No. SC93648

In the Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

ROBERT B. BLURTON,

Appellant.

Appeal from Clay County Circuit Court
Seventh Judicial Circuit
The Honorable Larry D. Harman, Judge

RESPONDENT'S BRIEF

CHRIS KOSTER
Attorney General

DANIEL N. McPHERSON
Assistant Attorney General
Missouri Bar No. 47182

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

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

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STATEMENT OF FACTS

Robert D. Blurton is appealing his conviction and sentence for three counts of murder in the first degree, section 565.020, RSMo 2000, for which he was sentenced to death. (L.F. 965-67). Following a change of venue from the Circuit Court of Benton County to the Circuit Court of Clay County, Appellant was tried by a jury on June 10-15, 2013, before Judge Larry D. Harman. (L.F. 4, 23-24). Appellant does not contest the sufficiency of the evidence to support his conviction. Viewed in the light most favorable to the verdict,[1] the following evidence was adduced at trial:

In 2009, Appellant was living in Garnett, Kansas, where he occasionally stayed with a former girlfriend, Karen Bruce. (Tr. 2037, 2039, 2054). Garnett was about a two-and-a-half hour drive from the town of Cole Camp, Missouri, where the charged crimes took place. (Tr. 2407-08). In the early part of the year, Appellant worked for a man named Doug Luckenbill who owned a motel remodeling business. (Tr. 2011-12). Appellant did not have his own car, so Luckenbill would pick him up on the way from his home in Nevada, Missouri to the worksite in Wichita, Kansas, and then drop him off again after the job had ended. (Tr. 2015, 2044). Luckenbill paid Appellant in cash at the end of each job. (Tr. 2014). Appellant's employment with

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[1] *State v. Baumruk*, 280 S.W.3d 600, 607 (Mo. 2009).

Luckenbill ended in May of 2009. (Tr. 2020-21). Luckenbill testified that he did not owe Appellant any money at the time Appellant's employment ended. (Tr. 2021). After Appellant stopped working for Luckenbill he did not have much money and did not have a car of his own. (Tr. 2053). He told Bruce that he owed people money. (Tr. 2053).

Appellant's mother had a sister named Sharon Luetjen. (Tr. 1365). In 2009, she and her husband Donnie lived in Cole Camp in the same house they had occupied for forty years. (Tr. 1353). Their fifteen-year-old granddaughter, Taron,[2] had lived with them ever since her father, Donnie and Sharon's son, died in an automobile accident when Taron was just a few weeks old. (Tr. 1353-54, 1947). Donnie ran an auto body shop out of his home and was known in the community as an all-around fix-it man. (Tr. 1355). Donnie collected coins and arrowheads and had accumulated several thousand of the latter. (Tr. 1366, 1955). Donnie stored many of the arrowheads in containers – such as Velveeta cheese boxes, cracker tins, and cigar boxes – that he kept in the top left hand drawer of his dresser. (Tr. 1366-68, 1971-72). Donnie also kept a large amount of loose change in that drawer. (Tr. 1366-68, 1971).

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[2] To avoid confusion, the Luetjens will hereafter be referred to by their first names. No familiarity or disrespect is intended.

When Appellant was fourteen or fifteen years old, his cousin Deborah[3] caught him removing quarters from the dresser drawer. (Tr. 1367). On another occasion she caught Appellant going through Sharon's purse and believed that he was stealing silver dollars that Sharon kept in the purse. (Tr. 1426, 1428). Appellant lived with the Luetjens for two or three months in 2004. (Tr. 1368-69). They helped him buy a car and Sharon got him a job at the factory where she worked. (Tr. 1363, 1431). The Luetjens also helped Appellant find a rental house when he moved out. (Tr. 1432-33). Appellant told his former girlfriend, Karen Bruce, that Donnie and Sharon were worth six-point-six million dollars and that he was set to inherit twenty-two percent of their estate. (Tr. 2128-29).

Bruce traveled to Odessa, Missouri the weekend of June 5-7, 2009. (Tr. 2054). Appellant led Bruce to believe that he was still working for Luckenbill and he told her that he needed to stay at her house while she was gone so that he could be picked up for work. (Tr. 2055). Appellant sent Bruce a text message on Saturday, June 6th, saying that he needed to use her car before the weekend was over to drive to Nevada, Missouri and pick up his paycheck from Luckenbill. (Tr. 2056-57, 2059).

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[3] Deborah's last name at the time of trial was Armenta. (Tr. 1352).

On the morning of June 7th, Sharon Luetjen took her friend Janet White to the hospital emergency room for treatment of bronchitis. (Tr. 1480-81). Sharon called her daughter, Deborah Armenta, around 3:00 or 3:30 p.m. and later took White home (Tr. 1374). At about a quarter to six that evening, Michael Porter, a neighbor of the Leutjens, was driving to church and saw Donnie weed-eating the driveway of a farm he owned south of Cole Camp. (Tr. 1295-96, 1299-1301). At about 9:15 that evening, Lillie Stelling dropped her car off at the Leutjens so Donnie could work on it. (Tr. 1312-13). Stelling talked with Sharon in the doorway and also saw Taron, who came to the door to say hello. (Tr. 1317-19). Sharon's hair was in rollers. (Tr. 1321). Stelling testified that Taron was in a good mood and that everything seemed normal. (Tr. 1320-21). Stelling left with her sister, who had followed in her own car, at about 9:30. (Tr. 1321-22, 1325-27).

Bruce had arrived home from Odessa about 6:30 p.m. (Tr. 2057-58). She took a shower and discovered when she got out of the shower that Appellant had taken her car. (Tr. 2060). Bruce called Appellant at about 8:16 p.m. and asked where he was. (Tr. 2063). Appellant said he was on his way to Nevada. (Tr. 2063). Appellant called Bruce at 9:30 p.m. and said he was at the Luckenbill's. (Tr. 2064). He also said that he could not leave right away because Luckenbill's wife was "hitting on" him and would not let him leave. (Tr. 2064-65). Luckenbill and his wife testified that Appellant had never

visited their home and that he had never met Luckenbill's wife. (Tr. 2018, 2021-22, 2035-36).

At about 10:15 p.m., a call was placed to 911 in Benton County from Taron's phone. (Tr. 1373, 1761-62, 1834, 1884, 1888). The sound was muffled, and all the dispatcher could hear was a noise that sounded like the phone was scratching against something. (Tr. 1834-35). The dispatcher disconnected the call after about forty-five seconds. (Tr. 1836). She then dialed the number that the call had been placed from and got Taron's voice mail. (Tr. 1762, 1840). The dispatcher decided that there was no emergency and did not send anyone to check out the call. (Tr. 1841).

Lorraine Hagston was in the bedroom of her home, which was less than half a mile from the Leutjen home, as her husband watched the 10:00 news downstairs. (Tr. 1331, 1333, 1337). The two homes were separated by a valley, and Hagston testified that she often heard noises and activities coming from the Luetjen home. (Tr. 1334). Hagston's bedroom window, which faced the Leutjen residence, was open. (Tr. 1337-38). Hagston heard three gunshots come from the direction of the Leutjens. (Tr. 1338-40). Hagston testified that she was familiar with the different sounds made by rifles and pistols, and that the shots she heard sounded like pistol shots. (Tr. 1339-40). The second and third gunshots were a bit farther apart than the first and second gunshots. (Tr. 1342). Hagston was concerned about hearing gunshots

that time of night, but her husband convinced her that nothing was wrong and she went to bed. (Tr. 1342). Hagston checked the clock as she went to bed and saw that it was between 10:20 and 10:30. (Tr. 1342).

At about four minutes after midnight, Appellant called Bruce and told her that he had a flat tire and had to walk three miles to get a can of Fix-a-Flat. (Tr. 2067). Appellant did not say where he was. (Tr. 2067). Appellant did not arrive back at Bruce's home until after 8:00 on Monday morning. (Tr. 2069-70).

The Luetjens' neighbor, Michael Porter, went to the Leutjen home the morning of Tuesday, June 9th to ask Donnie to repair a cracked guitar. (Tr. 1301-02). Porter first checked Donnie's shop and then went to the front door when he found that the shop was empty. (Tr. 1303-04). The door was not firmly latched and opened a bit when Porter knocked on it. (Tr. 1304). Nobody answered Porter's knocks and he went home. (Tr. 1305). Porter drove by the Leutjen house around the noon hour to see if Donnie was in his shop. (Tr. 1306). Porter did not see Donnie and went to a convenience store to put gas in his car. (Tr. 1307).

In the meantime, Janet White had received a call from Taron's driver's education teacher who was wondering why Taron had not been to driver's ed classes the past two days. (Tr. 1488, 1933). After calling the Luetjen house and getting no answer, White called Armenta, who said she had not heard

from Sharon since Sunday. (Tr. 1489). At Armenta's request, White walked to the Luetjen house. (Tr. 1489). Like Porter, White noticed that the door was slightly open. (Tr. 1490). White went inside and saw Taron's legs on the floor. (Tr. 1493-94). White yelled and got no response. (Tr. 1494). She also noticed a very foul odor. (Tr. 1494). White went outside and flagged down Porter, who was again driving by the Leutjen house after filling his vehicle. (Tr. 1307-08, 1495-96). Porter stayed with White as she called 911. (Tr. 1308, 1496).

When police arrived and went inside they found the bodies of Taron, Donnie, and Sharon. (Tr. 1509, 1523). They were lying face down on the floor with pillows underneath their heads. (Tr. 1643-44). They had each been shot once in the back of the head. (Tr. 1599, 1605). The medical examiner testified that the trajectory of the wounds was consistent with the gunman standing over the victims and shooting them as they lay on the floor. (Tr. 1612-13). The victims' hands and mouths had been bound with pieces of brown fabric that were taken from Taron's bedroom, where she had draped the fabric across the top of her bed to make a canopy. (Tr. 1399-1400, 1516-17, 1633, 1659-60). Sharon's hair was still in rollers. (Tr. 1517). All three bodies were in an advanced state of decomposition. (Tr. 1598). Officers checked the house for signs of forced entry and found none. (Tr. 1519-20).

The contents of Donnie's wallet were strewn about near the pillow on which his head had rested. (Tr. 1651-52). The wallet contained no cash, even

though Donnie was known to routinely carry at least 200-dollars in that wallet. (Tr. 1653, 1979). Sharon's wallet had been removed from her purse and it contained no cash. (Tr. 1383-84). The purse itself was not in its usual place. (Tr. 1384). The dresser drawer where Donnie kept his change and arrowheads was lying on the bed with the contents dumped out. (Tr. 1383, 1635). Only a small amount of change remained. (Tr. 1385). The Velveeta and cracker boxes kept in the drawer were empty. (Tr. 1383, 1635). Taron's cell phone was searched for, but never found. (Tr. 1372). A .25-caliber handgun that Donnie kept for his daughter was missing. (Tr. 1385-86). The storage area underneath the gun cabinet had been opened and items were left lying on the floor, including an empty holster in which Donnie normally kept two pistols. (Tr. 1390, 1392, 1976-77). Appellant's grandson told investigators that Donnie had a pair of .22-caliber pistols. (Tr. 2397). A unfired .22-caliber bullet was found on the floor near the holster. (Tr. 1659). The bullets recovered during the autopsy of the victims were believed to be .22-caliber. (Tr. 1742).

Garnett police contacted Appellant the day after the murders were discovered, and said they wanted to talk to him. (Tr. 2086). Appellant told Bruce that if anyone asked, she should say that Appellant was with her. (Tr. 2087). Appellant later told Bruce that if anyone discovered that they were not together, he would then use Luckenbill's wife as an alibi. (Tr. 2087-88).

Appellant was interviewed on June 10th by Missouri law enforcement officers who had traveled to Garnett. (Tr. 2180-85). Appellant told the officers that he was at home on the night of the murders and that he had not seen the Luetjens since 2004. (State's Exs. 111; 112, pp. 4-5, 10, 11-12).[4] Appellant told the officers that none of his DNA should be in the Luetjen home. (State's Exs. 111, 112, p. 9). Appellant told another set of Missouri officers who traveled to Garnett and interviewed him on June 12th, that he was at home on the night of the murders, that he did not leave Garnett that weekend, that he had not talked to the Luetjens since 2004 or 2005, and that he had not been at their house since he had lived with them briefly in 2004. (Tr. 2407-11; State's Ex. 115, 116, pp. 15, 16, 22, 25, 32-33, 42).

Three cups found on the living room coffee table were tested for DNA and fingerprints. (Tr. 1634, 1667). One of the cups contained multiple finger and thumb prints belonging to both Appellant and to Taron. (Tr. 2261-62, 2269-70, 2274-79, 2281-82). The coffee cup also contained DNA consistent with Appellant's DNA profile. (Tr. 2479). Male DNA was also found on the

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[4] State's Exhibits 112 and 116 are transcripts that were provided for the jury to review when the audio recordings of the interviews were played, but that were not admitted into evidence. (Tr. 2188-93, 2414-15). They are being provided to the Court for its convenience.

cloth used to bind the victims. Appellant was eliminated as the source of some of those samples while other samples did not contain enough information for analysts to conclude one way or the other whether the DNA was consistent with Appellant's profile. (Tr. 2490-2505).

A Criminal Intelligence Analyst at the Patrol's Missouri Information Analysis Center obtained a copy of Appellant's phone records, which included the location of cell towers contacted by the phone, and a document showing the location of those towers. (Tr. 1788. 2336-37, 2341-42, 2360-63, 2370-71). The records showed that several calls were placed from or to Appellant's phone between 8:16 p.m. and 9:59 p.m. on June 7th, and that those calls contacted cell towers on a route that suggested the phone was traveling on Highways 7 and 65 towards Cole Camp. (Tr. 2347-49, 2354-60, 2378).

Investigators obtained a recording of the 911 call. (Tr. 1760-61; State's Ex. 108). The recording contained the following:

Dispatcher: Nine One One where is your emergency?

(unintelligible)

Male: . . . put your hands behind your back.

Female: ohhh.

Dispatcher: Nine One One do you have an emergency?

Male: (unintelligible) in place . . . I will kill both of you.

Dispatcher: Hello?

Female: I have three hundred dollars in my purse.

Male: I heard you. Set right there. Set right there. Sharon, I'll kill all you guys. Set right there. I liked all of you. Give me that other hand.

(unintelligible)

(State's Exs. 108, 109, 146; Tr. 1417-18).[5]

Armenta listened to the 911 recording. (Tr. 1402-03, 1416; State's Ex. 108). She recognized Sharon's voice and Appellant's voice. (Tr. 1408). When asked to place a percentage on her level of certainty, Armenta said that she was eighty-percent certain that it was Appellant's voice she heard. (Tr. 1409). Armenta later listened to another recording of the 911 call in which some of the background noises had been reduced. (Tr. 1409). Armenta said that recording was easier to hear, and that prompted her to increase the certainty of her identification of Appellant's voice to ninety-percent. (Tr. 1409). Armenta listened prior to trial to yet another version of the 911 recording that had undergone further enhancements. (Tr. 1410, 1907-14; State's Ex.

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[5] State's Exhibit 146 is a transcript of the 911 call that was not admitted into evidence but was provided to the jury while it listened to State's Exhibits 108 and 109, the original recording and the second enhanced recording. (Tr. 2577-81). It is being deposited with the Court for its convenience.

109). Arementa testified that recording was much clearer than the previous two recordings, and that she was one-hundred percent certain that she heard Appellant's voice on that recording. (Tr. 1410-11).

Appellant was arrested in Garnett on June 27th. (Tr. 2101-04). Bruce was also taken to the police station, where she listened to the 911 call. (Tr. 2105-06). She recognized Appellant's voice on the tape and said, "Oh, my God, I can't believe that's him." (Tr. 2117-18). Bruce subsequently listened to the recording in which the background noises had been reduced. (Tr. 2120). Bruce testified that recording was much clearer than the original, and that the voices were more distinct. (Tr. 2121). Bruce testified that, without any doubt, she heard Appellant's voice on that recording. (Tr. 2121).

Appellant did not testify or present any evidence in the trial's guilt phase. (Tr. 2584, 2590). After both sides presented evidence in the penalty phase of the trial, the jury returned a verdict recommending imposition of the death penalty. (Tr. 2933). The jury found beyond a reasonable doubt on each count that Appellant had a serious assaultive conviction, namely a 1988 conviction for robbery in the first degree. (Tr. 2933, 2935, 2937). The jury also found that the murder of Donnie Luetjen was committed while Appellant was engaged in the commission of the unlawful homicides of Sharon and Taron Luetjen, that the murder of Sharon Luetjen was committed while Appellant was engaged in the commission of the unlawful homicides of Donnie and

Taron Luetjen, and that the murder of Taron Luetjen was committed while Appellant was engaged in the commission of the unlawful homicides of Donnie and Sharon Luetjen. (Tr. 2934-38). The jury also found on all three counts that the charged murder involved depravity of mind and was outrageously and wantonly vile, horrible and inhumane due to the victim being bound or otherwise rendered helpless by Appellant. (Tr. 2934, 2936, 2938). The court imposed the sentence recommended by the jury on August 9, 2013. (Tr. 2944, 3005-06). In doing so, the Court found beyond a reasonable doubt the existence of the statutory aggravating circumstances found by the jury. (Tr. 3001-02, 3003, 3004-05). The court also adopted and agreed with the jury's finding that the facts and circumstances in mitigation of punishment did not outweigh the facts and circumstances in aggravation. (Tr. 3002-03, 3003-04, 3005). Additional facts specific to Appellant's claims of error will be set forth in the argument portion of the brief.

ARGUMENT

I.

Appellant was not prejudiced by the refusal of his requested instruction on an additional lesser-included offense.

Appellant claims that the trial court erred in refusing his requested instruction for felony murder in the second degree. But Appellant was not prejudiced by the refusal of the instruction because the jury was instructed on conventional murder in the second degree, but found beyond a reasonable doubt that the State met its burden on all the elements of murder in the first degree.

A. Underlying Facts.

The State tendered, and the court submitted, verdict directing instructions on all three counts for murder in the first degree and lesser-included instructions for conventional murder in the second degree. (L.F. 765, 767, 769, 771, 773, 775). Appellant tendered, and the trial court submitted, an instruction presenting the defense of alibi. (L.F. 764).

Appellant also tendered, on each count, an instruction on felony murder in the second degree that read as follows:

> As to Count I, 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, 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 Luetjen 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 Luetjen was shot and killed, and

Third, that Donnie Luetjen 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 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. _____.

(Tr. 2595; L.F. 783-84). The tendered instructions for Counts II and III were identical except that they listed Sharon and Taron Luetjens, respectively, as the victims. (L.F. 789-92). The State objected to the instruction on the grounds that it was not in the proper form and did not have the accompanying instructions required to be given under the notes on use. (Tr. 2596). The State also objected that the instruction was mutually exclusive of the alibi instruction that the defense had inserted into the case. (Tr. 2596).

The court rejected the instruction, finding that it submitted an underlying felony that the State had not charged. (Tr. 2596). The court also found that the form of the tendered instruction was not proper, that the facts in evidence did not support giving the instruction, and that it was inconsistent with the defense's requested alibi instruction. (Tr. 2597). The motion for new trial contained a claim that the court erred in not giving the requested instructions for felony second-degree murder. (L.F. 904-05).

B. Standard of Review.

This Court ordinarily reviews *de novo* a trial court's decision whether to give a requested jury instruction. *State v. Jackson*, 433 S.W.3d 390, 395 (Mo. 2014). But where the defendant submits an incorrect instruction, any claim of error in failing to give the instruction is not preserved. *State v. Derenzy*, 89 S.W.3d 472, 475 (Mo. 2002). Issues that were not preserved may be reviewed for plain error only, which requires the reviewing court to find that manifest injustice or a miscarriage of justice has resulted from the trial court error. *Baumruk*, 280 S.W.3d at 607. Review for plain error involves a two-step process. *Id.* The first step requires a determination of whether the claim of error facially establishes substantial grounds for believing that manifest injustice or a miscarriage of justice has resulted. *Id.* All prejudicial error, however, is not plain error, and plain errors are those which are evident, obvious, and clear. *Id.* If plain error is found, the Court then must proceed to the second step and determine whether the claimed error resulted in manifest injustice or a miscarriage of justice. *Id.* at 607-08.

C. Analysis.

1. Appellant tendered incorrect instructions.

The instructions tendered by Appellant were not in the correct form. The first paragraph of the instructions told the jury that it could consider murder in the second degree if it did not find Appellant guilty of murder in

the first degree. (L.F. 783, 789, 791). But the instructions overlooked the fact that the jury was being instructed on both murder in the first degree and conventional murder in the second degree. When that occurs, the jury must first consider whether the defendant is guilty of first degree murder and then conventional second degree murder before it may consider felony second degree murder. *State v. Kinder*, 942 S.W.2d 313, 330 (Mo. 1996). The tendered instructions did not make provisions for that and did not contain the modifications that MAI requires when felony murder is submitted along with conventional second-degree murder. *See* MAI-CR 3d 314.06, Note on Use ¶ 5 (Sept. 1, 2003) (Appx. A9). Nor did Appellant tender properly modified instructions for conventional second degree murder. *See* MAI-CR 3d 314.04, Note on Use ¶ 5 (Sept. 1, 2003) (Appx. A4). A trial court does not err by refusing an incorrect instruction. *State v. Jaco*, 156 S.W.3d 775, 782 (Mo. 2005). But even if the instructions had been properly drafted, Appellant still cannot show prejudice, much less manifest injustice, from the trial court's refusal to submit them.

2. Failure to submit lesser-included instruction does not automatically require reversal.

Appellant argues that the Court's recent opinion in *Jackson* established that when the statutory requirements for giving a lesser-included

instruction[6] are met, the failure to give that instruction is *per se* reversible error, and that no further analysis should be necessary. But a closer reading of *Jackson* belies that assertion. Appellant relies on language in the standard of review section of the opinion which stated, "if the statutory requirements for giving such an instruction are met, a failure to give a requested instruction is reversible error." *Jackson*, 433 S.W.3d at 395. But in a footnote appended to the end of that sentence, the Court also noted that a case will not be remanded for a new trial on the basis of an error that did not violate a defendant's constitutional rights unless there is a reasonable probability that the trial court's error affected the outcome of the trial. *Id.* at 395 n.4. The Court also stated that "prejudice is presumed when a trial court fails to give a requested lesser included offense instruction that is supported by the evidence." *Id.* The Court has previously noted that the presumption of prejudice that arises from the failure to give a mandated instruction can be overcome if the State can clearly establish that the error did not result in prejudice. *State v. Westfall*, 75 S.W.3d 278, 284 (Mo. 2002). A presumption of

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[6] *See* § 556.046.3, RSMo Cum. Supp. 2002 (stating that the trial court shall be obligated to instruct on a lesser-included offense only if there is a basis in the evidence for acquitting the defendant of the immediately higher included offense and for convicting the defendant of the lesser offense).

prejudice created by an error in a criminal case can be overcome by the facts and circumstances of the particular case.[7] *State v. Ford*, 639 S.W.2d 573, 575 (Mo. 1982).

Jackson did not explicitly overrule the cases stating that a finding of prejudice is necessary before a conviction will be overturned for the failure to give a lesser-included instruction, but instead acknowledged that principle. The Court did not find that the presumption of prejudice had been overcome in *Jackson*, but that was a case where no lesser-included instruction was given. *Jackson*, 433 S.W.3d at 394. That case thus raised the spectre of a scenario where the defendant could go free despite evidence that proved he committed a crime the jury was not allowed to consider, or where the defendant would be sent to prison for a crime that the jury genuinely believed that he did not commit. *Id.* at 403. This case presents a different set of circumstances that do not implicate that concern and that are sufficient to overcome the presumption of prejudice.

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[7] Discussion of the presumption of prejudice standard presumes a properly preserved claim of error. Because the parties disagree on whether Appellant's claim is properly preserved, Respondent will discuss the presumption of prejudice standard out of an abundance of caution.

3. Appellant not prejudiced by refusal to submit felony murder instructions.

It is well established that the failure to give a different lesser-included offense instruction is neither erroneous nor prejudicial when instructions for the greater offense and *one* lesser-included offense are given and the defendant is found guilty of the greater offense. *State v. Johnson*, 284 S.W.3d 561, 575 (Mo. 2009); *Schad v. Arizona*, 501 U.S. 624, 647-48 (1991). As the Supreme Court has noted, the central concern for not giving a lesser-included instruction in a capital case is that a jury, convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime, might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all. *Schad*, 501 U.S. at 646 (discussing *Beck v. Alabama*, 447 U.S. 625 (1980), which invalidated an Alabama law prohibiting lesser-included instructions in capital cases), *see also*, *State v. McLaughlin*, 265 S.W.3d 257, 270 (Mo. 2008) (noting that obligation to instruct on lesser-included offenses in capital cases is to provide jury with a third choice beyond acquittal and conviction of first-degree murder). That concern is not present in cases where the jury is instructed on one lesser-included offense because the jury is not faced with an all-or-nothing choice between capital murder and innocence. *Schad*, 501 U.S. at 646-47.

This Court has previously addressed the exact situation presented in this case and found that when a jury convicts on first-degree murder after having been instructed on second-degree conventional murder, there is no prejudice to the defendant by the refusal to submit an instruction for second-degree felony murder. *McLaughlin*, 265 S.W.3d at 270. That is because the instruction on conventional second-degree murder sufficiently tested the evidence of deliberation by giving the jury the option of convicting Appellant of a lesser offense. *Id.*

Appellant acknowledges *McLaughlin* and similar cases, but argues that they should not be followed, at least in his case, because the instruction for conventional second-degree murder did not adequately test the disputed elements for first-degree murder. This Court has previously found that first-degree murder is distinguished from second-degree murder by deliberation. *Johnson*, 284 S.W.3d at 572. Accordingly, 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.

By finding Appellant guilty of first-degree murder, the jury rejected any theory that Appellant acted knowingly but did not deliberate on the murders. A felony murder instruction would not have changed that result since the perpetration or attempted perpetration of the underlying felony

simply provides the means for proving the necessary intent to commit the murder. *State v. Rumble*, 680 S.W.2d 939, 942 (Mo. 1984); *State v. Gheen*, 41 S.W.3d 598, 604 (Mo. App. W.D. 2001).

Apparently recognizing that the instructions that were given adequately tested the jury on the element of deliberation, Appellant makes an argument suggesting that the element actually in dispute was the identity of the shooter. Appellant states in his brief that a felony murder instruction would have allowed the jury to find that Appellant was initially involved in the robbery but that someone else deliberately murdered the victims during the course of that robbery. But 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. *See* MAI-CR 3d 314.06, Notes on Use ¶¶ 3(b), 6 (Sept. 1, 2003) (Appx. A8-A10). 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. The instructions that were submitted also gave the jury the choice of convicting Appellant if it believed that he was the shooter or acquitting him if it did not believe that he was the shooter. It is therefore difficult to see how Appellant's requested instruction would have

tested the jury any differently on the issue of Appellant's identity as the shooter than the instructions that were submitted.

Appellant's argument is similar to one that the Supreme Court rejected in *Schad*. The defendant in that case was convicted of first-degree murder and sentenced to death. *Schad*, 501 U.S. at 629. The jury was also instructed on second-degree murder. *Id.* The trial court refused to submit the defendant's requested instruction on theft as a lesser-included offense. *Id.* The defendant argued before the Supreme Court that the theory of defense at trial was not that he murdered the victim without premeditation but that, despite his possession of some of the victim's property, someone else had committed the murder. *Id.* at 647. The defendant argued that if the jurors had accepted his theory, it could have found him guilty of robbery and innocent of murder. *Id.* The Supreme Court rejected that argument as "unavailing," noting that the fact that the jury's third option was second-degree murder rather than robbery did not diminish the reliability of the verdict. *Id.* The Court further noted that to accept the defendant's contention would require an assumption that a jury unconvinced that the defendant was guilty of either capital murder or second-degree murder might choose capital murder rather than second-degree murder as a means of keeping him off the streets. *Id.* The Court stated that it could see no basis to assume such an irrationality on the jury's part. *Id.*

The jury in this case was similarly given the choice of deciding whether Appellant committed the murders following deliberation or whether Appellant committed the murders without deliberation. There is no logical basis to believe that the jury, if it truly believed that Appellant did not commit the murders at all but was unwilling to acquit him entirely, would have returned a first-degree murder conviction and death sentence instead of a second-degree murder conviction. "[T]he crucial assumption underlying the system of trial by jury is that juries will follow the instructions given to them by the trial judge." *Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983) (internal quotation marks omitted). Because the jury was given the opportunity to convict Appellant of a lesser offense, its decision to instead enter a conviction on the greater offense has to be presumed to reflect a determination that the State met its burden of proof on all the elements of that greater offense. There is no basis to conclude that the jury would have reached a different decision had it been presented with an additional theory of second-degree murder.

II.

Evidence on cell towers was properly admitted.

Appellant claims that the trial court abused its discretion in admitting evidence about the locations of cell towers used by Appellant's phones near the time of the murders because the State's witness on that subject was not qualified as an expert. But the State's witness did not offer any opinion testimony that would require an expert, but instead only provided a factual description of how he used computer software to locate calls made and received from Appellant's phone during a specific time period and then located the cell tower that the phone connected with during those calls.

A. Underlying Facts.

Highway Patrol Sergeant Hugh Fowler testified that investigators wanted to piece together Appellant's cell phone history and also the location of cell towers that may have been accessed by his phone. (Tr. 1778). Investigators therefore subpeonaed and received information from T-Mobile concerning the cell phone connected to Appellant. (Tr. 1775-77; State's Ex. 127). They also subpeonaed and received information from T-Mobile giving the locations of their cell towers. (Tr. 1780-81, 1784; State's Ex. 131).

That information was sent to Doug Middleton, a Criminal Intelligence Analyst at the Patrol's Missouri Information Analysis Center. (Tr. 1788, 2336-37, 2341). Middleton's duties included telephone "toll" analysis. (Tr.

2337). That work involved obtaining call detail records from a phone company and determining how frequently a person called another number, the location of where calls were made from, and the location of where the call ended. (Tr. 2338). Middleton said that the phone companies would usually supply the requested information in an Excel spreadsheet format. (Tr. 2339). Middleton testified that he first became involved in cellular phone analysis in 2004 while working as an intelligence analyst for the Drug Enforcement Administration. (Tr. 2339-40). Middleton attended a call analyst training school in 2004 that provided training in using Pen-Link, a phone toll analysis software used by the Highway Patrol. (Tr. 2340).

Middleton testified that he received Appellant's phone records in an Excel spreadsheet and imported them into the Pen-Link program. (Tr. 2342). Middleton ran searches in Pen-Link to identify calls made from Appellant's phone between 12:01 a.m. on June 7, 2009 and 11:00 p.m. on June 8, 2009. (Tr. 2345, 2347; State's Ex. 127).

Defense counsel objected when Middleton was asked the results of the search, on the grounds that Middleton was not a properly qualified expert to testify about the analysis of the records. (Tr. 2345-46). The court overruled the objection. (Tr. 2346).

Middleton testified that his search showed that numerous calls were placed from Appellant's phone on June 7th between 8:16 p.m. and 9:32 p.m.,

and that Appellant's phone received a call at 9:59 p.m. (Tr. 2347-49, 2354-60; State's Ex. 128). Middleton testified that the phone company records also identified the beginning and ending location of the calls by listing a location area code specific to a state and a cell tower identification number. (Tr. 2360-61). Middleton testified that he needed the cell tower location information provided by T-Mobile to determine where the phones were located when the calls were made. (Tr. 2361-62).

Middleton was asked what he did to determine where the phones might have been when the calls were made. (Tr. 2364). Defense counsel objected that Middleton was being asked to testify about plotting cell tower locations and call locations, and that he was not properly qualified as an expert in forensic digital analysis. (Tr. 2364). The prosecutor responded that Middleton would testify that all he did was take the cell tower location codes listed in the phone records and then find the GPS coordinates associated with those codes in the second spreadsheet. (Tr. 2365, 2367). The court overruled the objection:

> Yeah, I don't know that he was being offered as an expert, but the qualifications were that he did telephone analysis and telephone toll analysis, and then described what that was.
>
> That objection is overruled, he's 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, so that objection is overruled.

(Tr. 2367-68). Defense counsel requested, and received, a continuing objection. (Tr. 2368).

Middleton likened the spreadsheet that contained the cell tower locations to a phone book. (Tr. 2370-71; State's Ex. 131). He said that he could apply a filter to the phone book so that it only displayed the location area codes listed on the records of the calls to and from Appellant's phone. (Tr. 2370). The location codes also listed the cell tower identification number which contained longitudes and latitudes, and in some cases street addresses, of where the tower was located. (Tr. 2370-71). Middleton testified that he then used a Microsoft Streets and Trips program to create a map that identified the location of the cell towers according to the longitude and latitude information provided in the phone book. (Tr. 2373). Two different blown-up reproductions of the map, one giving an overall view and the other a more close-up view, were admitted into evidence over Appellant's objection. (Tr. 2373-74; State's Exs. 129, 130). The prosecutor then asked about what the map showed:

Q. And based on the phone associated with Mr. Blurton, are you able to describe on this map the, the cell towers, if you will, on, along the route and the direction of travel during that

time frame that the phone associated with Mr. Blurton would have traveled?

A. Yes, 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 –

Q. To Cole Camp?

A. – to Cole Camp.

(Tr. 2378). The motion for new trial contained a claim that the court erred in allowing Middleton to testify as an expert about the data contained within the phone company records concerning cell tower technology. (L.F. 928-29).

B. Standard of Review.

A trial court has broad discretion to admit or exclude evidence at trial, and the trial court's ruling will be reversed only if the court had clearly abused that discretion. *State v. Forrest*, 183 S.W.3d 218, 223 (Mo. 2006). Abuse of discretion occurs when a ruling is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration. *Id.* On direct appeal, this Court reviews for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial. *Id.* Trial court error is not prejudicial unless there is a reasonable probability that it affected the outcome of the trial. *Id.* A trial court's ruling on the admissibility of evidence will be upheld if it is

sustainable under any theory. *State v. Mort*, 321 S.W.3d 471, 483 (Mo. App. S.D. 2010); *State v. Pascale*, 386 S.W.3d 777, 780 (Mo. App. E.D. 2011); *State v. Miller*, 220 S.W.3d 862, 868 (Mo. App. W.D. 2007).

C. Analysis.

Generally, a lay witness is not permitted to give opinion testimony about a matter in dispute. *State v. Bivines*, 231 S.W.3d 889, 892-93 (Mo. App. W.D. 2007). A lay witness is a witness who does not possess scientific, technical or other specialized knowledge. *Id.* at 893. Middleton did not testify to any opinions. He instead related factual information based on the contents of Appellant's cell phone records and T-Mobile's "phone book" that listed cell tower locations. Reading the coordinates of cell sites from phone records and plotting them on a map is not a scientific procedure or technique. *State v. Patton*, 419 S.W.3d 125, 130 (Mo. App. E.D. 2013). The trial court accurately described Middleton's testimony as being that of a clerk describing how he performed an assigned task. (Tr. 2367-68).

Because Middleton only relayed facts from which the jury was free to form its own opinions, his testimony is distinguishable from that given in the only other Missouri case that has produced a published opinion on the question of whether expert testimony is needed on the subject of the location of cell sites used by a cell phone.

The State in that case, like the State here, presented a map showing the location of cell sites to which the defendant's phone connected and the times at which those connections occurred. *Patton*, 419 S.W.3d at 129. The court then turned to the question of whether the location of a cell phone in relation to the cell sites was a subject for expert testimony. *Id.* The court stated its recognition that cellular phones are a subject of everyday knowledge, 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 went on to find that the testimony of the State's lay witnes that the strongest signal generally comes from the closest site was misleadingly simple. *Id.* The court noted that a multitude of factors would affect which cell site would have the strongst signal, and that the lay witness's testimony required analysis of those variables. *Id.* at 131-32. The court concluded that such analysis amounted to opinion testimony that was properly the province of an expert.[8] *Id.* at 132.

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[8] The court noted that the problem with the testimony was that both the crime scene and the location of the defendant's alibi were only four miles apart and both were well within the hypothetical range of a cell site. *Id.* By contrast, Appellant's various alibis, based on his statements to police and to

In this case, the State did not elicit any information from Middleton about how cell towers operate and did not ask Middleton to offer an opinion as to where the phone associated with Appellant was located when the calls at issue were made. The most that Middleton did was summarize the information depicted on the map as to the location of the towers and the timing of when the phone connected with those towers. (Tr. 2378).

Courts in numerous other jurisdictions have found that the type of testimony given by Middleton is not expert testimony. The Florida Distict Court of Appeals found that a records custodian from Sprint-Nextel did not provide expert testimony when she factually compared the locations on phone records to locations on cell site maps, testified that a typical cell site covered an area of one to three miles, and stated that the record for a particular cell phone details the actual cell tower off of which the call bounces. *Perez v. State*, 980 So. 2d 1126, 1131 (Fla. Dist. Ct. App. 2008). The court found that the testimony "constituted general background information interpreting the cell phone records which did not require expert testimony." *Id.* That finding followed a Florida Supreme Court opinion in a post-conviction case where the court rejected a claim that counsel was ineffective for failing to object to the

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Karen Bruce, had him either in Garnett, Kansas or in Nevada, Missouri. (State's Exs. 111, 115; Tr. 2056-57, 2059, 2064).

testimony of police detectives who explained the contents of phone records linking the defendant to the charged murder and then compared the locations on the phone records to the locations on cell site maps. *Gordon v. State*, 863 So. 2d 1215, 1219 (Fla. 2003). The court described the testimony as "factual" and found that it did not constitute expert testimony. *Id.* Courts in two other states have, in unpublished opinions, also found that expert testimony is not required when the witness has plotted the location of phone calls based on call information from phone records and information describing the location of cell towers. *State v. Fleming*, 2012 WL 4794560 at *8-9 (Kan. Ct. App., Oct. 5, 2012); *State v. Hayes*, 2010 WL 5344882 at *10 (Tenn. Crim. App., June 22, 2010). Numerous federal courts have reached similar conclusions.

The United States Court of Appeals for the Eleventh Circuit has repeatedly found that testimony of the type at issue in this case need not be given by an expert. In *United States v. Ransfer*, a lay witness was permitted to explain how cell phone towers record "pings" from each cell phone tower and that he mapped the cell phone tower locations for each phone call that was admitted into evidence. *United States v. Ransfer*, 749 F.3d 914, 937 (11th Cir. 2014). The court found that the witness did not give any statements of opinion. *Id.* In *United States v. Batista*, the court upheld the admission of an FBI agent's testimony that he used the phone records of the defendant and an accomplice, along with phone company records of cell tower locations, to

plot on a map which towers connected with which cell phones at a particular point in time. *United States v. Batista*, 558 Fed. Appx. 874, 876 (11th Cir. 2014). A police detective similarly testified in *United States v. Feliciano* that he reviewed cellular telephone records of a person that the defendant was trying to implicate in the crime and a summary that identified the cellular towers for each call. *United States v. Feliciano*, 300 Fed. Appx. 795, 801 (11th Cir. 2008). The detective went on to testify that, based on his personal knowledge of the location of certain cellular towers, that cellular phone was nowhere near the location that could have implicated the phone's owner in the charged crime. *Id.* The court found that the testimony did not constitute expert testimony. *Id.*

The United States Court of Appeals for the Tenth Circuit has followed the reasoning of *Feliciano* in upholding the admission of an FBI agent's testimony that the defendant's cellular phone contacted certain cell towers at specified times and his testimony, based on the location of the towers, that the phone did not make or receive calls from a certain area during those times. *United States v. Henderson*, 564 Fed. Appx. 352, 360-61, 363-64 (10th Cir. 2014). The court described the bulk of the detective's testimony as "a nonexpert's recitation of business records." *Id.* at 363.

The United States Court of Appeals for the Third Circuit has found that testimony which consists entirely of reading and interpreting cell phone

records, including records detailing the location of cell phones towers used to carry out the phone calls, did not require any specialized scientific, technical or other specialized knowledge. *United States v. Kale*, 445 Fed. Appx. 482, 485 (3d Cir. 2011). That court reached the same conclusion about an FBI agent's testimony that he used commercially available software to create a map of the defendant's locations from his cell phone use. *United States v. Baker*, 496 Fed. Appx. 201, 204 (3d Cir. 2012). The FBI agent, like Middleton, located specific calls made on specific dates, found the location of the cell tower contacted by those calls, imported the cell tower locations into Microsoft Streets and Trips, then plotted the locations of the towers and matched the calls to those locations. *Id.* The court concluded that, "Given the omnipresent nature of computer mapping software in today's society . . . the agent's testimony about his use of the mapping software was not expert testimony[.]" *Id.*

It is true that Maryland courts have reached a contrary conclusion, finding that using the Microsoft Streets and Trips software "to plot location data on a map and to convert information from the cellular phone records in order to plot the locations from which [the defendant] used his cell phone . . ." required some specialized knowledge or skill that was not in the possession of jurors. *Wilder v. State*, 991 A.2d 172, 199-200 (Md. Ct. Spec. App. 2010). But the Tenth Circuit's observation in *Baker* seems the more realistic view.

Middleton testified that he received the phone records and cell tower location from T-Mobile in an Excel spreadsheet and plotted the locations with Microsoft's Streets and Trips software. (Tr. 2342, 2362-63, 2373). Both Excel and Streets and Trips are products that have been available for purchase and use by home computer users. *See* Microsoft.com *at*, http://products.Office.com/en-us/office-365-home (accessed Nov. 17, 2014) and *at* http://www.microsoft.com/Streets/en-us/default.aspx (accessed Nov. 17, 2014). In fact, Microsoft's web page announcing the discontinuation of the Streets and Trips program quoted the "test lead" for the program describing how much he had enjoyed hearing from RV users about their experiences in using the software "to plan their travel adventures." *Id.* at http://www.microsoft.com/Streets/en-us/default.aspx (accessed on Nov. 17, 2014). The program and its operation is thus familiar to, and easily understood by, the average layperson.

The only program used by Middleton that would be unfamiliar to the average computer user was the Pen-Link program into which he entered the phone records. (Tr. 2342). But Middleton testified that he had received training in how to use that program and had experience in using it. (Tr. 2337-38, 2340). He thus was qualified to testify as to his use of the program. *State v. Williams*, 427 S.W.3d 259, 266 (Mo. App. E.D. 2014). And it appears that Middleton used the program to search the phone records in order to identify

calls made from Appellant's phone during a certain time period. (Tr. 2345). Searching a computer software program to locate a particular piece of information is commonplace and not something that is outside the understanding of the average juror.

Even if the cell tower evidence required a level of expertise that Middleton did not possess, Appellant is still not entitled to reversal. Even without the cell tower evidence, the State still presented overwhelming evidence of Appellant's presence at the crime scene during the time of the murders in the form of the 911 call and the identification of his voice on the recording of that call by his former girlfriend and his cousin. (Tr. 1402-09, 2121). That evidence was further supported by evidence of Appellant's fingerprint and DNA on a cup found near the bodies, contrary to Appellant's assertion that he had not been in the home since 2004, five years before the murders. (Tr. 2261-62 2269-70, 2274-79, 2281-82, 2479; State's Exs. 111, 115). *See Patton*, 419 S.W.3d at 132 (finding no prejudice from admission of cell tower testimony where other evidence placed defendant at crime scene).

III.

Fingerprint examiner's testimony that her work had been verified by another examiner does not warrant reversal.

Appellant claims that the trial court abused its discretion in permitting a fingerprint analyst to testify that her work had been verified by other experts. But the court sustained all but one of Appellant's objections and instructed the jury to disregard one of the analyst's answers. Appellant requested no further relief from the trial court. Testimony that the fingerprint analysis had gone through a verification process was admissible in any case as it was part of the standard procedure that formed the basis of the analyst's opinion. Nor can Appellant show prejudice or manifest injustice, since Appellant's presence at the crime scene was established by other evidence, namely DNA and his voice on the 911 call that was made by one of the victims while the crime was in progress.

A. Underlying Facts.

Mary Kay Hunt, a latent print examiner for the Chula Vista, California Police Department, was employed as a criminalist in the Missouri Highway Patrol's Latent Print Unit in 2009. (Tr. 2216-18). Hunt analyzed fingerprints collected in connection with the Luetjen murders. (Tr. 2223). When the prosecutor asked Hunt if she had determined who had left some of the prints recovered from the scene, defense counsel objected that an insufficient

foundation had been laid as to the evaluation process that led to Hunt's conclusion. (Tr. 2247-48). The court sustained the objection and Hunt testified as to some of the specific characteristics of the prints that led her to make an identification. (Tr. 2249-50). Defense counsel again objected on foundation grounds when Hunt was asked whom she had identified as leaving the prints. (Tr. 2250). The court stated that the foundation was probably adequate, but suggested that Hunt might give more testimony as to the number of points of comparison that were necessary to make an identification. (Tr. 2251).

Hunt testified that there was no certain number of identical points of comparison that she had to observe in order to make an identification. (Tr. 2251-52). The prosecutor asked additional questions about the process Hunt followed in reaching her conclusions:

> Q. And did your analysis work and efforts and the things you found, do they all comply with your agency's guidelines, and your experience and training, in determining whether you can determine that that unknown print came from this subject?
>
> A. Yes.
>
> Q. And in addition to that, in your lab, do you have a peer review protocol when you make an identification in a case?

A. Yes.

Q. And what is a peer review, what is your peer review protocol?

A. 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.

Q. And was that, in fact, done in this case?

A. Yes, it was.

Q. By how many other peer reviewers, if you know?

A. I had my official, or primary verifier, and I, I believe there were two other individuals, actually.

(Tr. 2252-53). Defense counsel objected and asked to approach the bench:

MR. MORELAND: Object on grounds of Crawford versus Washington. For this witness to be relating what other analysts have to say about, about this evidence.

MR. ZOELLNER: And, Judge, I don't believe they, she said anything about what these analysts decided, she just described the peer review process.

THE COURT: Yeah, leave it at that –

MR. ZOELLNER: That's where I'm –

THE COURT: – that whether or not its gone through a peer review process.

MR. ZOELLNER: But I believe that's the foundation, Judge. I mean, I'm going to ask her the same question before. (sic).

THE COURT: 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. 2253-54). The prosecutor continued with his examination:

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 any issues were there?

A. No, there were not.

MR. MORELAND: Objection, Your Honor, that question's, same matter, objection as at the bench, it's asked the same way, or in a different manner.

THE COURT: Overruled.

(Tr. 2254-55). Hunt went on to testify that she determined that the latent print lifted from the coffee cup belonged to Taron Luetjen. (Tr. 2256-57, 2259-60). Hunt further testified that she had examined another latent print taken from the same coffee cup. (Tr. 2260). Defense counsel raised a foundation objection when Hunt was asked if she had made an identification, and the court directed the prosecutor to ask Hunt the same questions concerning her analysis that he had asked in connection with the previous print. (Tr. 2261-62). After Hunt testified about the features she analyzed in making her comparison, the prosecutor asked if she had reached a conclusion:

A. Yes, I did.

Q. With respect to whether this unknown matched something?

A. Yes, I did.

Q. And did you send this through that same peer review process that you described at the crime lab?

A. Yes.

MR. MORELAND: Well, objection, Your Honor, that's a violation of Crawford versus Washington.

MR. ZOELLNER: Judge, I –

THE COURT: Sustained as to the form of the question.

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. 2263-64). Appellant objected on the basis that the answer violated *Crawford v. Washington*.[9] (Tr. 2265). Counsel accepted the court's offer to instruct the jury to disregard (Tr. 2265), and the court gave the following instruction to the jury:

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.

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9 541 U.S. 36 (2003).

(Tr. 2267). Following a recess, Hunt went on to testify that another fingerprint found on the same coffee cup belonged to Appellant. (Tr. 2269-70).

The motion for new trial contained a claim that the court erred in overruling Appellant's objection to Hunt's testimony that she was confident in her results following peer review of her testing. (L.F. 896-97).

B. Standard of Review.

Appellant's point is not preserved. An objection which is made after the question has been asked and answered is untimely, and in the absence of a motion to strike the answer, the ruling of the trial court on the objection is not preserved for review. *State v. Smith*, 90 S.W.3d 132, 139 (Mo. App. W.D. 2002). An exception to the above principle occurs when a party is not given the opportunity to voice an objection because of a quick response by the witness. *Id.* However, even when this is the case, the party must object at the earliest opportunity and move to strike the answer in order to preserve the trial court's ruling for appeal. *Id.* Appellant never claimed that the exception applied, and he did not move to strike the reply. *Id.* Issues that were not preserved may be reviewed for plain error only, which requires the reviewing court to find that manifest injustice or a miscarriage of justice has resulted from the trial court error. *Baumruk*, 280 S.W.3d at 607.

To the extent that Appellant's claim is deemed preserved, this Court's review of the claim that the improperly admitted evidence was hearsay is

reviewed for abuse of discretion under *State v. Forrest*, *supra*. Whether testimony violated the Confrontation Clause is a legal issue that this Court reviews *de novo*. *State v. March*, 216 S.W.3d 663, 664-65 (Mo. 2007).

C. Analysis.

Appellant's point relied on contends that the trial court erred in overruling his objections to Hunt's testimony. But the trial court only overruled one of Appellant's objections, that being to the question as to whether there were any issues after Hunt's results were reviewed by other examiners. (Tr. 2254-55). In the instances where his objections were sustained, Appellant requested no further action from the trial court. When his last objection was sustained, the court offered to instruct the jury to disregard and Appellant accepted that offer. (Tr. 2265). Because Appellant received all of the relief he requested at trial, he cannot complain about that testimony on appeal. *State v. Scurlock*, 998 S.W.2d 578, 586 (Mo. App. W.D. 1999). While Appellant now complains in one instance that the jury was not informed that one of his objections had been sustained, and suggests in a footnote that instructing the jury to disregard may be insufficient, it was Appellant's responsibility to request a more drastic remedy if he felt that was warranted. *Id.* (quoting *State v. Olivares*, 868 S.W.2d 122, 130 (Mo. App. W.D. 1993). The adequacy of the corrective action taken by the trial court is assumed. *Id.*

That leaves the one instance in which Appellant's objection was overruled, where Hunt testified that there were no issues after her findings had been reviewed by other analysts. (Tr. 2255). Appellant claims that the testimony was inadmissible hearsay and violated his right to confront witnesses as set forth in *Crawford*.

Appellant's hearsay argument is not well taken because the verification process helped form the basis for Hunt's opinion. An expert opinion may be based on otherwise inadmissible hearsay evidence. *Baumruk*, 280 S.W.3d at 617. Both the Georgia and North Carolina Supreme Courts have applied that principle to reject hearsay challenges to testimony that a fingerprint analyst's work had been verified by another examiner as part of a standard procedure. *Jarnigan v. State*, 761 S.E.2d 256, 260 (Ga. 2014); *State v. Jones*, 368 S.E.2d 844, 848 (N.C. 1988). In this case, the State questioned Hunt about the verification procedure after Appellant repeatedly, and successfully, objected that the State had not laid an adequate foundation for Hunt's opinion because she had not discussed the procedure that she followed to make her identifications. (Tr. 2247-50). The verification process was a part of that procedure that led Hunt to make the identification and was thus admissible to establish the foundation for Hunt's opinion.

Appellant cites cases from other jurisdictions that reach a contrary result, but several of those cases are distinguishable. In *State v. Wicker*, the

testifying examiner identified by name the examiner who verified the fingerprint identification and noted that the verifying examiner's initials appeared on the fingerprint card. *State v. Wicker*, 832 P.2d 127, 128 (Wash. Ct. App. 1992). The court concluded that the initials, in the context in which they were presented, were an out-of-court statement. *Id.* at 129. The State in that case apparently did not raise, and the court did not address, whether the hearsay would be admissible as forming the basis of the testifying expert's opinion. The Appellate Court of Illinois likewise did not address that theory of admissibility in finding that testimony regarding verification of a fingerprint identification was inadmissible hearsay. *People v. Smith*, 628 N.E.2d 1176, 1181 (Ill. App. Ct. 1994).

The New Hampshire Supreme Court has, on the other hand, rejected the argument that testimony about verification of fingerprints is admissible as forming the basis for the testifying expert's opinion. *State v. Connor*, 937 A.2d 928, 931 (N.H. 2007). The Florida District Court of Appeals has ruled fingerprint verification testimony inadmissible under a different theory, that being that an expert cannot testify that he consulted with other experts in the same field in order to reach his opinion. *Telfort v. State*, 978 So. 2d 225, 226 (Fla. Dist. Ct. App. 2008). Because those cases are contrary to Missouri law on the basis of expert testimony, they are not persuasive and should not be followed.

None of the fingerprint verification cases cited by Appellant have addressed whether the admission of such testimony violates the Confrontation Clause under the rule set forth in *Crawford v. Washington* that generally bars the admission of testimonial hearsay. While Appellant recites the *Crawford* rule in his brief, he makes no argument demonstrating how Hunt's testimony would violate that rule. Appellant has accordingly abandoned that portion of his point relied on. *Mallow v. State*, 439 S.W.3d 764, 771 n.4 (Mo. 2014). Even if Appellant had developed a *Crawford* argument, it would not have been well taken.

Missouri courts have adopted an approach taken by other courts which hold that expert testimony does not violate the Confrontation Clause if the expert is testifying to his or her own independently developed opinions, even if those opinions are based in part on the observations of a non-testifying person, and the expert's testimony does not serve merely as a conduit for the admission of hearsay statements of other individuals. *State v. Sauerbry*, 2014 WL 5841087 at *8 (Mo. App. W.D., Nov. 12, 2014).[10] Hunt testified to her own opinions and did not refer to any opinions given by a non-testifying witness. The testimony that no problems turned up in the verification process

[10] Corrected opinion issued December 2, 2014. Mandate issued December 3, 2014.

suggests that the process showed that Hunt followed proper procedures. It does not necessarily mean that another analyst reached the same conclusion as to the identity of the person who left the fingerprint. The subsequent testimony that the identification had been verified could be viewed as expressing that someone else had reached the same conclusion as to identity, but again, the objection to that statement was sustained and the jury instructed to disregard.

Even if the court did err in overruling Appellant's objection to Hunt's statement that there were no problems with her identification, Appellant cannot show prejudice or manifest injustice. That particular question and answer were given in the context of Hunt describing her identification of Taron Luetjen's fingerprint. (Tr. 2254-60). Taron's presence in the house was beyond dispute and Appellant would therefore not be prejudiced by that identification. As noted earlier, Appellant's objection was sustained and the jury instructed to disregard when Hunt referenced verification in connection with her identification of Appellant's fingerprint. (Tr. 2263-70). Appellant requested no further relief. Furthermore, even if Hunt had not testified about the verification process, the jury would still have heard her testimony about the remainder of the process that she went through and the opinion she reached that the fingerprints belonged to Taron and Appellant, respectively. And the fingerprint evidence was not the only physical evidence linking

Appellant to the murders. Appellant's DNA was also found on the coffee cup, and calls made from Appellant's phone put that phone in the area of Cole Camp near the time of the murders, contradicting Appellant's statements to police that he had not been in the home for at least five years before the murders. Additionally, Appellant's cousin and former girlfriend both identified his voice on the 911 call made from Taron's phone as the crimes were in progress. Because that evidence established essentially the same facts as the fingerprint evidence, Appellant suffered no prejudice and is not entitled to reversal. *State v. Zagorski*, 632 S.W.2d 475, 478 n.2 (Mo. 1982).

IV.

The trial court properly restricted Appellant from arguing that another person committed the murders.

Appellant claims that the trial court abused its discretion in partially granting the State's motion in limine concerning the possible defense that someone else had committed the charged crimes, which resulted in the jury not hearing evidence that a woman identified as Debra Kost, Taron Luetjen's biological mother, was seen at the victims' home about two hours before the murders. But Appellant could have presented evidence of Kost being seen at the home if he chose to, and the trial court did not err in prohibiting Appellant from arguing that Kost may have committed the murders, because Appellant's proposed evidence did not directly connect her to the murders.

A. Underlying Facts.

The State filed a pre-trial motion in limine concerning the possible defense that someone else committed the crime. (L.F. 667). The State alleged in the motion that it anticipated that the defense would call a woman named Karen Wiskur to testify that she observed Taron Luetjen's biological mother, Debra Kost, standing outside the Luetjen home at about 8:00 p.m. on June 7, 2009. (L.F. 668). The motion alleged that Wiskur was expected to testify that Kost was smoking a cigarette and talking on her cell phone, that Kost put out the cigarette, placed it in her pocket, and then went inside the house. (L.F.

668). The motion noted that Kost had consistently denied being at the house that day. (L.F. 668). The motion stated that Appellant should not be able to offer any evidence blaming Debra Kost for the murder unless it could prove that she committed some act directly connecting her to the crimes. (L.F. 668-71).

After hearing arguments at a pre-trial hearing, the trial court granted the State's motion in part and denied it in part. (Tr. 550). The court ruled that the defense would be allowed to present evidence that Debra Kost was at or near the scene of the murders and would be allowed to present any other evidence that directly connected Kost with committing the murders, by way of an offer of proof outside the hearing of the jury. (Tr. 550-51). The court further ruled that if the defense presented evidence that directly connected Kost to the murders, other than her mere presence at the scene prior to the murders, that evidence would be allowed to be presented to the jury if otherwise admissible. (Tr. 551). The court ruled that failure of the defense to present evidence of an act connecting Kost to the commission of the murders would result in the exclusion of argument that she committed the offense. (Tr. 551).

During the trial, defense counsel made an offer of proof with Highway Patrol Sergeant Darren Blankenship.[11] (Tr. 1753). Sergeant Blankenship testified that he interviewed Debra Kost after receiving information that she had been seen at the Luetjen home on the evening of June 7, 2009. (Tr. 1753). Sergeant Blankenship said that he questioned Kost for about two-and-a-half hours and told Kost during the interview that she was involved in the death of the Luetjens. (Tr. 1753-54). Sergeant Blankenship said that the DVD recording of that interview had disappeared. (Tr. 1754). Sergeant Blankenship testified on cross-examination that he did not really believe that Kost was involved in the murders. (Tr. 1755). Sergeant Blankenship said that Kost never acknowledged being involved in the crimes and that he felt bad afterwards about treating her so harshly during the interview. (Tr. 1756). Sergeant Blankenship said that Kost agreed to, and ultimately did take, a polygraph test after the interview. (Tr. 1757). On redirect examination, Sergeant Blankenship said that Kost denied being at the Luetjen home on June 7, 2009. (Tr. 1758).

Neither Wiskur nor Kost were called to testify at trial or for purposes of making an offer of proof. The motion for new trial contained a claim that the

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[11] In his brief, Appellant mistakenly attributes Detective Blankenship's testimony to Kost, who did not testify.

court erred by granting in part the State's motion in limine to exclude evidence that someone else had committed the crimes and in preventing him from presenting evidence that Kost was seen outside the Luetjen home the night of the murders and that Kost had denied being outside the home when questioned by Sergeant Blankenship. (L.F. 882-86).

B. Standard of Review.

Appellant has not fully preserved his claim for review. His claim of error concerns the trial court's ruling on the motion in limine and the fact that the jury did not get to hear Karen Wiskur's testimony about seeing Debra Kost outside the victims' homes on the night of the murders. It initially bears noting that the trial court's ruling permitted Appellant to present evidence that Kost was purportedly seen outside the home on the night of the murders. (L.F. 550-51). But Appellant never called Kost, either to testify in front of the jury, or for purposes of making an offer of proof. To properly preserve a claim of error in the exclusion of evidence, the proponent of the evidence must make an offer of proof that shows three things: (1) what the evidence will be; (2) the purpose and object of the evidence; and (3) each fact essential to establishing the admissibility of the evidence. *State v. Tisius*, 92 S.W.3d 751, 767 (Mo. 2002). Where proffered evidence is excluded, relevancy and materiality must be shown by specific facts sufficient to establish admissibility so as to preserve the matter for review. *Id.* The

purposes of an offer of proof are: (1) to preserve the evidence so that the appellate court understands the scope and effect of the questions and proposed answers in considering whether the trial judge's ruling was proper; and (2) to allow the trial judge to further consider the claim of admissibility after having ruled the evidence inadmissible. *Id.* at 767-68. Because this point was not properly preserved it can only be reviewed for plain error, which requires the reviewing court to find that manifest injustice or a miscarriage of justice has resulted from the trial court error. *Id.* at 768; *Baumruk*, 280 S.W.3d at 607.

Appellant did make an offer of proof with Sergeant Blankenship and has preserved that portion of his claim for review. That portion of the claim is reviewable for abuse of discretion under *State v. Forrest*, *supra*.

C. Analysis.

Appellant's claim of error is that he was prevented from presenting evidence that Karen Wiskur had seen Deborah Kost outside the Luetjen home about two to two-and-a-half hours before the murders. The court's ruling was that Appellant could present that evidence. (Tr. 550-51). The limitation that the court placed on Appellant was that he could not argue that Kost was responsible for the murders unless he could produce evidence demonstrating a direct connection between Kost and the murders. (Tr. 551). Defense counsel indicated an intent during the trial to present evidence of

Kost's presence. (Tr. 1439-40). But even if one accepts the contention now made on appeal that evidence of Kost's presence was of no value to the defense unless he could point the finger at her, he is not entitled to relief because the court's ruling was correct.

To be admissible, evidence that another person had an opportunity or motive for committing the crime for which the defendant is being tried must tend to prove that the other person committed some act directly connecting him with the crime.[12] *State v. Rousan*, 961 S.W.2d 831, 848 (Mo. 1998). The evidence must be of the kind that directly connects the other person with the *corpus deliciti* and tends to clearly point to someone other than the accused as the guilty person. *Id.* Disconnected and remote acts outside the crime itself cannot be separately proved for such purpose; and evidence which can have no other effect than to cast a bare suspicion on another, or to raise a conjectural inference as to the commission of the crime by another, cannot be admitted. *Id.*

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[12] While Appellant does not directly attack the validity of this rule, he does discuss in his brief the right of a defendant to present a defense. This Court has previously found that the direct connection rule does not violate the constitutional right to present a defense. *State v. Nash*, 339 S.W.3d 500, 512-14 (Mo. 2011).

The evidence that Appellant claims should have been admitted would not have provided a direct connection between Kost and the murders and would have done nothing more than cast mere suspicion on her. At best it would have established that she was at the Luetjen home some two to two-and-a-half hours before the murders occurred, which might create an inference of opportunity. But mere presence at a crime scene does not equate to a direct connection.

The defendant in *State v. Miller* was charged with attempted burglary after he was discovered near a business and in possession of burglary tools at 3:00 a.m. *State v. Miller*, 368 S.W.2d 353, 354-54 (Mo. 1963). Additional burglary tools were found wedged under the framework of the business's front door. *Id.* at 355. The defendant wanted to present evidence that a man had been seen in the vicinity of that front door between 12:30 a.m. and 1:30 a.m., along with evidence that the coin plate in a phone booth the man occupied had been considerably damaged by one of the tools found in the doorway, and that tools similar to those found in the doorway were discovered in the phone booth. *Id.* In finding that the evidence was properly excluded, this Court noted that evidence that one person had an opportunity to commit the crime would not exculpate the defendant, who also had the opportunity to commit the crime. *Id.*

The Eastern District of the Court of Appeals has similarly upheld the exclusion of evidence that would have shown nothing more than opportunity to commit the charged crime of receiving stolen property. *State v. Shepherd*, 903 S.W.2d 230, 232 (Mo. App. E.D. 1995). The property in question had been stolen from a house over the course of a weekend where the homeowners were out of town and their daughter was holding a three day party. *Id.* at 231. One of the stolen items was found at the defendant's house. *Id.* The defendant unsuccessfully attempted to introduce evidence that three other persons were at the party, with the theory being that they stole the items and left them in the defendant's house without his knowledge. *Id.* at 232. The Eastern District found that the evidence did not establish that those three persons committed some act directly connecting them with receiving stolen property and would merely have cast suspicion on those persons. *Id.*

The defendant in *Nash* wanted to present evidence that the fingerprints of a third person had been found on the victim's car, while his fingerprints and those of the victim were not found. *Nash*, 339 S.W.3d at 514-15. The defendant also wanted to present evidence that a heavy rainstorm had occurred the night before the charged murder, which suggested that the rain had washed other fingerprints off the car. *Id.* at 504, 515. This Court upheld the trial court's ruling that the proposed evidence did not meet the direct connection standard. *Id.* at 515.

Appellant tries to argue that the woman identified as Kost demonstrated consciousness of guilt by putting an extinguished cigarette in her pants pocket. Even if that activity can be construed as suspicious, it would be evidence that would do no more than cast suspicion on Kost, which does not meet the direct connection standard. If a potential suspect's act of looking up hitmen on the internet did not directly connect that person to the charged murder, then putting an extinguished cigarette in one's pocket would not meet that standard. *See State v. Speaks*, 298 S.W.3d 70, 86 (Mo. App. E.D. 2009).

Appellant suggests that there was evidence that Kost had a motive to commit the murders, namely a long-standing dispute between Kost and Donnie and Sharon Luetjen over Taron Luetjen's custody.[13] The only evidence of a custody dispute that Respondent has found in the record was the following question asked by a detective who interviewed Appellant: "What can you tell me about Taron's biological mom? I guess it was some kind of a custody battle." (State's Ex. 111; 112, p. 6). In any event, evidence of

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[13] While that custody dispute might have provided Kost with a motive to kill Donnie and Sharon Luetjen, it would hardly explain why Kost would want her own daughter murdered, particularly since Kost was supposedly upset at not having more access to Taron. (Tr. 531).

motive is not by itself sufficient to admit evidence regarding an alternative suspect. *Id.* The evidence certainly would not have exonerated Appellant, who also had a motive to commit the murders. *Id.*

Appellant also briefly refers to being prohibited from adducing evidence that Kost denied being at the Luetjen home. Evidence that a third suspect had made false statements to the police does not meet the direct connection requirement. *Nash*, 339 S.W.3d at 515. And that assumes, of course, that Kost's statements were false. The trial court did not err, plainly or otherwise, in its ruling.

V.

The trial court properly excluded testimony by Deborah Armenta about threats made to Janet White after the murders by the maternal grandmother of victim Taron Luetjen.

Appellant claims that the trial court abused its discretion in sustaining the State's objections to evidence that Deborah Armenta, the daughter of victims Donnie and Sharon Luetjen, expressed concern for her safety to police because Janet White, a friend of Donnie and Sharon, had purportedly been threatened after the charged murders by the maternal grandmother of victim Taron Luetjen. Appellant claims that the evidence was admissible because the threat to White provided Armenta with a motive to distort or exaggerate her testimony. The theory of admissibility now urged on appeal was not placed before the trial court and the court therefore did not err in excluding the evidence. Nor would the evidence have been admissible under Appellant's new theory, since the evidence consisted of double hearsay that lacked logical and legal relevance.

A. Underlying Facts.

During cross-examination of Deborah Armenta, defense counsel asked Armenta whether she had told the police that she had "concerns about the – [.]" (Tr. 1437). The prosecutor objected before defense counsel could complete the question and told the court that he believed defense counsel was about to

ask Armenta whether she had concerns about Debra Kost. (Tr. 1438). Defense counsel told the court that he wanted to ask Armenta about her parents' level of involvement in raising Taron, due to the fact that there had been a long-running custody dispute between Kost, and Donnie and Sharon. (Tr. 1439). Defense counsel also stated that he expected there to be evidence that Kost was seen acting suspiciously outside the Luetjen home the evening of the murders, and that he wanted to put on that evidence. (Tr. 1439-40).

The jury was recessed for lunch and defense counsel made an offer of proof. (Tr. 1442-43). Armenta testified in the offer of proof that she had given the police a handwritten statement in which she expressed concern for herself and her family. (Tr. 1444-45). That statement was admitted into evidence for purposes of the offer of proof. (Tr. 1445). The statement began with Armenta recounting her activities on June 7, 2009, and a statement that she could provide receipts for purchases that she made that day. (Def.'s Ex. 261). Armenta then wrote the following:

> I want to express my concern for my [&] family (sic) safety due to the family of Debra Kost and her mother Dianne Reeves [&] the the rest of the family.

(Def.'s Ex. 261).

Armenta testified that the source of her concern was Kost and Kost's mother, Dianne Reeves. (Tr. 1445). Armenta said she had heard rumors that

Kost was going to try and take Taron's body so she could not be buried with the rest of the family. (Tr. 1446). Armenta said she had been present with Janet White when White received a phone call from Kost and Reeves where a statement was made to White along the lines of "Watch out or it could happen to you." (Tr. 1447). Armenta confirmed on cross-examination that the phone call took place two or three days after the murders and that she did not actually hear the call, but instead relied on what White told her. (Tr. 1449). Armenta said it was her understanding that Reeves made the statement to White. (Tr. 1449). Armenta also testified that she never heard Kost's voice on the 911 call. (Tr. 1450). The trial court ruled that statements made by Dianne Reeves were not relevant, but might become admissible if evidence was developed of overt actions demonstrating that another person committed the murders. (Tr. 1452-53).

The motion for new trial contained a claim that the court erred in not allowing Appellant to question Armenta about her fears for her safety due to her knowledge of threatening calls from Kost and Reeves to White. (L.F. 917-18). The motion did not state a basis as to why the evidence was admissible. (L.F. 917-18).

B. Standard of Review.

Appellant's point is not preserved for review. In his point relied on, Appellant claims that he was entitled to cross-examine Armenta about

anything that might have motivated her to distort or exaggerate her testimony. That theory of admissibility was never presented to the trial court. Appellant instead argued that he wanted to question Armenta as part of his effort to develop evidence regarding Debra Kost as an alternative suspect. (Tr. 1439-40). An issue that was never presented to or decided by the trial court is not preserved for appellate review:

> Because an appellate court is not a forum in which new points will be considered, but is merely a court of review to determine whether the rulings of the trial court, as there presented, were correct, a party seeking the correction of error must stand or fall on the record made in the trial court, thus it follows that only those objections or grounds of objections which were urged in the trial court, without change and without addition, will be considered on appeal.

State v. Davis, 348 S.W.3d 768, 770 (Mo. 2011). Accordingly, an appellate court generally will not find, absent plain error, that a lower court erred on an issue that was not put before it to decide. *Id.*

C. Analysis.

Appellant's argument largely centers on his constitutional right to present a defense. But that right is not absolute. *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996). "'The accused does not have an unfettered right to offer

[evidence] that is incompetent, privileged; or otherwise inadmissible under standard rules of evidence.'" *Id.* (quoting *Taylor v. Illinois*, 484 U.S. 400, 410 (1988)). "And any number of familiar and unquestionably constitutional evidentiary rules also authorize the exclusion of relevant evidence." *Egelhoff*, 518 U.S. at 42. Those include rules that exclude relevant evidence when the prejudicial effect of the evidence outweighs its probative value and rules that exclude hearsay testimony. *Id.*

Armenta's testimony was inadmissible on hearsay grounds. A hearsay statement 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. 1997). Reeves's statement to Janet White fits that definition because the evidentiary value of the statement would depend on its veracity. And because Armenta was not actually a party to the conversation where the statement was made, she would have been testifying to what White told her about Reeves's statement. Her testimony would thus have constituted hearsay within hearsay. A hearsay statement contained within other hearsay evidence is admissible only where both the statement and the original hearsay evidence are within exceptions to the hearsay rule. *Id.* at 377. Appellant never provided the trial court with any theory as to why the proposed testimony would not be

excluded under the hearsay rules, so the trial court could not have committed plain error in not allowing the testimony.

The evidence was further excludable under the general rules for relevance. Evidence must be relevant to be admissible. *State v. Anderson*, 306 S.W.3d 529, 538 (Mo. 2010). In Missouri, the general rule is that evidence is two-tiered: logical and legal. *Id.* Evidence is logically relevant if it tends to make the existence of a material fact more or less probable. *Id.* But logically relevant evidence is only admissible if it is legally relevant. *Id.* Legal relevance weighs the probative value of the evidence against its costs – unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness. *Id.* Accordingly, logically relevant evidence is excluded if its prejudice outweighs its probative value. *Id.*

Evidence of the phone conversation was not logically relevant. Appellant's theory is that Reeves's statement to Janet White gave Armenta a motive to identify Appellant's voice on the recording of the 911 call. The idea that fear of Reeves or Kost would motivate Armenta to implicate Appellant is illogical on its face. That is true even if Armenta had reason to believe that multiple persons were involved in the murders, and there is no evidence to show that is the case. Furthermore, Armenta's testimony during the offer of proof does not support Appellant's theory. Armenta admitted that any concerns she had were based on "stuff" that she had heard "through the

rumor mill," and that were "more or less hearsay." (Tr. 1446). One of those rumors was that Deborah Kost was going to try to take Taron's body so that it could not be buried with the rest of Armenta's family. (Tr. 1446, 1450). Armenta also said that she did not want her children bothered because, "you just don't know what they would say." (Tr. 1446). Armenta testified on cross-examination that her concerns about Kost and Reeves were not in reference to who may or may not have committed the murders. (Tr. 1450). She also denied having any ill feelings towards Kost. (Tr. 1450).

The lack of logical relevance is further demonstrated by the context of the statement that Reeves made to White. Reeves had recently learned that her granddaughter was dead and she was trying to find out what had happened. (Tr. 1568-70). Reeves made several calls to White's number to get information from her, but White, her sister, and Armenta – all of whom answered the phone at least once -- refused to talk to her. (Tr. 1569-74). The common-sense conclusion is that Reeves was understandably frustrated by the lack of cooperation, and her frustration prompted her to threaten White in order to induce White to provide the information that Reeves was seeking.

Even if the evidence could be deemed to have some logical relevance, it does not pass the test for legal relevance. Appellant's theory of bias stems from statements about which Armenta only possessed second-hand knowledge and that were made to and directed towards another person. The

tenuousness of that connection so weakens any probative value the evidence might possess that the probative value is substantially outweighed by the risk of unfair prejudice, confusion of the issues, misleading the jury, undue delay, and waste of time.

Nor can Appellant demonstrate either prejudice or manifest injustice from the exclusion of the evidence. Armenta was not the only witness who identified Appellant's voice on the 911 recording. Appellant's ex-girlfriend, Karen Bruce, also heard the recording and identified Appellant's voice. The 911 call was not the only evidence connecting Appellant to the murders. His DNA and fingerprints found at the scene along with telephone calls putting him in the vicinity of Cole Camp, despite his claims that he had not been in the Luetjen home for many years, were also sufficient for the jury to find that Appellant committed the murders.

VI.

The trial court properly excluded testimony from Janet White about threats made to her after the murders by the maternal grandmother of victim Taron Luetjen.

Appellant claims that the trial court abused its discretion in sustaining the State's objection to evidence of a purportedly threatening call made by maternal relatives of victim Taron Luetjen to Janet White, a friend of the victims. Appellant claims the evidence should have been admitted to confirm that Deborah Armenta, the daughter of Donnie and Sharon Luetjen, feared Taron's biological mother and grandmother and because it would have corroborated purported evidence that Taron's mother was seen outside the Luetjen home on the night of the murders. But the evidence was not admissible because it was based on hearsay and lacked logical and legal relevance to either demonstrate that Deborah Armenta feared Taron's maternal relatives or to support testimony that Taron's mother had been seen acting suspiciously outside the Luetjen home the night of the murders.

A. Underlying Facts.

Defense counsel made an offer of proof with Janet White after she finished testifying in the State's case-in-chief. (Tr. 1567). White testified that she received a phone call from Dianne Reeves on June 9, 2009, the day the bodies were found. (Tr. 1568). White said that Reeves asked if she could tell

her what had happened to her granddaughter, Taron. (Tr. 1569-70). White testified that she was unsure at that point what she should or should not be talking about, so she told Reeves, "No, I can't, I can't talk to you about this[.]" (Tr. 1570). White then hung up. (Tr. 1570). The phone soon rang a second time and Deborah Armenta, who was with White, answered. (Tr. 1570). White saw the incoming number and recognized it as Reeves's. (Tr. 1571). White heard Armenta ask the caller how she got the number. (Tr. 1571). Armenta then said "don't call again," and hung up. (Tr. 1571). The phone rang a third time and White answered. (Tr. 1571). Reeves was on the other end. (Tr. 1571-72). White asked Reeves how she got the number and Reeves replied that she got it from the sheriff's office. (Tr. 1572). White said that she did not appreciate Reeves calling her, said that she did not want Reeves to call the number again, and hung up. (Tr. 1572). Reeves called a fourth time and Debra Kost then made a phone call that was answered by White's sister. (Tr. 1573-74). During one of the phone calls, Reeves said to White, "If you do not tell me about my granddaughter, you'll end up just like her." (Tr. 1574).

After his questioning of White was completed, defense counsel asked the court to sustain the offer of proof without providing any reasons as to why he believed the evidence was admissible. (Tr. 1576). The prosecutor argued that the testimony should be excluded as inadmissible in the absence of any direct connection between Debra Kost and the murders. (Tr. 1576-77).

Defense counsel offered no response to that argument. (Tr. 1577). The court denied the offer of proof as not establishing an act by Debra Kost that would directly connect her to the murders. (Tr. 1577).

The motion for new trial contained a claim that the court erred in not allowing Appellant to question White about threatening calls by Kost and Reeves to White and her sister. (L.F. 918-19). The motion did not state a basis as to why the evidence was admissible. (L.F. 918-19).

B. Standard of Review.

Appellant's point is not preserved for review. In his point relied on, Appellant claims that he was entitled to examine White because her testimony would have confirmed Armenta's fears of Kost and Reeves, would have corroborated Armenta's excluded testimony about the phone calls, and would have supported Wiskur's purported testimony about seeing Kost outside the victim's home. Those theories of admissibility were never presented to the trial court. Appellant, in fact, presented the court with no reasons as to why the evidence was admissible. (Tr. 1576). An issue that was never presented to or decided by the trial court is not preserved for appellate review:

> Because an appellate court is not a forum in which new points will be considered, but is merely a court of review to determine whether the rulings of the trial court, as there presented, were

> correct, a party seeking the correction of error must stand or fall on the record made in the trial court, thus it follows that only those objections or grounds of objections which were urged in the trial court, without change and without addition, will be considered on appeal.

Davis, 348 S.W.3d at 770. Accordingly, an appellate court generally will not find, absent plain error, that a lower court erred on an issue that was not put before it to decide. *Id.* Should the Court find that Appellant's point is preserved as to the issue of whether it supported the proposed defense that Deborah Kost was responsible for the murders, then the trial court's ruling is reviewed for abuse of discretion under *Forrest*, *supra*.

C. Analysis.

Appellant argues that White's testimony was admissible to confirm Deborah Armenta's fear of Kost and Reeves and to corroborate Armenta's excluded testimony about the phone calls. White's testimony on the issue suffered from the same infirmity as Armenta's – it was based on hearsay and it lacked logical and legal relevance. Because Armenta's testimony on the subject was inadmissible, then White's testimony would likewise be inadmissible if offered for the same purposes.

Appellant also contends that White's testimony would have supported evidence that Karen Wiskur had seen Kost acting suspiciously outside the

victims's homes on the night of the murders. Appellant again refers to Karen Wiskur's testimony as being excluded, even though the trial court ruled that Appellant could present that testimony. (Tr. 550). Since Appellant never called Wiskur to testify, he can hardly complain that the trial court did not allow him to present evidence to corroborate her testimony.

Nor would White's testimony have corroborated what Wiskur would supposedly have testified to. The only threatening statement that White testified to was made by Dianne Reeves, not by Kost. And the context of that statement, as explained in the previous point, showed that Reeves was expressing frustration that White would not provide her information as to what had happened to her granddaughter. Far from implicating Reeves or Kost in the murders, the phone calls when taken in context showed that they were largely unaware of what had taken place.

Appellant cannot show prejudice or a manifest injustice in any event since the excluded testimony would not have exonerated him. The State presented ample evidence, as detailed in the preceding point, that allowed the jury to find that Appellant was present at the Luetjen house and committed the murders.

VII.

The trial court did not abuse its discretion in denying Appellant's requests for a mistrial.

Appellant claims that the trial court abused its discretion in denying his requests for a mistrial after the State inadvertently displayed photographs of the victim's bodies during the testimony of three witnesses. But the trial court, which closely observed the display of the pictures and the effect that it had on the jury, determined that the displays were inadvertent and brief and that they did not cause any undue reaction among the jurors. The court thus acted within its discretion in determining that the displays did not warrant a mistrial.

A. Underlying Facts.

During the direct examination of Donnie and Sharon Luetjens' daughter, Deborah Armenta, prosecutor Kevin Zoellner asked Armenta to identify photographs of the exterior of the Luetjens' home. (Tr. 1356). After Armenta identified the house and some vehicles parked outside, Zoellner told Armenta that he would show her a better picture. (Tr. 1358). Zoellner then said to Armenta, "This is State's Exhibit 1, we had the wrong number in there, I apologize. Can you identify this being that shop area and some other vehicles?" (Tr. 1358). Armenta went through the exhibit and identified the

various vehicles depicted. (Tr. 1358-59). Defense counsel then asked to approach:

> MR. MARSHALL: Your Honor, from where I was, my position, when the TV was being set up, I couldn't see what was being displayed there, but my co-counsel told me that the prosecutor flipped a picture of the victims' bound hands, and I want the record to reflect, ever since that happened, the witness has started to cry.
>
> MR. ZOELLNER: And Judge, I would note that she, she has started sniffling a little bit, from knowing her over these last four years, I could tell that she was emotional before that photo happened. We have a Powerpoint display, so the record knows this, and if you put in numerically the number of the exhibit and hit enter, it will go to that. I hit Number 1, which is the first exhibit, and hit enter, and that number, another photograph showing one of the victims did pop-up.
>
> So, I'm not sure if somebody, one of us had accidentally hit another number and never hit enter or what happened along those lines, Judge, but that did happen with the, but I can assure that at some point during this testimony, she was going to get

emotional, and that would happen based on my past experience with her.

(Tr. 1359-60). Defense counsel requested a mistrial. (Tr. 1360). The court denied the mistrial, noting that the photograph at issue was displayed for less than two to three seconds at most and that the entire period in which the photograph was displayed and then changed to another photograph took no more than ten to twelve seconds. (Tr. 1360). The court, noting that Armenta had been sniffling, asked her if she needed a break. (Tr. 1361-62). Armenta replied that she was fine and her testimony continued. (Tr. 1361).

Later in the trial, the State called as a witness Scott Beckman, who was Deborah Armenta's former husband. (Tr. 1934-35). Prosecutor Richard Hicks asked Beckman if he was familiar with the gun case inside the Luetjen home and Beckman said that he was:

Q. All right. I'm going to just – I'm sorry, (indicates) is this the house that you were, that you had been inside of?

A. Yes.

Q. All right. And I want to take you to, I'm sorry, sorry –

(Tr. 1939). Defense counsel asked to approach the bench and told the court that the prosecutor had "just flipped through a whole series of crime scene photographs in fairly rapid fashion, I would say it lasted maybe a total of 10 seconds[.]" (Tr. 1939-40). Counsel said that six or eight photos were involved

and he had no idea whether they had been admitted into evidence or not. (Tr. 1940). Counsel requested a mistrial. (Tr. 1940). Hicks stated that he had gone through about a dozen photographs that were in numerical order, starting at one, and that he understood that all the crime scene photographs had been admitted. (Tr. 1940). The court stated that it did not see which photographs had been displayed. (Tr. 1941). The court noted that photographs one through 32 and 36 through 41 had been admitted into evidence. (Tr. 1941). The court denied the request for a mistrial as being too drastic a remedy for what had occurred. (Tr. 1941-42). The court noted that the bench conference might actually have drawn more attention to the issue. (Tr. 1942).

The next State's witness was Eugene Beckman, a distant cousin of Scott Beckman. (Tr. 1954). Prosecutor Hicks asked Beckman whether he had been to Donnie's shop:

> A. Yes, he did some business for me on a couple of vehicles.
>
> Q. All right. Sounds like he did a lot of that?
>
> A. Uh-huh.
>
> MR. HICKS: God. Guys, it won't –

(Tr. 1956). Defense counsel objected and, after approaching the bench, asked for a mistrial. (Tr. 1957). Counsel stated that the State had flashed a picture of Donnie's bound body at the crime scene, for what counsel described as an

extended length of time. (Tr. 1957). Counsel stated that the display of pictures had happened three times and had to have had a negative effect on the jury. (Tr. 1957).

The court denied the mistrial request, noting that it had seen the picture and that it was on the screen for three to four seconds. (Tr. 1957-58). The court asked counsel if he wanted any other relief. (Tr. 1958). After equivocating on whether or not he wished that the jury be instructed to disregard the photograph, counsel decided not to request such an instruction. (Tr. 1958-60).

Prosecutor Hicks said that he was not going to try and show any more pictures and he explained what had happened:

> MR. HICKS: I will tell you this, that this is the same, it was photograph 11, it was, it's Exhibit 11, and it was the same one –
>
> THE COURT: Okay.
>
> MR. HICKS: – that Mr. Zoellner did in front of Deborah Armenta.
>
> What happens is, Number 1 and 2 are the pictures of the house, which is what I intended to show him. And then you hit it, if somebody's previously hit it, it makes 11, and then it apparently goes there.

(Tr. 1960).

At the hearing on the motion for new trial, Appellant presented testimony from an investigator in the public defender's office who said that jurors visibly reacted the first two times that the pictures were displayed and appeared to be disturbed by them. (Tr. 2949-58).

In denying the claim, the court first noted that the pictures at issue were ultimately admitted into evidence. (Tr. 2988). The court also found that the pictures had only been displayed momentarily, and estimated that they were visible for no more than six or seven seconds. (Tr. 2988-89). The court also found that the display of the pictures was not unduly prejudicial:

> It did cause a reaction with Ms. Armenta as she saw the first screen. Within a few moments of her taking the stand, I recall the discussion of, should we take a, quote, break. And my concern was for the composure of the witness. And my recollection is she did compose herself and was able to continue and did not, she did not really desire a recess or a break at that time.
>
> 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 there was some response to these particular photographs, or to the reaction of the witness, that was beyond any other human reaction.

(Tr. 2989). The court concluded that the displays of the photographs was inadvertent and did not cause prejudice. (Tr. 2990). The motion for new trial contained a claim that the court erred in not granting the mistrial requests outlined above. (L.F. 915-16, 923-25).

B. Standard of Review.

A mistrial is a drastic remedy to be exercised only in those extraordinary circumstances in which the prejudice to the defendant cannot otherwise be removed. *State v. Ward*, 242 S.W.3d 698, 704 (Mo. 2008). This decision is left to the discretion of the trial court, as it is in the best position to determine whether the incident had a prejudicial effect on the jury. *Id.* Appellate review of a trial court's refusal to grant a mistrial is for an abuse of discretion. *Id.* A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances before it and when the ruling is so arbitrary and unreasonable as to shock the appellate court's sense of justice and indicate a lack of careful consideration. *Id.*

C. Analysis.

Appellant concedes that the photographs at issue were all admitted into evidence and does not contest the decision to admit them. He

nonetheless contends that the photographs were improperly used and thus caused him prejudice warranting a new trial. The exact line where particular matter, although relevant, crosses the line into being more prejudicial than probative is necessarily a judgment that is entrusted to the trial court. *State v. Knese*, 985 S.W.2d 759, 768 (Mo. 1999). Similarly, as noted above, the trial court is given deference in determining whether a mistrial is warranted since it is in the best position to determine the effect of a particular incident on the jury and whether it resulted in prejudice to the defendant. *Ward*, 242 S.W.3d at 704. The trial court made clear that, based on its own observations of what had happened and the reaction of the jurors, that a mistrial was not warranted.

The court estimated that the pictures were visible for no more than six or seven seconds. (Tr. 2988-89). While Armenta did have an emotional reaction when the first picture was displayed, the court observed that she was able to compose herself fairly quickly. (Tr. 2989). The court pointed out that it had an unfettered and unobstructed view of the jury and that it had watched the jury closely. (Tr. 2989). The court said that it did not see any physical or visible reaction from any juror, or the jury as a whole, that would indicate to the court that there was any response or undue reaction to the photographs. (Tr. 2989). The court concluded that the displays of the photographs was inadvertent. (Tr. 2990). *See State v. Chambers*, 891 S.W.2d

93, 105 (Mo. 1994) (trial court did not abuse discretion in denying mistrial following unintentional display of autopsy photograph).

While Appellant presented testimony that the display of the photographs did cause an extreme emotional reaction among jurors, the trial court clearly did not find that testimony credible, based on its own observations to the contrary. This Court defers to the trial court's superior position to determine the credibility of witnesses. *State v. Blankenship*, 830 S.W.2d 1, 16 (Mo. 1992). The trial court did not abuse its discretion in finding that a mistrial was not warranted.

CONCLUSION

In view of the foregoing, Respondent submits that Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Daniel N. McPherson
DANIEL N. McPHERSON
Assistant Attorney General
Missouri Bar No. 47182

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 19,190 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2010 software; and

2. That a copy of this notification was sent through the eFiling system on this 8th day of December, 2014, to:

Craig A. Johnston
Office of the Missouri Public Defender
Woodrail Centre, 1000 W. Nifong
Building 7, Suite 100
Columbia, MO 65203

/s/ Daniel N. McPherson
DANIEL N. McPHERSON
Assistant Attorney General
Missouri Bar No. 47182

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321
Fax (573) 751-5391

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI