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No. SC96924

In the Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

CRAIG M. WOOD,

Appellant.

Appeal from Greene County Circuit Court
Thirty-First Judicial Circuit
The Honorable Thomas E. Mountjoy, Judge

RESPONDENT'S BRIEF

ERIC S. SCHMITT
Attorney General

DANIEL N. McPHERSON
Assistant Attorney General
Missouri Bar No. 47182

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
Dan.McPherson@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

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STATEMENT OF FACTS

Craig M. Wood is appealing his conviction for murder in the first degree, section 565.020, RSMo, 2000, and his resulting sentence of death. (D.884 pp.1-3). Appellant was tried by a jury on October 23 through November 6, 2017, before Judge Thomas E. Mountjoy. (D.607 pp.85-90). Appellant does not contest the sufficiency of the evidence to support his conviction. Viewed in the light most favorable to the verdict, the following evidence was adduced at trial:

On February 18, 2014, the ten-year-old Victim[1] stayed home from school because she said she was sick. (Tr. 3275). She spent much of the day taking pictures on a phone that she used for photos and music, but that was not activated to send or receive phone calls or text messages. (Tr. 3277-78).

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[1] Appellant was also charged with rape in the first degree, section 566.030, RSMo, and sodomy in the first degree, section 566.060, RSMo, (D.649 pp.1-5). Although those charges were severed and not tried in this proceeding, (Tr. 1267), the underlying conduct was submitted to the jury as statutory aggravating circumstances. (D.867 p.7). The State will thus follow the provisions of section 595.226, RSMo, and not identify Victim by name.

Victim had recovered enough by the time school let out that she went to visit a friend. (Tr. 3279).

Carlos and Michelle Edwards were standing in the garage at their home at 3247 West Lombard in Springfield. (Tr. 2907-08, 2912-13, 2931, 2935-36). Carlos Edwards was taking a break from raking leaves in the front yard. (Tr. 2935-36). Both of the Edwardses saw a tan Ford Ranger drive by the house at least twice that day. (Tr. 2919, 2934-35).

Victim stopped on the sidewalk in front of the Edwardses' house. (Tr. 2914, 3275). She was looking at her phone. (Tr. 2914, 2940). The tan Ford Ranger, driven by Appellant, drove past Victim and then turned around. (Tr. 2923, 2941, 2946). The van pulled up to where Victim was standing. (Tr. 2917, 2941). Appellant asked Victim if she knew where Springfield Street was. (Tr. 2917, 2941). Victim said she did not know and began to walk away. (Tr. 2917, 2941). Appellant opened his door and asked Victim to come to him. (Tr. 2917-18, 2941). Victim took two or three steps towards Appellant, and he grabbed her and put her in the van and then drove off at a high speed. (Tr. 2918). Carlos Edwards ran after the van but was unable to catch up to it. (Tr. 2918, 2941). Michelle Edwards was able to get the license plate number and called 911 at about 4:47 p.m. (Tr. 2918, 2924).

Victim's phone was found near a neighboring house. (Tr. 2953, 2957, 2963-64, 3537-38). Police downloaded photographs taken by victim with the

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phone that day. (Tr. 2996). The photographs were taken during a span beginning at 11:09 a.m. to 4:40 p.m., and allowed police to identify the clothing Victim was wearing when she was abducted. (Tr. 3005-08, 3538).

Police later received information that the suspect might be at 1538 East Stanford. (Tr. 2974, 3024-25, 3081). No vehicles were at the house when officers first drove by at 8:00 p.m. (Tr. 2976, 2978, 3027, 3082). Officers set up surveillance, and saw the Ford Ranger pull into the driveway at about 8:30 p.m. (Tr. 2978-79, 3029-30). Officers pulled in behind the truck, and saw that the license plate matched the number they had been given. (Tr. 2979-80, 3031). An officer walked up to Appellant as he got out of the truck and identified himself as Springfield police. (Tr. 2981, 2986, 3032). Appellant began walking towards the officer, holding a roll of duct tape in one hand and car keys in the other. (Tr. 2981, 3032). Appellant then turned and walked the other way. (Tr. 3033). He tossed the duct tape into the bed of the truck, then turned around again and walked towards the tailgate, where he dropped the keys into the bed of the truck. (Tr. 2981-82, 3033). Appellant nodded his head affirmatively when he was asked if he knew why the police were there. (Tr. 2982-83, 3035). Appellant was breathing hard and seemed nervous. (Tr. 2983). He smelled of bleach. (Tr. 3034).

Appellant agreed to go to police headquarters to be interviewed. (Tr. 2987, 3037). He did not respond to any questions about Victim's whereabouts.

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(State's Ex. 85). Appellant did admit that the Ranger belonged to him and that no one else had driven it that day. (State's Ex. 85). Appellant told officers that he had made two trips to a nearby Walmart that day, where he had purchased bleach and Liquid Plumr. (State's Ex. 85). Appellant also said that he had gone to a laundromat shortly before returning home, and that his laundry was still there. (State's Ex. 85).

After Appellant was taken to the police station, the officers went to the house and announced themselves several times, asking anyone inside to respond. (Tr. 3046-47, 3049). When they got no response, the officers entered the house to see if Victim was inside and still alive. (Tr. 3047, 3049). As they entered the basement, the officers noticed a strong odor of bleach. (Tr. 3052). The entire area was wet, including the edge of the walls. (Tr. 3052). A fan was blowing back up the steps. (Tr. 3052). A gallon container of bleach was found in the basement next to a bottle of drain cleaner. (Tr. 3050). Several more bottles of bleach were later found in the basement and in the kitchen. (Tr. 3136, 3144-45, 3155).

After finding no one in the home, the police left and obtained a warrant. (Tr. 3055, 3057). Victim's unclothed body was found wrapped in black plastic bags that were contained in a 35-gallon plastic tub. (Tr. 3063-66, 3413). Rigor mortis had set in, indicating that the body had been in that position for some time. (Tr. 3380). Her body was wet and there was a strong

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smell of bleach. (Tr. 3380). Liquid in the bottom of the container was tested and determined to be consistent with bleach. (Tr. 3526-27). Victim's wrists and hands had ligature marks in a pattern that suggested that Victim had been struggling to get out of the ligature. (Tr. 3381-82, 3418-19, 3424). Her cheek and ear were bruised. (Tr. 3420). She had a gunshot wound to the back of her neck that was determined to be the cause of death. (Tr. 3381, 3434).

An autopsy showed that the barrel of the gun had been loosely touching Victim's head when the gun was fired. (Tr. 3431). The bullet went through the base of the skull and the base of the brain. (Tr. 3432). The bullet appeared to have been fired from a smaller caliber weapon. (Tr. 3433). Bullet fragments recovered from the body were tested and determined to be from a .22-caliber bullet. (Tr. 3449, 3458).

A .22-caliber shell casing was found on the floor. (Tr. 3153). Several guns were found throughout the house, many of them out in the open and all larger in caliber than a .22. (Tr. 3159-62, 3165-67, 3179-80). A .22-caliber rifle was found locked inside a gun safe in a storage room. (Tr. 3176, 3180, 3183). The shell casing was determined to have been fired from that rifle. (Tr. 3463-64). The jury heard testimony that a .22-caliber weapon makes less noise and less mess than a larger caliber weapon. (Tr. 3186).

The autopsy also revealed that Victim had suffered injuries to her vaginal area and anus that were consistent with a penis or some other object

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being inserted into them. (Tr. 3427-28). DNA tests on swabs taken from Victim did not disclose the presence of semen, but the DNA analyst testified that did not rule out the possibility of a sexual assault. (Tr. 3520-21).

Appellant's bed had been stripped of any sheets or blankets. (State's Ex. 329). A purple folder found in a bedroom dresser contained photographs of girls who had been students at the middle school where Appellant worked as an aide and as a football coach. (Tr. 3170-71, 3174, 3221, 3224, 3234, 3553). The folder also contained two handwritten stories that fantasized about sexual encounters between an adult male and thirteen-year-old girls. (Tr. 3169; State's Exs. 347, 348).

Victim's clothing was found in a dumpster behind a strip mall that was located near Appellant's home. (Tr. 3287, 3326-27, 3545; State's Ex. 206). Surveillance video from a camera located in the alley showed Appellant putting the clothes in the dumpster shortly after 7:00 p.m. (Tr. 3297, 3303, 3306, 3544). Hairs recovered from the clothing were tested and found to be consistent with Appellant's hair. (Tr. 3497-98, 3513).

A Walmart receipt found in Appellant's truck showed that he had purchased a laundry bag and duct tape at about 8:17 p.m. (Tr. 3337). Police obtained video surveillance footage from Walmart that showed Appellant making two trips to the store on February 18. (Tr. 2991). The first trip was

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less than an hour after Victim was abducted. (Tr. 3541-42). Appellant purchased two bottles of bleach and a bottle of Liquid-Plumr. (Tr. 3540-41).

Bedding, a blanket, a towel, and various items of clothing were found in dryers at the laundromat that Appellant had visited shortly before his encounter with the police. (Tr. 3258, 3315-21). Among the items found in one of the dryers was the shirt that Appellant was wearing when he made his first trip to Walmart. (Tr. 3542).

Appellant did not testify or present any evidence in the guilt phase. (Tr. 3560-3564). The jury deliberated about an hour before finding Appellant guilty of murder in the first degree. (Tr. 3619-21).

The State presented testimony in the penalty phase from an investigating detective who said he could find no connection between Appellant and the victim, or the victim's family. (Tr. 3699).

A computer forensic examiner testified that Appellant received text messages from friends after an Amber Alert was issued for a 2008 gold Ranger. (Tr. 3701, 3703-04). One friend asked Appellant, "You haven't been hunting, have you?" (Tr. 3703). Another friend texted, "Oh, great, I just got an Amber Alert about a gold Ford Ranger. What have you and Bear done???" (Tr. 3704). Appellant's dog was named Bear. (Tr. 3699).

The mother of one of Victim's friends testified that Victim was an amazing little girl who was like a member of the family. (Tr. 3706). Victim

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was at her house right after school on February 18. (Tr. 3706-07). She identified pictures that Victim took in her house that day with her cell phone. (Tr. 3708). The mother testified about sending Victim home that afternoon, about learning that Victim had been abducted on her way home, and about the effect that Victim's death had on her daughter and on herself. (Tr. 3709-12, 3716).

One of Victim's teachers described Victim as a happy-go-lucky girl who was loved by everyone else. (Tr. 3718). She said that Victim was a very giving person. (Tr. 3718-19). The teacher testified about her reaction to learning of Victim's death and the difficulty of dealing with that at school. (Tr. 3720-21). She also testified that Victim's classmates struggled to cope with Victim's death. (Tr. 3726-28).

Victim's great-grandmother testified that Victim would visit her farm every two or three months, and loved to run and play in the yard. (Tr. 3730). Victim picked wildflowers to give to great-grandmother as a bouquet. (Tr. 3731). Great-grandmother read a poem that another woman had written to try to comfort her. (Tr. 3731-33).

Victim's aunt identified pictures of Victim and family members at various activities. (Tr. 3725, 3740-48). Aunt testified that Victim's death left an "unfillable void" in her family's life. (Tr. 3749). She testified that Victim's brother was a different person than before the murder, that he was closed off

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and scared of the dark. (Tr. 3751). Another aunt testified that a vigil was held for Victim a few days after the murder that attracted more than 10,000 people. (Tr. 3760-61).

A minister testified about Victim's participation in youth activities at his church. (Tr. 3764-65). He also testified to ministering to Victim's family after her body was found. (Tr. 3767-69). He testified that Victim's death had turned Springfield from a town to a city, where many parents became unwilling to let their children play outside unsupervised. (Tr. 3770-71).

Appellant's father testified for the defense in the penalty phase. (Tr. 3780). Jim Wood testified that Appellant had never fully made the transition to independent adult life. (Tr. 3787). He said Appellant did not expand his circle of friends beyond those of his childhood, and he did not have any romantic relationships post-college. (Tr. 3789-92). Mr. Wood said that he had problems with excessive drinking and was concerned that Appellant did as well. (Tr. 3812). Mr. Woods, who had a history of depression, also saw signs suggesting that Appellant suffered from the same. (Tr. 3814, 3816). Appellant's younger brother suffered from the same issues, but managed to turn his life around. (Tr. 3818-19).

Mr. Wood testified that he and Appellant shared a passion for coaching youth football. (Tr. 3795). Mr. Wood identified photographs depicting Appellant at various stages of his life. (Tr. 3797-3800, 3829-30). He also

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identified letters of appreciation written to Appellant by parents of students Appellant had coached. (Tr. 3805-06).

Appellant's mother, Genie Wood, testified that she dealt with depression while raising Appellant and his brother. (Tr. 3977, 3985). She said that Appellant and his brother resented each other. (Tr. 3987). Ms. Wood described Appellant as the class clown in high school. (Tr. 3990). She said that Appellant came daily to a farm that she and her husband owned to feed the animals. (Tr. 3993-94).

James Dishman was Appellant's friend from childhood. (Tr. 3858). He told a story of how Appellant had saved a man from a fire in the apartment complex that they lived in while in college. (Tr. 3863-64). Dishman described activities that they liked to do together, including playing in a bluegrass band. (Tr. 3867, 3870-71). Dishman said that Appellant had some depression over the course his life had taken, and that the depression had increased in the months before the murder. (Tr. 3877, 3882). Dishman sent the text message following the Amber Alert that asked Appellant if he had been hunting. (Tr. 3883). Dishman said that he was giving Appellant "crap," and that he never thought Appellant was actually involved. (Tr. 3883).

Doran Morris was another friend of Appellant from childhood. (Tr. 3911). He said that Appellant drank a twelve-pack or more of beer on a daily

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basis. (Tr. 3917). He said Appellant also regularly used marijuana and methamphetamine. (Tr. 3921).

William Kilburn was a long-time friend of Appellant who played in his bluegrass band. (Tr. 3950-51). He described Appellant as a functioning alcoholic who drank eight to twelve beers every night and more on weekends. (Tr. 3955). Appellant also used marijuana, cocaine, LSD, and methamphetamine. (Tr. 3965). Kilburn said that Appellant had become more reserved over the years, and perhaps a little depressed. (Tr. 3957). Kilburn said he and other friends of Appellant were in disbelief when they heard that Appellant had been arrested. (Tr. 3968). Kilburn testified that he saw Appellant about two weeks before the crime and did not notice anything different or unusual about him. (Tr. 3974).

George Hunt was a sergeant at the Greene County Jail, where Appellant was held pending trial. (Tr. 3889-90). Sergeant Hunt testified that, aside from one incident where Appellant hoarded pills as part of a potential suicide attempt, Appellant had not had any disciplinary problems at the jail. (Tr. 3905-07). Deputy Jeffrey Wright also worked at the jail and testified that Appellant had not caused any problems or violated any rules, other than the hoarding of pills. (Tr. 3941-48).

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Mike McDevitt, a Catholic priest, visited Appellant in jail. (Tr. 4000, 4005, 4007). Father McDevitt said that he believed Appellant showed actual remorse for his actions. (Tr. 4018).

The jury returned a verdict stating that it was unable to agree on punishment. (Tr. 4110). The jury unanimously found beyond a reasonable doubt the following statutory aggravating circumstances:

> Number 1, Subparagraph 1: The murder of [Victim] involved torture and depravity; that the defendant killed [Victim] after she was bound or otherwise rendered helpless by the defendant, and the defendant thereby exhibited a callous disregard for the sanctity of all human life.
>
> Number 2, Subparagraph 2: That the defendant's selection of the person he killed was random and without regard to the victim's identity and that defendant's killing of [Victim] thereby exhibited [] a callous disregard for the sanctity of human life.
>
> Number 2, full paragraph: Whether the murder of [Victim] was committed for the purpose of avoiding arrest;
>
> Number 3: Whether the murder of [Victim] was committed while the defendant was engaged in rape;
>
> Number 4: Whether the murder of [Victim] was committed while the defendant was engaged in sodomy;

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Number 5: Whether the murder of [Victim] was committed while the defendant was engaged in kidnapping;

Number 6: Whether [Victim] was a witness or potential witness of a pending investigation of the kidnapping of [Victim].

(Tr. 4111-12). The jury did not unanimously find that there were facts and circumstances in mitigation of punishment that were sufficient to outweigh the facts and circumstances in aggravation of punishment. (Tr. 4111).

The court subsequently sentenced Appellant to death. (Tr. 4169-70). In doing so, the court found beyond a reasonable doubt that the State had proven the six statutory aggravating circumstances found by the jury. (Tr. 4166). The court further found that the facts and circumstances in mitigation of punishment were not sufficient to outweigh the facts and circumstances in aggravation of punishment. (Tr. 4166). The court noted that it had given "very serious consideration" to both life imprisonment without the possibility of parole and the death sentence. (Tr. 4167).

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STANDARD OF REVIEW

The majority of Appellant's claims involve either alleged error in the admission of evidence (Points I, II, III, VI), or the constitutionality of Missouri's death penalty statutes (Points IV, V, and IX). To avoid repetition, the following standards of review applies to those points.

Evidentiary Rulings.

A trial court has broad discretion to admit or exclude evidence at trial. *State v. Blurton*, 484 S.W.3d 758, 769 (Mo. 2016). A trial court's decision regarding the admissibility of evidence is reviewed for an abuse of discretion. *Id.* A trial court abuses its discretion only if its decision to admit evidence is clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration. *Id.* Claims of trial court error are reviewed for prejudice, not mere error. *Id.* This Court will reverse the trial court's decision only if there is a reasonable probability that the error affected the outcome of the trial or deprived the defendant of a fair trial. *Id.* A trial court's ruling on the admissibility of evidence will be upheld if it is sustainable under any theory. *State v. Mort*, 321 S.W.3d 471, 483 (Mo. App. S.D. 2010); *State v. Pascale*, 386 S.W.3d 777, 780 (Mo. App. E.D. 2011); *State v. Miller*, 220 S.W.3d 862, 868 (Mo. App. W.D. 2007).

Constitutional Claims

"This Court reviews a constitutional challenge to a statute *de novo*." *State v. Mixon*, 391 S.W.3d 881, 883 (Mo. 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.*

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ARGUMENT

I.

The trial court did not abuse its discretion in admitting photographs from Victim's cell phone during the guilt phase of trial.

Appellant claims that the trial court abused its discretion in admitting, during the guilt phase of trial, thirty-two photographs found on Victim's cell phone that she was carrying when she was abducted. But the photographs were relevant to the circumstances surrounding the crime and Appellant would not be prejudiced in any event given the strong evidence of deliberation, which was the only element challenged in the guilt phase.

A. Underlying Facts.

Sergeant Steve Schwind, a supervisor of the Springfield Police Department's computer forensics and child victims unit, testified that he was able to download thirty-two photographs from Victim's cell phone that were taken on the day that Appellant abducted her. (Tr. 2970-73, 2996). He identified State's Exhibits 14 through 45 as those photos. (Tr. 2996-97).

Appellant objected when the prosecutor moved for admission of the photos. (Tr. 2997). Appellant argued that the photographs were irrelevant to any issues in the case and amounted to victim impact evidence that the State was trying to introduce in the guilt phase. (Tr. 2997-98). The prosecutor responded that the photographs were relevant and probative because they

established a timeline for Victim's activities that day, showed what clothing she was wearing, and showed that, prior to her death, Victim did not have the injuries that were later found during the autopsy. (Tr. 2999). The court viewed the photos and overruled the objection, finding that the probative value of the photographs outweighed the prejudicial effect, and granted Appellant a continuing objection. (Tr. 2997, 3004).

Sergeant Schwind then identified the date and time that each photograph was taken. (Tr. 3005-08). All of the photos were taken on February 18, 2014, between 11:09 a.m. and 4:40 p.m. (Tr. 3005-08). The record does not reflect whether the photographs were published to the jury during the testimonial portion of the trial.

The prosecutor discussed some of the photographs during his initial argument. He used the time stamps on the photographs to establish when Victim arrived at her friend's house and when she left. (Tr. 3592). He noted that Victim took her time going home and pointed out a picture she took of the house where her phone was later found. (Tr. 3592). He also noted that Victim stopped to climb a tree and pointed out that she was wearing the same clothes that were found in the dumpster. (Tr. 3592). He also said that the 911 call was placed just twelve minutes after that photo was taken. (Tr. 3593). The prosecutor later noted that the injuries found on Victim's face when her body was discovered were not present in the selfies taken on her

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phone. (Tr. 3603). It is not clear whether those photographs were displayed to the jury during that argument or whether the prosecutor was asking the jury to look at the photos during its deliberations. The record is also silent as to whether the exhibits were sent to the jury room. Appellant included a claim of error in his motion for new trial. (D.871 pp.16-17).

B. Analysis.

To be admissible, evidence must be both logically and legally relevant. *State v. Tisius*, 92 S.W.3d 751, 760 (Mo. 2002). Evidence is logically relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence, or if it tends to corroborate evidence which itself is relevant and bears on the principal issue of the case. *Id.* The determination of legal relevance, the balancing of the probative value of the proffered evidence against its prejudicial effect on the jury, rests within the sound discretion of the trial court. *Id.*

The State offered three reasons why the photographs were relevant: (1) to establish a timeline of Victim's activities on the day she was abducted and murdered; (2) to show that she was wearing the clothing that Appellant discarded in a dumpster that evening; and (3) to demonstrate that some of the injuries found on Victim's body were inflicted after Appellant kidnapped her. (Tr. 2999). Concerning the timeline, the prosecutor noted that one

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picture in particular showed the yard where Victim's phone was later found and that more pictures were taken after that picture, establishing that the phone was left in the yard later. (Tr. 3002).

Defense counsel conceded that some of the pictures were admissible, but argued that not every photograph should be admitted. (Tr. 3000, 3003-04). Appellant makes that same argument in his brief, and also contends that the photographs went to undisputed issues. But the State, because it must shoulder the burden of proving the defendant's guilt beyond a reasonable doubt, should not be unduly limited in its quantum of proof. *State v. Smith*, 32 S.W.3d 532, 546 (Mo. 2000). Even if a matter established by the evidence is not actively contested, "it remains the [S]tate's burden to establish all essential elements of a crime without relying on a defendant's extrajudicial admissions, statements or confessions." *Id.* (internal quotation marks omitted). As the trial court noted after viewing the photos, all of the photographs were part of the timeline and their probative value outweighed any prejudicial effect. (Tr. 3004).

Appellant complains that most of the photographs amounted to victim impact evidence that is inadmissible in the guilt phase of that trial. Appellant cites to two Missouri cases to support his argument. The first of those cases did not involve the admission of victim impact evidence in the guilt phase of a trial, but instead concerned a prosecutor's closing argument

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that described the defendant as a killer and his victim as a helpless paraplegic. *State v. Whitfield*, 837 S.W.2d 503, 511 (Mo. 1992). The second case concerned testimony elicited on redirect examination that was irrelevant because it did not refute any testimony that had been elicited on cross-examination. *State v. Earvin*, 743 S.W.2d 125, 128 (Mo. App. E.D. 1988).

Appellant also cites to two cases from outside Missouri. But both of those cases indicate that victim impact evidence can be admissible in the guilt phase of a trial when it is relevant to guilt phase issues. *State v. Heiney*, 2018 WL 4055559 (Ohio Ct. App., Aug. 24, 2018) ("Victim impact evidence is admissible, however, when it is related to the facts attendant to the offense."); *State v. Graham*, 650 S.E.2d 639, 646 (N.C. Ct. App. 2007) (finding that victim impact evidence is relevant and admissible in the guilt phase when it "tends to show the context or circumstances of the crime itself[.]"). The evidence in this case met those standards.

Appellant is not entitled to a new trial even if any or all of the photos were incorrectly admitted. Errors in admitting evidence require reversal only when the evidence is prejudicial to the point that it is outcome determinative. *State v. Johnson*, 207 S.W.3d 24, 42 (Mo. 2006). A finding of outcome-determinative prejudice expresses a judicial conclusion that the erroneously admitted evidence so influenced the jury that, when considered with and balanced against all evidence properly admitted, there is a reasonable

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probability that the jury would have acquitted but for the erroneously admitted evidence. *Id.*

Appellant acknowledges that his defense at trial was to admit that he committed the charged acts, but to contest whether he acted with deliberation. (Appellant's Brf., p.50 n.6). The properly admitted evidence clearly established deliberation, and there is thus not a reasonable probability that the jury would have acquitted Appellant of first-degree murder had the photos not been admitted. *See Tisius*, 92 S.W.3d at 764 ("Absent evidence of deliberation, an intentional killing is second-degree murder.").

Proof of deliberation must ordinarily be provided through the circumstances surrounding the crime. *State v. Strong*, 142 S.W.3d 702, 717 (Mo. 2004). Proof of deliberation does not require proof that the defendant contemplated his actions over a long period of time, only that the killer had ample opportunity to terminate the attack once it began. *Id.* Evidence of a prolonged struggle, multiple wounds, or repeated blows may support an inference of deliberation. *Tisius*, 92 S.W.3d at 764. Victim was only shot once, but that shot was delivered to the back of her neck at point-blank range, which would be indicative of deliberation. (Tr. 3381, 3431). Victim also had multiple other wounds to her body, including her face. (Tr. 3420). Victim was bound and the ligature marks showed that she had struggled to free herself

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from those bindings. (Tr. 3381-82, 3418-19, 3424). The evidence supports an inference of a prolonged struggle between Victim and Appellant.

In addition, Appellant's actions after the murder can also support a finding of deliberation. *Tisius*, 92 S.W.3d at 764. Failure to seek medical help for a victim strengthens the inference that the defendant had deliberated. *Strong*, 142 S.W.3d at 717. Appellant not only failed to seek medical attention for Victim, he denied any knowledge of her whereabouts to the police, (State's Ex. 85), even as her body sat undiscovered in his basement. *Id.* Appellant instead spent his time following the murder trying to cover-up the crime by dousing the body with bleach, buying more bleach, putting her body inside of a bag and placing it in a plastic container, traveling to a dumpster to get rid of Victim's clothes, and going to a laundromat to wash his own clothes to remove any evidence that might link him to the murder. (Tr. 3063-66, 3258, 3287, 3297, 3303, 3306, 3315-21, 3326-27, 3380, 3413, 3526-27, 3540-41, 3544-45). Appellant also tried to conceal the weapon used to kill Victim by locking it in a gun safe, even though several other weapons were left in the open in other parts of the house, including two shotguns located next to the safe.[2] (Tr. 3123-24, 3176, 3180, 3183, 3463-64; State's Ex. 49). Attached to the rifle was an empty ten-round magazine, and a live .22-caliber round was

[2] *See* Point II below for discussion of the evidence of those weapons.

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found nearby. (Tr. 3181, 3183-84). The jury could reasonably infer that Appellant unloaded the magazine after shooting Victim. Disposing of evidence supports an inference of deliberation. *Tisius*, 92 S.W.3d at 764.

In addition to the strong evidence of deliberation, the record does not show that the prosecutor used the photographs in an inflammatory manner. The witness who identified the photographs merely noted the times that the photographs were taken. (Tr. 3005-08). The only mention of the photographs in closing argument was to demonstrate how they established the timeline of events and also the absence of injuries before Victim was abducted. (Tr. 3592-93, 3603). And the record does not provide any insight as to whether, or to what extent, the pictures were displayed to the jury.

Appellant goes on to argue that the photos may also have affected the jury's deliberations in the penalty phase. Interestingly, he does not argue that the pictures could not have been admitted separately in the penalty phase had they been excluded in the guilt phase.

Victim impact evidence is admissible under the United States and Missouri Constitutions. *State v. Driskill*, 459 S.W.3d 412, 431 (Mo. 2015). The trial court has broad discretion to admit whatever evidence it determines may be helpful to the jury in assessing punishment. *Id.* The State is permitted to show the victims are individuals whose deaths represent a unique loss to society and to their family and that the victims are not merely

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faceless strangers. *Id.* Victim impact evidence violates the constitution only if it is so unduly prejudicial that it renders the trial fundamentally unfair. *Id.*

The pictures taken by Victim showed her uniqueness as a human being by giving the jury a glimpse into her life. Further, admission of photographs is not per se prejudicial to a defendant. *Id.* The substance of the photographs here cannot be said to be unduly prejudicial as they depicted mundane, everyday events, with several of the pictures depicting nothing more than the neighborhood where she was walking. As to the number of photographs, this Court has not found an abuse of discretion in admitting twenty-seven photographs of the victim and his family. *Id.* (citing *State v. Gill*, 167 S.W.3d 184, 195 (Mo. 2005) (victim's mother stood near the jury to show it the photographs). Because the photographs would have been separately admissible in the penalty phase, Appellant cannot show prejudice in his sentencing from their admission in the guilt phase. The fact that the jury deadlocked does not support a finding of undue prejudice where there is nothing to connect the deadlock to the photographic evidence. *State v. McLaughlin*, 265 S.W.3d 257, 273 (Mo. 2008). Appellant's point should be denied.

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II.

Evidence of guns was properly admitted.

Appellant claims that the trial court abused its discretion in admitting testimony and photographs of firearms, ammunition, and related items that were found in Appellant's home. But the evidence was relevant and admissible as it supported a finding of deliberation.

A. Underlying Facts.

Appellant filed a motion in limine to exclude evidence of guns found in his home. (D.817 p.1). The court denied the motion. (D.607 p.86).[3]

FBI Special Agent Jonathan Tucker assisted Springfield police in collecting evidence from Appellant's home. (Tr. 3110, 3112-13). He described for the jury a diagram of the house and identified a storage room where ammunition and loading supplies were kept. (Tr. 3123-24). Appellant objected and renewed his motion in limine to exclude evidence of guns. (Tr. 3124-25). The court adhered to its earlier ruling. (Tr. 3126). Appellant again objected when Special Agent Tucker was asked to identify photographs depicting firearms and related items that were scattered throughout the

[3] The motion also sought to prohibit evidence of other items found in the home. (D.817 p.1). The court granted that part of the motion. (D.607 p.86).

house. (Tr. 3157, 3163, 3178). The court admitted the photographs over objection. (Tr. 3159, 3165, 3178).

Special Agent Tucker identified photographs of five handguns, a handgun case, and a shell casing found in the dining room. (Tr. 3159-62). The bedroom contained a shotgun, and a .40-caliber semiautomatic pistol that was inside a handgun case. (Tr. 3164-67). The area around the gun safe in the storage room contained ammunition, a reloading station (including a speed reloader), a .44-caliber revolver, and two shotguns. (Tr. 3176-80, 3182). Locked inside the gun safe was the .22-caliber rifle used in the murder, along with other weapons. (Tr. 3180-81; (State's Exs. 373-374). Special Agent Tucker testified that the .22-caliber made a softer noise and less of a mess than the other caliber weapons he found in the house. (Tr. 3186).

In closing argument, the prosecutor talked about the evidence that supported a finding of deliberation. He noted that Appellant had stripped the bed to get rid of evidence that he had raped and sodomized Victim there. (Tr. 3595; State's Ex. 329). He pointed out that a handgun was on the nightstand next to the bed where he raped Victim, but rather than use that, he instead chose the smallest caliber weapon he had because it would make the least noise and the least mess. (Tr. 3596; State's Exs. 336-337). The prosecutor argued that Appellant took Victim to the basement in order to further dampen the noise, and again reiterated that Appellant had several guns to

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choose from and deliberately picked the smallest weapon. (Tr. 3604-05). The prosecutor also noted that Appellant unloaded the gun and hid it in the gun safe, instead of leaving it out in the open with his other weapons. (Tr. 3596-97). Appellant included a claim of error in his motion for new trial. (D.871 pp.14-15).

B. Analysis.

This Court has recognized the existence of "a line of cases that stand for the principle that 'weapons unconnected with either the accused or the offense for which he is standing trial lack any probative value and their admission into evidence is inherently prejudicial.'" *State v. Hosier*, 454 S.W.3d 883, 895 (Mo. 2015) (quoting *State v. Grant*, 810 S.W.2d 591, 592 (Mo. App. S.D. 1991)). This Court has found that principle inapplicable to weapons and ammunition found in the defendant's possession shortly after the charged murders took place, even when those weapons were not alleged to have been used in the murders. *Id.*

That is in keeping with another principle recognized by Missouri courts, that weapons found at or near a crime scene or that help explain the manner in which a crime is committed are generally found to be admissible. *State v. Speaks*, 298 S.W.3d 70, 81 (Mo. App. E.D. 2009); *State v. Ramsey*, 820 S.W.2d 663, 666 (Mo. App. W.D. 1991). Such evidence is properly

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admissible where it throws light upon a material fact in issue. *Speaks*, 298 S.W.3d at 81; *State v. Roller*, 31 S.W.3d 152, 158 (Mo. App. S.D. 2000).

As noted in the previous point, Appellant admitted to killing Victim, but argued that he should be convicted of second-degree murder because he did not deliberate upon the killing. Evidence of the weapons was relevant to establishing deliberation. Physical evidence was found suggesting that Victim had been raped and sodomized. (Tr. 3427-28). The fact that Appellant's bed had been stripped and that Appellant had taken the sheets to a laundromat to clean them supported an inference that the sexual assault had taken place in the bedroom. (Tr. 3258, 3315-21; State's Exs. 329). A handgun was available to Appellant on the nightstand next to the bed, but instead of using it he took Victim to the basement and selected the smallest caliber gun he owned. (Tr. 3180-81, 3186; State's Exs. 336-337). He then locked that weapon in the gun safe, supporting an inference that he tried to cover up his crime. (Tr. 3180-81).

The prosecutor argued those facts and never suggested to the jury that Appellant was an evil man because he owned lots of guns. (Tr. 3596, 3604-05). And, any prejudicial effect that the guns would have had was minimized by admitting only photographs and not the guns, ammunition, and related items themselves. *Hosier*, 454 S.W.3d at 896.

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Furthermore, as noted in the previous point, Appellant is not entitled to a new trial even if any or all of the photos were incorrectly admitted. Errors in admitting evidence require reversal only when prejudicial to the point that they are outcome determinative. *Johnson*, 207 S.W.3d at 42. A finding of outcome-determinative prejudice expresses a judicial conclusion that the erroneously admitted evidence so influenced the jury that, when considered with and balanced against all evidence properly admitted, there is a reasonable probability that the jury would have acquitted but for the erroneously admitted evidence. *Id.* The properly admitted evidence aside from the guns clearly established deliberation, and there is thus not a reasonable probability that the jury would have acquitted Appellant of first-degree murder had the photos not been admitted. *See Tisius*, 92 S.W.3d at 764 ("Absent evidence of deliberation, an intentional killing is second-degree murder.").

Proof of deliberation must ordinarily be provided through the circumstances surrounding the crime. *Strong*, 142 S.W.3d at 717. Proof of deliberation does not require proof that the defendant contemplated his actions over a long period of time, only that the killer had ample opportunity to terminate the attack once it began. *Id.* Evidence of a prolonged struggle, multiple wounds, or repeated blows may support an inference of deliberation. *Tisius*, 92 S.W.3d at 764. Victim was only shot once, but that shot was

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delivered to the back of her neck at point-blank range, which would be indicative of deliberation. (Tr. 3381, 3431). Victim also had multiple other wounds to her body, including her face. (Tr. 3420). Victim was also bound and the ligature marks showed that she had struggled to free herself from those bindings. (Tr. 3381-82, 3418-19, 3424). The evidence supports an inference of a prolonged struggle between Victim and Appellant.

In addition, Appellant's actions after the murder can also support a finding of deliberation. *Id.* Failure to seek medical help for a victim strengthens the inference that the defendant had deliberated. *Strong*, 142 S.W.3d at 717. Appellant not only failed to seek medical attention for Victim, he denied any knowledge of her whereabouts to the police, (State's Ex. 85), even as her body sat undiscovered in his basement. *Id.* Appellant instead spent his time following the murder trying to cover-up the crime by dousing the body with bleach, buying more bleach, putting her body inside of a bag and placing it in a plastic container, traveling to a dumpster to get rid of Victim's clothes, and going to a laundromat to wash his own clothes to remove any evidence that might link him to the murder. (Tr. 3063-66, 3258, 3287, 3297, 3303, 3306, 3315-21, 3326-27, 3380, 3413, 3526-27, 3540-41, 3544-45). Disposing of evidence supports an inference of deliberation. *Tisius*, 92 S.W.3d at 764.

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Appellant goes on to argue that the photos may also have affected the jury's deliberations in the penalty phase. That argument fails because the evidence would have been separately admissible in the penalty phase, where the State is allowed to introduce any evidence pertaining to the defendant's character. *State v. Cole*, 71 S.W.3d 163, 174 (Mo. 2002). Appellant also cannot provide any basis for his prejudice argument other than that the jury deadlocked on punishment. The fact that the jury deadlocked does not support a finding of undue prejudice where there is nothing to connect the deadlock to the photographic evidence. *McLaughlin*, 265 S.W.3d at 273. Appellant's point should be denied.

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III.

The trial court did not abuse its discretion in admitting photos of teenage girls found in Appellant's possession, and stories written by Appellant that fantasized about having sex with teenage girls.

Appellant claims that the trial court abused its discretion in admitting evidence in the guilt phase of the contents of a folder found in Appellant's home that contained fictional stories that Appellant wrote of sexual encounters with thirteen-year-old girls, a letter, and photographs of four of Appellant's female students. But Appellant is foreclosed from challenging the admission of the evidence since it was he who first mentioned those items to the jury in his opening statement as part of his trial strategy.

A. Underlying Facts.

Appellant filed a motion in limine seeking to prohibit the admission of the contents of a purple folder found in his home. (D.816 p.1). Those items included handwritten stories of sexual encounters with minors, photos of four girls who attended the middle school where Appellant worked, and other notes of alleged sexual encounters. (D.816 p.1). The court denied the motion. (D.607 p.86).

The prosecutor did not mention the contents of the folder during his opening statement. (Tr. 2878-98). Defense counsel began his opening statement by telling the jury that the crime "was an impulsive act, but

without planning or preparation by a man who was driven by an unhealthy, unhealthy sexual compulsion, methamphetamine, and an irrational mind." (Tr. 2899). Defense counsel went on to support his theory by discussing the contents of the folder:

> Now, compelled? Compelled by what? By what? When the police search the house after [Victim]'s body is discovered, they find in a bedroom dresser drawer a purple folder, they call it a portfolio, not much different than this. In this purple folder, they find handwritten stories. They are stories about sexual fantasies, two of them fantasies about having sex with thirteen-year-old girls.
>
> In one of the stories, the little girl is drugged with some sleeping medication. And after she passes out, she is sexually abused, photographed, and videoed. In the other story, also a thirteen-year-old girl, she purportedly consents to sexual activity with Craig during a game of truth and dare. These stories are in the folder, and it's disturbing, even disgusting as they are, they show that he has an unhealthy compelling sexual interest in prepubescent girls, young teenage girls, that doctors call a paraphilic disorder.

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> Also in the folder are four photographs, and these are pictures of girls who have gone through this school, the middle school, Pleasant View Middle School where he works as a teachers aide and a suspension supervisor, just sits monitoring kids that are undisciplined. And he's the boys football coach.
>
> The four pictures of these girls, two of them the names of the girls match the names of the girls in the stories, in the fantasy stories; so, of course, the police find these girls and have them interviewed by professionals that do this all the time at the Child Advocacy Center.
>
> All four of the girls, separately interviewed, say the same thing. This guy was pretty quiet. He hardly ever spoke to me. When he did, he didn't say much. He never said anything, he never did anything, he never acted in any way that made me feel uncomfortable at all. All four said that they were surprised that he had been arrested.

(Tr. 2901-03). Counsel went on to argue that methamphetamine use finally unleashed Appellant's long suppressed sexual urges for young teenage girls. (Tr. 2903-04).

Appellant renewed his motion in limine during the testimony of FBI Special Agent Jonathan Tucker, who assisted in collecting evidence from

Appellant's home. (Tr. 3130). The court denied the motion. (Tr. 3131). Appellant also objected when the prosecutor sought to admit a photograph of the folder and the folder itself, along with its contents. (Tr. 3163, 3167-68). The court overruled the objection and allowed the prosecutor to pass the exhibits to the jury. (Tr. 3169, 3173).

In his initial argument to the jury, the prosecutor contended that the stories demonstrated Appellant's intent:

> And you know his intent was to have vaginal and anal sex because he wrote about it. He wrote about that that's what he wanted to do to a little girl. What else did he write about when he was talking in these stories when he was actually having either anal sex or vaginal sex? What does he do? He pulls out when he ejaculates. That's what he tells us he does. That's his intent.

(Tr. 3602). Defense counsel argued that the stories "absolutely provides motive for the kidnapping and the rape and the sodomy." (Tr. 3608-09). But he argued that no one in the stories was killed. (Tr. 3609). Counsel argued that the evidence did not show a plan to rape, sodomize, and murder Victim, but that Appellant's actions were the result of compulsion. (Tr. 3609-10).

The prosecutor responded in his closing argument that there was no evidence of compulsion:

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> What about those stories, those fantasies? How did those end? In one, the drugged girl, she wakes up. She doesn't know anything really happened. Got away with it. Second time, she enjoys it, right? She likes it. She quietly goes to sleep beside the defendant or with the defendant. That's not what happened in this case.
>
> [Victim] struggled. [Victim] fought. [Victim] didn't want to have sex with the defendant. Yeah, he knew the jig – remember, in opening statement, he knew the jig was up, right? But as he drives that twelve minutes from where he took her, [Victim] fought him, right? No one is on his tail right then.
>
> He probably knows he's got limited time to do what he wants to do. So he goes to the house and he does it. He does it quick, right, because there's only like 33 minutes there, if you do all the math in the driving time and when he's at Walmart. But she didn't just go to sleep or wake up and not know anything happened. So she's got to be disposed of, like trash.

(Tr. 3614-15). Appellant included a claim of error in his motion for new trial. (D.871 pp.15-16).

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B. Analysis.

Appellant contends that the stories and pictures were inadmissible propensity evidence, which is evidence of uncharged crimes, wrongs, or acts, used to establish that the defendant has a natural tendency to commit the crimes charged. *State v. Shockley*, 410 S.W.3d 179, 193 (Mo. 2013). Evidence of prior uncharged misconduct is inadmissible for the sole purpose of showing the propensity of the defendant to commit such acts, but is admissible if it has some legitimate tendency to directly establish the defendant's guilt of the charge for which he is on trial. *Id.*; *State v. Jensen*, 524 S.W.3d 33, 41 (Mo. 2017). Evidence of uncharged misconduct may be admissible if it tends to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; or (5) the identity of the person charged with commission of the crime on trial. *Jensen*, 524 S.W.3d at 41. Evidence of uncharged misconduct may also be admitted to present a complete and coherent picture of the circumstances of the crime committed. *Id.*

As an initial matter, Appellant cannot complain about admission of the evidence because it was first brought into the case by his own counsel's opening statement. Otherwise inadmissible evidence can become admissible because a party has opened the door to it with a theory presented in opening

statement. *Shockley*, 410 S.W.3d at 194. Defense counsel used the contents of the folder to assert that Appellant acted out of compulsion, rather than by deliberation, when methamphetamine unleashed his long suppressed sexual urges for young teenage girls. (Tr. 2901-04). The prosecutor could thus permissibly admit the evidence to counter that inference and to argue the contrary inference that the stories demonstrated that Appellant acted intentionally. *Id.*

Defense counsel did state, when renewing his objection to the evidence, that he chose to discuss that evidence in opening statement as a result of the court's ruling on the motion in limine. (Tr. 3130). But counsel was not compelled to pursue that strategy. A ruling in limine is interlocutory only and is subject to change during trial. *Cole*, 71 S.W.3d at 175. Instead of anticipatorily bringing up the evidence, counsel could instead have maintained a consistent strategy of trying to keep the evidence away from the jury, with the hope that the court would change its initial ruling or, if that proved unsuccessful, taken his chances on appeal if he truly believed the evidence to be inadmissible. *State v. Carollo*, 172 S.W.3d 872, 876 (Mo. App. S.D. 2005). The Court of Appeals, in addressing a similar situation, stated the following:

> While we appreciate the difficult position in which trial counsel was placed by the trial court's denial of his motions to

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> exclude this evidence, Missouri law is settled that a party may not complain about evidence introduced into the case through his attorney's questions or conduct.

State v. Eighinger, 931 S.W.2d 835, 838 (Mo. App. W.D. 1996). "Simply stated, Defendant cannot seek to utilize evidence in the pursuit of reasonable trial strategy, and then, turn around on appeal and claim that the same evidence was inadmissible and prejudicial." *Carollo*, 172 S.W.3d at 876.

The evidence was admissible, even if Appellant had not opened the door, because it helped present a complete and coherent picture of the circumstances of the crime. Those circumstances included Appellant's abduction of Victim and his subsequent acts of rape and sodomy on her. As defense counsel conceded, the contents of the folder did establish Appellant's motive for those actions. (Tr. 3608-09). The evidence of the rape and sodomy was not conclusive, given the lack of DNA evidence, and the contents of the folder tended to establish that those acts occurred. The contents of the folder thus helped support a finding of deliberation, as the prosecutor argued to the jury. (Tr. 3614-15).

While Appellant did concede that he raped, sodomized, and murdered Victim, the State, because it must shoulder the burden of proving the defendant's guilt beyond a reasonable doubt, should not be unduly limited in its quantum of proof. *Smith*, 32 S.W.3d at 546. Even if a matter established

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by the evidence is not actively contested, "it remains the [S]tate's burden to establish all essential elements of a crime without relying on a defendant's extrajudicial admissions, statements or confessions." *Id.* (internal quotation marks omitted).

Furthermore, as noted in the previous point, Appellant is not entitled to a new trial even if any or all of the evidence was incorrectly admitted.[4] Errors in admitting evidence require reversal only when prejudicial to the point that they are outcome determinative. *Johnson*, 207 S.W.3d at 42. A finding of outcome-determinative prejudice expresses a judicial conclusion that the erroneously admitted evidence so influenced the jury that, when considered with and balanced against all evidence properly admitted, there is a reasonable probability that the jury would have acquitted but for the erroneously admitted evidence. *Id.* The properly admitted evidence aside from the contents of the purple folder clearly established deliberation, and there is thus not a reasonable probability that the jury would have acquitted Appellant of first-degree murder had those items not been admitted. *See*

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[4] Appellant only argues prejudice as to the guilt phase of the trial. That is most likely because the evidence would have been independently admissible in the penalty phase as evidence of Appellant's character. *Cole*, 71 S.W.3d at 174.

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Tisius, 92 S.W.3d at 764 ("Absent evidence of deliberation, an intentional killing is second-degree murder.").

Proof of deliberation must ordinarily be provided through the circumstances surrounding the crime. *Strong*, 142 S.W.3d at 717. Proof of deliberation does not require proof that the defendant contemplated his actions over a long period of time, only that the killer had ample opportunity to terminate the attack once it began. *Id.* Evidence of a prolonged struggle, multiple wounds, or repeated blows may support an inference of deliberation. *Tisius*, 92 S.W.3d at 764. Victim was only shot once, but that shot was delivered to the back of her neck at point-blank range, which would be indicative of deliberation. (Tr. 3381, 3431). Victim also had multiple other wounds to her body, including her face. (Tr. 3420). Victim was also bound and the ligature marks showed that she had struggled to free herself from those bindings. (Tr. 3381-82, 3418-19, 3424). The evidence supports an inference of a prolonged struggle between Victim and Appellant.

In addition, Appellant's actions after the murder can also support a finding of deliberation. *Id.* Failure to seek medical help for a victim strengthens the inference that the defendant had deliberated. *Strong*, 142 S.W.3d at 717. Appellant not only failed to seek medical attention for Victim, he denied any knowledge of her whereabouts to the police, (State's Ex. 85), even as her body sat undiscovered in his basement. *Id.* Appellant instead

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spent his time following the murder trying to cover-up the crime by dousing the body with bleach, buying more bleach, putting her body inside of a bag and placing it in a plastic container, traveling to a dumpster to get rid of Victim's clothes, and going to a laundromat to wash his own clothes to remove any evidence that might link him to the murder. (Tr. 3063-66, 3258, 3287, 3297, 3303, 3306, 3315-21, 3326-27, 3380, 3413, 3526-27, 3540-41, 3544-45). Disposing of evidence supports an inference of deliberation. *Tisius*, 92 S.W.3d at 764.

Appellant relies on *State v. Barriner* to argue that reversal is mandated in this case. This Court reversed a conviction in *Barriner* due to the admission of evidence of uncharged misconduct, including evidence of the defendant's sexual activities and proclivities. *State v. Barriner*, 34 S.W.3d 139, 153 (Mo. 2000). *Barriner* is distinguishable in several respects. First, the defense did not open the door to admission of the evidence in that case. Second, the State conceded that the evidence was improperly admitted, which is not the case here. *Id.* at 149. Finally, the amount and character of the evidence was far more extensive than the evidence here, as it involved videotapes of the defendant engaging in sexual activity with his former girlfriend, the girlfriend's testimony about her sexual activity with the defendant, sex toys, and several photographs. *Id.* Even with all that, the Court stated that it was not easy to reach the conclusion that the error

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required reversal. *Id.* at 151 n.4. The Court ultimately reached its conclusion that the evidence of guilt relied on by the State had been vigorously contested, should not have been admitted, or was consistent with the defense theory. *Id.* None of those apply to the evidence of deliberation cited above.

Because Appellant cannot show an abuse of discretion or prejudice, his point should be denied.

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IV.

Missouri's statute allowing the judge to impose the death penalty when the jury deadlocks on punishment is constitutional.

Appellant claims that Missouri's capital sentencing procedure is unconstitutional because it allows the judge to impose the death penalty when the jury cannot agree on punishment. But this Court has repeatedly found that procedure to be constitutional and Appellant has not cited any authority that changes those findings.

A. Underlying Facts.

Appellant filed a pre-trial motion claiming that Missouri's death penalty statute permitting a judge to impose a death sentence when the jury deadlocks on punishment is unconstitutional. (D.782 pp.1-13). The trial court denied the motion. (D.607 p.78). Appellant renewed the motion prior to the commencement of the penalty phase. (Tr. 4044). The court again denied the motion. (Tr. 4048). Appellant included a claim of error in his motion for new trial. (D.871 pp.36-39).

B. Analysis.

Appellant argues that section 565.030, RSMo is unconstitutional because it permits the judge to make sentencing determinations that are required to impose the death penalty. This Court has repeatedly rejected that 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.

Shockley, 410 S.W.3d at 198-99, *accord McLaughlin*, 265 S.W.3d at 262-64 (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).

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 at *20-23, 25-26 (E.D. Mo., Jun 15, 2018) (holding Missouri's death penalty scheme constitutional).

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Appellant argues that this Court must reconsider those earlier cases, particularly *McLaughlin* and *Shockley*, in light of *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 Appellant. This Court has, in fact, rejected writs for habeas corpus and motions to recall the mandate based on *Hurst* and the arguments presented herein. *State ex rel. Shockley v. Griffith*, SC96694 (Mo. Nov. 21, 2017), *cert. denied Shockley v. Griffith*, No. 17-8599 (Oct. 1, 2018); *State v. Shockley*, SC90286 (Mo. Apr. 4, 2017); *State v. Johnson*, SC89168 (Mo. Feb. 28, 2017), *cert. denied Johnson v. Missouri*, No. 16-9466 (Oct. 2, 2017); *State v. Dorsey*, SC89833 (Mo. May 2, 2017); *State ex rel. Dorsey v. Griffith* (Mo. Jun. 27, 2017), *cert. denied*, *Dorsey v. Griffith*, No. 17-6162 (Dec. 4, 2017).

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. *Hurst*, 136 S. Ct. 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.*

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(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."

Id. 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

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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 appellant 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

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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. § 565.030.4, RSMo. 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). On the other hand, 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. 2004); *Gill,* 167 S.W.3d at 193; *State v. Dorsey,* 318 S.W.3d 648, 653 (Mo. 2010).

Appellant also cites *State v. Whitfield*, 107 S.W.3d 253 (Mo. 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. Appellant argues that *Whitfield* said that the jury's factual findings "simply disappear" once the jury deadlocks and the judge imposes sentence.

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This argument is without merit, as Appellant'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 which punishment to issue. *Id.* at 263. Here, the record is not silent—the jury made all required factual findings. (D.867 pp.18-19). 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.

McLaughlin, 265 S.W.3d at 264; *see also Shockley*, 410 S.W.3d at 199 n.11 (noting explanation given in *McLaughlin*).

Appellant argues that those interrogatories do not render the supposed constitutional violation harmless. He cites *McLaughlin v. Steele*, 173 F. Supp. 3d 855 (E.D. Mo. 2016) (*McLaughlin II*), in support of his argument.

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McLaughlin II cannot help Appellant because: (1) the case is not final, as an appeal is currently pending before the Eighth Circuit, No. 18-3510[5]; and (2) *McLaughlin II* is not binding on this Court. *See State v. Salazar*, 414 S.W.3d 606, 615 (Mo. App. S.D. 2013) ("[D]ecisions of the federal district and intermediate appellate courts and decisions of other state courts are not binding on us."). In any event, this Court has found Missouri's statute constitutional, and any federal district court's finding to the contrary is not relevant.

Since *Whitfield*, this Court has issued multiple opinions narrowly interpreting *Whitfield* and has called into doubt *Whitfield*'s characterization of the "weighing step" under Missouri law. In *Glass,* this Court rejected an argument that *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 in *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

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

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cited the rule from *Apprendi*[6] 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 [appellant'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; *State v. Johnson,* 284 S.W.3d 561, 585, 588–89 (Mo. 2009); *State v. Davis,* 318 S.W.3d 618, 634 (Mo. 2010); *Dorsey,* 318 S.W.3d at 653; *State v. Anderson,* 306 S.W.3d 529, 540 (Mo. 2010); *Shockley,* 410 S.W.3d at 196-97; *Nunley,* 341 S.W.3d at 626 n.3. (collecting cases).

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

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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 appellant from the pool of death-eligible offenders, due to the strength of the mitigating evidence. The statute 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." § 565.030.4, RSMo. 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

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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. 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 Court focused in *Hurst* 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 appellant 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 Appellant raises here, which is whether a judge can impose a death sentence

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after the jury has made the necessary factual findings rendering the appellant death-eligible, but is unable to agree on a verdict.[7]

Appellant's reliance on *Rauf v. State*, is also misplaced. In *Rauf*, the Delaware Supreme Court responded to a request from 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 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.*

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[7] *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), also cited by Appellant, 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.

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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. That 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 525, 531-33 (Ala. 2016). 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 Alabama court reiterated that the Supreme Court's holding in *Hurst* "was based on an application, not an expansion, of *Apprendi* 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

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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.

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V.

Missouri's statute allowing the judge to impose the death sentence when the jury deadlocks on punishment does not violate evolving standards of decency.

Appellant claims that Missouri's statute that allows the judge to impose the death penalty when the jury cannot agree on punishment is unconstitutional because it violates evolving standards of decency. But Appellant has failed to meet his burden of demonstrating a constitutional violation.

A. Underlying Facts.

Appellant filed a pre-trial motion to strike the State's notice of intent to seek the death penalty. (D.782 pp.1-13). The motion alleged that Missouri was an outlier among the states because it has broadened the State's ability to obtain death sentences, while other jurisdictions are narrowing the State's ability to do so or abolishing the death penalty outright. (D.782 pp.11-12). Appellant also filed a pre-trial motion asking the trial court to declare that section 565.030.4, RSMo is unconstitutional. (D.801 pp.1-18). The motion included an argument that the statute violates evolving standards of decency by permitting a judge to impose a death sentence when the jury deadlocks on punishment. (D.801 pp.7-8).

The trial court denied the motions. (D.607 pp.77-78). Prior to the penalty phase, Appellant renewed the motion to strike the State's notice to seek the death penalty, and made an argument concerning evolving standards of decency. (Tr. 4044-47). The trial court again denied the motion. (Tr. 4048). It does not appear from the record that Appellant renewed the motion to declare section 565.030.4, RSMo unconstitutional. Appellant included claims of error concerning the denial of both motions in his motion for new trial. (D.871 pp.36-40).

B. Analysis.

Appellant 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." 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 that scheme as constitutional. *Harris v.*

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Alabama, 513 U.S. 504, 515 (1995), overruled on other grounds by, *Alleyne v. United States*, 570 U.S. 99 (2013).

Subsequently, an Alabama criminal appeals court reviewed an appellant'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. *Id.* at 1057.

The United States Supreme Court then rejected the *Woodward* appellant's petition for writ of certiorari. *Woodward v. Alabama*, 134 S. Ct. 405, 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 Appellant 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 were only "four States in which the jury has a role in sentencing but is not

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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*, 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 Appellant argues that Missouri is a "clear outlier," the dissent in *Woodward II* argued that Alabama was a "clear outlier" with its judicial-override death penalty scheme. *Id.* at 408.

In short, the Supreme Court refused to hear arguments similar to what Appellant 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 IV, this Court has repeatedly upheld this scheme, and there is no reason to question that body of case law.[8] Appellant points to no binding authority that holds otherwise.

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[8] The Supreme Court has also refused to grant certiorari from this Court's decisions addressing this issue. *State v. Johnson*, SC89168 (Mo. Feb. 28, 2017), *cert. denied Johnson v. Missouri*, No. 16-9466 (Oct. 2, 2017); *State ex rel. Dorsey v. Griffith*, SC96440 (Mo. June 27, 2017), *cert. denied*, *Dorsey*

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Appellant's claim that there has been a trend away from judge-imposed death sentences is not borne out by the authorities he cites. Appellant can point to only six states that allowed judge-imposed death sentences and moved away from the practice. In four of those states, that change was made in 2002 or 2003. (Appellant's Brf., p. 101 n.21). And in one of them, the case cited by Appellant was subsequently overruled to the extent it found that the weighing of aggravating and mitigating circumstances was a fact-finding that was subject to the beyond a reasonable doubt standard. *Johnson v. State*,59 P.3d 450 (Nev. 2002), *overruled in part by*, *Nunnery v. State*, 263 P.3d 235, 51 (Nev. 2011). The remaining two states that Appellant cites are Florida and Delaware, where he relies on the *Hurst* and *Rauf* decisions discussed *supra*. Appellant has thus not demonstrated a recent trend of states changing their laws regarding judge-imposed death sentences.[9]

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v. Griffith, 17-6162 (Dec. 4, 2017); *State ex rel. Shockley v. Griffith*, SC96694 (Mo. Nov. 21, 2017), *cert. denied*, *Shockley v. Griffith*, 17-8599 (Oct. 1, 2018).

[9] Appellant notes the number of states that have abolished the death penalty. Since his brief was filed, the Wyoming Senate rejected a bill to abolish the death penalty in that state. Bob Beck, *Wyoming Senate Rejects Attempt to Abolish the Death Penalty*, Wyoming Public Radio, Feb. 14, 2019, *available at* www.wyomingpublicmedia.org/post/wyoming-senate-rejects-

Appellant 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. Appellant's point should be denied.

attempt-abolish-death-penalty.

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VI.

The trial court did not abuse its discretion in the admission of victim impact evidence.

Appellant claims that the trial court abused its discretion in allowing the State to present evidence in the penalty phase regarding the effect of Victim's death on the Springfield community, and allowing the State to question witnesses in a manner intended to elicit strong emotional responses. But the challenged evidence was constitutionally and statutorily admissible, and the trial court did not abuse its discretion in determining that the emotional reactions of two witnesses did not result in fundamental unfairness to Appellant.

A. Underlying Facts.

Appellant filed a pre-trial motion to prohibit victim impact testimony. (D.832 pp.1-8). In a hearing on the motion, defense counsel argued that if the court would not exclude victim impact testimony altogether, it should limit such evidence. (Tr. 3646). Counsel argued that the State should not be allowed to present evidence of a candlelight vigil held for Victim that drew more than 10,000 people, because it was not victim impact evidence. (Tr. 3647-48). The court ruled that the evidence would be allowed. (Tr. 3669).

During the testimony of Sarah Wells, one of Victim's aunts, the prosecutor asked if a vigil was held for Victim. (Tr. 3756). Defense counsel

objected, and the court overruled the objection, granting a continuing objection. (Tr. 3756-59). Wells testified that a vigil was held in downtown Springfield a few days after Victim's death, that was attended by more than 10,000 people. (Tr. 3760-61). Wells testified about how the idea for the vigil was conceived. (Tr. 3760). She said that she did not remember what happened at the vigil, other than that she had to be escorted because of the large number of people who showed up. (Tr. 3761).

Patrick Findley, a pastor at Ridgecrest Baptist Church in Springfield, testified primarily about Victim's involvement in another church that he had served, about his ministry to the family after Victim's death, and about the effect of her death on the family. (Tr. 3762-69). Pastor Finley testified that he served a church with an average attendance of two-thousand people every Sunday morning. (Tr. 3770). Defense counsel objected when the prosecutor asked Pastor Finley whether, in terms of the pastoral care he provided to his parishioners, he had a sense for the effect of the crime on the community. (Tr. 3770). The court overruled the objection. (Tr. 3770). Pastor Finley testified that, based on his conversations with parents, the crime shifted the way that Springfield residents saw Springfield, that it went from a town to a city. (Tr. 3770). He said that countless parents had shared with him that they no longer allowed their children to play in the front yard unless they were

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present, and that they thought a lot harder before letting their children walk to school or walk down the street to a friend's house. (Tr. 3770-71).

The State presented testimony from Savannah Taylor, whose daughter was friends with Victim. (Tr. 3705). The prosecutor asked Taylor several questions about the relationship between her daughter and Victim, and had Taylor identify some photographs that Victim had taken at her house on the day she was murdered. (Tr. 3706-08). The prosecutor asked Taylor if she remembered her last interaction with Victim. (Tr. 3709). Before she could answer, defense counsel suggested that a recess be called so that Taylor could compose herself. (Tr. 3709). The court asked Taylor if she needed a break, and Taylor responded that she was fine. (Tr. 3709). Taylor went on to testify at length about the last time she saw Victim, how she learned that something had happened to Victim, her efforts to look for Victim, her reaction and her daughter's reaction to learning that Victim was missing, the circumstances of how she learned that Victim was dead, and the effect of Victim's murder on her and her daughter. (Tr. 3709-12).

Defense counsel objected when the prosecutor asked Taylor if she had any regrets about the day of the murder. (Tr. 3712-13). Counsel argued that Taylor had been crying through most of her testimony, and that the prosecutor's questions had been designed to elicit that response. (Tr. 3713). The court overruled the objection and granted a continuing objection, finding

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that emotional testimony is to be expected, and that the prosecutor's questions were not improper. (Tr. 3715-16). The prosecutor asked one additional question: "Ma'am, do you have any regrets from that evening of February 18th, 2014?" (Tr. 3716). Taylor answered: "Yeah. I – I wish I wouldn't have sent her home." (Tr. 3716).

The next witness was Tara Tharp, who was Victim's teacher when Victim was murdered. (Tr. 3717). She described Victim's personality, and talked about the last time Victim was in her class, which was for a Halloween party. (Tr. 3718-20). Tharp also testified about how she learned of Victim's death and that she did not know how to deal with her other students that day. (Tr. 3720-21). The court asked Tharp during that testimony if she needed a break, and Tharp said no. (Tr. 3721). Tharp began to talk about how the students memorialized Victim when defense counsel objected. (Tr. 3721).

Counsel stated that Tharp had been crying through most of her testimony and had actually broken down, prompting the court's inquiry as to whether she needed a break. (Tr. 3722). Counsel argued that Victim's family members in the audience were also crying and that four jurors were dabbing at their eyes. (Tr. 3723). Counsel argued that the prosecutor's questions were designed to produce that effect, and he requested a mistrial. (Tr. 3724).

The trial court made the following observations in response to counsel's representations:

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All right. Well let me address a couple of things that Mr. Berrigan said because I've been carefully observing the audience as well as the jury and the witness. And some of the – it is true, and I did not count, and I'll take counsels' word for it, as to the number that have been wiping their eyes.

But there's been nothing in the category of uncontrollable sobbing or anything from the jury, but just emotional response to the testimony which again I would put in the category of being natural. Nothing disruptive about it to anyone.

In the audience, I observed one individual blowing her nose and crying. I did not see or hear anyone else doing that. And it's difficult for the witness to get through this. I asked her about her need for a break for her own sake as well as just the ability to compose herself. She didn't need it, so that's fine.

Again, I don't see anything that is in the parameters of what is being asserted by the defense, so the objection is overruled.

(Tr. 3725-26). Over Appellant's continuing objection, Tharp went on to describe how Victim's death affected her students. (Tr. 3726-28).

Appellant included a claim of error in his motion for new trial. (D.871 pp.20-23).

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B. Analysis.

Victim impact evidence is admissible under the United States and Missouri Constitutions. *Driskill*, 459 S.W.3d at 431. The trial court has broad discretion to admit whatever evidence it determines may be helpful to the jury in assessing punishment. *Id.* The State is permitted to show the victims are individuals whose deaths represent a unique loss to society and to their family and that the victims are not merely faceless strangers. *Id.* Victim impact evidence violates the constitution only if it is so unduly prejudicial that it renders the trial fundamentally unfair. *Id.*

1. *Impact of the crime on the community*.

Appellant claims that testimony about the community vigil and Pastor Findley's testimony about how the crime had changed Springfield was outside the scope of permissible victim impact evidence. "It is not necessary that every piece of victim impact evidence relate to the direct impact of the victim's death on the witness." *Gill*, 167 S.W.3d at 196. Both the United States Supreme Court and this Court have said that the State is permitted to demonstrate the loss to society that has resulted from the defendant's homicide. *Id.* at 195; *Driskill*, 459 S.W.3d at 431; *Payne v. Tennessee*, 501 U.S. 808, 822-23 (1991). Courts from other jurisdictions have rejected an argument that victim impact evidence be restricted so as to exclude evidence

of the effect of the defendant's crimes on society at large. *See, e.g., People v. Trinh*, 326 P.3d 939, 961 (Cal. 2014).

a. Community vigil.

Appellant cites to no authority holding that evidence of a community-wide vigil is *per se* inadmissible as victim impact evidence. The closest he can come is a Louisiana case that upheld the admission of a photograph announcing a candlelight vigil in the defendant's neighborhood. *State v. Magee*, 103 So. 3d 285, 330 (La. 2012). The Court found the evidence admissible, in part because it did not attempt to show the crime's influence on the entire parish. *Id. Magee* is not probative in this instance because Louisiana has a statute specifically limiting the scope of victim impact evidence to the impact of the crime on the victim, family members, friends, and associates. *Id.* at 328. No such statutory limitation exists in Missouri. To the contrary, courts are given the discretion to allow "evidence concerning the murder victim and the impact of the offense upon the family of the victim *and others*." § 565.030.4, RSMo (emphasis added).

The court cannot be said to have abused its discretion in this case. The evidence concerning the vigil was brief and non-specific. It concerned a discussion about how the vigil was organized and an estimate of how many people attended. There was no evidence presented as to what was said or done during the vigil, and no photographs, video or audio recordings, or news

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articles about the video were admitted into evidence. Contrary to Appellant's suggestion that the jury was pressured into satisfying the vigil's attendees, there was no testimony suggesting that those attendees demanded, or even supported, the imposition of the death penalty for Appellant. While Appellant claims that the State tried to create a funeral atmosphere, the evidence in this case did not approach the type of evidence presented of actual funerals and memorial services that have been found to constitute proper victim impact evidence. *See, e.g., United States v. Bolden*, 545 F.3d 609 (8th Cir. 2008) (a collection of photographs taken at memorial service were relevant to the victim's uniqueness as a human being and the impact of his death and, thus, their admission was not unduly prejudicial); *People v. Brady*, 236 P.3d 312 (Cal. 2010) (videotape of memorial and funeral services was admissible to show impact of murder on loved ones and the community); *McGirth v. State*, 48 So. 3d 777, 791-92 (Fla. 2010) (photos of balloon release following memorial service, plaque in victim's honor and newspaper advertisement purchased in her memory).

b. Pastor Findlay's testimony.

Appellant launches a multi-faceted attack on Pastor Findley's testimony. He first claims it should have been excluded as hearsay. While Appellant claims to have objected to the testimony on that basis, the record does not clearly establish that. Appellant cites to a Confrontation Clause

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objection he made to the testimony of Savannah Taylor. (Tr. 3669-70). Several other witnesses testified between Taylor and Pastor Findley. When the prosecutor asked Pastor Findley about his sense of the effect of the crime on the community, Appellant said, "Same objection we previously launched." (Tr. 3770). It's not clear from that whether Appellant was renewing his confrontation objection or his objection that the evidence did not fit within the scope of permissible victim impact evidence.

If Appellant's objection did not encompass confrontation, then he failed to preserve that aspect of his claim for review. *State v. Walter*, 479 S.W.3d 118, 123 (Mo. 2016). That is true even though Appellant did include the claim in his motion for new trial. *Id.* An appellate court generally will not find, absent plain error, that a lower court erred on an issue that was not put before it to decide. *State v. Davis*, 348 S.W.3d 768, 770 (Mo. 2011).

Appellant is not entitled to relief even if the objection did encompass confrontation. A victim impact statement is not subject to the Confrontation Clause. *Johnson*, 284 S.W.3d at 584. "'The Confrontation Clause does not operate to bar the admission of testimony relevant only to a capital sentencing authority's selection decisions.'" *Id.* (quoting *United States v. Fields*, 483 F.3d 313, 326 (5th Cir. 2007). Victim impact evidence is admissible where it is not offered to prove an element of the charged offense or to support a statutory aggravating circumstance. *Id.* The evidence in this

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case was used to demonstrate the effect of the crime on the community and was properly admitted.

The rest of Appellant's argument is a reiteration of his position that community impact evidence is outside the scope of permissible victim impact evidence. Because such evidence is not constitutionally or statutorily barred in Missouri, Appellant resorts to cases from other jurisdictions that cautioned against including the community in victim impact evidence. One of those states has a victim impact statute that is far more restrictive than Missouri's. *State v. Young*, 196 S.W.3d 85, 108-09 (Tenn. 2006). And the courts in all three cases affirmed the defendant's sentence, finding that the admission of impact evidence on the community was not unduly prejudicial. *Id.* at 110; *State v. Burns*, 979 S.W.2d 276, 283 (Tenn. 1998); *United States v. Fields*, 516 F.3d 923, 947-48 (10th Cir. 2008); *Stone v. State*, 798 S.E.2d 561, 572 (S.C. 2017) (finding that defendant did not establish *Strickland*[10] prejudice from counsel's failure to object to evidence).

2. *Emotional testimony*.

Appellant claims that the testimony of Savannah Taylor and Tara Tharp was excessive and emotionally laden because both witnesses cried during their testimony. The trial court has broad discretion in determining

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10 *Strickland v. Washington*, 466 U.S. 668 (1984).

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the effect of emotional outbursts on the jury. *Gill*, 167 S.W.3d at 196. This Court has previously found no error in cases where victim impact testimony left witnesses, and even jurors, crying. *Id.*; *State v. Deck*, 994 S.W.2d 527, 538-39 (Mo. 1994); *State v. Middleton*, 995 S.W.2d 443, 464 (Mo. 1999). A certain level of emotion is to be expected when witnesses discuss the impact of the crime on their lives. *Gill*, 167 S.W.3d at 196. The record shows that the trial court carefully observed the proceedings, including the reaction of the jurors, and found that it did not cause undue prejudice. In light of the trial court's superior ability to judge the effect of the testimony on the jury, Appellant has failed to show that the court abused its discretion in overruling his objections. *State v. Johnston*, 957 S.W.2d 734, 750 (Mo. 1997).

3. *Appellant cannot show prejudice*.

Appellant's prejudice argument is limited to the fact that the jury deadlocked on punishment. The fact that the jury deadlocked does not support a finding of undue prejudice where there is nothing to connect the deadlock to the challenged evidence. *McLaughlin*, 265 S.W.3d at 273. Appellant's point should be denied.

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VII.

The State's penalty phase closing argument was proper.

Appellant claims that the trial court plainly erred in overruling his objection to the prosecutor's penalty phase closing argument that the jury, in sentencing Appellant to death, would speak for Victim and her family. But the prosecutor's argument, in context, was an appeal to the jury to uphold the law and not an argument that Victim's family desired the death penalty.

A. Underlying Facts.

During penalty phase closing argument, the prosecutor discussed the circumstances of Victim's death and then told the jury that the evidence called for the death sentence:

> Remember her cell phone photos? What did she photograph? The Katy Perry lyrics to "Roar." She tried to stand up when she was pushed down; she tried to fight, and she couldn't.
>
> With your verdict, sentencing him to the ultimate punishment, you speak for [Victim] –
>
> MR. BERRIGAN: We'd object, Judge.
>
> MR. PATTERSON: You speak for her family –
>
> MR. BERRIGAN: I have to object. May we approach?

(Tr. 4082). Defense counsel stated the prosecutor was attributing the decision regarding life or death to Victim and her family, and that the law specifically prohibits family members from commenting upon which verdict they think is appropriate. (Tr. 4083). The prosecutor responded that the nature of his argument spoke to Appellant for all of the harm that he had caused. (Tr. 4083). The trial court overruled the objection. (Tr. 4083). The prosecutor went on to describe the terror that Victim must have felt and the harm that she suffered. (Tr. 4085-86). The prosecutor then closed his argument as follows:

> This defendant not only brutalized [Victim], but he damaged her family, her brother, her school, her entire community, and changed our community, and your verdict will send a message to this defendant. There are no explanations for this. You can't explain your evil. You can't rely on your parents, who are good people, to get you out of this. No.
>
> For all those harms, this is the case. This is the case that calls for the ultimate punishment, and I ask you to sentence the defendant to death.

(Tr. 4086). Appellant did not include a claim of error in his motion for new trial. (D.871 pp.1-42).

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B. Standard of Review.

Appellant acknowledges that his claim is not preserved because he did not include it in his motion for new trial. Supreme Court Rule 29.11(d). The claim is unpreserved for an additional reason. Appellant's point relied on states that the argument was improper because the prosecutor sought and obtained the exclusion of testimony by Victim's mother that she wanted Appellant to receive a sentence of life without parole. (Appellant's Brf. 37). But Appellant never made that argument to the trial court. The objection made in the trial court cannot be broadened on appeal. *Driskill*, 459 S.W.3d at 426. Claims that are not preserved can only be reviewed for plain error. *Id.*

Closing argument is designed to advise the jury and opposing counsel of each party's position and to advocate to the jury what that party believes the jury should do. *State v. McFadden*, 369 S.W.3d 727, 747 (Mo. 2012). Plain error is rarely found in closing argument. *Id.* Reversal is required for improper argument only if such argument had a decisive effect on the jury's determination. *Id.* The burden is on the appellant to demonstrate a decisive effect. *Id.* The entire record is considered when interpreting a closing argument, not an isolated segment. *Id.*

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C. Analysis.

The scope of permissible argument during the penalty phase of a first-degree murder case is broad. *State v. Ringo*, 30 S.W.3d 811, 821 (Mo. 2000). The State is permitted to argue the need for strong law enforcement, the prevalence of crime in the community, and that conviction of the defendant is part of the jury's duty to uphold the law and prevent crime. *State v. McFadden*, 391 S.W.3d 408, 425 (Mo. 2013). The State is also allowed to argue to the jury that the protection of the public rests with them. *Id.*

While Appellant claims that the prosecutor's argument violated the ban on admitting the opinions of family members as to the appropriate punishment,[11] the full context of the argument shows that it was a permissible "send a message" argument that asked the jurors to serve as the conscience of the community, which included Victim and her family. *See McFadden*, 369 S.W.3d at 750 (Trial court did not abuse its discretion in allowing the prosecutor to tell the jury that it represented the community). It was similar to an argument that this Court found was a proper argument that equated the death penalty with justice:

> If the death penalty means anything, if it has any application at all, it can eliminate one thing here. It can stop

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11 *State v. Collings*, 450 S.W.3d 741, 765 (Mo. 2014).

Michal Tisius from doing this again. And it is an answer to the plea from the families of Leon and Jason and Randolph County that you do justice in this case.

Tisius v. State, 519 S.W.3d 413, 429 (Mo. 2017), *see also*, *State v. Tisius*, 362 S.W.3d 398, 411 (Mo. 2012) (finding that the argument did not amount to a manifest injustice).

Appellant's reliance on *State v. Roberts* is misplaced. While the prosecutor in that case argued that it was his job to speak for the victim's family, the problem with that argument was that no evidence had been presented that the victim had a family. *State v. Roberts*, 838 S.W.2d 126, 131 (Mo. App. E.D. 1992). That is not the case here, as the jury heard extensive testimony about, and from, Victim's family during both phases of the trial, including testimony from Victim's mother, great-grandmother, and two of her aunts. (Tr. 3274, 3730, 3725, 3760).

Appellant further claims that the argument was improper because the prosecutor had successfully objected to Appellant's attempt to call Victim's mother as a witness to testify that she wanted Appellant to be sentenced to life imprisonment without parole so there would not be so many appeals. (Tr. 819-33; D.607 p.77). Appellant did not make that argument to the trial court, and reviewing courts generally will not consider arguments not presented to the trial court. *State v. Carter*, 415 S.W.3d 685, 689 (Mo. 2013). In any event,

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the prosecutor did not explicitly argue that Victim or her family members in general demanded the death penalty, much less that Victim's mother in particular demanded it.

Even if the argument was deemed to be improper, it does not rise to the level of a manifest injustice or miscarriage of justice. The reference to the victim and her family was an isolated part of a larger argument that has not otherwise been challenged as improper in any respect. *State v. Simmons*, 955 S.W.2d 752, 765 (Mo. 1997) (finding no reversible error from court's failure to sustain an objection to prosecutor's argument that the victim's mother would have been justified in killing the defendant to save her daughter). Appellant cannot provide any basis for his prejudice argument other than that the jury deadlocked on punishment. The fact that the jury deadlocked does not support a finding of undue prejudice where there is nothing to connect the deadlock to the challenged argument. *McLaughlin*, 265 S.W.3d at 273. Appellant's point should be denied.

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VIII.

The trial court did not abuse its discretion in striking a prospective juror for cause.

Appellant claims that the trial court abused its discretion in sustaining the State's motion to strike Venireperson 114 for cause during the death qualification portion of voir dire. But the court acted within its discretion in finding that the Venireperson's equivocal answers demonstrated an inability to meaningfully consider the death penalty.

A. Underlying Facts.

Venireperson 114 indicated in her jury questionnaire that she was opposed to the death penalty. (Appellant's Ex. 1, p. 8). On a scale of one to seven, with one being strongly opposed to the death penalty and seven being strongly in favor of the death penalty, Venireperson 114 rated her position as two. (Appellant's Ex. 1, p. 8). When asked to explain her beliefs and opinions about the death penalty for a deliberate killing with no legal excuse or justification, Venireperson 114 answered:

> I believe that the death penalty is not adequately or fairly given out. Those convicted spend years going through appeals and wasting court resources. I believe the death penalty is given way more often to poor people or minorities. It is too hard to "play God" with someone's fate and I am a nonviolent person.

(Appellant's Ex. 1, p. 9). Venireperson 114 then gave the following explanation for the reasons underlying her beliefs:

> I believe if a person is guilty, life without eligibility for parole is the best option. Death may be the "easy" way out for a guilty person. I believe someone should have to live with and suffer from the guilt and consequences of their actions. I have always been a very peaceful and non-violent believer.

(Appellant's Ex. 1, p. 9). Venireperson 114 said that she believed the death penalty should be used "less often," and offered the following reasoning:

> It is unfairly given to way more minorities and those who cannot afford expensive lawyers.

(Appellant's Ex. 1, p. 9). Venireperson 114 gave the following answer when asked for her opinion about life in prison without the possibility of parole:

> I believe this is the best punishment. A convicted criminal should have to live the rest of his days experiencing the guilt, shame, and consequences of his crime.

(Appellant's Ex. 1, p. 10). Venireperson 114 gave the following explanation for why she felt that way:

> I don't believe the death penalty can be fairly carried out. I read the book "Just Mercy" and it opened my eyes to the problems of how unfairly the death penalty is given to minorities.

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(Appellant's Ex. 1, p. 10). Finally, Venireperson 114 said that she did not believe in "a life for a life" or "an eye for an eye," and explained why:

> It is barbaric. We should not stoop to the level of a criminal. We are better than that.

(Appellant's Ex. 1, p. 10).

Venireperson 114 was asked during voir dire if she could give meaningful consideration to the death penalty. (Tr. 2185-86). She answered, "Consideration, yes, but I am strongly against it in general." (Tr. 2186). Venireperson 114 reiterated her questionnaire answer that she believed life in prison was a more appropriate punishment, and that she was mainly against the death penalty because it "is not fairly distributed[.]" (Tr. 2186). When asked if her opinions would affect her ability to give meaningful consideration to the death penalty, Venireperson 114 answered, "Even though I feel strongly about it, I still would have to look at the evidence, and I would be able to consider this individual case." (Tr. 2187).

When asked if she believed that the State has committed a wrong if it executes someone, Venireperson 114 said the following:

> No. I think what I mean to say was that we should not act as criminals ourselves in ending a life. I feel like, you know, it's – I guess I don't believe in the eye for an eye type of punishment. I'm not sure if that answers your question.

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(Tr. 2187). When asked again if she could consider the death penalty, Venireperson 114 responded:

> I would consider it as a parent and as a person who would want the victims to have justice. I could consider it even though I am, on principle, opposed in general. But I also would want to listen to what that victim went through and make a decision based on the evidence.

(Tr. 2188-89).

Venireperson 114 was asked if she could sign a death verdict as foreman of the jury and answered, "No, I don't think I can." (Tr. 2189). When asked if that was due to her person beliefs, Venireperson 114 said, "Exactly. It's just personally that would – I feel like my conscience wouldn't let me do that." (Tr. 2189). Defense counsel asked Venireperson 114 if she could sign the verdict form with the understanding that it was indicating to the judge that all members of the jury had agreed to the verdict. (Tr. 2240-41). Venireperson 114 indicated that she could sign the form with that understanding. (Tr. 2241).

The prosecutor followed up with Venireperson 114 in rebuttal voir dire:

> [Venireperson 114], I have just a couple more questions. I hope I didn't confuse you about the verdict form. When we talked, you said you didn't think you could sign it under the

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circumstances the way I described that. Mr. Berrigan gave you a little more detail, and you said: With that circumstance, I think I can.

I'm trying to understand a little more when you talk about how your conscience wouldn't let you sign the verdict form. Is your conscience going to let you vote in favor of a death verdict?

[VENIREPERSON 114]: I think that's really what I meant, is my gut instinct is no, my conscience wouldn't – I'm against the death penalty.

MR. MYERS: So your gut instinct is you could not vote for it?

[VENIREPERSON 114]: Yes, that's right.

(Tr. 2248-49). Venireperson 114 told defense counsel in surrebuttal voir dire that she did not believe in the death penalty and would personally have a very hard time making that call. (Tr. 2251). She did say that she would consider the death penalty if certain things fell into place, saying that she owed it to the victim to listen to both sides. (Tr. 2253).

The State moved to strike Venireperson 114 for cause. (Tr. 2257). Appellant objected to the strike. (Tr. 2258). The court listened to extensive arguments from both sides, and deferred a ruling until it could review Venireperson 114's questionnaire. (Tr. 2269). The court sustained the State's

motion the following day. (Tr. 2460). The court pointed out Venireperson 114's answers that her conscience would not let her vote for the death penalty, and her statement that she could consider the death penalty only because she owed it to the victim's family. (Tr. 2459-60). Appellant raised a claim of error in his motion for new trial. (D.871 pp.2-3).

B. Standard of Review.

The trial court is in the best position to evaluate a venireperson's commitment to follow the law and is vested with broad discretion in determining the qualifications of prospective jurors. *McFadden*, 369 S.W.3d at 738. Unless the trial court abuses its discretion, a trial court's ruling on a challenge for cause will not be disturbed. *Id.* Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors. *Id.* Even a juror's assurance that she can follow the law and consider the death penalty may not overcome the reasonable inferences from other responses that she may be unable or unwilling to follow the law. *Id.*

C. Analysis.

The United States Supreme Court has "recognized that the Sixth Amendment's guarantee of an impartial jury confers on capital defendants the right to a jury not 'uncommonly willing to condemn a man to die.'" *White*

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v. Wheeler, 136 S. Ct. 456, 460 (2015) (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 521 (1968). "But the Court with equal clarity has acknowledged the State's 'strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes.'" *Id.* (quoting *Uttecht v. Brown*, 551 U.S. 1, 9 (2007)). When there is ambiguity in the prospective juror's statements, the trial court is entitled to resolve that ambiguity in favor of the State. *Id.* at 461.

Venireperson 114's answers were equivocal and ambiguous. She stated both on her questionnaire and during voir dire that she had strong objections to the death penalty. She expressed concerns about the fairness of how the death penalty was administered, stated that it could not be fairly carried out, and compared imposing the death penalty to "play[ing] God." (Appellant's Ex. 1, pp.8-10; Tr. 2185-87). While saying that she could give consideration to the death penalty, she also stated that her gut instinct was that she could not vote for it, and would have a very hard time making that call. (Tr. 2248-49, 2251). She also said that "certain things" would have to fall into place, and that she owed it to the victim to listen to both sides. (Tr. 2253).

"Where there is conflicting testimony regarding a prospective juror's ability to consider the death penalty, the trial court does not abuse its discretion by giving more weight to one response than the other and in finding that the venireperson could not properly consider the death penalty."

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State v. Roberts, 948 S.W.2d 577, 597 (Mo. 1997). This Court upheld the strike of a venireperson in *Roberts* who said at some points that he could consider the death penalty and at other points that he could not. *Id.* at 598.

In *State v. Johnson*, this Court upheld a strike for cause under circumstances similar to those present here:

> When the prosecutor asked Leiter if she could consider imposing the death penalty, she said that she "has a little difficulty with the death penalty" but that she "guess[ed]" she could consider it. She continued on to say that she did not think her ability to seriously consider voting for the death penalty would be impaired, but she did not believe that she could be the one to sign a verdict recommending a sentence of death. When asked by defense counsel if she could serve on a jury that was considering death, assuming that she was not the foreperson and did not have to sign off on the verdict, Leiter replied that she believed she could. She also stated that she believed that she could set aside her personal biases and be fair and impartial. However, when asked later whether she was leaning towards life without parole or death she said, "I would listen to the evidence, but I have to be honest and say that I would tend to lean for life."

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When questioned further, she went on to say that she "would try" to consider both punishments equally.

State v. Johnson, 244 S.W.3d 144, 159 (Mo. 2008). Like the venireperson in that case, Venireperson 114 expressed a preference for a life without parole sentence, and indicated that her gut instinct was not to vote to impose the death penalty. (Tr. 2186, 2248-49).

In *State v. Barnett*, a venireperson was properly struck where she initially told the prosecutor that she would not impose the death penalty, "no matter what," then told defense counsel that she could consider both life imprisonment and the death penalty, but later told the prosecutor that she did not think that she actually could vote for the death penalty if she was presented with that choice. *State v. Barnett*, 980 S.W.2d 297, 303 (Mo. 1998). This Court found no abuse of discretion, given the venireperson's initial and final responses. *Id.* This Court also upheld a strike for cause where a venireperson initially testified that she could never impose the death penalty, but later testified that maybe she could. *Tisius*, 92 S.W.3d at 763.

The trial court did not abuse its discretion in giving more weight to Venireperson 114's statements opposing the death penalty and in finding that her ability to consider the death penalty was substantially impaired. Appellant's point should be denied.

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IX.

Missouri's death penalty statute properly narrows the class of persons eligible for the death penalty.

Appellant claims that Missouri's death penalty statute is unconstitutional because it fails to properly narrow the class of persons eligible for the death penalty. But Appellant's point simply restates arguments that this Court has previously rejected.

A. Underlying Facts.

Appellant filed a pre-trial motion alleging that Missouri's death penalty statutes failed to genuinely narrow the class of persons eligible for the death penalty. (D.783 pp.1-24). The trial court denied the motion. (D.607 p.78). Appellant renewed the motion prior to commencement of the penalty phase. (Tr. 4050-51). The court again denied the motion. (Tr. 4051). Appellant included a claim of error in his motion for new trial. (D.871 p.27).

B. Analysis.

Appellant 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, he 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. (Appellant's Br. 131). The appellant 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. 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.*

Appellant argues that the aggravating circumstances under section 565.032, RSMo, which make a homicide death-eligible, are unconstitutionally broad. Appellant emphasizes the "wantonly vile" aggravating circumstance. 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. 2003); *Cole*, 71 S.W.3d at 171-72; *State v. Johns*, 34 S.W.3d 93, 113 (Mo. 2000); *State v. Johnson*, 22 S.W.3d 183, 191 (Mo. 2000); *State v. Knese*, 985 S.W.2d 759, 778 (Mo. 1999); *State v. Ervin*, 979 S.W.2d 149, 165-66 (Mo. 1997).

Appellant also argues that there are racial disparities in how the death penalty is imposed. The appellant in *State v. Taylor*, also raised race-related Eighth and Fourteenth Amendment challenges to the imposition of his death sentence. The appellant cited "statistics demonstrating a disparity between black and white appellants and other appellants with similar crimes who

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were offered life without parole." *State v. Taylor*, 18 S.W.3d 366, 376 (Mo. 2000). 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,

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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 appellant'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 appellants or for him in particular.

Id. at 376-77.

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The Sixth Circuit rejected a similar argument in *Coleman v. Mitchell*. The court noted that *McCleskey* is still controlling and forecloses arguments such as those made by the appellant in *Coleman* and by Appellant 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 v. Mitchell, 268 F.3d 417, 441-42 (6th Cir. 2001).

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Moreover, Appellant has neither argued nor demonstrated prosecutorial misconduct in the case here. As explained by the United States District Court for the District of Columbia:

> [Appellant] … 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).

Appellant also makes a geographical-disparity argument, which appears to be tied to his racial-disparity argument. 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. 2009); *State v. Ramsey*, 864 S.W.2d 320, 330 (Mo. 1993); *Whitfield*, 837 S.W.2d at 515; *State v. Powell*, 798 S.W.2d 709, 714 (Mo. 1990); *State v. McMillin*, 783 S.W.2d 82, 101-02 (Mo. 1990), abrogated on other grounds by *Morgan v. Illinois*, 504 U.S. 719 (1992).

Appellant presents no compelling argument for abandoning this Court's precedents. His point should be denied.

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CONCLUSION

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

Respectfully submitted,

ERIC S. SCHMITT
Attorney General

/s/ Daniel N. McPherson
DANIEL N. McPHERSON
Assistant Attorney General
Missouri Bar No. 47182

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the limitations in Supreme Court Rule 84.06, and contains 21,725 words as calculated under the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2016 software; and that pursuant to Supreme Court Rule 103.08, the brief was served on all parties through the electronic filing system.

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/s/ Daniel N. McPherson
DANIEL N. McPHERSON
Assistant Attorney General
Missouri Bar No. 47182

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321
Fax (573) 751-5391

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI