IN THE
SUPREME COURT OF MISSOURI
No. SC93648

STATE OF MISSOURI,

Respondent,

vs.

ROBERT B. BLURTON,

Appellant.

APPEAL FROM THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI
7TH JUDICIAL CIRCUIT, CLAY CO. NO. 10CY-CR01475
THE HONORABLE LARRY D. HARMAN, JUDGE

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Robert (Robbie) Blurton, was convicted after a jury trial in Clay County, Missouri of three counts of murder in the first degree, ***§ 565.020***. On August 9, 2013, he was sentenced to death for each count (Tr.2992, 3000-06; LF953-59, 960-61).[1] A timely notice of appeal was filed on August 15, 2013 (LF 964-67). Thus, this Court has exclusive appellate jurisdiction of this direct appeal. Art. V, Sec. 3, Mo. Const. (as amended 1982).

[1] All statutory references are to RSMo 2000, unless otherwise indicated.

STATEMENT OF FACTS

The day of the murders – June 7, 2009

In 2009, Donnie and Sharon Luetjen lived on South Elm Street in Cole Camp, Missouri (Tr.1353). Their granddaughter, Taron Luetjen, lived with them because her father had been killed in an accident (Tr.1353-54, 1437).[2]

On Sunday, June 7, 2009, Sharon took a neighbor, Janet White, to the emergency room (Tr.1480). Later in the afternoon, Sharon drove White to White's home (Tr.1481-83). About 8:30 p.m., Sharon visited with White for about ten minutes (Tr.1484).

Sharon and Taron were later seen at the Luetjen home by the Stelling sisters from about 9:15-9:30 p.m. (Tr.1313, 1315-18, 1321-22, 1325-27). Later, between 10:20-10:30 p.m., a neighbor, who lived less than a half a mile away, heard three gunshots from what appeared to be a handgun (Tr.1333-34, 1337-42).

The discovery of the bodies

On Tuesday, June 9, White was contacted by somebody from Taron's school asking why Taron had not been to driver's education class on Monday or Tuesday (Tr.1487, 1933). White was unable to reach anyone at the Luetjen home

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[2] The Luetjens will be referenced by their first names to avoid confusion. No disrespect is intended. Appellant, Robert Blurton, will be referenced as Robbie because most witnesses used that name because his father's name is Robert.

(Tr.1488). White called the Luetjens' daughter, Deborah Armenta (Tr. 1352-53, 1365, 1422,1488).[3] They decided that White would walk to the Luetjen's home to check on things (Tr.1489). After White went inside the home, she saw Taron's legs lying on the floor and noticed an unpleasant odor, so she called 9-1-1 (Tr.1491-95).

Cole Camp Chief of Police Storm Walker was dispatched to the Luetjen home (Tr.1502-03). There were no signs of forcible entry (Tr.1512, 1520, 1641-42, 1664, 2391). He discovered the bodies of Sharon, Donnie, and Taron lying on the living room floor (Tr.1510, 1523, 1597, 1604, 1605, 1629). Their hands were loosely bound behind their backs, they were gagged, and their heads were on pillows (Tr.1516-17, 1599, 1602, 1605, 1617, 1633, 1643-47, 2405-06).

The bindings appeared to have been made from the same brown fabric (Tr. 1647-48, 1653, 1660, 2405). More of that fabric was in Taron's bedroom and was draped across her poster bed in a canopy-like fashion (Tr. 1659-60, 1399-1400). Other pieces of the fabric were in the living room and the doorway of Taron's bedroom (Tr.1660, 1686, 1689, 1706).

Each victim died from a .22 caliber gunshot wound to the back of the head (Tr.1586, 1599, 1605, 1607, 1610, 1612-13, 1615, 1742, 2403). The shots

[3] Robbie is Armenta's cousin (Tr.1352-53, 1365, 1422). In 2004, Robbie lived with the Luetjens for a few months after he got out of prison (Tr.1369-70, 1423, 1430-31).

probably had been fired from greater than two feet from the victims (Tr.1609, 1611, 1614, 1618).

It appeared that someone had gone through Donnie's wallet, which was on a chair; there was no money in the wallet (Tr.1634, 1645, 1652, 1689). Donnie typically kept at least $200 in his wallet (Tr.1979). Sharon's purse was on the living room floor (Tr.1383, 1534). There was no money in Sharon's purse or wallet (Tr.1384).

Three coffee cups were on a table in the living room (Tr.1634, 1643-44). Law enforcement officers swabbed and fingerprinted them (Tr.1665, 1667-71). They discovered latent fingerprints on a white coffee cup (Tr.1671, 1674, 2259-60).

Items were strewn about in Donnie's and Sharon's bedroom (Tr.1630-31, 1654). On the floor were some antique cracker boxes or tins with the lids off (Tr.1635, 1656, 1707). A dresser drawer had been placed on the bed with some of the contents dumped out (Tr.1383-84, 1635, 1654-55). Donnie had been known to keep money and Native American artifacts in this drawer (Tr.1366-67, 1971).[4] Some change remained, but not as much as usual (Tr.1385-85, 1389). In the drawer was a Velveeta cheese box that had been opened and was empty (Tr.1385, 1635, 1654-55). Donnie normally kept arrowheads in the Velveeta box (Tr.1972).

[4] When Robbie was a teenager, Armenta saw Robbie take quarters from that drawer (Tr.1367, 1425).

An empty holster lay on the floor (Tr.1635, 1657, 1724-25). Normally, Donnie kept two .22 caliber pistols in that holster inside a gun cabinet in that bedroom (Tr.1393, 1975-78, 2397). A .22 caliber bullet was on the floor near the holster (Tr.1658-59, 1690, 2398). Armenta had been given a .25 caliber handgun that she left at the Luetjen residence (Tr.1385, 1938, 1944, 1946). But when the home was searched after the murders, it could not be located (Tr.1385-87, 1465-66).

Forensic evidence

A latent print examiner, Mary Kay Hunt, examined latent fingerprints found on the white coffee cup found at the crime scene (Tr.1671, 1674, 2216, 2243, 2245, 2247-48, 2259-60, 2269-76). Two of Taron's fingerprints were on the cup (Tr.2257, 2273-74, 2276, 2281-82). Hunt also believed that Robbie had made five fingerprints on the cup (Tr.2270-71, 2276-78, 2280-82). Hunt could not say how long the fingerprints had been on the cup (Tr.2326-26).

Missouri State Highway Patrol DNA caseworker Shawn Bales examined a swab that had been used on the white coffee cup (Tr.2472). Bales was able to obtain a full DNA profile, which exhibited male gender characteristics and was

consistent with Robbie, but Bales would not say that Robbie's DNA was on the coffee cup (Tr.2474-75, 2478-79, 2484, 2512).[5]

Bales examined a swab that was used on a red travel mug found at the crime scene; it had DNA that exhibited female gender characteristics and was consistent with Taron (Tr.2484-85). Bales examined a swab that was used on a plastic cup found at the crime scene; DNA on it exhibited a mixture of at least two people; Taron and Robbie were excluded as contributors to the mixture, whereas Donnie and Sharon could not be excluded (Tr.2486-88, 2490).

The bindings used to secure Sharon's hands had a DNA profile that was consistent with a mixture of at least two individuals – male and female (Tr.2490-911, 2493-94). The major DNA component was consistent with Sharon (Tr.2491-92, 2494). Taron and Donnie were excluded as being contributors to the mixture; Robbie could not be either included or excluded as a contributor (Tr.2492-94).

Donnie's right hand binding had a DNA profile that was consistent with a mixture of at least three people (Tr.2494-95). The major component was consistent with Donnie, Sharon was excluded as a contributor, and Robbie and Taron could not be eliminated as contributors to the mixture (Tr.2495, 2502). Donnie's left hand binding had a DNA profile that was consistent with a mixture

[5] Regarding the DNA profile from that coffee cup, Bales admitted that he had "clicked off an allele" from a location; the allele that Bales "clicked off" did not match Robbie's DNA profile at that particular loci (Tr.2541-42).

of at least three people (Tr.2497, 2499, 2542-43). The major component was consistent with Donnie; Sharon, Taron, and Robbie were excluded as contributors to the mixture (Tr.2497-98, 2543-44).

Taron's right hand binding had a DNA profile consistent with a mixture of at least two individuals, and exhibited both male and female characteristics (Tr.2504, 2561). The major component was consistent with Taron (Tr.2504). Robbie and Sharon were both eliminated as contributors to this mixture, but Donnie could not be excluded as a possible contributor to the mixture (Tr.2504, 2561). Taron's left hand binding had a DNA profile that was consistent with a mixture of at least two individuals (Tr.2505, 2553). The major component exhibited female characteristics and was consistent with Taron (Tr.2505, 2553). The minor component was consistent with male DNA, and Robbie, Donnie and Sharon were all eliminated as contributors (Tr.2505, 2553-54, 2556).

Swabs used on a dresser and display box in the Luetjen home were tested and DNA profiles were developed; Robbie was excluded as a contributor to those profiles (Tr.2545-46).

The 9-1-1 recording

Officers learned that a 9-1-1 call had been made from Taron's cell phone at about 10:15 p.m. on the night of the murders (Tr.1760-62, 1850, 1854, 1880-81,

1884, 1888, 1895).[6] The call lasted about 45 seconds before the operator disconnected it (Tr.1760-61, 1836, 1839, 1842; State's Exhibit No. 108). The 9-1-1 operator then attempted to call the number back, but only got the voicemail of a young female (Tr.1839-40). The 9-1-1 operator did not dispatch anyone to where the call had been made (Tr.1841).

Missouri State Highway Patrol officer Hugh Fowler seized a recording of the 9-1-1 call (Tr.1760-61, 1836, 1839, 1842; State's Exhibit No. 108). Fowler enhanced the recording and removed the voice of the 9-1-1 operator (Tr.1822). In an affidavit on June 26, 2009, Fowler swore that when he listened to the 9-1-1 recording, he could hear male voices in the background and that there were at least two male voices and one female voice other than the 9-1-1 operator's voice (Tr.1823-24, 1827). Fowler vouched that he heard one of the male voices direct Sharon to sit down and put her arms behind her back, and later threaten to kill her (Tr.1827). Fowler also stated that Sharon could be heard telling the suspects that she had $300 in her purse (Tr.1827). A male voice said something like, "I liked all of you" (State's Exhibit Nos. 108-109).

Dr. Robert Maher is a professor of electrical and computer engineering in Montana (Tr.1907). He received a digital file of the 9-1-1 call (Tr.1909). Dr. Maher amplified and filtered the contents of the file (Tr.1910-12, 1915). After Dr.

[6] After the murders, the victims' family was unable to find Taron's cell phone (Tr.1372, 1394).

Maher adjusted the file, he put the enhanced version of the file onto a compact disc and sent it to an investigator for the Missouri Attorney General's Office (Tr.1912). A few days later, the investigator asked Dr. Maher to attempt to get additional information about some of the utterances on the recording that the investigator thought were important (Tr.1912, 1925).

Dr. Maher conceded that he was not an expert on phonetics or interpreting what words were uttered; rather, he attempted to improve the quality of the recording (Tr.1913, 1920). Dr. Maher then prepared a report that included a further enhanced version of the recording and put that on a compact disc and sent it to the Missouri Attorney General's investigator (Tr.1914, 1927-28; State's Exhibit 109). One of the enhancements involved removing the voice of the 9-1-1 dispatcher (Tr.1915-16). Dr. Maher admitted that attempting to interpret what was being said is a subjective act (Tr.1918). He concluded that there was at least one male and one female speaker on the recording, but he could not rule out that there was more than one male or more than one female (Tr.1921).

On June 17, 2009, law enforcement officers asked Armenta to listen to the recording (Tr.1402). She listened several times to a copy of the 9-1-1 call with the aid of some headphones (Tr.1403, 1407-08). The first time, she recognized her mother's voice; Armenta was 100% positive of that voice identification (Tr.1408). Armenta also heard a male voice, which sounded like Robbie's voice (Tr.1408). Armenta asked if she could hear the recording again (Tr.1408). She said that she was about 80% sure that the male voice she heard was Robbie's (Tr.1409, 1456-

57). She listened to the enhanced version of the 9-1-1 tape again (Tr. 1409). She was then about 90% sure that the male voice she heard was Robbie's (Tr. 1409-10, 1457). In preparation for trial, within the year before trial, she listened to a third version of the recording, and she was about 100% sure it was Robbie's voice (Tr.1410-11). At trial, she was 100% sure it was Robbie's voice (Tr.1411, 1457, 1478-79).

After Robbie had been arrested, law enforcement officers had his girlfriend Karen Bruce listen to the 9-1-1 call (Tr.2106-07, 2110-11; State's Exhibit No. 108). The first time she listened to it, all she could hear was something about $300 (Tr.2112). She could not recognize any voices (Tr.2116). After she listened to it again, however, she believed she recognized Robbie's voice (Tr.2116-17). She told the officers that she could not believe that it was "him" (Tr.2118). She said that she was almost positive it was Robbie (Tr.2119). Bruce later listened to a clearer version of the 9-1-1 recording (Tr.2120-22; State's Exhibit No. 109). Bruce was positive that Robbie's voice was on that recording (Tr.2122).

Cell phone evidence

Douglas Middleton was an information analyst with the Missouri State Highway Patrol (Tr.2337). He performed cellular telephone analysis (Tr.2339-40). Middleton analyzed phone records of Robbie, Karen Bruce, and Nicole Close,

who worked at a hotel in Wichita, Kansas (Tr.1987, 2341).[7] Phone records from the night of the murders showed that Robbie's phone called Bruce's phone at 8:16 p.m. and 9:32 p.m.; Robbie called Nicole at 8:33 p.m., 8:34 p.m., 8:52 p.m., and 8:53 p.m.; and, Nicole called Robbie at 9:59 p.m. (Tr.2354-60).

Nicole testified that during the night of June 7, 2009, she received some phone calls from Robbie that went to voice mail (Tr.1993-94). Around 10:00 p.m., she spoke with Robbie on the phone (Tr.1994-95). In the background she could hear a group of people as if he were at a bar (Tr.1997-2000).

Middleton received T-Mobile's cell tower phone book (Tr.2362-63). The phone book provided street addresses and latitudes and longitudes of cell towers (Tr.2372). Middleton then created a map of the locations of the cell towers where the phone calls "hit off of" (Tr.2373). Middleton opined that, "based off the phone associated with Mr. Blurton, the time the calls were made, the cell tower locations, it shows a mode of travel highway 7, up Highway 65 – to Cole Camp" (Tr.2378).

The arrests and interrogations of Robbie and Karen Bruce

In June-July, 2009, Robbie lived on-and-off again with Karen Bruce and her daughter in Garnett, Kansas (Tr.2037-42, 2044, 2047, 2053). Robbie did not have his own vehicle, so occasionally he would drive Bruce's vehicle (Tr.2044). Bruce also allowed him to use a prepaid cell phone (Tr.2045, 2047-49, 2056).

[7] Nicole's last name was referenced as both Shell and Close, so Appellant will refer to her as Nicole. No disrespect is intended.

On June 12, 2009, an investigator with the Highway Patrol interviewed Robbie (Tr. 2408, 2411-15; State's Exhibit Nos. 115, 116). Robbie offered to give blood and saliva samples and to take a lie detector test, asserting that he would pass one (Tr.2438-39). Robbie said that he had been in Garnett, Kansas on the day of the murders (Tr.2440-42). Robbie said that some family members were "kicking his name around" as a possible suspect because of his criminal history (Tr.2442-43).

On June 27, 2009, Robbie was arrested at Bruce's residence in Garnett, Kansas, which is about a two-and-a-half hour drive from Cole Camp (Tr.1544, 1556, 2101, 2407-08). Bruce and her teenage daughter were also there at the time of the arrest (Tr.1546-48, 2102-03). Officers did not find anything from the Luetjen home at that residence (Tr.1550, 1831-32). Nor did they find any firearms (Tr.1550, 1831-32).[8]

Charges are filed

Robbie was charged by information in Benton County, Missouri, with three counts of murder in the first degree, ***§ 565.020*** (LF27-28) (Count I, Donnie, Count II, Sharon, Count III, Taron).[9] Later, the State filed a First Amended Information adding that Robbie was a prior and persistent offender (LF202-07). The State also

[8] Bruce testified that she had never known Robbie to possess a gun (Tr.2177-78).

[9] A change of venue was agreed upon to Clay County, Missouri (LF53).

filed a Notice of Intent to Seek the Death Penalty alleging several aggravating circumstances (LF35-37).

Karen's Bruce's trial testimony

In addition to the evidence recounted above, the State presented Bruce's testimony, as follows:

On Saturday, June 6, 2009, Bruce visited a boyfriend in Odessa, Missouri, and her daughter spent the night with a friend (Tr.2054-55, 2057, 2157-58). Robbie stayed at Bruce's home because he was supposed to get a ride to work from an employer (Tr.2055).

On Sunday, June 7, at about 6:30 p.m., Bruce returned home (Tr. 2058, 2158). Her daughter and Robbie were there (Tr.2058). Robbie wanted to use Bruce's car to drive to Nevada, Missouri to pick up a paycheck, but Bruce refused because her car was not functioning correctly (Tr.2058-60). While Bruce was taking a shower, Robbie took her car (Tr.2060).

Bruce called Robbie at 8:16 p.m. and asked where he was (Tr.2060, 2063). Robbie said he was going to get his paycheck and he would return shortly (Tr.2060, 2063). At about 9:38 p.m., he called Bruce and told her that he was in Nevada, but that there was a bad storm and he would be home as soon as the storm ended (Tr.2064, 2066). Bruce responded that she knew about the storm, but he needed to return with her car (Tr.2064). Robbie maintained that his boss's girlfriend would not let him leave (Tr.2064-66).

A few minutes after midnight, on Monday morning, Robbie called Bruce again (Tr.2066-67). He said that he had had to walk to get something to fix a flat tire (Tr.2067). When Bruce awoke that morning, Robbie was still not there (Tr.2068-69). At about 8:00 a.m., Robbie called and Bruce told him that she wanted her car (Tr.2069). Robbie brought the car home (Tr.2070).

Robbie spent Monday night at a hotel (Tr. 2071-72). On Tuesday morning, Bruce took Robbie to Walmart (Tr. 2072-73). While there, Bruce received a phone call from Robbie's stepmother (Tr.2073). Robbie spoke with his stepmother, and then told Bruce that he was a suspect in the Luetjen murders (Tr.2074, 2088, 2154-56). He and Bruce went to the sheriff's department in Garnett to speak to someone about it (Tr. 2075, 2085).

On Wednesday, law enforcement officers contacted Robbie and told him they wanted to talk to him (Tr.2086-87). Robbie told Bruce that if anyone asked, she should say that he had been with Bruce (Tr.2087-89, 2155). She asked, "What if they find out?," and he replied that he would use his boss's girlfriend as an alibi (Tr.2088-89).

Bruce decided that she would lie for Robbie; she told officers that he had been with Bruce at her home on the night of the murders (Tr.2090-91, 2159). She did not tell them that Robbie had told her to lie because the authorities told her that there were three people involved in the murders, including a woman, and she was afraid of them (Tr.2160-62).

On Friday, law enforcement officers interviewed Robbie again (Tr.2092-94). Afterward, Robbie told Bruce he had given a DNA sample and had passed a polygraph test (Tr.2094, 2098).

Bruce did not tell authorities that Robbie was not with her during the night of the murders until after she had been arrested and jailed for hindering prosecution, the officers had mentioned the possibility of her being charged as an accessory to murder, and they mentioned that her daughter might be placed in juvenile custody (Tr.2165-67, 2170, 2173-2177).

At some point, Robbie told Bruce that he was in the Luetjen's will and would inherent land, a vehicle, and 22% of 6.6 million dollars (Tr. 2128-29).

Procedural and Evidentiary Matters

Evidence that someone else was involved in the homicides

Before trial, Robbie endorsed Karen Wiskur as a witness (Tr.529). The State filed a Motion in Limine Concerning the Possible Defense that Someone Else Committed this Crime (LF667). The motion specifically mentioned that Taron's biological mother, Debra Kost, might be blamed for the murders by the defense and that Wiskur might be called to testify that at about 8:00 p.m. on the night of the murders, she saw Kost outside the Luetjen home talking on her cell phone while smoking a cigarette and then putting her extinguished cigarette inside her pocket before entering the home (LF668).

During a hearing on that motion, the State noted that Wiskur would testify that at about 8:00 p.m., on the day of the murders, she saw a woman, whom

Wiskur later identified as Kost, standing outside of the victims' home (Tr.529-30). The woman was on a cell phone and smoking a cigarette (Tr.530). After the woman finished the phone call, she put out the cigarette, put it into her pocket, and walked inside the house (Tr.530). Kost denied being there (Tr.533).

Kost is Taron's biological mother (Tr.530). Kost had been married to a son of the Luetjens, and after that son died in an automobile accident, a custody dispute concerning Taron arose between Kost and the Luetjens (Tr.530-531).

The State admitted that this was motive evidence, since Kost had not been allowed to see Taron, and thus she was upset at the Luetjens (Tr.531). But the State argued that there needed to be additional direct evidence connecting Kost to the crime for the evidence to be admissible (Tr.531).

Defense counsel noted additional evidence, including that Kost's cellphone records reflected that she had been using her phone "every few minutes every day," except that, mysteriously, on the day of the murders, she did not use her phone at all (Tr.538). Defense counsel also noted that Wiskur had identified Kost through a photo lineup (Tr.538-39). Wiskur had been across the street and saw Kost enter the house, but Wiskur never saw Kost exit the house before Wiskur left the scene (Tr.539). Defense counsel argued that Kost's physical presence at the murder scene was a "direct connection" to the murders (Tr.539). Defense counsel asserted that granting the State's motion would violate his rights to due process, to confront witnesses, and to present a defense, as guaranteed under the United States and Missouri Constitutions (Tr.541).

The trial court ruled that the defense would be allowed to present evidence "of Debra Kost, who may've been at or near the scene of the homicide" (Tr. 550-51, 552). The defense would be allowed to present any other evidence that directly connected Kost with the murders by way of an offer of proof outside the hearing of the jury (Tr.550-51, 552). If the defense presented evidence that directly connected Kost with an overt act in the commission of the murders, more than just her mere presence at the scene sometime prior to the murders, the evidence would be allowed to be presented to the jury, if otherwise admissible (Tr.551). But failure of the defense to present such an overt act connecting Kost with the murders would result in the exclusion of any argument that Kost committed the murders (Tr.551).

Kost testified in an offer of proof concerning this issue and denied being at the victims' residence on the day of the murders (Tr.1753, 1757-58).

In another offer of proof, Armenta testified that, in her handwritten statement to law enforcement officers, she expressed concern for her safety and that of her family because of Kost and Kost's mother, Dianne Reeves (Tr.1443-45). Reeves was the type of woman who would threaten a person with violence (Tr.1446). Armenta was with Janet White when Reeves called White and threatened that White should "watch out, or it could happen to you" (Tr. 1446-47, 1449). These phone calls occurred the day the bodies were found (Tr.1449). Armenta had been told that Kost was going to attempt to take Taron's body so that she could not be buried with the Luetjens (Tr.1446, 1449-50).

The trial court would not allow this evidence, ruling that it was not relevant unless further evidence of an overt action showed that Kost may have committed the murders (Tr. 1452-53).

In a later offer of proof, Janet White testified that on June 9, 2009, she had some telephone conversations with Reeves, and White's sister, Darlene Fajen, spoke with Kost (Tr. 1568-69). The first call was from Reeves, who asked what had happened to Taron (Tr.1369-70). White told Reeves that she could not talk about it (Tr. 1570). Armenta answered the second phone call; it was Reeves again (Tr.1570-71). The third call was again from Reeves (Tr.1571-72). White told her not to call again and hung up (Tr.1572). Fajen answered the next call (Tr.1572-73). Fajen told Kost to call the sheriff's office if she wanted to know what happened to Taron (Tr.1573). Kost said that the sheriff's office said that they could not tell her anything (Tr.1573). Fajen told Kost that she could not tell Kost anything either (Tr. 1573). Kost hung up (Tr. 1573). During one call, Reeves told White, "If you do not tell me about my granddaughter, you'll end up just like her" (Tr. 1574).

The trial court denied defense counsel's offer of proof, ruling that the defense would not be allowed to present that testimony (Tr.1577-78).

Requests for mistrial

During the State's direct examination of Armenta, an assistant attorney general inadvertently showed her a PowerPoint photo of the victims' bound hands,

which caused Armenta to cry (Tr.1358-59). The trial court denied defense counsel's request for a mistrial (Tr.1360-61).

During the State's direct examination of Armenta's ex-husband, an assistant attorney general "flipped through a whole series of crime scene photographs in fairly rapid fashion," which the jury was able to view (Tr.1939-40). The trial court again overruled defense counsel's request for a mistrial (Tr.1942).

Immediately after that witness testified, a similar thing happened during the State's direct examination testimony of a friend of Donnie (Tr.1956-57). This time, a photograph of Donnie's bound body was shown for an extended period of time (Tr.1957). Defense counsel noted that that was the third time that such an incident happened during the testimony of either a family member or close friend of the victims (Tr.1957). Defense counsel reminded the court that during Armenta's testimony it had evoked a very emotional response and counsel believed that the pattern of such incidents had to have a negative effect on the jury (Tr.1957).

The trial court again overruled defense counsel's request for a mistrial (Tr.1957-58, 1961).

Refused jury instructions and the guilty verdicts

At trial, in addition to the verdict directors for murder in the first degree, the State submitted, and the jury was given, verdict directors on the lesser included offense of conventional murder in the second degree (LF767, 771, 775).

In contrast, the trial court refused Robbie's lesser-included-offense instructions as to felony murder in the second degree:[10]

> As to Count [I/II/III], if you do not find the defendant guilty of murder in the first degree, you must consider whether he is guilty of murder in the second degree.
>
> As to Count [I/II/III], if you find and believe from the evidence beyond a reasonable doubt:
>
> First, that after 10:17 PM on the 7th day of June, 2009, at 802 South Elm, Cole Camp, in the County of Benton, State of Missouri, the defendant took property which was property owned by Donnie Luetjen and, that defendant did so for the purpose of withholding it from the owner permanently, and that defendant in doing so used physical force on or against [Donnie/Sharon/Taron] for the purpose of preventing resistance to

[10] There were three refused instructions: Refused Instruction A involved Count I with Donnie as the victim (LF783-84); Refused Instruction Q involved Count II with Sharon as the victim (LF789-90); and Refused Instruction R involved Count III with Taron as the victim (LF791-92).

the taking of the property, then you will find that the defendant has committed robbery in the second degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you cannot find that the defendant has committed robbery in the second degree.

Second, that [Donnie/Sharon/Taron] was shot and killed, and

Third, that [Donnie/Sharon/Taron] was killed as a result of the perpetration of that robbery in the second degree,

then you will find the defendant guilty under Count [I/II/III] of murder in the second degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of murder in the second degree under this instruction, but you must then consider whether he is guilty of murder in the second degree under Instruction No. ____.

(LF783-84, 789-90, 791-92; Tr.2595-97).

The State argued that the felony murder instructions should not be given because they were not in proper form – they did not have the proper accompanied instructions that were required under the notes on use – and because the instructions were not supported by the evidence since they were "mutually exclusive of the alibi defense that [defense counsel] proposed and inserted into the case" (Tr.2596).

In refusing the felony murder instructions, the trial court found: 1) Robbie was not charged with any underlying felony, and the tendered instructions picked a felony that Robbie was not charged by the State; 2) felony murder was inconsistent with the alibi instruction Robbie requested; and 3) the evidence did not support a felony murder instruction (Tr.2596-97).

The trial court also refused Robbie's proffered presence-at-the-scene-of-the-crime instruction (Tr.2597-98). The State had objected that because Robbie was not charged as an accomplice, the Notes on Use to MAI-CR3rd 310.08 provided that the instruction was not to be given (Tr.2597).

The jury found Robbie guilty of the charged offenses after deliberating for about four hours (Tr.2638, 2642; LF797-99).

Penalty phase

During the penalty phase, the State presented victim impact evidence through testimony from Armenta (Tr.2669-92) and Donnie and Sharon's grandson Austin Beckman (Tr.2692-2708); and, evidence that Robert had prior felony convictions for robbery in the first degree, two counts of burglary, felony stealing, two counts of forgery, and two counts for possession of a controlled substance in a correctional facility (Tr.2722-23).

Regarding the 1988 robbery, Robbie was charged with forcefully stealing money from a mini-mart while armed with a deadly weapon (Tr.2724). During that guilty plea, Robbie told the plea court, "I went into a store with a rifle and got the money and left" (Tr.2726). Later, Robbie elaborated that the rifle was loaded

and he forced the clerk at gunpoint to give him $500 from the cash register (Tr.2727-29).

In mitigation, Robbie presented testimony from an inmate (Joseph Enna) who recounted that when Enna and Robbie were in prison in their late teens, Robbie protected Enna from another inmate by fighting with the other inmate (Tr.2866-67, 2872, 2874-76). During that fight, Robbie refused to throw the first punch and took a beating so that Enna would not have to (Tr.2876).

David McCabe was in prison with Robbie when they were about eighteen years old (Tr.2753). McCabe testified that Missouri prisons are more secure than when he and Robbie were first in prison (Tr.2756, 2759). In the 1980's McCabe and Robbie were placed in "the hole" regarding an investigation for sexual assault (Tr.2758). McCabe testified, however, that Robbie was not there when it had happened (Tr.2758).

Robert's stepmother, Dana Elliott, testified that Robbie had been in-and-out of trouble since he was eighteen (Tr.2745). Prison changed Robbie, but Robbie was still polite to Elliott (Tr.2749).

Forensic Psychologist Dr. Thomas Reidy has written many articles on inmates' prison adjustment and the potential for future violence (Tr.2775, 2779, 2783). Dr. Reidy has testified as an expert in Missouri courts about violence risk assessment in prison settings (Tr. 2784).

Dr. Reidy evaluated Robbie about his potential for future acts of violence and adjustment to incarceration (Tr.2787, 2790). In doing this, Dr. Reidy reviewed

Robert's prison records (Tr.2791). Robbie was eighteen years old when he was first incarcerated; he was 49 years old at the time of trial (Tr.2791). Between the ages of 18 and 49, Robbie had spent about 29 of those years in prison (Tr.2792).

In Robbie's first 21 years of prison, he had 73 conduct violations; in his last four years of prison, he had only four or five conduct violations (Tr.2793). When he was 18-20 years old, he had about 20 violations (Tr.2793-94). In 1982, he had 12 violations; in 1983, he had 8 violations; in 1985, he only had a couple of fights; in 1996, he had 7 violations; and from 1999 to 2013, he had 0-3 violations each year and no serious assaults (Tr.2827-28). Robbie's most serious violation was for forcible sexual misconduct in the early 1980's (Tr.2795). No criminal charge was ever filed against Robert for that incident (Tr.2795). Twice Robbie was charged with escape for leaving halfway houses (Tr.2795-96).

Dr. Reidy testified that age is one of the most significant factors regarding long-term adjustment; the older the inmate, the less likely he is to engage in serious violent behavior (Tr.2811). Research has shown that individuals who get a life without parole sentence or an exceptionally long prison term tend to make a better adjustment overall as compared to inmates with shorter sentences (Tr.2812). When an inmate previously has been in prison, there is a greater probability that the inmate will behave in the future (Tr. 2812). Further, risk of violence decreases with the inmate's age (Tr.2814). Data suggests that someone Robbie's age would incur about a half a conduct violation per year on the average (Tr.2816). Also, Robbie obtained his G.E.D. while in prison; research shows that inmates with a

high school diploma or G.E.D. have about half the rate of serious violent behavior in prison than other inmates (Tr.2812, 2819).

Dr. Reidy also testified that a study examining Missouri prisons in the past 15 years and involving inmates with sentences of death, life without parole (LWOP), and life with parole show that about 80% of those inmates never get any kind of assaultive violation while in prison (Tr.2820-21). There had only been 12 "staff homicides" since 1841, and only two in the last decade (Tr.2820). A study performed at Potosi Correctional Center showed that inmates with sentences of death or LWOP engaged in substantially less violent misconduct than those serving life with parole (Tr.2821-22). Another study showed that homicide offenders do not engage in the most assaultive behavior in prison (Tr.2831, 2833).

Robbie had never assaulted any staff member despite having served about 90% of his adult life in prison (Tr.2834). The records did not show that Robbie ever used a weapon against another inmate or a prison staff member (Tr.2862). The probability that Robbie would assault someone in prison was low (Tr.2835-36).

The jury recommended sentences of death after finding these statutory aggravating circumstances as to each count: (1) Robbie had a serious assaultive conviction in that he was convicted of robbery in the first degree on November 21, 1988; (2, 3) the murders were committed while Robbie was engaged in the commission of the other two unlawful homicides; (4) the murders involved depravity of mind and as a result thereof, the murders were outrageously and

wantonly vile, horrible, and inhuman in that the victims were killed after they were bound or otherwise rendered helpless by Robbie and as a result Robbie thereby exhibited a callous disregard for the sanctity of all human life (Tr.2933-40; LF841-45).

Sentencing

On August 9, 2013, the trial court overruled Robbie's motion for new trial and sentenced him to death as to each count according to the jury's recommendations (Tr.2992, 3000-06; LF953-59, 960-61). This appeal follows. Any further facts necessary for the disposition of this appeal will be set out in the argument portion of this brief.

POINTS RELIED ON

I.

The trial court erred by refusing defense counsel's request to submit the lesser included offense instructions for felony murder in the second degree (Refused Instructions A, Q, R), because the failure to instruct the jury on the lesser-included offense of felony murder violated Robbie's right to due process of law, to present a defense, to a fair trial, and to be free from cruel and unusual punishment, as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, §§ 10, 18(a), and 21 of the Missouri Constitution, and §§ 556.046, 565.021, and 565.025, RSMo, in that Robbie timely requested the instructions; there was a basis in the evidence for acquitting Robbie of the charged offense (first-degree murder); and there was a basis in the evidence for convicting him of the lesser included offense of felony murder; and, because the statutory requirements for giving such instructions were met, the failure to give these requested instructions is reversible error.

State v. Jackson, 433 S.W.3d 390 (Mo.banc 2014);

State v. Frost, 49 S.W.3d 212 (Mo.App.W.D. 2001);

State v. Nutt, 432 S.W.3d 221, 224-25 (Mo.App.W.D. 2014);

Beck v. Alabama, 447 U.S. 625 (1980);

U.S. Const., Amends. VI, VIII, and XIV;

Mo. Constitution, Article I, §§ 10, 18(a), & 21;

§§ 565.021, 565.023, 565.025, RSMo 2000;

§ 556.046, RSMo. Supp. 2002; and;

MAI-CR3d 304.16, 314.00, 314.04, 314.06, 323.04.

II.

The trial court abused its discretion in admitting testimony from Douglas Middleton and evidence (State's Exhibit Nos. 128-130) regarding the locations of cell towers purportedly used by Robbie's cell phone near the time of the murders, in violation of Robbie's rights to due process and a fair trial, as guaranteed by the 6th and 14th Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that the trial court should not have permitted Middleton to offer lay opinion testimony about cell tower location used by Robbie's phone, or admitted the maps Middleton created based on his interpretation of the cellular telephone records, because this is a subject for an expert witness, and the State did not qualify Middleton as an expert regarding cell phone tower evidence and the tracking of Robbie's cell phone at the time of the murders – in fact he admitted that he was not an expert "in anything;" and Robbie was prejudiced because the State argued to the jurors that this evidence showed that Robbie was at or near the scene of the murders when they occurred.

State v. Patton, 419 S.W.3d 125 (Mo.App.E.D. 2013);

Wilder v. State, 191 Md.App. 319, 991 A.2d 172 (2010);

Coleman–Fuller v. State, 192 Md.App. 577, 995 A.2d 985 (2010);

Payne & Bond v. State, 211 Md. App. 220, 65 A.3d 154,

cert. granted, 434 Md. 311, 75 A.3d 317 (2013);

U.S. Const., Amends. VI and XIV; and

Mo. Constitution, Article I, §§ 10 & 18(a).

III.

The trial court abused its discretion in overruling Robbie's objection to fingerprint analyst Hunt testifying that other experts at the lab where she worked had gone through the same process she had and verified her conclusions about fingerprints found at the crime scene, and as a result of the peer review process, she felt confident in her conclusions since there "weren't issues," because this violated Robbie's rights to due process, a fair trial, and confrontation and cross-examination as guaranteed by the 6th and 14th Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that Hunt's testimony about other experts going through the same process she had, verifying her conclusions, and not turning up any "issues," improperly bolstered Hunt's opinions with the opinions of other experts who were not subject to cross-examination; Robbie was prejudiced by this verification evidence because Hunt's testimony physically linked Robbie to the crime.

State v. Wicker, 66 Wash.App. 409, 832 P.2d 127 (1992);

State v. Langill, 161 N.H. 218, 13 A.3d 171 (2010);

People v. Smith, 256 Ill.App.3d 610, 628 N.E.2d 1176 (1994);

Teifort v. State, 978 So.2d 225 (Fla. 4th DCA 2008);

U.S. Const., Amends. VI and XIV;

Mo. Const., Art. I, Sec. 18(a); and

Webster's Third New International Dictionary 2543 (unabridged ed.2002).

IV.

The trial court abused its discretion in partially granting the State's Motion in Limine Concerning the Possible Defense that Someone Else Committed this Crime, which resulted in the jury not hearing evidence that about two hours before the charged murders, Karen Wiskur saw a woman, whom Wiskur later identified as Debra Kost, exit the victims' home, light a cigarette, talk on a cell phone while pacing back-and-forth for 10-15 minutes, extinguish her cigarette on the bottom of her shoe, put the cigarette butt in her jeans' pocket, flip her phone shut, and go back inside the victims' home, and when Kost was later questioned about being there, she denied it, and in precluding the defense from arguing that Kost was involved in the murders without first presenting an additional overt act connecting Kost with the murders, because this denied Robbie's rights to due process, a fair trial and to present a defense as guaranteed by the 6th and 14th Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that Robbie was entitled to present evidence that this woman might have been involved in the murders, which was consistent with the defense that more than one person was involved in the robbery and subsequent murders of the victim, and this evidence was an act directly connecting this woman with the murders and it also established her motive, opportunity, and consciousness of guilt for the robbery/murders.

Holmes v. South Carolina, 547 U.S. 319, 324 (2006);

State v. Barriner, 111 S.W.3d 396 (Mo.banc 2003);

State v. Woodworth, 941 S.W.2d 679 (Mo.App.W.D. 1997);

Olden v. Kentucky, 488 U.S. 227 (1990);

U.S. Const., Amends. VI & XIV; and

Mo. Constitution, Article I, §§ 10 & 18(a).

V.

The trial court abused its discretion in sustaining the State's objections and in not allowing the jury to hear evidence from Deborah Armenta that in her handwritten statement to law enforcement officers, she expressed concern for her safety and that of her family because of Debra Kost and Kost's mother, Dianne Reeves, and that Armenta was with Janet White when Reeves called White and threatened that White should "watch out, or it could happen to you," because the prohibition of this evidence denied Robbie's rights to due process, a fair trial and to present a defense as guaranteed by the 6th and 14th Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that Robbie was entitled to cross-examine Armenta about anything that might have motivated her to distort or exaggerate her testimony, including any fear, intimidation, or duress that that she might have had about Kost, particularly since a witness had seen a woman, whom she believed was Kost, outside the victims' home shortly before the murders acting in a very suspicious manner, and authorities had believed and told people that there were three people involved in the murders. Robbie was prejudiced because Armenta identified Robbie's voice as being in the background of the 9-1-1 call placed at the victims' home during the robbery, and thus the jury was entitled to know about anything that would motivate Armenta to make that voice identification.

State v. Hunter, 544 S.W.2d 58 (Mo.App.K.C.D. 1976);

State v. Ofield, 635 S.W.2d 73 (Mo.App.W.D. 1982);

Olden v. Kentucky, 488 U.S. 227 (1990);

State v. Lockhart, 507 S.W.2d 395 (Mo. 1974);

U.S. Const., Amends. VI and XIV; and

Mo. Constitution, Article I, §§ 10 & 18(a).

VI.

The trial court abused its discretion in sustaining the State's objections and in not allowing the jury to hear evidence from Janet White concerning threatening phone calls made from Deborah Kost and her mother (Reeves) to White and her sister (Fajen) on the day that the victims' bodies were discovered, because the prohibition of this evidence denied Robbie's rights to due process, a fair trial and to present a defense as guaranteed by the 6th and 14th Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that Robbie was entitled to present this evidence to show the jury that during one phone call in a series of phone calls from Kost and Reeves to White and Fajen, Reeves told White, "If you do not tell me about my granddaughter, you'll end up just like her," because White's testimony would have confirmed Deborah Armenta's fear of Kost and Reeves and corroborated Armenta's excluded testimony about the phone calls (Point V), and White also would have supported Karen Wiskur's excluded testimony about seeing Kost outside the victims' home about two hours before the murder acting in a very suspicious manner (Point IV).

State v. Richardson, 838 S.W.2d 122 (Mo.App.E.D. 1992);

State v. Brown, 549 S.W.2d 336 (Mo.banc 1977);

Holmes v. South Carolina, 547 U.S. 319, 324 (2006);

Olden v. Kentucky, 488 U.S. 227 (1990);

U.S. Const., Amends. VI and XIV; and

Mo. Constitution, Article I, §§ 10 and 18(a).

VII.

The trial court abused its discretion in denying Robbie's requests for mistrials after the assistant attorney general three times unexpectedly displayed graphic photographs of the victims' dead bodies to witnesses on a large television screen, because this violated Robbie's rights to due process and a fair trial, as guaranteed by the 14th Amendment to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the sum total of what happened deprived Robbie of a fair trial because it triggered excessive emotions against Robbie as evidenced by the emotional reactions from witnesses, spectators, and jurors; it also caused Robbie's sentence to be imposed under the influence of passion, prejudice or any other arbitrary factors, § 565.035.3.

State v. Allen, 800 So.2d 378 (La.App. 4th Cir.2001);

People v. Williams, 161 Ill. 2d 1, 641 N.E.2d 296 (1994);

State v. Harris, 662 S.W.2d 276 (Mo.App. E.D. 1983);

State v. Webber, 982 S.W.2d 317 (Mo.App.S.D. 1998);

U.S. Const. Amend. XIV; and

Mo. Const. Article I, Sections 10 and 18(a).

ARGUMENT

I.

The trial court erred by refusing defense counsel's request to submit the lesser included offense instructions for felony murder in the second degree (Refused Instructions A, Q, R), because the failure to instruct the jury on the lesser-included offense of felony murder violated Robbie's right to due process of law, to present a defense, to a fair trial, and to be free from cruel and unusual punishment, as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, §§ 10, 18(a), and 21 of the Missouri Constitution, and §§ 556.046, 565.021, and 565.025, RSMo, in that Robbie timely requested the instructions; there was a basis in the evidence for acquitting Robbie of the charged offense (first-degree murder); and there was a basis in the evidence for convicting him of the lesser included offense of felony murder; and, because the statutory requirements for giving such instructions were met, the failure to give these requested instructions is reversible error.

Issue presented

In *State v. Jackson*, 433 S.W.3d 390, 396 (Mo.banc 2014), this Court held that under section 556.046, a trial court is obligated to give a first-level lesser included offense instruction when each of the following requirements is met: a) a party timely requests the instruction; b) there is a basis in the evidence for

acquitting the defendant of the charged offense; and c) there is a basis in the evidence for convicting the defendant of the lesser included offense for which the instruction is requested.

Robbie met each of the three *Jackson* requirements. Robbie was charged with three counts of murder in the first degree. Under section 565.025.2(a), felony second-degree murder is a first-level lesser included offense of first-degree murder. Robbie timely offered three instructions for that lesser included offense – one for each victim. The first requirement was met. The State offered, and the trial court gave, lesser included offense instructions for conventional second-degree murder, another first-level lesser included offense of first-degree murder, and thus the second requirement is conceded and unchallenged. The evidence clearly showed that the victims were killed during the perpetration of a robbery inside their home, and thus the third requirement was met. Thus, under *Jackson*, the trial court was required to give the felony murder instructions, but it refused.

Under *Jackson*, if the statutory requirements for giving such a lesser included offense instruction are met, as they were here, a failure to give a requested instruction "is reversible error." *Jackson*, 433 S.W.3d at 395. Prejudice is presumed when a trial court fails to give a requested lesser included offense instruction that is supported by the evidence. *Id*.

The issue presented on this appeal is:

If a party requests a statutorily-denominated, first-level lesser included offense instruction (felony murder), and the trial court refuses to give such an

instruction even when there is evidence to support it, does a presumption of prejudice result in reversible error? Or is that presumption necessarily overcome by the submission of another first-level lesser included offense instruction (conventional second-degree murder), that is not a greater offense than felony murder but is on equal footing, especially when conventional second-degree murder is not argued by either party nor consistent with either party's theory of the crime and thus did not adequately test the disputed elements for first-degree murder?

Preservation of the issue

Robbie tendered three instructions on the lesser included offense of felony murder in the second degree – one for each victim:[11]

> As to Count [I/II/III], if you do not find the defendant guilty of murder in the first degree, you must consider whether he is guilty of murder in the second degree.
>
> As to Count [I/II/III], if you find and believe from the evidence beyond a reasonable doubt:

[11] There were three refused instructions: Refused Instruction A - Count I with Donnie as the victim (LF783-84); Refused Instruction Q - Count II with Sharon as the victim (LF789-90); and Refused Instruction R - Count III with Taron as the victim (LF791-92).

First, that after 10:17 PM on the 7th day of June, 2009, at 802 South Elm, Cole Camp, in the County of Benton, State of Missouri, the defendant took property which was property owned by Donnie Luetjen and, that defendant did so for the purpose of withholding it from the owner permanently, and that defendant in doing so used physical force on or against [Donnie/Sharon/Taron] for the purpose of preventing resistance to the taking of the property, then you will find that the defendant has committed robbery in the second degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you cannot find that the defendant has committed robbery in the second degree.

Second, that [Donnie/Sharon/Taron] was shot and killed, and

Third, that [Donnie/Sharon/Taron] was killed as a result of the perpetration of that robbery in the second degree,

then you will find the defendant guilty under Count [I/II/III] of murder in the second degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of murder in the second degree under this instruction, but you must then consider whether he is guilty of murder in the second degree under Instruction No. ____.

(LF783-84, 789-90, 791-92; Tr.2595-97).

The State argued that the felony murder instructions should not be given because they were not in proper form – they did not have "the proper accompanied instructions that are required to be given under the notes on use" – and because they were not supported by the evidence since felony murder was "mutually exclusive of the alibi defense that they proposed and inserted into the case" (Tr.2596).[12]

In refusing the felony murder instructions, the trial court found: 1) Robbie was not charged with any underlying felony and the tendered instructions picked a felony that Robbie was not charged with; 2) felony murder was inconsistent with the alibi instruction requested by Robbie; and 3) the evidence did not support felony murder instructions (Tr.2596-97).

Robbie raised the trial court's refusal to give the instructions in his timely motion for new trial (claims 42 (Instruction A – Donnie), 43 (Instruction Q – Sharon), 44 (Instruction R - Taron)) (LF783-84, 789-90, 791-92). This point of error is properly preserved for appeal.

It is true that Note on Use No. 2 to MAI-CR3d 314.06 (felony murder) provides that if the issue of a defendant's guilt of the underlying felony is not submitted to the jury, as in the instant case, Paragraph First should cross-reference an instruction that is identical to a verdict director for the underlying felony, with a

[12] Although an alibi instruction was given at trial (LF 764), no witness actually testified that Robbie was elsewhere at the time of the charged murders.

modification from "then you will find the defendant guilty" to "then you will find that the defendant has committed…." Robbie did not prepare a separate instruction but instead chose to put all the elements of robbery in the second degree in Paragraph First.

But this should not be fatal to this point on appeal. First, Paragraph First of the refused instructions contained all the elements that would have been in the cross-referenced instruction, so the jury would have been required to find the same facts regardless of whether they were contained in one rather than two instructions. The pattern instruction for MAI-CR3d 323.04 (robbery in the second degree) requires the jury to find three elements, in pertinent part: 1) " First …the defendant (took) … [*Describe property*.], which was property (owned by) ….[*name of victim*], and Second, that defendant did so for the purpose of ….withholding it from the owner permanently, …and Third, that defendant in doing so (used physical force) … on or against [*name of person threatened or against whom force was applied*] for the purpose of …(preventing) … resistance to the taking of the property…." All three of these elements were contained in Paragraph First of the refused felony murder instructions. Thus, everything the jury would be required to find for second-degree robbery was included in the refused instructions, albeit within the felony murder instruction instead of in a second instruction that was cross-referenced by the felony murder instruction.

Second, as noted above, the trial court did not reject the instruction on this basis. If the court had refused it on this basis, Robbie could have modified the

instructions accordingly. So this Court should consider the point as properly preserved. *See*, *State v. Stepter*, 794 S.W.2d 649, 654 (Mo.banc 1990) ("The state ignores the fact that the trial court refused Stepter's instruction not on the basis of improper tender of a mental state used only upon request of the state, but on the ground that '[T]here's no evidence to substantiate it.'").

Standard of Review

This Court reviews *de novo* a trial court's decision whether to give a requested jury instruction under section 556.046, RSMo Supp. 2002, and, if the statutory requirements for giving such a lesser included offense instruction are met, a failure to give a requested instruction is reversible error. *State v. Jackson*, 433 S.W.3d 390, 395 (Mo.banc 2014). Prejudice is presumed when a trial court fails to give a requested lesser included offense instruction that is supported by the evidence. *Id*.

"In determining whether a refusal to submit an instruction was error, 'the evidence is viewed in the light most favorable to the defendant.' " *State v. Avery*, 120 S.W.3d 196, 200 (Mo.banc 2003) (quoting *State v. Westfall*, 75 S.W.3d 278 (Mo.banc 2002)). If the evidence tends to support differing conclusions, the defendant is entitled to an instruction. *Westfall*, 75 S.W.3d at 280.

The Statutes involved

Section 565.025.2 sets forth the lesser degree offenses of murder in the first degree: (a) Murder in the second degree under subdivisions (1) and (2) of subsection 1 of section 565.021;[13] (b) Voluntary manslaughter under subdivision (1) of subsection 1 of section 565.023; and (c) Involuntary manslaughter under subdivision (1) of subsection 1 of section 565.024.

Section 565.025.1 provides that, with the exceptions provided in sections 565.025.3, and 565.021.3, section 556.046 shall be used for the purpose of consideration of lesser offenses by the trier in all homicide cases. Section 565.025.3 provides that "[n]o instruction on a lesser included offense shall be submitted unless requested by one of the parties or the court." Section 565.021.3 provides,

> "Notwithstanding section 556.046 and section 565.025, in any charge of murder in the second degree, the jury shall be instructed on … any and all of the subdivisions in subsection 1 of this section [conventional and felony second-degree murder] which are supported by the evidence and requested by one of the parties or the court."

[13] Subdivision (1) of § 565.021.1 is often referred to as conventional second-degree murder, and subdivision (2) is referred to as felony murder. Under the statutory scheme, they are both first-level lesser included offenses of first-degree murder. § 565.025.2(a).

Section 556.046.1(2) provides, in pertinent part, that a defendant may be convicted of an offense included in an offense charged in the indictment or information, and an offense is so included when it is specifically denominated by statute as a lesser degree of the offense charged.

But the trial court is not obligated to charge the jury with respect to an included offense unless there is a basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense. § 556.046.2. An offense is "charged" under section 556.046 if it is in an indictment or information, or it is an offense submitted to the jury because there is a basis for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense. § 556.046.2.

The requirements of section 556.046 were met

Under section 556.046, a trial court is obligated to give a first-level lesser included offense instruction when each of the following requirements is met: a) a party timely requests the instruction; b) there is a basis in the evidence for acquitting the defendant of the charged offense; and c) there is a basis in the evidence for convicting the defendant of the lesser included offense for which the instruction is requested. *Jackson*, 433 S.W.3d at 396.

Robbie timely requested the felony murder instruction (Tr.2595-95; LF 783-84). He met the first requirement.

The State requested, and the trial court gave, the lesser included offense instructions of conventional second-degree murder (LF767, 771, 775). Under section 556.046, this could only be done if there was a basis in the evidence for acquitting Robbie of the charged offense (murder in the first degree). Thus, the second requirement was uncontested and met.

So if there was a basis in the evidence for convicting Robbie of felony murder, then the third requirement was met, the trial court was obligated to give a felony murder instruction as a lesser included offense of first-degree murder, *Jackson*, 433 S.W.3d at 396, and the failure to give this lesser included offense instruction supported by the evidence is reversible error requiring a new trial. *Id*. at 395.

There was a basis in the evidence for convicting Robbie of felony murder

The bodies of Sharon, Donnie, and Taron Luetjen were found lying on the living room floor (Tr.1510, 1523, 1597, 1604, 1605, 1629). They each died from a .22 caliber gunshot wound to the back of the head (Tr.1586, 1599, 1605, 1607, 1610, 1612-13, 1615, 1742, 2403). Their hands were loosely bound behind their backs, they were gagged, and their heads were on pillows (Tr.1516-17, 1599, 1602, 1605, 1617, 1633, 1643-47, 2405-06). The bindings appeared to have been made from the same brown fabric (Tr. 1647-48, 1653, 1660, 2405). More of that fabric was in Taron's bedroom being used as a decorative item on her bed (Tr. 1659-60).

The refused felony murder instructions submitted robbery in the second degree as the underlying felony. They alleged that Robbie took Donnie's property for the purpose of withholding it permanently, and in doing so used physical force against Donnie, Sharon, and Taron, for the purpose of preventing resistance to the taking of the property. They also alleged that the victims were killed as a result of the perpetration of that robbery.

There was overwhelming evidence of a robbery. It appeared that someone had gone through Donnie's wallet, which was on a chair; there was no money in it (Tr.1634, 1645, 1652, 1689). Donnie typically kept at least $200 in his wallet because he did not have a credit card (Tr.1979). Sharon's purse was on the living room floor, and there was no money in her purse or wallet (Tr.1383-84, 1534). In Donnie and Sharon's bedroom there were some items strewn about (Tr.1630-31, 1654). On the floor were some antique cracker boxes or tins with their lids removed (Tr.1635, 1656, 1707). Donnie's change drawer had been dumped out on the bed (Tr.1383-84). Some change remained, but not as much as usual (Tr.1385-85, 1389). A Velveeta box was open and empty (Tr.1385, 1635, 1654-55). An empty holster was on the floor (Tr.1635, 1657, 1724-25). Normally, Donnie kept two .22 caliber pistols in that holster inside the gun cabinet in the bedroom (Tr.1393, 1975-78, 2397). Armenta had left a .25 caliber handgun at the Luetjen residence, but when the home was searched after the murders, it could not be located (Tr.1385-87, 1465-66, 1938, 1944, 1946). The victims' family was also unable to find Taron's cell phone (Tr.1372, 1394).

Evidence supported a reasonable inference that more than one person was involved in the robbery.[14] Officer Hugh Fowler seized a recording of a 9-1-1 call that had been made from Taron's cell phone at about 10:15 p.m. on the night of the murders (Tr.1760-62, 1836, 1839, 1842, 1850, 1854, 1880-81, 1884, 1888, 1895; State's Exhibit No. 108). Fowler enhanced the recording, taking out the voice of the 9-1-1 operator (Tr.1822). In an affidavit on June 26, 2009, Fowler swore that when he heard the 9-1-1 recording, he could hear male voices in the background and that there were at least two male voices and one female voice other than the 9-1-1 operator's voice (Tr.1823-24, 1827). His affidavit stated that one of the male voices directed Sharon to sit down and put her arms behind her and threatened to shoot her (Tr.1827). Fowler also stated that Sharon could be heard telling the suspects that she had $300 in her purse (Tr.1827). Authorities

[14] Further evidence of another's possible involvement was excluded by the trial court (Tr.550-51). Karen Wiskur was not allowed to testify that at about 8:00 p.m. on the night of the murders, she saw a woman standing outside the Luetjen home talking on her cell phone (Tr.529-33, 539). The woman smoked a cigarette and then put her extinguished cigarette inside her pocket before entering the home (Tr.529-33, 539). A jury could have concluded that this person was somehow involved in the later robbery since, after calling someone on the phone, she took the unusual, suspicious action of putting an extinguished cigarette in her pocket, as ensuring that this potential carrier of her DNA would not be left at the scene.

told Karen Bruce, Robbie's girlfriend, that there were three people involved in the murders, including a woman (Tr.2160-62).

Dr. Robert Maher is a professor of electrical and computer engineering in Montana (Tr.1907). He received a digital file of the 9-1-1 call (Tr.1909). Dr. Maher amplified and filtered the contents of the file (Tr.1910-12, 1915). He concluded that there was at least one male and one female speaker on the recording, but he could not rule out the possibility of more than one male or more than one female (Tr.1921).

Missouri State Highway Patrol DNA caseworker Shawn Bales examined the bindings that were used to secure the victims' hands (Tr.2490). Donnie's left binding had a DNA profile that was consistent with a mixture of at least three people (Tr.2497, 2499, 2542-43). The major component was consistent with Donnie; Sharon, Taron, and Robbie were excluded as contributors to the mixture – thus there was an unknown contributor of DNA (Tr.2497-98, 2543-44). Taron's left hand binding had a DNA profile consistent with a mixture of at least two individuals (Tr.2505, 2553). The major component exhibited female characteristics and was consistent with Taron (Tr.2505, 2553). The minor component was consistent with male DNA, and Robbie, Donnie and Sharon were all eliminated as contributors – again, there was an unknown contributor of DNA (Tr.2505, 2553-54, 2556).

DNA profiles were developed from swabs used on a dresser and display box in the Luetjen home; Robbie was excluded as a contributor to those profiles too (Tr.2545-46).

Thus, ample evidence existed from which a jury could have concluded that the Luetjens were killed during the perpetration of a robbery and that someone else – possibly the unknown person whose DNA was left on Donnie's and Taron's bindings – was the person who shot and killed the victims.

The requirements of section 556.046 were met, *Jackson*, 433 S.W.3d at 396, and the lesser included offense instructions of felony murder should have been given.

The trial court's reasons for refusing felony murder instructions were erroneous

The trial court rejected the felony murder instructions because Robbie was not charged with any underlying felony and thus the tendered instructions picked a felony that Robbie was not charged with by the State (Tr.2596-97). But the Notes on Use to MAI-CR3d 314.06 (felony murder) allow this and specifically note that the issue of a defendant's guilt of the underlying felony does not have to be submitted to the jury. Further, nothing in section 565.025 requires that the State also charge the underlying felony before a defendant is entitled to the lesser included offense instruction of felony murder. Thus, contrary to the trial court's ruling, Robbie was entitled to a felony murder instruction even if the State did not elect to charge him with the underlying felony.

At the urging of the assistant attorney general, the trial court also refused the instruction based on the contention that it was inconsistent with the alibi instruction requested by Robbie (Tr.2596-97). This basis was also erroneous. This Court has reversed trial courts for failing to give lesser included offense instructions in homicide cases even where a defense of alibi was also presented. *See*, *Stepter*, 794 S.W.2d at 658 (failure to give instruction on lesser included offense of conventional second-degree murder was reversible error even though "Defendant's theory of defense was that … he was not there when the shooting occurred"); *State v. King*, 577 S.W.2d 621 (Mo.banc 1979) (defendant presented an alibi defense; new trial ordered because lesser included offense instructions on second-degree murder and manslaughter were not given). *Cf. State v. Avery*, 120 S.W.3d 196, 201 (Mo.banc 2003) ("self-defense is submissible, even where defendant testifies that the killing was an accident, if the inconsistent evidence of self-defense is offered by the State or by defendant through the testimony of a third party"). A defendant may not be denied an instruction that is supported by the evidence even if it is at odds with his defense. *State v. Santillan*, 948 S.W.2d 574, 576 (Mo.banc 1997); *State v. Redmond*, 937 S.W.2d 205, 209-10 (Mo.banc 1996) (seemingly inconsistent instructions may be submitted if supported by the evidence).

Finally, the trial court ruled that the evidence did not support a felony murder instruction (Tr.2596-97). As will be shown below, there was more than

enough evidence to support that the victims were killed in the perpetration of a robbery.

Presumption of prejudice requires a new trial

Robbie has shown that the statutory requirements for giving a first-level lesser included offense instruction for felony murder have been met. This Court has held that when these statutory requirements are met, the failure to give such a requested instruction "is reversible error." *Jackson*, 433 S.W.3d at 395. *Also see*, *State v. Pierce*, 433 S.W.3d 424, 431 (Mo.banc 2014) (new trial ordered for failure to give lesser included offense instruction of possession of a controlled substance even though the weight of the controlled substance was uncontested at trial). That should be the end of the analysis.

But Robbie acknowledges that this Court has also issued some seemingly contradictory opinions holding that when a jury convicts on first-degree murder after having been instructed on both first-degree and second-degree conventional murder, there is no prejudice to the defendant by the refusal to submit a second-degree felony murder instruction. E.g., *State v. Griffin*, 756 S.W.2d 475, 485 (Mo.banc 1988); *State v. McLaughlin*, 265 S.W.3d 257, 270-71 (Mo.banc 2008).

Not only are these cases seemingly contrary to *Jackson*, 433 S.W.3d at 395, which holds that the failure to give a first-level lesser included offense instruction

"is reversible error,"[15] but they also conflict with this Court's cases holding that a defendant is entitled to an instruction on "any theory" that the evidence tends to establish. *State v. Pond*, 131 S.W.3d 792, 794 (Mo.banc 2004); *State v. Hibler*, 5 S.W.3d 147, 150 (Mo.banc 1999). Further, the *Griffin-McLaughlin* line of cases are based upon a prior case from this Court, *State v. Baker*, 636 S.W.2d 902 (Mo. banc 1982), which did not hold what later cases stated as its holding.

This Court's opinions have misapplied its decision in State v. Baker

Prior to *Baker*, this Court reversed convictions when the trial court refused to give lesser included offense instructions for felony murder even when conventional second-degree murder instructions had also been given. *State v. Gardner*, 618 S.W.2d 40 (Mo.1980) (trial court's failure to instruct upon first-

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[15] In finding prejudice this Court noted,

> [A]ny such prejudice from the refusal to instruct the jury on second-degree robbery seems logically inconsistent with the fact, discussed above, that the jury found both that the object in Jackson's hand reasonably appeared to be a gun and that he actually used a gun. The Court need not reconcile these, however, because prejudice is presumed when a trial court fails to give a requested lesser included offense instruction that is supported by the evidence.

Jackson, 433 S.W.3d at 395.

degree (felony) murder in the commission of rape after instructing on capital murder, conventional second-degree and manslaughter, required reversal of the conviction); *State v. Fuhr*, 626 S.W.2d 379 (Mo.banc 1982)(capital murder conviction reversed for failure to instruct on felony murder even though the jury was also instructed on conventional second-degree murder and manslaughter); *State v. Donovan*, 631 S.W.2d 39 (Mo.1982) (both conventional and felony second-degree murder could be lesser included offense of first-degree murder and both should have been given; case reversed even though the jury had also been instructed on the lesser included offense of manslaughter).

Baker did *not* overturn those prior cases. It did not hold that in a first-degree murder case, if the jury is instructed on conventional second-degree murder, then the defendant is not prejudiced by the trial court's refusal to submit felony murder. Instead, *Baker* dealt with a very different statutory scheme for lesser included homicide offenses than is in effect today. At the time of *Baker*, first-degree felony murder was *not* a lesser included offense of capital murder because it was not specifically denominated as a lesser degree of capital murder. *Baker*, 636 S.W.2d at 904. *Contrast Gardner*, *supra*, which had dealt with a statutory scheme where felony murder was a lesser included offense of capital murder.

The *Baker* court also distinguished *Beck v. Alabama*, 447 U.S. 625 (1980), which requires that the jury in a capital murder case be allowed to consider lesser included offenses supported by the evidence so that the jury will not be placed in

an "all or nothing" situation in which it might err on the side of conviction. *Baker*, 636 S.W.2d at 905. The *Baker* court noted that *Beck* was not on point because first-degree felony murder was no longer a lesser included offense of capital murder in Missouri. *Id*. The *Baker* court also noted that omitting first-degree (felony) murder from the instructional scheme, where only capital murder was charged, did not run afoul of *Beck* because "it is second degree murder, not first degree [felony] murder, which would sufficiently test a jury's belief of the crucial facts for a conviction of capital murder." *Baker*, 636 S.W.2d at 905.

Latching upon this language, this Court in *Griffin*, 756 S.W.2d at 485, held that since the evidence in that case of defendant's state of mind was not conclusive, it did support an instruction on second-degree felony murder and the trial court should have so instructed the jury. But this Court then cited *Baker* for the proposition that the defendant was not prejudiced by the trial court's failure to do this because the jury was instructed on the lesser included offense of second-degree conventional murder. ***Id***. But that was not *Baker*'s holding – it had merely held that under the statutory scheme in effect at that time, felony murder was not a lesser included offense of capital murder. Thus the failure to instruct the jury on felony murder did not run afoul of *Beck* because felony murder was not a lesser included offense. *Baker* also noted that second-degree conventional murder sufficiently tested the jury's belief regarding deliberation – the one element different in capital murder from second-degree conventional murder.

After *Griffin*, this Court continued to cite to *Baker* and *Griffin* for the proposition that if the trial court gave a conventional second-degree murder instruction, then the defendant would not be prejudiced by the failure to give a felony murder instruction: *State v. Petary*, 781 S.W.2d 534, 544 (Mo.banc 1989), *vacated and remanded*, 494 U.S. 1075 (1990), *reaffirmed*, 790 S.W.2d 243 (Mo.banc 1990) (also noting that there was no basis in the evidence to acquit Petary of first-degree murder and convict him of felony murder); *State v. Six*, 805 S.W.2d 159, 164 (Mo.banc 1991); *State v. Wise*, 879 S.W.2d 494, 517 (Mo.banc 1994), *overruled on other grounds by Joy v. Morrison*, 254 S.W.3d 885 (Mo.banc 2008). Later, this Court relied upon those cases that had earlier relied upon *Baker* and *Griffin*. *State v. Roberts*, 948 S.W.2d 577, 603 (Mo.banc 1997); *State v. Barnett*, 980 S.W.2d 297 (Mo.banc 1998); *State v. Hall*, 982 S.W.2d 675, 682 (Mo. banc 1998); *State v. McLaughlin*, 265 S.W.3d 257, 270-71 (Mo.banc 2008). But as shown above, the genesis of this lack-of-prejudice analysis, *Baker*, did not actually hold that there would be no prejudice in such a situation since felony murder was not actually as lesser included offense of capital murder at the time *Baker* was decided.

This Court's opinions erroneously held that the jury must find the defendant not guilty of conventional second-degree murder before considering felony murder

The *Griffin-McLaughlin* line of cases also reasoned that the appropriate pattern MAI-CR3d instructions required that the jury find the defendant not guilty

of first-degree murder and then conventional second-degree murder before it could consider felony murder, and since the jury failed to find second-degree conventional murder, the defendant was not harmed by the absence of a submission of second-degree felony murder. *McLaughlin*, 265 S.W.3d at 271; *Petary*, 781 S.W.2d at 544; *Six*, 805 S.W.2d at 164; *State v. Kinder*, 942 S.W.2d 313, 330 (Mo.banc 1996). But that is incorrect under the present MAI-CR3d pattern instructions and sections 565.021 and 565.025.

Section 565.025.2(1)(a) lists both subdivisions of second-degree murder – conventional and felony murder – as first-level lesser included offenses. They are on equal footing – a finding of guilt on felony murder is not predicated on the defendant first being found not guilty of conventional murder. *Also see*, § 565.021, "in any charge of murder in the second degree, the jury shall be instructed on … any and all of the subdivisions in subsection 1 of this section [which contains both conventional and felony murder] which are supported by the evidence and requested by one of the parties or the court."

Further the Notes on Use to both conventional second-degree murder (MAI-CR3d 314.04, Note On Use No. 5) and felony murder (MAI-CR3d 314.06, Note On Use No. 5) both provide that if instructions on both felony murder and conventional second-degree murder are given, then an instruction on verdict possibilities is to be given, such as MAI-CR3d 304.16. Note on Use No. 7 to MAI-CR3d 314.06 states, "[w]hile it is not a lesser degree offense of murder in the second degree - conventional, murder in the second degree - felony can be

submitted as an alternative means of finding second degree murder." *Also see* Note on Use No. 4 to MAI-CR 3d 314.00, which states, "[w]here appropriate, both forms of second degree murder (conventional, MAI-CR 3d 314.04, and felony, MAI-CR 3d 314.06) can be submitted as lesser included offenses of first degree murder."

Correspondingly, Note on Use No. 2 to MAI-CR3d 304.16 provides that it is to be used when under one count, one offense of the same degree is submitted by alternative instructions, such as murder in the second degree – conventional and murder in the second degree – felony. MAI-CR 3d 304.16 instructs the jury that conventional second-degree murder and felony murder are instructions that "are in the alternative and set forth different ways of committing" that offense.

Thus, contrary to the holdings in *Petary*, *Six*, and *Kinder*, a defendant does *not* have to be first found not guilty of conventional second-degree murder before the jury considers felony murder since they are alternative submissions for second-degree murder.

Beyond a presumption of prejudice, Robbie was prejudiced by the court's failure to give a lesser included offense instruction for felony murder

Even without the *Jackson* presumption of prejudice, the record shows that Robbie was prejudiced by the trial court's failure to give the felony murder instructions under the facts in this case.

A defendant is entitled to an instruction on any theory for which there exists evidence sufficient for a reasonable jury to find in his favor – even in the context of lesser-included offense instructions. *Pond*, 131 S.W.3d at 794; *Jackson*, 433 S.W.3d at 398; *Mathews v. United States*, 485 U.S. 58, 63-64 (1988); *Stevenson v. United States*, 162 U.S. 313 (1896); *Keeble v. United States*, 412 U.S. 205, 208 (1973).

Although an alibi instruction was requested and given at trial (LF764),[16] the main theme of the defense was felony murder – that even if the State proved that Robbie was present during the robbery of the Luetjens, it failed to prove that he was the shooter or otherwise took part in deliberate murder. Defense counsel argued in closing: "Even Dr. Maher agreed that he could not rule out that he heard multiple male voices on the [9-1-1] recording, and the State is asking you to make an assumption that because one of the voices on that recording sounds like Robbie's that means Robbie is the shooter. And that is a leap of an assumption that they're asking you to make" (Tr.2621-22); "And it's a great assumption that the State is asking you to make that Robbie Blurton was still in the house when the Luetjens were shot. Concerning the DNA evidence, the State is wanting you to make an assumption that the as yet unidentified man whose DNA was found on Taron Luetjen's bindings, was not the person who bound Taron Luetjen, the State

[16] As noted above, no witness actually testified that Robbie was somewhere else at the time of the murders.

wants you to assume that the so far unidentified man who left his DNA on the bindings on her wrists was not the shooter" (Tr.2622-23).

Unfortunately, the jury was not given an instruction consistent with the defense of felony murder. Instead, the jury was given an instruction *offered by the State* that was not consistent with either party's theory of the case. As noted above, in addition to the three verdict directors for first-degree murder, the State submitted, and the jury was given, verdict directors on the lesser included offense of conventional second-degree murder (alleging that Robbie purposely caused the victims' deaths by shooting them) (LF767, 771, 775). But that lesser included offense did not fit either the State's or Robbie's theories of what occurred and thus did not adequately test all the elements for first-degree murder.

In *Beck v. Alabama*, 447 U.S. 625, 627 (1980), the United States Supreme Court held that a sentence of death cannot be constitutionally imposed after a jury verdict of guilty when the jury was not permitted to consider a verdict of guilty of a lesser included non-capital offense, and when the evidence would have supported such a verdict. *Beck* held that this would violate a defendant's Eighth Amendment rights and the due process clause of the Fourteenth Amendment by substantially increasing the risk of error in the fact finding process. *Id*. "[W]hen the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense—but leaves some doubt with respect to an element that would justify conviction of a capital offense—the failure to give the jury the 'third

option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." *Id*. at 637.

"*Beck* made clear that in a capital trial, a lesser included offense instruction is a necessary element of a constitutionally fair trial." *Spaziano v. Florida*, 468 U.S. 447, 455 (1984).Further, the United States Supreme Court has not suggested that *Beck* would be satisfied by instructing the jury on just any lesser included offense, even one without any support in the evidence. *Schad v. Arizona*, 501 U.S. 624, 648 (1991).

Missouri appellate courts have found prejudice for the failure to give a lesser included offense instruction even where another lesser included offense instruction was given.

In *State v. Frost*, 49 S.W.3d 212 (Mo.App.W.D. 2001) (Breckenridge, J), the trial court instructed on second-degree murder, voluntary manslaughter and self-defense; Frost was convicted of second-degree murder. *Id*. at 216. Frost offered an involuntary manslaughter instruction, but the ourt refused it when the State argued that involuntary manslaughter would be inconsistent with the defense submission of voluntary manslaughter and self-defense. *Id*. Nevertheless, the Western District found that the refusal of the involuntary manslaughter instruction was improper because the evidence supported its submission. *Id.* at 214.

The State had argued that no prejudice existed from the refusal because had the instruction been submitted, "no reasonable basis exist[ed] to believe that the jury would have exercised even greater leniency and convicted [the defendant] of

involuntary manslaughter." *Id.* at 218. The *Frost* court disagreed. It noted that the second-degree murder and voluntary manslaughter instructions asked whether the defendant acted purposefully. *Id*. at 219-20. The only element that differed between the two was whether the defendant did so under the influence of sudden passion. *Id*. However, the proffered involuntary manslaughter instruction asked whether the defendant acted purposefully in causing the victim's death, but did so with 'an unreasonable belief' in using deadly force to preserve her life. *Id.* at 220. The court concluded that because the involuntary manslaughter instruction offered a basis that had not been before the jury and thus had yet to be rejected, "a reasonable basis exist [ed] upon which the jury could have exercised greater leniency." *Id.* at 221. The court, therefore, could not conclude that "the jury was adequately tested on the elements of second-degree murder to the extent that submission of involuntary manslaughter would have made no difference," and remanded the case for a new trial. *Id.* at 221.

Similarly, in *State v. Nutt*, 432 S.W.3d 221, 224-25 (Mo.App.W.D. 2014), transfer denied (June 24, 2014), involving a conviction for first-degree assault, the Western District determined that there was prejudice in failing to give a third-degree assault instruction despite the fact that a second-degree assault instruction *was* given. The State claimed that the submission of the second-degree assault instruction tested the jury's resolve because "it provid[ed] the jury with a lesser offense on which to convict if, in fact, it [was] not convinced beyond a reasonable doubt as to the greater offense." *Id*. at 224. The court disagreed with the State:

> [Like *Frost*], in this case, the elements of first-degree assault were not adequately tested. The proffered third-degree assault instruction asked whether Mr. Nutt attempted to cause physical injury. The submitted first- and second-degree assault instructions did not ask that question, but rather asked whether Mr. Nutt's attempt to cause serious physical injury was done with sudden passion. Because the jury did not have before it a question of whether Mr. Nutt intended his actions to cause only physical injury, we cannot conclude that the elements of first-degree assault were adequately tested by the second-degree assault instruction. Accordingly, Mr. Nutt was prejudiced by the trial court's refusal of his instruction for third-degree assault under section 565.070.1(1), and his conviction and sentence are reversed.

Id. at 225.

Here the State alleged not only that Robbie purposely caused the victims' deaths by shooting them, but also that he did so after deliberation (i.e., he coolly reflected on it). During argument, the State argued that the evidence was "overwhelming" that whoever did the murders had deliberated (Tr.2605-06).

Understandably, Robbie did *not* present a defense that he purposely caused the victims' deaths by shooting them (conventional second-degree murder), but did so without coolly reflecting on it, nor did he argue so. Such a defense would be impossible to maintain since all three victims were shot once in the head while lying on the floor with their mouths gagged and hands bound behind their backs.

See, *State v. Parker*, 509 S.W.2d 67 (Mo. 1974) (evidence did not require an instruction on conventional second-degree murder where the fatal shots were fired at the victims while they were lying on the floor). Thus, under the facts present in this case, it would have been an instruction on felony murder and not conventional second-degree murder that would have sufficiently tested the defense theory and *all* the elements for first-degree murder (not just the element of deliberation, which was not the element disputed by the defense).

If the jury believed that the course of events led down the path of felony murder/robbery committed by Robbie with someone else shooting the victims, rather than a deliberated murder committed by Robbie, it could not have convicted Robbie of second-degree felony murder as a legitimate "third option" to first-degree murder or acquittal since it was not given that "third option." The test for determining whether *Beck* is satisfied is not the number of options given to the jury; it is whether the instructions respond to the elements of the offense that may be in doubt in the State's capital case.

The conventional second-degree murder instruction did not test the disputed elements – a felony murder instruction would have. If a juror had a reasonable doubt about the State's evidence that it was Robbie's purpose to cause the victims' deaths by shooting them or having them shot, but believed that the victims were killed in the course of a robbery that Robbie was involved in, there was no appropriate verdict that described this conduct. The instructions thus denied jurors the opportunity, required by *Beck*, to return a verdict in conformity

with their reasonable view of the evidence as an alternative to an acquittal of someone whom they believed had been guilty of a serious, violent offense (felony murder).

Conclusion

The trial court was obligated to instruct the jury as to felony murder, a first-level lesser included offense to first-degree murder, because Robbie timely requested the instruction, there was a basis in the evidence for acquitting Robbie of first-degree murder (implicitly conceded by the State and the trial court since the State offered and the trial court gave a lesser included offense instruction for conventional second-degree murder), and there was a basis in the evidence for convicting Robbie of felony murder since the evidence showed that the victims were killed during the perpetration of a robbery. *Jackson*, 433 S.W.3d at 396. The jury could have found that although Robbie was initially involved in a robbery of the victims, someone else deliberately murdered them during the course of or after the robbery. Thus, the trial court erred in not instructing the jury on the lesser included offense of second-degree felony murder which was supported by the evidence at trial.

The failure of a trial court to give a first-level lesser included offense instruction that is both requested and supported by the evidence is presumed prejudicial requiring a new trial. If properly instructed, Robbie could have been found guilty of second-degree felony murder rather than first-degree murder. A new trial is required.

II.

The trial court abused its discretion in admitting testimony from Douglas Middleton and evidence (State's Exhibit Nos. 128-130) regarding the locations of cell towers purportedly used by Robbie's cell phone near the time of the murders, in violation of Robbie's rights to due process and a fair trial, as guaranteed by the 6th and 14th Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that the trial court should not have permitted Middleton to offer lay opinion testimony about cell tower location used by Robbie's phone, or admitted the maps Middleton created based on his interpretation of the cellular telephone records, because this is a subject for an expert witness, and the State did not qualify Middleton as an expert regarding cell phone tower evidence and the tracking of Robbie's cell phone at the time of the murders – in fact he admitted that he was not an expert "in anything;" and Robbie was prejudiced because the State argued to the jurors that this evidence showed that Robbie was at or near the scene of the murders when they occurred.

Issue Presented:

Where a State's witness admits that he is not an "expert in anything," that he is not an expert regarding the different factors that might affect which cell tower a cell phone would use during a call, and admits that he was not even aware of the range of cell phone towers because he was not a cell phone technician,

should that witness be permitted to testify that upon receiving cell phone records from the cell phone company, he used two software programs to plot and map the cell towers purportedly used by Robbie's cell phone at the time of the murder, placing Robbie near the scene of the murders about the time they were committed, when case law clearly holds that an expert is required to testify regarding the location of a cell phone relative to the tower to which it connects?

Facts

State's Information Analyst was not "an expert in anything"

Douglas Middleton was an information analyst with the Missouri State Highway Patrol (Tr.2337). He performed cellular telephone analysis in this case (Tr.2339-40). Regarding possible expertise in that area, when the assistant attorney general asked him, "And as you sit here, you don't profess to be an expert in anything, do you?," he replied, "No, sir." (Tr.2340). He had, however, received training at "Analyst Training School" in 2004, where he was trained to use "Pen-Link, which is a phone toll analysis software that the highway patrol uses;" Pen-Link takes records and allows them to be "searchable faster" (Tr.2340, 2343). The training instructed him on how to import records into Pen-Link and how it analyzed the records (Tr.2341).

When defense counsel asked Middleton if there were different factors that might affect which cell tower a cell phone used during a call, Middleton answered, "I'm not an expert in that matter, so I couldn't answer that question" (Tr.2387).

When he was asked about the range of cell phone towers, he said, "I'm not aware of the exact range, my understanding is it will vary with terrain" (Tr. 2387). When he was asked the follow-up question, "could be miles?," he replied, "I'm not aware, I'm not a cell phone technician" (Tr. 2387-88).

The cell phone records

After Middleton used Pen-Link to sort Robbie and Karen Bruce's phone records targeting the day of the charged crime, June 7, 2009, he got a one-page Excel Spreadsheet consisting of 14 phone calls (Tr.2347-50; State's Exhibit No. 128). That spreadsheet showed that Robbie called Bruce at 8:16 p.m. and 9:32 p.m.; Robbie called Nicole Close, who worked at a Kansas hotel, at 8:33 p.m., 8:34 p.m., 8:52 p.m., and 8:53 p.m.; and Nicole called Robbie at 9:59 p.m. (Tr.2354-60).[17]

Middleton testified that the spreadsheet also showed a beginning and ending location of the calls, which were identified by numbers (Tr.2360-61). An "L" followed by numbers is a Location Area Code, which is specific to a State; a "C" followed by numbers is the cell tower ID number and is associated with a

[17] A phone call between Robbie and Bruce would be reflected twice on the spreadsheet – one phone placing the call and the other phone receiving it (Tr.2354, 2359). There were also some phone calls from Bruce's phone to an unknown person, which are not set out here (Tr.2355).

tower location (Tr.2360-61). In order to determine the location of the cell towers, however, Middleton needed to obtain from T-Mobile a cell tower location document, which is another Excel Spreadsheet (Tr.2362).

Middleton received T-Mobile's cell tower location document by email (Tr.2362-63, 2371-72; State's Exhibit No. 131). It provided street addresses and latitudes and longitudes of cell towers (Tr.2372). Middleton then created a map of the locations of the cell towers where the phone calls "hit off of" (Tr.2373). He described what he did:

> With the phone book, which was an Excel Spreadsheet, I could filter it to narrow down the location area code, which is similar to a zip code, to only the location area codes that were in the spreadsheet from Pen-Link. And then once it pulled those location area codes, it would also list the cell tower ID number.
>
> With the cell tower ID number then, it would give me the latitude and longitude, street address, whatever information there was on the location of that tower itself.

(Tr.2370).

Middleton then took the latitude and longitudes of certain phone calls and made a map of those calls:

> [U]sing Microsoft Streets and Trips, and the latitude and longitude provided by the [T-Mobile] phone book, I created a map that identified where, where the cell towers, that the phone calls hit off of, were located at.

(Tr.2372-73). He created two maps – one an "overall map" (State's Exhibit No. 129) and the other a "close-up version" (State's Exhibit No. 130) (Tr.2373-74).

Middleton opined that, "based off the phone associated with Mr. Blurton, the time the calls were made, the cell tower locations, it shows a mode of travel Highway 7, up Highway 65 -- to Cole Camp" (Tr. 2378).

The State's closing argument

During the State's first half of opening argument, the assistant attorney general opened with the cell phone evidence:

> We have laid out, over the last few days, that on Sunday evening, June 7th, Robbie Blurton, and we have evidence of this, left Garnett, Kansas, and travelled in a direct path to the little town of Cole Camp.
>
> If you look on the map here, (indicates), you see the very first time here as being around 8:30. And then he gets to Cole Camp around 8:53 is the first time. A direct path to Cole Camp.

(Tr. 2602).

The theme continued during closing argument:

> What did Nicole Close tell you? What did the phone records tell you? Follow his (indicates) line of travel. He is calling her. All night long. He's calling her. And all of these calls are about 30 seconds, he's leaving messages. Hey, Nicole, give me a call, Hey, Nicole, give me a call, hey, Nicole give me a call.

She says, I talked to him one time about 10 o'clock. Bingo. (Indicates) Right here in Cole Camp, that's where that call's at.

(Tr.2632).

Preservation

When the assistant attorney general asked Middleton about the results he got for the relevant time period after Middleton imported the T-Mobile phone records concerning Robbie and Karen Bruce's phones into Pen-Link, Robbie objected that Middleton was not a properly qualified expert; in fact, Middleton had admitted that he had no expertise except for attending one program (Tr.2342-43, 2345-46). The trial court overruled the objection (Tr.2346).

When Middleton was questioned about using Pen-Link to sort Robbie and Bruce's phone records (Tr.2347-50; State's Exhibit No. 128), Robbie's renewed objection was overruled by the trial court (Tr.2349).

When Middleton was later asked what he did to "figure out where these phones might be," Robbie objected: 1) the tower location had not been admitted into evidence (it was admitted later); 2) Middleton's testimony had moved beyond taking phone numbers from records to him testifying about plotting locations, and 3) Middleton had not been properly qualified as an expert in doing that (Tr.2364-65, 2367).

The trial court overruled the objections because "[Middleton is] just testifying, like any other clerk, if you will, might do if they were given an assigned

task, and were told how to do the task" (Tr.2367-68). Robbie was allowed to have a continuing objection (Tr.2368).

When the State offered into evidence two maps identifying cell towers that Middleton testified the phone calls had used, which he had created by using the cell phone records, Pen-Link, and Microsoft Streets and Trips, Robbie's renewed objection was again overruled (Tr.2373-74; State's Exhibit Nos. 129, 130).

Point 83 of the motion for new trial claimed that the trial court erred in overruling Robbie's objection and allowing Doug Middleton to testify as an "expert" concerning specific data purportedly contained within T-Mobile phone records concerning cell tower technology (LF 928-29). Middleton was not properly qualified to testify as an expert in cell phone or tower technology and the State did not lay sufficient foundation for Middleton to interpret the data contained within the T-Mobile records (LF 929). Middleton was allowed to testify, over objection, as to the locations of cell towers in the area between Garnett, Kansas and Cole Camp, Missouri and the locations of cell towers purportedly used during phone calls made from the number associated with Robbie (LF 929).

Standard of Review

A trial court has broad discretion to admit evidence at trial, including expert testimony. *State v. Daniels*, 179 S.W.3d 273, 280 (Mo.App.W.D. 2005). An exercise of this discretion will not be disturbed unless it is clearly against the logic of the circumstances. *State v. Reed*, 282 S.W.3d 835, 837 (Mo.banc 2009).

A proper foundation must be laid to establish the expertise of a witness. *State v. Manzella*, 128 S.W.3d 602, 609 (Mo.App.E.D. 2004). It is within the discretion of the trial court to determine whether a proper foundation was established. *Id.* The proponent must show that the witness had sufficient knowledge and experience and was acquainted with the subject matter. *Id.* A trial court's erroneous admission of a State's expert's testimony can result in the defendant being deprived of due process and a fair trial. *Ege v. Yukins*, 485 F.3d 364, 374-79 (6th Cir. 2007).

Evidentiary decisions of the trial court are reviewed, in the context of the whole trial, to ascertain whether the defendant received a fair trial. *State v. Walkup*, 220 S.W.3d 748, 757 (Mo.banc 2007). For evidentiary error to cause reversal, prejudice must be demonstrated. *Reed*, 282 S.W.3d at 837. The question is whether there is a reasonable probability that the evidence complained of might have contributed to the conviction. *U.S. v. Chapman*, 386 U.S. 16, 22 (1967). Improperly admitted evidence should not be declared harmless unless it is harmless without question and it is clear that the fact finder was not influenced by or disregarded the evidence. *State v. Duncan*, 27 S.W.3d 486, 488 (Mo.App.E.D. 2000). The inquiry is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). *Also see, Kotteakos v. United States*, 328 U.S. 750, 757-759 (1946), which held, "[I]t is not the appellate court's function to

determine guilt or innocence. Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out."

Cell phone location in relation to the cell sites is a subject for expert testimony

In Missouri, expert testimony is admissible if it is clear that the subject of such testimony is one upon which the jurors, for want of experience or knowledge, would otherwise be incapable of drawing a proper conclusion from the facts in evidence. *State v. Patton*, 419 S.W.3d 125, 131 (Mo.App.E.D. 2013) (expert testimony was required to determine the defendant's location based on cell phone site data). Expert testimony is proper if the subject is one with which lay jurors are not likely to be conversant, but if the subject is one of everyday experience, then expert testimony is properly rejected. *Id*.

Courts of other jurisdictions have differed on the question of whether an expert is required to testify regarding the location of a cell phone relative to the tower to which it connects. Contrast *Wilder v. State*, 191 Md.App. 319, 991 A.2d 172, 199-200 (2010) (Plotting the defendant's location according to cell site records required expert testimony), with *Perez v. State*, 980 So.2d 1126, 1131-32 (Fla.Dist.Ct.App.2008) (an expert is not required to explain the concept of access site and how it generally related to cellular telephone company records). Missouri requires expert testimony regarding the location of a cell phone relative to the tower to which it connects. *Patton, supra*.

In *Patton*, the Eastern District addressed a situation where the State, in order to place Patton near the crime scene at the time of the shootings, presented a map showing the locations of the cell sites to which Patton's phone connected and the times at which those connections occurred. *Patton*, 419 S.W.3d at 129, 132. The State's lay witness, Emily Blackburn,[18] used a map to show that Patton's cell phone connected to two cell sites in the vicinity of Patton's cousin's house several hours before the shooting, connected to three cell sites in the vicinity of the crime

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[18] The State's Respondent's Brief in *Patton* said the following regarding Ms. Blackburn's qualifications:

> Ms. Blackburn testified that she was a crime analysis unit manager for the St. Louis Metropolitan Police Department, and she had been with the Department for four-and-a-half years. (Tr. 550-51). Ms. Blackburn testified as to her education and training and specified that she attended the International Association of Crime Analysts training specific to crime mapping and an intermediate and advanced class on crime mapping. (Tr. 551-52). Ms. Blackburn further testified that she attended "various workshops at conferences for people in [her] profession specific to cell phone mapping and utilizing cell phones in criminal investigations." (Tr. 552).

2013 WL 3363827, at *17-18 (Mo.App. E.D. 2013).

scene near the time of the shootings, and connected again to sites near his cousin's house several hours after the shootings. *Id*. at 132. Blackburn also testified that several factors affect whether a phone connects to a particular site, but that a phone will usually connect to the closest one. *Id*.

The *Patton* court recognized that cellular phones are a subject of everyday experience, and that little technical knowledge is required to understand that a phone will connect to the cell site with the strongest signal. *Id*. at 131. But the court noted that it is impossible to determine from historical cell site data alone that a phone was closest to the cell site processing the call, and at best those records only indicate that a phone was located somewhere within a cell site's geographic coverage area. *Id*. The *Patton* court concluded that the trial court erred by failing to require an expert witness to testify as to the location of Patton's phone in relation to the cell sites to which it connected. *Id.* at 132.

In *Wilder*, the defense moved in limine to exclude testimony about how the police managed to track Wilder's movements, at or near the time of the shootings, by use of cellular telephone records. *Wilder*, 991 A.2d at 188. The trial court overruled the motion in limine, and the detective then testified about how he was able to track Wilder's whereabouts through the use of cellular telephone tracking and Global Positioning System (GPS) technology. *Id.* at 190-91. During this testimony, defense counsel objected to the detective testifying that he confronted the defendant with cellular telephone records that contradicted his account of the events that allegedly transpired. *Id*. Defense counsel also objected to the

detective's description of the software that he used to create a map of the locations where Wilder made cell phone calls before, during and after the shooting. *Id.* Finally, when the State moved to admit an exhibit, *i.e.*, a printout of the software-created map, defense counsel objected again. *Id.* The map was admitted over Wilder's objection. *Id.* Later, the detective testified that he had used the technique of charting telephone call locations in the computer software "approximately 25" times. *Id.* at 192-93.

The *Wilder* court determined "that the better approach is to require the prosecution to offer expert testimony to explain the functions of cell phone towers, derivative tracking, and the techniques of locating and/or plotting the origins of cell phone calls using cell phone records." *Id.* at 198. Although "cellular telephone technology has become generally understood," any opinion derived from a witness's experience or training must be admitted as expert testimony. *Id.* at 199-200. The *Wilder* court concluded that the detective should have been qualified as an expert because his training and experience enabled him to map the defendant's locations based on his cellular telephone records:

> …[The detective's] testimony implicated much more than mere telephone bills. He elaborated on the information provided by the cell phone records – the bills and records of calls- by his use of a Microsoft software program to plat location data on a map and to convert information from the cellular phone records in order to plot the locations from which Wilder used his cell

> phone. This procedure clearly required "some specialized knowledge or skill … that is not in the possession of the jurors [.]"

Id. at 200 (citation omitted). Thus, the trial court should not have permitted the detective to offer lay opinion testimony about the cell site location, and to describe the map created based on the cellular telephone records. *Id*. The appellate court reversed for a new trial finding that the testimony was not harmless beyond a reasonable doubt. *Id*.

Similarly, in *Coleman–Fuller v. State*, 192 Md.App. 577, 995 A.2d 985 (2010), prior to trial, the defendant filed a motion *in limine* seeking to preclude a detective from testifying as to the manner in which the records of the defendant's cell phone were utilized to establish the defendant's location at times before, during, and after the murder. *Id.* at 1006. The motion contended that such evidence required expert testimony and that the detective was not an expert. *Id.* The trial court denied the motion. *Id.*

During trial, a detective "testified extensively from the cell phone records of two cell phones recovered from [*the defendant*] at the time of his arrest." *Id.* at 992. Over defense counsel's objection, the detective used the records and cellular telephone tower sites to illustrate *the defendant's* locations before, during and after the murder. *Id.* During the trial, the detective also testified that he was qualified to decipher cellular telephone records because he "attended a school for cell phone analysis, a two-day school" and had "been doing this – as well as then talking to

engineers to the carriers, to our tech guys, reviewing cell phone records for a number of years." *Id.* at 1007.

On appeal, the *Coleman-Fuller court* noted that only a person with training and experience would know that cellular telephone technology permits individual phones to function by locking onto the nearest side of the nearest and/or strongest tower. *Id.* at 615, 995 A.2d 985. The court concluded:

> Patently, the testimony of Detective Childs is equivalent with that of the detective in *Wilder.* Similar to the detective in *Wilder,* utilizing the data from the cell phone records, Detective Childs rendered an opinion on [*the defendant's*] location at the time of the calls, stating that the phone records were consistent with [*the defendant's*] presence in the vicinity of the murder around the time it happened. From the cell phone records, he testified that he was able to determine whether the location of individuals was consistent with their statements to police and their testimony. Neither Detective Childs nor the detective in *Wilder* were qualified as experts, but rather, stated that their training was the result of certification from the cell phone company. Under our holding in *Wilder,* it was clearly error for the court to admit this evidence without expert testimony. On remand, this evidence may only be introduced through a witness qualified as an expert.

Id., at 1010.

Finally, in *Payne & Bond v. State*, 211 Md. App. 220, 237-41, 65 A.3d 154, 164-66 *cert. granted*, 434 Md. 311, 75 A.3d 317 (2013), a detective obtained

Payne's and Bond's cell phone records from Sprint Nextel in the form of a spreadsheet. *Id*., 65 A.3d at 166-67. He extracted their records from that spreadsheet, limiting them to the dates in question. *Id*. at 167. According to the detective, the cell tower information was obtained by matching the "lag ID" and the "cell ID" to the table and, utilizing this information as well as information available on the Sprint Nextel Web Site, the latitude and longitude of the tower can be determined by use of mapping software. *Id*. After using this procedure, the detective testified that Bond's cell phone registered off a cellular tower at a latitude and longitude located approximately one half to two miles away from the crime scene at approximately the time when the crime occurred. *Id*. He further testified that another call had been placed from Bond's cell phone registering off a cellular tower at the latitude and longitude of a location about one mile from the crime scene, at around the time emergency personnel responded to the scene. *Id*. The detective thereafter identified the map which had been generated as a mapping program that depicted the aforesaid locations. *Id*. Finally, the detective testified that Payne's cell phone activated off one of the towers located in proximity to the crime at about the time gunfire had been fired. *Id*. at 156, 167.

The appellate court in *Payne & Bond* followed *Wilder* and *Coleman-Fuller*, reversing for a new trial, holding that the trial court erred in admitting the detective's testimony regarding cell phone tower evidence in tracking of the location of the defendants at the time of the murders. *Id*. at 167.

Similar to these cases, the trial court abused its discretion in allowing Middleton's testimony regarding cell phone tower evidence in tracking Robbie's locaton on the day of the murders. Middleton was not an expert witness. He said so himself: "And as you sit here, you don't profess to be an expert in anything, do you?," he replied, "No, sir." (Tr.2340). He conceded, "I'm not an expert in that matter [different factors that might affect which cell tower a cell phone used during a call], so I couldn't answer that question" (Tr.2387); and, he was "not aware [of the range of cell phone towers], I'm not a cell phone technician" (Tr. 2387-88).

Thus, Middleton should not have been allowed to give testimony asserting that the records established that Robbie's cell phone was in Cole Camp near the time of the murders (e.g., "based off the phone associated with Mr. Blurton, the time the calls were made, the cell tower locations, it shows a mode of travel highway 7, up Highway 65 -- to Cole Camp" (Tr. 2378)). The trial court abused its discretion in allowing Middleton to testify regarding *his interpretation* of the data contained within the T-Mobile records, and to testify, over objection, as to the locations of cell towers purportedly used by Robbie's cell phone immediately prior to the murders.

Robbie was prejudiced by this cell phone evidence. The State argued that Middleton's testimony established Robbie's guilt: "on Sunday evening, June 7th, Robbie Blurton, and we have evidence of this, left Garnett, Kansas, and travelled in a direct path to the little town of Cole Camp. … And then he gets to Cole Camp

around 8:53 is the first time. A direct path to Cole Camp" (Tr. 2602); Nicole Close "says, I talked to him one time about 10 o'clock. Bingo. (Indicates) Right here in Cole Camp, that's where that call's at" (Tr.2632).

Thus, it cannot be said that that the jury was not influenced by the cell phone evidence, *Duncan*, 27 S.W.3d at 488, or that the guilty verdicts rendered in this trial were surely unattributable to the error. *Sullivan*, 508 U.S. at 279. This court cannot say that the error in the admission of Middleton's testimony, as well as the maps he made, did not contribute to the verdicts in this case. That evidence was used for the sole purpose of placing Robbie at or near the scene of the murders at the time they were committed. Robbie's convictions must be reversed and the cause remanded for a new trial.

III.

The trial court abused its discretion in overruling Robbie's objection to fingerprint analyst Hunt testifying that other experts at the lab where she worked had gone through the same process she had and verified her conclusions about fingerprints found at the crime scene, and as a result of the peer review process, she felt confident in her conclusions since there "weren't issues," because this violated Robbie's rights to due process, a fair trial, and confrontation and cross-examination as guaranteed by the 6th and 14th Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that Hunt's testimony about other experts going through the same process she had, verifying her conclusions, and not turning up any "issues," improperly bolstered Hunt's opinions with the opinions of other experts who were not subject to cross-examination; Robbie was prejudiced by this verification evidence because Hunt's testimony physically linked Robbie to the crime.

Facts

A latent print examiner, Mary Kay Hunt, examined latent fingerprints found on a white coffee cup found at the crime scene (Tr.1671, 1674, 2216, 2243, 2245, 2247-48, 2259-60, 2269-76). Hunt believed that Robbie had made five fingerprints on the cup; she could not say how long they had been there (Tr.2270-71, 2276-78, 2280-82, 2326-26).

During Hunt's testimony, she said that her lab had a "peer review protocol when [she made] an identification in a case" (Tr.2253). She elaborated,

> Anytime we have an identification, at least at the time this was, all identifications had to be verified by another examiner going through the same process I did when I compared it and identified it.

(Tr.2253). That had been done in this case too; she believed that there had been at least two "verifiers" (Tr.2253).

Defense counsel objected to Hunt testifying to what other analysts' opinions about the evidence because it violated "Crawford versus Washington" (Tr.2253). The assistant attorney general noted that Hunt had not testified about what any other analysts decided; rather, she had just described the peer review process (Tr.2254). The trial court replied, "Yeah, leave it at that" (Tr.2254). The court continued,

> Okay. She should, she should not testify as to what somebody else may have said or anything like that, but as part of the foundation, the process was that helps her reach her conclusions, I think you're going to ask her, that will be allowed. So the objection to hearsay is sustained. She hadn't gotten there, but I knew you were anticipating that.

(Tr.2254).

The assistant attorney general then asked, "And, Ma'am, the peer review process that you went through, did that help you, I don't know, feel confident in your conclusions that you reached in this case?" (Tr.2254). She responded, "sure,"

and was then asked the follow-up question, "Don't tell me what these folks concluded, but there weren't issues were there?," to which she replied, "No, there were not" (Tr.2255).

Defense counsel renewed his objection, noting that the question covered the same matter, it was just asked in a different manner (Tr. 2255). The trial court overruled the objection (Tr.2255).

While Hunt was later testifying about a latent print found on the coffee cup, which in her opinion matched Robbie's known print, the assistant attorney general asked Hunt if she had sent her results through the same peer review process at the crime lab that she had described earlier (Tr.2262-64, 2269-70).

Defense counsel again objected that this violated "Crawford versus Washington" (Tr.2264). The trial court sustained the objection "as to the form of the question" (Tr.2264).

Undaunted, the assistant attorney general asked Hunt, "What is, again, the protocol of the crime lab when you've made an identification of a fingerprint?" (Tr.2264). Hunt again testified that it was verified by another qualified examiner (Tr.2264).

Defense counsel objected that Hunt's testimony "not only violates Crawford versus Washington, but it's also bolstering" (Tr.2264). The trial court overruled the objection as to bolstering (Tr.2264). Defense counsel argued, "what it boils down to is that she's essentially telling this jury that somebody else looked

at it and said, yes, you're right, and that's, that is the message that's being sent to the jury" (Tr.2265).

The trial court agreed and ordered the jury to disregard Hunt's answer:

> The last answer of the witness, which was with respect to a protocol followed in the lab regarding forming opinions, the witness offered some information with respect to what some other person may have done or said, and the jury is instructed to disregard that portion of the answer, not to consider it when you retire to deliberate on the case.

(Tr.2265, 2267).

Point 29 of Robbie's timely motion for new trial alleged that the trial court erred when it overruled his objection to Hunt's testimony about being confident in her results following peer review of her testing (LF896-97). This denied Robbie his rights to due process, fair trial, and to confront and cross-examine witnesses, guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution (LF897).

Standard of Review

This Court generally reviews a trial court's decision to admit hearsay testimony for an abuse of discretion. *State v. Bell,* 950 S.W.2d 482, 484 (Mo.banc 1997). But whether admission of challenged testimony violates the Confrontation Clause is a question of law, which this Court reviews *de novo. State v. Justus*, 205 S.W.3d 872, 878 (Mo.banc 2006).

Evidentiary decisions of the trial court are reviewed, in the context of the whole trial, to ascertain whether the defendant received a fair trial. *State v. Walkup*, 220 S.W.3d 748, 757 (Mo.banc 2007). When a court admits evidence that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991).

"Properly preserved confrontation clause violations are presumed prejudicial." *Justus*, 205 S.W.3d at 881. This Court will uphold the trial court's ruling only if the error was "harmless beyond a reasonable doubt." *Id*. (citation omitted). "Harmless error is demonstrated 'only if there could be no reasonable doubt that the error's admission failed to contribute to the jury's verdict.'" *Id*. (citation omitted). The inquiry is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

Analysis

The Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him. . . ." The Sixth Amendment is applicable to criminal proceedings in state courts through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 406 (1965). The Missouri Constitution additionally provides that "in

criminal prosecutions the accused shall have the right to . . . meet the witnesses against him face to face. . . ." *Mo. Const., Art. I, § 18(a).*

In *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), the United States Supreme Court held that the Confrontation Clause does not allow the admission of testimonial statements of a witness who did not appear at trial unless the witness was unavailable to testify and the defendant had had a prior opportunity for cross-examination. If the statement is found to be testimonial, the Sixth Amendment demands what the common law required - in-court confrontation or unavailability and a prior opportunity for cross-examination. *Id.* at 68. A statement is testimonial if it is given while there was no emergency in progress and is made for the purpose of establishing or proving past events potentially relevant to later criminal prosecution. *Davis v. Washington*, 547 U.S. 813, 822, 829 (2006). Laboratory reports have been found to be testimonial evidence. *See, State v. March*, 216 S.W.3d 663 (Mo.banc 2007); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 321 (2009).

In a related vein, hearsay is any out-of-court statement that is used to prove the truth of the matter asserted and that depends on the veracity of the statement for its value. *State v. Sutherland*, 939 S.W.2d 373, 376 (Mo.banc 1997). "The essential principle of the hearsay rule is to secure trustworthiness of testimonial assertions by affording the opportunity to test the credit of the witness, and it is for this reason that such assertions are to be made in court subject to cross-examination." *State v. Kirkland*, 471 S.W.2d 191, 193 (Mo. 1971). It is also a

violation of the hearsay rule to set up a set of circumstances by the testimony of a witness which invites the inference of hearsay. *State v. Valentine*, 587 S.W.2d 859, 861 (Mo.banc 1979).

Hunt's testimony invited the inference of hearsay and denied Robbie his right to cross-examine and confront the two fingerprint "verifiers" that reviewed Hunt's work and confirmed her results, thus bolstering her conclusions.

Hunt first testified that other verifiers (she believed it was two), had gone through the same process that she did when she compared and identified the fingerprints (Tr.2253). Although the trial court ultimately sustained defense counsel's objection, that was done out of the jury's presence so the jury was not informed of the court's ruling; thus, they certainly considered that part of her testimony (Tr.2253-54). *See*, *State v. Robinson***,** 111 S.W.3d 510, 514 (Mo.App.S.D. 2003), holding that an appellate court is required to assume that the jury considered the improperly-admitted evidence as it reached its verdict.

Hunt then affirmed that as a result of the "peer review process," she felt confident in her conclusions and after that review had been done, "there weren't issues" (Tr.2255). Defense counsel's objection was overruled to this questioning, which in essence repeated the early testimony that the trial court had sustained defense counsel's objection (Tr.2253-54). Thus, for a second time the jury was told that other experts had reviewed her conclusions, confirmed them, and found no issues in her work.

Hunt later testified that her fingerprint identifications were verified by "another qualified examiner" (Tr.2264). The jury was ordered to disregard that portion of her answer about "some information with respect to what some other person may have done or said" (Tr.2267).[19]

In *State v. Wicker*, 66 Wash.App. 409, 832 P.2d 127 (1992), a police identification technician (Anderson) examined three latent fingerprints and determined that they matched Wicker's fingerprints. *Wicker*, 832 P.2d. at 128. At trial, not only did Anderson testify about his identifications, but he also testified that it was standard procedure for his comparison to be "verified" by another technician; the comparison is verified if the other technician agrees with the conclusion. *Id*. Anderson testified that his identification in Wicker's case was verified by Karen Tando, demonstrated by her initials on the fingerprint card. *Id*.

On appeal, Wicker asserted that evidence of Tando's verification was inadmissible hearsay. *Id*. at 129. The appellate court held that the combination of Anderson's testimony and Tando's initials was "classic hearsay" because they amounted to an assertion of Tando's opinion that the sets of prints matched. *Id*. It also violated Wicker's right to confrontation. *Id*. at 130. The objection should have

[19] *See, State v. Rayner***,** 549 S.W.2d 128, 133 (Mo.App.W.D. 1977) (inadmissible evidence cannot always be purged by the simple expedient of instructing a jury to disregard it).

been granted. *Id*. Wicker was entitled to a new trial even though the State did not stress Tando's confirmation opinion in closing argument. *Id*.

In *People v. Smith*, 256 Ill.App.3d 610, 628 N.E.2d 1176 (1994), a fingerprint examiner (McCarthy) compared a fingerprint on a purse involved in a robbery with Smith's fingerprints and, in her opinion, they were the same. *Smith*, 628 N.E.2d at 1179. McCarthy also testified that her identification was "verified" by another fingerprint examiner (Wicevic). *Id*. Smith's hearsay objection was overruled. *Id*. The appellate court held that McCarthy's testimony that Wicevic verified her fingerprint identification was clearly hearsay and improperly bolstered McCarthy's testimony, which required a new trial. *Id*. 1181-82.

In *State v. Connor*, 156 N.H. 544, 937 A.2d 928 (2007), a State fingerprint examiner (Jackson) testified that fingerprints found on a jar that had been used in an arson matched the defendant's fingerprints. *Connor*, 937 A.2d at 929-31. Jackson also testified that a second technician (Corson) had verified his findings. *Id*. The defendant objected that this testimony was hearsay and violated his right to confrontation, citing *Crawford*, and moved to strike Jackson's testimony. *Id*. at 930. The trial court denied the motion. *Id*. The appellate court found that Jackson's testimony about Corson's verification of his findings was hearsay. *Id*. 930-32. The *Connor* court declined to rule on the *Crawford* issue since they agreed with Connor on the hearsay grounds. *Id*. at 932.

In *State v. Langill*, 161 N.H. 218, 13 A.3d 171 (2010), a criminalist (Corson) testified that a latent fingerprint found at the crime scene belonged to the

defendant. *Langill*, 13 A.3d at 173-74. When the prosecutor asked Corson if her work had been verified, the defendant objected, arguing that it was hearsay and violated his right to cross-examine witnesses against him. The trial court agreed that the verification testimony was hearsay, but overruled the defendant's objection, relying upon the business records exception to the hearsay rule and allowed the State to present evidence that Corson's opinion had been verified. *Id*. at 174. Corson testified that her work was verified by another examiner (Jackson). *Id*.

The appellate court reversed for a new trial, finding that Corson's testimony regarding the verification constituted inadmissible hearsay. *Id*. at 175-79. The court noted that the ordinary definitions of "verify" include "to prove to be true: establish the truth of" and "to swear or affirm the truth of," *id*. at 177, *quoting Webster's Third New International Dictionary* 2543 (unabridged ed.2002). Implicit in Corson's testimony that Jackson had verified her conclusion was the statement Jackson had performed the same analysis, and, like Corson, reached the conclusion that the latent print matched the defendant's print. *Id*. This implicated the problem the rule against hearsay is designed to address: when the primary examiner testified about the verification, the defendant was unable to challenge the second examiner's statement that the prints matched. *Id*. at 178.

In *Langill*, the trial court also gave two limiting instructions. *Id*. The first reminded that jury that Jackson did not testify and thus the only opinion before it with regard to finger identification was that of Corson and not of Jackson. *Id*.

Thus, the jury was *not* to consider the verifier's work in that case as an additional opinion or as any way a supplement of Corson's opinion; the jury had to consider Corson's opinion on its own merits without regard to the verifier's actions. *Id.* The second limiting instruction reminded the jury that since the only expert opinion before it with regard to fingerprint identification was that of Corson, the jury was not to consider any other examiner's work in that case as an additional opinion or in any way as a supplement of Corson's opinion; the jury had to consider Corson's opinion on its own merits without regard to any other examiner's action in the matter. *Id*. The *Langill* court held that these instructions did not cure the error; the instructions still permitted the jury to conclude that Corson's work had been verified, which was tantamount to testimony that Jackson had affirmed the truth of Corson's match and had similarly concluded that the latent print matched the defendant's print, and thus was hearsay. *Id*.

In *Teifort v. State*, 978 So.2d 225 (Fla. 4th DCA 2008), the State's fingerprint expert testified that, under departmental policy, the fingerprint in question had been compared by two other examiners, who had identified the defendant's fingerprint. *Id*. at 226. The trial court overruled the defendant's objection that this testimony was improper bolstering. *Id*. The appellate court reversed the trial court's ruling and held that experts cannot bolster their opinions with the opinions of other experts who do not testify because the other expert is not subject to cross-examination. *Id*.

Like these cases, Hunt's opinions were improperly bolstered by other expert, the "verifiers," who confirmed her opinions without Robbie being able to cross-examine or confront them. Robbie was prejudiced by this verification evidence because Hunt's expert fingerprint testimony physically linked Robbie to the crime. Thus, any evidence bolstering her testimony was critical. Because of the importance of Hunt's testimony, this Court cannot find beyond a reasonable doubt that the admission of this evidence did not contribute to the jury's verdict. *Justus*, 205 S.W.3d at 881. A new trial is required.

IV.

The trial court abused its discretion in partially granting the State's Motion in Limine Concerning the Possible Defense that Someone Else Committed this Crime, which resulted in the jury not hearing evidence that about two hours before the charged murders, Karen Wiskur saw a woman, whom Wiskur later identified as Debra Kost, exit the victims' home, light a cigarette, talk on a cell phone while pacing back-and-forth for 10-15 minutes, extinguish her cigarette on the bottom of her shoe, put the cigarette butt in her jeans' pocket, flip her phone shut, and go back inside the victims' home, and when Kost was later questioned about being there, she denied it, and in precluding the defense from arguing that Kost was involved in the murders without first presenting an additional overt act connecting Kost with the murders, because this denied Robbie's rights to due process, a fair trial and to present a defense as guaranteed by the 6th and 14th Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that Robbie was entitled to present evidence that this woman might have been involved in the murders, which was consistent with the defense that more than one person was involved in the robbery and subsequent murders of the victim, and this evidence was an act directly connecting this woman with the murders and it also established her motive, opportunity, and consciousness of guilt for the robbery/murders.

Evidence that someone else was involved in the homicides was excluded

Before trial, Robbie endorsed Karen Wiskur as a witness (Tr.529). The State filed a Motion in Limine Concerning the Possible Defense that Someone Else Committed this Crime (LF667). The motion specifically mentioned that Taron's biological mother, Debra Kost,[20] might be blamed for the murders by the defense and that Wiskur might be called to testify that at about 8:00 p.m. on the night of the murders, Wiskur saw Kost outside the Luetjen home talking on her cell phone while smoking a cigarette and then putting her extinguished cigarette inside her pocket before entering the home (LF668).

During a hearing on that motion, the State again noted that Wiskur would testify that at about two hours before the murders, she saw a woman, whom Wiskur later identified as Kost, standing outside of the victims' home (Tr.529-30).[21] The woman was on a cell phone and smoking a cigarette (Tr.530). After the woman finished the phone call, she put out the cigarette, put it into her pocket, and walked inside the house (Tr.530).

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[20] Kost had been married to a son of the Luetjens, and after that son died in an automobile accident, a custody dispute concerning Taron arose between Kost and the Luetjens (Tr.530-531).

[21] Kost testified in an offer of proof concerning this issue and denied being at the victims' residence on the day of the murders (Tr.1753, 1757-58).

The State admitted that this was motive evidence, since Kost had not been allowed to see Taron, and thus she was upset at the Luetjens (Tr.531). But the State argued that the evidence was inadmissible unless there was additional "direct" evidence connecting Kost to the murders (Tr.531).

Defense counsel noted that Kost's cellphone records reflected that she had been using her phone "every few minutes every day," except that, mysteriously, on the day of the murders, she did not use her phone at all (Tr.538). Defense counsel also noted that Wiskur had identified Kost through a photo lineup (Tr.538-39). Wiskur had been across the street and saw Kost enter the house, but Wiskur never saw Kost exit the house before Wiskur left the scene (Tr.539). Defense counsel argued that Kost's physical presence at the murder scene was a "direct connection" to the murders (Tr.539). Defense counsel asserted that granting the State's motion would violate his rights to due process, effective assistance of counsel, to confront witnesses, and to present a defense, as guaranteed under the United States and Missouri Constitutions (Tr.541).

The trial court ruled that the defense would be allowed to present evidence "of Debra Kost, who may've been at or near the scene of the homicide" (Tr. 550-51, 552). The defense would be allowed to present any other evidence that directly connected Kost with the murders by way of an offer of proof outside the hearing of the jury (Tr.550-51, 552). If the defense presented other evidence that directly connected Kost with an overt act in the commission of the murders, more than just her mere presence at the scene prior to the murders, the evidence would be

allowed to be presented to the jury, if otherwise admissible (Tr.551). But failure of the defense to present such an overt act connecting Kost with the murders would result in the exclusion of any argument that Kost committed the murders (Tr.551).

Point 12 of Robbie's timely motion for new trial claimed that the trial court erred by granting in part the State's Motion in Limine Concerning the Possible Defense that Someone Else Committed this Crime (LF882-86). This denied Robbie his rights to due process, a fair trial, and to present a defense, as guaranteed by the United States and Missouri Constitutions (LF883). The motion acknowledged that the trial court had ruled that the defense could present evidence that Kost was seen at the Luetjen home on or about 8:00 p.m. on the day of the murders, but the motion complained that the defense could not present any other evidence concerning Kost's alleged presence without first establishing a direct connection between Kost and the murders (LF883). If not for the court's ruling, Robbie would have presented Wiskur's testimony that between 8:00-8:25 p.m. on the night of the murders, she was parked near the Luetjen home when she saw a woman exit the Luetjen home, light a cigarette, talk on a cell phone while pacing back-and-forth for 10-15 minutes, put out her cigarette on the bottom of her shoe, put the cigarette butt in her jeans' pocket, flipped her phone shut, and go back inside the Luetjen home (LF883-84). Wiskur later identified the woman in a photo lineup as being Kost (LF884). Wiskur described the woman: "her face was kind of hollow like she didn't have any teeth or not many teeth," and "having dark eyes and a pale complexion" (LF884). If not for the trial court's ruling, the defense also

would have presented evidence that Kost denied being at or near the Luetjen home on the night of the murders (LF885-86).

Standard of Review

This Court reviews the trial court's decision to exclude evidence offered by the defense for abuse of discretion. *State v. Sanders*, 126 S.W.3d 5, 20 (Mo.App.W.D. 2003). This Court will interfere with a trial court's discretionary ruling on the exclusion of evidence when there is a clear showing of abuse of that discretion. *Id*. This court will not disturb the trial court's ruling unless the abuse resulted in prejudice to the defendant. *State v. Ray*, 945 S.W.2d 462, 469 (Mo.App.W.D. 1997). Error in a criminal case is presumed to be prejudicial, unless rebutted by the facts and circumstances of the case. *Id*.

The right to present a defense

"The Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 688 (1986); *Olden v. Kentucky*, 488 U.S. 227 (1990). The rights of an accused in a criminal trial to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *State v. Brown*, 103 S.W.3d 923, 929 (Mo.App.W.D. 2003).

Further, a defendant has a constitutional right to a fair and impartial trial. *State v. Hill*, 817 S.W.2d 584, 587 (Mo.App.E.D. 1991). If the defendant is deprived of the opportunity to present relevant evidence to the jury, his rights under the Sixth and Fourteenth Amendments to the United States Constitution may have been violated. *Id*. Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the United States Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (exclusion of defense evidence of third-party guilt denied the defendant of a fair trial).

The relevancy of evidence depends on whether the evidence tends to confirm or refute a fact in issue or to corroborate evidence which is relevant. *State v. Ray*, 945 S.W.2d 462, 467 (Mo.App.W.D. 1997). Evidence need only be relevant, not conclusive, and it is relevant if it logically tends to prove a fact in issue or corroborates relevant evidence which bears on the principal issues. *State v. Richardson*, 838 S.W.2d 122, 124 (Mo.App.E.D. 1992). When considering questions of relevancy, trial courts must be mindful that a defendant's right to offer testimony of witnesses is the right to present a defense and is a fundamental element of due process. *State v. Brown*, 549 S.W.2d 336, 340 (Mo.banc 1977).

The court excluded evidence that another person was involved in the murders

"Generally, a defendant may introduce evidence tending to show that another person committed the offense, if a proper foundation is laid, unless the probative value of the evidence is substantially outweighed by its costs (such as undue delay, prejudice or confusion)." *State v. Barriner*, 111 S.W.3d 396, 400 (Mo.banc 2003). Evidence that another person had an opportunity or motive to commit the crime is not admissible just to cast bare suspicion on another person. *State v. Woodworth*, 941 S.W.2d 679, 691 (Mo.App.W.D. 1997). "When the evidence is merely that another person had opportunity or motive to commit the offense, or the evidence is otherwise disconnected or remote and there is no evidence that the other person committed an act directly connected to the offense, the minimal probative value of the evidence is outweighed by its tendency to confuse or misdirect the jury." *State v. Bowman*, 337 S.W.3d 679, 686 (Mo. banc 2011). But evidence that another had opportunity or motive is admissible if there is also proof that the other person committed some act directly connecting him with the crime. *Woodworth*, 941 S.W.2d at 691. *Cf. State v. Butler*, 951 S.W.2d 600, 606-08 (Mo. banc 1997) (evidence linking victim's nephew, not husband, to the crime would have been admissible and attorney was ineffective for not investigating and presenting it).

The proposed evidence satisfies this test. Evidence of an accused's opportunity, motive, and consciousness of guilt is sufficient to support a first-degree murder conviction. *State v. Norman*, 243 S.W.3d 466, 470 (Mo.App.S.D.

2007). And while there is no requirement that the defense has to prove that the other person did it, if these three factors are enough to affirm a conviction, they ought to be enough to allow the defense to present the evidence to that jury to show that someone else might have been involved in the murders.

Here there was evidence that Kost had a motive to murder the Luetjens; in fact, the State conceded that Kost had a motive to commit the murders (Tr.531).[22] There was also evidence that Kost had the opportunity to be involved in the murders – Wiskur saw her reenter the home about two hours before the murders (Tr.529-30, 538-39). There was also evidence of consciousness of guilt – Wiskur saw Kost put an extinguished cigarette in her pants pockets (Tr.529-33, 539). The jury could have concluded that this woman was somehow involved in the later robbery since, after calling someone on the phone, she took the unusual, suspicious action of putting an extinguished cigarette in her pocket, as ensuring that this potential carrier of her DNA would not be left at the scene. Further evidence of consciousness of guilt existed in that although Wiskur positively identified Kost as being at the victims' home two hours before the murder, Kost denied being there to law enforcement (Tr.533). Exculpatory statements, when proven false or contradicted, evidence a consciousness of guilt. *State v. Rodden*, 728 S.W.2d 212, 219 (Mo.banc 1987).

[22] Further evidence of motive was excluded by the trial court. See Point V.

Robbie acknowledges that it might be that Wiskur was wrong in her identification of Kost. But that does not preclude the refused evidence. First, that is for the jury to resolve. Second, evidence that a woman was acting suspiciously outside the victims' home two hours before the murder is relevant evidence regardless if it was Kost, particularly when the main defense argued by defense counsel was that even if the State proved the Robbie was at the murder scene, the State failed to prove that he was the shooter and that someone else might have been involved in the robbery of the Luetjens and shot them (Tr.2621-23).[23]

Also, Wiskur's testimony that would have placed Kost (or another woman) at the victims' home shortly before the murders is an act directly connected to the offense and thus should be enough to allow its admission. In *Bowman*, this Court rejected evidence that another person had the opportunity to commit the murder and speculative connections to link that suspect to the murders. *Bowman*, 337 S.W.3d at 687-88. This Court rejected the offer of proof in that case because there was "[n]o witnesses observed [the victim] in [the other suspect's] company at any time near her time of death." *Id*. at 688. Here, Wiskur did see this other woman at the victims' home near their time of death. Thus, this case is distinguishable from *Bowman*.

[23] Unfortunately, the trial court failed to give Robbie's lesser included offense instruction for felony murder. See Point I.

It is true that the trial court ruled that the defense would be allowed to present evidence "of Debra Kost, who may've been at or near the scene of the homicide" (Tr. 550-51, 552). But the trial court limited the defense's use of Wiskur evidence to such a degree that it would have been meaningless for the defense to put on evidence that merely showed that Kost may have been at or near the scene of the murders shortly before they occurred. The trial court required that the defense present other evidence directly connecting Kost with "an overt act" in the commission of the murders, more than just her mere presence at the scene prior to the murders, before the evidence would be allowed to be presented to the jury (Tr.551). The court ruled that the failure of the defense to present an additional "overt act" connecting Kost with the murders would result in the exclusion of any argument that Kost committed the murders (Tr.551). As Robbie's motion for new trial complained, if not for the trial court's ruling, the defense would have presented Wiskur's testimony and also would have presented evidence that Kost denied being at or near the Luetjen home on the night of the murders (LF883, 885-86).

"A trial court's exclusion of admissible evidence creates a presumption of prejudice, rebuttable by facts and circumstances of the particular case." *Barriner*, 111 S.W.3d at 401. The State cannot show that this error is harmless beyond a reasonable doubt. *State v. Watson*, 968 S.W.2d 249, 254 (Mo.App.S.D. 1998). The exclusion of this evidence was an abuse of discretion requiring Robbie's convictions to be reversed and remanded for a new trial.

V.

The trial court abused its discretion in sustaining the State's objections and in not allowing the jury to hear evidence from Deborah Armenta that in her handwritten statement to law enforcement officers, she expressed concern for her safety and that of her family because of Debra Kost and Kost's mother, Dianne Reeves, and that Armenta was with Janet White when Reeves called White and threatened that White should "watch out, or it could happen to you," because the prohibition of this evidence denied Robbie's rights to due process, a fair trial and to present a defense as guaranteed by the 6th and 14th Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that Robbie was entitled to cross-examine Armenta about anything that might have motivated her to distort or exaggerate her testimony, including any fear, intimidation, or duress that that she might have had about Kost, particularly since a witness had seen a woman, whom she believed was Kost, outside the victims' home shortly before the murders acting in a very suspicious manner, and authorities had believed and told people that there were three people involved in the murders. Robbie was prejudiced because Armenta identified Robbie's voice as being in the background of the 9-1-1 call placed at the victims' home during the robbery, and thus the jury was entitled to know about anything that would motivate Armenta to make that voice identification.

Facts

Robbie was convicted of killing Sharon, Donnie, and Taron Luetjen (Tr.2638, 2642; LF797-99). As noted in Point IV, Robbie was precluded from presenting evidence that Karen Wiskur would testify that she saw Taron's biological mother, Debra Kost, outside the victims' home between 8:00-8:25 p.m. on the night of the murders; Kost was talking on her cell phone while smoking a cigarette before putting her extinguished cigarette inside her pocket and re-entering the home (Tr.529-30, 538-39, 550-52).[24]

Kost had been married to a son of the Luetjens, and after that son died in an automobile accident, a custody dispute concerning Taron arose between Kost and the Luetjens (Tr.530-531). The State admitted that this was "motive" evidence, since Kost had not been allowed to see Taron, and thus she was upset at the Luetjens (Tr.531).

In an offer of proof, Deborah Armenta testified that in her handwritten statement to law enforcement officers, she expressed concern for her safety and that of her family because of Kost and Kost's mother, Dianne Reeves (Tr.1443-45). Armenta was with Janet White when Reeves called White and threatened that White should "watch out, or it could happen to you" (Tr.1446-47, 1449). This phone call occurred on the day the bodies were discovered (Tr.1449).

[24] Kost testified in an offer of proof concerning this issue and denied being at the victims' residence on the day of the murders (Tr.1753, 1757-58).

The trial court would not allow this evidence, ruling that it was not relevant unless further evidence of an "overt action" showed that Kost may have committed the murders (Tr. 1452-53).

Point 66 of Robbie's timely motion for new trial claimed that the trial court erred by sustaining the State's objections and not allowing defense counsel to question Armenta about her fear for her safety due to her knowledge of threatening phone calls from Kost and Reeves to White and Fajen (LF917). Point 20 of Robbie's timely motion for new trial claimed that the trial court erred by denying Robbie's offer of proof of threatening phone calls form Kost and Reeves to White and Fajen (LF891).

Standard of Review

This Court reviews the trial court's decision to exclude evidence offered by the defense for abuse of discretion. *State v. Sanders*, 126 S.W.3d 5, 20 (Mo.App.W.D. 2003). This Court will interfere with a trial court's discretionary ruling on the exclusion of evidence when there is a clear showing of abuse of that discretion. *Id*. This court will not disturb the trial court's ruling unless the abuse resulted in prejudice to the defendant. *State v. Ray*, 945 S.W.2d 462, 469 (Mo.App.W.D. 1997). Error in a criminal case is presumed to be prejudicial, unless rebutted by the facts and circumstances of the case. *Id*.

The right to present a defense

"The Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 688 (1986); *Olden v. Kentucky*, 488 U.S. 227 (1990). The rights of an accused in a criminal trial to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *State v. Brown*, 103 S.W.3d 923, 929 (Mo.App.W.D. 2003).

Further, a defendant has a constitutional right to a fair and impartial trial. *State v. Hill*, 817 S.W.2d 584, 587 (Mo.App.E.D. 1991). If the defendant is deprived of the opportunity to present relevant evidence to the jury, his rights under the Sixth and Fourteenth Amendments to the United States Constitution may have been violated. *Id*. Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the United States Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (exclusion of defense evidence of third-party guilt denied the defendant of a fair trial).

The court excluded relevant evidence

The relevancy of evidence depends on whether the evidence tends to confirm or refute a fact in issue or to corroborate evidence which is relevant. *State*

v. Ray, 945 S.W.2d 462, 467 (Mo.App.W.D. 1997). Evidence need only be relevant, not conclusive, and it is relevant if it logically tends to prove a fact in issue or corroborates relevant evidence which bears on the principal issues. *State v. Richardson*, 838 S.W.2d 122, 124 (Mo.App.E.D. 1992). When considering questions of relevancy, trial courts must be mindful that a defendant's right to offer testimony of witnesses is the right to present a defense and is a fundamental element of due process. *State v. Brown*, 549 S.W.2d 336, 340 (Mo.banc 1977).

The defendant's constitutional right to confront witnesses against him includes the right to expose to the jury any motivation, including potential bias or prejudice, which may influence the witness' testimony. *State v. Joiner*, 823 S.W.2d 50, 52 (Mo.App.E.D. 1991). A defendant must be able show potential bias or interest where the witness has a possible motivation to testify favorably for the State. *State v. Lockhart*, 507 S.W.2d 395, 396 (Mo. 1974).

Matters affecting the credibility of witnesses are always relevant and material. *State v. Hunter*, 544 S.W.2d 58, 59-60 (Mo.App.K.C.D. 1976). In criminal cases, it is generally recognized that defense counsel has the right, and that it may constitute prejudicial error to deny or unduly restrict that right, to cross-examine a prosecution witness as to the following, among others: motives for the testimony given by the witness; the witness' fear, intimidation, or duress; and shielding herself or some other person. *Id.* There is no question that a witness may be cross-examined about anything that might motivate her to distort or

exaggerate the facts to which she is testifying. *State v. Ofield*, 635 S.W.2d 73, 75 (Mo.App.W.D. 1982).

Armenta was an important prosecution witness. Law enforcement officers asked her to listen to the 9-1-1 recording that had been placed from Taron's phone during the robbery of the Luetjens on the night they were killed (Tr.1402). Armenta listened several times to a copy of the 9-1-1 call with the aid of some headphones (Tr.1403, 1407-08). The first time, she recognized her mother's voice; Armenta was 100% positive of that voice identification (Tr.1408). Armenta also heard a male voice, which sounded like Robbie's voice (Tr.1408). Armenta asked if she could hear the recording again (Tr.1408). She said that she was about 80% sure that the male voice she heard was Robbie's (Tr.1409, 1456-57). She then listened to the enhanced version of the 9-1-1 tape again (Tr. 1409). She was then about 90% sure that the male voice she heard was Robbie's (Tr. 1409-10, 1457). In preparation for trial, within the year before trial, she listened to a third version of the recording, and she was about 100% sure it was Robbie's voice (Tr.1410-11). At trial, she was 100% sure it was Robbie's voice (Tr.1411, 1457, 1478-79). Her certainty grew as time passed.

But Jurors were not given relevant evidence that Armenta had expressed her concern to law enforcement officers for her safety and that of her family because of Kost and Kost's mother, Dianne Reeves (Tr.1443-45), and that Armenta was with White when Reeves called and threatened that White should "watch out, or it could happen to you" (referring to the murders) (Tr.1446-47,

1449). This evidence was important to expose Armenta's motives for giving this testimony, including any fear, intimidation, or duress that that she might have had, as well as her shielding herself or some other person. *Hunter*, 544 S.W.2d at 59-60.

Robbie was entitled to cross-examine Arementa about anything that might motivate her to distort or exaggerate the facts to which she testified. *Ofield*, 635 S.W.2d. at 75. This is particularly true because there was evidence, also excluded from the jury, that a witness (Wiskur) had seen Kost outside the victims' home shortly before the murders acting in a very suspicious manner (see Point IV), and other evidence, which the jury did hear, that authorities had believed and told people that there were three people involved in the murders, including a woman (Tr.1823-24, 1827, 2160-62). If Armenta believed that Kost were somehow involved and that there were others involved who were not in custody, she might feel pressured to identify Robbie's voice as being in the background of the 9-1-1 call placed at the victims' home during the robbery rather than identifying someone else who might have been working with Kost, in light of Armenta's fear for herself and her family from Kost and Reeves. The jury was entitled to know about these fears in order to evaluate Armenta's testimony. *Id*.

"A trial court's exclusion of admissible evidence creates a presumption of prejudice, rebuttable by facts and circumstances of the particular case." *State v. Barriner*, 111 S.W.3d 396, 401 (Mo. banc 2003). Because Armenta was such an important witness to the State – identifying Robbie's voice on the 9-1-1 call, the

State's cannot show that this error was harmless beyond a reasonable doubt. *State v. Watson*, 968 S.W.2d 249, 254 (Mo.App.S.D. 1998). The exclusion of this evidence was an abuse of discretion that requires reversal of Robbie's convictions and a remand for a new trial.

VI.

The trial court abused its discretion in sustaining the State's objections and in not allowing the jury to hear evidence from Janet White concerning threatening phone calls made from Deborah Kost and her mother (Reeves) to White and her sister (Fajen) on the day that the victims' bodies were discovered, because the prohibition of this evidence denied Robbie's rights to due process, a fair trial and to present a defense as guaranteed by the 6th and 14th Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that Robbie was entitled to present this evidence to show the jury that during one phone call in a series of phone calls from Kost and Reeves to White and Fajen, Reeves told White, "If you do not tell me about my granddaughter, you'll end up just like her," because White's testimony would have confirmed Deborah Armenta's fear of Kost and Reeves and corroborated Armenta's excluded testimony about the phone calls (Point V), and White also would have supported Karen Wiskur's excluded testimony about seeing Kost outside the victims' home about two hours before the murder acting in a very suspicious manner (Point IV).

Facts

Robbie was convicted of killing Sharon, Donnie, and Taron Luetjen (Tr.2638, 2642; LF797-99). As noted in Point IV, Robbie was precluded from presenting evidence that Karen Wiskur saw Taron's biological mother, Debra

Kost, outside the victims' home between 8:00-8:25 p.m. on the night of the murders; Kost was talking on her cell phone while smoking a cigarette before putting her extinguished cigarette inside her pocket and re-entering the home (Tr.529-30, 538-39, 550-52).[25]

Kost had been married to a son of the Luetjens, and after that son died in an automobile accident, a custody dispute concerning Taron arose between Kost and the Luetjens (Tr.530-531). The State admitted that this was "motive" evidence, since Kost had not been allowed to see Taron, and thus she was upset at the Luetjens (Tr.531).

In an offer of proof, Janet White testified that on the day that the bodies were discovered by White, she had some telephone conversations with Kost's mother, Dianne Reeves, and White's sister, Darlene Fajen, spoke with Kost (Tr. 1568-69). The first call was from Reeves, who asked what had happened to Taron (Tr.1369-70). White told Reeves that she could not talk about it (Tr. 1570). Deborah Armenta answered the second phone call; it was Reeves again (Tr.1570-71).[26] The third call was again from Reeves (Tr.1571-72). White told her not to call again and hung up (Tr.1572). Fajen answered the next call (Tr.1572-73). Fajen

[25] Kost testified in an offer of proof concerning this issue and denied being at the victims' residence on the day of the murders (Tr.1753, 1757-58).

[26] See Point V regarding the exclusion of Armenta's testimony about the phone calls and some other matters involving Kost.

told Kost to call the sheriff's office if she wanted to know what happened to Taron (Tr.1573). Kost said that the sheriff's office said that they could not tell her anything (Tr.1573). Fajen told Kost that she could not tell Kost anything either (Tr. 1573). Kost hung up (Tr. 1573). During one call, Reeves told White, "If you do not tell me about my granddaughter, you'll end up just like her" (Tr. 1574).

The trial court denied defense counsel's offer of proof, ruling that the defense would not be allowed to present that testimony (Tr.1577-78).

Point 12 of Robbie's timely motion for new trial claimed that the trial court erred by granting in part the State's Motion in Limine Concerning the Possible Defense that Someone Else Committed this Crime (LF882-86). This denied Robbie his rights to due process, a fair trial, and to present a defense, as guaranteed by the United States and Missouri Constitutions (LF883). The motion noted that but for the trial court's rulings, the defense would have presented White's offer of proof testimony concerning the threatening phone calls from Kost and Reeves to White and Fajen (LF886).

Point 20 of Robbie's timely motion for new trial claimed that the trial court erred by denying Robbie's offer of proof of threatening phone calls from Kost and Reeves to White and Fajen (LF891).

Point 68 of Robbie's timely motion for new trial claimed that the trial court erred by sustaining the State's objections and not allowing defense counsel to question White about threatening phone calls from Kost and Reeves to White and Fajen (LF918-19).

Standard of Review

This Court reviews the trial court's decision to exclude evidence offered by the defense for abuse of discretion. *State v. Sanders*, 126 S.W.3d 5, 20 (Mo.App.W.D. 2003). This Court will interfere with a trial court's discretionary ruling on the exclusion of evidence when there is a clear showing of abuse of that discretion. *Id*. This court will not disturb the trial court's ruling unless the abuse resulted in prejudice to the defendant. *State v. Ray*, 945 S.W.2d 462, 469 (Mo.App.W.D. 1997). Error in a criminal case is presumed to be prejudicial, unless rebutted by the facts and circumstances of the case. *Id*.

The court excluded relevant evidence

"The Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 688 (1986); *Olden v. Kentucky*, 488 U.S. 227 (1990). The rights of an accused in a criminal trial to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *State v. Brown*, 103 S.W.3d 923, 929 (Mo.App.W.D. 2003).

Further, a defendant has a constitutional right to a fair and impartial trial. *State v. Hill*, 817 S.W.2d 584, 587 (Mo.App.E.D. 1991). If the defendant is deprived of the opportunity to present relevant evidence to the jury, his rights under the Sixth and Fourteenth Amendments to the United States Constitution

may have been violated. *Id*. Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the United States Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (exclusion of defense evidence of third-party guilt denied the defendant of a fair trial).

The relevancy of evidence depends on whether the evidence tends to confirm or refute a fact in issue or to corroborate evidence which is relevant. *State v. Ray*, 945 S.W.2d 462, 467 (Mo.App.W.D. 1997). Evidence need only be relevant, not conclusive, and it is relevant if it logically tends to prove a fact in issue or corroborates relevant evidence which bears on the principal issues. *State v. Richardson*, 838 S.W.2d 122, 124 (Mo.App.E.D. 1992). When considering questions of relevancy, trial courts must be mindful that a defendant's right to offer testimony of witnesses is the right to present a defense and is a fundamental element of due process. *State v. Brown*, 549 S.W.2d 336, 340 (Mo.banc 1977).

A criminal defendant also has a constitutional right to expose to the jury any motivation, including potential bias or prejudice, which may influence the witness' testimony. *State v. Joiner*, 823 S.W.2d 50, 52 (Mo. App. E. D. 1991). A defendant must be able show potential bias or interest where the witness has a possible motivation to testify favorably for the State. *State v. Lockhart*, 507 S.W.2d 395, 396 (Mo. 1974). Matters affecting the credibility of witnesses are

always relevant and material. *State v. Hunter*, 544 S.W.2d 58, 59-60 (Mo. App. K.C.D. 1976).

Here White's testimony was relevant. First, as noted in Point V, Deborah Armenta should have been able to testify about the phone calls and also that Armenta was afraid for her and her family's safety because of Kost and Reeves. White's excluded testimony would have corroborated Armenta's fears and Armenta's refused testimony about the phone calls.

Second, White's testimony would have supported the excluded evidence set out in Point IV of this brief. As noted above, Robbie was precluded from presenting evidence that Karen Wiskur saw Kost outside the victims' home about two hours before the murder acting in a very suspicious manner (Tr.529-30, 538-39, 550-52). White's testimony about Kost and Reeves' belligerent phone calls on the day that the bodies were discovered, including the threat that White would "end up just like [Taron]," would have supported Wiskur's testimony about Kost possibly being involved in the robbery/murders of the Luetjens (Tr. 1574)

"A trial court's exclusion of admissible evidence creates a presumption of prejudice, rebuttable by facts and circumstances of the particular case." *State v. Barriner*, 111 S.W.3d 396, 401 (Mo. banc 2003). The State cannot show that this error is harmless beyond a reasonable doubt. *State v. Watson*, 968 S.W.2d 249, 254 (Mo. App. S.D. 1998). The exclusion of this evidence was an abuse of discretion that requires reversal of Robbie's convictions and a remand for a new trial.

VII.

The trial court abused its discretion in denying Robbie's requests for mistrials after the assistant attorney general three times unexpectedly displayed graphic photographs of the victims' dead bodies to witnesses on a large television screen, because this violated Robbie's rights to due process and a fair trial, as guaranteed by the 14th Amendment to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the sum total of what happened deprived Robbie of a fair trial because it triggered excessive emotions against Robbie as evidenced by the emotional reactions from witnesses, spectators, and jurors; it also caused Robbie's sentence to be imposed under the influence of passion, prejudice or any other arbitrary factors, § 565.035.3.

Facts & Preservation

Deborah Armenta is the daughter of two of the victims, Donnie and Sharon Luetjens (Tr. 1352-53, 1365, 1422,1488). During the State's direct examination of Armenta, an assistant attorney general inadvertently showed her a PowerPoint photo of the victims' bound hands, which caused Armenta to cry (Tr.1358-59).[27] The trial court denied defense counsel's request for a mistrial (Tr.1360-61).

[27] Armenta declined an opportunity to take a break during her testimony after this happened (Tr.1362).

During the State's direct examination of Armenta's ex-husband regarding the victims' house, an assistant attorney general inadvertently "flipped through a whole series of crime scene photographs in fairly rapid fashion," which the jury was able to view (Tr.1938-40). The trial court again overruled defense counsel's request for a mistrial (Tr.1942).

Immediately after that witness testified, a similar thing happened during the State's direct examination testimony of a friend of Donnie (Tr.1956-57). This time, a photograph of Donnie's bound body was shown for an extended period of time (Tr.1957). Defense counsel noted that that was the third time that such an incident happened during the testimony of either a family member or close friend of the victims (Tr.1957). Defense counsel reminded the court that during Armenta's testimony it had evoked a very emotional response and counsel believed that the pattern of such incidents had to have a negative effect on the jury (Tr.1957).

The trial court again overruled defense counsel's request for a mistrial (Tr.1957-58, 1961).

Point 62 of Robbie's motion for new trial alleged that the trial court erred in overruling his request for mistrial during Armenta's testimony after the display of the graphic photograph to her (LF915-16). The new trial motion noted that the State's photographic exhibits were published to the jury on a television with an approximate size of three feet by five feet (LF915). During Armenta's testimony, the State displayed an image of the Luetjens' bodies lying on the floor (LF915).

Jurors and Armenta recoiled in shock, and someone in the gallery exclaimed, "Oh [expletive]" (LF44). Armenta was visible shaken and became tearful (LF915).

Points 75 and 76 similarly complained about the trial court's failure to declare a mistrial when the inadvertent displays occurred during the testimonies of Scott Beckman Armenta's former husband) and Eugene Beckman (a friend of Donnie) (LF923-25).

At the hearing on the motion for new trial an investigator with the public defender's office testified that when the photographic display occurred during Armenta's testimony, several jurors "kinda jolted in their chairs," covered their mouths, and their eyes widened (Tr.2954). A woman in the gallery said, "Oh, shit" (Tr.2955). Armenta was visibly upset and cried (Tr.2955).

When a similar thing happened during Scott Beckman's testimony, a few jurors leaned forward, put their heads partially down, and covered their mouths (Tr. 2955-57).

During the ruling on the motion for new trial, the trial court said,

> I have an unfettered and unobstructed view of the jury, and it is my long practice to, I watch the jury probably more than anybody else in the courtroom. I did not see any physical or visible reaction from any juror, or the jury as a whole, that would indicate to me that here was some response to these particular photographs, or to the reaction of the witness, that was beyond any other human reaction. I did not conclude at all that any undue prejudice had occurred to the defendant as a result of those photographs

which did occur early on in the case, regarding those photographs being displayed.

(Tr.2989-90).

The trial court also stated his belief that the "first displays" were inadvertent and did not result in a miscarriage of justice or a manifest injustice (Tr. 2990).

Standard of Review

The decision whether to declare a mistrial rests largely within the discretion of the trial court. *State v. Webber*, 982 S.W.2d 317, 323 (Mo.App.S.D. 1998). This Court will reverse a trial court's exercise of discretion after a showing of clear abuse and substantial prejudice resulting to the defendant. *Id*.

Analysis

An accused, whether guilty or innocent, is entitled to a fair trial, so it is the duty of the trial court to see that he gets one…." *State v. Tiedt*, 357 Mo. 115, 206 S.W.2d 524, 526 (Mo.banc 1947). A trial judge is under a duty, in order to protect the integrity of the trial, to take prompt and affirmative action to stop professional misconduct. *U.S. v. Dinitz*, 424 U.S. 600, 612 (1976) (Burger, concurring). Prosecutorial misconduct may become unconstitutional when it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

Consistent with these duties, a prosecutor has a duty to fairly present the evidence and permit the jury to come to a fair and impartial verdict. *Pendarvis v. State*, 752 So. 2d 75, 77 (Fla.Dist.Ct.App. 2000). Sometimes the manner in which the case is tried can warrant a new trial. *State v. Harris*, 662 S.W.2d 276 (Mo.App. E.D. 1983) ("the record indicates defendant did not receive a fair trial due to the continued harangue between the prosecutor and defense counsel throughout a heated trial"). This is such a case.

Three times family members and friends of the victims were suddenly, unexpectedly, confronted with large images of the victims' dead bodies displayed prominently on a screen while they were testifying. The record shows that the jury was equally surprised and affected by this sudden, graphic display, which evoked emotional reactions by people in the courtroom, including witnesses, jurors, and spectators. As defense counsel noted, these displays had "to have had a negative effect on this jury" (Tr.1957).

Forms of visual information or signals that the trigger anger, revenge or excessive emotions for or against a party violate a defendant's right to a fair trial guaranteed by the 6th amendment to the United States Constitution. *State v. Allen*, 800 So.2d 378, 389-90 (La.App. 4th Cir.2001) (per curiam) (new trial ordered because the State continued to display a photograph of the victim on its table after the photograph had been identified, and a witness testified wearing a T-shirt "emblazoned with a photograph of the victim.").

Although it is true that the photographs were all admitted into evidence during the trial, the improper use of properly admitted evidence can warrant a new trial if it prejudices the defendant's right to a new trial. *See*, *People v. Williams*, 161 Ill. 2d 1, 641 N.E.2d 296 (1994), holding that the prosecutor's use during sentencing hearing of eight-foot poster to display a list of the defendant's prior wrongdoings, arrests and convictions was prejudicial error, where evidence of defendant's criminal history was presented through certified copies of convictions and through series of witnesses, all of whose testimony was succinct and clearly understandable.

The continual, unexpected, startling display of graphic photographs to witnesses and the jury during testimony violated Robbie's rights to due process and a fair trial, as guaranteed by the 14th Amendment to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution. The trial court should have declared a mistrial to protect Robbie's rights, and because it did not, this Court should reverse and remand for a new trial.

Alternatively, this Court should set aside his sentence of death because what happened caused Robbie's sentence to be imposed under the influence of passion, prejudice or any other arbitrary factors, see § 565.035.3, which allows this Court to set aside a death sentence on this basis.

CONCLUSION

Because the trial court failed to give a lesser included offense instruction for felony murder, which was supported by the evidence and requested by Robbie, this Court should reverse and remand for a new trial (Point I).

Robbie is entitled to a new trial because the State's cell phone witness (Middleton) was not qualified to give an expert opinion regarding cell phone tower evidence and the tracking of Robbie's cell phone at the time of the murders – in fact Middleton admitted that he was not an expert "in anything." (Point II).

Robbie is entitled to a new trial because the State's fingerprint expert (Hunt) gave hearsay testimony that other experts at the lab where she worked had gone through the same process she had and verified her conclusion that Robbie's fingerprints were at the crime scene, and as a result of this peer review process, she felt confident in her conclusions since there "weren't issues" (Point III).

Robbie is entitled to a new trial because he was prevented from presenting evidence that about two hours before the charged murders, Karen Wiskur saw a woman, whom Wiskur later identified as Debra Kost, exit the victims' home, light a cigarette, talk on a cell phone while pacing back-and-forth for 10-15 minutes, extinguish her cigarette on the bottom of her shoe, put the cigarette butt in her jeans' pocket, flip her phone shut, and go back inside the victims' home, and when Kost was later questioned about being there, she denied it. The court also precluded the defense from arguing Kost's involvement in the murders without first presenting an additional overt act connecting her with the murders (Point IV).

Robbie is entitled to a new trial because he was prevented from presenting evidence from Deborah Armenta that she had expressed concern to law enforcement officers about her and her family's safety because of Kost and Kost's mother, Dianne Reeves, and that Armenta was with Janet White when Reeves called White and threatened that White should "watch out, or it could happen to you." (Point V).

Robbie is entitled to a new trial because he was prevented from presenting evidence from Janet White concerning threatening phone calls made from Kost and Reeves to White on the day that the victims' bodies were discovered, including that Reeves told White, "If you do not tell me about my granddaughter, you'll end up just like her" (Point VI).

Robbie is entitled to a new trial because a mistrial was warranted after the assistant attorney general three times unexpectedly displayed graphic photographs of the victims' dead bodies to witnesses on a large television screen, which triggered emotional reactions from witnesses, spectators, and jurors; it also caused Robbie's sentence to be imposed under the influence of passion, prejudice or any other arbitrary factors, § 565.035.3 (Point VII).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Craig A. Johnston, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, in Times New Roman size 13-point font. I hereby certify that this brief includes the information required by Rule 55.03. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 30,981 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On this 7th day of October, 2014, electronic copies of Appellant's Brief and Appellant's Brief Appendix were delivered through the Missouri e-Filing System to Shaun Mackelprang, Assistant Attorney General, at shaun.mackelprang@ago.mo.gov.

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