No. SC85419

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

RICHARD STRONG,

Appellant.

Appeal from the Circuit Court of St. Louis County, Missouri
21st Judicial Circuit, Division 6
Honorable Gary M. Gaertner, Jr., Judge

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from two convictions for murder in the first degree, § 565.020, RSMo 2000, obtained in the Circuit Court of St. Louis County, and for which appellant was given two death sentences. Due to the sentence imposed, the Supreme Court of Missouri has exclusive appellate jurisdiction. Article V, § 3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Richard Strong, was charged by indictment on November 30, 2000, with two counts of murder in the first degree and two counts of armed criminal action for the murders of Eva Washington and Zandrea Thomas (L.F. 27-29).[1] On March 20, 2001, the State filed its notice of aggravating circumstances (L.F. 59-61). An information in lieu of indictment was later filed charging appellant as a prior offender (L.F. 189-194). The armed criminal action charges were severed, and the murder charges went to jury trial beginning February 26, 2003, in the Circuit Court of St. Louis County, the Honorable Gary M. Gaertner, Jr., presiding (L.F. 14,491;Tr. 2).

The sufficiency of the evidence is contested in this appeal. In the light most favorable to the verdict, the following guilt-phase evidence was adduced: Around 3:30 p.m. on October 23, 2000, the St. Ann, Missouri police dispatcher received a 911 emergency telephone call, but the call was disconnected before she answered it (Tr. 1000-1001). She dispatched officers to the originating address of the call, 9825 Treadway Lane, Apartment 3, Edmundson, Missouri, and then played back a tape of the call, which starts recording as soon as the call connects, even before the operator answers the call (Tr. 994,1001,1076-1077, 1158,1236). The dispatcher heard

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[1]The record on appeal consists of the legal file (L.F.), trial transcript (Tr.), a pretrial transcript transcribed by Eleanor Quinn (Pre.Tr.), a sentencing transcript with other pretrial hearings (Sent.Tr.), and two transcripts of aborted plea attempts (Plea.Tr.1 & Plea Tr.2).

a scream on the tape, and so advised the officers en route to the scene (Tr. 1003-1004). She then tried to call the residence, and while the telephone rang through, there was no answer (Tr. 1004-1005). She advised officers at the scene of her unsuccessful attempts to contact the caller (Tr. 1005).

Officers responding to the scene recognized the address as that of victim Eva Washington, who lived there with two-year-old daughter Zandrea Thomas and new baby Alicia Strong (Tr. 1077,1150,1158,1236-1237,1225). Officers also knew appellant, Washington's boyfriend, often visited the home, as he was Alicia's father, and had at one point been living at the apartment in violation of the municipal housing code (Tr. 1152,1156-1158, 1225). Edmundson Officer Bret Carbray was the first to arrive, quickly followed by Officer Henry Kick and Lieutenant James Adams, all arriving within two minutes of the call (Tr. 1080-1082,1159). Carbray and Kick went to the front door of the apartment, and Adams went to the back door (Tr. 1081,1160). All of the officers knocked on the doors trying to get someone to answer for several minutes, but no one did (Tr. 1082,1160). Kick looked into the living room window and saw nothing out of place, then went to the back door to tell Adams what he saw (Tr. 1084,1161). Adams then told Kick to stay in the back and headed to the front (Tr. 1084-85,1161). Kick also looked in the back kitchen window, seeing nothing out of place in the kitchen and hallway (Tr. 1085-1086). After several more minutes of the officers knocking, Lieutenant Ron Hawkins arrived on went to the front, where Adams told him if they could not get an answer shortly, he would forcibly enter (Tr. 1086-1087,1163,1237-1238). Hawkins then went to the back (Tr. 1238).

Adams looked in the living room window again and saw appellant heading toward the

back door, and radioed that to the officers (Tr. 1088,1163-1165, 1239). As Hawkins approached Kick at the back door, appellant opened the door and appeared surprised to see Kick (Tr. 1090). Kick asked appellant if everything was all right and if anything was going on, and appellant said no (Tr. 1090,1243-1244). Appellant was sweating profusely and his chest was moving rapidly (Tr. 1091). Appellant was wearing a white polo shirt which looked clean and dry, but the T-shirt underneath was soaked with sweat (Tr. 1091-1092). Kick then asked if appellant's "wife and kids" were all right, to which he answered "Yes, they're all right. They're in the back sleeping" (Tr. 1090,1244). Appellant's jeans had dark stains on the knees (Tr. 1092). As appellant was talking to Kick, he reached back to the inside of the door near the doorknob with his right hind, then pulled the door shut (Tr. 1090-1091,1241). Kick asked if the officers could go in and check, but appellant said that the door was locked and he did not have a key (Tr. 1093,1244). Both he and Kick started knocking on the door trying to raise someone, but no one answered (Tr. 1093-93,1241).

Adams then arrived in the back and asked appellant if everything was okay, and appellant said everything was fine (Tr. 1095-1096,1168,122). Adams asked where Washington was, and appellant said she had gone to work (Tr. 1168-1169,1244). Kick and Hawkins then confronted appellant with his earlier statement that she was sleeping (Tr. 1170). Adams asked where the children were, and appellant said they were in the house (Tr. 1170,1245). Adams asked to go in and check on them, but appellant said he had locked himself out without a key (Tr. 1170-1171). Adams then saw a large blood stain on appellant's left hand, took hold of the hand, and asked appellant where it came from (Tr. 1171,1245). Appellant claimed he had cut himself earlier while cooking, but there was no sign of a laceration on the hand (Tr. 1171-1172). Adams moved

appellant away from the door and kicked the door in, prompting appellant to take off running north (Tr. 1096,1172,1246).

Kick, Adams, and Hawkins started pursuing appellant on foot, while Carbray got in a car and drove down the block to contain appellant (Tr. 1097,1174,1176-1177,1246). Appellant turned east at the end of the building, ran past two other apartment buildings, and started jumping over four-foot-high fences into and through backyards of duplexes next to the apartments (Tr. 1097, 1173-1174). Kick chased appellant over the fences, while Adams went to the front of the duplexes to try to contain appellant and head him off (Tr. 1098,1174). During the chase, appellant called out to the officers to shoot him (Tr. 1174-1175,1247). Kick cornered appellant at a tall privacy fence (Tr. 1099). Appellant turned to face Kick and told Kick to "go ahead and shoot me" in a somewhat nonchalant manner (Tr. 1100). Kick tried to reassure appellant that they could "talk about" whatever happened as he tried to cuff appellant (Tr. 1100-1101). Because the cuffs were too small, appellant flicked them off and started to run again (Tr. 1102). Kick sprayed appellant with mace, but the mace had no effect, and appellant kept running the direction he had come from (Tr. 1102-1103). Appellant started to climb up a 7-8 foot-high fence into an airport parking lot, but the fence collapsed, causing appellant to fall forward into some brush (Tr. 1103,1175). Kick administered a second dose of mace, and Adams and Kick tried to subdue and cuff appellant, but appellant got up and pulled away (Tr. 1104,1247). Hawkins ran in from the other side of the fence and slammed into appellant, knocking him to his knees (Tr. 1105,1175,1247). Following a third dose of mace, the officers were able to subdue and cuff appellant (Tr. 1105,1175,1247).

Kick and Hawkins walked appellant towards the street to take him to a patrol car, while

Adams returned to the apartment (Tr. 1106,1179,1248). As appellant was being taken to the car, he said, "Officers, you should have shot me, they're both dead, I killed them" (Tr. 1136,1143,1249). Appellant's handcuffs were replaced with larger "leg irons," and appellant was placed in a patrol car (Tr. 1249).

Adams entered the apartment, noticing nothing out of place in the kitchen or the front bedroom, but the back bedroom door was closed (Tr. 1179-1180). Adams opened the door and found the lifeless bodies of Washington and Zandrea lying in large pools of blood on the floor, with Zandrea's head resting on Washington's forearm (Tr. 1181). Adams notice multiple massive stabbing and slashing knife wounds to both victims: Washington had wounds to her head, face, neck, legs, and arms, and had a large laceration to her lower abdomen causing her intestines to protrude; Zandrea's throat was cut to the point of near-decapitation, and also had intestines protruding from an abdominal wound (Tr. 1181-1182). The victims' clothing was drenched in blood, blood had pooled under the victim's and on the bed, and blood was on the walls, television, phone, and mirrors (Tr. 1182-1183). On the bed, in addition to the pools of blood, Adams saw a large butcher's knife and three-month-old Alicia, who was alive and uninjured (Tr. 1184-1185). Adams stepped over the victims to take the baby, and left the apartment with her (Tr. 1184). As he was leaving to give the child to Carbray to take to the police station, Hawkins entered the apartment and viewed the scene, seeing the victims on the floor and blood on the bed linens, walls, dresser, and television (Tr. 1252).

Adams called paramedics to the scene, who declared the victims dead, as well as the medical examiner and St. Louis County Crime Scene Unit, who photographed and videotaped the scene and collected physical evidence (Tr. 1013-1048,1067-1073,1185,1253-1254). Among

the items and areas of the house photographed was the kitchen counter of the apartment, where a knife with a similar handle to the butcher's knife found in the bedroom was sitting in a dish drainer (Tr. 1030-1031).

While the victims were being discovered and the scene processed, Kick and Carbray took appellant and Alicia to the police station (Tr. 1106-1107). At the police station, the contents of appellant's pockets were taken into custody, including a set of keys (Tr. 1107-1108).

Over the next three weeks, Hawkins returned to the scene twice (Tr. 1260-1269). The first time, he tested the keys found in appellant's pocket when arrested, and one of the keys unlocked both the front and back door of the apartment (Tr. 1263-1264). The second time, he examined the telephones in the living room and bedroom, finding that, while the living room phone was still functioning, the cord from the bedroom phone leading to the wall jack had been pulled from the jack, leaving just the plastic end of the cord in the wall (Tr. 1264-1269). Hawkins recalled that, while he was at the scene the night of the murders, the phone rang in the living room, but not the bedroom (Tr. 1305).

St. Louis County Deputy Medical Examiner Ronald Turgeon conducted the autopsies on the victims (Tr. 1311,1315-1316). Turgeon found 21 stab wounds and 5 slash wounds on Washington's forehead, temple, ear, neck, cheek, neck and throat, upper arm, chest and breast, upper and lower abdomen, front left thigh, and upper and lower back (Tr. 1317-1365). Turgeon found that, from a physical perspective, none of the wounds alone would have instantly caused death or unconsciousness, although a wound to the side of the breast piercing and collapsing a lung was potentially fatal, another into the back piercing the diaphragm and liver would have caused death in several minutes, a wound to the right side of the abdomen causing the

evisceration of the intestines would have caused death in a "few hours" and emotionally might make one pass out from the shock, and a wound to the left side of the neck, shredding the jugular vein, would have caused unconsciousness and death in a few minutes (Tr. 1328-1366,1400-1401). Turgeon found that Washington died from multiple stab wounds, all of which caused significant external blood loss and contributed to her death (Tr. 1366-1367, 1369).

In the autopsy of Zandrea, nine stab wounds and twelve slash wounds were found to her left chest, lower back and midback, upper abdomen, and both sides of neck (Tr. 1369-1384). One of the wounds to the back cut through two ribs, the right lung, diaphragm, and liver, and two to the abdomen perforated intestines, caused intestinal evisceration, and perforated the vena cava (Tr. 1377-1378,1383-1384). Wounds to the right side and back of the neck showed extensive cutting of muscle and vascular tissues; these wounds would have been caused by a continuous back-and-forth motion with the knife, severing the jugular vein, carotid artery, vertebral column, and spinal cord (Tr. 1378–1382). The wound to the carotid artery would have caused blood to spurt with each heartbeat, and blood spatter found on the bed and on the walls of the apartment between 54 and 88 inches from the floor were consistent with spurting blood (Tr. 1387-1391). The cause of Zandrea's death was multiple stab wounds to the neck, back, and abdomen (Tr. 1391).

Additionally, during the autopsy of Washington, Turgeon recovered the tip of a knife embedded in the victim's skull (Tr. 1321-1322). The tip of the knife matched the knife found in the bedroom, on which the tip was broken off (Tr. 1037-1039, 1072). The ends of the stab wounds to the victims were also consistent with the wounds being made by that knife, and two "lash wounds" on Zandrea's back were consistent with having been caused by the scraping of the

tip of the broken knife across her skin or her moving against the tip of the knife (Tr. 1324-1325,1327-1328, 1375).

Appellant did not testify or call witnesses in the guilt phase (L.F. 1418-1425).

At the close of the guilt-phase evidence, instructions, and arguments of counsel, appellant was found guilty of both counts of first-degree murder (L.F. 539-540;Tr. 1486-1487).

In the penalty phase, the State presented testimony from Officer Daniel Patrick and Michelle Brady that appellant had previously assaulted Washington and struck Zandrea, and had threatened to kill them both (Tr. 1570-1575,1593-1595,1596-1597,1601). The State also called Kim Strong, appellant's ex-wife, who had been assaulted by appellant while pregnant with his child, puncturing her eardrum, and who had been threatened by appellant, who said he was going to "commit an O.J."; Lutricia Braggs, a former co-worker and paramour, who had once been beaten to unconsciousness by appellant while she was driving, causing an accident; and Alvin Thomas, Zandrea's father, who, in addition to Brady, provided victim impact testimony (Tr. 1536-1541,1551,1561-1563,1569,1602-1606,1611-1613). Additionally, the State presented evidence that both Washington and Ms. Strong had orders of protection against appellant (Tr. 1555-1556;1579-1580).

The defendant called several penalty-phase witnesses, including family, friends, and employers, to testify to appellant's character, as well as two witnesses to present jail adjustment evidence (Tr. 1614-1705). Appellant did not testify (Tr. 1707-1709).

At the close of the penalty-phase evidence, instructions, and arguments of counsel, the jury recommended that appellant be sentenced to death for each murder (L.F. 573-574). The court later followed that recommendation and sentenced appellant to death for each murder (L.F.

598-602;Sent.Tr. 53). This appeal follows.

ARGUMENT

I.

THE TRIAL COURT DID NOT PLAINLY ERR IN ADMITTING CRIME SCENE PHOTOGRAPHS AND AUTOPSY PHOTOGRAPHS OF THE VICTIMS IN THE PENALTY PHASE, NOR IN ALLOWING THE PROSECUTOR TO PROJECT THOSE PHOTOGRAPHS ON A SCREEN IN A POWERPOINT FORMAT DURING PENALTY-PHASE CLOSING ARGUMENT BECAUSE THE PHOTOGRAPHS WERE ADMISSIBLE AND THEIR USE IN CLOSING ARGUMENT LEGITIMATE IN THAT THEY WERE RELEVANT TO AND ASSISTED THE STATE IN MEETING ITS BURDEN OF PROVING THE EXISTENCE OF THE DEPRAVITY OF MIND STATUTORY AGGRAVATING CIRCUMSTANCES.

Appellant claims that the trial court erred in admitting photographs of the crime scenes, two of which depicted the victims at the scene, and photographs of the autopsies of the victims in the guilt phase, arguing that they "inflamed the jury's passions and prejudices, causing them to sentence [appellant] to death not based on the facts but on raw emotions" (App.Br.42). Appellant complains that the use of PowerPoint software to project the photographs onto a screen during the prosecutor's penalty phase argument, saying it caused the jury to "decide [his] fate solely on their gut reaction to graphic photographs" (App.Br.52). Appellant contends that the use of the pictures in the penalty phase "amplified" the "constitutional dimension" of his claim, raising it to an Eighth Amendment violation (App.Br.46).

During the guilt phase, the State introduced a number of photographs and a videotape of the crime scene, and the autopsies of the victims which appellant objected to as gruesome and

inflammatory (Tr. 951-965,1023-1024; St. Exh.10-17,19-35,42-45,49-54). At the beginning of the penalty phase, the State reoffered all of its exhibits admitted in the guilt phase for use in the penalty phase (Tr. 1535). When asked if he had an objection, appellant stated, "No. I have made my record on that," and the photograph were admitted (Tr. 1535-1536).[2]

The evening before penalty-phase closing arguments, the prosecutor advised the court he would be displaying photographs admitted in both phases in his closing argument through using PowerPoint software (Tr. 1720-1721). Appellant objected to the photographs being enlarged, which was overruled (Tr. 1721). During the argument, appellant made no objections to the use of the photographs, and nowhere does the record show when, where, or for how long any of the photographs in the PowerPoint presentation were displayed to the jury, nor does it show the size of the screen used or the images projected (Tr. 1722-1739;1754-1759).[3]

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[2]In his brief, appellant refers to a ruling the court made prior to the start of the penalty phase opening statements granting an continuing objection to "all the prior objections [counsel] has made," claiming his earlier objections to the photographs was included in this ruling (Tr. 1528;App.Br.42). However, the court's ruling was in response to appellant's request to a continuing objection to matters argued just prior to the start of the penalty phase, and, at most, could only reasonably be interpreted to have included those matters brought up at that hearing in chambers, which did not include objections to the photographs (Tr. 1495-1528).

[3]In his brief, appellant cites to a story about the trial in the St. Louis Post-Dispatch

Due to appellant's failure to object to the introduction of the photographs in the penalty phase, or to make any record whatsoever regarding their use during closing argument, his claims are not preserved for appeal, and may only be reviewed, if at all, for plain error. Supreme Court Rule 30.20. Review for plain error is only merited when an alleged error so substantially affected appellant's rights that a miscarriage of justice or manifest injustice would occur if the error is not corrected. State v. Williams, 97 S.W.3d 462, 470 (Mo. banc 2003). Appellant bears the burden of proving a manifest injustice. State v. Mayes, 63 S.W.3d 615 (Mo. banc 2001).

To any extent that appellant may have preserved any part of this claim, the trial court is vested with broad discretion in the admission of photographs. State v. Rousan, 961 S.W.2d 831,844 (Mo.banc), cert. denied 524 U.S. 961 (1998). "Because of the superior position of the trial court for balancing the probative effect and prejudicial effect, it is within the trial court's discretion to admit the photographs into evidence." State v. Sandles, 740 S.W.2d 169,177 (Mo.banc 1987), cert. denied 485 U.S. 994 (1988). This Court will not interfere with the admission of evidence unless an abuse of discretion is clearly shown. State v. Winfield, 5

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about the closing arguments, both in this Point and in Point XI (App.Br.44,132). Appellant also includes a copy of the story from the newspaper's Internet archive (App.Br.A4-5). As that newspaper story is outside the record, it should not be relied on by this Court, but it, and appellant's citations to it, should be stricken from appellant's brief and appendix. State v. Scott, 933 S.W.2d 844 (Mo.App.,W.D. 1996)State v. Scott, 933 S.W.2d 844,845 (Mo.App.,W.D. 1996). Respondent has filed a motion asking for such relief along with its brief.

S.W.3d 505,515 (Mo. banc 1999), cert. denied 528 U.S. 1130 (2000). Discretion is abused only when a ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. State v. Brown, 939 S.W.2d 882, 883-84 (Mo. banc 1997). If reasonable persons can differ about the propriety of an action taken by the court, it cannot be said the trial court abused its discretion. Id.

Further, the error must have been prejudicial, i.e. creating a reasonable probability that the verdict would have been different without the error. State v. Ringo, 30 S.W.3d 811,820 (Mo.banc 2000), cert. denied 121 S.Ct. 1381 (2001). Appellant bears the burden of proving prejudice from the allegedly erroneous admission. State v. Leisure, 796 S.W.2d 875,879 (Mo.banc 1990).

"Photographs are relevant if they show the scene of the crime, the identity of the victim, the nature and extent of the wounds, the cause of death, the condition and location of the body, or otherwise constitute proof of an element of the crime or assist the jury in understanding the testimony." State v. Feltrop, 803 S.W.2d 1 (Mo. banc),

cert. denied 501 U.S. 1262 (1991)Sandles, 740 S.W.2d at 177.

One of the statutory aggravating circumstances the State had to prove beyond a reasonable doubt was that the murders "involved depravity of mind and whether, as a result thereof, the murder was outrageous and wantonly vile, horrible, and inhuman," which is only shown if there are "repeated and excessive acts of physical abuse...and the killing was therefore unreasonably brutal" (L.F. 549,555). § 565.032.1(7), RSMo 2000; MAI-CR3d 313.40. Photographs of murder victims and the scene of the crime are admissible in the penalty phase of

a Missouri capital trial, as they are relevant in proving aggravating circumstances, especially the depravity-of-mind aggravator. State v. Wolfe, 13 S.W.3d 248,264 (Mo.banc), cert. denied 531 U.S. 845 (2000); State v. Brooks, 960 S.W.2d 479,501 (Mo.banc), cert. denied, 524 U.S. 957 (1997); State v. Meese, 842 S.W.2d 98,108-09 (Mo.banc 1992), cert. denied 508 U.S. 918 (1993); Sandles, the State introduced only one challenged photograph during the guilt phase, and another 27 photographs and a videotape depicting the victim's condition and home in the penalty phase. Sandles, 740 S.W.2d at 177. The photographs each showed a separate wound or blood spatters in various areas of the house, and the video "was an effective method" of showing the entire crime scene and condition of and location where the victim was found. Id. This Court held that the photographs and videotape were relevant, properly admissible, and not cumulative in the penalty phase to show the number of wounds, their vicious nature, and that the murder involved depravity of mind. Id.

The photographs of the victims, evidence, and crime scene in this case were admissible for this same purpose—to show the number of wounds and their vicious nature to prove that the murder involved depravity of mind. The prosecutor's argument directly refers to the aggravator in discussing the injuries to the victims, using the exact language of the instruction, discussing the blood flow or spurt from the injuries, and the relative positions of the victims as they died (Tr. 1738-1739). Clearly, these photographs were admissible to prove appellant's depravity of mind in the murders.

Further, the projection of multiple pictures at one time during penalty phase argument

was not improper. In **§ 565.020, RSMo 2000, DEFINING FIRST-DEGREE MURDER, IS UNCONSTITUTIONALLY VAGUE FOR FAILING TO ADEQUATELY DISTINGUISH BETWEEN FIRST- AND SECOND-DEGREE MURDER, IS MERITLESS AS THIS COURT HAS PREVIOUSLY REJECTED THIS ARGUMENT, FINDING THAT THE STATUTE PLAINLY DISTINGUISHES BETWEEN THE TWO OFFENSES.**

FURTHER, THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AND IN ACCEPTING THE JURY'S GUILTY VERDICTS FOR MURDER IN THE FIRST DEGREE ON THE GROUNDS OF INSUFFICIENT EVIDENCE OF DELIBERATION BECAUSE THERE WAS SUFFICIENT EVIDENCE OF DELIBERATION IN THAT THE EVIDENCE SHOWED THAT APPELLANT PLANNED THE MURDERS, PREVENTED THE VICTIMS FROM SEEKING AID, INFLICTED MULTIPLE DELIBERATE WOUNDS, PURPOSEFULLY SELECTED HIS VICTIMS, AND TOOK EFFORTS TO CONCEAL HIS CRIMES AND FLEE FROM THE SCENE.

Appellant makes a laundry list of claims in Point II, including insufficiency of the evidence, failure to declare a mistrial *sua sponte* in response the a prosecutorial argument,

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[4]Unlike Wolfe, the record tends to indicate that the photographs used during the argument were no larger than when they were used in guilt phase, as the photographs were apparently projected during the guilt phase after being admitted (Tr. 1109-1110;App.Br.103).

submission the verdict directors for first-degree murder, acceptance of the jury's guilty verdicts for first-degree murder, failure to dismiss first-degree murder charges, and a constitutional vagueness challenge to Supreme Court Rule 30.06State v. Thompson, 985 S.W.2d 779 (Mo. banc 1999)State v. Clay, 975 S.W.2d 121 (Mo.banc 1998),

cert. denied 525 U.S. 1085 (1999)Supreme Court Rule 84.04§ 565.002(3)State v. Middleton, 998 S.W.2d 520 (Mo. banc 1999),

cert. denied 528 U.S. 1167 (2000)State v. Rousan, 961 S.W.2d 831,851-52 (Mo. banc), cert. denied, 524 U.S. 961 (1998). As this Court stated in § 565.002(3), RSMo 2000; MAI-CR3d 313.02; See State v. Storey, 40 S.W.3d 898,912 (Mo. banc), cert. denied 534 U.S. 921 (2001).[5]

B. Sufficiency of the Evidence

In examining the sufficiency of the evidence, appellate review is limited to a determination of whether there is sufficient evidence from which a reasonable trier of fact might have found a defendant guilty beyond a reasonable doubt. State v. Chaney, 967 S.W.2d 47,52 (Mo. banc), cert. denied 525 U.S. 1021 (1998). The appellate court does not act as a "super juror" with veto powers, but gives great deference to the trier of fact. Id. In applying the

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[5]As the prosecutor's argument about the definition of reasonable doubt was to emphasize the entire correct definition of reasonable doubt to counter defense counsel's attempt to isolate only part of the definition, thus distorting its meaning, the argument was proper (Tr. 1474).

standard, the appellate court accepts as true all of the evidence favorable to the state, including all favorable inferences drawn from the evidence, and disregards all evidence and inferences to the contrary. Id.

In order to convict appellant of murder in the first degree as to the murders of Washington and Zandrea, the State had to present evidence that appellant knowingly caused their death after deliberation upon the matter. § 565.002(3), RSMo 2000. The element of deliberation, like any state of mind, may be proven from the circumstances surrounding the crime. State v. Tisius, 92 S.W.3d 751,764 (Mo.banc 2002), cert. denied 123 S.Ct. 2287 (2003); State v. Ferguson, 20 S.W.3d 485,497 (Mo.banc), cert. denied 531 U.S. 1019 (2001).

1. Prior to the Murders

Here, there are numerous circumstances supporting a finding that appellant deliberated in the murders of Washington and Thomas. First, appellant's actions prior to and at the start of the murders evidenced deliberation. The State showed that there were knives in the kitchen with handles matching the butcher's knife later found covered in blood in the bedroom (Tr. 1030-1031,St.Exh.13,51). The reasonable inference from this evidence is that the knife was in the kitchen prior to appellant retrieving it and going into the back bedroom to commit the murders. Evidence that a defendant prepared to commit murder—and therefore had an opportunity to abandon that plan before carrying it out—supports an inference of deliberation. See State v. Johnston, 957 S.W.2d 734,747-48 (Mo.banc 1997), cert. denied 522 U.S. 1150 (1990); State v. Roberts, 948 S.W.2d 577,590 (Mo.banc 1997).

Further, once appellant got into the bedroom, where Washington was trying to call 911, the reasonable inference is that he pulled the phone cord from the wall, as the dispatcher heard a

scream on the tape of the call and as the cord had been stretched and broken, leaving the plastic end of the cord in the wall jack (Tr. 998-1000,1267-1269). This showed that appellant intended to prevent Washington from acquiring aid and from being discovered during the murders, also showing evidence of a plan to carry out the murder.

2. During the Murders

Appellant's actions during the murders also supports an inference of murder. First, evidence of multiple wounds to the victims may support an inference of deliberation. State v. Ervin, 979 S.W.2d 149 (Mo.banc 1998),

cert. denied 525 U.S. 1169 (1999)Clay, 975 S.W.2d at 139. Here, appellant inflicted a total of 47 wounds on the two victims (Tr. 1317,1369). While appellant contends that the multiple blows may also reflect "frenzied, unthinking killing" or "impulse" (App.Br.54,61), this Court must reject such an inference, as it does not support the verdict. Chaney, 967 S.W.2d at 52-54; Tisius, 92 S.W.3d at 764; State v. Grubbs, 724 S.W.2d 494,498 (Mo.banc), cert. denied 482 U.S. 931 (1987).

Clearly, under the totality of all of the above circumstances, there was more than sufficient evidence that appellant deliberated in the murders. That another conclusion could have possibly been reached is irrelevant. "While the jury was not compelled to find deliberation from the evidence, the evidence was sufficient to support the jury's verdict that appellant deliberated before committing two counts of first-degree murder." State v. Clay, 975 S.W.2d 121, 144 (Mo.banc 1998), cert. denied 525 U.S. 1085 (1999); Supreme Court Rule 30.20. Review for plain error is only merited when an alleged error so substantially affected appellant's rights that a

miscarriage of justice or manifest injustice would occur if the error is not corrected. State v. Mayes, 63 S.W.3d 615 (Mo. banc 2001). Further, for instructional error to be plain error, the defendant must show more than mere prejudice; he must "establish that the trial court has so misdirected or failed to instruct the jury that it is apparent to the appellate court that the instructional error affected the jury's verdict." State v. Wright, 30 S.W.3d 906,912 (Mo.App.E.D. 2000).

A. Non-Statutory Aggravating Evidence, Including Unadjudicated Misconduct, was Admissible in the Penalty Phase and Did Not Need Be Proven Beyond a Reasonable Doubt for Jury to Find that Death was Warranted

"It is well-established that the purpose of having a separate penalty phase in a capital trial is to permit the presentation of a broad range of evidence that is relevant to punishment but irrelevant or inflammatory as to guilt." State v. Winfield, 5 S.W.3d 505,515 (Mo.banc 1999). "[E]vidence of a defendant's prior unadjudicated criminal conduct may be heard by the jury in the punishment phase of a trial." Id. The argument that the state may not introduce, in penalty phase, evidence of unadjudicated bad acts, "has been repeatedly rejected by this Court." State v. Debler, 856 S.W.2d 641 (Mo.banc 1993)Ervin, 979 S.W.2d at 158, in which this Court stated that it "has consistently held that the error in State v. Kreutzer, 928 S.W.2d 854 (Mo.banc 1996)Chambers, 891 S.W.2d at 107Debler was the lack of notice"); State v. Christeson, 50 S.W.3d 251,269-270 (Mo.banc 2001)(same).

For appellant's argument entire argument succeed, this Court must accept a premise which, as the above suggests, is untrue—that the jury must have found the non-statutory

aggravating circumstances true beyond a reasonable doubt in order to find that death was warranted. However, the existence of one statutory aggravating circumstance is sufficient to support a death sentence. State v. Smith, 32 S.W.3d 532, 556 (Mo. banc 2000). When the jury was considering what facts and circumstances in aggravation of punishment warranted death, it was not required to find any of the non-statutory aggravating circumstances occurred at all, let alone beyond a reasonable doubt, and still could have found that the aggravating circumstances as a whole merited death. Therefore, the jury was not required to find the existence of non-statutory aggravating circumstances beyond a reasonable doubt.

B. Determination that Aggravating Circumstances Warrant Death Not Subject to Reasonable Doubt

This Court has recognized that the only determination that must be made during penalty phase deliberations beyond a reasonable doubt is the existence of a statutory aggravating circumstance, and that a death penalty system that does not require further determinations be made beyond a reasonable doubt is constitutional. State v. Smith, 649 S.W.2d 417, 430 (Mo. banc), cert. denied 464 U.S. 908 (1983); State v. Bolder, 635 S.W.2d 673, 684 (Mo. banc 1982), cert. denied 459 U.S. 1137 (1983), citing Gregg v. Georgia, 428 U.S. 153, 196-97, 96 S.Ct.2909, 49 L.Ed.2d 859 (1976). This follows from the reasoning, stated in California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983)Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)Harris v. Alabama, 513 U.S. 504, 115 S.Ct. 1031, 130 L.Ed.2d 1004 (1995)Ring v. Arizona, 536 U.S. 584, 1122 S.Ct. 2448, 153 L.Ed.2d 556 (2002)Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348,

147 L.Ed.2d 435 (2000)People v. Danks, 82 P.3d 1249, 8 Cal.Rptr.3d 767 (Cal. 2004)Oken v. State, 835 A.3d 1105 (Md. 2003)Torres v. State, 58 P.3d 214 (Okla.Crim.App. 2002),

cert. denied 538 U.S. 928 (2003)Ring and State v. Whitfield, 107 S.W.3d 253 (Mo. banc 2003)Ring to have a "jury rather than a judge determine the facts on which the death penalty is based." Ring or Whitfield, 107 S.W.3d at 269. Had this Court's holding been that Whitfield required the jury to be instructed that the determinations other than the existence of a statutory aggravating circumstance must be found beyond a reasonable doubt, there would have been far more cases—presumably, every case resulting in a death sentence—affected by the holding. Therefore, Whitfield should not be read as broadly as appellant claims.

Further, this Court has indicated since Whitfield that Whitfield does not require that the determinations of whether aggravating circumstances taken as a whole warrant death and whether mitigating circumstances do not outweigh aggravating circumstances be established beyond a reasonable doubt. In October 2003, less than four months after deciding Whitfield, this Court issued new jury instructions dealing with the mechanics of penalty phase deliberation. Order, In re: Revisions and withdrawals to MACH-CR and MAI-CR 3d (Mo. banc October 7, 2003); MAI-CR3d 313.48, 313.48A, 313.48B. Under the version of the verdict mechanics instruction that would have applied to appellant's case had it been tried under the revisisions, the jury would have been instructed as it was in this case—that it was required to find the existence of at least aggravating statutory aggravating circumstance beyond a reasonable doubt, but was not required to find beyond a reasonable doubt that facts and circumstances in aggravation of

punishment warranted death or that mitigating circumstances did not outweigh aggravating circumstances. Whitfield in the new instructions is apparent in the changed penalty phase verdict forms, which require the jurors to answer special interrogatories when it cannot agree on punishment so that the court can determine at what stage of deliberations the jurors deadlocked. MAI-CR 3d 313.58, 313.58A, 313.58B. Based on this Court's actions in approving the new instructions, which took State v. Gray, 887 S.W.2d 369 (Mo.banc 1994),

cert. denied 514 U.S. 1042 (1995)State v. Cole, 31 S.W.3d 163 (Mo.banc),

cert. denied 537 U.S. 865 (2002)Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)State v. Brown, 998 S.W.3d 531 (Mo. banc),

cert. denied 528 U.S. 979 (1999)Purkett v. Elam; 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995)State v. Marlowe, 89 S.W.3d 464 (Mo. banc 2002)Cole, 31 S.W.3d at 172.

In determining pretext, the Court considers the totality of circumstances, including the presence of similarly situated white jurors not struck (a crucial factor), degree of logical relevance between the proffered reason and the case, the prosecutor's credibility (based on his demeanor/statements during voir dire and the court's prior experience with the prosecutor), and the demeanor of excluded veniremembers. Purkett, 514 U.S. at 769. The defendant may not challenge an explanation on appeal that he did not properly challenge before the trial court. Id.

After appellant made his Marlowe also favor the court's ruling in this case. As the court found, wanting jurors either having or being involved with young children is relevant to a case about the death of a young child and her mother (Tr. 918). That the State would prefer jurors

who did not have relatives in prison is also logical, as is wanting jurors that the State believed would be strong on the death penalty and not allow religious beliefs to potentially make a juror lean toward mercy in a case where the State was seeking the death penalty. Therefore, the State's reasons were logically relevant to the case. Id.

The third State v. Metts, 829 S.W.2d 585 (Mo.App.,E.D.1992)Purkett, 514 U.S. at 769. The fact that his argument is tied to a constitutional claim further defeats it, as constitutional claims cannot be raised for the first time on appeal. Chambers v. State, 24 S.W.3d 763,765 (Mo.App.,W.D.2000).

Finally, appellant's claim that the State's failure to exercise all of its peremptory challenges somehow prejudiced him is meritless. Essentially, by not exercising strikes against specific veniremembers, the prosecutor essentially struck the last three people on the list. The court's statement that, because of the State's inaction, three Caucasians were struck from the panel seems to support the argument that the jurors taken off the end of the list did not violate appellant's or the jurors equal protection rights.

Because the State's reasons for striking Stevenson and Bobo were race-neutral and not pretextual under the totality of the circumstances, appellant's claim of error in overruling his State v. Stewart, 18 S.W.3d 75 (Mo. App., E.D. 2000)Supreme Court Rule 30.20. Plain error is only reviewable if it appears that the alleged error so substantially affected appellant's rights that a miscarriage of justice or manifest injustice would occur if the error is not corrected. State v. Mayes, 63 S.W.3d 615 (Mo. banc 2001).

Missouri's physician-patient privilege, which prevents testimony regarding information given to a health professional for the purposes of treatment, also prevents the disclosure of

medical records. § 491.060(5), RSMo 2000; State ex rel. Dixon Oaks Health Center, Inc. v. Long, 929 S.W.2d 226,229 (Mo.App.,S.D.1996). That privilege may only be waived by the patient. Id. A similar privilege extends to protect communications and records of a patient's consultation with a licensed counselor or social worker. § 337.636, RSMo 2000. The privilege is not absolute, and may give way to some extent when there is a "stronger countervailing societal interest." State v. Goodwin, 65 S.W.3d 17 (Mo. App., S.D. 2001)State v. Seiter, 949 S.W.2d 218 (Mo. App., E.D. 1997)State v. Evans, 802 S.W.2d 507 (Mo. banc 1991)State v. Armentrout, 8 S.W.3d 99 (Mo. banc 1999),

cert. denied 529 U.S. 1120 (2000)§ 565.032.7, RSMo 2000, is unconstitutionally vague and overbroad, and that if "conscious suffering is required, there was insufficient evidence to support the jury's verdicts (App.Br.96-99).

The jury was as to the depravity of mind aggravator for each murder, in accordance with MAI-CR 3d 313.40, Note on Use 5[2].

Even though appellant objected to the above instructions, he only stated, "The defendant objects that it's not supported by the evidence and vague and unconstitutional" to Instruction 16 and "Same objection, and the defendant would tender to the Court—I would reiterate my objection previously under the instruction with regard to Count I" to Instruction 21 (Tr. 1714,1716). Appellant never specifically directed his objection to the depravity of mind aggravator, nor did he specify the specific constitutional provision violated or state facts showing the violation, all of which are necessary to properly raise and preserve his constitutional claim. State v. Hall, 982 S.W.2d 675,682 (Mo.banc 1997); State v. Knifong, 53 S.W.3d 188,192

(Mo.App.,W.D. 2001). Therefore, his constitutional claim is unpreserved and only plain error review is available, in which appellant bears the burden of proving that the error resulted in a manifest injustice. State v. Mayes, 63 S.W.3d 615 (Mo. banc 2001).

State v. Griffin, 756 S.W.2d 475 (Mo. banc 1988),

cert. denied 490 U.S. 1113 (1989)Godfrey v. Georgia, 446 U.S. 420 (1980)Griffin—numerous wounds (Tr. 1317,1369). Therefore, the evidence was sufficient to establish the depravity of mind aggravator with the unreasonable brutality limiting factor.

As shown by Griffin, appellant's claim that conscious suffering is required to show excessive acts of abuse is meritless. The rationale for this is obvious from the aggravating circumstance itself—to prove that the murder was outrageously and wantonly vile, horrible, and inhuman, the State must show that it involved either torture ***or*** depravity of mind—torture focusing on what the victim is experiencing, depravity of mind dealing with the defendant's mental state. It is telling that Griffin lists physical torture, which would seem to require some actual physical suffering by the victim, and thus may require conscious suffering, and brutality of conduct, which only focuses on the acts of the defendant in inflicting multiple wounds, as different factors. Id. at 489-90. The only rational interpretation of this differentiation is that brutality, i.e. "excessive acts of physical abuse," does not require a finding of "conscious suffering" from the infliction of multiple wounds, i.e. "physical torture."

Further, appellant's claim that this renders the depravity of mind aggravator unconstitutionally vague or overbroad for failing to narrow the class of homicides meriting the death penalty is also meritless. This Court has repeatedly rejected this claim, holding that

submission of the aggravator with the approved limiting factor is constitutional. State v. Hall, 955 S.W.2d 198,210 (Mo.banc 1997), cert. denied 523 U.S. 1053 (1998); State v. Tokar, 918 S.W.2d 753,772 (Mo. banc), cert. denied 519 U.S. 933 (1996); State ex rel. Dally v. Elliston, 811 S.W.2d 371 (Mo.banc 1991)Sidebottom v. State, 781 S.W.2d 791 (Mo. banc 1989), cert. denied 497 U.S. 1032 (1990)State v. Rousan, 961 S.W.2d 831,844 (Mo.banc), cert. denied 524 U.S. 961 (1998). "Because of the superior position of the trial court for balancing the probative effect and prejudicial effect, it is within the trial court's discretion to admit the photographs into evidence." State v. Winfield, 5 S.W.3d 505,515 (Mo. banc 1999), cert. denied 528 U.S. 1130 (2000). Discretion is abused only when a ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. State v. Ringo, 30 S.W.3d 811,820 (Mo.banc 2000), cert. denied 121 S.Ct. 1381 (2001). Appellant bears the burden of proving prejudice from the allegedly erroneous admission. Rousan, 961 S.W.2d at 844. If a photograph is relevant, it should not be excluded simply because it may be inflammatory. Id. "Insofar as photographs tend to be shocking or gruesome, it is almost always because the crime is shocking or gruesome." Id. Gruesome crimes produce gruesome, yet probative, photographs,

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[6]Although Turgeon speculated that the psychological shock of seeing her eviscerated intestines may have caused Washington to pass out, he testified that even that wound would not have physically caused unconsciousness on its own, as it would have taken "a few hours" for Washington to die from that wound alone (Tr. 1360-1361).

and a defendant may not escape the brutality of his own actions. Sandles, 740 S.W.2d at 177.

Prior to trial, the prosecutor went through the pictures he would present in the guilt phase, giving appellant the opportunity to object (Tr. 951-952). Appellant objected to the photographs discussed at that hearing, State's Exhibits 14-17, 19-28, and 31-34, all of which portrayed the victims, either at the scene or at the autopsies (Tr. 952-963). Appellant also objected to State's Exhibit 35, the crime scene videotape (Tr. 964).

The prosecutor intended on introducing twenty-two photographs of the scene of the crime or of the victims and their injuries, out of more than one hundred that were taken of the scene (Tr. 952,954). The prosecutor also attempted to limit the number of autopsy photographs by using photographs containing several injuries, so the medical examiner would not have to use one photograph per injury to explain the nature and location of the wounds, which would have been far more numerous considering that the medical examiner identified 47 different stabbing or slashing injuries on the two victims (Tr. 955-956,1317,1369). This shows that, as opposed to appellant's insinuation of intentional bombardment with as many graphic photographs as possible (Tr. 102,104-105), the prosecutor took steps to limit the number of photographs that would have to be shown to the jury.

A review of the testimony surrounding the photographs objected to at trial and challenged on appeal shows that all of the photographs were relevant, probative, and not duplicative, as each picture showed different items of evidence, different wounds, or different views of the scene.[7]

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[7]Appellant includes State's Exhibits 4-9 in his Point Relied On, although he did not object to them at trial, as they did not show the room in which the murders took place,

Exhibit 10, introduced into evidence during the testimony of Crime Scene Unit Officer Donald Scognamiglio, who took the pictures, and only used during that testimony, while showing a portion of Washington's body in the room, is not overly graphic, and shows the location of the crime scene with respect to the hallway appellant was first seen emerging from (Tr. 1022-1023;St.Exh. 10). Exhibits 11 and 12, show different angles of the bedroom, and specifically the bed, where the murder occurred, and include the location of blood stains, evidencing locations where injuries occurred, and the location of the murder weapon, also shown in Exhibit 13 with a ruler to show the size of the weapon (Tr. 1022-1023; St.Exh.11-13). Of these, only State's 12 was used by more than one witness, as the State used it with Lieutenant Hawkins, the second officer to view the scene and the chief investigator. Further, defendant used State's 12 with Adams to show where appellant's living daughter was found (Tr. 1190,1221,1259). Clearly, if even appellant found Exhibit 12 useful in helping the jury understand the officers' testimony, these photographs were admissible to show the location of the knife, blood spots on the bed, and

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nor did they display any "gruesome" subject matter (Tr. 1019,1021-1022). Respondent assumes these were included accidentally, as appellant's argument focuses on the inflammatory nature of the photographs, and these photographs simply show nothing even potentially inflammatory. If appellant intended to challenge these photographs, that challenge must fail, as the low prejudicial effect of the photographs could not possibly outweigh their use at trial in explaining the layout of the front part of the apartment, which figured into the testimony of Officer Kick and Lieutenant Adams (Tr. 1082-1086,1163).

the baby when officers first discovered the scene.

Exhibits 14 and 15 show the victims on the floor of the bedroom, where they presumably died and were found by police officers (Tr. 1023,1181,1252;St.Exh.14-15). One from behind Washington showing Zandrea's face and blood on the side of the bed, showing the victim's location with respect to the rest of the room, while the other shows both victims from directly overhead, showing the condition and position of their bodies, a relevant purpose for such photographs (Tr. 1023-1024;St.Exh.14-15). Rousan, 961 S.W.2d at 844.

State's exhibits 47 and 48, photographs of the victims while alive, were introduced by Alvin Thomas to identify the victims, and were used by Hawkins to establish that Washington and Zandrea were the victims (Tr. 991-992,1257;St.Exh.47-48). A photograph is relevant and admissible if it establishes the identity of the victim. Hall v. State, 16 S.W.3d 582, 587 (Mo. banc 2000). These pictures were not inflammatory at all, and were probative to establish the victim's identities in life, therefore they were admissible.

Finally, State's Exhibits 52-54 show very small spots of blood on the wall next to a tape measure or ruler (St.Exh.52-54). The photographs, introduced during Scognamiglio's testimony, are not gruesome or inflammatory, and were highly relevant when used by Dr. Turgeon to explain the extent of Zandrea's neck injury and to show that Zandrea's heart was still beating at the time her carotid artery was cut (Tr.1031,1387-1391). Thus, they were admissible to explain the nature and extent of wounds, as well as the condition of the scene.

A careful review of the photographs used in this case reveals that no picture was used by more than three witnesses, and most were used by only two, thus not being used "early and often" (App.Br.102). All of the pictures were relevant to show the scene of the crime, the

identity of the victims, the nature and extent of the wounds, the causes of death, and the condition and location of the bodies. Feltrop, 803 S.W.2d at 11. Because the probative value of the limited number of pictures offered by the State outweighed any prejudice inherent in the pictures.

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

VIII.

THE TRIAL COURT DID NOT PLAINLY ERR IN ADMITTING OFFICER HENRY KICK'S TESTIMONY THAT APPELLANT'S DEMEANOR WAS "KIND OF NONCHALANT" WHEN SAYING "GO AHEAD AND SHOOT ME" FOLLOWING A FOOT PURSUIT FROM APPELLANT'S APARTMENT ON THE GROUNDS THAT IT WAS INADMISSIBLE OPINION EVIDENCE OF APPELLANT'S STATE OF MIND BECAUSE THE TESTIMONY WAS ADMISSIBLE IN THAT THE TESTIMONY WAS SIMPLY A COMMONLY UNDERSTOOD WAY OF MATTER-OF-FACTLY PRESENTING HIS OBSERVATIONS OF HOW APPELLANT MADE THE STATEMENT.

Appellant claims that the trial court erred in admitting Officer Henry Kick's testimony that appellant's demeanor was "nonchalant" after having been chased and cornered by Kick after running from the apartment shortly following the murders, arguing that this testimony "supplanted its fact-finding role on a critical issue—[appellant]'s state of mind" (App.Br. 106-107). Appellant argues that, because his appearance may have signaled being stunned by "what had occurred," his appearance was "susceptible to diametrically-opposed interpretations," and should not have been admitted (App.Br. 110).

Kick testified that, after appellant ran from the apartment, he chased appellant over some fences until he cornered appellant in the backyard of a duplex (Tr. 1098-1099). When he turned to face Kick, he said "go ahead and shoot me" (Tr. 1099-1100). Kick was then asked what appellant's demeanor was when he said that, and answered, "Kind of nonchalant" (Tr. 1100). Appellant objected that the answer was "a conclusion, vague" which was overruled (Tr. 1100).

Despite appellant's argument to the contrary, his claim on appeal, that Kick's testimony was improper opinion evidence of appellant's state of mind, is different from the "conclusion, vague" objection made at trial (Tr. 1100;App.Br.107). Because the claim on appeal is different from that raised at trial, his claim is not preserved, and review is available only for plain error. See Supreme Court Rule 30.20. Plain error review places the burden on appellant to prove that the error so substantially affected his rights that a miscarriage of justice resulted would occur if the error was not corrected. State v. Wald, 861 S.W.2d 791 (Mo.App.,S.D.1993)State v. Hill, 812 S.W.2d 204 (Mo.App.,W.D.1991)State v. Basile, 942 S.W.2d 342 (Mo.banc), cert. denied 522 U.S. 883 (1997)State v. Mayes, 63 S.W.3d 615 (Mo.banc 2001).

There was no manifest injustice in this case because the statements were admissible as an excited utterance, an exception to the hearsay rule.

> The essential test for admissibility of a spontaneous statement or excited utterance is neither the time nor place of its utterance but whether it was made under such circumstances as to indicate it is trustworthy. The rationale of this exception to the hearsay rule is that where the statement is made under the immediate and uncontrolled domination of the senses as a result of the shock produced by the event, the utterance may be taken as expressing the true belief of the declarant.

State v. Van Orman, 642 S.W.2d 636, 639 (Mo.1982). The event and the statement need not be simultaneous so long as the statement is provoked by the excitement of the event and the

declarant is still under the control of that excitement. State v. Jackson 872 S.W.2d 123, 125 (Mo.App.E.D. 1994), citing State v. White, 621 S.W.2d 287, 295 (Mo.1981).

Here, Washington was obviously still under the control of the excitement of appellant's assault. She was "crying, shaken, visibly upset, borderline hysterical" (Tr. 1572-1573). Patrick noted physical injuries to the victim, confirming the existence of a startling event—some kind of attack on her (Tr. 1573). Washington had apparently urinated in her pants as a result of the stress of appellant's attack (Tr. 1575). Patrick arrived at the scene within a minute of the 911 call, and appellant was still at the scene when he arrived, showing the recency of the assault (Tr. 1571-1572). At the time of the assault, appellant did not deny that he assaulted the victim, but tacitly acknowledged the assault, claiming that Washington hit him first (Tr. 1578). Finally, Michelle Brady saw the victim the next day, and described the victim's injuries, stating that her head was "busted open," her left eye was closed shut, and there were welts and handprints on her neck, confirming Washington's account of being hit and choked (Tr. 1594-1595). Even the next morning, she was still shaken, scared, afraid, and upset (Tr. 1595). The circumstances surrounding the statements demonstrate that they made under the "immediate and uncontrolled domination of the senses" as a result of appellant's attack, and were therefore reliable and admissible as excited utterances.

Appellant claims State v. Bell, 950 S.W.2d 482 (Mo.banc 1997), which ruled that statements made by murder victim about a prior assault inadmissible, is dispositive (App.Br. 115-116). However, nowhere in the Bell opinion is the excited utterance exception mentioned—the evidence was admitted at trial, and argued to be admissible on appeal, under the present state-of-mind exception, an argument this Court rejected. Id. at 483-84. As some of the statements

contested in Bell were not made under the stress of a startling event rendering them reliable, but were made at work some time after the assaults and after the victim first said she had gotten from someone other than the defendant, they were not under the immediate and uncontrolled dominion of the senses, and therefore could not have been excited utterances. Id. at 483; Bell, Bell provides appellant no relief.

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

X.

THE TRIAL COURT DID NOT ERR, PLAINLY OR OTHERWISE, IN PERMITTING THE PROSECUTOR TO MAKE CERTAIN CHALLENGED STATEMENTS IN VOIR DIRE AND ARGUMENTS IN BOTH PHASES BECAUSE THOSE STATEMENTS WERE PERMISSIBLE IN THAT THEY WERE PROPER STATEMENTS OF THE LAW, REBUTTALS AND COMMENTS ON DEFENSE COUNSEL'S ARGUMENTS, PLEAS TO THE JURORS' COMMON EXPERIENCES, DISCUSSION (NOT DEFINITION) OF REASONABLE DOUBT, ARGUMENT ON ADMISSIBLE VICTIM IMPACT TESTIMONY, AND ARGUMENT FOR THE JURY TO IMPOSE THE MOST SEVERE PUNISHMENT.

Appellant makes a number of attacks on different statements and arguments made by the prosecutor during voir dire, guilt-phase closing, and penalty-phase closing, raising such claims as improperly commenting on the defendant's right to remain silent, misstating the law and facts, arguing facts outside the record, "personalizing," and arguing improper victim impact evidence (App.Br. 117-129).

Review of a preserved claim of trial court error regarding a prosecutor's closing argument is for abuse of discretion, as the trial court enjoys broad discretion in controlling closing argument. Godfrey v. Georgia, 446 U.S. 420, 427-28 (1980). Further, the prosecutor's comment was designed not to state facts not in the record, but to correct the impression created by defense counsel that the prosecutor had unlimited discretion in deciding who faced the death penalty (Tr. 55-56). A prosecutor is allowed to rebut defense counsel's questionable line of argument. State v. Jones, 979 S.W.2d 171,177 (Mo. banc 1998), cert. denied 525 U.S. 1112

(1999). Finally, following the objection, the prosecutor voluntarily rephrased the question without the comment, minimizing any prejudice. Therefore, this statement did not improperly put facts outside the record before the jury or "highly" prejudice appellant.

The second voir dire comment appellant complains about as comparing this case with others and finding it more heinous was the prosecutor's statement, "But there are sometimes certain facts that may be so overwhelming and overbearing that they impact a person's ability to be fair and impartial. We only do that in very rare instances . . . ." (Tr. 110). Defense counsel objected at that point as an improper comment on the evidence and a comparison with other cases (Tr. 111-112). Even though the prosecutor rephrased the question, making it abundantly clear that he was asking about critical facts (i.e. a child victim), which normally is not done during voir dire, the court granted appellant's request to instruct the jury to disregard (Tr. 111-114). Because the judge instructed the jury to disregard, and jurors are presumed to follow the court's instructions, appellant cannot demonstrate any prejudice from this comment. State v. Gilbert, 103 S.W.3d 743,751 (Mo. banc 2003).

2. Guilt Phase

In guilt phase closing argument[8], the prosecutor stated, "It's just as important what you didn't hear in that defense argument, and you didn't hear about anything about what was going on in that room" (Tr. 1472). Appellant eventually objected, claiming that this was a comment on his failure to testify (Tr. 1472-1473). However, the argument did not refer to appellant's failure to testify, but to counsel's failure to discuss the events of the crime in his closing argument,

[8]All of these challenged arguments were in the rebuttal portion of argument.

especially after counsel stated "he wants you to put the scene into your head. To concentrate on the bedroom rather than the facts" (Tr. 1464). This argument is similar to an argument referencing the defenses failure to offer evidence, which is permissible. State v. Reed, 855 S.W.2d 452,454 (Mo. App., E.D. 1993); see State v. Sidebottom, 753 S.W.2d 915,920 (Mo. banc 1988), cert. denied 488 U.S. 975 (1988).

The prosecutor later argued, " . . . and that he did so with deliberation. The deliberation is not cool, it's not something that has to be reflected on, it is cooly reflected upon for any length of time, no matter how brief. The entire instruction is important and that entire instruction is key" (Tr. 1474). This argument was not objected to, and rightfully so. The prosecutor's call for the jury to disregard defense counsel's effort to ignore the entire definition by focusing on just the "cool" portion or just the "reflect" portion of the definition (Tr. 1466), was a correct statement of the law: deliberation is defined as "cool reflection for any length of time no matter how brief." State v. Jones, 979 S.W.2d at 177.

The prosecutor later argued:

> And the medical examiner says, yes, she could have fallen on the knife and cut her own head off. I wish this was, and it isn't, it's not an episode of CSI. If it was, and I wish it was, I wish it was because then - -

(Tr. 1482). Following an overruled objection, he continued:

> I wish it was an episode of CSI, because if it was, every little bitty thing would fall right into place in one hour. Instead, of several days, we would have had all of that wrapped up and it

would all have pointed to Richard Strong, as it does, and we would all walk away from this thing.

You know why additionally I wish it was an episode of CSI? Because at the end of that hour these two would get up and walk away, and they're not going to.

(Tr. 1483). These statements regarding the television show "CSI" was not meant to invoke the facts of the fictitious cases on that program, but was a reference to shared experience—how television programs can "wrap things up" quickly and cleanly, with every question answered, but that its tougher to answer every question or overcome every possible scenario in a real criminal case. Such a plea to the jury's common experience is permissible in closing argument. See State v. Bristol, 98 S.W.3d 107,115 (Mo. App., W.D. 2003).

3. Penalty Phase

While appellant complains about a number of erroneous penalty phase arguments, he objected to none of these arguments at trial, leaving this claims unpreserved and allowing for only plain error review. State v. Edwards, 116 S.W.3d 511 (Mo. banc 2003), cert. denied ___U.S.___ (2004)State v. Johns, 34 S.W.3d 93 (Mo. banc 2000), cert. denied 532 U.S. 1012 (2001)Edwards, 116 S.W.3d at 537. The second argument does not implicate reasonable doubt at all, as it deals with the jury's determination in stage two of the capital sentencing scheme—whether all aggravating facts and circumstances warrant

death—which does not need to be found beyond a reasonable doubt. § 565.030.4(2), RSMo 2000MAI-CR 3d 313.41ABucklew v. State, 38 S.W.3d 395 (Mo.banc), cert. denied 534 U.S. 964 (2001)State v. Storey, 40 S.W.3d 898, 909 (Mo.banc), cert. denied 534 U.S. 921 (2001). To any extent that the argument could possibly be interpreted as reaching past proper victim impact testimony, it could not have resulted in manifest injustice, as it merely repeated the same arguments about the effect of the crime appellant's family made in his closing argument (Tr. 1743-1744)

Finally, appellant challenges this final argument as misstating law and facts, i.e. "encouraging the jury to believe life without parole sentence was not punishment" (App.Br. 128):

> And because we can't provide complete justice, and complete justice in this case would be to have things the way they were before, not even that, but at least to have Zandrea and Eva back on this earth, living, breathing human beings. We can't do that. That can't be done. No matter what occurs in here today, that can't be done.
>
> But should we allow Richard Strong to escape justice

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[9]This issue is thoroughly discussed in Point III, supra.

> because we can't provide complete justice? No. And that's exactly what would occur, he would escape justice, he would escape paying the price that he ought to be paying for what he did int this case, if he is sentenced to life without parole.

(Tr. 1754-1755). That the prosecutor was not saying that life without parole is not punishment is obvious from his earlier statement in the argument: "Life without parole, as severe a punishment as that is, as much as it's going to reach the same result, eventually he's never going to get out of prison. . . He will . . . either die in prison after a natural life, or he will be executed in prison." (Tr. 1733). The prosecutor's argument that only a death sentence would achieve justice in this case is simply a proper argument urging the jury to impose the most severe penalty available at law. State v. Clayton, 995 S.W.2d 468,481 (Mo.banc), cert. denied 528 U.S. 1027 (1999); State v. Lyons, 951 S.W.2d 584,596 (Mo.banc 1997), cert. denied 522 U.S. 1130 (1998).

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

XI.

THIS COURT SHOULD, IN THE EXERCISE OF ITS INDEPENDENT STATUTORY REVIEW, AFFIRM APPELLANT'S DEATH SENTENCES BECAUSE: (1) THE SENTENCE WAS NOT IMPOSED UNDER THE INFLUENCE OF PASSION, PREJUDICE, OR ANY OTHER ARBITRARY FACTOR; (2) THE EVIDENCE SUPPORTS THE JURY'S FINDINGS OF AGGRAVATING CIRCUMSTANCES, AND; (3) THE SENTENCE IS NOT EXCESSIVE OR DISPROPORTIONATE TO THOSE IN SIMILAR CASES CONSIDERING THE CRIME, THE STRENGTH OF THE EVIDENCE, AND THE DEFENDANT.

Under the mandatory independent review procedure contained in § 565.035.3, this Court must determine:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other factor;
>
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstance found;
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the strength of the evidence and the defendant.

State v. Ramsey, 864 S.W.2d 320 (Mo. banc 1993), cert. denied, 511 U.S. 1078 (1994) § 565.032.2(7); State v. Kreutzer, 928 S.W.2d 854

(Mo. banc 1996); State v. Griffin, 756 S.W.2d 475 (Mo. banc 1988); State v. Schneider, 736 S.W.2d 392 (Mo. banc 1987).

Additionally, this Court has frequently upheld the imposition of the death penalty where the defendant has murdered more than one person. State v. Johnson, 968 S.W.2d 123 (Mo. banc 1998),

cert. denied, 525 U.S. 935 (1998)State v. Hutchison, 957 S.W.2d 757 (Mo. banc 1997)Jones v. United States, 526 U.S. 227 (1999)Apprendi v. New Jersey, 530 U.S. 466 (2000), and State v. Whitfield, 107 S.W.3d 253 (Mo. banc 2003), deprived the trial court of jurisdiction to sentence appellant to death because they created distinct offenses of aggravated and non-aggravated first-degree murder, thus the lack of aggravating circumstances in the information charged appellant with only non-aggravated first-degree murder, making life without parole the maximum sentence he could receive (App.Br. 140,144).

By asking for plain error review, appellant recognizes that his claim is not preserved for appeal, as it is raised for the first time on appeal (App.Br. 136). State v. Williams, 97 S.W.3d 462, 470 (Mo. banc 2003). Appellant bears the burden of proving a manifest injustice. State v. Baker, 103 S.W.3d 711 (Mo. banc 2003)§ 565.020.2, RSMo 2000. Both the indictment and

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[10]Appellant gives passing reference to a perceived need to plead steps 2 and 3 of the capital sentencing structure in the information as well, but does not include this argument in his point relied on, thus waiving a related claim regarding those steps (App.Br. 140-141). Supreme Court Rule 84.04(e).

information charged appellant with two counts of first-degree murder (L.F. 27-29,121-124). Under §565.005.1, the State is required to give notice to the defendant "[a]t a reasonable time before the commencement of the first stage of [a capital trial]" of the statutory aggravating circumstances that it intends to submit in the event that the defendant is convicted of first-degree murder. State v. Parkhurst, 845 S.W.2d 21 (Mo. banc 1992)Whitfield, as this Court has stated that the notice of aggravating circumstances under State v. Edwards, 116 S.W.3d 511 (Mo.banc 2003)State v. Gilbert, 103 S.W.3d 743,747 (Mo.banc 2003); State v. Cole, 71 S.W.3d 163 (Mo.banc),

cert. denied 537 U.S. 865 (2002)U.S. Const., amend. VJones, 526 U.S. at 240-250, 246 n.6; United States v. Allen, 2004WL188080,*2-3 (2004), or specifically state that they do not address the issue of whether the State must allege enhancing facts in the charge. Ring, 536 U.S. at 597 n.4.

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

CONCLUSION

In view of the foregoing, the respondent submits that appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 23,049 words, excluding the cover this certification, as determined by WordPerfect 9 software; and

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

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 8th day of March, 2004, to:

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