No. SC96737

In the
Missouri Supreme Court

STATE OF MISSOURI,

Respondent,

v.

MARVIN RICE,

Appellant.

Appeal from St. Charles County Circuit Court
Eleventh Judicial Circuit
The Honorable Kelly Parker, Special Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Appellant (Defendant) was charged in Dent County Circuit Court with Count I, first-degree murder, for shooting Annette Durham, and Count II, first-degree murder, for shooting Steven Strotkamp; all occurring on or about December 10, 2011. (L.F. D43). An amended information was filed in Wayne County with the same charges. (L.F. D2). Venue was eventually changed to St. Charles County. (Tr. 1). After a jury trial, Defendant was found guilty as charged on Count I, and guilty of the lesser-included offense of second-degree murder on Count II. (L.F. D11, 15). During sentencing, the jury recommended a life sentence for Count II and ultimately deadlocked on the punishment for Count I. (L.F. D26; Tr. 2386). The trial court imposed a life sentence for Count II and a sentence of death for Count I. (L.F. D40P2; Tr. 2428). Viewed in the light most favorable to the verdict, the evidence at trial showed:

1. Defendant's affair with Annette Durham

Defendant was married to Kelly Rice and had worked as a deputy sheriff at the Dent County Sheriff's Department for about 5 years. (Tr. 1370-72, 1384). Annette had been incarcerated in the Dent County jail several times. (Tr. 1371).

Defendant was still a deputy with the Sheriff's Office when he had an affair with Annette Durham, which resulted in a child, Ayden. (Tr. 1206,

1703-04). This happened about a year or two before the murders, and Defendant was fired from the Sheriff's Department because of the affair. (Tr. 1370-71, 1384).

Annette generally struggled with drug addiction. (Tr. 1212). Rachel Casey met victim Annette Durham while the two were incarcerated. (Tr. 1202, 1212). Casey became Annette's sister-in-law when she married Annette's brother, Edward Durham, in 2005. (Tr. 1203). Casey and Annette became close, and Casey helped raise Annette's children. (Tr. 1212). At one point, Casey and her husband had guardianship over Annette's children while Annette was in prison. (Tr. 1213).

Annette was pregnant with Ayden the last time she went to prison. (Tr. 1214). She told Rachel Casey that once she had the baby, Defendant would come and get him. (Tr. 1215). Annette already had three children, and she gave birth to Ayden while in prison. (Tr. 1203, 1215).

Annette was released from prison in 2011 and got a job at a restaurant in Rolla. (Tr. 1204-05). She began a drug-treatment program and hoped to get her children back after completing it. (Tr. 1213, 1222). There was no official custody or visitation agreement with Ayden between Annette and Defendant, but Defendant permitted Annette to see Ayden only occasionally and only during supervised visits. (Tr. 1204-07).

Annette eventually began a romantic relationship with Steven Strotkamp and moved in with him. (Tr. 1205, 1233).

In December 2011, Annette was doing an "amazing" job of controlling her drug addiction, was spending more time with her children, was working, and wanted her children back to raise them herself. (Tr. 1226-27).

2. December 10, 2011, the day of the murders

On December 10, 2011, Annette was set to have her first unsupervised visit with Ayden. (Tr. 1207). Annette had three days off of work and was hoping to keep Ayden during that time, but Defendant told her that she could not keep him overnight. (Tr. 1207-08). Defendant had "demanded" that Annette return Ayden by 7:00 p.m. on the first night. (Tr. 1227). Rachel Casey, told Annette that Annette could keep Ayden during this stretch of days off work because there was no custody or visitation agreement. (Tr. 1208).

At some point, Annette apparently called Defendant and said that she was not going to return Ayden that night or perhaps ever. (Tr. 1680-81; State's Ex. 134 at 17).

Defendant became upset, grabbed his gun and two extra magazines, drove to an ATM to get cash, and drove to a gas station to get gas. (Tr. 1225, 1886-89).

Defendant then drove to Rachel Casey's house looking for Ayden and arrived at around 5:00 or 6:00 p.m. (Tr. 1209-10, 1224). Defendant was upset and shouting. (Tr. 1225). Nobody at the house would tell Defendant where Ayden was. (Tr. 1889-90). Rachel Casey tried calling Annette to warn her about Defendant and then texted her when Annette did not answer the phone. (Tr. 1209-10).

Defendant then drove to Annette's father, Gilbert Durham's home to look for Ayden. (Tr. 1891-92). Defendant learned that Ayden was with Annette and Steven at Steven's house. (Tr. 1892).

Defendant then drove to Steven's home. (Tr. 1234-35). Steven, Annette, her daughter Shailey,[1] and Ayden were in the house. (Tr. 1233). They had finished eating dinner when Defendant arrived. (Tr. 1234-35). Defendant was making noise at the front door, and Annette told Shailey and Ayden to go into the bedroom and close the door. (Tr. 1238). While in the bedroom, Shailey heard Annette tell Defendant that she was not going to let him have Ayden back. (Tr. 1248). Shailey also heard Annette tell Defendant to go away. (Tr. 1239).

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[1] Shailey was six years old at the time, and Ayden was one. (Tr. 1231, 1246-47).

At some point during the exchange, Defendant broke the front door down. (Tr. 1348, 1340, 1349-50, 1823). Shailey then heard gunshots.[2] (Tr. 1239). It sounded to Shailey that this all occurred at the front door. (Tr. 1239-40). Defendant had shot Annette four times and Steven two times. (Tr. 1289, 1311).

Defendant then walked into the bedroom and took Ayden without saying anything to Shailey. (Tr. 1242). He was carrying a black handgun in his hand. (Tr. 1242).

Shailey sat on the bed for a little bit, scared, and then left the room. (Tr. 1242-43). She cried out to Annette, who did not answer. (Tr. 1243). She then heard Strotkamp groan as she approached him. (Tr. 1243-44). She said "Steven," and he groaned again. (Tr. 1244). She then walked over his body and out of the house. (Tr. 1244-45). Once outside, she saw her mother, Annette's body lying on the ground. (Tr. 1245). Shailey testified, "I said momma and I realized that she wasn't alive anymore and then I screamed." (Tr. 1245).

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[2] Shailey did not realize at first that the noise was gunshots; she thought maybe someone was banging on the washer and dryer by the front door. (Tr. 1241).

Steven Strotkamp's parents, Carol Strotkamp and Stanley Watson, lived about 100 yards away. (Tr. 1233-34, 1245-46, 1252). Shailey ran to their house and told them what happened. (Tr. 1245-46). Carol testified that Shailey "was crying and shaking and very distraught," "very upset, crying, scared." (Tr. 1255-56). Stanley testified, "the little thing was just shaking all over and crying with blood all over her little feet. … She was definitely scared, bad." (Tr. 1271).

Carol ran to Steven and Annette's house and saw Annette on the front porch, deceased. (Tr. 1256-57). She then went into the house "hollering" for her son, Steven. (Tr. 1257).

Steven eventually answered Carol "best he could." (Tr. 1258). He was lying in the bathroom with his feet hanging out into the hallway. (Tr. 1258). Carol could see that Steven "was in so much pain." (Tr. 1262). There was "just a lot of blood, lots and lots of blood." (Tr. 1262). "He had blood all over him. He had blood on the floor." (Tr. 1262).

When Carol asked Steven what happened, "he said the word Marvin Rice." (Tr. 1261).

Carol told him that she was going to get help. (Tr. 1262). She returned to her house, called the police, stayed with the children, and sent Stanley to stay with Steven until help arrived. (Tr. 1262-67, 1272).

Stanley went to the house and saw Annette lying on the concrete outside. (Tr. 1273). As he walked inside, he noticed that the front door was torn off. (Tr. 1273). Stanley saw Steve lying in the house: "He called Marvin's name, he just said Marvin, I guess it was Marvin and he said dad I love you and I'm dying. That's the last words the boy said." (Tr. 1273). "The hallway and the floor was full" of blood, around where Steven was lying. (Tr. 1273).

Police arrived quickly, and Stanley told them what he saw. (Tr. 1274-75). When coroner and paramedic Gina White arrived, she saw that Annette was "obviously dead." (Tr. 1279-80). Another paramedic observed that Steven was also deceased. (Tr. 1280-81).

3. Defendant's flight from the murder scene

Sergeant Leonard Pabin tried calling Defendant's cell phone number shortly after the murders. (Tr. 1372). Defendant did not answer but called back about seven minutes later. (Tr. 1372-73). Pabin told Defendant "it don't look good," and Defendant responded, "no shit it don't look good." (Tr. 1375). Pabin asked if he could help, and Defendant started talking about how he "didn't think it was right" how he was fired from the Sheriff's Department; Defendant was especially upset with how one particular sergeant treated him. (Tr. 1375-76). As Sergeant Pabin was on the phone with Defendant, discussing the firing, Defendant's demeanor was as if it was "just like a normal phone conversation really." (Tr. 1377-78).

Sergeant Pabin told Defendant that he should turn himself in and take his chances in court. (Tr. 1378). Defendant said there was "no way that he was going to survive what happened." (Tr. 1378). Defendant also stated that he had a brain tumor and was on medications. (Tr. 1378). Defendant then started talking about finding a place to kill himself. (Tr. 1380). Defendant also said that "everybody needs to stay out of his way or they'd have to shoot him." (Tr. 1381). Pabin reminded Defendant that the officers had families too, but "all [Defendant] said was ... just have them stay away." (Tr. 1381).

Eventually, Defendant asked Sergeant Pabin if he would take down Defendant's "last will and testament." (Tr. 1382). Pabin agreed, but then the call just ended. (Tr. 1382). Defendant apparently turned off his cell phone. (Tr. 1382).

Police spoke with Defendant's wife, Kelly Rice, around the time Pabin was on the phone with Defendant. (Tr. 1385-86). Ms. Rice told police that Defendant was on his way to the V.A. hospital in Columbia, Missouri. (Tr. 1385-86).

As Defendant was driving from Annette and Steven's home toward Jefferson City, police engaged in a high-speed pursuit. (Tr. 1433-34). Officer Curtis Bohanan was the second police car in the pursuit, behind Defendant and another police car. (Tr. 1435). Several other officers were behind

Bohanan. (Tr. 1438). Defendant was driving "much faster" than the speed limit of 60. (Tr. 1437).

As Defendant was driving toward Jefferson City, officers there started closing off the highway and deployed spike strips. (Tr. 1412-16). As Defendant approached the spike strips, he made eye contact with Officer Randall Werner, who had deployed the strips. (Tr. 1418). Defendant then steered "right toward" Werner, who had to jump over the highway's concrete median barrier to avoid getting hit by Defendant's car. (Tr. 1418-19, 1440). Officer Bohanan saw Defendant steer toward Officer Werner and saw Werner jump over the median barrier. (Tr. 1440). Still, Defendant ran over the spike strip. (Tr. 1419).

4. Defendant's hotel shootout with Officer Bohanan

As Defendant approached and ran over the spike strip, he was approaching downtown Jefferson City, which was heavily populated. (Tr. 1412-14). Defendant turned off of the highway and into a hotel parking lot because one of his tires was flat and coming off the rim. (Tr. 1442). The hotel was particularly busy because Jefferson City Medical Group was hosting a Christmas party at the hotel and there was a hockey tournament in town. (Tr. 1443).

As Defendant drove under the front awning of the hotel, he jumped out of his moving car. (Tr. 1443). Most officers did not see him jump out and so

they continued pursuing his car. (Tr. 1444-45). Officer Bohanan, however, saw Defendant run into the hotel and chased after him. (Tr. 1444-45).

As Defendant ran past the registration desk, he fell down. (Tr. 1448). Officer Bohanan repeatedly yelled at Defendant to stay down, but Defendant ignored the commands, got back up, and kept running. (Tr. 1448).

At this point, Officer Bohanan saw that Defendant had a black semiautomatic pistol in his hand. (Tr. 1449). Bohanan lost sight of Defendant when Defendant ran around a corner, so Bohanan slowed down and started peeking around corners. (Tr. 1450). He saw Defendant taking cover behind a wall on the other side of the elevators. (Tr. 1450).

As soon as the two made eye contact, Defendant fired a shot at Bohanan. (Tr. 1450-51). Officer Bohanan returned fire, and then Defendant continued firing back. (Tr. 1451). During the shootout, the two men were about 9 feet apart from each other. (Tr. 1559-60). Bohanan fired seven shots; Defendant fired about seven shots as well. (Tr. 1462, 1553). Officer Bohanan shot Defendant in the hand or arm. (Tr. 1452-55, 1576). Based on where Defendant's bullets were hitting, Defendant was aiming at Bohanan's head. (Tr. 1462-64, 1471-72, 1558). Defendant never tried to speak with Bohanan and never raised his hands in surrender. (Tr. 1473). Bohanan had no doubt that Defendant was trying to kill him. (Tr. 1473).

Off-duty officer Sergeant Chris Suchanek was in plain clothes and was working security for the JCMG Christmas party. (Tr. 1452-53). During the party, Suchanek saw emails from the State Highway Patrol Information Center about the homicides and high-speed chase with Defendant. (Tr. 1490). Because of the noise at the party, Sergeant Suchanek did not hear any sirens, but he heard the gunshots inside the hotel. (Tr. 1492). Suchanek ran outside the ballroom and saw Bohanan, in uniform, shooting toward the elevator. (Tr. 1493).

Sergeant Suchanek approached Officer Bohanan, who pointed toward the elevators. (Tr. 1453, 1494). Sergeant Suchanek snuck around to Defendant's side and saw that Defendant had a gun in his hand, resting at his side. (Tr. 1452-55, 1494-95). When Defendant started to raise his gun, Suchanek shot one round, hitting him around the lower back and making him finally fall to the ground. (Tr. 1452-55, 1495-96, 1506).

Bohanan then approached Defendant and Suchanek and helped place Defendant in handcuffs. (Tr. 1455-56, 1507). Defendant was taken to the University Hospital in Columbia, Missouri for treatment. (Tr. 1575).

5. Defendant's interview

Sergeant David Rice interviewed Defendant at the hospital. (Tr. 1575). Defendant was given the *Miranda* warnings, indicated that he understood them, and indicated that he wanted to speak with Sergeant Rice. (Tr. 1577-

78). Defendant told Sergeant Rice that after the murders, he was thinking of going to the V.A. in Columbia to get help because that is where he could go to get medical and psychological care. (Tr. 1608-09). Defendant said that he did not initiate the shooting inside the hotel; rather, someone started shooting at him. (Tr. 1582). Defendant was adamant that he never shot at police in the hotel. (Tr. 1597). He said that he was "just returning fire and trying to get away and wanted them to stop shooting at him." (Tr. 1597).

Defendant told Sergeant Rice that he was depressed and had been on downhill slide for a couple years. (Tr. 1611-12). At one point Defendant was so depressed that he didn't leave his house for six or seven months. (Tr. 1611-12). Defendant said that he had a pituitary adenoma tumor. (Tr. 1612). Defendant admitted to his affair: "It's one of the biggest mistakes I've ever made in my life but I had an affair and out of that affair a child was born." (Tr. 1615).

Defendant stated that his only goal that night was to get Ayden back and that he did not at all have any plans of killing anyone. (State's Ex. 134 at 21-22). He said that he only shot Annette and Steven after Annette grabbed his shoulder and Steven started walking around Annette. (State's Ex. 134 at 17, 24-25). Defendant said that at the hotel, he just wanted to think, but then an officer started firing at him, and so he fired back as a reaction. (State's Ex.

134 at 11, 23). Defendant said he was not aiming at the officer and just wanted the officer to stop shooting at him. (State's Ex. 134 at 32).

At one point while Sergeant Rice was not recording, Defendant said that he was injured in a helicopter crash in Desert Storm. (Tr. 1590-93). This story was a lie, as Defendant had never been in a helicopter crash in Desert Storm, though he had been in a motorcycle crash at one point in his life. (Tr. 1605).

6. Police investigation

Detective Barret Wolters arrived at the hotel to collect evidence at about 9:30 p.m., after Defendant was arrested. (Tr. 1524-25). Police recovered Defendant's gun, a Glock model 22 that fired .40 caliber bullets. (Tr. 1547). Seven shell casings were found around where Defendant was located. (Tr. 1553). Officer Suchanek's and Officer Bohanan's guns were recovered; they were a Glock model 23 and a Glock 9 mm, respectively. (Tr. 1546, 1549). Defendant's gun was also recovered; it was a Glock model 22; there was a bullet in the chamber and eight in the magazine. (Tr. 1547, 1551-52). Defendant had two additional magazines with him, one with six bullets and one with 15. (Tr. 1552). There were seven shell casings found around where Defendant was located. (Tr. 1553).

Evan Garrison was a criminal supervisor over the firearms and toolmark section of the Missouri State Highway Patrol Crime Laboratory.

(Tr. 1626-27). Garrison compared Defendant's Glock 22 with the shell casings found around Defendant at the hotel and the shell casings found at the murder scene. (Tr. 1634-42). The shell casings found at the murder scene were fired from Defendant's gun, as were the shell casings found at the hotel. (Tr. 1641-42).

After the shooting, police found in Defendant's car a letter that Defendant wrote after the shootings, that same night. (Tr. 1401-03). The letter read: "To whom it may concern. Ayden Rice is to be kept with Kelly Rice forever and always. These are my wishes." (Tr. 1403). Defendant signed the letter and dated it December 10, 2011, the day of the murders. (Tr. 1403).

Sergeant Scott Mertens was a criminal investigator with the Missouri State Highway Patrol. (Tr. 1328-29). Police found Annette lying on her back, at the outer edge of the concreate porch area near the driveway. (Tr. 1331-32). There was a fresh indentation in concrete underneath her body, as well as lead bullet fragments and fragments of the bullet's copper jacket. (Tr. 1339-40, 1345-46). There were shell casings around the front door, as well as "door mechanism" pieces from when Defendant broke the door down. (Tr. 1340, 1348). Further into the house, in the hallway, was another shell casing and a bullet hole in the doorframe, close to where Steven's body was. (Tr. 1340). Police found seven shell casings, all from the same caliber bullet. (Tr.

1359). The shot in the concrete was more or less straight down, not at an angle. (Tr. 1367).

7. Victims' autopsies

Pathologist Carl Stacy performed the victims' autopsies. (Tr. 1288). Defendant shot Annette four times. (Tr. 1289). Three of the bullets entered her back; one entered her chest and exited out of her side. (Tr. 1291-1300, 1306-07). Her cause of death was blood loss from a gunshot wound. (Tr. 1302). She had abrasions on her hand from falling on a hard surface. (Tr. 1310).

Defendant shot Steven twice. (Tr. 1311). One bullet entered his left chest, went through major vessels between the lungs and heart, and exited out his back. (Tr. 1312). The second bullet entered his right hip and rested right behind his tailbone. (Tr. 1312). Steven would have bled to death, even if he had been taken immediately to a hospital. (Tr. 1313-14). His cause of death was blood loss from the gunshot wound. (Tr. 1314). Based on how the gunshot wound to his chest exited, Steven may have been standing with his back against a wall or door when he was shot. (Tr. 1316, 1326).

8. Defendant's expert witness

Doctor Jose Matthews testified as a defense witness. (Tr. 1756). Doctor Matthews described what Defendant had told him, and what the doctor had learned through reading deposition transcripts, about the events on

December 10. (Tr. 1816-28). Defendant said that this was the first time that Annette was seeing Ayden unsupervised. (Tr. 1816). Defendant wanted Ayden back by 7:00 p.m., but Annette called Defendant and told him that she would not have the child back by then. (Tr. 1817). Annette's phone then stopped working, and so Defendant could not get back in touch with her. (Tr. 1817).

Defendant then became upset with his life decisions and eventually made his way to Steven and Annette's house. (Tr. 1818-19). The main front door was open, but the accompanying storm door was closed. (Tr. 1821). According to Defendant, Annette walked out and shoved him to the ground, which was unusual to Defendant because Annette was normally not an aggressive person and only became so when she was using drugs. (Tr. 1821-22). Annette told Defendant that he and his family would never see Ayden again. (Tr. 1821). Defendant then became very afraid for Ayden and felt that he needed to get the child out of the house. (Tr. 1822).

Defendant then jumped up and rushed to the front door as it was closing. (Tr. 1823). Defendant did not think that he put much pressure on the door with his foot, but he splintered the door and broke the doorframe. (Tr. 1823). Annette then grabbed Defendant's arm and was striking him with her cell phone. (Tr. 1827). Defendant then heard Steven grab something and say,

"Annie get away from him," and then Defendant drew his gun and shot Steven. (Tr. 1824). He then immediately shot Annette. (Tr. 1827).

According to Defendant, he then grabbed Ayden, dropped the child off with his wife, and drove toward the Columbia V.A. to shoot himself in the chapel. (Tr. 1827-28).

Doctor Matthews testified that he believed Defendant was suffering from mental disease or defect on December 11:

> Q. … [H]ave you formed an opinion as to whether Marvin Rice was suffering from Mental disease or defect on December 11th [sic] of 2011?
>
> A. Yes.
>
> Q. Okay. And how positive are you of that opinion?
>
> A. To a reasonable degree of medical certainty ….
>
> Q. And what is your opinion?
>
> A. My opinion … is that you know that Marvin was suffering from major depressive disorder which is severe with some atypical features which are features that are not usually found in regular garden variety depression. … So the diagnosis of major depressive disorder, sever, with atypical features.
>
> …
>
> Q. And how [he] had a pituitary tumor and hormone treatments [that] further impaired his ability to control his impulses?

A. Yes.

(Tr. 1838-40).

Q. Do you have an opinion … that is of extreme emotional distress and agitation as a result of his mental disease or defect continuing during the period in which he was acting?

A. Yes.

Q. And what is that opinion?

A. That he was under severe mental distress during the time that he thought Ayden was in great danger and that he shot Steve and Annie and that it's not consistent with deliberation.

Q. Is that sort of thing incompatible with cool reflection?

A. Yes it is incompatible with cool reflection.

(Tr. 1840-41).

Doctor Matthews concluded that Defendant was able "to appreciate the nature, quality and wrongfulness of his conduct" and that he "knew right from wrong." (Tr. 1847).

Q. And when he did those things [getting a gun, driving around, finding Annette, who was responsible for him losing his job, killing Annette, and killing Steven], when he did those things and you said earlier before, he knew right from wrong correct?

A. Yes he had the ability to appreciate right from wrong yes.

(Tr. 1975-76). Dr. Matthews agreed that someone with schizophrenia could drive across town, deliberate, and kill two people. (Tr. 1983).

ARGUMENT

Point I (closing argument)

The trial court did not abuse its discretion in overruling Defendant's objection to the prosecutor's comment inferring that because Defendant had killed two people, he would have said that he was in favor of the death penalty if he had been asked during voir dire, because this comment was not a reference to Defendant's failure to testify at trial.

A. Facts

1. Prosecutor's voir dire questioning

Voir dire occurred on August 2 through 4, 2017. (Tr. 2). During voir dire, the prosecutor asked extensively about whether the venire panel could give "meaningful consideration" to the penalty of death for the defendant. (Tr. 217-26, 287-97, 502-48, 652-84, 751-803, 896-922, 962-89). Representative questions included: "What I want to ask you is could you give meaningful consideration to sentencing someone to death?" (Tr. 217). "I used the word meaningful there and it's important to me because you know we're not talking lip service either side to either one of these punishments, you know we're not talking yeah I could probably do it, I could do it, we're not talking about that, we're talking about whether you could give it meaningful

consideration." (Tr. 502-03). "And do you think you could give meaningful consideration to returning a sentence of death?" (Tr. 752).

2. Prosecutor's penalty-phase closing argument

The penalty phase occurred the next week, on August 11 and 12. (Tr. 7-9). At the end of his initial closing argument, the prosecutor used a rhetorical device, implying to the jury that because Defendant the death penalty to be appropriate, as evidenced by his killing two people and the jury's explicit finding that Defendant had killed two people, then the jury should also believe that the death penalty was appropriate here. (Tr. 2357-59). In making this argument, the prosecutor referred back to his voir-dire questions regarding meaningful consideration to the death penalty, arguing that if Defendant had answered those same questions, he would have said that he was willing to carry out the death penalty:

(Tr. 2357-59)

> Bailiff: Two minutes counselor.
>
> MR. ZOELLNER [prosecutor]: Thank you sir. You told us in the appropriate circumstance you could give meaningful consideration to both of these punishments. We're in that circumstance. I'm going to ask you to go back in that room and give meaningful consideration to these punishments and I'm going to ask after you consider all the ripples to sentence him to death. But when you go back there and when you do

this, I hope you remember only twelve of you are going to do it, there's a 13th juror in this room. The 13th juror is sitting behind you, we often call them the defendants, but he's the 13th juror and if I'd been allowed to ask him those questions last week, he would have told us…

MS. TURLINGTON [defense counsel]: Judge I'm going to object. This is commenting on the defendant's right not to testify.

MR. ZOELLNER: No it is not judge, it is not.

(Bench conference held at this time.)

MS. TURLINGTON: Judge Mr. Zoellner just said well this week if I could have talked to him, I don't know I mean.

MR. ZOELLNER: Judge the argument that I'm making is that if I could have talked to him last week he would have told you he could give meaningful consideration to the sentence of death. Not only that he is willing to carry out that sentence.

THE COURT: You're talking about during the voir dire process when you're referencing the voir dire process last week. Anything else on that Ms. Turlington?

MS. TURLINGTON: Judge I don't think this is being made clear that it's during the voir dire process, I think it's a reference to being able to question the defendant who did not take the stand. We've had numerous references to him not apologizing which I also feel is an

oblique reference to him not taking the stand, this seems to be like a running theme here rather than argument. I think this is improper, it's just highlighting the fact that Mr. Rice did not take the stand and that in addition it's completely speculative what Mr. Rice's answers would have been.

THE COURT: Under the circumstances the objection is overruled. Let's make sure you clarify that you're talking about last week during the voir dire process.

MR. ZOELLNER: I will.

(Bench conference concluded at this time).

THE COURT: You may.

MR. ZOELLNER: As I was describing to each of you the questions you answered, what I was saying to you is last week Mr. Rice, the defendant, would have been a potential juror. He is a potential juror and if he had been asked those questions he would have told us not only does he believe in the death penalty, he's willing to carry it out without the need for attorneys, judges, trials or jurors. When you twelve go back there, remember that he's the 13th juror.

(Tr. 2357-59).

Defendant included this issue in his motion for new trial. (L.F. D32P30-31).

B. Standard of Review

"A trial court maintains broad discretion in the control of closing arguments." *State v. Forrest*, 183 S.W.3d 218, 226 (Mo. banc 2006). "Review of the trial court's rulings during closing argument is for abuse of discretion." *Id.* "An abuse of discretion occurs when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *State v. Cofield*, 95 S.W.3d 202, 205 (Mo. App. S.D. 2003) (internal quotation marks omitted).

C. The trial court did not abuse its discretion.

"It is impermissible for a prosecutor to comment, either directly or indirectly, on a defendant's failure to testify." *State v. Coulter*, 255 S.W.3d 552, 556 (Mo. App. W.D. 2008) (citing *State v. Barnum,* 14 S.W.3d 587, 592 (Mo. banc 2000)). "The purpose of this rule is to avoid focusing the jury's attention on the defendant's failure to testify." *Id.* "In considering such statements, [*appellate courts*] *must view the comment 'in the context in which it appears*.'" *Id.* (quoting *State v. Neff*, 978 S.W.2d 341, 345 (Mo. banc 1998)) (emphasis added).

"The prosecutor makes a direct reference when using such words as 'defendant,' 'accused' and 'testify' or their equivalent." *State v. Hawkins*, 328 S.W.3d 799, 813 (Mo. App. S.D. 2010). "An indirect reference is one

reasonably apt to direct the jury's attention to the defendant's failure to testify." *Id.* "An indirect reference . . . requires reversal only if the state makes it with 'a calculated intent to magnify' the defendant's decision not to testify so as to call it to the jury's attention." *Id.* (quoting *State v. Bowles,* 23 S.W.3d 775, 782 (Mo. App. W.D. 2000)).

The prosecutor did not make a direct reference of Defendant's failure to testify. Although the prosecutor referred directly to Defendant, he did not use the word "testify" or its equivalent, and the prosecutor certainly did not frame his assertion in terms of the Defendant *failing* to testify at court.

Defendant's argument takes the prosecutor's comment out of context. The prosecutor simply stated that—*if* he had been permitted to ask Defendant the *voir-dire* questions regarding meaningful consideration of the death penalty—then clearly Defendant would have said that he believes in the death penalty and would be willing to carry it out, by virtue of his extra-judicial killings of Annette and Steven. (Tr. 2357-59). This comment had no connection to whether or not Defendant testified about *the charges*. The comment did not even involve a *failure* to testify.

Rather, the prosecutor used a rhetorical device, implying to the jury that Defendant believed that the death penalty is an appropriate punishment—as evidenced by his killing two people and the jury's explicit

finding that Defendant had killed two people—and so this jury should also believe that the death penalty is an appropriate punishment in this case.

The trial court understood the comment in the appropriate context, noting that the prosecutor was referring *not* to Defendant's failure to testify at trial, but to the voir-dire questioning the week before: "You're talking about during the voir dire process when you're referencing the voir dire process last week." (Tr. 2358); *see Coulter*, 255 S.W.3d at 556 ("[Appellate courts] must view the comment 'in the context in which it appears.'").

Defendant also asserts that the prosecutor asked the jurors to speculate as to what Defendant's answers would have been during the voir-dire questioning. (Defendant's Br. 34). This assertion disregards the context of the trial and the prosecutor's full statement. The jury found Defendant guilty of first-degree murder of both Annette and Steven—and so a reasonable juror could readily infer that Defendant is in favor of a penalty of death. The prosecutor's statement merely implied this ready inference: "if he had been asked those questions he would have told us not only does he believe in the death penalty, he's willing to carry it out without the need for attorneys, judges, trials or jurors." (Tr. 2359).

In short, the prosecutor made neither a direct nor an indirect comment on Defendant's failure to testify. The trial court overruled the objection, instructing the prosecutor to make clear what appropriate context of his

comment was. (Tr. 2358). The prosecutor did so. (Tr. 2359). The trial court's ruling was not clearly against the logic of the circumstances and so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Cofield*, 95 S.W.3d at 205. Defendant's point should be denied.

D. Defendant did not demonstrate prejudice.

As discussed, the prosecutor did not make a direct reference on Defendant's failure to testify at trial. Even assuming that the Defendant made an indirect reference, "[a]n indirect reference . . . requires reversal *only if the state makes it with 'a calculated intent to magnify'* the defendant's decision not to testify so as to call it to the jury's attention." *Hawkins*, 328 S.W.3d at 813 (emphasis added) (quoting *Bowles,* 23 S.W.3d at 782). Here, the prosecutor did not make a calculated attempt to magnify Defendant's decision not to testify. The prosecutor explained to the trial court the argument that he was making, and the court understood that the prosecutor was referring to voir dire, not Defendant's failure to testify at trial. (Tr. 2357-59). The trial court did not abuse its discretion in finding that prosecutor was referring to voir dire, not Defendant's decision not to testify at trial.

Furthermore, unless closing-argument discretion "has been clearly abused to the prejudice of the accused, the trial court's ruling should not be disturbed on appeal." *State v. Smith*, 422 S.W.3d 411, 415 (Mo. App. W.D.

2013). "Even if a trial court is found to have abused its discretion by allowing improper closing argument, to warrant reversal of a conviction, the defendant also must establish that such abuse prejudiced him or her." *Id.* "To establish prejudice, the defendant must show that there is a reasonable probability that, in the absence of the trial court's abuse, the verdict would have been different." *Id.*; *see also Darden v. Wainwright*, 477 U.S. 168, 181 (1986) ("[I]t 'is not enough that the prosecutors' remarks were undesirable or even universally condemned.' … The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'").

Defendant has failed to meet his burden to demonstrate prejudice. Defendant merely asserts that there was a large risk that the jury might have voted unanimously in favor of a life sentence. (Defendant's Br. 35). This bare assertion, without arguing any of the evidence adduced during the penalty phase, is not sufficient to meet Defendant's burden.

On the contrary, the comment was brief and unimportant to the State's case and was not mentioned again during rebuttal closing argument. (Tr. 2375-78). The prosecutor emphasized whether the jurors themselves, not Defendant, could give meaningful consideration to the death penalty. (Tr. 217-26, 287-97, 502-48, 652-84, 751-803, 896-922, 962-89). And then the prosecutor argued that the jury should impose the death penalty because

Defendant had killed two people that had done nothing wrong and then endangered the life of numerous civilians and then almost killed a police officer, *not* because Defendant may have been in favor of the death penalty. Furthermore, during closing argument when the trial court was determining the sentence for Count I, the prosecutor did not mention the comment again. (Tr. 2420-22).

Defendant failed to demonstrate prejudice. Defendant's point should be denied.

Point II (motion to suppress)

The trial court did not clearly err in overruling Defendant's motion to suppress because Defendant's comments about not wanting to talk did not constitute a clear, consistent, unequivocal, and unambiguous invocation of the right to silence when viewed in the context within which they were made, including: (1) Defendant's particular familiarity with the *Miranda* warnings, his acknowledgment that he understood them and that he did not have to speak with Sergeant Rice; (2) Defendant's subsequent willingness to speak with Sergeant Rice, even volunteering various information; (3) Defendant's obvious condition of being in pain, including his tone, moans, and express references to pain; and (4) Defendant's eventual statements about not wanting to talk, which could reasonably be interpreted as stemming from his pain and not from any desire to invoke the right to silence. Alternatively, even if Defendant invoked the right to silence, the trial court did not clearly err because Sergeant Rice scrupulously honored that request, and Defendant then reinitiated a conversation. Finally, Defendant was not prejudiced. (Responds to Defendant's Point III.)

A. Facts

1. Interview

Sergeant David Rice interviewed Defendant at the hospital, using a digital voice recorder. (Tr. 87, 1575). Defendant was in significant pain and was at some point receiving fentanyl to treat the pain. (Tr. 88, 1600-01; State's Ex. 134 at 2-4, 6-7, 9, 12, 14, 33).

After Defendant was given the *Miranda* warnings, he indicated that he understood them and that he wanted to speak with Sergeant Rice. (Tr. 1577-78). At the beginning of the interview, Defendant stated that he remembered the police trying to stop him, his car being disabled, and him running inside somewhere to think. (State's Ex. 134 at 1). Defendant also stated that somebody then started shooting at him. (State's Ex. 134 at 2). Defendant then spoke extensively during the interview. (State's Ex. 134 at 1-33).

Early during the interview, Defendant explained that he was in too much pain to continue speaking: "Are they gonna stick me again? … My mouth is so dry. … I'm sorry Sir I don't wanna talk no more." "David: You don't want to talk? You hurtin' too much?" "Marvin: Yes." (State's Ex. 134 at 3). When Defendant made this comment about not wanting to talk, he was being stuck with a needle multiple times by hospital staff for a second I.V., which was causing Defendant a lot of pain. (Tr. 42-43).

When Sergeant Rice resumed questioning Defendant about 20-30 minutes later, (Tr. 45), Defendant stated that the pain was getting worse; still, he continued answering the detective's questions, including about the pain he was in and where he worked. (State's Ex. 134 at 3).

A little later, Defendant moaned as if he was still uncomfortable and then mentioned needing to use the restroom. (State's Ex. 134 at 5). Sergeant Rice stopped the recording at this point, and when he resumed recording, he provided the *Miranda* warnings again. (State's Ex. 134 at 5).

Defendant then indicated that he did not have anything to say about what happened at Steve Strotkamp's home and then that he did not want to talk at the moment but that he might resume talking once his pain was back under control. (State's Ex. 134 at 6-7). Sergeant Rice testified at the suppression hearing that he did not believe that Defendant was invoking the right to silence and that Defendant might have simply been referring to the pain he was in, and so Rice sought to clarify Defendant's statements:

> David: Okay and, and obviously bein' a law enforcement officer a long time you're familiar with those [*Miranda* warnings]. But uh earlier … I asked you what happened and you told me …. Do you remember tellin me that?
>
> Marvin: Mm hmm.

David: Okay. Um what I need for you to tell me about here…you know the reason this whole thing started (sighs) what happened tonight at Steve's that kinda kicked this whole thing off? I need you to be honest with me.

Marvin: *I got nothin' to say Sir*.

David: 'Kay you got nothin' to say uh about at Steve's or…obviously you're upset with what happened down there …. [Y]ou understand where I'm comin' from Marvin?

Marvin: Mm hmm.

David: … I can't put words in your mouth. I, I need to hear from your side of the story as far as what happened.

Marvin: My heard dudn't like this. *I don't wanna talk*.

David: Mm 'kay. I, I understand that. Uh can you tell me anything about what happened before I go?

Marvin: Mm mmm.

David: M'kay. *Will you visit with me here in a little bit when they get your pain under control*? I mean can you tell me somethin' about

Marvin: *We'll see*.

David: why this happened with Annie?

Marvin: *If they actually get my pain under control we'll see*.

David: *Okay. Alright, we'll give you some time and try to get your pain under control alright*. I'm gonna go ahead and turn off the recorder.

(State's Ex. 134 at 6-7) (emphases added); (Tr. 48-49, 79-80).

Within minutes, Defendant spontaneously started talking to Sergeant Rice again. (Tr. 49); (State's Ex. 134 at 7). Defendant started talking about how he felt that he was unfairly fired and how he had been on a "steady downhill" since then, with a six- or seven-month stretch of not leaving his house. (State's Ex. 7-8). Defendant then brought up the investigation specifically, stating that he was sorry about what happened that night. (State's Ex. 134 at 10-11). When Sergeant Rice started asking questions again, Defendant answered them. (State's Ex. 134 at 7-33).

Defendant continued to repeatedly mention being in pain, though he still continued speaking with Sergeant Rice despite the pain. (State's Ex. 134 at 9, 12, 14, 33). At one point, a nurse offered Defendant pain medication, but Defendant deferred so that he could continue speaking with Sergeant Rice with a clear head. (State's Ex. 134 at 14); (Tr. 95). At the end of the interview, Defendant even asked Sergeant Rice whether Rice wanted to know anything else before Defendant received his pain medication: "Anything else or can I have my pain meds now?" (State's Ex. 134 at 33).

2. Defendant's motion to suppress

Defendant filed a motion to suppress, arguing in part that he invoked his right to silence during the interview but was questioned thereafter anyway. (L.F. D71P6-10). The State filed an opposition. (L.F. D49).

3. Hearing on the motion to suppress

A hearing was held on October 29, 2013. (Tr. 32-110). Sergeant Rice testified that he interviewed Defendant at the hospital at around 11:00 p.m. (Tr. 37). Defendant appeared "obviously in pain" to Sergeant Rice and was receiving pain medication]. (Tr. 40, 42). When Defendant made his comment about not wanting to talk, he was being stuck with a needle multiple times by hospital staff for a second I.V., which was "obviously causing [Defendant] a lot of pain with the needle sticks." (Tr. 42-43). Sergeant Rice testified that because of the context of Defendant's remark, he asked Defendant to clarify whether Defendant's reluctance to talk was because of the pain, and Defendant indicated yes. (Tr. 43-44). After a 20-30 minute break, Defendant continued talking with the detective. (Tr. 45-46).

After another break for Defendant to use the restroom, Defendant said "I've got nothing to say." (Tr. 47-48). Sergeant Rice testified that when Defendant made this statement, he was still "obviously in pain as he moved he was making groaning sounds and he was obviously in physical pain." (Tr. 48-49). Rice testified that because of this context—that "it was clear" to him

that Defendant was in pain—he did not believe that Defendant was invoking the right to silence, and so Rice sought to clarify Defendant's statement. (Tr. 48, 79-80); (State's Ex. 134 at 6).

During this clarification, Defendant explained to Sergeant Rice that he might continue speaking if the doctors could get his pain under control:

> Marvin: My heard dudn't like this. *I don't wanna talk*.
>
> David: Mm 'kay. I, I understand that. Uh can you tell me anything about what happened before I go?
>
> Marvin: Mm mmm.
>
> David: M'kay. *Will you visit with me here in a little bit when they get your pain under control*? I mean can you tell me somethin' about
>
> Marvin: *We'll see*.
>
> David: why this happened with Annie?
>
> Marvin: *If they actually get my pain under control we'll see*.
>
> David: *Okay. Alright, we'll give you some time and try to get your pain under control alright*. I'm gonna go ahead and turn off the recorder.

(State's Ex. 134 at 6-7) (emphases added).

Sergeant Rice testified that he stayed in the room because no other officers were there to watch Defendant, but he did not ask questions or speak with Defendant further. (Tr. 50, 80-81).

But within minutes, Defendant spontaneously started talking to Rice again. (Tr. 49). Rice did not capture this entire conversation on his recorder, but he turned it back on within five minutes of when he had turned it off, when it became obvious that Defendant was going to continue speaking with him. (Tr. 49-50). Rice testified that he did not intend to ask questions about the investigation and instead just wanted to record what Defendant was saying: "I was just talking with him, I was not, I had no intentions and I don't believe I did ask him any questions directly of trying to get him back into that area. I just wanted to record what he was saying at that point." (Tr. 51).

At around 1:30 or 2:00 a.m., the interview was then interrupted by a nearby drunk patient, and because of the medical care Defendant was receiving, Sergeant Rice eventually decided it was best to leave for the night. (Tr. 51-53).

Sergeant Rice returned to the hospital at around 9:00 a.m. the next morning and provided Defendant with the *Miranda* warnings again. (Tr. 53). Defendant indicated that he understood them and agreed to continue talking with Sergeant Rice. (Tr. 53-54). Eventually, Defendant explained his version of what happened in Dent County and at the hotel. (Tr. 54).

At the end of the hearing, defense counsel argued that Defendant invoked the right to silence three times but was interrogated afterward anyway. (Tr. 104-07). The prosecutor argued that Defendant's statements

were equivocal because they were made within the context of Defendant's pain, and that Defendant reinitiated the conversation with Sergeant Rice. (Tr. 107-09). The trial court took the motion under advisement and then overruled the motion via a docket entry on October 8, 2013, without detailed findings or conclusions. (Tr. 110), (L.F. D1P34).

4. Preservation

Defendant objected at trial and was granted a continuing objection. (Tr. 1174-75, 1570-71, 1579-80). He included this issue in his motion for new trial. (L.F. D32P7-9).

B. Standard of Review

"This Court reviews a trial court's ruling on a motion to suppress in the light most favorable to the ruling and defers to the trial court's determinations of credibility." *State v. Edwards*, 116 S.W.3d 511, 530 (Mo. banc 2003). "The inquiry is limited to whether the decision is supported by substantial evidence, and it will be reversed only if clearly erroneous." *Id.*

C. The trial court did not clearly err.

1. Defendant did not invoke the right to silence.

Defendant did not unequivocally and unambiguously invoke the right to silence during his interview. Defendant was repeatedly given the *Miranda* warnings, indicated that he understood them, and spoke with Sergeant Rice extensively. (State's Ex. 134 at 1, 5-6, 13, *passim*). Defendant at times

avoided certain questions and mentioned not wanting to talk in connection with being in pain. (State's Ex. 134 at 3, 6-7). But Defendant's comments, viewed in context—including his willingness to speak with Sergeant Rice, his particular understanding of the *Miranda* warnings by virtue of him being a former police officer, and his being in pain as the reason for not wanting to speak as opposed to an affirmative invocation of his right to silence—demonstrate that Defendant never invoked the right to silence. *See State v. Cannon*, 469 S.W.3d 887, 892 (Mo. App. E.D. 2015) ("The individual's statements are viewed in their entirety when determining whether the individual unequivocally invoked his right to remain silent.").

"A person has a right under the Fifth Amendment to 'cut off questioning' and this right must be scrupulously honored." *State v. Simmons*, 944 S.W.2d 165, 173 (Mo. banc 1997) (citing *Michigan v. Mosley*, 423 U.S. 96, 103 (1975)). "After receipt of the *Miranda* warnings, 'if the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.'" *Id.* (quoting *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966)).

"The suspect, however, must give 'a clear, consistent expression of a desire to remain silent' in order to invoke his rights adequately and cut off questioning." *Id.* at 173-74 (quoting *United States v. Thompson*, 866 F.2d 268, 272 (8th Cir. 1989)). The suspect's request must be unambiguous and

unequivocal. *State v. O'Neal*, 392 S.W.3d 556, 569 (Mo. App. W.D. 2013) (citing *Berghuis v. Thompkins*, 560 U.S. 370 (2010)). "[A]n ambiguous or equivocal act, omission, or statement" will *not* be considered post-*Miranda* silence." *Berghuis*, 560 U.S. at 382. "If the statement is equivocal or ambiguous, then the police have no obligation to clarify the suspect's intent and may proceed with the interrogation." *State v. Cannon*, 469 S.W.3d 887, 892 (Mo. App. E.D. 2015).

"The individual's statements are viewed in their entirety when determining whether the individual unequivocally invoked his right to remain silent." *Id.* "[W]e do not read *Miranda* searching for out-of-context sentences that support a preferred outcome." *O'Neal*, 392 S.W.3d at 569 (citing *State v. Clemons*, 946 S.W.2d 206, 219 (Mo. banc 1997)). "Instead, courts must look to the full context of a particular statement in order to determine whether a suspect invoked his rights or not." *Id.*

Here, the full context of Defendant's statements demonstrates that he did not invoke the *Miranda* right to silence. Rather, Defendant made a few remarks suggesting *some* desire to stop speaking, but those comments were within the context of the significant pain that he was experiencing, as well as his willingness to generally speak with Sergeant Rice. The audio recording of the interview contains Defendant's repeated moans, his general tone, and comments such as "are they gonna stick me again." (State's Ex. 133).

Defendant's demeanor can fairly be interpreted such that he was generally willing to speak with Sergeant Rice, but was simply unable to at various points because of the pain he was in. This conclusion is perhaps best illustrated by Defendant's first alleged invocation:

> Marvin: *Are they gonna stick me again*?
>
> Nurse: (inaudible) a second?
>
> David: Do what you need to do. Marvin what happened before you came, before you were comin to the VA tonight?
>
> Marvin: *My mouth is so dry*.
>
> David: Yeah. Marvin what, what happened before you came, before you came to the VA tonight?
>
> Marvin: *I'm sorry Sir I don't wanna talk no more*.
>
> David: *You don't want to talk? You hurtin' too much*?
>
> Marvin: *Yes*.
>
> David: Okay. Okay we'll give ya, give ya a few minutes so they can take care of ya, okay.

(State's Ex. 134 at 3) (emphases added).

This exchange was made within the following context: (1) Defendant was provided the *Miranda* warnings, said that he understood them, and said "Yes Sir" when he was told, "you understand you don't have to talk to me. You don't have to answer any questions or anything," (State's Ex. 134 at 1);

(2) Defendant was then willing to speak with Sergeant Rice, even volunteering that he remembered the police trying to stop him, his car being disabled, him trying to find a place to think, and the police starting to shoot at him, (State's Ex. 134 at 1-2); (3) Defendant's tone and moans, as well as his explicit reference to "lots of pain," his fear that hospital staff were "gonna stick [him] again"—which involved an undeniable sense of dread in his voice—and his statement that his mouth was so dry, (State's Ex. 134 at 2-3); and (4) his eventual statement that he did not want to talk anymore, which can fairly be said to have stemmed from his pain, based on Defendant's tone, the conversation up to that point, and Sergeant Rice's clarifying question asking whether Defendant did not want to talk because he was hurting too much, to which Defendant responded yes. (State's Ex. 133; State's Ex. 134 at 2-3). During the suppression hearing, Sergeant Rice testified that when Defendant made his comment about not wanting to talk, he was being stuck with a needle multiple times by hospital staff for a second I.V., which was "obviously causing [Defendant] a lot of pain with the needle sticks." (Tr. 42-43). Defendant's pain could be heard through the audio recording. (State's Ex. 133). Sergeant Rice ended the conversation after Defendant explained he was hurting too much to continue. (State's Ex. 134 at 3).[3]

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[3] About 20-30 minutes after ending the recording after the first alleged

Thus, in context, *O'Neal*, 392 S.W.3d at 569, Defendant did not invoke the right to silence.

This exchange essentially repeated itself for Defendant's second and third alleged invocations. After resuming the interview after a restroom break, Sergeant Rice reminded Defendant of the *Miranda* warnings. (State's Ex. 134 at 5). Defendant said that he understood his rights and had no questions about them. (State's Ex. 134 at 5). Sergeant Rice said that during this point of the conversation, Defendant was still "obviously in pain as he moved he was making groaning sounds and he was obviously in physical pain." (Tr. 48-49). Yet again, because of this context—that "it was clear" to Sergeant Rice that Defendant was in pain—Rice did not believe that Defendant was invoking the right to silence, and so Rice sought to clarify

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invocation, Defendant began speaking with Sergeant Rice again. (Tr. 45); (State's Ex. 134 at 3). Defendant again mentioned his pain, explaining that it was worse than before. (State's Ex. 134 at 3). Defendant complained that the staff "did not have to make [him] feel worse." (State's Ex. 134 at 4). Defendant's continued moaning and tone continued to demonstrate that he was still in pain. (State's Ex. 133). Eventually, Sergeant Rice took a 20-30 break from the interview because of Defendant's discomfort and so that Defendant could use the restroom. (Tr. 46-47); (State's Ex. 134 at 5).

Defendant's statement. (Tr. 48, 79-80); (State's Ex. 134 at 6). Consistent with Defendant's willingness to speak with Sergeant Rice throughout the interview, notwithstanding a couple breaks for his pain, Defendant then explained to the detective that he might speak further if the doctors could get his pain under control. (State's Ex. 134 at 6-7).

In short, considering the context of Defendant's three alleged invocations, Defendant never invoked the right to silence. Defendant was in pain, and it was within the trial court's discretion to find that Defendant's references to not talking were within the context of that pain and not the right to remain silent. This court should not be "left with a definite and firm impression that a mistake has been made." *State v. Shoults*, 159 S.W.3d 441, 445 (Mo. App. E.D. 2005). "We will not reverse the ruling if it was plausible in light of the record viewed in its entirety even if we would have weighed the evidence differently." *State v. Norman*, 431 S.W.3d 563, 568 (Mo. App. E.D. 2014). Given the significant evidence of the full context of Defendant's alleged invocations—including his pain, his understanding of the *Miranda* warnings, his continued willingness to speak with Sergeant Rice, and his acknowledgment to Sergeant Rice that the pain was the source of his temporarily not wanting to talk but that he might talk if his pain got under control—the trial court's ruling was "plausible in light of the record viewed in its entirety," even if this Court might have weighed the evidence differently.

Norman, 431 S.W.3d at 568. The trial court did not clearly err. Defendant's point should be denied.

The defendant in *O'Neal* made a similar remark, which the court held did not constitute invocation of the right to silence. The defendant was interviewed three times, and near the beginning of the third interview, he said, "I still don't feel like talking but, [I] feel terrible." *O'Neal*, 392 S.W.3d at 568. The court stated, "O'Neal's argument focuses on his isolated statement that 'I still don't feel like talking.'" *O'Neal*, 392 S.W.3d at 569. But the court noted that *in context*, the defendant "had indicated that he was willing to participate in a conversation 'to clear up' inconsistencies between his own account of events" and statements made by other individuals. *Id.* at 569-70. The court also noted that the defendant's comment "I feel terrible" added further ambiguity, and that the defendant was still willing to speak even after making the comment "I still don't feel like talking." *Id.* at 570.

The circumstances here are similar. Here, Defendant also gave prior indications that he was willing to speak with Sergeant Rice, by virtue of him acknowledging his understanding that he did not have to answer any of the questions, but answering them anyway. And even after making his alleged invocations, Defendant here continued speaking with Rice, just as the defendant in *O'Neal* did.

In *State v. Johnson*, 284 S.W.3d 561 (Mo. banc 2009), the defendant at various points in the interview stated, "I don't want to talk to you now. You want—," "I don't want to answer no more questions," and "I don't want to answer your questions." *Johnson*, 284 S.W.3d at 581. But after making these statements, the defendant "continued to engage in the conversation, either answering the questions directly or stating he did not know." *Id.* Noting that "*Miranda* rights may be invoked at any time by giving a clear, consistent expression of a desire to remain silent," the court held that the defendant "did not invoke his *Miranda* rights at any point. Appellant's statements did not convey a clear desire to remain silent and he continued to talk after making each statement. Appellant's constitutional rights were not violated." *Id.* at 582 (internal quotation marks omitted).

The Minnesota Supreme Court encountered similar facts in *State v. Parker*, 585 N.W.2d 398 (Minn. 1998):

> [A]ppellant first made an ambiguous and equivocal request for counsel with the statement: "Ya. I, I just want you to know, I'm not talkin' to you, alright so, ahh, I want some people to be there when you talk to me anyway. Cuz ah…." Following this statement, Mortenson attempted to clarify appellant's desires with regard to his right to counsel, as is required by this court. However, the appellant continued to ask questions of Mortenson. In fact, following Mortenson's attempt to

clarify appellant's ambiguous reference to counsel, appellant immediately asked four more questions about his arrest and the procedures that would follow.

Appellant later made a second ambiguous and equivocal request for counsel:

> But anyways ah, you know, I don't, I don't have any idea what you're talking about and I do wish to exercise my right but I was just thinkin' about something. You said there was somebody named Lonny [sic] Weldon and some other dude, right?

Appellant immediately went on to suggest that Weldon should be considered as a suspect, and questioned Mortenson about the evidence the police found.

Given these facts, the questioning of appellant did not violate appellant's right to counsel, and the trial court properly admitted appellant's statements to Mortenson at trial.

Parker, 585 N.W.2d at 405.

The Massachusetts Supreme Court has also rejected Defendant's argument. In *Commonwealth v. Westmoreland*, 446 N.E.2d 663 (Mass. 1983), during an interview with police, the defendant stated, "I'm not making any statement knowing that I am being held for this alleged murder of said person. I know it is not murder and I did not contribute to what is alleged to

be murder." *Westmoreland*, 446 N.E.2d at 667. The officer then immediately asked the defendant if he had been drinking, and the defendant answered that he had consumed no more than three drinks, and he continued to answer the other questions asked by the officer. *Id.* at 667-68.

> Our review of the defendant's statement, viewed in light of all the circumstances . . . satisfies us that the defendant's remark ("I'm not making any statement knowing that I am being held for this alleged murder of said person") was not intended as an assertion of his right to remain silent. . . .
>
> In this case the defendant's conduct subsequent to his alleged assertion of his right belies his contention that he, in fact, exercised his right to cut off questioning. Without any encouragement, he proclaimed his innocence immediately after his alleged assertion of his right. Further, he responded affirmatively to the question whether he had been drinking and expressed disbelief that the victim had died. He voluntarily answered most of the subsequent questions.

Id. at 668.

These cases demonstrate that the language of Defendant's alleged invocations here, as well as the context within which each alleged invocation was made, was not sufficient to invoke the right to silence.

Finally, although "an accused's postrequest responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request [for counsel] itself," *O'Neal*, 392 S.W.3d at 571, Defendant's continued participation after each alleged invocation serves "as further confirmation that no invocation in fact occurred." *O'Neal*, 392 S.W.3d at 571.

2. Even if Defendant invoked, Sergeant Rice scrupulously honored the request.

Even if Defendant had unambiguously invoked the right to silence, Sergeant Rice scrupulously honored the request. "Once a suspect invokes Fifth Amendment privileges interrogation must cease and the right to remain silent must be scrupulously honored." *O'Neal*, 392 S.W.3d at 566. "Despite the duty to 'scrupulously honor' a suspect's right to remain silent, however, after a suspect initially invokes the right to remain silent, the police are not indefinitely precluded from asking whether the suspect has changed her mind and wants to talk." *Id.* (internal quotation marks omitted).

Generally, courts consider five factors when determining whether police scrupulously honored the right to silence:

> (1) whether the police immediately ceased the interrogation upon defendant's request; (2) whether they resumed questioning only after the passage of a significant period of time and provided fresh *Miranda* warnings; (3) whether the object of subsequent interrogation was to

wear down the resistance of the suspect and make him change his mind; (4) how many subsequent interrogations were undertaken; and (5) whether subsequent questioning involved the same crime.

Id.

Here, Sergeant Rice immediately ended the conversation after clarifying Defendant's comments that he "d[idn't] wanna talk no more" and that he "d[idn't] wanna talk." (State's Ex. 134 at 3, 6-7). Additionally, Sergeant Rice provided *Miranda* warnings two additional times throughout the interview. (State's Ex. 134 at 5, 13). The object of any subsequent interrogation was not to "wear down" Defendant's resistance; rather, Defendant affirmatively indicated either that he only wanted to stop because he was in too much pain at the moment, (State's Ex. 134 at 3), or that he might start talking again once his pain was under control, (State's Ex. 134 at 6-7). Sergeant Rice cannot be faulted for subsequently asking Defendant if he wanted to speak again. *See O'Neal*, 392 S.W.3d at 566 ("[A]fter a suspect initially invokes the right to remain silent, the police are not indefinitely precluded from asking whether the suspect has changed her mind and wants to talk." (internal quotation marks omitted)). In context, the number of interrogations was not unreasonable, as Sergeant Rice merely gave Defendant breaks when it seemed appropriate, and Rice then returned to the hospital the next morning and provided fresh *Miranda* warnings. Finally,

although the questioning involved the same crime, "[n]umerous cases hold that the fact that a later interrogation addresses the same crime as earlier interrogations is not disqualifying." *Id.* at 567-68.

3. Even if Defendant invoked, Defendant reinitiated a conversation.

Even if Defendant had unambiguously invoked the right to silence, he reinitiated a conversation with Sergeant Rice. After Defendant stated that he did not want to talk and that he might continue the conversation if his pain got under control, Sergeant Rice ended the conversation and turned off the recorder. (State's Ex. 134 at 6-7). Sergeant Rice stayed in the room because no other officers were there to watch Defendant, but he did not ask questions or speak with Defendant further. (Tr. 50, 80-81).

But within minutes, Defendant spontaneously started talking to Rice again. (Tr. 49); (State's Ex. 134 at 7). Defendant volunteered information about how he felt that he was unfairly fired and how he had been on a "steady downhill" since then, with a six- or seven-month stretch of not leaving his house. (State's Ex. 7-8). Defendant then brought up the investigation specifically, stating that he was sorry about what happened that night. (State's Ex. 134 at 10-11). When Sergeant Rice started asking questions again, Defendant answered them. (State's Ex. 134 at 7-33).

In the context of the right to silence, police need only scrupulously honor an invocation. In the context of the more restrictive right to counsel, invocation "bars further interrogation until an attorney is present, unless the accused in the interim voluntarily initiates discussion." *State v. Bannister*, 680 S.W.2d 141, 147-48 (Mo. banc 1984) (citing *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981)).

Here, as illustrated above, Defendant reinitiated a conversation with Sergeant Rice within minutes of saying that he did not want to speak but might speak once his pain was under control. Sergeant Rice cannot be faulted for engaging in a conversation that Defendant himself reinitiated. Defendant's point should be denied.

D. Defendant was not prejudiced.

"The violation of an accused's Fifth Amendment right against self-incrimination does not require the automatic reversal of a conviction." *State v. Ramirez*, 447 S.W.3d 792, 797 (Mo. App. W.D. 2014) (citing *Chapman v. California*, 386 U.S. 18, 22 (1967)). "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. *Id.* "Under this test, the 'beneficiary of a constitutional error,' the State, must 'prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* (quoting *State v. Whitfield*, 107 S.W.3d 253, 262 (Mo. banc 2003)). The State

need not prove that the evidence had no possible influence on the jury. *Id.* ("Requiring the State to prove that improperly admitted evidence had no possible influence on a jury is tantamount to requiring automatic reversal of a conviction . . . [and] *Chapman* plainly rejects the prospect of automatic reversal."). The "harmless error standard . . . recognizes the relative harm improper evidence may inject depending on its strength, its relevance, and the presence of other evidence of guilt." *Id.*

Here, any error was harmless beyond a reasonable doubt. Defendant argues that the evidence was not overwhelming as to Defendant's mental state and that a "confession" is like no other evidence. (Defendant's Br. 60-61). But Defendant's statements during his interview cannot fairly be said to constitute a confession. Although Defendant admitted to the shootings, (Tr. 23, 25), Defendant's identity as the shooter at Steven and Annette's house and at the hotel was not disputed at trial. *See* (Tr. 1824-27) (defense witness testified, during direct examination, that Defendant admitted to him to shooting Steven and Annette). Moreover, Defendant did not "confess" to murder during the interview; rather, he stated that he was "assaulted at the front door" when went to look for his son. (State's Ex. 134 at 17). Defendant said that he was simply trying to get his son. (State's Ex. 134 at 18). Far from admitting deliberation, Defendant stated that he "[a]bsolutely [did] not" have any intention of shooting the victims and that his only plan was to get his

son. (State's Ex. 134 at 21-22). Defendant made more exculpatory statements, explaining that Annette had grabbed a hold of him and was trying to wrestle him down and that Steven then came at Defendant around the side of Annette. (State's Ex. 134 at 24-25).

Defendant's statements regarding the hotel shooting were also exculpatory. Defendant stated that he did not initiate the shootout; rather, the officer just "start[ed] shootin' at [him]." (State's Ex. 134 at 11). He said that he just wanted to be left alone so that he could think. (State's Ex. 134 at 11). He said that he "absolutely [was] not" aiming at the officer and that he simply wanted the officer to stop shooting at him. (State's Ex. 134 at 32). Defendant stated that he had seen too many officers killed in the line of duty and that he would not want to do that to any other family. (State's Ex. 134 at 33).

Defendant's statements during the interview were exculpatory in nature and so would not have necessarily contributed to the jury's finding of his mental state. On the contrary, "[m]ental state is rarely capable of direct proof." *State v. Montiel*, 509 S.W.3d 805, 808 (Mo. App. S.D. 2016). "Proof of a requisite mental state is usually established by circumstantial evidence and permissible inferences." *Id.* "In determining whether the defendant possessed the requisite mental state, the jury may look at evidence of and draw

inferences from the defendant's conduct before the act, during the act and after the act." *Id.*

The jury had myriad other evidence of Defendant's mental state or consciousness of guilt, including:

- his flight from the murder scene, including the dramatic nature of that flight and his willingness to shoot at a police officer's head, *State v. Culpepper*, 505 S.W.3d 819, 831 (Mo. App. S.D. 2016) ("Evidence of flight is admissible to show consciousness of guilt." "Moreover, the methodology of flight is probative as to the quality and depth of this consciousness.");
- his failure to seek medical help for the victims, *State v. Strong*, 142 S.W.3d 702, 717 (Mo. banc 2004) ("[F]ailure to seek medical help for a victim strengthens the inference that the defendant deliberated.");
- his murder of multiple victims, *State v. Tisius*, 92 S.W.3d 751, 764 (Mo. banc 2002) ("The multiple wounds and multiple victims help support the jury's inference of deliberation in this case.");
- his inflicting multiple gunshot wounds to each victim, *State v. Strong*, 142 S.W.3d 702, 717 (Mo. banc 2004) ("Deliberation may be inferred when there are multiple wounds or repeated blows.");
- his false exculpatory statements, including stating that he was not aiming at the officer at the hotel, despite the evidence that he was

aiming for the officer's head, (Tr. 1462-64, 1471-72, 1558), *State v. Hibbert*, 14 S.W.3d 249, 253 (Mo. App. S.D. 2000) ("When proven false, exculpatory statements evidence a consciousness of guilt.");

- his reloading after the murders and additional magazines, (Tr. 1551-54), *State v. Alexander*, 505 S.W.3d 384, 395 (Mo. App. E.D. 2016) (reloading is evidence of deliberation);
- his act of asking Sergeant Pabin if Pabin would take down Defendant's "last will and testament," and his writing and signing a letter asking that Ayden be kept with his wife, demonstrating that he was thinking clearly and rationally, (Tr. 1382); and
- his act of shooting straight down at Annette while she was lying on the concrete, (Tr. 1367).

In short, Defendant's exculpatory statements made in the interview did not affect the verdict, particularly in light of the fact that Defendant's identity as the shooter was never in dispute and that the jury had overwhelming other evidence of his mental state.

Point III (comment on invocation of right to silence)

The trial court did not err in admitting Defendant's interview, where he avoided answering certain questions, and testimony from the interviewing officer explaining that Defendant avoided answering those questions, because: (1) Defendant never clearly and unambiguously invoked the right to silence, and so no *Doyle* violations could have occurred at trial; and (2) Defendant waived the right to have the State not comment on his right to silence by choosing to speak with Sergeant Rice. Additionally, even if any *Doyle* violations occurred, the error was harmless. (Responds to Defendant's Point II.)

A. Facts

Defendant's defense at trial was that while he shot the victims, he did so impulsively while suffering from severe psychological issues, including severe depression and stress, and with a tumor that made him more depressed and impulsive, and so he did not deliberate during the killings. (Tr. 1816-41) (Dr. Matthews's testimony); (Tr. 2040-50) (Defendant's closing argument).

At the beginning of Defendant's interview with Sergeant Rice, Defendant was given *Miranda* warnings, and he explicitly acknowledged his understanding of the warnings and that he did not have to answer any of

Sergeant Rice's questions. (State's Ex. 134 at 1). Defendant then proceeded to talk about the investigation, including driving from home in Dent County toward the VA in Columbia, him wanting to go to the VA because his doctors and psychiatrist were there, his "havin' problems for a long time," the police chasing him, and his car being disabled. (State's Ex. 134 at 1-4).

When Sergeant Rice asked more specifically about what happened to Annette, Defendant avoided the questions. (State's Ex. 134 at 2-3, 5, 6). Eventually, Defendant spoke about his affair with Annette and the shooting at her and Steven's house. (State's Ex. 134 at 16-18, 21-22, 24-25).

During the prosecutor's direct examination of Sergeant Rice, the prosecutor asked about whether Defendant answered the questions about what happened to Annette; after Rice answered, Defendant eventually objected:

> Q. And did you ask him several times about what happened down in Dent County at his home in regard to Annie?
>
> A. Yes I did.
>
> Q. And did he answer any of those questions?
>
> A. No he did not.
>
> MR. ZOELLNER [prosecutor]: Judge could I begin the tape again?
>
> MS. TURLINGTON [defense counsel]: Judge I'd like to object and can we approach the bench?

THE COURT: Ms. Turlington do you want to ask any questions at this time?

MS. TURLINGTON: No but I would like to approach.

(Tr. 1582-83).

Defendant requested a mistrial on the grounds that the testimony constituted a comment on Defendant's right to silence. (Tr. 1583). Defendant explicitly requested that no curative instruction be given and instead moved for a mistrial. (Tr. 1583). The motion was overruled. (Tr. 1584). The prosecutor then resumed this line of questioning:

Q. And just prior to the end of that or to that break, you brought up again what happened to Ann, correct?

A. I did.

Q. And his reaction was what?

MS. TURLINGTON: Judge I'm going to make the same objection.

THE COURT: The objection is overruled.

A. He appeared to have more pain at that point and began groaning is what happened.

Q. Well let me ask you this when you brought up Ann[e] and down there and asked him about that did his demeanor change?

A. To me every you know when I brought up Ann[e] and asked him about what happened last night as you heard it seemed that his pain increased and he began moaning more and complaining.

Q. Does that sort of happen later on in these interviews.

A. It does consistently throughout the interview.

(Tr. 1586).

In his motion for new trial, Defendant argued that the trial court erred in admitting trial testimony "regarding [Defendant's] failure to answer questions regarding the shootings in Dent County during his statements to David Rice" and in "allowing the state to comment upon and question David Rice about [Defendant's] failure to answer questions regarding Annette Durham's death." (L.F. D32P13-15). Defendant did not argue that admission of the interview itself constituted an impermissible comment on Defendant's right to silence. (L.F. D32P13-15).

B. Preservation and Standard of Review

1. Defendant's interview

Defendant filed a motion to suppress his interview but did not argue that any portion of the interview constituted a comment on his right to silence. (L.F. D71). Defendant's motion for new trial complained of the trial testimony on this theory but not of the interview itself. (L.F. D32P13-15); *see State v. Goins*, 306 S.W.3d 639, 647 (Mo. App. S.D. 2010) ("A point on appeal

must be based upon the theory voiced in the objection at trial and a defendant cannot expand or change on appeal the objection as made."). Defendant has not argued that he ever objected to admission of the interview on this theory. (Defendant's Br. 36-47). Defendant has not asked for plain-error review, (Defendant's Br. 36-47), and so his claim should not be reviewed with regard to the interview itself. *State v. Oates*, 540 S.W.3d 858, 863 (Mo. banc 2018) (stating, "[w]ith plain-error review, 'the defendant bears the burden of establishing manifest injustice,'" and that where an appellant "does not even request plain-error review, he has made no attempt to carry this burden," and so the claim will be summarily denied).

2. Sergeant Rice's testimony.

"An objection which is made after the question has been asked and answered is untimely, and, in the absence of a motion to strike the answer, the ruling of the trial court on the objection is not preserved for appellate review." *State v. Smith*, 90 S.W.3d 132, 139 (Mo. App. W.D. 2002).

Defendant's objection to Sergeant Rice's initial testimony about whether Defendant answered Rice's questions came only after Rice answered the questions:

> Q. And did you ask him several times about what happened down in Dent County at his home in regard to Annie?
>
> A. Yes I did.

Q. And did he answer any of those questions?

A. No he did not.

MR. ZOELLNER [prosecutor]: Judge could I begin the tape again?

MS. TURLINGTON [defense counsel]: Judge I'd like to object and can we approach the bench?

(Tr. 1582-83).

As such, review of this testimony should be for plain error, if at all. *Smith*, 90 S.W.3d at 139.

Defendant's objection to Sergeant Rice's next testimony was timely and was included in his motion for new trial:

Q. And just prior to the end of that or to that break, you brought up again what happened to Ann, correct?

A. I did.

Q. And his reaction was what?

MS. TURLINGTON: Judge I'm going to make the same objection.

THE COURT: The objection is overruled.

A. He appeared to have more pain at that point and began groaning is what happened.

Q. Well let me ask you this when you brought up Ann[e] and down there and asked him about that did his demeanor change?

A. To me every you know when I brought up Ann[e] and asked him about what happened last night as you heard it seemed that his pain increased and he began moaning more and complaining.

Q. Does that sort of happen later on in these interviews.

A. It does consistently throughout the interview.

(Tr. 1586); (L.F. D32P13-15).

3. Plain error

Unpreserved errors are subject to plain-error review, if at all. "Plain error review is used sparingly and is limited to those cases where there is a strong, clear demonstration of manifest injustice or miscarriage of justice." *State v. Vanlue*, 216 S.W.3d 729, 733 (Mo. App. S.D. 2007). "Claims of plain error are reviewed under a two-prong standard." *Id.* "In the first prong, we determine whether there is, indeed, plain error, which is error that is evident, obvious, and clear." *Id.* at 734. "If so, then we look to the second prong of the analysis, which considers whether a manifest injustice or miscarriage of justice has, indeed, occurred as a result of the error." *Id.*

"A criminal defendant seeking plain error review bears the burden of showing that plain error occurred and that it resulted in a manifest injustice or miscarriage of justice." *Id.* "Manifest injustice is determined by the facts and circumstances of the case, and the defendant bears the burden of establishing manifest injustice." *State v. Baxter*, 204 S.W.3d 650, 652 (Mo.

banc 2006). Plain error review imposes a "heavy burden" on a defendant to demonstrate error and manifest injustice. *State v. Kohser*, 46 S.W.3d 108, 114 (Mo. App. S.D. 2001). "The outcome of plain error review depends heavily on the specific facts and circumstances of each case." *Vanlue*, 216 S.W.3d at 734. Additionally, "[u]nder Missouri law, plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative[.]" *State v. Baxter*, 204 S.W.3d 650, 652 (Mo. banc 2006) (quoting *Deck v. State*, 68 S.W.3d 418, 427 (Mo. banc 2002)).

4. Preserved error

"A trial court has broad discretion to admit evidence, and reversal is warranted only when that broad discretion is clearly abused." *State v. Ervin*, 398 S.W.3d 95, 99 (Mo. App. S.D. 2013). "A decision to admit evidence constitutes an abuse of discretion when the decision is clearly against the logic of the circumstances and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful consideration." *Id.* "If reasonable persons could disagree as to the trial court's ruling, then the trial court's discretion was not abused." *Id.*

"*Once a* Doyle *violation has been found*, this Court has discretion to review the violation or violations in the context of the entire record." *State v. Brooks*, 304 S.W.3d 130, 137 (Mo. banc 2010) (emphasis added). "The proper standard for review, when the error is preserved, is the harmless-beyond-a-

reasonable-doubt standard." *Id.* "Under this standard, the State bears the burden of proving that a federal constitutional error was harmless beyond a reasonable doubt." *Id.* "Harmless beyond a reasonable doubt means that no reasonable doubt exists that the admitted evidence failed to contribute to the jury's verdict." *Id.*

C. Defendant never invoked the right to silence.

"The Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides that '[n]o person ... shall be compelled in any criminal case to be a witness against himself.'" *State v. Brooks*, 304 S.W.3d 130, 133 (Mo. banc 2010). "In *Doyle v. Ohio*, 426 U.S. 610, 618, 96 S.Ct. 2240, 2245, 49 L.Ed.2d 91 (1976), the United States Supreme Court held that the use for impeachment purposes of a defendant's silence, at the time of arrest and after receiving *Miranda* warnings, is fundamentally unfair and violates the due process clause of the Fourteenth Amendment." *State v. Dexter*, 954 S.W.2d 332, 337 (Mo. banc 1997).

Since *Doyle* was decided in 1976, there have been various attempts to expand the scope of its rule. But the Supreme Court has consistently limited the rule of *Doyle* to those situations wherein "the defendants, after being arrested . . . received their *Miranda* warnings and chose to remain silent." *See Portuondo v. Agard*, 529 U.S. 61, 74 (2000) (reversing the lower court and

declining to expand *Doyle* to prohibit a prosecutor from commenting on the defendant's presence at trial); *see also South Dakota v. Neville*, 459 U.S. 553, 564-66 (1983) (reversing the lower court and declining to expand *Doyle* to prohibit evidence of a defendant's refusing a blood-alcohol test); *Fletcher v. Weir*, 455 U.S. 603, 605-07 (1982) (reversing the lower court and holding that a defendant can be impeached with post-arrest, pre-*Miranda* silence); *Anderson v. Charles*, 447 U.S. 404, 408-09 (1980) (reversing the lower court and holding that a defendant can be impeached with inconsistent post-*Miranda* statements); *Jenkins v. Anderson*, 447 U.S. 231, 238-40 (1980) (affirming the lower court and holding that a defendant can be impeached with pre-arrest silence); *Roberts v. United States*, 445 U.S. 552, 561 (1980) (observing that the defendant's post-conviction, presentencing silence bore "no resemblance to the 'insolubly ambiguous' postarrest silence that may be induced by the assurances contained in *Miranda* warnings").

Of particular relevance among these cases is the Court's decision in *Anderson v. Charles*, where the Court declined to expand *Doyle* and held that the government can use voluntary, post-*Miranda* statements to impeach a defendant's trial testimony, even if the State asks about the defendant's earlier failure to include certain details. 447 U.S. at 408-409. As outlined above, the Court held that "[s]uch questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving *Miranda*

warnings has not been induced to remain silent." *Id*. at 408. The Court admitted that "[e]ach of two inconsistent descriptions of events may be said to involve 'silence' insofar as it omits facts included in the other version," but the Court concluded that "*Doyle* does not require any such formalistic understanding of 'silence[.]' " *Id*. at 409.

Defendant asserts that his "assertion of his right to remain silent occurred post-*Miranda*." (Defendant's Br. 43). But as discussed above in Point II, Defendant never invoked the right to silence, and so the State could not have commented on Defendant's post-*Miranda* silence. And as the Court stated in *Anderson*, "a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent." *Anderson*, 447 U.S. at 408.

Additionally, the Supreme Court held in *Berghuis* that "an ambiguous or equivocal act, omission, or statement" will *not* be considered post-*Miranda* silence." *Berghuis*, 560 U.S. at 382. Thus, when Sergeant Rice asked about Annette or the shootings, and Defendant merely avoided the questions or made statements such as "I got nothin' to say," the State was permitted to introduce this evidence. The evidence could not be considered a comment on post-*Miranda* silence because *Berghuis* made clear that such statements do not constitute post-*Miranda* silence. This conclusion is consistent with Missouri caselaw holding that "[r]eassertion of the privilege [against self-

incrimination] functions to terminate the interrogation, but is not available to avoid a single offensive question[.]" *State v. Ervin*, 398 S.W.3d 95, 100 (Mo. App. S.D. 2013) (internal quotation marks omitted); see also .

The trial court did not abuse its discretion. Defendant's point should be denied.

D. Defendant waived the right to have the State not comment on his right to silence.

"As a general rule, an accused's silence while he is under arrest is not admissible against him because he is under no duty to speak." *State v. Dorris*, 191 S.W.3d 712, 715 (Mo. App. W.D. 2006). It is well-recognized that "this rule is inapplicable where the accused waives his Fifth Amendment privilege by making statements while in custody." *Id.* (citing *State v. Frentzel*, 717 S.W.2d 862, 866 (Mo. App. S.D. 1986)); *see also State v. Mason*, 420 S.W.3d 632, 639 (Mo. App. S.D. 2013); *State v. Anthony*, 857 S.W.2d 861, 868 (Mo. App. W.D. 1993) (citing *State v. Pulis*, 822 S.W.2d 541, 546 (Mo. App. S.D. 1992); *State v. Hudson*, 793 S.W.2d 872, 882 (Mo. App. E.D. 1990); *State v. Smart*, 756 S.W.2d 578, 580 (Mo. App. W.D. 1988)) ("However, this rule against the admissibility of an accused's postarrest, post-*Miranda* silence does not apply if the accused chooses not to exercise his or her right to remain silent and elects, instead, to make a statement while in custody."). This exception comports with the well-settled rule that during closing argument,

the State "is allowed to argue the evidence and all reasonable inferences from the evidence during closing arguments." *State v. Brown*, 337 S.W.3d 12, 14 (Mo. banc 2011).

"Where an accused, while in custody and having previously been informed of his right to remain silent, elects to answer questions or make statements, he has chosen not to remain silent and has waived his right to do so." *Dorris*, 191 S.W.3d at 715. "Once an accused agrees to answer questions, his failure to answer certain inquiries is a fair subject for comment at trial." *Anthony*, 857 S.W.2d at 868. "An accused's waiver of the right to remain silent is not irrevocable, but the accused has the burden of showing reinvocation of the right after a waiver." *Id.*

Because Defendant spoke with Sergeant Rice, the State was permitted to comment on Defendant's post-*Miranda* refusal to answer various questions. Defendant was given *Miranda* warnings, and then he explicitly acknowledged his understanding of the warnings and of the fact that he did not have to answer any of Sergeant Rice's questions. (State's Ex. 134 at 1). Defendant then proceeded to talk about the investigation, including his psychological problems, where he had driven from, where he was going, and why he was going there:

David: Okay. What, what do you remember about what happened?

Marvin: I remember tryin' to get to Columbia to the VA Medical Center.

David: Okay, okay…and then what?

Marvin: I remember a lotta lights and the police tryin' to stop me. I remember my car being disabled, and I ran inside somewhere tryin' to, tryin' to find a place where I could think.

…

David: Marvin what…you said you were on the way, on the way to the VA, where were you comin' from?

Marvin: I guess home. I don't…

(State's Ex. 134 at 1-2).

David: … Uh, why, why were you comin' to the VA?

Marvin: That was the only place I could think of to try and get help.

David: Is that a safe place?

Marvin: No I just know that that's…handles all my medical and psychological stuff.

David: Okay, okay. Have you been havin' some psychological problems or issues or problems at home or problems at work or

Marvin: I've been havin' problems for a long time.

(State's Ex. 134 at 4).

Then, after saying that he had nothing to say and that he did not want to talk, but explaining that he might resume talking once his pain was under control, and reinitiating a conversation with Sergeant Rice, (State's Ex. 134 at 6-7), Defendant eventually provided additional details about his version of the events on December 10. (State's Ex. 134 at 10-33).

Because Defendant chose to speak with Sergeant Rice, the State was permitted to comment on Defendant's failure to answer questions about what happened at Annette and Steven's home. *Dorris*, 191 S.W.3d at 715; *Anthony*, 857 S.W.2d at 868 ("Once an accused agrees to answer questions, his failure to answer certain inquiries is a fair subject for comment at trial.").

Simply because Defendant did not want to provide answers when Sergeant Rice asked about the killings directly does not mean that the State was prohibited from commenting on that refusal. *Anthony*, 857 S.W.2d at 868; *State v. Ervin*, 398 S.W.3d 95, 100 (Mo. App. S.D. 2013) ("Reassertion of the privilege functions to terminate the interrogation, but is not available to avoid a single offensive question[.]" (internal quotation marks omitted)); see also *Ervin v. Bowersox*, 892 F.3d 979, 984-85 (8th Cir. 2018) (*Ervin II*) (denying habeas relief to Ervin defendant, noting, "In light of the fact that the United States Supreme Court has not decided whether a defendant's assertion of his previously waived Miranda rights may be used against him, the Missouri Court of Appeals's decision that no Doyle violation occurred did

not constitute an unreasonable application of clearly established federal law.").

The trial court did not err, plainly or otherwise, in admitting evidence of Defendant's refusal to answer. Defendant's point should be denied.

Defendant generally acknowledges caselaw indicating that an accused's post-*Miranda* silence may be referred to in court if the accused waives the right against self-incrimination by making statements. (Defendant's Br. 44). Citing *Brooks*, Defendant argues that this rule should not apply because his statements to Sergeant Rice were allegedly related only "to what occurred in Jefferson City" and not the homicides themselves. (Defendant's Br. 44).

Defendant's argument fails for two reasons. First, the police chase—which did not only occur in Jefferson City but simply ended in Jefferson City—is intrinsically linked to the murders in Dent County. Defendant fled from the murder scene in Dent County, and as part of that flight, ended up in Jefferson City. This continuous course of conduct makes the murders directly connected to the flight, and so Defendant's assertion that these events are disconnected should be rejected.

Second, Defendant spoke with Sergeant Rice directly about his defense at trial—his "psychological stuff" that he had had "for a long time," including his explanation that he was heading to the V.A. in Columbia, where his "full time doctors and [his] psychiatrist are." (State's Ex. 2, 4). Defendant also

later volunteered information about his tumor, which at trial was used to argue that the tumor made him more depressed and impulsive. (State's Ex. 134 at 8).

In short: (1) Defendant's continuous course of conduct from the murder scene to Jefferson City involved the police chase, which Defendant willfully spoke about with Sergeant Rice; and (2) Defendant's statements to Sergeant Rice about his psychological problems were directly related to his sole defense at trial to the shootings in Dent County. As such, Defendant waived his right to silence about the shootings in Dent County.

In any event, Defendant's reliance on *Brooks* is misplaced. In *Brooks*, this Court held that there were multiple *Doyle* violations stemming from the defendant's invocation of his right to silence by stating during his interview with police, "I don't have nothing to hide" and "I didn't do nothing at all." *Brooks*, 304 S.W.3d 130. But shortly after Brooks was decided, the United States Supreme Court decided *Berghuis v. Thompkins*, 560 U.S. 370 (2010). The *Berghuis* court held that to invoke the right to remain silent, a suspect must do so unambiguously and unequivocally. *Berghuis*, 560 U.S. at 381-82; *see also State v. O'Neal*, 392 S.W.3d 556, 569 (Mo. App. W.D. 2013) (citing *Berghuis*); *State v. Cannon*, 469 S.W.3d 887, 892 (Mo. App. E.D. 2015) ("If the statement is equivocal or ambiguous, then the police have no obligation to clarify the suspect's intent and may proceed with the interrogation."). Thus,

under *Berghuis*, the statements made by the defendant in *Brooks* would *not* have constituted an invocation of the right to silence, and so the State could not have committed *Doyle* violations at trial.

E. Even if Doyle violations occurred, any error was harmless.

> To determine the effect of a *Doyle* violation on the jury's verdict, this Court examines these factors: (1) whether the government made repeated *Doyle* violations; (2) whether the trial court made any curative effort; (3) whether the defendant's exculpatory evidence is transparently frivolous; and (4) whether the other evidence of the defendant's guilt is otherwise overwhelming.

State v. Brooks, 304 S.W.3d 130, 137 (Mo. banc 2010).

First, any *Doyle* violations were nominal. Defendant acknowledges that any Doyle violations here were not as numerous as in *Brooks*. (Defendant's Br. 46). When analyzing this factor, the *Brooks* court emphasized that the State had made "a theme that carried throughout all phases of trial" of the defendant's refusal to make an exculpatory statement. *Brooks*, 304 S.W.3d at 137. Here, the prosecutor did not make Defendant's refusal to answer these questions a theme. On the contrary, this evidence was brief and was not mentioned during closing argument. (Tr. 1582-83, 1586, 2026-40, 2050-61).

Second, Defendant explicitly requested that no curative effort be made. Defendant asserts that the trial court's curative efforts were "nonexistent."

(Defendant's Br. 46-47). Defendant disregards the fact that he moved immediately for a mistrial upon the prosecutor's relevant questioning of Sergeant Rice. (Tr. 1582-84). But "[u]nder most circumstances, a trial court acts within its discretion and cures error in the admission of evidence by withdrawing the improper evidence and instructing the jury to disregard it, rather than declaring a mistrial." *State v. Carter*, 71 S.W.3d 267, 271 (Mo. App. S.D. 2002) (internal quotation marks omitted). "[T]he fact that [a] defendant [seeks] no relief other than a mistrial cannot aid him." *Id.* (internal quotation marks omitted).

Third, while Defendant's exculpatory evidence may not have been "transparently frivolous," it was generally offered by a single expert witness who was paid $15,000 and who, while opining that Defendant's mental state was not consistent with deliberation, also acknowledged that Defendant was able to appreciate the nature, quality and wrongfulness of his conduct and that he knew right from wrong. (Tr. 1840-41, 1847).

Fourth, the evidence of Defendant's guilt was overwhelming. As discussed above in Point II, the jury had significant evidence of Defendant's mental state or consciousness of guilt, including his flight from the murder scene, including the dramatic nature of that flight and his willingness to shoot at a police officer's head; his failure to seek medical help for the victims; his murder of multiple victims; his inflicting multiple gunshot wounds to

each victim; his false exculpatory statements, including stating that he was not aiming at the officer at the hotel, despite the evidence that he was aiming for the officer's head; his reloading after the murders and additional magazines; and his act of asking Sergeant Pabin to take down his "last will and testament"; his writing and signing a letter asking that Ayden be kept with his wife, demonstrating that he was thinking clearly and rationally; and his act of shooting straight down at Annette while she was lying on the concrete.

In short, any error was harmless beyond a reasonable doubt. Any error was minimal and not emphasized, and in context of the entire record, did not contribute to the jury's verdict. Defendant's point should be denied.

Point IV (Defendant's rejected jury instructions)

The trial court did not err in rejecting Defendant's proffered Instructions D and E, second-degree murder with sudden-passion-and-adequate-cause language and voluntary manslaughter, because there was no basis in the evidence to show that Defendant acted out of sudden passion arising from adequate cause, in that at most Annette grabbed Defendant's arm and Steven walked around Annette toward Defendant, which would not produce a degree of passion in a person of ordinary temperament sufficient to impair his or her capacity for self-control.

A. Facts

1. Trial evidence

Annette had at one point struggled with addiction, but by the time of the murders, she was doing an "amazing" job of controlling her drug addiction, was spending more time with her children, was working, and wanted her children back to raise them herself. (Tr. 1203, 1226-27).

On December 10, 2011, Annette was set to have her first unsupervised visit with Ayden. (Tr. 1207). Defendant had "demanded" that Annette return Ayden by 7:00 p.m., but at some point, Annette apparently called Defendant and said that she was not going to return Ayden that night or perhaps ever. (Tr. 1227, 1680-81; State's Ex. 134 at 17).

Defendant became upset, grabbed his gun and two extra magazines, drove to an ATM to get cash, and drove to a gas station to get gas. (Tr. 1225, 1886-89). He then drove to Rachel Casey's house looking for Ayden, but nobody there would tell Defendant where Ayden was. (Tr. 1209, 1224, 1889-90). Defendant then drove to Annette's father's home to look for Ayden, where he learned that Ayden was at Steven's house. (Tr. 1891-92).

Defendant then drove to Steven's home. (Tr. 1234-35). At some point while Annette and Defendant were talking, Defendant broke the front door down. (Tr. 1348, 1340, 1349-50, 1823).

Annette then grabbed Defendant's left shoulder, "tryin' to wrestle [him] down." (State's Ex. 134 at 24). About this time, Steven "started around the right hand side" of Annette, though Defendant did not hear him say anything. (State's Ex. 134 at 24-25).

Defendant then shot Steven and Annette to death. (Tr. 1239; State's Ex. 134 at 25).

2. Jury instructions

Defendant was charged in Count II first-degree murder for shooting Steven Strotkamp. (L.F. D2, D43).

For Count II, the jury was instructed on first-degree murder, second-degree murder, and first-degree involuntary manslaughter. (L.F. D11P12, 15-16).

For Count II, Defendant proffered Instruction No. D, second-degree murder with sudden-passion language:

INSTRUCTION NO. D

As to Count II, if you do not find the defendant guilty of murder in the first degree, you must consider whether he is guilty of murder in the second degree.

As to Count II, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about the 10th day of December 2011, in the County of Dent, State of Missouri, the defendant caused the death of Steven Strotkamp by shooting him, and

Second, that it was the defendant's purpose to cause the death of Steven Strotkamp, and

Third, that defendant did not do so under the influence of sudden passion arising from adequate cause,

then you will find the defendant guilty under Count I [sic] of murder in the second degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of murder in the second degree.

As used in this instruction, the term "sudden passion" means passion directly caused by and arising out of provocation by Steven Strotkamp, or another acting with Steven Strotkamp, which passion arose at the time of the offense. The Term "adequate cause" means cause that would reasonably produce a degree of passion in a person of ordinary temperament sufficient to substantially impair an ordinary persons' capacity for self-control.

(L.F. D8P3; Tr. 2003).

Defendant also proffered Instruction No. E, voluntary manslaughter, for Count II:

INSTRUCTION NO. E

As to Count II, if you do not find the defendant guilty of murder in the second degree, you must consider whether he is guilty of voluntary manslaughter.

As to Count II, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about the 10th day of December, 2011, in the County of Dent, State of Missouri, the defendant caused the death of Steven Strotkamp by shooting him, and

Second, that it was the defendant's purpose to cause the death of Steven Strotkamp,

then you will find the defendant guilty under Count II of voluntary manslaughter.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of voluntary manslaughter.

(L.F. D8P4; Tr. 2003).

Defendant argued that the instructions were appropriate because sudden passion from adequate cause resulted from: Annette's taking Ayden and threatening that Defendant would never see him again. (Tr. 1993-96). Defendant did *not* assert that the confrontation at Steven's house caused sudden passion from adequate cause. (Tr. 1993-96).

The prosecutor objected, arguing that after Annette called Defendant "exercis[ing] her legal and equal custodial rights," Defendant then "drove around town, went to four different locations before arriving at the fifth." (Tr. 1996). The prosecutor explained that Defendant went to an ATM, a gas station, and then two other homes before arriving at Steven and Annette's home, and then Defendant "created provocation by trying to trespass then break into this home." (Tr. 1996). "There is no sudden passion, there is no adequate cause and even if there were there's this cooling off period judge, and for those reasons those elements while they've tried to inject them into the case, whether you believe the statements or disbelieve them under both

scenarios they do not create sudden passion or adequate cause." (Tr. 1996-97).

The trial court refused the instructions. (L.F. D8P3-4; Tr. 2003). Defendant included this issue in his motion for new trial. (L.F. D32P23-27).

B. Preservation and Standard of Review

Defendant argued that the instructions were appropriate because of the evidence that Annette had taken Ayden and threatened that Defendant would never see him again; Defendant did *not* argue that sudden passion from adequate cause resulted from the confrontation at Steven's house. (Tr. 1993-96). As such, the prosecutor's argument only responded to the threat of Defendant never seeing Ayden again, and did not respond to Defendant's current argument on appeal that the confrontation at Steven's house resulted in sudden passion from adequate cause. (Tr. 1996-97).

"A point on appeal must be based upon the theory voiced in the objection at trial and a defendant cannot expand or change on appeal the objection as made." *State v. Goins*, 306 S.W.3d 639, 647 (Mo. App. S.D. 2010). Because Defendant has changed his theory of sudden passion and adequate cause, his point should be reviewed for plain error, if at all.

For preserved error, "we review the trial court's decision to give a requested instruction under Section 556.046 *de novo*." *State v. Meine*, 469 S.W.3d 491, 494 (Mo. App. E.D. 2015).

C. Argument

1. Caselaw

> The trial court is obligated to give an instruction on a lesser-included offense when (1) a party timely requests the instruction; (2) there is a basis in the evidence for acquitting the defendant of the charged offense; and (3) there is a basis in the evidence for convicting the defendant of the lesser-included offense for which the instruction is requested.

State v. Meine, 469 S.W.3d 491, 494 (Mo. App. E.D. 2015). Defendant timely requested his proffered instructions D and E, (L.F. D8P3, 4; Tr. 2003). But Defendant's point must be denied because there was not a basis in the evidence for convicting Defendant of involuntary manslaughter because there was not a basis in the evidence to show that Defendant acted out of sudden passion arising from adequate cause.

"[V]oluntary manslaughter is *not* a 'nested' lesser included offense of second degree murder." *State v. Clay*, 533 S.W.3d 710, 717 (Mo. banc 2017). "A nested lesser included offense consists of a subset of the elements of the greater offense, therefore rendering it impossible to commit the greater offense without necessarily committing the lesser." *Id.* "Voluntary manslaughter is defined as causing the death of another person under circumstances that would constitute murder in the second degree, except that

the death was caused 'under the influence of sudden passion arising from adequate cause.'" *Id.* (quoting Section 565.023.1).

2. Defendant did not act out of sudden passion arising from adequate cause.

Adequate cause "means cause that would reasonably produce a degree of passion in a person of ordinary temperament sufficient to substantially impair an ordinary person's capacity for self-control." Section 565.002(1). Sudden passion "means passion directly caused by and arising out of provocation by the victim or another acting with the victim which passion arises at the time of the offense and is not solely the result of former provocation." Section 565.002(7).

Defendant points to the following evidence as support that he acted out of sudden passion from adequate cause: (1) he was raising Ayden because of Annette's drug problem, and on the day of the shooting, Annette told him he would never see Ayden again, and so Defendant allegedly feared for Ayden's safety; (2) Defendant "was worried that he 'would be met with firearms'" at Steven's house; (3) when Defendant arrived at Steven's home, Steven and Annette "came at" Defendant, and Defendant described this as though he "basically got assaulted at the front door"; and (4) Annette grabbed Defendant's left shoulder, trying to wrestle him down, while Steven "started to go around her." (Defendant's Br. 68-69).

Defendant's reliance on the first through third items is misplaced. As to the first item, Steven was not involved in this conversation. While "sudden passion" can be created by the victim or another acting with the victim, Section 565.002(7), Defendant cites nothing in the record indicating that Steven was involved in this conversation or was acting with Annette when Annette said these things. (Defendant's Br. 68). As such, this conversation cannot be used to support sudden passion involving Defendant's murder of Steven. Moreover, even if Steven had been involved, Defendant had adequate time to cool after this conversation. After the phone call wherein Annette told Defendant that he would not see Ayden again, (State's Ex. 134 at 17), Defendant drove to an ATM, a gas station, Casey Rachel's house, and Gilbert Durham's house before finally arriving at Steven's house. (State's Ex. 134 at 17; Tr. 1209, 1224, 1234-35, 1886-89, 1891-92); *see also State v. Deckard*, 18 S.W.3d 495, 501 (Mo. App. S.D. 2000) (quoting *State v. Redmond*, 937 S.W.2d 205, 208 (Mo. banc 1996)) ("Furthermore, we have also previously observed that in order to support a submission of voluntary manslaughter the 'offense must have been committed in sudden passion, and not after there has been time for the passion to cool.'").

As to the second item, Defendant's fear that he would be met with firearms, this is not an allegation of fact involving any conduct by Steven. Defendant has cited to nothing in the record demonstrating that Steven did

anything to make Defendant actually fear that Steven would be armed when Defendant arrived at the house. On the contrary, it was Defendant who went to Steven's house, armed and with two extra magazines. (Tr. 1886-89). And in any event, even if Defendant was genuinely afraid, such fear would not establish that Defendant was overcome by passion so as to lose his ability to reason. *See State v. Burke*, 237 S.W.3d 225, 228 (Mo. App. S.D. 2007) (detailing a definition of "sudden passion" as "rage, anger, or terror … so extreme that, for the moment, action is directed by passion and not reason").

As to the third item, that Steven and Annette "came at" Defendant and "*basically* … assaulted" him, these vague and conclusory statements are not factual allegations that could support sudden passion arising from adequate cause. The reasonable inference is that these statements were Defendant's simple summaries of the actual confrontation that took place in the fourth item, involving the shoulder grabbing by Annette and Steven walking around Annette. Defendant had "the burden of injecting this issue *through evidence* showing sudden passion and adequate cause for it." *State v. Avery*, 120 S.W.3d 196, 205 (Mo. banc 2003) (emphasis added). Defendant's vague and conclusory statements were not evidence that could create sudden passion arising from adequate cause.

Thus, the fourth item is the only item that Defendant may properly assert caused him to act with sudden passion arising from adequate cause.

But there was no evidence that Steven was acting with Annette when Annette grabbed Defendant's shoulder, and so her conduct should not be considered when analyzing whether Steven's conduct was sufficient to cause sudden passion arising from adequate cause. The evidence was merely that Annette "grabbed a hold of my left shoulder and [Steven] started around the right-hand side"; "he was comin' at me around the right-hand side of her." (State's Ex. 134 at 24-25). In any event, even if Annette's conduct was considered, her mere shoulder grabbing and Steven's mere walking around Annette is not sufficient to have produced such a degree of passion in a person of ordinary temperament to impair his or her capacity for self-control, nor would these actions have caused Defendant to act by passion and not reason.

Missouri caselaw supports this conclusion. "Adequate cause requires a showing of *a sudden, unexpected encounter* or provocation tending to excite the passion beyond control such that it renders a person of ordinary temperament incapable of reflection, or such passion as to obscure reason." *State v. Simpson*, 315 S.W.3d 779, 783 (Mo. App. W.D. 2010) (emphasis added and internal quotation marks omitted). Here, there was no sudden, unexpected encounter. Defendant went to Steven's house, armed with a gun and two extra magazines. He broke the front door down when he arrived. Annette had already threatened, before Defendant drove to four different

places and then arrived at Steven's, that Defendant might never see Ayden again. Under these circumstances, Defendant cannot plausibly argue that Annette's grabbing his shoulder and Steven walking around Annette was a sudden, unexpected encounter that would excite the passion of an ordinary person beyond control and render him or her incapable of reflection or reason.

In *State v. Boyd*, 913 S.W.2d 838, 842 (Mo. App. E.D. 1995), the defendant argued that he acted out of sudden passion because the victim had "grabbed him from behind." *Boyd*, 913 S.W.2d at 842. The court rejected this argument, noting that even if that evidence was true, it "would not constitute sufficient evidence of adequate cause." *Id.*

Consistent with *Boyd*, Missouri courts have held that for "sudden passion" to arise during a confrontation, there must be "evidence of weapons being brandished and/or other minor contact combined with an exchange of words that would create a fear of great bodily harm":

> Where Missouri courts have found sudden passion during confrontations there has been evidence of weapons being brandished and/or other minor contact combined with an exchange of words that would create a fear of great bodily harm in the defendant. *See State v. Creighton,* 330 Mo. 1176, 52 S.W.2d 556, 557, 560–62 (1932) (indicating that sudden passion can arise where defendant is surprised by an unexpected provocation and where victim made threats of great bodily

harm and then reached for his pocket causing defendant to fear great bodily harm); *see also State v. Redmond,* 937 S.W.2d 205, 208–09 (Mo. banc 1996) (supporting a finding of sudden passion where victim confronted defendant in a threatening manner and displayed a gun and the defendant was scared for his life); *see also State v. Fears,* 803 S.W.2d 605, 608–09 (Mo. banc 1991) (supporting a finding of sudden passion from an altercation where victim prevented defendant from leaving and made threats that created a fear of great bodily harm in the defendant).

State v. Burks, 237 S.W.3d 225, 228 (Mo. App. S.D. 2007).

Here, Defendant was not confronted with any brandished weapons or even any verbal threats that would create a fear of great bodily harm. Neither Steven nor Annette made any verbal threats to Defendant's safety at all. When Defendant was asked whether Steven said anything, Defendant said no. (State's Ex. 134 at 25). Defendant asserts that Annette "grabbed [Defendant's] left shoulder, trying to wrestle him down, while Steven started to go around her." (Defendant's Br. 69). A mere shoulder-grabbing, even when combined with someone "walking around" the shoulder-grabber, cannot be sufficient to cause someone to lose self-control or to have such extreme rage that he or she is directed by passion and not reason. *See Burks*, 237 S.W.3d at 228.

Burks involved much more aggressive behavior on behalf of the victim, yet the court found that there still was not sudden passion from adequate cause. The victim had seen the defendant hitting a woman in a parking lot. *Burks*, 237 S.W.3d at 226. The woman ran away as the victim approached the defendant and told the defendant to stop hitting the woman. *Id.* at 226-27. The defendant answered with profanity and said it was none of the victim's business. *Id.* at 227. The victim then grabbed for the defendant's throat but only grabbed his collar because the defendant tried to knock the victim's hand away. *Id.* The two then shoved and pushed each other and threw punches without connecting. *Id.* Sometime during or immediately after the scuffle, the defendant stabbed the victim with a knife. *Id.*

The court noted that Missouri courts require "evidence of weapons being brandished and/or other minor contact combined with an exchange of words that would create a fear of great bodily harm," which did not occur between the victim and the defendant. *Burks*, 237 S.W.3d at 228. The court further noted that the defendant was not caught by surprise by the victim, as he saw the victim walk up to him, and that the scuffle would not have caused the defendant to be so enraged or terrified that he no longer acted with reason. *Id.*

Likewise, here, Defendant was not caught by surprise by Steven. On the contrary, Defendant was told that Ayden was at Steven's home, and

Defendant drove there. (Tr. 1891-92, 1234-35). And after an exchange of words between Defendant and Annette, Defendant rushed to the front door as it was closing and broke it down. At some point during the exchange, Defendant broke the front door down. (Tr. 1348, 1340, 1349-50, 1823).

Defendant cites *Fears*, *Creighton*, and *Redmond* for his argument. But as *Burks* explained, each of these cases involved "evidence of weapons being brandished and/or other minor contact combined with an exchange of words that would create a fear of great bodily harm in the defendant." *Burks*, 237 S.W.3d at 228.

Finally, to claim sudden passion from adequate provocation, the defendant may not be initial aggressor. *State v. Everage*, 124 S.W.3d 11, 16 (Mo. App. W.D. 2004) ("Whether or not the victim's conduct could be considered provocative toward Robert, it was never directed toward [defendant]. [Defendant] became an aggressor against [victim] when he joined in the fight. To show sudden passion arising from adequate cause, [defendant] had to prove the victim took some action to inflame him and that he was not the initial aggressor."); *Hill v. State*, 160 S.W.3d 855, 859 n.5 (Mo. App. S.D. 2005) ("Sudden passion cannot arise unless a defendant shows the victim took some action to inflame the defendant and that the defendant was not the initial aggressor.").

Here, Defendant was the initial aggressor. He grabbed his gun and two extra magazines before driving to two separate homes to learn where Ayden was. (Tr. 1209, 1224, 1886-89, 1891-92). Defendant finally went to Steven's home and broke down the front door. (Tr. 1234-35, 1348, 1340, 1349-50, 1823). Only then did Annette allegedly grab Defendant's while Steven walked around Annette shortly thereafter.

There was not a basis in the evidence to show that Defendant acted out of sudden passion arising from adequate cause. The trial court did not err, plainly or otherwise. Defendant's point should be denied.

Point V (constitutionality of judge-imposed death sentence)

The trial court did not err in sentencing Defendant to death after the jury made all required findings but then deadlocked on the ultimate sentence for Count I because this Court has repeatedly held that Missouri's death-penalty scheme is constitutional.

A. Facts

Defendant filed a "motion to quash information and dismiss due to the unconstitutionality of Missouri's statutory scheme for imposition of the death penalty," arguing in part that Section 565.030 is unconstitutional because it permits the judge to determine whether or not aggravating circumstances exist and "tak[es] punishment out of the hands of the jury." (L.F. D60P7-8). The motion was overruled, and Defendant was granted a continuing objection. (Tr. 180).

At trial, Defendant objected to instruction 314.58(C). (Tr. 2335-36). The objection was overruled. (Tr. 2336).

The jury was ultimately unable to decide on punishment for Annette's murder, but it completed the submitted instruction 314.58(C), making the findings required for imposition of the death sentence:

1. Does the jury unanimously find beyond a reasonable doubt statutory aggravating circumstance or circumstances?

Yes [√] No [ ]

. . .

2. Does the jury unanimously find that there are facts and circumstances in mitigation of punishment sufficient to outweigh facts and circumstances in aggravation of punishment"

Yes [ ] No [√]

. . .

If the answer to Question 1 is yes, list below the statutory aggravating circumstance or circumstances that you have unanimously found beyond a reasonable doubt: the murder of Annette Durham was committed while the defendant was engaged in the commission of another unlawful homicide of Steven Strotkamp.

(L.F. D26; Tr. 2386).

Defendant also filed a "motion for the court to impose a sentence of life without parole because section 565.030 RSMo is unconstitutional" on September 1, 2017, after the jury deadlocked on the punishment for Count I but before the court imposed sentence. (L.F. D1P2, D30). The State filed a response. (L.F. D34). The trial court overruled the motion. (Tr. 2404).

The court sentenced Defendant to death. (Tr. 2428).

Defendant included this issue in his motion for new trial. (L.F. D32P1-2, 31-33

B. Standard of Review

"This Court reviews a constitutional challenge to a statute *de novo*." *State v. Mixon*, 391 S.W.3d 881, 883 (Mo. banc 2012). "A statute is presumed valid and will not be held unconstitutional unless it clearly contravenes a constitutional provision." *Id.* "The person challenging the statute's validity bears the burden of proving the act clearly and undoubtedly violates the constitution." *Id.* "If a statutory provision can be interpreted in two ways, one constitutional and the other not constitutional, the constitutional construction shall be adopted." *Id.*

C. Argument

Defendant argues that Section 565.030 is unconstitutional because it permits the judge to make sentencing determinations that are required to impose the death penalty. (Defendant's Br. 74). This Court has repeatedly rejected Defendant's argument:

> Permitting a judge to consider the presence of statutory aggravators and to weigh mitigating evidence against that in aggravation in deciding whether to impose a death sentence when the jury did not unanimously agree on punishment does not negate the fact that the jury already had made the required findings that the State proved one or more statutory aggravators beyond a reasonable doubt and that it did not unanimously find that the factors in mitigation outweighed

those in aggravation. Rather, the statute provides an extra layer of findings that must occur before the court may impose a death sentence. Mr. Shockley's argument is without merit.

State v. Shockley, 410 S.W.3d 179, 198-99 (Mo. banc 2013); *accord State v. McLaughlin*, 265 S.W.3d 257, 262-64 (Mo. banc 2008) (explaining that "instructions in capital cases have been revised to require the jurors to answer special interrogatories," making Missouri's current death-penalty scheme comport with constitutional requirements).

Moreover, this Court has rejected motions to recall the mandate on this and a related *Hurst* issue. *State v. Kevin Johnson*, SC89168 (Mo. Feb. 28, 2017), *cert. denied Johnson v. Missouri*, No. 16-9466 (Oct. 2, 2017); *State v. Brian Dorsey*, SC89833 (Mo. May 2, 2017).

The Eighth Circuit has also held Missouri's death-penalty scheme to be constitutional. *See Griffin v. Delo,* 33 F.3d 895, 905–06 (8th Cir. 1994); *Battle v. Delo,* 19 F.3d 1547, 1560–62 (8th Cir. 1994); *McDonald v. Bowersox,* 101 F.3d 588, 599–600 (8th Cir. 1996); *see also Johnson v. Steele*, No. 2018 WL 3008307, *20-23, 25-26 (E.D. Mo. Jun 15, 2018) (holding Missouri's death-penalty scheme constitutional).

Defendant cites *McLaughlin v. Steele*, 173 F.Supp.3d 855 (E.D. Mo. 2016) (*McLaughlin II*), for his argument. *McLaughlin II* cannot help Defendant because: (1) the case is not final, as an appeal is currently pending

before the Eighth Circuit, No. 18-3510[4]; and (2) *McLaughlin II* is not binding on this Court. *See State v. Salazar*, 414 S.W.3d 606, 615 (Mo. Ct. App. 2013) ("[D]ecisions of the federal district and intermediate appellate courts and decisions of other state courts are not binding on us."). And in any event, this Court has found Missouri's statute constitutional, and any federal district court's finding to the contrary is not relevant.

Defendant also cites *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003), for his argument that Missouri has an unconstitutional "hybrid" death-penalty procedure when the jury becomes deadlocked on the punishment, wherein the judge then plays a role in making findings required to be made by the jury. (Defendant's Br. 82). Defendant argues that *Whitfield* said that the jury's factual findings "simply disappear" once the jury deadlocks and the judge imposes sentence. (Defendant's Br. 82).

This argument is without merit, as Defendant's argument takes *Whitfield* out of context. In *Whitfield*, "the record [wa]s silent in regard to the jury's findings," and so this Court simply could not determine whether the jury was deadlocked on any of the required factual findings or whether the jury had made the required factual findings but was simply deadlocked as to

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[4] The respondent filed a cross-appeal with the Eighth Circuit as well, No. 18-3628.

which punishment to issue. *Whitfield*, 107 S.W.3d at 263. Here, the record is not silent—the jury made all required factual findings. (L.F. D26). Perhaps more importantly, the Missouri Approved Instructions were revised after *Whitfield* to account for findings required to be made by the jury even when the jury cannot ultimately decide on the punishment:

> Since *Whitfield*, Missouri's instructions in capital cases have been revised to require the jurors to answer special interrogatories indicating whether they found a statutory aggravating factor to be present, and if so, what factor, and whether they found that mitigating evidence did not outweigh aggravating evidence. *See* MAI–CR 3d 314.40, 314.58.

State v. McLaughlin, 265 S.W.3d 257, 264 (Mo. banc 2008); *see also State v. Shockley*, 410 S.W.3d 179, 199 n.11 (Mo. banc 2013) (noting explanation given in *McLaughlin*).

Here, the jury made all required findings. (L.F. D26). Defendant's point should be denied.

Defendant also cites *Hurst v. Florida*, 136 S.Ct. 616 (2016). But significant differences exist between Missouri's statute and the Florida statute reviewed in *Hurst*, and so *Hurst* does not assist Defendant.

The Missouri statute, unlike Florida's, requires factual findings by a jury before a defendant is death-eligible. Florida's capital sentencing statute

included a provision that stated that a person convicted of a capital felony shall be punished by death only if an additional sentencing proceeding resulted in findings by the court that such person shall be punished by death. *Id.* at 620. The Supreme Court described that sentencing proceeding as a "'hybrid' proceeding 'in which [a] jury renders an advisory verdict but the judge makes the ultimate sentencing determination.'" *Id.* (quoting *Ring v. Arizona*, 536 U.S. 584, 608 n.6 (2002)). The Court described how the sentencing procedure was set out in the statute:

> First, the sentencing judge conducts an evidentiary hearing before a jury. Next, the jury renders an "advisory sentence" of life or death without specifying the factual basis of its recommendation. "Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death." If the court imposes death, it must "set forth in writing its findings upon which the sentence of death is based." Although the judge must give the jury recommendation "great weight," the sentencing order must "reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors."

Hurst, 136 S.Ct. at 620 (internal citations omitted).

The Supreme Court found that Florida's sentencing scheme violated the rule set forth in *Ring* that requires a jury to make any factual findings that expose a defendant to the death penalty. *Id.* at 621-22. The Court stated that the Florida scheme required the judge, and not the jury, to make the critical findings necessary to impose the death penalty. *Id.* at 622. It further noted that the presence of an advisory jury was immaterial because that jury did not make specific factual findings with regard to the existence of aggravating or mitigating circumstances, and its recommendation was not binding on the trial judge. *Id.*

In finding the Florida statute unconstitutional, the Supreme Court noted the "central and singular role the judge plays under Florida law." *Id.* "[T]he Florida sentencing statute does not make a defendant eligible for death until 'findings *by the court* that such person shall be punished by death.'" *Id.* (quoting Fla. Stat. § 775.082(1); emphasis added by the Court). "The trial court *alone* must find 'the facts . . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient aggravating circumstances to outweigh the aggravating circumstances.'" *Id.* (quoting Fla. Stat. § 921.141(3) (emphasis in original). "'[T]he jury's function under the Florida death penalty statute is advisory only.'" *Id.* (quoting *Spaziano v. State*, 433 So. 2d 508, 512 (Fla. 1983)).

But unlike in Florida, the trial judge in Missouri does not play the "central and singular role" under Missouri's sentencing scheme. Missouri's statute puts the fact-finding function in the hands of the jury. *See Shockley*, 410 S.W.3d at 198 (explaining jury's function, including finding a statutory aggravator beyond a reasonable doubt).

The Florida and Missouri statutes thus differ in significant respects. The Florida jury issued its recommended sentence without making any written factual findings or otherwise specifying the basis for its recommendation. *Hurst*, 136 S.Ct. at 620. A Missouri jury is required to specify in writing the statutory aggravating circumstances that it has found beyond a reasonable doubt. Section 565.030.4. It is that finding of the existence of an aggravating circumstance that renders a defendant eligible for the death penalty. *Ring*, 536 U.S. at 609; *Tuilaepa v. California*, 512 U.S. 967, 971 (1994).

Contrary to Defendant's assertion, (Defendant's Br. 85), the weighing of aggravating circumstances against mitigating circumstances is not a factual finding that increases the range of punishment. *Zink v. State*, 278 S.W.3d 170, 192-93 (Mo. 2009), *see also State v. Nunley*, 341 S.W.3d 611, 626 n.3 (Mo. 2011) (recognizing that a number of federal and state courts have determined that the weighing of aggravating factors are not fact determinations); *State v. Glass,* 136 S.W.3d 496, 521 (Mo. banc 2004); *State v.*

Gill, 167 S.W.3d 184, 193 (Mo. banc 2005); *State v. Dorsey,* 318 S.W.3d 648, 653 (Mo. 2010). Since *Whitfield*, this Court has issued multiple opinions narrowly interpreting *Whitfield* and has called into doubt the *Whitfield* Court's characterization of the "weighing step" under Missouri law.

In *Glass,* this Court rejected a defendant's argument that the court's prior decision in *Whitfield* required the jury to find that the evidence in mitigation of punishment was insufficient to outweigh the evidence in aggravation beyond a reasonable doubt. *Glass,* 136 S.W.3d at 521. This Court rejected the same argument in *State v. Taylor,* 134 S.W.3d 21, 30 (Mo. 2004) and *Gill,* 167 S.W.3d at 193.

This Court in *Zink* then again rejected a claim that Missouri's weighing-step determination had to be made beyond a reasonable doubt. This Court cited the rule from *Apprendi* and *Ring* and expressly stated that Missouri's weighing step did not "require[ ] a finding of fact that may increase Mr. Zink's penalty." *Zink,* 278 S.W.3d at 193. This Court explained:

> [The weighing step does not] require[ ] a finding of a fact that may increase [defendant's] penalty. Instead, the jury is weighing evidence and all information before them. Only findings of fact that increase the penalty for a crime beyond the prescribed statutory maximum are required to be found by a jury beyond a reasonable doubt. This Court

previously has recognized this distinction and held that steps two and three do not need to be found by a jury beyond a reasonable doubt.

Id. (citing *Glass* and *Gill*). Thus, this Court has indicated that Missouri's weighing step is *not* a factual finding that increases the maximum punishment. *See, e.g., Glass,* 136 S.W.3d at 521; *Taylor,* 134 S.W.3d at 30; *Gill,* 167 S.W.3d at 193; *Zink,* 278 S.W.3d at 192–93; *Johnson I,* 284 S.W.3d 561, 585, 588–89 (Mo. 2009); *State v. Davis,* 318 S.W.3d 618, 634 (Mo. 2010); *State v. Dorsey,* 318 S.W.3d 648, 653 (Mo. 2010); *State v. Anderson,* 306 S.W.3d 529, 540 (Mo. 2010); *Shockley,* 410 S.W.3d at 196-97.

Further, this Court in *Nunley* collected cases indicating that the weighing step is not a factual finding. *Nunley,* 341 S.W.3d at 626 n.3.

Additionally, the plain language of Section 565.030 indicates that Missouri's weighing step merely provides the jury with an opportunity to *automatically* remove the defendant from the pool of death-eligible offenders (due to the strength of the mitigating evidence). Section 565.030.4 states: "If the trier concludes that there is evidence in mitigation of punishment…which is sufficient to outweigh the evidence in aggravation of punishment," the trier of fact "shall assess and declare punishment at life imprisonment." Thus, Missouri's weighing step involves a weighing that *limits* the range of punishment to life imprisonment. This is proper guidance with regard to mitigation evidence.

Although not a factual finding, Missouri juries still make the weighing determination before the judge imposes a death sentence, unlike in Florida, where the court could alone make that determination. *See Hurst*, 136 S.Ct. at 620.

In sum, a Florida jury never made factual findings required before a death sentence could be imposed. Instead, the judge's written factual findings were the necessary prerequisite for imposition of a death sentence. In Missouri, by contrast, a defendant is rendered death eligible by the jury's written factual findings about the presence of a statutory aggravating circumstance, and the jury must weigh the aggravating and mitigating circumstances before a death sentence can be imposed. Unlike Florida, a Missouri judge can impose a death sentence based on the jury's factual findings, only after the jury has made the necessary factual findings.

Another key difference is that the Florida statute permitted the court to impose a death sentence even if the jury recommended a life sentence. *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975). The Missouri statute does not permit that. § 565.030, RSMo Cum. Supp. 2001. The jury's role in Missouri is far more than advisory, and the judge is not the central actor in Missouri's capital sentencing scheme.

Moreover, *Hurst* did not expand the holding in *Ring*. The *Hurst* court focused on the fact that a Florida jury does not make specific findings with

regard to the existence of aggravating or mitigating circumstances. *Hurst*, 136 S.Ct. at 622. That mirrors what *Ring* requires, that the jury had to find the facts that exposed the defendant to the death penalty. *Id.* at 621-22. The Supreme Court in *Hurst* did not go beyond the holding of *Ring* and specifically did not hold that the ultimate decision to impose the death penalty had to be made by the jury. *Hurst* did not even address the issue that Defendant raises here, which is whether a judge can impose a death sentence after the jury has made the necessary factual findings rendering the defendant death-eligible, but is unable to agree on a verdict.[5]

Defendant's reliance on *Rauf v. State*, 145 A. 3d 430 (Del. 2016), is also misplaced. (Defendant's Br. 80-81). In *Rauf*, the court responded to a request to the Delaware Supreme Court by the judge in a pending trial to answer a series of certified questions about Delaware's capital sentencing statute. *Rauf v. State*, 145 A. 3d 430, 432-33 (Del. 2016). The Court found the statute

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[5] *Hurst v. State*, 202 So. 3d 40, 44 (Fla. 2016), also cited by Defendant, is simply the proceedings conducted in the *Hurst* case in compliance with the Supreme Court's mandate. The Florida Supreme Court rejected an argument that the defendant was entitled to an automatic life sentence, and it remanded the case to the trial court for a new penalty phase hearing. *Hurst*, 202 So. 3d at 44-45.

unconstitutional in a *per curium* opinion, but could not articulate a unifying theory behind its decision. *Id.* at 433. It bears noting, however, that Delaware's statute mimicked Florida's insofar as it allowed the trial judge to override a jury's recommendation of a life sentence. *Id.* at 461 (Strine, C.J., concurring). Furthermore, one of the concurring opinions acknowledged that *Hurst* could reasonably be read as simply reiterating the rule previously set forth in *Ring* that any factual finding that makes a defendant eligible to receive the death penalty must be made by the jury. *Id.* at 436 (Strine, C.J., concurring). Another judge, who partially concurred in the holding, concluded that *Hurst* did not hold that jury sentencing was constitutionally required in capital cases. *Id.* at 498 (Valhura, J., concurring in part and dissenting in part). *Rauf* thus does not compel this Court to read Missouri's statute in the manner suggested by Appellant, especially given the comparative procedural postures of the Delaware case and this case.

The Alabama Supreme Court has illustrated that the *Hurst* holding should be read narrowly. In *In re Bohannon v. State*, 222 So.3d 525 (Ala. 2016), the court found that *Hurst* applied *Ring* and reiterated that a jury, not a judge, must find the existence of an aggravating factor to make a defendant death-eligible. *In re Bohannon*, 222 So.3d at 531-33. The court found that *Ring* and *Hurst* did not require anything more. *Id.* The court concluded that Alabama's law was thus constitutional because a jury, and not a judge,

determined by a unanimous verdict that an aggravating circumstance existed beyond a reasonable doubt. *Id.* The court reiterated that the Supreme Court's holding in *Hurst* "was based on an application, not an expansion, of *Apprendi*[6] and *Ring*." *Id.* at 533; *see also Ex parte State*, 223 So.3d 954, 963 (Ala. Crim. App. 2016) (stating that the Supreme Court in *Hurst* did not announce a new rule of constitutional law and did not expand its holdings in *Apprendi* and *Ring*). That conclusion is in accord with the narrow focus in *Hurst* on the judge's unique role in finding the existence of an aggravating circumstance under Florida law. *Hurst*, 136 S.Ct. at 621-22.

The Supreme Court's decision in *Hurst* represents a straightforward application of *Ring* to a statute that was substantially dissimilar to Missouri's statute. This Court has already found that Missouri's statute does not violate *Ring*. *See, e.g.*, *Shockley*, 410 S.W.3d at 199 n.11. *Hurst* does not change the correctness of this Court's prior opinions. Defendant's point should be denied.

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[6] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Point VI (8th Amendment, national consensus on death-penalty)

The trial court did not err in sentencing Defendant to death because Defendant has not met his burden to show that Missouri's death-penalty scheme "clearly and undoubtedly" violates the Constitution, particularly in light of Supreme Court and Missouri precedent upholding Missouri's death-penalty scheme or other similar schemes.

A. Facts

Defendant filed a "motion to quash information and dismiss due to the unconstitutionality of Missouri's statutory scheme for imposition of the death penalty," arguing in part that Section 565.030 "violates the … Eighth, and Fourteenth Amendments to the Unites States Constitution and Article I, Sections … of the Missouri Constitution (1945) in that it permits the Court to impose a sentence of death in those cases in which the jury is unable to decide or agree upon punishment." (L.F. D60P7-8). The motion was overruled, and Defendant was granted a continuing objection. (Tr. 180).

Defendant filed a "motion for the court to impose a sentence of life without parole because section 565.030 RSMo is unconstitutional" on September 1, 2017, after the jury deadlocked on the punishment for Count I but before the court imposed sentence. (L.F. D1P2, D30). In that motion, Defendant argued that Missouri's death-penalty scheme was not "in line with

evolving standards of decency as expressed by the legislation of 87% of the death penalty states and the federal government that if a jury of the defendant's peers cannot reach a death verdict, the defendant should not receive a death sentence." (L.F. D30P51).

Defendant also filed a "motion to declare the death penalty unconstitutional." (L.F. D73). The motion was overruled. (Tr. 169, 180-81).

Defendant included this issue in his motion for new trial. (L.F. D32P1-2, 40-41).

B. Standard of Review

"This Court reviews a constitutional challenge to a statute *de novo*." *State v. Mixon*, 391 S.W.3d 881, 883 (Mo. banc 2012). "A statute is presumed valid and will not be held unconstitutional unless it clearly contravenes a constitutional provision." *Id.* "The person challenging the statute's validity bears the burden of proving the act clearly and undoubtedly violates the constitution." *Id.* "If a statutory provision can be interpreted in two ways, one constitutional and the other not constitutional, the constitutional construction shall be adopted." *Id.*

C. Missouri's death-penalty scheme is constitutional.

Defendant argues that Missouri's death-penalty scheme violates the Eighth and Fourteenth Amendments because "there is a strong national

consensus against judge-imposed death sentences as well as death sentences premised on a non-unanimous jury verdict." (Defendant's Br. 87).

But the United States Supreme Court essentially rejected a similar argument in 2013, stemming out of Alabama's death-penalty scheme, which gives even more discretion to the judge than Missouri's scheme does. Alabama permits a judge to impose the death penalty even when the jury *unanimously* recommends a *lesser* sentence, such as life imprisonment. *See, e.g.*, *Bush v. State*, 92 So. 3d 121, 164 (Ala. Crim. App. 2009).

The United States Supreme Court upheld this scheme as constitutional in *Harris v. Alabama*, 513 U.S. 504 (1995), overruled on other grounds by *Alleyne v. United States*, 570 U.S. 99 (2013).

Subsequently, an Alabama criminal appeals court reviewed a defendant's argument that "execution of an offender following a recommendation by a jury of a sentence of life imprisonment without the possibility of parole violates the Eighth Amendment and the nation's evolving standards of decency." *Woodward v. State*, 123 So. 3d 989, 1055 (Ala. Crim. App. 2011). The court rejected this argument, citing *Harris*, 513 U.S. 504, as well as *Spaziano v. Florida*, 468 U.S. 447 (1984) ("We are not persuaded that placing the responsibility on a trial judge to impose the sentence in a capital case is so fundamentally at odds with contemporary standards of fairness and

decency that Florida must be required to alter its scheme and give final authority to the jury to make the life-or-death decision.").[7]

The United States Supreme Court then rejected the *Woodward* defendant's petition for writ of certiorari. *Woodward v. Alabama*, 571 U.S. 1045, 134 S.Ct. 405 (2013) (*Woodward II*). Only one Justice wrote a dissent, and only one other Justice joined only portions of that dissent. *Id.* The dissent noted, "In the last decade, Alabama has been the only State in which judges have imposed the death penalty in the face of contrary jury verdicts." *Id.* at 405 (Sotomayor, J., dissenting). "Since Alabama adopted its current statute, its judges have imposed death sentences on 95 defendants contrary to a jury's verdict." *Id.* The dissent raised arguments similar to those Defendant raises here: "It is perhaps unsurprising that the national consensus has moved towards a capital sentencing scheme in which the jury is responsible for imposing capital punishment." *Id.* at 407 n.2. The dissent noted that there

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[7] While *Hurst*, 136 S.Ct. 616, subsequently found fault with some aspect of Florida's death-penalty scheme, it did *not* stand for the proposition that a judge may not issue a death sentence, so long as the jury makes any required factual findings. Moreover, as discussed above in Point V, the Alabama Supreme Court has upheld Alabama's death-penalty scheme against a post-*Hurst* challenge. *In re Bohannon v. State*, 222 So.3d 525 (Ala. 2016).

were only "four States in which the jury has a role in sentencing but is not the final decisionmaker," with three of those states permitting the judge to override the jury's sentencing decision. *Id.* at 407.

The dissent then argued, "Eighteen years have passed since we decided *Harris* [*v. Alabama*], and in my view, the time has come for us to reconsider that decision." *Id.* Notably, the rest of the Supreme Court disagreed, denying certiorari. Just as Defendant argues that Missouri is a "clear outlier," (Defendant's Br. 91), the dissent in *Woodward II* argued that Alabama was a "clear outlier" with its judicial-override death-penalty scheme. *Woodward II*, 134 S.Ct. at 408.

In short, the Supreme Court refused to hear arguments similar to what Defendant makes here, regarding Alabama's death-penalty scheme, which gives even more discretion to the judge than Missouri's scheme does. The logical conclusion is that the Supreme Court would not find Missouri's death-penalty scheme unconstitutional. As discussed above in Point V, this Court has repeatedly upheld this scheme, and there is no reason to question that body of caselaw.[8] Defendant points to no binding authority that holds otherwise.

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[8] The United States Supreme Court has also refused to grant certiorari from this Court's decisions. *State v. Kevin Johnson*, SC89168 (Mo. Feb. 28, 2017),

Moreover, the United States Supreme Court has held that states may permit a judge to impose a death sentence, notwithstanding the jury's recommendation or lack thereof. *See Harris*, 513 U.S. 504; *Spaziano*, 468 U.S. 447; *see also Hurst*, 136 S.Ct. 616 (holding Florida's specific death-penalty scheme unconstitutional, but generally approving of judge-imposed death sentences). And "only th[e United States Supreme] Court may overrule one of its precedents." *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983).

Finally, Defendant cites caselaw mentioning "evolving standards of decency" and whether a punishment practice "has fallen outside these evolving standards." (Defendant's Br. 87-96). But Defendant has not argued that there has actually been any evolution or shift in recent years. (Defendant's Br. 87-96). Defendant merely points to the numbers of states that currently allow or disallow certain punishment schemes without arguing that there has been any real change since courts last reviewed schemes such as Missouri's. (Defendant's Br. 87-96). And if the nation's standards of

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cert. denied Johnson v. Missouri, No. 16-9466 (Oct. 2, 2017); *State ex rel. Brian Dorsey v. Cindy Griffith*, SC96440 (Mo. June 27, 2017), *cert. denied* 17-6162 (Dec. 4, 2017); *State ex rel. Lance Shockley v. Cindy Griffith*, SC96694 (Mo. Nov. 21, 2017), cert. denied 17-8599 (Oct. 1, 2018).

decency are not actually evolving, then Defendant's argument loses much or all of its force.

Defendant has failed to meet his burden to show that Missouri's death-penalty scheme "clearly contravenes" a constitutional provision or that it "clearly and undoubtedly violates the constitution." *Mixon*, 391 S.W.3d at 883. Defendant's point should be denied.

Point VII (failure to narrow death-eligible homicides)

The trial court did not err in sentencing Defendant to death because Defendant has not met his burden to show that Missouri's death-penalty scheme "clearly and undoubtedly" violates the Constitution, particularly in light Missouri Supreme Court precedent rejecting the same or similar arguments that Defendant raises here.

A. Facts

Defendant filed a "motion to quash information and dismiss due to the unconstitutionality of Missouri's statutory scheme for imposition of the death penalty," arguing in part that Missouri's death-penalty scheme is unconstitutional because "any crime could be determined to involve" an aggravating circumstance that makes a defendant death-eligible. (L.F. D60P3). The motion was denied. (Tr. 179-80). The issue was raised in Defendant's motion for new trial. (L.F. D32P1-2). Defendant made essentially the same argument in his "motion to declare the death penalty unconstitutional." (L.F. D73P23-24). The motion was overruled. (Tr. 169, 180-81). The issue was raised in the motion for new trial. (L.F. D32P40-41).

B. Preservation and Standard of Review

"To preserve an allegation of error for appellate review, an objection stating the grounds must be made at trial, that same objection must be set

out in the motion for new trial, and the objection must be carried forward in the appellate brief." *State v. Starks*, 470 S.W.3d 410, 413 (Mo. App. E.D. 2015).

Defendant does not appear to have made any arguments to the trial court regarding racial or geographical disparities, and Defendant does not assert in his brief that he did so. (Defendant's Br. 97-103). As such, those arguments are subject to plain-error review, if at all.

Generally, "This Court reviews a constitutional challenge to a statute *de novo*." *State v. Mixon*, 391 S.W.3d 881, 883 (Mo. banc 2012). "A statute is presumed valid and will not be held unconstitutional unless it clearly contravenes a constitutional provision." *Id.* "The person challenging the statute's validity bears the burden of proving the act clearly and undoubtedly violates the constitution." *Id.*

C. Argument

Defendant argues that Missouri's death penalty statute violates the Eighth and Fourteenth Amendments because it does not genuinely narrow the class of people eligible for the death penalty. To support that claim, Defendant cites a study by professors Sloss, Thaman, and Barnes, the results of which were published in the Arizona Law Review in the summer of 2009. (Defendant's Br. 100-01). The study that Appellant's argument is based upon has already been reviewed by this Court. The defendant in *Johnson v. State*

challenged the constitutionality of Missouri's death penalty statute based on that same study. *Johnson v. State*, 333 S.W.3d 459, 471-72 (Mo. banc 2011). This Court found no error in the motion court's conclusions that the study was "severely flawed," marred by deficiencies in the data and by the lack of "professional and practical experiences in criminal law." *Id.* at 472. Moreover, as the Court pointed out, "even if the study was not flawed, it does not necessarily establish that Missouri's statutory scheme is unconstitutional." *Id.*

Defendant argues that the aggravating circumstances under Section 565.032, which make a homicide death-eligible, are unconstitutionally broad. (Defendant's Br. 100). Defendant emphasizes the "wantonly vile" aggravating circumstance. (Defendant's Br. 100). But this Court has rejected the argument that this aggravating circumstance is unconstitutionally broad. *See State v. Williams*, 97 S.W.3d 462, 473-74 (Mo. banc 2003); *State v. Cole*, 71 S.W.3d 163, 171-72 (Mo. banc 2002); *State v. Johns*, 34 S.W.3d 93, 113 (Mo. banc 2000); *State v. Johnson*, 22 S.W.3d 183, 191 (Mo. banc 2000); *State v. Knese*, 985 S.W.2d 759, 778 (Mo. banc 1999); *State v. Ervin*, 979 S.W.2d 149, 165-66 (Mo. banc 1997).

Without providing specific, factual analysis, Defendant also makes broad, conclusory statements about race in Missouri's use of the death penalty: "Missouri's use of the death penalty in the modern era has been

marked by substantial disparities by the race and gender of the victim of the crime"; "The pernicious influence of race in capital sentencing is by now well-known and documented." (Defendant's Br. 102).

The defendant in *State v. Taylor*, 18 S.W.3d 366 (Mo. bc 2000), also raised race-related Eighth- and Fourteenth-Amendment challenges to the imposition of his death sentence. The defendant cited "statistics demonstrating a disparity between black and white defendants and other defendants with similar crimes who were offered life without parole." *Taylor*, 18 S.W.3d at 376. This Court rejected this argument:

> These assertions have been rejected by this Court in *State v. Mallett* 732 S.W.2d 527 (Mo. banc 1987), and *State v. Taylor,* 929 S.W.2d 209 (Mo. banc 1996). *Mallett* specifically relied on *McCleskey v. Kemp* to determine that statistics alone would not be enough to prove an equal protection violation. In *McCleskey,* the United States Supreme Court held that "statistics indicating a disparate impact seldom suffice to establish an equal protection claim." *State v. Mallett,* 732 S.W.2d 527, citing *McCleskey v. Kemp,* 481 U.S. 279, 290, 107 S.Ct. 1756, 95 L.Ed.2d 262.
>
> To establish an equal protection violation, a defendant must show an intent to discriminate. *Mallett,* 732 S.W.2d at 538. Here, in addition to statistics, Taylor presents evidence that in other murder cases the

prosecutor did not seek the death penalty but either allowed the defendant to plead guilty and receive life in prison or that life imprisonment was the punishment that the prosecutor sought at trial. This is insufficient evidence for an equal protection violation.

Taylor, 18 S.W.3d at 376. This Court further noted that broad prosecutorial discretion does not make Missouri's death-penalty scheme unconstitutional, particularly in light of the fact that prosecutors must consider various factors before seeking the death penalty:

> Prosecutors are given broad discretion in seeking the death penalty. *See section* 535.030. A prosecutor's broad discretion does not extend to decisions deliberately based on unjustifiable standards such as race or some other entirely arbitrary factor. *Wayte v. United States,* 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985). Taylor must prove both the prosecutor's decision had a discriminatory effect on him and it was motivated by a discriminatory purpose. As the Supreme Court stated in *McCleskey,* "because discretion is essential to the criminal justice process," the Court demands "exceptionally clear proof" before it will infer that the discretion has been abused. 481 U.S. at 297, 107 S.Ct. 1756 and *Mallett,* 732 S.W.2d at 539. Prosecutors must look at a variety of factors including statutory aggravating circumstances, the type of crime, the strength of the evidence and the defendant's involvement in

the crime in deciding whether to seek the death penalty. Taylor does not present "exceptionally clear proof" the prosecutor's office arbitrarily seeks the death penalty for black defendants or for him in particular.

Taylor, 18 S.W.3d at 376-77.

The Sixth Circuit rejected a similar argument in *Coleman v. Mitchell*, 268 F.3d 417 (6th Cir. 2001). The *Coleman* court noted that *McCleskey* is still controlling and forecloses arguments such as those made by the defendant in *Coleman* and Defendant here:

> Nevertheless, *McCleskey* remains controlling law on the ability of statistically-based arguments concerning racial disparity to establish an unconstitutional application of the death penalty. Although the racial imbalance in the State of Ohio's capital sentencing system is glaringly extreme, it is no more so than the statistical disparities considered and rejected by the Supreme Court in *McCleskey* as insufficient to "demonstrate a constitutionally significant risk of racial bias affecting the ... capital sentencing process." *McCleskey,* 481 U.S. at 313, 107 S.Ct. 1756. And though the racial imbalance is, to say the least, extremely troubling, we find that the prosecutorial discretion under the Ohio death penalty scheme, and the disconcerting racial imbalances accompanying such discretion, nevertheless fall, under current Supreme Court law, within the "constitutionally permissible

range of discretion in imposing the death penalty." *Id.* at 305, 107 S.Ct. 1756.

Coleman, 268 F.3d at 441-42.

Moreover, Defendant has neither argued nor demonstrated prosecutorial misconduct in the case here. As explained by the D.C. Circuit federal court:

> Defendant … argues that the racial disparities in the raw numbers of defendants charged with capital crimes should invalidate the government's Notice of Intent to Seek the Death Penalty.… Prosecutorial discretion in charging is seldom infringed upon by the courts, especially when there has been no showing of prosecutorial misconduct. *See McCleskey v. Kemp,* 481 U.S. 279, 297, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) ("Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused."); *United States v. Armstrong,* 517 U.S. at 467–68, 116 S.Ct. 1480 (1996). Other federal courts have expressed a lack of confidence in statistics as evidence of racial disparities in capital cases. *See United States v. Armstrong,* 517 U.S. 456, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996), *United States v. Bin Laden,* at 260–63, *United States v. Cooper,* 91 F.Supp.2d 90, 115 (D.D.C.2000).

United States v. Edelin, 134 F. Supp. 2d 59, 85-86 (D.D.C. 2001).

Defendant also makes a geographical-disparity argument, which appears to be tied to his racial-disparity argument. (Defendant's Br. 102). But this geographical-disparity argument is essentially another argument that prosecutorial discretion in Missouri makes the state's death-penalty scheme unconstitutional. This Court has repeatedly rejected the claim that Missouri's statutory death penalty procedure is unconstitutional because it vests too much discretionary power in local prosecutors. *See*, *e.g.*, *Johnson*, 333 S.W.3d at 471; *State v. Forrest*, 290 S.W.3d 704, 716-17 (Mo. banc 2009); *State v. Ramsey*, 864 S.W.2d 320, 330 (Mo. banc 1993); *State v. Whitfield*, 837 S.W.2d 503, 515 (Mo. banc 1992); *State v. Powell*, 798 S.W.2d 709, 714 (Mo. banc 1990); *State v. McMillin*, 783 S.W.2d 82, 101-02 (Mo. banc 1990), abrogated on other grounds by *Morgan v. Illinois*, 504 U.S. 719 (1992).

Finally, Defendant concedes that the death penalty "is rarely done in Missouri." (L.F. D60P13). And with such small sample sizes, any statistics regarding race and geographical disparities cannot be sufficiently meaningful to conclude that Missouri's death-penalty scheme "clearly and undoubtedly violates the constitution." *Mixon*, 391 S.W.3d at 883; *see also Carmichael v. Chappius*, 848 F.3d 536, 549 n.79 (2d Cir. 2017) (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977)) ("[C]onsiderations

such as small sample size may, of course, detract from the value of [statistical] evidence.").

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 27,676 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2010 software.

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