No. 87785

IN THE

Missouri Supreme Court

STATE OF MISSOURI,

Respondent,

v.

GARY W. BLACK,

Appellant.

Appeal from the Circuit Court of Jasper County, Missouri
29th Judicial Circuit, Division 3
The Honorable Jon A. Dermott, Judge

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from a conviction for murder in the first degree, § 565.020, RSMo 2000, obtained in the Circuit Court of Jasper County, the Honorable Jon Dermott presiding. Appellant was sentenced to death; thus, this Court has jurisdiction. MO. CONST., Art. V, § 3.

STATEMENT OF FACTS

On January 8, 1999, appellant, Gary W. Black, was charged with murder in the first degree, for the murder of Jason Johnson, which occurred on October 2, 1998 (L.F.11). The state filed a notice of aggravating circumstances, indicating its intent to seek the death penalty (L.F.13). The original charge was later amended to charge appellant as a persistent offender under § 558.016, RSMo 2000 (L.F.14).

At his first trial, appellant was found guilty and sentenced to death. *See State v. Black*, 50 S.W.3d 778, 783 (Mo. banc 2001). Appellant sought post-conviction relief, and, on appeal, the Court reversed and remanded appellant's case for a new trial due to ineffective assistance of trial counsel. *See Black v. State*, 151 S.W.3d 49, 51 (Mo. banc 2004).

At his second trial, the jury again found appellant guilty of murder in the first degree and recommended a sentence of death (Tr.1343,1428). The court sentenced appellant to death (L.F.1034; Tr.1436). Viewed in the light most favorable to the verdict, the facts were as follows:

On October 2, 1998, appellant and his girlfriend, Tammy Lawson, drove to a convenience store in Joplin, Missouri (Tr.715). Lawson went inside to purchase some cigarettes, and, while she was inside, she was bumped by Jason Johnson, the victim (Tr. 716, 720). Johnson apologized, but Lawson became upset, believing that Johnson had made inappropriate contact with her, and she told the

victim to "back off" (Tr.721,733,1024). Lawson told an acquaintance she had seen at the store that she "didn't appreciate" what the victim had done (Tr.721,740). After making her purchase, Lawson left the store (with the acquaintance she had chanced to meet) and returned to appellant's vehicle (Tr.663-664,721). Lawson told appellant what had happened, and, when the victim came out of the convenience store, she pointed at him (Tr.665,722,740,893-894). Using some profanity, Lawson told appellant she "didn't like" what the victim had done, or words to that effect (Tr.722,740).

When the victim came out of the convenience store, he was holding a bottle of beer in a bag (Tr.664,675,896). The victim got into Andy Martin's truck, and Martin pulled out of the parking lot (the victim and Martin, along with Mark Wolfe, who was in his own vehicle, were on their way to a club or bar) (Tr.656-657,665-666,723,890-891,896-897). Wolfe followed Martin's truck; they traveled down Fourth Street and turned onto Joplin (Tr.666-667,897). As they drove down Fourth Street, Wolfe noticed appellant's car following him very closely (Tr.667,723,741).

As they drove after the victim, appellant told Lawson that he was going to "Hurt that nig—," and "kick his a--" (Tr.757,766).[1] On Joplin, appellant passed

[1] The victim was an African-American.

Wolfe, and, at the intersection of Fifth Street and Joplin, appellant pulled up and stopped beside Martin's truck (Tr.668-669,794).

At the intersection, Martin briefly talked to a couple of women who walked up to his window (Tr.671,898,1051-1052). Appellant, meanwhile, yelled something at the victim and the victim yelled back (Tr.671,742-743,993,1011,1052-1053,1055,1058,1074).[2] Appellant, who had armed himself with a knife, got out of his car, walked quickly to the victim's window, and "threw a punch or a jab through the window," stabbing the victim in the neck (Tr.673,706,758,880,995-996,1010,1077,1085,1088). The victim had turned to face appellant (and had opened his door to get out of Martin's truck), and, accordingly, the knife entered the left side of his throat (Tr.704,902,1061-1062,1078,1085-1086). The stabbing motion was quick (as evidenced by the lack of lateral cutting), and it was delivered with enough force to completely sever the victim's jugular vein and nearly sever the victim's carotid artery (Tr.964-967,1139-1141,1181). The victim started to bleed (Tr.902).[3]

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[2] One witness recalled "a loud F-U," or words to that effect (Tr.1012), and one witness recalled hearing "do you want some of me or do you want something" (Tr.1075).

[3] An expert testified that he could not determine whether the apparent evidence of arterial spurt was deposited when the victim was getting out of the truck or when the victim was getting back in (Tr.1234,1248). It was possible that the arterial spurt would not have been immediate

The victim, who was very intoxicated (with a BAC of .23) exited Martin's truck and attempted to fight with appellant (Tr.674,706,904,981,996,1040,1078,1169). After a brief struggle, appellant disengaged, and the victim either swung or threw his beer bottle at appellant (Tr.675,707,761,767,903,939,997-998,1079,). The bottle fell to the ground (it may have also hit appellant or appellant's car), and appellant got into his car (Tr.676,704,707,761,905,998,1080-1081). The victim attempted to continue the fight, but appellant drove away (Tr.676-677,724,905,999,1081).

The victim, who was bleeding severely, then made his way back to Martin's truck, and Martin drove to a nearby parking lot, where bystanders called for help and attempted to provide first aid for the mortally wounded victim (Tr.676-677,905-908,910,955-956,999-1001,1082-1083). An ambulance arrived and took the victim to the hospital; but after emergency surgery, and after spending three days in the hospital, the victim died (Tr.911,968,970).

After getting back into his car, appellant tossed his knife onto Lawson's lap; he told her he had stabbed the victim in the throat; and he said, "One nig---down" (Tr.757,777). Then, as they drove away from the scene, appellant threw the knife out of his car near a cemetery (where the knife was later

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(Tr.974,976-977).

recovered)(Tr.725,728,804-806).

Appellant and Lawson then left town and drove to Oklahoma (Tr.762). They were later discovered there and arrested (Tr.762). The knife sheath was found in appellant's car (Tr.816). Prior to his arrest, appellant had told Lawson "to tell the cops that Jason started it" (Tr.762). Appellant also threatened that if Lawson did not tell that story, she and her kids "would be hurt" (Tr.763).

At trial (the re-trial commenced on May 1, 2006), appellant did not testify, but he offered the testimony of various witnesses who had had contact with some of the people involved in the events, including three witnesses who had been at the intersection (Tr.1043,1046,1071,1095,1100,1106,1189,1197). He also offered the testimony of two experts who talked, respectively, about the victim's injuries and the blood evidence at the scene (Tr.1118,1212). The jury found appellant guilty of murder in the first degree (Tr.1343).

In the penalty phase, the state presented evidence of appellant's previous, serious assaultive convictions (Tr.1360-1370; State's Ex.47). This evidence showed how appellant had, on March 5, 1976, robbed Jackie Clark, and how appellant had, without provocation, shot Clark in the back with a shotgun at point-blank range (Tr. 1360-1370). The state also presented evidence of appellant's prior conviction for burglary (Tr.1360; State's Ex.48). Appellant presented the testimony of Dr. William Logan in purported mitigation of punishment (Tr.1376).

After further deliberation, the jury recommended a sentence of death (Tr.1428).

On June 9, 2006, the trial court sentenced appellant to death (L.F.1034; Tr.1436). This appeal followed.

ARGUMENT

I.

The trial court did not plainly err in denying appellant's request to represent himself.

Appellant contends that the trial court erred in overruling his requests to proceed *pro se* (App.Br. 43). Citing *Faretta v. California*, 422 U.S. 806 (1975), he asserts that the trial court's rulings deprived him of his right to self-representation and precluded him from presenting his defense (App.Br. 43).

A. Factual background

Before appellant's re-trial began, on February 10, 2005, appellant filed a motion for leave to proceed *pro se*, citing *Faretta* in support of his request (L.F. 37). Five days later, on February 15, 2005, appellant filed a motion for an order granting him leave to represent himself (L.F. 40). The motion alleged that appellant unequivocally, intelligently, and voluntarily desired to represent himself; that appellant understood the case; and that appellant understood the "legal consequences" of self-representation, meaning that he knew that he would be bound by the "same rules and procedures as an attorney" (L.F. 40). The motion again cited *Faretta* and pointed out that appellant had a fundamental right to represent himself (L.F. 40). On February 16, 2005, in a docket entry, both motions were "denied as moot to be raised at the appropriate time by appointed

counsel" (L.F. 41, 1041).

On February 23, 2005, appellant filed a letter with the court, explaining that he had not requested appointment of counsel, and that he had filed two earlier motions seeking leave to proceed *pro se* (L.F. 45). Appellant pointed out that, under *Faretta*, he had a right to self-representation (L.F. 45). On February 25, 2005, appellant's attorneys formally entered appearance (L.F. 43).

On March 15, 2005, appellant filed a motion for an order dismissing appointed counsel and granting appellant leave to represent himself (L.F. 46). This motion stated that appellant had not requested counsel (after remand), that appellant did not want appointed counsel, that appellant fully understood the "legal consequences of self-representation," that appellant's request for self-representation was voluntarily made, that appellant's request was timely, that appellant had a fundamental right to self-representation (again citing *Faretta*), and that appellant was being denied meaningful access to the court (L.F. 46). This motion was denied in a docket entry on March 16, 2005 (L.F. 48).

Two days later, on March 18, 2005, the court took up various motions at a pre-trial hearing; neither defense counsel nor appellant, who was present, raised the issue of self-representation (Tr. 1-3). Likewise, at hearings on May 13, July 1 and August 19, 2005, neither defense counsel nor appellant raised the issue (Tr.

4-181).

On October 5, 2005, appellant filed a motion to dismiss assigned counsel (L.F. 680). This motion did *not* assert appellant's right to self-representation; rather, it alleged that one of appellant's attorneys, Thomas Jacquinot, had a conflict of interest, and it requested that he be removed from the case (L.F. 680). At a hearing on that motion, on October 18, 2005, the trial court observed that appellant's assigned attorneys were "working diligently on [his] behalf," and that they were trained in the law and had experience in criminal cases (Supp.Tr. 1). The court pointed out that appellant was "much better served by having counsel than not having counsel" (Supp.Tr. 1).

In response, although the motion then before the court had *not* asserted his right to self-representation, appellant said, "In other words, you don't think I'm qualified to represent myself, Your Honor?" (Supp.Tr. 2). To which the court responded, "That's true. I think you're less qualified than your attorney" (Supp.Tr. 2). The court pointed out that appellant, to the court's knowledge, had not been to law school, and that appellant did not have experience defending criminal cases (Supp.Tr. 2). Thus, the court concluded that appellant's attorneys were more capable of representing appellant (Supp.Tr. 2). Appellant made no response (and he made no request to represent himself), and defense counsel moved on to the next motion (Supp.Tr. 2).

At pre-trial hearings on December 16, 2005, and February 24, 2006, neither appellant nor defense counsel raised the issue of self-representation (Tr. 182-197). Then, at the conclusion of a pre-trial hearing on April 18, 2006 (approximately thirteen months *after* appellant had last filed a motion seeking to proceed *pro se*), appellant addressed the court as follows:

> BY THE DEFENDANT: Your Honor, can I make a record, sir?
>
> THE COURT: You may.
>
> BY THE DEFENDANT: At this time I'd like to renew my motion for leave to proceed pro se and inform the Court I'm fully aware that I won't receive no special treatment, that I'm bound to the same rules and policies that would apply to appointed counsel. That by doing so that I waive my right to the appointment of counsel. And in doing so I waive any right I might have to a claim of ineffective assistance of counsel during the course of this trial.
>
> THE COURT: The record will so note. The Court is of the firm opinion that because you're not a practicing attorney and because you have capable and experienced counsel available at no expense to you that your request will be denied.

(Tr. 281-282). Defense counsel made no objection to the court's ruling (Tr. 281-

282), and, about two weeks later, on May 1, 2006, trial commenced without objection by the defense (Tr. 283).

Defense counsels' uniform silence on the issue of self-representation ended abruptly on May 26, 2006, when it came time to file appellant's motion for new trial (L.F. 962). The first claim in appellant's motion for new trial spanned two and a half pages, and it alleged that the trial court had erred in denying appellant's "repeated and timely requests to proceed *pro se*" (L.F. 962). The motion for new trial cited *Faretta* (and outlined its holding), stated that appellant was competent to waive counsel, and alleged that appellant had made an unequivocal and intelligent waiver of counsel (L.F. 963-964).

B. Preservation

It is evident from the foregoing that defense counsel maintained a strategic silence on the issue of appellant's self-representation. In fact, at the first hearing where an objection could have been made (either by defense counsel or appellant), no objection was made, and appellant's *pro se* motion to represent himself was not renewed or even remarked upon – even though the trial court had only denied the motion by docket entry two days earlier, on March 16, 2005 (*see* L.F.1042; Tr.1-3).

Then, over the next thirteen months, and over the course of *six* pre-trial hearings, there was neither any objection nor any attempt to raise appellant's

right to self-representation (*see* Tr. 4-197; Supp.Tr.1-71). Appellant did file a motion to dismiss one of his attorneys due to an alleged conflict of interest, but this motion *did not* assert his right to self-representation (L.F.680). And, while appellant referred to self-representation at the hearing on that motion, that isolated reference merely made the continuing lack of objection (or renewal of appellant's earlier motion to proceed *pro se*) that much more evident.

It was not until the final pre-trial hearing, on April 18, 2006 (a little over thirteen months *after* the trial court had denied appellant's motion to proceed *pro se*) that appellant asked to "make a record" so that he could "renew [his] motion for leave to proceed pro se" (Tr. 281). But inasmuch as appellant's capital trial was just two weeks away, and inasmuch as no objection had been lodged during the thirteen months after the trial court made its first ruling, appellant's belated request was insufficient to preserve this claim for appeal.

"Constitutional claims are deemed to be waived if not presented to the trial court at the first opportunity." *State v. Mann*, 35 S.W.3d 913, 916 (Mo.App. S.D. 2001); *State v. Martin*, 940 S.W.2d 6, 9 (Mo.App. W.D. 1997). Additionally, counsel's lack of objection at any point – particularly after appellant renewed his request in open court at the April 18, 2006 pre-trial hearing – renders appellant's claim unpreserved for appellate review. *State v. Wishom*, 578 S.W.2d 275, 277

(Mo.App. St.L.D. 1978).

In *Wishom*, for example, after voir dire, the defendant's counsel informed the court that the defendant wanted to proceed *pro se*. *Id*. at 276. The trial court said it was too late, and the defendant's request was denied. *Id*. Trial counsel did not object to the trial court's ruling; thus, on appeal, the defendant's claim was not preserved. *Id*. at 277 ("An objection was not made at the time of the ruling by the trial court."). The claim was also not preserved because it had not been included in the defendant's motion for new trial. *Id*.

Here, too, defense counsel failed to object to the trial court's ruling. In fact, as outlined above, defense counsel never once objected or said even a word about appellant's right to self-representation prior to trial. In fact, given defense counsel's complete and utter silence on this issue *until* the filing of appellant's motion for new trial, it is apparent that defense counsel chose rather to sit on this issue and sandbag the court in hopes of obtaining another bite at the apple for appellant (in the event of a conviction). Such conduct should be discouraged. *See generally State v. Dewitt*, 924 S.W.2d 568, 571 (Mo.App.E.D.1996)("Defendant cannot decide to gamble on a verdict, then reap the benefits of a new trial when the verdict is unfavorable.").

In short, unless and until appellant was allowed to waive counsel, defense counsel was obligated to represent appellant's interests and preserve appellant's

rights by timely and specific objection. The failure to do so rendered this claim unpreserved. *See State v. Wishom*, 578 S.W.2d at 277.

C. The Standard of Review

When a claim is not preserved, review is limited to plain error review. *Id*. "Whether briefed or not, plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." Rule 30.20. Under this standard, a defendant is not entitled to a new trial unless the plain error was "outcome determinative." *See State v. Baxter*, 204 S.W.3d 650, 652 (Mo. banc 2006); *see generally United States v. Dominguez Benitez*, 542 U.S. 74, 81 (2004) ("To affect 'substantial rights,' . . . an error must have 'substantial and injurious effect or influence in determining the . . . verdict.' "); *Johnson v. United States*, 520 U.S. 461, 466-467 (1997) (discussing when and under what circumstances relief should be granted on claims of "plain error" under Federal Rule 52(b)). Manifest injustice is determined by the facts and circumstances of the case, and the defendant bears the burden of establishing manifest injustice. *State v. Mayes*, 63 S.W.3d 615, 624 (Mo. banc 2001).

Citing *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) Appellant claims the trial court's error was structural (App.Br. 52). But inasmuch as this claim was

not properly preserved, it should not be analyzed as "structural error." The plain-error rule governs review of this claim; thus, appellant is bound to show both plain error and manifest injustice or a miscarriage of justice. *See State v. Wishom*, 578 S.W.2d at 277; *see generally Johnson v. United States*, 520 U.S. at 466-467 (discussing when and under what circumstances relief should be granted on claims of "plain error" under Federal Rule 52(b), even where the defendant alleged a purported "structural error"). Indeed, because defense counsel failed to object and specifically point out the court's erroneous reasoning at a point where the alleged error could have been remedied (and because it appears that defense counsel strategically chose to remain silent until the filing of appellant's motion for new trial), appellant should not be entitled to an automatic reversal.

"The failure to object to any error, even a structural one, leaves the appellate court with the power to notice only plain error. " *Rahn v. Hawkins*, 464 F.3d 813, 819 (8th Cir. 2006)(citing *Johnson v. United States*, 520 U.S. at 466-467); *see generally Neder v. United States*, 527 U.S. 1, 34-35 (1999) ("*Johnson[v. United States*, 520 U.S. 461] stands for the proposition that, just as the absolute right to trial by jury can be waived, so also the failure to object to its deprivation at the point where the deprivation can be remedied will preclude automatic reversal.") (Scalia, J., dissenting). In short, because this claim was not preserved, it should be reviewed in accordance with this Court's previous precedents – appellant should

be required to show outcome-determinative error. And, inasmuch as appellant has not made such a showing, this claim should be denied.

D. The trial court erred, but appellant did not suffer manifest injustice

As this Court has recognized, the United States Supreme Court has held that "The Sixth Amendment's guarantee of assistance of counsel implies a correlative right to dispense with such assistance." *State v. Hampton*, 959 S.W.2d 444, 447 (Mo. 1997)(citing *Faretta*). Thus, ordinarily, "A criminal defendant who makes a timely, informed, voluntary and unequivocal waiver of the right to counsel may not be tried with counsel forced upon him by the State." *Id*.

To ensure that a waiver is valid, a defendant seeking to waive counsel and represent himself "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Faretta*, 422 U.S. at 835. Then, if the defendant expresses an adequate understanding of the risks, he should be allowed to represent himself, regardless of any lack of technical legal knowledge or training. *See id*. at 835-836 ("technical legal knowledge . . . was not relevant to an assessment of his knowing exercise of the right to defend himself"); *Godinez v. Moran*, 509 U.S. 389, 399-400 (1993)("although the defendant 'may conduct his own defense ultimately to his own detriment, his choice must be honored'").

Here, of course, the trial court did not advise appellant of the risks of proceeding *pro se* and then accept or refuse his waiver (Tr. 282). Instead, the trial court denied appellant's request because appellant was not a practicing attorney and because appellant had capable, experienced counsel to represent him (Tr. 282). This ruling was not consistent with *Faretta* and this Court's precedents, but it did not result in manifest injustice, because the court's error was not outcome determinative and it ultimately imbued appellant's trial with greater reliability.

First, it cannot be said that the trial court's error was outcome determinative. For, "When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel." *Faretta*, 422 U.S. at 835. Or, stated another way, "Our experience has taught us that 'a *pro se* defense is usually a bad defense, particularly when compared to a defense provided by an experienced criminal defense attorney.'" *Martinez v. Court of Appeal of California, Fourth Appellate District*, 528 U.S. 152, 161 (2000).

In short, because appellant was represented by capable counsel, there is no reason to believe that appellant would have done a better job of presenting his defense; and, consequently, there is no reason to believe that the trial court's error – in requiring appellant to continue with the assistance of counsel – was outcome determinative. *See State v. Wishom*, 578 S.W.2d at 277 ("A perusal of the

transcript indicates that he was well represented by appointed counsel at the time of the trial and we do not see that the court's action in refusing his second request to represent himself constituted a manifest injustice or miscarriage of justice within the plain error rule.").

Second, appellant did not suffer a manifest injustice, because the error had the effect of providing appellant with effective assistance of counsel – a circumstance that ultimately increased the reliability and fairness of appellant's trial. And, in a capital case, where the defendant's life is on the line, the reliability and fairness of appellant's trial takes on an extra dimension of importance – both because appellant has a right to be free from cruel and unusual punishment and because society has an interest in ensuring that such punishments are not imposed in an arbitrary and capricious fashion. *See generally United States v. Farhad*, 190 F.3d 1097, 1108 (1999) ("The right to self-representation must be balanced, like the right to waive conflict free counsel in *Wheat*, or the right to a public trial in *Estes*, against the Due Process Clause's fundamental guarantee that trials will be reliable, just, and fair. Surely if the right to a fair trial is compelling enough to justify the Court's previous limitations on Sixth Amendment rights, it is compelling enough to limit, in appropriate cases, the Sixth Amendment right at issue here.").

Admittedly, the risk of an unfair trial (due to a defendant's limited legal skills) is a risk that *Faretta* deemed acceptable in order to preserve the personal right of self-representation. *See* 422 U.S. 834-835. But, here, in examining a claim of plain error arising out of the denial of the right to self-representation, the Court should consider the competing constitutional and societal interests in determining whether appellant suffered a manifest injustice.

It has been recognized in certain circumstances that "Even at the trial level . . . the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *See Martinez*, 528 U.S. at 162. Appellant's case does not involve any of the circumstances referred to in *Martinez* (e.g. allowing the limited participation of stand-by counsel, over a defendant's objection), but, again, because this case involves a claim of plain error, it makes sense to consider the fairness, integrity and efficiency of appellant's trial in determining whether appellant suffered a manifest injustice.

In sum, while the trial court erred in failing to allow appellant to proceed *pro se* (after advising appellant of the grave dangers of self-representation in a capital case), appellant's claim was not preserved for appellate review. Defense counsel was conspicuously silent on the issue prior to trial, and it is apparent that the lack of any objection was a strategic choice designed to build error into

appellant's case. But while there was error, appellant cannot show – given the greater reliability of his trial – that the error was outcome determinative or that he suffered a manifest injustice.

II.

The trial court did not abuse its discretion or plainly err in allegedly refusing to allow the defense to impeach defense witnesses Michelle Copeland and Ronald Friend.

Appellant claims that the trial court "refused" to allow him to impeach Michelle Copeland and Ronald Friend, two of his own witnesses, with prior inconsistent statements (App.Br. 53). But, contrary to appellant's claim, the trial court expressly stated that it would *permit* appellant to impeach Copeland (Tr. 1070), and because appellant never attempted to impeach Friend with prior inconsistent statements, the trial court never actually ruled that appellant would not be allowed to impeach Friend (*see* Tr. 1071-1093).

A. The standard of review

"A trial court has broad discretion to admit or exclude evidence at trial." *State v. Madorie*,156 S.W.3d 351, 355 (Mo. banc 2005). "This standard of review compels the reversal of a trial court's ruling on the admission of evidence only if the court has clearly abused its discretion." *Id*.

When a claim is not properly preserved, review is limited to plain error review. This Court has discretion to review for plain error when the court finds that manifest injustice or miscarriage of justice has resulted. *State v. Baxter*, 204 S.W.3d 650, 652 (Mo. banc 2006). Plain error can serve as the basis for granting a

new trial on direct appeal only if the error was outcome determinative. *Id*. "Manifest injustice is determined by the facts and circumstances of the case, and the defendant bears the burden of establishing manifest injustice." *Id*.

B. The trial court expressly ruled that it would allow appellant to impeach Michelle Copeland

As appellant points out (App.Br. 56), under § 491.074, RSMo 2000, a party is allowed to impeach his own witness with a prior inconsistent statement, even in the absence of surprise or a showing of hostility. *See State v. Phillips*, 940 S.W.2d 512, 520 (Mo. banc 1997). "The old rule about impeachment of one's own witness [which required surprise or hostility] is inappropriate, in view of the statute [§491.074]. Inconsistent statements are available as substantive evidence, and may be used just as soon as the inconsistency appears from the testimony." *State v. Bowman*, 741 S.W.2d 10, 13-14 (Mo. banc 1987).

But contrary to appellant's claim, while the trial court did initially sustain the state's objections to defense counsel's impeaching Michelle Copeland (Tr. 1056-1057, 1062-1063), the trial court ultimately ruled that it would *permit* the defense to impeach Copeland (Tr. 1070). As the record shows, at the conclusion of Copeland's testimony, defense counsel approached the bench and asked the court to reconsider its earlier ruling (Tr. 1068). The prosecutor asked what the

defense wanted to elicit, and defense counsel explained that he want to elicit that Copeland had previously stated that she had heard yelling (between appellant and the victim), and that she had heard the victim's door pop open (Tr. 1069). The prosecutor said that the state would not object to such testimony, and the trial court stated, "Well, in view of the prosecutor's statements, *I'll permit you to inquire*" (Tr. 1070) (emphasis added).

The trial court then explained the reasoning behind its earlier ruling (that Copeland was not a hostile witness), and defense counsel, after indicating that he would accept the court's earlier ruling, indicated that the defense would not question Copeland any further: "We're through with her. These are an Offer of Proof" (Tr. 1070-1071). Then, in lieu of making a testimonial offer of proof, defense counsel offered Defense Exhibits 556 (Michelle Copeland's deposition) and 557 (James Wilburn's deposition) (Tr. 1071). The depositions were admitted as an offer of proof, but they were not admitted into evidence (Tr. 1071).

As is evident, while it was not willing to alter its reasoning for initially sustaining the state's objection, the trial court (after the state *withdrew* its objection) expressly ruled that it would *permit* defense counsel to inquire about the inconsistent statements that he wanted to elicit (Tr. 1069-1070). But defense counsel was apparently more interested in attempting to preserve an error based on the trial court's previous, incorrect reasoning, and he chose not to inquire.

Thus, because counsel could have inquired in accordance with the trial court's ruling, appellant should not now be heard to complain. *See State v. Parker*, 509 S.W.2d 67, 71 (Mo. 1974) ("The trial court did not rule that defense counsel could not produce further testimony by the appellant of his version of the conversation with Sergeant Viessman. Defense counsel dropped the matter, despite the invitation of the trial court to continue as to the conversation . . . .").

C. Because appellant never attempted to impeach Ronald Friend, the trial court never ruled that appellant would not be allowed to do so

After Copeland testified, appellant called Friend to testify (Tr 1071). Friend gave his account and was cross-examined (Tr. 1071-1090). At no time did defense counsel attempt to impeach Friend with any prior inconsistent statements (Tr. 1071-1090). Thus, during Friend's testimony, there was no objection by the state, and no ruling by the court to actually prevent the admission of Friend's prior inconsistent statements (Tr. 1071-1090).

Instead, at the conclusion of Friend's testimony, defense counsel approached the bench, indicated that he wanted to admit various statements, and stated, "From the Court's prior ruling, you're probably not going to let me do that, but I just wanted to make that offer and give you the chance" (Tr. 1090). The court asked counsel to outline the inconsistencies, and the prosecutor

asserted that Friend's deposition was consistent with his testimony (Tr. 1090). Defense counsel then pointed out that Friend had previously said that it "looked more like a point than a punch," that Friend had not previously said that Andy Martin was "in shock," and that Friend had previously said that appellant had gone "down in the fight" (Tr. 1090-1091). Defense counsel asserted that it would take an inordinate "amount of time for [him] to list all of the inconsistencies," but he asserted that he "would gradually go through them if [he] were given leave" (Tr. 1091). (At no time was defense counsel precluded from fully outlining the inconsistencies.) Defense counsel then complained that the state had been allowed to impeach its own witness, and the trial court pointed out that "About all the Court can do is sustain an objection" (Tr. 1091-1092). The court then allowed defense counsel to offer Defense Exhibit 558 (a transcript of an interview of Friend, along with a tape of the interview), but the court did not admit the exhibit into evidence (Tr. 1092-1093).

As the record shows, defense counsel simply assumed that the trial court would prevent him from asking Friend about any prior inconsistent statements (Tr. 1090). But in point of fact, defense counsel never sought to elicit the prior statements, the state never lodged any objection to any prior inconsistent statements, and the trial court never actually ruled that defense counsel would not be allowed to ask Friend about any prior statements. The trial court *did* refuse

to admit the transcript of Friend's interview into evidence, but refusing to admit the transcribed interview (especially in the absence of any attempt at questioning) was simply not the same as preventing any inquiry about prior inconsistent statements.

It is well settled that "the proponent of the evidence must attempt to present the excluded evidence at trial, and if an objection to the proffered evidence is sustained, the proponent must then make an offer of proof." *State v. Purlee*, 839 S.W.2d 584, 593 (Mo. banc 1992). Here, appellant never asked Friend about his prior statements, and the state never made any objection to the admission of those statements. Thus, on this record, it is not apparent that appellant necessarily would have been prevented from asking Friend about his prior statements, if he had bothered to inquire.

In fact, inasmuch as the state ultimately withdrew its objection to impeaching Copeland, it is possible that the state would not have objected at all. And if the state had not objected, there is no reason to believe that the court would have acted *sua sponte* to prevent the questioning. In short, it appears that defense counsel, instead to attempting to admit the evidence he claimed was probative, preferred simply to attempt to create or preserve a claim of error based on the trial court's previous, incorrect ruling. But the trial court should not

be blamed for defense counsel's decision to forego questioning. Rather, the trial court should only be accused of error based on actual evidentiary rulings. *See generally State v. Parker*, 509 S.W.2d at 71 ("The trial court did not rule that defense counsel could not produce further testimony by the appellant of his version of the conversation . . . .).

D. Appellant did not suffer manifest injustice

Even if appellant can rely on the trial court's initial ruling during Copeland's testimony (and the incorrect reasoning expressed at that time) to assert this claim of trial court error as to both Copeland and Friend, appellant is not entitled to relief.

1. Alleged inconsistencies in Copeland's testimony

Initially, it must be noted that appellant is only entitled to plain error review. As set forth above, the trial court was prepared to *permit* counsel to impeach Copeland on the issues defense counsel identified at trial. Thus, appellant's claim must be understood to assert that the trial court plainly erred in failing to *again* invite counsel to inquire after counsel decided to make an offer of proof. Also, because appellant is now identifying additional inconsistencies that were not argued at trial, appellant's claim should only be reviewed for plain error. "A point is preserved for appellate review only if it is based on the same theory presented at trial." *State v. Johnson*, 207 S.W.3d 24, 43 (Mo. banc 2006).

In any event, in arguing prejudice, appellant both misstates and overstates the evidence that was potentially available for impeachment. He first identifies various allegedly impeaching statements that Copeland allegedly made to an investigator on August 11, 1999, including: (1) "that Johnson was fully out of the truck before any fight began," (2) "that she was so alarmed by the yelling that she backed away from the truck about five feet," (3) "that she saw Johnson open the door and exit the truck," (4) that "She did not see any bleeding or injury," and (5) that "Out of the truck, Johnson continued to yell" (App.Br. 64, citing Def.Ex.555). But there are two problems with appellant's assertions.

First, Defense Exhibit 555 – the source of these alleged statements – was not included in the offer of proof. The record reveals that appellant offered Defense Exhibits 556 and 557 (Tr. 1069-1071). Thus, appellant cannot now rely on Defense Exhibit 555 for evidentiary support.[4]

Second, with regard to the alleged statements, a review of Defense Exhibit 555 reveals that Copeland did not make the first alleged inconsistent statement. In fact, Copeland never admitted to seeing *any* fight. Thus, appellant cannot

[4] The index of exhibits, however, indicates that Defense Exhibits 555 and 556 (and not 557) were admitted on page 1071; thus, respondent will address the substance of appellant's claim.

argue that she expressly said "that Johnson was fully out of the truck before any fight began." To the contrary, while Copeland's statement contained certain affirmative statements and certain negative responses to certain questions that arguably could have given rise to an *inference* that the victim exited the truck before the fight started, Copeland's statement did not include any affirmative statement that "Johnson was fully out of the truck before any fight began." What Copeland said included:

- When she was about "five (5) feet" away from the driver's side of the truck, she saw the black male open the passenger door and exit from the truck;[5]
- "no" she did not see the black male being assaulted or attacked while he was sitting in the truck;
- "no" she did not see the black male suffer an injury;
- "no" she did not see the black male come under attack while he exited the truck and while she had him under observation; and
- "no" the black male was not bleeding and suffering from an injury in the neck during the time she saw him exiting the truck and while she had him

[5] According to the report author, language not in quotes was paraphrased; thus, it is not exactly apparent what Copeland said (*see* Def.Ex.555, p.1).

under observation.

(Def.Ex.555, p.2).

As is evident, while Copeland's one statement and negative responses to specific questions provide grounds to *infer* that Johnson was outside the truck before the fight began, it is plainly evident that Copeland never made an affirmative statement along those lines. Indeed, her statement in Defense Exhibit 555 left open the distinct possibility that she simply did not see the stabbing, both because she was conversing with Andy Martin and because she was backing away from the truck.

Moreover, it is apparent that Copeland's trial testimony was essentially consistent with her prior statement. Indeed, to the extent that Copeland's testimony and elements of her prior statement to the investigator were necessary to give rise to the inference that the victim was out of the truck before he was stabbed, her testimony at trial accomplished that fact (even absent further impeachment). As the record shows, Copeland testified: (1) that she talked to Martin, that she heard the victim arguing with someone, that the victim's door was possibly partly open (but not all the way open), and that she backed away from the truck after talking to Martin; and (2) that "No" she did not see the victim being assaulted or attacked while he was in the truck, that "No" she did

not see the victim suffer an injury of any type, that "No" she did not see any blood, that "No" she did not see any hand reach through the window, and that "No" she did not see anyone standing outside the window (Tr.1052-1064). In other words, to the extent that elements of Copeland's prior statement could have provided a basis to infer that the stabbing did not occur until *after* the victim had exited the truck, those elements were essentially present in Copeland's testimony.

As outlined above, appellant also asserts that he should have been allowed to impeach Copeland with the following: "that she was so alarmed by the yelling that she backed away from the truck about five feet," "that she saw Johnson open the door and exit the truck," that "She did not see any bleeding or injury," and that "Out of the truck, Johnson continued to yell" (App.Br. 64). But none of this alleged impeachment had much value either for impeachment or its substance, because it was largely consistent with Copeland's trial testimony (or it simply was not present in Copeland's prior statement to the investigator).

For instance, Copeland expressly testified that she did not see any bleeding or injury (thus, no need to impeach on this aspect of her testimony) (Tr. 1059). Copeland did state that she did not see the victim exit the truck, but she admitted that the victim's door was possibly partly open (Tr. 1061-1062), and, in any event,

there was no controversy over the fact that the victim exited the truck.[6] With regard to yelling, the report simply did not state that once he was "Out of the truck, Johnson continued to yell" (Def.Ex.555).[7] And, with regard to Copeland's feelings, the report also did not state that "she was so alarmed by the yelling that she backed away" (Def.Ex.555). In short, these scraps of evidence would have had little or no value, and, as a consequence, appellant has not shown a manifest injustice.

Appellant also argues that he wanted to impeach Copeland with statements from her deposition, including: (1) that "she stated that Johnson had

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[6] Copeland's statement that she saw the victim exit the truck only had probative value to the extent that it could be combined with her negative responses to the questions about seeing an attack or injury (for together they gave rise to an inference that the stabbing occurred outside the truck). But, as discussed above, Copeland's trial testimony provided evidence from which to draw that inference.

[7] Copeland said that the victim and appellant were not loudly yelling (Tr. 1053), but she admitted that they were arguing and when asked whether they were yelling or having a conversation, the victim said, "I don't think it was a normal conversation" (Tr. 1057-1058). Thus, while Copeland would not expressly admit to hearing "yelling," she agreed that their voices were raised in argument. And, to the extent the evidence of yelling was important to the defense theory, there was ample other evidence of yelling (Tr.671,742-743,993,1011,1052-

never left the truck – he remained in the truck with the door partially open," (2) that "She stated she heard Johnson arguing with someone, but she wavered between describing it as yelling as opposed to an argument that was 'not hostile,'" and (3) that "She stated that she backed away from the truck, but wavered as to whether or not it was because of the yelling" (App.Br. 64, citing Def.Ex.556). But as is evident, the first two statements had absolutely no impeachment or substantive value, for they were wholly consistent with Copeland's trial testimony (Tr. 1053, 1057-1058, 1061-0162). As for the third statement, while Copeland testified at trial that the arguing did not concern her (Tr. 1066), she never explained why she backed away. Thus, offering her prior statement that she backed away because of the arguing, would have had only marginal impeachment or substantive value.

Appellant points out that this Court previously determined, on appeal from the denial of post-conviction relief, that "Copeland's prior inconsistent statement 'focused on the very root of the matter in controversy'" (App.Br. 65, citing *Black v. State*, 151 S.W.3d at 56). Thus, he implies that the alleged lack of impeachment at his second trial was also prejudicial. But the facts and evidence in this case (at least insofar as they were presented by the defense) vary

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1053,1055,1058,1074).

substantially from the facts and evidence that were present in appellant's first trial. At appellant's first trial, as this Court later summarized the evidence on post-conviction appeal:

> Mr. Black presented the testimony of Gloria Norman and Ronald Friend, who testified that the victim got out of the truck before he began bleeding and that the victim and Mr. Black fought in the street. He also presented evidence that he did not stab the victim until *after* the latter swung at him with the 40-ounce beer bottle.
>
> The evidence arguably was supported by forensic evidence that once the victim was stabbed, his blood would have spurted out heavily and spattered in a peculiar pattern, so that witnesses would have had to see substantial blood on Mr. Johnson once he was stabbed. If, as the defense witnesses indicated, witnesses did not see blood on Mr. Johnson until after he got out of the truck, then it would undermine the State's theory that Mr. Black stabbed the victim in the truck, rather than in a fight, and so undermine the State's claim that the killing occurred as a result of deliberation rather than passion.

Black v. State, 151 S.W.3d at 53. Under these circumstances (where the state's evidence was essentially the same as it was presented at the re-trial) this Court observed that impeaching the state's witnesses was "essential," so as to undermine the state's account and lead the jury to accept appellant's account. *Id*.

In the case at bar, however, there were not two clear-cut accounts. Appellant's eyewitnesses were not definite regarding the sequence of events. Michelle Copeland did not see any fighting (though she heard arguing), and she claimed not to have seen the victim get out of the truck at all (Tr.1058-1059,1067-1068). Ronald Friend testified on direct that he saw appellant out of his car first, and that he then saw the victim get out (Tr. 1077-1078). He said that he thought he saw appellant swing at the victim, but he did not know if the blow landed (thus, this was not necessarily appellant's first swing) (Tr. 1080). And it was only after that swing, as appellant was driving away, that Friend heard the victim's bottle break (after the victim threw it at the escaping appellant) (Tr. 108). Plus, on cross-examination, Friend testified that he saw appellant get out, approach the victim (who was still in the truck), throw a punch while the victim was trying to get out, and then move back to his car (Tr. 1085-1087).

Thus, appellant's eyewitnesses testified in a manner that was largely consistent with the state's case (or in a manner that could be reconciled with the state's evidence). And, consequently, rather than finding himself in a position

where he needed to impeach the state's witnesses to give his own witnesses greater credence, appellant was in the position of impeaching his own witnesses, in an attempt to build up a theory that he had not successfully portrayed with any substantial quantum of evidence. Moreover, one expert explained that the victim might not have had immediate arterial spurt (thus explaining why Copeland might not have seen any blood before the victim exited the truck), and the defense expert conceded that he could not determine the sequence of events from the blood evidence found at the scene (Tr.974,976-977,1224-1225,1234,1248).

In other words, unlike appellant's first trial, where impeachment of the state's witnesses was paramount, appellant needed affirmative evidence of his own theory. And, as outlined above, the minimal impeachment and substantive evidence that Copeland had to offer was of little or no consequence.

2. Alleged inconsistencies in Friend's testimony

As to Friend's testimony, review is also limited to plain error review. As set forth above, appellant never tried to elicit Friend's testimony, and there was never any objection to the admission of his testimony. Thus, the trial court never actually ruled that appellant would not be allowed to elicit Friend's alleged inconsistencies.

Appellant argues that the jury should have learned that Friend, seven

months after the fight, "gave a much different account," including: (1) that the fight took place in the middle of the road, and that the victim and appellant stood "buffaloing" each other; (2) that appellant only swung at the victim once, in the middle of the street; (3) that Friend rejected the notion that appellant swung at the victim in the truck, indicating that he thought appellant had "pointed at" the victim; (4) that the victim "leaned back from the punch in the middle of the street, not when appellant pointed at him in the truck; and (5) that both men initially stayed in their cars and yelled at each other, but that both men started out of their vehicles at the same time (App.Br. 64-65).

But while appellant puts great stock in these alleged inconsistencies, it is apparent that these inconsistencies are largely consistent with the testimony that Friend gave at trial (which, incidentally, tends to explain why there was no concerted effort to impeach Friend's testimony). Of course, as appellant points out, some of Friend's earlier statements were somewhat inconsistent with the slightly different account that Friend gave on cross-examination. But, even so, it cannot be said that appellant would have gleaned much favorable impeachment or substantive evidence by impeaching Friend with his prior inconsistent statements.

First, while Friend's prior statement indicated that both men popped open their doors, he expressly stated that appellant got out quicker (Def.Ex.558, p.2).

And, while Friend described appellant swinging at the victim in the street, he admitted that he glanced away before that happened (Def.Ex.558, p.3). Friend, like the other witnesses, stated that it was after the appellant's swing that the victim threw his bottle (Def.Ex.558, p.3). Thus, it was entirely possible that he was merely describing the fight in the street that the state's witnesses described. Finally, with regard to whether appellant reached through the victim's window, Friend did *not*, as appellant asserts, "reject" that notion. What friend said was, "it looked like he reached at first but he wasn't I don't think he was trying to grab him I think he was pointing at him" (Def.Ex.588, p. 6). But if appellant "reached at first," as Friend stated, he certainly could have stabbed the victim, which is consistent or at least reconcilable with the account that Friend gave on cross-examination. Moreover, in his prior statement, with regard to the first blow, Friend mentioned "pointing" again, but he admitted that appellant "may have swung at [the victim] when [the victim] was getting out of the truck" (Def.Ex.558, p.6). This, again, was consistent with the other accounts, which generally agreed that the victim had started to open his door (and was facing appellant) when appellant stabbed him in the neck.

In sum, as with Copeland, appellant has overstated or misstated the value of the alleged impeachment and substantive evidence that Friend would have

been able to provide if his largely consistent (and wholly reconcilable) testimony had been elicited at trial. And, consequently, appellant did not suffer manifest injustice.

III.

The trial court did not plainly err in controlling the cross-examination of state's witness Tammy Lawson.

Appellant asserts that the trial court erred and abused its discretion in refusing to allow him to play an audiotape of Tammy Lawson's second statement to the police (App.Br. 68). He argues that the jury should have been allowed to hear her voice so that they could better gauge her credibility (App.Br. 68).

A. The standard of review

"A trial court has broad discretion to admit or exclude evidence at trial." *State v. Madorie*,156 S.W.3d 351, 355 (Mo.banc 2005). When a claim is not properly preserved, review is limited to plain error review. This Court has discretion to review for plain error when the court finds that manifest injustice or miscarriage of justice has resulted. *State v. Baxter*, 204 S.W.3d 650, 652 (Mo. banc 2006). Plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative. *Id*. "Manifest injustice is determined by the facts and circumstances of the case, and the defendant bears the burden of establishing manifest injustice." *Id*.

B. The trial court allowed sufficient impeachment of Tammy Lawson

On direct examination, Tammy Lawson offered testimony consistent with the state's theory of the case, namely, that appellant chased the victim (after Lawson explained what had happened in the convenience store), that appellant got out of his car and stabbed the victim, and that appellant then fled from the scene. On cross-examination, defense counsel asked Lawson about her first (false) statement to the police (in which she had told the police that the victim had chased them and then attacked appellant)(Tr.744-747; *see* Def.Ex.519). Defense counsel then asked Lawson about her second statement and elicited some of the different statements she had given to "correct" her previous statement (Tr.747-750).

On re-cross-examination, defense counsel presented Lawson's first interview with the police in its entirety and played an audiotape of the interview for the jury (Tr. 768-770). Defense counsel then sought to admit the entirety of Lawson's second, "corrected" interview (Tr. 770). The prosecutor objected, pointing out that the second interview was not inconsistent with Lawson's trial testimony, except in certain places (Tr. 770). The trial court ruled that the defense could admit the prior inconsistent portions of the interview (Tr. 770). Defense counsel complained that "it would be impossible for a juror to really judge the credibility and the truth of that statement in the type of isolated context" (Tr.770-771). The trial court adhered to its ruling that the defense would only be

permitted to admit the prior inconsistent statements (Tr.771-772).

Defense counsel then elicited Lawson's various inconsistent statements using a transcript of the interview (Tr. 773-780). Defense counsel then renewed his request to play the tape, and he requested an opportunity to show the court "some things" on the tape and explain why he needed to play the tape (Tr. 781). The trial court stated that they could take up the tape after they broke for the evening (Tr. 781). But defense counsel did not raise the issue of the tape again (until the filing of appellant's motion for new trial, *see* L.F. 974).

On this record, it cannot be said that the trial court abused its discretion in controlling the cross-examination of Lawson. The defense was *not* precluded from impeaching Lawson with all of her prior inconsistent statements, and, accordingly, the defense was fully able to impeach her credibility at trial and argue the substance of any of her various statements. Additionally, the trial court was willing to *allow* defense counsel to play portions of the tape (thus, the jury could have heard Lawson's speech and attempted to gauge her credibility), but defense counsel opted not to play any portions if the court was not willing to allow the entire tape (Tr. 770-771,772). In short, defense counsel was given adequate leeway to fully impeach Lawson with her prior taped statements, and the trial court should not be accused of abusing its discretion in that regard.

Moreover, with regard to appellant's claim that he wanted to play the whole tape so that the jury could better gauge Lawson's credibility, appellant failed to make an offer of proof on that aspect of his claim. Defense counsel offered to play relevant portions for the trial court, as an offer of proof, but he ultimately did not do so (*see* Tr. 781).

It is well settled that "the proponent of the evidence must attempt to present the excluded evidence at trial, and if an objection to the proffered evidence is sustained, the proponent must then make an offer of proof." *State v. Purlee*, 839 S.W.2d 584, 593 (Mo. banc 1992). "Only with a fully developed factual context can a trial judge make a ruling that requires the balancing of a number of relevancy, reliability, and other issues." *Id*.

And, here, to the extent that defense counsel argued that playing the entire audiotape was necessary to aid the jury, counsel should have taken the opportunity to play the tape as an offer of proof, to allow the judge an opportunity to determine whether, in fact, it ought to have been played. Absent such an offer of proof, appellant failed to give the trial court the opportunity it needed to gauge the relevance of playing the whole tape (as opposed to portions, which the trial court would have allowed); and, accordingly, the remainder of appellant's claim was not preserved for review.

As for the substance of appellant's claim, the trial court did not plainly err.

As the record shows, the jury was wholly apprized of all of Lawson's prior inconsistent statements. Thus, it can hardly be said that appellant suffered a manifest injustice. To the contrary, because the trial court was willing to admit any portion (including any audio portion) that contained a prior inconsistent statement, appellant was permitted a full and fair opportunity to impeach Lawson.

Citing cases like *State v. Neely*, 979 S.W.2d 552 (Mo.App. S.D. 1998); and *State v. McClanahan*, 202 S.W.3d 64 (Mo.App. S.D. 2006), appellant points out that courts have upheld the admission of an entire tape, when the statement contained thereon is largely inconsistent with a witness' trial testimony (App.Br. 71-72). This is correct, but such holdings do not inevitably lead to the conclusion that the trial court, in limiting a tape to the inconsistent portions, will have abused its discretion. To the contrary, if the court's ruling is sufficient to allow a full and fair impeachment of the witness – as it was in this case – a defendant should not be heard to complain. Moreover, because appellant failed to properly preserve this aspect of his claim, he must show that the trial court's ruling resulted in a manifest injustice. This he cannot do, for all of Lawson's prior inconsistent statements *were* admitted, and the trial court's ruling would have allowed defense counsel to play those inconsistent portions, as well.

Appellant argues that the "best evidence rule" required the admission of the tape. But appellant's reliance on the best evidence rule is misplaced. The best evidence rule is invoked by an adverse party to ensure that the proponent of evidence is producing the best evidence. Moreover, the rule simply states the law's preference for producing a writing or recording when its terms or contents are at issue. *State v. Hill*, 918 S.W.2d 287, 288 (Mo.App. E.D. 1996). Here, the actual content of the audiotape was not disputed; thus, the best evidence rule is inapplicable. *Id*.; *State v. Fleer*, 851 S.W.2d 582, 592 (Mo.App. E.D. 1993) ("Where the contents of a writing are not directly in issue, although the evidence contained in the writing may bear upon a fundamental issue in the case, the best evidence rule does not apply and secondary evidence may be used without accounting for the original document.").

Finally, appellant argues that the rule of completeness required the admission of the entire tape. But this rule, too, does not compel reversal. "The 'rule' is stated: 'where either party introduces part of an act, occurrence, or transaction, the opposing party is entitled to introduce or to inquire into other parts of the whole thereof in order to explain or rebut adverse inferences which might arise from the fragmentary or incomplete character of the evidence introduced by his adversary – a rule that has been held to apply even though the evidence was in the first place illegal." *Id*. at 50. Here, the state was not seeking to

admit a portion of the interview out of context; rather, appellant, having admitted some of the statements, was seeking to then admit the entire tape. Thus the rule simply does not apply.

Additionally, "The rule of completeness seeks to ensure that a statement is not admitted out of context." *State v. Skillicorn*, 944 S.W.2d 877, 891 (Mo. banc 1997). "The rule is violated only when admission of the statement in an edited form distorts the meaning of the statement or excludes information that is substantially exculpatory to the declarant." *Id*. Here, even if the rule applied, appellant was not forced to admit Lawson's statements in an edited form that distorted the meaning of her statements.

Appellant argues that "Counsel's recitation of portions of Lawson's assertions marred the true effect of this evidence, because it prevented the jury from hearing Lawson's own voice and her own inflection and emphasis" (App.Br. 73). But it was defense counsel who chose not to play portions of the tape; the trial court was perfectly willing to allow the tape to be played, so long as defense counsel limited the tape to the inconsistent portions.

Appellant outlines various inconsistencies that he allegedly could not highlight with the tape (App.Br. 74-75); but, again, defense counsel was permitted to elicit each of those statements, and he would have been allowed to

play those portions of the tape. Thus, each of the inconsistencies outlined in appellant's brief were adequately conveyed to the jurors for their consideration. For instance, with regard to the inconsistency over appellant's use of racial epithets, it was perfectly apparent from the impeachment that took place at trial, that Lawson repeatedly denied that race had anything to do with the murder (Tr. 779-780; *see also* Tr. 773-780, where the other inconsistencies were elicited).

Lastly, for the first time, appellant argues that the jury should have been allowed to hear how the detectives questioned Lawson. But this is a claim that was never asserted at trial, either during Lawson's testimony or in appellant's motion for new trial, and it should not be considered here. But, in any event, to the extent that the questions were relevant, they too, were read to the jury to give Lawson's responses context. Thus, appellant cannot establish that he suffered a manifest injustice.

IV.

There was sufficient evidence of deliberation.

Appellant contends that there was insufficient evidence of deliberation (App.Br. 78).

A. The standard of review

In reviewing the sufficiency of the evidence, appellate review is limited to a determination of whether there was sufficient evidence from which a reasonable finder of fact might have found the defendant guilty beyond a reasonable doubt. *State v. Chaney*, 967 S.W.2d 47, 52 (Mo. banc 1998). In applying the standard, the reviewing court accepts as true all of the evidence favorable to the state, including all favorable inferences drawn from the evidence, and disregards all evidence and inferences to the contrary. *Id*. Appellant may not rely on inferences contrary to the jury's verdict. *Id*.

In *Jackson v. Virginia*, 443 U.S. 307 (1979), the United States Supreme Court emphasized the deference given to the trier of fact. The Court stated:

> this inquiry does not require a court to ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational

trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Id. at 318-319.

B. There was sufficient evidence of deliberation

To support a conviction of murder in the first degree, there must be evidence of deliberation. § 565.020, RSMo 2000. "**'Deliberation'** means cool reflection for any length of time no matter how brief." § 565.002.(3), RSMo 2000. "It is not necessary that the actor brood over his actions for an appreciable period of time." *State v. Feltrop*, 803 S.W.2d 1, 11 (Mo. banc 1991). "Deliberation may be inferred from the circumstances surrounding the murder." *Id*.

Viewed in the light most favorable to the verdict, the evidence was sufficient for a rational finder of fact to infer that appellant deliberated prior to murdering the victim. The events leading up to the murder were put in motion when Tammy Lawson informed appellant that the victim had brushed up against her in the Snak-Atak convenience store (Tr.722,740).

Lawson believed the victim had touched her inappropriately in a sexual or suggestive manner (Tr.721,733,1024). After explaining what had happened, Lawson pointed at the victim and identified him for appellant (Tr.664,675,896). When the victim drove away from the scene shortly after Lawson had told appellant what had happened, appellant followed in his own car

(Tr.667,723,741). As he drove after the victim, he told Lawson that he was going to "Hurt that nig---," and "kick his a--" (Tr.757,766).

From these facts, rational jurors could have inferred that appellant formed the intent to harm or kill the victim immediately prior to giving chase. Indeed, given appellant's stated intent to "Hurt that nig—," which he announced shortly after giving chase, it is reasonable to infer that appellant's purpose in following the victim was to inflict harm.

In addition, appellant followed the victim for several blocks, and for several minutes (*see* Tr.666-669,821). During that time, in addition to saying that he was going to hurt the victim and "kick his a--" appellant took his knife out of its sheath and armed himself for the anticipated conflict (*see* Tr.724,758). A knife is a deadly weapon, and from these facts, although appellant used euphemistic words like "hurt" and "kick . . . a--," rational jurors could have reasonably inferred that appellant had decided to kill the victim. *See State v. Stacy*, 913 S.W.2d 384, 387 (Mo.App. W.D. 1996) ("A reasonable inference can be drawn that by bringing a deadly weapon to commit the crime he had planned, Mr. Stacy reasonably anticipated use of the weapon. It is sufficient to show that the defendant merely considered taking another's life in a deliberate state of mind.").

Moreover, it is apparent that appellant could have stopped following the

victim or simply turned away from his pursuit at any time prior to the murder. But instead, he persisted in his design. As this Court noted on appellant's first appeal, this Court has held that evidence that the defendant had to "take a few steps" toward the victim before stabbing him gives rise to the reasonable inference that defendant reflected for at least the time it took to reach the victim. *State v. Black*, 50 S.W.2d 778, 788 (Mo. banc 2001)(citing *State v. Clemmons*, 753 S.W.2d 901, 906 (Mo. banc 1988)). Here, as this Court has previously held, appellant "took more than a few steps to reach the victim," and reasonable jurors could infer deliberation from all of the circumstances. *Id.*

Further indicia of deliberation include the fact that appellant stabbed the victim in a vital spot with sufficient force to sever the victim's jugular vein and carotid artery. *See State v. Seals*, 515 S.W.2d 481, 486 (Mo. 1974)("the carrying of a concealed weapon, and the use of it upon a vital part of the body of the victim are deemed to be highly material circumstances" of deliberation). Also, appellant's failing to seek medical aid for the victim supported an inference that he deliberated. *See State v. Feltrop*, 803 S.W.2d at 12. Disposing of evidence and flight can also support an inference of deliberation. *See State v. Tisius*, 92 S.W.3d 751 (Mo. banc 2002). Here, appellant believed he had killed the victim (he said, "One nig--- down" when he got back into his car), appellant fled from the scene (and ultimately went to Oklahoma), and appellant tried to dispose of the knife by

throwing it out the car window. All of these actions gave rise to an inference that appellant was merely carrying out his pre-considered plan, i.e., that appellant deliberated prior to the murder.

Focusing on Lawson's testimony that she was "angry, cursing and 'bitching' about what had happened inside the store," appellant argues that there was no opportunity for him to "cooly reflect" (App.Br. 81). He points out that Lawson testified that she thought appellant was getting madder and madder as the chase went on (App.Br. 81). But the problem with appellant's argument is twofold: first, it ignores the standard of review and relies on evidence and inferences that are contrary to the verdict. Thus, while appellant would like to credit Lawson's characterization of events, the jury was not bound to do so. The jury was free to conclude that certain aspects of Lawson's testimony were exaggerated, and that appellant – in carrying out what can readily be viewed as a cold-blooded murder – had acted after deliberation.

Second, even if appellant became angry or enraged as he chased after the victim, there was ample evidence from which to conclude that appellant deliberated prior to giving chase. Lawson had provided a motive, appellant obviously felt a certain degree of animus toward the victim, and the evidence supported an inference that appellant formed the intent to hurt the victim prior

to leaving the convenience store parking lot. Thus, rational jurors could have reasonably inferred that appellant – in those moments when he looked across the parking lot and decided that he was going to "Hurt that nig—" – deliberated.

V.

The trial court did not plainly err in allowing Detective Gallup to testify about Mark Wolfe's prior consistent statements.

Appellant claims that the trial court plainly erred in admitting evidence of Mark Wolfe's prior consistent statements to Detective Gallup (App.Br. 83). He asserts that the testimony constituted improper bolstering (App.Br. 83).

A. The standard of review

As appellant concedes, this claim was not preserved in appellant's motion for new trial (*see* L.F. 962-986). Thus review is for plain error.

This Court has discretion to review for plain error when the court finds that manifest injustice or miscarriage of justice has resulted. *State v. Baxter*, 204 S.W.3d 650, 652 (Mo. banc 2006). Plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative. *Id*. "Manifest injustice is determined by the facts and circumstances of the case, and the defendant bears the burden of establishing manifest injustice." *Id*.

B. Wolfe's statements to Detective Gallup were admissible under the rule of completeness and to rebut an inference of recent fabrication

On direct examination, Mark Wolfe described the altercation, explaining that appellant walked quickly to the victim's window, that appellant threw a

punch or jab through the window, that the victim then got out, that the two men struggled briefly, that the victim threw a bottle or swung at appellant, and that appellant got into his car and left (Tr. 673-676). On cross-examination, defense counsel sought to impeach Wolfe with certain, limited aspects of his prior statement to Detective Gallup:

> Q And when you talked to Detective Gallup, you actually told him that [the victim] pushed or shoved the door into Gary Black when the fight was beginning, true?
>
> A It's possible.
>
> Q And you also told him that when Jason swung or threw the beer bottle, he was approximately two to three feet away from Gary Black?
>
> A It's possible.
>
> Q And you also told him that in your opinion that you believe that that bottle hit Gary Black in either the arm or the head area, isn't that true?
>
> A It's possible, yes.

(Tr. 704).[8] These few questions were designed to suggest that Wolfe, in talking to

[8] Citing Tr. 699, appellant asserts that defense counsel also elicited that Wolfe told

Detective Gallup "two days after the incident" had "actually" initially described the victim as an aggressor "when the fight was beginning" (Tr. 703-704). The questions highlighted only the victim's actions (as related by Wolfe to Detective Gallup), and they were plainly intended to suggest that Wolfe's trial testimony did not match his earlier, more contemporaneous, account to Detective Gallup.

Thus, it was proper to admit the remainder of Wolfe's statements to Detective Gallup on either of two theories. First, prior consistent statements are admissible for the purpose of rehabilitating a witness whose credibility has been attacked by an express or implied claim of recent fabrication of trial testimony. *State v. Ramsey*, 864 S.W.2d 320, 329 (Mo. banc 1993); *State v. Ray*, 852 S.W.2d 165, 168 (Mo.App. S.D. 1993). Statements consistent with trial testimony, given before the corrupting influence to falsify occurred, are relevant to rebut a claim of contrivance. *State v. Ramsey*, 864 S.W.2d at 329. Any evidence tending to permit the inference that the testimony of the witness is recently fabricated opens the door to the introduction of the statement consistent with the witness' testimony if made prior to the suggested fabrication. *State v. Ray*, 852 S.W.2d at 168.

Detective Gallup that he "didn't know that [the victim] got hit with anything" (App.Br. 86), but, in fact, at that point, defense counsel was questioning Wolfe about what he had "told the first cop at the scene" – not Detective Gallup (Tr. 697-699).

Second, the remainder of Wolfe's statement to Gallup was admissible under the rule of completeness. "The 'rule' is stated: 'where either party introduces part of an act, occurrence, or transaction, the opposing party is entitled to introduce or to inquire into other parts of the whole thereof in order to explain or rebut adverse inferences which might arise from the fragmentary or incomplete character of the evidence introduced by his adversary – a rule that has been held to apply even though the evidence was in the first place illegal." *Id*. at 50. "The rule of completeness seeks to ensure that a statement is not admitted out of context." *State v. Skillicorn*, 944 S.W.2d 877, 891 (Mo. banc 1997). "The rule is violated only when admission of the statement in an edited form distorts the meaning of the statement or excludes information that is substantially exculpatory to the declarant." *Id*.

Here, defense counsel's cross-examination of Wolfe about limited aspects of his prior statement (in attempt to portray the victim as the initial aggressor) had the effect of implying that Wolfe (who testified that appellant was the initial aggressor) had recently fabricated his trial testimony. But, as the state pointed out through questioning Detective Gallup, Wolfe's statement two days after the murder, was consistent with his trial testimony; Gallup testified:

Q Mr. Jacquinot also asked you this morning about what Mark Wolfe said to you when you talked to him on the 4th, isn't that

true?

A Yes, sir.

* * *

Q And what did Mr. Wolfe tell you about what happened at Fifth and Joplin?

A Mr. Black and [the victim] had words, [the victim] didn't pay any attention, Mr. Black got out of the vehicle or I believe he used the term, rushed out of the vehicle and jabbed into the window of Andy's truck striking [the victim].

Q So the first one to use words at that intersection would have been whom?

A Mr. Black

Q The first one out of his vehicle would have been whom?

A Mr. Black.

Q The first one to throw a punch or a jab would have been whom?

BY [DEFENSE COUNSEL]: I would object to the leading, Your honor. I don't think it's appropriate.

BY THE COURT: Try not to lead the witness.

Q (by [the prosecutor]) Who threw the first punch?

A According to Mr. Wolfe, Mr. Black did.

(Tr. 878, 880-881).

This was proper rehabilitation, designed to rebut an implication of recent fabrication. *See State v. Wolfe*, 13 S.W.3d 248, 257 (Mo. banc 2000)("if the out-of-court statement is offered for relevant purposes other than corroboration and duplication – such as rehabilitation – there is no improper bolstering"). Thus, allowing Detective Gallup's testimony did not run afoul of the rule applied in cases like *State v. Seever*, 733 S.W.2d 438 (Mo. banc 2000), where the court ruled that merely duplicative testimony is not admissible.[9]

Additionally, inasmuch as defense counsel's questioning only elicited a portion of Wolfe's prior statement, in a fashion that plainly distorted the meaning of Wolfe's prior statement, Detective Gallup's testimony was also proper under the rule of completeness. The trial court did not plainly err.

[9] To the extent that Detective Gallup's testimony was similar to testimony that Wolfe offered on re-direct (after defense counsel had cross-examined him) (*see* Tr. 706-707), Gallup's testimony still had independent rehabilitative value. For, while Wolfe testified about what he had told Gallup (Tr. 706-707), it was, of course, Wolfe's credibility that had been impeached. Thus, to fully rehabilitate Wolfe, Gallup's testimony was admissible.

VI.

The trial court did not abuse its discretion in ruling, in accordance with § 491.050, that Tammy Lawson could only be impeached with her prior criminal convictions.

Appellant contends that the trial court abused its discretion in refusing to allow him to impeach Tammy Lawson with her prior municipal convictions (App.Br. 89). He argues that the rule precluding such impeachment is outdated and should be abrogated (App.Br. 89-90).

A. The standard of review

"A trial court has broad discretion to admit or exclude evidence at trial." *State v. Madorie*,156 S.W.3d 351, 355 (Mo.banc 2005). A trial court abuses its discretion when a ruling is clearly against the logic and circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *State v. Brown*, 939 S.W.2d 882, 883 (Mo. banc 1997). If reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Id*. at 883-884.

B. Because municipal convictions are not "criminal convictions," the trial properly concluded that they could not be used to impeach Tammy

Lawson

At trial, appellant sought to impeach Tammy Lawson with several municipal violations (Tr. 756-757). Relying on § 491.050, RSMo 2000, and well-settled caselaw, the trial court ruled that appellant would not be allowed to impeach Lawson with her prior convictions (Tr. 756). This was not an abuse of discretion.

Under § 491.050, RSMo 2000, the credibility of a person who testifies at a civil or criminal trial can be impeached with "any prior *criminal* convictions" (emphasis added). This statute does not permit impeachment with municipal violations, because, as Missouri courts have long held, municipal convictions are not "criminal" convictions. "[V]iolations of municipal ordinances are in the nature of civil violations and, therefore, are not criminal convictions and are not admissible for impeachment purposes." *Lewis v. Wahl*, 842 S.W.2d 82, 95 (Mo. banc 1992)(citing *Meredith v. Whillock*, 158 S.W. 1061, 1063 (1913)); *see State v. Moore*, 84 S.W.2d 564, 567 (Mo.App. S.D. 2002); *State v. Helm*, 892 S.W.2d 743, 745 (Mo.App. E.D. 1994).

As this Court explained in *Lewis v. Wahl*, this limitation on impeachment "makes perfect sense when one considers the long line of cases in this state holding that a violation of a city ordinance is not a criminal offense for other purposes." 842 S.W.2d at 95 (citing *Kansas City v. Neal*, 26 S.W. 695, 696

(1894)(holding that the Supreme Court was without jurisdiction to enter a writ of error because violation of a city ordinance is not a crime and, thus, not a felony); *Ex parte Hollwedell*, 74 Mo. 395 (1881)(violation of a city ordinance is not a criminal offense; therefore, Article II, Section 12, of the Missouri Constitution, requiring prosecution by indictment or information, is not applicable because an indictment or information is only necessary for a criminal offense); *State v. Muir*, 65 S.W. 285 (1901)(defendant indicted under Missouri statute for gaming, and defendant had previously been convicted for the same offense under an ordinance of the city of Mexico; because prosecution under a civil ordinance is a civil action, there is no double jeopardy problem when the state acts to enforce a statute, and both actions may be brought regardless of any particular order[10]).

Appellant argues that the traditional reasons for exempting municipal convictions from the category of "criminal" convictions have largely eroded; thus, he urges this Court to adopt a new rule and allow impeachment with municipal violations (App.Br. 92). For instance, he argues that in times past, municipal violations regulated "conduct that was not necessarily prohibited on a statewide basis;" but, "In contrast today, municipal convictions like Lawson's – for larceny and assault – are prohibited on a statewide basis" (App.Br. 92). But

[10] As will be discussed below, double jeopardy will now bar a subsequent prosecution.

the problem with this argument is that it only applies to certain municipal violations. There are still other municipal ordinances that prohibit conduct that is *not* prohibited statewide, e.g., a smoking ban in certain public places. Thus, while some people could be impeached with "convictions" arising out of certain conduct, others could not.

Appellant also points out that a municipal conviction today will, under a double jeopardy analysis, bar a subsequent criminal proceeding based on the same conduct (App.Br.92). Thus, he reasons that a municipal violation today it is more akin to a criminal conviction. But this extension of the protections of the Double Jeopardy Clause arose out of the United States Supreme Court determination in 1969 that the Double Jeopardy Clause of the Fifth Amendment applies to the states. *See Waller v. Florida*, 397 U.S. 387, 390-391 (1970)(citing *Benton v. Maryland*, 395 U.S. 784 (1969)). The shift was not based on any recognition that municipal violations are akin to crimes or should be treated like crimes; rather, it was based simply on the need to enforce the demands of the Double Jeopardy Clause. In short, it extended a *protection* against a subsequent punishment based on the same conduct.

Here, rather than extending a protection, appellant would like to make municipal violators suffer an additional civic liability – subsequent impeachment

at any trial.[11] But, under § 491.050, subsequent impeachment only applies to "criminal" convictions, and, accordingly, municipal violations should not qualify. And, incidentally, there are good reasons *not* to include municipal violations in the category of "criminal" convictions. A "criminal" conviction carries various onerous consequences (in addition to subsequent impeachment). People who apply for various public programs could be excluded if they are deemed to have criminal convictions; people who apply for jobs are often asked if they have any criminal convictions; and various civic duties and responsibilities (like voting and jury duty) hinge upon the lack of criminal convictions.

Another good reason to separate municipal violations from the general class of criminal convictions is that people are often less motivated to mount a strong defense against municipal violations (e.g., people might be less inclined to retain an attorney). Consequently, if municipal violations are deemed criminal, many people will suddenly find that they are laden with various "criminal" convictions that they might have sought to defend against more vigorously if they had known the convictions would carry such an onerous burden.

[11] And, incidentally, allowing impeachment with municipal violations would present yet another reason for criminal defendants to avoid taking the stand.

Appellant points out that many municipal violations are similar or identical to crimes prohibited by the state; thus, he reasons that such violations should be deemed "criminal" (App.Br. 93). But a facial similarity in the prohibited conduct should not be relied on to erase the fundamental difference between a municipal violation, which is civil in nature, and a criminal offense. It may be true that certain other protections have been extended to municipal violators as appellant points out (App.Br. 94), but the ability to avail oneself of certain *protections* does not logically lead to the conclusion that all municipal violations should be deemed criminal and carry all the burdens that accompany a criminal conviction.

It is true, as appellant argues (App.Br. 93-94), that certain municipal violations can be used to enhance criminal convictions, but this legislative policy simply reveals that certain conduct, when repeated, will be deemed more serious on the subsequent offense. It does not translate into a legislative intent to transform the original municipal violations into criminal convictions. And, tellingly, under § 570.040.2, RSMo 2000, a municipal violation can only be used to enhance, if the defendant was "represented by counsel or knowingly waived counsel in writing," and if the judge was "a licenced attorney." Thus, the statute recognizes that a municipal violation should only be used if the person took steps to mount an effective defense by obtaining counsel (or if the person

knowingly waived his right to counsel), which, as discussed above, is an effort that will not always accompany an ordinary municipal violation. *See also* § 577.023.1.(3), RSMo Cum. Supp. 2005 (defining an "intoxication-related offense," in relevant part, as "driving under the influence of alcohol or drugs in violation of state law or a county or municipal ordinance, where the defendant was represented by or waived the right to an attorney in writing").

In light of the foregoing, it is apparent that the courts and the legislature have generally attempted to maintain or extend protections to municipal violators. Thus, continuing to interpret § 491.050 to *exclude* impeachment with municipal violations is consistent with Missouri caselaw and the apparent intent of the Missouri General Assembly.

Finally, appellant argues that excluding such impeachment impedes his constitutional rights to present a defense, and to confront and cross-examine witnesses. But appellant has no constitutional right to present any and all evidence that might be beneficial to his defense. A defendant does not have an unfettered right to offer evidence that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. *See Montana v. Egelhoff*, 518 U.S. 37, 46-59 (1996) (upholding Montana's limitation on evidence of voluntary intoxication). In Missouri, for example, there are various types of evidence that

cannot be offered – even if they might be somewhat beneficial to the defense. *See e.g.* § 491.015, RSMo 2000 (rape shield); § 562.071, RSMo 2000 (limiting evidence of duress); § 562.076, RSMo 2000 (limiting admissibility of evidence of voluntary intoxication).

Moreover, appellant's claim that he was unduly limited in presenting his defense and in confronting and cross-examining Lawson is flatly refuted by the record. With very few constraints, appellant was allowed virtually unfettered ability to confront, cross-examine, and impeach Lawson. He impeached her with multiple prior inconsistent (and false) statements (*see e.g.* Tr.747-748,775,767-768,774-780), he impeached her with the fact that she had received some assistance from the police (Tr. 789-790,799-801), and, as is particularly relevant to this claim, he impeached her with her prior criminal convictions – one for possession of marijuana, and one for "driving under the influence" (Tr.755).

In short, the trial court did not abuse its discretion in adhering to the terms of § 491.050. Prior municipal violations are not "criminal convictions," and they should not be deemed such for purposes of bringing them within § 491.050. Moreover, this minor limitation on appellant's ability to impeach Tammy Lawson did not deprive appellant of his right to present a defense or to confront and cross-examine witnesses.

VII.

The trial court did not plainly err in penalty phase in permitting Jackie Clark to testify about how appellant had robbed him and shot him in the back with a sawed-off shotgun.

Appellant asserts that the trial court erred in penalty phase in permitting Jackie Clark to testify about the prior robbery and assault that appellant committed against him in 1976 (App.Br. 98). Citing *Shepard v. Untied States*, 544 U.S. 13 (2005), appellant argues that the state should have been limited to presenting evidence of appellant's prior convictions through documentary exhibits, such as the charging documents or the guilty plea transcript (App.Br. 98).

A. Preservation

Appellant claims that he preserved this claim by objecting at trial (App.Br. 99). But he did not. Jackie Clark, who was robbed and assaulted by appellant in 1976, testified about his experience at the hands of appellant, including the fact that he was robbed and shot in the back with a sawed-off shotgun (Tr. 1360-1365). This testimony was offered without objection by the defense (Tr. 1360-1365).

As the prosecutor started to ask questions about the immediate aftermath

of the robbery and assault, defense counsel objected, arguing that the state was trying to put on "victim impact" evidence from the 1976 crime (Tr. 1365). The prosecutor explained that he was not intending to ask Clark generally about the impact the crimes had had on his life, but the prosecutor pointed out that he should be allowed to elicit evidence of Clark's injuries, inasmuch as the state had to convince the jury that the crimes were serious assaultive convictions (Tr. 1366).

Defense counsel did not argue with that proposition, but he then requested that the state be directed to lead the witness, so as to avoid extraneous facts (Tr. 131366-1367). Defense counsel never objected to Clark's testimony on the grounds that the state should be limited to proving the prior crimes with documentary evidence (Tr. 1360-1370), and no such claim appears in appellant's motion for new trial (*see* L.F. 982-984, where a claim based on the actual trial objection *was* asserted).

As the record shows, appellant never sought to entirely preclude Clark's testimony, and, to the extent that appellant lodged any objection, it was not timely. Additionally, "A point is preserved for appellate review only if it is based on the same theory presented at trial." *State v. Johnson*, 207 S.W.3d 24, 43 (Mo. banc 2006).

B. The standard of review

Because this claim was not preserved, review is for plain error. This Court

has discretion to review for plain error when the court finds that manifest injustice or miscarriage of justice has resulted. *State v. Baxter*, 204 S.W.3d 650, 652 (Mo. banc 2006). Plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative. *Id*. "Manifest injustice is determined by the facts and circumstances of the case, and the defendant bears the burden of establishing manifest injustice." *Id*.

C. The evidence of appellant's prior robbery and assault was properly admitted, both to prove the existence of the statutory aggravating circumstance and to provide relevant sentencing information

For its statutory aggravating circumstance, the state submitted that appellant had one or more serious assaultive convictions, namely, convictions for robbery and assault (L.F. 954). To prove the existence of the aggravating circumstance, the state offered a copy of the prior convictions (State's Ex. 47; Tr. 1360) and the testimony of Jackie Clark, appellant's prior victim in that case (Tr. 1360-1370). Both types of evidence – the documents and Clark's testimony – had a legitimate tendency to prove the existence of the convictions and the nature of the convictions; thus, the trial court did not err, plainly or otherwise, in admitting Clark's testimony. *See* § 565.030.4, RSMo Cum. Supp. 2005 ("Evidence in aggravation . . . of punishment, including . . . evidence supporting any of the

aggravating . . . circumstances . . . may be presented subject to the rules of evidence at criminal trials.").

Citing *Shepard v. United States*, 544 U.S. 13 (2005), appellant argues that evidence in support of finding the existence of a serious assaultive conviction must be "limited to 'examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented [at the prior proceeding]" (App.Br. 99-100). But appellant wholly misunderstands the holding of *Shepard*.

In *Shepard*, the Court examined what types of evidence or information a *trial judge* could consider in imposing an enhanced sentence based on the existence of a prior conviction. 544 U.S. at 15-16. In analyzing the issue, the Court relied on its previous precedents to reiterate that "any fact" that will increase the range of punishment "must be found by a jury." *Id*. at 24 (citing *Jones v. United States*, 526 U.S. 227, 243, n. 6 (1999); and *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). Thus, the Court determined that when a *trial judge* is tasked with determining that a prior conviction qualifies to enhance a sentence, the judge is "limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record

of this information." *Id*. at 26. But no such limitation has ever been placed upon a jury, and *Shepard* does not purport to impose such a limitation on jury factfinding.[12]

Moreover, even if proof of the serious-assaultive-conviction aggravator were limited to documentary evidence (and respondent in no way suggests this should be the case), such a limitation would *not* operate to preclude testimonial evidence about the prior conviction. It has long been recognized that evidence in aggravation is *not* limited to simply proving the statutory aggravating circumstances. Section 565.030 states: "Evidence in aggravation and mitigation of punishment, including *but not limited to evidence supporting any of the aggravating or mitigating circumstances* listed in subsection 2 or 3 of section 565.032, may be presented subject to the rules of evidence at criminal trials." § 565.030.4, RSMo Cum. Supp 2005 (emphasis added).

Indeed, because of the importance of the decision to be made, and because of the need for an individualized determination of the appropriate sentence, the sentencer should generally receive any and all evidence that aids it in making that decision. *State v. Morrow*, 968 S.W.2d 100, 114 (Mo. banc 1998); *State v. Kreutzer*, 928 S.W.2d 854, 874 (Mo. banc 1996); *see State v. Gilyard*, 979 S.W.2d 138

[12] Appellant's reliance on *State v. Ivy* is misplaced for the same reason.

(Mo. banc 1998) ("Appropriate sentencing requires the fullest information possible concerning the defendant's life and characteristics.")(citing *Williams v. New York*, 337 U.S. 241, 247 (1949)). Thus, because Clark's testimony revealed the nature and circumstances of the prior crime and shed light on appellant's character, it was properly admitted.[13]

[13] In addition to aiding the jury, this type of evidence in aggravation is also relevant to the Court's proportionality review, which requires the Court to consider "the crime, the strength of the evidence *and the defendant*." § 565.035.3.(3), RSMo 2000 (emphasis added).

VIII.

The trial court erred in omitting an introductory penalty-phase instruction patterned after MAI-CR 3d 313.30A, but appellant did not suffer manifest injustice (responds to part of appellant's Point VIII).[14]

Appellant asserts that the trial court plainly erred in failing to submit an instruction patterned after MAI-CR 3d 313.30A, an introductory penalty-phase instruction (App.Br. 102). He claims that he was prejudiced because the jurors were not properly instructed on the meaning of "proof beyond a reasonable doubt" (App.Br. 102).

A. The standard of review

As appellant concedes, this claim was not preserved, either by objection or by inclusion in appellant's motion for new trial (*see* Tr. 1349; L.F. 962-986). Thus, review is for plain error. "Instructional error constitutes plain error when it is clear the trial court so misdirected or failed to instruct the jury so that it is apparent the error affected the verdict." *State v. Glass*, 136 S.W.3d 496, 515 n.9 (Mo. banc 2004).

B. The trial court erred in omitting the instruction, but appellant did not

[14] Appellant's claim regarding Instruction 19 and the need for unanimity in finding a statutory aggravating circumstance is addressed in Point IX, below.

suffer manifest injustice

According to the "Supplemental Notes on Use Applicable to the 313.00 Series" – *see* MAI-CR 3d 313.00 – the trial court should have instructed the jury in accordance with MAI-CR 3d 313.30A. But the trial court failed to do so (*see* Tr. 1349; L.F.952-960). The omitted instruction states:

> The law applicable to this stage of the trial is stated in these instruction and Instructions No. 1 and 2 which the Court read to you during the first stage of the trial. All of these instructions will be given to you to take to your jury room for use during your deliberations on punishment.
>
> You must not single out certain instructions and disregard others or question the wisdom of any rule of law.
>
> The Court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.
>
> In later instructions, you will be told that, in order to consider the death penalty, you must first find one or more statutory aggravating circumstances beyond a reasonable doubt. The burden of causing you to find the statutory aggravating circumstances beyond a reasonable doubt is upon the state.

A reasonable doubt is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the truth of a proposition. The law does not require proof that overcomes every possible doubt. If, after your consideration of all the evidence, you are firmly convinced that a proposition is true, then you may so find. If you are not so convinced, you must give the defendant the benefit of the doubt and must not find such proposition to be true.

MAI-CR 3d 313.30A.

Appellant argues that the absence of this instruction left the jury without guidance on the meaning of the phrase "beyond a reasonable doubt" (App.Br.103-108).[15] He points out that this burden of proof is a fundamental aspect of the penalty phase, and he claims that the absence of the instruction

[15] Appellant also claims that absent the instruction, the jury was not reminded of the "presumption of innocence" (App.Br. 103). But there is no presumption of innocence in penalty phase, and what appellant refers to as the "presumption of innocence" – that the jury, if not firmly convinced, "must give the defendant the benefit fo the doubt" – is actually just part of the

leaves open the possibility that the jury "applied an incorrect, lower standard of proof" (App.Br. 108).

But appellant's conclusion is not warranted. Where necessary, the instructions that were submitted to the jury properly instructed the jury that certain findings had to be made beyond a reasonable doubt (*see* L.F. 954, "You are further instructed that the burden rests upon the state to prove the foregoing circumstance beyond a reasonable doubt."). And, while the definition of reasonable doubt was not repeated in an introductory instruction immediately prior to penalty phase, the meaning of the phrase "beyond a reasonable doubt" was made perfectly clear to the jury at other points in the trial.

For instance, at the beginning of voir dire, the jury was instructed on the meaning of "proof beyond a reasonable doubt" and the need to give the defendant the "benefit of the doubt" if not firmly convinced (Supp.L.F. 20). Then, during guilt phase, the jury was again instructed on these issues (L.F. 936). Thus, it is apparent that the jury was adequately instructed on the issue of reasonable doubt, and there is no reason to believe that the jury suddenly decided to apply some other meaning to the phrase "proof beyond a reasonable doubt." *See generally State v. Madison*, 997 S.W.2d 16, 21 (Mo. banc 1999)(the jury is presumed

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reasonable doubt standard.

to follow the instructions); and *State v. Deck*, 994 S.W.2d 527, 541 (Mo. banc 1999)(reversal is not warranted when "The instructions, as given and taken as a whole, effectively guided the jurors through the deliberation process . . . .").

Citing *State v. Mayes*, 63 S.W.3d 615 (Mo. banc 2001), appellant points out that failing to give a no-adverse-inference instruction in penalty-phase can warrant reversal even if a no-adverse-inference instruction was given in guilt phase (App.Br. 107). But appellant's reliance on *Mayes* is misplaced. In that case, the absence of the no-adverse-inference instruction in penalty phase was found to be prejudicial for three reasons. First, because the instruction in guilt phase referred specifically to drawing no inference of *guilt* (an issue that had already been decided) – it did not instruct the jury that it could draw no adverse inference regarding punishment. *Id*. at 637. Second, because the jury was instructed that the governing instructions included only Instructions 1 and 2 from guilt phase, the jury could have concluded that the no-adverse-inference instruction did *not* apply in penalty phase. *Id*. at 638. And, finally, because the jury might have concluded that the no adverse inference instruction did not apply, it could have understood the court's admonition to consider "all" of the evidence as an invitation to consider the defendant's silence. *Id*.

Here, while the previous instructions about reasonable doubt referred

specifically to whether the defendant was guilty (inasmuch as they were given before the jury had found appellant guilty), the basic principles of "proof beyond a reasonable doubt" were explained in precisely the same manner as they would have been explained in MAI-CR 3d 313.30A, if it had been given. Second, the jury here was not instructed that only Instructions 1 and 2 from guilt phase were applicable in penalty phase, for it was MAI-CR 3d 313.30A that would have informed the jury of that fact; thus, the jury would have been under the impression that all of the court's instructions were still valid. And, finally, unlike *Mayes*, the omission here did not invite the jury to consider any evidence or circumstance that should not have been considered.

In short, while the introductory instruction was improperly omitted, appellant did not suffer a manifest injustice. Given the repeated instructions regarding the meaning of "proof beyond a reasonable doubt," there is simply no reason to believe that the jury suddenly concocted a new definition for the phrase "proof beyond a reasonable doubt."[16]

[16] The omitted instruction referenced other matters (which appellant does not raise), but those matters were also covered in other instructions previously read to the jury (*see* L.F. 935, 954; *see also* Supp.L.F. 25, 27).

IX.

The trial court did not plainly err in submitting Instruction 19, because it properly required the jury to unanimously find the aggravating circumstance beyond a reasonable doubt (responds to appellant's Point IX and part of Point VIII).

In two points, appellant asserts that the trial court plainly erred in submitting Instruction 19, which instructed the jury to determine whether the state had proved a statutory aggravating circumstance beyond a reasonable doubt (App.Br. 110).

In Point IX, he asserts that the instruction "did not ensure unanimity in the jurors' finding," because "it allowed the risk that some jurors would find that only one conviction was serious and assaultive and other jurors would find only the other conviction" (App.Br. 110).

In Point VIII, along similar lines, he asserts that the instruction omitted a sentence which would have instructed the jury to be unanimous in its finding (App.Br. 108-109).

A. The standard of review

As appellant concedes, these claims were not preserved, either by objection or by inclusion in appellant's motion for new trial (*see* Tr. 1395-L.F. 962-

986). Thus, review is for plain error. "Instructional error constitutes plain error when it is clear the trial court so misdirected or failed to instruct the jury so that it is apparent the error affected the verdict." *State v. Glass*, 136 S.W.3d 496, 515 n.9 (Mo. banc 2004).

B. Instruction 19 did not misdirect the jury, and it is apparent that the jury unanimously found both serious assaultive convictions, as submitted in the single aggravating circumstance

Instruction 19 was drafted in accordance with MAI-CR 3d 313.40:

> In determining the punishment to be assessed against the defendant for the murder of Jason O. Johnson, you must first consider whether the following statutory aggravating circumstance exists:
>
> Whether the defendant had one or more serious assaultive convictions in that he was convicted of armed robbery on October 14, 1976, in the Circuit Court of Newton County, Missouri because defendant stole the wallet of Jackie Clark and then shot Mr Clark in the back with a sawed-off shotgun leaving Mr. Clark with serious physical injuries and defendant was convicted of felonious assault on October 14, 1976 in the Circuit Court of Newton County, Missouri because defendant stole the wallet of Jackie Clark and then shot Mr.

Clark in the back with a sawed-off shotgun Leaving Mr. Clark with serious physical injuries.

You are further instructed that the burden rests upon the state to prove the foregoing circumstance beyond a reasonable doubt.

Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that the foregoing statutory aggravating circumstance exists, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

(L.F. 954). Appellant argues that this instruction permitted the jurors to find the aggravating circumstance even if they were *not* unanimous (App.Br. 111). He asserts: "Some jurors may have found that only the first listed conviction was serious and assaultive, and the remaining jurors may have found that only the second listed conviction was serious and assaultive" (App.Br. 111).

But this is baseless speculation. The jury instruction expressly required that the jury be "unanimous." And, under the plain language of the instruction, the jury would have understood this to mean that all of them had to agree that appellant had at least one serious and assaultive conviction and that all of them had to agree upon the same (or both) convictions. In other words, if six jurors

had believed that one of the convictions was serious and assaultive and six did not think it was serious and assaultive (while believing that the other *was* serious and assaultive), the jury would have known that it was not "unanimous" in its findings. The meaning of the term "unanimous" is widely understood, and there is no reason to believe that the jury, had it found itself in the above circumstances, would have improperly cobbled unanimity out of disagreement.[17]

Additionally, it must be noted that the defense did not dispute that the state had proved its statutory aggravating circumstance, which, given the evidence to support the circumstance, was understandable. In closing, defense counsel stated: "*The State, I believe, has proved that one aggravating circumstance exists* and that sort of really takes us to the three key things that you all are going to have to think about" (Tr. 1408)(emphasis added). Given this admission by the defense, appellant can hardly claim manifest injustice.

Moreover, it is apparent from the jury's verdict that the jury unanimously found the existence of *both* serious assaultive convictions contained in the aggravating circumstance. In rendering its verdict, the foreperson wrote in the exhibit numbers of *both* of appellant's prior convictions (L.F. 961), indicating that

[17] Incidentally, because appellant's two convictions arose out of a single violent attack, there is no reason to believe that the jurors would have considered one of the crimes serious and assaultive but not the other.

the jurors had found the statutory aggravating circumstance beyond a reasonable doubt. Thus, there is no reason to believe that the jury was not unanimous.

C. Instruction 19 was properly drafted

As set forth above, appellant also asserts that instruction 19 was incorrectly drafted (App.Br. 108-109). Specifically, he claims that it omitted the final sentence from the third paragraph, which, according to appellant, should have said: "All twelve of you must agree as to the existence of that circumstance" (App.Br. 108).

The pattern instruction, MAI-CR 3d 313.40, is drafted as follows:

> You are further instructed that the burden rests upon the state to prove (the) (at least one of the) foregoing circumstance(s) beyond a reasonable doubt. (On each circumstances that you find beyond a reasonable doubt, all) (All) twelve of you must agree as to the existence of that circumstance.

MAI-CR 3d 313.40. The notes on use for this paragraph state:

> 11. In the next to the last paragraph, which discusses the burden on the state, the sentence in parentheses must be added when more than one statutory aggravating circumstance is submitted in this in this instruction. If only one statutory aggravating circumstance is submitted, then it is not necessary to

include the sentence in parentheses.

MAI-CR 3d 313.40, Notes on Use 11.

As a practical matter (and as the Note on Use hints at), the final sentence of the paragraph in question – "All twelve of you must agree as to the existence of that circumstance" – is largely redundant when only one statutory aggravating circumstance is submitted to the jury. For when there is only one aggravating circumstance, the remainder of the instruction – which refers to a unanimous finding of that aggravating circumstance – makes plain that all twelve jurors must agree on the existence of the aggravating circumstance.

Additionally, it must be noted that the jury is reminded in the very next instruction (here, Instruction 20 based on MAI-CR 3d 313.41A) that their finding on the statutory aggravating circumstances must be unanimous (*see* L.F. 955, "If you have unanimously found beyond a reasonable doubt that the statutory aggravating circumstances . . ."). Thus, even if Instruction 19 should have included the sentence that was omitted, the jury was not misdirected, and appellant did not suffer manifest injustice. *See generally State v. Deck*, 994 S.W.2d 527, 541 (Mo. banc 1999)(reversal is not warranted when "The instructions, as given and taken as a whole, effectively guided the jurors through the deliberation process . . . .").

X.

The trial court did not abuse its discretion or plainly err in controlling closing arguments in guilt and penalty phase.

Appellant claims that the trial court erred or plainly erred in overruling objections or failing to intervene *sua sponte* at certain points during the state's guilt and penalty-phase closing arguments (App.Br. 113).

A. Preservation

None of appellant's claims were properly preserved. There was no objection to the challenged guilt-phase argument (Tr. 1284); thus, review is for plain error. *State v. Anderson*, 79 S.W.3d 420, 440 n.8 (Mo. banc 2002).

As for the alleged *Caldwell* violation in penalty-phase argument, counsel only made a non-specific objection (Tr. 1404-1405, "objectionable"); thus, that claim, too, was not preserved. *Id.*

And, finally, with regard to appellant's claim that the prosecutor argued or implied knowledge of facts outside the record, there was no objection to one of the comments (Tr. 1426), and appellant's objections to the other comments were *sustained* by the trial court (Tr. 1425-1426). Appellant did not request any further relief after his objections were sustained; thus, his claim that the trial court should have *sua sponte* declared a mistrial was not preserved. *See State v.*

McClanahan, 954 S.W.2d 476, 478 (Mo.App. W.D. 1997)("When a defendant's objection to a question is sustained and there is no further request for relief or motion directed to the court, nothing is preserved for review on appeal.").

Additionally, with regard to appellant's claim that the prosecutor argued facts not in evidence, the only objection asserted at trial was "personalization" (Tr. 1425-1426). But "personalization" properly refers to arguments that attempt to place the jury in fear, *see State v. Williams*, 97 S.W.3d 462, 474 (Mo. banc 2003), and that is not the theory that appellant now asserts on appeal. "A point is preserved for appellate review only if it is based on the same theory presented at trial." *State v. Johnson*, 207 S.W.3d 24, 43 (Mo. banc 2006).

B. The standard of review

This Court has discretion to review for plain error when the court finds that manifest injustice or miscarriage of justice has resulted. *State v. Baxter*, 204 S.W.3d 650, 652 (Mo. banc 2006). Plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative. *Id*. "Manifest injustice is determined by the facts and circumstances of the case, and the defendant bears the burden of establishing manifest injustice." *Id*.

Courts especially hesitate to find plain error in closing argument. *State v. Edwards*, 116 S.W.3d 511, 536 (Mo. banc 2003). A conviction will be reversed based on plain error in closing argument only when the argument had a decisive

effect on the outcome of the trial and amounts to manifest injustice. *Id*. at 536-537.

C. Guilt phase argument

Appellant first argues that the trial court plainly erred in failing to intervene *sua sponte* when the prosecutor argued:

> The third element, and the one that makes murder first different, is the element of deliberation. Deliberation is defined for you in the instruction as cool reflection upon the matter for any length of time no matter how brief. It doesn't say cool and calm, it says no matter how brief. It doesn't say hours, it doesn't say minutes, it doesn't say seconds.

(Tr.1284). Appellant argues that the prosecutor's argument was a misstatement of the law because the term "cool," by definition, means "calm" (App.Br.115-116).

But the prosecutor's comment did not misdefine deliberation or mislead the jury. In context, it is apparent that the prosecutor was simply pointing out that deliberation did not require cool reflection during a long period of stillness or tranquility.[18] Indeed, while the term "calm" is a word that can be used in

[18] Defense counsel saw the argument for what it was and responded: "The deliberation thing, I don't, you know – prosecutors always emphasize the absence of a time limit and then

defining the term "cool," the term "calm" has its own separate meaning – "still; quiet; tranquil," *see* WEBSTER'S NEW AMERICAN DICTIONARY 86 (1990) – and, accordingly, in arguing that there was deliberation under the facts of this case, it was proper to point out that deliberation did not require a lengthy period of stillness or tranquility.

Moreover, even if the prosecutor should have avoided using the term "calm," it cannot be said that the prosecutor's comment so misdirected the jury as to result in manifest injustice. There is no reason to believe that the prosecutor's comment led the jury to believe, as appellant asserts (App.Br.116), that "cool reflection" was not necessary to the offense. The prosecutor repeatedly stated that deliberation required "cool reflection" (*see e.g.* Tr.1284-1285,1288); the jury had the benefit of the instructions (L.F.938) and is presumed to follow them, *see State v. Madison*, 997 S.W.2d 16, 21 (Mo. banc 1999)(L.F.938); and defense counsel argued repeatedly, without objection, that deliberation required cool reflection (Tr.1309-1310,1317,1323). The trial court did not plainly err when it failed to intervene *sua sponte*. *See State v. Strong*, 142 S.W.3d 702, 717 (Mo. banc 2004) (no plain error where the prosecutor argued: "The deliberation is not cool,

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they play it in slow motion. They don't emphasize cool reflection. What, if anything, about these people is cool and reflective?" (Tr. 1309).

it's not something that has to be reflected on, it is coolly reflected upon for any length of time, no matter how brief.").

D. Penalty phase arguments

1. The alleged *Caldwell* violation

Appellant next argues that the trial court plainly erred in overruling his non-specific objection to the following:

> Keep in mind that you didn't put Gary Black in this position, Gary Black put himself in this position. If you decide that death is the appropriate punishment, it's not you putting Gary Black to death, it is Gary Black who put himself in that –
>
> [DEFENSE COUNSEL]: That is objectionable, Your Honor.
>
> BY THE COURT: Overruled.
>
> [THE PROSECUTOR]: It is Gary Black that has put himself into that position.

(Tr. 1404-1405). Citing *Caldwell v. Mississippi*, 472 U.S. 320 (1985), appellant argues that the prosecutor's argument led the jury "to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere" (App.Br. 117). But contrary to appellant's claim, the prosecutor did not imply that anyone other than the jury was responsible for determining the

appropriateness of a death sentence.

In observing that appellant had put himself "in this position," the prosecutor was simply pointing out that it was appellant's actions that had put appellant in jeopardy of receiving a death sentence. The prosecutor still expressly stated that it was for the jury to "decide that death is the appropriate punishment" (Tr. 1404), and there was no suggestion that some other person or proceeding would make the ultimate decision and remove responsibility from the jury. In short, by stating that appellant had put himself in jeopardy of receiving a death sentence, the prosecutor was simply arguing that appellant's crime warranted the death sentence – not that appellant would ultimately decide whether he should receive a death sentence.

2. The prosecutor's alleged reference to facts not in evidence

Lastly, appellant argues that the prosecutor expressed his personal opinion and argued facts not in evidence (App.Br. 117-119). The prosecutor argued:

> I think you know all the facts you need to know. I'm not going to tell you the facts, you know them, you've decided it. But I think there is one more thing that you need to know here this evening. I agree that the burden on you is a heavy burden, but I'd never asked someone else to do something that I wouldn't do myself.
>
> [DEFENSE COUNSEL]: Objection, that's improper

personalization.

BY THE COURT: Sustained.

[THE PROSECUTOR]: And the State of Missouri says that it is the decision only of the Prosecuting Attorney to decide in any first degree murder case whether it's appropriate to stand up here and ask a jury to consider whether the death penalty is the appropriate punishment. That was my burden, I made that decision.

[DEFENSE COUNSEL]: Objection. it's the same objection I made before.

BY THE COURT: Sustained.

[THE PROSECUTOR]: And Mr. Rouse gave you all the reasons why it's the appropriate punishment in the case and I can't add to that, he gave you those reasons. But I think it's important for you to know that as the elected prosecutor in this county, I'm asking you to impose the appropriate punishment in this case and that appropriate punishment is the death penalty.

(Tr. 1425-1426).

As the record shows, appellant's objections were sustained and he requested no other relief. The trial court should not be convicted of plain error,

when it granted appellant all of the relief he requested. *See State v. Buchli*, 152 S.W.3d 289, 304 (Mo.App. W.D. 2004)("the circuit court sustained Buchli's objections to those arguments. Buchli requested no other corrective action. He received the relief he requested and cannot now complain of error.").

In any event, as for appellant's argument that the prosecutor improperly referred to facts not in evidence, it is plain that the prosecutor did not. In arguing that death was the appropriate punishment, the prosecutor repeatedly referred to the facts that the jury had heard during trial (particularly as those facts had been outlined by Assistant Prosecutor Rouse), and he expressly stated that he had no additional information to "add to that" (Tr. 1425-1426). In short, as this Court determined on direct appeal after appellant's first trial, the prosecutor's comments about making the decision to seek death, did not "imply special knowledge," but were simply "a rhetorical argument based on the evidence." *State v. Black*, 50 S.W.3d 778, 792 (Mo. banc 2001).

Lastly, while appellant does not expressly argue that the prosecutor was attempting to vouch for a sentence of death by highlighting his position as the elected prosecutor, he cites two cases – *Shurn v. Delo*, 177 F.3d 662, 665 (8th Cir. 1999); and *United States v. Skard*, 845 F.2d 1508, 1510 (8th Cir. 1988) – which have stated that such comments are not proper. And, indeed, Missouri courts have recognized that prosecutor should not seek to sway juries with arguments that

urge a verdict based on "an expression of confidence in a prosecutorial system which does not bring innocent persons to trial." *State v. Evans*, 820 S.W.2d 545, 547-548 (Mo.App. E.D. 1991)(prosecutor argued, "If this man were innocent I wouldn't bring a charge.").

But these cases do not compel reversal here. First, while the prosecutor referred to his position as an "elected" official, he did not argue that he had acted in "good faith" in seeking the death penalty, *cf. United States v. Skarda*, 845 F.2d at 1510, and he did not imply that he had any special knowledge, by virtue of his office, that made the imposition of the death penalty the "obvious" choice. *Cf. Shurn v. Delo*, 177 F.3d. at 665 ("I'm telling you there's no case that could be more obvious . . . ."); *cf. also State v. Storey*, 901 S.W.2d 886, 900 (Mo. banc 1995)(prosecutor argued, "This case is about the most brutal slaying in the history of this county"). Second, the prosecutor's single reference to his position was wholly unlike the array of improper arguments that led to reversal in *Shurn v. Delo* (the court affirmed in *Skarda*). As this Court observed in appellant's first direct appeal: "in *Shurn*, the prosecutor's argument was 'filled with improper statements,' including linking the defendant to mass murderers like Charles Manson and urging the jury to 'kill Daryl Shurn.'" *State v. Black*, 50 S.W.3d at 792. Here, there was not a comparable array of improper comments.

In short, the prosecutor did not express an improper opinion or urge the jury to simply convict based on their trust in the system. Rather, while the prosecutor referred to the fact that he had been elected, his plea for a sentence of death was ultimately based on his argument that the facts warranted that sentence. "The prosecutor may express an opinion, fairly drawn from the evidence, that the death penalty is appropriate." *Id*. 791-792.

XI.

Appellant's sentence is not disproportionate, and the Court's method of independent proportionality review properly excludes consideration of cases where death has not been imposed.

Under § 565.035, RSMo 2000, this Court independently determines: (1) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) whether the evidence supports a statutory aggravating circumstance and any other circumstances found; (3) whether the sentence of death is excessive or disproportionate to the penalty in similar cases, considering the crime, the strength of the evidence, and the defendant.[19]

A. Passion, prejudice, or other arbitrary factors

Appellant argues his conviction was arbitrary due to some of the various claims he has raised in other points (App.Br. 125-126). But, as discussed in Point I, providing counsel for a defendant who is not trained in the law and who is not a seasoned capital litigator, had the effect of rendering appellant's trial more fair. Thus, it did not render appellant's sentence of death arbitrary.

[19] On direct appeal after appellant's first trial, this Court determined that appellant's sentence was not disproportionate. *State v. Black*, 50 S.W.3d 778, 792-793 (Mo. banc 2001).

The evidentiary rulings addressed in Points III, V, VI, and VII were not erroneous; thus, they also did not render appellant's sentence arbitrary. With regard to the evidentiary ruling addressed in Point II – appellant's ability to impeach his own witnesses – while the trial court's initial ruling was incorrect, appellant was not unfairly prejudiced, because (1) appellant was still able to elicit the most salient facts that his witnesses were called to present; and (2) the value of their alleged "impeachment" and substantive testimony was, ultimately, very limited. Thus, the trial court's incorrect ruling regarding appellant's ability to impeach his own witnesses did not render appellant's sentence arbitrary.

And, lastly, as discussed in Points VIII, IX, and XII, appellant's jury was adequately and properly instructed in penalty phase. Thus, the alleged instructional errors did not result in an arbitrary sentence.

B. The evidence supported the aggravating circumstance

Appellant does not contest that the evidence was sufficient to support the aggravating circumstances found by the jury, namely, that he had serious assaultive convictions arising out of a prior robbery and assault he perpetrated upon Jackie Clark. And the evidence, which consisted of copies of his prior convictions and the testimony of the victim of the prior crimes, was plainly sufficient (*see* Tr.1360-1370).

C. Appellant's sentence is not disproportionate

1. The nature of appellant's crime

The jury found that the defendant met the statutory aggravating factor of serious assaultive convictions, in that he had prior convictions for armed robbery and felonious assault (L.F. 961). This Court has affirmed sentences of death where the defendant had a history of prior convictions similar to the defendant: *State v. Amrine*, 741 S.W.2d 665, 672 (Mo. banc 1987)(defendant had two prior serious assaultive felonies, for first degree robberies); *State v. Reuscher*, 827 S.W.2d 710, 715 (Mo. banc 1992)(defendant had four prior serious assaultive felonies, including second-degree assault and sodomy); *State v. Nave*, 694 S.W.2d 729, 738 (Mo. banc 1985)(defendant's aggravator was his prior serious assaultive felonies, including armed robbery and forcible rape).

Instead of examining cases where similar aggravating circumstances were present, appellant argues that his case should be compared to cases where the murder has been committed by stabbing the victim (App.Br. 122). But while the instrumentality of the murder might be relevant in a given case, it is apparent from appellant's own argument that the instrumentality of the murder is *not* the circumstance that guides this Court's proportionality review. As appellant points out, "Uniformly, when a defendant receives the death sentence for a stabbing, he stabbed his victim multiple times; was a prison inmate; had numerous victims; or

inflicted some other type of abuse" (App.Br. 122). What this reveals is that the attendant circumstances (e.g., the statutory aggravating circumstances), and not simply the instrumentality of the murder, are the facts that should be looked at when determining whether any particular murder warrants a death sentence. This is sensible, because the statutory aggravating circumstances are the circumstances that separate any given murder from the larger body of murders where death is *not* an available sentence.

In any event, as for murder itself, the nature of appellant's crime also supports the sentence imposed. Appellant followed and then senselessly killed a young man (who was complete stranger) because he thought the victim had made a pass at his girlfriend. Appellant accomplished this murder by viciously stabbing the victim in the neck, severing the victim's jugular vein and nearly severing the victim's carotid artery. Before the stabbing, defendant said that he was "going to hurt that nig—." And, after stabbing the victim in the neck, defendant remarked, "One nig--- down." It is difficult to envision a more senseless murder, and appellant's callous attitude toward the fatally wounded victim highlights the heinous nature of his actions.

Appellant also argues that this Court should consider similar cases in which the death penalty was not imposed (App.Br. 123). But this Court has repeatedly declined to adopt this approach. "The term 'similar cases,' as

interpreted by this Court, means other cases where death has been imposed." *Lyons v. State*, 39 S.W.3d 32, 44 (Mo. banc 2001)(citing numerous cases); *see State v. Whitfield*, 5 S.W.3d 505, 516 (Mo. banc 1999)("The issue . . . in proportionality review is not whether any similar case can be found in which the jury imposed a life sentence."); *see also McClesky v. Kemp*, 481 U.S. 279, 306-307 (1987)(absent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner, McClesky cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did not receive the death penalty). And it makes sense to limit the court's review to cases where death has been imposed, because at various stages of the prosecution (and for various reasons), a defendant can be removed from consideration as a candidate for the death penalty. *Id*. at 307. If a jury extends mercy, for example, to a particular defendant, such mercy does not violate the Constitution, and it does not render a similarly situated defendant's death sentence disproportionate within any recognized meaning of the Eighth Amendment – so long as the similarly situated defendant's death sentence was not "wantonly and freakishly" imposed.

2. The strength of the evidence

It is undisputed that the defendant stabbed the victim after tailing him for

several blocks. This was observed by several witnesses. As discussed above in Point IV, there was also ample evidence that appellant murdered the victim after deliberation. And, while appellant tried to justify his actions at trial, there was no substantial evidence of self-defense.

3. The appellant's character and history

Finally, this Court must consider the defendant. Here, the evidence plainly demonstrated appellant's callous disregard for the victim. The evidence shows that appellant has a violent criminal history, and that appellant has, on a previous occasion, engaged in senseless violence that could easily have resulted in the senseless murder of another person. The evidence also showed that appellant had anther conviction for burglary in the first degree (State's Ex. 48). In short, appellant's "background does not distinguish him from cases involving similar crimes in which the death penalty was imposed." *See State v. Black*, 50 S.W.3d at 778.

XII.

The trial court did not plainly err in submitting Instructions 20 and 20A.

Appellant contends that the trial court plainly erred in submitting Instructions 20 and 20A, which instructed the jury to determine, respectively, (1) whether the facts and circumstances warranted the death penalty, and (2) whether there were facts and circumstances in mitigation sufficient to outweigh the evidence in aggravation (App.Br. 128). Citing *State v. Whitfield*, 107 S.W.3d 253, 258-261 (Mo. banc 2003), appellant argues that the instructions did not comport with Missouri's substantive law, in that the instructions failed to instruct the jury to make the relevant findings beyond a reasonable doubt (App.Br. 128-129).

This precise claim was rejected in *State v. Glass*, 136 S.W.3d 496, 521 (Mo. banc 2004). "Nothing in *Whitfield* or in section 565.030.4 requires the jury to make the findings in steps 2 and 3 beyond a reasonable doubt." *Id*. "In *Whitfield*, this Court determined that the factual determinations required in the first three steps, set out in subsections 565.030.4(1), (2) and (3), must be made by a jury, not a judge." *Id*. "While subsection 565.030.4(1) expressly requires that a jury find any statutory aggravating circumstances beyond a reasonable doubt, the other subsections do not." *Id*.; *see also State v. Johnson*, 207 S.W.3d 24, 47 (Mo. banc

2006); *State v. Gill*, 167 S.W.3d 184, 193 (Mo. banc 2005).

CONCLUSION

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

Respectfully submitted,

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APPENDIX

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

(1) That the attached brief complies with the limitations contained in this Supreme Court Rule 84.06(b), and that the brief, excluding the cover, the certificate of service, this certificate, the signature block, and appendix, contains 22,759 words (as determined by WordPerfect 9 software);

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

(3) That two true and correct copies of the brief, and a copy of the floppy disk containing a copy of the brief, were mailed, postage prepaid, this _____ day of January, 2007, to:

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