputation as a peaceable and law-abiding citizen, which was the only capacity in which his reputation could be shown in defense of murder.

12. Telecommunications ⟹497
Weapons ⟹17(3)

Evidence of defendant's reputation for truth, honesty and veracity was not relevant in trial for armed criminal action and wiretapping counts, as there was no element of deceit in those crimes.

13. Criminal Law ⟹377

A defendant is generally entitled to present evidence of his reputation concerning those traits of character which ordinarily would be involved in the commission of the charged offense; evidence of good reputation as to character traits inherent in the crime charged is relevant to show the improbability of the defendant committing the crime and as substantive proof of innocence.

14. Criminal Law ⟹377

Evidence of defendant's reputation for truth, honesty and veracity was inadmissible in murder case at time it was offered, although defendant subsequently placed his character at issue by testifying, where defendant failed to offer any witness concerning his reputation after he testified, nor did the state present rebuttal evidence on this issue.

15. Witnesses ⟹337(3)

When a defendant takes the stand, the defendant's reputation for truthfulness and veracity is put into issue.

16. Criminal Law ⟹388.5(12)

Evidence of defendant's offer or willingness to take a polygraph examination was inadmissible in trial for murder and related crimes.

17. Criminal Law ⟹419(2.20)

Testimony that victim stated that defendant gave her a black eye did not fall under state of mind hearsay exception; testimony was a narration which did not involve an indication of a specific emotion.

18. Criminal Law ⟹419(2.20)

State of mind statements are admissible as hearsay exceptions only in cases involving claims of self-defense, suicide or accidental death.

19. Criminal Law ⟹419(2.20)

To fall within state of mind hearsay exception, declaration must be relevant to the issue of the case and the relevance of those statements must not be outweighed by the prejudicial effect of the declarations.

20. Criminal Law ⟹384

Whether evidence is too remote to be material is largely a matter of discretion for the trial court.

21. Criminal Law ⟹384

Remoteness of time goes to the weight of the testimony, not to its admissibility.

22. Criminal Law ⟹419(2.20)

Statements which merely recount past events do not fall within the state of mind hearsay exception unless they are a contemporaneous statement of fear, emotion, or any other mental condition.

23. Criminal Law ⟹1168(2)

Erroneous admission of hearsay testimony that victim stated that defendant gave her a black eye was harmless, in murder trial; there was no dispute that the incident occurred, and other evidence established essentially the same facts.

24. Criminal Law ⟹419(2.20)

Victim's statements that defendant "would go berserk" if she served him with divorce papers and that she was afraid to serve defendant with divorce papers were admissible in murder trial under state of mind exception to hearsay rule, where statements were made shortly before victim's death.

25. Criminal Law ⟹419(2.20)

Statements of fear may be received under the state of mind exception to the hear-

any rule; however, such statements are admitted only when they are relevant and the relevance outweighs the prejudicial effect.

26. Criminal Law ⚖371(4, 12)

Evidence of defendant's prior assault on victim was admissible in murder case to show defendant's intent, motive and an absence of accident, where defendant claimed shooting was accidental.

27. Criminal Law ⚖369.1

Generally, evidence of uncharged crimes, wrongs, or acts committed by the accused is inadmissible.

28. Criminal Law ⚖[illegible], 369.2(1)

Evidence of uncharged crimes, wrongs, or acts, which tends to establish motive, intent, absence of mistake or accident, a common scheme or plan, identity or the res gestae is admissible.

29. Criminal Law ⚖369.2(1)

Previous assaults by a defendant upon the same victim involved in the offense for which the defendant is on trial are admissible as logically and legally relevant to establish a legitimate tendency of defendant's guilt of the charged offense.

Richard H. Sindel, Clayton, Joel Hirschhorn, Brian H. Bieber, Coral Gables, Fla., for defendant/appellant.

Jeremiah W. (Jay) Nixon, Atty. Gen., Jeanne E. Jones, Asst. Atty. Gen., Jefferson City, for plaintiff/respondent.

GRIMM, Presiding Judge.

A jury found defendant guilty of first degree murder, section 565.020.1 RSMo.[1] In addition, it found him guilty of armed criminal action, section 571.015, and thirteen counts of wiretapping, section 542.402.1(1). The trial court sentenced him to life without probation or parole for murder and a consecutive life sentence for armed criminal action. Further, the trial court gave him concurrent two year sentences on each of the wiretapping counts.

[1] All statutory references are to RSMo 1994.

On appeal, defendant raises seven points. His first point mandates a new trial. In this point, he alleges he was denied a fair and impartial trial because, during voir dire, a juror intentionally failed to reveal he had a prior criminal record.

In other points, defendant challenges the sufficiency of the evidence and raises evidentiary and jury instruction issues. We find some of these points are moot and deny the others. The judgment is reversed and remanded.

I. Sufficiency of Evidence

We first address defendant's fourth point, wherein he alleges the evidence was insufficient to sustain any of the convictions. Concerning the murder and armed criminal action charges, he argues the evidence "supported two (2) equally valid 'inferences, one pointing to guilt, the other pointing to innocence." On the wiretapping counts, he contends the victim lost the protection of the wiretapping statute when she gave defendant "her implied consent to be wiretapped and ... she was wiretapped while speaking on a portable telephone." We disagree and deny this point.

Defendant married victim on June 21, 19[illegible]. During the next eight years, they had three children. However, their marriage deteriorated and they had substantial marital problems. In the fall or early winter of 19[illegible], victim mentioned getting a divorce to defendant.

Thereafter, defendant placed a wiretap on their home phone. Although the record is unclear as to when defendant began the wiretap, it appears it began in January 19[illegible]. He placed a recording machine behind a night stand in the master bedroom and recorded several conversations. Victim learned about the machine and confronted him about it on February 2. Defendant told victim he would discontinue the recording. However, he did not, but rather moved the machine to the basement and continued recording.

Several of victim's friends identified recordings of phone conversations with her. All of them said they did not give permission

On Point News

for their calls to be recorded. The recorded conversations occurred in March and April of 1996.

On April 19, 1996, approximately two weeks before she was killed, victim went to an attorney to see about having the marriage dissolved. After victim furnished background information and discussed a dissolution, the attorney scheduled another meeting for May 5.

That meeting did not occur. Sometime late on Thursday, May 4, victim told defendant that she had an appointment the next day to sign the dissolution petition. Defendant asked victim to give him a week to see if they could work it out. Defendant told a police officer that victim said "she'd wait a week, but she didn't think that it would make a difference." Victim postponed the appointment until May 12.

Also on that Thursday, defendant made plans to take their then seven-year-old son turkey hunting. Defendant went to his parents' house and asked to borrow a shotgun and some camping equipment. After receiving permission to use them, he examined them but left them there. That evening, he purchased a hunting license, a turkey tag, and some 12 gauge shotgun shells with a rabbit/squirrel load.

Later that Thursday evening, defendant gathered up the tapes he had made of the telephone calls. He put the tapes, as well as two recording devices, in a bag. He placed the bag in the pickup truck he drove to work.

The next afternoon, Friday, May 5, he gave the bag to a close friend at work. While giving the bag, defendant said that he wanted the friend "to hold the package for him because he thought things were getting better and he didn't want to take a chance on his wife finding them and getting upset."

That evening, victim met a woman friend sometime after 5:00 p.m. They spent the evening together, talking, eating, shopping and drinking. While victim was out with her woman friend, defendant went to his parents' house and borrowed the shotgun and camping equipment. After returning home, he put the children to bed.

Sometime around 12:30 a.m. that night, which was early Saturday, May 6, victim went home, where defendant shot her. Defendant called 911. A police officer received a dispatch at 1:02 a.m. and arrived at the scene in less than a minute. Defendant was outside waving his arms and yelling. Defendant told him to hurry, he "accidentally shot [his] wife." The two of them ran into the house, and the officer saw victim just inside the front door laying on the floor.

The officer checked victim's vital signs. She was not breathing and no sounds were coming from her. The officer then asked defendant what had happened. Defendant said that he had been carrying a shotgun into the living room with some sleeping bags. When the sleeping bags and shotgun started to shift, he "went to readjust his grip on the gun and it went off and it struck" victim. Defendant indicated he was about 8 to 10 feet away from victim when the shotgun went off.

The officer then asked when this occurred. Defendant said "it couldn't have been any more than 5 minutes from the time it happened to the time [the officer] arrived."

Paramedics arrived at the house at 1:04 a.m. One of them examined victim while the other set up equipment. The examination disclosed that victim's lips and hands were a bluish-gray color and the arms and legs were already cooling. According to the paramedic, this indicated that victim had been dead "10 to 15 minutes or more."

A detective lieutenant arrived. In looking at the victim, he saw a wound in her arm "which appeared to be almost a contact-type wound." Further, he saw what he thought was stippling around the wound. Stippling occurs when there is a close gunshot and appears as little droplets around the skin of the wound.

The lieutenant was told that defendant said he was 8 to 10 feet away when he shot victim. This caused the lieutenant to become suspicious, because the wound did not "appear to be consistent with that."

At trial, the medical examiner testified that stippling could reach up to "18 feet, something like that."

Defendant was taken to the police station. There, a detective sergeant talked with him. He said that defendant told him he was surprised when the shotgun went off. When asked why he was surprised, defendant said "that he had forgot that the gun had been loaded." Defendant told this detective he estimated he was "eight to ten feet from her when the gun went off." When the shotgun went off, defendant said he ran over to her and "she was mumbling something or gasping for air, he wasn't sure. And then she stopped." Defendant said he did not attempt CPR, but did reach down, took hold of both her legs, and straightened them out.

Defendant told this detective that after the shooting, he panicked. He said that about 20 to 30 minutes after he shot victim, he ran through the house, looking for the portable phone. It was missing from the kitchen. Although there was a phone in the bedroom where the children were sleeping, he decided against using it because he did not want to wake the children. He ultimately found the portable phone in the living room on top of the television. The detective said that defendant did not say how long he searched for the phone, only that it was 20 to 30 minutes between the shooting and "the time he actually went to make the phone call."

The detective told defendant that "from the wound on [victim's] body it didn't seem right that he would be standing that far away ... when the gun went off." Defendant responded, "Well, I could have been mistaken. I— I accidentally bumped into her and that's when the gun went off." From that point on, defendant said he accidentally bumped into her.

Also, originally defendant told this detective that he and victim had a good marriage. After the detective told him he had information the marriage was bad, defendant then said that it had been a normal marriage with the normal amount of spats. However, since Christmas 1994, they had marital problems, and the past week before she was shot "had been a very stormy week."

When victim told defendant about the impending divorce, he was concerned about the children and their custody. In addition, defendant was mad about the divorce "and knew that the child support would also cost him a great deal and it would be hard for him to live a normal life having to pay so much money out."

This detective then went and obtained a warrant. When he read the warrant to defendant, defendant asked about the penalties for the crimes listed on the warrant. After receiving that information, defendant said "I'd like to tell you what really happened, but I don't think I should."

At trial, a twenty page letter defendant wrote to victim was admitted. In the letter, he described some of the problems regarding his marriage. He noted his attempts to change and the lack of response from victim. Further, he stated that if she did not change as a result of his efforts to change, he would reach his "break point."

Also, a notebook admitted at trial revealed further problems of the marriage. Defendant wrote, "I still remain changed but pressure is building." He noted that he had been following victim and she suspected him of this. He also wrote that he knew the victim was planning to file for divorce, but noted "she ain't going to divorce me." Further, he wrote, "I'm so sick of her. All she does is prove to me what a loser she is." The notes also referenced his activities including target shooting.

Defendant testified. Among many other things, he told his version of the shooting. He said that as he walked into the living room, he "stumbled on the gear, went to grab the— catch myself. When I caught myself the gun discharged and hit her." After checking on her and moving her legs, he said he tried to call 911. He ran around in the house and down to the basement looking for the portable phone. He finally found the phone on the television and called 911. He said that from the time the shotgun went off until he made the call, five to seven minutes elapsed.

Defendant was asked about his statements to the police regarding their suspicions of a contact-type wound. He said that he told the police that "maybe the gun bumped up after it went off but I told them over and over where I was at, the distance, and where I felt

I was." Further, he said that he did not tell the police that he "accidentally bumped her and the gun went off." Rather, he said, "if I dropped the gun and the gun bumped into her, I don't know."

Defendant denied telling the detective that "I'd like to tell you what really happened, but I don't think I should." Rather, he testified that he "told them I'd like to help you, I'd like to tell you what really happened. They were so intent on having me tell them something that didn't happen."

A. First Degree Murder and Armed Criminal Action Counts

[1] Defendant makes several arguments under this point. First, he argues that the evidence was insufficient as a matter of law to sustain the first degree murder and armed criminal action convictions. We disagree. The evidence, and the reasonable inferences derived therefrom, were sufficient to support findings by the jury that defendant knowingly caused the death of victim by shooting her with a shotgun after deliberation.

[2] Defendant acknowledged that he shot victim. Thus, the only issues are intent and deliberation. Intent and deliberation are most often proved by indirect evidence and inferences reasonably drawn from the circumstances surrounding the slaying. *State v. Stallings*, 812 S.W.2d 772, 777 (Mo.App. E.D.1991); *State v. Chapman*, 876 S.W.2d 15, 18 (Mo.App. E.D.1994).

Here, the State presented sufficient evidence. Defendant's conflicting statements and explanations to the police, his letter to victim, his comments in the notebook, and the recordings of victim's phone conversations, as well as his testimony and the other evidence the State presented, created a factual dispute of opposing inferences for the jury to resolve. The evidence, and reasonable inferences, were sufficient to support the jury's findings of guilt.

[3] Next, defendant argues that the evidence supported two equally valid inferences, one pointing to guilt, the other pointing to innocence. As a result, he contends, he must be acquitted.

At the time this case was briefed and argued, some question may have existed concerning the validity of the "equally valid inference rule". However, recently the Missouri Supreme Court confirmed that the "equally valid inferences rule was effectively abolished by *State v. Grim*, 854 S.W.2d 403 (Mo. banc 1993)." *State v. Chaney*, 967 S.W.2d 47, 54 (Mo. banc 1998). The court declared that "the equally valid inferences rule should no longer be applied." *Id.* Thus, we deny this argument.

B. Wiretapping Counts

In the second part of this point, defendant alleges the "state's evidence was insufficient as a matter of law to sustain a conviction for all the illegal wiretapping counts ...." First, he contends victim lost her protection of the wiretapping statute by giving defendant "her implied consent to be wiretapped" while she was speaking on a telephone. Second, he argues that the wiretapping statute does not apply to conversations on a cordless telephone.

In 1989, the Missouri General Assembly enacted a set of laws which have been given the title "Wiretapping." These laws were modeled after federal statutes enacted in 1968 and revised in 1986. *State v. King*, 873 S.W.2d 905, 908 (Mo.App. S.D.1994).

Section 542.402.1 provides that a person is guilty of a class D felony if one "[k]nowingly intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire communication." The wiretapping statute further provides that it is not unlawful "[f]or a person not acting under law to intercept a wire communication ... where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act." Section 542.402.2(3).

[4] Defendant argues victim gave her implied consent regarding the taping of her telephone conversations. Although not defined in Missouri, other jurisdictions have defined implied consent as "consent in fact" which is inferred "from surrounding circum-

On Point News

stances indicating that the party knowingly agreed to the surveillance." *Williams v. Poulos*, 11 F.3d 271, 281 (1st Cir.1993) (citations omitted, emphasis in original).

The record reveals victim did not knowingly agree to the surveillance. Defendant admitted hooking up a voice-activated tape recorder to the phone jack in the master bedroom. Initially, he placed the tape recorder out of sight, behind the night stand. He testified that he told victim on February 2, 1996 that he was tape recording her telephone conversations. He further admitted that until February 2, victim did not know she was being taped.

After February 2, defendant moved the recording machine from the bedroom to the basement and hooked it up to a phone jack. He stated he "didn't want her to find the machine. ... I didn't want her taking the tapes and the machines and I didn't want to anger her." Further, he admitted to taping victim's phone conversations during the following months.

[5] Nothing in the record establishes that victim knowingly agreed to the taping of her phone conversations. Defendant does not point to any "knowledge" other than victim's suspicions after February 2, 1996. "Deficient notice will almost always defeat a claim of implied consent." *United States v. Lanoue*, 71 F.3d 966, 981 (1st Cir.1995).

Furthermore, policy considerations of wiretapping demand close examination of implied consent. Electronic eavesdropping allows for the invasion of "individuality and humanity", a principal concern of Congress upon enactment of the wiretapping statute. *United States v. Jones*, 542 F.2d 661, 670 (6th Cir.1976). "If by merely creating a generalized suspicion that a victim's communications were possibly being intercepted, while at the same time avoiding detection, an electronic eavesdropper could bootstrap his activity from the proscribed to the permitted, the congressional purpose would be frustrated." *Id.*

The record does not contain sufficient evidence that victim gave her implied consent to be recorded. Rather, much of the evidence is to the contrary. We deny this portion of this point.

[6] We turn to the second part of defendant's argument concerning the wiretapping convictions. He argues that conversations via cordless phones are radio communications, rather than wire, which are not protected communications under the wiretapping act.

Defendant relies on *State v. King*. There, the defendant's neighbor was listening to her police scanner radio, which also picks up transmissions from cordless phones. While so doing, she overheard the defendant make arrangements to buy some marijuana. 873 S.W.2d at 907. She reported this to a highway patrolman, who arrested the defendant at the place the transaction was to occur. *Id.*

Defendant filed a motion to suppress the evidence. He argued that the radio signal broadcast from his cordless phone was a "wire communication" which the neighbor unlawfully intercepted. Thus, he contended any evidence obtained based on that interception should be suppressed as a violation of the wiretap statutes. *Id.* at 908. The trial court denied the motion.

The southern district of this court affirmed, holding that the defendant's cordless telephone transmissions were outside the bounds of the wiretapping act. *Id.* The court held that "[t]here is no reasonable expectation of privacy in a communication which is broadcast by radio in all directions to be overheard by countless people who have purchased and daily use receiving devices such as a 'monitor' scanner or who happen to have another mobile radio telephone tuned to the same frequency." *Id.*

King is easily distinguished. There, the radio signal was received directly from the cordless phone. Here, the voice-activated recorder was directly plugged into a phone jack in defendant and victim's home. The recording which took place came from the phone jack and the conversation carried over the phone line. Nothing in the record indicates that the recording that took place was directly received from the radio transmission from the cordless phone.

The evidence presented was sufficient to support the wiretapping charges against defendant. Defendant's fourth point of insufficiency of the evidence regarding first degree murder, armed criminal action, and illegal wiretapping is denied.

II. Intentional Juror Misconduct

[7] We turn now to defendant's first point, which controls our disposition of this matter. In this point, he alleges the trial court erred in denying defendant's motion for a new trial based on intentional juror misconduct. In the first subpoint, defendant contends Juror 6 intentionally failed to "reveal during jury selection/voir dire that he had numerous arrests, felony and misdemeanor (sic) convictions ... despite being directly asked to reveal his criminal record."

[8–10] The grant of a new trial based upon a juror's failure to answer a question asked during voir dire or on a juror's concealment of a fact lies within the sound discretion of the trial court. *State v. Hatcher*, 835 S.W.2d 340, 342 (Mo.App. W.D.1992). Every failure by a potential juror to respond to a question during voir dire does not entitle a defendant to a new trial. *State v. Martin*, 755 S.W.2d 337, 339 (Mo.App. E.D.1988). However, a new trial is merited where (1) the basis for disqualification is investigated during voir dire, (2) complaining counsel does not have knowledge of the juror's deception, and (3) the juror's concealment of the truth is intentional. *Id.*

State concedes that defendant intentionally concealed his criminal record. This concession is proper. Juror 6 contacted the prosecutor several days after the verdict and informed him he had not been completely truthful and honest during voir dire regarding his past criminal history.

At a hearing on a contempt citation against the juror, the facts disclose that, during voir dire, the prosecutor asked the panel "[a]nybody ever been accused of committing a crime?" The juror responded, "shoplifting." He further responded he felt that he was treated fairly. In addition, he stated that his "brother-in-law [sic] busted for stolen cars, chop shop," but "got off on technicalities." The prosecutor then asked him if there were any other incidents and he replied, "that's it." Juror 6 was subsequently selected as a juror and voted to find defendant guilty.

The trial court examined the juror's prior criminal history. The record discloses he pled guilty to three felonies, in 1973, 1979, and 1985, and to a misdemeanor in 1981. On one of the felonies, defendant's probation was revoked and he served a year in jail.

The trial court found the juror to have "willfully and knowingly violated this Court's order as set out and included in MAI-CR 3d 300.06" and found him in criminal contempt. It sentenced him to six months in jail and a fine of $2,240.

Here, the record discloses that the ground for disqualification was actually explored on voir dire when the prosecutor asked the panel if anybody had ever been accused of committing a crime. Juror 6 acknowledged only shoplifting. He did not mention his felony convictions. Moreover, section 561.026(1) provides that a person who is convicted of any felony shall be forever disqualified from serving as a juror. Thus, he would have been disqualified had his prior criminal history been revealed during voir dire.

Further, there is no indication that defense counsel had knowledge of his prior convictions. The trial court found the juror's concealment of his prior criminal history intentional and the State has conceded this matter. We find no abuse of discretion in the trial court finding that Juror 6 intentionally concealed his prior criminal record.

In 1955, the Missouri Supreme Court considered a similar case wherein a juror was asked if he had been involved in any criminal action. A juror remained silent, although he had been convicted of a federal felony in 1942 and served two years imprisonment. *State v. Hermann*, 283 S.W.2d 617, 618 (Mo.Div. 1 1955). The supreme court said that "in a case such as this where a juror deliberately conceals such an important conclusive matter of disqualification as a felony conviction and one which would be so vital to a party to the case, we think it is clear that a new trial must be granted." *Id.* at 622. *See also State*

v. Kuzbes, 920 S.W.2d 160 (Mo.App. E.D. 1995); State v. Morton.

Here, defendant has established the three requirements previously set forth. The ground for the disqualification of Juror 6 was explored by the State when the prosecutor asked the venire panel about being charged with any previous crimes and he responded only to shoplifting. The prosecutor even asked a followup question, "Any other incident?" Juror 6 replied, "That's it." Further, the other two requirements, lack of knowledge by the complaining counsel and the juror's intentional concealment are not in dispute.

Nevertheless, the State argues that two more recent cases, State v. Chambers, 891 S.W.2d 93 (Mo.banc 1994) and State v. Brown, 939 S.W.2d 882 (Mo.banc 1997), permit it to affirmatively prove that despite the misconduct of the juror, the other jurors were not subjected to improper influences. It presented such evidence to the trial court and now contends a new trial is not required.

State's reliance on these cases is misplaced and it reads these cases too broadly. In Chambers, two convictions for the same murder were reversed, and defendant was tried a third time. Chambers, 891 S.W.2d at 102. In his new trial motion, he alleged that jurors had improperly learned that he had been previously convicted and sentenced to death. The trial court conducted a hearing.

At that hearing, witness Rector while in jail said that he heard inmate Overton say that he had worked at the hotel where the jury was sequestered. Rector said that Overton said that Overton overheard jurors saying that they knew the defendant had been sentenced to death for murder, but that the State's evidence only supported a manslaughter charge. Id.

Overton's sworn testimony directly contradicted Rector. Specifically, Overton testified that he had not heard the jury discuss the case and denied telling Rector anything about the jury other than that it stayed at the hotel. Id. The trial court denied the motion, finding Rector's testimony not credible and finding Overton's testimony credible. Id.

The defendant in Chambers argued section 547.020(2) permits a new trial when the jury has been guilty of any misconduct tending to prevent a fair and due consideration of the case. The Chambers court reasoned that juror misconduct during trial requires a new trial "unless the state affirmatively shows that the jurors were not subject to improper influences." Id. Juror misconduct during deliberations creates a rebuttable presumption of prejudice, which can be overcome with evidence. Id.

In Chambers, the trial court determined that no juror misconduct occurred. It reached that conclusion by disbelieving Rector's testimony concerning alleged misconduct. The Chambers court found that the trial court had not abused its discretion in reaching that decision. Id.

Chambers concerns alleged misconduct during jury deliberations, which misconduct was not established. In contrast, here the trial court found that Juror 6 was personally guilty of misconduct by failing to truthfully answer questions concerning his prior criminal record. Whether Juror 6 influenced any other juror during jury deliberations is immaterial. Juror 6 improperly sat as a juror and voted to find defendant guilty. Chambers is inapplicable.

Nor does Brown aid the State. In Brown, the defendant was charged with two drug charges. Brown, 939 S.W.2d at 882. During voir dire, the prosecution asked:

> Has anybody here ever been involved in the prosecution or defense of a criminal case? In other words, have you ever gone to court to help a friend out, testify in a criminal case, or been a state's witness in any type of case? Anybody been called to testify? I see no hands. Is there anybody here who has a family member or close personal friend who has ever been charged or arrested or convicted of a crime?

Id. at 883.

The defendant's motion for new trial alleged that one juror had at least one conviction involving drugs. Id. No supporting affidavits or exhibits were attached to the motion, and apparently no evidence was of-

fered in support. The trial court denied the motion. *Id.*

The *Brown* opinion contains this paragraph: "When juror misconduct occurs during a felony trial the verdict will be set aside unless the state affirmatively proves that despite the misconduct, the other jurors were not subjected to improper influences. The burden of proof does not shift until misconduct is established, however." *Id.* (footnotes omitted). Seizing on this paragraph, the State argues that it has the right to prove that despite Juror 6's misconduct, the other jurors were not subjected to improper influences.

This argument is over broad. First, we note the *Brown* court said that it was not clear from the record if the juror "did have an arrest or conviction of any kind." *Id.* at 884. Thus, since the burden was on the defendant to establish juror misconduct and he did not, the trial court's denial of this allegation was not an abuse of discretion.

In addition, the *Brown* court noted that the prosecutor's question, when considered in context, "did not directly ask members of the venire panel if they had ever been arrested or convicted." *Id.* It noted that the responses from the panel demonstrated that the prosecutor's voir dire examination emphasized arrests and convictions of relatives and friends of the venirepersons, not of the venire persons themselves. Thus, the *Brown* court held that the question "does not necessarily apply to someone with a criminal record." *Id.*

In contrast to the facts in *Brown*, here the question asked Juror 6 was clear and unambiguous. Juror 6 did not answer it truthfully, he had prior criminal convictions, and his prior convictions are established in the record. *Brown*, unlike the case before us, was not a case of intentional concealment nor jury misconduct and therefore is not applicable. Under the holding of *Hermann* and its progeny, the point is granted.

Defendant also alleges in this point that the trial court erred in denying a new trial based on alleged misconduct of another juror. Our holding on this point does not require consideration of that allegation.

III. Refusal to Admit Testimonial Evidence

Defendant's second point relates to the hearing concerning the juror's misconduct and his third point concerns alleged error in failure to disclose an expert's testing and also error in closing rebuttal argument. As these issues may not arise on retrial, we decline to address them.

[11, 12] We turn now to defendant's fifth point. In this point, he alleges in the first subpart that the trial court erred in refusing to admit testimonial evidence of defendant's "reputation with respect to truth, honesty and veracity ...." Defendant contends these traits were relevant and once he testified before the jury, "his reputation as a truthful and honest person" was put at issue. In the second subpart, defendant alleges the trial court erred in refusing to admit evidence of defendant's "willingness to take a polygraph examination as requested by the interrogating police officers."

An appellate court gives substantial deference to a trial court's decision on admissibility of evidence and will not disturb that decision absent a showing of abuse of discretion. *State v. Seiler*, 949 S.W.2d 218, 222-23 (Mo. App. E.D.1997).

As defendant began his case, he attempted to introduce opinion evidence of his honesty. The State objected on grounds of relevancy. After a discussion in chambers, the court agreed to permit evidence of defendant's "reputation as a law abiding citizen or as a peaceable person. That's it." The court agreed with the State that truthfulness and honesty would not be allowed.

[13] A defendant is generally entitled to present evidence of his reputation concerning those traits of character which ordinarily would be involved in the commission of the charged offense. *State v. Graham*, 906 S.W.2d 771, 780 (Mo.App. W.D.1995). Evidence of good reputation as to character traits inherent in the crime charged is relevant to show the improbability of the defendant committing the crime and as substantive proof of innocence. *State v. Goodwin*, 866 S.W.2d 225, 230 (Mo.App. S.D.1993).

On Point News

Testimony as to a defendant's good reputation for truthfulness does not establish the defendant's good reputation as "a peaceable and law-abiding citizen, which is the only capacity in which his reputation may be shown in defense of assault or murder." *State v. Hogan*, 286 S.W. 791, 793 (Mo.Div. 2 1926); *State v. Manning*, 682 S.W.2d 127, 130-31 (Mo.App. E.D.1984). Furthermore, defendant's reputation for truthfulness and veracity is not relevant to the armed criminal action and wiretapping counts. There is no element of deceit in these crimes. *See* sections 571.015 and 542.402. We find no abuse of discretion on the part of the trial court to exclude opinion evidence of defendant's truthfulness or veracity.

[14, 15] In passing, we note that defendant asserts that when he testified on his own behalf, he placed his reputation for honesty and veracity at issue. Missouri case law has established that when a defendant takes the stand, the defendant's reputation for truthfulness and veracity is put into issue. *State v. Taylor*, 944 S.W.2d 925, 934 (Mo. banc 1997). Defendant did not offer any witness concerning his reputation after he testified. Nor did the State present rebuttal evidence on this issue. The trial court did not abuse its discretion in denying the proffered evidence at the time it was offered.

A. Polygraph Examination

[16] In the second part of this point, defendant maintains the trial court erred in excluding his testimony regarding his "willingness to take a polygraph examination as requested by the interrogating police officers." Suffice to say, a defendant's offer or willingness to take a polygraph examination is inadmissible. *State v. Biddle*, 599 S.W.2d 182, 185 (Mo.banc 1980). Point denied.

IV. Jury Instructions

In his sixth point, defendant alleges the trial court erred in overruling defendant's objections to several instructions. Specifically, he objects to portions of the instructions concerning first degree murder, second degree murder, involuntary manslaughter, circumstantial evidence, and definitions of terms.

We have carefully reviewed the instructions and considered them in light of defendant's objections. All instructions followed the applicable pattern instructions in MAI-CR 3d. In addition, our examination does not disclose any legal or constitutional infirmity in any of the given instructions. No jurisprudential purpose would be served by an extended discussion. Point denied.

V. Hearsay Evidence

[17] In defendant's final point, he alleges the trial court erred in overruling his objections and admitting testimony from Leonte Wheeler that victim "had told her in 1996 that [defendant] had struck her and given her a black eye in 1993" ... and testimony from Tamara Walsh and John DeAngelo "that [victim] had told them that she was afraid to serve her husband with divorce papers." He contends the testimony is inadmissible hearsay, fails to fall under the state of mind exception, and was logically and legally irrelevant.

[18, 19] We first acknowledge that trial courts have broad discretion in determining the relevancy and admissibility of evidence. *State v. Parkhurst*, 845 S.W.2d 31, 35 (Mo banc 1992). Regarding the state of mind hearsay exception, state of mind statements are only admissible in cases involving claims of self-defense, suicide or accidental death. *State v. Singh*, 586 S.W.2d 410, 418-19 (Mo. App. S.D.1979). The declaration must be relevant to the issue of the case and the relevance of these statements must not be outweighed by the prejudicial effect of the declarations. *Id.* at 417-19.

Prior to trial, defendant filed a motion in limine to preclude the evidence of Wheeler regarding the 1993 incident on the bases that the evidence was hearsay and irrelevant. The court heard arguments and overruled the motion.

[20, 21] When the State offered the evidence, defendant renewed his objection. The State argued the evidence was admissible as the incident weighed on victim's mind as to why "she's fearful of the defendant for serving him with divorce papers." The trial

On Point News

court found that "even though it is quite remote in time I think it probably goes to show what ... the deceased['s] state of mind would have been. ..." Whether evidence is too remote to be material is largely a matter of discretion for the trial court. *State v. Williams*, 865 S.W.2d 794, 804 (Mo.App. S.D. 1993). "Remoteness of time goes to the weight of the testimony, not to its admissibility." *Id.*

Over defendant's objection, Wheeler testified that about a year before victim's death, she noticed victim with a black eye and a black and blue nose. At that time, victim told her she had hit the kitchen cabinet accidentally. However, a week or two prior to victim's death, victim confided in Wheeler and said that the injuries were caused by defendant striking her when the two were engaged in an argument in their van.

[22] Statements which merely recount past events do not fall within the state of mind exception unless they are a "contemporaneous statement of fear, emotion, or any other mental condition." *State v. Bell*, 950 S.W.2d 482, 484 (Mo. banc 1997). The State admits Wheeler's testimony is a narration which does not involve an indication of a specific emotion. Her testimony does not fall under the state of mind exception.

[23] However, defendant did not suffer any prejudice from this testimony. In his own testimony, defendant acknowledged that he and victim were arguing in their van on the date in question. He testified the argument escalated and that victim became very angry and she hit him several times. He said that when she grabbed the wheel, he hit her with the back of his hand in the nose. Victim suffered broken blood vessels in her nose and both her eyes were black.

[24] There was no dispute the incident occurred. Although the evidence was improperly admitted, other evidence before the court established essentially the same facts. In such a situation, there is no prejudice and no reversible error. *State v. Gaston*, 838 S.W.2d 409, 418–19 (Mo.App. S.D.1992). Defendant also argues the testimony of Walsh and DeAngelo does not qualify under the state of mind exception to hearsay. Walsh testified that victim told her defendant "would go berserk" if she served him with divorce papers. Walsh defined "berserk" as to "go off on a tangent, no telling what he would do." Defendant's objection was overruled and the State was permitted to show what victim's state of mind might have been at that time. DeAngelo testified that victim confided in him about a week before she was killed that she was afraid to serve her husband with divorce papers.

[25] Statements of fear may be received under the state of mind exception to the hearsay rule. *State v. Fears*, 916 S.W.2d 337, 339 (Mo.App. E.D.1996). However, such statements are admitted only when they are relevant and the relevance outweighs the prejudicial effect. *Id.* Both of the challenged statements concern victim's emotions shortly before her death. We cannot say the trial court erred in overruling defendant's objection.

[26] Finally, defendant argues the testimony was neither logically nor legally relevant. Thus, he contends the admission of this testimony was inherently prejudicial and caused irreparable damage.

[27–29] Generally, evidence of uncharged crimes, wrongs, or acts committed by the accused is inadmissible. *State v. Bernard*, 849 S.W.2d 10, 13 (Mo. banc 1993). But, evidence which tends to establish motive, intent, absence of mistake or accident, a common scheme or plan, identity or the res gestae is admissible. *Id.* Previous assaults by a defendant upon the same victim involved in the offense for which the defendant is on trial are admissible as logically and legally relevant to establish a legitimate tendency of defendant's guilt of the charged offense. *Williams*, 865 S.W.2d at 804.

As previously noted, "declarations of a decedent in a homicide case are admissible to prove the decedent's state of mind where that is relevant." *State v. Pagano*, 882 S.W.2d 326, 330 (Mo.App. S.D.1994). Defendant's defense was that he accidentally shot his wife. Thus, evidence of defendant's prior assault on victim is admissible to show defendant's intent, motive and an absence of accident. Further, any statements of fear are

also admissible under the state of mind exception.

The trial court found the probative value of the evidence outweighs its prejudicial effect. We find no abuse of discretion in admitting this evidence. Point denied.

Because of the juror's intentional failure to disclose his prior criminal record, we must reverse and remand. The trial court's judgment is reversed and the cause remanded for a new trial.

PUDLOWSKI and GARY M. GAERTNER, JJ., concur.

INTERTEL, INC., Appellant,

v.

Jamell R. MIXON, Respondent.

No. 72602.

Missouri Court of Appeals,
Eastern District,
Division One.

April 21, 1998.

Motion for Rehearing and/or Transfer to Supreme Court Denied July 8, 1998.

Application for Transfer Denied Aug. 25, 1998.

Appeal from the Circuit Court, County of St. Louis; Barbara Ann Crancer, Judge.

Jon M. Basye, St. Louis, for appellant.

A. J. Brotsky, Brown & James, P.C., St. Louis, for respondent.

Before GRIMM, P.J., and PUDLOWSKI and GARY M. GAERTNER, JJ.

ORDER

PER CURIAM.

Appellant, Intertel, Inc., appeals from the judgment entered by the St. Louis County Circuit Court in favor of Respondent, Jamell R. Mixon. We affirm.

We have reviewed the briefs of the parties, the legal file, and the transcript and find the judgment is supported by substantial evidence, is not against the weight of the evidence, and does not erroneously declare or apply the law. As an extended opinion would serve no jurisprudential purpose, we affirm the judgment pursuant to Rule 84.16(b).

CHESTER BROSS CONSTRUCTION CO. and C.B. Equipment, Inc., Appellants,

v.

STATE HIGHWAY AND TRANSPORTATION COMMISSION, Respondent.

No. WD 54409.

Missouri Court of Appeals,
Western District.

April 21, 1998.

Motion for Rehearing and/or Transfer to Supreme Court Denied June 2, 1998.

Application for Transfer Denied Aug. 25, 1998.

Appeal from the Circuit Court, Cole County; Thomas Joseph Brown, III, Judge.

Charles Svoboda, Kansas City, for Appellants.

Michael Kopp, Jefferson City, for Respondent.

Before LAURA DENVIR STITH, P.J., and HANNA and RIEDERER, JJ.

ORDER

PER CURIAM.

Chester Bross Construction Company and C.B. Equipment Company, Inc. ("Bross") sued the Missouri Highway and Transporta-

notice of the August 2, 2002, trial date. The record does not indicate that the appellant's Rule 74.06(b) motion was ever ruled upon by the trial court. In fact, the judgment of November 18, 2002, overruling the appellant's motion to set aside the trial court's default judgment, was expressly couched in terms of Rule 74.05(d), including the court's finding that as to the appellant's "notice complaint," no notice was required because she was in default. While it is well settled that a defaulting party is not entitled to notice, *Green v. Green*, 19 S.W.3d 170, 171 (Mo.App.2000), here, we have already determined that the appellant was not in default as to the respondent's amended motion to modify child support.

Based on the foregoing, it appears that the trial court did not rule on the appellant's Rule 74.06(b) motion, believing that the disposition of the appellant's Rule 74.05(d) motion, in effect, rendered her Rule 74.06(b) motion moot. In light of this fact and our determination, *supra*, that the trial court's judgment denying the appellant's Rule 74.05(d) motion was a nullity, the appellant's Rule 74.06(b) motion still pends such that in dismissing, we remand to the trial court for it to decide the appellant's Rule 74.06(b) motion.

Conclusion

The appellant's appeal from the trial court's judgment denying her Rule 74.05(d) motion to set aside the trial court's August 2, 2002, judgment modifying child support is dismissed and the cause is remanded to the court for it to hear and rule upon the appellant's Rule 74.06(b) motion, which still pends.

BRECKENRIDGE, P.J., and HOWARD, J., concur.

STATE of Missouri, Respondent,

v.

William G. (Billy) CARTER, Appellant.

No. WD 62188.

Missouri Court of Appeals, Western District.

Jan. 27, 2004.

Background: Insanity acquittee filed application for conditional release from custody of Department of Mental Health. The Circuit Court, Adair County, Gary L. Dial, J., denied application, and acquittee appealed.

Holding: The Court of Appeals, Robert G. Ulrich, J., held that denial of application for conditional release was adequately supported by finding that acquittee continued to suffer from mental illness.

Affirmed.

1. Mental Health ⇔440

Substantial evidence supported trial court's finding that insanity acquittee continued to suffer from mental disease, as grounds for denying application for conditional release; trial court's acceptance of plea of not guilty by reason of insanity was based on evidence that acquittee labored under delusional beliefs and was diagnosed with paraphilia, borderline intellectual functioning and mixed personality disorder, and acquittee had refused all treatment offered for mental illness while in custody of Department of Mental Health.

2. Criminal Law ⇔48

A verdict of not guilty by reason of insanity establishes that the person committed a criminal act and that he committed the act because of mental illness.

On Point News

3. Mental Health ⇨440

When a criminal defendant establishes that he is not guilty of a crime by reason of insanity, the Government, on the basis of the insanity judgment, may confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society.

4. Mental Health ⇨440

The trial court, in denying an insanity acquittee's application for conditional release, must find that the person still suffers from a mental disease or defect that renders him dangerous to others. V.A.M.S. § 552.040.

5. Constitutional Law ⇨255(5)

Due Process forbids the continued confinement of a person acquitted by reason of insanity after the person no longer suffers from mental disease or defect. U.S.C.A. Const.Amend. 14.

6. Mental Health ⇨440

An insanity acquittal creates a presumption of continuing mental illness for the purposes of reviewing an application for release. V.A.M.S. § 552.040.

7. Mental Health ⇨440

The presumption of a continuing mental illness created by an acquittal by reason of insanity exists, for the purposes of considering an application for conditional release, because it comports with common sense to conclude that someone whose mental illness was sufficient to lead him to commit a criminal act is likely to remain ill and in need of treatment. V.A.M.S. § 552.040.

8. Mental Health ⇨440

As long as the presumption of continuing mental illness has not been broken following an acquittal by reason of insanity, the burden of proof need not shift to the State and remains on the insanity acquittee seeking conditional release to prove that he no longer has a mental disease or defect rendering him dangerous to himself or others. V.A.M.S. § 552.040.

Irene C. Karns, Columbia, MO, for appellant.

Jeremiah W. (Jay) Nixon, Atty. Gen., and Daniel N. McPherson, Jefferson City, MO, Bruce E. Hahn, Kansas City, MO, for respondent.

Before JOSEPH M. ELLIS, C.J., HAROLD L. LOWENSTEIN and ROBERT G. ULRICH, JJ.

ROBERT G. ULRICH, Judge.

Billy Carter appeals the judgment of the trial court denying his application for conditional release under section 552.040, RSMo 2000. He contends that the trial court's finding that he suffers from a mental disease or defect was not supported by substantial evidence and was against the weight of the evidence. The judgment of the trial court is affirmed.

Facts

Mr. Carter was charged in Macon County in January 2001 with forcible sodomy, kidnapping, first-degree burglary, felonious restraint, and deviate sexual assault for forcibly removing his sixteen-year-old neighbor from her home to his own residence, where he sexually assaulted her. A change of venue moved the case to Adair County. On January 21, 2002, the trial court accepted Mr. Carter's plea of not guilty by reason of mental disease or defect and committed him to the custody of the Department of Mental Health.

Less than a month later, Mr. Carter filed an application for conditional release

On Point News

with proposed release plans attached. At the hearing on the application, the trial court took judicial notice of all of the psychiatric reports in the court file and heard the testimony of the State's witness, Dr. Sonia Anne Partridge, Ph.D., and Mr. Carter. The trial court subsequently denied Mr. Carter's application for conditional release. This appeal by Mr. Carter followed.

Standard of Review

Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976) governs the standard of review for the denial of an application for conditional release from the custody of the Department of Mental Health. *See also Rawlings v. State*, 22 S.W.3d 719, 723 (Mo. App. W.D.2000). Thus, the trial court's decision will be reversed only if no substantial evidence exists to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Id.* The evidence and all reasonable inferences drawn therefrom favorable to the trial court's judgment is accepted as true, and all evidence to the contrary is disregarded. *State v. Nash*, 972 S.W.2d 479, 481 (Mo.App. W.D.1998).

Point on Appeal

[1] In his sole point on appeal, Mr. Carter argues that the trial court erred in denying his application for conditional release under section 552.040, RSMo 2000, because the trial court's finding that he suffers from a mental disease or defect was not supported by substantial evidence and was against the weight of the evidence.

[2, 3] A verdict of not guilty by reason of insanity establishes that the person committed a criminal act and that he committed the act because of mental illness. *Greene v. State*, 39 S.W.3d 300, 301 (Mo. banc 2001). "When a criminal defendant establishes that he is not guilty of a crime by reason of insanity, the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society." *Id.* (citing *Jones v. United States*, 463 U.S. 354, 370, 103 S.Ct. 3043, 3052, 77 L.Ed.2d 694 (1983)).

Section 552.040, RSMo 2000, governs the conditional release of a person committed to a mental health facility upon acquittal on the grounds of mental disease or defect. It provides six non-exclusive factors to be considered by the trial court in determining whether a committed person should be conditionally released:

(1) The nature of the offense for which the committed person was committed;

(2) The person's behavior while confined in a mental health facility;

(3) The elapsed time between the hearing and the last reported unlawful or dangerous act;

(4) The nature of the person's proposed release plan;

(5) The presence or absence in the community of family or others willing to take responsibility to help the defendant adhere to the conditions of release; and

(6) Whether the person has had previous conditional releases without incident.

§ 552.040.12, RSMo 2000; *Rawlings*, 22 S.W.3d at 723-24. Subsection 12 further provides that the burden of persuasion "shall be on the party seeking release to prove by clear and convincing evidence that the person for whom release is sought is not likely to be dangerous to others while on conditional release." § 552.040.12, RSMo 2000.

On Point News

[4, 5] While not expressly required by the statute, the trial court, in denying an application for conditional release, must find that the person still suffers from a mental disease or defect that renders him dangerous to others. *Rawlings*, 22 S.W.3d at 724 (citing *Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992) and *State v. Nash*, 972 S.W.2d 479 (Mo.App. W.D.1998)). Such finding is necessary because due process forbids the continued confinement of a person acquitted by reason of insanity after the person no longer suffers from mental disease or defect. *Id.* (citing *Foucha*, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437).

[6–8] An insanity acquittal creates a presumption of continuing mental illness. *Greeno*, 59 S.W.3d at 504; *State v. Tooley*, 875 S.W.2d 110, 112 (Mo. banc 1994)(citing *Jones*, 463 U.S. at 366, 103 S.Ct. 3043). Such presumption exists because "[i]t comports with common sense to conclude that someone whose mental illness was sufficient to lead him to commit a criminal act is likely to remain ill and in need of treatment." *Tooley*, 875 S.W.2d at 112 (quoting *Jones*, 463 U.S. at 366, 103 S.Ct. 3043). As long as the presumption of continuing mental illness has not been broken following an acquittal by reason of insanity, the burden of proof need not shift to the State and remains on the insanity acquittee to prove that he no longer has a mental disease or defect rendering him dangerous to himself or others. *Greeno*, 59 S.W.3d at 504; *State v. Revels*, 13 S.W.3d 293, 297 (Mo. banc 2000); *Tooley*, 875 S.W.2d at 113.

The evidence adduced in the hearing on Mr. Carter's application for conditional release included several pre-plea psychiatric reports, the report and testimony of Sena Partridge, Ph.D., and the testimony of Mr. Carter. The trial court took judicial notice of several psychiatric evaluations of Mr. Carter's mental condition prior to his plea of not guilty by reason of mental disease or defect, which were introduced and considered by the court when Mr. Carter pleaded. In the first report, dated June 5, 2000, A.E. Daniel, M.D., concluded that, at the time of the alleged offenses, Mr. Carter suffered from a mental disease or defect in that he was laboring under delusional beliefs and obsessions and also that Mr. Carter was incompetent to proceed to trial. Specifically, Dr. Daniel diagnosed Mr. Carter with Paraphilia (Sexual Deviation Disorder), Borderline Intellectual Functioning with Psychotic Symptoms, and Mixed Personality Disorder with features of Schizoid, Paranoid, and Passive Aggressive Types. Based on this report, the trial court found Mr. Carter incompetent to proceed and committed him to the Department of Mental Health.

While at Fulton State Hospital, Mr. Carter was evaluated by Thomas Green, Ph. D., in December 2000, relating to his competency to be tried. Dr. Green diagnosed Mr. Carter with Personality Disorder Not Otherwise Specified with Antisocial Features. He concluded that Mr. Carter did not suffer from a mental disease or defect as defined in Chapter 552 and that he was competent to proceed.

Dr. Daniel reexamined Mr. Carter in February 2001. Dr. Daniel again concluded that Mr. Carter was delusional at the time of the offense and at the time of the evaluation and that he was incompetent to proceed to trial. Dr. Daniel diagnosed Mr. Carter with Delusional Disorder, Erotomanic Type, which is a psychosis and a mental disease or defect as defined in Chapter 552, Sexual Deviation Disorders, and Borderline Intellectual Functioning.

In July 2001, Bruce Harry, M.D., evaluated Mr. Carter's competency to proceed to trial. Dr. Harry diagnosed Mr. Carter with Paraphilia Not Otherwise Specified

On Point News

and Personality Disorder Not Otherwise Specified with Antisocial and Narcissistic Features. Dr. Harry also concluded that Mr. Carter was not suffering from a mental disease or defect within the meaning of Chapter 552 and was competent to proceed to trial.

Next, Mr. Carter was evaluated by John Raban, M.D., in October 2001 relating to his competency to proceed and his mental state at the time of the alleged offenses. Dr. Raban diagnosed Mr. Carter with Personality Disorder, concluded that Mr. Carter did not suffer from a mental disease or defect at the time of the offenses or at the time of the evaluation, and found that Mr. Carter was competent to stand trial.

In January 2002, Mr. Carter pleaded not guilty by reason of mental disease or defect. Based on Dr. Daniel's February 2001 diagnoses of Delusional Disorder, Erotomanic Type, the trial court accepted Mr. Carter's plea and committed him to the Department of Mental Health. Following Mr. Carter's application for conditional release, Scott Partridge, Ph.D., evaluated him in June 2002. Dr. Partridge diagnosed Paraphilia Not Otherwise Specified, Alcohol Abuse in a Controlled Environment, and Narcissistic Personality Disorder with Antisocial Features concluding that Mr. Carter does not have a mental disease or defect as defined under Chapter 552.

The trial court's finding that Mr. Carter continues to suffer from a mental disease or defect was supported by substantial evidence and was not against the weight of the evidence. Prior to Mr. Carter's plea of not guilty by reason of mental disease or defect, Mr. Carter was evaluated by Dr. Daniel and diagnosed with Delusional Disorder, Erotomanic Type, Sexual Deviation Disorders, and Borderline Intellectual Functioning. Delusional Disorder, Erotomanic Type is a psychosis and a mental disease or defect. The trial court accepted this diagnosis in accepting Mr. Carter's plea. Upon his insanity acquittal, a presumption was created that the mental illness underlying his commitment continues. Dr. Partridge testified that, since his confinement, Mr. Carter has refused to participate in any treatment for his mental illness. Nothing in the record contradicted the evidence that Mr. Carter has had no treatment for his mental illness. Mr. Carter, in his application for conditional release, seemed to acknowledge that he suffers from a mental disease or defect. Under "Conditions for Proposed Release," Mr. Carter wrote, "To find a job if released by the Court, unless my Delusional Disorder, Erotmatic (sic) Type prevents me from maintaining a 40 hour week job."

Mr. Carter argues that the reports of Drs. Green, Harry, Raban, and Partridge and the testimony of Dr. Partridge establish that he does not have a mental disease or defect as defined in Chapter 552. "'Weight of the evidence' means its weight in probative value, not the quantity or amount of evidence. The weight of the evidence is not determined by mathematics, but on its effect in inducing belief." *Bauer v. Bauer*, 38 S.W.3d 449, 455 (Mo. App. W.D.2001)(quoting *Waddell v. Dir. of Revenue*, 856 S.W.2d 94, 96 (Mo.App. S.D. 1993)). An appellate court should exercise the power to set aside a decree or judgment on the ground that it is against the weight of the evidence with caution and with a firm belief that the decree or judgment is wrong. *Reeds*, 13 S.W.3d at 297 (quoting *Murphy*, 536 S.W.2d at 32). Drs. Green, Harry, and Raban evaluated and diagnosed Mr. Carter prior to his plea of not guilty by reason of insanity. Given the presumption of continuing mental illness that was created upon his plea and Dr. Partridge's testimony that Mr. Carter has refused all treatment for his mental illness,

On Point News

their reports provided little probative value as to whether Mr. Carter continued to suffer from a mental disease or defect after his plea and commitment. Furthermore, the trial court was free to disbelieve or give little weight to those reports. Greeno, 59 S.W.3d at 506. Additionally, Dr. Partridge testified that, although she concluded that Mr. Carter did not suffer from a mental disease or defect, she understands how Dr. Daniel arrived at his diagnosis. She explained that Mr. Carter appears to be psychotic and out of touch with reality and that it was "a fine line" between her diagnosis and Dr. Daniel's. Dr. Partridge also admitted that Dr. Daniel had more materials to review than she had in making her diagnosis. The trial court's finding that Mr. Carter continues to suffer from a mental disease or defect was supported by substantial evidence and was not against the weight of the evidence.

The trial court did not err in denying Mr. Carter's application for conditional release. The judgment of the trial court is affirmed.

ELLIS, C.J. and LOWENSTEIN, J., concur.

STATE of Missouri, Respondent,

v.

Jason FARRIS, Appellant.

No. WD 61517.

Missouri Court of Appeals, Western District.

Jan. 27, 2004.

Background: Defendant was convicted in the Circuit Court, Chariton County, Gary E. Ravens, J., of attempt to manufacture methamphetamine. Defendant appealed.

Holdings: The Court of Appeals, Patricia Breckenridge, J., held that:

(1) evidence was sufficient to support conviction, but that

(2) refusal to instruct jury on definition of possession constituted plain error.

Reversed and remanded for new trial.

1. Controlled Substances ⟹22

Defendant was in constructive possession of materials used to manufacture methamphetamine found in the car he was riding and on the roadway, and thus, defendant had taken substantial step toward committing offense, as required to support conviction for attempt to manufacture methamphetamine; police officer observed odor of ether while following car, strong smell of ether emanated from car after it was stopped, cooler containing items used in manufacture were found in trunk which matched items subsequently found along roadway, officers found plastic bucket on roadway that contained pasty substance that smelled strongly of ether, residue on bucket was methamphetamine, and defendant gave false and inconsistent incriminating statements to police. V.A.M.S. § 195.211.

2. Criminal Law ⟹44

An attempt to commit a crime has two elements: (1) the defendant has the purpose to commit the underlying offense, and (2) the doing of an act which is a substantial step toward the commission of that offense.

3. Criminal Law ⟹44

Conduct constituting the "substantial step" element of attempt includes possession of materials designed specifically for an unlawful purpose or that could not