No. SC90286

In the Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

LANCE C. SHOCKLEY,

Appellant.

Appeal from Carter County Circuit Court
Thirty-Seventh Judicial Circuit
The Honorable David P. Evans, Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Lance Shockley appeals his conviction for murder in the first degree, section 565.020, RSMo, and sentence of death for the shooting death of Missouri Highway Patrol Sergeant Carl DeWayne Graham, Jr. Appellant was tried by a jury on March 18-28, 2009, before Judge David P. Evans. (L.F. 34, 52-57).[1] He does not contest the sufficiency of the evidence to support his conviction.[2] Viewed in the light most favorable to the verdict, the evidence at trial showed:

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[1] The record on appeal consists of the Legal File (L.F.); a one-volume transcript of pre-trial proceedings conducted before the Honorable William L. Syler (Pre-Trial Tr.); a four-volume transcript of pre-trial, trial, and sentencing proceedings before the Honorable David P. Evans (Tr.); a transcript of a hearing conducted on December 22, 2010, regarding the completeness of the trial transcript (12/22/10 Tr.); a supplemental transcript filed with this Court on February 9, 2011 (Supp. Tr.); and various State's Exhibits that were admitted into evidence (State's Ex.).

[2] Appellant prefaces the argument portion of the brief with a discussion, separate from his Points Relied On, of the weight of the evidence in which he discusses the evidence and the inferences from that evidence in the light most favorable to the defense. (Appellant's Brf., pp. 63-70).

Appellant and his wife Coree[3] spent Thanksgiving of 2004 hosting Coree's sister, Cindy Chilton, and her fiancee Jeff Bayless at their home in Eastwood. (Tr. 1087-89). The day after Thanksgiving, the two women visited another sister in Poplar Bluff while Appellant and Bayless stayed behind. (Tr. 1089). The women arrived back at Appellant's home shortly after 7:30 in the evening and found that the two men had left, taking Appellant's white pick-up truck. (Tr. 1089, 1093). Bayless called the house at about 7:45 p.m. and sounded drunk. (Tr. 1090). Either he or Appellant said that they were hungry and on the way back home. (Tr. 1090).

Ivy and Paul Napier were watching television at their home in Eastwood at about 8:00 p.m. when Ivy heard a car drive by at a faster than usual speed. (Tr. 1038-40). She heard a knock on the door about fifteen minutes later and saw that Appellant was at the door. (Tr. 1040-41). He was invited inside and Ivy noticed that he had blood on his hands. (Tr. 1042-43, 1061). Appellant said that he had been in an accident and needed help. (Tr. 1043, 1061).

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[3] For purposes of clarity, certain witnesses sharing the same last name, including Coree and Robert Shockley, and Ivy and Paul Napier will at times be referred to by their first names. No disrespect is intended.

Paul accompanied Appellant to the scene of the accident to see if anything could be done for Bayless. (Tr. 1043, 1061). When they arrived at the scene, Paul realized that Bayless was beyond help. (Tr. 1061-62). Paul and Appellant returned to Paul's house, and Appellant called home and spoke with Coree. (Tr. 1044, 1091-92). Paul then drove Appellant home. (Tr. 1062). At some point when they were together, Appellant told Paul that he knew it was wrong and that he would do the right thing. (Tr. 1068).

About a mile from the house they met Coree and Chilton, who were driving towards the crash scene. (Tr. 1063, 1092-94). Appellant got into their car and they drove back to his house. (Tr. 1064, 1095). On the way back, Appellant told Chilton that Bayless was dead. (Tr. 1096). Appellant went into the house and made a phone call while Chilton and Coree drove to the crash site. (Tr. 1098-99).

Ivy, who was a certified nurses aide, called for medical assistance for Bayless. (Tr. 1045-46). She then drove to the crash site and saw the white truck off the road, with Bayless inside. (Tr. 1046). She checked Bayless for a pulse, but could not find one. (Tr. 1047). Paul returned to the scene, followed by Coree and Chilton, and they were all present when a local police officer arrived. (Tr. 1047, 1064, 1100-01). Highway Patrol Sergeant Carl Dewayne Graham, Jr. also arrived at the scene and began investigating. (Tr. 1071, 1101). After checking on Bayless, Sergeant Graham told Coree and Chilton

that there was nothing more to do and that they should go home. (Tr. 1101-02). They did. (Tr. 1102).

The investigation continued, with another officer finding beer cans and a tequila bottle inside the truck, and a spot of blood on the outside of the truck on the passenger side where Bayless was sitting.[4] (Tr. 1074). Sergeant Graham went to Appellant's house that night and spoke to Coree at the doorway. (Tr. 1104). She got Appellant out of the bedroom and he talked to Sergeant Graham on the porch. (Tr. 1105). Sergeant Graham then came inside and told Chilton to let him know if there was anything he could do for her. (Tr. 1106). He also gave her his card, which Chilton laid on a table and found shredded to pieces the next morning. (Tr. 1106-07).

At some point during the evening, Appellant told Coree and Chilton's stepfather that he had been driving the truck and that he was responsible for Bayless's death. (Tr. 1155). Appellant took Chilton to the crash site the next day and pointed out the spot where he lost control of the truck. (Tr. 1109). He apologized to Chilton and said that he would be there for her. (Tr. 1109). Despite their knowledge of Appellant's role in the crash, neither Chilton nor

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[4] Sergeant Graham collected a sample of the blood and sent it to the Highway Patrol laboratory. (Tr. 1075-76). It was tested for DNA in 2006 and found to be consistent with Appellant's DNA. (Tr. 1076-77).

any other family members said anything to law enforcement. (Tr. 1110). They were not the only ones to keep Appellant's involvement from the authorities. Sergeant Graham questioned Ivy Napier on the night of the crash. (Tr. 1047). She lied to protect Appellant and told Sergeant Graham that she did not know who had been involved in the wreck. (Tr. 1048).

Ivy did not hear anything more from Sergeant Graham until March 19, 2005. (Tr. 1048). Sergeant Graham came to the nursing home where Ivy worked and told her that Appellant had admitted to being involved in the accident. (Tr. 1049). Ivy told Sergeant Graham that Appellant had been to her house the night of the accident, but did not go into any further detail. (Tr. 1050). Ivy called Appellant after she got home from work that day and told him about her conversation with Sergeant Graham. (Tr. 1050-51). Appellant said that he had never told the Highway Patrol that he was involved in the accident. (Tr. 1051).

Cindy Chilton was at Appellant's house when Ivy called. (Tr. 1116). She went to a restaurant and bar where she learned from her mother that Sergeant Graham had been looking for her. (Tr. 1117). Graham indicated to Chilton's mother that he believed that Appellant was driving the truck when it crashed. (Tr. 1114). Chilton's mother relayed that to Chilton, who in turn told Coree. (Tr. 1114-16). Coree told Chilton that she was scared. (Tr. 1118). Appellant met with Chilton at 8:30 or 9:00 the next morning and told her

that she did not have to talk to Sergeant Graham. (Tr. 1119). Appellant then went to the home of Chilton's parents and asked her stepfather where Sergeant Graham lived. (Tr. 1159-60). The stepfather knew that information from being friends with Sergeant Graham's landlord, and he told Appellant the location of the house. (Tr. 1160).

Appellant called his uncle, Robert Shockley, that morning and asked to borrow his truck, but was refused. (Tr. 1389-90). Appellant went to his grandmother's house, located a few hundred feet from his own, at about 12:30 p.m. and borrowed her red 1995 Pontiac Grand Am that had a yellow sticker on the left hand side of the trunk. (Tr. 1801, 1803-08). The car was seen parked between 1:45 and 4:15 that afternoon on the wrong side of a lightly-traveled gravel road near where Sergeant Graham lived. (Tr. 1855-74, 1887-97, 1904-06, 1913). Appellant returned the car to his grandmother at about 4:30 p.m. (Tr. 1824-25). Investigators traveled different routes from the location where the car was seen to Appellant's home. (Tr. 1082-84). The most direct route took eighteen minutes and forty-two seconds when driven at the speed limit. (Tr. 1082).

Sergeant Graham was on duty that day, Sunday, March 20th. (Tr. 1165-66). He backed his patrol car into the driveway of his home, located on a private road in a densely-wooded rural area, and radioed the dispatcher at 4:03 p.m. that he was ending his shift. (Tr. 1168-69, 1192, 1226, 1297-98;

State's Ex. 4). At about the same time, employees of Ozark Applicators were loading a trailer at their business, which was owned by Sergeant Graham's landlord and was near the house that Graham rented. (Tr. 1173-76, 1186-87; State's Ex. 141). They heard a rifle shot coming from the direction of the house. (Tr. 1175-76). A few minutes later, they heard two shotgun blasts coming from the same area. (Tr. 1178, 1190). The timing of the shots suggested that they might have been fired in sequence from a pump shotgun. (Tr. 1179, 1190).

A woman named Judy Hogan was driving by Sergeant Graham's house at about 5:10 or 5:15 p.m. when she saw Graham lying in the driveway next to the left rear door of his car, which was open. (Tr. 1199, 1208-11). Papers and other items were lying on the ground next to the body. (Tr. 1209, 1233-34). Hogan drove up and saw that Graham was dead. (Tr. 1210). Sergeant Graham was shot in the back with a bullet from a high-powered rifle that penetrated his Kevlar vest. (Tr. 1260-62). The bullet traveled in an upwards path and lodged near the chin and neck area. (Tr. 1263-64). The land next to the driveway sloped downwards into the woods, with a wall made of railroad ties at the bottom of the hill. (Tr. 1304-07; State's Exs. 62, 69). Sergeant Graham's back was facing that area and investigators concluded that the initial rifle shot was fired from the retaining wall. (Tr. 1322-25, 1329). A splinter of wood was found to have been knocked off the top of the wall and

appeared to have been dislodged recently. (Tr. 1327-28; State's Exs. 64, 66). The bullet severed Sergeant Graham's spinal cord in the neck, causing him to immediately become completely paralyzed. (Tr. 1264, 1267). He fell backwards, with the force of the fall fracturing his skull and his ribs. (Tr. 1264-65, 1267; (State's Exs. 11, 12). Sergeant Graham, who was still alive, was then shot in the left side of the face and shoulder with a shotgun, with some of the pellets entering his lung. (Tr. 1258, 1266-68; (State's Exs. 73, 74). Pieces of paper wadding from shotgun shells were found near the body. (Tr. 1309-10, 1318-19, 1382).

Paperwork concerning Sergeant Graham's investigation into the crash that killed Jeffrey Bayless was found in the patrol car. (Tr. 1312-16, 1368-71; State's Exs. 25-27). A supplemental report found on Sergeant Graham's computer stated that he had learned in January of Appellant going to Ivy Napier's house with blood on his hands and asking for help. (Tr. 1132, 1135, 1137). The report also detailed Graham's interviews with Ivy and Paul Napier on March 19th, and his attempts to contact Cindy Chilton that same day. (Tr. 1138-40).

The rifle bullet recovered from Sergeant Graham's body was deformed, but was determined to be a small caliber bullet that would fit a .243 caliber rifle. (Tr. 1261-62, 1270). Sometime around 7:00 on the night of the murder, Coree Shockley went to Robert Shockley's house and gave him a box of .243

shells. (Tr. 1395-96). Robert told Coree that he did not want them because he did not have a .243 rifle.[5] (Tr. 1396). Coree responded, "Lance said you'd know what to do with them." (Tr. 1397). Robert put the shells in a drawer. (Tr. 1397). Robert eventually handed over the box of shells to police officers who came to his house to question him. (Tr. 1398, 1418-19). Coree's fingerprint was found on the box. (Tr. 1446, 1450). Appellant had owned at least one .243 rifle[6] and had fired it on Robert's property, including one time in January of 2005 that he brought over and shot a stray dog that he could not get rid of. (Tr. 1403-05, 1407, 1579). Officers searched Robert's property and recovered a .243 shell casing. (Tr. 1406, 1427). They also searched Appellant's property and recovered several bullet fragments and spent .243 Winchester shell casings. (Tr. 1458, 1467-71, 1534). A search of a wood-

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[5] Robert testified that he and Appellant had bought ammunition together for years, that Appellant placed the orders, and that he (Robert) had never owned a .243 caliber gun. (Tr. 1386). He also testified that the night of the murder was the only time that Appellant or Coree brought him .243 ammunition. (Tr. 1416).

[6] Robert and other witnesses described seeing a .243 rifle with a scope on it. (Tr. 1405, 1731, 1744, 1748, 1792). One witness testified that the gun was kept in a gun cabinet. (Tr. 1732).

burning furnace outside of the house yielded two brass heads from shotgun shells and some metal clips, grommets, and buttons from bib overalls.[7] (Tr. 1471-73, 1521-22, 1531-33). Officers also seized numerous rifles, shotguns, pistols, and ammunition located throughout the house, including three shotguns, two of which were pump action. (Tr. 1479, 1483-85, 1535-47). They did not recover any .243 caliber weapons or live .243 ammunition. (Tr. 1489, 1547-48). But the officers did see a gun cabinet that had only one empty slot. (Tr. 1481).

A Highway Patrol firearms examiner compared class and individual characteristics on three bullet fragments recovered from Appellant's property to the slug pulled out of Sergeant Graham's body. (Tr. 1672). He concluded within a reasonable degree of scientific certainty that those bullet fragments and the slug were fired from the same weapon. (Tr. 1676-77). Two other examiners at the Highway Patrol Laboratory also examined the bullet fragments and the slug and came to the same conclusion. (Tr. 1678-79). The slug and some of the bullet fragments were identified as belonging to the .22 to .24 caliber class of ammunition, which would include .243-caliber ammunition. (Tr. 1665-71). The examiner also testified that the shotgun

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[7] The jury heard testifimony that Appellant wore overalls and that he was strict about not burning trash in the wood stove. (Tr. 1124-25, 1572-73).

shell heads pulled from the wood stove were 12-gauge Olin/Winchester brand manufacture, which was consistent with the wadding found near Sergeant Graham's body. (Tr. 1702-03). A private forensic consultant also compared the bullet fragments and the slug recovered from Sergeant Graham. (Tr. 1581, 1583, 1595-98). He testified that the bullet fragments and the slug recovered from Sergeant Graham's body had consistent class characteristics and had some individual characteristics that corresponded to one another. (Tr. 1609, 1616). But he was unable to either identify or exclude any of the ammunition as being fired from the same gun. (Tr. 1614).

The Highway Patrol firearms examiner also compared class and individual characteristics of the .243 shell casing found at Robert Shockley's home with the .243 shell casings found at Appellant's home. (Tr. 1691-93). He concluded within a reasonable degree of scientific certainty that all of the shell casings had been fired from the same weapon. (Tr. 1693-94).

Highway Patrol investigators went to Appellant's home the night of Sergeant Graham's murder. (Tr. 1921-22). When they arrived at the house they called Appellant on the phone. (Tr. 1927-28). He refused to talk to them. (Tr. 1928-29). But he then came out on his porch and told the officers that he did not kill Sergeant Graham. (Tr. 1930-31). He also said that he

had been at home all day, working with his neighbor, Sylvan Duncan.[8] (Tr. 1932).

The officers visited Appellant at his worksite at about 11:30 the next morning. (Tr. 1934-35). They approached Appellant, who was in his truck eating lunch with his cousin. (Tr. 1779, 1935-36). Appellant told the officers that he would talk to them after he finished eating his lunch. (Tr. 1780, 1936). The officers walked back to their car while Appellant stayed in the truck. (Tr. 1783, 1937). Appellant borrowed a cell phone from his cousin and called Coree. (Tr. 1783-84, 1938). He asked Coree if the police had visited her, what they had asked her and what she had told them. (Tr. 1785). Coree responded that she had told the officers that Appellant had been at the house all day on Sunday until 5:30 or 5:45, when he went to Robert's house for a few minutes. (Tr. 1786). Appellant replied, "Okay, that will work, that will be fine." (Tr. 1786). Appellant then talked to the officers and gave them a more detailed account of his activities the previous day, which this time had him visiting relatives, including his grandmotheher at 7:30 in the morning, and watching Sylvan Duncan from his living room as Sylvan Duncan pushed brush. (Tr. 1939-40, 1944). That contrasted from the story he had told the

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[8] Appellant gave that same alibi to Cindy Chilton earlier in the evening. (Tr. 1123).

night before, in which he had claimed to have worked all day and to have worked with Duncan. (Tr. 1940-41). Appellant also did not say anything about borrowing his grandmother's car. (Tr. 1944). He did admit to knowing that Sergeant Graham was investigating him for leaving the scene of a fatality accident and talking to witnesses. (Tr. 1947). And he gave an unprompted statement about not knowing where Sergeant Graham lived. (Tr. 1944-45). As the officers left, Appellant said to them, "Don't come back to my house without a search warrant, because if you do there's going to be trouble and somebody is going to be shot."[9] (Tr. 1946).

Appellant visited his grandmother later that day and instructed her to tell the police that he was home all day on Sunday. (Tr. 1825). When the grandmother told Appellant that she would not lie for him, Appellant placed his finger over his mouth and said, "I was home all day Sunday. I was home all day Sunday. I was home all day Sunday." (Tr. 1825-26). And he told the cousin who overheard the phone conversation with Coree to keep his mouth shut. (Tr. 1787-88). Appellant also later asked the investigators to come to

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[9] Appellant was upset about an incident while he was being questioned the previous night where a police officer's rifle accidentally discharged on his property. (Tr. 1937). That incident will be discussed in more detail in the response to Appellant's Point III.

his house, where he berated them for interviewing his friends. (Tr. 1954). He also demanded to know who the officers had talked to and what they had said. (Tr. 1955).

Appellant was arrested the day following that confrontation for leaving the scene of an accident. (Tr. 1758, 1958). Appellant was not told the charge that he was being arrested on, and he stated that it probably had something to do with the trooper who had been shot. (Tr. 1762). Appellant denied borrowing his grandmother's car on the day of the murder. (Tr. 1960-61). But when asked if his grandmother was lying when she said that he was driving the car, Appellant replied that she was not a liar. (Tr. 1961). And when the officers confronted Appellant with their knowledge that Coree had taken a box of .243 shells to Robert's house, Appellant dropped his head. (Tr. 1961-63). While he was in jail, Appellant told a former girlfriend and mother of his children that he had done something really stupid. (Tr. 1575-76).

Appellant did not testify at trial. (Tr. 2010-11, 2019-20). He presented the testimony of one of the motorists who saw his grandmother's car on the rural road near Sergeant Graham's house. (Tr. 1993). That motorist testified that he had taken a stab at giving police the license plate number of the vehicle and had said that it could have contained the letters L and M. (Tr. 1995, 2000). The license plate on Appellant's grandmother's car did not contain those letters. (Tr. 2007). The witness also testified on cross-

examination that he saw Appellant's grandmother's car after it was seized by the police and that there was no doubt in his mind that it was the car he had seen on the day of the murder. (Tr. 2001-03, 2007).

The jury found Appellant guilty of murder in the first degree. (Tr. 2059; L.F. 1704). The State and the defense presented multiple witnesses in the penalty phase of the trial. (Tr. 2062-2137). The jury unanimously found the existence of three statutory aggravating circumstances: (1) that Carl Dewyane Graham, Jr. was a peace officer murdered because of the exercise of his official duty; (2) that Carl Dewayne Graham, Jr. was murdered for the purpose of preventing a lawful arrest of the defendant; and (3) that Carl Dewayne Graham, Jr. was a potential witness in the pending investigation of defendant for leaving the scene of a motor vehicle accident on or about November 26, 2004 and was killed as a result of his status as a potential witness. (Tr. 2227; L.F. 1723). The jury also returned a verdict stating that it did not unanimously find that there were facts and circumstances in mitigation of punishment sufficient to outweigh the facts and circumstances in aggravation of punishment. (Tr. 2227-28; L.F. 1723). The jury was unable, though, to agree on punishment. (Tr. 2227; L.F. 1723). On May 22, 2009, the court imposed a sentence of death. (Tr. 2236; L.F. 1765-66). In doing so, the court certified the jury's finding of the existence of the statutory aggravating circumstances and agreed with the jury's finding that the

mitigating facts and circumstances did not outweigh the aggravating facts and circumstances. (Tr. 2236; L.F. 1765-66). Additional facts specific to Appellant's points relied on will be set forth in the argument responding to those points.

ARGUMENT

I.

Appellant has failed to show that the entire transcript filed with this Court is incomplete or inaccurate or that he has suffered any prejudice from alleged errors or omissions in the transcript.

Appellant claims that the trial court erred in finding that the trial transcript is complete and accurate and in certifying that the transcript is sufficient for appellate review. But the circuit court, upon this Court's order, filed a supplemental transcript containing two proceedings omitted from the original transcript and Appellant has failed to show that any other trial proceedings have been omitted. And by not identifying any missing proceedings, Appellant has necessarily failed to make the required showing of prejudice from mistakes in or omissions from the transcript.

A. Underlying Facts.

The Notice of Appeal was filed in the Circuit Court on June 1, 2009, and in this Court on July 24, 2009.[10] The five volume trial transcript was filed on May 3, 2010. Appellant filed a motion for an extension of time to file his brief on July 30, 2010. That motion alleged that the trial transcript "appears to have been prepared under unusual circumstances." The motion

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[10] Respondent asks the Court to take judicial notice of its own files.

stated that the court reporter had been unable to prepare the transcript, and that it was eventually prepared by the Office of State Courts Administrator (OSCA), relying on courtroom voice recordings. The motion further stated that Appellant believed that some proceedings had been conducted outside of the courtroom, and that his trial attorneys had been asked to review the transcript to determine if any proceedings had not been transcribed.

On October 5, 2010, Appellant filed a motion to remand the case to the circuit court for determination of the sufficiency of the trial transcript and for preparation of a supplemental transcript. The motion was granted on October 13, 2010, and the circuit court was ordered to file a report with this Court on or before December 13, 2010.

The circuit court received an extension of time, and conducted a hearing on December 22, 2010. (12/22/10 Tr. 2). Court reporter Andrea Moore testified that she recorded Appellant's trial with a voice recognition program that translated into text the words that she spoke into a recording mask, and saved them onto her computer. (12/22/10 Tr. 4, 7, 12). She also placed two microphones in the courtroom that were attached to digital recording devices and made two recordings of what was being said in the courtroom. (12/22/10 Tr. 13). Moore said that every night during the trial she would copy the text and audio recordings onto DVDs and would make two copies of those DVDs. (12/22/10 Tr. 14).

Moore testified that there was only one time during the trial when something was recorded outside of the main courtroom. (12/22/10 Tr. 5). That discussion took place in an anteroom and concerned a question from the jury about continuing deliberations after being unable to agree on punishment. (12/22/10 Tr. 27). Moore said she also set her equipment up in a smaller courtroom that day, but was never asked to go on the record and record anything in that courtroom. (12/22/10 Tr. 6, 10). She testified that the judge did ask her to transcribe part of the voir dire proceedings concerning juror number 58, and that she did so in that courtroom. (12/22/10 Tr. 22, 24, 32). Moore said that she never recorded anything in the judge's chambers. (12/22/10 Tr. 6, 21).

Moore testified that she had difficulty preparing the transcript for this Court in a timely manner because of family illnesses and also because of a large number of trials held in the circuit. (12/22/10 Tr. 8, 15). She said those issues were not present during the trial and did not affect her ability to transcribe the proceedings during trial. (12/22/10 Tr. 8-9). Moore eventually sent her audio and text files to OSCA, along with written notes that she made during the trial. (12/22/10 Tr. 4, 8). Moore said that OSCA had trouble opening some of the files, but that problem was resolved after Moore traveled to Jefferson City and met with the OSCA staff. (12/22/10 Tr. 11-12, 16-18). She also said that the voice recording did not pick up a discussion that

occurred after voir dire but before the start of the trial, but that the OSCA transcribers were able to use a backup audio file. (12/22/10 Tr. 11). Moore testified that she reviewed parts of the transcript prepared by OSCA, did not see any problems and did not believe that she had omitted anything that was supposed to have been on the record. (12/22/10 Tr. 9-11).

One of Appellant's trial counsels, Brad Kessler, testified that he knew for a fact that an on-the-record discussion took place outside the main courtroom. (12/22/10 Tr. 39). Kessler testified that he thought the discussion took place before the jury became deadlocked on punishment and that it involved a more significant issue than that. (12/22/10 Tr. 39). Kessler was unable to provide anything more specific about that discussion.

Appellant's other trial counsel, David Bruns, testified that he thought a record was made in the small courtroom on Saturday morning, but he could offer no specifics on what that record was. (12/22/10 Tr. 40). He did testify that the issue being discussed that morning concerned whether Juror No. 58 should be struck from the jury, whether Kessler could continue to represent Appellant, and how that impacted the case. (12/22/10 Tr. 40). Bruns noted that those issues were eventually resolved and that a long record was made in the courtroom.[11] (12/22/10 Tr. 41).

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[11] See Trial Transcript pages 2147 to 2211.

Prosecutor Kevin Zoellner testified that some off-the-record discussions were had in chambers on Saturday morning about the concerns that had arisen over Juror No. 58 and that the attorneys then waited with Appellant in the small courtroom while the court conducted research on its options. (12/22/10 Tr. 45-47). Zoellner said that the court came in and talked about what it intended to do, and that everyone then went into the main courtroom to make a record. (12/22/10 Tr. 47-48).

The circuit court filed a report with this Court on February 9, 2011, in which it found that two brief conferences between the trial judge and trial counsel held in the court anteroom during trial were not included in the transcript filed with this Court. (Appellant's App., pp. A3-A4). The trial court directed that a supplemental transcript containing those discussions be filed with this Court, and it approved the transcript as supplemented as a true and accurate reproduction of the proceedings transcribed. (Appellant's App., pp. A3-A4). The anteroom discussions contained in the supplemental transcript concerned juror conduct that occurred on Thursday, March 26, 2009, and the punishment phase vote that occurred on Saturday, March 28, 2009. (Supp. Tr. i).

B. Standard of Review.

This Court's review on direct appeal is for prejudice, not mere error. *State v. McLaughlin*, 265 S.W.3d 257, 262 (Mo. banc 2008). A trial court's decision will thus be reversed only if it is both erroneous and sufficiently prejudicial that it deprived the defendant of a fair trial. *Id*.

C. Analysis.

Appellants are entitled to a full and complete transcript for the appellate court's review, but they are entitled to relief only if they exercised due diligence to correct the deficiency in the record and they were prejudiced by the alleged defects. *State v. Christeson*, 50 S.W.3d 251, 271 (Mo. banc 2001). Rule 30.04(h) allows for misstatements or omissions in the record to be corrected by stipulation of the parties or by an order of the appellate court directing that the defect be corrected. *Id*. at 272. Appellant obtained an order from this Court to have the circuit court certify the accuracy of the transcript. Appellant thus exercised due diligence in attempting to correct the alleged defects. *Id*.

But he is still not entitled to relief because he has failed to identify any inaccuracies or omissions that were not addressed in the supplemental transcript, and he has failed to show that he was prejudiced. The defendant in *Christeson* failed to prove prejudice when he "merely cite[d] various lines

on eighty pages dispersed throughout a transcript of more than 2,000 pages and allege[d] that a mistake occurred, without specifying what the mistake was or how it affects his appeal." *Id*. This Court found that another defendant failed to establish prejudice from thirty-four omissions in a nearly 4,000 page transcript from a three week trial. *State v. Middleton*, 995 S.W.2d 443, 466 (Mo. banc 1999).

Appellant has not pointed to anything omitted from the trial transcript that was not corrected through the circuit court's filing of the supplemental transcript. And the matters that were omitted from the original 2,243 page transcript were brief and did not involve any matters that were crucial to this appeal. The first matter concerned whether a juror had been winking and smiling at the defendant's family. (Supp. Tr. 2). The State did not ask that the juror be removed and the court concluded that there was insufficient evidence to establish that the juror had engaged in any misconduct. (Supp. Tr. 2-6). That exchange thus did not implicate any issues that Appellant would raise as a claim of error on appeal. The second omitted discussion provided through the supplemental transcript occurred after the jury sent the court a note indicating that it was deadlocked on punishment. (Supp. Tr. 7). That discussion consisted of the court and the attorneys working out the appropriate response to the jury's question about whether it should continue deliberations. (Supp. Tr. 7-8). Because both sides agreed on the wording of

the response, the discussion again does not implicate any issues that could be raised as errors on appeal.

Unable to specifically identify any missing proceedings, Appellant instead disparages the court reporter's work by misrepresenting her testimony at the December 22nd hearing. He first claims that the court reporter was unable to complete the transcripts because of her own disabilities. The court reporter testified that her difficulty in finishing the transcript stemmed from the death of her grandfather, from her child's ankle surgery, and from a large number of trials conducted in the circuit. (12/22/10 Tr. 15). She also testified that none of those issues were occurring or influencing her during the trial and would not have prevented her from producing a fair and accurate transcript. (12/22/10 Tr. 8-9).

Appellant also argues that the court reporter was very sick on the final morning of trial and that she was "horribly nervous" about whether counsel had been advised that the emergency transcript she had prepared that morning was just a rough draft. The court reporter did testify that she had bronchitis on Saturday and that her voice recognition files were not good because she was coughing a lot. (12/22/10 Tr. 19). But the court reporter also relied on audio recordings of the courtroom proceedings in addition to the voice recognition files. (12/22/10 Tr. 8, 12-13). Nothing in the record suggests that the court reporter's bronchitis on that one day impeded the preparation

of the transcript of that day's proceedings. Appellant also overstates the court reporter's nervousness over counsel being advised that the emergency transcript was a rough draft. She testified that her concern was relieved when the court did give counsel that advice on the record. (12/22/10 Tr. 22). The record simply does not show that the court reporter's conscientious concern over the preparation of an emergency transcript during a break in the trial proceedings affected the accuracy of her transcription of the actual trial.

Appellant also overstates the alleged difficulties that OSCA had in preparing the transcript. The emails included in the appendix to Appellant's brief raise minor issues and there is no evidence or suggestion that those issues were not satisfactorily resolved.

Appellant has failed to show that the entire transcript provided to this Court is incomplete or inaccurate, or that he has suffered any prejudice. In addition, the circuit court certified that the transcript as supplemented was a true and accurate record of the proceedings. (Appellant's App., p. A4). *See* Supreme Court Rule 30.04(g). When a trial court issues such a certification, appellate courts accept the transcript as written. *State v. Hughes*, 748 S.W.2d 733, 740 (Mo. App. E.D. 1988). Appellant provides no compelling reason for this Court to do otherwise and his point should be denied.

II.

The prosecutor did not comment on Appellant's right not to testify when he remarked that someone knew how Appellant's grandmother's car wound up near the murder scene.

Appellant claims that the trial court erred in failing to *sua sponte* provide a remedial instruction or to declare a mistrial when the prosecutor made a remark that Appellant claims was a comment on his right not to testify. But the challenged remark did not refer to Appellant's right not to testify and even if it could be construed as such a reference, Appellant is not entitled to reversal in the absence of a contemporaneous objection. Additionally, Appellant cannot show a manifest injustice or miscarriage of justice, given the remark's fleeting and isolated nature and the giving of the no adverse inference instruction to the jury.

A. Underlying Facts.

Lisa Hart testified that she and her husband saw a red Grand Am with a yellow sticker parked along a gravel road near Sergeant Graham's home on the afternoon that Graham was murdered. (Tr. 1886-89, 1892). Hart also testified that she saw the Grand Am belonging to Appellant's grandmother after it was seized by police and that she was one-hundred percent certain that it was the same car that she had seen on the gravel road. (Tr. 1905-06).

On cross-examination, the defense asked questions designed to suggest that Hart could only provide a general description of the car and that she could not specifically tie it to Appellant's grandmother. (Tr. 1907-12). The prosecutor addressed that line of questioning on redirect examination:

Q. Defense counsel asked you if that's the only description you were able to give. Actually you gave the description, "That's the car"; isn't that true?

A. Yes. That is the car. I am 100 percent sure the picture you showed me is the car.

Q. And when they were backing it out, it wasn't sitting out there amongst a whole bunch of police cars, you –

A. I didn't see any police cars.

Q. And it just happened to be coming out of a garage?

A. And they would not have known what time I was pulling up. I did not even know what time I was going to get there.

Q. So you just see it and instantly?

A. Instantly I said, "Oh my gosh. That's it." No doubt.

Q. Did you know Mae Shockley?

A. No.

Q. Do you know why her car would be across from where Sergeant Graham was murdered –

A. No.

Q. – on March 20, 2005?

A. No.

[PROSECUTOR]: Someone does.

THE COURT: Keep the comments to yourself. I've already warned defense counsel.

(Tr. 1913-14). Defense counsel then immediately began to re-cross examine Hart about the certainty of her identification of the car. (Tr. 1914-16). In addition to not objecting to the prosecutor's comment and not seeking any relief from the trial court, Appellant also did not include any claim of error in the new trial motion. (L.F. 1737-42).

B. Standard of Review.

To preserve a claim of error, a defendant must make an objection contemporaneous with the purported error and must include the claim in his motion for new trial. *State v. Davis*, 318 S.W.3d 618, 637 n.10 (Mo. banc 2010); Supreme Court Rule 29.11(d). Non-preserved issues are reviewed for plain error, which requires a showing that the error resulted in a manifest

injustice or a miscarriage of justice. *State v. Taylor*, 298 S.W.3d 482, 491 (Mo. banc 2009).

C. Analysis.

The prosecutor was not commenting on Appellant's right not to testify when he said, "Someone does." Comments much stronger than that have been found not to violate the rule against commenting on a defendant's right not to testify. One such comment was where the prosecutor stated, "How does the defendant know that (the prescription is) false, forged and counterfeit . . . The only one who can actually say he knew is the defendant." *State v. Rothaus*, 530 S.W.2d 235, 238 (Mo. banc 1975). The Court also questioned whether the following qualified as a reference to the defendant's right not to testify: "There's no explanation for any of this activity – You've got all this inexplicable behavior." *State v. Lawhorn*, 762 S.W.2d 820, 826 (Mo. banc 1988).

This Court has found that the following argument, "yet there is no one who has come forward with a reasonable explanation for how the property got into the defendant's car," was not a reference to the defendant's failure to testify because the defendant was not the only person who could have explained the presence of the stolen items in his car. *State v. Sechrest*, 485 S.W.2d 96, 98-99 (Mo. 1972). In this case, Appellant was not the only person

who could have explained how his grandmother's car got to the gravel road where Hart and other passing motorists saw it. Appellant's grandmother, as the owner of the car, could have provided that explanation and the jury could have reasonably interpreted the remark as applying to her.

Even if the prosecutor's statement were construed as a reference to Appellant's right not to testify, it does not warrant reversal. There are two types of references to the right not to testify. *State v. Neff*, 978 S.W.2d 341, 344 (Mo. banc 1998). A direct reference is made when the prosecutor uses words such as "defendant," "accused" and "testify" or their equivalent. *Id*. An indirect reference is one reasonably apt to direct the jury's attention to the defendant's failure to testify. *Id*. Where an objection is made and overruled, a direct reference to the defendant's failure to testify will almost invariably require reversal, but an indirect reference requires reversal only if there is a calculated intent to magnify that decision so as to call it to the jury's attention. *Id*.

At most, the prosecutor's comment can be considered only an indirect reference to Appellant's right not to testify. It did not use any terms equivalent to "defendant," "accused" or "testify." The record gives no indication of an intent by the prosecutor to call the jury's attention to Appellant's right not to testify. *Lawhorn*, 762 S.W.2d at 826-27. Furthermore, as noted above, Appellant was not necessarily the only person

who could have testified as to how the car got to the gravel road so the statement did not automatically lead the jury to the conclusion that it was a reference to Appellant. That factor makes the comment no more than an indirect reference. *State v. Taylor*, 944 S.W.2d 925, 935 (Mo. banc 1997).

But the Court need not decide whether the reference was indirect or direct because neither type of reference warrants reversal in the absence of a contemporaneous objection. *Neff*, 978 S.W.2d at 345; *State v. Parkus*, 753 S.W.2d 881, 885-86 (Mo. banc 1988). An objection gives the trial judge the chance to take appropriate corrective steps. *Neff*, 978 S.W.2d at 345; *State v. Kempker*, 824 S.W.2d 909, 911 (Mo. banc 1992). A defendant is not necessarily entitled to a mistrial when even a direct reference is made to the failure to testify. *Kempker*, 824 S.W.2d at 911. The judge can consider the state of the evidence and the apparent effect on the jury and might conclude that it is sufficient to sustain the objection and then caution the jury if requested. *Id*. The judge is not given that chance when defense counsel fails to object. *Id*.

Unobjected-to references, whether direct or indirect, do not rise to the level of a manifest injustice or miscarriage of justice where the jury was given the no adverse inference instruction in MAI-CR 3d 308.14. *Id*.; *Parkus*, 753 S.W.2d at 886; *State v. Dees*, 916 S.W.2d 287, 297 (Mo. App. W.D. 1995). The jury in this case was given that instruction as Instruction No. 7. (L.F. 1676,

1701). Defense counsel also discussed in voir dire the fact that the defense was not obligated to prove or disprove any facts, and the jury could conclude from that discussion that Appellant was not required to testify or present any other evidence. (Tr. 609, 755, 877). *See Kempker*, 824 S.W.2d at 911 (defense counsel questioned jurors in voir dire on whether they would draw adverse inference from failure to testify); *Parkus*, 753 S.W.2d at 886 (defense counsel examined venire on defendant's right not to testify).

It is also important to consider the context in which the statement was made in determining its impact on the jury. *Neff*, 978 S.W.2d at 345. The prosecutor's comment was brief and was not referred to again. *Dees*, 916 S.W.2d at 297. It was immediately followed by additional re-cross examination by Appellant. (Tr. 1914-18). The State then presented an additional witness who provided lengthy testimony. (Tr. 1918-90). Appellant presented Lisa Hart's husband as a defense witness and the court then took an overnight recess before closing arguments and submission of the case to the jury for guilt phase deliberations. (Tr. 1993-2055). After listening to four days of testimony involving thirty-six witnesses and more than 200 exhibits, it is not reasonably likely that the jury's verdict was affected by two words.

The prosecutor's fleeting, unobjected-to comment did not rise to the level of a manifest injustice or miscarriage of justice. Appellant's point should be denied.

III.

The trial court did not abuse its discretion in taking corrective action short of a mistrial in response to a reference to Appellant's "violent history" that was not a clear reference to other crimes.

Appellant claims that the trial court erred in failing to declare a mistrial after a law enforcement witness said that Appellant's history of violence was the reason that additional officers were sent to Appellant's house when he was being questioned by two troopers. But the evidence was admissible to counter the negative inference created by the defense that the police had prejudged Appellant's guilt and that the firearms discharge at his house may not have been accidental. Even if the testimony was inadmissible, it did not constitute clear evidence of another crime and the trial court thus did not abuse its discretion in denying the request for a mistrial.

A. Underlying Facts.

The prosecutor advised the jury in the State's opening statement that it was going to hear about an incident that happened when Highway Patrol investigators went to Appellant's house to talk to him on the night of Sergeant Graham's murder. (Tr. 1022). The prosecutor told the jury that officers from the Sikeston Department of Public Safety accompanied the investigators to the house because a trooper had just been killed and the

investigators did not know what kind of situation they would be facing when they went to the house in the middle of the woods. (Tr. 1022). The prosecutor then explained that one of the Sikeston officers, who had been stationed in the woods, accidentally fired his rifle as he was getting up to leave. (Tr. 1022).

Appellant's attorneys tried to use that incident to their advantage throughout the trial. Counsel accused the State in the defense's opening statement of trying to prove its case at any cost. (Tr. 1033). She said that Appellant was suspect number one on the day of the murder and that he became the focus of the investigation that night. (Tr. 1036). She said that the investigators come to Appellant's home late at night, woke him up, and took him outside to "interrogate" him. (Tr. 1036). She described the shot fired from the woods as "allegedly accidental" and said that Appellant was terrified because he did not know if the bullet was meant for him. (Tr. 1036).

Another of Appellant's attorneys was cross-examining MacDonald Brand, a Highway Patrol sergeant who participated in the investigation into Sergeant Graham's murder. (Tr. 1294-96, 1359). After questioning Brand about whether the Patrol looked into suspects other than Appellant, defense counsel asked:

> Q. And, therefore, every one of those other potential suspects would have had their house surrounded by policemen

and snipers as early as the 20th, the night of the death of Sergeant Graham; is that what you're saying?

A. No, sir.

Q. That every one of those people who were being investigated by Sergeant Graham would have been standing about five feet away when a bullet went through a car and hit another officer on their property; is that what you're telling us?

A. No, sir.

Q. That only happened to Lance Shockley; didn't it?

A. Well, I'm not – I wasn't involved in what you're talking about, so I don't know, sir, the details of what happened out there.

Q. Did you hear about anybody else whose house was surrounded –

A. No, sir.

Q. – on the evening that it was discovered that Sergeant Graham was killed?

A. No, sir.

Q. Are you aware of anybody else that was standing in his own front yard when someone accidentally, a sniper, a trained sniper accidentally discharged his firearm?

A. No, sir.

Q. Only happened to Lance Shockley, didn't it?

A. Yes, sir.

(Tr. 1359-60). Defense counsel also brought up the shooting when cross-examining Brand after he took the stand for a second time at a later stage of the trial. (Tr. 1503).

Defense counsel again brought up the incident when examining another Highway Patrol investigator, Warren Weidemann, who searched for evidence at Appellant's home (Tr. 1531):

Q. But if Mr. Shockley didn't do it, you guys wasted an awful lot of time digging up his stuff, surrounding his house, and shooting at him for a guy who didn't do anything. Wouldn't you acknowledge that?

[THE PROSECUTOR]: Your Honor –

THE WITNESS: I have no knowledge of anybody shooting at Mr. Shockley, I don't feel that's an accurate question.

BY [DEFENSE COUNSEL]:

Q. All right. Well, how about this. Your search warrant occurred after the day that you are aware that someone ripped off a shot, whether it was by accident or not, correct?

(Tr. 1559).

Later in the trial, the State called Highway Patrol Sergeant Jeff Heath, one of the officers who went to Appellant's house the night of Sergeant Graham's murder (Tr. 1918, 1921):

Q. Before going out there were you made aware that your superiors wanted some additional people to go along as – I'll use the term "backup"?

A. Yes, sir.

Q. And who was that that was going to go out there and what role were they supposed to play?

A. It was the Sikeston Department of Public Safety's SWAT team, if you will.

Q. And why were they going out with you?

A. A decision was made by my bosses, if you will, that due to Lance Shockley's violent history, that –

[DEFENSE COUNSEL]: Your Honor, I object.

THE WITNESS: – police should –

[DEFENSE COUNSEL]: Excuse me, sir.

THE WITNESS: – the SWAT team should go with me.

THE COURT: Hold on.

[DEFENSE COUNSEL]: Excuse me, sir.

THE COURT: You wanted to approach?

[DEFENSE COUNSEL]: Yes.

(At this time counsel approached the bench, and the following proceedings were had:)

[DEFENSE COUNSEL]: I object to any introduction of his history. This goes to character. It's only offered for that purpose, period. I object.

[THE PROSECUTOR]: Judge, I'm not going into his violent history. It goes to explain why they're out there. They've been beating up on these people and they had to open this door as why they went out there and why it happened. It goes to explain this.

[DEFENSE COUNSEL]: Judge, it doesn't –

[THE PROSECUTOR]: And I wasn't going into his history.

THE COURT: All right. Hold on. I'm going to sustain the objection. Are you requesting the instruction from the Court?

[DEFENSE COUNSEL]: Yes, Judge. As I understood it the objection has been sustained as this goes to character and that it's not been introduced because our client hasn't testified and introduced his character. That was our whole objection.

THE COURT: And what do you wish me to instruct the jury?

[DEFENSE COUNSEL]: I ask that the jury be instructed to disregard that statement. I need to know the ruling on that one, and then I'll ask for further relief depending on the ruling.

THE COURT: I'll sustain that. I intend on so instructing.

[DEFENSE COUNSEL]: I ask that it be stricken from the record, although I know this is a strange request but it still is I believe the next step, so I would ask that it be stricken from the record for all purposes other than review by any reviewing court.

THE COURT: Practically I don't know what effect that has. I'm going to instruct the jury to disregard the last comment, but it has to be preserved for appeal so I'm not sure exactly what you're asking.

[DEFENSE COUNSEL]: Well, Judge, I'm asking that it be stricken from the record for any purpose. I believe we can have it stricken so the reviewing court can't consider it as evidence in the case either. So I think I have to make the request.

THE COURT: To that effect it will be stricken as evidence in this case. It shall remain on the record for purposes of appeal.

[DEFENSE COUNSEL]: All right, Judge, we'd ask for a mistrial. I believe that was a statement that was asked for and responded to that [the prosecutor] knew he was going to ask the

question and knew why he was going to introduce it. Those purposes were improper. Now it's put something to the jury they had no information about. This is the first time and it's the last witness. It's been done solely to prejudice my client in the eyes of the jury. There was no question ever about – you know put from us to anybody about why they were there. It was because he was safe or it was a decision by the Highway Patrol to send those people out there. What ended up happening has been the subject, not necessarily cross-examination.

It was introduced by the State as early as their opening statement, and every chance they've had to talk about it, they've characterized it as a silly little incident, that it was an accident, that it was something that just happened. They introduced it into this case, not us. We ask for a mistrial, Judge, because I don't believe there's any way to cure the prejudice that's occurred.

THE COURT: All right. That request is denied and overruled.

(Proceedings returned to open court.)

THE COURT: The jury is instructed to disregard any comment made by the witness regarding any character or

reputation of the defendant and it should not be construed as evidence in this case.

Please proceed.

BY [THE PROSECUTOR]:

Q. Were they provided to you for your safety?

A. Yes, sir.

(Tr. 1922-25). Sergeant Heath went on to testify that after he and his partner left Appellant's house, a rifle belonging to one of the SWAT team members discharged and the bullet struck another officer sitting in a vehicle. (Tr. 1933). That incident led Appellant to go to the Patrol command post the next day and ask that Sergeant Heath meet him at his work site. (Tr. 1934).

Appellant's motion for new trial included a claim that the trial court erred in failing to grant a mistrial when Sergeant Heath commented on Appellant's violent history. (L.F. 1738). The motion alleged that the statement was a comment on Appellant's character and evidence of prior bad acts and uncharged crimes. (L.F. 1738).

B. Standard of Review.

Appellant's claim is only partially preserved. To preserve an objection to evidence for review, the objection must be specific and the point raised on appeal must be based on the same theory presented to the trial court. *State*

v. Knese, 985 S.W.2d 759, 766 (Mo. banc 1999). The objection made at trial was that the challenged testimony was character evidence that was not admissible because Appellant had not put his character at issue. (Tr. 1923). Defense counsel even stated that that was the whole objection. (Tr. 1923). But the scope of the objection was broadened in the new trial motion and on appeal by the addition of allegations that the testimony constituted evidence of prior bad acts, uncharged crimes, and propensity. (L.F. 1738; Appellant's Brf., p. 55). Those additional theories have not been preserved and can only be reviewed for plain error, which requires a showing that the error resulted in a manifest injustice or a miscarriage of justice. *Taylor*, 298 S.W.3d at 491.

To the extent Appellant's claim is preserved, the following standard of review applies. A mistrial is a drastic remedy, granted only in extraordinary circumstances. *State v. Johnson*, 968 S.W.2d 123, 134 (Mo. banc 1998). Because the trial court is in a better position to observe the evidence and it's impact, the granting of a mistrial rests within it's sound discretion. *Id*. Appellate review is for abuse of discretion. *Id*. An abuse of discretion occurs when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *State v. Fassero*, 256 S.W.3d 109, 115 (Mo. banc 2008).

C. Analysis.

Appellant received more relief than he was entitled to when the trial court sustained his objection to Sergeant Heath's testimony. Evidence of untried crimes may be admissible to provide the jury with a complete and coherent picture of the events that transpired. *State v. Primm*, 2011 WL 2552599 at *4 (Mo. banc, June 28, 2011). Defense counsel repeatedly cross-examined witnesses about the police surrounding Appellant's home and the State was entitled to explain to the jury why those officers were there.

The evidence was also admissible to counter the inference that the defense created from the opening statement on, that the gunshot fired at Appellant's home may not have been accidental and was indicative of the police prejudging Appellant's guilt and going to any lengths to bring him to account for Sergeant Graham's murder. Evidence that might otherwise be admissible can nevertheless become admissible because a party has opened the door to it with a theory presented in the opening statement. *State v. Rutter*, 93 S.W.3d 714, 727 (Mo. banc 2002). A defendant's opening statement can therefore open the door to evidence of a prior crime. *Id.* And evidence of a defendant's character can also be admissible when it is offered to rebut another issue that the defendant has injected into the case. *State v. Goodwin*, 43 S.W.3d 805, 814-15 (Mo. banc 2001).

Even if the evidence was not admissible, the trial court's action of sustaining Appellant's objection and instructing the jury to disregard the testimony was a sufficient remedy. A trial court does not abuse its discretion in denying a mistrial unless the testimony objected to consists of clear evidence of another crime. *State v. Brown*, 998 S.W.2d 531, 547 (Mo. banc 1999). The passing reference to Appellant's "violent history" did not constitute clear evidence of another crime under the precedents of this Court and the Court of Appeals.

A witness's statement that he knew the defendant "from the penitentiary" was found to be vague and indefinite because it did not show what crime the defendant had been accused of, or that he was convicted of any other crime. *State v. Riggins*, 987 S.W.2d 457, 462 (Mo. App. W.D. 1999). The trial court thus did not commit reversible error when it denied the defendant's request for a mistrial. *Id*. Passing references to a defendant's parole officer also did not constitute a clear reference to other crimes. *State v. Boulware*, 923 S.W.2d 402, 406 (Mo. App. W.D. 1996); *State v. Price*, 787 S.W.2d 296, 302 (Mo. App. W.D. 1990). Nor did testimony that the defendant "was wanted . . . for another incident," or testimony that the defendant was wanted on a capias warrant when arrested for the offense for which he was on trial. *State v. Simmons*, 955 S.W.2d 729, 738 (Mo. banc 1997); *State v. Lanos*, 14 S.W.3d 90, 96 (Mo. App. E.D. 1999).

Other vague and indefinite references to other crimes include testimony that the defendant had used aliases in the past. *Brown*, 998 S.W.2d at 547; *State v. Hornbuckle*, 769 S.W.2d 89, 95-96 (Mo. banc 1989). Also, testimony that the defendant had always been willing in the past to talk to the police. *Hornbuckle*, 769 S.W.2d at 96. And testimony that the defendant had said, "Let's beat the cops now like I beat the cops before," did not compel a mistrial. *State v. Jackson*, 836 S.W.2d 1, 4, 6 (Mo. App. E.D. 1992). While the court found that the testimony was a reference to other possible criminal acts, it also ruled that the trial court was in the best position to judge the statement's impact on the jury. *Id*. at 6.

Like the statements above, the testimony that Appellant had a violent history did not identify any specific crime that Appellant may have committed and did not indicate that Appellant had been arrested for, charged with, or convicted of any crimes involving violence.

Finally, Appellant cannot be said to be prejudiced because other testimony regarding past criminal acts had been admitted without objection. *Hornbuckle*, 769 S.W.2d at 96. By the time that Sergeant Heath testified, the jury had already heard extensive evidence about the automobile crash that killed Jeffrey Bayless and Appellant's efforts to conceal his involvement from the police.

Because Sergeant Heath's testimony was not a clear reference to other crimes, the trial court did not abuse its discretion in denying the motion for a mistrial. Appellant received adequate relief when his objection was sustained and when the jury was instructed to disregard the statement. Appellant's point should be denied.

IV.

The trial court did not err in overruling his motion for new trial because cumulative error cannot be predicated on a series of incidents that do not by themselves constitute trial court error.

Appellant claims that the trial court erred in overruling his motion for new trial based on the cumulative prejudicial effect of propensity and character evidence and argument. Appellant lists three such incidents in his point relied on: (1) Sergeant Heath's testimony that Appellant had a violent history; (2) the projection of a photograph of Appellant in jail clothing; and (3) the prosecutor's closing argument that compared Appellant's behavior in the fatal automobile accident to his behavior in shooting Sergeant Graham. (Appellant's Brf., p. 56). Appellant discusses an additional incident in the argument portion of his brief, a comment by Highway Patrol Sergeant Warren Weidemann that expressed his belief that Appellant had shot Sergeant Graham. (Appellant's Brf., p. 93).

Appellant's claim fails because there was no trial court error in any of the individual instances about which he complains. Under this Court's precedents, numerous non-errors cannot add up to error.

A. Underlying Facts.

1. Reference to Appellant's violent history.

Sergeant Heath's testimony that back-up officers were sent to Appellant's home because of his violent history has been thoroughly discussed in the previous point. Rather than repeat those facts and argument, Respondent incorporates the response to Appellant's Point III into the response to this point.

2. Display of photograph.

When Sergeant Heath testified, the prosecutor showed him State's Exhibit 2 and asked him to identify it. (Tr. 1919). Sergeant Heath replied that it was a picture of Lance Shockley. (Tr. 1919). The prosecutor offered the exhibit into evidence and defense counsel objected on the basis that it was a picture of Appellant in an orange jumpsuit and in front of an identification chart. (Tr. 1919). The prosecutor responded that the photo was from the shoulders up and that he was not going to refer to the clothing. (Tr. 1919). Defense counsel stated that the prosecutor could show the photo to Sergeant Heath but that he objected to it being in evidence. (Tr. 1920). The court sustained the objection. (Tr. 1920).

Defense counsel asked to approach the bench a few minutes later:

[THE PROSECUTOR]; First of all, my apologies.

[DEFENSE COUNSEL]: Judge, I want to make a record about – you know, [the prosecutor] and I we get into it an awful lot. I have nothing but respect. I don't mean anything I say to mean that I think he's, you know, anything but an excellent lawyer. I hope he would feel that much about me. However, inadvertently – I hope – the photograph that was just displayed before this turned out to be Exhibit No. 2, which has been excluded from the jury's consideration. My guess is it was there – to give [the prosecutor] the benefit of the doubt – because he planned on showing it if it had been admitted. I'm guessing that's how these things have been cued up. However, giving him the benefit of the doubt I would just ask – and there's no way not to highlight it now, Judge, but I'm in a pickle.

So I would just ask that to the extent that anyone viewed the photograph being put up that they be instructed to disregard it. That's the only record I would make for that. I'm not alleging bad faith. I'm not alleging anything other than it's unfortunate. But now I think the jury needs to be instructed as to it.

[THE PROSECUTOR]: Judge, just for the record I'll state that I had had it cued up on this. What he didn't state was we've been using a Powerpoint that we turn the screen off when it's not

in use in an effort to save time and not be fumbling around with the jury. In an expectation that the photograph would be admitted, I had it cued up for that. When I went to turn to the other photograph, I had to hit a button and it projected up there and I immediately went to another photograph. My guessstimate is if they saw it, it would have been for a split second.

[DEFENSE COUNSEL]: I don't disagree with any of that. I'm just requesting some temporary relief to the extent that –

THE COURT: All right.

(Proceedings returned to open court.)

THE COURT: The jury is instructed to disregard, if you saw, the last picture that was on the screen. The Court sustained the objection to that exhibit and it should be disregarded by the jury for any reason.

(Tr. 1926-27). Despite his acknowledgment that the picture was displayed inadvertently, and despite his failure to ask for any relief besides the curative instruction given by the court, defense counsel raised a claim in the new trial motion that the trial court erred in not declaring a mistrial because the display of the picture constituted impermissible evidence of prior bad acts and was a comment on Appellant's character. (L.F. 1738).

3. Statement that Appellant's shots were not accidental.

The testimony of Highway Patrol Sergeant Warren Wiedemann that is now being challenged was elicited when defense counsel was cross-examining him about the incident where a police officer's gun inadvertently discharged just after investigators had finished questioning Appellant:

A. You're asking me to verify something that I don't know for sure exactly what happened.

Q. I'm not asking you –

A. I've heard things second – and third-hand. I was not there.

Q. So you –

A. I don't know exactly what happened there that night.

Q. And so you can't tell the jury that that happened before you all went out there to search?

A. I know there was an accidental discharge. That's all I know for sure.

Q. All right. And that was an accidental discharge by someone other than Mr. Shockley, correct?

A. Yes. I don't believe his shots were accidental.

Q. It was – And now, let's examine that ignorant statement, can we? All right. The question to you, sir, as I

understand was you can't say that Mr. Shockley fired any shots that night and that it was fired by a law enforcement officer. Your response was that, "I don't believe his shots were accidental," thus suggesting that he shot Sergeant Graham, right?

A. Yes, sir.

Q. That's your bias, correct?

A. That's the result of the investigation, sir.

Q. Your investigation, correct?

A. It was a combination of many people's investigation.

Q. All right. And yet, we haven't heard any results. We haven't heard one piece of DNA evidence that ties Lance Shockley to the scene, have we?

A. No, sir.

Q. We haven't heard one identification from anybody there that says he was at the scene, have we?

A. No, sir.

Q. In fact, you then are aware, obviously, of some ballistics results, correct?

A. Yes, sir.

Q. Okay. That are totally debunked by the expert that was –

[THE PROSECUTOR]: Your Honor –

[DEFENSE COUNSEL]: – hired to confirm those results.

[THE PROSECUTOR]: Your Honor, this is argumentative, it calls for hearsay.

THE COURT: Sustained as to that objection.

BY [DEFENSE COUNSEL]:

Q. In fact there were two people who did ballistics results; were there not?

A. I have read the lab results on one. I've not seen any reports on the second.

Q. Are you telling the jury you're not aware that the second person hired by the State said that the first person was wrong?

[THE PROSECUTOR]: Your Honor –

BY [DEFENSE COUNSEL]:

Q. Are you not aware of that?

[THE PROSECUTOR]: Your Honor, that is not the case. Could we please approach?

THE COURT: Sustain the objection. Let's move on.

BY [DEFENSE COUNSEL]:

Q. When we talk about an investigation, shouldn't you have an open mind at some point? Wouldn't that be a good thing to have?

A. Yes, sir.

Q. And have you ever heard of this thing, the presumption of innocence? Is that something that you're vaguely aware of?

A. Yes, sir.

Q. All right. And that's something that exists at least for someone accused of a crime up through and until the time the jury decides that it should be removed, right?

[THE PROSECUTOR]: Judge, this is argumentative. It also calls for – It's getting close to invading the province of the jury.

THE COURT: It is argumentative. Let's move on.

[DEFENSE COUNSEL]: All right.

THE COURT: Sustained.

BY [DEFENSE COUNSEL]:

Q. And yet, you've quite clearly expressed your bias by indicating some existence of some evidence that this jury hasn't heard.

[THE PROSECUTOR]: Your Honor, I'm going to object. He asked a question and it was answered.

[DEFENSE COUNSEL]: No, Judge. I asked the question and he didn't answer the question. He blurted out some ignorant remark.

THE COURT: All right. Let's keep the comments to ourselves. Let's move on.

[DEFENSE COUNSEL]: I don't have anything else.

(Tr. 1560-63). Despite not asking for any relief from the trial court, Appellant's new trial motion contained a claim that the trial court erred in not declaring a mistrial when Sergeant Wiedemann said that Appellant's shot was not accidental. (L.F. 1738).

4. State's closing argument.

Appellant also complains about a portion of the prosecutor's closing argument in the guilt phase of the trial that began with the prosecutor recapping some of the evidence that pointed to Appellant's guilt:

Ladies and gentlemen, there has been a lot of evidence in this case. But if you look at the evidence there is only one

conclusion that you can have. That on March 20th Lance Shockley drove his grandma's car out at that time. That on March 20th when Sergeant Graham got off work he got murdered by Lance Shockley. That prior to that date all the evidence is that he was looking to solve his problem. He wasn't going to jail. And while [defense counsel] said everybody knew about this, everybody knew Lance was out there at this leaving the scene, there's one person that didn't know about it and had a job to find out. The one person was Sergeant Graham. The one person they keep kicking, a dead man. Sergeant Graham lied to Ivy Napier, how horrible is that. Imagine that, a highway patrolman lying. Beating on the police. Compare that lie, going to Ivy Napier, who is lying, telling her a small white lie, hey, Lance fessed up; why don't you just tell what really happened, getting the truth out of her about a vehicular homicide. A man was killed that night too. Another felony was committed. He left the scene, another felony. Prison time. Sergeant Graham was doing his job.

(Tr. 2051). Defense counsel objected that the prosecutor was arguing propensity. (Tr. 2051). The prosecutor responded that he was comparing lies in the case and was talking about motive. (Tr. 2051-52).

The court eventually concluded that the prosecutor did not argue propensity, but was preparing to argue motive. (Tr. 2053). The court nevertheless gave the jury a cautionary instruction:

> THE COURT: The Court will instruct the jury – and again I remind you as I previously read to you, the Court does not mean to assume is (sic) true any fact referred to in argument and these instructions at any time, anything I say to believe my opinion of what the facts are. That is completely irrelevant. You are the sole decider of the facts in this case. You should remember the evidence as presented to you and base your decision on that evidence and that evidence alone. I will further instruct you that the jury should not consider past conduct as an indication or propensity to commit the present offense.
>
> Counsel may proceed.
>
> [THE PROSECUTOR]: What I was saying was compare his lies and his friends' lies to the covering up those crimes and his lies covering up the crime of murder to what Sergeant Graham did to Ivy Napier. Again, if you've got the facts, you beat them with the facts. If you got the law, you would beat them with the law. If you don't have it, you beat on the cops, and they're kicking Sergeant Graham while he's down.

(Tr. 2054-55). Appellant's new trial motion contained a claim that the trial court erred in overruling his objection when "[t]he State argued that the 'defendant walked away from the body of Jeff Bayless just like he walked away from the body of Sgt. Graham.'"[12] (L.F. 1739). The motion alleged that the argument demonstrated Appellant's propensity to kill and was evidence of prior bad acts and bad character. (L.F. 1739).

B. Standard of Review.

A trial court's denial of a motion for new trial is reviewed for an abuse of discretion. *State v. Midkiff*, 286 S.W. 20, 24 (Mo. 1926); *State v. Rios*, 314 S.W.3d 414, 418 (Mo. App. W.D. 2010). An abuse of discretion occurs when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Fassero*, 256 S.W.3d at 115.

C. Analysis.

Appellant's claim is based on the alleged cumulative effect of the incidents specified above. But there is no cumulative effect to consider if the individual claims of error lack merit. "Numerous non-errors cannot add up to

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[12] The prosecutor never made the quoted statement and did not make any statement similar to that. (Tr. 2023-35, 2047-55).

error." *State v. Hunter*, 840 S.W.2d 850, 869-70 (Mo. banc 1992). There was no trial court error in any of the instances that Appellant complains of.

1. Court took adequate corrective action when Sergeant Heath testified about Appellant's violent history.

Appellant does not offer any additional argument about Sergeant Heath's reference to Appellant's "violent history." Respondent therefore incorporates the argument from Point III into this point.

2. Appellant received all requested relief when mug shot was inadvertently displayed to the jury.

Appellant claims that his mug shot was displayed to the jury twice but the transcript does not support that assertion. The transcript indicates that the prosecutor showed the photograph to the witness and asked him to identify it. (Tr. 1919). The prosecutor then offered the photograph into evidence and it was only then that defense counsel objected. (Tr. 1919). The ordinary procedure is to have a witness identify the exhibit, to ask the court to admit the exhibit into evidence and, if that request is granted, to ask the court for permission to publish the exhibit to the jury. Defense counsel said nothing in the course of making his objection to indicate that the jury had seen the photograph before the court ruled on its admission. (Tr. 1919-20). It stretches credulity to believe that counsel would have objected to admission of the picture but would not have raised the issue of the photograph being

displayed to the jury and asked for some type of relief, if that had in fact happened. And the motion for new trial contained no allegation that the photograph had been displayed twice. (L.F. 1738). The reasonable reading of the record is thus that the photograph was displayed to the jury only once, briefly and inadvertently. (Tr. 1926-27).

When that inadvertent display did happen, Appellant asked the court for some "temporary relief," which the court granted by instructing the jury to disregard the picture. (Tr. 1927). Appellant requested no further relief from the trial court. The adequacy of the corrective action taken by the trial is assumed. *State v. Scurlock*, 998 S.W.2d 578, 586 (Mo. App. W.D. 1999). If a more drastic relief was warranted, then it was up to defense counsel to request that relief. *Id*. When the defendant has received the relief that he requested, he cannot claim error on appeal. *Id*.

And the inadvertant display of the photograph would not have necessitated a mistrial had such a request been made. Police photographs, including "mug shots" are considered neutral and do not, in and of themselves, constitute evidence of other crimes where inculpatory information is masked. *State v. Carr*, 50 S.W.3d 848, 856 (Mo. App. W.D. 2001); *State v. McCauley*, 831 S.W.2d 741, 742 (Mo. App. E.D. 1992). The admission of a mug shot constitutes prejudicial evidence of other crimes only when the photograph or the accompanying testimony discloses a defendant's

prior arrests or convictions. *State v. Ware*, 326 S.W.3d 512, 523-24 (Mo. App. S.D. 2010). The photograph that was briefly displayed before the jury was taken from the shoulders up. (Tr. 1919; State's Ex. 2). Appellant was wearing an orange jumpsuit in the picture and a height scale can be seen in the background. (State's Ex. 2). But there is nothing to indicate when the photograph was taken. The jury would of course know that Appellant was arrested for Sergeant Graham's murder and would expect that a booking photograph was taken at that time. No testimony was presented to suggest that the photograph was taken in connection with some other offense. In fact, the record made by the prosecutor at the bench and the subsequent questioning comparing Appellant's appearance at trial to his appearance when he was questioned suggests that the picture was taken in connection with the arrest for Sergeant Graham's murder. (Tr. 1919, 1921).

When there is no evidence disclosing a defendant's prior arrests or convictions, the defendant has the burden of proving that the average juror erroneously believed that the mug shot was evidence of some prior crime. *Carr*, 50 S.W.3d at 857; *State v. McMillan*, 593 S.W.2d 629, 632-33 (Mo. App. S.D. 1980). Appellant has not met that burden and there is nothing present in the facts and circumstances of the case indicating that the jurors would have considered the picture to be evidence of other crimes. *Simmons*, 955 S.W.2d at 738; *Carr*, 50 S.W.3d at 857. Appellant has thus also failed to

show that the jury's opportunity to see the picture was so greivous that the error could have been cured in no other way than by mistrial. *McMillan*, 593 S.W.2d at 633.

3. Appellant waived claim about statement that his gunshot was not accidental when he did not object but instead tried to use the statement to support the defense theory.

Appellant also complains about Sergeant Wiedemann's statement during cross-examination by defense counsel that, "I don't believe [Appellant's] shots were accidental." (Tr. 1560). Appellant's claim about that statement can be disposed of through the holding adopted by this Court that a defendant cannot complain of matters brought into the case by his counsel's questions. *State v. Paige*, 446 S.W.2d 798, 806 (Mo. 1969); *State v. Malone*, 951 S.W.2d 725, 729 (Mo. App. W.D. 1997).

Additionally, instead of objecting or request any relief, Appellant strategically decided to cross-examine Sergeant Wiedemann about the statement to further the defense theory that the police had pre-judged Appellant's guilt. (Tr. 1560-63). A strategic decision not to object to testimony constitutes a waiver of any claim of error. *State v. Johnson*, 284 S.W.3d 561 582 (Mo. banc 2009). Appellant cannot seek to utilize evidence in the pursuit of reasonable trial strategy and then turn around on appeal and claim that the same evidence was inadmissible

and prejudicial. *State v. Carollo*, 172 S.W.3d 872, 876 (Mo. App. S.D. 2005). Because Appellant opted to use Sergeant Wiedemann's statement to his advantage instead of objecting or seeking other relief, the trial court did not plainly err in failing to *sua sponte* declare a mistrial. *Rios*, 314 S.W.3d at 425.

4. Appellant received all requested relief when he objected to the State's closing argument.

As to the complaint about the State's closing argument, Appellant asked for and received an instruction to the jury that it could not consider past conduct as indicating a propensity to commit the present offense. (Tr. 2051-54). Appellant did not request any other relief. The adequacy of the corrective action taken by the trial is assumed. *Scurlock*, 998 S.W.2d at 586. If a more drastic relief was warranted, then it was up to defense counsel to request that relief. *Id*. When the defendant has received the relief that he requested, he cannot claim error on appeal. *Id*.

Furthermore, the argument was not improper. The prosecutor was talking about the incident that the State alleged provided the motive for Sergeant Graham's murder. Evidence of that crime was properly admitted, and the prosecutor was allowed to argue reasonable inferences from that evidence. *State v. Edwards*, 116 S.W.3d 511, 533, 537 (Mo. banc 2003). The prosecutor was arguing the reasonable inference that Appellant murdered

Sergeant Graham because Graham's investigation might send him to jail for criminal behavior that he had spent months trying to conceal.

Appellant has not shown the existence of trial court error and has thus failed to show the existence of cumulative error. His point should be denied.

V.

Instruction No. 14, based on MAI-CR 3d 314.44, correctly instructed the jury on how to weigh mitigating and aggravating circumstances.

Appellant claims that the trial court erred in submitting penalty phase instruction 14, based on MAI-CR 3d 314.44, to the jury because that instruction relieves the State of its burden under section 565.030, RSMo to prove beyond a reasonable doubt that aggravating circumstances had a weight equal to or greater than mitigating circumstances. But the trial court did not err, plainly or otherwise, in submitting Instruction No. 14 because it correctly states the statutory requirements for how the jury is to weigh mitigating circumstances against aggravating circumstances.

A. Underlying Facts.

During the instruction conference, defense counsel told the court that he had a general objection to all of the instructions:

> I don't know specifically what motions the public defender's office had filed with regard to the death penalty in general. We believe that the instruction is in proper form. We don't mean to waive any potential challenge of the death penalty or any sort of motion that the public defender may have filed as to the constitutionality

of the death penalty under either Missouri or the U.S. Constitution.

(Tr. 2140). The trial court noted the objection as preserved for the record. (Tr. 2140). In the penalty phase, the court submitted Instruction No. 14, which was based on MAI-CR 3d 314.44, that directed the jury on how to weigh the aggravating factors and the mitigating factors. (L.F. 1683, 1716). Appellant included a claim in his motion for new trial that the MAI-CR 3d 314 series of instructions and sections 565.030 and 565.040, RSMo are unconstitutional because they require the defendant to prove and convince a jury unanimously that the mitigating circumstances outweigh the aggravating circumstances. (L.F. 1742).

B. Standard of Review.

Appellant's claim is not preserved for review. Counsel is required to make specific objections to instructions considered erroneous. Supreme Court Rule 28.03. Appellant's counsel did not make any specific objections, but instead made a general objection based on any motions that the public defenders who previously represented Appellant may have filed. (Tr. 2140). Respondent has been unable to locate anything in the record that demonstrates that the public defenders filed any motions challenging the MAI-approved instructions, including MAI-CR 3d 314.44 on which

Instruction No. 14 was based. Counsel's general objection was thus tantamount to no objection at all since it relied on what appear to be non-existent motions.

Appellant's claim on appeal is further not preserved because it relies on a different theory than was raised in the new trial motion. Appellant argued in the new trial motion that section 565.030, RSMo unconstitutionally places the burden on the defendant to show that mitigating factors outweigh aggravating factors. (L.F. 1742). He now argues on appeal that section 565.030, RSMo is not unconstitutional in the allocation of burdens because it places the burden of proof on the State to show that aggravating circumstances outweigh mitigating circumstances, and that MAI-CR 3d 314.44 is erroneous because it does not reflect that statutory burden. (Appellant's Brf., pp. 101, 105). That theory was not presented to the trial court, and an appellant is not permitted to broaden the scope of his objections beyond those made to the trial court. *State v. Johnson*, 207 S.W.3d 24, 43 (Mo. banc 2006).

Because Appellant's point on appeal is not based on the same theory presented to the trial court, it can only be reviewed for plain error. *Id*. To demonstrate that an instructional error was plain error, an appellant must show that the trial court so misdirected or failed to instruct the jury that the

error affected the jury's verdict. *State v. Dorsey*, 318 S.W.3d 648, 652 (Mo. banc 2010).

To the extent Appellant's claim of instructional error is preserved, it will lead to reversal only if there was error in submitting the instruction and prejudice to the defendant. *State v. Zink*, 181 S.W.3d 66, 74 (Mo. banc 2005). MAI instructions are presumptively valid and, when applicable, must be given to the exclusion of other instructions. *Id*.

C. Analysis.

Appellant's argument is based in part on the premise that due process places the burden on the State to prove that the aggravating circumstances had a weight equal to or greater than the mitigating circumstances. The United States Supreme Court and this Court have rejected that claim. *Kansas v. Marsh*, 548 U.S. 163, 170-71 (2006); *State v. Taylor*, 134 S.W.3d 21, 30 (Mo. banc 2004). And Appellant's argument that section 565.030, RSMo should be construed as placing that burden of proof on the State does not comport with the language of the statute.

Once evidence in aggravation and mitigation is presented to the jury, the relevant provision of the statute directs that:

> The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:
>
> * * * *
>
> (3) If the trier concludes that there is evidence in mitigation of punishment . . . which is sufficient to outweigh the evidence in aggravation of punishment found by the trier . . . .

§ 565.030.4(3), RSMo Cum. Supp. 2001.

The determination that the jury has to make under the statute, as well as under MAI-CR 314.44, is whether the mitigating circumstances are sufficient to outweigh the aggravating circumstances. *State v. Whitfield*, 107 S.W.3d 253, 259 (Mo. banc 2003). It would be absurd to place on the State, as the party seeking the death penalty, the burden of proving that the defendant is ineligible for the death penalty because the mitigating circumstances outweigh the aggravating circumstances. This Court presumes that the legislature did not intend an absurd result in enacting a statute. *Weeks v. State*, 140 S.W.3d 39, 47 (Mo. banc 2004). If the legislature wanted to place the burden on the State of proving that aggravating circumstances outweigh mitigating circumstances, then it would have written the statute to explicitly provide for that.

MAI-CR 314.44 follows the language and requirements of section 565.030, RSMo, and Appellant's argument that the instruction relieves the State of its burden of proof is not well taken. This Court has repeatedly and recently reaffirmed that MAI-CR 3d 314.44 correctly instructs the jury on how it is to consider mitigating and aggravating circumstances. *See, e.g.*, *State v. Anderson*, 306 S.W.3d 529, 539 (Mo. banc 2010); *Johnson*, 284 S.W.3d at 588-89; *McLaughlin*, 265 S.W.3d at 265-68; *Johnson*, 207 S.W.3d at 46-47; *Zink*, 181 S.W.3d at 74. The trial court did not err in giving the MAI-approved instruction and Appellant's point should be denied.

VI.

Instruction No. 16, based on MAI-CR 3d 314.48, does not diminish the jury's sense of responsibility by informing the jury that the court will determine punishment if the jury finds the defendant death-eligible but is unable to agree on punishment.

Appellant claims that the trial court erred in submitting penalty phase instruction 16 to the jury and in informing the jury that the court would fix Appellant's punishment if it failed to agree on a verdict, because that instruction diminished the jury's sense of responsibility and deprived Appellant of the opportunity to have his punishment determined by lay members of the community. Appellant also argues that section 565.030.4, RSMo should be declared unconstitutional for requiring that instruction. But neither the statute nor the instruction violate the constitution because they do not increase the chances that a jury would impose a death sentence despite being unable to unanimously agree that it was the appropriate sentence for the defendant.

A. Underlying Facts.

As noted in Point V above, defense counsel made only a general objection to the penalty phase instructions based on any motions that might have been filed by the public defenders who had previously represented

Appellant. (Tr. 2140). The court submitted to the jury Instruction No. 16, which was based on MAI-CR 3d 314.48. (L.F. 1685-86, 1718-19). Appellant's motion for new trial did not include any specific claim of error concerning Instruction No. 16 or the theory that the instruction lessened the jury's sense of responsbility by informing it that the trial court would fix punishment if the jury failed to agree on a punishment. (L.F. 1737-42).

B. Standard of Review.

Appellant's claim is not preserved for review. Counsel is required to make specific objections to instructions considered erroneous. Supreme Court Rule 28.03. Appellant's counsel did not make any specific objections, but instead made a general objection based on any motions that the public defenders who previously represented Appellant may have filed. (Tr. 2140). Respondent has been unable to locate anything in the record that demonstrates that the public defenders filed any motions challenging the MAI-approved instructions, including MAI-CR 3d 314.48 on which Instruction No. 16 was based. Counsel's general objection was thus tantamount to no objection at all since it relied on what appear to be non-existent motions.

Appellant's claim is further not preserved because it relies on a theory that was not raised in the new trial motion. An appellant is not permitted to

broaden the scope of his objections beyond those made to the trial court. *Johnson*, 207 S.W.3d at 43. Appellant's point thus can only be reviewed for plain error. *Id*. Instructional error is plain error only when the trial court so misdirected or failed to instruct the jury that the error affected the jury's verdict. *Dorsey*, 318 S.W.3d at 652.

To the extent Appellant's claim of instructional error is preserved, it will lead to reversal only if there was error in submitting the instruction and prejudice to the defendant. *Zink*, 181 S.W.3d at 74. MAI instructions are presumptively valid and, when applicable, must be given to the exclusion of other instructions. *Id*.

C. Analysis.

Instruction No. 16 gave the jury directions on filling out the verdict forms if it was able to unanimously agree on imposing either the death sentence or a sentence of life without parole. (L.F. 1718). The instruction also directed the jury what to do if it was unable to unanimously agree on a sentence:

> If you do unanimously find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, as submitted in Instruction No. 13, and you are unable to unanimously find that the facts or circumstances in mitigation of

punishment outweigh the facts and circumstances in aggravation of punishment, but are unable to agree upon the punishment, your foreperson will complete the verdict form and sign the verdict form stating that you are unable to decide or agree upon the punishment. In such case, you must answer the questions on the verdict form and write into your verdict all of the statutory aggravating circumsances submitted in Instruction No. 13 that you find beyond a reasonable doubt and your foreperson must sign the verdict form stating that you are unable to decide or agree upon the punishment.

If you return a verdict indicating that you are unable to decide or agree upon the punishment, the Court will fix the defendant's punishment at death or at imprisonment for life by the Department of Corrections without eligibility for probation or parole. You will bear in mind, however, that under the law, it is the primary duty and responsbility of the jury to fix the punishment.

(L.F. 1718-19). The last paragraph of the instruction, which is the provision being challenged by Appellant, is mandated by statute. The statute provides:

If the trier is a jury it shall be instructed before the case is submitted that if it is unable to decide or agree upon the

> punishment the court shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor or death.

§ 565.030.4(4), RSMo Cum. Supp. 2001.

Appellant relies primarily on *Caldwell v. Mississippi*, 472 U.S. 320 (1985), to support his argument that informing the jury that the court can decide punishment in the event of a deadlock diminishes the jury's sense of responsibility. *Caldwell* is inapposite and lends no support to Appellant.

The *Caldwell* opinion concerned a prosecutor's argument to the jury that if it imposed the death penalty, it would not be making the final decision to kill the defendant because the death penalty was subject to automatic appellate review. *Id*. at 325-26. In finding that the argument violated the Eighth Amendment, the Court was concerned that a jury would be more likely to return to a death sentence when it knew that another court could overturn the sentence if it turned out to be inappropriate. *Id*. at 333. The Court noted that a jury, unfamiliar with the limited scope of appellate review, could be "unconvinced that death is the appropriate punishment, [but] might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts. This desire might make the jury very receptive to the prosecutor's assurance that it can more freely 'err because the error may be corrected on appeal.'" *Id*. at 331. The Court similarly found that, "[O]ne can

easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in." *Id*. at 333.

Missouri's statutory and instructional schemes do not implicate the concerns expressed by the Supreme Court in *Caldwell* because they do not increase the likelihood of a jury imposing the death sentence. In fact, the provision that permits the judge to impose the death sentence only takes effect when the jury is unable to agree on punishment.[13] § 565.030.4(4), RSMo Cum. Supp. 2001. That is what the jury is told in the instruction, which reminds it that, "under the law, it is the primary duty and responsibility of the jury to fix the punishment." (L.F. 1719). And before the sentencing decision can be passed to the judge, the jury has to find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, the first step in causing a defendant to be eligible for the death penalty. (L.F. 1718-19). The jury also has to answer an interrogatory stating that it did not unanimously find that the mitigating circumstances were sufficient to outweigh the aggravating circumstances. (L.F. 1723).

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[13] Which, as will be discussed in Point VII, *infra*, is constitutionally permissible.

If the jury is unable to agree on whether the mitigating circumstances outweigh the aggravating circumstances, the court is then required to go through that same weighing process and make the determination that a jury would, namely that the mitigating circumstances do not outweigh the aggravating circumstances, before it can impose a death sentence. § 565.030.4(3), (4), RSMo Cum. Supp. 2001. The statutory scheme and the instruction based on it do not therefore lead to the concern expressed in *Caldwell* that "[a] defendant might thus be executed, although no sentencer had ever made a determination that death was the appropriate sentence." *Caldwell*, 472 U.S. at 331-32.

MAI-CR 3d 314.48 does not diminish the jury's sense of responsibility by permitting it to believe that it can return a death sentence but still not be responsible for the defendant's ultimate fate. And Appellant's speculative argument that the jury might be led to believe that it need not make a decision at all is undercut by the language of the instruction itself, which ends with an admonition that the jury bears the primary duty and responsibility to fix punishment. (L.F. 1719). The jury is presumed to know and follow the court's instructions. *Whitfield*, 107 S.W.3d at 263. That presumption would extend to the admonition that the jury must make every effort to reach a decision on sentencing. Informing the jury that the court will make the sentencing decision when the jury is unable to agree on

punishment despite finding the presence of at least one aggravating circumstance and that the mitigating circumstances do not outweigh the aggravating circumstances does not violate the Eighth Amendment and the trial court did not err in submitting the MAI-approved instruction. Appellant's point should be denied.

VII.

The trial court did not err in imposing the death sentence after the jury deadlocked on punishment.

Appellant claims the trial court erred in sentencing him to death after the jury was unable to reach a unanimous agreement on punishment because determining the relative weight of aggravating and mitigating circumstances is a fact-finding process that must be made by the jury. But the jury made the factual findings necessary to impose the death sentence before deadlocking on punishment, and the trial court was then permitted to consider those same facts and circumstances in considering whether the death sentence was appropriate.

A. Underlying Facts.

The jury returned a verdict form in the penalty phase of the trial indicating that it was unable to agree on punishment. (L.F. 1723). The jury checked the box indicating that it had found beyond a reasonable doubt the existence of statutory aggravating circumstances and wrote down those statutory aggravating circumstances as:

1. Carl Dewayne Graham, Jr. was a peace officer murdered because of the exercise of his official duty.

2. Carl Dewayne Graham, Jr. was murdered for the purpose of preventing a lawful arrest of the defendant.

3. Carl Dewayne Graham, Jr. was a potential witness in a pending investigation of defendant for leaving the scene of a motor vehicle accident on or about Nov. 26, 2004 and was killed as a result of his status as a potential witness.

(L.F. 1723). The jury also checked a box indicating that it did not unanimously find that there were facts and circumstances in mitigation of punishment sufficient to outweigh the facts and circumstances in aggravation of punishment. (L.F. 1723).

When the verdict was announced, Appellant did not raise any objections or make any requests other than for additional time to file the motion for new trial. (Tr. 2228-30). That new trial motion contained a claim that Missouri's statutory provisions regarding the death penalty are unconstitutional by allowing the judge to determine the sentence when the jury is unable to agree on punishment. (L.F. 1741-42). Appellant stood on the motion at the sentencing hearing. (Tr. 2235, 2236).

In sentencing Appellant to death, the court noted the findings that were made by the jury:

They did unanimously find you guilty beyond a reasonable doubt of murder in the first degree. The jury did agree on the statutory

> aggravating circumstances, which the Court has noted and certifies. The Court does agree that the facts and circumstances in mitigation of punishment do not outweigh the facts and circumstances in aggravation.

(Tr. 2236).

B. Standard of Review.

This Court's review on direct appeal is for prejudice, not mere error. *McLaughlin*, 265 S.W.3d at 262. A trial court's decision will thus be reversed only if it is both erroneous and sufficiently prejudicial that it deprived the defendant of a fair trial. *Id*.

C. Analysis.

The trial court did not err in imposing the death penalty after the jury was unable to agree on punishment. This Court has previously rejected Appellant's argument that the statutory procedure allowing the court to make that determination is unconstitutional. *Id*. at 264. The Court noted that Missouri's death penalty instructions now require the jury to answer interrogatories indicating whether it has found a statutory aggravating factor to be present, and if so, what factor, and whether it found that the mitigating evidence did not outweigh the aggravating evidence. *Id*. Appellant's jury answered that interrogatory, finding the existence of three specific statutory

aggravating circumstances, and further answered that it did not unanimously find that the facts and circumstances in mitigation of punishment were sufficient to outweigh the facts and circumstances in aggravation of punishment. (L.F. 1723).

That interrogatory, like the interrogatory returned by the jury in *McLaughlin*, showed that the jury deadlocked on punishment only after making the factual findings that a jury is required to make. *Id*. Once the jury made those findings and deadlocked on punishment, the court could consider those same facts and circumstances and determine whether the death sentence was appropriate. *Id*. The trial court did that, certifying the jury's finding on the statutory aggravating factors and agreeing with the jury's determination that the mitigating circumstances did not outweigh the aggravating circumstances. (Tr. 2236). The trial court did not err in imposing the death sentence after the jury deadlocked on punishment. Appellant's point should be denied.

VIII.

Juror No. 58's authorship of a fictional novel did not warrant a mistrial and Appellant waived his opportunity to present evidence to support his claim of juror bias.

Appellant's claim of error concerns a fictional novel written by Juror No. 58, who served as the foreman during the guilt phase of the trial. Defense counsel obtained a copy of the book following the return of the guilty verdict and discovered that it included a sequence where the book's protagonist committed a revenge murder against a man who had killed his wife in a drunk driving accident. Juror No. 58 was removed for the penalty phase deliberations, but Appellant claims that the trial court erred in denying his request for a mistrial, in refusing his request to inquire of Juror No. 58 and other jurors during trial, and in failing to conduct such an inquiry *sua sponte* after trial.

Appellant alleges that such an inquiry was necessary to review whether Juror No. 58 misrepresented his capacity to be fair to Appellant and whether the jury had been tainted by exposure to Juror No. 58's beliefs as allegedly represented in a fictional novel that he had written. But the trial court did not abuse its discretion in denying the request for a mistrial because the mere authorship of a fictional adventure tale does not overcome

Juror No. 58's assurances during voir dire that he could follow the court's instructions and reach a verdict by fairly and impartially considering the evidence presented at trial. And Appellant waived his claim that the trial court erred in failing to inquire of the jurors when he declined the opportunity provided by the trial court to present evidence at the hearing on the motion for new trial.

A. Underlying Facts.

Juror No. 58 answered during the death qualification portion of voir dire that he could give meaningful consideration to returning either a death sentence or a sentence of life without parole if the jury reached the point where it had to consider those options. (Tr. 685-87). Juror No. 58 also approached the bench during a break in the proceedings to inform the court and the attorneys that he was a published author and that his son was a police officer in Springfield. (Tr. 710). The court thanked Juror No. 58 for volunteering that information and said that the attorneys could ask questions later. (Tr. 710). Neither the prosecutor nor defense counsel followed up on Juror No. 58's disclosure that he was a published author.

The prosecutor did later question Juror No. 58 about the disclosure that his son was a police officer:

Is there anybody here that you yourself or a close personal friend or close family member are involved in law enforcement, maybe you're a MP in the military, you've got a relative that was, maybe you had some training at some point in time? I'll start with – I believe you mentioned during that break that you had a son?

JUROR NO. 58: Yes, sir.

[THE PROSECUTOR]: He's an officer where?

JUROR NO. 58: Springfield, Missouri.

[THE PROSECUTOR]: Okay. And the fact that he's a cop – a police officer, is it going to affect your ability to be fair in this case in any way?

JUROR NO. 58: No, sir.

[THE PROSECUTOR]: Let me ask you this question. You know it's about a police officer being killed. Simply, it's – our theory will be that he was killed because he was investigating Lance Shockley when he was killed. I mean, that's what it boils down to. Knowing that that's what this case is about and your son is a law enforcement officer, is it going to hit home, are you going to worry – I mean the thought of, man, if that ever happened to my son, are you going to be able to put that out of

your mind and decide this case solely on what goes on in this courtroom?

JUROR NO. 58: Yes, sir. I have my own mind.

[THE PROSECUTOR]: I'm sorry?

JUROR NO. 58: I have my own mind. Yes, sir.

(Tr. 742). Defense counsel did not direct any specific questions to Juror No. 58 during his portion of the general voir dire. (Tr. 753-59). No motion was made to strike Juror No. 58 for cause. (Tr. 759, 765-66). He served as the jury foreman in the guilt phase of the trial. (Tr. 983, 2148; L.F. 1610, 1704).

An overnight recess was taken after the State and the defense presented evidence in the penalty phase of the trial. (Tr. 2148). Before court reconvened the next morning, defense counsel informed the court that it had obtained a copy of the book written by Juror No. 58. (Tr. 2148). Counsel conceded that Juror No. 58 had disclosed in voir dire that he was a published author and that neither side had followed up on that information. (Tr. 2149). Counsel proceeded to read portions of the book, which described the protagonist kidnapping, torturing, and killing the drunk driver who had killed his wife, after that man was placed on probation following a conviction for involuntary manslaughter. (Tr. 2148-59). At another point in the book the protagonist, a retired Green Beret, mistakenly believes that his FBI agent son has been killed in a shooting. (Tr. 2149). He then steals nuclear

material in an attempt to strike back at the system. (Tr. 2149). Defense counsel asked the court to declare a mistrial due to juror misconduct in the first stage of the trial. (Tr. 2161). Counsel also asked that Juror No. 58 be removed from the jury for future proceedings. (Tr. 2162).

After listening to extensive argument from counsel and reviewing transcripts of Juror No. 58's voir dire responses, the court denied the request for a mistrial, finding that there was no evidence of juror misconduct. (Tr. 2162-74). The court also overruled defense counsel's suggestion to inquire of other jurors about any possible misconduct because such an inquiry at that stage would irreparably taint the proceedings, necessitating a mistrial. (Tr. 2174). The court did tell Appellant that he would be given the opportunity to address the issue after trial and to inquire of the jurors if necessary. (Tr. 2174). After additional arguments, Juror No. 58 was dismissed by consent of the parties, and an alternate juror took his place for the penalty phase deliberations. (Tr. 2174-2211).

Appellant's new trial motion claimed that the court erred in not declaring a mistrial when the contents of Juror No. 58's book were revealed to the court. (L.F. 1739-40). The motion claimed that the book was evidence that Juror No. 58 had not been truthful about his views on the death penalty nor forthright about his experiences with the criminal justice system, and that his actions undermined the reliability of the verdict. (L.F. 1740). The

motion also alleged that the court erred in refusing the defense request to hold a hearing to inquire of Juror No. 58 about the contents of the book and his beliefs, and to also hold a hearing to inquire of all the jurors on the effect that Juror No. 58's personal beliefs and opinions had on jury deliberations. (L.F. 1740). A week after the new trial motion was filed, the trial court sent a letter to the prosecutor and to defense counsel directing them to make arrangements for a phone conference if either side planned on questioning jurors at a post-trial hearing. (L.F. 1756). The court also advised counsel that Juror No. 58 gave a copy of his book to the court bailiff during the week of trial. (L.F. 1756).

The sentencing hearing was held twenty-four days after that letter was written. (Tr. 2231). Defense counsel acknowledged receipt of the court's letter and advised the court that the defense did not intend to call any witnesses regarding Juror No. 58. (Tr. 2231-32). The court also clarified that the incident where Juror No. 58 gave a copy of his book to the bailiff happened outside of court, and that the court did not learn about it until after the trial was over. (Tr. 2232-33). The court also disclosed that Juror No. 58 gave a copy of the book to his secretary during the sentencing phase of the trial. (Tr. 2232-33).

B. Standard of Review.

A mistrial is a drastic remedy, granted only in extraordinary circumstances. *Johnson*, 968 S.W.2d at 134. Because the trial court is in a better position to observe the evidence and it's impact, the granting of a mistrial rests within it's sound discretion. *Id*. Appellate review is for abuse of discretion. *Id*. An abuse of discretion occurs when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Fassero*, 256 S.W.3d at 115.

C. Analysis.

1. No abuse of discretion in denying request for a mistrial.

Appellant has failed to demonstrate the necessity for a mistrial. The theory behind the mistrial request was that Juror No. 58's authorship of a fictional novel reflected his beliefs and values, with the assumption being that Juror No. 58 was predisposed towards finding Appellant guilty and imposing the death penalty. The assumption that an author's fictional works provides a complete and accurate picture of their personal beliefs is highly questionable. Juror No. 58 only participated in the guilt phase deliberations and the scenario described in the book does not lead to the conclusion that he had preconceived ideas about the outcome of the guilt phase. The book's

protagonist does not seek revenge on the drunk driver because of an acquittal. He instead seeks revenge when that drunk driver is allowed to walk away with no prison time after being convicted of manslaughter. Because the plot of the book included an actual judgment of guilt, it cannot be said to reflect a bias that an acquittal is tantamount to letting a defendant "get away with it." And there is nothing else about the plot to suggest that Juror No. 58 had prejudged guilt or innocence, or that he would not hold the State to its burden of proving Appellant guilty beyond a reasonable doubt. Moreover, and more importantly, it cannot be assumed that an author personally holds the same views attributed to a fictional character in a book.

Appellant also expresses concerns about the jury's punishment phase deliberations being tainted despite Juror No. 58's non-participation in those deliberations. Again, the book on its face does not support those concerns. The protagonist exacted his revenge because even after being found guilty, the drunk driver was able to walk away with no prison time. Appellant's jury faced only two sentencing options after finding him guilty of murder in the first degree – death or life imprisonment without parole. Appellant was not going to walk away from anything.[14] And any concern that Juror No. 58

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[14] Appellant faced a sentence of ten years to life even if the jury convicted him of the lesser-included offense of murder in the second degree.

pushed a pro-death penalty bias that later affected the jury is undercut by the jury's inability to agree on punishment despite unanimously finding the required predicate facts for imposing the death penalty.

To the extent that the book may reflect some of the author's opinions about the criminal justice system, holding such opinions does not automatically disqualify him from jury service. *Davis*, 318 S.W.3d at 639. The determinative question is whether the opinion is of such intensity and holds such sway over the mind that it will not yield to the evidence presented at trial. *Id*. A juror's views on capital punishment will not support a strike for cause unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. *Id*.; *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). Disqualification of a juror thus requires a showing that the juror cannot consider the range of punishment, apply the correct burden of proof, or follow the court's instructions. *Davis*, 318 S.W.3d at 639.

There is nothing in the record to support such a showing. Juror No. 58 indicated during voir dire that he could give equal consideration to both the death penalty and to life imprisonment if the jury returned a guilty verdict. (Tr. 685-87). And he also gave assurances that the fact that his son was a

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§§ 565.021.2, RSMo 2000.; 558.011.1(1), RSMo Cum. Supp. 2003.

police officer would not interfere with his ability to fairly and impartially evaluate the evidence. (Tr. 742). The mere authorship of a fanciful novel does not rebut those assurances.[15]

2. Appellant waived claim that jurors should have been questioned.

Appellant's claim that the trial court erred in not inquiring of the jurors should be considered waived. The trial court provided Appellant the opportunity, prior to sentencing, to call witnesses to establish his claim that Juror No. 58 was biased and that his bias infected the jury's deliberations. (L.F. 1756). Such a hearing would have allowed Appellant to do more than merely speculate on whether the jury had been given copies of the book. (Appellant's Brf., p. 122). But Appellant chose not to take advantage of that

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[15] Appellant repeatedly categorizes the novel as "fictional autobiography" based on some puffery in a promotional piece that the author wrote for the book. (L.F. 1661). As the author notes, he drew on his Indian heritage, service in the military as a Green Beret, and his raising a son who became a law enforcement officer to provide some of the plot points in the book. (L.F. 1661). It stretches credulity though to think that the portions of the book dealing with kidnapping, torture, murder, and the theft of nuclear weapons are remotely autobiographical. If Appellant believed they were, he should have developed evidence of that at the hearing on the new trial motion.

opportunity and declined to call any witnesses to establish his claim. (Tr. 2231-32). A trial court will not be convicted of error in failing to *sua sponte* hold a hearing on a claim of juror misconduct where the defendant eschews the offer of a hearing. *State v. Donahue*, 280 S.W.3d 700, 705 (Mo. App. W.D. 2009). And it should be noted that *Donahue* involved actual evidence of potential juror misconduct, namely a couple of jurors overheard having a discussion during a lunch recess about why the defendant had been in jail for so long. *Id*. There is no evidence of potential misconduct by Juror No. 58 in this case. All the evidence shows is that he wrote a book and had a son who was a police officer. But he disclosed those facts during voir dire. (Tr. 710). The fact that Juror No. 58 gave copies of his book to a bailiff outside of court and to the judge's secretary is not by itself misconduct, as those actions do not on their face have any effect on the jury's deliberations. And again, if Appellant believed that Juror No. 58 had brought improper influences to bear on his fellow jurors, he had the opportunity and responsibility to develop evidence of that, but declined to do so.

Nor did the court abuse its discretion in declining to inquire of the jurors while the trial was still ongoing. In *State v. O'Dell*, defense counsel alerted the court during deliberations that relatives of the victim had been overheard making inflammatory remarks to some of the jurors. *State v. O'Dell*, 684 S.W.2d 453, 469 (Mo. App. S.D. 1984). The court declined to

interrupt deliberations to inquire of the jurors but offered defense counsel the opportunity to make a record with non-juror witnesses to the incident. *Id*. Counsel offered no evidence and did not make any other record. *Id*. The defendant then made a claim of error in his motion for new trial but did not attempt to present the testimony or affidavit of any juror. *Id*. at 470. The Southern District ruled that the trial court did not abuse its discretion in failing to declare a mistrial during deliberations or in failing to *sua sponte* hold a hearing in connection with the new trial motion. *Id*. at 469-70.

The trial court in this case did not abuse its discretion in determining that questioning the jury before the trial was concluded created an unjustifiable risk of creating prejudice where none may have otherwise existed, resulting in an unnecessary mistrial. The court reasonably concluded that a post-trial hearing would adequately protect Appellant's right to a new trial if one was truly warranted. The court should not be faulted for Appellant's decision to not take advantage of that reasonable solution. Appellant has failed to demonstrate error or prejudice. His point should be denied.

IX.

The death penalty is a proportionate and appropriate punishment for the planned, execution-style murder of a law enforcement officer committed for the purpose of avoiding a lawful arrest and removing a potential witness.

Appellant claims that his death sentence should be set aside because it is excessive and disproportionate to penalties imposed in similar cases. But the aggravating circumstances found by the jury, which Appellant does not dispute, and the circumstances surrounding the manner in which the murder was committed have supported death sentences in several cases. And Appellant's recent history of violent behavior, including violence directed at law enforcement and corrections officers, also makes the death penalty an appropriate and proportionate punishment.

A. Standard of Review.

This Court independently reviews each sentence of death to determine (1) whether it was imposed under the influence of passion or prejudice, or any other arbitrary factor; (2) whether there was sufficient evidence to support the finding of a statutory aggravating circumstance and any other circumstance found; and (3) whether the sentence was excessive or disproportionate to the penalty imposed in similar cases, considering both the

crime, the strength of the evidence and the defendant. § 565.035.3, RSMo 2000. In conducting proportionality review this Court gives due deference to the factual determinations reached below and determines whether the sentence is disproportionate as a matter of law. *State v. Deck*, 303 S.W.3d 527, 551 (Mo. banc 2010).

B. Analysis.

1. Aggravating circumstances that the jury found beyond a reasonable doubt support the death penalty.

Appellant does not allege that the sentence was imposed under the influence of passion, prejudice, or any arbitrary factor. *Anderson*, 306 S.W.3d at 544; *McLaughlin*, 265 S.W.3d at 277. Nor does Appellant claim that the aggravating circumstances found by the jury were unsupported by the evidence. *State v. Rodden*, 728 S.W.2d 212, 222 (Mo. banc 1987). And those aggravating circumstances that the jury did find have been held to be sufficient to support the death penalty in other cases.[16]

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[16] Appellant argues that this Court must also consider cases in which a sentence of death was possible but a life sentence resulted. (Appellant's Brf., p. 126). But he offers no examples of such cases that would support his claim that the death sentence is disproportionate in his case.

This Court has upheld death sentences in numerous cases involving the killing of law enforcement or corrections officers. *See, e.g.*, *Johnson*, 284 S.W.3d at 577; *State v. Tisius*, 92 S.W.3d 751, 765-66 (Mo. banc 2002); *State v. Clayton*, 995 S.W.2d 468, 484 (Mo. banc 1999); *Johnson*, 968 S.W.2d at 135; *State v. Sweet*, 796 S.W.2d 607, 617 (Mo. banc 1990); *State v. Mallett*, 732 S.W.2d 527, 542-43 (Mo. banc 1987); *State v. Driscoll*, 711 S.W.2d 512, 517-18 (Mo. banc 1986); *State v. Roberts*, 709 S.W.2d 857, 870 (Mo. banc 1986).

Death sentences have also been upheld in numerous cases where the murder was committed to prevent a lawful arrest. *See, e.g., Deck*, 303 S.W.3d at 552; *State v. Ferguson*, 20 S.W.3d 485, 494 (Mo. banc 2000); *State v. Simmons*, 944 S.W.2d 165, 191 (Mo. banc 1997); *State v. Smith*, 944 S.W.2d 901, 925 (Mo. banc 1997); *Sweet*, 796 S.W.2d at 616. And the Court has similarly found the death sentence to be proportionate in cases where the murder was committed to prevent a witness from testifying. *See, e.g., State v. Weaver*, 912 S.W.2d 499, 522 (Mo. banc 1996); *State v. Foster*, 700 S.W.2d 440, 445 (Mo. banc 1985); *State v. Williams*, 652 S.W.2d 102, 113 (Mo. banc 1983); *State v. Blair*, 638 S.W.2d 739, 759 (Mo. banc 1982). The Court has noted that such a murder strikes at the heart of the administration of justice:

> In short, a witness is the only person who, as an individual, is singularly indispensable to the fair administration of justice. The interference with the appearance of necessary witnesses in court

> and the killing of a witness to prevent the witness from testifying, as here, is absolutely intolerable. From the public standpoint it cuts the very heart out of a justice system necessary to maintenance of freedom. It is difficult to conceive of a crime more inimical to our society than the killing of a witness to prevent the witness from testifying. Prospective offenders who might consider killing a witness must be deterred. Such a purpose is served by imposing the death penalty.

Blair, 638 S.W.2d at 760.

2. Death penalty appropriate for planned execution-style killing.

The evidence points to Appellant carrying out a planned killing for his own purposes, which this Court has described as "the most aggravated of the death penalty cases." *State v. Ervin*, 835 S.W.2d 905, 927 (Mo. banc 1992). Appellant got directions to Sergeant Graham's house, borrowed a car that he drove to the area and then, armed with two weapons, hid for several hours behind a wooden barrier where he could not be seen but which gave him a clear view of Sergeant Graham's driveway. (Tr. 1159-60, 1175-76, 1179, 1190, 1304-07, 1322-25, 1329, 1803-08, 1855-74, 1887-97, 1904-06, 1913; State's Exs. 62, 69, 141). The death sentence has been imposed repeatedly for murders carried out pursuant to an elaborate plan. *See State v. Franklin*, 969 S.W.2d 743, 745-46 (Mo. banc 1998 (listing cases), *see also*, *Sweet*, 796

S.W.2d at 617 (upholding death sentence where murder was "a cold-blooded surprise attack by a defendant who then was sought under outstanding arrest warrants on drugs and weapons charges.").

The manner in which Sergeant Graham was murdered also supports imposition of the death penalty. This Court has upheld death sentences where an injured and helpless victim is subject to a fatal blow. *Johnson*, 284 S.W.3d at 577; *Tisius*, 92 S.W.3d at 765-66; *State v. Cole*, 71 S.W.3d 163, 177 (Mo. banc 2002); *State v. Johns*, 34 S.W.3d 93, 118 (Mo. banc 2000); *Middleton*, 995 S.W.2d at 467; *State v. Tokar*, 918 S.W.2d 753, 773 (Mo. banc 1996). A scenario similar to Sergeant Graham's murder can be found in *State v. Hutchison*, where one of the victims was paralyzed from the waist down after the first gunshot severed his spinal cord. *State v. Hutchison*, 957 S.W.2d 757, 766 (Mo. banc 1997). The defendant then shot the victim multiple times in the eyes and ears. *Id.*

Sergeant Graham was also paralyzed when the initial rifle shot severed his spinal cord. (Tr. 1267). He was still alive when he was shot twice in the face with a shotgun, with some of the pellets penetrating into his lungs. (Tr. 1267-68). Although the medical examiner testified that Sergeant Graham would have eventually died even without the shotgun wounds (Tr. 1268), there is no reason to treat this case differently than those in which the subsequent wounds were clearly the fatal blows. Appellant at the time could

not have definitively ruled out the possibility that Sergeant Graham might be able to survive the rifle shot. It is thus reasonable to presume that the shotgun blasts were intended to inflict a fatal blow. The manner of the shooting bears the characteristics of an execution-style shooting, which this Court has also found supports the imposition of the death penalty. *See, e.g.*, *Clayton*, 995 S.W.2d at 484; *Hutchison*, 957 S.W.2d at 766.

3. The death penalty is appropriate in a case with strong circumstantial evidence, such as this one.

Appellant primarily bases his claim that the sentence is disproportionate on the circumstantial nature of the case against him. But the circumstantial nature of the evidence is not dispositive to proportionality review under section 565.035, RSMo, since circumstantial evidence is afforded the same weight as direct evidence. *Hutchison*, 957 S.W.2d at 767. This Court has thus upheld the death penalty in cases grounded in circumstantial evidence. *See, e.g., id.*; *State v. Barton*, 240 S.W.3d 693, 710 (Mo. banc 2007); *State v. Jones*, 749 S.W.2d 356, 365 (Mo. banc 1988).

Appellant relies on *State v. Chaney*, where this Court set aside a death sentence as disproportionate because of the weakness of the circumstantial evidence pointing to the defendant's guilt. *State v. Chaney*, 967 S.W.2d 47, 60 (Mo. banc 1998). The Court found that the conviction was based primarily on trace and pathological evidence that fell within "a narrow band" where it was

sufficient to support a conviction, but not of the compelling nature usually found in cases where the sentence is death. *Id*.

Unlike *Chaney*, the circumstantial evidence in this case is strong, making the death penalty a proportionate punishment. *See Jones*, 749 S.W.2d at 365. Appellant was being investigated by Sergeant Graham for a fatal accident in which he faced the possibility of manslaughter charges. Appellant had concealed his involvement in the accident for several months, demonstrating his desire to avoid being held accountable. The day after Appellant learned that Sergeant Graham had obtained statements verifying his involvement in the accident, he obtained directions to Sergeant Graham's house and borrowed his grandmother's car. (Tr. 1051, 1114-19, 1159-60, 1803-08). That car was seen parked on a remote road near Sergeant Graham's house during the time frame when Sergeant Graham was shot. (Tr. 1855-74, 1887-97, 1904-06, 1913). Appellant returned the car within fifteen to twenty minutes after the final shots were fired. (Tr. 1175-76, 1178, 1190, 1824-25).

The first bullet that struck Sergeant Graham was consistent with having been fired from a .243 rifle, and Appellant's wife tried to dispose of a box of .243 shells later that night. (Tr. 1261-62, 1270, 1395-96). And even though Appellant had been known to possess a .243 rifle with a scope, that rifle was not among the many weapons later found in a search of Appellant's

house. (Tr. 1405, 1489, 1547-48, 1731, 1744, 1748, 1792). Spent .243 shell casings and bullet fragments were found on his property, though. (Tr. 1467-71). A Highway Patrol firearms examiner concluded within a reasonable degree of scientific certainty that three of the bullet fragments were fired from the same weapon as the slug found in Sergeant Graham's body. (Tr. 1458, 1467-71, 1534, 1676-77). Two of his colleagues did their own examination and reached the same conclusion. (Tr. 1679). And while a private forensic examiner was not willing to reach a similarly definitive conclusion, he still testified that the bullet fragments and the slug had consistent class characteristics and some corresponding individual characteristics, so that he could not exclude the possibility that all were fired from the same gun. (Tr. 1609, 1614, 1616). Burned shotgun shell heads were found in a wood stove on Appellant's property and were of a type that was consistent with wadding found near Sergeant Graham's body. (Tr. 1702-03).

Appellant also gave false alibis and actively encouraged other people to give the police false information about his activities and whereabouts on the day of the murder, or to not talk to the police at all. (Tr. 1783-86, 1825-26, 1787-88, 1932, 1939-41, 1944). He berated investigators for talking to his friends and demanded that they tell him who they had talked to and what those people had said. (Tr. 1954-55). When confronted by the investigators with their knowledge that he had tried to get rid of the .243 shells, Appellant

reacted in a way consistent with an acknowledgement of guilt. (Tr. 1961-63). And he later confided to a former girlfriend, who was also the mother of his children, that he was in jail because he had done something really stupid. (Tr. 1575-76).

4. Appellant's character makes death penalty appropriate.

In *Chaney*, the Court also noted the defendant's lack of prior criminal convictions and lack of any recent history of violent behavior. *Chaney*, 967 S.W.2d at 60. By contrast, Appellant pled guilty on March 23, 2004, almost a year to the day before Sergeant Graham's murder, to one count each of assault on a law enforcement officer and peace disturbance. (Tr. 2088-89). Those charges arose from an incident on July 12, 2003, where Appellant got into a scuffle with two guards at the Carter County Jail. (Tr. 2088-90). Evidence was also presented in the sentencing phase of the trial that Appellant defied orders from deputies at the Howell County Jail, where he was being held while awaiting trial for Sergeant Graham's murder, and threatened to sexually assault and kill one of those jailers. (Tr. 2093-95). Appellant also kicked an inmate who had been thrown to the floor in a fight with a third inmate. (Tr. 2096-97).

In the guilt phase of the trial, the jury heard evidence that police searching Appellant's home had found numerous guns strategically placed around the house, with some of the guns propped up against doors and

windows that had the screens removed, and others hidden in laundry baskets by Appellant's bed. (Tr. 1479-80; State's Ex. 140). The number and location of the weapons suggests that Appellant was prepared for an armed confrontation. The jury also heard testimony in the guilt phase that Appellant had threatened to shoot any officers who came to his house without a warrant, and that he had made comments to his co-workers about getting night vision goggles and "playing cowboys and Indians" with the police. (Tr. 1777, 1946). And the jury heard evidence in the guilt phase about Appellant's pattern of inhibiting police investigations by persuading others to lie to the police about his involvement in the accident that killed Jeff Bayless and to lie about his activities and whereabouts when Sergeant Graham was murdered. (Tr. 1110, 1785-86, 1825-26, 1787-88)

Appellant presented little mitigating evidence. His grandfather testified that Appellant had been a good worker, and a good athlete when growing up. (Tr. 2132-37). Appellant's former girlfriend and the mother of Appellant's children, who had been a State's witness in the guilt phase, testified that sentencing Appellant to life in prison would allow her daughters to have a relationship with their father. (Tr. 2128-30). Appellant's background and his actions in committing the murder make the death penalty an appropriate and proportionate punishment.

5. Jury's inability to agree on punishment does not foreclose the death penalty.

Appellant also claims that the sentence is disproportionate because the jury was unable to agree on punishment. But this Court has rejected proportionality challenges and upheld the death sentence where the trial court imposed the death sentence after the jury deadlocked on punishment. *McLaughlin*, 265 S.W.3d at 277-78.

The record demonstrates that the death sentence was proportionate as applied to Appellant. 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 22,676 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and

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

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 27th day of July, 2011, to:

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APPENDIX