
*In the
Supreme Court of Missouri*

STATE OF MISSOURI,

Respondent,

v.

KEVIN JOHNSON, JR.,

Appellant.

**Appeal from St. Louis County Circuit Court
Twenty-First Judicial Circuit
The Honorable Melvin W. Wiesman, Judge**

RESPONDENT’S BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from a conviction obtained in the Circuit Court of St. Louis County for murder in the first degree, section 565.020, RSMo,¹ for which Appellant was sentenced to death. Therefore, the Supreme Court of Missouri has exclusive appellate jurisdiction. Mo. Const. art. V, § 3.

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

STATEMENT OF FACTS

On September 28, 2005, Appellant was indicted for one count each of murder in the first degree, section 565.020, RSMo; robbery in the first degree, section 569.020, RSMo; and assault in the first degree, section 565.050, RSMo; and with three counts of armed criminal action, section 571.015, RSMo. (L.F. 3, 28-30). The State filed a Notice of Evidence of Aggravation on January 3, 2006. (L.F. 5, 45-47). The charge of murder in the first degree was severed from the remaining counts, and Appellant was tried by a jury on that charge on October 31-November 9, 2007, before Judge Melvin W. Wiesman. (L.F. 14, 16-17).² Viewed in the light most favorable to the verdict, the evidence at trial showed:

Appellant lived in the Meachem Park neighborhood of Kirkwood with his great-grandmother and with his twelve-year-old brother, Joseph “Bam Bam” Long. (State's Ex. 80; Tr. 1219, 1781). His grandmother lived in the house next door. (State's Ex. 80). In July of 2005, Appellant was wanted for a probation violation for a misdemeanor offense. (Tr. 1220-21). Appellant had previously fled when police officers went to his house to try and arrest him. (Tr. 1222). Shortly after that, Appellant had been seen by police driving a white Ford Explorer, but had eluded the officers. (Tr. 1222).

On July 5, 2005, Officer Chris Nelson was on patrol when he saw a white Ford Explorer parked across the street from Appellant's house. (Tr. 1225). Nelson contacted

² This appeal is taken from Appellant's second trial on the charged crime. An earlier trial ended with a hung jury. (L.F. 14).

an Officer Brand, who was also in the area. (Tr. 1228-29). The officers were trying to determine if the Explorer belonged to Appellant when Appellant's grandmother came out of her house and began yelling for help. (Tr. 1232). She told Officer Brand that her twelve-year-old grandson had a seizure and had fallen. (Tr. 1235). "Bam Bam" had been born with a congenital heart condition, but the officers weren't told that. (Tr. 1240-41, 1641, 1781). Officer Brand called for paramedics, and he and Officer Nelson went inside, where they found "Bam Bam" lying on the floor on his stomach. (Tr. 1236). He was not responsive and appeared to be unconscious. (Tr. 1236-37). The officers detected a faint pulse and weak breathing. (Tr. 1236-37). A small pool of blood had formed around "Bam Bam's" mouth, and the officers decided not to move him for fear that would cause more complications. (Tr. 1238). The officers had also been trained to not perform CPR on a person who has a pulse, because that can make the situation worse. (Tr. 1239).

The paramedics arrived at 5:35 p.m., four minutes after receiving the call. (Tr. 1182). Police Sergeant William McEntee, who was the supervisor for the area, also arrived at the scene. (Tr. 1191, 1240). Several family members were also present. (Tr. 1191). The paramedics rolled "Bam Bam" over on his back, and were unable to find a pulse. (Tr. 1187). They began performing CPR and used electric pads to try and shock the heart back into beating. (Tr. 1188-89). The paramedics asked the family members what "Bam Bam" had been doing before he collapsed, and about his medical history, but no one responded. (Tr. 1194-95). The paramedics were never told about "Bam Bam's" heart condition. (Tr. 1185-86). An EMT asked the officers to look for suicide notes,

drugs, open pesticide containers, or anything else that might explain why “Bam Bam” had collapsed. (Tr. 1196, 1242). Nelson checked the kitchen area and McEntee checked the basement, but they did not find anything. (Tr. 1196, 1243-44).

Jada Tatum, “Bam Bam” and Appellant’s mother, arrived while the paramedics were working on “Bam Bam.” (Tr. 1192, 1635-36, 1639). She was very upset and tried to get to her son. (Tr. 1192, 1640-41). The paramedics asked Sergeant McEntee to take her outside and he escorted her to the front porch. (Tr. 1193). Tatum was upset, but did not resist. (Tr. 1193). The paramedics took “Bam Bam” to the hospital, with Officer Brand following. (Tr. 1244). Sergeant McEntee asked Tatum’s boyfriend to take her to the hospital. (Tr. 1644). Sergeant McEntee and Officer Nelson stayed behind for a few minutes talking to a family member, and then left. (Tr. 1244-45). McEntee stopped by the hospital where “Bam Bam” had been taken. (Tr. 1198, 1644-45). “Bam Bam” died from an irregular heartbeat caused by his congenital heart problems. (Tr. 1781-82).

Later that evening, Appellant was driving around the neighborhood, where he ran into a cousin. (Tr. 1424-25). The cousin got into the vehicle, and they drove about a block over, where Appellant parked. (Tr. 1426). The two men then walked and talked, with Appellant saying that the police were acting like they didn’t want to save his brother. (Tr. 1426). Appellant and his cousin ended up on Alsobrook Street, where they encountered Appellant’s girlfriend. (Tr. 1428). She and Appellant’s cousin got into a truck and smoked marijuana, while Appellant walked towards Orleans Street. (Tr. 1429, 1433).

At about the same time, Sergeant McEntee was responding to a report of fireworks being shot off in Meachem Park. (Tr. 1167-68, 1433). As McEntee turned off of Orleans onto Alsobrook, he encountered three teenage boys. (Tr. 1293-95, 1316-17, 1380-81). McEntee stopped his car and asked the boys, who were standing on the driver's side of the car, whether they had been setting off fireworks. (Tr. 1296, 1318, 1383; State's Exs. 68, 69, 82). As this was taking place, Appellant walked up to the passenger side of the patrol car, said something to the effect of, "you killed my brother," put his hand through the open window and began firing a handgun. (Tr. 1299, 1320, 1347-48, 1384-85, 1442-45; State's Exs. 68, 75, 82). Witnesses saw McEntee's head and body jerking back from the force of the bullets, and blood running down the right side of his face. (Tr. 1321, 1385, 1447). One of the bullets went through and struck one of the teenagers in the leg. (Tr. 1301, 1323). Appellant reached inside the car and took McEntee's gun. (Tr. 1387-90, 1448, 1450-51; State's Ex. 82). Appellant ran from the scene. (Tr. 1322, 1348-49).

McEntee's patrol car went down the street and hit a tree. (Tr. 1349, 1671). A crowd of people ran to the car. (Tr. 1349). McEntee got out of the car and fell forward onto his knees. (Tr. 1351-52, 1675). He tried to talk, but his mouth was full of blood. (Tr. 1675). Appellant approached the car and told everyone to get out of his way. (Tr. 1352-53). Appellant shot McEntee two or three more times. (State's Exs. 66, 75). At least one shot struck McEntee in the head. (State's Ex. 80). McEntee fell to the ground. (State's Ex. 80). Appellant then bent over McEntee and appeared to be rifling through his pockets. (Tr. 1678-79). When a bystander asked Appellant what he was doing, Appellant replied that McEntee had killed his brother. (Tr. 1680).

Appellant then walked away from the scene, a gun in each hand, yelling and cursing, saying things like, “they killed my brother, I just don’t give a fuck” (Tr. 1680, 1711). He encountered his mother and her boyfriend. (Tr. 1654). Appellant’s mother asked him what he had done, and Appellant replied, “that mother fucker let my brother die, he needs to see what it feels like to die.” (Tr. 1654). His mother told him that wasn’t true. (Tr. 1654). Appellant walked away. (Tr. 1655). He eventually got in his Explorer and drove out of Meachem Park. (Tr. 1451-53, 1455; State's Ex. 80).

One of the bystanders had called 911, and another got on Sergeant McEntee’s radio and reported that an officer had been shot. (Tr. 1170, 1677). Officer Nelson was among the first to arrive at the scene. (Tr. 1252). He found Sergeant McEntee lying face down. (Tr. 1254). There were holes in McEntee’s face, and the back of his head had basically been blown away. (Tr. 1255). His tongue was hanging out of his mouth, which was bleeding profusely, and his right eye was missing. (Tr. 1255). Nelson rolled McEntee over, and a large amount of brain matter or blood was dumped in his lap. (Tr. 1256). Officer Nelson fixed McEntee’s hair, put his tongue back in his mouth, and pulled out the stuff that was hanging from his right eye. (Tr. 1256). Nelson then rolled McEntee back over to the position in which he had found him. (Tr. 1257). Nelson looked for McEntee’s gun and his extra ammunition, but they were missing. (Tr. 1258, 1265).

The same paramedic who, just a couple of hours earlier, had asked McEntee to escort Appellant’s mother out of the house responded to the scene and rolled McEntee over. (Tr. 1208). He was unable to recognize the sergeant. (Tr. 1208). He observed the

same injuries that Officer Nelson had seen. (Tr. 1208). Large amounts of blood came out of McEntee's mouth and from the holes in his head as the paramedic rolled him over. (Tr. 1208-09). McEntee was taken to a hospital, where he was pronounced dead. (Tr. 1271).

An autopsy showed that McEntee suffered seven gunshot wounds. (Tr. 1791). One bullet went in the right forehead, destroyed the right eye, and exited through the left cheek. (Tr. 1793). Another bullet went in the right cheek and lodged in the neck. (Tr. 1793-94). It damaged some teeth and went through the tongue, resulting in a lot of bleeding. (Tr. 1794-95). A third bullet went through the right jaw and also went through the tongue, exiting from the left upper neck. (Tr. 1795-96). A fourth bullet entered behind the right ear and lodged in a sinus located deep inside the right jaw. (Tr. 1797). A fifth bullet entered the right upper back and exited through the chest. (Tr. 1798). A sixth bullet grazed the right upper chest, entered in the left upper chest, and exited through the left shoulder. (Tr. 1799-1800). The seventh bullet entered the left upper chest and exited through the left upper arm. (Tr. 1800).

The medical examiner testified that the gunshot wound behind the right ear was fatal and would have immediately incapacitated Sergeant McEntee. (Tr. 1809-10). She testified that McEntee could have survived the other gunshots, and would still have been conscious and able to function briefly after those wounds were inflicted. (Tr. 1803-09). The angle of the fatal bullet was consistent with Sergeant McEntee being on his hands and knees when he was shot. (Tr. 1817). In that case, the shot would have immediately dropped him to the ground. (Tr. 1818). The angle of the gunshot wound to the back was

consistent with the shooter standing over Sergeant McEntee as he lay flat on the ground. (Tr. 1818).

Police recovered four nine-millimeter shell casings and a spent projectile from the street, and five shell casings from inside the patrol car. (Tr. 1504, 1510-13, 1522-25). Tests on the shell casings and on the bullet fragments that were recovered from Sergeant McEntee's body determined that they were all fired from the same weapon. (Tr. 1553, 1574-76).

Appellant went to his father, who made arrangements for him to stay at a cousin's apartment. (Tr. 1413-18; State's Ex. 80). St. Louis County police learned that Appellant's Explorer was parked at the apartment complex. (Tr. 1531-32). A distant cousin of Appellant was police chief in the St. Louis suburb of Beverly Hills and was asked by family members to arrange for Appellant's surrender. (Tr. 1882-83). St. Louis County police went to the apartment and placed Appellant under arrest. (Tr. 1884-86).

Appellant was given the *Miranda*³ warnings and driven to St. Louis County police headquarters, where he was again given the *Miranda* warnings and waived them. (Tr. 1598-1601, 1724-26). Appellant gave a statement where he denied shooting Sergeant McEntee. (State's Ex. 70). He did say that he went up to McEntee after the patrol car hit the tree and got blood on his hand when he bent over to get a closer look at McEntee. (State's Ex. 70). Appellant also said that he did not get emotional over "Bam Bam's"

³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

death, that he and his brother were not close, and that he did not feel the need to get back at anybody over “Bam Bam’s” death. (State's Ex. 70).

Appellant’s belt was seized and was sent to the crime lab for testing. (Tr. 1611, 1629). A spot found near the buckle tested presumptively positive for blood, but the sample was not large enough to confirm that it was blood. (Tr. 1630). DNA was extracted from the sample. (Tr. 1631). Neither Appellant nor Sergeant McEntee could be excluded as possible sources of the DNA. (Tr. 1631-32). The Explorer had been towed to the St. Louis County Crime Lab and processed for evidence. (Tr. 1541-42). A box of nine-millimeter bullets was found in the center console. (Tr. 1546). Very small blood spots were found inside the vehicle. (Tr. 1547). Those blood spots were tested and were found to be consistent with Sergeant McEntee’s DNA. (Tr. 1625-28).

At trial, the State played a DVD of Appellant’s testimony at his prior trial. (Tr. 1287). Appellant said that he was looking out the window of his great-grandmother’s house when he saw Officers Brand and Nelson looking at his Explorer. (State's Ex. 80). Appellant said that he was afraid the Explorer would be towed due to his outstanding warrant, so he gave the keys to “Bam Bam” and told him to give them to his grandmother so that she could say that she was driving the vehicle. (State's Ex. 80). Appellant said that after “Bam Bam” collapsed and the paramedics arrived, he saw Sergeant McEntee pushing his mother to keep her out of the house. (State's Ex. 80). Appellant said that he then started to get mad. (State's Ex. 80). Appellant also said that after “Bam Bam” was taken to the hospital, Sergeant McEntee came over to the house where he was staying, and asked his great-grandmother where Appellant was. (State's Ex. 80). Appellant said

that Sergeant McEntee saw Appellant standing in the window, that he tapped Officer Nelson on the shoulder, and that the two officers looked at Appellant and started smiling. (State's Ex. 80).

Appellant said that he learned thirty minutes later that “Bam Bam” had died, and that he was shocked, mad, and upset. (State's Ex. 80). Appellant said that he drove around for a while, and then began walking. (State's Ex. 80). Appellant ran into his cousin, whom he told that the police did not help “Bam Bam” because they had been too busy looking for him. (State's Ex. 80). Appellant and his cousin began walking, and Appellant said that he was, “kind of angry still but, you know, I wasn’t as mad as when I first heard the news.” (State's Ex. 80). Appellant eventually left his cousin, who by that time was smoking marijuana with Appellant’s girlfriend, and began walking down Alsobrook Street. (State's Ex. 80). Appellant said that he saw a police car and tried to walk by it without being noticed. (State's Ex. 80). As he did so, Appellant said that he saw Sergeant McEntee inside, and that McEntee saw him and started smiling. (State's Ex. 80). Appellant said that he “flipped out,” pulled out his gun and fired seven shots. (State's Ex. 80). Appellant then walked away towards Orleans Street. (State's Ex. 80).

Appellant said that he encountered his mother, who asked what was going to happen to Appellant’s two-year-old daughter. (State's Ex. 80). Appellant said that he started running to get his daughter. (State's Ex. 80). As he did so, he came across the patrol car and saw Sergeant McEntee moving on the side of the car. (State's Ex. 80). Appellant said that he “flipped out” and shot Sergeant McEntee one more time in the

head. (State's Ex. 80). McEntee fell forward, and Appellant said that he tripped over the body, causing the gun to discharge into the sidewalk. (State's Ex. 80).

Appellant did not testify at the instant trial, but did present two witnesses. (Tr. 1832, 1864-65, 1882). His grandmother testified that when "Bam Bam" collapsed at her house, the police stood around with their arms folded and did not attempt to help him. (Tr. 1845-46). She also testified that Sergeant McEntee pushed Appellant's mother out the door when she tried to enter the house. (Tr. 1850). She further testified that she told Appellant of "Bam Bam's" death between 6:30 and 7:00 p.m. (Tr. 1858). Joe Collins, the police chief of Beverly Hills and a distant cousin of Appellant, described his involvement in negotiating Appellant's surrender. (Tr. 1882-89).

The jury found Appellant guilty of murder in the first degree. (L.F. 482). After hearing evidence from both the State and the defense in the sentencing phase of trial, the jury returned with a sentencing recommendation of death. (Tr. 2034-2290; L.F. 515). The jury found the following aggravating circumstances beyond a reasonable doubt: (1) that Appellant, by his act of murdering Sergeant McEntee, knowingly created a great risk of death to more than one person by means of a weapon that would normally be hazardous to the lives of more than one person; (2) that the murder of Sergeant McEntee involved depravity of mind, and as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhumane; and (3) that the murder of Sergeant McEntee was committed against a peace officer while engaged in the performance of his official duty. (L.F. 515). The trial court imposed the jury's sentencing recommendation on February 1, 2008. (L.F. 18; Tr. 2375, 2390-91). This appeal follows. (L.F. 19, 594-96).

ARGUMENT

I.

Alleged intentional nondisclosure by juror Broome.

Appellant claims the trial court abused its discretion in overruling his Motion for New Trial because juror Elizabeth Broome intentionally failed to disclose that she knew one of the State's witnesses. But Broome's uncontroverted testimony was that she did not make the connection during voir dire that the witness was the husband of a former co-worker. The trial court did not abuse its discretion in finding that testimony credible.

A. Underlying Facts.

During voir dire, the prosecutor read the names of potential witnesses for the State and asked the venire panel if they thought they knew any of those people. (Tr. 869-70). The prosecutor first read off the names of eighteen people that he classified as civilians. (Tr. 869-70). He then read the names of four members of the McEntee family, eight people that he classified as firefighters/paramedics, and eleven officers from the Kirkwood Police Department. (Tr. 872-75). The prosecutor then turned to St. Louis County police officers:

There's a handful of St. Louis County police officers who participated in this who may also testify in this case. Let me run through those.

Detective Nickerson, Joe Nickerson. Clay Peeler. James McWilliams. Paul Neske. Leon Stone. Craig Chriska. Jeff Hunnius.

Mark Goebelney. Mark Houston. Don Scognamiglio. Michael Wood. I believe he's actually in Ferguson now. And Mark Hillian.

Are any of those names familiar to anybody as County police officers?

Anybody – let me start back with the jury box. Anybody know, friends with County police officers – or I won't even limit it to County. Close friends with police officers, law enforcement officers.

(Tr. 877). Venireperson Broome answered that her stepbrother was a police officer in Phoenix, that she did not talk to him on a regular basis, and that nothing about that relationship would affect her ability to hear and assess the testimony of police officers.

(Tr. 877-79). Broome served on the jury. (Tr. 1063; L.F. 552).

St. Louis County Police Detective Don Scognamiglio testified for the State. (Tr. 1494-95). He was assigned to the Crime Scene Unit in 2005, and was responsible for collecting evidence and photographing the scene of Sergeant McEntee's shooting. (Tr. 1495, 1498-99). Scognamiglio's testimony consisted of identifying and describing photographs taken at the scene, identifying shell casings and bullets recovered at the scene, and describing how that evidence was packaged and sent to the crime laboratory. (Tr. 1500-26). Defense counsel conducted a cursory cross-examination directed to types of evidence that were not found at the scene. (Tr. 1527-28).

Appellant's Motion for New Trial alleged that defense counsel discovered after trial that Juror Broome knew Scognamiglio, and that Broome's failure to

disclose that during voir dire warranted a new trial. (L.F. 556-57). Broome testified at the hearing on the new trial motion. (Tr. 2349). She testified that she remembered hearing the prosecutor mention Detective Scognamiglio's name, and that she had previously worked with his wife at an elementary school. (Tr. 2352-53). Broome worked in the school office and Scognamiglio's wife was a computer technician. (Tr. 2353). They worked together for two school years, before Mrs. Scognamiglio moved to a different school about two-and-a-half to three years prior to Appellant's trial. (Tr. 2353).

Broome said that Detective Scognamiglio occasionally came to the school to visit his wife, and would have to check in at the office. (Tr. 2354). Broome testified that she would say "hi" to him on those occasions. (Tr. 2354-55). She testified that she knew Scognamiglio was a police officer, but did not know that he was a detective and did not really know what he did in his job. (Tr. 2355).

Broome indicated that she recognized Detective Scognamiglio when he entered the courtroom to testify as a witness:

Q. Okay. Now, let me ask you why it was that you did not indicate to us that you knew who he was?

A. Because when [the prosecutor], I'm sorry, sir, he had mentioned it, it didn't register to me because he listed off a bunch of people, and I really didn't put two and two together because I hadn't seen him in over at least two and a half years. And when I seen him

on the stand, I didn't – I'm like, oh. I didn't know what I could do. I had no idea. If I should have said, I didn't know.

Q. Okay. So when you saw him on the stand, you knew that he was someone that you knew?

A. Yes, ma'am.

Q. At any point in time, did you make a comment to your husband or anyone else that he was the only credible witness and the only witness that hadn't changed his testimony?

A. I had. When I had gone home and we had discussed the case because – to get it out of my system, I told my husband – he had asked me just questions, and I said, yeah, I said, oh, I had seen Don there, and he was one of the ones who had brought evidence in that seemed to be the same evidence as the first time we had seen previous pictures or trial. That's what I told him.

Q. When you spoke to your husband about that, you referred to Detective Scognamiglio as Don?

A. Yes, because – uh-huh.

Q. So you knew his first name as well as his last name?

A. Yes.

Q. You knew his first name and last name during the jury selection?

A. Well, I knew it, but like I said, it did not register to me who he was because I hadn't talked to them or really had seen them in over two and a half years.

(Tr. 2355-57). Broome also said that she was not close friends with the Scognamiglio's, and that they did not socialize, with the possible exception of attending the same school function. (Tr. 2358-59). She was unable to definitively recall whether Detective Scognamiglio attended any of those functions. (Tr. 2359). Broome said that she did not know that Detective Scognamiglio was a St. Louis County police officer, and she reiterated twice more that his name did not register with her during voir dire. (Tr. 2358, 2360). Broome also said that her recognition of Detective Scognamiglio at trial did not have any impact on her decision or on how she viewed the evidence. (Tr. 2359).

The court made the following findings in denying the Motion for New Trial:

The Court finds that the juror was asked after the list of witnesses was read, and I quote, "Are any of those names familiar to anyone as County police officers?" The credible evidence before this Court is that the juror did not know Don Scognamiglio as a County police officer although she had in the past been aware that he was a police officer. Her relationship with the officer was peripheral to her familiarity with his wife. She never socialized with the officer and his wife, but only knew him as one who occasionally appeared at work and school functions. The Court finds that the juror's denial that the mention of his name in the midst [of] a list of twelve officers that were read in sequence did not register with her as

someone she knew, and the Court finds that that is credible. She had not seen him and had had no contact with him for a few years before that question was asked.

The remainder of the question by the prosecutor to which there was a response sought was, “Anybody – let me start back with the jury box. Anybody know, friends with County police officers – or I won’t even limit it to County. Close friends with police officers, law enforcement officers.” There’s no credible evidence before the Court that the juror was close friends with any officers, including the County detective, other than the friends the juror disclosed during voir dire, and she did give some responses to knowing some police officers during the questioning process.

Clearly, even if the Court were to find that the juror’s conduct could be interpreted as non-disclosure, which it does not, there’s no credible evidence that the non-disclosure would be intentional. At the very worst, it would be unintentional. Also, there is no credible evidence before the Court that the Defendant was prejudiced by any non-disclosure that would have resulted.

(Tr. 2371-73).

B. Standard of Review.

A trial court’s ruling as to the existence of juror misconduct will not be disturbed absent a finding of abuse of discretion on review. *State v. Smith*, 944 S.W.2d 901, 921 (Mo. banc 1997). In determining whether to grant a new trial based on an allegation of

juror nondisclosure, the court must determine whether a nondisclosure occurred at all, and if so, whether it was intentional or unintentional. *State v. Mayes*, 63 S.W.3d 615, 625 (Mo. banc 2001). If unintentional, a new trial is not warranted unless prejudice resulted from the nondisclosure that may have influenced the jury's verdict. *Id.* On the other hand, bias and prejudice will normally be presumed if a juror intentionally withholds material information. *Id.* Appellant bears the burden of proving intentional nondisclosure warranting a new trial. *Id.* at 625-26.

C. Analysis.

Intentional nondisclosure occurs: (1) where there exists no reasonable inability to comprehend the information solicited by the question asked of the prospective juror, and (2) where it develops that the prospective juror actually remembers the experience or that it was of such significance that her purported forgetfulness is unreasonable. *Id.* at 625; *Williams by Wilford v. Barnes Hosp.*, 736 S.W.2d 33, 36 (Mo. banc 1987). Unintentional nondisclosure occurs where the forgotten experience was remote in time or insignificant, or where the potential juror reasonably misunderstood the question propounded. *Williams by Wilford*, 736 S.W.2d at 36.

1. Juror made complete disclosure.

Nondisclosure occurs only after a clear question has been asked that is not truthfully answered. *Brines by and through Harlan v. Cibis*, 882 S.W.2d 138, 139 (Mo. banc 1994). The trial court correctly noted that two different questions were asked of the

venire panel.⁴ The first was whether any of the names that had just been read were familiar to the veniremembers as St. Louis County police officers. (Tr. 877-78; 2371-72). Broome testified that she did not know that Detective Scognamiglio was a St. Louis County police officer. (Tr. 2360). The trial court found that testimony to be credible. (Tr. 2372). This Court defers to the trial court’s credibility finding on questions of juror nondisclosure. *Byers v. Cheng*, 238 S.W.3d 717, 723 (Mo. App. E.D. 2007).

In *Byers*, a juror was accused of failing to disclose that he was related to the plaintiff’s attorney, was good friends with the attorney’s father and uncle, and worked for twenty years for the attorney’s aunt. *Id.* at 722. During voir dire, the attorney had asked the panel whether anyone knew him or his firm. *Id.* The juror testified at the hearing on the new trial motion that he did know the attorney’s relatives, but did not know the attorney, and that he did not connect the relatives with the attorney during voir dire. *Id.* at 722-23. The trial court found the juror to be a credible witness and accepted his testimony that he did not know the attorney at the time of voir dire. *Id.* at 723. The Eastern District found that, “[b]ecause [the juror] did not know [the attorney] at the time

⁴ Appellant contends that the trial court improperly focused on those specific questions instead of considering the entire voir dire. Both of the cases cited in support of that argument concern whether jurors were properly struck for cause. *State v. Hall*, 955 S.W.2d 198, 204 (Mo. banc 1997); *State v. Parker*, 738 S.W.2d 566, 571 (Mo. App. E.D. 1987). Neither case involved allegations of nondisclosure or other juror misconduct.

of *voir dire*, his silence when [the attorney] asked if any venireperson knew him was complete disclosure.” *Id.* at 723.

In this case, the trial court accepted Broome’s testimony that she did not know at the time of *voir dire* that Detective Scognamiglio was a St. Louis County police officer. As a result, her silence when the prosecutor asked if his name was familiar as a County officer was complete disclosure.

The second question to which the venirepanel was asked to respond was whether any of them were “close friends” with any police officers. (Tr. 878, 2372). Broome’s testimony, which the trial court again found credible, was that she and Detective Scognamiglio were not close friends. (Tr. 2372-73). Broome’s testimony at the hearing was not contradicted. *State v. Potter*, 711 S.W.2d 539, 541 (Mo. App. E.D. 1986). Because there was no showing that Broome considered Detective Scognamiglio to be a close friend, there was no showing of nondisclosure. *Chilton v. Gorden*, 952 S.W.2d 773, 780 (Mo. App. S.D. 1997).

2. Any nondisclosure that did occur was unintentional.

Even if Broome’s failure to mention Scognamiglio could be viewed as nondisclosure, the trial court correctly found that it would have been unintentional. (Tr. 2373). As noted above, unintentional nondisclosure occurs where the forgotten experience was remote in time or insignificant. *Williams by Wilford*, 736 S.W.2d at 36. The credible evidence before the trial court was that Broome only knew Detective Scognomiglia as the husband of a former co-worker whom she had not seen for nearly three years. (Tr. 2353). Broome did not socialize with the detective or his wife, and did

not maintain any type of regular contact with Mrs. Scognomiglia after she transferred to work at another school. (Tr. 2356-58). Broome was generally aware of Detective Scognomiglia's occupation, but did not know any details about his work, including the agency that employed him. (Tr. 2355, 2360).

Broome's contact with Detective Scognomiglia was insignificant and was somewhat remote in time. It is not objectively unreasonable to fail to immediately recognize a name, included within a long list of names, as a passing acquaintance from years past. There was no evidence presented to contradict Broome's testimony that she did not make the connection during voir dire that the Don Scognomiglia mentioned in that long list of police officers was the same person that she had been casually acquainted with some years before.

The determination of whether a disclosure is intentional is left to the sound discretion of the trial court. *Steele v. Evenflo Co.*, 147 S.W.3d 781, 792 (Mo. App. E.D. 2004). A trial court did not abuse its discretion in finding credible a juror's testimony that she did not remember at the time of voir dire a lawsuit filed against her five years previously. *Bradford v. BJC Corporate Healthcare Svcs.*, 200 S.W.3d 173, 182 (Mo. App. E.D. 2006).⁵ Another trial court did not abuse its discretion where the record lacked

⁵ *Bradford* distinguished one of the cases relied on by Appellant, *Hatfield v. Griffin*, 147 S.W.3d 115 (Mo. App. W.D. 2004). In *Hatfield*, the Western District found intentional nondisclosure when a juror failed to mention a legal action filed against her the week before the trial in which she served as a juror. *Hatfield*, 147 S.W.3d at 120.

any evidence that a juror intentionally concealed the truth during voir dire. *State v. Shelby*, 782 S.W.2d 703, 704 (Mo. App. W.D. 1989). No evidence of intentional concealment was found where the undisputed evidence was that the juror did not recognize a State's witness who approached him and said that he had dated the juror's mother. *Potter*, 711 S.W.2d at 541.

The credible and undisputed evidence before the trial court in this case shows that Broome failed to recognize during voir dire that Detective Scognamiglio was the same person she had met a few years previously. That failure was reasonable given the extent and latency of their acquaintance, and the trial court did not abuse its discretion in determining that if any nondisclosure occurred, it was unintentional.

3. Appellant was not prejudiced by unintentional nondisclosure.

The Eastern District noted in *Bradford* that the nondisclosed incident was far more remote in time. *Bradford*, 200 S.W.3d at 183. In this case, juror Broome's previous contacts with either Detective Scognamiglia or his wife were also far more remote than the nondisclosed incident in *Hatfield*.

The other case that Appellant relies on concerns a juror's claim that she did not remember during voir dire that the father of her only child was a murder victim. *State v. Martin*, 755 S.W.2d 337, 340 (Mo. App. E.D. 1988). The difference between failing to remember an incident of that magnitude and failing to remember a casual acquaintance from years previously is so obvious that it does not merit any further discussion.

Appellant's argument only asks this Court to infer prejudice from intentional nondisclosure, and does not argue any other basis for finding prejudice. As a result, Appellant has abandoned any claim that he was prejudiced by any unintentional nondisclosure. *Byers*, 238 S.W.3d at 725.

Appellant would not be able to show prejudice in any event. In determining prejudice, this Court considers the materiality and relevance of the undisclosed incident to the matter being tried. *Id.* at 722.

Detective Scognomiglia's testimony was limited to identifying crime scene photographs and shell casings and bullets recovered from the crime scene. (Tr. 1500-26). That evidence was not disputed and defense counsel asked only a few questions on cross-examination to establish that certain types of evidence were not found at the scene. (Tr. 1527-28). Counsel's approach to Scognamiglia's testimony is not surprising, since the defense strategy was to admit at the outset that Appellant shot and killed Sergeant McEntee. (Tr. 1097-98, 1101). Appellant's defense focused on his mental state at the time of the shooting and his own testimony was largely consistent with that of other witnesses as to the number of shots fired and where they were fired. (Tr. 1101; State's Ex. 80). The crime scene evidence thus would not have been dispositive in determining Appellant's guilt or innocence of murder in the first degree.

In addition, Broome testified at the hearing on the new trial motion that her recognition of Detective Scognamiglio at trial did not have any impact on her decision or on how she viewed the evidence. (Tr. 2359). The trial court was entitled to find that testimony credible. *See Bradford*, 200 S.W.3d at 183 (no prejudice where juror testified

that her involvement with nondisclosed suit would not have any impact on her ability to sit as a juror in medical negligence case). There is no reasonable likelihood that any nondisclosure by Broome affected the jury's verdict, and Appellant has not met his burden of showing that he is entitled to a new trial.

II.

***Batson* challenge to strike of veniremember Cottman.**

Appellant claims the trial court clearly erred in overruling his *Batson*⁶ challenge to the State's peremptory strike of veniremember Debra Cottman. The record in its entirety shows that Cottman was struck for a valid, race-neutral reason, and that the trial court's ruling was not clearly erroneous.

A. Underlying Facts.

The State exercised four peremptory strikes from the main jury panel and two strikes from the alternate panel. (Tr. 1048-49). Appellant raised a *Batson* challenge to the strike of Debra Cottman.⁷ (Tr. 1049). Counsel did not identify Cottman's race, or specify whether she was making a race or gender *Batson* challenge, but the court asked the prosecutor to articulate a race-neutral basis for the strike. (Tr. 1049). The prosecutor explained his reasons for striking Cottman:

Judge, I note that Cottman, I felt when we were questioning her in small groups was not antagonistic towards me but not all that willing to answer the questions regarding the death penalty and other issues surrounding that.

⁶ *Batson v. Kentucky*, 476 U.S. 79 (1986).

⁷ Appellant also challenged the strike of veniremember John Clark, but has not pursued that claim on appeal. (Tr. 1049).

Also as a development in that large group, she was a foster parent for the Annie Malone Children's Home. She indicated that she still sees a lot of the kids that she was a foster parent for during that time now that they have grown up some. I don't know what the age group is, but they were around the Defendant's age based on her time frame of when she said she was a foster parent down there. And since there will be evidence in this case, particularly if we get to a second half, there will be evidence that the Defendant was at least for some period of time in Annie Malone's custody, I don't want anybody associated with Annie Malone. I assume she has probably – rightly so I suggest, but a very high opinion of Annie Malone, anything that went on there. I think that's not something that would be favorable to our position regarding the Defendant's time away from home.

(Tr. 1051). In response, defense counsel stated that the State had not struck Robert Bayer, a white male who stated that he was a foster parent at some point in time. (Tr. 1052). The prosecutor noted that Bayer had said that he was briefly a foster parent for St. Vincent's and had no connection to Annie Malone. (Tr. 1052). The court found that none of the other jurors on the panel from which strikes were made had a connection to Annie Malone, and that the strike was race-neutral. (Tr. 1052-53).

B. Standard of Review.

This Court defers to the trial court's ruling on a *Batson* challenge, and will overturn that ruling only upon a showing of clear error. *State v. Edwards*, 116 S.W.3d 511, 525 (Mo. banc 2003). The trial court's determination will be overturned only if it is

shown to be clearly erroneous, leaving this Court with the definite and firm impression that a mistake was made. *Id.*

C. Analysis.

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

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

1. Similarly-situated white jurors.

During the hearing on the *Batson* challenge, Appellant identified Robert Bayer as being similarly-situated to Cottman on the second reason given for the strike – that Cottman had been associated with the Annie Malone Children’s Home. Appellant is now, for the first time on appeal, raising three other veniremembers as being similarly-situated on that grounds. Appellant is also claiming that thirty-six veniremembers are similarly-situated on the other reason identified for the strike – Cottman’s demeanor when being asked about the death penalty. Appellant’s failure to bring those veniremembers to the trial court’s attention raises the same concerns that govern the timeliness of a *Batson* challenge itself.

This Court has held that a *Batson* challenge should be made before the venire is excused and the jury sworn, in order “to allow the trial court the opportunity to correct errors and avoid prejudice in the first instance, without unduly hampering the vindication of the equal protection rights *Batson* is meant to protect.” *State v. Parker*, 836 S.W.2d 930, 935 (Mo. banc 1992). Those equal protection rights include those of the wrongfully excluded veniremember, so that quashing the panel and commencing the jury selection process anew permits the discrimination endured by the excluded venireperson to go unredressed. *Id.*

While the *Batson* challenge itself was timely, Appellant’s failure to raise the additional veniremembers now named on appeal prevented the trial court from seating veniremember Cottman on the jury, had the court determined that evidence regarding those veniremembers would have established a *Batson* violation. Similarly-situated white jurors should be brought to the trial court’s attention before the venire panel is

released. *State v. Mason*, 2008 WL 4388227 at *3 (Mo. App. W.D., Sept. 30, 2008); *State v. Williams*, 159 S.W.3d 480, 485 (Mo. App. S.D. 2005). Failure to timely identify any similarly-situated white jurors constitutes a waiver of the *Batson* challenge. *Mason*, 2008 WL 4388227 at *3. Since Appellant did timely raise one white juror as similarly-situated he has not completely waived his *Batson* claim, but he should be held to have partially waived the claim to the extent that it relies on similarly-situated jurors who were not timely brought to the trial court's attention. Even if this Court were to consider the untimely raised veniremembers, the record shows that they were not similarly-situated to Cottman.

a. *Demeanor during death qualification voir dire.*

As noted above, Appellant seeks to compare Cottman's answers during death qualification voir dire with those of thirty-six other veniremembers. Appellant then goes on to argue that, "[t]he state's failure to strike any of those other 36 jurors is strong evidence of pretext." (Appellant's Brf., p. 48). However, two of the thirty-six veniremembers identified by Appellant were peremptorily struck by the State – Cleeta Jackson and Katherine Stasiak. (Tr. 1048-49). An additional eleven were struck for cause – Haber, Schlenk, Grant, Stenslokken, Hunt, Peters, Knoepfel, Becherer, Queen, Aikman, and Nunez. (Tr. 242, 244-45, 339-40, 445, 447, 451, 850, 1040-42). Three others had jury numbers past the cut-off point and were excused prior to peremptory strikes being made – Fenton, Molnar, and Desloge. (Tr. 1044-45; L.F. 535-37). The responses of those jurors have no probative value in determining pretext. Nor, for that matter, do the answers of the remaining veniremembers.

Appellant's focus on the veniremember's answers misses the point. In explaining the strike, the prosecutor did not discuss Cottman's answers during death qualification voir dire. Rather, he talked about the demeanor that she displayed in answering the questions. (Tr. 1051). A venireperson's demeanor as well as her stance regarding the death penalty is a proper factor to consider and a reasonable grounds for striking a venireperson. *State v. Brooks*, 960 S.W.2d 479, 489 (Mo. banc 1997). A simple comparison of the words spoken by the veniremembers reveals nothing about the body language, the vocal inflections, or the overall attitude displayed when speaking those words. *See State v. Johnson*, 220 S.W.3d 377, 382 (Mo. App. E.D. 2007 (trial court's findings are given deference because tone of voice and demeanor cannot be gleaned from a transcript) *see also Snyder v. Louisiana*, 128 S. Ct. 1203, 1211 (2008) ("a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial").

While Appellant argues that the prosecutor should have made a record of Cottman's demeanor during the voir dire, the failure to do so does not constitute reversible error. *State v. Miller*, 162 S.W.3d 7, 17 (Mo. App. E.D. 2005). In fact, it should be noted that when the State made a *Batson* challenge to Appellant's peremptory strikes, defense counsel also cited to the demeanor of the excluded venirepersons, despite not having made a record of that during voir dire. (Tr. 1059-60). Those strikes were allowed to stand. (Tr. 1059-60).

Even if one were to consider just the verbal responses given by the veniremembers, that would still not be determinative of discriminatory motive.

Appellant relies on the Supreme Court decision in *Miller-El v. Dretke*, 545 U.S. 231 (2005). The Eighth Circuit has distinguished *Miller-El*, finding that allegedly inconsistent treatment of jurors who give similar responses is not, by itself, sufficient to find a *Batson* violation. *Nicklasson v. Roper*, 491 F.3d 830, 842 (8th Cir. 2007). That court has noted that *Miller-El* involved a number of additional factors, such as mischaracterizing the testimony of an African-American venireperson who should have been an ideal juror for the prosecution, asking different questions to African-American and white jurors, and manipulating the voir dire rules in order to effectuate the automatic exclusion of African-Americans. *Id.* at 842 n.14; *Barnett v. Roper*, 541 F.3d 804, 812 (8th Cir. 2008). The record in this case does not disclose the kinds of egregious additional factors that were present in *Miller-El*.

b. *Association with Annie Malone Children's Home.*

The prosecutor also stated that he struck Cottman because she had been a foster parent for children from the Annie Malone Children's Home who would have been about the same age as Appellant. (Tr. 1051). The prosecutor noted that Cottman probably had a positive view of Annie Malone, and that would not be favorable to his case, since there was likely to be evidence developed during the sentencing phase of trial that Appellant had been in the custody of Annie Malone. (Tr. 1051).

The only juror raised at trial as similarly-situated was Robert Bayer. (Tr. 1052). When asked during the defense voir dire if anyone had ever been in a foster parent situation, Bayer responded that he and his wife had been weekend foster parents for one child through Catholic Charities. (Tr. 1009). He said that experience lasted for two or

three months, ending when a family member took custody of the child. (Tr. 1009).

Cottman testified that she had been a weekend foster parent for Annie Malone, starting in the 1980's, and that she still had contact with some of the persons she had cared for. (Tr. 1010-11). No other jurors indicated that they had been foster parents.

The prosecutor properly distinguished Cottman from Bayer. The prosecutor's stated reason for striking Cottman was not based on a general experience with being a foster parent, but rather because of a specific association with Annie Malone, a facility specifically linked to Appellant. (Tr. 1051). As the prosecutor noted, Bayer had no connection to Annie Malone. (Tr. 1052). Since the reason given by the prosecutor for striking Cottman does not apply to Bayer, the two are not similarly-situated.

Appellant raises, for the first time, an additional argument as to why Bayer and other jurors not identified at trial should be considered similarly-situated. Appellant contends that he also received services from the Division of Family Services (DFS), and that jurors Bayer, Duggan, Georger, and Boedecker all had experiences with that agency. In response to defense questioning about prior contacts with DFS, Bayer said that about fourteen years previously, someone had made allegations to DFS that he had beaten his son. (Tr. 1004). Venireperson Duggan said that during her twenty-eight year teaching career, she had called DFS three times to make hotline reports concerning students. (Tr. 1005). She had no other involvement beyond making those calls. (Tr. 1005).

Venireperson Georger worked as a mentor in the family court program about nine or ten years prior to Appellant's trial. (Tr. 1006). Venireperson Boedecker said that she works with new moms and babies, and that DFS would be called to investigate when there

would be a positive drug screen following delivery. (Tr. 1007-08). Boedecker said that she was not the person who initiated those calls. (Tr. 1008).

Neither Bayer, Duggan, or Boedecker had the kind of extensive experience with DFS that would compare with Cottman's extensive involvement with Annie Malone. Furthermore, Bayer's experience with DFS would have been based on a negative incident, and there is nothing in his answer that would cause the prosecutor to fear that he might hold the type of favorable opinion of DFS that the prosecutor suspected Cottman of having towards Annie Malone. Venireperson Georger's mentoring experience would have some parallels with the foster parent experience, but Georger only mentioned the family court program. He did not say that he had any direct experience with DFS, and the record does not indicate that Appellant went through the same family court mentoring program that Georger was involved in. His answer thus does not raise the concern that led the prosecutor to strike Cottman, namely a substantial involvement with a specific program or institution that Appellant was involved in, and that would form part of the evidence in the sentencing phase of the trial. None of the jurors are similarly-situated to Cottman.

2. Logical relevance between stated reason and case to be tried.

A juror's apparent hesitation or discomfort with imposing the death penalty is a valid basis for exercising a peremptory strike. *Brooks*, 960 S.W.2d at 489. A peremptory strike is not discriminatory where the veniremember's answer can logically lead the prosecutor to believe that veniremember might be more sympathetic to the defendant. *State v. Johnson*, 207 S.W.3d 24, 38 (Mo. banc 2006). Cottman's demeanor during death

qualification and her involvement with an institution that would be mentioned as part of the mitigating evidence presented at sentencing by Appellant gave the prosecutor a legitimate concern about Cottman's ability to consider and impose the death penalty. While Appellant criticizes the prosecutor for speculating about Cottman's attitudes, *Batson* permits the State to exercise peremptory challenges on the basis of the prosecutor's hunches. *State v. Pullen*, 843 S.W.2d 360, 364 (Mo. banc 1992).

3. Prosecutor's demeanor.

The record does not reveal any information about the prosecutor's demeanor, and gives no indication that his demeanor caused the trial court any concerns. Appellant does complain that the prosecutor failed to inquire about the venire panel's experience as foster parents, and that the prosecutor speculated about the effect of Cottman's experience with Annie Malone on her ability to hear the evidence. The questioning about past foster home experiences was initiated by defense counsel, and Appellant would apparently have this Court enact a standard that prohibits a prosecutor from taking into consideration any information elicited during the defense voir dire. There is no legal nor logical basis for restricting the State's ability to make peremptory strikes in that manner.

Furthermore, this Court has questioned the weight to be placed on a prosecutor's failure to ask questions when there is no allegation that the prosecutor engaged in dissimilar questioning of venirepersons who had given similar responses. *Johnson*, 207 S.W.3d at 38. As to the argument that the prosecutor speculated about Cottman's attitude towards Annie Malone, there is nothing in the record to suggest that the trial court would have allowed the prosecutor additional questioning to explore that subject. Furthermore,

as noted above, a prosecutor is allowed to base a peremptory strike on hunches. *Pullen*, 843 S.W.2d at 364. The prosecutor’s conduct of voir dire does not lead to a conclusion that his reasons for striking Cottman were either “makeweight” or “reeking of afterthought.” *Johnson*, 207 S.W.3d at 38.

4. Trial court’s past experiences with the prosecutor.

Again, the record reveals nothing about the trial court’s past experiences with the specific prosecutor. Appellant instead relies on a handful of instances where appellate courts have found *Batson* violations in cases handled by the St. Louis County Prosecuting Attorney’s office. *State v. McFadden*, 216 S.W.3d 673 (Mo. banc 2007)⁸; *State v. McFadden*, 191 S.W.3d 648 (Mo. banc 2006); *State v. Hampton*, 163 S.W.3d 903 (Mo. banc 1995); *State v. Hopkins*, 140 S.W.3d 143 (Mo. App. E.D. 2004). None of those cases indicate that they involved the same prosecutor, and only one involved the same judge that tried this case. *Hampton*, 163 S.W.3d at 903. And in that case, the trial court’s finding that a white juror was similarly-situated to a stricken African-American juror was

⁸ Appellant cites a 2008 case, but presumably intended to cite to the above case. There is a 2008 case involving the same defendant, but it does not contain a *Batson* claim. *McFadden v. State*, 256 S.W.3d 103 (Mo. banc 2008).

later proved to be unfounded. *Id.* at 905. The cases cited by Appellant shed no light on the trial court's past experiences with the prosecutor trying the case.⁹

The cases also do not support Appellant's argument that the St. Louis County Prosecuting Attorney's office has engaged in a broad pattern of discriminatory practice similar to what the United States Supreme Court found in *Miller-El*. In that case, the Court noted that the prosecution had engaged in repeated shuffling of the venire panel when African-Americans were in the front rows, and had questioned African-Americans in a different manner than whites, with the questions to African-Americans designed so as to increase the chances of prompting disqualifying answers. *Miller-El*, 545 U.S. at 253-64. The Court also noted the existence of a formal policy, enshrined in a manual distributed to prosecutors, to exclude minorities from jury service. *Id.* at 253, 264.

None of the egregious facts relied on by the Court in *Miller-El* are present in this case. A finding of *Batson* violations in a mere four cases, out of the presumably thousands of cases tried by the office during that time period, does not rise to the level of an established and pervasive pattern of discrimination. That is particularly true when two of the opinions sparked dissents (*McFadden*, 216 S.W.3d at 679; *McFadden*, 191 S.W.3d at 658) – showing that reasonable persons could disagree about whether discrimination did actually occur – and where in a third case, this Court noted that the evidence did not

⁹ The fact that this case was tried by the elected prosecuting attorney is of no added significance given the lack of any evidence that the prosecuting attorney had initiated a systematic policy of excluding minorities from juries.

support the trial court's finding that a white juror was similarly-situated to a stricken African-American juror. *Hampton*, 163 S.W.3d at 905.

5. Other objective factors.

It is true that the victim in this case was white, while Appellant is African-American. There is no indication, however, that the shooting was specifically motivated by any sort of racial animus. The record does not specifically reflect the races of all the witnesses who testified at trial. It does appear though that many of the material witnesses, including all the eyewitnesses to the shooting, were African-American.

The record viewed in its entirety does not support Appellant's claim that venireperson Cottman was struck because of her race. The trial court did not clearly err in denying the *Batson* challenge.

III.

Instruction and argument on deliberation.

Appellant claims the trial court erred and plainly erred in overruling his motion for judgment of acquittal and his objections to the verdict-directing instruction for murder in the first degree. Appellant also argues plain error in the prosecutor's argument on deliberation. Those claims fail because the trial court properly instructed the jury with the applicable MAI instructions, and the prosecutor's argument properly set out for the jury the evidence and inferences supporting a finding of deliberation.

A. Underlying Facts.

The verdict directing instruction for murder in the first degree was based on MAI-CR 3d 314.02, and was marked as Instruction Number Five. (Tr. 1869). Appellant objected to the instruction on the basis that the definition of murder in the first degree left no distinction between murder in the first degree and murder in the second degree. (Tr. 1877). The court overruled the objection, noting that it was bound by the directives of this Court to give the instruction. (Tr. 1877). Instruction No. 5, as given to the jury, read:

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about July 5, 2005, in the County of St. Louis, State of Missouri, the defendant caused the death of Sgt. William McEntee by shooting him, and

Second, that defendant knew or was aware that his conduct was practically certain to cause the death of Sgt. William McEntee, and

Third, that defendant did so after deliberation, which means cool reflection upon the matter for any length of time no matter how brief, Then you will find the defendant guilty of murder in the first degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of murder in the first degree.

(L.F. 471).

In his opening argument to the jury, the prosecutor read the definition of deliberation set forth in the instruction. (Tr. 1903-04). The prosecutor then went on in both his opening and closing arguments to discuss the evidence and how it supported a finding of deliberation under that instruction. (Tr. 1904-29, 1972-96). Defense counsel did not object to those arguments.

Appellant's Motion for New Trial contained an allegation that the trial court erred in overruling Appellant's objection to Instruction No. 5. (L.F. 562-63). The motion contained no allegations of error regarding the prosecutor's argument.

B. Standard of Review.

Appellant's Point Relied On encompasses three unrelated claims of error, thus violating Rule 30.06, which prohibits multifarious claims of error. *State v. Thompson*, 985 S.W.2d 779, 784 n.1 (Mo. banc 1999); Supreme Court Rules 30.06(c) and 84.04(d). One of the claims asserted in the Point Relied On is that the trial court erred in overruling

the motion for judgment of acquittal. That assertion of error goes to whether there was sufficient evidence to support the jury's verdict. Supreme Court Rule 27.07(a); *State v. Johnson*, 244 S.W.3d 144, 152 (Mo. banc 2008). While Appellant argues that the evidence of deliberation was not overwhelming, he does not argue that the evidence was insufficient to support his conviction. Appellant's failure to cite any authority or present any argument waives the claim of error. *State v. Nicklasson*, 967 S.W.2d 596, 618 (Mo. banc 1998).

Appellant has not preserved his claim of error relating to the prosecutor's arguments, and that claim can only be reviewed for plain error. Supreme Court Rule 29.11(d); *Edwards*, 116 S.W.3d at 536. A conviction will be reversed based on plain error in closing argument only when it is established that the argument had a decisive effect on the outcome of the trial and amounts to a manifest injustice. *Edwards*, 116 S.W.3d at 536-37.

The only claim under this point that is properly preserved is the overruling of Appellant's objections to the verdict directing instruction. An appellate court will reverse on a claim of instructional error only if there is error in submitting an instruction and prejudice to the defendant. *State v. Zink*, 181 S.W.3d 66, 74 (Mo. banc 2005). MAI instructions are presumptively valid and, when applicable, must be given to the exclusion of other instructions. *Id.*

C. Analysis.

Appellant throws several claims of error into this Point. The claims can be divided into those alleging instructional error and those alleging plain error in the prosecutor's argument.

1. Instructional error claims.

Appellant argues that the statutory definition of deliberation contained in the verdict directing instruction blurs the distinction between first and second-degree murder. *See* § 565.002(3), RSMo 2000. That argument has been repeatedly rejected by this Court. *State v. Strong*, 142 S.W.3d 702, 716 (Mo. banc 2004); *State v. Middleton*, 998 S.W.2d 520, 524 (Mo. banc 1999); *State v. Rousan*, 961 S.W.2d 831, 851-52 (Mo. banc 1998).

The other claim of instructional error is that the jurors were not instructed that they must unanimously determine the existence of each element of murder in the first degree. That claim was not raised before the trial court, so it can only be reviewed for plain error. *Johnson*, 244 S.W.3d at 162. An instructional error does not constitute plain error unless Appellant can demonstrate that the trial court so misdirected the jury that it is apparent that the instructional error affected the verdict. *Id.*

Appellant notes this Court's opinion in *State v. Johnston*, where the jury sent a note during deliberations asking if the jury was required to be unanimous on each element. *State v. Johnston*, 957 S.W.2d 734, 752 (Mo. banc 1997). The trial court directed the jury to be guided by the instructions as given, and this Court found no prejudice in "suggest[ing] to the jury that they had their answer if they would consider the correct, clear and unambiguous instructions already given." *Id.* This Court therefore

found that the approved verdict directing instructions correctly stated the law and gave the jury adequate guidance as to the findings it must make to return a verdict of guilty. Furthermore, Instruction No. 5 contained a tail stating that, “unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of murder in the first degree.” (L.F. 471). Instruction No. 7 tells the jury that the verdict must be agreed to by each juror. (L.F. 473). The instructions, when read together, provided sufficient guidance to the jury. There is no error, much less plain error, in the instructions.

2. Prosecutor’s argument on lesser-included offense.

Appellant also argues that reversal is required due to the prosecutor giving what Appellant attempts to cast as an acquittal first argument. The full context of that portion of the argument is:

You also heard about Murder in the Second Degree. I want to tell you that again, read these instructions closely because they will tell you at the bottom – I’m sorry, at the top of No. 6, if you do not find the Defendant guilty of Murder in the First Degree, then you must consider whether he’s guilty of Murder in the Second Degree. Which tells you that you’re considering Murder in the First Degree, which is only if you decide that he didn’t commit Murder in the First Degree that you even get to Murder in the Second Degree.

(Tr. 1898). This Court has previously found that a similar argument did not require reversal because the jury was properly instructed on lesser-included offenses, and is

presumed to follow those instructions. *Tisius v. State*, 183 S.W.3d 207, 217 (Mo. banc 2006). The Court also found that the strength of the evidence of deliberation would preclude a finding of prejudice. *Id.*

The Court of Appeals for the Southern District recently found that a prosecutor's argument that the jury had to "reject" first-degree murder before considering second-degree murder did not constitute an acquittal first argument. *State v. Bescher*, 247 S.W.3d 135, 142 (Mo. App. S.D. 2008). The court noted that "reject" can simply mean not agreeing on first-degree murder and then moving on. *Id.* at 142-43. The prosecutor did not explicitly state that the jury had to acquit the defendant before moving on to second-degree murder. *Id.* at 143. Finally, the court concluded that there would be no manifest injustice even if the argument did misstate the law, because the jury was properly instructed and was presumed to have followed those instructions. *Id.*

The challenged statement by the prosecutor in this case is similar to that in *Bescher*. The prosecutor did not explicitly say that the jury had to acquit, and his argument could be interpreted as the jury being unable to agree that Appellant committed first-degree murder. Furthermore, not only was the jury properly instructed, but the prosecutor read the applicable portion of the second-degree murder instruction before making the argument Appellant now complains of. (Tr. 1898). Additionally, there was strong evidence of deliberation, as will be set out below. That portion of the prosecutor's argument thus did not cause prejudice, much less manifest injustice. *See id.*

3. Prosecutor's argument on deliberation.

Appellant picks out selected portions of the prosecutor's guilt phase opening argument and claims that the prosecutor misstated the law on deliberation. "A challenged prosecutorial argument must be considered in the context of instructions given by the trial court, as well as the argument as a whole." *State v. Mason*, 657 S.W.2d 40, 44 (Mo. App. E.D. 1983). Appellant does not mention it, but the prosecutor opened the argument by reminding the jury that the instructions were the law of the case. (Tr. 1892).

Appellant recites a portion of the prosecutor's remarks on the element of deliberation: "The issue in this case is the third element. If that's an issue." (Tr. 1903). Appellant fails to note that the prosecutor then immediately read to the jury the definition of deliberation, so that portion of the argument reads:

The issue in this case is the third element. If that's an issue. The Defendant did so after deliberation, which means cool reflection upon the matter for any length of time no matter how brief. Whether it is six months that he planned to murder somebody or in the blink of an eye, for any period of time no matter how brief.

(Tr. 1903-04). Appellant also cites various portions of the argument where the prosecutor refers to Appellant making a conscious decision to kill, and other portions where the prosecutor argued that Appellant knew that he was going to shoot Sergeant McEntee. (Tr. 1908-09, 1917, 1921).

The prosecutor did not misstate the law, but rather discussed how the evidence gave rise to a fair inference that Appellant knowingly caused Sergeant McEntee's death after deliberating on the matter. The elements of deliberation may be proven from the

circumstances surrounding the crime. *State v. Cole*, 71 S.W.3d 163, 169 (Mo. banc 2002). Evidence that can support an inference of deliberation include the defendant's opportunity to terminate the attack after it began, shooting the victim in the head, attempting to conceal evidence, failing to seek aid for the victim, and flight from the scene. *Id.*; *State v. Davis*, 914 S.W.2d 21, 22 (Mo. App. E.D. 1995); *State v. Tisius*, 92 S.W.3d 751, 764 (Mo. banc 2002); *State v. Ramsey*, 874 S.W.2d 414, 417 (Mo. App. W.D. 1994).

In addition to arguing that Appellant made a conscious decision to kill, which was a part of Appellant's deliberative process, the prosecutor discussed other evidence which would support an inference of deliberation. He noted that Appellant got a loaded gun out of his vehicle, put it in his pocket and sat on the steps of his home, thinking about what he was going to do. (Tr. 1912-14). He noted that Appellant then walked around, with the gun still in his pocket, and that Appellant had said that he had calmed down by that time. (Tr. 1915-16). The prosecutor noted that Appellant then walked straight up to the police car, stuck his hand inside and fired several shots. (Tr. 1918):

Walking up to that car, getting the gun out of his car, putting it in his pocket, roaming the neighborhood, waiting for a cop to show up is cool reflection. Walking down the street to the police car knowing he's going to kill him, knowing he's going to shoot this cop if he's the right guy he wants to kill is cool reflection. Putting that gun in there. Taking it out of his pocket is cool reflection. Sticking it in the window, shooting it, you killed

my brother, bang, bang, bang, bang, seven more times, seven times total, each one is cool reflection.

(Tr. 1921). The prosecutor went on to note that Appellant passed on the chance to terminate the attack:

He told you he's walking down the street after he shoots him, he's got the gun, and he hears the car take off. And his lawyer asked him, you hear the car hit the tree? No, I hear it take off and I turned around and I see it go up the street and hit the tree. And why is that important? Because he knows McEntee is not dead. He knows McEntee is still alive.

So he goes right back up that street after he sees that, comes around the corner there. Is he going to his car to head out of town, get out? He realizes McEntee is still alive, and he walks back up the street. He walks right up to McEntee. And you've seen the photographs but look at them again. There's no way on this earth he can walk the way he says he was going to see his baby and see movement over there. The car is at an angle, the door is open, and he's walking over, McEntee is down on all fours crawling away.

And as he sees him do that, he wants to tell you that it's just a reflex. Why? Because the truth hurts him. He can't say, I walked up to McEntee and shot him, but he did. If he says that, that's deliberation. It is deliberation. He walked up. Look at the angle of that shot. The angle of

that shot has him right over the top of him firing that shot. Just like Vivian Harris said. Just like Cecil Jones said.

And then what's he do? Now he's down – what does Cecil tell you? He's down going through his pockets. You know what, he wasn't going through his pockets. He was taking the clips. Johnson tells you he didn't have a gun. He wants you to believe that that means somebody else took the gun.

Only you know what it means? As he walks up there, he knows McEntee has been shot a whole bunch of times, he saw what Manu saw, but he knows he's also not dead and he knows McEntee is absolutely defenseless. He's alive and he doesn't have a gun because he's got the gun. He walks up to McEntee, and he puts a round in the back of his head as he stands over him, and down goes McEntee immediately.

(Tr. 1925-27). The prosecutor's argument, when taken in its entirety, correctly pointed the jury to the evidence and the reasonable inferences from that evidence which supported a finding of murder in the first degree.

Even if the prosecutor's argument could be considered to have included misstatements of the law, no manifest injustice would have resulted because the jury was properly instructed on the elements of murder in the first degree, including the definition of deliberation, and juries are presumed to follow the instructions. *State v. Parker*, 886 S.W.2d 908, 924 (Mo. banc 1994). It was on that basis that this Court found no manifest injustice in an accomplice liability case where the prosecutor told the jury that it was not

required to find that the defendant intended to kill the victim, but only that he committed an act purposefully which furthered the victim's death. *State v. Roberts*, 709 S.W.2d 857, 866 (Mo. banc 1986). This Court also found no manifest injustice where the prosecutor said: "The deliberation is not cool, it's not something that has to be reflected on, it is coolly reflected upon for any length of time, no matter how brief." *Strong* 142 S.W.3d at 717.

Finally, an argument that is inconsistent with the verdict-directing instructions will not constitute plain error requiring reversal when the evidence of guilt is strong. *Mason*, 657 S.W.2d at 44. As noted above, deliberation can be found from the defendant's opportunity to terminate the attack after it began, shooting the victim in the head, attempting to conceal evidence, failing to seek aid for the victim, and flight from the scene. *Cole*, 71 S.W.3d at 169; *Davis*, 914 S.W.2d at 22; *Tisius*, 92 S.W.3d at 764; *Ramsey*, 874 S.W.2d at 417.

The evidence favorable to the verdict shows that after Appellant shot Sergeant McEntee several times while McEntee was in the car, he started to leave the scene, but then came back after the car rolled down the street and hit a tree. (Tr. 1299, 1320, 1347-48, 1352-53, 1384-85, 1442-45; State's Exs. 68, 75, 82). Appellant told the gathered crowd to get out of his way, then fired the fatal shot into McEntee's head. (Tr. 1352-53, 1809-10, 1817-18; State's Exs. 66, 75, 80). Appellant obviously did not attempt to seek aid for McEntee, but instead fled from the area and hid out for several days. (Tr. 1413-18, 1882-83, 1884-86; State's Ex. 80). Appellant admitted to disposing of his gun, which was never recovered. (State's Ex. 80; Tr. 1575). There was also evidence that before the

shooting, Appellant was accusing the police of not doing enough to help his brother. (Tr. 1426). And witnesses heard Appellant make several statements immediately before and after the shootings that the police had killed his brother. (Tr. 1654, 1680, 1711).

Tisius also involved the shooting deaths of law enforcement officers and contained many of the factors present in this case. The defendant shot one officer a total of five times, three times in the head, at close range. *Tisius*, 92 S.W.3d at 764. After learning that the officer was conscious and did not die from the first round of shots, the defendant fired another round. *Id.* After shooting the victims, he took no note of their physical condition. *Id.* The defendant fled from the scene, disposing of the murder weapon along the way. *Id.* This Court found that the evidence recited above was sufficient to support the jury's finding of deliberation. *Id.*

The jury in this case, just as the jury in the *Tisius* case, had substantial evidence from which to find deliberation. It cannot, therefore, be said that the unobjected-to argument had a decisive effect on the outcome of the trial and amounted to a manifest injustice. *Edwards*, 116 S.W.3d at 536-37.

Appellant attempts to argue that the prosecutor's comments did have a decisive effect by comparing his argument in this trial with his argument from Appellant's first trial, which ended in a hung jury. In addition to relying on matters outside the record, it is sheer speculation as to what factors resulted in the different outcomes of the two trials. If a different outcome on retrial were a proper measuring stick for determining prejudice (and Respondent asserts that it is not), then one would have to compare every facet of the

two trials in order to make a valid comparison. Appellant's argument fails and his point should be denied.

IV.

Refusal of instructions on murder in the second degree without sudden passion and voluntary manslaughter.

Appellant alleges the trial court erred in refusing his proffered instructions on murder in the second degree without sudden passion and voluntary manslaughter. The trial court did not err because the evidence did not support the requested instructions. Appellant would not be prejudiced in any event because the jury was instructed on murder in the second degree without the sudden passion language, but found Appellant guilty of the greater offense of murder in the first degree.

A. Underlying Facts.

The State submitted, and the trial court gave to the jury, an instruction on murder in the second degree that did not contain any language on sudden passion. (Tr. 1869-70; L.F. 472). Appellant proffered an instruction on murder in the second degree that would have required the jury to find that Appellant was not under the influence of sudden passion arising from adequate cause when he shot Sergeant McEntee. (Tr. 1871-72). Appellant also proffered an instruction on voluntary manslaughter. (Tr. 1872-73).

Defense counsel argued that her proffered instruction on murder in the second degree would be submitted if the court were to submit voluntary manslaughter:

We feel that the voluntary manslaughter instruction is an appropriate instruction because the jury could infer from the evidence that a reasonable person may have been upset by the apparent lack of any effort on the part of the police to do anything in terms of helping Joseph Long as he was dying

on the floor. So we feel that that would be an appropriate instruction to submit to the Court.

(Tr. 1872). The court asked the prosecutor for a response:

Yes, Judge. I don't think there's any basis in the evidence from which the jury could find that there was sudden passion as defined by the statute, and certainly not passion that arose at the time of the offense. There's also a significant period of time between what defense is claiming as the adequate cause and the time of this action. And the only action at the time of his shooting of Sergeant McEntee in the first instance was that he turned and smiled at him, if that. So I don't think there's any basis for submitting either of those instructions.

THE COURT: The Court agrees with the State on that. I don't believe that there is any adequate evidence to support sudden passion and adequate cause. Definition of adequate cause means "cause that would reasonably produce a degree of passion in a person of ordinary temperament sufficient to substantially impair an ordinary person's capacity for self-control."

I don't believe there is any evidence to support that. I know that the evidence would indicate that the Defendant was upset, but I don't believe that he was – I believe he was upset over the death of Joseph, and I don't believe that there was anything that was done by Sergeant McEntee that would have created a – produced a reasonable degree of passion in a person

of ordinary temperament sufficient to substantially impair his capacity for self-control.

(Tr. 1873-74). Appellant's proffered instructions were refused and were marked as Instructions B and C. (Tr. 1874-75; L.F. 475-76).

B. Standard of Review.

In determining whether the refusal to submit an instruction was error, the evidence is viewed in the light most favorable to the defendant. *State v. Avery*, 120 S.W.3d 196, 200 (Mo. banc 2003). The trial court should resolve any doubts concerning the evidence in favor of instructing on a lower degree of the crime, leaving it to the jury to decide which of two or more grades of offense, if any, the defendant is guilty. *Johnston*, 957 S.W.2d at 751.

C. Analysis.

The concept of sudden passion arising from adequate cause is an objective standard that is measured by the ordinary person's capacity for self-control. *State v. Fears*, 80 S.W.2d 605, 609 (Mo. banc 1991). Passion may be rage, anger, or terror, but it must be so extreme that, for the moment, the action is being directed by passion rather than reason. *Id.* Sudden passion is not established where there has been time for the passion to cool. *Id.* To be adequate, the provocation must be of a nature calculated to inflame the passions of the ordinary, reasonable, temperate person and must result from a sudden, unexpected encounter or provocation tending to excite the passion beyond control. *Id.*

Appellant's theory is that Sergeant McEntee's alleged act of smiling at Appellant as he sat in his patrol car was adequate cause giving rise to sudden passion because it brought to mind "Bam Bam's" death and what Appellant perceived as the police's failure to respond. The events surrounding "Bam Bam's" death would have been a former provocation at best, and former provocation will not support a voluntary manslaughter

instruction. *Id.* (defendant not entitled to instructions where he murderously beat his wife because they had a previous argument and she returned home).

Appellant relies on a Court of Appeals opinion to argue that the events that occurred prior to the shooting can be considered on the question of provocation. *State v. Battle*, 32 S.W.3d 193 (Mo. App. E.D. 2000). The facts of that case are distinguishable, however. The court recited a series of acts occurring in the hours preceding the shooting: including the victim *continuously* glaring at the defendant and his girlfriend, nudging the defendant several times so as to spill his drink, trying to run the defendant off the road, following the defendant at speeds of up to 100 miles an hour, striking the defendant's girlfriend multiple times, making numerous threatening remarks to the defendant and his girlfriend, and lunging for the defendant's gun. *Id.* (emphasis added). The bulk of the provocative conduct immediately preceded the shooting. *Id.*

The court thus relied on an ongoing course of conduct that did not provide time for the passion to cool. *See Fears*, 803 S.W.2d at 609. That was not the situation in this case. The undisputed evidence showed that the shooting happened about two hours after "Bam Bam's" collapse and the events that purportedly angered Appellant. (Tr. 1182, 1200). About an hour-and-a-half elapsed between when Appellant learned of "Bam Bam's" death and when he encountered Sergeant McEntee. (State's Ex. 80). According to Appellant's own testimony, he had calmed down during that intervening period. Appellant described his state of mind as: "kind of angry still but, you know, I wasn't as mad as when I first heard the news." (State's Ex. 80). It is questionable whether Sergeant McEntee's act of smiling could be considered adequate cause under any

circumstances. It certainly cannot be considered adequate cause in light of the lapse of time and the opportunity for Appellant to cool off.

Even if Appellant had been entitled to the instructions, he cannot show that he was prejudiced. In *Johnston*, as in this case, the jury was instructed on murder in the first degree and murder in the second degree without the language on sudden passion. *Johnston*, 957 S.W.2d at 751. The jury found the defendant guilty of murder in the first degree. *Id.* at 739. This Court concluded that: “because the jury found Johnston guilty of the greater of the two instructed crimes, he could not have been prejudiced by the refusal to give an instruction on yet another lesser crime.” *Id.* at 751. This case presents the same situation. Appellant was not prejudiced by the refusal of his proffered instructions.

V.

Proportionality of death penalty.

Appellant alleges that the death penalty was disproportionately applied to his case. Appellant’s arguments for setting aside the death sentence are contrary to precedent from this Court and the United States Supreme Court. Application of the statutory factors and a comparison of this case with others in which the death penalty has been imposed shows that Appellant’s sentence is not excessive or disproportionate.

A. Standard of Review.

This Court independently reviews each sentence of death to determine (1) whether it was imposed under the influence of passion or prejudice, or any other arbitrary factor; (2) whether there was sufficient evidence to support the finding of a statutory aggravating circumstance and any other circumstance found; and (3) whether the sentence was

excessive or disproportionate to the penalty imposed in similar cases. § 565.035.3, RSMo 2000; *State v. Middleton*, 995 S.W.2d 443, 467 (Mo. banc 1999).

B. Analysis.

Appellant begins his argument by reciting the various allegations of error contained in his brief, and asserts that those alleged errors render his death sentence unreliable and disproportionate. Respondent has addressed those allegations of error in this brief and incorporates those arguments into this point. In each instance there either is no error, or harmless error that did not prejudice Appellant or result in a manifest injustice. Accordingly, none of the claims that Appellant raises elsewhere in his brief render the death sentence unreliable or disproportionate. *Johnson*, 207 S.W.3d at 50.

Appellant next claims that the death penalty is inappropriate due to the mitigating evidence that was presented. Appellant cites to no authority for the proposition that a certain volume or type of mitigating evidence renders a death sentence disproportionate. This Court has, in fact, turned aside similar arguments, noting that the jury had rejected the mitigating evidence. *Id.* at 51 *see also State v. Glass*, 136 S.W.3d 496, 522 n.11 (Mo. banc 2004) (noting that proportionality review disposed of argument that alleged trial errors combined with mitigating evidence undermined the reliability of the sentence). This Court has further noted that the presence of mitigating factors such as the defendant's youth and lack of a significant criminal history do not act as bars to the death penalty, nor does a defendant's traumatic childhood render the death penalty excessive or disproportionate. *State v. Hutchison*, 957 S.W.2d 757, 768 (Mo. banc 1997); *State v. Barnett*, 980 S.W.2d 297, 310 (Mo. banc 1998); *Brooks*, 960 S.W.2d at 503.

That leaves Appellant's final argument, which is that prosecutorial discretion and the absence of a mandatory opportunity for a defendant to obtain a sentence of life imprisonment renders Missouri's death penalty system arbitrary and capricious. The United State Supreme Court has expressly rejected the notion that prosecutorial discretion renders the death penalty arbitrary and capricious. *Gregg v. Georgia*, 428 U.S. 153, 199 (1976). The Court criticized the argument as placing "totally unrealistic conditions" on the use of the death penalty. *Id.* at 199 n.50. A concurring opinion agreed:

Petitioner has argued in effect that no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it. This cannot be accepted as a proposition of constitutional law.

Id. at 226 (White, J., concurring). This Court, likewise, has repeatedly rejected arguments that the death penalty is arbitrary due to prosecutorial discretion. *See, e.g., Barnett*, 980 S.W.2d at 309; *State v. Weaver*, 912 S.W.2d 499, 522 (Mo. banc 1995); *State v. Powell*, 798 S.W.2d 709, 714 (Mo. banc 1990); *State v. Smith*, 756 S.W.2d 493 497 (Mo. banc 1988); *State v. Trimble*, 638 S.W.2d 726, 736 (Mo. banc 1982), and cases cited therein.

Appellant offers no compelling reason to depart from the well-settled precedent of this Court and the United States Supreme Court. He cites to a statistical study by professors at the University of Arizona and St. Louis University Schools of Law, and a newspaper article, as evidence that the death penalty is inconsistently applied in different

jurisdictions. Neither source, however, establishes that death penalty decisions are being made in a manner that violates the Constitution.

The United States Supreme Court has found statistical studies insufficient in evaluating whether the death penalty is applied in a discriminatory manner. *McClesky v. Kemp*, 481 U.S. 279, 294, 297 (1987). The Court noted that the studies do not take into account the uniqueness of each capital jury and that jury's "consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital case." *Id.* at 294. Likewise, this Court has been provided with statistical analyses of Missouri death penalty cases and has found that the data did not aid in conducting a proportionality review. *Parker*, 886 S.W.2d at 933. The study cited by Appellant is similarly unhelpful.

"[T]he decision to impose [the death penalty has] to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant." *Gregg*, 428 U.S. at 199. The authors of the study on which Appellant relies concede that their statistical analyses "do not adjust for the culpability of the individual, or the heinousness of the crime." Katherine Y. Barnes, et al., *Life and Death Decisions: Prosecutorial Discretion and Capital Punishment in Missouri*, Arizona Legal Studies, Discussion Paper No. 08-03, p. 4 (March 2008), at <http://ssrn.com/abstract=1107456>. Given that significant omission, the study does not aid this Court in "provid[ing] a backstop against the freakish and wanton application of the death penalty," or in determining "whether the death sentence is excessive or

disproportionate in light of similar cases as a whole.” *Parker*, 886 S.W.2d at 934 (internal quotation marks omitted).

Appellant also relies on a newspaper article that concludes prosecutors in some jurisdictions are more willing than others to waive the death penalty as part of a plea bargain. As this Court has noted, however:

Discretionary acts before the sentencing phase are irrelevant to whether the death penalty is arbitrary and capricious. Only discretionary acts that concern punishment and that occur after conviction for capital murder are relevant to this issue. Thus, the prosecutor’s discretion to prosecute and the jury’s discretion to acquit of capital murder are irrelevant. Similarly, the mechanism by which this court compares capital murders committed in jails or other penal institutions need not include cases such as those in which the state chose not to charge a defendant with capital murder, the state agreed to a plea bargain whereby a defendant pled guilty to a lesser charge, the conviction was for an offense less than capital murder, or the state waived the death penalty.

Trimble, 638 S.W.2d at 737 (internal quotation marks omitted). Accordingly, the fact that Appellant received the death penalty for killing a police officer, while a defendant who killed a police officer in another jurisdiction was allowed to plead guilty and receive a life sentence is not proof that the death penalty is arbitrary or disproportionate. *See State v. Clay*, 975 S.W.2d 121, 146 (Mo. banc 1998) (proportionality of death sentence is

not determined based on whether any similar case can be found in which the defendant received a life sentence); *McClesky*, 481 U.S. at 306-07.

Furthermore, the article is bereft of the specific details of the crime from the other jurisdiction and fails to provide any insight into the reasons the prosecutor decided to enter into the plea agreement. As the Supreme Court has said:

Absent facts to the contrary it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts.

Gregg, 428 U.S. at 225. Appellant's article offers no facts to indicate that the charging decision in this case, or in any other case, was based on any improper considerations.

This Court has previously declined to consider newspaper articles submitted by defendants in support of their claims of error. *Strong*, 142 S.W.3d at 729. The failure of Appellant's article to shed any light on the constitutional dimensions of the death penalty's application renders it of no value in assessing the appropriateness of Appellant's sentence. It should likewise be disregarded.

Appellant goes on to argue that this Court should mandate that prosecutors give defendants an opportunity to avoid a death sentence by pleading guilty to first degree murder or a lesser sentence. That's a variation on an argument previously rejected by this Court, namely that the death penalty statute is unconstitutional for failing to dictate when the prosecution may waive the death penalty. *State v. Whitfield*, 837 S.W.2d 503, 515 (Mo. banc 1992). As this Court noted: "[t]he entire criminal justice system rests on

apparent prosecutorial discretion in choosing whether to file charges, what charges to file, and whether to accept a plea bargain.” *Id.*

Appellant’s proposal violates the “Separation of Powers” doctrine by seeking to have this Court intrude into the General Assembly’s proper role of determining the “wisdom of the death penalty,” as well as the discretion given to the executive branch (through the prosecuting attorneys) to enforce that law. *Id.* The United States Supreme Court has cautioned against the type of judicial intervention that Appellant seeks: “We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved.” *Gregg*, 428 U.S. at 175 *see also McClesky*, 481 U.S. at 298 (noting legislature’s necessarily wide discretion in the choice of criminal laws and penalties).

Appellant’s sentence is not disproportionate to his crime. Appellant has not demonstrated, and the record does not reflect, that his death sentence resulted from the influence of passion, prejudice, or any other arbitrary factor. § 565.035.3(1), RSMo 2000. The jury found the existence of three statutory factors beyond a reasonable doubt. (L.F. 515). § 565.035.3(2), RSMo 2000. Appellant does not contest two of those factors: (1) that Appellant, by his act of murdering Sergeant McEntee, knowingly created a great risk of death to more than one person by means of a weapon that would normally be hazardous to the lives of more than one person; and (2) that the murder of Sergeant McEntee was committed against a peace officer while engaged in the performance of his official duty. (L.F. 515). *State v. Clayton*, 995 S.W.2d 468, 484 (Mo. banc 1999). And,

as discussed in Point IX and incorporated into this point, substantial evidence supports the “depravity of mind” aggravator.

Finally, this Court determines whether the sentence of death is excessive or disproportionate compared to similar cases where the death penalty was imposed. § 565.035.3(3), RSMo 2000; *Johnson*, 207 S.W.3d at 51. The death penalty has been imposed in numerous cases involving the killing of a law enforcement or corrections officer. *See, e.g., Tisius*, 92 S.W.3d at 765-66; *State v. Mallett*, 732 S.W.2d 527, 542 (Mo. banc 1987); *Clayton*, 995 S.W.2d at 484; *State v. Sweet*, 796 S.W.2d 607, 617 (Mo. banc 1990), *overruled on other grounds, Sanders v. State*, 807 S.W.2d 493, 494 (Mo. banc 1991), and cases cited therein. Three cases that are particularly apposite are *Tisius*, where the officer was shot several times at close range, in two separate incidents, with the fatal blow being dealt while the victim was injured and helpless; *Sweet*, where the murder was committed in a cold-blooded surprise attack by a defendant who was sought under outstanding warrants; and *Mallett*, where the defendant fired two slugs through a trooper’s neck while the trooper was temporarily incapacitated. *Tisius*, 92 S.W.3d at 766; *Sweet*, 796 S.W.2d at 617; *Mallett*, 732 S.W.2d at 542-43. The circumstances of those shootings are similar to the circumstances of Appellant’s shooting of Sergeant McEntee.

The death penalty has also been upheld in numerous cases where victims were murdered while unarmed and helpless, were killed in an execution-like fashion, were shot multiple times, or where the murder involved brutality and abuse that demonstrated a depravity of mind. *Johnson*, 207 S.W.3d at 51; *Strong*, 142 S.W.3d at 728; *State v. Anderson*, 79 S.W.3d 420, 446 (Mo. banc 2002); *Clayton*, 995 S.W.2d at 484; *State v.*

Bucklew, 973 S.W.2d 83, 97 (Mo. banc 1998); *Hutchison*, 957 S.W.2d at 766-67; *State v. Driscoll*, 711 S.W.2d 512, 517 (Mo. banc 1986), and cases cited therein. All of those factors apply to this case, and Appellant's sentence is not excessive or disproportionate.

VI.

Strike of veniremember Tompkins for cause.

Appellant claims that the trial court erred in striking venire member Tompkins for cause during the death qualification voir dire. The court properly struck Tompkins because the voir dire demonstrated that her views on the death penalty would impair her ability to serve on the jury.

A. Underlying Facts.

During the small group voir dire, the prosecutor asked veniremember Tompkins if she thought the death penalty is the appropriate punishment in some cases:

VENIREPERSON TOMPKINS: I really could not see any case where it would be appropriate. I do feel I am somewhat impartial. I can be convinced otherwise, but I really do not see any case where the death penalty is appropriate.

[THE PROSECUTOR]: And other than what you may have read or heard about this case and setting that aside, you haven't heard any of the facts, you haven't heard any of the evidence in this case, correct?

VENIREPERSON TOMPKINS: Right. I mean, I don't even think with Jeffrey Dahmer, you know, things like that. You know, I'm –

[THE PROSECUTOR]: From what you know through the media about the facts in that case – let me ask you the question directly. I'm not going to ask you what they are, but can you imagine a set of circumstances where you would think death is the appropriate punishment?

VENIREPERSON TOMPKINS: I've been sitting here as you asked and I'm trying to think, and I mean, maybe genocide or something like that?

[THE PROSECUTOR]: Involving mass murder?

VENIREPERSON TOMPKINS: Yeah.

[THE PROSECUTOR]: Okay. Let me ask you, in this case you have heard a couple of times already, if the jury finds Kevin Johnson guilty of Murder in the First Degree, we go into the second phase, the jury makes the decision that at least one aggravating circumstance exists beyond a reasonable doubt, and then the jury weighs the mitigating evidence against the aggravating evidence. If you as a juror on a jury decide that the evidence in mitigation, would you automatically at that point – the only decision left is which punishment is appropriate, which one do we impose. Would you exclude the death penalty as a possible punishment?

VENIREPERSON TOMPKINS: Unless something, you know, tremendously – you know, something within the evidence that is given can convince me otherwise, I really don't think that – I think there would only be one option unless something real extraordinary happened that I saw.

[THE PROSECUTOR]: As you have been sitting here for the last half hour or so, you haven't been able to think of something that would be that extraordinary, have you?

VENIREPERSON TOMPKINS: No.

(Tr. 288-90). Defense counsel questioned Tompkins later in the voir dire:

[DEFENSE COUNSEL]: Ms. Tompkins, with regard to the issue on the death penalty versus life without parole, is it possible that you could hear some evidence as you sat in this courtroom that would convince you that the death penalty was the appropriate punishment?

VENIREPERSON TOMPKINS: Anything is possible.

[DEFENSE COUNSEL]: Okay. So you haven't ruled out the possibility in your own mind that that could happen?

VENIREPERSON TOMPKINS: No. I mean, even when she spoke of, you know, someone being psychopathic, I thought I would – in that situation, if I was told to consider it, I might be open. Most of me says it's not a possibility, but I'm open.

[DEFENSE COUNSEL]: Okay. So you're not entirely closed off to the idea that you could hear something that would make you think that death would be an appropriate punishment?

VENIREPERSON TOMPKINS: Right.

[DEFENSE COUNSEL]: Even in this case?

VENIREPERSON TOMPKINS: Uh-huh.

[DEFENSE COUNSEL]: Is that yes?

VENIREPERSON TOMPKINS: Yeah.

[DEFENSE COUNSEL]: Okay. And you wouldn't automatically reject any kind of mitigating evidence that you might hear, evidence presented on Kevin's behalf, his background, upbringing, that kind of thing?

VENIREPERSON TOMPKINS: I wouldn't reject any evidence.

[DEFENSE COUNSEL]: You wouldn't reject any evidence that the State presented either?

VENIREPERSON TOMPKINS: No.

(Tr. 322-33).

The prosecutor moved to strike Tompkins for cause:

[THE PROSECUTOR]: Ms. Tompkins made it initially very clear she didn't think death was ever appropriate. She modified it somewhat to genocide cases, perhaps to something a little more nebulous, a psychopath would be better off executed. It's real clear she will reject that automatically as a – death automatically as a possible punishment in the case.

THE COURT: Response?

[DEFENSE COUNSEL]: Yes, because Ms. Tompkins did say it was possible that something could be presented in this courtroom that

would convince her that death would be an appropriate punishment in this case.

THE COURT: Any objection?

[THE PROSECUTOR]: I think like the previous panel, Judge, a credibility issue there. Yes, this is a different situation, but she said, yeah, I got an opinion, but I can. I think credibility is the appropriate word, but certainly she talked about maybe genocide, a psychopath is better off executed. I think it's very clear that she is not going to consider death as a possible punishment in this case, noting for the record there will be no evidence of genocide.

THE COURT: Based upon the answer that she gave and the Court's view of her body language and assessing her credibility, she could not consider the death penalty. The motion to strike for cause is sustained.

(Tr. 337-38).

B. Standard of Review.

A trial court's ruling on a motion to strike for cause is reviewed for an abuse of discretion. *State v. Ringo*, 30 S.W.3d 811, 816 (Mo. banc 2000). The trial court's ruling will be upheld unless it is clearly against the weight of the evidence and contrary to logic. *Id.* The trial court is in the ideal position to weigh the venireperson's responses and evaluate their qualifications as prospective jurors. *Id.*

C. Analysis.

The proper standard for determining when a prospective juror may be excluded for cause due to her views on capital punishment is “whether the juror’s views would ‘prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.’” *Wainwright v. Witt*, 469 U.S. 412, 424 (1984). That standard does not require that the juror’s bias be proven with unmistakable clarity. *Id.*

In applying that standard, this Court has consistently ruled that jurors who equivocate about their ability to impose the death penalty may be properly removed for cause. *See, e.g., Johnson*, 244 S.W.3d at 159; *Tisius*, 92 S.W.3d at 753; *Anderson*, 79 S.W.3d at 435-36; *State v. Johnson*, 22 S.W.3d 183, 186 (Mo. banc 2000); *State v. Winfield*, 5 S.W.3d 505, 511 (Mo. banc 1999); *State v. Jones*, 979 S.W.2d 171, 184 (Mo. banc 1998); *State v. Jones*, 749 S.W.2d 356, 362 (Mo. banc 1988); *State v. Antwine*, 743 S.W.2d 51, 62 (Mo. banc 1987). The qualifications of a prospective juror are not determined conclusively by a single response, but are determined on the basis of the voir dire as a whole. *Tisius*, 92 S.W.3d at 763. A trial court faced with contradictory responses from a venireperson does not abuse its discretion by giving more weight to one response than the other and in finding that the venireperson could not properly consider the death penalty. *Id.*

To say that veniremember Tompkins equivocated on her ability to consider the death penalty is an understatement. She initially told the prosecutor that she could not really see any case where the death penalty would be appropriate. (Tr. 288). She did not even think the death penalty would be appropriate for the notorious Jeffrey Dahmer, who was a cannibal as well as a mass murderer. (Tr. 288). When pressed on whether she

could imagine a set of circumstances where the death penalty might be appropriate, she mentioned genocide, a circumstance not present in this case. (Tr. 289). She further indicated that it would take something extraordinary to get her to consider the death penalty, but readily conceded that she had not been able to think of anything that extraordinary. (Tr. 289-90).

Under questioning by defense counsel, Tompkins mentioned that she *might* consider the death penalty if the defendant was a psychopath. (Tr. 322). Again, that circumstance is not present in this case. And Tompkins said that while she might be open to that prospect, “[m]ost of me says it’s not a possibility” (Tr. 322).

Tompkins’ reservations about making the sentencing decision was sufficient cause to strike her. *State v. Kinder*, 942 S.W.2d 313, 325 (Mo. banc 1996); *Jones*, 979 S.W.2d at 184. In *Johnson*, a veniremember responded to the prosecutor’s questions by saying that she would hesitate to impose the death penalty. *Johnson*, 244 S.W.3d at 158. When questioned by defense counsel, the veniremember said that if the law told her she had to impose the death penalty, then she thought she could do it. *Id.* However, she also admitted that it would be very challenging for her, and that she would have hesitation in voting for the death sentence. *Id.* This Court found, based on the veniremember’s equivocation about her ability to impose the death penalty and the trial court’s opportunity to assess her demeanor, that the court did not abuse its discretion in striking her. *Id.* at 159. Tompkins’s answers go beyond those found sufficient to support a strike in *Johnson*. The prosecutor and the trial court had good reason to believe that Tompkins

would not be able to follow the court's instructions and give fair consideration to imposing the death penalty.

In addition to Tompkins' verbal answers, the trial court relied on its observations of her demeanor in sustaining the motion to strike. (Tr. 338). This Court has "consistently recognized the trial judge's superior position to interpret and evaluate the totality of a venireman's verbal and nonverbal responses when actually heard and seen – an evaluation which cannot be readily made from a cold record." *Antwine*, 743 S.W.2d at 61.

The test for determining whether a juror should be struck for cause for her views on the death penalty "is not a series of 'magic' words. Rather it is a decision of fact made by the trial judge based on observing the venireperson and her answers." *State v. Debler*, 856 S.W.2d 641, 647 (Mo. banc 1993). The entirety of Tompkins' voir dire, including her physical mannerisms as observed by the trial court, support the court's finding that her attitude towards the death penalty would prevent her from rendering a fair and impartial verdict. *Antwine*, 743 S.W.2d at 62. The trial court did not abuse its discretion in striking her for cause.

VII.

Admission of portions of Appellant's interview with the police.

Appellant contends that portions of his interview with the police were admitted in violation of his right to remain silent. Appellant has waived even plain error review by strategically deciding not to challenge the admission of the statements. Appellant cannot show a manifest injustice in any event, because the evidence now being challenged was not outcome determinative.

A. Underlying Facts.

The following record was made during a pretrial motions hearing on February 23, 2007, prior to Appellant's first trial:

[ASST. PROSECUTOR]: Your Honor, I would just like to raise one point that I had a bunch of officers that were subpoenaed to come in today for a potential Motion to Suppress. [Defense counsel] and I had a conversation . . .

THE COURT: I don't have a Motion to Suppress in the file.

[PROSECUTOR]: Are you still on the Motion for Continuance at this point?

THE COURT: Well, the Motion for Continuance is denied consistent with my prior ruling.

[ASST. PROSECUTOR]: There are no motions to suppress on file. I was anticipating they might file some. I had discussions with [defense counsel] that apparently there will be none that will be filed. That's a

matter of trial strategy for her. I just wanted to get that out in the open that that's what's going on.

THE COURT: Do you anticipate filing any motions to suppress?

[DEFENSE COUNSEL]: Not unless something comes up somehow in these jail phone calls that we have received.

THE COURT: That's either evidence seized or statements or identification?

[DEFENSE COUNSEL]: That's correct.

(Tr. 33-34). The record does not indicate that any motions to suppress were subsequently filed. (L.F. 12-16).

At trial, the State played portions of the videotape of Appellant's interview with the police, which was marked as State's Exhibit 70.¹⁰ (Tr. 1725-47). When the tape was admitted into evidence, defense counsel was asked if she had any objection, and she answered "no." (Tr. 1729). Counsel did not object when the prosecutor indicated his

¹⁰ An informal transcript was prepared that reflects the portions of the interview that were played for the jury. (Tr. 1731). As a matter of convenience to the Court, Respondent will seek leave to file that transcript at the time that State's Exhibit 70 is filed. Appellant has also prepared and filed with this Court a transcript of the entire interview that contains page and line numbers, and refers to it in his brief as (Interr. Tr.). Respondent will refer to that transcript to help identify where the portions of the interview that were played for the jury took place in the context of the entire interview.

intention to play portions of the tape for the jury. (Tr. 1730-31). The prosecutor also played two clips from the tape during the opening portion of his closing argument. (Tr. 1907). Again, Appellant did not object. (Tr. 1907). In his closing argument, defense counsel referred to the videotape and used it to support the argument that Appellant's actions after the shooting were motivated by fear of what the police might do to him. (Tr. 1957-58). The Motion for New Trial contains no assignment of error regarding the admission of portions of State's Exhibit 70. (L.F. 566-78).

B. Standard of Review.

Appellant has waived his claim of error. Defense counsel made the strategic decision not to file a motion to suppress the statement. (Tr. 33-34). "Given [Appellant's] trial strategy not to move to suppress the videotaped statement . . . he cannot now claim that the admission of the tape was erroneous." *Mallett*, 732 S.W.2d at 538 *see also State v. Hamilton*, 892 S.W.2d 774, 780 (Mo. App. S.D. 1995) (a trial strategy that includes intentionally not objecting to allegedly inadmissible evidence cannot be a basis to invoke the plain error rule). Appellant, fully aware of the contents of the videotape, chose not to seek to suppress it and not to object when portions of the statement were played for the jury. By affirmatively stating that he had no objection to admission of the statement, Appellant waived even plain error review of his claim. *Johnson v. State*, 189 S.W.3d 640, 647 (Mo. App. W.D. 2006).

The Court of Appeals for the Southern District recently found that the trial court committed no error, plain or otherwise, in failing to determine whether a statement was voluntary where the defendant never challenged the voluntariness of the statement at

trial. *State v. Burrage*, 258 S.W.3d 560, 563 (Mo. App. S.D. 2008). As was the case here, the defendant did not file a motion to suppress, and did not object at trial to admission of his statements to the police. *Id.* at 562. In denying the claim of error, the Southern District noted that it's own research "revealed no case where a trial court was convicted of error for not making a finding of voluntariness of a defendant's statement when the voluntariness of the statement was not challenged." *Id.* at 563. This case does not call for a different result.

Should this Court find that plain error review is warranted, then it must find that a manifest injustice or a miscarriage of justice had occurred. *State v. Baxter*, 204 S.W.3d 650, 652 (Mo. banc 2006). Manifest injustice is determined by the facts and circumstances of the case, and the defendant bears the burden of establishing manifest injustice. *Id.* Plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative. *Id.*

C. Analysis.

Once a defendant has received the *Miranda* warnings and waived them, any statements he makes can be admitted into evidence until the waiver is revoked. *State v. Clemons*, 946 S.W.2d 206, 220 (Mo. banc 1997); *State v. Tims*, 865 S.W.2d 881, 885 (Mo. App. E.D. 1993). Appellant argues that he did not waive his rights because he was not asked specifically if he wanted to waive them and was not given a form to sign. Appellant acknowledges that a written waiver is not necessary. And this Court has stated that: "[if] one is informed of his right to remain silent under *Miranda*, and understands his right to remain silent under *Miranda*, and thereafter makes voluntary statements, it is

absurd to say that such person has not made a knowing and intelligent waiver of his right to remain silent.” *State v. Schnick*, 819 S.W.2d 330, 336 (Mo. banc 1991) *see also Hutchison*, 957 S.W.2d at 763 (defendant waived his right to silence when he began answering questions).

Detective Neske, who participated in the interview of Appellant, testified that he gave the *Miranda* warnings to Appellant, and that Appellant indicated that he understood the warnings, including his right to remain silent. (Tr. 1726). The tape of the interview confirms that Appellant was given the *Miranda* warnings. (State's Ex. 70; Interr. Tr. 6). Although Appellant's response to the question of whether he understood the warnings is not audible, there is nothing on the tape to contradict Neske's testimony, and Appellant made no claim to the trial court that he did not understand his right to remain silent or that he did not wish to talk to Neske when the interview began. The cases that Appellant cites are inapposite because they involve situations where the defendant did attempt to suppress the statements, thus placing the burden of proof on the State to show the voluntariness of the waiver and giving the trial court an opportunity to consider all the circumstances surrounding the statements, including the defendant's account of what took place.

Appellant also argues that the statement was inadmissible because he asserted his right to remain silent during the course of the interview. If a suspect who has been given the *Miranda* warnings indicates at any time during questioning that he wishes to remain silent, interrogation must cease. *State v. Wolf*, 91 S.W.3d 636, 643 (Mo. App. W.D. 2002). A suspect must, however, give a clear, consistent expression of a desire to remain

silent in order to adequately invoke his rights and cut off questioning. *Id.* The desire to cut off questioning must be articulated with sufficient clarity that a reasonable police officer under the circumstances would understand the statement to be an assertion of the right to remain silent. *Id.* If the statement is ambiguous or equivocal, the police have no duty to clarify the suspect's intent and they may proceed with the interrogation. *Id.*

Appellant cites four instances where he claims to have invoked the right to remain silent. The first of those instances appears on page 42 of the transcript prepared by Appellant. Two portions of the interview that were played for the jury took place prior to that point. (Interr. Tr. p. 8, line 14 to p. 24, line 5; p. 36, line 17 to p. 39, line 12). Since only statements that are made after a suspect invokes his right to remain silent are inadmissible, no error results from the admission of those portions of the interview. *Id.*; *Clemons*, 946 S.W.2d at 220.

Furthermore, not all of the instances where Appellant now claims to have reinvoked his right to remain silent qualify as clear and unequivocal expressions that effectively invoked the right. *Wolf*, 91 S.W.3d at 643; *Tims*, 865 S.W.2d at 885. The first comment came after Appellant had been asked several times how he got blood on his hands, and after the officers had expressed skepticism about his explanation. (Interr. Tr. 28-29). When Detective Neske brought the subject up again, Appellant responded, "Do I have to keep telling you this?" (Interr. Tr. 42, lines 14-15). Given the context in which the statement was made, a reasonable police officer could interpret the statement as frustration with being asked the same question repeatedly, and as an indication that he was not going to change his answer. The Western District found that to be the case in

Wolf, where the defendant repeatedly denied killing his grandmother, and in response to the detective's continued questioning said, "Did not and that's my final statement." *Id.* at 644.

Appellant also claims that he invoked his right during the following portion of the interview:

DETECTIVE NESKE: That's the problem. I'm telling you what the witnesses see. They see you, not only your gun that you used to kill that policeman, but the gun you took from the policeman, okay.

KEVIN JOHNSON: Yeah.

DETECTIVE NESKE: Yes.

KEVIN JOHNSON: (Inaudible) I don't want to talk to you now.

You want –

DETECTIVE MESKE: I'm just telling you what the witnesses said.

KEVIN JOHNSON: Yes, exactly, yes now you're going to take my word and say he said this and he said that.

DETECTIVE MESKE: I'm not saying you said this.

KEVIN JOHNSON: That's why I really didn't want to talk to you at all when I got the case about the domestic violence, I said what happened and they twisted the words.

DETECTIVE NESKE: I don't know nothing about it.

KEVIN JOHNSON: Well, I'm telling you.

DETECTIVE NESKE: I'm not twisting yours, I'm saying yes when you say yes, yes that's what I mean.

KEVIN JOHNSON: You saying yes exactly.

DETECTIVE NESKE: Now, I'm not saying you're saying yes.

KEVIN JOHNSON: Yes, you are.

DETECTIVE NESKE: (Inaudible).

KEVIN JOHNSON: That's what you doing. What I'm doing to you, that's what you doing to me, you know.

DETECTIVE NESKE: All right. So what you're saying is you never had a gun with you that day?

KEVIN JOHNSON: I never had a gun.

(Interr. Tr. p. 47, line 17 to p. 49, line 1). Appellant's statement, especially taken in context, is not an unequivocal invocation of his right to remain silent. *See Clemons*, 946 S.W.2d at 219 (stating that this Court does not read *Miranda* as searching for out-of-context sentences that support a preferred outcome). Appellant continued talking to the detective, even though the detective had not posed a question to him. Furthermore, a reasonable officer could view the entire exchange as Appellant being frustrated because he thought that the detective was twisting his words, but that Appellant was willing to continue answering questions once that issue had been cleared up.

Later in the interview, beginning at page 177, line four of the transcript, Appellant does indicate that he does not want to answer any more questions, and the police continue to question him about the circumstances of the crime. Three portions of the interview

that occurred subsequent to that point were played for the jury. (Interr. Tr. p. 181, line 10 to p. 181, line 14; p. 207, line 4 to p. 208, line 24; p. 213, line 7 to p. 215, line 4).¹¹

Any error in admitting any or all of the interview does not rise to the level of a manifest injustice, however. Improper admission of a defendant's statement has been held to be harmless error where there is sufficient evidence of guilt to support the conviction aside from the challenged statement. *Bucklew*, 973 S.W.2d at 91-92; *State v. Minner*, 256 S.W.3d 92, 96-97 (Mo. banc 2008); *Tims*, 865 S.W.2d at 886. In *Bucklew*, this Court found that the testimony of a single eyewitness to the charged murder would have allowed the jury to find all the elements of murder in the first degree beyond a reasonable doubt. *Bucklew*, 973 S.W.2d at 91-92.

The jury in this case heard testimony from several eyewitnesses, plus medical evidence, that established that Appellant knowingly took Sergeant McEntee's life after deliberation on the matter. The facts that those witnesses testified to are set forth both in the Statement of Facts and in the argument under under Point III, and are incorporated into this point. The jury also heard Appellant's previous trial testimony, where he admitted shooting McEntee. (State's Ex. 80). Defense counsel even stated in her closing argument that the police interview was inconsequential due to that subsequent admission.

¹¹ The remaining portions of the interview that were played for the jury can be found at Interr. Tr. p. 48, line 16 to p. 49, line 23; p. 69, line 13 to page 77, line 13; p. 116, line 24 to p. 121, line 1; p. 144, line 25 to p. 152, line 12; p. 168, line 4 to p. 169, line 8; and p. 175, line 5 to p. 177, line 3.

(Tr. 1960). Appellant thus cannot show that admission of portions of the interview was prejudicial error, let alone show that it reached the higher level of manifest injustice.

State v. White, 92 S.W.3d 183, 189 (Mo. App. W.D. 2002).

VIII.

Victim impact evidence and instructions.

Appellant claims the trial court erred in allowing the victim's widow to read a statement written by her young son during the penalty phase of the trial. Appellant also claims the trial court erred in submitting Instruction No. 12, based on MAI-CR 3d 314.40, because it did not tell the jury how to consider non-statutory aggravating evidence, or instruct the jury that it must find the existence of such evidence beyond a reasonable doubt. Appellant's claims of instructional error have previously been rejected by this Court. Admission of the statement written by the victim's son, although hearsay, was not erroneous because the reliability concerns underlying the hearsay rule are not implicated by victim impact testimony, so admission of such evidence is not prejudicial to the defendant.

A. Underlying Facts.

The State presented victim impact testimony during the sentencing phase of the trial from Sergeant McEntee's mother, his brother, his two sisters, and his widow, Mary. (Tr. 2034, 2043-44, 2051, 2056, 2062). Defense counsel did not cross-examine Sergeant McEntee's mother or his siblings. (Tr. 2043, 2050, 2056, 2062).

Mary McEntee identified several pictures of Sergeant McEntee with his three children, and talked about the impact of his death on the children, who were ages sixteen, twelve, and nine at the time of trial. (Tr. 1063-73). Mrs. McEntee identified State's Exhibit 91, a letter that her twelve-year-old son Brendan had written when he was nine-years-old. (Tr. 2073-74, 2076). When the prosecutor offered the letter into evidence,

defense counsel objected to it as hearsay. (Tr. 2074). The court overruled the objection and admitted the letter into evidence. (Tr. 2074). Mrs. McEntee then read the letter:

Day one. The next day. I was all shook up about what happened. I did not go outside until five o'clock.

Day two. Coming out. I was still sad but I came out and went to my friend's house, Michael. I had a good time, but I miss him.

Day three. Lay out. It was hard to get past. I was about to burst, but I didn't. I sat in a room for seven hours wondering why I still didn't know, nobody does know except the guy who did it.

Day four. Funeral. It was sad day for me and everyone else. Then it was the end. Everyone said their goodbyes, and they left. Then I wondered why.

Those are the four most saddest days of my life. I am still sad today, and I wonder why. It has been three to four months from then, and we are doing better.

I am sad because he was the best coach ever and no one who could take my dad's spot, nobody. He was also my baseball coach, and I am sad about him not being there when I need him and I am lonely, when I kick a soccer ball. He was the greatest dad ever. He was ready for soccer season, and someone took his life away. I was so mad. I was in shock that night. I thought he would be okay, but I was wrong. He had passed away.

Dad, if you hear me right now, I love you.

(Tr. 2075-76). Defense counsel briefly cross-examined Mrs. McEntee about a divorce petition that was pending at the time of the murder. (Tr. 2076-77).

One of the sentencing phase instructions submitted to the jury was Instruction No. 12, which was based on MAI-CR 3d 314.40. (Tr. 2291-92; L.F. 499-500). Appellant had objected to the instruction on the basis that it did not tell the jury how to deal with non-statutory aggravating evidence, and that it did not tell the jury what the burden of proof is with regard to that aggravation. (Tr. 2291-92). Appellant submitted a not-in-MAI instruction that was marked as Instruction E and refused. (Tr. 2294; L.F. 508).

B. Standard of Review.

Appellant's Point Relied On encompasses unrelated claims of evidentiary and instructional error, thus violating Rule 30.06, which prohibits multifarious claims of error. *Thompson*, 985 S.W.2d at 784 n.1; Supreme Court Rules 30.06(c) and 84.04(d). Additionally, Appellant's Point Relied On and argument allege that admission of the challenged testimony violated his constitutional right to confrontation. Appellant only objected at trial on the basis of hearsay. (Tr. 2074). An objection made on hearsay grounds is insufficient to preserve constitutional claims relating to the same testimony. *State v. Chambers*, 891 S.W.2d 93, 103-04 (Mo. banc 1994). To the extent that Appellant's claims are preserved, the following standards of review apply:

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

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, 161 (Mo. banc 1991). A trial court does not abuse its discretion unless the ruling is clearly against the logic of the 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). If 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, review on direct appeal is for prejudice, not mere 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.*

C. Analysis.

1. Instruction No. 12.

Appellant contends that MAI-CR 3d 314.40 fails to inform the jury that the State had the burden of proving nonstatutory aggravating factors beyond a reasonable doubt. This Court has previously rejected similar claims that the MAI instructions do not properly instruct the jury on how to consider victim impact testimony or on what standard of proof to apply to that evidence. *State v. Forrest*, 183 S.W.3d 218, 226 (Mo. banc 2006).

Appellant cites to no cases specifically holding that nonstatutory aggravating circumstances have to be proven beyond a reasonable doubt. He instead relies on *Ring v. Arizona*, 536 U.S. 584, 600 (2002) and *State v. Whitfield*, 107 S.W.3d 253, 257 (Mo. banc 2003), for the proposition that specific facts that increase a life sentence to death must be found beyond a reasonable doubt. This Court has previously rejected a similar argument, noting that section 565.030.4(1), RSMo, expressly requires that a jury find *statutory* aggravating circumstances beyond a reasonable doubt, but does not apply that standard to any other death-eligibility findings. *Glass*, 136 S.W.3d at 521 *see also State v. Taylor*, 134 S.W.3d 21, 30 (Mo. banc 2004); *Forrest*, 183 S.W.3d at 228-29 (generally upholding MAI patterned sentencing instructions). This Court has also specifically found that admission of one form of nonstatutory aggravating circumstances, unadjudicated bad

acts, does not violate due process “because the state is not required to prove those acts beyond a reasonable doubt.” *Strong*, 142 S.W.3d at 720.

Furthermore, this Court has interpreted *Ring* as stating that the beyond a reasonable doubt standard only applies to facts that are the functional equivalent of elements of offenses, such as *statutory* aggravating circumstances. *State v. Clark*, 197 S.W.3d 598, 601 (Mo. banc 2006); *State v. Jaco*, 156 S.W.3d 775, 780 (Mo. banc 2005) (emphasis added). A nonstatutory aggravating circumstance does not operate as the functional equivalent of an element of the offense. Unlike a statutory aggravating circumstance, the jury is not required to find the existence of a nonstatutory aggravator in order to impose the death penalty. §§ 565.030.4(2), RSMo Supp. 2001 and 565.032(1), RSMo 2000. As a result, a defendant will be considered death-eligible if the jury finds the existence of just one valid statutory aggravating circumstance. *Zink*, 181 S.W.3d at 74. The trial court did not err in giving the MAI-approved instruction.

3. Written statement by victim’s son.

a. *Alleged Confrontation Clause violation.*

Not only did Appellant fail to raise a Confrontation Clause claim before the trial court, it is doubtful whether Appellant even enjoys confrontation rights when victim impact evidence is presented at the penalty phase of a trial. The Confrontation Clause is generally held to be inapplicable to sentencing proceedings. *See, e.g., United States v. Wallace*, 408 F.3d 1046, 1048 (8th Cir. 2005). Some jurisdictions have extended the Confrontation Clause’s inapplicability to some of the evidence presented at the sentencing phase of capital cases. *United States v. Fields*, 483 F.3d 313, 325-26 (5th Cir.

2007); *State v. McGill*, 140 P.3d 930, 941 (Ariz. 2006); *Thomas v. State*, 148 P.3d 727, 732 (Nev. 2006).

The United States Supreme Court opinion in *Bullington v. Missouri* does contain dicta indicating that the Confrontation Clause is available at proceedings at which a sentence may be imposed based on a new finding of fact. *Bullington v. Missouri*, 451 U.S. 430, 446 (1981). That language suggests that the right to confront witnesses applies to evidence presented to prove the existence of a statutory aggravating circumstance, since the jury is required to make a specific finding that the existence of the statutory aggravator was established beyond a reasonable doubt. § 565.030.4(4), RSMo Supp. 2001. The *Fields* case drew a distinction between statutory aggravating circumstances which have to be proven to make a person death eligible, and nonstatutory aggravating circumstances that are “neither necessary nor sufficient to authorize imposition of the death penalty.” *Fields*, 483 F.3d at 325.

As noted previously, Missouri’s capital sentencing scheme does not require the jury to find the existence of a nonstatutory aggravator in order to impose the death penalty. §§ 565.030.4(2), RSMo Supp. 2001 and 565.032(1), RSMo 2000. As a result, the conclusion of the Fifth Circuit in *Fields* applies with equal force to the evidence being challenged here:

Because they relate only to nonstatutory aggravating factors, the hearsay statements challenged by *Fields* are relevant only to the jury’s selection of an appropriate punishment from within an authorized range and not to the establishment of his eligibility for the death penalty. After

reviewing the applicable caselaw and considering the particular importance of “individualized sentencing” in capital cases, we conclude that the Confrontation Clause does not operate to bar the admission of testimony relevant only to a capital sentencing authority’s selection decision.

Fields, 483 F.3d at 325-26. This Court should reach the same conclusion regarding Appellant’s Confrontation Clause claim.

b. Alleged evidentiary violation.

“Victim impact evidence is admissible under the United States and Missouri Constitutions. [J]ust 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. Victim impact evidence violates the constitution only if it is so unduly prejudicial that it renders the trial fundamentally unfair.” *State v. McLaughlin*, 265 S.W.3d 257, 273 (Mo. banc 2008) (internal citations and quotation marks omitted).

Victim impact evidence, like all evidence in aggravation and mitigation of punishment, is admissible “subject to the rules of evidence at criminal trials.” § 565.030.4, RSMo 2000. Brendan McEntee’s written statement would appear to be hearsay since it was introduced for the truth of the matter asserted therein. *Barnett*, 980 S.W.2d at 306. Whether the trial court erred in allowing the statement to be read to the jury involves a determination of what “rules of evidence” means in relation to victim impact evidence.

“Because of the importance of the death penalty decision, the sentencer is entitled to any evidence that assists that decision.” *Clay*, 975 S.W.2d at 132. Accordingly, evidence of unadjudicated bad acts is admissible in penalty phase proceedings, even though such evidence is generally not allowed in the guilt phase. *Strong*, 142 S.W.3d at 720; *State v. Fassero*, 256 S.W.3d 109, 120 (Mo. banc 2008). Admittedly there have been cases finding that hearsay evidence is inadmissible in the penalty phase of a trial. *Barnett*, 980 S.W.2d at 306; *State v. Berry*, 168 S.W.3d 527, 540 (Mo. App. W.D. 2005). None of those cases involved victim impact testimony, however, and there is good reason to view such evidence differently than other evidence that might be offered in aggravation or mitigation of punishment.

“The underlying rationale for the hearsay rule is for the purpose of securing the trustworthiness of the assertions.” *State v. Link*, 25 S.W.3d 136, 145 (Mo. banc 2000). Trustworthiness is not a concern in victim impact testimony. Witnesses giving such testimony are discussing their own feelings and experiences. Specifically in this case, the out-of-court statement reflects the feelings of a then nine-year-old boy about the sudden and violent death of his father. There is no reason to question the authenticity or the trustworthiness of what is reflected in the letter.

In *State v. Basile*, this Court upheld the reading, by the victim’s sister, of a poem and a letter written by another sister. *State v. Basile*, 942 S.W.2d 342, 358 (Mo. banc 1997). That letter, much like the letter written by Brendan McEntee, contained the sister’s description of the victim and how the victim’s murder had affected her. *Id.* Defense counsel objected to the letter, though the opinion does not indicate that a hearsay

objection was raised. *Id.* This Court did not, however, make any observations of, or express any concerns about, a potential hearsay violation in allowing another witness to read the letter.

This Court has also rejected an argument that a victim's daughter's testimony about her eleven-year-old daughter's fear of coming to court to testify was prejudicial hearsay. *State v. Deck*, 136 S.W.3d 481, 487, 488 (Mo. banc 2004), *overruled on other grounds*, *Deck v. Missouri*, 544 U.S. 622 (2005). While the opinion does not specifically discuss the admissibility of hearsay victim impact evidence, it also expresses no concern about allowing such evidence.

Even if the trial court did err in admitting the evidence, Appellant cannot show that he was prejudiced. As noted above, the letter written by Brendan McEntee was similar to the letter written by the victim's sister in *Basile*, which this Court found did not render the sentencing proceeding fundamentally unfair. *Basile*, 942 S.W.2d at 359. Furthermore, the statement was cumulative of other, properly admitted, victim impact evidence from Sergeant McEntee's mother and siblings. The jury also had heard extensive evidence in the guilt phase "establishing the particularly senseless and brutal nature of the murder" of Sergeant McEntee. *Storey*, 40 S.W.3d at 909. Victim impact evidence has been deemed non-prejudicial where there was no evidence to suggest that the jury was incapable of understanding the penalty phase instructions, or that the victim impact evidence prejudiced the jury; and where the jury found beyond a reasonable doubt the statutory aggravators to support its sentencing recommendation. *Forrest*, 183 S.W.3d at 225.

The contents of the statement are unquestionably proper victim impact evidence. *See Storey*, 40 S.W.3d at 909 (allowing witnesses to read poems and eulogy that they wrote); *Fassero*, 136 S.W.3d at 487-88 (allowing victim's son to read narrative statement that he had written). It is hard to discern any prejudice from the mother reading the statement instead of the boy. The statement would probably have had a greater impact on the jury if Brendan had taken the stand to read it himself. There is nothing in the record to show that the reading of Brendan McEntee's statement, when balanced against the other aggravating evidence, was so prejudicial to Appellant as to render his trial fundamentally unfair.

IX.

Depravity of mind statutory aggravating circumstance.

Appellant contends the trial court erred in giving the jury Instruction No. 12 because it contained the “depravity of mind” statutory aggravating circumstance, which Appellant contends is unconstitutionally vague. The trial court did not err because this Court has rejected the argument that the “depravity of mind” aggravator is unconstitutionally vague, and because the jury also found two other statutory aggravating circumstances whose validity is not being questioned.

A. Underlying Facts.

In the sentencing phase of the trial the court submitted to the jury, over Appellant’s objections, Instruction No. 12, which was based on MAI-CR 3d 314.40. (Tr. 2291-92; L.F. 499-500). The instruction asked the jury to consider whether one or more of the following statutory aggravators existed:

1. Whether the defendant by his act of murdering Sgt. William McEntee knowingly created a great risk of death to more than one person by means of a weapon that would normally be hazardous to the lives of more than one person.
2. Whether the murder of Sgt. William McEntee involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find that the defendant committed repeated

and excessive acts of physical abuse upon Sgt. William McEntee and the killing was therefore unreasonably brutal.

3. Whether the murder of Sgt. William McEntee was committed against a peace officer while employed in the performance of his official duty.

(L.F. 499).

During deliberations, the jury sent a note to the court asking for a definition of depravity of mind. (L.F. 511). The court responded that the jury would be bound by the instruction as submitted. (L.F. 512). The jury then asked for a dictionary. (L.F. 513). The court denied the request and again told the jury that it would be bound by the instruction as submitted. (L.F. 514). The jury's verdict indicated that it had found all three of the statutory aggravating circumstances beyond a reasonable doubt. (L.F. 515).

B. Standard of Review.

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

C. Analysis.

Appellant argues that the instruction was unconstitutionally vague because the terms “repeated” and “excessive” were not defined or otherwise limited. This Court recently rejected a nearly identical argument. *McLaughlin*, 265 S.W.3d at 277 n.14. The Court found that the depravity of mind language, when combined with an instruction requiring the jury to find that the conduct constituted “repeated and excessive acts of physical abuse,” was not unduly vague. *Id.* The Court, in rejecting the vagueness argument, also found that the defendant’s actions of stalking the victim, raping her and stabbing her seven times “constitutes repeated and excessive brutality under any definition of the crime.” *Id.* The same can be said of Appellant’s actions in this case, particularly since this Court has found that evidence of numerous wounds inflicted on the victim will support the “depravity of mind” aggravator. *Strong*, 142 S.W.3d at 722.

More specifically, this Court has found the depravity of mind aggravator was established by evidence that the defendant shot a deputy sheriff several times, at close range, in two separate incidents. *Tisius*, 92 S.W.3d at 765. This case involves that same scenario. Appellant approached Sergeant McEntee as he was sitting in his patrol car and shot him several times at close range. (Tr. 1299, 1320, 1347-48, 1384-85, 1442-45;

State's Exs. 68, 75, 82). One of the bullets ripped out McEntee's right eye, another went through his tongue, and some of his teeth were also knocked out. (Tr. 1793-1800).

McEntee survived those wounds, and managed to get out of his car after it rolled down the road and hit a tree. (Tr. 1349, 1351-52, 1671, 1675, 1803-09). Then, as McEntee was on his knees, choking on his own blood, Appellant walked up to him and fired more shots, including the fatal shot to the back of McEntee's head, which was nearly blown off. (Tr. 1255, 1351, 1352-53, 1671, 1675, 1809-10; State's Exs. 66, 75, 80). Appellant's actions constitute excessive and repeated brutality under any definition of the term.

Appellant would not be entitled to relief even if the aggravator was found to be invalid. The jury found the existence of three aggravating circumstances beyond a reasonable doubt, and the validity of the other two aggravators is not being challenged. (L.F. 515). A defendant is "death eligible" where at least one statutory aggravator is found. *Zink*, 181 S.W.3d at 74. The trial court therefore did not err in sentencing Appellant to death.

X.

Penalty phase instructions.

Appellant claims the trial court erred in overruling his objection to Instruction No. 14, which was based on MAI-CR 3d 314.44, and in refusing his proffered Instruction F. Appellant claims that the MAI instruction shifts the burden of proof to the defendant to prove to a unanimous jury that the mitigating circumstances outweigh the aggravating circumstances. The trial court did not err in submitting the applicable MAI instruction.

A. Underlying Facts.

During the penalty phase instruction conference, the court noted that it had an instruction drafted pursuant to MAI-CR 3d 314.44, that was typed by the prosecutor, but marked as being submitted by the defendant. (Tr. 2295; L.F. 502-03). Defense counsel noted that she had several objections to the MAI instruction. (Tr. 2295). The court rejected a modified version of MAI-CR 314.44 that was prepared by Appellant. (Tr. 2296; L.F. 509-10). The court then gave the MAI instruction typed by the prosecutor as Instruction No. 14, and marked it as submitted by the State. (Tr. 2297; L.F. 502-03).

B. Standard of Review.

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

C. Analysis.

Appellant's argument is based on the premise that the State bears the burden of proving that the mitigating circumstances must be insufficient to outweigh the aggravating circumstances. This Court has previously rejected that claim and has found the MAI instructions to be constitutional. *Taylor*, 134 S.W.3d at 30. Appellant's argument that MAI-CR 314.44 improperly shifts the burden of proof is thus not well taken. This Court has subsequently reaffirmed that MAI-CR 3d 314.44 correctly instructs the jury on considering mitigating evidence. *Zink*, 181 S.W.3d at 74; *Johnson*, 207 S.W.3d at 46-47; *McLaughlin*, 265 S.W.3d at 265-68. The trial court did not err in giving the MAI-approved instruction.

XI.

Failure to plead aggravating circumstances in the information.

Appellant claims the trial court erred in not quashing the information and in sentencing Appellant to death, because the statutory aggravating circumstances were not pled in the information. The trial court followed controlling law in denying the motion to quash.

A. Standard of Review.

The test for sufficiency of an indictment or information is whether it contains all the essential elements of the offense as set out in the statute creating the offense. *State v. Stringer*, 36 S.W.3d 821, 822 (Mo. App. S.D. 2001).

B. Analysis.

Appellant's claim of error has been repeatedly rejected by this Court. *See, e.g., McLaughlin*, 265 S.W.3d at 277; *Johnson*, 207 S.W.3d at 48; *Forrest*, 183 S.W.3d at 229; *Zink*, 181 S.W.3d at 75; *State v. Gill*, 167 S.W.3d 184, 194 (Mo. banc 2005); *Strong*, 142 S.W.3d at 711-12; *Taylor*, 134 S.W.3d at 31; *Cole*, 71 S.W.3d at 171. Appellant raises the issue for preservation purposes, but provides no new or persuasive reason for this Court to abandon its repeated and recent precedent.

CONCLUSION

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

Respectfully submitted,

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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 25,629 words as calculated pursuant to the requirements of Missouri Supreme Court Rule 84.06, 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 15th day of December, 2008, to:

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