Missouri Court of Appeals

Southern District

Division Two

STATE OF MISSOURI,	)	
	)	
Plaintiff-Respondent,	)	
	)	
vs.	)	No. SD34647
	)	
ROBERT L. CAMPBELL,	)	**Filed: February 7, 2018**
	)	
Defendant-Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF JASPER COUNTY

Honorable Gayle L. Crane, Circuit Judge

STATEMENT

THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED, OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS COURT OR ANY OTHER COURT. A COPY OF THIS STATEMENT SHALL BE ATTACHED TO ANY MOTION FILED WITH THIS COURT FOR REHEARING OR TRANSFER TO THE SUPREME COURT.

Robert L. Campbell ("Defendant") was charged with murder in the first degree of his nephew, Russell Porter, and his nephew's wife, Rebecca Porter. A jury subsequently found Defendant guilty of murder in the second degree of the Porters, and assessed

punishment at life imprisonment for each murder. The trial court imposed the punishment assessed by the jury, and ordered the sentences to run consecutively. Defendant appeals raising two points of alleged trial court error: the trial court abused its discretion in (1) admitting a participant in the murders' "understanding" of the objectives and workings of a plan to abduct and kill the Porters because the participant's understanding allegedly was "inferential hearsay" attributable to another participant in the murders, and (2) denying Defendant's oral request for a mistrial based on an unsigned note from the jury during its deliberations that indicated a specific juror had made statements during deliberations that "should have disqualified him . . . in jury selection." We reject Defendant's points, and affirm the trial court's judgment.

Standard of Review

Point I – Claim that the Trial Court Abused Its Discretion in Admitting Inferential Hearsay

We review a trial court's decision to admit evidence as follows:

> A trial court has broad discretion to admit or exclude evidence at trial. This standard of review compels the reversal of a trial court's ruling on the admission of evidence only if the court has clearly abused its discretion. [T]hat discretion is abused when a ruling is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration. Additionally, on direct appeal, this Court reviews the trial court for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial. Trial court error is not prejudicial unless there is a reasonable probability that the trial court's error affected the outcome of the trial.

State v. Forrest, 183 S.W.3d 218, 223-24 (Mo. banc 2006) (internal footnotes and quotations omitted); see also ***State v. Brown***, 353 S.W.3d 412, 420 (Mo.App. S.D. 2011) ("'Absent a showing of prejudice, a trial court's admission of immaterial and irrelevant evidence, even of other crimes, will not be reversed.'" (quoting ***State v. Burton***, 320

S.W.3d 170, 176 (Mo.App. E.D. 2010)). The defendant has the burden to show prejudice. ***State v. Morgenroth***, 227 S.W.3d 517, 523 (Mo.App. S.D. 2007). However, in evaluating whether trial court error was prejudicial, we consider the whole record and do not view the evidence in the light most favorable to the judgment. ***State v. Foster***, 244 S.W.3d 800, 804 (Mo.App. S.D. 2008); ***State v. Tabor***, 219 S.W.3d 769, 772-73 (Mo.App. S.D. 2007). A finding of prejudice requires "'that the erroneously admitted evidence so influenced the jury that, when considered with and balanced against all evidence properly admitted, there is a reasonable probability that the jury would have acquitted but for the erroneously admitted evidence.'" ***State v. Blakey***, 203 S.W.3d 806, 814 (Mo.App. S.D. 2006) (quoting ***State v. Black***, 50 S.W.3d 778, 786 (Mo. banc 2001)).

Point II – Claim that the Trial Court Abused Its Discretion in "Failing to" Declare a Mistrial or Hold a Hearing Based on a Juror's Alleged Statements During Deliberations "that Should Have Disqualified" the Juror

> "A mistrial is a drastic remedy to be exercised only in those extraordinary circumstances in which the prejudice to the defendant cannot otherwise be removed." *State v. Harris*, 477 S.W.3d 131, 138 (Mo.App.E.D.2015). We review the refusal to grant a mistrial for abuse of discretion because the trial court, unlike a reviewing court, "has observed the complained of incident and is in a better position . . . to determine what prejudicial effect, if any, the alleged error had on the jury." *State v. McClendon*, 477 S.W.3d 206, 215 (Mo.App.W.D.2015). "An abuse of discretion is found when the trial court's ruling is clearly against the logic of the circumstances then before it and when the ruling is so arbitrary and unreasonable as to shock one's sense of justice and indicate a lack of careful consideration." *Id*.

State v. Roberson, 501 S.W.3d 465, 470 (Mo.App. W.D. 2016). "[P]lain errors affecting substantial rights may be considered in the discretion of the [appellate] court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." Rule 30.20.[1]

[1] All rule references are to Missouri Court Rules (2017).

Facts and Procedural Background

In December 2012, Defendant was charged in Taney County with two counts of murder in the first degree in that Defendant, "acting with one or more other persons," caused the death of Russell and Rebecca Porter on April 18, 2011, "by offering consideration to one or more persons to kill" the Porters. In November 2013, Defendant's pretrial bond was revoked and Defendant was taken into custody. Venue was transferred to Jasper County in February 2016. Defendant's trial began on Tuesday, July 5, 2016, and the jury returned verdicts of guilty on two counts of murder in the second degree on Wednesday, July 13, 2016.

The evidence at trial included the following. In the very late evening on Monday, April 18, 2011, Jessica Bullock and a friend went to Jessica's mother's home near Willard in Greene County. Jessica's mother was Rebecca Porter who was married to Russell Porter and lived with Russell in the original family home on Russell's grandparents' 120-acre farm. Sharon Kay Simmons, Russell's mother, and Sharon's mother, May, and Defendant's son, Tim, lived in a nearby dwelling, while Defendant's daughter lived in a third dwelling on the farm and Defendant and his wife, Carolyn, lived in a fourth dwelling on the farm. Defendant and Sharon are siblings.

Jessica went to her mother's home because she had not heard from her mother since April 17 and was concerned about her mother. On arriving at her mother's home, Jessica observed that both exterior screen doors were closed but the associated inside, exterior doors were open, and her mother's vehicle, which was her mother's and Russell's only means of transportation, was present at the home. Jessica knocked and called for her mother through each of the open doors, but received no response. Jessica

went to a nearby gas station and called 911. Two Greene County deputy sheriffs responded to the gas station, and returned with Jessica to her mother's home. The deputies walked through the home alone, and then walked to Sharon's home. Sharon returned with the deputies to Russell and Rebecca's home, and walked through the home with the deputies and Jessica. As Jessica exited the home, she asked Sharon "where is [Defendant]," and Sharon replied that Defendant "was out on a truck" in Texas.

The deputies then requested that the on-duty detective also respond to the home. The law enforcement officers discovered that a screen over the kitchen window had been cut, bleach had been poured on the kitchen and dining room floors,[2] the bedding on Russell and Rebecca's bed was pulled down to the foot of the bed and onto the floor, the mattress was out-of-alignment with the box springs, and Russell and Rebecca were not present in the home. Subsequent investigation at the home showed that exterior surveillance cameras had been knocked over, and any electronic device that stored video captured by the cameras had been removed from the home.

On March 31, 2011, roughly eighteen days before the events on April 18 and 19, Defendant was granted a full order of protection from Russell Porter, and Russell Porter was granted a full order of protection from Defendant. Rebecca Porter also had sought an order of protection from Defendant, but her application was denied. Law enforcement found one of the orders on the Porters' kitchen table during the investigation of the Porters' home.

[2] The detective testified that bleach can cause DNA to decompose.

The Porters' vehicle insurance company had provided the Porters with a device for their vehicle that monitored the vehicle's operation. The device showed that the vehicle was last driven on April 17.

Law enforcement was not able to "make contact" with Defendant until April 22, 2011, because he and his wife were out-of-state driving a truck. Law enforcement made contact with Defendant at Sharon's home, and Defendant then went with law enforcement to the Greene County sheriff's office for an interview. Defendant had not been arrested and was not in custody, but, on arrival at the sheriff's office, asked if the escorting officer was "planning on arresting [him] today." After Defendant was interviewed, law enforcement gave Defendant a ride back to his home. On the return trip, Defendant made the comment: "[W]hat's a person supposed to do? Get rid of that house and their belongings or sell that house and their belongings." On arrival at Defendant's home, Defendant consented to a search of his "cell phone." Defendant's phone contained a number for a person named Tony. Also, on April 22, 2011, Defendant's wife consented to a search of Defendant's home. Defendant was not present at his home at the time of the search.

Defendant's April 22 interview by law enforcement at the Greene County sheriff's office occurred in the late evening on April 22, 2011. The interviewing officer intended for the interview to be "recorded," but, because of an equipment malfunction or another officer's inadvertent error, the interview was not recorded. Defendant "denied any involvement in [Russell and Rebecca's] disappearance," and told the officer that he left Sunday, April 17, for the Texas-Mexico border driving a truck. Defendant also "made it clear that he did not like Rusty or Rebecca Porter," and said that "Rusty was a

low life. He treated his mom, Kay, badly. Would take pain pills, medication and would also steal from her." Defendant also disclosed that he and Russell had been in an "altercation," acknowledged each had an order of protection from the other, and said he was "afraid" of Russell. Defendant further told the officer that "when [Defendant] found out they were missing he had to tell his wife, Carol, he had to keep this [sic] log books in order to prove that he didn't have nothing [sic] to do with it." In response to the officer's question "whether [Defendant] thought Russell and Rebecca Porter were dead," Defendant "first said they were probably was [sic] dead that Rusty probably mouthed the wrong person. And then later he said that they probably are alive. Kay was hiding them out."

Defendant's son, Tim, who, at the time of trial, was incarcerated in the Missouri Department of Corrections for receiving stolen property, testified as follows. Tim had no agreement "with law enforcement in exchange for [his] testimony." In April 2011, Tim was living with his aunt, Sharon, and had lived with her off and on previously when he was not in prison. "[Rebecca's] family" had "nicely refurbished" the original family home on the farm, and Russell and Rebecca then had moved into the home. Defendant, his wife and his wife's three sons from a previous relationship were "jealous[]" because Russell and Rebecca moved into the original family home. Defendant, his wife and his wife's three sons on the one hand and Sharon's family on the other hand had a longstanding feud that waxed and waned over time.

In response to a law enforcement inquiry early on in the investigation, Tim suggested that law enforcement might want to "check out Tony Friend." Tony Friend was Defendant's wife's brother and was married to Windy. Tim was "suspicious" about

Tony because Tony had not "been on the farm for like 30 years or so," was "a piece a shit for real," had been forced to leave the farm, and was not welcome on the farm, but now was at the farm. Tim confronted Defendant about Tony's presence on the farm, and Defendant told Tim that Tony needed to be with Defendant's wife who was seriously ill.

Tony appeared at the farm "a month or 2 weeks before" Russell and Rebecca disappeared. On a "couple of occasions" when Tony was at "the Campbell's place," "it was kind of like a sit down under the tree conference deal and [Tim] approached it and they were just gabbing away and they just went silent."

"[P]robably a month, a month and a half" before Russell and Rebecca disappeared, Tim had to separate Defendant and Russell when the two men were in a heated, verbal altercation at or near Sharon's home. As Defendant and Tim were leaving the scene of the altercation in a truck to go to Defendant's home, Defendant told Tim "that boy's days are numbered and he put his hands on the wheel and it was just dea[d] calm. It was like it just kind of was over." Defendant had said Russell's days were numbered before.

After Russell and Rebecca disappeared, Tony was present at Defendant's home and "just pretty much had his way about everything up there at [the] farm." Shortly after Russell and Rebecca disappeared, Defendant left his home and stayed gone for a long time. Defendant also thought Russell was a "[l]azy bones," and a "smart ass."

Law enforcement also learned that Tony Friend had a son, Phillip Friend, and a second cousin, Dusty Hicks. Law enforcement obtained the phone records of Defendant, Tony, Windy and Phillip Friend, and Dusty Hicks.

For the period April 15 through 22, 2011, Defendant's phone records showed that his phone utilized a cell tower in Omaha, Arkansas, in the early evening on April 15, in Prescott, Arkansas, in the early afternoon on April 16, and other areas outside Missouri until he returned to Missouri on April 22, 2011.

In the period April 14 through April 16, 2011, there were multiple phone calls between Defendant and Tony or Windy Friend's phones. There were no communications between Defendant's and Tony or Windy's cell phones on April 17, 18, 19, 20 or 21, 2011. There were a "couple" of calls between Defendant and Windy's phones on April 22, 2011.

In the early morning hours on April 18, 2011, Tony, Windy and Phillip Friend, and Dusty Hicks were "communicating" and "were hitting off of towers in the area of the residence where the Porters lived." Later, at 3:23 a.m. that morning, Tony and Phillip's phones were "using towers" near Rueter, Taney County, Missouri. Rueter is east of, and near, where Russell and Rebecca Porter's remains eventually were found on July 21, 2011. Later that morning, Tony and Phillip's phones were using towers near Springfield. Later on April 18, at 9:34 and 9:35 p.m., Windy and Tony's phones were "hitting off" a tower in Springfield; then at 11:51 and 11:52 p.m., Windy and Tony's phones were using a tower near where Russell and Rebecca Porter's remains were found; and then were using a tower near Springfield at 3:56 a.m. the next day – April 19, 2011.

The phone records obtained in the investigation began January 1, 2011, and extended through May 6, 2011, and did not show any communications between Defendant and Tony or Windy Friend except as described above and except for two calls

involving Defendant's "house phone" in February 2011.[3] The records also did not show any other use of cell towers in Taney County by Defendant, the Friends or Dusty Hicks other than described above.

On April 25, 2011, a law enforcement officer interviewed Defendant at the Missouri State Highway Patrol Troop D headquarters in Springfield. "[A] little ways into [the] interview," the officer "activate[d] a[n audio] recording device." The interview began in the morning, and a second officer joined the interview about an hour into the interview. The audio recording of this interview was played for the jury.

A cousin of Tony Friend testified. The cousin lives in Cedarcreek, Missouri, which is near where Russell and Rebecca Porter's bodies eventually were recovered. The cousin has known Tony all her life, but has a "distant" relationship with Tony and "prefer[s] not to be around him." When the cousin and Tony were children, they frequently played in the woods at a place near Cedarcreek known as the "bulldozer place" because at one time there was an abandoned bulldozer there that the children played on. Tony "went over to . . . live there for a while" when he was a young adult, but "got ran off of the property." When the cousin was approached by law enforcement during the investigation, she suggested that law enforcement should look at the bulldozer place, and took law enforcement part of the way to that place.

Law enforcement subsequently found Russell and Rebecca's bodies on July 21, 2011, on the property that Tony's cousin described as the bulldozer place in Taney County. A DNA forensic scientist who was with the Missouri State Highway Patrol crime lab in 2011 and was with the Kansas Bureau of Investigation at the time of trial,

[3] The phone records obtained in the investigation showed a single phone call between Tony Friend and Defendant's son, Tim, on February 17, 2011.

told the jury that blood found on two window frames at the place where the bodies were found was 99.998060 percent certain to be from Rebecca Porter based on comparison of DNA extracted from the blood to a DNA profile of Rebecca's biological daughter.

A forensic pathologist told the jury that the skull of the male body had a hole on the "right side of the skull" in the "temporal region" and "fragments of a bullet" inside the skull. The male body did not have teeth at the time of his death, and the third, fourth and fifth vertebrae of the body's neck had been altered surgically. The gunshot to the head would have killed the male if he were alive at the time of the gunshot, but the pathologist was unable to determine if the male was alive at the time of the gunshot because of the "advance state of decomposition." The pathologist also believed that "it was unlikely that it was suicide."

The female body had "a hole between the right eye socket and the mouth," and a bullet fragment inside the skull. In addition, the first cervical vertebra located "right under the skull" was broken and appeared to have been broken by the bullet, a fragment of which was found inside the body's skull. The body also had a surgical implant in each breast, and the body's jaws "matched" Rebecca's dental x-rays. If the gunshot to the back of the female's neck had occurred when she was alive, "she would have been dead instantly," but the pathologist was unable to determine if the female was alive at the time of the gunshot because of the "advanced decomposition." The pathologist also opined that "[t]his would be a very hard place to shoot yourself, so yes this would almost certainly be a homicide."

A forensic anthropologist with the University of North Texas told the jury the following. Using medical records of Russell Porter and comparing information contained

in those records to the found male body, the anthropologist reached a "medically durable identification" of the male body as Russell Porter. The DNA lab at the university also analyzed DNA from the male body, and a forensic DNA analyst concluded that the male body was "3.8 trillion times more likely to be" the father of Russell Porter's two biological children than "an unrelated individual."[4] The condition of the male skull at the entry point of a gunshot indicated that the gunshot was "a very close, loose contact kind of injury." "[T]he round [went] from back to front, right to left and up to down." The anthropologist opined that the cause of death was a "cranial gunshot injury," and the manner of death was "homicidal violence."

In the female skull, the entry point of the gunshot was lower on the skull than with the male skull, but "[a]gain [was] right to left, up to down, back to front." The gunshot to the female skull caused greater damage to the female skull than the gunshot to the male skull indicating that the gunshot to the female skull was "a much tighter . . . contact" than the gunshot to the male skull. The anthropologist opined that the cause of the female's death was "a cranial gunshot injury," and the manner of death was "[h]omicidal violence." The anthropologist also identified the female body, and the DNA lab at the university analyzed DNA from the female body and a forensic DNA analyst concluded that the female body was "8.2 billion times more likely to be the mother" of Rebecca Porter's two biological children than "an unrelated individual."

The long-time paramour of Defendant's daughter, who lived with the daughter on the family farm for several years before Russell and Rebecca disappeared, knew Tony

[4] A match with Russell Porter's Missouri, criminal record DNA provided an even higher probability that the male body was Russell Porter – "the nuclear genetic data has an estimated frequency of occurrence [of] one in approximately 759 trillion Caucasian[s]."

Friend from grade school in Cedarcreek – the paramour attended the sixth grade when Tony attended the eighth grade. The paramour had never seen Tony at the family farm until he saw him there four times "[w]ithin a month" of Russell and Rebecca's disappearance – once at Defendant's house on Friday, April 15, once some time earlier when Tony came to visit Defendant's daughter at the daughter's house, and once at Defendant's house and once at the daughter's house shortly after Russell and Rebecca disappeared. The paramour and Defendant's daughter separated within a few months after Russell and Rebecca disappeared, and the paramour left the family farm.

Defendant's daughter testified that before April 2011, Tony Friend "wasn't allowed [on the family farm]. Dad wouldn't allow him out there" "[b]ecause Tony was a liar and a thief and a druggie."[5] "[L]ess than six weeks before" Russell and Rebecca disappeared, Tony "pulled up in [the daughter's] driveway looking for [Defendant]." Tony told the daughter he "was bringing Phil[l]ip . . . to talk to" Defendant about learning how to drive a truck. Tony asked the daughter what the daughter "thought about [her] neighbors," and the daughter replied that Russell "was a pain in [her] butt." Sometime after that, the daughter observed Tony, Windy and their young children at Defendant's "on and off maybe for a few days." After Russell and Rebecca disappeared, Tony was at Defendant's home, and the daughter observed "cars," "tractors or something, equipment" "leaving" Defendant's property but she was "not sure who was moving" these items. Around the time the daughter moved out of the family farm home, and Russell and Rebecca began remodeling the family farm home and then moved into the family farm

[5] In 2011, Tony "had been saying" that he had cancer "for years and years and years," and told Defendant's daughter that he had "[s]ix months" to live. At the time of trial in 2016, the daughter believed Tony was still alive.

home about one year or less before they disappeared, Defendant was "upset" about the fact that the daughter was moving out and that Russell and Rebecca were planning to move in. During that time, Defendant told the daughter that it would be "[o]ver his dead body" before he let Russell move in. Defendant further stated that "he would kill him first."

An individual who previously worked for Defendant one or two days doing odd jobs, and who was incarcerated in the Missouri Department of Corrections for "a fraud case online" at the time of trial, testified that he first met Defendant "a few days or so before" July 28, 2011. "[T]he next day or a couple of days later," the individual contacted Defendant and went to Defendant's house where the individual and his then wife did odd jobs for Defendant. In the course of performing the odd jobs, the individual overheard Defendant's side of a telephone conversation that the individual felt Defendant did not intend for him to overhear. Shortly after the telephone conversation ended, Defendant asked "if [the individual] knew the Porters," and the individual replied "no," but that he had seen flyers "about them missing at the time." Defendant continued that the police had come to his house and accused him of killing the Porters and had taken a shotgun and towel with blood stains from him. Defendant "laughed it off" and said the shotgun and towel did not "have anything to do with it." Defendant said "he was in Texas at the time that [the Porters] were killed," which struck the individual "as odd because at the time their bodies hadn't been found." Defendant made further "comments to the effect that if he wanted somebody killed all he had to do was make a phone call because he wasn't even in the state when [the Porters] were killed." Defendant also indicated that "Mrs. Porter['s] . . . body should only be able to be identified through her

breast implants . . . because her breast implants would have serial numbers." The individual testified that Defendant

> never really came out and said, look, I had these people killed, but I mean that's exactly what it was. You know, I mean, he was saying that I don't even have to be around. I was in Texas when this happened. All I've got to do is make a phone call, you know. And so - I mean, it was - he wasn't directly saying I could do the same to you, but that's - I mean that's absolutely what me and my wife both took he was implying.

At that point, the individual and his wife "were looking to get out of there without . . . seeming like we were trying to get out of there," and told Defendant they were going to McDonald's to eat, left without being paid the full amount they were owed, and did not return to Defendant's house.

On July 28, 2011, the individual talked to law enforcement about Defendant while the individual was in the Greene County jail awaiting transport to the Christian County jail. In testifying, the individual hoped to receive some benefit on his current sentence, but there was no agreement for any specific benefit. The individual had received "threats at the penitentiary" because of his willingness to testify.

Phillip Friend, the adult son of Tony Friend, testified as follows. At the time of trial, Phillip was incarcerated in the Missouri Department of Corrections – Phillip had pled guilty to two counts of "felonious restraint" and two counts of "second-degree murder" pursuant to a plea agreement. Phillip had been sentenced to concurrent terms of imprisonment of seven years on the felonious restraint counts, and was awaiting sentencing on the murder counts. Under his plea agreement, Phillip expected to receive concurrent terms of imprisonment of fifteen years on the murder counts. Phillip's plea agreement required him to cooperate with law enforcement including testifying truthfully in court.

Tony, Phillip, and Tony's then wife, who was Phillip's mother, lived with Defendant "briefly" when Phillip was three. Defendant was married to Tony's sister. After Phillip and his parents left, Phillip did not return to Defendant's house until "late March" 2011, because Phillip was not "allowed to be around" "[a]nyone that had a problem with my father." In 2011, Phillip was working "full time" for his father-in-law in Springfield, and would occasionally stay at Tony's apartment in Springfield. Tony lived at the apartment with his then wife Windy (Phillip's stepmother), and their two, young children. Tony was not working at that time. Phillip's wife and two young children lived in another apartment in the same apartment complex.

Shortly after "the Porter incident" and again later in 2011, Phillip was contacted by law enforcement. During those contacts, Phillip did not tell law enforcement the truth because he "wasn't ready to be forthright" because he did not "want to be the one to look like I was rolling over while everybody else is out. I just sorta wanted to be the last person to get arrested." For the same reason that he did not want to look like "a snitch," Phillip again did not tell the truth when he appeared in 2012, before a grand jury in Greene County.

Phillip "respect[ed] [his father] out of fear and not love," and was not excited to participate in the kidnapping of the Porters because he was used "to stealing 4-wheelers, breaking into homes stealing TVs or whatever they've got in there, not in dealing with people." In the beginning of April 2011, Phillip temporarily avoided participating in the kidnapping by, when Tony first approached him, telling Tony he was "not comfortable with that kind of work." Phillip understood that after the Porters were kidnapped:

> During the first encounter it was take them to birthdays. To my father that means killing them. The second time he said we're not going to kill them.

> We are going to take them at [*sic*] there and we're going to scare them and get them to move.

Phillip was "surprised that the Porters were murdered," but had "doubts that it was a scare tactic."

Planning for the kidnapping occurred in Tony's apartment. Tony, Windy, Dusty Hicks and Phillip were present when the planning occurred. Phillip understood that only the Porters and their "identification cards" were to be taken from the Porters' house. Phillip understood that nothing else should be taken "[s]o nothing would get caught on our person." Phillip attended two planning meetings for the kidnapping that occurred "very close to each other. A couple of nights before the 18th."

In the end, Phillip participated in the kidnapping because he "was given the ultimatum it was my family or their's [sic]." Phillip understood that the kidnapping was to occur "[b]efore the 19th." Tony, Windy, Phillip and Dusty participated in the kidnapping of the Porters. Phillip understood he would be responsible for "zip t[ying] Russell and Rebecca Porter."

Late on April 17, 2011, Phillip prepared for the kidnapping by showering and dressing in black clothes at Tony's apartment. Tony and Windy were present at the apartment. Dusty subsequently arrived at Tony's apartment before midnight. In the very early morning on April 18, Tony, Windy, Phillip and Dusty went to a Walmart store in Tony and Windy's truck with Tony driving. The truck had a front bench seat and a smaller rear bench seat, and could seat "[a]round six" people. Phillip observed that Tony had a handgun, and Dusty had a handgun.[6] At the Walmart store, Dusty purchased a

[6] Both handguns had been stolen by a third person in a burglary in which Phillip participated. Law enforcement recovered Dusty's handgun from Dusty during a consent search, but never were able to locate Tony's handgun.

bottle of bleach for the group. The group then drove to Defendant's house where Tony parked the truck and the three men exited the truck and walked across the field to the house where the Porters were living. At this point, it was about 3 a.m.

The men each took a different route to the Porters' house, and Phillip was the last to arrive at the house. When Phillip arrived, Tony and Dusty "were talking about the doors being locked." At that point, "Tony was talking about kicking in the door," and Phillip told Tony:

> we should call it a night. Kicking in the door is going to be very loud. There's another house directly behind their house and the dogs were already barking. So they already knew we were there. But calling it a night was not an option.

While this discussion was occurring, Dusty had been checking windows and found that the kitchen window right above the sink was open. Dusty cut the "screen [over the window] along the edge" and "slid the window open." Tony and Phillip lifted Dusty up so that he could enter the house through the window, and then went to the back door that Dusty opened for them.

Once the three men reached the Porters' bedroom, Tony "flipped on the light" and Tony and Dusty "rushed into the bedroom, had their guns drawn." Tony told Rebecca "to get her IDs," and Rebecca retrieved both her and Russell's IDs from her billfold, which was in her purse, and gave the IDs to Tony. Phillip went into the bedroom, but froze and Tony zip-tied the Porters' hands. Dusty took a computer tower from "an office area" of the house. The men also took "Rebecca's phone."

Tony then used his cell phone to call Phillip's cell phone, which Phillip had left in the truck with Windy. The three men and the Porters then left the house, and entered the truck that Windy had parked outside the Porters' house with the passenger-side doors

open. The Porters got into the back seat with Dusty, and Tony, Windy and Phillip got into the front seat with Tony driving. Before getting into the truck, Dusty had brought the computer tower out of the house and placed it in the bed of the truck; then took the bottle of bleach and returned to the house "for no more than a minute." The bleach was intended to "destroy . . . DNA." Phillip did not see what Dusty did with the bleach, but the bottle was empty when Dusty returned to the truck.

Tony then drove to I-44 and Highway 13, where he dropped Windy off at the intersection. Tony then drove east on I-44, south on 65, east on 60, and south on a road that went through Sparta to Cedarcreek – at some point on this road, the three men removed the batteries from their cell phones so they could not be "tracked." The trip took "[r]oughly, two hours" when, in Phillip's experience, it normally takes between an hour and one and a half hours to travel from Springfield to Cedarcreek. During the trip, Russell was "pleading," and Rebecca was "crying and praying."

The trip ended on the "Protem Cedar Creek Road" where Tony stopped the truck, got Rebecca and Russell out of the truck, and then walked them in their socks down a pathway away from the road into the woods. Tony had his handgun with him. Phillip and Dusty waited at the truck. "Roughly, almost an hour later," when "the sun was coming up," Phillip heard a gunshot. Phillip put the battery back in his cell phone and called Tony "[t]o ask him what was going on." Tony told Phillip "[i]t was just a scare shot." "Roughly, 10 minutes later there was another shot." Phillip told Dusty "he couldn't have. He couldn't have killed them."

Phillip and Dusty continued to wait at the truck, and Phillip fell asleep. Phillip awoke to Tony holding a gun against Phillip's head – Phillip was "[t]errified." Tony told

Phillip that "if I got anything to say I can go back there and live with them." Phillip told Tony "I had nothing to say. I done forgot about the whole situation." Tony had a similar conversation with Dusty. The three men then left in the truck with Tony driving, and "went to M Highway and up through Forsyth" – which was "a different route than [they] originally came in." During the return trip, the men placed the "zip ties" and Tony and Dusty's masks "in a plastic sack and tossed [the sack] into the river." On returning to Springfield, Dusty and Phillip took the computer tower, bleach bottle and Rebecca's phone and "burned them" in the country "off BB." Dusty and Phillip then "caught up on some sleep."

A "couple days later," Tony contacted Phillip, and Phillip learned that the three men had to go back to where Russell and Rebecca's bodies were left "because [the bodies] were not where they were supposed to be." The next day, the three men and Windy returned to the place where Russell and Rebecca's bodies were left, and brought two four-wheelers that Dusty and Phillip had stolen from a house and veterinary clinic in the early morning on the trip down. The men and Windy also brought "shovels and chains." Windy waited with the truck at the "end of Protem Cedar Creek [Road]" in a "turnaround." The three men took the shovels, chains and four-wheelers, and rode to where Russell and Rebecca's bodies had been left. While Tony watched, Dusty and Phillip "dug holes" "[r]ight there at the doorway where the biggest gap was in the floor" of the structure in which Russell and Rebecca's bodies were located. When the two men finished digging, the hole "was about two feet, if that." Tony then drug Rebecca and put her in the hole followed by Russell, and Dusty and Phillip then placed the excavated dirt back on the bodies. Then, the men "got on the 4-wheelers and kind of twisted the

structure down [on top of the Porters' bodies] and then threw a bunch of random stuff on top of [the pile formed by the structure]" "[t]o make it look natural."

Sometime later, Phillip helped Tony "get a car dolly" from Defendant's farm. Tony also apparently received a "Ford Ranger" from Defendant. Phillip never "receive[d] anything for participating in the kidnap and murder of Russell and Rebecca Porter."

In the "Spring of 2014," at the Taney County jail, Phillip spoke to Defendant through a door between the recreation room that Phillip was in and a jail pod that Defendant was in. Phillip asked Defendant for a phone card that Phillip could use to call family. Defendant told Phillip that he did not have a phone card, and then said:

> [Phillip]: ["S]ince I got you here who [is] putting my name out there involved in all this["] and I told him Dusty Hicks.
>
> [Prosecutor]: And then what?
>
> [Phillip]: He said he knows it's not Tony. Tony's not going to roll on you. You know, Tony won't roll on you. He said he was going to take care of Tony and Windy and help Windy get the kids.
>
> [Prosecutor]: Help her get the kids?
>
> [Phillip]: Yeah.
>
> [Prosecutor]: And then what happened?
>
> [Phillip]: He's gonna take care of Dusty for not keeping his name out of it and at that point I took it to [be] he can take care of me, too.
>
> . . . .
>
> [Prosecutor]: Okay. So then what?
>
> [Phillip]: I left it at. Said I'm just looking for a card, a phone card, and he said he can't give me a phone card, and let them see that I'm making calls on his phone card.

Guards then told each of the two men to get away from the door.

In the course of Phillip's direct testimony, the following testimony, objections, responses, and rulings occurred:

> [Prosecutor]: I might talk about that more a little bit later but I want to ask you were you part of a group of people who kidnapped Russell and Rebecca Porter from their home?
>
> [Phillip]: Yes.
>
> [Prosecutor]: How did you get involved with that?
>
> [Defense Counsel]: I object. It calls for hearsay.
>
> BY THE COURT: If he's going to state what somebody else is going to say, then that that will be sustained.
>
> [Prosecutor]: Did you come up with some great plan to kidnap and murder the Porters?
>
> [Phillip]: No.
>
> [Prosecutor]: Okay. Then why did you participate?
>
> [Phillip]: My father came to me and told me –
>
> [Defense Counsel]: Judge, I'm objecting.
>
> BY THE COURT: Sustained.
>
> [Prosecutor]: What was your belief why you were involved in this kidnapping?
>
> [Phillip]: Because my father needed me. Because in all his jobs I was sort of his right hand man.
>
> . . . .
>
> [Prosecutor]: What was your understanding of why the Porters were going to be kidnapped?
>
> [Defense counsel]: Your Honor, I'm going to object. That calls for hearsay.

[Prosecutor]: It goes to his state of mind, Your Honor.

BY THE COURT: Overruled.

[Phillip]: (By the Witness) They knew a little too much of what they shouldn't have known.

[Prosecutor]: Who is they?

[Phillip]: Russell and Rebecca Porter.

. . . .

[Prosecutor]: What was your understanding about why that was?

[Defense Counsel]: Judge, I'm going to object. That calls for hearsay.

[Prosecutor]: Still, again, I'm asking what his impression was and what his state of mind was, Your Honor.

BY THE COURT: Overruled.

[Phillip]: (By the Witness) Their identification cards were taken to show proof.

[Prosecutor]: And why nothing else?

[Phillip]: Because my - because Tony Friend said that he didn't want it to be - look like house robbery.

[Defense Counsel]: Judge, I'll object to what Tony said.

BY THE COURT: It will be sustained.

. . . .

[Prosecutor]: What was your understanding of why before the 19th?

[Defense Counsel]: Judge, I'll object. That calls for hearsay.

BY THE COURT: Overruled? [sic]

[Phillip]: (By the Witness) Because Robert was coming back that Monday.

. . . .

[Prosecutor]: What was your understanding of Tony Friend's motivation for kidnapping and murdering the Porters.

[Defense Counsel]: Judge, I'm going to object to the hearsay.

[Prosecutor]: What his understanding is, Your Honor. For his state of mind, it's not offered for the truth of the matter.

(Counsel approached the bench and the following proceedings were held outside the hearing of the jury.)

BY THE COURT: I couldn't hear her.

[Prosecutor]: You couldn't hear her.

[Defense Counsel 2]: His last question was as to what his understanding was if we knew what Tony Friend's motivation was. It is either improper speculation or hearsay. The objection was we were getting ready to hear hearsay.

BY THE COURT: Sustained.

[Prosecutor]: Okay. Thank you.

(The proceedings returned to open court.)

In the course of Phillip's redirect testimony, the following testimony, objections, responses and rulings occurred:

[Prosecutor]: Now, you were also asked by [defense counsel] about some of these other abductions you participated in with Tony Friend. Do you remember being asked those questions?

[Phillip]: Yes.

[Prosecutor]: And did I understand your testimony to be that there were not guns used in those other previous incidents?

[Phillip]: There were no guns.

[Prosecutor]: That was different from this incident. Wasn't it?

[Phillip]: Yes.

[Prosecutor]: What else was different about this incident from the previous incidents?

[Phillip]: This incident was not my father's bringing –

[Defense Counsel]: Objection, Judge. That's hearsay.

[Prosecutor]: Listen. I'm just trying to clarify what happened on cross, Judge. I am just trying to get some answers as to how this is different.

BY THE COURT: It will be overruled.

[Prosecutor]: Thank you. Go ahead?

[Phillip]: (By the Witness) This job my father did not come up with on his own.

[Prosecutor]: What else is different about this job from the previous jobs you participated in with your father?

[Phillip]: There is a lot more at stake.

[Prosecutor]: Like what?

[Phillip]: Murder and $100,000.

[Prosecutor]: Was that your understanding about what this was about?

[Phillip]: Yes.

[Prosecutor]: Had you ever done one of these abductions with your father when you believed he murdered somebody?

[Phillip]: No.

On recross examination, defense counsel elicited the following testimony:

[Defense Counsel]: You thought the dude that lived in that trailer had $100,000 to give you. That's what I'm hearing?

[Phillip]: Yes.

[Defense Counsel]: You never got a red penny?

[Phillip]: No.

[Defense Counsel]: Dad didn't come home with $100,000 in his pocket ever?

[Phillip]: No.

A Jasper County jail inmate testified as follows. In March and April 2016, the witness was in the Jasper County jail at the same time as Defendant for approximately three weeks. During that time, the witness was in the same pod as Defendant, but did not share a cell with Defendant. During that time, the witness made a card for Defendant at the request of another inmate. The witness subsequently was released from the Jasper County jail on April 15th, but returned to the jail on June 2, 2016, at which time he was placed in a cell with Defendant for approximately two weeks. One evening in their cell sometime before June 17th, after the witness and Defendant participated in a "prayer circle" before going to their cell, the witness observed that Defendant was crying and asked what was wrong. Defendant told the witness that "he hired his brother-in-law to kill his sister's boy while he was on the truck." At the time, all the witness knew was that Defendant "was in [jail] for some type murder." The witness first told this information to his attorney on Friday, July 1, 2016, when the witness "knew nothing of [Defendant's] trial," and the only benefit he expected to receive for testifying was that his cash-only bond would be converted to a surety bond so that the witness could be released on bond and see his son, who was born on June 17, 2016. Also, "[i]t would be nice" if the witness received "some lenience" in his pending cases, but "[n]othing has been promised."

Defendant did not call any witnesses, and chose not to testify.

Neither the State nor Defendant called Tony Friend to testify following a proffer outside the presence of the jury in which Tony largely invoked his right not to

incriminate himself. The trial court did take judicial notice of Tony's criminal judgment, and the jury was aware that the trial court did so. The judgment showed that Tony Friend had pled guilty to the murder of Russell and Rebecca Porter, and been sentenced to life without the possibility of parole.

The jury was instructed on murder in the first degree and several lesser included offenses including two forms of murder in the second degree. Instructions No. 13 and 25 (which were submitted by Defendant) instructed the jury on murder in the second degree "as a result of the perpetration of" the "felonious restraint" of the Porters, and required the jury to find and believe beyond a reasonable doubt that (1) Defendant "aided or encouraged Tony Friend to commit felonious restraint" of the Porters, (2) "during the felonious restraint, Tony Friend shot and killed" the Porters, and (3) the Porters were "killed as a result of the perpetration of that felonious restraint." In converse instructions (also submitted by Defendant) to Instructions No. 13 and 25, the jury was instructed that it must find Defendant not guilty of murder in the second degree as submitted in Instructions No. 13 and 25 if it had "a reasonable doubt as to whether [D]efendant aided or encouraged Tony Friend to commit felonious restraint of" the Porters. The jury also was instructed without objection that:

> A person is responsible for his own conduct and he is also responsible for the conduct of other persons in committing an offense if he acts with the other persons with the common purpose of committing that offense or if, for the purpose of committing that offense, he aids or encourages the other persons in committing it.

The jury began deliberations shortly after 2 p.m., on July 12, 2016. At 10:11 p.m., the jury sent the trial court an unsigned note that stated:

> Juror 11[7] has made statements that should have disqualified him him [sic] in jury selection.
> Can he be replaced?

The trial court ruled:

> After discussion off the record the attorneys have agreed the Court will send a note in that reads, "You will need to continue to deliberate. However, if you wish we could resume deliberations at 9 a.m. tomorrow.

The jury then replied a few minutes later by note that stated "come back in the morning" (most of the note was in all capital letters, and the note was not signed). The trial court then released the jury for the evening. Defense counsel did not object or request any other relief at the time.

The next morning, following the jury's resumption of deliberations, defense counsel told the trial court:

> Judge, I do want to make a record about the note that was sent out last night about 10:15. I was, I guess, admittedly out of it at that point, but on the drive home and the drive back in I have had some time to reflect on it. And I think it's appropriate at this time for me to ask for a mistrial based upon the note related to the jury saying . . . Juror Number 11 should be disqualified based upon statements he has made in the jury room. And can we replace him? I understand we are deep into trial. I'm not anticipating a positive response from the Court, but I believe it's appropriate for me to make a record about that.

The trial court replied:

> The Court will note that this note came in and the record will reflect it adequately from last night at approximately 10:10 p.m. At that time the jury had been deliberating approximately eight hours. We had heard little to nothing from out of the jury at that time. The jurors were tired. All parties agreed that the note that went back to ask them if they wanted deliberate at 9:00 today and within a few minutes they came back and said that they did that. They've now been in deliberating for approximately another 10 minutes. The Court believes that from the way that the note was written that they were tired and were in an enclosed box for eight and needed a

[7] From the record, "Juror 11" appears to be venire person number 27. No response or statement was made during voir dire that is identifiable as a response or statement by venire person 27.

> break from each other. And there's been no problems that have been evidenced today.
>
> And so at this point in time the Court is going to deny defendant's request for a mistrial.

Defense counsel did not object to the trial court's description of events, and did not request any other relief.

The jury reached verdicts a little over two hours after resuming deliberations. The jury found Defendant guilty of two counts of murder in the second degree as submitted in Instruction Nos. 13 and 25. Following the presentation of additional evidence, instruction, and argument, the jury assessed punishment at life imprisonment on each count.[8] The trial court subsequently imposed the punishment assessed by the jury, and ordered the sentences to run consecutively.

Analysis

Point I – Claim that the Trial Court Abused Its Discretion in Admitting Inferential Hearsay

In Defendant's first point, he claims that the trial court "abused its discretion in overruling [Defendant's] 'hearsay' objections" to Phillip Friend's "'understanding'" of the objectives and workings of a plan to abduct and kill the Porters because Phillip's understanding allegedly "was 'hearsay' by clear inference" from statements by Tony Friend to Phillip, which inferred statements were not admissible against Defendant as co-conspirator statements inasmuch as the State did not establish by a preponderance of the evidence, independent of the inferred statements by Tony to Phillip, that "a conspiracy existed" between Defendant and Tony Friend. In the argument portion of his brief, Defendant identifies the challenged testimony as "Phillip Friend's testimony about his

[8] The range of punishment available to the jury was imprisonment for ten to thirty years or life.

'understanding' that the kidnapping had to occur before [Defendant] returned, that the Porter's [sic] identifications cards had to be taken to show proof, and that the abduction of the Porters had to do with '[m]urder and $100,000'[.]"

> Statements of one conspirator are admissible against another under the co-conspirator exception to the hearsay rule, even if a conspiracy has not been charged. *State v. Pizzella*, 723 S.W.2d 384, 388 (Mo. banc 1987). For a statement to be admissible under the co-conspirator exception, there must be a showing, by evidence independent of the statement, of the existence of the conspiracy, and in addition, the statement must have been made in furtherance of the conspiracy. *Id*. The existence of a conspiracy need not be shown by conclusive evidence and may be established, instead, by circumstantial evidence consisting of the mere appearance of "acting in concert." *State v. Clay*, 975 S.W.2d 121, 131 (Mo. banc 1998), *cert. denied*, 525 U.S. 1085, 119 S.Ct. 834, 142 L.Ed.2d 690 (1999).

State v. Ferguson, 20 S.W.3d 485, 496 (Mo. banc 2000); *see also* ***State v. Warren***, 141 S.W.3d 478, 491 (Mo.App. E.D. 2004) (similar statement of rules); ***State v. Clay***, 975 S.W.2d 121, 131-32 (Mo. banc 1998) ("must be a showing, by evidence independent of the statement, that the conspiracy exists and that the defendant is part of that conspiracy[;]" "[o]nce the existence of a conspiracy is independently established, witnesses may testify to statements of a co-conspirator that show the furtherance of the conspiracy"); ***State v. Frederickson***, 739 S.W.2d 708, 711 (Mo. banc 1987) (declarant need not be "a coindictee or codefendant[;]" must establish "that defendant and the declarant were members of a conspiracy" "by a preponderance of the evidence" independent of the co-conspirator's statement); ***State v. Cornman***, 695 S.W.2d 443, 446 (Mo. banc 1985) ("[W]hen a conspiracy has been independently shown, statements or declarations of a conspirator, made in the furtherance of the object of such unlawful combination, are admissible against another conspirator not present when such statements or declarations were made."). Further, "'[o]n review, the appellate court's inquiry is

limited to whether the trial judge had reasonable grounds to make his findings.' [*State v.*] *Fuhr*, 660 S.W.2d [443,] 447 [(Mo.App. 1983)]." ***Frederickson***, 739 S.W.2d at 711; *see also* ***State v. Fleischer***, 873 S.W.2d 310, 313 (Mo.App. S.D. 1994) (similar statement of the rule).

In this case, contrary to Defendant's argument, there was ample evidence, independent of any inferred statements by Tony Friend to Phillip, to establish reasonable grounds for a finding that Defendant and Tony Friend were members of a conspiracy to abduct and kill the Porters with the result that, even if Phillip Friend's understanding of the objectives and workings of the conspiracy was based on Tony Friend's inferred statements to Phillip, those inferred statements were admissible against Defendant as statements by Defendant's co-conspirator.

Phillip Friend's testimony and phone records established that his father, Tony Friend, was a member of the conspiracy.

The evidence that established reasonable grounds for a finding that Defendant was a member of the conspiracy was: (1) Defendant told a jail cellmate that "he hired his brother-in-law to kill his sister's boy while he was on the truck;" (2) Defendant, his wife and his wife's three sons from a previous relationship were "jealous[]" because Russell and Rebecca Porter moved into the original family home at the family farm; (3) Defendant, his wife and his wife's three sons on the one hand and Defendant's sister's family on the other hand had a longstanding feud that waxed and waned over time; (4) "probably a month, a month and a half" before Russell and Rebecca Porter disappeared, Defendant's son had to separate Defendant and Russell when the two men were in a heated, verbal altercation at or near Defendant's sister's home; (5) as Defendant and his

son were leaving the scene of the altercation in a truck to go to Defendant's home, Defendant told his son "that boy's days are numbered and he put his hands on the wheel and it was just dea[d] calm. It was like it just kind of was over;" (6) shortly after the confrontation between Defendant and Russell, Tony Friend reappeared at the family farm after many years of not being welcome on the farm; (7) roughly eighteen days before Russell and Rebecca disappeared, Defendant was granted a full order of protection from Russell, and Russell was granted a full order of protection from Defendant; (8) conversations between Defendant and Tony "went silent" when Defendant's son approached the two individuals; (9) Defendant's daughter's paramour saw Tony at Defendant's house on Friday, April 15, 2011, (10) in the period April 14 through April 16, 2011, there were multiple phone calls between Defendant and Tony or Windy Friend's phones; (11) there were a "couple" of calls between Defendant and Windy's phones on April 22, 2011; (12) at the time of the abduction in the early morning hours on April 18, 2011, the abductors parked their truck at Defendant's house until it was time to pick up the Porters at the Porters' house; (13) after Russell and Rebecca disappeared, Tony was present at Defendant's home and "just pretty much had his way about everything up there at [the] farm;" (14) Tony ended up with personal property that previously belonged to Defendant; (15) Defendant made comments to a temporary worker "to the effect that if he wanted somebody killed all he had to do was make a phone call because he wasn't even in the state when [the Porters] were killed;" (16) while in the same jail facility, Defendant asked Phillip Friend "who [is] putting my name out there involved in all this and [Phillip] told him Dusty Hicks" after which Defendant told

Phillip that Defendant "knows it's not Tony. Tony's not going to roll on you," and Defendant was "gonna take care of Dusty for not keeping his name out of it."[9]

Defendant's first point is denied.

Point II – Claim that the Trial Court Abused Its Discretion in "Failing to" Declare a Mistrial or Hold a Hearing Based on a Juror's Alleged Statements During Deliberations "that Should Have Disqualified" the Juror

In his second point, Defendant claims that the trial court abused its discretion "in failing to declare a mistrial, or in the alternative, in failing to hold a full investigative hearing" following the receipt during the jury's deliberations of an unsigned note from the jury that indicated a specific juror "'has made statements that should have disqualified him . . . in jury selection'" because "the note raised the significant possibility that one of the twelve jurors was biased or prejudiced against [Defendant], and the note should have triggered a duty on the court to make an independent inquiry." We reject Defendant's second point for a number of reasons.

First, the jury sent its unsigned note to the trial court shortly after ten in the evening after the jury had been deliberating for approximately eight hours. The trial court then stated on the record that, "after discussion off the record the attorneys have agreed" that the trial court would reply to the jury in a note that instructed the jury it would "need to continue to deliberate," but gave the jury the option to break for the evening and resume deliberations in the morning. The jury replied that it would like to

[9] To the extent Defendant's argument is that Tony recounted to Phillip statements Defendant made to Tony and that Defendant's statements to Tony were inadmissible as "double hearsay," Tony's statements to Phillip were admissible as the statements of a co-conspirator and Defendant's statements to Tony would have been admissible as statements of the defendant in the case. *See* ***State v. Reagan***, 654 S.W.2d 636, 640, 639-41 (Mo.App. E.D. 1983) ("[t]he double hearsay testimony of Murphy was thus admissible because each hearsay statement met an exception to the rule barring hearsay testimony" – there the exceptions were the statement of a co-conspirator and the statement of the defendant in the case on facts similar to the facts in this appeal).

come back in the morning, and the trial court released the jury for the evening. Defendant did not challenge then and does not challenge now the trial court's statement that "after discussion off the record the attorneys have agreed" to the trial court's reply.[10] Defendant also did not request any other relief at the time. "Affirmatively acquiescing to an action by the trial court waives even plain error review. *See State v. Johnson*, 284 S.W.3d 561, 582 (Mo. banc 2009)." ***State v. Evans***, 517 S.W.3d 528, 548 (Mo.App. S.D. 2015). Defendant's oral request for a mistrial the next morning after the jury had resumed its deliberations was untimely. *See* ***id.*** at 545 ("It is counsel's responsibility to request a mistrial. . . . If counsel fails to do so, it will be assumed that counsel is satisfied with the measures taken by the trial court. . . . A subsequent request for a mistrial or other additional measures is untimely." (citations omitted)).

Second, Defendant did not present to the trial court the ground for a mistrial that he now presents to us. At the time Defendant orally requested a mistrial based on the jury's note, he did not state a specific legal ground for the request. From the trial court's response to the request and in light of the jury's inquiry "[c]an he be replaced," it appears the trial court interpreted Defendant's concern to be that the jury was unable to reach unanimous verdicts. Indeed, Defendant's motion for a new trial confirms Defendant's concern was that the jury was unable to reach unanimous verdicts. Defendant's motion for new trial states, in relevant part:

> The Court erred when it overruled defendant's request for mistrial after note received from jurors requesting dismissal of juror number 11. The note indicated that the jurors were hopelessly deadlocked and that to reconvene the Jury for deliberations resulted in a coercive step by the Court leading to a coerced verdict.

[10] Defendant also did not challenge the trial court's statement the next morning when, in response to Defendant's belated oral request for a mistrial, the trial court stated "[a]ll parties agreed" to the trial court's reply to the jury the previous evening.

The ground for mistrial presented to us is that a specific juror made statements during deliberations that "raised [a] significant possibility" the juror was biased or prejudiced against Defendant. We will not convict a trial court of error on a ground that was not presented to the trial court for decision and raised for the first time on appeal. ***State v. Lane***, 415 S.W.3d 740, 750 (Mo.App. S.D. 2013); *see also* Rule 29.11(d) ("In jury-tried cases, allegations of error to be preserved for appellate review must be included in a motion for new trial except for" limited questions not present in this case.).

Lastly, even if Defendant had not waived and failed to preserve the claim raised in his second point, the trial court did not abuse its discretion in denying Defendant's oral request for a mistrial. In the context of alleged juror misconduct during deliberations that is not discovered and raised until after the jury reaches a verdict,

> The "well-founded and long-established rule" governing impeachment of a verdict provides:
>
> > [T]he affidavit or testimony of a juror is inadmissible and is not to be received in evidence for the purpose of impeaching the verdict of a jury. Alternate jurors are likewise precluded from testifying in a manner that impeaches a verdict.
>
> *Storey v. State*, 175 S.W.3d 116, 130 (Mo. banc 2005) (citing *Wingate by Carlisle v. Lester E. Cox Med. Ctr.*, 853 S.W.2d 912, 916 (Mo. banc 1993)).
>
> "The rule is perfectly settled, that jurors speak through their verdict, and they cannot be allowed to violate the secrets of the jury room, and tell of any partiality or misconduct that transpired there, nor speak of the motives which induced or operated to produce the verdict." *Woodworth v. State*, 408 S.W.3d 143, 149 n. 5 (Mo.App. W.D. 2010) (internal citations and quotation marks omitted). "Missouri law has long held that a juror may not impeach a unanimous, unambiguous verdict after it is rendered." *State v. Carter*, 955 S.W.2d 548, 557 (Mo. banc 1997) (internal citation omitted). A juror's testimony about jury misconduct allegedly affecting deliberations may not be used to impeach the jury's verdict. *State v. Herndon*, 224 S.W.3d 97, 103 (Mo.App.W.D.2007) (internal citation and quotation marks omitted). Further, a motion court is not required to hear testimony from

> jurors to rule on a motion for new trial that is brought on allegations of juror misconduct. *State v. Chambers*, 891 S.W.2d 93, 101 (Mo. banc 1994) (citation omitted).

State v. West, 425 S.W.3d 151, 154-55 (Mo.App. W.D. 2014). The rule extends to juror conduct occurring after the presentation of evidence begins as well as to juror conduct occurring during deliberations. ***Smith v. Brown & Williamson Tobacco Corporation***, 410 S.W.3d 623, 642-44 (Mo. banc 2013). Our Supreme Court has recognized "two narrow exceptions" to the rule:

> "Jurors may testify about juror misconduct when a juror gathers extrinsic evidence and brings that evidence back into the court room. *Fleshner [v. Pepose Vision Inst., P.C.]*, 304 S.W.3d [81,] 88 [(Mo. banc 2010)]. Jurors also may testify about statements reflecting ethnic or religious bias made by a juror during deliberations. *Id*. at 89."

Id. at 642 n.8, 643 n.9.

On the other hand, when the alleged juror misconduct is discovered and raised before the jury reaches a verdict, the rule appears to be that a juror may, consistent with other applicable rules of evidence, testify about juror misconduct because there is no verdict that will be impeached. Although we did not find an express discussion of the rule for juror misconduct raised before the verdict in Missouri, it appears Missouri follows a similar rule. *See* ***State v. Harris***, 477 S.W.3d 131, 137-39 (Mo.App. E.D. 2015), *superseded on another ground by constitutional amendment as stated in* ***State v. Thigpen***, No. ED103992, 2017 WL 3388977, at *11 (Mo.App. E.D. Aug. 8, 2017), (during deliberations pre-verdict, the trial court, over the defendant's objection, questioned a juror who the jury's foreperson indicated in a note was "nervous and scared about participating in the verdict;" the appellate court stated: "The trial court properly investigated the cause of Juror 1975's fear, ensuring nothing had occurred overnight to

cause such, and then specifically advised Juror 1975 to be guided by the instructions, to not make a decision based on fear, and to listen to the views of the other jurors but to come to her own decision on what she believed.").

In this case, after approximately eight hours of deliberation, the jury sent the trial court an unsigned note stating: "Juror 11 has made statements that should have disqualified him him [sic] in jury selection. Can he be replaced?" The note did not disclose any of Juror 11's actual statements, and offered only the jury's conclusory lay opinion that Juror 11's statements "should have disqualified him . . . in jury selection." The trial court interpreted the note to indicate that the jurors were "tired" and "needed a break from each other," and the trial court had not observed any "problems" since the jurors' overnight recess. On that basis, the trial court denied Defendant's untimely request for a mistrial. Defendant never requested an evidentiary hearing, and has not referred us to any Missouri authority that requires the trial court, *sua sponte*, to convene an evidentiary hearing when the trial court learns during deliberations of information that suggests juror misconduct. Defendant never requested to make any offer of proof at the post-trial motion hearing. Defendant had the burden to show misconduct. He did not do so. Defendant's second point is denied.

The trial court's judgment is affirmed.