

No. SC93348

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IN THE  
**Supreme Court of Missouri**

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**STATE OF MISSOURI,**

*Respondent,*

v.

**SHARNIQUE N. JONES,**

*Appellant.*

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Appeal from the St. Louis County Circuit Court  
Twenty-first Judicial Circuit  
The Honorable Colleen Dolan, Judge

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**RESPONDENT'S SUBSTITUTE BRIEF**

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## STATEMENT OF FACTS

Ms. Jones appeals her convictions of murder in the second degree, § 565.021, RSMo 2000, endangering the welfare of a child in the first degree, § 568.045, RSMo Cum. Supp. 2005, and assault in the second degree, § 565.060, RSMo 2000.<sup>1</sup> The trial court sentenced Ms. Jones to concurrent sentences of fifteen, seven, and seven years (L.F. 60-62; Tr. 1027).

Ms. Jones challenges the sufficiency of the evidence to support her convictions (App.Sub.Br. 20-22). She also asserts that the trial court plainly erred in admitting her extrajudicial statements into evidence because there was no independent proof of the *corpus delicti* for murder (App.Sub.Br. 23). To avoid duplication, the facts are set forth here briefly; additional details are included in the Argument.

\* \* \*

Ms. Jones's daughter, S.J., was born January 3, 2008 (Tr. 328). Ms. Jones took S.J. to the hospital for the first time when she was three days old (Tr. 328). S.J. had thirteen hospital visits between January 3 and April 7, 2008, for problems that Ms. Jones described as jaundice, difficulty feeding,

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<sup>1</sup> The record includes the legal file (L.F.); the transcript (Tr.); and the transcript of Sacha Zubrisky's videotaped testimony, which was admitted as State's Exhibit 15 (S.Z. Tr.).

fever, irritability, diarrhea, a possible Zantac overdose, trouble breathing, and cardiac arrest (Tr. 326, 333, 337-338, 347, 352, 355-356, 357-358, 366, 372, 373-374, 378-379; S.Z. Tr. 20-22).

During most of the hospital visits, S.J. appeared generally healthy, and she ate well (Tr. 336, 342, 354-355, 357, 359, 361, 365, 375, 379; S.Z. Tr. 13). The medical staff provided Ms. Jones with instructions on proper feeding and safe sleep for newborns, and they gave her information about community resources available to provide help for new mothers (Tr. 332, 343-344, 347, 364-365, 452-459, 612-614).

On April 7, 2008, Ms. Jones was “overwhelmed” and “frustrated” because S.J. would not stop crying (Tr. 796). Ms. Jones was frustrated “[t]o the point where [she] felt like harming [herself] or [S.J.]” (State’s Ex. 2; see State’s Ex. 24, p. 3). Ms. Jones laid S.J. face down on a pillow in a twin bed while S.J. was crying (Tr. 328, 794-798). Ms. Jones then ran downstairs, planning to kill herself, and she “didn’t think twice about what was going to happen to [S.J.] or [herself]” (Tr. 797-798, 801). Ms. Jones did not commit suicide because she was interrupted when some other people came home (Tr. 795, 798-799, 801-802). When Ms. Jones went back upstairs fifteen or twenty minutes later, S.J. was not breathing (Tr. 795, 798-799, 801-802).

Ms. Jones called 911 and told the operator that she had put her baby down in the bassinet, and that she did not know what happened next, except

that she came back to find that the baby was not breathing (Tr. 290). When police officers arrived at the home, S.J. was lying very limp in a twin-size bed and showing no signs of breathing (Tr. 293-295). It would have taken S.J. ten to twelve minutes to suffocate in the pillow, and she likely would have continued crying for part of that time (Tr. 452-455). Ms. Jones’s demeanor was “pretty calm,” and she “didn’t appear to be a mother who lost a child who was really excited or crying or hysterical” (Tr. 296).

Initially, S.J.’s death was attributed to natural causes (Tr. 542-543). Later, after Ms. Jones had admitted to placing S.J. face down into the pillow, the death certificate was amended to indicate that the death was a homicide (Tr. 546-548, 552, 556).

Ms. Jones’s son, D.W., was born January 18, 2009 (Tr. 382-383). Ms. Jones first took him to the hospital on January 20, 2009, because he was jaundiced (Tr. 382-383, 678). In light of Ms. Jones’s history, the medical team admitted D.W. for lack of sufficient nutrition, listlessness or lethargy, and marginal dehydration (Tr. 383-384, 678). Ms. Jones reported that D.W. was not eating; D.W. ate while he was in the hospital (Tr. 384-385). While at the hospital, Ms. Jones objected to the medical team’s care and accused them of force feeding D.W. (Tr. 460, 696-697). Ms. Jones took D.W. home against medical advice three days later (Tr. 385, 683-685). Ms. Jones again received instructions on proper feeding, but was less cooperative than she had been

with S.J. (Tr. 390, 643, 647-649, 666-667, 683-685).

Three days later, on January 26, 2009, Ms. Jones called an ambulance because D.W. had stopped breathing (Tr. 391). She told the hospital that D.W.'s lips were blue and that he was cyanotic (Tr. 361-362, 391). Ms. Jones later admitted that on the day D.W.'s lips turned blue, she was watching TV and burping him with the rag in her hand; she then had her attention diverted to the TV and away from the baby (Tr. 769-771). A burp rag would have had to have been held over D.W.'s face for at least a minute to cause those symptoms (Tr. 694-695, 701). Ms. Jones also admitted that she did not regularly feed D.W.—specifically, that she missed six feedings on January 19 and 20, and that she missed five more feedings on January 25 and 26 (Tr. 766-69, 843-844; State's Ex. 2; *see* State's Ex. 24, pp. 1-2).

During D.W.'s second admission in the hospital, the medical team referred his case to the Children's Division, which then took him into protective custody (Tr. 702-703). Ann Fisher took custody of D.W. (Tr. 587, 589). She fed him by bottle and, while she sometimes had to wake him for feedings, she never had any trouble making him gain weight (Tr. 590). She also never noticed that D.W. had difficulty breathing (Tr. 590-591).

On August 5, 2009, the State charged Ms. Jones by indictment with murder in the second degree for causing the death of S.J. by suffocation, endangering the welfare of a child in the first degree by acting in a manner

that created a substantial risk to the life and health of D.W., and assault in the first degree for knowingly causing serious physical injury to D.W. by smothering him with a cloth until he stopped breathing (L.F. 8-9).

Ms. Jones went to trial in August, 2011, and the jury found her guilty of murder in the second degree, endangering the welfare of a child in the first degree, and the lesser included offense of assault in the second degree (L.F. 52-54, 60-61; Tr. 1021).<sup>2</sup> The trial court sentenced Ms. Jones to concurrent sentences of 15 years for murder and 7 years each for endangering and assault (L.F. 60-62; Tr. 1027).

On appeal, Ms. Jones challenged the sufficiency of the evidence and asserted that the trial court had plainly erred in admitting her statements into evidence. *State v. Jones*, No. ED97595, slip op. 3-4 (Mo.App. E.D. Oct. 2, 2012). The Court of Appeals found that the trial court erred in admitting Ms. Jones's statements due to inadequate proof of the *corpus delicti*. *Id.* at 5-9. The court reversed Ms. Jones's conviction for murder in the second degree and remanded that count for a new trial. *Id.* at 9. The Court of Appeals

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<sup>2</sup> The docket sheets reflect that Ms. Jones was convicted of assault in the first degree assault, but the verdict form, the transcript, and the written judgment state that the jury found her guilty of assault in the second degree (L.F. 1, 52-54, 60-61; Tr. 1021).

affirmed Ms. Jones's other convictions. *Id.* at 12.

The State filed a motion for rehearing or transfer, and the Court of Appeals granted rehearing. After argument en banc, the Court of Appeals readopted its opinion and transferred the case to this Court.

## ARGUMENT

### I.

**The evidence was sufficient to support Ms. Jones’s conviction for murder in the second degree.**

In her first point, Ms. Jones asserts that the evidence was insufficient to support her conviction for murder in the second degree (App.Sub.Br. 24). She asserts that the evidence “failed to prove that [she] knew or was aware that her conduct was practically certain to cause the death of [S.J.] when she put her face down on a pillow on the bed” (App.Sub.Br. 24).

#### **A. The standard of review**

“This Court’s review is limited to determining whether there was sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt.’” *State v. Miller*, 372 S.W.3d 455, 463 (Mo. banc 2012) (quoting *State v. Letica*, 356 S.W.3d 157, 166 (Mo. banc 2011)). “The evidence and all reasonable inferences therefrom are viewed in the light most favorable to the verdict, disregarding any evidence and inferences contrary to the verdict.’” *Id.* (quoting *State v. Belton*, 153 S.W.3d 307, 309 (Mo. banc 2005)).

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

rational fact-finder could have found the essential elements of the crime beyond a reasonable doubt.’” *Id.* (quoting *State v. Nash*, 339 S.W.3d 500, 509 (Mo. banc 2011)). “When reviewing the sufficiency of evidence supporting a criminal conviction, the Court does not act as a ‘super juror’ with veto powers.” *Id.* “In such cases, this Court gives great deference to the trier of fact.” *Id.* (quoting *State v. Grim*, 854 S.W.2d 403, 414 (Mo. banc 1993)).

## **B. The relevant evidence at trial**

### **1. Hospitalizations of S.J.**

Dr. Jamie Kondis testified that on January 6, 2008, Ms. Jones first took S.J. to Children’s Hospital with jaundice (Tr. 326). S.J. was three days old at that time (Tr. 328). While at the hospital, Ms. Jones received instructions on how to breastfeed, supplement with formula if the baby did not appear able to breastfeed, and then follow up with her primary pediatrician (Tr. 332).

Ms. Jones again took S.J. to the hospital for jaundice on January 8, 2008 (Tr. 333). The bilirubin level of S.J.’s blood—the measuring factor to evaluate whether a baby is at risk for brain damage from jaundice—had decreased in the two days since her initial visit (Tr. 332-334). Ms. Jones said that S.J. was still having difficulty feeding and had some mucousy emesis, or spit-up (Tr. 334-335). S.J.’s vital signs were normal (Tr. 336). Ms. Jones was instructed to give smaller, more frequent feedings and to burp in between feedings (Tr. 336).

Ms. Jones took S.J. to the emergency room for a third time on January 16, 2008 (Tr. 337). She reported that S.J. had a fever, was not eating, and was irritable whenever Ms. Jones put her down (Tr. 337-338). The hospital admitted her for two days and ran a battery of tests (Tr. 339-340). All of the tests came back negative for sepsis or infection (Tr. 341). S.J. ate very well while she was in the hospital (Tr. 342).

Ms. Jones also took S.J. to the hospital on January 27, 2008, because she said she thought the baby had overdosed on Zantac (Tr. 347). S.J. was admitted, but discharged the next day because all of her tests came back negative (Tr. 349-352).

On February 4, 2008, S.J. was in the hospital for a fever (Tr. 352). S.J. again fed well while she was in the hospital and she was discharged on February 7 (Tr. 354-355). S.J. had also gone to Cardinal Glennon Children's Hospital on January 30 for related issues (Tr. 355).

Ms. Jones took S.J. to the emergency room again on February 16, 2008, complaining that S.J. was vomiting and had diarrhea (Tr. 355-356). S.J.'s vital signs were normal (Tr. 356-357). "[S]he looked very, very well in the emergency room" (Tr. 357). The hospital again provided feeding instructions "because [Ms. Jones] had said she wasn't giving her fluids because of the vomiting. She was encouraged to give her fluids even though she was vomiting for hydration" (Tr. 357). S.J. was discharged from the emergency

room later that night, but she was brought, by ambulance, back to the hospital two days later because Ms. Jones said that she had not been breathing (Tr. 357-358). When the paramedics had arrived at the home, however, S.J. “looked totally normal” (Tr. 359). S.J. was discharged on February 20 (Tr. 361).

While in the hospital, S.J. did not have any instances where she stopped breathing or experienced apnea (Tr. 361). Apnea is when a patient stops breathing for more than ten seconds (Tr. 361). Prolonged apnea can lead to cyanosis, which means that the face turns blue (Tr. 361-362). Ms. Jones reported that S.J.’s lips had looked blue at home (Tr. 362). Ms. Jones also complained that S.J. cried unless she was being held (Tr. 362-363).

Ms. Jones brought S.J. into the hospital on February 22, 2008, because S.J. was not breathing (Tr. 366). S.J. showed signs that she was having trouble breathing (Tr. 367-368). The test results were positive for the rhinovirus, which could have meant that her breathing difficulties were related to a cold (Tr. 369).

Dr. Kondis and the medical team were concerned about S.J. having so many hospitalizations and ER visits at such a young age with no definitive cause:

**[Prosecutor]:** Other than that, was it concerning that the baby was continually brought to the hospital and there weren’t any

causes determined for what the mother was reporting?

**[Dr. Kondis]:** It was concerning because we kept telling her to follow up with her pediatrician and she wasn't doing that. I actually spoke to her pediatrician during times I took care of her and other doctors did and the pediatrician was happy to follow up. We said: Call your pediatrician first. Just don't bring her to the hospital.

**[Prosecutor]:** The pediatrician was made aware?

**[Dr. Kondis]:** Yes.

**[Prosecutor]:** And she wasn't saying: I'm not going to see her anymore?

**[Dr. Kondis]:** No. She wanted her to come there instead of coming to the hospitals.

(Tr. 370-372).

S.J. was again admitted on March 9, 2008, for another report of being apneic at home (Tr. 372). Sacha Zubrisky, a firefighter paramedic, testified that she responded to Ms. Jones's 911 call reporting that Victim had possibly had a seizure (S.Z. Tr. 11). When she arrived, "the baby was breathing normally [and] the baby looked fine" (S.Z. Tr. 13). She and her partner transported S.J. to the hospital, but S.J. did not require any stabilization steps (S.Z. Tr. 13-14). Ms. Jones told Ms. Zubrisky that S.J. had stopped

breathing, so she gave her CPR (S.Z. Tr. 16).

Dr. Michael Noetzel, a pediatric neurologist, testified that he treated S.J. during her March 9 visit because she exhibited behaviors that could have been associated with seizures (Tr. 425-427, 433). Her brain wave EEGs showed that she did have seizures (Tr. 434). Dr. Noetzel put her on medication to control the seizures and educated Ms. Jones on how to recognize if S.J. was having a seizure (Tr. 437-438, 443). Dr. Noetzel testified that it is “decidedly uncommon” for an infant younger than six months of age to die from a seizure (Tr. 432). He testified that S.J.’s seizures were not deadly: “I think we had pretty good documentation based on what the discharges looked like and what she looked like clinically for me to say these were not life-threatening seizures” (Tr. 445-446). S.J. was discharged on March 13 (Tr. 373).

Ms. Jones again took S.J. to the hospital on March 19, 2008 (Tr. 373). She said S.J. had been vomiting and experiencing diarrhea and a fever of 105 (Tr. 374). S.J.’s vital signs were normal and she did not have a fever (Tr. 375). The medical team admitted her “to kind of just watch her” (Tr. 375). She was diagnosed with a stomach virus (Tr. 376). She took fluids well in the hospital, so she was discharged the next day (Tr. 377-78).

Ms. Jones brought S.J. to the hospital again on March 21, 2008, for being apneic at home (Tr. 378). “At that time she wasn’t displaying anything

that could possibly be thought to be a seizure” (Tr. 379).

## **2. Safe-sleep instructions to Ms. Jones and related testimony**

Each time S.J. was hospitalized, Ms. Jones was routinely referred to Nurses for Newborns and Parents as Teachers (Tr. 364). Both agencies tried to contact Ms. Jones, but were unable to find her because she kept changing addresses (Tr. 365).

During her January 16 visit, the hospital provided counseling for Ms. Jones, including instructions on safe sleep for newborns:

**[Prosecutor]:** Was she also spoken to on that occasion about safe sleep?

**[Dr. Kondis]:** Yes.

**[Prosecutor]:** And can you describe for the jury what safe sleep means?

**[Dr. Kondis]:** So, safe sleep practices are now a standard part of when you're discharged from the nursery after having a baby and then that may be reiterated during other hospitalizations as needed, but basically we instruct parents to always have the child in their own bed, in an actual crib, bassinet, or some sort of infant bed, as opposed to an adult bed with an adult or on a chair, couch, or some non-bed. That's part of it, and also to put the child on their back to sleep and to not have a lot of things up around by

the child like pillows, blankets, and those types of things.

(Tr. 343-344). Dr. Kondis later reiterated that the social worker addressed safe sleep practices with Ms. Jones (Tr. 347).

Dr. Noetzel explained to the jury the effects of putting pressure over a baby's mouth:

**[Prosecutor]:** If you were to cover the face of a baby either with your hand or with a pillow or with a cloth or something that would obstruct the oxygen from flowing freely into the nose and mouth of a baby who was crying, and if you would hold that there for a period of time, would the baby stop crying?

**[Dr. Noetzel]:** Yes, I would suspect – what happens is you're not exchanging oxygen well. You're also not blowing off carbon dioxide, CO<sub>2</sub>, and after a while that carbon dioxide starts to build up. It causes you to be less energetic, less capable of breathing. So, you start to work less efficiently in terms of your breathing and after a while that effect is going to render you less able to breathe successfully, you're certainly going to stop crying.

**[Prosecutor]:** If you continued to hold the object, cloth or hand over the baby's face after the crying ceased, could that baby lose consciousness?

**[Dr. Noetzel]:** Yes.

**[Prosecutor]:** And would the loss of consciousness likely occur before the crying ceased or after?

**[Dr. Noetzel]:** After the cessation of crying.

\* \* \*

**[Prosecutor]:** About how long do you think it would take for the death to occur if you were to keep something over the face of a baby, depriving it of oxygen whether it be a pillow or a rag or cloth?

**[Dr. Noetzel]:** I think that that's pretty much of a challenging question, because you'd have to know whether you're totally inhibiting the flow of oxygen, but we do know, for example, if somebody is deprived of oxygen – think about somebody holding their breath under water. You're going to pass out probably four or five minutes into that and then again if there's not any sort of resuscitation or the baby doesn't start to perk up very easily by ten or twelve minutes you could have a child that again you've not only stopped breathing, but then you've affected the heart and heart starts to go down the blood pressure starts to go down. So the death of the baby can quickly ensue anywhere between ten and fifteen minutes from the start of this episode you could end up, unfortunately, with the death of an infant of that age.

(Tr. 452-455). Dr. Noetzel also testified about the dangers of placing an infant in a soft bed:

**[Prosecutor]:** And hypothetically, if a 13 and a half week old child were placed face-down in a soft pillow and left there for a period of time as you testified within the 10, 15-minute range, could that cause a child to suffocate?

**[Dr. Noetzel]:** Yes. You know, again, I know we've been talking about back to sleep and all those other things. Even when we were less concerned that babies were sleeping on their stomach, they weren't sleeping on soft pillows. They weren't supposed to sleep on anything. They were supposed to be sleeping on firm mattresses. Because of the concern about that face falling into something soft and them not being able to raise the neck. Again, even if somebody said I think there's a reason why at times I'm going to have this baby face-down it would be in with an adult in attendance, certainly not on a soft surface like a pillow.

(Tr. 458-459). Dr. Noetzel testified that it is common for hospital personnel and social workers to educate young mothers and reinforce the concepts of safe sleep for infants (Tr. 459).

Larissa Zguta, a social worker in the child-protection unit, testified that she was first referred to S.J.'s case on January 28, 2008 (Tr. 637). She

met Ms. Jones in the hospital that day and noticed that “[s]he seemed pretty flat and not emotional in any way about the situation or circumstance” (Tr. 639-640).

Amanda Simon, a children’s division social worker, testified that she received a newborn crisis referral regarding Ms. Jones in February 18, 2008 (Tr. 600-601). She had been informed that Ms. Jones had fallen asleep with S.J. in her arms while she was at the hospital, which is very dangerous for a newborn (Tr. 603). She first visited Ms. Jones when she was in the hospital with S.J. (Tr. 602, 605). She also conducted a home visit on March 14, 2008 (Tr. 609, 617). S.J. was “healthy and happy” as far as she could tell (Tr. 633). When Ms. Simon arrived, S.J. was asleep on the couch, wearing a fleece blanket (Tr. 611). Upon seeing this, she talked to Ms. Jones about safe sleep:

**[Prosecutor]:** What did you tell her about what is the safe sleep environment for the child?

**[Ms. Simon]:** In a crib with the baby on their back with no other belongings in the crib, and if the baby does use a blanket, to tuck it in underneath their chest area so it’s not by her head, but we usually prefer the child sleep in a onesie and put multiple layers on the baby.

**[Prosecutor]:** Multiple layers of clothing; not blankets or covers?

**[Ms. Simon]:** Yes.

**[Prosecutor]:** When you told her this, did she seem to understand what she [sic] was saying?

**[Ms. Simon]:** Yes, we even had a conversation. I kind of took the baby and showed her, since the blanket was by her head, how easy it would be for the baby to move its head and not move back and consequences that would occur.

**[Prosecutor]:** What did you tell her the consequences could be if the baby's head were to turn into the blanket and the baby couldn't move her head away from the blanket?

**[Ms. Simon]:** The baby would be smothered.

**[Prosecutor]:** And did she appear to be [sic] appreciate that concern?

**[Ms. Simon]:** Yes, yes, and she explained it wasn't usual for her to [wrap the baby in a blanket]. She was just doing laundry and there was no clean clothes at the time.

(Tr. 612-613). Ms. Simon also testified that based on their conversation, she was confident that Ms. Jones understood safe-sleep practices because Ms. Jones did not appear to be on any drugs or medication and because S.J. was sleeping on her back the next time she saw her (Tr. 614).

Ms. Simon also testified about how she would answer typical questions a mother might have about safe sleep:

**[Prosecutor]:** Would you have ever told any mother of a newborn that it would ever be okay to place a baby on their tummies?

**[Ms. Simon]:** No.

**[Prosecutor]:** Even if their mother said: That's how she likes to sleep?

**[Ms. Simon]:** I would tell them to let the baby cry it out.

**[Prosecutor]:** And if the baby is having reflux so she spits up a lot, I'm worried that she's going to aspirate or choke on her spit-up while sleeping, would you have said: Okay, put her on her tummy?

**[Ms. Simon]:** No.

(Tr. 629). She further emphasized that if a baby has reflux or stomach pains, the mother should consult her pediatrician, but that it is never okay to put a baby facedown to sleep (Tr. 629-30).

### **3. S.J.'s death and related expert testimony**

Police Chief Ricky Collins testified that he responded to a 911 call for a child who was not breathing on April 7, 2008 (Tr. 290). One of the women who answered the door told him that the baby was upstairs (Tr. 293). Once upstairs, he saw an infant on a bed (Tr. 293). There was a bassinet in the room, but the baby was lying on the adult twin-sized bed (Tr. 294-95). Chief

Collins picked up the baby, did not find any signs of breathing, began CPR, and then took the baby downstairs (Tr. 293). Chief Collins handed the baby to Sacha Zubrisky; S.J. was in full cardiac arrest (S.Z. Tr. 20-22).

Dr. Ariel Goldschmidt testified that he performed the autopsy of S.J. (Tr. 498). He did not find anything of note about the condition of her brain (Tr. 503). He found that she did not die of any metabolic disorder or disease (Tr. 505). Because his physical examination was inconclusive, he determined that the cause of death was a seizure, based on the investigative report and S.J.'s medical records (Tr. 505-511).

Dr. Michael Graham, the Chief Medical Examiner for St. Louis County, testified that he reviewed Dr. Goldschmidt's findings and signed S.J.'s death certificate to reflect that she died of a natural disease (Tr. 542-543). A year after the autopsy, Dr. Graham amended the death certificate to reflect that the manner of death was a homicide because he received information that S.J. died of suffocation (Tr. 546-548). He stated that "the history of the child being placed face-down into a pillow precluded, or made it more likely that the death was due to a suffocation than it was to the seizure disorder" (Tr. 552). He testified that he received information that "the mother said that the child had been crying inconsolably and she couldn't really take it anymore. She put the child face-down into the pillow without thinking about really what was going to happen to the child, and then went downstairs to

potentially take her own life” (Tr. 556).

Ms. Jones presented evidence from Dr. Janice Ophoven, a pediatric forensic pathologist (Tr. 851). She reviewed all of the medical records and autopsy reports, and child protective services reports involving Ms. Jones and both victims (Tr. 862-893). Dr. Ophoved testified that the “number one killer of kids is Sudden Infant Death Syndrome,” in which there does not appear to be a cause of death (Tr. 878-879). She determined that S.J.’s cause of death was undetermined because of her preexisting conditions (Tr. 878-880). She further stated her opinion that a baby laid facedown in a pillow is not indicative of intentional suffocation (Tr. 885).

#### **4. Ms. Jones’s incriminating admissions**

Detective Clayborn testified that, in questioning Ms. Jones about the burp-rag incident with D.W, Ms. Jones repeatedly mentioned S.J. (Tr. 780). Ms. Jones told him that she was scared for D.W. based on the problems she had had with S.J. (Tr. 780). Because she had repeatedly mentioned S.J., Detective Clayborn began questioning her about S.J. (Tr. 780-785). He told Ms. Jones that he doubted that S.J. died of seizures (Tr. 782-783). Ms. Jones told him that she had laid S.J. “down on a pillow with her faced turned to the side and she went downstairs” (Tr. 794). She initially said that she laid her face down, but then she changed her answer (Tr. 794). She consistently said that she laid her on her stomach on a bed (Tr. 794). Ms. Jones said that she

was downstairs for 15 or 20 minutes (Tr. 795). Ms. Jones said that she was “overwhelmed” and “frustrated” because she could not stop S.J.’s crying (Tr. 796). Ms. Jones was frustrated “[t]o the point where [she] felt like harming [herself] or [S.J.]” (State’s Ex. 2; *see* State’s Ex. 24, p. 3). Ms. Jones told Detective Clayborn that she went downstairs planning to commit suicide by taking pills, and she said, “I didn’t think twice about what was going to happen to her or me” (Tr. 797-798, 801). She did not carry out her suicide plan because she was interrupted when some other people came home (Tr. 798, 801). When Ms. Jones went back upstairs, S.J. was not breathing (Tr. 799, 802). Ms. Jones told Detective Clayborn that she felt better after telling the truth, and then she began crying (Tr. 802).

Ms. Jones agreed to make a taped statement, which was admitted into evidence as State’s Exhibit 2 (Tr. 803-813; *see also* State’s Ex. 24). The State played the tape for the jury (Tr. 813).

**C. The evidence was sufficient to prove that Ms. Jones knowingly caused S.J.’s death**

“A person commits the crime of murder in the second degree if he . . . [k]nowingly causes the death of another person[.]” § 565.021.1(1), RSMo 2000. A person acts knowingly “when he is aware that his conduct is practically certain to cause” a result. § 562.016.3(2), RSMo 2000.

“In determining whether actions rise to this level, we look at the

totality of the circumstances as presented by the evidence.” *See State v. Kuhn*, 115 S.W.3d 845, 849 (Mo. App. E.D. 2003). “The mental elements of the defendant’s knowledge may be proven by direct evidence and reasonable inferences drawn from the circumstances surrounding the incident.” *Id.*

Here, the evidence and reasonable inferences drawn from the evidence showed that S.J. consistently received inadequate care from Ms. Jones. The evidence showed that S.J. was repeatedly taken to the hospital during her short life, and that Ms. Jones often made claims that turned out to be overblown or untrue (*e.g.*, the rapist who allegedly broke into her house, secluded himself in the bathroom with S.J., and administered Zantac to S.J. (Tr. 348, 350)).<sup>3</sup> In contrast to her home life, while S.J. was in the hospital, she appeared generally healthy, and she ate well (Tr. 336, 342, 354-355, 357, 359, 361, 365, 375, 379; S.Z. Tr. 13). Thus, rational jurors could have inferred that S.J.’s medical troubles stemmed from poor care at home, and that Ms. Jones’s claims of unverified medical problems were an attempt to cover the

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<sup>3</sup> Citing page 436 of the trial transcript, Ms. Jones asserts that S.J. “had apnea spells which were observed in the hospital, not just reported by her mother” (App.Sub.Br. 25). But there is no testimony along those lines on that page. To the contrary, Dr. Noetzel testified that he did not believe S.J. suffered any apneic episodes at the hospital (Tr. 435-436).

poor care that she knew she was providing for her child.

Consistent with that conclusion, the evidence also showed that Ms. Jones was repeatedly given advice and training regarding the proper care of S.J (see Tr. 332, 343-344, 347, 364-365, 452-459, 612-614). In particular, Ms. Jones had repeatedly been instructed about the dangers of suffocation when placing a baby on a soft surface or near blankets (Tr. 347, 459, 612-613). During those conversations about safe sleep practices, Ms. Jones appeared cooperative and engaged, and showed no signs to the contrary (Tr. 612-614). Thus, rational jurors could have concluded that Ms. Jones was aware that S.J. would suffocate if she was left facedown in a pillow for an extended period of time.

That Ms. Jones knowingly caused S.J.’s death was also shown by the events that immediately preceded the suffocation. On that day, Ms. Jones was “overwhelmed” and “frustrated” because S.J. would not stop crying (Tr. 796). Ms. Jones was frustrated “[t]o the point where [she] felt like harming [herself] or [S.J.]” (State’s Ex. 2; see State’s Ex. 24, p. 3). Ms. Jones laid S.J. facedown on a pillow in a twin bed while S.J. was crying (Tr. 328, 794-798). Ms. Jones then ran downstairs, planning to kill herself, and she “didn’t think twice about what was going to happen to [S.J.] or [herself]” (Tr. 797-798, 801). Ultimately, Ms. Jones did not carry out her planned suicide because she was interrupted when some other people came home (Tr. 795, 798-799, 801-

802). When Ms. Jones went back upstairs fifteen or twenty minutes later, S.J. was not breathing (Tr. 795, 798-799, 801-802).

Based on this evidence, rational jurors could have readily concluded that Ms. Jones was frustrated to the point of harming herself or S.J., and that Ms. Jones knew that S.J. would suffocate if she left S.J. facedown on the pillow while she committed suicide. Indeed, the reasonable inference from Ms. Jones's statement is that she intended to kill both herself and S.J.

Further evidence buttressed the conclusion that Ms. Jones acted knowingly. The evidence showed that when Ms. Jones called 911, she lied about placing S.J. in the bassinet. Ms. Jones told the operator that she had put her baby down in the bassinet, and that she did not know what happened next, except that she came back to find that her baby was not breathing (Tr. 290). Ms. Jones later admitted that she had laid S.J. facedown on the pillow, and other evidence showed that when police officers arrived at the home, S.J. was lying very limp in a twin-size bed and showing no signs of breathing (Tr. 293-295). Ms. Jones's false account to the 911 operator showed her consciousness of guilt. *See State v. Cole*, 384 S.W.3d 318, 327-328 (Mo.App. S.D. 2012) (false statements to law enforcement officers demonstrates consciousness of guilt). That Ms. Jones was conscious of her guilt was also evident after she confessed her misconduct to Detective Clayborn. At that time, Ms. Jones told him that she felt better after telling the truth, and then

she began crying (Tr. 802).

Additionally, rational jurors could have inferred that Ms. Jones acted knowingly because she left S.J. in peril for fifteen to twenty minutes. It would have taken S.J. ten to twelve minutes to suffocate in the pillow, and she likely would have continued crying for part of that time (Tr. 452-455). And, yet, Ms. Jones did not go to her aid after leaving her facedown in the pillow. Afterward, Ms. Jones’s demeanor was also “pretty calm,” and she “didn’t appear to be a mother who lost a child who was really excited or crying or hysterical” (Tr. 296). Rational jurors could have concluded that Ms. Jones’s calm demeanor evinced a knowing mental state.

Ms. Jones’s case is similar to *State v. Brooks*, 185 S.W.3d 265, 268-69 (Mo.App. W.D. 2006), in which the defendant was convicted of second-degree murder after a baby that she was watching suffocated while she was taking a nap. In that case, the primary evidence was that the defendant “admitted that she placed the blanket over the child’s face and put pressure on it for ‘about a minute’ until she stopped crying.” *Id.* at 271. Here, while Ms. Jones did not admit to putting pressure on S.J. until she stopped crying, she did admit to putting S.J. facedown on a pillow while in a state of mind to do harm to both S.J. and herself. In light of all of the evidence outlined above, rational jurors could have concluded that Ms. Jones knew that S.J. would suffocate if left facedown on the pillow.

Ms. Jones implies that the only evidence supporting her conviction was her statement to the police (App.Sub.Br. 26). But in making this argument, Ms. Jones ignores all of the other evidence outlined above. As set forth above, there was substantial other evidence that rational jurors could have relied on to conclude that Ms. Jones knew or was aware that her conduct would cause S.J.’s death.

Ms. Jones cites *State v. Mattingly*, 573 S.W.2d 372 (Mo.App. St.L.D. 1978), and *State v. Patterson*, 443 S.W.2d 104 (Mo. banc 1969), as examples of cases where evidence of prior abuse has been deemed relevant on the issue of intent in murder and assault cases (App.Sub.Br. 27). She then argues that “[h]ere, the evidence was opposite” (App.Sub.Br. 27). She then points out that she repeatedly took S.J. to the hospital (App.Sub.Br. 27-28). She asserts that she “seemingly did not understand what they were telling her to do, or they perceived her as disagreeing with it or ignoring it” (App.Sub.Br. 28). She then concludes that she “was a young mother who was seeking help for a baby whom she thought was sick” (App.Sub.Br. 28).

But Ms. Jones’s argument entirely disregards the standard of review and relies on evidence and inferences contrary to the verdict. As outlined above, rational jurors could have concluded that Ms. Jones was *not* caring for S.J. properly at home, that Ms. Jones was generally ignoring the advice and training she received at the hospital, that Ms. Jones invented medical

problems in an attempt to cover her poor care, and that Ms. Jones was conscious of her wrongdoing.

In short, while Mr. Jones's admissions of wrongdoing were undoubtedly strong evidence supporting the verdict, there was other evidence that also supported the jury's verdict. The evidence was sufficient for a rational finder of fact to conclude that Ms. Jones knowingly caused S.J.'s death. This point should be denied.

## II.

**The evidence was sufficient to support Ms. Jones’s convictions for endangering the welfare of a child and assault. (Responds to Points II and III of the appellant’s brief.)**

In her second and third points, Ms. Jones challenges the sufficiency of the evidence to support her convictions of endangering the welfare of a child in the first degree and assault in the second degree (App.Sub.Br. 29, 33).

She asserts in her second point that the evidence did not prove “that she acted knowingly in failing to provide [D.W.] with adequate nutrition such that it created a substantial risk to his life or health” (App.Sub.Br. 29). She asserts in her third point that the evidence did not prove “that [she] acted recklessly when [D.W.’s] face fell into the burp rag while feeding, causing him to stop breathing” (App.Sub.Br. 33).

### **A. The standard of review**

“This Court’s review is limited to determining whether there was sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt.’” *State v. Miller*, 372 S.W.3d 455, 463 (Mo. banc 2012) (quoting *State v. Letica*, 356 S.W.3d 157, 166 (Mo. banc 2011)). “The evidence and all reasonable inferences therefrom are viewed in the light most favorable to the verdict, disregarding any evidence and inferences contrary to the verdict.’” *Id.* (quoting *State v. Belton*, 153

S.W.3d 307, 309 (Mo. banc 2005)).

“This is not an assessment of whether the Court believes that the evidence at trial established guilt beyond a reasonable doubt but rather a question of whether, in light of the evidence most favorable to the State, any rational fact-finder could have found the essential elements of the crime beyond a reasonable doubt.’” *Id.* (quoting *State v. Nash*, 339 S.W.3d 500, 509 (Mo. banc 2011)). “When reviewing the sufficiency of evidence supporting a criminal conviction, the Court does not act as a ‘super juror’ with veto powers.” *Id.* “In such cases, this Court gives great deference to the trier of fact.” *Id.* (quoting *State v. Grim*, 854 S.W.2d 403, 414 (Mo. banc 1993)).

## **B. The relevant evidence at trial**

### **1. D.W.’s medical history, related expert testimony, and Ms. Jones’s lack of cooperation with medical personnel**

Dr. Robert Paschall testified that he was the medical director of the hospital’s child protection program (Tr. 674). D.W. was first referred to his unit on January 27, 2009 (Tr. 676-77). D.W. was admitted on January 20 “because of his history of lack of sufficient nutrition and for his listlessness or lethargy, [and] his state of marginal dehydration” (Tr. 678).

Dr. Jamie Kondis testified that she also cared for D.W. when he was hospitalized (Tr. 380). Ms. Jones first brought D.W. to the hospital on January 20, 2009 (Tr. 382). Though D.W. was slightly jaundiced, his bilirubin

level was not elevated (Tr. 383). He looked dehydrated, and Ms. Jones reported that he was lethargic at home (Tr. 384). Ms. Jones said that she had to wake him up for feedings and that he was not eating (Tr. 384). D.W. was hospitalized for three days, during which he ate orally without difficulty (Tr. 384-385).

On January 24, Ms. Jones took D.W. home against medical advice (Tr. 385). Ms. Jones expressed concern that the feeding program was a form of forced feeding and that it was not good for her child (Tr. 460). The form Ms. Jones signed when taking D.W. home against medical advice warned her that the potential risks of taking him home included “[d]ehydration, starvation, neurologic disorders, or death” (Tr. 666-667).

Dr. Kondis also testified that Ms. Jones was educated about the proper way to feed a baby, but she did not appear to comply with those methods (Tr. 390). Dr. Paschall testified that Ms. Jones believed an infant should only be given as much food as it can take and no more (Tr. 682). Ms. Jones told Dr. Paschall that they were force feeding her baby (Tr. 696-97). Dr. Paschall stated that Ms. Jones ignored the social worker on the day she took D.W. home against medical advice (Tr. 683-685).

Two days later, on January 26, D.W. came back to the hospital in an ambulance (Tr. 390). Ms. Jones said that when she was feeding him, he became apneic and cyanotic (Tr. 391). By the time he presented in the ER, he

“was looking back to normal” (Tr. 391). His test results were negative for any viral or bacterial infections (Tr. 393). Dr. Noetzel testified that the testing never revealed any evidence that D.W. had a seizure disorder (Tr. 463).

Dr. Paschall testified a child could become apneic and ultimately cyanotic if he were smothered, including by a cloth if it were accidentally or intentionally placed over the nose (Tr. 694-695). He stated that, to become cyanotic, it would take up to a minute or longer before the child would start changing colors (Tr. 701).

Larissa Zguta, a social worker in the child protection unit at the hospital, testified that she became involved in D.W.’s case on January 30, 2009 (Tr. 644). At that time, there were still concerns that Ms. Jones was under-feeding him (Tr. 643-644). Although Ms. Jones had only provided minimal information when Ms. Zguta met with her a year earlier about S.J., her demeanor was angrier during their meeting about D.W. (Tr. 643, 647-648). Ms. Zguta stated that Ms. Jones’s “level of cooperation was pretty poor” (Tr. 649). Although the medical staff made multiple attempts to talk with Ms. Jones about proper feeding, Ms. Jones “continued to believe that that was force-feeding and she did not want to participate in that” (Tr. 649).

Dr. Paschall testified that his team was not going to allow her to take D.W. home again against medical advice, so they reported the case to the Children’s Division (Tr. 702-03). D.W. was taken into protective custody and

Ms. Jones, upon hearing that she could not take him home, just walked out of his room (Tr. 393, 703). D.W. was discharged February 5, 2009 (Tr. 393).

Ann Fisher testified that she took in D.W. as a foster child in February 2009, when he was two weeks old (Tr. 587). She fed him by bottle and while she sometimes had to wake him for feedings, she never had any trouble making him gain weight (Tr. 590). She testified that, while under her care, D.W. was healthy and never had any difficulties breathing (Tr. 590-591).

Ms. Jones presented evidence from Dr. Janice Ophoven, a pediatric forensic pathologist (Tr. 851). She reviewed all of the medical records, the autopsy reports, and child protective services reports involving Ms. Jones and both victims (Tr. 862-893). She stated that because D.W. was born slightly premature, it would affect his ability to wake up at regular intervals for feedings (Tr. 887-90). She stated that he would likely improve his feeding skills over time (Tr. 891-892). She also stated that because of his proneness to apnea, D.W. might “take longer breaks” in his breathing and appear as though he is not breathing (Tr. 890).

## **2. Ms. Jones’s admission of fault**

Detective Clayborn testified that in February 2009, he was referred to D.W.’s case as a case of child neglect by nutritional neglect (Tr. 732). On the morning of February 11, 2009, he went to Ms. Jones’s home with Detective Anthony Cavaletti (Tr. 736). They did not have a warrant and were not

intending to arrest Ms. Jones (Tr. 737). Detective Clayborn told Ms. Jones that he wanted to talk to her about an incident with D.W. (Tr. 739). She agreed to come with him to the police station and her cooperation level was “very high” (Tr. 739-740). Detective Clayborn advised Ms. Jones of the *Miranda* warnings at 9:45 a.m., and she affirmed that she understood, and she signed a consent form agreeing to waive her rights (Tr. 749-754).

Ms. Jones told Detective Clayborn she was feeding D.W. less than an ounce per feeding (Tr. 760). Detective Clayborn said that Ms. Jones “seemed a little agitated because she said [the medical team was] accusing her of not taking care of [D.W.]” (Tr. 761). In defending her parenting abilities, Ms. Jones mentioned S.J. by saying, “I’ve had a child before that passed away. I know how to take care of a child” (Tr. 765).

Ms. Jones told Detective Clayborn that she was scared about taking care of D.W. because of what happened with S.J. (Tr. 767). She admitted that when she had custody of D.W., she missed several of his feedings (Tr. 766-769). Ms. Jones told Detective Clayborn that the hospital had given her tips and education on feeding techniques, but she “just didn’t wake up and feed the baby” (Tr. 843-844).

With regard to the events on January 26, Ms. Jones admitted that she had been burping D.W. when he stopped breathing:

**[Prosecutor]:** What did she tell you about that?

**[Detective Clayborn]:** She told me that she was burping him on her lap and her attention was diverted from his attention to the TV and when her attention diverted back to him he was face-down in the burp rag.

**[Prosecutor]:** Did she demonstrate this in any way?

**[Detective Clayborn]:** Yes.

**[Prosecutor]:** So, can you describe for the jury how she demonstrated how she was burping him, how this happened that his face ended up in a burp rag?

**[Detective Clayborn]:** From what I remember the child's sitting on her on one leg on her lap, she's patting the back, the burp rag is in her hand, and she's turned to look to see what's coming on TV, and as she turns back around his face is in the burp rag.

**[Prosecutor]:** Did she tell you anything about whether he was breathing at that time?

**[Detective Clayborn]:** He wasn't breathing. She performed CPR and blew in his face.

**[Prosecutor]:** Did she tell you when she noticed that his face was in the burp rag? Did she tell you anything about when she looked at his face what did she observe about his face?

**[Detective Clayborn]:** It was blue.

(Tr. 769-770). Ms. Jones told him that she did CPR (Tr. 770). At that point, Detective Clayborn told Ms. Jones that he did not believe she was telling the whole truth (Tr. 771). Ms. Jones became very emotional and responded that she would never hurt her son (Tr. 771).

Ms. Jones agreed to make a taped statement, which was admitted as State’s Exhibit 2, along with the transcript thereof (Tr. 803-813; *see* State’s Ex. 24). In her taped statement, Ms. Jones reiterated that she had been distracted by the television before D.W.’s face ended up in the burp rag, and she stated that she had missed six feedings on January 19 and 20, and that she had missed five more feedings on January 25 and 26 (Tr. 766-69, 843-844; State’s Ex. 2; *see* State’s Ex. 24, pp. 1-2).

**C. The evidence was sufficient to support Ms. Jones’s convictions of endangering the welfare of a child and assault**

**1. Endangering the welfare of a child**

As relevant in this case, “[a] person commits the crime of endangering the welfare of a child in the first degree if . . . [t]he person knowingly acts in a manner that creates a substantial risk to the life . . . or health of a child less than seventeen years old[.]” § 568.045.1(1), RSMo Cum. Supp. 2005. A person acts knowingly “when he is aware that his conduct is practically certain to cause” a result. § 562.016.3(2), RSMo 2000.

“In determining whether actions rise to this level, we look at the

totality of the circumstances as presented by the evidence.” *State v. Kuhn*, 115 S.W.3d 845, 849 (Mo. App. E.D. 2003). “The mental elements of the defendant’s knowledge may be proven by direct evidence and reasonable inferences drawn from the circumstances surrounding the incident.” *Id.*

Here, there was ample evidence showing that Ms. Jones knowingly created a substantial risk to D.W.’s life and health by failing to provide him with adequate nutrition. Ms. Jones received instructions on proper feeding for D.W. from multiple social workers and doctors (Tr. 390). The evidence also showed that Ms. Jones took D.W. home from the hospital against medical advice, after he had been admitted for malnutrition, and that she removed D.W. from the hospital in spite of the warning that the potential risks of doing so included “[d]ehydration, starvation, neurologic disorders, or death” (Tr. 666-667). The evidence also showed that, despite these warnings, Ms. Jones admitted that she missed five feedings on January 25 and January 26, after she removed D.W. from the hospital against medical advice (State’s Ex. 2; see State’s Ex. 24, pp. 1-2). Based on this evidence, rational jurors could have concluded that Ms. Jones was aware of the importance of regular feedings, and that Ms. Jones knowingly created a substantial risk to his health and life by removing him from the hospital and failing to feed him.

Ms. Jones argues that “[i]n the light most favorable to the verdict, the evidence still shows a mother trying to feed her child and seeking medical

attention when he will not eat enough” (App.Sub.Br. 32). But, in fact, this interpretation of the evidence is directly contrary to the evidence in the light most favorable to the verdict. As outlined above, Ms. Jones knew that D.W. was not eating enough; she knew that D.W. was receiving treatment in the hospital to alleviate his dehydration and malnutrition; she removed D.W. from the hospital against medical advice, after being warned that removal presented serious risks to his health, including death; and she then failed to feed him on five occasions before he was returned to the hospital in an ambulance. Point II should be denied.

## **2. Assault in the second degree**

As relevant in this case, “[a] person commits the crime of assault in the second degree if he . . . [r]ecklessly causes serious physical injury to another person[.]” § 565.060.1(3), RSMo 2000. “A person ‘acts recklessly’ or is reckless when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.” § 562.016.4, RSMo 2000.

Here, the evidence showed that D.W. was taken to the hospital after Ms. Jones said that she was feeding him and he became apneic and cyanotic (Tr. 391). Ms. Jones later admitted that she was burping D.W., that she had gotten distracted by the television, and that when she looked down D.W. had

stopped breathing and was blue (Tr. 769-770). Dr. Paschall testified that a child could become apneic and cyanotic if he were smothered, including by a cloth if it were accidentally or intentionally placed over the nose (Tr. 694-695). He stated that, to become cyanotic, it would take up to a minute or longer before the child would start changing colors (Tr. 701).

From this evidence, rational jurors could have inferred that Ms. Jones acted recklessly when she left D.W. (who was only a few weeks old) facedown in the burp cloth for a minute or longer until he stopped breathing and turned blue. Rational jurors could have readily concluded that by ignoring an infant child for that length of time, Ms. Jones consciously disregarded a substantial and unjustifiable risk that the child would be harmed. Rational jurors also could have concluded that Ms. Jones’s inattention constituted a gross deviation from the standard of care that a reasonable person would exercise in the situation.

Ms. Jones asserts that nothing presented at trial “establishes anything other than an accident,” and she relies on *State v. Ludwig*, 18 S.W.3d 139, 143 (Mo. App. E.D. 2000), to argue that carelessness and negligence are distinguishable from recklessness (App.Sub.Br. 35). But to the extent that those mental states differ from recklessness, that difference alone does not establish that the evidence here was insufficient. And to the extent that Ms. Jones is asserting that the evidence only supported an inference of accident

or negligence, she is ignoring the standard of review and refraining from drawing reasonable inferences that the jurors could have drawn from the evidence. As outlined above, there was evidence from which rational jurors could have inferred that Ms. Jones's prolonged inattention to her infant child was not a mere accident or negligence. Point III should be denied.

### III.

**The Court should re-examine the need for the *corpus delicti* rule or at least clarify that in Missouri the *corpus delicti* rule does not require proof of every element of the *corpus delicti* independent of the defendant’s statements. But even strictly applying the *corpus delicti* rule here, the trial court did not plainly err in admitting Ms. Jones’s statements. (Responds to Point IV of the appellant’s brief.)**

In her fourth point, Ms. Jones asserts that the trial court plainly erred in admitting into evidence statements she made to the police (App.Sub.Br. 36). She asserts that, aside from her statements to the police, “there was no independent proof of the *corpus delicti* of the offense—that [S.J.] died as a result of homicide rather than from natural causes” (App.Sub.Br. 36).

#### **A. Preservation and the standard of review**

Ms. Jones concedes that she did not object to the admission of her statements on the grounds that it would violate the *corpus delicti* rule (App.Sub.Br. 36). *See* Tr. 577; L.F. 105-109. She requests that the Court exercise its discretion to review for plain error (App.Sub.Br. 36).

“The plain error rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review.’” *State v. Letica*, 356 S.W.3d 157, 167 (Mo. banc 2011) (quoting *State v. Chaney*, 967 S.W.2d 47, 59 (Mo. banc 1998)). “Plain errors

affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.’” *Id.* (quoting Rule 29.12(b)).

Here, the trial court did not plainly err.

**B. This Court should re-examine or clarify the application of the *corpus delicti* rule in Missouri**

The “*corpus delicti* rule” is “[t]he doctrine that prohibits a prosecutor from proving the *corpus delicti* based solely on a defendant’s extrajudicial statements.” Black’s Law Dictionary (9th ed. 2009). In a murder case, the *corpus delicti* has two parts: “(1) proof of the death of the victim, and (2) evidence that the criminal agency of another was the cause of the victim’s death.” *State v. Edwards*, 116 S.W.3d 511, 544 (Mo. banc 2003).

This Court first “explicitly adopted” the *corpus delicti* rule in *Robinson v. State*, 12 Mo. 592, 597 (1849). *See State v. Madorie*, 156 S.W.3d 351, 354 (Mo. banc 2005). This common law rule originated in seventeenth-century England, and it was designed to avoid a particular evil. *See id.* “Specifically, the idea of requiring corroborating evidence independent of a defendant’s confession is traced to several murder cases in which the accused confessed to the killing, were hanged, and the victims were later found still alive.” *Id.* To the extent that the rule was adopted in English common law, “its application was limited to murder cases.” *Id.* “In the United States, however, the rule has

been accepted as a basic requirement in any criminal case.” *Id.* At least that may have been true at one point in time.

The *corpus delicti* rule no longer applies in every state. In 2013, both Colorado and Idaho abandoned a strict application of the *corpus delicti* rule based on changed conditions and their conclusions that its application does more harm than good. See *People v. LaRosa*, 293 P.3d 567 (Colo. 2013); *State v. Suriner*, 294 P.3d 1093 (Idaho 2013). In so finding, Colorado joined the federal courts and the courts of nine other states in abandoning the *corpus delicti* rule in favor of a rule that requires “substantial independent evidence which would tend to establish the trustworthiness of the statement.” See *Opper v. United States*, 348 U.S. 84, 93 (1954) (“we think the better rule to be that the corroborative evidence need not be sufficient, independent of the statements, to establish the *corpus delicti*”); *Smith v. United States*, 348 U.S. 147, 156 (1954); *State v. Mauchley*, 67 P.3d 477 (Utah 2003); *State v. Hafford*, 746 A.2d 150, 172-174 (Conn. 2000); *State v. Hansen*, 989 P.2d 338, 346 (Mont. 1999); *State v. Parker*, 337 S.E.2d 487 (N.C. 1985); *Armstrong v. State*, 502 P.2d 440, 447 (Alaska 1972); *Harrison v. United States*, 281 A.2d 222, 224-225 (D.C. 1971); *State v. George*, 257 A.2d 19, 20-21 (N.H. 1969); *State v. Yoshida*, 354 P.2d 986, 990 (Haw. 1960); *Fontenot v. State*, 881 P.2d 69, 77-78 (Okla. Crim. App. 1994) (citing *Jones v. State*, 55 P.2d 63, 68 (Okla. Crim. App. 1976)). See also *State v. Hansen*, 989 P.2d at 346 (“Eventually, the

*corpus delicti* rule outlived its usefulness and the rule was thoroughly disparaged by commentators.”). The Idaho Supreme Court, on the other hand, determined that there was “no reason to attempt to fashion another rule” in place of the *corpus delicti* rule, and instead held that “the jury can give a defendant’s extrajudicial confession or statement whatever weight it deems appropriate along with all of the other evidence when deciding whether the State has proved guilt beyond a reasonable doubt.” *Suriner*, 294 P.3d at 1100.

As stated above, Missouri has long adhered to the *corpus delicti* rule, and a decision of this Court “should not be lightly overruled, particularly where . . . the opinion has remained unchanged for many years.” *First Bank v. Fischer & Frichtel, Inc.*, 364 S.W.3d 216, 224 (Mo. banc 2012) (citations omitted). “The doctrine of *stare decisis* promotes security in the law by encouraging adherence to previously decided cases.” *Watts v. Lester E. Cox Med. Centers*, 376 S.W.3d 633, 644 (Mo. banc 2012) (citation omitted). “But, the adherence to precedent is not absolute, and the passage of time and the experience of enforcing a purportedly incorrect precedent may demonstrate a compelling case for changing course.” *Id.* Additionally, to the extent that subsequent decisions of this Court have employed a less strict application of the *corpus delicti* rule, the time is ripe to re-examine the need for the *corpus delicti* rule and to make plain that, in Missouri, the rule does not require

proof of every element of the *corpus delicti* independent of the defendant’s extrajudicial statements. *See generally Alleyne v. United States*, 133 S.Ct. 2151, 2164 (2013) (“*stare decisis* does not compel adherence to a decision whose ‘underpinnings’ have been ‘eroded’ by subsequent developments of constitutional law”).

### **1. The weaknesses of the *corpus delicti* doctrine**

In *Mauchley*, 67 P.3d at 483-485, the Utah Supreme Court discussed three “inherent weaknesses” of the *corpus delicti* rule: (1) that it “does not guard against innocent persons falsely confessing to actual crimes”; (2) that it “inadequately protects the innocent because it focuses on the body of the crime rather than the confession”; and (3) that it “may work to obstruct justice.” *Id.* at 483-485. Based on these weaknesses, which were present from the rule’s inception, the court concluded that “the rule was ill-conceived and originally erroneous.” *Id.* at 484. It was, thus, “not inexorably bound to retain it” or “precluded from replacing the rule with one that is more sound.” *Id.*

#### **a. False confessions by innocent persons**

The *corpus delicti* rule “exists to detect false confessions but does so in only one circumstance: when a person confesses to an imaginary crime.” *People v. LaRosa*, 293 P.3d at 573-574. “One of the inherent weaknesses of the *corpus delicti* rule is that it ‘serve[s] an extremely limited function.’” *Mauchley*, 67 P.3d at 483 (quoting *Smith v. United States*, 348 U.S. at 153);

*see also LaRosa*, 293 P.3d at 573. “It aspires to prevent innocent persons from being convicted when they falsely confess to committing ‘a crime that was never committed.’” *Mauchley*, 67 P.3d at 483 (quoting *State v. Parker*, 337 S.E.2d 487, 491 (N.C. 1985) (citation omitted)).

Although this is a worthy goal, there is “little distinction between convicting a person for a crime that was never committed and convicting a person for a crime that was committed by someone else.” *Id.* (citing *Parker*, 337 S.E.2d at 494 (citing *State v. Lucas*, 152 A.2d 50, 60 (N.J. 1959))). And, “[y]et, the [*corpus delicti*] rule does not protect innocent individuals from being wrongly convicted when they falsely confess to committing a crime that was committed by another.” *Id.*

In cases where “the State establishes injury by criminal act, the *corpus delicti* rule is satisfied and no longer operates to bar the admission of a confession.” *Mauchley*, 67 P.3d at 483. In other words, where the independent evidence suffices to prove the *corpus delicti* (*i.e.*, where a murder is evident), “a defendant’s false confession may be used to establish one of the most important elements necessary for conviction—the identity of the perpetrator.” *Id.* at 483-484. Because “[t]his is true even if there is no other evidence linking the defendant to the crime[,] . . . the rule does nothing to ensure that a particular defendant was the perpetrator of the crime.” *Id.* at 484.

**b. Misplaced focus on the body of the crime**

“Another weakness of the *corpus delicti* rule is that it focuses solely on whether a crime occurred instead of on whether a confession was true or false.” *Mauchley*, 67 P.3d at 484. This focus does not align with the rule’s original intention to detect false confessions. *Id.*

“The belief seems to be that if the State can introduce independent evidence supporting the occurrence of the charged crime, a confession about the crime must be reliable.” *Mauchley*, 67 P.3d at 484 (citing Corey J. Ayling, Comment, Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions, 1984 Wis. L.Rev. 1121, 1128). “The assumption is that the supporting evidence proves the ‘confession was not the imaginary product of a mentally diseased or deficient mind.’” *Id.* (quoting *Lucas*, 152 A.2d at 60).

But while such reasoning has some logical force, the rule does not establish whether a confession was true or trustworthy. For instance, “if a person falsely confesses to the supposed crime after hearing about it through the news media, or after being brought in for questioning as a suspect, the rule likely would not preclude the confession from being used to establish guilt due to the independent evidence of the supposed crime.” *Mauchley*, 67 P.3d at 484. Because the rule focuses only on the evidence rather than the confession, “[t]he *corpus delicti* rule is ill-suited to detecting such false

confessions[.]” *Id.* “Hence, even though the rule’s purpose is to prevent innocent persons from being convicted for a crime that never occurred, the rule’s inherent design fails to adequately address the evil at which it is aimed.” *Id.*

### **c. The potential for obstructing justice**

“In addition to failing to adequately protect the innocent from the consequences of their false confessions, the *corpus delicti* rule potentially operates to obstruct justice.” *Mauchley*, 67 P.3d at 484. “[H]ard-and-fast rules requiring corroboration are as likely to obstruct the punishment of the guilty as they are to safeguard the innocent.” *Id.* (quoting *Lucas*, 152 A.2d at 57). This issue particularly applies to cases like Ms. Jones’s case.

The rule may especially “obstruct justice in cases where . . . the victim is too young to testify and no tangible injury results from the alleged criminal act.” *LaRosa*, 293 P.3d at 574 (citation omitted). “In such situations, the rule may operate to reward defendants who target young or mentally infirm victims who are unable to testify and commit crimes that do not result in tangible injuries or do so carefully and leave no evidence.” *Id.* “That the rule may operate to bar conviction for crimes committed against the most vulnerable victims, such as infants, young children, and the mentally infirm, and for crimes that are especially egregious, such as sexual assault and infanticide, has been described as ‘especially troublesome.’” *Id.* (citing

*Mauchley*, 67 P.3d at 485; Maria Lisa Crisera, Comment, Reevaluation of the California *Corpus Delicti* Rule: A Response to the Invitation of Proposition 8, 78 Calif. L. Rev. 1571, 1583 (1990) (discussing the rule’s potential to obstruct justice in cases involving child abuse and infanticide because it can be difficult, if not impossible, to establish that such injuries resulted from criminal acts)).

These situations in which the *corpus delicti* rule has proven problematic include infanticide by suffocation, the crime at issue here. See *Mauchley*, 67 P.3d at 485; *Suriner*, 294 P.3d at 1097-99 (citing *State v. Tiffany*, 88 P.3d 728 (Idaho 2004)). An application of the rule “may preclude convicting an individual who voluntarily confesses to smothering a child because ‘as is often the case with death by smothering, there [is] no way to determine conclusively whether the death was by natural causes or was a homicide.’” *Id.* (quoting Catherine L. Goldenburg, Comment: Sudden Infant Death Syndrome as a Mask for Murder: Investigating and Prosecuting Infanticide, 28 Sw. U.L.Rev. 599, 621 (1999)). This is a dangerous rule because the element that the harm or injury occurred by criminal act may often be difficult to prove in suffocation cases. See *id.*; *State v. Aten*, 927 P.2d 210, 222, 225 (Wash. 1996) (excluding a voluntary confession because the State could not establish that the infant’s death was by criminal act rather than natural causes).

“These and other similar situations cause concern because ‘safeguards for the accused should not be turned into obstacles whereby the guilty can escape just punishment.’” *Mauchley*, 67 P.3d at 485 (quoting *Lucas*, 152 A.2d at 61). Although courts have long held that the rule should not “be used as a technical obstruction to the administration of justice,” it is difficult to see how such consequences can be avoided under the current application of the rule. *Id.* (citations omitted).

“The *corpus delicti* rule obstructs justice, in part, because it makes ‘irrational distinctions and [yields] incongruous results.’” *Mauchley*, 67 P.3d at 485; *Hansen*, 989 P.2d at 346-51 (discussing Montana’s confusion with the concept of *corpus delicti*). The “rule fails to provide a ‘rational reason’ why a person cunning enough to hide evidence should not ‘be confronted with his voluntary confession while’ a more careless criminal should be.” *Mauchley*, 67 P.3d at 485. The rule also “bars concededly voluntary confessions,” yet fails to “block the admission of dubious confessions.” *Id.* The rule is, thus, flawed.

## **2. Changed conditions make the rule no longer necessary**

“The rule has also been criticized as outdated.” *LaRosa*, 293 P.3d at 573. “[C]hanged conditions since the advent of the rule provide additional support that more good than harm will come by departing from precedent.” *Mauchley*, 67 P.3d at 485; *see also State v. Suriner*, 294 P.3d at 1099.

“An underlying goal of the *corpus delicti* rule is to minimize the weight

of a confession and [to] require collateral evidence to support a conviction.” *Mauchley*, 67 P.3d at 485-86 (citation omitted). “The goal of minimizing the weight of a confession ‘likely betrays a concern about’ whether a confession was freely and voluntarily given[.]” *Id.* at 486. This was based on a history of confessions that were “extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence[.]” *Id.* (citing *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964); *Haynes v. Washington*, 373 U.S. 503, 519 (1963)).

But since the inception of the *corpus delicti* rule, “the United States Supreme Court has recognized additional constitutional and procedural safeguards concerning the voluntariness of confessions that have led some courts to question whether the rule is obsolete.” *LaRosa*, 293 P.3d at 573 (citing *State v. Parker*, 337 S.E.2d 487, 494 (N.C. 1985) (noting that the rule’s concern with coercive police tactics in obtaining confessions has been undercut by *Miranda v. Arizona*, 384 U.S. 436 (1966)); see also *Mauchley*, 67 P.3d at 486; *Suriner*, 294 P.3d at 1099. Because of these additional safeguards, the *corpus delicti* rule is not needed to prevent the use of involuntary confessions. *Mauchley*, 67 P.3d at 486-88 (citing *Brown v. Mississippi*, 297 U.S. 278, 286-287 (1936) (holding that confessions elicited by physical force or duress violate procedural due process); *Miranda v. Arizona*, 384 U.S. at 444-447 (mandating that prior to any custodial interrogation,

officers must inform suspects of their rights to remain silent and to have the assistance of counsel); *Escobedo*, 378 U.S. at 488, 490-91 (holding that the right to counsel includes the right to request and consult with a lawyer before being interrogated); *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960) (courts also play a role in protecting against involuntary confessions when they look at the totality of the circumstances under which a confession was made to ensure it was voluntary)). In Ms. Jones’s case, for instance, the trial court found, after a suppression hearing, that Ms. Jones’s statements were voluntary (Tr. 4-48; L.F. 4).

“Additionally, since courts first began applying the *corpus delicti* rule, criminal statutes have become more numerous and complex, making the *corpus delicti* difficult, if not impossible, to define for certain crimes.” *LaRosa*, 293 P.3d at 573-574 (citing *Mauchley*, 67 P.3d at 485-488). “Because the rule is ill-equipped to adapt to the changing face of criminal law, courts are faced with either selectively applying the rule to certain crimes or abandoning it for all crimes.” *Mauchley*, 67 P.3d at 486-88 (citing *State v. Daugherty*, 845 P.2d 474, 477-78 (Ariz. Ct. App. 1992) (excluding application of the *corpus delicti* rule to various crimes)). Because “numerous exceptions can soon subsume a rule,” the “better approach is to abolish the rule rather than trying to ‘work around the rule to achieve justice.’” *Id.*

### **3. Focusing on the probative value of the confession better serves the original purposes of the *corpus delicti* rule**

In 1954, the United States Supreme Court adopted a rule that focused on the trustworthiness of the defendant’s statements. *See Opper v. United States*, 348 U.S. 84; and *Smith v. United States*, 348 U.S. 147. Such a rule “differs from the *corpus delicti* rule because it requires corroboration of the confession itself rather than corroboration that a crime was committed.” *Mauchley*, 67 P.3d at 488 (citing *State v. Parker*, 337 S.E.2d at 492).

Under that rule, “[a]ll elements of the offense must be established by independent evidence or corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense ‘through’ the statements of the accused.” *Smith*, 348 U.S. at 156 (emphasis added). Thus, “the elements may be established by independent evidence of the crime, a corroborated confession, or a combination of both.” *Mauchley*, 67 P.3d at 488 (citation omitted). The standard differs from the *corpus delicti* doctrine in that “the State does not have to provide independent evidence that a harm or injury occurred by criminal act before a confession may be admitted to help establish guilt.” *Id.*

Although the corroborative evidence need not be independent of the defendant’s statements, the State must still “introduce substantial independent evidence which would tend to establish the trustworthiness of

the statement.” *Opper*, 348 U.S. at 93. The independent evidence “tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense.” *Id.* (citing *Smith*, 348 U.S. at 147); *see also Mauchley*, 67 P.3d at 488 (citing *United States v. Corona-Garcia*, 210 F.3d 973, 979 n. 4 (9th Cir. 2000)). “Hence, the precept still stands that ‘no defendant can be convicted [solely] on the basis of an uncorroborated out-of-court [confession].’” *Mauchley*, 67 P.3d at 488 (quoting *United States v. Dickerson*, 163 F.3d 639, 641 (D.C. Cir. 1999)).

**4. This Court should make plain that, in Missouri, it is not necessary to present proof of every element of the *corpus delicti* independent of the defendant’s statements**

In light of the foregoing, this Court should make plain that the *corpus delicti* rule should not be strictly applied in the manner that it was applied by the Court of Appeals in this case. The Court of Appeals focused on its conclusion that there was allegedly no independent proof (aside from Ms. Jones’s statements) of criminal agency of another person. *State v. Jones*, No. ED97595, slip op. at 8-9. But this Court should make plain that there need not be proof of every element of the *corpus delicti* independent of the defendant’s statement.

Indeed, Missouri courts have stated that it is “well established that full proof of the *corpus delicti* independent of the defendant’s extrajudicial

confessions is not required.” *State v. Pratte*, 345 S.W.3d 357, 360 (Mo.App. S.D. 2011). Moreover, “[i]f there is evidence of corroborating circumstances independent of the confession, which tends to prove the offense by confirming matters related in the confession, both the corroborating circumstances and the confession may be considered in determining whether or not the *corpus delicti* has been established.” *Id.* And, yet, in Ms. Jones’s case, the Court of Appeals was unwilling to consider her statements together with the other evidence to conclude that the *corpus delicti* had been established.

In short, the Court should make plain that the absence of independent proof of criminal agency of another person will not preclude admission of a defendant’s incriminating statements. Moreover, the Court should make plain that the defendant’s statements can constitute proof of the *corpus delicti* when considered together with other evidence.

And, consequently, the Court should hold that the trial court did not plainly err in admitting Ms. Jones’s statements. The evidence indisputably showed that S.J. died, and the evidence showed that S.J.’s death was consistent with suffocation. Ms. Jones’s subsequent incriminating statements showing that she suffocated the victim were corroborated by those facts. Moreover, other evidence showed that Ms. Jones acted knowingly in causing the victim’s death, and the trustworthiness of Ms. Jones’s statements was demonstrated by the evidence presented at the suppression hearing, which

showed that she voluntarily made her statements after a knowing, intelligent, and voluntary waiver of her rights. Under such circumstances, there is no need for a strict application of the *corpus delicti* rule, and the evidence was sufficient to establish the *corpus delicti*.

Additionally, a strict application of the rule in Ms. Jones’s case will not serve the ends of justice. Indeed, in cases where the victim was an infant susceptible to harm, and where the victim’s death was consistent (physically) with both natural and criminal causes, a strict application of the *corpus delicti* rule will operate to shield guilty defendants from culpability.

**C. The trial court did not plainly err because the *corpus delicti* rule was satisfied**

Even if the Court were to strictly apply the *corpus delicti* rule in this case, the trial court did not plainly err in admitting Ms. Jones’s statements. “Extrajudicial admissions or statements of the defendant are not admissible in the absence of independent proof of the commission of an offense, i.e. the *corpus delicti*.” *State v. Madorie*, 156 S.W.3d at 355. “Evidence, however, that the defendant was the criminal agent is not required before the defendant’s statement or confession is admitted.” *Id.* “In addition, absolute proof independent of his statement or confession that a crime was committed is not required.” *Id.* “All that is required is evidence of circumstances tending to prove the *corpus delicti* corresponding with the confession. *Slight*

*corroborating facts* are sufficient to establish the *corpus delicti.*” *Id.*

Here, the State presented sufficient corroborating evidence to prove the two elements required for the *corpus delicti* in a homicide case: (1) proof of the death of the victim, and (2) evidence that the criminal agency of another caused the victim’s death. *See State v. Hayes*, 347 S.W.3d 676, 681 (Mo. App. E.D. 2011). That S.J. died was undisputed.

The following additional circumstances were sufficient to prove the *corpus delicti* because they corroborated Ms. Jones’s confession that she suffocated S.J. out of frustration: Ms. Jones was home alone with S.J.; Ms. Jones had reported that S.J. constantly cried unless she was held; covering an infant’s face with a pillow would cause her to stop crying; S.J. was found facedown on an adult bed with a pillow; physical evidence to support a finding that a three-month-old infant died of suffocation is rare; the available physical evidence was, nevertheless, consistent with suffocation (as shown by the medical examiner’s ultimate conclusion); the amount of physical force necessary to force a three-month-old infant into a pillow is minimal; Ms. Jones did not appear emotional when it was clear S.J. had stopped breathing; Ms. Jones lied about placing S.J. in the bassinet; and it is decidedly uncommon for an infant to die of seizures.

Although the evidence regarding S.J.’s death was initially inconclusive, it supported a reasonable inference that it was the result of the criminal

agency of another. As the medical examiner testified, there will rarely be physical evidence to support a finding that a three-month-old infant died of suffocation as opposed to other causes (Tr. 552). He found that “the history of the child being placed facedown into a pillow precluded, or made it much more likely that the death was due to a suffocation than it was to the seizure disorder” (Tr. 552). The pediatric neurologist testified that while three-month-old S.J. did have seizures, it is “decidedly uncommon” for an infant younger than six months of age to die from a seizure (Tr. 432-34). The evidence also showed that S.J.’s seizures were not life-threatening (Tr. 445-46). This evidence supported a reasonable inference that S.J. did not die of natural causes and, thus, died as a result of the criminal agency of another.

The evidence showing how S.J. was found in the bed also supported a reasonable inference that she died facedown in a pillow, as Ms. Jones described in her confession. Even Ms. Jones’s expert witness, Dr. Ophoven’s testimony specifically corroborated Ms. Jones’s confession regarding S.J.’s cause of death: “She was found face-down. The autopsy and pictures show that she had a pattern of livor mortis consistent with her having spent time on her face, in a face-down position” (Tr. 878). She further testified that the evidence showed indications that S.J. “died face-down” (Tr. 878).

When Pine Lawn Police Chief Collins found S.J., he believed that her death was suspicious (Tr. 297). Ms. Jones’s demeanor at the time was not

what he would expect of a mother whose child was not breathing, but rather she was “emotionless” and “pretty calm” (Tr. 296, 350-51). Chief Collins testified that he made the determination to involve the St. Louis County police department because his department’s “policy is that anything of suspicion is to be turned over to St. Louis County for investigation” (Tr. 297). Although Chief Collins could not recall S.J.’s position on the bed when he arrived, he clearly testified that she “was laying [sic] on the large bed, the adult bed, just below the pillows” (Tr. 294-95). Chief Collins found S.J. in this position after he received a call saying that the child was not breathing (Tr. 490). It was reasonable to infer that someone had moved S.J. out of the pillow to discover that she was not breathing. Thus, the reasonable inferences from Chief Collins’s testimony point to a finding that S.J. died of suffocation in an adult pillow—a finding consistent with Ms. Jones’s confession.

Ms. Jones’s confession that she was frustrated was also consistent with Dr. Kondis’s testimony that during one of her hospital visits, Ms. Jones told her that S.J. would cry unless she was held (Tr. 362-63). Her confession was also consistent with the pediatric neurologist’s testimony that a baby would stop crying and possibly lose consciousness if her face was covered (Tr. 452-53). Overall, the evidence presented corroborated Ms. Jones’s confession, in which she said that S.J. was inconsolable and that Ms. Jones could not get her to stop crying (Tr. 273). Furthermore, it is consistent with her admission

that S.J.’s crying frustrated her so much that she thought about hurting herself or S.J. (Tr. 273). Ms. Jones described that she was “overwhelmed” and “frustrated” because she could not stop S.J. from crying (Tr. 796). Ms. Jones told Detective Clayborn that on the day S.J. died, she went downstairs planning to commit suicide by taking pills and said, “I didn’t think twice about what was going to happen to her or me” (Tr. 797-98, 801).

Ms. Jones’s statement was further corroborated by S.J.’s history of multiple hospital visits with no significant diagnosis (326, 333, 337-38, 347, 352, 355-56, 357-58, 366, 372, 373-74, 378-79, 796; S.Z. Tr. 20-22). During most of her visits, S.J. appeared generally healthy and ate well (Tr. 336, 342, 354-55, 357, 359, 361, 365, 375, 379; S.Z. Tr. 13). It was reasonable to infer from that evidence that Ms. Jones was not providing proper care at home, and that Ms. Jones was, as she later expressed, extremely frustrated.

It is well settled that the corroborative evidence must only meet a minimal standard. *State v. Madorie*, 156 S.W.3d at 355; *State v. Edwards*, 116 S.W.3d at 544-545; *State v. McQuinn*, 235 S.W.2d 396, 397 (Mo. 1951); *Robinson v. State*, 12 Mo. at 597 (“full proof of the body of the crime, the *corpus delicti*, independently of the confession, is not required by any of the cases[.]”). “Only ‘slight corroborating facts’ are needed” and “[c]orroborating evidence may be circumstantial[.]” *State v. Edwards*, 116 S.W.3d at 544-545; *State v. Evans*, 992 S.W.2d 275, 285 (Mo.App. S.D. 1999). “[F]ull proof of the

corpus delicti need not be independent of the admission.” *Id.*

“The determination of whether there is sufficient independent evidence of the *corpus delicti* of an offense is fact specific and requires a case-by-case evaluation.” *Madorie*, 156 S.W.3d at 355. When examining the evidence, this Court should also consider the amount of force necessary to cause death in a case involving an infant victim. For instance, when a child is forcibly raped, the amount of force required for establishing “reasonable resistance” varies with the victim’s age. “Reasonable resistance is that which is suitable under the circumstances.” *State v. Vandevere*, 175 S.W.3d 107, 109 (Mo. banc 2005). In such cases, the “totality of the circumstances [. . .] determines whether this was physical force which would overcome reasonable resistance.” *State v. Spencer*, 50 S.W.3d 869, 874 (Mo. App. E.D. 2001). Here, in light of the testimony that an infant of S.J.’s age was unable even to lift her head, it was reasonable to infer that little to no force was required to cause her death by suffocation in an adult pillow (Tr. 346).

In support of her claim, Ms. Jones relies on *State v. Sardeson*, 220 S.W.3d 458 (Mo.App. S.D. 2007) (App.Sub.Br. 40-41). But *Sardeson* is distinguishable, and it illustrates the important difference between cases involving substantial physical force and cases involving little or no force. In that case, the defendant confessed to causing the death of his five-month-old son in a manner far more likely to create corroborative physical evidence

than in the present case: “I rolled over, I put my elbow on the child’s back and neck, I pushed and I pushed and I pushed, and I heard the baby wiggle and gasp.” *Sardeson*, 220 S.W.3d at 461, 463. Because the manner of death in *Sardeson* involved physical force that caused physical injuries in addition to suffocation, the State was able to present testimony that the medical examiner observed fresh bruises on the victim’s back, a rib fracture suffered near the time of his death, and internal hemorrhaging in his chest cavity. *Id.* at 471.

Here, of course, because S.J.’s death required no force, there was no such corroborating evidence. In fact, the existence of such evidence would have been inconsistent with Ms. Jones confession of wrongdoing. Ms. Jones confessed that she laid her three-month-old baby facedown in a pillow on an adult twin bed. The victim in this case was not able to lift her head, so little to no force was required to cause her death by suffocation in an adult pillow (Tr. 346).

Ms. Jones’s reliance upon *Sardeson* is also misplaced because, while the court found that the *corpus delicti* had been established in that case, the Court did not hold that the sort of evidence present in that case was the amount of evidence minimally required to establish the *corpus delicti*. 220 S.W.3d at 470-471. The Court in *Sardeson* did not make that sort of pronouncement, and the opinion should not be read to require such evidence.

See *State v. Madorie*, 156 S.W.3d at 355 (“The determination of whether there is sufficient independent evidence of the *corpus delicti* of an offense is fact specific and requires a case-by-case evaluation.”). Rather, each case must be determined on its own facts.

The circumstances here are similar to those in *State v. Tiffany*, 88 P.3d 728, 730 (Idaho 2004), in which the autopsy of a two-month-old infant did not reveal any cause of death. The medical examiner thus listed the cause as sudden infant death syndrome. *Id.* Eleven months later, the victim’s mother admitted to her husband that she had smothered the infant in an attempt to stop his crying. *Id.* The Idaho Supreme Court found sufficient corroborating evidence to support *corpus delicti* based on the facts “that [infant] was dead, that he died while under the exclusive care of [the defendant], and that her statements about how she killed him were consistent with the autopsy results.” *Id.* at 734. (Nine years later, the Idaho Supreme Court highlighted the *Tiffany* case in *Suriner*, when it decided to abandon the *corpus delicti* rule altogether. *Suriner*, 294 P.3d at 1097-1099.)

The facts of Ms. Jones’s case are also similar to *State v. Smith*, 685 N.E.2d 595, 597 (Ohio Ct. App. 1996), in which an eleven-week-old victim was found dead. The coroner originally ruled that the cause of death was Sudden Infant Death Syndrome. *Id.* More than two years later, the “police obtained letters written by defendant to his wife in which he admitted

smothering their son.” *Id.* The defendant later made a full confession to the police, which he later recorded. *Id.* Upon hearing the defendant’s confessions, the coroner “testified that he changed [the victim’s] death certificate to reflect that [the victim’s] death was caused by ‘death by suffocation, homicide’ and not by S.I.D.S. as he had concluded earlier.” *Id.* at 597-598. Regarding the sufficiency of the corroborative evidence for his confessions, the court found that the “defendant has not demonstrated that the admission of these confessions resulted in material prejudice or an unfair trial.” *Id.* at 598.

Similarly in *State v. Reed*, 676 A.2d 479, 480 (Me. 1996), the medical examiner was unable to determine the cause of death, so he listed the cause of death as Sudden Infant Death Syndrome. In *Reed*, as in this case, the medical examiner testified that there is not always physical evidence available to show that a baby has been smothered. *Id.* at 480-481. “He testified that SIDS has become a conventional finding as a ‘cause’ of death although it really means there is no known cause, whether natural or unnatural; it is synonymous with ‘undetermined.’” *Id.* The defendant in that case filed a motion to dismiss for insufficient *corpus delicti*. *Id.* at 479. Applying a probable cause standard for *corpus delicti*, the Maine Supreme Court found no clear error and affirmed the trial court’s denial of the defendant’s motion based on the following evidence: the location of the baby in the defendant’s bed and the location of the wet pillow at the head of the

bed; the unexplained death of a healthy baby; and the defendant’s prior threat to the baby’s mother and suspicious behavior in returning to the scene of the crime. *Id.* at 481.

In *People v. Biggs*, 509 N.W.2d 803, 806 (Mich. App. 1993), “a pathologist testified that the child did not die of natural causes and specifically ruled out injury, disease, accident, suicide, and sudden infant death syndrome. He testified that suffocation was the most likely cause of death.” As in this case, the State also presented evidence “that death does not usually result from childhood seizures” and that “the child had a history of suspicious unexplained seizures and injuries.” *Id.* The court in that case found that the evidence sufficiently established the *corpus delicti* such that the trial court did not abuse its discretion in admitting the defendant’s confession to smothering the child.

Ms. Jones points out that the medical examiner changed S.J.’s cause of death to suffocation only after Ms. Jones made her incriminating statements (App.Sub.Br. 39, 41). But that fact did not render Ms. Jones’s statement inadmissible, and it was not plain error to find corroboration for Ms. Jones’s statement in the medical examiner’s updated cause of death.

Experts may properly rely on the types of evidence considered by the medical examiner in this case. “[A]n expert may rely on hearsay evidence as support for opinions, as long as that evidence is of a type reasonably relied

upon by other experts in the field; such evidence need not be independently admissible.” *State v. Brown*, 998 S.W.2d 531, 549 (Mo. banc 1999).

The medical examiner testified that he initially determined S.J.’s cause of death based on her medical history of seizures because the autopsy results were inconclusive (Tr. 549-51). The Chief Medical examiner also testified that he re-evaluates cases “fairly frequently” (Tr. 545-546). As discussed above in *State v. Smith*, the coroner in that case changed his conclusion on the victim’s cause of death based on the defendant’s confession two years later. 685 N.E.2d at 597. That fact did not render the defendant’s confession inadmissible. *Id.*

Ms. Jones’s case serves as an example of when an autopsy of an infant shows little or no physical evidence of the cause of death and a medical examiner who—considering suspicious, yet inconclusive circumstances—did not jump to the conclusion that the infant’s death was caused by the criminal agency of another. Only after Ms. Jones confessed to causing S.J.’s death—in a manner consistent with the previously inconclusive evidence—did the medical examiner amend the cause of death to a homicide. Under those circumstances, the medical examiner properly reconsidered S.J.’s case in light of new information.

In sum, the trial court’s admission of Ms. Jones’s confession was not plain error. There was sufficient evidence, independent of Ms. Jones’s

confession, that S.J.'s death was not the result of natural causes, but rather was the result of another person's criminal agency. Point IV should be denied.

**CONCLUSION**

The Court should affirm Ms. Jones’s convictions and sentences.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE AND SERVICE**

I hereby certify that the attached brief complies with Rule 84.06(b) and contains 15,381 words, excluding the cover, the table of contents, the table of authorities, this certification, and the signature block, as counted by Microsoft Word; and that an electronic copy of this brief was sent through the Missouri eFiling System on this 27<sup>th</sup> day of August, 2013, to:

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