No. SC93153

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

LARON HART,

Appellant.

Appeal from St. Louis City Circuit Court
Twenty-Second Judicial Circuit
The Honorable John J. Riley, Judge

RESPONDENT'S 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 robbery, and armed criminal action, for which he was sentenced to life without parole on the murder charge and concurrent sentences of 30 years each on the remaining charges. Defendant, who was 17 years old when he committed first-degree murder, challenges for the first time on appeal the constitutionality of his sentence of life imprisonment without parole and the constitutionality of the penalty provision of the first-degree murder statute (§ 565.020.2, RSMo 2000) as applied to juvenile murderers. Although Defendant initially filed this appeal in the Court of Appeals, Eastern District, that court transferred the case to this Court on jurisdictional grounds before opinion. Because this case involves the constitutionality of a state statute, jurisdiction lies in this Court. MO. CONST. art. V, §§ 3 and 11.

STATEMENT OF FACTS

This is an appeal from a St. Louis City Circuit Court judgment convicting Appellant (Defendant) of one count of first-degree murder, one count of first-degree robbery, and two counts of armed criminal action, for which he was sentenced to life without parole on the murder charge and concurrent sentences of 30 years each on the remaining charges.

Defendant was indicted in St. Louis City Circuit Court on one count of first-degree murder (Count I), one count of first-degree robbery (Count III), and two counts of armed criminal action (Counts II and IV). (L.F. 15–16). Just before jury selection began, Defendant waived jury sentencing. (Tr. 14–18; L.F. 28). Defendant was tried before a jury on July 25–29, 2011, with Judge John J. Riley presiding. (L.F. 6–7). The jury found Defendant guilty as charged on all counts, and the court later sentenced him to life without parole for first-degree murder and to concurrent 30-year sentences on the robbery and armed criminal action charges. (L.F. 8, 77–81; Sent. Tr. 12–13).

Defendant does not challenge the sufficiency of the evidence to support the convictions. Viewed in the light most favorable to the verdict, the evidence presented at trial showed the following:

On January 14, 2010, at approximately 8:50 or 8:55 p.m., victim Hellrich left her St. Louis City apartment located on Allen, got into her car parked across the street, and put the keys into the ignition. (Tr. 282–83). Just before

she closed her door, a blue Cutlass abruptly stopped behind her; one man got out of the back passenger seat and sprinted toward Ms. Hellrich's car. (Tr. 283–84, 311). The man, who had dreadlocks, pulled Ms. Hellrich's door open and said, "give me your shit." (Tr. 284–85, 290). The man was partially inside the car door and facing Ms. Hellrich when he demanded her property; Ms. Hellrich's dome light was on and she was parked under a street light. (Tr. 285–86). When Ms. Hellrich attempted to give him only her wallet, the robber pulled out a silver handgun; she then gave him her entire purse. (Tr. 287). Inside her purse was, among other things, a blue iPod. (Tr. 287).

The robber then returned to the backseat of the car he arrived in and the car sped off. (Tr. 287–88). Ms. Hellrich immediately drove to the nearest gas station and told a security guard that she had just been robbed by a younger black male with dreadlocks. (Tr. 288–89, 319–21). She described the robber to police as having darker skin and medium-length dreadlocks. (Tr. 290).

Several minutes later, at approximately 9:15 or 9:20 p.m., victim Sindelar was walking on the sidewalk next to Morganford Road in St. Louis. (Tr. 330–31, 357, 369–70). A powder-blue Cutlass pulled over abruptly and a young black male with medium-length dreadlocks came up behind Mr. Sindelar and grabbed the backpack Mr. Sindelar was wearing. (Tr. 331–35, 349, 359). After Mr. Sindelar screamed, the robber pulled out a gun and fired one shot at him. (Tr. 335, 348). Mr. Sindelar took a few steps into the street, stepped back up

on the sidewalk, and collapsed. (Tr. 336–37). The shooter returned to the car, which then sped off.[1] (Tr. 337–39, 362).

Mr. Sindelar died from a gunshot wound to the chest. (Tr. 571–77). A .380 caliber shell casing was found near his body. (Tr. 373–74). One of the straps on his backpack had been removed, though the other was still attached to the body as if a struggle had taken place. (Tr. 370). A bike helmet was found lying near his right hand. (Tr. 375).

Early the next morning (January 15, 2010), at approximately 7 a.m., police spotted an older model blue Cutlass. (Tr. 380–83, 412). The driver and a passenger in the car noticed police and a high-speed pursuit ensued. (Tr. 382–86, 412–13). After wrecking the Cutlass, 19-year-old Kenneth Ivy, who is Defendant's cousin, and 15- or 16-year-old Reginald Green, the car's only

[1] A witness to the shooting testified that only one person got out of the car and that he was certain that this person—the shooter—had dreadlocks. (Tr. 334–35, 338–39, 343–44, 354). Another witness who did not see the shooting, but heard the shot, testified that he saw two black males running toward the blue Cutlass after the shooting, but that only one of them had dreadlocks; the other one had shorter hair and no dreadlocks. (Tr. 358–60, 364–65).

occupants, ran from the vehicle, but they were caught after a short foot chase.[2] (Tr. 387–89, 395, 400, 403–04, 524–26, 542, 621–22, 668).

Police found victim Hellrich's purse inside the blue Cutlass. (Tr. 291, 416–17, 503). Inside the pocket of the coat Reginald Green was wearing, police found Ms. Hellrich's blue iPod. (Tr. 291, 401–02, 503). Ms. Hellrich did not identify either Ivy or Green in a lineup as the person who robbed her. (Tr. 299–300). This did not surprise police because neither of them matched the robber's description.[3] (Tr. 462–63, 469).

During the police investigation, Ivy's father and Green's mother identified Defendant as fitting the description of a black male with dreadlocks.[4] (Tr.

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[2] Ms. Hellrich and the two witnesses to the Sindelar shooting identified the blue Cutlass as the car involved in the January 14th robberies and shooting. (Tr. 296–97, 341, 362–63, 523–24).

[3] Neither Green nor Ivy has dreadlocks. (Tr. 522–23). Defendant testified at trial that Ivy and Green both had short "afros" and that he was the only one of the three with dreadlocks. (Tr. 668–69). Defendant's mother testified that Green also had a short afro and that Ivy never had dreadlocks, but had a low haircut or a bald head. (Tr. 637–38).

[4] Defendant's mother testified at trial that Defendant "hung out" with Ivy and Green and that she knows Green's mother. (Tr. 622–24).

524–27). On January 22, 2010, victim Hellrich picked Defendant out of a photographic lineup as the person who robbed her, but she told detectives she could not be 100% sure until she viewed a live lineup. (Tr. 301–04, 314–15, 473–74).

Defendant, who was then 17 years old, was arrested on January 25, 2010; he denied involvement in any robberies. (Tr. 405–08, 474, 479, 620–21, 651). Later that day, Ms. Hellrich positively identified Defendant in a live lineup as the person who robbed her. (Tr. 306, 482–83). Upon viewing the live lineup and identifying Defendant, Ms. Hellrich had a physical reaction to seeing Defendant again; she started shaking, was scared, and had to be assisted from the room.[5] (Tr. 306–07).

Defendant appeared anxious about the result of the live lineup. (Tr. 537). When detectives told Defendant that he had been positively identified in that lineup, he began to cry and asked to explain what happened. (Tr. 487, 537). Defendant, who was repeatedly given the *Miranda* warnings and signed a warning and waiver form, then participated in a video-recorded interview

[5] At trial, Ms. Hellrich positively identified Defendant as the person who pulled a gun on her and robbed her. (Tr. 307, 318).

with detectives from the robbery and homicide units. (Tr. 477–79, 487–92, 531–33, 537–38, 698–99).

At first Defendant claimed that he knew about the robberies only from what Ivy and Green had told him. (State's Ex. 21). He said that Ivy was driving a blue car and that Green ran up on Ms. Hellrich with a handgun and took her white purse. (State's Ex. 21). He said that they also told him about another robbery in which they approached the victim with a gun. (State's Ex. 21). He claimed that Ivy and Green came to his house after the Hellrich robbery and gave him $5 of the robbery proceeds. (State's Ex. 21).

After detectives told Defendant again that Ms. Hellrich had picked him out of the lineup, Defendant changed his story and said that he was present during the Hellrich robbery, but that he did not have a gun. (State's Ex. 21). He said that by the time he got out of the car, "Reggie" (Green) had already pulled a gun on Ms. Hellrich and was taking her purse. (State's Ex. 21). He claimed that after the robbery, Ivy and Green took him home and that he did not go to the Sindelar robbery. (State's Ex. 21).

After detectives told him that the second robbery occurred only 15 minutes later, Defendant said that he was "being 100% honest" that he was not at the second robbery where the guy got shot. (State's Ex. 21). He insisted that he was dropped off after the Hellrich robbery, and that he heard the next morning that Ivy and Green had been arrested for robbery and murder.

(State's Ex. 21). He promised detectives that he was not at the robbery where "Reggie" shot the man. (State's Ex. 21).

The detectives explained to Defendant that it was not possible to drive from the Hellrich robbery, to Defendant's house, and back to the south side in time to commit the Sindelar robbery and shooting, which occurred 15 or 20 minutes after the Hellrich robbery. (State's Ex. 21). Defendant then changed his story again and said that he was present when Sindelar was robbed, but again insisted that he did not have a gun and that he did not get out of the car. (State's Ex. 21). Defendant claimed that he stayed in the car and that "Reggie" was pointing a gun at Mr. Sindelar. (State's Ex. 21). He said the gun went off when Reggie got hit with a bike helmet Mr. Sindelar had with him. (State's Ex. 21). He said he was sitting in the backseat during the robbery and that he never got out of the car. (State's Ex. 21).

The robbery detectives then left the room so the homicide detectives could ask Defendant more about the Sindelar shooting. (State's Ex. 21). Defendant said that he, Ivy, and Green were together in the car; Ivy was driving, Green was in the front passenger seat, and Defendant was in the back seat behind the driver. (State's Ex. 21). He said that he did not know Mr. Sindelar was going to be robbed and that after they pulled up, Green jumped out of the car to rob him. (State's Ex. 21). Defendant said Green admitted that he shot Mr. Sindelar after Green was hit with a helmet. (State's Ex. 21).

The detectives then told Defendant that he had been identified as being at the scene, and they asked him if he got out of the car. (State's Ex. 21). Defendant again denied being out of the car. (State's Ex. 21). After the detectives said that their witness had seen him out of the car, Defendant changed his story and said that he got out of the car and walked toward Green, but that before he reached Green and Mr. Sindelar, Green had already shot him. (State's Ex. 21). He said that he and Green then ran back to the car. (State's Ex. 21). He also conceded that he knew Green was going to rob Mr. Sindelar, but that he did not know he was going to shoot him. (State's Ex. 21). Defendant denied having, or even touching, the gun. (State's Ex. 21). He claimed that he got out of the car only because Ivy told him to check on Green. (State's Ex. 21). He said that Green always wanted to be the gunman and that he got out of the car at both robberies only after Green had already robbed the victims.[6] (State's Ex. 21).

Defendant again insisted that he never touched the gun and that the gun belonged to Ivy. (State's Ex. 21). He admitted that he initially lied about

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[6] The homicide detective testified that when multiple suspects, including a juvenile, are involved in a crime, the older people will generally blame the juvenile because they believe the juvenile will be treated more leniently. (Tr. 542).

being present at the robberies because he was afraid police would accuse him of being the shooter. (State's Ex. 21). He also claimed that he was intimidated by the others into going along to the robberies. (State's Ex. 21).

Defendant call several family members and friends as alibi witnesses to testify that he was at home playing cards the entire afternoon and evening of January 14, 2010, except for 30 minutes when he went to the store, but that he was back by 8:30 p.m. (Tr. 581–628). Defendant testified that he was home all day on January 14, and that he left the house for around 8 o'clock for 15 or 20 minutes to go to the liquor store. (Tr. 651–55). Defendant said he was not in the car that night or present during the robberies and that he lied to the detectives during the recorded interview because he was being pressured. (Tr. 660–67).

ARGUMENT

I (constitutionality of sentence).

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). (Responds to Defendant's Points I and II).

Defendant challenges, for the first time on appeal, the statutorily mandated sentence of life without parole for his first-degree murder conviction.

A. The record regarding this claim.

At the beginning of the sentencing hearing, the trial court stated that it had not ordered a sentencing assessment report because "as to Count I [first-degree murder], the court's limited as to what it could impose by way of sentence." (Sent. Tr. 4). After hearing argument from counsel, the court imposed concurrent sentences of life without parole for the first-degree

murder charge and 30-year sentences on the robbery and armed criminal action charges. (Sent. Tr. 12–13).

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,[7] the only available sentence under the statute for those offenders is life without parole.

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

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 was a juvenile when he committed first-degree murder, 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 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 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, the evidence showed that Defendant fired the fatal shot into the robbery victim, Mr. Sindelar, when he refused to give up his backpack during the robbery. 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. Any suggestion that this Court develop a detailed framework for a "*Miller*-compliant" sentencing hearing is unnecessary. In *State v. Riley*, 58 A.3d 304 (Conn. App. 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. *Id.* at 315. 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." *Id.* at 310. 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." *Id.* at 313–14. 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." *Id.* at 315.

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

D. The waiver of jury sentencing applies to any 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 nothing in the record shows that Defendant waived jury sentencing out of any sense of futility. Defendant may have waived because he believed that he would fare better in front of the judge, as opposed to the jury that heard detailed evidence of the crimes in which he actively participated. He may also have surmised, quite accurately as it turns out, that the State would be less inclined to present evidence in aggravation of punishment, including victim-impact testimony, if the sentence was being determine only by a judge. Defendant's decision not to present evidence during the sentencing hearing was likely in response to the State's decision not to do so either. Defendant could have easily concluded that the implicit mutual decision by both sides not to present evidence at sentencing inured to his benefit. Simply because Defendant may be entitled to a remand for resentencing on the first-degree murder charge does not also mean that he can withdraw his waiver of jury sentencing, especially when the jury was available to hear the sentencing phase if not for Defendant's waiver.

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.

Defendant's reliance on *State v. Chapman*, 167 S.W.3d 759 (Mo. App. E.D. 2005), is misplaced. There, the defendant was tried and sentenced before Missouri adopted the bifurcated sentencing procedure contained in § 557.036. In recalling the mandate and setting aside the defendant's sentences because they exceeded the maximum sentences authorized when he committed the crimes, the court remanded the case for jury sentencing under the new bifurcated-sentencing law since a jury had originally determined his sentences under the unitary procedure. *Id.* at 761–63. The defendant in *Chapman* had not previously waived jury sentencing, and nothing in that case purports to address the issue of a defendant seeking permission to withdraw a valid waiver of jury sentencing on remand.

This Court should remand this case for resentencing only on Count I, and it should affirm the 30-year sentences imposed on the remaining counts.

II (other-crimes evidence).

The trial court did not abuse its discretion in overruling Defendant's objection to that part of his recorded statement in which the police ask him about other robberies occurring the day before the charged offense because this did not constitute evidence of other crimes in that the officers did not accuse Defendant of committing those crimes, Defendant was not definitely associated with those offenses, and he denied on the recording that he had anything to do with them.

In addition, the court did not abuse its discretion in determining that the probative value of the jury viewing the recorded statement in its entirety outweighed any potential prejudice from references to other crimes not attributed to Defendant in light of Defendant's claim, made for the first time during trial, that police coerced his confession, coupled with his recorded denial of any involvement in the uncharged robberies, and the fact that the disputed portion of the recording consists of approximately 1½ minutes during a 52-minute recorded interview. (Respondent's to Defendant's Point III).

A. The record regarding this claim.

Defendant gave a video-recorded statement to police after he was arrested. (Tr. 490–92; State's Ex. 21). Nothing in the docket sheets indicates that

Defendant filed a pretrial motion to suppress the statement he made to police. (L.F. 2–9).

During opening statements, Defendant's counsel told jurors that the confession he made to police was false, and he implied that the circumstances surrounding Defendant's interrogation would show that his statement was involuntary or coerced. (Tr. 277).

Just before the State called its first witness to testify about Defendant's recorded statement, the prosecutor told the court that the parties had previously reached an agreement to turn the volume of the recording down when Defendant was asked about other uncharged robberies that occurred the day before the charged robberies; Defendant denied on the recording that he had committed any of those robberies. (Tr. 450). But since the defense had suggested during opening statements that Defendant's statement was coerced, the prosecutor contended that the agreement was moot and that the entire recording was relevant to the jury's consideration of whether the statement was coerced:

> [The Prosecutor]: Our next witness is going to get in the first part of the defendant's statement. It's a detective by the name of Leonard Blansitt. Prior to opening, we had discussed either on the record or off the record the fact that they had confronted him during this first part of the interview with these other robberies that happened the day before. I

think there was like five or six robberies, and he denies it in his—in the taped statement, the first part of the taped statement. So that part's going to be potentially played now.

The Court: Why?

[The Prosecutor]: Well, I think we had an agreement that we weren't going to, even though it was a denial—even though it was a denial, we weren't—we were going to turn the volume down. However, he's now gotten up and claimed coercion in his opening statement on the part of either one detective or all the detectives that he got the statement from. Therefore, I think it is extremely relevant now because of the fact that if they're getting—if they're coercing him into making the statement and admitting that he's there, our argument is why haven't they coerced him as well with regard to all the other robberies?

In addition, if we were to turn down the volume, they're left with wondering what are they saying to him during that portion of the tape, is this now evidence of coercion during this portion. I think based upon his opening and his statement to the jury that he's coerced, that we should be entitled to play the entire tape.

* * * *

[Defendant's Counsel]: Just for purposes of the record, I'm going to object to both the admission of any of the testimony about the interrogation,

as well as the part speaking directly about uncharged crimes. The reason for that is, for the whole interrogation, confession—for the whole interrogation/confession it was coerced for the particular part of the uncharged crimes.

The Court: So your position is none of this should be displayed?

[Defendant's Counsel]: That's correct, Your Honor.

The Court: But if any of it is played, the part in the beginning where they're talking about occurrences that don't—does not result in your client being charged with a crime, that shouldn't be heard by the jury?

Defendant's Counsel]: Yes, that is my contention.

(Tr. 450–52).[8]

After the prosecutor explained that the portion during which the detectives asked Defendant about other, uncharged robberies, which he denied any involvement in, was only "30 seconds" or a "minute" on a 52-minute recorded statement, the trial court asked what would happen if the recording was simply turned off for the "30 second stretch." (Tr. 453, 454).

[8] Although the trial court referred to "the part in the beginning" as being the portion of the recording containing the reference to other robberies, the recorded statement shows that this reference occurred in the middle of the interview. (State's Ex. 21).

The prosecutor reiterated that turning the recording off for that period of time, coupled with Defendant's argument that his entire statement was coerced, could leave the jury wondering what had occurred during the deleted or silenced portion of the recording:

> The Court: What would happen if you just turned the machine off for that 30 second stretch and start it up again?
>
> [The Prosecutor]: Because he in his opening statement claimed coercion. First of all. He denies it. He's not charged with it. I'm not sure what prejudice there is to him. Fall back position is in his opening he says these police officers are coercing him. So in effect, if you're turning off the TV or turning down the volume to the TV, the jury is left wondering what is said to him during these critical 30 seconds, because then they go back into the robbery investigation, they go back into getting more statements from him regarding the Rebecca Hellrich robbery.
>
> So it's essential. I mean, based upon his—his tactic, his theory of the case, I think the jury should be entitled to hear the entire tape.

(Tr. 453–54).

Defense counsel argued that he did not want the jury "to take a negative inference" from "the idea that [Defendant] was involved in a string of robberies that the codefendants are charged with but my client's not charged with." (Tr. 454). But he agreed that the reference to other robberies was

"brief." (Tr. 454). The prosecutor responded that Defendant was not charged with the other robberies and that the State would not argue "these other things." (Tr. 456). But he added that "the jury should be entitled to hear the entire tape based upon [defense counsel's] assertions" that the statement was coerced. (Tr. 456). The court ruled that it would allow "the jury to hear the whole thing." (Tr. 457).

Before the jury viewed the recorded interview, one of the detectives (Blansitt) investigating the Hellrich robbery, who had briefly interviewed Defendant before the live lineup, testified without objection that when Defendant was told that the detectives were investigating "robberies," Defendant denied involvement in any robbery:

Q. And did he choose to give you a statement at that particular time?

A. He denied involvement in any robbery.

Q. So you asked him specifically about the Rebecca Hellrich robbery?

A. No. What we told him was we were investigating robberies. He said he was not involved in any robbery.

Q. Was that the end of the interview?

A. That was it.

Q. And that would have occurred at about what time?

A. Probably a little after seven.

(Tr. 479).

The detective also testified that after the first robbery victim, Ms. Hellrich, identified Defendant in a live lineup conducted at 9:15 p.m. as the person who had robbed her, the detectives re-interviewed Defendant. (Tr. 479-87). When the detective started to testify about what Defendant had said during that second interview, defense counsel objected. (Tr. 487). Defense counsel also objected to the playing of the videotaped interview (State's Exhibit 21) before the jury. (Tr. 492). That objection was overruled, and the jury viewed the recording. (Tr. 492–93).

During an approximately 1½-minute portion (14:50 to 16:20) of the 52-minute recorded interview, the robbery detectives asked Defendant about other robberies occurring on January 13, which was the day before the Hellrich robbery, including one where a man was robbed at a convenience store. (State's Ex. 21). Defendant denied any participation in those robberies. (State's Ex. 21). The detectives then mentioned to Defendant that the car he was riding in during the Hellrich and Sindelar robberies, which occurred on January 14, was stolen early in the morning on January 13 and that about a half hour later robberies were reported at 6:37, 6:42, 6:48, 6:53, and 7:04. (State's Ex. 21). Defendant told the detectives that he was not with Green and Ivy on January 13 and that he did not even know that the car was stolen. (State's Ex. 21).

Defendant's motion for new trial contains a claim that the trial court erred in failing to exclude "comments on the confession video of uncharged crimes and bad acts referred to during the interrogation." (Motion for New Trial, ¶ 2).[9]

B. Standard of review.

The trial court is vested with broad discretion to admit and exclude evidence at trial, and error will be found only if this discretion was clearly abused. *State v. Simmons*, 955 S.W.2d 729, 737 (Mo. banc 1997). On direct appeal, this Court reviews the trial court "for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial." *State v. Morrow*, 968 S.W.2d 100, 106 (Mo. banc 1998).

"In a criminal proceeding, questions of relevance are left to the discretion of the trial court and its ruling will be disturbed only if an abuse of discretion is shown." *State v. Santillan*, 1 S.W.3d 572, 578 (Mo. App. E.D. 1999). A trial court will be found to have abused its discretion only when a ruling is "clearly against the logic and circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable persons can differ about the propriety of the

[9] The parties filed a stipulation in the Court of Appeals relating to the filing of the motion for new trial.

action taken by the trial court, then it cannot be said that the trial court abused its discretion." *State v. Brown*, 939 S.W.2d 882, 883 (Mo. banc 1997).

C. The challenged portion of the recording did not constitute other-crimes evidence.

To violate the rule prohibiting evidence of other crimes or misconduct by the defendant, the evidence must show the defendant committed, was accused of, was convicted of, or was definitely associated with, the other crimes or misconduct. *State v. Ponder*, 950 S.W.2d 900, 911-12 (Mo. App. S.D. 1997). When the reference to the other conduct is vague or speculative, it cannot be characterized as clear evidence associating a defendant with other crimes and does not violate the rule against evidence of other crimes. *State v. Rush*, 949 S.W.2d 251, 255 (Mo. App. S.D. 1997); *State v. Bickham*, 917 S.W.2d 197, 199 (Mo. App. W.D. 1996). Vague remarks or references cannot be characterized as clear evidence definitely associating the defendant with the commission of other crimes. *State v. McFadden*, 369 S.W.3d 727, 741 (Mo. banc 2012); *State v. Norton*, 949 S.W.2d 672, 677 (Mo. App. W.D. 1997); *State v. Rush*, 949 S.W.2d at 255. Defendant bears the burden of showing that the challenged testimony constituted evidence of other crimes. *Hays v. State*, 360 S.W.3d 304, 312 (Mo. App. W.D. 2012). "The challenged evidence is admissible if it does not constitute evidence of specific bad acts or misconduct by Defendant. *Id.*

The general rule is that evidence of prior uncharged misconduct is not admissible for the purpose of showing the propensity of the defendant to commit such crimes. *State v. Hawkins*, 328 S.W.3d 799, 812 (Mo. App. S.D. 2010). "However, proffered evidence only runs afoul of that rule 'if it shows that the defendant has committed, been accused of, been convicted of or definitely associated with another crime or crimes.'" *Id.* (quoting *State v. Wallace*, 952 S.W.2d 395, 397 (Mo. App. W.D.1997)). "The necessary nexus between the defendant and the uncharged crime does not exist when the defendant's involvement in the other crime is speculative, when the defendant is not identified as the perpetrator, or when the other crime is attributed to someone other than the defendant.'" *Id.* (quoting *State v. Tyra*, 153 S.W.3d 341, 347 (Mo. App. S.D. 2005)). "It is [the defendant]'s burden to prove that the challenged testimony constituted evidence of other crimes." *Id.*

In *Tyra*, the defendant challenged his conviction for statutory sodomy on the ground that the trial court had erred in admitting other-crimes evidence in the form of testimony from a treating physician in which he stated that the victim's mother reported "that somebody in the vicinity of their home had a history of sexually abusing people, and that [victim] had contact with this person on a regular basis" and that he then advised the inpatient facility where the victim was being treated that "there was a possibility" that the victim "had been sexually abused." *Tyra*, 153 S.W.3d at 345–46. In rejecting

this claim, the court held that the "statement neither mentioned [the defendant] by name nor even vaguely referenced him," that "there was simply no 'necessary nexus' between [the defendant] and [the physician]'s mention that [victim's] mother believed [the victim] had been exposed to an abuser," and that the physician's statement contained no 'clear evidence associating [A]ppellant with other crimes.'" *Id.* at 347. *See also Hawkins*, 328 S.W.3d at 812 (testimony that the victim told a police officer investigating abuse of another teenage girl that the "same thing happened to me" was not inadmissible other-crime evidence because speculation was required to connect the defendant to the uncharged crime and the testimony did not "provide the necessary nexus" between the defendant and the unidentified girl's possible perpetrator).

In *State v. Wright*, 810 S.W.2d 86 (Mo. App. E.D. 1991), the defendant complained that the trial court had plainly erred in allowing a detective to testify that the defendant's prints had been compared to other prints lifted at other unsolved burglaries. *Id.* at 89. The court held that the detective's "general reference to an unspecified number of burglaries for the purpose of explaining the process by which [the defendant] was identified as the perpetrator of one of those burglaries cannot be considered improper where [the defendant] was on trial for multiple offenses." *Id.* at 90. In addition, the court held that the defendant's failure to object when other questions

pertaining to those uncharged burglaries were asked showed that the objected to testimony could not have been prejudicial. *Id.* at 90–91.

In *State v. Jones*, 525 S.W.2d 435 (Mo. App. K.C.D. 1975), the defendant, who was convicted of "possessing with intent to utter as true a personal money order," complained on appeal that the prosecutor's comments during opening statements and the State's evidence that showed that the money order was taken during an armed robbery violated the rule against the admission of other-crime evidence. *Id.* at 436–37. The court rejected this claim because the State's comment and evidence did not "purport to contend to prove that the defendant committed any crime other than the one for which he was being tried." *Id.* at 437. The court also noted that proof that the money order was stolen was relevant to show that it was not issued to the defendant. *Id.*

Similarly, in Defendant's case, the State never purported to show that Defendant committed any crimes other than the ones with which he was charged. The detectives simply asked him about other reported robberies the day before the charged offenses, and Defendant denied that he had anything to do with them saying that he was not with Green and Ivy on that date. The implication left from this exchange shows that those robberies were attributable to Green and Ivy, but not to Defendant. The detectives did not

accuse Defendant of participating in the uncharged robberies, and the prosecutor never mentioned them to the jury during trial.

Moreover, once Defendant injected the issue concerning the voluntariness of any part of his recorded statement, the entire recorded statement became relevant to the jury's determination of whether Defendant's statement was coerced. *See State v. Bryant*, 362 S.W.3d 46, 51 (Mo. App. S.D. 2012) ("When a defendant injects an issue into the case, the State may be allowed to admit otherwise inadmissible evidence to explain or counteract a negative inference raised by the issue injected."). Defendant's counsel had reached an agreement with the prosecutor about turning down the sound during that small portion of the recording, but then stated before the jury that the entire statement was coerced. The jurors would have obviously known they were being prevented from hearing a portion of the recording without explanation. This may have left them wondering, albeit falsely, whether that redaction had something to do with Defendant's claim of coercion. Defendant should not be permitted to exploit that situation when it was his claim of coercion that made the jury's viewing of the entire recording necessary to resolve the coercion issue. This situation was exacerbated by the fact that Defendant did not file a pretrial motion to suppress his statements, thereby giving the trial court the opportunity to consider the voluntariness of the statement outside

the jury's presence, but waited until trial to challenge the voluntariness of his statement before the jury.

The trial court properly balanced the prejudicial effect of admitting the entire recording—including the 1½ minutes in which the detectives informed Defendant about the other robberies occurring the day before the charged offenses—against the probative value of having the jury see the entire recording without the volume being turned off during the middle of the interview, especially in light of Defendant's eleventh hour trial strategy in which he argued that the entire statement was coerced.

Even if the disputed statement coupled with a speculative assumption showed that Defendant may have been involved with the uncharged robberies, courts have held that evidence of other crimes may be admissible to explain "the entire context of an event." *State v. Slaughter*, 316 S.W.3d 400, 404 (Mo. App. W.D. 2010). *See State v. Payne*, 135 S.W.3d 504, 507 (Mo. App. W.D. 2004) (defendant charged with three robberies; evidence of fourth robbery committed during the same spree was admissible); *State v. Morrow*, 968 S.W.2d at 107 (evidence of other uncharged crimes admissible when crimes were "part of a three day drug binge and crime spree," to "fully and fairly [present] a complete and coherent picture of the ... whole truth to the jury").

D. Defendant has failed to demonstrate prejudice.

Defendant also cannot establish that he was prejudiced by the trial court's action. When a defendant complains about the admission of evidence, he has the "dual burden" of establishing that the admission of this evidence was error, and that this error was prejudicial. *State v. Isa*, 850 S.W.2d 876, 895 (Mo. banc 1993). In reviewing for "prejudice," reversal is warranted "only if the admitted evidence was so prejudicial that it deprived the defendant of a fair trial." *State v. Richardson*, 923 S.W.2d 302, 311 (Mo. banc 1996). Absent a showing that the evidence inflamed the jury or diverted its attention from the issues to be resolved, admitted evidence, even if immaterial or irrelevant, will not constitute prejudicial error. *State v. Stoner*, 907 S.W.2d 360, 364 (Mo. App. W.D. 1995). Mere allegations of prejudice are insufficient to meet this burden. *Id.*

In determining whether the improper admission of evidence is harmless error this Court employs the "outcome-determinative" test. *State v. Barriner*, 34 S.W.3d 139, 150 (Mo. banc 2000); *State v. Black*, 50 S.W.3d 778, 786 (Mo. banc 2001). Improperly admitted evidence is outcome-determinative when it has "an effect on the jury's deliberations to the point that it contributed to the result reached." *Barriner*, 34 S.W.3d at 151. In other words, a finding of outcome-determinative prejudice occurs when "the erroneously admitted evidence so influenced the jury that, when considered with and balanced

against all evidence properly admitted, there is a reasonable probability that the jury would have acquitted but for the erroneously admitted evidence." *State v. Black*, 50 S.W.3d at 786; *see also State v. Barriner*, 34 S.W.3d at 150.

Defendant cannot make that showing in this case. First, the disputed portion of the recording consisted of only 1½ minutes of a 52-minute interview. Second, the mention of other robberies did not accuse or implicate Defendant as the perpetrator; the officers were merely seeking information. Third, Defendant denied on the recording that he had anything to do with those robberies and the implication was that those robberies were attributable not to Defendant, but to Green and Ivy. Fourth, the prosecutor never mentioned the uncharged robberies to the jury and did not argue in any manner that the existence of those robberies proved Defendant's guilt for the charged robberies. Finally, Defendant failed to object when the detective testified that Defendant was asked about "robberies" and denied involvement in any robberies. *See State v. Dickson*, 337 S.W.3d 733, 744–45 (Mo. App. S.D. 2011) ("Generally, if other evidence admitted without objection sufficiently established essentially the same facts, the challenged evidence cannot create undue prejudice because it is simply cumulative of other properly admitted evidence.").

E. The cases on which Defendant relies are inapposite.

The cases on which Defendant relies to prove that the trial court abused its discretion are readily distinguishable from what occurred in this case as cases in which the State's evidence definitely proved the defendant had committed an unrelated, uncharged crime and actively relied on the uncharged offense to establish the defendant's guilt for the charged offenses.

State v. Pennington, 24 S.W.3d 185, 191 (Mo. App. W.D. 2000), involved a robbery trial in which the trial court erroneously admitted evidence that the defendant had stolen items from the same store on previous, unrelated occasions. *Id.* at 187-88. Later cases have distinguished *Pennington* as one in which the disputed evidence was not part of circumstances surrounding the charged offense and in which the other-crimes evidence was extensive and emphasized by the State. *See State v. Blakey*, 203 S.W.3d 806 (Mo. App. S.D. 2006) (noting that the other-crimes evidence in *Pennington* was extensive and emphasized by the State during closing); *Payne*, 135 S.W.3d at 507-08 (distinguishing *Pennington* on the ground that the prior offenses in *Pennington* were not part of the circumstances or sequence of events surrounding the charged offense).

In *State v. Davis*, 226 S.W.3d 167 (Mo. App. W.D. 2007), the defendant was charged with acting in concert with a co-defendant who shot Thomas outside Peterson's apartment. *Id.* at 169. Thomas had been in Peterson's

apartment when an altercation that led to the shooting occurred. *Id.* At trial, the state admitted evidence of the defendant's attempt to strike Peterson with his car two days before the shooting. *Id.* at 170. The court held that this evidence was inadmissible evidence of other crimes because "evidence of the prior incident was not necessary to prove or understand the facts surrounding the shooting" and the defendant's previous desire to injure Peterson had no apparent bearing on his motivation to encourage [his co-defendant] to shoot and injure Thomas and the others." *Id.* at 171. Moreover, the court found that the "primary effect of the testimony was to impugn [the defendant]'s character, by making it seem more likely that he had a reckless and violent temperament" and that this would "only serve[ ] to inflame the jury regarding [the defendant]'s propensity for violence." *Id.*

In *State v. Batiste*, 264 S.W.3d 648 (Mo. App. W.D. 2008), the court held that admission of evidence in a child-abuse prosecution showing that a month before the charged incident, the defendant had fractured the same child's arm by hitting him with a belt and extension cord. *Id.* at 650. The court determined that this was pure propensity evidence, and noted that the State had presented extensive evidence and argument during trial of the defendant's prior abuse of the victim. *Id.* at 652-53.

The trial court did not abuse its discretion in allowing the jury to hear the entirety of Defendant's recorded statement.

III (voluntariness of statement).

The trial court did not plainly err in allowing the jury to hear Defendant's recorded statement to police because Defendant failed to prove that his statements were involuntary as being induced by a promise of leniency in that the record shows that no promise of leniency was made and that Defendant did not rely on any alleged promise in making his statements since most of his incriminating statements were made before the detective made any comment that Defendant now contends was a promise. (Responds to Defendant's Point IV).

A. The record regarding this claim.

Nothing in the docket sheets indicates that Defendant filed a pretrial motion to suppress the statements he made to police. (L.F. 1–9). The first mention about voluntariness of Defendant's statements came during the middle of trial just before the State called a detective who interviewed Defendant to testify about Defendant's interview and statements. (Tr. 451). Defendant objected to the playing of any part of the recorded statement only on the ground that the "confession was coerced." (Tr. 451). The trial court overruled the objection. (Tr. 457).

Defendant's motion for new trial contained a claim that Defendant's interrogation and confession was "obtained illegally" and "should have been

suppressed" on the ground that Defendant was "exhausted and had been under continuous pressure to confess" and that "the detectives went so far as to use the defendant's infant daughter as leverage against" him. (Motion for New Trial, ¶ 2).[10]

The record shows that after Defendant was arrested, he was told that he was a suspect in a robbery, that he had been identified in a photographic lineup, and that he was going to be placed in a live lineup. (Tr. 477–79). Defendant was then read the *Miranda* warnings, and he executed a warning and waiver form. (Tr. 477–79). After Defendant was identified in the live lineup, he was told that he had been identified and was again given the *Miranda* warnings and asked to execute a warning and waiver form; Defendant signed and initialed the form at 9:52 p.m. and he was told the interview would be videotaped. (Tr. 487–90, 698–99).

The beginning of Defendant's videotaped interview shows the officers entering the room, reading the *Miranda* warnings to him for yet a third time, and confirming that Defendant had already executed the warning and waiver form. (State's Ex. 21; Tr. 493). The recording shows Defendant verbally

[10] The parties filed a stipulation in the Court of Appeals relating to the motion for new trial.

agreeing that he understood his rights and was voluntarily waiving them. (State's Ex. 21).

After initially denying to the robbery detectives that he was in the car during the Hellrich robbery, Defendant admitted that he was present when she was robbed, but denied having a gun. (State's Ex. 21). He claimed that he then went home and was not present for the next robbery that occurred 15 minutes later. (State's Ex. 21). After the detectives told him that it was not physically possible for him to have been dropped off at his house after the Hellrich robbery and for Ivy and Green to have then returned to the south side of the city and committed the Sindelar robbery, Defendant relented and said that he was in the car at the Sindelar robbery. (State's Ex. 21). But he again insisted that he did not get out of the car during that second robbery. (State's Ex. 21).

After Defendant was told he would be charged with robbery and that the homicide detectives would come in the room next to ask him about the Sindelar shooting, Defendant told the last robbery detective to leave that he was not the type of person to do these kinds of things and suggested that he was subjected to peer pressure by the others to go along. (State's Ex. 21). Defendant then asked the detective if he would be "be spending the rest of my life in jail." (State's Ex. 21). The detective replied, "I don't believe you will be. I really don't. *If what you're saying is true and that you didn't have that gun,*

you never had that gun . . ." (State's Ex. 21). Defendant then stated that he wanted to prove that he did not shoot Sindelar. (State's Ex. 21). The detective told Defendant again that "*if what you're saying is true, o.k., that you didn't pull the trigger and you didn't have that gun*, then no you're not going to spend the rest of your life in jail" (State's Ex. 21). He repeated this statement to Defendant again just before leaving the room ("if it's true what you're saying that you didn't pull that trigger…"). (State's Ex. 21).

The homicide detectives then entered the interview room and talked to Defendant about the Sindelar robbery and shooting. (State's Ex. 21). Defendant admitted being in the car during the robbery but denied getting out of the car. (State's Ex. 21). After he was told that he had been identified at the scene as being outside the car, Defendant changed his story and said that while he got out of the car, the shooting occurred before he was able to get to where the man was standing when he was shot. (State's Ex. 21). Defendant continued to deny that he had the gun or even touched it. (State's Ex. 21).

At the end of the interview, Defendant asked the homicide detectives whether he "will be spending the rest of his life in jail"; the detective responded that it "will be up to a jury" which "will weigh out all those circumstances." (State's Ex. 21).

B. The constitutional claim is not preserved for appellate review.

Defendant did not file a motion to suppress his statements. Instead, he waited until the middle of trial to assert that his confession was coerced. His failure to file a pretrial motion to suppress the statements renders his claim unreviewable, except for plain error. *See State v. Conn*, 950 S.W.2d 535 (Mo. App. E.D. 1997) (holding that a foundational objection made during trial to admission of a defendant's statement premised on the State's failure to adduce evidence that *Miranda* warnings were given was not preserved for appellate review when the defendant made no motion to suppress the statements); *State v. Kovach*, 839 S.W.2d 303, 309 (Mo. App. S.D. 1992) (holding that the defendant's claim on appeal challenging the admissibility of statements he made to police was not preserved for appellate review when those claims were not included in the written motion to suppress). *See also State v. Galazin*, 58 S.W.3d 500, 505 (Mo. banc 2001) ("Unlawful search and seizure claims must be raised by a motion to suppress evidence before trial."); *State v. Collins*, 72 S.W.3d 188, 194 (Mo. App. S.D. 2002) (holding that the defendant's claim that the officer's arrest violated her Fourth Amendment rights was not preserved for appellate review when it was not asserted in a pretrial motion to suppress but made for the first time during trial).

These holdings flow from the principle that a "claim that evidence was obtained in violation of a defendant's constitutional rights must be raised at

the earliest opportunity." *Collins*, 72 S.W.3d at 14 (holding that "a defendant must raise a claim of an unlawful search or seizure by filing a motion to suppress evidence before trial") (citing *Galazin*, 58 S.W.3d at 505). This Court has identified three reasons why constitutional challenges to the admission of evidence should be made in a pretrial suppression motion. First, requiring the filing of a motion to suppress "avoid[s] delays during trial in determining [the constitutional] issue." *Galazin*, 58 S.W.3d at 505. Second, it makes the basis of the constitutional claim "known, giving the state a fair chance to respond and the trial court a fair opportunity to rule on the claim." *Id.* And, third, the "rule helps to eliminate the possibility of sandbagging with respect to an issue not relating to guilt or punishment." *Id.*

In addition, Rule 24.05 provides that "[r]equests that evidence be suppressed shall be raised by motion before trial." *See Galazin*, 58 S.W.3d at 504 n.2 (suggesting that Rule 24.05 requires the filing of a pretrial motion to suppress a defendant's statements to preserve such a claim for appellate review). Although the rule also provides that "the court may in its discretion entertain a motion to suppress evidence at any time during trial," this does not mean that an untimely objection to evidence based on unstated constitutional grounds is sufficient to transform a vague objection into a motion to suppress. *Id.* at 505 (noting that objections to the admissibility of evidence "do not have the earmarks of a motion to suppress" when they do

not allege a violation of the defendant's constitutional rights); *State v. Johnson*, 752 S.W.2d 851, 854 (Mo. App. E.D. 1988) (holding that unless an objection to a defendant's statements is considered by the trial court as a motion to suppress, a claim that statements were unconstitutionally obtained is "technically not preserved for appellate review" in the absence of a written motion to suppress). *But see State v. Dravenstott*, 138 S.W.3d 186 (Mo. App. W.D. 2004) (holding that the defendant's claim that his statements should have been suppressed was preserved for appellate review despite his having waited until the middle of trial to assert it when the defendant "specifically object[ed] to the admission of [his] incriminating statements on constitutional grounds, i.e., that the statements were made during a custodial interrogation conducted without *Miranda* warnings). [11]

[11] The holding in *Dravenstott* is not well taken in light of the specific holdings in other cases, including *Galazin*, that the failure to raise constitutional objections in a pretrial motion to suppress renders the claim unpreserved for appellate review and that motions to suppress made for the first time during trial are disfavored. The *Dravenstott* court's attempt to marginalize this Court's holding in *Galazin* is unpersuasive. *See Dravenstott*, 58 S.W.3d at 193–94.

Another reason why Defendant's constitutional claim relating to the voluntariness of his confession is not preserved is that he cited no constitutional provision in objecting; rather, he simply claimed that his confession was "coerced." *See Galazin*, 58 S.W.3d at 505. (holding that the defendant's failure to lodge specific constitutional objections to the admission of evidence on Fourth Amendment grounds rendered the constitutional claim unpreserved for appellate review). *Id.* at 505. "To preserve an alleged error for review on appeal an adequate specific objection must be made at the earliest possible opportunity in the progress of the trial." *State v. Franks*, 685 S.W.2d 845, 848–49 (Mo. App. E.D. 1984) (holding that a constitutional challenge to the introduction of preliminary-hearing testimony asserted for the first time in the defendant's motion for new trial was not preserved for appellate review). Constitutional claims are waived if they are not presented to the trial court at the first opportunity. *State v. Parker*, 886 S.W.2d 908, 925 (Mo. banc 1994); *see also State v. Mann*, 35 S.W.3d 913, 916 (Mo. App. S.D. 2001). To preserve a constitutional claim for judicial review, it must be raised at the earliest opportunity. *See State v. Fassero*, 256 S.W.3d 109, 117 (Mo. banc 2008) (holding that a criminal defendant's constitutional claim raised for the first time on appeal was waived).

Finally, Defendant's claim is not preserved because the objection he made during trial—that his confession was coerced by police pressure to confess—is

notably different than his current claim on appeal, which is that he was induced to confess by a promise of leniency. *See State v. Morgan*, 366 S.W.3d 565, 586 (Mo. App. E.D. 2012) (holding that an appellate claim that statements were inadmissible because they were derived from an unlawful pre-*Miranda* custodial interrogation was not preserved for review because it differed from the objection raised at trial). "To preserve a claim of error in the taking of evidence, an accused must object with sufficient specificity to apprise the trial court of the grounds for the objection. The grounds asserted on appeal are limited to those stated at trial." *State v. Gaines*, 342 S.W.3d 390, 395 (Mo. App. W.D. 2011) (quoting *State v. Phillips*, 939 S.W.2d 502, 505 (Mo. App. W.D. 1997)). "An appellant may not broaden the objection he presented to the trial court, nor may he rely on a theory different from the one offered at trial." *Id.* (quoting *State v. Mattic*, 84 S.W.3d 161, 168 (Mo. App. W.D. 2002)). *See also State v. Letica*, 356 S.W.3d 157, 168 (Mo. banc 2011) ("A party is not permitted to advance on appeal an objection different from that stated at trial.").

C. Standard of review.

Because Defendant's claim is not preserved for appellate review, it may be reviewed, if at all, only for plain error. "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 ("[P]lain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom."). "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) (quoting *State v. Smith*, 293 S.W.3d 149, 151 (Mo. App. S.D. 2009)). An appellate court is not required to grant plain-error review; it does so solely within its discretion. *Id.* "A defendant bears the burden of establishing that the trial court committed an evident, obvious and clear error and in proving the existence of a manifest injustice or a miscarriage of justice." *State v. Castoe*, 357 S.W.3d 305, 310 (Mo. App. S.D. 2012).

Similarly, since Defendant failed to file a pretrial motion to suppress, he bore the burden at trial, and now on appeal, to prove that his statements were unconstitutionally obtained. *See Galazin*, 58 S.W.3d at 505 (noting that the failure to file a motion to suppress shifts the burden to the defendant of establishing the unlawfulness of the police conduct).

D. Defendant's statement was not involuntary or induced by a promise of leniency.

"It is well settled that a statement is not voluntary and is inadmissible if it was extracted by promises, direct or implied." *State v. Dixon*, 332 S.W.3d 214, 218 (Mo. App. E.D. 2010). "A promise to a defendant in custody does not per se make any statement he gives thereafter involuntary." *Id.* (quoting *State v. Stokes*, 710 S.W.2d 424, 428 (Mo. App. E.D.1986)). "All the circumstances surrounding the statement must be considered in determining if the defendant's will was overborne by the promise."*Id. "*The nature of the promise must be considered. *Id.* "The promise must be positive in its terms and clear in its implication." *Id.* "The promise must directly relate to the crime charged and be made by one in authority to deliver it. *Id.* But "[p]romises made to [the] defendant after his statements were made will not render them involuntary and objectionable as evidence." *State v. McCulley*, 736 S.W.2d 504 (Mo. App. E.D. 1987). "[W]hether a statement is admissible hinges on its voluntariness in light of the totality of the circumstances, not on whether a promise was made." *Dixon*, 332 S.W.3d at 218 (quoting *Stokes*, 710 S.W.2d at 428) (alteration in original).

In addition, the"issue of voluntariness is not resolved by labeling what a police officer said as a promise or not a promise, but by an analysis [of] the 'totality of the circumstances.'" *Id.* (quoting *Stokes*, 710 S.W.2d at 428)

(alteration in original). "The test for whether a statement is voluntary 'is whether the totality of the circumstances created a physical or psychological coercion sufficient to deprive the defendant of a free choice to admit, deny or refuse to answer the examiner's questions." *Id.* (quoting *State v. Simmons*, 944 S.W.2d 165, 173 (Mo. banc 1997)). And "whether the physical and psychological coercion was of such a degree that the defendant's will was overborne at the time he [made the statement]." *Id.* (quoting *State v. Rousan*, 961 S.W.2d 831, 845 (Mo. banc 1998)) (alteration in original). "The waiver of *Miranda* rights, while not dispositive of the question of voluntariness, is an important consideration." *Id.* "Other factors to consider include the 'defendant's physical and mental state, the length of questioning, the presence of police coercion or intimidation, and the withholding of food, water, or other physical needs.'" *Id.* (quoting *Rousan*, 961 S.W.2d at 845).

Here, no promise of leniency was made to Defendant. The detective's comment came in response to Defendant's question asking if he would spend the rest of his life in prison. The detective made no promise one way or the other, but simply offered his opinion that he did not think that would happen *if* what Defendant was saying was true—that he never had the gun or pulled the trigger. As demonstrated by the evidence at trial and the jury's verdict, Defendant's statement that he did not have the gun or pull the trigger was

obviously not true. Nothing in the detective's statement suggested a positive promise on which Defendant could have reasonably relied.

In *State v. Schnick*, 819 S.W.2d 330 (Mo. banc 1991), an officer interviewing the defendant, who was subsequently convicted of first-degree murder and sentenced to death, told the defendant that he should "answer only for what he did." *Id.* at 336. After the officer explained the difference between first and second degree murder, he told the defendant that if "it's not a premeditated type of killing, then, it's second degree murder," and, "if it wasn't premeditated murder, you know, then you shouldn't be prosecuted for premeditated murder." *Id.* The court rejected the claim of coercion because there was "no implicit or explicit promise of possible leniency or mitigation of punishment." *Id.*

Moreover, the detective's statement was not made until after Defendant had changed his story and incriminated himself by admitting that he was present in the car when both Hellrich and Sindelar were robbed. In *McCulley*, the defendant claimed that his statement to police was involuntary because it was induced by promises to get his bail reduced. 736 S.W.3d at 505. The court rejected this claim because the "promise was made after defendant had been interrogated and statements were obtained from him concerning his own involvement in the burglaries." *Id.*

The entirety of the record demonstrates that Defendant did not rely on the detective's alleged "promise" or that his will was overborne by what the detective said. The record suggests that Defendant asked the question about whether he would spend the rest of his life in prison in an effort to discern whether the story he was telling to the detectives was helping in his effort to minimize his potential criminal liability. His will was obviously not overborne by what the detective said since he had already implicated himself by admitting he was present in the car when the robberies occurred.

In addition, the totality of the circumstances surrounding the interrogation demonstrates that Defendant's statement was voluntary. Most importantly, he was given the *Miranda* warnings at least three times and waived them both verbally and in writing. The detectives testified that no one threatened, coerced, or harmed Defendant while he was in custody in order to get him to make a statement. (Tr. 494, 511, 541). Every 15 minutes or so while Defendant was in the holding cell at the homicide office, he was offered food, water, and bathroom breaks. (Tr. 548). Nothing in the record, except for Defendant's self-serving statements, suggests that Defendant was pressured or coerced to make a statement. The recording of the interview shows that Defendant was forthcoming in answering the detectives' questions; nothing suggested that he was under any undue pressure or coercion in responding the questions or providing information.

In *State v. Dixon*, the circuit court suppressed the defendant's statement to police who were investigating the first-degree assault of an eight-month-old baby. *Dixon*, 332 S.W.3d at 215–16. During an interview with the defendant, a detective told him that he was "in trouble for hurting that baby," that no matter what the defendant said he could not "be in any more trouble," and that if the defendant had taken "that kid and threw it a football field length" he could not be "in any more trouble." *Id.* at 217. The detective added, "You got my word on that." *Id.* The defendant "subsequently made numerous statements as to how the baby was injured, finally admitting throwing the baby." *Id.*

The appellate court reversed the circuit court's suppression of the defendant's statements because the totality of the circumstances did not show that the defendant's statements to the police were involuntary after a promise of leniency. *Id.* at 218. The court based this finding "[f]irst and foremost" on the fact that the defendant waived his Miranda rights and signed a waiver form." *Id.* Moreover, the defendant's physical and mental state showed he acted with a sound mind, he answered the questions appropriately, the interview was short (one hour and forty-five minutes), and nothing in the record suggested that the defendant was physically coerced or deprived of food or water. *Id.* at 218–19. Finally, "a reading of the entire transcript of the interview demonstrates that [the defendant]'s will was not

overborne by a promise of leniency rendering his statements involuntary." *Id.* at 219.

The trial court did not plainly err in admitting into evidence Defendant's video-recorded interview with police.

CONCLUSION

Defendant's case should be remanded for resentencing by the court only on the first-degree murder charge (Count I). Otherwise, the trial court did not commit reversible error, and Defendant's convictions and remaining 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 14,179 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 March 7, 2013, to:

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