

No. SC88181

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In the  
Supreme Court of Missouri

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STATE OF MISSOURI,

Respondent,

v.

SCOTT A. MCLAUGHLIN,

Appellant.

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Appeal from St. Louis County Circuit Court  
Twenty-First Judicial Circuit  
The Honorable Steven H. Goldman, Judge

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RESPONDENT'S BRIEF

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## **JURISDICTIONAL STATEMENT**

This appeal is from a conviction after a jury trial obtained in the Circuit Court of St. Louis County. Appellant was convicted of first degree murder, § 565.020, RSMo 2000,<sup>1</sup> armed criminal action, § 571.015, and forcible rape, § 566.030. He was sentenced as a persistent offender to consecutive terms of death for first degree murder, life for armed criminal action, and life for forcible rape. Since Appellant was sentenced to death, the Supreme Court of Missouri has exclusive appellate jurisdiction. *See* Article V, § 3, Missouri Constitution (as amended 1982).

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<sup>1</sup> All statutory references are to RSMo 2000 unless otherwise noted.

## STATEMENT OF FACTS

Appellant was charged with first degree murder, forcible rape, and two counts of armed criminal action. (L.F. 756-757). The case proceeded to jury trial on September 25, 2006, in the Circuit Court for St. Louis County before the Honorable Steven H. Goldman. (L.F. 15, 909). In the light most favorable to the verdict, the following evidence was produced at trial:

During November of 2003, Beverly Guenther was working at Compucard in Earth City. (Tr. 800, 948). Her shift was from 9:00 a.m. to 6:00 p.m. (Tr. 803-804, 949). By November, it was nighttime at 6:00 p.m. and very dark outside. (Tr. 803-804, 824, 863, 1198). There were no streetlights so it was dark near the office building. (Tr. 855-856, 959).

Appellant and Guenther had been in a relationship. (Tr. 802-803, 819). The relationship had many ups and downs, and Guenther and Appellant had broken up several times and gotten back together over the course of a year. (Tr. 813, 918, 832, 961). At some points, Appellant and Guenther were living together, but Appellant had moved out in March. (Tr. 819-820, 821-822, 841, 874, 949). In September, they broke up again, and Guenther was serious about the breakup. (Tr. 802, 816, 821-822, 841-843).

During the course of Guenther's relationship with Appellant, one of Guenther's neighbors, Virginia Aurich, had seen Appellant and Guenther get into verbal

arguments. (Tr. 834). Aurich had also witnessed one incident where Appellant got angry while playing cards and lifted up the table. (Tr. 836-837). During another incident, Appellant had thrown a radio at Guenther. (Tr. 838-839). About a year before Guenther's death, Aurich saw a man trying to stop Appellant from hurting Guenther. (Tr. 844). Aurich noticed a mirror that had been broken with a barstool, and there was blood on the man's shirt. (Tr. 844-845).

A couple of times in October and November, 2003, Aurich had seen Appellant sitting on the street behind Guenther's house and watching to see whether Guenther was coming or going . (Tr. 822).

On October 27, 2003, another of Guenther's neighbors saw Appellant burglarizing Guenther's house. (Tr. 874-876, 898). When police arrived, Appellant fled in his car. (Tr. 899). When he was apprehended, Appellant told police that he had gone to Guenther's house to take some things that were already his (a pool cue, a tool box, an RC car, clothes, a stereo, holiday decorations, DVDs, and VHSs). (Tr. 927-928). Appellant said he was going to take the deep freeze and bed, but he left them. (Tr. 928). He said he heard sirens and took off. (Tr. 928). The officer who arrested Appellant noted that there was several items in Appellant's car that were not on the list of items he claimed to have owned (including a make-up kit, a cookie tin, a robe, some deodorant, a toothbrush, and some samples of Lexapro). (Tr. 942).

Appellant was released on bond, and an arraignment was set for November 18. (Tr. 936).

Both before and after they broke up, Appellant would frequently call Guenther at work, making a nuisance of himself. (Tr. 803, 814, 956, 961-962). After they broke up, he continued to come by her office. (Tr. 816, 823-824). Appellant would hide in various places around the office, sometimes during the day and sometimes later. (Tr. 816). A lot of times, Appellant would come to the office after Guenther's co-workers had left for the day. (Tr. 806-807).

A few weeks before November 20, Guenther's boss decided that Appellant was not allowed to come to Compucard anymore. (Tr. 951). That afternoon, Appellant came by the office, but Guenther's boss told him he could not come in. (Tr. 951). Appellant left for about five minutes before he returned, holding his hand, crying, and bleeding profusely. (Tr. 951). Guenther's boss treated Appellant's hand with a first aid kit, but Appellant would not say what was wrong. (Tr. 951-952, 954).

Also a few weeks before November 20, Appellant visited his nephew and said that his life would be over without Guenther. (Tr. 1032). At some point, Appellant had told Guenther's neighbor, Aurich, that if he could not have Guenther, no one would. (Tr. 827).

Guenther had obtained an order of protection against Appellant. (Tr. 1165). The court had received return of process on November 20, 2003. (Tr. 1165). There was a hearing set for November 21 at 9:00 a.m. (Tr. 1166).

In late October and early November, officers from the St. Louis Police Department went to Guenther's work to escort her to her car from or to park across the street around the time that Guenther got off work. (Tr. 854-858, 862-865).

On November 20, 2003, Guenther was alone in the office after 4:00 p.m. with the building's door locked. (Tr. 806-807, 955).

Around 4:00 or 5:00 p.m. on November 20, Appellant went to his brother's house. (Tr. 971-972, 975). Appellant told his brother's roommate, "I'm fucking killing that bitch." (Tr. 974-975). Appellant said he did not want to be locked up because of "her." (Tr. 978). Appellant left about fifteen minutes later by himself. (Tr. 975, 977).

Appellant returned to his brother's house at about 7:30 p.m. (Tr. 978). Appellant was acting scared, and he had blood on his face, shirt, and arms. (Tr. 978-980). Appellant washed up at his brother's house. (Tr. 979).

When Guenther did not come home on November 20, her neighbors called her boss who then called the police. (Tr. 877, 957, 1017). When police arrived, they found Guenther's truck parked next to a bush. (Tr. 1023). There was a flashlight on the ground near the victim's truck. (Tr. 1023-1024).

There was a trail of dried blood on the pavement starting to the west of Guenther's truck. (Tr. 1020, 1092, 1143-1144). Initially there were just droplets, but the trail became larger and looked like puddles. (Tr. 1099). The trail led to a pack of cigarettes and a broken knife handle three inches long. (Tr. 1020, 1085). The trail continued increased in size until it ended at one of the parking spots. (Tr. 1020-1021, 1163). ). There was no blood on the path from the office door to the victim's truck. (Tr. 1027).

There were marks in the blood trail that looked like drag marks. (Tr. 1100, 1163). Stains at one point showed a fan shape, which were consistent with an arterial wound and indicated that the source was close to the ground at the time. (Tr. 1103, 1293). There were also arcing and slung patterns consistent with a violent struggle. (Tr. 1113). Subsequent DNA testing revealed that the blood was consistent with Guenther's DNA. (Tr. 1354-1355).

Early in the morning on November 21, Appellant called a woman he was getting to know, Shenia Hodges, and asked for a ride, saying he had a flat tire. (Tr. 1046). Hodges refused and went back to sleep. (Tr. 1046).

Around 6:00 a.m. on November 21, Appellant appeared at his nephew's house. (Tr. 1033). Appellant lay down on the sofa. (Tr. 1033-1034). His eyes were black and sunken, and he "stunk real bad" as if he had rolled in a sewer. (Tr. 1034).

When Hodges arose in the morning, she went to Appellant's nephew's house. (Tr. 1047). Appellant's car was there, and Appellant was inside sleeping on the couch. (Tr. 1047). His arms were all scratched up, and his jeans were dirty. (Tr. 1047). Hodges took Appellant to get his paycheck and then to Wal-Mart to buy some bleach. (Tr. 1047, 1050). Appellant said he was going to pour the bleach in his car because he had a broken window, and his car smelled like mildew. (Tr. 1050-1051). When the two returned to Appellant's nephew's house, Appellant stayed outside poured the bleach in his car. (Tr. 1051).

Later that night, Appellant started getting antsy and asked Hodges to take him to the hospital. (Tr. 1052). Appellant's grandmother informed police that Appellant was on the way to the hospital, and when Appellant and Hodges arrived at the hospital, police were there waiting to arrest Appellant. (Tr. 1054-1055, 1063, 1171).

Officers brought Appellant to the police station in Clayton. (Tr. 1070). There, they asked if Appellant needed anything to drink and allowed him to use the restroom. (Tr. 1072). Appellant waived his *Miranda* rights. (Tr. 1178-1179). Appellant initially denied any knowledge of where Guenther was or any involvement in her disappearance. (Tr. 1185). Later, Appellant admitted that Guenther was dead and that he had dumped her in the river off of South Broadway. (Tr. 1185).

Appellant then led detectives to Guenther's body. (Tr. 1185-1187). It was a dark and remote area. (Tr. 1122-1123). The location was about two or three blocks

from Appellant's brother's house. (Tr. 1228, 1237). Detectives could not park where Appellant had parked because it was muddy, and they were afraid of getting stuck. (Tr. 1188). Appellant said that he had almost gotten stuck also. (Tr. 1188). Appellant led the detectives to a hill with some very thick brush. (Tr. 1188). Through the brush was a steep hill to some railroad tracks. (Tr. 1188). Appellant led detectives down to a tree and indicated where the body was. (Tr. 1188).

The decline leading to the riverbank was very rough and overgrown. (Tr. 1124). It was dangerous to walk on. (Tr. 1124). Guenther's body was about twenty feet down the river bank. (Tr. 1145). Guenther's body had on a bra and white flowered blue dress, which had been pulled up so that she was naked from the chest down. (Tr. 1125, 1263, State's Ex. 38, 39). The dress and bra were both darkly stained in blood. (Tr. 1125). There was a ligature around Guenther's feet. (Tr. 1149, 1263).

Appellant returned with detectives to the police station and made a videotaped statement. (Tr. 1192-1194). Appellant said he had gone to Guenther's workplace and waited for her, kneeling down by the steps. (State's Ex. 70, 71). Appellant said that when Guenther got to the bottom of the steps, he raised up and called her name. (Tr. 1222, State's Ex. 70, 71). Guenther said she did not want to talk to him. (State's Ex. 70, 71). Appellant said he had been keeping a knife in his car for months, but this night he had the knife in his back pocket. (Tr. 1224-1225, State's Ex. 70, 71).

Appellant said that for some reason, he pulled out the knife and stabbed Guenther. (Tr. 1225). Appellant did not know how many times he stabbed her. (State's Ex. 70, 71). At some point, Appellant said, Guenther fell to the pavement, and he drug her to his car. (State's Ex. 70, 71).

Appellant told detectives he thought Guenther was dead when he put her in his car. (Tr. 1227, State's Ex. 70, 71). Appellant said he went to his brother's house because he wanted to "get rid of" Guenther. (Tr. 1248). He said he had taken the victim's clothes off because he wanted her to sink in the river. (State's Ex. 70, 71). Appellant said he placed the twine on Guenther's feet and then drug and carried her to the riverbank. (State's Ex. 70, 71). Appellant said he was alone at the time. (State's Ex. 70, 71). During the interview, detectives noticed that Appellant had scratch marks on his face and arms. (Tr. 1189, 1200). Appellant said he got those from Guenther during the struggle. (Tr. 1199).

The police took the shirt and jeans that Appellant had been wearing at his nephew's house. (Tr. 1036-1037). Blood on the jeans was consistent with the victim's DNA. (Tr. 1356). Police also seized a bottle of bleach found on the kitchen floor of Appellant's nephew's house. (Tr. 1074). Appellant's friend, Hodges, gave police a Wal-Mart receipt that included purchases of bleach, athletic shoes, and fleece pants. (Tr. 1175-1176).

Police seized Appellant's car and found that it had a flat tire. (Tr. 1172). In the cargo area of the car, there were red stains going down towards where the spare tire was kept. (Tr. 1115-1116, 1173). The stains pooled by the bottom of the trunk area. (Tr. 1116). There were sections of fabric missing from the back of the rear seat. (Tr. 1117, 1173). There were also several large pieces of fabric missing from the back seat. (Tr. 1118, 1173). There was a utility knife and a carpet knife in the back that could have been used to cut the seat fabric. (Tr. 1117). There was a strong odor of bleach in the car. (Tr. 1173). Blood in Appellant's car was consistent with Guenther's. (Tr. 1356).

The autopsy revealed that Guenther had several injuries inflicted before her death, including a scratch on the right side of her face, abrasions on her upper eyelid, cheekbone, and cheek, a bruised and swollen nose, and bruises on the inside of her lip and around her lower lip. (Tr. 1256). There was also a hemorrhage under the white of her eye and areas of tiny hemorrhages called petechial hemorrhages, which is an indication of asphyxiation. (Tr. 1226). Guenther also had abrasions on her wrist and scratches on her neck that appeared to have been inflicted before her death. (Tr. 1268, 1274). There were several additional wounds that came after death, including scratches on the chest and pubic area, abrasions on the legs, back, and buttock, and insect bites. (Tr. 1267-1268, 1269).

Guenther had one stab wound to the right side of her neck. (Tr. 1271). It was 3.4 cm long and about 3 inches deep. (Tr. 1272). The wound partially transected the carotid artery. (Tr. 1272). A portion of the wound penetrated the soft tissue of the vertebral column disk and hit the bones. (Tr. 1227-1273). There was another stab wound injury just below the victim's neck near the clavicle. (Tr. 1274-1275). It was 1.5 cm long and 4 ½ inches deep, but it was not fatal. (Tr. 1275-1276). There was a third stab wound to the shoulder area. (Tr. 1276). It was 1.5 cm in length and penetrated more deeply into the soft tissue, but it did not hit any major structures. (Tr. 1277). A fourth, small stab wound was present on the victim's left forearm. (Tr. 1277-1278). There was a fifth stab wound to the back of the left forearm. (Tr. 1278). It was about 3 ½ inches deep and had caused a lot of bleeding into the muscle. (Tr. 1278). On the left hand, between the thumb and index finger, there was a sixth knife wound, a slice. (Tr. 1279-1280). A seventh knife wound was present as an incision wound to the left middle finger. (Tr. 1280).

The injuries on Guenther's hands were consistent with defensive wounds from the knife blade. (Tr. 1268, 1282). The fatal wound was the stab wound to the neck. (Tr. 1283). With the transaction to the carotid artery, the victim was probably conscious for a few minutes and then died a few minutes later. (Tr. 1287-1288, 1290-1291, 1292).

A vaginal swab taken as part of a rape kit tested positive for semen. (Tr. 1316-1341). The DNA found was a mixture of two individuals, including one male. (Tr. 1346). Appellant and Guenther could not be excluded from the DNA sample. (Tr. 1346). DNA from Guenther's fingernail clippings was tested, and neither Guenther nor Appellant could be excluded as the source. (Tr. 1351).

The Monday following Guenther's death, Appellant called Guenther's office and left a message saying, "Ken and Judi [Guenther's boss and co-worker], I just wanted to say I am sorry for what I did, and I am ashamed of it. By[e]." (Tr. 810).

In March 2004, Appellant called Guenther's neighbor, Aurich, and asked if she knew who it was. (Tr. 828). Appellant then said "[y]ou're next." (Tr. 828).

Appellant decided not to testify during the guilt phase, and he rested without presenting evidence. (Tr. 1378, 1381).

After the close of evidence and arguments, the jury found Appellant guilty of first degree murder, armed criminal action, and forcible rape. (L.F. 16, 842-846).

During the penalty phase, the State presented victim impact testimony from Beverly Guenther's mother, son, and brother. (Tr. 1489, 1495, 1505). It also presented evidence from Officer Judy Doss regarding Guenther's complaints about Appellant and statements in her application for an order of protection. (Tr. 1510, State's Ex. 101). Finally, the State presented documents showing that Appellant had been arrested for a burglary charge with an arraignment scheduled on November 18,

that the victim had filed for an order of protection against Appellant, and that Appellant had been convicted of tampering, sexual assault, forgery, third degree assault, and felony non-support. (Tr. 1515, 1521-1522, 1529, 1530, 1532, 1533, 1534-1535).

During Appellant's penalty-phase case, he called a psychologist to testify about Appellant's social and educational background and how the difficult situations Appellant had faced through parental abandonment, adoption, family instability, and learning disabilities had resulted in an adjustment disorder and attention deficit-hyperactivity disorder. (Tr. 1545-1554). A forensic psychologist added that Appellant had a choice in killing Guenther, but that choice was mitigated by his bad childhood. (Tr. 1693-1696).

Appellant also presented testimony from the woman with whom Appellant had sex as the basis for his sexual assault conviction. (Tr. 1580-1581). She testified that she had a consensual sexual relationship with Appellant when she was fourteen years old and Appellant was nineteen. (Tr. 1576-1578). She testified that she became pregnant, and Appellant was charged related to his relationship with her. (Tr. 1580-1581).

Appellant called his natural aunt to testify about his adoption and early family life. (Tr. 1589). Appellant's biological sister testified about Appellant's rough early home life and life with his adoptive parents. (Tr. 1908-1920).

The trial court submitted statutory aggravators based on whether the crime involved depravity of mind, whether the murder was committed while in the perpetration of forcible rape, whether Guenther was killed because she was a potential witness in a burglary prosecution, and whether Guenther was killed because she was a potential witness in an order of protection investigation. (L.F. 856-857).

After deliberations, the jury was unable to agree on punishment. (L.F. 865, Tr. 1999-2000). It returned a verdict form indicating it had found beyond a reasonable doubt that the killing involved depravity of mind through excessive and repeated acts of violence. (L.F. 865-866. Tr. 2000). It also indicated that it did not unanimously find that the evidence in mitigation of punishment outweighed the evidence in aggravation of punishment. (L.F. 866).

Subsequently the trial court sentenced Appellant as a persistent offender to consecutive terms of death for first degree, life for armed criminal action, and life for forcible rape. (L.F. 17, 909-912, 914-915, Tr. 2005).

Appellant filed a timely notice of appeal. (L.F. 940)

## ARGUMENT

### I

**The trial court did not err in sentencing Appellant to death after the jury was unable to reach a decision regarding punishment.**

Under his first point, Appellant raises two distinct claims that he alleges entitle him to a punishment of life in prison instead of death. First, he argues that the trial court violated *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002), and *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003), when it sentenced Appellant to death after the jury was unable to reach a decision on punishment. (App. Br. 50-55). Appellant argues that the trial court necessarily made its own factual findings in violation of *Ring*, and he claims § 565.030.4 is unconstitutional because it directs the trial court to make factual findings when imposing sentence. (App. Br. 51-52). Because he concludes that the process and statute applied in imposing the death penalty were unconstitutional, Appellant claims that § 565.040 mandates a punishment of life. (App. Br. 51, 58). Appellant's second claim is that he is entitled to a life sentence because the jury instructions required unanimity regarding whether the mitigating evidence outweighed the aggravating evidence when, he claims, the statute does not require the jury to be unanimous. (App. Br. 60-61). However, because the instruction was consistent with the statute and because the jury made the factual findings required by *Ring*, Appellant's point should be denied.

**A. The procedure followed by the trial court did not violate *Ring* or *Whitfield*.**

The trial court did not violate Appellant's constitutional rights as described in *Ring* or *Whitfield* because the jury in Appellant's case made the required factual findings to make Appellant eligible for the death penalty. In *Apprendi v. New Jersey*, the United States Supreme court held that, other than the fact of a prior conviction, Due Process and the Sixth Amendment require the jury to find any fact that increases the punishment for a crime beyond the statutory maximum. 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-2363 (2000). In *Ring v. Arizona*, the Court applied *Apprendi* to hold that the jury, not the judge, must find any statutory aggravating circumstances necessary for imposition of the death penalty. *Ring v. Arizona*, 536 U.S. at 589, 597.

In Appellant's case, the jury made the requisite factual findings for imposition of the death penalty. Missouri's statutory scheme requires the fact finder to follow a four-step process in determining the punishment for murder in the first degree. *See* § 565.030.4. The trier is directed to impose a punishment of life in prison without eligibility for probation or parole:

- (1) If the trier finds by a preponderance of the evidence that the defendant is mentally retarded; or
- (2) If the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances set out in subsection 2 of section 565.032; or

(3) If the trier concludes that there is evidence in mitigation of punishment . . . which is sufficient to outweigh the evidence in aggravation of punishment found by the trier; or

(4) If the trier decides under all of the circumstances not to assess and declare the punishment at death.

*Id.*

This Court in *State v. Whitfield* determined that *Ring* requires the jury to find at least one statutory aggravator pursuant to § 565.030.4. *State v. Whitfield*, 107 S.W.3d at 258-259. It also determined that the jury must make the finding required by § 565.030.4(3) regarding the balance between aggravating and mitigating evidence. *Id.* at 259-261. The fourth step, however, a decision under all of the circumstances not to assess the punishment at death, is a discretionary balancing that does not depend on weighing the actual mitigating and aggravating facts the jury found, and so it does not require a finding by the jury. *Id.*<sup>2</sup>

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<sup>2</sup> *Whitfield* also determined that the jury had to determine that the aggravating circumstances warranted death, which was a separate step under the version of § 565.030.4 applicable at the time. *See State v. Whitfield*, 107 S.W.3d at 259. In 2001, the statute was amended to remove that finding as a separate step in the sentencing analysis. *See Id.* at 259 n. 5.

Appellant conceded that retardation was not at issue, and he elected not to instruct the jury to make a finding under § 565.030.4(1) that he was not retarded. (Tr. 1739). Thus, under *Ring*, *Whitfield*, and Missouri's sentencing statutes, the jury rather than the judge in Appellant's case had to (1) find at least one statutory aggravating circumstance, and (2) not conclude that there was evidence in mitigation sufficient to outweigh evidence in aggravation.

Those were precisely the findings that the jury made. On the verdict form returned, the jury indicated that it had unanimously found a statutory aggravating circumstance beyond a reasonable doubt (that the murder involved depravity of mind and was therefore outrageously and wantonly vile, horrible, and inhuman). (L.F. 865-866); *See* § 565.030.4(2). The jury also did not conclude that there were facts and circumstances in mitigation of punishment sufficient to outweigh facts and circumstances in aggravation of punishment. (L.F. 866); *See* § 565.030.4(3). Those were the only findings the jury was required to make for Appellant to be eligible for the death penalty. *See State v. Whitfield*, 107 S.W.3d at 258-259; § 565.030.4. Since the jury and not the judge made those factual findings, there was no *Ring* violation.

Contrary to Appellant's claim, since the jury made the required findings to make Appellant death-eligible, allowing the trial court to impose punishment and make other findings did not violate *Ring*. Appellant claims that the trial court did not rely on the jury's findings in imposing sentence because the court found that

Appellant had had sex with the victim's body. (App. Br. 52-55). He points out that, though the jury had found Appellant guilty of forcible rape, it did not indicate a finding regarding the statutory aggravator that the killing was committed while Appellant was engaged in the perpetration of forcible rape (and the State did not instruct the jury on a statutory aggravator that the killing involved depravity because Appellant had sex with the victim during the killing or immediately thereafter). (L.F. 842-846, 856, 866, Tr. 2005, App. Br. 52-55). Appellant also complains because the jury's verdict form does not list specific non-statutory aggravators, so the judge could not have used the jury's findings in weighing the evidence as required by § 565.030.4. (App. Br. 55-56).

But *Ring* and *Whitfield* do not require the jury to make every factual finding. They only require the jury to find facts that increase the maximum punishment, that is, the facts that make the defendant eligible for the death penalty. *Ring v. Arizona*, 536 U.S. at 589, 597; *Ex parte Waldrop*, 859 So.2d 1181, 1188 (Ala. 2002) ("This is all *Ring* and *Apprendi* require"); see also *Holmes v. State*, 820 N.E.2d 136, 139 (Ind. 2005) (holding that once a jury finding on a statutory aggravator was shown beyond a reasonable doubt, *Ring* was satisfied). Under *Whitfield* and § 565.030.4, to make Appellant eligible for the death sentence, the jury only had to find at least one statutory aggravator and not conclude that the mitigating evidence outweighed the aggravating evidence.

Neither *Ring* or *Whitfield* preclude the trial court from making findings or imposing punishment once the jury has made the requisite death-eligibility findings. *See Ring v. Arizona*, 536 U.S. at 612-613 (Scalia, J., concurring). Other courts addressing the question under *Ring* have held that *Ring* only requires the jury to make initial death-eligibility findings and does not preclude the judge from making additional findings. *See Brice v. State*, 815 A.2d 314, 322 (Del. 2003) (holding that the jury need not find the specific non-statutory aggravators relied upon by the judge in imposing a death sentence); *Holmes v. State*, 820 N.E.2d at 139 (above); *Ex parte Waldrop*, 859 So.2d at 1188 (above).

In Appellant's case, since the jury had made the requisite findings to make the death penalty a possibility, the trial judge was not prohibited by *Ring* from making additional factual findings or from imposing a death sentence.

Also, contrary to Appellant's claim (App Br. 55-56), the jury's findings were not insufficient to allow this Court to undertake an analysis to determine that the punishment was appropriate and supported by the evidence. That analysis would be no different in Appellant's case than a case where the jury had returned a death sentence after finding the killing involved depravity of mind and not finding that the mitigating evidence outweighed the aggravating evidence.

In sum, since the verdict form shows that the jury made the factual findings necessary to make Appellant death-eligible, the procedure followed did not violate *Ring*. Appellant's claim to the contrary should be denied.

**B. Section 565.040 does not apply because neither § 565.030 nor the death penalty imposed were unconstitutional.**

Contrary to Appellant's claim, § 565.040 would not apply in Appellant's case because neither the procedure followed nor § 565.030.4 are unconstitutional. Under § 565.040.1, if "the death penalty provided in [Chapter 565] is held to be unconstitutional, any person convicted of murder in the first degree shall be sentenced by the court to life imprisonment . . ." Likewise, under § 565.040.2, if "any death sentence imposed pursuant to [Chapter 565] is held to be unconstitutional, the trial court which previously sentenced the defendant to death shall cause the defendant to be brought before the court and shall sentence the defendant to life imprisonment . . ." Appellant claims that § 565.040 mandates a sentence of life imprisonment in his case because, he claims, the procedure required by § 565.030.4 is unconstitutional under *Ring* as it calls for the judge to make death-eligibility findings when the jury is unable to determine punishment. (App. Br. 51-52). However, neither the procedure in § 565.030 nor the procedure followed in Appellant's case are unconstitutional.

First, as noted above, the procedure followed in Appellant's case was constitutional because the jury made the requisite findings to make Appellant death

eligible. That is all that *Ring* and *Whitfield* require. See *Ring v. Arizona*, 536 U.S. at 612-613 (Scalia, J., concurring).

Second, § 565.030.4 is not unconstitutional because it does not require the trial court to violate *Ring*. Appellant complains because § 565.030.4 has not been amended since *Ring* or *Whitfield*. (App. Br. 51). But *Whitfield* did not hold that § 565.030.4 was unconstitutional. It only held that the findings now included in paragraphs (2) and (3) of § 565.030.4 must be made by a jury rather than a judge. See *Whitfield*, 107 S.W.3d at 258-259. And section 565.030.4 does not require the trial court to make those findings in absence of a jury finding. It only requires the judge to follow the steps outlined for the trier of fact and make the findings “whenever it is required to determine punishment for murder in the first degree.” § 565.030.4.

Where the jury has already made the findings required by *Whitfield* and *Ring*, the judge making independent findings by following the procedure in § 565.030.4 does not violate *Ring*. See *Brice v. State*, 815 A.2d at 322; *Holmes v. State*, 820 N.E.2d at 139; *Ex parte Waldrop*, 859 So.2d at 1188 (above). To the contrary, it provides an extra level of protection through an additional chance for the defendant to be spared the death penalty (such as when the trial court disagrees with the jury about whether a statutory aggravator was proved or whether the mitigating evidence outweighed the aggravating evidence). Since neither § 565.030.4 nor the procedure

applied in Appellant's case are unconstitutional, § 565.040 does not apply, and the trial court's sentence should stand.

**C. Instruction 24 and 26 were proper.**

The penalty-phase instructions in Appellant's case correctly charged the jury to return a verdict indicating whether they had concluded that the mitigating evidence outweighed the aggravating evidence unanimously. Besides challenging the constitutionality of § 565.030.4 and the procedure the trial court followed, Appellant claims that his death sentence should be reversed based on instructional error. (App. Br. 60). He argues that Instructions No. 24 and 26 told the jury to indicate whether it concluded that the mitigating evidence outweighed the aggravating evidence unanimously when, according to Appellant, the statute does not require unanimity. (App. Br. 61).

Appellant's claim regarding the instructions was not preserved and should be reviewed, if at all, for plain error only. Appellant did not include his claim regarding the unanimity requirement of the instruction in his point relied on. (App. Br. 50). Rule 84.04(d) requires every claim of error to be set out in the point relied on. Claims not raised in a point relied on are deemed abandoned. *State v. Shaw*, 847 S.W.2d 768, 773 n. 4 (Mo. banc 1993); *Brizendine v. Conrad*, 71 S.W.3d 587, 593 (Mo. banc 2002). They should be reviewed only under this Court's discretionary power to review claims for plain error. *See Brizendine v. Conrad*, 71 S.W.3d at 593 n. 5.

Since Appellant failed to include his claim regarding the instructions in his point relied on, this court should review his claim regarding the alleged instructional error, if at all, for plain error only. *See Id.*

The first challenged instruction, Instruction No. 24, was provided to the jury as follows:

As to Count I, if you have unanimously found beyond a reasonable doubt that one or more of the statutory aggravating circumstances submitted in Instruction No. 23 exists, you must then determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh the facts and circumstances in aggravation of punishment.

In deciding this question, you may consider all of the evidence presented in both the guilt and the punishment states of trial, including evidence presented in support of the statutory aggravating circumstances submitted in Instruction No. 23, and evidence presented in support of mitigating circumstances submitted in this instruction.

You shall also consider any fact or circumstances which you find from the evidence in mitigation of punishment.

It is not necessary that all the jurors agree upon particular facts and circumstances in mitigation of punishment. If each juror determines

that there are facts or circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

(L.F. 858).

The second instruction, Instruction 26, read as follows:

You will be provided with forms of verdict for your convenience. You cannot return any verdict imposing a sentence of death unless all twelve jurors concur in and agree to it, but any such verdict should be signed by your foreperson alone.

As to Count I, if you unanimously decide, after considering all of the evidence and instructions of law given to you, that the defendant must be put to death for the murder of Beverly Guenther, your foreperson must complete the verdict form and write into your verdict all of the statutory aggravating circumstances submitted in Instruction No. 23 which you found beyond a reasonable doubt. The foreperson will sign the verdict form so fixing the punishment.

If you unanimously decide that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in

aggravation of punishment, then the defendant must be punished for the murder of Beverly Guenther by imprisonment for life by the Department of Corrections without eligibility for probation or parole, and your foreperson will sign the verdict form so fixing the punishment.

If you unanimously decide, after considering all of the evidence and instructions of law, that the defendant must be punished for the murder of Beverly Guenther by imprisonment for life by the Department of Corrections without eligibility for probation or parole, your foreperson will sign the death verdict form so fixing the punishment.

If you are unable to unanimously find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, as submitted in Instruction No. 23, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

If you do find unanimously the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, as submitted in Instruction No. 23, and you are unable to unanimously find that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, but are unable to agree upon the punishment, your foreperson will complete the verdict form and

sign the verdict form stating that you are unable to decide or agree upon the punishment. In such case, you must answer the questions on the verdict form and write into your verdict all of the statutory aggravating circumstances submitted in Instruction No. 23 that you found beyond a reasonable doubt and your foreperson must sign the verdict form stating that you are unable to decide or agree upon the punishment.

If you return a verdict indicating that you are unable to decide or agree upon the punishment, the Court will fix the defendant's punishment at death or at imprisonment for life by the Department of Corrections without eligibility for probation or parole. You will bear in mind, however, that under the law, it is the primary duty and responsibility of the jury to fix the punishment.

When you have concluded your deliberations you will complete the applicable forms to which all twelve jurors agree and return them with all unused forms and the written instructions of the Court.

(L.F. 860-862).

Instructions 24 and 26 were proper. First, the instructions complied with MAI. "MAI instructions are presumptively valid and, when applicable, must be given to the exclusion of other instructions." *State v. Zink*, 181 S.W.3d 66, 74 (Mo. banc 2005). The applicable MAI directs the court to instruct the jury to find whether they are

unanimous in concluding that the mitigating evidence outweighed the aggravating evidence. *See* MAI-CR3d 314.48 (“If you do unanimously find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, as submitted in Instruction No. [Insert the number given to MAI-CR 3d 314.40.], and you are unable to unanimously find that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, but are unable to agree upon the punishment”). The instructions in this case tracked the applicable MAI. *Compare* Instruction No. 24 with MAI-CR3d 314.44 and Instruction No 26 with MAI-CR3d 314.48. As such, the trial court did not plainly err in submitting the instructions. *See State v. Zink*, 181 S.W.3d at 74.

Second, Instructions No. 24 and 26 properly instructed the jury according to the statute. Section 565.030.4(3) requires the trier of fact to return a sentence of life in prison “[i]f the trier concludes that there is evidence in mitigation of punishment, . . . which is sufficient to outweigh the evidence in aggravation of punishment found by the trier.”

This Court has rejected the claim that such instructions improperly raise the defendant’s burden by requiring unanimity. *See State v. Zink*, 181 S.W.3d 66, 74 (Mo. banc 2005). Rather, the MAI-patterned instructions “in no way preclude the jury from giving proper effect to the mitigating evidence.” *Id.* That is the logical conclusion from the use of the words “if the trier concludes” in the statute, which

suggests that the jury as a whole, and not a specific number of jurors, must conclude that mitigating evidence outweighs aggravating evidence. § 565.030.4(3). Appellant complains that under the instruction, some jurors may have concluded that the mitigating evidence outweighed the aggravating evidence, but the same verdict form would have been returned. (App. Br. 61). But that result is consistent with the statute. If some jurors believe that the aggravating evidence exceeded the mitigating evidence (or even that the evidence was in equipoise), then the “trier” did not conclude that the mitigating evidence outweighed the aggravating evidence.

Consequently, instructing that each juror should independently consider the mitigating evidence and then indicate whether the jury unanimously concluded that it outweighed the aggravating evidence (even if they did not agree on what that mitigating and aggravating evidence was) does not misstate the law or misdirect the jury. Since the trial court properly instructed the jury as to consideration of mitigating evidence, Appellant’s sub-point challenging the instructions should be denied.

## II

**The trial court did not err in denying Appellant's motion for judgment of acquittal of forcible rape or in denying Appellant's request for a converse instruction telling the jury to acquit if there was a reasonable doubt about whether the victim was alive when Appellant raped her. There was sufficient evidence for the jury to find that Appellant forcibly raped the victim while she was alive, and Appellant's converse was not a correct statement of the law.**

In Appellant's second point, he raises two distinct claims that he argues entitle him to reversal on his conviction for forcible rape. (App. Br. 65). First, Appellant challenges the sufficiency of evidence that he forcibly raped the victim, claiming there was insufficient evidence that he raped the victim before she died rather than after. (App. Br. 71). He argues that as a matter of law, the victim of a rape must be alive at the time of sexual intercourse. (App. Br. 68-69). Second, Appellant claims the trial court erred in refusing his proposed converse instruction, which told the jury to acquit him of rape if they had a reasonable doubt about whether the victim was alive at the time of sexual intercourse. (App. Br. 76). Because there was sufficient evidence that the victim was alive at the time of the rape and because the trial court correctly concluded that forcible rape can be consummated after the victim is dead as long as it followed a continuous assault while the victim was alive, Appellant's sub-points should be denied.

**A. There was sufficient evidence that Appellant forcibly raped the victim.**

Contrary to Appellant's claim, there was sufficient evidence that the victim was alive when he had sex with her. Thus, regardless of whether a conviction for forcible rape requires the victim to have been alive at the moment of penetration, there was sufficient evidence to convict Appellant. In determining the sufficiency of the evidence, a reviewing court accepts as true all the evidence favorable to the state, including all favorable inferences drawn from the evidence, and disregards all contrary evidence and inferences. *State v. Grim*, 854 S.W.2d 403, 405 (Mo. banc 1993). An appellate court neither weighs the evidence, nor determines the eligibility or credibility of the witnesses. *State v. Villa Perez*, 835 S.W.2d 897, 900 (Mo. banc 1992). The determination is limited to whether there is substantial evidence from which a reasonable jury might have found the defendant guilty beyond a reasonable doubt. *State v. Silvey*, 894 S.W.2d 662, 673 (Mo. banc 1995).

“A person commits the crime of forcible rape if such person has sexual intercourse with another person by the use of forcible compulsion.” § 566.030. Forcible compulsion is either “[p]hysical force that overcomes reasonable resistance” or a threat “that places a person in reasonable fear of death, serious physical injury or kidnapping of such person or another person.” § 556.061(12). Appellant does not claim that beating, strangling, stabbing, or killing the victim was insufficient forcible compulsion under the statute or that evidence that his semen was found in the victim's

vagina was insufficient proof that he had sexual intercourse with her. He only claims there was insufficient evidence to show that the victim was alive at the moment of penetration. (App. Br. 71-74).

There was sufficient evidence that the victim was alive when Appellant had sex with her. First, the evidence showed there was a struggle in the parking lot and that Appellant did not simply begin stabbing Guenther. Guenther had a bruised nose and scratches on her wrists, face, and neck that were inflicted while she was still alive. (Tr. 1256, 1268, 1274). She also had a hemorrhage under the white of her eye and areas of petechial hemorrhages, indicating asphyxiation. (Tr. 1226). Appellant had scratch marks on his face and arms that he said he got from Guenther during the struggle, and Guenther had Appellant's DNA under her fingernails. (Tr. 1199, 1351). Given that the fatal stab wound to the neck would have killed Guenther in several minutes (Tr. 1287-1288, 1290-1291, 1292), it is reasonable to conclude that Appellant struggled with Guenther and choked her some time before the stabbing. Also, the blood in the parking lot was found only west of the victim's car, and there was no blood along the path from the office door to her truck, supporting the conclusion that the struggle preceded the stabbing. (Tr. 1027, 1143-1144). Stains in the blood trail demonstrated a fan shape, which suggested that the victim had been on the ground. (Tr. 1103).

Besides evidence of the struggle preceding the stabbing, Appellant had ended a relationship with Guenther, and he had been stalking and harassing her since they broke up. (Tr. 802, 806-807, 816, 821-822, 823-824). Appellant had also said that his life would be over without Guenther and that if he could not have her, no one would. (Tr. 827, 1032). That provided evidence of some the evidence of a motive for the rape. That evidence, taken together, creates a reasonable picture that Appellant was obsessed with Guenther. He went to her work after dark, he accosted her in the parking lot. Instead of stabbing her immediately, he struggled with her, pushing her down and choking her. During that struggle, it was reasonable to conclude that Appellant raped the victim and that he then stabbed her to death.

Appellant argues that the rape could have occurred later, such as when Appellant brought Guenther's body to the river for disposal. (App. Br. 71-73). But his argument ignores the standard of review. And the only evidence that Appellant may have had sex with the victim anywhere else was from an offer of proof during the penalty phase that was ultimately and properly excluded as hearsay (addressed in Point IX). The evidence as a whole supported the inference that the rape was committed during a struggle on that parking lot either before or while Appellant stabbed the victim. There was no evidence at the guilt phase that Appellant had sex with the victim anywhere other than the parking lot.

The fact that the jury acquitted Appellant of the armed criminal action charge associated with the forcible rape does not show, as Appellant claims, that the jury believed Appellant had sex with the victim's body after she was dead. (App. Br. 73-74). Appellant claims that the jury's verdict showed that they did not believe the stabbing was the forcible compulsion used. (App. Br. 74). But the acquittal of armed criminal action could have simply been an act of lenience by the jury. *See State v. Bratton*, 92 S.W.3d 275, 278 (Mo.App., W.D. 2002) (holding that that there was evidence to convict of both armed criminal action and the related charge and that acquittal of armed criminal action indicated only that the jury had shown lenience). Also, other than the stabbing, there was evidence that Appellant had struggled with and choked the victim. (Tr. 1199, 1226, 1256, 1351). There was further evidence that the victim was on the ground when Appellant stabbed her. (Tr. 1103, 1293). Given the evidence of Appellant's relationship with the victim and the struggle at the parking lot, the jury could have concluded that Appellant forcibly raped the victim by choking her before he stabbed her, which is consistent with finding that the knife was not the weapon used. Thus, the fact that the jury did not convict Appellant of armed criminal action does not mean that they did not believe that Appellant had sex with the victim before she died.

Finally, despite Appellant's argument to the contrary (App. Br. 74), the fact that the jury inquired during deliberations about whether it is rape if a person has sexual

intercourse with a person who is deceased did not show that there was insufficient evidence to support the conviction for rape. (L.F. 840, Tr. 1450). That question did not show the jury believed the victim was already dead at the time that Appellant had sexual intercourse with her. It only indicated that it was a question that the jury was considering during in its deliberations.

Since there was evidence that Appellant beat and choked the victim, that he had her on the ground, and that he victim would have died quickly after the stabbing, and since there was no evidence that Appellant had sex with the victim anywhere else, the evidence supported a reasonable inference that the victim was alive when Appellant had sex with her. As such, whether forcible rape requires a victim who was alive at the moment of penetration, there was sufficient evidence to convict Appellant.

**B. The trial court did not err in refusing Appellant's Instruction A.**

Ultimately, whether the victim was alive was immaterial because rape can be committed even after a victim dies. And for that reason, and because of the general rule governing converse instruction, the trial court did not err in denying Appellant's request for a converse

Appellant's proposed instruction was as follows:

INSTRUCTION NO. A

If you have a reasonable doubt as to whether Beverly Guenther was alive at the time that the defendant had sexual intercourse with her,

you must find the defendant not guilty under Count III of forcible rape as submitted in Instruction No. \_\_\_\_.

(L.F. 836).

First, Appellant was not entitled to have the court instruct based on Instruction A because he had already offered a converse on whether the jury believed Appellant used forcible compulsion. “A defendant is entitled to only one MAI-CR 3d 308.02 [that is, one converse instruction] for each verdict director. . . .” MAI 308.02 Note 2. Appellant offered, and the trial court accepted, Appellant’s proposed instruction that conversed the element of forcible compulsion. (L.F. 831). It appears that Appellant submitted both suggested converse instructions at the same time. (Tr. 1385). It is not clear from the record whether Appellant would have preferred his proposed converse on forcible compulsion or his instruction on whether the victim was alive. Since Appellant submitted two converse instruction and since he was only entitled to one, the trial court did not err in denying Appellant’s Instruction A.

Second, Appellant was not entitled to an instruction on whether the victim was alive at the time of sexual intercourse because the instruction was not a proper statement of the law. Currently, the states are divided regarding whether a victim must be alive at the time of sexual intercourse to constitute rape or whether the act cannot be rape even if the person dies only moments before penetration. *See Lipham v. State*, 364 S.E.2d 840, 842-843 (Ga. 1988) (holding that the evidence supported a

rape conviction whether or not the defendant raped and then killed the victim or first killed her and then raped her), *Doyle v. State*, 921 P.2d 901, 913 (Nev. 1996) (holding that rape requires a live victim and collecting cases coming to different results).<sup>3</sup> This Court should adopt the better view that forcible rape can be committed upon a dead person so long as that person was alive when the force used in perpetrating the rape was begun. *See Com. v. Waters*, 649 N.E.2d 724, 726 (Mass. 1995); *State v. Jones*, 705 A.2d 805, 813 (N.J. Super. 1998) (applying the continuing force approach).

There are several reasons why applying the forcible rape statute to rapes committed during a continuing assault makes sense. Where a defendant kills a victim in order to have sex with her, he has nonetheless employed forcible compulsion to overcome her resistance and have sexual intercourse with her. *See State v. Collins*, 585 N.E.2d 532, 536 (Ohio App., 1990) (reasoning that a defendant who kills his victim has nonetheless compelled her to submit to sexual intercourse through force). “If the element of force is satisfied where the defendant has used less than deadly force to overcome the victim’s resistance so as to allow him to have carnal knowledge of the victim, the element of force is surely no less satisfied when the defendant has used deadly force to accomplish his aim.” *Lipham v. State*, 364 S.E.2d at 842. Also, this court has recognized that proof of forcible compulsion can include evidence that the victim was incapable of resisting “due to being in an unconscious or sleeping

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<sup>3</sup> (overruled on other grounds by *Kaczmarek v. State*, 91 P.3d 16, 29 (Nev. 2004))

state.” *State v. Niederstadt*, 66 S.W.3d 12, 16 (Mo. banc 2002). In the case of murder, the defendant’s actions effectively render the victim permanently unconscious. Further, in cases where the defendant rapes the victim as part of a continuous, violent assault resulting in the victim’s death, a holding that no rape occurred if the penetration occurred even a moment after death would ignore the sexual nature of the assault. *See State v. Brobeck*, 751 S.W.2d 828, 832 (Tenn. 1988) (“We are likewise unable to embrace the notion that the fortuitous circumstance, for the rapist, that death may have preceded penetration by an instant, negates commission of the crime of aggravated rape and reduces it to a relatively minor offense associated with erotic attraction to dead bodies.”).

The conclusion that forcible rape occurs if penetration follows a continuous assault is also supported by the language of Missouri’s statute. Missouri’s statute defines forcible rape as having “sexual intercourse with another person by the use of forcible compulsion.” § 566.030. That nature of forcible compulsion (force that overcomes reasonable resistance) only requires the victim to be alive at the time the force is applied. *See* § 566.030.1. And it is the force that makes the sexual intercourse criminal. *See State v. Jones*, 705 A.2d at 813 (noting that the state’s criminal code focused more on the assaultive behavior than the criminal act). When it is part of a continuing assault that results in sexual intercourse, killing can be force that overcomes reasonable resistance

The use of “person” in the statute is not inconsistent with the forcible rape after death caused by a continuous assault. Though some other states have suggested that the use of “person” connotes someone who is alive, *see State v. Perkins*, 811 P.2d 1142, 1150 (Kan. 1991), others have rejected that conclusion under similar statutes. *See State v. Collins*, 585 N.E.2d 532, 536 (Ohio App., 1990); *Smith v. Commonwealth*, 722 S.W.2d 892, 893 (Ky. 1987). “Person” is not defined by the Missouri statute. In the absence of a definition, words in a statute are given their plain and ordinary meaning. *Spradlin v. City of Fulton*, 982 S.W.2d 255, 258 (Mo. banc 1998). The common and ordinary use of the term person does not preclude someone who has recently died, as indicated by the jury’s note that asked the court whether it was rape to have sex with “person who is deceased.” (L.F. 840, Tr. 1450). As such, the forcible rape statute is not inconsistent with applying the rule that forcible rape still occurs, despite the victim’s death, as long as the force was part of a continuous assault.

### III

**Any error from refusing Appellant's instruction on felony murder as a lesser included offense was harmless in light of Appellant's conviction for first degree murder rather than for conventional murder in the second degree.**

Contrary to Appellant's claim (App. Br. 78), the trial court did not commit reversible error by refusing Appellant's instruction on felony murder. Since the trial court instructed the jury on conventional second degree murder, and the jury instead convicted Appellant of first degree murder, there was no prejudice from refusing an instruction on felony murder.

A trial court must give an instruction on a lesser included offense if there is "a basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." § 556.046.3. Felony murder is a lesser included offense of first degree murder. § 565.025.2(1)(a).

This Court, however, need not decide whether a felony murder instruction would have been warranted because there was no prejudice from denying it. Missouri courts have long held that, when the jury did not convict the defendant of the least serious offense available to it, the defendant could suffer no prejudice from the trial court's failure to submit a possibly otherwise warranted lesser-included or lesser-degree offense instruction. *See State v. Rousan*, 961 S.W.2d 831, 855 (Mo. banc 1998). In particular, this Court has held numerous times that failing to instruct on

felony murder is not reversible error where the jury was instructed on, but rejected, a lesser included instruction on conventional second degree murder. *See State v. Barnett*, 980 S.W.2d 297, 305 (Mo. banc 1998); *State v. Kinder*, 942 S.W.2d 313, 330 (Mo. banc 1996); *State v. Wise*, 879 S.W.2d 494, 517 (Mo. banc 1994). That is because the conventional second degree murder instruction sufficiently tests the jury's belief that the defendant met all the elements for first degree murder. *State v. Barnett*, 980 S.W.2d at 305; *State v. Wise*, 879 S.W.2d at 517. And it allows the jury to exercise lenience by convicting the defendant of the lesser offense. *See State v. Six*, 805 S.W.2d 159, 164 (Mo. banc 1991) (rejecting a claim that not instructing on felony murder as a second lesser offense violated *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 2382 (1980)). Also, under the instructions, the jury has to have found the defendant not guilty of first degree murder and then not guilty of conventional second degree murder before it can even consider felony murder. *State v. Kinder*, 942 S.W.2d 313, 330 (Mo. banc 1996). Thus, where a jury is instructed on conventional second degree murder as a lesser offense, but the jury convicts of first degree murder, there is no prejudice from not submitting a felony murder instruction as an additional lesser included offense.

Missouri's well-established rule is supported by United States Supreme Court precedent. In *Schad v. Arizona*, 501 U.S. 624, 647-648, 111 S.Ct. 2491, 2505 (1991), the defendant claimed the jury should have been instructed on an additional lesser

offense (besides second degree murder). The United States Supreme Court disagreed, holding that the second-degree murder instruction was sufficient to prevent the jury from facing the unconstitutional choice of convicting the defendant of capital murder or acquitting him outright:

To accept the contention advanced by petitioner and the dissent, we would have to assume that a jury unconvinced that petitioner was guilty of either capital or second-degree murder, but loath to acquit him completely (because it was convinced he was guilty of robbery), might choose capital murder rather than second-degree murder as its means of keeping him off the streets. Because we can see no basis to assume such irrationality, we are satisfied that the second-degree murder instruction in this case sufficed to ensure the verdict's reliability.

*Schad v. Arizona*, 501 U.S. at 647-648.

In Appellant's case, because the jury was instructed on both first degree murder and conventional murder in the second degree (L.F. 825, 827), and because it convicted him of the greater offense (L.F. 842-846), there was no prejudice from refusing an instruction on felony murder. *See State v. Barnett*, 980 S.W.2d at 305; *State v. Kinder*, 942 S.W.2d at 330.

Appellant argues that this Court should revisit the rule discussed above to allow capital litigants the same detailed factual analysis as non-capital cases to determine

whether the lesser included instruction should have been given. (App. Br. 87-89). But the rule is based on the lack of prejudice and thus, a detailed factual analysis is not required to determine whether the instruction would have been warranted. *See State v. Smith*, 944 S.W.2d 901, 918-919 (Mo. banc 1997) (noting that there was no prejudice even assuming the defendant was entitled to the instruction). Because the jury in Appellant's case was instructed on conventional second degree murder but instead convicted Appellant of first degree murder, there was no prejudice from denying Appellant's proposed instruction on felony murder. Appellant's point should be denied.

## IV

**The trial court did not abuse its discretion in overruling Appellant's objections to testimony of Officers Wathen and Crocker that they had escorted the victim from her office to her car.**

Appellant claims the trial court erred in overruling his objections to testimony from two police officers that they had escorted Guenther from her workplace in October and November, 2003. (App. Br. 96). Appellant claims that the testimony created an inference of hearsay by suggesting that Guenther must have told the officers something that warranted an escort because Appellant was dangerous. (App. Br. 98). He argues that he was prejudiced because the testimony implied uncharged conduct that required Guenther to get an escort and because the jury could have believed that the police thought he was dangerous. (App. Br. 101). The officers, however, did not testify about what anyone told them to cause them to escort Guenther, and the fact that they escorted her was relevant. Also, given the fact that Appellant admitted to the murder, that significant physical evidence connected Appellant to the killing, and that there was other evidence that Appellant had been stalking and harassing Guenther, any error would have been harmless.

### **A. Standard of Review**

“A trial court has broad discretion to admit or exclude evidence at trial.” *State v. Madorie*, 156 S.W.3d 351, 355 (Mo. banc 2005). “This standard of review compels the

reversal of a trial court's ruling on the admission of evidence only if the court has clearly abused its discretion." *Id.* Whether admission of the challenged testimony violated the Confrontation Clause is a question of law, which the Court reviews *de novo*. *State v. Justus*, 205 S.W.3d 872, 878 (Mo. banc 2006).

### **B. Testimony at issue.**

Before Officers Wathen and Crocker each testified, Appellant objected to testimony that Guenther had requested a police escort. (Tr. 847-848). He argued that without hearsay from Guenther about why she wanted a police escort, the fact that there was an escort was irrelevant. (Tr. 847-848, 850).

The trial court noted that it did not know what the State would be presenting and that it did not think the State would be presenting any hearsay. (Tr. 850-851, 859-860). The court overruled Appellant's objection and allowed it to be continuing throughout the testimony. (Tr. 850-851, 859).

Officer Wathen with the St. Louis County Police Department testified that he was occasionally called to escort people from their business or homes. (Tr. 853). He said that he was directed to escort Beverly Guenther in Earth City around 5:40 p.m. on October 30, 2003. (Tr. 854-856). Officer Wathen said that it was dark at that time and that there were no streetlights near the building. (Tr. 855-856). He said he talked to Guenther about the reason he was there, and, without testifying about what Guenther said, stated that he escorted Guenther to her car. (Tr. 856-857). Officer

Wathen said that he did not personally escort Guenther to her car after that night, but on several occasions he parked across the street from Guenther's workplace from 5:45 to 6:00 p.m. when Guenther would get off work. (Tr. 857-858).

St. Louis County Police Officer Crocker also testified that he had been called upon to provide escorts for citizens from their place of business or home. (Tr. 861). He testified that on November 14, 2003, he got a dispatch to escort Guenther at her workplace. (Tr. 861-862). When Officer Crocker prepared to volunteer why the escort had been ordered, the prosecutor instructed him not to say anything that Guenther might have said. (Tr. 862). Officer Crocker said he arrived at around 5:30 p.m., and it was dark out. (Tr. 863). He said that Guenther secured the door of the business, and then he walked her to her truck. (Tr. 862-863). Officer Crocker said that Guenther asked him to follow her out of the business park, and he followed her to Interstate 70. (Tr. 864). He did not have any contact with Guenther after that. (Tr. 863). Officer Crocker did not recall whether he personally patrolled the area after that, but he said they knew there were some problems going on and had given the area special attention. (Tr. 865).

**C. The trial court did not abuse its discretion in admitting the testimony because there was no hearsay, and the testimony was relevant.**

Testimony that Officers Wathen and Crocker escorted the victim from her workplace was relevant and was not hearsay. There are two types of relevance

logical relevance and legal relevance. *State v. Tisius*, 92 S.W.3d 751, 760 (Mo. banc 2002). Evidence is logically relevant if it tends to make any fact at issue more or less probable or tends to corroborate other relevant evidence. *Id.* Legal relevance is a determination of the balance between the probative value and prejudicial effect of the evidence. *Id.* “Any incriminating evidence offered against the defendant is prejudicial.” *State v. Kreutzer*, 928 S.W.2d 854, 867 (Mo. banc 1996). The prejudice is only unfair if evidence would cause a jury to convict without regard to its probative value. *State v. Dowell*, 25 S.W.3d 594, 602 (Mo.App., W.D. 2000). Balancing the probative value and prejudicial effect of evidence rests within the sound discretion of the trial court. *State v. Hayes*, 88 S.W.3d 47, 60 (Mo.App., W.D. 2002); *State v. Kreutzer*, 928 S.W.2d at 867 .

Officer’s Wathen and Crocker’s testimony was relevant. First, their testimony was relevant to explain the delay between Appellant’s breakup with Guenther and his attack at her workplace. Testimony from Guenther’s coworkers and neighbors indicated that she had broken up with Appellant before, but she had decided to break up with him for good in September, 2003. (Tr. 802, 816, 821-822, 841-843). A few weeks before November 20, Guenther’s boss had told Appellant that he could not enter the office to see Guenther at work, which caused Appellant to hurt himself and cry. (Tr. 951-952, 954). Evidence that there was a police officer in the parking lot of Guenther’s work or parked nearby during the end of October and beginning of

November explained why Appellant may not have been able to attack Guenther before he did. Second, the officers' testimony was relevant to show the conditions of the crime scene. Several witnesses testified that it was dark by around 6:00 p.m. in November, 2003. (Tr. 803-804, 824, 863, 1198). But, since Officers Wathen and Croker were present when Guenther was leaving her work, they could testify about the lack of lighting at that particular time. (Tr. 855-856, 863). Thus, the trial court did not abuse its discretion in finding that testimony that the officers had provided a police escort for Guenther was relevant.

The testimony was also not hearsay. Hearsay, an out-of-court statement offered to prove the truth of the matter asserted, is generally inadmissible. *State v. Barnett*, 980 S.W.2d 297, 306 (Mo. banc 1998). But statements made by an out-of-court declarant that explain subsequent police conduct are admissible, supplying relevant background and continuity. *State v. Dunn*, 817 S.W.2d 241, 243 (Mo. banc 1991). In fact, if the out-of court statement is offered to provide relevant background to the testimony, as oppose to the truth of the matter asserted, it not hearsay and it is admissible. *State v. Jones*, 863 S.W.2d 353, 357 (Mo. App., W.D. 1993).

In Appellant's case, the testimony from Officers Wathen and Crocker was not hearsay. Neither officer testified about anything that the victim, or anyone else, told them that caused them to escort the victim from her workplace. They merely testified

that they had provided an escort for Guenther, which was a relevant, historical fact. It was not hearsay.

Contrary to Appellant's claim (App. Br. 98-99), the officers' testimony was not inadmissible under the rule of inferred hearsay. The rule of inferred hearsay derives from *State v. Valentine*, 587 S.W.2d 859, 861 (Mo. banc 1979). In *Valentine*, the prosecution presented a single witness, Valentine's co-defendant, Louis Bateman, who could identify Valentine as being at the scene of the crime. Bateman, was called as a witness by the prosecution, but he refused to testify on the ground that he might be forced to incriminate himself. After Bateman refused to testify, the State elicited testimony from the officer who had arrested Bateman that he had questioned Bateman about a robbery and that the next thing he did after the interview was issue an arrest warrant for the defendant. No other evidence was offered by the state to connect the defendant to the crime. During deliberations the jury had asked the court, "[w]hy was Valentine wanted for this crime? Was it because of the description given to the police by [the victim] or was it from a statement by [the co-defendant]?" *Id.* at 861.

Valentine appealed his conviction on the grounds the prosecution purposely injected a hearsay inference that Bateman had told the officer that Valentine was his accomplice. This Court reversed and remanded for a new trial because the state elicited "[t]estimony which, by clear inference, showed that an alleged accomplice

had implicated the defendant in the offense involved.” *State v. Valentine*, 587 S.W.2d at 861.

In Appellant’s case, unlike in *Valentine*, there was no evidence that anyone in particular told the officers anything in particular that caused them to provide an escort from Guenther, and there was no reason to believe the jury would have inferred such a statement. In particular, there was no reason to believe that the officers only provided escorts for people that were subject to dangerous threats, or, as Appellant suggests, that the jury would have concluded that Appellant was a dangerous person simply based on speculation about what someone may have said that caused the escort to issue.

Also, to the extent the jury would have inferred that someone requested the officers to escort Guenther, the testimony would have been admissible to explain subsequent police conduct. Any inference that would have arisen would simply have been that someone had asked the police to escort Guenther from work. Unlike in *Valentine*, that evidence did not directly connect Appellant to the crime, let alone provide the only connection. Rather, it would have been evidence that explained why the police were present to provide Guenther an escort from her work, which as described above, was a relevant and historical fact. Since the evidence was relevant and did not create an inference of inadmissible hearsay, the trial court did not abuse its discretion in admitting the testimony.

**D. Any error from admitting the testimony would have been harmless in light of the other evidence.**

In addition to the contested testimony not being hearsay, Appellant is not entitled to reversal because he was not prejudiced. On direct appeal, review is “for prejudice, not mere error, and [the court] will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial.” *State v. Middleton*, 995 S.W.2d 443, 452 (Mo. banc 1999). In light of the evidence of Appellant’s guilt and other evidence that that would have made the victim afraid of Appellant, admitting evidence that police officers escorted the victim from her work was harmless beyond a reasonable doubt.

First, the evidence of Appellant’s guilt was overwhelming. Appellant confessed to stabbing Guenther to death and disposing of her body by the river, and he did not claim at trial that he had not actually done so. (Tr. 1185, 1224-1227, State’s Ex. 70, 71). Other evidence showed that Appellant’s DNA was under the victim’s fingernails, that Appellant’s semen was in the victim’s vagina, and that the victim’s blood was on Appellant’s clothes and in his car. (Tr. 1346, 1351, 1356). There was, thus, overwhelming evidence that Appellant killed Guenther.

Second, other testimony established reasons why the victim (or her employer) might have requested a police escort. Testimony from Guenther’s boss and co-worker established that Appellant had been appearing at Guenther’s work and bothering her

as well as the other employees there. (Tr. 803, 814, 816, 823-824, 951, 956, 961-962). There was evidence that Appellant had burglarized the victim's home. (Tr. 874-876, 898, 927-928). And there was evidence that the victim had obtained an order of protection, which had been served upon Appellant. (Tr. 1165-1166). In fact, Guenther's boss testified without objection that Guenther was worried after her last breakup with Appellant to the point of having a police escort. (Tr. 966-967). Given the strength of evidence showing Appellant's guilt and other evidence suggesting why Guenther or her employer may have requested a police escort, evidence that the officers actually provided that escort was harmless beyond a reasonable doubt.

Appellant claims he was prejudiced because the jury might have believed that the police considered Appellant dangerous and that Guenther had good reason to fear Appellant. (App. Br. 101). But there was no reason to believe the jury would have thought the police would only provide escort service after making a determination about dangerousness in general or that the police had good reason to fear Appellant in particular. In any event, since there was overwhelming evidence of Appellant's guilt and abundant evidence for why the victim would fear Appellant, Appellant was not prejudiced by admission of testimony that police officers had escorted the victim from her workplace.

## V

**The trial court did not abuse its discretion in overruling Appellant's objections to parts of Christopher Guenther's penalty-phase testimony regarding the deaths of his younger brother and grandfather because the testimony was relevant evidence of the victim's history and the impact of her murder on her family.**

Appellant claims that evidence from Beverly Guenther's son, Christopher, that the victim had another son who had died as an infant and that Christopher's grandparents had died impermissibly exceeded scope of victim impact evidence. (App. Br. 102). He argues that it had nothing to do with the impact of Appellant's crime on the victim's family and that it encouraged the jurors to make a decision based on emotion. (App. Br. 102). The trial court, however, did not abuse its discretion in determining that the evidence was relevant history of the victim's life.

### **A. Standard of Review**

“The trial court has discretion during the punishment phase of trial to admit whatever evidence it deems helpful to the jury in assessing punishment.” *State v. Six*, 805 S.W.2d 159, 166 (Mo. banc 1991). A trial court does not abuse its discretion unless the ruling is “clearly against the logic and circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.” *State v. Brown*, 939 S.W.2d 882, 883 (Mo. banc 1997). “[I]f

reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.” *Id.*

Also, on direct appeal, review is for prejudice, not simply error. *State v. Storey*, 40 S.W.3d 898, 903 (Mo. banc 2001). Reversal is warranted “only if the error was so prejudicial that it deprived the defendant of a fair trial.” *Id.*

#### **B. Contested testimony.**

During the penalty phase, Christopher Guenther, the victim’s son, testified that he had a brother, Corey, who had died. (Tr. 1495). Appellant objected that the testimony was irrelevant, and the trial court overruled the objection. (Tr. 1495). Christopher continued that the family had an above-ground pool, and Corey had climbed into the pool when no one was watching him. (Tr. 1495). Christopher testified that the death affected the whole family, including Beverly Guenther. (Tr. 1495).

Christopher explained that after Corey died, his mother and father divorced, and Christopher lived with his father. (Tr. 1496). Christopher thought that his parents splitting up had a lot to do with Corey’s death and the death of Christopher’s grandfather. (Tr. 1496).

When the prosecutor asked Christopher to tell him about that, Appellant objected that the testimony would be irrelevant and hearsay. (Tr. 1497). The prosecutor explained that the testimony would show how the victim developed

independence, and the trial court overruled Appellant's objection on the State's representation that it would show how the evidence related to the victim's history. (Tr. 1498).

Christopher continued by explaining that his grandfather's death had impacted Beverly Guenther. (Tr. 1498). He said that his parents did not split up right away when Corey died but that Beverly had become independent after the split. (Tr. 1498). He said that Beverly was proud of her independence. (Tr. 1499). Christopher said that he had offered to let his mother stay with him to avoid the situation with Appellant, but Beverly would not do so. (Tr. 1499). She was too proud, and she had her own home. (Tr. 1499).

### **C. The trial court did not abuse its discretion.**

Christopher's testimony was proper victim impact evidence. Both the United States and Missouri Constitutions permit the State to present victim impact testimony during the penalty phase. *State v. Parker*, 886 S.W.2d 908, 926 (Mo. banc 1994); *Payne v Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). Missouri statutes specifically provide that the trial court has discretion to admit evidence about the impact of the crime upon the victim, his family, and others. *See* §§ 557.036.3, 565.030.4. "According to *Payne*, just as the defendant is entitled to present evidence in mitigation designed to show that the defendant is a 'uniquely individual human being,' the State is also allowed to present evidence showing each victim's

‘uniqueness as an individual human being.’” *State v. Deck*, 994 S.W.2d 527, 538 (Mo. banc 1999)(quoting *Payne*, 501 U.S. at 822 23). Victim impact evidence is “simply another form or method of informing the court about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities.” *State v. Worthington*, 8 S.W.3d 83, 90 (Mo. banc 1999).

“It is not necessary that every piece of victim impact evidence relate to the direct impact of the victim’s death on the witness.” *State v. Gill*, 167 S.W.3d 184, 196 (Mo. banc 2005). Victim impact testimony is permissible to show the unique loss caused by the victim’s death including the impact of that loss on the victim’s family and community. *See Storey*, 40 S.W.3d at 909; *see also State v. Forrest*, 183 S.W.3d 218, 225 (Mo. banc 2006) (holding that evidence that the victim's brother had died after her murder was not improper where there was no suggestion that the brother’s death was a result of the defendant's actions).

Victim impact evidence only violates the constitution if it is so “unduly prejudicial that it renders the trial fundamentally unfair.” *Parker*, 886 S.W.2d at 927 (quoting *Payne*, 501 U.S. at 824 26).

*State v. Gill*, 167 S.W.3d 184, 196 (Mo. banc 2005), provides an example of the permissible scope of victim impact testimony. During the penalty phase in *Gill*, the trial court had allowed the victim’s sister to stand near the jury and display small photographs of the victim and his family. The sister then showed a picture of her

mother's home and talked about how she and the victim had cleaned the house after their mother became ill. The witness later read a statement discussing the impact of the crime on the family, including a discussion of moral lessons she and her siblings had learned from their parents. She also mentioned that their father had been a prisoner of war during World War II. The sister also discussed her parents' death and how the victim had helped steady her hand when she signed a consent form to remove their father's life support. The victim's brother-in-law then testified about growing up terribly poor. Both the victim's sister and his brother-in-law were visibly upset and crying during the testimony.

On appeal to this Court, Gill claimed that the testimony exceeded the permissible scope of *Payne v. Tennessee* because it dwelt on the victims' morally solid upbringing and invited the jury to feel sympathy for their painful times and to use that irrelevant evidence to sentence the defendant to death. This court disagreed. *Gill*, 167 S.W.3d 196. It held that evidence of the parents' death was proper to demonstrate how the victim had helped his sister during those times. *Id.* It also held that references to the victim's father being a prisoner of war and the brother-in-law's poverty were brief and were not attributed to the defendant. *Id.*

Like in *Gill*, admission of the victim impact evidence in Appellant's case was not reversible error. Evidence that Christopher's grandfather had died and that he had a brother who died as a child was relevant to show the victim's history. It explained

her divorce and development of her independence, for which the victim was proud. (Tr. 1499). That was something that Appellant's crimes had taken away from her. It was also relevant because of the fact that the victim's son (a victim too) had lost another loved one. Further, as in *Gill*, there was no insinuation that Appellant had caused the other losses and no reason to believe that the jury would have improperly attributed the deaths of Christopher's brother and grandfather to Appellant. As such, the trial court did not abuse its discretion in overruling Appellant's objections. Appellant's point should be denied.

## VI

**The trial court did not plainly err by not intervening *sua sponte* during closing argument when the prosecutor analogized the duty of serving on a jury to the duty of serving as a soldier.**

Appellant claims for the first time on appeal that the prosecutor improperly analogized service on a jury with service as a soldier during penalty-phase closing argument. (App. Br. 108). He argues that referring to soldiers implicitly told them to imagine themselves as soldiers carrying out a duty to kill. (App. Br. 113). The argument, however, only suggested that the duty of serving on a jury was a duty like a soldier and not that the jury had a duty to return a death verdict. Also, the argument as a whole and the instructions were clear that the jury had discretion in choosing a sentence. As such, there was no plain error.

### **A. Standard of Review**

Appellant did not object to the prosecutor's statements during closing argument. (Tr. 1994-1995). Instead, he asserts that the trial court plainly erred in failing to intervene, *sua sponte*, and instruct the jury to disregard the argument. (App. Br. 109).

Claims of improper closing argument are generally waived when there was no objection at trial:

This Court will not review those claims not preserved for appeal, and relief should be rarely granted on assertion of plain error to matters

contained in closing argument, for trial strategy looms as an important consideration and such assertions are generally denied without explication.

*State v. Clay*, 975 S.W.2d 1212, 134 (Mo. banc 1998).

In the absence of an objection, the trial court's options are narrowed to uninvited interference with summation and a corresponding increase of error by such intervention. *State v. Clemmons*, 753 S.W.2d 901, 907-908 (Mo. banc 1988). Had objection been made, the trial court could have taken appropriate steps to make corrections. *State v. Kempker*, 824 S.W.2d 909, 911 (Mo. banc 1992). Because Appellant did not object, the court did not have a chance to instruct the jury to disregard the comment, as Appellant claims it should have. (App. Br. 108, 113). A party should not be allowed to forgo a request for relief, gamble on the verdict, and then if adverse, request relief for the first time on appeal. *State v. McGee*, 848 S.W.2d 512, 514 (Mo.App., E.D. 1993). Since he did not object at trial, Appellant's point should be denied.

If this court exercises its discretion to review the claim, review should be for plain error only. *See* Supreme Court Rule 30.20. "Relief should rarely be granted on an assertion of plain error with respect to a closing argument." *State v. Smith*, 32 S.W.3d 532, 551 (Mo. banc 2000). Even when a comment is improper, a conviction will be reversed only where it is established that the comment in question had a

decisive effect on the jury's determination. *State v. Winfield*, 5 S.W.3d 505, 516 (Mo. banc 1999). The burden is on the defendant to prove the decisive significance of the complained of comment. *Id.*

**B. Argument at issue.**

During his penalty-phase rebuttal, the prosecutor made the following argument:

Also, another thing I want to point out to you is when you are out there deciding now what you are going to do, when you're deciding – we've talked about that duty. When you find a shred of humanity, ladies and gentlemen, find it for her family.

You know, she didn't have somebody there who was trying to decide her fate and decide whether she should live or die. She just had this man. You know, sometimes when you come in you have a duty. You've all seen this. You've all seen soldiers in World War II. You know, they're now what? In their 70s and 80s, if they're still around.

They went back in World War II, and they did their duty. The war wasn't something I'm sure they took pleasure in. They didn't want to do that. They didn't want to get taken away from their families and go over and fight the Germans and the Nazis. That wasn't what they wanted to do; they had a duty to do it, and they did their duty.

And just as you have a duty to do.

The Court: You have 2 minutes left.

[Prosecutor]: Thank you, Your Honor.

When you talk about those men now, and you look at those men, you know what? They're able to stand up there tall, and they're proud. They're not proud because of what they had to do to those other young men, but they're proud because they're able to do their duty. They did what was right even though it was hard to do that.

So, ladies and gentlemen, you've heard all the evidence. You've heard both the aggravating and mitigating. It's up to you to decide. In doing that, if you're trying to think of why you should do this, well, number one, the evidence is there for you to do it. And, number two, you know, you could send a message. Even if it only stops one other person from doing what he did, that's a message you want to send.

(Tr. 1994-1995).

**C. The prosecutor's argument did not amount to plain error.**

Appellant is not entitled to reversal based on the prosecutor's statements. Prosecutors should refrain from employing wrongful methods designed to achieve a wrongful conviction. *See Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935). Misconduct alone, however, does not warrant reversal of an otherwise valid conviction. *U.S. v. Young*, 470 U.S. 1, 11, 105 S.Ct. 1038, 1044 (1985). Even

conduct that was “undesirable or even universally condemned” does not warrant reversal unless it “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986)(quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). The improper conduct must be judged in context to determine “the probable effect . . . on the jury's ability to judge the evidence fairly.” *Young*, 470 U.S. at 12. “[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.” *Donnelly v. DeChristoforo*, 416 U.S. at 647.

The lack of *sua sponte* intervention in the prosecutor’s argument was not plain error because, though the prosecutor analogized the duty of serving as a juror to the duty of serving as a soldier, the prosecutor and the instructions were clear that the jury was charged with making a decision about punishment and that it had discretion to do so. Appellant’s argument is based on the premise that by analogizing the jurors to soldiers, the prosecutor minimized their sense of responsibility in imposing a death penalty. (App. Br. 113). The Eighth Amendment prohibits a death penalty imposed by a sentencer who has been led to believe that someone else has responsibility for the defendant’s death. *Caldwell v. Mississippi*, 472 U.S. 320, 329, 105 S.Ct. 2633, 2639 (1985) (holding that it was improper for a prosecutor to argue that the jurors should

not think of themselves as killing the defendant because the sentence would be reviewed for correctness by the state supreme court). But that did not happen in the present case.

The prosecutor never suggested that the jurors were not responsible for the penalty they imposed or that they were compelled to return a particular verdict. The prosecutor employed the soldier analogy to argue that, like being a soldier, being a juror in a capital case was something hard but something they had a duty to do. (Tr. 1994-1995). He urged the jury to do what was right even though it might be hard because that was their duty. (Tr. 1994-1995). But the prosecutor was explicit that the jurors were charged with the responsibility of determining what the punishment would be: “You’ve heard both the aggravating and mitigating. It’s up to you to decide.” (Tr. 1995). He did not suggest that they had a soldier-like order to impose any particular sentence that they were duty-bound to follow. Further, the instructions tell the jury that it is their duty to impose punishment. (L.F. 853, 862). And, like the prosecutor’s argument, they made explicit that the jury had discretion in determining punishment, telling them that they were not compelled to fix a punishment at death even if they find the mitigating evidence does not outweigh the aggravating evidence. (L.F. 859).

Because the prosecutor did not imply that someone else was responsible for the verdict returned or that the jury did not have discretion in setting a sentence, the

argument was not improper. And, since the prosecutor and the instruction were explicit that the jury had discretion in determining the punishment to impose, the argument did not so infect the trial as to make render Appellant's conviction a denial of due process. *See Darden v. Wainwright*, 477 U.S. at 181. As such, the trial court did not plainly err by not intervening *sua sponte* to prevent the argument, and Appellant's point should be denied.

Appellant's cited case, *Weaver v. Bowersox*, 438 F.3d 832 (8<sup>th</sup> Cir. 2006), is substantially different than Appellant's case, and his cited case, *Brooks v. Kemp*, 762 F.2d 1383, 1400 (11th Cir.1985) (en banc),<sup>4</sup> is harmful to his claim. First, the argument in *Weaver* was only one of several arguments that the court found improper. In addition to the reference to soldiers in World War II, the prosecutor had argued that if the jury did not sentence the defendant to die there was no point in having a death penalty, that the jury should send a message to other drug dealers, that the prosecutor was the top law enforcement official and decided in which cases to seek the death penalty, and various other statements designed to appeal to the jury's emotions. By contrast, the reference to soldiers was the only penalty-phase argument that Appellant claims was improper. (App. Br. 108). The fact that the argument in *Weaver* was only one of several improper arguments is important because the standard for finding a due

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<sup>4</sup> *vacated on other grounds*, 478 U.S. 1016 (1986), *reinstated on remand*, 809 F.2d 700 (11th Cir. 1987) (en banc), *cert. denied*, 483 U.S. 1010 (1987)

process violation is whether, judged in context, the argument so infected the trial as to make the resulting conviction a denial of due process. *See Darden v. Wainwright*, 477 U.S. at 181; *Young*, 470 U.S. at 12. The fact that the several improper arguments in *Weaver* were absent in Appellant's case militates against finding a due process violation.

Second, in *Weaver*, the argument containing an analogy to the jury as soldiers was both more graphic than the one in Appellant's case and more likely to interfere with the juror's view of its responsibility to independently and reliably determine the sentence. In *Weaver*, the prosecutor had argued that sometimes killing was "your duty." He continued by making an analogy to a speech from a war movie:

I know there's a movie, *Patton*, and in the movie, George Patton was talking to his troops because the next day they were going to go out in battle and they were scared as young soldiers. And he's explaining to them that I know that some of you are going to get killed and some of you are going to do some killing tomorrow morning. And they all knew that. And he was going to try to encourage them that sometimes you've got to kill and sometimes you've got to risk death because it's right. He said: But tomorrow when you reach over and put your hand in the pile of goo that a moment before was your best friend's face, you'll know what to do.

*Weaver v. Bowersox*, 438 F.3d 832, 836 (8<sup>th</sup> Cir. 2006). The Eighth Circuit determined that the soldier analogy was improper. *Id.* at 840. The court reasoned that telling jurors they had a duty to kill like soldiers and using a graphic story from a movie to support that duty should be taken as an effort to remove reason and responsibility from sentencing. *Id.* at 840. The court noted that soldiers have no choice in killing and are just following orders, undermining the requirement that capital sentencing be discretionary and diminishing the jurors' sense of responsibility. *Id.* The court held that the comments, along with the other arguments, violated the defendant's right to due process. *Id.* at 840-841.

*Weaver* does not govern Appellant's case. Notably, this Court, which is not governed by the Eighth Circuit, had rejected the claim that the prosecutor's arguments in *Weaver* resulted in a denial of due process. *See State v. Weaver*, 912 S.W.2d 499, 514 (Mo. banc 1995). And, at any rate, the arguments in Appellant's case were not like the ones in *Weaver*. Unlike in *Weaver*, the prosecutor in the present case did not imply that there was any general ordering the jurors to kill. He also did not suggest that the jurors had a duty to kill indiscriminately or without deliberation rather than simply to serve on the jury and do something that was difficult. Thus, contrary to Appellant's claim, the present case is different than *Weaver* not only because *Weaver* involved several other improper arguments but also because the argument in his case did not create the troublesome inferences present in *Weaver*.

*Brooks v. Kemp* is also different from Appellant's case and actually undermines Appellant's claim. In *Brooks*, along with several other contested arguments (including the prosecutor's own personal belief in the death penalty, that he had only sought the death penalty for a few cases in the past years, and that death should be imposed because it was cheaper than life in prison), the prosecutor noted that he had lived during three wars, that young soldiers had been trained to kill in those wars, and that they were given medals for killing well. He further argued that there was a war against the criminal element in America and that the criminals were winning. The prosecutor concluded the analogy by suggesting that the defendant was a member of the criminal element and suggesting, "if we can send a seventeen-year old young man overseas to kill an enemy soldier, is it asking too much to ask you to go back and vote for the death penalty in this case against William Brooks . . ." *Brooks v. Kemp*, 762 F.2d at 1396.

In addressing the many challenged arguments, the Eleventh Circuit was ambiguous about whether the soldier analogy was improper. It first said that the analogy was appropriate in its implication that imposing death was difficult but sometimes sanctioned:

Finally, the analogy of the death penalty to killing in a war was appropriate insofar as it implied that imposing death, while difficult, is at

times sanctioned by the state because of compelling reasons (national security or deterring crime).

*Brooks v. Kemp*, 762 F.2d at 1412. But the court went on to note that the argument was faulty because the discretion of a juror in sentencing is not analogous to a soldier who is ordered to kill an enemy. *Id.* To that extent, the analogy misrepresented the jury's task because it undermined the guided discretion required by the Eighth Amendment. *Id.* at 1412-1413.

Nonetheless, the Eleventh Circuit held that the prosecutor's arguments did not render the defendant's trial fundamentally unfair. *Brooks v. Kemp*, 762 F.2d at 1414-1415. That was because the trial court's instructions had unambiguously charged the jury with setting punishment, potentially exercising mercy, and individually considering the defendant's case. *Id.* at 1414-1415. Also, defense counsel had argued that the jury had the sole responsibility for setting sentence, and the prosecutor had made other arguments that the jury was to decide from the evidence what punishment to impose. *Id.* at 1414-1415.

Unlike in *Brooks*, the prosecutor in Appellant's case did not make the myriad of objectionable arguments included in *Brooks*. Also, the prosecutor never told the jury that they should due their duty like soldiers and kill Appellant. He only made the reference, approved by the Eleventh Circuit, to jury service as something that was a difficult duty that, like the duty of soldiers, had to be done. (Tr. 1994-1995).

Notably undermining Appellant's reliance on *Brooks* was the court's conclusion that the prosecutor's remarks (including the ones not made by the prosecutor in Appellant's case) had not rendered the proceeding unfair because the argument as a whole and the court's instructions properly charged the jury with the independent decision of what punishment to impose. Likewise, in Appellant's case, the prosecutor's argument was unambiguous that the jury was required to determine punishment based on the evidence and not based on a duty to follow orders. The trial court's instructions were similarly explicit that the jury had discretion in determining what the punishment would be. As such, like in *Brooks*, the prosecutor's argument in Appellant's case did not render the trial unfair. The trial court did not plainly err, and Appellant's point should be denied.

## VII

**The trial court did not err in rejecting Appellant’s proffered Instruction C, which instructed the jury to determine whether the evidence as a whole justified death or imprisonment for life.**

Appellant claims the trial court erred in refusing his Instruction C, which would have told the jury to determine whether the evidence as a whole justified the death penalty. (App. Br. 115). Appellant claims that his instruction was required by § 565.032, which calls for an instruction asking the jury to consider whether the evidence as a whole justifies death or life in prison. (App. Br. 116). The trial court did not commit reversible error, however, because the instructions submitted told the jury to consider all the evidence in deciding whether to impose death.

### **A. Appellant’s proffered instruction.**

During the penalty phase instructions conference, Appellant offered the following instruction, which was denied by the court:

#### Instruction No. C

If you have unanimously found beyond a reasonable doubt that (one or more of) the statutory aggravating circumstance(s) submitted in Instruction No. \_\_\_\_ exists, and if you have not found the existence of facts and circumstances in aggravation of punishment, you must then determine whether the evidence as a whole justifies a sentence of death

or imprisonment for life by the Department of Corrections without eligibility for probation or parole. If you do not unanimously find beyond a reasonable doubt that the evidence as a whole justifies a sentence of death, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

(Supp. L.F. 5).

**B. The trial court did not err because other instructions accomplished the purpose of Appellant's instruction.**

The trial court did not err, and Appellant was not prejudiced by the trial court's refusal of Appellant's Non-MAI instruction because other instructions required the jury to consider the evidence as a whole in imposing a penalty. Section 565.032.1(2) provides that the jury is to be instructed to consider whether the evidence as a whole justifies a sentence of death or life in prison:

In all cases of murder in the first degree for which the death penalty is authorized, the judge in a jury-waived trial shall consider, or he shall include in his instructions to the jury for it to consider . . .

(2) If a statutory aggravating circumstance or circumstances is proven beyond a reasonable doubt, whether the evidence as a whole justifies a sentence of death or a sentence of life

imprisonment without eligibility for probation, parole, or release  
except by act of the governor. . . .”

In Appellant’s case, though no instruction employed the exact language in § 565.032.1(2), other instructions accomplished the statute’s purpose. Instruction No. 20 told the jury that it had a duty to determine punishment. (L.F. 853). Instruction No. 25 informed the jury that it was not compelled to fix death as punishment, even if it did not find facts and circumstances sufficient to outweigh the aggravating evidence. (L.F. 859). That instruction added that the jury must consider all the evidence in deciding whether to impose a punishment of death or life: “You must consider all the evidence in deciding whether to assess and declare the punishment at death.” (L.F. 859).

Those two instructions satisfied the requirements of § 565.032.1(2). They told the jury that they had a duty to impose punishment and in doing so, that they had to consider all the evidence. That was the equivalent of an instruction that the jury must consider whether the evidence as a whole justifies a sentence of death or life. *See* § 565.032.1(2). As such, the instructions complied with the statute.

Contrary to Appellant’s claim (App. Br. 117), § 565.032.1(2) does not create a prerequisite to death eligibility and therefore does not create a factual finding that must be made by the jury under *Ring v. Arizona*. Under *Ring v. Arizona*, the jury, not the judge, must find any statutory aggravating circumstances necessary for imposition

of the death penalty. *Ring v. Arizona*, 536 U.S. at 589, 597. This Court in *State v. Whitfield* determined that, under Missouri’s sentencing scheme, *Ring* requires the jury to find at least one statutory aggravator and to make a finding under § 565.030.4(3) regarding the balance between aggravating and mitigating evidence. *State v. Whitfield*, 107 S.W.3d at 259-261.

But the court held that the jury was not required to make a determination under the § 565.030.4(1) regarding whether to assess the punishment at death. Under that section, the jury is directed to impose a life sentence unless “the trier decides under all of the circumstances not to assess and declare the punishment at death.” This Court in *Whitfield* held that this fourth step did not require a jury finding. *State v. Whitfield*, 107 S.W.3d at 259-261. That was because a decision under all of the circumstances not to assess the death penalty is a discretionary balancing function that does not depend on weighing the actual mitigating and aggravating facts the jury found. *Id.*

Under *Whitfield*, Appellant’s argument that § 565.032.1 requires a jury finding should be denied. The requirement in § 565.032.1 is essentially identical to the requirement in § 565.030.4(4). In both instances, the statute directs the jury to consider all the evidence in determining punishment. Both involve a discretionary balancing function rather than a factual determination. Thus, like § 565.030.4(4) as addressed in *Whitfield*, *Ring* does not require a jury finding regarding § 565.032.1.

## VIII

**The trial court did not abuse its discretion in overruling Appellant’s objection and allowing penalty-phase evidence about the victim’s prior statements regarding harassing and stalking by Appellant in the months leading up to her death.**

Appellant claims the trial court erred in overruling his objection to testimony about statements by victim to other witnesses about stalking and harassment by Appellant. (App. Br. 119-120). Appellant argues that the statements were hearsay and should not have been admitted under the doctrine of forfeiture by wrongdoing because, he claims, that doctrine should only apply to proceedings from which the defendant intended to make the witness absent and not to the witness’s murder trial. (App. Br. 123-126). While Appellant’s specific claim presents an issue of first impression in Missouri, this Court should hold that the trial court correctly determined that the doctrine of forfeiture by wrongdoing can apply at a witness’s murder trial.

### **A. Standard of Review**

“A trial court has broad discretion to admit or exclude evidence at trial.” *State v. Madorie*, 156 S.W.3d 351, 355 (Mo. banc 2005). “This standard of review compels the reversal of a trial court’s ruling on the admission of evidence only if the court has clearly abused its discretion.” *Id.* Whether admission of the challenged testimony

violated the Confrontation Clause is a question of law, which the Court reviews *de novo*. *State v. Justus*, 205 S.W.3d 872, 878 (Mo. banc 2006).

## **B. Trial proceedings and the Contested Evidence**

The trial court held a hearing and decided to admit the victim's prior statements under the doctrine of forfeiture by wrongdoing. (11/22 Pretrial Tr. 2-3, Tr. 14-15, 79-80, 1475-1476.).

During the penalty phase, the prosecutor offered testimony through Officer Melissa Doss that the victim had told her on October 30 that she had found some of her clothes that Appellant had not previously returned in her truck, and they were cut to the point of being un-wearable. (State's Ex. 101). The victim also told Officer Doss that that Appellant had called her several times that day from a pay phone and had made repeated calls to her work in October and November. (State's Ex. 101).

Officer Goss testified that on November 13, the victim reported that Appellant had stopped her in the parking lot as she was leaving work and was asking about a burglary in Moscow Mills. (State's Ex. 101). The victim told Appellant she did not want to talk to him, and Appellant tried to kiss her twice. (State's Ex. 101).

The victim also said that Appellant had jumped from the bushes and grabbed her breast. (State's Ex. 101). She believed Appellant was becoming increasingly violent and aggressive with each encounter. (State's Ex. 101).

The trial court also allowed a written statement including a log of calls and visits to the victim by Appellant (State's Ex. 500), and the victim's statement from her petition for an order of protection. (State's Ex. 74).

**C. Evidence of the victim's prior statements was properly admitted under the doctrine of forfeiture by wrongdoing.**

Under the doctrine of forfeiture by wrongdoing, admission of the victim's prior statements did not violate Appellant's right to confrontation. "The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.' "

*Crawford v. Washington*, 541 U.S. 36, 42 (2004). But this right is not absolute, and it must sometimes be curtailed in favor of other considerations. *See Mattox v. United States*, 156 U.S. 237, 243 (1895) (the right of confrontation "must occasionally give way to considerations of public policy and the necessities of the case."). For instance, the Court in *Crawford* recognized that the "rule of forfeiture by wrongdoing . . . extinguishes confrontation claims . . . ." 541 U.S. at 62 (citing *Reynolds v. United States*, 98 U.S. 145, 158-159 (1879)).

Indeed, simple equity and common sense justify a defendant's forfeiture of his confrontation rights when he has caused a witness to absent himself because of defendant's threats or violence. *See United States v. Dhinsa*, 243 F.3d 635, 651-652 (2nd Cir. 2001); *United States v. White*, 116 F.3d 903, 911 (D.C. Cir. 1997); *State v.*

*Hallum*, 606 N.W.2d 351, 356 (Iowa 2000). As the United States Supreme Court recently stated, “when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce.” *Davis v. Washington*, 126 S.Ct. 2266, 2280 (2006); *see also United States v. Johnson*, 495 F.3d 951, 970 (8th Cir. 2007) (“[A] defendant’s confrontation rights under the Sixth Amendment are ‘forfeited with respect to any witness or potential witness whose absence a defendant wrongfully procures.’ ”).

Besides application to Confrontation Clause claims, in the federal courts, this rule of forfeiture is also invoked under Federal Rule 804(b)(6) to reject any objection on hearsay grounds. *See United States v. Johnson*, 495 F.3d at 970. To Respondent’s knowledge, Missouri has not formally adopted such a rule with regard to hearsay, but, based on the same considerations that support forfeiture of the right to confrontation, such a rule is warranted. *See Gonzalez v. State*, 195 S.W.3d 114, 119 (Tex.Crim.App. 2006) (“If the defendant’s conduct is such as to cause a forfeiture of the constitutional objection, it should *a fortiori* be enough to cause a forfeiture of the parallel hearsay objection.”); *see also U.S. v. Houlihan*, 92 F.3d 1271, 1281-1282 (1<sup>st</sup> Circ. 1996) (holding that forfeiture by wrongdoing would apply to hearsay, noting, “[o]nce the confrontation right is lifted from the scales by operation of the accused’s waiver of that right, the balance tips sharply in favor of the need for evidence.”).

Appellant argues that the rule of forfeiture by wrongdoing should not be applied to his case because the State asserted that Appellant killed the victim to keep her from testifying in the burglary trial and order of protection proceedings rather than at his murder trial. (App. Br. 123). There is some disagreement regarding whether the forfeiture rule should be applied in murder cases where the act that kept the witness away was the murder. *See Gonzalez v. State*, 195 S.W.3d at 121-124 (discussing the split). But several courts have held that applying the rule as Appellant suggests to exclude the victim's prior statements would be to allow the very evil that the rule seeks to prevent. *See, e.g., United States v. Garcia-Meza*, 403 F.3d 364, 370 (6th Cir. 2005); *People v. Moore*, 117 P.3d 1 (Colo. App. 2004); *State v. Meeks*, 88 P.3d 789, 794-795 (Kan. 2004). Indeed, that has been the holding from the majority of post-*Crawford* cases. *See Gonzalez v. State*, 195 S.W.3d at 124.

The Eighth Circuit has determined that forfeiture by wrongdoing would apply in murder cases for killing the witness. *U.S. v. Emery*, 186 F.3d 921, 926 (8<sup>th</sup> Cir. 1999). Not applying the rule in such cases, the court held, would be contrary to the “the manifest object of the principles” of the rule. *U.S. v. Emery*, 186 F.3d at 926. The court noted that the rule established “the general proposition that a defendant may not benefit from his or her wrongful prevention of future testimony from a witness or potential witness.” *Id.* But accepting the position that the doctrine does not apply to a murder case “would allow [the defendant] to do just that.” *Id.*

The Second Circuit has likewise determined that application of the doctrine of forfeiture by wrongdoing to murder cases, even when there was no pending prosecution, was both “both logical and fair since a contrary rule ‘would serve as a prod to the unscrupulous to accelerate the timetable and murder suspected snitches sooner rather than later.’” *U.S. v. Dhinsa*, 243 F.3d 635, 652 (2<sup>nd</sup> Cir. 2001) (quoting *United States v. Houlihan*, 92 F.3d 1271, 1279 (1st Cir.1996)).

Applying that majority rule to Appellant’s case, the trial court correctly applied the rule of forfeiture by wrongdoing to Appellant’s case. There was evidence that Appellant killed the victim. (Tr. 1185, 1224-1227, 1346, 1351, 1356, State’s Ex. 70, 71). It follows logically that his wrongdoing in killing her caused her to be absent from the trial. Thus, the trial court correctly admitted the evidence and determined that Appellant had forfeited his confrontation claim.

Even under Appellant’s suggested approach (that the forfeiture by wrongdoing should only be applied to the case from which the defendant intended to absent the witness), the doctrine should still apply to Appellant’s case. First, though it may initially appear strange to conclude that a defendant would kill a victim in order to prevent her from testifying at the victim’s murder trial, the conclusion is not a logical contradiction. At least in cases where the defendant is killing the victim to prevent them from testifying in *some* proceeding, it should follow that the defendant will know that the killing the victim will also absent her from a potential trial based on the

unlawful acts that cause the absence (which may make murder a particularly effective way of securing the absence of the witness). In Appellant's case, the State provided evidence that Appellant had killed Guenther to prevent her from testifying in pending burglary and order of protection cases, and it submitted statutory aggravating circumstances based on that theory. (L.F. 856-857, Tr. 927-928, 978, 1165-1166). Since there was evidence that Appellant had killed Guenther to keep her from testifying in some proceeding, it was reasonable to conclude that Appellant had killed her to keep her from testifying in whatever trial would result from his efforts to keep her away from the courts. As such, even if intent to absent the witness from the particular hearing is required to employ the rule of forfeiture by wrongdoing, the rule still applies to Appellant's case.

Regardless of whether the rule should apply when the defendant tried to keep a witness away in general, the rule should apply in Appellant's case because Appellant was also convicted of rape. (L.F. 844). Though the state did not submit a proposed statutory aggravator based on whether Appellant killed Guenther to keep her from testifying in a rape trial, it was reasonable to conclude that Appellant had killed Guenther to keep her from testifying at a subsequent rape trial. That is particularly true since the evidence of Appellant's obsession with Guenther and his struggle with her before the stabbing suggested that Appellant raped Guenther and then stabbed her to death. (Tr. 802, 806-807, 816, 821-822, 823-824, 1027, 1143-1144).

Consequently, even if the rule of forfeiture by wrongdoing were limited to instances where the defendant specifically intended to prevent the witness from testifying at a particular trial, the trial court did not err in applying the rule to Appellant's case.

In short, the trial court reasonably determined that rule of forfeiture by wrongdoing would apply to Appellant's case because not limiting the rule, as Appellant proposes, would have allowed Appellant to take advantage of his own misconduct in a way that the rule was specifically designed to prevent. And, at any rate, since there was evidence that Appellant killed the victim to keep her from testifying in general and particularly from testifying at a rape trial, the trial court correctly applied the doctrine to Appellant's case. As such, admission of the victim's former statements were properly admitted, and Appellant's point should be denied.

## IX

**The trial court did not plainly err in excluding evidence during the penalty phase that Shawn Delgado had heard Billy McLaughlin, Appellant's brother, say that Billy was present at the murder, had tied the victim's legs together, and had helped Appellant throw the victim's body by the river.**

Appellant claims the trial court plainly erred in overruling his offer of proof from Shawn Delgado that Billy McLaughlin, Appellant's brother, had said he was present during the murder, had suggested the river as a place to dispose of the victim's body, and had accompanied Appellant to the river. (App. Br. 131). Appellant claims that the testimony was material mitigating evidence, and under *Green v. Georgia*, 442 U.S. 95, 97, 99 S.Ct. 2150, 60 L.Ed.3d 738 (1979), the trial court erred in applying the hearsay rule to exclude it. (App. Br. 133-134, 135-136). The evidence, however, was not highly relevant mitigation evidence, and Appellant did not demonstrate that Billy's statements were reliable.

### **A. Standard of Review**

Appellant concedes that his claim was not preserved. (App. Br. 132-133). He requests plain error review. (App. Br. 132-133). For a claim of plain error, the appellant must demonstrate that a manifest injustice of miscarriage of justice will occur if the error is not corrected. *State v. Tokar*, 918 S.W.2d 753, 769-770 (Mo. banc 1996). Even when such error exists, the appellate court has discretion regarding

whether to review the claim. Supreme Court Rule 30.20. That discretion “is to be used sparingly and [plain error] may not be used to justify a review of every point that has not been otherwise preserved for appellate review.” *Tokar*, 918 S.W.2d at 769-770 (citations omitted).

**B. Delgado’s proposed testimony.**

Billy McLaughlin, Appellant’s brother, invoked his Fifth Amendment privilege against self-incrimination. (Tr. 1375-1376).

During the penalty phase, Appellant sought to present testimony from Shawn Delgado, Appellant and Billy McLaughlin’s cousin, about statements allegedly made by Billy. (Tr. 1615, 1622). The State objected, and Appellant made an offer of proof. (Tr. 1620, 1622).

During the offer of proof, Delgado said that Billy told her that he had tied the victim’s legs together and helped drag her body to the riverbank where they threw her down a hill. (Tr. 1623). Delgado said it was Billy’s idea to bind the victim’s ankles and take her to the river. (Tr. 1624). According to Delgado, Billy said that once there Appellant cut the victim again and had sex with her. (Tr. 1623). Delgado claimed that Billy told her that the victim’s neck had been cut from ear to ear and from neck to pelvic bone. (Tr. 1623).

Delgado said that Billy also told her that he was present for the murder. (Tr. 1623). Billy allegedly said that Appellant stabbed the victim in the back and that she

was begging for her life, but Billy had said, “I ain’t helping that bitch.” (Tr. 1623-1624).

The trial court sustained the State’s objection and excluded Delgado’s testimony regarding Billy’s statements. (Tr. 1626-1627).

**C. The trial court did not plainly err in excluding Delgado’s testimony.**

The trial court did not plainly err in refusing Delgado’s testimony because it was hearsay. Hearsay, an out-of-court statement offered to prove the truth of the matter asserted, is generally inadmissible. *State v. Barnett*, 980 S.W.2d 297, 306 (Mo. banc 1998). Appellant wanted to present evidence from Delgado that Billy McLaughlin had told her he was involved in disposing of the victim’s body as proof that Billy was actually involved in disposing of the body. (Tr. 1626, App. Br. 135-136). Thus, the evidence was excludable as hearsay.

Contrary to Appellant’s claim, the United States Supreme Court decision in *Green v. Georgia*, 442 U.S. at 97, 99, does not compel admission of Billy’s alleged statements to Delgado because they were not material to punishment and because they were not shown to be reliable. In *Green*, the United States Supreme Court held that a state’s rules of evidence may sometimes be required to give way in the punishment phase of a capital trial, but only when “the excluded testimony was highly relevant to a critical issue in the punishment phase of the trial . . . and substantial reasons existed to assume its reliability.” *Green v. Georgia*, 442 U.S. at 97, 99; *see also State v.*

*Phillips*, 940 S.W.2d 512, 517 (Mo. banc 1997). But *Green* does not compel admission of evidence during the penalty phase simply because a defendant wants to admit it. See *State v. Wise*, 879 S.W.2d 494, 521-522 (Mo. banc 1994) (holding that cumulative evidence of the defendant's talents in music and poetry was not admissible under *Green* because no evidence of reliability and was not a critical issue in case).

In *Green*, acting either together or one acting alone, Green and Moore had abducted, raped, and murdered the victim. The trial court excluded penalty-phase evidence from a third person that Moore had said he alone killed the victim after sending Green on an errand. Despite exclusion of the evidence that Moore alone committed the murder, during closing argument, the state argued that in the absence of evidence to the contrary, the jury could infer that both Green and Moore were involved in the shooting.

The Supreme Court held that even if the evidence of Moore's statement was hearsay, "under the facts of [the] case" (which the Court called "unique circumstances"), excluding it was a due process violation. *Green v. Georgia*, 442 U.S. at 97. The court noted that the excluded evidence was "highly relevant" to a "critical issue" in the penalty phase. *Id.* There were also substantial reasons to assume the statement's reliability, including that it was made spontaneously to a close friend, that it was corroborated by other evidence, that it had been a statement against interest, and that there was no reason to believe that the co-defendant had an ulterior

motive in making the statement. *Id.* The court also found “[p]erhaps most important” that the state had considered the testimony sufficiently reliable to use it against the co-defendant (Moore) and to base a sentence of death upon the evidence. *Id.*

Appellant’s case involves facts substantially different from those in *Green*. First, the statements from Billy were not material to punishment. The aggravating circumstances in Appellant’s case came from the brutal killing that involved beating, choking, a sexual assault, and stabbing. There was nothing particularly grisly about the way the victim’s body was disposed of – it was just discarded by the river with twine around its feet. (Tr. 1149, 1188-1189). Evidence that Billy helped Appellant carry the body or that it was Billy’s idea to bind her ankles and take her body to the river would not have been “highly relevant” mitigating evidence. *Cf. Green v. Georgia*, 442 U.S. at 97 (above). To the contrary, Delgado’s said that Billy told her Appellant had cut the victim’s body and had sex with her once they were by the river. (Tr. 1623). Delgado also said that Billy told her he was present for the murder and that Appellant stabbed the victim as she begged for her life. (Tr. 1623-1624). Thus, not only would Delgado’s testimony about Billy’s statements not have been material evidence in mitigation, it would more likely have provided further aggravating evidence showing depravity of mind.

In addition to not providing highly relevant mitigating evidence, Billy’s statements were not shown to be reliable. Factors in considering whether the evidence

was reliable include whether the statement was made spontaneously to a close friend, whether the statement was corroborated by the evidence, whether the statement was against interest, whether the declarant had an ulterior motive in making the statement, and whether the state relied upon the statement in other proceedings. *Green v. Georgia*, 442 U.S. at 97; *State v. Phillips*, 940 S.W.2d 512, 517-518 (Mo. banc 1997).

Billy's alleged statements to Delgado fail under that test. The statements were arguably statements against interest. But, the other factors weighed against admitting the testimony. Other than the fact that Delgado was Billy's biological cousin, there was no evidence that Billy and Delgado were close. (Tr. 1615). In fact, the evidence showed that Appellant and his siblings, including Billy had been adopted (Billy being adopted around the age of eight). (Tr. 1546, 1597-1598, 1909). Thus it was unclear whether Billy would have been close with his biological cousins or with Delgado in particular. Also, there was no evidence suggesting that Billy made the statement to Delgado spontaneously or under circumstances suggesting reliability.

Further, Billy's statement was not corroborated by the evidence. While the statement was consistent with some of the general facts of the crime, including that the murder involved stabbing, that Appellant had sex with the victim, and that the victim's feet were bound before she was discarded by the river, Billy's statement differed from the physical facts significantly. Notably, Billy said that the victim had been cut ear-to-ear and from her neck to her pelvic bone. (Tr. 1623). In fact, the

only injuries the victim had on her torso were three stab wounds, and they were only 3.5 cm, 1.5 cm, and 1.5 cm in length. (Tr. 1272-1274, 1276-1277). There was nothing about the appearance of the victim's body that would have led a person seeing it to think it was disfigured as Billy claimed (if there had been, Billy's inaccurate description could have been evidence that he at least personally saw the body). (States Ex. 38, 39, 60, 78, 80). Also, despite Appellant having discarded the victim's body in a muddy area and becoming covered in mud himself, Billy was clean on the morning after the killing. (Tr. 981). Further, Billy claimed that he had seen Appellant stabbing the victim in the back. (Tr. 1623-1624). But there were no stab wounds to Guenther's back. (Tr. 1271-1280). Also, Billy's roommate testified that Appellant had left before the killing alone, and Appellant said he was the one who put the twine on the victim's feet and that he was alone when he carried and drug her body to the river. (Tr. 975, 977, State's Ex. 70, 71). Thus, Billy's alleged statement was not corroborated by the physical evidence. And most importantly, unlike in *Green*, there was no evidence that the State used Delgado's testimony against Billy in a separate trial. Since Appellant did not demonstrate that Delgado's testimony about Billy's statement would have provided materially mitigating evidence or that the statement was reliable, the trial court did not plainly err in excluding it.

Contrary to Appellant's claim, his case is not governed by *State v. Phillips*, 940 S.W.2d 512 (Mo. banc 1997). Appellant claims that, under *Phillips*, evidence that

does not exculpate the defendant in the killing can nonetheless be admissible under *Green* if it mitigates the defendant's role in disposing of the body. (App. Br. 135). *Philips*, however, is inapposite because in *Philips*, unlike in Appellant's case, the manner of disposing of the body was the sole aggravating factor.

In *Philips*, the victim was killed by a single gunshot wound to the head. Her body was discovered, dismembered, three days later. The State had argued that Philips deserved the death penalty because she had personally cut up the victim's body. The only aggravator found was depravity of mind based on dismemberment of the body. In his motion for post-conviction relief, Philips claimed the State had violated *Brady v. Maryland* by not disclosing an audiotape from a witness saying that Buddy Minster, Philips's son, had said that he and Philips had killed the victim, that Philips drove while Minster scattered the victim's body, that they threw the victim's hands into a river, and that Minster was the one who had dismembered the victim's body.

This Court determined that the audiotape was material to punishment under *Brady*. *State v. Phillips*, 940 S.W.2d at 516-517. The Court determined that the tape did not reduce the defendant's guilt, but it exculpated her involvement in disposition of the body by showing that Philips's involvement in the dismemberment, if any, was tangential rather than direct and that "Buddy, more than Philips, was the depraved party." *Id.* at 517. 517. Once it found materiality, the Court also determined that the

evidence was reliable and would have been admissible at the penalty phase under *Green* (the statements were made spontaneously during a social gathering, indicated knowledge of the gruesome details including that the victim's hands were not found with her body, and were statements against penal interest; also, Buddy had used the murder weapon for target practice within a day or so of the murder). *Id.* at 517-518.

In Appellant's case, unlike in *Philips*, the manner of disposing of the body was not the basis for the statutory aggravator. Unlike the dismembering in *Philips*, there was not anything particularly depraved about the way Appellant disposed of the victim's body. Notably, unlike in *Philips* (or *Green*) evidence that Billy had gone along to help Appellant drop the victim's body at the river or even that Billy suggested the location would not have made Billy more culpable than Appellant in beating, choking, raping, and stabbing the victim before discarding her body. Thus, unlike in *Philips*, it would not have provided highly relevant mitigating evidence.

## X

**There was sufficient evidence to submit instruction No. 23, which included an aggravating circumstance based on depravity of mind.**

In his tenth point, Appellant claims there was insufficient evidence to support the jury's finding that the killing involved depravity of mind, and he asserts that the depravity aggravator is unconstitutionally vague. (App. Br. 137). Primarily, his argument is that he only stabbed the victim seven times and that such a stabbing does not seem excessive when compared with other cases. (App. Br. 139-143). Besides stabbing, however, Appellant's killing of Guenther followed a violent struggle involved beating, choking, and sexual assault, and the seven stab Appellant inflicted with a steak knife included several defensive wounds.

### **A. The instruction at issue.**

In relevant part, Instruction No. 23 read as follows:

In determining the punishment to be assessed under Count I against the defendant for the murder of Beverly Guenther, you must first consider whether one or more of the following statutory aggravating circumstances exist:

1. Whether the murder of Beverly Guenther involved depravity of mind and whether, as a result thereof, the murder was outrageously

wantonly vile, horrible, and inhuman. You can made a determination of depravity of mind only if you find:

That the defendant committed repeated and excessive acts of physical abuse upon Beverly Guenther and the killing was therefore unreasonably brutal.

(L.F. 856).

**B. The depravity instruction was not unconstitutionally vague.**

The statutory aggravator of depravity of mind based on repeated and excessive acts of physical abuse was not unconstitutionally vague. Section 565.032.2, which lists the statutory aggravating circumstances includes whether “[t]he murder in the first degree was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind[.]” § 565.032.2(7). In *State v. Griffin*, 756 S.W.2d 475, 489 (Mo. banc 1988), in order to comply with the U.S. Supreme Court’s decision in *Godfrey v. Georgia*, 446 U.S. 420 (1980), finding the general depravity of mind language unconstitutional, this Court ruled that the depravity of mind must be supplemented by one of several court-approved limiting factors. Specifically regarding the “brutality of defendant’s conduct,” the Court required the murder to involve “serious physical abuse,” which would be found where there is “evidence that numerous wounds were inflicted upon a victim[.]” *Id.*

This ruling is recognized by the pattern instruction and accompanying Notes on Use, which requires one of ten paragraphs to more specifically define the conduct of the defendant which demonstrates depravity of mind. MAI-CR 3d 313.40, Note 5(B). Among those paragraphs was the one used in Instruction No. 23, “That the defendant committed repeated and excessive acts of physical abuse upon [name of victim] and the killing was therefore unreasonably brutal.” MAI-CR 3d 313.40, Note 5(B)[2].

Because the limiting instruction narrows the class of murders for which the instruction applies and provides sufficient guidance to the jury for when the aggravating circumstance can be applied, this Court has repeatedly rejected claims that the depravity of mind aggravating circumstance with the narrowing language is vague. *See, e.g., State v. Williams*, 97 S.W.3d 462, 473-474 (Mo. banc 2003); *State v. Johnson*, 207 S.W.3d 24, 46 (Mo. banc 2006). As such, Appellant’s claim that the depravity instruction was vague is without merit.

**C. There was sufficient evidence to support the jury’s finding that the killing involved depravity of mind due to repeated and excessive acts of physical abuse.**

There was sufficient evidence to support the jury’s finding that the killing involved depravity of mind. “The test for a challenge to the sufficiency of the evidence to support an aggravating circumstance is whether a reasonable juror could reasonably find from the evidence that the proposition advanced is true beyond a reasonable doubt.” *State v. Kinder*, 942 S.W.2d 313, 332 (Mo. banc 1996). The

reviewing court takes the evidence in the light most favorable to the verdict. *State v. Edwards*, 116 S.W.3d 511, 545 (Mo. banc 2003).

In order to find that the killing involved depravity of mind as instructed, the jury had to find that Appellant committed repeated and excessive acts of physical abuse upon the victim and that the killing was therefore unreasonably brutal. (L.F. 856); MAI-CR 3d 313.40, Note 5(B)[2].

*State v. Butler*, 951 S.W.2d 600, 606 (Mo. banc 1997) and *State v. Rodden*, 728 S.W.2d 212, 222 (Mo. banc 1987), provide examples of the kind of evidence that can show depravity of mind. In *Butler*, the victim died from two gunshot wounds to the head. The jury found the statutory aggravator that the murder involved depravity of mind based on repeated and excessive acts of physical abuse. On appeal, the defendant claimed the evidence was insufficient to support that finding. This court disagreed. *Butler*, 951 S.W.2d at 606. It held that a gunshot wound to the head was an excessive act of physical abuse. *Id.* Because the victim was shot twice in the head, there was sufficient evidence of repeated and excessive acts of physical abuse. *Id.*

In *State v. Rodden*, defensive wounds on the victim's arms supported a finding of depravity. The defendant in *Rodden* stabbed the victim eleven times. Evidence showed that the victim would have been conscious for around ten minutes after the fatal stabbing. Once the victim died, the defendant poured a combustible liquid on her and set the body on fire. In discussing the depravity of the killing, this Court noted

that the victim was stabbed several times and that she had blocking wounds on her arms, indicating that she was conscious during the attack and attempted to fend off the defendant's knife. *State v. Rodden*, 728 S.W.2d at 222. That, along with the fact that the victim would have remained conscious after the attack and that her body was mutilated by fire, caused this Court to conclude that the victim was subject to brutal abuse and that she had ample time to contemplate her fate, showing sufficient depravity to warrant the death penalty. *Id.*

Like in *Rodden* and *Butler*, there was sufficient evidence to support the jury's finding of depravity in Appellant's case. Appellant did not simply stab Guenther. There were arcs and a slung pattern in the blood stains in the parking lot, indicating there had been a violent struggle. (Tr. 1113).

The victim had also received various injuries before the stabbing. Guenther had a bruised nose and scratches on her wrists, face, and neck that were inflicted while she was still alive. (Tr. 1256, 1268, 1274). She also had a hemorrhage under the white of her eye and areas of petechial hemorrhages, indicating she had been subjected to asphyxiation. (Tr. 1226). Appellant had scratch marks on his face and arms that he said he received from Guenther during the struggle, further demonstrating the violence of Appellant's attack. (Tr. 1199).

Besides the struggle and physical injuries preceding the killing, Appellant also had sex with the victim. (Tr. 1346). Rape is a violent act, and (as discussed above in

Point II), there was sufficient evidence that the victim was alive at the time of the rape. And in any case, for determining whether the killing involved depravity of mind, it does not matter whether Appellant had sex with the victim before she died or after. Having sex with the victim's beaten and already-dead body is at least as depraved as having sex with her while she was alive.

Finally, Appellant stabbed the victim seven times with a steak knife. (Tr. 1271-1280). Besides the fatal wound, Appellant inflicted a second stab wound near the victim's collar bone under her neck that was inflicted with sufficient force that the blade penetrated an inch and half deeper than the blade's length. (Tr. 1085, 1272-1275). Additional stab and slice wounds to the victim's arms and hands were defensive wounds, showing that the victim continued to struggle while Appellant repeatedly stabbed her. (Tr. 1268, 1279-1280, 1282). In total, the evidence showed that Appellant stabbed the victim seven times. (Tr. 1271-1280).

That evidence, showing that Appellant had beat, choked, and sexually assaulted the victim as well as stabbing her multiple times was sufficient evidence that Appellant had committed repeated and excessive acts of physical abuse upon the victim, and therefore, that the killing was unreasonably brutal.

## XI

**The trial court did not err in denying Appellant’s motion to quash the information or preclude the death penalty based on the information not including the alleged statutory aggravators.**

Appellant claims that Missouri statutes provide for two kinds of first degree murder -aggravated and non-aggravated - and therefore, that the State must plead the statutory aggravators it will rely upon at trial before the death penalty may be imposed. (App. Br. 144-147).

Under section 565.005.1, however, the State is only required to give the defendant notice of statutory aggravating circumstances that it intends to submit “[a]t a reasonable time before the commencement of the first stage of [a capital trial].”

The prosecutor in the present case gave Appellant notice initial notice of alleged statutory aggravators, including that the killing involved depravity of mind, a year before trial. (L.F. 14, 15, 56).

This Court has repeatedly rejected arguments, like Appellant’s, that this Court’s opinion in *Whitfield*, or the United States Supreme Court decisions in *Apprendi v. New Jersey* and *Ring v. Arizona*, require aggravating facts to be pled in the indictment or information, rather than in a separate filing. *See State v. Strong*, 142 S.W.3d 702, 711-712 (Mo. banc 2004); *State v. Glass*, 136 S.W.3d 496, 513 (Mo. banc 2004). This Court has called the claim Appellant’s raises that Missouri’s statutory scheme

creates the separate offenses of aggravated first degree murder and un-aggravated first degree murder “meritless.” *Cole*, 71 S.W.3d at 171. Appellant offers no persuasive reason for this Court to reverse its recent precedents.

Appellant’s reliance on *State v. Nolan*, 418 S.W.2d 51 (Mo. 1967), is misplaced. In *Nolan*, the defendant was convicted and sentenced of the crime of first degree robbery by means of a dangerous and deadly weapon, which carried a greater penalty than the crime of first degree robbery. *Id.* at 52. The Court held that the information was insufficient by charging the defendant with first degree robbery “with force and arms” because this language was not the same as charging that the defendant used a dangerous and deadly weapon. *Id.* at 54. Here, by contrast, Appellant was given notice of the statutory aggravating circumstances upon which the State intended to rely. (L.F. 119, 430, 716, 731). Also, this Court’s later decisions in *Strong*, *Glass*, *Edwards*, *Gilbert*, *Tisius*, and *Cole*, control over the holding in *Nolan*, which is distinguishable on its facts.

## CONCLUSION

For all the foregoing reasons, Appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 24,510 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 18<sup>th</sup> day of December, 2007, to:

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**APPENDIX**

Sentence and Judgment.....A1