No. SC89699

In the
Missouri Supreme Court

STATE OF MISSOURI,

Respondent,

v.

RICHARD D. DAVIS,

Appellant.

Appeal from the Circuit Court of Jackson County
Sixteenth Judicial Circuit, Division 16
The Honorable Marco A. Roldan, Judge

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from convictions for murder in the first degree, § 565.020, RSMo 2000, two counts of kidnapping, § 565.110, RSMo 2000, two counts of felonious restraint, § 565.120, RSMo 2000, four counts of forcible rape, § 566.030, RSMo 2000, nine counts of forcible sodomy, § 566.060, RSMo 2000, three counts of sexual abuse, § 566.100, RSMo 2000, and four counts of assault in the first degree, § 565.050, RSMo 2000, obtained in the Circuit Court of Jackson County, and for which appellant was sentenced to death for murder in the first degree and to life sentences as a persistent offender and persistent sexual offender in the custody of the Department of Corrections for all of the sexual offenses, the kidnapping and the assaults, and fifteen years for both counts of felonious restraint, resulting in a total of four consecutive life sentences run consecutively to the death sentence. Due to the imposition of the death sentence, the Supreme Court of Missouri has exclusive appellate jurisdiction. Mo. Const., Art. V, § 3 (as amended 1982).

STATEMENT OF FACTS

Appellant, Richard Davis, was charged by indictment with one count of murder in the first degree, two counts of kidnapping, two counts of felonious restraint, six counts of forcible rape, fourteen counts of forcible sodomy, nine counts of sexual abuse, and six counts of first-degree assault (L.F. 64-72). The State later filed a notice of aggravating circumstances and intent to seek the death penalty, alleging that appellant had one or more prior serious assaultive convictions, that the murder was outrageously wanton and vile, and that it was committed while appellant was also committing the felonies of forcible rape, forcible sodomy, and kidnapping (L.F. 92-94). An information in lieu of indictment was later filed, charging appellant as a prior offender, persistent offender, and persistent sex offender (L.F. 1101-1118). That information was subsequently amended to reduce the number of rape charges to four, the number of sodomy charges to nine, the number of sexual abuse charges to three, and the number of first-degree assault charges to five (L.F. 4925-4939). This cause went to a trial by jury in the Circuit Court of Jackson County beginning on July 7, 2008, the Honorable Marco A. Roldan presiding (L.F. 5106).

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: Sometime in mid-February 2006, Lorie Dunfield, a friend of victim Marsha Spicer, got a phone call from appellant, who called himself "David" (Tr. 3633-3637). Appellant said that he had gotten her number from Athena Fagan, his cousin and a friend of Dunfield's who lived at the same apartment complex at which Spicer had been staying (Tr. 3633-3635). Appellant said that he could

"hook [her] up" with some women for sexual activities, which interested her, so she agreed to meet appellant for lunch (Tr. 3635-3636). Appellant picked her up and took her to get some food, then took her to his apartment, located at 1125 West Truman Road, Apartment 3, in Independence (Tr. 3636-3637). They talked as Dunfield ate, and appellant mentioned that he had a video to watch in the bedroom (Tr. 3638). They went into the bedroom, and appellant showed her a video of him having sex with Athena and another woman (Tr. 3637). Appellant and Dunfield then had sex (Tr. 3639). After having sex, they went back into the living room, and appellant asked Dunfield if she wanted to participate with him in his sexual "fantasy" (Tr. 3639). He told her that his fantasy was to "start killing women" and that he specifically wanted to "choke out" or suffocate a woman while she was having sex with both of them (Tr. 3639). He also wanted to videotape the sex and murder (Tr. 3639). Dunfield was "freaked out" by appellant's request, but she played along because she was scared and wanted him to take her home (Tr. 3640-3641). She asked appellant about how he would get rid of the evidence, and he said that he would dismember the bodies if he had to, flush the victim out with a water hose to get rid of DNA evidence, and take them out of the apartment in a sack or boxes (Tr. 3640-3641). Eventually, appellant had to go back to work, and he took Dunfield home (Tr. 3642).

On the afternoon of May 14, 2006, John McGee was fishing in Sni-a-Bar Creek near the intersection of Highways D and FF, about 5½ miles north of Bates City (Tr. 3550, 3566, 3571). As he moved around looking for a good spot, he walked up an embankment to a flat area in the woods, where he saw a three-foot-by-two-foot hole in the ground and a shovel

sticking up in it (Tr. 3554). He grabbed the shovel to dig up some worms, but decided not to, sticking the shovel back into the ground (Tr. 3555). He resumed fishing and, when he was finished, walked back past the hole, finding that nothing had changed (Tr. 3555).

McGhee thought about the hole that night and asked some people at work about it the next day (Tr. 3556). They thought the hole was something that should not be there, so McGhee decided to go back and check it out (Tr. 3557). He had trouble finding the hole, eventually seeing a piece of dirt that looked like it was not originally there (Tr. 3557-3558). He used a stick to start digging, and, at about nine inches from the surface, he saw an arm and hand (Tr. 3559). He left and eventually went to the Bates City Police Department to report his finding (Tr. 3559-3560, 3564). An officer had McGhee take him to the spot, and, upon seeing the hand, arm, and shoulder sticking out of the ground, the officer had the dispatcher advise the Lafayette County Sheriff's Department that it was a crime scene (Tr. 3568). Investigators subsequently uncovered the body: a nude white woman with no visible jewelry, markings, wallet, or identification (Tr. 3580). Her legs had been bent at the knees so that her heels were touching her buttocks; there was no other way for her to have fit in the small grave (Tr. 3580).

Sometime with the next two days, the woman was identified as victim Spicer (Tr. 3584-3585, 3587, 3644-3645, 3678). On the afternoon of May 17, 2006, Lafayette County detectives went to the apartment complex where Spicer lived in Kansas City to meet with some of her friends (Tr. 3678, 3695). Meanwhile, Dunfield saw on the news that Spicer's body had been found, so she went to the apartment complex to talk with the man Spicer had

been staying with (Tr. 3644). She saw that the police were there and, being concerned that appellant may have been involved in the victim's death, approached them and told them about her February encounter with appellant (Tr. 3645, 3679-3681, 3696). The police had Dunfield take them to point out appellant's apartment (Tr. 3646-3647, 3682-3683, 3697). Dunfield also pointed out the light blue Toyota that appellant drove; the license plates were registered to appellant at that address (Tr. 3683). At that point, the detectives contacted the Independence Police Department for assistance so that they could make contact with appellant (Tr. 3683-3684, 3698).

Around 9:30 p.m., one of the detectives and an Independence police officer knocked on the door of the apartment Dunfield had pointed out, and appellant answered (Tr. 3657-3658, 3684). The officers asked if they could speak with appellant, and he invited the officers into the apartment's kitchen (Tr. 3659). The officers asked if they could search the rest of the apartment for other people, and appellant said, "Yeah, that's fine but my girlfriend's here and she's naked" (Tr. 3659). As the officer went into the living room, appellant's girlfriend, Dena Riley, walked into the room wearing just panties (Tr. 3659-3660). The officer had her put something on and then come and sit on the couch (Tr. 3659-3660). The officer then did a "cursory" search of the apartment for other people, during which he noticed a video camera on a stand next to the bed in the bedroom plugged in and pointed towards the bed (Tr. 3661).

Meanwhile, the detective told appellant that his name had come up in an investigation and asked if he would come to the police station to talk about it (Tr. 3685-3686). Appellant

was reluctant to do so, asking what it was about and why they could not talk at the apartment (Tr. 3685-3686). The detective mentioned that Fagan's name had also come up, and appellant said that she was his cousin but that he had not spoken with her for four months because she had stolen from him (Tr. 3686). When asked again to go to the police station, appellant decided he wanted to call an attorney (Tr. 3687). While he was trying to do so, the officer who saw the camera told the detective about it (Tr. 3687). At that point, the detective decided to secure the apartment to get a search warrant (Tr. 3662, 3688). When appellant came back and said he could not reach the attorney, the officers told him that he and Riley had to leave the apartment and their cars until the morning (Tr. 3688-3690). Appellant and Riley gathered some belongings and left the apartment (Tr. 3669, 3688-3689, 3699).

While appellant and Riley were waiting for a ride, another detective told him they were investigating the homicide of victim Spicer and asked if appellant knew her (Tr. 3700). Appellant, who was nervous and looked away when answering questions, said he did not know anybody by that name (Tr. 3700). Appellant also denied knowing anybody fitting the victim's description (Tr. 3700-3702). Appellant was told that she was a friend of Fagan's and was asked if she had possibly introduced them, and appellant said that Fagan "never brought anybody like that" (Tr. 3701). Appellant and Riley left cell phone numbers with the detectives, and left with a friend (Tr. 3689, 3703-3704).

The officers applied for a search warrant, but that request was denied (Tr. 3690-3691, 3704). The detectives locked up the apartment and attempted to call appellant and Riley to

tell them they could go back to the apartment, but there was no answer (Tr. 3691, 3704-3705).

Investigators received more information the next day about the case, prompting them to apply for another search warrant (Tr. 3692, 3705). An officer who went by the apartment during the day found that no one was there and appellant's and Riley's vehicles were still outside; thus, it appeared that appellant and Riley had never returned to the apartment (Tr. 3692-3693). The search warrant was obtained late that night and executed the morning of May 19 (Tr. 3693, 3705, 3707-3708). Among the items seized from the apartment were the video camera and digital video microcassettes found on top of the dresser and on the shelf under the television in the bedroom (Tr. 3713-3718). Two of the tapes, logged by the police as Items #26 and #31, contained "very graphic, very disturbing" footage of a man and woman raping women who were bound (Tr. 3721).

Item #26 showed a total of one hour and eight minutes of footage, starting at 3:25 a.m. on May 14[1] and occurring in appellant's apartment, including footage of appellant and Riley forcing the victim Spicer, whose wrists were bound behind her back with duct tape, to participate in vaginal intercourse, anal sodomy, and oral sodomy of both appellant and Riley (Tr. 3753-3756; St. Exh. 305). Portions of Item #26 shown to the jury showed appellant giving the victim some soda, then putting his penis in her mouth (St. Exh. 305). Appellant

[1]Police discovered that the clock on the camera was one day and six minutes behind; thus, the time and date stamp on the tape when viewed in the camera stated that the events occurred one day and six minutes earlier than they actually occurred (Tr. 3749).

straddled the victim's head and forced his penis in and out of her mouth (St. Exh. 305). He used his penis to slap the victim in the face, then forced it back into her mouth (St. Exh. 305). At one point, the victim pleaded "Wait, wait, please" (St. Exh. 305). Appellant later vaginally raped the victim while Riley directed him, telling him where to position the victim for the camera (St. Exh. 305). During the sodomy and rape, appellant hit the victim in the stomach and punched her in the side (St. Exh. 305).

Item #31 showed footage of appellant and Riley performing forced sexual acts on a woman unknown to the police at that point (Tr. 3757; St. Exh. 304). The events in that footage occurred on April 8, 2006 starting at 11:34 p.m. in appellant's apartment; the tape lasted for one hour and twenty-one minutes (Tr. 3757). The victim, later identified as Michelle Huff Ricci, had her hands bound behind her back with yellow speaker wire (Tr. 3757, 3762, 4096-4097; St. Exh 304). The total footage showed the victim being forced into acts of vaginal intercourse, anal sodomy, and oral sodomy on both appellant and Riley, as well as general acts of violence against the victim (Tr. 3761-3762; St. Exh. 304). Portions of Item #31 shown to the jury showed appellant penetrating the bound victim anally while forcing her face into Riley's genitals (St. Exh. 304). Appellant and Riley repeatedly smacked the victim in the head and back during this while the victim moaned in pain and at one point crying out, "It hurts, oh my God" (St. Exh. 304). Appellant and Riley repeatedly made comments during this attack about wishing the victim was a small child (St. Exh. 304). At one point, appellant choked the victim and told her to do what he said or she would wish she had died (St. Exh. 304). Appellant forced his penis into the victim's mouth for some

time, and then again penetrated her either vaginally or anally while touching her breast and while Riley straddled her face (St. Exh. 304).

Over the next several days, officers collected evidence from inside and around appellant's apartment consistent with what was seen on the videotapes, including: a roll of duct tape from the kitchen (Tr. 3722-3723); various pieces of duct tape, some with hair on them, from the bedroom and from outside the apartment (Tr. 3724-3728, 3843, 3845); several prescription bottles prescribed to appellant and Riley, some empty, for numerous controlled substances (Tr. 3723, 3737-3740, 3845); empty root beer cans which were similar to those given to victim Spicer (Tr. 3723-3724); skin lotion used as a lubricant by appellant in the video (Tr. 3724); and a box containing numerous wires, including yellow wire (Tr. 3767). A receipt with the name "Marsha" and a phone number written on it was found in a bedroom drawer (Tr. 3767). A rental receipt from Blockbuster video was also found in the apartment, showing that appellant rented the movie "Natural Born Killers" on April 15, 2006 (Tr. 3864-3865). That movie depicted a murderous couple, on the run from police, looking for women for three-way sex and engaging in violent sex, including binding women with duct tape (Tr. 4053-4054). Appellant's blue Toyota was also searched; used rubber gloves were found in the side door pocket, and a pitchfork was found in the trunk (Tr. 3960, 3963). Luminol tests on a spot on the back floorboard were positive for the possible presence of blood (Tr. 3842).

On Sunday, May 21, a lieutenant with the Missouri State Highway patrol on the eastern side of the state was asked to interview a woman in Perryville named Susan

Summers about appellant's whereabouts, as Summers had telephone and mail contact with appellant and Riley (Tr. 3775). The lieutenant went to speak with her, and she met him outside of the building she lived in (which was like a residential care facility) (Tr. 3780). They talked outside for 20-25 minutes, then lieutenant asked if he could go into her apartment (Tr. 3781). Summers went inside first, then came back and got him (Tr. 3782). Inside the apartment was her boyfriend (Tr. 3782). They talked awhile longer, and then the lieutenant gave them contact information and went to the local sheriff's department (Tr. 3782). Shortly after he left, he got a voice mail message from Summers, so he went back to her building (Tr. 3783). Summers met him outside, very nervous and frantic (Tr. 3784). Summers was with another woman, who gave the lieutenant handwritten "wills" for appellant and Riley and a box of other items, which included a note to Riley's mother dated that day (Tr. 3785-3789). The lieutenant was told that appellant and Riley were going off to kill them themselves, so he alerted area law enforcement agencies to be on the lookout for them (Tr. 3789-3790).

Around 4:00 p.m. on May 25, 2006, the Barton County, Missouri, Sheriff's Department received a 911 call from someone claiming to be Riley saying that they were on one of the county's roads (Tr. 3830-3831). The deputy handling the call, aware of appellant and Riley from wanted posters issued nationwide by the Independence Police Department, told the sheriff about the call, and the sheriff told dispatchers to scramble officers to the area then left for that area (Tr. 3809-3810). The Independence police were notified that appellant and Riley were possibly in the area, so they headed to the area as well (Tr. 3830-3832).

About an hour later, Terry Johnston, a local farmer and volunteer fireman, was driving eastward on Southeast 10th Road near Lamar when he saw a red pickup truck stuck in a ditch (Tr. 3794-3795, 3799-3800). Seeing one of his neighbors standing nearby, he stopped and approached the neighbor, who was talking to appellant (Tr. 3793). Johnston saw a woman inside the truck who never got out (Tr. 3796). The neighbor asked if Johnston could help pull appellant's truck out of the ditch, and Johnston said he might be able to help (Tr. 3797). Johnston backed his truck up, and appellant immediately looped a rope already hooked up to his truck onto the back of Johnston's truck (Tr. 3797). Johnston noticed things about the truck that made him uncomfortable and, having heard on the radio earlier that day that police were looking for someone in the area, decided that he was not going to actually help appellant (Tr. 3805). Appellant got into his truck and put the gas all the way down (Tr. 3800). Johnston, however, only pulled forward enough to take the slack out of the rope so it would look like he was helping; he was attempting to contact police while doing this (Tr. 3799-3800). After appellant stopped trying to get out, both men got out of their trucks, and appellant said he "wanted out of the fucking ditch" (Tr. 3800). Johnston said he would try one more time, so both got back in their trucks, and Johnston again pretended to pull the rope while appellant tried to back out of the ditch; Johnston again tried to contact police (Tr. 3801). Johnston then got out, unhooked the rope, and pulled away (Tr. 3801). As he did so, the sheriff pulled up, got out of his car, and approached appellant, who was out of the truck again (Tr. 3801-3803; 3812-3814). The sheriff pointed his gun at appellant and ordered him to the ground (Tr. 3814). Appellant did not comply, so the sheriff grabbed his arm, swept his

legs, and took him to the ground (Tr. 3815). The sheriff asked appellant his name, and appellant replied, "Richard Davis" (Tr. 3815). The sheriff then ordered Riley out of the truck, but there was no response; she was in and out of consciousness and had blood coming from her nose (Tr. 3815-3816). Based on information that both appellant and Riley had attempted to overdose on drugs, both were eventually sent to the hospital (Tr. 3816). The two were later transported to Truman Medical Center in Kansas City and subsequently taken to the Independence Police Department (Tr. 3834, 3886).

At around 5:25 p.m. on May 27, appellant waived his rights and agreed to talk to police (Tr. 3886-3889). Appellant also asked to speak with detectives on May 28, wanting to tell where he had disposed of some evidence (Tr. 3905-3906). Appellant said that he knew that the interview was about a missing person named Marsha Spicer (Tr. 3890). During that interview, appellant said that Fagan had wanted to "hook him up" with victim Spicer to "dog her out," which meant to be sexually aggressive and abusive (St. Exh. 220, 222). He claimed that he met victim Spicer at Fagan's apartment building, where she agreed to have sex in exchange for drugs (St. Exh. 220). The victim went with appellant and Riley to his apartment and, after talking about sex and drinking, appellant claimed that he and the victim engaged in consensual sex (St. Exh. 220). Appellant told the victim that he wanted her to have sex with Riley, but the victim did not want to unless she was high (St. Exh. 220). After about a half an hour, the victim did not want to have sex anymore, wanted her drugs, and wanted to leave, but appellant and Riley told her to shut up and that they wanted to have sex now (St. Exh. 220). Appellant slapped her in the face, after which he claimed the victim said

that he did not have to do it "like this" and that she would do what he wanted (St. Exh. 220). Appellant blocked the victim's way out of the apartment, and then Riley grabbed the victim by the hair and threw her on the bed (St. Exh. 220). Appellant said that he tied the victim up with plastic ties he got from work, then unsuccessfully tried to put duct tape on her mouth (St. Exh. 220). Appellant said that he then did "everything" with the victim—vaginal intercourse, anal sodomy, and oral sodomy—and that the victim also had sex with Riley (St. Exh. 220). He first said that they brought her to the apartment on a Saturday kept her "all day," but later said that they had brought her to the apartment on a Friday (St. Exh. 220, 222). He admitted that he videotaped these acts, and said at one point that he did not think the victim was alive at the end of the tape, but later said that he was not filming at that time (St. Exh. 220, 222).

Initially, appellant denied that he and Riley had murdered the victim, claiming that she had accidentally died as they were making the victim perform oral sex on Riley while appellant held the victim, and that "it turned out" that Riley smothered the victim to death without Riley realizing it (St. Exh. 220). He claimed that they "freaked out" when she died and that they tried to wake her up by slapping her and putting her in the shower, and that Riley was crying and sorry that she did it (St. Exh. 220). Appellant also denied ever choking the victim (St. Exh. 220). Later, however, appellant admitted that he knew they were going to kill the victim as soon as the sex "went too far," as he knew she could not leave the apartment, and he thought he would give her a lethal amount of drugs if the smothering did not work (St. Exh. 222). He said that Riley actually had started playing computer games

after the victim died and that it took twenty minutes for him to put her in the shower (St. Exh. 225).

Appellant said that he washed the body, running water over the body for about 20 minutes (St. Exh. 220, 225). He poured bleach in the tub to cover up any DNA (St. Exh. 221, 222, 225). He let the body soak in the bleach and water for about ten hours, while he went to his nephew's graduation party (St. Exh. 225). He said that he and Riley went to a place on the Sni-a-Bar Creek where he had fished before with a shovel and pitchfork and he dug a hole while Riley pretended to fish; he left the shovel there (St. Exh. 220, 221, 225). They went back to the apartment and slept until around midnight (St. Exh. 225). When appellant woke up, he drained the bathtub, and wrapped the victim's body in a rug, piece of painter's plastic, and a plastic bag (St. Exh. 220, 222, 225). They went to bed for a couple of hours, then started to carry the victim's body to appellant's car (St. Exh. 220, 225). The victim's body fell out of the bag and down some stairs, and her head came out of the rug and struck several stairs (St. Exh. 220, 225). Appellant put the body in the truck and drove back out to the place where he had dug the hole, where he buried the victim while Riley waited in the car (St. Exh. 221, 225).

After burying the victim, appellant threw the shovel into the creek (St. Exh. 225). They then disposed of evidence in different places around the area, including at a park, a car wash, and out the window as they drove (St. Exh. 225). They vacuumed the apartment and then took the vacuum to a "Planet Aid" clothes donation box (St. Exh. 225). They burned the victim's identification at a location off of Highway 210 (St. Exh. 225).

While discussing the murder of victim Spicer, appellant was shown a picture of victim Ricci, and appellant said he had never seen her before (St. Exh. 221). The police told appellant that they had a video of him doing the same things to her that he did to victim Spicer (St. Exh. 221). Eventually, appellant told police that he had started talking to her at a stoplight 1½-2 months earlier and told her that he would get her high in exchange for sex (St. Exh. 221). Appellant claimed that she agreed and got in his car, and they went back to his house (St. Exh. 221). Appellant called Riley to let them know they were coming, and told victim Ricci that there was going to be a threesome; appellant claimed that Ricci was "game" (St. Exh. 221). At the apartment, appellant claimed that they all started drinking and the women used methamphetamine (St. Exh. 221). Appellant gave the victim vodka with five or six Vicodin crushed up in it; appellant described the victim as "pretty loaded" (St. Exh. 221). Appellant said that all three had consensual sex "at first," but that he tied her up about an hour later; he could tell that she was scared of them (St. Exh. 221). Appellant said that they had the victim at his apartment for "a day and a half or so" and that they had sex with her "for hours" throughout that time, engaging in vaginal intercourse, anal sodomy, and oral sodomy with the victim, all while filming the assaults (St. Exh. 221). Appellant continually gave her pills and vodka to keep her drugged (St. Exh. 221). He said that the victim was not tied up the whole time and was unconscious for part of it (St. Exh. 221). Appellant said he hit victim "seven or eight" different times (St. Exh. 221).

Eventually, appellant claimed that he and Riley discussed whether or not the victim would say anything to anyone else about the crimes, and figured she probably would (St.

Exh. 221). Appellant said that Riley tried to "smotherfuck" the victim, meaning that she put all of her weight on the victim's face while straddling her, but the victim struggled with her (St. Exh. 221).

Appellant also told the police about the places he and Riley went after the police came to his apartment (St. Exh. 220, 223). He said that they had taken a truck from a friend (St. Exh. 220, 223). He told police that he and Riley went to the eastern part of the state, at one point briefly going to Illinois to withdraw money from an ATM so police would think he was staying in Illinois (St. Exh. 223). He said that he and Riley were in Summers's room in Perryville when the trooper arrived to talk with her, but that he hid in another room to evade capture, and left after the trooper left (St. Exh. 220, 223). Once he saw that the police were looking for them in the eastern part of the state, he decided to come back to Kansas City, where he took another of his friend's trucks, this time heading to Kansas (St. Exh. 223). After going to Pittsburg and Arcadia, Kansas, they came back to Missouri, where they called 911 before eventually being captured (St. Exh. 223). When one of the detectives said that it was "kind of a crazy story," appellant said it was "like Mickey and Mallory," the two murderous characters from "Natural Born Killers" (St. Exh. 220, 225).

On August 29, 2006, the day after his second interview, appellant went with detectives to ride around the area and show them where he disposed of evidence, which coincided with the places he had previously told them about (Tr. 3907-3908, 4056-4062). When they returned, appellant told the detectives that he had other videotapes hidden at Winntech, his workplace (Tr. 3908-3910). Appellant said that victim Spicer's death was on

one of those tapes (Tr. 3909). Appellant drew a map to show where he had hidden them, saying that they were hidden above the ceiling tiles in a closet in a storage room off the cafeteria (Tr. 3909-3911). A search warrant was obtained and executed that night, and police found four videotapes exactly where appellant said they would be found (Tr. 3979-3984, 4079). The tapes were labeled Tapes A, B, C, and D as they were seized and catalogued (Tr. 4079).

Tape A contained one hour and thirty minutes of footage from inside the apartment starting at 12:41 a.m. on April 9, 2006 (Tr. 4084-4086). The entire tape showed four sex acts between appellant, Riley, and victim Ricci, including oral, anal, and vaginal sex (Tr. 4086). The victim's hands were bound behind her back with yellow speaker wire (Tr. 4086). The portion of Tape A played for the jury showed appellant raping and anally sodomizing the victim (St. Exh. 304). Appellant told the victim not to make him angry (St. Exh. 304). At one point, appellant asked Riley what she wanted him to do; she said she just wanted him to keep "taking control" (St. Exh. 304). Appellant grabbed the victim by the hair and held her face up to the camera, saying "I've got control. Look at her face" (St. Exh. 304).

Tape D contained one hour and one minute of footage from inside the apartment at some time after the events on Tape A (Tr. 4092). It generally showed four sex acts, including vaginal, anal, and oral sex acts, between appellant, Riley, and victim Ricci, who was bound with duct tape (Tr. 4092). The portion viewed by the jury showed Riley straddling the victim's face while the victim was moaning and crying (St. Exh. 304). Appellant started raping the victim, who screamed in pain, prompting Riley to smack her on

the side (St. Exh. 304). Riley repeatedly attempted to smother the victim by leaning down on her face, causing the victim to struggle and attempt to scream (St. Exh. 304). Both Riley and appellant put their hands on the victim's breasts (St. Exh. 304). Each repeatedly smacked or punched the victim in the face, chest and side, and each put their hands on the victim's throat (Tr. 304). (St. Exh. 304). At one point, while trying to smother her, Riley taunted the victim, saying "Having a little trouble breathing there?" (St. Exh. 304). The victim jerked and kicked as Riley tried to smother her (St. Exh. 304). Appellant then got behind the victim and started choking her with his arm as Riley continued to hit the victim and said, "Choke the fuck out of her" (St. Exh. 304). Appellant choked the victim until she started urinating on the bed; they pulled the victim off the bed and started stripping it as the victim apologized for urinating (St. Exh. 304). When the camera came back on, appellant had the victim by her hair and was pushing his penis into her mouth, causing her to repeatedly gag, while Riley continued to punch and smack her (St. Exh. 304).

Tape B contained one hour and thirty-four minutes of footage from inside the apartment at several times between May 10 and May 14, 2006 (Tr. 4087). While the earlier portions did not contain any criminal activity, the two segments from May 14 showed anal, vaginal, and oral sex between appellant, Riley, and victim Spicer (Tr. 4087-4088). That footage, occurring before the events on Tape #26, showed that the victim was not initially bound, but showed that she was later bound with black zip ties and then duct tape (Tr. 4088). The portion viewed by the jury showed the victim crying as appellant raped her and touched her breasts (St. Exh. 305). Appellant put his hand over her mouth and started to smother her,

prompting the victim to scream (St. Exh. 305). Appellant raised a fist and told her there would be no more warnings and that he would crush her larynx the next time (St. Exh. 305). Appellant turned the victim over, bound her hands with the plastic tie, grabbed a bottle of lotion and lubricated his penis, then anally penetrated the victim, causing her to gasp in pain (St. Exh. 305). As the victim squirmed, appellant punched her and said, "I told you not to move, bitch" (St. Exh. 305). Appellant made several statements about wishing the victim was a little girl (St. Exh. 305). Appellant also said, "I like it when they cry," "I like it when you're scared," and "I'll fuck her dead body" (St. Exh. 305).

Tape C contained, among other footage, three different periods of oral, anal, and vaginal sex between appellant, Riley, and victim Spicer on May 14 between 6:00 and 8:46 a.m. (Tr. 4088-4089). At first, the victim was bound with duct tape, but was later unbound (Tr. 4089-4090). The tape showed a total of four sex acts (Tr. 4089). For the last portion, the camera was moved to a different position, the bed had been smoothed out, and a large section of plastic was on the bed (Tr. 4089). Unlike the rest of the footage, appellant and Riley were not talking during this portion (Tr. 4090). This portion included the victim's apparent death (Tr. 4090). The portion of Tape C played for the jury first showed appellant forcing the victim's head up and down while his penis was in her mouth; duct tape was stuck to her hair and on her arms (St. Exh. 305). After a camera cut, the victim is seen lying on the bed nearly unconscious (St. Exh. 305). Plastic crinkled as appellant and Riley got on the bed (St. Exh. 305). Appellant penetrated the victim's vagina while Riley straddled the victim's face (St. Exh. 305). After appellant and Riley kissed, appellant stopped raping the victim

and held her down while Riley pushed her weight down on the victim's face (St. Exh. 305). The victim moaned, struggled, kicked, and cried out, then stopped resisting and went limp, presumably dying (St. Exh. 305). Appellant resumed raping the victim, then placed a towel on the victim's midsection, and pulled out of the victim (St. Exh. 305). Appellant and Riley both masturbated appellant into the towel (St. Exh. 305). After the two kissed, caressed, and whispered to each other for a few moments, Riley got up and shut of the camera (St. Exh. 305).

Based on information from appellant and the tapes, officers collected additional evidence of the crimes. Another piece of duct tape with a hair on it, another pill bottle, black plastic zip ties, appellant's address, and a shirt and skirt Riley was wearing on the videos, including the video of victim Spicer's death, were recovered from the apartment (Tr. 3771-3772, 3844-3846). The shovel was recovered from the creek, and the victim's partial denture was recovered from the side of the road near the site appellant buried her (Tr. 3966-3967, 3970-3972). Evidence was also recovered from the trucks appellant and Riley used during their flight which corroborated some of appellant's account of their route (Tr. 3866-3878, 3848-3852). In the truck appellant and Riley were in when arrested was a tape recorder with an audiotape in it (Tr. 4040). On it, appellant identified himself and gave instructions for disposing of his property and his ashes (Tr. 4041). Appellant then said that he and Riley were going to have "one big last party" and then turn themselves in (Tr. 4041-4043). Appellant talked about possible book or movie deals about their story, noting that movies were made about "the couple up in Canada, Karla and Paul" (Tr. 4042). That reference

matched references in appellant's address book to Paul Bernardo and Karla Homolka and a book about them, "Invisible Darkness" (Tr. 4045-4046). In his address book, appellant had written down several page numbers from the book; those pages included details similar to appellant's crimes, including that they ground up pills and put them in their victims' drinks, they bound their victims and engaged in three-way sex with them on videotape, including forced oral sex, and that Homolka sat on her victims' faces (Tr. 4050-4051). Appellant also had contact information for the prison in Canada where Bernardo was incarcerated (Tr. 4049).

DNA tests were conducted on some of the hairs found on one of the pieces of duct tape and on the skirt found in the apartment, which had stains containing saliva (Tr. 3999-4005). The DNA on the skirt stains each contained a mixture of Riley's and victim's Spicer's DNA (Tr. 4018-4019). Victim Ricci was the "most likely" source of the hair on the duct tape (Tr. 4020).

An autopsy conducted on victim Spicer revealed finger marks on her neck and shoulders consistent with finger marks (Tr. 3595-3596). The victim had black eyes, consistent with increased pressure in the head and the blocking of blood drainage (Tr. 3595). There was extensive hemorrhaging in the muscles around the victim's neck and clavicle and the base of her skull (Tr. 3599-3600). This showed that the victim had been subjected to multiple periods of strangulation, although she did not die of strangulation (Tr. 3599-3605). Blood was also backing up into the victim's lungs, a condition which could have gone on for several hours and made the victim more susceptible to suffocation; the suffocation was "the

straw that [broke] the camel's back" (Tr. 3607-3608). The drugs in the victim's system, cocaine and Trazedone, also decreased her ability to resist (Tr. 3610). The cause of the victim's death was the combination of repeated strangulation and smothering (Tr. 3612).

Appellant did not present any witnesses during the guilt phase, but, through cross-examination and argument, presented a defense that appellant did not deliberate at the moment of victim Spicer's death, but was "caught up" in the moment (Tr. 4204-4234).

Appellant was found guilty of all counts except one count of first-degree assault against victim Ricci (L.F. 5214-5239).

In the penalty phase, the State presented evidence that, after appellant and Riley finished their sexual torture of victim Ricci, they took her to a remote part of Clay County, where appellant had the victim remove her clothes, attempted to strangle her to death, and then successfully smothered her to death with his hand (Tr. 4343, 4355; St. Exh. 595). Appellant later set victim Ricci's body on fire to destroy her remains and disposed of her clothes (Tr. 4351, 4355; St. Exh. 595).

The State presented evidence that appellant and Riley committed sexual crimes against J.B., a five-year-old girl he and Riley kidnapped the day of their arrest (Tr. 4307, 4315-4338, 4357-4361, 4409-4448; St. Exh. 595). While on the run, appellant and Riley went to Arcadia, Kansas, where J.B. lived with her father and mother; appellant said that J.B.'s mother was his sister (Tr. 4410-4412). Appellant, Riley (whom appellant introduced as "Sherri") and J.B.'s parents stayed up talking about the family, and appellant and Riley wound up staying the night with them (Tr. 4412-4413). The next day, appellant wanted to

go into nearby Pittsburg to meet another sister, and J.B. insisted on riding with appellant and Riley, so J.B's father allowed her to do so (Tr. 4415-4416). J.B.'s father went with them in another car to the other sister's home; afterwards, they planned to go for lunch at a pizza place (Tr. 4416-4417). At the pizza place, appellant said they were going to go to McDonald's because that's where J.B. wanted to go (Tr. 4417). J.B.'s father told them to meet back at the sister's home, but appellant, Riley, and J.B. never returned (Tr. 4417-4419).

After taking J.B., appellant and Riley headed back towards Missouri (St. Exh. 595). Sometime after they entered Missouri, Riley took J.B.'s clothes off and started kissing the girl all over, including on her genitals (St. Exh. 595). Later, appellant stopped the car, possibly in a meadow near the arrest site, and started molesting the little girl (Tr. 4430-4433; St. Exh. 595). He touched J.B.'s genitals with his hands and his mouth, inserting his tongue into her vagina (St. Exh. 595). He touched his penis to J.B.'s lips, attempting to force her to perform oral sex on him, but she resisted (St. Exh. 595). He then anally sodomized and vaginally raped J.B. (St. Exh. 595). When J.B. was later found during the arrest of appellant and Riley, she had a laceration over her left eye and blood in the crotch of her pants (Tr. 4426-4428). Appellant's raping of J.B. caused vaginal, perineal, and anal tearing which required surgery (Tr. 4445-4447). J.B. also needed stitches for the wound over her eye (Tr. 4448).

After the arrest and appellant's statements to the police, the police allowed appellant and Riley to speak to each other without officers in the room (Tr. 4393). Appellant told Riley, "We got to do some things we wanted" and that they should have just kept driving

(Tr. 4398). He also told Riley to tear her pants in the crotch because he wanted "to see it one last time" (Tr. 4399).

The State also presented evidence of prior crimes (Tr. 4290-4301; Tr. 595). First, in June 1987, appellant pretended to be a stranded motorist and got a ride from a passerby, 27-year-old T.B. (Tr. 4290-4292). He convinced her to give him a ride home and then led her to an isolated area, where he then repeatedly raped and anally and orally sodomized T.B. while punching her in the head, forcing her around by the hair, and threatening her with a knife (Tr. 4293-4296). During that attack, he kept telling her she was not "tight" and that he wished she was a little girl (Tr. 4296). After the attack, appellant wanted to wipe the car down to get rid of fingerprints, but T.B. managed to get away (Tr. 4298). Appellant was identified through a tattoo on his chest, and eventually pled guilty to forcible rape and forcible sodomy with a weapon, receiving a total sentence of twenty-five years (Tr. 4300-4301). Appellant told police that he had committed another rape in 1987, when he used what appeared to be a switchblade knife to forcibly rape and orally sodomize a woman he picked up in Blue Valley Park (St. Exh. 595).

The State also presented evidence that appellant committed a planned attack of another inmate in the Jackson County Jail, repeatedly punching the man in the head and face (Tr. 4365-4375). Finally, the State presented victim impact testimony from victim Spicer's niece and daughter (Tr. 4454-4460).

Appellant presented his own testimony and the testimony of four other witnesses, including a psychologist, to support a mitigation theory that he suffered from personality

disorders and paraphilia (abnormal sexual preferences) due in part to his "developmental influences" in childhood and adolescence (Tr. 4473-4690, 4718-4742).

The jury found all three charged aggravating circumstances and recommended a death sentence for the murder of Spicer (L.F. 5240). The trial court followed the recommendation of the jury and sentenced appellant to death for the murder of Spicer (L.F. 5359; Tr. 4800). As to the other counts, the court sentenced appellant as a persistent offender to life imprisonment for all but felonious restraint, to which the court imposed a fifteen-year sentence (L.F. 5359; Tr. 4801-4803). Appellant was also sentenced as a persistent sexual offender for each of the sexual offenses (L.F. 5359; Tr. 4801-4803). The sentences were imposed in a manner to make a total of four consecutive life sentences to be served consecutively to appellant's death sentence and to the sentence he was already serving for his prior rape conviction (L.F. 5359-5360; Tr. 4803-4804). This appeal followed.

ARGUMENT

I.

The trial court did not err in advising appellant that, if he chose to represent himself, he was not entitled to have funding to prepare his defense, thus prompting him to proceed to trial with counsel because the trial court's advice to appellant was not incorrect in that appellant had no constitutional right to access to the funds he requested to pay his own litigation expenses if he proceeded *pro se*.

Appellant claims that the trial court erred in advising appellant that he was not entitled to funding to prepare his defense if he represented himself, "forcing" him to accept representation against his desire to proceed *pro se*, and in denying subsequent requests for self-representation with such funding (App.Br. 45-69). But because there was no right to funding for his requested *pro se* litigation costs, the trial court's advice was not erroneous, and thus the court did not improperly deny appellant the right to represent himself.

A. Facts

The capital public defenders that represented appellant at trial first entered their appearance starting on November 2, 2006 (L.F. 12). On March 28, 2007, appellant filed a motion to dismiss counsel, and, in one sentence, said that he would be his own lawyer (L.F. 107-108). The court held a hearing on that motion on April 12, 2007; at the hearing, appellant said that he still wanted to dismiss counsel, giving the court a list of complaints about counsel, but he made no request to represent himself (Mot. Tr. 4-8). The court denied

the motion, advising appellant that he did not have the right to choose appointed counsel (Mot. Tr. 15).

In June and July 2007, appellant filed numerous motions to either compel counsel to do the things he wanted or to represent himself (L.F. 153-154, 155-161, 162-165, 169-170, 172-176, 179-183, 192-197). In those motions, when appellant asked to represent himself, he also insisted on receiving "means" and "help" to represent himself (L.F. 153-154, 155-161, 162-165, 169-170, 172-176, 179-183, 192-197). Among the aid that appellant sought was: people to be appointed to assist in investigation and depositions (L.F. 154, 160, 197); physical items, including additional copies, a typewriter, a VCR, and a telephone (L.F. 155); to be physically present for the questioning of witnesses (L.F. 158); additional access to the jail's law library (L.F. 160, 170); a lawyer to help him (L.F. 160, 192, 197); experts in "medical drugs" (L.F. 169-170); access to internet research (L.F. 169-170); legal assistance with research and "legal issues" (L.F. 169-170); a DVD player (L.F. 170); and an unmonitored telephone with access to all telephone systems (L.F. 170).

The court held a motion on appellant's request to represent himself on October 10, 2007 (Tr. 16). At the hearing, appellant initially stated that he wanted to represent himself, and that he was making that request "clear" (Tr. 17). The court examined appellant about that decision and the dangers of proceeding without counsel; again, appellant stated that he understood the difficulties in representing himself and wanted to do so because he wanted to determine the choice of defense (Tr. 19-31). The court then advised appellant that the decision to represent himself "limits a lot of the things you can do in behalf of your defense"

(Tr. 33). When appellant asked how, the court said that the public defender's office had the ability to use whatever resources they deemed necessary for the defense, such as money for investigators and depositions, and that, there being no "absolute right" to a lot of those things, appellant would have to come up with the money for such expenses himself (Tr. 34). Appellant said that he thought the court could appoint someone to assist him with litigation (Tr. 35-36). The court said that it could not force an investigator to work for free (Tr. 35). Appellant said that he understood (Tr. 35). At that point, appellant believed he would not be able to prepare the defense he desired without such resources, and that representing himself would be "useless" and "a mistake" (Tr. 37). Appellant said that the public defenders could continue to represent him (Tr. 38).

By the end of the month, appellant again filed a motion to dismiss counsel and represent himself (L.F. 285-286). Appellant incorporated his prior motions in that motion (Tr. 285). In December 2007, appellant filed a motion for "funding" for investigation and preparation, including for: copying, expert witnesses and related experts, an investigator for locating witnesses and evidence and for conducting legal research; clothing; transcripts; and law books not contained in the jail library (Tr. 318-319). He continued to file motions to represent himself, all of which either incorporated his earlier motions or explicitly requested funding (Tr. 324-329, 406-422, 670-681, 4909-4922). In none of those motions did appellant state that he was willing to represent himself without the requested funding. (L.F. 285-286, 318-319, 324-329, 406-422, 670-681, 4909-4922).

On July 17, 2002, after the penalty phase portion of *voir dire* but before the general *voir dire*, the court held a hearing on appellant's more recent motions (Tr. 2965). Appellant said that he believed that he had the right to represent himself and to receive funds from the court to do so (Tr. 2966-2967). Appellant never said during that hearing that he was willing to represent himself without the requested funding (Tr. 2965-2974). When appellant's motions were denied, appellant subsequently filed another motion objecting to the court's decision, again stating that he wanted funding for an investigator and expert witnesses (L.F. 5020-5036). That motion was overruled (L.F. 5113).

B. Standard of Review

As appellant's claim is whether or not appellant's acceptance of counsel and decision not to represent himself was rendered involuntary by allegedly erroneous advice by the trial court, it is comparable to a claim that appellant's right to self-representation was improperly denied. The denial of the right to self-representation is structural error. *State v. Black*, 223 S.W.3d 149, 153 (Mo. banc 2007). There is no discretion for a court to deny a timely, unequivocal, voluntary, and informed request for self-representation. *Id.*

C. The Court's Advice to Appellant was Not Erroneous

The United States Supreme Court has recognized a right to self-representation in a criminal trial in the federal Sixth Amendment right to counsel. *Faretta v. California*, 422 U.S. 806, 814, 820 (1975); *Black*, 223 S.W.3d at 153. That right applies to the states through the Fourteenth Amendment. *Faretta*, 422 U.S. at 836; *Black*, 223 S.W.3d at 153. "There are four requirements for a defendant seeking to waive his right to counsel and proceed pro

se. A defendant's invocation of the right must be made unequivocally and in a timely manner, and the corresponding waiver of counsel must be knowing and intelligent." *Black*, 223 S.W.3d at 153. That the waiver must also be voluntary is "an unstated or assumed prerequisite." *Id.* at 154 n. 3.

In evaluating appellant's claim, it is important to note what appellant's claim is not. First, it is not a claim that the court improperly denied a valid request for self-representation, as appellant's claim recognizes that appellant relinquished his right to self-representation after allegedly invoking it (App.Br. 45, 58, 69). While appellant referred to error in the court "denying subsequent requests to represent himself" after appellant's decision not to represent himself in his point relied on, appellant does not argue error in these rulings in his argument, arguing only that the trial court's advice rendered appellant's waiver unknowing and involuntary (App.Br. 34, 45-69). The failure to discuss a claim included in the point relied on in the argument renders such a claim abandoned. *State v. Neher*, 213 S.W.3d 44, 49 n. 5 (Mo. banc 2007). Moreover, appellant never made an "unequivocal" request to represent himself. Instead, he repeatedly requested assistance, including the assistance of attorneys, in representing himself; in later motions, appellant always incorporated his earlier requests which included those requests; and in the last hearing on the matter, appellant never relented from his position that he desired legal assistance in representing himself (L.F. 160, 169, 172-176, 192, 4946; Tr. 2966-2967). Where a defendant requests to represent himself but also requests the aid of legal counsel, such a request is not an unequivocal waiver of the right to

counsel. *State v. Hampton*, 959 S.W.3d 444, 448 (Mo. banc 1997). Thus, appellant's claim is not a claim of the denial of a proper request for self-representation.

Second, appellant's claim is also not a claim that the trial court erred in failing to provide appellant the necessary "tools" to aid in his defense. When confronted with the choice to accept counsel or to represent himself and then challenge the denial of his requests for aid, appellant chose not to represent himself. Had he done so, he could have raised a challenge to the denial of his requests for aid. But, because appellant was represented by counsel, appellant had "full access" to the necessary tools for his defense. *See Holt v. Pitts*, 702 F.2d 639, 640 (6th Cir 1983)(the provision of counsel fulfills a state's obligation to provide a defendant with full access to the courts). Therefore, appellant's claim is not one of error in failing to grant appellant's motions for aid to prepare a *pro se* defense.

Understanding what appellant's claim is not, this Court can review the claim that appellant has actually raised: that the trial court committed error by advising appellant that he could not receive funding from the court to pay for the aid he desired in representing himself, thus making his subsequent decision not to represent himself involuntary, unknowing, and unintelligent (App.Br. 45-69). But because the trial court's advice was not erroneous, appellant's decision not to represent himself was not made involuntary, unknowing, and unintelligent by the trial court.

Appellant's claim rests on a misunderstanding of the United States Supreme Court's opinion in *Ake v. Oklahoma*, 470 U.S. 68 (1985). In *Ake*, the Court held that an indigent defendant, represented by appointed counsel had the right of "access to a competent

psychiatrist" to conduct an appropriate examination and then assist in the defense when he demonstrates to the trial court that his sanity is a significant factor at trial. *Ake*, 470 U.S. at 74, 84. The Court noted that this holding was premised "in significant part" on the Fourteenth Amendment's due process guarantee of fundamental fairness which requires that the State "take steps to assure that the defendant has a fair opportunity to present his defense." *Id.* at 76. The *Ake* court noted that previous cases recognized that an indigent criminal defendant had the right to receive certain tools, including trial transcripts for appeal, free filing of a notice of appeal, and the right to assistance of effective counsel, and noted that the "consistent theme" of the "basic tools" cases was "meaningful access to justice." *Id.* at 77. Because the Court determined that access to a psychiatrist in a case where psychiatric assistance was necessary was included in these "basic tools," it found such access necessary. *Id.* at 82-83.

Even with that holding, however, the Court noted, "This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own." *Id.* at 83. All that was required, according to *Ake*, was "*access* to a competent psychiatrist[.]" *Id.* Thus, *Ake*'s primary concern is that indigent defendants have access to the basic tools necessary for representation. Implicit in such a holding is that, as long as the State provides defendant with an option by which to receive those tools, the State has satisfied its due process obligation to provide access. Federal courts which have evaluated the constitutional burden on the government to provide

meaningful access to the courts have concluded that its burden is met by offering the defendant appointed counsel.

In *United States v. Smith*, 907 F.2d 42 (6th Cir. 1990), the Sixth Circuit rejected a claim that a criminal defendant who decided to represent himself was denied his constitutional right of access to the Courts from the denial of his repeated requests to access to legal materials and facilities. *Id.* at 44. The court, noting that *Faretta* explicitly realized that a *pro se* defendant may "destroy[] any meaningful access to the court that he may have had" with counsel by proceeding *pro se*, held that a defendant cannot complain about lack of access to a law library when he waived his right to counsel. *Id.* at 45. The court stated that, by waiving the right to counsel, the defendant also waived his right to access to a law library, and found that such a conclusion did not violate due process guarantees. *Id.* 45-46. A prisoner who chooses not to avail himself of the alternative provided has no basis-constitutional or otherwise-for complaint. *Id.* at 640-41; *see also Pitts*, 702 F.2d at 640 ("By his own admission, it is clear that counsel was appointed to represent [the defendant] in both federal and state actions pending against him. As a matter of law, therefore, the state fulfilled its constitutional obligation to provide him with full access to the courts. The choice between alternatives lies with the state."). The Fourth, Seventh, and Ninth Circuits have reached similar results, noting that it is up to the State to determine the form in which the State provides access to legal assistance will take and that the offer of counsel satisfies the State's constitutional obligations. *United States v. Chatman*, 584 F.2d 1358, 1359 (4th Cir. 1978); *United States ex rel. George v. Lane*, 718 F.2d 226, 231 (7th Cir. 1983); *United States*

v. Wilson, 690 F.2d 1267 (9th Cir. 1982). Thus, there is no constitutional violation when the State ties appellant's access to the courts, i.e. the tools necessary for litigation, to the right to counsel. Such an approach is fully consistent with *Ake*, which only requires access to the basic tools and permits the State to determine how those tools shall be administered. Missouri has determined that such tools be provided to indigent defendants through the appointment of counsel through the Public Defender system. § 600.011 et seq., RSMo 2000. Thus, by offering appellant access to the tools necessary to his defense by the appointment of counsel, the State satisfied its burden under *Ake*. Thus, the court's advice to appellant that, by waiving counsel, he was also waiving the provision of funds to cover litigation expenses was accurate.

Such a conclusion is strengthened when considering United States Supreme Court's opinions dealing with specific requests for "tools" that appellant requested, each stating that the Court has not recognized any right to such "tools." In *United States v. Bagley*, 473 U.S. 667 (1985), in addressing a *Brady* claim, the court specifically stated that there was no constitutional obligation for the State to provide "investigators who will assure that the defendant has an opportunity to discover every existing piece of helpful evidence." *Id.* at 695. As for appellant's request for increased law library access or legal assistance, the Court has stated that there is no abstract, freestanding right to a law library or legal assistance. *Lewis v. Casey*, 518 U.S. 343, 351 (1996). As to general requests for the trial court to do things for a *pro se* defendant that counsel would normally do for a defendant, the Court has held, "The trial judge is under no duty to perform any legal 'chores' for the defendant that

counsel would normally carry out. *Martinez v. Court of Appeal of California, Fourth Appellate Dist.*, 582 S.W.3d 152, 162 (2000). These cases show that appellant's requests, far from being for the "tools" necessary to represent himself, were for things that the Court has explicitly found a lack of constitutional entitlement. Thus, these cases further strengthen the conclusion that the trial court did not err in advising appellant that he was not entitled to funds for his requested items.

Appellant cites to language from *Simmons v. United States*, 390 U.S. 377 (1968), cited by this Court in *State v. Armentrout*, 8 S.W.3d 99 (Mo. banc 1999), stating, "The state may not require a defendant to relinquish one of two procedural rights in order to obtain the protection of the other" (App.Br. 57). *Simmons*, 390 U.S. at 394; *Armentrout*, 8 S.W.3d at 105. While this quote was used in the context raised here in *Armentrout*, respondent believes that the language should not be extended beyond *Simmons*, which dealt with the ability of a defendant to testify in support of a motion to suppress (a Fourth Amendment concern) without hindering his right to remain silent at a subsequent trial (a Fifth Amendment concern). *Simmons*, 390 U.S. at 389-94. *Simmons* did not analyze two competing constitutional rights that, by definition, cannot be exercised at the same time. Here, by contrast, the competing rights are mutually exclusive. By definition, a defendant who elects to exercise his constitutional right to represent himself cannot also exercise his constitutional right to be represented by counsel. Thus, this case presents a situation where a defendant must relinquish one constitutional right to exercise the other. Because appellant's right to receive aid in the preparation of a defense was tied to the State's provision of appointed

counsel, as such provision satisfies the right to meaningful access to such tools, there was no constitutional infirmity in advising appellant that giving up his right to counsel also required giving up that related right.

In citing *Armentrout*, appellant ignores other language in that case which shows that the advice that the court gave appellant was fully consistent with the law governing his right to counsel. In *Armentrout*, this Court stated,

> In this case, it is clear that Appellant had the right to represent himself under *Faretta*, but it is not at all clear that *Ake* required state funding for all the depositions and experts Appellant requested, or that *Ake* (which involved a defendant represented by counsel) requires any funding whatsoever where a defendant chooses to represent himself.

Armentrout, 8 S.W.3d at 105. While this language was not necessary to resolve the claim on appeal, it does show that this Court recognized that there is no settled right for a criminal defendant to receive funding for litigation expenses. Because this Court has stated that there is no law declaring that such a right exists, the trial court cannot be faulted for reaching the same conclusion, and advising appellant as such. Thus, appellant has failed to demonstrate that the trial court's advice to appellant about representing himself was error.

Finally, appellant briefly argues that language in the State constitution could permit recognition of this right, since Article 1, § 18(a) of the constitution allows a defendant to appear "in person and by counsel" in a criminal prosecution (App.Br. 66). Mo. Const., Art.

I, § 18(a) (1875). This Court, however, has recognized that this constitutional provision does not provide for any right different than the rights provided by the federal constitution. "[Article] I, § 18(a) of the Missouri Constitution protects the same rights as the Sixth Amendment of the United States Constitution." *State v. Hester*, 801 S.W.2d 695, 697 (Mo. banc 1991). Again, trial courts should be allowed to rely on this Court's precedents in analyzing what rights are provided by constitutional provisions. Because nothing in the law alerted the trial court that the State constitution provided the multitude of resources appellant desired if he represented himself, this Court should not convict the trial court of error for advising appellant in a manner consistent with the law.

In short, nothing in the precedents of the United States Supreme Court or this Court required the provision of the resources requested by appellant if appellant chose to represent himself. Persuasive federal authority interpreting appellant's due process right to access to the assistance he stated that he wanted shows that the right to access is fully satisfied by the provision of appointed counsel. The United States Supreme Court has refused to recognize a right to the specific "tools" requested by appellant. In light of these precedents and the failure of the courts to previously recognize the right appellant claims should exist, the trial court cannot be said to have erred in advising appellant that he did not have a right to the funding he requested. Therefore, appellant's decision not to represent himself but to instead keep his appointed counsel was not improperly rendered involuntary, unknowing, or unintelligent by that advice.

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

II.

The trial court did not plainly err in refusing either to permit appellant to testify in the narrative or to force counsel to ask appellant questions selected by appellant because the trial court's ruling was proper in that a defendant has no constitutional right to testify in any manner he sees fit, the trial court's control of the examination of witnesses is a matter of the trial court's discretion, and the choice of trial strategy belongs to trial counsel.

Appellant claims that the trial court improperly coerced appellant into waiving his right to testify by not allowing appellant to testify in the narrative or by not forcing appellant's counsel to ask questions appellant wanted counsel to ask, arguing that he had a constitutional right to present his testimony in whatever manner he wanted (App.Br. 70-85). But because appellant had no constitutional right to testify in the narrative or to answer only questions that he chose for his counsel to ask, because the trial court had the discretion to control the examination of appellant, and because counsel had the authority to choose the questions to be asked on direct examination, the trial court did not plainly err in refusing to allow appellant to testify in any manner he chose and in advising appellant as such.

A. Facts

Prior to the close of the evidence in the guilt phase, the court asked appellant about his rights regarding testifying (Tr. 4144-4162). During that examination, appellant stated that he understood he had the right to testify, but asked if he was permitted to testify to whatever he wanted to testify to, or if he would have to answer questions put to him by his counsel (Tr.

4145, 4148). Appellant stated that he wanted "to testify and put on evidence," saying that he wanted "to get where I could talk and have other people that knew me…to just try to, you know, explain the last two months that I was out there" (Tr. 4149-4150). In saying that he "just want[ed] to be heard," appellant kept referring to trying to put on evidence from other people and to raise the objections he had been raising in *pro se* motions (Tr. 4151, 4154). The court explained that there were things appellant might want to say that were prohibited by the rules of evidence (Tr. 4150-4152). Appellant admitted that he understood, but that he had not discussed this with counsel (Tr. 4152). At that point, the court wanted to take a recess to have counsel speak with appellant (Tr. 4152). Before that recess could be taken, appellant again started to ask if he could talk about what he wanted if called to the stand; the court stopped appellant and told him, as he had previously, that the court did not want to hear about the content of discussions between appellant and counsel, as those discussions were privileged and the court could not give appellant advice about what evidence he should put on (Tr. 4152).

After a lengthy discussion about appellant's problems with counsel and his desire to argue his *pro se* motions, appellant again said that he understood that he had the right to testify, "but I don't know what actually to testify means, if they have to cross-examine me, if I have to count on them to cross-examine me or do I get to just, to talk to my – to say what I want to say within the legal evidence rules and all that" (Tr. 4157). When the court again attempted to recess so that appellant could speak to counsel, counsel said that he believed it was appropriate for the court to tell appellant that counsel would be required to conduct the

examination, that the State would cross-examine, and that the right to testify was not a "free forum opportunity to be heard" (Tr. 4157). The court asked appellant if he understood that counsel would ask the questions, that the State could cross-examine, and that he would not "get to just sit there and tell the jury whatever you want" (Tr. 4157-4158). Appellant said he understood, but asked if he could have counsel "ask questions that I want to ask"; the court said "No" (Tr. 4158). Appellant understood, but then he did not need counsel and wanted to waive counsel so that he could be heard (Tr. 4158-4159). The court said that it had already ruled on the waiver of counsel, and then said that appellant's testimony was "going to be under the rules of evidence, and that is [counsel] is going to ask you questions or it's not going to be done at all. Because I will not just let you sit there and talk to the jury on your own" (Tr. 4159). Appellant said that he understood and would try to ask counsel if counsel would ask certain questions (Tr. 4159).

After a recess, appellant said that he understood that, if he chose to testify, it would be under the rules of evidence by the questioning of counsel (Tr. 4160-4161). Appellant said that he would not be able to testify to anything that he wanted to say because counsel would not ask the questions that appellant wanted asked (Tr. 4161). Appellant told the court that he did not want to testify "[b]ecause I would be testifying to basically just what the prosecution wants" (Tr. 4161-4162).[2]

[2]In the penalty phase, the court again told appellant that he could not make counsel ask the questions that appellant wanted and that the questions asked would be up to counsel (Tr. 4703, 4708-4710). Appellant asked if he could ask his counsel to ask him certain

B. Standard of Review

Appellant concedes that this claim is not preserved for appeal, as it was not included in the motion for new trial (App.Br. 70-71). Appellant thus requests plain error review. Supreme Court Rule 30.20. Review for plain error involves a two-step process: first, there must be "evident, obvious, and clear" error which "facially establishes substantial grounds" for believing that manifest injustice or a miscarriage of justice occurred; and second, that error must have actually resulted in manifest injustice or a miscarriage of justice. *State v. Baumruk*, 280 S.W.3d 600, 607-08 (Mo. banc 2009).

C. There was No Plain Error

A criminal defendant has a constitutional right to testify in his own behalf at trial. *Rock v. Arkansas*, 483 U.S. 44, 49-53 (1987). That right may be waived by the defendant, but only if the waiver is knowing and voluntary. *Smith v. State*, 276 S.W.3d 314, 317 (Mo.App., E.D. 2008); *Allen v. State*, 50 S.W.3d 323, 327 (Mo.App., W.D. 2001). Appellant claims that his waiver of the right to testify was not voluntary because it was coerced by the court telling him that he could only testify by answering the questions put to him by counsel instead of testifying in the narrative (App.Br. 70-85). Appellant's argument suggests that his right to testify is absolute and subject to no procedural restriction by the trial court, i.e., that

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questions, a question he had not asked the court during the guilt phase examination (Tr. 4710). The court said that he could "obviously" give them questions he wanted asked, but that it was still up to counsel to choose what questions to ask (Tr. 4710-4711). Appellant chose to testify (Tr. 4711, 4717-4742).

the trial court must allow a defendant to testify in any manner the defendant wishes. Appellant's argument is incorrect. The defendant's right to testify is not "without limitation." *Rock*, 483 U.S. at 55. That right may "bow to accommodate other legitimate interests" of the trial process. *Id.* Restrictions on testimony do not violate the right to testify unless they are arbitrary or disproportionate to the purposes they are designed to serve. *Id.* at 55-56. "Numerous state procedural and evidentiary rules control the presentation of evidence and do not offend the defendant's right to testify." *Id.* at 55 n. 11. Such rules are permissible even if they affect the substance of the defendant's testimony. *See Cox v. Wyrick*, 873 F.2d 200, 202 (8th Cir. 1989)(willful failure to respond to discovery requests justified the exclusion of the defendant's own alibi testimony).

Appellant fails to point to a single authority from any jurisdiction that holds that the defendant's right to testify requires the trial court to allow the defendant to testify in any manner he desires (App.Br. 77-85). Respondent can find no such authority; instead, those courts that have dealt with this question have all held that the right to testify does not include the right to testify in any manner of the defendant's choosing. *United States v. Gallagher*, 99 F.3d 329, 332 (9th Cir. 1996)(there is no constitutional violation in refusing to permit the defendant to present narrative testimony); *State v. Wassenaar*, 161 P.3d 608, 615 (Ariz. App. 2007)("a defendant has no right to testify through any manner of his choosing."); *Medley v. State*, 600 So.2d 957, 962 (Miss. 1992)(defendant's claim that appellant's right to testify included the right to testify in the narrative had "no merit").

In *State v. Joyner*, 848 P.2d 769, 774 (Wash. App. 1993), the trial court required a *pro se* defendant to testify in a question-and-answer format. *Id.* at 771-72. The defendant waived his right to testify because he was not prepared to do so. *Id.* at 772. On appeal, the defendant claimed that the court "unconstitutionally abridged his right to testify freely in his own defense when it denied his request to testify in narrative form." *Id.* at 773. The Court of Appeals of Washington, noting that the defendant failed to identify any authority holding that failing to allow narrative testimony violated the right to testify, denied the claim. *Id.* at 773-74. The court stated:

> Our authorities make clear that only an undue burden on a criminal defendant's choice of *whether to testify* is unconstitutional. [Citation omitted]. Here, however, the judge's ruling affected only the *manner* in which Joyner was to testify. The trial judge gave Joyner ample opportunity to testify in a question-and-answer format. Because Joyner could have chosen to exercise his constitutional right, we find no abridgment of Joyner's right to testify in his own defense.

Id. at 774 (emphasis in original).

In light of the lack of the any authority constitutionally requiring that the defendant be allowed to testify in any manner he wishes and the United States Supreme Court's recognition that a defendant's right to testify is subject to non-arbitrary procedural rules, this Court should find the apparently unanimous position of those courts addressing this same

question persuasive. This Court has "long held" that the "entire subject" of the manner of the examination of witnesses is within the trial court's discretion. *State v. Couch*, 256 S.W.3d 64, 72 (Mo. banc 2008). This discretion included the question of whether a witness must testify by either question-and-answer or by narrative. *Id*. at 71-72. The trial court's decision here was not arbitrary or disproportionate to the purpose of maintaining order in the trial. Appellant was subjected to the same rules of every other witness. Requiring appellant to answer questions permitted the State to object to irrelevant or otherwise inadmissible evidence. Appellant's penalty phase testimony demonstrated such a need: the prosecutor repeatedly had to object to non-responsive and narrative answers by appellant (Tr. 4734, 4735, 4736, 4739, 4740, 4740-4741). Because the court's requirement that appellant testify only in response to counsel's questions did not arbitrarily or disproportionately infringe on his right to testify and was within the court's discretion, the trial court's refusal to allow appellant to testify in the narrative and his advice to appellant regarding that refusal was not plainly erroneous.

Further, the trial court was not required to force trial counsel to ask appellant questions that appellant wanted asked. Generally, the examination of witnesses and introduction of evidence is a matter left to counsel's exercise of trial strategy. *Anderson v. State*, 196 S.W.3d 28, 37 (Mo. banc 2006). Defense counsel has wide discretion in determining what strategy to use in defending his or her client. *Worthington v. State*, 166 S.W.3d 566, 578-79 (Mo. banc 2005). While a defendant has the right to make certain fundamental decisions, including whether or not to testify, all other decisions belong to trial

counsel alone. *Id*. at 579. Moreover, a defendant has no constitutional right to hybrid representation. *State v. Hampton*, 959 S.W.3d 444, 447 (Mo. banc 1997). Appellant's claim that he had the right to force counsel to ask certain questions is essentially a claim that he had the right to both the assistance of counsel and to represent himself. Because such a right does not exist, appellant's claim that the trial court misadvised him that he did not have such a right is meritless.

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

III.

The trial court did not err in refusing to strike juror Adam Powell for cause because the totality of Powell's answers during *voir dire* and on his pretrial questionnaire demonstrated that he could meaningfully consider mitigating evidence.

Appellant claims that the trial court erred in failing to grant his motion to strike juror Adam Powell because his answers to questions about whether he could "look at" childhood experiences as a reason to vote against the death penalty showed that he could not give "meaningful consideration" to mitigating evidence. But because the totality of Powell's answers on his pretrial questionnaire and during *voir dire* showed that he could meaningfully consider mitigating evidence, the trial court did not err in refusing to strike him.

A. Facts

In his pretrial questionnaire, juror Powell checked a box that said he thought the death penalty was used an "appropriate amount," and wrote, "I think most of the time the punishment fits the crime" (L.F. 2550). He also checked boxes saying that he "somewhat favor[ed]" the death penalty and believed in the idea of an "eye for an eye" (L.F. 2550). He checked another box saying that he felt that childhood experience "somewhat affects later behavior" and said that he believed the testimony of mental health professionals was "very necessary" in some cases and that that they should "be extended every right to [assist] in the trial" (L.F. 2553).

During the punishment phase portion of *voir dire*, Powell stated that he understood deliberation process as described by the prosecutor, that he could vote for either death or life

and had no preference for either sentence, that he would keep both options open, and that, if he believed mitigating circumstances outweighed aggravating circumstances, he would vote for life (Tr. 998-999). Defense counsel later explained that mitigation looked at "what made somebody the way they were that they would make such a poor choice," and then only emphasized childhood development and experience as "usually what we would discuss as mitigating evidence" (Tr. 1018-1019).

Counsel then questioned Powell, who said that he considered both death and life to be appropriate punishment options (Tr. 1020). Counsel then asked Powell if he was "willing to say that you could look at somebody's childhood experience and give that meaningful consideration as a reason to vote against the death penalty" (Tr. 1020). Powell replied, "I'm willing to look at it, but I believe as an adult you're a person and no matter what happened in your childhood you know the difference between right and wrong and killing a person and not killing a person" (Tr. 1021). He said that he would look at and listen to such evidence (Tr. 1020). Counsel asked, "But from your world view it's not something that should be given meaningful consideration in deciding which punishment to give the deliberate murderer?" (Tr. 1021). Powell answered, "Again, I think that's so abstract. In some cases, yes, it could be, but I believe that most generally, no, as an adult human being you know that it's right to kill a person or not right or what your feelings are" (Tr. 1021). Counsel then asked to verify that Powell agreed with the concept of "an eye for an eye and a tooth for a tooth and a life for a life?" (Tr. 1021). Powell said that, if that is what is "laid forth" by the justice system and society, then he did believe in it (Tr. 1021-1022).

The prosecutor later asked Powell, even if he would not give "a great deal of weight to evidence of someone's childhood, for example," if he would consider it under the appropriate circumstances (Tr. 1035). Powell said, "Being that we're talking so vague, yes. I mean, I could see where there could be something that I would consider but generally no." The prosecutor clarified that this answer referred to how much weight he would tend to give such evidence as opposed to being unwilling to consider it at all (Tr. 1035).

Appellant moved to strike Powell, arguing that he "essentially" said that he could not give "meaningful consideration to things such as childhood experiences as a reasons to vote against the death penalty for an adult murderer" (Tr. 1041-1042). Thus, he reasoned, Powell's ability to consider a life sentence was substantially impaired (Tr. 1042). The prosecutor objected to the strike, noting that Powell affirmed that he would consider the evidence, even if he was not inclined to generally give it much weight (Tr. 1041-1042). The court denied the strike (Tr. 1043).

B. Standard of Review

The trial court's ruling on a challenge for cause shall not be disturbed on appeal unless it is against the weight of the evidence and constitutes a clear abuse of discretion. *State v. Johnson*, 244 S.W.3d 144, 158 (Mo. banc 2008). An abuse of discretion is only found where the court's ruling is "clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *State ex rel. Wyeth v. Grady*, 262 S.W.3d 216, 219 (Mo. banc 2008). If

reasonable persons may differ as to the propriety of an action taken by the trial court, then there was no abuse of discretion. *Id.*

C. No Abuse of Discretion

To warrant being struck for cause, a venire member must hold views which would prevent or substantially impair the performance of his duties as a juror in accordance with the instruction and oath. *Wainwright v. Witt*, 469 U.S. 412, 433 (1985); *Johnson*, 244 S.W.3d at 158. "If it appears that a juror cannot consider the range of punishment, apply the correct burden of proof, or follow the court's instructions in a murder case, then a challenge for cause will be sustained." *Johnson*, 244 S.W.3d at 158. The trial court's ruling is entitled to deference on review, and will be upheld if it "fairly supported" by the record considered as a whole. *Uttecht v. Brown*, 551 U.S. 1, 9 (2007); *Witt*, 469 U.S. at 433. "Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." *Uttecht*, 551 U.S. at 9. "Additionally, when there is ambiguity in a prospective juror's statements, the trial court, which is aided by its assessment of a juror's demeanor, is entitled to resolve the ambiguity in favor of the State." *Johnson*, 244 S.W.3d at 158, citing *Uttecht*, 551 U.S. at 7.

Here, Powell's responses from the entire examination, as well as his questionnaire, supported the trial court's finding that Powell was qualified. Powell's answers made it clear that he was not predisposed to either sentence, that he was willing to consider mitigating evidence, and that he would vote for life if he found that mitigating circumstances

outweighed aggravating circumstances (Tr. 998-999). While he was thought that childhood experiences would generally not be a reason to sentence someone to life instead of death, he understood that those experiences could be mitigating in some cases and he was willing to consider it as mitigating evidence in this case (Tr. 1021, 1035). Further, appellant's childhood experience evidence was put into context by Dr. Steven Mandracchia, who testified that appellant's upbringing contributed to his currently having "full-blown" personality disorders and paraphilia, which contributed to the crimes (Tr. 4568-4690). In his questionnaire, Powell stated that he believed childhood experiences did have some effect on later behavior and showed that he was very open to the testimony of psychologists and other mental health professionals, finding their contributions "very necessary" in certain cases and believing that they should be "extended every right" to assist at trial (L.F. 2553). Thus, the entirety of Powell's answers "fairly supported" the conclusion that Powell was willing and able to give meaningful consideration to the type of mitigating evidence appellant planned on presenting.

Appellant's argument seems to suggest that a juror must promise to treat certain evidence (in this case, childhood background evidence) as persuasive mitigating evidence to be considered able to give "meaningful consideration" to such evidence. No constitutional principle requires such a promise. To be disqualified to determine a capital sentence, a sentencer must indicate a refusal to consider any relevant mitigating evidence. *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982). That does not mean that a juror is required to give allegedly mitigating evidence any weight; it is up to the sentencer to decide what, if any,

weight to give such evidence. *Eddings*, 455 U.S. at 115; *United States v. Fulks*, 454 F.3d 410, 428 (4th Cir. 2006). If a juror is willing and able to consider the mitigating evidence, it is not an abuse of discretion to find such a juror qualified for service; the juror is merely prohibited from giving the evidence no weight by even refusing to consider it. *Simmons v. Bowersox*, 235 F.3d 1124, 1137 (8th Cir. 2001); s*ee also Fulks*, 454 F.3d at 428-29 (juror's statement that mitigating circumstances would "weigh into" his decision but that he would vote for death "90 percent of the time" unless the history of abuse was "something outrageous" showed an acceptable willingness to consider mitigating evidence). Here, Powell repeatedly indicated a willingness not only to consider that childhood experience could be relevant mitigating evidence, but admitted there were cases in which it actually would justify a life sentence (Tr. 1021, 1035). Therefore, Powell indicated the required willingness to consider mitigating evidence, and appellant's argument that he could not give the evidence "meaningful consideration" is meritless.

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

IV.

The trial court did not abuse its discretion in admitting redacted video footage of videotapes of appellant's crimes, still photographs from those videotapes, testimony about the contents of the entire videotapes, and appellant's statements because the evidence was logically and legally relevant and not needlessly cumulative in that each of these items of evidence established different facts, served different purposes, or actually served to minimize the jury's exposure to more than seven hours of sexual offenses and assaults on the victims.

Appellant claims that the trial court erred in admitting allegedly "duplicative" evidence of the crimes in the form of video footage redacted from appellant's videotapes of the crimes, testimony about the contents of the entire videotapes, video footage of appellant's statements to police, and still photographs made from parts of the videotapes, arguing that the repetition of the graphic evidence of the nature of his crimes resulted in the prejudicial effect of the evidence outweighing the probative value (App.Br. 94-100). But because each of the challenged pieces of evidence established different facts, served different purposes, or actually served to minimize the jury's exposure to all of the videotaped footage of appellant's crime (thus minimizing the prejudice to appellant), each piece of evidence was logically and legally relevant and not impermissibly cumulative.

A. Facts

Prior to trial, appellant filed a motion to exclude the playing of the tapes of appellant's crimes to the jury, citing their "disturbing" nature and arguing that the tapes were cumulative

to other evidence, such as appellant's confession (L.F. 720-726). The State responded that the tapes were not cumulative, as they were not the same kind of evidence as other evidence, and that they had "immense" probative value (L.F. 1060-1064). The court overruled the motion, finding that the State had edited the tapes down to about 95 minutes of footage to be shown to the jury, that the probative value of the footage outweighed the prejudicial effect, and that the tapes did not present cumulative evidence (L.F. 1094-1095).

Prior to general *voir dire*, appellant moved to exclude still photographs made from the entire videotapes, incorporating the prior motion regarding the videotapes, as well as making arguments not related to the issue on appeal (Tr. 2947). During the lengthy discussion regarding using the still photographs during opening statements, the prosecutor stated that the uncut videotapes were seven hours and thirty-three minutes long, but had been edited down to about ninety minutes of footage matching the twenty-six counts of the amended information (Tr. 2960). The prosecutor stated that, in lieu of showing all of the tapes, a witness would provide a brief overview of the contents of those tapes (Tr. 2960). The court denied the motion (Tr. 2965). Appellant renewed that motion and objected prior to opening statements during which photos were shown, and referenced the earlier objection again when those photos were admitted (Tr. 3476, 3763, 4068-4069, 4096). During one of those objections, the prosecutor stated that the pictures were not going to be separately published during the evidence, but used instead of showing the video again during closing argument to point out when each criminal act was performed (Tr. 4069-4070). The court overruled the objection and granted a continuing objection for the closing argument (Tr. 4070).

Prior to Detective John Howe's testimony, appellant made a motion in limine to prevent him from providing "a lot of specific detail about what is on those tapes," arguing that it would unnecessarily cumulative (Tr. 3744). The court told the prosecutor that the witness could generally summarize what was on the tapes, but could not make legal conclusions about "rapes" and "sodomies" (Tr. 3744). Appellant said he did not want the witness to go into "seven acts of this sex act and that" because the tapes would speak for themselves (Tr. 3744-3745). The court gave the prosecutor permission to lead the witness during those descriptions (Tr. 3745).

When the videotapes #26 and #31 (and DVD copies of the entire tapes) were introduced, appellant renewed his objection (Tr. 3751, 3757). Detective John Howe provided a description of the contents of the entirety of the tapes: he gave the starting times and length; he identified appellant's apartment as the setting; he identified appellant, Riley, victim Spicer, and an "unknown female" later identified as victim Ricci; he said the tapes featured "forced sexual acts" between two females and a male; he said that the victims were bound; and he said he saw vaginal intercourse, anal intercourse, oral sex performed on both appellant and Riley, and "general acts of violence" (Tr. 3752-3755, 3758-3762). Appellant did not object to the description of Tape #26, but did object during the description of Tape #31 to the State "trying to repeat the same thing over and over again" (Tr. 3762). The court overruled the objection, finding that the descriptions were general and not detailed (Tr. 3762).

The videotapes of appellant's statements to the police were admitted and played during the testimony of Detective Chris Rapp (Tr. 3884-3907; St. Exh. 220-223, 225). While appellant objected based on an earlier motion to suppress evidence, he did not object that the statements contained cumulative evidence of appellant's crimes (Tr. 3883-3907). In those interviews, appellant gave a lot of details about how he met the victims and got them to the apartment, about how he got rid of the evidence of the crimes, and about where he and Riley fled to when on the run (St. Exh. 220-223, 225). Appellant provided a few details about the crimes, such as acknowledging that he had vaginal, oral, and anal sex with each victim and that they performed oral sex on Riley that he bound each victim, that the victims only had consensual sex with him "at first," and that they tried to smother victim Ricci and that victim Spicer was smothered by Riley while he held the victim (St. Exh. 220-222, 225). During the interviews, however, appellant minimized much of his conduct, saying he did not recall choking victim Spicer, never mentioning choking victim Ricci, repeatedly saying the death of Spicer was an accident, and saying he only slapped Spicer once in the face (St. Exh. 220-222, 225).

Detective Howe was later recalled to testify about Tapes A, B, C, and D (Tr. 4040). He provided descriptions of the contents of the entire videos similar to his earlier descriptions of Tapes #26 and #31, but also included extra details about the portion of the video featuring victim Spicer's death (Tr. 4084-4092). Appellant did not object to these descriptions (Tr. 4084-4092). The edited versions of all of the tapes were then played for the jury (Tr. 4099).

B. Standard of Review

Appellant claim is preserved as it regards the tapes actually shown to the jury, the still photos, and Detective Howe's description of Tape #31, as he objected to those at trial and again in his motion for new trial (L.F. 5245-5246, 5274-5275, 5280). As the trial court has discretion in the admission of evidence, review is for abuse of that discretion. *State v. Reed*, 282 S.W.3d 835, 837 (Mo. banc 2009). An abuse of discretion is only found where the court's ruling is "clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *State ex rel. Wyeth v. Grady*, 262 S.W.3d 216, 219 (Mo. banc 2008). If reasonable persons may differ as to the propriety of an action taken by the trial court, then there was no abuse of discretion. *Id.* Further, prejudice must also be demonstrated from the admission of the evidence. *Reed*, 282 S.W.3d at 837

Appellant's claims as to Howe's description of Tapes #26 and A-D and appellant's statements are not preserved, as appellant did not make the objection he raises now to that evidence. Preservation of evidentiary questions for appeal requires an objection at the time the evidence is introduced along with the same objection being carried forward on appeal. *State v. Thomas*, 272 S.W.3d 421, 427 (Mo.App., E.D. 2008); *State v. Hoy*, 219 S.W.3d 796, 809 (Mo.App., S.D. 2007). Review is therefore only available, if at all, for plain error. Supreme Court Rule 30.20. Review for plain error involves a two-step process: first, there must be "evident, obvious, and clear" error which "facially establishes substantial grounds" for believing that manifest injustice or a miscarriage of justice occurred; and second, that

error must have actually resulted in manifest injustice or a miscarriage of justice. *State v. Baumruk*, 280 S.W.3d 600, 607-08 (Mo. banc 2009).

C. The Evidence was Admissible and Not Cumulative

To be admissible, evidence must be both logically and legally relevant. *State v. Anderson*, 76 S.W.3d 275, 276 (Mo. banc 2002). Evidence is logically relevant if the evidence tends to make the existence of material fact more or less probable. *Id.* Evidence is legally relevant if its benefits outweigh its costs, including unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness. *Id.*

Here, all of the challenged evidence was logically relevant as each piece of evidence established similar yet distinct facts about the charged offenses. The portions of the taped crimes themselves were obviously probative, as they showed the actual murder, sex acts and assaults themselves as they were occurring, as well as showing the circumstances tending to establish kidnapping, felonious restraint, and forcible compulsion. The still photographs were probative as they isolated the specific sex crimes and assaults, allowing the jury to insure that appellant committed the specific acts charged in those twenty-one counts. Detective Howe's descriptions of the contents of the entire tapes was the only evidence establishing the total amount of footage and what was generally on the portions of the tapes not seen by the jury. This allowed the jury to better understand the full scope of the abuse inflicted on the victims and gave context to the footage actually seen by the jury. Evidence of the circumstances surrounding the charged crimes and intertwined with those events is relevant. *See State v. Jones*, 157 S.W.3d 379, 383 (Mo.App., E.D. 2005)(videotape of rape

victim masturbating on the defendant's bed earlier the same evening as the rape was admissible to establish circumstances surrounding the charged crimes). Appellant's statements were relevant to show that appellant generally admitted to committing the sex crimes, assaultive behavior, and the death of the victim, as well as the circumstances preceding and following the crimes and during his flight. Therefore, all of the evidence was logically relevant.

The evidence was also legally relevant. While the videotape and photo evidence was indeed highly graphic and disturbing, that was because appellant chose to make the videos of his graphic and disturbing crimes. Where photographic evidence is shocking and gruesome, it is because the crime is shocking and disturbing. *State v. Mayes*, 63 S.W.3d 615, 632 (Mo. banc 2001). "'To exclude graphic evidence solely because it is graphic would deprive the State of evidence when it needs it the most: the evidence would be inadmissible to prosecute what are typically the most serious crimes.'" *Id.*, quoting *State v. Johnson*, 930 S.W.2d 456, 462-63 (Mo.App., W.D. 1996). Thus, the probative value of the each piece of evidence outweighed any prejudicial effect due to the nature of the evidence.

The evidence was also not needlessly cumulative. As shown above, each of the four challenged types of evidence—the edited video footage, the still photographs, the descriptions of the entire tapes, and appellant's confessions—established different facts or served different purposes. Further, the reason for the use of the still photographs and Howe's descriptions was to limit the jury's exposure to the hours of videotaped footage of appellant's crimes, and in doing so, limit the prejudice to appellant. The still photographs

were used by the State in argument to point out the specific acts in the video footage that met the elements of the crimes so that the videotaped footage of the crimes would not need to be shown again. Howe's descriptions were made to summarize the total amount of footage, including sex acts not shown to the jury, so that the jury would not have to watch hours of appellant's criminal acts. The State even reduced the number of charges from forty to twenty-six, removing thirteen sex crimes and an assault that were allegedly on the portions of video not shown to the jury to prevent the jury from being overly exposed to the graphic video (L.F. 64-72, 4925-4939). In light of the different purposes served by the evidence and the court's (and State's) efforts to reduce the amount of video footage that the jury needed to see to prove the charged crimes and thus reduce the prejudicial effect of the evidence, it cannot be said that the court's decision to admit the challenged evidence lacked careful consideration or shocks the sense of justice. Therefore, the trial court did not abuse its discretion in admitting the challenged evidence.

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

V.

The trial court did not abuse its discretion in submitting the verdict directors for each count of forcible rape, forcible sodomy, sexual abuse, and first-degree assault with references to the videotape that each act was recorded on because the Notes on Use for the pattern instruction permitted the designations and because appellant suffered no prejudice.

Appellant claims that the trial court erred in submitting the verdict directors for each count of forcible rape, forcible sodomy, sexual abuse, and first-degree assault with references to the videotape that each act was recorded on, claiming that this amounted to the trial court inadvertently putting its "stamp of approval on specific evidence" by saying that the specified evidence proved the charge (App.Br. 104). But because the Notes on Use for instructions allowed for the designations used in the instructions, and because appellant suffered no prejudice, the trial court did not abuse its discretion in submitting the instructions.

A. Facts

As set out in the amended information, each count of forcible rape, forcible sodomy, sexual abuse, and first-degree assault referenced a specific act recorded on one of six videotapes recovered during the investigation of the offenses (L.F. 4926-4931). There were multiple counts of each offense: three of the counts of forcible sodomy, two counts of forcible rape, and one count of sexual abuse were against victim Spicer; six counts of forcible sodomy, two counts of forcible rape, two counts of sexual abuse, and all five counts

of assault were against victim Ricci (L.F. 4926-4931). All of the counts against victim Spicer were alleged to have occurred "on or about" May 14, 2006; the counts against victim Ricci occurred either "between and including April 8, 2006 and April 9, 2006" (four counts) or on April 9, 2006 (eleven counts).

At trial, Detective John Howe testified to the starting time and date stamp according to appellant's video camera for each of the tapes and to the overall lapsed time, but did not testify specifically as to every tape whether the elapsed time featured one cumulative shot of footage or several different shots (Tr. 3753, 3757, 4085-4089). The tapes were edited for the trial from more than seven-and-a-half hours to about ninety minutes and there is no indication in the record that the time and date stamp were visible during the jury's viewing (Tr. 4093-4094; St. Exh. 304, 305).[3] The footage shown to the jury included numerous cuts, and there was no clarification what cuts were the result of editing for trial and what cuts were from appellant and Riley shutting off the camera (St. Exh. 304, 305).

The verdict directors for each count of rape, sodomy, sexual abuse, and assault included a reference to the tape on which the charged act was allegedly recorded (L.F. 5141-5188). For example, the first element paragraph for Instruction No. 13, the verdict director for sexual abuse as alleged in Count IV, read, "First, that on or about May 14, 2006, in the County of Jackson, State of Missouri, the defendant touched the breast of Marsha Spicer *as depicted in "Tape B"* (L.F. 5141)(emphasis added). Appellant objected that the reference to

[3]Counsel's viewing of the DVD copies of the tapes viewed by the jury did not reveal the time and date stamp (St. Exh. 304, 305).

the tape was prejudicial because it pointed out a specific piece of evidence (Tr. 4106). The State responded the phase was attempting to comply with the patterned instructions by making "every effort" to direct the jury to the particular acts supporting each count (Tr. 4106). Appellant renewed that objection with each of the verdict directors for each count of rape, sodomy, sexual abuse, and assault, and was also permitted to have a continuing objection to that language (Tr. 4107-4119).

B. Standard of Review

"It is within the trial court's discretion to decide whether a tendered jury instruction should be submitted." *State v. Johnson*, 244 S.W.3d 144, 150 (Mo. banc 2008). Thus, the decision to submit an instruction will not be disturbed on appeal unless the trial court abused its discretion. *State v. Allen*, 274 S.W.3d 514, 520 (Mo.App., W.D. 2008); *State v. Hartman*, 224 S.W.3d 642, 648 (Mo.App., S.D. 2007). An abuse of discretion is found only when the ruling is "clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *State ex rel. Wyeth v. Grady*, 262 S.W.3d 216, 219 (Mo. banc 2008). If reasonable persons may differ as to the propriety of an action taken by the trial court, then there was no abuse of discretion. *Id.*

C. No Abuse of Discretion

There was no abuse of discretion in this case because the references to the specific tapes were permissible to allow the jury to differentiate between the acts comprising each individual count. "There is no doubt that when multiple offenses are submitted, they should

be differentiated." *State v. Rudd*, 759 S.W.2d 625, 629 (Mo.App., S.D. 1988). According to the Notes on Use for MAI-CR 304.02, the general instruction for verdict directors, where there are multiple offenses against the same victim in the short period of time, the instructions should, if possible, also include the time of each offense. MAI-CR 3d 304.02, Notes on Use 4(c) (2005). "If it is impossible to fix the occasion of the offense by time or date, the instruction should be modified by the Court to identify the occurrence by some other reference." *Id.*

Here, the trial court did not err in using the tape each alleged act appeared on as a way of differentiating between each act. As to victim Spicer, every act occurred on the same date, and as to victim Ricci, multiple counts occurred in each of two date ranges (either between and including April 8 and 9 or solely on April 9). Thus, differentiation of the acts was required. While the State was able to present evidence suggesting the actual starting times of the footage, such could not have been definitively established. First, the time and date stamp on the camera was not accurate; while the detective testified as to perceived times of the crimes based on the camera setting at the time it was seized, that process was somewhat speculative, as there was no evidence that the time disparity was constant from the recording of the first acts with Ricci until the camera was seized (Tr. 3752). Second, the tapes show that appellant and Riley stopped and started the camera at different times, and the tapes contained unrelated footage; the jurors could not have therefore just used the starting time and total time to figure out the range of time for each criminal act (Tr. 2948-2963; St. Exh. 304, 305). Further, because the tapes the jury actually viewed were edited to reduce the

amount of the rape and torture footage shown to the jury and to focus attention only on those portions necessary to prove the charges, it was even more difficult to fix the exact times when each of the charged acts occurred (Tr. 4093-4094). Thus, the difficulty in fixing the exact times for each of the acts made it impossible to differentiate every charge merely by reference to time. At the very least, such a conclusion is not so arbitrary and unreasonable as to shock the sense of justice in this case. By using the tape labels as the means of differentiating the offenses, the court did just as the Notes on Use required, as it differentiated the crimes "by some other reference." MAI-CR 3d 304.02, Notes on Use 4(c) (2005). Therefore, the trial court did not abuse its discretion in submitting the verdict directors with references to the tapes the charged acts allegedly appeared on.

D. No Prejudice

Moreover, appellant suffered no prejudice from the tape references in the verdict directors. First, the jury was instructed that the inclusion of the label was not a judicial finding that the charged acts were actually on the tape. Instruction No. 3, patterned after MAI-CR 302.03, advised the jury, "The Court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are" (L.F. 5128). MAI-CR 3d 302.03 (1987). This language was sufficient to cure any potential that some fact was already found or admitted to by the presence of the tape names in the instruction. *See State v. Avery*, 275 S.W.3d 231, 233 (Mo. banc 2009)(MAI-CR 302.03 was sufficient to insure that the jury did not believe that the defendant admitted wrongdoing and was attempting to escape liability due to the submission of the voluntary intoxication

instruction). Jurors are presumed to follow the court's instructions. *State v. Forrest*, 183 S.W.3d 218, 229 (Mo. banc 2006). Thus, the jury was aware that the inclusion of the tape references did not mean that the trial court was stating that the alleged acts were actually depicted on the tapes.

Further, the record shows that the jury actually was not misled into believing that the presence of the tape reference meant that the tape actually proved the charged crime. Instruction 53, one of the verdict directors for first-degree assault, required the jury to find the defendant guilty if it believed appellant "attempted to kill or cause serious physical injury to Michelle Huff Ricci by striking her in her side with a closed fist as depicted in 'Tape D'" (L.F. 5184). The jury acquitted appellant of that offense (L.F. 5237). That acquittal shows that the jury did not assume that the elements of the crime were judicially established by the presence of the tape reference in the instruction.

Finally, appellant's guilt on all of the sexual offenses and of the remaining assaults was established by overwhelming evidence. The entirety of the portions of the tapes played for the jury showed a sufficient number of each of the charged acts to satisfy the conduct elements of each of the sex offenses and assaults (St. Exh. 304, 305). In his statements, appellant admitted that the victims did not consent to all of the sex acts he subjected them to and that he and Riley attempted to smother Ricci because they believed she would tell the authorities what happened to her if they let her go, establishing an intent to kill (St. Exh. 220, 221, 222). In his closing argument, appellant even conceded his guilt all of the sex crime counts and to the assault counts appellant was actually convicted of, only challenging the

first-degree murder count and the assault count that resulted in acquittal (Tr. 4121-4215). Overwhelming evidence of guilt allows a finding that a defendant was not prejudiced by alleged trial court error. *State v. Banks*, 215 S.W.3d 118, 121 (Mo. banc 2007). Because overwhelming and uncontested evidence established appellant's guilt for these offenses, appellant did not suffer prejudice from the inclusion of the tape references in the verdict directors.

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

VI.

The trial court did not err in overruling appellant's objection to all of the verdict directors for allegedly failing to advise the jurors had to be unanimous "as to each of the elements of the offense" because the jury instructions sufficiently advised the jurors that their verdicts had to be unanimous as to each element of each offense.

Appellant claims that the verdict directors submitted to the jury were insufficient to advise the jury regarding unanimity because they did not explicitly advise the jurors that the jurors had to be unanimous "as to each element of the offense" (Tr. 105-110). But because the jury instructions as a whole were sufficient to advise the jury that its verdicts on each count had to be unanimous as to each element, the trial court did not err in submitting those instructions.

This Court has recently rejected the argument that appellant raises. In *State v. Johnson*, 284 S.W.3d 561 (Mo. banc 2009), the defendant argued that the verdict director for first-degree murder did not require unanimity as to each element of the offense. *Id.* at 575. This Court held that the instructions did advise the jury that its verdict had to be unanimous as to each element of the offense, reasoning:

> The first-degree murder instruction provided, "unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of murder in the first degree." MAI-CR3d 314.02. The jury was also instructed:

You will then discuss the case with your fellow jurors. Each of you *must decide the case for yourself* but you should do so only after you have considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Your verdict, whether guilty or not guilty, *must be agreed to by each juror*. Although the *verdict must be unanimous*, the verdict should be signed by your foreperson alone.

When you have concluded your deliberations, you will complete the applicable form to which you unanimously agree and return it with all the unused forms and the written instructions of the Court.

MAI-CR3d 302.05 (emphasis added).

The instructions require unanimity as to each element.

Johnson, 284 S.W.3d at 575. While appellant contends that *Johnson* is wrong, he does not even attempt to explain how this analysis is flawed, but instead makes the conclusory allegation that the instructions were simply insufficient to require unanimity. As appellant has not offered any compelling reason why this Court should disregard its analysis in *Johnson*, that holding should apply in this case.

The jury in this case was instructed in the same manner as the jury in *Johnson*. Each verdict director required the jurors to find that the evidence established "each and all" of the elements of the offenses beyond a reasonable doubt, or else they had to find the defendant not guilty (L.F. 5130-5189). Thus, the jurors knew they had to find each element of each offense to find the defendant guilty. Moreover, Instruction No. 64, patterned after MAI-CR 302.05, advised the jurors that each juror had to decide "the case for yourself" and that the verdict "must be agreed to by each juror" and "must be unanimous" (L.F. 5196). MAI-CR 3d 302.05 (1992). This instruction instructed the jury that each juror individually had to reach a verdict and that the verdict had to be unanimous. Therefore, the verdict directors in combination with Instruction No. 64 fully advised the juror that the verdict as to each offense had to be unanimous as to each of the elements of the offenses. Thus, as in *Johnson*, the instructions were sufficient to insure unanimity.

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

VII.

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), *Ring v. Arizona*, 536 U.S. 584 (2002), and *Jones v. United States*, 526 U.S. 227 (1999), require aggravating circumstances to be pled in the charging document (App.Br. 112-116). Appellant claims that those cases require a finding that Missouri law created distinct offenses of aggravated and non-aggravated first-degree murder requiring the pleading of the aggravating circumstances in the charging document; 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. 112-116).

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. Johnson*, 284 S.W.3d 561, 589 (Mo. banc 2009); *State v. Johnson*, 207 S.W.3d 24, 48 (Mo. banc 2007); *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). Missouri law establishes only one crime of murder in the first degree with a maximum sentence of death, and that the requirement of aggravating circumstances does not increase the punishment for first-degree murder. *Johnson*, 284 S.W.3d at 589; *Johnson*, 207 S.W.3d at 48. Those holdings are 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. Therefore, the trial court did not err in refusing to quash the indictment.

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

VIII.

The trial court did not err in submitting Instructions No. 70 and 71, the mitigating evidence and jury mechanics instructions, because the third stage of Missouri's capital sentencing scheme does not require the State to prove beyond a reasonable doubt that mitigating circumstances were outweighed by aggravating circumstances, and the instructions properly advised the jury how to evaluate mitigating and aggravating circumstances.

Appellant claims that § 565.030.4(3), RSMo Cum. Supp. 2001, Instruction No. 70, the mitigating evidence instruction patterned after MAI-CR 3d 314.44, and Instruction No. 71, the jury mechanics instruction patterned after MAI-CR 3d 314.48, unconstitutionally shift the burden of proof as to whether the jury believed mitigating circumstances outweighed aggravating circumstances, arguing that the State must bear the burden of proving that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt (App.Br. 117-123).

This Court has repeatedly rejected this claim, 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. *State v. Johnson*, 284 S.W.3d 561, 587-589 (Mo. banc 2009), *State v. Taylor*, 134 S.W.3d 21, 30 (Mo. banc 2004); *see also 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). Appellant argues that this holding of this Court is "inconsistent" with United States Supreme Court precedent allegedly

requiring the State to bear the burden of proving that mitigating circumstances outweigh aggravating circumstances (App.Br. 120). This argument overlooks the United States Supreme Court's opinion in *Kansas v. Marsh*, 548 U.S. 163, 170-71 (2006), which stated:

> So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, *a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency.*

Id. at 170-71 (emphasis added). This Court has explicitly applied *Marsh* to Missouri's capital sentencing scheme. *Johnson*, 284 S.W.3d at 588-89. Therefore, Missouri statues, the approved pattern instructions, and the instructions given in this case did not unconstitutionally shift the burden of proof regarding mitigating circumstances. Thus, the trial court did not err in submitting instructions patterned after the approved instructions and conforming to § 565.030.

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

CONCLUSION

In view of the foregoing, 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 20,920 words, excluding the cover, this certification and the appendix, as determined by Microsoft Word 2003 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 January, 2010, to:

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APPENDIX