No. SC85128

IN THE
SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI,

Respondent,

vs.

TRAVIS GLASS,

Appellant.

Appeal from the Circuit Court of
Callaway County, Missouri
Honorable Frank Conley, Judge

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from a conviction of first degree murder, §565.020, RSMo 2000, obtained in the Circuit Court of Callaway County and for which appellant received a sentence of death. Because of the sentence of death imposed, the Supreme Court of Missouri has exclusive appellate jurisdiction over this appeal. Article V, §3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

The appellant, Travis Glass, was charged by information on August 7, 2001, with one count of first degree murder, §565.020, RSMo 2000 (L.F.29-30).[1] Following a change of venue from Ralls to Callaway County, this cause went to trial before a jury on November 18, 2002, the Honorable Frank Conley presiding (Tr.310;L.F.35).

Appellant contests the sufficiency of the evidence. Viewed in the light most favorable to the verdict, the evidence at trial showed the following: Elizabeth Campbell lived with her thirteen-year-old daughter, Steffini Wilkins, who is the victim in this case, and her two younger sons at 1602 Vermont in Hannibal, Missouri (Tr.968,972,989,St.Ex.37). Campbell owned and ran a tavern called the Ole Milts in Hannibal (Tr.968). Campbell met appellant, who was a frequent bar customer, in late 2000 or early 2001 (Tr.981-982). In March 2001, Campbell hired appellant as a bartender (Tr.982-983), and as a result, appellant had been to Campbell's home on at least three occasions, running errands for her or giving Campbell's cousin a ride a home (Tr.985-987).

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[1]The record on appeal cited in this brief consists of the trial and sentencing transcripts ("Tr."), the legal file ("L.F."), a supplemental legal file ("Supp.L.F.), State's Exhibits ("St.Ex."), and Defendant's Exhibits ("Def.Ex.").

There were also occasions, during the time when appellant was either a customer or an employee, when Steffini would visit the bar during the day, and appellant would see her and joke around with her (Tr.983,985). On one such occasion, appellant called Steffini a "hottie" (Tr.985). Appellant also talked to Steffini on the phone (Tr.984-985).

Approximately two weeks before Steffini's murder on May 25, 2001, Campbell fired appellant because he failed to call or show up for work for two days (Tr.987).

On May 24, 2001, at 8:30 p.m., Campbell left for work and took the other children to the baby-sitter while Steffini stayed home alone and talked with her friend Shannon from 10:40 p.m. until 11:15 to 11:30 p.m. (Tr.968,970,995-996).

Meanwhile, at the bar, Campbell saw appellant drinking beer (Tr.987). She told him to make sure he took his belongings that were behind the bar (Tr.987-988). Appellant responded that he had his things, and then turned to leave, looked Campbell "square in the eye" and gave her a "very snide sneer" as he walked out the door (Tr.988). Appellant, who drove a 1996 black Oldsmobile, left the bar between 11:10 and 11:15 p.m (Tr.819,844,988).

Christopher Tharp, a neighbor who lives across the street from Campbell, came home from work around 11:30 p.m. and noticed a black Oldsmobile parked in front of Campbell's home (Tr.1000).

Around 1:00 a.m., going into the early morning hours of May 25, Michael King, a friend of appellant, awoke to the sound of appellant honking his car horn and flashing his

headlights into his bedroom (Tr.1004,1010). King got dressed and went outside to talk to appellant (Tr.1005). Appellant was in his car and asked King if he hated him (Tr.1005). King then got into the passenger side of the car and he and appellant smoked cigarettes and talked (Tr.1006). Appellant looked dirty and muddy as if he had fallen down and there was mud on his feet (Tr.1007). At one point when King shook appellant's hand, appellant commented that his hand was sore (Tr.1007). King saw a mark or injury on the palm of appellant's hand (Tr.1007,1014). They talked for two hours and before appellant left, he asked King to replace a fuse in the trunk (Tr.1009). As he was working under the hood, King found a size D "flashlight battery" next to the windshield wipers (Tr.1009).

Campbell came home from work around 3:00 a.m. on May 25 (Tr.971-972). She did not find Steffini in her room so she checked her own room and then became concerned at not finding her (Tr.974-975). She looked around Steffini's room and saw that her schoolwork was "everywhere" and noticed that Steffini's underwear was still inside the jeans Steffini had been wearing when Campbell left for work and that one of the pant legs was inside out (Tr.976). Steffini did not ordinarily take off her jeans in that manner (Tr.976). After making various phone calls to family and friends, Campbell contacted the Hannibal Police Department (Tr.978).

During the early morning hours of May 25, a fisherman spotted a female body on the Indian Access Road at the Salt River campground in Ralls County (Tr.714-719). Law enforcement and an ambulance were called to the scene (Tr.717-718,722,729). The nude

body, later identified as the body of Steffini Wilkins, was laying face down in the grass with her head turned to the right (Tr.727,732,981,State's Exhibits 3-6). The coroner arrived and examined the body and determined that she was deceased (Tr.739).

Steffini's face appeared battered and bruised and there was blood coming from out of her nose (Tr.793,St.Ex.10). Her body was "pretty much covered" in mud, dirt, and grass (Tr.732,793,St.Ex.22). There were also shoe prints in mud on the middle of her back and along her shoulder blades (Tr.793-794,St.Ex.4). There was also a bra strap tied around her neck that was "extremely" taut and cutting about half and inch into her neck (Tr.1046). There were also several abrasions and indentations in her neck (Tr.798,St.Ex.11).

An autopsy revealed that there were abrasions on Steffini's left cheek, right shoulder, lower neck, shoulders, breasts, upper and lower chest, lower abdomen, along her back, along her right left lower knee, and right lower leg (Tr.774,State's Exhibits 10-16). She also had multiple bruises on the face, swollen eyes, and a laceration above the right eyebrow (Tr.754,St.Ex.10). There were also multiple hemorrhages in the head suggesting a blunt trauma injury such as being struck by a fist or object (Tr.754,763). Steffini also had six linear abrasions on the right side of her neck which correlated with the ligature from the bra strap that was tied to her neck, and which suggested that the ligature had been moved (Tr.756,St.Ex.11). Also, Steffini had hemorrhages in her kidney and appendix and had a one-and-one half inch laceration to one of the folds of skin surrounding her

vagina, suggesting a blunt trauma to that area through penetration (Tr.761-762). The age of the vagina laceration was consistent with the other bruises "around that area" and with other bruises on her body in that there was no evidence of healing taking place (Tr.776-777). Steffini also had linear abrasions on her back which were consistent with being dragged (Tr.769,St.Ex.14). Steffini's cause of death was from asphyxiation, lack of blood containing oxygen to the brain, secondary to compression of the neck by a ligature (Tr.763). An injury of this sort requires continuing pressure to cause death over a period of time with 30 to 40 seconds to lose consciousness and from two to three minutes to cause brain death (Tr.763).

Corporal David Hall, a criminal investigator for the Missouri Highway Patrol examined the scene (Tr.790-791). Hall seized hairs that were found on Steffini's back (Tr.794). Officers found a piece of a bra strap up the roadway and noted several impressions in the mud near Steffini's body (Tr.802). The officers attempted to make tire and shoe impressions but found it difficult to do so due to the wind and rain (Tr.802). It had rained during the night and there was light rain that morning (Tr.734). Officers also discovered several pieces of a broken flashlight in the parking lot and driveway area (Tr.803).

Sergeant Michael Lawzano of the Hannibal Police Department was also called to the scene as he had been assigned to investigate Steffini Wilkins' disappearance from her home (Tr. 813-815). As Lawzano reported to the Indian Camp Access area, his detectives

were sent to Campbell's home (Tr.815). Campbell's neighbor, Mr. Tharp, told the officers about seeing a black Oldsmobile and Campbell informed the officers that appellant was the only person she knew who drove a black Oldsmobile (Tr.980,1001). After checking motor vehicle records, Lawzano confirmed that a black Oldsmobile was registered to appellant and that appellant's address was in Palmyra, Missouri, which is approximately seven to eight miles north of Hannibal (Tr.818-819).

Some time before noon on May 25, 2001, Sergeant Lawzano and Trooper Scott Miller went to appellant's house and saw a 1996 black Oldsmobile parked in the driveway (Tr.819-820). When they arrived at the house, appellant's grandparents and uncle were outside and the officers asked to speak to appellant (Tr.819).

Appellant then came outside to talk to them (Tr.820). Sgt. Lawzano asked appellant if he had any information about Steffini's disappearance and also asked him if he had been to her house (Tr.829). Appellant said that he had not been there and gave an account of his whereabouts from the night before (Tr.825,829).

Sgt. Lawzano asked appellant about the clothes he had been wearing the night before and appellant told him that his clothes were in the washer (Tr.823). Lawzano asked appellant if he would take him inside and show him the washer (Tr.824). Appellant agreed and took Lawzano to the washer and showed him the clothes (Tr.824). Another officer later observed that there was a lot of sand on the clothes and in the bottom of the washing machine (Tr.843).

At 11:25 a.m., Sgt. Lawzano then asked for and received consent from appellant to search his car (Tr.820,St.Ex.25). Lawzano observed what he felt were signs of struggle on the hood and trunk of the car (Tr.821). He saw "very distinct" mud smears that appeared to come from small fingers being dragged cross the trunk of the car (Tr.821). Lawzano seized hairs that were on the hood and trunk of the car (Tr.822).

At some point that day, appellant's car was moved to a covered location at the Marion County Jail where officers seized a pair of blue jeans from the back seat (Tr.843,845). Also, there appeared to be blood found on the back of the front license plate and cotton swabs of what appeared to be blood were taken off of the exterior of the car (Tr.847-848,St.Ex.31).

Sgt. Lawzano then asked appellant to accompany him to the Marion County Sheriff's Department so that he could give a written statement (Tr.825). When they arrived at the station, Lawzano and appellant went over the verbal statement he had earlier given at his house (Tr.826-827). Appellant asked Lawzano to write the statement out for him (Tr.827). After he wrote the statement, paraphrasing the earlier conversation, appellant read the statement, agreed it was accurate and signed off on it at 1:32 p.m (Tr.827,835,St.Ex.38).

Appellant stated that at about 6:30 p.m., he left Palmyra and went to the Ole Milts Bar, owned by "Liz Campbell" (Tr.827-828). He said that once he got down to the bar, he drank between 12 and 16 cans of beer and played darts for "quite a bit" (Tr.828).

Appellant said he then left the bar between 11:00 and 11:30 p.m. and went to Mike King's house (Tr.828). Appellant said King sat in his car with him, talked to him for two or three hours and then he drove home to Palmyra and went to bed (Tr.828,St.Ex.38). Appellant stated that he knew Steffini from his association with Campbell through working at the bar (St.Ex.38). He also said he had e-mailed Steffini once two or three months prior to her disappearance (St.Ex.38). Appellant also said that he had been to Campbell's home a few times while he worked for her and that the last time he had been there was three weeks prior (Tr.832). Sgt. Lawzano asked appellant if it was possible that he was there earlier that morning and appellant responded that "anything is possible" but that he did not remember being there (Tr.832).

At 1:00 p.m.,Campbell arrived at the Indian Camp Access and identified the body of the young female as her daughter Steffini Wilkins (Tr.980-981).

Sergeant Michael Platte with the Missouri Highway Patrol arrived at the Marion County Sheriff's Department and was told of appellant's interview with Sgt. Lawzano (Tr.1016). Around 3:00 p.m, Platte explained to appellant his **Miranda** rights and asked if he understood his rights (Tr.1020,St.Ex.39). Appellant indicated he understood, signed a waiver of rights form, and agreed to talk to him (Tr.1022,St.Ex.39). Appellant told Platte the same story he told Sergeant Lawzano (Tr.1023-1024). Platte asked him about Steffini and appellant stated that she was a cheerleader who liked all kinds of sports and described her as "all-right looking" (Tr.1025). He then denied several times going to

Campbell's home (Tr.1025). Platte expressed his disbelief and confronted him with some inconsistencies in his story (Tr.1025-1026).

Sgt. Platte then told appellant that Steffini was still alive and that she was going to recover and tell her story (Tr.1026). Platte also "posed a possible scenario" to appellant about what might have happened at Campbell's home (Tr.1028). He asked appellant if it was not possible that he was at the bar and thought that Steffini would be home alone and that he then went to her house to get "closer to her" (Tr.1028). Platte then said maybe "things started happening" between them and then when she changed her mind, everything turned to "hell in a handbasket" (Tr.1028). Platte said if that was the case, then appellant needed to tell his story (Tr.1028). Appellant then responded, "you're right" (Tr.1028).

Appellant said that he left the bar between 11:00 and 11:30 p.m, and that he had thought about going to see Steffini to meet with her (Tr.1029). He knocked on the door and a few minutes later, Steffini answered wearing blue boxers and a bra (Tr.1029). He said he entered the house and they started kissing and "she started sucking my cock" (Tr.1029). When he tried to take it further she started to scream that she was going to call her mom (Tr.1029). Appellant said he put his hand on her mouth for a few minutes trying to quiet her down and that at some point she went limp and he could not find her pulse (Tr.1029). He then picked her up and put her in the car to go find help (Tr.1029). He said he went to the river access where her body was found (Tr.1030). He said once he was

there, she started making wheezing noises, like she was attempting to breathe (Tr.1030). He then picked her up out of his car, put her on the hood, but that she fell on the ground several times (Tr.1030). He said she made sounds, so he set her down on the ground and left (Tr.1030).

Appellant denied penetrating her vagina with his penis or performing oral sex on her (Tr.1031). He said he had only "licked her titties" (Tr.1031). Appellant said that her clothing, with the exception of a bra, would all be found in the living room area (Tr.1031). He said when he left, she was still wearing her bra but it was pulled up above her breasts, and she was totally nude except for that (Tr.1031). At approximately 3:45 p.m., Sgt. Platte asked appellant to write a statement (Tr.1031). Appellant did so and drew a map where he said her body was left (Tr.1031-1032,St.Ex.40). Cpl. Hall then "informed" Sgt. Platte, so that appellant could hear, that Steffini had in fact died (Tr.1034). After hearing that, appellant told Sgt. Platte to get his gun because he did not deserve to live (Tr.1043).

After appellant's interview with Sgt. Platte, Sgt. Lawzano took appellant outside to smoke a couple of cigarettes (Tr.1055-1056). While they were outside, appellant told him that he wanted to tell him everything (Tr.1056). Lawzano took him back to the interview room, but first served a search warrant for the car on him (Tr.1057). Appellant then went over the same details as he told Platte but then became emotional when Lawzano told him that they knew those facts and that there were still some "blanks" in his story (Tr.1059).

Appellant then told him that at the point when Steffini was on the trunk of his car, she was gasping for breath and was blue in the face, "suffering bad" (Tr.1059,St.Ex.41). Appellant then "wrapped her bra strap around her throat" and choked her (Tr.1059,St.Ex.41). He set her down on the ground and then left and drove to Mike King's home (St.Ex.41). As before, Sergeant Lawzano wrote a statement for him, using appellant's words (Tr.1061). Appellant read the statement, agreed it was true and signed it (Tr.1061,St.Ex.41). This interview concluded at 8:10 p.m. (St.Ex.41).

Later that evening, after appellant was arrested, Cpl. Hall was present when appellant removed his clothing and personal effects, and he observed what appeared to be scratches on appellant's upper right shoulder (Tr.1072, St.Ex.42).

Sexual assault kits- meaning blood, head and pubic hair samples, fingernail scrapings, and pubic hairs combings-were taken from both appellant and Steffini (Tr.786,858-860). DNA material was extracted from the blood found on appellant's license plate, the jeans found in the backseat of appellant's car, and a hair from appellant's trunk (Tr.894-896). The DNA profile from these items were consistent with the DNA profile of Steffini and not appellant's (Tr.897). The frequency of occurrence of the DNA profile obtained from these items is approximately one in 2.3 quintillion in the Caucasian population and one in 85.5 quintillion in the Black population (Tr.898).

Hair comparisons were also conducted (Tr. 942). Three hairs found on Steffini's back were consistent with the pubic hairs of appellant, with one of the hairs making "a

very good . . . root-to-tip" match (Tr.949). A hair seized from the trunk of appellant's car was dark brown head hair and was not similar to appellant's hair, but was found to be "similar in microscopic characteristics" to Steffini's head hair (Tr.949).

Additionally, glitter particles were found on Steffini's bedspread, the license plate from appellant's car and the jeans seized from the backseat of appellant's car (Tr.950-951). The glimmer particles from the three items all had the same physical characteristics including having the same anomaly around the edges, indicating they came from the same cutter (Tr.952). Steffini had a lot of items in her bedroom which contained glitter, including gel pens, fingernail polish, and body spray (Tr.979).

Appellant did not take the stand. At the close of the evidence, instructions and arguments of counsel, the jury found appellant guilty as charged of one count of first degree murder (Tr.1139;L.F.410). In the punishment phase of trial, the state adduced appellant's prior conviction for felony stealing (Tr.1187). The state also presented evidence from two young ladies that on two separate occasions, late at night, approximately a month before Steffini's murder, appellant walked into the home of a previous co-worker, Sandy Harding, unannounced and uninvited (Tr.1188-1212). Appellant had been to the house before and yet on one of the occasions acted "confused" as to whether he was in his home, which was about twenty miles away (Tr.1193-1194,1201-1202). Also, on one of the occasions, Harding was not home, but her daughters, one fourteen to fifteen years old, were there (Tr.1203). The state also presented

evidence concerning the impact of Steffini's death upon her family and friends (Tr.1213-1220). Appellant called ten witnesses in purported mitigation of punishment (Tr.1231-1334). Thereafter, the jury returned a verdict stating that it found the existence of one statutory aggravating circumstance, and recommended appellant's sentence at death (Tr.1391;L.F. 424). The trial court imposed that sentence (L.F.479-480). Appellant brings this appeal from his conviction and sentence.

Argument

I

The trial court did not abuse its discretion in admitting evidence of appellant's statements to Sgts. Lawzano and Platte on May 25, 2001, because appellant's statements were not the fruit of an unreasonable seizure of appellant's person in that appellant engaged in a consensual encounter with Sgt. Lawzano, appellant voluntarily accompanied the police to the sheriff's department for investigatory

questioning, and appellant was not restrained or under arrest when he made the statements in question and appellant was informed of his Miranda rights before he made statements to Sgt. Platte.

Even if appellant had been "seized" by the officers during the initial encounter with him, the officers had probable cause to arrest him before they arrived at the house and before appellant went to the sheriff's department. Finally, even assuming there was an illegal seizure or that appellant was in custody prior to receiving the Miranda warnings, the admission of the statements at trial was harmless error.

Appellant raises two distinct points on appeal, one based on the Fourth Amendment protections against unreasonable searches and seizures and the other on the Fifth Amendment right against self-incrimination. First, appellant argues that the trial court abused its discretion in admitting evidence at trial of statements appellant made to Sergeants Michael Lawzano and Michael Platte on the basis that they were the "fruit" of an illegal arrest without probable cause and that there were no intervening events to sufficiently attenuate the taint of his illegal arrest (App.Br.52). Appellant then argues that the initial statements made to Sgt. Lawzano were made while he was in "custody" and therefore he should have received his **Miranda**[2] warnings (App.Br.52). As a result, he claims that the subsequent statements made to Sgt. Platte post-**Miranda** should have been

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[2]**Miranda v. Arizona**, 384 U.S. 436 (1966).

suppressed "because he elicited them by using the unwarned statements [appellant] had made to Sgt. Lawzano" (App.Br.52-53)

A. Standard of Review

> Where a claim regarding a motion to suppress is preserved for review, the court views a trial court's ruling on a motion to suppress in the light most favorable to the ruling and defers to the trial court's determinations of credibility. The inquiry is limited to whether the decision is supported by substantial evidence, and it will be reversed only if clearly erroneous. The Court will consider evidence presented at a pre-trial hearing, as well as any additional evidence presented at trial

State v. Edwards, 116 S.W.3d 511,530 (Mo.banc 2003)(citations omitted). The facts and reasonable inferences are viewed in the light most favorable to the trial court's decision, and contrary evidence and inferences are disregarded. **State v. Hoyt**, 75 S.W.3d 879,882 (Mo.App.W.D. 2002). The trial court's factual findings and credibility determinations are given deference, and questions of law are reviewed de novo. **Id**.

B. Relevant Facts

1. Investigation

On the morning of May 25, 2001, around 8:00 a.m., Sergeant Michael Lawzano of the Hannibal Police Department was assigned to investigate Steffini Wilkins' disappearance from her home (Tr.3-4,101,813-815). As Lawzano reported to the Indian

Camp access in the Salt River campground, the area where a female body had been found earlier that morning, his detectives were sent to Steffini's home (Tr.101,815). When he arrived at Indian Camp access, the coroner and Missouri Highway Patrol officers were already there (Tr.815). He received information from Sergeant Michael Platte and Corporal David Hall as to the progress of their investigation (Tr.816). Hall had observed that the body was covered in mud, dirt, and grass and that her face appeared to have been battered and bruised (Tr.793). Cpl. Hall also saw that there were shoe prints in mud on the middle of her back and along her shoulder blades (Tr.793-794). Sgt. Lawzano took some general pictures and after talking with the Sgt. Platte and Cpl. Hall a bit more, it was decided that he would go to Steffini's home to follow up on any leads while they took care of the crime scene (Tr.816).

Meanwhile, at Steffini's home, a neighbor told the officers about seeing a black Oldsmobile (Tr.6,980,1001). Elizabeth Campbell, Steffini's mother, informed the officers that appellant was the only person she knew who drove a black Oldsmobile and that he was a former employee of hers whom she had fired two weeks prior (Tr.6,13,980,1001). Campbell also told them that appellant had e-mailed Steffini and had called her a "hottie" (Tr.13). She also noted that she did not believe appellant had anything to do with Steffini's disappearance (Tr.13). After checking motor vehicle records, Sgt. Lawzano confirmed that a black Oldsmobile was registered to appellant and that appellant's address

was in Palmyra, Missouri, which is approximately seven to eight miles north of Hannibal (Tr.818-819).

2. Encounter at Appellant's House

Around 10:30 a.m., on May 25, 2001, Sgt. Lawzano and Trooper Scott Miller drove together to appellant's house and saw a 1996 black Oldsmobile parked in the driveway (Tr.5, 14,102,819-820). When they arrived at the house, appellant's grandparents and uncle were outside and the officers asked to speak to appellant (Tr.104,819). Appellant was inside sleeping so his uncle went inside to wake him up (Tr.104).

While they were outside, Sgt. Lawzano observed mud on the trunk of the car (Tr.15-16). Appellant then came outside to talk to them (Tr.104,820). Lawzano was not in uniform, while Trooper Miller was (Tr.7). Lawzano asked appellant if he had any information about Steffini's disappearance and also asked him if he had been to her house (Tr.829). Appellant said that he had not been there (Tr.829). Lawzano asked him if he knew where Steffini's house was and gave him the address (Tr.829). Appellant said that he did not know the address (Tr.829). When Lawzano told him it was Elizabeth Campbell's address, he said he did know where it was (Tr.829). Appellant also stated that he had not been to Steffini's house that night and that Steffini had never been in his car (Tr.829). Appellant then gave an account of his whereabouts from the night before (Tr.825).

Sgt. Lawzano asked appellant about the clothes he had been wearing the night before and appellant told him that his clothes were in the washer (Tr.20,823). Lawzano asked appellant if he would take him inside and show him the washer (Tr.824). Appellant agreed and took Lawzano to the washer and showed him the clothes (Tr.824).

At 11:25 a.m., Sgt. Lawzano then asked for and received consent from appellant to search his car (Tr.16,104-105,820,St.Ex.25). By that time, Sergeant Glen Atkisson of the Missouri Highway Patrol had been called to the scene and had been introduced to appellant (Tr.841). Lawzano asked appellant if Atkisson could also sign the consent form and appellant agreed (Tr.841,St.Ex.25). Lawzano did not threaten appellant to get his consent (Tr.105). Lawzano observed "very distinct" mud smears that appeared to come from small fingers being dragged across the trunk of the car (Tr.14-15,821). Lawzano seized hairs that were on the hood and trunk of the car (Tr.17,106,822). Atkisson took photographs of the car and seized two more hairs found on the car (Tr.114-116). Lawzano asked appellant about the mud on his car, and appellant could not explain how it got there (Tr.17).

Sgt. Lawzano then asked appellant to accompany him to the Marion County Sheriff's Department in Palmyra so that he could give a written statement (Tr.4-5,825). Appellant agreed to go (Tr.5). Trooper Miller and Sgt. Atkisson stayed behind at appellant's residence to wait for "decisions on the car," to be made while another officer

was called in to give Sgt. Lawzano and appellant a ride to the sheriff's department (Tr.17-18).

On the way to the sheriff's department, appellant wanted to stop and get cigarettes, so they stopped at a convenience store where appellant entered alone, got his cigarettes, and returned to the car (Tr.5-6). At that time, appellant was not under arrest, was not considered to be under arrest, and he was not told he was under arrest (Tr.7). Further, appellant was free to go at that time and to not accompany them if he so chose (Tr.7,21).

3. First Written Statement-Sgt. Lawzano

When they arrived at the sheriff's department, Sgt. Lawzano and appellant went over the verbal statement he had earlier given at his house (Tr.7-8,826-827). Appellant asked Lawzano to write the statement out for him (Tr.827). After he wrote the statement, paraphrasing the earlier conversation, appellant read the statement, agreed it was accurate and signed off on it at 1:32 p.m (Tr.827,835,St.Ex.38).

Appellant stated that at about 6:30 p.m., he left Palmyra and went to the Ole Milts Bar, owned by "Liz Campbell" (Tr.827-828). He said that once he got down to the bar, he drank between 12 and 16 cans of beer and played darts for "quite a bit" (Tr.828). Appellant said he then left the bar between 11:00 and 11:30 p.m. and went to Mike King's house (Tr.828). Appellant said King sat in his car with him, talked to him for two or three hours and then he drove home to Palmyra and went to bed (Tr.828,St.Ex.38). Appellant stated that he knew Steffini from his association with Campbell through working at the bar

(St.Ex.38). He also said he had e-mailed Steffini once two or three months prior to her disappearance (St.Ex.38). Appellant also said that he had been to Campbell's home a few times while he worked for her and that the last time he had been there was three weeks prior (Tr.832). Lawzano asked appellant if it was possible that he was there earlier that morning and appellant responded that "anything is possible" but that he did not remember being there (Tr.832).

At 1:00 p.m, Campbell identified the body of the young female as her daughter Steffini Wilkins (Tr.980-981).

4. Second Written Statement-Sgt. Platte

Sergeant Michael Platte with the Missouri Highway Patrol arrived at the Marion County Sheriff's Department and was briefly told of appellant's interview with Sgt. Lawzano (Tr.26-27,1016). Appellant was not under arrest (Tr.27). Around 3:00 p.m, Platte explained to appellant his **Miranda** rights and asked if he understood his rights (Tr.26-27, 1020,St.Ex.39). Appellant indicated he understood, signed a waiver of rights form at 3:13 p.m., and agreed to talk to him (Tr.27,1022,St.Ex.39).

The interview took place in a small conference room, 10 foot by 8 foot (Tr.29). Sgt. Platte did not have his gun and he issued no physical or verbal threats toward appellant nor made any offers to induce him to speak to him (Tr.30).

Appellant told Sgt. Platte the same story he told Sgt. Lawzano (Tr.1023-1024). Platte asked him about Steffini and appellant stated that she was a cheerleader who liked

all kinds of sports and described her as "all-right looking" (Tr.1025). He then denied several times going to Campbell's home (Tr.1025). Platte expressed his disbelief and confronted him with some inconsistencies in his story, including that he and Mike King stated different times for when appellant arrived at King's home (Tr.34-35,1025-1026).

Sgt. Platte then told appellant that Steffini was still alive (Tr.36,1026). Platte also "posed a possible scenario" to appellant about what might have happened at Campbell's home (Tr.1028). He asked appellant if it was not possible that he was at the bar, thought that Steffini would be home alone, and that he then went to her house to get "closer to her" (Tr.35-36,1028). Platte then said maybe "things started happening" between them and then when she changed her mind, everything turned to "hell in a handbasket" (Tr.1028). Platte said if that was the case, then appellant needed to tell his story (Tr.1028). Appellant then responded, "you're right" (Tr.36,1028).

Appellant said that he left the bar between 11:00 and 11:30 p.m, and that he had thought about going to see Steffini to meet with her (Tr.1029). He knocked on the door and a few minutes later, Steffini answered wearing blue boxers and a bra (Tr.1029). He said he entered the house and they started kissing and "she started sucking my cock" (Tr.1029). When he tried to take it further she started to scream that she was going to call her mom (Tr.1029). Appellant said he put his hand on her mouth for a few minutes trying to quiet her down and that at some point she went limp and he could not find her pulse (Tr.1029). He then picked her up and put her in the car to go find her help (Tr.1029). He

said he went to the river access where her body was found (Tr.1030). He said once he was there, she started making wheezing noises, like she was attempting to breathe (Tr.1030). He then picked her up out of his car, put her on the hood, but that she fell on the ground several times (Tr.1030). He said she made sounds, so he set her down on the ground and left (Tr.1030).

Appellant denied penetrating her vagina with his penis or performing oral sex on her (Tr.1031). He said he had only "licked her titties" (Tr.1031). Appellant said that her clothing, with the exception of a bra, would all be found in the living room area (Tr.1031). He said when he left, she was still wearing her bra but it was pulled up above her breasts, and she was totally nude except for that (Tr.1031). Appellant said there was a possibility that he stepped on Steffini because it was "slippery out there" (Tr.1046). At approximately 3:45 p.m., Sgt. Platte asked appellant to write a statement (Tr.1031). Appellant did so and drew a map where he said her body was left (Tr.1031-1032,St.Ex.40). The statement was written at 3:58 p.m. (St.Ex.40). Another officer then "informed" Platte, so that appellant could hear, that Steffini had in fact died (Tr.1034). After hearing that, appellant told Platte to get his gun because he did not deserve to live (Tr.1043).

During the time Sgt. Platte interviewed appellant, appellant was given three breaks, provided coffee, two hot ham and cheese sandwhiches and a drink, and allowed to smoke a cigarette (Tr.32). The total interview time with Sgt. Platte was approximately 45 minutes (Tr.32).

5. Third Written Statement-Sgt. Lawzano

After appellant's interview with Sgt. Platte, Sgt. Lawzano took appellant outside to smoke a couple of cigarettes (Tr.1055-1056). While they were outside, appellant told him that he wanted to tell him everything (Tr.1056). Lawzano was aware that appellant had been read his **Miranda** rights and had waived them (Tr.38). Lawzano reminded appellant of his **Miranda** rights and talked to him again (Tr.39). Lawzano took him back to the interview room, but first served a search warrant for the car on him (Tr.1057). Appellant went over the same details as he told Sgt. Platte but then became emotional when Lawzano told him that they knew those facts and that there were still some "blanks" in his story (Tr.1059).

Appellant then told him that at the point when Steffini was on the trunk of his car, she was gasping for breath and was blue in the face, "suffering bad" (Tr.1059, St.Ex.41). Appellant then "wrapped her bra strap around her throat" and choked her (Tr.1059,St.Ex. 41). He set her down on the ground and then left and drove to Mike King's home (St.Ex.41). Sgt. Lawzano asked appellant to repeat what he had just said to Platte, but appellant said that he said it once, and he was never going to say it again (Tr.1060). As before, Lawzano wrote a statement for him, using appellant's words (Tr.1061). Appellant read the statement, agreed it was true and signed it (Tr.1061,St.Ex.41). This interview concluded at 8:10 p.m. (St.Ex.41).

C. Appellant's Statements Were Not the Fruit of an Illegal Arrest

1. Appellant was not "seized" at his home.

Appellant grants that before Sgt. Lawzano arrived at his home to question him, he had reasonable suspicion to believe that appellant had "probably committed a crime" (App.Br.58). However, appellant then asserts that "[a]t the time that Sgt. Lawzano detained [appellant] and subjected him to custodial questioning, he did not have probable cause to seize [appellant]" (App.Br.58). Appellant's claim fails because appellant's encounter with Lawzano was consensual and the existence of probable cause to arrest him was not necessary.

It is well settled that the Fourth Amendment protection includes seizure of the person. **California v. Hodari**, 499 U.S. 621,624 (1991). The United States Supreme Court has stated, however, that "[o]ur cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions." **Florida v. Bostick**, 501 U.S. 429 ,434(1991).

In **State v. Faulkner**, 103 S.W.3d 346,355 (Mo.App.S.D. 2003), the Court of Appeals addressed the different categories of contact police can have with civilians and distinguished between voluntary encounters, investigative detentions and arrests for the degree of protection under the Fourth Amendment that they require. *Accord* **United States v. Espinosa**, 782 F.2d 888,890-891 (10th Cir. 1986). A consensual or voluntary encounter occurs when a citizen cooperates in response to non-coercive questioning by the

police and does not constitute a seizure, and thus does not invoke Fourth Amendment protection. **Id**. at 355.

"The test provides that the police can be said to have seized an individual 'only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" **Michigan v. Chesternut**, 486 U.S. 567, 573, 108 S.Ct. 1975, 1979, 100 L.Ed.2d 565 (1988); *see* **Florida v. Bostick**, 501 U.S. at 436("free to leave" analysis turns upon "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter").

While there is no litmus test for determining when an encounter is a seizure, circumstances that may indicate a seizure include "'the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.'" *See* **State v. LeMasters**, 878 S.W.2d 485,487-488 (Mo.App.S.D. 1994)(*quoting* **United States v. Mendenhall**, 446 U.S. 545, 554 (1980)).

Furthermore, "a person who is asked preliminary, investigatory questions by a police officer is not considered under arrest . . . Even if the individual being questioned is a suspect, this does not transform investigatory questioning into an arrest." **State v. Murdock**, 928 S.W.2d 374,379 (Mo.App.W.D. 1996) (*quoting* **State v. Norton**, 904 S.W.2d 265,271 (Mo.App.W.D. 1995)).

Here, the record reveals that appellant's encounter with Sgt. Lawzano and Trooper Miller was consensual. It was 10:30 a.m., a reasonable hour, when Lawzano and Miller arrived at appellant's home (Tr.5,14,102,819-820) They were in one car, with only Miller in uniform (Tr.5,7,14,102,819-820). Appellant's grandparents and uncle were outside when the officers arrived and asked to speak to appellant (Tr.104,819). The officers remained outside while appellant's uncle went inside to wake appellant (Tr.104).

When appellant came outside, Sgt. Lawzano identified himself and asked about Steffini's disappearance (Tr.829). Appellant denied being at Steffini's home and claimed that Steffini had never been in his car (Tr.829,832). Lawzano asked questions about the clothes he had worn the night before and asked if appellant would take him to see the clothes in the washer (Tr.20,823-824). Appellant agreed (Tr.824).

At 11:25 a.m., Sgt. Lawzano then asked for and received consent from appellant to search his car (Tr.16,104-105,820,St.Ex.25). By that time, Sergeant Glen Atkisson of the Missouri Highway Patrol had been called to the scene and had been introduced to appellant (Tr.841). Lawzano asked appellant if Atkisson could also sign the consent form and appellant agreed (Tr.841,St.Ex.25). Lawzano did not threaten appellant to get his consent (Tr.105). Lawzano then asked appellant to accompany him to the sheriff's department so that he could give a written statement and appellant agreed to go (Tr.4-5,825).

This encounter was consensual. The bulk of the encounter occurred outside his home. There was no threatening presence of several officers. No weapon was displayed. There was no evidence that officers used physical force or a forceful show of authority while the officers were at his home. As for the language or tone used by Lawzano, there is nothing he said which suggested that his request was an order and that, if appellant did not comply, Lawzano would compel him to do so. Indeed, Lawzano specifically testified that he did not threaten or promise appellant anything to induce him to give consent to search the car. The weight and credibility of the witnesses are matters for the trial court's determination. **State v. Burkhardt**, 795 S.W.2d 399,404 (Mo.banc 1990). The only "show of authority" made was the fact that two officers arrived at appellant's home to question him and that later a third officer arrived once a consent to search his car had been freely given. There was nothing inherently coercive in the officers' actions of requesting a consent to search and then seizing evidence found on the car or in photographing the car. This is particularly so since there is absolutely no evidence that the officers conducted their business in a threatening or intimidating manner.

Based on the totality of the circumstances of the situation, the encounter with appellant outside his home was consensual and no probable cause was necessary.

2. Appellant was not "seized" when he voluntarily agreed to accompany the officers to the sheriff's department to make a statement.

Appellant next argues that "[e]ven if this Court should find that [appellant] consented of his own free will to the 'encounter' between the officers and himself at his house," the encounter was transformed into a seizure "within the meaning of the Fourth Amendment" (App.Br.62). Appellant claims that "a reasonable person in his situation would [not] have thought he was sitting in the interview room as a matter of choice, free to change his mind and go home to bed" (App.Br.62)(*citing* **Kaupp v. Texas**, 123 S.Ct. 1843 (2003)).

Howeve, the case law in Missouri is well-settled in this area holding that if a person voluntarily accompanies officers to a police station for questioning, is not "restrained" or coerced, and the police demonstrate that the person was free to go at any time prior to the actual arrest, then the situation does not constitute an "arrest." *See* **State v. Reynolds**, 619 S.W.2d 741 (Mo. 1981); **State v. Sherrard**, 659 S.W.2d 582,586 (Mo.App.E.D. 1983); **State v. Spivey**, 710 S.W.2d 295,298-299 (Mo.App.E.D. 1986); **State v. Hicks**, 755 S.W.2d 242,244 (Mo.App.W.D. 1988); **State v. Harrington**, 756 S.W.2d 647 (Mo.App.E.D. 1988); **State v. White**, 770 S.W.2d 357 (Mo.App.E.D. 1989); **State v. Landers**, 841 S.W.2d 791 (Mo.App.E.D. 1992); **State v. Brewster**, 836 S.W.2d 9,12-13 (Mo.App.E.D. 1992); **State v. Murdock**, 928 S.W.2d 374 (Mo.App.W.D. 1996)[3];

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[3]Although in most of these cases the defendant is Mirandized once at the station, the focus of the analysis is whether the defendant was seized before getting to the station.

and **State v. Faulkner**, 103 S.W.3d 346 (Mo.App.S.D. 2003)(cases where the defendant challenged evidence or statements as "fruit" of an illegal arrest and no such seizure was found). Many of these cases distinguish **Brown v. Illinois**, **supra** and **Dunaway v. New York**, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979)(cases cited by appellant), by noting that in those cases the defendants were clearly seized in that in **Brown** the officers pointed guns at the defendant and told him he was under arrest and in **Dunaway** there was no evidence that the defendant was free to go. See **Spivey**, 710 S.W.2d at 298-299; **Reynolds**, 619 S.W.2d at 745; **Sherrard**, 659 S.W.2d at 586.

Here, as outlined above, appellant voluntarily agreed to accompany the officers to the sheriff's department for investigatory purposes, and he was never handcuffed or physically restrained. In fact, on the way to the sheriff's department, appellant asked to get cigarettes and the officers stopped at a convenience store where appellant entered the store alone, purchased his cigarettes and then returned to the car. Furthermore, Sgt. Lawzano testified that at that point, appellant was not under arrest, not considered to be under arrest, nor was he told he was under arrest. Also, as in the cases cited above, Lawzano testified

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Whether or not appellant was given **Miranda** warnings upon arrival at the station is a factor for whether the subsequent statement was sufficiently attenuated from the circumstances of his alleged illegal seizure, **Brown v. Illinois**, 422 U.S. 590,603-604 (1975), and is not relevant in determining whether there was a seizure.

that appellant was free to go at that time. **Reynolds** 619 S.W.2d at 475; **Brewster** 836 S.W.2d at 12; **Harrington** 756 S.W.2d at 650. This is not the type of "seizure" referred to in **Dunaway v. New York**, **supra**, which was said to be so significant as to "to trigger the traditional safeguards against illegal arrest." **Reynolds**, **supra** at 746.

Appellant's reliance on **Kaupp v. Texas**, 123 S.Ct. 1843 (2003), is also unavailing. In **Kaupp**, a seventeen-year old defendant was awakened in his bedroom at 1:00 a.m. by three police officers, with one of them stating, "we need to go and talk." **Id**. at 1845. He was then taken from his home in handcuffs, without shoes, in his underwear in January, and then taken to the scene of the crime before finally arriving at the sheriff's offices for questioning. **Id**. The United States Supreme Court found that he had been unlawfully seized from his home and remanded the cause for further proceedings to determine if the statements were sufficiently attenuated from the seizure **Id**. at 1848. While the defendant in **Kaupp** was taken to the crime scene in no shoes and underwear before arriving at the station, here appellant was taken to a convenience store to purchase cigarettes before arriving at the station. Contrary to appellant's view, the only similarity between the case at bar and **Kaupp** was that they both involve a trip to the station and the respective defendant had been sleeping in his home. None of the egregious behavior that occurred in **Kaupp** occurred here.

3.Even assuming that appellant was "seized" at his home, the officers had probable cause to arrest him before they arrived at the house and certainly before taking him to the station.

As noted above, the officers did not need probable cause to go to appellant's home and speak to him as officers can go to anyone's home and engage in a consensual encounter and because here, appellant voluntarily agreed to speak to them outside his home. Appellant concedes that before Sgt. Lawzano arrived at his home to question him, there was evidence that appellant had "probably committed a crime" (App.Br.58). In fact, even if this Court would consider that appellant was under arrest at his home, such an arrest would be lawful because the record shows that the officers did have probable cause to believe appellant had committed a crime.

"Probable cause to arrest exists when the arresting officer's knowledge of the particular facts and circumstances is sufficient to warrant a prudent person's belief that a suspect has committed an offense." **State v. Tokar**, 918 S.W.2d 753,767 (Mo.banc 1996). Whether probable cause to arrest exists depends on the information in the officers' possession prior to the arrest. **State v. Page**, 895 S.W.2d 269,273 (Mo.App.S.D. 1995). **Clayton**, 995 S.W.2d 468,477 (Mo.banc 1999). Probable cause must be determined based on the practical considerations of everyday life in which reasonable persons act. **State v. Page**, 895 S.W.2D 269,273 (Mo.App.S.D. 1995). There is no precise test for determining whether probable cause exists; rather, it is based on the particular facts and circumstances

of the individual case. **Clayton**, **supra**, at 477. Probable cause is not dependent upon the subjective intentions of the officer, but rather is determined in light of the facts and circumstances confronting the officer at the time, objectively. **Id.**; **State v. Slavin**, 944 S.W.2d 314 (Mo.App.W.D. 1997). Subjective intentions play no role in ordinary, probable cause Fourth Amendment analysis. **State v. Sullivan**, 49 S.W.3d 800,810 (Mo.App.W.D. 2001). Further, the arresting officer need not possess all of the information upon which the arrest is based; the knowledge of other officers and agencies is imputed to the arresting officer. **State v. Futo**, 990 S.W.2d 7,17 (Mo.App.E.D. 1999). Although the quantum of evidence to find probable cause need not be enough to convict, police must have more than a mere suspicion of criminal activity to justify an arrest. **State v. McCulley**, 782 S.W.2d 733,736 (Mo.App.E.D. 1989).

Here, the police had more than a mere suspicion that appellant was involved in Steffini's disappearance and likely death. Here, Sgt. Lawzano personally observed the female body found at the campground and took photographs of the general area (Tr.815-816). He conferred with Sgt. Platte and Cpl. Hall as to the information they had gathered at that point (Tr.816). Hall had observed that the body was covered in mud, dirt, and grass and that her face appeared to have been battered and bruised (Tr.793). Lawzano also knew that 13-year-old Steffini Wilkins was missing from the night before and knew that a neighbor had seen a black Oldsmobile parked in front of Steffini's home at around 11:30 p.m. on the night of her disappearance (Tr.813-814). Lawzano also knew that a 1996

black Oldsmobile was registered to appellant and that the only person Steffini's mom knew who drove that make of car was appellant (Tr.6,818-819,1001) Lawzano was also informed that appellant used to work for Steffini's mother, Elizabeth Campbell, at a bar and that she had fired him two weeks prior (Tr.6). In addition, Lawzano knew that appellant had e-mailed her in the past and had once called Steffini a "hottie" (Tr.13).

Thus, evidence that a car matching the make and color of appellant's car had been seen at Steffini's home in Hannibal, a relatively small town and not a big city, and that appellant, a former bartender at Campbell's bar who had been fired two weeks prior, was said to have previously e-mailed his boss' thirteen-year-old daughter and had once called her a hottie, all gave rise to facts and circumstances sufficient to warrant a prudent person's belief that appellant was involved with Steffini's disappearance and death. **Clayton**, 995 S.W.2d at 477. Contrast this case with **State v. Hicks**, 515 S.W.2d 518 (Mo. 1974), in which this Court held that there was no probable cause to arrest the defendant in a first degree murder case where the police *only* knew that the defendant had a history of prior arrest, had recently been released from a state mental hospital, lived near the murder victim's apartment, and became excited when police told him that he would be taken to the police station for questioning. **Id**. at 521. In **Hicks**, there was no evidence to link the defendant to the crime. This Court held that, "No other facts and circumstances from which the arresting officers might infer a nexus between appellant and the murder were shown to have been known to the officers." **Id**.

Here, Steffini's mother provided a sufficient nexus between appellant and Steffini illuminating appellant's possible motive to harm Steffini because of his association with her by e-mailing her and contacting her and because Steffini's mother had fired him two weeks prior. Also, the officers had information about a car matching appellant's car seen in front of her home on the night of her disappearance. The only fact the police had in **Hicks** that remotely linked the defendant to the murder victim was that he lived near the victim's apartment. **Id**. at 521. As mentioned above, such a lack of sufficient nexus was not the case here.

Even if the police did not have probable cause *before* arriving at appellant's home, which respondent strenuously argues was not necessary in order to engage in a consensual encounter with appellant outside his home, Sgt. Lawzano certainly obtained probable cause once he talked to appellant at his house and before he was allegedly "seized" when transported to the sheriff's department. While outside waiting for appellant to come out, Lawzano saw mud on appellant's car. Then after talking to appellant and obtaining his consent to search his car, Lawzano observed "very distinct" mud smears that appeared to come from small fingers being dragged cross the trunk of appellant's car (Tr.14-15,821). Lawzano also saw hairs that were on the hood and trunk of the car (Tr.17,106,822). Appellant could not explain the mud on his car (Tr.17). These observations coupled with

the fact that the body was found covered in mud and grass gave rise to the officers having probable cause to arrest appellant.[4]

Because the police had probable cause to believe that appellant committed a crime with respect to Steffini's disappearance and death, appellant's statements to Sgt. Lawzano and Sgt. Platte were not the fruit of an illegal arrest and were admissible at trial.

D. Appellant Was Not "In Custody" When He Made His Pre-Miranda Statements to Sgt. Lawzano.

Appellant also argues that "even assuming the police had probable cause, [appellant's] statements should have been suppressed because he was subjected to custodial questioning without first being advised of his constitutional rights as required by the Fifth and Fourteenth Amendments and Miranda" (App.Br.64). As a result, appellant also challenges his post-**Miranda** statements to Sgt. Platte because he "elicited them by using the unwarned statements" he made to Sgt. Lawzano (App.Br.53).

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[4]It is irrelevant that Sgt. Lawzano testified at the hearing that at the time appellant went to the sheriff's department he did not believe he had probable cause to arrest him (Tr. 21-22). "'Subjective intentions play no role in ordinary, probable cause Fourth Amendment analysis.'" **State v. Lane**, 937 S.W.2d 721, 723 (Mo.banc 1997), (*quoting* **Whren v. United States**, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996)).

Miranda warnings are, of course, required to be given prior to "custodial interrogation." **State v. Norton**, 904 S.W.2d at 271.

"Custodial interrogation" is defined as questioning initiated by law enforcement officers after a person has been taken into custody or otherwise been deprived of his freedom of action in any significant way. **State v. Copeland**, 928 S.W.2d 828,853-854 (Mo.banc 1996). In other words, custodial interrogation occurs only when the suspect is questioned by police after formally being arrested or subjected to arrest-like restraints. **State v. Dye**, 946 S.W.2d 783,786 (Mo.App.E.D. 1997).

In **Oregon v. Mathiason**, 429 U.S. at 495, the United States Supreme Court held that **Miranda** warnings are not required every time the police question an individual. The Court stated:

> [P]olice officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.

Id. at 714 (emphasis in original).

As already argued previously, the evidence in this case showed that appellant had not been formally arrested or subjected to arrest-like restraints when he was questioned by police. There was no display of weapons. There was no evidence that he was placed in handcuffs or restrained in any way, he voluntarily went with the police to the station, and he was taken to a convenience store in order to buy cigarettes. At the time he was taken to the station, appellant was not considered to be under arrest, he was not told he was under arrest and he was free to go if he so chose. Thus, appellant was not in custody when he made his statements, and the police were not required to Mirandize him before they questioned him. *See* **State v. Feltrop**, 803 S.W.2d 1,13 (Mo.banc 1991)(noncustodial questioning at police station); **Oregon v. Mathiason**, 429 U.S. 492 (1977)(noncustodial questioning at police station).

Even if this Court finds that appellant was in custody and his first two statements to Sgt. Lawzano should have been preceded by **Miranda** warnings, appellant did not suffer prejudice from the admission of the two statements as they did not provide incriminating information. It was only after he was given his **Miranda** warnings that appellant incriminated himself to Platte and then later to Lawzano.

Finally, appellant's claim that his post-**Miranda** statements should have been suppressed because they were obtained by use of the pre-**Miranda** statements also fails. Even assuming *arguendo* that appellant's voluntary statements to Lawzano should have been preceded by **Miranda** warnings, in **Oregon v. Elstad**, 470 U.S. 298, 303-309

(1985), the Supreme Court specifically held that the "cat out of the bag" and 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.

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 other words, in the absence of some evidence of police coercion in obtaining the defendant's original statement, the mere failure of the police to advise a defendant of his or her **Miranda** rights prior to obtaining that statement does not render a subsequent statement "the fruit of the poisonous tree," where as here, it is preceded by a valid waiver of the defendant's **Miranda** rights. **State v. Skillicorn**, 944 S.W.2d 877,891 (Mo.banc 1997).

Here, as argued above, there is absolutely no evidence that coercive police activity occurred when Sgt. Lawzano took appellant's original statement at his house and then in the sheriff's department. Therefore, since the statements to Lawzano were voluntary and

not coerced, appellant's subsequent post-**Miranda** statements made to Sgt. Platte and then again to Lawzano were properly admitted. **Oregon v. Elstad**, 470 U.S. at 314.

Appellant cites to **State v. Seibert**, 93 S.W.3d 700 (Mo.banc 2002), and claims that the officers in this case questioned appellant without giving him **Miranda** warnings in "bad faith" (App.Br.64). However, **Seibert** is not relevant to this case because, unlike the case at bar, in **Seibert** there *was* custodial interrogation as the defendant was placed under arrest and then taken to a police station. **Id**. at 702. Furthermore, the officer in **Seibert** testified that it was his conscious decision to withhold **Miranda** in an effort to obtain an admission of guilt. **Id**. Contrary to appellant's assertion, Lawzano did not state that he consciously chose to withhold **Miranda** warnings because appellant was not under arrest, (App.Br.64, *citing to* Tr.21-22,835). Rather, Lawzano stated (1) that at the time appellant was at the convenience store he would have let appellant go if he wanted to because he did not "have the information to make an arrest" and did not believe he had probable cause, (Tr.21-22), and (2) after appellant signed his written statement, he considered him a suspect (Tr.835-836). The facts of this case are vastly different than the scenario presented in **Seibert**. At any rate, the United States Supreme Court granted a writ of certiorari in **Seibert,** and is currently considering issues raised in that case.

E. Overwhelming Evidence of Guilt

Appellant argues that he was prejudiced by the admission of the statements (App.Br.65-66). A defendant seeking a new trial on the basis of the admission of

evidence obtained by an improper search and seizure has the dual burden of proving both the error and prejudice in the reception of such evidence. **State v. Beishline**, 926 S.W.2d 501,508 (Mo.App.W.D. 1996). An error by the trial court will not be considered sufficiently "prejudicial" to require reversal unless there is a "reasonable probability that the trial court's error affected the outcome of the trial." **State v. Johnston**, 957 S.W.2d 734,744 (Mo.banc 1997)(case involving the issue of whether evidence had been improperly seized); *see also* **State v. Bucklew**, 973 S.W.2d 83,91 (Mo.banc 1998)("harmless error beyond a reasonable doubt" analysis with a claim of a Fifth Amendment violation).

Here, even without evidence of appellant's confessions to Sgts. Lawzano and Platte, there was overwhelming evidence presented to support appellant's conviction and sentence.

1. Evidence connecting appellant to Steffini Wilkins

Steffini's body was covered in mud, dirt and grass (Tr.793). Appellant's car had "very distinct" mud smears of what appeared to be small fingers being dragged across the car (Tr.821). Appellant's friend, Mike King, saw him the night of Steffini's disappearance looking "dirty and muddy" (Tr.1007).

Mr. King also saw a size D, "flashlight battery" in between appellant's windshield and the hood (Tr.1009). Broken pieces of flashlight were discovered in a driveway near where Steffini's body was found (Tr.803).

Hairs found on Steffini's back were consistent with appellant's pubic hairs, with one of the hairs making a "very good . . . root-to-tip match" (Tr.949). A hair seized from the trunk of appellant's car was dark brown head hair and was not similar to appellant's hair, but was found to be "similar in microscopic characteristics" to Steffini's head hair (Tr.949).

DNA material was extracted from the blood found on appellant's license plate, the jeans found in the backseat of appellant's car, and a hair from appellant's trunk (Tr.894-896). The DNA profile from these items were consistent with the DNA profile of Steffini and not appellant's (Tr.897). The frequency of occurrence of the DNA profile obtained from these items is approximately one in 2.3 quintillion in the Caucasian population and one in 85.5 quintillion in the Black population (Tr.898).

Glitter particles were found on Steffini's bedspread, the license plate from appellant's car, and the jeans seized from the backseat of appellant's car (Tr.950-951). The glimmer particles from the three items all had the same physical characteristics including having the same anomaly around the edges, indicating they came from the same cutter (Tr.952). Steffini had a lot of items in her bedroom which contained glitter, including gel pens, fingernail polish, and body spray (Tr.979).

All this evidence connected appellant to Steffini, her bedroom, the condition her body was found in, and to the area surrounding her body at the Indian Camp access.

2. Evidence establishing opportunity, a time-line, and the aggravating circumstance of kidnapping

Steffini finished a phone conversation with her friend between 11:15 and 11:30 p.m. on the night of her disappearance (Tr.995-996). That night, appellant was seen leaving Elizabeth Campbell's bar between 11:10 and 11:15 p.m (Tr.988). A car matching appellant's description was seen in front of Steffini's home around 11:30 p.m. (Tr.819,844,1000). Appellant arrived at King's home around 1:00 a.m. (Tr.1004,1010). Steffini's mother came home around 3:00 a.m. to find Steffini missing (Tr.971-975). She noticed that Steffini's underwear was still inside the jeans Steffini had been wearing when Campbell left for work and that one of the pant legs was inside out (Tr.976). Steffini did not ordinarily take off her jeans in that manner (Tr.976).

Thus with all this evidence, the jury could have reasonably inferred that appellant took Steffini from her home, without her consent, between the hours of 11:30 p.m. and 1:00 a.m on May 24 to 25, 2001, before her mother came home and found her missing.

3. Evidence of deliberation and motive

Appellant worked for Steffini's mother, Campbell, as a bartender and had been to her home on at least three occasions (Tr.982-983,985-987). Campbell fired appellant two weeks before Steffini disappeared (Tr.987). Appellant had seen Steffini, called her a "hottie," e-mailed her and phoned her in the past (Tr.983-985). On the night of Steffini's

disappearance, appellant gave Campbell a "very snide sneer" before leaving the bar (Tr.988).

Steffini suffered multiple injuries, including blunt trauma head injuries and was discovered with a bra strap tied around her neck (Tr.761-774). Steffini's cause of death was from asphyxiation secondary to compression of the neck by a ligature (Tr.763). An injury of this sort requires continuing pressure to cause death over a period of time and it takes usually from two to three minutes to cause brain death (Tr.763).

Therefore, even without appellant's confessions, the evidence showed that appellant committed a deliberate murder of Steffini Wilkins by asphyxiation, kidnapped her from her home, and left her nude body at the Indian Camp access in the Salt River.

In sum, neither probable cause nor the **Miranda** warnings were necessary at the time appellant was questioned outside his home and at the sheriff's department as appellant was involved in a consensual encounter with the police, he voluntarily accompanied the police to the sheriff's department, and was not subjected to arrest or arrest-like restraints or otherwise in "custody." As such, the statements he made to Sgts. Lawzano and Platte were not the "fruit" of an illegal arrest nor were they tainted by appellant's pre-**Miranda** statements. In any event, Sgt. Lawzano did have probable cause to arrest appellant at his home. Finally, because of the overwhelming evidence of guilt presented in both phases of trial, reversal is not required as there is no reasonable

probability that an error in the admission of the statements affected the outcome of the trial.

II

The trial court did not plainly err in admitting, during the penalty phase, evidence of appellant's two break-ins into a home approximately a month before the murder because the receipt that led to evidence of the break-ins was not illegally seized in that (1) the receipt was discovered in either the computer room or in a common area of appellant's bedroom and appellant's grandfather had the authority to consent to a search of the rooms on his property and (2) even if it was found that the receipt was seized from appellant's bedroom, appellant did not have a reasonable

expectation of privacy due to the layout of the home. Moreover, the evidence was admissible under the doctrine of inevitable discovery.

Appellant claims that the trial court erred in overruling his motions to suppress evidence, overruling his objections at trial, and in admitting at the penalty phase "evidence that on two different occasions [appellant] walked into residences occupied by teenage girls" on the basis that the evidence was "fruit of the poisonous tree" (App.Br.67). Appellant contends that the state only learned of the evidence "through property improperly seized from [his] room without his consent or, alternatively, that the state failed to show [the property] had been seized from a location other than his room" (App.Br.67).

A. Relevant Facts

Evidence from the motion to suppress hearing and trial demonstrated that on July 5, 2001, appellant's grandfather, George Patre, consented to a search of the home he owned at 224 East in Palmyra, Missouri (Tr.134,136,141,State'sEx.13). Appellant was raised by his grandparents, George and Wanetta Patre, and lived with them in that house since he was a young child (Tr.1227,1256-1257). The home had a layout where there were doorways but no doors, except for in the bathroom, and there was no hallway (Tr.161,1236). As a result, one had to walk through the various rooms in order to reach other rooms (Tr.167-168). Appellant's room had three doorways, with one room leading to the computer room, one room leading to the living room, and one room leading to

another bedroom (Tr.161). Officers searched in the computer room and appellant's bedroom (Tr.151-152).

In the computer room, officers seized various photos, purses, wallets, women's clothing and undergarments, checkbooks, credit cards, compact discs, financial documents, papers, and receipts (Tr.263-264,266). In appellant's room, officers seized paperwork, note paper and financial receipts that were located on top of an entertainment center (Tr.268). Inside the entertainment center, officers seized videos and compact discs that did not appear to belong to appellant or his family (Tr.268). Officers seized stacks of photos that were on a shelf above the bed and a purse that was on the floor in the closet (Tr.269). Corporal David Hall stated that although he could not say exactly where many of the items came from, he could say that all the paperwork, identification and "so forth" came from either the computer room, on top of the entertainment center or the shelving unit in appellant's bedroom (Tr.271-272).

At the end of the hearing, the trial court excluded items found in appellant's bedroom closet (except a purse found on the floor) and property seized from the shelf and interior of the entertainment center (Tr.278). The court clarified that it was excluding items from appellant's bedroom that it believed were found where appellant had a reasonable expectation of privacy, including articles "that were on shelves that had to be

gone through in order to observe . . . that were not in plain view" and items found in the interior of the entertainment center (Tr.279).[5]

Prior to the second phase of trial, the court took up appellant's motion to suppress evidence of the two break-ins on the ground that the evidence was fruit of the poisonous tree stemming from the illegal seizure of a receipt bearing Sandra Harding's name (Tr.1152-1153, L.F. 38-353). Cpl. Hall testified that he found a Basswood Pool and Spa receipt and business card bearing Sandra Harding's name (Tr.1169). He then interviewed Harding and she told him about two break-ins involving appellant, Nicole Withrow and Samantha Bramlett (Tr.1172). Hall testified that although he could not remember exactly where the "items" were recovered, he could say the majority of the "identification" items and receipts, "things of that nature" were recovered from the computer room area (Tr.1167,1170). Hall also stated that there were some receipts that were found on the shelf that was immediately above appellant's bed (Tr.1170). Hall testified that he could not say "for certain" whether or not the receipt that led him to speak to Harding was seized from the computer room or from the shelf above appellant's bed (Tr.1170).

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[5] Regardless of the correctness of the trial court's ruling and whether it applied to the receipt if found in the computer room, the evidence of the break-ins cannot be considered fruit of an illegal seizure of the receipt because, as will be argued below, appellant's grandfather had acutal authority to consent to the search of the entire house.

Cpl. Hall also testified that he believed he would have uncovered Harding's name through an investigation of appellant's "character background" because she used to work with appellant at Dura Automotive (Tr.1167-1168). Hall stated that they were contacting prior employers "trying to find out people who knew [appellant] and had a relationship with [appellant]" (Tr.1168). The trial court then overruled appellant's motion to suppress and ruled that Withrow and Bramlett would be permitted to testify about the break-ins (Tr.1176).

B. Appellant's Claim is Not Preserved

Although appellant fails to acknowledge in his argument, appellant did not object prior to the admission of Withrow's or Bramlett's testimony, but instead attempted to raise an objection to their testimony the following morning (Tr.1241). Appellant's claim is therefore unpreserved. **State v. Copeland**, 928 S.W.2d 828,848 (Mo.banc 1996), (Interlocutory motions preserve nothing for review unless objections are made at the appropriate time during the case); **State v. Barnett**, 980 S.W.2d 297,304-305 (Mo.banc 1998)(to be timely, objection must be made contemporaneously with the introduction of the evidence).

To obtain relief, appellant bears the burden of showing that the alleged error will inexorably lead to manifest injustice or a miscarriage of justice if left uncorrected. **State v. Tate**, 850 S.W.2d 385,388 (Mo.App.W.D. 1993); **State v. Collis**, 849 S.W.2d 660,663

(Mo.App.W.D. 1993). A showing of mere prejudice is insufficient. **State v. Kalagian**, 833 S.W.2d 431,434 (Mo.App.E.D. 1992).

C. Analysis

A warrantless search will be valid if it is made with consent that is freely and voluntarily given. **State v. Woods**, 861 S.W.2d 326,332 (Mo.App.S.D. 1993). It is well settled that the consent of one who possesses common authority over premises or effects is valid against the absent, nonconsenting person with whom that authority is shared. **United States v. Matlock**, 415 U.S. 164, 171(1974); **State v. Johns**, 679 S.W.2d 253,262 (Mo.banc 1984). "Common authority" in this context refers to the mutual use of the property by persons generally having joint access or control of the premises or effects for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their own number might permit the common area to be searched. **Matlock**, 415 U.S. at 171; **Johns**, **supra** at 262.

Furthermore, [i]t appears that it takes unusual circumstances for a child living with a parent to claim that the parent does not have permission to consent to a search of the child's sleeping area *even if the child is an adult*." **State v. Cole**, 706 S.W.2d 917,919 (Mo.App.S.D. 1986) (*citing* 2 LaFave, Search and Seizure, § 8.4(b), at 731-736 (1978)) (emphasis added). A parent may consent to a search of an adult child's room, although areas where the child has a particular expectation of privacy, such as a closed footlocker,

may sometimes be treated otherwise. **Cole**, **supra** at 920-921; *see also* **State v. Peterson**, 525 S.W.2d 599,608 (Mo.App.K.C.D 1975)(evidence showed that the basement bedroom was "exclusively" his area and "no one else had a right to be there"); **State v. Pinegar**, 583 S.W.2d 217, (Mo.App.W.D. 1979)(evidence showed that the family understood a footlocker in the adult son's bedroom was his private personal footlocker).

Here, the State presented substantial evidence to prove that Mr. Patre possessed common authority and had joint access over both the computer area of the home or the area in appellant's bedroom that provided access to the rest of the rooms in the home.[6] Either one of these was sufficient for him to validly consent to the search of the home. **See State v. Woods**, **supra** at 332; **Johns**, **supra** at 262. Patre was the owner of the home and the computer room was in a common area of the house. There was evidence that the

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[6]The record below supports the inference that the receipt was found in either the computer room or in areas of appellant's bedroom where appellant did not have a reasonable expectation of privacy. Cpl. Hall stated that although he could not recall exactly where the receipt was found, the majority of the items of "that nature" were found in the computer room (Tr. 1167, 1170). Cpl. Hall stated that although he could not say exactly where many of the items came from, he could say that all the paperwork, identification and "so forth" came from either the computer room, on the top of the entertainment center or the shelving unit in plain view (Tr. 271-272).

computer room was an "all-purpose" room containing not only the computer, but sewing items as well (Tr.166). In addition, the home had a layout where there were doorways but no doors, except for in the bathroom, and there was no hallway (Tr.161). As a result, one had to walk through the various rooms in order to reach other rooms (Tr.167-168). Appellant's room had three doorways, with one room leading to the computer room, one room leading to the living room, and one room leading to another bedroom (Tr.161). Therefore, it was reasonable for the trial court to recognize that Patre, as not only the owner of the home but also a co-habitant, had the right to permit the inspection in his own right and that appellant assumed the risk that Patre might permit those areas to be searched. **See Matlock**, **supra** at 171; **Johns**, **supra** at 262. Indeed, appellant admitted to the fact that he had no reasonable expectation of privacy anywhere in his home when his counsel noted to the jury in penalty phase opening statement that "there was virtually **no privacy** in the house that [appellant] grew up in . . . the house afforded **no privacy** other than a front door to the house, and a door that led to the bathroom, there were no other doors in the house. There were hallways that led from room to room, but there was **no privacy** afforded to anybody" (Tr.1183-1184)(emphasis added).

Since the state presented substantial evidence to support the proposition that Patre had actual authority to validly consent to the search, appellant's point on appeal must fail.

D. Inevitable Discovery

Even assuming *arguendo*, that the evidence of the break-ins was the fruit of the illegal seizure of the receipt, illegally-seized evidence need not be excluded if the state can show by a preponderance of the evidence that the illegally seized evidence would inevitably have been discovered by lawful means. **Nix v. Williams**, 467 U.S. 431,444 (1984); **State v. Butler**, 676 S.W.2d 809,812-13 (Mo.banc 1984). This is because excluding evidence in such a situation does not serve the underlying rationale of the exclusionary rule, the deterrence of police misconduct. **State v. Butler**, 676 S.W.2d 809 (Mo.banc 1984) (*quoting* **Nix**, 467 U.S. at 444). Furthermore, the fairness of the trial is not compromised, because the state gains no advantage, and the defendant suffers no prejudice. **Id**.

Cpl. Hall testified that he believed he would have uncovered Harding's name through an investigation of appellant's "character background" because she used to work with appellant at Dura Automotive (Tr.1167-1168). Hall stated that they were contacting prior employers "trying to find out people who knew [appellant] and had a relationship with [appellant]" (Tr.1168).

Therefore, assuming the officers engaged in even a half-decent investigation of his employment background, *see* **State v. Butler**, 676 S.W.2d at 813, an interview of Sandra Harding would have occurred and therefore information about the break-ins would inevitably have been discovered by legal means when Harding would have directed the

officers to Nicole Withrow and Samantha Bramlett. Appellant cannot show he suffered a manifest injustice. Therefore, appellant's point must fail.

IIIA.

The trial court did not err in overruling appellant's motion for acquittal at the close of all the evidence because sufficient evidence was presented at trial to establish that appellant deliberated upon the murder of Steffini Wilkins in that she was killed in a manner that necessarily required the passage of time to inflict, she suffered multiple wounds and repeated blows, there was ample opportunity to stop the attack, and appellant did not seek medical assistance after the attack.

Point III of the appellant's brief contains two legally-distinct claims of error: first, that the evidence presented at trial was insufficient to establish that appellant deliberated upon the murder of Steffini Wilkins; and second, that appellant's sentence of death should be reduced to life imprisonment in this Court's statutorily-mandated review of capital sentences (App.Br.73-82). These claims will be addressed separately.

In reviewing a claim of insufficiency of evidence, an appellate court accepts as true the evidence in the light most favorable to the state, affording the state all reasonable inferences drawn from the evidence and disregarding contrary evidence and inferences. **State v. Goodwin**, 43 S.W.3d 805,815 (Mo.banc 2001); **State v. Chaney**, 967 S.W.2d

47,52 (Mo.banc 1998). Proof of the intent element of deliberation, defined in §565.002(3), RSMo 2000 as "cool reflection for any length of time no matter how brief," must ordinarily be provided through the circumstances surrounding the crime. **State v. Ferguson**, 20 S.W.3d 485,497 (Mo.banc 2000).

The evidence in this case in the light most favorable to the verdict established that appellant went to Steffini Wilkins' home at 11:30 p.m. on May 24, 2001(Tr.819,844,987-988,1000,1029); with the knowledge that her mother was not there and that at some point he removed her clothes (Tr.727,732,976,987-988); took her from her home to an isolated area in the Salt River campgrounds (Tr.714,1029,St.Ex.40); perpetrated some sort of sexual offense on her (Tr.761-762,775-777,949,1029,1031,St.Ex.40); struggled with her (Tr.793, 821-822,847-848); beat her repeatedly with either his fists or a flashlight (Tr.754,803,1009); choked her with her own bra (Tr.1059,St.Ex.41); dragged and then discarded her nude body on the ground (Tr.774,754,769,1031-1032, St.Ex 41); stepped on her back (Tr.793-794); and left the scene (St.Ex.41).

Furthermore, Steffini's cause of death was from aphyxia, lack of blood containing oxygen to the brain, secondary to compression of the neck by a ligature, in this case her own bra (Tr.763). An injury of this sort requires continuing pressure to cause death over a period of time with 30 to 40 seconds to lose consciousness and from two to three minutes to cause brain death (Tr.763).

From all this evidence the jury could reasonably infer that a method of attack that necessarily required the passage of time to inflict, such as strangulation or asphyxiation, supports an inference that appellant deliberated. **State v. Johnston**, 957 S.W.2d 734,747 (Mo.banc 1997); **State v. Smith**, 944 S.W.2d 901,916 (Mo.banc1997); **State v. Parkus**, 753 S.W.2d 881,884 (Mo.banc 1988).

Evidence of multiple wounds or repeated blows may support an inference of deliberation. **State v. Ervin**, 979 S.W.2d 149,159 (Mo.banc 1999); **State v. Clay**, 975 S.W.2d 121,139 (Mo.banc 1998). Here, Steffini suffered multiple injuries on her left cheek, right shoulder, lower neck, shoulders, breasts, upper and lower chest, lower abdomen, along her back, along her right left lower knee, and right lower leg (Tr.774,State's Exhibits 10-16). She had also had multiple bruises on the face, swollen eyes, and a laceration above the right eyebrow (Tr.754,St.Ex.10). There were also multiple hemorrhages in the head suggesting a blunt trauma injury such as being struck by a fist or object (Tr.754,763). All of this evidence suggested that appellant repeatedly struck her and that there was a struggle.

Jurors may also have reasonably inferred deliberation from the fact that appellant intentionally disregarded any opportunities to terminate the attack. **Johnston**, 957 S.W.2d at 734; **Smith**, 944 S.W.2d at 916. By appellant's own admission, after he put his hand over her mouth to the point where she went limp and could not find her pulse, he took her

to the campground and choked her with her bra, instead of truly seeking help for her as he claimed was his intention (St.Ex.40,41).

Appellant's conduct in failing to seek medical assistance for Steffini after asphyxiating her is also relevant in determining whether or not he deliberated upon her murder. *See* **State v. Feltrop**, 803 S.W.2d 1,12 (Mo.banc 1991).

Appellant alleges nonetheless that "regardless of the length of time that [appellant] had to think about what he was doing," the state did not prove that he "cooly" reflected on killing Steffini Wilkins (App.Br.73). He asserts that there was "hardly [evidence of] cool reflection" in that he confessed to praying to God for forgiveness for what he was "about to do" and choked Steffini only to end her suffering (App.Br.77). Such an argument ignores the appellate standard of review for sufficiency claims and asserts, in effect, that the jurors were required to believe appellant's self-serving account of his intentions. **State v. Brown**, 902 S.W.2d 278,288 (Mo.banc 1995).

At any rate, to satisfy the requirement of "deliberation," it is sufficient to show that the defendant merely considered taking another's life in a deliberate state of mind. **State v. Spears**, 876 S.W.2d 33 (Mo.App.S.D. 1994). "[A] deliberate act is a free act of the will, that is done in furtherance of a formed design to gratify a feeling of revenge or to accomplish some other unlawful purpose and while not under the influence of a violent passion suddenly aroused by some provocation." **Parkus**, 753 S.W.2d at 884.

Here, even by appellant's own version of events, his choking and killing of Steffini was an act of free will done for the unlawful purpose of ending the suffering he had previously imposed on her. What more cool reflection is needed than to decide to kill someone, recognize that it is wrong, pray for forgiveness and then still do it anyway?

The jury had overwhelming evidence in this case to support the inference that appellant committed murder in the first degree. Therefore, the trial court did not err in overruling appellant's motion for acquittal.

IIIB.

This court should, in the exercise of its independent review, affirm appellant's sentences of death because (1) they were not imposed under the influence of passion, prejudice or any other arbitrary factor; and (2) appellant's sentences are not excessive or disproportionate to those in similar cases, considering the crimes, the strength of the evidence and the defendant. Further, this court's proportionality review is adequate and need not encompass consideration of cases where the death penalty was waived or a conviction for a lesser degree of homicide was found because such cases are irrelevant in this context.

As an alternative to his attack upon the sufficiency of the evidence, appellant invokes this Court's duty of independent sentence review under §565.035.3, RSMo 2000, arguing that the evidence that he deliberated upon the murder of Steffini Wilkins was "not sufficiently strong" and citing various of his claims of trial error as evidence that his punishment-phase hearing was unfair (App.Br.77-82). Contrary to the assertions in appellant's brief (App.Br.79-80), the proportionality review conducted by this Court is not

a requisite under the Due Process Clause, or under any other provision of the United States Constitution. **Morrow v. State**, 21 S.W.3d 819,829-830 (Mo.banc 2000).[7]

Under the mandatory independent review contained in §565.035.3, RSMo 2000, this Court has to 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, 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).

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[7]**Cooper Industries, Inc. v. Leatherman Toolgroup, Inc.**, 532 U.S. 424(2001), cited by appellant, does not support his claim: this decision concerned the review of punitive damage awards and did not purport to overrule, modify or even address **Pulley v. Harris**, 465 U.S. 37 (1984), which held that proportionality review is not constitutionally required in an otherwise valid capital sentencing system.

Appellant's allegation that "serious and prejudicial errors" from both the guilt and penalty phases of trial improperly influenced the punishment verdict rests entirely upon the claims of error advanced in Points I, II, XI, XIII, and IX of appellant's brief and on two other claims of error not raised on appeal (App.Br.78-79).[8] For the reasons stated in the equivalent points in the respondent's brief, appellant's arguments are meritless. In addition, appellant's two new claims are meritless as well. The trial court gave appellant the opportunity to cross-examine the State's DNA expert, Brian Hoey, or to have his own expert testify about errors in Mr. Hoey's raw data, but would not allow appellant to run a computer demonstration with Mr. Hoey's raw data because appellant did not lay the proper foundation for the computer program (Tr.900,928-933). Also, it cannot be said that appellant was unduly prejudiced by the state presenting evidence that he whined when

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[8]Appellant also cites **Cooper Industries, Inc. v. Leatherman Toolgroup, Inc., supra**, for the proposition that the alleged trial errors he cites should be considered "in evaluating the reliability and proportionality of the verdict of death" (App.Br. 79). **Cooper Industries** has nothing whatsoever to say on this issue. Appellant's argument is superfluous, however, because §565.035.3(1) already directs this Court to review the record for "arbitrary factor[s]" that could have caused the trier of fact to assess punishment based upon something other than the relevant facts and law.

his hair was pulled for the sexual assault kit in light of the overwhelming evidence of his callous and brutal murder of Steffini Wilkins.

As to whether appellant's sentence of death was "excessive or disproportionate to the penalty imposed in similar cases, considering . . . the crime, the strength of the evidence and the defendant," §565.035.3(3), the murder of Steffini Wilkins resembles the atrocious murders in such cases as **State v. Ferguson**, 20 S.W.3d 485,497 (Mo.banc 2000); **State v. Brooks**, 960 S.W.2d 479,502 (Mo.banc 1997); **State v. Nunley**, 923 S.W.2d 911,926 (Mo.banc 1996); **State v. Brown**, 902 S.W.2d 278,300-301 (Mo. banc 1995); **State v. Gray**, 887 S.W.2d 369 (Mo. banc 1994); and **State v. Lingar**, 726 S.W.2d 728,741-742 (Mo.banc 1987). There, as here, the defendants abducted a young victim for no other reason than their desire to commit a forcible sexual offense. They murdered the victim when their desires were satiated at least in part because of the inconvenience posed by the existence of a living witness. Then, they discarded the dead body of the victim as if it was a piece of refuse. In addition, Steffini Wilkins had ample time in which to anticipate her coming death while appellant drove her away from her home in Hannibal, raped her or otherwise sexually used her, and particularly during the time it took for her to lose consciousness as appellant tightened the ligature around her neck. *See* **State v. Parker**, 886 S.W.2d 908,925-926 (Mo. banc 1994); *see also* **State v. Hampton**, 959 S.W.2d 444,446,454 (Mo.banc 1997); **State v. Ervin**, 835 S.W.2d 905,912-913 (Mo.banc 1992); **State v. Griffin**, 756 S.W.2d at 478-479 (Mo.banc 1988).

Appellant cites **Palmer v. Clarke**, 293 F.Supp.2d 1011 (D.Neb 2003), for the proposition that this Court must look at all murder cases in determining whether the death penalty is appropriate (App.Br.74-75). However, **Palmer** is not controlling law and is distinguishable because it is based on the interpretation of a Nebraska state statute. **Id**. at 1041-42. At any rate, this claim has been repeatedly rejected; this Court has determined that "non-death sentenced," (App.Br.80), cases are simply not relevant in the proportionality calculus. **State v. Bolder**, 635 S.W.2d 673,685 (Mo.banc 1982); **State v. Lashley**, 667 S.W.2d 712,716 (Mo.banc 1984); **State v. White**, 813 S.W.2d 862,866 (Mo.banc 1991); **State v. Rousan**, 961 S.W.2d 831,854 (Mo.banc 1998). This Court reasoned as follows:

> Cases resulting in convictions for charges less than first degree murder are not cases in which the 'sentence of death or life imprisonment without probation or parole was imposed . . . .' Section 565.035.6. Cases in which the death penalty is waived are cases in which the sentencing authority has no discretion; therefore, there can be no arbitrary and capricious sentencing in such cases. They are not similar cases because the focus of such cases is the prosecutor's exercise of discretion, not the sentencing authority's choice between life or death.

Rousan, **supra** at 854.

The "strength of the evidence" could not support the verdict of the jury more strongly, of course, considering the state's evidence outlined in Point I and III(A) above. Therefore, the strength of the evidence does not support appellant's argument that his sentence is excessive. In considering this particular defendant, it must also be noted that the state presented evidence of appellant's prior conviction for felony stealing (Tr.1187). The state also presented evidence from two young ladies that on two separate occasions, late at night, approximately a month before Steffini's murder, appellant walked into the home of a previous co-worker, Sandy Harding's, home unannounced and uninvited (Tr.1188-1212). Appellant had been to the house before and yet on one of the occasions acted "confused" as to whether he was in his home, which was about twenty miles away (Tr.1193-1194,1201-1202). Also, on one of the occasions, Harding was not home, but her daughters, one fourteen to fifteen years old, were there (Tr.1203). From this evidence, the jury could have reasonably inferred that appellant was beginning a habit of abducting young teenage girls from their homes, particularly from homes where he knew the girls and had previously been to their homes. The jury could infer that fortunately for some reason appellant did not have the nerve to do so on those two previous occasions but unfortunately did go through with his plans for Steffini.

Considering the nature of the crime, the strength of the evidence and the history of the defendant, no legitimate basis exists to reduce the sentence of death imposed by the jury. Appellant's relative youth and the fact that he had not previously been in "serious

trouble," (App.Br.81), do not support his argument that his sentences are disproportionate. That has been true in a number of past cases in which sentences of death have been upheld by this Court. *See* **State v. Hutchison**, 957 S.W.2d 757,768 (Mo.banc 1997) and cases cited therein. It would be strange indeed if a defendant who committed the deliberate murder of a young thirteen-year old girl by taking her from her home as part of an attempt to gratify his sexual desire could evade the death penalty for his crime by asserting, in essence, that he hadn't done anything like that before. "Only when the case, taken as a whole, is plainly lacking circumstances in which the death penalty has been imposed will resentencing be ordered." **Id.** at 766. A review of the facts of this case, as well as the facts of the above cases, will reveal that this is not such a case. Moreover, under the facts of this case, the death penalty is not a "freakish or wanton" punishment. *See* **Id**. Accordingly, the death sentence here was not disproportionate, and must be affirmed.

IV.

The trial court did not err, plainly or otherwise, in overruling appellant's pretrial motions to (1) quash the information; (2) strike the aggravating circumstance on the claim that the state did not specify the particular felony appellant committed at the time of the murder, or, alternatively, to require the state to provide a bill of particulars and in (3) submitting Instruction 17, the verdict director requiring the jury to determine if there is an aggravating circumstance because the information, notice of intent to seek the death penalty, supplemental disclosure, and instruction were proper and provided sufficient notice to appellant of the aggravating circumstances the state intended to rely on (Responds to Appellant's Points IV and V).

Appellant's fourth and fifth points raise issues of whether the statutory aggravating circumstances that the state intended to submit in the punishment phase were required to be pled in the information, and consequently whether appellant received adequate notice of the aggravating circumstances. As such, respondent will address those claims together.

Facts

On January 4, 2002, the state filed a notice of intent to seek the death penalty based on two statutory aggravating circumstances including one that the murder was committed while appellant was perpetrating or attempting to perpetrate one of several felonies listed in Section 565.032.2(11) (L.F.48-49). On May 14, 2002, appellant moved to quash in

information for failure to comply with **Jones v. United States** and **Apprendi v. New Jersey** and to require the state to disclose the evidence it would rely on to prove the statutory aggravating circumstances (L.F.116-119,139-1442). Also that day, appellant moved to strike the aggravating circumstance under §565.032.2(11), or alternatively, for a bill of particulars or an identification of the type and degree of felony that the state was alleging appellant had been committing during the murder (L.F.222-225).

On June 7, 2002, a pre-trial motion hearing was held and the above motions were taken up (L.F.6-10). Although that hearing has not been transcribed, the docket sheets indicate that appellant's motions were "argued, submitted and overruled" (L.F.7-9).

On June 19, 2002, the state filed a "Notice of Evidence in Aggravation and Supplemental Disclosure Pursuant to Section 565.005, RSMO" indicating that, among other things, the state will offer "evidence through the testimony of witnesses herein or previously disclosed that Stefani Wilkins, . . .was removed from her home to a location remote therefrom, sexually assaulted and murdered after defendant rendered her unconscious and helpless" (Supp.L.F. 1;Resp.Appx. A3).

Prior to trial, appellant moved to renew the previously filed motions (Tr.311-320). Defense counsel noted that the trial court had sustained appellant's "motion for court order directing the state to provide defendant prior to trial with a copy of all jury instructions the state intends to submit" (Tr.321). Defense counsel noted that they had received one of the verdict directors but that stated that appellant wanted "the aggravating

instruction" (Tr.321). The state responded that he had "prepared several versions of that, but I'll let you see them, sure" and stated that he would get appellant a copy (Tr.321).

During penalty-phase instruction conference, appellant objected to Instruction 17, the aggravating circumstance verdict director on the basis that he did not receive adequate notice of either aggravating circumstance (Tr.1356-1357). Specifically, appellant stated that the notice "provided to us listed a whole host of different types of crimes that would fit within that aggravating circumstance and the Court overruled our request and so we were essentially kind of left hanging not knowing what aggravating circumstance they were trying to prove, what crime, and so they elected to go with kidnapping, but that's news to us" (Tr.1358). Appellant also renewed the other previously filed motions mentioned above (Tr.1358). The trial court overruled the motions (Tr.1358).

Analysis

1. Motion to Quash

Under §565.005.1, RSMo 2000, the State is required to give notice to the defendant "[a]t a reasonable time before the commencement of the first stage of [a capital trial]" of the statutory aggravating circumstances that it intends to submit in the event that the defendant is convicted of first degree murder. The state did so in this case (L.F.48-49;Supp.L.F.1; Resp.Appx. A3).

Appellant alleged in the pretrial motion that the information filed against him was defective because the state did not plead in the information the statutory aggravating

circumstances it intended to submit at his trial, which he claimed was required under the holding of **Apprendi v. New Jersey**, 530 U.S. 466 (2000) (L.F.139-142).

This Court has repeatedly rejected appellant's claim[9]. *See* **State v. Edwards**, 116 S.W.3d 511,544 (Mo.banc 2003); **State v. Gilbert**, 103 S.W.3d 743,747 (Mo.banc 2003) *and cases cited therein*; **State v. Tisius,** 92 S.W.3d 751,766-767 (Mo.banc 2002); **State v. Cole**, 71 S.W.3d 163,171 (Mo.banc 2002). Just as in the cases above, appellant's claim is without merit, as the state gave appellant notice of its intent to seek the death penalty and the aggravating circumstance was found beyond a reasonable doubt by the jury.

Even without this Court's recent decisions finding claims such as these without merit, appellant's reliance on **Apprendi** to support his claim would still fail. The Supreme Court in **Apprendi** expressly stated that it was not addressing what must be alleged in the charging document:

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[9]Appellant acknowledges that his claim has been rejected by this Court, but claims he is raising it now "because the Supreme Court has yet to directly address the specific question presented here" (App.Br. 99).

> Apprendi has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment. . . . [The Fourteenth] Amendment has not . . . been construed to include the Fifth Amendment right to "presentment or indictment of a Grand Jury" that was implicated in our recent decision in Almendarez-Torres v. United States, 523 U.S. 224, 140 L.Ed.2d 350, 118 S.Ct. 1219 (1998). We thus do not address the indictment question separately today.

Apprendi v. New Jersey, **supra**, 530 U.S. at 476 (n. 3).

Ring v. Arizona, 122 S.Ct. 2428 (2002), also cited by appellant (App.Br.92-93), which for the first time held that the Sixth and Fourteenth Amendments do not allow "a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty," confirms that it does not, any more than did **Apprendi**, hold that statutory aggravating circumstances must be pled in the indictment or information. The Supreme Court noted that the issue before it was limited:

> Ring's claim is tightly delineated: he contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. . . . Ring does not contend that his indictment was constitutionally defective. See Apprendi, 530 U.S., at 477, n. 3 (Fourteenth Amendment "has not . . . been construed to include the Fifth Amendment right to 'presentment or indictment of a Grand Jury'").

Ring, **supra**.

Respondent notes that in **United States v. Allen**, 2004 WL 188080,*2-3 (8th Cir. Mo February 2, 2004), the United States Court of Appeals, Eighth Circuit, held that the Indictment Clause of the Fifth Amendment requires that the statutory aggravating circumstances be pled in the indictment. However, the Indictment Clause of the Fifth Amendment does not apply to the states. **Apprendi**, **supra**, 530 U.S. at 477(n. 3). The only constitutional provision that is relevant to state charging documents is the Sixth Amendment requirement that an accused "be informed of the nature and cause of the accusation," which has been applied to the states through the Fourteenth Amendment. **Blair v. Armontrout**, 916 F.2d 1310,1329 (8th Cir. 1990). The difference between the rights guaranteed by the Fifth Amendment on the one hand and the Sixth and Fourteenth Amendments on the other is instructive in demonstrating the absence of merit in appellant's argument. The Indictment Clause of the Fifth Amendment specifies that criminal charges must be initiated by a grand jury indictment and requires that all elements of the criminal offense charged be stated in the indictment. **Almendarez-Torres v. United States**, 523 U.S. 224,228 (1997).

Here, the Sixth and Fourteenth Amendments, by contrast, require only that a criminal defendant receive notice of the "nature and cause of the accusation" and does

not specify the form that notice must take.[10] Even legally insufficient charging documents have been held not to violate the Sixth Amendment when the defendant received actual notice of the charge against him. **Hartman**, **supra**, 283 F.3d at 194-196; **Blair**, **supra**. Under the law of Missouri, appellant was entitled to, and received, notice before trial of the statutory aggravating circumstances that the state intended to offer in the punishment phase. Nothing in **Apprendi**, **Ring**, or any other pertinent authority supports appellant's claim that this notice provision violates the Sixth and Fourteenth Amendment to the United States Constitution.

The recent opinion in **State v. Fortin**, 2004 WL 190051 *46-49 ((N.J. February 3, 2004), also held that aggravating factors must be submitted to the grand jury in capital cases. Just as in federal criminal prosecutions, the New Jersey State Constitution requires that offenses be charged only through indictment. **Id**. at *46. The state constitution also requires proof of every element of an offense be provided to the grand jury and that the state specify the elements in the indictment. **Id**. at *46. Therefore, just as **Allen**, **Fortin** is distinguishable from the case at bar as well. In fact, the **Fortin** opinion recognizes that

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[10]"[T]he states are not bound by the technical rules governing federal criminal prosecutions" under the Fifth Amendment. **Blair v. Armontrout**, **supra**. Fifth Amendment decisions are therefore of "little value" in evaluating state indictments or informations. **Hartman v. Lee**, 283 F.3d 190,195 (n. 4)(4th Cir. 2002).

such a result would not be required in states such as Missouri noting that "[t]he filing of a Notice of Aggravating Factors may be consonant with the procedures in those States that commence prosecution by information." **Id**. at *49.

Based on the foregoing, appellant's claim on appeal must fail.

2. Alleged Failure to Give Sufficient Notice of Particular Felony Appellant Was Alleged to Have Committed During Steffini Wilkins' Murder that the state alleged as an aggravating circumstance.

Although appellant concedes that this Court "has taken the position that 'notice' of the statutory aggravating circumstances stands in lieu of charging them in the information or indictment," appellant asserts that he was only given notice that the state planned to rely on §565.032.2(11)-notice he asserts was inadequate (App.Br.85-86). As such, appellant claims that the trial court erred in "failing to grant [his] motion and require the state to provide a bill of particulars or identify the felony that it would rely on to complete §565.032.2(11)" and in submitting Instruction 17, the aggravating circumstance verdict director (App.Br.87).

As already noted above, under §565.005.1, RSMo 2000, the state is required to give notice to the defendant "[a]t a reasonable time before the commencement of the first stage of [a capital trial]" of the statutory aggravating circumstances that it intends to submit in the event that the defendant is convicted of first degree murder. The state did so in this case (L.F. 48-49;Supp.L.F. 1;Resp.Appx. A3). Further, as already established

above, the state is not required to plead the aggravating circumstances in the charging document. So the only issue here, is whether appellant received adequate notice as required by §565.005.1.

Contrary to appellant's assertions at trial and on appeal, after the trial court overruled appellant's "motion to the strike the aggravating circumstance on the claim that the state did not specify the particular felony appellant committed at the time of the murder, or, alternatively, to require the state to provide a bill of particulars," the state did provide sufficient notice to him. Approximately five months prior to trial, the state filed a "Notice of Evidence in Aggravation and Supplemental Disclosure Pursuant to Section 565.005, RSMO" indicating that, among other things, the state would offer "evidence through the testimony of witnesses herein or previously disclosed that Stefani Wilkins, . . .**was removed from her home to a location remote therefrom**, sexually assaulted and murdered after defendant rendered her unconscious and helpless" (Supp.L.F. 1; Resp.Appx. A3)(emphasis added). This was sufficient notice.

In **State v. Bucklew**, the defendant claimed that the trial court violated his right to due process by permitting the state to present the non-statutory aggravating circumstance of future dangerousness and supporting evidence as he allegedly had no notice. 973 S.W.2d 83, 96 (Mo.banc 1998). This Court noted that in the disclosure of aggravating circumstances filed more than nine months prior to trial, the state noted that it would present evidence of "the affect upon the victims and the anti-social and criminal history

of the defendant" and then later also disclosed twenty-one previous convictions and charges committed by the defendant. **Id**. This Court then rejected the defendant's claim of inadequate notice and held that "the allegations of fact contained in the state's disclosures and the language the state used ('anti-social and criminal history') provided Bucklew with sufficient notice of the state's intent to argue future dangerousness." **Id**.

Such is the case here. The state, in its notice of intent to seek the death penalty, stated that it was basing its intent to do so on two statutory aggravating circumstances including one that the murder was committed while appellant was perpetrating or attempting to perpetrate one of several felonies listed in §565.032.2(11)(L.F.48-49). Then, more than five months prior to trial, the state disclosed that in penalty phase, it would offer "evidence through the testimony of witnesses herein or previously disclosed that Stefani Wilkins, . . .**was removed from her home to a location remote therefrom**, sexually assaulted and murdered after defendant rendered her unconscious and helpless" (Supp.L.F. 1;Resp.Appx. A3)(emphasis added). Therefore, the allegations of fact contained in the state's disclosures-that appellant removed Steffini from her home to a remote location-coupled with the notice that the state was basing one of its statutory aggravating circumstances on one of the enumerated felonies listed in §565.032.2(11), provided notice to appellant that the state intended to allege as an aggravating circumstance that Steffini's murder was committed while appellant was perpetrating a kidnapping.

Appellant's claim also fails because appellant has not shown that he was prejudiced by the actions of the trial court. Rule 23.11 provides that "No indictment or information shall be invalid, nor shall the trial, judgment, or other proceedings thereon be stayed, because of any defect therein which does not prejudice the substantial rights of the defendant." *See* **State v. Collis**, 849 S.W.2d 600,664 (Mo.App.W.D. 1993).

Appellant has made no attempt to explain how his defense was impaired by the alleged insufficient information (App.Br.82-87). Appellant confessed to the officers that he went to Steffini Wilkins' home, perpetrated some sort of sexual offense against her, and then put his hand over her mouth until she "went limp" (St.Ex.39,41). Appellant then confessed that he took her from her home, put her in his car and drove her to a remote area such as the Salt River, and strangled her with her own bra (St.Ex.39,41). Appellant has not indicated how he would have changed his penalty-phase defense. He "points to no act that he was unable to undertake nor any witness in mitigation whom he was unable to discover or present as a result" of the alleged error by the trial court in overruling his motion for a bill of particulars. **State v. McMillin**, 783 S.W.2d 82,102 (Mo.banc 1990). Appellant's second claim fails.

3. Alleged variance from the information to Instruction 17

Appellant claims that the trial court erred in submitting Instruction 17, the aggravating circumstance verdict director because "it was a fatal variance from the offenses of first degree murder charged in the Information" (App.Br.87). Appellant seeks

plain error review on this claim because, as he acknowledges, he did not object to Instruction 17 on the fatal variance ground now raised on appeal (App.Br.84).

In addition to the argument already raised and disposed of above, that appellant did not receive adequate notice of the statutory aggravating circumstance the state intended to rely on, appellant also argues that Instruction 17 varied from the information because the verdict director "submitted a new and greater offense than that charged in the information, and the information gave [appellant] no notice whatsoever that he was being charged with the greater offense of aggravated first degree murder" (App.Br.89).

This sort of claim was recently raised and denied by this Court in **State v. Tisius,** 92 S.W.3d 751,766-767 (Mo.banc 2002). This Court noted that Tisius' argument was premised on the notion that (1) "the aggravating circumstances were additional elements of first-degree murder punishable by death" and therefore needed to be pled in the original information and (2) "the combined effect of sections 565.020 and 565.030.4 creates two types of first-degree murder," one that is "unenhanced" and the other that is "aggravated" or "capital" murder. **Id**. at 766. Appellant raises the exact sort of argument here (App.Br.87-90). This Court found that appellant's contention was without merit, stating in relevant part, that:

> As held in [State v. Cole, 71 S.W.3d 163, 177 (Mo. banc 2002)] the two statutes Appellant cites serve different functions: section 565.020 defines the single offense of first-degree murder with the range of

> punishment including life imprisonment or death; section 565.030 merely delineates trial procedure. The Appellant's contention of a violation of *Apprendi* is without merit: pursuant to section 565.005.1, the State gave Appellant notice that it would seek the death penalty, and the aggravating circumstances were proved to a jury beyond a reasonable doubt. "The maximum penalty for first-degree murder in Missouri is death, and the required presence of aggravating facts or circumstances to result in this sentence in no way increases this maximum penalty." [citation omitted].

Just as in **Tisius**, **supra**, appellant's claim is without merit, as the State gave appellant notice of its intent to seek the death penalty and the aggravating circumstance was found beyond a reasonable doubt by the jury. Appellant cannot demonstrate that he suffered a manifest injustice here. Appellant's third claim must fail.

The bottom line is that appellant received adequate notice of the statutory aggravating circumstances that the state was intending to rely on in the form and manner prescribed by Missouri law. Specifically, appellant also received notice from the formal notice of intent to seek the death penalty and through factual allegations raised in subsequent disclosures that the state would allege appellant committed Steffini Wilkins' murder while perpetrating the felony of kidnapping. Appellant's claim in his Points IV and V must fail.

V.

The trial court did not plainly err in refusing to submit Instruction A, a verdict director for the lesser-included offense of involuntary manslaughter, because appellant did not suffer a manifest injustice in that (A) there is no reasonable probability that the the jury would have convicted him of that offense since the jury found appellant guilty of murder in the first degree and did not find appellant guilty of murder in the second degree and (B) appellant was not entitled to the instruction

on the theory appellant raises on appeal as the evidence did not tend to support a theory that appellant recklessly caused the death of Steffini Wilkins through suffocation by putting his hand over her mouth (Responds to Appellant's Point VI).

Appellant contends that the trial court erred in refusing to submit a verdict director for the lesser-included offense of involuntary manslaughter (App.Br.100).

Appellant submitted proposed Instruction Number A, a verdict director for involuntary manslaughter, on the basis that appellant recklessly "caused the death of Steffini Wilkins by *strangling* her" (L.F.411)(emphasis added). On appeal, appellant's theory is different[11].

He argues that based on the statement he made to Sergeant Michael Platte, "the jury could have inferred and found as fact that after [appellant] left, Steffini died from the effects of *suffocation* as a result of appellant putting his hand over her face" (App.Br.105)(emphasis added).

In order to preserve a claim of error, an appellant must lodge a specific objection thereto, and may not broaden, on appeal, the scope of the objection made to the trial

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[11]Appellant requests plain error review for "the portion of this point that addresses the failure to submit involuntary manslaughter by suffocation" (App.Br.101). However, appellant abandons any claim in his argument that addresses the failure to submit involuntary manslaughter by strangulation, as he had proposed at trial (App.Br.100-110).

court. *See* **State v. Bucklew**, 973 S.W.2d 83,94 (Mo.banc 1998); **State v. Brown**, 902 S.W.2d 278,287-288 (Mo.banc 1995)(objections to instructions that were given). Appellant has changed his theory on appeal, and his point, consequently, is unpreserved. Rule 30.20.

"Instructional error seldom rises to the level of plain error." **State v. Wright**, 30 S.W.3d 906,912 (Mo.App.E.D. 2000). For instructional error to be plain error, the defendant must show more than mere prejudice; he must "establish that the trial court has so misdirected or failed to instruct the jury that it is apparent to the appellate court that the instructional error affected the jury's verdict." **Wright**, 30 S.W.3d at 912; *see also* **State v. Black**, 50 S.W.3d 778,788 (Mo.banc 2001).

A. Appellant Did Not Suffer Manifest Injustice

Should this Court reach the merits of appellant's contention, appellant's claim failed because he cannot show that he suffered prejudice, much less prejudice that would rise to the level of plain error.

Appellant's jury was instructed on murder in the first degree and murder in the second degree (L.F.401,403). Appellant's instruction A, the proffered verdict director for involuntary manslaughter told the jury: "If you do not find the defendant guilty of murder in the second degree, you must consider whether he is guilty of involuntary manslaughter in the first degree" (L.F.411).

Because the jury found appellant guilty of murder in the first degree, and did not reach the second-degree murder instruction, it could not have reached appellant's instruction on involuntary manslaughter. *See* **State v. Six**, 805 S.W.2d 159,164 (Mo.banc 1991). It is well-established that the fact that the jury convicted appellant of the highest offense charged, murder in the first degree, and refused to convict him of a lesser-included offense, murder in the second degree, means that there is no reasonable basis to suggest that the jury would have convicted appellant of either voluntary or involuntary manslaughter if it had been given that opportunity. **State v. Rutter**, 93 S.W3d 714,731 (Mo.banc 2002); **State v. Jones**, 979 S.W.2d 171,185 (Mo.banc 1998); **State v. Barnett**, 980 S.W.2d 297,305-306 (Mo.banc 1998); **State v. Hall**, 982 S.W.2d 675,682 (Mo.banc 1998); **Six**, 805 S.W.2d at 164.

This is because the jury's willingness to show clemency beyond the verdict rendered has been adequately tested by the submission of the instruction of the next lesser-included or lesser-degree offense, **Barnett**, 980 S.W.2d at 305-306, and also by the fact that the jurors ultimately imposed death.

Attempting to distinguish these cases, appellant argues that the "two-down" rule had been called into question by **State v. Beeler**, 12 S.W.3d 294 (Mo.banc 2000)(App.Br. 107). However, **Beeler** is inapposite as it has nothing to do with the propriety of a trial court failing to submit a lesser-included instruction for involuntary manslaughter under circumstances such as these where both murder in the first degree

and second degree were submitted and the jury found murder in the first degree. **Beeler** dealt with the issue of whether it was error for the court to instruct on involuntary manslaughter, over the defendant's objection, when the evidence is such that the jury could acquit of a higher offense except on the basis of self-defense. **Id**. at 297. He offers, though, no persuasive reasons for reconsideration of this line of cases through extension of **Beeler** and respondent is not aware of any cases following or citing to **Beeler** abrogating the long-standing "two-down" rule from the above cited cases. **B. Instruction "A" Was Not Supported By The Evidence**

In addition to the foregoing, Instruction A was not supported by the evidence. By its express term, §556.046.2 does not require an instruction on a lesser-included offense unless there is some "basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." Thus, in the analysis of whether there is a basis for acquitting the defendant of the offense charged, "[t]here must be an evidentiary basis logically permitting an operative fact to be disregarded." **State v. Smith**, 891 S.W.2d 461,467 (Mo.App.W.D. 1994); *see also* **State v. Roddy**, 998 S.W.2d 562,564 (Mo.App.S.D. 1999). In other words, "[u]ndisputed facts may not be disregarded in determining an evidentiary basis for acquittal of the greater offense and conviction of the lesser." **State v. Coleman**, 949 S.W.2d 137,142 (Mo.App.W.D. 1997); *see also* **State v. Wurtzberger**, 40 S.W.3d 893,898 (Mo.banc 2001); **Wright**, 30 S.W.3d at 912 (where it was held that a trial court's failure to correctly instruct the jury on an element of the

crime charged that was disputed at trial cannot result in manifest injustice.). Also, the fact that a jury might disbelieve some of the prosecution's evidence, does not entitle the defendant to an instruction otherwise unsupported by the evidence. **State v. Olson**, 836 S.W.2d 318,322 (Mo.banc 1982); **State v. Warrington**, 884 S.W.2d 711,717 (Mo.App.S.D. 1994); **Roddy**, 988 S.W.2d at 564.

In **Roddy**, the defendant was charged with property damage first degree, which requires proof of loss in excess of $750, and all the evidence supported a finding of a loss in excess of that amount. 988 S.W.2d at 564. The owner of the cars testified that the damage done to the vehicles totaled $5,355.31 and appellant offered no evidence to dispute the amount. **Id**. The trial rejected appellant's request to instruct on the lesser-included offense of property damage second degree and reasoned as follows:

> . . .there is absolutely no evidence whatsoever to support any verdict other than damages in excess of $750. Any finding of less than that would be speculation on the part of the jury, in the opinion of the court.

Id. 564. The Court of Appeals found no error in the trial court's refusal to give the instruction holding that "this uncontradicted evidence of value warranted the instruction given by the trial court, and there was no error in the trial court's refusal to give the lesser included offense instruction . . . Any finding by the jury that damages were less than $750 would be based on mere speculation." **Id**., *citing cases*.

Here, the evidence is undisputed that Steffini Wilkins' cause of death was from asphyxiation secondary to compression of the neck by a ligature (Tr.763). Thus, the undisputed evidence at trial was that Steffini was strangled to death. During appellant's cross-examination of Dr. Edward Adelstein, who was testifying to the findings in Dr. Jay Dix' report[12], appellant never once questioned the cause of death (Tr.766-770,781). At one point during trial defense counsel referred to Steffini's cause of death at trial as "strangulation" (Tr.1044). Nor did appellant argue to the jury a different cause of death, such as the theory of suffocation that he now posits on appeal (Tr.1111-1127). Therefore, as in **Roddy**, the trial court here did not commit a manifest injustice in finding that the undisputed evidence at trial was that Steffini died from strangulation and that the involuntary manslaughter conviction was not warranted.

Even if appellant's story were to be believed by the jury, that he recklessly suffocated Steffini by putting his hand over her mouth to merely quiet her, the jurors would have to disregard the undisputed physical evidence at trial that Steffini died from strangulation by neck compression. Thus, the evidence from the record would not tend to support his theory that Steffini did not die from being strangled with her bra, but that she died when appellant recklessly suffocated her with his hand to quiet her down. To accept appellant's reasoning that the jury did not have to believe the undisputed fact that Steffini

[12]Dr. Dix died from cancer approximately a week before trial (Tr. 743).

died from strangulation would not make sense and would require the jurors to speculate and to leave their common sense behind.[13] Jurors should not have lose their common sense, for example, in a case where the defendant claims that he recklessly killed the victim by dropping a brick on the victim's head when the undisputed evidence at trial is that a victim died from a gunshot wound-a completely different cause of death.

Although it is true that "[i]f the evidence tends to establish the defendant's theory, or supports differing conclusions, the defendant is entitled to an instruction on it," **State v. Avery**, 120 S.W.3d 196,200 (Mo.banc 2003), here, the evidence does not tend to support appellant's conclusion that appellant recklessly suffocated Steffini by putting his hand over her mouth. This is not the situation, such as in **Avery**, where the evidence at issue was not about the cause of death, but rather the defendant's mental state when she shot the victim. This is a case where there is no evidence to support a theory that the victim died in the manner that appellant proposes, and the evidence is uncontested that the victim died from asphyxiation through strangulation. Based on the foregoing, appellant cannot establish that he suffered a manifest injustice and his claim on appeal must fail.

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[13]Respondent would note that the jurors would have to also ignore appellant's subsequent confession where he said that he strangled Steffini with her bra to end her suffering (St.Ex.41).

VI.

The trial court did not plainly err in (1) allowing the introduction of penalty phase evidence of appellant's two break-ins into a home approximately a month before the murder, and in (2) submitting instructions to the jury which allowed them to consider this evidence in deciding whether to impose death, because this admission of prior unadjudicated bad acts was proper and the jury need not be instructed that determinations whether aggravating circumstances warrant death and whether mitigating circumstances are outweighed by aggravators must be found beyond a reasonable doubt. As such, appellant has not met his burden of proving that the trial court's actions created a manifest injustice (Responds to Appellant's Point VII).

Appellant claims that the trial court erred in admitting evidence of appellant's two break-ins into a home approximately a month before the murder and in submitting Instructions 18 and 19, the instructions for steps two and three of Missouri's capital sentencing scheme (App.Br.111). Appellant contends a manifest injustice occurred because Instructions 18 and 19 failed to instruct the jury that the state had the burden of proving beyond a reasonable doubt that the aggravating circumstances warranted death (step two) and that the mitigating circumstances did not outweigh the aggravating circumstances (step three)(App.Br.111-112). Appellant argues that evidence of the

uncharged bad acts was "inherently unreliable" that the flawed instructions allowed the jury to use twice (App.Br.112).

Appellant's Claims Are Unpreserved

Prior to trial, appellant filed a motion to suppress evidence of appellant's two break-ins into Sandra Harding's home on the basis that the evidence was obtained was the "fruit" of an illegal seizure-a motion which the court overruled after having held a hearing on the matter (Tr.1176). As explained in Respondent's Statement of Facts and in Respondent's Point II, during penalty phase, the state called two witnesses to give testimony regarding appellant walking into Sandra Harding's home on separate occasions about a month before the murder (Tr.1188-1212). Appellant did not object prior to the admission of their testimony but instead attempted to raise an objection to their testimony the following morning and *only* on the grounds raised in the motion to suppress (Tr.1241)[14]. The trial court overruled the objection (Tr.1241).

Appellant's claim is not preserved. Appellant only objected to this evidence, based on his motion in suppress and only after the witnesses had testified. **State v. Copeland**, 928 S.W.2d 828,848 (Mo.banc 1996)("Motions in limine preserve nothing for review unless objections are made at the appropriate time during the case"); **State v.**

[14]Appellant raised the issue of the break-ins in his motion for new trial, but again, only the grounds raised in the motion to suppress (L.F.465-467)

Barnett, 980 S.W.2d 297,304-305 (Mo.banc 1998)(to be timely, objection must be made contemporaneously with the introduction of the evidence).

Also, as appellant acknowledges (App.Br.115), he did not object to Instructions 18 and 19 on the grounds raised on appeal (Tr.1356-1360). **State v. Clay**, 975 S.W.2d 121,134 (Mo. banc 1998)(to be preserved, claim raised on appeal must have been presented to the trial court). Therefore, his claims are not preserved for review, and he bears the heavy burden of establishing plain error resulting in manifest injustice. **State v. Worthington**, 8 S.W.3d 83,87 (Mo.banc 1999).

"Instructional error seldom rises to the level of plain error." **State v. Wright**, 30 S.W.3d 906,912 (Mo.App.E.D. 2000). For instructional error to be plain error, the defendant must show more than mere prejudice; he must "establish that the trial court has so misdirected or failed to instruct the jury that it is apparent to the appellate court that the instructional error affected the jury's verdict." **Wright**, 30 S.W.3d at 912; *see also* **State v. Black**, 50 S.W.3d 778,788 (Mo.banc 2001).

1.Unadjudicated Misconduct Was Admissible

"It is well-established that the purpose of having a separate penalty phase in a capital trial is to permit the presentation of a broad range of evidence that is relevant to punishment but irrelevant or inflammatory as to guilt." **State v. Ervin**, 979 S.W.2d 149,158 (Mo.banc 1998). Both the state and the defendant may introduce any evidence pertaining to the defendant's character in order to help the jury assess punishment. **Id.**,

State v. Winfield, 5 S.W.3d 505,515 (Mo.banc 1999). "[E]vidence of a defendant's prior unadjudicated criminal conduct may be heard by the jury in the punishment phase of a trial." **Id**. The argument that the state may not introduce, in penalty phase, evidence of unadjudicated bad acts, "has been repeatedly rejected by this Court." **State v. Ferguson**, 20 S.W.3d 485,500 (Mo. banc 2000). Therefore, evidence that appellant broken into Sandra Harding's home twice was admissible even though appellant had not yet been tried and convicted for his criminal conduct, and there was no plain error in allowing this evidence.

Further, there is no merit to appellant's claim that, even if the evidence is admissible, the instructions must be modified to tell the jury what weight to give the evidence. Appellant relies on **State v. Debler**, 856 S.W.2d 641 (Mo.banc 1993), for the proposition that unadjudicated crimes are different from convictions, and the jury must be instructed on that difference (App.Br. 116-118). Appellant's argument was squarely rejected in **State v. Ervin**, 979 S.W.2d at 158, in which this Court stated that it "has consistently held that the error in **Debler** was lack of notice," and therefore, there was no merit to the defendant's claim that **Debler** required the jury to be instructed on what weight to give evidence of unadjudicated criminal acts. *See also* **State v. Kreutzer**, 928 S.W.2d 854,874 (Mo.banc 1996) ("This Court made clear in **Chambers**, 891 S.W.2d at 107, that the error in **Debler** was the lack of notice"); **State v. Christeson**, 50 S.W.3d 251,269-270 (Mo.banc 2001)(same). Appellant does not and cannot possibly argue that

he did not receive notice that the state planned to argue the evidence of the break-ins since appellant filed a motion to suppress the evidence and a full hearing was conducted on the matter (*see* Point II above).

2. Non-Statutory Aggravators Need Not Be Proven Beyond a Reasonable Doubt for Jury to Find Death Warranted and Mitigators Outweighed by Aggravators

Appellant claims that he suffered a manifest injustice because Instructions 18 and 19 failed to instruct the jury that they had to make factual findings on steps 2 and 3 beyond a reasonable doubt. For appellant's argument to succeed, this Court must accept a premise which is untrue—that the jury must have found the non-statutory aggravating circumstances true beyond a reasonable doubt in order to find that death was warranted. However, the existence of one statutory aggravating circumstance is sufficient to support a death sentence. **State v. Smith**, 32 S.W.3d 532,556 (Mo.banc 2000). When the jury was considering what facts and circumstances in aggravation of punishment warranted death, it was not required to find any of the non-statutory aggravating circumstances occurred at all, let alone beyond a reasonable doubt, and still could have found that the aggravating circumstances as a whole merited death. Therefore, the jury was not required to find the existence of non-statutory aggravating circumstances beyond a reasonable doubt.

3. Determinations that Aggravating Circumstances Warrant Death and Mitigating Circumstances are Outweighed by Aggravators Not Subject to Reasonable Doubt

This Court has recognized that the only determination that must be made during penalty phase deliberations beyond a reasonable doubt is the existence of a statutory aggravating circumstance, and that a death penalty system that does not require further determinations be made beyond a reasonable doubt is constitutional. **State v. Smith**, 649 S.W.2d 417,430 (Mo. banc 1983); **State v. Bolder**, 635 S.W.2d 673,684 (Mo.banc 1982)(*citing* **Gregg v. Georgia**, 428 U.S. 153, 196-97 (1976)). This follows from the reasoning, stated in **Smith**, that the determinations of whether all of the facts and circumstances as a whole merit the imposition of death and whether mitigating circumstances outweigh aggravating circumstances are not determinations subject to proof of a fact certain, but to the evaluation of all the facts presented to the jury. **Smith**, 649 S.W.2d at 430. The nature of discretionary judgment in making this factual determination is apparent: "In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In fixing a penalty, however, there is no 'central issue' from which the jury's attention may be diverted. . . . In this sense, the jury's choice between life and death must be individualized." **California v. Ramos**, 463 U.S. 992, 1008 (1983).

Because of the qualitative, evaluative nature of the factual determinations of whether death is warranted or whether mitigators outweigh aggravators and the lack of a central issue around which such analysis must be made, there is no constitutional requirement that these determinations be made beyond a reasonable doubt. "[T]he

Constitution does not require a State to adopt specific standards for instructing the jury in consideration of aggravating and mitigating circumstances[.]" **Zant v. Stephens**, 462 U.S. 862, 890(1983). As the U.S. Supreme Court later said:

> We have rejected the notion that "a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required." . . . Equally settled is the corollary that the Constitution does not require the State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer.

Harris v. Alabama, 513 U.S. 504, 512 (1995)(internal citation omitted).

Appellant argues that the United States Supreme Court's decision in **Ring v. Arizona**, 536 U.S. 584, 1122 S.Ct. 2448 (2002), based on its reasoning in **Apprendi v. New Jersey**, 530 U.S. 466 (2000), which requires that a jury, and not a judge, find the existence of a statutory aggravating circumstance, raised the burden of proof for every step in penalty phase deliberations but the last (App.Br.119-124). However, the issue in **Ring** was limited only to whether statutory aggravating circumstances must be found by a jury instead of the judge—the Court specifically stated that it was not considering any claim regarding mitigating circumstances or whether a jury must make the ultimate determination whether or not to impose a death sentence. **Ring**, 536 U.S. at 597, 597 n. 4. The Court held that statutory aggravating circumstances "operate as 'the functional

equivalent of an element of a greater offense'" and must therefore have been found by a jury. **Id**. at 609(*quoting* **Apprendi**, 530 U.S. at 494 n. 19). The opinion stated that such a functional equivalent of an element "must be found by a jury beyond a reasonable doubt." **Ring**, 536 U.S. at 602 (*citing* **Apprendi**, 530 U.S. at 482-483).

In this case, the jury instruction and sentence complied with the specific holding of **Ring**. The jury was instructed that it had to find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt in order to sentence appellant to death, and its verdict stated that it found one such circumstance (L.F.418,424). Nothing in **Ring** or **Apprendi** requires that the determination of the aggregate effect of aggravating or mitigating circumstances, as is done in steps two and three of Missouri's sentencing scheme, be found beyond a reasonable doubt. The California Supreme Court recently considered this exact claim and held as follows:

> Nor should the jury have been instructed that the reasonable doubt standard governed its penalty determination, i.e., that to impose a sentence of death they had to be persuaded beyond a reasonable doubt that the aggravating circumstances were so substantial in comparison with the mitigating circumstances that they warranted death, and that death was the justified and appropriate sentence in view of all the evidence . . . Nothing in [Ring and Apprendi] mandates a different conclusion.

People v. Danks, 82 P.3d 1249, 8 Cal.Rptr.3d 767, 806 (Cal. 2004)(internal citations omitted).*See also* **Oken v. State**, 835 A.3d 1105, 1148-1152 (Md. 2003); **Torres v. State**, 58 P.3d 214, 215-16 (Okla.Crim.App. 2002). Therefore, **Ring** and **Apprendi** provide appellant no relief.

Appellant also argues that **State v. Whitfield**, 107 S.W.3d 253 requires that steps two and three of the sentencing scheme must be proven beyond a reasonable doubt (App.Br.112-113). In **Whitfield**, this Court did extend to those steps the protection provided by **Ring** to have a "jury rather than a judge determine the facts on which the death penalty is based." **Whitfield**, 107 S.W.3d 253,262 (Mo.banc 2003). While the opinion quotes language from **Ring** (*quoting* **Apprendi**) about the jury having to find facts increasing the authorized punishment "beyond a reasonable doubt," this language was not relied upon by this Court in its holding, nor was it necessary for either the constitutional violations in **Ring** or **Whitfield** to be remedied, as in both cases, only judges, not juries, found any of the facts necessary to impose punishment. **Ring**, 536 U.S. at 609; **Whitfield**, 107 S.W.3d at 261-262. Outside of that one quote, nowhere in the **Whitfield** opinion does it say that steps two and three must be found beyond a reasonable doubt. Even in its analysis finding that steps two and three were "facts" requiring jury determination, this Court recognized the evaluative nature of these two steps, identifying them not as "elements" or "provable facts," but as "case-by-case factual determination[s] based on all the aggravating facts the trier of fact finds . . . present in the

case" and "factual finding that are prerequisites to the trier of fact's determination" of death eligilility. **Whitfield**, 107 S.W.3d at 259, 261. Because **Whitfield** is limited to the issue of whether a judge or jury can make the required factual findings, and not to what burden is associated with those findings, **Whitfield** does not, as appellant asserts, necessarily support appellant's claim that it requires the jury to find steps two and three beyond a reasonable doubt.

The **Whitfield** opinion itself recognizes that its holding is limited only to the issue of whether judge or jury must make the determinations of whether aggravating circumstances warrant death or whether mitigating circumstances outweigh aggravating circumstances, and does not require proof of these determinations beyond a reasonable doubt. In determining the effect retroactive application of the rule created in **Whitfield** to cases on collateral review would have on the administration of justice, this Court identified only five cases which would be affected by the new rule. **Whitfield**, 107 S.W.3d at 269. Had this Court's holding in **Whitfield** been that the jury must be instructed that the determinations other than the existence of a statutory aggravating circumstances must be found beyond a reasonable doubt, the Court would have identified far more cases affected by its holding – presumably every case resulting in a death sentence. **Whitfield** should not be read as broadly as appellant claims.

Further, this Court has indicated since **Whitfield** that **Whitfield** does not require that the determinations of whether aggravating circumstances taken as a whole warrant

death and whether mitigating circumstances do not outweigh aggravating circumstances be established beyond a reasonable doubt. In October 2003, less than four months after **Whitfield**, this Court issued new jury instructions dealing with the mechanics of penalty phase deliberation. Order, In re: Revisions and withdrawals to MACH-CR and MAI-CR 3d (Mo. banc October 7, 2003); MAI-CR 3d 313.48, 313.48A, 313.48B. Under the version of the verdict mechanics instruction that would have applied to appellant's case had it been tried under the revisisions, the jury would have been instructed as it was in this case—that it was required to find the existence of at least aggravating statutory aggravating circumstance beyond a reasonable doubt, but was not required to find beyond a reasonable doubt that facts and circumstances in aggravation of punishment warranted death or that mitigating circumstances did not outweigh aggravating circumstances. MAI-CR 3d 313.48A. That this Court considered **Whitfield** in the new instructions is apparent in the changed penalty phase verdict forms, which require the jurors to answer special interrogatories when it cannot agree on punishment so that the court can determine at what stage of deliberations the jurors deadlocked. MAI-CR 3d 313.58, 313.58A, 313.58B. Based on this Court's actions in approving the new instructions, which took **Whitfield** into account, it is apparent that appellant's argument that **Whitfield** requires proof beyond a reasonable doubt of facts other than one statutory aggravating circumstance misinterprets the holding of **Whitfield**—that the jury, and not

the court, must make the determinations required by all but the last stage of penalty phase deliberations.

As this claim is being raised for the first time on appeal, appellant bears the "heavy burden" of establishing plain error resulting in manifest injustice. **Worthington**, 8 S.W.3d at 87. Appellant has not established that the submission of the instructions so misdirected or failed to instruct the jury that it is apparent to this Court that the instructional error affected the jury's verdict. **Black**, 50 S.W.3d at 788. In other words, appellant has not shown that had the jury been instructed as appellant insists was required, the jury would have sentenced him to life imprisonment without parole. Given the strength of the state's evidence in both stages of trial, the fact that appellant was given the opportunity to fully cross-examine the witnesses on the issue of the break-ins, and that the evidence in mitigation of punishment was not strong, it cannot be said that appellant suffered a miscarriage of justice from the submission of Instructions 18 and 19.

Based on the foregoing, appellant's claim must fail.

VII.

The trial court did not plainly err in excluding certain purported mitigation evidence during the penalty phase consisting of Defense Exhibits 41, 42, and 46, a letter written by appellant's grandmother, a poem and a family tree, (the latter two allegedly written and filled in by appellant) because appellant did not suffer a manifest injustice in that the exhibits were either hearsay or cumulative to other such evidence admitted at trial and appellant did not demonstrate that he suffered a manifest injustice from the exclusion of the exhibits (Responds to Appellant's Points VIII and IX).

Appellant alleges that the trial court erred in excluding Defense Exhibits 41, 42 and 46, a letter written by his grandmother, a poem allegedly written while appellant was in jail, and a family tree allegedly filled in by appellant (App.Br.127,131). Appellant argues that the letter was mitigating evidence of his character "reflected in his family's love for him . . . In particular, his grandmother's letter was evidence of the love of the person who may have known him better than anyone: his grandmother who raised him

from infancy" (App.Br.131). Appellant also asserts that the both the poem and family tree were "artistic and literary work" by him that constitute relevant evidence the jury could consider on whether "the death penalty was an appropriate punishment" (App.Br.127). Finally, appellant also claims that because the poem was written after he was confined in jail, it is "unique and crucial evidence" of his adjustment to confinement, which is "classic Skipper[15] evidence" (App.Br.127,129).

A. Relevant Facts

Appellant presented ten witnesses during the penalty phase of trial to testify about his family life and ancestry (Tr.1225-1227,1255-1257,1277,1282-1285,1298-1300,1313,1334-1344), and appellant's musical and artistic talents (Tr.1231,1233,1262-1264,1269-1270, 1285-1286,1305,1319). Specifically, appellant's sister, Tonya Gollaher, testified about appellant's artistic talents in playing the saxophone and drawing and she identified a picture appellant drew for her daughter on her birthday while he was in jail (Tr.1231,1234,Def.Ex. 28). The picture was admitted into evidence (Tr.1235,Def.Ex. 28).

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[15]**Skipper v. South Carolina**, 476 U.S. 1,4(1986), (which held that it was error for trial court to preclude testimony that the defendant made a good adjustment to prison life in the time between his arrest and trial).

Appellant's other sister, Tina Hammel, testified that "even after [appellant] got arrested he sent us letters [and] he'd always have a little picture drawn on the bottom or on the back of the envelope" (Tr.1263). Appellant's cousin also testified that since appellant was "locked up" he drew for him "various pictures" and sent letters (Tr.1319).

Hammel also stated that appellant wrote poetry and that on one occasion while he was in jail he wrote a song for her and her husband for their wedding (Tr.1263). She invited him to the wedding to make him feel "like he was a part of it" (Tr.1263). The song he wrote for her, "It's Called Love," was read out loud to the jury and admitted into evidence (Tr.1266-1267,Def.Ex.32).

Appellant's mother, uncle, aunt, and cousin testified that they loved appellant, missed him, and that they would continue to maintain contact with him if he were to receive a sentence of life in prison (Tr.1295,1307,1321,1352).

During appellant's aunt's testimony, she identified Defense Exhibit 41 as a letter from appellant's grandmother that was written in her presence (Tr.1305-1306). His aunt, Connie Patre, testified that his grandmother was not in "good enough condition" to come to court and testify (Tr.1306). Patre stated that his grandmother wrote the letter "to let [appellant] know that she was thinking about him and that she wishes she could be [there]" (Tr.1306). The state objected to the admission of the evidence on the basis of hearsay and relevancy (Tr.1306-1307). The trial court sustained the objection and defense counsel moved on without further comment on the issue (Tr.1307). Appellant

then moved to admit Defense Exhibit 46, a family tree Patre said appellant made (Tr.1311). The state objected on the basis that the exhibit was cumulative and hearsay (Tr.1311). The court sustained the objection (Tr.1312). Defense counsel asked to federalize the objection and moved on without further comment on the issue (Tr.1311-1312).

A pastor from appellant's church testified in great detail for over ten pages of transcript about appellant's religious service to the church, his musical talents, and his desire to attend bible college (Tr.1322-1333).

Appellant's mother, Sandy Glass, testified at trial and identified a poem appellant wrote while in jail and a certificate appellant won for writing the poem (Tr.1348-1349, Def.Ex.42,43). The state objected to the admission of the poem as hearsay but had no objection to the certificate (Tr.1349). Defense counsel responded that the poem was not being offered to prove the truth of the matter asserted and that "it's just simply a poem" (Tr.1349). The court admitted Defense Exhibit 43, the certificate, but sustained the state's objection to the poem (Tr.1349). The parties approached the bench and defense counsel again noted that the poem was not being offered to prove the truth of the matter asserted and that it was written while appellant was in jail (Tr.1350). The state then added relevance as an objection to the poem (Tr.1350). Defense counsel responded that the poem shows appellant's talent and that "he's doing something while he's incarcerated other than getting in trouble" (Tr.1350). The court noted and counsel acknowledged that

he had already admitted a poem into evidence (Tr.1350). The court then sustained the objection on the basis of self-serving hearsay (Tr.1350). Counsel asked to federalize the objection and moved on (Tr.1350).

B. Preservation and Standard of Review

Appellant's claims have not been properly preserved for appeal. In **State v Tisius**, 92 S.W.3d 751,767 (Mo.banc 2002), this Court found that the appellant's claims of trial court error in excluding penalty phase evidence were not preserved because he had failed to make a proper offer of proof sufficiently stating the relevance of the proffered evidence and because the reasons asserted on appeal for why the exhibits should have been admitted were not presented to the trial court. The same can be said here.

When the state sought to introduce the letter from his grandmother, he only adduced evidence that she wrote it to "let [appellant] know that she was thinking about him and that she wishes she could be [there]" (Tr.1306). However, after the state objected on the basis of hearsay and relevance and the court sustained the objection, appellant made no further argument nor adduced no further evidence on the matter (Tr.1307). Likewise, after the state objected to the family tree on the basis of relevance and that it was cumulative, appellant merely asked to "federalize" the objection and moved on (Tr.1312). Appellant did attempt to offer a theory of admissibility of relevance regarding the poem, stating that it was written while in jail and that it showed "he's doing something while he's incarcerated other than getting in trouble" (Tr.1350). However,

after the trial court sustained the objection on the basis that it was cumulative and self-serving hearsay, defense counsel merely asked to federalize his objection and did not sufficiently articulate why the fact that the poem showed he was not getting into trouble in jail would be relevant (Tr.1350). With respect to the necessity for an offer of proof, this Court noted as follows:

> Where proffered evidence is excluded, relevancy and materiality must be shown by specific facts sufficient to establish admissibility so as to preserve the matter for review. The purposes of an offer of proof are 1) to preserve the evidence so that the appellate court understands the scope and effect of the questions and proposed answers in considering whether the trial court's ruling was proper; and 2) to allow the trial judge to further consider the claim of admissibility after having ruled the evidence inadmissible

Id. at 767-768. Here, the trial court was never given the opportunity to further consider the claim of admissibility after having ruled the evidence inadmissible and with respect to the letter and family tree, the trial court was never given a theory of admissibility at all.

To the extent that the theories of admissibility offered by appellant on appeal were never presented to the trial court, and that he failed to make a proper offer of proof, his claims of error should be reviewed, at most, for the presence of manifest injustice. **Tisius**, **supra** at 768; **State v. Winfield**, 5 S.W.3d 505,515 (Mo.banc 1999); Supreme Court Rule 30.20.

To obtain relief, appellant bears the burden of showing that the alleged error will inexorably lead to manifest injustice or a miscarriage of justice if left uncorrected. **State v. Tate**, 850 S.W.2d 385,388 (Mo.App.W.D. 1993); **State v. Collis**, 849 S.W.2d 660,663 (Mo.App.W.D. 1993). A showing of mere prejudice is insufficient. **State v. Kalagian**, 833 S.W.2d 431,434 (Mo.App.E.D. 1992).

C. Analysis

"[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, **any aspect of a defendant's character or record and any of the circumstances of the offense** that the defendant proffers as a basis for a sentence less than death." **Lockett v. Ohio**, 438 U.S. 586, 604 (1978) (emphasis in italics in original, emphasis in bold supplied). However, the trial court retains broad discretion in determining whether evidence offered during the penalty phase of a capital case is admitted. **State v. Nicklasson**, 967 S.W.2d 596,619 (Mo.banc 1998).

1. The letter from appellant's grandmother was hearsay

Hearsay 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.'" **Smulls v. State**, 71 S.W.3d 138,148-149 (Mo.banc 2002), *quoting* **Rodriguez v. Suzuki Motor Corp.**, 996 S.W.2d 47,59 (Mo.banc 1999). "Stated another way, evidence is hearsay only if its evidentiary value depends on drawing an inference from the truth of the statement." **Id**.

The evidentiary value from everything in that letter, that appellant's grandmother loved and missed him and the details of his life, depend on drawing inferences from the truth of those statements.

The United States Supreme Court has held that a state's rules of evidence may sometimes be required to give way in the punishment phase of a capital trial, but only when there are "substantial reasons . . . to assume its reliability." **Green v. Georgia**, 442 U.S. 95, 97 (1979); *see also* **State v. Phillips**, 940 S.W.2d 512,517 (Mo.banc 1997). In **Green**, the Supreme Court ruled that the statement of a witness against his penal interest should have been admitted in the punishment phase, even though the State of Georgia did not recognize statements against penal interest as admissible, because there was ample corroboration of the reliability of the statement. **Id**.; *see* **Chambers v. Mississippi**, 410 U.S. 284 (1973).[16] By contrast, there is no basis to assume the reliability of appellant's grandmother's statements: it is a letter written in support of mitigation. Accordingly, the trial court did not plainly err in declining to admit this evidence.

2. No manifest injustice

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[16]The Supreme Court in **Green** considered "most important" the fact that the state had presented this very statement in the prosecution of Green's codefendant. **Id**, 442 U.S. at 97.

Regardless of the correctness of the trial court's rulings in finding that the exhibits were inadmissible hearsay, appellant's protestations that he should receive a new penalty phase trial because of the exclusion of these three exhibits take on a quality of unreality in light of the fact–unacknowledged by appellant–that evidence of his artistic talents in the form of a drawing and a love song he wrote were admitted at trial and there was testimony from seven family members detailing their love for him.

Appellant argues that the letter from his grandmother demonstrates his character "reflected in his family's love for him" and especially from the woman who raised him (App.Br.13). However, there was testimony at trial that appellant had a "good" and "close" relationship with his grandparents and there was even a photograph of his grandmother and appellant's cousin admitted at trial such that jurors could put a face to appellant's grandmother (Tr.1305,1320). Indeed, there was testimony that appellant's grandparents visited appellant in jail until their health prevented them from doing so (Tr.1293-1295).

At any rate, as noted above, virtually every aspect of the information stemming from the letter was already repeatedly testified to at trial by other family members. In the letter, appellant's grandmother stated that she and her husband raised appellant since he was a baby (Def.Ex.41). This fact was testified to by six family members (Tr.1227,1256-1257,1270-1271,1284-1285,1299-1300,1399). Appellant's grandmother stated that she loved and missed appellant (Def.Ex.41), while other family members testified the same

(Tr.1295,1307, 1321,1352). The grandmother noted that appellant's grandfather has suffered a stroke (Def.Ex.41), and this information came out at trial (Tr.1257,1294). The grandmother noted that appellant was a smart well-behaved boy who played saxophone and was in band at high school and that he watched sports on television (Def.Ex.41), and this information was repeatedly covered at trial (Tr.1231,1233,1244,1260-1263,1271,1285-1286,1300,1304-1305, 1315,1317-1318).

Given that the bulk of the information from appellant's grandmother came out at trial from other friends and family members, including members of his family that lived with or next door to him his entire life, it cannot be said that appellant suffered a manifest injustice from the exclusion of the letter.

Appellant argues that the poem and family tree demonstrate appellant's artistic and literary talents (App.Br.127), however, a drawing he made for his niece and a love song he wrote for his sister's wedding were admitted at trial (Def.Ex.28,32). To the extent that appellant argues he was prejudiced from not having his "talents" displayed for the jury, appellant's claim fails as the family tree and poem would have only been cumulative to other such testimony at trial.

Finally, appellant's claim that the poem represented "unique" evidence of his adjustment to jail must fail as well (App.Br.127,131). Appellant's sister, Tina Hammel, testified that "even after [appellant] got arrested he sent us letters [and] he'd always have a little picture drawn on the bottom or on the back of the envelope" (Tr.1263).

Appellant's cousin also testified that since appellant was "locked up" he drew for him "various pictures" and sent letters (Tr.1319). In addition, appellant's mother testified that appellant wrote a poem while in jail and that he received a certificate for writing the poem (Tr.1348-1349). The certificate showing that appellant received an "honorable mention" for literary excellence in writing the excluded poem was admitted at trial (Tr.1349,Def.Ex.43). Thus, contrary to appellant's claim, even without actually *seeing* the poem, the jury did have evidence before it, in the form of Ms. Glass' testimony and the actual certificate, to "infer and find that [appellant] would continue to be interested in and write poetry and that this would help him to continue to remain well-adjusted to prison life" (App.Br.129)[17].

Appellant's reliance on **Brown v. Luebbers**, 344 F.2d 770 (8th Cir. 2003), for the proposition that his grandmother's letter is "highly relevant to a critical issue" (App.Br.133), is questionable in light of the fact that the United States Court of Appeal

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[17]Although respondent questions whether without a proper offer of proof showing specific facts to establish the admissibility of the poem, the poem could be stretched to constitute evidence of his good behavior or adjustment in jail, considering the tone and title of the poem, "GoodBye" and which contains such angry and confrontational lines such as "who are you to judge" and "those who are the first to cast the stones are the weakest in the bones" (Def.Ex. 42).

for the Eight Circuit recently granted the state's motion for rehearing *en banc* on January 23, 2004. At any rate, the facts here are distinguishable from **Brown** in that here, as noted above, there was a wealth of mitigation evidence presented at trial providing the same details as those found in the grandmother's letter. Also, the analysis from that opinion made much of the fact that the jurors would have been impressed by the letter from the defendant's brother because he was a soldier serving in Iraq during Desert Storm and because the judge made comments about soldiers during the course of trial. No such similar circumstances occurred here.

It is not an abuse of discretion for the trial court to limit cumulative mitigation evidence. **Nicklasson**, 967 S.W.2d at 619-620; *see also* **State v. Owsley**, 959 S.W.2d 789,796 (Mo.banc 1998). Under these circumstances then, where there was an exhaustive amount of mitigation evidence put on about his family and artistic and literary talents, appellant could not possibly have suffered prejudice, let alone manifest injustice, from the exclusion of the letter, family tree and poem.

CONCLUSION

For the foregoing reasons, the judgment of the motion court should be affirmed.

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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 ___ words, excluding the cover and this certification, 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 23rd day of February, 2004, to:

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RESPONDENT'S APPENDIX

Respondent' Appendix

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