No. SC93882

IN THE

Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

JESSE DRISKILL,

Appellant.

Appeal from the Laclede County Circuit Court
Twenty-sixth Judicial Circuit
The Honorable Kenneth M. Hayden, Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Mr. Driskill appeals his convictions on two counts of murder in the first degree, one count of burglary in the first degree, one count of forcible rape, one count of forcible sodomy, and five counts of armed criminal action (L.F. 947-949). For each count of murder in the first degree, Mr. Driskill was sentenced to death (L.F. 949).

Mr. Driskill asserts six claims on appeal: (1) that the trial court erred in proceeding to trial without an additional competency evaluation; (2) that the trial court erred in "allowing crucial phases of the trial to proceed without Driskill present in the courtroom"; (3) that the trial court denied Mr. Driskill his right to testify; (4) that the trial court erred in denying Mr. Driskill's request for a continuance and in failing to order that Mr. Driskill receive a certain medication; (5) that the trial court erred in "denying the jurors' request to view all exhibits admitted into evidence during the penalty phase," including defense exhibits AAAA-IIII; and (6) that the trial court erred in "allowing excessive victim impact testimony and evidence" (App.Br. 38-46).

* * *

On July 25, 2010, in the late evening hours, Jessica Wallace was with Mr. Driskill at the Prosperine River Access on the Niangua River (Tr. 1077-1078). They "hung out a little bit, talked, and then in the later evening, [they] ended up having sex" (Tr. 1078). Earlier they had taken "a pill" (Tr. 1078).

While they were having sex, a police officer arrived, and Mr. Driskill ran off into the woods (Tr. 1078-1079). Mr. Driskill had his clothes and a gun when he ran off (Tr. 1079). After talking to the officer, Ms. Wallace went home (Tr. 1079-1080).

The victims in this case, J.W. and C.W., had a home that was located in a rural area about a mile and half from the Prosperine River Access (Tr. 719, 895). Most of the time, the victims lived in Highlandville, Missouri, with family members (Tr. 717-718, 728). But on July 25, after celebrating their 59th wedding anniversary, they decided to stay at their home in the country before returning to Highlandville the next day (Tr. 718, 729). The victims told their family members that they would return to Highlandville by noon the next day (Tr. 718, 729).

The victims never returned to Highlandville (*see* Tr. 718, 730). When the victims did not return to Highlandville, their family members became worried (Tr. 718, 730). They called the victims' home, but they got no answer (Tr. 718-719, 729). They also called hospitals to see if there might have been an accident (Tr. 730).

At about 5:00 p.m., they decided to drive over to the victims' house, which was located in Laclede County (Tr. 719, 730). They arrived at about 7:00 p.m. and found the doors locked; the victims' vehicle was not present (Tr. 720, 731). The victims' grandson-in-law entered through a window (Tr. 721).

The interior was "smoky and smelly" (Tr. 721). In the dining room, C.W.'s feet were "sticking out from under a big pile of blankets" (Tr. 721). The blankets were still smoldering (Tr. 721).

The victims' grandson-in-law opened the front door and told the victims' son to come inside (Tr. 721, 732). They found J.W. under another pile of blankets with some chairs piled on top (Tr. 722, 732). There were pools of blood near the victims' heads (Tr. 732). They called 911 (Tr. 721).

Meanwhile, sometime after 7:00 p.m., Mr. Driskill called Ms. Wallace and told her he was going to need a ride (Tr. 1080). Mr. Driskill said he would call her when he needed her to leave to pick him up (Tr. 1080).

Deputy Daniel Christman arrived at the scene of the murders at about 7:37 p.m. (Tr. 737, 743-744). A number of other law enforcement officers also arrived (Tr. 745, 802). Inside the house, Deputy Christman smelled and saw smoke (Tr. 746). He saw C.W. beneath the blanket, and he saw "no signs of life" (Tr. 746). He saw J.W. beneath another blanket and a chair (Tr. 747). Highway patrol officers processed the scene and collected evidence (Tr. 803). There were no signs of forced entry (Tr. 804). There was an odor of an "accelerant" (e.g., gasoline) near the bodies (Tr. 819-820; *see* Tr. 749, 761).

C.W.'s body had burn marks around the top part of her body (Tr. 811). Paper towels had been wadded up and burned in her groin area (Tr. 813-814). A partially burned sheet from a small tear-off calendar was also between her

legs (Tr. 833). A clear fluid and apparent blood was draining from her vaginal and anal areas (Tr. 821). C.W. had blackened areas beneath both eyes, and there was a wound above her right eyebrow (Tr. 821).

J.W.'s body was naked, except for his shoes, and there was a plastic bag over his head (Tr. 817). A large amount of blood had drained out of the bag and saturated the carpet beneath J.W.'s head (Tr. 818). He had a wound on his face (Tr. 822).

C.W.'s purse had been dumped out onto the floor (Tr. 825). There was a blue kerosene can in the hallway (Tr. 826, 851). Subsequent testing revealed that the can contained gasoline (Tr. 1176-1177). There was also gasoline on the paper towels found between C.W.'s legs (Tr. 1176-1178). A sample of the carpet beneath C.W.'s body and samples from the blankets placed over the victims' bodies also contained gasoline (Tr. 1178).

After the investigation was underway at the victims' home, law enforcement officers received reports of a burning vehicle near Conway, Missouri (*see* Tr. 864-866). The Dallas County Sheriff's Department investigated the report (*see* Tr. 867-868).

A little after 8:00 p.m., Mr. Driskill called Ms. Wallace, and said that he would be on Highway N, in Conway, Missouri (Tr. 1081). Ms. Wallace drove to Conway, but she did not find Mr. Driskill (Tr. 1081). She drove up and down the highway a couple of times (Tr. 1081-1082). She stopped at a gas

station, and, while there, she saw smoke in the distance (Tr. 1082). She saw police and other first responders heading toward the smoke (Tr. 1082). She then went home (Tr. 1082).

At about 10:45 p.m., Mr. Driskill went to Hannah's General Store in Conway and asked the store clerk to charge his cell phone (Tr. 874-876). The clerk did not have a charger, so Mr. Driskill went outside and asked various people if he could use their cell phone to make a call (Tr. 875).

Mr. Driskill then went to a nearby Budget Inn and asked to use their telephone (Tr. 882-884). Mr. Driskill's first call did not reach anyone, but he then called Jessica Cummins and asked her to come and pick him up (Tr. 884, 908). Ms. Cummins agreed to pick him up, and she picked him up at the Budget Inn (Tr. 885, 908).

Ms. Cummins started driving back to Lebanon, and Mr. Driskill said "something about being mad" at her (Tr. 909). Mr. Driskill "kept mumbling," and he said he had "shot someone," and that he had "messed up really bad" (Tr. 909). Ms. Cummins also thought he said he had "shot up" some drugs (Tr. 910).

At about 11:33 p.m., after receiving a report about the burned vehicle, Sergeant Bearden of the highway patrol went to the scene of the vehicle (Tr. 867-868). The car was located near the county line between Laclede and Dallas counties (Tr. 869). Sergeant Bearden recovered a license plate from

the vehicle, and he found a mallet on the ground that "looked out of place" (Tr. 870). A check of the license plate revealed that it was from the victims' vehicle (Tr. 871).

A little after midnight, Ms. Cummins dropped off Mr. Driskill at Codi Vause's house in Lebanon, Missouri (Tr. 910, 933-934). Calvin Perry was there with Ms. Vause (Tr. 933). Mr. Driskill looked exhausted and anxious, and he said that he "needed some help" (Tr. 937). Mr. Driskill indicated that the authorities ("the dogs") were after him (Tr. 938-939). Mr. Driskill said that he needed some new clothes, and he said, "I had to kill a couple of people today" (Tr. 939).

At some point, Mr. Driskill called Ms. Wallace, and she asked him what was going on (Tr. 1083). Mr. Driskill told her he had "pulled a home invasion and a robbery and a murder, a double homicide" (Tr. 1083). Ms. Wallace drove over to Ms. Vause's house (Tr. 1084).

Mr. Driskill told Ms. Wallace that he had "murdered an elderly couple," and that "they had caught him going through a garage or shed or something" (Tr. 1085). He said he used his gun and ordered them back inside their home (Tr. 1085). He said he demanded money, and that when the man gave him five dollars, he said that "wasn't enough" (Tr. 1085). He said he shot the man (Tr. 1085). He said he told the woman to "bend over," and that he raped her (Tr. 1086). Mr. Driskill said, "I told that bitch to bend over, and I raped her"

(Tr. 1086). He said that he then shot the woman in the face (Tr. 1086). He said the woman tried to get away, and that he shot her two more times (Tr. 1086). He said that he "put a plastic bag down her throat and a pillow over her head" (Tr. 1086-1087). He said that he then "tried to clean up any evidence" (Tr. 1087). He said he shaved her "pussy" and "poured bleach inside of her" (Tr. 1087). He said he used bleach and gasoline (Tr. 1087). He said he used five gallons of gas to burn the house, and he commented, "You'd be amazed how much five gallons of gas can make a house go up" (Tr. 1087). Mr. Driskill was "[k]ind of bragging" (Tr. 1088). He said he took their vehicle (Tr. 1088). Mr. Driskill said his shoes were filled with blood (Tr. 1088-1089).

After hearing Mr. Driskill's account, Ms. Wallace left and went to a convenience store where a friend worked (Tr. 1089). Ms. Wallace was upset; she had been crying; and a police officer at the store asked her what was wrong (Tr. 1090). She told the police what she had heard from Mr. Driskill (Tr. 766-767, 1090-1091).

The other people at Ms. Vause's house also heard Mr. Driskill's account. Mr. Perry heard Mr. Driskill say that he had been trying to break into a garage when two people showed up and said they were going to call the police (Tr. 944). Mr. Driskill said that he took out his gun and said, "No, what we're going to do is we're going to walk into the house" (Tr. 944). Mr. Driskill said that he made the people give him their money, but it "wasn't enough"

(Tr. 945). He said that when they got inside the house, he shot the man (Tr. 944). He said that he then shot the woman in the face (Tr. 944). Mr. Driskill said, "She fell down, Perry, but I knew she was playing possum" (Tr. 944). Mr. Driskill then said, "Well, I had to get me some of that" (Tr. 946). Mr. Driskill said that he then put a bag over the woman's head and raped her (Tr. 946). Mr. Driskill said that he raped her vaginally and anally, and he said he "got [his] load off in her" (Tr. 947). Mr. Driskill seemed to enjoy the fact that his words were upsetting the others (Tr. 949).

Mr. Driskill asked Mr. Perry if bleach would get rid of DNA (Tr. 950). Mr. Perry did not know (Tr. 950). Mr. Driskill said that he had "bleached her out," and he indicated that he had put bleach into "the cavity areas where he would have needed to have used it" (Tr. 950). Mr. Driskill said that he also put paper into her vaginal area and lit it on fire (Tr. 950-951). Mr. Driskill said that he took the victims' vehicle and burned it (Tr. 955).

Ms. Vause noticed that Mr. Driskill's eyes were "completely dilated" (Tr. 1034). Ms. Vause recalled that Mr. Driskill said that he "was trying to rob their house and the husband caught him" (Tr. 1035). He said he "tied the older man up and then had his way with the older lady" (Tr. 1035). Mr. Driskill said that they were "elderly" (Tr. 1036). Mr. Driskill said that he "started having sex with her forcibly" (Tr. 1037). He said he shot the man after he "was done with the older lady" (Tr. 1037). He said he "put bleach in

her" (Tr. 1037). He said the woman lived through the first shot, so "he smothered her and then set her on fire" (Tr. 1037). He said he put bleach in her and set her on fire to "ruin the evidence" (Tr. 1037-1038). He said he shot the man in the head (Tr. 1038). He also said he shot the woman in the head (Tr. 1038). He said he put the bleach in her vagina (Tr. 1038). He said he "ditched" the gun and stole the victim's vehicle (Tr. 1039). He said he set the car on fire (Tr. 1039).

After dropping off Mr. Driskill at Ms. Vause's home, Ms. Cummins retrieved some personal items from another location and returned to Ms. Vause's home (Tr. 911). When she arrived, Ms. Vause and Mr. Perry were sitting on the couch, and Mr. Driskill was in the kitchen washing out his shoes (Tr. 911). Mr. Driskill changed his clothes and told Ms. Vause to get rid of the clothes he had been wearing (Tr. 912, 1039-1040). Ms. Vause put Mr. Driskill's clothes into a trash bag (Tr. 1040). Mr. Driskill then fell asleep on the couch, and the others told Ms. Cummins what Mr. Driskill had told them (Tr. 912, 1041). They decided to call the police (Tr. 912, 956, 1041). When the police arrived, they each gave statements to the police (Tr. 913).

At about 1:45 a.m. (July 27), law enforcement officers arrived to arrest Mr. Driskill (Tr. 748, 913, 1123). They entered Ms. Vause's apartment and found Mr. Driskill asleep on the couch (Tr. 1124). One of the officers grabbed Mr. Driskill's arm to put him in handcuffs, and Mr. Driskill woke up (Tr.

1125). The officer said, "Sheriff's Office. Put your hand behind your back" (Tr. 1125). Mr. Driskill said, "What the f---" and tried to get away (Tr. 1125). The officers took Mr. Driskill to the ground, and Mr. Driskill's head hit a coffee table, resulting in a laceration (Tr. 749, 1125). Deputy Moore said, "Quit resisting, put your hands behind your back" (Tr. 1125). Mr. Driskill did not comply, and Deputy Moore used his Taser three times to subdue him (Tr. 1126-1128). They put handcuffs on Mr. Driskill and took him to the hospital for treatment (Tr. 749, 1128). Officers seized Mr. Driskill's clothing from the bathroom (Tr. 837).

At 4:00 a.m., law enforcement officers executed a search warrant to collect "DNA, hair samples, anything that would have been involved with Jesse Driskill or the homicide" (Tr. 1108-1109). They also conducted a gunshot residue test (Tr. 1109). He collected "blood stains on [Mr. Driskill's] right and left hand" (Tr. 1109). They seized "an unlabeled pill bottle," and they conducted a sexual assault kit on Mr. Driskill (Tr. 1109). They also collected Mr. Driskill's clothing, which contained a pack of Decade Menthol 100 cigarettes (Tr. 839, 1110-1111). The pack of cigarettes in Mr. Driskill's clothing and a pack of cigarettes of the same type found at the victims' home had the same manufacturer's "run number" (Tr. 841-842).

Later that day, July 27, the victims' bodies were autopsied (Tr. 771-772). A sexual assault kit was used to collect samples from C.W., and

fingernail scrapings were collected from her hands (Tr. 783-784, 790-791, 998). A bullet was retrieved from C.W.'s head (Tr. 779-780, 784).

C.W. had extensive burns, predominantly on the left side of her body (Tr. 988). She had burns on her left side, on her face and head, and on her legs and back (Tr. 988). The burns were predominantly "direct thermal injuries," meaning that the fire was in contact with her skin (Tr. 988). The majority of the burns were second and third-degree burns (Tr. 989). One gunshot wound traveled along C.W.'s jawline, exited her neck, and then went through her shoulder (Tr. 990). C.W. had also been shot above the left eye, and that bullet went through her skull and lodged beneath her scalp (Tr. 991-992). The shot went through her brain; it was "instantly incapacitating" and ultimately fatal, and it appeared to have been fired from "near contact or a loose contact range," or less than an inch away (Tr. 992-993, 1006-1007, 1009). C.W. also had a laceration along her right eyebrow from blunt trauma, and her skull was fractured beneath that laceration (Tr. 994).

C.W. had also suffered trauma to her vaginal area (Tr. 995). There was bruising and some slight tearing of the entrance to her vagina from penetrating injuries (Tr. 995-996). The injuries were consistent with a sexual assault (Tr. 996). There were also two small tears in the entrance to her rectum (Tr. 997). Those injuries were also consistent with a sexual assault (Tr. 997).

During the autopsy of J.W., a wadded up plastic sack was found in his throat (Tr. 788). A DNA swab and fingernail scrapings were collected from him (Tr. 791-792). J.W. did not have any burn injuries, but he did have gunshot wounds from a single bullet (Tr. 1010). The bullet entered his right cheek, went through his tongue and the back of his throat, exited his neck, and lodged in his shoulder (Tr. 1011). The bullet made a small tear in his jugular vein (Tr. 1011). The gunshot wound was potentially fatal, but it was not determined to be the cause of J.W's death (Tr. 1012). Rather, he was asphyxiated by the plastic bag in his throat (Tr. 1013).

After the autopsies revealed that the victims had been shot, officers returned to the victims' home and found two expended bullets (Tr. 845-846). One was inside of a cabinet, and one was on the floor beneath the cabinet (Tr. 847-848). Subsequent examination revealed that the bullets from the scene and the bullet from C.W.'s head were all consistent with, or had the class characteristics of, a .380 auto cartridge (Tr. 1143-1144). The bullets could have been fired from one particular firearm, but there were insufficient individual characteristics to determine that conclusively (Tr. 1146-1149).

Microscopic examination of the vaginal swabs from C.W. revealed the presence of intact sperm cells (Tr.1202). Testing also revealed the presence of "antigen P-30, a component of semen" on the vaginal swabs (Tr. 1202). Both swabs were then subjected to DNA analysis (Tr. 1203). The sperm fraction

from the first swab produced a mixture from two individuals (Tr. 1203). The major component was consistent with C.W.'s DNA profile (Tr. 1203, 1207). The minor component was a partial profile consistent with Mr. Driskill's DNA profile (Tr. 1203, 1208). J.W. was eliminated as a contributor to the DNA mixture (Tr. 1207).

Additional testing of the first vaginal swab produced an autosomal DNA profile, and it was a mixture of at least two individuals (Tr. 1211). The major contributor was consistent with C.W.'s DNA profile (Tr. 1211). The minor contributor produced a partial profile that was consistent with Mr. Driskill's DNA profile (Tr. 1211). It was 94.97 billion times more likely that the mixture was produced by C.W. and Mr. Driskill than by C.W. and some other unknown person (Tr. 1215).

On July 27, 2010, the State filed a complaint (L.F. 48-49). The State subsequently charged Mr. Driskill by amended information with two counts of murder in the first degree, one count of burglary in the first degree, one count of forcible rape, one count of forcible sodomy, and five counts of armed criminal action (L.F. 593-603). On November 1, 2010, the State gave notice that it intended to seek the death penalty (L.F. 124-127).

At trial, Mr. Driskill presented the testimony of Paul Cordia and Richard Herndon (Tr. 1254, 1269). Mr. Cordia testified about certain text messages sent to Mr. Driskill's cell phone by "Jessie" (Tr. 1257-1259). Mr.

Herndon testified about two text messages that had been sent from Mr. Driskill's cell phone on July 24 to "Jessie" (Tr. 1270-1271). Mr. Herndon testified that the last message sent from Mr. Driskill's cell phone was sent at 5:08 p.m. on July 25 (Tr. 1275).

The jury found Mr. Driskill guilty on all counts—two counts of murder in the first degree, one count of burglary in the first degree, one count of forcible rape, one count of forcible sodomy, and five counts of armed criminal action (Tr. 1379, 1382).

In the penalty phase, the State presented evidence of Mr. Driskill's eight prior convictions, including two second-degree assaults, four second-degree burglaries, one third-degree domestic assault, and one tampering with physical evidence (Tr. 1432-1438, 1456-1457). The State also presented the testimony of Officer Daniel Nash, who had investigated Mr. Driskill's involvement in the tampering case (Tr. 1439).

Officer Nash testified that he investigated the kidnapping and robbing of an elderly woman in Dunklin County in December 2003 (Tr. 1439-1440). The woman had been found in a ditch in Dallas County with her throat cut (Tr. 1440). The woman had been flown to a hospital, and she survived the attack (Tr. 1440-1441).

Officer Nash learned that Mr. Driskill and his girlfriend might have been involved in the crime, so he interviewed Mr. Driskill (Tr. 1441-1442).

Mr. Driskill initially denied any knowledge about the case (Tr. 1444). But Mr. Driskill eventually admitted to Officer Nash that the people who had kidnapped the woman had come to him looking for help because they "needed help getting rid of her" (Tr. 1447).

Mr. Driskill told Officer Nash that he told the people he could not go with them because he was on parole and had a GPS ankle monitor that would notify his parole officer if he left the house (Tr. 1448). Mr. Driskill said, however, that he told the people his girlfriend would go with them and help them "get rid of" the woman (Tr. 1449). Mr. Driskill said that the people needed to get rid of the woman because she could identify them (Tr. 1449).

Mr. Driskill admitted to Officer Nash that the people later returned and gave him some of their bloody clothes and some jewelry they had stolen from the woman (Tr. 1450). Mr. Driskill admitted that he hid the items in trash bags at his house and did not turn them over to the police (Tr. 1450). He admitted that the people had told him they had taken the woman to a rural area and slit her throat (Tr. 1450).

The State also presented the testimony of three of the victims' family members (Tr. 1458, 1462, 1467). They offered testimony about the victims and described the effect their deaths had had upon them (Tr. 1458-1476).

Mr. Driskill presented the testimony of a family friend, one of his seventh grade teachers, a prison warden, a drug counselor supervisor, a

neuropsychologist, a psychiatrist, and his family doctor (Tr. 1482, 1501, 1506, 1534, 1541, 1589, 1645). Mr. Driskill also presented a letter from his brother (Tr. 1660).

Mr. Driskill's family friend and seventh grade teacher testified that Mr. Driskill had a rough childhood and suffered abuse as a child (Tr. 1484, 1501-1502). Mr. Driskill's family friend testified that Mr. Driskill suffered from some mental problems and had abused drugs, but she also testified that he loved the outdoors and was really good with her children (Tr. 1485, 1489, 1491, 1495).

The prison warden and drug counselor supervisor testified about conditions in prison and Mr. Driskill's ability to follow rules in a structured environment (1511-1517, 1535-1536).

The neuropsychologist, Dr. Robert Hanlon, testified that Mr. Driskill had previously been diagnosed with multiple psychiatric disorders, "intermittent explosive disorder," "bipolar disorder," "anxiety disorder, particularly characterized by panic attacks," and "chronic, long-standing migraine headaches" (Tr. 1553). He testified that intermittent explosive disorder "involves a misinterpretation of something that someone said or a misinterpretation of a behavior, and it involves a very rapid escalation to a very high level of hostility and aggression" (Tr. 1555-1556).

Dr. Hanlon testified that Mr. Driskill had "some mild cognitive or

neuropsychological deficits" (Tr. 1557). He testified that Mr. Driskill "is the kind of individual who benefits from structure and a high level of structure and routine where there are minimal choices to be made, there is a regimented routine to follow" (Tr. 1563). He concluded that "Mr. Driskill manifested some selective or circumscribed neurocognitive deficits," and that he was "less able to control his behavior" and "make good decisions" (Tr. 1565-1566).

The psychiatrist, Dr. William Bernet, testified that genetics can have an effect on whether a person is violent (Tr. 1598). He testified that children who are abused "are more likely to grow up and become abusive themselves" (Tr. 1606). He testified that Mr. Driskill had a history of abuse, and that Mr. Driskill also had the monoamine oxidase A (MAOA) gene with the "low activity allele" that is "associated with violence and antisocial behavior" (Tr. 1611). Dr. Bernet testified that these were risk factors that "made it significantly more likely that he would act in a violent manner" (Tr. 1613).

Mr. Driskill's family physician testified that when he first saw Mr. Driskill in 2003, he was "real anxious, real quiet, real paranoid" (Tr. 1648). He testified that Mr. Driskill came from a "tumultuous background"—"a lot of abuse, a lot of issues that caused anxiety and paranoia and mistrust" (Tr. 1648). He testified that he last saw Mr. Driskill around July 12, 2010 (Tr. 1649). He said Mr. Driskill was "a little more unsettled than what he had

been in the past, but all in all, I thought he was in a pretty – pretty good place" (Tr. 1649). He confirmed that Mr. Driskill had suffered from "anxiety disorder" and some depression, but mostly "explosive behavior disorder, anger issues" (Tr. 1651-1652).

Mr. Driskill's last piece of evidence was a letter from Mr. Driskill's brother (Tr. 1660). The letter described Mr. Driskill as "a great brother" who "always protected me" (Tr. 1660). The letter stated that Mr. Driskill had always helped his brother, and taught him, and protected him (Tr. 1660-1661). It stated: "Jesse and me had a hard childhood and a hard life. I love my brother very much because he is always there for me. He always protected me. He is a great brother. He will always be my best friend, and I love him" (Tr. 1662).

The jury recommended sentences of death for each count of murder in the first degree (Tr. 1749). With regard to the murder of C.W., the jury found nine statutory aggravating circumstances: (1) that Mr. Driskill had a serious assaultive conviction based on his prior conviction for assault in the second degree in Laclede County; (2) that Mr. Driskill had a serious assaultive conviction based on his prior conviction for assault in the second degree in Hickory County; (3) that the murder of C.W. was committed while Mr. Driskill was engaged in the commission of another unlawful homicide of J.W.; (4) that Mr. Driskill murdered C.W. for the purpose of receiving money or any

other thing of monetary value from C.W. or another; (5) that the murder of C.W. involved depravity of mind and was outrageously and wantonly vile, horrible, and inhuman, in that Mr. Driskill, while killing C.W. or immediately thereafter, had sexual intercourse with her; (6) that the murder of C.W. was committed while Mr. Driskill was engaged in the perpetration of a burglary; (7) that the murder of C.W. was committed while Mr. Driskill was engaged in the perpetration of a robbery; (8) that the murder of C.W. was committed while Mr. Driskill was engaged in the perpetration of forcible rape; and (9) that the murder of C.W. was committed while Mr. Driskill was engaged in the perpetration of forcible sodomy (L.F. 820-821, 837).

With regard to the murder of J.W., the jury found eight statutory aggravating circumstances: (1) that Mr. Driskill had a serious assaultive conviction based on his prior conviction for assault in the second degree in Laclede County; (2) that Mr. Driskill had a serious assaultive conviction based on his prior conviction for assault in the second degree in Hickory County; (3) that the murder of J.W. was committed while Mr. Driskill was engaged in the commission of another unlawful homicide of C.W.; (4) that Mr. Driskill murdered J.W. for the purpose of receiving money or any other thing of monetary value from J.W. or another; (5) that the murder of J.W. was committed while Mr. Driskill was engaged in the perpetration of a burglary; (6) that the murder of J.W. was committed while Mr. Driskill was engaged in

the perpetration of a robbery; (7) that the murder of J.W. was committed while Mr. Driskill was engaged in the perpetration of forcible rape; and (8) that the murder of J.W. was committed while Mr. Driskill was engaged in the perpetration of forcible sodomy (Tr. 828-829, 841).

On November 5, 2013, the trial court sentenced Mr. Driskill to death for each count of murder in the first degree (Tr. 1765). The court sentenced Mr. Driskill to fifteen years for burglary and to life imprisonment for each of the other offenses (Tr. 1765-1766). The court ordered the sentences to run consecutively (Tr. 1766).

ARGUMENT

I.

The trial court did not err in finding that Mr. Driskill was competent to stand trial.

In his first point, Mr. Driskill asserts that the trial court erred in proceeding to trial when he was incompetent to stand trial (App.Br. 47). He asserts that the trial court should have ordered a competency evaluation and granted his request for a continuance (App.Br. 47).

A. The standard of review

" 'It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the prosecution of a defendant who is not competent to stand trial.' " *State v. Baumruk*, 280 S.W.3d 600, 608 (Mo. 2009) (quoting *State v. Anderson*, 79 S.W.3d 420, 432 (Mo. 2002)). " 'A defendant is competent when he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him.' " *Id.* (internal quotation marks and citation omitted).

"A defendant is presumed competent and has the burden of proving incompetence by a preponderance of the evidence." *Id.* (citing § 552.020.8, RSMo 2000). "Furthermore, '[t]he trial court's determination of competency is one of fact, and must stand unless there is no substantial evidence to support

it.' " *Id.* (citing *Anderson*, 79 S.W.3d at 433). " 'In assessing sufficiency of evidence, this Court does not independently weigh the evidence, but accepts as true all evidence and reasonable inferences that tend to support the trial court's finding.' " *Id.*

B. There was substantial evidence of Mr. Driskill's competence, and Mr. Driskill failed to prove by a preponderance of the evidence that he was not competent to stand trial

1. The trial court's initial finding of competence

Before trial, in July 2013, Mr. Driskill's attorneys advised the trial court that Mr. Driskill would like to attend trial, or parts of trial, via closed circuit television (Tr. 39). Counsel stated that Mr. Driskill suffered from "anxiety disorder" and "intermittent explosive disorder" (Tr. 47). Counsel stated that Mr. Driskill feared he might suffer from a "panic attack" at times, and that he thought it would be better to remove himself in that event (Tr. 47). The court personally questioned Mr. Driskill about counsel's request for closed circuit television (Tr. 46-48). Mr. Driskill said that he had discussed the issue with counsel, and he indicated that he wanted to be able to tell counsel if he was about to have a panic attack, so that he could leave the courtroom and watch on television (Tr. 47-48).

At a pre-trial hearing on August 14 (the first day of trial, but before voir dire commenced), counsel again asked for closed circuit television to

accommodate Mr. Driskill's anxiety disorder and potential panic attacks (Tr. 61). Counsel disclosed that one of their experts, Dr. Linda Gruenberg, had found Mr. Driskill "incompetent for trial without being placed on Neurontin" (Tr. 61). Counsel stated that they had tried to get the department of corrections to give Mr. Driskill Neurontin, but that department doctors would not prescribe it based on an outside doctor's advice (Tr. 62). Counsel stated that Mr. Driskill was not taking any medication for his anxiety (Tr. 63).

Counsel also disclosed that a second expert, Dr. Rob Fucetola, had evaluated Mr. Driskill in July, and that Dr. Fucetola agreed that closed circuit television participation would be beneficial for Mr. Driskill (Tr. 62). Counsel informed the court that Dr. Fucetola had found Mr. Driskill competent to stand trial (Tr. 62). But counsel warned that "we may have to ask for a competency evaluation in the middle of trial" (Tr. 65). To that point, counsel had not requested another competency evaluation or continuance.

Later that day, during the State's questioning of the second small panel in voir dire, counsel informed the court that Mr. Driskill needed to leave the courtroom (Tr. 231). The court called a recess and granted Mr. Driskill's request (Tr. 231). After the jury had left the courtroom, counsel stated that Mr. Driskill had suffered a panic attack, and she stated that she did not "think that he can participate in the trial right now at this moment meaningfully" (Tr. 233-234). Counsel requested a competency evaluation (Tr.

234; *see* Tr. 244-245).

The trial court inquired about the previous competency evaluations, and counsel informed the court that Dr. Fucetola, who had conducted the most recent evaluation, had found Mr. Driskill competent to stand trial (Tr. 235-236). Counsel stated, however, that Dr. Fucetola met with Mr. Driskill in jail and "could not give an opinion as to whether or not, during the middle of trial if Mr. Driskill suffered a panic attack, he would be competent at that time" (Tr. 234).

The prosecutor acknowledged that a person might not be able to assist counsel in a meaningful manner at the moment of a panic attack or an outburst (Tr. 235). But in light of the fact that Mr. Driskill was otherwise competent to stand trial, the prosecutor argued that temporary outbursts could be dealt with by the trial court taking other measures (Tr. 235-236).

The trial court observed that if Mr. Driskill were again evaluated in jail, it would be no different than the previous evaluation that took place in jail (*i.e.*, that Mr. Driskill could not be evaluated at trial) (Tr. 237). Defense counsel suggested having a doctor on standby in the courthouse, but neither the prosecutor nor the court thought that was workable (Tr. 237-238).

A deputy who escorted Mr. Driskill to a cell reported that, upon entering the cell, Mr. Driskill had punched the wall, and that he was "really amped up, a lot of air, almost hyperventilating, red in the face, crying,

rubbing his head, kneeling over like his stomach was hurting[.]" (Tr. 240). The deputy said that Mr. Driskill did not want to talk to his attorneys (Tr. 241). A second deputy reported that Mr. Driskill had since calmed down, but that he had gotten sick and thrown up (Tr. 241). He stated that Mr. Driskill was calming down, but that he was "still a little irritated" (Tr. 241). The court stated that it would take a fifteen or twenty minute break (Tr. 241).

After the break, defense counsel stated that she had spoken "very briefly" with Mr. Driskill, but that she was unable to "have a really good conversation with him" (Tr. 242). She stated that he was still crying, but that he had calmed down a lot (Tr. 242). She stated that he was "really not in a position to actively participate in the trial right now," and she requested that they recess for the day and reconvene in the morning with Mr. Driskill participating by television (Tr. 242).

The court denied defense counsel's request for a competency evaluation, observing that there had already been two evaluations (Tr. 243). The court then granted counsel's request for a recess until the next morning, and the court agreed to allow Mr. Driskill to participate via television (Tr. 243). Defense counsel clarified that they were asking for television participation "in lieu of [their] motion for a competency evaluation" (Tr. 244).

The next morning (August 15), defense counsel offered the reports of Dr. Gruenberg and Dr. Fucetola (Tr. 249). Dr. Gruenberg had evaluated Mr.

Driskill on May 13, 2013, and Dr. Fucetola had evaluated Mr. Driskill on July 13, 2013 (Tr. 249). The court observed that Dr. Fucetola had found that Mr. Driskill "does have the adequate capacity to appreciate his own legal situation, he has a rational understanding of the legal situation, he has an adequate factual understanding of the legal system and process of adjudication and the capacity to assist his own counsel in his defense" (Tr. 250). The court acknowledged that Dr. Gruenberg had concluded that Mr. Driskill was "unfit to stand trial," but the court concluded, based on the more recent report of Dr. Fucetola, that Mr. Driskill was competent—that he was "able to understand the legal proceedings and their nature, and . . . able to assist his legal defense team in his defense" (Tr. 250).

The court then questioned Mr. Driskill, and Mr. Driskill indicated that he could hear the proceedings over the television, that he had asked to be excused from the courtroom, and that he understood his right to be present (Tr. 251-252). Mr. Driskill stated that he understood the television system, that he had no questions, that he did not need more time to talk to his attorneys, and that he wanted to appear by television "[f]or today" (Tr. 253). Mr. Driskill stated that he had not been threatened or promised anything to induce him to appear by television (Tr. 253). Mr. Driskill stated that he hoped to be present in court the next day, but that he was waiving his right to be in the courtroom at that time (Tr. 254).

Counsel reiterated her belief that Mr. Driskill was not competent to proceed without medication, stating, "he is not competent to proceed right now at this time" (Tr. 254-255). The court then questioned Mr. Driskill again, and Mr. Driskill stated that he was feeling better, and that he was much calmer than he had been the day before (Tr. 255). Mr. Driskill said that he was able to think clearly, and that there was nothing preventing him from communicating with counsel and assisting in his defense (Tr. 255-256). Mr. Driskill acknowledged that he had been given a telephone so that he could text and communicate with counsel (Tr. 256). Mr. Driskill stated that there was nothing prohibiting him from understanding the proceedings, and he stated that he understood that it was the second day of jury selection (Tr. 256). Mr. Driskill said he could communicate anything to counsel (Tr. 256).

The court concluded that Mr. Driskill understood his right to be present, and the court observed that Mr. Driskill was calmer and that Mr. Driskill said he understood the proceedings (Tr. 257). The court observed that Mr. Driskill could communicate with counsel, and the court concluded that he appeared "to be competent and able to assist in his own defense" (Tr. 257).

Based on this record, the trial court did not err in finding that Mr. Driskill was competent to stand trial. Dr. Fucetola had evaluated Mr. Driskill about a month before trial, and notwithstanding Dr. Gruenberg's contrary view, the trial court was entitled to credit Dr. Fucetola's conclusion that Mr.

Driskill was competent. "While the experts disagreed as to [the defendant's] mental state, 'a mere disagreement among experts does not necessary indicate error on the part of the trial court. On the contrary, it is the duty of the trial court to determine which evidence is more credible and persuasive.' " *See State v. Baumruk*, 280 S.W.3d at 609.[1]

Moreover, here, where the trial court also personally observed Mr. Driskill in court and questioned him directly about the proceedings, the trial court had a substantial basis for concluding that Mr. Driskill was competent. In fact, contrary to defense counsel's stated concern, Mr. Driskill assured the court that his mind was clear, that he understood what was going on, and that he was able to communicate with counsel. In short, in light of Dr. Fucetola's conclusion, and in light of Mr. Driskill's own conduct and ability to rationally interact with the court, there was substantial evidence of Mr.

[1] Mr. Driskill's reliance on *People v. Moore*, 946 N.E.2d 442 (Ill.App. 2011), is misplaced. There, the uncontradicted testimony of a single doctor (which was relied on by the trial court) indicated that the defendant needed his medications "in order to be fit for trial." *Id*. at 447-448. Thus, when the defendant told the court that he had not been given his medication, that fact "raised a *bona fide* doubt as to defendant's fitness." *Id*. at 448. Here, Dr. Fucetola did not predicate competence upon Mr. Driskill's being medicated.

Driskill's competence. *See id*. (observing that "the trial court observed [the defendant's] interaction with his lawyers during the [competency] hearing"); *State v. Hampton*, 959 S.W.2d 444, 450 (Mo. 1997) ("We will not reweigh the evidence and second-guess this factual conclusion [regarding the defendant's competence to stand trial] supported, as it is, by the expert testimony presented to the trial court and the court's own observation of the defendant's behavior."); *State v. Tokar*, 918 S.W.2d 753, 765 (Mo. 1996) ("On the two occasions he gave testimony, [the defendant's] answers were clear and logical. In both instances he stated that he wanted to follow the advice of his attorneys and not testify."); *see also Drope v. Missouri*, 420 U.S. 162, 180 (1975) (in making a competency determination, a court may consider a number of factors, including the defendant's behavior in the courtroom, evidence of irrational behavior, and any prior medical opinions as to competence).

It is true that Mr. Driskill also demonstrated a temporary inability to remain calm, and that he was apparently temporarily unable to communicate with counsel (Tr. 240-242). But the record shows that the trial court took appropriate steps to ensure that Mr. Driskill's alleged condition did not impair his right to due process. Specifically, the trial court halted Mr. Driskill's trial, recessed and briefly continued the case until the next day, and did not proceed with trial until the court was satisfied that Mr. Driskill was

competent to proceed. And, as set forth above, there was ample evidence showing that Mr. Driskill understood the proceedings and was capable of consulting with and assisting counsel.

To be sure, there are conditions that could affect a person's ability to sit for long periods of time and remain focused on a trial (*e.g.*, narcolepsy or a seizure disorder). But such problems do not automatically require additional competency evaluations before beginning (or completing) a trial—especially where, as here, they are known, and the experts who conducted previous competency evaluations considered them in rendering their opinions on the defendant's competence.

Mr. Driskill did not suffer from a mental condition that left him in a permanent state of incompetence. Rather, the evidence presented by the defense showed that Mr. Driskill might occasionally suffer from an episode that would *temporarily* render him unable to consult with counsel. But according to Mr. Driskill's own pleadings, Dr. Fucetola was of the opinion that "the ability to let Mr. Driskill be excused from the proceedings and recover from the anxiety or panic attack should be enough to allow Mr. Driskill to remain competent in that Mr. Driskill could continue to assist in his own defense[.]" (L.F. 736).

Consistent with managing Mr. Driskill's alleged condition in that manner, the record shows that when Mr. Driskill had a "panic attack" during

the prosecutor's questioning of the second small panel in voir dire, the trial court halted the trial until Mr. Driskill demonstrated that he was able to proceed. Moreover, the record shows that Mr. Driskill was never unable to assist in his defense. To the contrary, the record shows that Mr. Driskill was aware that he needed to take a break, and that he informed counsel of that fact (who then informed the court) (Tr. 231). Mr. Driskill was apparently anxious and upset, but he did not have an outburst in court, and he remained in control until after he was removed from the courtroom. Finally, after the overnight recess, Mr. Driskill indicated that he was capable of understanding the proceedings and assisting the defense.

2. The trial court's subsequent denial of Mr. Driskill's request for a competency evaluation

Mr. Driskill points to other events and evidence that allegedly prove that he was incompetent to stand trial, namely, a "supplemental report" from Dr. Fucetola presented to the trial court on the fourth day of trial, counsel's statements that Mr. Driskill was not competent, Mr. Driskill's "repeated panic attacks and forced absences from the courtroom," and Mr. Driskill's "lengthy and documented history of mental illness" (App.Br. 47). But the record does not bear out Mr. Driskill's claim.

(a) Voir dire and guilt phase

On the second day of trial (August 15), while Mr. Driskill participated

by television, he did not demonstrate any inability to assist counsel. To the contrary, defense counsel confirmed that there were no "issues at all," and counsel stated that Mr. Driskill intended to be present for general voir dire the next day (Tr. 548-549).[2]

On the third day of trial (August 16), Mr. Driskill was present in the courtroom (Tr. 554). There were no problems that day.

On the fourth day of trial (August 19), Mr. Driskill was again present in the courtroom (Tr. 692). At that time, defense counsel again requested a competency evaluation and presented an e-mail that Dr. Fucetola had provided to her over the weekend (Tr. 692-693). In his e-mail, Dr. Fucetola had written (based on his understanding of what had occurred on the first day of trial): "During the panic attacks, and in the moments before and after attacks, I am concerned that Mr. Driskill does not have the capacity to assist you in his own defense due to his transient state of mind" (L.F. 751).

But while this "report" had been recently generated, it did not provide any basis for ordering another competency evaluation, and it did not provide any evidence that undermined Dr. Fucetola's earlier conclusion that Mr. Driskill was otherwise competent to stand trial. The trial court was aware of

[2] Mr. Driskill's waiver of his right to be present in the courtroom is discussed further in Point II.

what had occurred on the first day of trial, and the concern that Mr. Driskill was temporarily incompetent in the midst of his "panic attack" (or in the moments immediately preceding or following it) was unremarkable.

At most, it suggested that the trial might need to be halted for a brief period if Mr. Driskill suffered a panic attack. The prosecutor pointed out that if a person with narcolepsy "fell asleep because of that medical condition, we would nudge them, wake them up and, in the meantime, halt the proceedings" (Tr. 693). Likewise, the prosecutor argued, Mr. Driskill's alleged temporary inability to proceed (if it arose during trial), could be adequately addressed by stopping the proceedings and giving Mr. Driskill time to compose himself (Tr. 693).

Accordingly, Dr. Fucetola's e-mail did not provide any evidence that Mr. Driskill was incompetent on the fourth day of trial, and it did not provide any new information that required the trial court to order another competency evaluation. And, as the record shows, on the fourth day of trial, there were no problems, and counsel reported at the end of the day that Mr. Driskill was able to converse with counsel and answer questions, that Mr. Driskill was able to assist in his defense, and that counsel had no reason to believe that Mr. Driskill was "under any type of duress or mental disability throughout" the day (Tr. 973-974).

On the fifth day of trial (August 20), Mr. Driskill was again present in

the courtroom (Tr. 977). The State completed its case without any indication that Mr. Driskill was not competent (Tr. 1246). In fact, the record showed that Mr. Driskill communicated with counsel about his decision not to testify, and that Mr. Driskill gave rational answers when questioned about whether he wanted to testify (Tr. 1247-1250). Mr. Driskill did experience some anxiety immediately before the defense called its first witness, but when Mr. Driskill informed the court (through counsel) that he needed "about five minutes," the court recessed before bringing the jury back in (Tr. 1253). Counsel later told the court that Mr. Driskill had been able to assist with his defense throughout the day (except during that short recess before the defense called its first witness), that Mr. Driskill had understood the proceedings, and that Mr. Driskill was "able to assist [counsel] in his defense at all times . . . during the evidentiary portion of trial" (Tr. 1266).

On the sixth day of trial (August 21), Mr. Driskill again gave rational answers when questioned about whether he wanted to testify (Tr. 1263).[3] There were no problems during the presentation of evidence and closing arguments, and counsel later confirmed that she was able to consult with Mr. Driskill during those portions of the trial, and that Mr. Driskill was able to assist the defense (Tr. 1400-1401).

[3] Mr. Driskill's decision not to testify is discussed further in Point III.

After the first seven guilty verdicts were read by the court, however, defense counsel asked that Mr. Driskell be escorted from the courtroom (Tr. 1379). Mr. Driskill was "upset" and had asked to be excused (Tr. 1381). The trial court recessed the proceedings and asked counsel to talk to Mr. Driskill and determine if he would like to be present for the reading of the three remaining verdicts (Tr. 1380-1381). Counsel then talked to Mr. Driskill and informed the court that Mr. Driskill did not want to be present and would waive his presence for the remaining verdicts (Tr. 1381).

There was no evidence that Mr. Driskill suffered another "panic attack" at that time, or that he was incapable of understanding the proceedings and consulting with counsel (*see* Tr. 1380-1381, 1400-1401). Rather, it appears that Mr. Driskill was simply upset by the numerous guilty verdicts, including two guilty verdicts for murder in the first degree.

In sum, there was nothing that occurred throughout the remainder of voir dire and the guilt phase that undermined the trial court's original determination that Mr. Driskill was competent to stand trial. To the contrary, once the trial court took steps to accommodate Mr. Driskill's alleged anxiety, there were no more panic attacks, and Mr. Driskill consistently demonstrated a rational and factual understanding of the proceedings. Moreover, counsel repeatedly confirmed that they were able to communicate with Mr. Driskill at all relevant times, and that Mr. Driskill was capable of

assisting in his defense. The trial court did not err in denying counsel's request for a competency hearing on the fourth day of trial (or at some other unspecified point).

(b) Penalty phase

On the seventh day of trial (August 22), Mr. Driskill was present in the courtroom, and, while counsel stated that Mr. Driskill was in a "somewhat of a heightened state of anxiety," counsel stated that Mr. Driskill was able to assist the defense (Tr. 1393, 1401-1402).

Later, however, during the State's opening statement, Mr. Driskill asked to be excused from the courtroom (Tr. 1410). The court recessed and questioned Mr. Driskill (Tr. 1411). Mr. Driskill said that he had been told about the evidence that would be presented, and he stated his belief that he would have an "episode" if he remained in the courtroom (Tr. 1411). Mr. Driskill said, "I mean, I know how I am and I know I'll snap out" (Tr. 1411).

The court asked if Mr. Driskill wanted to be present, and Mr. Driskill said, "I just know it ain't a good idea for me to be in here right now" (Tr. 1412). The court offered to let Mr. Driskill participate via television, but Mr. Driskill said that the television was worse, and that he "didn't like it" (Tr. 1413). Mr. Driskill stated that he wanted to be present, but he said, "I just feel it would be best if I'm not in here" (Tr. 1413). He stated: "I mean I feel uneasy right now, so I can only imagine what's going to happen in a matter of

minutes" (Tr. 1413). Mr. Driskill then asked to be excused during the State's evidence (Tr. 1414). He stated that no one had threatened him to waive his right to be present and that he knew he had the right to be present (Tr. 1414).

Defense counsel stated that Mr. Driskill was "incredibly anxious" (Tr. 1416). Counsel asserted that the court was "forcing Mr. Driskill to go through this while he's having periods of what we believe are incompetency" (Tr. 1416). Accordingly, counsel requested a continuance and a competency evaluation (Tr. 1416). Alternatively, counsel requested more time to allow Mr. Driskill to calm down, but counsel said she could not estimate how much time she thought was needed (Tr. 1416-1417).

The prosecutor pointed out that Mr. Driskill had been calm during questioning and that he had answered all of the court's questions (Tr. 1418). The prosecutor argued that Mr. Driskill's alleged anxiety could be dealt with in the same way it had been dealt with up to that point (Tr. 1418).

The trial court asked if defense counsel had any new evidence to present, and counsel said she did not (Tr. 1418). The trial court denied the request for a competency evaluation, and it denied the alternative request for a recess of indeterminate length (Tr. 1418-1419). Mr. Driskill again answered the court's questions about remaining in the courtroom or participating via television, and then he asked to be excused (Tr. 1419).

Later, after the State had called all of its penalty-phase witnesses, Mr. Driskill informed the court that he did not want to be present for the testimony of his witnesses (Tr. 1477). He again asked to be excused, and he again provided rational answers upon questioning, indicating that he understood his right to be present, that no one had threatened him, and that he was concerned about having "another panic attack" if he remained in the courtroom (Tr. 1477-1478).

Defense counsel again requested a competency evaluation or a recess of indefinite length to allow Mr. Driskill to calm down (Tr. 1478-1479). Both counsel and Mr. Driskill stated that they did not know how long it would take Mr. Driskill to calm down (Tr. 1479). Mr. Driskill again told the court that he did not want to participate via television (Tr. 1479-1480).

The trial court denied counsel's requests, observing that, while Mr. Driskill's leg was "bouncing up and down a little bit," "it did not appear to the Court that the defendant was under any type of duress" (Tr. 1481). The court further observed that Mr. Driskill was able to answer the questions put to him and that he appeared to understand (Tr. 1481).

After four of Mr. Driskill's witnesses had testified, Mr. Driskill returned to the courtroom (Tr. 1541-1542). He remained in the courtroom while two experts testified, and, at the end of the day, counsel confirmed that Mr. Driskill had been able to consult with counsel while he present, that Mr.

Driskill had appeared to understand the proceedings, and that Mr. Driskill was able to assist in his defense (Tr. 1643).

On the last day of trial (August 23), Mr. Driskill was present in the courtroom while his next witness testified (Tr. 1645). But then, just before his brother's letter was read into evidence, Mr. Driskill asked to be excused (Tr. 1659). There was no evidence that Mr. Driskill suffered another "panic attack" (Tr. 1659).

After the defense rested, and after Mr. Driskill had time to get "ready," Mr. Driskill returned to the courtroom and informed the court that he had elected not to testify in the penalty phase (Tr. 1663). Mr. Driskill stated that he understood his right to testify, that he had had enough time to consult with counsel, that he did not need more time to talk to counsel, and that he had personally made the decision not to testify (Tr. 1663-1664). Mr. Driskill then remained in the courtroom (at his request) during the instructions conference (Tr. 1664-1665).

Mr. Driskill also remained in the courtroom during penalty-phase closing arguments and then asked to be excused (Tr. 1743). After the court sent the jurors out to deliberate, Mr. Driskill returned to the courtroom (Tr. 1744). Mr. Driskill was then present for the jury's final verdicts and the polling of the jurors (Tr. 1749-1755).

As is evident, there was no point during the penalty phase that Mr.

Driskill suffered the sort of "panic attack" that occurred on the first day of trial. Rather, while counsel and Mr. Driskill expressed concern or a belief that something might happen, the record showed that Mr. Driskill was able to consult with counsel throughout the penalty phase, and that Mr. Driskill's reasonable requests were accommodated whenever he felt that he could not continue in the courtroom.

Mr. Driskill points out that on two occasions, the trial court would not recess indefinitely to allow him to calm down (App.Br. 58). But the trial court did not abuse its discretion or err in that regard because Mr. Driskill had not reached a point where delaying the trial indefinitely was necessary. As set forth above, Mr. Driskill had not suffered a "panic attack" at any point during the penalty phase, and Mr. Driskill had consistently shown the ability to advise the court of any need to take a break. Thus, absent evidence that Mr. Driskill was in the midst of one of his alleged "panic attacks," the trial court was not obligated to do more than it did, namely, inquire and ascertain whether Mr. Driskill was competent to proceed. And, having found that Mr. Driskill was competent to proceed (and lacking any substantial evidence that he had become incompetent due to another "panic attack), the trial court did not err in denying Mr. Driskill's requests.

Mr. Driskill also points out that he had a history of mental health problems and a history of being abused as a child (App.Br. 59-60). But that

information was considered by Dr. Gruenberg and Dr. Fucetola when they evaluated Mr. Driskill before trial. That was not new information that should have prompted the trial court to seek an evaluation. Rather, it was known information that Dr. Fucetola considered in concluding that Mr. Driskill was, nevertheless, competent to stand trial.

Mr. Driskill asserts that the conflicting reports "should have prompted a hearing" (App.Br. 61). But there was an inquiry on the second day of trial, when counsel offered both reports to the trial court (Tr. 249-257). To the extent that the trial court was obligated to inquire into Mr. Driskill's alleged "panic attack," it did so by receiving evidence of two prior competency evaluations, considering the arguments of counsel, and questioning Mr. Driskill directly.

Mr. Driskill also asserts that the trial court's "efforts to deal with the situation were not enough" (App.Br. 62). But as outlined above, the record shows that the court's efforts effectively ameliorated Mr. Driskill's anxiety and permitted him to participate in his trial without suffering another "panic attack." At no point after the first day did Mr. Driskill suffer the sort of attack that rendered him temporarily incompetent to proceed. Rather, the record shows that counsel consistently reported that they were able to consult with Mr. Driskill and that Mr. Driskill understood the proceedings.

Mr. Driskill complains that he should not have been required to face

the prospect that the jury would see him lose control or become agitated, that he should not have been forced to participate by television, and that he should not have been forced to absent himself altogether (App.Br. 62). But there is no right to be tried while perfectly calm, and Mr. Driskill was not forced to participate by television or to absent himself altogether.

Mr. Driskill had the opportunity to remain in the courtroom for his entire trial, and the record reveals that the trial court would have taken reasonable steps to accommodate Mr. Driskill's condition. From the very beginning, the trial court showed a willingness to accommodate Mr. Driskill by declaring a recess and waiting until the next day to reconvene. The trial court then allowed Mr. Driskill to participate by television because Mr. Driskill proposed it as an alternative to being in court. When that was not satisfactory to Mr. Driskill, the trial court allowed him to return, and any time Mr. Driskill needed a break, he was given one.

In light of the record made by the trial court, it is apparent that the trial court endeavored to accommodate every reasonable request made by Mr. Driskill. And if Mr. Driskill had opted to be in the courtroom instead of participating by television or instead of temporarily stepping out, there is every reason to believe that the trial court would have continued to make reasonable accommodations for him.

It is true that Mr. Driskill might have suffered more discomfort if he

had chosen to remain in the courtroom, and it is true that Mr. Driskill might have had another outburst or "panic attack" in the courtroom. But those risks exist in virtually any case (to a greater or lesser degree), and the relevant question is not whether Mr. Driskill might have been temporarily incompetent if he had made different choices and decided to spend more time in the courtroom. Rather, the relevant question is whether Mr. Driskill was, in fact, incompetent to stand trial. (Had Mr. Driskill actually suffered another in-court "panic attack," for instance, then it might appear that the trial court's efforts were not sufficient.)

Mr. Driskill cites *State v. Coco*, 371 So.2d 803 (La. 1979), as an example of a case where the trial court did not take sufficient precautions to ensure that the defendant was competent (App.Br. 63-64). But Mr. Driskill's reliance on that case is misplaced.

In *Coco*, the defendant—a sixteen-year-old male "of low normal to mildly retarded intellectual development—suffered from "seizures which result[ed] from a rare form of temporal lobe epilepsy." *Id.* at 806. The trial court found the defendant to be competent, but the competency hearing "and the court's determination was made before the physicians had fully diagnosed [the defendant's] condition[.]" *Id.* Accordingly, the record did not provide "an adequate basis for predicting probable consequences if [the defendant] should suffer an epileptic seizure during trial." *Id.*

The evidence in *Coco* also showed that, while the seizures would typically last "no more than one and a half minutes, . . . the confusion and memory loss which result may endure for hours." *Id.* Additionally, the seizures were "difficult to detect, even for an expert, because they usually are manifested only by lack of facial expression or a slight movement of the mouth." *Id.* Finally, it appeared from the evidence that the defendant's seizures might have been caused by something other than temporal lobe epilepsy—which meant that the defendant needed to be medicated "under clinical conditions." *Id.* Moreover, the length of time the defendant was impaired by his seizures (along with the amount of time necessary to rehabilitate the defendant) was unknown. *Id.*

Here, by contrast, Mr. Driskill's history of mental problems was well known to Dr. Fucetola, and there was no evidence that he did not understand Mr. Driskill's condition or that he was ill-equipped to render an opinion. Dr. Fucetola also did not predicate his competency determination on the fact that Mr. Driskill would be properly medicated. Rather, in his e-mail, he merely stated that anxiolytic medication would likely "decondition [Mr. Driskill's] panic response" (L.F. 751). There was no suggestion that Mr. Driskill was not competent absent medication.

In addition, Dr. Fucetola did not suggest that Mr. Driskill's panic attack on the first day of trial would have any lasting effects into the second

day (or any subsequent day) of trial (L.F. 751). Rather, he merely stated a concern that Mr. Driskill would not be competent to assist the defense "[d]uring the panic attacks, and in the moments before and after attacks" (L.F. 751). Thus, it was not erroneous for the trial court to conclude that Mr. Driskill could quickly recover, and that any evidence of incompetence could be ferreted out by questioning Mr. Driskill and his attorneys.

In sum, there was substantial evidence supporting the trial court's finding that Mr. Driskill was competent to stand trial. An expert had concluded that Mr. Driskill was competent, and the trial court's own observations confirmed that Mr. Driskill understood the proceedings and was able to assist his attorneys at all critical stages of trial. Moreover, the trial court took adequate steps to ensure that Mr. Driskill was competent throughout the trial, and there was no new evidence (or incident) that required the trial court to order an additional competency evaluation. This point should be denied.

II.

The trial court did not violate Mr. Driskill's right to be present during critical stages of trial.

In his second point, Mr. Driskill asserts that the trial court violated his right to be present at all critical stages of trial (App.Br. 66).

A. Preservation and the standard of review

After Mr. Driskill had a "panic attack" on the first day of trial, defense counsel specifically requested that Mr. Driskill be permitted to appear via closed-circuit television (Tr. 242). Defense counsel preserved an objection to the trial court's ruling on his request for a competency evaluation (and listed various constitutional rights), but she did not object that Mr. Driskill's right to be present at critical stages of trial would be violated by permitting Mr. Driskill to appear by television (Tr. 244-245).

When court convened the next morning, defense counsel again preserved her objection to the court's ruling on the competency issue, but counsel made no objection that Mr. Driskill's right to be present was being violated (Tr. 254-255). To the contrary, while counsel maintained her argument that Mr. Driskill was entitled to a competency evaluation, counsel conceded that Mr. Driskill was voluntarily appearing via television: "the only reason that Mr. Driskill is *voluntarily appearing on the polycom system today* is because the Court denied our request for a competency evaluation" (Tr.

253) (emphasis added). Counsel continued by saying, "in no way *by agreeing to appear voluntarily today* are we waiving our objection to the Court's ruling on competence" (Tr. 255) (emphasis added).

Consequently, this claim was not preserved. In fact, because appearance by closed-circuit television was expressly requested by counsel (and Mr. Driskill), this claim was waived. The trial court should not be convicted of plain error when the court was carrying out defense counsel's and Mr. Driskill's express request. " 'It is axiomatic that a defendant may not take advantage of self-invited error or error of his own making.' " *State v. Bolden*, 371 S.W.3d 802, 806 (Mo. 2012) (quoting *State v. Mayes*, 63 S.W.3d 615, 632 n. 6 (Mo. 2001)).

If this Court overlooks the lack of preservation and counsel's waiver, review should be limited to plain error review. *See State v. Middleton*, 998 S.W.2d 520, 525 (Mo. 1998) (alleged violation of defendant's right to be present was not included in the defendant's motion for new trial).

B. Mr. Driskill waived his right to be present

"The right to be present at critical stages of trial is guaranteed by the United States Constitution, the Missouri Constitution, and Missouri statutory law." *State v. Johns*, 34 S.W.3d 93, 116 (Mo. 2000) (citing *State v. Middleton*, 998 S.W.2d at 524-526). "But like most rights, this right can be waived." *Id.* (citing *State v. Madison*, 997 S.W.2d 16, 21-22 (Mo. 1999)). "In

the absence of evidence to the contrary, the defendant's purposeful absence from the courtroom creates the presumption of a valid waiver." *Id.* (citing *State v. Knese*, 985 S.W.2d 759, 776 (Mo. banc 1999)).

1. Voir dire

Mr. Driskill first asserts that he was denied his right to be present on the second day of voir dire when he was "forced from the courtroom" (App.Br. 67). He asserts that he was "only agreeing to appear by polycom because the court denied his motion for a competency hearing" (App.Br. 67). But these assertions are not borne out by the record.

The only reason Mr. Driskill participated by television on the second day of voir dire was because he requested it. If Mr. Driskill had said that he wanted to be physically present in the courtroom, the trial court undoubtedly would have let him come to court.

In addition, to the extent that an additional waiver of his right to be present was necessary (*i.e.*, a waiver in addition to counsel's express request), the trial court specifically asked Mr. Driskill if he was waiving his right to be present in the courtroom (Tr. 251-252). Mr. Driskill informed the court that he understood that he had a right to be present, and he stated that he was asking the court to allow him to participate by television "[f]or today" (Tr. 252-253). Mr. Driskill stated that he consented and agreed "to appearing today by closed circuit TV rather than being personally present here in the

courtroom" (Tr. 253). Mr. Driskill also assured the court that no one had threatened him or promised him anything, or coerced him in any way "to get [him] to agree to appearing by closed circuit TV rather than being personally present here in the courtroom today" (Tr. 23). Mr. Driskill stated that he understood that he was agreeing to "being present by TV rather than in person," and he expressly asked the court to permit him to participate by television (Tr. 253-254). This was a valid waiver of Mr. Driskill's right to be present. *See State v. Black*, 50 S.W.3d 778, 789 (Mo. 2001) (defendant requested to be absent and stated that his decision was knowing and voluntary); *State v. Middleton*, 998 S.W.2d at 525-526.

Citing *Diaz v. United States*, 223 U.S. 442 (1912), Mr. Driskill asserts that a defendant in a capital case cannot waive his right to be present (App.Br. 72). But this Court has repeatedly held that capital defendants have validly waived their right to be present. *See State v. Black*, 50 S.W.3d at 789; *State v. Johns*, 34 S.W.3d at 116; *State v. Middleton*, 998 S.W.2d at 525-526. Indeed, it would be an odd result if a defendant in a capital case could, for instance, waive his right to trial and plead guilty but not waive his right to be present at some portion of trial. Moreover, this Court previously determined in *State v. Drope*, 462 S.W.2d 677 (Mo. 1971), that there was no logical basis for distinguishing between capital cases and other felony cases:

Some authorities seem to distinguish between a waiver of the

> right to be present in capital cases and in felony cases generally. … Federal Rule 43 for criminal procedure in the federal courts, expressly excludes waiver of the right to be present in capital cases. However, we agree with the previous statement of this court in *State v. McCrary*, *supra*, and with the ruling in *Boreing v. Beard*, 226 Ky. 47, 10 S.W.2d 447, that there is no logical basis for the distinction, absent a statute or rule on the matter. The State is interested in all felony prosecutions, and it is as much the duty of the courts in the prosecution of felony cases generally to protect the liberty of accused persons as it is their duty to protect the rights of one accused of a capital offense. As noted in the *McCrary* case, the legislature, in amending the statute, now § 546.030, in 1879 to authorize the entry of a verdict when the defendant voluntarily absented himself, made no distinction between capital cases and other felony cases, and we consider that a declaration of the public policy of this State.

State v. Drope, 462 S.W.2d at 683-684.

Mr. Driskill next asserts that his waiver was not voluntary because he "only waived his presence at the trial because if he remained in the courtroom, he would suffer from panic attacks" (App.Br. 74). He asserts that he was forced by the trial court's ruling on the competency issue "to absent

himself from the courtroom" (Tr. 74). He likens himself to the defendant in *United States v. Salim*, 690 F.3d 115, 123 (2nd Cir. 2012), who told the court by videoconference that he did not want to come to court because he would be "subjected to being beaten up and . . . spit on" by prison guards during transportation (App.Br. 74-75). But Mr. Driskill was not subjected to anything like the defendant alleged in *Salim*.

Mr. Driskill's case is more akin to *State v. Morrison*, 174 S.W.3d 646, 651-652 (Mo.App. W.D. 2005), where the defendant alleged that his waiver of his right to jury trial was coerced by an incorrect, adverse ruling by the trial court that led him to believe that inflammatory evidence would be presented to a jury if he had a jury trial. But the court of appeals rejected the claim, pointing out that the trial court's ruling was interlocutory, and that the trial court did not compel the defendant to proceed with or without a jury. *Id.*

Here, similarly, while the trial court ruled against Mr. Driskill, Mr. Driskill was still free to be present in the courtroom or not. The trial court had indicated (and had demonstrated) a willingness to accommodate Mr. Driskill's alleged "panic attacks," and there was no reason to believe that the trial court would have done anything different if Mr. Driskill had opted to come to court instead of participating via television. The fact that Mr. Driskill claimed a fear of his own proclivity to alleged "panic attacks" did not render Mr. Driskill's waiver involuntary, particularly where the trial court was

willing to accommodate Mr. Driskill's reasonable requests.

Mr. Driskill next asserts that "polycom was not good enough" (App.Br. 75). But whether Mr. Driskill validly waived his right to be present is not governed by how closely his chosen option replicated trial. Mr. Driskill *waived* his right to be present in the courtroom; thus, he waived the opportunity to have some of the courtroom experience. Mr. Driskill stated that he understood how the polycom system worked, and if he had wanted to come to court instead, he could have informed the court that he had changed his mind.

In sum, there was no error, plain or otherwise, in granting Mr. Driskill's request to participate via television on the second day of voir dire. To the contrary, Mr. Driskill expressly requested that he be allowed to do so, and he personally waived his right to be present.

2. Guilt phase

Mr. Driskill was present in the courtroom during the guilt phase, except for the reading of the last three verdicts (Tr. 1379). At that point, defense counsel asked that Mr. Driskell be escorted from the courtroom (Tr. 1379). Mr. Driskill was "upset" and had asked to be excused (Tr. 1381). The trial court recessed the proceedings and asked counsel to talk to Mr. Driskill and determine if he would like to be present for the reading of the three remaining verdicts (Tr. 1380-1381). Counsel then talked to Mr. Driskill and

informed the court that Mr. Driskill did not want to be present and would waive his presence for the remaining verdicts (Tr. 1381).

There was no evidence that Mr. Driskill suffered another "panic attack" at that time, or that he was incapable of understanding the proceedings and consulting with counsel (*see* Tr. 1380-1381, 1400-1401). Rather, it appears that Mr. Driskill was simply upset by the numerous guilty verdicts, including two guilty verdicts for murder in the first degree.

Based on the record, and in light of counsel's assurance that Mr. Driskill did not want to be present, there was no plain error in proceeding with the last three verdicts in Mr. Driskill's absence. *See State v. Black*, 50 S.W.3d at 789 ("The trial court properly relied on the representation of defendant's attorney."); *see* Rule 31.03(b) ("A verdict may be received by the court in the absence of the defendant when such absence is voluntary.").

3. Penalty phase

Mr. Driskill was next absent during parts of the penalty phase, namely, part of the State's opening statement, the presentation of the State's evidence, and the presentation of some of the defense evidence (*see* Tr. 1410, 1414, 1477, 1659). But in each instance, Mr. Driskill waived his right to be present.

During the State's opening statement, the court recessed and asked Mr. Driskill a series of questions (Tr. 1411). When asked if he wanted to be

present, Mr. Driskill said, "I just know it ain't a good idea for me to be in here right now" (Tr. 1412). The court offered to let Mr. Driskill participate via television, but Mr. Driskill said that the television was worse, and that he "didn't like it" (Tr. 1413). Mr. Driskill stated that he wanted to be present, but he said, "I just feel it would be best if I'm not in here" (Tr. 1413). He stated: "I mean I feel uneasy right now, so I can only imagine what's going to happen in a matter of minutes" (Tr. 1413).

Mr. Driskill then asked to be excused during the State's evidence (Tr. 1414). He stated that no one had threatened him to waive his right to be present, and that he knew he had the right to be present (Tr. 1414).

Defense counsel stated that Mr. Driskill was "incredibly anxious" (Tr. 1416). Counsel asserted that the court was "forcing Mr. Driskill to go through this while he's having periods of what we believe are incompetency" (Tr. 1416). Accordingly, counsel requested a continuance and a competency evaluation (Tr. 1416). Alternatively, counsel requested more time to allow Mr. Driskill to calm down, but counsel said she could not estimate how much time she thought was needed (Tr. 1416-1417).

The prosecutor pointed out that Mr. Driskill had been calm during questioning and that he had answered all of the court's questions (Tr. 1418). The prosecutor argued that Mr. Driskill's alleged anxiety could be dealt with in the same way it had been dealt with up to that point (Tr. 1418).

The trial court asked if defense counsel had any new evidence to present, and counsel said she did not (Tr. 1418). The trial court denied the request for a competency evaluation, and it denied the alternative request for a recess of indeterminate length (Tr. 1418-1419). Mr. Driskill again answered the court's questions about remaining in the courtroom or participating via television, and then he asked to be excused (Tr. 1419).

On this record, Mr. Driskill made a valid waiver of his right to be present. By that time, Mr. Driskill had been questioned more than once about his right to be present, and the trial court had repeatedly demonstrated its willingness to accommodate Mr. Driskill's reasonable requests. In short, Mr. Driskill was not forced by the trial court to absent himself; he simply chose to do so. And it is understandable why Mr. Driskill might have been inclined to avoid that part of the trial. *See State v. Johns*, 34 S.W.3d 93, 106 (Mo. 2000) (defendant's "choice not to attend certain penalty phase testimony is understandable given the fact that the testimony would concern his childhood abuse, illiteracy, and borderline mental abilities"). The trial court did not plainly err.

Likewise, when Mr. Driskill asked to be excused during the presentation of his own witnesses, the trial court did not plainly err in granting his requests.

As the record shows, Mr. Driskill informed the court that he did not

want to be present for the testimony of his witnesses (Tr. 1477). He again asked to be excused, and he again provided rational answers upon questioning, indicating that he understood his right to be present, that no one had threatened him, and that he was concerned about having "another panic attack" if he remained in the courtroom (Tr. 1477-1478). Again, the trial court did not plainly err in finding that Mr. Driskill waived his right to be present.

Mr. Driskill cites *Riggins v. Nevada*, 504 U.S. 127 (1992)—a case where the defendant was involuntarily medicated—to suggest that he, like the defendant in *Riggins*, was prejudiced by the trial court's ruling on the competency issue because "the trial court adversely affected how the defendant would appear to the jury or, here, whether the defendant would appear at all" (App.Br. 80). But the analogy is imperfect at best.

Here, Mr. Driskill was not forced to do anything except stand trial. He had the option of remaining in the courtroom; his decision to leave the courtroom (and any alleged prejudice flowing from that decision) cannot be attributed to the trial court. Moreover, to the extent that the trial court's ruling on the competency issue might have potentially led to a prejudicial event (*e.g.*, if Mr. Driskill had suffered a "panic attack" in the courtroom), that potential prejudice is immaterial where no such prejudice came to fruition. In short, Mr. Driskill's lengthy speculation about various types of prejudice that may have blossomed in the fecund minds of the jurors (*see*

App.Br. 80-82) is immaterial, as none of it was caused by any ruling or action by the trial court.

In short, there was no error, plain or otherwise, in granting Mr. Driskill's requests to temporarily absent himself during parts of the trial. It was Mr. Driskill's decision whether to remain or not, and he was not forced at any point to leave the courtroom. This point should be denied.

III.

The trial court did not deny Mr. Driskill the right to testify.

In his third point, Mr. Driskill asserts that the trial court erred in denying him "his right to testify in both the guilt and penalty phases" (App.Br. 84). Mr. Driskill asserts that he was "forced not to testify because he could not testify without suffering panic attacks due to his untreated mental illness" (App.Br. 84).

A. Factual background

After the State rested its case, the trial court inquired whether Mr. Driskill was going to testify (Tr. 1247). Defense counsel stated that she had spoken to Mr. Driskill and that he had stated that he did not want to testify (Tr. 1247). Counsel stated that "part of his decision is based on the fact that he just doesn't think that right now he can do it without having some sort of a panic attack" (Tr. 1247). Having said that, counsel admitted that she could not say that Mr. Driskill would change his mind if he were taking medication, or that Mr. Driskill's decision would "be different in the future" (Tr. 1248).

The court then questioned Mr. Driskill, and he stated that he had decided not to testify (Tr. 1248). He stated that he did not need more time to discuss his decision with counsel, and he stated that he understood that he had the right to remain silent or testify (Tr. 1248). Mr. Driskill assured the court that no one had threatened him or coerced him to get him to waive his

right to testify (Tr. 1249). He stated that he had been advised by counsel, but that he understood that the decision was his alone to make (Tr. 1249). Mr. Driskill then volunteered his thought process; he stated: "I'm just going to say it to everybody. I want to testify, but I just know I can't. I mean I'm not good with people" (Tr. 1249-1250). Mr. Driskill stated that he understood he would have to testify in front of the jury, and he expressed his belief that he could not take the stand and do that (Tr. 1250).

Defense counsel then stated that they had "discussed this many times with Mr. Driskill" (Tr. 1252). She stated: "This is not something new or that we didn't know was going to come up. Again, we will see him tonight, like we do almost every night; but if there's a change, we'll be more than happy to notify the Court" (Tr. 1252).

The next day, the trial court again asked Mr. Driskill if he was going to testify, and Mr. Driskill said, "No" (Tr. 1263). Mr. Driskill said that he had made his decision after consulting with counsel, and he again assured the court that no one had threatened him or coerced him in making that decision (Tr. 1263).

Defense counsel took issue with one of Mr. Driskill's answers and she said that "[h]e is feeling like he was coerced because he doesn't have a choice because he will have a panic attack if he takes the stand" (Tr. 1264). Counsel stated, "we are very concerned about that, and that is playing into Mr.

Driskill's decision here today" (Tr. 1265). Counsel admitted that she did not know whether medication would affect Mr. Driskill's behavior or thought process (Tr. 1265).

In the penalty phase, Mr. Driskill again informed the court that he had elected not to testify in the penalty phase (Tr. 1663). Mr. Driskill stated that he understood his right to testify, that he had had enough time to consult with counsel, that he did not need more time to talk to counsel, that no one had threatened him to coerce his decision, and that he had personally made the decision not to testify (Tr. 1663-1664). No one suggested at that point that Mr. Driskill was concerned about having a panic attack on the stand.

B. Mr. Driskill validly waived his right to testify

"A criminal defendant has a constitutional right to testify in his own behalf at trial." *State v. Davis*, 318 S.W.3d 618, 637 (Mo. 2010) (citing *Rock v. Arkansas*, 483 U.S. 44, 51 (1987)). "A defendant knowingly and voluntarily may waive the right to testify." *Id.*

In light of the record made at trial, the trial court did not err in accepting Mr. Driskill's waiver. Mr. Driskill assured the court that he had discussed his right to testify with counsel, and counsel confirmed that they had discussed it with Mr. Driskill (Tr. 1249, 1252; *see* Tr. 1663-1664). In fact, it appeared from the record that counsel fully anticipated Mr. Driskill's decision (based on many previous discussions), and that Mr. Driskill's

decision was motivated by concerns other than the alleged concern now asserted on appeal.

When questioned during guilt phase, Mr. Driskill did not mention any concern that he would have a panic attack. Instead, he simply said that he thought he was "not good with people" (Tr. 1249-1250). This response showed both that Mr. Driskill had a good understanding of the risks that come with testifying and that Mr. Driskill was not impelled to waive his right due to fear of a panic attack. Even defense counsel acknowledged that she could not say that medication would affect Mr. Driskill's decision—an admission that any concern about anxiety on the stand was not Mr. Driskill's main concern.

Moreover, there is little reason to believe that Mr. Driskill felt coerced by the trial court's ruling on the competency issue. Mr. Driskill knew that the trial court would accommodate him and take breaks if necessary, and there was no reason for Mr. Driskill to believe that the trial court's practices would suddenly change. And, as the record shows, Mr. Driskill twice assured the court that he had not been threatened or coerced by any person—a response he gave on two consecutive days, after having another chance to consult with counsel in between (Tr. 1249, 1263).

Mr. Driskill asserts that he was "forced to choose between abandoning his right to testify or risking losing control before the jury due to his mental illness" (App.Br. 90). And, citing *Flemming v. State*, 949 S.W.2d 876, 879

(Tex.App. 1997)—a case where the court held that a deception employed during an interrogation did not compel an involuntary statement—he asserts that "the State may not use such mental compulsion against the defendant to secure waiver of a fundamental right" (App.Br. 90).

But neither the State nor the Court used any "mental compulsion" against Mr. Driskill to coerce his waiver. The record of Mr. Driskill's waiver is devoid of any expression of mental anguish on the part of Mr. Driskill. His reason for deciding not to testify in the guilty phase was straightforward, to the point, and simple: he did not think he would be a good witness (Tr. 1249-1250).[4] Additionally, as stated above, Mr. Driskill had no reason to believe that he would be forced to have a panic attack in front of the jury. The trial court had granted Mr. Driskill's reasonable requests, and there was never any suggestion by anyone that Mr. Driskill would be forced to remain on the stand, even if he encountered difficulty while testifying.

Citing the Americans With Disabilities Act (ADA), Mr. Driskill asserts that the trial court was "required to ensure equal access to disabled individuals" (App.Br. 92). This claim was not asserted in the trial court (as

[4] In light of the clarity of Mr. Driskill's responses, Mr. Driskill's reliance on *Ward v. Sternes*, 334 F.3d 696 (7th Cir. 2003)—where a defendant suffering from aphasia said, "I guess. I don't know"—is misplaced (App.Br. 90).

Mr. Driskill acknowledges), and this Court should decline to review it. Mr. Driskill cites no case suggesting that the ADA provides him any rights that can be vindicated through an appeal in a criminal case. Rather, the case he cites—*In re McDonough*, 930 N.E.2d 1279 (Mass. 2010)—suggests that a person aggrieved by an alleged violation of the ADA should seek relief in a separate civil action or by interlocutory appeal (if a party in the case) as allowed by Massachusetts law. *Id*. at 521.

Mr. Driskill also does not demonstrate that he was "disabled" as defined by the ADA, or that he was denied equal access to the witness stand. To the contrary, he was offered access to the witness stand, and his alleged disability *did not* preclude him from testifying, as the trial court found that he was competent to stand trial and participate therein. The mere fact that the trial court might have had to pause and provide breaks to Mr. Driskill (a reasonable accommodation, incidentally), was not proof that Mr. Driskill was denied equal access to the witness stand.

Additionally, if Mr. Driskill had suggested an alternative means of putting his testimony before the jury, *e.g.*, via the polycom system, there is reason to believe that the trial court would have granted any reasonable request Mr. Driskill made (as it did on the second day of trial). Mr. Driskill points out that the trial court told him he would have to testify in front of the jury (App.Br. 92). But in explaining the ordinary course of trial, the court did

not foreclose the possibility of some other accommodation. The trial court still could have permitted Mr. Driskill to testify before the jury by some other means—if Mr. Driskill had been interested in suggesting some other means of testifying.

Here, however, the record shows that while Mr. Driskill expressed some desire to testify in guilt phase, he ultimately chose not to after consulting with counsel. Mr. Driskill asserts that because he "told the court that he wanted to testify, . . . the court should have enabled him to do so" (App.Br. 90). But the court did enable him to do so by asking him on two separate occasions whether he wanted to testify in guilt phase, and by asking him another time in penalty phase. If Mr. Driskill had elected to testify, the trial court would have let him, and there is no reason to believe that the trial court would have forced Mr. Driskill to endure a "panic attack" on the stand. This point should be denied.

IV.

The trial court did not abuse its discretion in denying Mr. Driskill's requests for a continuance.

In his fourth point, Mr. Driskill asserts that the trial court abused its discretion in denying his request for a continuance (App.Br. 95). He also asserts that the trial court erred in failing "to order that Driskill receive the medication he needed" (App.Br. 95).

A. The standard of review

"The decision to grant a continuance is within the sound discretion of the trial court." *State v. Salter*, 250 S.W.3d 705, 712 (Mo. 2008). "Reversal is not warranted unless there is a very strong showing that there was an abuse of discretion resulting in prejudice." *Id*.

B. Mr. Driskill was not entitled to a continuance

Mr. Driskill asserts that medication would have alleviated his anxiety at trial (App.Br. 96). He then asserts that, without medication, he was not "mentally fit" for his trial (App.Br. 97). But as discussed above in Point I, the trial court found that Mr. Driskill was competent to stand trial, and there was substantial evidence supporting the trial court's finding. Moreover, Dr. Fucetola's evaluation did not predicate competency on Mr. Driskill's being medicated. Thus, the trial court did not abuse its discretion in declining to grant a continuance due to a lack of allegedly necessary medication.

Mr. Driskill asserts that he was also absent "physically for large portions of his trial" (Tr. 97-98). But as discussed above in Point II, to the extent that Mr. Driskill was physically absent, it was by his own choice. He did not have to be absent, and he did not need a continuance to enable him to be present at trial. The trial court was willing to accommodate Mr. Driskill's reasonable requests for recesses; thus, a continuance simply was not needed. Moreover, there was no evidence that Mr. Driskill suffered a "panic attack" after the first alleged attack on the first day of trial. Mr. Driskill's apparent distress after the first day was much less, and the record shows that he was able to calm down and continue with the trial after short periods of time.

Mr. Driskill asserts that the trial judge should have ordered the department of corrections to give Mr. Driskill the medication one of his doctors had suggested (App.Br. 100-101). But there was no way for the judge to prescribe and order the administration of a certain drug, and even if there were a means of indirectly obtaining needed medication for a defendant (*e.g.*, by ordering a mental examination), the trial court was not obligated to do so here because Mr. Driskill was competent to stand trial.

Citing *United States v. Brown*, 821 F.2d 986 (4th Cir. 1987), Mr. Driskill asserts that trial courts should make accommodations for defendants who suffer from medical ailments (Tr. 101). But *Brown* confirms that the trial court in Mr. Driskill's case followed an appropriate course. After Mr. Driskill

had his "panic attack," the trial court considered evidence from two experts and determined, based on a review of that evidence and direct observations of Mr. Driskill, that Mr. Driskill was competent to stand trial. Nevertheless, the trial court was open to reasonable accommodations (to help Mr. Driskill manage his anxiety), and the trial court readily halted the proceedings, recessed, and gave Mr. Driskill time to collect himself. The trial court also questioned Mr. Driskill from time to time and ascertained from him and defense counsel whether he understood the proceedings and was capable of assisting in his defense. As such, the trial did not abuse its discretion in denying Mr. Driskill's requests for a continuance. The measures employed by the trial court were sufficient to preserve Mr. Driskill's rights.[5]

Mr. Driskill asserts that he was prejudiced because he was unable to exercise his constitutional rights, including his right to testify (App.Br. 104). But as discussed above in Point III, Mr. Driskill was not deprived of his right

[5] The trial court's actions also did not run afoul of the various factors outlined in *State v. Karno*, 342 So.2d 219 (La. 1977), a Louisiana case which is also cited in Mr. Driskill's brief, *e.g.*, whether trial will seriously endanger the defendant's health, whether the defendant has participated effectively at some hearings, whether lesser measures than a continuance can be employed, whether the defendant's rights will be violated.

to testify; he waived his right to testify.

Mr. Driskill also speculates that, absent a continuance and the administration of medication, the jury probably viewed his agitated behavior, his sudden departures from the courtroom, and his unexplained absences as sinister (App.Br. 105). But that is merely speculation, and, thus, there is no substantial reason to believe that a continuance and the administration of medication would have affected the trial by eliminating such notions. Moreover, the record does not reveal that Mr. Driskill's conduct was at all extraordinary—even on the day he had his alleged "panic attack." On that day, a deputy stood by Mr. Driskill and put his hands on him, but the trial court's observations led it to agree with the prosecutor that the jurors would have simply seen Mr. Driskill stand up and leave with the bailiffs (Tr. 258).

In sum, a continuance was not warranted in this case, as Mr. Driskill was competent without the administration of a particular drug. Moreover, as discussed in this point and the previous three points, Mr. Driskill was not forced to stand trial while mentally and physically absent from trial. This point should be denied.

V.

The trial court did not abuse its discretion in deciding not to send any exhibits to the jury during penalty phase deliberations.

In his fifth point, Mr. Driskill asserts that the trial court abused its discretion in denying "the jurors' request to view all exhibits admitted into evidence during the penalty phase and, in particular, in barring the jury from viewing and considering defense exhibits AAAA-IIII (App.Br. 107).

A. The standard of review

"The decision to send an exhibit to the jury room during deliberations lies within the sound discretion of the trial court." *State v. Barnett*, 980 S.W.2d 297, 308 (Mo. 1998) (citing *State v. Skillicorn*, 944 S.W.2d 877, 896 (Mo. 1997)). "An abuse of discretion occurs only when the trial court's decision to exclude an exhibit from the jury room 'was clearly against reason and resulted in an injustice to the defendant.' " *Id.* (quoting *State v. Roberts*, 948 S.W.2d 577, 596-597 (Mo. 1997)).

B. The trial court did not abuse its discretion

During deliberations in the penalty phase, the jury sent out a note stating, "We would like to see all evidence/submissions during the penalty phase" (Tr. 1746). The trial court observed that the attorneys for each side had tried to make up a list of exhibits to send back to the jurors, but that the parties could not agree on which exhibits to send back (Tr. 1746). The court

tried to redact the State's prior conviction exhibits, but defense counsel objected to sending those exhibits back to the jury (Tr. 1747). Because the parties had not been able to agree, the trial court announced that it was going to tell the jury, "You must be guided by the instructions given and the evidence as your remember it" (Tr. 1747). The court did not send back any exhibits to the jury (Tr. 1747).

Defense counsel then objected to not sending back any exhibits (Tr. 1747). Defense counsel stated that she thought it was prejudicial to Mr. Driskill not to send back the defense exhibits (Tr. 1747). The trial court stated that it was not "appropriate to send back just a portion of the exhibits" (Tr. 1747).

The trial court did not abuse its discretion. To send back only the defense exhibits would have been "very one-sided" and unfair to the State. *See State v. Barnett*, 980 S.W.2d at 308. Moreover, requiring the jury to deliberate on the penalty based "solely from their recollection of the evidence and arguments did not work an injustice to" Mr. Driskill, since the jury was not given unfair access to either side's exhibits. *See id.* As in *Barnett*, "[i]t bears mention . . . that the judge refused to send *any* of the exhibits to the jury room, including those exhibits unfavorable to [defendant], such as his prior criminal record." *Id.*

Mr. Driskill asserts that his exhibits should have been sent back

because it is unconstitutional to preclude a defendant from presenting a defense and presenting mitigation evidence (App.Br. 113-116). Of course, Mr. Driskill was not precluded from admitting relevant evidence, presenting evidence in mitigation, or rebutting the State's case. All of his exhibits were admitted into evidence, and his experts highlighted and testified about the salient aspects of the exhibits.

Mr. Driskill asserts that the State's evidence of his prior convictions could have been reduced to a typed list of prior convictions that was acceptable to the defense; and he argues that, accordingly, they should have been reduced to a list, so as to permit sending his exhibits back to the jury (App.Br. 118-119). He asserts that this would have been the proper course of action since the State had initially agreed that the prior convictions would not be published to the jury (App.Br. 112, 118-119). But it is common practice to redact exhibits before they are sent to the jury, and, thus, there was nothing "egregious" or "obstreperous" about the State's decision to send back redacted exhibits (as opposed to a typed list that did not remotely resemble the evidence) (App.Br. 119). In short, the record simply shows that the parties could not reach an agreement, and that the trial court, in a proper exercise of its discretion, decided not to send back any exhibits.

Mr. Driskill asserts that he was forced to choose between two constitutional rights, namely, the right to present a mitigation defense, and

the right to have his sentence determined only on the evidence properly admitted against him (App.Br. 119-120). But Mr. Driskill was not forced to make any such choice.

As indicated above, Mr. Driskill was permitted to present all of his evidence. The mere fact that the jury was not permitted to view certain exhibits during deliberations did not deprive him of his right to present a mitigation defense. Moreover, if he had agreed to send back the State's redacted exhibits, he would not have been subjecting himself to evidence of "numerous other illegal acts that were not the subject of testimony or evidence at trial" (App.Br. 120). The State's exhibits were going to be redacted; thus, the alleged evidence of uncharged crimes was not going to be before the jury. This point should be denied.

VI.

The trial court did not abuse its discretion in admitting victim impact evidence.

In his sixth point, Mr. Driskill asserts that the trial court abused its discretion in admitting victim impact evidence (App.Br. 124). He asserts that the State's victim impact evidence was "excessive, in that it far exceeded what is authorized, overwhelmed the jury with emotion, and encouraged the jury to weigh the value of Driskill's life against the victims' " (App.Br. 124).

A. The standard of review

"The trial court has broad discretion to exclude or admit evidence at trial." *State v. Shockley*, 410 S.W.3d 179, 195 (Mo. 2013). "This Court will reverse only upon a showing of a clear abuse of discretion." *Id.*

B. The State's evidence was properly admitted

"Victim impact evidence is admissible under the United States and Missouri Constitutions." *State v. McLaughlin*, 265 S.W.3d 257, 273 (Mo. 2008). " '[J]ust as the defendant is entitled to present evidence in mitigation designed to show that the defendant is a uniquely individual human being, the State is also allowed to present evidence showing each victim's uniqueness as an individual human being.' " *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)). " 'Victim impact evidence violates the constitution only if it "is so unduly prejudicial that it renders the trial fundamentally

unfair." ' " *Id*. (quoting *State v. Gill*, 167 S.W.3d 184, 195 (Mo. 2005)).

Here, the trial court did not abuse its discretion in permitting three family members to testify about the victims. The victims' son offered about four and a half pages of testimony (Tr. 1462-1466). He testified that his parents had two children—himself and daughter with cerebral palsy who died in 1972 (Tr. 1462). He testified that C.W. took care of his sister until she was almost twenty years old (Tr. 1463). He testified that his parents built their home on land that had been in the family for generations (Tr. 1463-1464). He testified that J.W. was handy and built a lot of the house (Tr. 1464). He testified that he had still looked to his parents for advice, and that his dad was smarter than he was (Tr. 1464). He testified that the victims' deaths had affected him "immensely," and that their deaths had been "terrible" for him (Tr. 1465). He testified that he still imagines how he found their bodies, and that it is "very sad" (Tr. 1466). He testified that his parents had a long marriage and loved each other; he said they had a "really special relationship and cared for each other" (Tr. 1466).

Contrary to Mr. Driskill's claim, this testimony was brief and provided a brief glimpse into the unique lives of the victims who were both around eighty years old. This testimony showed the effect their deaths had on a family member, and it was admissible in the penalty phase. *See State v. Storey*, 40 S.W.3d 898, 908 (Mo. 2001). The trial court did not abuse its

discretion in admitting the victims' son's testimony.

The victims' grandson-in-law offered about four pages of testimony (Tr. 1458-1461). He testified that he considered the victims his Granny and Grandpa (Tr. 1458). He testified that C.W. was "just a little old lady that walked around with her cane and always giving everybody candy" (Tr. 1459). He testified that she "always had a smile on her face," and was "always wanting to do something for other people" (Tr. 1459). He testified that C.W. visited her mother until C.W.'s mother passed away (Tr. 1459). He testified that J.W. was "just a neat old man" (Tr. 1460). He testified that J.W. would "watch the squirrels go by outside and laugh at the dogs" (Tr. 1460). He testified that J.W. enjoyed hot peppers, and that they would eat them together (Tr. 1460). He said that J.W. was "fairly active," but that his heart was weakening (Tr. 1460). He testified that his own children called the victims "Granny and Grandpa" (Tr. 1460). He testified that they were always there for the children (Tr. 1461). He said that things were different now, and they were sometimes reminded of the victims (Tr. 1461).

This testimony, too, gave only a brief glimpse into the decades-long lives of the victims. It properly showed their uniqueness, and it was admissible in penalty phase. *See State v. Storey*, 40 S.W.3d at 908-909. The trial court did not abuse its discretion in permitting the victims' grandson-in-law to offer his testimony.

The victims' granddaughter offered about eight and a half pages of testimony, and she identified several photographs of the victims (Tr. 1467-1476). She testified that the victims' were always around, and that she spent a lot of time with them when she was growing up (Tr. 1467-1468). She testified that the victims collected decanters and were members of the "International Jim Beam Bottle Club Association" (Tr. 1468). She said C.W. had "a servant's heart in every sense of the word" (Tr. 1468). She said that C.W. was "kind and gentle and loving and would do absolutely anything for anybody" (Tr. 1468-1469).[6] She testified that C.W. was a volunteer and very active, and that she loved flowers (Tr. 1469-1470). She said that J.W. was an outdoorsman (Tr. 1470). She testified that J.W. was great with numbers, and that "[h]e fascinated me by the way he could do certain math problems off his head" (Tr. 1471). She testified that, in the week prior to the murders, J.W. got an electric wheelchair and had greater mobility; he picked a big flower for C.W. (Tr. 1471). She testified that C.W. had been very excited about the impending birth of the granddaughter's baby (Tr. 1472). She identified various family photographs that depicted the victims at various times and places, including their wedding day, a Christmas party, her brother's wedding, a wedding anniversary, a Jim Beam Association event, and a 50th

[6] The trial court sustained an objection to this testimony (Tr. 1469).

wedding anniversary (Tr. 1473-1474). She testified that the victims' deaths affected her in "so many ways" (Tr. 1474). She said that it complicated her pregnancy, strained all of her relationships, and caused her to live in fear and carry a gun (Tr. 1474-1475).

This testimony, including the photographs, was also admissible, in that it showed a glimpse of the victims' lives, demonstrated ways in which they were unique, and showed how the victims' deaths affected family members. The trial court did not abuse its discretion in admitting the victims' granddaughter's testimony. *See State v. Storey*, 40 S.W.3d at 909 ("The photographs of Frey with her class, the balloon release, and the memorial garden serve to illustrate Frey's value to the community and the impact of her death upon her friends and co-workers. In other words, the exhibits help the jury to see the victim as something other than a 'faceless stranger.' ").

In sum, the State's victim impact evidence was properly admitted, and the trial court did not abuse its discretion. Moreover, it cannot be said that any of this testimony was so unduly prejudicial that it rendered the trial fundamentally unfair. This point should be denied.

CONCLUSION

The Court should affirm Mr. Driskill's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that the attached brief complies with Rule 84.06(b) and contains 18,897 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word; and that an electronic copy of this brief was sent through the Missouri eFiling System on this 16th day of September, 2014, to:

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