No. SC89429

In the Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

VINCENT McFADDEN,

Appellant.

Appeal from St. Louis County Circuit Court
Twenty-First Judicial Circuit
The Honorable Gary M. Gaertner, Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Vincent McFadden is appealing his conviction and sentence for murder in the first degree, section 565.020, RSMo 2000, and armed criminal action, section 571.015, RSMo 2000.[1] (L.F. 786-90).[2] Appellant was sentenced to death on the charge of murder in the first degree, and was given a consecutive sentence of seventy-five years imprisonment for armed criminal action. (L.F. 779). Appellant was tried by a jury on April 1-10, 2008, before Judge Gary M. Gaertner. (L.F. 23-25). Appellant does not contest the sufficiency of the evidence to support his conviction. Viewed in the light most favorable to the verdict, the evidence at trial showed:

On May 15, 2003, Eva Addison was at 31 Blakemore in Pine Lawn when Appellant arrived in a Nissan Altima driven by a man named B.T. (Tr. 61-62). Appellant and Addison had a child together. (Tr. 61). Appellant got

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[1] Appellant was also convicted of witness tampering, section 575.270, RSMo 2000, but his Notice of Appeal only indicates that he is appealing the murder and armed criminal action convictions. (L.F. 788).

[2] The record on appeal consists of the Legal File (L.F.); Supplemental Legal File (Supp. L.F.); a transcript of motions and preliminary matters (Mot. Tr.); five separately paginated volumes of voir dire transcript (VD Tr.-I-V); the trial transcript (Tr.); and the sentencing transcript (Sent. Tr.).

out of the car, kissed the child and then slapped Addison in the face, telling her that "You ho's can't come back to Pine Lawn." (Tr. 62). Addison took the reference to "ho's" to refer to her and her sisters. (Tr. 64). Appellant told Addison that one of the sisters was "supposed to have told something on him." (Tr. 64). Appellant got back in the car and left. (Tr. 65).

Addison's sisters, Leslie and Jessica, soon arrived at the house.[3] (Tr. 65-66). Eva told them that they had to leave Pine Lawn and recounted the incident with Appellant. (Tr. 66). Eva gave Jessica the keys to her car, and Jessica left with Eva's child and her niece and nephew. (Tr. 66, 200). Eva also accidentally gave Jessica the keys to a car belonging to another sister, but neither woman realized it at the time. (Tr. 66, 200). Eva and Leslie were searching for the keys when Appellant returned. (Tr. 66). He got out of the car and said, "I told you all ho's to leave, to get out of Pine Lawn." (Tr. 67). Leslie replied, "We didn't do nothing to you." (Tr. 67). Appellant told Leslie to "shut the fuck up," pointed a gun at her and pulled the trigger, but the gun did not go off. (Tr. 68). A companion of Appellant's who had been following in another car told Appellant to leave the women alone. (Tr. 68). Appellant replied, "One of these ho's has got to die tonight." (Tr. 68). Appellant had

[3] To avoid confusion, the Addison sisters will hereafter be referred to by their first names. No disrespect is intended.

also told Leslie, when he was pointing the gun at her, that she would see her deceased brother that night. (Tr. 69). Appellant and his companions got back into their cars and drove off. (Tr. 69). Eva and Leslie went back into the house. (Tr. 69).

Leslie decided to leave, and said she was going to walk to a skating rink to use a pay phone and call for a ride out of Pine Lawn. (Tr. 70-71, 131). As Leslie was walking down the street, Eva saw the car that Appellant had been riding in come around a corner. (Tr. 71). Eva ran to Leslie and urged her to come back, but Leslie waved her off and continued walking. (Tr. 71, 79). Eva hid in some bushes and watched as Appellant got out of the car, ran to Leslie and began arguing with her. (Tr. 72). A resident of a nearby house, Stacy Stevenson, overheard an argument between a man and a woman and heard the man say, "Fucking bitch, come here. Where are you fittin' to go? I thought I told you and your sister to get the fuck from down here and stay the fuck from down here." (Tr. 178-79). Eva saw Appellant point a gun at Leslie and heard him laugh. (Tr. 72, 78). Leslie said, "Please don't shoot me," and pushed the gun away. (Tr. 72-73). Appellant said, "Shut the fuck up," and shot Leslie. (Tr. 73). She fell to the ground and Appellant shot her several more times as he stood over her. (Tr. 73). He then got into the car with B.T. and they drove off. (Tr. 73).

Eva ran back to 31 Blakemore and told the woman who lived there that Appellant had killed her sister. (Tr. 74). She and the woman then ran back to the scene. (Tr. 74, 181). Stevenson, the neighbor who had overheard the argument between Appellant and Leslie, came outside after hearing the gunshots and ran to Leslie's body. (Tr. 18). As he checked Leslie's pulse, she coughed and choked and said, "Help me. He shot me. He shot me." (Tr. 180-81). Eva gave statements to the police that night where she identified Appellant as the shooter. (Tr. 102-03, 165-67).

An autopsy showed that Leslie had been shot four times. (Tr. 280). The fatal wound was to the head, with the gunshot entering above and in front of the left ear and coming to rest at the base of the skull. (Tr. 281). Another bullet entered the lower jaw at the chin and came to rest at the base of the neck. (Tr. 289-90). Those bullets and bullet fragments were recovered during the autopsy. (Tr. 246-47, 257, 289, 292). The other two gunshot wounds were to the back of the right shoulder and the left upper arm. (Tr. 295). A bullet was removed from Leslie's arm at the hospital and a bullet fragment was found at the scene, in a pool of blood on the sidewalk. (Tr. 222-23, 255, 257). A firearms examiner testified that the bullet found on the sidewalk and the bullet found in Leslie's neck were .38-caliber and were consistent with being fired from the same gun, while the bullet recovered

from her arm and the lead fragment found in her head were too damaged to make a positive identification. (Tr. 255-59).

Appellant called one of Eva's cousins the day after the shooting and learned that Eva had seen him murder Leslie. (Tr. 205). He said to the cousin, "Tell them bitches to get my name out of that shit . . . I'm out of town. But when I come back, it's going to be like that for any one of you all I see." (Tr. 203). Appellant called Eva's parent's house the same day and told Eva to "get his name off that shit or he was going to kill [her]." (Tr. 104). Appellant was arrested at a motel in St. Charles on May 17th. (Tr. 266-68). Eva went to stay with Appellant's mother and Appellant called the house from jail on May 27th. (Tr. 106, 115). An inmate identified as "Slim" participated in the phone call and relayed messages between Appellant and Eva. (Tr. 106-07, 116). Appellant asked Eva to go to his lawyer and sign papers and to go into court and say that it wasn't him. (Tr. 127). Eva refused, despite Appellant's threats indicating that his friends might do something to her or her family. (Tr. 127, 130, 134-35). Eva later visited Appellant at the jail, where he held up a sign saying that he was sorry for killing her sister, while telling her that she should not talk about it over the phone. (Tr. 136).

Appellant did not testify or present any evidence during the guilt phase of the trial. (Tr. 311-12). The jury found Appellant guilty of first-degree murder, armed criminal action, and tampering with a witness. (Tr. 415-16).

The State submitted the following statutory aggravating circumstances during the penalty phase of the trial:

1. Whether the defendant has a serious assaultive conviction in that he was convicted of Murder in the First Degree on September 7, 2007 in the Circuit Court of St. Louis County, Missouri, because defendant killed Todd Franklin on July 3, 2002.

2. Whether the defendant has a serious assaultive conviction in that he was convicted of Armed Criminal Action on September 7, 2007, in the Circuit Court of St. Louis County, Missouri, because defendant killed Todd Franklin with a deadly weapon on July 3, 2002.

3. Whether the defendant has a serious assaultive conviction in that he was convicted of Assault in the First Degree on February 4, 2005, in the Circuit Court of St. Louis County, Missouri, because defendant shot at Daryl Bryant on April 4, 2002.

4. Whether the defendant has a serious assaultive conviction in that he was convicted of Armed Criminal Action on February 4, 2005, in the Circuit Court of St. Louis County,

Missouri, because defendant shot at Daryl Bryant with a deadly weapon on April 4, 2002.

5. Whether the defendant has a serious assaultive conviction in that he was convicted of Assault in the First Degree on February 4, 2005, in the Circuit Court of St. Louis County, Missouri, because defendant shot at Jermaine Burns on April 4, 2002.

6. Whether the defendant has a serious assaultive conviction in that he was convicted of Armed Criminal Action on February 4, 2005, in the Circuit Court of St. Louis County, Missouri, because defendant shot at Jermaine Burns with a deadly weapon on April 4, 2002.

(L.F. 669-70). The State entered certified copies of those convictions into evidence and elicited testimony from witnesses about the underlying facts of those crimes. (Tr. 460-571, 624-28). The State also presented evidence of non-statutory aggravating circumstances, including the fact that Appellant had crack cocaine in his pants pockets when he was arrested after Leslie's murder, that Appellant laughed and said that he felt good and wanted to celebrate when talking to others about Todd Franklin's murder, and that he had gotten into an altercation with Leslie the year before her murder where he went after her with guns and had to be restrained by his father. (Tr. 572-

94). The State also presented evidence that Leslie, who was eighteen-years-old when she was killed, had a wig placed on her head for her funeral, that her face was so swollen that she looked like a forty-year-old, and that all the mourners kissed her face as they filed past the casket, causing the make-up on her face to rub off and reveal the bullet hole in her chin. (Tr. 596-97, 600, 630-31). The State also presented evidence that Appellant had slapped Jessica Addison when he saw her talking on the phone during the time that he was wanted for Todd Franklin's murder. (Tr. 612).

Appellant presented evidence that his father was often absent and was an alcoholic, that his mother worked multiple jobs, and that he often spent time with relatives or other adults. (Tr. 652-727).

The jury returned with a verdict of death for the charge of murder in the first degree. (Tr. 826). The jury found beyond a reasonable doubt the existence of all of the statutory aggravating circumstances submitted to it. (Tr. 826-28). The court imposed the jury's verdict on June 12, 2008, and also imposed consecutive sentences of seventy-five years imprisonment for armed criminal action and seven years imprisonment for tampering with a witness. (Sent. Tr. 12-13). Additional facts specific to Appellant's claims of error will be set forth in the argument portion of the brief.

STANDARD OF REVIEW

This Court reviews a sentence of death on direct appeal for prejudice, not just mere error. *State v. Anderson*, 306 S.W.3d 529, 534 (Mo. banc 2010). This Court will reverse a trial court's decision only when an alleged error is so prejudicial that the defendant was deprived of a fair trial. *State v. Johnson*, 284 S.W.3d 561, 568 (Mo. banc 2009). Prejudice exists when there is a reasonable probability that the trial court's error affected the outcome at trial. *Anderson*, 306 S.W.3d at 534. Evidence admitted at trial is reviewed in the light most favorable to the verdict and is reviewed for an abuse of discretion. *Id.* A trial court's ruling on the admissibility of evidence will be upheld if it is sustainable under any theory. *State v. Mort*, 321 S.W.3d 471, 483 (Mo. App. S.D. 2010); *State v. McLaughlin*, 272 S.W.3d 506, 509 (Mo. App. E.D. 2008); *State v. Miller*, 220 S.W.3d 862, 868 (Mo. App. W.D. 2007).

Points raised that are not preserved for appeal can only be reviewed for plain error. Supreme Court Rule 30.20. Plain error is found when the alleged error "'facially establish[es] substantial grounds for believing a manifest injustice or miscarriage of justice occurred.'" *State v. Dorsey*, 318 S.W.3d 648, 652 (Mo. banc 2010) (quoting *State v. Salter*, 250 S.W.3d 705, 713 (Mo. banc 2008).

ARGUMENT

I.

No evidence of juror nondisclosure has been established.

Appellant claims that the trial court plainly erred in convicting him of first-degree murder and sentencing him to death because one of the jurors at his trial failed to disclose that he had been a member of the venire panel for Appellant's trial on assault and armed criminal action charges that provided four of the statutory aggravating circumstances submitted to the jury. But the trial court could not have erred since no claim of juror nondisclosure was put before it. And Appellant has failed to provide evidence showing that nondisclosure occurred, much less intentional nondisclosure.

A. Underlying Facts.

Jimmie L. Williams was Juror No. 44 on the venire panel. (L.F. 616). He was selected for the petit jury as Juror No. 3. (L.F. 619). The jury questionnaire for this case stated that Williams was employed as a service technician by Industrial Battery, that he was married with no children under the age of eighteen, that his spouse's occupation was marketing coordinator, and that he had previously served as a juror. (Supp. L.F. 1). Venire members 34 through sixty-six were individually questioned on the second day of individual voir dire. (VD Tr.-II Index, 4). The court introduced the attorneys and the parties towards the beginning of the voir dire:

> I'm going to introduce at this time, Mr. Vincent McFadden.
>
> Does anyone think they recognize Mr. Vincent McFadden?
>
> Again, I see no hands.
>
> You may be seated, Mr. McFadden.

(VD Tr.-II 7). During the death qualification portion of voir dire, the prosecutor told the venire members that they would hear that Appellant had a conviction of armed criminal action in 2007 and "that in 2005 another jury in a separate case altogether convicted the defendant of "Assault First Degree, Armed Criminal Action, Assault First Degree, Armed Criminal Action." (VD Tr.-II 21).

Appellant was tried on December 14, 2004 for three counts of assault in the first degree, three counts of armed criminal action, and one count of unlawful use of a weapon.[4] (Supp. L.F. 17, 20, 103). The jury questionnaire for that case listed as Juror No. 6 on the venire panel Jimmie L. Williams, who was employed as a service technician by Industrial Battery, who was

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[4] Appellant was sentenced on those convictions on February 4, 2005, and that date was used in the instruction submitting aggravating circumstances. (Supp. L.F. 103; L.F. 669-70). Additionally, the trial court directed verdicts of acquittal on one count of assault in the first degree and one count of armed criminal action. (Supp. L.F. 20, 103).

married with no minor children, whose spouse was employed as a marketing coordinator, and who had no previous jury experience. (Supp. L.F. 5). The venire panel was informed during voir dire of the charges. (Supp. L.F. 21). Defense counsel introduced Appellant to the venire at the beginning of the defense voir dire. (Supp. L.F. 69). Defense counsel also discussed the charges when talking to the venire about the burden of proof. (Supp. L.F. 78-79). Williams was apparently struck peremptorily, as his name was crossed through on the juror questionnaire and the record does not show that he was struck for cause. (Supp. L.F. 5, 96-102).

In the present case, Appellant did not raise any objection to Juror Williams during the course of the trial. Neither the motion for new trial filed by counsel nor the *pro se* motion filed by Appellant contained a claim about Juror Williams. (L.F. 706-77). No claim regarding Juror Williams was presented at the hearing on the new trial motion. (Sent. Tr. 1-8).

B. Analysis.

Juror nondisclosure during voir dire requires a two-prong analysis. *Johnson*, 284 S.W.3d at 569. First, nondisclosure occurs when the juror reasonably can comprehend the information solicited by the question asked. *Id.* A response is reasonable based on the language and context, and the question's clarity is subject to *de novo* review. *Id.* Second, it must be determined whether the disclosure is intentional or unintentional. *Id.*

Intentional nondisclosure occurs when the juror actually remembers the experience or it was of such significance that his purported forgetfulness is unreasonable. *Id.* When material information is intentionally withheld, bias and prejudice are presumed. *Id.*

Unintentional nondisclosure involves an insignificant or remote experience, misunderstanding the question, or disconnected information. *Id.* at 69-70. For unintentional nondisclosure, a new trial is warranted when the verdict is prejudicially influenced. *Id.* at 70. The trial court has discretion to grant a new trial. *Id.*

Appellant has failed to establish nondisclosure by Juror Williams. To obtain a new trial on the grounds of juror nondisclosure, the moving party must show more than the existence of disqualifying information; that party must show that, when questioned, the juror knew about the information solicited and that the juror concealed or failed to reveal his knowledge. *State v. Lawrence*, 64 S.W.3d 346, 352 (Mo. App. S.D. 2002). In this case, that means that Appellant has to show that Juror Williams actually recognized Appellant at the time that question was asked in voir dire. A defendant alleging juror misconduct must therefore present evidence, through testimony or affidavits of any juror, or other witness. *State v. Mayes*, 63 S.W.3d 615, 625-26 (Mo. banc 2001). That evidence generally should be presented either at trial or in the motion for new trial. *Id.* Because

Appellant's claim is being raised for the first time on appeal, this Court is being asked to review material that was not considered by the trial court and was not made part of the record below. Such material is not to be introduced into the record on appeal. *McQuary v. State*, 241 S.W.3d 446, 453 (Mo. App. W.D. 2007). That is particularly true in claims alleging juror nondisclosure, because those claims present factual questions of the sort that appellate courts are ill equipped to decide. *See id.*[5]

[5] In *McQuary*, the Western District ruled that a claim of juror nondisclosure could be raised in a Rule 29.15 motion where testimony at the Rule 29.15 evidentiary hearing established that the defendant did not learn of the alleged juror misconduct until after the notice of appeal had been filed in the direct appeal from conviction. *McQuary*, 241 S.W.3d at 453. Appellant has not set forth any facts in this appeal demonstrating why he could not have learned of the claimed juror nondisclosure before filing his motion for new trial. Appellant cites this Court's opinion in *Johnson v. McCullough*, 306 S.W.3d 551 (Mo. banc 2010) for the proposition that this Court can grant plain error relief on his claim. But that case dealt with whether a trial court could grant a new trial on a claim of juror nondisclosure raised for the first time in the motion for new trial. *Id.* at 558. The case is not instructive on whether relief can be granted on a claim initially raised on appeal.

Even if this Court were to consider the material that Appellant seeks to introduce, that information is inadequate to resolve the claim. All Appellant presents this Court with is information establishing that Juror Williams served on the venire panel of Appellant's assault trial. But that information does not by itself establish that Williams remembered, or recognized, Appellant when called to serve more than three years later on the venire for the present trial.

In *Mayes*, the defendant claimed that the jury foreperson failed to disclose during questioning that a close family member had been a victim of a crime. *Mayes*, 63 S.W.3d at 624. The only evidence offered in support of the motion for new trial was a copy of the juror questionnaire, where the juror had checked "yes" in response to the question of whether she or a family member had been a victim of a crime. *Id.* at 624, 626. This Court found that the defendant's failure to call the juror or otherwise establish the relevant facts left this Court to "speculate as to whether any nondisclosure occurred at all, much less intentional nondisclosure." *Id.* at 626.

In *State v. Camacho,* the defendant alleged juror misconduct from the failure to disclose during voir dire that he had been sued and that a law partner of the defendant's counsel had signed the petition that was served on that juror. *State v. Camacho*, 357 S.W.2d 99, 101 (Mo. 1962). Documents from that case were offered as evidence to support the claim, but the juror did

not testify at the hearing on the motion for new trial. *Id.* at 102. This Court noted the absence from the record of any evidence of the juror's actual knowledge, if any, of the connection between the lawyers in the previous litigation and the lawyer representing the defendant. *Id.* The Court rejected the claim of juror nondisclosure based on the appellant's failure to show knowledge by the juror, the willful withholding of knowledge, or that the juror was prejudiced. *Id.*

Even if the bare information that Juror Williams had been on the venire panel for Appellant's previous assault trial could be viewed as creating an inference of nondisclosure, it does not clearly demonstrate that the nondisclosure was intentional, nor does it provide this Court with a basis to make that presumption. As noted above, more than three years elapsed between the assault trial and the trial in the present case. Voir dire in the assault trial was brief, so that Williams's exposure to the assault case lasted less than a day. As a member of the venire panel at the assault trial, Williams heard a brief description of the charges, but he did not hear detailed evidence about how the crimes were committed. It is perfectly reasonable to conclude that Williams's experience on that venire panel did not leave a lasting impression and that Appellant, likewise, did not leave a lasting impression. Williams's memories of the experience and of Appellant likely faded as time passed, and even if he retained some memory of Appellant it is

possible that Appellant's appearance might have changed enough in the intervening time that Williams did not recognize him.

Appellant has failed to demonstrate the existence of juror nondisclosure, let alone intentional nondisclosure. His point should be denied.

II.

Statutory aggravators instruction was proper.

Appellant claims that the trial court erred in submitting Instruction No. 21, based on MAI-CR 3d 314.40, because it submitted Appellant's prior assaultive convictions in six separately numbered paragraphs. *See* (L.F. 669-70). Appellant claims that the instruction violated the Notes on Use to MAI-CR 3d 314.40, which he says requires multiple serious assaultive convictions to be submitted in a single paragraph. This Court recently considered, and rejected, the identical argument raised by Appellant in his appeal from the death sentence that he received for the Todd Franklin murder. *State v. McFadden*, 2012 WL 1931205 at *8 (Mo. banc, May 29, 2012). The Court noted precedent explaining that separating prior convictions rather than listing them together as one statutory aggravator eliminates potential jury confusion. *Id.* The Court also noted that Appellant would not be entitled to relief even if the prior convictions should have been listed in one paragraph, since only one statutory aggravtor need be found to permit the jury to consider the death penalty, and the jury found five. *Id.* In this case, the jury found six. (Tr. 826-28). No error occurred. Appellant's point should be denied.

III.

The trial court properly struck for cause venirepersons who were unwilling to sign a death verdict.

Appellant claims that the trial court abused its discretion and plainly erred in striking venire members Behrens, Stevens, and Brunetti for cause after those veniremembers indicated that they would not be able to sign a verdict returning a sentence of death. But the trial court could properly find that the jurors' responses indicated an inability to follow the court's instructions and fulfill their duties as jurors.

A. Underlying Facts.

1. Venireperson Behrens.

Venireperson Behrens, when asked in individual voir dire if he could, in the proper case, vote for the death penalty on Appellant, replied that whether or not the defendant showed remorse would weigh heavily on his decision, (VD Tr.-I 240). Behrens had also indicated in his questionnaire that he would only recommend the death penalty "in extreme circumstances that involved an act of murder where the suspect showed no remorse and there was absolutely no doubt he was guilty." (VD Tr.-I 241). Under questioning by the prosecutor, Behrens stated that he understood that the burden of proof was beyond a reasonable doubt and that he would not require proof overcoming all possible doubt, and that he could realistically vote for

the death penalty if there was no evidence of remorse either way. (VD Tr.-I 241-45). Behrens said that he could consider all evidence, aggravating and mitigating. (VD Tr.-I 246-48). When asked if he could sign the death verdict if elected the foreman of the jury or announce his verdict in open court, venireperson Behrens stated unequivocally that he could not, that he was firm on that position, and that he was not going to change his mind. (VD Tr.-I 248-49). Under questioning by defense counsel, venireperson Behrens reiterated that he would not be willing to sign the death verdict, even understanding that all the jurors would be agreeing to that verdict. (VD Tr.-I 250-51). The prosecutor made a motion to strike veniremember Behrens for cause. (VD Tr.-I 252). When asked if she had an objection, defense counsel answered, "No." (VD Tr.-I 252). The court granted the strike. (VD Tr.-I 253).

2. Venireperson Stevens.

When asked if she could impose the death penalty in a proper case, venireperson Stevens initially answered, "If necessary, yes." (VD Tr.-III 111). After further questioning by the prosecutor, venireperson Stevens said that she would be able to consider both punishments and would be able to vote for either in the proper case. (VD Tr.-III 111-14). When asked if she could, as foreman of the jury, sign the death verdict, venireperson Stevens initially answered, "Yes." (VD Tr.-III 114). She later equivocated and said that she

was "not real sure" that she could sign the death verdict. (VD Tr.-III 115). After further explanation of the foreman's role in signing the verdict form, venireperson Stevens stated that she could not sign the verdict form and could not announce in open court that the death verdict was her verdict. (VD Tr.-III 115-16). Under questioning by defense counsel, venireperson Stevens said that she was not one-hundred percent sure that she could sign the death verdict if she were the foreperson. (VD Tr.-III 118). She later expressed that she did not want to be a leader, and at one point said that defense counsel was confusing her. (VD Tr.-III 118-19). Venireperson Stevens then said, "I suppose I could do it, but I wouldn't want to." (VD Tr.-III 120). When the prosecutor attempted to clarify her answer regarding signing the death verdict, venireperson Stevens again said that she could not sign the verdict and could not announce her verdict in open court. (VD Tr.-III 125-26). She said that she was not going to change her answer. (VD Tr.-III 126).

The court then asked if there was a motion:

> MR. LARNER: Yes, your Honor. She cannot sign a verdict form nor can she announce her verdict in court.
>
> THE COURT: Ms. Turlington?
>
> MS. TURLINGTON: No objection.

> THE COURT: Okay. I think her osculating (sic) answers and she finally, after thinking about it, said she couldn't. So we'll strike her for cause . . . .

(VD Tr.-III 127).

3. Venireperson Brunetti.

Venireperson Brunetti indicated that she could consider both death and life without parole. (VD Tr.-IV 159-61). She also said that she could not sign the death verdict as jury foreman, but would be able to announce her death verdict in open court. (VD Tr.-IV 161-62). Venireperson Brunetti said that she was firm on her position, and defense counsel asked only a single question, to which venireperson Brunetti affirmed her inability to sign the death verdict. (VD Tr.-IV 162-63). The prosecutor moved to strike venireperson Brunetti for cause because she could not sign the death verdict as foreperson of the jury. (VD Tr.-IV 164). Defense counsel objected that no juror is required to be foreperson so that did not disqualify her. (VD Tr.-IV 164). The court noted that the foreperson is the only one to sign the verdict form, and that if she was selected as foreperson her unwillingness to sign the form should preclude her from serving on the jury. (VD Tr.-IV 164-65). The motion for new trial contained a claim that the trial court erred in striking venireperson Brunetti. (L.F. 761-62).

B. Analysis.

Appellant has waived his claim regarding the strikes of venirepersons Behrens and Stevens, since a statement of "no objection," unlike a mere failure to object, affirmatively waives even plain error review. *Johnson*, 284 S.W.3d at 582. To the extent Appellant's claim is reviewable, he has not shown that the trial court erred.

The standard for determining when a prospective juror may be excluded for cause due to his or her views on capital punishment is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. 412, 424 (1984). That standard does not require that the juror's bias be proven with unmistakeable clarity. *Id.*

Appellant's argument is that a venireperson's unwillingness to sign a death verdict is not cause to strike them unless the venireperson also equivocates about their willingness to impose both punishments – death or life without parole. This Court has rejected that argument:

> It is true that a juror's equivocation about his ability to follow the law in a capital case together with an unequivocal statement that he could not sign a verdict of death can provide a basis for the trial court to exclude the venireperson from the jury. It does not follow, however, as appellant insists, that both equivocation and

> an unequivocal statement about being able to sign the death verdict are required before the trial court may disqualify a venireperson. **An unequivocal statement concerning a venireperson's inability to sign a death verdict alone is enough**. An uncompromising statement by a juror that he or she refuses to sign a death warrant hints at an uncertainty underlying the juror's determination to consider the full range of punishment. No panel of twelve jurors, all of whom decided that he or she could not sign a verdict form assessing the death penalty against the defendant, could be said to have the unimpaired ability to consider the appropriateness of the death penalty.

State v. Smith, 32 S.W.3d 532, 544-45 (Mo. banc 2000) (emphasis added) (internal citations, quotation marks, and brackets omitted).

More recently, this Court has stated that a prospective juror's reluctance or refusal to sign the death verdict may be considered among other facts and circumstances, but need not be conclusive. *State v. Deck*, 303 S.W.3d 527, 538 (Mo. banc 2010). But the Court went on to state, in upholding the trial court's decision to strike venirepersons who indicated that they could not sign the death verdict:

> Where, as here, if a veniremember claims on the one hand that he or she could fairly consider both punishments but, at the same time, unequivocally states that he or she would not sign a verdict of death, the trial court is in the best position to consider whether the record contains sufficient evidence of equivocation creating a doubt as to whether that veniremember would be able to fairly consider both punishments. Here, the veniremember's responses revealed an inability to follow the court's instructions if that person were chosen as foreman of the jury and the trial court could have concluded from the record as a whole that there was a substantial possibility that the veniremember may not be able to fairly consider both punishments despite their assurances to the contrary. The trial court was in a better position than this Court to make that determination and did not abuse its discretion in sustaining the State's motion to strike these veniremembers for cause.

Id.

The above passage from *Deck* applies with equal force to this case. The trial court did not err, plainly or otherwise, in sustaining the strikes for cause of venirepersons Behrens, Stevens, and Brunetti. Appellant's point should be denied.

IV.

No error in court determining whether prior convictions were "serious assaultive."

Appellant claims that the trial court erred in finding that Appellant's previous convictions were for serious assaultive offenses, and in submitting Instruction No. 21, based on MAI-CR 3d 314.40, because it failed to set forth facts that would let the jury determine whether the convictions were for serious assaultive offenses. The same argument was raised and rejected in the recent opinion affirming Appellant's conviction and death sentence in the Todd Franklin murder. *McFadden*, 2012 WL 1931205 at *10. The Court noted that it has addressed this same argument "multiple times," and reiterated that "'The determination of whether a prior offense is "serious assaultive" is a question of law for the court to decide.'" *Id.* (quoting *Mayes*, 63 S.W.3d at 640). The trial court did not err, and Appellant's point should be denied.

V.

No error in submitting Instructions 22 and 24.

Appellant claims that the trial court erred in submitting Instructions 22, based on MAI-CR 3d 314.44, and 24, based on MAI-CR 3d 314.48, because they: (1) placed the burden of proof on the defense; (2) failed to require that the State prove eligibility steps beyond a reasonable doubt; (3) required jurors to unanimously find that mitigating circumstances outweigh aggravating factors in order to impose a life sentence; (4) allowed jurors to consider constitutionally impermissible evidence as aggravation; and (5) did not require written findings by the jury. Again, Appellant raised the exact same claims in his appeal from the Todd Franklin murder, and this Court rejected them. *McFadden*, 2012 WL 1931205 at *10-11. The trial court did not err, and Appellant's point should be denied.

VI.

No error, plain or otherwise, in prosecutor's statements and arguments.

Appellant claims the trial court erred and plainly erred in overruling objections and mistrial requests, and in not *sua sponte* granting a mistrial based on more than forty statements by the prosecutor at different stages of the proceedings.[6] Appellant's claim is largely unpreserved because for many of the statements that he claims were erroneous he either failed to object, made only general objections, objected on different grounds than are raised on appeal, or failed to include a claim of error in the motion for new trial. *McFadden*, 2012 WL 1931205 at *6, 11; Supreme Court Rule 29.11(d). Those unpreserved claims are subject to plain error review, which requires a showing that the alleged misstatements had a decisive impact on the outcome of the trial. *Id.* at *11. Preserved claims are reviewed for an abuse of discretion and require a showing that any error committed affected the

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[6] In the appeal from the Todd Franklin murder conviction, Appellant drafted a point relied on that claimed error in thirty-nine statements by the prosecutor. *McFadden*, 2012 WL 1931205 at *11 n.3. This Court criticized that point as multifarious and ineffectual. *Id.* The Court's observations about the point raised in that case are equally applicable to this point.

outcome of the trial. *State v. Deck*, 994 S.W.2d 527, 543 (Mo. banc 1999). Appellant has failed to demonstrate the existence of either plain error resulting in a manifest injustice or an abuse of the trial court's discretion.

VOIR DIRE

Appellant complains that the assistant prosecutor trying the case introduced himself to veniremembers by telling them that he worked for the elected prosecutor, who was elected by the people of St. Louis County and represented the citizens of St. Louis County. The assistant prosecutor also told at least some of the veniremembers that they may know the elected prosecutor or have heard of him or voted for him. Defense counsel objected when the prosecutor told the first group of veniremembers that the prosecutor represented crime victims. (VD Tr-I 30-31). The prosecutor did not repeat that remark and defense counsel did not object to the subsequent introductory remarks. The same assistant prosecutor tried the Todd Franklin murder case and made the same remarks to the jurors in that case, and Appellant raised the same claim of error in that appeal that he makes here. *McFadden*, 2012 WL 1931205 at *11. This Court found no prejudice from the statements. *Id.*

Appellant next claims that the prosecutor misstated the law, telling every venire panel without objection that a life sentence would result if all jurors found that mitigators outweighed aggravators, but if only one juror

found that aggravators outweighed mitigators, the jury would proceed to the step of deciding whether to impose a death sentence; that he told some panels that jurors did not have to vote for the same non-statutory aggravating evidence; and that the weighing step had no burden of proof. Appellant did not object to any of those statements. Appellant's argument concerning those statements is essentially the same argument that he raised in Point V about MAI-CR 3d instructions 314.44 and 314.48. Appellant conceded in that point that those arguments have previously been rejected by this Court (Appellant's Brf., p. 72 n.6), and subsequent to the filing of that brief they were again rejected in the appeal from the Todd Franklin murder conviction. *McFadden*, 2012 WL 1931205 at *10-11. The prosecutor did not misstate the law and there was thus no plain error.

GUILT PHASE

Appellant claims that the prosecutor in closing argument referred to his failure to testify. "Have you heard of anyone else that was mad at her other than the defendant?" (Tr. 341). Defense counsel objected to the argument as shifting the burden of proof, but did not object to it being a reference to his failure to testify. (Tr. 341). The prosecutor later stated, without objection, "There's been no, no zero evidence that it was anyone other (snapped fingers) than that man. No evidence. None." (Tr. 342). The prosecutor also began to argue, "There's no evidence the defendant was

anywhere else – "but defense counsel objected on the basis of shifting the burden and commenting on the defendant's right not to testify. (Tr. 342-43). Defense counsel asked for a mistrial. (Tr. 343). The court instructed the jury to disregard the statement. (Tr. 345).

While a prosecutor may not comment on a defendant's failure to testify, he may refer to the defendant's failure to offer evidence. *State v. Tolliver*, 839 S.W.2d 296, 300 (Mo. banc 1992). In *Tolliver*, the following argument was found to be a permissible comment on the defense's failure to offer evidence, "In fact, there has been nothing to negate anything that we put on here" and "There has been nothing to negate the State's evidence in this case. Nothing." *Id.* The comments that Appellant complains of are substantially the same as those approved in *Tolliver* and are not erroneous. Appellant thus received more relief than he was entitled to when the trial court instructed the jury to disregard one of the prosecutor's arguments. Appellant therefore cannot show an abuse of discretion that caused him prejudice. *State v. Strong*, 142 S.W.3d 702, 704 (Mo. banc 2004). That is particularly so since the prosecutor followed-up the court's instruction by telling the jury that the State's evidence was uncontradicted, and it is well established that such a statement does not violate the rule against commenting on the defendant's failure to testify. *State v. Barnum*, 14 S.W.3d 587, 592 (Mo. banc 2000).

Appellant next claims that the prosecutor argued facts outside the record. The first argument that Appellant complains of came when the prosecutor told the jury that Eva made a taped statement but they would not get to hear it. Appellant picks out only parts of that argument, contrary to the rule that the entire record is considered when interpreting a closing argument, not an isolated segment. *McFadden*, 2012 WL 1931205 at *13. The argument, in full, was as follows:

> When the witnesses came forward that night, Eva made a taped statement. You don't get to hear – I told you in voir dire you wouldn't get to hear a lot of that stuff. It doesn't matter.
>
> If there was anything inconsistent that could be brought out – did you see the inconsistencies that the defense brought out in Eva's testimony? They had all kinds of sources.
>
> They had her written statement, they had her taped statement, they had her oral statement, they had her deposition, they had her prior sworn testimony, and they had her testimony in court.
>
> MS. TURLINGTON: Judge, I'm going to object. That's not evidence, the other statements, how many there were –
>
> MR. LARNER: Well, it came out how many she did.

MS. TURLINGTON: No, it didn't.

MR. LARNER: Yes, it did.

MS. TURLINGTON: That's not the evidence.

MR. LARNER: We talked about her deposition –

THE COURT: The jury will be instructed to recall the evidence as they heard it.

MR. LARNER: We talked about her deposition, we talked about her taped statement to the police, we talked about her oral statement, we talked about her two written statements. We talked about them all.

You know that they occurred. You know that she came forward immediately. If fact, Eva talked about the statements she made, to Ed McGee, twice. There are about seven statements that she made. And anything that was inconsistent in those statements could have been brought out.

And if there were a bunch of inconsistencies, they would have been brought out. Do you understand that? There weren't any inconsistencies in her story, from day one, although you don't get to see all the statements for yourself. That's how it works.

The defense pointed out whatever inconsistencies they could find. You know what they found? Was your mother at the

skating rink that night or was your mother not at the skating rink that night.

What other inconsistency was there? None. Nothing. Because she said the same thing, from day one. The car she said. Everything she said. From hour one. From hour one.

(Tr. 345-47).[7] The prosecutor's argument was based on evidence presented to the jury. Eva testified that she gave verbal, written, and taped statements to the police. (Tr. 74-75). Defense counsel used her statements during cross-examination to try and elicit supposed inconsistencies. (Tr. 144-50). On redirect examination, Eva listed all the statements that she had given since the murder, and testified that she had never said anything other than that Appellant had shot her sister. (Tr. 165-67). The State is allowed to argue the evidence and the reasonable inferences from the evidence. *McFadden*, 2012 WL 1931205 at *14. The prosecutor's argument was based on the evidence recited above and made the reasonable inference that if Eva had made any prior inconsistent statements the defense would have brought them out

[7] This argument is also discussed in the response to Appellant's Point X, which claims that evidence and argument of Eva's statements amounted to bolstering. To the extent it is relevant, the facts and arguments raised in the response to Point X are incorporated into this Point.

during cross-examination. The trial court did not plainly err or abuse its discretion in allowing the argument.

Appellant next complains of isolated segments of the following argument:

> She (sic) picked one, and he got her. He got her. And he thought no one saw it. He thought no one saw it. He was shocked when Evelyn said, Hey, Eva saw you do it.
>
> "Well, I don't know about that." "I didn't know about that." He didn't know about that or she'd be dead, too. He would have killed Eva. He didn't know Eva saw it.
>
> MS. TURLINGTON: I'm going to object to the portion of the argument regarding he would kill Eva –
>
> MR. LARNER: He said he would kill her.
>
> THE COURT: It's closing argument. I'll overrule.
>
> MR. LARNER: He said he would kill her. He called Evelyn and said, ["]You bitches better get my name out of this or it's going to be like that for all of you."
>
> And then he called Eva and said, Get my name out of it or your next, bitch. He was going to kill her next. He wasn't done killing. The guy that turned him in –

> MS. TURLINGTON: I'm going to object to that: He wasn't done killing. There's no evidence of that.
>
> MR. LARNER: Hold my time, your Honor.
>
> THE COURT: That will be overruled.
>
> MR. LARNER: By his own statement, he wasn't done killing. This isn't me talking. It's him talking. Him talking. He ain't done killing. He hasn't killed Eva yet, the only eyewitness.
>
> Then is he done killing? No. He's got to get the guy that turned him in at the hotel, the Travel Lodge. "I'm going to fuck that nigger up." "You don't cross me, man[.]"

(Tr. 333-34). The prosecutor's argument was based on the evidence of Appellant's own statements as admitted through the testimony of Eva, of Evelyn Carter, and through the recording of the jailhouse conversation between Appellant and Eva. (Tr. 104-05, 133, 203-05; State's Ex. 148-D). The State's argument was properly based on the evidence and the reasonable inferences from that evidence.

Appellant claims that the following arguments constituted vouching for Eva's credibility: "Now look. A lot's been made about Eva's eyesight. She hit a glare on the screen, whatever, and couldn't tell 10:30 from – or 10:18 from 9:18 or 11, whatever it was. Sit in the chair. A little glare there." And "Now, we talked in voir dire about one eyewitness. This isn't just one eyewitness.

You got one eyewitness who's an incredibly great eyewitness who knew him, who happened to be there because of the threats." (Tr. 335, 338). The State is allowed to comment on a witness's credibility during closing argument. *Id.* at *13. The prosecutor's argument was not vouching because it was based on the evidence and on the physical conditions of the courtroom, all facts that were before the jury. *Id.* Appellant's only real complaint about the argument is that the State failed to produce school and medical records that it did not have and which Appellant has not established would have revealed any problem with Eva's eyesight. *See* Point XIII, *infra*.

Appellant cites two arguments where he alleges that the prosecutor urged the jury to convict with emotion, the first was when the prosecutor, in discussing the evidence that demonstrated deliberation, said that the worst place to shoot a woman was in the face and that such an act was vile. (Tr. 358). The second complained-of statement was where the prosecutor said he would speak for Leslie. That comment came in rebuttal after defense counsel in her closing argument questioned the credibility of Eva's testimony about the sequence of events leading to the shooting by saying that it did not make sense that Leslie would walk to a skating rink after Appellant had threatened her. (Tr. 368-69). In context, the prosecutor made the following reply to that argument:

> And you know what? Why does Leslie go to the Skate King? I'll answer all her questions. First of all, Leslie is not here to tell you. Here's what she would say if she was here:
>
> I wanted to get the hell out of there because he had come back with a gun after I got there; he came back on foot and he said I had to get out of Pine Lawn. Well, I'm getting out of Pine Lawn.
>
> That's why. I'll speak for Leslie.

(Tr. 396).

The arguments about shooting a woman in the face and about speaking for Leslie were comments on the evidence and the reasonable inferences from that evidence. Additionally, the first argument can also properly be characterized as a rhetorical flourish that does not constitute plain error. *State v. Rhodes*, 988 S.W.2d 521, 527 (Mo. banc 1999). The second argument came in rebuttal, where prosecutors are given considerable leeway to retaliate to issues raised by the defense, even if the comment would otherwise be proper. *State v. Sanchez*, 186 S.W.3d 260, 265 (Mo. banc 2006). The prosecutor was retaliating to defense counsel's argument that it did not make sense for Leslie to walk to the skating rink. The argument thus was not improper. *Id.*

PENALTY PHASE CLOSING

Many of the penalty phase arguments that Appellant complains of were not preserved, meaning that Appellant has to show plain error that had a decisive impact on the jury and amounted to a manifest injustice. *McFadden*, 2012 WL 1931205 at *16. Plain error is seldom found during penalty phase closing argument because the absence of an objection and request for relief means that the trial court's options are narrowed to uninvited interference with summation, which itself may constitute error. *Id.* Properly preserved arguments will be specifically noted.

Appellant first complains that the prosecutor told the jury to count all six serious assaultive convictions as separate statutory aggravators. That misconstrues the prosecutor's argument. The prosecutor told the jury that any one of the six convictions was sufficient by itself for the jury to find the existence of that aggravating circumstance, but he also told the jurors that he presented evidence to support the existence of each prior conviction and that they should vote individually on each conviction to determine whether the State had proven its existence. (Tr. 769-70). The prosecutor did not misstate the law, and the only allegation of error Appellant raises is to repeat the contention made in Point II that the instructions should have listed the convictions in one paragraph instead of separate paragraphs. As noted in the response to that point, the instruction was correct. Appellant was not

prejudiced by that instruction and he has therefore not shown how he was prejudiced by the argument.

Appellant next complains of an argument where the prosecutor told the jurors that their sentencing decision should be based on Appellant's actions and not on his family background, noting that the victim also came from a good family. (Tr. 771-72). Appellant fails to develop any argument as to why that argument was erroneous or caused a manifest injustice.

In the next argument Appellant complains of, the prosecutor noted Appellant's criminal history and argued that Appellant had been given breaks through probation and opportunities for treatment. (Tr. 816-17). The prosecutor went on to say, "He's been spitting on the floor of courtrooms for years in all of those cases because no one has held him accountable. And the reason you're going to hold him accountable is because innocent people have a right to live. And murderers have no right to not pay for their crimes." (Tr. 817). "The State may assert its opinion regarding the imposition of the death penalty as long as it is based upon the evidence presented." *Id.* The prosecutor's argument was based on the evidence and was proper.

The next complaint, which is preserved, is that the prosecutor argued Appellant's prior death sentence. What the prosecutor stated was that Appellant had been convicted of first degree murder for killing Todd Franklin, and that the jury knew that the possible punishments for that

offense were life without parole or the death sentence. (Tr. 772). Defense counsel objected and when the court asked what relief she was requesting, counsel said that she wanted the jury instructed to disregard that statement. (Tr. 772-73). The court ordered the statement struck and instructed the jury to disregard. (Tr. 773). Appellant received all the relief he requested and cannot complain of error. *State v. Scurlock*, 998 S.W.2d 578, 586 (Mo. App. W.D. 1999).

Appellant complains that the prosecutor told the jury, "And you all said that you would do that: In the proper case, you would vote for the death penalty . . . And that's why you're sitting here. Or you wouldn't be if you didn't tell me that." (Tr. 795). Appellant fails to mention the comments preceding that, where the prosecutor said, "But under the law, the law never says you have to vote for one and the law never says you have to vote for the other one, but you got to be fair and impartial. And you got to do the right thing under the facts and the law." (Tr. 795). In context, the prosecutor was telling the jurors that they had to consider both penalties and impose the penalty that it felt was appropriate for that case. The argument was not erroneous.

Appellant complains that the prosecutor referred to him as an "evil" person and to Leslie as a "good person." (Tr. 781, 797). It is not error for a prosecutor to characterize a defendant and his criminal conduct as long as

the evidence supports such a characterization. *State v. Simmons*, 944 S.W.2d 165, 182 (Mo. banc 1997). In *Simmons*, the prosecutor referred to the defendant as a "predator" and suggested that he possessed an "evil mind." *Id.* This Court found that those characterizations were reasonable, given that the defendant had committed the deliberate and premeditated murder of the victim by throwing her from a bridge. *Id.* In a more recent case, the Court found permissible a prosecutor's argument that the defendant's acts and the consequences of those acts were evil. *Dorsey*, 318 S.W.3d at 656-57. The Court of Appeals has upheld arguments that characterized the defendant as "evil" and an "executioner." *State v. Kennedy*, 107 S.W.3d 306, 314 (Mo. App. W.D. 2003). The defendant in that case was convicted for shooting three people outside a nightclub, one of whom died from his wounds. *Id.* at 309. The court found that while the characterization was unflattering, it was not impermissible given the evidence in the case, and did not amount to plain error. *Id.* Appellant's pursuit of Leslie, who was unarmed and who had done nothing to him, and his shooting her four times is sufficient evidence to support the prosecutor's characterization of him as evil, and evidence in the penalty phase of his previous crimes lends further support to that characterization. The characterization of Leslie as a good person was also supported by the evidence admitted during the penalty phase. The argument was proper.

The next complaint is that the prosecutor encouraged jurors to consider victim impact evidence concerning Todd Franklin and his family. Appellant argues that victim impact evidence must be limited to the victim of the charged crime and that person's family. This is the mirror image of the claim that Appellant raised in the appeal from his conviction for Franklin's murder, when evidence of Leslie's murder was admitted in the penalty phase. This Court rejected that argument. *McFadden*, 2012 WL 1931205 at *17. It should do the same here. Some of the arguments that Appellant cites are not even victim impact arguments, but instead go to the aggravating nature of Appellant's actions. (Tr. 790, 796, 797). To the extent that the prosecutor did ask the jury to consider the impact of Appellant's actions, he did not argue that the jurors should imagine that they were the victims of those actions. *Id.*

Appellant next complains of the following argument, "Ms. Kraft asks for mercy and forgiveness. Well, look around ladies and gentlemen. We are not in a church. There are no stained glass windows. And I pray that Mr. McFadden can find peace and forgiveness with his creator, but that's not our job. That's not our job. Our job is to give justice. And justice deserves and demands the death penalty." (Tr. 811). A prosecutor is allowed to argue that the defendant does not deserve mercy under the facts of a particular case. *State v. Storey*, 40 S.W.3d 898, 911 (Mo. banc 2001). Arguments equating

mercy with weakness have been found to not constitute an abuse of discretion, let alone plain error. *Id.*; *State v. Rousan*, 961 S.W.2d 831, 851 (Mo. banc 1998).

Appellant lists several statements where he says the prosecutor tried to convert aggravating circumstances into mitigating circumstances. Only one of the statements was preserved. That was where the prosecutor started to say, "Sometimes we hear people are too crazy, too insane, retarded –" before defense counsel objected. (Tr. 812-13). The court overruled the objection, but cautioned the prosecutor not to go any further. (Tr. 813). The prosecutor then told the jury that Appellant had the capacity to know right from wrong. (Tr. 813). Appellant has failed to show that the court's action was insufficient, particularly since the prosecutor did not attempt to attach an aggravating label to a factor that should militate in favor of a lesser punishment, such as mental illness. *See Zant v. Stephens*, 462 U.S. 862, 885 (1983). What the prosecutor began to argue was the absence of some of the mitigating factors that militate against the death penalty. Even if the argument strayed beyond permissible bounds, the jury was nevertheless properly instructed on aggravating and mitigating circumstances, and it is presumed to follow those instructions. *State v. Madison*, 997 S.W.2d 16, 21 (Mo. banc 1999). Appellant has not alleged any facts to rebut that presumption.

The other statements listed by Appellant are similar to arguments about which the same claim was raised in the Todd Franklin appeal. The Court rejected the claim there, noting that the State is free to comment on the evidence and the credibility of the defendant's case, and may even belittle and point to the improbability and untruthfulness of certain evidence. *McFadden*, 2012 WL 1931205 at *18. Also, the first statement listed, where the prosecutor commented on the fact that Appellant's family were good people but did not have to accept what he did, actually came in response to an outburst by a spectator, who said to the prosecutor to "Don't be lying. Tell the damn truth." (Tr. 780). The prosecutor's response, under the circumstances, was proper.

Next, Appellant lists several statements that he says raised facts outside the record and expressed the prosecutor's personal opinion. Objections were made to only four of those statements. The first was where the prosecutor argued that he did not see anything mitigating in the case because the evidence was not that Appellant was sexually molested, or abused, or beaten, but instead was that he came from a good family that tried to do the best they could for him. (Tr. 771). Defense counsel made only a general objection that the argument was improper. (Tr. 771). And the motion for new trial only claimed that the prosecutor tried to turn the normalcy of Appellant's family into an aggravator, which is not the claim

here. (L.F. 768). As noted previously, "The State may assert its opinion regarding the imposition of the death penalty as long as it is based upon the evidence presented." *McFadden*, 2012 WL 1931205 at *16. The prosecutor's argument was based on the evidence and was proper. So were several unobjected-to statements where the prosecutor expressed the opinion that the death penalty was proper in this case. (Tr. 776, 794, 795, 789).[8]

The next argument, which was preserved, was that Appellant's family knew he was a fugitive from justice in California. (Tr. 779). The court instructed the jury to recall the evidence. (Tr. 779). The State elicited evidence that a nationwide "wanted" was put out for Appellant after the shootings of Darryl Bryant and Jermaine Burns. (Tr. 534-35). Testimony was elicited by defense counsel that Appellant went to California after he was wanted for Todd Franklin's murder and Eva visited him there. (Tr. 603). At least one of Appellant's relatives was aware that he went to California, but she claimed that he went there for a family reunion. (Tr. 674-75). The prosecutor's argument was a reasonable inference from the evidence and a permissible comment on the improbability and untruthfulness of the

[8] Appellant misquotes one of the arguments as "You will do the right thing," when the actual statement was, "That's what it's really about: justice. Doing the right thing under the law." (Tr. 789).

testimony of the defense witnesses. *McFadden*, 2012 WL 1931205 at *16. So were other unobjected-to arguments on the same subject matter. (Tr. 779-80, 790).

The next preserved claim concerns the prosecutor arguing that a .44-caliber gun has a big kick when it is fired. (Tr. 786). Prosecutors can argue matters of common knowledge. *Strong*, 142 S.W.3d at 725.

The final preserved claim in this series of arguments was over the prosecutor's statement, "And if this ain't a death penalty case, then there ain't such a thing." (Tr. 818). That again is a permissible expression of opinion that the death penalty is warranted based on the evidence presented in the case. *McFadden*, 2012 WL 1931205 at *16.

Appellant next raises a claim that the prosecutor relied on external sources of law and encouraged jurors to apply vigilante justice when he made the following unobjected-to arguments: "Now look. We live in a civilized society. And back in the old days, we would have allowed the Addison and the Franklin families to go hunt him down like he deserves and get retribution. We wouldn't have had this jury. But, that was in the old days. We're more civilized now. He had the right to counsel." and "And on that day that he killed Todd, on the following May, there was one juror in Pine Lawn. That juror was the foreperson. Had no instructions of law. There was no trial. There were no jury instructions. There was no evidence. There were

no witnesses. And that foreperson and that juror decided that the death penalty was appropriate then and that Todd and Leslie should not get a fair trial. Because if there's one person that believes in the death penalty, it's that man right there." (Tr. 814, 810). Similar arguments from the Franklin trial were found to not be erroneous, with the Court noting that, "'Arguments likely to inflame and excite prejudices of the jury are not improper if they help the jury understand and appreciate evidence that is likely to cause an emotional response.'" *McFadden*, 2012 WL 1931205 at *17 (quoting *Rhodes*, 988 S.W.2d at 528).

Appellant next complains of "send a message" arguments made by the prosecutor. The claim is preserved as to only one of those arguments. (Tr. 775). It is well established that the prosecutor is permitted to argue the need for strong law enforcement, the prevalence of crime in the community, the jury's duty to uphold the law and prevent crime, and to urge the jury to consider the effect upon society if the law is not upheld. *Id.* at *16. The prosecutor may also argue to the jury that the protection of the public rests with them. *Id.* at *14. All of the complained-of arguments fall within the permissible bounds of those rules.

Appellant claims that the prosecutor argued Appellant's failure to testify, but the arguments he points to actually told the jury that the Appellant's continued act of shooting people demonstrated a lack of remorse,

and that his lack of remorse was aggravating. (Tr. 789, 778). Appellant did not object to the statements on the grounds that they commented on his right to testify, and the new trial motion did not contain that theory. (L.F. 710-11). As was the case in the appeal from the Franklin murder, Appellant presents no argument other than his bare allegation. *Id.* at *17. A prosecutor is permitted to comment during the punishment phase on the lack of evidence of a defendant's remorse to show the nature of his character. *Id.*

Appellant points to two arguments that he says encouraged the jurors to decide punishment on visceral emotion. Only the first of those arguments is preserved. (Tr. 787; L.F. 769). As noted above, arguments likely to inflame and excite prejudices of the jury are not improper if they help the jury understand and appreciate evidence that is likely to cause an emotional response. *Id.* The facts surrounding Leslie's murder were emotionally charged and the State argued inferences from those facts. *Id.*

Finally, Appellant claims that the State engaged in improper personalization when the prosecutor asked the jury to imagine the terror experienced by Leslie, Eva, and the mother and sister of Todd Franklin. Improper personalization occurs when the State suggests that a defendant poses a personal danger to the jurors or their families. *Id.* at *16. The argument that Appellant complains of did not suggest that Appellant's future dangerousness would intrude upon the safety of the jury. *Id.* Appellant's

reliance on *State v. Storey* and *State v. Rhodes* is inapposite because the prosecutor in both cases graphically detailed the crime as if the jurors were in the victim's place. *State v. Storey*, 901 S.W.2d 886, 901 (Mo. banc 1995); *Rhodes*, 988 S.W.2d at 529. The argument in this case did not describe the crime in graphic detail and it did not ask the jurors to imagine themselves as the victim. The prosecutor instead merely asked the jurors to consider the impact of Appellant's actions on the victims and their families.

Appellant has failed to show the existence of error, plain or otherwise, or the existence of prejudice or a manifest injustice warranting reversal. His point should be denied.

VII.

Evidence in penalty phase about possible motive for Todd Franklin murder was properly admitted.

Appellant claims that the trial court erred in overruling objections to testimony and argument in the penalty phase that Appellant killed Todd Franklin because of Franklin's testimony against Appellant's friends, because jurors in Appellant's first trial for murdering Franklin rejected the statutory aggravator that Franklin was killed because he was a witness in a prior prosecution. But this Court recently rejected the same claim in Appellant's conviction from his retrial for the Franklin murder, reaffirming that the failure to find a particular aggravating circumstance does not constitute an acquittal, and that the submission of an aggravator rejected in a previous trial does not violate double jeopardy. *McFadden*, 2012 WL 1931205 at *3. The trial court did not err in allowing the evidence, and Appellant's point should be denied.

VIII.

Evidence of circumstances surrounding Todd Franklin's murder was properly admitted in penalty phase.

Appellant claims that the trial court erred in admitting evidence about Todd Franklin's murder in the penalty phase of this trial. But the evidence was relevant and admissible, and the trial court did not abuse its discretion in admitting it.

A. Underlying Facts.

Appellant filed a motion in limine to exclude testimony in the penalty phase about the facts of the Todd Franklin murder. (L.F. 602). The motion argued that the State should be limited to presenting evidence that Appellant had a prior conviction for the murder. (L.F. 603). The court made a pre-trial ruling that it would take up the motion at the time evidence was presented. (L.F. 602). Prior to the presentation of witnesses in the penalty phase, defense counsel renewed her objection to the State presenting evidence of the prior convictions, based on the argument that the State was not allowed to present any evidence other than the fact of the conviction, and was granted a continuing objection as to each of the State's witnesses. (Tr. 440-49).

The State presented eight witnesses in the penalty phase who testified about the Franklin murder or events connected to it. Gary Lucas was an eyewitness to the murder and described how it occurred. (Tr. 466-84). Todd

Franklin's sister, Tara, testified briefly that she saw her brother alive about thirty minutes before the shooting. (Tr. 499-502). Robert Sieck was a St. Louis County Police Detective at the time of the murder and he testified about his investigation of the crime scene, including the location of bullets in reference to Franklin's body. (Tr. 504-27). Heather Burke, a fingerprint examiner for the St. Louis County Police Department, testified that Appellant's fingerprint was found on a cigar found near Franklin's body. (Tr. 537-52). Dr. Raj Nanduri, a deputy medical examiner for the City of St. Louis, testified about the autopsy that he performed on Franklin's body. (Tr. 552-64). St. Louis County Police firearms examiner William George testified about tests he conducted on the bullets found by or in Franklin's body. (Tr. 566-71). Leslie Addison's cousin, Evelyn Carter, testified that she talked to Appellant the day after Franklin's murder and that he laughed, said he felt good about it, wanted to go celebrate, and that Franklin was "soft" and a "snitch."[9] (Tr. 584-88). William Goldstein, an attorney, had previously testified that he represented Lorenzo Smith on robbery, armed criminal action, first-degree assault, and unlawful use of a weapons charges where the victim was Todd Franklin, and where Franklin gave sworn testimony. (Tr.

[9] The bulk of Carter's testimony was about Leslie and about incidents involving Appellant both before and after Leslie's murder. (Tr. 589-601).

487-94). Photographs of the crime scene and of Franklin before and after the murder were also introduced into evidence, along with some physical evidence. (Tr. 476-84, 501-02, 508-10, 555-58, 562-64). The motion for new trial included a claim that the trial court erred in allowing the State to present evidence of the Todd Franklin murder in the penalty phase of the trial. (L.F. 762-63).

B. Analysis.

A wide range of evidence about the defendant's past character and conduct is admissible at the penalty phase of a trial to assist the jury in the serious business of determining the appropriate penalty for the individual defendant. *State v. Johns*, 34 S.W.3d 93, 113 (Mo. banc 2000). The wide range of evidence admissible in the penalty phase includes the facts and circumstances surrounding prior convictions, not just the existence of those convictions. *McFadden*, 2012 WL 1931205 at *11. The trial court has discretion to control the evidence concerning those circumstances. *State v. Simmons*, 955 S.W.2d 729, 740 (Mo. banc 1997). Evidence of prior offenses, including details that reflect their seriousness, is relevant and not inadmissible because it arguably prejudices the defendant. *State v. Malone*, 694 S.W.2d 723, 727 (Mo. banc 1985).

Appellant raises conflicting arguments. On the one hand, he repeats the argument made to the trial court that the State should be limited

to presenting only the record of his prior conviction. That contention is contrary to well-established case law and not in accord with Missouri's statute permitting the introduction of evidence supporting any aggravating circumstance. § 565.030.4, RSMo 2000. In *State v. Middleton*, the State presented evidence in the penalty phase of two other murders for which the defendant had not yet been convicted. *State v. Middleton*, 995 S.W.2d 443, 463 (Mo. banc 1999). The evidence consisted of testimony by a witness to the murders and by the medical examiner, and by the admission of a videotape of the crime scene and a photograph of the body of one of the victims. *Id.* This Court found that the evidence was admissible to help the jury understand the defendant's prior acts for the purpose of determining his punishment for the charged crime. *Id.*

Elsewhere in his brief, Appellant seems to concede that some evidence of the circumstances of those prior convictions is admissible, but that the State went too far in presenting such evidence. Appellant points to no Missouri case where a conviction has been reversed because the State presented excessive evidence during the penalty phase.[10] Even in the

[10] Appellant instead relies on a New Jersey case that is inapposite because it discussed violations of a New Jersey statute that contains

Whitfield case that he cites for the proposition that a penalty phase is not a mini-trial of prior offenses, this Court found that the trial court did not abuse its discretion in admitting evidence of the circumstances of those prior offenses. *State v. Whitfield*, 837 S.W.2d 503, 512 (Mo. banc 1992). And in the *Johns* case, also cited by Appellant, this Court found no abuse of discretion in the State calling twenty-one witnesses in the penalty phase to present evidence of six burglaries and two murders. *Johns*, 34 S.W.3d at 113. The Court concluded that the quantity of evidence was directly related to the seriousness of the defendant's actions, and that the trial court could properly find that the evidence was helpful to the jury in assessing punishment. *Id.*

Appellant offers this Court no guidance about where he believes the trial court should have drawn the line on admitting evidence of the Todd Franklin murder. The only limitation he suggests is that the State should have been restricted to introducing the record of conviction, which as noted above is contrary to case law and statute. The amount and type of evidence presented by the State was directly related to the seriousness of Appellant's actions in murdering Todd Franklin. *Id.* The record also shows that the trial

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evidentiary restrictions not present in Missouri law. *State v. Josephs*, 803 A.2d 1074, 1117-21 (N.J. 2002).

court exercised its discretion to limit the evidence to an appropriate amount that would help the jury in assessing punishment. For instance, the court restricted the scope of the State's examination of Tara Franklin, and it also limited the number of photographs that it allowed the State to offer into evidence. (Tr. 498-99, 507, 509-10). The trial court did not abuse its discretion in admitting evidence of the circumstances surrounding the Todd Franklin murder. Appellant's point should be denied.

IX.

The death sentence was properly imposed and is not disproportionate.

Appellant claims that this Court should set aside his death sentence due to the number of venire members who were struck for being unwilling to consider the death penalty, that he was denied a jury that represented a fair cross-section of the community due to the percentage of African-Americans on the venire panel, that the State engaged in misconduct at trial, and that his sntence is disproportionate when this case is compared with all similar cases.[11] But Appellant has failed to demonstrate that "evolving standards of decency" call for setting aside his sentence, has failed to demonstrate that the statutory procedures for jury selection were not followed in this case, has failed to demonstrate any misconduct by the State warranting the vacation of his sentence, and has failed to show that his sentence is disproportionate.

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[11] This point violates Rule 84.04(d) by grouping together multiple contentions not related to a single issue. *McFadden*, 2012 WL 1931205 at *11 n.3.

1. "Evolving Standards of Decency".

Appellant argues that "evolving standards of decency" require his death sentence be set aside because over one-third of the veniremembers were struck for cause because they could not consider the death penalty. Appellant claims that number demonstrates that the death penalty constitutes cruel and unusual punishment in St. Louis County. That argument suffers from multiple flawed premises.

The first flaw is the notion that evolving standards of decency and the sentiments of a particular populace can be determined through the views expressed in a single venire panel in a single trial. In trying to evaluate and reach conclusions about evolving standards of decency, the United States Supreme Court and this Court have looked at a broad range of information from multiple sources. That information includes legislation passed by the several states, various studies and surveys, policy pronouncements of churches and other organizations, and the laws of the several nations. *Roper v. Simmons*, 543 U.S. 551, 564-78 (2005); *Atkins v. Virginia*, 536 U.S. 304, 313-17 (2002); *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 401-06 (Mo. banc 2003). By contrast, Appellant asks this Court to judge evolving standards of decency by looking at the responses of 164 randomly selected residents of a county of nearly a million people. *Official State Manual of Missouri*, p. 816 (2009-2010). Such a small and isolated sample is inadequate

to draw any meaningful conclusions about evolving standards of decency in St. Louis County or anywhere else.[12]

Relying on a single venire panel to judge "evolving standards of decency" would result in an arbitrary and capricious method of imposing the death penalty. The logical converse to Appellant's argument is that the death penalty does comport with evolving standards of decency and can be imposed in a particular trial if a sufficient number of veniremembers are able to consider it. But Appellant provides no guidance as to where that line should be drawn. Another arbitrary and capricious aspect of Appellant's argument is that it raises the possibility that the death penalty, as a state law, can constitute cruel and unusual punishment in one county, but not be cruel and unusual in another county where a sufficient percentage of the populace supports it and is willing to consider it if called to serve as jurors.

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[12] And relying on a single venire panel actually undercuts Appellant's argument, since he raised this same claim in his previous trial where more than half of the venire members were struck for cause for being unable to consider the death penalty. (Appellant's Brf., p. 120). The reduction in that percentage between the first and second trials, if it has any significance at all, would suggest that the St. Louis County populace had become more accepting of the death penalty.

Finally, the "evolving standards of decency" analysis has been used to consider whether the death penalty is appropriate for discrete and identifiable classes of persons. *Roper*, 543 U.S. at 569 and *Simmons*, 112 S.W.3d at 412 (juveniles); *Atkins*, 536 U.S. at 318 (the mentally retarded). In doing so, the Courts have looked at whether the retributive or deterrent purposes of the death penalty apply to those persons due to some shared class characteristic. That is not the case here, and Appellant's approach completely fails to take into account whether his "extreme culpability makes [him] 'the most deserving of execution.'" *Roper*, 543 U.S. at 568.

2. Fair Cross-Section.

Appellant claims that his right to an impartial jury drawn from a fair cross-section of the community was violated because African-Americans comprised 17.9 percent of the members of the venire panel for his trial, while African-Americans comprised 21.8 percent of the population of St. Louis County. A defendant bears the burden of showing a *prima facie* violation of the fair cross-section requirement. *Anderson*, 306 S.W.3d at 542. A single venire panel that fails to mirror the make-up of the community is insufficient to establish that *prima facie* case. *Id.* Instead, a defendant must show that the underrepresentation of a particular group was due to a systematic exclusion in the selection process by pleading and proving prior to trial a fatal deparature from the statutory procedure for jury selection. *Id.* Appellant

failed to make that showing. He moved to quash the venire panel after peremptory strikes were made, but relied solely on the number of African-Americans on the panel as compared to the African-American percentage of the St. Louis County population. (VD Tr.-V 238-40). That argument is the same as the argument that this Court found insufficient in *Anderson* to establish a fair cross-section violation. *Id.*

For the first time on appeal, an argument is presented that *Batson*[13] violations found in previous cases should be used to find a fair cross-section violation in this case. Notably, no *Batson* claim was raised in this case, and a *Batson* claim raised in the most recent trial for the Todd Franklin murder was found by this Court to lack merit. (VD Tr.-V 238-42); *McFadden*, 2012 WL 1931205 at *6. Appellant has failed to meet his burden of establishing a fair cross-section violation.

3. Alleged Misconduct by State.

Appellant simply reiterates some of the same arguments by the prosecutor that he claimed as erroneous in Point VI. Respondent has already discussed in the response to that point why those arguments were not erroneous and do not require the granting of a new trial. Appellant makes no

[13] *Batson v. Kentucky*, 476 U.S. 79 (1986).

additional argument to demonstrate why the prosecutor's statements warrant the vacating of his sentence.

4. Comparison to Other Cases.

Appellant claims that his death sentence is disproportionate based on a comparison to four cases where defendants received sentences of life without parole. Appellant offers no other basis for his proportionality argument, despite the fact this Court has emphasized that comparison to similar cases cannot be the sole determination in proportionality review. *Forrest v. State*, 290 S.W.3d 704, 716 (Mo. banc 2009). Furthermore, this Court's consideration in conducting proportionality review of cases where a life sentence has been handed down has been limited to cases where the death penalty was submitted to the jury and rejected. *McFadden*, 2012 WL 1931205 at *20; *Dorsey*, 318 S.W.3d at 659. Appellant cites to only one case where it is clear that the death penalty was submitted to the jury, and in that case the defendant actually received the death penalty. *State v. Schnick*, 819 S.W.2d 330, 331 (Mo. banc 1991). This Court awarded the defendant a new trial due to an erroneous ruling on a motion to strike a prospective juror for

cause.[14] *Id.* at 332. Appellant states, without citing to a source, that the defendant following remand entered a plea in exchange for a sentence of life without parole. That assertion, presuming it is accurate, in no ways shows that the death sentence was disproportionate in this case. *See Dorsey*, 318 S.W.3d at 659 (noting defendant's failure to name similar cases where **the jury** rejected the death penalty).

Veniremembers in *State v. Blankenship* were questioned about the death penalty, so that punishment was apparently in play at least at the beginning of the trial. *State v. Blankenship*, 830 S.W.2d 1, 15 (Mo. banc 1992). But the opinion provides no details about sentencing other than the sentence that was ultimately imposed, so it is uncertain whether the jury rejected the death penalty, whether the trial court ultimately decided to impose life sentences on the murder counts, or whether the State ultimately opted not to seek the death penalty once the trial got underway. Even if *Blankenship* is a case where the jury rejected the death penalty, it contains distinguishable facts that demonstrate why a jury might have felt the death penalty inappropriate in that particular case. The charges in *Blankenship*

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[14] That conviction would not be reversed if the case were tried today because the juror in question was removed by a peremptory strike. *Id.* at 333, *see*, § 494.480.4, RSMo 2000.

resulted from a supermarket robbery by two gunmen where five people were killed. *Id.* at 4. It is not clear from the opinion which of the two gunmen was the shooter. *Id.* at 4-5. Given that uncertainty, the jury could reasonably have been reluctant to impose the death penalty, assuming that it was given that option. By contrast, this case involved a lone gunman, with Appellant being positively identified as the shooter. Given that distinction between the cases it would appear that *Blankenship*, not this case, is the aberration, assuming that the jury did indeed reject the death penalty. *Dorsey*, 318 S.W.3d at 659.

The other two cases cited by Appellant contain no information showing that the death penalty was sought, much less submitted to the jury. *State v. Gilyard*, 257 S.W.3d 654, 654 (Mo. App. W.D. 2008); *State v. Beishline*, 926 S.W.2d 501, 505 (Mo. App. W.D. 1996). In fact, the conviction in *Gilyard* was affirmed by a *per curiam* order issued under Rule 30.25(b). *Gilyard*, 257 S.W.3d at 654. That order is not considered a formal opinion of the court and is not to be cited nor otherwise used in any case before any court. Supreme Court Rule 30.25(b). That case is thus not properly considered as part of this Court's proportionality review. *See Dorsey*, 318 S.W.3d at 659 (noting absence of **published opinions** involving similar circumstances where the jury declined to impose a death sentence). Even if it were, the order

affirming the conviction provides no details that would aid this Court in conducting that review.

The common thread among *Schnick*, *Blankenship*, and *Gilyard* seems to be that the defendants were convicted of multiple counts of murder.[15] But as this Court recently noted, the death sentence has been upheld multiple times when one victim is murdered. *McFadden*, 2012 WL 1931205 at *21 (citing *Johnson*, 284 S.W.3d at 561; *State v. Freeman*, 269 S.W.3d 422 (Mo. banc 2008); *State v. McLaughlin*, 265 S.W.3d 257 (Mo. banc 2008)). Rather than look merely at the number of victims, this Court also has to look at whether the cases Appellant relies on contain the additional aggravating factors found by the jury in this case. *Dorsey*, 318 S.W.3d at 659.

The jury found that Appellant had serious assaultive convictions, and this Court has affirmed death sentences when the defendant had a serious assaultive criminal history. *McFadden*, 2012 WL 1931205 at *21 (citing *State v. Bowman*, 337 S.W.3d 679 (Mo. banc 2011); *State v. Davis*, 318 S.W.3d 618 (Mo. banc 2010); *State v. Barton*, 240 S.W.3d 693 (Mo. banc 2007)). Of the opinions to which Appellant cites, only *Beishline* shows that the

[15] The defendant in *Beishline* was convicted of a single count of murder, but evidence was introduced at trial indicating that he had assaulted another woman prior to the murder. *Beishline*, 926 S.W.2d at 504, 506.

defendant had a history of assaultive behavior. *Beishline*, 926 S.W.2d at 504. But again, it does not appear from the opinion that the death penalty was submitted to the jury, so there is no evidence that the jury was ever asked to find the existence of a serious assaultive conviction as an aggravating circumstance.

This Court has also upheld the death sentence when a defendant murders someone who is helpless and defenseless. *McFadden*, 2012 WL 1931205 at *21 (citing *Anderson*, 306 S.W.3d at 529; *State v. Tisius*, 92 S.W.3d 751 (Mo. banc 2002); *State v. Cole*, 71 S.W.3d 163 (Mo. banc 2002)). The Court found that the death sentence Appellant received in the Todd Franklin murder was proportionate because he pursued an unarmed man who was rendered helpless, assaulted him, and then shot him multiple times. *McFadden*, 2012 WL 1931205 at *21. Appellant likewise got out of a car and crossed the street to confront Leslie, who was unarmed. He rendered her helpless by shooting her, and then shot her multiple times as she lay on the ground. The circumstances of Leslie's murder are close enough to those of the Todd Franklin murder to warrant the same finding that this Court made in the Franklin case.

Appellant has failed to show the existence of a case where a jury rejected the death penalty for a defendant with a serious assaultive criminal history who pursued an unarmed and helpless victim before shooting her

multiple times. *See Forrest*, 290 S.W.3d at 716 (in conducting proportionality review, "individual circumstances, including the specific crime and aggravating and mitigating circumstances must be considered."). The cases cited by Appellant do not show that the death penalty was disproportionate as applied to Appellant.

X.

No error, plain or otherwise, in evidence and argument concerning the consistency of Eva's identification of Appellant.

Appellant claims that the trial court erred and plainly erred by permitting evidence and argument that Eva Addison had consistently identified Appellant as Leslie's killer. But the evidence that Eva had consistently identified Appellant was properly brought out during redirect examination after Appellant had attempted to impeach her ability to see the shooting and identify Appellant.

A. Underlying Facts.

In his guilt phase opening statement, the prosecutor outlined Eva Addison's expected testimony of what she saw when Appellant shot her sister:

> And he puts the gun up and shoots her in the head. Shoots her in the brain. At the side of the head here. Shoots her again. She falls to the ground. She's on the ground. He stands over her and shoots her again.
>
> And this is what Eva told the police: that she fell to the ground and he shot her again on the ground. Told the police immediately. Immediately that night. Does an oral statement,

taped statement, written statement: that he stood over her and shot her again.

Now, there was no way for her to know that unless she was there. And the reason I say – because the evidence will be there was a bullet underneath the body. There was a bullet underneath the body. Right next to the body.

(Tr. 27).

The prosecutor later told the jury the anticipated evidence of Eva Addison's actions after she watched Appellant shoot her sister:

She's just beside herself, you know, with emotion. And she's coming back to the scene because of what she's just seen. And she tells the police right there on the scene who did it. Him: [Appellant].

She goes down to the police station immediately with them, Pine Lawn, a couple blocks away. She does a written statement there. Tells them what happened. Then she goes to the St. Louis County Police Department, because that's who does the investigation on homicides in Pine Lawn.

Immediately she goes with the St. Louis County police and she does another written statements there and then she does a taped statement, an audiotape. This is all within – I mean, right

after the murder. Her sister has just died. It's less than two hours later, and she's done with all of her statements.

And she's done the best that she could to say what she could at the time, under the emotion that she was under.

But she tells him how he shot her when she was on the ground. And she doesn't know that a bullet has been found.

(Tr. 28-29).

Actually, Eva is going to tell you she ran back towards the house, but she stopped behind the bush. She watched him get out of the car. Walk up to the sister. Argue with the sister. Sister begged for her life. Shoot the sister. Watched him walk back. Right back to the car. Get in the car. And proceed this way up Kienlen.

Then she runs back to 31 Blakemore. Then she comes back down. Then she goes with the police and does her statements. Leslie's (sic) eyes are excellent. She doesn't wear glasses.

(Tr. 34). The prosecutor later told the jury that Eva had originally told the police that she did not know the identity of the driver of the car because she was afraid of mentioning two people, having already identified Appellant to the police. (Tr. 50). The prosecutor began to tell the jury that Eva later gave the driver's name to an investigator from the prosecutor's office when defense

counsel objected to "bolstering the witness with numerous statements that are not in evidence and may not be in evidence." (Tr. 50-51). The trial court sustained the objection. (Tr. 51).

Eva Addison testified as the first witness in the guilt phase and described hiding behind a bush and watching as Appellant shot her sister. (Tr. 72-73). The prosecutor asked Eva if she told the police what she saw, if she went to the Pine Lawn police station, if she went to the St. Louis County police department, and if she gave written and taped statements. (Tr. 74-75). Eva answered "Yes" to each question. (Tr. 74-75). Defense counsel did not object. (Tr. 74-75). The prosecutor asked Eva if she told the police what kind of car Appellant rode in and whether she told the police that the gun did not go off the first time Appellant squeezed the trigger, and that he laughed. (Tr. 75). She answered "Yes" to those questions before defense counsel objected that the questions were leading. (Tr. 75). The prosecutor asked Eva if it would refresh her memory if he showed her the transcript of her taped statement. (Tr. 76). After defense counsel objected, the court told the prosecutor to ask a question and see if her memory needed refreshing. (Tr. 76). The prosecutor asked Eva questions about the events immediately prior to the shooting, which she answered without reference to any prior statements she had given. (Tr. 76-77).

Eva later testified that there were lights near Pine Lawn School, where Appellant got out of the car. (Tr. 81-82). She said that she saw Appellant's face, body, and clothing when he got out of the car. (Tr. 82). Eva also said that she saw how he walked and how he ran, and that she knew how he ran from seeing him in the past. (Tr. 82-83). She said Appellant was wearing the same clothing he had on when she saw him a few minutes earlier at 31 Blakemore. (Tr. 83). Eva said that she also saw how Appellant was wearing his hair and that it was the same style she had seen earlier in the evening. (Tr. 83). She further said that Appellant's face and head were not covered. (Tr. 84). Eva testified that she clearly saw the person get out of the car, and she identified that person in court as Appellant. (Tr. 85). Eva said that she was one-hundred percent positive that she saw Appellant shoot and kill her sister. (Tr. 86). Eva said that she never took her eyes off Appellant from the time he got out of the car until he shot Leslie, and that she recognized his voice when he told Leslie to "Shut the fuck up." (Tr. 88).

Eva's taped statement to the police on the night of the murder was admitted into evidence over Appellant's relevancy and bolstering objections, but the tape was not played to the jury. (Tr. 89-92). The only testimony Eva gave about the tape was to name the detectives she talked to. (Tr. 92-93). Eva's written statement to the police was also admitted into evidence over

Appellant's objection, but the prosecutor was not allowed to read any of the report to the jury or to question Eva about its contents. (Tr. 102-03).

Defense counsel tried to elicit evidence on cross-examination that Eva's view of the shooting was blocked by the bushes she hid behind, but Eva testified unequivocally that she saw "everything." (Tr. 148). Defense counsel cross-examined Eva about supposed inconsistencies in her prior statements and testimony. (Tr. 144-50). Defense counsel also elicited testimony on cross-examination that Eva stayed with Appellant's mother for a period of time after the murder and that she visited him in jail on several occasions and had several phone conversations with him. (Tr. 159-62). Defense counsel asked Eva, "You, on your own, decided to have all those phone coversations and visits with someone that you say killed your sister." (Tr. 162).

On redirect examination, the prosecutor listed all the statements that Eva had made since the murder and asked if she had ever said anything other than that Appellant had shot Leslie. (Tr. 165-67). After defense counsel's bolstering objection was overruled, Eva answered, "No." (Tr. 167). Eva also stated, without objection, that she had not told anyone, including family or friends, anything different than that Appellant had shot her sister. (Tr. 167). Eva later testified that she had told the police that she been standing behind the bushes in the alley when Appellant shot Leslie, and that

she told the police that she had seen "all of it." (Tr. 172-73). When defense counsel objected to that questioning, the prosecutor noted that it went to the cross-examination about whether Eva could see the crime. (Tr. 171-72). Defense counsel questioned other State's witnesses about the lighting and the sightlines at the murder scene. (Tr. 187, 197, 229-37, 243-44).

In closing argument, the prosecutor brought up the consistency of Eva's description of the events surrounding the murder:

> If there was anything inconsistent that could be brought out – did you see the inconsistencies that the defense brought out in Eva's testimony? They had all kinds of sources.
>
> They had her written statement, they had her taped statement, they had her oral statement, they had her deposition, they had her prior sworn testimony, and they had her testimony in court.
>
> MS. TURLINGTON: Judge, I'm going to object. That's not evidence, the other statements, how many there were –
>
> MR. LARNER: Well, it came out how many she did.
>
> MS. TURLINGTON: No, it didn't.
>
> MR. LARNER: Yes, it did.
>
> MS. TURLINGTON: That's not the evidence.
>
> MR. LARNER: We talked about the deposition –

THE COURT: The jury will be instructed to recall the evidence as they heard it.

MR. LARNER: We talked about her deposition, we talked about her taped statement to the police, we talked about her oral statement, we talked about her two written statements. We talked about them all.

You know that they occurred. You know that she came forward immediately. In fact, Eva talked about the statements she made, to Ed McGee, twice. There are about seven statements that she made. And anything that was inconsistent in those statements could have been brought up.

And if there were a bunch of inconsistencies, they would have been brought out. Do you understand that? There weren't any inconsistencies in her story, from day one, although you don't get to see all the statements for yourself. That's how it works.

The defense pointed out whatever inconsistencies they could find. You know what they found? Was your mother at the skating rink that night or was your mother not at the skating rink that night.

> What other inconsistency was there? Nothing. Because she said the same thing, from day one. The car she said. Everything she said. From hour one. From hour one.

(Tr. 345-47).[16]

Defense counsel opened Appellant's closing argument by telling the jury that "this case basically hangs on the testimony of Eva Addison." (Tr. 359). Defense counsel argued that Eva's description of the events prior to the shooting did not make sense. (Tr. 359-60, 368-69). Defense counsel told the jury, "I am sure that Eva saw her sister get shot. The question is, did she see Vincent McFadden shoot her sister." (Tr. 369). Defense counsel questioned Eva's eyesight, her ability to see through the bushes she hid behind, and the adequacy of the lighting at the scene. (Tr. 369-72). Counsel brought up Eva's statement to the police, arguing that she told the police that she could not see the gun. (Tr. 373-74). Defense counsel later questioned why Eva continued to see Appellant after the murder, "It just doesn't make sense, if she one hundred percent believed he was the killer, why would she do it. It just

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[16] This argument is also discussed in the response to Appellant's Point VI, which raises multiple claims of error in closing argument. To the extent it is relevant, the facts and arguments raised in the response to Point VI are incorporated into this Point.

doesn't make sense." (Tr. 381). Defense counsel closed by arguing that inconsistencies in Eva's testimony clouded her credibility:

> And she came in. And she's not – I don't know what happened that night, but whatever happened, it's not exactly what she says is going on. I don't know exactly why Leslie went to Skate King, but on some occasions Eva testified under oath that she didn't know why.
>
> She testified yesterday that her mom was at Skate King because her mom skates every Thursday. Well, she's testified before under oath that her mom never skated on Thursdays. Those things color Eva Addison's testimony.
>
> Really, she's the only witness in this case that matters in a lot of ways. And if Eva Addison wasn't sure after this happened that Vincent McFadden shot her sister; if even Addison had doubts about it and that's why she had to go see him over and over, then everyone should have doubts about what happened that night.

(Tr. 383-84).

The prosecutor opened his rebuttal argument by reminding the jury that Eva had said she was one-hundred percent sure and that there was no evidence that she did not see what happened. (Tr. 384-85). Later in the

argument, the prosecutor reviewed the layout of the crime scene and the positioning of the witnesses to rebut defense counsel's argument that Eva could not see what was happening:

> Then this is where the lights are in front of the school. She's right here. You know, it may be a 150 feet or so from the body to here, but he's here and she's here.
>
> And if – she's able to see him under those lights that it's him. If she wasn't sure, she'd say she wasn't sure. She's a hundred percent sure.

(Tr. 403-04).

The motion for new trial contained a claim that the trial court erred in allowing the State to argue that all of Eva's statements from depositions, transcripts, and police reports were consistent when those reports were not in evidence. (L.F. 711). The motion also contained claims that the trial court erred in admitting into evidence Eva's taped and written statements to the police, and in allowing the State to elicit testimony that Eva had made numerous statements in which she identified Appellant as the killer. (L.F. 725-28). The motion alleged that the argument and the evidence bolstered Eva's testimony and her credibility. (L.F. 712, 725-28).

B. Analysis.

Appellant's claim is largely unpreserved because for the majority of the statements and testimony that he claims were erroneous he either failed to object, or objected on different grounds than are raised on appeal. *McFadden*, 2012 WL 1931205 at *6. In fact, two of the objections that Appellant did make, one in opening statement and one during Eva's direct examination, were sustained and Appellant requested no further relief. (Tr. 50-51, 76-77). When a defendant receives all the relief he requested, nothing is preserved for review and he cannot complain of error on appeal. *Scurlock*, 998 S.W.2d at 586. One objection was overruled in the closing argument, but that objection was that the evidence did not show how many statements Eva had made. (Tr. 345-46). The prosecutor at that point had only referenced the existence of the statements and nothing more. (Tr. 345).

The only claims that are preserved are the admission of the taped and written statements to the police, the objection to Eva's testimony on redirect that she never said anything in her previous statements other than that

Appellant was the killer, and, arguably, her testimony that she told the police that she "saw all of it."[17] (Tr. 89-92, 102-03, 165-67, 171-73).

Improper bolstering occurs when an out-of-court statement of a witness is offered solely to duplicate or corroborate trial testimony. *State v. Forrest*, 183 S.W.3d 218, 224 (Mo. banc 2006). However, there is no improper bolstering if the out-of-court statement is offered for relvant purposes other than corroboration or duplication. *Id.* When the out-of-court statement is a prior consistent statement, it is admissible for whatever rehabilitative value it may have. *State v. Davis*, 186 S.W.3d 367, 375 (Mo. App. W.D. 2005). Appellant's specific complaint is about Eva's out-of-court statements where she identified Appellant as the killer. But she did not testify about those identifications until redirect, after defense counsel had read from the statement in an effort to cast doubt on her ability to see and identify the man who shot her sister. (Tr. 165-67). It is quite proper to use prior consistent statements to rehabilitate a witness whose credibility has been attacked on cross-examination, particularly when the prior consistent statement is part of the same overall statement that the defense attempted to use for

[17] Appellant's bolstering objection was made several questions before the prosecutor asked Eva about that portion of her statement. (Tr. 171). No additional objection was made when that question was asked. (Tr. 173).

impeachment purposes. *Id.*; *State v. Spencer*, 62 S.W.2d 623, 627 (Mo. App. E.D. 2001).

And to the extent evidence of any prior consistent statements was eleicited on direct examination, it is permissible for the State to anticipate a possible basis for impeachment and demonstrate it on direct examination. *State v. Spinks*, 629 S.W.2d 499, 503 (Mo. App. E.D. 1981). Because Appellant had made discovery requests for Eva's school and medical records concerning her eyesight, the State was well aware that the defense would try to impeach her ability to observe the shooting and identify Appellant as the shooter. (L.F. 605-06).

Finally, if there was any error in admitting evidence of Eva's extra-judicial statements, that error is harmless where the statement adds nothing substantial and the witness is available for cross-examination. *State v. McMillin*, 783 S.W.2d 82, 98 (Mo. banc 1990). The jury never heard the exact statement that Eva gave to police, but merely summaries of those statements that were far less detailed than the testimony that she provided from her own independent recollection. And Eva was, of course, not only subject to cross-examination but was extensively cross-examined, with some of that cross-examination based on her previous statements.

Appellant also cannot show a manifest injustice from the prosecutor's opening statements that were supported by the evidence that was admitted at trial. *McFadden*, 2012 WL 1931205 at *12.

Appellant has failed to show error, plain or otherwise. His point should be denied.

XI.

No error, plain or otherwise, in admission of Appellant's statements that purportedly reference other crimes.

Appellant claims that the trial court erred and plainly erred in allowing guilt phase evidence and argument of other crimes. But the evidence and argument that Appellant complains of was properly admitted as part of the *res gestae* surrounding the tampering charge that he was tried on.

While Appellant's Point Relied On complains of the introduction of evidence and argument about other crimes in the guilt phase, one piece of evidence referenced in the point was actually made during the penalty phase. That was where Gary Lucas, a witness to the murder of Todd Franklin, testified that his family had suggested that he leave town until the police captured Appellant. (Tr. 475). As noted in Point VIII, a wide range of evidence about the defendant's past character and conduct is admissible at the penalty phase of a trial, including the facts and circumstances surrounding prior convictions. *Johns*, 34 S.W.3d at 113; *McFadden*, 2012 WL 1931205 at *11; *Malone*, 694 S.W.2d at 727.

The guilt phase evidence that Appellant complains of was contained in State's Exhibit 148-D, the taped jailhouse conversation between Appellant, Eva, and Slim. When the prosecutor moved to admit the tape into evidence, defense counsel objected to a portion of the tape where Appellant mentioned a

man named Al, who defense counsel believed had changed his testimony in another proceeding. (Tr. 108-09). The prosecutor noted that Appellant's statement to Eva on the tape was, "I want you to say it wasn't me" or "just go to court and say it wasn't me," and that Appellant then said something like, "Like Al did." (Tr. 109). The court overruled the objection, noting that it was a direct statement of Appellant. (Tr. 111).

Evidence of other crimes or wrongful acts is admissible when it is part of the circumstances or sequence of events surrounding the charged offense. *State v. Wolfe*, 13 S.W.3d 248, 262 (Mo. banc 2000). The reference to Al was part of the sequence of events surrounding his attempt to persuade Eva to go to court and falsely testify that he did not murder her sister. The evidence was thus relevant to the tampering charge and properly admissible.

Additionally, the rule against evidence of uncharged crimes is not violated by vague references that do not definitely show that the defendant has committed, been accused of, been convicted of, or definitely associated with another crime. *State v. Hornbuckle*, 769 S.W.2d 89, 96 (Mo. banc 1989). The reference to Al was vague and did not definitely associate Appellant with another crime, and the trial court did not err in admitting it.

Appellant also discusses the prosecutor's references to the statement in guilt phase opening, but as noted in the previous point, there is no error in the prosecutor's referring in opening statement to evidence that the State

had a good faith belief would be admissible at trial. *McFadden*, 2012 WL 1931205 at *8. That portion of the tape was admitted during Appellant's first trial for Leslie's murder, so the prosecutor clearly had a good faith basis for believing it would be admissible in this trial. (Tr. 109).

Finally, Appellant complains of the prosecutor's argument about other statements made by Appellant. The prosecutor noted that Appellant had called Eva and said, "Get my name out of it or your next, bitch" and argued that showed that Appellant was not done killing. (Tr. 334). The prosecutor also noted Appellant's statement on the tape that he was going to "fuck that nigger up," and argued that meant that Appellant would kill anyone who crossed him. (Tr. 334-35). The State is allowed to argue the evidence and all reasonable inferences from the evidence during closing argument. *McFadden*, 2012 WL 1931205 at *14. The statements themselves were relevant and admissible to the tampering charge, and the prosecutor's arguments were reasonable inferences drawn from that evidence.

The court did not err, plainly or otherwise, in admitting the evidence or arguments. Appellant's point should be denied.

XII.

The trial court did not err, plainly or otherwise, in its ruling on Appellant's objections that certain questions were leading.

Appellant claims that the trial court abused its discretion in overruling his objections to the prosecutor's leading questions of Eva Addison. But most of the questions that Appellant now complains of were not objected to and the trial court sustained Appellant's objections to some of the questions and directed the prosecutor to rephrase. Virtually all of the questions about which Appellant complains, including the two to which timely objections were overruled, were permissible because they restated prior answers or refreshed the witness's memory.

A. Underlying Facts.

Appellant complains of various questions, highlighted below, asked during the prosecutor's direct examination of Eva Addison:

Q. Did he say anything about any of your sisters?

A. Yes.

Q. What did he say?

A. The ho's were supposed to have told something on him.

Q. All right. **Did he say that you – and did he tell you and your sisters to get out of Pine Lawn?**

MS. TURLINGTON: Objection to leading, and it's been asked and answered.

Q. (By Mr. Larner) **Did you already say that he told you and your sisters to – ho's to get out of Pine Lawn?** Is that –

A. Yes.

(Tr. 64).

* * * *

Q. And what did [Leslie] say? Before he shot her, what did she say?

A "Please don't shoot me."

Q. **Did you hear her say "Please don't shoot me?"**

A. Yes.

Q. And what did he say?

A. "Shut the fuck up."

Q. **And did you see him point the gun at her?**

A. Yes.

(Tr. 72-73).

* * * *

Q. **Now, when he – now when he first – when he was at the place where he shot her and he squeezed the**

trigger, did you tell the police that night that it didn't go off and he started laughing?

A. Yes.

Q. Is that what he did?

A. Yes.

MS. TURLINGTON: Your Honor, I'm going to object to leading.

THE COURT: Mr. Larner, if you would just –

Q. (By Mr. Larner) Would it refresh your memory – this is five years ago, this incident. Would it refresh your memory if I showed you –

MS. TURLINGTON: Judge, I'm going to object to him refreshing her memory. She hasn't said she needed it.

Q. (By Mr. Larner) Let me ask you: Would it refresh your memory if I showed you your taped statement, transcript of it, as to what happened exactly when he first tried to shoot your sister? Would it refresh your memory if I showed you?

A. Yes.

MS. TURLINGTON: Judge, I'm still going to object –

THE COURT: Why don't you ask the question Mr. Larner, first and see if she needs it.

Q. (By Mr. Larner) Again, when you just said earlier that the gun didn't go off at 31 Blakemore, at Naylor and Kienlen, is that where the shooting occurred? At the intersection?

A. Yes.

Q. Did he point the gun at her at that point before it went off?

A. And did go off? (sic) Leslie moved the gun out the way, and he put it back there and he shot her.

Q. **Did he give any type of gesture or laugh or any saying like that?** Do you understand what I'm saying?

A. Did he laugh?

Q. Yes.

A. Yes, he laughed.

(Tr. 77).

* * * *

Q. Did B.T. do anything other than sit in the car?

A. B.T. sat in the car.

Q. He didn't say anything?

A. No.

Q. **So you didn't hear him say anything that evening.**

MS. TURLINGTON: Objection to the leading questions.

THE COURT: Rephrase your question.

Q. (By Mr. Larner) Did you hear B.T. say anything that night?

A. No.

(Tr. 94-95).

* * * *

After Eva's written statement to the police was admitted into evidence, the prosecutor asked her the following questions:

Q. (By Mr. Larner) Is this your handwriting on here?

A. Yes.

Q. Did you write this of your own?

A. Yes.

Q. **Were you upset when you wrote it?**

A. Yes.

Q. **Did you do the best you could?**

A. Yes.

(Tr. 103-04). Defense counsel made a relevance objection that was overruled. (Tr. 104).

During a break in the testimony, defense counsel asked that the court prevent the prosecutor from continuing his questioning without waiting for a ruling on defense objections. (Tr. 112). The court made the following response:

> Keith, we're going to have to put a ruling on. Also, I understand that this witness is a rough witness, if I can say that, and not be accused of anything. It's just hard. So I understand.
>
> I've given you leeway with regard to your questions, but please just try to not lead the witness. And if there's a real problem, I can understand it. But I'm saying, if you do it every single time, it's – just try to get it out with open-ended questions. Thank you.

(Tr. 112-13).

Appellant also complains of the following highlighted questions that were asked subsequent to that admonition:

> Q. All right. After the murder of your sister, were you staying over at his mother's house for a while?
>
> A. Yes.
>
> Q. Is that the reason you were staying there?

A. Yes.

Q. **Did you actually feel safer there than your own home?**

A. Yes.

MS. TURLINGTON: Objection to leading.

THE COURT: That will be overruled.

(Tr. 116).

After the State played the tape recording of the conversation between Appellant, Eva, and Slim, the prosecutor reviewed with Eva the contents of that conversation:

Q. Eva, on that tape I heard you say "I seen it." What were you talking about?

A. I seen J.R. kill my sister.

Q. **You were telling him that you saw him. Isn't that right?**

A. Right.

Q. And when you said, I don't want to see you, I know you don't want to see me, you're going to see Leslie and me, what did you mean by that? What were you telling him?

A. Because he killed Leslie.

Q. **And looking at you, he was going to see Leslie. Is that what you were saying?**

A. Right.

Q. **You were confronting a murderer. Is that what you were doing?**

A. Right.

MS. TURLINGTON: Objection to leading.

THE COURT: That will be overruled at this point.

(Tr. 122).

* * * *

Q. (By Mr. Larner) Did he tell you to go to the lawyer and sign papers?

A. Yes.

Q. **Did he tell you to go in to court and say that it wasn't him?**

A. Yes.

MS. TURLINGTON: Objection to leading.

MR. LARNER: It's on the tape, your Honor.

THE COURT: Yes. If you would, just try to do non-leading nature of the questions.

(Tr. 127).

* * * *

Q. **When he's talking about, on that tape, the motherfuckers this and the motherfuckers that, who is he referring to?**

MS. TURLINGTON: Objection. Calls for speculation.

THE COURT: Well, why don't you rephrase your question.

Q. (By Mr. Larner) **Is he referring to his friends?**

MS. TURLINGTON: Objection. Leading and calls for speculation.

THE COURT: Why don't you rephrase your question: What she understood.

Q. (By Mr. Larner) What did you understand it to mean when he said that the motherfuckers aren't going to do anything to you but they're going to so something to your family? Who did you __

A. He was talking about his friends go do something to my family.

(Tr. 129-30).

After the prosecutor admitted into evidence pictures of the apartment building occupied by Appellant's mother, he questioned Eva about the exhibits:

Q. (By Mr. Larner) Is this the address at 3223 Magnolia?

A. Yes.

Q. Apartment A?

A. Yes.

Q. **And is that where you were staying also because you felt safer there –**

A. Yes.

Q. **-- after he killed your sister?**

A. Yes.

(Tr. 138).

Appellant"s motion for new trial contained a claim that the trial court "erred in repeatedly allowing the state's attorney to ask leading questions of Eva Addison on direct examination." (L.F. 729). The only specific question referenced in the motion was the question about "confronting the killer." (L.F. 729).

B. Analysis.

Leading questions suggest the desired answer of material matters to the witness. *State v. Miller*, 208 S.W.3d 284, 289 (Mo. App. W.D. 2006). Missouri courts have accepted the proposition that leading questions are generally impermissible. *Id.* Leading questions are, however, occasionally permitted where the witness is shy, timid, or unwilling; where the witness is hostile; for preliminary or formal matters; where the witness had difficulty understanding English; or where the answer has already been produced and the attorney is merely repeating that answer. *Id.* Whether to allow leading questions is within the sound discretion of the trial court. *Id.*; *State v. Todd*, 372 S.W.2d 133, 137 (Mo. 1963); *State v. Taylor*, 317 S.W.3d 89, 93 (Mo. App. E.D. 2010). The trial court's decision will be overturned only if it constituted an abuse of discretion and prejudiced the defendant. *Id.*

The statements about which Appellant complains can be divided into various categories. Several of the statements were either unobjected to, or objections were made after the question was answered and no request was made of the trial court to strike the answer. (Tr. 64 (second highlighted question), 72-73, 77 (both questions), 103-04, 116, 122 (all questions), 127, 138 (both questions)). Appellant's failure to object deprived the trial court of the opportunity to take corrective action, if such action was necessary. *Miller*, 208 S.W.3d at 290. An objection made after the answer is untimely,

and in the absence of a motion to strike, the ruling of the trial court is not preserved. *State v. Taylor*, 408 S.W.2d 8, 11 (Mo. 1966).

Where Appellant did make timely objections, the court sustained two of them and directed the prosecutor to rephrase his questions. (Tr. 94-95, 129-30). (Tr. 77). Appellant sought no further relief. When the trial court grants the defendant all the relief that he seeks, the adequacy of the corrective action taken by the trial court is assumed, and the defendant cannot claim error on appeal. *Scurlock*, 998 S.W.2d at 586. Additionally, a trial court will generally not be found to have abused its discretion when it has sustained at least some of the objections raised to leading questions and admonished the attorney asking those questions. *State v. Loazia*, 829 S.W.2d 558, 564 (Mo. App. E.D. 1992); *State v. Hawthorne*, 523 S.W.2d 332, 335-36 (K.C.D. 1975). The court overruled only two of Appellant's objections, both of which were untimely because they were raised after the witness had answered. (Tr. 116, 122). And one objection was not ruled on because the prosecutor immediately rephrased the question. (Tr. 64). Appellant did not object to that rephrased question. (Tr. 64).

Furthermore, virtually all of the questions complained of, whether preserved for review or not, fall within the recognized purposes for which leading questions are allowed on direct examination. Several of the questions merely repeated answers that Eva had already given. *Miller*, 208 S.W.3d at

289. Those questions include those about whether Appellant told Eva and her sisters to get out of Pine Lawn (Tr. 62, 64), whether Eva heard Leslie say "Please don't shoot me" and saw Appellant point the gun at her (Tr. 68, 72-73), whether Eva heard B.T. (the driver of the car) say anything that evening (Tr. 94), whether Eva felt safer staying with Appellant's mother (Tr. 115-16, 138), and whether Eva told Appellant in the jailhouse phone call that she saw him kill Leslie (Tr. 122).

A court may also allow leading questioning on direct examination to refresh the witness's memory by directing attention to a particular matter, referring to a prior statement or prior testimony, or by reading prior testimony or a portion thereof. *State v. Edberg*, 185 S.W.3d 290, 294 (Mo. App. S.D. 2006); *State v. Johnson*, 687 S.W.2d 706, 709 (Mo. App. W.D. 1985). Several of the questions were designed to refresh Eva's memory by directing her to prior statements she had made, including whether she told the police that Appellant laughed when the gun did not initially fire (Tr. 77), and the questioning about the statements the Eva made during the phone conversation that was played for the jury. (Tr. 127, 129-30). At least one of the questions in that series that Appellant complains of is not even leading, the one where the prosecutor asks what Appellant meant when he talked on the tape about "motherfuckers this and motherfuckers that." (Tr. 129).

The only questions that do not appear to fall within the categories mentioned above were the questions about whether Eva was upset when she wrote her statement to the police and whether she did the best she could. (Tr. 103-04). But those questions can hardly be said to have prejudiced Appellant, since the jury heard that the statement was given the night of the shooting, when it would be presumed that Eva was upset over her sister's death. (Tr. 102-03). The jury would also reasonably presume, even if the question had not been asked, that Eva would do the best that she could in writing out the statement. And in any event, the full contents of the statement were not presented to the jury, so that question and answer has no real prejudicial effect.

The court also noted that Eva was a difficult witness and that it had allowed the prosecutor some leeway in his questioning because of that. It is within the trial court's discretion to permit the leading of a difficult witness. *Miller*, 208 S.W.3d at 289.

Finally, the jury was instructed that it must not assume as true any fact solely because it is included in or suggested by a question asked a witness, and that a question is not evidence. (L.F. 640). The jury is presumed to follow the trial court's instructions. *McFadden*, 2012 WL 1931205 at *18. Appellant offers no facts that overcome that presumption. His point should be denied.

XIII.

No error, plain or otherwise, in admission of testimony and denial of motion to produce records not in the State's possession.

Appellant claims the trial court abused its discretion and plainly erred in allowing Stacy Stevenson's testimony about what he heard an unidentified man say, in denying his motion for Eva Addison's school and medical records, in letting the prosecutor "testify" that Eva's eyesight was excellent, and letting the prosecutor use Eva's testimony to identify Appellant as the speaker/shooter.[18] But Stevenson's testimony was not hearsay and was properly admitted, the court did not err in failing to order the State to disclose materials that it did not have and which the defense did not establish contained material information, and the prosecutor's argument was based on the evidence and the reasonable inferences from that evidence.

A. Underlying Facts.

1. Stacy Stevenson's testimony.

Appellant filed a motion in limine to exclude evidence that Stacy Stevenson, the witness who lived near the scene of the shooting, had

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[18] This point violates Rule 84.04(d) by grouping together multiple contentions not related to a single issue. *McFadden*, 2012 WL 1931205 at *11 n.3.

overheard a man's voice saying shortly before the shooting, "Fucking bitch, come here, where you fixing to go? I told you and your sister to get the fuck from down here and stay the fuck from down here." (L.F. 578-81). The motion claimed that the statement was hearsay that did not fall within a recognized exception to the rule against admitting hearsay. (L.F. 579). The trial court denied the motion at a pre-trial hearing, ruling that the statement was not being offered for the truth of the matter asserted, but was instead offered to show that the statement was made. (Mot. Tr. 29-30).

Stacy Stevenson testified for the State at trial and was asked if anything unusual happened at about 11:45 p.m. on May 15, 2003:

> Up there on the hill at Naylor, I heard commotion up there. I seen two females arguing. I don't know what they was arguing about.
>
> One of the females went back towards the house where she came from and the other female walked straight down Naylor going towards Kienlen.
>
> I turned around and looked back at TV. Probably about 30 seconds later, I heard a guy arguing with a female. He was telling her –
>
> MS. TURLINGTON: Objection. This is hearsay.
>
> MR. LARNER: Statement of the defendant, your Honor.

THE COURT: That will be overruled. You may proceed.

Q. (By Mr. Larner) You may say what you heard.

A. He was telling her, Fucking bitch, come here. Where are you fittin' to go? I thought I told you and your sister to get the fuck from down here and stay the fuck from down here.

(Tr. 178-79). Stevenson testified that he could not identify the man who made the statement and that he did not know Appellant. (Tr. 182, 184). The motion for new trial alleged that the trial court erred in letting the statement into evidence because it was a hearsay that did not fall within a recognized exception. (L.F. 717-18).

2. Request for Eva's school and medical records.

Appellant filed a pre-trial motion asking the trial court to order the State to produce Eva Addison's school and medical records. (L.F. 605-06). The motion alleged that "The defendant, Mr. McFadden, believes that Ms. Addison's school and medical records contain information that cast doubt upon her credibility, ability to observe and truthfulness . . . ." (L.F. 605). At a pre-trial hearing, defense counsel argued that Eva had trouble reading a clock during a previous trial. (Mot. Tr. 45). The prosecutor responded that Eva had read the clock accurately from forty feet away. (Mot. Tr. 46). The prosecutor also stated that the State did not have any medical records for Eva. (Mot. Tr. 46). The court asked defense counsel what basis she had to

believe that school and medical records contained information casting doubt on Eva's credibility, ability to observe, and truthfulness. (Mot. Tr. 46-47). Defense counsel responded that the records would have information about her eyes being tested. (Mot. Tr. 47). When the court asked if Eva wore glasses or contacts, defense counsel responded that she had no idea. (Mot. Tr. 47). The prosecutor stated that Eva had told him that her vision was 20/20 and that she had never worn contacts or glasses. (Mot. Tr. 47). Defense counsel conceded that she had no indication that Eva had an eyesight problem other than the previous incident where counsel believed she had trouble reading the clock. (Mot. Tr. 49). The court indicated that it would allow the defense to ask Eva prior to her taking the stand whether she had any medical problems with her eyes or had ever seen a doctor about her eyes. (Mot. Tr. 51). The court stated that it would revisit the issue of the medical records if Eva said that she did have such problem. (Tr. 51). The motion for new trial contained a claim that the trial court erred in overruling the motion to produce the school and medical records. (L.F. 734-35).

3. Claim that prosecutor "testified" about Eva's eyesight.

Eva was questioned about her eyesight on direct examination:

Q. And how good is your eyesight?

A. Good.

Q. What time does the clock say in the back of the room?

A. 10:18. Is it 10:18? 10:18. It's not 10:18?

Q. Well look at it.

A. Oh. It's 11:18. I'm sorry. Is it 11:18?

Q. Don't ask me. Tell me. What is it?

A. It's 11:18.

Q. Okay. You said 10:18 for a second there. All right, 11:18. Do you wear glasses?

A. No.

Q. Have you ever worn glasses?

A. No.

Q. Is your vision perfect, to your knowledge?

A. Yes.

(Tr. 71-72). Later on in direct, the prosecutor showed Eva a rental agreement for the Nissan that Appellant was riding in on the night of the murder. (Tr. 97). When the prosecutor asked Eva if she could see the document, Eva responded, "Jennings Station Road, St. Louis, Missouri, 63136." (Tr. 98). Defense counsel did not cross-examine Eva about her eyesight.

In the State's closing argument, the prosecutor said, without objection:

Now, look. A lot's been made about Eva's eyesight. She hit a glare on the screen, whatever, and couldn't tell 10:30 from – or

10:18 from 9:18 or 11, whatever it was. Sit in the chair. A little glare there.

You know the woman's got good eyesight. How do you know? Look at this. Look at this. She could read from where she was sitting in that box. She could read – can you read it? 8629 Jennings Station Road. She says, 8629 Jennings Station Road.

She's sitting here. I got glasses on, okay? And you're about the same distance away. Take a look at that. What do you think? Good eyesight? Woman's got good eyesight.

(Tr. 335-36). The motion for new trial contained no claim of error about the argument set forth above. (L.F. 706-73).

B. Analysis.

1. Admission of Stevenson's testimony.

Appellant objected to Stevenson's testimony on the basis that it was hearsay. Not all out-of-court statements are hearsay. *State v. Copeland*, 928 S.W.2d 828, 848 (Mo. banc 1996). The hearsay rule only prohibits the admission of out-of-court statements offered to prove the truth of the out-of-court declaration. *Id.* The out-of-court statement to which Stevenson testified was admissible under the well-established "verbal acts" rule. *Id.* That rule provides that utterances made contemporaneously with or preparatory to an act which is material to the ligitigation that tends to

explain, illustrate, or show the object or motive of an act, and which are offered irrespective of the truth of any assertion they contain, are not hearsay and are admissible. *Id.* Evidence of threats are admissible to show motive or intent. *State v. Petty*, 967 S.W.2d 127, 135 (Mo. App. E.D. 1998). Stevenson's testimony was admissible both as a threat made immediately preparatory to the shooting, and as evidence of a previous threat. Taken either way, the statement was probative of the motive and intent behind the shooting. The statement was not hearsay and was properly admitted.

Even if the statement did have a hearsay element to it, there was a reasonable basis for it to be admitted as a statement by the defendant. *See State v. Basile*, 942 S.W.2d 342, 358 (Mo. banc 1997) ("Generally, statements of the defendant are excepted from the hearsay rule."). The identity of a speaker can be established by circumstantial evidence. *State v. Edwards*, 31 S.W.3d 73, 80 (Mo. banc 2000). There was sufficient circumstantial evidence for the court to reasonably conclude that the speaker whom Stevenson heard was Appellant. Eva testified that she saw Appellant approach Leslie and argue with her. (Tr. 72). The words Stevenson heard were also consistent with the threats Appellant had made a short time earlier at 31 Blakemore. (Tr. 62, 64, 67). This is not a case where there was a complete lack of evidence to discern the identity of the person that Stevenson heard.

2. Request for disclosure of school and medical records.

The trial court also did not err in failing to order the disclosure of Eva's school and medical records. The rules of discovery do not require the State to disclose what it does not have. *State v. Johnson*, 957 S.W.2d 734, 748 (Mo. banc 1997). The prosecutor indicated at the hearing on the motion to disclose that the State did not have possession of the requested records. (Mot. Tr. 46). Appellant's discussion of *United States v. Nixon*, 418 U.S. 683 (1974), and other cases involving privilege of medical records are inapposite because Appellant's motion was not denied on the basis of privilege.

To be entitled to a court order requiring production of the records, Appellant has to demonstrate more than a mere possibility that the records might be helpful. *State v. Taylor*, 134 S.W.3d 21, 26-27 (Mo. banc 2004). Appellant's motion alleged:

> The defendant, Mr. McFadden, believes that Ms. Addison's school and medical records contain information that cast doubt upon her credibility, ability to observe and truthfulness and should be made available to the defense.

(L.F. 605). That allegation is insufficient to show an abuse of discretion by the trial court. *Id.*

In addition, when the court asked defense counsel at the hearing on the motion what basis she had to believe that school and medical records

contained information casting doubt on Eva's credibility, ability to observe, and truthfulness, counsel responded only that the records would have information about her eyes being tested, but also stated that she had no idea if Eva wore glasses or contacts. (Mot. Tr. 46-47). Defense counsel also conceded that she had no indication that Eva had an eyesight problem other than the incident at a prior trial where counsel believed Eva had trouble reading the clock. (Mot. Tr. 49). Despite the failure to articulate specific facts showing the need for the records, the court still granted defense counsel the opportunity to question Eva about her eyesight before she testified, and to revisit the issue of the records if Eva indicated problems with her vision. (Mot. Tr. 51). The record does not indicate that defense counsel discovered any information that would have warranted a court order for Eva's records.

3. Claim that prosecutor "testified" about Eva's eyesight.

The State may argue the evidence, the reasonable inferences from the evidence, and the credibility of the witnesses. *McFadden*, 2012 WL 1931205 at *15. That is exactly what the prosecutor did. In the argument that Appellant complains of, the prosecutor referred back to Eva's ability to read the address from the car rental agreement that was entered into evidence. The prosecutor also discussed the physical conditions in the courtroom, namely the visibility of the clock, that were readily observable by the jurors, so he did not base his argument on facts not before the jury. *See id.*

(vouching occurs when a prosecutor implies that he has facts establishing the veracity of a State's witness that are not before the jury for its consideration). The prosecutor also invited the jury to determine for itself from those facts whether Eva was able to see the events that she described.

4. Claim of "bootstrapping".

Appellant claims in his point relied on that the prosecutor "bootstrapped" an identification of Appellant as the shooter through Eva's testimony. (Appellant's Brf., p. 141). The argument portion of the brief also states that the prosecutor "bootstrapped" the identification by linking the testimony of Eva and Stevenson. (Appellant's Brf., p. 142). Appellant does not clearly explain what the prosecutor did or said that resulted in the alleged "bootstrapping." It is not this Court's role to create a viable analysis supporting a claim of error. *Id.* at *14. Nor is it Respondent's. Given that Stevenson's testimony was properly admitted and that the State is entitled to argue reasonable inferences from the evidence, it is difficult to see how any improper "bootstrapping" could have occurred.

None of Appellant's multifarious claims of error have merit. Appellant's point should be denied.

XIV.

Tape of jailhouse phone call was properly admitted.

Appellant claims that the trial court plainly erred and abused its discretion in admitting State's Exhibit 148-D, a tape recording of a conversation involving Appellant, Eva Addison, and a third man named "Slim" because the State failed to lay a foundation for the recording and it contained hearsay. The same recording was admitted into evidence at the trial on the Todd Franklin murder, and the same claim of error was raised in the appeal from that conviction. *McFadden*, 2012 WL 1931205 at *18-19. This Court found that the existence of the tape recording, Eva's positive identification of the recording as the conversation she had with Appellant and Slim, her testimony that it was a fair and accurate recording of that conversation, and the lack of any challenge to the voluntariness of the statement, established a foundation for admitting the tape. *Id.* at *19. In this trial, Eva identified the tape as a recording of her conversation with Appellant and Slim, identified the voices on the tape, and testified that the tape fairly and accurately showed their conversation. (Tr. 106-07). No challenge was raised to the voluntariness of the conversation. The same foundation that was laid in the Franklin murder trial was laid in this trial, and it was sufficient to establish the admissibility of the tape.

This Court also rejected the hearsay challenge to the recording, finding that the recording contained Appellant's admissions, which are a recognized exception to the hearsay rule. *Id.* The trial court did not err in admitting the tape, and Appellant's point should be denied.

XV.

No plain error in striking for cause veniremembers who were unable to consider imposing the death penalty due to their religious beliefs.

Appellant claims that the trial court plainly erred in striking for cause twenty veniremembers who expressed an unwillingness to impose the death penalty due to their religious beliefs. But the unobjected-to strikes were proper because the veniremembers' responses demonstrated that their views on the death penalty would prevent or substantially impair the performance of their duties as a juror in accordance with their instructions and oath.

A. Underlying Facts.

Veniremember Boyd stated during individual voir dire that she could not consider the death penalty and that she could not participate in a case where the death penalty is an option because she felt that only God had the right to take a life. (VD Tr.-I 52-53). Boyd said that she would automatically vote against the death penalty in all cases and that she could not set aside that belief. (VD Tr.-I 53). The State moved to strike Boyd for cause because she could not consider the death penalty. (VD Tr.-I 54). When asked if she had an objection, defense counsel said, "No." (VD Tr.-I 54).

Veniremember Heet said multiple times that he was not sure that he could vote for the death penalty, and he said there was a "strong possibility"

that his religious beliefs might prevent him from considering the death penalty and voting for it. (VD Tr.-I 186-87). When asked if he could sign the death verdict as jury foreman, Heet answered, "Absolutely not," and added that he was pretty firm on that position. (VD Tr.-I 188). Heet also said that he would not be able to announce a death verdict in open court. (VD Tr.-I 188). The prosecutor made a motion to strike for cause without giving any supporting reasons and defense counsel said "No" when asked if she had any objections. (VD Tr.-I 189). In granting the strike, the court noted that Heet was "very certain and clear about his not being able to return as a juror or sign a death form as a foreperson and general beliefs about the death penalty." (VD Tr.-I 189).

Veniremember Davis stated on her questionnaire that she could not judge life or death situations due to her Christian beliefs. (VD Tr.-I 287). She answered "Yes" when asked if she would be unable to vote for the death penalty in every case, and again when asked if she was against the death penalty 100 percent, and answered "No" when asked if it was possible for her to set aside her personal beliefs and consider both punishments. (VD Tr.-I 288). Defense counsel said "No" when asked if she had an objection to the State's motion to strike Davis for cause. (VD Tr.-I 288).

When veniremember Bunch was asked if he could consider the death penalty in an appropriate case he stated that he really did not think that he

could. (VD Tr.-I 324). When asked whether his response was based in a religious, moral or ethical feeling, Bunch answered, "No. It's just my six decade and a half of living and I just believe in the sanctity of life." (VD Tr.-I 324-25). Bunch also said that he could not be "a true believer" if he set those beliefs aside and considered the death penalty, and that he was firm in his belief. (VD Tr.-I 325). Bunch said that while he believed the death penalty was an appropriate punishment in some cases, he would not vote for a death sentence even if he believed that Appellant's case was one of those cases. (VD Tr.-I 326). Defense counsel answered "No" when asked if she had any objection to the State's strike for cause. (VD Tr.-I 327).

Veniremember Rebholz indicated on his questionnaire that he could not consider both punishments. (VD Tr.-I 399). Rebholz said that he was unable to realistically consider the death penalty based on his Catholic religion. (VD Tr.-I 400). Rebholz told defense counsel that there was no circumstance in which he would impose the death penalty, and that he could not set aside his beliefs and follow the court's instructions. (VD Tr.-I 402-03). Defense counsel was not asked if she objected to the State's motion to strike Rebholz for cause and she did not state an objection. (VD Tr.-I 403).

Veniremember Hornak stated that he was in transition as to whether there should be a death penalty and that he was beginning to lean more against the death penalty than ten years previously. (VD Tr.-II 30). Hornak

said that when push came to shove, he would have a problem with the death penalty based on religious grounds. (VD Tr.-II 30). Hornak also said that he could not sign a death verdict if he were foreman of the jury. (VD Tr.-II 31). He further said that he could not set aside his beliefs and consider the death penalty in Appellant's case. (VD Tr.-II 32). Defense counsel did not ask any questions and stated "No objection" when the State moved to strike Hornak for cause. (VD Tr.-II 32-33).

Veniremember Linville stated on her questionnaire that she could not consider the death penalty because she believed it was contrary to God's law and also because she believed that it violated the constitutional prohibition against cruel and unusual punishment. (VD Tr.-II 40-41). Linville said that she would choose life without parole over the death penalty in all cases and would not consider the death penalty as a viable option. (VD Tr.-II 41). Linville told defense counsel that there was no way that she could set aside those beliefs and consider both punishments if instructed to do so by the court. (VD Tr.-II 41). Defense counsel stated "No objection" when the State moved to strike Linville for cause. (VD Tr.-II 42).

Veniremember Merz stated on her questionnaire and in response to the prosecutor's questioning that she did not believe in the death penalty. (VD Tr.-II 43). When asked whether she would be unable to vote for the death penalty in all cases, she answered, "I think so. Yes, you're right." (VD Tr.-II

43). When asked if she would automatically vote for life without parole when given the choice between that and the death penalty, Merz answered, "Yes, I believe so." (VD Tr.-II 43). When asked if that was based on a belief that only God can determine when it's a person's turn to die and that she would therefore not be able to consider the death penalty, Merz answered, "Right." (VD Tr.-II 43-44). Merz said that she was absolutely firm in her beliefs. (VD Tr.-II 44). When asked by defense counsel if there was a possibility that she could set those beliefs aside and consider both punishments if instructed to do so by the court, Merz answered, "I don't think so." (VD Tr.-II 44). Defense counsel stated "No objection" when the State moved to strike Merz for cause. (VD Tr.-II 45).

Veniremember Gray said that he was a Jehovah's Witness and that sentencing someone to death conflicted with his religious beliefs. (VD Tr.-II 54-55). Gray said that would be unable to vote for the death penalty in all cases, that he would always vote for life without parole if given the choice between that and the death penalty, and that he could not set aside his beliefs for Appellant's case and consider the death penalty. (VD Tr.-II 55). Defense counsel asked no questions and stated "No objection" when the State moved to strike Gray for cause. (VD Tr.-II 55-56).

Prior to the questioning of veniremember Williamson, defense counsel noted that she was taking medication for schizophrenia and that could

possibly be sufficient reason to strike her. (VD Tr.-II 106-07). Williamson said that she was a "traditional Catholic" and was "against murder." (VD Tr.-II 107). Williamson said that in all cases she would automatically vote for life without parole if faced with the choice between that and the death penalty. (VD Tr.-II 108). When asked if that meant that she would never vote for the death penalty because of her religion, Williamson initially answered that she would probably vote for the death penalty if the case involved several murders by the accused. (VD Tr.-II 108). But under additional questioning by the prosecutor, defense counsel, and the court, Williamson stated that she could not vote for the death penalty and that she would not vote for it even in a case involving multiple murders. (VD Tr.-II 108-10). Defense counsel answered "No" when asked if she objected to the State's motion to strike for cause, which was made without articulating a reason. (VD Tr.-II 111). In granting the strike, the court stated both that Williamson was very clear on her indication on the death penalty and also that she had a medical condition with schizophrenia. (VD Tr.-II 111).

Veniremember Ousley said that she was unable to sit in judgment in any criminal case due to her religious beliefs. (VD Tr.-II 114, 116). Ousley said that she was against the death penalty in all cases and that she did not think that she could vote for the death penalty in any case. (VD Tr.-II 115). When asked by defense counsel if she could set aside her personal beliefs and

follow the court's instructions to consider the death penalty, Ousley twice answered, "I really don't think I could do it." (VD Tr.-II 116-17). Defense counsel said "No" when asked if she objected to the State's motion to strike Ousley for cause. (VD Tr.-II 117).

Veniremember Ayidiyah said that he believed that he was not one to judge other people because he was not perfect himself. (VD Tr.-II 135). Ayidiyah said that he would be unable to judge Appellant's guilt or innocence, that he did not believe in the death penalty, that he would be unable to consider the death penalty, that he believed punishment by death is cruel and wrong, that he would always choose the option of life without parole if serving on a jury, that he would not be able to consider voting for the death penalty, that he would be unable to sign a verdict of death as foreman, and that he would be unable to follow instructions directing him to consider both punishments. (VD Tr.-II 136-38). Defense counsel asked no questions and stated "No objection" when the State moved to strike Ayidiyah for cause. (VD Tr.-II 138-39).

Veniremember Hernton said that he would be unable to impose the death penalty against Appellant and would, in all cases, choose life without parole when given the choice between that and the death penalty. (VD Tr.-III 141). Under questioning by defense counsel, Hernton indicated that his views on the death penalty had changed since he had completed his juror

questionnaire, and he cited his religious beliefs as the reason. (VD Tr.-III 142-43). Defense counsel stated "No objection" when the State moved to strike Hernton for cause. (VD Tr.-III 144).

Veniremember Horst stated that she was opposed to the death penalty in all cases, would not ever be able to vote for the death penalty, and would not be able to set her views aside and follow the court's instructions to consider the death penalty. (VD Tr.-III 208). Defense counsel asked no questions and said "No objection" when the State moved to strike Horst for cause. (VD Tr.-III 208-09).

Veniremember Robinson said that she would not be able to vote for the death penalty for Appellant, that she believed only God and not man can give and take life, that she was not sure she could give a sentence of life without parole, but that in no case could she vote for the death penalty, and that she could not set her views aside for Appellant's case only to consider the death penalty. (VD Tr.-III 219-20). Defense counsel asked no questions and stated "No objection" when the State moved to strike Robinson for cause. (VD Tr.-III 220-21).

Veniremember Rohrbacker did not believe in the death penalty due to his Catholic faith and said that in no case could he consider the death penalty. (VD Tr.-III 221-22). Rohrbacker said that he could not set aside his beliefs and consider the death penalty in Appellant's case. (VD Tr.-III 222).

Defense counsel asked no questions and stated "No objection" when the State moved to strike Rohrbacker for cause. (VD Tr.-III 222-23).

Veniremember Bugarin said that he would automatically vote for life without parole if given the choice between that and the death penalty and that he could not vote the death penalty against anyone. (VD Tr.-III 363-64). Bugarin said that he would not be able to sign the verdict of death as foreman of the jury and would not be able to come into open court and announce a verdict of death. (VD Tr.-III 365). Bugarin answered "Yes" when asked if he had personal, moral, or religious beliefs against the death penalty. (VD Tr.-III 368). Defense counsel asked no questions and stated "No objection" when the State moved to strike Bugarin for cause. (VD Tr.-III 368-69). In granting the strike, the court noted that Bugarin had "a moral and personal perspective on the death penalty" and also that Bugarin could not sign the death warrant as a foreperson. (VD Tr.-III 369).

Veniremember Tornetto stated that he felt "pretty uncomfortable" about voting for the death penalty against Appellant. (VD Tr.-III 416). Tornetto ascribed that feeling to the Ten Commandments, specifically the commandment saying "Thou shalt not kill." (VD Tr.-III 416-17). Tornetto said that he would be unable to consider the death penalty for Appellant and would vote for life without parole in all cases where the choice was between that punishment and the death penalty. (VD Tr.-III 417). Tornetto said that

he could not set aside his feelings and consider the death penalty in Appellant's trial. (VD Tr.-III 417-18). Defense counsel asked no questions and responded "No" when asked if she had any objection to the State's motion to strike for cause. (VD Tr.-III 418-19).

Veniremember Bonastia volunteered, before the prosecutor began his questioning, that as a Catholic he would "not be able to be in favor of the death penalty." (VD Tr.-III 440). Bonastia said that given the choice between the death penalty and life without parole he would automatically vote for life without parole and would give no consideration to the death penalty option. (VD Tr.-III 441). Bonastia also said that he had also come to the conclusion that he would not be able to sit in judgment of Appellant due to his religious beliefs, would not be able to seriously consider the death penalty in any circumstances, and would not be able to set aside his views and consider the death penalty under the law in Appellant's case. (VD Tr.-III 441-42). Defense counsel asked no questions and responded "No" when asked if she had any objection to the State's motion to strike for cause. (VD Tr.-III 442-43).

Veniremember Schlake said that she did not believe in taking people's lives and did not think that she would be able to be responsible for taking someone else's life. (VD Tr.-IV 247). Schlake said that under no circumstances would she be able to vote for the death penalty and would not

be able to set aside her views and consider the death penalty. (VD Tr.-IV 247-50). Defense counsel asked no questions and stated "No objection" when the State moved to strike Schlake for cause. (VD Tr.-IV 250).

B. Analysis.

This Court should find that Appellant has waived his claim of error since defense counsel repeatedly said that she had no objection to the State's strikes for cause. A statement of "no objection," unlike a mere failure to object, affirmatively waives even plain error review. *Johnson*, 284 S.W.3d at 582. Even if the Court chooses to conduct plain error review, no such error occurred.

While veniremembers cannot be excluded simply because they voice general objections to the death penalty or express conscientious or religious scruples against its infliction, the State is permitted to exclude those jurors whose views on the death penalty would prevent or substantially impair the performance of his or her duties as a juror in accordance with his instructions and his oath. *Gray v. Mississippi*, 481 U.S. 648, 657-58 (1987); *Witt*, 469 U.S. at 424; *Storey*, 40 S.W.3d at 905; *State v. Roberts*, 948 S.W.2d 577, 597 (Mo. banc 1997). Appellant cites to no United States Supreme Court case or opinion of this Court that holds that a prospective juror is shielded from being struck for cause because their inability to perform their duties as a juror stems from a religious belief. To the contrary, this Court has explicitly

rejected Appellant's argument, made for the first time on appeal, that striking a person whose religious views would prevent them from fulfilling their duties as a juror violates article I, section 5 of the Missouri Constitution. *See*, *e.g.*, *Storey*, 901 S.W.2d at 892-93; *State v. Sandles*, 740 S.W.2d 169, 178 (Mo. banc 1987).

In the 2001 *Storey* opinion, this Court upheld the strike for cause of a venireperson who said that he had a moral or religious belief that stopped him from considering the death penalty in the defendant's case. *Storey*, 40 S.W.3d at 905. The venireperson later said that it was possible, but not likely that he could consider the death penalty in "a very severe case" and added that the prosecutor "would really have to show me some evidence." *Id.* This Court found that the venireperson's equivocal and shifting responses to questions focusing on his ability to impose the death penalty provided a sufficient basis for the trial court to conclude that the venireperson could not consider the full range of punishment as required by his oath and the instructions. *Id.*

Unlike the venireperson in *Storey*, the vast majority of the venirepersons identified by Appellant expressed no equivocation at all about their inability to consider or impose the death penalty against Appellant. Even in the case of any veniremembers who gave answers that might be viewed as equivocal, that equivocation provided the trial court with a

sufficient basis to conclude that the venireperson could not discharge their responsibilities as jurors by giving serious consideration to imposing both punishments. *See also*, *Tisius*, 92 S.W.3d at 763 (finding no abuse of discretion in sustaining strike for cause where veniremember equivocated on ability to impose the death penalty). And all of those veniremembers, plus several others, stated unequivocally that they could not sign a death verdict if they were foreman of the jury, which as discussed in Point III above provides sufficient cause for a strike.

It also bears pointing out that some veniremembers were struck for reasons other than their religion-based views on the death penalty. Veniremember Linville voiced both religious and constitutional objections to the death penalty. (VD Tr.-II 40-41). Veniremember Williamson was also struck because she suffered from schizophrenia, which defense counsel had identified as a possible reason to strike her. (VD Tr.-II 106-07, 111). In addition, veniremember Bugarin said that he had personal, moral, or religious objections to the death penalty, but did not specify which category or categories his beliefs fell into. (VD Tr.-III 360). It thus cannot be clearly said that he was struck due to his religious beliefs.

Because the trial court is in the best position to evaluate venireperson's responses, it has broad discretion in determining the qualifications of prospective jurors based on the entire voir dire examination and by giving

what it believes to be the appropriate weight to the venireperson's answers. *Roberts*, 948 S.W.2d at 597-98. Appellant has not shown that the trial court abused its discretion, much less plainly erred, in granting the State's unobjected-to strikes for cause. His point should be denied.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 26,646 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and

2. That a copy of this notification was sent through the eFiling system on this 22nd day of June, 2012, to:

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