No. 82743

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

BOBBY JOE MAYES,

Appellant.

Appeal from the Circuit Court of Pulaski County, Missouri
25th Judicial Circuit, Division I
The Honorable Douglas E. Long, Jr., Judge

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from convictions of two counts of murder in the first degree, §565.020, RSMo 2000, and two counts of armed criminal action, §571.015, RSMo 2000, obtained in the Circuit Court of Pulaski County, the Honorable Douglas E. Long, Jr. presiding. For each count of murder, appellant was sentenced to death. For each count of armed criminal action, appellant was sentenced to life imprisonment. Because sentences of death were imposed, the Missouri Supreme Court has exclusive appellate jurisdiction. Article V, § 3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Bobby Joe Mayes, was charged by amended information, as a persistent offender, §558.016, RSMo 2000, with two counts of murder in the first degree, §565.020, RSMo 2000, and two counts of armed criminal action, §571.015, RSMo 2000 (L.F.84-86). He was found guilty of all four counts (L.F.377-380; Tr.1840). The facts were as follows:

Guilt Phase

In August 1998, appellant lived at 1114 Charles Street, in Houston, Missouri, with Sondra Mayes, his wife, and Amanda Perkins, his fourteen-year-old stepdaughter (Tr.942). Appellant was having financial difficulties (he had lost his job); appellant was not getting along with Sondra; and on August 7, 1998, appellant had signed a "waiver of marital rights" at Sondra's request (Tr.979,988-989,1056,1182-1183,1230-1232,1430; Exhibit 11a). The waiver stated that appellant assented to conveyances of real property made by Sondra, and that any such conveyance was not "in fraud of [his] marital rights" (Exhibit 11a).

Approximately four days before the murders, August 6, 1998, appellant talked briefly with Michael James, an acquaintance in Edgar Springs, Missouri (Tr.1230). Appellant mentioned his financial troubles (Tr.1230). As he was getting ready to leave the store, appellant asked James what time it was and said that he did not want to return home when his wife was there (Tr.1231). Appellant told James that it might cause conflicts (Tr.1232). During their conversation, appellant also asked James where he could get a gun (Tr.1232).

In addition to his financial and marital problems, appellant was scheduled to stand trial for "sexual charges" on August 11, 1998, (Tr.1182,1333).[1] In that pending case, Sondra and Amanda had been endorsed

[1] In penalty phase, it was revealed that appellant had been charged with committing statutory sodomy on his two daughters from a previous relationship (Tr.1986).

as defense witnesses (Tr.1333). However, shortly before trial, Sondra told appellant that she was not going to testify (Tr.1182).[2]

On August 10, 1998, the day before appellant's pending trial, Sondra went to work and arrived at 8:00 a.m. (Tr.984). Shortly after 10:00 a.m., Sondra talked to appellant on the telephone (Tr.986,1427). As she talked to appellant, Sondra had her head lowered and her hand on her forehead (Tr.986). Cora Wade, one of Sondra's co-workers, talked to Sondra and reminded her of the importance of filing the waiver that appellant had signed (Tr.988). Sondra wanted to talk to Wade that morning, but Wade said that she would talk to Sondra in the afternoon (Tr.988). Sondra worked until noon and took her lunch break (Tr.989).

In the meantime, during the morning hours, appellant was home alone with Amanda, his stepdaughter (Tr.956,959,1003). Perhaps motivated by his circumstances, or driven by some other motivation, appellant attacked Amanda.

[2] In penalty phase, it was revealed that Sondra had indicated that she would testify for appellant if he signed the waiver (Tr.1991). On August 10, 1998, however, Sondra still did not intend to testify, despite appellant's having signed the waiver (Tr.1992).

Amanda was subdued, perhaps by a blow to the head, draped over the edge of her bed, and strangled (Tr.1296-1299,1671,1674,1694-1695; Exhibits 20c,20m,20q). Appellant then partially undressed Amanda by pulling up her shirt and pulling down her panties (Tr.1665-1670; Exhibits 43b,43c,43h).[3]

Having partially undressed Amanda, appellant stood behind her and stabbed her in the back approximately twenty-one times (Exhibit 43h). Fourteen of the stab wounds were not very deep and did not contribute substantially to Amanda's death (Tr.1680-1690). The other seven cuts penetrated Amanda's chest cavity, and one cut severed pulmonary arteries and veins (Tr.1681-1682,1693). During the next fifteen minutes, Amanda lost about half of her total blood volume and eventually died of exsanguination and lack of oxygen (Tr.1699-1700). The lack of oxygen came from the aspiration of some of her gastric contents into her lungs (Tr.1700).

At some point during the attack, appellant either pulled down his pants or exposed his penis and ejaculated on the bloody bed sheet (Tr.1565-1566,1739-1740,1743-1744). The blood-stained portion of Amanda's bed sheet bore "whitish" stains, and testing of the sheet revealed sperm with DNA consistent with appellant's DNA (Tr.1565-1566,1739-1740,1743-1744; Exhibits 20m,20n,20o). One stain contained a mixture of genetic components consistent with Amanda's DNA and appellant's DNA (Tr.1742). Some of the whitish stains also appeared to be on top of the blood, indicating that the sperm was deposited after the victim was stabbed (Exhibit 20o).

When Sondra arrived home, appellant attacked her (Tr.1182). Sondra tried to defend herself, and in the process, her hands and left forearm were lacerated (Tr.1642-1649). Appellant stabbed Sondra's breasts, left ear, and back (Tr.1640-1656). When he stabbed her in the back, appellant thrust the knife between

[3] Evidence that appellant partially undressed Amanda is discussed more thoroughly in Point IX.

Sondra's ribs and pulled the knife laterally between the bones (Tr.1655). The knife entered Sondra's chest cavity and cut her left lung and blood vessels to the lung (Tr.1652-1656). Sondra died from exsanguination (Tr.1656-1658).

At some point, appellant went into the bathroom and cleaned up, leaving a bloody fingerprint on the edge of the bathroom sink (Tr.1066-1067,1080,1086-1088; Exhibit 10a). The bloody fingerprint was later discovered by the police and positively matched to appellant's left ring finger (Tr.1066-1067,1087-1088).

After cleaning himself, appellant left the house at about 1:00 p.m.[4] and visited several locations, including Billy Ray's liquor store, a surplus store in Edgar Springs, and a pay fishing lake in Phelps County (Tr.1221,1375). It was about 2:30 p.m., when appellant arrived at the surplus store in Edgar Springs (Tr.1221). While there, he looked into the back room and got the store owner's attention (Tr.1221). Later, when the police searched the crime scene, they found a notepad which bore appellant's initials, and on which three times (and some lines) were written approximately as follows: "2:15—", "2:40—", and "3:15<—><—>—" (Tr.1060-1061; Exhibit 8).

Appellant returned home a little before 4:00 p.m. (Tr.965). Fifteen minutes later, appellant called 911 and requested an ambulance (Tr.1618; Exhibit 3). When asked what was wrong, appellant said, "I don't know. I just come home and, I don't know. You just need to send somebody over here" (Exhibit 3). Appellant then indicated that someone was "hurt" and that the person did not appear to be breathing (Exhibit 3). When asked if he would check for a pulse, appellant refused, saying, "I'm not going in there" (Exhibit 3). Appellant agreed, however, to stand outside and flag the ambulance (Exhibit 3). When told that the ambulance was coming, appellant told the 911 dispatcher that he wouldn't touch anything (Tr.1022; Exhibit

[4] When Sondra's co-worker, Cora Wade, called the house at 1:15 p.m., no one answered, indicating that the murders occurred before appellant left the house at 1:00 p.m. (Tr.992).

3).

Josh Campbell, a Houston City police officer, arrived on the scene at about 4:20 p.m. (Tr.1103). Appellant was standing in the driveway, pacing back and forth, and rubbing the backs of his hands with a blue cloth (Tr.1104). Campbell asked appellant what was going on, and appellant said that he did not know (Tr.1104). Campbell went inside the house and discovered Sondra's body (Tr.1104-1105). Because the door to Amanda's bedroom was closed, however, her body was not immediately discovered (Tr.1136).

At about 4:23 p.m., Danny Dunn, another Houston City police officer arrived (Tr.1133). Dunn saw appellant standing outside (Tr.1133-1134). Dunn asked appellant what was going on, and appellant said, "I have an alibi, I have an alibi. I've been fishing for the last three and a half hours" (Tr.1134). Dunn then went inside the house (Tr.1135).

At about 4:30, Dunn went back outside and told appellant to stay in the yard (Tr.1138). Appellant again said that he had an "alibi" and that he had been fishing for three and one half hours (Tr.1138). Appellant was still rubbing his hands with the blue cloth (Tr.1138-1139). Appellant did not ask about his stepdaughter (Tr.1139).

Shortly thereafter, Carlos "Joe" Kirkman, the Houston Chief of Police, arrived at the scene and went inside the house (Tr.1390-1391). When he arrived, another officer, Joey Moore, was with appellant in the front yard (Tr.1392). After Kirkman had been briefed, he went back outside and talked to appellant (Tr.1392-1393). Appellant said that he had last seen Sondra at about 7:00 a.m., and that he had last talked to her at about 10:00 a.m. on the telephone (Tr.1394-1395). Appellant said he had walked to "Flat Rock" or "White Rock" in the morning to go fishing (Tr.1394). He said that he walked because he was having trouble with his car (Tr.1431-1432). Appellant then said that after talking to his wife on the telephone, he drove to "Flat" or "Duke" to go fishing (Tr.1395). Appellant did not ask about his stepdaughter (Tr.1396).

At about 4:40 p.m., Kirkman was informed that Sondra's father, Duane Sutton, was on the telephone

(Tr.1110,1117,1396). After being told that Sondra was dead, Sutton asked about his granddaughter, Amanda (Tr.1111). The officers, alerted to the possibility of another person in the house, searched and found Amanda's body in her bedroom (Tr.1112).

After Amanda's body was found, appellant was arrested and advised of his Miranda rights (Tr.1401). Kirkman then talked to appellant a second time (Tr.1423). This time, appellant described walking to Brushy Creek (about a mile away) to go fishing in the morning (Tr.1426,1434-1435,1441). He then repeated that he had driven to "Flat" or "Duke" in the afternoon (Tr.1441). When asked why he would drive his car to another county when he was having car trouble, appellant said that he had wanted to see what was wrong with the car (Tr.1432). He explained that he took along a can of "that stuff to put in the carburetor" (Tr.1432). However, he could not remember exactly what it was he poured into the carburetor (Tr.1432).

At the Texas County Jail, appellant consented to the search of his person and the seizure of his clothing and samples from his person (Tr.1503-1504). At that time (and earlier in the day) police observed marks across the backs of appellant's hands and discoloration (Tr.1158,1515-1522). Accordingly, Dr. Lynn Hausenstein was brought in to examine appellant's hands (Tr.1522).

Dr. Hausenstein found a laceration on appellant's right hand, and constriction injuries across the backs of both hands (Tr.1309-1325). The injuries were worse on appellant's right hand, consistent with the ligature mark on Amanda's neck, which was also more severe on the right side (Tr.1317,1672).

Later, while in jail, appellant shared a cell with David Cook (Tr.1180). When asked what he was in for, appellant told Cook to watch the news (Tr.1181). After a couple of days, however, appellant talked to Cook and admitted to killing both Sondra and Amanda (Tr.1181-1182). Appellant related his financial, marital, and legal problems, and told Cook about various things he had done at the time of the murder (Tr.1182-1184).

At trial, appellant did not testify, but he offered the testimony of Carl Rothove and Fred Martin (Tr.1773,1786). Rothove testified that Jenny Smith, a criminalist, had found no foreign hairs on appellant,

Amanda, or Sondra (Tr.1779-1780). Martin testified that he had not received any information that either Sondra or Amanda had changed her mind about testifying for appellant in the pending case (Tr.1788).

The jury found appellant guilty of two counts of murder in the first degree and two counts of armed criminal action (L.F.377-380; Tr.1840).

Penalty Phase

The state presented evidence of appellant's previous attempts to sexually assault or molest two young girls (Tr.1959-1983). Holly Geary testified that in 1984, when she was fourteen years old, appellant attacked her and tried to rape her (Tr.1964-1970). Falicia Wysong testified that in 1995, when she was nine years old, appellant pulled his penis out of his pants and lifted up her shirt (Tr.1978-1980). Appellant did not want Wysong to say anything, and he told Wysong that he had a knife and that he would hurt her mother (Tr.1981). In addition, the state presented evidence of appellant's prior convictions of sexual abuse in the first degree, robbery in the second degree, burglary in the second degree, sexual abuse in the first degree, indecent or immoral practices with another, escape in the second degree, and escape in the second degree (Tr.1994-1996; Exhibits 45,48-51). Finally, the state presented evidence that the deaths of Sondra and Amanda were a great loss to their friends and family (Tr.1895-1902,1938-1944,1990-1992).

Appellant presented the testimony of a mental health expert in purported mitigation of punishment (Tr.1903-1930). After deliberation, the jury found the existence of statutory aggravators beyond a reasonable doubt and assessed a sentence of death for each count of murder in the first degree (L.F.414-415; Tr.2027).

On May 30, 2000, appellant was sentenced to death for each count of murder in the first degree (L.F.455-457; Tr.2072-2074). For the armed criminal action counts, appellant was sentenced to consecutive terms of life imprisonment in the Missouri Department of Corrections (L.F.455-457; Tr.2073-2075). This appeal followed.

POINTS RELIED ON

I.

THE TRIAL COURT DID NOT PLAINLY ERR IN FAILING TO DECLARE A MISTRIAL, SUA SPONTE, IN RESPONSE TO ALLEGED PROSECUTORIAL MISCONDUCT DURING THE QUESTIONING OF MICHAEL JAMES (ABOUT APPELLANT'S REQUEST ABOUT ACQUIRING A GUN) AND DR. NELDA FERGUSON (ABOUT APPELLANT'S PRISON INCIDENT REPORTS), BECAUSE THE PROSECUTOR'S QUESTIONS WERE ENTIRELY PROPER, IN THAT (1) THE GUN QUESTION ELICITED EVIDENCE OF DELIBERATION, AND (2) THE INCIDENT-REPORT QUESTION AIDED THE JURY IN EVALUATING FERGUSON'S EXPERT TESTIMONY.

State v. Zindel, 918 S.W.2d 239 (Mo.banc 1996);

State v. Williams, 922 S.W.2d 845 (Mo.App.E.D.1996);

State v. Smith, 32 S.W.2d 532 (Mo.banc 2000);

State v. Madison, 997 S.W.2d 16 (Mo.banc 1999).

II.

THE TRIAL COURT DID NOT PLAINLY ERR IN ALLEGEDLY DENYING APPELLANT ALLOCUTION, BECAUSE APPELLANT WAS NOT DENIED ALLOCUTION, IN THAT APPELLANT WAS GIVEN THE OPPORTUNITY TO STATE ANY LEGAL REASON NOT TO IMPOSE JUDGMENT AND SENTENCE. MOREOVER, BECAUSE APPELLANT WAS HEARD ON HIS MOTION FOR NEW TRIAL, ANY OMISSION IN GRANTING ALLOCUTION DID NOT INVALIDATE THE JUDGMENT OR SENTENCE.

State v. Wise, 879 S.W.2d 494 (Mo.banc 1994);

State v. Athanasiades, 857 S.W.2d 337 (Mo.App.E.D.1993);

State v. Scott, 621 S.W.2d 915 (Mo.1981);

Supreme Court Rule 29.07(b)(1).

III.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE THAT APPELLANT ASKED MICHAEL JAMES ABOUT ACQUIRING A GUN JUST FOUR DAYS PRIOR TO THE MURDERS, BECAUSE THE EVIDENCE WAS RELEVANT, IN THAT IT TENDED TO SHOW DELIBERATION.

State v. Simmons, 944 S.W.2d 165 (Mo.banc 1997);

State v. Brown, 939 S.W.2d 882, 883 (Mo.banc 1997).

IV.

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY DURING PENALTY PHASE THAT NO ADVERSE INFERENCE COULD BE DRAWN FROM APPELLANT'S FAILURE TO TESTIFY, BUT THE ERROR WAS HARMLESS BECAUSE, EVEN IF THE INSTRUCTION HAD BEEN GIVEN, THE JURY WOULD HAVE REACHED THE SAME RESULT, IN THAT (1) THE REFUSED INSTRUCTION WAS AN OPTIONAL INSTRUCTION, (2) THE JURY FOUND THE EXISTENCE OF SEVERAL STATUTORY AGGRAVATING CIRCUMSTANCES (WHILE DECLINING TO FIND OTHERS), (3) THE EVIDENCE OF APPELLANT'S DOUBLE HOMICIDE WAS EGREGIOUS AND OVERWHELMING, (4) THE EVIDENCE IN AGGRAVATION OF PUNISHMENT WAS OVERWHELMING, AND (5) THE EVIDENCE IN MITIGATION OF PUNISHMENT WAS MINIMAL.

Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981);

State v. Storey, 986 S.W.2d 462 (Mo.banc 1999);

United States v. Flores, 63 F.3d 1342 (5th Cir.1995);

Finney v. Rothgerber, 751 F.2d 858 (6th Cir.1985).

V.

A.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR PLAINLY ERR IN ALLEGEDLY LIMITING THE CROSS-EXAMINATION OF DAVID COOK, BECAUSE THE TRIAL COURT DID NOT MATERIALLY LIMIT CROSS-EXAMINATION OR PRECLUDE THE DEFENSE FROM REVEALING COOK'S BIAS, IN THAT THE TRIAL COURT ALLOWED THE DEFENSE TO ELICIT COOK'S RELEVANT PENDING CHARGES, PRIOR CONVICTIONS, AND APPARENT GAINS THAT CAME FROM AIDING THE PROSECUTION.

B.

THE TRIAL COURT DID NOT PLAINLY ERR IN REFUSING TO SUBMIT A SPECIAL INSTRUCTION (E.G. INSTRUCTION C SUBMITTED BY THE DEFENSE) REGARDING COOK'S CREDIBILITY, BECAUSE THE JURY WAS ADEQUATELY AND PROPERLY INSTRUCTED, IN THAT THE COURT SUBMITTED MAI-CR3d 302.01, WHICH EXPRESSLY INSTRUCTS THE JURY ON HOW TO EVALUATE CREDIBILITY AND PROHIBITS THE SUBMISSION OF ANY OTHER CREDIBILITY INSTRUCTION.

State v. Taylor, 944 S.W.2d 925 (Mo.banc 1997);

State v. Silvey, 894 S.W.2d 662 (Mo.banc 1995);

State v. Oxford, 791 S.W.2d 396 (Mo.banc 1990);

State v. Mease, 842 S.W.2d 98 (Mo.banc 1992);

MAI-CR3d 302.01.

VI.

IN ITS EXERCISE OF INDEPENDENT SENTENCE REVIEW, THIS COURT SHOULD UPHOLD APPELLANT'S SENTENCE OF DEATH BECAUSE (1) THE SENTENCE WAS NOT IMPOSED UNDER THE INFLUENCE OF PASSION, PREJUDICE, OR ANY OTHER ARBITRARY FACTOR, (2) THE EVIDENCE SUPPORTS THE JURY'S FINDING OF AGGRAVATING CIRCUMSTANCES, AND (3) THE SENTENCE IS NOT EXCESSIVE OR DISPROPORTIONATE CONSIDERING THE CRIME, THE STRENGTH OF THE EVIDENCE, AND THE DEFENDANT.

State v. Smith, 32 S.W.3d 532 (Mo.banc 2000);

State v. Middleton, 998 S.W.2d 520 (Mo.banc 1999);

State v. Brown, 998 S.W.2d 531, 552 (Mo.banc 1999);

State v. Taylor, 18 S.W.3d 366 (Mo.banc 2000).

VII.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE THAT APPELLANT HAD SEXUAL CHARGES PENDING AGAINST HIM AT THE TIME OF THE MURDERS, BECAUSE THE EVIDENCE WAS RELEVANT, IN THAT IT SHOWED HIS MOTIVE TO KILL THE VICTIMS DUE TO THEIR REFUSING TO TESTIFY ON HIS BEHALF. FURTHER, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO RE-OPEN VOIR DIRE FOR FURTHER INQUIRY ABOUT APPELLANT'S PENDING SEXUAL CHARGES (AFTER THE JURY HAD ALREADY BEEN CHOSEN), BECAUSE DEFENSE COUNSEL'S REQUEST WAS UNTIMELY AND UNWARRANTED, IN THAT DEFENSE COUNSEL COULD HAVE INQUIRED DURING GENERAL VOIR DIRE.

State v. Barriner, 34 S.W.3d 139 (Mo.banc 2000);

State v. Mallett, 732 S.W.2d 525 (Mo.banc 1987);

State v. Clark, 981 S.W.2d 143 (Mo.banc 1998);

State v. Johnson, 901 S.W.2d 60 (Mo.banc 1995).

VIII.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EXHIBITS 43F, 43G, AND 43I, PHOTOGRAPHS FROM AMANDA'S AUTOPSY, BECAUSE THE PHOTOGRAPHS WERE RELEVANT, IN THAT THEY SHOWED THE LOCATION AND NATURE OF WOUNDS, THE CONDITION OF AMANDA'S BODY, THE CAUSE OF DEATH, AND DELIBERATION; AND THEY AIDED THE JURY IN UNDERSTANDING DR. DOUGLAS ANDERSON'S EXPERT TESTIMONY.

State v. Rousan, 961 S.W.2d 831, 844 (Mo.banc 1998);

State v. Middleton, 995 S.W.2d 443 (Mo.banc 1999);

State v. Rhodes, 988 S.W.2d 521 (Mo.banc 1999).

IX.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE THAT APPELLANT SODOMIZED AMANDA, BECAUSE THE SODOMY WAS ADMISSIBLE TO SHOW A COMPLETE AND COHERENT PICTURE OF THE CHARGED CRIME, IN THAT THE EVIDENCE SHOWED THAT APPELLANT CONTEMPORANEOUSLY SODOMIZED AND MURDERED AMANDA. THE EVIDENCE WAS ALSO ADMISSIBLE TO SHOW DELIBERATION, MOTIVE AND ANIMUS.

State v. Harris, 263 Mo. 642, 174 S.W. 57 (Mo.1915);

State v. Morrow, 968 S.W.2d 100 (Mo.banc 1998);

State v. Roberts, 948 S.W.2d 577 (Mo.banc 1997);

State v. Walker, 484 S.W.2d 284 (Mo.1972).

X.

THE TRIAL COURT DID NOT PLAINLY ERR IN FAILING TO QUESTION VENIREPERSON ROUSE SUA SPONTE ABOUT A QUESTION THAT SHE GAVE NO ORAL RESPONSE TO DURING VOIR DIRE, BECAUSE (1) THE COURT HAD NO DUTY TO INQUIRE, IN THAT ROUSE HAD ALREADY DISCLOSED HER POTENTIALLY BIASING EXPERIENCE AND IT WAS, THEREFORE, DEFENSE COUNSEL'S OBLIGATION TO PROBE INTO ROUSE'S BIASES, (2) THERE WAS NO INFERENCE OF BIAS OR PREJUDICE, IN THAT ROUSE DID NOT CONCEAL INFORMATION THAT WAS UNKNOWN TO DEFENSE COUNSEL, AND (3) APPELLANT WAS NOT PREJUDICED, IN THAT APPELLANT HAS NOT SHOWN WHAT INFORMATION ROUSE FAILED TO DISCLOSE THAT COULD HAVE HAD ANY EFFECT UPON HER ABILITY TO FAIRLY AND IMPARTIALLY CONSIDER THE CASE.

State v. Clemmons, 753 S.W.2d 901 (Mo.banc 1988);

State v. Hughes, 748 S.W.2d 733 (Mo.App.E.D.1988);

State v. Shackley, 750 S.W.2d 99 (Mo.App.E.D.1988);

State v. Fuller, 837 S.W.2d 304 (Mo.App.W.D.1992).

XI.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN STRIKING VENIREPERSON MORGAN FOR CAUSE, BECAUSE MORGAN'S VIEWS PREVENTED OR SUBSTANTIALLY IMPAIRED HER ABILITY TO FULFILL HER DUTIES AS A JUROR, IN THAT SHE INITIALLY EQUIVOCATED ABOUT HER ABILITY TO CONSIDER THE DEATH PENALTY AND THEN UNEQUIVOCALLY STATED THAT SHE COULD NOT SIGN A DEATH VERDICT.

State v. Smith, 32 S.W.3d 32 (Mo.banc 2000);

Supreme Court Rule 29.01(a).

XII.

THE TRIAL COURT DID NOT PLAINLY ERR IN FAILING TO GRANT A MISTRIAL SUA SPONTE OR IN ALLOWING THE PROSECUTOR TO MAKE VARIOUS COMMENTS DURING GUILT- AND PENALTY-PHASE CLOSING ARGUMENTS, BECAUSE (1) THE COMMENTS WERE PROPER, IN THAT THEY DID NOT WARN THE JURORS THAT THEY WOULD HAVE TO EXPLAIN THEIR VERDICT TO FRIENDS OR FAMILY, INVITE THE JURORS TO BASE THEIR VERDICT UPON EMOTION, CONSTITUTE UNSWORN TESTIMONY, OR DIMINISH THE JURORS' SENSE OF RESPONSIBILITY; (2) THE COURT TOOK APPROPRIATE CURATIVE ACTION WHEN IT DEEMED IT NECESSARY; AND (3) APPELLANT DID NOT SUFFER MANIFEST INJUSTICE.

State v. Smith, 32 S.W.3d 532 (Mo.banc 2000);

State v. Link, 25 S.W.3d 136 (Mo.banc 2000);

State v. Stewart, 18 S.W.3d 75 (Mo.App.E.D.2000);

State v. Richardson, 923 S.W.2d 301 (Mo.banc 1996).

XIII.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING CORA WADE TO TESTIFY TO OUT-OF-COURT STATEMENTS MADE BY SONDRA MAYES (WHICH INDICATED THAT SONDRA DID NOT INTEND TO TESTIFY FOR APPELLANT AT HIS PENDING TRIAL), BECAUSE (1) THEY WERE NOT HEARSAY, IN THAT THEY SHOWED SONDRA'S PRESENT INTENTION TO DO A PARTICULAR ACT AND HER STATE OF MIND, AND (2) APPELLANT OPENED THE DOOR TO THE STATEMENTS, IN THAT HE USED INADMISSIBLE HEARSAY TO SUGGEST THAT SONDRA INTENDED TO TESTIFY. IN ANY EVENT, ANY ERROR IN ADMITTING THE STATEMENTS WAS HARMLESS BECAUSE (1) THE EVIDENCE WAS CUMULATIVE TO OTHER PROPERLY ADMITTED EVIDENCE, AND (2) THERE IS NO POSSIBILITY THAT THE JURY WOULD HAVE IMPOSED A LESSER SENTENCE IF THE STATEMENTS HAD NOT BEEN ADMITTED.

State v. Buckner, 810 S.W.2d 354 (Mo.App.W.D.1991);

State v. Bell, 950 S.W.2d 482 (Mo.banc 1997);

State v. Martinelli, 972 S.W.2d 424 (Mo.App.E.D.1998);

State v. Haddock, 24 S.W.2d 192 (Mo.App.W.D.2000).

XIV.

THE TRIAL COURT DID NOT PLAINLY ERR IN ADMITTING EVIDENCE THAT APPELLANT ARGUED WITH SONDRA PRIOR TO THE MURDERS AND THAT APPELLANT HAD BEEN "LET GO" FROM WORK, BECAUSE THE EVIDENCE WAS NOT ELICITED TO "IMPUGN [HIS] CHARACTER, IN THAT (1) THE EVIDENCE SHOWED MOTIVE, ANIMUS, OR DELIBERATION; AND (2) EVEN IF ERRONEOUSLY ADMITTED, IT DID NOT RESULT IN MANIFEST INJUSTICE.

State v. Smith, 32 S.W.3d 532 (Mo.banc 2000);

State v. Barnett, 980 S.W.2d 297 (Mo.banc 1998);

State v. Stewart, 18 S.W.3d 75 (Mo.App.E.D.2000);

Bucklew v. State, 38 S.W.3d 395 (Mo.banc 2001).

XV.

THIS COURT NEED NOT REVIEW APPELLANT'S CLAIM THAT HIS SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED WHEN DR. LYNN HAUSENSTEIN TESTIFIED THAT APPELLANT OFFERED NO EXPLANATION ABOUT THE INJURIES ON HIS HANDS, BECAUSE THE CLAIM WAS WAIVED, IN THAT APPELLANT DID NOT OBJECT AT THE EARLIEST OPPORTUNITY. IN ANY EVENT, THE TRIAL COURT DID NOT PLAINLY ERR IN ADMITTING HAUSENSTEIN'S TESTIMONY, BECAUSE APPELLANT'S SIXTH AMENDMENT RIGHT TO COUNSEL (WHICH HAD ATTACHED IN THE PENDING PROSECUTION) HAD NOT ATTACHED IN THE MURDER INVESTIGATION, IN THAT THE SIXTH AMENDMENT RIGHT TO COUNSEL IS "OFFENSE SPECIFIC." FURTHER, HAUSENSTEIN DID NOT IMPERMISSIBLY COMMENT ON APPELLANT'S SILENCE. MOREOVER, ANY ERROR IN ADMITTING HAUSENSTEIN'S TESTIMONY THAT APPELLANT FAILED TO EXPLAIN THE MARKS WAS HARMLESS.

Texas v. Cobb, ---U.S.---, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001);

McNeil v. Wisconsin, 501 U.S. 171, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991);

State v. Norton, 949 S.W.2d 672 (Mo.App.W.D.1997);

State v. Dexter, 954 S.W.2d 332 (Mo.banc 1997).

XVI.

THE TRIAL COURT DID NOT ERR IN MAKING THE DETERMINATION THAT APPELLANT'S PRIOR CONVICTIONS WERE SERIOUSLY ASSAULTIVE, BECAUSE IT WAS PROPER FOR THE COURT TO DO SO, IN THAT THE DETERMINATION OF WHETHER A PRIOR CONVICTION IS A SERIOUS ASSAULT, FOR PURPOSES OF THE STATUTORY AGGRAVATOR, IS A MATTER OF LAW FOR THE COURT.

Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999);

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000);

State v. Johns, 34 S.W.3d 93 (Mo.banc 2000).

XVII.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EXHIBITS 45, 48, AND 51, APPELLANT'S PRIOR CONVICTIONS, BECAUSE THE EXHIBITS WERE RELEVANT, IN THAT THEY AIDED THE JURY IN MAKING AN INDIVIDUALIZED DETERMINATION OF THE APPROPRIATE SENTENCE.

State v. Johns, 34 S.W.3d 93 (Mo.banc 2000);

State v. Smith, 32 S.W.2d 532 (Mo.banc 2000).

XVIII.

THE TRIAL COURT DID NOT ERR OR PLAINLY ERR IN SUBMITTING THE "DEPRAVITY OF MIND," §565.032.2.(7), RSMo 2000, AND "MULTIPLE HOMICIDE," §565.032.2(2), RSMo 2000, STATUTORY AGGRAVATORS, BECAUSE (A) THE "DEPRAVITY OF MIND" AGGRAVATOR WAS SUPPORTED BY SUFFICIENT EVIDENCE, IN THAT THE EVIDENCE SHOWED THAT APPELLANT TORTURED AND MURDERED HIS STEPDAUGHTER BY HITTING HER ON THE HEAD, STABBING HER TWENTY-ONE TIMES, AND STRANGLING HER OVER THE COURSE OF ABOUT FIFTEEN MINUTES, AND (B) BECAUSE NEITHER AGGRAVATOR WAS UNCONSTITUTIONALLY VAGUE, IN THAT EACH AGGRAVATOR PROVIDED A PRINCIPLED MEANS TO DISTINGUISH CASES IN WHICH THE DEATH PENALTY IS IMPOSED FROM THOSE IN WHICH IT IS NOT.

State v. Ervin, 979 S.W.2d 149 (Mo.banc 1998);

State v. Smith, 32 S.W.3d 532 (Mo.banc 2000);

State v. Smith, 944 S.W.2d 901 (Mo.banc 1997);

State v. Clay, 975 S.W.2d 121 (Mo.banc 1998);

MAI-CR3d 313.40;

§565.030.4.(2)-(4), RSMo 2000.

ARGUMENT

I.

THE TRIAL COURT DID NOT PLAINLY ERR IN FAILING TO DECLARE A MISTRIAL, SUA SPONTE, IN RESPONSE TO ALLEGED PROSECUTORIAL MISCONDUCT DURING THE QUESTIONING OF MICHAEL JAMES (ABOUT APPELLANT'S REQUEST ABOUT ACQUIRING A GUN) AND DR. NELDA FERGUSON (ABOUT APPELLANT'S PRISON INCIDENT REPORTS), BECAUSE THE PROSECUTOR'S QUESTIONS WERE ENTIRELY PROPER, IN THAT (1) THE GUN QUESTION ELICITED EVIDENCE OF DELIBERATION, AND (2) THE INCIDENT-REPORT QUESTION AIDED THE JURY IN EVALUATING FERGUSON'S EXPERT TESTIMONY.

Appellant contends that the trial court plainly erred in entering judgment and sentence because the prosecutor "won [his] convictions and death sentences through gross misconduct" (App.Br.54). He claims that the prosecutor "lied" by "redact[ing] material facts to hide the truth" (App.Br.54).[5]

A. The Standard of Review

As appellant concedes, this claim was not preserved (App.Br.54). No objection on the grounds now asserted was ever made at trial or included in appellant's motion for new trial (L.F.416-444; Tr.1216,1927). Review, if any, is limited to plain error review. State v. Blackwell, 978 S.W.2d 475,479-479 (Mo.App.E.D.1998).

To prevail on plain error review, appellant must show that the alleged error so substantially affected

[5] Appellant also asserted this claim in a "Motion to Reverse and Remand for a New Trial Due to Prosecutorial Misconduct." This court overruled that motion.

his rights, that manifest injustice or miscarriage of justice inexorably results if left uncorrected. State v. Coutee, 879 S.W.2d 762,766 (Mo.App.S.D.1994). 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 analyzing prosecutorial misconduct, the test is not whether the prosecutor is culpable; rather, the test is whether appellant received a fair trial. State v. Williams, 922 S.W.2d 845,851 (Mo.App.E.D.1996).

B. The Prosecutor Did Not Lie

1. Appellant's question about acquiring a gun

The prosecutor's first alleged "lie" occurred during guilt phase when the prosecutor asked Michael James about a conversation he had had with appellant just a few days before the murders.

Prior to James's testimony, defense counsel requested to approach the bench and attempted to convince the judge that any evidence about appellant's looking for a gun was "irrelevant and prejudicial" because it referred to an uncharged crime (Tr.1216). Defense counsel pointed out that the gun was mentioned when appellant said that he wanted to "rob Donnie Storm" (Tr.1216). Defense counsel requested, therefore, that the robbery not be mentioned (Tr.1216).

The prosecutor responded by pointing out that the gun question was part of a conversation in which appellant mentioned having trouble with his wife (Tr.1217). The prosecutor argued that the request about acquiring a gun was, therefore, evidence of deliberation (Tr.1217). The court agreed with the prosecutor but granted defense counsel's request that there be no mention of the robbery (Tr.1217).

Accordingly, James testified as follows:

Q. Okay. Did he have any conversations with you about — conversations with you about his wife?

A. When he was about ready to leave the store, he asked what time it was.

Q. What did you say?

A. I believe I told him the time is — then I told him. I don't remember the exact time.

Q. Okay. After you told him about what time it was, what happened?

A. He told me that he didn't want to get home while his wife was there.

Q. Okay. Did he say why?

A. He said it might cause conflicts.

Q. Okay. Did he say why?

A. No, he didn't.

Q. All right. Now at some point during any of this conversation on that date, did he ask you about where he could get a gun?

A. Yes, he did.

Q. And what did you say?

A. I told him no and that was the end of the conversation.

(Tr.1231-1232).

Because there was no mention of the robbery, appellant now argues that the prosecutor "lied," "redacted material facts," and "contorted the truth beyond recognition" (App.Br.54-55,58). Appellant's accusations of such serious misconduct are unwarranted and unsupported by the record.

As is evident, any mention of the robbery was redacted at defense counsel's request. Accordingly, appellant cannot now lay this allegedly erroneous redaction at the feet of the prosecutor and charge the prosecutor with lying. If appellant had wanted the jury to know more about the circumstances of his request about acquiring a gun, he could have let the prosecutor proceed without objection. Alternatively, he could have cross-examined James and elicited more details about the conversation.

Of course, appellant wanted to exclude the robbery entirely. Thus, appellant's claim boils down to

his allegation that his looking for a gun four days before the murder was not evidence of deliberation as the prosecutor argued (App.Br.58-59; see also Point III).

In arguing this point, appellant cites to a Missouri Highway Patrol "report of investigation" included in the appendix to his brief (App.Br.58). That report is not part of the record on appeal, and it was never introduced at trial. The report should be ignored. See Respondent's Motion to Strike the Appendix Attached to Appellant's Brief.

In any event, appellant's claim is without merit. His asking about a gun just four days before the murder was evidence that legitimately tended to prove deliberation. Appellant disputes that conclusion, arguing (1) that the prosecutor knew "that [the gun] related to a hypothetical robbery," and (2) that, by using the gun as evidence of deliberation, the prosecutor "contorted the truth beyond recognition" (App.Br.54-55,58). Not so.

While the prosecutor might have known that appellant asked about the gun in connection with a "hypothetical robbery," the prosecutor was free to interpret appellant's request for a gun in any reasonable manner. Knowing that appellant had killed his wife just four days after the request, it was not unreasonable for the prosecutor to conclude that appellant was looking for a gun for reasons other than those stated to Michael James. In fact, it was reasonable to conclude that appellant was a desperate man in the days prior to the murders, and (as the murders now attest) that he resorted to desperate actions to resolve his problems.

There is no reason to believe that appellant would fully disclose his murderous intent to Michael James and reveal the real reason he was looking for a gun. In fact, if appellant was planning murder that far in advance, he would not want to tell anyone. Thus, rather than telling James that he wanted a gun to kill his wife, appellant made his request while suggesting that he wanted to rob someone. The prosecutor's use of this evidence was entirely proper.

2. Appellant's prison incident reports

The prosecutor's second alleged "lie" occurred in penalty phase, during the cross-examination of Dr. Nelda Ferguson (Tr.1928). Dr. Ferguson testified that appellant suffered from "intermittent explosive disorder," an "impulse control disorder," and a "personality disorder" (Tr.1911). Ferguson also testified that, at the time of the murders, appellant was under the influence of extreme mental or emotional disturbance, and that his ability to conform to the requirements of the law was impaired (Tr.1916-1917). She concluded that appellant needed a "structured environment" and medication to control his impulses (Tr.1918).

On cross-examination, Ferguson testified that she had reviewed appellant's sixty-seven prison disciplinary and incident reports (Tr.1921-1922). She also admitted that appellant had been on medication during periods of his incarceration (Tr.1921-1922) On re-direct examination, Ferguson testified that the incident reports were not an overwhelming consideration, stating that she had seen records like that in the past (Tr.1924-1925). She opined that such records were further evidence of mental illness (Tr.1925). Then, after a brief discussion at the bench[6] where defense counsel argued against the admission of uncharged misconduct (Tr.1927), the prosecutor cross-examined Ferguson as follows:

> Q. (by the [prosecutor]): Doctor, you said you tried to consider everything in the incident and disciplinary reports. Do you remember saying that?
>
> A. Yes.
>
> Q. Did you consider the factor that he'd been accused of stabbing a fellow inmate in making your analysis?

[6] It was the prosecutor who requested this bench conference to determine, out of the hearing of the jury, whether the court would allow her proposed questions (Tr.1926).

A. I tried to consider everything — yes.

Q. Did you consider that factor?

A. Yes — yes.

Q. I'm sorry?

A. Yes.

Q. And yet your opinion remains the same.

A. Yes.

(Tr.1927-1928).

Based upon this testimony, appellant again accuses the prosecutor of lying (App.Br.56). He claims that the "incident report" in question also showed that he had been "cleared" of the stabbing (App.Br.56). Appellant claims that, by failing to elicit the fact of his being "cleared," the prosecutor "intentionally deceiv[ed] the jurors" and accused appellant of actually stabbing another inmate (App.Br.57). Again, appellant's serious accusations of misconduct are unwarranted and unsupported by the record.

It is well established that an expert witness may be cross-examined regarding facts not in evidence to test his qualifications, skills, and credibility or to test the validity and weight of his opinion. State v. Smith, 32 S.W.2d 532, 550 (Mo.banc 2000). In the case at bar, the prosecutor questioned Ferguson about the incident reports to test her credibility and to test the validity and weight of her opinion.

Appellant's numerous incident reports while in prison (and while medicated) stood in stark contrast to Ferguson's opinion that appellant's impulse-control problem could be harnessed in a structured environment with medication. The prosecutor therefore properly sought to test Ferguson's knowledge of appellant's prior failures in prison and the potentially serious nature of his failings. In addition, the prosecutor's questions revealed that Ferguson really had little independent recollection of appellant's past incarceration history, suggesting that Ferguson may have overlooked the evidence that tended to contradict her ultimate conclusions.

As such, the questions were entirely proper. See id. (experts were questioned about the defendant's prior violent acts).

Appellant claims, however, that the prosecutor's use of that particular incident report was a deliberate attempt to imply that appellant had, in fact, stabbed another inmate (App.Br.54-55). To support his claim that the prosecutor lied, appellant cites to a Commonwealth of Kentucky "incident report" included in the appendix to his brief. The incident report is not part of the record on appeal, and it was never introduced at trial as an exhibit. It should be ignored by this Court. See Respondent's Motion to Strike the Appendix Attached to Appellant's Brief.

Consequently, there is nothing in the record to support appellant's claim that he was "cleared" of the stabbing that the prosecutor referred to.[7] In addition, even if that incident report is not struck, there is nothing in the record to assure this court that the incident report included in appellant's appendix is the incident report that the prosecutor referred to during cross-examination.

In any event, even assuming that appellant has the correct incident report, the prosecutor did not ask an improper question. The prosecutor correctly phrased her question by asking whether Ferguson knew that appellant had been "accused" — merely accused — of stabbing another inmate (Tr.1928). According to the incident report, appellant had been accused of stabbing another inmate. That was true. The prosecutor did not ask, for example, whether Ferguson knew that appellant had stabbed another inmate. If she had, or if she had later argued that fact, then the prosecutor's question or subsequent argument would have misstated the

[7] There is also nothing in the record to support his assertion that he "***saved*** the lives of two Kentucky prison guards" (App.Br.58).

truth. But neither occurred in appellant's case.

In sum, there is no reason to believe that the jury read additional unstated facts into the prosecutor's question. In fact, they were specifically instructed not to do so (L.F.350), and the jury is presumed to know and follow the instructions. State v. Madison, 997 S.W.2d 16,21 (Mo.banc 1999). Furthermore, if the defense had had any concern about the effect of the prosecutor's question, it would have been a simple thing for them to cross-examine Ferguson and point out that appellant had, in fact, been "cleared" of the accusation.

In short, because the prosecutor did not misstate the truth with her questions, appellant's accusation of deliberate falsification is utterly unjustified and entirely without merit. There was no prosecutorial misconduct — much less misconduct that resulted in manifest injustice. This point should be denied.

II.

THE TRIAL COURT DID NOT PLAINLY ERR IN ALLEGEDLY DENYING APPELLANT ALLOCUTION, BECAUSE APPELLANT WAS NOT DENIED ALLOCUTION, IN THAT APPELLANT WAS GIVEN THE OPPORTUNITY TO STATE ANY LEGAL REASON NOT TO IMPOSE JUDGMENT AND SENTENCE. MOREOVER, BECAUSE APPELLANT WAS HEARD ON HIS MOTION FOR NEW TRIAL, ANY OMISSION IN GRANTING ALLOCUTION DID NOT INVALIDATE THE JUDGMENT OR SENTENCE.

Appellant contends that the trial court erred in sentencing him without granting allocution (App.Br.61). Appellant also claims that the trial court denied his affirmative request to personally address the court at sentencing (App.Br.63).[8]

Supreme Court Rule 29.07(b)(1) provides:

> When the defendant appears for judgment and sentence, he must be informed by the court of the verdict or finding and asked whether he has any legal cause to show why judgment and sentence should not be pronounced against him; and if no sufficient cause be shown, the court shall render the proper judgment and pronounce sentence thereon. If the defendant has been heard on the motion for new trial, and in all cases of misdemeanor, the requirements of this subparagraph are directory and the omission to comply with them shall not invalidate the judgment or sentence.

[8] Appellant also asserted this claim in a "Motion to Vacate and Remand for Resentencing with Allocution." This court overruled that motion.

In the case at bar, appellant was not denied allocution. Twice at sentencing, the court asked if there was any legal cause to show why judgment and sentence should not be pronounced against appellant. Specifically, after extensive argument on appellant's motion for new trial, the court stated: "Is there — the Court having heard the motion for a new trial and having denied the same, is there any legal [sic] why sentencing should not now be imposed?" (Tr.2071). Whereupon defense counsel said, "Not that I'm aware of" (Tr.2071). Then, after sentence and judgment had been imposed on counts I and II, the court advised appellant of the verdict in count III and asked: "The Defendant — does he have any legal cause in this — on this count?" Whereupon defense counsel again said, "Not that I'm aware of" (Tr.2074).

As the record shows, appellant was given two opportunities to address the court. The court, by asking whether the "Defendant" had any legal cause, adequately fulfilled the mandate of Rule 29.07. In addition, appellant's secondary claim, that his affirmative request to address the court personally was denied, is completely devoid of factual support. The record shows no such request (Tr.2071-2077). His reliance upon State v. Wise, 879 S.W.2d 494,516 (Mo.banc 1994), for the suggestion that such a denial may be unconstitutional, is, therefore, completely inapposite.

In any event, as is apparent from the plain language of Rule 29.07(b)(1), failure to grant a defendant allocution is not fatal to the judgment or sentence where defendant has been heard on his motion for new trial. State v. Athanasiades, 857 S.W.2d 337,343 (Mo.App.E.D.1993)(citing State v. Scott, 621 S.W.2d 915,918 (Mo.1981)). "Heard on the motion for new trial" within the meaning and intent of Rule 29.07(b)(1) is satisfied where the motion was considered and acted upon following argument by the parties. See id. That was done in appellant's case (Tr.2037-2071). This point should be denied.[9]

[9] Appellant's claim that, if granted allocution, he would have informed the court that he was "cleared" of the stabbing and that he saved the lives of two prison guards (App.Br.64) is unsupported by the record. The documents in the appendix to his brief were neither presented to the trial court nor made a part

of the record (App.Br.64). They should be ignored. See Respondent's Motion to Strike the Appendix Attached to Appellant's Brief.

III.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE THAT APPELLANT ASKED MICHAEL JAMES ABOUT ACQUIRING A GUN JUST FOUR DAYS PRIOR TO THE MURDERS, BECAUSE THE EVIDENCE WAS RELEVANT, IN THAT IT TENDED TO SHOW DELIBERATION.

Appellant contends that the trial court abused its discretion in admitting evidence that he asked Michael James about acquiring a gun just four days prior to the murders (App.Br.65). He claims that the gun did not show deliberation because he was actually looking for a gun so that he could rob some other third party (App.Br.65).

The trial court has broad discretion to admit or exclude evidence, and the appellate court will reverse only upon a showing of an abuse of discretion. State v. Simmons, 944 S.W.2d 165,178 (Mo.banc 1997). A trial court abuses 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[.]" State v. Brown, 939 S.W.2d 882,883 (Mo.banc 1997).

The trial court's ruling passes this standard. For the reasons discussed in Point I, there was no abuse of discretion. Appellant's request about acquiring a gun was evidence that tended to prove deliberation. As discussed above, the prosecutor might have known that appellant asked about the gun in connection with a "hypothetical robbery," but the prosecutor was free to interpret appellant's request for a gun in any reasonable manner. And knowing that appellant had killed his wife just four days after the request, it was not unreasonable for the prosecutor to conclude that appellant was looking for a gun for reasons other than those stated to Michael James. In fact, it was reasonable to conclude that appellant was a desperate man in the days prior to the murders, and (as the murders now testify) that he resorted to desperate actions to resolve his problems.

There is no reason to believe that appellant would fully disclose his murderous intent to Michael James and reveal the real reason he was looking for a gun. In fact, if appellant was planning murder that far in advance, he would not want to tell anyone. Thus, rather than telling James that he wanted a gun to kill his wife, appellant made his request while suggesting, perhaps hypothetically, that he wanted to rob some other person. This point should be denied.

IV.

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY DURING PENALTY PHASE THAT NO ADVERSE INFERENCE COULD BE DRAWN FROM APPELLANT'S FAILURE TO TESTIFY, BUT THE ERROR WAS HARMLESS BECAUSE, EVEN IF THE INSTRUCTION HAD BEEN GIVEN, THE JURY WOULD HAVE REACHED THE SAME RESULT, IN THAT (1) THE REFUSED INSTRUCTION WAS AN OPTIONAL INSTRUCTION, (2) THE JURY FOUND THE EXISTENCE OF SEVERAL STATUTORY AGGRAVATING CIRCUMSTANCES (WHILE DECLINING TO FIND OTHERS), (3) THE EVIDENCE OF APPELLANT'S DOUBLE HOMICIDE WAS EGREGIOUS AND OVERWHELMING, (4) THE EVIDENCE IN AGGRAVATION OF PUNISHMENT WAS OVERWHELMING, AND (5) THE EVIDENCE IN MITIGATION OF PUNISHMENT WAS MINIMAL.

Appellant contends that the trial court erred in failing to instruct the jury during penalty phase that no adverse inference could be drawn from his failure to testify (App.Br.68). He argues that the error was prejudicial and not harmless error (App.Br.70).

Appellant proffered two instructions drafted as follows:

Instruction No. G

> Under the law, the defendant has the right not to testify. No presumption and no inference of any kind as to his punishment may be drawn from the fact that he did not testify.

Instruction No. P

> Under the law, a defendant has the right not to testify. No presumption as to punishment may be raised and no inference of any kind may be drawn from the fact that the defendant did not testify.

(L.F.401,413). Though requested, the trial court refused to give either instruction.

The trial court erred. Refusing to give the prophylactic instruction when requested by the defendant

"exacts an impermissible toll on the [defendant's] full and free exercise of the [Fifth Amendment] privilege" to remain silent, Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112,1121, 67 L.Ed.2d 241 (1981). Thus, when a defendant request the no-adverse-inference instruction, courts have a constitutional obligation to give the instruction. Id. at 1121-1122; State v. Storey, 986 S.W.2d 462,463-464 (Mo.banc 1999).

Because appellant requested the "no-adverse-inference" instruction, the question for this Court to resolve is whether the trial court's error was harmless. See State v. Storey, 986 S.W.2d at 464 (citing Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), and Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). Respondent submits that it was.

First, respondent submits that this constitutional error is virtually always harmless. For instance, if the defendant does not ask for the no-adverse-inference instruction, then (barring other circumstances necessitating the instruction, e.g. prosecutorial comment upon the defendant's failure to testify) the lack of such an instruction does not create reversible error. See United States v. Flores, 63 F.3d 1342,1375-1376 (5th Cir.1995). That is, when the defendant does not request the no-adverse-inference instruction, the jury is allowed to deliberate without the instruction, even though there is a "danger that the jury will give evidentiary weight to a defendant's failure to testify." See Carter v. Kentucky, 101 S.Ct. at 1122.

Consequently, the absence of the no-adverse-inference instruction — even if requested — should almost never require reversal. If it is reversible error for a jury to deliberate without such an instruction (because of the "danger that the jury will give evidentiary weight to a defendant's failure to testify"), then every verdict that is reached in the absence of such an instruction should be reversed. In short, because the instruction is merely optional it necessarily follows that the absence of the instruction, alone, does not improperly prejudice the defendant. After all, the request for the instruction is not made before the jury; thus, the absence of the instruction appears the same to the jury whether requested or not.

This is not to say that refusing to give the instruction (when requested) does not infringe upon the "full

and free exercise" of the defendant's Fifth Amendment privilege, because it does. See Carter v. Kentucky, 101 S.Ct. at 1121. If the defendant elects to exercise his privilege in that fashion, he should be allowed to do so. However, whether that infringement requires reversal is an entirely different question — a question which the United States Supreme Court has yet to address. Nevertheless, respondent submits that the mere absence of the optional instruction — "optional" in the sense that it need not be given to the jury unless requested — has no greater prejudicial impact upon the jury simply by virtue of its having been requested.

Having said that, respondent admits that this Court has already held in one case that the trial court's refusing to give a no-adverse-inference instruction during penalty phase was not harmless error. See State v. Storey, 986 S.W.2d at 464-465. In that case, this Court noted that the jury had only found one statutory aggravating circumstance. Id. at 464. This Court then noted that "[t]he evaluation of the aggravating and mitigating evidence offered during the penalty phase is more complicated than a determination of which side proves the most statutory factors beyond a reasonable doubt." Id.

This Court further noted that a jury can assess life imprisonment in any case, regardless of the evidence presented. Id. Finally, this Court noted that "prejudice against a defendant who invokes the privilege — prejudice which is 'inescapably impressed on the jury's consciousness' — is not purely speculative[.]" Id. at 464-465. Accordingly, despite other indicators that the state argued as militating against a finding of prejudice (e.g. the fact that defense counsel had inquired during voir dire about the jury's ability to refrain from drawing adverse inferences), this Court concluded that the error was not harmless. Id. at 465.

Contrary to this Court's remark in Story, respondent submits that "prejudice" is not "inescapably impressed" upon the jury whenever a defendant chooses not testify. If that were true, then the constitution would require the submission of a no-adverse-inference instruction in every case where the defendant chooses to remain silent. There is no such requirement, however, because prejudice is not presumed to arise in the minds of jurors when a defendant does not testify.

Indeed, as a general rule, it is not "prejudice" that "inescapably" impresses itself upon the jury when the defendant does not testify; rather, it is the simple fact that the defendant did not testify that is impressed upon the jury. In fact, it was in making that very observation that the United States Supreme Court quoted the "inescapably impressed" language in Carter. Carter v. Kentucky, 101 S.Ct. at 1120 n.18.

"Prejudice," on the other hand, is not inescapable when the instruction is not given, it is merely possible. It is possible because without the "prophylactic [no-adverse-inference] instruction" that must be given if requested by the defendant, there is a "danger that the jury will give evidentiary weight to a defendant's failure to testify." Id. at 1122. That danger, as discussed above, however, is present in any case where the no-adverse-inference instruction is not given. Accordingly, the mere "danger" or possibility that an adverse inference was drawn is not so prejudicial as to require reversal.

In any event, under the circumstances presented in appellant's case, further analysis also reveals that the trial court's refusing to give the no-adverse-inference instruction was harmless. In determining whether the error was harmless, this Court should also examine various factors, such as: the strength of the evidence of guilt, the number and nature of statutory aggravators found (and not found), the egregiousness of the murder(s), and the strength of the evidence in aggravation as opposed to that in mitigation. See State v. Storey, 986 S.W.2d at 464; United States v. Brand, 80 F.3d 560,567-568 (1st Cir.1996); United States v. Ramirez, 810 F.2d 1338 (5th Cir. 1987); Finney v. Rothgerber, 751 F.2d 858 (6th Cir.1985). See also United States v. Flores, 63 F.3d at 1376. Also relevant, though not necessarily dispositive, cf. State v. Storey, 986 S.W.2d at 465, would be whether the jury was ever instructed not to draw inferences from the defendant's silence, and whether any party commented upon the defendant's failure to testify. See Beathard v. Johnson, 177 F.3d 340,350 (5th Cir.1999); United States v. Flores, 63 F.3d at 1376; United States v. Castaneda, 94 F.3d 592,596 (9th Cir.1996).

In appellant's case, various factors conclusively show that the error was harmless. First, appellant's

jury determined, without any risk that it drew adverse inferences from appellant's silence (L.F.353), that appellant was guilty of two counts of murder in the first degree. Unlike the jurors in Storey, who were simply told (and had to accept) that appellant was guilty, appellant's jurors resolved the question of guilt on their own. Thus, while the jurors in Storey might have harbored residual doubts about guilt that they resolved by drawing improper inferences from the defendant's silence, there was no risk of such inferences in the case at bar.

Second, the evidence of appellant's guilt was overwhelming. He was seen leaving the scene of the crime shortly after the murders were committed (Tr.961-962). He conspicuously tried to create an alibi for himself, and practically before the investigation had truly begun, he spontaneously told the police that he had an "alibi" (Tr.1060-1063,1134,1221,1374-1375). In addition, the physical evidence was very strong. His bloody fingerprint (despite his telling the 911 operator that he would not touch anything) was on the bathroom sink (Tr.1022,1080,1087-1088), and his sperm was on a bloodstained sheet from his murdered stepdaughter's bed (Tr.1739-1741,1743-1744). Perhaps the most telling physical evidence, however, was the telltale constriction marks on appellant's hands which clearly identified him as the murderer (Tr.1309-1317). In addition to the physical evidence, was appellant's confession to David Cook, wherein he admitted to killing both his wife and stepdaughter (Tr.1182), and appellant's gradually changing story about his whereabouts on the day of the murders (Tr.1394,1424-1426,1429-1432,1440-1441).

Third, appellant's jury found the existence of multiple aggravating circumstances beyond a reasonable doubt. With regard to the murder of Amanda, the jury found that appellant had three serious assaultive convictions, that appellant murdered Amanda during the commission of another unlawful homicide, and that appellant's murder of Amanda involved depravity of mind (L.F.415). Similarly, with regard to the murder of Sondra, the jury again found the existence of three serious assaultive convictions and that appellant had murdered Sondra during the commission of another unlawful homicide (L.F.414).

Fourth, the jury declined to find (1) that Amanda was murdered while the defendant was engaged in

sodomizing her, or (2) that either victim was killed because of her status as a potential witness in a pending prosecution (L.F.384,391). This is relevant because it indicates that the jury carefully examined and evaluated the evidence. Furthermore, the jury's assessment of death sentences, despite the rejection of these aggravating circumstances, reveals that the jury was convinced even without accepting all of the evidence in aggravation that death was an appropriate punishment.

Fifth, appellant's murders were egregious. He murdered his wife and his stepdaughter in a horrible fashion by stabbing them multiple times. The brutality of the double homicide was clearly shown by the fact that he stabbed his stepdaughter in excess of twenty times (Tr.1669). Not only that, but prior to killing his stepdaughter, appellant further brutalized her by striking her forcefully on the top of the head and strangling her (Tr.1671-1674,1694). He strangled her with such intensity, that he cut the flesh of his right palm and left constriction injuries on the backs of both of his hands (Tr.1309-1317). In addition, as evidenced by the presence of his sperm on the bloody bed sheet, appellant partially undressed Amanda and obtained some kind of sexual fulfillment concomitant with the murder (Tr.1565-1566,1739-1740,1743-1744; Exhibits 20m,20n,20o,43b,43c,43h).

Sixth, an examination of the remaining evidence in aggravation reveals that appellant was a long-time criminal with several prior criminal convictions (Tr.1932,1994-1996). Appellant's violent and predatory nature was revealed by the testimony of two of his prior victims, both young girls at the time appellant attacked them or attempted to sexually molest them (Tr.1961-1973,1977-1982). The evidence in mitigation of punishment, however, was minimal, suggesting merely that appellant (with his various personality disorders) would be a good candidate for incarceration and medication, and that appellant was under the influence of emotional disturbance or perhaps unable to conform his conduct to the requirements of the law at the time of the murders (Tr.1903-1930).

In addition to the foregoing, it must be noted that appellant's jury was instructed during the guilt phase

not to draw any inferences from appellant's silence (L.F.353). The earlier submission of this instruction suggests that the jury was well aware that it could not draw inferences from appellant's failure to testify. Thus, unlike the jury in Storey, appellant's jury was instructed not to draw any adverse inferences, and appellant's claim is simply that the trial court erred in not telling the jury a second time.

Appellant claims otherwise, arguing that the earlier instruction simply made the absence of the instruction in penalty phase more glaring (App.Br.70). However, if appellant's argument is followed to its logical conclusion, then the no-adverse-inference instruction must always be given in penalty phase if it is given in guilt phase. There can be no other result. Respondent submits, however, that the no-adverse-inference instruction should remain optional. A jury will not necessarily disregard the court's earlier instruction regarding the defendant's failure to testify, and, perhaps more importantly, defendants may not always want to highlight the no-adverse-inference rule a second time — particularly if the defendant believes that the earlier no-adverse-inference instruction worked to his detriment by highlighting the fact that he did not testify.

Furthermore, in appellant's case, the jury was also reminded during voir dire that it could not draw adverse inferences from appellant's failure to testify. In voir dire, defense counsel informed the jury that appellant had the right to remain silent, that they could not draw any inferences from his silence, and that the judge would so instruct them later in the case (Tr.835,840). As stated above, the judge did so instruct the jury (L.F.353).

Finally, despite appellant's claim to the contrary, the prosecutor did not impermissibly comment upon his failure to testify. Appellant cites to the prosecutor's penultimate comment in closing argument that "[t]he Defendant already had his say on August 10th, 1998, when he took both their lives" (App.Br.71). This statement, however, was not a comment upon the fact that appellant failed to testify at trial. The comment was made while asking the jury to examine the evidence and assess an appropriate sentence (Tr.2023-2024). The comment was simply a reiteration of the already-established fact that appellant had killed his victims on

August 10, 1998, and it was a plea that the jury consider appellant's fate as already sealed by his earlier actions. There is no possibility that it was perceived by the jury as a reminder that appellant did not testify at trial, or that it caused the jury to draw adverse inferences from appellant's failure to testify.

In sum, all of foregoing factors, lead inexorably to the conclusion that appellant's sentences would not have been different if the no-adverse-inference instruction had been given to the jury. The evidence in aggravation was overwhelming and, due to the optional nature of the omitted instruction, there is no possibility that giving the instruction would have changed the outcome of appellant's penalty phase.

V.

A.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR PLAINLY ERR IN ALLEGEDLY LIMITING THE CROSS-EXAMINATION OF DAVID COOK, BECAUSE THE TRIAL COURT DID NOT MATERIALLY LIMIT CROSS-EXAMINATION OR PRECLUDE THE DEFENSE FROM REVEALING COOK'S BIAS, IN THAT THE TRIAL COURT ALLOWED THE DEFENSE TO ELICIT COOK'S RELEVANT PENDING CHARGES, PRIOR CONVICTIONS, AND APPARENT GAINS THAT CAME FROM AIDING THE PROSECUTION.

B.

THE TRIAL COURT DID NOT PLAINLY ERR IN REFUSING TO SUBMIT A SPECIAL INSTRUCTION (E.G. INSTRUCTION C SUBMITTED BY THE DEFENSE) REGARDING COOK'S CREDIBILITY, BECAUSE THE JURY WAS ADEQUATELY AND PROPERLY INSTRUCTED, IN THAT THE COURT SUBMITTED MAI-CR3d 302.01, WHICH EXPRESSLY INSTRUCTS THE JURY ON HOW TO EVALUATE CREDIBILITY AND PROHIBITS THE SUBMISSION OF ANY OTHER CREDIBILITY INSTRUCTION.

In his fifth point, appellant first claims that the trial court abused its discretion in limiting the cross-examination of David Cook (App.Br.72). He argues that the court's rulings prevented him from showing Cook's "full motive to lie" (App.Br.72). Appellant argues that the court's rulings were particularly damaging because the state's case "boiled down to this snitch" (App.Br.74). Appellant also argues, secondarily, that the trial court should have submitted a special instruction regarding Cook's credibility (App.Br.72). Appellant submitted such an instruction at trial, Instruction C, but he now argues that the trial court should have submitted a special instruction similar to instructions used in other jurisdictions (App.Br.76-78).

A. Cook's Alleged Motivation to Lie Was Fully Revealed

"The scope of cross-examination and the determination of matters of witness credibility are largely within the discretion of the trial court." State v. Taylor, 944 S.W.2d 925,935 (Mo.banc 1997). Among the reasons for permitting trial judges wide latitude for the purpose of imposing reasonable limits on cross-examination are concerns about prejudice, confusion of the issues, and interrogation that is only marginally relevant. Id.

In the case at bar, prior to Cook's testimony, the trial court sided with defense counsel, holding that it would "allow[] latitude to go into the reason for this man [Cook] giving testimony" (Tr.1174). That ruling was made despite the fact that Cook was not testifying pursuant to any agreement for his testimony (Tr.1170-1171).

Accordingly, on cross-examination, defense counsel elicited extensive evidence showing a possible motivation for Cook to lie. Defense counsel began by eliciting that Cook had been "hoping for some help" with his pending cases, that he had six pending counts of burglary and stealing, and that some of his pending cases arose while he was out on bond for previous burglaries and thefts (Tr.1186). Defense counsel then elicited that the pending burglary and stealing charges were class C felonies that each carried a potential sentence of seven years in prison (Tr.1186-1190).

Having elicited those facts, the state objected and pointed out (at the bench) that defense counsel was referring to at least two charges that had been dismissed before Cook ever made any kind of statements to the police (Tr.1191-1192). Defense counsel admitted his error and said that he would correct it (Tr.1192).

Defense counsel then elicited that two of Cook's pending charges (one burglary and one stealing) had actually been dismissed in January 1998 (Tr.1192). Thus, in August 1998, when he told the police that he had information about appellant's murders, Cook was facing two counts each of burglary and stealing (Tr.1192-1193).

In addition, defense counsel elicited the fact that Cook was facing an escape charge (Tr.1193). That

particular charge arose when Cook escaped from the Phelps County Jail in January 1998 using a hacksaw (Tr.1193-1194). Defense counsel elicited the fact that Cook used a hacksaw to escape ostensibly because it was the aggravating circumstance that elevated the escape charge to a class A felony (Tr.1193-1194). Defense counsel then elicited that Cook was, therefore, facing a potential life sentence when he told the police that he had information about appellant's murders (Tr.1194).

Having set the stage, defense counsel then elicited that Cook conversed with the police "about midnight" (Tr.1194). Defense counsel also elicited that Cook refused to give any kind of recorded statement at "that midnight meeting" (Tr.1194-1195). Defense counsel further elicited that Cook sought protective custody from the police in exchange for his statements (Tr.1195). Then, defense counsel elicited that Cook was immediately transported to the Texas County Jail (Tr.1195).

Having established Cook's dire circumstances, and having shown the state's apparent willingness to engage in some quid pro quo, defense counsel then elicited that Cook had pled guilty shortly after the midnight meeting to an escape charge that had been reduced to a class D felony (Tr.1196). Furthermore, defense counsel elicited that Cook had been sentenced to a mere five years on that count (Tr.1197). Defense counsel also elicited that Cook had simultaneously pled guilty to one of the burglary charges (Tr.1197).[10] Defense counsel also elicited that Cook's two five-year sentences were ordered to run concurrently, and that Cook's remaining three counts were dismissed altogether (Tr.1197-1198).

[10] At this point, defense counsel attempted to elicit that Cook's burglary had involved his uncle's "sport bar" (Tr.1197).

Then, after impeaching Cook with his prior testimony at deposition, defense counsel returned to the question of Cook's motivation to lie (Tr.1199-1205). Defense counsel elicited that after pleading guilty, Cook was released from paroled from prison in spring 1999, after just a few months of incarceration (Tr.1206). Defense counsel then elicited that Cook was back in Phelps County Jail in summer 1999 on parole violations (Tr.1206). Defense counsel pointed out that it was at that time, when Cook found himself in trouble, that Cook talked to the police again (Tr.1206-1207).[11]

Defense counsel was still not finished, however. Defense counsel then elicited that appellant had first been charged in fall 1997 (Tr.1207).[12] Finally, defense counsel came full circle and elicited that Cook had been out on bond for those charges when he apparently violated the bond agreement and was charged with two counts each of burglary and stealing (Tr.1208-1209). Defense counsel then reminded the jury that it was at that time, when Cook had the pending charges, that Cook was also charged with the escape charge (Tr.1209).

As is evident, defense counsel was given — and took — ample opportunity to reveal Cook's alleged motivation to lie. Appellant cites three specific facts, however, that he argues were necessary to fully reveal

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[11] At this point, defense counsel tried to elicit that in August 1998 (when Cook first talked to police) Cook's girlfriend was pregnant (Tr.1207). Though the objection was sustained, Cook answered in the affirmative (Tr.1207).

[12] As is evident, despite appellant's claim to the contrary, this fact was successfully elicited (Tr.1207).

Cook's motivation, specifically: (1) that the business Cook burgled was his uncle's sports bar, (2) that Cook's "crime spree" began in fall 1997, and (3) that Cook's girlfriend was pregnant in August 1998 (App.Br.74).

As to the first fact, it was properly excluded as irrelevant. The jury was apprised of the nature of the crime and the potential sentence that Cook faced. It was the possibility of incarceration and the length thereof that gave rise to any motivation to lie. The fact that the business was owned by Cook's uncle was, at the very most, only marginally relevant. It was well within the trial court's discretion to exclude that fact.

As to the second fact, defense counsel successfully elicited that Cook had first been charged in 1997 (Tr.1207). Appellant's claim to the contrary is flatly refuted by the record.

As to the third fact, it, too, was properly excluded as irrelevant. The jury had already been apprised that Cook faced a life sentence on one of his crimes. Consequently, the jury certainly knew that Cook would miss out on various important life events. Eliciting a specific life event was only marginally relevant. Furthermore, to the extent that Cook may have wanted to "hold his newborn child" as appellant now argues (App.Br.74), that specific motivation to lie was no longer in existence when Cook testified. In fact, that specific motivation was already gone in August 1999 when Cook talked to the police a second time (Tr.1206). Thus, that specific motivation was long gone when Cook finally testified in April 2000. Moreover, this specific claim of error was not included in appellant's motion for new trial (L.F.428); thus, it should only be reviewed for plain error. Excluding this particular fact did not result in manifest injustice.

Appellant's claim that the state's case "boiled down to this snitch" is also refuted by the record and his own arguments (App.Br.74). Notably, in pressing his argument that there was no evidence connecting him to the crime, appellant had to explain away his bloody fingerprint on the bathroom sink and the cut on his right palm (App.Br.75). Each of those facts connected appellant to the murders. Of course, appellant cannot explain away the telltale constriction marks that were on the backs of his hands, his semen that was on the bloody sheet from his stepdaughter's room, his consciousness of guilt, or his gradually changing alibi.

In sum, the trial court did not materially limit appellant's cross-examination of Cook. Appellant's claim that Cook's "full motive to lie" was not revealed is refuted by the record. Appellant elicited extensive evidence in support of his belief that Cook was lying, and the two facts excluded by the trial court were, at best, only marginally relevant. The trial court did not abuse its discretion or plainly err.

B. The Jury Was Properly Instructed

Secondarily, appellant claims that the trial court plainly erred in failing to submit an instruction which would have specifically instructed the jury on how to evaluate Cook's testimony. Appellant proffered such an instruction at trial (L.F.373), but he now argues that the trial court should have offered a similar, but different, instruction sua sponte (App.Br.76-77). There was no error.

As appellant concedes (App.Br.78), the only appropriate jury instruction regarding credibility of witnesses is MAI-CR3d 302.01. State v. Silvey, 894 S.W.2d 662,669-670 (Mo.banc 1995). See also State v. Oxford, 791 S.W.2d 396,400 (Mo.banc 1990)(trial court properly refused special instruction regarding the credibility of informants); State v. Smith, 800 S.W.2d 794,795-796 (Mo.App.E.D.1990), overruled on other grounds, State v. Carson, 941 S.W.2d 518,523 (Mo.banc 1997)(trial court properly refused special instruction regarding the credibility of the defendant's alleged accomplice).

In the case at bar, MAI-CR3d 302.01, was given to the jury (L.F.349). Despite appellant's likening the usefulness of the instruction to "tarot cards or tea leaves" (App.Br.78), the MAI adequately and properly instructed the jury on how to evaluate the testimony of witnesses. Specifically, it stated:

> In determining the believability of a witness and the weight to be given to testimony of the witness, you may take into consideration the witness' manner while testifying; the ability and opportunity of the witness to observe and remember any matter about which testimony is given; any interest, bias, or prejudice the witness may have; the reasonableness of the witness' testimony considered in the light of all of the evidence in the case; and any

other matter that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness.

(L.F.349). In its clarity and scope, MAI-CR3d 302.01, adequately and properly instructed the jury on how to evaluate credibility. No other instruction was necessary or proper, and, in fact, the submission of any other instruction is prohibited. State v. Silvey, 894 S.W.2d at 669-670. There was no manifest injustice.

Finally, in claiming that he was prejudiced (but without raising this as a claim in his point), appellant argues at the conclusion of his point that the prosecutor "vouch[ed]" for Cook's testimony in closing argument (App.Br.78). Not so. "Vouching" occurs when a prosecutor implies that he or she had "facts that were not before the jury for their consideration." State v. Mease, 842 S.W.2d 98,109 (Mo.banc 1992). In the case at bar, however, the prosecutor argued Cook's credibility by drawing reasonable inferences from facts that were before the jury (Tr.1822-1824). This point should be denied.

VI.

IN ITS EXERCISE OF INDEPENDENT SENTENCE REVIEW, THIS COURT SHOULD UPHOLD APPELLANT'S SENTENCE OF DEATH BECAUSE (1) THE SENTENCE WAS NOT IMPOSED UNDER THE INFLUENCE OF PASSION, PREJUDICE, OR ANY OTHER ARBITRARY FACTOR, (2) THE EVIDENCE SUPPORTS THE JURY'S FINDING OF AGGRAVATING CIRCUMSTANCES, AND (3) THE SENTENCE IS NOT EXCESSIVE OR DISPROPORTIONATE CONSIDERING THE CRIME, THE STRENGTH OF THE EVIDENCE, AND THE DEFENDANT.

Appellant contends that his death sentences were imposed due to arbitrary factors and weak evidence (App.Br.79). He claims that his sentences "are the freakish result of the State's reliance on lies and emotion" (App.Br.79). He groups his complaints into three areas.

First appellant complains of allegedly arbitrary factors that allegedly influenced the jury (App.Br.79). He cites this Court to his earlier allegations of prosecutorial misconduct in Point I and argues that the prosecutor "opted to lie" to "win his execution" (App.Br.79-80). Appellant calls the prosecutor's alleged lies "reprehensible" (App.Br.80).

As discussed in Point I, however, the record shows that the prosecutor did not lie or mislead the jury. In fact, as discussed above, appellant's allegations of misconduct are entirely false.[13]

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[13] Appellant's attempt to contrast the prosecutor's "lies" with his having allegedly "***saved*** the lives of two Kentucky guards" is pointless (App.Br.80). In drawing the contrast, appellant refers to documents that were never admitted at trial or made a part of the record on appeal (App.Br.80). The documents should be

ignored. See Respondent's Motion to Strike the Appendix Attached to Appellant's Brief.

Appellant also argues that the prosecutor "contorted" Dr. Nelda Ferguson's testimony and argued that "since Bobby sees people as objects, he should die" (App.Br.80). The prosecutor argued as follows:

> This girl [Amanda] lived through it. Lived through it from a man who we have heard used people as objects. He sees people as objects who get in his way and who deserve to be punished when they get in his way. Their own doctor told us that.

(Tr.2005). There was, of course, nothing improper or "arbitrary" about this argument.

In commenting on Dr. Ferguson's testimony that appellant sometimes "used people as objects," the prosecutor was arguing that appellant was prone to diminishing the value of other people (Tr.1920-1921,2005). Such a tendency to view people as objects (to be used as objects) was a character flaw that the prosecutor was entitled to argue to the jury. To suggest that the prosecutor cannot point out character flaws that may have guided the defendant's thought processes — and which are supported by the evidence — is simply ludicrous.

Second, appellant argues that his death sentences were the result of passion. He cites this Court to claims raised in various other points and argues that the jury was incited by "suspicions and sexual innuendo," "ghastly" photographs, and "emotional pleas" (App.Br.82). Each of the various claims referred to is adequately discussed in the relevant points, however, respondent would reiterate that the evidence of the contemporaneous sodomy was substantial and entirely admissible (see Point IX), and the allegedly gruesome photographs were also properly admitted and properly used at trial (see Point VIII). With regard to the prosecutor's alleged emotional pleas, there is no evidence that the prosecutor wept in the courtroom, and there is no reason to believe that the jury was inflamed by the prosecutor's statement that "This isn't abut emotion, but emotion is fair" (see Point XII).

Lastly, appellant claims that the death sentences resulted from "wholly unreliable evidence," i.e., the "inherently untrustworthy" testimony of David Cook (App.Br.82). If Cook's testimony were the only

evidence, he might have a point.

However, Cook's testimony was only one small part of the whole (see Statement of Facts). To reiterate briefly, it should be remembered that the evidence showed that appellant was present at the scene of the crime at the time of the murders, appellant's bloody fingerprint was found at the scene of the crime, appellant's sperm was found on Amanda's bloody bed sheet, appellant's hands bore constriction marks that were precisely consistent with the ligature mark on Amanda's neck,[14] appellant showed consciousness of guilt in desperately asserting his "alibi" to the police, and appellant's alibi story slowly changed as he talked to the police.

All of that evidence was in addition to the confession that appellant gave to Cook, and it should be noted that Cook's testimony was not completely uncorroborated. Cook knew, for example, that appellant was upset about losing the house, that appellant "walked down to a guy's house" after the murders, that appellant had scissors in his car, and that appellant went "fishing" to build an alibi (Tr.1183-1184). In addition, any motivation that Cook had to testify favorably for the state was laid out in great detail for the jury (see Point V).

In short, appellant's sentences were not imposed under the influence of passion, prejudice, or any other arbitrary factor.

In addition, the statutory aggravators were supported by sufficient evidence and appellant's sentences were not disproportionate considering the crime, the strength of the evidence, and the defendant.

To prove appellant's three serious assaultive prior convictions, the state presented certified copies of his convictions of sexual abuse in the first degree, robbery in the second degree, and sexual abuse in the first

[14] How appellant can claim that the state had "no physical evidence connecting [him] to these murders" (App.Br.82) is a mystery.

degree (Tr.1972,1994-1996; Exhibits 49-50). Appellant does not claim that the evidence was insufficient to prove either that he had the prior convictions or that the prior convictions were serious assaultive convictions.

To prove the multiple-homicide aggravator as to each murder, and to prove the depravity-of-mind aggravator as to Amanda's murder, the state presented the evidence as outlined above in the Statement of Facts. Except in Point XVIII, where he claims that Amanda was not tortured, appellant does not contest the sufficiency of the evidence as to these statutory aggravators. There was sufficient evidence of torture as discussed in Point XVIII.

And lastly, though not challenged by appellant, appellant's sentences of death were not disproportionate. As to appellant's crime, sentences of death are often imposed in cases where the defendant murders more than one person. State v. Smith, 32 S.W.3d 532,559 (Mo.banc 2000); State v. Middleton, 998 S.W.2d 520,531 (Mo.banc 1999). In addition, sentences of death have often been imposed when the murder involved acts of brutality and abuse that showed depravity of mind. State v. Brown, 998 S.W.2d 531,552 (Mo.banc 1999). Finally, sentences of death have also been imposed where the defendant has a history of serious assaultive offenses. See State v. Taylor, 18 S.W.3d 366,379 (Mo.banc 2000); State v. Whitfield, 939 S.W.2d 361,372-373 (Mo.banc 1997).

As to the strength of the evidence, the evidence was overwhelming. As to the defendant, in addition to the heinousness of his actions in the case at bar, the evidence in aggravation showed that appellant was a long-time criminal with several prior criminal convictions (Tr.1932,1994-1996; Exhibits 45,48-51). Appellant's violent and predatory nature was revealed by the testimony of two of his prior victims, both young girls at the time appellant attacked them or attempted to rape or sexually molest them (Tr.1961-1973,1977-1982).

In sum, considering the crime, the strength of the evidence, and the defendant, appellant's sentences are not disproportionate. This Court should affirm appellant's sentences of death.

VII.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE THAT APPELLANT HAD SEXUAL CHARGES PENDING AGAINST HIM AT THE TIME OF THE MURDERS, BECAUSE THE EVIDENCE WAS RELEVANT, IN THAT IT SHOWED HIS MOTIVE TO KILL THE VICTIMS DUE TO THEIR REFUSING TO TESTIFY ON HIS BEHALF. FURTHER, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO RE-OPEN VOIR DIRE FOR FURTHER INQUIRY ABOUT APPELLANT'S PENDING SEXUAL CHARGES (AFTER THE JURY HAD ALREADY BEEN CHOSEN), BECAUSE DEFENSE COUNSEL'S REQUEST WAS UNTIMELY AND UNWARRANTED, IN THAT DEFENSE COUNSEL COULD HAVE INQUIRED DURING GENERAL VOIR DIRE.

Appellant contends that the trial court abused its discretion in admitting evidence of his pending sexual charges, arguing that the nature of his pending charges "added nothing but prejudice" (App.Br.84-85). Secondarily, he also contends that the trial court abused its discretion in refusing to re-open voir dire for further questioning about the pending sexual charges (App.Br.87).

A. The Pending Sexual Charges Showed Motive

As a general rule, evidence of prior uncharged misconduct is inadmissible for the purpose of showing the propensity of the defendant to commit such crimes. State v. Barriner, 34 S.W.3d 139,144 (Mo.banc 2000). If, however, evidence of prior misconduct is both logically and legally relevant to prove the charged crime, it is admissible. Id. Evidence is logically relevant if it has some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial. Id. Evidence is legally relevant if its probative value outweighs its prejudicial effect. Id. at 144-145. Evidence of prior uncharged misconduct generally has a legitimate tendency to prove the specific crime charged when its tends to establish motive, intent, the absence of mistake or accident, a common scheme or plan, or the identity of the person charged with the commission of the crime on trial. Id. at 145. This list of exceptions is not exhaustive. Id.

In the case at bar, evidence of appellant's pending case was relevant because it tended to prove motive. That much appellant concedes (App.Br.84-87), as he must, because appellant actually confessed that particular motive to his cell-mate, David Cook (Tr.1182). Appellant argues, however, that the sexual nature of the pending charges was irrelevant and unduly prejudicial (App.Br.84-87). He is incorrect.

The sexual nature of the pending charges was a critical and highly probative component of the evidence. Put simply, the seriousness of the pending charges increased the likelihood that the pending case was, in fact, the motive for the murders. Stated conversely, if the pending charge had been something less serious – e.g. the infraction of trespass in the second degree, §569.150, RSMo 2000, defense counsel would have undoubtedly argued that the state's so-called "motive" was ludicrous. See State v. Mallett, 732 S.W.2d 525,535 (Mo.banc 1987)(details of robbery leading to arrest were admissible in murder case to show the defendant's motive).

In short, it was well within the trial court's discretion to admit evidence of the pending sexual charges because the state's use of the pending charges legitimately tended to prove appellant's guilt.[15] Further, it was not an impermissible stretch for the state to logically infer that the evidence that proved appellant's motive also tended to undermine his alleged alibi of a carefree day of fishing. In any event, appellant made no objection to that comment during closing, and the comment certainly did not result in manifest injustice. Appellant's first claim should be denied.

B. The Trial Court Properly Refused To Re-Open Voir Dire

Appellant's secondary claim, that the trial court abused its discretion in refusing to re-open voir dire for further questioning, should also be denied. Appellant cites State v. Clark, 981 S.W.2d 143 (Mo.banc 1998),

[15] It should be noted that the trial court carefully exercised its discretion and precluded the state from eliciting the fact that appellant's sexual misconduct involved his own children (Tr.909).

and attempts to argue that the trial court erroneously "preclud[ing]" him from asking the potential jurors about the pending sexual charges (App.Br.87-89). The trial court, however, never precluded any line of inquiry.

Appellant correctly points out that the trial court delayed in ruling on his motion to preclude the state's admitting evidence of his pending charges (App.Br.87-88). Immediately prior to voir dire, however, the court took up appellant's motion and ruled that the state would be able to admit some evidence of his pending charges (Tr.132). When defense counsel pressed for a more specific ruling, the court stated that they were "not nearly to that" (Tr.132), indicating that the trial court was considering the motion as it pertained to the admission of evidence at trial.

After further discussion, defense counsel again brought up the motion and asked, "For this purpose today for what we are able to say to the panel . . ." (Tr.134). But the court responded by saying, "They're [the state is] not going to say anything like that to the panel. I can't see that coming up **until general voir dire** — even if it comes up then" (Tr.134) (emphasis added). The state agreed that in general voir dire they could "take that when we get to it" (Tr.134). Defense also agreed, saying, "Okay" (Tr.134).

The court then conducted an introductory voir dire (on two panels) and death-qualification voir dire (on several smaller panels) (Tr.135-778). Defense counsel never sought a further ruling on the motion or reiterated that he would be hampered in conducting his voir dire if the trial court did not rule on the motion.

The next day, before general voir dire, defense counsel did not raise the motion, seek any further ruling on the motion, or argue that his general voir dire would be hampered without some further ruling by the trial court (Tr.807). In fact, at no time during general voir dire did defense counsel even attempt to broach the subject of the pending charges — either through a request that the court make a further ruling on his motion or through an attempt to question the venire panel (Tr.807-859).

It was only after the jury had been selected (and the remainder of the venire panel dismissed) that defense counsel again raised the motion (Tr.859,878-881). The court deferred ruling, but even then, defense

counsel did not mention that he thought the court's ruling had hampered his ability to conduct voir dire (Tr.878-881). Instead, defense counsel waited until the next day, just prior to opening statements, to argue that the court's rulings had hampered his ability to conduct voir dire (Tr.912-913). The court denied defense counsel's request to re-open voir dire (Tr.913).

Thus, as is evident, defense counsel was never precluded from questioning the venire about his pending charges. In fact, defense counsel never tried to question the venire about the pending charges, and defense counsel never took any steps during general voir dire to get a ruling from the trial court.

Put simply, even though the defense knew that the court could rule against them on the motion in limine, the defense simply chose not to question the venire about appellant's pending charges. The defense was not "precluded" from inquiring; rather, the defense chose not to inquire, undoubtedly hoping that the jury would never hear about the pending charges. See State v. Johnson, 901 S.W.2d 60,61-62 (Mo.banc 1995) (defendant claimed that counsel was "forced" to ask questions about a prior conviction during voir dire due to the trial court's erroneous ruling in limine). The trial court did not abuse its discretion in refusing defense counsel's untimely request to re-open voir dire; this point should be denied.

VIII.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EXHIBITS 43F, 43G, AND 43I, PHOTOGRAPHS FROM AMANDA'S AUTOPSY, BECAUSE THE PHOTOGRAPHS WERE RELEVANT, IN THAT THEY SHOWED THE LOCATION AND NATURE OF WOUNDS, THE CONDITION OF AMANDA'S BODY, THE CAUSE OF DEATH, AND DELIBERATION; AND THEY AIDED THE JURY IN UNDERSTANDING DR. DOUGLAS ANDERSON'S EXPERT TESTIMONY.

Appellant contends that the trial court abused its discretion in admitting Exhibits 43f, 43g, and 43i, photographs from Amanda's autopsy (App.Br.90). He argues that their probative value was outweighed by their prejudicial effect (App.Br.90).

The trial court is vested with broad discretion in the admission of photographs. State v. Rousan, 961 S.W.2d 831,844 (Mo.banc 1998). Photographs are relevant if they show the scene of the crime, the identity of the victim, the nature and extent of wounds, the cause of death, the condition and location of the body or otherwise constitute proof of an element of the crime or assist the jury in understanding the testimony. Id. If relevant, photographs may be admitted even if they are inflammatory. Id.

In the case at bar, Exhibits 43f, 43g, and 43i were all relevant and admissible on one or more grounds. The pathologist who testified for the state at trial, Dr. Douglas Anderson, testified that the photographs would aid him in giving his testimony (Tr.1659-1660). On that basis alone, the challenged photographs were admissible to aid the jury in understanding Anderson's expert medical testimony.

More specifically, Exhibit 43f, showed the condition of Amanda's body. Primarily, it depicted her enlarged rectum, a condition that Dr. Anderson noted and took steps to investigate (Tr.1674-1677). Anderson testified that Amanda's enlarged rectum could have been caused by strangulation or, possibly, by sexual assault (Tr.1675). Both strangulation and sodomy were details of the offense.

Exhibit 43f also depicted fecal soiling on Amanda's buttocks and a lack of soiling on Amanda's thighs

(Tr.1674; Exhibit 43f). That condition was relevant because it supported the conclusion that Amanda was re-dressed at some point during or immediately after the murder (Tr.1668; see Point IX for a discussion of the evidence indicating that Amanda was re-dressed). In short, Exhibit 43f showed the condition of Amanda's body and tended to corroborate that Amanda was strangled and sodomized.

Exhibit 43g showed the nature and location of a wound on Amanda's head. Dr. Anderson testified that when Amanda's scalp was refracted, there was an area of bleeding that was consistent with an inflicted, blunt trauma (Tr.1694-1695). The blow to Amanda's head may have stunned her, knocked her unconscious, or had little or no effect (Tr.1695). Nevertheless, as a method of subduing his victim, Exhibit 43g showed that appellant might have stunned Amanda or knocked her unconscious to gain control over her (which would explain why she bore virtually no defensive wounds) (Tr.1691-1693,1712). The evidentiary value of the photograph was not "negated" by Anderson's testimony that the blow might have had little or no effect; rather, Anderson's testimony merely aided the jury in weighing the evidence.

In addition, Exhibit 43g tended to corroborate Anderson's earlier testimony that the hemorrhage in Amanda's eyes could have been caused by a blow to the head. It should be noted, of course, that a blow to the head (as depicted in the photograph) was admissible as a detail of the offense and to show the animus with which the offense was carried out. No other photograph revealed the injury inflicted there.

Exhibit 43i showed the location and nature of Amanda's wounds, the cause of her death, and deliberation. In particular, Exhibit 43i clearly depicted the size and horizontal orientation of the "sixth" wound that penetrated Amanda's lung and lacerated pulmonary arteries (Tr.1682,1697).[16] The size of the wound and its placement indicated that it directly contributed to Amanda's death (Tr.1683). In addition, the horizontal

[16] The wounds were numbered to aid the pathologist in describing them, not to indicate the order in which they were inflicted (Tr.1679).

orientation was significant because the other wounds that penetrated Amanda's chest cavity were vertically oriented (Tr.1689,1693,1697). The different orientation suggested that appellant had finally finished torturing Amanda and deliberately turned the blade so that it could penetrate and cut between the ribs to produce a more deadly wound. In other words, it was evidence of deliberation.

In short, the photographs, while perhaps graphic, were highly probative. All of the conditions depicted in the photographs — the enlarged rectum, injured head, and perforated chest cavity — were caused by appellant's brutal attack upon Amanda. As in most cases dealing with gruesome photographs, it was appellant's brutal crime that produced gruesome photographs. See State v. Middleton, 995 S.W.2d 443,462 (Mo.banc 1999); State v. Rhodes, 988 S.W.2d 521,524 (Mo.banc 1999).

Lastly, even if true, appellant's tacked-on arguments that the prosecutor attempted to inflame the jury by referring to the photographs and making emotional pleas (App.Br.93-94), have no bearing on the trial court's exercise of discretion in admitting the photographs (which was the claim raised in his point).

In any event, there was nothing wrong with the prosecutor telling the jury to look at photographs that were properly admitted at trial.[17] Neither was there any problem with the jury determining appellant's guilt and punishment based upon properly admitted evidence. Appellant's claim regarding the "emotion is fair" comment in closing argument is more fully addressed in Point XII. In any event, appellant's attempt to link that comment to the jury's consideration of Exhibits 43f, 43g, and 43i is without any basis. The trial court did not abuse its discretion in admitting the challenged photographs; this point should be denied.

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[17] It should be noted, however, that when the prosecutor said "look at the pictures," she was obviously referring to pictures of the crime scene (Tr.1811).

IX.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE THAT APPELLANT SODOMIZED AMANDA, BECAUSE THE SODOMY WAS ADMISSIBLE TO SHOW A COMPLETE AND COHERENT PICTURE OF THE CHARGED CRIME, IN THAT THE EVIDENCE SHOWED THAT APPELLANT CONTEMPORANEOUSLY SODOMIZED AND MURDERED AMANDA. THE EVIDENCE WAS ALSO ADMISSIBLE TO SHOW DELIBERATION, MOTIVE AND ANIMUS.

Appellant contends that the trial court abused its discretion in admitting evidence that he sodomized Amanda (App.Br.95). He argues that the evidence merely cast a bare suspicion that he sodomized Amanda (App.Br.95).

It has long been recognized that "if a defendant at the very time and place where he commits an offense for which he is being tried has also committed another crime, all of the criminal acts committed or participated in by him at that particular time and place may be shown as a part of the res gestae." State v. Harris, 263 Mo. 642,658, 174 S.W. 57,62 (Mo.1915); State v. Shumate, 478 S.W.2d 328,331 (Mo.1972). This exception to the rule barring the admission of evidence of uncharged crimes has more recently been called the "complete and coherent picture" exception. State v. Morrow, 968 S.W.2d 100,107 (Mo.banc 1998). Such evidence has also been deemed admissible as "details of the crime." State v. Roberts, 948 S.W.2d 577,590 (Mo.banc 1997). In addition, it is proper to show all the acts done or words spoken by an accused at the time of committing an offense, so that the jury may know the animus which inspired the act charged. State v. Walker, 484 S.W.2d 284,287 (Mo.1972).

Accordingly, if appellant committed an act of sodomy contemporaneously with Amanda's murder, then evidence of that act was admissible. The only relevant question, therefore, is whether the challenged evidence gave rise to a fair inference that appellant sodomized Amanda. It did.

The evidence showed that Amanda was subdued, perhaps by a blow to the head, placed over the

edge of her bed, and strangled (Tr.1296-1299,1671,1674,1694-1695; Exhibits 20c,20m,20q). Amanda was stabbed, primarily in the back, twenty-one times (Tr.1669; see Exhibit 43h). Her shirt, however, was cut *thirty-two* times, indicating that while the murder was occurring her shirt was pulled up and bunched together so that the knife could pass through the fabric more than once for at least some of the stab wounds (Tr.1669-1670). Amanda's panties were filled with excrement, and while there were no smears of fecal matter on her thighs (indicating that the feces had not run down her leg), there was a smear of fecal matter on her calves, indicating that at some point, her panties were pulled down around her shins or ankles (Tr.1667-1668; Exhibit 43c). As further evidence that Amanda's panties had been pulled down, the waistband was rolled up, indicating that she had been sloppily re-dressed (Tr.1665-1666; Exhibit 43b).

Thus, the evidence at the scene, the condition of Amanda's body, and the condition of Amanda's clothing showed that Amanda was partially undressed, face-down, and draped over the side of the bed for some period of time while the murder was occurring. It can also be inferred that appellant was standing behind her while she was draped half naked over the edge of the bed, because he both strangled her (from behind) and stabbed her in the back.

As to why appellant would pull up Amanda's shirt and pull down her panties during the course of the murder, the state had a simple and plausible theory: so that he could commit an act of anal sodomy. Sickeningly, appellant calls this theory "titillating" (App.Br.95).

In any event, the state's theory was supported by further evidence. In addition to the foregoing, Amanda's rectum was abnormally enlarged, indicating that she may have been anally penetrated by some object (Tr.1674-1675,1723; Exhibit 43f).[18] More telling, however, was the presence of appellant's sperm on

[18] Close examination revealed that her rectum was not otherwise physically damaged, but a lack of other physical damage did not exclude the possibility of anal sodomy (Tr.1676). The chance of other physical damage was also decreased by the fact that the victim's rectum had been lubricated by her expelled feces

Amanda's blood-stained bed sheet (Tr.1565-1566,1739-1740,1743-1744). The blood-stained portion of the sheet bore "whitish" stains, and testing of the sheet revealed sperm with DNA consistent with appellant's DNA (Tr.1565-1566,1739-1740,1743-1744; Exhibits 20m,20n,20o). One stain also contained a mixture of genetic components consistent with Amanda's DNA and appellant's DNA (Tr.1742). Some of the whitish stains also appeared to be on top of the blood, indicating that the sperm was deposited after the victim was stabbed (Exhibit 20o).

Thus, in its entirety, the evidence gave rise to a fair inference that appellant strangled Amanda, draped her over the side of the bed, pulled up her shirt, pulled down her panties, put his penis in or on her rectum, stabbed her numerous times,[19] and eventually ejaculated on the bed sheet. In fact, there is virtually no other explanation that accounts for all of the physical evidence (including appellant's sperm) and the condition of Amanda's body and clothing. Even appellant grudgingly admits that the sperm was "certainly suspicious" (App.Br.97). In fact, however, it was a great deal more than "suspicious."

In short, numerous pieces of evidence supported the conclusion that appellant contemporaneously sodomized and murdered Amanda. The trial court did not abuse its discretion in admitting the evidence of sodomy, because the sodomy was a detail of the crime that was necessary to give the jury a complete and

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(Tr.1720).

[19] The numerous shallow cuts indicated that appellant deliberately inflicted non-fatal wounds, perhaps in an attempt to cause the victim's anus and muscles to contract (Tr.1702).

coherent picture of the offense.

Furthermore, the evidence of sodomy was probative, in that it tended to show deliberation, motive, and animus. The fact that appellant sodomized Amanda while killing her, suggested that the murder was not a spur-of-the-moment decision, i.e., it suggested that the murder was the culminating aspect of a planned sexual attack. On the other hand, the sodomy also could have provided a motive for the murder, i.e., having sodomized his step-daughter, appellant wanted to silence her and protect himself by killing her. Lastly, as this Court has stated, it is proper to show all the acts done by an accused at the time of committing an offense, so that the jury may know the animus which inspired the act charged. State v. Walker, 484 S.W.2d at 287.

For all of the foregoing reasons, the trial court did not abuse its discretion in admitting the challenged evidence. This point should be denied.

X.

THE TRIAL COURT DID NOT PLAINLY ERR IN FAILING TO QUESTION VENIREPERSON ROUSE SUA SPONTE ABOUT A QUESTION THAT SHE GAVE NO ORAL RESPONSE TO DURING VOIR DIRE, BECAUSE (1) THE COURT HAD NO DUTY TO INQUIRE, IN THAT ROUSE HAD ALREADY DISCLOSED HER POTENTIALLY BIASING EXPERIENCE AND IT WAS, THEREFORE, DEFENSE COUNSEL'S OBLIGATION TO PROBE INTO ROUSE'S BIASES, (2) THERE WAS NO INFERENCE OF BIAS OR PREJUDICE, IN THAT ROUSE DID NOT CONCEAL INFORMATION THAT WAS UNKNOWN TO DEFENSE COUNSEL, AND (3) APPELLANT WAS NOT PREJUDICED, IN THAT APPELLANT HAS NOT SHOWN WHAT INFORMATION ROUSE FAILED TO DISCLOSE THAT COULD HAVE HAD ANY EFFECT UPON HER ABILITY TO FAIRLY AND IMPARTIALLY CONSIDER THE CASE.

Appellant contends that the trial court plainly erred entering sentence and judgment (App.Br.104). As stated in his motion for new trial, this allegation arose out of the trial court's failing to sua sponte question Venireperson Rouse about her or a relative's having been a victim of a crime some time in the past (App.Br.103). Rouse had indicated on a jury questionnaire that she or a relative had been a victim of a crime (L.F.445), but when the question was posed to the venire at large (as part of an extended compound question), Rouse gave no oral response (Tr.145-254). Thus, appellant claims that Rouse "lied" to get onto the jury by "willfully evading her duty" to explain her questionnaire response (App.Br.103).

As the trial court evidently realized, this case did not present a situation in which a juror failed to disclose a potentially biasing piece of information or intentionally gave false responses to a directly posed question. Specifically, in ruling on this point, the trial court stated:

> Well, it's apparent that I know that the parties — the attorneys were furnished with those questionnaires and the information was on her questionnaire. If it wasn't part of trial strategy, they could have — they had the opportunity, of course, to question the witness if she

> forgot the point about being a victim if she didn't come forward to the Bench. She had informed us that she had been the victim of a crime. If you wanted to inquire further, you may — you could have done so, counselor. That point is denied.

(Tr.2055-2056).

In a somewhat similar context, in State v. Clemmons, 753 S.W.2d 901,906 (Mo.banc 1988), a venireperson disclosed that her son had been shot. On appeal, in addition to claiming that the venireperson should have been excused for cause, the defendant claimed that the trial court should have conducted an independent examination to determine whether the venireperson had any bias in favor of the prosecution. Id. at 907. This Court rejected the claim, stating:

> The burden . . . is on the defendant to probe into any area on voir dire which is considered to be grounds for disqualification. This the defendant did not do. While at times the trial court has a duty to independently examine the qualifications of potential jurors, this duty arises only when a member of the venire gives an equivocal or otherwise uncertain answer concerning his or her ability to hear the evidence and adjudge the cause without bias or prejudice.

Id. (citations omitted).

In the case at bar, Rouse disclosed a potentially biasing piece of information on her questionnaire. Her failure to respond to the question in voir dire, therefore, might have simply arisen from her belief that she had already disclosed her answer to the court. In any event, because Rouse actually disclosed the information to the parties, the burden was upon defense counsel to inquire further. Id. Having failed to do so, appellant cannot now claim plain error. Furthermore, because Rouse gave no unequivocal answers, the trial court had no independent obligation to inquire further. Id.

Even if Rouse's failure to respond orally is viewed as a failure to disclose information, it would not

require reversal. "Not every failure of a prospective juror to answer a question is sufficient to entitle defendant to a new trial." State v. Hughes, 748 S.W.2d 733,736 (Mo.App.E.D.1988).[20] The issue is left to the discretion of the trial judge and will only be overturned if the record indicates there has been an abuse of discretion. Id. An inference of bias and prejudice arises only if (1) the ground for disqualification was actually explored on voir dire, (2) complaining counsel had no knowledge of juror's deception, and (3) the juror intentionally conceals the truth. State v. Shackley, 750 S.W.2d 99,101 (Mo.App.E.D.1988).

In the case at bar, Rouse did not intentionally conceal the truth. Appellant characterizes her silence during voir dire as willful evasion, but the trial court's suggestion that Rouse merely "forgot" the prior victimization (Tr.2055) is eminently more believable and entitled to deference. See State v. Fuller, 837 S.W.2d 304,308 (Mo.App.W.D.1992). In fact, if Rouse were such a crafty liar (as appellant argues), then it makes no sense that she would disclose the prior victimization on her questionnaire and then try to hide it from the court. Only a misguided perception colors Rouse as a willful, deceptive, finagling liar. No inference of bias or prejudice should arise.

In addition, defense counsel knew about the alleged deception. As the trial court noted, defense counsel had Rouse's questionnaire (Tr.2055), and defense counsel could have probed into Rouse's alleged bias. Appellant's claim that defense counsel brought it to the trial court's attention "as soon as practicable"

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[20] Appellant's reliance upon State v. Martin, 755 S.W.2d 337,339-340 (Mo.App.E.D.1988), is misplaced. In that case the venireperson was specifically and individually questioned, and the venireperson expressly and intentionally gave a false response that defense counsel could not uncover during voir dire. Id.

(App.Br.106) is a hollow attempt to convert defense counsel's "neglect" into plain trial court error. The stark fact remains, however, that defense counsel had the information that was allegedly concealed by Rouse, and that defense counsel "through neglect" (as they alleged at trial) or purposeful lawyering did not inquire. Again, no inference of bias or prejudice should arise.

Furthermore, while the ground for disqualification was actually explored during voir dire, Rouse was not specifically questioned individually. Instead, the subject was part of an at-large inquiry that involved many topics. The trial court asked the question as follows:

> Now then, I'm going to ask you those several questions. Please pay attention because I don't want anybody to raise their hand. I want you to form an orderly line after I get through asking these questions — those of you who have an answer to any of these questions. I need to know if any of you are presently serving as a law enforcement officer or whether you have in the past served as a law enforcement officer or whether you have a close relative or a close friend who's presently serving as a law enforcement officer. That's the way we ask on question — we give them several. **The next question is whether you or any of your loved ones or close friends have ever been the victim of a crime.** Three — I need to know whether any of you or close family members have ever been convicted of a crime. And of course, the last question is those of you who think it would be an undue hardship upon you to serve as a juror in this case.

(Tr.145-146) (emphasis added).

Under the circumstances, it would not have been impossible for Rouse to have missed the victim-of-a-crime question in the midst of so many others, or (as the trial court suggested) Rouse may have simply forgotten about the earlier incident. In fact, the idea that Rouse may have forgotten the prior incident (whatever it was) also finds some support on her questionnaire. An apparent mark on the questionnaire

reveals that Rouse may have almost marked the "No" box in response to the victim-of-a-crime question (L.F.445), suggesting that she may have only remembered the prior incident after her initially negative reaction to the question.

Finally, appellant has not shown any possibility of prejudice. Because Rouse did not intentionally conceal information that was unknown to defense counsel, no inference of bias or prejudice arises in this case. Furthermore, appellant has failed to show what possible information Rouse might have revealed that could have had any effect upon her ability to be fair and impartial.

Where unintentional non-disclosure exists, the inquiry is whether, under the circumstances, the juror's presence on the jury did or may have influenced the verdict so as to prejudice the party seeking a new trial. State v. Fuller, 837 S.W.2d at 308. Prejudice is a determination of fact for the trial court, and its finding will be disturbed only for an abuse of discretion. Id.

In the case at bar, there is nothing in the record that reveals the nature of the prior crime of which Rouse or a relative was a victim. Compare State v. Martin, 755 S.W.2d at 339-340 (juror expressly denied that she or relative was victim of a crime but, in fact, her son's father had been murdered a few years earlier). In fact, without any further evidence on the matter, it could be assumed that Rouse merely had a second cousin whose mailbox was smashed by vandals twenty years before the trial.[21] Such a forgettable crime, in light of Rouse's assurances that she could fairly and impartially consider the case despite its grievous nature (Tr.386-387), would have had no effect upon Rouse's ability to fairly and impartially consider the case. There

[21] If the prior crime was such an attenuated crime, then it is even more reasonable that Rouse merely forgot. See State v. Martin, 755 S.W.2d at 340.

was no manifest injustice.

XI.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN STRIKING VENIREPERSON MORGAN FOR CAUSE, BECAUSE MORGAN'S VIEWS PREVENTED OR SUBSTANTIALLY IMPAIRED HER ABILITY TO FULFILL HER DUTIES AS A JUROR, IN THAT SHE INITIALLY EQUIVOCATED ABOUT HER ABILITY TO CONSIDER THE DEATH PENALTY AND THEN UNEQUIVOCALLY STATED THAT SHE COULD NOT SIGN A DEATH VERDICT.

Appellant contends that the trial court abused its discretion in striking Venireperson Morgan for cause (App.Br.108). He argues that Morgan's inability to sign a death verdict did not prevent or substantially impair her ability to fulfill her duties as a juror (App.Br.108).

Venirepersons may be excluded when their views prevent or substantially impair the performance of their duties. State v. Smith, 32 S.W.3d 532,544 (Mo.banc 2000). The trial court is in the best position to evaluate a venireperson and is vested with broad discretion in determining qualifications of prospective jurors. Id. The trial court's ruling on a challenge for cause will not be disturbed unless it is a clear abuse of discretion. Id.

Venireperson Morgan gave the following responses during voir dire:

> [THE PROSECUTOR]: Thank you. No. 18 — ma'am, do you have any opinions on the death penalty such that you could not realistically consider both life without probation and parole and the death penalty as appropriate — as possible forms of punishment in a case of Murder in the First Degree?
>
> VENIREPERSON MORGAN: No.
>
> [THE PROSECUTOR]: You could consider both forms of punishment?
>
> VENIREPERSON MORGAN: I don't know. I don't like the death penalty.
>
> [THE PROSECUTOR]: I don't think there's anybody that does. The

question is can you realistically consider it?

VENIREPERSON MORGAN: Yes.

[THE PROSECUTOR]: I'm sorry?

VENIREPERSON MORGAN: Yes.

[THE PROSECUTOR]: Do you think you could actually fulfill the obligations of the foreperson . . .

VENIREPERSON MORGAN: No.

[THE PROSECUTOR]: You answered that quickly, but I just want to make sure there wasn't any confusion on my questions — okay? The obligation of a foreperson — if the jury were to find beyond a reasonable doubt and you actually conclude the death penalty is the appropriate form of punishment, do you think you could fulfill that obligation as a foreperson and sign your name to a form assessing the penalty of death against someone?

VENIREPERSON MORGAN: No.

* * *

[DEFENSE COUNSEL]: And juror No. 18, you had indicated that this is an uncomfortable type of a decision to have to make — is that correct?

VENIREPERSON MORGAN: Yes.

[DEFENSE COUNSEL]: But it's a decision that you would be willing to consider both sides of — is that correct?

VENIREPERSON MORGAN: Yes.

[DEFENSE COUNSEL]: Sometimes we lawyers are clumsy. If I do that, it's because I'm clumsy, not because they misplaced the equipment. Would you be willing, Juror No. 18, to consider evidence regarding all possible aggravating circumstances and mitigation

evidence before rendering your decision?

VENIREPERSON MORGAN: Yes.

(Tr.272-273,287).

After the panel had been questioned, the prosecutor moved to strike Morgan, arguing that she had equivocated about her ability to consider the death penalty and that she had stated unequivocally that she could not sign the verdict (Tr.299). The court agreed, stating:

> Along with her other equivocation and her being unable to sign as the foreperson — having taken all that into consideration, the Court does discharge that juror for cause over the objection — Federalized objection of defense counsel.

(Tr.299).

Thus, as the record shows, Morgan both equivocated about her ability and stated that she could not sign a death verdict. It was on those grounds that the trial court made its ruling. A venireperson's equivocation about her ability to follow the law in a capital case together with an unequivocal statement that she could not sign a death verdict can provide a basis to exclude the venireperson from the jury. State v. Smith, 32 S.W.3d at 544. The trial court did not abuse its discretion.

Even if the ruling was based solely upon Morgan's inability to sign the death verdict, as appellant claims (App.Br.108), there was no abuse of discretion. As appellant concedes (App.Br.109), this Court recently rejected a virtually identical claim. As this Court stated in Smith, "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." Id. at 545.

Indeed, it is the unwavering inability to sign the verdict form that reveals the impairment in the juror's ability to carry out his or her duties. As appellant points out, even people opposed to the death penalty can be qualified jurors if they are capable of putting aside their personal beliefs and carrying out their obligation

under the law (App.Br.109). A person who cannot sign a death verdict, however, obviously cannot suspend his or her personal views and wholly defer to the demands of jury duty.[22] As this Court stated in Smith, "[a]n 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." Id. In this context, a "hint" is merely an allusion to the existence of a real barrier to the venireperson's ability to fulfill her or his oath.

[22] The verdict must be signed by the foreperson. Supreme Court Rule 29.01(a).

XII.

THE TRIAL COURT DID NOT PLAINLY ERR IN FAILING TO GRANT A MISTRIAL SUA SPONTE OR IN ALLOWING THE PROSECUTOR TO MAKE VARIOUS COMMENTS DURING GUILT- AND PENALTY-PHASE CLOSING ARGUMENTS, BECAUSE (1) THE COMMENTS WERE PROPER, IN THAT THEY DID NOT WARN THE JURORS THAT THEY WOULD HAVE TO EXPLAIN THEIR VERDICT TO FRIENDS OR FAMILY, INVITE THE JURORS TO BASE THEIR VERDICT UPON EMOTION, CONSTITUTE UNSWORN TESTIMONY, OR DIMINISH THE JURORS' SENSE OF RESPONSIBILITY; (2) THE COURT TOOK APPROPRIATE CURATIVE ACTION WHEN IT DEEMED IT NECESSARY; AND (3) APPELLANT DID NOT SUFFER MANIFEST INJUSTICE.

Appellant contends that the trial court plainly erred in failing to declare a mistrial sua sponte and abused its discretion in allowing the prosecutor to make certain arguments during both guilt- and penalty-phase closing arguments (App.Br.112).

A. Standard Of Review

Mistrial is a drastic remedy. State v. Smith, 32 S.W.3d 532,552 (Mo.banc 2000). The decision whether to grant a mistrial is left primarily to the trial court, which is in the best position to determine whether the complained-of incident had any prejudicial effect on the jury. Id. This Court will reverse a conviction only if the challenged comments had a decisive effect on the jury verdict, meaning that there is a reasonable probability that, in the absence of the comments, the verdict would have been different. Id.

B. Guilt Phase

In guilt phase, the prosecutor argued:

> Now when we sit and we look and think about what happened to Sondra and Amanda and we try to put all the pieces together, you have to sit back and say — did whoever killed them intend and deliberate and plan to kill them? The only answer on that is

absolutely yes. That is why any conviction for other than Murder in the First Degree is an insult to Sondra and to Amanda. They deserve a conviction for Murder in the First Degree.

[whereupon defense counsel's objection of "improper argument" was overruled]

. . .

But let's talk about briefly what, under the law, is Murder in the First Degree. Murder in the First Degree is if the Defendant — we have to prove it was him — caused the death of a victim, caused them to die by stabbing. Okay? And that he was — knew he was causing the victim to die and that he killed the victim after deliberating about it. Now what is deliberation? Deliberation means cool reflection for a period of time, no matter how brief — any period of time. The time it takes to turn a knife is time enough for deliberation. There is plenty of deliberation in this case and that's why any decision other than Murder in the First degree is an insult to Sondra and Amanda.

[whereupon defense counsel's objection of "improper argument" was again overruled]

(Tr.1817-1818).

Appellant claims that the "insult" comments "warned" the jurors that they would have to explain a lesser verdict to their friends and family (App.Br.114). As is evident, defense counsel did not object on any specific grounds; thus, as appellant concedes (App.Br.114), review is for plain error.

A recent case, State v. Smith, 32 S.W.3d at 552, is directly on point. There, as here, the prosecutor argued that a lesser verdict would be an "insult" to the victims. Id. This Court specifically held that the comment "did not intimate to the jury that it would have to explain its actions to friends or family after the trial." Id. This Court also pointed out that the prosecutor's comment was part of a proper discussion of "whether appellant's actions constituted murder in the first degree." Id. The same conclusions are warranted

in the case at bar; this claim should be denied.

C. Penalty Phase

1. "emotion is fair"

In penalty phase, the prosecutor made three comments that appellant now challenges. The prosecutor opened her penalty-phase argument as follows: "It's been awhile since we've seen this picture. This isn't about emotion, but emotion is fair" (Tr.2001). The prosecutor then went on to point out that the trial was about "justice" (Tr.2001).

The lack of objection (Tr.2001) and failure to include this claim in the motion for new trial (L.F.442-443) should be fatal to appellant's claim. State v. Vaughn, 32 S.W.3d 798,800 (Mo.App.S.D.2000)(citing State v. Kempker, 824 S.W.2d 909,911 (Mo.banc 1992)).

In any event, the "emotion is fair" comment did not result in manifest injustice. As appellant correctly points out, it is improper to urge the jury to impose the death penalty based on emotion, not reason. State v. Taylor, 944 S.W.2d 925,937 (Mo.banc 1997). It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion. Id.

In the case at bar, however, the prosecutor did not improperly urge the jury to impose death based upon emotion rather than reason. The prosecutor's reference to emotion was fleeting, and it was not emphasized or urged upon the jury as a proper basis for imposing the death penalty. Compare id. In fact, in making the comment, the prosecutor said, "[t]his isn't about emotion" (Tr.2001). In other words, the prosecutor essentially told the jurors that while it was reasonable for them feel emotion (because some evidence evokes emotional responses), the trial was not "about emotion," the trial was about "justice."

In any event, even if viewed as an appeal to emotion, the "emotion is fair" comment did not result in manifest injustice. There was no objection (and thus the court did not condone the appeal to emotion by

overruling an objection), the comment was fleeting, and the comment was not emphasized by the prosecutor. Under such circumstances, and in light of the overwhelming evidence in aggravation (see Point IV), there is no possibility that the jury improperly based its verdict upon emotion as a result of this comment. See e.g. State v. Link, 25 S.W.3d 136,147-148 (Mo.banc 2000)(no plain error when prosecutor told jury to get "mad as hell" and find defendant guilty).

2. "a thousand times more humane"

Appellant next argues that the prosecutor offered unsworn testimony when she argued:

Any execution of Bobby Mayes would be a thousand times more humane . . .

[DEFENSE COUNSEL]: Objection, Your Honor.

[THE PROSECUTOR]: . . . than this act . . .

[DEFENSE COUNSEL]: Improper argument.

THE COURT: Overruled.

[THE PROSECUTOR]: A thousand times more humane than was given — than the death of Sondra Mayes. The execution of Bobby Mayes would be a thousand times more humane than the death Amanda Perkins suffered.

[DEFENSE COUNSEL]: Objection, improper argument.

THE COURT: Again, overruled.

(Tr.2001-2002). The prosecutor then went on to remind the jury that the trial was about "justice" and "fairness" (Tr.2002).

Appellant claims that the "thousand times more humane" comment minimized the jury's sentencing burden by suggesting to the jury that death by lethal injection would be "instantaneous, and therefore painless and easy" (App.Br.118). Here, as with the claim related to guilt-phase closing argument, defense counsel did not object on any specific grounds. Thus, review is for plain error.

Again, State v. Smith, 32 S.W.3d at 552-553, is directly on point. In that case, the prosecutor argued that the defendant's death would be "a thousand times more merciful than" the victims' deaths. Id. This Court held that the comment was not "unsworn testimony" from the prosecutor that the death penalty leads to a quick and easy death. Id. at 553. This Court then went on to recognize that the prosecutor's comment was simply a counter-argument to defense counsel's arguments for mercy. Id.

Similarly, in the case at bar, the prosecutor's comments were not unsworn testimony. The prosecutor did not attempt to describe the execution process, as did the prosecutor in Antwine v. Delo, 54 F.3d 1357,1361 (8th Cir.1995), and the prosecutor did not refer to any facts outside the record.[23] The prosecutor merely compared a potential sentence of death with appellant's two brutal murders. It was not improper for the prosecutor to opine, based upon the egregious nature of the murders, that appellant's execution (presumably by lethal injection) would be "more humane" than death by repeated, brutal stabbing at the hands of a husband or step-father.

In fact, while not a response to arguments for mercy (as occurred in Smith), the prosecutor's use of hyperbole was simply a method of arguing that the demands of justice would not be overly compensated by a sentence of death, i.e., that the death sentence was not disproportionate to the heinous crimes that appellant had committed. As in Smith, the prosecutor's rhetorical flourish was neither improper nor manifestly unjust.

3. "the ultimate say"

Lastly, appellant claims that the prosecutor diminished the jurors' sense of responsibility with the following:

The ultimate fate of Bobby Mayes is not at issue today. That's wrong. What is at issue

[23] Ironically, in making this claim, appellant turns to facts outside the record to argue that lethal injection is not humane (App.Br.117-118).

today is what justice is going to be given to Sondra Mayes and Amanda Perkins. That's what's at issue. The ultimate fate of Bobby Mayes has yet to be decided. A vote for the death penalty in this case is not a vote about where Bobby Mayes will spend his days. It is a vote about what is right and what is wrong. It's not the ultimate say.

[DEFENSE COUNSEL]: Objection, Your Honor. Improper argument.

THE COURT: Excuse me. I didn't hear the comment.

[THE PROSECUTOR]: I said it's not the ultimate say.

THE COURT: Excuse me. That is improper. The jury is admonished to disregard that fact that it's the ultimate say. Yours is the ultimate say.

(Tr.2021-2022). Appellant did not request a mistrial (Tr.2022).

Appellant claims that the prosecutor's "ultimate say" comments led the jury to believe that the responsibility for determining the appropriateness of the death sentence lay elsewhere (App.Br.118). The claim is without merit.

As the record shows, the trial court agreed with defense counsel and told the jury that the prosecutor's comment was improper. The trial court then instructed the jury to disregard the comment. Then, the trial judge went on to specifically instruct the jury that "[y]ours is the ultimate say" (Tr.2022). There is no reason to believe that the jury declined to believe the court and follow the court's instruction. The court was very clear in refuting the prosecutor's comment and telling the jury that they did, in fact, have the ultimate say. In short, appellant got the relief he requested and cannot now claim error. State v. Stewart, 18 S.W.3d 75,86 (Mo.App.E.D.2000). The trial court did not plainly err in failing to grant a mistrial sua sponte at that time.

Lastly, it is worthy of note that the prosecutor's comment was actually proper retaliation. Defense counsel argued that appellant would "never" get out of prison, that the jury would determine the "ultimate fate

of another human," and that the death sentence was an "ultimate penalty" (Tr.2014,2020-2021). A prosecutor has considerable leeway to make retaliatory arguments in closing. State v. Middleton, 998 S.W.2d 520,529-530 (Mo.banc 1999). Here, defense counsel misstated the law because the jury, due to the possibility of executive clemency, does not have the "ultimate" say. Thus, the prosecutor should have been allowed to respond. See State v. Richardson, 923 S.W.2d 301,321 (Mo.banc 1996) (in response to argument that defendant would be in prison "forever," prosecutor referred to executive clemency). This point should be denied.

XIII.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING CORA WADE TO TESTIFY TO OUT-OF-COURT STATEMENTS MADE BY SONDRA MAYES (WHICH INDICATED THAT SONDRA DID NOT INTEND TO TESTIFY FOR APPELLANT AT HIS PENDING TRIAL), BECAUSE (1) THEY WERE NOT HEARSAY, IN THAT THEY SHOWED SONDRA'S PRESENT INTENTION TO DO A PARTICULAR ACT AND HER STATE OF MIND, AND (2) APPELLANT OPENED THE DOOR TO THE STATEMENTS, IN THAT HE USED INADMISSIBLE HEARSAY TO SUGGEST THAT SONDRA INTENDED TO TESTIFY. IN ANY EVENT, ANY ERROR IN ADMITTING THE STATEMENTS WAS HARMLESS BECAUSE (1) THE EVIDENCE WAS CUMULATIVE TO OTHER PROPERLY ADMITTED EVIDENCE, AND (2) THERE IS NO POSSIBILITY THAT THE JURY WOULD HAVE IMPOSED A LESSER SENTENCE IF THE STATEMENTS HAD NOT BEEN ADMITTED.

Appellant contends that the trial court abused its discretion in allowing Cora Wade to testify to out-of-court statements made by Sondra Mayes (App.Br.121). Appellant argues that Sondra's statements were inadmissible hearsay and that he was prejudiced by their admission (App.Br.121,124).

Appellant challenges the following out-of-court statements: (1) "She [Sondra] said that she wasn't intending to testify for him and she had told him so," (2) "She [Sondra] said she might testify after — if he [appellant] signed the waiver," and (3) "She [Sondra] said that he [appellant] had signed it [the waiver], but that she had not been able to work up the courage to tell him that she still wasn't going to testify for him" (Tr.1991-1992).

Prior to Wade's testimony, the prosecutor argued that Wade's testimony showed that Sondra "did not intend to testify" on appellant's behalf at the impending trial for sexual offenses (Tr.1872). The prosecutor argued that the defense had opened the door to Wade's testimony by calling Fred Martin, appellant's attorney in the pending case (Tr.1872-1873). The trial court ruled that Wade's testimony was admissible to show

Sondra's "state of mind" (Tr.1873).

Contrary to appellant's claim (App.Br.123), these statements did not merely recount past events. In fact, only two portions of the statements — "she had told him so" and "that he had signed it" — recounted past events. The remaining statements merely recounted Sondra's intentions just prior to the murders.

"A declaration that indicates a present intention to do a particular act in the immediate future, relevant to a fact in issue, is admissible to prove that the act was in fact performed." State v. Buckner, 810 S.W.2d 354,358 (Mo.App.W.D.1991). See State v. Bell, 950 S.W.2d 482,484 (Mo.banc 1997)(statements that refer to an "intention, design or state of mind of the declarant" are admissible). "A statement of that kind explains or gives color to the conduct of the declarant and so is not received as an assertion of the truth of the matter spoken, but as a verbal act." State v. Buckner, 810 S.W.2d at 358.

"A verbal act within this rule of admissibility describes not only a declaration of present intention to do a particular act in the immediate future, but any statement of the declarant's existing state of mind that is so closely connected with an act in litigation as to give character to that act." Id. "It is admissible, in effect, as a fact relevant to a fact in issue." Id.

In the case at bar, Sondra's out-of-court statements that she did not intend to testify were statements of her present intention to refuse to testify. They were admissible, therefore, to prove that she had, in fact, refused to testify. That intention and that refusal were relevant to a fact in issue because they tended to prove appellant's motive to kill. Indeed, in confessing his murders to David Cook, appellant admitted that Sondra's refusal to testify had prompted his attack (Tr.1182). Motive, of course, was a fact in issue because appellant claimed that he was innocent. The trial court did not abuse its discretion in admitting Sondra's out-of-court statements which showed her present intention.

In addition to showing her present intention, one of Sondra's out-of-court statements showed her stated of mind. "Out-of-court statements offered to prove knowledge or state of mind of the declarant are

not hearsay." State v. Brown, 998 S.W.2d 531,546 (Mo.banc 1999). "Such statements are admissible if relevant." Id.

Sondra's statement that "she had not been able to work up the courage to tell him that she still wasn't going to testify for him" showed her fear of appellant just prior to the murder. Statements of fear may be received under the state of mind exception to the hearsay rule. State v. Martinelli, 972 S.W.2d 424,436 (Mo.App.E.D.1998)(a week before murder, victim told third party that she was afraid to serve her husband with divorce papers).

In appellant's case, Sondra's fear — her need to "work up the courage" — was relevant because it shed light on the critical importance of her decision not to testify. In fact, it was so important to appellant, that when she refused, he killed her (Tr.1182). The trial court did not abuse its discretion in admitting that particular statement. Id.

As stated above, however, two portions of Sondra's out-of-court statements merely recited past events. The first, that "she [Sondra] had told him [appellant]" that she was not going to testify (Tr.1991), was inadmissible hearsay. The second, that "he [appellant] had signed" the waiver (Tr.1992), was also inadmissible hearsay. The admission of these two statements (and all of the others if deemed inadmissible hearsay), however, was neither an abuse of discretion nor prejudicial for two reasons.

The first reason is the "curative admissibility doctrine," which applies after one party introduces inadmissible evidence. State v. Middleton, 998 S.W.2d 520,528 (Mo.banc 1999). In such situations, the opposing party may introduce otherwise inadmissible evidence of its own to rebut or explain inferences raised by the first party's evidence. Id.

In the case at bar, the state first broached the subject of Sondra's refusing to testify when David Cook related appellant's confession (Tr.1182). That evidence, however, was admissible as an admission — it was not hearsay. Appellant attempted to refute that admissible evidence by calling Fred Martin, his attorney

in the pending case (Tr.1787). Martin testified that Sondra was going to testify for appellant (Tr.1787-1788). He further testified that he did not have any information that Sondra had changed her mind (Tr.1788).

Of course, the only way Martin would have had such information was if Sondra (or perhaps appellant) had previously told him she would testify and had not told him otherwise. Thus, Martin's testimony was based upon out-of-court statements of the same nature as the out-of-court statements testified to by Cora Wade. Under the curative admissibility doctrine, Wade's testimony was admissible to rebut Martin's. See id.

Even if improperly admitted, however, appellant was not prejudiced by Sondra's out-of-court statements. The improper admission of hearsay does not require reversal unless the defendant is prejudiced. State v. Haddock, 24 S.W.2d 192,195 (Mo.App.W.D.2000). Such prejudice does not exist if the hearsay is merely cumulative to other properly-admitted evidence. Id. at 196; State v. Martinelli, 972 S.W.2d at 436. See Moss v. State, 10 S.W.3d 508,512 (Mo.banc 2000); State v. Brown, 949 S.W.2d 639,642 (Mo.App.E.D.1997).

Here, virtually every important fact relayed by Sondra's out-of-court statements had been established by other properly admitted evidence. The fact that Sondra was not going to testify for appellant — and the fact that she had told appellant that she was not going to testify — was established by appellant's admission to David Cook (Tr.1182). In addition, the fact that appellant had signed the waiver was established by the signed waiver, Exhibit 11a (Tr.979,989). Appellant was not prejudiced.

Appellant attempts to show prejudice by pointing out that the prosecutor argued the truth of Sondra's out-of-court statements, saying that appellant "couldn't even tell his own lawyer his wife wasn't going to testify for him" (App.Br.125). He claims that this comment was based upon Wade's testimony; however, this comment was actually based upon Fred Martin's testimony that he had not received any information "whatsoever" that Sondra had decided not to testify (Tr.1788).

Finally, it must be noted that Sondra's out-of-court statements were admitted during the penalty

phase. Thus, any possibility of prejudice was greatly decreased. Appellant's guilt had already been decided, and there is simply no possibility that the jury (in light of the overwhelming evidence in aggravation, see Point III, above) would have imposed a lesser sentence if Sondra's out-of-court statements had not been admitted.

XIV.

THE TRIAL COURT DID NOT PLAINLY ERR IN ADMITTING EVIDENCE THAT APPELLANT ARGUED WITH SONDRA PRIOR TO THE MURDERS AND THAT APPELLANT HAD BEEN "LET GO" FROM WORK, BECAUSE THE EVIDENCE WAS NOT ELICITED TO "IMPUGN [HIS] CHARACTER, IN THAT (1) THE EVIDENCE SHOWED MOTIVE, ANIMUS, OR DELIBERATION; AND (2) EVEN IF ERRONEOUSLY ADMITTED, IT DID NOT RESULT IN MANIFEST INJUSTICE.

Appellant contends that the trial court abused its discretion in admitting evidence that allegedly impugned his character (App.Br.126). He claims that the alleged character evidence resulted in manifest injustice (App.Br.126).

It is true that the prosecution may not attack the character of a criminal defendant unless the defendant first puts his character into issue. State v. Smith, 32 S.W.3d 532,549 (Mo.banc 2000). Contrary to appellant's claims, however, the state did not attack appellant's character with the challenged evidence.

Appellant first highlights the testimony of Edna Yarnall, one of appellant's neighbors (App.Br.127). She testified as follows:

> Q. (by [the prosecutor]) Could you ever hear them [appellant and Sondra] arguing next door?
>
> [DEFENSE COUNSEL]: Objection. Calls for speculation.
>
> THE COURT: Overruled.
>
> THE WITNESS: Yes.
>
> Q. (by [the prosecutor]) And is that the times you are referring to that you could hear them?
>
> A. Yes.
>
> Q. And at what times, if you remember, in general terms, would that have been prior to

the date, August 10th, of 1998.

A. Yes, prior to that.

Q. What — how far before?

[DEFENSE COUNSEL]: Objection, vague question.

THE COURT: Overruled.

THE WITNESS: When we first moved into . . .

THE COURT: Excuse me. Let's see, let's do this. Rephrase that question as to what was the time frame.

Q. (by [the prosecutor]) What was the time frame? We know it was prior to August 10th, of 1998. What was the time frame that you would hear those arguments?

A. Okay. When we first moved into our home, their door would be open and ours were open and I would hear them occasionally, say four or five times, and then I began closing my door so I couldn't hear it.

(Tr.999-1000).

Appellant then highlights the testimony of Carlos "Joe" Kirkman who testified two days later (Tr.1390). Kirkman testified:

Q. All right. Let — let's break this down. After the phone call, did he tell you anything about whether or not at the time of the — that on August 10th, 1998, he was employed or not?

[DEFENSE COUNSEL]: Objection — irrelevant, Your Honor.

THE COURT: Overruled.

THE WITNESS: Yes. He told me that he had been working for a pavement company in — a paving company in Springfield, but unknown to his wife [Sondra], they had

let him go.

(Tr.1430).

As is evident, defense counsel never objected to any of this testimony on the grounds now asserted. Instead, the grounds stated at trial were "speculation," "vague question," and "irrelevant" (Tr.999-1000). The grounds now argued were also not included in the motion for new trial (L.F.429-430). Because the claim was not preserved for appeal, the claim was waived. State v. Barnett, 980 S.W.2d 297,303 (Mo.banc 1998).

At most, this court should review for plain error. State v. Smith, 32 S.W.3d at 556-557. Under that standard, appellant bears the burden of showing plain error resulting in manifest injustice. Id.

Yarnall's testimony did not attack appellant's character. The fact that appellant and Sondra had arguments tended to prove animus, or that they had a troubled relationship, and that appellant had a motive for killing Sondra. See State v. Stewart, 18 S.W.3d 75,84-90 (Mo.App.E.D.2000) (numerous examples of behavior showing motive); see also Bucklew v. State, 38 S.W.3d 395,401 (Mo.banc 2001).

Likewise, Kirkman's testimony also tended to prove appellant's motive. Appellant had just lost his job, and that fact, combined with the other circumstances in appellant's life, tended to prove that appellant had fallen on difficult and desperate circumstances. In short, the fact that appellant had just lost his job made it more probable that appellant would take desperate action. In addition, Kirkman's testimony also suggested that appellant had hidden his unemployment from Sondra, indicating that their relationship was troubled.

In any event, even if viewed as impermissible character evidence, Yarnall and Kirkman's testimony did not result in manifest injustice. Appellant tries to characterize their testimony as a calculated attack upon his character — an attempt to portray him as a "violent" and "lazy man" (App.Br.128). At best, appellant's claim is a stretch.

The arguments that appellant had with Sondra were never characterized as violent, and the jury may well have viewed them as the kind of simple disagreements that apparently "[a]ll couples" have (App.Br.128).

In addition, being "let go" from a job is a common occurrence. Appellant was never characterized as a "lazy man who could not hold a job" (App.Br.128), and there is no reason to believe that the jury viewed appellant's misfortune in a sinister light. Appellant simply reads too much into this evidence.

In addition, appellant overestimates the persuasive power of this evidence. In light of the overwhelming evidence of appellant's guilt — his telltale hands, his bloody fingerprint, his sperm on the bloody sheet, his presence at the house at the time of the murders, his changing alibi, his desperate attempt to build an alibi, and his confession — there is simply no possibility that the jury's verdicts would have been different but for these two scraps of alleged character evidence. The trial court did not plainly err; this point should be denied.

XV.

THIS COURT NEED NOT REVIEW APPELLANT'S CLAIM THAT HIS SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED WHEN DR. LYNN HAUSENSTEIN TESTIFIED THAT APPELLANT OFFERED NO EXPLANATION ABOUT THE INJURIES ON HIS HANDS, BECAUSE THE CLAIM WAS WAIVED, IN THAT APPELLANT DID NOT OBJECT AT THE EARLIEST OPPORTUNITY. IN ANY EVENT, THE TRIAL COURT DID NOT PLAINLY ERR IN ADMITTING HAUSENSTEIN'S TESTIMONY, BECAUSE APPELLANT'S SIXTH AMENDMENT RIGHT TO COUNSEL (WHICH HAD ATTACHED IN THE PENDING PROSECUTION) HAD NOT ATTACHED IN THE MURDER INVESTIGATION, IN THAT THE SIXTH AMENDMENT RIGHT TO COUNSEL IS "OFFENSE SPECIFIC." FURTHER, HAUSENSTEIN DID NOT IMPERMISSIBLY COMMENT ON APPELLANT'S SILENCE. MOREOVER, ANY ERROR IN ADMITTING HAUSENSTEIN'S TESTIMONY THAT APPELLANT FAILED TO EXPLAIN THE MARKS WAS HARMLESS.

Appellant claims that the trial court plainly erred in admitting Dr. Lynn Hausenstein's testimony (App.Br.129). Dr. Hausenstein, who examined appellant's hands in the county jail about five hours after appellant was arrested for the murders (Tr.1307), testified that appellant "offered no exculpatory explanation for the marks on his hands" (Tr.1320). Appellant now claims that his Sixth Amendment right to counsel had attached in his "inextricably intertwined"[24] pending prosecution, and that, consequently, the state could not offer Hausenstein's testimony because Hausenstein examined appellant without his counsel from the pending case being present (App.Br.129).

This Court need not review this claim because it was waived. Failure to object at the earliest

[24] Respondent does not agree that the pending sexual charges were "inextricably intertwined" with the murders, but as will be discussed, that fact is irrelevant.

opportunity to the admission of evidence constitutes a waiver of the claim. State v. Barnett, 980 S.W.2d 297,304 (Mo.banc 1998). In addition, as a general rule, a constitutional claim must be raised at the earliest opportunity and preserved at each stage of the judicial process. State v. Blankenship, 830 S.W.2d. 1,12 (Mo.banc 1992).

In the case at bar, there was never any objection to any of Dr. Hausenstein's testimony (Tr.1305-1326).[25] In addition, appellant made no claim regarding Hausenstein's testimony in his motion for new trial (L.F.420-433). If this Court reviews this claim, review is limited to plain error review. Id.

There was no plain error. "The Sixth Amendment provides that 'in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.'" Texas v. Cobb, ---U.S.---, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001). The right is "offense specific." Id. (citing McNeil v. Wisconsin, 501 U.S. 171,175, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991)).

In the case at bar, with regard to the murders, appellant's Sixth Amendment right to counsel had not attached at the time he was examined by Dr. Hausenstein and failed to give an explanation for his injuries (L.F.1). Consequently, because the Sixth Amendment right to counsel is offense specific, there was no violation of appellant's right to counsel.

Appellant argues, however, that his right to counsel had attached in another case that was

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[25] In fact, rather than making any objection to the testimony, defense counsel elicited that appellant's hand was bleeding, perhaps hoping that the jury would think that appellant's bleeding hand was the source of his bloody fingerprint at the scene (Tr.1326).

"inextricably intertwined" with the murders (App.Br.131). Thus, he reasons, his right to counsel had also attached with regard to the murders (App.Br.130-133). Not so.

The United States Supreme Court recently repudiated the "inextricably intertwined" or "closely related factually" exception to the rule that the Sixth Amendment right to counsel is offense specific. In Texas v. Cobb, 121 S.Ct. 1335, 149 L.Ed.2d 321, the defendant argued unsuccessfully that his right to counsel had attached in a new case due to attachment in a factually-related, pending prosecution. Id. at ----. The United States Supreme Court rejected the argument, holding that "offense specific" meant exactly what it said. Id. at ----.[26] In short, there is no Sixth Amendment right to counsel that attaches to all offenses that are "inextricably intertwined" with a pending prosecution. This point should be denied.

Offhandedly, in arguing this claim, appellant also asserts that Hausenstein's testifying that appellant failed to explain the origin of his injuries was "grossly improper" because "showing that a defendant failed to volunteer an exculpatory explanation amounts to plain error, causing manifest injustice" (App.Br.133). Respondent assumes that this afterthought refers to an alleged Fifth Amendment violation. The record shows, however, that there was no Fifth Amendment violation.

In explaining her observations and conclusions, Hausenstein testified that she requested the opportunity to examine appellant's hands a second time (Tr.1318). She explained her reasons for a return visit

[26] The Supreme Court noted, however, that when the Sixth Amendment right to counsel attaches, it does encompass offenses that, even if not formally charged, would be considered the same offense under double-jeopardy analysis. Id. at ----.

to the jail as follows:

Q. (by [the prosecutor]) Now let's — let's back up a bit. Why did you ask to see the Defendant on August 12th, 1998?

A. The reason was twofold.

Q. Which was?

A. To check his cut to make sure that it wasn't getting infected, and if a cut's going to get infected, it's usually at the two to three hour point, and also . . .

Q. Two to three hours?

A. I'm sorry, two to three days. Excuse me, two to three day mark — forty-eight to sixty hours, and also . . .

Q. The second reason?

A. Was to — after observing his hands, I wanted to go back and see if these purplish marks that I had identified were of some sort of permanent nature. He — he'd offered me no explanation as to how they had gotten there. I wasn't sure if the [sic] were birth marks and I wanted to see if they had changed any indicating that maybe they were fading or going away, or if they still looked identical to what I'd seen the first day, then I could conclude they's probably been there a long time.

* * *

Q. Now you said prior to your — prior to your — on August 10th he gave no explanation as to what happened to him — correct?

A. No. The only thing he — the only explanation he offered is, while we were looking at the cut, he said he got it caught in a fishing line and kind of indicated to me that a fishing line was responsible for making that cut.

Q. Okay.

A. And I didn't explore that with him at all.

(Tr.1320,1324).

Generally, an accused's failure to volunteer an exculpatory statement or deny or explain an incriminating fact while he is under arrest is inadmissible. State v. Norton, 949 S.W.2d 672,675 (Mo.App.W.D.1997). However, this rule does not apply where the accused waives his Fifth Amendment privilege by making statements while in custody. Id. Where an accused, in custody and previously informed of his Miranda rights, answers questions or makes statements, he has elected not to remain silent and has waived his right to do so. Id.

As the record shows, appellant had been previously informed of his Miranda rights (Tr.1401,1423). After being advised of his rights, appellant (who was no stranger to the criminal justice system) waived his right to remain silent and made numerous statements to the police (Tr.1423-1434). At no time did appellant ever assert his right to remain silent, and appellant has never alleged that he did not voluntarily waive his right.

Likewise, when appellant's hands were examined, appellant did not remain silent or ever assert his right to remain silent. As is evident from the record, appellant tried to explain the cut on his palm (Tr.1324), but he offered no explanation for the other marks. Because appellant chose not to remain silent, it was proper for the prosecutor to elicit the fact that appellant offered no explanation for the marks on the backs of his hands. See State v. Norton, 949 S.W.2d at 675-676. Cf. State v. Dexter, 954 S.W.2d 332,335-343 (Mo.banc 1997) (prosecutor highlighted the defendant's assertion of his right to remain silent, which was made after the defendant was essentially accused of murdering his wife).

In any event, even if there was error, it was harmless. The physical examination of appellant's hands was not an interrogation. Dr. Hausenstein's conclusions and subsequent testimony that appellant's injuries came from constriction (i.e., when he strangled his step-daughter) were based upon what she observed —

not anything that appellant said or failed to say.

Thus, the bulk of her testimony was admissible in any event. And in conjunction with the other evidence — his bloody fingerprint at the scene, his sperm on the bloody sheet, his presence at the house at the time of the murders, his changing alibi, his desperate attempt to build an alibi, and his confession — the evidence of appellant's guilt was overwhelming. This point should be denied.

XVI.

THE TRIAL COURT DID NOT ERR IN MAKING THE DETERMINATION THAT APPELLANT'S PRIOR CONVICTIONS WERE SERIOUSLY ASSAULTIVE, BECAUSE IT WAS PROPER FOR THE COURT TO DO SO, IN THAT THE DETERMINATION OF WHETHER A PRIOR CONVICTION IS A SERIOUS ASSAULT, FOR PURPOSES OF THE STATUTORY AGGRAVATOR, IS A MATTER OF LAW FOR THE COURT.

Appellant contends that the court erred in making the determination that three of his prior convictions were "serious assaultive" convictions (App.Br.135). Citing Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), and Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), he claims that that finding should be left to the jury (App.Br.135).

As appellant acknowledges, this Court recently rejected an identical claim in State v. Johns, 34 S.W.3d 93,114 (Mo.banc 2000). In Johns, this Court stated:

> We have repeatedly held that the determination of whether a prior conviction is a serious assault, for purposes of the statutory aggravator, is a matter of law for the court, and the jury need only find as a matter of fact that a prior conviction actually occurred.

Id. In Johns, this Court specifically noted that the holdings in Jones and Apprendi were not applicable. Id. at 114 n.2. Appellant's claim does not warrant further review.

XVII.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EXHIBITS 45, 48, AND 51, APPELLANT'S PRIOR CONVICTIONS, BECAUSE THE EXHIBITS WERE RELEVANT, IN THAT THEY AIDED THE JURY IN MAKING AN INDIVIDUALIZED DETERMINATION OF THE APPROPRIATE SENTENCE.

Appellant contends that the trial court abused its discretion in admitting evidence of his prior convictions (App.Br.140). He argues that, due to the repeal of §565.032.1.(3), RSMo Cum. Supp. 1992 (repeal effective 8-28-93), and the current language of §565.032.2.(1), RSMo 2000, prior convictions are inadmissible unless they are a statutory aggravator (App.Br.140-141).

Appellant is incorrect. Prior convictions aid the jury in making an individualized determination of the appropriate sentence. An identical claim was rejected by this Court in State v. Johns, 34 S.W.3d 93,112-113 (Mo.banc 2000), and State v. Smith, 32 S.W.2d 532,556-557 (Mo.banc 2000). This claim does not warrant further review.

Appellant also alleges that he was especially prejudiced by the admission of his prior convictions, because the jury was allegedly not properly instructed on how to consider his prior convictions (App.Br.143). Instructions 27-29 and 33-35 adequately described how the jury was to consider the evidence in aggravation (L.F.386-388,394-396). Id. at 557.

XVIII.

THE TRIAL COURT DID NOT ERR OR PLAINLY ERR IN SUBMITTING THE "DEPRAVITY OF MIND," §565.032.2.(7), RSMo 2000, AND "MULTIPLE HOMICIDE," §565.032.2(2), RSMo 2000, STATUTORY AGGRAVATORS, BECAUSE (A) THE "DEPRAVITY OF MIND" AGGRAVATOR WAS SUPPORTED BY SUFFICIENT EVIDENCE, IN THAT THE EVIDENCE SHOWED THAT APPELLANT TORTURED AND MURDERED HIS STEPDAUGHTER BY HITTING HER ON THE HEAD, STABBING HER TWENTY-ONE TIMES, AND STRANGLING HER OVER THE COURSE OF ABOUT FIFTEEN MINUTES, AND (B) BECAUSE NEITHER AGGRAVATOR WAS UNCONSTITUTIONALLY VAGUE, IN THAT EACH AGGRAVATOR PROVIDED A PRINCIPLED MEANS TO DISTINGUISH CASES IN WHICH THE DEATH PENALTY IS IMPOSED FROM THOSE IN WHICH IT IS NOT.

Appellant contends that the trial court erred or plainly erred in submitting the fourth and fifth aggravators listed in Instructions 26 and 31 (App.Br.144). He argues that the "depravity of mind" aggravator was not supported by sufficient evidence, and that both aggravators were unconstitutionally vague (App.Br.144).

The multiple-murder aggravator was drafted as follows:

> 4. Whether the murder of Sondra Sutton Mayes [Amanda Perkins], was committed while the defendant was engaged in the commission of another unlawful homicide of Amanda Perkins [Sondra Sutton Mayes]. A person commits the unlawful homicide of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.

(L.F.384,391). The depravity-of-mind aggravator was drafted as follows:

> 5. Whether the murder of Amanda Perkins involved torture and depravity of mind, and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible,

and inhuman. You can make a determination of depravity of mind only if you find:

> That the defendant committed repeated and excessive acts of physical abuse upon Amanda Perkins and the killing was therefore unreasonably brutal.

(L.F.391).

As to the murder of Amanda, the jury found a total of five aggravating circumstances, including both the "depravity of mind" and "multiple homicide" aggravators (L.F.415). As to the murder of Sondra, the jury found a total of four aggravating circumstances, including the "multiple homicide" aggravator (L.F.414). The "depravity of mind" aggravator submitted in connection with Sondra Mayes's murder was not found by the jury (L.F.414).

As to the depravity-of-mind aggravator, appellant first argues that the evidence was insufficient to support its submission (App.Br.144-145). He suggests that the stab wounds came in "rapid succession" and that Amanda died within three or four minutes from lack of oxygen (App.Br.144).[27] He then goes on to say that Amanda was not tortured because she was unconscious while she was repeatedly stabbed (App.Br.144-145).

Appellant misstates the evidence. First, there was substantial evidence that Amanda survived the attack for several minutes (Tr.1699,1721). The scenario most consistent with the physical evidence involved Amanda surviving for ten to fifteen minutes (Tr.1721).[28] The amount of blood lost — approximately half of

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[27] Lack of oxygen did contribute to her death, due to aspiration of some of her gastric contents into her lungs, but the evidence suggested that aspiration occurred ten to fifteen minutes after the first stab wounds (Tr.1699-1701,1721).

[28] The spectrum ranged from five to twenty minutes, including possibly longer than twenty minutes

her total blood volume — indicated that Amanda was alive for at least several minutes (Tr.1721-1722). Furthermore, it was possible that Amanda was conscious (Tr.1699). The jury could have inferred that Amanda revived at least partially when she was being stabbed.

The physical evidence belies appellant's claim that he did not torture Amanda. Many of the stab wounds were shallow and did not contribute significantly to her death (Tr.1680-1690). Fourteen of her twenty-one wounds merely caused bleeding and pain (Tr.1680-1690). Such evidence gave rise to a fair inference that appellant tortured Amanda by deliberately inflicted numerous non-fatal wounds merely to cause her additional pain prior to her death.

Appellant claims further that the depravity-of-mind aggravator is unconstitutionally vague (App.Br.145). This Court has repeatedly denied such claims when the aggravator is accompanied by a an appropriate limiting instruction. See State v. Ervin, 979 S.W.2d 149,165-166 (Mo.banc 1998); see also State v. Smith, 32 S.W.3d 532,558 (Mo.banc 2000). In Ervin, the limiting instruction was identical to the limiting instruction used in appellant's case. Id.

Here, as in Ervin, the limiting instruction was drafted precisely as required by MAI-CR3d 313.40, Notes on Use 7. Id. Thus, as in Ervin, the depravity-of-mind aggravator was not unconstitutionally vague. See also State v. Johnson, 22 S.W.3d 183,191 (Mo.banc 2000).

Appellant also argues that the aggravator was vague by pointing out that the jury did not find that Sondra's murder involved depravity of mind (App.Br.145). He calls this a "bizarre dichotomy" (App.Br.145). In fact, however, the jury's failing to find the depravity-of-mind aggravator as to Sondra's murder (which, while similar, was factually different) illustrates exactly how this aggravator can properly limit a jury's

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(Tr.1699,1717).

discretion and provide a principled means to distinguish one murder from another.

Also, it should be noted that the depravity-of-mind aggravator was not the same in both instructions. As to Sondra's murder, the aggravator required the jury to find that "defendant inflicted physical pain or emotional suffering on Sondra Sutton Mayes and that the defendant did so for the purpose of making Sondra Sutton Mayes suffer before dying" (L.F.384). These were findings quite different from those submitted in the instruction regarding the murder of Amanda.

As to the multiple-homicide aggravator, appellant argues that "it does not narrow the class of defendants who are eligible for the death penalty" (App.Br.146). It does: not all murderers kill more than one person as part of a single scheme. Thus, the aggravator serves to narrow the class of eligible defendants because it excludes murderers who, in the absence of other factors, only murder one person. The multiple-homicide aggravator has repeatedly withstood the claim that it is unconstitutionally vague. State v. Smith, 32 S.W.3d at 558.

Unable to explain why this aggravator is vague, appellant quickly turns to another theory — that using one murder to aggravate the other is "double counting" (App.Br.147). Appellant argues that "[e]ach murder is counted in its own right and then again in aggravation of the other" (App.Br.147). The assertion is simply not true. Each murder was only counted once — to aggravate the other murder.[29] In any event, this Court

[29] Appellant's reliance upon Engberg v. Meyer, 820 P.2d 70 (Wyo.1991), Willie v. State, 585 So.2d 660 (Miss.1991), and United States v. Farrow, 198 F.3d 179 (6th Cir.1999), is misplaced for at least two reasons. First, they are not controlling. Second, they do not address the same factual and legal issues. In Engberg, for example, the defendant was convicted of felony murder. Engberg v. Meyer, 820 P.2d at 87. Under Wyoming law, the defendant, whose murder was "unpremeditated," was, nevertheless, guilty of a capital offense. Id. The court held that the underlying felony (robbery) could not be used as both (1) the element of the crime that transformed the unpremeditated murder into a capital offense, and (2) a statutory

has repeatedly rejected claims that aggravators are "duplicative." See State v. Barnett, 980 S.W.2d 297,309 (Mo.banc 1998); State v. Carter, 955 S.W.2d 548,558-559 (Mo.banc 1997).

A claim that statutory aggravators are "duplicative" is meaningless because the only purpose served by statutory aggravators is to make the defendant eligible for the death penalty, and only a single aggravator is needed for that purpose. Zant v. Stephens, 462 U.S. 862,873-874, 103 S.Ct. 2377, 77 L.Ed.2d 235 (1983); State v. Worthington, 8 S.W.3d 83,87-88 (Mo.banc 1999). Once the sentencer determines that the defendant is eligible for the imposition of capital punishment, it considers all of the evidence, including evidence supporting the statutory aggravating circumstances, in deciding upon the appropriate penalty. Id.; §565.030.4.(2)-(4), RSMo 2000. Therefore, appellant's claim that this aggravating circumstance was "duplicative" would state no ground for relief even if true. See State v. Worthington, 8 S.W.3d at 87-88; State v. Shafer, 969 S.W.2d 719,740 (Mo.banc 1998).

Though not raised in his point relied on, appellant also seems to suggest that the evidence did not support the multiple-homicide aggravator. He points to the prosecutor's closing argument (which suggested that there was a "gap in time" between the murders), and he obliquely suggests that the murders were not "committed while the defendant was engaged in the commission of another unlawful homicide" (App.Br.146).

However, given the relationship of the parties, appellant's confession to David Cook (wherein appellant said that he turned immediately from one murder to the next), and the fact that appellant killed both women within a short period of time (at the same location), the jury could have reasonably concluded that appellant committed both murders as part of a single plan, and that he committed each of the murders while engaged in the commission of the other. A short lapse of time between the murders did not invalidate the

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aggravator. Id. 87-92. The case is not analogous.

aggravator. See State v. Smith, 944 S.W.2d 901,920 (Mo.banc 1997) (the defendant lured one victim downstairs to strangle her right after he strangled the first victim).

Finally, even if one or both of these circumstances were found to be invalid, the invalidation of one aggravating circumstance does not require a sentence of death to be put aside. "The jury need find only one statutory aggravating circumstance in order to recommend imposition of the death penalty." State v. Clay, 975 S.W.2d 121,145 (Mo.banc 1998). This Court will affirm if "there is a finding of one valid aggravating circumstance beyond a reasonable doubt." State v. Middleton, 998 S.W.2d at 530.[30] Consequently, even if one or both of these aggravators was invalid, appellant was not prejudiced.

[30] Despite appellant's claims to the contrary, here and in Point XVI, Missouri is not a "weighing state." State v. Brooks, 960 S.W.2d 479,496-497 (Mo.banc 1997).

CONCLUSION

In view of the foregoing, 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 this Court's Special Rule No. 1(b), and that the brief, excluding the cover, the certificate of service, this certificate, and signature block, contains 27,886 words (as determined by WordPerfect 9 software);

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

(3) That two true and correct copies of the brief, and a copy of the floppy disk containing a copy of the brief, were mailed, postage prepaid, this _____ day of August, 2001, to: GARY E. BROTHERTON
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