No. 86518

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

EARL M. FORREST,

Appellant.

Appeal from the Circuit Court of Platte County, Missouri
The Honorable Owens Lee Hull, Jr., Judge

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from convictions of three counts of murder in the first degree, '565.020, RSMo 2000, obtained in the Circuit Court of Platte County, Missouri, for which appellant was sentenced to death for each count of murder. 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 April 21, 2003, appellant, Earl Forrest was charged by information with three counts of murder in the first degree, ' 565.020, RSMo 2000, in the Circuit Court of Platte County, Missouri (following a change of venue from Dent County) (L.F. 78-83). On September 19, 2003, the State filed its notice of intent to seek the death penalty on all charges (L.F. 97-100). On October 4, 2004, the cause proceeded to trial, before a jury, the Honorable Owens Lee Hull, presiding (Tr. 143).

Appellant does not challenge the sufficiency of the evidence to support his convictions. Viewed in the light most favorable to the verdict, the following evidence was adduced:

Around 10:00 a.m., on December 9, 2002, appellant, who had been drinking whiskey that morning, along with his then girlfriend Angelia Gamblin[1], drove to Harriett Smith=s[2] house (Tr. 1066). Appellant went into the house while Gamblin remained in the

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[1]Shortly before trial, Angelia Gamblin was married. She is referred to as Angelia Neff in the trial transcript (Tr. 1061).

[2]Although they had been friends for years, appellant and Smith had a falling out, approximately a year earlier Tr. 841, 852). Appellant and Smith had argued about whether Smith would purchase a lawnmower and trailer for appellant which appellant believed she owed him for introducing her to a source for her methamphetamine; Appellant and Smith also argued about appellant failing to help Smith around her house

car (Tr. 1068). Inside the house, Smith and Michael Wells, a friend of Smith=s, were in the living room (Tr. 873). Smith=s boyfriend, Eddie Starks was in one of the back bedrooms using the computer (Tr. 873-874). As appellant entered the house, he said to Smith, AAll I asked you for was a fucking lawnmower@ (Tr. 875). Smith responded, AEarl, I=ll get you a lawnmower. Calm down.@ (Tr. 875). Appellant then asked if anyone else was in the house; Smith responded AEddie@ (Tr. 876). Appellant fired two shots with a gun he had brought to the Smith home (Tr. 876). One shot hit and killed Wells (Tr. 877). The other shot hit Smith (Tr. 877, 1072).

Smith ran out of the house and got into Gamblin=s car in the driver=s seat (Tr. 1068-1069). Smith was screaming (Tr. 1069). She put the car in reverse and attempted to back up (Tr. 1069). Gamblin started yelling at her asking her what was wrong (Tr. 1069). Smith did not answer (Tr. 1069). Smith continued to back up but hit a tree; the car was stuck (Tr. 1070). Gamblin got out of the car (Tr. 1070).

In the meantime, appellant came outside and fired the gun into the air (Tr. 1070). Appellant walked up to Gamblin=s car and got in on the passenger side (Tr. 1070-1071). Gamblin walked up to the car and screamed, asking appellant and Smith what was going on (Tr. 1071). Smith told her not to worry about it and said, AI=m sorry. I=ll make it right. I=m sorry.@ (Tr. 1071). Appellant said not to worry and that Aeverything would be

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as he had previously promised (Tr. 841, 852).

okay@ (Tr. 1072).

Smith got the car unstuck and drove back towards the house (Tr. 1072). Smith and appellant got out of the car and walked inside (Tr. 1072). Meanwhile, uninjured, Starks had left Smith=s house, running to a neighbor=s house to get help (Tr. 839-840, 843, 869, 879).

Back at Smith=s home, Gamblin remained outside and looked at the damage to her car; as she started to get inside the car, she noticed blood all over the driver=s seat where Smith had been sitting (Tr. 1072). Appellant came outside a few minutes later carrying the gun and a metal lockbox (Tr. 1073). Appellant got into Gamblin=s car and told Gamblin to drive home (Tr. 1074-1075).

Appellant and Gamblin returned to his house (Tr. 1074). Appellant shot the lockbox to open it (Tr. 1074). He proceeded to inject himself with some of the methamphetamine that was inside the box (Tr. 1075). When Gamblin remarked that there was a lot of methamphetamine inside the box, appellant stated that it was worth approximately $25,000 (Tr. 1076).

Meanwhile, Starks had returned to the Smith home with his friend Karen Ruth Workman and her daughter Karen Kozak (Tr. 843-844, 879). Workman ran inside and saw Wells on the couch; he did not have a pulse (Tr. 845). Workman started screaming for Smith and looking through the house (Tr. 845). Starks and Workman found Smith in her bedroom, Aslumped@ up against the bed; she was not breathing and did not have a pulse (Tr. 845, 879). Workman returned to the living room and called 911 (Tr. 845).

After searching for Smith=s metal lockbox of methamphetamine, they left the house and waited outside for officers (Tr. 840, 842, 848, 870).

After receiving a dispatch relating to appellant being involved in the shooting at Smith=s residence, Sheriff Bob Wofford and Deputy Sharon Joann Barnes arrived at appellant=s house (Tr. 1006, 1077, 1173). Inside the house, Gamblin noticed the officers coming up the driveway and told appellant that they were there; appellant told her to answer the door (Tr. 1078). When Gamblin opened the door, Sheriff Wofford asked for appellant; Gamblin stepped away from the door (Tr. 1078, 1174). Sheriff Wofford noticed that as appellant walked toward the door, he took a gun from behind his thigh; Sheriff Wofford warned Deputy Barnes that appellant had a gun (Tr. 1175-1176). Appellant squatted down beside the door, raised his gun, pointed it out the door, and began shooting at the officers (Tr. 1079, 1176). Sheriff Wofford returned fire (Tr. 1176). Appellant and the officers continued to exchange gunfire (Tr. 1177). All of a sudden, the gunfire stopped and Sheriff Wofford noticed that Deputy Barnes was lying on the ground, not breathing, with blood coming out of her ears (Tr. 1006, 1177-1178). Sheriff Wofford noticed that he had also been shot (Tr. 1178). He returned to his patrol car and called for help (Tr. 1178). Sheriff Wofford could see inside the house and he noticed appellant sitting on the sofa, looking at the officer, and fiddling with something (Tr. 1178). Sheriff Wofford took another shot at appellant from the patrol car, and then he could no longer see appellant inside the house (Tr. 1178).

Sheriff Wofford again called for help (Tr. 1179). When officers arrived, including

Officers Sigman and Officer Piatt of the Salem Police Department, gunfire from inside and outside the house began again (Tr. 1007, 1179). Officer Sigman noticed Sheriff Wofford=s gunshot wound to his abdomen (Tr. 1009). Officer Sigman fired five rounds over the house so Officer Piatt could take Sheriff Wofford behind another patrol vehicle for safety[3] (Tr. 1010, 1180). Appellant did not return fire (Tr. 1010).

Meanwhile, inside appellant=s house, at some point during the exchange of gunfire, Gamblin was shot in the shoulder and back (Tr. 1080). Gamblin fell against the wall behind the couch (Tr. 1080). Appellant ran into the bedroom and looked out the window (Tr. 1080). The shooting stopped and appellant returned to the living room and crouched down near Gamblin (Tr. 1080). Appellant had been shot in the face (Tr. 1080). Appellant said he was going to surrender; he had put some of the methamphetamine in his mouth (Tr. 1081). Appellant crawled to the door and started yelling, AI surrender. We need help. People down.@ (Tr. 1081).

At this point, Corporal Folsom and Sargent Roark with the Missouri Highway Patrol had arrived at appellant=s residence and had approached the residence from the back of the house (Tr. 905-906, 1019). As they approached the house, they noticed

[3]Sheriff Wofford was then removed from the scene by ambulance and treated at the hospital (Tr. 1010, 1180).

Deputy Barnes lying on the ground but did not locate appellant at first (Tr. 907). Folsom then noticed appellant=s hands at the doorway of the house and told appellant to crawl out so Folsom could determine whether appellant had any weapons (Tr. 907, 924, 1022). Appellant crawled out of the house and Folsom apprehended appellant (Tr. 907, 924-925, 1022). After arresting appellant and placing him in handcuffs, Folsom noticed that appellant had a large hunting knife in a sheath on his side (Tr. 908, 1023). As Folsom took the knife, he noticed that appellant had a wound to his face (Tr. 908, 1023).

Roark then entered the house to see if any other individuals were inside (Tr. 1024). Roark located Angelia Gamblin, who was lying face down on the floor, crying and who appeared to be in pain (Tr. 1024). Roark noticed a great deal of blood but could not tell the extent of her injuries (Tr. 1024). Gamblin told Roark that appellant had started shooting and that Sheriff Wofford returned fire and shot her (Tr. 1025). Gamblin also stated that she and appellant had previously gone to the Smith house (Tr. 1025). Gamblin was later taken to the hospital (Tr. 1025).

Meanwhile, Folsom checked on Deputy Barnes (Tr. 909). Deputy Barnes was lying on her side with her face down (Tr. 909). Her service pistol was still holstered (Tr. 1026). Folsom rolled her over onto her back and tilted her head back (Tr. 909). She had a bullet wound in her chest (Tr. 909, 1012-1013). She was still breathing but had blood coming out of her ears (Tr. 909, 1013, 1026). Folsom rolled her onto her side to attempt to allow one lung to function, assuming she was bleeding internally (Tr. 909). Folsom then noticed that she also had a gunshot wound to the back of her head (Tr.

909). Deputy Barnes was transported to St. Louis Hospital where she later died (Tr. 998).

Folsom and Roark then processed the scene at appellant=s residence (Tr. 1029). Inside appellant=s home, they recovered several .22 caliber shell casings, a .22 caliber bullet fragment, a .40 caliber bullet fragment from a hole in a wall, a .22 caliber Ruger semiautomatic pistol (with blood on it) lying on the floor near the doorway of the master bedroom, an empty magazine next to the pistol, a full box of 100 rounds of .22 caliber ammunition, a partially used box of 100 rounds of .22 caliber ammunition, a brown metal lockbox with gunshot holes in the side, containing large bags of methamphetamine (Tr. 1123), later identified as belonging to Harriett Smith, a black web belt with a holster lying on the sofa, drug paraphernalia including stash boxes and pipes, small plastic baggies, glass tubes normally used for ingesting various types of drugs, another .22 caliber semiautomatic rifle lying on the floor near the refrigerator, five .22 caliber shell casings found in the dining room and kitchen, a Ruger magazine on the coffee table, and a large hunting knife propped up against one of the living room walls (Tr. 1029-1032, 1035-1036, 1038). A 1996 Chrysler vehicle, registered to Angelia Gamblin, was parked in front of the house (Tr. 1034). Inside the vehicle, officers located various blood stains on the seat of the driver=s area and on a white cotton towel on the back of the seat (Tr. 1034). The blood stain extracted from the seat was later DNA tested and was found to be consistent with Smith (Tr. 1159-1163).

After processing the scene at appellant=s residence, Folsom and Roark went to

the Smith residence to process the scene (Tr. 832, 910). They seized two .22 shell casings; one from the living room sectional couch and another lying on the floor near the couch (Tr. 911). In the bedroom, where Harriett Smith was located, they located a large amount of blood on the bed and some blood splatter on the wall (Tr. 914). Officers noticed several gunshot wounds to Smith, including two gunshot wounds to her left hand and a gunshot wound to her leg, and a large amount of blood covering her body (Tr. 919). At the front door of the residence, in the interior, they located a bullet hole, approximately two feet from the ground (Tr. 917). In the living room, officers noticed that Michael Wells had a gunshot wound to the facial area (Tr. 918).

Smith had a bullet wound to the right leg (Tr. 947, 953). She had a bullet removed from under her left breast (Tr. 948). She had two bullet wounds to her back, including one in her lower back (Tr. 948, 956). Her left hand had two bullet wounds, one in her wrist and one in the palm of her hand; these were close contact wounds (Tr. 949, 954). She had two bullet wounds to her face, including a gunshot wound above her left eyebrow, which was also a close contact wound (Tr. 949-950, 954).

The gunshot wounds to her head caused extensive brain damage and caused her to stop breathing; these wounds were fatal (Tr. 955-957). The gunshot wounds to her back entered her spleen, her lungs, and her liver (Tr. 956). The wounds to her hand would have been quite painful but were not life threatening (Tr. 956). Various bullets and bullet fragments were removed from Smith=s body (Tr. 991).

Wells had a gunshot wound, close contact, to his head, near his eye (Tr. 959).

The wound damaged his eye and penetrated his skull and traveled into the sinuses in the front of the brain (Tr. 959, 961). The gunshot wound caused him to hemorrhage around his brainstem and cerebellum and would have stopped his breathing (Tr. 962).

Barnes had two gunshot wounds; one gunshot wound was to the back of her head, near her left ear, and one gunshot wound was to her abdomen in the gastric area (Tr. 979). The wound to the abdomen damaged her colon and caused a lot of internal bleeding (Tr. 981-982). The wound to her head went through the scalp and the cranium bone and traveled from the left side of the brain to the right side of the brain (Tr. 982). Barnes=s cranium was torn and fractured (Tr. 982). The gunshot wound to her head was fatal (Tr. 982). Bullet fragments and a bullet were retrieved from Deputy Barnes=s body (Tr. 998).

Appellant did not testify in his own behalf during the guilt phase, but presented one witness, Dr. Robert Smith, a psychologist, who testified that he diagnosed appellant with dysthymic disorder, cognitive disorder, and substance dependence (Tr. 1207-1208).

Appellant was found guilty of all three charges of murder in the first degree (Tr. 1274-1275).

During the penalty phase, the State presented evidence regarding appellant=s possession, as a felon, of a concealed .22 caliber handgun, illegal possession of a four-inch-long-gravity-type knife, possession of methamphetamine, possession of a .44 Ruger handgun while he was living in California (Tr. 1311-1318), the conviction of

possession of a weapon by a felon (Tr. 1318), evidence regarding possessing several bags of methamphetamine, drug paraphernalia, stolen checks, and cash (Tr. 1324-1326), and evidence regarding the impact of the victims' deaths on their families (Tr. 1330-1351).

Appellant did not testify on his own behalf during the penalty phase but presented multiple witnesses including family members, friends, and expert witnesses in an attempt to mitigate punishment (Tr. 1356-1657).

At the close of the evidence, instructions and argument, the jury recommended that appellant be sentenced to death for the murder of Harriett Smith, finding the aggravating circumstances 1) that the murder of Smith was committed while appellant was engaged in the commission of another unlawful homicide of Michael Wells, and 2) that appellant murdered Smith for the purpose of receiving money or any other thing of monetary value from Harriett S. Smith (Tr. 1744-1745). The jury recommended appellant be sentenced to death for the murder of Michael Wells, finding the aggravating circumstance that appellant murdered Wells for the purpose of receiving money or any other thing of monetary value from Smith (Tr. 1745-1746). The jury recommended appellant be sentenced to death for the murder of Joann Barnes, finding the aggravating circumstance that the murder of Barnes was committed against a peace officer while engaged in the performance of her official duty (Tr. 1746). The trial court sentenced appellant to death for each count of murder (Tr. 1784).

ARGUMENT

I.

The trial court did not err in admitting evidence of appellant=s drug possession in California during the penalty phase because this Court has repeatedly found that any evidence of a defendant=s character, including unadjudicated criminal conduct is relevant and admissible during punishment phase and that the jury is not required to be instructed that this evidence is to be found beyond a reasonable doubt.

Appellant alleges that the trial court erred in admitting various evidence during the penalty phase of appellant=s trial (App. Br. 40). Specifically, appellant alleges that the trial court erred in admitting evidence of appellant=s Aalleged drug possession and dealing in California@ because the trial court did not require the State to prove these facts beyond a reasonable doubt (App. Br. 40).

During the penalty phase, the State called two witnesses, Officer Trudeau and Officer Ridenour who testified about two different arrests of appellant for drug possession while appellant lived in California (Tr. 1307-1330).

Appellant=s claim that this evidence was inadmissible because he had not been tried and convicted for these crimes and the State was not required to prove these facts beyond a reasonable doubt is without merit[4].

[4]Appellant also appears to argue that this evidence was inadmissible because

evidence of other crimes is not relevant to proving a defendant=s guilt (with limited exceptions) (App. Br. 44). Of course, this evidence was not admitted during the guilt phase. The issue is the admissibility during punishment phase.

AIt is well-established that the purpose of having a separate penalty phase in a capital trial is to permit the presentation of a broad range of evidence that is relevant to punishment but irrelevant or inflammatory as to guilt.@ State v. Ervin, 979 S.W.2d 149, 158 (Mo. banc 1998), cert. denied 525 U.S. 1169 (1999). Both the state and the defendant may introduce any evidence pertaining to the defendant=s character in order to help the jury assess punishment. Id., State v. Winfield, 5 S.W.3d 505, 515 (Mo. banc 1999), cert. denied 120 S.Ct. 967 (2000). A[E]vidence of a defendant=s prior unadjudicated criminal conduct may be heard by the jury in the punishment phase of a trial.@ Winfield, 5 S.W.3d at 515. The argument that the state may not introduce, in penalty phase, evidence of unadjudicated bad acts, Ahas been repeatedly rejected by this Court.@ State v. Ferguson, 20 S.W.3d 485, 500 (Mo. banc 2000), cert. denied, 531 U.S. 1019 (2000); State v. Strong, 142 S.W.3d 702, 719-720 (Mo.banc 2004), cert. denied, 125 S.Ct. 872 (2005); State v. Glass, 136 S.W.3d 496, 517 (Mo. banc 2004) cert. denied, 125 S.Ct. 869 (2005); State v. Deck, 136 S.W.3d 481, 486 (Mo.banc 2004); State v. Taylor, 134 S.W.3d 21, 30 (Mo.banc 2004), cert. denied, 125 S.Ct. 322 (2004).[5]

[5]Appellant acknowledges that this claim has been repeatedly denied by this Court

(App. Br. 47). Although appellant asks for reconsideration, he offers no new argument or case law in support of his request.

Citing State v. Debler, 856 S.W.2d 641 (Mo. banc 1993), appellant claims that even if the evidence is admissible, the instructions must be modified to tell the jury what weight to give the evidence. But, this claim has also been repeatedly denied by this Court. See State v. Christeson, 50 S.W.3d 251, 269-70 (Mo. banc 2001); State v. Ferguson, 20 S.W.3d 485, 500 (Mo. banc 2000); State v. Kinder, 942 S.W.2d 313, 331 (Mo. banc 1996). In Ervin, 979 S.W.2d at 158, this Court stated that it Ahas consistently held that the error in Debler was lack of notice,@ and therefore, there was no merit to the defendant=s claim that Debler required the jury to be instructed on what weight to give evidence of unadjudicated criminal acts. See also State v. Kreutzer, 928 S.W.2d 854, 874 (Mo. banc 1996), cert. denied 519 U.S. 1083 (1997) (AThis Court made clear in Chambers, 891 S.W.2d at 107, that the error in Debler was the lack of notice@). Instructions 22, 25, and 28 were patterned after MAI-CR 3d 313.41A and therefore were presumptively valid, and moreover, they correctly instructed the jury on the requirement of '565.032.1, RSMo 2000. Ervin, 979 S.W.2d at 158-59.

Based on the foregoing, this claim must fail.

II.

The trial court did not err in overruling appellant=s motion to exclude and/or limit victim impact evidence and in allowing the testimony of Raymond Wells and Lois Lambiel, because this evidence was properly admitted in that their testimony concerned the murder victims and the impact of the crime upon their families.

Appellant alleges that the trial court erred in overruling his motion to exclude and/or limit victim impact evidence and in allowing testimony from Raymond Wells and Lois Lambiel, family members of appellant=s murder victims (App. Br. 50). Appellant alleges that the victim impact evidence presented Afar exceeded the >brief glimpse= of the victims= lives authorized by Payne v. Tennessee; included hearsay and unsubstantiated alleged results of Earl=s actions; requested Earl=s execution; let the jurors weigh the value of the victims= lives against Earl=s; and gave them no guidance on how to consider or weigh the evidence in reaching their verdict@ (App. Br. 50).

During the penalty phase, the State called two witnesses, Raymond Wells, Michael Wells=s brother, and Lois Lambiel, Sharon Joann Barnes=s sister, to testify regarding the effects that their family members= deaths had caused (Tr. 1330-1337, 1339-1350).

Trial courts have broad discretion to admit or exclude evidence at trial. State v. Johns, 34 S.W.3d 93, 103 (Mo. banc 2000), cert. denied, 532 U.S. 1012 (2001). Unless this discretion was clearly abused, error will not be found. Id.

Victim impact evidence is admissible under the United States and Missouri

Constitutions. State v. Roberts, 948 S.W.2d 577, 594 (Mo. banc 1997), cert. denied, 522 U.S. 1056 (1998); State v. Parker, 886 S.W.2d 908, 926 (Mo. banc 1994), cert. denied 514 U.S. 1098 (1995). AA State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury=s decision as to whether or not the death penalty should be imposed.@ Payne v. Tennessee, 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991). AVictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question.@ Id. AThe state is permitted to show the victims are individuals whose deaths represent a unique loss to society and to their family and that the victims are not simply >faceless strangers.=@ Roberts, 948 S.W.2d at 604 (citing Payne, 501 U.S. at 825). Section 565.030.4, RSMo 2000, provides that punishment phase evidence, Amay include, within the discretion of the court, evidence concerning the murder victim and the impact of the crime upon the family of the victim and others.@

In the case at bar, the trial court did not err in allowing the admission of the victim impact evidence. First, as to appellant=s claim that these two witnesses= testimony, covering only 20 pages of testimony was somehow excessive and provided exceedingly more than a Abrief glimpse@ is without merit. Wells= and Lambiel=s testimony was brief and focused merely on the effects of the murder and described their murdered family members. Moreover, contrary to appellant=s argument, Payne does not stand for the

proposition that only a brief glimpse of the victim=s life is all that is constitutionally permissible. State v. Knese, 985 S.W.2d 759, 771-772 (Mo.banc 1999), cert. denied, 526 U.S. 1136 (1999). The issue is not whether the victim impact evidence presented was more or less than a brief glimpse of the victim=s life, but rather whether Ain a particular case, a witness= testimony or a prosecutor=s remark so infects the sentencing proceeding as to render it fundamentally unfair,@ and, therefore, a due process violation. Id. In the case at bar, it cannot be said that the brief testimony from Lambiel and Wells Ainfected@ the sentencing proceeding. Rather, their testimony was short, discussed the effect of the murders on the family members and briefly described the types of persons Michael Wells and Deputy Barnes[6] were in life. There was nothing unfair about allowing the Ajury to bear in mind that harm [the defendant=s acts had caused] at the same time as it consider[ed] the mitigating evidence introduced by the defendant.@ State v. Simmons, 944 S.W.2d 165, 186-187 (Mo.banc 1997), cert. denied, 522 U.S. 953 (1997). The evidence presented was not such that it Ainflame[d] the passions of the jury beyond the passion that the facts of the crime itself inflames. Id., quoting, Payne, 501 U.S. at 832; see State v. Storey, 40 S.W.3d 898, 908-909 (Mo.banc 2001), cert. denied, 534 U.S. 921 (2001) (Admission of testimony of two

[6]Respondent notes that although appellant complains about the amount of victim impact testimony presented, the State only called two victim impact witnesses and no members of Harriett Smith=s family testified during penalty phase.

victim impact witnesses, who testified about the physical, emotional, employment, and marital problems that resulted from the victim=s death, as well as eleven exhibits related to the structures and events that were dedicated to the victim following her death, including photographs of the victim, a memorial garden, a memorial plaque, photographs of a Aballoon release@ ceremony,@ a sketch of the victim, a special edition of the school newsletter commemorating the victim=s death, a poem written about the victim, and a eulogy were proper victim impact testimony and did not render the trial fundamentally unfair).

Second, appellant claims that the victim impact testimony let the jurors weigh the value of the victims= lives against his life (App. Br. 50). However, not one of the witnesses said anything about whether appellant=s life was worth more than the life of the victims, and not one of the witnesses even hinted that the jury should compare the value of their lives as a basis for imposing death. Appellant=s argument is identical to that rejected by the United States Supreme Court in Payne v. Tennessee, where the Court held that:

> As a general matter, . . . victim impact evidence is not offered to encourage comparative judgments of this kind--for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead *each* victim's Auniqueness as an individual human being,@ whatever the jury might think the loss to the community resulting from his death might be.

Payne, 501 U.S. at 823 (emphasis in original). In the case at bar, the evidence was offered to help the jury understand that the people appellant killed were not just Afaceless strangers,@ but that they were real people with unique characteristics as human beings. This evidence did not improperly compare the value of their lives with appellant=s life.

Third, appellant=s claim that Lambiel=s testimony about other family members= conversations about the impact of Barnes= death was inadmissible hearsay is also without merit (App. Br. 54). Appellant cites to three transcript citations in support of this claim. However, two of these cites, (Tr. 1333 and 1336) are not testimony by Lambiel. The third cite, although Lambiel=s testimony, does not exhibit any hearsay. Rather, the testimony reflects Lambiel=s observations of how Barnes=s nieces and nephews reacted to Barnes= death (Tr. 1349-1350). None of the testimony was offered for the truth of the matter asserted.

Fourth, contrary to appellant=s argument, Lambiel never associated her brother=s strokes and her other brother=s death to appellant=s murder of Barnes. AIt is not necessary that every piece of victim impact evidence relate to the direct impact of the victim=s death on the witness.@ State v. Gill, 167 S.W.3d 184, 195-197 (Mo. banc 2005). Rather, Lambiel was merely explaining the events and hardships that had occurred to Barnes= family after Barnes had been murdered. Nothing about her testimony suggested that appellant was to blame for the other family members= medical problems.

Fifth, appellant asserts that Lambiel offered improper victim impact testimony by saying, Awe feel like that it=s not right unless we get an eye for an eye@ (Tr. 1780). But,

this statement was not made in front of the jury or even during punishment phase. Rather, this statement was made after the trial at appellant=s formal sentencing in front of the trial judge only. Thus, it had absolutely no impact on the jury=s determination of punishment. For appellant to somehow suggest otherwise is simply false. Moreover, appellant has made no showing that this statement had any impact on the trial court=s imposition of sentence. Denying a similar claim in State v. Smith, 32 S.W.3d 532, 555 (Mo.banc 2000), where the victims stated at the sentencing hearing that the defendant Adeserves to die,@ that the victim could not survive if the defendant Ais given life,@ and that the death penalty was Atoo good@ for appellant, this Court held:

> Appellant=s position is foreclosed by State v. Taylor, 944 S.W.2d 925 (Mo. banc 1997). In that case, the state conceded that the victim=s family members' testimony concerning the appropriate sentence was inadmissible under Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). This Court held, nevertheless, that prejudice sufficient to result in reversal could not be demonstrated Abecause judges are presumed not to consider improper evidence during sentencing.@ Taylor, 944 S.W.2d at 938.Appellant has not overcome that presumption in this case.

See also State v. Smith, 163 S.W.3d 63, 68 (Mo.App. S.D. 2005) (we presume the trial judge disregarded any improperly admitted evidence; where a judge, rather than a jury, is the trier of fact, the reviewing court presumes that inadmissible evidence is not

prejudicial); State v. Mullins, 140 S.W.3d 64, 71 (Mo.App. W.D. 2004) (A judge is presumed to be able to disregard the most inappropriate, improper material and proceed to a fair result); State v. McMillin, 783 S.W.2d 82 (Mo.banc 1990) (Where judge, rather than jury, is trier of fact, reviewing court presumes that inadmissible evidence is not prejudicial). Appellant has failed to demonstrate that Lambiel=s statement had any effect on the trial court=s im position of sentence.

Finally, to the extent that appellant again alleges that the jury is not properly instructed on how to consider punishment phase evidence (in this instance, victim impact) or what standard of proof to apply, these claims have been repeatedly denied by this Court. State v. Glass, 136 S.W.3d 496, 517 (Mo. banc 2004) cert. denied, 125 S.Ct. 869 (2005); State v. Ferguson, 20 S.W.3d 485, 500 (Mo. banc 2000), cert. denied, 531 U.S. 1019 (2000).

Based on the foregoing, this claim should be denied.

III.

The trial court did not err in sustaining the State=s objection to defense counsel=s argument that sentencing appellant to death would make his family and friends Avery, very, very distraught@ because this evidence was irrelevant to the issue of appellant=s sentence in that this evidence did not bear on appellant=s character, record, or circumstances of his offense.

Appellant alleges that the trial court erred in sustaining the State=s objection to appellant=s penalty phase closing argument that appellant=s family and friends would be Avery, very, very distraught@ if appellant was sentenced to death (App. Br. 62). Appellant claims that this argument was a proper rebuttal to the State=s argument to consider the impact on the victims families and that counsel had a right to argue the impact of executing appellant on his family and friends as mitigating (App. Br. 62).

During appellant=s penalty phase closing argument, the following occurred, relevant to this claim:

> The prior convictions that he had were simply not of the same nature of the things that happened on December the 9th of 2002. It=s a completely different thing. You should be mad at him for what happened on December the 9th of 2002, but please, look beyond that day. Please look beyond that day. Look at his whole life and look at those people out in the audience, ladies and gentlemen. Look at those people out in the audience who are going to be very, very, very distraught if you kill him.

That=s a mitigating circumstance.

Mr. Ahsens: I=m going to object to that, Your Honor. I think that=s improper argument.

Mr. Kenyon: That=s something that you can take into consideration, Your Honor.

The Court: Sustained as to that. And your time is up.

Mr. Kenyon: Please, ladies and gentlemen, don=t kill Earl Forrest.

(Tr. 1723-1724).

Trial courts have broad discretion in controlling the scope of closing argument. State v. Barton, 936 S.W.2d 781, 783 (Mo. banc 1996). Unless it appears clear that the trial court abused its discretion, its rulings will not be disturbed on appeal. State v. Hampton, 653 S.W.2d 191, 195 (Mo. banc 1983); State v. Walton, 920 S.W.2d 585, 587 (Mo.App. W.D. 1996). A trial court will be found to have abused its discretion when a ruling is "clearly against the logic and circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." State v. Brown, 939 S.W.2d 882, 883 (Mo. banc 1997). This Court will not reverse the trial court's ruling on the propriety of counsel's argument unless there has been a clear abuse of discretion.

Evidence not bearing on the defendant's character, prior record, or the

circumstances of his offense is irrelevant and is not admissible. State v. Nicklasson, 967 S.W.2d 596, 619 (Mo.banc 1998); Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

Here, appellant attempted to argue that a sentence of death would cause his family and friends to be distraught. His family=s feelings about his punishment were irrelevant. It is not evidence of appellant=s character, record, or circumstances surrounding the offense. Nicklasson, supra at 619 (That a convicted murder's relatives care about him is not relevant to the punishment question). Thus, the trial court did not err in sustaining the State=s objection.

As for appellant=s claim that this was proper rebuttal to the admission of the victim=s family evidence regarding the impact of the offense on the victim=s, appellant is mixing apples with oranges. Evidence regarding the impact of a crime on the victims is relevant. It is evidence regarding the offense of which appellant is on trial and the impact of that offense. Evidence regarding what effect a punishment would have on the appellant=s family has nothing to do with the crime, appellant=s record, or his character. It is irrelevant to the determination of punishment and the trial court correctly sustained the State=s objection.

Based on the foregoing, this claim should be denied.

IV.

The trial court did not err in overruling appellant=s pre-trial motions based on Apprendi, not quashing the information, or proceeding to penalty phase because this Court has repeatedly found that the penalty phase instructions properly instruct the jury on how to determine punishment and that the statutory aggravators are not required to be pled in the indictment.

Appellant alleges that the trial court committed a myriad of errors relating to whether the State was required to plead the statutory and non-statutory aggravators in the charging document and whether such facts must be found by the jury unanimously and beyond a reasonable doubt (App. Br. 72).

First, as to appellant=s claim that the instructions fail to instruct the jury to find all evidence presented during the penalty phase beyond a reasonable doubt, these claims have been repeatedly denied by this Court, as discussed in Points I and II above. See State v. Glass, 136 S.W.3d 496, 517 (Mo. banc 2004) cert. denied, 125 S.Ct. 869 (2005); State v. Taylor 134 S.W.3d 21, 30 (Mo.banc 2004), cert. denied, 125 S.Ct. 322 (2004); State v. Ferguson, 20 S.W.3d 485, 500 (Mo. banc 2000), cert. denied, 531 U.S. 1019 (2000).

Second, appellant=s allegations 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 have also been repeatedly rejected by this

Court.[7] See State v. Gill, 167 S.W.3d 184, 195-197 (Mo. banc 2005); State v. Edwards, 116 S.W.3d 511,544 (Mo.banc 2003), cert. denied, 540 U.S. 1186 (2004); State v. Gilbert, 103 S.W.3d 743,747 (Mo.banc 2003); State v. Tisius, 92 S.W.3d 751,766-767 (Mo.banc 2002), cert. denied, 539 U.S. 920 (2003); State v. Cole, 71 S.W.3d 163,171 (Mo.banc 2002), cert. denied, 537 U.S. 865 (2002). Just as in the cases above, appellant=s claim is without merit, as the State gave appellant notice of its intent to seek the death penalty, the aggravating circumstances were found beyond a reasonable doubt by the jury, and the jury was otherwise properly instructed as to how to consider the remaining evidence determine the sentence.

Based on the foregoing, this claim should be denied.

[7]Appellant acknowledges that his claim has been rejected by this Court, and although he asks for reconsideration, he fails to present any new case law or argument in support.

V.

The trial court did not err in submitting instructions based on MAI-CR3d 314.44 and MAI-CR3d 314.48 because these instructions were constitutional, properly instructed the jury on how to properly determine punishment, and did not mislead the jury.

Appellant again asserts that the penalty phase instructions were in error because they failed to instruct the jury on the burden of proof (App. Br. 87). Appellant alleges that the instructions failed to Ainstruct the jury that the State had the burden of proof beyond a reasonable doubt and that they improperly shifted the burden of proof to the defense@ (App. Br. 87).

As discussed above in previous points, this Court has repeatedly found that MAI-CR3d 314.44 and 314.48 are constitutional and correctly instruct the jury on determination of punishment. State v. Glass, 136 S.W.3d 496, 517 (Mo. banc 2004) cert. denied, 125 S.Ct. 869 (2005); State v. Taylor 134 S.W.3d 21, 30 (Mo.banc 2004), cert. denied, 125 S.Ct. 322 (2004). The instructions properly instruct the jury on what burden of proof to apply in determining punishment.

Finally, as for appellant=s claim that the instructions misled the jury into placing the burden of proof on appellant, this claim is not well taken. First, a defendant does bear the burden for presentation of mitigating evidence. State v. Armentrout, 8 S.W.3d 99, 111 -112 (Mo.banc 1999), cert. denied, 529 U.S. 1120 (2000); Delo v. Lashley, 507 U.S. 272, 275-276, 113 S.Ct. 1222, 122 L.Ed.2d 620 (1993) (under Missouri law the

defendant is required to bear the risk of nonpersuasion as to the existence of mitigating circumstances). Moreover, appellant Aoffers no case on point or statutory requirement that the prosecutor has the burden to demonstrate that the mitigating circumstances must be insufficient to outweigh aggravating circumstance.@ Taylor, supra at 30; Delo, supra (A[s]o long as a State=s method of allocating the burdens of proof does not lessen the State=s burden ... to prove the existence of aggravating circumstances, a defendant=s constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency@). Appellant offers no evidence to establish that the jury was somehow misled on how to determine appellant=s sentence. The jury was properly instructed on the applicable law in determining punishment. Jurors are presumed to follow the court=s instructions and appellant offers no evidence to the contrary. Armentrout, supra; State v. Lyons, 951 S.W.2d 584, 598 (Mo. banc 1997), cert. denied, 522 U.S. 1130 (1998).

Based on the foregoing, the claim should be denied.

VI.

The trial court did not plainly err in failing to sua sponte admonish the prosecutor or declare a mistrial when the prosecutor stated that he would not concede that Dr. Gelbort and Dr. Evan were experts because the State had a right to object to the trial court=s acceptance of these individuals as experts and appellant did not suffer a manifest injustice in that the trial court overruled the prosecutor=s objections, and accepted the individuals as experts and appellant fails to make any showing that the jury was somehow misled.

Appellant alleges that the trial court plainly erred in failing to sua sponte admonish the prosecutor or declare a mistrial when the prosecutor, in response to the trial court, stated that he objected to Drs Gelbort and Evan being accepted as experts (App. Br. 94). Appellant alleges that the prosecutor=s objections were Alegal conclusions solely for the trial court; personalized and suggested facts outside the evidence, encouraging the jury to disregard the defense experts= testimony solely based on Ahsens= personal opinion@ (App. Br. 94).

During penalty phase, appellant called two doctors, Dr. Michael Gelbort and Dr. Lee Evans[8], in support of mitigation. During Dr. Gelbort=s direct examination, appellant asked the court that Dr. Gelbort be recognized as an expert in the field of

[8]Appellant also called Dr. Robert Smith and other family members and friends. Their testimony is not at issue in this claim.

neuropsychology (Tr. 1530). The prosecutor stated AI do not concede that@ (Tr. 1530). After the trial court asked the prosecutor whether he wished to voir dire the witness, the prosecutor again stated AI simply do not concede it and will not@ (Tr. 1530). The trial court then stated Aall right. At this time the Court finds that he will be so considered.@ (Tr. 1530). Dr. Gelbort then continued his testimony regarding his neuropsychological testing of appellant.

During Dr. Lee Evan=s testimony, following his direct testimony regarding his curriculum vitae and appellant requesting Dr. Evans to be accepted as an expert in psychiatric pharmacy, the prosecutor voir dired Dr. Evan=s regarding his qualifications as a psychiatric pharmacist (Tr. 1571-1572). Following the voir dire examination, appellant again requested Dr. Evans to be recognized and accepted as an expert in the field of psychiatric pharmacy (Tr. 1572). The trial court responded ASo considered@ (Tr. 1572).

Following Dr. Evan=s testimony on direct examination, the State conducted its cross-examination of Dr. Evans. During the State=s cross-examination, the following occurred, relevant to this claim:

> Q. (By Mr. Ahsens) Is that to a reasonable degree of psychiatric certainty, Doctor?
>
> A. I think it=s a reasonable degree of **B** of pharmacological certainty and scientific certainty.
>
> Q. Is that to a reasonable degree of psychological certainty?

A. I=m not a psychologist, no.

Q. Or a psychiatrist or a physician.

A. Correct.

Mr. Ahsens: I would ask then, Your Honor, that the defendant=s [sic] answers in all of these respects be stricken and the jury instructed not to consider them. This man is not an expert and cannot render such opinion.

The Court: That request is denied.

(Tr. 1588-1589).

Appellant acknowledges that he made no objection during the State=s objections and/or requests, and thus requests plain error review. AThe plain error rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review.@ State v. Roberts, 948 S.W.2d 577, 592 (Mo.banc 1997), cert. denied, 522 U.S. 1056 (1998). Should this Court decide to grant plain error review, to prevail on plain error review, appellant must show that the error affected his rights so substantially that a miscarriage of justice or manifest injustice results if the error is not corrected. State v. Skillicorn, 944 S.W.2d 877, 884 (Mo. banc 1997), cert. denied, 522 U.S. 999 (1997). Manifest injustice depends on the facts and circumstances of the particular case and the defendant bears the burden of establishing manifest injustice amounting to plain error. State v. Zindel, 918 S.W.2d 239, 241 (Mo. banc 1996). Moreover, 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).

It was certainly not a manifest injustice nor was a mistrial warranted when the prosecutor made an objection to the qualifications of the proposed experts. More importantly, it certainly was not error. The prosecutor was within the proper bounds to object to the qualifications of the proposed expert. Appellant points to no proposition of law that somehow prohibits a prosecutor from making an objection. The trial court did not err. More telling that appellant did not suffer a manifest injustice was the trial court=s response to the prosecutor=s objections and requests**C**both were overruled and the doctors were accepted as experts and permitted to testify as such. Moreover, the jury was instructed that objections are not evidence (L.F. 573), jurors are presumed to follow the instructions, and appellant has pointed to no evidence to even suggest that the jurors were somehow misled. State v. Armentrout, 8 S.W.3d 99, 111 -112 (Mo.banc 1999), cert. denied, 529 U.S. 1120 (2000); State v. Lyons, 951 S.W.2d 584, 598 (Mo. banc 1997), cert. denied, 522 U.S. 1130 (1998). The trial court did not err in failing to sua sponte admonish the prosecutor or declare a mistrial when the prosecutor objected

to the qualifications of appellant=s proposed experts.

Finally, contrary to appellant=s argument (App. Br. 97), the prosecutor=s objection and explanation of his objection was not Areminiscent@ of State v. Storey, 901 S.W.2d 886 (Mo.bacn 1995), where this Court reversed the murder convictions due to the prosecutor=s repeated improper comments during closing argument. Nor was this an example of the prosecutor arguing facts outside the record, asserting personal knowledge of facts, or giving of unsworn testimony as appellant claims (App. Br. 97). Rather, this was simply an example of the prosecutor objecting to the qualifications of an expert, the giving of the testimony and offering his reasons behind his objections. The trial court did not err in not sua sponte admonishing the prosecutor or in not declaring a mistrial.

Based on the foregoing, this claim should be denied.

VII.

A. The trial court did not plainly err in accepting the jury=s penalty phase verdicts on Count I (Harriett Smith) and Count II (Michael Wells) because the verdicts were not necessarily inconsistent in that the jury did not make a finding that the murder of Wells was committed during the commission of another homicide, but simply chose a different aggravator to support his death sentence.

B. The trial court did not plainly err in accepting the penalty phase verdict on Count I (Harriett Smith) because the evidence was sufficient in that the evidence established that appellant committed the murder of Harriett Smith while committing the murder of Michael Wells.

Appellant alleges that the trial court erred in accepting the jury=s penalty phase verdicts on Count I (Harriett Smith) and Count II (Michael Wells) because the verdicts were inconsistent (App. Br. 99). Specifically, appellant claims that because the jury made the written finding as to Count I, that the murder of Harriett Smith was committed during the murder of Michael Wells, but failed to make a written finding as to Count II, that the murder of Michael Wells was committed during the murder of Harriett Smith, the verdicts were inconsistent and cannot stand. Appellant argues in the alternative that the evidence was insufficient to find that the murder of Harriett Smith was committed during the commission of the murder of Michael Wells and therefore, the penalty phase verdict on Count I (Harriett Smith) cannot stand (App. Br. 99).

A. Verdicts were not inconsistent

Appellant did not make any objection to the verdicts being allegedly inconsistent at trial and thus, his claim is reviewable, if at all, for plain error. Should this Court decide to grant plain error review, to prevail on plain error review, appellant must show that the error affected his rights so substantially that a miscarriage of justice or manifest injustice results if the error is not corrected. State v. Skillicorn, 944 S.W.2d 877, 884 (Mo. banc 1997), cert. denied, 522 U.S. 999 (1997). Manifest injustice depends on the facts and circumstances of the particular case and the defendant bears the burden of establishing manifest injustice amounting to plain error. State v. Zindel, 918 S.W.2d 239, 241 (Mo. banc 1996).

In the case at bar, the jury returned three death verdicts for appellant=s murder of Michael Wells, Harriett Smith, and Joann Barnes (L.F. 630-632). Relevant to this claim, the evidence at trial established that around 10:00 a.m., on December 9, 2002, appellant, who had been drinking whiskey that morning, along with his then girlfriend Angelia Gamblin, drove to Harriett Smith=s house (Tr. 1066). Appellant went into the house while Gamblin remained in the car (Tr. 1068). Inside the Smith home, appellant shot Michael Wells in the head, killing him (Tr. 876-877). Harriett Smith ran outside and tried to leave (Tr. 1070-1072). Appellant followed her outside and eventually, appellant convinced Smith to come back into the house where appellant shot Smith multiple times killing her (Tr. 914, 947-956, 1073).

The jury, finding appellant guilty of murder in the first degree for the murders of

Smith and Wells (as well as Barnes), returned penalty phase verdicts of death for each of the victims (L.F. 630-632). As to the murder of Harriett Smith, the jurors found the following aggravating factors:

> 1. The murder of Harriett S. Smith was committed while the defendant was engaged in the commission of another unlawful homicide of Michael L. Wells.
>
> 2. The defendant murdered Harriett S. Smith for the purpose of the defendant receiving money or any other thing of monetary value from Harriett S. Smith.

(L.F. 630). As to the murder of Michael Wells, the jurors found the following aggravating factor:

> The defendant murdered Michael R. Wells for the purpose of the defendant receiving money or any other thing of monetary value from Harriett S. Smith.

(L.F. 631).

Appellant alleges that these verdicts are inconsistent because, while the jury made the written finding that the murder of Harriett Smith was committed while appellant was engaged in murdering Michael Wells as an aggravator supporting their death verdict for the murder of Harriett Smith, the jury did not find that the murder of Michael Wells was committed while appellant was engaged in murdering Harriett Smith as an aggravator supporting their death verdict for the murder of Michael Wells (App. Br. 99-102).

First, the jury=s findings are not inconsistent but are very understandable. Appellant killed Wells first. There were no other murders occurring prior to Wells= murder. He then continued his killing spree, killing Smith. The jury very well could have considered the evidence that established that since Wells was murdered first, it was only Smith=s murder that was committed during the commission of another unlawful homicide. Thus, the jury=s verdict was not inconsistent[9].

Second, the mere fact that the jury did not make the written finding that the murder of Michael Wells was committed during the commission of another unlawful homicide does not mean that the jury rejected that finding or disbelieved the evidence supporting that aggravator. Each count in an indictment is regarded as if it were a separate indictment. State v. Clemons, 643 S.W.2d 803, 805 (Mo. banc 1983), citing Dunn v. United States, 284 U.S. 390, 390-394, 52 S.Ct. 189, 190-191, 76 L.Ed.2d 356, 358-359 (1932).

As the court in State v. O'Dell, 684 S.W.2d 453 (Mo.App. S.D. 1984) stated:

Consistency in the verdict is not necessary. . . . That the verdict may have

[9]Of course, nothing prevented the jury (or another jury) from viewing the evidence as both murders were committed while in the commission of another offense.

been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters. (citation omitted).

* * *

When a defendant is tried on a multiple count charge involving crimes with different elements, there is no requirement that the jury's verdict be logically consistent. The jury may acquit on one charge and convict on the other . . . . There is no reason to speculate on the reasoning which led to the verdict in this case. It is sufficient that the evidence have supported the finding of guilt which the jury made, without regard for its verdict of acquittal. (citation omitted).

O'Dell, supra, at 465-466.

"However much the jury's conclusion may tax a legally trained penchant for consistency, the law is clear that inconsistent verdicts among the varied charges of a multi-count indictment are not self vitiating . . . [j]uries frequently convict on some counts and acquit on others, not because they are unconvinced of guilt but simply because of compassion, and compromise." State v. McCall, 602 S.W.2d 702, 708 [22] [Mo. App. 1980).

State v. Davis, 797 S.W.2d 560, 563 (Mo.App. W.D. 1990) citing State v. Doney, 622 S.W.2d 227 (Mo. App. E.D. 1981). Thus, the fact that the jury may not have made the

written finding that the murder of Michael Wells was committed during another unlawful homicide, does not render the verdicts inconsistent. The jury was not necessarily unconvinced of this aggravator but could have compromised. The lack of a written finding of this aggravator does not indicate that the jury rejected this aggravator or that the verdicts were invalid.

B. Sufficient Evidence to Support Finding that the homicide of Harriett Smith was committed while appellant was engaged in the commission of the homicide of Michael Wells

Even assuming that the verdicts were inconsistent, the verdicts are not invalid and a reversal is not required provided there is sufficient evidence to support the jury=s finding of guilt. State v. O'Dell, 684 S.W.2d 453, 465 (Mo. App. S.D. 1984) citing State v. Clemons, 643 S.W.2d 803, 805 (Mo. banc 1983); State v. Davis, 824 S.W.2d 936, 942 (Mo. App. E.D. 1992).

The only remaining question, then, is whether there was sufficient evidence to find that the homicide of Harriett Smith was committed while appellant was engaged in the commission of the homicide of Michael Wells[10]. As the above discussed evidence

[10]Respondent notes that appellant does not challenge the sufficiency of the evidence to support the aggravators that appellant murdered Smith and Wells for the purpose of receiving money or any other thing of monetary value. Appellant only challenges the sufficiency of the evidence to support the jury=s finding that the murder of

demonstrates, Harriett Smith was murdered just moments after Michael Wells. It was during the same transaction. This evidence was sufficient.

Appellant claims that the term Awhile@ means that the murder of Harriett Smith had to occur Aduring the time that@ appellant was murdering Michael Wells (App. Br. 104). Appellant goes on to argue that because the evidence established that Wells was killed before Smith, that the statutory aggravator was not supported (App. Br. 105). In other words, under appellant=s theory, this statutory aggravator would never be satisfied unless the defendant shot the victims at the exact same time. Appellant=s interpretation leads to absurd results. The aggravator of committing a homicide while in the commission of another unlawful homicide has never been held to require that the victims be killed at the exact same time. Rather, this Court has repeatedly found that this aggravator has been satisfied when the defendant has killed two (or more) victims during one criminal transaction. See State v. Deck, 994 S.W.2d 527, 545 (Mo.banc 1999) (Husband was killed and wife was killed moments later); State v. Wolfe, 13 S.W.3d 248, 264 (Mo.banc

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Harriett Smith was committed while in the commission of another unlawful homicide, Michael Wells. The existence of one statutory aggravator is sufficient to support a death sentence. State v. Smith, 32 S.W.3d 532, 556 (Mo.banc 2000).

2000) (Defendant shot husband while in car; defendant returned to victim=s home and shot and killed wife); State v. Barnett, 980 S.W.2d 297, 309-310 (Mo.banc 1998) (Defendant stabbed and killed grandfather, went to kitchen to get a new knife, returned to living room and stabbed and killed grandmother); State v. Strong, 142 S.W.2d 702, 708 (Mo.banc 2004) (Defendant stabbed wife and then stabbed child). As these cases demonstrate, the term Awhile@ does not require that the victims be killed at the same exact moment in time; rather, the victims are killed in the same criminal transaction. Basis the case of appellant=s murder of Harriett Smith and Michael Wells. The evidence was sufficient to support the aggravating circumstance and appellant=s claim must fail.

Based on the foregoing, this claim should be denied.

VIII.

The trial court did not err in striking for cause Venirepersons Parrott and Giger because they were not qualified to sit as jurors in that their views on the death penalty would have substantially impaired their performance as a juror as shown by their inability to sign a verdict of death.

Appellant alleges that the trial court abused its discretion in sustaining the State=s challenges for cause of Venirepersons Parrott and Giger (App. Br. 107). Appellant points out that the trial court struck the venirepersons because they stated that they could not sign a death verdict and he claims that that is not a requirement for service and thus, the venirepersons were improperly struck (App. Br. 107).

AVenirepersons may be excluded from the jury when their views would prevent or substantially impair their ability to perform their duties as jurors in accordance with the court's instructions and their oath.@ State v. Middleton, 995 S.W.2d 443, 460 (Mo. banc 1999), cert. denied, 120 S.Ct. 598 (1999); Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985). AThe qualifications of a prospective juror are not determined conclusively by a single response, >but are made on the basis of the entire examination.=@ State v. Middleton, 995 S.W.2d at 460 (quoting State v. Kreutzer, 928 S.W.2d 854, 866 (Mo. banc 1996), cert. denied, 519 U.S. 1083 (1997)).

The trial court is in the best position to evaluate a venireperson=s commitment to follow the law and is vested with broad discretion in determining the qualifications of prospective jurors. Id. A trial court's ruling on a challenge for cause will not be

disturbed on appeal unless it is clearly against the evidence and constitutes a clear abuse of discretion. Id.

A. Venireperson Parrott

During voir dire, the following exchange between the prosecutor and Venireperson Parrott occurred, relevant to this claim:

> Mr. Ahsens: Same question for you, going back to the original question: Final point of decision, could you vote for the death penalty?
>
> Venireperson Parrott: I don=t think so.
>
> Mr. Ahsens: Is this a belief that you have held prior to coming into the courtroom today?
>
> Venireperson Parrott: Pretty much so.
>
> Mr. Ahsens: All right.
>
> Venireperson Parrott: I would**B**I would have a difficult time.
>
> Mr. Ahsens: Well**B**
>
> Venireperson Parrott: I=d have to really**B**
>
> Mr. Ahsens: You were about to say?
>
> Venireperson Parrott: I=d have to really listen to all the facts.
>
> Mr. Ahsens: Well, we would expect you to do that.
>
> Venireperson Parrott: Right.
>
> Mr. Ahsens: Is this something that**B**is this an opinion that you hold that you**B**let me ask you this question first: Do you have any similar

reservations about the other punishment of life in prison without probation or parole?

Venireperson Parrott: No.

Mr. Ahsens: All right. So your reservations are strictly with the death penalty.

Venireperson Parrott: (Nods her head.)

Mr. Ahsens: Is this—is this something that you think—is this an opinion or are these reservations about the death penalty something you think could be changed by the evidence, or is this what you believe no matter what the evidence might be? And again, I ask you to think in realistic terms. I mean, we can all imagine some, you know, terrible, terrible situation that is not realistically involved here.

Venireperson Parrott: I don't know.

Mr. Ahsens: All right. Think you'd have any problem coming in and having a death verdict announced if it was announced that being your verdict in a courtroom like I described to Ms. Ward Hatchett?

Venireperson Parrott: I don't know. I mean, I don't know.

Mr. Ahsens: All right. This is obviously something you're having a lot—and look, folks, we don't sit around and talk about this issue with family—

Venireperson Parrott: Correct.

Mr. Ahsens: Bover Sunday dinner. Okay. And this is something some of you may be confronting squarely for the first time today, right here, right now, and I understand that.

Last question, you heard me ask it of Ms. Ward Hatchett a moment ago. Assuming you=re the foreperson, the foreperson is the only one who signs the verdict, could you sign a death verdict?

Venireperson Parrott: I don=t think so.

Mr. Ahsens: Your name on that piece of paper in the court file for as long as may be?

Venireperson Parrott: (Shakes her head.)

Mr. Ahsens: Is that a Ayes@ or a Ano@? I=m going to put you on the spot. You said you didn=t think so. Does that mean Ano@?

Venireperson Parrott: Would I sign it? No.

(Tr. 527-530).

Later, during defense voir dire, the following colloquy occurred, relevant to this claim:

Ms. Turlington: ...Ms. Parrott, I think you were another person who expressed extreme difficulty with this procedure, and I just want to explore that with you and make sure that it isn=t just difficulty, but it is such that you do not believe that, even given instructions by the judge that it was your duty, that you could actually do it. All right. Ma=am, I think you said you

would have a problem signing the form if you were the foreman of the jury. Correct?

Venireperson Parrott: Correct.

Ms. Turlington: All right. And I guess it's the same question that I asked the gentleman down here, Mr. Giger. You would never be in the position of having to sign the form unless you had gone through, found someone guilty of murder in the first degree beyond a reasonable doubt, and then gone through the whole second half of the trial, found an aggravating circumstance unanimously beyond a reasonable doubt, listened to the evidence in aggravation of punishment and mitigation of punishment, and found that aggravation outweighed mitigation; and then you, in your heart, believe that the death penalty was appropriate even then, because even going through those first two steps and finding that aggravation outweighs mitigation, you wouldn't be required to give the death penalty. So only if you, yourself, felt that it was the appropriate punishment, and eleven other people did too, would you be in a situation where you would be required to sign the form.

Assuming that you had done all those things, and that you felt it was the appropriate punishment, could you then sign the form?

Venireperson Parrott: You're saying that I decided I could.

Ms. Turlington: I'm saying that by time you have decided that death

is the appropriate punishment and you've gone through all of these other steps.

Mr. Ahsens: Your Honor, I'm going to object to that question. I think it's misleading.

The Court: Sustained.

Ms. Turlington: Ma'am, what I'm asking you is: As a juror, you and the other twelve jurors have gone through this entire process, you've found someone guilty of murder in the first degree, you've considered the aggravating circumstances, you've found one of them beyond a reasonable doubt, you've listened to and weighed the evidence in aggravation and mitigation of punishment, all right, and then all twelve jury members have said that the appropriate punishment should be the death penalty, and you would also at that point be included in that twelve, and you're the foreman, all right, could you at that point sign a verdict form?

Vernireperson Parrott: No.

Mr. Ahsens: Same objection.

Venireperson Parrott: No.

The Court: Overruled.

Ms. Turlington: Okay. So no matter what, you would not be able to sign the form?

Venireperson Parrott: No.

(Tr. 573-576).

Following voir dire, the State moved to strike Venireperson Parrott for cause (Tr. 578). Over appellant=s objection, the trial court struck Venireperson Parrott (Tr. 578-579).

Given Parrott=s responses, the trial court did not abuse its discretion in ruling that Parrott was substantially impaired and excusing her for cause. Parrott stated that she did not believe that she could vote for the death penalty, that she had held the belief for some time, and that she could not sign a death verdict as a foreman. This Court has repeatedly and consistently held that a juror=s inability to sign a verdict of death demonstrates equivocation about his or her ability to serve, which would substantially impair the performance of the juror=s duties in accordance with the juror=s instructions and oath. State v. Johnson, 22 S.W.3d 183, 187 (Mo. banc 2000), cert. denied 121 S.Ct. 322 (2000); State v. Clayton, 995 S.W.2d 468, 477 (Mo. banc 1999), cert. denied 120 S.Ct. 543 (1999); State v. Johnson, 968 S.W.2d 686, 693-694 (Mo. banc 1998); State v. Middleton, 995 S.W.2d at 461; State v. Kreutzer, 928 S.W.2d 854, 866-67 (Mo. banc 1996), cert. denied 519 U.S. 1083 (1997). "A juror's equivocation about his ability to follow the law in a capital case together with an equivocal statement that he could not sign a verdict of death can provide a basis for the trial court to exclude the venireperson from the jury." State v. Rousan, 961 S.W.2d 831, 840 (Mo. banc 1998), cert. denied 524 U.S. 961 (1998).

In Johnson, for example, the venireperson stated that he could follow the law in

the penalty phase. State v. Johnson, 968 S.W.2d at 693. The venireperson also said that he felt that the death penalty was appropriate in some cases. Id. However, the venireperson then admitted that he could not sign a verdict recommending death. Id. at 693-694. The trial court granted the state's motion to strike for cause. Id. at 692. This Court held:

> It is reasonable for a trial court to conclude that a veniremember's unequivocal statement of his inability to sign a death warrant amounts to a substantial impairment to performing the duties of a juror, specifically, the serious consideration of the full range of punishment at law, including the death penalty.

Id. at 694; see also State v. Tinsley, 143 S.W.3d 722, 731 -733 (Mo.App. S.D. 2004); State v. Anderson, 79 S.W.3d 420, 434 -436 (Mo.banc 2002). In the case at bar, as in Johnson, the trial court did not abuse its discretion.

B. Venireperson Giger

Following with the same type of questioning as with Venireperson Parrott, the prosecutor asked the following questions of Venireperson Giger:

> Mr. Ahsens: Okay, Mr. Giger. Same**B**same question: Final point of decision, could you vote for the death penalty?
>
> Venireperson Giger: I=m not sure. I=m really not. I **B** I **B** I **B** I=m not sure I could put my name on a certificate that said for the death penalty.
>
> Mr. Ahsens: Well, if you were the foreperson and that=s a duty that

could fall to anyone and—

Venireperson Giger: I understand that.

Mr. Ahsens: —that's exactly what you'd be asked to do.

Venireperson Giger: Yeah. And I'm not sure I could do that.

Mr. Ahsens: You know I'm going to press you for a yes or no answer. Sorry about that.

Venireperson Giger: I'd have to say no then.

Mr. Ahsens: Okay.

Venireperson Giger: To be honest, no.

Mr. Ahsens: Well, look folks, this is not a test. All right. There—there's no right or wrong answer here. There's just the truth. There is nobody in this room who wants to hear anything else but the truth. If you can or can't do anything, it's not a sign of weakness and it's not a sign of manhood or anything else; it's just what you think. And that's what we're trying to find out here. Okay.

Mr. Ahsens: I appreciate your candor. I take it you don't have any similar reservations about the life-in-prison-without-parole sentence?

Venireperson Giger: No. I wouldn't have any difficulty with that.

(Tr. 533-534).

Later, during defense voir dire, the following colloquy occurred, relevant to this claim:

Ms. Turlington: ....Mr. Giger, I think you were a little bit more unsure. And I don=t want to put words in your mouth, but it seemed to me that you were unsure about the death penalty, but it=s possible that you may consider it in some circumstances. Is that correct? And if it=s not, you tell me.

Venireperson Giger: I would=I said I would have a very difficult time putting my name on a certificate for someone to die. That=s what I said.

Ms. Turlington: Okay. And I understand that it might be a very difficult time, but what we need to know=and I would hope that it is difficult for people to make that type of decision. And I understand that it would be difficult for you. I guess what the question is: Is if, in this case, you were chosen as a juror and you listen to all the evidence in the first half of the trial, that you felt that someone was guilty beyond a reasonable doubt of at least one count of murder in the first degree, that you listen to all the evidence in the second half of the trial, and that after going through and finding that there is an aggravating circumstance proven beyond a reasonable doubt, after believing that aggravation outweighs mitigation, and after you, yourself, and eleven other people believe that death was the appropriate punishment, and you, yourself, would be believing that because if you don=t believe it, you don=t have to vote for it, under those

circumstances, could you sign as a foreman a verdict of death?

Venireperson Giger: I don=t think so. No.

Ms. Turlington: Okay. So even if you firmly believed it, after the process, you do not believe you could sign it?

Venireperson Giger: No. I don=t think so.

(Tr. 570-571). Following voir dire, the State moved to strike Venireperson Giger for cause (Tr. 579). Over appellant=s objection, the trial court struck Venireperson Giger for cause (Tr. 579).

Similar to Venireperson Parrott discussed above, Venireperson Giger expressed difficulty with whether he could vote for the death penalty and stated that he would be unable to sign a death verdict. This demonstrated that Giger=s views on the death penalty would have substantially impaired his performance of his duties as a juror. Therefore, the trial court did not err in sustaining the prosecutor=s strike of Giger for cause. See State v. Christeson 50 S.W.3d 251, 264 -265 (Mo.banc 2001) (AUnder these circumstances, this Court will not dispute the trial court's evaluation that the answers, on the whole, were equivocal and, hence, disqualifying. In light of [the venireperson=s] equivocation about imposing the death penalty, and his unequivocal assertion that he could not sign a verdict form assessing the death penalty, the record supports the conclusion that his views would have substantially impaired the performance of his duties as a juror@); State v. Smith, 32 S.W.3d 532, 544 -545 (Mo.banc 2000) (An uncompromising statement by a juror that he or she refuses to

sign a death warrant hints at an uncertainty underlying the juror's determination to consider the full range of punishment. No panel of twelve jurors, all of whom decided that he or she could not sign a verdict form assessing the death penalty against the defendant, could be said to have the unimpaired ability to consider the appropriateness of the death penalty. The trial court, therefore, did not run afoul of the rule that "the exclusion of venire members must be limited to ... those whose views would prevent them from making an impartial decision on the question of guilt.").

The trial court did not abuse its discretion in striking for cause Venirepersons Parrott and Giger as these jurors= responses demonstrated their views would have substantially impaired their performance as jurors in this case.

Based on the foregoing, this claim should be denied.

IX

The trial court did not err or commit manifest injustice in declining to sustain objections or intervene sua sponte on numerous occasions throughout the trial because (1) to the extent that appellant's claims were preserved for appellate review, the statements and arguments by the prosecutor were proper; and (2) appellant's request that this court review these numerous complaints as Aplain error@ should be rejected, but even if reviewed, these statements and arguments did not amount to manifest injustice.

Appellant alleges that the trial court should have declared a mistrial on its own motion at numerous times during the State=s guilt phase and penalty phase closing arguments for multiple reasons (App.Br. 78-79).

Standard of Review

"[B]oth parties have wide latitude in arguing during the penalty phase of a first-degree murder case." State v. Carter, 955 S.W.2d 548, 558 (Mo. banc 1997), cert. denied, 523 U.S. 1052 (1998); State v. Morrow, 968 S.W.2d 100, 117 (Mo. banc), cert. denied, 525 U.S. 896 (1998). The trial court is vested with broad discretion in controlling the scope of closing argument, and an appellate court will reverse a trial court's ruling with regard to closing argument only if there is an abuse of discretion. State v. Shurn, 866 S.W.2d 447, 460 (Mo. banc 1993), cert. denied, 513 U.S. 837 (1994). An abuse of discretion will not be found unless the prosecutor's comments were clearly unwarranted and had a decisive effect on the jury. State v. Kee, 956 S.W.2d

298, 303 (Mo.App. W.D. 1997).

As for appellant=s unpreserved claims, this Court has stated that relief should be rarely granted on assertion of plain error to matters contained in closing argument, for trial strategy looms as an important consideration and such assertions are generally denied without explication. State v. Clay, 975 S.W.2d 121, 134 (Mo. banc 1998), cert. denied 525 U.S. 1085 (1999). The failure to object during closing argument is more likely a function of trial strategy than of error. State v. Boyd, 844 S.W.2d 524, 529 (Mo.App. E.D. 1992). See also State v. Tokar, 918 S.W.2d 753, 768 (Mo. banc 1996), cert. denied 519 U.S. 933 (1996).

Additionally, in the absence of an objection, the trial court=s options are narrowed to uninvited interference with summation and a corresponding increase of error by such intervention. State v. Clemmons, 753 S.W.2d 901, 907-908 (Mo. banc 1988), cert. denied 488 U.S. 948 (1988). Had objection been made, the trial court could have taken appropriate steps to make corrections. State v. Kempker, 824 S.W.2d 909, 911 (Mo. banc 1992). A party cannot fail to request relief, gamble on the verdict, and then if adverse, request relief for the first time on appeal. State v. McGee, 848 S.W.2d 512, 514 (Mo.App. E.D. 1993). Additionally, appellant has not shown that plain error resulted as appellant has failed to establish that these alleged errors had a decisive effect on the outcome of the trial and resulted in manifest injustice. State v. Clayton, 995 S.W.2d 468, 479 (Mo.banc 1999), cert. denied 528 U.S. 1027 (1999).

Penalty Phase Claims

1. Comment on Smith=s Injuries

And three, whether the defendant was Bthe murder of Harriett Smith involved depravity of mind, and as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make the determination of depravity of mind only if you find the defendant committed repeated excessive acts of physical abuse upon Harriett Smith, and the killing was therefore unreasonably brutal. Well, we can probably argue about what brutal is, but A**I submit to you when you**B**when you get shot in the leg, and shot in the palm, and shot in the wrists, and shot in the torso, and then twice in the head, and again, there is no reason to keep shooting somebody if they=re already dead.**@ You knowB

Mr. Kenyon: I=m going to object, Your Honor. There=s been no evidence in what order those shots came in. That=s misleading the jury.

Mr. Ahsens: This is argument, Your Honor.

The Court: Overruled.

Mr. Ahsens: As I said, there=s no reason to shoot somebody again if they=re already dead. But shooting somebody in a nonlethal fashion repeatedly in order to get information is certainly something here which I suggest to you is exactly what was going on. The information sought was

the location of those drugs.

> And was it unBunBwantonly vile, horrible, and inhuman? Well, these excessive acts of abuse I submit to you were extremely painful. And we do know that the defendant got the drugs, and we do know therefore that he extracted the information he wanted, and he shot her at least six timesBfive or six times. And she was alive, we know, when she was shot because she ran outside bleeding. We know that because the blood was on the seat of Angelia Gamblin=s car, and she was taken back inside.

(Tr. 1695-1697) (emphasis added).

Contrary to appellant=s argument, the prosecutor=s statement, when read in context, did not improperly misstate the facts. Although it is true that Dr. Adelstein testified that he could not tell the sequence of Smith=s wounds**,** the prosecutor=s argument was not an attempt to argue the specific sequence of the wounds, but was an argument based on reasonable inferences from the evidence that appellant shot Smith repeatedly trying to get information from her and that this method of killing her was outrageously wanton and vile and supported the statutory aggravator submitted to the jury. The prosecutor properly argued that appellant had shot her at least once, prior to her running out of the house, and then shot her multiple times, attempting to learn where the drugs were and then ultimately killing her. This was a proper argument based on the record. The trial court did not abuse its discretion in overruling appellant=s objection.

2. Comment on Penalty Phase Instructions

Now, keep in mind we've talked about two steps: proof of statutory aggravating circumstances beyond a reasonable doubt. And you'll all have to unanimously agree that that is so on each count; and if you don't, then you're only option is life in prison without parole.

Your second option is— the second thing is you must find that the statutory— that the aggravating circumstances, that is all the facts in the case taken as a whole are not outweighed by the mitigating circumstances. And if you find unanimously that that is so, then you will have that final point of decision we talked about, with all the options open.

And if you don't— if you find on the other hand that the mitigating circumstances outweigh the aggravating circumstances, you're only choice is life in prison without parole.

(Tr. 1700) (emphasis added).

Contrary to appellant's argument, this statement neither misstated the law nor improperly placed the burden of proof on appellant or require the jury to find beyond a reasonable doubt the aggravators it weighs (App. Br. 120). This argument properly discussed the instructions submitted to the jury. Moreover, the jury was properly instructed and is presumed to follow instructions. State v. Glass, 136 S.W.3d 496, 517 (Mo. banc 2004) cert. denied, 125 S.Ct. 869 (2005); State v. Taylor 134 S.W.3d 21, 30 (Mo.banc 2004), cert. denied, 125 S.Ct. 322 (2004) (this Court has repeatedly found

that MAI-CR3d 314.44 and 314.48 are constitutional and correctly instruct the jury on determination of punishment). Finally, as appellant failed to make any objection to this argument, appellant has failed to demonstrate that the jury failed to follow the instructions or demonstrated that a manifest injustice resulted.

3. Reference to right to ASelf-Defense@

> The question for you is to decide whether all those acts fit the circumstances where someone should be put to death. We don=t do that because it is an easy thing to do. We do that because it is necessary. **Society, just like each one of us as an individual has the right to self-defense, even if that right of self-defense includes killing in order Bagainst an unprovoked attack.**
>
> Mr. Kenyon: Your Honor, I=m going to object to this. This is improper argument. Arguing it=s self defense, deterrence, these are all improper arguments under the law.
>
> Mr. Ahsens: Societal self-defense has all been approved.
>
> The Court: Overruled:
>
> Mr. Ahsens: **Society has the right to defend itself.** And you, as you sit here, right here, right now, represent society. That=s why we have juries. You have to determine whether as a society a triple murderer should face the ultimate penalty, and I suggest to you very strongly that he should. That puts you in the position of having to make that decision, but

that=s why we have juries.

* * * * *

Mr. Ahsens: In considering your verdict, look at everything, but look mostly at what the defendant did because that tells the tale. Talk is cheap; actions count. And unfortunately, they count very heavily against who? Harriett Smith and Michael Wells and Sharon Joann Barnes. Their loved ones will never see them again. There=s no way to write and no way to call. **You are society. We look to you to defend us.**

(Tr. 1701-1703) (emphasis added).

Appellant's claim of error concerns the analogy, commonly used by prosecutors, of "societal self-defense": that the decision of a jury to sentence a defendant to death was similar to--and just as legitimate as--the physical killing of that person during a murderous assault by him on another to save the life of the intended victim. As this Court has noted, a similar argument was upheld by the United States Supreme Court in Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 2190-2191, 2193, 129 L.Ed.2d 133 (1994). State v. Chambers, 891 S.W.2d 93, 108 (Mo.banc 1994). This Court upheld similar "societal self-defense" arguments in State v. Richardson, 923 S.W.2d 301, 322-323 (Mo.banc 1996), cert. denied, 519 U.S. 972 (1996); and State v. Kreutzer, 928 S.W.2d 854, 876 (Mo.banc 1996), cert. denied, 519 U.S. 1083 (1997). This argument properly makes the point that capital punishment and defense of others are both part of the law, and that the former is no less legitimate than the latter.

Richardson, supra; Kreutzer, supra. This argument did not improperly suggest society had more to fear from Earl, who would commit more murders if not sentenced to death and did not place jury in victim=s shoes. As this Court held in Kreutzer, supra:

> Appellant seeks review of the trial court's failure, ***sua sponte***, to prohibit the prosecutor from making the following argument:
>
> Well, society as a whole has the same right to self-defense as [the victim] had. We have the right to stop the predators among us. We have the right to make sure that those predators do not have the opportunity to kill again.
>
> Appellant claims that the argument is indistinguishable from that in *Storey,* 901 S.W.2d at 901-02, in which the prosecutor argued:
>
> I want you to think about that guy right there on the front row, [the victim's brother]. What if he had happened onto this brutal thing and seen his very close sister in the process of [being] murdered? Would he have been justified in taking the Defendant's life? Yes. Without question. Without question.
>
> Contrary to appellant's assertion, the challenged argument in the present case was not improper personalization because it did not suggest personal danger to the jurors or their families. *See Storey,* 901 S.W.2d at 901; *Shurn,* 866 S.W.2d at 464. The challenged argument in the present case is not comparable to the argument found erroneous in *Storey*.

> Rather, the argument under scrutiny here is more similar to the penalty-phase argument upheld by this Court in *Shurn,* 866 S.W.2d at 464, in which the prosecutor made reference to a circumstance, such as sentencing a defendant to death, in which it is legal to take a human life.

Kreutzer, 928 S.W.2d at 876. In the case at bar, the prosecutor made a proper reference to a circumstance where it is legal to take a human life. The prosecutor=s comments were not improper.

4. Statements regarding A Society is still at risk@

> **He says putting him in prison is enough, for life. You know, well, unfortunately, there are people in prison too: prisoners and staff and guards. It=s not like he=s going to be inside of a concrete box with no access to anybody so society is still at risk.**

(Tr. 1725) (emphasis added).

These comments by the prosecutor during rebuttal closing argument were proper statements in response to appellant=s comments that life in prison would be an appropriate sentence and that society would be protected by appellant being sentenced to life imprisonment (Tr. 1704). As this Court held in State v. Ramsey, 864 S.W.2d 320, 332 (Mo.banc 1993) A[t]aken in context, the prosecutor=s argument was in retaliation for an argument by the defense counsel that defendant could be deterred by being in the penitentiary so that >he'll never do anything again.= The argument was not improper.@ See also, Rousan v. State, 48 S.W.3d 576, 585 (Mo.banc 2001) (AThe prosecutor is

allowed to retaliate when defense counsel argues that "a sentence of life imprisonment without the possibility of parole would 'protect society.' " *Id.* Here, the prosecutor was responding that the defense's statement was not necessarily true, as members of society, such as people who worked at the prison, would still come in contact with [the defendant]); State v. Kreutzer, 928 S.W.2d at 875-876) (Prosecutor=s argument that life without parole was not an appropriate sentence because other prisoners would be at risk and deserved to be safe was proper retaliation for defense counsel=s repeated argument that a sentence of life imprisonment without the possibility of parole would Aprotect society@).

Moreover, this argument was proper as it discussed appellant=s character and his future dangerousness. See State v. Chambers, 891 S.W.2d 93, 107 (Mo.banc 1994) (ACharacter and future dangerousness evidence is admissible at penalty phase.@); Simmons v. South Carolina, 512 U.S. 154, , 114 S.Ct. 2187, 2193, 129 L.Ed.2d 133 (1994) (Arguments relating to defendant's future dangerousness ordinarily would be inappropriate at guilt phase of trial, but where jury has sentencing responsibilities in capital trial, many issues that are irrelevant to guilt-innocence determination step into foreground and require consideration at sentencing phase, including defendant's character, prior criminal history, mental capacity, background, age, and future dangerousness.); see also State v. Bucklew, 973 S.W.3d 83, 96 (Mo.banc 1998) (admission of evidence of future dangerousness proper during penalty phase of capital trial).

Finally, appellant failed to make any objection to these comments and has failed to demonstrate any manifest injustice.

5. Reference to Trial Testimony

> **Remember the incidents described by Lt. Trudeau and Officer Ridenour: high speed chases,** arresting him with large amounts of drugs. You know, folks, the man was running drugs and carrying guns and that was a constant state with him, the fact he happened to be nice to some children notwithstanding. Let=s come back to reality here.

(Tr. 1726) (emphasis added). Again, appellant failed to make any objection to this statement. This claim may be reviewed, if at all for plain error. A prosecutor=s argument may make reasonable inferences from the evidence. State v. Weaver, 912 S.W.2d 499, 512 -513 (Mo.banc 1995). This was a reasonable inference from Lieutenant Trudeau=s testimony that appellant had an outstanding warrant for a police pursuit that had occurred a couple of months prior to Trudeau=s arrest of appellant for narcotics possession (Tr. 1309). AA defendant who permits testimony to be introduced at trial without objection cannot later complain about the prosecutor's improper remarks on such evidence during closing argument.@ State v. Williams, 849 S.W.2d 575, 579 (Mo.App. E.D. 1994). Thus, where evidence is introduced without objection, the prosecutor is entitled to argue the evidence. State v. Devereux, 823 S.W.2d 2, 3-4 (Mo.App. E.D. 1991). As this was a proper inference from Lieutenant Trudeau=s testimony, the argument was proper.

Even assuming a misstatement of the facts, this comment was not such that it had any effect on the verdict. State v. Wolfe, 13 S.W.3d 248, 262 -263 (Mo. banc 2000). This was an isolated statement and would not have had any impact on the jury=s determination of punishment.

6. Reference to no Amercy@ for Appellant

> **The defendantBthe defense made a rather eloquent plea for mercy, but I want you to understand what mercy is. Mercy is something that is given by the powerful to the weak and the innocent. You have power. He=s not innocent.** I submit to you that mercy would be inappropriate here. Mercy is not what should control your decision, although it is something you mustByou may consider. What should control your decision is justice. And sometimes justice is necessarily harsh because the acts being punished were equally as harsh.

(Tr. 1726) (emphasis added). Again, appellant offered no objection to this argument. Appellant has not shown a manifest injustice from these comments or even error. Prosecutors may discuss the concept of mercy in their closing arguments because mercy is a valid sentencing consideration, and in that connection may argue that the defendant should not be granted mercy. State v. Deck, 994 S.W.2d 527, 543 -544 (Mo.banc 1999). In this case, the prosecutor simply argued that appellant did not deserve mercy under the facts and circumstances of this case. See also State v. Smith, 781 S.W.2d 761, 772 (Mo. banc 1989), vac'd and remanded, 495 U.S. 916, reaff'd, 790

S.W.2d 241 (Mo. banc), cert. denied, 498 U.S. 973 (1990) (prosecutor's statement was "merely an expression of the simple concept, wholly consistent with our law, that mercy is not necessarily justice in every case"); Nave v. State, 757 S.W.2d 249, 254 (Mo.App. E.D. 1988), cert. denied, 489 U.S. 1059 (1989) (argument which included comment, "when mercy is the rule . . . [t]hen it's not mercy. . .it's just plain weakness," was proper); State v. Rousan, 961 S.W.2d 831, 850-51 (Mo. banc), cert. denied, 524 U.S. 961 (1998).

Moreover, contrary to appellant=s argument that the prosecutor=s statements somehow informed the jury that Athey lacked discretion to exercise mercy,@ (App. Br. 122), looking at the argument in context demonstrates that the prosecutor explicitly informed them that they could consider mercy as a factor but that this case did not warrant Amercy.@ The argument was proper and appellant has failed to demonstrate a manifest injustice.

7. Argument that the facts of the crime warranted the death sentence

> **I=m tempted to say and I think I will: How many people do you get to kill before you stop them cold? If not now, when? If not here, where?**

(Tr. 1732) (emphasis added).

Again, appellant made no objection to this statement at trial. In any event, the prosecutor=s argument was proper. First, these statements were a proper argument regarding two of the statutory aggravators submitted to the jury: that each victim was

killed during the commission of another unlawful homicide. Second, a prosecutor may properly argue that the facts, in this case multiple homicides, support the imposition of the death penalty. State v. Morrow, 968 S.W.2d 100, 117 -118 (Mo.banc 1998) (Prosecutor=s argument focused on the facts of this case warranting the death penalty and argued that justice demanded the death penalty in this case based on these facts); Middleton v. State, 80 S.W.3d 799, 816 -817 (Mo.banc 2002) (Prosecutor=s argument that Ajustice here absolutely demands that these two people's deaths are avenged and that they, this defendant get the death penalty for it, the highest punishment you can give for a crime like this. If you can't give the death penalty for this crime, what kind of crimes are you going to give the death penalty for?@ was a proper open-ended question, inviting the jurors to consider the appropriate punishment for the crime); State v. Lyons, 951 S.W.2d 584, 596 (Mo.banc 1997) (Prosecutor=s argument that AIf this crime doesn't deserve the death penalty, then what crime does? If this criminal does not deserve the death penalty, what criminal would? was proper argument and did not constitute reversible error). Contrary to appellant=s argument, the prosecutor was not arguing appellant=s future dangerousness, which would have been a proper argument, in any event. See Chambers, 891 S.W.2d at 107. These statements were proper and appellant has not demonstrated a manifest injustice.

8. Argument that A All that is necessary for evil to triumph is for good men to do nothing@

Now folks, I=m going to finish up with one thing. **I was struck when**

I read some of what Edmond Burke had to say, English philosopher of the last century; actually, I guess two centuries ago now. He said, Aall that is necessary for evil to triumph is for good men to do nothing.@

You could send him to prison. He knows all about prison. I suggest to you that=s tantamount to doing nothing. It=s not enough. Three people are dead.

(Tr. 1732-1733) (emphasis added).

Once again, appellant failed to make any objection to this argument. In any event, contrary to appellant=s claims, this argument did not suggest appellant=s future dangerousness or that appellant could not be safely sentenced to life in prison (App. Br. 121). This statement was simply the rhetoric designed to convince the jury that life imprisonment was not an appropriate sentence in light of the gravity of the crime, i.e. it was Anothing@ when compared to the grave Aevil@ of killing these three people. See generally State v. Anderson, 79 S.W.3d 420, 439-440 (Mo.banc 2002), cert. denied, 537 U.S. 898 (2002) (No error of law from prosecutor=s similar argument that Aas a much smarter man than I once said, the only thing that is necessary for evil to triumph is for good men, and I suggest good women, to do nothing. I suggest to you that you dare not do nothing.@). Moreover, appellant has not shown that plain error resulted from the lack of a mistrial because he has not shown that the alleged error could not have been cured by measures short of a mistrial, or that it had a decisive effect on the outcome of

the trial.

9. Comment that Appellant Demonstrated No Remorse

> **Remorse? Show me remorse in this case. Remember what Officer Belawski said? He said he simply asked how Joann was. Why? Because he knew that shooting a cop is one thing, killing a cop is something else altogether and he knew.**
>
> Mr. Kenyon: I'm going to object, Your Honor, this is misleading. He's misstating Officer Belawski's testimony. What Officer Belawski said—
>
> Mr. Ahsens: Retaliatory argument.
>
> Mr. Kenyon: —was that he was sorry.
>
> The Court: Overruled.
>
> Mr. Ahsens: Remember, too, that Officer Belawski was his guard and he was there and he heard it.

(Tr. 1728) (emphasis added).

Although appellant objected at trial that this misstated Officer Belawski's testimony, appellant has modified that theory on appeal and now argues that this argument "impermissibly attempted to convert a mitigator into an aggravator" and that it was "based on no evidence." First, the prosecutor is entitled to argue reasonable inferences from the evidence. The jury was not required to accept appellant's self-serving explanation regarding why he was questioning the condition of Officer Barnes. It was a reasonable inference that appellant was not showing remorse (especially

considering he never asked about the conditions of Smith or Wells) but was considering future charges since he had shot an officer. The prosecutor could properly rebut appellant=s argument on why appellant inquired about the condition of Officer Barnes. See State v. Kenley, 952 S.W.2d 250, 271-272 (Mo.banc 1997) (Where defendant had apologized to victim=s family and argued that apology demonstrated that he had turned over a new leaf, prosecutor entitled to argue that defendant had other potential motives for his behavior such as apologizing was in his best interest for appearance at trial). A prosecutor may argue that a defendant failed to exhibit remorse. See State v. Tokar, 918 S.W.2d 753, 769 (Mo.banc 1996), cert. denied, 519 U.S. 933 (1996); Anderson, supra; State v. Richardson, 923 S.W.2d 301, 321-323 (Mo.banc 1996).

Second, appellant=s claim that the prosecutor Aimpermissibly attempted to convert a mitigator into an aggravator,@ citing to Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1993), is nonsensical. Zant, does not stand for the proposition that a prosecutor cannot argue that the facts support aggravation or that certain facts may only be considered by the jury as mitigating; rather, Zant, held that although after imposition of death penalty the Georgia Supreme Court invalidated statutory aggravating circumstance of substantial history of serious assault of criminal convictions, death penalty was not required to be vacated where jury expressly found existence of two other valid statutory aggravating circumstances. Jurors may interpret facts differently and may see some facts, even though offered in mitigation as aggravating. See

Skillicorn v. State, 22 S.W.3d 678, 685 (Mo.banc2000) (Even if offered as mitigating evidence, jurors may find that chemical abuse is an aggravating factor engendering no sympathy for the defendant). This was a reasonable inference from the testimony; the trial court did not err.

Guilt Phase Claims

10. Deliberation

> Did he know what he was doing? If for no other reason, he had the opportunity to deliberate when he was loading that gun and walking to the door and keeping it hidden behind his leg. Oh, yeah, he deliberated. **Did he deliberate—did he deliberate after the first shot? He had time. Did he deliberate after the second shot? He had time again. After the third? He had adequate time then. He kept shooting, didn=t he?** Oh, yeah, there=s deliberation here, three times over.

(Tr. 1249) (emphasis added). Appellant failed to make any objection to this argument during guilt phase but now argues on appeal that this argument misstated the law, encouraging the jury Ato ignore first degree murder=s distinguishing characteristic of deliberation—Acool reflection,@ not merely Apassage of time@ (App. Br. 123). However, upon looking at the State=s entire argument, not just the isolated statement appellant now complains of, it is readily apparent that the State was arguing all of the facts that **together** demonstrated that appellant deliberated—including, that appellant brought a gun with him to the house, that he hid the gun on his person, that there had been a falling out

with Smith and that he had been angry with her for over a year, that Smith was shot multiple times at close proximity in vital parts of her body, that he shot her in order to get the methamphetamine, that Wells was also shot at A point-blank range in a vital part of his body, his head, that he killed Barnes by ambush, firing repeatedly, that he loaded the weapon before firing, and that he fired multiple times (Tr. 1245-1246). This was the argument that the prosecutor was making Bthat all of the facts surrounding the crimes, including the multiple shots, demonstrated that appellant deliberated. 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); State v. Clay, 975 S.W.2d 121, 139 (Mo. banc 1998), cert. denied, 525 U.S. 1085 (1999); State v. Howard, 896 S.W.2d 471, 480 (Mo.App. S.D. 1995). These statements were not improper.

11. Multiple Wounds as Evidence of Deliberation

> **Now, is the fact that you knowingly shoot somebody enough to be deliberation? In and of itself, no. But certainly if you pull the trigger twice, was there time to deliberate? You bet there was. And he shot Harriett Smith five or six times.**

(Tr. 1261-1262) (emphasis added). As with the immediately preceding claim, appellant claims that this argument misstated the law on deliberation. However, as can be seen, the prosecutor is arguing whether appellant had time to deliberate. And, in any event,

as discussed above, evidence regarding multiple wounds is evidence of deliberation. Ervin, supra; Clay, supra; Howard, supra.

The trial court did not err or plainly err in failing to declare a mistrial or in overruling appellant=s objections because the prosecutor=s statements were not improper and appellant has failed to demonstrate prejudice or a manifest injustice.

Based on the foregoing, this claim should be denied.

X.

The trial court did not plainly err in overruling appellant=s motion for judgment of acquittal or in failing to sua sponte declare a mistrial when the prosecutor argued that the facts supported deliberation because the prosecutor=s argument was proper in that the prosecutor argued that all of the facts including the multiple wounds, type of wounds, time, and all other facts demonstrated deliberation.

Moreover, appellant=s claim that there is no distinction between murder in the first degree and murder in the second degree should be denied as this claim has been repeatedly denied by this Court.

As in Point IX, appellant again alleges that the prosecutor improperly argued the element of deliberation in closing argument (App. Br. 125). Specifically, appellant alleges that the prosecutor told the jury that because appellant had time to deliberate, then he must have done so (App. Br. 125). Appellant also alleges that there is no distinction between murder in the first degree and murder in the second degree as the definition of deliberation is vague (App. Br. 125).

"[D]eliberation does not require proof the defendant contemplated his actions for a long period of time, and it may be implied from the circumstances." State v. Shaw, 14 S.W.3d 77, 86 (Mo.App.E.D. 1999). "Deliberation may be properly inferred where the defendant had ample opportunity to terminate the crime as well as where the victim sustained multiple wounds or repeated blows." Id. Evidence of a prolonged struggle,

multiple wounds, or repeated blows may also support an inference of deliberation." State v. Ervin, 979 S.W.2d 149, 159 (Mo. banc 1998), cert. denied 525 U.S. 1169 (1999); State v. Johnston, 957 S.W.2d 734, 748 (Mo.banc 1997), cert. denied, 522 U.S. 1150 (1998). Evidence that a defendant prepared to commit murder—and therefore had an opportunity to abandon that plan before carrying it out—supports an inference of deliberation. See Johnston, 957 S.W.2d at 747-748; State v. Roberts, 948 S.W.2d 577,590 (Mo.banc 1997). Evidence of multiple wounds to the victims may support an inference of deliberation. State v. Tisius, 92 S.W.3d 751, 764 (Mo.banc 2002); State v. Ervin, 979 S.W.2d 149,159 (Mo.banc 1998), cert. denied 525 U.S. 1169 (1999).

As discussed above in Point IX, the State did not argue that merely because there was time to deliberate, that appellant must have deliberated. Rather, the entire argument reflects that the State argued that all of the facts surrounding the crime supported a finding of deliberation.

The State argued that all of the facts that **together** demonstrated that appellant deliberated—including, that appellant brought a gun with him to the house, that he hid the gun on his person, that there had been a falling out with Smith and that he had been angry with her for over a year, that Smith was shot multiple times at close proximity in vital parts of her body, that he shot her in order to get the methamphetamine, that Wells was also shot at a point-blank range in a vital part of his body, his head, that he killed Barnes by ambush, firing repeatedly, that he loaded the weapon before firing, and that he fired multiple times (Tr. 1245-1246). The State=s argument demonstrates that the

evidence of multiple wounds, the time between shots, and appellant=s planning inferred that appellant had deliberated. The prosecutor did not improperly define or argue deliberation.

As for appellant=s attack on the definition of deliberation, claiming that it does not adequately distinguish first-degree murder from second-degree murder, this argument has been previously considered and rejected by this Court. State v. Middleton, 998 S.W.2d 520,524 (Mo. banc 1999), cert. denied 528 U.S. 1167 (2000); State v. Rousan, 961 S.W.2d 831,851-52 (Mo. banc), cert. denied, 524 U.S. 961 (1998). As this Court stated in Rousan:

> Contrary to appellant's assertions, the statutory language of chapter 565 and this Court's decisions clearly distinguish first from second degree murder. A person commits the crime of second degree murder if he "knowingly causes the death of another person." Section 565.021.1(1). A person commits the crime of first degree murder if "he knowingly causes the death of another person after deliberation upon the matter." Section 565.020.1. "Deliberation" is 'cool reflection for any length of time no matter how brief." Section 565.002(3). The element of deliberation is the element that separates first degree and second-degree murder. . . . Only first degree murder requires "the unimpassioned premeditation that the law calls deliberation." . . . The statutory language of chapter 565 and this Court's decisions, therefore, plainly distinguish between second and first

degree murder by requiring cool reflection for a conviction of murder in the first degree.

Rousan, S.W.2d at 851-52.

Based on the foregoing, this claim should be denied.

XI.

The trial court did not err in overruling appellant=s objection to Instruction 5, the voluntary intoxication instruction, because this instruction does not mislead the jury or relieve the State of its burden of proof in that the jury is specifically instructed that the State must prove every element of the crime beyond a reasonable doubt.

Appellant alleges that the trial court erred in overruling appellant=s objection to Instruction 5, the voluntary intoxication instruction (App. Br. 134). Appellant alleges that the instruction denies appellant the right to present a defense, the ability to rebut the State=s case and fails to hold the State to proof beyond a reasonable doubt because the instruction=s language informs the jury not to consider appellant=s intoxication in determining mental state which shifts the burden of proof to the defense (App. Br. 134).

This Claim has been repeatedly denied by the Courts of this State as the jury is properly instructed that the State must prove every element of the crime beyond a reasonable doubt. In addressing this same issue, this Court in State v. Taylor, 944 S.W.2d 925, 936 (Mo.banc 1997), found that:

> Taylor also claims that the revised version of MAI-CR3d 310.50 fails to remedy the constitutional flaw found in the earlier version of MAI-CR3d 310.50. State v. Erwin, 848 S.W.2d 476, 483-84 (Mo. banc), cert. denied, 510 U.S. 826, 114 S.Ct. 88, 126 L.Ed.2d 56 (1993). This Court held that the prior pattern instruction (which read "You are instructed that an

intoxicated condition from alcohol will not relieve a person of responsibility for his conduct") implicitly relieved the State of its burden of proof of intent. *Erwin,* 848 S.W.2d at 483-84. Since Erwin, MAI-CR3d 310.50 was revised to include the opening sentence: "The state must prove every element of the crime beyond a reasonable doubt." MAI-CR3d 310.50 (effective 10-1- 94). The current instruction "explicitly directs the jury's attention to the state's burden to prove every element of the crime." State v. Bell, 906 S.W.2d 737, 740 (Mo.App.1995); See State v. Armstrong, 930 S.W.2d 449, 451- 52 (Mo.App.1996). There is no constitutional error in Instruction 5.

See also State v. Johnson, 968 S.W.2d 686, 694 (Mo.banc 1998); State v. Armstrong, 930 S.W.2d 449, 450 -453 (Mo.App. S.D. 1996); State v. Bell, 906 S.W.2d 737, 739 - 740 (Mo.App. E.D. 1995).

Based on the foregoing, this claim should be denied.

XII.

The trial court did not plainly err in submitting instructions no. 4 and 19 and the oral instruction based on MAI-CR3d 300.02 defining reasonable doubt because that instruction was constitutional.

Appellant challenges the constitutionality of the definition of reasonable doubt in the instructions submitted to the jury (App. Br. 143).

This claim has been repeatedly denied by both this Court and the Federal Courts. State v. Johnson, 22 S.W.3d 183, 192 (Mo.banc 2000); State v. Wolfe, 13 S.W.3d 248, 264 (Mo.banc 2000); State v. Johnson, 968 S.W.2d 686, 694-95 (Mo. banc 1998); State v. Simmons, 955 S.W.2d 752, 764, 771 (Mo. banc 1997), cert. denied 552 U.S. 1129 (1998); State v. Simmons, 944 S.W.2d 165, 180 (Mo. banc 1997), cert. denied 522 U.S. 953 (1997); Harris v. Bowersox, 184 F.3d 744, 750-52 (8th Cir. 1999), cert. denied 120 S.Ct. 840 (2000); Murray v. Delo, 34 F.3d 1367, 1381-82 (8th Cir. 1994), cert. denied 515 U.S. 1136 (1995). Appellant gives no new arguments for a change in this law. This claim should be denied.

XIII.

The trial court did not err in admitting Sheriff Wofford=s testimony regarding other officers statements and Officer Roark=s testimony about Angelia Gamblin statements because their testimony did not improperly Abolster@ other testimony but was merely cumulative and appellant was not prejudiced in that these isolated statements had no effect on the jury=s determination of guilt.

Appellant alleges that the trial court erred in admitting Sheriff Wofford=s testimony Aabout Officers= Sigman and Piatt=s statements and Officer Roark=s testimony about Angelia Gamblin=s statements@ (App. Br. 148). Appellant alleges that this testimony was hearsay and was offered Asolely to bolster the in-court testimony of these witnesses@ (App. Br. 148)

During trial, Officer Wofford, while describing the events surrounding appellant shooting him and the murder of Officer Joann Barnes, offered the following testimony, relevant to this claim:

> Q. Was there any other firingBgunfire from the house while you waited?
>
> A. There were officers that arrived, and there was gunfire after Sgt. Sigman and Officer Piatt showed up, too.
>
> Q. Was that gunfire from the house?
>
> A. I couldn=t really tell. They heardBand they said there were sparksB

Ms. Turlington: Objection. This is hearsay.

A. BI mean, they thought from the house. They couldn=t tell.

Court Reporter: I couldn=t hear your objection.

Ms. Turlington: Hearsay.

The Court: Overruled. And would you please answer the question, Sheriff.

Mr. Ahsens: Go ahead and answer the question again.

A. They thought the gunfire was coming from the house. Yes. I wasn=t hearing that well at that time.

(Tr. 1179). Appellant alleges that Sheriff Wofford=s testimony that Officers Sigman and Piatt thought that there was gunfire coming from the house was hearsay and was offered solely to bolster Officer Sigman=s previous testimony that after he and Officer Piatt arrived at appellant=s residence, they heard gunfire coming from the residence (Tr. 1007-1009).

Appellant also claims that the following testimony from Officer Roark was hearsay and improperly bolstered Angelia Gamblin=s trial testimony that the Sheriff had shot her and that appellant shot first:

Q. What did she tell you had occurred?

Mr. Kenyon: I=m going to object to this. This is hearsay.

The Court: Is she a witness in this cause?

Mr. Ahsens: She is.

The Court: OverruledB

Q. (By Mr. Ahsens) You mayB

The Court: Bwith the understandingB

Mr. Ahsens: She willBshe will be called and she will testify.

The Court: Overruled. You can answer the question.

A. Of course I asked her her name. She identified herself. I asked her to tell me what happened. As I recall she responded, ABob WoffordBor ASheriff Wofford shot me.@ I asked her if Earl Forrest had fired a shot. She replied that he had. And I asked her who fired first. She replied that Earl fired first.

(Tr. 1024-1025).

Although appellant objected to these statements as hearsay, appellant offered no objection at trial that these statements were improper bolstering. Thus, appellant has changed his claim on appeal and his claim is not preserved. Thus, he is entitled to plain error review, if any review at all. In order to be entitled to relief, appellant must demonstrate that he suffered a manifest injustice. Appellant has not.

Regardless of whether these statements were offered for their truth or to establish the conduct of the officers, this testimony certainly did not Abolster@ the other testimony. These were each isolated statements regarding whether gunfire was heard from the house and whether appellant had shot first. This testimony was at best cumulative, but Sheriff Wofford and Officer Roark=s testimony certainly did not Awholly duplicate@ the

testimony of Officer Sigman or Angelia Gamblin as was this Court=s concern in State v. Seever, 733 S.W.2d 438, 441 (Mo.banc 1987) cited by appellant (App. Br. 150-151) where this Court found that a child=s statement that was wholly duplicative of the child=s in-court testimony improperly bolstered the child=s testimony and Aeffectively allowed the witness to testify twice.@ Each of these witnesses testified to the events surrounding them on the day of the murders. Their testimony each had independent value. See State v. Redman, 916 S.W.2d 787 (Mo.banc 1996); State v. Collis, 849 S.W.2d 660, 667 (Mo.App. W.D. 1993); State v. Tringl, 848 S.W.2d 29, 31 (Mo.App. E.D. 1993). The testimony was not wholly duplicative, each witness=s testimony had independent probative value explaining the events that occurred and appellant has failed to demonstrate that he suffered a manifest injustice or was prejudiced in that these isolated statements had no effect on the jury=s determination of guilt.

Based on the foregoing, this claim should be denied.

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 9 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 November, 2005.

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RESPONDENT'S APPENDIX

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