

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI,

RESPONDENT,

v.

JOE D. POWELL,

APPELLANT.

**DOCKET NUMBER WD69307
MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: June 2, 2009

**Appeal From:
JACKSON COUNTY CIRCUIT COURT
THE HONORABLE CHARLES DAVID DARNOLD, JUDGE**

**Appellate Judges:
DIVISION THREE: HAROLD L. LOWENSTEIN, Presiding Judge, JOSEPH M.
ELLIS and LISA WHITE HARDWICK, Judges**

**Attorneys:
Frederick J. Ernse, Esq., Kansas City, MO, for appellant.**

**Shaun J. Mackelprang, Esq., and James B. Farnsworth, Esq., Jefferson City,
MO, for respondent.**

**MISSOURI APPELLATE COURT OPINION
SUMMARY**

COURT OF APPEALS -- WESTERN DISTRICT

STATE OF MISSOURI,

RESPONDENT,

v.

JOE D. POWELL,

APPELLANT

WD69307

Jackson County

Before Division Three Judges: Harold L. Lowenstein, Presiding Judge,
Joseph M. Ellis and Lisa White Hardwick, Judges

Joe D. Powell appeals from his convictions after a jury trial for murder in the first degree, section 565.020.1 RSMo (2000), and armed criminal action, section 571.015 RSMo (2000). Powell sets forth three allegations of error.

AFFIRMED.

Division Three holds:

Powell first states that the trial court erred in allowing the prosecutor to elicit rebuttal testimony from a psychologist after Powell put forth testimony indicating that he did not deliberate before killing the victim because he suffered from psychological disorders. The trial court did not abuse its discretion in allowing the prosecutor's rebuttal evidence because Powell put his state of mind at issue and the rebuttal evidence did not invade the province of the jury.

Powell's second allegation of error states that the trial court failed to *sua sponte* interrupt the prosecutor's opening statement because it was argumentative in pointing out which of Powell's acts constituted deliberation for purposes of first degree murder. As there was no objection at trial and Powell fails to show that the prosecutor's remarks resulted in manifest

injustice by having a decisive effect on the jury's determination, this court declines plain error review of Powell's second point.

Powell finally alleges as error the trial court's failure to *sua sponte* strike the prosecutor's closing argument regarding the victim's good character because it was not at issue in trial and was used to inflame the passion of the jury. Because Powell mischaracterizes the prosecutor's statements, this court declines plain error review of Powell's third point. For the foregoing reasons, Powell's points are denied, and the judgment of the trial court is affirmed.

Opinion by: Harold L. Lowenstein, Judge

June 2, 2009

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