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 REPLY BRIEF

Craig A. Johnston, MOBar #32191
Attorney for Appellant
Woodrail Centre
1000 West Nifong
Building 7 Suite 100
Columbia, Missouri 65203
(573) 777-9977
Fax (573) 777-9963
Email: Craig.Johnston@mspd.mo.gov

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I.

The trial court erred by refusing defense counsel's timely request to submit the lesser included offense (LIO) instructions for second-degree felony murder (Refused Instructions A, Q, R), because there was a basis in the evidence for acquitting Appellant of the charged offense (first-degree murder), and there was a basis in the evidence for convicting him of the LIO of felony murder. Section 556.046. Respondent does not contest these matters.

Because the statutory requirements for giving these LIO instructions were met, under *State v. Jackson*,[1] the failure to give these requested instructions is presumed prejudicial and results in reversible error.

Respondent has not overcome that presumption of prejudice merely because the state submitted the LIO of conventional second-degree murder since that LIO was not argued by either party, it was not consistent with either party's theory of the crime, and it only tested an undisputed element – deliberation. Only the LIO of felony murder would have adequately tested the theory of defense and disputed matter here: Did Appellant shoot the victims or was he only involved in a robbery of the victims, but someone else deliberately murdered them during or after the robbery.

[1] *State v. Jackson*, 433 S.W.3d 390, 396 (Mo. banc 2014).

Introduction:

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 timely requested first-level lesser included offense (LIO) instruction when 1) there is a basis in the evidence for acquitting the defendant of the charged offense; and 2) there is a basis in the evidence for convicting the defendant of the LIO for which the instruction is requested.

Appellant met both these requirements. Respondent does not contest this. Thus, the trial court was required to give the felony murder instructions, but it erroneously refused to do so. *Id*.

What must be resolved, however, is whether Appellant was prejudiced by the failure of the trial court to submit felony murder to the jury when the theory of defense argued by defense counsel to the jury was that although the evidence might have shown that Appellant was part of the robbery of the victims, the evidence did not prove that he was involved in shooting them.

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 LIO instruction "is reversible error." *Jackson*, 433 S.W.3d at 395. This is because prejudice is presumed when a trial court fails to give a requested LIO instruction that is supported by the evidence. *Id*.

Respondent counters, however, that the presumption of prejudice was rebutted because the jury was given the state's LIO instruction for conventional

second-degree murder (Rsp. Br. at 27-30). But that LIO was not argued by either party, it was not consistent with either party's theory of the crimes, and the element of deliberation was not contested. Thus, the state's LIO did not adequately test the theory of defense and disputed matter: Did Appellant shoot the victims or was he only involved in the robbery and someone else deliberately murdered them during or after the robbery. The state has not overcome the presumption of prejudice that exists when a trial court fails to give a requested LIO instruction that is supported by the evidence.

De novo review is the correct standard of review

Appellant's opening brief argued that this Court should review *de novo* the trial court's refusal to give the requested felony murder instructions, *citing Jackson*, 433 S.W.3d at 395 (App. Br. at 54).

Respondent counters that any review must be for plain error because the refused instructions were "incorrect" and "not in the correct form" (Rsp. Br. at 23-24). Respondent notes that the first paragraph of Appellant's tendered felony murder instructions told the jury that it could consider felony murder in the second degree if it did not find Appellant guilty of murder in the first degree (Rsp. Br. at 23-24): "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." (LF 783-84, 789-92).

The first paragraph of the pattern instruction for *MAI-CR3d 314.06* provides: "((As to Count ____, if) (If) you do not find the defendant guilty of (murder in the first degree) (murder in the second degree as submitted in Instruction No. ___), you must consider whether he is guilty of murder in the second degree (under this instruction).)."

Respondent's complaint, raised for the first time on appeal, is that because conventional second-degree murder instructions were also submitted at trial, then Appellant's felony murder instructions should have contained the optional "under this instruction" language (Rsp. Br. at 23-24). But at the time that both Appellant and the state prepared their proposed lesser included second-degree murder instructions, the optional language would not be included in either set because neither party offered both second-degree murder instructions, and it would only be *after* the trial court ruled that *both* forms of second-degree murder instructions would be given that *both* sets of instructions – the conventional second degree murder instructions offered by the state and the felony murder instructions offered by Appellant – would have to be modified by both parties by adding that optional language.

Respondent also faults Appellant for not tendering properly modified instructions for conventional second-degree murder (Rsp. Br. at 24). But it was the state who submitted the conventional second-degree murder instructions, not Appellant (LF 767, 771, 775). Respondent does not explain why Appellant had an obligation to modify instructions submitted by the opposing party.

But if this Court decides that the felony murder instructions were not in the correct form because they failed to include the "under this instruction" language, in anticipation that the trial court would also grant the state's request to submit LIO instructions for conventional second-degree murder, this Court should still treat this claim as properly preserved for appeal because the trial court did not reject the instructions on the basis that they failed to include this language, which could have been easily added if, and only if, the court decided to give both forms of second-degree murder instructions.[2] *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.' …. The point was preserved for appeal."). *Contrast*, *State v. Derenzy*, 89 S.W.3d 472, 474-75 (Mo. banc 2002), which granted plain error relief for the trial court's failure to give a LIO instruction that failed to describe the charged offense accurately, which was a major, substantive flaw.

[2] The trial court refused the instructions because: 1) Appellant was not charged with any underlying felony; 2) felony murder was inconsistent with the alibi instruction requested by Appellant; and 3) the evidence did not support felony murder instructions (Tr. 2596-97). Appellant's opening brief discussed why the trial court's reasoning was incorrect.

But if this Court declines to follow the reasoning in *Stepter*, which would treat this issue as "preserved for appeal," 794 S.W.2d at 654, this Court should grant plain error review under *Rule 30.20*. *See, State v. Christopher Hunt*, No. SC94081, slip op. at 13-14 (Mo. banc December 23, 2014), which held that "the liberty of a criminal defendant is a substantial right that, when violated, can lead to manifest injustice or miscarriage of justice."

The section 556.046 requirements were met

Under section 556.046, a trial court is obligated to give a timely requested first-level LIO instruction when 1) there is a basis in the evidence for acquitting the defendant of the charged offense; and 2) there is a basis in the evidence for convicting the defendant of the LIO for which the instruction is requested. *Jackson*, 433 S.W.3d at 396. Respondent does not argue that Appellant failed to meet these prerequisites. Thus, Respondent implicitly concedes that the section 556.046 requirements were met in this case.

Prejudice

Because Respondent does not argue that the *Jackson* prerequisites were not met, the real issue is whether Appellant was prejudiced by the trial court's erroneous failure to give felony murder instructions.

This Court has held that when the statutory requirements of section 556.046 are met, the failure to give a requested LIO instruction "is reversible error."

Jackson, 433 S.W.3d at 395. This is so even though the jury necessarily found all the elements of the greater offense because "prejudice is presumed when a trial court fails to give a requested lesser included offense instruction that is supported by the evidence." *Id*. at 395 n. 4, *citing State v. Redmond*, 937 S.W.2d 205, 210 (Mo. banc 1996). *Also see*, *State v. Pierce*, 433 S.W.3d 424, 431 (Mo. banc 2014) (defendant was convicted of possessing more than 2 grams of cocaine base, a controlled substance; new trial ordered for the failure to give LIO instruction of possession of a controlled substance even though the weight of the controlled substance was not only uncontested by the defense at trial, it was conceded).

Respondent argues that it can overcome this presumption of prejudice because this Court's prior cases hold that when a jury convicts on first-degree murder, after having also been instructed on conventional second-degree murder, there is no prejudice by the refusal to submit a second-degree felony murder instruction (Rsp. Br. at 27-30). E.g., *State v. McLaughlin*, 265 S.W.3d 257, 270-71 (Mo. banc 2008); *State v. Johnson*, 284 S.W.3d 561, 572 (2009).[3] In other words,

[3] Respondent also relies upon *Schad v. Arizona*, 501 U.S. 624 (1991), but that case does not control because there the United States Supreme Court was only asked to decide "whether the principle recognized in [*Beck v. Alabama*, 447 U.S. 625 (1980)] entitles a defendant to instructions on all offenses that are lesser than, and included within, a capital offense as charged." There the refused LIO was for a non-homicide offense – robbery. But in the present case, this Court is required,

Respondent argues that if the jury is given one LIO for a charge, then the failure to give the jury another LIO option can *never* be prejudicial regardless of the circumstances because the jury is not faced with an "all-or-nothing choice" (Rsp. Br. at 27).

Respondent supports its argument by saying that "the only disputed element in arguing for a second-degree murder conviction as opposed to a first-degree murder conviction is whether the defendant deliberated before committing the murder." (Rsp. Br. at 28). But that is only true for the LIO of *conventional* second-degree murder. Here, however, the refused instructions were for *felony* murder, which is a LIO of first-degree murder not because it is necessarily included based upon its elements, but because it is statutorily, specifically denominated as such. *State v. Wilkerson*, 616 S.W.2d 829, 832-33 (Mo. banc 1981).

Deliberation was not the element that Appellant disputed. The defense did not contend that the person who shot the victims did not deliberate. Appellant's defense was *not* that he knowingly killed the victims, but that he did not do it after

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apart from any constitutional issue, to determine whether Appellant was entitled to the requested LIO instructions as a matter of substantive Missouri law and whether he was prejudiced by the failure to give it. *See Jackson*, 433 S.W.3d at 395, analyzing a LIO claim solely on section 556.046**.** Further, even *Schad* did not suggest that *Beck* would be satisfied by instructing the jury on just any LIO, even one without any evidentiary support. *Schad*, 501 U.S. at 648.

deliberating on it. Because the three victims were shot one after the other while bound and gagged on the floor, it would be an impossible defense to present that they were knowingly killed, but without deliberation; perhaps this is why it was the state and not Appellant who submitted the LIO of conventional second-degree murder.

Instead Appellant's defense was that although there was some evidence that he was involved in a robbery of the victims (DNA, phone records, fingerprints), they were shot and killed by someone else during the perpetration of that robbery, and there was no evidence showing that he was involved in their deaths – in other words, he was only guilty felony murder (LF 783-84, 789-90, 791-92; Tr. 2621-23). This was a viable defense. *See*, *State v. Blankenship*, 830 S.W.2d 1 (Mo. banc 1992) (defendant who was charged with five counts of first-degree murder, was convicted of the LIO offenses of second-degree felony murder where during a robbery of National Supermarket, five victims were shot and killed after they were ordered to lie on the ground; defendant's admitted participation in the murders was to take a guard's gun and give it to his uncle, but there was no evidence that he shot the victims).

Thus, a conventional second-degree murder instruction did not sufficiently test all the elements of first-degree murder; it only tested the deliberation element, which was an element not contested at trial. 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). That instruction in this case was for felony murder, which the jury did not get to consider with proper instruction.

Appellant's situation is distinguishable from this Court's cases cited in Respondent's brief, such as *McLaughlin, supra, Johnson, supra*.

For instance, in *Mclaughlin*, the defendant admitted that he had killed the victim, and thus, conventional second-degree murder as a LIO adequately tested the only disputed element – deliberation. The other felony (rape) was an ancillary, additional charge to the defendant knowingly murdering the victim.

Johnson involved a situation where the given LIO instruction for conventional second-degree murder contained the same elements as the refused LIO for voluntary manslaughter. *Johnson*, 284 S.W.3d at 575-7, n.10-13. Because the voluntary manslaughter instruction contained the same elements as the given second-degree murder instruction, it is clear that the failure to give that LIO instruction did not prejudice the defendant.[4]

But other cases show that the presumption of prejudice can still warrant a new trial even when another LIO instruction is given to the jury. *See, State v.*

[4] Because the defendant submitted voluntary manslaughter, the defendant also submitted a related second-degree murder instruction that was identical to the given LIO with the exception that it contained the required, additional sudden passion/adequate cause paragraph that is to be included if a voluntary manslaughter instruction is given. *Johnson,* 284 S.W.3d at 575-7, n.10, 13.

Frost, 49 S.W.3d 212, 216-20 (Mo. App. W.D. 2001) (defendant was convicted of second-degree murder, and a LIO instruction of voluntary manslaughter was given; a new trial was ordered because the trial court failed to give the defendant's involuntary manslaughter LIO instruction); and, *State v. Nutt*, 432 S.W.3d 221, 224-25 (Mo. App. W.D. 2014) (defendant was convicted of first-degree assault, and a LIO instruction of second-degree assault was given; a new trial was ordered because the trial court failed to give the defendant's third-degree assault LIO instruction).[5]

For instance, in *Vujosevic v. Rafferty*, 844 F.2d 1023 (3rd Cir. 1988), the trial court instructed the jury on three levels of homicide: murder, aggravated manslaughter (when the actor other than purposely or knowingly causes death under circumstances manifesting extreme indifference to human life), and manslaughter (homicide committed recklessly or in the heat of passion). *Id*. at 1026. The court refused to instruct the jury on the LIO of aggravated assault (attempted to cause serious bodily injury to another purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life). *Id*. The aggravated assault instruction was based on the theory that although the defendant's testimony admitted criminal conduct it also could support

[5] For a more detailed discussion of *Frost* and *Nutt*, see pages 72-74 of Appellant's opening brief.

a finding that the victim's death was not caused by him. *Id*. The defendant was convicted of aggravated manslaughter. *Id*.

The New Jersey Appellate Division and the District Court found that it was error to refuse to give an instruction on aggravated assault, but both courts found the error to be harmless in large part because there was an instruction given as to the LIO of simple manslaughter. *Id*. at 1027. Those courts reasoned that had the jury not been convinced of the defendant's guilt of aggravated manslaughter and yet been reluctant to set him free, it would have returned a verdict of guilty on the lesser offense of manslaughter. *Id*.

The Third Circuit disagreed and held that those courts were wrong as a matter of law to find the error harmless beyond a reasonable doubt. *Id*. The Third Circuit reasoned that the fact that the jury chose aggravated manslaughter rather than manslaughter did not necessarily mean that the jury was convinced that the defendant's actions caused the victim's death. *Id*. at 1027-28. It might have meant nothing more than that, causation aside, the defendant's actions fit the instruction of aggravated manslaughter better than manslaughter. *Id*. at 1028. The defendant's own testimony not only supported a conviction for assault (the refused LIO), but it also established a level of culpability which would make a conviction for simple manslaughter "nonsensical." *Id*.

The Third Circuit held that given the fact that the defense theory was that the defendant committed aggravated assault, but he did not cause the victim's death, the instruction on simple manslaughter was not a constitutionally adequate

substitute for an instruction on aggravated assault. *Id*. The factual question placed in issue by the defense was *not* the level of culpability, but rather the causation of the victim's death. *Id*. Even a rational juror who thought the defendant did not cause the death, but who did not want to set the defendant free, might not vote for conviction on simple manslaughter, because the defendant's culpability was not mere recklessness or heat of passion. *Id*. Thus, the manslaughter instruction did not necessarily offer the jury a rational compromise between aggravated manslaughter and acquittal; only an aggravated assault charge could do that. *Id*. "Under these circumstances, it is pure speculation to forecast what verdict the jury would have returned if properly instructed based on the jury's verdict of aggravated manslaughter after an incomplete instruction." *Id*. *Also see*, *State v. Westfall*, 75 S.W.3d 278, 284 (Mo. banc 2002) ("It should be noted that the grounds for rejecting any 'end-run' arguments that the jury must have necessarily decided the factual question concerning the use of deadly force when it convicted Westfall of armed criminal action have also been long-settled in Missouri. '[A]ppellate courts do not reason deductively from the jury's verdict back to their actual intention, where they may have been adversely influenced by an erroneous instruction or by the lack of an instruction required by the statute.' [citations omitted] The jury must be entitled to weigh all of the evidence under good instructions."

What these cases show is that sometimes the presumption of prejudice was overcome by the giving of another LIO instruction when that instruction

adequately tested the *disputed* elements at trial. E.g., *McLaughlin, supra*; *Johnson, supra*. But sometimes the fact that another LIO was given did not overcome the presumption of prejudice because the other LIO did not adequately test the disputed elements at trial. E.g., *Frost, supra*; *Nutt, supra*; *Vujosevic, supra.*

Respondent argues:

> Appellant's tendered instructions were not modified so as to submit a theory of accomplice liability and thus would not have allowed the jury to make the finding that another person committed the murders during the course of a robbery or attempted robbery. … The jury's choice under Appellant's tendered instruction would either have been to find Appellant guilty of second degree murder based on Appellant shooting the victims during the course of a robbery, or acquitting Appellant if it did not believe that he shot the victims.

(Rsp. Br. at 29).

Respondent's argument is incorrect. The refused felony murder instructions would have allowed the jury to find that Appellant committed the robbery, but he had nothing to do with shooting the victims. The first paragraph submitted that Appellant took each victim's property for the purpose of withholding it from the owner permanently, and in doing so, he used physical force on or against the victim for the purpose of preventing resistance to the taking of the property (LF 783-84, 789-90, 791-92). If the jury found these things, it would find that Appellant committed robbery. The second and third elements of the refused

instructions required that the jury find that the victims were shot and killed as a result of the perpetration of that robbery; those elements *did not* require the jury to find that it was Appellant who shot and killed the victims – it only required a finding that they were shot as result of the robbery. This is permissible because a defendant can be found guilty of felony murder even if the defendant (or an accomplice) did not cause someone's death during the perpetration of a robbery. *See, State v. Moore*, 580 S.W.2d 747 (Mo. banc 1979) (felony-murder rule was applicable even though evidence established that fatal shot had not been fired by defendant or an accomplice, but by a bystander attempting to thwart the attempted robbery). Thus, contrary to Respondent's argument, the jury could have found Appellant guilty of felony murder if it did not believe that he shot the victims, but it believed that he took part of the robbery leading up to the shootings done by someone else.

If the jury believed that the course of events established a felony murder/robbery committed by Appellant with someone else shooting the victims, rather than a deliberated murder committed by him, it could not have convicted Appellant of second-degree felony murder as a legitimate "third option" to first-degree murder or acquittal since it was not given that "third option." 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).

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 Appellant timely requested the instruction, there was a basis in the evidence for acquitting him of first-degree murder, and there was a basis in the evidence for convicting him 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 Appellant 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 second-degree felony murder.

If the jury had been properly instructed, Appellant could have been found guilty of second-degree felony murder rather than first-degree murder. Because the state has failed to overcome the presumption of prejudice that exists when the court fails to give a LIO instruction that is supported by the evidence, a new trial must be ordered.

III.

Fingerprint analyst 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.

Fingerprint examiner Mary Kay Hunt was allowed to testify over objection that her work had been examined by other experts and as a result of a peer review process, she felt confident in her conclusions since there "weren't issues" (Tr.2255).[6] Respondent argues that this part of Hunt's testimony was admissible "as it was part of the standard procedure that formed the basis of the analyst's opinion" (Respondent's Brief at 45).[7] Respondent supports its argument through

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[6] Q. 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? A. Sure. Q. "And don't, I mean, don't tell me what these folks concluded, but there weren't issues were there? A. No, there were not. (Tr. 2254-55).

[7] Respondent also asserts that the issue was not properly preserved for appeal and that the testimony was not prejudicial. Appellant's opening brief sets out why he believes this issue is properly preserved and was prejudicial. But Appellant will comment on one aspect of preservation. Respondent argues that a motion to strike was required to preserve the issue (Respondent's Brief at 51). But here the

case law holding that an expert opinion may be based on otherwise inadmissible hearsay evidence (Respondent's Brief at 53, 55-56).

While there are Missouri cases that generally hold as Respondent asserts, they are inapplicable because Hunt had already formed her opinion prior to the verification process and thus Hunt did not truly form her opinion based on the verifications. Hunt's opinion was not based upon the absent examiners' confirmations; rather, Hunt's opinion was improperly bolstered by inferential hearsay testimony concerning what other experts found when they examined the same fingerprints examined by Hunt. The verifications may have made Hunt confident that she was correct, but she did not form her opinion based on the verifications as evidenced by the fact that she had already reached her opinion that certain latent prints matched known prints prior to the verification process.[8] Thus,

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objection was overruled – at least as to the one question and answer raised on this point. A motion to strike only makes sense if the objection is sustained. By overruling the objection, the trial court ruled that evidence was admissible and thus the court would not strike admissible testimony.

[8] E.g., Q. What is, again, the protocol of the crime lab when you've made an identification of a fingerprint? A. It is, it is, excuse me, it's verified by another qualified examiner. (Tr. 2264). In other words, the verification process was not utilized until *after* Hunt had examined that latent prints and had already determined that they matched known prints.

contrary to Respondent's argument, the hearsay did not "form[] the basis of the analyst's opinion" (Respondent' Brief at 45); it corroborated it in a manner that did not allow Appellant to confront and cross-examine the absent examiners at trial.

Respondent relies upon two Missouri cases in professed support of its argument. This Court in *State v. Baumruk,* 280 S.W.3d 600 (Mo. banc 2009) did in fact declare that "[A]n expert opinion may be based on otherwise inadmissible hearsay evidence." *Id.* at 617 (citation omitted). But the situation in *Baumruk* is markedly different than the instant case. In *Baumruk*, a state psychiatrist rebutted a defense of not guilty by reason of mental disease or defect by relying on statements made by the defendant to a law enforcement officer in support of the psychiatrist's conclusion that the defendant remembered the shootings and thus did not suffer from amnestic disorder. *Id.*[9] Thus, the psychiatrist used hearsay statements to form the basis of his opinion that the defendant did not suffer from

[9] The psychiatrist had initially believed that the defendant suffered from amnestic disorder, but upon discovering that the defendant had recalled and recounted details of the shootings to an officer and three other people, the psychiatrist concluded that the defendant did *not* suffer from amnestic disorder. *Baumruk*, 280 S.W.3d at 617.

amnestic disorder.[10] The psychiatrist did not, like Hunt, reach an opinion, have that opinion verified by another psychiatrist, and testify that the non-testifying psychiatrist verified the diagnosis.

Similarly, Respondent's reliance upon *State v. Sauerbry*, -- S.W.3d --, 2014 WL 5841087 (Mo. App. W.D. 2014) is misplaced. In that case, a medical examiner (Dr. Dudley) testified regarding the nature and potential causes of the victim's wounds after relying on *observations* concerning the measurements and nature of the wounds made by another pathologist during the autopsy as the basis for Dr. Dudley's *opinions*. *Id.* at *3-4. Thus *Sauerbry* is also distinguishable from Appellant's case because Dr. Dudley based her own independent opinions upon *observations* made by the other pathologist – she did not submit her opinions to another expert to have them verified and then testify about the verification. Further, the *Sauerbry* court noted that the alleged hearsay in that case involved *factual* information, *not* the absent examiner's *opinions*. *Id.* at *3-8.

Thus, Respondent fails to cite to any Missouri appellate court allowing an expert to testify that the testifying expert's opinion was verified by an absent examiner's opinion. The reference to the absent verifying fingerprint analysts was improper inferential hearsay since Hunt's testimony that there were no "issues"

[10] Actually, this Court did not decide whether the information was admitted improperly since it was duplicative of other admitted evidence. *Baumruk*, 280 S.W.3d at 617.

when other analysts verified her work invited the inference that the other experts reached conclusions identical to Hunt, *State v. Valentine*, 587 S.W.2d 859, 861 (Mo. banc 1979) (prosecutor set up circumstances which improperly invited inference of hearsay testimony). It also violated Appellant's right to confrontation and cross-examination because the absent examiners' verifications were testimonial since they were done for the purpose of prosecuting Appellant. *See*, *State v. March*, 216 S.W.3d 663 (Mo. banc 2007) and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 321 (2009), holding that lab reports admitted as business records were testimonial when created for the purpose of prosecuting a defendant.

In Appellant's opening brief, he cited to five cases from other jurisdictions in support of his argument that Hunt's verification testimony was improper. *See*, *State v. Wicker*, 66 Wash.App. 409, 832 P.2d 127 (1992); *People v. Smith*, 256 Ill.App.3d 610, 628 N.E.2d 1176 (1994); *State v. Connor*, 156 N.H. 544, 937 A.2d 928 (2007); *State v. Langill*, 161 N.H. 218, 13 A.3d 171 (2010); *Teifort v. State*, 978 So.2d 225 (Fla. 4th DCA 2008). There are others: *People v. Yancy*, 368 Ill.App.3d 381, 858 N.E.2d 454 (2005) (Testimony of fingerprint examiner that quality assurance department agreed with her identification of latent prints as defendant's was hearsay); *Bunche v. State*, 5 So.3d 38 (Fla. Dist. Ct. App. 2009) (fingerprint examiner's testimony that a second examiner had come to the same conclusion was improper bolstering of expert opinion); *Potts v. State*, 57 So.3d 292 (Fla. Dist. Ct. App. 2011) (fingerprint examiner should not have been allowed

to testify that another examiner had verified the test results since such testimony constituted improper bolstering).

In rebuttal, Respondent cites to two cases from other jurisdictions, *State v. Jones*, 322 N.C. 406, 368 S.E.2d 844 (1988) and *Jarnigan v. State*, 295 Ga. 603, 761 S.E.2d 256 (2014).

Jarnigan is factually distinguishable from Appellant's case. In that case, Davis, who was jointly tried with Jarnigan, objected on hearsay grounds when fingerprint expert Taylor testified that the initials of another expert (Wargo) appeared on a fingerprint card, and when Taylor identified Wargo as another fingerprint examiner, and when Taylor testified that Wargo had "verified" the work Taylor had done. *Jarnigan*, 761 S.E.2d at 259-60. But "Davis made no hearsay objection when Taylor explained that verification involves an independent analysis by another examiner who reaches her own conclusions based upon her own analysis and comparisons, and Davis likewise made no hearsay objection when Taylor testified that Wargo would have noted any disagreement with Taylor, implying that the absence of such a notation indicated that Wargo agreed with Taylor. Moreover, Davis made no objection at all on confrontation grounds." *Id.*, at 259, n. 2. Accordingly, the Court had no occasion "to consider whether any testimony offered by Taylor was barred by the Confrontation Clause." The Court cautioned "the reader to keep in mind the limited scope of" the decision and it also cautioned "the reader that this case is governed by our former Evidence Code, and

we offer no opinion about admissibility under the new Evidence Code." *Id*. Thus, *Jarnigan* is not persuasive authority.

Jones is also distinguishable. The *Jones* court dealt with a rule of evidence that provided:

> The facts or data in the particular case upon which an expert bases an opinion or inference *may be those* perceived by or *made known to him at or before the hearing*. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, *the facts or data need not be admissible in evidence*.

Jones, 368 S.E.2d at 846 (quoting North Carolina Rule 703) (emphasis added).

That Rule had been interpreted by the North Carolina Supreme Court as permitting an expert witness to base an opinion on the out-of-court opinion of an expert who does not testify and to testify about that out-of-court opinion. *Id*. at 846-47. But Missouri courts have not gone so far. The testifying expert cannot discuss the absent examiner's opinions or conclusions:

> The general conclusion reached in those cases is that the testifying examiner may properly testify to his or her *own* opinions and conclusions, even if relying upon the absent examiner's report, without violating the Confrontation Clause, so long as the testifying examiner does not discuss the absent examiner's opinions or conclusions, and the absent examiner's report is not admitted into evidence.

Sauerbry, 2014 WL 5841087 at *4, *quoting*, *State v. Fulton*, 353 S.W.3d 451, 455 (Mo. App. W.D. 2011).

But here, Hunt testified about the absent examiners' opinions inferentially when she testified that that her work had been examined by other examiners as a result of a peer review process, and she felt confident in her conclusions since there "weren't issues" (Tr. 2254-55). This testimony was hearsay and violated Appellant's confrontation rights. *See State v. Bell*, 274 S.W.3d 592, 595 (Mo. App. W.D. 2009) (Dr. Dudley testified as to her conclusions regarding the victim's death as well as the conclusion of the doctor who performed the autopsy, Dr. Gill: "Dr. Dudley's testimony, to the extent she discussed Dr. Gill's opinions, was error and violated Mr. Bell's Confrontation Clause rights.").

Respondent argues that Hunt did not refer to any opinions given by a non-testifying witness and that her testimony that no problems turned up in the verification process did "not necessarily mean that another analyst reached the same conclusion as to the identity of the person who left the fingerprint." (Respondent's Brief at 55-56). But Hunt testified that all identifications had to be verified by another examiner going through the same process she did when she compared and identified fingerprints, and that there had been at least two "verifiers" in this case (Tr. 2253). She then testified that the peer review process that she went through made her feel "confident" in her conclusions and that there were no "issues" (Tr. 2254-55). Certainly if the verifying examiners had *not* reached the same conclusions as Hunt had as to the identities of the persons who

left fingerprints at the murder scene, then there would have been "issues." The fact that there were no "issues" inferentially established that the absent examiners had reached the same conclusions as Hunt as to the identities of the persons who had left the fingerprints.

Respondent argues that none of the fingerprint verification cases cited by Appellant addressed whether the admission of such testimony violates the Confrontation Clause. (Respondent's brief at 55). But in *Wicker*, which was cited on pages 101-02 of Appellant's opening brief, the appellate court held that the combination of the testifying expert's testimony and the absent expert's initials amounted to an assertion of the absent expert's opinion that the sets of prints matched and violated Wicker's right to confrontation. *Wicker*, 832 P.2d at 130. And, although not a fingerprint case, the *Bell* case cited above in this reply brief also found a violation of the Confrontation Clause for one expert to discuss an absent expert's opinions. *Bell*, 274 S.W.3d at 595.

Hunt's testimony invited the inference of hearsay and denied Appellant his right to cross-examine and confront the two fingerprint "verifiers" that reviewed Hunt's work and confirmed her results, thus improperly bolstering her conclusions. A new trial should be ordered.

CONCLUSION[11]

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

Appellant 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 Appellant'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).

Respectfully submitted,

/s/ Craig A. Johnston

Craig A. Johnston, MOBar #32191
Assistant State Public Defender
Woodrail Centre
1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
Phone: (573) 777-9977
Fax: (573) 777-9963

[11] Appellant is not waiving the other points raised in his opening brief; he believes that the opening brief adequately addresses the other issues.

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, and this certificate of compliance and service, the reply brief contains 6,564words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

On this 5th day of January, 2015, an electronic copy of Appellant's Reply Brief was delivered through the Missouri e-Filing System to Daniel N. McPherson, Assistant Attorney General, at Dan.McPherson@ago.mo.gov.

/s/ Craig A. Johnston

Craig A. Johnston, MOBar #32191
Assistant State Public Defender
Woodrail Centre
1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
Phone: (573) 777-9977
Fax: (573) 777-9963
Email: Craig.Johnston@mspd.mo.gov