No. 84315

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IN THE
MISSOURI SUPREME COURT

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STATE OF MISSOURI,

Respondent,

v.

PATRICE D. SEIBERT,

Appellant.

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Appeal from the Circuit Court of Pulaski County, Missouri
25th Judicial Circuit, Division 1
The Honorable Douglas E. Long, Jr., Judge

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RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from a conviction of murder in the second degree, § 565.021.1.(1), RSMo 2000, obtained in the Circuit Court of Pulaski County, the Honorable Douglas E. Long, Jr. presiding. Appellant was sentenced to life imprisonment in the Missouri Department of Corrections. The Court of Appeals, Southern District, affirmed appellant's conviction and sentence. Pursuant to Supreme Court Rule 32.02, this Court granted transfer. This Court has jurisdiction. Article V, § 10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Patrice Seibert, was charged by information with murder in the first degree, § 565.021.1, RSMo 2000, and arson in the first degree, § 569.040.1, RSMo 2000 (L.F. 48). After a trial by jury, appellant was found guilty of murder in the second degree and sentenced to life imprisonment in the Missouri Department of Corrections (L.F. 99; Tr. 990, 997, 1001). Appellant contests the sufficiency of the evidence. Viewed in the light most favorable to the verdict, the facts were as follows:

On or about February 11, 1997, one of appellant's children, Jonathan Seibert, died of an unknown cause (Tr. 757-758, 836).[1] Appellant was distraught, and (apparently because of sores on Jonathan's body) she worried that she would be charged with neglecting her child (Tr. 836-837, 858; State's Ex. 42).[2]

Appellant sent one of her children to tell Darian Seibert (another of appellant's children) to come home (Tr. 855; State's Ex. 42). Darian went home and talked to appellant (Tr. 857). Appellant was upset, and Darian told appellant that she should call the police (Tr. 857). Later, Darian, Derrick Roper, and Jeremy Batcher went to appellant's home and talked to appellant (Tr. 835-837, 858; State's Ex. 42). Appellant told them that she could not call the police because Jonathan had sores (Tr. 858; State's Ex. 42).

Appellant, Darian, and Roper then discussed how they could cover up Jonathan's death (Tr. 837-838, 860; State's Ex. 42). The conversation eventually turned to burning appellant's trailer, and appellant mentioned something about an electrical fire (Tr. 837-838, 859; State's Ex. 42). In discussing their plan, Roper or Darian suggested that "someone had to be" in the trailer when it burned (Tr. 838). Roper

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[1] To avoid confusion, respondent will refer to the members of the Seibert family by their first names.

[2] An autopsy also revealed that Jonathan was malnourished (Tr. 754).

suggested that Donald Rector (another occupant of the trailer) could be in the trailer when it burned (Tr. 840).

Darian asked about Rector and said that he would have to be "take[n] out," and appellant said that Rector would be asleep, due to his "new medicine" (Tr. 861; State's Ex. 42). Darian asked why Rector had to die, and Roper said that someone had to be there (Tr. 861). Darian also asked about his little brothers, Patrick and Shawn, but appellant said that they could go to church (Tr. 860). Darian then went into the bathroom, and when he emerged, Roper and appellant were lying on the couch, kissing and whispering to each other (Tr. 861).

At about that time, Roper asked if they had a gas can, and Darian said that they did not (Tr. 862). Roper stated that they would need funds to get a can of gasoline, and appellant gave Roper a twenty-dollar bill (Tr. 862-863). Then, when Roper got up to leave, appellant told Darian to go with him (Tr. 863).

Roper and Darian went to three locations and eventually bought a gasoline can at O'Reilly Auto Parts (Tr. 795, 863). From there, the two young men walked to "Delano's" and filled the can with gasoline (Tr. 864). Then they called a taxi and rode back to the vicinity of the trailer park (Tr. 864). Near the trailer park, Roper hid the can of gasoline in a creek (Tr. 865).

At the trailer, when the two young men arrived, no one was home (Tr. 865). Shortly thereafter, worried that it might be found, Roper left the trailer to move the can of gasoline (Tr. 865). Patrick and Shawn, two of appellant's younger children, arrived home; and, thereafter, Rector, Roper, and appellant arrived (Tr. 866).

According to the plan, Patrick and Shawn later left to go to church (Tr. 867; State's Ex. 42). Then appellant left, saying that she was leaving with a friend (Tr. 867). She later admitted that she left because

she did not want to be there when the trailer burned (State's Ex. 42). Appellant took a duffel bag of clothing and some money (Tr. 866; State's Ex. 42).

Once Rector was asleep, Roper left to get the can of gasoline (Tr. 867-868). Darian also fell asleep, but he woke up when Roper, in the process of pouring gasoline throughout the trailer, splashed gasoline on him (Tr. 868). Darian ran outside to wipe off the gasoline and get some fresh air (Tr. 868).

When Darian went back inside, Roper was hitting Rector (Tr. 869). Darian ran to Rector, who was apparently having a seizure, and tried to help him (Tr. 869). Roper said, "You're going to flip on me" and ran off (Tr. 869). Frightened, and worried that Roper would set the trailer on fire, Darian ran after Roper (Tr. 869-870). Then there was a "screeching sound" and the trailer went up in flames (Tr. 870).

The two young men panicked and ran past the front door (Tr. 871). Roper tried to kick out the front window, but that was unsuccessful (Tr. 871). They then ran back down the hall and escaped the burning trailer through the front door (Tr. 872). Darian suffered serious injuries from the fire (Tr. 850).

Rector died in the fire from "asphyxiation secondary to burning" (Tr. 757). Rector sustained multiple blunt-trauma blows to the head, but those injuries did not kill him, as evidenced by the soot in his airway (Tr. 744, 748, 750-751).

When questioned by the police, appellant denied any involvement or knowledge regarding the fire (Tr. 912-915). Appellant also failed to mention that Jonathan had died prior to the fire (Tr. 914). Appellant also denied that she was covering for anyone (Tr. 915).

About five days later, after gaining additional information from Roper, the police arrested appellant (Tr. 917). In a subsequent interrogation, appellant admitted that she had been involved in the murder (Tr. 921). She also admitted that she knew that Rector could die in the trailer (State's Ex. 42).

At trial, appellant did not testify and did not offer any evidence in her defense. The jury found appellant guilty of murder in the second degree and recommended a sentence of life imprisonment (Tr. 990, 997). Appellant was sentenced to life imprisonment (Tr. 1001).

On appeal, the Court of Appeals, Southern District, affirmed appellant's conviction and sentence. State v. Seibert, No. 23729 (Mo.App. S.D. January 30, 2002).[3] Thereafter, this Court granted appellant's application for transfer.

[3] An addendum to the original opinion was filed on February 28, 2002.

ARGUMENT

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING APPELLANT'S POST-MIRANDA STATEMENT, WHICH WAS GIVEN ON FEBRUARY 17, 1997, BECAUSE, ALTHOUGH APPELLANT ALSO GAVE AN UNWARNED PRE-MIRANDA STATEMENT (WHICH WAS NOT ADMITTED AT TRIAL), THE PRE-MIRANDA STATEMENT WAS ACTUALLY VOLUNTARY, AND APPELLANT SUBSEQUENTLY WAS ADVISED OF HER MIRANDA RIGHTS, INDICATED THAT SHE UNDERSTOOD HER RIGHTS, AND VOLUNTARILY GAVE HER POST-MIRANDA STATEMENT.

Appellant contends that the trial court erred and abused its discretion in admitting appellant's statements which were given on February 17, 1997, to the police (App.Br. 21). She claims that the statement's were illegally obtained by engaging in a purposeful "'end-run' of Miranda" (App.Br. 21).

A. The Facts

On February 17, 1997, at about 3:00 a.m., appellant was arrested (Tr. 10, 24-25). The arresting officer did not inform appellant of her Miranda rights (Tr. 12, 27). In fact, the arresting officer was specifically told not to inform appellant of her rights (Tr. 27).

Appellant was transported to the police department and placed in an interview room (Tr. 11). After about fifteen minutes, at about 3:34 a.m., appellant was interrogated (Tr. 12). This first interview was not recorded (Tr. 12), and its contents were not admitted into evidence at trial by the state.

After the first interview, and after a fifteen- to twenty-minute break, at about 4:30 a.m., appellant

was advised of her Miranda rights (Tr. 13, 936).[4] A form was used to advise appellant of her rights, and she indicated that she understood the rights that had been read to her (Tr. 13-14, 918). Appellant then signed the form and indicated that she wanted to talk to the police (Tr. 14-15). This second interview was recorded and admitted at trial as State's Exhibit 42 (Tr. 14, 925).

In particular, appellant was informed of her rights and indicated her understanding of them, as follows:

Q. Ok. And Patrice, before we go any further, I have to read your rights to you, you understand that?

A. Yes.

Q. Ok. You do not have to make any statement at this time and have a right to remain silent. Do you understand that?

A. Yes.

Q. Ok. Anything you say can and will be used against you in a court of law. Do you understand that?

A. Yes.

Q. You're entitled to con . . . consult with an attorney before an interview and have an attorney present at the time of interrogation. Do you understand that?

A. Yes.

Q. If you cannot afford an attorney, one will be appointed for you. Do you

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[4] Appellant was given a break to drink a cup of coffee and smoke a cigarette (Tr. 936).

understand that?

A. Yes.

Q. Having your rights in mind, [Pa]trice, are you willing to go ahead and answer questions for us?

A. Yes.

Q. Ok. What I need you to do . . . is I need you to initial next to every one of these check marks where I read the rights to you, and I need you to sign and date and time here.

(State's Exhibit 42). Appellant initialed each right on the form (Tr. 14).

At no time did appellant invoke her right to remain silent or request an attorney (Tr. 16). Appellant was not threatened in any way, and no promises were made to her to induce her statements (Tr. 16-18). Appellant was questioned in low, conversational tones (Tr. 17).

B. The Standard of Review

In reviewing the trial court's ruling on a motion to suppress, the facts and any reasonable inferences arising from the facts are to be stated most favorably to the ruling challenged on appeal. State v. Kinkead, 983 S.W.2d 518, 519 (Mo. banc 1998). The reviewing court will disregard any evidence that contradicts the ruling. Id.

C. Appellant's Statements Were Properly Admitted

There is no question that appellant was in custody when she was interrogated. Thus, it is equally clear that appellant's initial pre-Miranda statement, which were suppressed, were not admissible. The question that remains, therefore, is whether appellant's subsequent, post-Miranda statement were properly

admitted.

The Court of Appeals, Southern District, held that the post-Miranda statement was admissible under Oregon v. Elstad, 470 U.S. 298, 303-309, 105 S.Ct. 1285, 1290-1293, 84 L.Ed.2d 222 (1985). State v. Seibert, No. 23729, slip op. at 9-14 (Mo.App. S.D. January 30, 2002). Respondent submits that the Court of Appeals was correct.

Appellant claims, however, that the deliberate withholding of Miranda warnings was an "improper tactic" that was so coercive as to render the subsequent post-Miranda statements inadmissible as fruit of the poisonous tree (App.Br. 39-41). Analyzing Oregon v. Elstad, appellant argues that the "deterrence" rationale — the desire to curtail improper police conduct — adopted by the Elstad Court "bars a bad-faith violation of Miranda" and requires this Court to hold that her second, post-Miranda was the inadmissible fruit of the poisonous tree (App.Br. 33-50).

In Oregon v. Elstad, however, the Supreme Court specifically held that the "fruits" doctrine did not apply to a violation of Miranda, and that "the admissibility of any [post-violation] statement should turn in these circumstances solely on whether it is knowingly and voluntary made." Oregon v. Elstad, 470 U.S. at 303-309. In reaching this decision, the Court pointed out that the Miranda exclusionary rule "sweeps more broadly that the Fifth Amendment" and, as a consequence, "may be triggered even in the absence of a Fifth Amendment violation." Id. at 306. The Court explained:

> The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony. Failure to administer Miranda warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under

Miranda. Thus, in the individual case, Miranda's preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm.

Id. at 306-307.

Recognizing the difference between "presumptive coercion" arising from a violation of Miranda and "actual coercion" arising from official misconduct, the Court stated: "If errors are made by law enforcement officers in administering the prophylactic Miranda procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself." Id. at 309. "It is an unwarranted extension of Miranda to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period." Id.

Accordingly, the Court concluded: "We must conclude that, absent deliberatively coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion." Id. at 314. "A subsequent administration of Miranda warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." Id.

In short, under the circumstances of appellant's case (as will be more fully discussed below), it is irrelevant that appellant's first statement was obtained in violation of the constitutional guidelines set forth in Miranda. See United States v. Orso, 266 F.3d 1030, 1035 (9th Cir. 2001). "[S]o long as the earlier statement was not involuntary due to constitutional coercion, the subsequent, voluntary, warned statement is still admissible — without regard to whether the subsequent statement was 'tainted' by the earlier

statement." Id.

1. Appellant's Second Statement Was Admissible Under Elstad

Under Elstad, as discussed above, to admit the second, post-Miranda statement, ordinarily, the first, unwarned statement must be voluntary. In the case at bar, there was no actual coercion — or improper police tactics — that compelled appellant's first statement (in fact, appellant does not argue that her first statement was "actually" coerced by any of the traditional methods of coercion).

As the record shows, appellant was interrogated for about twenty minutes in the absence of Miranda warnings. The interrogation was conducted in low, conversation tones without any threats of any kind. Accordingly, in light of those circumstances, there is no reason to believe that appellant's will was overcome by the conduct of the police. See United States v. Elie, 111 F.3d 1135, 1143-1144 (4th Cir. 1997) (giving examples of coercive conduct and finding none where the defendant was arrested at gunpoint); State v. Fakes, 51 S.W.3d 24, 29 (Mo.App. W.D. 2001) ("The law is clear . . . evidence that an accused is surprised and emotionally upset, absent evidence of coercion by the police officers, is an insufficient basis to conclude that a confession was involuntary."). And because appellant's first statement was voluntary, her subsequent, post-Miranda statement was admissible under Elstad.

Despite the noncoercive interrogation, appellant attempts to characterize the deliberate withholding of Miranda warnings as a coercive "improper tactic" that should be deterred (App.Br.49-50). However, as discussed above, the simple failure to advise a defendant of Miranda warnings is not the kind of "improper tactic" that the Court contemplated when it described actual coercion. Oregon v. Elstad, 470 U.S. at 309; United States v. Orso, 266 F.3d at 1035-1037; United States v. Esquilin, 208 F.3d 315, 320 (1st Cir. 2000). In other words, to rise to the level of an "improper tactic" that should be deterred with

the additional exclusion of post-Miranda statements (for it must be remembered that the exclusion of pre-Miranda statements is already in place to deter the withholding of Miranda warnings), the improper tactic must have some actually coercive effect upon the person, i.e., there must be an actual violation of the individual's constitutional rights as opposed to a technical violation of Miranda. See United States v. Orso, 266 F.3d at 1037-1038 (Elstad does not stand for proposition that courts should suppress post-Miranda confessions to deter noncoercive "improper tactics").

"Actual" coercion involves coercive police activity, e.g., lengthy interrogations that overcome the defendant's will, lengthy incarceration without outside contact, beatings, withholding of food and water, threats of harm, refusing to honor requests for cessation of questioning, refusing to honor requests for an attorney, and the like. See Spano v. New York, 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959). It does not include the "psychological effects of *voluntary* unwarned [cat-out-of-the-bag] admissions[.]" Oregon v. Elstad, 470 U.S. at 309-314. On the other hand, "presumptive" coercion arising from the mere failure to advise a person of his or her Miranda rights is not actually coercive. Oregon v. Elstad, 470 U.S. at 314, 105 S.Ct. at 1296; United States v. Orso, 266 F.3d at 1035-1038; United States v. Esquilin, 208 F.3d at 320.

In fact, even if the failure to give Miranda warnings is deliberate, the conduct of the police officers is still noncoercive. Id. at 321 ("The addition of a subjective intent by the officer to violate Miranda, unaccompanied by any coercive *conduct* cannot in itself undermine the suspects free will."); see also Davis v. United States, 724 A.2d 1163 (D.C. App. 1998) (deliberate failure to advise defendant of his rights did not vitiate subsequent, post-Miranda statement). Thus, regardless of whether the failure to give the Miranda warnings is a purposeful or inadvertent, there is no actually coercive effect upon the person not

advised of the Miranda rights.[5] Consequently, in the case at bar, due to the shortness of the initial interview and the complete lack of any coercive police activity, the trial court correctly concluded that appellant's statements were voluntary. And, as stated above, if voluntary — not actually coerced — then appellant's second, post-Miranda statement was properly admitted. Oregon v. Elstad, 470 U.S. at 314; see Nova v. Bartlett, 211 F.3d 705, 708-709 (2nd Cir. 2000); United States v. Rith, 164 F.3d 1323, 1332-1333 (10th Cir. 1999); Watson v. Detella, 122 F.3d 450, 454 (7th Cir. 1997).

With regard to appellant's second, post-Miranda statement, specifically, the record shows that appellant was explicitly warned of her Miranda rights, and that appellant fully understood her rights. In particular, appellant was told, "You do not have to make any statement at this time and have a right to remain silent," and she stated that she understood (State's Ex. 42). She was told, "Anything you say can and will be used against you in a court of law," and she stated that she understood (State's Ex. 42). She was told, "You're entitled to . . . consult with an attorney before an interview and have an attorney present at the time of interrogation," and she stated that she understood (State's Ex. 42). She was also told, "If you cannot afford an attorney, one will be appointed for you," and she stated that she understood (State's Ex. 42). Finally, she was asked, "Having your rights in mind, [Pa]trice, are you willing to go ahead and

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[5] The same would not necessarily be true, however, with a more egregious violation of Miranda that was specifically calculated to undermine a person's free will, e.g., continued questioning after the person had clearly indicated a desire not to answer further questions. But see Correll v. Anderson, 63 F.3d 1279, 1290-1291 (4th Cir. 1995) (applying Elstad rationale when there was a technical violation of Miranda arising from continued questioning after a request for counsel).

answer questions for us?," and she stated that she was willing (State's Ex. 42). All of this occurred after appellant was given a fifteen- to twenty-minute break (Tr. 936).

As is evident, there is nothing in the record to suggest that appellant was coerced, that appellant's will was overborne, or that appellant did not voluntarily agree to give her statement to the police. To the contrary, appellant expressly stated that she understood her rights, and that she wanted to give her statements to the police. As the United States Supreme Court stated in Elstad, "a careful and thorough administration of Miranda warnings serves to cure the condition that rendered the unwarned statement inadmissible." Oregon v. Elstad, 470 U.S. 310-311. Indeed, the "warning conveys the relevant information and thereafter the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an 'act of free will.'" Id.; United States v. Esquilin, 208 F.3d at 319.

Also, as similarly stated by this Court: "If one is informed of his right to remain silent under Miranda, understands his right to remain silent under Miranda, and thereafter makes voluntary statements, it is absurd to say that such person has not made a knowing and intelligent waiver of his right to remain silent." State v. Winfield, 5 S.W.3d 505, 512 (Mo. banc 1999), cert. denied, 528 U.S. 1130 (2000). Under such circumstances, "[w]hen neither the initial nor the subsequent admission is coerced, little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder." Oregon v. Elstad, 470 U.S. at 312.

Appellant further argues that deliberately withholding the advice of Miranda warnings is police misconduct that should be deterred because, after Dickerson v. United States, 530 U.S. 428, 439-444, 120 S.Ct. 2326, 2333-2336, 147 L.Ed.2d 405 (2000), "Miranda is not simply a prophylactic rule" (App.Br. 31, 53-56). However, appellant overstates the holding of Dickerson.

In Dickerson, the Court did not alter the prophylactic nature of the Miranda warnings; rather, the Court held that Congress could not legislatively remove the prophylactic warnings (or constitutional guidelines) that were necessary to adequately protect an individual's constitutional rights. See Id. at 439-444. See also Michigan v. Tucker, 417 U.S. 433, 444, 94 S.Ct. 2357, 2364, 41 L.Ed.2d 182 (1974) ("The prophylactic Miranda warnings therefore are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.'"). In fact, the Court specifically acknowledged the continuing validity of post-Miranda decisions (such as Oregon v. Elstad), and stated that it was not going beyond the original Miranda decision in deciding the case. Dickerson v. United States, 530 U.S. at 441-442.[6] Thus, even after Dickerson, the prophylactic nature of the Miranda warnings remains; and, as Dickerson expressly acknowledged, the "voluntariness inquiry" in Miranda jurisprudence also remains. Id. at 444.

In any event, with regard to deterrence, police misconduct is already sufficiently deterred by the current Miranda jurisprudence. See United States v. Esquilin, 208 F.3d at 321. In appellant's case, for example, there was no "actual" coercion — there was only "presumptive" coercion. As a consequence, under Miranda, appellant's first, presumptively coerced statement was excluded. However, once the presumptively coercive misconduct stopped, and the Miranda warnings were given, there was no more misconduct (actual or presumptive) to deter by the further exclusion of appellant's second, post-Miranda,

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[6] In this regard, the Court also noted that "the Constitution does not require police to administer the particular Miranda warnings," but that the Constitution simply requires "a procedure that is effective in securing Fifth Amendment rights." Dickerson v. United States, 530 U.S. at 440 n.6.

voluntary statement. This level of deterrence is sufficient, because it limits exclusion to statements obtained in violation of the individual's constitutional rights (even if the violation is only presumptive and not actual). To go any further would simply punish the police for no additional violation of any constitutional right or guideline. See id.; see also Oregon v. Elstad, 470 U.S. 306-307 (exclusionary rule of Miranda already excludes voluntary statements that the Fifth Amendment would not exclude and thereby administers "preventive medicine" to defendants who have "suffered no identifiable constitutional harm").

2. Reliance Upon State v. Fakes and United States v. Carter is Misplaced

Citing State v. Fakes, 51 S.W.2d 24 (Mo.App. W.D. 2001), and United States v. Carter, 884 F.2d 368 (8th Cir. 1989), appellant argues that this issue has already been decided in his favor (App.Br. 42-50). However, State v. Fakes is distinguishable, and United States v. Carter was decided under different procedural facts, is distinguishable, conflicts with Oregon v. Elstad, and should not be followed.

In Fakes, the police subjected the defendant to a "lengthy," "extensive[]," unwarned interview, in which one of the officers "play[ed] the 'heavy'" while the other officer "play[ed] the sympathetic person." State v. Fakes, 51 S.W.3d at 32-33. A Miranda warning was then given as an "afterthought," but only after the first interrogation had ended when the defendant became too emotional Id. at 33-34. More importantly, however, appellant's pre-Miranda responses, evasions, and reluctance (which were not duplicated in her post-Miranda statement) were admitted into evidence at trial. Id. at 32-34 (the effect of admitting the pre-Miranda responses undermined the Miranda protections altogether).

Under those circumstances, and where the police failed to document the defendant's post-Miranda statements, the court in Fakes agreed with the defendant's contention that the pre- and post-Miranda statements could not be separated from each other. Id. at 34-35. Unlike the case at bar, the only carefully

documented statements in Fakes were the pre-Miranda statements. It was unclear, therefore, whether all of the statements admitted at trial were actually post-Miranda statements. Consequently, the court could not conclude that the defendant's pre-Miranda statements had not been improperly used against her. Thus, the case was reversed not because the court disagreed with the holding in Oregon v. Elstad, but because presumptively coerced pre-Miranda statements had been admitted at the defendant's trial (without any guarantee that similar post-Miranda statements had been made by the defendant). See id. at 35; cf. Nova v. Bartlett, 211 F.3d at 708-709; Tankleff v. Senkowski, 135 F.3d 235, 245-246 (2nd Cir. 1998); United States v. Robinson, 20 F.3d 320, 322-323 (8th Cir. 1994) (under Elstad, admission of voluntary pre-Miranda statements was harmless error where defendant made identical voluntary post-Miranda statements).

Contrariwise, in the case at bar, the police carefully documented appellant's post-Miranda statements. In fact, as the record shows, the statements were tape recorded and admitted into evidence using the tape (Tr. 925). Most importantly, however, the state did not use any of appellant's pre-Miranda statements. In fact, it was defense counsel, not the state, that introduced the substance of some of appellant's pre-Miranda statements (Tr. 936-937).

Appellant's reliance upon Carter is similarly misplaced. In Carter, the Eighth Circuit reviewed the lower court's determination that evidence and statements be suppressed. United States v. Carter, 884 F.2d at 369. The lower court had based its decision upon the fact that the defendant had been questioned for an hour and a half without the benefit of Miranda warnings in a coercive atmosphere, including the use of a "Mutt and Jeff" interrogation technique. Id. at 369-372. Additionally, the lower court had based its decision upon the fact that it was an involuntary consent to search that produced the incriminating evidence

and statements. Id. The consent was involuntary due to the coercive atmosphere of the office, a lack of Miranda warnings, a misrepresentation made by the inspector, and the inspector's failing to advise the defendant that he was not required to produce the wallet. Id. Accordingly, in reviewing the lower court's decision, and giving proper deference to the lower court, a divided panel of the court concluded that the pre-Miranda statements were properly excluded. Id. at 372; but see id. at 376.

The court then went on to examine whether the defendant's subsequent, post-Miranda written statement was nevertheless admissible under the rationale of Oregon v. Elstad. Id. Tellingly, however, after laying out the principles of Elstad, the court began its analysis by stating, "[a]ssuming *arguendo* that the first, unwarned, confession was voluntary, we find that the circumstances of this case do not warrant admission of the second warned confession." Id. at 373. Thus, as is evident, the court was not convinced that the pre-Miranda statement was actually voluntary, as is ordinarily required under Elstad.[7]

In any event, the court went on to opine that the defendant's post-Miranda written confession "cannot be allowed into evidence." Id. The court pointed out factual differences between Carter and Elstad (most of which centered upon the coercive atmosphere present during the pre-Miranda interrogation in Carter), and concluded that the Miranda violation was not merely a "technical violation" like the violation in Elstad. Accordingly, the court opined that allowing police to withhold Miranda warnings and interrogate until they obtained a confession constituted an "end run around Miranda." Id. But see id. at 376

[7] An involuntary pre-Miranda confession will "taint" a post-Miranda confession; however, even in such cases, the original "taint" can dissipate to the point that subsequent post-Miranda confessions are admissible. Oregon v. Elstad, 470 U.S. at 311-312, 105 S.Ct. at 1294.

(dissenting opinion) (the defendant's post-Miranda written statement "falls will within the ruling in Oregon v. Elstad"). However, because the Carter court distinguished Carter's case from Elstad based upon the coercive atmosphere of the interrogation, it seems evident that the court was, in fact, troubled by the involuntary, pre-Miranda confession — the "taint" of which had not had a chance to dissipate.

Moreover, Carter's avoidance of Elstad was based in part upon the assertion that permitting police "to ignore Miranda until after they obtain a confession" will "embroil[]" the courts "in the endless case-by-case voluntariness inquiries Miranda was designed to prevent[.]" Id. at 374. However, Miranda does not prevent voluntariness inquiries. Even after Miranda, as the Supreme Court pointed out in Dickerson, the "voluntariness inquiry" remains. Dickerson v. United States, 530 U.S. at 444, 120 S.Ct. at 2336. Additionally, under Miranda, courts must still make case-by-case determinations on the "in custody" question on a regular basis. Moreover, courts must still make case-by-case determinations as to whether the defendant knowingly, voluntarily, and intelligently waived his or her Miranda warnings. Thus, to argue against the rationale of Oregon v. Elstad by decrying the possibility of more case-by-case determinations, is to simultaneously argue against many of Miranda's progeny. Such an argument would also undercut the viability of cases like Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), which held that voluntary statements — even if obtained in violation of Miranda — are admissible to impeach the defendant.

In addition, it is clear that the Carter court was not fully convinced that Elstad would not permit the admission of the defendant's post-Miranda confession. United States v. Carter, 884 F.2d at 374 (finding that even if Elstad would permit the admission of the confession, the confession was the "fruit of an unconstitutional search"); see United States v. Wiley, 997 F.2d 378, 383 (8th Cir. 1993) (stating that

Carter's holding turned upon the illegal search); see also United States v. Esquilin, 208 F.3d at 320 (recognizing that Carter's Elstad analysis is dicta).

Finally, that the Carter case conflicts with Elstad has been recognized by at least one other federal court. United States v. Esquilin, 208 F.3d at 320. In short, Carter is an anomaly that should not be followed.

D. Conclusion

In sum, because appellant's pre-Miranda confession was voluntary, and because the state admitted only post-Miranda statements, which were obtained after appellant freely and voluntarily waived her rights, the trial court did not abuse its discretion in admitting appellant's February 17, 1997 statement to the police. To hold otherwise would result in the exclusion of statements that were not obtained in violation of any constitutional right. This point should be denied.

II.

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT AND SENTENCE, OR PLAINLY ERR IN INSTRUCTING THE JURY ON MURDER IN THE SECOND DEGREE, BECAUSE THERE WAS SUFFICIENT EVIDENCE THAT APPELLANT WAS AN ACCOMPLICE TO SECOND DEGREE MURDER.

In her second point, appellant mixes two different claims: sufficiency of the evidence to support her conviction of murder in the second degree, and the propriety of submitting a verdict director on a lesser included offense of murder in the second degree (App.Br. 60). As a basis for both claims, she argues that the evidence was insufficient for a reasonable finder of fact to conclude beyond a reasonable doubt that she "knowingly caused the death of Donald Rector in the absence of premeditation or deliberation" (App.Br. 60).

Appellant's claims boil down to the rather ironic assertion that she is, in fact, guiltier than the verdict that the jury chose to render. Such a claim, however, should be denied. See § 545.030.1.(17), RSMo 2000 (no criminal trial, judgment or other proceedings shall be in any manner affected because the evidence shows or tends to show him to be guilty of a higher degree of the offense than that of which he is convicted). In any event, the evidence was sufficient.

A. The Standard of Review

1. Sufficiency of The Evidence

In reviewing the sufficiency of the evidence, appellate review is limited to a determination of whether there is sufficient evidence from which a reasonable finder of fact might have found the defendant guilty beyond a reasonable doubt. State v. Chaney, 967 S.W.2d 47, 52 (Mo. banc), cert. denied, 119

S.Ct. 551 (1998). In applying the standard, the reviewing court accepts as true all of the evidence favorable to the state, including all favorable inferences drawn from the evidence, and disregards all evidence and inferences to the contrary. Id. Appellant may not rely on inferences contrary to the jury's verdict. Id.

In Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), the United States Supreme Court emphasized the deference given to the trier of fact. The Court stated: "[T]his inquiry does not require a court to ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 318-319.

2. Instructional Error

As appellant concedes, her claim of instructional error was not preserved for appeal and can only be reviewed for plain error (App.Br. 60). Instructional error constitutes plain error when it is clear the trial court so misdirected or failed to instruct the jury so as to result in manifest injustice. See State v. Beeler, 12 S.W.3d 294, 300 (Mo. banc 2000).

B. Appellant's Claim of Instructional Error Should Not be Reviewed

There is no basis for appellant's assertion that she did not request (or desire) an instruction on murder in the first degree (App.Br. 60). The record shows no objection to the instruction (Tr. 960-961), and the mere fact that Instruction No. 7 was submitted by the state shows nothing. At the time of trial appellant may have strongly desired the lesser included offense instruction, and as shown by closing arguments, it was part of counsel's trial strategy to seek a conviction on the lesser offense (Tr. 984). In

fact, absent any evidence to the contrary, it should be presumed that counsel acted reasonably in not objecting to the instruction, and that submitting the instruction was part of a reasonable strategy to avoid a conviction of murder in the first degree. The trial court should not be convicted of plain error under such circumstances.

C. The Evidence Was Sufficient to Submit And Convict of The Lesser Offense

Even assuming that appellant did not desire the submission of the lesser included offense as part of his trial strategy, appellant's claims are without merit. The first of appellant's two claims is that the evidence was insufficient for a rational finder of fact to conclude beyond a reasonable doubt that appellant was guilty of murder in the second degree (App.Br. 60). Generally, a person commits the crime of murder in the second degree if he "[k]nowingly causes the death of another person[.]" § 565.021.1.(1), RSMo 2000.

In the case at bar, appellant was charged as an accomplice (L.F. 48). "A person is criminally responsible for the conduct of another when . . . [e]ither before or during the commission of an offense with the purpose of promoting the commission of an offense, he aids or agrees to aid or attempts to aid such other person in planning, committing or attempting to commit the offense." § 562.041, RSMo 2000.

Accordingly, appellant's jury was instructed as follows:

> If you do not find the defendant guilty of murder in the first degree, you must consider whether she is guilty of murder in the second degree under this instruction.
>
> If you find and believe from the evidence beyond a reasonable doubt:
>
> First, that on or about February 12, 1997, in the County of Phelps, State of Missouri, Darian Seibert or Derek Roper caused the death of Donald

Rector by causing the fire to the trailer house in which Donald Rector was located, and

Second, that Darian Seibert or Derek Roper knew or was aware that his conduct was causing or was practically certain to cause the death of Donald Rector, then you are instructed that the offense of murder in the second degree has occurred, and if you further find and believe from the evidence beyond a reasonable doubt:

Third, that with the purpose of promoting or furthering the commission of the murder in the second degree the defendant acted together with, aided or encouraged Darian Seibert or Derek Roper in committing that offense, then you will find the defendant guilty of murder in the second degree.

(L.F. 74).

As outlined in the statement of facts, appellant discussed burning the trailer with both Darian Seibert and Derrick Roper (Tr. 837-838, 859; State's Ex. 42). In discussing their plan, Roper or Darian suggested that "someone had to be" in the trailer when it burned (Tr. 838). Roper suggested that Rector could be in the trailer when it burned (Tr. 840).

Darian asked about Rector and said that he would have to be "take[n] out," and appellant said that Rector would be asleep, apparently due to is "new medicine" (Tr. 861; State's Ex. 42). Darian asked why Rector had to die, and Roper said that someone had to be there (Tr. 861). Darian also asked about his little brothers, Patrick and Shawn, but appellant said that they could go to church (Tr. 860). Darian then went into the bathroom, and when he emerged, Roper and appellant were lying on the couch, kissing and

whispering to each other (Tr. 861).

At about that time, Roper asked if they had a gas can, and Darian said that they did not (Tr. 862). Roper stated that they would need funds to get a can of gasoline, and appellant gave Roper a twenty-dollar bill (Tr. 862-863). Then, when Roper got up to leave, appellant told Darian to go with him (Tr. 863).

Later, according to the plan, appellant sent Patrick and Shawn to church (Tr. 867; State's Ex. 42). Then appellant left, saying that she was leaving with a friend (Tr. 867). She later admitted that she left because she did not want to be there when the trailer burned (State's Ex. 42). Appellant took a duffel bag of clothing and some money (Tr. 866; State's Ex. 42).

When questioned by the police, appellant denied any involvement or knowledge regarding the fire (Tr. 912-915). Appellant also failed to mention that Jonathan had died prior to the fire (Tr. 914). Appellant also denied that she was covering for anyone (Tr. 915).

About five days later, after gaining additional information from Roper, the police arrested appellant (Tr. 917). In a subsequent interrogation, appellant admitted that she had been involved in the murder (Tr. 921). She also admitted that she knew that Rector could die in the trailer (State's Ex. 42).

In light of these facts, there was sufficient evidence for a rational finder of fact to conclude beyond a reasonable doubt that appellant was an accomplice to murder in the second degree. Appellant helped formulate the plan to burn the trailer while Rector was inside; appellant gave Roper money to obtain a gasoline can and gasoline; appellant sent her younger children out of danger; appellant did not warn Rector that he was in danger; appellant fled from the danger by going to a friend's house; appellant knew that Rector would be sleeping; and appellant knew that Rector could die in the fire. This was more than sufficient evidence to conclude beyond a reasonable doubt that appellant purposely promoted or furthered

the commission of murder in the second degree.

Appellant attempts to refute this conclusion by arguing that this evidence only supported a finding of knowing murder after deliberation, i.e., that this evidence could only support a verdict of murder in the first degree (App.Br. 60-61). Citing § 556.046.2, RSMo 2000, she argues that it is only proper to instruct on the lesser included offense of murder in the second degree if there is a basis to acquit of murder in the first degree and to convict of murder in the second degree (App.Br. 61-62).

However, appellant misunderstands the distinction between first and second degree murder and misstates the circumstances under which the lesser offense of murder in the second degree *may* be submitted to the jury. In particular, appellant's reliance upon the statutory provision of § 556.046.2, RSMo 2000, is misplaced. In fact, that particular statutory provision is irrelevant in determining when a trial court "may" instruct down. State v. Beeler, 12 S.W.3d 294, 300 (Mo. banc 2000) ("Section 556.046.2 does not prohibit the giving of lesser included offense instructions. This is made clear from the phrase '[t]he court shall not be obligated' to give the lesser included instruction except in specified circumstances.").

A trial court "may" instruct down even when it is not "obligated" to instruct down. See § 556.046.1-.2, RSMo 2000. Section 556.046.1, provides:

> A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when
>
> (1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
>
> (2) It is specifically denominated by statute as a lesser degree of the offense charged; or

(3) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein.

§ 556.046.1, RSMo 2000.

As stated State v. Shipley, 920 S.W.2d 120, 122 (Mo.App. E.D. 1996), "[d]ue process requires that a defendant may not be convicted of an offense which is not charged in the indictment or information." Accordingly, "a trial court may not instruct on an offense not specifically charged unless it is a lesser included offense." Id.

In the case at bar, murder it the second degree was a lesser included offense of murder in the first degree both because it was "established by proof of the same or less than all the facts required to establish the commission of the offense charged," and because it was "specifically denominated by statute as a lesser degree of the offense charged."[8]

Murder in the first degree, like murder in the second degree, is committed when a person "knowingly causes the death of another person[.]" § 565.020.1, RSMo 2000. However, such "knowing" murder is only murder in the first degree if the murder is committed "after deliberation upon the matter." § 565.020.1, RSMo 2000.

Accordingly, when the state presented evidence of "knowing" murder after "deliberation" (murder in the first degree), the state simultaneously presented evidence of "knowing" murder (murder in the second

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[8] Appellant concedes, as she must, that murder in the second degree is specifically denominated by statute as a lesser included offense of murder in the first degree (App.Br. 61). See § 565.025.2, RSMo 2000.

degree). In short, because murder in the second degree was "established by proof of the same or less than all the facts required to establish" murder in the first degree, it was both proper to submit the lesser included offense to the jury, and possible for the jury to conclude that appellant was guilty of the lesser offense (i.e., for the jury to conclude that appellant knowingly caused the death of the victim) — even if the same evidence also tended to show deliberation. Additionally, the jury was not obligated to conclude that appellant "coolly reflected" upon the murder. The jury was free to conclude, for example, that appellant was very upset by the death of her other, neglected child, and that appellant never deliberated upon the murder.

Appellant cites various cases which discuss when the trial court is "obligated" to instruct down, including State v. Santillan, 948 S.W.2d 574 (Mo. banc 1997); State v. Mease, 842 S.W.2d 98 (Mo. banc 1992); State v. Stepter, 794 S.W.2d 649 (Mo. banc 1990); and State v. Leisure, 838 S.W.2d 49 (Mo.App. E.D. 1992) (App.Br. 62, 65). However, because these cases examined whether the trial court was obligated to instruct down (i.e., whether the trial court erred in refusing to instruct down), they are inapposite to the issue presented here.

There is language in Leisure that suggests that the trial court "may" only instruct down when there is evidence to acquit of the greater offense and convict of the lesser. Id. at 57. However, that language (which does not reflect the language of the statute) seems to have arisen from a combination of two factors: a slight misstatement of the statutory language contained in § 556.046.2, and a reference to this Court's opinion in State v. Anding, 752 S.W.2d 59 (Mo. banc 1988). Id.

In Anding, admittedly, this Court examined a situation in which the trial court *had* instructed down; however, that case has been distinguished (and effectively modified) by the more recent decision in State

v. Beeler. See State v. Beeler, 12 S.W.3d at 299-300 (Section 556.046.2 does not prohibit the giving of lesser included offense instructions). Also, in Anding, the trial court had felt obligated to instruct down (due to the "automatic submission" rule) even though the trial court stated its belief that "there was no evidence to support the submission" of the lesser offense. State v. Anding, 752 S.W.2d at 60. Accordingly, in abolishing the "automatic submission" rule, this Court cited the rule that governed when the trial court is "obligated" to instruct down. Id. at 62. This Court did not, however, cite that rule as a guideline for when the trial court *may* instruct down.[9]

In the case at bar, the trial court did not refuse to instruct down; thus, examining whether the trial court was "obligated" to instruct down leads nowhere. The only relevant question in determining whether the trial court properly instructed down is whether the offense was a lesser included offense. And, of course, murder in the second degree was a lesser included offense of murder in the first degree.

In sum, as previously stated, appellant's claims boil down to the rather ironic assertion that she is, in fact, guiltier than the verdict that the jury chose to render. Such a claim, however, can be safely denied. See § 545.030.1.(17), RSMo 2000 (no criminal trial, judgment or other proceedings shall be in any manner

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[9] This Court ultimately conclude that the trial court had "erred in instructing" down because there was no evidence to support the submission of the lesser offense. State v. Anding, 752 S.W.2d at 62. Thus, to the extent that Anding has any bearing upon the question of when the trial court *may* instruct down, it holds merely that the trial court may not instruct down when there is no evidence to support the lesser charge. Respondent submits, however, that such "instructional error" is more properly challenged by challenging the sufficiency of the evidence.

affected because the evidence shows or tends to show him to be guilty of a higher degree of the offense than that of which he is convicted). In any event, the evidence was sufficient to support both the conviction and the submission of murder in the second degree. For all of the foregoing reasons, appellant's claims should be denied.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 8,681 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

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

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this _____ day of June, 2002, to:

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