

No. 84214

**IN THE
MISSOURI SUPREME COURT**

STATE OF MISSOURI,

Respondent,

v.

LEWIS E. GILBERT,

Appellant.

**Appeal from the Circuit Court of Callaway County, Missouri
The Honorable Gene Hamilton, Judge**

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from convictions of two counts of murder in the first degree, §565.020, RSMo 2000, one count of first degree burglary, §569.160, RSMo 2000, one count of armed criminal action, §571.015, RSMo 2000, one count of stealing, §570.030, RSMo 2000, and one count of tampering in the first degree, §569.080, RSMo 2000, obtained in the Circuit Court of Callaway County, Missouri, for which appellant was sentenced to death for each count of murder, and consecutive terms of fifteen years for burglary, life imprisonment for armed criminal action, seven years for stealing, and seven years for tampering in the custody of the Missouri Department of Corrections. Because of the sentence imposed, the Supreme Court of Missouri has exclusive appellate jurisdiction. Article V, §3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

On March 2, 2001, appellant, Lewis Gilbert, was charged by amended information, with two counts of murder in the first degree, §565.020, RSMo 2000, one count of first degree burglary, §569.160, RSMo 2000, one count of armed criminal action, §571.015, RSMo 2000, one count of stealing, §570.030, RSMo 2000, and one count of tampering in the first degree, §569.080, RSMo 2000, in the Circuit Court of Callaway County, Missouri (L.F. 129-132). On October 25, 2001, the State filed its Notice of Intent to Seek the Death Penalty (L.F. 152-153). On December 4, 2001, the cause proceeded to trial, before a jury, the Honorable Gene Hamilton, presiding (Tr. 185, 199).

Appellant challenges the sufficiency of the evidence to support his convictions for first degree murder. In the light most favorable to the verdicts, the following evidence was adduced: Sometime in late August, 1994, appellant and his accomplice, Eric Elliott, both living in Ohio, took a woman's car, Ruth Loader's red Buick,¹ and began driving southwest through the United

¹During the penalty phase, evidence was presented that appellant had been convicted of stealing Ms. Loader's car and had also admitted to killing her by shooting her three times in the head (Tr. 1038-1042; 907, 940-942).

States (Tr. 677-678, 684-686). Elliott had taken his father's handgun and ammunition along for the trip (State's Exhibit 43).

A few days later, appellant and Elliott ended up at the home of William "Bill" Brewer, age 86, and his wife, Flossie Brewer, age 75, the victims in this case, on County Road 147 in Kingdom City, Missouri (Tr. 573, 602).² Appellant and Elliott shot and killed the Brewers, each three times in the head, and stole their car, cash, and rifles (Tr. 863-866).

Appellant and Elliott left the red Buick, belonging to Ruth Loader, approximately a quarter mile from the Brewer home (Tr. 573, 594, 756, 766, 819-821). It was found on Wednesday, August 31, 1994 by Frank Watson who lived near the Brewers (Tr. 573). Watson had located the red Buick sitting approximately fifty feet inside his field (Tr. 576-578). Mr. Watson contacted the sheriff's department (Tr. 578-579).

That same day, Watson drove by the Brewer home and noticed that the Brewer car was gone but the porch door had been left open (Tr. 579).

The next day, Thursday, September 1, 1994, around 8:00 p.m., Andy Brewer, the Brewers' son, and his wife went to the Brewer home to check on his parents (Tr. 609). Inside the home, Andy noticed that there was a telephone cord, which had been pulled from the wall, in a chair cushion (Tr. 610). Andy looked around the house and then headed downstairs (Tr. 611). When Andy walked into the basement, he saw his parents slumped over on the wood pile,

²The Brewers had last been seen alive on Tuesday, August 30, 1994 (Tr. 609).

each shot in the head (Tr. 617-618; State's Exhibit 20-22). Mrs. Brewer's hands were tied behind her back with a telephone cord (Tr. 634). Elsewhere in the house, the rug between the kitchen and the dining room was crumpled and askew (Tr. 636). On the south side of the dining room, a black purse sat on a white cabinet (Tr. 636). The contents of the purse had been taken out and scattered across the top of the cabinet (Tr. 636). In the southwest bedroom, a gun cabinet on the closet wall was askew and the two rifles were missing (Tr. 637-638).

Outside the house, the planking on the front porch contained a layer of dust (Tr. 638). Shoe prints were found in the dust (Tr. 638). Photographs of the prints were taken and gel lifts were also taken (Tr. 638).

The autopsy of Bill Brewer showed that he died from three gunshot wounds to his head with injury to the brain, from close proximity (Tr. 659-664; State's Exhibit 26, 27). Flossie Brewer's autopsy showed that she also died from three gunshot wounds to the head from close proximity (Tr. 672-673; State's Exhibit 38).

After killing the Brewers, appellant and Elliott left Missouri and headed to Oklahoma in the Brewer's Oldsmobile, where appellant tried to sell two .22 caliber rifles from the trunk of the car to his friend Rusty Medlin (Tr. 700, 721-727, 737-739). Medlin decided not to buy the rifles from appellant (Tr. 701).

Appellant and Elliott left the Brewer's car in Oklahoma, took a Dodge pickup truck, that had belonged to a woman, Roxy Ruddell, and headed for New Mexico (Tr. 773, 800-801).³

³During the penalty phase, evidence was presented that appellant had killed Roxy

Ruddell by shooting her three times in the head and he and Elliott then stole her truck (Tr. 1035-1037, 907, 940-942). Prior to this trial, appellant had been convicted of murder in the first degree in Oklahoma for that crime (Tr. 940-942).

Approximately a week after the Brewers were found dead in their home, on September 6, 1994, appellant and Elliott were discovered in Santa Fe, New Mexico in an arroyo off State Road 599 (Tr. 787-788). Officer Jimmy Salmon, with the New Mexico State Police Department, saw appellant and Elliott, in a culvert, lying next to each other with their heads facing the officer (Tr. 789). Officer Salmon also noticed two long rifles leaning against the culvert next to the men (Tr. 789).

When Officer Salmon attempted to arrest the men, Elliott complied with Officer Salmon's commands and stayed on his knees with his hands up, but appellant continually disobeyed Officer Salmon's orders and attempted to flee from the officer (Tr. 790-800). Eventually, Eric Elliott and appellant were placed in handcuffs, arrested, and read their Miranda rights (Tr. 795-796). Appellant and Eric Elliott were then transported to the police department (Tr. 796).

Recovered from the scene were two .22 caliber rifles, a Mountain Dew bottle, a Skoal can, a black bag with red trim, a lighter, a glove, and glasses (Tr. 796-797, 804). A Marlin rifle was lying on the ground on a blanket; a Glenfield rifle was recovered from the north wall of the culvert; and a BB gun and .22 caliber revolver were found in a tan suede glove (Tr. 808-811). The revolver was the revolver taken from the Elliott home in Ohio (State's Exhibit 43). The rifles had belonged to Brewers, which had been discovered missing from their gun rack (Tr. 615-617). Also located was the Dodge pickup truck, belonging to Roxy Ruddell, which appellant and Elliott had taken from Oklahoma (Tr. 773, 800-801).

Officer Daniel Becker, with the New Mexico State Police, interviewed appellant after his arrest (Tr. 848). Officer Becker informed appellant of his Miranda rights (Tr. 850-851). Appellant stated that he understood his rights and agreed to answer Officer Becker's questions (Tr. 851-852). Appellant told Officer Becker that he would talk to him but he was not going to tell him everything (Tr. 857).

During the interview, when Officer Becker questioned appellant about Ohio, appellant said, "next question" (Tr. 857). When Officer Becker raised the topic of Missouri, appellant initially stated that he did not remember being in Missouri (Tr. 857). During the interview, appellant also avoided answering some of the questions relating to the murders (Tr. 860). Officer Becker then questioned appellant about Oklahoma (Tr. 857). Appellant stated that he had stopped to visit his mother (Tr. 857-858).

Officer Becker asked appellant if he killed anyone in Missouri (Tr. 859). Appellant responded that there were several weapons recovered from where he and Elliott were arrested and that the .22 pistol that was recovered would match the bullets at the crime scene in Missouri (Tr. 860).

Appellant informed Officer Becker that they had driven a truck to the area where they had been arrested (Tr. 861). When Officer Becker asked him if he was solely responsible for the murders in Missouri, appellant stated that it was a "50/50 deal" (Tr. 862). Appellant also told Officer Becker that he and Elliott had pawned a couple of Game Boy games, entertainment centers, and fishing equipment in Oklahoma (Tr. 862). Appellant stated that "he knew that he

was leaving a trail in his travels from Ohio to New Mexico” (Tr. 862). He stated that “a dead person can’t report a stolen vehicle” (Tr. 862).

Regarding the murders of the Brewers, appellant told Officer Becker that he and Elliott had come from Ohio to Missouri in a red vehicle (Tr. 863). Appellant stated that they had parked the car in a field and slept (Tr. 863). According to appellant, they realized that the car was stuck in the mud and he and Elliott devised a plan to approach a residence to ask to use the telephone to call a wrecker service (Tr. 863). Appellant stated that they approached the house and were greeted by an elderly lady (Tr. 864). Appellant told Officer Becker that they explained to her that the vehicle was stuck and that they wanted to use the telephone (Tr. 864). According to appellant, the woman, later identified as Flossie Brewer, invited them inside the house where they saw an elderly man, Bill Brewer, sitting on the living room couch (Tr. 864). Appellant stated that once they realized that there was no telephone book in the house, they decided they were going to kill the couple (Tr. 864).

Appellant told Officer Becker that they talked with the couple for half an hour and then one of them pulled out a .22 pistol and together they tied the lady’s hands behind her back (Tr. 864). According to appellant, they led the couple down the stairs into the cellar (Tr. 864). Appellant stated that, at some point, Mrs. Brewer had tried to push the gun away but otherwise the couple did not resist (Tr. 865). Appellant explained that they had to assist the woman into the cellar (Tr. 864). Appellant then stated that Elliott shot the lady three times in the head and she fell onto the wood pile; Elliott then shot the man three times in the head (Tr. 864). When

asked if he had murdered the couple in self-defense or if he was a cold-blooded killer, appellant responded, “it’s one of them. It’s one or the other. It’s one of them” (Tr. 865).

Appellant told Officer Becker that after the couple were dead, he went upstairs and petted the dog (Tr. 865). According to appellant, while he was petting the dog, Elliott was rummaging through the house and found the keys to the couple’s Oldsmobile, a couple hundred dollars in cash, and some rifles in the bedroom (Tr. 866). Appellant stated that they took the Oldsmobile (Tr. 866). When asked if the couple had done anything wrong to deserve being killed, appellant responded, “they didn’t deserve it” (Tr. 866). Appellant also told Officer Becker that “you wouldn’t understand. We did this out of craziness” (Tr. 880).

Appellant presented one witness, Evan T. (Todd) Garrison, and also testified on his own behalf. According to Evan Garrison, with the Missouri State Highway Patrol Crime Laboratory Division, shoes retrieved from Eric Elliott’s locker could have made the shoe prints found at the Brewer home (Tr. 898-905).

Appellant testified that he had prior convictions in Oklahoma for grand theft auto or unauthorized use of a motor vehicle, first degree murder, kidnapping, robbery with a firearm, and embezzlement by a bailee; and convictions in Ohio for breaking and entering, child endangerment, and theft (Tr. 907, 940-942). According to appellant, contrary to his confession to Officer Becker, he was present at the Brewer home when they were killed but he only intended on robbing them, taking their car and their money (Tr. 907-908). Appellant testified that although he tied up Mrs. Brewer, it was Elliott who took the money, the rifles, and the keys to the car, and shot and killed the Brewers (Tr. 908-913). Appellant maintained that he was

upstairs getting something to eat and petting the dog when the shots were fired and he did not know that Elliott was going to kill them (Tr.908-913). Appellant testified that when he asked Elliott why he killed the Brewers, Elliott responded, “because they can identify us” (Tr. 913).

During rebuttal, the State presented the testimony of Officer Daniel Becker (Tr. 957). Officer Becker testified that appellant told him that he saw both victims fall after they were shot and that after they were shot he turned away (Tr. 957-958). Officer Becker also testified that appellant told him that the victims fell onto a wood pile after they were shot and then he and Elliott went upstairs (Tr. 958).

At the close of the evidence, instructions and argument, the jury found appellant guilty of two counts of murder in the first degree, one count of first degree burglary, one count of armed criminal action, one count of stealing, and one count of tampering in the first degree (Tr. 1012-1013; L.F. 324-326).

In the penalty phase, the State presented evidence regarding appellant’s murder of Ruth Loader in Ohio; appellant’s murder of Roxy Ruddell in Oklahoma; appellant’s abuse of his child in Ohio; and testimony from the victims’ children about the victims (Tr. 1031-1101).

Appellant presented the testimony of seven witnesses in an attempt to mitigate punishment (Tr. 1103-1277).

At the close of the evidence, instructions and argument, the jury recommended that appellant be sentenced to death for the murder of Flossie Brewer and death for the murder of William Brewer (Tr. 1314-1315; L.F. 324-326). The jury found as statutory aggravating circumstances that the murders were committed while appellant was engaged in the

commission of another unlawful homicide; and that appellant murdered the victims for the purpose of receiving money or something of monetary value from the Brewers (Tr. 1314-1315). The trial court sentenced appellant to death for each count of murder, and consecutive terms of fifteen years for burglary, life imprisonment for armed criminal action, seven years for stealing, and seven years for tampering in the custody of the Missouri Department of Corrections (Tr. 1326-1328).

ARGUMENT

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SUSTAINING THE STATE’S OBJECTION TO APPELLANT’S VOIR DIRE QUESTIONS ABOUT WHETHER ANY OF THE VENIRE HAD “RECALL[ED] PERSONALLY EVER HAVING MADE A STATEMENT...ABOUT THE DEATH PENALTY” BECAUSE THE TRIAL COURT REASONABLY CONCLUDED THAT THIS OPEN ENDED QUESTION EXPLORING PROSPECTIVE JURORS’ “THOUGHTS” OR “FEELINGS” WAS IRRELEVANT AND THEREFORE, PROPERLY EXCLUDED; AND THE TRIAL COURT, WITHIN ITS DISCRETION, PROPERLY LIMITED THE QUESTIONING TO FORMAL STATEMENTS (I.E. ARTICLES OR SPEECHES) MADE BY THE PROSPECTIVE JURORS.

Appellant claims that the trial court abused its discretion in sustaining the State’s objection to his voir dire questions regarding whether any of the prospective jurors had ever made any statement about the death penalty (App. Br. 36). Appellant claims that the questions would have allowed him to determine “the jurors’ true and fixed beliefs and opinions about the death penalty, gaug[e] whether the jurors were truly able to follow the law and were qualified to serve in a death penalty case, and intelligently us[e] peremptory challenges” (App. Br. 36).

Appellant alleges that the trial court’s allowance of questions about formal statements such as “articles” and/or “speeches” about the death penalty made by prospective jurors was an “unreasonabl[e] limit[ation]” (App. Br. 37).

Relevant Facts

During voir dire, defense counsel attempted to ask the following question:

MR. WOLFRUM: Well, let me ask you this question initially: Can you recall—and I agree that this is not a thing that people talk about every day. I'm asking if you recall personally ever having made a statement from words from your own mouth or maybe written a letter to the editor or anything about the death penalty? I'm talking about do you recall ever making a statement about the death penalty from your own mouth? If you do—

VENIREMAN THOMAS: No.

MR. AHSENS: Objection. Irrelevant and immaterial.

MR. WOLFRUM: May we approach?

(COUNSEL APPROACHED THE BENCH AND THE FOLLOWING PROCEEDINGS WERE HAD:)

MR. WOLFRUM: And I want to make a record on being allowed to ask this question and then I will—I think this is this question asking jurors if they have ever personally specifically made statements, either orally or in writing, from their mouth, about the death penalty, is an important question in this process. It, you know, I'm going to be called upon to make intelligent requests for strikes for cause and intelligent peremptories. This is a request for historical information that goes to fixed opinions or belief of the jurors.

I think it's crucial information for me and the Court in evaluating the juror's opinion that it can consider both punishments.

For example, the reason I want to ask this question is, if a juror, in response to this question, told me that they had a strong relationship, advocated for the death penalty or made a statement last week saying, "Anyone who kills someone should get the death penalty," that would give me reason to be suspect of a juror's representation that they can consider both punishments, you know.

I think denying the right to ask this question is denying defendant's right to due process for a fair and impartial juror, freedom from cruel and unusual punishment, ineffective assistance of counsel under the Fourth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18 of the Missouri Constitution.

And I'm aware of *State vs. Kreutzer*. But that case said that the court sustained the State's objections only when appellant's counsel, one, presented specific fact scenario and answers which arguably constituted obtaining a commitment from the venireperson. And I'm not doing that.

And two, asked open-ended questions about how prospective jurors felt or thought about certain issues or to compare one venireperson's belief to another. I'm not doing that.

Three, misstated the law on the jury's obligation. I'm not doing that.

Four, asked confusing, argumentative, or irrelevant questions. And I'm not doing that.

I'm asking historical information about specific statements that the jurors themselves have made, and I wanted to make a record and get the Court's ruling.

THE COURT: Mr. Ahsens.

MR. AHSENS: Your Honor, the issue, I believe, in *Kreutzer* is the first of a series of questions on these issues. I think that the issue, as always is whether the venireperson is capable of following the instructions of the Court and keeping in mind whether they can seriously consider a vote for both sentencing alternatives. Whether they've made any statement in the past, pro, con, or indifferent, does not aid that inquiry.

THE COURT: Mr. Wolfrum, the Court will adhere to its ruling, except I do think there is a difference between somebody having written an article about the death penalty or having made a public speech about the death penalty than just coffee counter talk. I mean, frankly, who remembers what they've said about anything over the years just in informal talk?

I will allow you to go into the fact that they maybe made a public speech about it or has anybody done something formal in the course of writing about it.

MR. WOLFRUM: Okay. And I mean, my request is to be allowed to go farther than the Court is saying.

THE COURT: I understand that. I don't think it's proper to ask, you know, what the coffee talk conversation has been.

MR. WOLFRUM: Or for specific statements that they've made about it?

THE COURT: Yeah.

MR. WOLFRUM: Okay. So just so we're making the record, the Court's overruling my desire to ask that?

THE COURT: I will let you go into more formal type of statement and writing but not just anything.

MR. WOLFRUM: Okay.

THE COURT: Okay.

(Tr. 411-414). Appellant then questioned the jury about any formal speeches or formal writings they had made relating to the death penalty (Tr. 414-416, 482-483, 538-540). Appellant also questioned the jurors about whether they understood the law about aggravating and mitigating circumstances (Tr. 416); whether they would follow the instructions given by the court on sentencing (Tr. 416); whether they could consider evidence in mitigation (Tr. 420); and whether they could vote for either punishment (Tr. 420, 474-480, 529-542).

Standard of Review

Review of limitations imposed by the trial court during venire questioning is for an abuse of discretion. State v. Kreutzer, 928 S.W.2d 854, 861 (Mo.banc 1996), cert. denied, 519 U.S. 1083 (1997). Although wide latitude should be permitted in exploring possible grounds for challenges for cause or peremptory strikes, the nature and extent of the questions that may be asked are discretionary with the court. Id. The party asserting the abuse of discretion has the burden of demonstrating a real probability that the prejudice resulted. Id. A trial court has abused its discretion and reversal is required only if the voir dire permitted does not allow the discovery of bias, prejudiced, or impartiality in potential jurors. State v. Nicklasson, 967 S.W.2d 596, 608 (Mo.banc 1998), cert. denied, 525 U.S. 1021 (1998).

Analysis

The trial court was within its discretion to disallow appellant's irrelevant voir dire questions. Appellant's questions were designed to ask prospective jurors how they "felt" or what they "thought" about particular legal principles, rather than advising them of what the law required and asking them if they could fairly and impartially follow an instruction to that effect.

Questions about whether venirepersons had previously made statements about the death penalty are open-ended questions attempting to explore feelings or thoughts of the venireperson—an irrelevant and properly excluded question. See Kreutzer, supra. Where a trial court sustains objections during voir dire to questions by appellant's counsel that 1) present specific fact scenarios the answers to which arguably constitute obtaining commitment from the venireperson; 2) are open-ended questions about how prospective jurors "felt" or "thought"

about certain issues, or to compare one venireperson's beliefs to another; 3) misstates the law or the jury's obligation under the law; or 4) asks confusing, irrelevant, or argumentative questions of the panel, it cannot be said that the trial court's limitation of appellant's questioning is unreasonable, or an abuse of the trial court's discretion in controlling voir dire. Id.; State v. Thompson, 985 S.W.2d 779, 790 (Mo.banc 1999). It is permissible for a trial court to prohibit broad questioning about how a prospective juror thinks or feels, as the relevant inquiry is whether a prospective juror can follow the law. State v. Chaney, 967 S.W.2d 47, 57 (Mo.banc 1998). "The question is not whether a prospective juror holds opinions about the case, but whether these opinions will yield and the juror will determine the issues under the law" (citations omitted). State v. Feltrop, 803 S.W.2d 1, 8 (Mo.banc 1991), cert. denied 501 U.S. 1262 (1991).

In Kreutzer, defense counsel attempted to ask the following questions of the venire panel:

Q. We're not in the courtroom, I walk up to you in a coffee shop, maybe I know you, and we sit down and we start talking, and we see in the paper that a death penalty has been carried out. And I say to you, what do you think of the death penalty, what are you going to tell me?

* * * * *

Q. Have you ever expressed an opinion about the death penalty before?

A. Probably?

Q. Do you remember what you said, or can you recall or reconstruct what you said?

Kreutzer, supra at 863. This Court recognized that the trial court properly excluded these questions, as well as others, as they were open-ended questions, designed to illicit responses about the venirepersons' thoughts and feelings. Id. at 864-865. This Court held that:

[T]he trial court did not entirely preclude appellant from following any particular line of questioning. The court properly required appellant, however, to narrow his questioning according to the dictates of existing law. The trial court allowed sufficient latitude in determining whether each venireperson could fairly and impartially follow the court's instructions during deliberations.

Id. at 864-865. Just as the trial court in Kreutzer, the trial court in the case at bar, exercised its discretion and properly limited appellant's voir dire questioning. The trial court put a manageable limit on questioning on statements by jurors—questions only relating to formal statements. This was a reasonable limitation. The trial court properly excluded the irrelevant questions and allowed sufficient latitude in determining whether each venireperson could fairly and impartially follow the court's instructions. The trial court did not abuse its discretion.

Moreover, appellant has failed to demonstrate that he was prejudiced. Kreutzer, supra. Appellant's only theory as to prejudice is that the trial court prevented him from "gauging whether jurors were truly able to follow the law and were qualified to serve in a death penalty case, and intelligently us[e] peremptory challenges" (App. Br. 36). Appellant makes no attempt to explain why his other inquiries were insufficient to determine the prospective jurors

qualifications. The fact that some statement was made at some time in the past about the death penalty is, at best, minimally relevant, and would not have assisted appellant in “gauging the jurors” ability to follow the law, unlike his questions regarding whether the jury understood the instructions, whether the jury could follow the instructions as a juror or a foreperson, and whether the jury could impose either sentence. Appellant has failed to establish that the trial court’s limitation on voir dire was not reasonable or that he was prejudiced by the trial court’s actions.

Based on the foregoing, appellant’s claim must fail.

II.

THE TRIAL COURT DID NOT ERR IN SUBMITTING INSTRUCTIONS 6 AND 10, THE VERDICT DIRECTORS AS TO MURDER IN THE FIRST DEGREE, WHICH INSTRUCTED THE JURY THAT APPELLANT OR ERIC ELLIOTT CAUSED THE DEATHS OF THE BREWERS BECAUSE THE DISJUNCTIVE SUBMISSION WAS PROPER UNDER MAI-CR3D 304.04 IN THAT THE EVIDENCE WAS UNCLEAR AS TO WHETHER APPELLANT OR ELLIOTT SHOT THE VICTIMS AND FAILURE TO ADVISE THE JURY THAT APPELLANT WAS GUILTY IN EITHER CASE COULD HAVE MISLED THE JURY.

Appellant claims that the trial court erred in overruling his objections to Instructions 6 and 10, the verdict directors for murder in the first degree, because the instructions attributed the conduct elements to either appellant or Eric Elliott (App. Br. 54). Appellant alleges that these disjunctive submissions were in error because there was no evidence that appellant committed any of the conduct elements of the offense (App. Br. 54). Appellant alleges that he was prejudiced by this error because the instructions allowed the jury to disregard the evidence and come to a verdict based on their “speculative ideas” (App. Br. 54-55).

Verdict Directors

Instruction 6, the verdict director for first degree murder of Flossie Brewer, read as follows:

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

First that on or about August 30, 1994, in the County of Callaway, State of Missouri, **the defendant or Eric Elliott** caused the death of Flossie Brewer by shooting her, and

Second, that the defendant or Eric Elliott knew or was aware that his conduct was practically certain to cause the death of Flossie Brewer, and

Third, that the defendant or Eric Elliott did so after deliberation, which means cool reflection on the matter for any length of time no matter how brief then you are instructed the at the offense of murder in the first degree has occurred, and if you further find and believe from the evidence beyond a reasonable doubt:

Fourth, that with the purpose of promoting or furthering the death of Flossie Brewer, the defendant aided or encouraged Eric Elliott in causing the death of Flossie Brewer and 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 under Count I 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 that offense.

(L.F. 201). Instruction 10, the verdict director for murder in the first degree of Bill Brewer, read the same as above, with the exception of changing the victim's name (L.F. 205).

Analysis

Appellant contends that he was prejudiced by the disjunctive use of “defendant or Eric Elliott” in the preceding highlighted paragraph because there was no evidence that appellant caused the deaths of the Brewers (App. Br. 54).

In order to determine whether instructions submitted under accomplice liability are proper, it is necessary to first look at the Notes on Use of MAI-CR3d 304.04. Note 5(c) states that:

Where the evidence is not clear or conflicts as to which person (in a group including the defendant) engaged in the conduct constituting the offense, then

(1) those conduct elements of the offense should be ascribed to the defendant or the other person or persons, and

(2) select one of the alternatives such as “acted together with or aided” in the paragraph following “then you are instructed that the offense of [*name of offense*] has occurred....”

The purpose of the disjunctive submission of parties in this situation is to give the jury the opportunity to consider evidence that is unclear. State v. Dulany, 781 S.W.2d 52, 55 (Mo.banc 1989).

Under the facts of this case, it was unclear whether appellant or Elliott pulled the trigger. Although appellant stated both in his confession to Officer Becker and during his trial testimony that it was Elliott who actually shot the Brewers, the jury was free to disbelieve or

ignore appellant's self-serving statements. Dulany, supra. The evidence established that appellant and Elliott went to the Brewer home together, planned to kill the Brewers, planned to rob the Brewers, tied up Mrs. Brewer, and took the Brewers downstairs before killing them. The direct and circumstantial evidence show appellant and Elliott were the last persons in the Brewer home prior to the victims being robbed and shot. Considering that appellant's statement was self-serving in that he originally denied ever being in Missouri and only changed his story once he was confronted with evidence showing otherwise, the jury was free to infer that appellant's denial that he was actually the one to pull the trigger was another lie. The jury was not bound by appellant's self serving statements that he was not the one who actually "pulled the trigger." Dulany, supra; State v. Sherman, 927 S.W.2d 350, 355 (Mo.App. W.D. 1996). The jury could reject appellant's testimony and find that he in fact committed the acts rather than Elliott. The evidence presented at trial was unclear as to who, appellant or Elliott, pulled the trigger, and therefore, the trial court properly submitted the instruction in the disjunctive.

Similar facts were present in Dulany, supra. In Dulany, the defendant consistently denied that she was responsible for killing the victims and named others as responsible for causing the victims' deaths. Id. This Court found no error in the submission that defendant or another actor caused the death of the victims because the evidence was unclear as to who actually caused the death of the victims. Id. The jury was free to disregard the defendant's self-serving testimony, and the direct and circumstantial evidence showed that the defendant was one of the last persons present in the victims' home prior to their death. Id. "The jury

could properly disbelieve defendant and find she committed these acts.” Id; see also Sherman, supra (jury not bound by defendant’s self-serving statements that she did not commit the murder herself, but she knew who did). In the case at bar, as in Dulany, there was no error in instructing the jury in the disjunctive. Dulany, supra; State v. Griffin, 848 S.W.2d 464, 469 (Mo.banc 1993); Sherman, supra; State v. Jackson, 822 S.W.2d 952, 957-958 (Mo.App. S.D. 1992); State v. Geneminson, 791 S.W.2d 868, 872 (Mo.App. E.D. 1990); State v. Davis, 963 S.W.2d 317, 323-324 (Mo.App. W.D. 1997).

Appellant’s theory that the State was required to rely upon his self-serving denial that he shot the Brewers in drafting the verdict directing instructions essentially advocates that the jury be misled as to what facts would be sufficient to support a conviction. If the jury was instructed that it could find appellant guilty only if Eric Elliott caused the deaths of the Brewers, this would amount to an instruction that appellant must be acquitted if the jury concluded that appellant himself pulled the trigger. The obvious purpose of Notes on Use 5(c) to MAI-CR3d 304.04 is to permit the jury to be fully instructed on the law applicable to various permutations of the facts where, as here, it is truly unclear which of multiple actors committed the acts constituting the offense. Appellant is not entitled to an instruction that misleads the jury on the law.

Appellant’s reliance on State v. Sparks, 701 S.W.2d 731, 733-734 (Mo.App. E.D. 1985) and State v. Scott, 689 S.W.2d 758 (Mo.App. E.D. 1985) is misplaced. In both Sparks, and Scott, the jury was instructed that the defendant or his co-defendants committed the acts constituting the offense even though the evidence was clear that it was only the co-defendants

who had committed the acts. In Sparks, the defendant was not even in the same town when his co-defendants disposed of the sows constituting the offense of disposing of stolen property. Sparks, supra at 733-734. In Scott, the evidence was clear the defendant was standing outside of the house when his co-defendant shot and killed the victim. Scott, supra. The evidence was clear in both Scott, and Sparks, that the defendants were not present during the commission of the crime but merely aided and encouraged their co-defendants. Thus, the Court of Appeals found that submitting in the disjunctive was improper as the evidence was clear on who committed the crimes. However, in the case at bar, as discussed above, the evidence was unclear whether appellant or Elliott, both present at the Brewer home, pulled the trigger. Therefore, the disjunctive submission was proper under MAI-CR3d 304.04.

Appellant also relies on State v. O'Brien, 875 S.W.2d 212 (Mo.banc 1993) (App. Br. 70-71). In O'Brien, this Court reversed the defendant's conviction for first degree murder as there was no evidence of deliberation on his part as an accomplice. Id. O'Brien, did not involve disjunctive submission of jury instructions and is not applicable to the case at bar. The trial court did not err in instructing the jury in the disjunctive.

Based on the foregoing, appellant's claim must fail.

III.

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S PRETRIAL MOTION TO QUASH THE INFORMATION BECAUSE THE STATUTORY AGGRAVATING CIRCUMSTANCES THAT THE STATE INTENDED TO SUBMIT IN THE PUNISHMENT PHASE WERE NOT REQUIRED TO BE PLED IN THE INFORMATION IN THAT (A) APPRENDI V. NEW JERSEY AND RING V. ARIZONA DO NOT SO HOLD; (B) APPELLANT RECEIVED PRETRIAL NOTICE OF THE STATUTORY AGGRAVATING CIRCUMSTANCES UNDER SECTION 565.005, RSMO 2000, WHICH SATISFIED APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION AGAINST HIM; AND (C) THIS FORM OF NOTICE VIOLATES NO PROVISION OF THE MISSOURI CONSTITUTION.

Under §565.005.1, RSMo 2000, the State is required to give notice to the defendant “[a]t a reasonable time before the commencement of the first stage of [a capital trial]” of the statutory aggravating circumstances that it intends to submit in the event that the defendant is convicted of first degree murder. The State did so in this case (L.F. 152-153). Appellant alleged in a pretrial motion that the information filed against him was defective because the State did not plead in the information the statutory aggravating circumstances it intended to submit at his trial, which he claimed was required under the holding of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (L.F. 179-186). Appellant’s motion was overruled (Tr. 176). Although phrased as a challenge to the charging document in this case,

appellant's contention is, in effect, that §565.005.1, RSMo 2000, is unconstitutional under Appendi.

Appellant's construction of Appendi as creating a requirement that statutory aggravating circumstances be pled in the indictment or information is refuted by the language of that decision. The issue presented to the United States Supreme Court in that case was "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." Id. 530 U.S. at 469. Relying upon the guarantee under the Sixth and Fourteenth Amendments of a trial by jury, the Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. 530 U.S. at 476, 490. Thus, the holding of Appendi concerned what matters must be submitted to and found by a jury, not what must be contained in an indictment or information.

If the plain language of the holding in Appendi was not sufficient to dispose of appellant's reliance upon that decision, it would be demolished by the fact that the Supreme Court expressly stated that it was not addressing what must be alleged in the charging document:

Appendi has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment. . . . [The Fourteenth] Amendment has not . . . been construed to

include the Fifth Amendment right to “presentment or indictment of a Grand Jury” that was implicated in our recent decision in Almendarez-Torres v. United States, 523 U.S. 224, 140 L.Ed.2d 350, 118 S.Ct. 1219 (1998). We thus do not address the indictment question separately today.

Apprendi v. New Jersey, *supra*, 530 U.S. at 476 (n. 3).

The brief of appellant ignores the stated holding of Apprendi and the footnote quoted above, and relies exclusively upon language from a previous decision, Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.3d 311 (1999), which was quoted in Apprendi as “foreshadowing” that decision. *Id.* 530 U.S. at 476 (App.Br. 73). The issue before the Supreme Court in Jones was how to construe the federal carjacking statute: whether particular statutory language was an “element” of the crime, in which case it was required to be alleged in the indictment and found by the jury; or whether it was a “sentencing factor” that need not be charged and could be found by the court. *Id.* 526 U.S. at 230-232.⁴ The majority opinion found that the statutory language constituted an element of the crime, but noted in extended *dicta* its view that sentence enhancements might also violate due process if not charged and found by the trial jury. *Id.* 526 U.S. at 240-250.⁵ The majority summarized its view as being

⁴This distinction between “elements” and “sentencing factors” was later abolished in Apprendi, 530 U.S. at 478-490.

⁵That this was *dicta* was confirmed in Apprendi, 530 U.S. at 472-473.

that “under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” Id. 526 U.S. at 246 (n. 6).

This *dicta* from Jones certainly “foreshadowed” the holding of Apprendi that any factor that increased the range of punishment must be found by a jury, but the fact that the quotation from Jones was not a holding of Apprendi is established by (1) the statement in Apprendi that it was not addressing what must be pled in the indictment; (2) the fact that the quotation from Jones cites the Fifth Amendment to the United States Constitution which, in the context of indictments, applies to the federal government (as in Jones) but not to the states (as in Apprendi); and (3) the rejection of this construction of Apprendi by other jurisdictions.⁶ Appellant’s claim that Apprendi supports his argument is meritless.

⁶E.g., State v. Nichols, 201 Ariz 234, 33 P.3d 1172, 1174-1176 (2001); People v. Ford, 198 Ill.2d 68, 761 N.E.2d 735, 738 (n. 1) (2001), cert. denied 2002 U.S.Lexis 5010 (June 28, 2002); State v. Mitchell, 353 N.C. 309, 543 S.E.2d 830, 842 (2001), cert. denied 122 S.Ct.

475 (2001); United States v. Sanchez, 269 F.3d 1250, 1257-1262 (11th Cir. 2001), cert. denied 122 S.Ct. 1327 (2002).

Ring v. Arizona, 122 S.Ct. 2428 (2002), also cited by appellant (App.Br. 76, 78), which for the first time held that the Sixth and Fourteenth Amendments do not allow “a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty,” confirms that it does not, any more than did Apprendi, hold that statutory aggravating circumstances must be pled in the indictment or information. The Supreme Court noted that the issue before it was limited:

Ring’s claim is tightly delineated: he contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. . . . Ring does not contend that his indictment was constitutionally defective. See Apprendi, 530 U.S., at 477, n. 3 (Fourteenth Amendment “has not . . . been construed to include the Fifth Amendment right to ‘presentment or indictment of a Grand Jury’”).

Ring, supra.

Appellant also cites various decisions of the United States Supreme Court preceding Apprendi as supporting his argument that the statutory aggravating circumstances were required to be pled in the information (App.Br. 79-81). None of these authorities are apposite and some are based upon the Indictment Clause of the Fifth Amendment, which does not apply to the states. Apprendi, supra, 530 U.S. at 477 (n. 3). The only constitutional provision that is relevant to state charging documents is the Sixth Amendment requirement that an accused “be informed of the nature and cause of the accusation,” which has been applied to the states through the Fourteenth Amendment. Blair v. Armontrout, 916 F.2d 1310, 1329 (8th Cir.

1990), cert. denied 502 U.S. 825 (1991). The difference between the rights guaranteed by the Fifth Amendment on the one hand and the Sixth and Fourteenth Amendments on the other is instructive in demonstrating the absence of merit in appellant's argument. The Indictment Clause of the Fifth Amendment specifies that criminal charges must be initiated by a grand jury indictment and requires that all elements of the criminal offense charged be stated in the indictment. Almendarez-Torres v. United States, 523 U.S. 224, 228, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1997).⁷

⁷At the time of its decision in Ring, supra, the Supreme Court had before it a claim in a federal death penalty case that the Fifth Amendment required that statutory aggravating circumstances be pled in the indictment. It remanded that case for reconsideration in light of Ring. United States v. Allen, 247 F.3d 741 (8th Cir. 2001), remanded 2002 U.S.Lexis 4893 (June 28, 2002).

The Sixth and Fourteenth Amendments, by contrast, require only that a criminal defendant receive notice of the “nature and cause of the accusation” and does not specify the form that notice must take.⁸ Even legally insufficient charging documents have been held not to violate the Sixth Amendment when the defendant received actual notice of the charge against him. Hartman, *supra*, 283 F.3d at 194-196; Blair, *supra*. Under the law of Missouri, appellant was entitled to, and received, notice before trial of the statutory aggravating circumstances that the state intended to offer in the punishment phase. Nothing in Apprendi, Ring, or any other pertinent authority supports appellant’s claim that this notice provision violates the Sixth and Fourteenth Amendment to the United States Constitution.

Appellant additionally asserts, without argument or citation of authority, that the notice provision in §565.005.1 conflicts with Article I, Sections 10 (“due process”), 14 (courts open to every person), 18(a) (right to demand nature and cause of accusation) and 21 (cruel and unusual punishments) of the Missouri Constitution (1945). As in many previous instances before this Court in which the Missouri Constitution has been cited indiscriminately and without explanation, nothing in the language of these sections, or in any decisional authority known to respondent, supports appellant’s attack upon §565.005.1. See State v. Black, 50

⁸ “[T]he states are not bound by the technical rules governing federal criminal prosecutions” under the Fifth Amendment. Blair v. Armontrout, *supra*. Fifth Amendment decisions are therefore of “little value” in evaluating state indictments or informations. Hartman v. Lee, 283 F.3d 190, 195 (n. 4) (4th Cir. 2002).

S.W.3d 778, 784 (n. 1) (Mo.banc 2001), cert. denied 122 S.Ct. 1121 (2002). Accordingly, appellant's challenge to the constitutionality of §565.005.1 is without merit.

Finally, respondent notes that appellant's claim is essentially the same claim raised and denied by this Court in State v. Tisius, SC84036, slip opinion at 18-20, (Mo.banc December 11, 2002). This Court found that appellant's contention was without merit, stating in relevant part, that:

As held in [State v. Cole, 71 S.W.3d 163, 177 (Mo. banc 2002)] the two statutes Appellant cites serve different functions: section 565.020 defines the single offense of first-degree murder with the range of punishment including life imprisonment or death; section 565.030 merely delineates trial procedure. The Appellant's contention of a violation of *Apprendi* is without merit: pursuant to section 565.005.1, the State gave Appellant notice that it would seek the death penalty, and the aggravating circumstances were proved to a jury beyond a reasonable doubt. "The maximum penalty for first-degree murder in Missouri is death, and the required presence of aggravating facts or circumstances to result in this sentence in no way increases this maximum penalty." [citation omitted].

Just as in Tisius, supra, appellant's claim is without merit, as the State gave appellant notice of its intent to seek the death penalty and the aggravating circumstances were found beyond a reasonable doubt by the jury. Apprendi, supra does not support appellant's claim.

Based on the foregoing, appellant's claim must fail.

IV.

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S MOTIONS JUDGMENT OF ACQUITTAL FOR THE COUNTS OF MURDER IN THE FIRST DEGREE BECAUSE REASONABLE JURORS COULD HAVE FOUND THAT APPELLANT DELIBERATED IN THAT THE EVIDENCE SHOWED THAT APPELLANT COOLY REFLECTED UPON THE MURDERS OF WILLIAM AND FLOSSIE BREWER.

Appellant claims that the evidence was insufficient to support his convictions for first degree murder (App. Br. 83). Specifically, appellant claims that there was “no substantial evidence” that appellant planned to kill the Brewers or deliberated on killing the Brewers (App. Br. 83).

Standard of Review

In reviewing the sufficiency of the evidence to support a criminal conviction, a reviewing court views the evidence, together with all reasonable inferences drawn therefrom, in the light most favorable to the state and disregards all evidence and inferences to the contrary. State v. Silvey, 894 S.W.2d 662, 673 (Mo.banc 1995). Review is limited to determining whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt. Id.; State v. Dulany, 781 S.W.2d 52, 55 (Mo.banc 1989). Circumstantial evidence is afforded the same weight as direct evidence. State v. Hutchison, 957 S.W.2d 757, 767 (Mo.banc 1997).

Analysis

To find appellant guilty of murder in the first degree, the jury had to find beyond a reasonable doubt that appellant or Eric Elliott knowingly caused the death of the Brewers after deliberation upon the matter (L.F. 201, 205). §565.020, RSMo 2000. The jury had to find that appellant aided or encouraged Eric Elliott in causing the death of the Brewers, and that he did so after deliberation (L.F. 201, 205). Regardless of whether appellant was the principal or the accomplice, appellant must have acted with the purpose to commit the crime. §542.041.1(2), RSMo 2000; see State v. Mills, 809 S.W.2d 1, 3-4 (Mo.App. E.D. 1990). Where, as here, the charge is first degree murder, the unique nature of the intent required for that crime dictates that the accused also be shown to have acted after deliberation--that he coolly reflected on the crime for any length of time no matter how short. State v. O'Brien, 857 S.W.2d 212, 217-218 (Mo.banc 1993); see State v. Isa, 850 S.W.2d 876, 899 (Mo.banc 1993); §565.002(3), RSMo 2000. Proof of the intent element of deliberation, must ordinarily be proved through the circumstances surrounding the crime, including the defendant's statements and conduct. State v. Ferguson, 20 S.W.3d 485, 497 (Mo.banc 2000), cert. denied 531 U.S. 1019 (2000); State v. Feltrop, 803 S.W.2d 1, 11 (Mo.banc 1991), cert. denied 501 U.S. 1262 (1991).

The evidence presented at trial supported the jury's finding of deliberation. Most importantly, appellant told Officer Becker that he and Elliott had made the decision to kill the Brewers upon learning that there was no telephone book in the home (Tr. 864)--direct evidence

of appellant's deliberation.⁹ This alone was sufficient for the jury to find appellant guilty of murder in the first degree.

Besides appellant's admission that he and Elliott had planned to kill the Brewers, several other factors may be considered when determining whether appellant deliberated upon the Brewers' murders:

1) Intent to kill may be inferred from the use of a deadly weapon on some vital area of the victim's body. O'Brien, supra. In the case at bar, the victims were shot in the head, multiple times (Tr. 659, 672-673).

2) Presence at a crime scene, opportunity, companionship, conduct and flight are evidence of purpose, intent, and consciousness of guilt. State v. Clay, 975 S.W.2d 121, 139

⁹Appellant's claim that this evidence should be discounted because Officer Becker did not include this statement in his notes and that appellant never stated that he and Elliott "discussed" murdering the Brewers before doing so is without merit. The fact that appellant did not tell Officer Becker that he and Elliott "discussed" the murders, does not contradict appellant's statement that he and Elliott decided to kill the Brewers before shooting them.

(Mo. banc 1998), cert. denied, 525 U.S. 1085 (1999); State v. Ramsey, 874 S.W.2d 414, 417 (Mo.App. W.D. 1994). In the case at bar, appellant was present in the basement when the victims were killed (he described the wood pile and the victim's slumping over when they were killed) (Tr. 864-865). Appellant fled from the home, stealing the Brewer's car and accompanied Elliott, continuing to travel with him across the midwest (Tr. 847-866). Appellant also attempted to flee from officers when arrested (Tr. 794-796)

3) "Exculpatory statements, when proven false, evidence a consciousness of guilt" and a jury may infer guilt from such evidence. Clay, supra. Although appellant denied being present in the basement when the Brewers were killed during his trial testimony, Officer Becker testified during rebuttal that during appellant's confession, appellant had told him that he was downstairs with the Brewers when they were killed and he watched as they were shot and they slumped over on the wood pile (Tr. 957-958)—information appellant would not have know if he was not in the basement when they were killed.

4) Moreover, "all of [appellant's] activities after the murder were undertaken with a 'somewhat chilling nonchalance about events,' demonstrating [appellant's] complete state of indifference to the shooting of [the victim], which also supports the jury's finding of deliberation." State v. Williams, 945 S.W.2d 575, 580 (Mo.App. W.D. 1997) at 580, quoting State v. Greathouse, 627 S.W.2d 592, 596 (Mo.banc 1982). After brutally killing the Brewers, appellant went upstairs, made a sandwich in their kitchen, sat down on their furniture, and ate his sandwich while petting the Brewer's dog (Tr. 866, 911-912). Instead of attempting to disassociate himself from the murder, as one would expect if appellant was surprised by the

murders, appellant continued to travel with Elliott and then attempted to profit from the murders by trying to sell the Brewers guns that they had stolen after killing them (Tr. 700-702).

Appellant's actions were not the result of a wild and passionate act, but rather were the actions of a cold calculating killer.

5) Evidence of multiple wounds or repeated blows may support an inference of deliberation as well as shooting the victim in the head to make sure that the victim died (Tr. 659, 672-673). State v. Ervin, 979 S.W.2d 149, 159 (Mo.banc 1998), cert. denied 525 U.S. 1169 (1999); Clay, supra; State v. Howard, 896 S.W.2d 471, 480 (Mo.App. S.D. 1995). The fact that the victims were each shot three times in the head at close range reinforces a reasonable inference that appellant coolly reflected on the victims' death.

6) Appellant's failure to seek assistance for the Brewers, and his subsequent flight from the state support the jury's finding that he deliberated upon the murders. Feltrop, supra; State v. Williams, 945 S.W.2d 575, 580 (Mo.App. W.D. 1997); State v. Moore, 949 S.W.2d 629, 633 (Mo.App. W.D. 1997). The evidence presented and the reasonable inferences therefrom were sufficient for a reasonable jury to find that appellant deliberated upon the murders on the Brewers and thus, he was guilty of murder in the first degree for both victims.

Appellant's sufficiency challenge rests, in its entirety, upon his attempt to reargue on appeal the version of the facts that was offered by the defense at trial and was rejected by the jury: that appellant did not intend to kill of the Brewers, but rather only intended to rob them (App. Br. 83-85). Appellant cites evidence that the original scheme discussed by appellant and Elliott was to put merely rob the Brewers and asserts that this was his plan when he entered the

home (App. Br. 83-85). Such an argument ignores the appellate standard of review for sufficiency claims and asserts, in effect, that the jurors were required to believe appellant's self-serving account of his intentions. Appellant's factual hypothesis of innocence as to first degree murder was squarely presented to the jurors at trial and was unanimously rejected by them, as they were entitled to do. The fact that appellate courts do not reweigh the evidence in reviewing sufficiency claims, Ervin, supra, is fatal to his argument. The trial court could not have erred in overruling appellant's motion for judgment of acquittal.

Based on the foregoing, appellant's claim must fail.

V.

THIS COURT SHOULD, IN THE EXERCISE OF ITS INDEPENDENT REVIEW, AFFIRM APPELLANT'S SENTENCES OF DEATH BECAUSE (1) THEY WERE NOT IMPOSED UNDER THE INFLUENCE OF PASSION, PREJUDICE OR ANY OTHER ARBITRARY FACTOR; AND (2) APPELLANT'S SENTENCES ARE NOT EXCESSIVE OR DISPROPORTIONATE TO THOSE IN SIMILAR CASES, CONSIDERING THE CRIMES, THE STRENGTH OF THE EVIDENCE, AND THE DEFENDANT.

As an alternative to his attack upon the sufficiency of the evidence in Point IV, appellant invokes this Court's duty of independent sentence review under Section 565.035.3, RSMo 2000, arguing that the evidence that he deliberated upon the murders of the Brewers was unreliable and citing various of his claims of trial error as evidence that his punishment phase hearing was unfair (App. Br. 92-104).

Contrary to appellant's assertions, the proportionality review conducted by this Court is not a requisite under the due process clause, or under any other provision of the United States Constitution. Morrow v. State, 21 S.W.3d 819, 829-830 (Mo.banc 2000), cert. denied, 531 U.S. 1171 (2001).¹⁰

¹⁰Cooper Industries, Inc. v. Leatherman Toolgroup, Inc., 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001), cited by appellant, does not support his claim: this decision concerned the review of punitive damage awards and did not purport to overrule, modify or even address Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), which held

that proportionality review is not constitutionally required in an otherwise valid capital sentencing system.

Under the mandatory independent review contained in §565.035.3, RSMo 2000, this Court has to determine:

- (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
- (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstance found;
- (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime the strength of the evidence and the defendant.

This Court's proportionality review is designed to prevent freakish and wanton application of the death penalty. State v. Ramsey, 864 S.W.2d 320, 328 (Mo.banc 1993), cert. denied 511 U.S. 78 (1994).

1. Sentence was not imposed under the influence of passion, prejudice, or any other improper factor

The record shows that appellant's sentence was not imposed under the influence of prejudice, passion or any other improper factor. Appellant's argument on this matter is just a rehash of the arguments that were shown to be without merit in other parts of this brief.¹¹

¹¹Appellant also cites Cooper Industries, Inc., supra, for the proposition that the alleged trial errors he cites should be considered "in evaluating the reliability and proportionality of

Moreover, appellant's argument that his death sentences were improperly imposed, due to the destruction of medical records allegedly containing mitigation evidence is without merit. The evidence of his medical problems as a child was presented through other witnesses during the penalty phase (Tr. 1103-1147). Moreover, appellant does not even allege that he was unable to present comparable evidence, nor does he allege how he was prejudiced. Appellant's claim must fail.

2. Statutory aggravating circumstances were supported by the evidence and are valid

The evidence presented at trial supported the jury's findings of the statutory aggravating circumstances (1) that each of the murders occurred while appellant was engaged in the commission of another unlawful homicide, and (2) that appellant murdered the Brewers for the purpose of receiving money or something of monetary value from the Brewers. § 565.032.2

the verdict of death" (App. Br. 98). Cooper Industries has nothing whatsoever to say on this issue. Appellant's argument is superfluous, however, because §565.035.3(1) already directs this Court to review the record for "arbitrary factor[s]" that could have caused the trier of fact to assess punishment based upon something other than the relevant facts and law.

(2), and (4), RSMo 2000. The evidence showed that appellant killed Flossie Brewer while also killing William Brewer and that appellant murdered the Brewers so that he could take their money, their rifles, and their car (Tr. 1031-1101). The findings of these statutory aggravating circumstances are valid (L.F. 246-247).

3. Sentence is not disproportionate

Appellant's sentences are not disproportionate to the penalty imposed in other similar cases, considering the crime, the strength of the evidence, and the defendant. The murders of the Brewers resemble the crimes committed in State v. Wolfe, 13 S.W.3d 248, 265 (Mo.banc 2000), cert. denied 531 U.S. 845 (2000); and State v. Roberts, 948 S.W.2d 577, 607 (Mo.banc 1997), cert. denied 522 U.S. 1056 (1998), in that the murder was committed after appellant invaded a home for the purpose of committing a crime, in this case robbing the Brewers. As in such cases as State v. Barton, 998 S.W.2d 19, 29 (Mo.banc 1999), cert. denied 528 U.S. 1121 (2000); and State v. Clayton, 995 S.W.2d 468, 484 (Mo.banc 1999), cert. denied 528 U.S. 484 (1999), appellant murdered a person who was defenseless: Flossie Brewer's hands were tied behind her back and she was sitting on a wood pile when appellant shot her three times in the head (Tr. 634, 673; State's Exhibit 20-22). "There are also numerous Missouri cases where, as here, the death penalty was imposed on defendants who murdered more than one person." State v. Barnett, 980 S.W.2d 297 (Mo.banc 1998), cert. denied, 525 U.S. 1161 (1999); State v. Johnston, 968 S.W.2d 123 (Mo.banc 1998), cert. denied 525 U.S. 935 (1998); State v. Clemons, 946 S.W.2d 206 (Mo.banc 1997), cert. denied 522 U.S. 968 (1997);

Ramsey, supra; State v. Hunter, 840 S.W.2d 850 (Mo.banc 1992), cert. denied 509 U.S. 926 (1993); State v. Hutchison, 957 S.W.2d 757, 766 (Mo.banc 1999).

This Court has upheld death sentences in many cases where, as in the case at bar, defendants murdered their victims to eliminate a witness and avoid arrest. See State v. Middleton, 998 S.W.2d 520, 531 (Mo. banc 1999), cert. denied, 528 U.S. 1167 (2000); State v. Deck, 994 S.W.2d 527, 545 (Mo.banc 1999), cert. denied, 528 U.S. 1009 (1999); State v. Copeland, 928 S.W.2d 828, 851 (Mo.banc 1996), cert. denied, 519 U.S. 1126 (1997); State v. Richardson, 923 S.W.2d 301, 330 (Mo. banc 1996), cert. denied, 519 U.S. 972 (1996); State v. Tokar, 918 S.W.2d 753, 773 (Mo. banc 1996), cert. denied, 519 U.S. 933 (1996); State v. Gray, 887 S.W.2d 369, 389 (Mo. banc 1994), cert. denied, 514 U.S. 1042 (1995).

Moreover, appellant's callousness and complete disregard for his actions—making a sandwich and petting the dog after brutally murdering them—also refutes the notion that his sentences are excessive or disproportionate. State v. Preston, 673 S.W.2d 1 (Mo.banc 1984), cert. denied, 469 U.S. 893 (1984); State v. Walls, 744 S.W.2d 791 (Mo.banc 1988), cert. denied, 488 U.S. 871 (1988). Thus, appellant's sentences were not excessive or disproportionate.

Based on the foregoing, appellant's claim must fail.

VI-A.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN OVERRULING APPELLANT’S MOTION TO SUPPRESS HIS STATEMENTS AND IN ADMITTING APPELLANT’S STATEMENTS AT TRIAL BECAUSE APPELLANT’S WAIVER WAS VOLUNTARILY, INTELLIGENTLY, AND KNOWINGLY MADE IN THAT MIRANDA RIGHTS WERE READ TO APPELLANT, APPELLANT UNDERSTOOD HIS RIGHTS, APPELLANT AGREED TO SPEAK TO OFFICER BECKER, AND THERE WAS NO COERCION, THREATS OR PROMISES TO INDUCE APPELLANT TO MAKE A STATEMENT. (Responds to the first claim in Appellant’s Point VI).

Appellant claims that the trial court abused its discretion in overruling his motion to suppress his statements and in admitting those statements at trial (App. Br. 105-106). Specifically, appellant claims that his Miranda waiver was not knowingly, intelligently, or knowingly made because 1) Officer Becker did not read the “waiver” section of the rights waiver form to appellant; 2) Officer Becker did not ask appellant to waive his rights; 3) Officer Becker did not ask appellant to sign the waiver form; 4) appellant’s statements such as “I expect to get interrogated” and “I don’t see any point in doing it” show that appellant did not know or understand his right to end questioning; 5) that Officer Becker “tricked and coerced” appellant to make a statement by telling him that “the truth will set you free”; and 6) that he did not waive his rights but rather invoked his right to remain silent (App. Br. 105-106).

Relevant Facts

Prior to trial, appellant filed a motion to suppress his statements (L.F. 55-59, 133-141, 147-151, 168-174). The following evidence was presented during the motion to suppress hearing. On September 6, 1994, appellant was arrested in Santa Fe, New Mexico (Tr. 139). Upon being arrested, appellant was advised of his Miranda rights (Tr. 140-142). Appellant was then transported to the police station (Tr. 142-143).

Officer Daniel Becker of the New Mexico State Police, was directed to Santa Fe, New Mexico, to assist in the investigation of appellant and Eric Elliott (Tr. 60-61). When Officer Becker arrived at the Santa Fe office, he met with Lieutenant Mike Bowen who informed Officer Becker that appellant and Elliott had killed an elderly lady in Ohio, an elderly couple in Missouri, and another woman in Oklahoma (Tr. 61-62). That was all the information that Officer Becker was given before interviewing appellant (Tr. 62).

Officer Becker entered the field office room where appellant was seated and handcuffed to a retention bar (Tr. 62). Officer Becker informed appellant that he wanted to do an interview with him about “what he had alleged to have done” and then led appellant to a small office and began the interview (Tr. 62). Appellant remained handcuffed (Tr. 62). It was approximately 11:00 a.m. when the interview began (Tr. 63).

A tape recorder was used to record appellant’s statement (Tr. 64). The tape recorder was in view of appellant (Tr. 64). Officer Becker informed appellant of his Miranda Rights (Tr. 64). Officer Becker used a form that contained the Miranda Rights and read the rights to appellant (Tr. 64). After reading each right to appellant, Officer Becker put a check mark beside the right (Tr. 65). After reading the rights to appellant, Officer Becker asked appellant

if he understood his rights (Tr. 65). Appellant stated that he understood (Tr. 65). Appellant did not sign the rights waiver form because his hands were handcuffed behind his back (Tr. 66). Appellant's hands remained handcuffed nearly the entire time during the interview (Tr. 66). Although Officer Becker did not read the waiver of rights section at the bottom of the rights form, Officer Becker did ask appellant if he was willing to speak with him (Tr. 66-67). Appellant agreed to speak with Officer Becker (Tr. 67). Appellant did not ask any questions about the rights that were read to him (Tr. 69). Appellant did not tell Officer Becker that he wanted a lawyer present and never told Officer Becker that he did not want to answer any more questions (Tr. 70). There were one or two questions that appellant did not give an answer to or would answer a question with a question (Tr. 70). For instance, appellant would say "Next question" or "I don't like Ohio" (Tr. 104).

Officer Becker interviewed appellant for approximately three and a half to four hours (Tr. 67). During that time, Officer Becker did not strike appellant, did not "do anything to raise any level of discomfort," did not make any promises to appellant, did not threaten appellant, and did not say anything that was intended to coerce appellant to talk to him (Tr. 67-68).

During the interview, Officer Becker and appellant were the only two people in the interview room (Tr. 68). They took a couple of breaks to allow appellant to smoke and to eat a sandwich (Tr. 68).

On occasion, appellant would answer a question with another question that was completely off the subject (Tr. 71). Officer Becker would answer appellant's question, talk about something else briefly, and then return to the previous questions (Tr. 71).

Appellant asked Officer Becker if the tape would be played for the public to hear (Tr. 75). Officer Becker informed appellant that it would not (Tr. 75). The interview then continued (Tr. 75).

During one portion of the interview, appellant stated, “and life without pa [sic], life in prison, that ain’t no life, you’re going to die within a matter of months anyway” (State’s Suppression Hearing Exhibit 2, pg 9-10). Officer Becker responded “Well, you’ve heard the expression that the truth shall set you free, now this is your opportunity, I mean do you want to carry this around with you for the rest of your life? I mean do you want your child growing up ah, thinking that ah, all these accusations are true, or do you want to tell me what happened?” (Tr. 87; State’s Suppression Hearing Exhibit 2, pg. 10). Officer Becker was attempting to alleviate appellant’s conscience (Tr. 88).

Appellant did not present any witnesses.

The trial court overruled appellant’s motion to suppress and his objections at trial to the admission of his statements (L.F. 8; Tr. 854-855, 1033).

Standard of Review

Appellate review of a ruling on a motion to suppress is limited to determining whether the evidence is sufficient to support the trial court's ruling. State v. Thompson, 826 S.W.2d 17, 19 (Mo.App. W.D. 1992), cert. denied, 506 U.S. 884 (1992). The trial court has broad discretion to admit or exclude evidence at trial and this Court will reverse only upon a showing of a clear abuse of discretion. State v. Simmons, 944 S.W.2d 165, 178 (Mo.banc 1997), cert. denied, 522 U.S. 953 (1997).

Appellant's Waiver was Voluntary

"The test for voluntariness is whether, under the totality of the circumstances, the defendant was deprived of free choice to admit, to deny, or to refuse to answer and whether physical or psychological coercion was of such a degree that the defendant's will was overborne at the time he confessed. State v. Mitchell, 2 S.W.3d 123, 127 (Mo.App. S.D. 1999). The State merely has to show that "the defendant was informed of his rights, that he could understand the rights, and that no physical force, threats, promises or coercive tactics were used to obtain the confession." State v. Day, 970 S.W.2d 406, 409 (Mo.App. E.D. 1998). "The proper focus of such a challenge is whether coercive police activity occurred." State v. Smith, 944 S.W.2d 901, 910 (Mo.banc 1997), cert. denied 522 U.S. 954 (1997). "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary'" Colorado v. Connelly, 479 U.S. 157, 167, 107 S.Ct. 515, 522, 93 L.Ed.2d 473 (1986). The key to interpreting the voluntariness of a Miranda waiver is police overreaching, not a defendant's free choice. Connelly, 107 S.Ct. at 523.

In the case at bar, the evidence showed that appellant's waiver was voluntary. The evidence showed that there was no coercion or threats made by the interrogating officer. The interview remained conversational and appellant remained calm and relaxed throughout the interview. Appellant spoke freely. Moreover, appellant did not present any evidence regarding the voluntariness of his waiver. No evidence was presented regarding any police coercion or misconduct. In fact, the record is absolutely devoid of evidence of promises, threats, or any wrongdoing on the part of the police. Appellant's waiver was voluntary.

Appellant raises numerous circumstances which he claims demonstrate that his confession was not voluntary: 1) Appellant claims that he was coerced into making a statement by Officer Becker's "promise" that "the truth would set him free" (App. Br. 105-106). Although it is true that a confession extracted through a promise of leniency is inadmissible, "encouragement to cooperate is far from a promise of leniency and does not as a matter of law render a confession involuntary." State v. Nicklasson, 967 S.W.2d 596, 606 (Mo.banc 1998), cert. denied, 525 U.S. 1021 (1998); State v. Sutherland, 11 S.W.3d 628, 632 (Mo.App. E.D. 1999). State v. Simmons, 944 S.W.2d 165, 175 (Mo.banc 1997), cert. denied, 522 U.S. 953 (1997) (telling a suspect that he was possibly facing the death penalty and it would be in the suspect's best interest to cooperate was not a promise). Moreover, a noncommittal statement by police that is twisted into a promise in the mind of the defendant does not rise to the level of an implied promise. State v. Smith, 944 S.W.2d 901, 911 (Mo.banc 1997), cert. denied, 522 U.S. 954 (1997). Officer Becker's statement that the "truth would set him free" was not a promise of leniency but rather was encouragement. This did not affect the voluntariness of appellant's confession.

2) Appellant argues that the police did not cease questioning when he told them he did not want to make a statement and that the following statements were his invocation of his right to remain silent: "I'll say something, but I ain't going to say everything" (State's Suppression Hearing Exhibit 2); "I don't worry about names and pictures. I could talk and say whatever you want me to say but I don't know if I'm being (inaudible) whatever, you know what I'm saying. I don't know what's going to happen to me. If I say whether, if I say (inaudible) I'm going to

be still fucking, I may still go to, you know get (inaudible) so what's the difference" (State's Suppression Hearing Exhibit 2); and "I don't see any point in doing it, I mean I, what am I going to gain in doing it, what am I going to huh?" (State's Suppression Hearing Exhibit 2) (App. Br. 110-112).

Contrary to appellant's assertion, he did not invoke his right to remain silent, but rather agreed to make a statement to Officer Becker ("I'll say something, but I ain't going to say everything"). It is true that once a suspect invokes his Fifth Amendment privileges, questioning must cease, and the defendant's right to remain silent must be "scrupulously honored." Michigan v. Mosley, 423 U.S. 96, 104, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). However, an accused must give "a clear, consistent expression of a desire to remain silent" in order to invoke his rights adequately and cut off questioning. Nicklasson, *supra*, at 606; State v. Simmons, 944 S.W.2d 165, 174 (Mo.banc 1997), *cert. denied*, 522 U.S. 953 (1997). A revocation of a defendant's waiver of his right to remain silent must be clearly made in order to be effective. State v. Tims, 865 S.W.2d 881, 885 (Mo.App. E.D. 1993). If the privilege is reasserted, it is not available to avoid a single question, and cannot be reasserted sporadically or incompletely. Id. Rather, it is the defendant's obligation to communicate his revocation in a clear and intelligible fashion. Id.¹² In the present case, appellant's statements were not an

¹²In an analogous area of the law, where a suspect has first waived his rights and then, during questioning, makes an actual, unambiguous and unequivocal invocation of his right to counsel, courts have used an objective standard by looking to see whether a reasonable police

invocation of his right to discontinue questioning but rather an indication that he did not intend to answer every question Officer Becker asked or tell Officer Becker everything that happened.

Appellant continued to engage in conversation with the officer immediately following these alleged invocations of his right to remain silent and continued to answer questions. See State v. Hornbeck, 702 S.W.2d 90, 92 (Mo.App. E.D. 1985) (Defendant's remark that did not want to answer question about certain issue was not an invocation of right to remain silent). The trial court had the opportunity to view and listen to the tape of the confession (State Suppression Hearing Exhibit 2) and interpret appellant's statement for itself and determine that he had not invoked his right to remain silent. The trial court did not err in finding that appellant had not invoked his right to remain silent.

3) Appellant claims that the following statement during his interrogation shows that he did not understand his right to end questioning: "I expect to get interrogated" (App. Br. 105-106). However, contrary to appellant's contention, when taken in context, it is evident that

officer in the circumstances would understand the statement to be a request for an attorney.

Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 1884-1885, 68 L.Ed.2d 378 (1981).

appellant was not indicating that he did not understand what was happening. The following was the conversation that was held during which appellant made the above statement:

BECKER: I want you to tell me about what happened?

GILBERT: Are you nervous:

BECKER: Are you?

GILBERT: Yeah this is the first time I've ever been through this shit.

Hell I expect to get interrogated.

BECKER: Is that what you want me to do?

GILBERT: What?

BECKER: Interrogate you like they do on television?

GILBERT: Nah.

BECKER: Start yelling and hollaring [sic] and throwing things around?

GILBERT: Yeah, (inaudible for several words).

(State Suppression Hearing Exhibit 2, pg 15).

As can be seen, appellant's statement in context shows that appellant thought he would be "interrogated" like on television with yelling and heated confrontation, not just questioned in a conversational manner as was occurring between himself and Officer Becker. It was not an indication that he did not understand he could end questioning. The trial court did not err in finding that appellant understood his rights.

Appellant's Waiver was Knowing and Intelligent

Appellant also claims that his waiver was not knowing and intelligent (App. Br. 105-106). "A knowing and intelligent waiver of the right to silence is normally shown by having a police officer testify that he read the accused his rights, asked whether the rights were understood, and received an affirmative response." State v. Wise, 879 S.W.2d 494, 505 (Mo.banc 1994), cert. denied 513 U.S. 1093 (1995). In deciding whether a waiver is knowing and intelligent, a court considers the totality of the circumstances. State v. Powell, 798 S.W.2d 709, 713 (Mo.banc 1990), cert. denied 501 U.S. 1259 (1991). "The requirement of a knowing and intelligent waiver of the right to silence does not mean that an accused must make an intelligent waiver decision, for one can argue that it is never a strategically good decision to confess to a crime." Wise, supra at 506. "The requirement that a waiver of rights be knowing and intelligent does not mean that a defendant must know and understand all of the possible consequences of the waiver. Rather, it requires that the defendant understood the warnings themselves" Powell, supra at 713. "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. Bucklew, 973 S.W.2d 83, 90 (Mo.banc 1998), cert. denied, 525 U.S. 1082 (1999).

In the case at bar, appellant knowingly waived his rights and knowingly agreed to make a statement. Officer Becker read appellant his rights, asked if he understood them, and asked if appellant agreed to speak with him. Appellant stated that he understood his rights and that he agreed to speak with Officer Becker. Appellant's waiver was knowing and intelligent.

Appellant cites the fact that Officer Becker did not read the “Waiver of Rights” section of the Miranda form which allows a suspect to explicitly waive his rights in writing with a signature and that Officer Becker did not have appellant sign “Waiver of Rights” section of the form (App. Br. 105). Appellant’s argument is much ado about nothing. There is no requirement that appellant’s waiver be in writing and no requirement that appellant sign his waiver. The only requirement is that one is informed of his right to remain silent under Miranda, and understands that right. Bucklew, supra. A defendant may waive his rights by orally indicating a willingness to cooperate in police questioning without signing a written waiver. State v. Day, 987 S.W.2d 824, 825 (Mo.App. E.D. 1999); see also State v. Urhahn, 621 S.W.2d 928, 931 (Mo.App. E.D. 1981). There was no evidence that appellant did not understand his rights, that his faculties were impaired, or that he was coerced. It was a knowing and intelligent waiver.

Appellant also contends that after having given appellant his Miranda warnings, the officer should have specifically asked him if he wanted an attorney and if he wanted to remain silent (App. Br. 105-106). An explicit statement of waiver, however, is not invariably necessary to support a finding that the defendant waived his right to remain silent or right to counsel. State v. Brosseit, 958 S.W.2d 615, 617 (Mo.App. W.D. 1998); State v. Miller, 714 S.W.2d 815, 824 (Mo.App. S.D. 1986). Although the police are required to advise a defendant of his rights, they may “leave it to him to claim these rights.” Brosseit, supra. The relevant question is whether appellant knowingly and voluntarily waived his rights. Bucklew, supra. The fact that appellant was read his rights, said he understood those rights, and immediately

answered the officer's questions was sufficient basis for the trial court to conclude he had knowingly, intelligently, and voluntarily waived his rights. Brosseit, supra; State v. Ringo, 30 S.W.3d 811, 825 (Mo.banc 2000), cert. denied, 121 U.S. 1381 (2001). The trial court did not err in overruling appellant's motion to suppress

Based on the foregoing, appellant's claim must fail.

VI-B.

APPELLANT'S CLAIMS THAT THE TRIAL COURT SHOULD HAVE INTERVENED, SUA SPONTE, IN THE GUILT PHASE REBUTTAL CLOSING ARGUMENT AND PENALTY PHASE CLOSING ARGUMENT SHOULD BE DENIED WITHOUT EXPLICATION, BECAUSE TRIAL STRATEGY IS AN IMPORTANT CONSIDERATION THAT WARRANTS AGAINST UNINVITED INTERFERENCE BY THE TRIAL COURT. FURTHERMORE, ALL OF THE STATE'S ARGUMENTS REGARDING APPELLANT'S STATEMENTS AND "SELECTIVE SILENCE" WERE PROPER IN THAT HE VOLUNTARILY WAIVED HIS RIGHT TO REMAIN SILENT, MADE STATEMENTS, AND DID NOT REVOKE HIS WAIVER. (Responds to the second claim in appellant's Point VI).

Also in Point VI of his brief, appellant claims that the trial court plainly erred in allowing the prosecutor to "highlight [appellant's] silence and failure to make statements" during guilt phase rebuttal closing argument and penalty phase closing argument (App. Br. 105).

Relevant Facts

Appellant claims that the following statements made by the prosecutor during the guilt phase rebuttal closing argument were improper comments on appellant's invocation of his right to remain silent:

It is not the case that all the evidence is that Eric Elliott shot the Brewers.

We don't know that. You know, the defendant had an opportunity with Daniel

Becker. I don't know his level of education. I don't know if he's some stupid kid.

He didn't say, "I didn't kill them." He could have.

He didn't say, "I didn't do it." There's four words that would have been completely different from what he said to Daniel Becker.

You remember what he said to Daniel Becker?

"Either you killed those people out of self-defense or some justifiable reason or you're just a cold-blooded killer, you and him. Which is it?"

"One or the other. One of them."

Becker, trying to see if he'll say something:

"Well, stuff happens."

"You wouldn't understand. We did this out of craziness. You wouldn't understand it."

"Did you and your friend kill somebody in Missouri?"

"You guys are going to find out that all—some stuff anyway. You guys got the gun. You guys can match the bullet to the gun."

How easy this would have been. If this were the truth, this is what he would have said.

He was trying to fool Daniel Becker back in September of 1994, ladies and gentlemen. And he was trying to fool you today.

* * * * *

“Are you solely responsible for these murders?” Becker asked him.

Did he say, “I didn’t do it”?

No.

(Tr. 997-999).

He was trying to fool Becker back in ‘94 and he’s trying to fool you.

“Next question” he’d say to Becker.

“I don’t remember Missouri. He would disagree.”

(Tr. 1001).

Appellant also claims that the following statements made by the prosecutor during penalty phase closing argument were also comments on appellant’s invocation of his right to remain silent.

“Remember Becker’s statement, what he told Sergeant Becker...?”

What other statement do we know he made that tells the tale that the two are connected?

(Tr. 1285).

And the defendant by his own statement, says that he shot [Ruth Loader] out in a wooded area...

(Tr. 1289).

So I don’t know exactly what happened. But by his own statement, when they went to the Brewers, he says, “That’s when we decided to kill them.” It was a joint venture. “It was a 50/50 deal.” His own words.

Why did Roxy Ruddell say what she told them? She made it pretty clear she was hoping that they wouldn't sexually assault her. I think that's what the implication is, isn't it? That was just an excuse he used to try and justify his killing...

(Tr. 1305).

Standard of Review

Appellant concedes that he failed to object to these statements at trial and failed to include this claim in his motion for new trial (App. Br. 107).

It was appellant's responsibility to request any type of relief and to object on the specific grounds raised on appeal in order to preserve his claim for review. State v. Miller, 870 S.W.2d 242, 246 (Mo.App. S.D. 1994); State v. Hornbuckle, 769 S.W.2d 89, 92 (Mo.banc 1989), cert. denied 493 U.S. 860 (1989). Accordingly, appellant is not entitled to any review. State v. Silvey, 894 S.W.2d 662, 670 (Mo.banc 1995).

Indeed, this Court has made it abundantly clear that relief should be granted on an assertion of plain error to matters contained in closing argument only under extraordinary circumstances. Silvey, supra; State v. Kempker, 824 S.W.2d 909, 911 (Mo.banc 1992). In the absence of an objection and a proper request for relief, the trial court's options are narrowed to "uninvited interference with summation and a corresponding increase of error by such intervention." State v. Lyons, 951 S.W.2d 584, 596 (Mo.banc 1997) (quoting State v. Clemmons, 753 S.W.2d 901, 908 (Mo.banc 1988), cert. denied 488 U.S. 948 (1988)). Relief should be rarely granted on assertion of plain error to matters contained in closing argument,

because trial strategy looms as an important consideration and such assertions are generally denied without explication. State v. Clayton, 995 S.w.2d 468, 478 (Mo.banc 1999), cert. denied, 528 U.S. 1027 (1999). Accordingly, the appellant's claim concerning the State's closing arguments should be summarily dismissed. See Silvey, supra, at 670.

If, however, this Court chooses to grant the appellant plain error review, a claim of plain error in a closing argument context will not justify relief unless the appellant demonstrates that manifest injustice or a miscarriage of justice will result if relief is not granted. State v. Baller, 949 S.W.2d 269, 272 (Mo.App. E.D. 1997).

Analysis

Appellant has failed to establish that he suffered manifest injustice from the prosecutor's statements as the statements were not an improper reference to appellant's post-Miranda silence, but rather were comments on the statements appellant made to Officer Becker after receiving and waiving his Miranda rights. See Doyle v. Ohio, 426 U.S. 610, 619, 96 S.Ct. 2240, 2245 (1976); State v. Dexter, 954 S.W.2d 332, 337-341 (Mo.banc 1997).

Although it is generally true that a defendant's silence while under arrest is not admissible against him, where a defendant waives his right to remain silent and makes statements, the State may remark in closing argument on questions that were not answered. State v. Frentzel, 717 S.W.2d 862, 866 (Mo.App. S.D. 1986); State v. Bragg, 867 S.W.2d 284, 292 (Mo.App. W.D. 1993). The State may also point out gaps and inconsistencies in the defendant's statements, and question their credibility. Id. Thus, when an accused chooses to waive his Fifth Amendment privilege and makes statements while in custody, his statements and

even his silence in response to certain inquiries are fair subjects for comment. Id.; State v. Tims, 865 S.W.2d 881, 885 (Mo.App. E.D. 1993); State v. Pulis, 822 S.W.2d 541, 546 (Mo.App. S.D. 1992); Wilson v. State, 50 S.W.3d 885, 889 (Mo.App. S.D. 2001).

As discussed above in Point VIA, appellant never invoked his rights. Rather, appellant made statements to Officer Becker. Appellant's right to remain silent was waived once he began answering Officer Becker's questions. Wilson, supra. As a result, all speech and silence, could be commented on. Id. Therefore, the prosecutor's comments on appellant's "selective silence," his failure to answer certain questions, and the gaps and discrepancies in his story were all proper arguments. Accordingly, there was no error in the admission of these arguments regarding appellant's interview with Officer Becker. The trial court did not err in admitting these statements.

Based on the foregoing, appellant's claim must fail.

VII.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN OVERRULING APPELLANT'S MOTION FOR A MISTRIAL WHEN THE PROSECUTING ATTORNEY STATED IN PENALTY PHASE OPENING STATEMENT THAT THE EVIDENCE PRESENTED DURING THE PENALTY PHASE WOULD SHOW THAT APPELLANT WAS A SERIAL KILLER BECAUSE 1) THIS DESCRIPTION WAS SUPPORTED BY THE EVIDENCE IN THAT APPELLANT WAS A SERIAL KILLER, KILLING MULTIPLE, RANDOM PEOPLE, ONE AFTER ANOTHER; AND 2) EVEN IF THIS DESCRIPTION WAS NOT SUPPORTED BY THE EVIDENCE, THE TRIAL COURT CORRECTED ANY POTENTIAL PREJUDICE BY SUSTAINING APPELLANT'S OBJECTION AND INSTRUCTING THE JURY TO DISREGARD THE COMMENT.

Appellant claims that the trial court erred in overruling his motion for mistrial when the prosecutor stated in penalty phase opening statement that the evidence presented at penalty phase would show that appellant was serial killer (App. Br. 142). Appellant claims that the trial court's remedy of sustaining his objection and instructing the jury to disregard was an inadequate remedy because the jury would not disregard the statement and that by merely sustaining the objection, and not granting a mistrial, the prosecutor would feel free to continue this argument in future trials (App. Br. 142-143).

Relevant Facts

The prosecutor made the following statements during the penalty phase opening statement, relevant to this claim, as follows:

I believe the evidence in this phase of the trial will be essentially as follows:

You're going to hear first from Sergeant Daniel Becker. You've seen him before. And when you hear him testify, you will perhaps understand why it was that he was somewhat disjointed. Because he's going to tell you about all of the statement that the defendant gave him, and including a discussion of the two other murders that the defendant told him about, the one involving Ruth Louise Loader in Ohio, and Roxy Ruddell in Oklahoma.

You will hear evidence that the defendant has a lengthy criminal record. You've already heard about the names of those things. We will tell you something about them, about the robbery and the murder of Roxy Ruddell, the kidnapping in Oklahoma, and about his earlier problems there with auto theft and some other activities.

You will hear from a Detective Bob Bemo, now retired from the Oklahoma City Police Department. He will tell you he worked that murder. We will show you pictures of Roxy Ruddell as she was found on Coyote Trail near Drpaer Lake in Oklahoma City on September 4th.

We do not—we can't show you pictures of Ruth Loader, however, for the defendant told Daniel Becker that he and Elliott killed her as well; she's never been found.

We will also provide you with evidence that the defendant was convicted of what they call breaking and entering in Ohio. Now, breaking and entering is not something we use in our criminal law here in Missouri. But technically, you enter on someone else's property, they consider that breaking and entering in Ohio, when stealing a boat, a jon boat, some sort of boat from that property.

You will hear also of the defendant having been charged with and pleading guilty to child endangering, which is again a crime in which they have in Ohio which doesn't translate word for word into the law in Missouri. We might call it child abuse or something like it. We will have the officers testify, the officer who had helped investigate that case, testify about what he saw and we will show you the pictures of the defendant's own three-and-a-half-month-old child whom he abused.

So ladies and gentlemen, I think it will be very clear, when you hear all of this evidence, that what we're dealing with here is a serial killer.

MR. WOLFRUM: Judge, I object. And that's—

THE COURT: Objection will be sustained.

MR. WOLFRUM: That's improper and I ask the jury be instructed to disregard that.

THE COURT: The jury will disregard.

MR. WOLFRUM: Judge, request a mistrial on the basis of that statement.

THE COURT: That will be overruled.

(Tr. 1019-1021).

Proper Statement as Evidence Showed that Appellant was a Serial Killer

Appellant claims that the prosecutor's statement that the evidence would show that appellant was a serial killer was improper as appellant was not a serial killer (App. Br. 147-149). However, the prosecutor was correct and proper-- the evidence did show that appellant was a serial killer. State v. Kenley, 952 S.W.2d 250, 272 (Mo. banc 1997), cert. denied, 118 S.Ct. 892 (1998) (prosecutor's description of defendant as "juvenile delinquent," was proper because it was supported by the evidence adduced at trial); State v. Warrington, 884 S.W.2d 711, 718 (Mo.App. S.D. 1994) ("drug pusher" and "brazen drug dealer"); State v. Smith, 781 S.W.2d 761, 771 (Mo. banc 1989), vacated on other grounds, 491 U.S. 916, 110 S.Ct. 1994, 101 L.Ed.2d 306 (1990) (defendant referred to as "just a killing machine" on a "killing spree"); State v. Wood, 719 S.W.2d 756, 759 (Mo. banc 1986) (defendant called "an animal").

“Serial killer” or “serial murderer” is defined by Black’s Law Dictionary, (7th ed. 1999), as “a murder pattern in which one criminal selects several victims at random or because the victims share similar characteristics.”

Other common definitions include:

“A person who murders many people one after another.” The Cambridge International Dictionary of English, www.dictionary.cambridge.org

“A person who attacks and kills victims one by one in a series of incidents.” The American Heritage Dictionary of the English Language: Fourth Edition. 2000. The Houghton Mifflin Company. www.bartleby.com; www.dictionary.com;

“Someone who murders more than three victims one at a time in a relatively short interval”www.dictionary.com.

“Someone who commits a succession of murders, often choosing the same method killing or the same type of victim.”www.allwords.com

“Individuals who have a history of multiple slayings of individuals usually unknown to them beforehand.”Wikipedia, the Free encyclopedia. www.wikipedia.org.

As the prosecutor discussed in his opening statement, the evidence during the penalty phase would show that appellant was a serial killer. The evidence showed that appellant and Eric Elliott shot and killed Ruth Loader in Ohio, taking her vehicle, days before arriving in Missouri, where they shot and killed Bill and Flossie Brewer, taking their vehicle and then proceeded to Oklahoma, shooting and killing another woman, Roxy Ruddell, again taking her vehicle (Tr. 1031-1101). Appellant was someone who committed a succession of murders (Ruth Loader, Bill and Flossie Brewer, Roxy Ruddell), of people he did not know beforehand, in the same method (shooting them each three times in the head), in a short interval of time (a matter of days). Appellant was a serial killer.

The prosecutor was simply laying out the facts that would be presented to the jury during the penalty phase, including the fact that appellant was a serial killer. The prosecutor’s statement was proper.

Appellant compares the prosecutor's statement to that of the argument made in State v. Whitfield, 837 S.W.2d 503, 513 (Mo.banc 1992). In Whitfield, the defendant complained of the State's closing argument which referred to the defendant as a "mass murderer" and a "serial killer." Id. at 513. This Court held that:

First, the prosecutor referred to defendant as a "mass murderer" four times and as a "serial killer" three times dispersed throughout the opening part of the closing argument. Defendant contends that these statements distort the evidence and are prejudicial. The common sense meaning of those terms forces this Court to agree. Defendant's two prior homicides occurred almost 20 years before the current homicide, and were not similar (the first—a manslaughter conviction—involved a gun that went off "accidentally" after defendant hit the victim with it; the second—a second degree murder conviction—occurred as part of a robbery). The evidence before the trial court does not demonstrate that defendant was either a mass murderer or a serial killer.

The terms "mass murderer" and "serial killer" are pejorative names associated with a small ghoulish class of homicidal sociopaths who repeatedly and cruelly murder for no apparent motive than to satisfy a perverse desire to kill or cause pain. No evidence suggests that the defendant's prior homicides were of this character. The use of these words is name calling designed to inflame passions of jurors. Comments designed solely to inflame jurors against the defendant by associating him with heinous crimes not in the record is always

error, although not always reversible error. Because this case is reversed on other grounds, this Court need not determine the prejudice here. The argument was error, the objection should have been sustained; and on retrial, the State must avoid such argument.

Id.

Whitfield, is not supportive of appellant's position. First, unlike Whitfield, the evidence supported the characterization of "serial killer." Appellant had killed multiple people, at random, in similar fashion, in a short interval of time. In Whitfield, the prior murders were over 20 years prior to the current murder and were not similar to each other, failing to demonstrate that the defendant was either a mass murderer or a serial killer. Id. Second, unlike the multiple references in Whitfield, the prosecutor in the case at bar only referred to serial killer on one occasion. The prosecutor's statement, in the case at bar, was not in error.

Absence of Prejudice

Appellant also claims that the trial court's remedy of instructing the jury to disregard the statement was improper and that a mistrial should have been granted (App. Br. 142-143).

Even assuming that the prosecutor's statement was in error, the trial court's remedy was sufficient to remove any potential prejudice to the jurors as this was not an extraordinary circumstance warranting a mistrial.

The declaration of a mistrial is a drastic remedy which should only be employed in the most extraordinary circumstances. State v. Clemons, 946 S.W.2d 206, 217 (Mo.banc 1997), cert. denied 522 U.S. 968 (1997). Because the trial court observed the entire proceedings and the events giving rise to the request for a mistrial and is in a better position than an appellate court to evaluate its prejudicial effect, this Court's review extends only to determining whether, as a matter of law, the trial court erred in refusing to declare a mistrial. State v. Parker, 886 S.W.2d 908, 922 (Mo.banc 1994), cert. denied 514 U.S. 1098 (1995).

In the case at bar, the trial court took appropriate action to cure any potential prejudice. The trial court sustained the objection and instructed the jury to disregard. A jury is presumed to follow the trial court's instructions to disregard any improper comments. State v. Albanese, 9 S.W.3d 39, 46 (Mo.App. W.D. 1999); see also State v. Lyons, 951 S.W.2d 584, 598 (Mo.banc 1997), cert. denied, 522 U.S. 1130 (1998). Where an objection has been sustained and the jury instructed to disregard, a reviewing court may presume that no prejudice occurred. Albanese, supra. Appellant has presented no evidence and there is no evidence in the record that the jury failed to follow the court's instruction. A mistrial was not warranted. The jury

was instructed to disregard the comment, curing any potential prejudice. See Clemons, supra, at 217. The trial court did not err in failing to grant a mistrial.

**New Trial or Reduction in Sentence Not Appropriate Remedy
for Alleged Prosecutorial Misconduct**

Finally, appellant claims that he is entitled to a new penalty phase or a reduction of his sentence to life imprisonment because the prosecutor “knew that making this kind of argument in an opening statement was prohibited and would prejudice the jury against [appellant]” and that there is a “likelihood that if this Court does not correct the assistant attorney general’s improper argument the state will make similar arguments in the future” (App. Br. 142-143). Appellant’s argument overlooks the fact that the prosecutor’s statement was correct.

However, in looking at whether the alleged prosecutorial misconduct warrants reversal, the correct question is not the culpability of the prosecutor, or whether the prosecutor will make similar arguments in the future, but whether the alleged prosecutorial misconduct affected the fairness of the trial. Clemons, supra at 217. In Clemons, the prosecutor had been warned by the trial court not to compare the defendant to Charles Manson or make any other analogy to a “horrible and well-known scenario.” Id. at 217. During penalty phase closing argument, the prosecutor then compared appellant’s lack of a prior criminal history to John Wayne Gacy’s and Charles Manson’s. Id. Defense counsel objected; the trial court sustained the objection, admonished the prosecutor to refrain from such argument, ordered the comments stricken from the record, and ordered the jury to disregard the comments. Id. On appeal, the defendant argued that the trial court’s corrective measures were inadequate and that

the deliberate misconduct on the part of the prosecutor warranted a reversal because “the prosecutor’s misconduct seriously affected the integrity or public reputation of the proceedings.” Id. In upholding the trial court’s actions, this Court held that:

The critical component of due process analysis in cases involving prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. Mistrial is a drastic remedy reserved for the most extraordinary circumstances. A decision whether to grant a mistrial is left to the sound discretion of the trial court. This rule recognizes that the trial court is in the best position to observe the impact of the problematic incident. Review is for abuse of discretion. Reversal is mandated where the failure to grant a mistrial resulted in a denial of a fair trial.

The trial court did not abuse its discretion in refusing to declare a mistrial in this case. In striking the statement from the record and ordering the jury not to consider it, the trial court took sufficient corrective measures to ameliorate any prejudice the prosecutor’s statement created.

Id. Just as in Clemons, in the case at bar, the proper consideration is not whether the prosecutor’s actions were intentional, nor is it proper to reverse a case merely due to alleged misconduct by the prosecutor. Rather, the proper question is whether the prosecutor’s conduct affected the fairness of the trial. As in Clemons, the trial court took sufficient corrective measures to ameliorate any prejudice that may have resulted. A mistrial was not warranted; a remand is not required; and a reduction in sentence is not an appropriate remedy.

The trial court did not err in sustaining appellant's objection but failing to grant a mistrial because the prosecutor's comment was proper and in any event, instructing the jury to disregard the statement cured any potential prejudice.

Based on the foregoing, appellant's claim must fail.

VIII.

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT’S MOTION FOR RELIEF FROM UNLAWFUL EXTRADITION BECAUSE THE LEGALITY OF EXTRADITION IS NOT A PROPER CHALLENGE IN THE CRIMINAL COURT IN THAT IMPROPER EXTRADITION DOES NOT DEPRIVE A COURT OF POWER TO TRY A CRIMINAL DEFENDANT.

Appellant challenges the jurisdiction of the trial court as he claims he was transported from Oklahoma to Missouri without proper extradition proceedings (App. Br. 154).

It has long been held by the United States Supreme Court that a criminal defendant may not challenge a state court's jurisdiction based upon means by which he or she was brought into the state. Frisbie v. Collins, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541 (1952); see also Ker v. Illinois, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886). The manner of extradition simply does not impair a state's power to try a defendant even if he or she had been brought within the trial court’s jurisdiction by the way of “forcible abduction.” Frisbie, 342 U.S. at 522, 72 S.Ct. at 511-12; U.S. v. Alvarez-Machain, 504 U.S. 655, 119 S.Ct. 441, 112 L.Ed. 2188 (1992); Gallimore v. State, 924 S.W.2d 319 (Mo.App. S.D. 1996); Beachem v. Missouri, 808 F.2d 1303 (8th Circuit 1987).

There is no requirement that a court “permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.” Id. Therefore, regardless of whether appellant was illegally extradited, appellant was not entitled to any relief from the trial

court as the legality of the extradition is not a proper subject for a legal attack. Gallimore, supra at 320.

In accordance with Frisbie, this Court has held that when a defendant has been brought within the custody of the State of Missouri, the legality of the defendant's extradition is no longer a proper subject for any legal attack. State v. Williams, 652 S.W.2d 102, 109 (Mo.banc 1983). Consequently, the trial court may not inquire into the validity of the extradition proceedings by which the defendant was returned to the State of Missouri. Gallimore, supra; Watson v. State, 475 S.W.2d 8, 12 (Mo. 1972); James v. State, 748 S.W.2d 747, 749 (Mo.App. E.D. 1988).

In the case at bar the trial court properly denied appellant's motion as it was not a proper subject for legal attack.

Based on the foregoing, appellant's claim must fail.

CONCLUSION

In view of the foregoing, the respondent submits that appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b)/Local Rule 360 of this Court and contains _____ words, excluding the cover, this certification and the appendix, as determined by WordPerfect 6 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, postage prepaid, this ____ day of December, 2002.

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