In the Missouri Court of Appeals
Eastern District
DIVISION FOUR

STATE OF MISSOURI,	)	No. ED105246
	)	
Plaintiff/Respondent,	)	Appeal from the Circuit Court of
	)	Montgomery County
vs.	)	
	)	
JASON STUFFLEBEAN,	)	Hon. Kelly Broniec
	)	
Defendant/Appellant.	)	FILED: March 13, 2018

OPINION

Jason Stufflebean appeals the trial court's judgment after a jury convicted him of attempting to manufacture a controlled substance, methamphetamine. Finding no reversible error, we affirm.

Factual Background

Jason Stufflebean ("Appellant") was charged with attempting to manufacture methamphetamine, for an incident occurring on May 18, 2012. A jury found him guilty as charged on December 16, 2016. This appeal follows.

In May 2012, 23354 Lloyd Road (the "Burke property") was owned by Appellant's cousins, Christopher Burke ("Burke") and his sister, Mandy. The Burke property had previously been owned by Christopher and Mandy's father, and the trailer on the Burke property had once been the family's residence, although no one lived there by May 2012.

On May 16, 2012, deputies responding to report of possible trespassing at 23354 Lloyd Road entered the uninhabited trailer and found a duffle bag containing muriatic acid, Coleman fuel, and an ice-pack label – items consistent with the manufacture of methamphetamine. Because such items were not safe to transport, and no one was available for an immediate pickup of the items, a deputy at the scene hid the bag with the items under the porch until someone could retrieve it.

Two days later, on May 18, 2012, Deputy Todd Clark ("Clark") and two other deputies responded to a call regarding suspicious activity at the Burke property. On arrival, the officers encountered Burke and Cody Jackson ("Jackson") at the front of the trailer, and Clark observed a third individual run from the rear of the trailer into a wooded area. Clark later testified that he believed the individual to be Appellant based on Clark's viewing of a photograph of Appellant that hung in the sheriff's department squad room. Burke and Jackson were detained, and after an unsuccessful attempt to locate the third individual, Clark conducted what he called a "protective sweep" of the interior of the trailer. During the sweep, he observed more items consistent with the manufacture of methamphetamine.

Afterward, Clark interviewed Burke, who at first denied that a third person had been present at the trailer. Clark told Burke that he believed it was Appellant who ran from the trailer, and that if Burke told the truth he would not be arrested that night. Burke confirmed that is was Appellant who had run from the trailer. Burke also told Clark that he, Appellant, and Jackson went to the Burke property to "make money" by making methamphetamine.

Meanwhile, Detective Jeff Doerr ("Doerr"), obtained a search warrant for the trailer. Doerr seized and photographed items from the trailer, including those that were hidden under the porch on May 16. Doerr gave the seized hazardous material items to the drug task force for destruction. He did not obtain permission from the court or take representative samples of the materials before their destruction.

Further investigation yielded evidence that Burke had purchased pseudoephedrine on May 18. Doerr and Lieutenant Scott Schoenfeld ("Schoenfeld") went to Burke's home on May 21 to interview him further. At that point, Burke said that he bought the pseudoephedrine for Appellant and told the officers the entire sequence of events from May 18, which included Burke and Appellant visiting several different stores to purchase ingredients for methamphetamine manufacture. Officers then investigated Burke's claims by viewing surveillance videos and obtaining receipts for items purchased, some of which were admitted as evidence at trial. At trial, Burke testified that he did not remember making the statements to police on May 18 and 21.

Additional facts relevant to the points on appeal appear below.

Analysis[1]

The State claims that Appellant's Points I and IV are multifarious and are therefore not subject to appellate review. While we agree that Appellant's Points I and IV are multifarious, we prefer to decide cases on the merits when it is feasible to do so, as it is here.

Fourth Amendment claim (Point I)

For his first point, Appellant contends that the trial erred in overruling his motion

[1] All statutory references are to RSMo. 2016.

to suppress evidence seized from the Burke Property and in overruling his motion to reconsider suppression of the same evidence. Appellant claims that the police violated his Fourth Amendment rights with respect to the evidence seized from the Burke Property on May 16 and 18. We review a trial court's ruling on a motion to suppress for clear error, reversing only if "we are left with the definite and firm impression that a mistake has been made." *State v. Pierce*, 504 S.W.3d 766, 769 (Mo. App. E.D. 2016). We defer to the trial court's factual findings and credibility determinations and consider all evidence and reasonable inferences in the light most favorable to the trial court's ruling, disregarding all contrary evidence and inferences. *State v. Loggins*, 445 S.W.3d 105, 109 (Mo. App. E.D. 2014). Finally, "while we defer to the trial court's factual findings and credibility determinations, the question of whether the Fourth Amendment has been violated is a legal one that we review *de novo*." *State v. Brown*, 382 S.W.3d 147, 156 (Mo. App. W.D. 2012).

The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures . . ." U.S. Const. amend. IV. Fourth Amendment rights are personal and may not be asserted vicariously. *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978). "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Id.* at 134. To show that his Fourth Amendment rights have been violated personally, a defendant must have an actual, subjective expectation of privacy in the place or thing searched, and that expectation must be "reasonable" or "legitimate." *State v. Faruqi*, 344 S.W.3d 193, 205

(Mo. banc 2011). A defendant who does not have a reasonable expectation of privacy related to that property at the time of the allegedly improper search or seizure lacks standing to complain of the search or seizure of property. *State v. Mosby*, 94 S.W.3d 410, 416 (Mo. App. W.D. 2003). Even if Appellant had a personal, subjective expectation or belief that his property in the Burke trailer would go undisturbed, that is not enough. A "legitimate" expectation of privacy requires more than a subjective expectation of not being discovered. *Brown*, 382 S.W.3d at 157.

Appellant does not claim the trailer was a residence for the purposes of Fourth Amendment analysis.[2] Instead he asserts that his "business use of the trailer as acknowledged by the trial court gave rise to a legitimate expectation of privacy and suffices to confer standing." The purported "business use" refers to Appellant's work for his brother James's tree service. Our review of the record shows that Appellant lacked standing to challenge the searches because this claimed expectation of privacy was not reasonable.

The evidence on record is that, in the summer of 2012, James and others working for his tree service, including Appellant, would come to the Burke property "a couple times a week" to burn tree debris, that they sometimes kept a change of clothes or coolers in the trailer, and that before the water was disconnected in the spring of 2012, they

[2] Although the trial court did not make specific findings as to whether it believed Appellant's testimony at the hearing on the motion to suppress that he "periodically" stayed overnight at the trailer, stored his things, and ate meals there, we infer from the trial court's denial of the motion to suppress that it did not find these claims credible. *Cf. State v. Peterson*, 583 S.W.2d 277, 280 (Mo. App. W.D. 1979). Of course, we defer to this credibility determination. *Id.*; *Loggins*, 445 S.W.3d at 109. Appellant acknowledges on appeal that he cannot rely on his hearing testimony that he was an occasional overnight guest at the trailer. Even if true, such circumstances cannot reasonably be relied upon to justify a Fourth Amendment privacy interest.

would sometimes wash up in the trailer, as well. Appellant did not own the Burke Property or the trailer thereon, nor did he stay at the trailer overnight on or between May 16 and 18. During that time, the trailer was in the process of being torn down, the water was shut off in the trailer, and only one room in the trailer offered safe shelter; otherwise, in various places, the trailer's walls were missing, the roof was caving in, and the floor was rotting away.

"Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *State v. Williams*, 485 S.W.3d 797, 801 (Mo. App. W.D. 2016), *citing Rakas*, 439 U.S. at 143 n.12. Appellant's claim of a reasonable, business-related expectation of privacy in the trailer is wholly unsupported by the evidence. Although Appellant asserts that "the Fourth Amendment applies to a shack on a worksite as much as it does to a living room at a residence,"[3] we see no evidence in the record supporting a reasonable conclusion that the trailer was used as "commercial premises" for the tree service. James testified that the trailer was in the process of being scrapped in May 2012, and that James and the tree service employees used it for the very limited purposes of storing a change of clothes or a cooler a couple of days per week. There is no evidence that James kept tools, equipment, or records relating to the business in the trailer, or that James met with customers, planned jobs or performed any part of his business operations inside the trailer. Even if we assume, *arguendo*, that

[3] Although inconsequential to our analysis because the trailer was not, in fact, "commercial premises" for James's tree service business, we note that Appellant's contention is flawed in asserting that the privacy protections of the Fourth Amendment apply to a business property "as much as" a home. "An expectation of privacy in commercial premises [] is different from, and indeed less than, a similar expectation in an individual's home," *New York v. Burger*, 482 U.S. 691, 700 (1987).

James had an expectation of privacy in the trailer as owner of the tree service, Appellant offers no authority to support his claim that he may assert James's privacy interest vicariously. *Compare New York v. Burger*, 482 U.S. at 699 ("An owner or operator of a business thus has an expectation of privacy in commercial property, which society is prepared to consider to be reasonable,") *with Rakas*, 439 U.S. 133-34, *supra.*

Concluding that Appellant had no legitimate privacy interest via traditional concepts of property control or ownership, nor as an employee of James's tree service, we next examine whether society would otherwise find Appellant's expectation of privacy to be legitimate or reasonable. *Williams*, 485 S.W.3d at 801. Appellant did not attempt to protect his claimed privacy interest; the trailer was open to the elements due to its missing roof and walls, and not secured against intruders. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967). Tree service employees were only present at the trailer intermittently, at all other times the trailer would appear abandoned and accessible to any person who felt inclined to enter. There were no signs warning against trespass, fences, or other barriers to entry that would demonstrate an expectation of privacy. *See State v. Pierce*, 504 S.W.3d 766, 771 (Mo. App. E.D. 2016) (Homeowner demonstrated his expectation of privacy in chicken coop by locating it within a barbed wire fence, posting "no trespassing" signs, and denying others entry to his property); *State v. Nichols*, 628 S.W.2d 732, 735 (Mo. App. S.D. 1982) ("One of the main rights attaching to property is the right to exclude others and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude").

We are not persuaded of a societal expectation of privacy in a partially collapsed, uninhabited, and dilapidated trailer which is not used as a residence or for legitimate commercial purposes and is also wholly unsecured and left open to the public and the elements. This finding is even stronger when, as here, the party claiming the privacy interest does not have a personal proprietary, residential, or occupational interest in the building. Point I is therefore denied.

Fruits of the searches (Point II)

In his second point, Appellant claims that whether or not he had a legitimate expectation of privacy in the trailer, the searches were nonetheless illegal, and their fruits, namely Burke's statements to officers on May 18 and 21, should be suppressed. We disagree. As discussed with respect to Point I, Appellant had no legitimate expectation of privacy in the trailer, thus he cannot assert a violation of his Fourth Amendment rights. "[S]uppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." *Alderman v. United States*, 394 U.S. 165, 171–72 (1969). We decline Appellant's request that we exercise so-called "pragmatic judicial supervision of very questionable law-enforcement tactics." Point II is denied.

Burke's out-of-court statements (Point III)

For his third point, Appellant claims that the trial court erred in admitting the testimony from Clark, Doerr, and Schoenfeld regarding Burke's out-of-court, unsworn hearsay statements. Appellant further challenges the admission of audio recordings of those statements. Appellant essentially argues that no inconsistent statement exists when

the witness cannot remember whether he made the statement. For this issue, Appellant concedes that he did not object to Clark's testimony at trial, however, the issues as to Doerr's and Schoenfield's testimony were properly preserved. Because the basis of the claim is the same for all of the testimony, and for ease of analysis, we address all three officers' testimony as if preserved.

We review the admission of evidence for abuse of discretion. *State v. Reed*, 282 S.W.3d 835, 837 (Mo. banc 2009). We will not disturb a trial court's broad discretion in admitting evidence unless it is clearly against the logic of the circumstances. *Id.* Even then, we reverse for evidentiary error only on a demonstration of prejudice. *Id.*

Section 491.074 allows for the use of prior inconsistent statements as substantive evidence in criminal cases:

> Notwithstanding any other provisions of law to the contrary, a prior inconsistent statement of any witness testifying in the trial of a criminal offense shall be received as substantive evidence, and the party offering the prior inconsistent statement may argue the truth of such statement.

Admission of a prior inconsistent statement requires a foundational inquiry as to whether the witness made the statement and whether the statement is true. *State v. Reed*, 282 S.W.3d 835, 838 (Mo. banc 2009). "If a witness claims not to remember if a prior statement was or was not made, a proper foundation has been laid to admit the prior inconsistent statement." *Id.* At trial, Burke testified that he did not recall any of the statements he made to officers on May 18 or 21, nor did he meaningfully recall any other events of May 18. Burke testified only that he, Appellant, and Jackson were present at the trailer on his property when sheriff's deputies arrived there on May 18, that he spoke to deputies that day, and that a few days later, two officers came to speak with him. Burke testified that although he could not recall making certain statements, he did not

deny making those statements. Hence, the State laid a proper foundation for admitting the officers' testimony about Burke's prior statements.

Appellant further claims that the trial court erred in allowing testimony about recordings of Burke's May 18 and 21 statements because the State did not quote each of Burke's prior statements verbatim in its examination of Burke or confront Burke after each inconsistent answer by reading or playing the prior statement back while he was still on the stand. However, the Missouri Supreme Court, in *Reed*, has held that "[a] specific question is not necessary to lay a foundation" for the admission of a prior inconsistent statement. 282 S.W.3d at 838.

The cases Appellant cites for his contention that the proponent of a prior inconsistent statement must specifically quote the statement in question are inapposite to the instant case. In *Reed*, the State elicited testimony from an officer that a witness told him that he believed the defendant was making methamphetamine, even though "the State failed even to ask [the witness] a generally related question" to whether he ever said he believed the defendant was making methamphetamine. In *State v. Duncan,* 397 S.W.3d 531 (Mo. App. E.D. 2013), this court held that impeachment was improper when a witness was impeached using a prior statement made by another person, that was not materially inconsistent with the witness's trial testimony. In *State v. Tolen*, 295 S.W.3d 883 (Mo. App. E.D. 2009), the defendant wished to admit a phone call in which the victim told the defendant that her aunt lied. However, on examination, the question asked of the victim was whether she told the defendant that she, the victim, told a third party that her aunt lied. This court held that the trial court did not err in finding that the victim's response during examination was not inconsistent with her statement on the

phone call, noting that "[a]bsent the threshold showing of an inconsistency between the testimony and the statements contained within the proffered exhibits, use of the exhibits to impeach is questionable." *Id.* at 889-90. Here, no such issues exist. Unlike in *Reed*, here, Burke was questioned directly about the statements he made to officers on May 18 and 21, for example:

> Q: Do you recall telling the police you were buying [the pills] for [Appellant]?
>
> * * *
>
> Q: Do you remember telling the police [Appellant] was wearing blue jeans, a white shirt, and a ball cap?
>
> * * *
>
> Q: Do you remember telling the police that [Appellant] was complaining about the missing Coleman fuel?

Unlike *Tolen*, the substance of these questions matched the inconsistent statements offered by the State, where, for example, the officers' testimony included:

> Q: Did [Burke] tell you what happened that day?
> DOERR: So he did walk us through what went on that day. He explained that earlier that day he did purchase the Sudafed pills for [Appellant].
>
> * * *
>
> Q: Did [Burke] tell you what [Appellant] was wearing that day?
> SCHOENFELD: He said that on that day [Appellant] was wearing a hat -- a ball cap, blue jeans and a white shirt.
>
> * * *
>
> Q: Did [Burke] say that [Appellant] made any statements about some items being missing from the trailer when they got out there?
> SCHOENFELD: He said that [Appellant] had complained about stuff being missing from the trailer . . . that's what [Appellant] said he was missing, Coleman fuel.

Unlike *Duncan*, Burke was asked about his own statements, and the testimony offered by the State presented materially different statements from Burke's total lack of recall. The trial court did not abuse its discretion in determining that the officers' testimony and recording of Burke's statements were admissible as prior inconsistent statements.

Appellant also makes two unpreserved claims: first, that the trial court erred in allowing the officers to give "paraphrased narratives" of Burke's statements, in particular calling attention to Schoenfeld's "embellished commentary about what methamphetamine makers do and prefer;" and second, that admission of Burke's prior statements despite Burke's assertion that he could not remember those statements deprived Appellant of his constitutional right to "meaningfully confront" witnesses against him.[4]

Appellant did not base objections at trial on the paraphrased/embellished testimony, nor on confrontation grounds, therefore these claims are not preserved for appeal and are subject only to plain error review. *State v. Johnson*, 207 S.W.3d 24, 34 (Mo. banc 2006). "We exercise our discretion to review for plain error only where the appellant asserting error establishes facially substantial grounds for believing that the trial court's error was evident, obvious, and clear, and that manifest injustice or a miscarriage of justice has resulted." *State v. Boston*, 530 S.W.3d 588, 590 (Mo. App. E.D. 2017). Plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome-determinative, *Id*., that is, whether the jury would have reached the same conclusion but for the erroneously admitted evidence, *State v. Bynum*, 299 S.W.3d 52, 60 (Mo. App. E.D. 2009).

Appellant failed to provide authority showing evident, obvious, and clear error in the admission of the paraphrased or embellished hearsay statements. Appellant cited only generally *Tolen* and *Duncan* for his contention that allowing a paraphrased narrative

[4] The Sixth Amendment to the United States Constitution reads, in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

embellished with the testifying officer's "spin" was erroneous, although neither case involved an observer testifying to another witness's prior statements. Even assuming, *arguendo* that the trial court erred in allowing "embellished commentary" from the officers, this commentary was not outcome-determinative, as the evidence of guilt, including Burke's incriminating statements themselves, was very strong absent the comments in question.

For the confrontation issue, we find that *United State v. Owens*, 484 U.S. 554, 558-559 (1988) disposes of Appellant's allegation of error. In that case, the Court held that a "witness' inability to 'recall either the underlying events that are the subject of an extra-judicial statement or previous testimony or recollect the circumstances under which the statement was given, does not have Sixth Amendment consequence.'" *Id*. (quoting *California v. Green*, 399 U.S. 149, 188 (1970) (Harlan, J., concurring)).

Point III is denied.

"Negative light" evidence (Point IV)

For his fourth point, Appellant presents a litany of claims of erroneously admitted evidence "having no other purpose than to portray [Appellant] is a negative light." First, we address those issues preserved for appeal, and next, those issues subject only to plain error review. [5]

We review preserved claims regarding rulings on the admission of evidence for abuse of discretion, as described above in Point III.

[5] Appellant also mentions, in his brief, the State's objected-to statement in closing argument that the police found no pseudoephedrine pills on Burke because Burke gave the pills to Appellant to "grind up" at an associate's home. Appellant does not present argument about this statement in his already multifarious Point IV. Moreover, the statement does not constitute evidence of prior bad acts. We therefore do not address it.

Appellant's first preserved claim pertains to Clark's testimony about seeing Appellant's photograph in the squad room at the sheriff's department. At trial, Appellant cross-examined Clark regarding his identification of Appellant as the person he saw running away from the trailer on May 18. On redirect, the State questioned Clark about his familiarity with Appellant:

> Q [THE STATE]: So you believe when you saw him before Chris Burke ever said it, you believed that was [Appellant] that fled from the house?
> A [CLARK]: Yes, ma'am, I did.
> Q: Had you met [Appellant] before?
> A: No, ma'am.
> Q: How then -- why did you believe that was [Appellant]?
> A: Prior investigations in the area.
> Q: Had you seen photographs?
> A: I had.
> Q: Where did you see photographs?

At this point, Appellant objected to testimony that Appellant's photograph hung in the police squad room as more prejudicial than probative. The State argued that Appellant put Clark's identification at issue, so Clark's testimony on redirect was probative of his ability to identify Appellant. The court overruled Appellant's objection, and the following testimony was heard:

> Q: You had seen a photograph of [Appellant].
> A: Yes, ma'am, I had.
> Q: Where did you see the photograph of [Appellant]?
> A: In the squad room at the [] sheriff's department.
> Q: And as a general rule, why do they put photographs of people on the squad room wall in the sheriff's department?
> A: Persons of interest. Persons that we're looking at investigating. Persons under investigations currently. Several. There could [sic] any reason.
> Q: But when they put those pictures up there, are you, the officers, supposed to study them and be on the lookout for that person?
> A: Yes, ma'am.
> Q: And did you do so in this case?
> A: Yes, ma'am, I had.
> Q: So you were looking for [Appellant] before you saw him run from the back of the house?
> A: Yes, ma'am.

As a general rule, evidence of a defendant's prior uncharged misconduct is inadmissible for the sole purpose of demonstrating the defendant's criminal propensity. *State v. Jensen*, 524 S.W.3d 33, 41 (Mo. banc 2017). However, the admission of evidence only violates this general rule if the evidence shows that the defendant has committed, been accused of, been convicted of or definitely associated with another crime or crimes. *State v. Harris*, 156 S.W.3d 817, 824 (Mo. App. W.D. 2005). "Vague references are not clear evidence associating a defendant with other crimes." *Id*. Here, Clark's response was generic and did not definitely associate Appellant with some other crime. Clark did not mention a certain crime or type of crime, nor did he speak of an arrest, indictment, or conviction. Evidence that indicates nothing more specific than that a defendant is known to police is not clear evidence that the defendant was involved in another crime. *State v. Turner*, 367 S.W.3d 183, 188-89 (Mo. App. S.D. 2012). While Clark's statement was slightly more specific than mere knowledge of Appellant, it nonetheless was sufficiently generic to avoid definitely associating Appellant with another crime.

Appellant also argues that he did not "open the door" to the issue of Clark's familiarity with Appellant, because Appellant only questioned Clark's identification regarding Clark's positioning and distance from the figure who ran from the back of the trailer. Of course, "otherwise inadmissible evidence can nevertheless become admissible because a party has opened the door to it with a theory presented in an opening statement or through cross-examination." *State v. Shockley*, 410 S.W.3d 179, 194 (Mo. banc 2013). But here, as discussed above, Clark's testimony about knowing Appellant from a photograph hanging in the squad room was not inadmissible because it was relevant to

his ability to recognize Appellant. The State's introduction of Clark's admissible testimony was not dependent on Appellant "opening the door." Therefore, we find no abuse of discretion in the trial court's admission of testimony about the squad room photograph.

Appellant's next preserved claim in Point IV deals with the evidence of items found at the trailer on May 16, which Appellant claims is inadmissible evidence of uncharged bad acts. At trial, the State argued that the May 16 evidence was being offered not as propensity evidence, but to prove intent and to "tell the jury the whole story" regarding Burke's statement's that Appellant had complained that items, including Coleman fuel, were missing from the trailer. Indeed, one recognized exception to the general rule regarding propensity evidence provides for the admissibility of evidence offered to establish motive or intent for the crime with which the defendant is charged. *State v. Watson*, 391 S.W.3d 18, 21 (Mo. App. E.D. 2012). Another exception states that when evidence of prior uncharged bad acts "is part of the surrounding circumstances or sequence of events relating to the charged crime, [the evidence] is admissible to present a complete and coherent picture of the events that transpired." *Id.* To be admissible under either of these exceptions, the evidence, like all evidence, must be logically and legally relevant, where logical relevance means that the evidence tends to establish the defendant's guilt of the crime charged, and legal relevance means that the evidence's probative value outweighs its prejudicial effect. *Id.* Appellant does not seem to contest the logical relevance of the May 16 evidence, rather he questions the legal relevance, arguing that "the evidence from May 16 was more probative of the [State's] improper effort to show a pattern of criminal activity at the [Burke] property, than probative of

intent." It is within the sound discretion of the trial court to determine whether any prejudice outweighs the probative value of evidence of uncharged bad acts. *Id*. Here, the fact that items were seized from the trailer on May 16 certainly is part of the sequence of events relating to the crime of attempt to manufacture methamphetamine. That the items had been removed from the trailer by a sheriff's deputy is probative of Appellant's intent to manufacture methamphetamine in that Appellant told Burke that some of the items needed to manufacture the methamphetamine, including Coleman fuel, were missing and video evidence was offered to show Appellant buying Coleman fuel on May 18. The trial court noted that it would allow the evidence of items seized on May 16 as evidence of preparation but not as evidence of any other crime. The trial court's decision neither shocks our sense of justice nor evinces a lack of careful consideration. We find no abuse of discretion in the trial court's decision to admit the evidence of items seized on May 16.

Appellant's last preserved claim of error in Point IV pertains to the trial court's admission of a lab report analyzing the substances found in the trailer on May 18. The report identified Appellant as a "suspect." Appellant claims that the lab report's identification of Appellant as a suspect "reinforced" the "harm" caused by Clark's testimony about the squad room photograph. Appellant offers no evidence or authority for his claim. Evidence identifying a defendant as a "suspect" in the crime for which he currently stands trial by definition cannot constitute evidence of a *prior uncharged* bad act. Moreover, Appellant's argument at trial: "I [defense counsel] believe [the lab report] suggests my client is guilty before the stuff even went to the lab because he's a suspect" is unsupported by case law and is logically unsound. The lab report does not invade the province of the jury by directly commenting on Appellant's innocence or guilt, it only

shows that Appellant was a suspect at some point during the police investigation. *See State v. Link,* 25 S.W.3d 136, 145 (Mo. banc 2000) (Testimony that there were other suspects who had eventually been eliminated by police was not direct commentary on defendant's guilt, and not improper). That a defendant was a suspect in the crime for which he is charged is a foregone conclusion. We do not disturb the trial court's admission of the report listing Appellant as a suspect.

Next, we address Appellant's unpreserved claims, which allege error in the trial court's admission of testimony referencing prior police investigations at the Burke property, the use of police scanners by "criminals" in the area, and evidence of syringes found at the crime scene. As explained in Point III, claims that were not preserved in the trial court can only be reviewed for plain error. We exercise our discretion to review for plain error when the trial court's error is evident, obvious and clear. *Boston*, 530 S.W.3d at 590. Appellant challenges, as improper propensity or uncharged bad act evidence the following two pieces of testimony:

> DEFENSE COUNSEL: You were aware of the situation on May 18, 2012. Right? The incident that we've been talking about.
> SCHOENFELD: ·Yeah, I was aware of the situation on May 18th . . . it was part of an ongoing investigation, because we've had stuff out there before.
>
> * * *
>
> STATE: [Was communication with other deputies on May 18] over the radio or was that by cell phone? How was that?
> CLARK: We communicated via cell phone at the time.
> STATE: Is there a reason you communicated via cell phone?
> CLARK: Yes. It's pretty common knowledge that criminals, especially in the area where we worked there, had access to scanners, and they could track or listen to our radio traffic as we were communicating with each other through the radios in the car.

As we discussed *supra*, in order for evidence to be inadmissible as a prior uncharged bad act, it must definitely associate the defendant with another crime. *Harris*, 156 S.W.3d at

824. The testimony in question makes only vague references to police investigations and to criminals in the area. Neither statement mentions Appellant. Neither statement was offered to show that Appellant has a propensity to manufacture methamphetamine, rather each goes to why the witnesses acted as they did. Admission of this testimony was not evident, obvious, or clear error so we decline to review these claims for plain error.

Because prejudicial error is a condition precedent of plain error, *Deck v. State*, 68 S.W.3d 418, 424 (Mo. banc 2002), we dispose of Appellant's request for plain error review of the evidence of used syringes at the crime scene without addressing the propriety of the evidence. "A finding of outcome-determinative prejudice expresses a judicial conclusion 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. Moyers*, 266 S.W.3d 272, 282 (Mo. App. W.D. 2008). Here, we do not find that the jury would have acquitted Appellant but for the evidence of syringes, which is insubstantial when compared with the properly admitted evidence of Burke's statements to police, receipts and video showing Appellant and Burke going store-to-store to buy methamphetamine ingredients, and Clark's description of the man fleeing the trailer. There was no prejudice to Appellant from the evidence of the syringes, and we therefore decline review of this claim for plain error.

Point IV is denied.

Best Evidence (Point V)

For his fourth point, Appellant claims that the trial court erred in admitting and later refusing to instruct the jury to disregard Doerr's and Schoenfeld's testimony about

the contents of a surveillance video from the Warrenton WalMart. The state concedes that testimony from Doerr and Schoenfeld about what they saw on the surveillance tape was inadmissible under the best evidence rule. The rule applies when evidence is offered to prove the contents of a writing or recording, including videotapes. *State v. Teague*, 64 S.W.3d 917, 922 (Mo. App. S.D. 2002). Under the best evidence rule, secondary evidence of the contents of a video, such as the testimony of someone who watched a surveillance tape after the events in question were recorded, are inadmissible unless the primary evidence, i.e. the video, is unavailable or inaccessible. *Id.* Here, the video was available, but not admissible due to the State's failure to provide authentication. Therefore, the secondary evidence of Doerr's and Schoenfeld's testimony to what they saw on the Warrenton WalMart video was inadmissible, and the trial court erred in overruling Appellant's objections.

However, we review claims of improper admission of evidence for both error and prejudice, *Id*., as discussed in Points III and IV. "Erroneously admitted evidence is not considered prejudicial where similar evidence is properly admitted elsewhere in the case or has otherwise come into evidence without objection." *State v. Collis*, 139 S.W.3d 638, 641 (Mo. App. S.D. 2004). Here, Burke's properly admitted hearsay statements, as discussed in Point III, described the same sequence of events that Doerr and Schoenfeld described from the Warrenton WalMart surveillance video. Therefore, the improper secondary evidence of the contents of the video was merely cumulative of other evidence and therefore, not prejudicial. Point V is denied.

Disposal of Hazardous Evidence (Point VI)

For his sixth point, Appellant claims that the trial court erred in overruling his

objections to the admission of evidence of hazardous materials seized from the trailer and disposed of in violation of Section 490.733.2, which states:

> Notwithstanding the provisions of section 575.100 *and with the approval of the affected court*, any law enforcement officer who seizes hazardous materials as evidence related to a criminal investigation may *collect representative samples* of such hazardous materials, and destroy or dispose of, or direct another person to destroy or dispose of the remaining quantity of such hazardous materials.

(Emphasis added). It is uncontested that the law enforcement officers here did not obtain approval of the court or collect representative samples of the muriatic acid or Coleman fuel seized from the trailer on May 18 before destroying them. Appellant argues that Section 490.733 should be interpreted to render inadmissible any evidence destroyed without approval of the court and without first taking representative samples thereof. Statutory interpretation is a question of law that we review *de novo*. *State v. Whipple*, 501 S.W.3d 507, 513 (Mo. App. E.D. 2016). In *State v. Michael*, 234 S.W.3d 542, 547-49 (Mo. App. E.D. 2007), we held that "nothing in the [Section 490.733] mandates the exclusion of any evidence of the existence of hazardous materials not collected in the manner permitted under Section 490.733." We are compelled to follow *Michael* under the doctrine of *stare decisis*. *State v. Chase*, 490 S.W.3d 771, 774 (Mo. App. W.D. 2016) ("Under the stare decisis doctrine, a court follows earlier judicial decisions when the same point arises again in litigation"). Therefore, admission of evidence pertaining to the muriatic acid and Coleman fuel was not erroneous, and Point VI is denied.

Cumulative Error (Point VII)

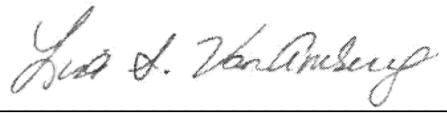
For his seventh and final point, Appellant claims that the trial court erred in denying his motion for acquittal or new trial because the totality of errors in his trial resulted in manifest miscarriage of justice and deprived him of a fair trial. Appellant asks

this court to "consider the total impact of the separately presented errors" and find that a manifest injustice or a miscarriage of justice resulted, such that reversal is warranted on that cumulative error.

The Missouri Supreme Court has expressly rejected the theory of "cumulative error" under the circumstances here. *State v. Miller*, 372 S.W.3d 455, 475 (Mo. banc 2012); *State v. Gray*, 887 S.W.2d 369, 390 (Mo. banc 1994). In *Gray*, the Supreme Court held that "having determined that none of defendant's previous points amount to reversible error, there can be no reversible error attributable to their cumulative effect." We find no reversible error here in Points I-VI, so we deny Point VII accordingly.

Conclusion

The trial court's judgment is affirmed.



Lisa Van Amburg, Judge

Colleen Dolan, P.J.
Mary K. Hoff, J., concur.