No. SC86689

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

JOHNNY A. JOHNSON,

Appellant.

Appeal from the Circuit Court of St. Louis County, Missouri
21st Judicial Circuit, Division 3
Honorable Mark D. Seigel, Judge

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from convictions for murder in the first degree, § 565.020, RSMo 2000, armed criminal action, § 571.015, RSMo 2000, kidnapping, § 565.110, RSMo 2000, and attempted forcible rape, §§ 564.011, 566.030, RSMo 2000, obtained in the Circuit Court of St. Louis County, and for which appellant was sentenced as a persistent offender to death for first-degree murder and consecutive life sentences for the remaining crimes. Due to the sentence imposed, the Supreme Court of Missouri has exclusive appellate jurisdiction. Mo. Const., Art. V, § 3 (as amended 1982).

STATEMENT OF FACTS

Appellant, Johnny A. Johnson, was charged by indictment with first-degree murder, armed criminal action, kidnapping, and attempted forcible rape (L.F. 21-23). A substitute information charged appellant as a prior and persistent offender (L.F. 78-84). On December 3, 2002, the State filed its notice of aggravating circumstances, alleging three statutory aggravating circumstances and other non-statutory aggravating circumstances (L.F. 40-42). This cause went to a trial by jury beginning on January 10, 2005, in the Circuit Court of St. Louis County, the Honorable Mark D. Siegel presiding (L.F. 14; Tr. 249).

The sufficiency of the evidence is not at issue in this appeal. Viewed in the light most favorable to the verdict, the following evidence was adduced: In July 2002, the victim, six-year-old Cassandra (Casey) Williamson, lived at the home of her grandfather, Jim Wideman, along with her mother, Angie Williamson, her older sister, twelve-year-old Chelsea Wideman, and her two younger siblings (Tr. 820-821, 855). The Wideman home, located at 805 Benton in Valley Park, Missouri, was across the street from the home of Michelle Rehm and her boyfriend Eddy (810 Benton), where the victim's father, Ernie Williamson, who was separated from Angie at the time, was staying so that he could still be close to his children (Tr. 820-821, 856-858, 899-902).

On or around Wednesday, July 24, 2002, appellant, who had gone to school with Eddy and whose sister had been Angie's best friend for much of her life, was walking down Benton Street past the Wideman home, where Angie and Ernie were outside on the porch (Tr. 860-861). Angie said hello to appellant, and appellant stopped and talked with Ernie and

Angie (Tr. 861-862). Appellant also had gone to Rehm's house around that same time, looking for Eddy and Ernie (Tr. 902-903). At another point that same day, Chelsea and her friend, Angel Friese, were riding bikes on Benton Street when they noticed appellant following them, walking a half-block behind them(Tr. 981-982, 985). The girls turned on to 7th Street heading towards Vest Avenue (Tr. 983). As they did, they saw that appellant was now in an alley between Benton and Vest, still heading towards them (Tr. 983). The girls started to speed up and stopped looking back at appellant, riding back to the Wideman house (Tr. 983-984).

Later that night, between 10:30 and 11:00, Angie was at home with her three younger children (Chelsea spent the night with Friese) when she had a fight with her father (Tr. 866-867). She decided to take the kids and go over to Rehm's house to spend the night with Ernie (Tr. 866). When she got there, she saw that appellant was over with Eddy and Rehm, and that he was going to spend the night on the couch, which Rehm had no problem with (Tr. 905). Appellant, who everyone but Rehm had known since childhood, exhibited no unusual behaviors which caused any concern about appellant being around the children (Tr. 824-825, 869-870, 902, 906). Angie said hello to appellant and then, with Ernie and the children, went upstairs to bed (Tr. 867).

Around 9:00 the next morning, Angie got up along with her two younger children and went downstairs (Tr. 868). Casey had already gotten up and gone downstairs earlier, and Angie found her on the couch in the living room, watching cartoons with appellant (Tr. 869). Angie asked appellant if the victim had woken him up, and appellant said that the victim was

fine and was not bothering him (Tr. 869). In fact, appellant thought that the victim was "cute," and, unbeknownst to anyone, appellant was starting to have "ideas" of wanting to have sex with the child (Tr. 1375). Eventually, Angie took her kids back over to her father's house for the day (Tr. 876).

Rehm noticed that appellant was still at the house that morning and that he was "in and out" during the day, which led her to believe that appellant was visiting other friends in the neighborhood (Tr. 908). At one point during the day, however, while the victim, Chelsea, Friese, and other neighborhood kids were over at the Wideman house by themselves, Friese looked out a window at the deck and saw appellant sitting in a chair by the deck (Tr. 986). Friese locked the door, and about ten minutes later she heard a knocking at the door, which she did not answer (Tr. 987).

That evening, Angie, Ernie, Eddy, Rehm, and the children were together barbequing when they saw appellant walking on the street again (Tr. 824, 871, 909). Appellant was invited to come and eat with them, and while appellant joined them, he did not eat anything (Tr. 824, 871-872, 911-912). Later, Angie took the kids back to the Wideman house, but later, the kids said that they wanted to stay with their father again, so she took them back over to Rehm's house (Tr. 874-875). Appellant was still there with Rehm and Eddie watching television, so, after engaging in some small talk, Angie took the kids upstairs (Tr. 875-876). Ernie returned to the house from work sometime after 9:00, and, noting that appellant was still there, briefly spoke with appellant as he headed upstairs (Tr. 822). Ernie went back downstairs around 10:00 p.m. to get the victim something to eat, and saw

appellant and Eddy on the couch drinking "Ten High"[1] and playing video games (Tr. 844).

The next morning, Friday, June 26, Ernie woke up between 6:00 and 6:30 to get ready for work (Tr. 826, 877). The victim woke up at the same time, telling her father that she was hungry (Tr. 826). Ernie told her he would have to take her across the street to get breakfast because there was no milk in the house (Tr. 827, 913). He then told her to wait upstairs while he went downstairs to the bathroom to get ready (Tr. 827). He then went to the downstairs bathroom, noting on his way that appellant was asleep on the couch (Tr. 827, 913).

Instead of waiting upstairs, the victim went downstairs to the living room (Tr. 878, 1268). Appellant woke up, finding the victim standing near the couch (Tr. 1376). The television was on and the victim was laughing (Tr. 913-914). Appellant sensed that this was his best opportunity to have sex with the victim, as everyone else was asleep (Tr. 1376; St.Exh. 90). Appellant had also decided that, to avoid being caught for sexually assaulting the victim, he would kill her after having sex with her (St.Exh. 90). Appellant asked the victim if she wanted to go to the "glass factory," where they could play games and have fun (Tr. 1376).[2] The victim said she would go with him, and the two left out the front door, with

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[1]"Ten High" is a brand of sour mash bourbon whiskey, 80 proof. http://www.bartonbrands.com/tenhigh.html (last viewed May 4, 2006).

[2]The "glass factory" referred to a nearby wooded area with numerous trains which contained the remnants of an old glass factory, consisting of the old foundations, with

the victim still wearing only underpants and the nightgown she had slept in (Tr. 840, 887-888). After walking a short distance down Benton Street and into an alley behind Sal's Market, the victim complained that her feet were hurting, so appellant picked her up and carried her piggyback-style (Tr. 1268, 1376).

Meanwhile, after being in the bathroom for about fifteen minutes, Ernie came out and went back upstairs to get the victim (Tr. 827-828). Not finding her, he looked around the house, calling her name, and then went over to the Wideman house to look for her, again calling out her name (Tr. 828-829, 914). Not finding her in the other house, he went back to the Rehm house and, around 7:15, woke up Angie, asking if the victim had come back upstairs (Tr. 878). She said no, he told her that he could not find the victim and was running late, so he needed some help (Tr. 830-831, 878). Angie then got up and both looked around for the victim, both upstairs and downstairs (Tr. 878-879). Only when he came downstairs this time did Ernie notice that appellant was also not there (Tr. 830). Thinking that appellant may have taken the victim to the store to buy some milk or get breakfast, Ernie took the alley between St. Louis Avenue and Benton Street to nearby Sal's Market, but the victim was not there, so he headed back to the Wideman house (Tr. 831-832).

By that time, appellant and the victim had already left St. Louis Avenue by cutting across a parking lot to Marshall Road and then across an open field to the edge of the woods

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numerous trails, chambers and tunnels, which was a popular spot for local youths to hang out (Tr. 834, 960-961, 972-973).

(Tr. 935-937, 950-952, 1268-1269; St.Exh. 87). At the edge of the woods, appellant put the victim down and told her she had to walk the rest of the way (Tr. 1268-1269). From there, both appellant and the victim walked along one of the paths and then over several structures, old concrete, rocks, and tree trunks to reach what appellant called a "silo," a sunken pit with brick and concrete walls more than six feet high (Tr. 1050-1052, 1115, 1269, 1287). At the pit, first the victim, who was 3'8" tall, and then appellant crawled through a small, ten-foot-long tunnel and dropped down into the pit from the mouth of the tunnel, the bottom of which was four feet and seven inches above the surface of the pit (Tr. 1268-1269, 1290, 1377).

Back at the Wideman home, when Ernie returned from the store, he found that Angie had woken up Chelsea and sent her to one of her friends' houses in search of the victim while Angie contacted other neighbors (Tr. 833, 880-882). Angie also called her father to see if Casey had gone to work with him that morning, something she had done before, and found out that he had not taken her (Tr. 882-883). At that point, the victim had been gone for about thirty minutes, so Ernie and Angie decided to call the police, who arrived within a couple of minutes (Tr. 833, 849-851, 883, 916). When police arrived, they conducted a 3-5 minute search of the two houses, then called in other officers for a larger search (Tr. 834, 1007-1009). Descriptions of both the victim and appellant were broadcast to area officers (Tr. 1010-1011).

In the glass factory, after dropping down into the pit, appellant asked the victim if she wanted to see his penis (Tr. 1290; St.Exh 90). Even though the victim said no, appellant pulled down his shorts and exposed his penis (Tr. 1291, 1377-1378; St.Exh. 90). The victim

turned her head away (St.Exh. 90). Appellant then asked the victim to pull down her panties so he could see her vagina (Tr. 1378; St.Exh. 90). When she said no, appellant grabbed the victim's underwear, tearing it off of her and forcing her to the ground (Tr. 1379; St.Exh. 90). He then got on top of her, pinning her to the ground with his chest, and started rubbing his penis on her leg to try to get an erection (Tr. 1379; St.Exh. 90). The victim started screaming, kicking, and pushing at appellant, scratching his chest (Tr. 1379; St.Exh. 90).

Appellant got up and, even though he had not yet raped the victim, decided to go ahead and kill her (St.Exh. 90). He grabbed a brick and hit her in the head with it at least six times, causing bleeding and bruising, but not killing her or rendering her unconscious (Tr. 1379, 1432-1435). After the victim was struck the first time, she started to run around the pit, leaving blood in various places around the pit (Tr. 1136-1137, 1156-1159, 1195-1198, 1228-1230). When appellant hit her with it again, the victim fell to her knees, sagging to the ground, but she continued to try to crawl away from appellant (Tr. 1291; St.Exh. 87). Appellant struck the victim with the brick again, eventually knocking her to the ground and, at some point, fracturing the right side of her skull with the brick (Tr. 1291; St. At that point, because the victim was still moving around, appellant lifted a "rather large boulder" (about the size of a basketball) over his head and brought it down on the back left side of the victim's head and neck, causing multiple fractures to her skull (Tr. 1291, 1424-1425, 1430; St.Exh 87). The victim inhaled and exhaled "really fast," and then stopped breathing (St.Exh. 87). Appellant then wiped blood off the victim's face with her underpants, threw them in another opening in the wall, and started burying the victim with rocks, leaves, and

other debris in the pit (Tr. 10543-1055, 1116-1117, 1136, 1140, 1291-1292, 1380; St.Exh. 87). Appellant then climbed out of the pit, went back through the tunnel, and headed down to the nearby Meramec River to wash the victim's blood and other trace evidence off of his body (Tr. 1291-1292, 1380; St.Exh. 87, 90).

After washing himself in the river, appellant came up the boat ramp onto River Road, where he was seen by city workers laying asphalt (Tr. 962-963). Appellant was no longer wearing his shirt, and he was wet from the waist down (Tr. 965). Appellant looked at the workers with a "hateful" look and did not acknowledge their greeting (Tr. 966). Shortly thereafter, Angel Friese, who was riding her bike around the neighborhood looking for the victim, saw appellant on Marshall Street (Tr. 990). She asked appellant where the victim was, and he said he did not know (Tr. 991). Appellant said he went swimming in the Meramec, and Angel noticed that appellant's shirt was over his shoulders and his shorts were wet (Tr. 991). Angel said, "I think you do know something," to which appellant did not respond (Tr. 1002-1003). Knowing that the police were looking for appellant, she went back to the Wideman house and told the police where appellant was (Tr. 992).

Officer Chad Louis went down to Ninth Street, where he met up with appellant, who said, "I hear you're looking for me" (Tr. 1011, 1014). Louis had appellant walk back towards the house and get in a police car to talk due to the large number of people now around the area (Tr. 1015). Once in the car, without any question being asked, appellant said that he would not hurt "little kids" and that he liked them because he had one of his own (Tr. 1015). Appellant told Louis that he went down to the river for a swim and explained what

route he took to get there, which was unusual, as local residents would have cut through the glass factory to get to the river (Tr. 1016-1017, 1019). Louis asked appellant if he had been in the glass factory, and appellant said he had not (Tr. 1016, 1019-1020). Officer Louis then asked appellant if he would go back to the police station to talk in private, which appellant agreed to do (Tr. 1020). Officer Louis took appellant to the Valley Park police station and left him there (Tr. 1023).

While at the Valley Park station, one of the witnesses who had seen appellant carrying the victim on his back was brought to the station and identified appellant (Tr. 940). About 20-30 minutes after appellant was brought to the station, around 8:30 a.m., Detectives Paul Neske and Dave Knieb arrived at the station and decided to take appellant to a St. Louis County Police Substation at Sulphur Springs and Big Bend Road, where there was an open office for them to talk with appellant (Tr. 1072-1073, 1236-1237, 1240). On the ride to the substation, Detective Neske advised appellant of his rights against self-incrimination and to counsel, which appellant said he understood (Tr. 1239). After arriving at the substation around 9:25 a.m., Detective Neske again advised appellant of his rights using a form, which appellant said he understood, initialing each right, and signed the waiver of his rights, saying that he wanted to make a statement (Tr. 1242-1247). During their first conversation, which lasted about one hour, appellant denied seeing or being with the victim that morning, again saying that he had left the house and, after waiting for his boss to pick him up for work, went down to the river for a swim (Tr. 1248). Appellant continued to deny being around the victim even when confronted with the accounts of witnesses who saw him with the victim

that morning (Tr. 1249-1250).

Getting nowhere, Detective Neske decided to change the subject and just start talking to appellant about his life (Tr. 1252-1253). During the conversation, appellant mentioned liking the television program "CSI," and the two talked about forensics for a while (Tr. 1255). That conversation ended between 11:30 and 11:45 a.m. when Detective Neske brought up a hypothetical situation in which appellant's son was missing (Tr. 1256). Appellant got angry, rising up out of his seat and banging his fists against the table, assuming a posture like he wanted to fight (Tr. 1257, 1314-1315). Appellant said that he was under a doctor's care for schizophrenia and had been hospitalized in the past for it (Tr. 1257). Neske tried to calm appellant down and asked appellant if he was hearing voices, which appellant denied, saying that he usually saw shadows (Tr. 1257). Appellant denied having any hallucinations at that time (Tr. 1257). Neske asked if appellant was on medication, appellant said he had not taken any for a month and was not suffering from it anymore (Tr. 1257, 1317). Due to appellant's outburst, Neske handcuffed one of appellant's hands to the chair for 15-20 minutes until he calmed down, and took a break, during which Detective Knieb got appellant some food (Tr. 1257-1259).

Between 1:30 and 1:45 p.m., Detective Neske asked appellant if he would sumbit to a suspect rape kit, and he agreed (Tr. 1260-1261). Between 30-45 minutes later, the identification officers arrived to collect the samples (Tr. 1263-1264). Once the officers started pulling out their equipment, Neske noticed that appellant's demeanor significantly changed, showing concern and a little fear, and he believed that appellant was ready to tell

where the victim was (Tr. 1265-1266). Before any of the samples were actually collected, Detective Neske ordered the identification officers out of the office, then pulled appellant close to him, saying, "Johnny, they're going to find out whether or not you were involved in this. You need to do the right thing, you need to be a man and tell me where she's at, we can help you, tell us where she's at" (Tr. 1266). Appellant started crying and said, "She's in the old glass factory" (Tr. 1266).

While Detective Knieb went to call the commander on the scene to tell him to search the glass factory, Neske asked appellant if the victim was dead or alive (Tr. 1267). Appellant said she was dead and that it was an accident (Tr. 1267). Appellant told Neske that the victim had wanted to go to the glass factory with him and that, while they were in the pit, he had tried to climb out and the large rock he was grabbing onto had fallen out onto the victim's head, killing her (Tr. 1268-1269). Appellant said he had then "freaked out," thinking he would not be believed, and buried the victim with rocks, leaves, and sticks (Tr. 1269). Appellant said that he had then gone to the river to kill himself, but could not (Tr. 1269). During this conversation, appellant drew two maps that had been requested to help officers locate the body (Tr. 1275-1276). Forty-five minutes after the "confession," the commanding officer told Neske to bring appellant to the scene, as they could not find the victim, so he cuffed appellant, put him in a car, and headed to the scene (Tr. 1278).

While Neske and appellant had been talking, the search for the victim had grown, as police (including police from neighboring areas), city workers, members of the media, and other private citizens were searching all over the area, including the glass factory (Tr. 834-

838, 968-969, 1046-1047, 1077, 1110-1112). One of those private citizens, David Hults, a friend of Jim Wideman, had been searching the glass factory for a couple of hours and was about to walk out when he decided to check one area about five minutes off of the main trail that had not yet been searched (Tr. 1047-1048, 1050-1052). Hults went through the same tunnel that appellant and the victim had gone through, noticing a bunch of tennis shoe tracks in the dust and mud at the entrance (Tr. 1053). When he got into the pit, he saw a pile of rocks in the middle, blood around the pile, and the victim's foot between a couple of the rocks (Tr. 1053-1055). He hollered the victim's name to see if she would move (Tr. 1056). He saw that there was a chunk of concrete weighing "probably a hundred pounds" where the victim's head would have been (Tr. 1056-1057). Hults then called for help from people who had been searching with him to help him out of the pit (Tr. 1057). Police eventually arrived and secured the pit (Tr. 1058, 1117-1118).

As Neske arrived at the scene with appellant, he called his supervisor and was told that the victim had been found, so he took appellant back to the substation (Tr. 1279). There, he made arrangements to have appellant taken to the main police headquarters in Clayton, and then went to the scene, where he was directed back to the pit (Tr. 1281-1282). He looked around the pit and could not find any indication along the wall where a rock would have fallen away into the pit (Tr. 1285-1286). The evidence officer processing the pit told Neske that there was no place where a person could have climbed up out of the pit and that there was blood found all over the floor of the pit, which contradicted appellant's story (Tr. 1285-1287).

Detective Neske went back to headquarters, where he again advised appellant of his rights and the waiver, and then told appellant that he had been to the scene and did not think it was an accident (Tr. 1289). Appellant then told Neske that, once he and the victim had gotten into the pit, he asked the victim if she wanted to see his penis and pulled down his pants (Tr. 1290-1291). When he asked the victim if she would show him her vagina and then pulled off her panties, he said she started "freaking out" and saying she was going to tell her parents (Tr. 1291-1292). This caused appellant to start "freaking out" as well, at which time he picked up the brick and hit her a couple of times in the head, then dropped the "boulder" on her head (Tr. 1291). He said that he had wanted her to expose herself so he could masturbate (Tr. 1292). He also said he wiped blood off of her face with the underwear and discarded them, buried her body, and went to the river to wash off the blood (Tr. 1292-1293). After giving this statement, appellant agreed to make an audiotaped statement, which was consistent with this version of events (Tr. 1293-1294; St.Exh. 87). In this statement, appellant did not admit that he intended to take the victim, rape her, or kill her prior to getting into the pit (Tr. 1329).

Later that night, while awaiting booking at the jail with Detectives John Newsham and Craig Longworth, appellant and Newsham were talking about reading and the works of Edgar Allen Poe (Tr. 1365-1367). Appellant said that he also liked to read the Bible, and was concerned about his "eternal salvation" (Tr. 1367). Appellant said he was "fine," and that he anticipated being executed for his crime, which was "wanted," but asked Newsham, "[D]o you think I'll ever achieve eternal salvation[?]" (Tr. 1367-1368). Newsham said yes,

and, because he thought appellant was indicating that he had not been completely honest earlier, said that, to be forgiven for this crime, appellant had to be completely truthful and honest and not leave any details out (Tr. 1368). Appellant seemed particularly interested at that and said that he had not been completely honest and had left details out (Tr. 1368-1369). The detectives brought appellant back to headquarters, where he again waived his rights and made both verbal and audiotaped statements, admitting that he had intended to take the victim for the purpose of having sex with her and that he had planned to kill her after doing so (Tr. 1375-1381).

An autopsy conducted on the victim showed that she died from blunt force injuries to the head, which appellant struck at least six times, resulting in numerous fractures, bruising to the scalp and brain, and other injuries (Tr. 1413-1419, 1424-1434). The victim also suffered numerous other injuries to her forearms, shoulders, legs, and back (Tr. 1419-1424). Laboratory testing showed that the victim's blood was on appellant's shirt and a brick and large rock recovered from the pit (Tr. 1230-1231). Appellant's semen was found on his shorts (Tr. 1215).

Appellant called eight witnesses, presenting a defense that appellant could not deliberate due to mental illness, specifically schizo-affective disorder which caused command hallucinations to rape and kill the victim (Tr. 1446-1793). In rebuttal, the State called Dr. Byron English, who testified that any hallucinations appellant may have experienced at the time was due to methamphetamine intoxication and not due to psychosis, and that he was capable of deliberation (Tr. 1797-1883).

At the close of the guilt phase evidence, instructions, and arguments of counsel, appellant was found guilty of all offenses (L.F. 778-781). During the penalty phase, the State called five victim impact witnesses and presented evidence of appellant's convictions for seven criminal offenses and two ordinance violations, including convictions for second-degree burglary, felony and misdemeanor stealing, property damage, and "indecent act" (Tr. 1986-2032). Appellant called seventeen witnesses, establishing his personal and family history, including evidence regarding his own and other family members' mental illness (Tr. 2033-2265). Following the penalty-phase instructions and arguments of counsel, the jury recommended a sentence of death for the murder of Casey Williamson, finding all three statutory aggravating circumstances submitted: that the murder was outrageously wanton and vile, that the murder was committed while committing the offense of kidnapping, and that the murder was committed while committing the offense of attempted forcible rape (L.F. 797-798).

On March 7, 2005, in accordance with the jury's verdict, the court sentenced appellant to death for first-degree murder, and also sentenced appellant as a persistent offender to consecutive life sentences for the remaining offenses (L.F. 884-888; Tr. 2370-2371). This appeal follows.

ARGUMENT

I.

The trial court did not clearly err in denying appellant's Batson claims because the prosecutor's reasons for the strikes of two minority venire members were legitimate race-neutral reasons, the reasons were applied to similarly-situated Caucasian venire members, and the prosecutor did not use available strikes to strike all of the minority venire members from the jury panel.

Appellant claims that the trial court erred in denying his Batson challenges to two venire members, an African-American man and Asian-American woman (App.Br. 47). Appellant first argues that the prosecutor's race-neutral reasons for the strikes were pretextual (App.Br. 50-59). Appellant also faults the court for denying the claim "without allowing Defendant an opportunity to carry his burden" of showing discrimination (App.Br. 59-60).

A. Facts

Following voir dire and the exercise of peremptory strikes, appellant raised Batson challenges to two of the State's peremptory strikes: those of venire members Murphy, an African-American male, and Gilbert, an "Asian" female (Tr. 760-761). As to venire member Murphy, the State responded that he was single with no minor children, and the State preferred to have jurors with children; and that he was a Division of Youth Services youth specialist, and his status of working with "troubled kids"might make him more able to identify with appellant as one of those "troubled kids" (Tr. 761). The court noted that these

explanations seemed like a viable reason to deny the challenge (Tr. 761). As to venire member Gilbert, the prosecutor also noted that she had no minor children, and that she listed her occupation as "student," and that, because of her age, she might have been a "professional student," which made her an undesirable juror as, in his experience, students do not have the same sort of life experiences that non-students have (Tr. 761-762). At that point, the court stated it was overruling the Batson challenges (App.Br. 762).

Appellant then asked if the reason for striking Gilbert was that she did not have minor children, to which the prosecutor replied, "Yeah, one of the reasons. There's no single reason for anybody, but that's certainly one of the considerations in both selecting and striking jurors with [sic] minor children" (Tr. 762). The record shows that every single one of the State's strikes was of venire members without minor children (L.F. 728-745). Appellant then pointed out that two white male venire members, Travers and Maloney, also indicated that they had no minor children (Tr. 762). The prosecutor replied that: 1) having no children was one of the reasons, but was not the sole consideration, as the stricken venire members' statuses as a DYS worker and student were also important consideration for the strikes; and 2) both men had responses and mannerisms making them appear that they would favor the State (Tr. 762-763). After raising a challenge to one of the State's alternate strikes, appellant also pointed out that the State relied on minor children as a reason without asking it (Tr. 764).

B. Standard of Review

Trial judges are vested with considerable discretion in determining the plausibility of

the prosecutor's reasons for peremptory strikes and whether the prosecutor purposefully discriminated in exercising peremptory strikes. State v. Gray, 887 S.W.2d 369, 384 (Mo.banc 1994). The appellate court will not reverse the trial court's decision as to whether the strike was racially motivated unless that decision is clearly erroneous. Id. This decision is clearly erroneous when it leaves the reviewing court with a firm impression that a mistake has been made. State v. Cole, 31 S.W.3d 163, 172 (Mo.banc 2002).

C. Appellant Failed to Prove the Race-Neutral Reason was Pretextual

Using a peremptory challenge to strike a potential juror based solely on that juror's race violates the Equal Protection Clause of the United States Constitution. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). For defendant to challenge the State's peremptory strike at trial, the defendant must object to the prosecutor's use of peremptory challenges and identify the racial or gender group to which the stricken person belongs. State v. Brown, 998 S.W.2d 531, 541 (Mo. banc 1999). The State then must provide explanations for the peremptory challenges which are race-neutral. Id. The State's reason need not rise to the level of a challenge for cause, nor need it even be a persuasive or plausible explanation. Id.; Purkett v. Elam, 514 U.S. 765, 115 S.Ct. 1769, 1770, 131 L.Ed.2d 834 (1995). The reason is deemed race-neutral unless discriminatory intent is inherent in the explanation. State v. Marlowe, 89 S.W.3d 464, 468 (Mo. banc 2002). Once the prosecutor articulates a reason, the burden shifts to the defendant to show the State's proffered reason was merely pretextual and that the strike was actually based on race. Cole, 31 S.W.3d at 172.

In determining pretext, the Court considers the totality of circumstances, including the

presence of similarly situated white jurors not struck (a crucial factor), degree of logical relevance between the proffered reason and the case, the prosecutor's credibility (based on his demeanor/statements during voir dire and the court's prior experience with the prosecutor), and the demeanor of excluded venire members. Marlowe, 89 S.W.3d at 469-470. While the presence of similarly-situated white or male jurors is crucially probative of pretext, it is not dispositive. State v. Parker, 836 S.W.2d 930, 939 (Mo. banc 1992). The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from the opponent of the strike. Purkett, 514 U.S. at 769.

Here, appellant failed to demonstrate that the State's race-neutral reasons for the strikes were pretextual. First, the explanation that the State did not want jurors with minor children was obviously important to the State regardless of race, as every venire member struck by the State, which presumably included at least seven Caucasian venire members, indicated that they had no minor children (L.F. 728-745). Using the same reason to strike similarly-situated Caucasian venire members demonstrates that the reason is a race-neutral one. State v. Ashley, 940 S.W.2d 927, 932 (Mo.App., W.D. 1997); State v. Jackson, 925 S.W.2d 856, 864 (Mo.App., W.D. 1996). Further, this was obviously logically relevant to the case, as the victim of the crime was a minor child, and the prosecutor would desire jurors who would be more apt to relate to the loss of a young child. That there were jurors who served who also had no minor children is of no effect here, as the State struck as many venire members without children as it could—it did not have enough strikes to strike all of the venire members without minor children. Exhausting the number of strikes for the same

reason as the challenged jurors tends to show the reason is race-neutral. See Ashley, 940 S.W.2d at 932.

In addition to the venire members' lack of minor children, the prosecutor noted that their relative employments (or lack thereof) were important factors in making the strikes, as the prosecutor specifically indicated that minor children alone was not the reason for these strikes (Tr. 761-763). Employment is a legitimate, race-neutral reason for exercising a peremptory strike. State v. Williams, 97 S.W.3d 462, 472 (Mo. banc 2003). As to venire member Murphy, the fact that he was a youth specialist with the Division of Youth Services was obviously logically relevant to the case: appellant's defense, especially in the penalty phase, focused on appellant's rough childhood, and appellant called, among other witnesses, a social worker in both phases of the trial, and teachers and a school counselor in the penalty phase to testify to that troubled childhood (Tr. 1518-1543, 2061-2173, 2237-2243). Striking a social worker out of fear that such a venire member would be sympathetic to the defense is a legitimate race-neutral reason for a strike. State v. Terry, 928 S.W.2d 879, 884-85 (Mo.App., E.D. 1996).

As to venire member Gilbert, her lack of employment and status as a student was obviously important to the prosecutor. The State also exercised peremptory challenges against venire members Milan, who was unemployed, and Schaefer and Johnson, who had only been at their jobs for a year (L.F. 728-745). Of the actual jury members without minor children, one was retired, and, of the rest, the minimum time any of them had been at their jobs was five years (L.F. 728-745). Lack of employment is a valid race-neutral reason for

a strike. State v. Mosely, 873 S.W.2d 879, 883 (Mo.App., E.D. 1994).

Further, as best as the record reveals, the State did not use all of its strikes to strike minorities. The prosecutor noted that there "are a number of black jurors that we – that are on the jury, both male and female" (Tr. 765). Appellant did not even attempt to refute this (Tr. 765). The prosecutor's failure to use all available challenges against minority jurors is relevant to show the reason for a strike is not racially motivated. Ashley, 940 S.W.2d at 932. Therefore, because the State's reasons for the strikes of Murphy and Gilbert were legitimate race-neutral reasons, the prosecutor used the same reasons to strike similarly-situated Caucasian venire members, and the State did not use its available strikes to strike all (or even apparently a majority) of the minorities on the panel, appellant failed to demonstrate that the prosecutors reasons for the strikes were pretextual.

Appellant raises a few other sundry arguments calling the strikes into question. First, appellant argues that the prosecutor used "makeweight" explanations such as "other matters" and "mannerisms" (App.Br. 50-51, 53-54). This argument misrepresents the actual record: the prosecutors reference to "other matters" after allegedly similarly-situated jurors were pointed out referred back to the reasons already given relating to Gilbert's and Murphy's employment status, not to some kind of amorphous "other reason" as appellant would have this Court believe (Tr. 762-763).

Second, appellant faults the prosecutor for not questioning the panel about either their children or employment status (App.Br. 55-58). This argument is somewhat disingenuous, as appellant did the exact same thing in explaining the reasons for his strikes (Tr. 766-769).

More importantly, such questioning was simply not necessary here, as the information needed for the strikes was contained in the jury lists composed from juror questionnaires (L.F. 728-745). Appellant tries to minimize this, arguing and citing cases for the proposition that juror questionnaires are "disfavor[ed]" (App.Br. 57). Appellant cites State v. Parker, 886 S.W.2d 908, 921 (Mo.banc 1994), to support this argument, but does so completely out of context, as the claim in Parker dealt with the right to have a jury questionnaire in the first place, not with the use of questionnaires which were already given. Id. at 920-21. This disregards case law showing that, once counsel has access to questionnaires, he has a duty to use those questionnaires to determine the qualifications of jurors. See Knese v. State, 85 S.W.3d 628, 631-33 (Mo.banc 2002)(counsel ineffective for not reviewing questionnaire answers to determine qualification of jurors). He also cites State v. Hopkins, 140 S.W.3d 143, 149-151 (Mo.App., E.D. 2004), where the Court faulted the prosecutor for not inquiring into employment history to support his rather trite reason that a struck juror's job involved "adding things up," especially where another juror had a very similar finance-oriented job. Id. This is a far cry from the minor child and employment status reasons in this case, which are readily apparent from the questionnaires and which have previously been recognized by courts as valid race-neutral reasons. Terry, 928 S.W.2d at 884-85; State v. Hubert, 923 S.W.2d 434, 437 (Mo.App., E.D. 1996)(no children as reason where case involved children); Mosely, 873 S.W.2d at 883.

Finally, appellant argues that "known evidence" of the prosecutor's office's discriminatory practices are relevant here, citing two cases where convictions from St. Louis

County were reversed on Batson claims, State v. Hampton, 163 S.W.3d 903 (Mo. banc 2005), and Hopkins (App.Br. 58). First, appellant overstates the meaning of these cases. Far from showing a pattern or practice by the prosecutor's office of discrimination, these cases merely show two individual prosecutors giving a reason for a single strike that was not accepted by the trial court in one case and by the appellate court in the other. Hampton, 163 S.W.3d at 904-05; Hopkins, 140 S.W.3d at 149-51. Appellant presents absolutely no evidence that these cases were part of some overreaching office practice to eliminate minorities from jury panels. Cf. Miller-El v. Dretke, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005)(detailing widespread, statistically significant patterns of practice designed to keep minorities off juries).

Second, appellant's summary treatment of these cases hides the ball. While there was a finding of a Batson violation in Hopkins, 140 S.W.3d at 149-51, the facts in Hampton show that the State, upon being advised of the similarly-situated white juror (which, this Court actually noted, was not truly similarly-situated) and having the challenged sustained, sought to remove that juror as well, showing that the reason for the strike—a prior experience of being cross-examined—was race-neutral.[3] Hampton, 163 S.W.3d at 904-05. So, in essence, appellant's citation of the prosecutor's alleged pattern of discrimination rests on one case—Hopkins. In trying to establish discriminatory practices, what appellant conveniently

[3]This issue in Hampton was the trial court's error in fashioning relief for its Batson finding, not the prosecutor's motives for the strike. Hampton, 163 S.W.3d at 904-05.

ignores is that, time and again, the courts of this State, including this Court, have repeatedly rejected numerous Batson claims on appeal, which, under appellant's reasoning, would show that the office, by a vast preponderance of the cases, has not engaged in discriminatory practices. See, e.g., State v. Strong, 142 S.W.3d 702, 712-14 (Mo.banc 2004), cert. denied 543 U.S. 1059 (2005); State v. Edwards, 116 S.W.3d 511, 524-28 (Mo.banc 2003), cert. denied 540 U.S. 1186 (2004); Williams, 97 S.W.3d at 471-72; State v. Cole, 71 S.W.3d 163, 172-73 (Mo.banc), cert. denied 537 U.S. 865 (2002); State v. Gray, 41 S.W.3d 527, 527 (Mo.App., E.D. 2001); State v. Elliot, 16 S.W.3d 621, 621 (Mo.App., E.D. 2000). Thus, appellant's argument regarding a pattern of discrimination by the St. Louis County Prosecutor's Office is meritless.

D. Trial Court's "Premature" Ruling was Harmless

Appellant also argues that the trial court committed error when it "overruled" his Batson challenges prior to him making his showing why the State's reasons for the strikes were pretextual (App.Br. 59-60). This argument puts form over substance. While the trial court did state the challenges were "overruled" prior to the defense stating its reasons that the prosecutor's reasons were pretextual, the record clearly shows that all of the steps of the Batson challenge, including the pretext stage, were made: appellant argued why the steps were pretextual, forcing the prosecutor to explain why those explanations were not true (Tr. 761-765). Even though the court said "overruled" prior to the arguments on pretext, there is nothing in the record to show that the trial court did not consider these arguments, which cover parts of four pages of transcript (Tr. 761-765). Appellant cites only to State v. Phillips,

941 S.W.2d 599, 604 (Mo.App., E.D. 1997), for support (App.Br. 59). Phillips does state, in dicta, that it is error not to permit the argument for pretext before ruling on the Batson challenge. Id. Because Phillips was already being reversed on a different point, however, the Eastern District did not contemplate what effect such a "technical" error has. In this case, it is clear that there was absolutely no effect from the court's "premature" ruling: appellant was able to present his claim of pretext to the trial court, the prosecutor was forced to respond, and appellant's claim was preserved for review. That there is no effect at all in this case is even more readily apparent by the fact, demonstrated above, that appellant failed to demonstrate pretext, as the prosecutor's reasons were legitimately race-neutral, applied to both minorities and similarly-situated Caucasians, and were not used to strike all minorities. That appellant could receive relief for an "error" which had no effect on his claim and which he failed to prove on the merits is nonsensical. On direct appeal, this Court reviews not only for error, but for prejudice, and will reverse only if error was so prejudicial as to deprive the defendant a fair trial. State v. Zink, 181 S.W.3d 66, 73 (Mo.banc 2005). Because appellant had the opportunity to argue pretext and failed to demonstrate that the State's explanation was pretextual, he could have suffered no prejudice at all, and any error from the trial court's "premature" ruling must be considered harmless.

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

II.

The trial court did not abuse its discretion in refusing to allow appellant to ask the venire panel hypothetical questions about different types of murder in an effort to define deliberation because the proposed questions were improper, as it is the duty of the trial court to instruct the jury on the law, and appellant suffered no prejudice, as the court allowed venire members to be asked if they could consider a life sentence under the actual circumstances of the case.

Appellant claims that the trial court erred in precluding him from asking the venire panel during death-qualification voir dire whether they could consider a life sentence knowing that first-degree murder is "coolly-reflected-upon, deliberated killing" (App.Br. 60). Appellant contends that, without his proposed line of questioning, jurors would not have understood what first-degree murder was in order to intelligently say whether or not they could consider a life sentence, and thus, their qualification to serve on the jury could not be determined (App.Br. 63-70).

A. Facts

The trial court conducted death-qualification voir dire by splitting the venire into panels of ten (Tr. 248). During each of the State's examinations of the panels, all of the members of the panels who said that they would be able to consider a death sentence at all indicated that they would be able to consider both death and life sentences for first-degree murder as that would be defined by the court, and would not automatically exclude either

possible sentence (Tr. 275, 318-319, 366-367, 409, 453-454).[4] During the defense examination of the first panel, appellant's counsel told the venire that murder in the first degree was not an accidental killing, the murder of a spouse upon finding the spouse with a lover, or a killing in self-defense (Tr. 277). When counsel started to define murder in the first degree, the state objected that defining the crime was not appropriate (Tr. 278). Counsel stated that she was just going to tell them to separate the kind of case where death is an available sentence from any other kind of killing (Tr. 278). The court sustained the objection, stating that it would instruct the jury as to the definition of first-degree murder and that it was improper to try to instruct the jury now (Tr. 278). The venire members did say that they could realistically consider life without parole for the murder of a six-year-old girl (Tr. 280-281).

During the second panel, the defense was able to say that first-degree murder was not accidental, killing in self-defense, or killing a spouse in bed with somebody, but was "talking about coolly reflected upon, murder in the first degree" without drawing an objection (Tr. 320). None of these venire members served on the jury (L.F. 728-745).

During the third panel, defense counsel stated that murder in the first degree was not self-defense or accident, and started to define first-degree murder, drawing an objection for the attempt to define (Tr. 369). That objection was sustained (Tr. 370). Defense counsel

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[4]It is only necessary to consider the first five panels, as all of the jurors who actually served were from the first, third, fourth and fifth panels (L.F. 728-745).

then started to say that the jury could rule things out such as where one spouse comes home to catch the other spouse with a lover, but the prosecutor objected, saying that such a situation could not be ruled out as murder in the first degree, and thus counsel was attempting to improperly define first-degree murder (Tr. 370). Defense counsel stated that she was "only trying to establish that there is an element involved" before reaching the issue of punishment (Tr. 370). The court stated that it was an improper definition (Tr. 370). Counsel then said she wanted to come back to the question about understanding coolly deliberated murder, which the court would not allow, as it defined the offense (Tr. 370). Those who could consider both sentences stated that they would still be able to realistically consider a life sentence for someone who killed a six-year-old girl where there were additional charges against the defendant (Tr. 374-375).

When defense counsel started to get into hypothetical situations regarding killings that were not first-degree murder with the fourth panel, the prosecutor objected to the attempt to define, which was sustained (Tr. 412-413). Another objection was sustained to an attempt to define first-degree murder (Tr. 413). In a subsequent bench conference, counsel stated that it was "critical" for jurors to understand that first-degree murder was "coolly reflected upon killing" (Tr. 413-414). The prosecutor stated that defining the offense was properly done by the court at the appropriate time and that it was the court's responsibility to instruct the jury (Tr. 414-415). Counsel stated that she needed to know what kind of murder the venire believed merited a life sentence (Tr. 415). The court sustained the objection because defining the offense invaded the province of the court (Tr. 415). Appellant was granted a

continuing objection to not being allowed to ask that question to future panels, with the assumption that she would have asked each panel the same questions (Tr. 416). The fourth panelists who could consider both punishments did say that they could realistically consider a life sentence for the first-degree murder of a six-year-old girl when the defendant was also charged with attempted rape, kidnapping, and armed criminal action (Tr. 417-420).

The fifth panel members who could consider both sentences all stated that they would be able to render a verdict on punishment in accordance with the law and not emotion after finding the defendant guilty of first-degree murder for killing a six-year-old girl (Tr. 458-460, 465-466).

B. Standard of Review

What questions may be asked during voir dire is left to the trial court. State v. Morrow, 968 S.W.2d 100, 110 (Mo. banc 1998). The trial court's ruling on whether to allow a voir dire question is reversed only for an abuse of discretion. State v. Hall, 955 S.W.2d 198, 203 (Mo. banc 1997).

C. No Abuse of Discretion

Appellant's claim that the trial court improperly limited voir dire by not allowing the defense to define elements of offenses, including the different degrees of murder and the definition of deliberation for first-degree murder, has been repeatedly rejected by this Court. State v. Johns, 34 S.W.3d 93, 109-10 (Mo. banc 2000), Morrow, 968 S.W.2d at 111; Hall, 955 S.W.2d at 203; State v. Brown, 902 S.W.2d 278, 286 (Mo. banc 1995). Counsel for neither side may tell the jury panel what law will be applied to the case or what instructions

will be given to the jury. Johns, 34 S.W.3d at 110; Morrow, 968 S.W.2d at 111; Hall, 955 S.W.2d at 203; Brown, 902 S.W.2d at 286. Voir dire is not the proper arena for legal definitions appearing in jury instructions, as the venire panel is not the jury, nor does the venire have evidence before it. Hall, 955 S.W.2d at 203. Because this Court has repeatedly found that the exact same limitation the court used in this case has not been an abuse of discretion in numerous other cases, it should find that the trial court did not abuse its discretion in following the repeated precedent of this Court.

Further, the types of killings that appellant wanted to use to distinguish first-degree murder were irrelevant or misleading. Accidental killing is not murder at all, possibly arising only to manslaughter; self-defense is justified killing: neither of these would be punishable, if at all, by a potential sentence of either life or death. The other hypothetical scenario proposed by appellant, the spouse killing the other spouse for catching him or her with a lover, was even more misleading, as such a murder could be manslaughter under sudden passion, but, if done with deliberation, could be first-degree murder and warrant the death penalty. Further, none of these types of killing were at issue in this case. Trial courts may exclude questions which are marginally relevant or irrelevant, or which may mislead or confuse the venire members. State v. Armentrout, 8 S.W.3d 99, 109 (Mo. banc 1999). Thus, appellant's hypothetical killings questions, which were not relevant to the issues to be tried and had the potential to mislead the jurors as to the definition of deliberation, were improper.

Appellant ignores this Court's direct precedent, instead relying on other cases of this Court where it has found that the trial court's decision to permit voir dire regarding legal

concepts such as felony murder, accomplice liability, plea bargaining, and circumstantial evidence, as well as permitting voir dire about "critical facts," (facts with substantial potential for disqualifying bias) such as the age of the victim (App.Br. 65-67). State v. Gill, 167 S.W.3d 184, 192 (Mo. banc 2005); State v. Clark, 981 S.W.2d 143, 147 (Mo. banc 1998); State v. Ramsey, 864 S.W.2d 320, 355 (Mo. banc 1993). These cases, however, do not demonstrate that the trial court committed an abuse of discretion in this case.

First, none of these cases dealt with the same issue of defining first-degree murder as this case, whereas the cases of Morrow, Hall, and Brown all did, and thus were more directly on point for guiding the trial court. Second, review is not for simply whether or not the trial court is technically right, but whether the decision abuses the range of discretion given to the court. As this Court noted in Ramsey, while it is ordinarily improper to seek a commitment on how the jury will decide certain issues, it was not a clear abuse of the trial court's discretion to allow questions regarding preconceived notions of the law. Ramsey, 864 S.W.2d at 355. That the trial court in this case may have been within its discretion to possibly allow some of the questions appellant wanted to ask (a question respondent does not concede) is irrelevant, as it clearly was not abusing that discretion by not permitting the questions, as this Court has held such questions to be improper. Therefore, appellant's claims that prior opinions of this Court demonstrate an abuse of discretion by the trial court are meritless.

D. No Prejudice

Further, in reviewing the trial court's ruling on voir dire questions, this Court asks

whether there is a "real probability of injury" to the defendant by the court's ruling. Morrow, 968 S.W.2d at 110. Here, there was no probability of injury. First, the jury was well aware that the trial was for first-degree murder, the most serious level of murder recognized by society, and thus would have been aware of the seriousness of the crime charged when giving their answers. Second, appellant was permitted to ask whether or not the jury could realistically consider a life sentence in light of the fact that the case involved the murder of a six-year-old girl and that appellant was also charged with kidnapping, attempted rape, and armed criminal action (Tr. 280-281, 321, 374-375, 417-420, 458-460, 465-466). These questions were sufficient to reveal not only the critical fact of the victim's age, but also the presence of other crimes which, taken as a whole, suggested the murder was far more serious than the other killings appellant suggested.

The fact that the jurors who served were able to realistically consider a life sentence with those factors in mind shows that they were not laboring under some misunderstanding that life was only suitable for "less culpable" killings. Additionally, appellant was permitted to ask the venire whether they could consider the principle defense issue which was relevant to considering a life sentence: appellant's evidence of mental illness. (Tr. 287-288, 426-427). Thus, appellant was able to ensure that the potential jurors could consider a life sentence based on the type of evidence that would actually be presented, showing that there was little to no chance of injury from appellant not being allowed to ask about other types of killings that were not at issue in the case.

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

III.

The trial court did not abuse its discretion in admitting evidence that appellant was following other young girls in the neighborhood in the two days prior to the murder because it was not inadmissible evidence of uncharged crimes, as it did not clearly connect appellant to any specific crime, and it was relevant to show appellant's intent and motive, which were at issue in appellant's trial, and appellant suffered no prejudice.

Appellant claims that the trial court erred in admitting evidence of "uncharged crimes," namely, that appellant "stalked" neighborhood children in the days leading up to the murder (App.Br. 71, 74). Appellant argues that this evidence was "pure propensity" evidence introduced to invite "the jury to imagine the worst" regarding his intention toward children (App.Br. 71, 75, 80). He contends that this evidence was not admissible under any exception to the prohibition against evidence of uncharged crimes, and that he was prejudiced by this evidence (App.Br. 76-79, 79-81).

A. Facts

Prior to opening argument, upon finding out the State would not be calling Chelsea Wideman, the victim's sister, during the guilt phase, defense counsel mentioned "some discussion" about appellant "stalking" Chelsea and one of her friends, to which the prosecutor stated he had planned on asking the friend, Angel Friese, about that (Tr. 783). Appellant argued that any evidence of "stalking" or following the girls was uncharged misconduct and thus inadmissible (Tr. 783-784). The prosecutor responded that the evidence

of appellant following the girls on their bikes and later trying to enter the house where the girls were, and in which the victim was also present, was relevant to show appellant's state of mind, intent, and purpose, especially in light of his later statements about intending to kidnap the victim shows that he had the necessary intent "for some time" (Tr. 784-785). The court overruled the objection (Tr. 786).

Prior to Angel's testimony, appellant again objected that this evidence was evidence of uncharged crimes and was thus irrelevant and highly prejudicial (Tr. 975). The prosecutor responded that the evidence showed appellant's motive and intent, as it showed appellant followed little girls around the neighborhood prior to walking off with one the next day (Tr. 975). The court found that the evidence was relevant to show motive and intent, as well as possibly opportunity (Tr. 975). Appellant argued that the motive and intent exceptions did not apply because the girls were not the victim, but unrelated persons, to which the prosecutor responded that one of the girls was the victim's sister, both lived on the same block, and was the day before the victim disappeared (Tr. 975). The court overruled the objection (Tr. 976).

Angel testified that, two days before the murder, she and Chelsea were riding bikes on Benton Street when they noticed appellant following them, walking a half-block behind them(Tr. 981-982, 985). The girls turned on to 7th Street heading towards Vest Avenue (Tr. 983). As they did, they saw that appellant was now in an alley between Benton and Vest, still heading towards them (Tr. 983). The girls started to speed up and stopped looking back at appellant, riding back to the Wideman house (Tr. 983-984).

She also testified that, the day before the murder, she, Chelsea, the victim, and two other children were at the Wideman house (Tr. 985-986). Angel looked out a window at the deck and saw appellant sitting in a chair by the deck (Tr. 986). After talking to her mother on the phone, who told her to lock the door, Angel locked the door, and about ten minutes later she heard a knocking at the door, which she did not answer (Tr. 987).

During the defense guilt phase evidence, Angel's mother Patricia Friese testified that she saw appellant pacing back and forth next to the Wideman house, so, knowing Angel was over there, she called Angel and told her to lock the door (Tr. 1561-1562). After knocking on the door and getting no answer, appellant got really upset, hitting himself in the head (Tr. 1562).

B. Standard of Review

Trial courts are vested with broad discretion over the admissibility of evidence, and appellate courts will not interfere with those decisions unless there is a clear showing of an abuse of that discretion. State v. Winfield, 5 S.W.3d 505, 515 (Mo. banc 1999). The trial court clearly abuses that discretion when a ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. State v. Brown, 939 S.W.2d 882, 883-84 (Mo. banc 1997). If reasonable persons can differ about the propriety of an action taken by the court, it cannot be said the trial court abused its discretion. Id. Further, appellate courts review the trial court's decision for prejudice, and not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial. State v.

Johns, 34 S.W.2d 93, 103 (Mo. banc 2000). Prejudice is established by showing a reasonable probability that the verdict would have been different had the error not occurred. State v. Ringo, 30 S.W.3d 811, 820 (Mo. banc 2000). The defendant bears the burden of proving both error and prejudice. State v. Morin, 873 S.W.2d 858, 867 (Mo.App., S.D. 1994).

C. The Evidence was Admissible

The general rule is that evidence of uncharged misconduct is inadmissible to show the defendant's propensity to commit the charged crimes. State v. Bernard, 849 S.W.2d 10, 13 (Mo.banc 1993). There are, however, exceptions, and proof of prior bad acts is admissible if it tends to establish motive, intent, absence of mistake or accident, identity, a common scheme or plan, or signature *modus operandi*. State v. Gilyard, 979 S.W.2d 138, 140 (Mo. banc 1998). Further, such evidence is also admissible if the uncharged crime evidence are part of the circumstance or sequence of events surrounding the charged offense. State v. Harris, 870 S.W.2d 798, 810 (Mo. banc 1994). Evidence is logically relevant if it has some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial. State v. Sladek, 835 S.W.2d 308, 311 (Mo. banc 1992). Evidence is legally relevant if its probative value outweighs its prejudicial effect. State v. Mallet, 732 S.W.2d 527, 534 (Mo. banc 1987). If the evidence is both logically and legally relevant to prove the charged crime, and not just to show propensity, it is admissible. State v. Harris, 156 S.W.3d 817, 824 (Mo.App., W.D. 2005). The balancing of the effect and value of evidence rests within the sound discretion of the trial court. Bernard, 849 S.W.2d at 13.

1. The Evidence Did Not Clearly Connect Appellant to Any Crime

Appellant's claim of inadmissible evidence of "uncharged crimes" must first fail because the evidence appellant complains about was not truly evidence of a crime. The general rule against evidence of other uncharged misconduct only applies to evidence of other crimes which shows that the defendant has committed, been accused of, been convicted of, or definitely associated with another crime or crimes. State v. Kelly, 119 S.W.3d 587, 591 (Mo. App., E.D. 2003); State v. Carr, 50 S.W.3d 848, 854 (Mo. App., W.D. 2001). Here, Angel's testimony did not show that appellant had committed any crime, either in following the girls or in waiting outside the house the children were in, then in knocking on the door, as neither of those activities constituted a crime (Tr. 981-987). While appellant calls this conduct "stalking," it is not stalking in the criminal sense, which, in Missouri, requires purposeful and repeated harassment (a series of acts directed at a specific person showing a continuity of purpose serving no legitimate purpose which would reasonably cause and actually causes substantial emotional distress) with the intent of harassing a specific person. § 565.225, RSMo 2000. As appellant's conduct did not amount to the criminal offense of stalking, the testimony did not clearly connect appellant to another crime.

2. The Evidence was Relevant to Intent and Motive

While not truly evidence of an uncharged crime, appellant's conduct in following the two girls on their bikes and then trying to gain access to the house in which those two girls and the victim were present was admissible to show appellant's motive and intent for the underlying offense. "In such cases, Missouri courts typically admit prior uncharged misconduct as it is 'commonly considered to be of such a degree of relevance as to outweigh the prejudicial effects.'" State v. Morgan, 137 S.W.3d 477, 480 (Mo.App., S.D. 2004), quoting State v. Smotherman, 993 S.W.2d 525, 528 (Mo.App.1999). The fact that appellant was pursuing young girls, in what could be construed as an attempt to gain access to them, in the 48 hours prior to kidnapping one of those young girls for the purpose of having sex with her, is highly relevant evidence that appellant intended to commit the crimes of kidnapping and, at the very least, statutory rape well prior to his leaving the house with the victim that Friday morning. Thus, this evidence was not to show that appellant committed bad acts—stalking—against other children to show that he had the propensity to commit bad acts against the victim, but that, at the time he was trying to gain access to the girls, including the victim, he had already developed the motive and intent to kidnap, rape, and murder, a motive and intent he carried out with the victim that Friday morning.

As appellant points out, appellant's intent that morning was not only at issue, but was essentially the only thing at issue during the guilt phase (App.Br. 81). Appellant's defense was that he could not have developed the requisite intent for first-degree murder because his mental illness caused command hallucinations telling him to commit the offenses, all after

he and the victim had already left the house (Tr. 813-814, 817-819, 1629-1631, 1937, 1939, 1941). Dr. Dean, testifying to that conclusion, stated that appellant had no plan for "causing harm" to the victim that morning, and that even his desire to engage in sexual activity did not develop until after he and the victim were already on their way to the glass factory (Tr. 1624-1625). She testified that his "original intent" was "nothing bad, nothing evil," but that his original intent was overridden by the voices telling him first to "show yourself to her, show yourself to her" and then to "hit her, hit her, hit her" (Tr. 1625-1626). Where appellant puts his intent squarely in issue, evidence of prior misconduct against the same victim or against the same class of victims (here, young girls) is relevant to establish that intent. State v. Tolliver, 101 S.W.3d 313, 316-17 (Mo.App., E.D. 2003); State v. Arney, 731 S.W.2d 36, 41-42 (Mo.App., S.D. 1987). Therefore, appellant's conduct within the two days of the murder, supporting the inference that he planned to commit such crimes against a young girl and actually did so the morning of the murder, was relevant and admissible to help prove appellant's intent and motive.

3. Complete and Coherent Picture

The evidence of appellant trying to gain access to the neighborhood girls, including the victim, prior to the murder was also relevant to show a complete and coherent picture of the crime. Harris, 870 S.W.2d at 810. Appellant's statement to police established that he had started to develop the intent to rape the victim soon after coming into contact with the Williamsons (Tr. 1375). These events, along with the evidence showing appellant's almost constant presence among the family, show that appellant was not just simply awaiting the

opportunity to kidnap the victim, but was attempting to create opportunities to do so. As such, this evidence provides greater weight to the State's position that his kidnapping of the victim on Friday morning was not on a whim or the result of the victim asking to go with appellant, but was part of appellant's overall plan, which was being developed early on in his stay at the Rehm house, to commit these crimes. Therefore, the evidence was admissible to show a complete and coherent picture of appellant's plan to kidnap, rape, and murder the victim.

D. No Prejudice

Finally, appellant has failed to demonstrate prejudice. To show prejudice due to the introduction of evidence, the defendant must show "outcome-determinative" prejudice, which is:

> a judicial conclusion that the erroneously admitted evidence so influenced the jury that, when considered with and balanced against all of the evidence properly admitted, there is a reasonable probability that the jury would have reached a different conclusion but for the erroneously admitted evidence.

State v. Roberts, 948 S.W.3d 577, 592 (Mo. banc 1997). Here, considering all of the other evidence admitted, including that of appellant's expert witnesses, there was no probability, let alone a reasonable probability, that the jury would have acquitted appellant of first-degree murder.

As appellant concedes everything except deliberation, it is only necessary look at all

of the evidence supporting that element. Appellant confessed that he had intended to take the victim away to have sex with her then kill her (Tr. 1375-1380; St.Exh. 90). He took the victim at a time when no one was around to stop him, showing planning and an effort to avoid detection (Tr. 827-828). He took the victim to an isolated area where he would not be detected (Tr. 960-961, 1024-1026). He put the victim into a pit from which there was no escape to ensure the uninterrupted commission of the crimes (Tr. 1048-1053, 1285). He buried the victim to avoid the detection of her body (Tr. 1048-1053). He had the presence of mind and desire to conceal evidence by throwing the victim's underwear out of sight and by going to the river to wash the blood off of his legs (Tr. 1140, 1291-1292). He purposely avoided the glass factory after cleaning up in the river and said he had not been there, showing his consciousness of guilt and desire to avoid detection in the area of the murder (Tr. 1016-1020). He repeatedly lied to law enforcement officials to first conceal then minimize his involvement in the murder (Tr. 1019-1020; 1248, 1268-1269, 1291, 1368). All of this evidence overwhelmingly established appellant's deliberation in the victim's murder. The evidence appellant cites supporting a lack of deliberation was essentially limited to appellant's mental illness (App.Br. 81). Of that evidence, only one witness, Dr. Dean, testified that appellant's illness prevented him from deliberating; two other experts (including one called by appellant) testified that, despite his mental illness, appellant had the ability to deliberate, which one expert said included the ability to plan ahead and carry out that plan (Tr. 1493-1494, 1629-1630, 1843). In light of all of the evidence, the evidence that appellant committed first-degree murder was so overwhelming that there was no realistic chance, let

alone a reasonable probability, that Angel's testimony had the effect of turning an acquittal of appellant into a conviction. See Roberts, 948 S.W.2d at 592. Therefore, appellant suffered no outcome-determinative prejudice from Friese's testimony.

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

IV.

The trial court did not plainly err in submitting Instruction #6 regarding voluntary intoxication because there was evidence supporting the instruction, in that both Dr. Dean and Dr. English testified that appellant had been using methamphetamine in the days prior to the murder, and Dr. English testified that any psychological symptoms appellant was experiencing at the time of the murder were not due to psychotic symptoms of his mental illness, but to voluntary methamphetamine intoxication.

Appellant contends that the trial court erred in submitting Instruction #6 regarding voluntary intoxication because there was no substantive evidence that he was intoxicated at the time of the murder (App.Br. 82). Appellant argues that the only evidence supporting an inference of intoxication came from statements made to experts, which were not substantive evidence which would support an instruction (App.Br. 88-89). Appellant alleges prejudice, claiming jurors were confused that his defense was based on intoxication as opposed to mental illness (App.Br. 90-91).

A. Facts

At the instruction conference, the State submitted Instruction #6, patterned after MAI-CR 3d 310.50, stating:

> The state must prove every element of the crime beyond a reasonable doubt. However, in determining the defendant's guilt or innocence, you are instructed that an intoxicated or a

drugged condition whether from alcohol or drugs will not relieve a person of responsibility for his conduct.

(L.F. 764; Tr. 1890). Appellant objected to the instruction, claiming that it was inconsistent with the instruction on diminished capacity, as the evidence of drug use showed accompanying psychosis, rendering 310.50 inapplicable (Tr. 1890-1891). The court submitted the instruction to the jury (Tr. 1892).

B. Preservation and Standard of Review

Appellant's claim is not preserved for review. The reason given at trial for his objection was different than his claim on appeal (Tr. 1890-1891; App.Br. 82). To preserve an objection for appeal, the theory on appeal must be the same as that raised at trial. State v. Barnett, 980 S.W.2d 297, 303 (Mo. banc 1998). Therefore, review is only available, if at all, for plain error. Supreme Court Rule 30.20. Review for plain error is only merited when an alleged error so substantially affected appellant's rights that a miscarriage of justice or manifest injustice would occur if the error is not corrected. State v. Williams, 97 S.W.3d 462, 470 (Mo. banc 2003). Appellant bears the burden of proving a manifest injustice. State v. Mayes, 63 S.W.3d 615 (Mo. banc 2001). Further, instructional error rarely rises to the level of plain error, and only amounts to such when the instruction so misdirects or fails to instruct that it is apparent that the error affected the jury's verdict. State v. Rathmann, 148 S.W.3d 842, 844 (Mo.App., E.D. 2004).

C. The Instruction was Supported by Substantive Evidence

A jury may not consider voluntary intoxication on the issue of a defendant's mental

state. State v Nicklasson, 967 S.W.3d 596, 617 (Mo. banc 1998). To support the submission of an instruction patterned on MAI-CR 310.50, which instructs the jury that an intoxicated or drugged condition "will not relieve a person of responsibility for his conduct," there need only be evidence that a person was voluntarily intoxicated. State v. Owsley, 959 S.W.2d 789, 795 (Mo. banc 1997); MAI-CR 3d 310.50. Here, there was evidence that appellant was voluntarily intoxicated by methamphetamine at the time of the murders. First, Lisa Mabe testified that she had gone down to Valley Park to get appellant 1-2 days before the murder, and that appellant had been doing meth with Eddy and/or Ernie (Tr. 1552-1554, 1558). Dr. Dean testified that appellant had used methamphetamine for 24 to 72 hours immediately prior to the murder, as well as drinking and using marijuana, and had not been sleeping, staying up the night before the murder (Tr. 1620, 1622-23). She acknowledged that appellant had a history of drug use independent of his mental illness, and had previously hallucinated while using drugs (Tr. 1604-1605, 1657). Dr. English also testified to appellant's drug use, testifying that appellant abused alcohol and marijuana and injected methamphetamine the day before the murders (Tr. 1820-1821). He testified that appellant stated he took methamphetamine so he could hear voices, which he liked, and knew the voices were not real and that he did not have to follow them (Tr. 182301825, 1838-1839). Dr. English concluded that any hallucinations that appellant may have experienced at the time of the murder was the result of his methamphetamine use the previous day (Tr. 1825, 1840, 1863). Based on this testimony, there was sufficient evidence that appellant was intoxicated by methamphetamine at the time of the murders to at least warrant the intoxication instruction.

Appellant claims that the evidence coming from his statements to the doctors could not be used to support the submission of the intoxication instruction (App.Br. 88-89). Appellant overlooks the logical inconsistency of his position. He has no qualms with the fact that he was permitted to submit an instruction on diminished capacity based on mental illness (L.F. 768). That instruction was supported only by the testimony of Dr. Dean, who was the only person to testify that appellant was hallucinating at the time of the murder, which came only from appellant's "hearsay" reports to her of hearing voices (Tr. 1625-1627, 1629-1630). But he claims that giving the voluntary intoxication instruction is improper because Dr. English's conclusions about intoxication came only from appellant's "hearsay" reports of methamphetamine use (App.Br. 85-86; Tr.1825, 1840, 1863). Under his theory on this point, his mental illness instruction should not have been submitted either, because the only "substantive evidence" to support the instruction was his statements. This illogical result shows that appellant has overstated the prohibition on what kind of evidence is necessary for submission of an instruction on the defendant's mental state.

Under § 552.030, statements made by the accused in the course of a mental examination shall not be admitted against the accused on the issue of whether the accused committed the criminal act charged. § 552.030.5, RSMo 2000. The prohibition only applies to statements about those acts resulting in the death of the victim. State v. Kreutzer, 928 S.W.2d 854, 871 (Mo. banc 1996). Statements by the defendant are "admissible in evidence," either for or against the accused, on the issue of the defendant's mental condition. § 552.030.5, RSMo 2000. In making such statements admissible as to mental state, there is

no limitation on that admissibility of the substance of those statements. Id. Thus, those statements were admissible as "substantive evidence" of appellant's mental state, and therefore supported the giving of not only appellant's diminished capacity instruction, but also the voluntary intoxication instruction.

Appellant cites first to State v. Barnes, 740 S.W.2d 340, 343 (Mo.App., E.D. 1987), to support his claim that such statements are not admissible as "substantive evidence," but Barnes says no such thing: in stating a rule, it repeats only that which is contained in the statute—that the statements were admissible on the issue of the defendant's mental condition. Id. The opinion does state that the record showed the statements were admitted "for the purpose of showing the foundation of the doctor's opinion," but that statement neither states this as a rule, nor states that this evidence was not "substantive evidence" of the defendant's mental state. Id. at 343. Appellant also cites State v. Gary, 913 S.W.2d 822, 830 (Mo.App., E.D. 1995), which refers to Barnes to support a finding that such statements could only have been considered on the issue of the credibility of the doctor's opinion, not for their truth. Id. Such a conclusion is not warranted by either Barnes, which contained no such limitation, nor the language of the statute, and should not be considered controlling. This is especially true in light of this Court's declaration that court rules give way to the evidentiary rule in this statute. State v. Thompson, 985 S.W.2d 779, 786 (Mo. banc 1999). Therefore, because the statute renders statements to doctors "admissible" as to the defendant's mental state, those statements could support the submission of the voluntary intoxication instruction.

Further, even if one would accept appellant's argument, there was still sufficient

evidence to submit the instruction. Dr. English's conclusion that appellant's alleged hallucinations was the result of methamphetamine intoxication sufficiently established intoxication. Appellant makes no claim that a doctor's conclusion is not "substantive evidence," nor can he, as, under his theory, that would completely do away with any mental health instruction. Because there only need be some evidence of intoxication to merit the instruction, Owsley, 959 S.W.2d at 795, Dr. English's conclusion was sufficient on its own to merit the instruction. Further, Lisa Mabe's testimony, not based on appellant's statements and having nothing to do with any examination, established appellant's access to and use of methamphetamine around the time of the murder (Tr. 1552-1554, 1558). Therefore, even without the remaining testimony by Dr. Dean and Dr. English, there was sufficient evidence of intoxication to merit the instruction.

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

V.

The trial court did not err in overruling appellant's motion to suppress appellant's statements to Detective Newsham and in admitting those statements because any question about the truthfulness of Newsham's testimony was for the trial court to resolve, and there was sufficient evidence that appellant statements were voluntary.

Appellant claims that the trial court erred in failing to suppress evidence of his statements made to Detective Newsham indicating that he planned to kidnap, rape, and murder the victim prior to doing so (App.Br. 91-92). Appellant first contends that the evidence was "unreliable" because of a purported conflict between Newsham's testimony and jail records showing appellant's presence at the jail around the same time (App.Br. 92-95). Appellant alternatively contends that the statement was involuntary because it was coerced by Newsham's statements that appellant could receive eternal salvation for being completely honest about the crime (App.Br. 93, 95-99).

A. Facts

Appellant filed a motion to suppress statements, claiming that appellant's statements were not voluntary, as the length of the custody and interrogation were "inherently coercive," he was subjected to "mental, physical, and psychological duress," and his statement was induced by either explicit or implicit promises of leniency (Tr. 477-479).

At the hearing on the motion, and similarly at trial, Detective Paul Neske testified that he had started speaking with appellant around 9:25 a.m., having advised appellant in the car on the way to the police substation of his rights against self-incrimination and rights to

counsel, which appellant said he understood (Tr. 127-131, 1239, 1242). At the station, Neske again advised appellant of his rights, and appellant voluntarily executed a written waiver, saying that he understood his rights but wanted to make a statement (Tr. 132-134, 1242-1247). Appellant and Neske spoke on and off throughout the day, during which appellant went from initially denying any involvement in the crime to admitting that he had killed the victim after she "freaked out" upon his exposing his penis to her (Tr. 135-147, 1248-1292). Neske advised appellant of his rights at least one other time during these conversations, which appellant again said he understood and voluntarily waived (Tr. 142, 1289).

Later that night, while awaiting booking at the jail with Detectives John Newsham and Craig Longworth, who had transported appellant there, appellant and Newsham were talking about reading and the works of Edgar Allen Poe (Tr. 184-185, 187, 1365-1367). This conversation had nothing to do with the case (Tr. 170). The conversation had started when Newsham noticed appellant had a tattoo with Poe's name misspelled (Tr. 184, 1365). Appellant laughed and said it was funny because he liked to read Poe (Tr. 187, 1365). The two talked about Poe writings, with appellant saying he did not read "The Raven" because he did not like poetry and correcting Newsham for getting the title of "The Fall of the House of Usher" wrong (Tr. 184-185, 1366-1367).

Newsham asked if appellant liked to read anything else, and appellant said that he liked to read the Bible (Tr. 185, 1367). Appellant then said that he was concerned about his "eternal salvation" (Tr. 1367). Appellant said he was "fine," and that he anticipated being executed for his crime, which he "wanted," but asked Newsham, "[D]o you think I'll ever

achieve eternal salvation[?]" (Tr. 185, 1367-1368). Newsham said yes, and, because he thought appellant was indicating that he had not been completely honest earlier, said that, to be forgiven for this crime, appellant had to be completely truthful and honest and not leave any details out (Tr. 186, 1368). Appellant seemed particularly interested at that and said that he had not been completely honest and had left details out, and that he wanted to make a further statement (Tr. 186, 1368-1369). The detectives brought appellant back to headquarters, where he again waived his rights and made both verbal and audiotaped statements, admitting that he had intended to take the victim for the purpose of having sex with her and that he had planned to kill her after doing so (Tr. 171-179, 1375-1381; St.Exh. 90). Newsham stated that the waiver of rights and statement started at 12:30 a.m., the initial conversation took 15-20 minutes, and the taped interview lasted eight minutes (Tr. 176, 1373, 1381). Newsham testified that appellant never showed any physical, emotional, or mental stress during the conversation, and never answered any question inappropriately (Tr. 180). Newsham testified that he delivered appellant back to the jail between 1:30 and 1:45 a.m.

On cross-examination at trial, appellant confronted Newsham with jail records claiming that appellant was in the jail at 12:53, at the same time appellant was giving his statement to Newsham, and that appellant had contact with the jail nurse the first time they were there, even though Newsham said that was, to his knowledge, not true (Tr. 1392-1394).

The trial court denied appellant's motion to suppress (Tr. 656).

B. Standard of Review

In reviewing the trial court's ruling denying a motion to suppress, the appellate court

looks only to determine whether the evidence was sufficient to support the ruling. State v. Rushing, 935 S.W.2d 30, 32 (Mo. banc 1996). All evidence elicited at both the suppression hearing and trial, and the reasonable inferences rising therefrom, are to be viewed in the light most favorable to the trial court's ruling. State v. Edwards, 116 S.W.3d 511, 530 (Mo. banc 2003). The appellate court defers to the trial court's finding of facts and credibility determinations, and reviews questions of law *de novo*. State v. Rousan, 961 S.W.2d 831, 845 (Mo. banc), cert. denied 524 U.S. 961 (1998). The trial court's determination on a motion to suppress will only be reversed if clearly erroneous. Id. "If the ruling is plausible, in light of the entire record, an appellate court will not reverse, even if convinced that it would have weighed the evidence differently." City of Springfield v. Hampton, 150 S.W.3d 322, 325 (Mo.App., S.D. 2004).

C. The Statement to Newsham was Admissible

1. Reliability

The basis for appellant's claim that Newsham's testimony about appellant's statement was unreliable is that the jail records purported to show that appellant was at the jail during the time Newsham claims he had taken appellant back to the station for the interview (App.Br. 92-93, 95). He argues that, if the jail records are true, then Newsham's testimony was false, and the State thus failed to prove that appellant's statement was voluntary (App.Br. 95). Appellant's argument, made without any citation to authority, is meritless, as it is essentially an attempt to attack the credibility of a witness. Thus, appellant overlooks the well-settled principle of law that the appellate court defers to the trial court's determination

of credibility and factual findings. State v. Goff, 129 S.W.3d 857, 862 (Mo. banc 2004). The evidence appellant claims shows the statement was unreliable was before the trial court, yet the trial court did not suppress the evidence. Looking at this in the light most favorable to the court's ruling, this Court must consider any claim that Newsham could not be believed was rejected by the trial court. Thus, appellant's claim that Newsham's testimony was unreliable is meritless.

2. Voluntariness

Once the admissibility of a statement has been challenged, the State bears the burden of demonstrating by a preponderance of the evidence that the defendant voluntarily, knowingly and intelligently made the statement." State v. Bucklew, 973 S.W.2d 83, 87 (Mo. banc 1998). "The proper focus of such a challenge is whether coercive police activity occurred[,]" as such activity is a predicate to finding a confession involuntary. State v. Smith, 944 S.W.2d 901, 910 (Mo. banc 1997); Colorado v. Connelly, 479 U.S. 157, 164, 167, (1986). "The test for whether a confession is voluntary is whether the totality of the circumstances created a physical or psychological coercion sufficient to deprive the defendant of a free choice to admit, deny or refuse to answer the examiner's questions." State v. Simmons, 944 S.W.2d 165, 173 (Mo. banc 1997). The waiver of Miranda rights, while not dispositive of the question of voluntariness, is an important consideration. State v. Feltrop, 803 S.W.2d 1, 13 (Mo. banc 1991). Other factors to consider include the "defendant's physical and mental state, the length of questioning, the presence of police coercion or intimidation, and the withholding of food, water, or other physical needs." State

v. Rousan, 961 S.W.2d 831, 845 (Mo. banc 1998). Mental condition alone does not justify a claim of constitutional involuntariness. State v. Skillicorn, 944 S.W.2d 877, 889-90 (Mo. banc 1997).

A review of all of the above factors supports the trial court's determination that the statement was voluntary. First, as to police coercion, despite appellant's claim to the contrary, Newsham's comment about needing to be honest to be forgiven was not improperly coercive. To be inadmissible as a coerced statement due to promise, either direct or indirect, that promise must be a promise of a "worldly advantage" and not "adjurations of a moral or spiritual nature." State v. Dennis, 153 S.W.3d 910, 921 (Mo.App., W.D. 2005). Here, Newsham's statement about "eternal salvation" and "forgiveness" was not a "promise" of worldly advantage, but of a spiritual nature, and thus is not the type of statement that renders the subsequent confession involuntary. This should be especially true in this case, where it was appellant who broached the subject of eternal salvation and specifically asked Newsham his opinion about it. Further, it was made while the two were not talking about the case, but having a conversation about reading. Therefore, Newsham's statement simply does not rise to the level of a "promise" that overbore appellant's will.

The additional factors also support a finding of a lack of involuntariness. While appellant did present evidence at trial of mental illness, both Neske and Newsham testified that, but for one instance early in the day where appellant simply became angry, appellant never seemed to exhibit any symptom of physical, emotional, or mental stress, let alone mental illness (Tr. 166, 180, 1256-1257). Appellant specifically denied having any psychotic

symptoms during the interview process, and said that he thought he was fine (Tr. 163-164). Appellant was able to answer all questions appropriately, and did nothing unusual or bizarre (Tr. 164, 1239, 1250). Appellant was even able to carry on a conversation about literature, noting things said in the conversation which were wrong (Tr. 184-185). Thus, the evidence of appellant's mental state also supports a finding of voluntariness.

Further, appellant repeatedly was advised of his Miranda rights and repeatedly waived them and offered to make statements, including right before the statement to Newsham (Tr. 127-131, 132-134, 142, 171-179, 1239, 1242-1247, 1289, 1375-1381). While appellant had been questioned often that day, there had been numerous breaks, and appellant's decision to make this statement was not made during an interrogation, but during a casual conversation (Tr. 184-186, 1365-1368). Appellant was not deprived physical needs—food and bathroom breaks were provided, and he was allowed to smoke and have soda (Tr. 135-136, 1257-1259). Therefore, in light of all the evidence most favorable to its ruling, the trial court did not err in finding that appellant's statement was voluntary.

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

VI.

The trial court did not err in submitting the "depravity of mind" statutory aggravating circumstance because the Instruction #23, setting out the aggravating circumstance, was not vague, and the addition of language interpreting the aggravating circumstance does not violate the separation of powers or amount to "judicial fact-finding."

Appellant claims that the trial court erred in submitting Instruction #23, containing the depravity of mind statutory aggravating circumstance, because the statute it is derived from, § 565.032.2(7), is unconstitutionally vague (App.Br. 99). Appellant contends that, even though the instruction contained Court-approved language which provided the "additional, constitutional required guidance," that limiting language did not correct the problem with the statute, as the limiting language was judicially, not legislatively, created, and thus "infringes on the Constitutional requirements that legislatures, not the judiciary, legislate" (App.Br. 100-103).

A. Facts

Prior to trial, appellant filed a motion attacking § 565.032.2(7) as constitutionally vague and overbroad (L.F. 295-298). Nowhere in that motion is the argument that the depravity of mind aggravating circumstance, as submitted to the jury, is improper due to some kind of separation of powers claim (L.F. 295-298). The trial court denied the motion (Tr. 74-75; L.F. 646). Appellant renewed his objection to the instruction at the instructions conference (Tr. 2128).

The jury was instructed as to the depravity of mind aggravating circumstance in accordance with MAI-CR 3d 313.40 and the accompanying Notes on Use, as follows:

> Whether the murder of Cassandra "Casey" Williamson involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find:
>
> That the defendant committed repeated and excessive acts of physical abuse upon Cassandra "Casey" Williamson and the killing was therefore unreasonably brutal.

(L.F. 549, 555). MAI-CR 3d 313.40, Note on Use 5[2].

B. Preservation and Standard of Review

Even though appellant objected to the above instruction as vague, his theory raised on appeal—that the instruction as modified according to the Notes on Use usurps legislative authority, and thus cannot be properly used to define "depravity of mind"—was neither raised in his motion, at the hearing on the motion, or at trial, and thus was never before the trial court. The reason given at trial for his objection was different than his claim on appeal (Tr. 1890-1891; App.Br. 82). To preserve an objection for appeal, the theory on appeal must be the same as that raised at trial. State v. Barnett, 980 S.W.2d 297, 303 (Mo. banc 1998). Therefore, his constitutional claim is unpreserved and only plain error review is available, in which appellant bears the burden of proving that the error resulted in a manifest injustice.

Supreme Court Rule 30.20; State v. Mayes, 63 S.W.3d 615 (Mo. banc 2001).

C. Instruction #23 Was Proper

Section 565.032.2, which lists the statutory aggravating circumstances, of which one must be found to make a defendant death-eligible, includes whether "[t]he murder in the first degree was outrageously or wantonly vile, horrible or inhuman in that it involved torture, ***or*** depravity of mind[.]" § 565.032.2(7), RSMo 2000 (emphasis added). In State v. Griffin, 756 S.W.2d 475 (Mo. banc 1988), in order to comply with the U.S. Supreme Court's judgment in Godfrey v. Georgia, 446 U.S. 420 (1980), finding the general depravity of mind language unconstitutional, this Court ruled that the depravity of mind must be supplemented by one of several Court-approved limiting factors, including: mental state of the defendant; infliction of physical or psychological torture upon the victim as when the victim has a substantial period of time before death to anticipate and reflect upon it; brutality of the defendant's conduct; mutilation of the body after death; absence of any substantive motive; absence of defendant's remorse; and the nature of the crime. Id. at 489. "This limiting construction of the depravity of mind aggravating circumstance is sufficiently definite to provide a principled means to distinguish cases in which the death penalty is imposed from those in which it is not." Id. at 490. Specifically regarding the "brutality of defendant's conduct," the Court required the murder to involve "serious physical abuse," which would be found where there is "evidence that numerous wounds were inflicted upon a victim[.]" Id.

This ruling is recognized by the pattern instruction and accompanying Notes on Use,

which requires one of ten paragraphs to more specifically define the conduct of the defendant which demonstrates depravity of mind. MAI-CR 3d 313.40, Note on Use 5(B). Among those paragraphs was the one used in Instruction #23, "That the defendant committed repeated and excessive acts of physical abuse upon [name of victim] and the killing was therefore unreasonably brutal." MAI-CR 3d 313.40, Note on Use 5(B)[2].

This Court has repeatedly rejected claims that the depravity of mind aggravating circumstance as given to the jury with the narrowing language is vague. State v. Knese, 985 S.W.2d 759, 778 (Mo. banc 1999); State v. Butler, 951 S.W.2d 600, 605-06 (Mo. banc 1997); State v. Tokar, 918 S.W.2d 753, 772 (Mo. banc 1996). This is because the limiting instruction narrows the class of murders for which the aggravating circumstance can be applied and provides the jury sufficient guidance on when the circumstance can be found. Butler, 951 S.W.2d 605-06; Tokar, 918 S.W.2d at 772. Therefore, because, as appellant admits, the additional language in the instruction meets constitutional requirements for specificity, the instruction was not vague, and appellant therefore could have suffered no injury, let alone a manifest injustice, from its submission.

Appellant tries to circumvent the main point of a vagueness challenge—that the circumstance was not specific enough to identify the conduct at issue—by focusing on the fact that the Court-approved limiting instructions do not correct the vagueness of the statute, as they are not included in the statute, and that the instructions thus violate the separation of powers. This argument must fail. First, while claiming that this violates "the federal and state constitutional separation of powers," appellant cites absolutely no state authority for

this, citing only a federal case (App.Br. 101). Respondent is unaware of any holding of any court applying the federal constitutional separation of powers principles to state law, nor does appellant explain how such incorporation to the states might be found. Appellant's failure to develop such an argument or to include any citation to state law showing that this Court's interpretation of the depravity of mind circumstance violates the state constitutional principles of state law should render his claim abandoned. Beatty v. State Tax Comm'n, 912 S.W.2d 492, 498-99 (Mo. banc 1995)("where a party fails to support a contention with relevant authority or argument beyond conclusions, the point is considered abandoned").

Even if this Court did review appellant's separation of powers claim, such review would demonstrate that the claim is meritless. The state separation of powers clause, Mo. Const., Art. II, § 1 (1875), does not create an "impenetrable wall" between the branches of government, but simply prevents the concentration of unchecked power in one branch. McPherson v. U.S. Physicians Mut. Risk Retention Group, 99 S.W.3d 462, 485 (Mo.App., W.D. 2003). Here, by including the Court-approved language in the instruction, even though not included in the statute, neither the trial court, nor this Court in defining those limitations, engaged in legislation, but in interpretation and construction of the statute, which is within the province of the courts. See, e.g., State ex rel. Golden v. Crawford, 165 S.W.3d 147, 148-49 (Mo. banc 2005).

The primary rule of statutory construction is to ascertain the intent of the legislature from the language used and to give effect to that intent if possible. Richards v. Missouri Dept. of Corrections, 162 S.W.3d 35, 39 (Mo.App., W.D. 2005). Where the language in a

statute is ambiguous, a court must construe the statute in a manner that is consistent with the legislative intent, "giving meaning to the words used within the broad context of the legislature's purpose in enacting the law." State v. Laplante, 148 S.W.3d 347, 349 (Mo.App., S.D. 2004). The language in the statute is ambiguous, Griffin, 756 S.W.2d at 489, but the legislature's intent is not—the legislature has clearly intended murders evidencing a depravity of mind to be considered for the death penalty. § 565.032.2, RSMo 2000. By adopting the limiting language, this Court, by opinion and pattern instruction, has not usurped the legislature, but has given effect to its intent. Therefore, the use of court-approved language to interpret the depravity of mind aggravating circumstance does not violate separation of powers.

Appellant also includes a brief argument (not included in his point relied on) that the limiting language is a form of judicial fact finding. This is simply untrue. The limiting instructions do not find any facts—it is still up to the jury to determine whether facts exists satisfying the specific definition of depravity of mind given to the jury. All that the limiting language does is limit the juries consideration of the aggravating circumstance to those issues raised by the evidence. It does not mandate that the jury find that such evidence is true. Thus, the language is not "judicial fact-finding."

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

VII.

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

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

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

§ 565.035.3, RSMo 2000. This Court's proportionality review is designed to prevent freakish and wanton application of the death penalty. State v. Ramsey, 864 S.W.2d 320, 328

(Mo. banc 1993).

As to the first step in proportionality review, appellant cites to alleged errors at trial raised in his points on appeal, suggesting that these errors, even if not warranting reversal on their own, "improperly influenced the jury's determination of sentence" and thus "undermines the reliability of the verdict of death" (App.Br. 112-113). As respondent has already shown and will continue to show, none of these claims amounted to error, and thus could not have caused such prejudicial error as to undermine the reliability of the death verdict. Numerous non-errors cannot add up to error. State v. Buchli, 152 S.W.3d 289, 309 (Mo.App., W.D. 2004). Thus, appellant's claim of prejudice is meritless.

As to the second step in proportionality review, appellant raises no argument that there was insufficient evidence to support the aggravating circumstances found by the jury, nor could he raise such a claim. The evidence showed that appellant lured the six-year-old victim away from home and confined her in the pit at the glass factory for the purpose of having sexual intercourse with her, and that he tried to sexually force himself on her by exposing his penis, pulling off her panties, getting on top of her, and rubbing his penis on her leg to try to get an erection, all while she struggled against him (Tr. 1329; St.Exh. 50). Thus, the evidence established that appellant committed the felonies of kidnapping and attempted forcible rape, and committed the murder while engaged in those felonies, fulfilling two of the statutory aggravating circumstances found by the jury (L.F. 797-798). The evidence also showed that appellant struck the victim in the head at least six times with a brick and a rock, resulting in numerous fractures to all parts of her skull, bruising to the scalp and brain, and

other injuries (Tr. 1413-1419, 1424-1434). The victim also suffered numerous other injuries to her forearms, shoulders, legs, and back (Tr. 1419-1424). Thus, the evidence sufficiently established the depravity of mind aggravating circumstance for repeated or excessive acts of abuse (L.F. 797-798).

As to the third step in proportionality review, appellant first contends that this Court must exercise its independent duty to reduce his sentence to life without parole, first arguing that his mental illness "distinguishes him from other, similarly-situated, capital defendants" and should excuse him from the death penalty (App.Br. 103-110). He cites from the United State's Supreme Court's holding in Atkins v. Virginia, 526 U.S. 304 (2002), preventing the execution of the mentally retarded, and argues the same should be true of executing those with mental illness (App.Br. 104-109). This argument is meritless. Both federal and state courts have recognized that the holding in Atkins does create a exemption from execution based on mental illness. In re Nelville, 440 F.3d 220, 221 (5th Cir. 2006); State v. Hancock, 840 N.E.2d 1032, 1059-60 (Ohio 2006). In Hancock, the court noted that it had found no court holding that imposing a death sentence on a defendant who was severely mentally ill at the time of the offense violates the Eighth Amendment, and faults the defendant for citing no evidence that the execution of such offenders is inconsistent with "evolving standards of decency," the finding which is a cornerstone for the Atkins holding. Hancock, 840 N.E.2d at 1059-60; Atkins, 536 U.S. at 311-12, 315-16. The Hancock court then addressed the reasoning for finding against the claim that mental illness equates with mental retardation:

However, this claim appears to rest on nothing but Hancock's

> assertion that it is so. He does not attempt to lay a basis for his broad statement that everyone with a severe mental illness is comparable to a mentally retarded person with respect to reasoning, judgment, and impulse control. He does not even explain what he means by "severe mental illness." [Citation omitted]. Mental illnesses come in many forms; different illnesses may affect a defendant's moral responsibility or deterrability in different ways and to different degrees.
>
> R.C. 2929.04(B)(3) and (B)(7) permit the judge and jury in a capital case to consider a defendant's mental illness as a mitigating factor, thus providing the individualized determination that the Eighth Amendment requires in capital cases. Hancock asks us to establish a new, ill-defined category of murderers who would receive a blanket exemption from capital punishment without regard to the individualized balance between aggravation and mitigation in a specific case. To do as he suggests would be a significant extension of Atkins. Hancock has not made a persuasive argument that Atkins should be so extended.

Hancock, 840 N.E.2d at 1059-60. Likewise, the jury in this case considered, both in the guilt and penalty phases, appellant's claims that his mental illness affected his culpability for this

crime (L.F. 768, 791). In both phases, the jury found against appellant. There is nothing in the record to suggest that this Court either should or must disregard those findings to reduce appellant's sentence.

Appellant's claim that his mental illness distinguishes him from other capital defendants is simply untrue, as this Court has upheld the imposition of a death sentence in several cases where the defendant presented evidence of mental illness, including the same type of schizophrenia-related illnesses he had been diagnosed with. See, e.g., State v. Taylor, 134 S.W.3d 21, 25-26 (Mo. banc 2004)(paranoid schizophrenia); Taylor v. State, 126 S.W.3d 755, 761 (Mo. banc 2004)(post-traumatic stress disorder, dysthymic disorder, and mixed personality disorder with antisocial and paranoid features); State v. Anderson, 79 S.W.3d 420, 429 (Mo. banc 2002)(brain damage, severe depression, and extreme paranoia). Thus, appellant's evidence of mental illness does not distinguish him from others whom have been sentenced to death and had those sentences upheld by this Court.

Appellant next lists cases where defendants who murdered children were charged with first-degree murder and were either convicted of a lesser offense or sentenced to life (App.Br. 111). This Court, however, has repeatedly held that the comparison of a case to "similar cases" for purposes of proportionality review means cases where death is imposed. See, e.g., Lyons v. State, 39 S.W.3d 32, 44 (Mo. banc 2001); State v. Clay, 975 S.W.2d 121, 146 (Mo. banc 1998). The issue in proportionality review is not whether or not similar cases exist where a defendant received a life sentence, but whether the application of the death penalty in the current case is excessive or disproportionate in light of the case. Clay, 975 S.W.2d at

146. Therefore, comparison to death cases alone is the only proper comparison, as similarity between the current case and other cases where death is imposed demonstrates that the imposition of death in the current case is not "freakish or wanton." Id.

A comparison of the crime and the defendant in this case with those in similar cases further, and overwhelmingly, supports the imposition of the death penalty in this case. This Court has upheld numerous death sentences where the defendant evidenced a depravity of mind through acts of repeated and excessive physical abuse. State v. Strong, 142 S.W.2d 702 (Mo. banc 2004); State v. Williams, 97 S.W.3d 462 (Mo. banc 2003); State v. Cole, 71 S.W.3d 163 (Mo. banc 2002); State v. Johns, 34 S.W.3d 93 (Mo. banc 2000). This Court has also upheld death sentences where, as in this case, the fatal blow was inflicted when the victim was lying injured and helpless. State v. Johns, 34 S.W.3d 93 (Mo. banc 2000); State v. Middleton, 995 S.W.2d 443, 467 (Mo. banc 1999); State v. Tokar, 918 S.W.2d 753, 773 (Mo. banc 1996).

Additionally, this Court has upheld the imposition of death where the defendant was engaged in a sexual assault of the victim. State v. Knese, 985 S.W.2d 759 (Mo. banc 1999); State v. Kinder, 942 S.W.2d 313 (Mo. banc 1996); State v. Gray, 887 S.W.2d 369 (Mo. banc 1994). Finally, this Court has upheld the imposition of the death penalty where the defendant has murdered a child victim. State v. Strong, 142 S.W.2d 702 (Mo. banc 2004); State v. Christeson, 50 S.W.3d 251 (Mo. banc 2001).

In light of the foregoing, this Court should affirm appellant's sentences.

VIII.

The trial court did not err in submitting Instructions #24 and #26, the mitigating evidence and jury mechanics instructions, because the third stage of Missouri's capital sentencing scheme does not require proof beyond a reasonable doubt by the State, and the instructions properly advised the jury how to evaluate mitigating and aggravating circumstances. Further, the instructions' requirements that the jury unanimously find mitigating evidence outweigh aggravating evidence and omission of the statutory reference to aggravating circumstances "found by the trier" did not misstate the law or mislead the jury.

Appellant claims that Instruction #24, the mitigating evidence instruction patterned after MAI-CR 3d 314.44, and Instruction #26, the jury mechanics instruction patterned after MAI-CR 3d 314.48, do not properly instruct the jury as to the weighing of mitigating and aggravating circumstances because they do not advise the jury that the State bears the burden of proving that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt (App.Br. 113-122). Appellant also alleges that the instructions are incorrect because they require jury unanimity as to mitigation evidence outweighing aggravating evidence and fail to include language that the aggravating evidence must be "found" by the trier of fact (App.Br. 122).

A. Facts

Prior to trial, appellant filed objections to § 565.030 and to the entire 314 series of Missouri Approved Instructions, and MAI-CR 3d 314.44 specifically, on the grounds that

they did not require a finding of proof by the State beyond a reasonable doubt in step three of the capital sentencing structure, and also failed to adequately instruct the jury as to how to resolve a "tie" between aggravating and mitigating evidence (L.F. 269-276, 707-713). The court denied these motions (L.F. 645-646, 715).

At trial, the court submitted Instruction #24, the mitigating circumstances instruction, over appellant's renewed objection, as follows:

> If you have unanimously found beyond a reasonable doubt that one or more of the statutory aggravating circumstances submitted in Instruction No. 23 exists, you must then determine whether there are facts and circumstances in mitigation of punishment which are sufficient to outweigh facts and circumstances in aggravation of punishment.
>
> * * *
>
> It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. If each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

(L.F. 791). The court also submitted Instruction #26, the jury mechanics instruction, which included the following relevant language:

> If you unanimously decide that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, then the defendant must be punished for the murder of Cassandra "Casey" Williamson by imprisonment for life by the Department of Corrections without eligibility for probation or parole, and your foreperson will sign the verdict form so fixing the punishment.

(L.F. 793-794).

B. Burden of Proof Claim

This Court has repeatedly rejected the claim that appellant raised, holding that there is no requirement that the determination of the weight of mitigating and aggravating circumstances be established by the State beyond a reasonable doubt. Storey v. State, 175 S.W.3d 116, 157 (Mo. banc 2005); State v. Gill, 167 S.W.3d 184, 193 (Mo. banc 2005); State v. Glass, 136 S.W.3d 496, 520-21 (Mo. banc 2004). Therefore, the instructions given by the trial court, repeatedly approved by this Court, properly stated the law as to the burden of proof relating to mitigating circumstances. Thus, the trial court did not err in submitting them.

C. Statutory Analysis Claims

As to appellant's remaining claims regarding the instructions' purported deviations

from the statute, appellant readily admits these claims are unpreserved and reviewable only for plain error. Supreme Court Rule 30.20. Review for plain error is only merited when an alleged error so substantially affected appellant's rights that a miscarriage of justice or manifest injustice would occur if the error is not corrected. State v. Williams, 97 S.W.3d 462, 470 (Mo. banc 2003). Appellant bears the burden of proving a manifest injustice. State v. Mayes, 63 S.W.3d 615 (Mo. banc 2001). Further, instructional error rarely rises to the level of plain error, and only amounts to such when the instruction so misdirects or fails to instruct that it is apparent that the error affected the jury's verdict. State v. Rathmann, 148 S.W.3d 842, 844 (Mo.App., E.D. 2004).

Here, neither of appellant's claims amount to a manifest injustice, as the instructions did not misdirect the jury. First, as to appellant's jury unanimity claim, this Court again has recently rejected the claim that the instructions' requirement that each member of the jury finding evidence in mitigation outweighs aggravating evidence is improper. State v. Zink, 181 S.W.3d 66, 74 (Mo. banc 2005). Such is the logical conclusion from the use of the words "if the trier concludes" in the statute, which suggests that the jury as a whole, and not a specific number of jurors, must conclude that mitigating evidence outweighs aggravating evidence. § 565.030.4(3), RSMo Cum.Supp. 2005. Therefore, the instructions' call for each juror to make this determination does not misstate the law or misdirect the jury.

As to appellant's claim that the statutes statement that the mitigating evidence outweighs the evidence in aggravation "found by the trier," respondent is at a loss to explain how the absence of these specific words in the instructions at all affects the meaning of the

instructions or demonstrates a conflict between the instructions and the statute. The jury was instructed that it did not have to unanimously agree on which evidence on mitigation to consider, so long as each agreed that mitigating evidence was sufficient to outweigh "the facts or circumstances in aggravation of punishment" (L.F. 791). MAI-CR 3d 314.44. Such an instruction clearly assumes that the jury made a finding of those "facts or circumstances" or it could not have completed this step, which it did (L.F. 797-798). Thus, the fact that the specific words "found by the trier" were not in the instructions did not so mislead the jury as to call the verdict into question.

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

IX.

The trial court did not err in failing to quash the information in lieu of indictment on the grounds that it failed to plead statutory aggravating circumstances because the state was not required to plead the circumstances in the information in that the state's notices of aggravating circumstances and evidence was sufficient to advise appellant that he was facing the death penalty and to allow him to prepare his defense.

Appellant claims the trial court erred in failing to quash the information in lieu of indictment for failing to include statutory aggravating circumstances, arguing that Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002), require aggravating circumstances to be pled in the charging document (App.Br. 123-126). Appellant claims that those cases deprived the trial court of jurisdiction to sentence appellant to death because they created distinct offenses of aggravated and non-aggravated first-degree murder, thus the lack of aggravating circumstances in the information charged appellant with only non-aggravated first-degree murder, making life without parole the maximum sentence he could receive (App.Br. 126-129).

Appellant's claim that the aggravating circumstances create a distinct offense requiring pleading has been oft-rejected by this Court, as this Court has stated that the notice of aggravating circumstances under § 565.005.1 is sufficient to notify appellant that he is charged with a capital offense. State v. Gill, 167 S.W.2d 184, 194 (Mo. banc 2005); State v. Strong, 142 S.W.3d 702, 711-12 (Mo. banc 2004); State v. Glass, 136 S.W.3d 496, 512-13 (Mo. banc 2004); State v. Edwards, 116 S.W.3d 511, 544 (Mo.banc 2003). That holding is

completely consistent with the U.S. Supreme Court cases, which specifically state that they do not address the issue of whether the State must allege enhancing facts in the charge. Apprendi, 530 U.S. at 476 n.3; Ring, 536 U.S. at 597 n.4.

In light of the foregoing, appellant's claim must fail.

X.

This court should refuse to review appellant's claim that the trial court failed to *sua sponte* interfere with guilt-phase closing argument as such claims are typically denied without explication. In any event, the trial court did not plainly err in not interfering *sua sponte* with the prosecutor's closing argument that the jury should hold appellant fully responsible for his acts "for once" because there was evidence supporting the inference that appellant had previously used his mental illness to get out of trouble or minimize the consequences of his actions.

Appellant claims that the trial court plainly erred in failing to interrupt the prosecutor's closing argument and admonish him for arguing that the jury should "for once" hold him responsible for his actions and find him guilty of first-degree murder (App.Br. 129). Appellant argues that there was no "substantive evidence" to support this argument (App.Br. 132-133).

A. Facts

During the guilt phase rebuttal argument, the prosecutor made the following arguments in reference to the credibility of appellant's mental illness defense:

> Did it prevent him from deliberating, did it prevent him from coolly reflecting on the matter before he did it. Absolutely not, absolutely not. When you get to this point, all I'm asking you to do is consider all of that evidence and for once see Johnny –

THE COURT: Two minutes.

[Prosecuting Attorney]: – for once in his entire life hold him, hold him completely, not partially, not like all the other nonsense he's gone through. Yes, he not [sic] problems. He's spent his entire life in various deliberate attempts to manipulate the system, whether it's the mental health system, we know he's got some problems, he's smart enough, certainly he isn't suffering from mental retardation. He has average intelligence and there's nothing wrong with average intelligence. That's why he can cook up this plan. He cooks as well as Dr. Dean ever thought about cooking and he puts that stuff together, he knows all I've got to do is start squawking around, having mental illness, all I have to do is start squawking around about everything and as has happened for my entire life I'm going to get a better situation then I might get otherwise. That's all he's doing in this particular case.

He doesn't mention, he's not going to, going to tell and then Neske starts closing in on him, he's closing in him and then he starts going after that mental illness. He's got something. I don't know what it is but he's got it and he knows it and he knows how to manipulate it.

> I'm asking you for once in his entire life to hold him not just responsible, completely responsible, completely responsible for what he did, murder in the first first degree, armed criminal action, kidnapping and attempted rape, the only verdicts that are true and just in this particular case.

(Tr. 1956-1957). There was no objection to this argument (Tr. 1956-1957).

B. This Court Should Not Review Appellant's Claim

Appellant concedes that there was no objection to this argument (App.Br. 29). Statements made in closing argument will rarely amount to plain error, and any assertion that the trial court erred for failure to intervene *sua sponte* overlooks the fact that the absence of an objection by trial counsel may have been strategic in nature. State v. Cole, 71 S.W.3d 163, 171 (Mo. banc), cert. denied 537 U.S. 865 (2002). Without an objection, "the trial court's options are narrowed to uninvited interference with summation and a corresponding increase of error by such intervention." State v. Clemmons, 753 S.W.2d 901, 907-908 (Mo. banc 1988). Because trial strategy looms as an important consideration in any trial, assertions of plain error regarding matters contained in closing argument are generally denied without explication. State v. Chavez, 128 S.W.3d 569, 577 (Mo. App., W.D. 2004). Therefore, this Court should choose not to exercise its discretionary ability to review for plain error, and deny appellant's claim without review.

C. Standard of Review

If this Court chooses to review appellant's claim, review is only available, if at all, for

plain error. Supreme Court Rule 30.20. Review for plain error is only merited when an alleged error so substantially affected appellant's rights that a miscarriage of justice or manifest injustice would occur if the error is not corrected. State v. Williams, 97 S.W.3d 462, 470 (Mo. banc 2003). Appellant bears the burden of proving a manifest injustice. State v. Mayes, 63 S.W.3d 615 (Mo. banc 2001). Plain error will seldom be found in unobjected to closing argument. State v. Sanchez, 186 S.W.3d 260, 265 (Mo. banc 2006).

D. The Court Did Not Plainly Err

A prosecutor may argue reasonable inferences from the evidence. Here, the prosecutor's comments regarding appellant's use of his mental illness to escape or minimize trouble and his call to the jury not to allow appellant not to manipulate the verdict, but to hold him responsible, was based on reasonable inferences from the record. There was considerable evidence appellant had a tendency to, at the very least, exaggerate his claims of mental illness. Dr. Rabun testified that appellant had been diagnosed with probable malingering in 1996, and that in 2001, he included malingering in his diagnosis (Tr. 1494-1495, 1501). Dr. Rabun also acknowledged that much of diagnosing mental illness depends on self-reporting (Tr. 1488). Dahley Dugbatey, appellant's social worker, testified that appellant was caught violating his probation in June by drinking in a bar, and that same month started to have "odd" conversations (Tr. 1527-1528, 1539). Dr. Dean testified that appellant tended to exaggerate his symptoms and complain a lot about them (Tr. 1594). She said that he self-reported those traits making him look sick a very high amount while reporting those traits reflecting good mental health very low (Tr. 1664). She reported that

he scored a 70 on the first I.Q. test he took after being arrested, even though he had scored much higher on every other test he took in his life (Tr. 1671-1672). He initially told Dr. Dean that he did not remember the crime, although he had earlier told a jail psychologist that he did remember the crime and that he was clear-headed at the time (Tr. 1645, 1691-1692, 1773-1776). Later, he changed his story again, telling Dr. Dean he had heard voices throughout the rape and murder (Tr. 1625-1627). She also testified, as did Drs. Rehmani and Cotton-Williger, that appellant was kept in the infirmary when at the St. Louis County Jail, which is done for safety, and where some inmates prefer to be to stay isolated (Tr. 1606, 1762, 1774, 1777-1779).

In rebuttal, State's witness Dr. English testified that appellant had malingered in his low I.Q. test and had the ability to read at a high school level (Tr. 1812-1815). He found that appellant tended to overreport and exaggerate symptoms, showing malingering (Tr. 1831). He diagnosed appellant in part with malingering (Tr. 1839-1840).

All of this evidence showed, or led to the reasonable inference, that appellant had the tendency to exaggerate or even make up psychotic symptoms in order to avoid troubling situations—e.g., when he was caught violating his probation, when he was placed in jail to avoid being placed in general population. Thus, this evidence supported the inference that appellant had used his mental illness in the past to avoid trouble.

Further, there was evidence that appellant was using this tendency to try to manipulate his way out of full responsibility for this crime. First, his reporting of symptoms and their affect on the crime to his various doctors started out as virtually non-existent (which did him

the least good) and went all the way to being at the mercy of command hallucinations (which, if believed, would have done him the most good. Second, as the prosecutor pointed out, when Detective Neske was interviewing appellant and brought the conversation to a point of sounding accusatory, appellant got mad and, instead of denying involvement, immediately mentioned his mental illness (Tr. 1256-1257). This evidence supported the reasonable inference that, just as in the past, appellant was again trying to use his mental illness to try to excuse or minimize his responsibility. Therefore, the prosecutor's argument to that effect was supported by the evidence.

Appellant argues that most of this evidence could not support the prosecutor's argument because it came in through statements made by appellant to medical experts (Tr. 131-132). Appellant's contention is meritless. As explained more fully in Point IV, supra, Statements by the defendant are "admissible in evidence," either for or against the accused, on the issue of the defendant's mental condition. § 552.030.5, RSMo 2000. In making such statements admissible as to mental state, there is no limitation on that admissibility of the substance of those statements. Id. Thus, those statements were admissible as "substantive evidence" of appellant's mental state, and could be relied on by the prosecutor in making the reasonable inference about appellant's tendency to use his illness to minimize trouble.

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

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 22,308 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 11th day of May, 2006, to:

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APPENDIX