

**IN THE
SUPREME COURT OF MISSOURI**

No. SC87753

STATE OF MISSOURI,

Respondent,

vs.

VINCENT MCFADDEN,

Appellant.

**APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
TWENTY-FIRST JUDICIAL CIRCUIT
THE HONORABLE GARY M. GAERTNER, JR., JUDGE**

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from a conviction obtained in the Circuit Court of St. Louis County for murder in the first degree, Section 565.020, RSMo; armed criminal action, Section 571.015, RSMo; and tampering with a witness, Section 575.270, RSMo.¹ Appellant was sentenced to death on his conviction for murder in the first degree. Therefore, the Supreme Court of Missouri has exclusive appellate jurisdiction. Article V, § 3, Missouri Constitution (as amended 1982).

¹ All statutory references are to RSMo 2000 unless otherwise indicated.

STATEMENT OF FACTS

On March 17, 2006, Appellant was charged in an information in lieu of indictment with one count each of murder in the first degree, Section 565.020, RSMo; armed criminal action, Section 571.015, RSMo; and tampering with a witness, Section 575.270, RSMo. (L.F. 280). Appellant had been indicted on the same charges on June 23, 2004, and the State filed a Notice of Evidence of Aggravation on May 3, 2005. (L.F. 3, 4, 41-42, 58-61). Appellant was tried by a jury on March 15-23, 2006, before Judge Gary M. Gaertner, Jr. (L.F. 7-9). Appellant does not contest the sufficiency of the evidence to support his conviction. Viewed in the light most favorable to the verdict, the evidence at trial showed:

Appellant met Eva Addison in 1998, when she was fourteen or fifteen years old. (Tr. 1011). The couple began dating and had a son in 2002. (Tr. 1013). The relationship between Appellant and Eva eventually cooled. (Tr. 1013-14). On the evening of May 15, 2003, Eva Addison was at a friend's house in Pine Lawn, waiting for her younger sister, Leslie.² (Tr. 1010, 1017, 1019, 1057). As Eva sat on the porch, Appellant arrived in a car being driven by one of his friends. (Tr. 1019). Appellant got out of the car, walked up to Eva, hit her in the face, and told her that she was banned from Pine Lawn and that she needed to leave before he took his problems out on her. (Tr. 1020). Appellant said that

² To avoid confusion, Eva and Leslie Addison will hereinafter be referred to by their first names. No disrespect is intended.

Eva's sisters didn't need to come back to Pine Lawn because someone wanted to kill them. (Tr. 1021). Appellant got back in the car and rode off. (Tr. 1021).

Leslie arrived back at the house with another sister, Jessica. (Tr. 1022, 1108). Eva told them that Appellant had been around earlier and that they needed to leave. (Tr. 1022). She gave the car keys to Jessica, and told her to take her son and nephew with her. (Tr. 1022). After Jessica left with the children, Eva realized that she had also given her the keys to her other car. (Tr. 1023). Eva and Leslie were outside the house as Appellant and his friend drove back up. (Tr. 1023). Appellant got out and again hit Eva in the face. (Tr. 1024). Leslie tried to intervene and Appellant told her to shut up. (Tr. 1024). Eva and Leslie had an older brother who died in 2000. (Tr. 1010). Appellant asked Leslie if she loved her brother. (Tr. 1024). When Leslie said that she did, Appellant told her, "well, bitch, you going to see him tonight." (Tr. 1024). Leslie began crying, and Appellant pulled a gun, pointed it at her and pulled the trigger. (Tr. 1024). The gun made a clicking sound. (Tr. 1024).

After Appellant left, Leslie told Eva that she was going to walk to a nearby skating rink to use the pay phone. (Tr. 1026). Eva told Leslie not to go, but Leslie began walking down the street. (Tr. 1027). Eva followed, and spotted the car that Appellant was riding in at a nearby intersection. (Tr. 1028, 1031). Eva called out to warn Leslie, and then ducked for cover behind some bushes. (Tr. 1028, 1032). The car pulled up to a stop sign and Appellant got out and ran towards Leslie. (Tr. 1032).

Appellant pulled the gun and Leslie tried to push it away. (Tr. 1033). Leslie was crying and screaming and begging for her life. (Tr. 1034-35). Appellant shot Leslie. (Tr. 1033). She fell to the ground and Appellant shot her two or three more times. (Tr. 1033-34). He then got back into the car with his friend, who drove away. (Tr. 1034).

An autopsy determined that Leslie suffered four gunshot wounds: one above the right ear, one to the chin, one to the right shoulder and one to the left arm. (Tr. 1205-06). The bullet wound above the right ear was the fatal injury. (Tr. 1206-07).

Appellant was arrested in St. Charles two days after the shooting and was taken to the St. Louis County Jail. (Tr. 1122, 1124, 1126-30). Eva received a phone call from the jail a few days later. (Tr. 1037-38; State's Exs. 148 and 148E). The call was from an inmate named Slim, but Eva could hear Appellant's voice in the background, directing Slim to pass messages on to her. (Tr. 1038, 1046; State's Ex. 148). Appellant told Eva that she had to sign some papers to get him out of jail and that she had to tell authorities that he was innocent. (State's Ex. 148E, p. 10). Appellant also said, "if I don't get out of here this month, I'm gonna let that motherfucker do what the fuck they want to do." (State's Ex. 148E, p. 15).

Appellant did not testify or present any evidence in the guilt phase of the trial. (Tr. 1214). At the end of evidence, argument, and instructions, the jury found Appellant guilty on all three counts charged in the information. (L.F. 354-57; Tr. 1261).

In the penalty phase, the State presented evidence of Appellant's previous convictions: a December 18, 1996 guilty plea to assault in the third degree; a December 17, 1997 guilty plea to possession of a controlled substance and unlawful use of a weapon; a guilty plea to tampering in the second degree and stealing under \$150; a December 16, 2004 conviction for two counts each of assault in the first degree and armed criminal action, and one count of unlawful use of a weapon; and a March 9, 2005 conviction for murder in the first degree and armed criminal action, for which Appellant was sentenced to death. (Tr. 1277-91).

The State also presented testimony from a retired St. Louis County detective, who identified photographs taken at the scene of the murder for which Appellant was convicted on March 9, 2005. (Tr. 1292-1305). The jury also viewed a videotape the detective made at the crime scene. (Tr. 1308-09). The murder victim's aunt testified and identified photographs of the victim. (Tr. 1313-16).

Two St. Charles County detectives testified that when Appellant was arrested for Leslie's murder he had 18.4 grams of cocaine base in his pants. (Tr. 1318-23). The State also presented victim impact testimony from Leslie's sisters, Jessica and Shonte. (Tr. 1324-38).

Appellant presented testimony from a neuropsychologist who evaluated Appellant. (Tr. 1339, 1349). The evaluation included an IQ test that came back with a score of 85, placing Appellant in the low average range. (Tr. 1356). The neuropsychologist testified

that any mental deficits that Appellant had would not cause him to commit Leslie's murder or any other crime. (Tr. 1376). A professor of psychiatry and behavioral sciences also evaluated Appellant. (Tr. 1490, 1495). She testified that Appellant had an attachment disorder from being shuttled between various family members who cared for him as a child. (Tr. 1501-03). She also testified that the attachment disorder did not cause Appellant to commit murder, and that Appellant had the capacity to understand what he was doing and to distinguish right from wrong. (Tr. 1511). Some of Appellant's relatives, family friends, and a juvenile officer testified about his upbringing. (Tr. 1400-89).

After evidence, argument and instruction in the penalty phase, the jury returned a verdict that Appellant be sentenced to death on the charge of murder in the first degree. (L.F. 391; Tr. 1569). The jury found the following statutory aggravating circumstances beyond a reasonable doubt: (1) an April 22, 2005 conviction for murder in the first degree in the shooting death of Todd Franklin; (2) an April 22, 2005 conviction for armed criminal action in the shooting death of Todd Franklin; (3) a February 4, 2005³ conviction for assault in the first degree for shooting Darryl Bryant; (4) a February 4, 2005 conviction for armed criminal action for shooting Darryl Bryant; (5) a February 4,

³ The Sentence and Judgment filed by the trial court in that case is dated February 4, 2005, but indicates that the jury verdicts were returned on December 16, 2004. (State's Ex.101).

2005 conviction for assault in the first degree for shooting at Jermaine Burns; (6) a February 4, 2005 conviction for armed criminal action for shooting at Jermaine Burns. (L.F. 391-92; Tr. 1569-70).

Appellant was sentenced on May 24, 2006. (L.F. 9; Tr. 1604). In addition to imposing the jury's sentence on the murder charge, the trial court determined the sentences for armed criminal action and tampering with a witness, after finding beyond a reasonable doubt that Appellant was a prior felony offender. (L.F. 329; Tr. 1145-46). The court sentenced Appellant to seventy-five years imprisonment for armed criminal action and seven years imprisonment for tampering with a witness. (L.F. 9; Tr. 1604-05).

ARGUMENT

I.

Appellant's *Batson* challenges.

Appellant claims the trial court clearly erred in overruling his *Batson*⁴ challenges to the State's peremptory strikes of venirepersons Donna Cole and Sherlonda Harris. Appellant raised *Batson* challenges to five of the State's nine peremptory strikes. (Tr. 944). Appellant identified venirepersons Cole, Sherlonda Harris, Barbara Harris, and Lana Poke as African-American, and venireperson James Lui as Asian-American. (Tr. 944). Appellant waived his *Batson* challenges on Poke and on Barbara Harris after hearing the State's race-neutral explanation for the strikes. (Tr. 960-61). The State's peremptory strike of venireperson Lui is not being challenged in this appeal.

A. Standard of Review.

A trial judge's determination that a peremptory strike was made on racially neutral grounds is entitled to great deference on appeal. *State v. Edwards*, 116 S.W.3d 511, 525 (Mo. banc 2003). The trial court's determination will be overturned only if it is shown to be clearly erroneous, leaving this Court with the definite and firm impression that a mistake was made. *Id.*

⁴ *Batson v. Kentucky*, 476 U.S. 79 (1986).

B. *Batson* procedure.

A three-step test is used to determine the validity of a *Batson* challenge: (1) the defendant must object that the strike was made on an improper basis, such as race; (2) the burden then shifts to the State to offer a race-neutral explanation for the strike; and (3) if the State does so, the burden then shifts to the defendant to show that the given reason is pretextual. *Id.* at 524. The third step of the test is at issue in this appeal.

This Court has set forth a non-exclusive list of factors to use in determining pretext. *Id.* at 527. The chief consideration is the plausibility of the prosecutor's explanations in light of the totality of the facts and circumstances surrounding the case. *Id.* Other factors include: (1) the existence of similarly-situated white jurors who were not struck; (2) the degree of logical relevance between the proffered explanation and the case to be tried in terms of the kind of crime charged, the nature of the evidence to be adduced, and the potential punishment if the defendant is convicted; (3) the prosecutor's demeanor or statements during voir dire, as well as the demeanor of the excluded venireperson; (4) the court's past experiences with the prosecutor; and (5) objective factors bearing on the State's motive to discriminate on the basis of race, such as conditions prevailing in the community and the race of the defendant, the victim, and the material witnesses. *Id.*

The record shows that the trial court properly took a participatory role in the voir dire process and looked at the totality of the circumstances surrounding the State's

peremptory challenges. *State v. Antwine*, 743 S.W.2d 51, 64 (Mo. banc 1987); *State v. Taylor*, 18 S.W.3d 366, 374 (Mo. banc 2000). After the *Batson* challenge was made and the State gave its race-neutral reasons for the strikes, the court took a recess to research and review cases applying *Batson*. (Tr. 951, 981-82). The court also relied on its own notes and observations made during voir dire, and even referred to portions of the transcripts of both the death qualification and general voir dire. (Tr. 968-69, 971-73, 981, 983-84). “If the record is clear that the trial judge looked at the totality of the circumstances, then this Court will not disturb the trial court’s decision.” *Taylor*, 18 S.W.3d at 374.

In addition to addressing the specific circumstances of the stricken venirepersons, which will be discussed below, the court also took note of the general circumstances surrounding the strikes. The court was aware of the number of minorities who made it to the general voir dire after death qualification. (Tr. 971). The court kept track of the questions asked by the prosecutor to see if the prosecutor questioned African-American venirepersons differently than Caucasian venirepersons. (Tr. 970). The Court also noted its past experience with the prosecutor: “I’ve tried probably seven to ten cases with Mr. Bishop over a five and a half year period. Mr. Bishop, in fact, has avoided on many occasions attempting to even get into a *Batson* type challenge area . . . [a]nd he shows no racial animus. He is – in this case, nor in any other case.” (Tr. 969-70). It should also be noted that in this case, the victim and the only eyewitness to the shooting were also

African-American. The fact that the victim and the key eyewitness were also African-American discounts any advantage a prosecutor might perceive from striking African-Americans from the jury. *Antwine*, 743 S.W.2d at 65.

C. Venireperson Cole.

1. Facts.

Venireperson Cole responded when the prosecutor asked whether any venireperson, or a close family member or a close friend had been a victim of crime:

VENIREPERSON COLE: My brother was shot by his neighbor.

MR. BISHOP: . . . and how long ago was that?

VENIREPERSON COLE: About ten years.

MR. BISHOP: Did he recover from that?

VENIREPERSON COLE: Yes, he did.

* * * *

MR. BISHOP: Was anybody prosecuted for that offense?

VENIREPERSON COLE: No.

MR. BISHOP: Was your brother – just didn't want to prosecute, or is it that the State didn't prosecute this neighbor for some other reason?

VENIREPERSON COLE: I'm not sure.

(Tr. 796-98). Venireperson Cole also responded when the prosecutor asked whether any venirepersons had ever visited anyone in prison:

MR. BISHOP: Ms. Cole? Can you tell me about that?

VENIREPERSON COLE: Prison ministry, singing.

MR. BISHOP: I didn't hear what you said after –

VENIREPERSON COLE: Singing.

MR. BISHOP: Oh, like a choir?

VENIREPERSON COLE: Yes.

MR. BISHOP: And is that something you continue to do?

VENIREPERSON COLE: Yes, I continue to do it.

MR. BISHOP: Is there – how long have you been doing that?

VENIREPERSON [COLE]⁵: Ten years or so.

MR. BISHOP: And how often do you do that?

VENIREPERSON COLE: Christmas Day.

MR. BISHOP: Okay. Just like once a year?

VENIREPERSON COLE: Once a year.

MR. BISHOP: Is there anything about that experience, singing to inmates – well do you go to – what facility do you go to? Is it the same one every year?

⁵ The transcript at this point only identified venireperson Cole as venireperson Courtney. (Tr. 835). The context of the entire voir dire makes it clear that Cole, and not Courtney, was answering the question.

VENIREPERSON COLE: Yeah, same one, Hall Street.

MR. BISHOP: Is that the Workhouse?

VENIREPERSON COLE: Yes.

(Tr. 834-36). Defense counsel asked more questions about that experience:

MS. TURLINGTON: . . . Ms. Cole, you mentioned earlier that once a year you're in a choir and you go to, I guess the Workhouse?

VENIREPERSON COLE: Yes.

MS. TURLINGTON: Is that something that your church does?

VENIREPERSON COLE: Yes, it is.

MS. TURLINGTON: Okay. And – because I think you said earlier it was a prison ministry? Is it just really your church does this once a year?

VENIREPERSON COLE: Once a year, yes.

MS. TURLINGTON: Do you have any contact with the prisoners when you do this?

VENIREPERSON COLE: No.

MS. TURLINGTON: And I guess this is something that's organized by your church, not by you personally?

VENIREPERSON COLE: Right.

MS. TURLINGTON: Okay. And I take it you just – you're a member of your church choir throughout the year, and that's just something that your choir does?

VENIREPERSON COLE: Yes.

(Tr. 915-16).

When the State struck venireperson Cole, Appellant identified her as an African-American female and challenged the State's peremptory strike as being made on the basis of race. (Tr. 944). The prosecutor explained his reasons for striking Cole:

Ms. Cole indicated that she is involved in the prison ministry, where she is in the choir. And she visits the St. Louis City Workhouse at least once a year, and just a few short months ago. The City Workhouse, I've never been there, but from what I understand from the many defense attorneys I've dealt with, that it's not a pleasant place to visit. And she was there to – for the benefit of inmates awaiting trial. And I know that there are people that are there for very serious charges.

Secondly, her brother was shot previously. And she didn't even know if the brother was cooperative with the prosecution, or anybody was prosecuted. Even though she indicated it was a neighbor of his that shot her brother.

(Tr. 945-46). The trial court found that explanation to be race-neutral. (Tr. 946).

Defense counsel responded that Cole was being struck for the mere fact that she had been inside a penal institution, and that two Caucasian venirepersons, Walter Matye and Judith Woolsey, had been on jail tours. (Tr. 952). Defense counsel also argued that the prosecutor incorrectly stated that Cole did not know whether or not anyone was prosecuted for shooting her brother, and that Cole's actual response was that no one was prosecuted. (Tr. 953). Defense counsel identified two Caucasian venirepersons that she said were similarly situated. Kathleen Effinger stated that someone was prosecuted for killing her husband's cousin, but she did not know what happened on that prosecution. (Tr. 953). Michael Walker stated that a girlfriend's mother had been killed during a burglary, but he was not asked whether he knew what happened on the prosecution of that murder. (Tr. 953).

The prosecutor responded that a prison ministry is different than going on a mandatory jail visit as part of a class, because Cole went to the jail for the benefit of the inmates rather than to study them. (Tr. 954). The prosecutor also noted that the incidents related by the Caucasian venirepersons involved distant relatives, whereas Cole's situation involved her brother. (Tr. 954).

The trial court then ruled on the *Batson* challenge:

Okay. I'm going to go into – with regard to the prison ministry, there were a number of Caucasian jurors who visited prisons. Ms. Woolsey mentioned that she visited in high school and also when she was a

councilwoman for the City of St. Johns. Mr. Mayte (sic) visited for high school and college. Mr. Walker visited in high school.

But in particular, Ms. Cole specifically said it was prison ministry singing. And she's continued to do it for the last ten years. And she goes there on Christmas Day to Hall Street. Which is a totally different situation than the similarly situated white Caucasian jurors who went there because of school.

And I think the degree of logical relevance proffered is that we're here, and Mr. Bishop is trying to put Mr. McFadden to death. That somebody who goes to a prison ministering by singing may not have the same feeling about that. That – it's a gut reaction. I find it's a race neutral reason.

With regard to the reason of the brother being shot by the neighbor ten years ago, he did recover. Fully recovered. There was no prosecution. She wasn't sure. And that's the quote I have.

There's other similarly situated people. Mr. Walker, who was a former girlfriend's mother. You have the situation involving Ms. Effinger, whose husband's cousin was killed in a parking garage. I think a brother is closer than a cousin.

Regardless of that, I think when you combine the fact that you have a prison ministry singing, and the fact that there was no prosecution, and her brother was shot by a neighbor, – on these other cases, Ms. Effinger said she did not know what happened. But it didn't say no prosecution.

It raises a real issue of why a neighbor is shooting you and then there's no prosecution for it. It goes to whether there's a self-defense argument, or whether he didn't cooperate. I don't know. And I'm saying it raises an issue that clearly I believe is logically relevant in this case.

And when you combine it, most importantly, with the only person on this jury who goes to prison ministering, and sings every Christmas. So I'm going to – based on the totality of her answers, I'm going to deny the Batson challenge on Number 4.

(Tr. 955-56).

2. Analysis.

Appellant puts forward venirepersons Matye and Woolsey as similarly-situated white jurors on the issue of jail visits, and venirepersons Effinger and Walker as similarly-situated white jurors on the issue of having relatives who were victims of violent crimes. However, the trial court upheld the peremptory strike of venireperson Cole based on the combination of her involvement in a prison ministry and the fact that her brother was shot by a neighbor, but no one was prosecuted. (Tr. 956). None of the

venirepersons cited by Appellant share that combination of characteristics. A venireperson who shares only one of the characteristics used to strike another venireperson is not similarly-situated. *State v. Brooks*, 960 S.W.2d 479, 489 (Mo. banc 1997). Likewise, a reason given by the State for a peremptory strike is not pretextual simply because that reason by itself did not compel the prosecutor to strike other panel members. *Id.*

The trial court correctly noted other distinctions between venireperson Cole's experiences and those of the venirepersons held out by Appellant as being similarly situated. Venireperson Matye made two jail visits, one when he was in high school, and the other when he was in college. (Tr. 918). The record does not reflect his age, but he listed his occupation on the jury questionnaire as a supervisor for United Parcel Service, so it is reasonable to presume that he had been out of school for some time. (L.F. 295). Venireperson Woolsey toured a prison in Illinois when she was in high school, and as a member of the St. John City Council she visited the city jail, which she described as a holding cell. (Tr. 919-20). Again, the record does not reflect venireperson Woolsey's age, but her questionnaire indicated that her husband was retired and that she had previously served as a juror in 1996. (L.F. 304). It is reasonable to presume that the high school tour had taken place several years previously. The time frame of the visit to the St. John jail is less clear, but the experience of visiting a holding cell could scarcely be considered comparable to visiting the St. Louis City Workhouse.

By contrast, venireperson Cole indicated that her visits to the Workhouse occurred annually, and that she had been making those visits over the past ten years. (Tr. 835). The most important distinction, as recognized by the prosecutor and the trial court, was the purpose behind the jail visits. Matye and Woolsey's visits can best be described as having a neutral purpose, or as the prosecutor described it, "to study [the inmates]." (Tr. 954). Cole, on the other hand, was involved in a ministry program designed to provide a benefit for the inmates. The distinction is similar to one upheld by this Court, where a venireperson was struck because he taught at a seminary. *State v. Strong*, 142 S.W.3d 702, 712-13 (Mo. banc 2004). This Court found that a retired parochial school teacher was not similarly situated because teaching students at a private high school differs from teaching individuals for a religious vocation. *Id.* at 714. While Cole stated that she did not have any personal contact with the inmates (Tr. 916), the prosecutor could reasonably presume that the experience of annually visiting the jail as part of a ministry program could cause her to feel sympathy for those inmates, and by extension, sympathy for Appellant, who was incarcerated for his previous murder conviction.

The record reveals additional reasons why the prosecutor would have chosen not to strike Matye or Woolsey. Both venirepersons indicated that they had friends who were police officers. (Tr. 890, 902). That would potentially make them good jurors for the State. It would also increase the likelihood that the defense would exercise peremptory strikes against them, which, in fact, the defense did. (Tr. 975). In Matye's case,

Appellant had previously tried without success to have him struck for cause. (Tr. 938).

The prosecutor could reasonably conclude that Appellant would use a peremptory strike to remove him, and thus would have no reason to use one of his peremptories on Matye.

The State's actions in regard to other venirepersons who had experience visiting prisons or jails further shows the legitimacy of the strike. The other venirepersons with that experience were English, Houska, Poke, Winschel, McKinley, and Walker. English and McKinley were struck for cause. (L.F. 315, 327; Tr. 936, 941). Venireperson Houska's experience was attending a parole hearing for a man involved in the death of her son. (Tr. 836, 921). Defense counsel asked the court to question her privately because Houska was visibly upset discussing the incident. (Tr. 921). Houska also indicated that she tended to be more sympathetic to crime victims. (Tr. 923). The prosecutor thus would have viewed her as a favorable juror for the State and could also reasonably expect the defense to peremptorily strike her, which it did. (Tr. 974).

The State exercised a peremptory strike against Poke, which drew a *Batson* challenge from Appellant. (Tr. 944). That challenge was waived after the prosecutor explained that he struck Poke because she had two brothers who had served time in prison for murder and a son who had served time in prison for a drug offense and for a hindering charge in a murder investigation. (Tr. 948, 961).

That leaves venirepersons Winschel and Walker who served on the jury. (L.F. 328). Winschel's experience arose out of his employment as a corrections officer with

the Missouri Department of Corrections. (Tr. 841, 851). The prosecutor could reasonably view him as a favorable juror for the State, and could reasonably have believed that the defense would strike him, even though it did not. Walker indicated that he visited a county jail once while in high school. (Tr. 920). Like Matye and Woolsey, his experience visiting jails was isolated, presumably remote in time, and related to a seemingly neutral purpose. That experience would thus not give the prosecutor reason to believe that Walker might be more favorable to Appellant.

The second reason given for striking Cole was the fact that her brother had been shot by a neighbor, but the neighbor had not been prosecuted. Venireperson Effinger, who Appellant raised as similarly-situated, said that her husband's cousin had been killed, that someone had been prosecuted, but she did not know the result. (Tr. 800). Venireperson Walker stated that he dated a woman for a year, the woman's mother had been killed, and someone had been prosecuted for the crime in Ohio. (Tr. 816). Effinger and Walker are not similarly-situated. Cole had a close relative who was the victim of an unprosecuted crime. The trial court noted that the lack of prosecution raised a legitimate concern. (Tr. 956). By contrast, Effinger's experience involved a distant relative by marriage, and Walker's experience did not even involve a relative. And in both their cases, the crime resulted in a prosecution. There was nothing about their experiences that would cause the prosecutor any concern about whether they would be favorable jurors for the State.

D. Venireperson Harris.

1. Facts.

The questionnaires filled-out by the venirepersons indicated whether or not they were licensed drivers. (L.F. 285-324). Only two venirepersons, Sherlonda Harris and Melissa Graden, indicated that they were not licensed drivers. (L.F. 306, 317).

Venireperson Kelley Schnake did not indicate whether or not he or she held a license. (L.F. 309). Schnake was stricken for cause during the death qualification voir dire. (Tr. 705). Graden was stricken for cause after arriving more than two hours late for the general voir dire. (Tr. 770, 886-87, 938). Contrary to Appellant's assertion, the prosecutor did question Harris about her lack of a driver's license:

MR. BISHOP: It says here, one of the questions they ask is whether you're a licensed driver or not. And do you have a driver's license?

VENIREPERSON SHERLONDA HARRIS: No.

MR. BISHOP: Okay. Is it because of some physical infirmity, or is it just, you just don't have a license?

VENIREPERSON SHERLONDA HARRIS: I just don't have a license.

MR. BISHOP: Is it suspended or anything?

VENIREPERSON SHERLONDA HARRIS: No.

(Tr. 851-52).

When the State struck venireperson Harris, Appellant identified her as an African-American female and challenged the State's peremptory strike as being made on the basis of race. (Tr. 944). The prosecutor explained his reasons for striking Harris:

Well, the first thing that anybody noticed about Ms. Harris, Juror Number 33, is her crazy-looking red hair. It is a red – a color of red brighter than the ink that comes out of a red pen or a marker. I'm not sure if it's a wig or it's her real hair.

She also doesn't have a driver's license, the only one in the panel who doesn't have a physical reason for not having a driver's license.

And her demeanor, especially in the death qualification, appeared to me to be hostile to the – at least to the process, if not to me personally, with her arm folded. I noticed as I was standing directly in front of her at one point her eyes were closed. I don't know for sure if she was sleeping, but she seemed completely disinterested in the process of death qualification, at least for part of my jury selection and death qualification.

She was very weak on the death penalty. She hesitated in her responses regarding the death penalty before she would answer on more than once, (sic) especially when I questioned her about signing the death verdict and she indicated that she would be able to consider that punishment. I believe from her demeanor, and her answers, that she was

lying to me. That she would not, in fact, ever consider the death sentence under any circumstance, nor would she ever put herself in a position to where she would require – be required to sign a death verdict or announce that verdict in open court.

(Tr. 950-51). The trial court found that explanation to be race-neutral. (Tr. 951).

Defense counsel questioned whether Harris' hair color was relevant and speculated that Harris could have been wearing a wig after going through chemotherapy. (Tr. 961). Counsel also argued that several women in the African-American community have their hair dyed that color as a fashion statement. (Tr. 962). Counsel also argued that lack of a driver's license is not relevant, and she noted that several of her relatives did not have licenses. (Tr. 962). Counsel also stated that the prosecutor never made a record about Harris' demeanor, and that the bailiffs told her that they did not see Harris sleeping or inattentive. (Tr. 963). Counsel also said that Harris never indicated any hesitation on the death penalty. (Tr. 963).

The prosecutor responded:

Well, with regard to what defense counsel has stated, even by defense counsel's own admission, this crazy red hair is at least some sort of statement. And she's obviously trying to set herself apart from the crowd. I don't need somebody with – that has some sort of weird or crazy attitude towards her appearance to be getting back in the jury.

These jurors have to come to a unanimous verdict. She's obviously setting herself apart from the crowd, for whatever reason, in a very open and notorious way. There's no similarly situated juror that has a crazy appearance, other than what – I would call him a goofball that was struck for cause that had a shaved head and ZZ Top beard, and tattoos on his head. I would have struck him, too, if he made it through, because he's obviously making a statement, too.

She is obviously not invested in the community if she doesn't even have a driver's license. What kind of identification does she have? That's my thought.

That's not the major thing. It's the crazy red hair. I found that her demeanor was hostile. And I'm not really concerned with what bailiffs or defense attorneys think. That's for the defense attorney to make their determination about how they view these jurors.

I know for a fact, as I stood in front of her during death qualifications, her eyes were closed. Now, I may have been really boring, she may have been thinking real hard, but I got the impression she wasn't listening to me. And I don't like when somebody is not going to listen to death qualification questioning.

If it were another part – I don't like when they don't seem to be paying attention at all. But I understand as it goes on and on. But when you're in a small group death qualification, that's an issue. And when they're not looking at me, I make a mental note of it.

And I remember distinctly that she did not answer immediately upon me asking the question. That cannot be reflected in the record. If there's a pause, the record will not show question, whatever it is, pause, yes. It will just say yes.

I made a note of it. And I've tried over thirty jury trials. I've been involved in four death penalty cases. I know how to analyze a person's demeanor in determining whether or not they're going to be good for me or bad for me. I've had experiences both ways.

And based on her demeanor, and my analysis of her demeanor, and my experience selecting all these jurors in various jury trials over my ten-year career as a lawyer, – and further, I consulted with Michael Bert, my co-counsel, and he had in his notes the word liar. That she, in fact – he, independently of me, also thought that she was not being truthful with regard to her views on the death penalty. We discussed it together. It was our decision that she is never going to return a verdict of death. I question

whether or not she's ever going to return a verdict of guilty no matter what the evidence is.

And it's for all those reasons that I struck her. There's no similarly situated juror. Those are race neutral reasons. It has nothing to do with her race. It has to do with whether a juror, I think, can follow the law or not. I don't think she's going to follow the law. I think no matter what I put on there, there's no way she could return a verdict of death.

That's the way I view it. If other people disagree, fine. But the way I view it, the way Mr. Bert viewed it, we saw that we don't think that she's ever going to return a verdict of death. And it's because of her demeanor, her answers, her appearance, and her status as an unlicensed driver.

I don't think that an unlicensed driver is that big of a deal. But you combine all of it, she's obviously sitting – I, in fact, asked her about her license. I thought, well, maybe if she's got some physical problem, I can't tell by looking at her, that's a reason why you wouldn't have a driver's license in St. Louis. She's not elderly. She probably looks to me like she's in her twenties.

And it seems to me odd that somebody who especially has retail employment at her job as a Foot Locker employee, which would have, I would assume, varying hours, which would make it very difficult to get to

work if you don't have a license, an ability to drive a car. That's what we experienced with the juror who didn't show up today, because she said she didn't have a ride, and didn't have a license.

So those are my reasons. They are all race neutral. It has nothing to do with race.

(Tr. 963-67). Defense counsel argued that Harris' hairstyle did not set her aside from the community of African-American women, so that the prosecutor's explanation "makes it even actually more of a racial issue." (Tr. 967). Counsel also disputed the idea that not having a driver's license means you're not invested in the community, and she criticized the prosecutor for not asking Harris why she did not have a driver's license. (Tr. 967).

The trial court then explained why it was denying the *Batson* challenge:

With regard to Venireperson Harris, Mr. Bishop did – I have – the Court has gotten the transcripts of both the death penalty and the general voir dire of Ms. Harris. And the Court has read those in detail, and especially the death qualification.

They are just very plain simple yes or no answers. And it's not – it doesn't give – doesn't reflect the pauses.

Do you normally put pauses in there?

COURT REPORTER: No.

THE COURT: So more importantly, with regard to the general voir dire in particular, Mr. Bishop stated going in – the Court is aware that a prosecutor or an attorney can't set somebody up in order to do a Batson strike by the type of specific questions to an individual. But when Mr. Bishop started questioning Ms. Harris with regard to the driver's license, and started getting into more of the details, my perception of Ms. Harris was she was very offended by that. And her – by going into that detail. And I'm not sure if Mr. Bishop had gone any further, she would not have been even more offended.

I don't – I didn't see any offense towards Mr. Bishop or towards the defense in the death penalty voir dire. But in the general voir dire, I did notice that.

With regard to the first point of any other similarly situated jurors, there are no similarly situated Caucasian jurors that were of a similar physical mannerism, except for the individual that had the tattoos on his head, extensive beard, and a shaved head, who was stricken for cause much earlier on.

And there's no other similarly situated individuals that had such a hair style, or hair coloring, or stood out of the normal out of this panel,

regardless if they were Caucasian or even African-American people in particular. So there's no other similarly situated individuals that way.

The third factor under that case of Marlowe⁶ is the prosecutor's credibility based upon the prosecutor's demeanor and statements during voir dire, and the Court's past experiences with Mr. Bishop.

I've tried probably seven to ten cases with Mr. Bishop over a five and a half year period. Mr. Bishop, in fact, has avoided on many occasions attempting to even get into a Batson type challenge area. He – I find that his voir dire is very straight, to the point. As a trial attorney, I'm not sure I could try the same type of case and get away with it. But he treats everybody the same, and it doesn't matter who they are. He sort of runs, says whatever he says, and goes right through it. And he shows no racial animus. He is – in this case, nor any other cases.

In that case of Hopkins⁷ we've been – the Eastern District Court of Appeals came out with an opinion on Hopkins in August 24, 2004, written by the Honorable Booker T. Shaw, that went into detail of did the prosecutor ask a number of questions against African-American jurors more, or the number of questions that were asked. And I've tried to keep

⁶ *State v. Marlowe*, 89 S.W.3d 464 (Mo. banc 2002).

⁷ *State v. Hopkins*, 140 S.W.3d 143 (Mo. App. E.D. 2004).

track of the questioning that Mr. Bishop did. And Mr. Bishop didn't specifically go to question African-American jurors.

There were, in my – he did not question the African-American jurors more than the Caucasian jurors. He didn't change his questions from a Caucasian person to an African-American, an African-American to a Caucasian.

So on the basis of the Hopkins type analysis of Mr. Bishop's voir dire, and his voir dres in the past, Mr. Bishop has clearly not been violative of any of those type of – in particular, we had one, two, three, four, five, five African-American females, one African-American – let's see. Six African-American females, one African-American male, and one Asian-American who made it to the general voir dire after death qualification. One African-American female struck herself by failing to appear for approximately over two hours for the voir dire. One of the African-American males, in fact, was stricken for cause.

And at this point in time, Mr. Bishop has stricken Ms. Cole, Ms. Poke, Ms. Harris. And the Court and even defense counsel have acknowledged that those are race neutral reasons. And clearly the Court will say – there's no ability for the Court to say there's any ability to say, in

fact, that there was any racial reason for any of those. Those were strictly for non-racial reasons.

And Mr. Bishop's record prosecuting these cases has been clear, how he's performed with regard to these cases.

We're going to Ms. Harris. And the situation is the circuit judge, in fact, actually grew up in the City of St. Louis and actually attended St. Louis City Public Schools when he was young, and is very familiar, and actually worked for the City of St. Louis for a number of years. Worked for the City of St. Louis, worked in the Federal Court down in the City of St. Louis, and only left the City of St. Louis approximately seven or eight years ago from living in the City for thirty-two years.

And I'm out in the courthouse here. And St. Louis County is also a very racially diverse courthouse. And the red hair of Ms. Harris is not a hairstyle that is – the Court has seen on a lot of – ever, really, before. And it is a very distinctive red hairstyle that Ms. Harris has.

It may not be the same structure as somebody who looks like a skinhead, who left the jury for cause, but at the same time that is – that is a – you know, courts have been clear that the physical features of an individual are a race neutral reason. The United States Supreme Court in

[*Purkett v. Elem*],⁸ which is affirming of a secondary conviction. This was a prosecutor's proffered explanation for peremptory challenge of a black male: The juror had long unkempt hair, moustache and a beard, was race neutral and satisfied the prosecutor's burden of articulating a not discriminatory reason for the strike.

I think the red hair also, as Mr. Bishop indicates, does distinguish her and makes her separate from the crowd, and very individualistic. And Mr. Bishop from his prosecutorial experience does not necessarily want that on a jury.

And I think that based upon the second reason of the degree of logical relevance between the proffered reason and the case to be tried, there is a case that people that are sort of out there on the fringe, whether by hair, or how they dress, or mannerisms, a prosecutor for a non-racial reason will not want that type of person on this case.

The explanation given for the non – having a non-driver's license, I think in and of itself, is not a very – is not logically relevant between – is not really logically relevant. Although there's no similarly situated Caucasian jurors that are of that mode.

⁸ *Purkett v. Elem*, 514 U.S. 765 (1995).

But conceivably if you combine that with the fact that this – well, various different red-colored hair, that that condition in and of itself, I think, just not having a license would be clearly not a good enough rationale for a strike, to strike her. But in combining the others, and the Court’s past experience with Mr. Bishop, and watching the animosity that the juror had, and the Court’s taking notice that a prosecutor can’t themselves cause a strike because of how they question somebody, and I don’t believe Mr. Bishop’s – the way Mr. Bishop asked Ms. Harris was.

But Ms. Harris, I think, was taken aback by the questioning concerning the license. I’m not sure if she was offended. She appeared offended. But I’m not sure if that would play any role.

But the – based on those reasons, I will deny the Batson challenge.

(Tr. 968-74).

2. Analysis.

Appellant did not identify any similarly-situated white jurors when the trial court was considering the *Batson* challenges, and he does not identify any in this appeal. The failure to present similarly-situated white jurors is relevant to determining whether the State’s reasons were pretextual. *State v. Morrow*, 968 S.W.2d 100, 114 (Mo. banc 1998). The reasons provided by the prosecutor: appearance, lack of a stake in the community, and demeanor, have all been recognized as legitimate race-neutral reasons for striking

jurors. *See, e.g., Elem*, 514 U.S. at 769 (appearance); *State v. Williams*, 97 S.W.3d 462, 471 (Mo. banc 2003); *State v. Blankenship*, 830 S.W.2d 1, 15 (Mo. banc 1992) (appearance, demeanor, lack of stake in the community); *Brooks*, 960 S.W.2d at 489 (demeanor); *State v. Weaver*, 912 S.W.2d 499, 509 (Mo. banc 1999) (demeanor).

The trial court examined the record and relied on its own observations and its past experience with the prosecutor in finding the prosecutor's explanations to be credible. Appellant argues that the prosecutor's explanation that Harris appeared to have a hostile demeanor should not be found credible because the trial court only observed hostility during the general voir dire and not during the death qualification voir dire. (Tr. 969). Appellant reads the trial court's statement too broadly. The court did not say that the prosecutor's observations were wrong, but only that it was not picking up on the same signals as the prosecutor. The trial court appears to be saying that it found the prosecutor's explanation credible because it was consistent with the court's own observations of hostility displayed during the general voir dire. Due to the subjective nature of peremptory strikes, great reliance is placed on the trial court's judgment when it comes to assessing the legitimacy of the State's explanation. *Morrow*, 968 S.W.2d at 114. Even if Appellant's interpretation were correct, a trial court can reject a portion of the prosecutor's explanation, but still uphold the peremptory strike where the prosecutor articulates other, race-neutral reasons. *Taylor*, 18 S.W.3d at 370 n.6.

While Appellant’s Point Relied On does not claim that the State failed to meet its burden of articulating a race-neutral reason for the strike, Appellant nonetheless argues that striking Harris for her appearance was not racially neutral because her hair color and style were acceptable within the African-American community. The comments of both the prosecutor and the trial court show that venireperson Harris stood out even from the other African-Americans on the venire panel. (Tr. 963-64, 969). At the hearing on the new trial motion, the court described Harris’ hair as “flourescent” and an assistant prosecutor said that Harris’ hair “looked more like Ronald McDonald’s red hair. It looked like clown red hair. It tended more towards the orange side.” (Tr. 1587, 1594).

Not only does Appellant fail to show that Harris’ hair style and color would be considered normal in the African-American community,⁹ he also fails to demonstrate that African-Americans are more likely than Caucasians to dye their hair bright red or orange. Even if that is the case, striking a venireperson for a reason that might have a disparate impact on African-Americans does not convert a facially race-neutral reason into a *per se* equal protection violation. *Brooks*, 960 S.W.2d at 488.

⁹ Appellant has submitted in the Appendix to his Brief excerpts from a magazine called “Hype Hair.” Respondent has filed a separate motion to strike those materials, not only because they are outside the record, but because there is no proof that Harris’ hair color or style resemble any of the models who are depicted.

The prosecutor stated that Harris was using her appearance to make a statement and to stand out, and that he did not want those sorts of persons on the jury. (Tr. 963). This Court has found that striking a venireperson because his earrings and clothing “indicated that he was ‘trying to be different’” was a valid, race neutral reason. *Williams*, 97 S.W.3d at 471. There is nothing in the record to suggest that the prosecutor would not have exercised a strike against a Caucasian venireperson who displayed a flamboyant hairstyle. To the contrary, both the prosecutor and the trial court noted that a Caucasian venireperson stood out from the other Caucasians on the panel, and the prosecutor stated that he would have struck that venireperson based on his appearance if he had survived the strikes for cause. (Tr. 964, 969).

While the trial court found that lack of a driver’s license would not be sufficient reason alone, it constituted a valid reason when combined with the other reasons given for the strike. (Tr. 973-74). The prosecutor likewise indicated that lack of a driver’s license was not the primary reason for striking venireperson Harris, but was one factor combined with other, stronger factors. (Tr. 966).

The trial court carefully examined the State’s explanation for the challenged strikes in the context of the entire circumstances. The court evidenced an awareness of the *Batson* issues before it and of the governing law that it had to apply in evaluating the challenged strikes. The trial court’s rulings are supported by the record and are not clearly erroneous.

II.

Appellant's prior murder conviction and death sentence as a statutory aggravating circumstance.

Appellant asks this Court to exercise its independent proportionality review and reduce his death sentence to life imprisonment without parole because the State used photographs to establish Todd Franklin's death and established two statutory aggravating circumstances by presenting the fact of Appellant's murder conviction and death sentence that were reversed by this Court on May 16, 2006.

A. Standard of Review.

This Court independently reviews each sentence of death to determine (1) whether it was imposed under the influence of passion or prejudice, or any other arbitrary factor; (2) whether there was sufficient evidence to support the finding of a statutory aggravating circumstance and any other circumstance found; and (3) whether the sentence was excessive or disproportionate to the penalty imposed in similar cases. § 565.035.3, RSMo 2000; *State v. Middleton*, 995 S.W.2d 443, 467 (Mo. banc 1999).

B. Facts.

On May 5, 2005, the State served notice of the aggravating circumstances that it intended to prove at trial. (L.F. 4, 58). Those aggravating circumstances included Appellant's conviction on April 22, 2005, of murder in the first degree and armed criminal action for killing Todd Franklin on July 3, 2002. (L.F. 59-60).

During the penalty phase of the trial, the State introduced into evidence certified court records reflecting Appellant's conviction and sentence on the murder and armed criminal action charges. (Tr. 1289-91; State's Ex. 200). Retired St. Louis County Police detective Robert Sieck testified. (Tr. 1291-92). Sieck processed the scene of Todd Franklin's murder as a member of the crime scene unit. (Tr. 1292-93). Sieck identified several photographs that he took at the scene, and those photographs were admitted into evidence. (Tr. 1294; State's Exs. 9-14, 18, 27, 28, 31-33, 35). Some of the photographs depicted Franklin's body and the gunshot wounds he suffered. (Tr. 1302-03). Other photographs showed bullets and blood found at the scene. (Tr. 1303-05). Sieck also identified three of the bullets recovered from the scene, and they were admitted into evidence. (Tr. 1305-06). Also admitted into evidence was a diagram Sieck made of the crime scene, and Sieck explained the diagram to the jury. (Tr. 1307-10).

Todd Franklin's aunt, Jeannette Legard, also testified for the State. (Tr. 1313). She identified pictures of Franklin taken when he was ten or eleven years old, and a picture taken when he was twenty. (Tr. 1314). Legard testified that Franklin was twenty years old when he was killed. (Tr. 1316). She also testified that she had to go to Franklin's home after the shooting and identify his body. (Tr. 1315).

In returning its sentence of death on March 23, 2006, the jury found those convictions had been proven beyond a reasonable doubt. (L.F. 9, 391-92). The jury also found beyond a reasonable doubt that Appellant had serious assaultive convictions on

February 4, 2005, for two counts of assault in the first degree and two counts of armed criminal action. (L.F. 392). On May 16, 2006, this Court reversed and remanded Appellant's convictions for murder in the first degree and armed criminal action in the shooting death of Todd Franklin. *State v. McFadden*, 191 S.W.3d 648, 650 (Mo. banc 2006). The trial court sentenced Appellant in this case on May 24, 2006. (L.F. 9).

C. Analysis.

As noted above, the jury found beyond a reasonable doubt that Appellant had serious assaultive convictions for assault in the first degree and armed criminal action. (L.F. 392). Those findings are sufficient to get beyond the threshold determination of whether the death penalty can be imposed, and allow the jury to weigh aggravating and mitigating circumstances to decide if the death penalty should be imposed. *See State v. Shaw*, 636 S.W.2d 667, 675 (Mo. banc 1982). The question is thus whether the jury's consideration of the prior murder conviction that was subsequently reversed impermissibly skewed the weighing of aggravating and mitigating circumstances.

The Supreme Court has recently refined the test for determining when the presence of an invalid aggravating circumstance requires reversal:

An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the

other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.

Brown v. Sanders, 546 U.S. 212, 126 S.Ct. 884, 892 (2006) (emphasis in original). The Court went on to explain that no constitutional error occurs where evidence supporting the invalidated factor is properly admitted, and the jury can give aggravating weight to that same evidence under the rubric of some other, valid aggravating factor. *Id.*

In the principal case relied on by Appellant, reversal was mandated because the only evidence presented in support of the invalid conviction was a court document establishing the fact of the conviction. *Johnson v. Mississippi*, 486 U.S. 578, 585 (1988). The Court found that without any evidence of the underlying crime, the facts of the crime had no relevance to the sentencing decision, and the reversal of the conviction deprived the court document of any relevance. *Id.*

This case is distinguishable from *Johnson* because the prosecutor did present evidence of Todd Franklin's murder separate and apart from the fact of Appellant's conviction. Unadjudicated bad acts are admissible as non-statutory aggravating circumstances, so the prosecutor's ability to present that evidence to the jury was not dependant on the fact of the prior conviction. *State v. Ferguson*, 20 S.W.3d 485, 500 (Mo. banc 2000); *State v. Kinder*, 942 S.W.2d 313, 331 (Mo. banc 1996). Therefore, the jury could properly give aggravating weight to that evidence as a non-statutory circumstance, thus meeting the *Brown* standard. *See Brown*, 126 S.Ct. at 893 (erroneous

factor could not have skewed the sentence where all of the aggravating facts and circumstances that the invalid aggravator permitted the jury to consider were also open to their proper consideration under one of the other factors). Since the jury is not instructed to weigh statutory aggravating circumstances more heavily than non-statutory aggravating circumstances, the fact that the evidence was tied to a statutory circumstance would not have skewed the weighing process towards imposition of the death penalty.

Appellant argues that he was prejudiced because the prosecutor's references to the conviction and sentence in the Todd Franklin murder case permeated this case. In *Clemons*, the Supreme Court found prejudice because the prosecutor repeatedly emphasized and argued the aggravating factor that was subsequently invalidated. *Clemons*, 494 U.S. at 753. By contrast, the State in this case did not place undue emphasis on the prior murder conviction and barely made reference to the death sentence. In fact, the subject of the previous death sentence was first put before the jury by defense counsel during the small group voir dire on death qualification. (Tr. 195, 262, 324, 404, 474, 523, 578, 638, 699, 748). Appellant cannot complain of error resulting from issues that he injected into the case. *State v. Driscoll*, 711 S.W.2d 512, 516 (Mo. banc 1986); *State v. Byrd*, 676 S.W.2d 494, 500 (Mo. banc 1984).

The State's only mentions of the previous death sentence were one brief reference in the penalty phase opening statement, and the admission of a court document that was read to the jury, setting out the fact that Appellant was sentenced to death for Todd

Franklin's murder. (Tr. 1268, 1291). The prosecutor's closing arguments did not mention the death penalty, and made only a passing reference to the murder conviction. (Tr. 1543). The prosecutor referenced the additional evidence that was introduced to establish Todd Franklin's murder, and all subsequent references to that murder, both direct and indirect, were made absent any mention of the conviction and sentence. (Tr. 1544-47, 1549-51, 1563-64, 1566). Contrary to Appellant's argument, the fact of the prior death sentence did not permeate the case.

Besides the additional evidence of the underlying crime, another distinction between this case and *Johnson* is that the prior conviction used as an aggravating circumstance in *Johnson* was subsequently vacated, meaning the defendant could not be retried on those charges. *Johnson*, 486 U.S. at 582. The same is true of the one Missouri case that has reversed a conviction in reliance on *Johnson*. *State v. Herret*, 965 S.W.2d 363, 364-65 (Mo. App. E.D. 1998) (subsequently vacated conviction had been used to establish defendant's prior offender status). By contrast, Appellant's conviction for the murder of Todd Franklin was reversed and remanded for a new trial after this Court found the existence of a *Batson* violation. *McFadden*, 191 S.W.3d at 650. The opinion raises no serious question about Appellant's guilt, but is addressed entirely to whether he received the procedural protections which he is due.

Since the reversal does not undermine the reliability or sufficiency of the evidence used to convict Appellant, it also does not undermine the reliability of the underlying

evidence of the murder that was presented to the jury in the penalty phase of this trial. The jury had sufficient grounds wholly apart from the fact of the conviction and sentence on which to find that Appellant murdered Todd Franklin. The jury properly weighed those facts in reaching its verdict, and there has been no showing that the additional fact of the conviction and sentence impermissibly tipped the scales in favor of the death penalty.

III.

Strikes of venirepersons Swanson and Vinson for cause.

Appellant claims the trial court abused its discretion in granting the State's motions to strike venirepersons Swanson and Vinson for cause.

A. Standard of Review.

A trial court's ruling on a motion to strike for cause is reviewed for abuse of discretion. *State v. Ringo*, 30 S.W.3d 811, 816 (Mo. banc 2000). The trial court's ruling will be upheld unless it is clearly against the weight of the evidence and contrary to logic. *Id.* Where a venireperson expresses reluctance to give the death penalty, the court may exclude the venireperson when it appears that his or her views will substantially impair the performance of duties as a juror in accordance with the court's instructions and the oath. *Id.* The trial court is in the ideal position to weigh the venireperson's responses and evaluate their qualifications as prospective jurors. *Id.*

B. Facts.

Venireperson Swanson responded when the prosecutor asked during voir dire if any venirepersons could not seriously consider imposing the death penalty. (Tr. 236, 242):

VENIREPERSON SWANSON: I'm not for sure if I could. I just want to be up front and honest. I don't feel like they do, but when it came right down to it, I don't think I could.

MR. BISHOP: . . . So let me ask you, Ms. Swanson, if you're given a choice, if we get to that stage of the trial . . . [a]nd the choice is, you know, life in prison without probation or parole or the death sentence. Are you automatically going to exclude the death sentence and go with life in prison without protection (sic) or parole?

VENIREPERSON SWANSON: I just don't know if I could go to bed at night and personally do that to somebody.

MR. BISHOP: And you're talking about, to choose the death sentence?

VENIREPERSON SWANSON: Yes.

MR. BISHOP: Not the life without parole?

VENIREPERSON SWANSON: No, not that.

MR. BISHOP: And so I'm inferring from your answer that, yes, you would exclude the death sentence, you would go with life without? Or you tell me.

VENIREPERSON SWANSON: I'm not for sure.

MR. BISHOP: Okay. As a juror, if we get to that stage of the trial you'll have to seriously consider both. That would be your duty, if we get through all that . . . Is the death sentence a real option for you in the appropriate case at the appropriate time, if we get to that point?

VENIREPERSON SWANSON: Not really.

MR. BISHOP: And let me ask you, if you're a juror and you're selected by the other jurors as the foreperson, can you sign a verdict of death if you think it's the appropriate verdict?

VENIREPERSON SWANSON: No.

MR. BISHOP: Assuming that you think it's the appropriate verdict, is there any way you could sign that verdict?

VENIREPERSON SWANSON: No.

(Tr. 244-47). Defense counsel also questioned venireperson Swanson:

MS. TURLINGTON: Ms. Swanson, I know that earlier you were saying that – you started out saying that you thought that you could give a death sentence in an appropriate case. And then you were saying you didn't think you could sign the verdict form. And you kind of changed your answer to, you didn't really want to do it, but maybe you could do it. Is that fair to say?

VENIREPERSON SWANSON: Let me put it like this.

MS. TURLINGTON: Okay.

VENIREPERSON SWANSON: I believe in the death penalty. And like anybody else who had anything to do with the like 9/11, those people should get the death penalty. Do I want to be the person signing that, or

saying yes? No. But do I want somebody else saying that somebody else should have the responsibility for that, saying yes? Does that make –

MS. TURLINGTON: Okay. You don't want to participate in the process, but you do believe in the death penalty, is that a correct statement?

VENIREPERSON SWANSON: Yes.

MS. TURLINGTON: All right. Is your belief such that – I know you don't want to participate in the process. Most people don't. Do you think that you could not participate in the process, is my question.

VENIREPERSON SWANSON: I think part of the reason why I say I couldn't is because, I don't know – just like, you know, if God and everything, it's like, you know, I don't know if I'm worthy enough. I don't know, you know, if I'm worthy enough to say, yes, that person should die. I guess I don't want the burden.

MS. TURLINGTON: Okay.

VENIREPERSON SWANSON: I don't think I'm explaining myself well.

MS. TURLINGTON: No, I do understand what you're saying. You understand that if you were a juror in this case, you are never required to give a death sentence, okay?

VENIREPERSON SWANSON: That I'm what?

MS. TURLINGTON: You are never required to give a death sentence. Even if you go through that first step and you find an aggravating circumstance, or more than one, beyond a reasonable doubt. And even if you go through the second step, and the aggravating evidence is horrible, and it outweighs the mitigation. Even at the end of that, any juror for whatever reason that they personally have can say, I do not want to vote for the death penalty in this case. All right?

VENIREPERSON SWANSON: (Nods).

MS. TURLINGTON: The only time you would ever vote for the death penalty is when you, in your own mind, in your own heart, having heard all the evidence, and having followed the instructions of law, felt that it was the appropriate verdict. Okay?

So only when you were comfortable with it in your mind after – and with satisfying the law and knowing that that’s what – the law had been satisfied, that’s the only time you would even be faced with that, okay?

VENIREPERSON SWANSON: Um-hum.

MS. TURLINGTON: If you personally felt that you have gone through the legal steps, and you personally believed that the death penalty was the appropriate punishment, and you felt comfortable with it, could you do it in those circumstances?

VENIREPERSON SWANSON: Honestly, I don't know. I mean, for me to sit here – I mean, this is something I have to sleep on, and deliberate. So for me to give you a yes or no quick answer is probably not fair.

MS. TURLINGTON: Okay. And I know that this isn't the greatest place to have to ask you this stuff, because you didn't know you were going to be asked this before you came in.

Do you think – realistically, in your mind, do you think it's possible that you could do it?

I think at the end of the day, –

VENIREPERSON SWANSON: Yes.

MS. TURLINGTON: – it would be very difficult for you, it's fair to say?

VENIREPERSON SWANSON: Um-hum.

MS. TURLINGTON: Is that a yes?

VENIREPERSON SWANSON: Yes.

(Tr. 266-69). The State moved to strike venireperson Swanson for cause and Appellant objected on the basis that she had been rehabilitated. (Tr. 276). The trial court granted the strike and explained its ruling:

The court will note that Ms. Swanson was physically breaking up at several points during the questioning. I noticed in particular there was, she had red flashes, and was literally on the verge of crying.

She said she's not sure she could go to bed at night. She said, I'm not sure I could. She stated she could not – she would not sign a verdict of death form. Not announce in open court.

Although she said she believed in the death penalty. She wanted somebody else to say it, not her. She said, I do not know if I'm worthy enough to say somebody should – a person should die. Do not want to do that. She did say at one point – she was attempted to be rehabilitated.

But I think the juror's physical mannerisms that I watched, her equivocal and shifting responses to the questions, taken as a whole, combined with her physical body language that I personally observed, leave me with the definite impression that this juror would be unable to faithfully and impartially follow and apply the law as given. . . .

(Tr. 277).

The prosecutor asked venireperson Vinson whether she could render a verdict of death in the appropriate case at the appropriate time:

VENIREPERSON VINSON: I could consider it. But I would really prefer life in prison.

MR. BISHOP: Okay. So if we get to that stage in the trial, and the judge would give you the option, you can pick life in prison without probation or parole, which means just that, he spends every day of his life in prison, or the death penalty, are you automatically going to go with the life in prison?

VENIREPERSON VINSON: I think I would.

MR. BISHOP: So you're automatically going to exclude the death sentence if you're given that choice?

VENIREPERSON VINSON: Well, it depends on the circumstances and the evidence.

MR. BISHOP: If you would speak up just that little bit? I apologize.

VENIREPERSON VINSON: It depends on the evidence and how strong it would be.

MR. BISHOP: If you were selected as a juror, could you announce the verdict of death in open court? Assuming that that was your verdict?

VENIREPERSON VINSON: That would be tough to do. I might be able to. I don't know. I've never pronounced a verdict of death on anybody.

MR. BISHOP: Right. If you were selected as the foreperson by your fellow jurors, could you sign the verdict, if you believed the verdict of

death was appropriate? Could you sign that verdict of death as a foreperson?

VENIREPERSON VINSON: I don't know if I could do that.

MR. BISHOP: So you can't assure the Court that – if you were instructed that that may be one of your duties, you can't assure the Court that you would be able to fulfill that duty?

VENIREPERSON VINSON: Not totally. But I might be able to.

THE COURT: Would you say that last part –

VENIREPERSON VINSON: I'm not sure if I could or not. I might be able to.

MR. BISHOP: Okay. And I want to make sure you understand. I don't really care what your answers are. . . . We just want to know what your views are.

So what – did you have a problem with the sentence of life in prison without the possibility of probation or parole?

VENIREPERSON VINSON: That's not a good deal either. But at least I'm not killing somebody.

MR. BISHOP: Okay. So you could seriously consider that option as a penalty? Life in prison?

VENIREPERSON VINSON: Yes, sir.

MR. BISHOP: Could you assure us that you could seriously consider the death penalty as a possible option?

VENIREPERSON VINSON: I could consider it. I don't know if I could impose it or not.

MR. BISHOP: Okay. So even if you thought it was the appropriate punishment, you don't think you could actually do it?

VENIREPERSON VINSON: I don't know.

(Tr. 736-39). Defense counsel also questioned venireperson Vinson:

MS. KRAFT: You sort of talked along those same lines, you just weren't sure. And at one point in time you did talk about, well, it would depend on the circumstances. Do you remember saying that?

VENIREPERSON VINSON: Yes, ma'am.

MS. KRAFT: Okay. So is it possible that if you sat on a jury, there would be some circumstances that you would determine would be bad enough that you could say that the death penalty was appropriate?

VENIREPERSON VINSON: That is possible.

MS. KRAFT: Okay. And if you felt that strongly, that the death penalty was appropriate, could you, in fact, say, in this case I need to do it?

VENIREPERSON VINSON: I don't know. It's possible. But it's really tough.

MS. KRAFT: Okay. And it shouldn't be easy for anybody to do this. . . . But you're telling me that it's possible – even though it would be hard, it's possible that that could happen?

VENIREPERSON VINSON: I would just as soon not issue that proclamation. The life without parole is not good either.

MS. KRAFT: Right.

VENIREPERSON VINSON: But it's not taking a life.

MS. KRAFT: Okay. But even though you would just as soon not do it, is it at least possible that you could? If you felt strongly enough about it?

VENIREPERSON VINSON: It's possible. But I don't know.

MS. KRAFT: Okay. You're not automatically excluding the death penalty?

VENIREPERSON VINSON: Right.

MS. KRAFT: Okay. And you said that you might be able to sign the verdict form, if it came down to it?

VENIREPERSON VINSON: I don't think I could do that.

MS. KRAFT: Okay. Because I thought that earlier that you had said you might be able to.

VENIREPERSON VINSON: Oh, no. I don't think I did.

MS. KRAFT: Okay. So are you telling us that even if you believed the death penalty was the appropriate punishment, you know right now you would refuse to sign the verdict form, even if you were told you had to?

VENIREPERSON VINSON: I would – I don't think I could. I would be told I would have to?

MS. KRAFT: If you were the foreperson of the jury. And there's no requirement that anybody be the foreperson of the jury. But if you were the foreperson of the jury, the law says that the foreperson of the jury has to sign the verdict. If you knew that that was the instruction of the Court, could you do – follow that instruction?

VENIREPERSON VINSON: It's a possibility. But I would really prefer not to.

MS. KRAFT: Okay. You wouldn't want to. But if the instruction told you you had to, you could?

VENIREPERSON VINSON: I suppose so. I don't know.

(Tr. 755-58). The State moved to strike venireperson Vinson for cause and defense counsel responded that while Vinson was not definite in her responses, she said enough to remain on the jury. (Tr. 761).

The court granted the strike and explained its reasoning:

This juror stated it would be tough to announce in open court. Don't know. Sign the death warrant. Don't know. I'm not sure. Might be able to. She kept equivocating on the death penalty. Must assume, not – she said it's tough. Just as soon not issue the proclamation of death. And when she was asked if she could sign the death warrant, again she said – I don't think she was clear. In her physical mannerisms she was shaking her head no. And you could see it in her body language. Then when you again talked about signing it, she said, I don't think I could. And she was still shaking her head again no.

She equivocated in her answers, and her answers shifted between the prosecutor and the defense attorney, and within the defense attorney's own questioning she went back and forth. But taken as a whole, and combined with the juror's negative body language that I personally observed, leave me with the definite impression that the juror would be unable to faithfully follow and apply the given instructions.

(Tr. 761-62).

C. Analysis.

Appellant relies on the United States Supreme Court case of *Witherspoon v. Illinois* to argue that only those potential jurors who can never consider death or are partial about their guilt decision when death is a possibility can be excluded from serving

on a capital case. *See Witherspoon v. Illinois*, 391 U.S. 510, 522 n.21 (1968). Appellant fails to note that the Supreme Court subsequently abandoned that test, in a case cited in Appellant's Brief. *Wainwright v. Witt*, 469 U.S. 412, 424 (1984). The Court announced that the proper standard for determining when a prospective juror may be excluded for cause due to her views on capital punishment is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Id.* That standard does not require that the juror's bias be proven with unmistakable clarity. *Id.*

In applying that standard, this Court has consistently ruled that jurors who equivocate about their ability to impose the death penalty may be properly removed for cause. *See, e.g., State v. Tisius*, 92 S.W.3d 751, 763 (Mo. banc 2002); *State v. Anderson*, 79 S.W.3d 420, 435-36 (Mo. banc 2002); *State v. Johnson*, 22 S.W.3d 183, 186 (Mo. banc 2000); *State v. Winfield*, 5 S.W.3d 505, 511 (Mo. banc 1999); *State v. Jones*, 979 S.W.2d 171, 184 (Mo. banc 1998); *State v. Jones*, 749 S.W.2d 356, 362 (Mo. banc 1988); *Antwine*, 743 S.W.2d at 62. The qualifications of a prospective juror are not determined conclusively by a single response, but are determined on the basis of the voir dire as a whole. *Tisius*, 92 S.W.3d at 763. A trial court faced with contradictory responses from a venireperson does not abuse its discretion by giving more weight to one response than the other and in finding that the venireperson could not properly consider the death penalty. *Id.*

Venireperson Swanson equivocated on her ability to consider the death penalty, and unequivocally stated that she could not sign a death verdict if selected as jury foreperson. An unequivocal statement that a venireperson cannot sign a death verdict is, by itself, sufficient to disqualify that person. *State v. Smith*, 32 S.W.3d 532, 545 (Mo. banc 2000). Swanson also indicated that she did not feel worthy to decide whether someone should receive a death sentence. (Tr. 267). Reservations about making the sentencing decision are sufficient cause to strike a venireperson. *Kinder*, 942 S.W.2d at 325; *Jones*, 979 S.W.2d at 184. In addition to Swanson's verbal answers, the trial court took note of her emotional state, and the fact that she was nearly in tears. (Tr. 277). "The court may excuse jurors who give indication of lack of emotional stability, especially when a long trial with a sequestered jury is in prospect." *Jones*, 749 S.W.2d at 360.

Venireperson Vinson also unequivocally stated that she could not sign a death verdict. (Tr. 738, 757). Most telling was her strong response when defense counsel first attempted to rehabilitate her on that issue. (Tr. 757). As to the rest of her answers, even defense counsel admitted that Vinson never definitively indicated that she could impose the death penalty. (Tr. 761). The trial court also noted the inconsistency of her answers, and particularly the fact that her answers seemed to change depending on who was questioning her. (Tr. 762).

The trial court could reasonably determine that Vinson's subsequent statements that she could consider the death penalty did not overcome her initial statement that she

would automatically go with life imprisonment. (Tr. 737). *See Winfield*, 5 S.W.3d at 511 (venireperson's statements that she would consider the death penalty along with life imprisonment fell short of recanting her earlier statement that "I just don't think I could" impose the death penalty). Further support for the trial court's ruling can be found in Vinson's statements where she expresses reluctance to kill somebody or take a life. (Tr. 739, 756). Those answers indicate that Vinson equates capital punishment with murder, raising serious questions about her ability to impose that punishment.

The trial court further noted that Vinson's equivocal answers were accompanied by head shakes and other physical mannerisms indicating a negative attitude towards the death penalty. (Tr. 762). This Court has "consistently recognized the trial judge's superior position to interpret and evaluate the totality of a venireman's verbal and nonverbal responses when actually heard and seen – an evaluation which cannot be readily made from a cold record." *Antwine*, 743 S.W.2d at 61.

The test for determining whether a juror should be struck for cause for her views on the death penalty "is not a series of 'magic' words. Rather it is a decision of fact made by the trial judge based on observing the venireperson and her answers." *State v. Debler*, 856 S.W.2d 641, 647 (Mo. banc 1993). The qualifications of a prospective juror are not determined conclusively by a single response, but are made on the basis of the entire examination. *Tisius*, 92 S.W.3d at 763. The entirety of Swanson and Vinson's voir dire, including their physical mannerisms, could easily have left the trial court with the definite

impression that their attitude toward the death penalty would prevent them from rendering a fair and impartial verdict. *Antwine*, 743 S.W.2d at 62. The trial court did not abuse its discretion in striking them for cause.

IV.

Submission of MAI-CR 3d 314.40 to the jury.

Appellant claims the trial court erred in overruling his objections to MAI-CR 3d 314.40 and to the trial court making the “serious assaultive” fact-findings because whether a prior conviction is seriously assaultive is an eligibility factor to be found by the jury beyond a reasonable doubt.

A. Standard of Review.

An appellate court will reverse on a claim of instructional error only if there is error in submitting an instruction and prejudice to the defendant. *State v. Zink*, 181 S.W.3d 66, 74 (Mo. banc 2005). MAI instructions are presumptively valid and, when applicable, must be given to the exclusion of other instructions. *Id.*

B. Analysis.

Appellant filed a pre-trial motion objecting to MAI-CR 3d 314.40 on the basis that it permitted the judge, and not the jury, to determine whether a previous conviction was for a serious assaultive offense. (L.F. 126-34). That motion was filed on February 2, 2006, and was directed at the version of MAI-CR 3d 314.40 then in effect. (L.F. 126-27). However, that instruction was modified effective March 1, 2006, and it was the revised version that was submitted to the jury over Appellant’s objection. (Tr. 1530).

This Court has long held that, for purposes of evaluating a statutory aggravator, the determination of whether a prior conviction is a serious assault is a matter of law for

the court, and the jury only as a matter of fact that a prior conviction actually occurred. *Kinder*, 942 S.W.2d at 332. This Court has also repeatedly held that it does not violate *Apprendi*¹⁰ to allow the trial court to determine that certain convictions are serious and assaultive, and to simply require the jury to determine whether the convictions exist. *Williams*, 97 S.W.3d at 474; *State v. Mayes*, 63 S.W.3d 615, 640 (Mo. banc 2001); *State v. Johns*, 34 S.W.3d 93, 114 n.2 (Mo. banc 2000). “Allowing the court to determine, as a matter of law, whether prior convictions are ‘serious assaultive criminal convictions’ does not interfere with the jury’s mandate to find the facts.” *Williams*, 97 S.W.3d at 474. None of those cases have been overruled.

Even if the jury is required to determine whether a prior conviction is a “serious assaultive conviction,” the instructions given in this case permitted the jury to make that finding. The version of MAI-CR 3d 314.40 submitted to the jury required it to make the following findings:

Whether the defendant had (a) (one or more) serious assaultive conviction(s) in that he was convicted of [*Insert name of serious assaultive crime.*] on [*date*], in the [*name of court*] of [*name of county, district, etc.*] of [*name of state*] because defendant [*Identify brief facts to establish that*

¹⁰ *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

crime was a serious assaultive conviction.] (.) (And [Specify other serious assaultive convictions in the same manner.]).

MAI-CR 3d 314.40, ¶ 1B (Mar. 1, 2006). The statutory aggravating circumstances were submitted in Instruction No. 18, which followed the MAI format:

Whether the defendant has a serious assaultive conviction in that he was convicted of Murder in the First Degree on April 22, 2005 in Division 15 of the St. Louis County Circuit Court for events that occurred on July 3, 2002 for killing Todd Franklin.

* * * *

Whether the defendant has a serious assaultive conviction in that he was convicted of Assault in the First Degree on February 4, 2005 in Division 15 of the St. Louis County Circuit Court for events that occurred on April 4, 2002 for shooting Daryl Bryant.

* * * *

Whether the defendant has a serious assaultive conviction in that he was convicted of Assault in the First Degree on February 4, 2005 in Division 15 of the St. Louis County Circuit Court for events that occurred on April 4, 2002 for shooting at Jermaine Burns.

(L.F. 369-70). The convictions for armed criminal action arising out of those events were submitted in the same format. (L.F. 369-70).

The gravamen of Appellant’s complaint appears to be that prior to commencement of the penalty phase proceedings, the State asked the trial court to find that Appellant’s previous convictions for murder in the first degree, assault in the first degree, and armed criminal action were serious assaultive convictions. (Tr. 1265-66). The court made those findings over Appellant’s objection. (Tr. 1266-67). The Notes on Use to the prior version of MAI-CR 3d 314.40 required the court to determine outside the hearing of the jury if the defendant had one or more serious assaultive convictions. MAI-CR 3d 314.40, Notes on Use, § 5 (Sept. 1, 2002). That requirement was removed from the Notes on Use adopted on March 1, 2006, just two weeks before the start of Appellant’s trial,¹¹ but the trial judge still acted properly under the revised Notes:

The court should determine before submitting paragraph 1B that there is sufficient evidence to warrant its submission. For discussions of offenses that might constitute a “serious assaultive conviction,” see State v. Brooks, 960 S.W.2d 479, 496 (Mo. banc 1997); State v. Kinder, 942

¹¹ Both the prosecutor and defense counsel admitted later that they were not aware of the revisions to the Notes on Use at the time of trial. (Tr. 1596).

S.W.2d 313, 332 (Mo. banc 1996); and State v. Brown, 902 S.W.2d 278, 293-294 (Mo. banc 1995).

Because of the United States Supreme Court decision in Shepard v. United States, [544 U.S. 13], 125 S.Ct. 1254 (2005), the facts of the “serious assaultive conviction” should be submitted to the jury.

MAI-CR 3d 314.40, Notes on Use, § 5 (Mar. 1, 2006).

The first paragraph quoted above requires the trial court to look at the nature of the offense underlying the previous conviction to determine if it qualifies as a “serious assaultive conviction” that can be submitted to the jury. It also directs the trial court to look at three decisions of this Court in determining whether an offense constitutes a “serious assaultive conviction.” *Brooks* states that robbery in the first degree is a serious assaultive conviction because it is defined in part as a robbery that causes serious physical injury to any person or that involves a deadly weapon or dangerous instrument. *Brooks*, 960 S.W.2d at 496. *Kinder* states that “[t]he proper line between serious assaultive offenses and other assaultive offenses is the line between felonies and misdemeanors. The former are serious assaultive offenses and the latter are not.” *Kinder*, 942 S.W.2d at 332. A felony offense can constitute a serious assaultive offense even if no serious physical injury actually occurs. *Id.* *Brown* found that an Indiana conviction for assault and battery with intent to gratify sexual desires was a serious assaultive criminal conviction because it was a felony offense. *State v. Brown*, 902

S.W.2d 278, 293-94 (Mo. banc 1995). Those cases thus set forth guidelines for the trial court to use in making a threshold determination that a prior conviction meets the legal definition of a serious assaultive conviction, and can thus be submitted to the jury as such.

The finding made by the trial judge was the functional equivalent of a finding that sufficient evidence existed to submit the prior convictions to the jury. As the prosecutor later noted, the jury was not told about the trial court's finding and the jury was given the proper instructions that allowed it to make the serious assaultive finding. (Tr. 1596-97).

Appellant now argues on appeal that the State did not present sufficient evidence of the serious assaultive nature of the prior convictions. This directly contradicts the argument Appellant made during the pre-trial, trial and post-trial proceedings. Appellant consistently argued that the State should be precluded from putting on any evidence about the prior convictions other than the fact of the convictions. (Tr. 1263-64, 1531, 1598-99).

The jury was presented evidence that Appellant was: (1) convicted of the Class C felony of assault in the first degree for shooting at Daryl Bryant, "and such conduct was a substantial step toward the commission of the crime of Attempting to Cause Serious Physical Injury to Daryl Bryant and was done for the purpose of committing such assault, and in the course thereof, inflicted serious physical injury on Darryl Bryant"; (2) convicted of the felony of armed criminal action for committing assault in the first degree

through the use, assistance, and aid of a deadly weapon; (3) convicted of the class B felony of assault in the first degree for shooting at Jermaine Burns, “and such conduct was a substantial step toward the commission of the crime of attempt to cause serious physical injury to Jermaine Burns and was done for the purpose of committing such assault”; (4) convicted of the felony of armed criminal action for committing assault in the first degree through the use, assistance, and aid of a deadly weapon; (5) convicted of the class A felony of murder in the first degree for knowingly causing the death of Todd Franklin by shooting him; and (6) convicted of the felony of armed criminal action for committing murder in the first degree through the use, assistance, and aid of a deadly weapon. (Tr. 1284-91). As detailed in Point II above, the State presented additional evidence concerning the murder of Todd Franklin.

The information contained in the court documents read to the jury are sufficient by themselves to establish that the offenses met the legal definition of serious assaultive offenses as set forth in *Brooks*, *Kinder* and *Brown*. The instruction also contained sufficient facts to support a finding of serious assaultive convictions. (L.F. 369-70). By finding those facts to be true, the jury could therefore also find that Appellant had previous serious assaultive convictions.

Appellant claims, however, that the jury did not make the required finding because it did not write on the verdict forms that the previous convictions were for serious assaultive offenses. (Tr. 391-92). Appellant did not raise that objection when the verdict

was returned. (Tr. 1571). Verdicts are not to be tested by technical rules of construction. *State v. Reuscher*, 827 S.W.2d 710, 718 (Mo. banc 1992). In determining the validity of a verdict, the overriding objective is to ascertain the jury's intent. *Id.* If the jury's intent is clearly discernable, the verdict is good though it may be irregular in form. *Id.* That rule applies to capital cases. *Id.* at 719. If the intent to impose a penalty of death is clear and the aggravating circumstances upon which that determination was made is sufficiently identified, a death sentence may stand. *Id.* Where no objection is made to a verdict before the jury is discharged, the claimed irregularity is reviewed for plain error. *Id.* at 717.

Here, when the verdict is read in conjunction with Instruction No. 18, the jury's intent to impose the death penalty is clear, and the aggravating circumstance is sufficiently identified. *Id.* at 719; *State v. Storey*, 40 S.W.3d 898, 912 (Mo. banc 2001) (jury instructions are not to be viewed in isolation, but are to be taken as a whole to determine whether error occurred). The verdict form as returned by the jury is sufficient.

V.

Evidentiary and discovery issues.

Appellant claims the trial court abused its discretion in: (1) overruling his objection to Stacy Stevenson's testimony that he heard an unidentified man say, "Come here, bitch, where you fixin' to go. I told you and your sister to get the fuck from down here in Pine Lawn"; (2) denying Appellant's motion to obtain Eva Addison's school and medical records; and (3) using Stevenson's testimony to bolster Addison's identification of Appellant as the shooter. By joining unrelated claims of error in the admission of evidence and error in the denial of a discovery motion, Appellant's Point Relied On violates Rule 30.06, which prohibits multifarious allegations of error. *State v. Thompson*, 985 S.W.2d 779, 784 n.1 (Mo. banc 1999); Supreme Court Rules 30.06(c) and 84.04(d).

A. Standard of Review.

In his Motion for New Trial, Appellant alleged the trial court erred in admitting Stevenson's testimony. (L.F. 418-20). The motion did not allege error in the denial of the discovery motion.

A trial court has broad discretion to admit or exclude evidence at trial, and the trial court's ruling will be reversed only if the court had clearly abused that discretion. *State v. Forrest*, 183 S.W.3d 218, 223 (Mo. banc 2006). Abuse of discretion occurs when a ruling is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration. *Id.* On direct appeal, this Court reviews for

prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial. *Id.* Trial court error is not prejudicial unless there is a reasonable probability that it affected the outcome of the trial. *Id.*

An allegation of error must be contained in a motion for new trial to be preserved for review. *State v. Barnett*, 980 S.W.2d 297, 303 (Mo. banc 1998). Issues that were not properly preserved may be reviewed for plain error only, requiring this Court to find manifest injustice or a miscarriage of justice has resulted from the trial court error. *Middleton*, 995 S.W.2d at 452; Supreme Court Rule 30.20.

B. Facts.

Stacy Stevenson lived near the scene of Leslie Addison's murder. (Tr. 1090). He testified that he was watching television in his apartment at about 11:30 p.m. on March 15, 2003, when he heard two women arguing. (Tr. 1090, 1092-93). Stevenson looked out his window and saw the women walk away in different directions. (Tr. 1093). Stevenson testified that he watched one of the women as she walked away:

A. Probably around about halfway before she got to Kienlen, I heard a guy's voice. A guy was arguing with her, telling her –

MS. TURLINGTON: Judge, I'm going to object at this point. Could we approach briefly?

THE COURT: Yes.

(The following was had at the bench):

THE COURT: You're renewing your objection at this time?

MS. TURLINGTON: Yes, Judge. I'm renewing our objection to the statement regarding the, I told your sisters that you – that get out of Pine Lawn thing. I just want to renew the objection, and it violates our client's rights to confrontation under the 6th Amendment and the 14th Amendment of the United States Constitution, and the attendant provisions of the Missouri Constitution. And it is hearsay. And I ask that it be a continuing throughout the discussion of it.

MR. BISHOP: It's a statement of the defendant. It's part of the murder itself.

THE COURT: Okay. It will be overruled at this time. It will be a continuing objection then.

(The proceedings returned to open court).

Q. Okay, Mr. Stevenson, can you tell the jury what you heard that male voice say?

A. Come here, bitch, where you fixin' to go. I told you and your sister to get the fuck from down here in Pine Lawn.

Q. And could you see that person to be able to recognize him?

A. No.

Q. And you don't know a man by the name Vincent McFadden, do you, personally?

A. No.

Q. And what happened after you heard that man say those words at that time?

A. The girl, she started walking fast. When she got right there at Kienlen, she made a right turn, northbound. And the guy, he was walking behind her. And they got out of my sight. I heard the female scream. And after the first shot, she didn't scream no more. Then I heard two more shots.

(Tr. 1094-95).

C. Analysis.

Appellant objected to Stevenson's testimony on the basis that it was hearsay. Not all out-of-court statements are hearsay. *State v. Copeland*, 928 S.W.2d 828, 848 (Mo. banc 1996). The hearsay rule only prohibits admission of out-of-court statements offered to prove the truth of the out-of-court declaration. *Id.* The out-of-court statement to which Stevenson testified was admissible under the well-established "verbal acts" rule. *Id.* That rule provides that utterances made contemporaneously with or immediately preparatory to an act which is material to the litigation that tends to explain, illustrate or show the object or motive of an act, and which are offered irrespective of the truth of any

assertion they contain, are not hearsay and are admissible. *Id.* Evidence of threats are admissible to show motive or intent. *State v. Petty*, 967 S.W.2d 127, 135 (Mo. App. E.D. 1998). Stevenson's testimony was admissible both as a threat made immediately preparatory to the shooting, and as evidence of a previous threat. Taken either way, the statement was probative of the motive and intent behind the shooting. The statement was not hearsay and was properly admitted.

The trial court also did not err in failing to order the disclosure of Eva Addison's school and medical records. Appellant filed a motion asking the court to order the State to disclose the records. (L.F. 260). The prosecutor indicated at the hearing on the motion that the State was not in possession of those records. (Tr. 15). The rules of discovery do not require the State to disclose what it does not have. *State v. Johnson*, 957 S.W.2d 734, 748 (Mo. banc 1997). Appellant's discussion of *United States v. Nixon* is inapposite because that case involved the assertion of privilege to resist a subpoena. *United States v. Nixon*, 418 U.S. 683, 686 (1974). Appellant's motion was not denied on the basis of an assertion of privilege.

To be entitled to a court order requiring production of the records, Appellant has to demonstrate more than a mere possibility that the records might be helpful. *State v. Taylor*, 134 S.W.3d 21, 26-27 (Mo. banc 2004). Appellant's motion alleged:

The defendant, Mr. McFadden, believes that Ms. Addison's school and medical records contain information that cast doubt upon her credibility,

ability to observe and truthfulness and should be made available to the defense.

(L.F. 260). That allegation would be insufficient to show an abuse of discretion under a properly preserved claim of error. *Id.* at 27. It falls far short of showing a manifest injustice or miscarriage of justice, particularly since defense counsel admitted that she was unaware of any *Brady*¹² materials or exculpatory evidence contained in the records. (Tr. 17).

¹² *Brady v. Maryland*, 373 U.S. 83 (1963).

VI.

Appellant's proposed voir dire on death penalty economics.

Appellant claims the trial court abused its discretion in prohibiting him from inquiring during voir dire about the venireperson's beliefs about the costs of a death sentence versus a sentence of life without parole.

A. Standard of Review.

The nature and extent of questioning on voir dire is within the discretion of the trial judge, and only a manifest abuse of discretion and a probability of prejudice to the defendant will justify reversal. *State v. Armentrout*, 8 S.W.3d 99, 109 (Mo. banc 1999). Trial courts may exclude questions that are marginally relevant or irrelevant to issues in the case. *Id.*

B. Analysis.

Appellant recognizes that this Court has previously found that "the economic cost of imposing a death sentence is irrelevant to any issue submitted to the jury." *Id. see also Weaver*, 912 S.W.2d at 519; *Ferguson*, 20 S.W.3d at 506; *State v. Clay*, 975 S.W.2d 121, 142 (Mo. banc 1998). He nonetheless asks this Court to abandon its long-standing precedent.

The cases relied on by Appellant do not advance his argument. He argues that a capital defendant is constitutionally entitled to uncover jurors' racial prejudices, and argues that a similar right exists to uncover juror's beliefs about the relative costs of

capital punishment versus life imprisonment. However, the case relied on by Appellant states that there is no *per se* constitutional rule requiring inquiry into juror's racial prejudices. *Rosales-Lopez v. United States*, 451 U.S. 182, 190 (1981).¹³ Such an inquiry is constitutionally required only where there are substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case. *Id.* Absent such circumstances, the trial judge has the discretion to decide whether an inquiry into racial prejudice is warranted. *Id.* *Rosales-Lopez* relies on *Ristaino v. Ross*, where the Court stated:

The Constitution does not always entitle a defendant to have questions posed during Voir dire specifically directed to matters that conceivably might prejudice veniremen against him. . . . the State's

¹³ Appellant also cites to *United States v. Love*, 219 F.3d 721(8th Cir. 2000). However, the specific cite is to a dissenting opinion. *Id.* at 723-26 (Bennett, J., concurring in part and dissenting in part). The majority found no abuse of discretion in the trial court's voir dire. *Id.* at 721-22.

obligation to the defendant to impanel an impartial jury generally can be satisfied by less than an inquiry into a specific prejudice feared by the defendant.

Ristaino v. Ross, 424 U.S. 589, 594-95 (1975). These cases demonstrate that Appellant has no constitutional right to introduce the subject of death penalty economics into the voir dire, and they provide no basis for overriding this Court's precedents.

VII.

Denial of Appellant's motion to strike venireperson Sandifer for cause.

Appellant claims the trial court abused its discretion in: (1) denying his motion to strike venireperson Isaac Sandifer for cause; (2) allowing the jury to be told during voir dire that Appellant was already serving a death sentence for the murder of Todd Franklin, and alternatively, in denying his motion for separate guilt and penalty phase juries.

A. Standard of Review.

A trial court's ruling on a motion to strike for cause is reviewed for abuse of discretion. *Ringo*, 30 S.W.3d at 816. The trial court's ruling will be upheld unless it is clearly against the weight of the evidence and contrary to logic. *Id.* The trial court is in the ideal position to weigh the venireperson's responses and evaluate their qualifications as prospective jurors. *Id.* The nature and extent of questioning on voir dire is within the discretion of the trial judge, and only a manifest abuse of discretion and a probability of prejudice to the defendant will justify reversal. *Armentrout*, 8 S.W.3d at 109.

B. Facts.

Appellant filed a pre-trial motion for separate juries in the guilt and penalty phases of the trial, and a motion to prevent disclosure that Appellant was under another sentence of death. (L.F. 112, 190). The State indicated at a pre-trial hearing on the motions that it only intended to offer evidence of the previous conviction and sentence during the penalty phase as a statutory aggravating circumstance. (Tr. 38). The trial court denied

Appellant's motions and indicated that it would permit Appellant to voir dire on his previous conviction and sentence. (Tr. 8-9, 43, 47). Immediately prior to voir dire, Appellant renewed the motion to exclude evidence of the prior conviction and sentence, and the trial court again denied it. (Tr. 83-85). Defense counsel declined the court's offer to inform the jury that the conviction and sentence was on appeal. (Tr. 84-85). Defense counsel made a record that she felt that she had no choice but to voir dire the venire on the fact of the prior death sentence. (Tr. 86-87).

During the questioning of the second death qualification panel, defense counsel informed the venirepersons of Appellant's prior conviction and death sentence, and asked, "knowing that another jury convicted Mr. McFadden, and that he's currently serving a sentence of death, can you still give realistic consideration to a sentence of life without probation or parole in this case?" (Tr. 262). Venireperson Sandifer answered, "yes," and defense counsel continued her questioning:

MS. TURLINGTON: Mr. Sandifer, would you automatically give someone the death penalty, knowing that he's already on death row for another homicide?

VENIREPERSON SANDIFER: No.

* * * *

MS. TURLINGTON: Mr. Sandifer, my question to you is, would you feel like your verdict in this case didn't really matter because he's already on death row for another homicide?

MR. SANDIFER: I would have to be honest with you and say yes. (Tr. 262-64). Defense counsel moved on to other subjects, and Sandifer indicated in response to her questions that he thought mitigating information would be important for him to hear, and that he could give consideration to such evidence in determining the appropriate punishment. (Tr. 271).

The prosecutor then questioned venireperson Sandifer:

MR. BISHOP: . . . If you're selected as a juror in this case, and we should get to that penalty phase, do you understand that the verdict in this case is a real verdict in this case?

VENIREPERSON SANDIFER: Yes.

MR. BISHOP: And whatever other sentence he may have, – let me ask you this. You understand it's your responsibility, as well as the other jurors, to make the sentencing determination on this case?

VENIREPERSON SANDIFER: Yes. I understand you have to block the other case out and just listen to this case. I understand that.

MR. BISHOP: You're making a decision on the evidence as presented in this case.

VENIREPERSON SANDIFER: I understand that.

MR. BISHOP: And just because some other jury may have said one sentence doesn't mean you are to go with it. Do you understand that?

VENIREPERSON SANDIFER: Yes, sir.

MR. BISHOP: Can you seriously consider both possible punishments, life in prison without probation or parole and the death sentence in this case, should we get to that point?

VENIREPERSON SANDIFER: Yes, sir.

MR. BISHOP: And that's – even though the defense counsel has told you something about his past?

VENIREPERSON SANDIFER: Yes.

MR. BISHOP: Okay. You could still consider life in prison without probation or parole?

VENIREPERSON SANDIFER: Yes.

(Tr. 272-73). Appellant moved to strike Sandifer for cause. (Tr. 279). The prosecutor stated that he believed Sandifer had been rehabilitated. (Tr. 280). The trial court agreed, but called Sandifer in for further questioning:

THE COURT: . . . Mr. Sandifer, you indicated – you did make one statement at one point during the defense attorney's statement about your verdict would not matter, and you answered yes to that. And I know in

your questioning later you indicated that you understood that your verdict was a real verdict. Is that correct?

VENIREPERSON SANDIFER: Yes, sir.

THE COURT: And in consideration of that, in light of the fact that you heard testimony that Mr. McFadden, in fact, had been convicted and sentenced to death in a prior case one year before, would that make you automatically impose the death penalty in this case?

VENIREPERSON SANDIFER: No, sir.

THE COURT: Would that automatically make you impose a sentence of life imprisonment without probation or parole?

VENIREPERSON SANDIFER: No.

THE COURT: Do you understand that you have to make a decision of this case based upon the facts that you hear in this case, and not based upon any other facts?

VENIREPERSON SANDIFER: Yes, sir.

THE COURT: Which include the fact that he's under a sentence of death at this time?

VENIREPERSON SANDIFER: Yes.

THE COURT: Would you follow the Court's instructions concerning that?

VENIREPERSON SANDIFER: Yes.

THE COURT: Would you be fair and impartial as a juror in this case, in light of the fact that you know that Mr. McFadden is currently under a sentence of death?

VENIREPERSON SANDIFER: Yes.

THE COURT: Okay, Thank you very much, Mr. Sandifer.

MS. KRAFT: Judge, can I ask just one question?

THE COURT: Yes.

MS. KRAFT: Mr. Sandifer, after all of our discussion, do you still feel like your verdict wouldn't matter in this case?

VENIREPERSON SANDIFER: Yes. I don't understand. May I speak?

THE COURT: Yeah. You're welcome to speak.

VENIREPERSON SANDIFER: I just don't understand what the – you know, what my verdict would – you know what I'm saying?

THE COURT: Well, can I explain, when you say you don't think your verdict would matter, I want to make sure you –

VENIREPERSON SANDIFER: I understand perfectly what you're saying, you know. I wouldn't let the other case, or the other conviction or whatever it was, have any bearing on this one.

But I just don't quite understand. I'm just trying to be honest.

THE COURT: I want you to be. I'm not looking for any answer from you at all. Go ahead.

VENIREPERSON SANDIFER: I don't understand what the verdict of this trial would even accomplish. I'm just being honest. That's why I –

THE COURT: That's the problem you have?

VENIREPERSON SANDIFER: Yes, sir.

THE COURT: Okay. It's not a problem that just because Mr. McFadden is under a sentence of death in another case, that would skew your ability to view those facts –

VENIREPERSON SANDIFER: No, it would not. It's just –

THE COURT: – or would make you automatically impose a death penalty, or automatically find Mr. McFadden guilty?

VENIREPERSON SANDIFER: Definitely not. I just don't understand the rest of that, you know. What the –

THE COURT: You could follow the Court's instructions in this case?

VENIREPERSON SANDIFER: Yes, sir.

THE COURT: Mr. Bishop, do you have any questions you wish to follow up with Mr. Sandifer?

MR. BISHOP: You understand – if you get to that point, and you return a verdict, you understand it has real implications?

VENIREPERSON SANDIFER: Yes, I understand.

(Tr. 280-84). Defense counsel renewed the motion to the strike, which the court denied.

(Tr. 284-86). Sandifer served on the jury. (L.F. 328).

C. Analysis.

Appellant’s argument that presenting evidence of his prior conviction and death sentence to the jury violates *Caldwell v. Mississippi*¹⁴ ignores the fact that the United States Supreme Court has expressly rejected that contention. *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). As the Court noted, *Caldwell* violations only occur when remarks are made to a jury that improperly describe the role assigned to it by local law. *Id.* Informing a jury about a previous conviction and death sentence does not implicate those concerns. *Id.* The information the jury received about Appellant’s prior conviction and sentence was not false at the time it was admitted and it did not misinform the jury about its role in the sentencing process. *See id.* Also, as in *Romano*, the penalty phase instructions emphasized the importance of the jury’s role in the sentencing process. *Id.*; *see also State v. Clemmons*, 753 S.W.2d 901, 911 (Mo. banc 1988). (L.F. 367, 370-75).

The trial court properly overruled Appellant’s Motion in Limine. Appellant then made the strategic decision to introduce the fact of the previous conviction and death

¹⁴ 472 U.S. 320 (1985).

sentence during voir dire. Appellant cannot complain of error based on that decision. *Driscoll*, 711 S.W.2d at 516; *Byrd*, 676 S.W.2d at 500. While defense counsel may have felt compelled to raise the subject, her nonetheless voluntary choice was not prompted by any trial court error.

Appellant's argument that he should have received separate guilt and penalty phase juries fails for the same reason. The State was entitled to present evidence of Appellant's previous conviction and sentence in the penalty phase, and any exposure the jurors had to that information prior to the guilt phase was caused by Appellant's actions. In addition, this Court has repeatedly held that separate guilt and penalty phase juries are not required in capital cases. *State v. Hampton*, 959 S.W.2d 444, 451 (Mo. banc 1997).

That leaves the question of whether the trial court properly refused to strike venireperson Sandifer for cause. The test for determining whether a juror should be struck for cause for his views on the death penalty "is not a series of 'magic' words. Rather it is a decision of fact made by the trial judge based on observing the venireperson and [his] answers." *Debler*, 856 S.W.2d at 647. The qualifications of a prospective juror are not determined conclusively by a single response, but are made on the basis of the entire examination. *Forrest*, 183 S.W.3d at 231.

In denying the challenge for cause, the trial court noted that while Sandifer may have stated that he did not understand why there was a second trial, he did not say anything indicating that he would allow that question to affect his consideration of the

case.¹⁵ (Tr. 285-86). The court noted that Sandifer's physical mannerisms indicated that he would have no problem following the court's instructions. (Tr. 285). The court also stated that Sandifer, "understands the implications of this verdict as being real, and the importance, and he would not automatically indicate that just because he's under the death penalty, it would affect him one way or the other to vote for death, or life without probation and parole." (Tr. 286).

The court's conclusions are supported by the record. Sandifer repeatedly stated in affirmative tones that he understood the instant trial had real implications, that he would not let the fact of the prior conviction and sentence influence his decisions, that he could consider mitigating evidence, and that he could consider both alternative of life without parole or the death sentence. His voir dire answers taken in their entirety show that Sandifer's sense of responsibility as a juror was not diminished by the knowledge that Appellant was already under another death sentence. The trial court did not abuse its discretion in denying the strike for cause.

¹⁵ Sandifer's questions might have been answered had Appellant accepted the trial court's offer to inform the panel that the previous conviction and death sentence was being appealed. (Tr. 45). Appellant erroneously asserted that any mention of an appeal violates *Caldwell*. (Tr. 45-46). Comments addressed to the finality of a defendant's sentence in a different case do not violate *Caldwell*. *State v. Middleton*, 998 S.W.2d 520, 530 (Mo. banc 1999).

VIII.

Denial of Appellant's motion to prohibit the death penalty.

Appellant claims the trial court erred in denying his motion for mistrial, failing to quash the jury panel and failing to prohibit the State from seeking the death penalty after more than fifty-percent of the venirepersons were struck for cause after indicating that they could not consider the death penalty. Appellant asks this Court to exercise its independent proportionality review and reduce his death sentence to life imprisonment without parole.

A. Standard of Review.

This Court independently reviews each sentence of death to determine (1) whether it was imposed under the influence of passion or prejudice, or any other arbitrary factor; (2) whether there was sufficient evidence to support the finding of a statutory aggravating circumstance and any other circumstance found; and (3) whether the sentence was excessive or disproportionate to the penalty imposed in similar cases. § 565.035.3, RSMo 2000; *Middleton*, 995 S.W.2d at 467.

B. Analysis.

Appellant argues that “evolving standards of decency” require his death sentence be set aside because over fifty-percent of the veniremembers were struck for cause because they could not consider the death penalty. Appellant claims that number

demonstrates that the death penalty constitutes cruel and unusual punishment in St. Louis County. That argument suffers from multiple flawed premises.

The first flaw is the notion that evolving standards of decency and the sentiments of a particular populace can be determined through views expressed in a single venire panel in a single trial. In trying to evaluate and reach conclusions about evolving standards of decency, the United States Supreme Court and this Court have looked at a broad range of information from multiple sources. That information includes legislation passed by the several states, various studies and surveys, policy pronouncements of churches and other organizations, and the laws of the several nations. *Roper v. Simmons*, 543 U.S. 551, 564-78 (2005); *Atkins v. Virginia*, 536 U.S. 304, 313-17 (2002); *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 401-06 (Mo. banc 2003). By contrast, Appellant asks this Court to judge evolving standards of decency by looking at the responses of 120 residents of a county of more than one-million people. *Official Manual, State of Missouri*, p. 839 (2005-2006). Such a small and isolated sample is grossly inadequate to draw any meaningful conclusions about evolving standards of decency in St. Louis County, or anywhere else.

Appellant argues that his death sentence would be arbitrary and capricious, “given that the people of St. Louis County have, in such numbers rejected its imposition.” (Appellant’s Brf., p. 105). It’s hard to imagine a more arbitrary and capricious method of imposing the death sentence than to rely on the responses of a single venire panel. The

logical converse to Appellant's argument is that imposition of the death penalty is not cruel and unusual punishment where a majority of the veniremembers indicate that they can consider the death penalty. To take Appellant's argument to its logical extreme, two defendants could be charged in St. Louis County as accomplices involved in the same murder and tried separately – one defendant would be subjected to the death penalty if a majority of his venire panel indicated that it could consider that punishment, while the second defendant would escape the death penalty if a majority of his venire panel answered differently.

The second flaw in Appellant's argument is the idea that the death penalty, as a state law, can constitute cruel and unusual punishment in one county, but presumably not be cruel and unusual in another county where the majority of the populace demonstrably supports the death penalty. That raises the same arbitrariness problem noted above, as the death penalty would only be possible in certain parts of the State.

Finally, the "evolving standards of decency" analysis has been used to consider whether the death penalty is appropriate for discrete and identifiable classes of persons. *Roper*, 543 U.S. at 569; *Simmons*, 112 S.W.3d at 412 (juveniles); *Atkins*, 536 U.S. at 318 (mentally retarded). In doing so, the Courts have looked at whether the retributive or deterrent purposes of the death penalty apply to those persons due to some shared class characteristic. That is not the case here, and Appellant's approach completely fails to

take into account whether he or any other defendant's "extreme culpability makes them 'the most deserving of execution.'" *Roper*, 543 U.S. at 568.

IX.

Prosecutor's arguments and comments.

Appellant claims the trial court erred and plainly erred in overruling Appellant's objections and requests for a mistrial and in not granting a mistrial *sua sponte* following various statements made by the State during voir dire, guilt phase closing argument, and penalty phase closing argument. Appellant did not object to any of the penalty phase arguments and objected to only some of the comments and arguments made in voir dire and the guilt phase. The Motion for New Trial only alleged error in two statements that were properly objected to, both of them occurring during the guilt phase closing argument: (1) that the victim had a family who loved her; and (2) that the evidence of Appellant's guilt was uncontroverted. (L.F. 415-16).

A. Standard of Review.

The arguments and comments that were either not objected to or not included in the Motion for New Trial are not preserved and can only be reviewed for plain error. Supreme Court Rule 29.11(d); *Edwards*, 116 S.W.3d at 536. A conviction will be reversed based on plain error in closing argument only when it is established that the argument had a decisive effect on the outcome of the trial and amounts to a manifest injustice. *Edwards*, 116 S.W.3d at 536-37. A properly preserved claim of error in closing argument will result in reversal only on a showing that the trial court abused its discretion, prejudicing the defendant. *Ferguson*, 20 S.W.3d at 498.

B. Voir dire.

Appellant complains of the following statement, “We have an interest in this case, too, as does the victim’s family.” (Tr. 773). Appellant ignores the context in which that statement was made:

But we need twelve fair and impartial jurors to be selected from you to decide this case. Mr. McFadden is entitled to twelve fair and impartial jurors to decide this case and, if necessary, decide his punishment. And the State of Missouri is also entitled to twelve fair and impartial jurors to decide this case. We have an interest in this case, too, as does the victim’s family.

(Tr. 772-73). Appellant did not object and he can scarcely be said to have suffered a manifest injustice because the prosecutor emphasized the importance of selecting a jury that could be fair and impartial to both sides.

The other voir dire statement that Appellant complains of came as the prosecutor discussed the burden of proof. The prosecutor was explaining to the jury that the burden of proof extends only to the elements of the crime, and not to every detail that might come up during the trial. (Tr. 774). During the course of that explanation, the prosecutor said:

And if I had to prove everything beyond a reasonable doubt, the trial would never end. I would call my first witness, and I would say, state your name, and that witness would say –

(Tr. 776). Defense counsel objected on the basis that the prosecutor was trying to define reasonable doubt. (Tr. 776). The trial court told the prosecutor, “Mr. Bishop, I think you’ve made your point. Just wrap it up real quick.” (Tr. 776). Defense counsel requested no other relief. (Tr. 776). After briefly recapping, without objection, that the State only has to prove the elements of the offense, the prosecutor moved on to a different subject. (Tr. 776).

The State is permitted to discuss the concept of “beyond a reasonable doubt” without attempting to define it for the jury. *State v. Brown*, 822 S.W.2d 529, 530 (Mo. App. E.D. 1991). Telling the jury that the State’s burden of proof applies only to the elements of the offense is a permissible discussion of the burden of proof, rather than a definition. *Id.* Furthermore, the trial court essentially sustained Appellant’s objection by telling the prosecutor to wrap it up, and Appellant did not seek any further relief. A party who has received all the relief he requested cannot claim error on appeal. *State v. Scurlock*, 998 S.W.2d 578, 586 (Mo. App. W.D. 1999).

C. Guilt phase.

During the initial guilt phase closing argument, the prosecutor stated:

In this case, all the evidence points to the defendant's guilt. There's a term we use called uncontroverted. There's no evidence to the contrary.

All of the evidence you heard was that he did it.

(Tr. 1215). Defense counsel objected and asked for a mistrial on the grounds that the prosecutor made a direct comment on the fact that the defense did not present evidence.

(Tr. 1216). After having the prosecutor's statement read back by the court reporter, the trial court denied the request for a mistrial. (Tr. 1217). The prosecutor then proceeded to summarize the evidence presented by the State. (Tr. 1217-18).

Appellant now claims the prosecutor's comments were an indirect, rather than direct, reference to his failure to testify. "Description of the State's evidence as uncontradicted or undisputed is not a reference to the defendant's failure to testify." *State v. Taylor*, 944 S.W.2d 925, 935 (Mo. banc 1997) *see also State v. Simmons*, 955 S.W.2d 752, 764 (Mo. banc 1997). Furthermore, a statement that evidence is uncontradicted could only be an indirect reference to the failure to testify where the accused is the only witness who can deny the evidence. *State v. Clemons*, 946 S.W.2d 206, 228 (Mo. banc 1997). Eva Addison testified that Appellant was accompanied by another man, B.T., when he shot Leslie Addison. (Tr. 1032-33). B.T. was thus available as a witness to deny Eva Addison's testimony and the trial court did not err in denying the motion for mistrial. *See id.*

In his final closing argument, the prosecutor was recounting Eva Addison's testimony describing the murder of her sister Leslie, when he said:

Don't forget about Leslie. This isn't just about him, about Vincent McFadden (indicating). Don't forget about her. Don't forget about her. When you go back there, you don't forget that this was a young woman with a future. You don't forget that she's eighteen years old, in the prime of her life. She had family that loved her.

(Tr. 1248). Defense counsel objected that the argument was an attempt to invoke sympathy for the family and was not evidence. (Tr. 1248). The objection was overruled and the prosecutor continued, "[s]he was eighteen years old. Eighteen years old. A defenseless girl. And he put four bullets in her. Why?" (Tr. 1248).

A prosecutor can properly argue that a jury should "send a message" to the community that criminal conduct will not be tolerated. *State v. Link*, 25 S.W.3d 136, 147 (Mo. banc 2000). A prosecutor can also properly argue the jury's duty to uphold the law. *State v. Jeffries*, 858 S.W.2d 821, 825 (Mo. App. E.D. 1993). While the prosecutor in this case may not have used the phrase, "send a message," the thrust of his argument was the jury should consider the seriousness of the crime and return a verdict demonstrating that shooting an unarmed, eighteen-year-old girl four times is unacceptable conduct that will not be tolerated. *See Kinder*, 942 S.W.2d at 329 (argument that victim was a mother,

daughter, sister, and friend whose life could never be returned highlighted the seriousness of the crime).

While the argument might potentially have an emotional impact, the prosecutor did not tell the jury that it should base its decision on emotions. *Link*, 25 S.W.3d at 147. In *Link*, the prosecutor in guilt-phase closing argument held up a photograph of the victim and told the jury that he was asking them to return a verdict for her. *Id.* This Court did not find that statement to be an unacceptable emotional appeal, but did state that the prosecutor crossed the line when he told the jury that it should “raise that window and say we’re mad as hell and we are not going to take it.” *Id.* The error did not require reversal, however, because in the context of the overall argument, the complained-of statement was relatively brief and was not repeated elsewhere. *See id.* The comments were also determined to have less prejudicial effect because they were made in the guilt phase rather than the penalty phase. *Id.* The prosecutor in this case did not say anything approaching the kind of direct appeal to emotion made in *Link*. As was true in that case, there is nothing in the record of this case to suggest a reasonable probability that the jury would have acquitted Appellant had the argument not been made. *Id.*

D. Penalty phase.

Appellant complains of several statements made during penalty phase closing argument. Both parties have wide latitude in arguing during the penalty phase of a first-degree murder trial. *Storey*, 40 S.W.3d at 910. Appellant is further hindered by his

failure to object to any of the arguments of which he now complains, making his claims reviewable, if at all, for plain error. *Edwards*, 116 S.W.3d at 546.

The prosecutor discussed Instruction No. 18, which submitted the statutory aggravating circumstances and instructed the jury that unless it found at least one of those circumstances beyond a reasonable doubt, it had to return a sentence of life imprisonment without parole. The prosecutor argued that he had met his burden of proving the statutory aggravating circumstances beyond a reasonable doubt, and then stated:

There are other convictions that you should consider in determining what to do with him. His whole criminal history are non-statutory aggravating circumstances. I didn't have to prove them to get you past this stage. But you've got a more complete picture of his entire criminal history.

(Tr. 1543-44). Contrary to Appellant's claim, the prosecutor did not misstate the law. He correctly noted that he only had to prove the existence of at least one statutory aggravating circumstance beyond a reasonable doubt in order for the jury to be able to consider the death penalty. *Shaw*, 636 S.W.2d at 675. Even if the jury were somehow misled into believing the State did not have to prove the non-statutory prior convictions, that would not constitute plain error since, as counsel admitted in her closing argument, the State did prove their existence. (Tr. 1277-84, 1560-61).

Appellant claims the following statements misstated the facts or speculated on matters unsupported by the evidence: “This man was terrorizing the whole neighborhood”; “And don’t forget about how he fled, how after he killed Todd he fled the State. After he killed Leslie, he fled the County.” (Tr. 1545); “He does bad things. He does evil things. He hurts people. And he enjoys it. He enjoys it.” (Tr. 1564). Prosecutors have wide latitude in arguing reasonable inferences from the evidence. *Forrest*, 183 S.W.3d at 228. All three of the arguments are reasonable inferences drawn from the evidence.

In stating that Appellant was terrorizing the neighborhood, the prosecutor showed the jury a map of the area where Leslie Addison was killed, and noted that Todd Franklin was killed nearby, and that Appellant shot Darryl Bryant and shot at Jermaine Burns in that same general area. (Tr. 1545). The comment that Appellant fled after the two murders was a reasonable inference from the evidence that Appellant traveled to California shortly after Todd Franklin’s murder, and he was arrested in St. Charles County a few days after Leslie Addison’s murder. (Tr. 1126-30, 1289, 1483).

Appellant claims the following argument speculated on the possibility of future crimes:

First one, you see he’s climbing the ladder of crime. The 6100 block of Greer. He didn’t kill them. He killed Todd Franklin. Then he knows – with Leslie Addison, he kills her at that particular time to avoid the

witnesses. Do you remember he knew he was on the run in California. He knew he was wanted for the murder. He knows you don't leave witnesses . . . He didn't realize Eva was there.”

(Tr. 1546-47). Future dangerousness is a permissible argument in the penalty phase of a capital case. *Antwine*, 743 S.W.2d at 71. However, the prosecutor in this instance was not talking about future crimes, but was noting how the severity of Appellant's past crimes had escalated, from the assault on Darryl Bryant and Jermaine Burns, to the murder of Todd Franklin, to the murder of Leslie Addison. The argument was a fair comment on the evidence. The prosecutor also did not argue that Appellant would have killed Eva Addison if he had known she was there, but even if he did, that would have been a fair inference from the evidence. *Winfield*, 5 S.W.3d at 516 (fair to infer that others in house would have been shot had defendant not run out of bullets).

Appellant claims the following argument speculated about future harm to Leslie Addison's family, “He took from her parents any grandchildren that she might have. There's going to be no wedding for Leslie, no marriage, no children, no grandchildren, no life.” (Tr. 1565). The argument came in the final closing and was a proper response to defense counsel's argument that the jury should show mercy because Appellant would be punished by having “to live with the fact that he took himself away from his son” (Tr. 1562). *Strong*, 142 S.W.3d at 727 *see also Forrest*, 183 S.W.3d at 228 (because

mercy is a valid sentencing consideration, a prosecutor may argue that mercy should not be granted).

Appellant contends the prosecutor engaged in improper personalization with this argument:

And you want to talk about mothers, let's talk about a mother's worst nightmare. A mother's worst nightmare is a picture of your child with a State's exhibit sticker on it. And we've got two of them. Two of them (indicating). Picture your own child with a State's exhibit sticker on it. That's a mother's worst nightmare.

(Tr. 1551). The argument was not improper personalization in that it did not suggest personal danger to the jurors or use the kind of graphic detail that would prejudice Appellant. *Williams*, 97 S.W.3d at 474; *State v. Deck*, 994 S.W.2d 527, 544 (Mo. banc 1999) (prosecutor asked jurors to imagine gun being pointed at their head). The prosecutor was contrasting Appellant's penalty phase evidence that his mother was absent for much of his childhood with the victim's impact evidence. (Tr. 1551). The argument was thus a fair comment on the evidence.

Appellant claims the following statement denigrated defense counsel:

You know, and what a cruel question to ask his father. Do you think you're a good father, do you think you did a good job as a father. This is a man who knows his son has just been found guilty of a First Degree Murder

case. To ask him that. What father wouldn't think, boy, how bad a job he did. What a cruel question to ask him.

(Tr. 1566). While personal attacks on defense counsel are improper and objectionable, such statements do not always require reversal. *State v. Reyes*, 108 S.W.3d 161, 170 (Mo. App. W.D. 2003). Statements directed at the tactics or techniques of trial counsel, rather than counsel's integrity or character, are permissible. *Id.* The prosecutor was questioning counsel's tactical decision to ask Appellant's father a particular question, and his comments fall far short of those that have prompted reversal in other cases. *Weaver*, 912 S.W.2d at 513-14.

The final statement of which Appellant complains came in the prosecutor's final closing. Defense counsel argued in her closing that Appellant would not be eligible for the death penalty if not for his prior convictions, that he had already been punished for those crimes, and that his punishment in this case should be based only on what happened the night of Leslie Addison's murder. (Tr. 1561-62). The prosecutor rebutted that argument in his final closing and argued that Appellant deserved the death penalty. (Tr. 1563). In the course of arguing that position, the prosecutor stated, "[t]he death penalty is only appropriate for the worst of the worst. The worst of the worst. He is the worst of the worst." (Tr. 1563-64). Appellant contends this is the type of argument condemned in *State v. Storey*, where a prosecutor referred to the case being tried as "about the most

brutal slaying in the history of this county.” *State v. Storey*, 901 S.W.2d 886, 900 (Mo. banc 1995).

In addition to being a proper response to Appellant’s closing argument, the prosecutor gave a correct statement of the law when he said the death penalty is only appropriate for the worst of the worst. *Kansas v. Marsh*, 126 S.Ct. 2516, 2543 (2006). By arguing that Appellant was the worst of the worst, the prosecutor did not, as in *Storey*, imply that he had any special knowledge of all the other murders in the county. Instead, he was telling the jury that Appellant fell within that category of offenders for whom the death penalty is an appropriate punishment. A prosecutor may state his personal opinion on whether the death penalty should be imposed, so long as the argument is fairly based on the evidence. *Edwards*, 116 S.W.3d at 547. The prosecutor’s argument, taken in context, shows they were proper comments on Appellant’s character, the seriousness of the crime, and the appropriateness of the death penalty. *See Debler*, 856 S.W.2d at 651 (prosecutor stated, “this is the most cold-blooded murder that you could conceive of”); *Kinder*, 942 S.W.2d at 333 (prosecutor called defendant “evil”).

X.

Admission of taped phone conversation.

Appellant claims the trial court erred and abused its discretion in admitting a taped phone conversation between Eva Addison and “Slim” Dickens because the tape constituted hearsay and contained evidence of uncharged bad acts. The recording admitted into evidence was of a phone call that Addison received from the St. Louis County Jail on May 27, 2003. (State’s Ex. 148, 148E). Three voices are heard in the conversation – Addison, Dickens, and a voice in the background that Addison identified as Appellant. (State’s Ex. 148; Tr. 1046). Dickens’ role in the conversation was mostly to relay what Appellant said to Addison, and vice versa, although Addison’s reactions during parts of the conversation demonstrate that she was able to directly hear and understand Appellant. (State’s Ex. 148).

A. Standard of Review.

A trial court has broad discretion to admit or exclude evidence at trial, and the trial court’s ruling will be reversed only if the court has clearly abused that discretion. *Forrest*, 183 S.W.3d at 223. Abuse of discretion occurs when a ruling is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration. *Id.* On direct appeal, this Court reviews for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair

trial. *Id.* Trial court error is not prejudicial unless there is a reasonable probability that it affected the outcome of the trial. *Id.*

B. Analysis.

In addition to murder and armed criminal action, Appellant was also tried and convicted on the charge of tampering with a witness. The jury was instructed that it had to find that Appellant threatened Eva Addison with the intent to influence her to testify falsely when he told her on May 27, 2003, “if I don’t get out of here this month, I’m gonna let that motherfucker do what the fuck they wanna do.” (L.F. 344). That statement was made during the phone conversation. (State’s Ex. 148E, p. 15). Appellant’s recorded statements thus constituted the crime for which Appellant was charged and convicted.

A statement is not hearsay where its relevance lies in the mere fact that it was made, and no reliance is placed on the truth of the statement. *State v. Sutherland*, 939 S.W.2d 373, 377 (Mo. banc 1997). The recording was not admitted to prove the truth of any of the statements by Appellant, but was admitted to show his intent to scare Addison so she would not testify against him. *See Copeland*, 928 S.W.2d at 848 (verbal acts admissible to show intent). The South Dakota Supreme Court faced a similar factual situation, and cited *Copeland* in upholding the admission of testimony that a third party called a witness at the defendant’s behest to discourage her from testifying against him. *State v. Charger*, 611 N.W.2d 221, 227 (S.D. 2000).

The statements on the tape also do not constitute hearsay because they are the admissions of a party opponent. *State v. Gilmore*, 22 S.W.3d 712, 718 (Mo. App. W.D.

1999). Dickens was plainly acting as a mere conduit and simply trying to repeat Appellant's statements verbatim, albeit with some errors. Dickens' statements had no independent evidentiary value. He was, in the general sense of the word, merely a translator. *See State v. Spivey*, 710 S.W.2d 295, 297 (Mo. App. E.D. 1986) (a translator's interpretation of a defendant's statement is admissible as an admission). Admittedly, there were moments on the tape where Appellant's voice was inaudible, making it less certain that Dickens was correctly relaying Appellant's words. But, in light of Dickens' consistent efforts to merely relay Appellant's words, it is reasonable to infer that Dickens continued to do so. Even if Dickens' statements in those limited instances should not have been admitted, any error was harmless since Dickens did not convey any substantial evidence that was not mirrored in Appellant's recorded statements.

Appellant also complains the recording contains evidence of other crimes, specifically a reference that someone named Al had testified falsely, and that Appellant was facing prison time on a narcotics charge. (State's Ex. 148E, pp. 10, 19). Evidence of other crimes or wrongful acts is admissible when it is part of the circumstances or sequence of events surrounding the charged offense. *State v. Wolfe*, 13 S.W.3d 248, 262 (Mo. banc 2000). The comments of which Appellant complains were part of the sequence of events surrounding his attempt to persuade Eva Addison to go to court and falsely testify that he did not murder her sister. The reference to the narcotics charge was

even followed by another threat. (State's Ex. 148E, p. 20). The evidence was relevant to the tampering charge, and was properly admitted.

XI.

Admission of photographs.

Appellant claims the trial court abused its discretion in admitting during the guilt phase photographs of the victim and her family in life, and autopsy photographs and x-rays of the victim; and in introducing during the penalty phase photographs of Todd Franklin, the victim of the other murder for which Appellant had been convicted.

A. Standard of Review.

Of the photographs listed in Appellant's Point Relied On, only six were actually objected to at trial **and** included in the Motion for New Trial. Those are State's Exhibits 129, 130, and 135 – autopsy photographs of Leslie Addison, and Exhibits 300, 303, and 306 – the pictures depicting Leslie and members of her family in life. (Tr. 1055-57,1172; L.F. 437-38). The motion for new trial contains a general allegation of error in admitting additional evidence of Todd Franklin's murder, but the motion does not specifically reference the photographs, and does not encompass the allegation in Appellant's Brief that the photographs were cumulative, gruesome and irrelevant. (L.F. 417-18).

To preserve a claim of error in the admission of evidence, a specific objection must be made at trial, the claim of error must be included in the new trial motion, and the point raised on appeal must be based on the same theory. *State v. Knese*, 985 S.W.2d 759, 766, 769 (Mo. banc 1999). Matters not properly preserved can be reviewed for plain error only. *Id.* at 769.

Properly preserved claims of error are reviewed to determine whether the trial court clearly abused its broad discretion in the admission of photographs. *Strong*, 142 S.W.3d at 715. Photographs are relevant if they show the scene of the crime, the identity of the victim, the nature and extent of the wounds, the cause of death, the condition and location of the body, or otherwise constitute proof of an element of the crime or assist the jury in understanding the testimony. *Id.* at 715-16. “It is generally accepted that if photographs are gruesome, it is simply because the crime itself was gruesome.” *State v. Ervin*, 979 S.W.2d 149, 161 (Mo. banc 1998). “A photograph is not rendered inadmissible simply because other evidence described what is shown in the photograph.” *State v. Rousan*, 961 S.W.2d 831, 844 (Mo. banc 1998).

B. Guilt phase.

Three photographs were admitted during Eva Addison’s testimony. State’s Exhibit 303 depicted Eva, Leslie and another sister. (Tr. 1051). State’s Exhibit 300 depicted Leslie and a nephew. (Tr. 1055). State’s Exhibit 300 was a picture of Leslie. (Tr. 1056). The prosecutor indicated that the pictures were being offered to establish the identity of the victim, that Leslie and Eva were sisters, and that Leslie was alive before Appellant shot her. (Tr. 1052-53). The prosecutor indicated that he did not want to unnecessarily upset Eva by forcing her to identify her sister from the autopsy photographs. (Tr. 1053). The trial court indicated that it was allowing the prosecutor to select three photographs out of a group of eleven or twelve that were representative

depictions of the victim. (Tr. 1054). The photographs were relevant to establish identity of the victim and an element of the crime, and the three photographs were not of a nature so as to be unduly prejudicial.

Appellant specifically objected to four of the autopsy photographs as being duplicative. (Tr. 1172). The trial court excluded one of those photographs after the prosecutor indicated that he did not plan to use it. (Tr. 1173). As to the remaining three photographs (Exhibits 129, 130 , 135), the trial court concluded that the photos showed entry and exit wounds in the victim's chin that were not shown in the other photos. (Tr. 1173).

Appellant now complains that Exhibits 132, 136-37, 140-41, 145, and 149-50 were cumulative. However, defense counsel was asked prior to their admission whether she had any objection, and she answered "no." (Tr. 1160, 1202). A statement of no objection precludes direct appellate review of the claim of error. *State v. Baker*, 103 S.W.3d 711, 716 (Mo. banc 2003).

A review of the photographs shows they are taken from different angles and/or distances, so that each picture provided the jury with a different perspective of the victim's wounds. In *Strong*, no error was found in admitting thirty-eight photographs and a videotape depicting the victims and the crime scene. *Strong*, 142 S.W.3d at 715 n.8, 716. This Court found each of the photos to be independently relevant and helpful to the jury. *Id.* at 716. The State admitted far fewer photographs in this case, sixteen, and each

of them was independently helpful and relevant to the jury. The X-ray photos also had independent relevance in that they depicted for the jury where the various bullets lodged inside the victim's body. (Tr. 1202-05).

C. Penalty phase.

The photographs of Todd Franklin were admissible as proper evidence of Appellant's character. *Morrow*, 968 S.W.2d at 115. Of the thirteen photographs that Appellant complains of in his Point Relied On, only four show Franklin's body. (State's Exs. 18, 27-28, 33). The pictures are taken from different angles and distances, and are not duplicative. Three pictures depict pools of blood, and Franklin's hand or arm can be seen in the corner of two of those pictures. (State's Exs. 31-32, 35). The remaining pictures show the crime scene or items of evidence recovered there. (State's Exs. 9-14).

In the argument portion of his Brief, Appellant mentions Exhibits 157 and 160, photographs of Franklin in life, and argues that they were irrelevant. Appellant's Point Relied On does not mention those photographs, nor does it raise the relevancy issue contained in the argument portion of the Brief. Allegations of error that are raised only in the argument portion of a brief are not preserved for review. *Ferguson*, 20 S.W.3d at 500. The photographs were relevant and admissible, and Appellant did not suffer a manifest injustice.

XII.

Submission of statutory aggravating circumstances.

Appellant claims the trial court erred in submitting Instruction No. 18 to the jury over his objection because it submitted each of Appellant's six prior convictions as a separate statutory aggravating circumstance instead of submitting the fact of his prior convictions as a single aggravating circumstance.

A. Standard of Review.

An appellate court will reverse on a claim of instructional error only if there is error in submitting an instruction and prejudice to the defendant. *Zink*, 181 S.W.3d at 74. MAI instructions are presumptively valid and, when applicable, must be given to the exclusion of other instructions. *Id.*

B. Analysis.

In submitting the statutory aggravating circumstances, the court followed the Notes on Use to MAI-CR 3d 314.40:

Whether the defendant had (a) (one or more) serious assaultive conviction(s) in that he was convicted of [*Insert name of serious assaultive crime.*] on [*date*], in the [*name of court*] of [*name of county, district, etc.*] of [*name of state*] because defendant [*Identify brief facts to establish that crime was a serious assaultive conviction.*] (.) (And [*Specify other serious assaultive convictions in the same manner.*]).

MAI-CR 3d 314.40, ¶ 1B (Mar. 1, 2006). Appellant’s claim that the prior assaultive convictions should not be listed separately has been repeatedly rejected by this Court. *Taylor*, 18 S.W.3d at 378 n.18; *State v. Ramsey*, 864 S.W.2d 320, 337 (Mo. banc 1993); *Clemmons*, 753 S.W.2d at 911-12. As those cases noted, a jury finding of a single aggravating circumstance is sufficient for the jury to consider imposing the death penalty, and submitting several convictions as one aggravating circumstance could confuse the jury. *Clemmons*, 753 S.W.2d at 911-12.

Appellant’s argument that those cases are no longer viable in light of this Court’s decision in *Whitfield* is not well taken. *Whitfield* simply addresses the issue of whether a judge, rather than a jury, can make any of the factual findings on which eligibility for the death penalty is predicated. *State v. Whitfield*, 107 S.W.3d 253, 256 (Mo. banc 2003). *Whitfield* does not sweep any more broadly than that, and nothing in that opinion changes the analysis that a jury finding of any conviction that qualifies as serious assaultive “is sufficient to meet this threshold requirement for jury consideration of the death penalty.” *Clemmons*, 753 S.W.2d at 912.

Furthermore, Appellant hasn’t shown how a different instruction would lead to a different result. In order for the jury to find the existence of one or more serious assaultive convictions, it would have to be informed of at least the fact of those convictions. Appellant does not argue otherwise. In weighing the aggravating circumstances against the mitigating circumstances, the jury will most likely consider not

only the number of convictions, but also the nature of the offenses. Since the jury is not instructed that it has to give any special weight to the number of aggravating or mitigating circumstances, it will almost certainly give the same assessment to the prior convictions regardless of whether they are listed separately or grouped together as a single aggravating circumstance. The instruction submitted by the trial court complied with MAI and the substantive law, and did not prejudice Appellant.

XIII.

Evidence and instructions in penalty phase.

Appellant claims the trial court erred, plainly erred, and abused its discretion in admitting during the penalty phase evidence of his prior bad acts and unadjudicated misconduct, and in submitting Instructions Nos. 19, 20, and 21, because the jury received no guidance on how to consider that evidence and was told that the defense bore the burden of proof. By joining unrelated claims of evidentiary and instructional error, Appellant's Point Relied On violates Rule 30.06, which prohibits multifarious allegations of error. *Thompson*, 985 S.W.2d at 784 n.1; Supreme Court Rules 30.06(c) and 84.04(d).

The argument portion of Appellant's Brief does not address the admissibility of the penalty phase evidence, but instead discusses how the jury was instructed to consider that evidence. Appellant has failed to present any claim of error for this Court to review regarding the admission of that evidence. *State v. Nicklasson*, 967 S.W.2d 596, 608 (Mo. banc 1998). Some of the evidence and argument discussed by Appellant was raised in other points of his Brief. Respondent refers the Court to the argument made under those points in this Brief, and will focus in this point on the claim of instructional error.

A. Standard of Review.

An appellate court will reverse on a claim of instructional error only if there is error in submitting an instruction and prejudice to the defendant. *Zink*, 181 S.W.3d at 74.

MAI instructions are presumptively valid and, when applicable, must be given to the exclusion of other instructions. *Id.*

B. Analysis.

Instruction 19 was based on MAI-CR 3d 314.44; Instruction 20 on MAI-CR 3d 314.46; and Instruction 21 on MAI-CR 3d 314.48. (Tr. 1531, 1533-34). Appellant's claim that those instructions failed to properly guide the jury in considering that evidence, and misstated the burden of proof, have been repeatedly rejected by this Court. *See, e.g., Forrest*, 183 S.W.3d at 229; *Zink*, 181 S.W.3d at 74; *State v. Gill*, 167 S.W.3d 184, 193 (Mo. banc 2005); *State v. Glass*, 136 S.W.3d 496, 520-21 (Mo. banc 2004); *Taylor*, 134 S.W.3d at 30; *Tisius*, 92 S.W.3d at 770; *State v. Cole*, 71 S.W.3d 163, 176 (Mo. banc 2002). Appellant asks this Court to reconsider, but provides no new or persuasive reason for this Court to abandon its repeated and recent precedent.

XIV.

Failure to plead aggravating circumstances in indictment or information.

Appellant claims the trial court erred in not quashing the indictment, in accepting the jury's sentencing recommendation, and in sentencing Appellant to death, because the statutory aggravating circumstances were not pled in the indictment or information.

A. Standard of Review.

The test for the sufficiency of an indictment or information is whether it contains all the essential elements of the offense as set out in the statute creating the offense. *State v. Stringer*, 36 S.W.3d 821, 822 (Mo. App. S.D. 2001). The indictment or information must also clearly advise the defendant of the facts constituting the offense so that he may prepare an adequate defense and prevent retrial on the same charge in case of an acquittal. *Id.* at 822-23.

B. Analysis.

Appellant's claim of error has been repeatedly rejected by this Court. *See, e.g., Forrest*, 183 S.W.3d at 229; *Zink*, 181 S.W.3d at 75; *Gill*, 167 S.W.3d at 194; *Taylor*, 134 S.W.3d at 31; *Cole*, 71 S.W.3d at 171. Appellant raises the issue for preservation purposes and for reconsideration, but provides no new or persuasive reason for this Court to abandon its repeated and recent precedent.

CONCLUSION

In view of the foregoing, Respondent submits that Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned assistant attorney general hereby certifies that:

(1) The attached brief complies with the limitations set forth in Supreme Court Rule 84.06, in that it contains 26,491 words as calculated pursuant to the requirements of Supreme Court Rule 84.06; and

(2) A copy of the brief has been supplied to the Court in diskette form on a diskette that has been scanned and found to be virus free; and

(3) A true and correct copy of the attached brief and a diskette containing a copy of this brief were mailed on December 27, 2006, to:

Janet M. Thompson
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