No. 89895

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

TERRANCE ANDERSON,

Appellant.

Appeal from Cape Girardeau County Circuit Court
Thirty-Second Judicial Circuit
The Honorable William L. Syler, Judge

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

Appellant was convicted of two counts of first-degree murder, § 565.020,[1] in the Circuit Court of Cape Girardeau County and sentenced to life without parole and death. In *Anderson v. State,* 196 S.W.3d 28 (Mo. banc 2006), this Court vacated Appellant's death sentence and remanded the case for another penalty phase. On remand, Appellant was again sentenced to death. Because the sentence of death was imposed, the Supreme Court of Missouri has exclusive appellate jurisdiction over this appeal. Mo. Const. Art. V, § 3.

[1] Unless otherwise noted, all statutory references are to RSMo 1994.

STATEMENT OF FACTS

Appellant, Terrance Anderson, was convicted of two counts of first-degree murder, § 565.020, and sentenced to life without parole and death. *State v. Anderson*, 79 S.W.3d 420 (Mo. banc 2002). After those convictions were affirmed on appeal, Appellant filed a Rule 29.15 motion, and his death sentence was vacated. *Id.*; *Anderson v. State*, 196 S.W.3d 28 (Mo. banc 2006). The case was remanded for resentencing on the murder of Deborah Rainwater, and a second penalty phase was conducted on November 6 through 12, 2008 (L.F. 32-33). The evidence at sentencing showed:

Appellant had been involved in a romantic relationship with the victims' older daughter, Abby Rainwater[2] (Tr. 657). Abby was 16 years old and Appellant was 21 years old (Tr. 642, 751). In 1996, Abby found out she was pregnant with Appellant's child (Tr. 643-644, 660). Shortly before the baby was born, Appellant and Abby broke up (Tr. 644, 666). Appellant continued to see Abby because he wanted to be involved in his child's life (Tr. 667).

In July of 1997, Abby told her father that Appellant had been abusing her (Tr. 643, 678). On July 25, 1997, Abby's father, Steven Rainwater, helped her to get a restraining order against Appellant (Tr. 644-645). That afternoon, Abby told Appellant about the restraining order over the telephone, and she said that visitation with their child would be worked out by the courts (Tr. 646). Appellant was angry (Tr. 646).

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[2] The first names of the members of the victims' family have been used throughout because they all have the same last name. No disrespect is intended.

That night, Abby and some of her friends were hanging out in the basement (Tr. 642). They heard a knock at the window (Tr. 642, 647). They told Steven, and together they investigated, but did not see anything (Tr. 647-648). Steven decided to drive around the neighborhood to make sure (Tr. 648). Abby and her friends waited in the living room with Abby's mother, Deborah Rainwater; Abby's baby; and Abby's younger sister, Whitney Rainwater (Tr. 648).

About ten minutes later, the doorbell rang (Tr. 691). One of Abby's friends looked out the window and saw Appellant with a gun (Tr. 691). Appellant kicked in the door (Tr. 692). Deborah told Abby to run, and Abby left out the back door, heading to a neighbor's house to call 911 (Tr. 649-650). Whitney started to go with her (Tr. 719).

Appellant entered the home yelling at Deborah (Tr. 628). Appellant forced Deborah to her knees (Tr. 791). She had Abby's baby in her arms, and she was begging Appellant not to shoot her (Tr. 628). Appellant said "I told you I was going to do this," and then he fired the gun (Tr. 630).

When Whitney heard the gun, she went back into the house (Tr. 719-720). She pulled the baby from under her mother's body (Tr. 720). She tried to hide, but the baby was crying and so Appellant found them (Tr. 721). Appellant took Whitney and the baby out front (Tr. 721-722). Appellant made Whitney yell for Abby to come back (Tr. 722). Appellant said that if Abby did not return, he would shoot the baby (Tr. 722). He put the gun to the baby's head (Tr. 633).

About this time, Steven returned (Tr. 723). Appellant told Whitney to hide, then went out to meet Steven (Tr. 723). They spoke for a moment, and then Appellant shot Steven in the head (Tr. 724, 779-781).

After shooting Steven, Appellant took the girls back inside (Tr. 724). He forced Whitney to search the house for the others (Tr. 724). She found one of Abby's friends, but did not reveal the girl's location to Appellant (Tr. 724-725). Shortly thereafter, the police began to arrive (Tr. 781). The police set up a perimeter around the house and ordered Appellant to come out (Tr. 553, 557-556). After some delay, Appellant surrendered (Tr.554-556).

As part of his case in mitigation, Appellant testified. He admitted the shootings (Tr. 775). He further admitted that when he went to the house that night he intended to kill Steven, Deborah, and Abby (Tr. 787, 795-796). He also stated that he wanted to be involved in the baby's life but that he was angry because the Rainwaters had restricted his access to the child both in the past and on the day of the murders (Tr. 756, 774-775).

Appellant also presented evidence of his background. He presented evidence that he was on his high school basketball team during all four years (Tr. 805-810). Appellant received a scholarship to college for basketball and track, but had to come home before completing his first year (Tr. 812, 815). Appellant also presented evidence that he was behaving well in prison (Depo. of Donald P. Roper; Tr. 832-833).

The jury found two statutory aggravators—that "The murder of Deborah Rainwater was committed while the defendant was engaged in the commission of another unlawful homicide of Stephen Rainwater," and that "The murder of Deborah Rainwater involved

depravity of mind … [in that] the defendant killed Deborah Rainwater as part of the defendant's plan to kill more than one person." (L.F. 189). The jury assessed Appellant's punishment at death for the murder of Deborah, and the court sentenced Appellant in accordance with that recommendation (L.F. 225-228).

ARGUMENT

Point I

Appellant was not prejudiced by any error in Instruction No. 10, because the instructions, when read as a whole, properly informed the jury how to consider mitigating evidence.

Appellant claims that the trial court erred to his prejudice in giving Instruction 10 because that instruction "failed to include required language instructing the jury that if it 'decide[d] that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment' the verdict must be life imprisonment." (App. Br. 32). While the court probably should have given an instruction which incorporated the 2004 revisions to the approved instruction, the instructions, when taken as a whole, did not mislead the jury because Instructions No. 8 and No. 9 informed the jury how to consider mitigating evidence and made plain that the jury was not required to return a verdict of death.

A. Standard of Review

Claims of instructional error are reviewed for both error and prejudice. *State v. Zink*, 181 S.W.3d 66, 74 (Mo. banc 2005). Reversal is only warranted where "the error was so prejudicial that it deprived the defendant of a fair trial." *State v. Middleton*, 995 S.W.2d 443, 452 (Mo. banc 1999).

B. Analysis

"MAI instructions are presumptively valid and, when applicable, must be given to the exclusion of other instructions." *State v. Zink*, 181 S.W.3d 66, 74 (Mo. banc 2005). In capital cases, juries are given an instruction referred to as the "verdict mechanics"

instruction; for crimes occurring prior to August 28, 2001, but after August 28, 1993, the pattern instruction is MAI-CR 3d 313.48A. MAI-CR 3d 313.48A, Notes on Use 1. This instruction summarizes the process the jury should use in considering the evidence, explains which verdict forms the jury should complete, and tells the foreman how to fill in the appropriate forms. *See State v. Storey*, 40 S.W.3d 898, 913 (Mo. banc 2001).

Where there is a retrial of the punishment phase alone, the capital penalty phase instructions are modified in certain respects. MAI-CR 3d 313.00, Notes on Use 6. These modifications are laid out in the Appendix to MAI-CR 3d 313.00. The modified version of MAI-CR 3d 313.48A contained in the Appendix to MAI-CR 3d 313.00 was used in Appellant's case. This modified version of MAI-CR 3d 313.48A was patterned after the September 1, 2003 version of MAI-CR 3d 313.48A.

In 2004, the regular version of MAI-CR 3d 313.48A was revised to include language regarding the jury's consideration of evidence in mitigation. *Compare* MAI-CR 3d 313.48A (September 1, 2003) *with* MAI-CR 3d 313.48A (January 1, 2004). More specifically, the 2004 revision added the following paragraph:

> If you unanimously decide that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, then the defendant must be punished for the murder of [*name of victim in this count*] by imprisonment for life by the Department of Corrections without eligibility for probation or parole, and your foreperson will sign the verdict form so fixing the punishment.

MAI-CR 3d 313.48A (January 1, 2004). But, while the regular MAI was revised, the modified version of MAI-CR 3d 313.48A, which is included in the appendix to MAI-CR3d 313.00, was not revised. Thus, the "verdict mechanics" instruction submitted in Appellant's case, Instruction No. 10, omitted the paragraph added in 2004. [3]

Given the revisions of the regular instruction in 2004, the trial court probably should have drafted Instruction No. 10 to comply with the body of the current version of the regular MAI-CR 3d 313.48A, while modifying the first paragraph as suggested by the Appendix to the Notes on Use for MAI-CR 3d 313.00. But, this error, if it was one, did not misdirect the jury.

A change in a pattern instruction does not mandate the conclusion that the prior version incorrectly instructed juries on the law. *State v. Richardson*, 923 S.W.2d 301, 318 (Mo. banc 1996). Here, the 2004 revision to the verdict mechanics instruction was not based on a change in the law, but was simply part of the ongoing effort to clarify the current instructions. The Notes on Use do not specify any change in the law motivating the

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[3] The ordinary MAI-CR 3d 313.48A was also revised in 2006 to accommodate the holding in *Roper v. Simmons*, 543 U.S. 551 (2005), by adding further optional language regarding the defendant's age. *See* MAI-CR 3d 313.40A (March 1, 2006), Notes on Use 2; *compare* MAI-CR 3d 313.48A (January 1, 2004) *with* MAI-CR 3d 313.48A (March 1, 2006). The modified MAI used in Appellant's case did not include this revision, but, as there was no dispute that Appellant was over the age of eighteen at the time of the crimes, there was no need to use any of the language from the 2006 revision.

alteration, *see* MAI-CR 3d 313.48A (2004), Notes on Use; thus, it appears that the revision was prompted by the Court's continuing desire to find the best means of instructing the jury. Consequently, Appellant was not prejudiced by the fact that the jury in his case was instructed using an older version of the approved instruction because that instruction still complied with the applicable law.

"Jury instructions are not to be viewed in isolation, but are to be taken as a whole to determine whether error occurred." *State v. Storey*, 40 S.W.3d 898, 912 (Mo. banc 2001). The "absence of language in a particular instruction does not prejudice the defendant if the subject matter is covered and provided elsewhere in the instruction." *State v. Sandles*, 740 S.W.2d 169, 173 (Mo. banc 1987). And, in fact, this Court has specifically and repeatedly held that the prior version of MAI-CR 3d 313.48A properly instructs the jury, even though it does not contain the mitigation-evidence paragraph that was added in 2004. *State v. Cole*, 71 S.W.3d 163, 176 (Mo. banc 2002); *State v. Tisius*, 92 S.W.3d 751, 770 (Mo. banc 2002); *State v. Storey*, 40 S.W.3d 898, 913 (Mo. banc 2001).

For example, in *Storey*, the defendant argued that language mentioning mitigating circumstances should have been included in the verdict mechanics instruction. 40 S.W.3d at 913. The Court held that there was no prejudice from this omission because the jury was properly instructed on the consideration of the evidence in the proceeding instructions. *Id.* Hence, the court concluded that "these instructions in no way precluded the jury from giving effect to the mitigating evidence." *Id.* at 914.

Here, as in *Storey*, the jury was properly instructed on the consideration of mitigating circumstances in Instruction No. 8. Instruction No. 8, based on MAI-CR3d 313.44A, told

the jury how to perform the "weighing step" of the penalty phase deliberations (L.F. 167). The jurors were instructed that they should consider the three listed statutory mitigators and "any other facts or circumstances which [they] find from the evidence in mitigation of punishment." (L.F. 167). Then the instruction stated that "[i]f each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the evidence in mitigation of punishment, then [they] must return a verdict fixing defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole." (L.F. 167). Since this instruction included language explaining to the jurors how to consider the mitigation evidence and what to do if they found the mitigating evidence sufficient to outweigh the evidence in aggravation, Appellant was not prejudiced by the omission of that language from the verdict mechanics instruction. *Storey*, 40 S.W.3d at 913-914.

Appellant's reliance on *State v. McClure*, 632 S.W.2d 314 (Mo. App. S.D. 1982), is misplaced. Appellant cites *McClure* for the proposition that an "error is not cured by a separate instruction covering the defense." (App. Br. 36). This argument ignores the fact that *McClure* involved the omission of a special negative defense from the verdict director. 632 S.W.2d at 317. While the defendant bears the burden of proof on an affirmative defense such as not guilty by reason of insanity, the State bears the burden of disproving special negative defenses. *State v. Wilkerson*, 616 S.W.2d 829, 835-836 (Mo. banc 1981). A special negative defense functions much like an additional element because it must be disproven by the State beyond a reasonable doubt. *See id.* Where that defense is not included in the verdict director, the jury is not instructed that the State must disprove the defense beyond a

reasonable doubt. *McClure*, 632 S.W.2d at 317. But mitigation evidence is not subject to such a requirement. *See, e.g.*, *State v. Gill*, 167 S.W.3d 184, 193 (Mo. banc 2005). Hence, a separate instruction describing the consideration of mitigating evidence is sufficient to assure that the jury will properly consider such evidence. To hold otherwise would be contrary to this Court's decisions in *State v. Cole*, 71 S.W.3d 163, 176 (Mo. banc 2002); *State v. Tisius*, 92 S.W.3d 751, 770 (Mo. banc 2002); and *State v. Storey*, 40 S.W.3d 898, 913 (Mo. banc 2001).

Appellant also relies on *Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002). He argues that *Deck*, which discussed the omission of language required by MAI-CR3d 313.44A, is similar to the present case because both resulted in the omission of "all mention of mitigating circumstances and evidence." (App. Br. 40). This reliance is misplaced because the cases are factually distinct.

In *Deck*, the trial court used the same version of the verdict mechanics instruction as was used in this case, but, unlike in the present case, the instruction for the "weighing step" (MAI-CR 3d 313.44A) was erroneous. 68 S.W.3d at 423. The instruction for the weighing step in *Deck* omitted the final two paragraphs of the approved instruction, with the result that the jury was not instructed that they should "also consider any (other) facts or circumstances which you find from the evidence in mitigation of punishment." *Id.* Thus, in that case, the jury was not properly instructed on how to consider mitigating evidence.

Here, in contrast, the jury was properly instructed on how to consider mitigating evidence in Instruction No. 8 (L.F. 167). Consequently, the omission of the language from the verdict mechanics instruction was not prejudicial. *See State v. Cole*, 71 S.W.3d 163, 176

(Mo. banc 2002); *State v. Tisius*, 92 S.W.3d 751, 770 (Mo. banc 2002); *State v. Storey*, 40 S.W.3d 898, 913 (Mo. banc 2001).

Appellant's reliance on *Deck* is further misplaced because the circumstances in this case were much different from those in *Deck*. The Court in *Deck* noted several facts which supported its finding of prejudice, including the lack of discussion of mitigation during voir dire and the fact that the jury expressed confusion regarding the definition of mitigation. 68 S.W.3d at 430-431. The Court specifically stated that the omission in that case was not "so inherently erroneous that it will always result in prejudice. … Each case must be decided on its own facts." *Id.* at 431.

None of the additional factors which the Court found prejudicial in *Deck* are present in this case. First, the concept of mitigation was discussed during voir dire. The assistant attorney general who tried the case explained to each panel of the venire the way the law directs fact-finders to consider evidence in aggravation and evidence in mitigation (Tr. 73-75,133-136, 197-201, 244-249, 306-311). He also asked them if they could follow that process (Tr. 73-75,133-136, 197-201, 244-249, 306-311). Appellant's counsel also asked each panel whether they would still be able to consider a life sentence even though Appellant had already been convicted of two murders (Tr. 103,156-157, 213-214, 273-274, 331-332).

Second, the jury did not ask any questions indicating they were confused about the instructions regarding mitigation. The only question they asked was about taking a break for lunch (Tr. 928). Given the discussions during voir dire and the lack of any sign of confusion on the part of the jury, there is no indication that Appellant was prejudiced by the omission of language in Instruction No. 10.

C. Conclusion

Although it would have been correct to give the current version of MAI-CR 3d 313.48A (with the modification contained in the Appendix to MAI-CR 3d 313.00), the trial court did not commit reversible error when it denied Appellant's objection to Instruction No. 10 and gave a verdict mechanics instruction patterned after the earlier approved instruction. The instruction did not misstate the law, and, when read in combination with the other instructions, the jury was properly informed about how to consider mitigating evidence. In short, any error in submitting Instruction No. 10 was not prejudicial. Appellant's first point should be denied.

Point II

The trial court did not err in denying Appellant's motion to dismiss based on allegations of a faulty charging document and double jeopardy. The State was not required to plead the statutory aggravators in the information or indictment, and in Appellant's first trial the jury convicted Appellant of first-degree murder and sentenced him to death. Consequently, Appellant was simply retried after he succeeded in overturning his conviction on appeal.

Appellant argues that the State was prohibited from seeking the death penalty on retrial because he was not actually convicted of "aggravated murder in the first degree" at his first trial (App. Br. 47). Citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002), and other cases, Appellant points out that a defendant can only be convicted of the crime with which he is charged (App. Br. 46-47). Based on this principle, Appellant asserts that he could not have been convicted of "aggravated murder" in his first trial because the State did not include the aggravating circumstances in the original charging document (App. Br. 46-47). Appellant finally concludes that the penalty phase of his trial could not be retried because that action would result in his being tried for a greater offense after conviction for the so-called lesser included offense of "non-aggravated" murder in the first degree (App. Br. 49-50).

But Appellant's conclusion that the State could not seek the death penalty on retrial rests on a fundamental misunderstanding of the law. In Missouri, as this Court has repeatedly held, there is only one crime of murder in the first-degree, and the State is not required to plead aggravating circumstances in the information or indictment so long as the

defendant has notice of the State's intent to seek the death penalty. *State v. Gill*, 167 S.W.3d 184, 193-194 (Mo. banc 2005); *State v. Glass*, 136 S.W.3d 496, 513 (Mo. banc 2004); *State v. Edwards*, 116 S.W.3d 511, 543 (Mo. banc 2003).

This rule distinguishes Missouri practice from federal practice. In the federal courts, pursuant to the indictment clause of the Fifth Amendment, the charging document must include each fact that the jury must find in order to impose a specified punishment. *Jones v. United States*, 526 U.S. 227, 251-252 (1999). But the indictment clause is not applicable to the states, *State v. Glass*, 136 S.W.3d 496, 513 (Mo. banc 2004), and in a state proceeding, due process under the Sixth Amendment is satisfied where the defendant receives notice of the State's intent to seek increased punishment and the facts necessary to impose that increased punishment are found by a jury. *State v. Johnson*, 207 S.W.3d 24, 48 (Mo. banc 2006); *State v. Gill*, 167 S.W.3d 184, 193-194 (Mo. banc 2005); *State v. Edwards*, 116 S.W.3d 511, 543 (Mo. banc 2003).

In the present case, Appellant was properly charged with first-degree murder (L.F. 1). Appellant received notice of the State's intent to seek the death penalty when the State filed its "Notice of Aggravating Circumstances" on September 23, 1997 (L.F. 2). The jury in Appellant's first trial found each of the aggravating circumstances beyond a reasonable doubt. *State v. Anderson*, 79 S.W.3d at 429; (L.F. 189). Thus, the requirements of *Apprendi* and subsequent cases applying it were satisfied.

Appellant recognizes this Court's previous decisions, but he asserts that the United States Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004), compels a

different result. Appellant argues that this Court's previous decisions rest on the same rational used by the government in *Blakely* (App. Br. 48). But Appellant is incorrect.

This Court's precedents do not rely on the reasoning rejected in *Blakely*. *Blakely*, like *Ring* and *Apprendi* before it, dealt with a situation where a sentence was enhanced based on findings of fact made by the judge alone. 542 U.S. at 304-305. In that case, the state argued "that there was no *Apprendi* violation because the relevant 'statutory maximum' [was] not 53 months, but the 10-year maximum for class B felonies," even though the judge had had to make an additional factual finding to increase the sentence beyond 53 months. 542 U.S. at 303. The Court rejected this attempt to sidestep *Apprendi* and reiterated "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Id.* (emphasis in original).

This Court's prior decisions do not conflict with this principle. *See, e.g., State v. Johnson*, 207 S.W.3d 24, 48 (Mo. banc 2006); *State v. Gill*, 167 S.W.3d 184, 193-194 (Mo. banc 2005); *State v. Edwards*, 116 S.W.3d 511, 543 (Mo. banc 2003). In the Missouri cases, as in Appellant's case, the necessary facts were found by a jury. Consequently, the holding in *Blakely* does not undermine this Court's previous cases or compel a different outcome in Appellant's case. In fact, this issue has been addressed by this Court in the time since *Blakely* was decided and this Court reaffirmed its prior holdings. *See, e.g., State v. Gill*, 167 S.W.3d 184, 194 (Mo. banc 2005) (rejecting the argument that this Court's prior decisions conflict with *Blakely*).

In the present case, Appellant had notice of the statutory aggravators, and the facts supporting those aggravators were found by a jury beyond a reasonable doubt. *Anderson*, 79 S.W.3d at 429. This procedure complied with due process and the requirements of *Apprendi*. Thus, Appellant's reliance on *Blakely* is misplaced.

Appellant's argument that retrial subjected him to double jeopardy because he was only previously found guilty of "non-aggravated" first-degree murder, due to the alleged failure of the charging document, should also be rejected. This argument rests on the false premise that Missouri law has two forms of murder. As this court has repeatedly held, "Missouri's statutory scheme recognizes a single offense of murder with a maximum sentence of death, and the required presence of aggravating facts or circumstances to result in this sentence in no way increases this maximum penalty." *Gill*, 167 S.W.3d at 194.

The double jeopardy clause protects criminal defendants against both multiple punishments for the same offense and against retrial after acquittal. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106 (2003). However, "[t]here is no double jeopardy bar to retrying a defendant who has succeeded in overturning his conviction" on appeal. *Bullington v. Missouri*, 451 U.S. 430, 442 (1981). This rule promotes "the sound administration of justice," and protects defendants because "it is at least doubtful that appellate courts would be as zealous as they are now in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution." *United States v. Tateo*, 377 U.S. 463, 466 (1964).

Where the issue is one of the penalty sought on retrial of the punishment phase alone, the issue is whether the result in the previous trial amounted to an "acquittal." In *Bullington*,

the Supreme Court held that double jeopardy analysis could apply to bar seeking the death penalty on retrial given Missouri's bifurcated trial procedure. 451 U.S. 430, 442 (1981). That this rule only applied in some cases was clarified in *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106 (2003). In *Sattazahn*, the Supreme Court faced the issue of whether the State could again seek the death penalty after the defendant succeeded in having his conviction overturned on appeal. *Id.* at 105. The first jury had found the defendant guilty during the first phase of trial, but had deadlocked on the issue of punishment. *Id.* at 104. The applicable statute required the judge to enter a sentence of life in that situation. *Id.* The appellate court reversed based on an instructional error, and on remand, the state again sought the death penalty. *Id.* at 105.

The Court acknowledged its holding in *Bullington*, and stated that after *Ring*, double jeopardy can apply in some capital sentencing proceedings. *Id.* at 112. The question, the Court stated, was whether there was the equivalent of an acquittal, *i.e.*, where the jury failed to find the facts necessary to increase the punishment to death. *Id.* The Court concluded that since a hung jury was not equivalent to an "acquittal," that is, such a result could not support the conclusion that the state had failed to prove its case, the state was permitted to seek the death penalty on retrial. *Id.*

Here, similarly, nothing that happened in Appellant's previous trial operated as an "acquittal" to bring this case within the application of the double jeopardy clause. As discussed above, Appellant received timely notice of the State's intent to seek the death penalty (L.F. 2). The jury found beyond a reasonable doubt each of the three statutory aggravators submitted to it. *Anderson*, 79 S.W.3d at 429. Consequently, Appellant was not

"acquitted" of the death penalty, and double jeopardy does not bar retrial. Appellant simply succeeded in having his conviction overturned on appeal, and thus, the State was entitled to seek the death penalty a second time. Appellant's second point should be denied.

Point III

The trial court did not abuse its discretion when it admitted details regarding the autopsy of Steven Rainwater because that evidence was relevant to demonstrate the nature and circumstances of the crime in that it assisted the jury in understanding the nature of the wounds Appellant inflicted and, thus, the heinous nature of his plan to murder the Rainwaters.

Appellant next argues that the trial court erred in admitting details regarding the autopsy of Steven Rainwater (App. Br. 51). While he acknowledges the State's burden to prove the death of Steven Rainwater as a statutory aggravator, he claims this testimony was irrelevant because the death of Steven Rainwater was demonstrated with a certified copy of Appellant's conviction (App. Br. 55). This argument fails because the description of the wounds assisted the jury in understanding the heinous nature of Appellant's plan to kill the Rainwater family.

A. Standard of Review

The trial court has broad discretion in determining the relevance of evidence admitted during the penalty phase. *State v. Rousan*, 961 S.W.3d 831, 848 (Mo. banc 1998). The trial court's decision in these matters will only be overturned on appeal where there is a showing of an abuse of that discretion. *Id.* Moreover, review is for prejudice, not mere error. *State v. Hall*, 982 S.W.2d 675, 680 (Mo. banc 1998).

B. The details of the autopsy were relevant to demonstrate the circumstances surrounding one of the statutory aggravators.

To determine whether evidence is relevant, the court must consider "whether the offered evidence tends to prove or disprove a fact in issue or corroborates other relevant evidence." *State v. Rousan*, 961 S.W.2d 831, 848 (Mo. banc 1998). During the penalty phase of a capital trial, the trier of fact must determine whether the evidence as a whole warrants the imposition of the death penalty. § 565.032.2. In making this determination, the trier is allowed to consider many facts, including evidence presented in the guilt phase of trial. *Id.* One of the statutory aggravators submitted to the jury was whether the defendant killed the victim in the course of another unlawful homicide (L.F. 164). Thus, the murder of Steven Rainwater was a fact the State was required to prove beyond a reasonable doubt.

Evidence showing the location and extent of wounds can be relevant not only to demonstrate cause of death, but also to corroborate the testimony of other witnesses, and help show the defendant's intent. *State v. Holmes*, 609 S.W.2d 132, 136 (Mo. banc 1980). "Imposing the death penalty is the most serious decision society makes about an individual, and the sentencer is entitled to any evidence that assists in that determination." *State v. Parker*, 886 S.W.2d 908, 924 (Mo. banc 1994). Evidence of prior crimes committed by the defendant are generally admissible in the penalty phase of a capital case. *Rousan*, 961 S.W.2d at 849; *State v. Simmons*, 955 S.W.2d 729, 740 (Mo. banc 1997); *State v. Brown*, 902 S.W.2d 278, 291 (Mo. banc 1995). Moreover, "[d]etails that reflect the seriousness of a prior offense are relevant." *Rousan*, 961 S.W.2d at 849.

This rule is even more logical where the evidence of the other crime is directly related to the crime for which the defendant is being sentenced. *See Brown*, 902 S.W.2d at 291. For example, in *Brown*, the defendant was charged with two first degree murders, and the

counts were severed for trial. *Id.* The defendant claimed that it was error for the trial court to allow evidence of the confession and details of one of those murders into evidence in the penalty phase for the other murder. *Id.* The Court disagreed and held that the details regarding the other murder were relevant to demonstrate the nature and circumstances of the crime. *Id.*

Here, similarly, the evidence of the autopsy of Steven Rainwater was relevant to demonstrate the nature and circumstances of the crime. The doctor who performed the autopsy testified that the victim had an entry wound over his left eyebrow, and that the bullet passed through the frontal lobe causing massive damage before lodging in the back of the head (Tr. 602-605). He also testified that this type of injury would have caused the victim to collapse immediately (Tr. 605). This evidence corroborated the testimony of the witnesses who said Steven Rainwater was found lying motionless on the ground moments after the shooting (Tr. 550). The precision of the wound and its location in the head also supported the State's evidence that both murders were part of a plan.

Appellant's argument that testimony regarding the autopsy was rendered more prejudicial than probative because the death of Steven Rainwater was proven with a certified copy of Appellant's conviction for that crime is not supported by the law (App. Br. 55). The state, because it must shoulder the burden of proving its case beyond a reasonable doubt, "should not be unduly limited in its quantum of proof." *State v. Smith*, 32 S.W.3d 532, 546 (Mo. banc 2000) (the court upheld the admission of a message written in the victim's blood, which identified the defendant, even though the defendant admitted he was the killer); *see also State v. Branscomb*, 638 S.W.2d 306, 307 (Mo.App. E.D. 1982) (bloody shirt and jacket

with bullet holes were properly admitted despite defense counsel's judicial admission that victim had been shot); *State v. Wallace*, 504 S.W.2d 67, 70-71 (Mo. 1973) (court admitted blood-stained shirt with bullet holes).

Here, the manner in which Appellant executed Steven Rainwater was relevant not merely because it proved that Appellant murdered Steven, but because it tended to prove the heinous nature of Appellant's crimes. "If the showing of [wounds'] location and number tends to be inflammatory it is because any accurate portrayal, whether by oral testimony, or by a photograph, … would be inflammatory." *Holmes*, 609 S.W.2d at 136. *See also State v. Smith*, 32 S.W.3d at 546-547 ("Although the fact that the message was written in blood makes the evidence potentially more prejudicial than other, less graphic evidence, defendants are not prejudiced by the fact that graphic evidence is a consequence of brutal actions."). The nature of Steven Rainwater's wounds was an important part of the circumstances surrounding the crime of killing Deborah Rainwater, and so the trial court did not abuse its discretion in allowing testimony regarding his autopsy. Appellant's third point should be denied.

Point IV

The trial court did not err in overruling Appellant's objections to Instructions No. 3, No. 7, No. 8, and No. 10 because those instructions complied with the applicable MAI-CR instructions and those instructions properly stated the law regarding the burden of proof in a capital sentencing proceeding (Responds to Appellant's Points IV, V, and VII).

In Points IV, V, and VII, Appellant challenges the penalty phase instructions that guide the jury through their deliberations on the death penalty, arguing that they each in failed to correctly inform the jury of the burden of proof.

In Point IV, Appellant claims that Instruction No. 8 impermissibly shifted the burden of proving that the mitigating factors outweighed the aggravating factors from the State to him (App. Br. 57).

In Point V, he claims that the combination of all four instructions violated the United States Supreme Court's holdings in *Ring* and *Apprendi* in that together they do not require the State to prove the non-statutory aggravators and the mitigation "weighing step" beyond a reasonable doubt (App. Br. 63-64).

In Point VII, Appellant argues that Instructions No. 7 and No. 8 violated his constitutional rights because they did not state any burden of proof at all (App. Br. 77). This Court has previously addressed and rejected these claims.

A. Standard of Review

Claims of instructional error are reviewed for both error and prejudice. *State v. Zink*, 181 S.W.3d 66, 74 (Mo. banc 2005). Reversal is only warranted where "the error was so

prejudicial that it deprived the defendant of a fair trial." *State v. Middleton*, 995 S.W.2d 443, 452 (Mo. banc 1999).

B. Instructions No. 3, No. 7, No. 8, and No. 10 properly instructed the jury.

The approved instructions "are presumptively correct." *State v. Storey*, 40 S.W.3d 898, 912 (Mo. banc 2001). "Whenever there is an MAI-CR instruction applicable under the law …, the MAI-CR instruction is to be given to the exclusion of any other instruction." *State v. Ervin*, 979 S.W.2d 149, 158 (Mo. banc 1998).

In the present case, Instructions No. 3, No. 7, No. 8, and No. 10 properly instructed the jury regarding the burden of proof. Instructions No. 3, No. 7., and No. 8 were properly patterned on MAI-CR3d 313.03A, 313.30A, 313.41A, and 313.44A (L.F. 162, 166-167, 169; Res. Br. A3-A10). As discussed above in Point I, while Instruction No. 10 was patterned after an older version of MAI-CR 3d 313.48A, this instruction did not prejudice Appellant because the other instructions properly told the jury how to consider mitigating evidence, while the remaining instructions satisfied the requirements of *Ring* and *Apprendi*. Most importantly, in satisfying *Ring* and *Apprendi*, in the first step of the penalty phase deliberation, the jury was told they had to find the statutory aggravators beyond a reasonable doubt (L.F. 162).

In contrast, Appellant's proposed instructions did not comply with MAI-CR (L.F. 172, 173-174, 180). Consequently, the court did not err in refusing to give these instructions. *See, e.g., State v. Zink*, 181 S.W.3d at 74. Appellant's arguments to the contrary all ignore well-settled law.

1) Instruction No. 8 did not impermissibly shift the burden of proof to Appellant.

In Point IV, Appellant argues that Instruction No. 8, based on MAI-CR 3d 313.44A, impermissibly shifted to the defendant the burden of proving that the evidence in mitigation outweighed the evidence in aggravation (App. Br. 57). Appellant relies on *Apprendi*, *Ring*, and their progeny (App. Br. 57). The trial court did not err in submitting Instruction No. 8, because it is constitutionally permissible for the state to require the defendant to bear the burden of proof on mitigating circumstances. *State v. Johnson*, 284 S.W.3d 561, 587-589 (Mo. banc 2009).

The holding in *Ring v. Arizona*, 536 U.S. 584, 608-609 (2002), requires that any facts necessary to increase the range of punishment must be proven beyond a reasonable doubt. It does not follow from this reasoning, however, that *all* facts considered in determining an appropriate sentence must be found beyond a reasonable doubt. *See Kansas v. Marsh*, 548 U.S. 163 (2006). As long as the statutory aggravators have been demonstrated beyond a reasonable doubt, it is constitutionally permissible for the State to require the defendant to bear the burden of proving the facts in mitigation. *Id.*; *State v. Bolder*, 635 S.W.2d 673, 684 (Mo. banc 1982).

In *Marsh*, the United States Supreme Court evaluated the constitutionality of a death penalty sentencing scheme "which require[d] the imposition of the death penalty when the sentencing jury determine[d] that aggravating evidence and mitigating evidence [were] in equipoise." *Id.* at 165-166. The Court held that such a scheme was constitutionally permissible, stating that "[s]o long as a state's method of allocating the burdens of proof does not lessen the state's burden to prove every element of the offense charged, or in this case 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." *Id.* at 170-171 (*quoting Walton v. Arizona*, 497 U.S. 639 (1999)). That is to say, as long as the State is required to prove at least one statutory aggravator beyond a reasonable doubt, rendering the defendant death eligible, the legislature has discretion in allocating the burden of proof guiding the remainder of the jury's determination.

Missouri's statutory scheme, and the instructions in this case, comply with that mandate. Under § 565.030, the State must prove the existence of at least one statutory aggravator before the jury may consider imposing the death penalty. After that, the legislature has imposed a balancing procedure which is reflected in the instructions. § 565.030 ("The trier shall assess and declare the punishment at life imprisonment … if the trier concludes that there is evidence in mitigation of punishment … which is sufficient to outweigh the evidence in aggravation of punishment found by the trier."); MAI-CR3d 313.41A; MAI-CR3d 313.44A. This Court, also relying on *Marsh*, recently upheld the propriety of the pattern instruction in the face of a claim that it impermissibly shifted the burden of proof in the weighing step. *Johnson*, 248 S.W.3d at 587-589. *See also State v. Taylor*, 134 S.W.3d 21, 30 (Mo. banc 2004).

2) Instructions No. 3, No. 8, and No. 10 properly instructed the jury regarding the burden of proof.

Appellant argues in Point V, that Instructions No. 3, No. 7, No. 8, and No. 10 were constitutionally improper because they did not "require the state to prove, and the jury to

find, beyond a reasonable doubt *all* facts required to enhance punishment" (App. Br. 63). He bases this argument on the assertion that the "weighing step" is a fact which must be proved beyond a reasonable doubt under *Apprendi* and *Ring*. This argument has been repeatedly rejected by this Court. *Johnson*, 248 S.W.3d at 585; *Zink v. State*, 278 S.W.3d 170, 193 (Mo. banc 2009); *State v. Gill*, 167 S.W.3d 184, 193 (Mo. banc 2005); *State v. Glass*, 136 S.W.3d 496, 520-521 (Mo. banc 2004).

As explained in *Johnson*, neither the constitution nor the Missouri death penalty statute require that the State prove the weighing step beyond a reasonable doubt. As discussed above, it is constitutionally permissible to place the burden of proving mitigating circumstances on the defendant. *Johnson*, 284 S.W.3d at 580. *See Marsh*, 548 U.S. at 165-166. Section 565.032 specifically states that the aggravating circumstances must be found beyond a reasonable doubt, but no quantum of proof is assigned to the weighing step. *See, e.g., Gill*, 167 S.W.3d at 193.

Appellant states that "at least two states … apply *Apprendi* to capital sentencing and hold that other sentence-enhancing facts – not just statutory aggravating circumstances – must be found beyond a reasonable doubt." (App. Br. 66). In support of this proposition, he cites to *State v. Wakefield*, 921 A.2d 954 (N.J. 2007), and *Dumas v. State*, 803 N.E.2d 1113 (Ind. 2004). But Appellant's reliance on *Wakefield* and *Dumas* is misplaced.

In *Wakefield*, the court merely observed that under New Jersey law, the state bore the burden of proving beyond a reasonable doubt that the aggravating circumstances outweighed any mitigating circumstances. But that was merely a consequence of the New Jersey statute which required the state to prove that aggravating circumstances were *not* outweighed by

evidence in mitigation. 921 A.2d at 1000 (*citing State v. Biegenwald (II)*, 524 A.2d 130 (1987), a case in which the New Jersey Supreme Court analyzed the New Jersey statute and concluded that the state bore the burden in the weighing step.). Under Missouri law, as discussed above, the defendant bears the burden in the weighing step.

The decision in *Dumas* merely stands for the unremarkable proposition that ordinary rules of evidence apply in the sentencing phase of a capital trial, and, further, that "the facts supporting eligibility for the death penalty or life without parole must be found beyond a reasonable doubt." 803 N.E.2d 1120-1121. The case does not provide any compelling basis to fault Missouri's weighing step.

3) Instructions No. 7 and No. 8 did not fail to instruct the jury in how to consider non-statutory aggravating circumstances and mitigating circumstances.

In Point VII, Appellant argues that Instructions No. 7 and No. 8 should have instructed the jury that the State bore the burden of proving the non-statutory aggravators "by at least a preponderance of the evidence" (App. Br. 77). This Court has recently rejected this same argument. *Zink v. State*, 278 S.W.3d 170, 193 (Mo. banc 2009); *State v. Johnson*, 284 S.W.3d 561, 585 (Mo. banc 2009). Instructions based on MAI-CR 3d 313.40A, MAI-CR-3d 313.41A, and MAI-CR 3d 313.44A properly instruct the jury regarding the burden of proof on each of the steps in the penalty phase deliberation of a capital trial. *Johnson*, 284 S.W.3d at 585. *See also Zink*, 278 S.W.3d at 193; *State v. Forrest*, 183 S.W.3d 218, 226 (Mo. banc 2006); *Gill*, 167 S.W.3d at 193.

Appellant complains that the instructions as submitted allowed "the jury to … assume that the state had no burden to prove these facts." (App. Br. 78). He then argues that the

reasoning in *State v. Clark*, 197 S.W.3d 598 (Mo. banc 2006), and *State v. Fassero*, 256 S.W.3d 109 (Mo. banc 2008), should be expanded to provide a higher burden of proof in cases involving enhanced punishment (App. Br. 79-81). He concludes that "the jury should have been instructed that the state had the burden of proving all aggravating evidence – statutory and non-statutory beyond a reasonable doubt for it to be used in determining [Appellant's] sentence." (App. Br. 81). While Appellant is partially correct, in that the State (logically) does not bear the burden of proving that the evidence in mitigation outweighs the evidence in aggravation, his conclusion is incorrect.

As this Court has repeatedly held, the State has no burden of proof at the weighing stage because it does not "require[] a finding of a fact that may increase [the defendant's] penalty." *Zink v. State*, 278 S.W.3d 170, 193 (Mo. banc 2009). Instead, only the facts which make the death penalty available—the statutory aggravators—must be proven beyond a reasonable doubt. *Id.* *See also Buchanan v. Angelone*, 522 U.S. 269, 276-273 (1998). Moreover, once those facts are demonstrated, the remainder of the facts affecting punishment can be subject to a lesser standard of proof. In fact, the U.S. Supreme Court has suggested that at the balancing stage "complete jury discretion is constitutionally permissible." *Id.*

Here, Instruction No. 6 told the jury that they had to find at least one statutory aggravator beyond a reasonable doubt (L.F. 165). Instruction No. 6 only allowed the jury to proceed if they had found the statutory aggravator beyond a reasonable doubt (L.F. 166). Instruction No. 8 told the jury to consider all mitigating circumstances, and to impose a life sentence if the jurors found that the mitigating evidence outweighed the evidence in aggravation (L.F. 167). Instruction No. 9 told the jury that they could fix a sentence of life

even if they had made all the appropriate findings for a death sentence (L.F. 168). This procedure assured that the jury made the constitutionally required findings beyond a reasonable doubt and gave them the opportunity to consider mitigating circumstances.

C. Conclusion

The trial court did not err in overruling Appellant's objections to Instructions No. 3, No. 7, No. 8, and No. 10. The instructions properly guided the jury, and, as discussed above in Point I, any error in Instruction No. 10 was not prejudicial. Appellant's Points IV, V, and VII should be denied.

Point V

The trial court did not plainly err in overruling Appellant's motion to quash the jury panel because Appellant failed to present prima facie proof that the jury selection procedures in Cape Girardeau County systematically excluded African-Americans (Responds to Appellant's Point VI).

Appellant next claims that the trial court improperly denied his motion to quash the jury based on the allegation that the panel violated his right to have his jury selected from a panel representing a fair cross-section of the community (App. Br. 70). This claim should not be reviewed because it was addressed and denied in Appellant's original appeal. Moreover, the claim is not preserved because Appellant did not object to the venire prior to his second trial. In any event, the claim fails on its merits because Appellant did not present any evidence that the jury selection procedures employed by Cape Girardeau County systematically exclude African-Americans.

A. This claim should not be reviewed.

The doctrine of the law of the case applies to subsequent appeals involving the same facts and issues. *State v. Johnson*, 22 S.W.3d 183, 189 (Mo. banc 2000). Under this doctrine, parties are prohibited from relitigating issues which have already been decided. *Id.*

In his first direct appeal, Appellant challenged the jury selection procedures of Cape Girardeau County. *State v. Anderson*, 79 S.W.3d 420, 430 (Mo. banc 2002). This Court denied that claim. *Id.* The selection procedures have not changed since the Court decided that case (Tr. 515-516). Consequently, this issue has already been litigated in this case, and Appellant should not be permitted to relitigate this issue.

B. Preservation and Standard of Review

In any event, Appellant's claim is not preserved because he did not make a timely objection to the jury selection procedures. "One who would challenge a jury panel must do so before trial by pleading and proving fatal departures from the basic procedural requirements." *State v. Sumowski*, 794 S.W.2d 643, 647 (Mo. banc 1990). Where such objection is not made, the claim is waived. *Id.* "The policy requiring a contemporaneous objection is to minimize the incentive for sandbagging in hopes of an acquittal and then, after an unfavorable verdict, challenge the selection of the jury which convicted." *Id.*

In the present case, Appellant did not challenge the jury selection procedures before trial. Prior to trial, Appellant filed several motions in limine (L.F. 30-32). The only one of these motions to deal with jury selection requested the court to restrict the State's inquiry regarding the burden of proof (L.F. 125-129). The only reference to a motion presenting a fair-cross section claim is in the docket sheets, and it pertains to the previous trial (L.F. 21). Before trial, Appellant's attorneys specifically renewed certain motions raised by the defense counsel in the previous trial, but the fair-cross section claim was not among them (Tr. 53-56).

Appellant's only objection to the jury selection procedures was not made until after voir dire was conducted (Tr. 515). This objection was not timely. *Sumowski*, 794 S.W.2d at 647. Consequently, Appellant's fair-cross section claim is unpreserved. This Court may, in its discretion, review unpreserved errors for plain error. Supreme Court Rule 30.20; *Sumowski*, 794 S.W.2d at 647.

C. Appellant did not present any evidence in support of his claim.

"[A] criminal defendant has a constitutional right to the unbiased selection of a jury drawn from a fair cross-section of the community." *State v. Brooks*, 960 S.W.2d 479, 487 (Mo. banc 1997). Proof of such a claim has three components: that the procedures excluded a distinct group, that the distinct group was underrepresented in the jury pool over time, and that the underrepresentation of the group was the product of systematic exclusion. *Id.* Furthermore, "[u]nless it is shown that the difference between the percentage of the individuals in the identifiable group and those within the venires as a whole is greater than 10 %, a prima facie case has not been made." *Ringo v. State*, 120 S.W.3d 743, 747 (Mo. banc 2003).

"It has been repeatedly held that bare assertions of counsel do not suffice to show a constitutionally impermissible exclusion of an identifiable class from a jury panel." *State v. Briscoe*, 646 S.W.2d 424, 426 (Mo. App. W.D. 1983). Moreover, "[t]he systematic exclusion of a distinctive group is not established by the underrepresentation or nonrepresentation of that group on a particular jury panel." *State v. Williams*, 767 S.W.2d 87, 90 (Mo. App. E.D. 1989). A successful claim of denial of the right to a fair-cross section must show "a competent statistical analysis of the venires" in the relevant county. *Ringo*, 120 S.W.3d at 747. Simply selecting a number of cases for comparison does not meet this standard. *Id.*

For example, in *Ringo*, the defendant's attorneys "simply selected a few cases tried by the public defender's officer that had no statistical correlation or validity." *Id.* This Court held that the showing was insufficient because it did not demonstrate the composition of the venires over time. *Id.* The court further stated "[e]ven if his individual panel was

underrepresented by the African-American community, 'a single panel that fails to mirror the make-up of the community is insufficient to establish a prima facie case of systematic exclusion.'" *Id.*

Appellant's claim similarly fails for lack of proof. At trial, Appellant presented no statistical evidence supporting his claim (Tr. 515). Moreover, he relied only on the numbers of the jurors in the panel selected for his case (Tr. 515). Counsel stated that only two of approximately 100 potential jurors summoned were African-American (Tr. 515). This observation, if correct, was insufficient to establish a prima facie case of systematic exclusion.

Even if the numbers recited by counsel reflected the composition of venires over time, they did not reflect a ten percent difference between the venires and the population of the county because, according to Appellant, the population of Cape Girardeau County is only 5.4 % African-Americans. On appeal, Appellant simply lists four cases in which the defendant challenged the jury on the basis that the venire did not contain any African-Americans (App. Br. 74). These assertions are insufficient to support his claim, and so the trial court did not plainly err in denying Appellant's oral motion.

Perhaps in recognition of the fact that he failed to present the necessary evidence, Appellant argues that § 494.430, RSMo Cum. Supp. 2008, exacerbates the systematic exclusion of African-Americans (App. Br. 75). Appellant argues that since the statute does not require judges to keep track of the race of those excused based on hardship "there is no way to determine the extent to which this statutory provision for *ex parte* exclusions contributes to the systematic exclusion of African-Americans." (App. Br. 75). However, the

burden of demonstrating systematic exclusion rests on the party alleging a violation. *Sumowski*, 794 S.W.2d at 647. Thus, if a party is concerned about the manner in which a judge is granting exclusions for hardship, the party should ask the court to make a record of the race of the jurors excluded. Here, Appellant did not take steps to prove his claim beyond the mere assertions of counsel.

Moreover, there is nothing about § 494.430, RSMo Cum. Supp. 2008, which suggests that it would tend to systematically exclude African-Americans absent a discriminatory intent on the part of the judge, which Appellant does not allege (App. Br. 75). Section 494.430, RSMo Cum. Supp. 2008, allows judges to exclude people from the venire for hardship based on their professions, health, or family commitments. These are facts which occur in the population regardless of race. Hence, without a discriminatory intent on the part of the judge which Appellant does not allege, the operation of the statute would not result in a systematic exclusion of African-Americans.

D. Conclusion

Appellant's fair cross-section claim should not be reviewed because it has already been decided against him. Moreover, Appellant failed to lodge a timely objection to the selection of the venire. Finally, Appellant did not present proof demonstrating either a statistically significant underrepresentation of African-Americans in the venires of Cape Girardeau County or that such underrepresentation was the product of systematic exclusion. Appellant's sixth point should be denied.

Point VI

The trial court did not plainly err in overruling Appellant's objections to the State's closing arguments because those statements were proper. (Responds to Appellant's Point VIII).

In his final point, Appellant challenges three of the prosecutor's statements during closing argument. He claims that the argument that "'mercy is for the weak and the innocent…' and that sending [Appellant] back to prison was 'doing nothing' … misled the jury about 'mercy'" (App. Br. 83). He further alleges that the prosecutor's reference to "two ultimate crimes" impermissibly encouraged "the jury to sentence [Appellant] to death to punish him for both Debbie's murder and the uncharged murder of Stephen [sic]." (App. Br. 83).

A. Pertinent Facts

In the first part of the State's closing argument, the prosecutor explained how the State's version of the facts fit the instructions (Tr. 893-894). He briefly discussed Appellant's testimony, and then concluded by emphasizing the aggravating factor that the murder occurred in the course of another unlawful homicide (Tr. 901). Specifically, the prosecutor concluded by stating "I'm going to suggest to you that there is only one logical thing, and that is for the ultimate crime, not once but twice, two ultimate crimes, that the ultimate punishment is necessary and proper. Not because we like the idea, but because it is just." (Tr. 901).

In his closing argument, Appellant attempted to convince the jury that he should be given mercy because he had admitted what he had done. Counsel began the argument by

pointing out that Appellant "came in here yesterday and he took that stand and he told you he did this." (Tr. 901). She then explained how his testimony indicated his remorse, and so he was not among "the worst of the worst" for whom the death penalty is reserved (Tr. 902-903). More than once, defense counsel urged the jury to "choose life" (Tr. 903, 918). She said that the family problems kept this case from being the "worst of the worst" (Tr. 904-907). Shortly before the end of her argument, she pleaded for mercy for Appellant, stating:

> And I say to you, chose life. Choose life. That is the appropriate punishment for this man under these circumstances. It may be said that he didn't choose life. It may be said we're not an eye for an eye society. We are not an eye for an eye society because that doesn't solve anything. And it's been said to you, deliver justice. And I say to you, deliver justice with mercy. Mercy is not weak. Mercy is operating from a position of strength. You can deliver justice in this case and sentence this man to life in prison without parole, and you are delivering justice tempered with mercy. And that does not make you a weak group of people by any stretch. It makes you a strong group of people who assess the entire situation and know that that is what the appropriate punishment in this case is, life.

(Tr. 918-919). She then explained that a life sentence would be appropriate because Appellant had become well adjusted in prison, and she concluded by stating that the jury should "choose life" so that the victim's granddaughter, Appellant's daughter, would have the opportunity to know her father (Tr. 919-920).

In response, the prosecutor reiterated the aggravating circumstances before addressing defense counsel's argument on mercy (Tr. 921-924). While the prosecutor was discussing mercy, the following exchange occurred:

> Two things were mentioned by counsel, and I'll end with these. One, that you have the power to give mercy, and certainly you do. And mercy is a good thing. But keep in mind what mercy is. Mercy is something given by the strong, the powerful. And in this case, you make that decision. That's power. But it is something that is given to the weak and to the innocent. This man does not qualify.
>
> I'll remind you of what a much smarter man than I am once said, John Stuart Mill, a 19th Century English philosopher.
>
> [DEFENSE COUNSEL]: Judge, I'm going to object at this time and ask to approach. Sorry for the interruption.
>
> [PROSECUTOR]: Would you preserve my time, please.
>
> (Counsel approached the bench, and the following proceedings were had out of the hearing of the jury:)
>
> [DEFENSE COUNSEL]: I'm objecting to [the prosecutor's] statement to the jury that they have the power to give mercy, but that mercy is only reserved for the innocent. It's a misstatement of the law. I mean, that's why not every murder case is a death penalty case. I mean, you can have somebody who is guilty, and that doesn't mean they deserve death. I think that's what he's telling them. But, you know, they can only give life without

in a situation where a person is innocent, I think that's misleading and I think it's prejudicial, and I move at this time or a mistrial based on that statement.

THE COURT: Mr. Ahsens?

[THE PROSECUTOR]: I've made the argument repeatedly. It's been upheld, Your Honor. Once more, she brought it up.

[DEFENSE COUNSEL]: But I never brought it up in the context of mercy is only reserved for the innocent.

[THE PROSECUTOR]: Mercy is not defined.

THE COURT: I'm going to deny your objection. I'm going to deny your request for a mistrial. You have six minutes remaining.

[DEFENSE COUSNEL]: Okay. And Judge, just for the purposes of the record, I would ask that my objection be federalized. It be –

[THE PROSECUTOR]: No objection.

THE COURT: Okay.

[DEFENSE COUNSEL]: I can state the basis if you want.

THE COURT: You can do that afterwards if you want.

[DEFENSE COUNSEL]: Okay. I will. Thank you.

(Proceedings resumed before the jury.)

[THE PROSECUTOR]: I think I was talking about John Stuart Mill, the 19th Century English philosopher. He said the only thing necessary for evil to triumph –

[DEFENSE COUNSEL]: Judge, I'm going to object. This is not evidence. This is not something that has been brought into evidence.

THE COURT: Overruled.

[THE PROSECUTOR]: The only thing necessary for evil to triumph is for good men to do nothing. I suggest to you that if you send this man back to prison, you will have done nothing. Thank you.

(Tr. 924-926).

B. Standard of Review

As Appellant concedes, counsel failed to object to certain portions of the prosecutor's argument (App. Br. 84-85). Moreover, the objection counsel did make was untimely in that it came after the prosecutor had finished his discussion of mercy and was beginning to talk about the quotation from John Stuart Mill (Tr. 924). Where defense counsel either fails to object or objects in an untimely fashion, review is only for plain error. *State v. Johnson*, 284 S.W.3d 561, 573 (Mo. banc 2009). To succeed on a claim of plain error, the defendant must demonstrate a manifest injustice or miscarriage of justice. Supreme Court Rule 30.20. In the context of closing arguments, manifest injustice or miscarriage of justice occurs when it appears that the argument "had a decisive effect on the jury's determination." *Johnson*, 284 S.W.3d at 573.

C. The prosecutor's statements were proper.

It is not the function of attorneys to instruct the jury in the applicable law. *Jordan*, 646 S.W.2d at 751. While attorneys are permitted wide latitude in closing arguments, "[m]isstatements of the law are impermissible." *State v. Blackeburn*, 859 S.W.2d 170, 174

(Mo. App. W.D. 1993). However, "it is not error for counsel to discuss the law without defining it." *Jordan*, 646 S.W.2d at 751. In determining whether a statement is either an impermissible definition of the law or merely an appropriate discussion of the law, courts will not examine the statement in isolation, but rather in the context of the argument as a whole. *Johnson*, 284 S.W.3d 561, 573 (Mo. banc 2009).

In the context of this case, each of the arguments Appellant challenges was proper. First, in concluding the first portion of the State's closing argument, the prosecutor was simply explaining why the facts of this case warranted the death penalty. One of the aggravating factors submitted to the jury was whether the murder of Debora Rainwater occurred in the commission of another unlawful homicide (L.F. 165). § 565.032.2(2). Hence, when the prosecutor stated that Appellant deserved the death penalty because he committed not one but "two ultimate crimes," he was simply stating how the statutory aggravators had been proven in this case (Tr. 901).

The prosecutor's argument that "mercy is for the weak" was simply rhetoric designed to emphasize the State's position that mercy was inappropriate in this case. This Court has repeatedly held that prosecutors' discussion of mercy in closing arguments is proper. *State v. Rousan*, 961 S.W.2d 831, 851 (Mo. banc 1998); *State v. Mease*, 842 S.W.2d 98, 109-110 (Mo. banc 1992); *State v. Petary*, 781 S.W.2d 534, 541 (Mo. banc 1989); *State v. Clemmons*, 753 S.W.3d 901, 910 (Mo. banc 1988). "Prosecutors can discuss mercy in closing arguments because mercy is a valid sentencing consideration when based on the circumstances of the case, in that a jury can sentence the defendant to life in prison even if it determines that the aggravating circumstances outweigh the mitigating circumstances."

Rousan, 961 S.W.2d at 851. Moreover, "[a] prosecutor is allowed to argue that the defendant does not deserve mercy under the facts of a particular case." *Id.*

Here, Appellant's closing argument was a plea for mercy. When viewed in context, the prosecutor's comments simply responded by giving the State's view of the appropriateness of that choice. Immediately after stating that mercy is for the weak and innocent, the prosecutor concluded that Appellant "does not qualify" (Tr. 924). Contrary to Appellant's assertion, the jury did not consider this as an explanation of the law. They were instructed that the arguments of counsel were not evidence (L.F. 171). Moreover, given the context of the statement, it was clearly rhetorical flourish. Mercy is not a legal element with a concrete definition; rather it is measured by what is appropriate in each case. Reasonable people could, and do, differ on when mercy is appropriate. There is nothing in the record to suggest that the jury was unduly swayed by this comment, much less that they felt compelled to follow it as if it were a statement of the law. And, finally, the jury was properly instructed that it was not required to give the death penalty, even if it had previously found that Appellant had committed the murder under the aggravating circumstances set forth in the instructions (L.F. 168). Thus, the jury knew that "mercy"—to the extent they felt it was warranted—rested in their hands.

Appellant also challenges the prosecutor's use of a quotation in that same discussion. He argues it was improper for the prosecutor to argue that sentencing Appellant to life imprisonment was "doing nothing" (App. Br. 83). In *State v. Forrest*, 183 S.W.3d 218, 229 (Mo. banc 2006), this Court considered a claim arising from the use of this same quotation. The Court held that this argument was a proper way for the prosecutor to express the State's

view that mercy would be inappropriate. *Id.* Here, similarly, the quotation was simply a way to facilitate the state's discussion of the appropriate punishment in this case (Tr. 925-926).

In sum, each of the arguments Appellant challenges were proper comments on the aggravating circumstances and the State's view of the appropriate punishment in this case. The trial court did not err in failing to take action or in overruling the objections that were made. Appellant's final point should be denied.

CONCLUSION

Appellant's sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 11,629 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief and a floppy disk containing a copy of this brief, were mailed this 31st day of September, 2009, to:

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APPENDIX