No. SC88959

In the Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

VINCENT McFADDEN, JR.,

Appellant.

Appeal from the Circuit Court of St. Louis County, Missouri
21st Judicial Circuit, Division 15
The Honorable John A. Ross, Judge

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from convictions of murder in the first degree and armed criminal action in the Circuit Court of St. Louis County, the Honorable John A. Ross presiding. Appellant was sentenced to death for the offense of murder in the first degree. This Court has jurisdiction. Mo. Const. Art. V, § 3.

STATEMENT OF FACTS

Appellant, Vincent McFadden, Jr., was charged by indictment in the Circuit Court of St. Louis County with murder in the first degree and armed criminal action (L.F.26-30). A jury found Appellant guilty of both offenses(L.F.623-24).[1]

Viewed in the light most favorable to the verdict, the following evidence was adduced.

On July 3, 2002, Todd Franklin and Mark Silas were walking near the Pine Lawn Elementary School(State'sEx.78-C,p.1-2;Tr.1042). They encountered Appellant and Michael Douglas, and as they walked through a vacant lot, Appellant and Douglas asked Franklin if he had a gun(State'sEx.78-C,p.2-3; Tr.1192). Appellant was known as "JR"(Tr.1375). Franklin indicated that he did not, and he started to walk away(State'sEx.78-C,p.3). Douglas pulled out a cap gun and fired, as if to check and see if they had a gun(State'sEx.78-C,p.2-3).

Franklin and Silas ran away(State'sEx.78-C,p.3). Franklin ran to his next-door neighbor's yard, where his next-door neighbor, Gregory Hazlett, and some other men were working on Hazlett's house(Tr.1148,1190-91). Franklin talked to Hazlett about whether Hazlett would give him some work(Tr.1192-93). Hazlett felt as if something wasn't right, so he walked toward the house(Tr.1193). Douglas shot Franklin, and he fell down in the

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[1] This Court reversed Appellant's previous conviction for Franklin's murder on a *Batson* issue and remanded the cause for a new trial. *State v. McFadden* (*McFadden I*), 191 S.W.3d 648(Mo.banc2006).

driveway(Tr.1193,1199-1201,1630). Appellant went to where Franklin lay, kicked him, and said, "the nigger ain't dead yet," or "I'm going to make sure you're dead, motherfucker"(Tr.1149-50,1193,1228). Appellant stood over Franklin and shot him at least two more times(Tr.1193,1196-97,1199-1200). Appellant ran away(Tr.1199-1200), and Silas also left the scene(Tr.1057;State'sEx.78-C,p.5). The gunshot wounds were fatal; Franklin died at the scene(Tr.1139).

An investigation ensued(Tr.1264-1306). Expended bullets and bullet fragments were seized at the scene and from the victim's body(Tr.1268,1273,1323-27). Later examination showed that they were .44 caliber slugs, and that all of them could have been fired from the same gun(Tr.1139-40,1343). Two of the bullets were definitely fired from the same gun(Tr.1341). The police found a cigar at the edge of the sidewalk at the edge of the driveway, about eight or ten feet away from Franklin's body(Tr.1285-89,1305). Subsequent analysis revealed the presence of Appellant's right thumb print on the cigar(Tr.1311,1315).

The police interviewed Silas that night, and Silas implicated Appellant(State'sEx.78-C). At the crime scene, Hazlett told the police that he would come and talk to them later, because he did not want to be identified as a "snitch" in Pine Lawn(Tr.1203-04). Hazlett went to the police station later that night, gave a statement implicating Appellant, and identified Appellant in a photo lineup as one of the shooters(Tr.1203-07).

Franklin had previously given sworn deposition testimony in a prosecution against Corey and Lorenzo Smith after they robbed him, and he implicated Corey and Lorenzo in the

crime, to which they pled guilty(Tr.1363-68). Appellant was friends with Corey and Lorenzo, and they hung out with the same group of friends(Tr.1395-96). The day after the murder, Appellant called his girlfriend's cousin, Evelyn Carter, and told her that he felt "good" about killing Franklin because Franklin was "soft" and a "snitch"(Tr.1393-95,1398). Carter understood that Appellant killed Franklin because Franklin had "told on" Corey and Lorenzo(Tr.1399,1409-10). Appellant then moved to California(Tr.1384-85).

On May 17, 2003, the police learned that Appellant was at a Travelodge motel in St. Charles(Tr.1353-54). When Appellant came to the door, the police forced their way in and arrested him(Tr.1355-56).

The jury found Appellant guilty of first-degree murder and armed criminal action(L.F.623-24).

In the penalty phase, the State presented evidence of Appellant's prior convictions(Tr.2028-32); evidence that Appellant murdered his girlfriend's sister, Leslie Addison, on May 15, 2003(Tr.1841-65,1958-2000);[2] evidence that Appellant attempted to prevent his girlfriend, Eva Addison, from identifying him as Leslie's murderer(Tr.1866-79;State'sEx.148-C); and evidence that Appellant had 18.4 grams of crack in his possession when he was arrested(Tr.1910-14).

The jury found five statutory aggravators—four serious assaultive convictions and depravity of mind—and it assessed a sentence of death(L.F.684-85).

[2] *See State v. McFadden* (*McFadden II*), 216 S.W.3d 673(Mo.banc2007).

The trial court sentenced Appellant to death on the conviction for first-degree murder and to a term of life imprisonment on the conviction for armed criminal action(L.F.740-42).

This appeal followed.

ARGUMENT

I.

The trial court did not abuse its discretion in limiting the testimony of defense witness Michael Douglas as to the degree of murder to which Douglas pled guilty or the sentence that he received, as such evidence was not relevant to Appellant's guilt or punishment. Appellant was allowed to question Douglas as to the fact that he pled guilty, did not receive the maximum punishment, and did not want to be charged with perjury.

Appellant contends that he should have been allowed to question Michael Douglas, a defense witness, to elicit the fact that Douglas pled guilty to second degree murder and received a twenty-year sentence.

A. Additional facts: guilt phase.

In its motion in limine filed on June 20, 2007, the State moved that "[n]either party may mention or argue or elicit testimony that the co-defendant, Michael Douglas, pleaded guilty to Murder Second Degree and/or the amount of the sentence of 20 years MDC that Douglas received. Said evidence and testimony is irrelevant and is inadmissible"(L.F.498,500). The State also made an oral motion in limine to exclude evidence as to the sentence that Douglas received and the charge to which he pled guilty(Tr.1578).

The trial court sustained the motion in limine as to the term of imprisonment and the

degree of murder to which Douglas pled guilty(Tr.1583). The trial court stated that the prosecutor could ask Douglas about Douglas's plea of guilty to a charge of murder, and the fact that he got the benefit of a plea agreement(Tr.1583). The trial court also stated that the prosecutor could ask Douglas if he understood that he could be charged with perjury, and what the term of imprisonment for perjury might be(Tr.1583). The trial court stated that the prosecutor could also ask Douglas about the fact that, based on his plea agreement, he did not get the maximum punishment that he could have gotten on the charge(Tr.1586).

Douglas was called as a witness by the defense in the guilt phase(Tr.1622-80). Douglas testified that he shot Franklin first, that he passed the gun to Appellant so Appellant could shoot Franklin, and that Appellant shot Franklin "as far as I know"(Tr. 1627,1629,1631). Douglas acknowledged that he had previously made oral and written statements that Appellant had nothing to do with the killing(Tr.1631-36). Douglas testified that he pled guilty and that he did not get the maximum sentence(Tr. 1638,1640). Douglas also testified that he did not want to be charged with perjury because he believed that he could receive a sentence of up to life imprisonment for that(Tr.1639-40).

On cross-examination, Douglas admitted that he had lied to defense counsel in a letter and had told defense counsel that his brother, rather than Appellant, was the second shooter(Tr.1648-49). As the prosecutor cross-examined Douglas about statements that Douglas had made in a letter to Appellant, Douglas's counsel intervened and stated that she was instructing her client to invoke the Fifth Amendment as to any questions "that could lead

to an obstruction charge"(Tr.1660,1666). Douglas testified that the prosecutor had not promised him anything for his testimony, and that he had a plea agreement for a charge of murder(Tr.1679-80).

Appellant made an offer of proof of Douglas's testimony that he had previously told Appellant's defense counsel that the only reason he had said, at his guilty plea hearing, that he acted with Appellant, was so he could get murder second and a sentence of twenty years(Tr.1686-87). Defense counsel requested that the court reverse its ruling as to whether counsel could inquire into Douglas's sentence and the degree of murder to which he pled guilty(Tr.1687-88). The court stated that Appellant had been given "great leeway" in exploring the fact that Douglas got a benefit from his plea agreement, but the extent of that benefit was not relevant(Tr.1693-95). The court stated that they might talk about the issue later if they reached a penalty phase because it might be relevant to mitigation of punishment(Tr.1695). The court stated that the objection would be sustained and that the court would not reverse its ruling(Tr.1695).

After the defense rested its case in the guilt phase, defense counsel requested that the trial court reconsider its ruling and allow evidence in the penalty phase that Douglas received a twenty-year sentence for murder in the second degree(Tr.2334-36). The trial court ruled that such evidence was not relevant(Tr.2336-40).

B. The standard of review.

Appellant preserved this issue in his motion for new trial(L.F.688-91).

"The standard of review for the admission of evidence is abuse of discretion." *State v. Primm*, 347 S.W.3d 66, 70(Mo.banc2011). "This standard gives the trial court broad leeway in choosing to admit evidence; therefore, an exercise of this discretion will not be disturbed unless it is clearly against the logic of the circumstances." *Id.* (quoting *State v. Reed*, 282 S.W.3d 835, 837(Mo.banc2009)). "Additionally, on direct appeal, this Court reviews . . . for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial." *State v. Kemp*, 212 S.W.3d 135, 145(Mo.banc2007). "Trial court error is not prejudicial unless there is a reasonable probability that the trial court's error affected the outcome of the trial." *Id.* at 145-46.

C. The State did not open the door in the guilt phase.

"[A] party may open the door to otherwise inadmissible testimony from the opposing side if it first introduces such evidence." *Union Elec. Co. v. Metropolitan St. Louis Sewer Dist.*, 258 S.W.3d 48, 57(Mo.banc2008). Appellant asserts that the State opened the door to evidence of the details of Douglas's conviction and sentence by asking Douglas what he had meant by writing statements to Appellant, such as "I'll put some of the weight on my shoulder to take the weight of the world off yours" and "We gonna see the streets again sooner rather than later"(Tr.1661). Douglas testified that this meant that he had an out date(Tr.1661). The prosecutor merely asked Douglas what he meant by these statements. This did not open the door to the degree of murder to which Douglas pled guilty or to what his sentence was.

D. The trial court did not err in precluding evidence of Michael Douglas's guilty plea and sentence in the guilt phase of Appellant's trial.

In general, a conviction or guilty plea of a co-defendant is inadmissible because it cannot be used as substantive evidence against the other co-defendant. *State v. Akins*, 829 S.W.2d 619, 621(Mo.App.E.D.1992). Appellant argues that evidence of Douglas's sentence was admissible for showing his bias and motive to lie, as Appellant alleges that he had a motive to curry favor with the State and create an enhanced opportunity for parole eligibility. Appellant refers to the right to cross-examination, but Douglas was called as a witness by the defense(Tr.1622).

Though, as a general proposition, a party may impeach its own witness, *State v. Phillips*, 940 S.W.2d 512, 520(Mo.banc1997), the jury already had evidence before it that Douglas pled guilty and did not get the maximum sentence(Tr.1638,1640). The fact that Douglas received a twenty-year sentence would have added nothing for purposes of impeaching Douglas, in addition to the evidence already before the jury. *Compare State v. Thomas*, 118 S.W.3d 686, 690(Mo.App.W.D.2003)(defendant was prohibited from cross-examining witnesses to disclose to the jury the witnesses' potential motivation to lie in order to curry favor with the prosecution); *see also State v. Wilkins*, 59 S.W.3d 591, 595(Mo.App.E.D.2001)(the scope of the claimed impeachment should not exceed its necessary bounds; "[w]e should candidly realize that jurors may have difficulty enough in properly limiting impeachment evidence to its intended purpose").

Here, Douglas was a defense witness and there was little need for the defense to impeach him. In his testimony on direct examination, he readily admitted that he had previously made statements that Appellant had nothing to do with the killing of Franklin(Tr.1631-36), whereas, at trial, he testified that he passed the gun to Appellant so Appellant could shoot Franklin, and that Appellant shot Franklin "as far as I know"(Tr.1627,1629,1631). Thus, it appears that the defense wanted to present evidence of the disposition of Douglas's case, not really to impeach Douglas, but to present additional facts irrelevant to Appellant's guilt to gain sympathy from the jury and mitigate Appellant's conduct. The trial court acted within its discretion in excluding this evidence. Further, Appellant was not prejudiced, as Douglas's credibility was impeached by his own inconsistent statements(Tr.1631-36), and his possible bias was already explored through the fact that he pled guilty and did not receive the maximum sentence(Tr.1638,1640).

E. Additional facts: penalty phase.

Prior to the presentation of evidence in the penalty phase, the prosecutor stated that evidence as to Douglas's sentence and the degree of murder to which he pled guilty should not be argued or elicited before the jury(Tr.1809). The court stated that it had reviewed *State v. Edwards*, 200 S.W.3d 500, 509-10(Mo.banc2006), and such evidence would not be allowed in mitigation because it did not pertain to the defendant's conduct, background, and history(Tr.1810-11). The court stated that Douglas's guilty plea would not be evidence in mitigation in the penalty phase(Tr.1811-15).

F. Penalty phase.

Appellant acknowledges that defense counsel did not move to reopen the evidence. Appellant argues that *Edwards* is distinguishable because the co-defendant did not testify in that case and his credibility was not at issue. Such distinguishing facts are not decisive, however, as this Court plainly held that "[t]here is no basis in Missouri law for concluding that a co-defendant's sentence is relevant as to mitigation in the penalty phase."*Id.* at 511. Appellant requests that this Court revisit *Edwards* and find, under *Parker v. Duggar*, 498 U.S. 308(1991), that such evidence may not be excluded. However, in *Edwards*, 200 S.W.3d at 511, this Court already addressed the impact of *Parker* and concluded that that case did "not change the standard for admissibility of mitigating evidence[.]" This Court should decline Appellant's invitation to re-examine its holding in *Edwards*.

Appellant further contends that the prosecutor's closing argument opened the door to such evidence in the penalty phase because he argued that Appellant was older than Douglas and was the leader who drew "others into his web of violence"(Tr.2384). However, the prosecutor's closing argument had nothing to do with Douglas's sentence, and the closing argument, made after the close of all the evidence in the penalty phase, could not open the door to the admission of additional evidence.

Appellant's point should be denied.

II.

The trial court did not err in overruling Appellant's objections to evidence and arguments that Appellant killed Franklin because Franklin testified in a prior prosecution against Corey and Lorenzo. The jury's rejection of the statutory aggravator, in the first trial, that Franklin was killed because he was a witness in a past prosecution, did not preclude the State from presenting evidence, upon retrial, that Franklin was killed because he was a witness in a past prosecution, as such evidence was relevant to Appellant's motive, even if the State did not submit the same aggravator in the present case.

Appellant argues that the jury in Appellant's first trial for the murder of Franklin rejected the statutory aggravator that Franklin was killed because he was a witness in a past prosecution of Lorenzo Smith and Corey Smith for the robbery and assault of Franklin(L.F.365-66,375), and the State was estopped from introducing evidence or arguing in the present case that Appellant killed Franklin because Franklin was a witness against Corey and Lorenzo.

A. Additional facts.

As Appellant recognizes, in the present case the State did not submit the aggravator, as it did in the previous trial, that Appellant killed Franklin because Franklin had been a witness in a prosecution against Lorenzo and Corey(L.F. 654-55).

Appellant moved to exclude evidence regarding Lorenzo and Corey Smith(Tr.977)

because the jury, in the previous trial, did not find the aggravating circumstance that Franklin was killed because of his status as a witness(L.F.365-66,375). The trial court ruled that evidence regarding Lorenzo and Corey was relevant and admissible in the present case(Tr.978). Appellant raised a continuing objection to evidence as to references to the incident in which Lorenzo and Corey robbed Franklin(Tr.979-80).

In his opening statement, the prosecutor referred to the fact that Franklin had testified against Lorenzo and Corey(Tr.994-95,1031,1038).

Mark Silas testified that he heard that Franklin was a "victim" of Lorenzo and Corey(Tr.1110). Defense counsel objected, and the trial court overruled the objection but stated that it would not allow more questions of Silas on this subject because he had no first-hand knowledge(Tr.1111).

The State called William Goldstein, Lorenzo's lawyer, and defense counsel objected on grounds that the State was estopped from showing that the killing of Franklin was related to his status as a witness in the Smith matter(Tr.1360-63). The court overruled the objection(Tr.1361-62). Goldstein testified that Franklin was deposed and implicated the Smiths in crimes charged against them, and Lorenzo pled guilty to robbery and assault(Tr.1364-65). He testified that Franklin was the victim of the robbery and assault, and was the only witness(Tr.1365). He testified that Franklin testified credibly in the deposition and that it was in Lorenzo's best interest to plead guilty(Tr.1371).

Eva Addison, Appellant's girlfriend, testified that Lorenzo and Cory were close

friends with Appellant, and they hung out together in a tightly-knit group of friends(Tr.1373-74,1376).

Evelyn Carter, Eva's cousin, testified that Corey and Lorenzo were friends with Appellant(Tr.1395). She testified that Appellant told her that Franklin was a "snitch" and was "soft," and he killed Franklin because Franklin "told on" his "homies"(Tr.1398-1400). She knew that Corey and Lorenzo were in prison because of the situation with Franklin, and Appellant called them "homies" or "home boys"(Tr.1399).

The State introduced into evidence State's Ex. 409, a letter from Appellant to Douglas(Tr.1564,1574-76), stating, "You must make sure you don't say anything about Zo-n-Corey in this case at all. Say the prosecutor directed you to say you acted with me and that dude got killed for Zo-n-Corey." "Zo" was short for Lorenzo(Tr.1402).

B. The standard of review.

Appellant preserved the evidentiary issue in his motion for new trial(L.F.701). The trial court's ruling on the admission of evidence is reviewed for abuse of discretion. *Primm*, 347 S.W.3d at 70.

C. The State was not precluded from presenting evidence that Appellant killed Franklin because Franklin was a witness in a prosecution against Corey and Lorenzo.

As Appellant recognizes, in the present case the State did not submit an aggravator that Appellant killed Franklin because Franklin had been a witness in a prosecution against Corey and Lorenzo(L.F.654-55). Appellant argues that the State was precluded from

presenting evidence of this motive in the present case because the jury did not find that aggravator in the first trial. However, such evidence of motive was logically relevant and admissible. *State v. Shurn*, 866 S.W.2d 447, 457(Mo.banc1993). The State and the accused alike generally have wide latitude to develop evidence of motive. *Id.* "Motive can be relevant in a criminal prosecution even if it is not an element of the crime charged." *State v. Pickens*, 332 S.W.3d 303, 316n.9(Mo.App.E.D.2011). The fact that the jury did not find that statutory aggravator in the first trial did not preclude the State from presenting the evidence regarding motive in the present case. Indeed, motive, which is not a statutory aggravator (or even an element of first degree murder), need not be proved beyond a reasonable doubt.

In *State v. Simmons*, 955 S.W.2d 752, 759(Mo.banc1997), the defendant in a first-degree murder trial argued that the indictment should be dismissed on grounds of double jeopardy and collateral estoppel because the jury had not listed this murder as an aggravator on the verdict form during a previous trial. This Court rejected this claim, holding that "[t]he principle that emerges from *Bullington* [*v. Missouri*, 101 S.Ct. 1852 (1981)] and *Poland* [*v. Arizona*, 106 S.Ct. 1749 (1986)] is that the failure to find a particular aggravating circumstance forms the basis for a judgment of acquittal on the imposition of the death sentence only when there is a complete failure to find that any aggravating circumstance exists to support the death sentence." *Simmons*, 955 S.W.2d at 759-60. This Court held that the defendant's "attempt to rely on collateral estoppel fare[d] no better[.]" *Id.* The Court noted the holding of *Ashe v. Swenson*, 90 S.Ct. 1189, 1195 (1970), that the federal rule of

collateral estoppel is embodied in the Fifth Amendment guarantees against double jeopardy and applies to the states. *Simmons*, 955 S.W.2d at 760. Thus, under *Ashe*, 90 S.Ct. at 1195, "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." However, the *Simmons* Court held that "[t]he jury's failure in the [previous] murder case to find McClendon's murder as an aggravating circumstance is not a 'finding' at all, but rather a lack of one; and the *Ashe* rationale does not even apply." 955 S.W.2d at 760; *accord*, *State v. Simmons*, 955 S.W.2d 729, 743(Mo.banc1997); *see also State v. Storey*, 40 S.W.3d 898, 914-15(Mo.banc2001)(submission of aggravator rejected in previous trials does not violate double jeopardy).

Appellant relies on *Ring v. Arizona*, 122 S.Ct. 2428(2002), where the Court held that an Arizona statute that required a trial judge, sitting alone, to determine the presence or absence of aggravating factors was a violation of the Sixth Amendment right to a jury trial in capital prosecutions. Appellant recognizes *Ring*'s holding that aggravating factors must be found by a jury if the defendant exercises his right to a trial by jury. *Id.* at 2443. Appellant argues that if those factual findings are not made unanimously beyond a reasonable doubt, the defendant is acquitted of that element. However, this does not address the effect of the absence of the finding of an aggravating circumstance in a prior trial. *Simmons*, 955 S.W.2d at 760, which did address that issue, holds that the absence of the finding in the first trial is not preclusive in the second.

Appellant also relies on *State v. Whitfield*, 107 S.W.3d 253, 264-72(Mo.banc2003), and *Apprendi v. New Jersey*, 120 S.Ct. 2348, 2362-63(2000). In *Whitfield*, 107 S.W.3d at 264-72, this Court gave retroactive effect to the holding of *Ring*, but did not address the issue in the case *sub judice*. *See also State ex rel. Taylor v. Steele*, 341 S.W.3d 634, 651(Mo.banc2011)*(*limiting this Court's holding in *Whitfield*). *Apprendi*, 120 S.Ct. at 2362-63, similarly, emphasized the need for findings by a jury as to any fact that increases the penalty, but did not address the effect to be given to the absence of a jury finding in a prior trial.

Appellant further contends that *Whitfield*, *Ring*, and *Apprendi* compel a "rethinking" of *Poland*. In *Poland*, 106 S.Ct. at 1756, the Court held that the trial court's rejection of an aggravating circumstance was not an acquittal of that circumstance for purposes of double jeopardy, and could be reconsidered upon retrial. *Whitfield*, *Ring*, and *Apprendi* in no way address the effect to be given to the absence of a finding on an aggravator in a previous trial; thus, those cases neither warrant nor compel a rethinking of *Poland*. In *Simmons*, 955 S.W.2d at 760, this Court relied on *Poland* in stating that aggravating circumstances "are not separate penalties or offenses, on which the jury's finding produces a conviction or the jury's failure to find produces an acquittal." As Appellant recognizes, the State did not resubmit the aggravator in the present case regarding Franklin's status as a witness in another proceeding (L.F. 654-55). The jury's rejection of the aggravator in the first trial does not preclude the presentation of evidence and argument in the second trial regarding Appellant's

motive. Obviously the evidence at the second trial was different from the evidence at the first trial, and the trial court was correct in allowing the State to present that evidence.

Appellant's point should be denied.

III.

The trial court did not abuse its discretion in striking Venireperson Kerr for cause.

Appellant contends that the trial court abused its discretion in striking Venireperson Mark Kerr for cause.

A. Additional facts.

During voir dire, Kerr (Juror No. 62)(L.F.540) stated that jury service would create a hardship for him due to his father's health (Tr.374), and the trial court found that Kerr would be excused if his father had a problem(Tr.393). Later, the following exchange occurred:

> MR. LARNER: . . . Mr. Kerr, in a proper case, when you're at that third door [the death penalty], would you be able to vote for the death penalty on a defendant?
>
> VENIREPERSON KERR: I guess it would depend on the evidence.
>
> MR. LARNER: Okay. I noticed you hesitated about 20 seconds. So you're giving it some thought?
>
> VENIREPERSON KERR: Right.
>
> MR. LARNER: And I'm not asking you for a commitment. . . So I just want to know if I ask you to do it, would you be able to, in the proper case, vote for the death penalty for the defendant? If you can't, you can't. If you can, you can. . . .

VENIREPERSON KERR: You asked me if I have a problem with it, if I believe in the death penalty.

MR. LARNER: I'm not asking you if you believe in the death penalty.

VENIREPERSON KERR: If you ask me that, I would tell you yes. I would tell you yes. But when you start talking about subjective things, see, in order for me to give you an answer for that, I would have to have more information about whatever is transpiring. Then I could answer.

MR. LARNER: Let me say this: I don't care whether you believe in the death penalty or don't believe in the death penalty. At this point, I'm not going to ask anyone that question.

VENIREPERSON KERR; But, see, if you don't believe in the death penalty and you ask for the death penalty, a person may not use it.

MR. LARNER: That's right. That person is going to say no when I ask them. . . . So, in the proper case, can you—would you be able to sign the death verdict as the foreman of the jury?

VENIREPERSON KERR: I would say yes.

MR. LARNER: I noticed you hesitated again. You're giving this some thought?

VENIREPERSON KERR: Yes.

MR. LARNER: And would you be able to come into court and announce your

verdict in open court of "death"?

VENIREPERSON KERR: Yes.

(Tr. 405-09).

The exchange continued as to the burden of proof:

MR. LARNER: . . . Would you require proof beyond all doubt before you'd be able to vote for the death penalty?

VENIREPERSON KERR: That's hard, because you would want to be sure. You want to be as sure as you could that this was being fair to whoever the individual is. And so that's hard. That's a hard question to answer. . . .

MR. LARNER: Would you be able to vote for the death penalty with that level of proof, beyond a reasonable doubt, or would you require more proof than that, such as proof beyond all doubt?

VENIREPERSON KERR: You don't give me much choice in the matter.

MR. LARNER: I'm just asking you the question. I'm not trying to put the words in your mouth. . . .

VENIREPERSON KERR: You're asking for the ultimate punishment, so you should make sure you have—yeah, I probably would require that.

MR. LARNER: Require which?

VENIREPERSON KERR: Maybe more than whatever it is that you said: the reasonable doubt. And the reason why is because all too often what's

important is not really the justice in the thing, whether the person really committed the crime or not. Sometimes that's not the innocent party.

It's just whether you have enough proof to make this stick or make that stick. So you should make sure you have your stuff right if you want this person to die for what he's done.

MR. LARNER: And the law is for the State to get its stuff right: proof beyond a reasonable doubt.

VENIREPERSON KERR: Yeah. See, but the problem—

MR. LARNER: That's the law.

VENIREPERSON KERR: The problem with that, you've already—you already know that sometimes the death penalty is not administered fairly and that justice is not done. Sometimes. You already know that.

So you need to make sure that your stuff is better than that. When you ask for some person to die, you should make sure that you have what you have correct.

MR. LARNER: So you want proof beyond all doubt?

VENIREPERSON KERR: Yes, sir, I guess so. If that's the only choice you're giving me, then I guess that's true.

MR. LARNER: All right. Well, the choice that the Court's going to give you is "proof beyond a reasonable doubt." And the instruction is going to tell you that the law does not require proof that overcomes every possible doubt.

And it sounds to me like you won't be able to follow that particular instruction because you're going to require proof that overcomes every possible doubt. Is that correct?

VENIREPERSON KERR: You're still giving me these same two choices.

MR. LARNER: I don't want to belabor the point, but I think this discussion is helping other jurors as well. And that's part of the reason I do that.

(Tr. 413-16).

Defense counsel questioned Venireperson Kerr as follows:

MS. KRAFT: Okay. And is that what you're trying to tell us, that you want to be firmly convinced that the person is guilty and the person should receive a death sentence?

VENIREPERSON KERR: Yes.

MS. KRAFT: Okay. So basically what you're telling us is that the "proof beyond a reasonable doubt," being firmly convinced, is what you would follow. Is that what you're saying?

VENIREPERSON KERR: Yeah, I guess that's it. Yeah.

MS. KRAFT: If the definition of "beyond a reasonable doubt" is "firmly convinced," you're okay with that?

VENIREPERSON KERR: Yeah, I guess so. Yeah, I guess that's right. Yeah, I guess that's right.

(Tr.438-39).

The State moved to strike Kerr for cause because he hesitated "ten to twenty seconds" when asked if he could impose the death penalty, he hesitated again when asked a second time, he "wanted to make sure that stuff was right," he stated that sometimes the death penalty was not administered fairly, and he was quite certain when he said that he wanted proof beyond all doubt(Tr.440-42). Defense counsel argued that Kerr stated that he could give the death penalty, and "[w]ith regard to the burden of proof issue: once I clarified for him what that definition was, that he must be firmly convinced, he said, 'I guess that's what I'm trying to say'"(Tr.442-43). The prosecutor argued that defense counsel had asked Kerr about only part of the definition, which was "firmly convinced," and Kerr hesitated and said, "Yeah, I think I could do that," but he never said that he could(Tr.443). The prosecutor stated that defense counsel never asked Kerr about the rest of the definition, which stated that the law does not require proof that overcomes every possible doubt(Tr.443). The prosecutor stated:

> This is a kind of juror that's not going to follow the law if he doesn't agree with the law. I mean, you know, just because he might say "firmly convinced" is okay, based on what he said about, you know, if my father gets sick, I won't show up, you won't find me. This is the kind of person that's not going to follow the law if he doesn't agree with it. He also said justice isn't always important or isn't always served in a case and that that's not always the most

important thing.

(Tr.443-44).

The trial court stated that Kerr had hesitated in answering questions, but he should be struck for cause because:

> the fact of the matter is that on a number of occasions he waivered on his ability to consider the death penalty. He clearly stated that he believed the death penalty was not administered fairly and that he would require proof above and beyond the burden of proof as required by law. . . He ultimately said, 'I guess so," but was clearly not indicating that he would follow the instructions of law as given by the Court.
>
> On more than one occasion he said that he would hold the State to a higher burden of proof. Based on all of his answers and his waivering back and forth, it's the Court's view that he is not a qualified juror and should be stricken for cause.

(Tr.444-45).

B. The standard of review.

Appellant preserved this issue in his motion for new trial(L.F.697-98). "A trial court's ruling on a challenge for cause will be upheld on appeal unless it is clearly against the evidence and is a clear abuse of discretion." *Joy v. Morrison*, 254 S.W.3d 885, 888(Mo.banc2008) (quoting *State v. Christeson*, 50 S.W.3d 251, 264(Mo.banc2001)). "The

trial court is in the best position to evaluate a venireperson's qualifications to serve as a juror and has broad discretion in making the evaluation." *Id.* (quoting *State v. Johnson*, 22 S.W.3d 183,187(Mo.banc2000)).

C. Venireperson Kerr's views prevented or substantially impaired his ability to fulfill his duties.

"In a capital case, the standard for determining when a prospective juror may be excluded for cause is 'whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *State v. Davis*, 318 S.W.3d 618, 639(Mo.banc2010)(quoting *Wainwright v. Witt,* 105 S.Ct. 844, 852(1985)). If it appears that a prospective juror "cannot consider the range of punishment, apply the correct burden of proof, or follow the court's instructions in a murder case, then a challenge for cause will be sustained." *Davis*, 318 S.W.3d at 639.

"The qualifications for a prospective juror are not determined from a single response, but rather from the entire examination." *State v. Deck*, 303 S.W.3d 527, 535-36 (Mo.banc2010). "The trial court can better evaluate a veniremember's commitment to follow the law and has broad discretion to determine the qualifications of prospective jurors." *Id.* "[T]he trial judge evaluates the venire's responses and determines whether their views would prevent or substantially impair their performance as jurors (including the ability to follow instructions on the burden of proof)." *Id.*(quoting *Johnson*, 22 S.W.3d at 188. "Accordingly, a great deal of deference is owed to the trial court's determination that a prospective juror is

substantially impaired." *Deck*, 303 S.W.3d at 535. "Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." *Id.*(quoting *Uttecht v. Brown*, 127 S.Ct. 2218 (2007)).

"The trial court's 'finding may be upheld even in the absence of clear statements from the juror that he or she is impaired.'" *Deck*, 303 S.W.3d at 535(quoting *Uttecht*,551 U.S. at 7). "Thus, when there is ambiguity in the prospective juror's statements, the trial court, aided as it undoubtedly is by its assessment of the venireman's demeanor, is entitled to resolve it in favor of the State." *Deck*, 303 S.W.3d at 535(quoting *Uttecht*,551 U.S. at 7). "Where there is conflicting testimony regarding a prospective juror's ability to consider the death penalty, the trial court does not abuse its discretion by giving more weight to one response than to another and in finding that the venireperson could not properly consider the death penalty." *Deck*, 303 S.W.3d at 535 (quoting *State v. Tisius*, 92 S.W.3d 751, 763 (Mo. banc 2002)). "Even a juror's assurance that he or she can follow the law and consider the death penalty may not overcome the reasonable inferences from other responses that he or she may be unable or unwilling to follow the law." *Deck*, 303 S.W.3d at 535-36. "A trial court's determination whether to excuse a juror for cause is not dependent upon a technical evaluation of the venireperson's use of 'magic' words. Instead, it is heavily weighted to the impressions of the trial court and the exercise of the court's judgment and discretion." *State v. Clayton*, 995 S.W.2d 468, 476(Mo.banc1999).

In the case at bar, Venireperson Kerr expressed views that showed that he believed the death penalty was administered unfairly and that he was incapable of properly applying the burden of proof(Tr.413-16). He was equivocal in responses to defense counsel(Tr.438-39). Although defense counsel stated that he said, "I guess that's what I'm trying to say"(Tr. 438-39), that was not exactly how the exchange occurred(Tr.438-39). For example, when she asked him if he was "okay" with the definition of "beyond a reasonable doubt" as being "firmly convinced," he responded, "Yeah, I guess so. Yeah, I guess that's right. Yeah, I guess that's right"(Tr.438-39).

Upon a finding of guilt, a juror must be able to realistically consider the full range of punishment, including the death penalty. It is apparent from Kerr's responses that he could not realistically consider imposing a sentence of death upon a finding of guilt beyond a reasonable doubt. Instead, Kerr stated that "you need to make sure that your stuff is better than that," and he indicated that he would want proof beyond all doubt(Tr.415). The trial court was entitled to give more weight to some responses than to others. *Deck*, 303 S.W.3d at 535.

Appellant argues that hesitancy in answering questions is not enough to strike a venireperson for cause. However, the strike was based on more than Kerr's mere hesitancy. Kerr plainly stated that he could not realistically consider imposing a death sentence unless the prosecution met a higher burden of proof than what was legally required(Tr.415). *See State v. Middleton*, 995 S.W.2d 443, 460(Mo.banc1999)(trial court did not abuse its

discretion in excluding venireperson for cause when he stated that he would require proof beyond all doubt). A prospective juror may be rehabilitated only if "there is a clear, unequivocal assurance that the juror would not be partial." *White v. State*, 290 S.W.3d 162, 166(Mo.App.E.D.2009). Kerr's repeated, equivocal responses of "I guess" were not enough to rehabilitate him(Tr. 438-39). The trial court, having had the opportunity to observe the venireperson, is in a better position than this Court to determine the weight to be given to his responses. *Deck*, 303 S.W.3d at 538. The trial court does not abuse its discretion in giving more weight to one response than the other. *Id.* at 535. The trial court did not abuse its discretion in striking Kerr for cause.

Appellant's point should be denied.

IV.

Because Appellant did not carry his burden of showing that the prosecutor's race-neutral explanations were a pretext to hide purposeful discrimination, the trial court did not clearly err in denying one of Appellant's *Batson* challenges.

Appellant asserts that the trial court clearly erred in overruling his *Batson* challenge to the State's peremptory strike of Wanda Bryant, Juror No. 75(L.F.543). *Batson v. Kentucky*, 106 S.Ct. 1712(1986).

A. Additional facts.

Appellant is African-American(State'sExs.6-7).

Juror Nos. 10, 22, 29, 33, 46, 51, 73, 84, 91, 108, and 120—all African-Americans—were struck for cause by agreement of the parties(Tr.75-76,93,145,177,181,207-08,227,271,279,394-95,527,594,660-61,767-71,775-76,915,923-24;L.F.527-54).

The prosecutor asked Bryant, an African-American venireperson(Tr.924), if she would be able to vote for the death penalty, and she stated, "It depends upon once I hear the information"(Tr.484). The prosecutor asked her if there was anything that would keep her from considering one of the punishments, and she responded in the negative(Tr.484). The prosecutor stated, "I know you're hesitating. You're giving it quite a bit of thought"(Tr.484-85). Bryant indicated that she could vote for the death penalty, she could sign the verdict of death if she were the foreperson, and she could announce the verdict in court(Tr.485-86). The following exchange occurred:

MR. LARNER: Would you be able to consider life without parole as an option?

VENIREPERSON BRYANT: Yes, sir.

MR. LARNER: Now, you didn't hesitate on that, I noticed. That was pretty quick. Are you favoring one over the other?

VENIREPERSON BRYANT: Yes.

MR. LARNER: And which one are you favoring? Well, it's life without parole, right?

VENIREPERSON BRYANT: Yes.

(Tr.486). The prosecutor asked again if she would be "leaning" towards life without parole, and she answered "yes"(Tr.486-87). Bryant first stated that she would require proof beyond all doubt before she could vote for the death penalty, but after further discussion, when the prosecutor explained that "[t]he law does not require proof that overcomes every possible doubt," she indicated that she could vote for the death penalty under that standard(Tr.501-03).

The prosecutor moved to strike Bryant for cause, and the trial court denied the strike(Tr.526-27).

During the questioning in general voir dire as to whether there was anyone who could not properly apply the burden of proof, Bryant did not respond(Tr.695-702).

The State made a peremptory challenge as to Bryant, who was on the juror list as No.

75 but was Panel Member No. 37(L.F.543;Tr.920-21). Defense counsel made a record that 119 potential jurors were called and seventeen were African-American(Tr.921-22). Defense counsel asserted that the State "targeted African Americans, in terms of their questioning, particularly on the burden of proof question"(Tr.924). Defense counsel moved to quash the entire panel under *Batson* because the State had made four peremptory strikes of African-Americans, which would leave an all-white jury(Tr.924-25).[3] The trial court denied the motion to strike the entire panel(Tr.925). The trial court found that the prosecutor's reasons for striking Panel Member Nos. 16 (Robinson), 17 (Slaughter), and 30 (Banks) were not race-neutral(Tr.935,942,950-51); thus, the trial court sustained the *Batson* challenges as to those venirepersons.

The prosecutor offered, as his race-neutral reasons for striking Bryant, that she had expressed that she would require proof beyond all doubt, she leaned toward life without parole, and the first time he had asked her whether she could consider the death penalty, "[s]he hesitated for at least 20 seconds"(Tr.951-53). Defense counsel asserted that Bryant had stated that she could follow the court's instructions on the burden of proof and that she was the first prospective juror who was asked about the sentencing issue, "[s]o the fact that

[3] Venireperson Jeffries (Juror No. 110 and Panel Member No. 53) was African-American and had not been struck for cause, but was not reached in the peremptory strike process because there was a sufficient number of potential jurors and the parties only went through Panel Member No. 45 in making peremptory strikes(Tr.918,920-21,924;L.F.552).

she had to think for a few seconds really should not be an issue"(Tr.953-54). The court found the prosecutor's explanations race-neutral because Bryant:

> expressed quite a bit of reservation. She specifically said that she favors life without parole and that she would lean toward life without parole.
>
> The manner in which she answered the questions indicated her hesitancy with regard to the death penalty. And her answers specifically reflect that.

(Tr.954). Thus, Bryant was struck(Tr.956). Panel Member Nos. 16 (Robinson), 17 (Slaughter), and 30 (Banks) remained on the jury(Tr.957-58; L.F.506).

B. The standard of review.

Appellant preserved this issue in his motion for new trial(L.F.727-28). This Court reviews the trial court's denial of a *Batson* challenge for clear error. *State v. Johnson*, 284 S.W.3d 561, 571(Mo.banc2009). When reviewing for clear error, this Court will not reverse the trial court's decision unless after a review of the entire evidence, it is left with the definite and firm conviction that a mistake was made. *McFadden II*, 216 S.W.3d at 675. In making this determination, the trial court is accorded "great deference because its findings of fact largely depend on its evaluation of credibility and demeanor." *Kesler–Ferguson v. Hy–Vee, Inc.*, 271 S.W.3d 556, 558(Mo.banc2008).

C. The prosecutor did not engage in purposeful discrimination.

Racial discrimination in jury selection violates the Equal Protection Clause. *McFadden I*, 191 S.W.3d at 651. There are three steps in a *Batson*, or race-based, challenge.

Id. "First, a defendant must challenge one or more specific venirepersons struck by the State and identify the cognizable racial group to which they belong." *Id.* "Second, the State must provide a race-neutral reason that is more than an unsubstantiated denial of discriminatory purpose." *Id.* "Third, the defense must show that the State's explanation was pretextual and the true reason for the strike was racial." *Id.*

"[T]he justification for [a] peremptory strike need not rise to the level of justification for a challenge for cause." *State v. Jones*, 979 S.W.2d 171, 185(Mo.banc1998). Because of the subjective nature of peremptory challenges, the reviewing court places great reliance on the trial court's judgment when it comes to assessing the legitimacy of an explanation. *State v. Morrow*, 968 S.W.2d 100,114(Mo.banc1998) (finding a venireperson's hesitation and body language was a legitimate basis for a strike).

1. Pattern of questioning.

In the Argument portion of his brief, Appellant argues that the prosecutor noted Bryant's hesitation in answering a question as to whether she could vote for the death penalty, and the prosecutor asked an African-American venireperson, Kevin Slaughter, if he had any hesitation in whether he could impose the death penalty(Tr.195), but did not ask any Caucasian venirepersons if their responses provoked hesitation. Appellant asserts that Bryant and Kerr were the first in their groups to be questioned and the first to formulate answers, thus they hesitated. Appellant contends that, when viewed together, the prosecutor's voir dire of Bryant, Kerr, and Slaughter(Tr.935-36) revealed a broader pattern of practice of

excluding African-Americans through patterns of questioning.[4] Appellant made a record as to the number of potential jurors who were called and were African-American(Tr.921-24). Appellant also asserts that the prosecutor's strike of Bryant must be viewed within a broader pattern and history of ensuring all-white juries to make life or death decisions in the past.

Appellant's reliance on *Miller-El v. Cockrell*, 123 S.Ct. 1029 (2003), and *Miller-El v. Dretke*, 125 S.Ct. 2317 (2004), to support his claim is misplaced. In *Cockrell*, the Court held that the petitioner was entitled to a certificate of appealability, and *Dretke* involved the appeal of the same matter. Those cases revealed a pervasive pattern of discrimination in jury selection procedures in the State of Texas. One witness, a judge formerly employed by a district attorney's office, testified that his superior in the district attorney's office warned him that he would be fired if he permitted any African-Americans to serve on a jury. *Cockrell*, 123 S.Ct. at 1038. The Court noted that out of 20 African-American members of the 108-person venire panel, only one served. *Dretke*, 125 S.Ct. at 2325. The Court noted that ten were peremptorily struck by the prosecution, and that "[h]appenstance is unlikely to produce this disparity." *Id.* The Court also noted the use of a procedure in Texas known as the "jury shuffle," in which "either side may literally reshuffle the cards bearing panel members'

[4] However, Appellant's Point Relied On does not allege that there was a pattern of discriminatory questioning in this case, and thus arguably does not preserve that issue. *See Missouri Public Service Com'n v. Hurricane Deck Holding Co.*, 302 S.W.3d 786, 791n.5(Mo.App.W.D.2010); Supreme Court Rule 84.04(e).

names, thus rearranging the order in which members of a venire panel are seated and reached for questioning." *Dretke*, 125 S.Ct. at 2332. The prosecution sought a jury shuffle when a predominant number of African-Americans were seated in the front of the panel. *Id.* at 2333. The Court also found that the prosecution used a "graphic script" when questioning African-American venire members, describing how the prisoner was placed on a gurney and injected with a lethal substance to carry out the death sentence. *Id.* at 2333-34; *Cockrell*, 123 S.Ct. at 1037.

Here, Appellant has established no pervasive pattern of discriminatory practice as in *Dretke* and *Cockrell*. Appellant contends that the prosecutor asked Slaughter if he had any hesitation, but did not ask any Caucasians if their responses provoked hesitation. However, in context, the exchange with Venireperson Slaughter occurred as follows:

> MR. LARNER: . . . Now, Mr. Slaughter, in a proper case, when you're at that third door, could you impose the death penalty on the defendant?
>
> VENIREPERSON SLAUGHTER: Yes.
>
> MR. LARNER: You could?
>
> VENIREPERSON SLAUGHTER: (Nodding.)
>
> MR. LARNER: Any hesitation on that?

(Tr.195).

Thus, in context, the prosecutor's question as to hesitation was in reference to the venireperson's non-verbal response. Further, it is quite possible that the prosecutor had

difficulty in hearing and understanding the venireperson's first answer, prompting the additional question, "You could?", and the cold record cannot reveal the speed of Slaughter's non-verbal response(Tr.195). That is why reliance is placed on the trial court's judgment—the trial court is in the position to hear and observe the questioning and the venireperson's responses. *See Morrow*, 968 S.W.2d at 114.

The prosecutor also noted that having spent more time questioning Robinson and Slaughter, he could spend less time with other venire members(Tr.194,200). He also noted that from the inflection in Robinson's voice, she seemed more confident about life without parole(Tr.193). He noted that Venireperson Williams had more time to think(Tr.208). Further, when Venireperson Endicott, a Caucasian venireperson, indicated that he could not vote for the death penalty, the prosecutor responded, "You didn't take very long to answer that. You thought about this issue before?"(Tr.190,921-24). Thus, as borne out by the record, the venirepersons' degree of hesitation is a legitimate consideration in evaluating their responses, and was not considered in a discriminatory manner. In *Morrow*, 968 S.W.2d at 114, this Court held that a venireperson's hesitation and body language during questioning was a legitimate basis for using a peremptory strike.

Appellant also argues that Kerr and Bryant were the first in their groups to be questioned(Tr.Index2-3; Tr.404-05,484; L.F.540,543). The voir dire on punishment was broken into groups of venirepersons; Bryant was the first in her group, and Kerr was the first in his group because the person before him was struck for hardship due to a schedule

conflict(Tr.Index2-3; Tr.373-74,440;L.F.540,543). Other African-Americans, who were not at the beginning of their groups, were questioned sequentially(Tr.Index1-3; Tr.68,145,193-200,207-09,251-52,314-19,388-92,494,566-67,629-34,644-45,921-24; L.F.527-54). During general voir dire, the prosecutor began his questioning with Venireperson Gaied in the first row, who indicated that he had no problem with the "beyond a reasonable doubt" standard, and then the prosecutor proceeded to Robinson(Tr.687). The prosecutor also asked other venirepersons whether they could follow the standard, and finally asked if there were any venirepersons seated in any of the rows who could not follow the instruction on burden of proof beyond a reasonable doubt(Tr.693-702). The record demonstrates no pattern of discriminatory questioning.[5]

[5] Venireperson Jeffries, an African-American, was Panel Member No. 53 and thus was not reached for peremptory challenges or jury service, as the court took the panel members through No. 45(Tr.918,920-21,924;L.F.552). However, Jeffries' voir dire responses had indicated that she could properly apply the burden of proof and would not hold the State to a higher burden than legally required in the penalty phase(Tr.630-34). Other African-American venirepersons (Juror Nos. 10, 22, 29, 33, 46, 51, 73, 84, 91, 108, and 120) were struck for cause by agreement of the parties(Tr.75-76,93,145,177,181,207-08,271,279,394-95,527,594,660-61, 767-71,775-76,915,923-24;L.F.527-54).

2. Appellant failed to meet his burden on the *Batson* challenge as to Bryant.

a. Steps in the *Batson* analysis.

In the first step, Appellant raised the *Batson* challenge as to the State's peremptory strike of Bryant(Tr.920-21). In the second step, the State provided a race-neutral reason for the strike that was more than an unsubstantiated denial of a discriminatory purpose(Tr.951-53). *McFadden I*, 191 S.W.3d at 651. A "race-neutral explanation" in the context of a *Batson* challenge simply means "an explanation based on something other than the race of the juror." *Hernandez v. New York*, 111 S.Ct. 1859, 1866(1991). The second step of the Batson challenge process does not require an explanation that is persuasive, or even plausible. *Purkett v. Elem*, 115 S.Ct. 1769, 1771(1995). The issue is simply the facial validity of the prosecutor's explanation and "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.*; *Hernandez*, 111 S.Ct. at 1866. Even if a prosecutor's criterion might result in the disproportionate removal of a certain racial group, the disproportionate impact does not turn a prosecutor's actions into a *per se* violation of the equal protection clause. *Hernandez*, 111 S.Ct. at 1867. Furthermore, while "disparate impact should be given appropriate weight in determining whether the prosecutor acted with a forbidden intent, it will not be conclusive in the preliminary race-neutrality step of the *Batson* inquiry." *Id.*

The prosecutor offered, as his race-neutral reason for striking Bryant, that she had expressed that she would require proof beyond all doubt, she leaned toward life without

parole, and the first time he had asked her whether she could consider the death penalty, "[s]he hesitated for at least 20 seconds"(Tr.951-53). In *Morrow*, 968 S.W.2d at 114, this Court held that a venireperson's hesitation and body language during questioning was a legitimate basis for using a peremptory strike. Here the peremptory strike was based not only on Bryant's hesitation but on her stated predisposition toward life without parole(Tr.951-53). The State clearly offered a facially valid, race-neutral explanation.

Once the State produces a facially valid explanation, the burden then shifts back to the defendant to demonstrate that the State's proffered reasons for the strike were merely pretextual and that the strikes were racially motivated. *Purkett*, 115 S.Ct. at 1771 (noting that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from the opponent of the strike); *State v. Johnson*, 207 S.W.3d 24, 35(Mo.banc2006). To meet this standard, the party challenging the strike must present evidence or specific analysis showing that the proffered reason was pretextual. *Goodman v. Angle*, 342 S.W.3d 458, 462(Mo.App.W.D.2011).

The trial court has considerable discretion in determining pretext. *State v. Collins*, 290 S.W.3d 736,742(Mo.App.E.D.2009); *see also McFadden II*, 216 S.W.3d at 676 ("peremptory strikes are subjective, and great reliance is placed on the trial court's assessment of the legitimacy of the State's explanation"). The trial court's main consideration is the plausibility of the prosecutor's given explanation and whether the prosecutor purposefully discriminated in exercising a peremptory strike in light of the totality of the facts and

circumstances surrounding the case. *Johnson*, 207 S.W.3d at 35. "At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Kesler-Ferguson*, 271 S.W.3d at 559(quoting *Purkett*, 115 S.Ct. at 1771).

"To determine if pretext exists, this Court considers a non-exclusive list of factors including: the explanation in light of the circumstances; similarly situated jurors not struck; the relevance between the explanation and the case; the demeanor of the state and excluded venire members; the court's prior experiences with the prosecutor's office; and objective measures relating to motive." *Johnson*, 284 S.W.3d at 571. The lack of a similarly situated Caucasian juror, though described as "crucial" in some precedents, is not dispositive. *State v. Bateman*, 318 S.W.3d 681, 690(Mo.banc2010).

b. Failure to prove factors demonstrating pretext.

The prosecutor offered, as his race-neutral reason for striking Bryant, that she had expressed that she would require proof beyond all doubt, she leaned toward life without parole, and the first time he had asked her whether she could consider the death penalty, "[s]he hesitated for at least 20 seconds"(Tr.951-53). In arguing pretext, defense counsel asserted that Bryant had stated that she could follow the court's instructions on the burden of proof and that she was the first prospective juror who was asked about the sentencing issue, "[s]o the fact that she had to think for a few seconds really should not be an issue"(Tr.953-54).

Here, trial defense counsel failed to develop any of the factors to establish pretext. As

in *State v. Clark*, 280 S.W.3d 625, 630(Mo.App.W.D.2008), the defendant failed to establish a single factor, and he failed to meet his burden to establish that the race-neutral reasons were merely pretextual. In *Clark*, the Western District held that the defendant did not contradict the prosecutor's statements or offer any justification to illustrate his claim of pretext. *Id.* The Court thus held that because the State provided a race-neutral reason for striking the venireperson, the trial court had not clearly erred in overruling the defendant's *Batson* challenge. *Id.*[6]

Similarly, in the present case, Appellant failed to argue and establish any of the relevant factors and failed to meet his burden to show pretext. The prosecutor was plainly concerned about Bryant's qualifications (as corroborated by his attempt to remove her for cause), and the prosecutor could legitimately follow his "hunch" and use a strike to remove her from the panel. Defense counsel's belief that hesitation was not significant showed merely that defense counsel was not subjectively concerned—it did not show that the prosecutor was discriminating. Indeed, because it appears that the prosecutor was concerned when any potential juror hesitated, it appears that the prosecutors' concern was legitimate. Any suggestion to the contrary would require this Court to conclude that the prosecutor's explanation was not credible, but any such credibility determination should be left to the trial

[6] Further, the Western District in *Clark,* 280 S.W.3d at 630, followed the reasoning of the Eastern District in *State v. Johnson*, 220 S.W.3d 377, 383(Mo.App.E.D.2007), refusing to consider arguments about pretextual strikes that are raised for the first time on appeal.

court. *McFadden II*, 216 S.W.3d at 676; *Morrow*, 968 S.W.2d at 114.

c. Alleged removal of African-Americans from jury panel.

Appellant argues that the prosecutor attempted to use peremptory strikes to remove all African-Americans from the jury, and he notes that his jury was not all-white only because the trial court sustained his *Batson* challenges as to the three peremptory challenges against other African-Americans(Tr.935,942,950-51). As this Court noted in *Bateman*, 318 S.W.3d at 691, "[t]he prosecutor's disproportionate number of strikes against other minority venirepersons and/or the number of minority venirepersons remaining after peremptory strikes in the case before the court, is significant." However, there the Court also noted that the defendant had not argued in the trial court or before this Court "that the prosecutor used a disproportionate number of strikes against minorities . . . or that other objective factors supporting pretext were present." *Id.* at 693.

In the Argument portion of his brief, Appellant asserts that the strike of Bryant must be viewed within the broader context the St. Louis County Prosecutor's Office's "pattern and history" of ensuring an all-white jury. Appellant's Brief at 72. A pattern and history may be a relevant consideration. *Bateman*, 318 S.W.3d at 691.[7] Even if the claim may be

[7] However, in the present case this claim of "pattern and history" was not raised in Appellant's Point Relied on, and thus should not be considered. *Hurricane Deck Holding Co.*, 302 S.W.3d at 791n.5; Supreme Court Rule 84.04(e). Further, though Appellant's motion for new trial raised this alleged pattern and history(L.F.728), it was not part of his

considered, its factual premises fail. In *McFadden I*, 191 S.W.3d at 650, one African-American remained on the jury, although the State had exercised five of its nine peremptory challenges to remove African-American venirepersons. In *McFadden II*, 216 S.W.3d at 674-75, the State exercised five of its nine peremptory challenges to remove one Asian and four African-American venirepersons, but the remaining African-American was removed for hardship, leaving an all-white jury. Thus, Appellant's argument that the prosecutor has used peremptories to ensure an all-white jury is inaccurate.

Further, in this case the trial court sustained three out of four of Appellant's *Batson* challenges, and those persons remained on the jury(Tr.957-58;L.F.506). Appellant attempts to use this to argue that the prosecutor engaged in a pattern of discrimination, but in fact, those *Batson* challenges were sustained at the second step rather than the third, and though the prosecutor offered reasons that were actually race-neutral, it appears that the trial court acted in an abundance of caution to avoid even an appearance of discrimination(Tr.935,942,950-51).

In addition, Appellant points to no evidence, other than the present case and this Court's two reversals in his previous cases before this Court, to establish the St. Louis County Prosecutor's alleged "pattern and history." Appellant's Brief at 72. As discussed

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objections raised at trial(Tr.924-25), and is thus unpreserved. Instead, Appellant argued before the trial court the alleged targeting of African-Americans in voir dire in this case(Tr.924).

previously, there is no evidence in this case of a pervasive pattern as in *Cockrell* and *Dretke*. *See also Dora v. State*, 20 So.3d 46, 50(Miss.App.2009)(prosecutor's use of four out of five strikes to preclude African-Americans does not show pattern of purposeful discrimination). Most importantly, however, the prosecutor offered abundant race-neutral reasons for exercising a peremptory challenge against Venireperson Bryant(Tr.951-53), and Appellant has not established pretext, through either historical data or factors specific to Venireperson Bryant.

The trial court did not clearly err in denying Appellant's *Batson* challenge as to Bryant. Appellant's point should be denied.

V.

The trial court did not plainly err in admitting evidence that Appellant's picture was on the wall at the police station, in allowing the prosecutor's reference to such in opening statement, and in admitting the testimony of a fingerprint expert that she compared Appellant's fingerprints to those in a master file.

Appellant argues that the trial court erred in allowing the prosecutor to state in his opening statement(Tr.1007), and in allowing three witnesses to testify, that Appellant's picture was on the wall at the police station(Tr.1059-60,1416,1609), and allowing a fingerprint expert witness to testify that she compared Appellant's fingerprints to those in the master file(Tr.1310,1312,1315,1317).

A. The standard of review.

Appellant did not object to the prosecutor's comment in opening statement, or to any of the testimony of which he complains(Tr.1007,1059-60,1310,1312,1315, 1317,1416,1609). Further, Appellant did not raise these issues in his motion for new trial(L.F.688-738). Therefore, his claims are subject to plain error analysis. *State v. Drudge*, 296 S.W.3d 37, 42(Mo.App.E.D.2009). Review for plain error involves a two-step process. *State v. Baumruk*, 280 S.W.3d 600, 607 (Mo. banc 2009). The first step requires a determination of whether the claim of error "facially establishes substantial grounds for believing that 'manifest injustice or miscarriage of justice' has resulted." *Id.*; Supreme Court Rule 30.20. All prejudicial error, however, is not plain error, and "[p]lain errors are those which are

evident, obvious, and clear." *Baumruk*, 280 S.W.3d at 607. If plain error is found, the court then must proceed to the second step and determine "whether the claimed error resulted in manifest injustice or a miscarriage of justice." *Id.* at 607-08.

B. The trial court did not plainly err in admitting evidence of uncharged crimes or prior bad acts, or in allowing the prosecutor's reference in opening statement.

"It is a well-established general rule that 'proof of the commission of separate and distinct crimes is not admissible unless such proof has some legitimate tendency to directly establish the defendant's guilt of the charge for which he is on trial.'" *Primm*, 347 S.W.3d at 70 (quoting *State v. Vorhees*, 248 S.W.3d 585, 587 (Mo. banc 2008)). "The rationale for the general rule of exclusion is to prevent such evidence from being admitted for the purpose of demonstrating the defendant's propensity to commit the crime with which he is presently charged." *Id.* Vague references to uncharged crimes do not violate the propensity rule. *State v. Goodwin*, 43 S.W.3d 805,815(Mo.banc2001). "[T]here are several exceptions under which otherwise inadmissible evidence may be admitted." *Primm*, 347 S.W.3d at 70. "Such evidence may be admissible if it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; or (5) the identity of the person charged with commission of the crime on trial." *Id.* "In addition, evidence of uncharged crimes that are part of the circumstances or the sequence of events surrounding the offense charged may be admissible to present a complete and coherent

picture of the events that transpired." *Id.*

Appellant argues that the trial court plainly erred in admitting evidence that his picture was on the wall at the police station, which Appellant argues was a suggestion that he was wanted for other crimes. Appellant also argues that the trial court plainly erred in admitting evidence that the fingerprint examiner compared a print on a cigar found near Franklin's body to prints from the master files, which Appellant argues was a suggestion that he was involved in prior criminal activity. However, the evidence in question was simply evidence that established Appellant's identity and presence at the scene, and did not constitute clear evidence of uncharged crimes.

The evidence that Appellant's photograph was on the wall at the Pine Lawn police station (Tr.1059-60,1416,1609) did not constitute evidence of uncharged crimes. The jury was not told that the photograph was a "wanted" poster. Indeed, the picture that was shown to the jury had the "wanted" designation redacted from it(Tr.1707). Such a vague reference—without any reference to a specific bad act—did not run afoul of the rule against uncharged crimes. *See State v. Smith*, 973 S.W.2d 548,549(Mo.App.E.D.1998)(evidence that defendant's photograph came from police "record room" did not constitute evidence of other crimes). In *Nunn v. State*, 755 S.W.2d 269, 272 (Mo.App.E.D.1988), the Court held that, where an officer testified that he saw the defendant's picture at "roll-call," there was no evidence of other crimes because the officer's testimony only suggested the defendant had a criminal record. Likewise, in *State v. Howard*, 714 S.W.2d 736, 738(Mo.App.E.D.1986), the

Court held that, where an officer testified that a "street crew" of police officers already knew the defendant and that he had "pulled" the defendant's photograph, such testimony did not constitute evidence of other crimes in that "there was no reference to any kind of prior criminal record of the defendant." The Court noted that the defendant's photograph "in theory, could have been obtained from services unrelated to prior criminal activity," and that "[t]he fact that some police officers knew defendant does not necessarily indicate that he [had] a prior criminal record." *Id.* In *State v. Carr*, 50 S.W.3d 848, 857(Mo.App. W.D.2001), the Court held that the testimony of a Kansas City, Missouri police officer that a lineup photograph of defendant was obtained from the Kansas City, Kansas police department was not evidence of other crimes, and the defendant could not show manifest injustice or a miscarriage of justice resulting from the admission of the challenged testimony. *See also State v. Ware*, 326 S.W.3d 512, 523-24(Mo.App.S.D.2010) ("The admission of a mug shot constitutes prejudicial evidence of other crimes only when the mug shots or accompanying testimony discloses a defendant's prior arrests or convictions[;] [t]he admission into evidence of a mug shot is permissible where all identifying information is masked, where a defendant's identity is in issue and where admission of the mug shots will help a jury to determine the accuracy of the identification").

"The purpose of an opening statement is to inform the circuit court and the jury of the general outline of the anticipated evidence and its significance." *State v. Powell*, 286 S.W.3d 843, 850(Mo.App.W.D.2009). "The prosecutor should limit his opening statement to

provable factual statements" and should not include arguments. *Id.* Because the evidence was admissible, the prosecutor's comment in opening statement was also proper(Tr.1007).

Appellant next points to the evidence that the fingerprint examiner had compared a fingerprint with prints in a master file. However, such testimony was not evidence of uncharged crimes. *Carr*, 50 S.W.3d at 857("Fingerprint cards, in and of themselves, do not constitute evidence of a prior crime"). In *Morrow*, 968 S.W.2d at 111, the defendant argued that the neutrality of the fingerprint cards in question was compromised by the testimony of the "intake officer," who testified, *inter alia*, that the defendant's name for the fingerprint card was obtained off the "booking sheet." The Court held that despite the officer's testimony, because the appellant's fingerprint cards "did not mention any crimes," they were not rendered inadmissible as evidence of uncharged crimes. *Id*. at 112. Similarly, in *State v. Perryman*, 851 S.W.2d 776, 779 (Mo.App.E.D.1993), the Court, in upholding the trial court's admission of testimony concerning the defendant's fingerprints taken in connection with a prior incident, stated that "[a]n examination of the challenged testimony reveals that the officer gave no indication that defendant was fingerprinted pursuant to an arrest or conviction of a crime. The officer's testimony was neutral, and did not constitute evidence of prior crimes or offenses." In *Carr*, 50 S.W.3d at 854, a police officer identified the fingerprint card and testified that he took it in his capacity as a deputy for the Johnson County, Kansas, Sheriff's Department, but he did not testify as to the purpose for the defendant being fingerprinted. Likewise, a fingerprint examiner called by the State did not testify about the

purpose for fingerprinting the defendant in 1988. *Id.* at 854-55. Thus, the Court held that there was no manifest injustice or miscarriage of justice. *Id.* at 855.

Similarly, in the present case the fingerprint examiner merely testified as to her comparison of the prints(Tr.1310,1312,1315,1317), and did not testify as to any other crimes. Because Appellant's claim does not facially establish substantial grounds for believing that manifest injustice or miscarriage of justice has resulted, this Court should deny plain error review.

Appellant's point should be denied.

VI.

The trial court did not err in giving Instruction No. 18, as the trial court complied with the Notes on Use.

Appellant contends that Instruction No. 18 violated the Notes on Use because it submitted Appellant's prior convictions in separate numbered paragraphs.

A. Additional facts.

The State proffered Instruction No. 18, which set forth a serious assaultive conviction in each paragraph numbered 1-4(L.F.654). Defense counsel objected to Instruction No. 18 on the basis that it was allegedly improper to submit aggravating circumstances 1-4 as four separate convictions, and these should have been submitted as one aggravating circumstance(Tr.2343-44;L.F.625-30). Defense counsel stated that the Notes on Use to MAI-CR3d 313.40 had changed(Tr.2346). The trial court stated that "[t]here was a prior note on use and cases that indicated you could set forth in separate paragraphs each serious assaultive conviction. It's unclear and, therefore, the Court will allow it in the form that it's been submitted"(Tr.2347).

B. The standard of review.

Appellant preserved this issue in his motion for new trial(L.F.719-20). "This Court will reverse on a claim of instructional error only if there is an error in submitting an instruction and that error results in prejudice to the defendant." *Deck*, 303 S.W.3d at 548.

C. The trial court complied with the statute and the Notes on Use.

Section 565.032.2(1), RSMo 2000, provides for a statutory aggravating circumstance when "the offense was committed by a person who has one or more serious assaultive convictions[.]" Appellant contends that the number of statutory aggravators was increased because the serious assaultive convictions were listed separately in Instruction No. 18, and that this "skewed the result toward death." Appellant's Brief at 83.

However, in *State v. Taylor*, 18 S.W.3d 366, 378n.18(Mo.banc2000), this Court stated:

> The structure of our death penalty statute implicitly requires each statutory aggravating circumstance be submitted separately because once a jury finds one aggravating circumstance, it may impose the death penalty. Separation of such prior convictions permits the jury to consider the death sentence if any one of several convictions is found to exist. By separating the prior convictions, any potential jury confusion is eliminated.

(internal citations omitted).

In *State v. Clemmons*, 753 S.W.2d 901, 911-12(Mo.banc1988), the Court stated that the instruction was patterned after MAI-CR3d 313.40, "which mandates that each of a defendant's relevant prior convictions be enumerated as a separate aggravating circumstance," and:

> Contrary to defendant's assertion the procedure under MAI-CR3d 313.40 in

> no way adds any aggravating circumstance to those enumerated in § 565.032.2. . . . Moreover, the structure of the death penalty statutes implicitly demands that each conviction relevant under § 565.032.2(1) be submitted separately. Once a jury finds even a single aggravating circumstance it may consider imposing the death penalty. A jury finding that the defendant has any conviction relevant under §565.032.2(1) is sufficient to meet this threshold requirement for jury consideration of the death penalty. Because a finding of any such conviction permits jury consideration of the death penalty, each one must be listed as a separate aggravating circumstance in the instructions in order to avoid confusing the jury. If the convictions were submitted together as one aggravating circumstance the jury would be confused about whether it could consider the death penalty if it believed one of the convictions existed but not the others.

Appellant contends that this Court intended to change the procedure by eliminating the requirement in the Notes on Use to MAI-CR3d 314.40 that the serious assaultive convictions be listed in separate paragraphs. However, because the current Note on Use 5 gives no direction as to whether the serious assaultive convictions must be stated in separate paragraphs, the instruction does not violate the Notes on Use in so doing. Further, as this Court stated in *Taylor* and *Clemmons*, the instruction is in compliance with § 565.032.2(1), RSMo 2000, and the separate listing of the previous offenses serves to avoid confusion

among the jury members.

Appellant relies on *Stringer v. Black*, 112 S.Ct. 1130, 1137(1992), where the Court stated that "when the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale." *But see Brown v. Sanders*, 126 S.Ct. 884, 894(2005)(jury's consideration of invalid "special circumstance" gave rise to no constitutional violation). Here, the factor was not vague or invalid.

Appellant also argues that the jury was "encouraged to quadruple-count what should have been one." Appellant's Brief at 83. However, as this Court noted in *Clemmons*, 753 S.W.2d at 911-12, the jury may consider the death penalty if it finds even a single aggravating circumstance, and if the convictions were submitted together as one aggravating circumstance, the jury would be confused about whether it could consider the death penalty if it believed one of the convictions existed but not the others. *See also Jones v. United States*, 119 S.Ct. 2090, 2107(1999)("We have never before held that aggravating factors could be duplicative so as to render them constitutionally invalid, nor have we passed on the 'double counting' theory")(per Justice Thomas, with three justices concurring). The trial court did not err in submitting the instruction, and Appellant was not prejudiced.

Appellant's point should be denied.

VII.

The trial court did not plainly err in giving Instruction No. 18, in that the "depravity of mind" aggravator did not allow the jury to sentence Appellant to death based on Michael Douglas's conduct.

Appellant asserts that the trial court erred in giving Instruction No. 18 because the "depravity of mind" aggravator allowed the jury to sentence Appellant to death based on Douglas's conduct.

A. The standard of review.

Appellant concedes that defense counsel did not object to the instruction on this ground; thus, Appellant requests plain error review. The claim is subject to plain error analysis for the additional reason that Appellant did not preserve the issue in his motion for new trial(L.F.638-738). The first step requires a determination of whether the claim of error "facially establishes substantial grounds for believing that 'manifest injustice or miscarriage of justice has resulted.'" *Baumruk*, 280 S.W.3d at 607; Supreme Court Rule 30.20. If plain error is found, the Court then must proceed to the second step and determine "whether the claimed error resulted in manifest injustice or a miscarriage of justice." *Baumruk*, 280 S.W.3d at 607-08.

"[I]nstructional error seldom constitutes plain error, which requires a defendant to demonstrate more than mere prejudice." *State v. Tillman*, 289 S.W.3d 282, 291-92(Mo.App. W.D.2009)(quoting *State v. Darden*, 263 S.W.3d 760, 762(Mo.App.2008)). "For

instructional error to rise to the level of plain error, the trial court must have so misdirected or failed to instruct the jury that it is apparent to the appellate court that the instructional error affected the jury's verdict." *Id.* "In determining whether the misdirection likely affected the jury's verdict, an appellate court will be more inclined to reverse in cases where the erroneous instruction did not merely allow a wrong word or some other ambiguity to exist, but excused the State from its burden of proof on a contested element of the crime." *Tillman*, 289 S.W.3d at 292.

B. The depravity of mind aggravator did not allow the jury to sentence Appellant to death based on Michael Douglas's conduct.

Appellant contends that Instruction No. 18 allowed the jury to sentence him to death based on Michael Douglas's conduct because it stated:

> You can make a determination of depravity of mind only if you find:
>
> That the defendant killed Todd Franklin after he was bound or otherwise rendered helpless by defendant or another acting with or aiding the defendant and that defendant exhibited a callous disregard for the sanctity of human life.

(L.F.655).

Appellant relies on *State v. Isa*, 850 S.W.2d 876, 901-03(Mo. banc 1993). There the depravity of mind aggravator was modified by adding language from MAI-CR3d 304.04 regarding acting with or aiding or encouraging another in committing an offense, and the instruction was repeatedly phrased in terms of the defendant "acting together with" her

husband in killing their daughter, with the conclusion that "the defendant Maria Isa acting together with Zein Isa killed Palestina Isa after she was bound or otherwise rendered helpless by defendant and that defendant Maria Isa thereby exhibited a callous disregard for sanctity of human life." *Id.* at 901-02. The Court rejected the instruction because typographical errors made the instruction ambiguous and it departed from the Notes on Use by combining the standard instruction with MAI-CR3d 304.04. *Id.* at 902-03.

Currently, MAI-CR3d 314.40 Note on Use 8 provides:

> You must continue the instruction by including as a finding, one of the following phrases (as supported by the evidence). More than one phrase may be submitted; if so, each phrase must be supported by the evidence and joined by "and".
>
> ***
>
> [3] That the defendant killed [*name of victim*] after he was bound or otherwise rendered helpless by (defendant) (or) ([*name or describe person acting with defendant*]) and that defendant thereby exhibited a callous disregard for the sanctity of human life.

Here, in contrast to *Isa*, the instruction complied with the Notes on Use. Note on Use 8 continues:

> Depravity of mind must be premised upon the acts and "intent" of the defendant, not those of any other person. See Notes on Use 7b.

> If depravity of mind is being submitted where the defendant acted with or aided another in the killing, these paragraphs may be modified accordingly. Any such modification must make clear that a finding of depravity of mind must be premised upon the acts and "intent" of the defendant, not those of any other person. See State v. Isa, 850 S.W.2d 876 (Mo. banc 1993), and State v. Hutchison, 957 S.W.2d 757, 765 (Mo. banc 1997).

In *Isa*, 850 S.W.2d at 901-02, the entire instruction was predicated upon the conduct of another acting with the defendant, but here the instruction merely acknowledged, in conformity with the Note on Use and the law, that the victim may have been rendered helpless either by the defendant or another acting with the defendant(L.F.655).

The instruction at issue here is actually very similar to the instruction that this Court held permissible in *State v. Hutchison*, 957 S.W.2d 757, 765(Mo. banc1997). There the jury was instructed that it could make a determination of depravity of mind only if it found:

> (1) That the defendant with the purpose of promoting the death of Brian Yates, killed *or aided in the killing* of Brian Yates after he was bound or otherwise rendered helpless by defendant or Michael Salazar and the defendant thereby exhibited a callous disregard for the sanctity of human life; and
>
> (2) That the defendant with the purpose of promoting the death of Brian Yates, killed *or aided in the killing* of Brian Yates as a part of defendant's plan to kill more than one person and thereby exhibited a callous disregard for the sanctity

of all human life.

This Court found no manifest injustice or miscarriage of justice from the modification, as it did not "remove the jury's focus from the convicted murderer's own character, record and individual mindset as betrayed by his own conduct." *Id.* The Court held that: "To the contrary, this language has the effect of focusing the jury entirely on Hutchison's conduct. Whether that conduct be 'killing' or 'aiding', Hutchison is clearly portrayed in these instructions as a single actor." *Id.* The Court further found that the modification adding the words "or aided in the killing" was taken directly from the Notes on Use as in effect at that time. *Id.*

Here, the instruction required the jury to find that Appellant killed the helpless victim, and that Appellant exhibited a callous disregard for the sanctity of human life(L.F.655). Because Appellant has not established substantial grounds for believing that manifest injustice or miscarriage of justice has resulted, *Baumruk*, 280 S.W.3d at 607, this Court should deny plain error review.

Appellant's point should be denied.

VIII.

The trial court did not err in accepting the jury's death verdict and in sentencing Appellant to death, in that the jury properly found the "depravity of mind" aggravator, and the limiting construction was not void for vagueness.

Appellant argues that the trial court erred in accepting the jury's death verdict and in sentencing him to death because the jury did not find the limiting construction for the "depravity of mind" aggravator. Alternatively, Appellant asserts that the limiting construction was void for vagueness.

A. Additional facts.

Instruction No. 18 informed the jury that:

> In determining the punishment to be assessed against the defendant for the murder of Todd Franklin, you must first consider whether one or more of the following statutory aggravating circumstances exists:
>
> ***
>
> 5. Whether the murder of Todd Franklin involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find:
>
> That the defendant killed Todd Franklin after he was bound or otherwise rendered helpless by defendant or another acting with or aiding the defendant

and that defendant thereby exhibited a callous disregard for the sanctity of all human life.

(L.F.654-55).

During deliberations in the penalty phase, the jury sent a question to the trial court: "Do we write the complete narration verbatim from inst. # 18 or do we just indiction [sic] #1, #s, etc from instruction 18?"(L.F. 679). The trial court responded, "verbatim"(L.F.680). On its verdict form, the jury wrote as a statutory aggravator: "#5 Whether the murder of Todd Franklin involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman"(L.F.685).

B. The standard of review.

Appellant concedes that he did not object on this basis at trial. Therefore, this issue is subject to plain error analysis. Further, his motion for new trial asserted that the limiting construction was void for vagueness(L.F.724-25), but did not assert that the jury failed to find the limiting construction(L.F.688-738). The first step requires a determination of whether the claim of error "facially establishes substantial grounds for believing that 'manifest injustice or miscarriage of justice has resulted.'" *Baumruk*, 280 S.W.3d at 607; Supreme Court Rule 30.20. If plain error is found, the Court then must proceed to the second step and determine "whether the claimed error resulted in manifest injustice or a miscarriage of justice." *Baumruk*, 280 S.W.3d at 607-08. "Manifest injustice is determined by the facts and circumstances of the case, and the defendant bears the burden of establishing manifest

injustice." *State v. Baxter*, 204 S.W.3d 650, 652(Mo.banc2006).

C. Because the jury made the requisite factual findings, there was no error in accepting the jury's verdict.

In determining Appellant's sentence, the jury found five statutory aggravators beyond a reasonable doubt, including the "depravity of mind" aggravator set forth in § 565.032.2(7), RSMo 2000(L.F.685). The foreperson filled out the verdict form and wrote out the depravity-of-mind aggravator as follows: "#5 Whether the murder of Todd Franklin involved depravity of mind and, as a result thereof, the murder was outrageously and wantonly vile, horrible and inhuman"(L.F.685). The foreperson did not write out the limiting factual finding that the jury was required to make under Instruction 18 to support the depravity-of-mind aggravator(L.F.685). However, this was not error, and it did not render the jury's verdict unreliable.

Instruction 21 instructed the jury to write out the "the statutory aggravating circumstances . . . which you found beyond a reasonable doubt"(L.F.658). That is precisely what the foreperson did. The limiting factual determination was not identified as part of the aggravating circumstance, but as a factual determination that the jury had to make to support the aggravating circumstance(L.F.654-55). Thus, the foreperson followed the instructions to the letter and only wrote the aggravating circumstance that the jury had found beyond a reasonable doubt. This was not error.

Further, there was no unreliability in the verdict. The jury was instructed that it could

"only" find the "depravity of mind" aggravator if it made the requisite factual finding included in Instruction No. 18(L.F.654-55). The jury is presumed to follow the jury instructions, *Whitfield*, 107 S.W.3d at 263, and there is no reason to believe the jury wrote in the "depravity of mind" aggravator in the absence of the requisite factual finding.

This Court considered a similar claim in *State v. Zink*, 181 S.W.3d 66, 74(Mo.banc2005). The Court noted that the jury had been specifically instructed to make the relevant factual determination before finding the depravity-of-mind aggravator. *Id.* at 74 n. 24. Thus, the Court stated, "[t]he verdict form for aggravating circumstances may have been inartfully completed by the jury, but this does not negate the fact that the necessary findings were made to support this aggravator." *Id.* The Court also noted that the jury found the presence of three statutory aggravators beyond a reasonable doubt; thus, even assuming *arguendo* that the "depravity of mind" aggravator was invalid, the defendant was death-eligible where at least one valid statutory aggravator was found. *Id.* In the present case, the jury found the "serious assaultive conviction" aggravator as well as the "depravity of mind" aggravator(L.F.684-85), thus the death penalty was supported even if the jury failed to find the limiting construction.

D. The limiting construction was not void for vagueness.

Appellant contends that the limiting construction is void for vagueness because if the victim is rendered helpless by one shot, the limiting construction applies to any case involving more than one shot. The instruction complied with MAI-CR3d 314.40 and the

Notes on Use. Therefore, the instruction is presumptively valid. *Deck*, 303 S.W.3d at 548.

This Court has acknowledged that the language "depravity of mind ... outrageously or wantonly vile, horrible or inhuman," without further definition, is too vague to provide adequate guidance to a sentencer. *State v. Feltrop*, 803 S.W.2d 1, 14(Mo.banc1991). Seeking to give substance to the terms, however, this Court has articulated a limiting construction of the aggravating circumstance at issue in this case. *State v. Preston*, 673 S.W.2d 1, 11(Mo.banc1984), *cert. denied*, 105 S.Ct. 269(1984). The factors to be considered in determining whether depravity of mind exists include: the mental state of the defendant; infliction of physical or psychological torture upon the victim as when the victim has a substantial period of time before death to anticipate and reflect upon it; brutality of defendant's conduct; mutilation of the body after death; absence of any substantive motive; absence of defendant's remorse; and the nature of the crime. *Preston*, 673 S.W.2d at 11. The limiting construction employed by this Court requires that at least one of the *Preston* factors be present before this Court will find that the evidence supports a finding of depravity of mind.

An aggravating circumstance "may not apply to every defendant convicted of a murder[.]" *State v. Butler*, 951 S.W.2d 600, 605(Mo.banc1997). "If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm." *Id.* In *Butler*, the defendant claimed that the limiting construction was unconstitutionally vague in stating "That the

defendant committed repeated and excesive [sic] acts of physical abuse upon Diana Butler and the killing was therefore unreasonably brutal," and the Court held, without any further discussion, that the depravity of mind instruction was not unconstitutionally vague. *Id.* at 605-06; *see also Johnson*, 284 S.W.3d at 586-87 (same limiting construction as in *Butler* was not unconstitutionally vague).

In *State v. Smith*, 944 S.W.2d 901, 921(Mo.banc1997), the defendant claimed that the "depravity of mind" aggravating circumstance was unconstitutional, even with the limiting construction. This Court held that even if it readdressed this issue, and decided it in Smith's favor, the other three statutory aggravating circumstances would remain, and where there is a finding of one valid aggravating circumstance beyond a reasonable doubt, the Court will affirm the death sentence. The Court further found that, due to the brutal nature of the crime, the evidence sufficiently supported the "depravity of mind" aggravating circumstance. *Id.*

In *State v. Rousan*, 961 S.W.2d 831, 853(Mo.banc1998), the defendant claimed that the aggravator that he "acted with a callous disregard for the sanctity of all human life" was as vague as the "outrageously and wantonly vile, horrible and inhuman," language held inadequate in *Godfrey v. Georgia*, 100 S.Ct. 1759(1980), without a limiting instruction to guide the jury. However, the Court found no need to address the issue because more than one aggravator supported the sentence, and one aggravator is sufficient. *Id.*

Similarly, the limiting construction is not unconstitutionally vague here. With the

limiting construction, the aggravator is not one that would apply to every defendant. *Butler*, 951 S.W.2d at 605. Further, even if the "depravity of mind" aggravating circumstance were infirm, there are other aggravators (the serious assaultive convictions) to support the death penalty(L.F.685).

Appellant's point should be denied.

IX.

The jury found the "depravity of mind" aggravator in the previous trial; thus, submission of that aggravator was not precluded in the present case.

Appellant argues that the jury's lack of finding of the limiting construction of the "depravity of mind" aggravator in the previous trial constituted a rejection of that aggravator and precluded submission of that aggravator in the present case.[8]

A. The standard of review.

Appellant filed a written objection to Instruction No. 18 on the basis that the jury rejected the "depravity of mind" aggravator in the first trial(L.F.631-39), and Appellant also objected on those grounds at the trial in the present case(Tr.2349-51). Appellant also preserved the issue in his motion for new trial(L.F.725).

"This Court will reverse on a claim of instructional error only if there is an error in submitting an instruction and that error results in prejudice to the defendant." *Deck*, 303 S.W.3d at 548.

B. The jury's failure to find the limiting construction in the previous trial was not a rejection of the "depravity of mind" aggravator. The jury found the aggravator in the previous trial; thus, submission of that aggravator was not precluded in the present case.

The jury's lack of finding of the limiting construction in the previous trial was not a

[8] Appellant's legal argument of preclusion echoes his argument raised in Point II.

rejection of the aggravator(L.F.375). Rather, the jury unequivocally found the aggravator. In the previous trial, Instruction No. 18 informed the jury that:

> In determining the punishment to be assessed against the defendant for the murder of Todd Franklin, you must first consider whether one or more of the following statutory aggravating circumstances exists:
>
> ***
>
> 5. Whether the murder of Todd Franklin involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find:
>
> That the defendant killed Todd Franklin after he was bound or otherwise rendered helpless by defendant or another acting with or aiding the defendant and that defendant thereby exhibited a callous disregard for the sanctity of all human life.

(L.F.365-66).

The jury in the previous trial found, as aggravating circumstance # 5, that "The murder of Todd Franklin involved depravity of mind and, as a result thereof, the murder was outrageously and wantonly vile, horrible and inhuman"(L.F.374-75).

Instruction 21 in the previous trial instructed the jury to write out the "the statutory aggravating circumstances . . . which you found beyond a reasonable doubt"(L.F.369), and

that is precisely what the foreperson did. The limiting factual determination was not identified as part of the aggravating circumstance, but as a factual determination that the jury had to make to support the aggravating circumstance(L.F.365-66). Thus, the foreperson followed the instructions to the letter and only wrote the aggravating circumstance that the jury had found beyond a reasonable doubt.

Further, in the previous trial, the jury was instructed that it could "only" find the "depravity of mind" aggravator if it made the requisite factual finding included in Instruction No. 18(L.F.365-66). The jury is presumed to follow the jury instructions, *Whitfield*, 107 S.W.3d at 263, and there is no reason to believe the jury wrote in the "depravity of mind" aggravator in the absence of the requisite factual finding.

This Court considered a similar claim in *Zink*, 181 S.W.3d at 74. In a footnote, the Court noted that the jury had been specifically instructed to make the relevant factual determination before finding the depravity-of-mind aggravator. *Id.* at 74 n. 24. Thus, the Court stated, "The verdict form for aggravating circumstances may have been inartfully completed by the jury, but this does not negate the fact that the necessary findings were made to support this aggravator." *Id.* The jury's lack of finding of the limiting construction in the previous trial(L.F.374-75) was not a rejection of the "depravity of mind" aggravator. Rather, the jury found the aggravator unequivocally. Submission of the aggravator was not precluded in the present case.

Appellant's point should be denied.

X.

The trial court did not err in giving Instruction No. 18 and in accepting the jury's verdict, as the jury's findings of serious assaultive convictions were sufficient.

Appellant next argues that Instruction No. 18 did not require the jury to make a "serious assaultive" factual finding. Appellant also argues that there was insufficient evidence to support a "serious assaultive" finding.

A. Additional facts.

In the penalty phase, the trial court admitted into evidence Exhibit 101, a certified copy of court records showing convictions for two counts of assault in the first degree and two counts of armed criminal action in a prior case against Appellant(Tr.2028). Appellant objected on grounds that the convictions "would have to be established by putting on the facts. However, the statute only allows for the prior conviction"(Tr.2024-25).

Appellant filed a written objection to the method of submitting serious assaultive aggravating circumstances pursuant to MAI-CR3d 314.40(L.F.207-17).

At trial, defense counsel objected to Instruction No. 18 on grounds that it is for the jury to decide whether or not a conviction is serious and assaultive, and that could be done only by presenting facts as to each particular instance so that they could make the determination that the incident was serious and assaultive(Tr.2343). Defense counsel also objected to Instruction No. 18 because each of the aggravators for serious assaultive convictions had "a small amount of fact that is put into the instruction," and defense counsel

did not "think that it is proper for instructions to contain extraneous facts for the jury"(Tr.2344-45). Paradoxically, however, Appellant objected at trial that the State should not be allowed to give any facts surrounding the prior convictions(L.F.629-30).

Defense counsel also objected to Instruction No. 18 on grounds that there was a conflict between the statute, § 565.032.2(1), RSMo 2000, and the instructions in that the statute limited the State to putting in the convictions and did not allow for facts, but the jury needed to hear some facts in order to make a finding that the convictions were serious assaultive convictions and thus satisfy *Ring*(Tr.2347-48). She argued that submission of these aggravating circumstances could not constitutionally be submitted to the jury(Tr.2348).

The trial court stated that the prior convictions were sufficient to be submitted to the jury to determine if they were serious assaultive convictions, and defense counsel objected on grounds that evidence should have been presented to the jury regarding the specific prior convictions, and the instructions should have been more specific as to what the jury needed to find in order to determine that the convictions were serious and assaultive(Tr.2359-60). The trial court ruled that the instruction was sufficient and that the jury could make that determination based on the evidence that was admitted(Tr.2360-61).

During deliberations, the jury asked to see Exhibit 101(L.F.677). Counts V and VI were redacted from that exhibit because Appellant had been acquitted on those counts(Tr.2417-18; Exhibit 101).

B. The standard of review.

Appellant's motion for new trial asserted that Instruction No. 18 allowed the judge, rather than the jury, to determine that a prior conviction was a serious assaultive conviction(L.F.718-19). To that extent, his claim is preserved. *Drudge*, 296 S.W.3d at 42. "This Court will reverse on a claim of instructional error only if there is an error in submitting an instruction and that error results in prejudice to the defendant." *Deck*, 303 S.W.3d at 548.

C. Instruction No. 18 properly instructed the jury in determining whether Appellant had serious assaultive convictions.

Section 565.032.2(1), RSMo 2000, allows the jury to receive a statutory aggravating circumstance instruction when "[t]he offense was committed by a person who has one or more serious assaultive criminal convictions." MAI-CR3d 314.40 paragraph 1(B) describes this aggravating circumstance as follows:

> Whether the defendant had (a) (one or more) serious assaultive conviction(s) in that he was convicted of [*Insert name of serious assaultive crime*.] on [*date*], in the [*name of court*] of [*name of county, district, etc.*] of [*name of state*] because defendant [*Identify brief facts to establish that the crime was a serious assaultive conviction*.]
>
> The Notes on Use, paragraph 5, state:
>
> The court should determine before submitting paragraph 1B that there is

sufficient evidence to warrant its submission. For discussions of offenses that might constitute a "serious assaultive conviction," see State v. Brooks, 960 S.W.2d 479, 496 (Mo. banc 1997); State v. Kinder, 942 S.W.2d 313, 332 (Mo. banc 1996); and State v. Brown, 902 S.W.2d 278, 293-94 (Mo. banc 1995). Because of the United States Supreme Court decision in Shepard v. United States, 544 U.S. 13 (2005), the facts of the "serious assaultive conviction" should be submitted to the jury.

In *Shepard v. United States*, 125 S.Ct. 1254, 1262(2000), the Court recognized, under the *Apprendi* line of cases, that "any fact other than a prior conviction sufficient to raise the limit of the possible federal sentence must be found by a jury[.]"

Instruction No. 18 set forth the serious-assaultive-conviction aggravator in the following format:

> 1. Whether the defendant has a serious assaultive conviction in that he was convicted of Assault in the First Degree on February 4, 2005 in the Circuit Court of St. Louis County because defendant shot at Daryl Bryant on April 4, 2002.

(L.F.654). The instruction also set forth three other instances for which the jury could find that Appellant had serious assaultive convictions(L.F.654). The instruction required the jury to find the aggravators beyond a reasonable doubt(L.F.655).

Because the instruction complied with MAI-CR3d 314.40 and the Notes on Use in the

submission of the "serious assaultive conviction" aggravator, the instruction is presumptively valid. *Deck*, 303 S.W.3d at 548. The instruction expressly required the jury to determine whether Appellant had a "serious assaultive conviction" in light of a previous conviction of assault or armed criminal action. Thus, the jury was instructed to determine both that Appellant had the conviction and that the conviction was a "serious assaultive" conviction.

Appellant asserts that telling the jury, through the instruction and Exhibit 101, that he "shot at" someone is insufficient to show that his conduct was "serious" or "serious assaultive." Because Appellant did not object on this basis at trial or raise this specific claim in the motion for new trial(L.F.688-738), it is subject to plain error analysis at best. Appellant relies on *State v. Schlup*, 724 S.W.2d 236, 239(Mo.banc1987), which Appellant admits was based on a predecessor statute requiring a "substantial history of serious assaultive convictions," but there this Court stated that there must be "something more than bare evidence of the crime of 'assault.'" In the present case, the jury was provided with Exhibit 101(Tr. 2417-18), which showed Appellant's convictions on charges of shooting at Daryl Bryant and inflicting serious physical upon him, and shooting at Jermaine Burns, which was a substantial step toward the commission of the crime of attempting to cause serious physical injury to him(Exhibit 101). Here, "shooting" is sufficient to establish a serious assaultive conviction.

Appellant asserts that the jury received no guidance to make the factual determination that the prior convictions were "serious assaultive" convictions. However, in the present

case, as in *State v. Smith*, 781 S.W.2d 761, 769(Mo.banc1989), *vacated on other grounds*, 110 S.Ct. 1944 (1990), *opinion reinstated*, 790 S.W.2d 241 (1990), it was "difficult to dispute" that shooting at someone was a serious assaultive conviction.

The trial court did not err, plainly or otherwise, in giving Instruction No. 18 to the jury.

Appellant's point should be denied.

XI.

The trial court did not err in giving Instructions Nos. 19 and 21, as they did not violate *Ring* and *Apprendi*, and the trial court did not err in allowing evidence of non-statutory aggravators.

Appellant argues that the trial court erred in submitting Instruction No. 19, the mitigating circumstances instruction patterned after MAI-CR3d 314.44, and Instruction No. 21, the unanimity instruction patterned after MAI-CR3d 314.48. Appellant claims that these instructions placed the burden of proof on the defendant, did not require proof of aggravators beyond a reasonable doubt, and erroneously required a unanimous finding that mitigators outweighed aggravators. Appellant also argues that the trial court erred in allowing evidence of non-statutory aggravators.

A. Additional facts.

Appellant objected to Instruction No. 19 on these grounds at trial(L.F.151-53; Tr.2352-54). Appellant also filed general written objections to the penalty phase instructions on grounds that they did not require the jury to unanimously make all findings beyond a reasonable doubt, and shifted the burden of proof to the defendant to show that mitigating circumstances outweighed aggravating circumstances(L.F.146-50).

Appellant's written objections and submission of alternative instructions asserted that MAI-CR3d 314.44 did not limit aggravating evidence to evidence found by the trier of fact and did not require the jurors to unanimously conclude that the facts in mitigation were

sufficient to outweigh the evidence in aggravation(L.F.664-65). Appellant's written objections and submission of alternative instructions also asserted that the State must prove beyond a reasonable doubt that the aggravating evidence outweighed the mitigating evidence(L.F.667-70). Appellant also submitted an alternative instruction to MAI-CR3d 314.48, but the trial court refused the alternative instruction(L.F.675-76).

Instruction No. 19 stated:

> If you have unanimously found beyond a reasonable doubt that one or more of the statutory aggravating circumstances submitted in Instruction No. 18 exists, you must then determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh facts and circumstances in aggravation of punishment.
>
> In deciding this question, you may consider all of the evidence presented in both the guilty and punishment stages of trial, including evidence presented in support of the statutory aggravating circumstances submitted in Instruction No. 18, and evidence presented in support of mitigating circumstances.
>
> You shall consider any facts or circumstances which you find from the evidence in mitigation of punishment.
>
> It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. If each juror determine that there are facts or circumstances in mitigation of punishment sufficient to outweigh the facts or

> circumstances 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.656).

Instruction No. 21 stated, in part:

> 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 Todd Franklin 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.658).

B. The standard of review.

Appellant preserved his claim of instructional error in his motion for new trial(L.F.702-09). "This Court will reverse on a claim of instructional error only if there is an error in submitting an instruction and that error results in prejudice to the defendant." *Deck*, 303 S.W.3d at 548.

In his objections and motion for new trial, Appellant complained only of evidence of other crimes, but did not object to the remaining evidence of non-statutory aggravators of which he now complains(L.F.115-18,218-24,256I-K,710-12,Tr.1806-08,1841-1909,1919-

2034,2035-54,2057-73). Preserved claims of evidentiary error are reviewed for abuse of discretion. *Primm*, 347 S.W.3d at 70. Appellant's unpreserved claims are subject to plain error analysis. *Baumruk*, 280 S.W.3d at 607.

C. Instructions Nos. 19 and 21 did not violate *Ring* and *Apprendi*.

MAI instructions are presumptively valid, *Deck*, 303 S.W.3d at 548, and when applicable, must be given to the exclusion of other instructions. Supreme Court Rule 28.02(c); *State v. Anderson*, 306 S.W.3d 529, 548(Mo.banc2010).

In *Johnson*, 284 S.W.3d at 588-89, this Court noted that the appellant's argument that the instruction improperly shifted the burden of proof has been rejected by the United States Supreme Court and this Court. The *Johnson* Court quoted the United States Supreme Court, which had 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.

Kansas v. Marsh, 126 S.Ct. 2516(2006).

In *Johnson*, 207 S.W.3d at 48, this Court stated that "[t]his Court has repeatedly rejected the claim that section 565.030.4(3) requires the jury to make a finding beyond a reasonable doubt" that mitigators are insufficient to outweigh any aggravators found. The

Court rejected the defendant's claim for plain error review on the defendant's allegation that § 565.030.4(3), RSMo 2000, does not require the jury to "unanimously" find that mitigators outweigh aggravators. *Id.*

In *Davis*, 318 S.W.3d at 643, this Court rejected the defendant's argument that *Apprendi* requires that juries in capital cases be instructed that the State bears the burden of proof during the § 565.030.4(3) step of determining whether mitigating circumstances outweigh aggravating circumstances. The Court reaffirmed its prior 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. *Id.*

In *Anderson*, 306 S.W.3d at 539, this Court rejected the defendant's argument, based on *Ring* and *Apprendi*, that the trial court had erred in submitting an instruction based on MAI-CR3d 313.44. There the Court stated that "as long as the State is required to prove at least one statutory aggravator beyond a reasonable doubt, rendering the defendant death eligible, the legislature has discretion in allocating the burden of proof guiding the remainder of the jury's determination." *Id.* The Court also held that "only evidence functionally equivalent to an element, including statutory aggravating circumstances, must be found beyond a reasonable doubt." *Id.* at 540 (quoting *Johnson*, 284 S.W.3d at 585). The Court stated that "it is constitutionally permissible to place the burden of proving mitigating circumstances on the defendant." *Id.*

Pursuant to this Court's previous rulings, there was no error in giving Instructions

Nos. 19 and 21.

Citing *Zant v. Stephens*, 103 S.Ct. 2733, 2747(1983), Appellant asserts that Instruction No. 19 allowed the jury to consider constitutionally impermissible evidence. In *Zant*, 103 S.Ct. at 2747, the Court stated in dicta that if a State attached the "aggravating" label to factors that actually should militate in favor of a lesser penalty, such as the defendant's mental illness, due process of law would require that the jury's decision to impose death be set aside. There the United States Supreme Court held that the Georgia Supreme Court had not erred in its conclusion that the "mere fact that some of the aggravating circumstances presented were improperly designated 'statutory'" had "an inconsequential impact on the jury's decision regarding the death penalty." *Id.* at 2749. The dicta in *Zant* did not preclude the consideration of non-statutory aggravators.

Appellant also asserts that the jury should have been required to make written findings. Under *Ring*, 122 S.Ct. at 2443, aggravating factors must be found by a jury if the defendant exercises his right to a trial by jury, and *Apprendi*, 120 S.Ct. at 2362-63, similarly, emphasized the need for findings by a jury as to any fact that increases the penalty. The jury did make written findings of the statutory aggravators(L.F.685), and Appellant has not shown that anything more is required.

In summary, the trial court did not err in giving Instructions Nos. 19 and 21, which were consistent with MAI-CR3d and with this Court's precedents.

D. The trial court did not err in admitting evidence of non-statutory aggravators.

Appellant also complains that the trial court erred in admitting evidence of non-statutory aggravators. Appellant's point is multifarious in raising this claim of evidentiary error along with his claim of instructional error. *Rogers v. Hester ex rel. Mills*, 334 S.W.3d 528, 539(Mo.App.S.D.2010). But in any event, evidence of non-statutory aggravators is relevant after finding a statutory aggravator, *State v. Parker*, 886 S.W.2d 908, 928(Mo.banc1994), and the trial court has the discretion during the penalty phase to admit evidence of non-statutory aggravators. *Simmons*, 955 S.W.2d at 768. In his objections and motion for new trial, Appellant complained only of evidence of other crimes(L.F.115-18,218-24,710-12,Tr.1806-08,1841-1909,1919-2034,2035-54,2057-73), but did not object to the remaining evidence of which he now complains. The trial court did not err, plainly or otherwise, in allowing evidence of non-statutory aggravators.

Appellant's point should be denied.

XII.

The trial court did not err, plainly or otherwise, in allowing the prosecutor's comments during voir dire, opening statement, and argument.

Appellant raises numerous claims of error as to the prosecutor's comments during voir dire, as well as the opening statement and closing arguments. Most of these claims were not the subject of objections at trial or included in Appellant's motion for new trial, and thus are subject to plain error analysis at best.

A. The standard of review.

A trial judge is vested with discretion to judge the appropriateness of specific questions and has wide discretion in the conduct of voir dire. *Baumruk*, 280 S.W.3d 600.

The circuit court has broad discretion in regulating the scope of the prosecutor's opening statement. *Powell*, 286 S.W.3d at 850. Courts will grant plain error review on the basis of an error in the prosecutor's opening statement only when the defendant can show that the prosecutor's remark had a decisive effect on the jury's determination. *Id.* This is a difficult standard to meet because the courts have concluded that the impact of the prosecutor's opening statement diminishes after the parties introduce evidence and give their closing arguments. *Id.*

Preserved claims of error regarding closing argument are reviewed for abuse of discretion—whether a defendant was prejudiced to the extent that there is a reasonable probability that the outcome at trial would have been different if the error had not been

committed. *State v. Deck*, 994 S.W.2d 527, 543(Mo.banc1999). Closing arguments must be examined in the context of the entire record. *Id.*

"Plain error relief is rarely appropriate for claims involving closing arguments because the decision to object is often a matter of trial strategy." *Anderson*, 306 S.W.3d at 543. "Appellate review of assertions of plain error in a prosecution's closing argument pressures trial courts into the situation of uninvited interference with summation and a corresponding increase in the risk of error by such intervention." *State v. Wise*, 879 S.W.2d 494,516(Mo.banc1994). A conviction is reversed due to an improper closing argument only if the argument "had a decisive effect on the jury's determination." *State v. Taylor*, 298 S.W.3d 482, 510(Mo.banc2009). "In order for a prosecutor's statements to have such a decisive effect, there must be a reasonable probability that the verdict would have been different had the error not been committed." *Deck*, 994 S.W.2d at 543.

Most of Appellant's claims were not raised in his motion for new trial, and are thus subject to plain error analysis. *Drudge*, 296 S.W.3d at 42.[9]

Voir dire.

Appellant contends that the trial court erred in allowing certain statements by the prosecutor during voir dire. However, the trial judge has wide discretion in the conduct of

[9] In responding to this point, Respondent will specifically designate the comments to which Appellant objected at trial and raised in his motion for new trial. Otherwise, the claim was not preserved.

voir dire. *Baumruk*, 280 S.W.3d 600. Therefore, the trial court did not err, plainly or otherwise, in these instances.

Appellant complains that the prosecutor introduced himself to the jury and explained that he worked for the elected prosecutor(Tr.42,125,184,238,303,476,553,616). This was merely background information for the prospective jurors, and the comments were proper.

Appellant also complains that venire members were told that their answers didn't matter. However, it was permissible for the prosecutor to tell some venire members that they would not be on the jury or that they would be skipped(Tr.195). Venireperson Richmond, for example, had already stated that he had prepaid plane tickets and would not be available(Tr.177-78). The prosecutor acknowledged that he mistook Venireperson Middleton for another venireperson, and he apologized, while the trial court informed her that her question was not irrelevant and that they were "concerned about everybody's point of view"(Tr.737-40). Appellant moved to quash the panel and the trial court denied the motion(Tr.743-44). Appellant raised the issue in his motion for new trial(L.F.698-99), but acknowledges that he did not object at first to the comment to Venireperson Middleton when the prosecutor stated that he wasn't going to talk to her(Tr.737). The trial court took corrective action by telling the panel that the prosecutor had made a mistake regarding Middleton, and that "we are interested in all of your views" and "[y]ou are all equally important to us as we go through this process"(Tr.745-46). The trial court did not err, plainly or otherwise, in allowing the prosecutor to tell the venire members that they would not be

asked more questions or that they would not be on the jury.

Appellant also complains that the prosecutor erroneously stated that the jury must be unanimous to reach a verdict of life without parole(Tr.51,256). This same claim was addressed in *State v. Clay*, 975 S.W.2d 121, 135(Mo.banc1998), and *Storey v. State*, 175 S.W.3d 116, 156(Mo.banc2005). This Court held that the defendants did not show prejudice because they had not shown a reasonable probability that had defense counsel objected to the prosecutor's comment, the result of the proceeding would have been different.

Appellant also complains that the prosecutor referred to other cases when he stated that the State was not required to show that a weapon was recovered, and he rhetorically asked the venirepersons how many guns were at the bottom of the Mississippi River(Tr.765). The prosecutor's comment was permissible. The prosecutor correctly stated that the State was not required to show that a weapon was recovered, and the prosecutor merely made an inference from common everyday experience that weapons used in crimes might be thrown into a river.

In summary, the trial court did not err, plainly or otherwise, in allowing the prosecutor's comments.

Guilt phase.

Appellant complains that the prosecutor, in opening statement, referred to Appellant's picture on the wall at the police station(Tr.1007). This was already discussed in Point V, and because the evidence was admissible at trial, this statement in opening was not plain error.

Appellant claims that the prosecutor's closing argument improperly directed the jury to disregard Silas's in-court testimony because his statement had been "set in stone" in his recorded statement(Tr.1747). The prosecutor was entitled to argue reasonable inferences from the evidence, *State v. Brown*, 337 S.W.3d 12, 14(Mo.banc2011), and "[a] prosecutor is allowed to comment on the witnesses' credibility during closing argument." *State v. Chism*, 252 S.W.3d 178, 188(Mo.App.W.D.2008). Because Silas was an uncooperative witness(Tr.1041-1134), the prosecutor's statement simply guided the jury through the evidence and was a comment on Silas's credibility. This argument was proper.

Appellant asserts that the prosecutor vouched for witnesses, saying they had no reason to lie. The prosecutor began a statement that Silas was "getting nothing for his--" and defense counsel interrupted with an objection, which the court sustained, at that point(Tr.1031-32). "Vouching occurs when a prosecutor implies that he or she has facts establishing the veracity of a state's witness that are not before the jury for their consideration." *Glover v. State*, 225 S.W.3d 425, 430(Mo.banc2007). "Stating that a witness is telling the truth does not constitute vouching as long as the prosecutor does not imply that the statement is based on evidence not before the jury." *Id.*

Appellant improperly refers to the record of the previous trial for Hazlett's criminal history; the present case must be based on the evidence presented in this case and not in any other. The prosecutor correctly stated in opening that Hazlett had pled guilty to unlawful use of a weapon(Tr.1032,1232). The fact that Hazlett had charges against him was brought out

on cross-examination, and defense counsel asked, "And just a couple of months ago, Mr. Larner did you a favor and didn't issue charges on another DWI and possession of a weapon while you were drunk?"(Tr.1231-32). Hazlett answered "yes"(Tr.1232). Hazlett pled guilty to unlawful use of a weapon(Tr.1232). The prosecutor's statement that Hazlett had no convictions(Tr.1794) was not necessarily incorrect, as the word "conviction," standing alone, does not include a disposition by a suspended imposition of sentence. *Yale v. City of Independence*, 846 S.W.2d 193, 196(Mo.banc1993). The prosecutor did not improperly vouch for Hazlett.

Appellant also claims that the prosecutor improperly vouched for Lucas by stating that "he's probably one of the most credible guys in the world. He's got no convictions"(Tr.1794). Again, "[v]ouching occurs when a prosecutor implies that he or she has facts establishing the veracity of a state's witness that are not before the jury for their consideration." *Glover*, 225 S.W.3d at 430. "Stating that a witness is telling the truth does not constitute vouching as long as the prosecutor does not imply that the statement is based on evidence not before the jury." *Id.* There was no evidence that Lucas had any convictions(Tr.1146-89). This was not vouching, and the argument was proper.

Appellant argues that the prosecutor's closing personalized and argued outside the evidence because he referred to the process of shooting a gun, and he also told the jurors that they represented St. Louis County(Tr.1737,1775). The trial court sustained defense counsel's objection to the prosecutor's statement that there is a "kick" when a .44 is fired(Tr.1737).

The prosecutor continued, without objection, by stating that "You got to refocus, retrain that gun on that same spot"(Tr.1737). The prosecutor was entitled to argue reasonable inferences from the evidence based on common experience. *Brown*, 337 S.W.3d at 14. Further, "t]he law in Missouri has long permitted the State to argue to the jury that the protection of the public rests with them." *State v. Collins*, 150 S.W.3d 340, 354(Mo.App.S.D.2004). Thus, the prosecutor was entitled to inform the jurors that they represented the community.

Appellant asserts that the prosecutor in opening statement read from letters that were not in evidence(Tr.1033-37,1726). The prosecutor read from portions of Exs. 401, 403, 407, and 409, which were admitted into evidence(Tr.1529,1542,1544). In closing, the prosecutor stated that the judge might or might not give the letters to the jury, because not everything in them might be relevant, but they could ask for them(Tr.1726). The jury did not request these exhibits(L.F.677,679), but they were in evidence and available for the jury. "The purpose of an opening statement is to inform the circuit court and the jury of the general outline of the anticipated evidence and its significance." *Powell*, 286 S.W.3d at 850. "The prosecutor should limit his opening statement to provable factual statements" and should not include arguments. *Id.* The prosecutor's opening statement referred to the anticipated evidence and the exhibits were available for the jury(Tr.1726). The prosecutor's opening statement was proper.

Appellant asserts that the prosecutor denigrated Appellant by saying he treated Franklin like a deer (the court overruled the objection)(Tr.1781-82;L.F.736). Appellant

raised this claim in his motion for new trial(L.F.736-37). Appellant also claims that the prosecutor denigrated defense counsel by asking why anyone would want to convict someone(Tr.1775). The prosecutor did not denigrate Appellant or counsel, and was entitled to argue reasonable inferences from the evidence. *Brown*, 337 S.W.3d at 14. The argument was proper.

The prosecutor continued his deer-hunting analogy by stating that this was the "mentality" of the killers, and "[t]hey don't think the way we think"(Tr.1782). Again, the prosecutor was entitled to argue common experiences and reasonable inferences from the evidence. *Id.* This argument was permissible.

Appellant argues that the prosecutor should not have told the jury that they could not return a verdict for murder second because that would be a "huge victory" and "what they want"(Tr.1780). Defense counsel objected to "counsel's argument about what's a victory and what isn't," and the court sustained the objection(Tr.1780). As to the remaining argument that the jury should not return a verdict for murder second, which was unobjected to, the very purpose of argument is to apply the law to the facts, and the argument was entirely proper.

Appellant complains that the prosecutor improperly injected himself into the proceedings(Tr.1782-83). "A prosecutor's statement of personal opinion or belief not drawn from the evidence is improper." *State v. Storey*, 901 S.W.2d 886, 901(Mo.banc1995). In context, the prosecutor explained that the jury must find proof of the defendant's guilt

beyond a reasonable doubt, and continued: "Not was this guy on the roof or was this guy on the ground. If you have a reasonable doubt about that—so do I—I don't care. He was on the roof for part of the shots."(Tr.1783). In *Storey*, under Supreme Court Rule 29.15, numerous errors amounted to a prejudicial effect, and this Court found that there was a reasonable probability that they affected the outcome of the proceedings. *Id.* Though the prosecutor's statement of personal opinion may have been technically improper, it was merely an attempt to guide the jury, and was not prejudicial.

Appellant complains that the prosecutor denigrated him by referring to Douglas and him as "cold-blooded killers"(Tr.1752). The trial court overruled defense counsel's objection(Tr.1752), but Appellant did not raise the issue in his motion for new trial(L.F.688-738). In *State v. Knighton*, 518 S.W.2d 674, 681(Mo.App.Spr.D.1975), the Court held that the prosecutor's argument that the defendant was a cold-blooded, hardened criminal was not plain error. The prosecutor was entitled to argue reasonable inferences from the evidence. *Brown*, 337 S.W.3d at 14.

Appellant complains that the prosecutor stated: "They put on Michael Douglas to confirm everything the State's witnesses said. What was all the B.S. about—this trial about cross-examining all these people about these inconsistent statements about Michael Douglas?"(Tr.1734). The prosecutor then stated that he didn't even need an eyewitness, and the court sustained Appellant's objection to that statement(Tr.1734). Appellant later moved for a mistrial based on the "B.S." comment and the prosecutor's argument that witnesses

were in fear, and the trial court correctly denied the motion(Tr.1797-98). Appellant complained about the "B.S." comment in his motion for new trial(L.F.732-33), but because there was no objection(Tr.1734), the issue was not preserved. Regardless, "[c]omments directed at the tactics of defense counsel are permissible." *Tisius v. State*, 183 S.W.3d 207, 218(Mo.banc2006). Thus, the trial court did not err, plainly or otherwise, in allowing the argument.

Penalty phase closing argument.

Appellant argues that the prosecutor improperly stated that he didn't hear anything in mitigation(Tr.2377) and that his "feeling" was that the killing of Leslie would probably tip the case "over the edge and get him the death penalty"(Tr.2379). "A prosecutor may state his personal opinions on whether the death penalty should be imposed so long as that argument is fairly based on the evidence." *State v. Strong*, 142 S.W.3d 702, 726(Mo.banc2004). The argument was permissible.

Appellant contends that the prosecutor argued without evidentiary support. In arguing the aggravator for depravity of mind, the prosecutor stated that shooting someone who was already on the ground helpless shows a callous disregard for the sanctity of human life, and "[i]t's as if it was a deer that he's killing—He has no—there's no sanctity for human life in this man"(Tr.2376). This was proper argument based on the evidence and matters of common understanding.

The prosecutor argued that Appellant threatened to kill Eva but didn't get a chance;

"[t]hat's aggravating. He's not done killing"(Tr.2380). Eva testified that Appellant called her the day after her sister's murder and "said he was going to kill me next if I didn't get his name off it"(Tr.1865-66). The prosecutor was entitled to argue the evidence and reasonable inferences therefrom. *Brown*, 337 S.W.3d at 14. This argument was proper.

The prosecutor argued that Appellant drew others into his web of violence(Tr.2384); "It's like stomping a beetle. Those people meant nothing to him"(Tr.2387). The prosecutor is entitled to argue reasonable inferences from the evidence. *Id.*

The prosecutor argued that Appellant "kills for power, control, status," but "even animals don't kill for those reasons"(Tr.2389), and "if there's one person that believes in the death penalty in this courtroom, it's that man"(Tr.2404). Appellant asserts that these arguments encouraged the jury to decide on the basis of emotion. However, the prosecutor was entitled to argue reasonable inferences from the evidence and from the experiences of everyday life. *Id.* The argument was permissible.

Appellant asserts that the prosecutor exceeded the proper scope of victim impact by telling the jury to consider the impact of Appellant's actions on the families of the victims in his other cases(Tr.2384-85). In *Strong*, 142 S.W.3d at 727, this Court rejected the defendant's argument that the prosecutor improperly expanded the scope of victim impact evidence, and the Court held that there was no manifest injustice in the prosecutor's argument that "this tragedy affects people. It affected everybody that came into this courtroom and who knows how many beyond[.]" That holding applies here.

Appellant claims that the prosecutor improperly personalized by telling jurors that the criminal justice system doesn't work without them and without witnesses(Tr.2381,2383), that Todd testified because he had faith in the criminal justice system, and "[h]e's got faith in you"(Tr.2383), and that they represented the community(Tr.2411-12). Defense counsel objected to the argument that the jurors represented the community, and the trial court overruled the objection(Tr.2411-12). "A prosecuting attorney during closing argument is generally permitted considerable latitude in arguing the necessity of law enforcement and the responsibility thereby imposed on juries." *State v. Schaefer*, 855 S.W.2d 504, 507(Mo.App.E.D.1993). "[T]he law in Missouri has long permitted the State to argue to the jury that the protection of the public rests with them." *Collins*, 150 S.W.3d at 354. The argument was proper, and further, contrary to Appellant's Point Relied On, the prosecutor made no suggestion that the jurors' lives or safety was at risk.

Appellant also raises a number of claims that the prosecutor improperly personalized to the jury. "Improper personalization is established when the State suggests that a defendant poses a personal danger to the jurors or their families." *Deck*, 303 S.W.3d at 540. "Arguing for jurors to place themselves in the shoes of a party or victim is improper personalization that can only arouse fear in the jury." *Id.* In *Storey*, 901 S.W.2d at 901, the State argued:

> Think for just this moment. Try to put yourselves in Jill Frey's place. Can you imagine? And, then—and then, to have your head yanked back by its hair and to feel the blade of that knife slicing through your flesh, severing your vocal

> cords, wanting to scream out in terror, but not being able to. Trying to breathe, but not being able to for the blood pouring down into your esophagus.

This Court held the State's argument was improper and undeniably prejudicial because graphically detailing the crime as if the jurors were in the victim's place could only serve to arouse fear in the jury. *Id.*

In *State v. Rhodes*, 988 S.W.2d 521(Mo.banc1999), the State argued:

> Try, try just taking your wrists during deliberations and crossing them and lay down and see how that feels (demonstrating). Imagine your hands are tied up.... And ladies and gentlemen, you're on the floor, and you're like that, with your hands behind your back, and this guy is beating you. Your nose is broken. Every time you take a breath, your broken rib hurts. And finally, after you're back over on your face, he comes over and he pulls your head back so hard it snaps your neck.... Hold your breath. For as long as you can. Hold it for 30 seconds. Imagine it's your last one.

988 S.W.2d at 529. This Court, relying on *Storey*, stated that graphically detailing the crime as if the jurors were the victims was improper because it interfered with the jury's ability to make a reasoned and deliberate determination to impose the death penalty. *Id.*

The prosecutor's argument to think of the terror that the victims and family members went through(Tr.2413) was not personalized to the jury at all but was only expressed in terms of the experience of those involved. The prosecutor did not ask the jurors to put themselves

in the victims' place, but only asked them to think of what the victims and families went through(Tr.2413). The argument was permissible.

Finally, the prosecutor's comment to hold the victims, hug them, tell them you love them, and don't let them down(Tr.2414) was not personalized to the jurors either. Again, the prosecutor may argue to the jury that the protection of the public rests with them, and he "may urge the jury to consider the effect upon society if the law is not upheld." *State v. Roberts*, 948 S.W.2d 577, 593(Mo.banc1997).

The prosecutor rhetorically asked whether any remorse had been exhibited in this case(Tr.2407). Defense counsel objected that the "argument is improper," and the trial court overruled the objection(Tr.2407;L.F.733). Appellant claims this was an impermissible comment on his failure to testify. Appellant did not make the objection on this basis at trial, but raised this claim in his motion for new trial(L.F.733-34). In any event, the prosecutor was not commenting on Appellant's failure to testify. The prosecutor continued by stating that Appellant, as shown in a conversation with Evelyn Carter, wanted to celebrate killing Franklin, and "That's what I'm talking about: no remorse exhibited"(Tr.2408). The prosecutor's argument was based on the evidence, and entirely proper.

Appellant complains that the prosecutor encouraged the jury to decide the case based on emotion by stating that there was a time when victims' families would have been allowed to hunt down the defendant "like he deserves," but he was given a fair trial instead(Tr.2409). Again, the prosecutor is allowed to comment on the defendant's guilt as supported by the

evidence, *see Strong*, 142 S.W.3d at 726, but while this melodramatic comment was excessive, it actually paralleled the evidence as to what Appellant did to the victim(Tr.1193,1196-97,1199-1200), and as it pointed the jury to the need for a fair trial, it could not have worked to Appellant's prejudice.

Appellant also claims that the prosecutor relied on emotion in reference to the killing of Leslie (the sister of Appellant's girlfriend) by stating:

> Please don't shoot me. My God. My God. Please don't shoot me. I'm 18. I want to live. I haven't lived. I haven't had children. I didn't do anything. I'm a totally innocent victim. I'm a woman.

(Tr.2387). The evidence showed that Leslie cried and begged Appellant not to shoot her, but he told her to "shut the fuck up" and shot her anyway, as her sister watched(Tr.1852-53). "A prosecutor is allowed to argue the evidence and all reasonable inferences from the evidence during closing arguments." *Brown*, 337 S.W.3d at 14. The argument was proper.

Appellant asserts that the prosecutor's argument turned mitigating circumstances into aggravators. For example, he stated that Appellant "has no mental disease, under the law. That's aggravating"(Tr.2389), and "He has the intelligence to choose to do what is right. He's not retarded. His grades were average in school. That's aggravating"(Tr.2389). He further argued that Appellant had never been molested or abused as a child, and "That's aggravating"(Tr.2390). The prosecutor continued in a similar vein(Tr.2390,2405,2407).

In *Feltrop*, 803 S.W.2d at 18, the prosecutor asked one of the defendant's high school

teachers, who testified as to a mitigating factor of the defendant's background, "Did you ever have a conversation with [defendant] about these strange behavior patterns?" and the witness responded, "Not that I recall, no." One of the mitigating circumstances the jury was instructed to consider was "[t]he personal background and history of the defendant." *Id.* There the defendant claimed that the State's final question was an effort to denigrate and recharacterize the defendant's "dysfunction" as an aggravating rather than mitigating factor. *Id.* There, as here, the defendant claimed that what was offered as mitigating evidence was argued by the prosecutor as aggravating evidence contrary to *Zant*, 103 S.Ct. at 2747. In *Feltrop*, 803 S.W.2d at 18, this Court held that the record did not support the defendant's contention that the State argued that the defendant's personal background and history constituted an aggravating factor, and the trial court did not plainly err in failing to declare a mistrial.

In *Zant*, 103 S.Ct. at 2747, the Court stated in dicta that if a State attached the "aggravating" label to factors that actually should militate in favor of a lesser penalty, such as the defendant's mental illness, due process of law would require that the jury's decision to impose death be set aside. There the United States Supreme Court held that the Georgia Supreme Court had not erred in its conclusion that the "mere fact that some of the aggravating circumstances presented were improperly designated 'statutory'" had "an inconsequential impact on the jury's decision regarding the death penalty." *Id.* at 2749.

Here Appellant raises an issue, not with the instructions, but with the prosecutor's

argument (mostly unobjected to). A jury is presumed to follow the instructions, *State v. Madison*, 997 S.W.2d 16, 21(Mo.banc1999), which did not run afoul of *Zant*. The prosecutor's argument was proper because it argued the evidence; the jury was not required to accept any fact as mitigating. Indeed, whether some circumstances could be viewed as either aggravating or mitigating may depend upon an individual's viewpoint. The trial court did not plainly err in failing to intervene during the prosecutor's closing argument.

Appellant's point should be denied.

XIII.

The trial court did not abuse its discretion in admitting evidence in the penalty phase of a taped conversation between Appellant and Eva Addison.

Appellant contends that the trial court abused its discretion in admitting into evidence a recorded jailhouse telephone conversation between Appellant and Eva Addison (State's Ex. 148-B), and a transcript of the conversation (State's Ex. 148-C), in which Appellant attempted to convince Eva—sometimes using threats—not to testify against him. Appellant claims an inadequate foundation, and he asserts that the tape contained the inadmissible hearsay of a man named "Slim" (Antoine Dickens) who acted as an intermediary by relaying Appellant's words to Eva and Eva's words to Appellant.

A. Additional facts.

During Eva's penalty phase testimony, the State offered into evidence as State's Ex. 148-B the tape recording of a conversation between Appellant, Eva, and Dickens(Tr.1866). Eva testified that Appellant and Dickens called her from the county jail on May 27, 2003, and that the tape was a recording of that telephone conversation (Tr.1866). Eva testified that the tape was a fair and accurate recording, that her voice, Appellant's voice, and Dickens' voice were on the tape, and that she knew of Dickens(Tr.1872-73). Defense counsel objected on grounds that Dickens' statements were hearsay and that there was no foundation because Dickens had "not seen the tape, listened to the tape, or identified it"(Tr.1868-69).

The trial court overruled the objections (Tr.1868-70), and admitted the tape (State's

Ex. 148-B) and the transcript (State's Ex. 148-C) into evidence(Tr.1874). Defense counsel had no objection to the use of the transcript(Tr.1870,1875;State's Ex. 148-C). The tape was played for the jury, and transcripts of the tape were provided to the jurors(Tr.1874-76).

B. The standard of review.

Appellant preserved this issue in his motion for new trial(L.F.712-14).

"The standard of review for the admission of evidence is abuse of discretion." *Primm*, 347 S.W.3d at 70. This Court will not reverse unless "there is a reasonable probability that the trial court's error affected the outcome of the trial." *Kemp*, 212 S.W.3d at 145.

C. The trial court did not abuse its discretion in admitting the tape.

1. There was an adequate foundation for the tape.

Under these facts, there was an adequate foundation for the tape. A proper foundation for the admission of a tape-recorded conversation ordinarily includes: (1) the device was capable of recording accurately; (2) the operator of the recording device was competent to operate it; (3) the recording is authentic and correct; (4) changes, additions and deletions have not been made to the recording; (5) the recording has been preserved in an acceptable manner; (6) the speakers are identified; and (7) the conversation was voluntary and without inducement." *State v. Fletcher*, 948 S.W.2d 436,439(Mo.App.W.D.1997)(citing *State v. Wahby*,775 S.W.2d 147,153(Mo.banc1989)).

Appellant argues that "[v]irtually every foundational requirement" was missing

Appellant's Brief at 136. In particular, he argues that the State failed to establish the second, third, and fourth requirements. However, defense counsel only objected on grounds of lack of foundation at trial because Dickens had "not seen the tape, listened to the tape, or identified it"(Tr.1868-69). This is not a valid objection under any of the criteria set forth in *Wahby*, but merely a claim that one participant in the conversation had not authenticated the tape. "A general objection to 'lack of foundation' will not preserve alleged errors because it fails to direct the trial court's attention to the specific foundational element considered deficient." *State v. Schuster*, 92 S.W.3d 816, 823(Mo.App.S.D.2003). Thus, any arguments beyond the objection raised before the trial court should only be reviewed, if at all, for plain error.

In any event, as for the first requirement, "[g]enerally, the existence of a tape recording satisfies the first element[.]" *Wahby*,775 S.W.2d at 153. Here, of course, there was a recording, and Eva testified that the recording was a fair and accurate recording of her conversation with Appellant and Dickens(Tr.1872-73). Thus, the first requirement was satisfied.

As for the second requirement, while the actual operator of the recording equipment was not called to testify, the evidence showed that Appellant called from the St. Louis County Jail, and that the telephone call was recorded (in some fashion) by the institution(Tr.1866). It was reasonable for the trial court to infer that the St. Louis County Jail had experience in recording telephone calls, and that its agents were therefore

"competent to operate" recording devices (like most ordinary people). Indeed, under such circumstances, the existence of the tape, coupled with the fact that it was a fair and accurate recording of the conversation, was sufficient to show that the operator of the equipment was competent.[10] *See Fletcher*, 948 S.W.2d at 440("The second element, competence of the recording operator, can reasonably be inferred from Officer Maddux's testimony [that the recordings were complete and accurate], as well as his eleven years of experience as a law enforcement officer.").

The third, fourth, and fifth requirements were established by Eva's testimony that the recording was fair and accurate. As set forth above, she testified that the tape was a fair and accurate recording(Tr.1872-73). This was sufficient to establish that the recording was authentic and correct, and that the recording had not been altered. Moreover, it was sufficient to eliminate Appellant's chain-of-custody claim. *Id.* ("The state is not required to show 'hand-to-hand' custody. The state must only prove 'reasonable assurance' that the evidence was not tampered with. Furthermore, once the recordings are fairly identified . . . 'the chain

[10] With tape recordings, the first two requirements listed in *Wahby* seem somewhat unnecessary; for if there is an accurate tape, it seems self evident that the recording device was capable of recording, and that the operator was competent. These requirements seem more appropriate when dealing with devices such as breathalyzers, which must be accurately calibrated and utilized by trained personnel to obtain accurate results.

of custody issue is moot.'" *Id.* (citation omitted).

Appellant attempts to argue that Eva was "not competent" to testify that the recording was fair and accurate. Appellant's Brief at 136. He claims that Dickens was the only one who heard both Eva and Appellant, and he claims that Eva relied on Dickens to tell her what Appellant was saying. But Appellant's assertions are not supported by the record. As is evident from the tape, Appellant's voice was plainly audible. In fact, there were instances where Eva responded directly to Appellant(State'sExhibit 148-C,pp.6,8-11,13-15,24,26-27,29-30,32). There were times when Appellant's voice became inaudible, and instances where Eva indicated that she had not heard Appellant(*see* State'sExhibit 148-C,pp.13,21,35), but those brief instances do not change the fact that the tape was a fair and accurate recording of the telephone conversation as heard by Eva. Eva was plainly competent to testify that the recording was a fair and accurate recording of what she said and heard.

As for the sixth requirement, Eva identified herself, and she identified Appellant's voice in the background. *See State v. Gardner*,955 S.W.2d 819,823(Mo.App.E.D.1997)("lay opinion of voice identification of an audio tape is admissible as a foundation for introduction of the tape"). This was a sufficient foundation (even without any testimony that she recognized Dickens' voice), because Dickens' statements were essentially irrelevant to the conversation. Dickens was involved in the conversation, but only insofar as he was a conduit for Appellant and Eva's words. Accordingly, since none of Dickens' statements were admitted for their truth, any lack of foundation as to his identity did not affect the

admissibility of the tape.

Finally, as to the seventh requirement, it was apparent that the conversation was voluntary, and Appellant does not claim otherwise. Appellant called Eva(Tr.1866). It was plain that he was directing his part of the conversation, and that he wanted to talk to Eva.

2. Dickens' statements were not hearsay.

Appellant also argues that the tape was improperly admitted because evidence of what Dickens stated that Appellant told him was hearsay. "A hearsay statement is any out-of-court statement that is used to prove the truth of the matter asserted and that depends upon the veracity of the statement for its value." *State v. Winfrey*, 337 S.W.3d 1, 6(Mo.banc2011). "The admission of a party opponent is not hearsay." *State v. Floyd*, 347 S.W.3d 115, 124(Mo.App.E.D.2011).

Here, the conversation was admitted into evidence because it contained *Appellant's* admissions. Indeed, in light of the fact that Dickens was plainly acting as a mere conduit and simply trying to repeat Appellant's statements verbatim, Dickens' statements obviously had no independent evidentiary value. Dickens was, in the general sense of the word, merely a translator; and, accordingly, the trial court correctly determined that his recitation of Appellant's admissions was not hearsay. *See State v. Spivey*, 710 S.W.2d 295,297(Mo.App.E.D.1986)(a translator's interpretation of a defendant's statements is admissible as an admission).

Admittedly, there were moments on the tape where Appellant's voice was inaudible,

making it less certain that Dickens was correctly relaying Appellant's words. However, in light of Dickens' consistent efforts to simply relay Appellant's words, it was reasonable to infer that Dickens continued to do so. In any event, even if Dickens' statements in those limited instances should not have been admitted, any error was harmless, as Dickens did not convey much substantial aggravating evidence that was not mirrored in Appellant's recorded statements.

Appellant's point should be denied.

XIV.

Because it was not necessary to plead the aggravating circumstances in the indictment or information, the trial court did not err in imposing a sentence of death.

Appellant asserts that the trial court erred in overruling his pre-trial motions and in failing to quash the information because the statutory and non-statutory aggravators were not pled in the charging document. Appellant recognizes that this Court has rejected this argument numerous times, *e.g.*, *Zink*, 181 S.W.3d at 74-75*; State v. Gill*, 167 S.W.3d 184, 193-94(Mo.banc2005); *State v. Cole*, 71 S.W.3d 163, 171(Mo.banc2002); but he requests reconsideration.

A. Additional facts.

Appellant filed a pre-trial "Motion to Quash the Indictment or in the Alternative to Preclude the State from Seeking the Death Penalty for Failing to Comply with *Ring v. Arizona*, *Apprendi v. New Jersey*, and *Jones v. United States* and the Notice, Charging and Due Process Requirements of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution" on grounds that the indictment failed to plead the facts necessary to establish the statutory aggravators for imposition of the death penalty(L.F.171-200). The trial court denied the motion(L.F.257). At trial, Appellant renewed the motion, and the trial court denied it(Tr.5-6).

B. The standard of review.

Appellant preserved this issue in his motion for new trial(L.F.723-24). The issue

whether to quash an information or indictment is a question of law that this Court reviews *de novo*. *See State v. Rousseau*, 34 S.W.3d 254, 259(Mo.App.W.D.2000).

C. Because it was not necessary to plead the aggravating circumstances in the indictment or information, the trial court did not err in imposing a sentence of death.

Section 565.005, RSMo 2000, provides:

> At a reasonable time before the commencement of the first stage of any trial of murder in the first degree at which the death penalty is not waived, the state and defendant, upon request and without order of the court, shall serve counsel of the opposing party with:
>
> (1) A list of all aggravating or mitigating circumstances as provided in subsection 1 of section 565.032, which the party intends to prove at the second stage of the trial[.]

The State filed notices of evidence of aggravation, notifying Appellant of aggravating circumstances that it intended to prove at trial(L.F.38-41,276-78,456-58).

In *Davis*, 318 S.W.3d at 642, this Court stated that:

> As this Court has noted in numerous prior cases, neither *Apprendi* nor other cases require that the charging document list aggravating circumstances; the notice of aggravating circumstances under section 565.005.1 was adequate to notify Mr. Davis that he was charged with a capital offense. See, e.g., *State v. Johnson*, 284 S.W.3d 561, 589 (Mo. banc 2009); *State v. Johnson*, 207 S.W.3d

24, 48 (Mo. banc 2006); *State v. Gill*, 167 S.W.3d 184, 194 (Mo. banc 2005).

See also Anderson, 306 S.W.3d at 536-37.

Appellant points to no case law or extenuating factors that would warrant a re-examination of this Court's pronouncements on the subject. The United States Supreme Court's decisions in *Apprendi*, 120 S.Ct. at 2356 n.3; and *Ring*, 122 S.Ct. at 2437 n.4, specifically state that they do not address the issue of whether the State must allege enhancing facts in the charge, and in *Almendarez-Torres v. United States*, 118 S.Ct. 1219, 1223 (1998), the Court held that an indictment "need not set forth factors relevant only to the sentencing of an offender found guilty of the charged crime."

Appellant's point should be denied.

CONCLUSION

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 Missouri Supreme Court Rule 84.06 and contains 25,831words, excluding the cover, the signature block, this certification and the Appendix, as determined by Microsoft Word 2007 software; and

2. That a copy of this notification was sent through the eFiling system on this 9th day of January, 2012, to:

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