No. SC93855

In The Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

DAVID HOSIER,

Appellant.

Appeal From Cole County Circuit Court
Nineteenth Judicial Circuit
The Honorable Patricia S. Joyce, Judge

RESPONDENT'S BRIEF

CHRIS KOSTER
Attorney General

GREGORY L. BARNES
Assistant Attorney General
Missouri Bar No. 38946

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
Greg.Barnes@Ago.Mo.Gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

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STATEMENT OF FACTS

Defendant was convicted of murder in the first degree, armed criminal action, burglary in the first degree, and unlawful possession of a firearm by a felon following a jury trial in the Circuit Court of Cole County. §§565.020; 571.015; 569.160; 571.070.[1] (Tr. 1439-1441; LF 392-395). The jury recommended the death penalty for the murder conviction, and the court sentenced Defendant to death for murder, 15 years for armed criminal action, 15 years for burglary, and 7 years for being a felon in possession of a firearm. (Tr. 1672-1673, 1692-1694; LF 412, 531-534). The jury and the court specifically found two statutory aggravators: 1) Defendant had a serious assaultive conviction in that he was convicted of battery in Indiana because he beat Nancy Marshall about the face while she was handcuffed; and 2) the murder was committed while Defendant was engaged in the commission of another unlawful homicide, that of Rodney Gilpin. (Tr. 1672-1673, 1692-1693; LF 412, 531-534).

The sufficiency of the evidence to convict is at issue only with respect to the burglary count. Viewed in the light most favorable to the verdicts, the

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[1] All statutory citations are to RSMo. (2000), as amended through the 2009 Cumulative Supplement, unless otherwise indicated. The transcript will be cited as "Tr.," and the legal file as "LF."

evidence and reasonable inferences therefrom at trial established the following facts:

On September 28, 2009, Defendant shot and killed Angela Gilpin ("Victim"), a married woman with whom he had been having an affair which she had recently ended, and her husband, Rodney.

During the spring and summer of 2009, Defendant was involved in an on-again, off-again affair with Victim. (Tr. 782-783, 788-790, 802-803, 816-817). Defendant helped Victim get an apartment in a neighboring apartment building in Jefferson City. (Tr. 828). The relationship was "back and forth with a lot of drama." (Tr. 829).

Defendant rented an apartment on the top floor of 1107 West Main St., a building that is much higher and looks down on the apartment building at 1100 West High St. where the Victim rented. (Tr. 844, 847-848). There was a parking lot in between for the tenants of either building (Tr. 848). Defendant rented the apartment in the West Main building from August 2007 to September 2009; Victim rented the apartment in the W. High St. building from May 2009 through September 2009 (Tr. 844).

The relationship was ended by Victim near the end of August 2009, when she reconciled with her husband, Rodney (Tr. 781, 788-790). Victim's husband moved in with Victim during the late summer of 2009 (Tr. 783).

After the breakup, Defendant asked Geralyn Bleckler to try to get Victim and him back together because he didn't think Victim's husband was good enough for her (Tr. 788-89). Defendant made this request on several occasions (Tr. 789).

At the end of August, Defendant told Bleckler that he was in love with Victim and always would be, and that he thought he was the one that Victim needed and not her husband (Tr. 789-90). Defendant would get upset because he could not figure out why Victim was still with her husband (Tr. 790). Defendant told Bleckler that if Victim would not come back with him, he would "put a stop to it somehow." (Tr. 790). Defendant said if he couldn't have Victim, nobody was going to have Victim. (Tr. 790).

After Victim broke up with Defendant in late August, she dropped some items that Defendant had given her as little mementos just outside his apartment because she didn't have access to building (Tr. 808). Defendant brought them to Bleckler's porch with a note saying he didn't want them and to give them back to Victim (Tr. 808). Bleckler delivered them to Victim, but Victim asked her to take them back to the Defendant, and they went together to Defendant's building and set them on the outside during the first or second week of September 2009 (Tr. 809).

On September 27, 2009, Bleckler returned home from watching a football game with the Victims at the Victims' apartment and there were several voice

mails from Defendant asking whether she had had time to talk to Victim about her husband and informing Bleckler that he knew she had been over there because he had seen her (Tr. 791). Defendant then called Bleckler and told her that he knew she wasn't going to try to get him back together with Victim again (Tr. 792). Defendant also knew that Victim's husband had been there and was angry that Bleckler hadn't gotten Victim away from her husband. Exhibit 10. Bleckler told Defendant that he needed to leave Victim alone, that she was going to be with her husband, and that there was no sense in pursuing the situation because Victim didn't want to have anything to do with him (Tr. 792).

After that conversation, Defendant continued to call Bleckler, but she did not answer the calls and allowed them to go to voice mail (Tr. 792). Bleckler did not retrieve those messages until the next morning, when Detective Miles came to her apartment and informed her that Victim had been murdered and that another man had been murdered (Tr. 792-793). Victim told Detective Miles the man was probably Rodney Gilpin, and subsequently identified Rodney from a photograph (Tr. 792-793). Voice mails left by Defendant at 1:56 PM and 8:03 PM on September 27, 2009 were played for the jury (Tr. 798-802). The 1:56 voice mail expressed frustration that Bleckler did not get Victim away from her husband to talk to her on his behalf. Ex. 9-10. The 8:03 voice mail said:

> Yeah, you know, I have yet to meet a woman that could do what a man ask her to do without comin up with fifty reasons why it didn't

work or why it won't work, I should say, or why they couldn't do it or whatever else. I've asked you, I don't know how many times, to talk with that bitch to tell her to knock her shit off and talk to me tell me what the fuck's going on and she's come up with excuses. I told you to get that fuckin asshole away from her and talk to her when you can't do it, you've not asked her, you've not tried. Well, you know what I'm tired of the shit. I told you to tell her to get her fuckin ass out of my sight for good. Get the fuck away from here. Move back with fuckin Rodney. Get out of that god damn apartment. You didn't tell her that. I'm gonna fuckin finish it. I'm tired of the shit. You don't believe me. I'm tired of the shit.

Exs. 11-12.

During the month prior to the murders, Defendant discussed his relationship with Victim with longtime friend, Steven Armstrong, and told him that Victim was upset and wanted to break up with him and was going back to her husband (Tr. 781). Defendant was upset and called Armstrong two weeks before the murders because he had received an eviction notice from his apartment and a restraining order (Tr. 781-782).

Both Victim and Defendant rented from the same landlord, in neighboring buildings (Tr. 843-848, 866). The landlord was aware in March or April 2009 that Victim and Defendant were having a relationship, and that Victim was

staying at Defendant's apartment (Tr. 866). Very soon thereafter, Defendant made arrangements to get Victim an apartment in the High Street building (Tr. 866). Defendant told landlord during the late summer of 2009 that he had keys to Victim's apartment and that Victim had given them to him (Tr. 868). Defendant told landlord that on one occasion when Victim had threatened to kill herself, to save time, he had gone through the storage room to which he had access because he did odd jobs for the landlord, and obtained the master keys (Tr. 869). However, landlord believed that after he took Defendant off the code list for the storage room, that code was erased, and Defendant couldn't get into the storage room any longer (Tr. 869-870). Defendant did get into the storage room on one occasion after that when he did some work on a little house next to the apartment building (Tr. 870). However, the keys to the key cabinet are not there, so landlord believed that Defendant didn't have access to the key cabinet. (Tr. 870). Landlord let Defendant into the storage room during that time (Tr. 870).

During the time period of the breakup, Victim called her landlord and left a message that Defendant had entered her apartment without her permission and that she was changing the deadbolt on her door (Tr. 852-853). After the complaint, the landlord asked Defendant for the keys to her apartment and informed Defendant that he did not have permission to enter the building at 1100 West High St. where the Victim's apartment was located (Tr. 854-855).

On September 21, 2009, the landlord read a letter he had received from Victim indicating that she feared Defendant and had filed for a restraining order in court, and asking whether he had other properties for rent so that she could move (Tr. 856-857).[2] On that same day, landlord learned from Jodene Scott that she believed Defendant had a felony conviction in Indiana (Tr. 858). Landlord checked out the felony conviction and then attempted to contact Defendant, but he was not home that day (Tr. 858-859). After talking to Ms. Scott, while attempting to make contact with Defendant at his apartment, landlord was working on a defective entry door lock when a sheriff's deputy came and said he was there to serve papers on Defendant (Tr. 864-865). Landlord informed the deputy that to his knowledge, Defendant was out of the state (Tr. 865).

On September 22, 2009, landlord contacted Defendant by phone; Defendant told landlord he was driving back from Indiana (Tr. 859). Landlord told Defendant that Victim had asked him to move out, but that he had learned

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[2] Victim's note to the landlord stated in part: "I am writing you to inquire as to [whether] you may have any other apartment rentals anywhere else in town. I can no longer live next door to Dave Hosier. I have gone to the Court House and [filed] for a restraining order.… I'm sorry for all the B.S. Believe me, he scares me. I don't know what he will do next." (Tr. 1403; Ex. 199A).

of Defendant's past conviction and given the circumstances, he thought Defendant should move out by the end of the month (Tr. 860).

The landlord replied to Victim, saying that he had asked Defendant to be out of his apartment by the end of the month and would like her to consider staying, and slipped that note under Victim's apartment door on September 22, 2009 (Tr. 857-858).

On September 23, 2009, Defendant met was police and claimed that Victim would frequently drive drunk; Defendant provided police with detailed information he kept in a notebook about Victim's habits, her vehicle information, her license information, and the various times that she went to work or left the Budweiser Inn (Tr. 881-885, 889-890, 891-894). Defendant also claimed that Rodney Gilpin sometimes drove while intoxicated and provided information about his vehicle license plate number as well (Tr. 895). A trooper who investigated the complaint advised his sergeant that it was unfounded (Tr. 884). On September 25, 2009, Defendant told landlord that if Victim was going to be moving out, he didn't know why he couldn't remain there, but landlord told Defendant his mind was made up and that he would have to move and asked him why he had not told him about his background when he initially leased from him (Tr. 860-861). Defendant did not say or acknowledge that he would be out of his apartment by the end of the month as requested (Tr. 861).

Jodene Scott met Defendant and Victim in April 2009 when she looked at an apartment in the same building as Defendant (Tr. 816). Scott subsequently lived in the same apartment building as Defendant (Tr. 815). Scott went to garage sales and out to eat with Defendant (Tr. 815-816). Scott knew the Defendant and Victim were having an affair (Tr. 816-817). Scott worked a second job at the Bee Line convenience store in Wardsville, and knew that Victim always opened that store at 3:30 or 4 o'clock in the morning (Tr. 818). In early September 2009, Defendant told Scott that he and Victim were having a lot of problems and that Victim was trying to get back with her husband, which Scott knew to be true (Tr. 817). Defendant expressed that he was upset with that on more than one occasion (Tr. 817).

On September 15, 2009, Victim filed a verified "Adult Abuse/Stalking Petition for Order of Protection," against Defendant, citing constant stalking, false reports made by Defendant to JCPD, and violent behavior by Defendant in previous marriages. Ex. 200 at 2. Victim said under oath that Defendant and she were "ex-lovers," that "he knows everywhere i go, who i go with, who comes to my home and is harassing me calling JCPD for no reason[.]" [sic] Ex. 200 at 1. A copy of this document was found in Victim's purse when her body was found. Testimony described these documents as an application for an *ex parte* order of protection. (Tr. 955, 987-989).

Included within the exhibit was information Victim had provided on a form, apparently for purposes of obtaining service, describing Defendant as having a criminal record as having a prior criminal record and "lots of firearms in his [apartment]." Ex. 200 at 5.

In addition, the documents included an "Adult Abuse/Stalking Notice of Hearing on Full Order of Protection" with a hearing date of September 24, 2009 set by the court on September 15, 2009. Ex. 200 at 6.

Within the exhibit was a typewritten piece of paper folded together with the court papers in Victim's purse and admitted into evidence (but not read or passed to the jury) which listed malicious acts of vandalism against Victim and her family's property, a statement that "Now I'm really scared, for he has been evicted from his apartment," and the fact that Defendant had "a lot of guns" and that "I think he just might shoot me or my husband, or both." Ex. 200 at 9. The week prior to the murders, Defendant had stopped by Scott's workplace, stating that he was upset that Victim wouldn't talk to him or take any of his phone calls, that he "was really tired of being blamed for shit," and said three times that he "was going to fuck her over since she fucked him over." (Tr. 823-826, 1053).

Scott received a call from Defendant on September 27, 2009, at 9:49 PM (Tr. 818-820). Defendant wanted to come up to her apartment to give her something, but Scott told Defendant not to because she had just gotten home

from work and was tired and had to get up the next morning go to her regular job (Tr. 821). Defendant then said he was going to leave something on her car, including keys and instructions to take care of his stuff if something occurred or anything happened to him (Tr. 821, 1049-1050). Defendant said during the phone call that he was going to eliminate his problems. (Tr. 823).

Victim's store manager testified that she was aware that Victim had obtained a conceal and carry permit for a firearm during the spring of 2009 and was concerned with Victim's safety based on their discussions due to troubles with the Defendant rather than with the store (Tr. 878-879).

Jennifer Stubbs, who lived across from Victim in the same building, returned from out of town during the early morning hours of September 28, 2009 and saw bodies lying on the floor at approximately 3:30 AM (Tr. 762-763). She called 911 (Tr. 764). The light in the common area of the building was left on at all times (Tr. 764-765).

Another neighbor heard pops that sounded like gunfire between 3:15 and 3:20 AM (Tr. 767). A third neighbor awoke to the sound of gunshots, heard somebody walk out the back door,[3] down the stairs, and on the rocks below his

[3] A photograph and diagram of the buildings admitted into evidence demonstrates that the back door to Victim's building leads towards the direction

open window; this neighbor got up and looked out his window at what he estimated was approximately 3:30 AM (Tr. 771-772).

Sgt. Gary Campbell of the Jefferson City Police Department received a dispatch about a deceased person at 1100 West High St., and obtained a key from Jennifer Stubbs to get into the apartment complex within two minutes of her 911 call (Tr. 940-941). Police found Victim lying at the threshold of her apartment, partially in the open foyer, with numerous spent shell casings around the body, and found her husband lying within the apartment (Tr. 941-942, 946, 949). The shell casings were 9 mm and were present both in the foyer area and within the apartment itself (Tr. 943-944, 1041-1042). Both Victim and her husband were dead (Tr. 942).

Police also found four bullet holes in the wall of the apartment and observed that some rounds that penetrated the door also penetrated the wall (Tr. 950). Some of the bullet holes were not round holes, which is very unusual (Tr. 965). Detective Lee Tubbesing testified that he had seen those types of bullet holes before in both his military and police experience, and that the projectiles were tumbling at the time they penetrated, rather than penetrating in a nose-on fashion. (Tr. 967-968).

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of Defendant's building and that the parking lot of Victim's building was outside the back door and visible from Defendant's apartment. State's Exhibits 3 & 4.

Victim was wearing a Bee Line shirt with the Bee Line logo on it; a Bee Line snack shop coffee cup, handle of which appeared to have a bullet hole in it, was found in the hallway (Tr. 963, 971). The cup contained almost a full cup of coffee (Tr. 973).

Victim had gunshot wounds in the lower back, in the upper chest area, and to the back of the head (Tr. 975-976). Victim had an Application for an Adult Abuse/Stalking Order of Protection against Defendant in her purse, along with service information noting that Defendant had a prior criminal record and a lot of guns (Tr. 980, 987-988; Exs. 57, 200). Victim also had a typewritten document folded with the court documents stating that she was even more afraid now that Defendant had been evicted from his apartment and that she was afraid that Defendant would shoot her, her husband or both. Ex. 200.

Dennis Prenger, who was both Defendant's and Victim's landlord, received a call from the Police Department at 4:25 AM on September 28, 2009, and went to the scene (Tr. 861). Prenger told police that Victim was the tenant in Apartment 2 at 1100 W. High, that she had had problems with Defendant, and gave police a copy of the letter Victim had given him (Tr. 862). Prenger also gave police a copy of the national criminal check that he ran on Defendant after being notified by Scott that she believed he had a criminal record (Tr. 862). Prenger was familiar with Defendant's vehicle, and with the fact that Defendant

generally parked up the street on West Main; Prenger noticed and told police that Defendant's vehicle was gone (Tr. 863-864).

At the request of police, Prenger showed them to Defendant's apartment on W. Main St. and, after they had obtained a search warrant, police went in (Tr. 864).

Steven Armstrong, who had known Defendant for 25 to 30 years and had helped him move back to Jefferson City from Indiana, knew that Defendant had brought back several weapons with him and had had discussions with Defendant about his relationship with the Victim in the month prior to the murders (Tr. 777, 780-781). When Armstrong heard on the early morning news on September 28, 2009, that there been a double homicide and thought the address sounded familiar, he drove to the area where the police had barricaded off the streets, and recognized it as the apartment area that the Defendant had lived in (Tr. 777, 779). Armstrong told a police officer that Defendant could be heavily armed and that there were several weapons that Defendant had in his apartment (Tr. 780).

Police used information from Armstrong, Prenger, and others to obtain a search warrant for Defendant's apartment (Tr. 1019). Police knocked on the door and announced their presence, but received no answer (Tr. 1018-20). They used a key provided by Prenger to open the door (Tr. 1020).

Immediately inside the door, Defendant had a gun safe (Tr. 1020). Inside the gun safe, police found a partial box of 9 mm ammunition (Tr. 1021). On top of the safe, police found an empty carton or box for fifty 9-mm shells (Tr. 1021, 1026). Police found a wooden chest sitting on the floor with a TV on top of it that was used for the storage of long guns, rifles or shotguns (Tr. 1021).

Inside the case was a schematic for a STEN gun, "basically a blueprint on how to make a submachine gun." (Tr. 1021). ATF agents arrived to help process the search warrant, and pointed out that the schematic or template to the STEN gun could be used to manufacture a weapon that would fire 9 mm ammunition (Tr. 1022-1023). The STEN MK II submachine gun receiver template wrapped around the metal to show the areas that could be used to manufacture a weapon out of that tube. (Tr. 1028). Half of the ammunition inside the 9 mm box was spent and half was live (Tr. 1029). The bag of spent ammunition was in the common living area of the apartment. (Tr. 1038).

Numerous other weapons, weapon parts including speed loaders (which enable the rapid switching of ammunition in an out of a weapon), and other calibers of ammunition were found at the apartment. (Tr. 1021-1022, 1024-1025, 1027, 1030-1032, 1037-1039). Two empty packages for a speed loader were found right on top of the trash in the kitchen trash can (Tr. 1021-1022, 1030-1031).

After talking with Jodene Scott, police retrieved an envelope left on the windshield of her car (Tr. 956-958). The envelope contained keys to a self-

storage locker in Holts Summit leased by Defendant and instructions to call his sister if anything happened to him. (Tr. 959).

Along with a search warrant for Defendant's apartment, police obtained an order allowing them to "ping" and track Defendant's cell phone. (Tr. 1019). After receiving information from the cell phone tracking at approximately 9:45 AM, police notified the Oklahoma Highway Patrol of the area of his last known location (Tr. 899, 927).

Troopers in Oklahoma spotted Defendant's vehicle, but Defendant refused to pull over; police from multiple Oklahoma jurisdictions were forced to engage in a pursuit down multiple highways in Oklahoma, during which Defendant evaded a roadblock and was stopped successfully only after a second ramming maneuver (Tr. 899-901, 919-923).

Upon being stopped between 10:30 and 11:00 AM, Defendant was instructed to go to the ground at gunpoint, but refused to comply with multiple commands (Tr. 923-924, 927). Defendant said something to the effect of "shoot me, and get it over with" or "end it" numerous times. (Tr. 924). Police were extra cautious because they had received information that Defendant may be heavily armed (Tr. 925). One officer eventually took Defendant to the ground, but Defendant continued to say, "just shoot me" while he was on the ground multiple times (Tr. 925, 934).

Detective Edwards and Detective Miles of the Jefferson City Police Department flew to Tahlequah, Oklahoma; police in Oklahoma obtained a search warrant for Defendant's car and personal items. (Tr. 1054-1055).

The butt of a gun (later determined to be the murder weapon) was found next to the passenger door in the front seat of Defendant's car (Tr. 929). This weapon was later determined to be a STEN submachine gun, which fired 9 mm shells (Tr. 1066, 1068, 1075-1077, 1150). The weapon was jammed in between the passenger door and the bottom of the floorboard, with a magazine next to or underneath it (Tr. 1069). A magazine that went to the STEN submachine gun was the only one that was out of any type of bag in the car (Tr. 1068). Police found 12 other magazines to this STEN submachine gun in a duffel bag found in the front passenger compartment, all of which were fully loaded. (Tr. 1076-1077). Each magazine held 30 rounds. (Tr. 1077).

Police found 15 guns, numerous forms of ammunition, a bulletproof vest or body armor, a crowbar or pry bar, latex gloves, a homemade police baton, two speed loaders, and a knife inside the vehicle (Tr. 1056, 1064-1065, 1066-1077, 1083-1089, 1091-1094, 1096-1103, 1108). All of the weapons inside the vehicle were loaded except for the STEN submachine gun (Tr. 1067).

A note found in the front passenger seat of Defendant's vehicle said:

> If you're going with[][4] someone, do not lie to them, do not play games with them, do not fuck them over by telling other people things that are not true, do not blame them for things that they have not done. Be honest with them and tell them if there is something wrong. If you do not, this could happen to you. People do not like being fucked with, and after so much shit they can go off the deep end. Had to [sic] much shit!

(Tr. 1081-1082; Ex. 104).

Inside Defendant's car, police also found a yellow notepad with information describing the license plate and a brief description of the Victim's truck (Tr. 1105-1106).

Shortly after being arrested, Defendant told Robert Sanford, a fellow inmate of a correctional facility in Leavenworth, Kansas, that an ex-girlfriend had been murdered after they had broken up and she had been involved with somebody else; Defendant expressed agitation about the breakup and her involvement with the other person (Tr. 1155-1157, 1158). Defendant said he would solve the problem and admitted to feeling he was able to kill somebody

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[4] The note was read into the record with "without" substituted for "with" and a "[sic]" notation; however, the photographic exhibit of the note makes it plain that "with" was the word used (i.e., "If you're going with some one….") Ex. 104.

over it (Tr. 1159). Defendant also said he would possibly be physical towards the person she was involved with (Tr. 1158-1159). Defendant didn't admit that he killed anyone, but did make the statements that he was done wrong by his girlfriend and that he was capable of killing somebody. (Tr. 1160).

Defendant told Sanford that there was a way to make a gun from a semiautomatic to a fully automatic; the magazine would then come out of the side of the gun instead of the bottom (Tr. 1157-1158). Sanford testified that he thought the gun referenced had a German name, perhaps STEN Mark (Tr. 1157-1158, 1176).[5]

The magazines to Defendant's STEN submachine gun fit into the side, as Sanford described. (Tr. 1113-1116).

Police obtained a search warrant for Defendant's storage unit in Holts Summit (Tr. 1110). Inside, they found magazines that appeared to be compatible with the STEN gun (Tr. 1113-1117, 1123-1124). Some of them had ammunition (Tr. 1124). They also found gun parts that may have been STEN or some other

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[5] Sanford received no reduction in his federal sentence as the result of making the statements he testified about and no one had promised him anything in the future for testifying or making those statements, although his attorneys had told him prior to sentencing that the federal government might take that into consideration (Tr. 1166-1169, 1175).

type (Tr. 1119). In addition, police found ammunition, ammunition cans, and various personal effects of Defendant's (Tr. 1111).

Evan Garrison, a criminalist supervisor in the firearm and toolmark section of the Missouri State Highway Patrol crime laboratory, whose primary function is to examine and compare firearms and expended ammunition to ascertain if they were fired in or from a particular firearm, testified that he was asked to test a 9 mm STEN submachine gun and expended shell casings and bullets in this case (Tr. 1181-1186). Garrison testified that the gun was designed to hold 32 rounds per magazine, but that this particular magazine would hold 33 due to a worn-out spring or its age. (Tr. 1188-1189).

Twenty-one live rounds were found in the magazine (Tr. 1189). When set in fully automatic mode, the weapon will continue firing after a single squeeze of the trigger until the magazine is empty or until a person quit squeezing the trigger (unless there is a malfunction). (Tr. 1190-1191).

All nine of the shell casings Garrison initially received from the crime scene had agreements of class characteristics to his six test standards, which demonstrated that it was possible that they were fired in that particular firearm (Tr. 1204-1205). Due to the lack of individual characteristics as the result of the unusually smooth bore, he could not say that they were fired within that particular firearm conclusively (Tr. 1204-1205, 1221-1223).

However, there were sufficient individual characteristics to confirm that four of the cartridge cases were extracted from that particular submachine gun due to extractor marks left on the cases (Tr. 1208-1209). In addition, there were sufficient ejector marks left on five of the cartridge cases to scientifically confirm that they had been ejected from that particular STEN machine gun (Tr. 1210-1211).

A tenth cartridge case later submitted by the Police Department also contained sufficient individual characteristics to confirm that it had been ejected from that particular submachine gun (Tr. 1211-1212).

Forensic analysis of class and individual characteristics indicated that three of the expended bullets could have been fired from this particular submachine gun though there were insufficient characteristics to rise to the level of a reasonable degree of scientific certainty (Tr. 1214-1215). Two other bullets also demonstrated sufficient agreement of class characteristics to indicate that they could have been fired from this particular submachine gun (Tr. 1215-1216). In addition, a bullet that came out of the body of Rodney Gilpin had sufficient agreement of class characteristics to indicate that it could have been fired in that particular submachine gun (Tr. 1217-1218).

A cross comparison between tests found that all of them could have been fired from the same gun, although there were not sufficient individual characteristics to rise to a true identification between tests (Tr. 1218-1219).

The primary factor preventing a more definitive conclusion was that the bore of the submachine gun was extremely smooth where there should be lands and grooves, and was very shallow (Tr. 1219, 1221-1222). A casting of the barrel indicated that the lands and grooves were worn-out or altered; Garrison could not say which. (Tr. 1220). Garrison found residual vestiges of what at one time were probably lands and grooves but the bore was very, very smooth compared to what he would expect to find in the bore of a rifle (Tr. 1222-1223).

Garrison demonstrated that an evidence marker at the scene showed a bullet impact where the bullet hit sideways as opposed to nose first, which created the need to find out what kind of gun barrel would cause a bullet to tumble (Tr. 1291-1292). Given how worn the lands and grooves were, Garrison testified that it would not surprise him "one bit" that the barrel that he examined on the STEN machine gun would cause a bullet to tumble out because it doesn't have the spin imparted to it by adequate lands and grooves that a normal projectile would (Tr. 1220, 1292).

Special Agent Charles Tomlin of the Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") assisted the Jefferson City Police Department in serving a search warrant at Defendant's residence (Tr. 1302-1303). Special Agent Tomlin testified that he found a receiver template for a STEN Mark II 9-millimeter submachine gun in Defendant's apartment, and that he had experience with a STEN submachine gun (Tr. 1303). The STEN MK II

submachine gun receiver template located in Defendant's apartment was copyrighted in 1984 (Tr. 1306).

Tomlin testified that citizens can buy a parts kit on the internet and at gun shows, and could use the template to assemble the parts kit within a pipe after making cuts out of the metal, and thereby manufacture a firearm (Tr. 1304). However, a person would not be able to make an operable weapon without the additional template if they purchased only the parts kit (Tr. 1304-1305). While the parts kit is legal to own, it would not be legal to put the receiver onto the parts kit because under federal law, once assembled, it becomes an actual firearm and would be required to have a serial number (Tr. 1307).

Special Agent Tomlin accompanied Jefferson City detectives during execution of the search warrant at Defendant's storage shed and noticed two butt stocks for a STEN gun and three other parts that were STEN receiver parts for a separate machine gun (Tr. 1308).

Special Agent Tomlin testified that he had received a certified copy of Defendant's prior felony record that included a 1993 felony in Indiana (Tr. 1309-1310).

Dr. Carl Stacy, a forensic pathologist employed by the University of Missouri, who is also the chief medical Examiner for Boone County, performed the autopsy of the Victim on September 29, 2009 (Tr. 1317-1320, 1324).

Victim suffered four gunshot wounds to the torso and two gunshot wounds to the head (Tr. 1325). The entrance wounds of the bullets were in the front of the body and the exit wounds were on the back (Tr. 1337). One gunshot wound went into the right side of the heart (Tr. 1337). At least four bullet wounds went into the liver (Tr. 1337-1338). Victim's liver and aorta had multiple lacerations, Victim's liver was "pulpif[i]ed," Victim's spine, left kidney and spleen, as well as surrounding structures, were perforated, and Victim's kidney was pale due to massive blood loss (Tr. 1337-1338).

In addition, a gunshot wound fractured and perforated Victim's right skull (Tr. 1338-1339). Victim had a "large skull fracture" (Tr. 1351-1352). One of Victim's head wounds was just above the ear canal and the other was near the back of the head behind the ear (Tr. 1351).

Victim died as the result of gunshot wounds to the head and torso (Tr. 1339).[6]

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[6] As Victim's clothing was removed, a projectile was recovered that had been in the clothing (Tr. 1324). The 21 remaining live rounds found in the murder weapon when seized, along with the 10 rounds submitted for examination at the crime lab, and this final round found in Victim's clothing are consistent with the normal 32-round capacity of the STEN submachine gun previously noted.

Rodney Gilpin died as a result of three gunshot wounds to the chest; he also had a gunshot wound to the left elbow. (Tr. 1340).

During Defendant's closing argument, defense counsel stated, "[Defendant] was distraught. You can tell that by the notes." (Tr. 1431).

The jury found Defendant guilty of first-degree murder, armed criminal action, first-degree burglary, and unlawful possession of a firearm by a felon (Tr. 1439-1441).

During the penalty phase, one of Defendant's ex-wives testified that he had lost his job as a fireman with Jefferson City in 1986 and had assaulted her with their two young children present (Tr. 1464-1466). The ex-wife testified that Defendant "was really enjoying it." (Tr. 1467). The ex-wife suffered bruises from the assault and went to the doctor; in addition, she obtained an order of protection from the Defendant. (Tr. 1467). Defendant violated the order of protection, and the ex-wife eventually left the state with her children because of her fear of Defendant (Tr. 1467-1468). Defendant had threatened to move the children out of the country and the statements he had made to her about the children gave her great concern for their safety (Tr. 1469-1470). The children were crying and were very, very afraid (Tr. 1470).

In September 2009, the same month as the murders, Defendant made attempts to contact the ex-wife, which she believed were designed to frighten

her. (Tr. 1470-1471). Defendant left an angry voice message on her machine on September 25, 2009 (the Friday before the murders). (Tr. 1471).

Former Cole County Deputy Sheriff Richard Lee testified that in 1986, while serving as a Cole County Prosecutor's investigator, he had called the Sheriff's Department because of concern that Defendant was a potential threat to Sheriff's Department personnel who were trying to serve civil process upon him (Tr. 1485-1487). Defendant had come into his office to talk about an issue relating to the attempted service by the Sheriff's Department (Tr. 1485-1486). An order had been issued for a 96-hour commitment for a mental evaluation of the Defendant; Lee and Deputy Les Jobe were eventually assigned to serve it (Tr. 1487-1488). Law enforcement believed that Defendant had weapons and children in his home, and were so fearful for the neighbors in the area around his home, that they blocked the streets off, and positioned officers around Defendant's home (Tr. 1488-1489). Police were forced to negotiate with Defendant from a house across the street for approximately four hours (Tr. 1489). It was apparent that Defendant was not going to allow civil process to be served if that was possible, and officers believed it was a potential hostage situation (Tr. 1488-1489, 1494, 1498-1499).

Deputy Jobe testified that when police asked Defendant to come out, he refused to do so until police cars left, and when the deputy explained to him that they were not going to leave, Defendant said that, "We were then in a standoff."

(Tr. 1510). When Defendant was asked if he intended to hurt anybody, Defendant responded that he was "prepared to do whatever he needed to do just like I was." (Tr. 1510-1511). When asked if he intended to hurt himself, Defendant responded no, he valued his own life. (Tr. 1511).

Once Defendant eventually came out of his house, as the deputy and the investigator approached, Defendant still seemed "arrogant, demanding, wanting to maintain control the situation." (Tr. 1511). When told that he needed to come with them, Defendant started walking slowly backwards, and Defendant resisted when they took him into custody by struggling and trying to break free (Tr. 1511-1513).

Former Jefferson City police officer Chester Brown testified for the defense that more than 30 guns were seized from Defendant's house after the standoff ended, and that many of the guns were loaded, but not all. (Tr. 1585-1586). Defendant had been known to make threats to kill law enforcement officers at that time and was known to be armed. (Tr. 1587-1588).

Nancy Marshall, a former girlfriend of Defendant in Indiana, testified that in the summer of 1992, she told Defendant that he needed to move out of her house, and that she obtained an order of protection against him (Tr. 1515). She later rescinded the order and let him stay, but on November 21, 1992, Defendant grabbed her, took her to the basement, handcuffed her and started beating her until she lost consciousness (Tr. 1516). Marshall was taken to the hospital with

a concussion and bruises on her face (Tr. 1517-1518). Defendant was convicted of assault and sentenced to eight years in prison as the result of this domestic assault. (Tr. 1518).

Detective Rick Canfield testified that he was called out to a criminal confinement, battery, and hostage situation involving Defendant where Nancy Marshall was the victim (Tr. 1520-1523). Although he had known Nancy before that, he was not able to recognize her with the injuries that she had after the assault (Tr. 1522). Nancy got out of the house only through negotiations with Defendant by the Sheriff and other officers (Tr. 1522).

After Nancy was out of the house, Defendant threatened law enforcement by saying there had better not be any confrontation or there might be a war (Tr. 1523). Defendant eluded the officers in the area trying to keep an eye on the residence and escaped the house (Tr. 1523).

Defendant later called from an adjoining county and claimed the incident was Nancy's fault because he had heard her laughing at him in a phone conversation with another lady that he had surreptitiously recorded on Nancy's phone (Tr. 1524-1525). Defendant told police in Indiana that he had five or six firearms on him or with him and said that if anyone to started to mess with him, there would be war (Tr. 1525-1526). Defendant engaged in several such phone calls to law enforcement over a period of hours, tried to make conditions for his

surrender, and did not show up at an agreed meeting for his surrender until 30-45 minutes after the agreed time (Tr. 1527-1528).

After waiving his *Miranda* rights, Defendant admitted to battering Nancy by striking her in the face, and that he confined her in the residence so that she could not leave (Tr. 1529-1530). Defendant admitted to having firearms in the residence when the confinement and battery occurred, and admitted to sitting Nancy on the toilet and striking her while she was on the toilet (Tr. 1530). Defendant said he didn't know how Nancy got the handcuffs on her, but that he had handcuffs, and that if Nancy said that he put them on her, then that must have been what happened (Tr. 5030-1531).

Ron Browning, who had been acquainted with Defendant since 1999, testified that Defendant threatened another ex-wife; Defendant said that he thought about taking her life while he lived at their property in Indiana (Tr. 1535-1537).[7] Defendant was very confrontational with the local police (Tr. 1537).

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[7] Browning's ex-wife, Lisa, who testified for the defense, confirmed that Defendant had threatened his ex-wife with bodily harm during their divorce and had remarked that he would kill her (Tr. 1622). When Lisa learned of the double murders in Jefferson City, she moved to a place of greater safety because nobody knew where Defendant was or whether he was headed back to Indiana (Tr. 1623).

When the Brownings asked Defendant to move out, Defendant cursed, then pulled a semi-automatic gun from his car and aimed it directly at Browning (Tr. 1539). Fortunately, Browning had anticipated that Defendant might do such a thing and had his wife hold a gun on Defendant from the house during their discussion, which resulted in Defendant putting his gun down and leaving (Tr. 1538-1540).

Shortly before the homicides in 2009, Defendant showed up in Rochester, Indiana, where Browning observed that Defendant hadn't shaved in a week and had "agitated energy bouncing off of him" (Tr. 1551-1552). Because Defendant was agitated about what was going on in Missouri, Browning asked Defendant why he didn't just stay, and offered to call someone in Montana to hook him up with a place to live and a job as a short order cook with his adopted brother saying; Browning told Defendant, "Don't go back. There's nothing worth it." (Tr. 1552, 1573). When Browning turned around, Defendant was gone (Tr. 1552). Victim's mother and two sons also testified concerning the loss they and Victim's new grandson had experienced (Tr. 1574-1579).

Pastor David Avery, who testified for the defense, admitted that Defendant did not request forgiveness for any of his actions and did not verbally express any remorse or regret for them (Tr. 1594).

The jury unanimously found two statutory aggravators: 1) that Defendant had a serious assaultive conviction in that he was convicted of battery in 1993 in Cass County, Indiana, because he beat Nancy Marshall about the face while she was handcuffed; and 2) that the murder was committed while Defendant was engaged in the commission of another unlawful homicide, that of Rodney Gilpin. (Tr. 1672-1673). The jury recommended a sentence of death for first-degree murder (Tr. 1672-1673).

At the sentencing hearing, the court observed that it agreed with the jury's finding and found beyond a reasonable doubt that Defendant had a serious assaultive conviction and that the murder was committed while Defendant was engaged in the commission of another unlawful homicide (Tr. 1692-1693). The court found, as did the jury, that the facts and circumstances in mitigation of punishment were not sufficient to outweigh the facts and circumstances in aggravation of punishment (Tr. 1692-1693).

The court sentenced Defendant to death for first-degree murder, 15 years in prison for armed criminal action, 15 years in prison for burglary, and seven years in prison for unlawful possession of a firearm by a felon (Tr. 1693-1695).

ARGUMENT

I.

The trial court did not plainly err by overruling Defendant's motion to suppress and admitting items seized from his car because Defendant had no reasonable expectation of privacy in the signals emitted by a cell phone he voluntarily purchased, possessed, and chose to travel with to a third party he voluntarily contracted with, while traveling on public thoroughfares.

Defendant contends that the trial court erred by admitting evidence seized from his car on the grounds that authorities would never have found his car had it not been for a "ping" order authorized by a Missouri court order, which he contends was supported by a deficient affidavit that did not rise to the level of probable cause. Defendant argues that the Fourth Amendment was violated but does not contend that the statutory criteria for a Stored Communications Act ("SCA") order were absent.

A. The alleged error was not raised in the motion to suppress.

Defendant failed to properly preserve the alleged error because his motion to suppress physical evidence did not mention the "ping" order. (LF 138-142). Nor does Defendant seek plain error review under Rule 30.20.

"'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as

well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States v. Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)). Failure to object at the earliest opportunity to the admission of evidence constitutes a waiver of the claim. *State v. Borden*, 605 S.W.2d 88, 90 (Mo. banc 1980). The underlying policies requiring contemporaneous objection run contrary to Defendant's present claim of error. *Id*. A timely objection to putative error affords the trial court an opportunity to invoke remedial measures rather than relegating appellate courts to the imprecise calculus of determining whether prejudice resulted. *Id*. Moreover, requiring a timely objection minimizes the incentive for "sandbagging," an improper tactic sometimes employed to build in error for exploitation on appeal should an unfavorable verdict obtain. *Id*. Under these circumstances, it is settled that an appellant will not be heard to complain of such error. *Id*.

> Plain error review is used sparingly and is limited to those cases where there is a clear demonstration of manifest injustice or miscarriage of justice. Claims of plain error are reviewed under a two-prong standard. In the first prong, we determine whether there is, indeed, plain error, which is error that is evident, obvious, and clear. If so, then we look to the second prong of the analysis, which considers whether a manifest injustice or miscarriage of justice has,

> indeed, occurred as a result of the error. A criminal Defendant seeking plain error review bears the burden of showing that plain error occurred and that it resulted in a manifest injustice or miscarriage of justice. The outcome of plain error review depends heavily on the specific facts and circumstances of each case.

State v. Ray, 407 S.W.3d 162, 170 (Mo. App. E.D. 2013); *State v. Celis-Garcia*, 420 S.W.3d 723, 726-727 (Mo. App. W.D. 2014). *See*, Rule 30.20.

B. No reasonable expectation of privacy in cell location signals on public highways

In *United States v. Knotts*, 460 U.S. 276 (1983), the United States Supreme Court held that, "A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id*. at 281. In upholding the use by the Government of a beeper placed into a 5-gallon drum of chloroform in order to track the movements of a Defendant and discover the location of a clandestine drug laboratory, the Court noted that, "[a] police car following [Defendant] at a distance throughout his journey could have observed him leaving the public highway and arriving at the cabin.... [T]here is no indication that the beeper

was used in any way to reveal information… that would not have been visible to the naked eye[.]" *Id*. at 285.[8]

In *New York v. Class*, 475 U.S. 106 (1986), the United States Supreme Court held that "[t]he exterior of a car… is thrust into the public eye, and thus to examine it does not constitute a 'search.'" *Id*. at 114.

These principles were persuasively applied to GPS surveillance of cell phones in the context of police tracking of criminal activity in *United States v. Skinner*, 690 F.3d 772 (6th Cir. 2012). In *Skinner*, the Court held:

> There is no Fourth Amendment violation because Skinner did not have a reasonable expectation of privacy in the data given off by his voluntarily procured… cell phone. If a tool … gives off a signal that can be tracked for location, certainly the police can track the signal. The law cannot be that a criminal is entitled to rely on the expected untrackability of his tools. Otherwise, dogs could not be used to track a fugitive if the fugitive did not know that the dog hounds had his scent. A getaway car could not be identified and followed based on the license plate number if the driver reasonably thought he had gotten away unseen. The recent nature of cell phone location

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[8] This Supreme Court held thus despite the failure of the visual surveillance effort in *Knotts*. *Id*. at 285.

> technology does not change this. If it did, then technology would help criminals but not the police. It follows that Skinner had no expectation of privacy… just as the driver of a getaway car has no expectation of privacy in the particular combination of colors of the car's paint.

Id. at 777 (footnote omitted).

The court emphasized that even "an innocent actor would similarly lack a reasonable expectation of privacy in the inherent external locatability of a tool that he or she bought." *Id*. at 777 n.1.

The court emphasized that the surveillance, as in *Knotts*, *supra*, amounted principally to following an automobile on public streets and highways where a person has no reasonable expectation of privacy in his movements from one place to another. *Id*. at 778. While the cell site information aided the police in determining the Defendant's location, that same information could have been obtained through visual surveillance. *Id*.

> There is no inherent constitutional difference between trailing a Defendant and tracking him via such technology. Law enforcement tactics must be allowed to advance with technological changes, in order to prevent criminals from circumventing the justice system. The Supreme Court said as much in *Knotts*, noting that, "[i]nsofar as respondent's complaint appears to be simply that scientific

> devices such as the beeper enable the police to be more effective in detecting crime, it simply has no constitutional foundation. We have never equated police efficiency with unconstitutionality, and we decline to do so now." *Id*. at 284[.]

Skinner, 690 F.3rd at 778.

The court reaffirmed its holding in *United States v. Forest*, 355 F.3rd 942 (6th Cir. 2004), that calling a Defendant's cell phone in order to "ping" or gather data on the phone's physical location along a public roadway did not violate a legitimate expectation of privacy in the cell site data itself. *Skinner* at 778-779.

Because "the cell-site data is simply a proxy for [the defendant's] visually observable location," and a defendant has "no legitimate expectation of privacy in his movements along public highways," we concluded, as we do here, that "the Supreme Court's decision in *Knotts* is controlling, and [thus] the DEA agents did not conduct a search within the meaning of the Fourth Amendment." *Id*.

Skinner, 690 F.3rd at 779.

"Using a more efficient means of discovering this information does not amount to a Fourth Amendment violation. In any event, we determine whether a defendant's reasonable expectation of privacy has been violated by looking at what the defendant is disclosing to the public, and not what information is known to the police." *Id*.

While the *Skinner* court observed that the authorities had obtained an order from a magistrate judge to track and "ping" two cell phone numbers to locate drugs while they were en route across the country, the court found that this was "not necessary to find that there was no Fourth Amendment violation in this case[.]" *Id.*

The court distinguished the recent United States Supreme Court decision in *United States v. Jones*, 132 S.Ct. 945 (2012), which "explicitly relied on the trespassory nature of the police action" in secretly placing a tracking device on the defendant's car, and noted that the *Jones* opinion explicitly distinguished *Knotts* on the grounds that trespass was not an issue in *Knotts*, and emphasized that *Jones* in no way purported to limit or overrule *Knotts*. *Id.* (citing *Jones* at 949).[9]

The court concluded that the Government never had physical contact with Skinner's cell phone; the defendant obtained it, GPS technology and all, and "could not object to its presence." *Id.* at 781. Authorities tracked a known number that was voluntarily used while traveling on public thoroughfares, and

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[9] The court further held that the three-day surveillance that took place in *Skinner* comes "nowhere near that line" that Justice Alito's concurrence suggested might constitute a level of comprehensive tracking that would violate the Fourth Amendment. *Id*. at 780.

the defendant did not have a reasonable expectation of privacy in the GPS data and location of his cell phone. *Id*.

"Here, the monitoring of the location of the contraband-carrying vehicle as it crossed the country is no more of a comprehensively invasive search that if instead the car was identified in Arizona and then tracked visually and the search handed off from one local authority to another as the vehicles progressed. That the officers were able to use less expensive and more efficient means to track the vehicles is only to their credit." *Id*. at 780.

Similarly, in the case at bar, Defendant had no reasonable expectation of privacy in his location along public thoroughfares or in the cell location data which a cell phone that he voluntarily purchased and chose to accompany him emitted as a proxy for that location. *See*, *id*.

C. No reasonable expectation of privacy in third-party business records

In *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735 (1984), the Supreme Court held, "It is established that, when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities." *Id*. at 743.

In *United States v. Miller*, 425 U.S. 435 (1976), the Supreme Court rejected a bank depositor's Fourth Amendment challenge to a subpoena of bank records because, as the bank was a party to the transactions, the records

belonged to the bank. *Id*. at 440-441. "[T]he documents subpoenaed here are not respondent's private papers.... [R]espondent can assert neither ownership nor possession. Instead, these are the business records of the banks.... [They] pertain to transactions to which the bank itself was a party." *Id*.

The United States Court of Appeals for the Fifth Circuit recently applied this line of cases to conclude that orders compelling cell phone service providers to produce cell site information for targeted cell phones that would track the phones over a two-month period under the Stored Communications Act ("SCA") did not violate the Fourth Amendment. *In re Application of the United States of America For Historical Cell Site Data,* 724 F.3d 600 (5th Cir. 2013).

The SCA provides that "a governmental entity receiving records or information [of non-content data] is not required to provide notice to a subscriber or customer" before or after government officials obtain this information. *Id.* at 610 n. 11 (quoting §2703(c)(3)). *See*, *Jerry T. O'Brien*, 467 U.S. at 743 (concluding that Supreme Court precedents "disable respondents from arguing that notice of subpoenas issued to third parties is necessary to allow a target to prevent an unconstitutional search or seizure of his papers"). In short, it is the party who owns the records, not the party whose information is recorded, that has the right to challenge the order.

The Fifth Circuit further observed that defining business records as records of transactions to which the record-keeper is a party "also fits well with

the historical and statutory distinction between communications content and addressing information." *In re Application of the United States of America For Historical Cell Site Data,* 724 F.3d at 611. The court observed that a line of cases dating back to the 19th century from the United States Supreme Court "has held that the government cannot engage in a warrantless search of the contents of sealed mail, but can observe whatever information people put on the outside of mail, because that information is voluntarily transmitted to third parties." *Id.* (quoting *United States v. Forrester*, 512 F.3rd 500, 511 (9th Cir. 2008)(collecting cases)).

Similarly, pen registers, which are installed by the phone company at the request of police to record the numbers dialed from particular land lines, "do not acquire the contents of communications" and do not require a warrant. *Id.* (quoting *Smith v. Maryland*, 442 U.S. 735, 741 (1979)).

"The government's surveillance of e-mail addresses also may be technologically sophisticated, but it is conceptually indistinguishable from government surveillance of physical mail.… E-mail, like physical mail, has an outside address 'visible' to the third-party carriers that transmit it to its intended location, and also a package of content that the sender presumes will be read only by the intended recipient." *Id.* (quoting *Forrester*, 512 F.3rd at 511).

The Fifth Circuit concluded, "Under this framework, cell site information is clearly a business record." *Id.* "The government does not require service providers to record this information or store it." *Id.*

Moreover, these are the provider's own records of transactions to which it is a party. The caller is not conveying location information to anyone other than his service provider. He is sending information so that the provider can perform the service for which he pays it: to connect his call. And the historical cell site information reveals his location information for addressing purposes, not the contents of his calls. The provider uses this data to properly route his call, while the person he is calling does not receive this information.

Id. at 612 (footnote omitted).

Just as *Smith* concluded that all telephone users realize they must convey phone numbers they dial to the telephone company, and are informed in most phone books that the company can help in identifying to the authorities the origin of unwelcome and troublesome calls, cell phone subscribers understand that their cellphones must send a signal to a nearby cell tower in order to wirelessly connect their calls. *Id*. at 612-613. "[C]ell-phone users have knowledge that when they place or receive calls, they, through their cell phones, are transmitting signals to the nearest cell tower, and, thus, to their communications service providers." *Id*. at 613 (quoting *United States v. Madison*,

No. 11-60285-CR, 2012 WL 3095357, at*8 (S.D. Fla. July 30, 2012) (unpublished)).

> Cell phone users recognize that, if their phone cannot pick up a signal (or "has no bars"), they are out of the range of their service provider's network of towers. And they realize that, if many customers in an area attempt to make calls at the same time, they may overload the network's local towers and the calls may not go through. Even if this cell phone-to-tower signal transmission was not "common knowledge," *California v. Greenwood*, 486 U.S. 35, 40 [] (1988), the Government also has presented evidence that cell service providers' and subscribers' contractual terms of service and providers' privacy policies expressly state that a provider uses a subscriber's location information to route his cell phone calls. In addition, these documents inform subscribers that the providers not only use the information, but collect it. *See also Madison*, 2012 WL 3095357, at*8 ("Moreover, the cell-phone-using public knows that communications companies make and maintain permanent records regarding cell phone usage, as many different types of billing plans are available.… Some plans also impose additional charges when a cell phone is used outside its 'home area' (known commonly as 'roaming' charges). In order to bill in these different ways,

> communications companies must keep the requisite data, including cell-tower information."). Finally, they make clear the providers will turn over these records to government officials if served with a court order. Cell phone users, therefore, understand that their service providers record their location information when they use their phones at least to the same extent that the landline users and *Smith* understood that the phone company recorded the numbers they dialed.

Id. at 613.

In addition, the Fifth Circuit endorsed the Sixth Circuit's view in *United States v. Skinner, supra*, that the use of cell phones is "entirely voluntary." *Id*. The government does not require a member of the public to own or carry a phone; does not require him to obtain his cell phone service from a particular service provider that keeps historical cell site records for its subscribers; and it does not require him to make a call, let alone to make a call at a specific location. *Id.*

The court concluded that "a user voluntarily conveys such information when he places a call, even though he does not directly inform his service provider of the location of the nearest cell phone tower. Because a cell phone user makes a choice to get a phone, to select a particular service provider, and to make a call, and because he knows that the call conveys cell site information,

the provider retains this information, and the provider will turn it over to the police if they have a court order, he voluntarily conveys his cell site data each time he makes a call." *Id*. at 614.[10]

The Fifth Circuit agreed with the Sixth Circuit that, "[l]aw enforcement tactics must be allowed to advance with technological changes, in order to prevent criminals from circumventing the justice system." *Id*. (quoting *Skinner*, 690 F.3d at 778, citing *United States v. Knotts*, 460 U.S. at 284). While acknowledging privacy concerns, the Court observed that, "[i]n circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative. The legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way." *Id*. (quoting *Jones*, 132 S.Ct. at 964 (Alito, J., concurring in the judgment)). "Congress has crafted such a legislative solution in the SCA. The statute conforms to existing Supreme Court Fourth Amendment precedent." *Id.* This precedent, as it now stands, does not recognize a situation where a conventional order for a third party's voluntarily created business records

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[10] By analogy, the Court observed that when a customer makes a credit card purchase at a store or restaurant, law enforcement officers can obtain his credit card records from the company with a subpoena and use them to track his location. *Id*. at 614 n.13.

transforms into a Fourth Amendment search or seizure when the records cover more than some specified time period or shed light on a target's activities in an area traditionally protected from governmental intrusion. We decline to create a new rule to hold that Congress's balancing of privacy and safety is unconstitutional.

Id. at 614-615 (footnote omitted).[11]

In short, "[c]ell site data are business records and should be analyzed under that line of Supreme Court precedent." *Id*. at 615. The data should not be treated as tracking information. *Id*. The proper standard to be applied is the

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[11] While the Court understood that cell phone users may reasonably want their location information to remain private, just as they may want their trash placed curbside in opaque bags or the view of their property from 400 feet above the ground to remain so, "the recourse for these desires is in the market or the political process: in demanding that service providers do away with such records (or anonymize them) or in lobbying elected representatives to enact statutory protections. The Fourth Amendment, safeguarded by the courts, protects only reasonable *expectations* of privacy." *Id*. at 615 (emphasis original).

SCA's statutory standard, not the Fourth Amendment probable cause standard. *Id.*[12]

Because Defendant's challenge is based solely upon the Fourth Amendment, and not on any allegation that the statutory standard of the SCA was not met, Defendant's first point should be rejected.

D. The court's order met the required standard.

Defendant challenges the sufficiency of the affidavit supporting the court's order that AT&T Wireless provide a pen register, a trap and trace device, and "E-911, precision location, and/or GPS precision location information for" Defendants' cell phone number. State's Motion Exhibit 1. The court's order was issued "pursuant to an application under Title 18, United States Code, Sections 2703(c) and (d), 3122 and 3123[.]" State's Motion Exhibit 1 at 9.

1. The court's order

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[12] The Fifth Circuit's analysis was recently adopted by a Texas Court of Appeals in *Ford v. State*, 2014 WL 4099731 (Tex. App.-San Antonio August 20, 2014) (expressly upholding warrantless acquisition of AT&T cell phone location data on the night of a murder even where records were of passive activity on a cell phone because defendant voluntarily availed himself of cellular service, which included the ability to receive data sent to a subscriber's phone, when he chose it as his provider).

The court ordered "pursuant to 18 U.S.C. 3123," that Jefferson City Police Department officers "may install, or cause to be installed, and use a pen register to register numbers dialed or otherwise transmitted from the [Defendant's cell phone number], to record the date and time of such dialings or transmissions, and to record the length of time the telephone receiver in question is 'off the hook' for incoming or outgoing calls for a period of sixty days from the date this order is filed by the court [.]" *Id*. at 10.

In addition, the court ordered "pursuant to 18 U.S.C. 3123," that Jefferson City Police Department officers "may install, or cause to be installed, and use a trap and trace device, on [Defendant's cell phone number] to capture and record the incoming electronic or other impulses which identify the originating numbers of wire or electronic communications, and record the date, time, and duration of calls created by such incoming impulses, for a period of sixty days from the date this order is filed by the court, and that the tracing operations be without geographical limits[.]" *Id*.

The court also ordered "pursuant to 18 U.S.C. 2703(c)(1)(B)(ii), 2703(c)(1)(C) and 2703(d)," that the telecommunications and/or electronic communications service providers "shall supply subscriber names and addresses, whether listed, unlisted or non published [sic], call detail reports starting from September 28, 2009 and periods of telephone activation for numbers dialed or otherwise transmitted to and from the [Defendant's cell

phone number], along with 24 hour expedited service on all telephone numbers upon oral or written request by officers of the Jefferson City Police Department [,]" and "pursuant to 18 U.S.C. 2703(c)(1)(B)(ii) and 2703(d), that the wireless carriers shall provide, on an ongoing and/or real-time basis, the location of cell site/sector (physical address) at call origination (for outbound calling), call termination (for incoming calls) and during the progress of the call, and direction and strength of signal, for the [Defendant's cell phone number]." *Id*. at 10-11.

Finally, the order allowed "based upon probable cause," for "E-911, precision location, and/or GPS Precision location" information for numbers dialed from or transmitted to Defendant's cell phone number to be provided to JCPD. *Id*. at 10, 11.

2. The affidavit in support

In his "Affidavit Supporting Subp[oe]na" attached to the Sealed Application for an order "(1) authorizing the installation and use of a pen register and a trap and trace device, and (2) authorizing release of subscriber information and/or cell site information and GPS/precision location information," Detective Barret Wolters outlined his 13 years of experience, training, and involvement in hundreds of investigations, and then stated as follows:

> 2. I certify that the Jefferson City Police Department is conducting a homicide investigation involving David R. Hosier (DOB 02/10/1955).

> 3. David R. Hosier has been identified as the primary suspect in the homicide investigation.
>
> 4. David R. Hosier utilizes cell phone number (573) 645-7335. The cell phone number's carrier is AT&T Wireless. The establishment of a trap and trace precision locator is essential to the ongoing investigation as it is crucial that David Hosier is apprehended as expeditiously as possibl[e] to obtain key evidence relevant to the ongoing criminal investigation.

State's Motion Exhibit 1 at 1.

3. The State's application under penalty of perjury

The State's application was filed by the prosecutor as an "attorney for the Government" as defined in Rule 54(c) of the Federal Rules of Criminal Procedure who, pursuant to 18 U.S.C. §3122, may apply for an order authorizing the installation and use of pen registers and trap and trace devices and the disclosure of subscriber information. *Id*. at 4.

Both the prosecutor and Detective Wolters certified under penalty of perjury in the application itself that the Jefferson City Police Department "is conducting a homicide investigation in which David R Hosier has been identified as the primary suspect." *Id*. They further certified "that the information likely to be obtained from the pen register and trap and trace device is relevant to the homicide investigation as it is crucial that David Hosier is apprehended as

expeditiously as possibl[e] to obtain key evidence relevant to the ongoing criminal investigation." *Id*. In addition, "David R. Hosier (DOB 02/10/9055) has been identified as the primary suspect in the ongoing homicide investigation." *Id*. at 5. Further, "The investigation has determined that David R. Hosier is using the cellular phone of (573) 645-7335, which belongs to AT&T Wireless." *Id*.

The application further declared under penalty of perjury that:

> In the experience of Detective Barret Wolters, subscriber information has yielded information in past investigations that is relevant and material to fugitive investigations. Such information includes leads relating to the names of family members, associates, friends and other individuals who may assist in the apprehension of the fugitives or may aid in the harboring of the fugitives. Detective Barret Wolters has advised me, based upon his training and experience, one way to identify associates may be to obtain subscriber information for calls made to and from the [Defendant's cell phone number] and then conduct an investigation concerning those names and addresses. Based upon this subscriber information, Detective Barret Wolters would then direct other investigators to monitor the location/address and determine if… David R. Hosier is present or if the associates may lead investigators to him.

Id. at 5-6.

Moreover:

> Detective Barret Wolters has further advised me that the general goographic location of the [Defendant's cell phone number] derived from cell site information used by the [Defendant's cell phone number] can be used to corroborate the observations of surveillance agents. More specifically, surveillance agents can compare observations of the user of the [Defendant's cell phone number] with cell site information in order to verify the identification and location of the user of the [Defendant's cell phone number].

Id. at 6.

The State's application concluded:

> Accordingly, based upon the above proffer, and pursuant to 18 U.S.C. §§2703(c)(1)(B)(ii), 2703(c)(1)(C), and 2703(d), because there are reasonable grounds to believe that such information is relevant and material to the ongoing investigation, I request that the local, long-distance and wireless carriers listed in the proposed order, filed concurrently herewith, be ordered to supply subscriber names and addresses, whether listed, unlisted or non published, call detail reports starting from September 28, 2009 and periods of telephone activation for numbers dialed or otherwise transmitted from (as

captured by the pen register) and dialed or otherwise transmitted to (as captured by the trap and trace device) the [Defendant's cell phone number], along with 24 hour expedited service on all telephone numbers upon oral or written request by officers of Jefferson City Police Department and also be ordered to disclose, on an ongoing and/or real-time basis, the location of cell site/sector (physical address) at call origination (for outbound calling), call termination (for incoming calls) and during the progress of a call, and direction and strength of signal, for the [Defendant's cell phone number].

Id. at 7.

Both the prosecutor and Detective Wolters made each of the statements in the application under penalty of perjury. *Id*. at 8.

4. Challenge is to a SCA order rather than a warrant

The relevant portions of the State's application and the court's order were issued pursuant to sections of the United States Code that constitute the Stored Communications Act ("SCA"), 18 U.S.C. §§2701-2712. *See, In re application of United States of America for Historical Cell Site Data,* 724 F.3d 600, 602 (5th Cir. 2013).

As noted above, Defendant does not challenge whether the order met the statutory criteria of the SCA. Rather, Defendant's point is limited to the question of whether or not the order violated the Fourth Amendment.

However, "an application for this type of order is an independent proceeding, not tied to any current criminal case… denying or granting the order finally disposes of the proceeding." *Id*. at 605. For the reasons noted above, only the party subject to the order had standing to challenge it on appeal, and it chose not to do so.[13]

In any case, Fourth Amendment standards do not apply to such an order. Rather, an order compelling disclosure of non-content records or other subscriber information "may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal

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[13] The proceeding on the SCA order below was captioned, "In the Matter of the Application of the State of Missouri for an Order: (1) Authorizing the Installation and Use of a Pen Register and Trap and Trace Device, and (2) Authorizing Release of Subscriber Information and/or Cell Site Information and GPS/Precision Location Information." State's Motion Ex. 1 at 2.

investigation." §2703 (d); *In re application of United States of America for Historical Cell Site Data*, 724 F.3d at 606. "The 'specific and articulable facts' standard is a lesser showing than the probable cause standard that is required by the Fourth Amendment to obtain a warrant." *Id*. "'§2703 (d) creates a higher standard than that required by the pen register and trap and trace statutes' but 'a less stringent [standard] than probable cause[.]'" *Id*. (quoting *In re application of United States of America For an Order Directing a Provider of Electronic Communication Service to Disclose Records to the Government*, 620 F.3d 304, 315 (3rd Cir. 2010) and citing *Warshak v. United States*, 631 F.3d 266, 291 (6th Cir. 2010)).

In *Warshak, supra*, the Sixth Circuit rejected a Defendant's claim that the Government's application for a §2703(d) order failed to provide a particularized factual basis for disclosure. *Id*. at 290-291. The court observed that the "specific and articulable facts" standard derives from the Supreme Court's decision in *Terry v. Ohio*, 392 U.S.1 (1968). *Id*. at 291; *United States v. Perrine,* 518 F.3d 1196, 1202 (10th Cir. 2008). The standard of proof falls short of probable cause, and merely requires the State to show that there are reasonable grounds to believe that the records are relevant and material to an ongoing criminal investigation. *Warshak*, 631 F.3d at 291.

In *Warshak*, the government's application indicated that it was "investigating a complex, large-scale mail and wire fraud operation based in

Cincinnati, Ohio." *Id.* The application further indicated that "interviews of current and former employees of the target company suggest that electronic mail is a vital communication tool is been used to perpetuate fraudulent conduct" and that "various sources [have verified] that NuVox provides electronic communication services to certain individual(s) [under] investigation." *Id.* The court held, "In light of these statements, it is clear that the application was, in fact, supported by specific and articulable facts, especially given the diminished standard that applies to §2703 (d) applications." *Id.*

Similarly, although Defendant does not challenge that the affidavit met the SCA standard of proof, it is clear that in the case at bar, as in *Warshak*, the target of the investigation was identified, and the basis for believing that the evidence would be relevant and material to an ongoing criminal investigation was explained through the use of specific and articulable facts by Detective Wolters, both in the sworn application submitted under penalty of perjury, and in the accompanying affidavit. *See, id.*

E. Probable cause because cell phone itself was evidence of murder

Even if the probable cause standard were, *arguendo*, to apply, probable cause was present here because the cell phone itself had been used to make calls that were threatening towards the victim, including those to Jodene Scott and Geralyn Bleckler the day before the murders. The police had probable cause for this belief, including the interview with Scott and the inspection of her cell

phone. The phone itself was therefore evidence in the murder case and the State had probable cause to seek an order allowing the State to locate it. *See, e.g.,* State's Motion Exhibit 6 at 4 ("It is believed that HOSIER may have used a cellular phone to communicate with others his intent to commit homicide and/or plans to evade capture.")[14]

F. Probable cause because evidence of flight and consciousness of guilt

Furthermore, even if probable cause was required, flight is evidence of consciousness of guilt. *State v. Sprous*, 639 S.W.2d 576, 578 (Mo. 1982). The cell site location information was evidence of flight and was, therefore, itself evidence of consciousness of guilt, particularly since it established that the timeline of Defendant's fleeing behavior was consistent with having left Jefferson City shortly after the middle-of-the-night murders. Police had probable cause to believe that Defendant had fled Jefferson City, since they knew he had left a note on Scott's car the night before, but his apartment was locked and dark and no one answered when they knocked on his door between 5 a.m. and 6 a.m. after the 3:00-3:20 a.m. murders. Moreover, his car was gone, and he had asked

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[14] The quoted language is from the Affidavit for Search Warrant for Defendant's vehicle filed by Lt. Holt in Oklahoma, but reflects the collective belief of law enforcement officers working the case and reflects his communications with Missouri authorities.

Scott to take care of his things and contact his relatives should anything occur or happen to him the night before.

These facts would justify a reasonable person in believing there was at least a "fair probability" based upon "a practical, common-sense decision" given all the circumstances set forth in the affidavit that evidence of Defendant's flight would be obtained from the phone company records. *State v. Middleton*, 995 S.W.2d 443, 457 (Mo. 1999).

G. The good-faith exception applies.

In *United States v. Davis*, 754 F.3d 1205 (11th Cir. 2014),[15] the Court held that even if obtaining cell site location information without probable cause violated the Defendant's Fourth Amendment rights, the "good faith" exception to the exclusionary rule applied to the search and seizure of the Defendant's cell site location information. As in *United States v. Leon*, 468 U.S. 897 (1984), wherein the Supreme Court held that officers "acting in reasonable reliance on a

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[15] The 11th Circuit has recently granted rehearing en banc in this case and vacated the opinion. *United States v. Davis*, 2014 WL 4358411 (11th Cir. Sep. 4, 2014)(No. 12-12928). While the original panel decision was wrong on the question of whether there was a violation of a reasonable expectation of privacy, as the 5th and 6th Circuits have held—and thus the rehearing understandable on that basis—the analysis of the good-faith issue was sound.

search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause" acted "with objective good faith" and within the scope of the search warrant, the exclusionary rule should not be used to penalize the officer for the magistrate's error. *Id*. at 1217.

While the officers in *Davis* acted in good-faith reliance on an order rather than a warrant, there was a "judicial mandate" to the officers to conduct the search and seizure contemplated by the court order. *Id*. at 1218. As in *Leon*, the officers "had a sworn duty to carry out" the provisions of the order. *Id*. "Therefore, even if there was a defect in the issuance of the mandate, there is no foundation for the application of the exclusionary rule." *Id*.

The court emphasized that the law enforcement officers, the prosecution, and the judicial officer issuing the order acted in scrupulous obedience to a federal statute, the Stored Communications Act, 18 U.S.C. §2703. "At that time, there was no governing authority affecting the constitutionality of this application of the Act." *Id*.

Similarly, in the case at bar, the order was issued in 2009 and the *Jones* decision was not handed down until 2012. Nor, to this day, has there been a governing decision of this Court, the Eighth Circuit, or the United States Supreme Court which held that orders issued under the SCA are unconstitutional under the Fourth Amendment. Thus, even if this Court should agree with the reasoning of the Third Circuit and (the vacated subject to

rehearing en banc) opinion of theEleventh Circuit, rather than the logic of the Fifth and Sixth Circuits, the good-faith exception would apply as emphasized by the original opinion of the Eleventh Circuit and Defendant's first point should still be rejected.

II.

The Jefferson City Police Department had reasonable suspicion to request a *Terry* stop of Defendant, and the Oklahoma Highway Patrol and other authorities had reasonable suspicion to stop Defendant based both upon notice from the Jefferson City Police Department that Defendant was wanted and upon his flight when they attempted to stop him.

Defendant's second point contends that Missouri authorities lacked probable cause to have Oklahoma authorities stop Defendant's car and that all of the evidence found therein, including the murder weapon, should be suppressed as fruit of the poisonous tree. Defendant admits that he fled from the Oklahoma police when they activated their lights and sirens, but contends that he was seized at the moment of their activation before they had cause for the stop. Defendant admits that recent U.S. Supreme Court case law is contrary to his position, but contends that earlier case law should apply under the Missouri Constitution's equivalent to the Fourth Amendment. However, there was ample reasonable suspicion supporting the *Terry* stop, including Defendant's flight and numerous pieces of circumstantial evidence pointing to Defendant as the primary suspect in a homicide investigation, who was believed to be in possession of important evidence, including his cell phone and the missing murder weapon.

A. Standard of review

In reviewing a trial court's decision to overrule a motion to suppress and to allow the admission of evidence, this Court reviews the evidence presented both at the suppression hearing and at trial. *State v. Grayson*, 336 S.W.3d 138, 142 (Mo. banc 2011). This Court affirms the trial court's decision if the evidence is sufficient to sustain its finding. *State v. Franklin*, 841 S.W.2d 639, 641 (Mo. banc 1992). The facts and the reasonable inferences arising from the facts are to be stated favorably to the trial court's order with a reviewing court free to disregard contrary evidence and inferences. *Id*. The legal determination whether reasonable suspicion or probable cause was present is reviewed *de novo*. *Grayson*, 336 S.W.3d at 142.

B. Substantive standards

The Fourth Amendment is not offended when a law enforcement officer briefly stops a person if the officer has a reasonable suspicion, based upon specific and articulable facts, that the person was or is involved in criminal activity. *Terry v. Ohio*, 392 U.S. 1 (1968); *Franklin*, 841 S.W.2d at 641. Reasonable suspicion is dependent upon the totality of the circumstances. *United States v. Cortez*, 449 U.S. 411, 417 (1981); *Franklin*, 841 S.W.2d at 644. "If the police have a reasonable suspicion, grounded in specific and articulable facts that a person they encounter was involved **or is wanted in connection with a completed felony**, a stop under the rule of *Terry v. Ohio*… may be

made to investigate that suspicion." *United States v. Hensley*, 469 U.S. 221, 229 (1985); *State v. Nelson*, 777 S.W.2d 333, 335 (Mo. App. W.D. 1989) (emphasis added). "It is therefore not necessary that the person stopped be currently engaged in criminal conduct or be in flight from the scene of a crime before an investigatory stop is justified." *Nelson*, 777 S.W.2d at 335.

"Assuming the police make a *Terry* stop in objective reliance on a flyer or bulletin, we hold that the evidence uncovered in the course of the stop is admissible if the police who *issued* the flyer or bulletin possessed a reasonable suspicion justifying a stop… and if the stop that in fact occurred was not significantly more intrusive than would have been permitted the issuing department." *Hensley*, 469 US at 682. "[W]here the police have been unable to locate a person suspected of involvement in a past crime, the ability to briefly stop that person, ask questions, or check identification in the absence of probable cause promotes the strong government interest in solving crimes and bringing offenders to justice." *Id*. at 229. "Particularly in the context of felonies or crimes involving a threat to public safety, it is in the public interest that the crime be solved and the suspect detained as promptly as possible. The law enforcement interests at stake in these circumstances outweigh the individual's interest to be free of the stop and detention that is no more extensive than permissible in the investigation of imminent or ongoing crimes." *Id*.

"In an era when criminal suspects are increasingly mobile and increasingly likely to flee across jurisdictional boundaries, this rule is a matter of common sense: it minimizes the volume of information concerning suspects that must be transmitted to other jurisdictions and enables police in one jurisdiction to act promptly in reliance on information from another jurisdiction." *Id.* at 231.

C. Oklahoma authorities had reasonable suspicion

1. Wanted bulletin from Missouri

It is undisputed that Oklahoma authorities were on the lookout for Defendant based upon a notification from the Jefferson City Police Department that he was wanted in a murder investigation and there was evidence that he was within their jurisdiction. As noted above, police may stop a person if they have a reasonable suspicion that the person they encounter is wanted in connection with a completed felony. *United States v. Hensley*, 469 U.S. at 229; *State v. Nelson*, 777 S.W.2d at 335.

2. Flight prior to seizure

It is equally undisputed that upon the activation of police lights and sirens, Defendant led numerous police and other law enforcement authorities on a lengthy chase, rather than submit to police authority as required by Oklahoma law. This behavior included running a police roadblock and failure to stop until a second ramming maneuver was successful.

Defendant concedes that his flight provided the Oklahoma Highway Patrol with reasonable suspicion for a stop, but argues that he was seized prior to his flight when the patrol car's sirens and lights were activated, even though he did not submit to this display of authority, and that because authorities allegedly lacked probable cause at the outset, all subsequent events and the evidence gathered thereby must be suppressed as fruit of the poisonous tree.

Defendant concedes that in *California v. Hodari D*, 499 U.S. 621 (1991), the United States Supreme Court held that a person is "seized" for purposes of the Fourth Amendment only when an officer uses physical force to detain a person or where a person submits or yields to a show of authority by the officer. *Id*. at 626. Defendant further concedes that this Court applied this standard in *State v. Deck*, 994 S.W.2d 527 (Mo banc 1999), wherein this Court held, "A person is not 'seized' until either being subjected to the application of physical force by the police or by voluntarily submitting to the assertion of police authority." *Id*. at 535. Defendant admits that under this test, "a person would not be seized until he or she stopped in response to the emergency lights (i.e., they yielded or submitted to the show of authority)." Brief for Appellant at 67. Defendant offers no argument to explain why *Hodari D*. is not binding Fourth Amendment jurisprudence. Defendant argues only that Missouri should disregard United States Supreme Court precedent in interpreting its own constitution, despite the similarity of language and the existence of the *Deck*

precedent, and apply other Missouri case law even though the alleged seizure took place in Oklahoma.

However, "Missouri's corresponding constitutional search and seizure provision, found in MO. CONST. art. I, §15 of the Missouri Constitution, is co-extensive with the Fourth Amendment. *State v. Deck*, 994 S.W.2d 527, 534 (Mo banc 1999)." *State v. Rowe*, 67 S.W.3d 649, 654 (Mo. App. W.D. 2002).[16]

Moreover, Defendant offers no theory to explain how the Missouri Constitution could have extraterritorial effect in Oklahoma.

Because the seizing authorities in Oklahoma had reasonable suspicion both based upon the wanted bulletin from Missouri and Defendant's illegal conduct prior to the time he submitted to the seizing authority, Oklahoma authorities committed no constitutional violation and the evidence cannot be suppressed based upon their conduct.

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[16] Article I, section 15 of the Missouri Constitution provides: "[T]he people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures…." The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated…." US CONST., Amend. IV. Defendant's cases are distinguishable because in those instances, the arrestee had already been stopped by the police.

D. Missouri authorities had reasonable suspicion

At the time the Jefferson City Police Department contacted the Oklahoma authorities, they knew that Defendant had come to Jodene Scott's workplace on the Thursday prior to the murder, had said three times that the victim "has fucked him over" and that he was "going to fuck her over." (Tr. 826, 1053). They were also aware that Defendant had called Scott the night before the murder to tell her he was going to leave things on her car for her to take care of in case something happened (Tr. 1049). Defendant said during the phone call that he was going to "eliminate" his problems (Tr. 823). They had retrieved the note from Scott's car left by Defendant that indicated that if something occurred, she should contact his relatives and friends and take care of his storage unit. (Tr. 97, 956-960, 1049-1050). After obtaining the information from Scott, police thought of Defendant as a suspect in the homicide (Tr. 95-96).

Missouri authorities were also aware that Defendant had left recorded phone messages for Geralyn Bleckler which contained implied threats against the victim and expressed anger that she had not helped Defendant get victim away from her husband, who had also been murdered (Tr. 96, 1043-1044).
In addition, the police were aware that Victim had sought a restraining order against Defendant, which was found in her purse at the murder scene, which referenced the fact that they were ex-lovers and that Defendant had been harassing and stalking her; moreover, she had referenced both the seeking of

the restraining order and her fear of Defendant in a letter to her landlord approximately one week prior to the murder in which she requested to move because she was afraid of what Defendant might do next (Tr. 854-857, 980, 987-988). Police were aware that Defendant had been asked to leave his apartment in the neighboring building by the end of the month (a date which was impending at the time of the murders) as the result of the victim's fear of Defendant and the landlord's recent knowledge of Defendant's past conviction for attacking a romantic partner in Indiana (Tr. 857-860, 862).

Police were further aware that Defendant had been terminated from a job at the Budweiser Inn because he had been "harassing and stalking" victim, who had been a customer at the Inn. (State's Motion Exhibit 2; Tr. 66-69).

In addition, police had observed that Defendant's vehicle was gone and that he was not at his apartment in the wee hours of the morning after the murder (Tr. 76, 864, 1018-1020).

Finally, police had discovered that Victim had a document contained with the Order of Protection paperwork in her purse that said that now that Defendant had been evicted, she was more afraid than ever, and that Defendant had a lot of guns (despite his criminal record) and that she feared he may shoot her, her husband, or both. Ex. 200 at 9.

Prior to contacting Oklahoma authorities at 9:15-9:30 a.m., Missouri authorities had obtained a "ping" order at 7:40 a.m. and had established that

Defendant had left Jefferson City by the morning of the murders (after having been in Jefferson City to leave the note on Scott's car the night prior to the murders) and had crossed into Oklahoma after having traveled for a period of time consistent with leaving Jefferson City at approximately the time of the murders (Tr. 79-80, 91-92).

Finally, police were aware that both the firearm and Defendant were missing after the murders. (Tr. 90, 91). Defendant "definitely was at the top of the list of people that we wanted to locate immediately[.]" (Tr. 92).

Reasonable suspicion is a less stringent standard than probable cause. *State v. Pike*, 162 S.W.3d 464, 473 (Mo banc 2005); *State v. Peery*, 303 S.W.3d 150, 154 (Mo. App. W.D. 2010). The State may establish that the police officer had reasonable suspicion even though they had information that was less reliable than the evidence that would be required to establish probable cause. *Id*. An officer's suspicion is reasonable when the officer is able to point to specific and articulable facts and inferences, which establish a particularized and objective basis for suspecting illegal activity. *Peery*, 303 S.W.3d at 155.

The awareness of the police that Defendant had been threatening victim, had left a threatening voice mail concerning the victim on answering machine the night before the murders, had left a note on a friends windshield the night before the murders making arrangements for contacting his relatives should something happen to him, that Defendant was about to be evicted from his

apartment for threatening the victim, that Defendant was likely to be armed and dangerous based on an interview with a friend who had accompanied him back to Missouri just days prior to the murder, and that Defendant had left Jefferson City by the wee hours of the morning of the murders and crossed into Oklahoma in a time frame consistent with having left just after the murders constituted specific and articulable facts which more than justified a reasonable person in suspecting illegal activity sufficient to justify a *Terry* stop by the police in Oklahoma. The fact that Victim carried paperwork in her purpose reflecting her fear that Defendant would shoot her and/or her husband was about as specific and articulable a fact supporting the reasonable suspicion of law enforcement as could exist in such a circumstance, particularly in tandem with the other known evidence.

Moreover, police had obtained a search warrant for Defendant's apartment at 7:40 AM, and presumably had the information that Defendant had a template for a STEN Mark II submachine gun and 9 mm ammunition (such as was used in the crime), along with numerous other weapons and items of ammunition despite being a convicted felon who was not allowed to possess firearms.[17] While

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[17] Oklahoma police received the first call about Defendant at 9:45 AM, as noted previously.

Defendant argues that probable cause was required because the Oklahoma authorities intended to detain the Defendant and not just to stop him, the stop was objectively justified by the above specific and articulable facts, and the subsequent arrest was justified by the violation of Oklahoma law by Defendant in fleeing the police.

Defendant's second point should be rejected.

III.

The trial court did not abuse its broad discretion by overruling Defendant's motion to suppress physical evidence and admitting evidence seized from his apartment as a result of the execution of the search warrant because the affidavit established probable cause that there was a fair probability that contraband or evidence of a crime would be found in the apartment.

Defendant contends that there was insufficient probable cause contained within the affidavit supporting the search warrant for his apartment and that the evidence seized therein should have been suppressed.

A. Standard of review

In reviewing a trial court's decision to overrule a motion to suppress and allow the admission of evidence, this Court reviews the evidence presented both at the suppression hearing and at trial. *State v. Grayson*, 336 S.W.3d 138, 142 (Mo. banc 2011). This Court affirms the trial court's decision if the evidence is sufficient to sustain its finding. *State v. Franklin*, 841 S.W.2d 639, 641 (Mo. banc 1992). The facts and the reasonable inferences arising from the facts are to be stated favorably to the trial court's order with a reviewing court free to disregard contrary evidence and inferences. *Id.* The legal determination whether reasonable suspicion or probable cause was present is reviewed *de novo*. *Grayson*, 336 S.W.3d at 142.

B. Basis for probable cause within the affidavit

The affidavit supporting the search warrant was prepared by Barret Wolters, a detective with 13 years of law enforcement experience. State's Motion Exhibit 2 at 4. Detective Wolters indicated that he found the bodies of the victims and observed a number of spent cartridges that appeared to have been fired from a 9 mm weapon. *Id*.

Detective Wolters cited the following specific and articulable facts which supported his belief that there was a fair probability that evidence related to the murders would be found in Defendant's apartment: 1) a neighbor of the victim had received recorded messages on her phone from Defendant that had a hostile tone that was threatening toward victim; 2) victim's landlord had advised police that Defendant lived in an adjacent apartment building, that victim had made him aware of threats from Defendant, that victim had sent him a letter stating that she wanted to move because she was afraid of Defendant, that he had asked Defendant to move out of the apartment building adjacent to the victims, that Defendant had called the landlord three days earlier trying to find out what was in the letter or the reason he had been asked to leave the apartment building, and that he had learned that Defendant had a previous felony conviction for battery; 3) court records showed that victim had obtained an ex parte order of protection from the Cole County Circuit Court against Defendant; 4) Defendant's vehicle was not on or around the apartment building lots or streets and, upon

going to Defendant's apartment, the apartment was dark inside and the door was locked; and 5) the owner/operator of the Budweiser Inn had informed police that Defendant had been let go from his job there because he had "been harassing and stalking" the deceased victim, who was a customer there. *Id*. at 4-5.

As a result, Detective Wolters believed there was a fair probability that there would be a pistol or ammunition matching that used in the murders of victim and her husband at the adjacent apartment building in Defendant's apartment. *Id*. at 5.[18]

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[18] Victim had an application for a restraining order in her purse. Police knew from related documents that Victim that Defendant "has lots of firearms in his apartment." Ex. 200 at 5. Victim's purse further contained a document that stated that Defendant "has a lot of guns. I think he just might shoot me or my husband, or both." Ex. 200 at 9.

Steven Armstrong, who had known Defendant for 25 to 30 years and had help to move back to Jefferson City from Indiana, knew that Defendant had brought back several weapons with him and had had discussions with Defendant about his relationship with the Victim in the month prior to the murders (Tr. 777, 780-781). When he heard on the early morning news on September 28, 2009, that there been a double homicide and that the address

C. What police found

Police did in fact find 9 mm ammunition in Defendant's apartment. In addition, they found a template for a STEN MK II submachine gun, which was later determined to be the murder weapon and which was found in Defendant's possession at the time of his arrest in Oklahoma. Police also found numerous other weapons in Defendant's apartment.

D. Police had probable cause for the search

Where, as here, information which the issuance of a search warrant is based on is provided by sworn affidavit, the affiant runs the risk of a perjury prosecution if the sworn statement is false; in such circumstances "it may be fairly concluded that the information given by the informant under oath is reliable." *Rogers v. State*, 265 S.W.3rd 853, 858 (Mo. App. S.D. 2008) (quoting *State v. Weide*, 812 S.W.2d 866, 871 (Mo. App. W.D. 1991)).

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sounded familiar, he drove to the area with the police had barricaded off the streets and recognized it as the apartment area that the Defendant had lived in (Tr. 777, 779). Armstrong told a police officer that Defendant could be heavily armed and that there were several weapons that Defendant had in his apartment (Tr. 780). Police used information from Armstrong and others to obtain a search warrant for Defendant's apartment (Tr. 1019).

A judge must determine whether there is probable cause to issue the search warrant based only on the written application together with any supplemental written affidavit. §§542.276.3-.4; *State v. Gordon*, 851 S.W.2d 607, 612 (Mo. App. S.D. 1993). In considering a supplemental affidavit, the judge is entitled to a common-sense reading of the entire supporting affidavit. *State v. Pennington*, 642 S.W.2d 646, 648 (Mo. 1982); *Gordon*, 851 S.W.2nd at 612. The assessment a judge makes in determining whether to issue a search warrant is based on a lesser standard of proof than that required to convict an accused of a crime. *Gordon* at 612. "Only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause." *Id*. (quoting *Spinelli v. US*, 393 U.S. 410, 419 (1969)). Probable cause is based on the factual and practical considerations of everyday life on which reasonable and prudent people, not legal technicians, act. *Id*. (quoting *Brinegar v. US*, 338 U.S. 160 (1949)).

Here, a practical, reasonable, and prudent person would act based upon the Defendant's repeated, threatening behavior towards the Victim, including threatening phone messages left on her neighbor's machine, his loss of a job for threatening the victim, and an order of protection received by the Victim against the Defendant, his impending eviction at the behest of the Victim, which he had expressed concern about just days prior to the murders, and the fact that both Defendant and his car had disappeared from the area of his and the Victims' residence in the wee hours following the murders. *See, State v. Beatty*, 770

S.W.2d 387, 392-393 (Mo. App. S.D. 1989) (probable cause to issue search warrant for Defendant's home existed as the result of description of robber matching Defendant and anonymous tip that the perpetrator had previously worked at a specific workplace and the workplace manager identified Defendant as a person matching the description who had previously worked there).

Here, as in *Beatty*, a practical person would consider Defendant a suspect and would seek to determine whether Defendant had a weapon or ammunition matching the physical evidence by searching his neighboring abode, which he had fled after the murders. *See, id.*

Because officers had probable cause for the search, the trial court did not err by denying motion to suppress and admitting the evidence found in Defendant's apartment, including 9 mm ammunition and a template for the murder weapon.

Even if, *arguendo*, there was not had probable cause for the search, the good-faith exception would apply, as discussed in the argument under Point II. Nor was Defendant prejudiced in light of the fact that he was caught in possession of the murder weapon in Oklahoma during a time frame consistent with having fled Jefferson City shortly after the murders.

Defendant's third point should be rejected.

IV.

The trial court did not abuse its broad discretion by admitting evidence of weapons and ammunition unrelated to the murder because they were probative of the charged offense of unlawful possession of a firearm by a felon.

Defendant's fourth point contends that Defendant was prejudiced by admission into evidence of 14 firearms and ammunition found in his car when he was stopped and arrested in Oklahoma. Defendant does not challenge the admission of a fifteenth firearm, which was determined to be the murder weapon.

However, Defendant was charged with being a felon in possession of a firearm and this evidence was probative of that offense, because Defendant had been in continuous flight from the scene of the crime and a reasonable juror could conclude that he had possessed these firearms in Missouri prior to entering Oklahoma, particularly since the police had been tracking his progress from southwest Missouri (including Joplin, Missouri) into Oklahoma by pinging his cell phone shortly before the Oklahoma authorities spotted him near Big Cabin, Oklahoma and began their chase (Tr. 77, 79, 82-84, 86-88).

The standard of review is as outlined in the preceding two points.

The bodies were discovered at approximately 3:20 AM. The State procured a ping order at 7:40 AM. The procedure took between an hour and a half and 2

hours to set up with the phone company. The first successful ping located Defendant in Southwest Missouri, the second in Joplin, Missouri, and the third indicated he had crossed into Oklahoma. The latter ping, which prompted Missouri authorities to contact Oklahoma authorities, took place at 9:33 AM. This timeline is consistent with Defendant having left Jefferson City shortly after committing the murders. Moreover, it at least inferentially suggests continuous travel. There was no suggestion by Defendant at trial, and there is none on appeal, that Defendant somehow stopped in Oklahoma and purchased 14 weapons between the 9:33 AM ping and the time he was spotted by Oklahoma authorities at approximately 10:00 AM.

In addition, upon executing a search warrant at Defendant's apartment, large supplies of ammunition were located that matched the guns found in Defendant's car, which suggests that Defendant possessed the weapons in Missouri prior to fleeing to Oklahoma.

A trial court enjoys broad discretion in ruling whether to admit evidence adduced by the parties at trial. *State v. Henderson*, 826 S.W.2d 371, 374 (Mo. App. E.D. 1992). An appellate court does not interfere with a trial court's ruling on the admission or exclusion of evidence unless the trial court clearly abused that discretion. *Id.* "An abuse of discretion is found when the decision to admit or exclude the challenged evidence is so clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful

consideration." *State v. McGee*, 284 S.W.3d 690, 701 (Mo. App. E.D. 2009) (quoting *State v. Barriner*, 210 S.W.3d 285, 296 (Mo. App. W.D. 2006)). Upon finding an abuse of discretion, this court will reverse only if the prejudice resulting from the improper admission of evidence is outcome-determinative. *McGee* at 701; *State v. Barriner*, 34 S.W.3d 139, 150 (Mo. banc 2000). "When evidence challenged on constitutional grounds is cumulative of other properly-admitted evidence, the disputed evidence could not have contributed to the Defendant's conviction and is harmless beyond a reasonable doubt." *State v. Martin*, 291 S.W.3d 269, 288 (Mo. App. S.D. 2009) (*quoting Zink v. State*, 278 S.W.3d 170, 189 n.11 (Mo. banc 2009) (*quoting State v. Lopez*, 128 S.W.3d 195, 202 (Mo. App. S.D. 2004))).

If a weapon demonstrates motive, malice, intent, or knowledge or preparation, then it may be received into evidence. *State v. Smulls*, 935 S.W.2d 9, 19-20 (Mo. banc 1996).

In *State v. Edwards*, 31 S.W.3d 73 (Mo. App. W.D. 2000), the Court of Appeals upheld the Defendant's conviction where he challenged the admission of two knives, from the Victim's and the Defendant's homes, respectively, which police found when they searched for evidence following a knifing. *Id.* at 80. The court held that as a general rule, physical evidence will be admitted if it is relevant to a material matter at issue. *Id.* Where the evidence in question tends to connect the Defendant with the crime or throws light upon a material fact and

issue, it is properly admissible. *Id.* at 81. Testimony about the knives had not been objected to and only the admission of the knives was challenged. *Id.* at 82. The court went on to hold that even if admission of one or both of the knives was erroneous, it was not prejudicial where other evidence before the court established essentially the same facts. *Id.*

Here, the weapons were probative of a charged offense. Moreover, in light of the massive number of guns and the massive amount of ammunition found in Defendant's apartment and storage unit, which were unquestionably admissible, the evidence was not remotely prejudicial.

Defendant's fourth point should be rejected.

V.

The trial court did not abuse its broad discretion by allowing evidence of a petition for an *ex parte* order of protection that Victim had filed against Defendant because the evidence was admissible under the forfeiture by wrongdoing doctrine. Moreover, much of the evidence was cumulative, the exhibit containing Victim's statements was not published to the jury, Defendant did not object to the small excerpts read during closing argument, and Defendant was not prejudiced.

Defendant's fifth point contends that the trial court erred by admitting into evidence an Application for Adult Abuse/Stalking Order of Protection filed by Victim against Defendant less than two weeks prior to the murder, because Victim's statements therein were hearsay and Defendant was unable to exercise confrontation clause rights against the Victim he had killed. The court admitted two exhibits: 1) Ex. 57, which merely showed a photograph of the top page of the document from a distance among other items found within the Victim's purse; and 2) Ex. 200, which contained the documents themselves (but which was not published to the jury during the evidentiary phase of the trial) under the "forfeiture by wrongdoing" doctrine. The court had indicated its intention to limit the statements that could be published to the jury.

Although the prosecutor read a few excerpts during closing argument, there was no objection raised at that time. The court had granted a continuing objection to the admission of the exhibit itself.

A. Victim's statements read during closing argument

While Defendant acknowledges that Exhibit 200 was not published to the jury during the evidence phase of the trial, he complains of the following unobjected-to closing argument by the prosecutor:

> The restraining order that [Victim] filed, completed for stalking, part of the petition she filled out. "Ex-lovers. He knows everywhere I go, who I go with, who comes to my home, and is harassing me, calling JCPD for no reason." #8, "He stalks me every day, has called JCPD on me Saturday – – or S-a-t., Monday." [Victim] was trying to get help, trying to keep the defendant away from her. That was filed September 15, 2009, two weeks prior to her murder.

(Tr. 1403).

B. The forfeiture by wrongdoing doctrine

In *Giles v. California*, 554 U.S. 353 (2008), the United States Supreme Court reaffirmed its holding in *Reynolds v. United States*, 98 U.S. 145 (1879) that:

> the Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; if a witness is

> absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he kept away.... [The Constitution] grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is no condition to assert that his constitutional rights have been violated.

Giles, 554 US at 372 (quoting *Reynolds*, 98 US at 158).

The U.S. Supreme Court acknowledged that this common-law doctrine of forfeiture by wrongdoing was one of two forms of testimonial statements admitted at common law even though they were unconfronted. *Id.* at 358-359. The Court noted that it approved a Federal Rule of Evidence in 1997 entitled "Forfeiture by wrongdoing," which applies when the defendant "engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." *Id.* at 367 (quoting Fed. Rule Evid. 804(b)(6)).

The opinion of the Court by Justice Scalia specifically addressed acts committed in abusive relationships culminating in murder as follows:

> Acts of domestic violence often are intended to dissuade the victim from resorting to outside help, and include conduct designed to

prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution – rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.

Id. at 377.

Two concurring justices (Souter and Ginsburg) agreed that:

. . . the element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process. If the evidence for admissibility shows a continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say, in a fit of anger.

> The court's conclusion… thus fits the rationale that equity requires and the historical record supports.

Id. at 380.

Three dissenting justices (Breyer, Stevens and Kennedy) emphasized that in the context of domestic violence, at least the two concurring justices and perhaps the majority opinion itself seemed to be saying that "a showing of domestic abuse is sufficient to call into play the protection of the forfeiture rule in a trial for murder of the domestic abuse victim." *Id*. at 404. The three dissenters agreed with this formulation. *Id*. at 405. Thus, this view seems to have commanded at least five votes on the United States Supreme Court.[19]

As Justice Breyer emphasized:

> The rule of forfeiture is implicated primarily where domestic abuse is at issue. In such a case, a murder victim may have previously given a testimonial statement, say, to the police, about an abuser's

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[19] The dissenting opinion held that murderers intend the natural, foreseeable, and probable consequences of their actions, including the unavailability of confrontation at a murder trial as a result of their wrongdoing, and that this constitutes the wrongful procurement of the absence of the witness and thereby makes the "forfeiture by wrongdoing" doctrine applicable; they further held that equity demanded such a result from an equitable doctrine. *Id*. at 385-389.

> attacks; and introduction of that statement may be at issue in a later trial for the abuser's subsequent murder of the victim. This is not an uncommon occurrence. Each year, domestic violence results in more than 1,500 deaths and more than 2 million injuries; it accounts for a substantial portion of all homicides; it typically involves a history of repeated violence; and it is difficult to prove in court because the victim is generally reluctant or unable to testify.

Id. at 405 (citing federal statistics from the Bureau of Justice Statistics and the Department of Health and Human Services).

In *State v. McLaughlin*, 265 S.W.3rd 257 (Mo. banc 2008), this Court applied the equitable principle of forfeiture by wrongdoing in a capital murder case resulting from the murder of an intimate partner attempting to break off the relationship. The trial court found that the defendant intended to make the victim unavailable as a witness in burglary and abuse cases against him. *Id*. at 271-272. This Court held that the finding was supported by ample evidence, including: 1) victim's statements prior to her death about defendant's stalking, threats, and abusive conduct made during the time she was attempting to break from the relationship; 2) victim had filed for orders of protection and sought protection from the police so that she could safely go from work to home; 3) the fact that police were prosecuting defendant for burglary of her home less than

the month prior to the murder; and 4) the fact that during the succeeding month the defendant was seen watching her home. *Id*. at 278 n.10.

In *State v. McLaughlin*, 272 S.W.3rd 506 (Mo. App E.D. 2008), the Court of Appeals applied the same doctrine in the same defendant's later burglary trial. The court noted the following evidence of earlier abuse or threats of abuse intended to dissuade the victim from obtaining the help of law enforcement or the courts: 1) victim had stated in a victim impact statement that defendant threatened her and her friends; 2) victim stated that defendant showed up at her job; 3) victim stated that defendant watched "everything" that she did; 4) defendant burglarized her trailer in spite of a restraining order against him. *Id*. at 509-510. Moreover, defendant murdered victim within one month after defendant was formally charged with burglarizing victim's mobile home. *Id*. at 510.

The court held that an appellate court will affirm a conviction where the Defendant challenges the sufficiency of the showing that the Defendant killed the victim with the intent to prevent her from testifying if the evidence of Defendant's intent present at trial was sufficient to apply the forfeiture by wrongdoing doctrine under *Giles*. *Id*. at 509. The court held that the above evidence was sufficient to make that showing. *Id*. at 510.

C. Forfeiture by wrongdoing applied here.

This case involves similar evidence of abusive conduct in an intimate relationship that the victim was seeking to break off. Victim swore under oath that defendant was stalking her daily; Victim had sought and obtained an *ex parte* order of protection; the court had before it Victim's complaint that defendant engaged in abusive acts of vandalism and harassment towards herself and her family; Victim said that Defendant egged Victim's car before leaving for Indiana (thereby successfully evading service based on the landlord's testimony that officers showed up to serve him during his absence) after she applied for the order; Defendant was fired from his job for harassing Victim; Defendant threatened Victim in phone calls to friends; Victim stated that Defendant watched what she did and who came and went to her home; Victim complained that Defendant had entered her apartment without permission and that she was forced to change her deadbolt lock; and Defendant murdered Victim within two weeks of her application for a restraining order. Thus, as in the two *McLaughlin* cases, there was ample evidence to support the trial court's finding that the equitable principle of forfeiture by wrongdoing applied. *McLaughlin*, 272 S.W. 3rd at 509-510; *McLaughlin*, 265 S.W.3rd at 278 n. 10.

In the case at bar, Victim sought a protective order and obtained an *ex parte* order of protection on September 15, 2009. She stated that Defendant had, *inter alia* stalked her, called her all night long during visits from her husband, vandalized her and her family's cars, vandalized her son's air conditioner and

her family's outdoor pool, and watched who came and went to her home and followed where she went. Victim also alleged that Defendant made false police reports for the purposes of harassing her (a fact later confirmed by police). Victim said that Defendant egged her car prior to departing for Indiana. Ex. 200 at 2-9.

Significantly, Victim further stated that Defendant had a lot of guns in his apartment and that she feared (particularly in light of the fact that he had been evicted from his apartment) that he might just shoot her, her husband, or both of them. Ex. 200. (Being a convicted felon, Defendant would have been aware that even the mere disclosure that he had guns could send him to prison.)

On September 21, Victim's landlord received a letter from Victim saying she had filed for a protective order against Defendant and wanted to move because she was afraid of him and didn't know what he would do next. On the same day, the landlord was fixing a defective lock on Defendant's building when a Sheriff's deputy came and said he was there to serve papers on Defendant. (Tr. 864-865). Landlord informed the deputy that, to his knowledge, Defendant was out of the state. (Tr. 865).

On September 22, Victim's landlord informed Defendant as he was returning from Indiana that he wanted him out of his apartment by the end of the month; this action was taken in part because of the protective order Victim had called to his attention and Defendant's harassing behavior.

While in Indiana after Victim obtained the protective order, Defendant repeatedly made further false reports of alleged drunk driving by Victim, which the police confronted Defendant about upon his return on September 23, 2009. (Tr. 893-895; Ex. 287). This was the evening prior to the scheduled hearing on the full order of protection set for 9 AM on September 24, 2009. Defendant promised police they would have no further trouble from him.[20] Ex. 287.

Sometime during the week prior to the murders (after the *ex parte* protective order), Defendant stopped by Scott's place of employment and said that he was tired of "being blamed for shit" and was "going to fuck [victim] over because she fucked him over." (Tr. 823-826, 1053).

Prior to the murders, Defendant called his longtime friend, Steven Armstrong, upset because he had received an eviction notice from his apartment and a restraining order (Tr. 781-782).

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[20] This hearing apparently did not take place because Defendant had not been successfully served. During penalty phase, it was noted that on a previous occasion during which Cole County was attempting to serve Defendant with process, he had made affirmative threats against law enforcement personnel and then engaged in a multi-hour standoff that police feared was a hostage situation.

On September 25, 2009, Defendant confronted the landlord about why he couldn't stay in his apartment, and the landlord said his mind was made up. (Tr. 860-861).

On September 27, 2009, Defendant left repeated voice mails to Bleckler urging her to separate victim from her husband and get him back together with him, and became angry when she failed to do so. Defendant had earlier told Bleckler that if Victim would not come back with him, he would "put a stop to it somehow." (Tr. 790). Defendant said if he couldn't have Victim, nobody was going to have Victim. (Tr. 790). On September 27, 2009, after Bleckler returned home from watching a football game with the Victims at the Victims' apartment, there were several voice mails from Defendant asking whether she had had time to talk to Victim about her husband and informing Bleckler that he knew she had been over there because he had seen her (Tr. 791). Defendant then called Bleckler and told her that he knew she wasn't going to try to get him back together with Victim again (Tr. 792). Defendant also knew that Victim's husband had been there and was angry that Bleckler hadn't gotten Victim away from her husband. Exhibit 10.

Bleckler told Defendant that he needed to leave Victim alone, that she was going to be with her husband, and that there was no sense in pursuing the situation because Victim didn't want to have anything to do with him (Tr. 792).

After that conversation, Defendant continued to call Bleckler, but she did not answer the calls and allowed them to go to voice mail (Tr. 792). Bleckler did not retrieve those messages until after the murders (Tr. 792-793). Voice mails left by Defendant at 1:56 PM and 8:03 PM on September 27, 2009 were played for the jury (Tr. 798-802). The 1:56 voice mail expressed frustration that Bleckler did not get Victim away from her husband to talk to her on his behalf. Ex. 9-10. The 8:03 voice mail said three times that Defendant was "tired of the shit" and Defendant said that he "was gonna fuckin finish it." Exs. 11-12.

On September 27, Defendant also called Scott to say he was going to "eliminate his problems" and had left instructions for her in case something occurred or something happened to him.

Victim was murdered with the order of protection paperwork in her purse. Ex. 200.

The trial judge's finding that the forfeiture by wrongdoing exception to the hearsay rule and the Confrontation Clause applied to prevent Defendant from benefitting from his elimination of the witness who had sought to escape his escalating abuse, and had pointed out his stash of illegal weapons, to "eliminate his problems" was supported by ample evidence. *See*, *McLaughlin*, 272 S.W.3rd at 509-510; *McLaughlin*, 265 S.W.3rd at 278 n.10. There was ample evidence, as required by *Giles*, that Defendant attempted to isolate and dissuade Victim from

seeking law enforcement help, and to prevent testimony concerning both his abuse and his stash of illegal weapons. *See*, *id*.

The trial court did not abuse its broad discretion in the admission of evidence or violate Defendant's confrontation rights.

D. Any error was not prejudicial and was harmless beyond a reasonable doubt.

Even assuming, *arguendo*, that there had been an evidentiary and/or constitutional error, there was no prejudice to defendant and any error was harmless beyond a reasonable doubt.

In the immediate aftermath of the murder, Defendant fled to Oklahoma, where he was caught red-handed with the murder weapon (the template for assembly of which was found in his apartment). Defendant had told Scott that he was going to "fuck [victim] over" and "eliminate his problems" and left a voice mail for Bleckler the night before the murder that was threatening towards Victim. Defendant evinced consciousness of guilt by fleeing from authorities in Oklahoma and then asked that they shoot him, the contingency for which he had anticipated by leaving an explanatory note in his car and another note on Scott's windshield.

Moreover, the jury already knew Defendant and Victim were "[e]x-lovers," an issue which was undisputed at trial. The jury knew from Bleckler's testimony that Defendant watched Victim's entrance and knew her husband was there.

The jury knew from multiple law enforcement witnesses that Defendant had called JCPD multiple times on complaints that turned out to be unfounded. The jury knew Defendant had refused to accept the breakup with Victim. Thus, the few specific statements referenced in closing arguments (the only ones the jury ever heard or saw) were cumulative and/or non-prejudicial, and in light of the totality of the evidence, harmless beyond a reasonable doubt. *See*, *State v. Moorehead*, 811 S.W.2d 425, 428 (Mo. App. E.D. 1991) (cumulative evidence harmless); *Chapman v. California*, 386 U.S. 18 (1967).

Defendant's fifth point should be rejected.

VI.

The trial court did not abuse its broad discretion in admitting evidence of Victim's statements to her landlord about Defendant being inside her apartment without her permission, or in admitting a redacted form of the letter she had written to the landlord concerning her desire to move and fear of Defendant, because the evidence was admissible both under the forfeiture by wrongdoing doctrine and under the state of mind exception to the hearsay rule. Moreover, the evidence was not hearsay because it did not go to the truth of matter asserted, but rather was authenticated by and proved Prenger's testimony that he had written a note explaining that he had evicted Defendant and delivered the letter back to victim just days before the murder. This evidence was relevant to motive.

Defendant's sixth point is multifarious in that it complains of both the admission of oral statements by the victim to Dennis Prenger, and of the admission of a document on which she and Prenger exchanged notes.

Victim initially complained to Prenger that Defendant had been in her apartment without authorization and explained that she was changing the deadbolt lock and asked whether Prenger had any objection to that; he testified that he did not.

Victim then wrote Prenger a letter, the unredacted portion of which asked whether he had other properties that she could move to; Victim's letter said that she could no longer live next to Defendant, had filed for a restraining order against him, and was afraid of him and did not know what he would do next. Defendant says the evidence was not admissible under the forfeiture by wrongdoing exception. For the reasons established in the argument under point V, the evidence was admissible under the forfeiture by wrongdoing exception and the trial court did not abuse its discretion.

Moreover, it is well-settled that a trial court's ruling on admissibility of evidence will be upheld if it is sustainable on any theory. *State v. McLaughlin*, 272 S.W.3rd at 509.

A. Victim's oral statement to Prenger

Prenger testified that Victim called to tell him that Defendant had been inside her apartment without her permission and that she had changed the lock. Prenger testified that he told Victim he did not have a problem with that. Prenger responded by telling Defendant that he no longer had permission to enter Victim's apartment building, taking away Defendant's key, and deleting the code to the building that had earlier permitted Defendant to perform odd jobs for him there.

Prenger's testimony as to his actions in response to Victim's complaint was relevant to the burglary count (lack of permission to be in the building) and

admissible. Defendant does not contend that it was not. His testimony concerning Victim's statements merely explained his actions. Defendant was not charged with trespass, so the statement was not admissible for the truth of matter asserted. Defendant does not contend on appeal that this was evidence of an uncharged crime.

Nor was this evidence prejudicial. If anything, Victim's statement that the lock had been changed benefitted the defense, which contended that Defendant could not have entered the building to commit the murders and therefore could not have committed burglary.

B. The redacted letter to Prenger

The trial court heavily redacted victim's letter to Prenger, removing all references to the vandalism of her and her family's property, and a sentence in which she referred to defendant as "PSYCHO!" The remaining portion of the letter stated that she wished to move to another of Prenger's properties, if possible, because while she enjoyed renting from him, she could no longer live next door to Defendant and had filed for a restraining order against him. Victim apologized for "all the B.S." and stated, "[b]elieve me, he scares me. I don't know what he'll do next."

In addition to being admissible under the forfeiture by wrongdoing doctrine for the reasons discussed in the argument under Point V, this evidence was admissible under the state of mind exception. *State v. Shurn*, 866 S.W.2d

447, 458 (Mo. 1993) ("A victim's statements of fear of the defendant—where relevant and not unduly prejudicial—are admissible under the state-of-mind exception to the hearsay rule.") *See also*, Wigmore on Evidence § 1730 at 148 (1976).

The evidence was admitted during the testimony of Prenger to explain that he had evicted Defendant and asked Victim to stay. The evidence was admissible to explain Prenger's subsequent conduct. *See*, *State v. Douglas*, 131 S.W.3d 818, 823 (Mo. App. W.D. 2004) (evidence offered to explain subsequent police conduct not hearsay because not admitted for the truth of the matter asserted). Prenger wrote a note on the bottom of Victim's letter that he testified he returned to Victim, which contained the information that he had evicted Defendant and wanted her to stay. Thus, Prenger had authenticated the note and confirmed the relevant portion, which went to Defendant's motive.

The portion referencing Victim having filed for a restraining order was cumulative and therefore not prejudicial. The exchange of notes' probative value did not rest on the truth of Victim's assertions, which reflected her state of mind, but rather on the escalating anger of the Defendant prompted by his eviction at the behest of the Victim (which Prenger testified to).

C. Evidence not prejudicial

Nor was the evidence prejudicial. The jury was already aware that Victim had filed for a restraining order. The jury was aware from the testimony of

Bleckler that her discussions with Victim led Bleckler to be concerned for her safety at the hands of Defendant. The jury was aware that Defendant had threatened Victim in a phone message to Bleckler the night before the murders in which he said that he was "tired of the shit" he perceived he was receiving from Victim and that he was "gonna fuckin finish it." The jury was aware that Defendant had visited Scott at her workplace and said that he was going to "fuck [Victim] over" and had told her the night before that he was going to "eliminate his problems."

Moreover, Defendant was caught red-handed with the murder weapon in his car after he fled to Oklahoma, at a time which indicated he had left Jefferson City just after the murders. The template for the home manufacture of the murder weapon was found in Defendant's apartment, as was 9 mm ammunition (the caliber used in the murders). Defendant's flight evinced consciousness of guilt, which was further demonstrated by his defiance of police who attempted to pull him over and after he was stopped. Defendant left multiple notes suggesting something ominous was about to occur, including one in his car which would explain his actions in the event the police took him up on his request that they "just shoot" him.

Defendant's sixth point should be rejected.

VII.

There was sufficient evidence to support Defendant's conviction for burglary in the first degree because a reasonable juror could find beyond a reasonable doubt that Defendant entered Victim's apartment building unlawfully for the purposes of murdering her.

Defendant's seventh point contends the evidence was insufficient to convict him of burglary on the grounds that there was allegedly no evidence that Defendant unlawfully entered the apartment building in which she was convicted of murdering victim. Defendant does not contest the sufficiency of the evidence for the first-degree murder conviction, nor does he contest that the victims were shot at close range inside the apartment building. Defendant offers no explanation for how a reasonable juror could have found that he murdered the Victim at close range inside her apartment building without being inside her apartment building. Nor does Defendant contest that, after threatening Victim and unlawfully entering her apartment on a previous occasion, the landlord forbid him to enter those premises.

A. Standard of review

Appellate review of a challenge to the sufficiency of the evidence supporting a criminal conviction is limited to a determination of whether sufficient evidence was presented at trial from which a reasonable juror might have found the Defendant guilty of the essential elements of the crime beyond a

reasonable doubt. *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993); *State v. Gibbs*, 306 S.W.3d 178, 181 (Mo. App. E.D. 2010). Appellate courts accept as true all of the evidence favorable to the State, including all favorable inferences drawn from the evidence, and disregard all evidence and inferences to the contrary. *Gibbs* at 181. Appellate courts do not act as a "super juror" with veto powers over the conviction, but rather give great deference to the trier of fact. *Id.*; *State v. Jones*, 296 S.W.3d 506, 509-10 (Mo. App. E.D. 2009).

B. The evidence was sufficient

Accepting all favorable inferences drawn from the evidence, Defendant murdered victim inside her apartment building at close range. Thus, the evidence was sufficient to establish that Defendant was inside victim's apartment building.

Victim's landlord testified that he had taken Defendant's key to the building away from him following a complaint by victim that he had been in her apartment without authorization. The landlord further testified that he had told Defendant that he was forbidden from being inside the building. The landlord changed the codes to the building so that Defendant could not gain access to the building.

To prove burglary in the first degree, the State must establish that the Defendant:

knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein, and when in effecting entry or while in the building or inhabitable structure or in immediate flight therefrom, he or another participant in the crime:

(1) Is armed with explosives or a deadly weapon or;

(2) Causes or threatens immediate physical injury to any person who is not a participant in the crime; or

(3) There is present in the structure another person who is not a participant in the crime.

§569.160.1; *State v. Olten*, 326 S.W.3rd 137, 140 (Mo. App. W.D. 2010).

Section 569.010 defines "enters unlawfully or remains unlawfully" as occurring when "a person 'enters unlawfully or remains unlawfully' in or upon premises when he is not licensed or privileged to do so." The testimony of Dennis Prenger, if believed by the jury, established that Defendant was not licensed or privileged to enter the Victim's premises, for which he was the landlord.

Therefore, according the State the benefit of all favorable evidence and all reasonable inferences therefrom, a reasonable juror could (and 12 reasonable jurors did) find that Defendant was unlawfully present in the Victim's apartment building for the purpose of murdering her and her husband. This was sufficient to support Defendant's conviction for burglary in the first degree.

Defendant's seventh point should be rejected.

VIII.

The trial court did not abuse its broad discretion by admitting the note found in Defendant's car because circumstantial evidence supported his authorship of the note, and the trier of fact could compare the handwriting to the known sample admitted into evidence (the note left on Scott's car by Defendant). Furthermore, there was no prejudice where the murder weapon was found in Defendant's car as he was fleeing and the template for the murder weapon was found in Defendant's apartment, Defendant had made recent threats against Victim, and Defendant had left a note the night before on a friend's car asking her to notify relatives and take care of his possessions (including illegal guns) if something was to happen to him. Moreover, Defendant had made similar statements in a voice mail which was admitted into evidence, so the evidence was cumulative and not prejudicial.

Defendant's final point complains of the admission into evidence of a note written on yellow notepad paper in the backseat of Defendant's car, which stated:

> If you are going with some one, don't lie to them, do not play games with them, do not fuck them over by telling other people things that are not true, do not blame them for things that they have not done.

> Be honest with them and tell them if there is something wrong. If you do not this could happen to YOU!! People do not like being fucked with, and after so much shit they can go off the deep end. Had TO [sic] much shit!!!

State's Exhibits 104, 223.

Defendant contends that the State failed to properly authenticate the note to prove it was written by Defendant, and that it was irrelevant hearsay. Inside Defendant's car, police also found a yellow notepad with information describing the license plate and a brief description of the Victim's truck (Tr. 1105-1106).

A. Standard of review

Whether a foundation is sufficient to admit an exhibit is a matter within the trial court's broad discretion. *State v. Copeland*, 928 S.W.2d 828, 846 (Mo banc 1996) (overruled on other grounds by *Joy v. Morrison*, 258 S.W.3d 885 (Mo 2008)).

B. Substantive standards

Once a known sample of handwriting has been admitted, the comparison with the disputed sample contemplated by §490.640 may be made by expert witnesses or by the jurors themselves. 33 Mo. Prac., Courtroom Handbook on

Mo. Evid. §901(3).2 (2014 ed.) (referencing *State v. Farmer*, 612 S.W.2d 441, 444 (Mo. App. S.D. 1981)).[21]

In the case at bar, a known sample of Defendant's handwriting had been admitted as State's Exhibit 203, namely Defendant's letter to Jody Scott left on her windshield the night before the murders asking that if anything happened to him, that she contact specified relatives and friends. The trier of fact was therefore able to compare the handwriting of the note found in Defendant's car

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[21] Section 490.640 provides, "Comparison of a disputed writing with any writing proved to the satisfaction the judge to be genuine shall be **permitted** to be made by witnesses, and **such writings** and evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute." (Emphasis added.) Whether *Farmer* actually stands for the proposition that jurors may make the determination in the absence of a witness comparison may admittedly be open to interpretation as there were expert witnesses on both sides in that case. However, the permissive nature of the language of the statute with respect to allowing, but not requiring a comparison by a witness, combined with the fact that both the known sample and the disputed sample "may be submitted to the court and jury as evidence" supports this interpretation.

amongst his weapons, bulletproof vest, and other possessions, and to resolve any dispute as to whether Defendant authored the note. *See, id*.

Moreover, in cases involving comparison of a disputed writing with a writing established to be genuine, the genuine writing "may be established by the testimony of lay witnesses, *see, e.g.*, State v. Farmer, 612 S.W.2d 441, 444 (Mo. Ct. App. S. D. 1981); by expert testimony, *see, e.g.*, Fedina's Estate v. Fedina, 491 S.W.2d 552, 558-59 (Mo. 1973); by circumstantial evidence, *see, e.g.*, State v. Copeland, 928 S.W.2d 828, 846 (Mo. 1996) (overruled on other grounds by, Joy v. Morrison, 254 S.W.3d 885 (Mo. 2008)); by admissions of an opponent, *see, e. g.*, Klaus v. Zimmerman, 174 S.W.2d 365, 369 (Mo Ct. App. 1943); or by any other method satisfactory to the court. *See* Boyd v. Civil Service Commission of City of St. Louis, 657 S.W.2d 83, 86 (Mo. Ct. App. E.D. 1983)." 33 Mo. Prac., Courtroom Handbook on Mo. Evid. §901(3).2 (2014 ed.). Even when a trial judge decides that there is sufficient evidence to satisfy a reasonable trier of fact that the known sample is genuine, the jury is not bound by the trial court's determination that the known sample is genuine. *Id*. *See*, *Klaus v. Zimmerman*, 174 S.W.2d at 368.

C. Sufficient circumstantial evidence to create a jury question

Just as circumstantial evidence suggested that Defendant's yellow notepad note admitted as Exhibit 203, which is not challenged on appeal, was genuine, the circumstantial evidence was sufficient to allow a reasonable trier of

fact to believe that Defendant's yellow notepad note, found amidst his weapons and bulletproof vest and other possessions (including a yellow notepad with detailed information about the Victims) in the vehicle from which he was fleeing the murder scene was genuine. At a minimum, it was sufficient to allow the jury to make the factual determination of whether the note was written by Defendant.

The note was written on paper identical to that of the known note; the note reflected the writer's explanation for going "off the deep end" after what he perceived to be being "fucked with" or "fuck[ed] over" by someone he had been going with, which was consistent with multiple previous statements he had made about the treatment he perceived that he was receiving from the Victim; and the note, which was not signed by anyone else as a sender, reflects the desired message of an extreme act committed out of frustration with such a relationship. A yellow notepad with detailed information about the Victims (consistent with that described by an officer who testified about Defendant's false complaints of Victim driving while intoxicated) was also found in Defendant's possession in the car.

The note was: 1) found in Defendant's possession, in his car; 2) amidst Defendant's weapons and other possessions-- including the yellow notepad with what the jury was entitled to infer had information he had written about the Victims; 3) as he was fleeing from the murder scene; 4) shortly after he

requested the police to "end it" or "just shoot" him; 5) on identical paper to his other note making arrangements for what should happen in the event of his death that he had left the night part of the murders (with handwriting the jury could compare) could lead a reasonable juror to conclude that Defendant had written the note to explain his actions in the event that he died resisting the police (particularly since he did resist both the police stop and their initial commands upon exiting the vehicle). There was sufficient circumstantial evidence to allow the trier of fact to resolve any dispute about its authorship, if it existed.

D. No prejudice

In any event, Defendant was not prejudiced. A template for the assembly of a STEN MK II submachine gun was found in Defendant's apartment. The murder weapon, a STEN MK II submachine gun, was in Defendant's possession, in the vehicle from which Defendant fled the murder scene at a time his location suggests was shortly after the murders.

Defendant had threatened Victim, both personally to a degree which caused her to seek an order of protection and to seek to move away from the neighboring building, and in a voice mail left the night before the murder with victim's neighbor. Defendant had made similar statements to witnesses, who testified that he felt that Victim had "fucked him over" so he intended to "fuck her over."

Defendant expressed agitation about his recent breakup with a girlfriend who was involved with somebody else who had been murdered to Robert Sanford, a fellow inmate. (Tr. 1155-1157, 1158). Defendant said he would solve the problem and admitted to feeling he was able to kill somebody over it (Tr. 1159). Defendant also said he would possibly be physical towards the person she was involved with (Tr. 1158-1159). Defendant didn't admit that he killed anyone, but did make the statement about feeling that he was done wrong by his girlfriend and that he was capable of killing somebody. (Tr. 1160).

Defendant also described to Sanford how to make a STEN Mark gun from a semiautomatic to a fully automatic, and how the magazine came out of the side of the gun (Tr. 1157-1158, 1176). The magazines to Defendant's STEN MK II submachine gun fit into the side, as Sanford described. (Tr. 1113-1116). Defendant told Jody Scott that he would leave a note in case something occurred or something happened to him, and did leave such a note suggesting that something might happen to him on Jody Scott's windshield the night before.

The disputed, written rant was not admitted for the truth of the matters asserted (i.e., it was not admitted to prove that similar things could happen to others or that he had, in fact, had "TO much shit!!!"), but rather for his state of mind and was not hearsay. It was relevant to his state of mind and his intent, which were elements of the charged offense of first-degree murder.

The evidence was not crucial to his conviction. Nor did it tell the jury anything it did not already know about his state of mind towards the Victim, which was in evidence through the testimony of the witnesses, or his motive and intentions, which were in evidence both through witnesses and the other note. Thus, the evidence was cumulative and therefore not prejudicial under the law cited in the argument under Point VII.

Defendant's final point should be rejected.[22]

[22] Defense counsel did not dispute, but rather assumed, the genuineness of both notes in his closing argument, when he stated: "[Defendant] was distraught. You can tell that by the notes." (Tr. 1431).

CONCLUSION

Defendant's convictions and sentences should be affirmed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Gregory L. Barnes
GREGORY L. BARNES
Assistant Attorney General
Missouri Bar No. 38946

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
greg.barnes@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 25,742 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2010 software; and

2. That a copy of this notification was sent through the eFiling system on this 15th day of September, 2014, to:

Craig Johnston
Woodrail Centre, Bldg. 7, Ste. 100
1000 West Nifong
Columbia, Missouri 65203
Craig.johnston@mspd.mo.gov

/s/ Gregory L. Barnes
GREGORY L. BARNES
Assistant Attorney General
Missouri Bar No. 38946
P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
greg.barnes@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI