No. SC91209

In the
Missouri Supreme Court

STATE OF MISSOURI,

Respondent,

v.

MICHAEL TISIUS,

Appellant.

Appeal from the Circuit Court of Boone County
Thirteenth Judicial Circuit, Division II
The Honorable Gary M. Oxenhandler, Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Appellant, Michael Tisius, was charged in Randolph County with two counts of murder in the first degree (L.F. 36-38).[1] Following a change of venue to Boone County, appellant was convicted of both counts of first-degree murder and sentenced to death (L.F. 2, 11-12). In its opinion on direct appeal from that conviction, this Court set out the facts underlying appellant's convictions as follows:

> In early June of 2000, Appellant and Roy Vance were cellmates at the Randolph County Jail in Huntsville, Missouri. Appellant's sentence lasted thirty days, and Vance told Appellant he would be in jail for some fifty years. As such, Appellant and Vance discussed various schemes where Appellant would return to jail to help Vance escape. In one of those plans, Appellant was to return to the jail with a firearm, force the guards into a cell, and give the gun to Vance, who would then take charge and release all of the inmates.
>
> The Randolph County Jail was a two story brick building that had been converted from a house. The front

[1]Appellant was also charged with aiding the escape of a prisoner, first degree burglary, and armed criminal action; these counts were dismissed by *nolle prosequi* following appellant's first trial (L.F. 2, 12, 36-37).

door of the jail was kept locked, and the officers could remotely open the door when visitors rang a doorbell. Inside the front door was a small foyer, and to the right behind a counter was the dispatch area where the officers were stationed. A hall led from the dispatch area to the jail cells in the rear of the building.

Appellant was released on June 13, 2000. Shortly after his release, Appellant contacted Vance's girlfriend, Tracie Bulington, who said that she wanted to go through with the escape plan. Four days later, Bulington drove from Macon to Columbia with a woman named Heather Douglas to pick up Appellant and drive him back to Macon; Appellant and Bulington stayed at Douglas' home for four or five days. During the ride to Columbia, Douglas heard the two discuss various ways of breaking Vance out of jail, including the idea of locking the jailers in a cell. They told Douglas they were joking. Douglas testified that over the days to follow, she heard Appellant and Bulington say that they were "on a mission," but they would not elaborate. Appellant and Bulington also described taking cigarettes to Vance at the jail and of having gotten information from a "stupid deputy." At

other times they would stop talking when Douglas entered the room. Douglas also testified that Appellant and Bulington kept a stereo, clothing and camping gear in Bulington's car and that she also saw a pistol in Bulington's car.

Beginning June 17, 2000, and continuing over several days, Appellant and Bulington visited the jail several times. At or around 1:30 a.m. or 2 a.m. one of those mornings, they were admitted in the front door and delivered a pack of cigarettes to an on duty officer, requesting that it be given to Vance. A day or two later, Appellant and Bulington returned to the jail with a pair of socks for Vance and asked questions about his upcoming court date.

Bulington testified that each delivery signified to Vance certain facts, such as that Appellant had made it to town or that the jail break would not occur the night of the delivery. During some of those visits, Appellant kept a .22 caliber pistol that Bulington had taken from her parents' home in the front of his pants. Appellant had tried to acquire a bigger gun than the one Bulington took. On the night of one of their visits, one officer testified that the Appellant and

Bulington were acting "real funny," nervous and erratic, such that he wrote a police report about the visit.

Appellant tested the gun by firing it outside of Bulington's car window while the two were driving on country roads on June 21, 2000. Later that evening, Appellant and Bulington[2] drove around listening to a song [that contained the lyrics "mo' murder" and mentioned a shotgun][3] as they prepared to get Vance out of jail. Appellant rewound the cassette and played the "mo murda" song over and over. Appellant told Bulington "it was getting about time" and that "he was going to go in and just start shooting and that he had to do what he had to do." Appellant also said he would go "in with a blaze of glory."

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[2]The original opinion notes that Bulington only testified in the penalty phase, so any testimony that came from Bulington was not considered in determining the sufficiency of the evidence. *State v. Tisius*, 92 S.W.3d 751, 758 n. 3 (Mo. banc 2002).

[3]The song Bulington identified at the first trial as the song appellant listened to was later determined to be the wrong song; Bulington subsequently identified a different song with similar lyrics as the correct song prior to this penalty phase retrial and testified to the above at trial (Tr. 68-75, 790).

At 12:15 a.m. on June 22, Appellant and Bulington returned to the Randolph County Jail, rang the doorbell and were admitted. Appellant again carried the pistol in his pants. Appellant and Bulington told the officers they were delivering cigarettes to Vance. The two officers present were Leon Egley and Jason Acton. Appellant made small talk with one of the officers for about ten minutes, discussing what Appellant was planning to do with his life and how Appellant was doing. Bulington testified that at that point, she was about to tell Appellant she was ready to leave but froze as she noticed Appellant had the gun drawn beside his leg. Appellant then raised his arm with the pistol drawn and, from a distance of two to four feet, shot Acton in the forehead above his left eye, killing him instantly. Egley began to approach Appellant, and about ten seconds after he killed Acton, Appellant shot Egley one or more times from a distance of four or five feet, until Egley fell to the ground. Both officers were unarmed.

Appellant then took some keys from the dispatch area and went to Vance's cell. Appellant could not open the cell, so he returned to the dispatch area to search for more keys.

> While Appellant was in the dispatch area, Egley grabbed Bulington's legs from where he was lying on the floor, and Appellant shot him several more times at a distance of two or three feet. Egley suffered five gunshot wounds, three to the forehead, a graze wound to the right cheek and a wound to the upper right shoulder. Not long afterwards, police found Egley gasping for air and a heard gurgling sound; he was surrounded by a pool of blood. Egley died shortly afterwards.
>
> Appellant and Bulington fled in her automobile. Appellant threw the keys from the dispatch area out of the car window on the way out of town. Bulington threw the pistol from the car window while crossing a bridge on Highway 36. After the two had passed through St. Joseph and crossed the Kansas state line, Bulington's car broke down. Later that day, the two were apprehended by the police, and the keys and gun were recovered. After having waived his Miranda rights, Appellant gave oral and written confessions to the murders.

State v. Tisius, 92 S.W.3d 751, 757-759 (Mo. banc 2002). This Court affirmed appellant's convictions and death sentences. *Id.* at 757, 771.

Appellant subsequently filed a motion for post-conviction relief under Rule 29.15. *Tisius v. State*, 183 S.W.3d 207, 211 (Mo. banc 2006). The motion court denied appellant's post-conviction claims as to the guilt phase,[4] but remanded for a new penalty phase. *Id.* at 211. That new penalty phase began on July 9, 2010, in the Circuit Court of Boone County, the Honorable Gary M. Oxenhandler presiding.

The State called numerous witnesses, including accomplice Bulington, to establish the facts surrounding the crime and establish that appellant committed both murders at the same time and that both Deputy Acton and Deputy Egley were peace officers engaged in active duty at the time of their murders (Tr. 575-854). The State called four witnesses and read into evidence the prior testimony of one other witness to testify about the impact of the victims' deaths on their families (Tr. 855-875). The State offered into evidence records of appellant's subsequent conviction for possession of a prohibited article in the Department of Corrections for possessing a piece of metal "commonly known as a boot shank" (Tr. 895-897). Finally, the State called two jailers to testify about episodes of appellant's conduct following the shootings (Tr. 898-910). In July 2000 at the Chariton County Jail, appellant raised his hands and pointed his fingers at a jailer while making motions with his mouth, as if he was mimicking shooting a gun at her (Tr. 898-900). In April 2001 at the Boone County Jail, appellant bragged to one of the jailers, asking

[4]This Court affirmed the motion court's denial of appellant's guilt phase claims. *Tisius*, 183 S.W.3d at 218.

"Don't you know who I am?" and saying he was the one that killed the two jailers in Randolph County (Tr. 906-910).

Appellant called his mother, his half-brother, two former teachers, two former neighbors and a youth program worker to testify about appellant's upbringing, who established that appellant was rejected by his father throughout his entire life, was badly beaten up by his half-brother on numerous occasions, was poorly supervised by his mother due to her needing to work, suffered from depression from childhood, and became a poor student, although he excelled in art (Tr. 920-1042, 1061-1065, 1082-1095). He also called several friends from his life closer in time to the murders (Tr. 1050-1060, 1068-1075). He presented testimony from a prison minister who befriended him while in the Department of Corrections (Tr. 1078-1080).

Appellant also presented testimony from three psychiatric/psychological practitioners (Tr. 1067, 1077, 1101-1163). Dr. A.E. Daniel treated appellant for depression in the Boone County Jail after the murders (Daniel 58-82).[5] Dr. Peterson and psychologist Shirley Taylor testified that, due to his upbringing, appellant suffered from

[5]Dr. Daniel and Dr. Peterson did not testify at trial; prior testimony from appellant's PCR hearing was read into evidence (Tr. 1067, 1077). This prior testimony was not transcribed at trial (Tr. 1067, 1077). The parties will stipulate to the portions of the prior testimony read at trial and submit those to the Court. Respondent refers to the testimony of those two witnesses by their name and the page number from the portions of the prior transcripts.

major depressive disorder and childhood-onset post-traumatic stress disorder, which rendered him needy and immature and thus open to being manipulated by accomplice Vance (Tr. 1116; Peterson 235-291).

The jury recommended death sentences for each of the murders, finding three aggravating circumstances for the murder of Deputy Egley and two aggravating circumstances for the murder of Deputy Acton (L.F. 204, 208). The court sentenced appellant to death for each murder (L.F. 222-224). This appeal followed.

ARGUMENT

I.

The trial court did not abuse its discretion or plainly err in allowing the State to read into evidence the complaint from State's Exhibit 53, the certified court record of appellant's conviction for possession of a prohibited item in the Department of Corrections, because the complaint was admissible as a public record and admission of appellant, did not violate appellant's confrontation rights, and was relevant to the issue of appellant's sentence.

Appellant's first point raises multifarious claims of error as to the admission and reading into evidence of the criminal complaint from State's Exhibit 53, the certified court record of appellant's conviction for possession of a prohibited item in the Department of Corrections, including that the complaint was hearsay, violated appellant's right to confrontation, and was irrelevant (App. Br. 48-75). But because the complaint was admissible as a public record and as an admission of appellant, did not violate appellant's confrontation rights, and was relevant to the issue of appellant's sentence, the trial court did not abuse its discretion or plainly err in permitting the reading of the complaint.

A. Facts

Near the end of the State's case, the prosecutor told the court that he intended to offer State's Exhibit 53, a certified copy of appellant's conviction of possessing a prohibited article in the Department of Corrections in Potosi (Tr. 884). The prosecutor

stated that the exhibit would not go to the jury, but, to inform the jury of the relevant content of the conviction, he would read the docket entry showing that appellant entered an Alford plea to the crime, the complaint to establish what the crime was, and the sentence (Tr. 884-885). Appellant objected, arguing that the prosecutor should only be allowed to read the charge that appellant pled guilty to, the sentence, and "if he wants to read the charging information" (Tr. 885-886). Appellant specifically objected to the portion of the complaint stating that appellant "knowingly possessed a metal object known as a boot shank, a weapon or item [of] personal property that could be used in such manner," arguing that admission of that information was "not consistent with what the law says about the admission of prior convictions" (Tr. 887). Appellant additionally argued that admitting that information through "a document" was hearsay (Tr. 887). The prosecutor responded that the document was admissible as a certified copy of a court record (Tr. 888). The court permitted the prosecutor to read the complaint up to the point that it said that appellant was charged with knowingly possessing a metal object, "commonly known as a boot shank" (Tr. 888-889).

Later, the court admitted State's Exhibit 53 over the defense's previous objections. (Tr. 895). The prosecutor read the jury the docket entry showing that appellant withdrew his not guilty plea to the charge offense of "Possession of Prohibited Article in Department of Correction," that he entered an Alford plea to that offense, and that he was sentenced to a concurrent term of five years (Tr. 896). The prosecutor then read the "charge" to the jury as follows:

> Comes now the prosecuting attorney of the County of Washington, State of Missouri, being duly sworn upon oath and information and belief and states that there is probable cause to believe that on or about June 6, 2006, the accused committed the following crimes: The Defendant, in violation of section 217.360, RSMo, committed the Class B felony of Possession of a Prohibited Article in the Department of Corrections, punishable upon conviction under section 558.011.12 RSMo, in that on or about June 6, 2006, in the County of Washington, the State of Missouri, the Defendant knowingly possessed a metal object commonly known as a boot shank.

(Tr. 897).

B. Standard of Review

Appellant argues that all of his claims were preserved because "defense counsel objected before the admission of State's Exhibit 53 and before the prosecutor read the allegations in the Complaint to the jury" and included his claims in his motion for new trial (App. Br. 52). While appellant objected at trial that the complaint constituted hearsay, and thus preserved that claim, appellant did not object that admission of the conviction violated his confrontation rights or that it was irrelevant (Tr. 886-887). To preserve an objection for review on appeal, the objection must be specific and must rely

on the same theory as relied on in the point on appeal. *State v. Moore*, 303 S.W.3d 515, 522-23 (Mo. banc 2010). This is especially true of appellant's confrontation claim, as constitutional claims must be made at the first opportunity to preserve such a claim. *State v. Baxter*, 204 S.W.3d 650, 652 (Mo. banc 2006). Because appellant did not present his confrontation or relevance claims to the trial court, he did not preserve those claims for appeal.

As to appellant's hearsay claim, review is for an abuse of discretion, which is only found when the decision is clearly against the logic of the circumstances. *State v. Taylor*, 298 S.W.3d 482, 491-92 (Mo. banc 2009). This is the same standard of review for publishing evidence to the jury. *Id.* Reversal due to an evidentiary error also requires a showing of prejudice. *Id.* at 492. Prejudice exists when there is a reasonable probability that the trial court's error affected the outcome of the trial. *Id.* at 492.

As to appellant's confrontation and relevance claims, review is only available for plain error. Supreme Court Rule 30.20. This Court can review for plain error when it finds that a manifest injustice resulted from error. *Baxter*, 204 S.W.3d at 652. Manifest injustice is determined by the facts and circumstances of the case, and the defendant bears the burden of establishing manifest injustice. *Id.*

C. State's Exhibit 53 was Not Inadmissible Hearsay

Hearsay is an out-of-court statement that is used to prove the truth of the matter asserted and that depends on the veracity of the statement for its value. *Taylor*, 298 S.W.3d at 492. Hearsay is generally inadmissible hearsay because the out-of-court

statement is not subject to cross-examination, is not offered under oath, and is not subject to the fact finder's ability to judge demeanor at the time the statement is made. *Id.* Exceptions to the general prohibition against hearsay, however, may apply when circumstances assure the trustworthiness of the declarant's statement. *Id.* Here, the complaint was not inadmissible hearsay because it was admissible under two exceptions to the hearsay rule.

First, the entirety of State's Exhibit 53, including the complaint, was admissible as a certified copy of a court record. As codified in § 491.130, certified copies of court records are admissible "as evidence of acts or proceedings of such court in any court of this state[.]" § 491.130, RSMo Cum. Supp. 2001. The complaint in a criminal case is such a document, as it is required to initiate a felony proceeding. Supreme Court Rule 22.01. Thus, the complaint as a whole is admissible as a certified copy of a court record.

Second, the specific acts of conduct stated in the complaint (and thus read to the jury) were admissible as admissions of the defendant. While appellant claims that that complaint was admitted as evidence that the Prosecuting Attorney of Washington County had probable cause to believe appellant committed the offense charged in State's Exhibit 53, thus making the statement hearsay, this is not true (App. Br. 55). Instead, the prosecutor read the complaint to establish the conduct to which appellant entered his Alford plea. By reading the charge from the complaint, the prosecutor was establishing the facts that appellant admitted could be proven to be true beyond a reasonable doubt, i.e., the facts that he agreed established his guilt for the charged offense. As such, the

language contained in the complaint was language adopted by appellant to admit his guilt was established, and served as an admission of appellant. The admission of a party opponent is not hearsay. *State v. Floyd*, 347 S.W.3d 115, 124 (Mo. App., E.D. 2011). While it may have been more proper for the prosecutor to have read from the information instead of the complaint, as the information would have been the operative charging document at the time appellant entered his plea, this is immaterial, as the information contained in State's Exhibit 53, and thus constituting the exact charge appellant entered his plea to, contained the exact same language regarding the possession of a "metal object, commonly known as a boot shank" (St. Exh. 53). This language was not superfluous or irrelevant, as, for appellant to have validly entered his plea, the statute required a showing that the item possessed was a "gun, knife, weapon, or other article or item of personal property that may be used in such a manner as to…endanger the life or limb of any offender or employee of such a center." § 217.360.1(4), RSMo Cum. Supp. 2003. Thus, appellant's Alford plea included an admission that his guilt for possessing a weapon commonly known as a "boot shank" could be established beyond a reasonable doubt. Therefore, in combination with his plea, the complaint was admissible as an admission of a party opponent of guilt beyond a reasonable doubt for that conduct, and could be presented to the jury as such.

Further, appellant suffered no prejudice from the mention of the boot shank in the complaint, as similar evidence was later revealed during the cross-examination of defense expert Shirley Taylor without any objection. During that testimony, the State confronted

Taylor's conclusion that appellant was not aggressive with evidence of aggressive behavior while incarcerated (Tr. 1148-1150). Taylor testified that she knew that a shank was a weapon and knew it was against the law for an inmate to possess one (Tr. 1150). The prosecutor asked if Taylor was made aware that appellant was convicted of possessing a boot shank while in prison, and Taylor acknowledged the conviction, stating that she knew "he had a piece of metal that he was holding for someone else," an understanding she had because appellant told her that (Tr. 1151). Thus, evidence of the boot shank was otherwise admitted without objection. A defendant is not prejudiced by hearsay evidence that is merely cumulative to other evidence admitted through another witness. *State v. Bynum*, 299 S.W.3d 52, 61 (Mo. App., E.D. 2009); *State v. Placke*, 290 S.W.3d 145, 154 (Mo.App., S.D. 2009). Moreover, through that testimony, appellant was able to give the jury his own explanation of the crime, designed to minimize his responsibility for the crime, without having to surrender his right not to testify. Therefore, because Taylor testified to similar evidence as admitted in State's Exhibit 53, appellant suffered no prejudice from that exhibit.

D. No Plain Error Regarding Appellant's Alleged Right to Confrontation

Appellant spends the vast majority of his point attempting to establish that the Confrontation Clause of the Sixth Amendment applies to the penalty phase of a capital trial (App. Br. 59-72). Respondent agrees with appellant that this is not a settled issue. *See, e.g., United States v. Barrett*, 496 F.3d 1079, 1100 (10th Cir. 2007)(citing other cases noting that it is "far from clear" that the Confrontation Clause applies to a capital

sentencing proceeding). Several jurisdictions have concluded, in reliance on the United States Supreme Court's opinion in *Williams v. New York*, 337 U.S. 241 (1949), which held that appellant had no due process right to confront witnesses in a capital sentencing proceeding, that the Confrontation Clause either does not apply to such proceedings at all or to all evidence except evidence of statutory aggravating circumstances. *See, e.g.*, *United States v. Fields*, 483 S.W.3d 313, 325-26 (5th Cir. 2007); *Szabo v. Walls*, 313 F.3d 392, 398 (7th Cir. 2002); *State v. Galindo,* 774 N.W.2d 190, 243-245 (Neb. 2009); *People v. Banks*, 934 N.E.2d 435, 460-62 (Ill. 2010); *Summers v. State*, 148 P.3d 778, 781-83 (Nev. 2006). On the other hand, other jurisdictions have held the right to confrontation applies to capital penalty proceedings. *See, e.g., United States v. Concepcion Sablan*, 555 F.Supp.2d 1205, 1217-21 (D. Colo. 2007); *Rodgers v. State*, 948 So.2d 655, 662-63 (Fla. 2006). Regardless of appellant's claim and the apparent split of authority on the issue, this case is not an appropriate vehicle for this Court to determine this issue.

First, as shown above, appellant's claim can only be reviewed for plain error due to his failure to present his confrontation claim to the trial court. Plain errors are only those errors which are evident, obvious and clear. *State v. Baumruk*, 280 S.W.3d 600, 607 (Mo. banc 2009). Because the United States Supreme Court precedent has been interpreted to hold that the right to confrontation does not apply in capital sentencing proceedings, this Court had not resolved this question prior to appellant's trial, and other jurisdictions are considerably split as to what the law is regarding confrontation in capital sentencing proceedings, it cannot be said that the trial court committed evident, obvious,

or clear error in failing to *sua sponte* exclude the evidence of the complaint as violating appellant's right to confrontation. *See United States v. Higgs*, 353 F.3d 281, 324 (4th Cir. 2003)("we cannot say that the error was plain since it even now remains unclear whether the Confrontation Clause applies in this circumstance"). Therefore, appellant's failure to raise this claim at trial should prevent review of it now, as appellant cannot establish plain error in these circumstances.

Second, even assuming that the Sixth Amendment right to confrontation did apply in the penalty phase, it would not apply to the complaint contained in State's Exhibit 53 because the complaint was not testimonial. A defendant is only denied his right to confrontation of a non-testifying declarant whose statements are admitted when such statements are "testimonial." *Crawford v. Washington*, 541 U.S. 36, 59 (2004). Statements are testimonial when made for the primary purpose of establishing or proving past events potentially relevant to later criminal prosecution. *Davis v. Washington*, 547 U.S. 813, 822 (2009). Such evidence is testimonial where it is made under circumstances which would lead an objective witness to reasonably believe the statement would be available for use at a later trial. *Crawford*, 541 U.S. at 52.

In *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), the United States Supreme Court held that sworn lab analyst affidavits identifying drugs that were tested admitted pursuant to a statutes specifically permitting such affidavits to establish those facts were testimonial. *Id.* at 2531-32. In doing so, the Court distinguished such

affidavits, clearly created for the purpose of being admitted as evidence at a subsequent trial, from business or official records, which are not created for such a purpose:

> Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here-prepared specifically for use at petitioner's trial-were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.

Id. at 2539-40. Under that rationale, official records which are not specifically prepared to create or preserve evidence, but in the administration of an entity's affairs, are not testimonial. *Id.*

Applying that reasoning to this case, the complaint in appellant's possession of a prohibited item case was not testimonial. While the complaint was prepared in connection with litigation, the complaint was not prepared for the purpose of creating or preserving evidence. In other words, it was not created to replace in-court testimony. Instead, it was created for the purpose of carrying out the administration of the prosecutor's and court's affairs: to commence a criminal prosecution. Supreme Court

Rule 22.01. The prosecutor's purpose in making the complaint could not have been to preserve or create evidence, nor would any reasonable observer believe that the complaint could be used at a trial in that case, as the charge itself is not evidence of the crime and does not tend to prove that the defendant committed that crime. *State v. Fassero*, 256 S.W.3d 109, 119 (Mo. banc 2008); MAI-CR 3d 300.02 (2002). As the complaint was not created as a substitute for evidence or in a manner that a reasonable person would believe it would be evidence, but instead for the administration of official duties, the complaint was not "testimonial" under *Crawford* and its progeny. Several other jurisdictions have reached such a conclusion, holding that documentary proof of prior convictions is not testimonial. *See, e.g., Com. v. Maloney*, 855 N.E.2d 765, 776-77 (Mass. 2006); *People v. Taulton*, 29 Cal.Rptr.3d 203, 1222-24 (Cal. App. 2005); *State v. King*, 146 P.3d 1274, 1280 (Ariz. App. 2006). Therefore, appellant's right to confrontation was not violated by the admission of the complaint as part of his prior conviction.

Moreover, had appellant chose to confront the evidence against him in the possession case, he had that opportunity to do so by going to trial on that charge and confronting the witnesses against him. By entering an Alford plea to that charge, appellant waived his right to confront the evidence against him establishing that he possessed the boot shank. Supreme Court Rule 24.02(b)(3)-(4); *see Michaels v. State*, 346 S.W.3d 404, 408 (Mo.App., S.D. 2011)(an Alford plea is treated no differently than a guilty plea). Because appellant waived his right to confront the evidence that he

possessed a boot shank in the earlier prosecution, the trial court did not plainly err in admitting the result of that waiver at this trial.

E. The Prior Conviction was Relevant

Finally, appellant claims that the allegations in the complaint were irrelevant, citing this Court's holding in *Fassero* that an indictment was not evidence that appellant committed the crime charged therein, but only that he was charged with such a crime (App. Br. 72-73). But appellant misses the point. In *Fassero*, the defendant had not been convicted of the crime set out in the indictment; thus, there was no evidence that he had in fact committed the charged crime. *Fassero*, 256 S.W.3d at 119. In this case, the complaint in State's Exhibit 53 was for a crime for which appellant was found guilty beyond a reasonable doubt based upon his Alford plea (St. Exh. 53). Thus, the complaint constituted evidence "detailing the circumstances" of a prior conviction, which is relevant and admissible in the penalty phase. *State v. Cole*, 71 S.W.3d 163, 174 (Mo. banc 2002). Therefore, appellant's relevance claim is meritless.

For the foregoing reasons, appellant's point must fail.

II.

The trial court did not abuse its discretion or plainly err during the State's cross-examination of defense expert Dr. Shirley Taylor because the prosecutor's questions sought to elicit logically and legally relevant evidence, appellant suffered no prejudice, and appellant waived any foundational objections.

Appellant's second point is a multifarious collection of claims of alleged improper cross-examination questions by the prosecutor put to Dr. Shirley Taylor about a study revealing problems with diagnosing mental illness, a biography of an abused child who became a good citizen, and the fact that appellant did not plead guilty, claiming these questions called for irrelevant evidence, lacked foundation, and misstated facts about that evidence (App. Br. 76-95). But because the prosecutor's questions sought logically and legally relevant evidence, appellant waived any foundational objections, and appellant suffered no prejudice, the trial court did not abuse its discretion or plainly err.

A. Facts

On direct testimony, Dr. Taylor concluded that appellant suffered from depression and post-traumatic stress disorder due to his abandonment by his father and beatings he received at the hands of his brother (Tr. 1107-1117). She testified that this background explained why appellant "idolized" Roy Vance and was "desperate" for his approval, thus explaining why appellant committed the murders (Tr. 117, 1121). She also testified that appellant was "extremely sorrowful" and "almost in shock" about the murders, that

he prayed for the souls of his victims, and that he wanted to say he was sorry to the victims' families (Tr. 1118).

During the cross-examination of Dr. Taylor, the prosecutor asked about the necessity of her subject to self-report truthfully, and she acknowledged that, based on that, there was "some" error rate in her profession, "[j]ust like there would be for an MRI for a brain tumor" (Tr. 1129). The prosecutor then asked Dr. Taylor if she was familiar with the "the Rosenhan study" (Tr. 1129). When she said she had never heard of it, the prosecutor explained it was a study where "thirty people" who were "completely normal" went to various doctors (Tr. 1129). At that point, appellant objected to the relevance of the question (Tr. 1129). The court overruled the objection (Tr. 1130). The prosecutor continued to explain that all of the subjects came back with incorrect psychological diagnoses (Tr. 1129-1130). He stated that the study "demonstrated [a] 100 percent error rate in your profession" (Tr. 1130). At that point, Dr. Taylor testified, "Well, I am familiar with that. I didn't know what it was called" (Tr. 1130). She testified that she was familiar with "a number of studies like that," and concluded that those study "just show[] that we can all be fooled" (Tr. 1130).

The prosecutor continued to ask questions about the credibility of her conclusions based upon the fact that they relied on appellant's self-reporting, asking about his motivation to lie to avoid conviction and death sentences (Tr. 1135, 1139). Dr. Taylor attempted to interject other opinions without answering the questions (Tr. 1140). Eventually, she testified, "He didn't care if he was found guilty of murder. He knew he

was guilty of murder" (Tr. 1140). The prosecutor asked, "But did he plead guilty? No. Right? He didn't plead guilty[?] (Tr. 1140). Before Dr. Taylor could answer that question, appellant objected to the relevance and argued the question was prejudicial because appellant "was never offered the chance to plead guilty" (Tr. 1140). The court found that the prosecutor's final question was the result of the witness's refusal to answer the prosecutor's yes-or-no questions about a motivation to lie (Tr. 1141). The prosecutor offered to rephrase the question, at which point the court overruled the objection "with the understanding that I'm going to hear a different question now" (Tr. 1141). At that point, the prosecutor established with Dr. Taylor that appellant had not yet been found guilty or sentenced for any crime when she first encountered appellant and that she was hired because the prosecution was seeking death and the defense was seeking a life sentence (Tr. 1141-1142). Dr. Taylor continued to insist that the potential death sentence did not give appellant an incentive to lie because she did not believe appellant wanted "one sentence over the other" (Tr. 1142-1143).

Later, during questioning about her conclusions regarding appellant's upbringing, Dr. Taylor agreed that children from good backgrounds can also commit murder and that "some kids that have it just like Michael, even worse, can grow up to be productive members of society (Tr. 1154). The prosecutor then asked if Dr. Taylor had heard of a book called "A Child Called It," and she said that she had (Tr. 1154). She testified that the book was about the author, Dave "Pelz"[6] (Tr. 1154). At that point, appellant objected

[6]As appellant notes, the author's name was actually David Pelzer (App. Br. 76).

to relevance (Tr. 1155). The prosecutor explained that the book spoke of a man who "came from deplorable circumstances" who became a "hero," which was relevant to rebut Dr. Taylor's conclusion that the murders were the result of his bad upbringing (Tr. 1155). Appellant replied that referencing the book was "irrelevant and immaterial" (Tr. 1155-1156). The prosecutor again responded that he should have the opportunity to test the expert's theories and knowledge (Tr. 1156). The court overruled the objection (Tr. 1156).

The prosecutor then started to read a description of the book, referring to the abuse the author suffered (Tr. 1156). After a sustained objection, the following occurred:

> Q. Are you familiar with this child's background, Dave Pelzer's background?
>
> A. Yes.
>
> Q. Okay. And it was – would you agree it was much, much worse than what you know about Mr. Tisius's background?
>
> A. I don't know if it was worse.
>
> Q. It was horrible.
>
> A. It was horrible. So was – so was Mr. Tisius's.

(Tr. 1157). The prosecutor established through questions that Pelzer became a captain in the Air Force, participated in wars, and ran youth-at-risk programs in California (Tr. 1157-1158). He finished this line of questioning by asking, "Basically, Dave Pelzer grew

up to be the type of guy every one of us should want to be despite a horrible childhood…and he did it through hard work and determination?" (Tr. 1158).

B. Standards of Review

Appellant concedes that the only portion of his claim that was preserved was his relevance objection to the questioning about "A Child Called It," as that was the only part of his claim both objected to at trial and included in his motion for new trial (App. Br. 84-85). As to that portion of his claim, review is for an abuse of discretion, as the trial court has "broad discretion" in determining the scope of cross-examination. *State v. Mayes*, 63 S.W.3d 615, 629 (Mo. banc 2001). Moreover, reversal will only lie where there has been an abuse of discretion and prejudice to the defendant. *State v. Roper*, 136 S.W.3d 891, 900 (Mo. App., W.D. 2004).

As to the remainder of appellant's claim, review is available, if at all, only for plain error. Supreme Court Rule 30.20. Plain error exists only where the error is "evident, obvious and clear" and it so substantially affected the defendant's rights that a manifest injustice resulted. *State v. Baumruk*, 280 S.W.3d 600, 607 (Mo. banc 2009).

C. The Cross-Examination Sought Logically and Legally Relevant Evidence

Evidence must be both logically and legally relevant to be admissible. *State v. Anderson*, 306 S.W.3d 529, 538 (Mo. banc 2010). Evidence is logically relevant if it tends to make the existence of a material fact more or less probable. *Id.* Evidence is legally relevant if the probative value is not outweighed by its prejudicial value, which

considers such things as confusion of the issues, misleading the jury, undue delay, waste of time, and cumulativeness. *Id.*

Here, the challenged evidence was admissible, as it was logically and legally relevant in the context of the cross-examination of an expert witness. Wide latitude is afforded the cross-examination of expert witnesses to test qualifications, credibility, skill or knowledge, and the value and accuracy of the expert's opinion. *State v. Zink*, 181 S.W.3d 66, 72 (Mo. banc 2005). The prosecutor's questions all fall within this wide latitude, as they were relevant to test the credibility, value, and accuracy of Dr. Taylor's opinions regarding appellant's motivation for the murders. First, the questions about "A Boy Called It" were logically relevant, as the example of the author of the book had some tendency to refute the accuracy of Dr. Taylor's conclusions that appellant's bad childhood would necessarily have led to mental illnesses, the outcome of which was to motivate him to commit murder in order to earn the approval of accomplice Vance (Tr. 1107-1117, 1121). Moreover, this evidence was not unduly prejudicial: it was relatively simple in its premise that a bad childhood does not necessarily result in mental illness and a willingness to commit murder, and thus was not confusing; it did not constitute such a large portion of the cross-examination as to constitute a waste of time; and was not misleading, as even Dr. Taylor acknowledge the underlying "common sense" implication of the evidence—that a person can have a bad childhood and still choose not commit murder (Tr. 1154, 1188-1189, 1991). Because the evidence had some probative value

and no significant prejudicial effect, the questions eliciting this evidence were permissible.

Likewise, the questions about the Rosenhan study were also logically and legally relevant. Dr. Taylor admitted that "some" of the discipline of psychology was "subjective" and that the accuracy of her conclusions depended on accurate self-reporting by the subject (Tr. 1128). The evidence elicited regarding the Rosenhan study, which Dr. Taylor admitted she had heard of when it was described, tended to prove that inaccurate self-reporting could lead to inaccurate diagnoses or conclusions. Additionally, the issue of the credibility of appellant's self-reporting to Dr. Taylor was strongly contested, as evidenced by her later injection of her uninvited testimony that appellant was "almost painfully honest" (Tr. 1135). Thus, the evidence was logically relevant. Further, it was not unduly prejudicial, as the questioning was relatively brief and was consistent with Dr. Taylor's other testimony about self-reporting. To the extent that the prosecutor's questions about a "100 percent error rate" could be deemed confusing, Dr. Taylor's answer interpreting those results (as well as the results of similar studies mentioned by her, not the prosecutor), was simply that it was possible to fool a psychologist (Tr. 1130). Thus, the trial court did not plainly err in concluding that this evidence was both logically and legally relevant.

Finally, the question asking if appellant had not pled guilty was also permissible. That appellant had not pled guilty and accepted a death sentence was certainly relevant to the issue of whether or not appellant cared whether or not he was convicted of murder or

whether he preferred a life sentence over a death sentence (Tr. 1140, 1142). Further, appellant, through Dr. Taylor's testimony, opened the door to this inquiry. Dr. Taylor had repeatedly refused to answer the prosecutor's yes-or-no questions as to whether or not appellant's potential death sentence gave him a motivation to lie to her, an issue she herself injected with a non-responsive answer to a question that alternate explanations to Dr. Peterson could be an indication that appellant was lying (Tr. 1139-1140). Because Dr. Taylor both opened the door to the issue of appellant's motivation to lie to avoid a death sentence and refused to properly answer the subsequent questions about the potential motivation to lie, the trial court was permitted to allow the prosecutor to ask this question. Where the defense injects an issue in the case, the State may be allowed to admit even otherwise inadmissible evidence in order to explain or counteract the negative inference raised by the injected issue. *State v. Sapien*, 337 S.W.3d 72, 81 (Mo. App., W.D. 2011).

Moreover, appellant could not have suffered prejudice from this question, because it was never answered; the prosecutor offered to rephrase the question after the defense made an objection (which the court overruled due to Taylor opening the door) (Tr. 1140-1141). The jury was instructed that questions alone were not evidence and could only be considered as the question supplied meaning to the answer (L.F. 146). MAI-CR 3d 302.02 (1987). Because the question was never answered, under the instruction, the jury would not have considered it. Jurors are presumed to follow the court's instructions. *State v. Forrest*, 183 S.W.3d 218, 230 (Mo. banc 2006). Therefore, because appellant's

failure to plead guilty was relevant to appellant's injected issue of his lack of motive to lie, and because the jury would not have considered the unanswered question, the trial court did not plainly err.

D. Appellant Waived Any Foundational Objection

Appellant also raises, for the first time on appeal, claims that there was no foundation for testimony regarding "A Child Called It" or the Rosenhan study because the prosecutor did not establish a foundation for admitting the book or study as "authoritative scientific texts" (App. Br. 90-93). Appellant's failure to raise these claims below should deprive appellant of even plain error review of this claim. Missouri courts have held that, where the defendant fails to make an objection at trial to the lack of a sufficient foundation for evidence, a foundational claim raised for the first time on appeal should not be reviewed. *State v. Coomer*, 976 S.W.2d 605, 606 (Mo. App., E.D. 1998); *State v. Hudson*, 970 S.W.2d 855, 860 (Mo.App., S.D. 1998); *State v. Blue*, 875 S.W.2d 632, 633 (Mo. App., E.D. 1994); *State v. Jones*, 569 S.W.2d 15, 16 (Mo. App., St. L. Dist. 1978). This is because a proper foundational objection identifies the specific deficiency for the trial court in order to give the State an opportunity to remedy the deficiency. *Coomer*, 976 S.W.2d at 606; *State v. Brown*, 949 S.W.2d 639, 642 (Mo. App., E.D. 1997); *Blue*, 875 S.W.2d at 633.

This reasoning should control here. It is true that the propounding party of written evidence during the cross-examination of an expert should establish a foundation that the evidence is "generally accepted" and "regarded as authoritative within the profession" to

establish a foundation for the evidence. *Barker v. Schisler*, 329 S.W.3d 726, 731 (Mo.App., S.D. 2011). But the prosecutor had no reason to question that the foundation of either piece of evidence was questioned by appellant or Dr. Taylor, as there was no objection to the lack of foundation. Had appellant objected, the prosecutor could have asked Dr. Taylor the questions to establish that foundation. Further, nothing in Dr. Taylor's answers suggested that either source of evidence was not properly regarded in the psychological community. She testified that she was familiar with both and provided an explanation of the meaning of the Rosenhan study and similar studies (Tr. 1129-1130, 1154-1158). While familiarity alone would not necessarily provide a sufficient foundation, *id.* at 731, Dr. Taylor's testimony raises the possibility that both sources of evidence were not only familiar to her, but generally accepted and considered authoritative. It is also possible that she would testified that they were not accepted or authoritative, but, as there was no foundational objection, appellant deprived the State the opportunity of proving what it did not know appellant was objecting to. Moreover, even if the error was reviewed for plain error, it would be appellant's burden of demonstrating clear error and a manifest injustice. *State v. Baxter*, 204 S.W.3d 650, 652 (Mo. banc 2006). To establish that, appellant would have to prove that Dr. Taylor's answers to those foundational questions would have been "no." But because there was no objection, those questions were never asked. Thus, appellant is not entitled to relief on his foundational claim.

Appellant's lack of foundational objection must also defeat his plain error claim that the prosecutor made "untrue assertions" about the Rosenhan study. Appellant attempts to identify the Rosenhan study as a 1973 article in the scientific journal *Science*, and claims that the study featured only eight subjects, not thirty (App. Br. 86-88). But, because appellant did not make an objection to the foundation of evidence of "the Rosenhan study," there is no way of knowing whether or not the study identified by appellant is the study the prosecutor and Dr. Taylor were talking about. It does not stretch credulity to believe that, even if the *Science* article was about the same researcher, that he or she did not do a subsequent study with more subjects that reached a similar result. It is telling that, after describing the study with the allegedly "untrue assertions" about it, Dr. Taylor was able to recognize the study and testified that she was familiar with it. Had the prosecutor misstated the study, it is not unreasonable to believe that Dr. Taylor would have testified that she did not recognize the study or that the prosecutor had incorrectly described it. Because there was no objection to the foundation for the testimony about the study, the record is simply insufficient to support appellant's claim that the prosecutor's questions (and Dr. Taylor's answers) were incorrect. Thus, appellant cannot meet his burden of establishing evident, obvious, and clear error resulting in a manifest injustice from this testimony.

For the foregoing reasons, appellant's point must fail.

III.

The trial court did not plainly err in failing to *sua sponte* interfere with several portions of the prosecutors' closing arguments because all of the challenged arguments were either permissible or did not result in a manifest injustice.

Appellant's third point is a multifarious collection of claims of alleged plain error by the trial court for failing to interfere *sua sponte* with the prosecutors' closing arguments (App. Br. 96-105). But because such claims are typically denied without explication, and all of the challenged arguments were either permissible or did not result in a manifest injustice, the trial court did not plainly err.

First, appellant concedes that there was no objection to any of these challenged arguments (App. Br. 97). Statements made in closing argument will rarely amount to plain error, and any assertion that the trial court erred for failure to intervene *sua sponte* overlooks the fact that the absence of an objection by trial counsel may have been strategic in nature. *State v. Cole*, 71 S.W.3d 163, 171 (Mo. banc 2002). Without an objection, "the trial court's options are narrowed to uninvited interference with summation and a corresponding increase of error by such intervention." *State v. Clemmons*, 753 S.W.2d 901, 907-08 (Mo. banc 1988). Because trial strategy looms as an important consideration in any trial, assertions of plain error regarding matters contained in closing argument are generally denied without explication. *State v. Perry*, 275 S.W.3d 237, 248 (Mo. banc 2009). Therefore, this Court should choose not to exercise its discretionary ability to review for plain error, and deny appellant's claim without review.

Should this Court exercise its discretion to engage in plain error review, relief can only be granted if it is established that an error occurred in the argument which had a decisive effect on the outcome of the trial and amounts to manifest injustice. *State v. Deck*, 303 S.W.3d 527, 541 (Mo. banc 2010). Appellant bears the burden of proving the argument had a decisive effect on the jury. *Id.*

A. Alleged Misstatement of Law

Appellant's first argument is that the prosecutor misstated the law by arguing that appellant did not "have a right to ask for mercy" and "forfeited that right" by committing the murders (App. Br. 98-99). Appellant, however, mischaracterizes this argument by taking it out of context. "Closing arguments must be examined in the context of the entire record." *Id.* The entirety of the argument was as follows:

> Ladies and gentlemen, you can – and I told you during voir dire a couple of days ago, you can extend mercy for whatever reason to this man. You can do that. But the one thing he does not have the right to do is to ask for it. He forfeited that right on June 22nd when he committed these two murders.

(Tr. 1176-1177). First, despite appellant's argument to the contrary, the prosecutor did not tell the jury that it could not exercise its discretion to grant appellant mercy; the above quote shows that the prosecutor told the jury that it could extend mercy to appellant "for whatever reason."

Second, while the prosecutor did say that appellant had "forfeited" his "right" to ask for mercy, the nature of the statement shows that the prosecutor was not arguing that appellant had no legal right to request mercy, but that such a plea for mercy should not be considered by the jury in this case because appellant did not deserve mercy as he had not extended mercy to his victims. This is clear from the prosecutor's statement shortly after the above argument:

> We're asking you to take a man's life, and – but we're asking you to do it – unlike he did it, we're asking you after he's had attorneys, after he's gotten to state his case, *after he's gotten to plead for his mercy*, we're asking you to do that. None of those things were afforded to Jason Acton; none of those things were afforded to Leon Egley. He decided to take it upon himself to be judge, juror and executioner.

(Tr. 1177)(emphasis added). A prosecutor is allowed to argue that a defendant does not deserve mercy under the facts of a particular case. *State v. Storey*, 40 S.W.3d 898, 911 (Mo. banc 2001); *see also State v. Hall*, 955 S.W.2d 198, 209 (Mo. banc 1997)(argument that the victim did not have a lawyer and twelve people to ask for mercy was not plainly erroneous). The prosecutor even noted that appellant was going to get to "plead for mercy," thus showing that the prosecutor was not saying that appellant did not have the legal right to ask for mercy. In context, the prosecutor's argument was not a statement

about appellant's legal right to ask for mercy, but a plea to reject that request for mercy under the facts of the case. Therefore, the argument was permissible.

B. Future Dangerousness Arguments

Appellant next complains that statements by the prosecutors in both portions of the closing argument were improper arguments that death was an appropriate punishment because appellant represented a future danger to others in prison, claiming that such arguments are "prohibited" because they suggested that the jury had an obligation to protect others from future harm (App. Br. 100-101). Appellant relies on two Nevada cases, *Schoels v. State*, 966 P.2d 735, 740 (Nev. 1998), and *Blake v. State*, 121 P.2d 567 (Nev. 2005), to argue that such arguments are improper when they "directly or by implication, place responsibility on the jury for the deaths of unknown future victims" (App. Br. 101). Appellant claims the prosecutors' statements violated that standard by arguing that "we all have an obligation to protect" prison workers (Tr. 1190), that "I'm asking you to protect us, protect them from people like" appellant (Tr. 1192), and that "our goal" was to make sure nobody but appellant died in prison (Tr. 1219) (App. Br. 100).

This Court rejected an identical claim, which relied on the exact same Nevada cases, in *Deck*. In that case, the prosecutor argued, "He knows how to escape, helping people that were in for the rest of their lives. I need you to be the sheepdog. I need you to protect the guards that will have to guard him so that he doesn't injure them. I need you to be a sheepdog and even protect other, more vulnerable inmates." *Deck*, 303 S.W.3d at

543. This Court, citing the United States Supreme Court in *Simmons v. South Carolina*, 512 U.S. 154, 162 (1994), noted that the future dangerousness of the defendant is a legitimate consideration in a capital penalty phase. *Id.* at 543-44. This Court then held that the challenged argument permissibly argued future dangerousness and "did not did not suggest or imply the jurors would be directly responsible or held accountable if Deck harmed anyone else in the future." *Id.*

The argument in this case is indistinguishable from that in *Deck*. The prosecutors in this case did not argue that the jury would be responsible for any future harm appellant caused if it did not sentence appellant to death, but, as in *Deck*, argued that the jury needed to protect others from appellant by imposing death sentences. Just, as in *Deck*, such an argument appealing to the jury's sense of duty is not the same as blaming them for any future harm. Therefore, just as in *Deck*, the prosecutors' arguments were permissible future dangerousness arguments.

3. Appeals for Justice for the Victims' Families

Finally, appellant challenges two arguments that he claims "implied" that the victims' families wanted appellant sentenced to death, which constituted an improper mention of the victims' families' opinion of an appropriate sentence and improper appeals to the jurors' emotions (App. Br. 102-103). In the second of these challenged statements, the prosecutor argued that the death penalty "is an answer to the plea from the families of Leon and Jason and Randolph County that you do justice in this case" (App. Br. 1219). The argument, however, was not plainly erroneous. In *Deck*, this Court

rejected a similar claim of improper appeal to emotion from an argument asking for justice on behalf of the victim's family members, finding that the remarks were not improper emotional appeals and did not inappropriately attempt to hold jurors responsible to the victims' family for their verdict. *Deck*, 303 S.W.3d at 541. The challenged argument was merely a permissible call to the jury to do justice by imposing the harshest possible punishment. *See, e.g., State v. Strong*, 142 S.W.3d 702, 727-28 (Mo. banc 2004).

The other argument that appellant claims is an expression of the victims' desires that appellant be executed somewhat misrepresents that argument. In that argument, after talking about the fact that victim Acton was engaged to be married to a woman with four children, the prosecutor stated:

> And you know, it's pretty audacious to come in here now, as this defendant is doing, and saying, "I didn't have a dad and, boy, look[] what happened. Do those Miller kids – do those Miller kids get to go kill somebody because their dad, their father figure is gone? If so, Mr. Tisius, write down the name. Tell me who they get to kill, because I bet your name would be on that piece of paper.

(Tr. 1184-1185). In context, the statement about Acton's future stepchildren "getting" to kill was not a reference to the children's desire that appellant be executed, but a sarcastic response to a primary theme of appellant's defense: that he was less responsible for the

murders because he was rejected by his father (Tr. 555, 558-559, 561-562, 564-565, 567, 921-923, 932-933, 942-943, 976, 985-987, 996, 1009, 1034, 1036-1037, 1108-1111, 1116-1117; Peterson 240, 243). A prosecutor may comment on the evidence and even belittle and point to the improbability and untruthfulness of specific evidence. *State v. Storey*, 40 S.W.3d 898, 910 (Mo. banc 2001). While the prosecutor acknowledged that appellant had a difficult life (Tr. 1185), he clearly believed that it should not be used as a reason not to impose death sentences for appellant's heinous crimes; this argument was merely a means of conveying that belief. Therefore, in context, the argument was not an emotional plea for death on behalf of the victim's families.

Further, even if this argument did exceed propriety by directly addressing the appellant and indicating that the victims' children would want to kill him if they got to use the same logic as appellant's defense, there was no manifest injustice. To the extent the last portion of the argument was inappropriate, it was brief, filling about two lines of an argument covering seventeen pages of transcript, and isolated, as the prosecutor quickly changed the subject and did not return to it. Even improper comments during argument that are brief and isolated do not amount to manifest injustice. *See State v. Deck*, 994 S.W.2d 527, 544 (Mo. banc 1999)(personalizing comment to the jurors to think of someone pointing a gun at their heads for ten minutes was brief and isolated and thus did not amount to a manifest injustice). Due to the brief and isolated nature of the statement, as well as the nature of appellant's crimes and the evidence against him, it

cannot be said that this one statement had a decisive effect on the jury's verdict. Therefore, there was no manifest injustice, and thus no plain error.

For the foregoing reasons, appellant's point must fail.

IV.

The trial court did not plainly err in submitting Instructions No. 11 and 17, the verdict mechanics instructions, because any error in failing to specifically mention mitigating circumstances did not result in a manifest injustice, as the instructions in their entirety instructed the jury how to consider mitigating circumstances and return a life verdict if it believed mitigating circumstances outweighed aggravating circumstances.

Appellant claims that reversal is required because Instructions No. 11 and 17, the verdict mechanics instructions, failed to include a required paragraph specifically referring to mitigating circumstances (App. Br. 106-112). But because the instructions in their entirety informed the jury how to consider mitigating circumstances and return a life verdict if it believed mitigating circumstances outweighed aggravating circumstances, there was no manifest injustice from any error in those instructions. Therefore, the trial court did not clearly err in submitting those instructions.

As appellant concedes, because he raised no objection to the challenged instructions, review is available only for plain error. Supreme Court Rule 30.20. Plain error may be found when the alleged error facially establishes substantial grounds for believing a manifest injustice occurred. *State v. Dorsey*, 318 S.W.3d 648, 652 (Mo. banc 2010). "To demonstrate that an instructional error constitutes plain error, the defendant must show that the trial court 'so misdirected or failed to instruct the jury' that the error affected the jury's verdict." *Id.*

As appellant notes, the technical error that occurred in this case appears to be identical to that which occurred in *State v. Anderson*, 306 S.W.3d 529 (Mo. banc 2010): the State patterned Instructions No. 11 and 17 after the modified versions of MAI-CR 3d 313.48A set out in the appendix to MAI-CR 3d 313.00, applicable to retrial of a capital trial punishment phase alone (L.F. 156-158, 165-166). MAI-CR 3d 313.00 (2003); *Anderson*, 306 S.W.3d at 534. The appendix to 313.00, and thus Instructions 11 and 17, did not include an intervening addition to 313.48A, which added the following paragraph:

> If you unanimously decide that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, then the defendant must be punished for the murder of [*name of the victim in this count*] by imprisonment for life by the Department of Corrections without eligibility for probation or parole, and your foreperson will sign the verdict form so fixing the punishment

(L.F. 156-158, 165-166). MAI-CR 3d 313.48A (2004); *Anderson*, 306 S.W.3d at 534-35.

As this Court decided in *Anderson*, even though the failure to include the above paragraph was technically error, it was not prejudicial, as the entirety of the instructions informed the jury how to consider mitigating circumstances and return a life verdict if it believed mitigating circumstances outweighed aggravating circumstances. *Anderson*, 306 S.W.3d 535-36. Instructions No. 9 and 15 instructed the jury:

> If each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole

(L.F. 154, 163). Further, the verdict mechanics instructions stated,

> If you unanimously decide, after considering all of the evidence and instructions of law, that the defendant must be punished for the murder of [Leon Egley/Jason Acton] by imprisonment for life by the Department of Corrections without eligibility for probation or parole, your foreperson will sign the verdict for so fixing the punishment

(L.F. 156, 165). Thus, these two paragraphs sufficiently instructed the jury that, if it concluded that mitigating circumstances outweighed aggravating circumstances, it must return a verdict of life imprisonment, and thus must sign the verdict fixing a life sentence. As this Court noted, the additional paragraph about mitigating circumstances did not change the law or render the earlier instruction incorrect, but instead was "simply part of the ongoing effort to clarify the current instructions." *Anderson*, 302 S.W.3d at 535 n. 2. Therefore, the error in omitting the additional paragraph did not result in the jury being so misdirected as to have affected the verdict, and thus did not amount to plain error.

Appellant admits that *Anderson* is controlling and against his position, but asks this Court to reconsider its holding, noting that three members of this Court dissented from that holding (App. Br. 108-109). But appellant's argument ignores a vital reason for that dissent: because the instruction was objected to, it should have been presumed prejudicial, and the dissent did not believe that presumption was rebutted. *Anderson*, 302 S.W.3d at 547-48. The dissent explicitly distinguished its dissenting opinion from other cases where this error was raised but the burden was on the defendant to establish prejudice. *Id.* at 548. Here, appellant bore the burden of establishing not only prejudice, but a manifest injustice, i.e., a showing that the error so misdirected the jury that it actually affected the verdict. Because the entirety of the instructions advised the jury that it must return a life verdict if it believed mitigating circumstances outweighed aggravating circumstances, appellant did not meet his burden of demonstrating a manifest injustice from the error.

For the foregoing reasons, appellant's point must fail.

V.

The trial court did not err in submitting Instructions 9 and 15, based on MAI-CR3d 313.44A, the mitigating circumstances instruction, for failing to instruct the jury that it had to find beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances because this Court has repeatedly rejected this claim in other cases, holding that the pattern instruction properly sets out Missouri law, which does not place any burden on the State regarding mitigating circumstances.

Appellant claims that the mitigating circumstance instructions, patterned after approved instruction 313.44A, were erroneous because they failed to place the burden of proving that aggravating circumstances outweigh mitigating circumstances on the State (App. Br. 113-116). This Court has repeatedly rejected this claim, holding that there is no requirement that the determination of the weight of mitigating and aggravating circumstances be established by the State beyond a reasonable doubt. *State v. Davis*, 318 S.W.3d 618, 643 (Mo. banc 2010); *State v. Johnson*, 284 S.W.3d 561, 587-89 (Mo. banc 2009); *State v. Taylor*, 134 S.W.3d 21, 30 (Mo. banc 2004); *see also Storey v. State*, 175 S.W.3d 116, 157 (Mo. banc 2005); *State v. Gill*, 167 S.W.3d 184, 193 (Mo. banc 2005); *State v. Glass*, 136 S.W.3d 496, 520-21 (Mo. banc 2004).

Appellant argues that this holding of this Court violates United States Supreme Court precedent allegedly requiring the State to bear the burden of proving that mitigating circumstances outweigh aggravating circumstances (App.Br. 114-115). This

argument overlooks the United States Supreme Court's opinion in *Kansas v. Marsh*, 548 U.S. 163, 170-71 (2006), which stated:

> So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, *a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency.*

Id. at 170-71 (emphasis added). This Court has explicitly applied *Marsh* to Missouri's capital sentencing scheme. *Johnson*, 284 S.W.3d at 588-89. Therefore, the approved pattern instruction and the instructions given in this case did not unconstitutionally shift the burden of proof regarding mitigating circumstances. Thus, the trial court did not err in submitting instructions patterned after the approved instruction.

For the foregoing reasons, appellant's point must fail.

VI.

The trial court did not err in convicting appellant of first-degree murder and sentencing appellant to death due to the failure to include aggravating circumstances in the information because this Court has already decided this issue against appellant and has repeatedly rejected the claim that aggravating circumstances are elements which create a distinct offense of "aggravated first-degree murder" and thus must be included in the information

Appellant claims that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002), and *United States v. Booker*, 543 U.S. 232 (2005), require aggravating circumstances to be pled in the charging document (App. Br. 117-119). He argues that the failure of the information to contain those circumstances resulted in appellant being sentenced to death "for a crime never pled in the information," as such pleading is required to charge the distinct offense of "aggravated first-degree murder," the only offense for which appellant could be sentenced to death (App.Br. 117-119).

Appellant's claim is barred as it has already been decided against him by this Court. In his first direct appeal, appellant raised the exact same claim. *State v. Tisius*, 92 S.W.3d 751, 766 (Mo. banc 2002). This Court rejected the argument, holding that Missouri's first-degree murder statutes establish a single crime of first-degree murder with a range of punishment including life imprisonment and death, and therefore aggravating circumstances were not elements of a distinct crime of first-degree murder. *Id.* at 766-67. Under the law-of-the-case doctrine, the previous holding of a court is the

law of the case for all points presented and decided, and those issues may not be re-litigated on remand and subsequent appeal. *State v. Deck*, 303 S.W.3d 527, 545 n. 2 (Mo. banc 2010). Because appellant's claim is the same as that already decided against him in this Court, this Court's prior opinion is the law of the case, and therefore his claim is barred.

Moreover, even if appellant's claim had not been rejected in his previous appeal, the substance of his claim has subsequently been oft-rejected by this Court, as this Court has stated that the notice of aggravating circumstances under § 565.005.1 is sufficient to notify appellant that he is charged with a capital offense. *State v. Johnson*, 284 S.W.3d 561, 589 (Mo. banc 2009); *State v. Johnson*, 207 S.W.3d 24, 48 (Mo. banc 2007); *State v. Gill*, 167 S.W.2d 184, 194 (Mo. banc 2005); *State v. Strong*, 142 S.W.3d 702, 711-12 (Mo. banc 2004); *State v. Glass*, 136 S.W.3d 496, 512-13 (Mo. banc 2004); *State v. Edwards*, 116 S.W.3d 511, 544 (Mo.banc 2003). Missouri law establishes only one crime of murder in the first degree with a maximum sentence of death, and that the requirement of aggravating circumstances does not increase the punishment for first-degree murder. *Johnson*, 284 S.W.3d at 589; *Johnson*, 207 S.W.3d at 48. Those holdings are completely consistent with the U.S. Supreme Court cases, which specifically state that they do not address the issue of whether the State must allege enhancing facts in the charge. *Apprendi*, 530 U.S. at 476 n.3; *Ring*, 536 U.S. at 597 n.4. Therefore, appellant was eligible to be sentenced to death for his first-degree murder conviction.

For the foregoing reasons, appellant's claim must fail.

VII.

This Court should, in the exercise of its independent statutory review, affirm appellant's death sentences because: (1) the sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) the evidence supports the jury's finding of aggravating circumstances, and; (3) the sentence is not excessive or disproportionate to those in similar cases considering the crime, the strength of the evidence, and the defendant.

Under the mandatory independent review procedure contained in § 565.035, this Court must determine:

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

§ 565.035.3, RSMo 2000.

As to the first step in proportionality review, appellant cites to the alleged errors raised in his first three points on appeal, suggesting that the "combined impact of these errors," even if not warranting reversal on their own, "resulted in the death sentences being imposed under the influence of passion, prejudice, and other arbitrary factors" (App.Br. 112-113). As respondent has already shown as to each of appellant's claims, there was either no error at all or, if there was, any error was not unduly prejudicial to appellant. Thus, these alleged errors could not have caused such prejudicial error as to undermine the reliability of the death verdicts. Numerous non-errors cannot add up to error. *State v. Buchli*, 152 S.W.3d 289, 309 (Mo.App., W.D. 2004). Thus, appellant's claim of "passion, prejudice, or other arbitrary factors" is meritless.

As to the second step in proportionality review, appellant raises no argument that there was insufficient evidence of the aggravating circumstances, nor could he raise such a claim. The jury found two aggravating circumstances as to both of the murders which were uncontested: the deputies were indeed peace officers engaged in the performance of their official duties, and appellant killed each deputy while engaged in the murder of the other (L.F. 204, 208). Further, there was evidence that the murder of Egley was part of a plan to kill more than one person, supporting the depravity of mind aggravator. *See, e.g., State v. Dorsey*, 318 S.W.3d 648, 653-54 (Mo. banc 2010). Therefore, the second step of this Court's proportionality review was satisfied.

As to the third step, whether appellant's death sentences are excessive or disproportionate to the penalty imposed in other cases, a review of this Court's prior

opinions reveals that they were not. Most notably, this Court has already previously found that appellant's death sentences were neither excessive nor disproportionate to his crimes. *State v. Tisius*, 92 S.W.3d 751, 765-66 (Mo. banc 2002). It is true that this Court's prior determination does not preclude reconsideration of the issue, as the interpretation of § 565.030 has changed since appellant's last appeal to allow for consideration of cases where defendants received life sentences without probation or parole for first-degree murder. *See State v. Davis*, 318 S.W.3d 618, 643-44 (Mo. banc 2010). Appellant urges this Court to use this change in the law to find that appellant's death sentences are disproportionate, citing to several cases that resulted in life sentences even though the defendants murdered multiple victims (App. Br. 126-130). But appellant's argument regarding the change in the law should not lead to a different result from appellant's first appeal. Appellant's context-free laundry list of cases fails to explain the circumstances showing why those defendants received life sentences which would have no bearing in this case, such as: if the prosecutor elected not to seek the death penalty and thus the death penalty was not at issue at all; if the evidence of guilt left some room for the jury to choose a life sentence due to residual doubt; if the defense presented much stronger mitigation evidence than appellant did in this case; or if the jury simple elected to extend mercy (App. Br. 126-130).

On the other hand, a comparison of similar cases where death was imposed is more relevant to statutory review, as the defendants in those cases were in the same contextual position as appellant. Logically, if appellant's cases are factually similar to

other cases where the death penalty was not excessive or disproportionate (and if appellant's death sentences were considered neither excessive nor disproportionate in his first appeal), this Court should again conclude that statutory review supports affirmance.

Appellant's crimes were similar to other crimes which resulted in death sentences affirmed by this Court. First, despite appellant's attempt to identify cases with multiple victims resulting in life sentences, there are also numerous cases where death sentences have been found to be neither excessive nor disproportionate when the defendant murdered more than one person. *See, e.g.*, *State v. Strong*, 142 S.W.3d 702, 728 (Mo. banc 2004); *State v. Ringo*, 30 S.W.3d 811, 826-27 (Mo. banc. 2000); *State v. Middleton*, 998 S.W.2d 520, 531 (Mo. banc 1999); *State v. Johnson*, 968 S.W.2d 123, 135 (Mo. banc 1998); *State v. Hutchison*, 957 S.W.2d 757, 767 (Mo. banc 1997); *State v. Clemons*, 946 S.W.2d 206 (Mo. banc 1997). Such multiple-murder cases include cases reviewed by this Court since a majority of this Court has supported review of both death- and life-sentence cases. *See, e.g.*, *Dorsey*, 318 S.W.3d at 659; *State v. Anderson*, 306 S.W.3d 544, 547 (Mo. banc 2010); *State v. Deck*, 303 S.W.3d 527, 552-53, 561-63 (Mo. banc 2010). Second, as occurred in the murder of Deputy Egley, death sentences have been found to be neither excessive nor disproportional when the defendant delivers the fatal blow to the victim while he is lying injured and helpless. *See, e.g., State v. Johnson*, 284 S.W.3d 561, 577 (Mo. banc 2009); *State v. Cole*, 71 S.W.3d 163, 177 (Mo. banc 2002); *State v. Middleton*, 995 S.W.2d 443, 467 (Mo. banc 1999); *State v. Tokar*, 918 S.W.2d 753, 773 (Mo. banc 1996).

Third, death sentences have been upheld as appropriate in cases where the defendant murders law enforcement officers. *See, e.g., Johnson*, 284 S.W.3d at 577; *State v. Clayton*, 995 S.W.2d 468, 484 (Mo. banc 1999); *Johnson*, 968 S.W.2d at 135; *State v. Mallett*, 732 S.W.2d 527, 542-43 (Mo. banc 1987). In fact, the only other Missouri case which respondent could locate in which a defendant was convicted of the first-degree murder of more than one law enforcement officer was the James Johnson case, which resulted in a death sentence this Court found appropriate under its statutory review. *Johnson*, 968 S.W.2d at 135. Appellant's acts of actually entering a law enforcement facility and murdering multiple law enforcement officers appears unmatched in this Court's capital jurisprudence and shows such an utter disregard for not only human life, but any respect for the law, that the imposition of death sentences for those crimes should be deemed appropriate under this Court's independent statutory review.

Appellant urges this Court to ignore the above, instead relying on his mitigating evidence purporting to portray him as a "needy" and "scared" boy manipulated by accomplice Vance, whom he claims was the "most culpable" of the defendants for the crimes, to show that appellant's death sentences are not appropriate (App. Br. 122-123, 125). In support, he invokes *State v. McIlvoy*, 629 S.W.2d 333 (Mo. 1982), in which this Court found the defendant's death sentence disproportionate because the defendant had a low IQ, substantial alcohol problems which included becoming intoxicated immediately prior to the murders, and being a "weakling and follower" of the woman who planned the underlying murder. *Id.* at 123-124. Appellant's argument must fail for several reasons.

First, appellant's description of his personality traits depends almost entirely on his mitigating evidence being found credible. There is, however, no evidence that the jury found this evidence credible, and there is no reason for this Court to regard it as such. This is especially true of the psychological evidence, which was primarily based on appellant's own biased and unconfronted self-reporting and which was shown to ignore traits of the defendant which did not comply with the "appellant-as-victim" theme of those witnesses, such as evidence of a history of aggressive and violent behavior which resulted in him being "thrown out" of school and social service programs for fighting and sexual harassment and his acts of aggressiveness towards jailers after the murders (Tr. 999-1000, 1129, 1137-1139, 1143, 1146-1148, 1149-1150, 1163).

Second, appellant's description of appellant's attitude towards the murders and Vance's role in the murders both overstates Vance's influence on appellant and understates appellant's own desire for involvement. Appellant did not show the reverence towards Vance that appellant's witnesses tried to portray, referring to Vance as "my boy" (Tr. 747). Appellant showed that he not just taking orders from Vance, as both appellant and Bulington admitted that Vance never told them that the plan involved appellant killing the jailers, yet appellant decided to kill the jailers himself anyhow (Tr. 772, 832). This was consistent with Vance's actions after the murder, as he appeared to try to withdraw from the conspiracy by telling appellant, "I ain't going fucking nowhere" when appellant tried to get Vance out of his cell (Tr. 626). Appellant seemed excited about committing the murders, referring to the plan as his "mission," bragging that he

was going to "go in in a blaze of glory" and "just start shooting" to "do what he had to do," and preparing himself for the murders by repeatedly listening to a rap song that included the lyrics about "mo' murder" and a shotgun (Tr. 738, 790, 804). Thus, the evidence showed that appellant was not just a scared, manipulated victim, but willingly chose to commit the murders.

Third, even if the above evidence could be credited, this Court determined in appellant's first appeal that the death sentences were appropriate despite this evidence. Appellant called many of the same witnesses in his first trial in an attempt to make the same claims about his upbringing and his subservience to Vance that he did in this trial (SC84036 Tr. 1064-1240, 1261-1287).[7] Because this Court has already found that such evidence did not justify setting aside appellant's death sentences, this evidence should not warrant a finding that the death sentences in this appeal. *See Deck*, 303 S.W.3d at 552-53 (refusing to set aside death sentences based on mitigating evidence where the that evidence was similar to that presented in a prior trial and did not present sufficient grounds to set aside the death sentences).

Finally, this Court premised its decision in *McIlvoy* in part on McIlvoy's low IQ. *McIlvoy*, 629 S.W.2d at 341. Appellant, on the other hand, had an average-to-above-average IQ and "decent" conventional thinking (Tr. 1114-1115). This Court also considered McIlvoy's intoxication at the time of the murder. *Id.* There was no evidence

[7]Respondent requests that this Court take judicial notice of the contents of its file in *State of Missouri v. Michael A. Tisius*, SC84036.

that appellant drank or took any drug prior to the murders. McIlvoy also turned himself in and readily confessed, while appellant had to be found by police and arrested and then initially attempted to deflect responsibility for the crimes by claiming he could not remember what happened (Tr. 707, 829). *Id.* at 341-42; *see Deck*, 303 S.W.3d at 553 (distinguishing *McIlvoy*). Due to these differences, *McIlvoy* does not justify setting aside appellant's death sentences.

For the foregoing reasons, this Court should uphold appellant's death sentences.

CONCLUSION

In view of the foregoing, appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 14,334 words, excluding the cover and this certification, as determined by Microsoft Word 2007 software; and

2. That a true and correct copy of the attached brief was sent through the eFiling system, this 10th day of November, 2011, to:

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