No. SC92979

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent/Cross-Appellant,

v.

LEDALE NATHAN,

Appellant.

Appeal from St. Louis City Circuit Court
Twenty-Second Judicial Circuit
The Honorable Robert H. Dierker, Judge

RESPONDENT/CROSS-APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant (Defendant) appeals from a St. Louis City Circuit Court judgment convicting him of first-degree murder, first-degree burglary, and several counts of first-degree assault, first-degree robbery, kidnapping, and armed criminal action. Following an opinion, the Court of Appeals, Eastern District, transferred this case to this Court. Therefore, jurisdiction lies in this Court. MO. CONST. art. V, § 10.

This Court has jurisdiction over the State's cross-appeal because after trial the circuit court dismissed "without prejudice" charges for lack of jurisdiction, which had the effect of foreclosing any further prosecution of those charges in the criminal courts. *See* § 547.200.2, RSMo 2000[1]; *State v. Smothers*, 297 S.W.3d 626, 631 (Mo. App. W.D. 2009) ("If the judgment precludes the litigant from maintaining the action in the forum chosen, it is a final judgment, irrespective of whether it is denominated "with prejudice" or "without prejudice."); *State v. March*, 130 S.W.3d 746, 747–48 (Mo. App. E.D. 2004) (holding that a judgment involving the dismissal of a charge was appealable when it purported to preclude further prosecution); *see also State v. Burns*, 994 S.W.2d 941, 942 (Mo. banc 1999) (noting that a judgment is

[1] All further sectional references are to the 2012 Cumulative Supplement to the Revised Statutes of Missouri, unless otherwise indicated.

final when the trial court enters an order of dismissal which has the effect of foreclosing further prosecution of the defendant on that particular charge). The circuit court's dismissal of those charges (which is described in detail in Point VIII) has the effect of precluding any further prosecution of Defendant for those charges.

STATEMENT OF FACTS

Within a day after the crimes in this case occurred, the St. Louis City juvenile officer filed a petition in St. Louis City juvenile court alleging that Defendant, a juvenile,[2] had, on or about October 5, 2009, committed several criminal offenses in this case, including first-degree murder and several counts of first-degree assault, first-degree robbery, and felonious restraint. (L.F. 85-87; Cert. Tr. 8).[3] The juvenile officer later moved to dismiss the juvenile petition and asked the juvenile court to determine whether Defendant was a proper subject to be dealt with under the juvenile code. (L.F. 88; Cert. Tr 8–9). The juvenile court held a certification hearing and determined that Defendant was not a proper subject to be dealt with under the juvenile code, dismissed the juvenile-court petition, and relinquished juvenile-court jurisdiction over Defendant. (L.F. 88-90).

The State then charged Defendant and his co-defendant, Mario Coleman, in a 26-count indictment with numerous criminal offenses committed during the October 5, 2009 home-invasion robbery, which resulted in the shooting death of Gina Stallis and multiple gunshot wounds to Nicholas Keonig and off-duty police officer Isabella Lovadina. (L.F. 18–25). Defendant filed pretrial

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[2] Defendant was born January 7, 1993. (L.F. 85).

[3] "Cert. Tr." refers to the certification-hearing transcript.

motions both to dismiss several counts of the indictment on the ground that those counts had not been certified by the juvenile court and to declare the juvenile-certification law (§ 211.071) unconstitutional. (L.F. 60–74, 91–94). Defendant also filed a motion to sever his case from his co-defendant's case, which was sustained. (L.F.33, 59).

A jury trial was held April 4-11, 2011, with Judge Robert H. Dierker presiding. (L.F. 8–11, 111–18). During opening statements, Defendant's trial counsel told jurors that Defendant was the person (not Coleman) who shot and killed Gina Stallis.[4] (Tr. 338–41). Defense counsel admitted that Defendant was guilty of second-degree murder, but not of first-degree murder. (Tr. 343). During closing arguments, defense counsel relied on the physical evidence to argue that Defendant was the shooter and that the testifying victims "simply have who is doing what reversed." (Tr. 960–62).

Defendant challenges the sufficiency of the evidence to support his first-degree murder conviction solely on the element of deliberation. Viewed in the

[4] The State's theory at trial was that Defendant and Coleman were passing the murder weapon (a silver .25 automatic) back and forth during the incident and that it was Coleman who shot the victims. (Tr. 327, 942, 944–45).

light most favorable to the verdict, the evidence presented at trial showed the following:

Just after midnight on October 5, 2009, Nick Koenig and Isabella Lovadina, who was an off-duty St. Louis City police officer, were standing on the sidewalk in front of Koenig's grandmother's (Ida Rask's) three-story house when a black car sped by them and turned around with its tires squealing. (Tr. 347–57, 463, 468–69). Less than a minute later, Koenig and Lovadina were quickly approached by two men coming from the direction where the car had gone. (Tr. 359–60). One man was wearing a black-hooded sweatshirt (hoodie) and carrying a silver gun and the other was wearing a red hoodie and carrying a black gun.[5] (Tr. 359–61). Both men pointed their guns at Koenig and Lovadina, announced a robbery, and ordered them to turn over anything they had. (Tr. 359–61, 469–71, 507). Lovadina said she did not have anything and Koenig surrendered his wallet. (Tr. 471, 507–08).

The robbers then asked who was in the house. (Tr. 362, 472). Inside were Koenig's 77-year-old grandmother (Ida Rask), Rask's two daughters (Rosemary Whitrock and Susan Diane Koenig—Nick Koenig's mother),

[5] Koenig and Lovadina identified Defendant as the person wearing the red hoodie and Mario Coleman as the person wearing the black hoodie. (Tr. 371, 389–91, 492–99, 562–63).

Whitrock's daughter (Gina Stallis), and Stallis's two young sons. (Tr. 348–49, 407–08, 464, 563–65). Koenig informed them that only women and children were inside. (Tr. 362, 472).

The robbers forced Koenig and Lovadina inside at gunpoint. (Tr. 362, 473). Once inside, the men turned off the lights and whispered to each other.[6] (Tr. 364). When Lovadina told the robbers to take whatever they wanted, the robber in the black hoodie told her to turn around and get on the "fucking" floor with their heads down. (Tr. 364–65, 473). Lovadina and Koenig got on the floor, and the robber in the red hoodie went upstairs. (Tr. 365, 474). The robber in the black hoodie leaned down and asked Lovadina if she was sure that she did not have anything; he then grabbed Lovadina's butt in a sexual way. (Tr. 367, 478–79). Whenever Lovadina or Koenig lifted their heads, they were told to put them down or else they would be shot.[7] (Tr. 367–68, 475).

Rosemary Whitrock, who was sleeping upstairs, was awakened by the sound of her terrified daughter (Gina Stallis) crying. (Tr. 412, 475–76). The robber in the red hoodie was cussing at Stallis and pointing a silver gun at

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[6] Whenever anyone attempted to turn on a light during the course of this 20-minute incident, the robbers became threatening and demanded that the lights be kept off. (Tr. 385, 422–23, 452, 570–71).

[7] One robber told Koenig he "would blow his head off." (Tr. 475).

Whitrock's head. (Tr. 412, 476, 570). He then led Whitrock into Rask's room and pointed the gun at both of them. (Tr. 568–69). Whitrock was led into another room on the second floor and was told to lie face down on the floor. (Tr. 413–14). When she refused, the robber in the red hoodie told her to "lay the fuck down or I'm going to shoot you; get down you fucking bitch." (Tr. 414). One of the robbers returned a few minutes later and took jewelry off Rask's dresser. (Tr. 418–19, 569–70). Rask was also ordered to take off her necklaces, ring, and watch. (Tr. 571–72, 591–92). Whitrock gave the robber two jewelry boxes and some money she had in her purse. (Tr. 418–20).

The robber in the red hoodie ordered Stallis, who had just been released from the hospital, to pick up a large flat-screen television on the second floor and carry it downstairs to the first floor. (Tr. 409, 415, 566, 602–03). When Whitrock attempted to help her daughter, who was having difficulty lifting the television, the man in the red hoodie told her to "sit the fuck down." (Tr. 415). Stallis, who was hunched over and crying, was forced to carry the television downstairs while the robber in the red hoodie was screaming and pointing a gun at her. (Tr. 370–72, 421, 476). The red-hooded robber was very aggressive and "picked on" Stallis. (Tr. 423).

When Stallis asked the robbers whether she could check on her children, one of them told her to "shut the fuck up, bitch; I'll kill you." (Tr. 373). Whitrock was brought downstairs and ordered to lie on the floor. (Tr. 375).

Rask was also brought downstairs, and while she was sitting on the stairs with a blank stare, the man in the red hoodie took the gun from the other robber, put the gun in Rask's face, pressed it to her forehead, and said several times, "I'll fucking kill you, I'll fucking shoot you." (Tr. 376, 421–22, 449, 574–75).

After discovering that there was a basement, the robber in the red hoodie ordered Stallis to get up and go into the basement; the robbers also said something about everyone being forced into the basement. (Tr. 378–79, 402, 422, 479, 576). When Stallis got up to go to the basement, she turned the light on; the robber in the red hoodie, who was directly behind Stallis, yelled at her to turn it off.[8] (Tr. 378, 422, 451–52). Whitrock told Stallis not to go into the basement. (Tr. 379).

Lovadina then got up and told Stallis to stay upstairs and that she would go downstairs into the basement. (Tr. 380–81, 481–82, 518). With that, Lovadina rushed the man wearing the black hoodie, who was by then holding the silver gun, in an effort to disarm him. (Tr. 380–81, 405, 482, 577). As the

[8] Whitrock saw the face of the robber in the red hoodie when the light flashed on. (Tr. 452–53). Although she was unable to identify Defendant in a photographic lineup, she identified Defendant in a live lineup as the robber wearing the red hoodie. (Tr. 429–32, 449–50, 452–53).

robber in the red hoodie, who was carrying the black gun, ran toward them, Koenig stopped him and a struggle between them ensued. (Tr. 424, 455, 482–84, 489, 518). Multiple gunshots were fired (seven shell casings were found on the floor), and Lovadina fell to the floor in pain. (Tr. 381–82, 456, 577, 683). The robber in the black hoodie fired shots into Lovadina while she was on the ground.[9] (Tr. 483, 486). Both robbers fled. [10] (Tr. 362, 403).

Lovadina was shot 5 times. (Tr. 386, 388). Her cheek was grazed by one bullet, she was shot twice in the chest, a fourth bullet went through her upper chest and shoulder, and a fifth bullet entered her upper thigh, went through her uterus, and lodged in her pelvis. (Tr. 386–87). Koenig was shot three times in the throat, shoulder, and back of the neck. (Tr. 484–89). Stallis lay dead on the floor with a gunshot wound to the chest. (Tr. 489–90, 877–78).

Defendant, who was shot in the left hand, was taken to the hospital. (Tr. 611–12, 617). He asked an X-ray technician to discard his red hoodie, which

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[9] Koenig testified that Coleman was the shooter. (Tr. 486).

[10] Coleman's fingerprints were on jewelry boxes and a tape recorder in the house. (Tr. 756–62). Defendant's blood was in the entryway and floor. (Tr. 852–53).

had blood on it; the hoodie was later found in a hospital laundry cart.[11] (Tr. 608–10, 667–68, 809).

Defendant told police at the hospital that he had been shot while with his girlfriend. (Tr. 657–58). He later added that he had been shot while driving his car. (Tr. 657–58). When an officer pointed out that Defendant had not initially mentioned anything about being in a car, Defendant became nervous and insisted that he had. (Tr. 658–59).

Defendant's mother, who was also at the hospital, pointed police to the people who had brought Defendant there. (Tr. 617–18). The police followed these people as they crossed the road in front of the hospital and approached Defendant's black Ford Thunderbird. (Tr. 618–20, 661, 746–47). The group stopped near the car, bypassed it, and started down the sidewalk. (Tr. 620). When they were ordered to stop, Coleman reached into his pocket and threw down Rask's necklaces, ring, and watch; he also dropped a black .22 caliber handgun. (Tr. 591–92, 622–26, 631–32). The gun had one live round in it, but was missing its magazine and magazine release lever. (Tr. 630, 637–39, 645, 880–81). Without this lever and a magazine, the gun would fire only one bullet at a time. (Tr. 883).

[11] Defendant's DNA was on the red hoodie. (Tr. 859).

Inside Defendant's car, police found a silver .25 caliber semi-automatic handgun wedged between the passenger seat and console.[12] (Tr. 643–44, 661). Although a seven-shot clip was in the gun, no bullets were in it. (Tr. 644, 884–86). Seven shell casings fired from the .25 caliber gun were found in the house where the victims were shot, and bullets found in Stallis and Lovadina were fired from that same gun. (Tr. 887–90). A black hoodie was also found in Defendant's trunk, and victim Stallis's cell phone was found in the pocket. (Tr. 438–39, 650, 661).

Defendant did not testify or offer evidence after the State rested its case. (Tr. 910).

During the hearing on Defendant's motion for new trial, the trial court dismissed on jurisdictional grounds several counts of the indictment (Counts IX, X, XXXIII, and XXIV) pertaining to victim Rosemary Whitrock, which the jury had found Defendant guilty of committing, because the offenses involving her were not specifically mentioned in the juvenile-court petition. (L.F. 247, 259–60; Tr. 982).

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[12] Defendant's DNA was on the trigger grip and body of the silver .25 caliber gun. (Tr. 843). The front and inside barrel of the .25 caliber gun had Lovadina's blood on it. (Tr. 844). Lovadina's blood was also found on Defendant's pant leg and sneaker. (Tr. 848-50).

Defendant was found guilty on all counts, including those later dismissed by the trial court, and, after waiving jury sentencing, he received consecutive sentences of life without parole for first-degree murder, life imprisonment for each count of first-degree assault ((2 counts) and first-degree robbery (3 counts), 15 years for each count of kidnapping (4 counts), and 15 years for one count of first-degree burglary. The life sentences imposed on the armed-criminal-action counts (11 counts) were ordered to run concurrently with their associated charges, but consecutively to each other. (Tr. 977–78, 996–1004; L.F. 262-70).

POINT RELIED ON

The trial court erred in dismissing Counts IX, X, XXIII, and XXIV for lack of jurisdiction because the trial court had jurisdiction over these charges notwithstanding the fact that victim Whitrock's name was not mentioned in the juvenile-court petition in that: (1) under Missouri law a juvenile court has jurisdiction only over the juvenile's person, not over the charges that may subsequently be brought by the State if the juvenile court relinquishes jurisdiction following a certification hearing; and (2) after certification, juvenile-court jurisdiction over the juvenile is "forever terminated" under § 211.071.9 and the State may bring any criminal charge(s) it chooses, including any related to the incident that precipitated the juvenile-court petition and certification proceeding. (Point VIII).

State v. Davis, 988 S.W.2d 68 (Mo. App. W.D. 1999);

Scott v. State, 691 S.W.2d 291 (Mo. App. W.D. 1985);

State v. Ford, 487 S.W.2d 1 (Mo. 1972);

Richardson v. State, 555 S.W.2d 83 (Mo. App. K.C.D. 1977);

Section 211.071.9.

ARGUMENT

I (sufficiency—deliberation).

The trial court did not err in overruling Defendant's motion for judgment of acquittal on the charge of first-degree murder on the ground that there was insufficient evidence of deliberation because the record contains sufficient evidence that Defendant deliberated before victim Stallis was murdered in that he admitted at trial that he was the person who fired the shots that wounded victims Lovadina and Koenig and killed Stallis.

Defendant challenges his first-degree murder conviction only on the ground that the evidence was insufficient to prove deliberation.

A. Standard of review.

When considering sufficiency-of-evidence claims, this Court's review is limited to determining whether the evidence is sufficient for a reasonable juror to find each element of the crime beyond a reasonable doubt. *State v. Freeman*, 269 S.W.3d 422, 425 (Mo. banc 2008); *State v. O'Brien*, 857 S.W.2d 212, 215-16 (Mo. banc 1993). Appellate courts do not review the evidence de novo; rather they consider the record in the light most favorable to the verdict:

To ensure that the reviewing court does not engage in futile attempts to weigh the evidence or judge the witnesses' credibility, courts employ "a

> legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution." Thus, evidence that supports a finding of guilt is taken as true and all logical inferences that support a finding of guilt and that may reasonably be drawn from the evidence are indulged. Conversely, the evidence and any inferences to be drawn therefrom that do not support a finding of guilt are ignored.

O'Brien, 857 S.W.2d at 215–16 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "An appellate court 'faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *State v. Chaney*, 967 S.W.2d 47, 54 (Mo. banc 1998) (quoting *Jackson v. Virginia*, 443 U.S. at 326); *see also Freeman*, 269 S.W.3d at 425 (holding that an appellate court should "not weigh the evidence anew since 'the fact-finder may believe all, some, or none of the testimony of a witness when considered with the facts, circumstances and other testimony in the case'") (quoting *State v. Crawford*, 68 S.W.3d 406, 408 (Mo. banc 2002)).

Appellate courts do not act as a "super juror with veto powers"; instead they give great deference to the trier of fact. *State v. Grim*, 854 S.W.2d 403, 405 (Mo. banc 1993); *State v. Chaney*, 967 S.W.2d at 52. Appellate courts may neither determine the credibility of witnesses, nor weigh the evidence. *State*

v. Villa-Perez, 835 S.W.2d 897, 900 (Mo. banc 1992). It is within the trier of fact's province to believe all, some, or none of the witnesses' testimony in arriving at the verdict. *State v. Dulany*, 781 S.W.2d 52, 55 (Mo. banc 1989). Circumstantial evidence is given the same weight as direct evidence in considering the sufficiency of the evidence. *Grim*, 854 S.W.2d at 405–06.

B. The evidence was sufficient to prove the element of deliberation.

"A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter." Section 565.020.1, RSMo 2000. "'Deliberation' means cool reflection for any length of time no matter how brief . . . ." Section 565.002(3), RSMo 2000. The jury instruction for first-degree murder (Instruction No. 5) contained language covering both accomplice liability and transferred intent. (L.F. 133). Under Missouri accomplice-liability law, a "person is criminally responsible for the conduct of another when . . . [e]ither before or during the commission of an offense with the purpose of promoting the commission of an offense, he aids agrees to aid or attempts to aid such other person in planning, committing or attempting to commit the offense." Section 562.041.1, RSMo 2000. Missouri's transferred-intent law for homicide crimes provides that the "culpable mental state necessary for a homicide offense may be found to exist if the only difference between what actually occurred and what was the object

of the offender's state of mind is that a different person or persons were killed." Section 565.003.1, RSMo 2000.

"Proof of deliberation does not require proof that the defendant contemplated his actions over a long period of time, only that the killer had ample opportunity to terminate the attack once it began." *State v. Strong*, 142 S.W.3d 702, 717 (Mo. banc 2004). *See also State v. Jones*, 955 S.W.2d 5, 12 (Mo. App. W.D. 1997) ("The deliberation necessary to support a conviction of first-degree murder need only be momentary; it is only necessary that the evidence show that the defendant considered taking another's life in a deliberate state of mind."). "Deliberation ordinarily is established through circumstances surrounding the crime." *Zink v. State*, 278 S.W.3d 170, 180 (Mo. banc 2009). "Deliberation . . . for [first-degree] murder . . . may 'be proved by indirect evidence and inferences reasonably drawn from circumstances surrounding the killing.'" *State v. Smith*, 185 S.W.3d 747, 758–59 (Mo. App. S.D. 2006). "Deliberation may be inferred when there are multiple wounds or repeated blows." *Strong*, 142 S.W.3d at 717. "The inference of deliberation can be strengthened by the fact that a defendant left the scene of the crime immediately after shooting without checking on the victim; that defendant failed to procure aid for the victim; and that defendant disposed of the weapon used in the shooting." *Smith*, 185 S.W.3d at 759; *see also State v. Tisius*, 92 S.W.3d 751, 764 (Mo. banc 2002) (holding that

"[d]isposing of evidence and flight can support the inference of deliberation). "In addition, failure to seek medical help for a victim strengthens the inference that the defendant deliberated." *Strong*, 142 S.W.3d at 717.

Defendant admitted before the jury that he was guilty of second-degree murder. (Tr. 343). Moreover, he admitted to the jury that he fired the seven shots that killed Stallis and injured Lovadina and Koenig, notwithstanding the fact that the State's theory was that Coleman fired the shots. (Tr. 327, 339–41, 960–62, 942, 944–45).

"When a defendant makes a voluntary judicial admission of fact before a jury, it serves as a substitute for evidence and dispenses with proof of the actual fact and the admission is conclusive on him for the purposes of the case." *State v. Olinger*, 396 S.W.2d 617, 621-22 (Mo. 1965). *See also State v. Roberts*, 948 S.W.2d 577, 588 (Mo. banc 1997) (rejecting a claim regarding the trial court's failure to give a limiting instruction when the defendant "confessed to the actus reus" through "[d]efense counsel['s] acknowledge[ment] to the jury on several occasions that [the defendant] had killed [the victim]"); *State v. Kimbrough*, 166 S.W.2d 1077, (Mo. 1942) (holding that the "general rule is that when a defendant makes a voluntary judicial admission of fact before the jury, it serves as a substitute for evidence and dispenses with proof of the actual fact" and that the "admission is conclusive on him for the purposes of the case"). In *State v. Wood*, 301 S.W.3d

578 (Mo. App. S.D. 2010), the court rejected the defendant's sufficiency challenge and held that the defendant's voluntar[y] . . . admissions of fact before the jury [during closing argument] . . . served as substitutes for evidence and obviated the need for any additional proof of these facts." *Id.* at 582-83. *See also State v. Aldazabal*, 430 N.W.2d 614, 615–16 (Wis. App. 1988) (rejecting the defendant's constitutional challenge to the sufficiency of the evidence on the ground that the defendant stipulated to an essential element of the offense).

Defendant's admission before the jury that he was the shooter constituted a judicial admission notwithstanding other evidence showing that Coleman was the shooter. In other words, the State was not required to present further proof that Defendant was the actual shooter and his judicial admission should preclude him from now arguing for the first time on appeal that he was not the person who did the shooting.

If the record is viewed in light of Defendant's judicial admission that he was the shooter, the evidence amply supports the jury's finding of deliberation. The shooter fired seven shots from the gun and emptied it; and he shot three people, two of whom were shot multiple times.[13] The evidence of

[13] The trigger of the murder weapon had to be pulled for each shot and each pull required seven pounds of force. (Tr. 892).

deliberation is especially strong for Lovadina's shooting. The shooter shot Lovadina five times, with several shots to vital areas of her body. (Tr. 386-88). Koenig testified that he saw the shooter firing directly at Lovadina. (Tr. 486). Even without this testimony, however, the evidence supported an inference of intentionally fired shots delivered at close range since Lovadina's blood was found on the front, and even inside the barrel, of the murder weapon. (Tr. 844). *See State v. Johns*, 34 S.W.3d 93, 111 (Mo. banc 2000) (holding that the jury could infer deliberation since the location of the shell casings showed that the fatal blow was delivered at close range after the victim had been shot a number of times and was lying helpless on the ground). In addition, Defendant made numerous threats to kill several members of the household during the course of the incident, pointed the gun at the heads of several of them, and was attempting to force one victim, perhaps to be followed by others, into the dark basement when the shooting erupted. (Tr. 370–78, 414–15, 421–23, 449–52, 476, 574–75). Finally, Defendant ran from the house without procuring help for the victims, attempted to dispose of evidence, hid the murder weapon in his car, and lied to police about how his hand was injured. (Tr. 362, 403, 608–10, 643–44, 657–61, 667–68, 809).

Under the law of transferred intent, the fact that the shooter deliberated before shooting Lovadina, or even Koenig, would support a finding of guilt for

the first-degree murder of Stallis. *See State v. Wren*, 317 S.W.3d 111, 121–22 (Mo. App. E.D. 2010) (holding that the evidence was sufficient to convict the defendant of first-degree murder under the theory of transferred intent where the record showed that the jury could have determined that the defendant killed the murder victim while intending to shoot and kill another person).

Even if the record is viewed under an accomplice-liability theory with co-defendant Coleman being the actual shooter, the evidence is still sufficient to prove that Defendant deliberated. *See Wren*, 317 S.W.3d at 121 (holding that for a first-degree murder conviction premised on accomplice liability the "[d]efendant need not have personally performed each act constituting the crime's elements, but in order to be responsible for the other person's acts, he must have acted together with or aided that person either before or during the commission of the murder, with the purpose of promoting the crime").

Missouri courts have found sufficient evidence of deliberation in accomplice-liability cases in which the defendant did not fire the fatal shots or strike the lethal blow. In *State v. Ramsey*, 874 S.W.2d 414, (Mo. App. W.D. 1994), the court found sufficient evidence of deliberation to support the first-degree murder conviction premised on accomplice liability notwithstanding the lack of any direct evidence showing that the defendant shot the victims. *Id.* at 416. The court also held that if the defendant "was only an accomplice

and that his co-defendant shot both men while [the defendant] stood by," the evidence was still sufficient . *Id.* at 416–17. *See also State v. Skillicorn*, 944 S.W.2d 877, (Mo. banc 1997), *overruled in part on other grounds by Joy v. Morrison*, 254 S.W.3d 885 (Mo. banc 2008); *State v. Boston*, 910 S.W.2d 306, 310 (Mo. App. W.D. 1995) (holding that for a first-degree murder conviction premised on accomplice liability it is "wholly irrelevant that [the defendant] did not fire the fatal shot").

The record contains sufficient evidence to support Defendant's conviction for first-degree murder on the theory that Defendant was the shooter based on his judicial admission or on an accomplice-liability theory based on his conduct immediately before the shooting began.

II (cruel-and-unusual punishment).

Although imposition of the statutorily-mandated sentence of life without parole on a juvenile convicted of first-degree murder under § 565.020.2, RSMo 2000, was unconstitutional as applied to Defendant by virtue of *Miller v. Alabama*, which held that the Eighth Amendment forbids sentencing schemes that mandate life-without-parole sentences, such a sentence is nevertheless constitutionally available to be imposed on juveniles convicted of first-degree murder and this case may be remanded for resentencing only on the first-degree-murder charge (Count I).

The imposition of consecutive life sentences for Defendant's convictions on multiple, violent non-homicide offenses did not violate the Eighth Amendment under *Graham v. Florida* because that case dealt only with the imposition of a life-without-parole sentence on a single offense; the Court in *Graham* expressly distinguished that case from one involving a juvenile who had also committed a homicide offense; and Missouri law treats consecutive sentences totaling more than 75 years as a 75-year sentence.

A. The record regarding this claim.

Defendant filed a pretrial motion claiming that the sentencing provision of the first-degree murder statute violated the Eighth Amendment on two

grounds: (1) that imposition of a statutorily-mandated sentence of life without parole was unconstitutional; and (2) that sentencing any juvenile to life without parole was unconstitutional. (L.F. 60–74). The court overruled this motion. (L.F. 249–57).

The jury found Defendant guilty of first-degree murder. (Tr. 971; L.F. 176). After the jury was polled, Defendant's counsel informed the court that Defendant wished to waive jury sentencing. (Tr. 977). The court then explained to Defendant that he had the right to have the jury assess punishment within a range on all counts, except that it would not have a range of punishment for the first-degree murder charge. (Tr. 977–78). Defendant said that he still wanted to waive jury sentencing. (Tr. 977–78). After the court determined that Defendant's waiver was voluntary, it discharged the jury and scheduled a date for the sentencing hearing before the court. (Tr. 978).

Defendant's motion for new trial challenged the constitutionality of his mandated sentence on the same grounds asserted in the pretrial motion. (Supp. L.F. 134–35).

The trial court sentenced Defendant to life without parole on the first-degree murder charge. (Tr. 996; L.F. 266). It also imposed sentences on the other 22 counts for which Defendant was found guilty. This included consecutive sentences of life imprisonment on each of 2 counts of first-degree

assault (Counts III and V) and 3 counts of first-degree robbery (Counts VII, XI, and XIII). The court ordered consecutive sentences of 15 years each on 4 counts of kidnapping (Counts XVII, XIX, XXI, XXV) and 1 count of first-degree burglary (Count XV). (L.F. 266–70). The court also imposed life sentences on each of 11 counts of armed criminal action (Counts II, IV, VI, VIII, XII, XIV, XVI, XVIII, XX, XXII, XXVI), but ordered that those sentences run concurrently with their associated charge, but consecutively to the other counts, except that the life sentence for the armed criminal action charge in Count II, which was associated with the first-degree murder count (Count I), was simply ordered to run concurrently with Count I. (L.F. 266–70).

B. This Court should remand for resentencing only on the first-degree murder charge (Count I).

Missouri's first-degree murder statute, which requires a finding that the defendant acted knowingly after deliberation, provides two possible sentences: death or life imprisonment without probation or parole:

> 1. A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.
>
> 2. Murder in the first degree is a class A felony, and the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor; except that, if a person has

not reached his sixteenth birthday at the time of the commission of the crime, the punishment shall be imprisonment for life without eligibility for probation or parole, or release except by act of the governor.

Section 565.020, RSMo 2000. Since a juvenile murderer cannot be sentenced to death,[14] the only available sentence under the statute for those offenders is life without parole.

But in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the Court held that the Eighth Amendment does not permit a sentencing scheme that mandates the imposition of a life-without-parole sentence on a juvenile murderer. *Id.* at 2469 ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."). Since it appears that § 565.020.2 is a sentencing scheme that mandates imposition of a sentence of life without parole on Defendant, who is a juvenile, it is unconstitutional as applied to him.

This Court must now therefore consider whether and how § 565.020 applies to juvenile murderers in *Miller's* aftermath. Defendant's answer is that nothing remains of § 565.020 as applied to him. He contends that after *Miller*, the crime of first-degree murder no longer exists for juveniles in Missouri and that the highest homicide offense applicable to their conduct is

[14] *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005).

second-degree murder. He argues that since the only sentence available under § 565.020.2 for juvenile murderers is life without parole, which cannot be statutorily mandated under *Miller*, no penalty exists for juveniles convicted of first-degree murder. Defendant relies on *State v. Harper*, 510 S.W.2d 749 (Mo. App. K.C.D. 1974), for the proposition that when a criminal statute does not provide for a penalty, it is void. *Id.* at 750–51 (holding that a statute making it "unlawful to possess devices for the unauthorized use of . . . controlled substances" was not a criminal offense since no penalty for its violation was provided).

But Defendant's argument fails at its most basic level. The Court in *Miller* expressly held that a life-without-parole sentence may constitutionally be imposed on a juvenile murderer, just not under a sentencing scheme that mandates its imposition. *See Miller*, 132 S. Ct. at 2465 ("To be sure, *Graham's* flat ban on life without parole applied only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder."); *Id.* at 2469 (noting that the Court's holding did "not foreclose a sentencer's ability" to impose a life-without-parole sentence in homicide cases); *Id.* at 2471 ("Our decision does not categorically bar a penalty for a class of offenders or type of crime . . . ."). The constitutional problem in *Miller* involved sentencing schemes that mandated life-without-parole sentences, not the sentence itself. The Court stressed that its holding "mandate[d] only that a sentencer follow

a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* at 2471.

Defendant's argument overlooks two important principles when considering the constitutionality of a statute. First, "[t]his Court will 'resolve all doubt in favor of the act's validity' and may 'make every reasonable intendment to sustain the constitutionality of the statute.'" *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007) (quoting *Westin Crown Plaza Hotel v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984)). "If a statutory provision can be interpreted in two ways, one constitutional and the other not constitutional, the constitutional construction shall be adopted." *Id.*

Second, the legislature has declared that the provisions of every statute are severable in the event a court declares a statute unconstitutional:

> The provisions of every statute are severable. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

Section 1.140, RSMo 2000.

There are three situations in which the doctrine of severability applies. *Associated Indus. v. Director of Revenue*, 918 S.W.2d 780, 784 (Mo. banc 1996). They are (1) where part, but not all, of an act is invalid as to all applications; (2) where the entire act is invalid to part, but not all, possible applications; and (3) where part, but not all, of the act is invalid to part, but not all, possible applications. *Id.* The third category applies here, as, under *Miller*, part of § 565.020.2 is invalid as applied to juvenile defendants but not as applied to all defendants.

When part of an act is invalid to part, but not all possible applications—the situation present in this case—"the statute must, in effect, be rewritten to accommodate the constitutionally imposed limitation, and this will be done as long as it is consistent with legislative intent." *Associated Indus.*, 918 S.W.2d at 784; *see also National Solid Waste Management Ass'n v. Director of Dep't of Natural Resources*, 964 S.W.2d 818, 822 (Mo. banc 1998) ("severance may be accomplished by restricting the application of the statute"). Section 1.140 expresses a legislative intent that "all statutes . . . be upheld to the fullest extent possible." *Associated Indus.*, 918 S.W.2d at 784. In applying § 1.140, this Court must determine whether the "General Assembly would have passed [the statute] even if it could only be applied in the manner required by the Supreme Court." *Id.*

There can be no doubt that the General Assembly would have passed § 565.020.2 providing for a life-without-parole sentence for juveniles convicted of first-degree murder even if that sentence could not be statutorily mandated. Evidence of this intent can be seen by a clause in the statute that mandates a life-without-parole sentence for any person less than 16 years old who is found guilty of first-degree murder. Even after that limitation was rendered obsolete by *Roper*, which held that no one who murdered before their 18th birthday could be executed, the General Assembly made no changes to § 565.020.2, indicating that it intended that juveniles convicted of first-degree murder be sentenced to life without parole.

Defendant's argument can prevail only if this Court were to determine that the legislature would not have passed § 565.020.2 if it could not constitutionally mandate a life-without-parole sentence for juvenile murderers. In other words, would the legislature have chosen not to subject juveniles to prosecution for first-degree murder if it could not also mandate a life-without-parole sentence upon conviction? The answer to that question is obviously not. Even if the statutory sentencing scheme cannot mandate a life-without-parole sentence, it is evident that the General Assembly would have passed § 565.020.2 notwithstanding this constitutional limitation.

Once it is determined that the legislature would have passed § 565.020.2 even with this constitutional limitation, the issue becomes how to construe,

or even effectively rewrite, the statute so that it is upheld to its fullest extent possible consistent with legislative intent. The simplest method would be to sever the phrase "without eligibility for probation or parole" from subsection 2 and prescribe a sentence of life imprisonment as the only punishment for juveniles convicted of first-degree murder. This avoids any constitutional conflict with *Miller*, which is concerned only with sentencing schemes mandating life-without-parole sentences—the harshest penalty a state may impose on a juvenile. *Miller* does not address life sentences with the possibility of parole, but the opinion suggests that if a juvenile murderer is not subjected to a statutorily-mandated lifetime of incarceration, the Eighth Amendment is not implicated. And in Missouri a life sentence is "calculated to be thirty years. Section 558.019.4(1).

But simply striking the words "without eligibility for probation or parole does not uphold the statute to its fullest extent possible or achieve a result consistent with legislative intent because a sentence of life without parole for juvenile murderers is still constitutional even after *Miller*, and the obvious intent of the General Assembly in passing § 565.020.2 was to impose a life-without-parole sentence on juveniles convicted of first-degree murder.

The method that permits subsection 2 to be upheld to its fullest extent and that is most harmonious with legislative intent is to construe subsection 2 as providing for a sentence of either life imprisonment or life imprisonment

without parole for juveniles convicted of first-degree murder. Although this method involves more than severing words from subsection 2, the cases cited above suggest that this Court may construe the statute in a way that effectively rewrites it to accommodate the constitutional limitation when only part of the statute is invalid. Here, the penalty provided for in the statute—life without parole—is not invalid; the invalidity stems from the legislature's sentencing scheme that mandates this as the only penalty available without allowing for consideration of the factors outlined in *Miller*. Allowing the sentencing authority to consider the factors outlined in *Miller* and choosing between life and life without parole satisfies the concerns outlined by the Court in *Miller* and allows for subsection 2 to be upheld to its fullest extent in accordance with legislative intent.

Moreover, when considering the manner in which to construe Missouri's first-degree murder statute, it should be kept in mind that the situation in Defendant's case—in fact, in all Missouri cases in which a juvenile is convicted of first-degree murder—is distinguishable from what occurred in *Miller*. Here, Defendant admitted at trial that he fired multiple gunshots and was convicted of first-degree murder, which required a specific jury finding that he knowingly caused the victim's death and deliberated on it beforehand. In *Miller*, on the other hand, one of the 14-year-old defendants did not fire the gun that killed the victim, did not intend the victim's death, and was

convicted merely under an aiding-and-abetting theory. *Miller*, 132 S. Ct. at 2468. In short, in Missouri (unlike some other states) juveniles convicted of first-degree murder have already been statutorily winnowed out as the more serious offenders when compared to other juvenile murderers. Thus, construing the statute to provide for a sentence of either life imprisonment or life imprisonment without parole is not unreasonable under *Miller*.

This Court could also find that a sentence of life imprisonment is specifically authorized because of the language in subsection 2 declaring that first-degree murder is a class A felony. One of the authorized terms of imprisonment for a class A felony includes a sentence of life imprisonment. *See* § 558.011.1(1). This leads to another alternative this Court may consider in construing § 565.020.2. That method would involve retaining the penalty of life without parole provided under subsection 2 and include with it the penalty provision provided under § 558.011.1(1) for a class A felony, which is "a term of years not less than ten years and not to exceed thirty years, or life imprisonment." But this method is less faithful to legislative intent than construing the statute to provide for either life or life without parole because the statute contains specific language evidencing legislative intent that juveniles convicted of first-degree murder receive life without parole.

Thus, the method of construing § 565.020.2 so that it is upheld to the fullest extent possible in accordance with *Miller* and consistent with

legislative intent is to construe it as providing for a penalty of either life imprisonment or life imprisonment without parole.

C. Missouri's current sentencing procedures are constitutional as applied to juveniles convicted of first-degree murder.

Although the Court in *Miller* did not foreclose a sentencer's ability to impose a life-without-parole sentence, it did require the sentencing authority to take the murderer's youthfulness into account before imposing that sentence. *Miller*, 132 S. Ct. at 2469, 2471. In addition to age, the sentencer may consider the offender's family and home environment and the circumstances surrounding the murder. *Id.* at 2468. After *Miller*, Missouri's trial procedure for first-degree murder prosecutions when the death penalty has been waived cannot constitutionally be applied to juveniles since it presumes that life without parole is the only sentence available and requires guilt and punishment to be tried together in a single stage. *See* § 565.030.1.

Missouri's general sentencing laws, on the other hand, provide for a bifurcated sentencing proceeding. Under those provisions, the court reaches a decision on the sentence "having regard to the nature and circumstances of the offenses and the history and character of the defendant." Section 557.036.1. In a bifurcated sentencing proceeding before a jury, the law contemplates the presentation of evidence regarding the nature and

circumstances of the offense and the history and character of the defendant." Section 557.036.3.

These provisions coupled with the factors outlined in *Miller* itself provide trial courts with an adequate framework upon which to determine the appropriate sentence in first-degree murder cases involving juveniles. The suggestion in the *amicus* brief that this Court develop a detailed framework for a "*Miller*-compliant" sentencing hearing is unnecessary. In *State v. Riley*, —A.3d —, 2013 WL 9883 (Conn. App. Jan 1, 2013), the court rejected the defendant's claim that Connecticut's sentencing procedures were inadequate following *Miller*, and it declined his request for a judicially-created set of rules for juvenile sentencing. Slip op at 7–9. The court "read *Miller* to hold that juvenile defendants, in cases where life without parole is a possible penalty, must have the opportunity to present mitigating evidence, but not to define a process that sentencing courts must follow." Slip op. at 4. It reasoned that *Miller* did not require the relief being sought because "*Miller*, which invalidated two sentencing schemes in which the sentencing courts had no discretion, and in which the defendants were unable to present any evidence in mitigation, requires only the opportunity to present such evidence to a court permitted to consider it, and to impose a lesser sentence in its discretion." Slip op. at 6. Finally, it held that Connecticut's "current sentencing procedures afford juvenile defendants sufficient opportunity, and

courts ample discretion, for meaningful mitigation of juvenile sentences" and that this "individualized sentencing process therefore comports with the Eighth Amendment." Slip op. at 8.

Similarly, Missouri's current sentencing procedures are constitutionally sound under the Eighth Amendment even after *Miller*.

D. Defendant's waiver of jury sentencing remains effective upon remand.

Defendant contends that if this case is remanded for resentencing he should be allowed to withdraw his waiver of jury sentencing because he could not have foreseen the decision in *Miller*. The problem with this argument is that Defendant was pursuing the same Eighth Amendment arguments in the trial court that the defendants in *Miller* were. His decision to waive jury sentencing on all counts is not consistent with his argument that a statutorily-mandated sentence of life without parole was unconstitutional. If he was seeking relief on that basis, it made no sense for him to waive jury sentencing on the counts that provided for a range of punishment that the jury had discretion in assessing. Thus, it appears that his waiver was animated by something other than the lack of sentencing discretion. Defendant may have waived jury sentencing because he believed that he would fare better in front of the judge, as opposed to the jury that heard detailed evidence of the horrific crimes in which he actively participated.

Whether he guessed wrong should not allow him the opportunity to withdraw his jury waiver, especially when the jury was available to hear the sentencing phase and was only discharged after Defendant waived his right to jury sentencing.

This Court has rejected a similar claim in a capital case. In *State v. Nunley*, 341 S.W.3d 611 (Mo. banc 2011), the defendant pleaded guilty to first-degree murder and other charges and waived jury sentencing; he was sentenced to death by the court. *Id.* at 613–14. After his case was remanded for resentencing, the defendant argued that his waiver of jury sentencing was ineffective and that he should have had a "fresh slate" on remand. *Id.* at 621. This Court rejected that claim and held that the defendant's waiver remained in effect even after his case was remanded for resentencing. *Id.* at 621–22. The same principle should apply in Defendant's case.

E. Defendant's claim that life-without-parole sentences for juveniles are categorically unconstitutional is not ripe for review.

Defendant asks this Court to do something the United States Supreme Court declined to do in *Miller*: to declare that any life-without-parole sentence imposed on a juvenile to be categorically unconstitutional under the Eighth Amendment. But Defendant's argument puts the cart before the horse. When this Court sets aside his statutorily-mandated life-without-parole sentence as being unconstitutionally imposed under *Miller*, Defendant

will have no sentence that this Court could declare unconstitutional. And until Defendant is resentenced on the first-degree murder charge upon remand (or sentenced by this Court in the event his case is not remanded) and actually receives a sentence of life without parole, his claim that life-without-parole sentences are categorically unconstitutional is not ripe for judicial review.

"In order that a controversy be ripe for adjudication a 'sufficient immediacy' must be established." *Buechner v. Bond*, 650 S.W.2d 611, 614 (Mo. banc 1983). "Ripeness does not exist when the question rests solely on a probability that an event will occur." *Id.* "The doctrine of ripeness is a tool of the court, which is used to determine whether a controversy is ripe or ready for judicial review, or whether by conducting the review, [the court] would simply be rendering an advisory opinion on some future set of circumstances, which [it is] not permitted to do." *Schultz v. Warren County*, 249 S.W.3d 898, 901 (Mo. App. E.D. 2008).

Defendant's sentence is not yet known. Until he is sentenced to life without parole in compliance with *Miller*, a sentence which may or may not be imposed, any opinion by this Court on the constitutionality of such a sentence as applied to juveniles would be purely advisory. *See also Cox v. Director of Revenue*, 974 S.W.2d 633, 635 (Mo. App. W.D. 1998) (holding that a driver's challenge to the Director's purported decision not to reinstate the

license was not ripe for review until the driver applied for reinstatement and was denied).

In any event, the *Miller* court quite clearly announced that it was not declaring a sentence of life without parole categorically unconstitutional for juvenile murderers. *See Miller*, 132 S. Ct. at 2469, 2471 (noting that its holding did not "categorically bar a penalty for a class of offenders" but "mandates only that a sentencer follow a certain process—considering an offender's youth and attendant circumstances—before imposing a *particular* penalty") (emphasis added). Defendant's argument that the Eighth Amendment categorically prohibits the imposition of a life without parole sentence on a juvenile murderer was not accepted by the *Miller* Court: "Because th[is] holding is sufficient to decide these cases, we do not consider [the defendants'] alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger." *Miller*, 132 S.Ct. at 2469. The opinion goes on to say that the Court was "not foreclose[ing] a sentencer's ability to make that judgment in homicide cases." *Id.* Thus, the Court reaffirmed what it had suggested in both *Roper* and *Graham v. Florida*, 130 S. Ct. 2011 (2010), which is that a sentence of life without parole for a juvenile murderer is not unconstitutional. *See Roper*, 543 U.S. at 572 (in analyzing the deterrent effect of the death penalty for juvenile offenders, the Court said that it was "worth noting that

the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person").

In *Graham*, the Court held "that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." But the Court noted that only six jurisdictions prohibited life without parole sentences for juvenile offenders. *Graham*, 130 S. Ct. at 2023. Forty-four other states, the District of Columbia, and the federal government allow life-without-parole sentences on juvenile offenders, even those as young as 13. *Id.* To support its decision to draw a constitutional line against life-without-parole sentences for juveniles committing non-homicide offenses, the *Graham* court observed that there "is a line 'between homicide and other serious violent offenses against the individual.'" *Id.* at 2027 (quoting *Kennedy v. Louisiana*, 128 S.Ct. 2641, 2659–60 (2008)). The Court qualified its holding by stressing that a State need not release the non-homicide offender during his or her "natural life": "Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives." *Id.* at 2030. The Constitution requires only that States provide a meaningful opportunity for release, but only for juvenile *non-homicide* offenders. *See also Burnett v. State*, 311 S.W.3d 810 (Mo. App. E.D. 2009) (noting that the Court in *Roper* affirmed the

Missouri Supreme Court's decision to re-sentence the juvenile murderer to life without parole).

Defendant's implied suggestion that this Court may re-evaluate the Supreme Court's holdings in *Roper*, *Graham*, and *Miller* and determine that the Eighth Amendment does categorically preclude life-without-parole sentences for juvenile murderers is inconsistent with the Supreme Court's unequivocal statements that it alone has the power to overrule its own precedents. *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (it is the Supreme Court's "prerogative alone to overrule one of its precedents"); *see also U.S. v. Duncan*, 413 F.3d 680, 684 (7th Cir. 2005) ("[I]t certainly is not our role as an intermediate appellate court to overrule a decision of the Supreme Court or even to anticipate such an overruling by the Court.").

F. Defendant's non-homicide sentences do not violate the Eighth Amendment.

Defendant contends that his consecutive sentences for the non-homicide offenses should be set aside because they are contrary to *Graham's* prohibition on the imposition of life-without-parole sentences for juveniles committing non-homicide offenses and to the reasoning enunciated in *Miller* requiring a sentencer to consider the juvenile's youth and attendant circumstances. But the constitutional requirement created in *Miller* applies only when consideration is being given to sentencing the juvenile murderer to

life without parole, the harshest penalty constitutionally available to impose. *See Miller*, 132 S. Ct. at 2469 (holding that a sentencing scheme that mandates life in prison without parole is unconstitutional because it makes the offender's youth "irrelevant to imposition of that *harshest* prison sentence") (emphasis added); *Id.* at 2475 (explaining that "*Graham*, *Roper*, and our individualize sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the *harshest possible penalty*"). Here, Defendant was given consecutive sentences of life imprisonment and 15 years on multiple counts. These are not the "harshest" penalties that may be imposed on a juvenile offender. Moreover, Defendant waived his opportunity to have a sentencing hearing before the jury in which he could have presented mitigation evidence and instead chose to allow the judge to determine his sentences.

In *Graham v. Florida*, the defendant, who was 16 years old when he committed his crime, was sentenced to life without parole based on his guilty plea to a single count of "armed burglary."[15] *Graham*, 130 S. Ct. at 2020. The

[15] The defendant was actually sentenced to life imprisonment on this charge, but since Florida had abolished its parole system, the sentence was equivalent to a sentence of life without parole. *Id.* at 2020. The defendant

Court found this sentence unconstitutional and held that the Eighth Amendment prohibits the imposition of a life-without-parole sentence on a juvenile who commits a *non-homicide* offense. *Id.* at 2030 ("This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole."). The Court clearly noted that "[t]he instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense." *Id.* at 2023. In reaching this holding that Court stated that "an offense like robbery or rape is a 'serious crime deserving serious punishment,' [but] those crimes differ from homicide in a moral sense." *Id.* (quoting *Enmund v. Florida*, 458 U.S. 782, 797 (1982)). The Court qualified its holding by stressing that a State need not release the non-homicide offender during his or her "natural life": "Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives." *Id.* at 2030. "The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life." *Id.* at 2030.

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also received a 15-year sentence for attempted armed robbery stemming from the same incident. *Id.*

While it may be cruel and unusual punishment to impose a life sentence without parole on a juvenile offender for one count of armed burglary, it does not follow that a juvenile offender who commits multiple, serious, violent crimes at some point becomes immune to additional punishment for his additional offenses. *See Bunch v. Smith*, 685 F.3d 546, 550 (6th Cir. 2012) (*Graham* "did not clearly establish that consecutive fixed-term sentences for juveniles who commit nonhomicide felonies are unconstitutional when they amount to the practical equivalent of life without parole"). Courts in other jurisdictions have reached similar holdings in applying *Graham* to consecutive or aggregate sentences of less than life without parole. *See Walle v. State*, 99 So.3d 967, 971 (Fla. App. 2012) (holding that *Graham* "applies solely to a single sentence of life without parole" and declining to expand its holding to the imposition of consecutive sentences of less than life without parole); *State v. Kasic*, 265 P.3d 410, 415 (Ariz. App. 2011) (holding that a combined 139.75-year sentence for a juvenile defendant who committed non-homicide offenses was constitutional). Other less-persuasive opinions purport to apply the "spirit" of *Graham* in striking down aggregate sentences that are deemed the equivalent of life without parole. *See People v. Caballero*, 282 P.3d 291 (Cal. 2012) (holding that the juvenile defendant's total sentence of 110-ten years to life for non-homicide offenses to be unconstitutional under *Graham*); *Floyd v. State*, 87 So.3d 45 (Fla. App. 2012) (holding that juvenile's

combined 80-year sentence was the functional equivalent of life without parole).

Another factor which makes *Graham* inapplicable to Defendant's case is that Defendant was found guilty of first-degree murder in addition to the multiple counts of assault, robbery, kidnapping, and armed criminal action. In *Graham*, the State contended that a study containing an estimate of the number of juveniles serving life without parole for non-homicide offenses was "inaccurate because it does not count juvenile offenders who were convicted of both a homicide and nonhomicide offense, even when the offender received a life without parole sentence for the nonhomicide." *Graham*, 130 S. Ct. at 2023. But the Court rejected that distinction as "unpersuasive" because a case involving a juvenile murderer presented a "different situation" and the Court's holding concerned only offenders sentenced solely for a nonhomicide offense:

> It is difficult to say that a defendant who receives a life sentence on a nonhomicide offense but who was at the same time convicted of homicide is not in some sense being punished in part for the homicide when the judge makes the sentencing determination. The instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense

Id.

Finally, Defendant suggests that under Missouri law, his consecutive life sentences push his "earliest possible release date well outside his normal life expectancy." App. Br. 36 n.3. But nothing in the record establishes any possible release date Defendant might expect. Also, while Defendant correctly notes that each life sentence is calculated to be thirty years, he overlooks the very next subsection which provides that "[a]ny sentence either alone or in the aggregate with other consecutive sentences for crimes committed at or near the same time which is over seventy-five years shall be calculated to be seventy-five years." Section 558.019.4(1) and (2).

The Court's holding in *Graham* should not be expanded in this case to apply to consecutive terms of imprisonment imposed for offenses in a case in which the juvenile defendant also committed a homicide offense. Defendant has not established that his consecutive sentences for the non-homicide offenses violated the Eighth Amendment under *Graham*.

III (constitutionality of juvenile-certification statute).

The trial court did not err in refusing to declare the juvenile-certification statute (§ 211.071) unconstitutional because due process does not require judicial fact finding before a juvenile court may relinquish jurisdiction and Defendant's claim that the Sixth Amendment requires a jury to decide whether juvenile-court jurisdiction should be relinquished was rejected by the Missouri Supreme Court in *State v. Andrews*.

A. Standard of review.

"The constitutionality of a statute is a question of law, the review of which is de novo." *Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732, 737 (Mo. banc 2007). "A statute is presumed to be constitutional and will not be invalidated unless it 'clearly and undoubtedly' violates some constitutional provision and 'palpably affronts fundamental law embodied in the constitution.'" *State v. Richard*, 298 S.W.3d 529, 531 (Mo. banc 2009). "This Court will 'resolve all doubt in favor of the act's validity' and may 'make every reasonable intendment to sustain the constitutionality of the statute.'" *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007). "If a statutory provision can be interpreted in two ways, one constitutional and the other not constitutional, the constitutional construction shall be adopted." *Id.* "The

party challenging the validity of the statute has the burden of proving the statute unconstitutional." *Id.*

B. Defendant has not proved that § 211.071 is unconstitutional.

Defendant's point relied on claims constitutional error on three grounds. First, he contends that the juvenile-certification statute (§ 211.071) violates procedural and substantive due process because it presumes the allegations made in the juvenile-court petition are true without a full investigation into the facts of the alleged offense. App. Br. 18. Defendant claims that this results in arbitrary certification based upon mere allegations. App. Br. 18. In the argument section of his brief, Defendant argues that he had a constitutional right to judicial fact finding to ascertain Defendant's "level of relative culpability." App. Br. 47. The other two arguments Defendant makes are that: (1) juvenile-certification increases the range of punishment without an opportunity to be heard or fact-finding on the underlying offenses; and (2) the statutory factors considered in a certification proceeding must be found by a jury. These latter two arguments were rejected by this Court in *State v. Andrews*. Defendant's first argument is without merit because it misapprehends the nature of Missouri's juvenile-certification law.

In *Kent v. United States*, 383 U.S. 541 (1966), the Court held that juvenile-certification proceedings are constitutional as long as they provide for a hearing, the right to counsel, the right to access the juvenile's records, and a

decision stating why jurisdiction is being relinquished. *Id.* at 557–62. But the Court cautioned that it did "not mean by [its holding] to indicate that the hearing . . . must conform with all of the requirements of a criminal trial or even of the usual administrative hearing," only that it "measure up to the essentials of due process and fair treatment."[16] *Id.*

In *Breed v. Jones*, 421 U.S. 519 (1975), the Court clarified the limited holding in *Kent* and noted that it had set no constitutional rules outlining the type and quantum of evidence required to relinquish juvenile-court jurisdiction:

> [T]he Court has never attempted to prescribe criteria for, or the nature and quantum of evidence that must support, a decision to transfer a juvenile for trial in adult court. We require only that, whatever the relevant criteria, and whatever the evidence demanded, a State determine whether it wants to treat a juvenile within the juvenile-court system

[16] Defendant's claim that *Kent* requires a "full investigation" is misleading. The Court in *Kent* was simply quoting the certification statute at issue, which required a "full investigation" before the court could waive jurisdiction. *Id.* at 547–48. In other words, due process required that the juvenile court follow the statute before waiving jurisdiction, not that due process required a "full investigation" before jurisdiction could be waived.

> before entering upon a proceeding that may result in an adjudication that he has violated a criminal law and in a substantial deprivation of liberty, rather than subject him to the expense, delay, strain, and embarrassment of two such proceedings.

Id. at 537–38. The Court also noted the need to maintain flexibility within the juvenile-justice system and that States should be free to choose whatever standards they deem fit in determining whether a juvenile court should relinquish jurisdiction. *Id.* at 535 ("[T]ransfer provisions represent an attempt to impart to the juvenile-court system the flexibility needed to deal with youthful offenders who cannot benefit from the specialized guidance and treatment contemplated by the system."). Because a juvenile has double-jeopardy protection from being prosecuted in adult court following an adjudication in juvenile court over the same offense, the Court stressed that a juvenile transfer or certification proceeding, whatever its form, not occur as part of an adjudicatory proceeding. *Id.* at 538 n.18.

Defendant's argument that due process requires full fact finding at the certification hearing —essentially an adjudication—would be directly contrary to *Breed*. The court in *Breed* found that the juvenile's right to be free from double jeopardy was violated by a juvenile court's adjudication that the juvenile committed the alleged offenses followed by its transfer of the juvenile

to adult court for criminal prosecution of those offenses. *See Breed*, 421 U.S. at 531. *See also Kinder v. State*, 515 So.2d 55, 70–71 (Ala. Cr. App. 1986).

Due process requires only that the court follow the statute in making the certification decision; it does not require the statute to contain any specific factors to consider or findings that must be made. *See Stokes v. Fair*, 581 F.2d 287, 289 (1st Cir. 1978) ("This means that the procedural protections which must be afforded a juvenile before he may be transferred to adult offender status vary in terms of the particular statutory scheme which entitles him to juvenile status in the first place."). "[T]here are no substantive constitutional requirements as to the content of the statutory scheme a state may select." *Id.* at 289 fn*. Under *Kent* and *Breed*, it is the terms of the certification statute that determine the amount of process the juvenile is due; due process does not control the content of these statutes.[17] *Id.* at 289–90.

The Missouri Supreme Court, in construing a previous version of § 211.071, held that the juvenile-certification statute "vests in the juvenile judge a discretion, after receiving the investigation report and hearing evidence, to determine whether the juvenile . . . is a proper subject to be dealt

[17] Although not required by due process, Missouri's statute requires the court to "show the reasons underlying the court's decision to transfer jurisdiction." § 211.071.7(4).

with under the juvenile code.[18] *Coney v. State*, 491 S.W.2d 501, 511 (Mo. 1973). The court further held that this version of the statute, which was much less comprehensive than the current version, did not violate the holding in *Kent*. *Id.* at 512. The court noted that while *Kent* "requires a statement of reasons for the juvenile court's decision" to relinquish jurisdiction, it "does not specify any particular form or *require detailed findings of fact*." *Id.* (emphasis added) (internal quotation marks omitted). *See also In Interest of A. D. R.*, 603 S.W.2d 575, 580 (Mo. banc 1980).

The court in *A.D.R.* acknowledged *Breed* and stated that the Court "'has never attempted to prescribe criteria for, or the nature or quantum of evidence that must support, a decision to transfer a juvenile for trial in an adult court'". *Id.* at 580. Finally, the court noted that to the extent Missouri's juvenile code creates a "right" for treatment in juvenile court, any such right is expressly limited by § 211.071. *Id.* at 579–80.

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[18] The previous version of the statute simply provided that the juvenile "may be prosecuted under the general law, whenever the judge after receiving the report of the investigation . . . and hearing evidence finds that such child . . . is not a proper subject to be dealt with under the provisions of" the juvenile code. *See* § 211.071, RSMo 1969.

> The purpose of Defendant's certification hearing was not to determine his guilt or innocence. Rather, its purpose was to determine whether Defendant would be tried in the juvenile court system or under the general law as an adult.

State v. Perry, 954 S.W.2d 554, 569 (Mo. App. S.D. 1997). *See also Stout v. Commonwealth*, 44 S.W.3d 781 (Ky. App. 2000) (holding that juvenile-transfer statute's failure to include a standard of proof governing the district court's transfer determination did not violate due process).

"It is axiomatic that a juvenile offender has no constitutional right to be tried in juvenile court." *Stout*, 44 S.W.3d at 785. "[T]reatment as a juvenile is not an inherent right but one granted by the state legislature, therefore the legislature may restrict or qualify that right as it sees fit, as long as no arbitrary or discriminatory classification is involved." *Woodard v. Wainwright*, 556 F.2d 781, 785 (5th Cir. 1977).

Missouri's certification statute itself does not require specific fact finding into the offense allegedly committed. It speaks to the "alleged" offense; none of the 10 factors the juvenile court considers requires it to find detailed facts establishing the juvenile's level of culpability in the offense alleged. § 211.071.6. The facts of this case demonstrate the futility of constitutionally requiring detailed findings on the juvenile's relative level of culpability. In Defendant's case, even after a full criminal trial, the parties disagreed on

whether the evidence showed that Defendant or his accomplice fired the gun. Defendant's claim that the juvenile court should have conducted extensive fact finding into his relative level of culpability for these offenses is somewhat baffling considering that he admitted to the jury that he was the one who fired the gun.

In *In re W.T.L.*, 656 A.2d 1123 (D.C. 1995), the court rejected an argument nearly identical to the one Defendant advances here. In that case, which involved a juvenile-certification statute similar to Missouri's, the juvenile argued that the statute was unconstitutional because it did not provide him with the right to "fact-finding" at the transfer hearing and created a presumption of guilt. *Id.* at 1131. The court first noted that "a federal statutory presumption similar to that attacked by [the juvenile] 'is not inconsistent with a juvenile's due process rights because the trial itself functions as a corrective for any reliance on inaccurate allegations made at the transfer stage." *Id.* at 1132 (quoting *In re Sealed Case*, 893 F.2d 363, 369 (D.C. Cir. 1990) (holding that due process is not violated by a presumption in the federal juvenile-transfer statute that the juvenile committed the alleged offense)). The court also rejected the argument that *Kent* constitutionally required that juvenile-transfer statutes provide these protections by relying on the Court's later decision in *Breed*. *Id.*

In *People of Territory of Guam v. Kingsbury*, 649 F.2d 740 (9th Cir. 1981), the juvenile defendant argued that his due process rights were violated by the juvenile court's failure to inquire into his motive to commit the charged offense before certifying him to stand trial as an adult. In rejecting this claim, the court held that "[i]n the context of juvenile certification procedures, due process requires the rights to counsel, to adequate notice and to a statement of reasons at a hearing to determine whether a juvenile is to be tried as an adult." *Id.* at 743. Moreover, it held that under *Kent* the "specific factors to be considered and the weight to be given to each, however, are discretionary." *Id.* at 743–44.

Defendant's remaining claims, premised on an extension of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), are foreclosed by the Missouri Supreme Court's decision in *State v. Andrews*, 329 S.W.3d 369 (Mo. banc 2010), which considered identical claims and rejected them. *See Andrews*, 329 S.W.3d at 375–76. (holding that juvenile certification does not increase the potential maximum sentence for Sixth Amendment purposes under *Apprendi* because certification simply determines which court has jurisdiction).

IV (verdict director—first-degree murder).

The trial court did not plainly err in submitting the verdict director for first-degree murder because the definition of deliberation is not vague or confusing and Defendant cannot show he suffered manifest injustice since he admitted that he was the shooter.

A. The record regarding this claim.

The verdict director for first-degree murder (Instruction No. 5) instructed the jury that to find Defendant guilty it had to find, among other things, that Defendant or his accomplice (Coleman) caused Stallis's death by shooting her and that either of them "did so after deliberation, which means cool reflection upon the matter for any length of time no matter how brief." (L.F. 133). The instruction also contained accomplice-liability language:

> Fourth, that with the purpose of promoting or furthering the death of Gina Stallis, the defendant . . . aided or encouraged . . . Coleman in causing the death of Gina Stallis and did so after deliberation, which means cool reflection upon the matter for any length of time no matter how brief . . . .

(L.F. 133). Defense counsel objected to the instruction only on the grounds that it "improperly states the law as to transferred intent and as to the defendant's personal deliberation." (Tr. 921-22).

B. Standard of review.

Defendant concedes plain-error review because the objections made at trial differ from those asserted on appeal.

"An unpreserved claim of error can be reviewed only for plain error, which requires a finding of manifest injustice or a miscarriage of justice resulting from the trial court's error." *State v. Celis-Garcia*, 344 S.W.3d 150, 154 (Mo. banc 2011); *see also* Rule 30.20. "Rule 30.20 is no panacea for unpreserved error, and does not justify review of all such complaints, but is used sparingly and limited to error that is evident, obvious, and clear." *State v. Phillips*, 319 S.W.3d 471, 476 (Mo. App. S.D. 2010). An appellate court is not required to grant plain-error review; it does so within its discretion. *Id.*

If this Court undertakes plain-error review, Defendant has a tremendous burden to show entitlement to relief. "Instructional error seldom rises to the level of plain error." *State v. Wright*, 30 S.W.3d 906, 912 (Mo. App. E.D. 2000). For instructional error to be plain error, the defendant must show more than mere prejudice; he must "demonstrate that the trial court so misdirected or failed to instruct the jury that it is evident that the instructional error affected the jury's verdict." *State v. Baker*, 103 S.W.3d 711, 723 (Mo. banc 2003).

C. Defendant did not suffer manifest injustice.

Defendant's first claim is that the definition of deliberation is vague and confusing. The Missouri Supreme Court has rejected challenges to the definition of "deliberation" contained in the MAI verdict director for first-degree murder. *See Tisius v. State*, 183 S.W.3d 207, 214 (Mo. banc 2006); *State v. Johnson*, 284 S.W.3d 561, 572-73 (Mo. banc 2009). Defendant's argument is premised on unfounded speculation about what the jury might have believed the word 'matter'—as used in the phrase "cool reflection upon the matter"—referred to. The "matter" referred to in the instruction is cool reflection on shooting at any of the three victims with the awareness that this would cause their death. Moreover, to the extent that the jury might have believed Defendant was not the shooter, it was required to find that Defendant aided or encouraged Coleman in causing Stallis's death after deliberation.

Defendant's second claim—that the instruction gave the jury a "roving commission" to decide what constitutes the "matter"—is without merit. In *State v. Roddy*, 963 S.W.2d 313 (Mo. App. W.D. 1997), an accomplice-liability case, the defendant argued that the disjunctive use of "defendant or other persons" in the verdict director for first-degree murder "allowed the jury to 'mix and match' among the elements by allowing them to find that 'other persons' committed some elements and that [the defendant] committed

others, and by not requiring the entire jury to find that the same person or persons committed any single element." *Id.* at 316. In rejecting this claim, the court held that "it is sufficient that all jurors ultimately agree on their ultimate conclusion that the defendant is guilty of the crime charged, though they may not agree on the manner in which the defendant participated in the crime if under any of the alternative ways the defendant would be guilty of the crime charged." *Id. See also State v. Davis*, 963 S.W.2d 317, 323–24 (Mo. App. W.D. 1997) (rejecting the argument in an accomplice-liability case "that the disjunctive format of the [first-degree murder] instruction allowed the jury to 'mix and match' elements without returning a unanimous verdict" and holding "that the jury need only be unanimous as to the ultimate issue of the defendant's guilt or innocence of the crime charged" and "need not be unanimous as to the means by which the crime was committed"); *State v. Hill*, 884 S.W.2d 69 (Mo. App. S.D. 1994). "To permit any other conclusion would be to permit the guilty defendant to escape accountability under the law because jurors could not unanimously choose beyond a reasonable doubt which of several alternate ways the defendant actually participated, even though all agree that he was, in fact, a participant." *State v. Cox*, 820 S.W.2d 532, 537 (Mo. App. W.D. 1991).

Defendant's argument supporting his assertion that the jurors may have been misled by the word "matter" exposes the flaw in his claim. First, the

record does not support either of his assertions that some jurors may have believed the "matter" was either the criminal enterprise as a whole or killing in general, since the paragraph concerning deliberation comes after the two paragraphs requiring the jurors to find that either Defendant or his accomplice caused Stallis's death by shooting at either her or at victims Lovadina or Koenig and that Defendant or his accomplice knew that this conduct would cause death. As the cases cited above demonstrate, it simply does not matter whether the jury agreed on the identity of the precise victim, only that Defendant or his accomplice deliberated before undertaking a shooting that caused Stallis's death. Whether the jurors as a whole agreed that the shooter was targeting one specific victim was irrelevant in determining whether deliberation existed since the element of deliberation, which was found by the jury, obviously applied regardless who the intended target may have been.

The instruction also contained accomplice-liability language requiring a finding that Defendant aided or encouraged his accomplice in causing Stallis's death and did so after deliberation. Defendant does not explain how he was prejudiced by the instruction, other than to say it might have caused the jury not to find every element of the offense. But the instruction did not prevent the jury from doing so since it required them to find each element of first-degree murder regardless who the jurors individually believed was

specifically targeted by the shooter. Defendant's claim of prejudice—in this case manifest injustice—is especially curious considering that he admitted to the jury that he was the shooter.

Defendant's reliance on *State v. Scott*, 278 S.W.3d 208 (Mo. App. W.D. 2009), is misplaced because the court in that case held that the instruction did not give the jury a roving commission, which the court described as an instruction that "authorize[s] the jury to roam through the evidence to find any facts that would impose liability on [the defendant] for any action." *Id.* at 214. Instead, the court held that the instruction in *Scott* was "a straightforward and limited inquiry" and that the phrase "shortly thereafter," which was used in the instruction, was not "too ambiguous or open ended for the jury to comprehend." The same is true with respect to the use of the word "matter" in the definition of deliberation.

State v. Mitchell, 704 S.W.2d 280 (Mo. App. S.D. 1986), is also distinguishable since that case involved two identical verdict directors relating to two distinct criminal offenses occurring in different locations. *Id.* at 284-85.

V (newly discovered evidence).

The trial court did not plainly err in rejecting Defendant's untimely claim pertaining to the after-trial discovery that a witness allegedly had municipal-court convictions that were not disclosed since this evidence would not completely exonerate Defendant and a witness may not be impeached with evidence of municipal convictions.

A. The record.

The State called victim Koenig as a witness. (Tr. 463). Defendant's motion for new trial alleged "a reasonable belief that the State never fulfilled its affirmative duty to determine if Koenig had any . . . prior criminal convictions." (Supp. L.F. 133). Defendant also filed a motion asking the court to direct the prosecutor to conduct a search to determine if any witness called by the state had prior criminal convictions. (L.F. 204). During a post-trial hearing on this motion, the prosecutor informed the court "that he has run MULES, REJIS, and NCIC checks on all lay witnesses who testified in trial and that those witnesses have no record of prior criminal convictions." (L.F. 204).

Defendant later filed an untimely supplement to his new-trial motion alleging that Koenig had two stealing convictions in Webster Groves Municipal Court. (L.F. 205-30). The trial court noted the claim was untimely

and rejected it because impeachment with a municipal-ordinance conviction is not permitted. (L.F. 258-59). Thus, the court concluded that no due process or discovery violation occurred from the failure to disclose municipal convictions. (L.F. 258). Moreover, the court noted that "there is absolutely no likelihood that the disclosure of . . . Koenig's municipal violation history would have affected the result of this trial." (L.F. 259).

B. Defendant's suffered no manifest injustice.

"New trials based on newly discovered evidence are disfavored." *State v. Smith*, 181 S.W.3d 634, 638 (Mo. App. E.D. 2006); *State v. Clark*, 112 S.W.3d 95, 98 (Mo. App. W.D. 2003). "Once the time for filing a motion for a new trial has passed, the Missouri rules have no provision for the granting of a new trial based on newly discovered evidence even if the evidence is available prior to sentencing." *State v. Terry*, 304 S.W.3d 105, 109 (Mo. banc 2010). Generally, Missouri courts "will not remand a case before an appeal is concluded if the lone fact of newly discovered evidence is not enough to grant a new trial." *Id.* Since Defendant's claim of newly discovered evidence was not timely included in a motion for new trial, it was not preserved for appeal. *State v. Bradshaw*, 779 S.W.2d 617, 619 (Mo. App. E.D. 1989). *See also State v. Lopez-McCurdy*, 266 S.W.3d 874, 879 (Mo. App. S.D. 2008) (holding that an "untimely, amended motion for new trial . . . preserve[s] nothing for review and [is], procedurally, a nullity"); *State v. Langston*, 229 S.W.3d 289, 294 (Mo.

App. S.D. 2007) ("A trial court lacks the power to waive or extend the time for filing a motion for new trial beyond that authorized by Rule 29.11(b)."). Moreover, "[o]nce the time within which to file a motion for new trial has expired, a remedy no longer lies through direct appeal." *State v. Skillicorn*, 944 S.W.2d 877, 896 (Mo. banc 1997); *see also State v. Greathouse*, 694 S.W.2d 903, 911–12 (Mo. App. S.D. 1985).

"But an appellate court has the inherent power to prevent a miscarriage of justice or manifest injustice by remanding a case to the trial court for consideration of newly discovered evidence presented for the first time on appeal." *Terry*, 304 S.W.3d at 109. "To exercise this power, the appellate court may, in limited circumstances, dismiss the appeal and remand the case to the trial court to allow the appellant to file an amended motion for new trial." *State v. Nylon*, 311 S.W.3d 869, 876 (Mo. App. E.D. 2010). The exercise of this power, however, remains in the discretion of the appellate court. *Id.*; *see also Terry*, 304 S.W.3d at 109.

"To obtain a new trial on the basis of newly discovered evidence," the defendant must show:

1. The facts constituting the newly discovered evidence have come to the [defendant]'s knowledge after the end of the trial;

2. [Defendant]'s lack of prior knowledge is not owing to any want of due diligence on his part;

3. The evidence is so material that it is likely to produce a difference result at a new trial; and

4. The evidence is neither cumulative only nor merely of an impeaching nature.

Terry, 304 S.W.3d at 109.

"Faced with newly discovered evidence, courts have often required that the newly discovered evidence would actually exonerate the defendant and not merely impeach a witness's credibility." *Nylon*, 311 S.W.3d at 877. *See also State v. Parker*, 208 S.W.3d 331,337 (Mo. App. S.D. 2006) (mere impeachment evidence is insufficient to warrant a remand based on newly discovered evidence); *State v. Rutter*, 93 S.W.3d 714, 730 (Mo. banc 2002) (holding that the trial court did not abuse its discretion in refusing to order a new trial based on newly discovered evidence because the post-trial testimony of a prosecution witness, who said that his trial testimony about the name on a prescription bottle was mistaken, "did nothing more than impeach the credibility of his previous testimony"). But this Court "in *Terry* . . . noted that there may be an exceptional circumstance "where impeachment is reason to remand to the trial court to grant a new trial at the appellate court's discretion." *Id.* (quoting *Terry*, 304 S.W.3d at 110). Even if the newly discovered evidence would not completely exonerate the defendant, an appellate court has discretion to remand under *Terry* if newly discovered

forensic evidence shows that the "victim witness lied about material facts." *Terry*, 304 S.W.3d at 110.

The defendant in *Terry* was convicted of statutory rape based on the victim's testimony. *Terry*, 304 S.W.3d at 106. The defendant testified that he had not had sex with the victim. *Id.* The "victim was visibly pregnant" at trial, and she "testified that [the defendant] was the only person who could have impregnated her." *Id.* at 110. The prosecutor even implied in closing argument that the victim's pregnancy corroborated her testimony. *Id.* at 107. But a DNA test performed after the child's birth showed that the defendant was not the father of the victim's baby. *Id.* Thus, the supreme court concluded that if "the DNA test is accurate, [the victim] had sexual relations with someone else, contrary to her testimony," and that "[h]er testimony appears to be false" and "the jury had no opportunity to weigh the evidence and determine the facts and credibility of the witnesses with the inclusion of the DNA test in evidence." *Id.* at 110–11. The *Terry* court noted that the case before it was "an unusual case because of the subsequently obtained DNA evidence" and that "[j]ust the fact that there is newly discovered evidence during an appeal usually is not enough for a new trial, but here, the newly discovered forensic evidence, if verified, appears to be central to the case and shows that [the defendant] was convicted with the aid of false testimony from the alleged victim." *Id.* at 111.

The rare use by Missouri courts of the newly discovered-evidence doctrine to remand a case for new trial was cogently explained in *State v. Gray*, 24 S.W.3d 204 (Mo. App. W.D. 2000). The *Gray* court explained why two previous cases in which courts had reversed convictions based on newly discovered evidence involved "extraordinary circumstances that [were] clearly distinguishable from" the defendant's case in *Gray*:

> In [*State v. Mooney*, 670 S.W.2d 510 (Mo. App. E.D. 1984)], the defendant was convicted of molesting a minor, and the only evidence to support the conviction was that of the minor. After the conviction and sentencing, one of the defendant's alibi witnesses tape-recorded a conversation with the victim in which the victim admitted his testimony was false and that he made up the entire incident.
>
> In [*State v. Williams*, 673 S.W.2d 847 (Mo. App. E.D. 1984)] both the prosecuting attorney and the Attorney General filed affidavits in the Court of Appeals agreeing that jurisdiction should be returned to the trial court to hold a hearing on the defendant's motion for new trial based on newly discovered evidence. Due to the agreement, belief and recognition by both parties that the information contained in the defendant's motion was true and accurate, the court overlooked the time constraints and remanded the case to the trial court.

Gray, 24 S.W.3d at 209. The *Gray* court explained that in the other case in which an untimely claim of newly discovered evidence was made, *State v. Post*, 804 S.W.2d 862 (Mo. App. E.D. 1991), the "case was remanded on the basis of jury misconduct, not 'newly-discovered evidence.'" *Id.*

Missouri courts have repeatedly rejected defendants' requests for new trials based on claims that newly discovered evidence completely exonerated them of the crimes they were convicted of committing. *See, e.g., State v. Clark*, 112 S.W.3d at 98-99; *State v. Smith*, 181 S.W.3d at 637-38; *State v. Dorsey*, 156 S.W.3d 791, 797–800 (Mo. App. S.D. 2005); *State v. Dunmore*, 227 S.W.3d 524, 526–27 (Mo. App. W.D. 2007); *State v. Parker*, 208 S.W.3d 331, 335-36 (Mo. App. S.D. 2006); *State v. McQuary*, 173 S.W.3d 663, 665–66 (Mo. App. W.D. 2005); *State v. Bransford*, 920 S.W.2d 937, 949 (Mo. App. S.D. 1996).

Since the undisclosed evidence here appears to be nothing more than potential impeachment evidence and would not completely exonerate Defendant, the law does not allow for a remand and a new trial.

No manifest injustice occurred even if Defendant's belated claim is considered. Rule 25.03 requires the State to disclose any record of prior criminal convictions of persons the state intends to call as witnesses at a hearing or the trial . . . ." Rule 25.03(A)(7). Under *Brady v. Maryland*, 373 U.S. 83 (1963), "due process is violated when the prosecutor suppresses

evidence that is favorable to the defendant and material to either guilt or punishment." *State v. Salter*, 250 S.W.3d 705, 714 (Mo. banc 2008). "Evidence is material only when there is a reasonable probability that the result of the proceeding would have been different if the evidence had been disclosed to the defense." *Id.*

The question whether the State violated a discovery rule, and the remedy to be applied if a violation occurred, lies within the sound discretion of the trial court. *State v. Bynum*, 299 S.W.3d 52, 62 (Mo. App. E.D. 2009). "The trial court abuses its discretion when the fashioned remedy results in fundamental unfairness to the defendant." *Id.* "Fundamental unfairness arises when there is a 'reasonable likelihood that an earlier disclosure of the requested evidence would have affected the result of the trial.'" *Id.* (quoting *State v. Scott*, 943 S.W.2d 730, 735–36 (Mo. App. W.D. 1997)). Here, of course, the standard of review is plain error.

The record does not clearly show that information regarding municipal convictions was subject to discovery and disclosure by the State. The prosecutor ran all the appropriate checks and these municipal convictions apparently were not reported on any of the searched databases. Even if the prosecutor could be charged with knowledge of municipal convictions, Defendant suffered no manifest injustice because the witness could not be impeached with them under Missouri law. *See State v. Albanese*, 920 S.W.2d

917, 927 (Mo. App. W.D. 1996), *overruled on other grounds by State v. Beeler*, 12 S.W.3d 294 (Mo. banc 2000); *State v. Moore*, 84 S.W.3d 564, 567 (Mo. App. S.D. 2002); *State v. Helm*, 892 S.W.2d 743, 745 (Mo. App. E.D. 1994).

The trial court also found that impeachment with these convictions would not have affected the trial. Although Defendant suggests that Koenig was the only witness to testify that he saw the shooter aim at Lovadina, the evidence overwhelmingly showed this even without Koenig's testimony. Lovadina was shot five times and several shots found vital parts of her body. Moreover, it can be reasonably inferred that one or more of these shots occurred after Lovadina was already shot and perhaps fell to the floor. (Tr. 381-82). Finally, Lovadina's blood was found on the front, and inside the barrel, of the gun that fired the shots. (Tr. 844). The trial court correctly concluded that this impeachment evidence would not have affected the trial's result.

Defendant's reliance on *Mitchell v. Kardesch*, 313 S.W.3d 667 (Mo. banc 2010), is misplaced. The issue in *Mitchell* involved the cross-examination of an expert witness about his prior false deposition testimony in an unrelated case regarding whether his medical license had been suspended. *Id.* at 670. Although this Court noted that cross-examination regarding prior convictions was permitted, it did not address, much less overrule, prior Missouri cases holding that impeachment with municipal convictions was not permitted. Moreover, *Mitchell* was concerned with impeachment of "a witness on his or

her character for truth and veracity" with previous false deposition testimony. *Id.* at 676–77. Here, the purported impeachment did not involve prior false testimony or statements, but involved shoplifting from a grocery store and a municipal stealing conviction, which does not directly implicate the witness's character for truth and veracity like the impeachment in *Mitchell*. It is simply evidence of a prior bad act upon which a witness may not be impeached.

This is demonstrated by this Court's later holding in *State v. Winfrey*, 337 S.W.3d 1 (Mo. banc 2011), in which the court considered the propriety of impeaching a witness's character for "truth and veracity" with prison conduct violations for lying to prison guards and giving false information to prison staff. *Id.* at 9. In addressing the defendant's claim that the trial court had abused its discretion in refusing to allow cross-examination on these matters, the court noted that *Mitchell* does not stand for the proposition that all *dishonest statements* are admissible for purposes of impeaching a witness' character for truth and veracity." *Id.* at 10 (emphasis added). This court also repeated its previous statement in *Mitchell* that "the fact that a person has *told a lie on an irrelevant issue* that is remote in time or subject may make the [ ] evidence of little value in determining the witness' character for truth and veracity." *Id.* (quoting *Mitchell*, 313 S.W.3d at 681–82) (alteration in original) (emphasis added). Therefore, *Mitchell* and *Winfrey* are concerned

with instances of previous lying or false statements as affecting a witness's character for truth and veracity. Acts of shoplifting or municipal stealing convictions do not fall into this category.

Mitchell expressly held that a "witness may not be impeached by evidence that his or her 'general moral character is bad' or that his or her 'general reputation for morality' is bad." *Mitchell*, 313 S.W.3d at 677. This has long been the law in Missouri. Evidence that a witness has previously engaged in specific acts of misconduct is generally inadmissible for purposes of impeachment. *See Williams v. State*, 168 S.W.3d 433, 441 (Mo. banc 2005). *See also State v. Adams*, 51 S.W.3d 94, 101 (Mo. App. E.D. 2001) ("[T]he law is clear: the credibility of a witness cannot be attacked by showing a specific act of immorality or by showing that her general moral character is bad.") (citations omitted); *State v. Ivy*, 710 S.W.2d 431, 433 (Mo. App. E.D. 1986) ("The credibility of a witness cannot be attacked by showing specific acts of immorality.").

Defendant has not shown that he suffered any manifest injustice or that he is entitled under the law to a remand for a new trial based on newly discovered evidence.

VI (in camera inspection).

Defendant has not established that the trial court committed any error in conducting an in camera inspection and determining that the information in question was not relevant and need not be disclosed.

The trial court held a pretrial hearing on the State's request for an in camera inspection of information pertaining to a potential witness who had come into subsequent contact with law enforcement in a different jurisdiction. (Tr. 2). The prosecutor told the court that this contact had resulted in an "ongoing criminal investigation by law enforcement." (Tr. 2). The prosecutor was seeking an in camera inspection of the information because of concerns about "the safety of this witness, as well as the safety of other witnesses in this ongoing investigation, as well as the viability of this continuing, ongoing investigation." (Tr. 2-3). The prosecutor then provided a memorandum to the court reflecting the contact the witness had with law enforcement.[19] (Tr. 3). The court reviewed the memorandum and noted that the information was "certainly not exculpatory in any sense." (Tr. 7). At most, it was potential impeachment material, but the court wanted to further

[19] This memorandum is not included in the legal file and the State's undersigned counsel has not seen it.

review the matter before deciding if the information was admissible for even that purpose. (Tr. 8). At a later pretrial hearing, the court ruled that the information would not be admissible at trial:

> [T]he Court's conclusion is that the matter brought to the Court's attention by the State's in camera disclosure would not be subject to cross-examination of the witness at trial, and as I indicated at the in camera—or the in-chambers hearing, the materials are definitely not exculpatory of the defendant, so it all post-dates the incidents that are at issue.

(Tr. 10).

In his motion for new trial, Defendant asserted that the trial court erred in not releasing this information to the defense. (Supp. L.F. 133-34). In its post-trial order, the court reiterated its finding that the sealed information was "in no way exculpatory to the defendant" and that it had "no doubt that cross-examination regarding the sealed matter would properly have been foreclosed at trial. (L.F. 257).

Although Defendant's appellate counsel, who claims to have reviewed the document in question, believes that further investigation into the subject matter of the sealed document would provide relevant impeachment material, there is no way for the State's undersigned counsel to respond to that claim since he has not seen the document.

Suffice it to say, however, that the trial court was fully aware of the scope of cross-examination and the this Court's latest pronouncement on it in *Mitchell v. Kardesch* and *Winfrey*, and it determined that nothing in the material provided would have been a permissible matter for impeachment. To the extent that the sealed material involved some act of misconduct on the witness's part, the cases discussed in Point V demonstrate that the witness could not be impeached on such matters.

VII (motion to dismiss—Stallis).

The trial court did not err in failing to dismiss Counts XI, XII, XXI, and XXII pertaining to victim Stallis because the court had jurisdiction over those charges in that they were related to the incident that led to the juvenile-court petition and certification proceeding.

Since Point VII of Defendant's brief, which asserts that the trial court erred in not dismissing the robbery, kidnapping, and their associated armed-criminal-action counts involving Stallis, and Point VIII of the State's brief, which asserts the trial court erred in dismissing all four counts of the indictment relating to Whitrock, are intertwined and involve identical legal analysis, the facts and argument regarding Point VII of Defendant's brief are contained in Point VIII of this brief. In short, the argument outlined in Point VIII demonstrating why the trial court improperly dismissed the Whitrock charges, equally applies to show that the trial court properly refused to dismiss the Stallis charges.

VIII (motion to dismiss—Whitrock).

The trial court erred in dismissing Counts IX, X, XXIII, and XXIV for lack of jurisdiction because the trial court had jurisdiction over these charges notwithstanding the fact that victim Whitrock's name was not mentioned in the juvenile-court petition in that: (1) under Missouri law a juvenile court has jurisdiction only over the juvenile's person, not over the charges that may subsequently be brought by the State if the juvenile court relinquishes jurisdiction following a certification hearing; and (2) after certification, juvenile-court jurisdiction over the juvenile is "forever terminated" under § 211.071.9 and the State may bring any criminal charge(s) it chooses, including any related to the incident that precipitated the juvenile-court petition and certification proceeding.

The structure of Missouri juvenile law evinces the legislature's intent that juvenile courts have personal jurisdiction over juveniles, not over the charges that may be brought whenever a juvenile court relinquishes personal jurisdiction following a certification proceeding. When juvenile-court jurisdiction is relinquished, the State may bring any and all charges fairly encompassed within the incident that gave rise to the juvenile-court petition and certification hearing. Here, that incident began on the sidewalk in front

of the house and culminated in the numerous crimes committed against all the occupants in the house, including Rosemary Whitrock.

A. The record.

The juvenile officer's juvenile-court petition alleged that Defendant murdered Stallis, assaulted and attempted to rob Lovadina and Koenig, robbed Rusk, burglarized Rusk's house, and feloniously restrained Lovadina, Koenig, and Rusk. (L.F. 85-87). Victim Whitrock's name did not appear in the petition.

A certification hearing was held on the juvenile officer's motion to dismiss the juvenile-court petition and to determine whether Defendant was a proper subject to be dealt with under the juvenile code. (L.F. 88; Cert. Tr. 8-9). During the hearing, the deputy juvenile officer explained Defendant's "alleged participation in" the offenses listed in the juvenile-court petition, which included a specific reference to Whitrock that Defendant's counsel did not object to:

> . . . It is alleged that [Defendant] . . . , along with his 22 year old adult accomplice, approached . . . Lovadina and . . . Koenig outside the residence . . . .
>
> It is further alleged that the juvenile's accomplice forced . . . Lovadina and . . . Koenig inside that residence at gunpoint and restrained them,

along with victims Gina Stallis, Ida Rask which is the grandmother of Gina Stallis, [and] Rose Whitrock . . . .

During the time that the victims were restrained, it's alleged that the suspects demanded money, jewelry, and other household items.

(Cert.Tr. 14-15). During closing, the juvenile officer's counsel expressly stated, without objection, that "Rose Whitrock" was a victim in this case. (Cert.Tr. 84).

After the juvenile court entered an order relinquishing jurisdiction so that Defendant could be prosecuted under the general law, the State filed a 26-count indictment against Defendant and his accomplice, Coleman. (L.F. 18-25). Counts XI and XII alleged that Defendant and Coleman committed first-degree robbery and armed criminal action against Stallis, and counts XXI and XXII alleged that Defendant and Coleman committed kidnapping and armed criminal action against Stallis. (L.F. 22, 24).[20] Counts IX and X alleged that Defendant and Coleman committed first-degree robbery and armed criminal action against Rosemary Whitrock, and counts XXIII and XXIV alleged that Defendant and his accomplice committed kidnapping and armed criminal action against Whitrock. (L.F. 21, 24). Defendant later filed a "Motion To Dismiss Charges Not Certified By Juvenile Court" alleging that

[20] These counts are the subject of Defendant's Point VII.

21 of the 26 counts of the indictment, including counts IX, X, XI, XII, XXI, XXII, XXIII, and XXIV, should be dismissed and remanded to the juvenile court. (L.F. 91-94).

The trial court overruled the motion for nearly all counts, including the robbery, kidnapping, and armed criminal action counts involving Stallis. (Tr. 12-19). But it expressly reserved ruling on that part of the motion relating to the counts involving Whitrock. (Tr. 19). During the post-trial hearing on the motion for new trial, the trial court dismissed without prejudice counts IX, X, XXIII, and XXIV of the indictment. (Tr. 982; L.F. 288). The court based its decision on the fact that since Whitrock was not identified as a victim in the juvenile-court petition, the trial court did not have jurisdiction over the counts relating to crimes committed against her. (L.F. 284–88).

B. Standard of review.

The trial court's dismissal of charges for lack of jurisdiction is reviewed for an abuse of discretion. *State v. Davis*, 988 S.W.2d 68, 70 (Mo. App. W.D. 1999).

C. Missouri's juvenile code.

Under Missouri law, juvenile courts have "exclusive original jurisdiction in proceedings . . . involving any child who is alleged to have violated a state law or municipal ordinance prior to attaining the age of seventeen years . . . ." Section 211.031. But if a juvenile has committed an offense that would

otherwise be considered a felony if committed by an adult, the juvenile court has the discretion to dismiss the juvenile-court proceeding and transfer the child to a court of general jurisdiction for prosecution:

> If a petition alleges that a child between the ages of twelve and seventeen has committed an offense which would be considered a felony if committed by an adult, the court may, upon its own motion or upon motion by the juvenile officer, the child or the child's custodian, order a hearing and may, in its discretion, dismiss the petition and such child may be transferred to the court of general jurisdiction and prosecuted under the general law . . . .

Section 211.071.1. If the petition alleges that the child has committed certain violent offenses, including first-degree murder, the juvenile court is required to hold a hearing and "may in its discretion, dismiss the petition and transfer the child to a court of general jurisdiction for prosecution under the general law." *Id.* The notice of hearing "shall contain a statement that the purpose of the hearing is to determine whether the child is a proper subject to be dealt with under the provisions of this chapter," and if he or she is not, that "the petition will be dismissed to allow for prosecution of the child under the general law." *Id.* In determining "whether the [juvenile] is a proper subject to be dealt with under the provisions of" the juvenile code and "whether there are reasonable prospects of rehabilitation within the juvenile justice system,

the juvenile court is required to consider ten statutory criteria, only four of which have any relation to the offense alleged in the petition. Section 211.071.6.

If the juvenile court dismisses the petition, the statute expressly states that the juvenile court's jurisdiction over that juvenile for any later violation of state or municipal law is "*forever terminated*":

> When a petition has been dismissed thereby permitting a child to be prosecuted under the general law, the jurisdiction of the juvenile court over that child is forever terminated, except as provided in subsection 10 of this section, for an act that would be a violation of a state law or municipal ordinance.

Section 211.071.9. [21]

D. The trial court erred in dismissing the Whitrock charges.

The meaning of the statutory phrase "forever terminated" was considered in *State v. Davis*, 988 S.W.2d 68 (Mo. App. W.D. 1999). There, the juvenile court relinquished jurisdiction over the defendant following a certification hearing and the State filed charges in a court of general jurisdiction. *Id.* at

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[21] Subsection 10 allows the juvenile court to retain jurisdiction over the juvenile for later violations of law if the juvenile is prosecuted under the general law and found not guilty. Section 211.071.10.

69. The State subsequently dismissed those charges before a preliminary hearing. *Id.* Unrelated charges were filed against the defendant a month later without a certification hearing. *Id.* The circuit court sustained the defendant's motion to dismiss the charges, and the State appealed. *Id.*

The court of appeals reversed the dismissal of the charges based on the "clear and unambiguous" language of the juvenile code providing that once "a [juvenile-court] petition has been dismissed, thereby permitting a child to be prosecuted under the general law, the jurisdiction of the juvenile court over that child is forever terminated." *Id.* at 70-71. The court found that the only exception to this mandate was if the juvenile is found not guilty in a court of general jurisdiction following relinquishment of juvenile-court jurisdiction. *Id.* at 71.

The trial court incorrectly determined that the petition's failure to specifically mention Whitrock by name deprived it of jurisdiction to convict Defendant of any crimes relating to her. The juvenile-court petition inarguably conferred jurisdiction over Defendant on the juvenile court since it alleged Defendant was a juvenile who had committed acts in violation of numerous state laws. In other words, the petition did not need to specifically mention the actions Defendant took against Whitrock to invoke the juvenile court's jurisdiction over him. Once the juvenile court dismissed the petition, § 211.071.9 expressly provides that its jurisdiction over Defendant's person—

not the offenses alleged in the petition—was "forever terminated." This means that the juvenile courts have no authority over Defendant and cannot adjudicate any charges that he violated state law notwithstanding whether those violations occurred before, after, or at the same time as the offenses alleged in the juvenile-court petition that was subsequently dismissed.

For example, assume that, after the certification hearing and the juvenile court's relinquishment of jurisdiction, it was determined that Defendant had committed an unrelated crime either before or after the crimes in this case. The State could simply charge Defendant in a court of general jurisdiction with those crimes without having to wait for certification and the relinquishment of juvenile-court jurisdiction. Why? Because the juvenile court has jurisdiction over juveniles, not their offenses, and through its dismissal of the juvenile-court petition in this case, it "forever terminated" its jurisdiction over Defendant—not just the offenses the juvenile-court petition alleged he committed. The same principle would also logically apply to offenses Defendant committed simultaneously with the offenses mentioned in the juvenile-court petition, which includes any offense committed against Whitrock. Thus, the trial court had jurisdiction to adjudicate the offenses alleged against Defendant in the indictment involving Whitrock (and Stallis, *see* Point VII) that were not specifically alleged in the juvenile-court petition.

The logic behind this analysis is apparent from the statutory framework of Missouri's juvenile law and the purpose of a certification hearing. "[T]he purpose of the [certification] hearing is to determine whether the child is a proper subject to be dealt with under the provisions" of the juvenile code. Section 211.071.4. Once a juvenile court has determined that a juvenile is not a proper subject to be dealt with under the juvenile code, its jurisdiction is forever terminated because it certainly makes no sense to believe that the juvenile would later become a proper subject for juvenile-court jurisdiction. This holds true whether a later offense occurred before or simultaneously with the offense alleged in the juvenile-court petition that led to the relinquishment of juvenile-court jurisdiction. In other words, in an apparent effort to conserve the scarce resources of the juvenile-court system for those who can truly benefit from it, the legislature made the policy decision to dispense with any future certification proceedings for any juvenile over whom the juvenile court has relinquished jurisdiction under § 211.071.

The holdings of several Missouri cases demonstrate the fallacy in the trial court's reasoning.

In *Scott v. State*, 691 S.W.2d 291 (Mo. App. W.D. 1985), the juvenile argued that he could not be convicted of capital murder after the juvenile court relinquished jurisdiction over him because he was "charged" in the juvenile court with only with first-degree murder. The court rejected this

claim and held that after the juvenile is certified to stand trial as an adult, it is the prosecutor's responsibility to decide which charge to bring, even though the juvenile officer's petition in juvenile court cited a different charge. *Id.* at 293-94.

In *State v. Ford*, 487 S.W.2d 1 (Mo. 1972), the court held that the prosecutor's statement during jury selection that the juvenile defendant was being "tried as an adult" was "obviously incorrect" because the only thing a juvenile court does when it dismisses a petition following a certification hearing is to relinquish its jurisdiction over the juvenile:

> Although the action of a juvenile court in dismissing a petition under the provisions of [§] 211.071 . . . has been frequently characterized as 'certifying the juvenile for trial as an adult', or 'ordering the juvenile to be tried as an adult' the characterizations are incorrect. All that the juvenile court can do under [§] 211.071 . . . is to dismiss the petition which has the effect of relinquishing juvenile court jurisdiction over the juvenile. When this jurisdiction is relinquished the juvenile is subject to prosecution in the same manner that others may be prosecuted.

Id. at 5.

In *Richardson v. State*, 555 S.W.2d 83 (Mo. App. K.C.D. 1977), the juvenile murder defendant, over whom the juvenile court had relinquished jurisdiction, claimed that his subsequent indictment for first-degree murder

was unlawful because the juvenile-court petition had alleged only second-degree murder and the juvenile-court's dismissal order stated that the juvenile could be prosecuted for the crime alleged in the petition. *Id.* at 86. The court rejected this claim because "the basic purpose of a [juvenile-court] petition is to state facts which bring the child within" that court's jurisdiction, which occurs whenever "the petition alleges that a [juvenile] . . . has violated state law," and that the allegations of the [juvenile-court] petition need not be couched in the technical terms required of an indictment or information. *Id.* The court further explained that the juvenile's argument misperceived both Missouri juvenile law and the effect of the juvenile-court's order dismissing a petition, which is simply the relinquishment of juvenile-court jurisdiction:

> [The defendant]'s first point is based upon a misconception of the effect of th[e] order [dismissing the juvenile-court petition]. It is simply a waiver by the Juvenile Court of its initial jurisdiction over the child; it does not in any sense mandate jurisdiction upon the Circuit Court; it simply makes the juvenile subject to prosecution in the same manner as others; it leaves such future prosecution to the judgment of the prosecutor or grand jury on the criminal level; and, it divorces the Juvenile Court from all further connection with the process by waiver.

Id. See also In Interest of P— A— M—, 606 S.W.2d 449, 455 (Mo. App. W.D. 1980) (Once the juvenile court relinquishes jurisdiction it "loses all jurisdiction over the particular matter and is without power or authority to mandate what further action is to be taken, if any, either by the prosecuting authorities or the circuit criminal court."). "The so-called misnomer of 'certification' is in fact a waiver of the Juvenile Court of its initial exclusive jurisdiction and nothing more." *P—A—M—*, 606 S.W.2d at 455.

The legislature did not intend to limit the offenses the prosecutor may charge in circuit court to only those specifically alleged in the dismissed juvenile-court petition. Juvenile officers are essentially social workers, not legally-trained prosecutors. *See* § 211.361.1(2), RSMo 2000 (requiring juvenile officers to have a major in sociology or experience in social work). The purpose of the juvenile courts is not the criminal prosecution of juveniles, but to "facilitate the care, protection, and discipline of children." § 211.011, RSMo 2000. It makes no sense to construe the law to limit the prosecutor's charging discretion to only what the juvenile officer includes in his or her petition.

The piecemeal approach to prosecuting juveniles implicated by the trial court's order of some charges is inconsistent with this policy. The trial court's order also creates a judicial limbo over the dismissed offenses since the statute provides that the juvenile court's jurisdiction over Defendant has

been forever terminated. The juvenile court no longer has any jurisdiction over Defendant. The trial court's order dismissing those charges was contrary to law, and its decision should be reversed. The convictions for the dismissed offenses should be reinstated, and the case should be remanded to the trial court to impose sentence on those counts.

The decision in *State v. K.J.*, 97 S.W.3d 543 (Mo. App. W.D. 2003), does not compel a different result. In *K.J.* the juvenile court relinquished jurisdiction over the juvenile defendant by dismissing a juvenile-court petition. *Id.* at 544. But the State never subsequently filed charges relating to the offenses alleged in the petition, thereby depriving the juvenile of his right to contest the juvenile court's relinquishment of jurisdiction.[22] *Id.* at 544. Two years later, the State, relying on the juvenile court's previous relinquishment of jurisdiction, filed charges alleging a new offense. *Id.* The circuit court dismissed the charges for lack of jurisdiction, and the State appealed. *Id.* The court of appeals affirmed the dismissal and impliedly held that a juvenile has a protected interest in maintaining his or her status as a juvenile under the

[22] An order dismissing a juvenile-court petition is not an appealable order. *In re T.J.H.*, 479 S.W.2d 433, 434 (Mo. banc 1972). The exclusive method to review such an order is through a motion to dismiss the subsequent indictment or information. *Id.*

law; it also explicitly held that the juvenile's "inability to appeal or seek relief from the certification" violated due process. *Id.* at 547.

Thus, *K.J.* simply stands for the proposition that a circuit court has no jurisdiction over criminal charges brought against a juvenile based on a juvenile court's previous relinquishment of jurisdiction if the juvenile has not had an opportunity to appeal the relinquishment of juvenile-court jurisdiction. That concern is not present here.

The trial court's reliance on *T.S.G. v. Juvenile Officer*, 322 S.W.3d 145 (Mo. App. W.D. 2010), as authority for its dismissal was misplaced. In *T.S.G.*, the juvenile underwent a juvenile-court adjudication involving a juvenile officer's petition that essentially alleged conduct that, if committed by an adult, would constitute 2 counts of sexual misconduct.. *Id.* at 147. At the conclusion of the juvenile-court hearing, the court found that the juvenile officer had failed to prove either count of the delinquency petition. *Id.* But the court unilaterally amended the petition to conform to the evidence and found that the juvenile had committed a "status offense." *Id.* The court of appeals, which considered the propriety of the juvenile court's *sua sponte* action, held that the juvenile court's amendment of the petition after the hearing to essentially charge a new and distinct offense violated the juvenile's rights under due process to notice of the charge and an opportunity to be heard. *Id.* at 150.

Defendant's case is obviously distinguishable on its facts. Here, no hearing on the charges occurred in juvenile court. The juvenile court simply relinquished jurisdiction over Defendant following a certification proceeding. Thus, no issue of notice or an opportunity to be heard was implicated since the juvenile court never held an adjudication hearing. Defendant's due process rights to notice of the charges and an opportunity to be heard was satisfied by the filing of an indictment and a jury trial.

The trial court also likened Defendant's situation to the one in *State ex rel. D— V— v. Cook*, 495 S.W.2d 127 (Mo. App. K.C.D. 1973), but, again, that case is distinguishable. In *Cook*, the juvenile sought a writ of prohibition to prevent criminal proceedings in a case in which the juvenile court relinquished jurisdiction by dismissing a petition that alleged only that the juvenile "participated . . . in unnecessary aggressive sexual behavior" against the victim without citation to any state law that had been violated. *Id.* at 129 (quoting Section 211.091.2, RSMo 1969). Because this vague language was insufficient to apprise the juvenile that any violation of law had occurred, which was necessary to invoke the juvenile court's jurisdiction under § 211.031, and because it was the sole basis upon which the juvenile court relinquished jurisdiction over the juvenile, the court held that the petition provided an insufficient basis to accomplish the transfer or relinquishment of jurisdiction. *Id.*

In other words, the court in *Cook* simply held that when a juvenile-court petition contains allegations so vague that it is impossible to determine whether the juvenile court actually has jurisdiction, the juvenile court has no jurisdiction or authority to determine whether it should relinquish jurisdiction. The trial court too broadly read the holding in *Cook* as imposing a limitation on the prosecutor to charge only the specific offenses alleged in the juvenile-court petition. This broad reading of *Cook* is also inconsistent with the cases discussed above.

Courts in other states that have considered this issue have held that the prosecuting authority is not limited in its charging decisions to only the offenses or charges encompassed within the juvenile-court petition.[23]

In *State v. Day*, 911 A.2d 1042 (R.I. 2006), the court considered whether the "Legislature intend[ed] for a waiver of jurisdiction under [Rhode Island's juvenile code] to constitute a complete waiver of personal jurisdiction over the child, or merely a waiver of jurisdiction for the particular offense for which the child is waived." *Id.* at 1047. The court concluded that the waiver extended only to personal jurisdiction of the juvenile and "that it would be

[23] Although these cases involve the courts' construction of statutes unique to their states, "their value is in showing their approach to the problem and not the result." *State v. Randolph*, 876 P.2d 177, 180 (Kan. App. 1994).

illogical to conclude that the Legislature intended to give the [juvenile] [c]ourt the power to dictate what charges [the prosecutor] may bring in the adult court." *Id.* at 1053. *See also Randolph*, 876 P.2d at 180–81 (holding that the "criminal court can try any additional charges that might arise from the same set of facts that spawned the juvenile case" and that the state "does not have to return to juvenile court and again seek its waiver of jurisdiction"); *State v. Walton*, 600 N.W.2d 524 (S.D. 1999) (holding that the state's juvenile code does "not require a strict policy of bringing every charge before the juvenile court for its approval" and that the "juvenile court is to make the judicial determination of whether a juvenile should remain within the province of the juvenile court and not determine what charges the State can file").

The court in *Day* also declined to apply a "literal construction" to the word 'offense' (which is also used in § 211.071) to mean "a particular crime defined by the laws of this state." *Day*, 911 A.2d at 1053. Instead, because the juvenile court has no jurisdiction over criminal offenses, the court construed the word 'offense' as used in the juvenile-certification law to mean the actions of the juvenile, and not as a reference to any specific statutory offenses that the juvenile may have committed:

> [T]o do so would completely ignore the statutory limitations of the [juvenile court], which does not have subject matter jurisdiction over

> violations of the criminal code. As previously discussed, a child cannot be charged with any crime while still under the jurisdiction of that court. Rather, children are accused of certain acts through the filing of delinquency petitions. Therefore, we conclude that the words "for the offense" employed in [the juvenile code] do not refer to a particular crime, but rather refer to the actions of the accused child.

Id. Ultimately, the court concluded that after the juvenile court waives jurisdiction, the juvenile can be charged with any offense "spawned" by the actions that led to the waiver:

> [I]t is clear that the [juvenile] [c]court's only function . . . is to determine whether the child should be tried as an adult for any and all of that child's actions arising from the nucleus of operative facts that served as the basis for the waiver motion. Significantly, that function does not include a determination of the criminal charges on which the child must be tried in the adult court. . . . [O]nce the [juvenile] [c]ourt orders a waiver of its personal jurisdiction over a child, jurisdiction is vested completely in the adult court. Although . . . the waiver of jurisdiction is limited by the [statute] to the actions which spawned the waiver, it certainly is not limited by the [juvenile] [c]ourt's legal conclusion that those actions constituted particular crime(s).

Id.[24] *See also State v. Garcia*, 596 P.2d 264, 266–67 (N.M. 1979) (holding that following the juvenile court's waiver of jurisdiction, the criminal court had jurisdiction over "offenses arising from the same transaction"); *Osborne v. Commonwealth*, 43 S.W.3d 234, 238–39 (Ky. 2001) (holding that if a juvenile is indicted as a youthful offender, Kentucky law "does not preclude . . . indicting the child for other offenses arising out of the same course of conduct that gave rise to the offense that caused the child to be transferred to circuit court").

The trial court erred in dismissing on jurisdictional grounds the counts in the indictment pertaining to the crimes committed against Whitrock. It also committed no error for refusing to dismiss other counts pertaining to victim Stallis (Point VII). After the juvenile-court jurisdiction was relinquished following Defendant's certification hearing, the State was permitted under the law to charge any criminal offense it chose, including any related to the incident that spawned the juvenile-court petition and certification hearing. The crimes committed against Whitrock and Stallis were indisputably involved in that incident.

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[24] The court was also concerned that a contrary holding would infringe on the prosecutor's constitutional authority to determine what charges to bring. *Id.* at 1054.

The trial court erred in dismissing the charges pertaining to victim Whitrock (Counts IX, X, XXIII, and XXIV). The court's dismissal order should be set aside, the jury's guilty verdicts on those counts reinstated, and this case remanded for sentencing on those counts.

CONCLUSION

The trial court erred in dismissing Counts IX, X, XXIII, and XXIV (Point VIII). The guilty verdicts on those charges should be reinstated and the case remanded for sentencing on those counts.

This case should be remanded for resentencing on the first-degree murder charge (Point II), and any remand should be limited to a hearing in which the trial court will determine whether Defendant should be sentenced to life imprisonment or life imprisonment without parole.

The trial court did not otherwise commit reversible error. Defendant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 22,703 words, excluding the cover, certification, and appendix, as determined by Microsoft Word 2007 software; and that a copy of this brief was sent through the electronic filing system on January 28, 2013, to:

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