No. SC89294

In the

Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

LEONARD S. TAYLOR,

Appellant.

Appeal From St. Louis County Circuit Court
Twenty-First Judicial Circuit
The Honorable James R. Hartenbach, Judge

RESPONDENT'S AMENDED BRIEF

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JURISDICTIONAL STATEMENT

Appellant appeals from a St. Louis County Circuit Court judgment convicting him of four counts of first-degree murder (§ 565.020, RSMo 2000) and four related counts of armed criminal action (§ 571.015, RSMo 2000), for which he was given four death sentences and four consecutive sentences of life imprisonment. Since a sentence of death was imposed, this Court has exclusive appellate jurisdiction of this appeal. MO. CONST. Art. V, § 3.

STATEMENT OF FACTS

In May 2005, Appellant was indicted in St. Louis County Circuit Court on four charges of first-degree murder (§ 565.020.1, RSMo 2000) and four counts of armed criminal action (§ 571.015, RSMo 2000) for the 2004 murders of his girlfriend Angela Rowe and her three children, Alexus Conley, Acquera Conley, and Tyrese Conley. (L.F. 54-57). The State later filed notice of its intent to seek the death penalty for the murders. (L.F. 82-84). The trial court later found that Appellant was a persistent offender. (Tr. 531-33). Appellant was tried before a jury from February 20-29, 2008, with Judge James R. Hartenbach presiding. (L.F. 35-37).

Appellant does not contest the sufficiency of the evidence to support his convictions. Viewed in the light most favorable to the verdict, the evidence presented at trial showed that:

Angela Rowe had three children (Alexus Conley, Acquera Conley, and Tyrese Conley) whose father was Tyrone Conley. (Tr. 837-38). In 2004, Angela was in a relationship with Appellant. (Tr. 1094). Angela Rowe worked all day at her hospital job on November 20, 2004, but she called in sick on November 21, 2004. (Tr. 1162-63).

The last time the children's father saw Angela and his children was on November 22, 2004, when he met Angela at a restaurant to return the children to her after he had spent the weekend with them. (Tr. 841-42, 845). The children had told him that they did not want to go back home. (Tr. 841). Angela was not walking normally and was acting "weird," as if she was in pain. (Tr. 842). A car followed Angela to the restaurant and it

circled the parking lot while she was there. (Tr. 843-44). Although the children's father could not positively identify the driver of the car, it appeared to him that it was Appellant. (Tr. 844-45).

Appellant called his older brother, Perry Taylor, who was an over-the-road truck driver, sometime before Thanksgiving Day and asked his brother for some money.[1] (Tr. 854-55; State's Ex. 196B). When Perry asked why, Appellant said he needed money because he had just killed Angela. (State's Ex. 196B). Appellant claimed that Angela came at him with a knife and that he shot her two or three times. (State's Ex. 196B). Appellant then told his brother that he was going to, or already had, killed the children because they had witnessed it. (State's Ex. 196B). After Appellant hung up, Perry called him back and Appellant admitted that he was still at the house. (State's Ex. 196B). Perry

[1] Exhibit 196B is an edited version of a recorded interview police conducted with Perry Taylor. (Tr. 1036-40). It was played for the jury after Perry testified at trial and denied, or did not remember, making certain statements to the police describing telephone conversations in which Appellant admitted that he killed the victims. (Tr. 856, 864, 877). Perry acknowledged making certain statements to police, but he claimed they were false and coerced by police, who, Perry claimed, told him what to say. (Tr. 864-66, 880-84).

then called their mother and told her what had happened.[2] (State's Ex. 196B). Perry had several phone calls with Appellant that evening. (State's Ex. 196B).

Telephone records showed that Appellant called Perry at 11:24 p.m. on November 23, 2004, and the call lasted 662 seconds, that Perry called Appellant back several minutes later and the call lasted for 531 seconds, and that just after midnight on November 24, 2004, Appellant called Perry back and the call lasted 639 seconds. (Tr. 1431-34; State's Exhibits 231, 233). Appellant's wife Debrene Williams called Appellant at 11:45 p.m. on November 23 and at 12:07 a.m. on November 24 and the calls lasted 390 and 633 seconds, respectively. (Tr. 1437-38). The records also showed that Appellant called his mother at 11:35 p.m. on November 23, 2004, and that the call lasted 490 seconds. (Tr. 1440; State's Ex. 239). For these calls on November 23 and 24, 2004, Appellant's cell phone accessed a cell phone tower located just a half mile from the victims' house. (Tr. 1315).

Telephone records also showed that on November 24, 2004, 9 calls were made from the Angela Rowe's home telephone: two calls to Valerie Burke, who is an "old friend" of Appellant's family; five calls to Perry Taylor; and two calls to Southwest Airlines. (Tr. 1528-30; State's Ex. 220). Beginning at 9:50 a.m. on November 25, 2004,

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[2] Telephone records showed that Perry received a call from his mother on November 24, 2004 at 12:47 a.m. and that the call lasted 350 seconds. (Tr. 1441-42).

all calls to the victims' home phone were forwarded to voicemail and no outgoing calls were made. (Tr. 1530-31).

While he was out on the road, Appellant's brother Perry Taylor had a telephone conversation with a girlfriend of his, Betty Byers, on November 24, 2004. (Tr. 1079-80). During this conversation, Ms. Byers asked Perry how Appellant was doing. (Tr. 1079-80). Perry told her that she did not want to know what Appellant had done. (Tr. 1079-80). When Ms. Byers persisted in asking, Perry told her that Appellant had told him that he had killed Angela and her three children. (Tr. 1079-80).

Perry arrived in St. Louis on Thanksgiving Day, November 25, 2004, and Ms. Byers picked him up and took him to her house.[3] (Tr. 1064-65, 1072-73, 1080-81). Perry again told her that Appellant had told him that he had killed Angela and the children. (Tr. 1081). Perry said that Appellant had told him that Angela came at him with a knife and cut his finger. (Tr. 1081-82). Appellant said that he shot her once and when Angela got up he shot her again in the head. (Tr. 1081-82). Perry told her that Appellant also admitted killing the children, but did not say how he had done it. (Tr. 1082).

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[3] The parties stipulated to the GPS records of the trucking company Perry Taylor worked for showing that he arrived in St. Louis at 3:45 p.m. on November 25, 2004 (Thanksgiving Day). (Tr. 1285-86).

While Perry was at Ms. Byers house on November 25 he received a cell phone call from Appellant. (Tr. 1082). Ms. Byers heard Perry saying to Appellant, "Man, you the fuck still there. Man what the fuck you still doing there." (Tr. 1082-83). Perry told Ms. Byers that Appellant was still at the victims' residence waiting for a letter that was supposed to come from Appellant's wife, Debrene Williams, who lived in the state of California. (Tr. 1083). When Perry asked his brother how he could stay in the house with "them people," Appellant replied, "They dead." (Tr. 1083). Appellant also said that he had turned off the heat and turned on the air conditioner. (Tr. 1083). Appellant also told Perry that "the bitch wouldn't let him go." (Tr. 1083).

Between 5:30 and 6 a.m. on Friday, November 26, 2004, Appellant's wife, Debrene Williams, called her sister (Appellant's sister-in-law), Elizabeth Williams, who lived in St. Louis. (Tr. 1245-47, 1249). Elizabeth went to the front door and found Appellant standing there. (Tr. 1247). Appellant, who was wearing brown-tinted glasses, said he had been sleeping in his vehicle in front of her house and asked her if she could take him to the airport. (Tr. 1247-48, 1250). Elizabeth had to call her sister Debrene to determine what time Appellant needed to be at the airport. (Tr. 1249). The Chevy Blazer Appellant was driving, which belonged to his brother Perry, was parked in the street, and Appellant insisted that Elizabeth move it into her garage. (Tr. 869, 1250-51).

Appellant loaded four or five bags into Elizabeth's car. (Tr. 1251). Appellant had so many bags that they all did not fit into the trunk. (Tr. 1252-53). After Appellant loaded his luggage and just before they left for the airport, Appellant walked across the

street from Elizabeth's house, made a motion into his jacket, and threw a dark metal, long-barreled revolver into the sewer.[4] (Tr. 1253-54, 1260-61). Elizabeth's daughter also saw Appellant throw "something" into the sewer, though she could not tell what it was. (Tr. 1282-83). In October 2004, Appellant had been seen at a party in possession of a black long-barreled revolver. (Tr. 1096-97).

On the drive to the airport, Appellant told Elizabeth that this would be the last time she would see him alive. (Tr. 1255). He told her that "some people" were trying to kill him. (Tr. 1255). He also said that she was going to hear things about him but that she should not believe what she heard. (Tr. 1255). He said that some of things she hears

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[4] On December 2, 2004, the day before the victims' bodies were discovered, a contractor for the sewer district cleaned the sewer in front of Elizabeth Williams's house. (Tr. 1297-1300). A large truck containing a vacuum run by a 200 horsepower motor was used to suck up all the material in the sewer. (Tr. 1296-97, 1298). The vacuum is powerful enough to lift material weighing up to 25 or 30 pounds. (Tr. 1298). On December 7, 2004, the police had sewer district employees search the sewer in front of Appellant's sister-in-law's (Elizabeth Williams) house looking for the gun. (Tr. 1030-31). They did not find one. (Tr. 1031). The police also searched the dump site where the material sucked out of the sewers was dumped, but they did not find anything there either. (Tr. 1300-02).

might appear on the news. (Tr. 1255). Appellant also told Elizabeth that he needed to get out of St. Louis. (Tr. 1255).

On November 26, 2004, Appellant, using the name Louis Bradley, bought a ticket and boarded a Southwest Airlines flight from St. Louis to Phoenix that departed at 8:10 a.m. on November 26, 2004. (Tr. 1287-88). He then flew from Phoenix to Ontario, California. (Tr. 1287-88). The reservations for this flight were made on November 25, 2004, by a person named "Deb." (Tr. 1287-88).

The next day, Saturday, November 27, 2004, Elizabeth's sister Debrene (Appellant's wife) called her from California. (Tr. 1256, 1263). Elizabeth could hear Appellant in the background yelling for Elizabeth to put the Blazer in the garage. (Tr. 1256-57, 1263). Later in the week, Appellant's brother, Perry Taylor, came to Elizabeth's house and picked up the Blazer. (Tr. 1264). Elizabeth also gave Perry some papers that Appellant had left at her house with instructions for her to give to Perry. (Tr. 1277). The papers were wrapped around a heavy box, which Elizabeth also gave to Perry. (Tr. 1278).

Inside the Blazer, police found a partial box of Winchester .38 special cartridges. (Tr. 1121-23, 1135).

Angela Rowe, who was described as a "good employee," was scheduled to work the Friday, Saturday, and Sunday after Thanksgiving (November 26, 27, and 28, 2004). (Tr. 1164, 1166). Angela did not show up for work or call in to her employer on any of those three days. (Tr. 1164-65, 1168-70). The children were in school on Monday, November 22, 2004, and Tuesday, November 23, 2004. (Tr. 1228-29). They did not have school on Wednesday, November 24, 2004, because of Thanksgiving break. (Tr. 1228). The children did not show up for school when school resumed on Monday, November 29, 2004, or on any day thereafter. (Tr. 1229).

Phone records showed that Appellant made one cell phone call to the victims' phone number on Monday, November 22, 2003, and did not call the victims' number on any date after that. (Tr. 1429; State's Ex. 232).

On December, 2004, a Jennings police officer responded to a call to check on the well being of the residents at Angela Rowe's house. (Tr. 820). The officer found the yard full of daily newspapers and the mailbox full of mail. (Tr. 820-21, 835). The newspapers lying in the front yard were dated November 26, 27, 28, and 29, 2004. (Tr. 983-86, 1003-04). All the windows and doors were locked, so the officer asked the fire department to pry open a back window and he crawled inside. (Tr. 821-22). Although it was dark inside, the officer heard the televisions on with the sound turned up. (Tr. 822, 829, 831). The inside of the house was extremely cold. (Tr. 822, 829, 911). The air

conditioner had been turned on and the thermostat was set on its lowest setting. (Tr. 957-58). The house had not been ransacked, all the doors and windows were locked, and no signs of forced entry were found. (Tr. 821, 824, 829, 914).

Angela Rowe was found dead in the bedroom where the officer had entered. (Tr. 826). She had suffered several gunshot wounds. (Tr. 1106-10). In the master bedroom, the officer found Angela Rowe's children Alexus Conley (age 10), Acquera Conley (age 6), and Tyrese Conley (age 5) lying side by side on the bed. (Tr. 825, 1188-90). They were all dead with gunshot wounds to the head. (Tr. 825). Although police had information that five people lived at the residence, including Appellant, no one else was found in the house. (Tr. 828, 1043-44).

Angela Rowe suffered two gunshot wounds through her lower left arm and a bullet "grazing" wound just below her left breast. (Tr. 1178-79). She had lacerations on the left side of her forehead that occurred near her death. (Tr. 1181). The fatal gunshot wound she suffered was one that entered on the back of the right side of her head that tracked downward toward the front. (Tr. 1182-83). Bullet fragments were recovered from her brain. (Tr. 1111, 1182).

The oldest child, Alexus Conley, had two gunshot wounds to the back of her head. (Tr. 1190). Both shots entered the back of her head and tracked toward the front of it. (Tr. 1190-91). A bullet was found in the crown of Alexus's head. (Tr. 1119, 1190-91). Acquera also suffered two gunshot wounds to the head. (Tr. 1183-84). Both shots entered just above and in front of her right ear, and the bullets tracked from front to back.

(Tr. 1184, 1186). The bullets tracked all the way through the brain and skull, and one bullet fell out and was recovered at the morgue as her body was being moved. (Tr. 1113-14, 1187). There were soot deposits and gunpowder residue on the wounds indicating that the gun was only inches away from her head. (Tr. 1185, 1192). Tyrese Conley had a single gunshot wound to the head that entered above and behind his left ear with a downward track going back to front. (Tr. 1189). Based on the position of the children's bodies when they were found, the medical examiner opined that the shooter was above them and positioned to the right. (Tr. 1193-94).

The victims all died at about the same time and their bodies showed signs of decomposition; they had a foul odor and were past the state of rigor mortis. (Tr. 1194, 1196). Based on the atmospheric conditions around the bodies and the fact that the air conditioner was on and set on its lowest setting led, the medical examiner concluded that they had been dead two or three weeks before being found. (Tr. 1195-96, 1219-21, 1223).

All 10 projectiles recovered from the victims' residence and their bodies were fired from the same gun, a .38 or .357 caliber revolver.[5] (Tr. 960, 977, 987-89, 1001-02, 1144-45).

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[5] The firearms examiner testified that .38 caliber shells can also be fired from a .357 caliber revolver. (Tr. 1152).

Also inside the house, police found an envelope addressed to Angela Rowe with a San Bernadino, California postmark of November 22, 2004. (Tr. 912-13). Inside was an unsigned letter that read:

> Is your man faithful ??? Eventually it all comes out. Enjoy it now. Because he's not yours.

(Tr. 913; State's Ex. 139). In the kitchen, police found a can of Glade air freshener with Appellant's fingerprints on it. (Tr. 1009, 1269-70, 1273).

In a box in the basement, police found a social security card and driver's license for a "Terrence Carter"; Appellant's picture was on the driver's license. (Tr. 920-21).

On December 9, 2004, police were conducting surveillance at Appellant's girlfriend's house in Madisonville, Kentucky. (Tr. 1303-05). At 10 a.m., a man, not Appellant, came out of the house and got inside a maroon Oldsmobile and drove away. (Tr. 1305). Ten minutes later, the car returned and the driver started bringing luggage out of the house and loading it into the car. (Tr. 1305). The driver went back inside and returned with more luggage that he loaded into the car. (Tr. 1305-06). He then opened the right rear passenger door, left the door ajar, and backed up closer to the garage. (Tr. 1305-06). The driver went and looked up and down the street and then got back into the car. (Tr. 1306-07). Appellant then came out of the house, stooping low along the car, and got in the door that the driver had left ajar. (Tr. 1306-07). Appellant closed the door, dove down onto the floorboard, and the car drove away. (Tr. 1306-07).

The police stopped the vehicle and arrested Appellant. (Tr. 1317). Appellant told police that his name was Jason Lovely, and in his luggage was a Missouri identity card with the name Jason Lovely on it. (Tr. 1318-19). Also in the luggage were bus itineraries under the name of Jason Lovely showing a departure from San Bernardino, California on November 29 with a destination of Lanett, Alabama. (Tr. 1329). Other items found included an Illinois birth certificate with the name Jason Anthony Richardson, and several pamphlets and books on how to create a new identity. (Tr. 1324-28, 1330; State's Exhibits 154, 155, 156, and 191).

Also in Appellant's luggage was a pair of brown-tinted glasses that belonged to Appellant and which he had been seen wearing before the murders. (Tr. 929-30, 1094-95, 1098, 1249-50, 1331; State's Exhibits 124, 168, 169). The glasses tested positive for the possible presence of blood on the right nose guard area. (Tr. 1372, 1375-77). A confirmatory blood test could not be performed because of the possibility that the entire sample would be consumed and lost for any further testing. (Tr. 1378, 1380, 1397-98). A DNA analyst was able to extract DNA from the stain on the eyeglasses. (Tr. 1467). Although she could not obtain a full genetic profile from the DNA retrieved because of the small sample present, the analyst was able to eliminate the murdered children (Alexus, Acquera, and Tyrese Conley) as the source of the DNA. (Tr. 1468, 1479-80, 1488-89). She could not, however, eliminate their mother, victim Angela Rowe, as the source of the DNA. (Tr. 1468, 1503, 1509). The partial DNA profile that was obtained occurs in only 1 in 12,930 persons in the African-American population. (Tr. 1469).

On February 20, 2008, a week before trial began, Appellant called his brother Perry to let him know that court had issued a writ of body attachment against Perry and that if Perry left the state and was later arrested, he could fight extradition and could not be brought back to Missouri. (Tr. 1557-63; State's Ex. 259).

Appellant did not testify, but called several witnesses on his behalf. (Tr. 1578-1708). The jury found Appellant guilty on all counts. (L.F. 36, 1186, 1189, 1198, 1201, 1204, 1207).

During the penalty-phase proceeding, the State presented evidence of Appellant's convictions for cocaine possession with intent to distribute, forcible rape, forgery, and stealing. (Tr. 1802-05). In addition to victim-impact testimony from the victims' family members, the State also presented evidence that in July 2000, Appellant raped his stepdaughter at gunpoint in a vacant parking lot, and that he threatened to kill her, her mother, and her siblings if she told. (Tr. 1805-20).

Appellant informed the court that he had instructed, and was, in fact, prohibiting his attorneys from presenting any evidence during the penalty-phase proceeding. (Tr. 1794-95). Appellant explained that it was against his religious beliefs for either he or his attorneys to ask the jury to spare his life. (Tr. 1796-98). Appellant did allow his attorneys to offer a stipulation into evidence regarding his behavior while in prison. (Tr. 1794-95, 1821-23). Appellant also prohibited his attorneys from making a penalty-phase closing argument. (Tr. 1849-50).

The jury recommended that Appellant receive four death sentences for these murders. (L.F. 37, 1273-80, 1303-04, 1308-09, 1313-14, 1318-19). The trial court sentenced Appellant to four death sentences and imposed four consecutive life sentences for the armed criminal action convictions. (Tr. 1859-61; L.F. 37, 1409-14).

ARGUMENT

I (hearsay—gas station pay phone).

The trial court did not err in excluding Gerjuan Rowe's deposition testimony that the victim, Angela Rowe, called her from a pay phone because this testimony was inadmissible hearsay in that the sole source of Gerjuan Rowe's knowledge that the victim was calling from a pay phone was based on an alleged out-of-court statement of the victim.

A. The record.

During the State's case-in-chief, Appellant's attorneys informed the court that a subpoena had been served on victim Angela Rowe's sister, Gerjuan Rowe, that an investigator for the Public Defender's Office had called and told Ms. Rowe to come to court to testify, and that Gerjuan Rowe had told the investigator that she would not appear in court despite having been subpoenaed. (Tr. 1406-09). The court issued a writ of body attachment for Gerjuan Rowe. (Tr. 1409).

Near the end of the State's case, Appellant's attorneys informed the court of the efforts they had expended in attempting to serve the writ of body attachment, that the writ had not yet been served, and that the defense had intended to call Ms. Rowe as a witness during their case. (Tr. 1568-71). They then sought permission to read portions of Ms. Rowe's deposition into the record. (Tr. 1571). The court found that the defense had made diligent efforts to secure the witness's attendance, granted the request to read

portions of Ms. Rowe's deposition, and ruled that both Appellant and the State would be allowed to read portions of that deposition into evidence. (Tr. 1571-72).

During a conference outside the jury's hearing, the parties identified what portions of the deposition they wanted read to the jury, and the court considered the parties' objections to the reading of certain parts of the deposition. (Tr. 1576-77, 1630-67). As Appellant's counsel was identifying by page and line number those parts of the deposition transcript she wanted read to the jury, the prosecutor raised a hearsay objection to Gerjuan Rowe's testimony stating that the victim Angela Rowe had called her from a pay phone:

> [The Prosecutor]: Okay. Judge, I'm objecting to that. This is the discussion that supposedly the witness had with the victim Angela Rowe where the victim told her I'm calling from a pay phone. That's what this witness indicates is that the information she's at a pay phone came from Angela Rowe and no one else. I believe based upon that it is hearsay that Angela was even on a pay phone. And I object to these lines coming in on that basis. She ended up she indicated that she never even went down there, she never hooked up with Angela or saw her at the location on Jennings Station Road and West Florissant or saw her on the pay phone.
>
> [Appellant's Counsel]: And again I object in light of the argument that the State has made with respect to the cell phone records are reflective of contact between Gerjuan Rowe and Angela Rowe, that this information that she

was calling from a pay phone would not be reflected in the cell--in the Charter records that have been offered by the State.

[The Prosecutor]: But those phone calls would be reflected within the cell phone records of Gerjuan Rowe, which is my understanding have also been admitted into evidence.

[Appellant's Counsel]: That's correct, those records are in evidence.

(Tr. 1652-53).

During this discussion, the court read portions of the deposition into the record and concluded that Gerjuan Rowe's testimony stating that her sister called her from a pay phone was based on hearsay:

The Court: It's based on hearsay, Bev [Appellant's Counsel]. How do you know—"MR. KEY [The Prosecutor]: How do you know she was on the pay phone?" "Answer: Because I asked her. I asked her, 'Where are you?' And she said she was on the pay phone." And I can't think of an exception to the hearsay rule. I won't allow this in so I'll sustain the objection.

(Tr. 1653). Appellant's attorneys then discussed with the court whether they could leave in the testimony showing that the victim's sister talked with the victim on the phone, and the court indicated that the testimony showing that Gerjuan Rowe talked to her sister on the phone would be admitted into evidence:

[Appellant's Counsel (Ms. Kraft)]: Can you pare it out a little bit?

[Appellant's Counsel (Ms. Beimdiek)]: Yeah, she can say she got a call. Can she say that?

The Court: Absolutely.

(Tr. 1653). The court then pointed out that Appellant, by using the telephone records admitted into evidence, could prove that a call was made from Gerjuan Rowe's cell phone to the gas station pay phone on the day in question:

[Appellant's Counsel (Ms. Beimdeik)]: Okay. Well, I object to the Court excluding that based on the cell phone records that have been admitted into evidence, I do believe it's relevant.

The Court: Based on the cell phone records?

[Appellant's Counsel]: Right.

The Court: What do they have to do with it?

[Appellant's Counsel]: There's a call in there from the Amoco Station in Gerjuan Rowe's cell phone.

The Court: And you'll be able to point that out to the jury.

[Appellant's Counsel]: But if I'm prevented from saying she's calling from the Amoco.

The Court: I don't know, I didn't read this whole thing. But putting this in context, doesn't Gerjuan say about what time she called Angela on what day, and upon what time, and upon the—

[Appellant's Counsel]: The early morning hours of the 28th.

The Court: And can't you go to her cell phone records from the jury and say she called her—from her deposition she said she called her on such a such a day, and here's the phone records to verify that she got a call from her that time on that day?

[Appellant's Counsel]: And the germane point is there's a cell phone call to the Amoco Station.

The Court: I understand.

[Appellant's Counsel]: But if I don't have that, the call is less valuable to me to just point to a phone call from Gerjuan's cell phone records to an Amoco Station if I don't have that Gerjuan is calling the Amoco Station because that's where she believes Angela is located.

The Court: Well, that may well be. I don't know how you get it in without violating the hearsay rule. So I'll sustain the objection to that. And as [the Prosecutor] said, not to the phone call itself but—or the fact that it was made, or anything else, but just the fact she was on a pay phone; that's hearsay.

(Tr. 1653-55).

Appellant's counsel then identified portions of the deposition, excluding the references to the pay phone, that were to be read to the jury containing Gerjuan Rowe's testimony that she had a telephone conversation with the victim Angela Rowe late on November 27 or early on November 28, 2004:

[Appellant's Counsel]: We will take out she was supposed – "I was supposed to have been on my way to get her. I was supposed to have been on my way to get her." Page 62 beginning on line 5. And we're taking out the reference to the pay phone which I understand the Court has ruled we can't get into. And the question, "How do you know she was on the pay phone?"

[The Prosecutor]: And you want to read the line, "I was supposed to have been on my way to get her. I was supposed to have been on my way to get her, that's what I was supposed to be doing. That's how I knew," which is where the hearsay's coming in.

[Appellant's Counsel]: Well, it's just totally out of context. Okay. Page 60 starting at line 16.

* * * *

[The Prosecutor]: No. Starting line 22 is your question, "And it sounds like the last time you had personal contact with her."

[Appellant's Counsel]: Yeah, "And it sounds like the last time you had contact with her was early morning hours of the 28th, and you guys were out walking on the street? "That was the 27th to the 28th. "Right. Late Saturday night, early Sunday morning? "Early Sunday morning, exactly. "And that wasn't phone contact, that was standing there with her? "No, we was on the phone." Okay?

The Prosecutor]: "Early Sunday morning, exactly. "And that wasn't phone contact, that was standing there with her? "No, we was on the phone." Do you want to stop there or continue with the full answer?

[Appellant's Counsel]: I want to continue with the answer.

[The Prosecutor]: 'I was walking around. You talking about that 3:00 o'clock in the morning?"

[Appellant's Counsel]: "Yes." And I want to go to the next sentence, "We was out walking around, and she did call me from a pay phone on Jennings Station Road and West Florissant a [sic] the Amoco."

[The Prosecutor]: And that's my objection.

The Court: That's out based on hearsay.

(Tr. 1655-57). The court made the same ruling regarding a pay phone reference with respect to another portion of the deposition, but allowed testimony stating that the last time Gerjuan Rowe talked to the victim was on November 28:

[The Prosecutor]: Then on page 73 you wanted beginning line 17, "And last time you saw Angela alive was on Saturday, the 27th?" And I have no objection to lines 17, 18, 19, 20, 21 and 22. But I have an objection to lines 23, 24 and 25, where it again references the pay phone.

[Appellant's Counsel]: How about if we take out—"And the last time you talked to her was when she called you on the 28th of November?"—"from the pay phone," in light of the Court's ruling.

The Court: I'll allow that.

[Appellant's Counsel]: Okay. So "she called you," I'm striking the words "from a pay phone" and leaving the rest; is that correct?

The Court: Yes.

[Appellant's Counsel]: Over onto page 74.

[The Prosecutor]: The first four lines?

[Appellant's Counsel]: Right. Ending at, "Yeah". And again over my objection to I'm being prevented from having her establish it was a pay phone.

[The Proseuctor]: Okay. Starting line 17 page 73, "And last time you saw Angela alive"; is that right?

[Appellant's Counsel]: Yes.

[The Prosecutor]: And then going through the end of the page with those words about the pay phone taken out. And down to line 4 on page 74; right?

[Appellant's Counsel]: Yes.

[The Prosecutor]: Okay. Nothing else on page 74?

[Appellant's Counsel]: Beginning line 17, "Did you also tell the police you had phone contact with Angela Sunday evening at 7:00 p.m.?"

[The Prosecutor: Okay. My objection would be line 25.

The Court: On 74?

[The Prosecutor]: On 74, "So you talked about this phone call," on page 75, "from a pay phone."

The Court: I'll delete the reference to the pay phone.

[Appellant's Counsel]: She tells the police that she talked to her on a pay phone, I guess that's what I'm asking her about. I understand the Court's ruling.

The Court: When she called you from a pay phone, the only way she would know that—

[Appellant's Counsel]: "So you talked about this phone call", and are you saying take out, "From a pay phone?"

[The Prosecutor]: "From a pay phone", leave the rest in. . . . .

(Tr. 1663-65).

After the parties completed this process, selected portions of Gerjuan Rowe's deposition testimony were read to the jury.[6] (Tr. 1700-01).

During closing argument, Appellant's counsel argued to the jury that evidence presented at trial showed that Gerjuan Rowe's cell phone records proved that a call to the gas station was placed on the date and time that Gerjuan testified in her deposition that she was talking to the victim.[7] (Tr. 1749-53).

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[6] The portions of the deposition that were read to the jury were not transcribed in the trial transcript. (Tr. 1701). The deposition of Gerjuan Rowe was apparently not marked as an exhibit or offered into evidence by the parties.

[7] Excerpts of Appellant's counsel's argument on this issue appear in Point X.

B. Standard of review.

The trial court is vested with broad discretion to admit and exclude evidence at trial, and error will be found only if this discretion was clearly abused. *State v. Simmons*, 955 S.W.2d 729, 737 (Mo. banc 1997). On direct appeal, this Court reviews the trial court "for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial." *State v. Morrow*, 968 S.W.2d 100, 106 (Mo. banc 1998).

C. The testimony that the victim was calling from a pay phone was inadmissible hearsay.

"A hearsay statement is any out-of-court statement that is used to prove the truth of the matter asserted and that depends on the veracity of the statement for its value." *State v. Forrest*, 183 S.W.3d 218, 224 (Mo. banc 2006). "Hearsay statements generally are inadmissible." *State v. Sutherland*, 939 S.W.2d 373, 376 (Mo. banc 1997). "The underlying rationale for the hearsay rule is for the purpose of securing the trustworthiness of the assertions." *State v. Link*, 25 S.W.3d 136, 145 (Mo. 2000); *see also State v. Kirkland*, 471 S.W.2d 191, 193 (Mo. 1971) ("The essential principle of the hearsay rule is to secure trustworthiness of testimonial assertions by affording the opportunity to test the credit of the witness, and it is for this reason that such assertions are to be made in court subject to cross-examination."). "Courts generally exclude hearsay because the out-of-court statement is not subject to cross-examination, is not offered under oath, and the fact-finder is not able to judge the declarant's demeanor and credibility as a witness."

Id. "The right to cross-examination is essential and indispensable." *State v. Jaynes*, 949 S.W.2d 633, 635 (Mo. App. E.D. 1997).

Gerjuan Rowe's deposition testimony that her sister called her from a pay phone is clearly hearsay. This knowledge was not based on any personal observation of Gerjuan Rowe, but was derived solely from what the victim allegedly told her during the phone call. But Appellant contends that this hearsay testimony was admissible under the present-sense-impression exception to the hearsay rule. The record shows, however, that this hearsay testimony does not qualify for admission under that exception.

"For a declarant's out-of-court statement to be admitted as a present sense impression: (1) the statement must be uttered simultaneously, or almost simultaneously, with the occurrence of an event or act (2) the statement must describe or explain the event or act, and (3) the declarant must have perceived the event or act with his or her own senses." *State v. Smith*, 265 S.W.3d 874, 879 (Mo. App. E.D. 2008). "Although statements of present sense impression, unlike excited utterances, do not result from the shock or excitement produced by a startling or unusual occurrence, other indicia of trustworthiness support their admissibility as evidence." *Id.* "Additionally, in most cases, a witness will have observed the event and can corroborate the hearsay statement, and the declarant will often be available at trial for cross-examination to verify his or her credibility." *Id.*

For example, in *Smith*, the court held that the hearsay testimony offered into evidence did not fall under the present-sense-impression exception because the declarant

was unavailable to testify and no testimonial or physical evidence corroborated the hearsay statement. *Id.* On the other hand, in *State v. Crump*, 986 S.W.2d 180 (Mo. App. E.D. 1999), the court held that the hearsay statement was admissible under the present-sense-impression exception when both the declarant and the person who heard the declaration testified at trial and were subject to cross-examination. *Crump*, 986 S.W.2d at 188.

In Appellant's case, neither the declarant, nor the witness who heard the statement was available to testify. The declarant, the murder victim, was obviously unavailable and the witness who allegedly heard the statement refused to appear for trial. In addition, the victim's alleged statement that she was calling from a pay phone is not a "present sense impression" that would qualify under this exception. The fact that the victim allegedly said she was calling from a pay phone is not the perception of an event while it is occurring and such a comment does not describe or explain an event. It was simply an unverified out-of-court statement as to the caller's location given in response to a direct question from the witness who claimed to have heard this statement. For an out-of-court statement to have any reliability as a present sense impression it must be made spontaneously and without prompting or in response to questioning by the party who claimed to have heard the statement.

The out-of-state cases on which Appellant relies are inapposite. First, the courts in those cases were considering claims that the trial court had erred in allowing hearsay testimony. Here, of course, Appellant is complaining that the trial court abused its

discretion in *not* admitting unreliable hearsay testimony. Second, those cases involve a declarant's testimony recounting a statement made by an observer during, or immediately after, a telephone conversation which describes an event that occurred during the call. *See State v. Newell*, 710 N.W.2d 6, 17, 19 (Iowa 2006) (declarant's hearsay testimony that the observer said during a telephone conversation that the defendant was listening to the conversation); *McBeath v. Commonwealth*, 244 S.W.3d 22, 37-40 (Ky. 2008) (declarant's hearsay testimony that the observer said immediately after ending a telephone conversation with the defendant that the defendant was looking for a gun); *State v. Price*, 952 So.2d 112, 119-20 (La. Ct. App. 2006) (declarant's hearsay testimony that the observer said during a telephone conversation that the defendant was driving recklessly); *People v. Coleman*, 791 N.Y.S.2d 112 (N.Y. App. 2005) (recording of 911 call in which unidentified observer is describing an attack in progress). The testimony excluded by the trial court in this case is completely unlike the testimony admitted by the trial courts in these out-of-state cases.

This testimony also does not fall under the constitutionally-based hearsay exception recognized in *Chambers v. Mississippi*, 410 U.S. 284 (1973). In *Chambers*, the United States Supreme Court "found a constitutionally-based hearsay exception in the due process clause." *State v. Hutchison*, 957 S.W.2d 757, 761 (Mo. 1997). "This exception applies to out-of-court statements that both exonerate the accused and are 'originally made and subsequently offered at trial under circumstances providing considerable assurance of their reliability.'" *Id.* (quoting *Chambers*, 410 U.S. at 300).

"The Supreme Court recognized three such circumstances of reliability: 1) each confession is 'in a very real sense self-incriminatory and unquestionably against interest'; 2) each statement was 'spontaneously made to a close acquaintance shortly after the murder occurred'; and 3) the statements are 'corroborated by other evidence in the case'". *Id.* (quoting *Chambers*, 410 U.S. at 300-01). After *Chambers* was decided, this Court noted that "the dangers inherent in opening the door to extrajudicial confessions made by one not a party to the proceeding" and cautioned against opening the doors beyond the facts presented in *Chambers*. *State v. Turner*, 623 S.W.2d 4, 9 (Mo. banc 1981).

The other cases relied on by Appellant to support this claim are equally unavailing. *See State v. Douglas*, 797 S.W.2d 532 (Mo. App. W.D. 1990) (the rape-shield statute could not be used to preclude testimony showing that the victim was sexually active with her boyfriend when the state's evidence suggested that the victim's only sexual activity was with the defendant); *State v. Samuels*, 88 S.W.3d 71 ((Mo. App. W.D. 2002) (defendant was allowed to present evidence of victim's previous sexual abuse to rebut evidence suggesting that the defendant was the source of the victim's sexual knowledge).

In addition, this Court "has never adopted the residual hearsay exception rule, which allows admission of statements not specifically covered by any other exception when they have equivalent circumstantial guarantees of trustworthiness." *State v. Freeman*, 269 S.W.3d 422, 428 (Mo. banc 2008). In any event, very little about Gerjuan Rowe's deposition testimony that is included in this record provides any guarantee of

trustworthiness. Ms. Rowe had drug convictions, including one for trafficking, she admitted that she was intoxicated on Thanksgiving and could not remember anything, and was confused about the dates and times she had telephone conversations with the victim. (Tr. 1662, 1666-67, 1701-05, 1746-47).

Finally, this hearsay testimony was not admissible under the doctrine of curative admissibility. In criminal cases, the doctrine of curative admissibility provides that when a "defendant has injected an issue into the case, the state may be allowed to admit otherwise inadmissible evidence in order to explain or counteract a negative inference raised by the issue defendant injects." *State v. Weaver*, 912 S.W.2d 499, 510 (Mo. banc 1995). "Under this doctrine, the defendant must first have introduced evidence, even though it might be technically inadmissible evidence." *Id.* Appellant is apparently relying on this doctrine to support his claim that the trial court erred in refusing to admit hearsay evidence that did not fall under any known exception on the ground that it was offered to counteract a negative inference raised by the State. But the "curative admissibility [doctrine] lies only to combat an opponent's introduction of inadmissible evidence." *State v. Hill*, 250 S.W.3d 855, 858 (Mo. App. S.D. 2008); *see also State v. Mozee*, 112 S.W.3d 102, 108 (Mo. App. W.D. 2003). Appellant points to no inadmissible evidence introduced by the State that would have triggered this doctrine. The State's telephone records were admissible. Appellant was attempting to introduce inadmissible and unreliable hearsay testimony to cast doubt on the telephone records and

to bolster the telephone records that showed Gerjuan Rowe called the gas station on the date in question.

This evidence in the record also shows that Appellant was not prejudiced by the exclusion of this hearsay testimony. Evidence was presented showing that Gerjuan Rowe testified that she talked to the victim on the phone on November 28th and her telephone records admitted by the defense showed that she called the gas station on the date and at the time in question. The fact that Gerjuan claimed that the victim told her that she was calling from a pay phone adds little or nothing to the evidence that was already before the jury.

II (hearsay—victim's day planner).

The trial court did not err in excluding Gerjuan Rowe's deposition testimony stating that Appellant was away from the victims' residence for days without calling or interpreting the notations found in a day planner discovered in the residence; and the court did not err in refusing to allow the jury to view the day planner because Gerjuan Rowe's testimony was hearsay in that her knowledge of these matters was based strictly on what the victim had told her or on her own speculation and the notations in the day planner were the out-of-court statements of the victim, the meaning of which was not entirely clear.

A. The record.

A day planner police found in victim Angela Rowe's house was offered into evidence by Appellant's counsel during the testimony of the detective who discovered it. (Tr. 1048-50; Deft's Ex. Z). The court admitted it into evidence, but reserved its ruling on whether the jury would be allowed to view it. (Tr. 1050-51).

During a later discussion regarding what portions of Gerjuan Rowe's deposition would be read into evidence, the State objected on hearsay grounds to testimony from Gerjuan Rowe that Appellant was away for days at a time because the deposition showed that the only way Gerjuan Rowe knew this was because Angela Rowe had told her:

> [The Prosecutor]: And you want to put in—
>
> [Appellant's Counsel]: Beginning, "Yes, yes, yes he was gone maybe six days a week out of seven." Over to—

* * * *

[The Prosecutor]: And here's one I have an objection to, Judge. On line 22, her knowledge is based upon—the defendant being there or not being there is based upon, as she said, about that that Angela complained about it. Her knowledge is based on hearsay. She has no personal knowledge of the defendant being gone, she just refers to it as the victim Angela making statements and complaining about him being gone.

The Court: I have to back up.

[The Prosecutor]: I think it starts at line 14.

The Court: Yeah, that's where it starts. You're objecting to—

[The Prosecutor]: I'm objecting to this entire passage that she wants in because it's all based upon what Angela, who is certainly not subject to cross-examination, telling her about their relationship and him being gone and his phone being off, and things like that. And her complaining about him being on the road. It's based upon hearsay and I don't know of any exception to it being—

The Court: It's hearsay.

(Tr. 1637-38). Appellant's counsel complained that the State's phone records implied that Appellant left the victims' residence and did not call because he knew the victims were dead and that this testimony rebutted that inference. (Tr. 1638). But the court noted that the fact that Appellant "traveled a lot" was "kind of in evidence." (Tr. 1638). When

Appellant's counsel insisted that Appellant had a habit of not calling, the court suggested that the phone records would show this and that Gerjuan Rowe's hearsay statement suggested nothing about Appellant's calling habits, only that he was away for days at a time. (Tr. 1639).

The State also objected on hearsay grounds to Gerjuan Rowe's testimony that interpreted notations that Angela Rowe had made in the day planner:

> [The Prosecutor]: Judge, again, my objection to this, we're talking about the day planner, the identity of the day planner, if she recognizes it. That may not be objectionable. But her interpreting it, what she does with the calendar, her interpretation of the calendar, her handwriting and what she writes there I think again is based upon hearsay. And indicating that Angela discussing with her November 2004, him leaving the town, or his schedule, and things like that is what we object to because again it's based upon Angela Rowe's statements to this witness. This witness has no personal knowledge of that.
>
> The Court: You were going from what line on 30?
>
> [Appellant's Counsel]: Starting on line 10 on page 33, and showed her Defendant's Exhibit A which is the day planner that's been admitted into evidence, but I think publishing it to the jury is still under consideration by the Court.
>
> The Court: Right.

[The Prosecutor]: And then Bevy [Appellant's Counsel] beginning on line 24, "She keeps track in there when he's gone?" "Answer: Yes, yes, yes." That's all based upon a calendar of which this witness has no personal knowledge, just based upon her recognizing what Angela— recognizing her handwriting I guess I'm saying. I don't object to lines 10 through 19 where she's recognizing it and identifying it. But anything she is saying that Angela is indicating or saying within that calendar are the statements of a dead person, not subject to cross-examination, and are therefore hearsay.

The Court: What's your response to that?

[Appellant's Counsel]: Well, just so I understand, you're not objecting to her identifying Angela's handwriting in the calendar?

[The Prosecutor]: I think she can look at something and say I recognize that as being.

[Appellant's Counsel]: Okay. And she—I don't think she's interpreting, she just says I do this, too. It's talking about her habit and also about Angela's habits, which I think are also admissible. And goes to Angela's state of mind reflecting notes that she makes. And just because—

The Court: The notes is what he's objecting to. Bottom line, everything leads up to a note I guess is that the word "off" is what you're objecting to?

[The Prosecutor]: Yeah, she's saying, you know, this is what we do. She keeps—and then Bev suggests to her, "She keeps track in there of when he's

gone?" And she's saying "Yes, yes, yes." She's interpreting the writing of someone who is not available for cross-examination with no personal knowledge.

[Appellant's Counsel]: Let me ask you this: If we can just get her to identify the handwriting, I would ask the jury be permitted to view the checkbook or the calendar.

The Court: It's just chock full of hearsay, it's full of nothing but hearsay. It's all Angela's handwriting.

[Appellant's Counsel]: Right. And she recognizes it so why can't we get it in if it's Angela's handwriting and her sister says I recognize the writing? Why is it not admissible?

The Court: Because it's hearsay and you can't question her, what do you mean when you write the word "off".

[Appellant's Counsel]: Because the calendar reflects months on end, and I'm not talking about the notation that she thought she was "off" on the 26th, that calendar—I don't have it here, perhaps I should read—let me get a copy. Could we go get it? July I'm not going to—I guess the easiest way to do this is to simply ask the Court the [sic] review it. I know the exhibit has been admitted into evidence, the calendar. For months preceding November notes times where she writes "home", throughout most of

September. She writes at the end of August "no call, no show," "no call, no show." She makes repeated entries about that.

The Court: Do you know what she's talking about, "no call, no show?"

[Appellant's Counsel]: Well, I think when you look at the context of the calendar as a whole where she documents when her husband comes home, "Didn't come home yet LT". She writes, "Didn't come home yet LT." That's the entire month of July, "Didn't come home yet." The entire month of July she writes, "Didn't come home yet LT" in every single entry of that month. In June she notes things like, "Didn't come home yet LT, didn't talk to him," that's June 8th. June 9th, "Didn't come home LT, talked to him." She notes that she talks to LT. "Two weeks LT didn't come home and didn't talk to him." That's June 10th. June 11th, "Didn't come home yet didn't talk to him." And it goes on and on throughout the calendar. So she's noting LT on the calendar. I think it goes to her state of mind about communication that she was having with him or not having with him.

The Court: When did the victim's state of mind became [sic] relevant?

[Appellant's Counsel]: When the State suggests that—in this case when the State offers these phone records to say he never called. I keep saying this over and over again, I think we are rebutting the inference they created by these phone records with Defendant's Exhibit Z which is the calendar from the home that the sister has recognized.

The Court: You can't get around the fact that it's hearsay, and it's—I can't think of any exception to the hearsay rule that might—

[Appellant's Counsel]: So the Court's ruling that Defendant's Exhibit Z while admitted into evidence cannot be viewed by the jury as I understand it?

The Court: That's correct, because it's full of hearsay.

(Tr. 1641-46).

B. Standard of review.

The standard of review for a trial court's ruling on the admission of evidence or testimony is contained in Point I. The court admitted the day planner into evidence as an item collected from the victims' residence during the murder investigation, but did not allow the jury to see it. "The decision to publish evidence to the jury is within the discretion of the trial court." *State v. Wolfe*, 13 S.W.3d 248, 260 (Mo. banc 2000). "An abuse of discretion exists only if the trial court's decision was clearly against reason and resulted in an injustice to defendant." *Id.* at 260-61.

Moreover, Appellant waived appellate review of the trial court's failure to allow the jury to see the day planner notation "off" written on the date of November 26 because trial counsel told the court that she "was not talking about the notation that she [Angela Rowe] thought she was 'off' on the 26th." (Tr. 1644). At most, this claim may be reviewed for plain error.

Plain errors may be considered in the discretion of the court when the court finds that manifest injustice or a miscarriage of justice has resulted therefrom. Rule 30.20.

The plain error rule should be used sparingly and does not justify a review of every alleged trial error that has not been properly preserved for appellate review. *State v. Hibler*, 21 S.W.3d 87, 96 (Mo. App. W.D. 2000).

Plain error review is essentially a two-step process. First, the court must determine whether the claim for review "facially establishes substantial grounds for believing that manifest injustice or miscarriage of justice has resulted." *Id.* If this is not found, then the court should decline to exercise its discretion to review a claim of error under Rule 30.20. *Id.* But not all prejudicial or reversible error is plain error. Plain errors are those which are "evident, obvious and clear." *Id.* If the court finds plain error, then the second step requires the court to determine whether the claimed error resulted in manifest injustice or a miscarriage of justice. *Id.* A plain error is one that "must impact so substantially upon the rights of the defendant that manifest injustice or a miscarriage of justice will result if uncorrected." *State v. Driscoll*, 711 S.W.2d 512, 515 (Mo. banc 1986).

C. The trial court did not err in excluding the hearsay testimony or preventing the jury from viewing the day planner.

When a diary or journal entry, or similar writing, is offered to prove the truth of the matter asserted, it falls under the hearsay rule. *See State v. Hardin*, 645 S.W.2d 163, 165-66 (Mo. App. S.D. 1982) (notation "acct closed" written on check amounted to hearsay); *but see State v. Woltering*, 810 S.W.2d 584, 587 (Mo. App. E.D. 1991) (admission of murder victim's diary entry into evidence did not violate hearsay rule when

the entry was not offered for the truth of the matter asserted). A writing made by an out-of-court declarant offered to prove the truth of the matter asserted in the writing is inadmissible hearsay, absent some exception. *See Jaynes*, 949 S.W.2d at 635 (letter from insurance company offered to prove that the defendant had sent a letter inquiring about the murder victim's life insurance policy); *State v. Revelle*, 957 S.W.2d 428, 431-34 (Mo. App. S.D. 1997) (letter written by the murder victim regarding the state of her marriage to the defendant was inadmissible hearsay)

Appellant offered the notations on the day planner found in the victim's residence solely for the purpose of proving the truth of the matters asserted in those entries. Not only were these notations clearly inadmissible hearsay, they were also inferential hearsay as well. In other words, the entries by themselves had no meaning other than what the jury could have inferred from them. For example, Appellant wanted the jury to infer from the notation "off" appearing on a specific date that the victim believed she was off work on that date. From the notation "no call, no show," Appellant wanted the jury to infer that this meant that Appellant had not called or been to the victim's residence on those dates.

The trial court did not err in excluding Gerjuan Rowe's deposition testimony interpreting these entries or preventing the jury from viewing the hearsay in the day planner. Moreover, Gerjuan Rowe's testimony that the victim had told her that Appellant was gone six or seven days a week was also clearly hearsay and properly excluded by the trial court.

Appellant's contention at trial was that the day planner entries fell under the state-of-mind exception to the hearsay rule. "Generally, 'statements of a declarant's present mental condition made out of court are excepted from the hearsay ban' and are admissible 'in limited situations when they are relevant and the relevancy outweighs their prejudicial effect.'" *State v. Bell*, 950 S.W.2d 482, 483 (Mo. banc 1997) (quoting *State v. Boliek*, 706 S.W.2d 847, 850 (Mo. banc 1986)). For example, statements of fear by person later found murdered are often "accompanied by recitals of facts explaining the state of mind." *Id.* But in "such cases, factual assertions are admitted solely to show state of mind, and care must be taken to ensure that accompanying factual matter is not taken as evidence of the truth of the matter asserted." *Id.* "Because of the danger that such evidence might be considered for an improper purpose, its use is generally limited to cases where hearsay declarations of mental condition are especially relevant—particularly where the defendant has put the decedent's mental state at issue by claiming accident, self-defense or suicide." *Id. See also State v. Brown*, 998 S.W.2d 531, 546 (Mo. banc 1999) ("The hearsay declarations of a victim's state of mind are particularly relevant where the defendant has put the victim's mental state at issue by claiming accident, self-defense or suicide.").

Appellant was not offering the deposition testimony or seeking permission for the jurors to view the day planner solely to prove the victim's state of mind. Appellant's defense in this case was alibi. (4-12-07 Mot. Tr. 48; L.F. 405-06). He claimed that he

did not commit the murders because he was out of the state when they occurred. Consequently, the victim's state of mind was not relevant to any issue at trial.

And, as mentioned above, Appellant wanted to offer these day planner entries to prove the truth of what they purportedly asserted. The problem with this argument is that no one knows exactly what the entries meant. For example, Appellant contends that the notation "off" written on November 26, 2004, simply shows that the victim thought she was off work and provides and innocent explanation for why she did not show up for work. But it is obvious that these notations were written well in advance of the dates on which they appear, since these notations appear in December 2004 and January 2005 well after the victim was murdered. Consequently, the suggestion that the victim missed work because she thought she was "off" is nothing other than rank speculation. It is unreliable assertions like the one Appellant urges in this case that the hearsay rule was adopted to combat.

Appellant simply wanted the day planner available to jurors so he could speculate during closing argument as to what the entries, which were clearly not self-explanatory, meant. The fact that the entries needed to be defined is bolstered by Appellant's attempt to offer Gerjuan Rowe's deposition testimony explaining the entries based on inadmissible hearsay evidence from her sister.

The trial court did not err in refusing to admit this hearsay testimony or in precluding the jury from viewing the hearsay in the day planner.

III (hearsay—checkbook).

The trial court did not err in allowing the jury to view a checkbook found in the victims' residence because it contained hearsay.

A. The record.

During the cross-examination of an investigating detective, Appellant's counsel asked him to identify a checkbook (Defendant's Ex. II) he seized from the murder victims' house during the investigation. (Tr. 1050). When Appellant offered the checkbook into evidence, the prosecutor objected to the jury viewing the checkbook. (Tr. 1050). The court overruled the objection, admitted the checkbook into evidence, and said that if the prosecutor had an objection to the jury viewing the checkbook, it would be addressed after counsel made a request for the jury to view the evidence admitted during trial. (Tr. 1050-51).

During a discussion regarding what portions of Gerjuan Rowe's deposition testimony would be admitted into evidence, Appellant's attorneys also mentioned that a notation in victim Angela Rowe's checkbook showed a check dated November 27, which would "speak for itself" and which they wanted the jury to see. (Tr. 1646). Appellant's attorneys objected to the court's ruling that prevented the jury from seeing this checkbook entry. (Tr. 1647).

The victim's checkbook is a duplicate check design which contains carbon copy paper below each individual check. (Deft's Ex. II). In the victim's checkbook there is a carbon copy with the date "11-27-04," the amount of "three hundred ninety dollars"

("390.00"), and the victim's telephone number ("395-1512") written on it. (Deft's Ex. II). There is no other handwriting contained on this carbon copy; the part of the carbon copy relating to the "pay to the order of" line of the check is blank.

B. Standard of review.

The standard of review applicable to a trial court's decision not to publish exhibits to the jury is outlined in Point II.

C. The trial court committed no error.

Because Appellant wanted the jury to view the checkbook entries for the truth of the matter asserted, those entries constituted hearsay without some testimony regarding their making. *See* Point II. The problem is compounded in this case because Appellant is not attempting to prove that the victim made this entry, but he is attempting to prove a matter that is at least three layers away from the primary hearsay problem. In other words, Appellant first wanted the jury to infer that someone wrote a check dated November 27, 2004, a day in which he was not in St. Louis. Second, he wanted the jury to infer that it was the victim who actually wrote the check. Third, he wanted the jury to infer that the victim was alive on November 27, 2004 because she had written a check containing that date.

All of these inferences constitute rank hearsay that the trial court was well within its discretion in keeping from the jury. Appellant's argument ignores the possibility that someone other than the victim wrote the check or that the victim wrote the check before November 27 and simply post-dated the check to coincide with a bill that was due or

receipt of her paycheck. In fact, a similar voided check (#0657) written to 'Check'n Go of Missouri," which appeared in the pay line in the form of a stamp, was dated November 29, 2004, presumably near the victim's payday. The check at issue had a date of November 27, 2004, and the victim was paid on November 26, 2004. (Defendant's Exhibit A). The victim simply could have written the check out in advance of November 27 in anticipation of receiving her paycheck and with the intention to take the check to the payee, who could enter their name by stamping it on the "pay to the order of" line. Without testimony establishing when or why the check was written and by whom it was written, the multiple inferences Appellant was attempting to assert constituted inadmissible hearsay. The court did not err in refusing to publish this checkbook to the jury.

IV (hearsay—who lived at the victims' house).

The trial court did not err in refusing to admit Gerjuan Rowe's deposition testimony suggesting that someone related to Appellant may have lived in the victims' basement because this testimony was hearsay in that it was derived solely from the out-of-court statements of victim Angela Rowe.

A. The record.

During the discussion regarding which portions of Gerjuan Rowe's deposition would be read to the jury, Appellant wanted to read testimony suggesting that Appellant had a relative who may have lived in the victims' basement. (Tr. 1648). The State objected on hearsay grounds to testimony that someone related to Appellant may have been living in the basement of the victims' residence because Gerjuan Rowe had never been to the residence and had no first-hand knowledge that any such person was living there:

> [Appellant's Counsel]: Line 11, "And I think you sort of said you knew Leonard Taylor had a brother, but do you know anything more about him."
>
> [The Prosecutor]: Okay. My objection to that, Judge, was that is based upon hearsay. She says elsewhere in this deposition that she'd never been to the house on Park Lane, other than the night ofBDecember 3rd when the bodies were discovered. So any talk about anybody who's living in the basement or any knowledge of anybody who's living in the basement is based upon

information she gleaned from someone else as she has no personal knowledge of observing anyone in the basement living there or otherwise.

The Court: She doesn't know if it was a cousin or brother living there, so I'll sustain the objection.

(Tr. 1648).

B. Standard of review.

The standard of review regarding the trial court's ruling on the admission of evidence is contained in Point I.

C. This testimony was inadmissible hearsay.

The record clearly shows that Gerjuan Rowe's testimony that someone related to Appellant may have been living in the victims' basement was inadmissible hearsay since this information was derived solely from the out-of-court statements of victim Angela Rowe. In fact, the record shows that Gerjuan Rowe had never been to the victims' residence before the night their bodies were discovered. The court committed no error in refusing to admit this deposition testimony.

Appellant was not prejudiced by the exclusion of this inadmissible hearsay evidence. Another part of the record showed that Appellant's brother, Perry Taylor, kept some of his personal belongings at the victims' residence and had been asked by the victim Angela Rowe to remove his belongings. (Tr. 898). The reason for admitting the hearsay evidence was to establish that someone other than Appellant potentially had

access to the residence. Testimony that Perry Taylor kept some of his belongings there filled this gap and did not violate the hearsay rule.

V (glasses, blood testing, and DNA report).

The trial court did not abuse its discretion in refusing to exclude evidence of Appellant's glasses, the blood testing performed on those glasses, or the DNA report generated from an analysis of the glasses because this evidence was relevant.

A. The record.

After Appellant's arrest in Kentucky, the police searched his luggage and found a pair of brown-tinted glasses.[8] (Tr. 929-30, 1331). These glasses belonged to Appellant, and he had been seen wearing them before the murders.[9] (Tr. 1098, 1249-50; State's Exhibit 124).

On May 25, 2006, Appellant filed a pro se motion for return of the property seized from him at the time of his arrest in Kentucky. (L.F. 181-94; Tr. 1353). Attached to that motion was a list of this property and copies of police evidence receipts reflecting the property seized from him. (L.F. 183-94). Included in this list were a brown eyeglass

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[8] The glasses themselves were marked as State's Exhibit 158 and admitted into evidence. (Tr. 929-30). A picture of the glasses, along with other items removed from a pocket of one of Appellant's suitcases, was marked as State's Exhibit 124 and admitted into evidence. (Tr. 930).

[9] Pictures of Appellant admitted into evidence at trial, including one taken with victim Angela Rowe, showed Appellant wearing these glasses. (State's Exhibits 168 and 169; Tr. 1094-95).

case with two pairs of eyeglasses. (L.F. 183). This pro se motion was followed by an October 11, 2006 letter from Appellant's counsel to the prosecutor requesting the return of Appellant's personal property. (Tr. 1354-55, 1364). This letter specifically mentioned the return of the eyeglasses. (Tr. 1354-55, 1364). In November 2006, an investigator for the prosecutor's office took the eyeglasses to the police laboratory for testing. (Tr. 1356).

A forensic scientist at the lab tested the glasses for the presence of biological fluids on them. (Tr. 1372). As part of this testing, she performed a phenolphthalein test to determine the possible presence of blood on them. (Tr. 1375). She testified that the phenolphthalein test, which has been used for one hundred years, is a presumptive test for the presence of blood. (Tr. 1376). She explained to the jury that the phenolphthalein and Luminol tests are used as presumptive tests for blood. (Tr. 1373). They are only presumptive because these tests can react to non-blood materials. (Tr. 1400). For example, one can get a positive phenolphthalein test from potatoes, horseradish, rust, and bleach. (Tr. 1400). To confirm the actual presence of blood, a confirmatory test, such as the Takayama re-agent test, must be performed. (Tr. 1373). She testified that without a confirmatory test, the most that can be said about a positive phenolphthalein or Luminol test is that it reveals the possible presence of blood. (Tr. 1401).

The scientist testified that she performed nine swabbings of the eyeglasses and obtained a "weak" positive result on the phenolphthalein test from a stain on the right nose guard area of the glasses. (Tr. 1375-77). This stain, which was not visible to the naked eye, did not contain a sufficient quantity of material to allow for the performance

of a confirmatory test for the presence of blood. (Tr. 1378, 1380, 1398). To have performed a confirmatory test would have possibly consumed the entire sample, which would have then been lost for any other testing. (Tr. 1380, 1397-98). Because no confirmatory test was performed, she testified that the most she could say about the stain was that it tested positive for the possible presence of blood. (Tr. 1401).

The stain on the eyeglasses was then tested for the presence of DNA. (Tr. 1460-61). The DNA analyst at the police crime lab was able to extract DNA from the stain on the eyeglasses. (Tr. 1467). She testified that DNA can be obtained from blood, semen, saliva, urine, hair, teeth, bone, and tissue. (Tr. 1460). A DNA analyst simply looking at genetic material cannot determine if it comes from blood, saliva, or other biological material because the DNA looks the same from whatever source it is derived. (Tr. 1487-88). Although she could not obtain a full genetic profile from the DNA retrieved because of the small sample present, the analyst was able to eliminate the murdered children (Alexus, Acquera, and Tyrese Conley) as the source of the DNA. (Tr. 1468, 1479-80, 1488-89). She could not, however, eliminate their mother, victim Angela Rowe, as the source of the DNA. (Tr. 1468, 1503, 1509). The partial DNA profile that was obtained occurs in only 1 in 12,930 persons in the African-American population. (Tr. 1469).

B. Standard of review.

The standard of review for a trial court's ruling on the admission of evidence is outlined in Point I. "In a criminal proceeding, questions of relevance are left to the discretion of the trial court and its ruling will be disturbed only if an abuse of discretion is

shown." *State v. Santillan*, 1 S.W.3d 572, 578 (Mo. App. E.D. 1999). A trial court will be found to have abused its discretion only when a ruling is "clearly against the logic and circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." *State v. Brown*, 939 S.W.2d 882, 883 (Mo. banc 1997).

C. The blood and DNA evidence was relevant and admissible.

In criminal cases, this Court has previously applied the *Frye* standard to determine the admissibility of the results of scientific tests. *See State v. Davis*, 814 S.W.2d 593, 600 (Mo. banc 1991); *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); *but see State Bd. of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146, 153 (Mo. banc 2003) (holding that in civil cases the standard of admissibility for scientific evidence is established by § 490.065, RSMo, not as set forth in *Frye*). Scientific evidence is admissible if the procedure is "sufficiently established to have gained general acceptance in the particular field in which it belongs." *Davis*, 814 S.W.2d at 600 (quoting Frye, 293 F. at 1014)). Appellant does not suggest that the phenolphthalein or DNA tests performed in this case are not generally accepted in the scientific community. In fact, the trial court held a pre-trial *Frye* hearing, (1-30-08 Mot Tr. 67- 101), and determined that the phenolphthalein test was generally accepted in the scientific community and that the results of the test performed in this case would be admissible at trial. (2-15-08 Mot Tr. 41-44).

This evidence was relevant to the issues in this case. The victims were shot multiple times at close range and the crime scene was riddled with blood. (State's Exhibits 13, 16, 22, 35, 37, 46-47, 49). It was entirely plausible that the killer might have gotten blood on himself or his clothing. Performing tests on Appellant's glasses, especially after his repeated efforts to retrieve them from the police, was eminently reasonable. The scientific testimony admitted at trial thoroughly informed the jury that the phenolphthalein test performed on the glasses was only a presumptive test for the presence of blood and that a confirmatory test could not be performed because it would have consumed the entire sample, which would have made it unavailable for any other testing.

The presumptive test for blood was reinforced by the DNA testing which produced a partial genetic profile. DNA can only be derived from blood, saliva, semen, or other human biological material. The positive presumptive test for blood combined with the extraction of human DNA from that sample was evidence the jury was entitled to consider. The fact that a confirmatory test for the presence of blood was unable to be performed goes to the weight to be given the evidence, not its admissibility. Courts in other states have held that the results for presumptive blood tests are admissible when the jury is fully informed that it is a presumptive test only and that the test may react positively to substances other than blood. *See State v. Canaan*, 964 P.2d 681, 694 (Kan. 1998); *State v. Stenson*, 940 P.2d 1239, 1264 (Wash. 1997); *People v. Cumbee*, 851 N.E.2d 934, 947-49 (Ill. App. Ct. 2006). As long as the jury is fully informed that it is a

presumptive test, the fact that the test may react positively to substances other than blood goes to the weight of the evidence, not its admissibility. *See Canaan*, 964 P.2d at 694; *Compare State v. Ferguson*, 20 S.W.3d 485, 495 (Mo. banc 2000) (holding that the manner in which DNA testing was performed goes to the weight of the evidence, not its admissibility). Appellant's remedy was not to exclude this evidence, but to test it during cross-examination. The trial court did not err in admitting this evidence.

In addition, even though a full genetic profile was not obtained from the DNA sample, the jury could rely on the partial profile that left the victim as a possible source of the DNA along with the other evidence suggesting that the victim was the source of the biological material found on Appellant's glasses. "It is permissible for a jury to give significant weight to DNA evidence, even when that evidence fails to provide a positive identification. *State v. Abdelmalik*, 273 S.W.3d 61, 64 (Mo. App. W.D. 2008) (holding that the jury could consider DNA evidence that resulted in only a partial profile but which did not eliminate the defendant as the source of the DNA); *see also State v. Rockett*, 87 S.W.3d 398, 405 (Mo. App. W.D. 2002) (holding that the jury could rely on DNA evidence that did not result in identification to a scientific certainty as substantial evidence of the defendant's identity).

Appellant's reliance on *State v. Daniels*, 179 S.W.3d 273 (Mo. App. W.D. 2005), is misplaced. In *Daniels*, police investigators obtained positive Luminol tests—a presumptive test for the presence of blood—on several items found in the defendant's house and car, but performed no confirmatory tests to establish the presence of blood. *Id.*

at 282. Some of the items on which confirmatory blood tests were performed proved scientifically not to be blood. *Id.* at 279-80, 282. Other samples recovered for confirmatory testing were inadvertently destroyed by police. *Id.* at 280. Later testing of areas inside the house with a Hemastix—another presumptive blood test—revealed that no blood was present in the areas that tested positive in the Luminol tests. *Id.* at 279-80.

Unlike Appellant's case, the trial court in *Daniels* did not conduct a *Frye* hearing to determining the admissibility of the Luminol test results. *Id.* at 285. The State's witnesses were allowed to opine that the positive Luminol tests revealed the presence of blood in the defendant's house despite the fact that no confirmatory tests were ever performed and that the ones that were performed on several items showed that no blood was present. *Id.* at 284. Further compounding the problem was the fact that the State argued in closing that the positive Luminol tests conclusively revealed the presence of blood. *Id.* at 284-85.

Appellant's case is distinguishable. Here the jury was fully informed that the positive phenolphthalein test was presumptive only and indicated only the possible presence of blood. It was further explained that a confirmatory test could not be performed without risking consumption of the entire sample, rendering it useless for further testing, including DNA testing. The fact that human DNA was extracted from the sample revealed that it was biological material, since DNA can only be obtained from biological matter, which includes blood. Finally, the State did not improperly argue that the positive phenolphthalein test conclusively established that the stain was blood. In

fact, the prosecutor corrected himself during closing argument and said that the stain "presumptively tested" positive for blood, and then he added that no confirmatory test could be performed without consuming the sample, which would have made DNA testing impossible. (Tr. 1745). In his closing argument, Appellant stressed that the stain was not confirmed to be blood. (Tr. 1760-61).

The trial court did not err in admitting evidence of Appellant's sunglasses, the positive phenolphthalein test, and the DNA test results.

VI (late disclosure).

The trial court did not err in refusing to exclude the blood and DNA evidence as a remedy for an alleged discovery violation because it was within its discretion to grant the less drastic relief of a continuance sought by the defense.

A. The record.

On May 25, 2006, Appellant filed a pro se motion for return of his property seized from him at the time of his arrest in Kentucky. (L.F. 181-94; Tr. 1353). Attached to that motion was a list of this property and copies of police evidence receipts reflecting the property seized from him. (L.F. 183-94). Included in this lists was a brown eyeglass case with two pairs of eyeglasses. (L.F. 183). This pro se motion was followed by an October 11, 2006 letter from Appellant's counsel to the prosecutor requesting the return of Appellant's personal property. (Tr. 1354-55, 1364). This letter specifically mentioned the return of the eyeglasses. (Tr. 1354-55, 1364). In November 2006, an investigator for the prosecutor's office took the eyeglasses to the police laboratory for testing. (Tr. 1356). The crime lab performed blood testing in November 2006 and DNA testing in January 2007. (Tr. 1371, 1381, 1389, 1483). The DNA report was finished on April 19, 2007. (Tr. 1483).

In mid-March 2007, the prosecutor gave the defense a lab report dated January 26, 2007, and on April 20, 2007, the prosecutor informed the defense that an additional DNA report was forthcoming. (5-9-07 Mot. Tr. 70-72).

On April 30, 2007, Appellant filed a motion to exclude the DNA evidence on the ground that the State made a late disclosure of this evidence. (L.F. 645-48). The motion alleged that the State had had possession of items, including a pair of sunglasses, seized from Appellant after his December 2004 arrest in Kentucky, but had failed to test the items until November 2006. On May 9, 2007, Appellant's attorneys also filed a motion for continuance from the May 30, 2007 trial setting based on the late disclosure of the DNA evidence. (L.F. 663-66).

During a May 9, 2007 hearing on the motion to exclude evidence, the prosecutor explained that the need to test the items did not arise until Appellant filed a pro se motion for the return of this property, including the sunglasses, in May 2006. (Tr. 74-75). The prosecutor said that the decision to test would have been a police matter up until Appellant's request for the return of the glasses. (Tr. 75). It was at that point that the prosecutor's office stepped in and asked for the testing before these items were possibly returned to Appellant. (Tr. 75). The trial court overruled Appellant's motion to exclude the DNA evidence "[b]ased on everything" it had heard during the hearing and on "conversations" apparently involving the court and counsel. (Tr. 76). The court also granted Appellant's counsels' motion for continuance, and the case was set for trial to begin on February 20, 2008. (Tr. 76-77; L.F. 32, 666, 690).[10]

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[10] Further details regarding the seizure of the glasses and their submission to the crime lab for testing are contained in Point V.

B. Standard of review.

"In reviewing criminal discovery claims, this Court will overturn the trial court only if it appears that the trial court abused its discretion to the extent that fundamental unfairness to the defendant resulted." *State v. Taylor*, 944 S.W.2d 925, 932 (Mo. banc 1997) (citing *State v. Mease*, 842 S.W.2d 98, 108 (Mo. banc 1992)).

C. The court did not abuse its discretion.

Rule 25.03 governs criminal discovery and requires the disclosure of, among other things, the names of witnesses, together with their written or recorded statements. Rule 25.03(A)(1). The purpose of discovery is to permit the defendant a opportunity to prepare in advance for trial and to avoid surprise; the focus of the denial of discovery, therefore, is whether there is a reasonable likelihood that the denial of discovery affected the result of the trial. *Mease*, 842 S.W.2d at 108. Whether the State violated the rules of discovery rests within the sound discretion of the trial court. *State v. Engel*, 859 S.W.2d 822, 829 (Mo. App. W.D. 1993). Likewise, Determining whether a sanction should be imposed for a discovery violation is within the court's discretion. *State v. Neil*, 869 S.W.2d 734, 738 (Mo. banc 1994).

Failure to comply with discovery does not mandate a reversal of a conviction, however. *State v. Davis*, 556 S.W.2d 45, 47 (Mo. banc 1977). Rather, the trial court must make a determination as to the effect of the noncompliance on the outcome of the case. *Id.* The decision to impose a sanction of some sort for a party's noncompliance with the discovery requests lies within the sound discretion of the trial court. *State v.*

Kinder, 942 S.W.2d 313, 338 (Mo. banc 1996). Rule 25.16 allows the trial court to order disclosure of material and information, grant a continuance, exclude the evidence "or enter such other orders as it deems just under the circumstances." These sanctions are permissive, not mandatory. *State v. Petty*, 967 S.W.2d 127, 137 (Mo. App. E.D. 1998). The trial court is in the best position to assess the prejudicial effect of the failure to disclose and to determine what remedy was necessary to alleviate any unfairness. *Id.*

The court properly exercised its discretion in this case. The State explained the reason for the delay in testing the glasses and Appellant sought a continuance, which was granted, to consider this evidence. The evidence was disclosed within a reasonable time after it was discovered. In fact, it is difficult to discern whether any discovery violation in fact occurred. To the extent that it did, it was within the trial court's discretion to grant a continuance, rather than excluding relevant evidence, to remedy the situation.

In addition, Appellant cites no case supporting his claim that the granting of a continuance as a remedy for a discovery violation can constitute a violation of a defendant's right to a speedy trial. The trial court committed no error in the way it handled this situation.

VII (disposition of detainer).

The trial court did not err in failing to dismiss the charges against Appellant for lack of jurisdiction based on failing to bring him to trial by the deadline imposed under the UMDDL because the delays in trial were for continuances sought by defense counsel for good cause shown, or due to the withdrawal of Appellant's first attorney based on Appellant's failure to pay him.

A. The record

On February 8, 2005, Appellant was arrested on the charges arising from this case. (L.F. 45-46). Private counsel, Joseph Hogan, entered his appearance on Appellant's behalf on February 16, 2005. (L.F. 49). Appellant's request to dispose of the detainer lodged against him on these charges was filed in circuit court on July 22, 2005.[11] (L.F. 77).

On August 11, 2005, Mr. Hogan appeared before the circuit court and asked that he be allowed to withdraw as counsel because payments promised to him were not received and his belief was that he would not receive any payments. (8-11-05 Mot. Tr. 2). Counsel further informed the court that the prosecutor had informed him that the State intended to seek the death penalty and that he had inadequate resources in which to defend Appellant in a capital case. (8-11-05 Mot. Tr. 2-3). Counsel then moved to

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[11] Appellant was delivered to the Missouri Department of Corrections on April 20, 2005, to serve a sentence in an unrelated case. (L.F. 68).

withdraw based on having no financial resources to enable him to adequately represent Appellant. (8-11-05 Mot. Tr. 3).

The court then asked Appellant if he had anything to say about his attorney's motion to withdraw. (8-11-05 Mot. Tr. 3-4). Appellant initially said that he had "nothing" to add, but then said that he did not "totally agree" that "because of the "difficult financial . . . situations" between him and his attorney "did not mean" that it would not "be resolved down the road." (8-11-05 Mot. Tr. 4). Appellant also said that he wanted his case resolved within 180 days on his request to dispose of the detainer and that he was "not waiving that time on any conditions or circumstances." (8-11-05 Mot. Tr. 4-5). After hearing this, the State objected to counsel's motion to withdraw so that the time necessitated by any delay in the start of the trial would not be counted against the State. (8-11-05 Mot. Tr. 5).

The court granted counsel's motion to withdraw and directed the Public Defender's Office to determine whether Appellant was eligible for their services. (8-11-05 Mot. Tr. 6). The court also continued the case until September 16, 2005, for entry of new counsel and ordered that the time between "this date" (August 11, 2005) and September 16, 2005, be "tolled" for speedy trial purposes. (8-11-05 Mot. Tr. 6).

An attorney, presumably from the Public Defender's Office, entered her appearance on Appellant's behalf on August 26, 2008. (L.F. 81). On the same day the State filed notice of its intent to seek the death penalty, three assistant public defenders

(presumably from the capital trial division) entered their appearance on Appellant's behalf. (L.F. 85).

During the September 16, 2005 hearing to set a trial date, Appellant's attorneys told the court that Appellant refused to waive his motion for a speedy trial. (9-16-05 Mot. Tr. 4). The prosecutor stated that the State could proceed to trial before the speedy trial deadline, which he believed was January 18, 2006, but Appellant's attorneys told the court that they would not be ready by that date and that their office had "at least five capital trials set" in the interim. (9-16-05 Mot. Tr. 4). The court then set trial for October 11, 2006. (9-16-05 Mot. Tr. 4). Although Appellant's attorneys did not object, Appellant said he did not agree with the trial date and was not waiving the 180-day speedy trial deadline. (9-16-05 Mot. Tr. 5).

During a November 22, 2005 hearing on the State's motion to reconsider the trial setting date, the prosecuting attorney asked the court to reconsider setting the trial beyond the 180-day deadline in light of Appellant's refusal to waive his request to dispose of the detainer against him. (11-22-05 Mot. Tr. 7-9; L.F. 99-100). Appellant's attorney told the court that its order setting the trial in October 2005 was "perfectly reasonable." (11-22-05 Mot. Tr. 10-11). Each of Appellant's attorneys then listed the cases they were handling that would prevent them from going to trial before the January 18, 2006 deadline. (11-22-05 Mot. Tr. 10-15). The court decided that it would retain the October 11, 2006 trial setting and found that because Appellant deserved a fair trial with effective

assistance of counsel, the October trial setting was not only reasonable, but necessary. (11-22-05 Mot. Tr. 18-19).

On July 24, 2006, Appellant's attorneys filed a verified motion for a continuance of the October 11, 2006 trial setting. (L.F. 200-14). The motion noted that Appellant was then currently confined at Potosi Correctional Center serving a 100-year sentence on an unrelated conviction. (L.F. 200). The motion then outlined the several capital cases being handled by Appellant's attorneys and described budget cuts that had impinged on the personnel and resources of the Public Defender's Office. (L.F. 200-05). The motion also outlined the additional investigation that needed to be completed in Appellant's case before it could be tried, including taking witness depositions. (Tr. 205-13).

During an August 1, 2006 hearing regarding this continuance motion, counsel made the court aware that Appellant opposed his attorneys' request for a continuance. (8-1-06 Mot. Tr. 44). Appellant's attorneys then outlined for the court the work that needed to be completed before Appellant's case could be tried, including taking depositions, conducting further investigation, and viewing physical evidence.[12] (8-1-06 Mot. Tr. 44-55). The prosecutor opposed the continuance motion only on the ground that Appellant was persisting in asking for a speedy trial. (8-1-06 Mot. Tr. 55-57). Appellant,

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[12] Appellant's attorney also noted that it had received "a large box of material" from Appellant's private counsel, Mr. Hogan, that was not organized and that it took the attorneys several days to organize it. (8-1-06 Mot. Tr. 50).

who was present for the hearing, said that he was not waiving his speedy trial request despite what his attorneys had said. (8-1-06 Mot. Tr. 59). Appellant's position was that the court lost jurisdiction of his case when it failed to try him in January 2006 and he was not going to waive that claim by agreeing to a continuance. (8-1-06 Mot. Tr. 59-60). The court denied the motion for a continuance. (8-1-06 Mot. Tr. 60-61).

On August 22, 2006, Appellant's attorneys filed a motion to reconsider. (L.F. 237-38). Included with that filing was a document entitled 'Defendant's Consent to Continuance,' which was signed by Appellant and stated that while he was not waiving his prior request for a speedy trial and the court's violation of it, Appellant was consenting to any "additional continuances as are necessary to allow for the complete preparation of" his case for trial. (L.F. 239). During an August 24, 2006 hearing on the motion to reconsider, the court read to Appellant the consent document he had signed and asked him if he agreed with it. (8-24-06 Mot. Tr. 63-64). Appellant agreed that it was an "accurate statement." (8-24-06 Mot. Tr. 64). The court then continued the trial until May 30, 2007. (8-24-06 Mot. Tr. 65; L.F.). The court reiterated that it had found that the Appellant's attorneys' request for a continuance was for good cause. (8-24-06 Mot. Tr. 65).

On September 19, 2006, Appellant's case was transferred from Judge Kendrick to Judge Hartenbach. (L.F. 28, 452-53). On October 12, 2006, and again on April 12, 2006, Appellant filed pro se motions to dismiss the charges for violation of the 180-day deadline for the disposition of detainers. (L.F. 454-89, 598-603).

Appellant moved to dismiss his case again during an April 12, 2007 motion hearing before Judge Hartenbach.[13] (4-12-07 Mot. Tr. 2-3). He argued that the court had no jurisdiction to try him since he had never agreed to a trial setting past the 180-day deadline, which he contended was January 18, 2006. (4-12-07 Mot. Tr. 2-4).

On May 9, 2007, Appellant's attorneys filed a motion for continuance from the May 30, 2007 trial setting based on the late disclosure of DNA evidence (See Point VI). (L.F. 663-66). The motion indicated that Appellant's attorneys felt "compelled to request a continuance to allow time to prepare for the newly discovered evidence" and that Appellant "did not consent" to the filing of the motion. The court granted this motion "for good cause shown," and the case was continued until February 20, 2008. (L.F. 666, 690). The court's order noted that this setting was made over Appellant's objection. (L.F. 690).

During a February 15, 2008 hearing on other matters, Appellant personally renewed his "speedy trial motions" and asked that the charges against him be dismissed. (2-15-08 Mot. Tr. 56-58). During this hearing, Appellant said that prior delays that his "defense team" asked for were "against [his] will" but that "we can accept that." (2-15-08 Mot. Tr. 58).

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[13] The transcript incorrectly shows that this hearing was held on April 12, *2008*. (Tr. 2). It is clear from the record, however, that this hearing was held on April 12, *2007*. (L.F. 29-31).

Appellant's trial began on February 20, 2008. (L.F. 35).

B. Standard of review.

"[T]he right to be brought to trial within 180 days after a proper request under [the UMDDL] is jurisdictional." *State v. Nichols*, 207 S.W.3d 215, 219 (Mo. App. S.D. 2006) (quoting *Carson v. State*, 997 S.W.2d 92, 98 (Mo.App. S.D.1999)). Since jurisdictional issues present questions of law, appellate courts review them de novo. *Id.* But to the extent the application of the law is based on the evidence presented, appellate courts defer to the trial court's factual findings. *See State v. Overton*, 261 S.W.3d 654, 658 (Mo. App. S.D. 2008).

C. The circuit court did not lose jurisdiction.

Under § 217.450, RSMo 2000, an inmate in a correctional facility may request final disposition of any untried and pending indictment, information, or complaint upon which a detainer has been lodged against him. *See State ex rel. Wolfrum v. Wiesman*, 225 S.W.3d 409, 411 (Mo. banc 2007). Once such a request is filed with the court in which the indictment, information, or complaint is pending, the court must bring the inmate to trial within 180 days, unless that period is tolled on the grounds provided in the statute:

> Within one hundred eighty days after the receipt of the request and certificate . . . by the court and prosecuting attorney or within such additional necessary or reasonable time as the court may grant, for good cause shown in open court, the offender or his counsel being present, the indictment, information, or complaint shall be brought to trial. The parties may stipulate for a continuance or a

> continuance may be granted if notice is given to the attorney of record with an opportunity for him to be heard. If the indictment, information, or complaint is not brought to trial within the period, no court of this state shall have jurisdiction of such indictment, information or complaint, nor shall the untried indictment, information, or complaint be of any further force or effect; and the court shall issue an order dismissing the same with prejudice.

Section 217.460, RSMo 2000. "The plain language of section 217.460 makes clear that it is within the trial court's discretion to allow a continuance 'for good cause shown.'" *Wiesman*, 225 S.W.3d at 412.

In *Wiesman*, this Court held that the language in § 217.460 "necessarily includes good cause shown by defense counsel." *Id.* This means that a trial court can delay a case without the defendant's consent if defense counsel seeks a continuance and the delay is for good cause:

> The statute does not require that the defendant consent to the delay, but does require that either the defendant or his attorney must be present. Where . . . the defendant is represented by counsel, but objects to further delay, defendant's counsel may request and be granted a continuance pursuant to section 217.460, so long as the additional necessary or reasonable time granted is based on reasonable grounds showing the delay is for good cause.

Id.

In *Wiesman,* a case in which the state was seeking the death penalty, this Court held that defense counsel's request for a continuance over the objections of the defendant based on inadequate time and resources to prepare the case for trial was based on good cause.[14] *Id.* In fact, this Court noted that a "conviction obtained without an appropriate continuance would have made defense counsel vulnerable to allegations of ineffective assistance." *Id.* Moreover, this Court held that by having invoked the right to counsel, the defendant "effectively ceded to his counsel the authority to seek reasonable continuances for the purpose of assuring effective assistance of counsel." *Id.* The defendant's "rights under the UMDDL do not prohibit the granting of counsel's request for additional time when good cause is shown." *Id.*

In Appellant's case, each continuance was sought by defense counsel for good cause shown. Defense counsel informed the trial court that they were representing other defendants in pending capital cases and because of a lack of time and resources they needed additional time to prepare Appellant's case for trial. Thus, the continuances were granted for good cause shown despite Appellant's objections to them and the trial court did not lose jurisdiction of Appellant's case under the UMDDL.

In addition, the delay from the date Appellant's privately-retained attorney was allowed to withdraw from the case (August 11, 2005) because of Appellant's failure to

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[14] The appointed counsel for the defendant in *Wiesman* also represented Appellant in this case.

pay him and the date of the hearing in which Appellant's appointed attorneys appeared and sought a continuance (September 16, 2005) does not count against the 180-day deadline because a delay based on the withdrawal of a defendant's attorney can be for good cause under the UMDDL and IAD (Interstate Agreement on Detainers). *See People v. Stone*, 712 N.W.2d 165, 167 (Mich. Ct. App. 2005); *State v. Schaaf*, 819 P.2d 909, 914-15 (Ariz, 1991). In any event, Appellant's failure to pay his attorney, which directly resulted in his withdrawal, constitutes affirmative action by Appellant to delay the case. "Any delay attributable to a defendant's affirmative action or agreement is not included in the period of limitation." *State v. Allen*, 954 S.W.2d 414, 417 (Mo. App. E.D. 1997).

Appellant's reliance on cases in which the appellate courts have held that a circuit court has authority to appoint private attorneys to represent indigent defendants without compensation is misplaced. *See State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. banc 1981); *State ex rel. Public Defender Comm'n v. Williamson*, 971 S.W.2d 835 (Mo. App. W.D. 1998). Appellant contends that the trial court here committed error by not requiring counsel to stay in the case without compensation. But the courts in *Ruddy* and *Williamson* simply held that the circuit court did not exceed its authority in appointing counsel; they did not hold that the court had an affirmative duty to do so. Moreover, courts have held that while private attorneys may be compelled to provide services without compensation, they cannot be forced to spend their own funds in litigation expenses. *See Williamson v. Vardeman*, 674 F.2d 1211, 1215-16 (8th Cir. 1982); *State ex rel. Scott v. Roper*, 688 S.W.2d 757, 759 (Mo. banc 1985); *Williamson*, 971 S.W.2d at

838 n.2. In seeking to withdrawal from this case, Appellant's privately-retained attorney noted that this was a capital case and that he did not have adequate resources to defend Appellant. The delay based on the withdrawal of Appellant's first attorney was both for good cause shown and attributable to Appellant.

The court did not err in refusing to dismiss Appellant's case for lack of jurisdiction.

VIII (opinion evidence).

The trial court did not err in allowing the jury to view a recording of Perry Taylor's statement to police because the interrogating officer did not offer any lay opinion testimony; his comments were in the form of questions and gave context to the answers Perry Taylor was giving

A. The record

Before trial began, Appellant filed a motion objecting to the playing of Appellant's brother's (Mr. Perry Taylor) recorded interview before the jury. (L.F. 1073-91). In one of the claims raised in that motion, Appellant sought to exclude the interviewing officers' statement suggesting that Appellant's brother did not commit the offense, which Appellant alleged was inadmissible opinion evidence and speculation. (L.F. 1075).

Appellant's brother testified that he did not remember making a statement to police late on December 8th and into the early morning hours of December 9th, 2004. (Tr. 856-57). The prosecutor then began to ask him about a specific statement he made to police during the interview, and Appellant objected on the ground that the interviewing officer's question expressed an opinion that Appellant's brother did not commit the offense and that Appellant's brother's response was self-serving. (Tr. 859). The court overruled the objection noting that the officer's statement was not "expressing an opinion, it's asking a question." (Tr. 859). The prosecutor then read the following from

a transcript of that interview and asked Appellant's brother whether he had made these statements:

Q. (By [the Prosecutor]) Back to the question, Mr. Taylor. You're saying you don't recall giving any statement to police at the Jennings Station at this time?

A. I don't remember.

Q. I'm going to ask you basically these questions that were asked of you that night, and your responses; you can tell me if they're true or not, okay?

"SPEAKER 2: Right. But you didn't do it?

"PERRY TAYLOR: No, I didn't have anything to do with it.

"SPEAKER 2: Right.

"SPEAKER 1: All right. I want to first—unless you want to start.

"SPEAKER 2: No.

"SPEAKER 1: I want to go back, I believe it's the day after—the day after Thanksgiving. Well, let me put it this way—to you this way: When was the last time you spoke with [Appellant]?

"PERRY TAYLOR: Last time I spoke to him was the night he told me he did that."

Would that be correct or not?

A. That would not be correct.

(Tr. 860).

The detective who conducted the interview with Perry Taylor later identified a recording of that interview.[15] (Tr. 1036-37). Appellant objected to showing this recorded interview to the jury on the ground that the interviewing officer stated his "opinion" in asking Mr. Taylor certain questions. (Tr. 1038-39). The court overruled the objection and the recorded interview (State's Exhibit 196B) was played for the jury. (Tr. 1040, 1042).

At the beginning of the interview, one of the officers told Perry Taylor that Appellant's "problems have become your problems now." (State's Exhibit 196A). Perry said, "I don't understand that, but go ahead." (State's Exhibit 196A). Moments later, one of the officers described how Perry had been answering "a lot of these questions already" and that they wanted to ask him some others that they did not know the answer to. (State's Exhibit 196A). Perry said that he could not do "no damn time" and that he had not been in any "trouble." (State's Exhibit 196A). The officer responded that "We see that, that's obvious to us," and Perry responded, "I just want to walk the hell away from this, man." (State's Exhibit 196A). After Perry said he cared about his family, the

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[15] The original recorded interview (State's Ex. 196A) was over three hours long. (Tr. 1035). A shortened version of the interview (State's Ex. 196B) was played for the jury. (Tr. 1036-37, 1042).

officer said "Right, but you didn't do it." (State's Exhibits 196A and 196B). Perry said "No, I didn't have anything to do with it," to which the officer replied, "Right." (State's Exhibit 196B).

Later during the interview, the officer asked what Appellant did on Thanksgiving, and Perry replied that he had "no idea" and that Appellant "was probably still there, I don't know." (State's Exhibit 196A). The officer then said, "Because he had already told you before Thanksgiving what had happened, right?" (State's Exhibit 196B). Perry said "Yeah," and the officer asked was "that the day before? Two days before." (State's Exhibit 196B). Perry said that Appellant "probably told me that—well, I want to say the day before Thanksgiving." (State's Exhibit 196B). The officer then asked, "So the day before Thanksgiving," to which Perry replied, "I'm thinking, I'm not even sure about that, I think so." (State's Exhibit 196B). The officer said, "Okay, I think you're right." (State's Exhibit 196B). Perry responded, "If I had to guess, I would say the day before." (State's Exhibit 196B).

B. Standard of review.

The standard of review for the admissibility of evidence is outlined in Point I.

C. The officers comments did not constitute lay opinions.

Appellant's claim that the officer asking the questions during the interview testified as a lay witness is not borne out by the record of the interview. The trial court correctly concluded that from the context of the interview, the officer was asking questions, not expressing an opinion about the facts of the case. The officer's questions

and comments in response to Perry Taylor's statements simply gave context to the interview and could not be construed by the jury as providing a lay opinion about what Perry was saying. The officer who conducted the interview testified at trial and offered no opinion testimony about the accuracy of Perry's statements. (Tr. 1032-37, 1058-60). In fact, on cross-examination, defense counsel asked the officer leading questions to elicit testimony that the officer believed Perry was being evasive and lying during the interview. (Tr. 1061). Contrary to Appellant's contention that the so-called opinions expressed by the officer during the interview harmed the defense's efforts to show that Perry was a liar, the record of the officer's testimony at trial in fact supported that claim.

Appellant's contention that the officer's statements expressed a belief in Perry's innocence is an exaggeration of what occurred during the interview. Moreover, Appellant's argument that the jurors were "likely swayed" by the officer's statements during the interview and that they gave the officer's comments "great weight" is nothing but pure speculation. The record shows that the officer's comments were not made in the context of giving an opinion about Perry's statements, but to reiterate what Perry had been telling police during the questioning that obviously occurred before the recorded interview, which is that Perry had denied having anything to do with the murders.

Appellant's reliance on *State v. Presberry*, 128 S.W.3d 80 (Mo. App. E.D. 2003), and *State v. Bybee*, 254 S.W.3d 115 (Mo. App. W.D. 2008), is misplaced. In those cases, police witnesses testified about the identity of a person seen in security videotapes or photographs when the witness was in no better position than jurors to make that

determination (Presberry) and gave testimony in the form of an accident reconstruction report about the identity of the person driving the vehicle, which was the ultimate issue before the jury (Bybee). These cases are obviously distinguishable from Appellant's case. Here, the officer did not offer any lay opinion testimony, much less any testimony about an ultimate issue for the jury to decide. Instead, the officer's comments during the interview were in the form of questions or restatements of what Perry had already said and simply gave context to the statements Perry was making.

The court did not abuse its discretion in allowing these portions of the recorded interview to be played for the jury.

IX (veniremember removed for cause).

The trial court did not abuse its discretion in sustaining the State's objections and removing veniremember Tumminia for cause because an examination of the entire record shows that she was equivocal and refused to directly answer the question whether she could set aside her personal beliefs, consider the full range of punishment, and follow the court's instructions.

A trial court does not abuse its discretion in removing a veniremember for cause when the complete record of the veniremember's responses shows that he or she would be unable or unwilling to follow the court's instructions on the issue of punishment or to consider the full range of punishment.

A. The law regarding jury selection in capital cases.

In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the Court held that a State cannot automatically exclude jurors from a death-penalty case simply because they had "conscientious scruples against capital punishment" or were opposed it. *Id.* at 512; *see also Wainwright v. Witt*, 469 U.S. 412, 418 (1985). The Court refined this doctrine in two cases following *Witherspoon*. *See Boulden v. Holman*, 394 U.S. 478, 483-84 (1969) (noting that a person who has a fixed opinion against or does not believe in capital punishment may nevertheless be able to follow the law and fairly consider imposition of the death penalty in a particular case); *Lockett v. Ohio*, 438 U.S. 586, 595-96 (1978) (holding that prospective jurors were properly disqualified when they were unable to set

aside their personal beliefs or convictions regarding capital punishment and take an oath to follow the law).[16]

In *Adams v. Texas*, 448 U.S. 38 (1980), the Court, in considering the holdings of these previous cases, held that the standard for establishing whether a prospective juror in a capital case may be excused for cause is whether that person's views about capital punishment would prevent or substantially impair the performance of that person as a juror:

> This line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

Id. at 45; *see also Witt*, 469 U.S. at 424; *Johnson*, 22 S.W.3d at 187 ("The relevant question is whether a venireperson's beliefs preclude following the court's instructions so

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[16]In *Lockett*, the excluded jurors were unable to respond affirmatively to the following question: "Do you feel that you could take an oath to well and truely [sic] try this case . . . and follow the law, or is your conviction so strong that you cannot take an oath, knowing that a possibility exists in regard to capital punishment." 438 U.S. at 595-96.

as to 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'").

The *Adams* court also noted that a State "does not violate the *Witherspoon* doctrine when it excludes prospective jurors who are unable or unwilling to address the penalty questions with this degree of impartiality." *Id.* at 46. The Court read *Witherspoon* as a limitation on the State's power to exclude prospective jurors on a basis any broader than their inability to follow the law or abide by their oaths. *Id.* at 48; *see also Lockhart v. McCree*, 476 U.S. 162 (1986) (holding that the Sixth Amendment's fair-cross-section requirement was not violated when prospective jurors were excluded for cause after stating that under no circumstances would they vote for death).

Consequently, no one can seriously argue that a prospective juror who cannot or will not follow the law in a capital case may not be excluded for cause. The easy cases are those in which prospective jurors unequivocally state that under no circumstances with they follow the law and consider the death penalty. The more difficult cases are the ones in which jurors adopt no firm position or give no definitive answer about their ability to set aside their personal beliefs and follow the law.

In *Witt*, after reaffirming the *Adams* "standard" for juror exclusion, the Court held that a prospective juror's bias need not be proved with "unmistakable clarity" and that a trial judge may still lawfully exclude such jurors if the judge believes that the prospective juror would be unable to follow the law:

> [T]his standard likewise does not require that a juror's bias be proved with 'unmistakable clarity.' This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

Witt, 469 U.S. at 424-26.

This Court has held that a potential juror's "equivocation about his ability to follow the law in a capital case together with an unequivocal statement that he could not sign a verdict of death can provide a basis for the trial court to exclude the venireperson from the jury." *State v. Johnson*, 22 S.W.3d 183, 186 (Mo. banc 2000). In addition, a statement indicating that a veniremember would hold the state to a burden of proof higher than the beyond-a-reasonable-doubt standard constitutes a sufficient basis on which to sustain a motion to strike for cause. *Johnson*, 22 S.W.3d at 188-89; *State v. Clayton*, 995 S.W.2d 468, 476 (Mo. banc 1999).

B. Standard of review.

"The trial court's 'ruling on a challenge for cause will not be disturbed on appeal unless it is clearly against the evidence and constitutes a clear abuse of discretion.'" *State v. Taylor*, 134 S.W.3d 21, 29 (Mo. banc 2004) (quoting *State v. Smith*, 32 S.W.3d 532, 544 (Mo. banc 2000)).

The qualifications of a prospective juror are not determined from a single response, but rather from the entire examination. *Johnson*, 22 S.W.3d at 188. The trial court can better evaluate a venireperson's commitment to follow the law and has broad discretion to determine the qualifications of prospective jurors. *Id.* "Under *Wainwright*, the trial judge evaluates the venire's responses and determines whether their views would prevent or substantially impair their performance as jurors (including the ability to follow instructions on the burden of proof)." *Id.*

Accordingly, a great deal of deference is owed to the trial court's determination that a prospective juror is substantially impaired. *See Uttecht v. Brown*, 127 S. Ct. 2218, 2224 (2007). This deferential standard applies whether the trial court has engaged in a specific analysis regarding the substantial impairment; even the simple act of granting a motion to excuse for cause "constitutes an implicit finding of bias." *Id.* at 2223. "Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of *critical* importance in assessing the attitude and qualifications of potential jurors. *Id.* at 2224. The trial court's "finding may be upheld even in the absence of clear statements from the

juror that he or she is impaired." *Id.* at 2223. "Thus, when there is ambiguity in the prospective juror's statements, 'the trial court, aided as it undoubtedly [is] by its assessment of [the venireman's] demeanor, [is] entitled to resolve it in favor of the State.'" *Id.* (quoting *Witt*, 469 U.S. at 434); *see also State v. Tisius*, 92 S.W.3d 751, 763 (Mo. banc 2002) (quoting *State v. Roberts*, 948 S.W.2d 577, 597 (Mo. banc 1997)) ("Where there is conflicting testimony regarding a prospective juror's ability to consider the death penalty, the trial court does not abuse its discretion by giving more weight to one response than to another and in finding that the venireperson could not properly consider the death penalty."). Even a juror's assurance that he or she can follow the law and consider the death penalty may not overcome the reasonable inferences from other responses that he or she may be unable or unwilling to. *Uttecht*, 127 S. Ct. at 2229.

C. The record of death-qualification voir dire.

After one veniremember said during death-qualification voir dire that she could never impose the death penalty, the prosecutor asked:

> [The Prosecutor]: Anybody else on the panel of ten here? Anybody else has a deep rooted personal belief against the death penalty that you would not be allowed to consider the full range of punishment? It is important for us, at it is for them, that you weigh the evidence, you look at everything, you take your time and you legitimately can consider life to death as punishment; okay?
>
> Panelist Tumminia: I would have qualms about it. I would have difficulty.

[The Prosecutor]: You would have—

Panelist Tumminia: I'm not certain I could go for death.

* * * *

[The Prosecutor]: And when I first asked the question [the first panelist]'s the only one that raised her hand. Are you on the fence or are you saying now after listening to what I'm explaining you don't think you could ever give the death penalty?

Panelist Tumminia: I find this an overwhelming question—I find your question overwhelming at this point, I'm not certain how I feel because I've never considered it seriously before.

[The Prosecutor]: Okay. And obviously when you all walked in today you had no idea what kind of case you were going to be walking into.

Panelist Tumminia: Right.

[The Prosecutor]: It's not a stealing case, not a robbery case; it's the most serious case you can have in the State of Missouri. So as you speak now, after you've listened to all the facts in the case, thought there was enough facts to convict him of Murder in the First Degree and then you go to the second stage, and you're sitting here now, and there's aggravating facts put on, mitigating facts put on. Are you saying now that the shock of being here today, the fact that you've never really considered, really thought too much

about the death penalty is what I'm assuming, that you're not sure you can follow the Judge's instructions, consider the full range of punishment?

Panelist Tumminia: Well, I just think it's such a thorny issue, I don't know if it's a black/white, I can't see it being drawn very clearly right now because of all the words like aggravated, mitigating, Judge's instructions; there's so many things to take into consideration here. And I don't understand the whole ball of wax. To say yes or no when you don't understand the situation is difficult.

[The Prosecutor]: What we're asking you though is if you can consider the full range of punishment. What I'm looking for is people absolutely could not ever consider death. They're against the death penalty, they think it's wrong, they can never sit on a jury no matter, they will always vote for life no matter what the facts are; is that what you're saying?

Panelist Tumminia: I'm not sure which way I would go.

[The Prosecutor]: It's not so much which way you'll go, if you're on the fence. You can never go for death if you were put in this situation.

Panelist Tumminia: Perhaps.

[The Prosecutor]: So it's not so much, you would say, life or death. It's at the point of the second phase you're not sure you can be back there and go, I don't believe I'm here, I can never give the death penalty?

Panelist Tumminia: I don't know if I could sleep at night.

[The Prosecutor]: But the question I'm asking you, if you got to the second stage do you think you would get back there, I don't know if I can consider the full range of punishment, I think I might only consider life; is that what you're saying now?

Panelist Tumminia: I'm just saying I'm on the fence, and I don't know if I could be open to the whole range of possibilities that you're offering.

(Tr. 165-69).

Later, in response to defense counsel's question regarding whether anyone on the panel had "written down" or "discussed" views about the death penalty with others, Ms. Tumminia said that as a "debate coach" she had "published various balance sheets on both sides." (Tr. 202). She also said that she had "been involved politically, down in Potosi along the lines of vigils, a member of Amnesty International." (Tr. 202). Defense counsel then directly asked whether she could "give realistic consideration to both the punishments that have been described,":

Panelist Tumminia: I think I could be fair and firm, I think I could isolate what takes place from my emotional concerns about life, my more—I guess spiritual leanings toward my faith and such. I think I could be fair, if I had a balance sheet in front of me.

[Defense Counsel]: And I don't know about a balance sheet, but do you think you could follow the Court's written instructions—

Panelist Tumminia: Yes.

[Defense Counsel]: —as they've been described to you here this morning?

Panelist Tumminia: I think I could deal realistically with it.

[Defense Counsel]: And could you give realistic consideration to both punishments?

Panelist Tumminia: And I don't think economics has anything to do with it.

The Court: I'm sorry, I didn't hear the last part?

Panelist Tumminia: I don't think economics has anything to do with it.[17]

(Tr. 202-04).

The State moved to disqualify Ms. Tumminia for cause. (Tr. 209). The court, after noting that despite being repeatedly asked whether she could consider both punishment, observed that Ms. Tumminia never "gave a direct answer" to that question and equivocated when answering the prosecutor's questions. (Tr. 210). When defense counsel suggested that Ms. Tumminia had affirmatively stated that she could consider both punishments, the court asked the court reporter to read back her answer and after

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[17] This comment apparently referred to another veniremember's comments suggesting that he would lean toward death because if someone is sentenced to life without parole, why would "we" spend "our" money to keep them in prison "the rest of their life." (Tr. 189-90). Defense counsel referred to that comment as the "economics of the situation," (Tr. 194), or "economic considerations," (Tr. 196), in later questioning until the court sustained an objection to that inquiry. (Tr. 196-98).

hearing that she did not answer the question, it struck Ms. Tumminia for cause. (Tr. 211-12).

D. The court did not err in granting the strike for cause.

When considered in its entirety, the record shows that the veniremember in question gave equivocal answers to the question whether she could fairly consider both punishments and follow the court's instructions. Even when asked a direct question regarding whether she could follow the instructions or consider both punishments, the veniremember refused to give a straight answer. She certainly fell into the category of the hypothetical potential juror mentioned in *Witt*: the one who cannot be asked enough questions to expose his or her bias with unmistakable clarity. The record shows enough equivocation and evasiveness from the veniremember's responses that the trial court cannot be found to have abused its discretion in granting the motion to strike for cause.

X (closing argument).

The trial court did not plainly err in failing to intervene sua sponte during the prosecutor's closing argument.

A. Standard of review.

Plain error relief is rarely appropriate for claims involving closing arguments. *State v. McDonald*, 661 S.W.2d 497, 506 (Mo. banc 1983). Courts are especially reluctant to find plain error in the contest of closing argument because the decision to object is often a matter of trial strategy, and without an objection and request for relief, the court options are narrowed to uninvited interference with summation and a corresponding increase of error by such intervention. *State v. Mayes*, 63 S.W.3d 615, 633 (Mo. banc 2001); *State v. Wise*, 879 S.W.2d 494, 516 (Mo. banc 1994). "[R]elief should be rarely granted on assertions of plain error to matters contained in closing argument, for trial strategy looms as an important consideration and such assertions are generally denied without explication." *State v. Middleton*, 995 S.W.2d 443, 456 (Mo. banc 1999).

Under plain error review, a conviction will be reversed for improper argument only when it is established that the argument had a decisive effect on the outcome of the trial and amounts to manifest injustice." *State v. Middleton*, 995 S.W.2d at 456. "The burden is on the defendant to prove the decisive significance." *State v. Parker*, 856 S.W.2d 331, 333 (Mo. banc 1993).

B. Failure to acknowledge inadmissible hearsay evidence.

The trial court ruled that Gerjuan Rowe's deposition testimony that her sister Angela Rowe called her from a gas station pay phone on November 27, 2004, was plainly hearsay and would not be read to the jury because the sole source of her knowledge concerning where Angela was calling from was that Angela told her she was calling from the pay phone. *See* Point I. The court did allow the jury to hear Gerjuan Rowe's testimony that Angela called her on the night of November 28th. It simply excluded inadmissible hearsay testimony that Angela was calling from a pay phone.

During opening closing argument, the prosecutor told jurors that Gerjuan Rowe was mistaken about the date she received the phone calls from Angela Rowe and that the telephone records of the numbers belonging to the two women did not show any calls after November 24th:

> Gerjuan Rowe. Look at the records here on Gerjuan Rowe. Phone calls from the victim's house to Gerjuan. Those two calls I told you about the early morning hours, twenty-two minutes after midnight on the 24th. That's her sister. We played—we read into evidence Gerjuan's depo. Of course Gerjuan first time says last time I talked to her was the 20th and 21st, the correct weekend. But when she's questioned again she changes.
>
> She has drug problems, drug convictions. Very upset about this. You heard the depo. She kind of makes it to where the 27th, 28th where all these

phone calls were happening, there's trouble, there was a falling out, she said. Probably the defendant and the victim.

Look at the amount of calls that happened on the 21st, 22nd, 23rd. She's correct, she has the wrong weekend.

I also asked Dan Jensen, did you go through Gerjuan Rowe's records line by line? And when was the last time her outgoing called the victim's house? November 23rd. So whatever the defense wants to say about Gerjuan Rowe what you know from these facts is that the last call—Charter counts only outgoing calls, the last outgoing call to Gerjuan Rowe was on the 24th at 12:22 a.m., twenty-two minutes after midnight. And that's from the victim to her sister Gerjuan Rowe.

And if you look at the records, Gerjuan Rowe's Sprint, which captured the incoming and outgoing, you will not find the victim's number after 11/23. Two cell phone companies or one house company and one cell phone, there's absolutely no communication between these two women, sisters, from 11/24 after the—after twenty-two minutes after the hour ever again.

(Tr. 1746-47).

During Appellant's closing argument, his counsel reminded the jury that the State's telephone records did not tell the entire story of telephone communication between Gerjuan and Angela Rowe, that Gerjuan testified during her deposition that she saw Angela on November 27, and that Gerjuan's cell phone records show a call to the gas

station pay phone at about the same time she testified that she was talking to Angela on her cell phone:

> And we know that Leonard Taylor is not in St. Louis on the 27th, and yet Gerjuan Rowe sees Angela face-to-face. You don't have to rely on phone records when you see somebody face-to-face.
>
> And when you're interviewed on December 3rd, which is when Gerjuan Rowe was interviewed, and when you tell the police it hasn't even been a week that I haven't seen my sister, it hasn't been a week, it's been less than a week.
>
> Now, the State says there's no phone records after the 23rd or 24th. There's a couple of things you need to know about. They emphasize heavily the phone activity of Leonard's cell phone and Perry's cell phones, and calls to various people on November 23rd. But there's a record of a call in their records at 11:52 where Gerjuan Rowe calls Angela. And to see that you have to look at the Sprint records that we got, Defendant's Exhibit BB.
>
> Do you remember you heard when we read the testimony of Gerjuan Rowe she said get my records, I've talked to her, get my cell phone records.
>
> * * * *
>
> And one of the things that Gerjuan says is that she talks—or gets a call from Angela on the night of the 28th. And if you look at the cell phone records, the Sprint records, and they're minute, these Sprint records are just not as easy to

read even with reading glasses. But there is a call that shows up in those records, a Sprint call at 4:36 a.m. on the 28th.

And you heard the testimony of Gerjuan that she was out walking, and that she had phone contact with her sister, and there's a call where Gerjuan calls the Amoco Station, and that fits right with the time that Gerjuan says she's out walking and is talking on her cell phone to Angela.

Gerjuan says I talked to her on Sunday night, too, about 7:00 p.m. And so that's why when she says to the police it hasn't even been a week because she's remembering that call, that Sunday night call at 7:00 p.m. that she had with her sister that she drew upon as remembering the last time she talked to her sister.

And the thing about the Sprint records is that they don't record the numbers of incoming calls. If you look at those they just say incoming, so when the State tries to suggest that there are no calls between Gerjuan and Angela, they can't say that because these records do not give you the full picture. And Gerjuan says get my records, to the police, get them, I've been talking to her. But the police didn't get those records.

One of the things you'll see when you look at those Charter records, and you can either look at the original records that they provided back a year ago or you can look at the new ones, but either way when you look through those records and you have a list of all the phone numbers that have been agreed to in this case, and you'll see what Gerjuan's phone number is, it never ever shows up as an

incoming call to Angela's house. Gerjuan's cell phone never shows up in those Charter records as calling that house. But if you look at Gerjuan's Sprint records you will find that there are many calls to Angela's house.

Gerjuan's getting charged by Sprint for calling Angela, but the Charter people are not capturing that call. And you heard that from Cathy Herbert, we don't collect all data of all phone calls. So, yes, those records from Charter they show the data that Charter collected, but they are not the full and complete picture of the phone activity at that house. The only way you can possibly have the full picture of the phone activity of that house is to figure out every person who ever called that house and get their cell phone records and their land line records.

Because those Charter records are not complete. They are a snapshot. They are a partial picture. But you cannot rely on those to tell you the whole story.

(Tr. 1749-53).

Contrary to Appellant's claim, the prosecutor did not misrepresent the evidence. He simply pointed out that Gerjuan Rowe's cell phone records show no calls from Angela Rowe's number after November 23rd. He directed his comments to what the telephone records showed. The defense pointed out that Gerjuan Rowe testified that she talked to her sister late on November 28th and that her cell phone records showed that she called the gas station on that same date around the time she claimed she had talked to

Angela. Both sides argued what the evidence showed and the reasonable inferences that could be derived from it.

The cases on which Appellant relies are inapposite because they stand for the proposition that reversible error occurs when a prosecutor comments on a defendant's failure to present evidence on a matter when the State has obtained an order excluding that evidence as a discovery sanction. In *State v. Hammonds*, 651 S.W.2d 537 (Mo. App. E.D. 1983), the prosecutor obtained the exclusion of Appellant's alibi witness because he was not timely disclosed and argued in closing about the defendant's failure to call this witness to support his alibi. *Id.* at 539. A nearly identical situation occurred in *State v. Price*, 541 S.W.2d 777, 778-79 (Mo. App. St.L.D. 1976), when the prosecutor mentioned the defendant's failure to call an alibi witness whom the State had sought to exclude for late disclosure. In *State v. Weiss*, 24 S.W.3d 198 (Mo. App. W.D. 2000), the prosecutor made "intentional and deliberate" misrepresentations during closing argument about the existence of evidence that the defendant had tried to admit, but was precluded from doing so when the prosecutor obtained an order excluding it from evidence. *Id.* at 202-03. In *State v. Williams*, 119 S.W.3d 674 (Mo. App. S.D. 2003), the prosecutor "made positive misrepresentations to the jury that there was no evidence to support Appellant's defense theory when he knew that he had successfully excluded that evidence as a discovery sanction. *Id.* at 680-81.

Appellant cites no case suggesting that it is reversible error for a prosecutor not to argue inferences contrary to what might have been established by inadmissible hearsay

evidence, as opposed to otherwise admissible evidence that has been excluded based on a discovery violation. The prosecutor's argument did not constitute plain error.

C. Failure to present evidence.

During his pretrial deposition, the medical examiner testified that it was unlikely that the victims, who were discovered on December 3, 2004, had been dead for more than two or three days. (Tr. 1206-07, 1219). At trial, he said that he did not realize during his deposition that the air conditioner had been turned on and set to its lowest setting. (Tr. 1207, 1219-21). After considering this additional information, he opined at trial that the bodies had been in the house for two or three weeks. (Tr. 1196).

In Appellant's closing argument, his counsel thoroughly attacked the medical examiner for changing his testimony and in suggesting at trial that the bodies had been dead for two or three weeks. (Tr. 1766-69). In his rebuttal closing argument, the prosecutor replied:

> And believe me if there's somebody else that could refute Dr. Burch they would have put them on the stand. And in his deposition he said three to ten days. It happens on the tenth day.

(Tr. 1778).

Comments made during closing argument "must be interpreted with the entire record rather than isolation." *State v. Graham*, 916 S.W.2d 434, 436 (Mo. App. E.D. 1996). "A prosecutor has considerable leeway to make retaliatory arguments in closing. A defendant may not provoke a reply and then assert error." *State v. Middleton*, 998

S.W.2d 520, 530 (Mo. banc 1999). In fact, a prosecutor may retaliate to an issue raised by the defense even if the prosecutor's comment otherwise would be improper. *State v. Clayton*, 995 S.W.2d 468, 479 (Mo. banc 1999). "[A] prosecutor may rebut defense counsel's argument if the defense counsel opens the door to an otherwise questionable line of argument." *State v. Jones*, 979 S.W.2d 171, 176 (Mo. banc 1998). *See also State v. Walls*, 744 S.W.2d 791, 798 (Mo. banc 1988); *State v. Plummer*, 860 S.W.2d 340, 350 (Mo. App. E.D. 1993); *State v. Williams*, 849 S.W.2d 575, 579 (Mo. App. E.D. 1993) (prosecuting attorney may go further by way of retaliation in answering the argument of defense counsel than would be permitted in the first instance).

Appellant complains that this argument was a comment on the defense's failure to call a witness who was equally available to both sides. App. Br. 131. But it was actually an argument on the defense's failure to present evidence on an issue, which is permissible, especially in rebuttal closing argument. *See State v. Stepter*, 794 S.W.2d 649, 655 (Mo. banc 1990).

XI (handcuffing defendant).

Appellant's constitutional rights were not violated by the jury's brief viewing of him being handcuffed while being transported from the courtroom after the guilty verdicts had been announced.

A. The record

Appellant filed a pretrial motion asking that he be allowed to appear in his own clothing and without restraints. (L.F. 436-38). After arguing the motion during an April 12, 2007 hearing, the court ruled that Appellant would be allowed to appear without restraints, but added that "the only time that would change is if the defendant would himself do something that would cause me to feel that as a security measure that I have to reverse my original order."[18] (Tr. 60). During trial, Appellant wore a "leg brace" that was not visible. (Tr. 143-44).

After the guilty verdicts were read and the jury polled, the court asked the bailiffs to remove the defendant from the courtroom. (Tr. 1785-86). Appellant's counsel then approached the bench and complained that "one of the transportation officers placed handcuffs on [Appellant]'s wrists right in front of everybody." (Tr. 1786). Counsel then moved for a mistrial on the ground that putting "any kind of restraints on a defendant in

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[18] The transcript incorrectly shows that this hearing was held on April 12, *2008*. (Tr. 2). It is clear from the record, however, that this hearing was held on April 12, *2007*. (L.F. 29-31).

the presence of the jury" violated his constitutional rights. (Tr. 1786). The court overruled Appellant's motion for mistrial. (Tr. 1786-87).

During the April 17, 2007 sentencing hearing, the prosecutor made a record regarding Appellant's handcuffing:

> From the State's perspective I just wanted to include a couple of things for the record. Throughout the trial the Department of Justice Services had informed the State that defendant had an intention to act out, that there may be a problem in the trial. I know that I did conveyed [sic] that to the Court. From our perspective, from what we were aware of.
>
> I think also there was no prejudice to the defendant, in the first phase of the trial it was made very clear from both parties the defendant was confined throughout the trial. The State in its case in chief played a tape of a telephone call he made from the jail to his brother Perry Taylor. So there was no prejudice to him in any event because the jury was clearly aware of the fact he was in custody the entire time.

(Tr. 1855-56).

B. No constitutional violation occurred.

In *Deck v. Missouri*, 544 U.S. 622 (2005), during the retrial of the penalty-phase proceeding in a capital case, culminating in two death sentences, the defendant "[f]rom the first day of the new proceeding, . . . was shackled with leg irons, handcuffs, and a belly chain." *Id.* at 625. The trial judge's only reason for shackling the defendant was

merely the fact that he had already been convicted of murder. *Id.* at 634. The Court held that "courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding." *Id.* at 633. But the Court said this rule was "not absolute," and would give way to the use of restraints involving security concerns that may call for shackling. *Id.*

Appellant's case is distinguishable from *Deck*. Appellant was not subjected to shackling during the entirety of his penalty-phase proceeding. He wore only a leg brace that was hidden underneath his clothing. The handcuffing occurred only after the guilty verdicts had been announced and the court had directed the bailiffs to remove Appellant from the courtroom. It is a reasonable inference from the record that the handcuffing was a normal procedure for transporting prisoners. *State v. McMillian*, 779 S.W.2d 670, 672 (Mo. App. E.D. 1989) (noting the handcuffing a defendant is standard procedure "when the defendant is being escorted from the courtroom"). At most, the jury's view of the handcuffing was brief and occurred immediately before Appellant left the courtroom. The jury was aware that Appellant had been in custody before trial since they heard a jailhouse recording of a telephone call Appellant made to his brother Perry in the days before trial began instructing him to leave the state to avoid testifying. (Tr. 1560-64; State's Exhibit 258 and 259). The prosecutor informed the trial court that the guards had received information that Appellant intended to "act out" during trial. A likely time for this to have occurred, if it was to occur at all, would be after the jury announced its guilty verdicts.

Since *Deck*, at least one court has held that a jury's momentary and fleeting sight of a defendant wearing restraints while being transported to or from the courtroom is not grounds for a mistrial under the United States Supreme Court's decision in *Deck*. *See Spicer v. State*, 921 So.2d 292 (Miss. 2006) (potential jurors possibly observed the defendant in shackles during a brief walk of approximately six feet between the back entrance of the courtroom and the witness room). Missouri courts have held that the brief, inadvertent exposure of the defendant in restraints does not deny him the right to a fair trial. *See State v. Smith*, 996 S.W.2d 518, 523 (Mo. App. W.D. 1999) (holding that brief exposure to a handcuffed defendant being taken from one place to another did not deny a fair trial); *McMillian*, 779 S.W.2d at 672 (jury members saw the defendant handcuffed on two occasions while being escorted from courtroom). In *State v. Vaughn*, 271 S.W.3d 632 (Mo. App. W.D. 2008), the court held that a defendant's constitutional rights were not violated when the venire panel saw the defendant being escorted into the courtroom by two uniformed corrections officers and a uniformed deputy sheriff. *Id.* at 633.

Appellant's constitutional rights were not violated to the extent the jury saw him briefly being handcuffed while he was escorted out of the courtroom.

XII (proportionality review).

This Court should, in the exercise of its independent statutory review, affirm Appellant's death sentence 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 findings of aggravating circumstances, and; (3) the sentence is not excessive or disproportionate to those in similar cases considering the crime, the strength of the evidence and the defendant.

Appellant does not challenge the proportionality of his sentence, and this Court should exercise its discretion to affirm Appellant's sentence in this case. Under the mandatory independent review procedure contained in § 565.035.3, RSMo 2000, this Court must determine:

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

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

Nothing in the record suggests that Appellant's sentence was imposed under the influence of prejudice, passion, or any other improper factor.

The jury found all the aggravating circumstances presented to them, which were that Appellant had one or more serious assaultive convictions, that the murder of each victim was committed while Appellant was engaged in the unlawful homicides of the other victims, and that each murder involved depravity of mind and as a result was outrageously and wantonly vile, horrible, and inhumane. (L.F. 1273-80, 1303-04, 1308-09, 1313-14, 1318-19). The record supports a finding of each of these aggravating circumstances.

The death sentence in this case is neither excessive nor disproportionate to the penalty imposed in similar cases, considering the crime, the strength of the evidence, and the defendant. "This Court has often upheld death sentences where the defendant murdered more than one victim." *State v. Anderson*, 79 S.W.3d 420, 446 (Mo. banc 2002); *see also State v. Smith*, 32 S.W.3d 532, 559 (Mo. banc 2000); *State v. Ringo*, 30 S.W.3d 811, 826 (Mo. banc 2000); *State v. Johnson*, 968 S.W.2d 123, 135 (Mo. banc 1998); *Ramsey*, 864 S.W.2d 320, 327 (Mo. banc 1993). "Death sentences have been upheld where the defendant . . . sought to eliminate possible witnesses." *Ringo*, 30 S.W.3d at 826; *State v. Shafer*, 969 S.W.2d 719, 741 (Mo. banc 1998).

CONCLUSION

The trial court did not commit reversible error in this case. Appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 25740 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and

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

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were overnight mailed this 6th day of April, 2009, to:

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APPENDIX