NO. SC84452

IN THE
SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI,

Respondent,

vs.

CECIL BARRINER,

Appellant.

Appeal From the Circuit Court of
Warren County, Missouri
Honorable Edward D. Hodge, Judge

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from a conviction of two counts of first degree murder, §565.020, RSMo 2000, obtained in the Circuit Court of Warren County and for which appellant received two sentences of death. Because of the sentences of death imposed, the Supreme Court of Missouri has exclusive appellate jurisdiction over this appeal. Article V, §3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

The appellant, Cecil Barriner, was charged by information on March 19, 1997, with two counts of first degree murder, §565.020, RSMo 1994, and two counts of armed criminal action, §571.015, RSMo 1994 (Prev.L.F. 14-16).[1] An amended information was subsequently filed that deleted the charges of armed criminal action (Prev.L.F. 123-125). Following a change of venue from New Madrid County to Dent County, this cause went to trial before a jury on March 21, 1999, the Honorable J. Max Price presiding (Prev.Tr. 232; Prev.L.F. 26). Thereafter, the jury found appellant guilty as charged but returned a verdict stating that it was unable to agree upon the punishment for either count (Prev.Tr. 1696-1697; Prev.L.F. 187-188). On May 5, 1999, the court issued oral and written findings in which it found the existence of seven statutory aggravating circumstances as to each count, and assessed appellant's sentence at death on both counts (Prev.Tr. 1719-1728; Prev.L.F. 211-215).

This court reversed those convictions based on the admission of appellant's prior uncharged sexual misconduct and remanded the case for a new trial. State v. Barriner, 34 S.W.3d 139 (Mo.banc 2000). Following three changes of venue from Dent, Franklin and

[1]The record on appeal cited in this brief consists of the trial and sentencing transcripts ("Tr.") and ("Sent.Tr."), the legal file ("L.F."), the transcript from the pre-trial motion hearing filed as a supplemental legal file, ("Mot.Tr."), State's Exhibits ("St.Ex."), Defendant's Exhibits ("Def.Ex."), and the transcripts ("Prev.Tr.") and legal file ("Prev.L.F.") from the first trial.

Audrain Counties to Warren County, this cause was re-tried before a jury on February 11, 2002, the Honorable Edward D. Hodge presiding (Tr. 1; L.F. 3, 8, 11).

Appellant does not contest the sufficiency of the evidence to sustain his conviction of two counts of first degree murder. Viewed in the light most favorable to the verdicts, the evidence at trial showed the following: beginning in 1993, appellant entered into a relationship with a woman named Shirley Niswonger (Tr. 679). This relationship, which was marked by intermittent fights and separations wherein appellant would get "angry and mad" whenever Niswonger would break off the relationship, continued until August of 1996 (Tr. 680, 684-685).

During his relationship with Niswonger, appellant also became acquainted with Niswonger's daughter, Candace ("Candy") Sisk, who was nineteen years old as of January of 1996 (Tr. 582, 676; St.Ex. 100). Candy Sisk lived with her paternal grandparents, Obie and Irene Sisk, at their home in Tallapoosa, Missouri, which is located in New Madrid County (Tr. 555, 559-560, 606, 677; St.Ex. 45, 152b). During the time she had the relationship with appellant, he accompanied Niswonger to the Sisks' home and waited in the car while she went inside to borrow money from them (Tr. 680). Obie Sisk died in April of 1996, leaving Candy Sisk and her grandmother, seventy-five year old Irene Sisk, as the only residents of the house (Tr. 559, 582).

In August of 1996, Shirley Niswonger began serving a prison term resulting from her conviction of possession of a controlled substance (Tr. 682-683). While in prison, she communicated with appellant by telephone and letters and suggested to him that they end their

relationship (Tr. 684-685). Niswonger's last communication with appellant was through a letter written by appellant in November of 1996 (Tr. 687).

In December of 1996, according to his subsequent statements to police, appellant became concerned that he had failed a urinalysis for the presence of controlled substances, and that as a result his probation would be revoked (Tr. 1110). Acting on the belief that Obie Sisk had been wealthy, and that he had left his assets to Irene and Candy Sisk, appellant resolved to get money from the Sisks in order to leave town (Tr. 1097, 1110). Late on the afternoon of Sunday, December 15, he visited friends, Daniel and Samantha Simmons, who lived in Malden, Missouri, not far from the Sisks' home in Tallapoosa (Tr. 633, 635, St.Ex. 45). The vehicle that appellant was driving when he visited the Simmons was a white Ford Taurus that was owned by his mother (Tr. 635-636). Appellant told Samantha Simmons that he was going to Tallapoosa because someone "owed him some money" (Tr. 637). He returned approximately forty-five minutes later and told her that no one had been home (Tr. 637).

Daniel and Samantha Simmons then accompanied appellant in his car to a gas station, where they bought him a soda, after which they drove to Tallapoosa and passed by the Sisk house two times (Tr. 639-640; St.Ex. 104). Appellant pointed out what he said was a note that he had left on the door to the Sisk house (Tr. 640). During the trip with appellant, Samantha Simmons noticed that appellant was holding and playing with a purple Crown Royal bag, contents unknown (Tr. 641-642; see St.Ex. 137). Appellant returned the Simmons to their home and left (Tr. 643).

Shortly after 8:00 the next morning (Monday, December 16), a neighbor of the Sisks observed a medium-sized white automobile with a male driver driving very slowly in front of

the Sisk residence (Tr. 665, 668-671; St.Ex. 146-147). At approximately 8:45 am, Candy Sisk telephoned her aunt, Debbie Dubois, and said that a man had been to the house a short time earlier and had told her grandmother that he had a Christmas gift for Candy from her mother in jail (Tr. 571). Candy reported that her grandmother had said that the man had acted "very strange," and that the same man had been in Tallapoosa the day before asking where they lived (Tr. 571-572). Candy told Dubois that her grandmother did not know the man and that she had not herself observed the man but had seen his car, which was a white Ford Taurus (Tr. 572). Dubois agreed to call a relative and have him come and check on Candy and her grandmother, but she was unable to reach the relative on the telephone (Tr. 573). She called Candy back and reported that fact, and told Candy to telephone her if the man returned (Tr. 573).

Shortly after 9:00 that morning, a bank teller at a drive-up bank facility in Risco, Missouri, a few miles from Tallapoosa, waited on a man driving a white Ford Taurus or Sable (Tr. 559, 707-710; St.Ex. 45, 148-149). The teller saw and recognized Candy Sisk in the front passenger seat of the car, and she also saw a person she believed to be a woman in the back seat (Tr. 708-709, 713). Candy was wearing nightclothes and had a blanket over her legs (Tr. 712). The man sent in a check for one thousand dollars on Candy's account, signed by Candy, and said that he wanted one hundred dollars of that amount in twenty-dollar bills (Tr. 711-712). The teller sent out a cash receipt ticket, which Candy signed and returned, and gave the man the thousand dollars in cash (Tr. 712).[2]

[2] A man working at a site across from the bank saw a light-colored car drive by with

At around 11:00 am, Candy's aunt, Debbie Dubois, made several telephone calls to the Sisk house and got no answer (Tr. 574). This was unusual because the Sisks had an answering machine, and also because Candy had had back surgery four days previously and was not supposed to leave the house for six weeks (Tr. 562, 565, 569, 574). Dubois drove to the house and there found Candy and Irene Sisk dead (Tr. 576-577, 579). She tried to phone the police, but the telephones in the living room were missing, so she drove to see a relative who notified the authorities (Tr. 579-580).

The body of Candy Sisk was lying supine on the bed in her bedroom (Tr. 571, 623; St.Ex. 43,44, 118-119). Her hands had been bound in front of her with rope, and she was unclothed below the waist (Tr. 577, 803, 1048; St.Ex. 44, 118-119, 150c); a pair of sweat pants were on the floor near the bed (Tr. 801; St.Ex. 43,44). She had suffered "multiple complex injuries" to the neck with one of the injuries "taking out" the left jugular vein, and she had a knife protruding from her chest (Tr. 577, 798, 1053-1054; St.Ex.44, 150a-150b, 150e-150f, 150h). An autopsy established that she had bled to death from the wounds to her neck, and that the stab wound to her chest had been inflicted after she was already dead (Tr. 1046, 1053, 1067). Bite marks were present on the victim's left breast, and she had been anally and vaginally violated with an object,

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Irene in the backseat around 8:00 to 8:30 a.m. (Tr. 737, 739-740). He did not know the driver or the passenger but believed the driver was a woman (Tr. 743). Although he could not swear to the date, he did know that he learned about Irene and Candy's deaths two days after seeing Irene in the car (Tr. 742, 744).

resulting in severe lacerations to her rectum and vagina, at or after the time of her death (Tr. 1060, 1062, 1064-1066; St.Ex. 150j).

The body of Irene Sisk was on the floor of her bedroom next to the bed (Tr. 579; St.Ex. 43,44,120-121, 151b). Her wrists and ankles were bound together with the same length of rope (Tr. 579, 793;St.Ex. 44, 120-123, 151b-151d). The victim had seventeen superficial stab wounds in a localized area on her left chest, which did not cause her death and were inflicted roughly fifteen to sixty minutes before she was killed (Tr. 1073, 1076; St.Ex. 151a,151e). After these wounds had been inflicted, her throat was slashed at least three times, causing her death (Tr. 1078, 1082; St.Ex. 151f-151g).

Police officers investigating the murder scene developed additional evidence pertaining to these crimes. The purses of Candy and Irene Sisk were found near their respective bodies; each had been opened and there were two checkbooks lying near the purse of Irene Sisk (Tr. 794, 797, 803, 807, 810; St.Ex. 43,44, 115-116). In one of these checkbooks, a check for one thousand dollars had been made out to "cash" but not signed (Tr. 794; St.Ex. 116). A VCR was missing from Candy's bedroom (Tr. 800). An empty box for a videotape of the movie "Independence Day" was near where the missing VCR had been (Tr. 800). Three telephones in the residence were either missing or disabled (Tr. 785, 786, 799; St.Ex. 44, 109-110). There were smears of blood on a utensil drawer in the kitchen that had been partially left open and on the handle to the back door to the house (Tr. 784; St.Ex. 43,44, 105-108). DNA analysis established that the blood on the kitchen utensil drawer was consistent with the DNA profile of

Irene Sisk (Tr. 956). The knife found in Candy's chest and the knife from the kitchen drawer appeared to be from the same set (Tr. 788).

Early on the afternoon of December 16, a few hours after the bodies of Irene and Candy Sisk had been discovered, appellant checked into the Tower Motel in Poplar Bluff (Tr. 746). Appellant's ordinary place of residence was his brother's home in Poplar Bluff (Tr. 1092). Appellant seemed "a little edgy" when he paid for the room in cash, and told the motel clerk that he wanted to be left alone (Tr. 748-749). Later that day, around 6:00 p.m., appellant visited a man named Kevin Dennis, who repaired electronic equipment, and gave him a VCR for use in salvaging parts (Tr. 759, 760-761). Appellant told Dennis that he got the VCR out of someone's trash (Tr. 761).

At around 4:15 pm two days after the victims' bodies had been discovered (Wednesday, December 18), appellant was contacted at his brother's home by Lieutenant Steve Hinesly of the Missouri State Highway Patrol and Deputy Scott Johnson of the Butler County Sheriff's Office (Tr. 1084, 1093). Hinesley told appellant about their investigation and appellant said, "Candy is dead?" (Tr. 1094). Appellant agreed to accompany Hinsely and Johnson to Patrol headquarters in Poplar Bluff to discuss this matter (Tr. 1094). After being advised of and waiving his Miranda rights, appellant denied killing the Sisks and claimed that he had made trips to Cape Girardeau and two other towns on the day of the murders (Tr. 1095, 1098, 1099-1100). When Hinesly disputed that appellant could have traveled the distance he claimed to have done in a single day, appellant changed his story and asserted that he had bought and used

methamphetamine at the home of Kevin Dennis when the murders were committed (Tr. 1101-1102). Hinesly told appellant that he would check out appellant's account (Tr. 1102).

Hinesly talked to Dennis later that evening (Tr. 1102-1103). Dennis said he saw appellant on Monday the 16th at around 5:00 to 6:00 p.m., and that appellant brought an older VCR with him and had changed his jeans at Dennis' home taking his old jeans with him (Tr. 1103). Dennis stated that he did not see appellant on Monday morning (Tr. 1103).

At around 9:00 the next evening (Thursday, December 19), Lieutenant Hinesly interviewed appellant a second time at the Butler County Sheriff's office (Tr. 1107). After obtaining a waiver of appellant's Miranda rights, Hinesly told him that his story had not checked out, and described other information that police had discovered over the previous twenty-four hours (Tr. 1104-1105, 1107-1108). Appellant said that he wanted to tell Hinesly the truth but couldn't, and asked to speak to his brother (Tr. 1108). Appellant's brother was summoned and consulted with appellant, after which appellant admitted to the murder of Irene and Candy Sisk (Tr. 1109).

Appellant told Hinesly that his intention had been to simply tie the victims up to give him time to get out of town (Tr. 1110). He said that Candy and Irene Sisk had disagreed over whether to surrender money to appellant, and that Irene Sisk had started to write out a check but did not sign it (Tr. 1110). Appellant stated that Candy had then written a check and that he had taken the Sisks to the bank, where Candy cashed her check (Tr. 1110). When they returned to the Sisk residence, appellant said, he had tied them up, but as he was leaving the house he saw that Irene Sisk had already gotten free and was looking at him out of the kitchen window (Tr.

1111). Appellant claimed that Irene Sisk reached for a knife as he was retying her, and he also said that the victims wouldn't stop screaming, and that he "shut them up" (Tr. 1109, 1111). He denied sexually assaulting Candy Sisk, and said that officers would not find any semen at the murder scene (Tr. 1114, 1143).

Appellant said that he had worn gloves when he had gone to the Sisk residence so that his fingerprints would not be discovered by police, and that he had later thrown the camouflage jacket that he had been wearing out the window of his car because it had blood on it (Tr. 1111,1114). When he returned to Poplar Bluff, appellant said, he checked into the Tower Motel because he was afraid that he had been followed (Tr. 1112). Appellant later observed to Hinesly that "the ironic thing" about his situation was that he had since learned that he probably wouldn't have had to go back to jail for "just failing one piss test" (Tr. 1115).

On the same evening that appellant confessed to the murders, a search warrant was obtained and executed for the home of appellant's brother, where appellant resided (Tr. 1105-1106). In the room where appellant lived, officers found 32 ropes and cords (Tr. 1014; St.Ex. 134,138). A microscopic comparison of these ropes established that two of the ropes and four of the strands were consistent in color, composition and construction with the ropes that had been used to bind Irene and Candy Sisk (Tr. 1014-1018, 1024).

In a wastebasket of appellant's room, officers found several handwritten notes on index cards or small pieces of paper (Tr. 825-826). One note bore a number of names, including the name "Candace," and under her name the word "Gideon" and a telephone number; another had

directions from Poplar Bluff, where appellant lived, to the Sisk residence; and the third stated as follows:

> Things for First Entrance
>
> gun (back) - handcuffs (pocket) - 12 ft of rope (legs) in two 6 ft pieces -

(Tr. 826; St.Ex. 131-132). Also found in appellant's bedroom were a Crown Royal bag containing handcuffs (Tr. 822; St.Ex. 137), a duffel bag containing ropes, twine and other items (Tr. 827; St.Ex. ??), a videotape of the movie "Independence Day" without a box (Tr. 824; St.Ex. 133), appellant's wallet containing cash (Tr. 821; St.Ex. 139); two sales receipts dated December 17 (Tr. 828, 832), and three telephones found under his bed (Tr. 827).

The white Ford Taurus that had been driven by appellant was also seized and processed (Tr. 834-836; St.Ex. 129-130). Traces of what was later determined to be blood were found on the driver's door and door handle, the steering wheel and the trunk clasp (Tr. 919, 922, 923, 925); the blood on the steering wheel was established as human blood (Tr. 925). According to DNA analysis, the blood on the driver's-side door handle was consistent with being a mixture of Irene Sisk's blood and that of another individual (Tr. 919, 957-959).

Appellant did not take the stand. At the close of the evidence, instructions and arguments of counsel, the jury found appellant guilty as charged of two counts of first degree murder (Tr. 1229-1232; L.F. 223-224). In the punishment phase of trial, the state adduced appellant's prior conviction for possession of a controlled substance (Tr. 1292), and also presented evidence concerning the impact of the victims' deaths upon their family and friends

(Tr. 1245-1289). Appellant called seven witnesses in purported mitigation of punishment (Tr. 1296-1345). Thereafter, the jury returned a verdict stating that it found the existence of six statutory aggravating circumstances as to each count, and assessed appellant's sentence at death on both counts (Tr. 1396-1397, 1407-1409; L.F. 225-226). Appellant brings this appeal from his convictions and sentences.

ARGUMENT

I.

A.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REJECTING APPELLANT'S OFFERS OF PROOF AND SUSTAINING THE STATE'S OBJECTIONS TO TESTIMONY REGARDING HAIRS SEIZED FROM THE SCENE BECAUSE THE OFFERS OF PROOF WERE INSUFFICIENT IN THAT THEY FAILED TO DEMONSTRATE THE MATERIALITY OR THE LEGAL RELEVANCE OF THE EVIDENCE. FURTHERMORE, APPELLANT WAS NOT PREJUDICED IN LIGHT OF THE OVERWHELMING EVIDENCE OF GUILT.

B.

APPELLANT'S CLAIM THAT THE TRIAL COURT PLAINLY ERRED IN FAILING TO SUA SPONTE INTERVENE IN THE STATE'S CLOSING ARGUMENT WHEN THE STATE ARGUED THAT "THERE IS NOT ONE SHRED OF EVIDENCE IN THIS THAT POINTS ANY DIRECTION BUT TO HIM" SHOULD NOT BE REVIEWED BECAUSE TRIAL STRATEGY IS AN IMPORTANT CONSIDERATION IN CLOSING ARGUMENT AND SUCH CLAIMS ARE GENERALLY DENIED WITHOUT EXPLICATION AND IT WAS PROPER ARGUMENT IN THAT IT WAS NOT A COMMENT ON EXCLUDED EVIDENCE.

Appellant contends that the trial court erred in not allowing him to elicit evidence from state's witnesses "that hair found on Cand[y], in Cand[y]'s bed and in the ropes binding Irene's

hands . . . **did not match Cand[y]'s, Irene's, or [appellant's] hair**" (App.Br. 50) (emphasis added). Appellant further argues that the trial court plainly erred in allowing the State "to blatantly ignore the law and the rules of ethics and argue to the jury that 'there is not one shred of evidence in this that points any direction but to him'" (App.Br. 50).

A. CLAIM REGARDING EXCLUSION OF EVIDENCE

Contrary to his assertions at trial, in his Point Relied On, and throughout his argument, the evidence did not show that hairs seized from around the bodies of Candy or Irene were excluded from belonging to either of them. At most, the evidence at trial was that the hairs were not consistent with appellant's hair samples. As a result, appellant's first claim fails because his offers of proof did not demonstrate the materiality or the legal relevance of the evidence and was an attempt to inject confusion and speculation at trial.

Facts

At trial, Officer Don Windham, a sergeant with the Missouri Highway patrol testified to his part in the processing of the Sisk house crime scene (Tr. 775-777). At one point in his testimony, Windham stated that he had collected hair (from the head and pubic area), saliva, and blood samples from appellant (Tr. 844). Then, during Windham's cross-examination the following exchange occurred:

Q: [defense] One of the things that you did at the scene was to process the bed and the area where Ms. Sisk and where [Candy] were found?

A: Yes.

Q: All right. And you collected a number of hairs; did you not?

A: Yes, I did.

Q: From both of those areas?

A: Yes.

STATE: Judge, may we approach briefly? Your Honor, I'm going to make a motion in limine at this time to getting into any hair evidence relating to this case. There has been no connection of the hair evidence in any of this to any individuals connected in this case. It's simply a matter by the defense in an attempt to open and raise a specter of some unknown, unidentified phantom person committing these murders. If the Court will recall, the State filed a memorandum of law with regard to the law on whether the defense is allowed [the] specter of some unknown phantom person, and it was very clear that they cannot. Even if there was evidence connecting to an individual, which there is not, even if there were, the defense can't get into it unless that evidence rises to the level under the law of excluding their client. So this whole line of things is to throw some red herring in here that simply does not exist.

(Tr. 859-860). Appellant then responded:

Judge, hair evidence that is seized from the scene, sent to the lab, compared with the Defendant, and ruled to exclude the Defendant and the victims in this case is no different than a fingerprint from a scene, taken to the lab, compared with the suspects, and found not to be the suspects'. It is

> exculpatory evidence and I would like to present a defense. This is physical evidence at the scene. It is not connected to our client. And to deny our right to present that evidence would violate every constitutional right meliorated in the stipulation previously filed.

(Tr. 860). The court found that it was not exculpatory evidence and sustained the State's motion in limine (Tr. 861).

As the first offer of proof, Windham testified that he seized seven hairs "from around" or "near the body" of Candy (Tr. 863). Three hairs were on or near the bed where Candy was found, one was underneath her body, one was on the pillow, one on the floor, and one came from her leg (Tr. 863). Windham also seized "hairs from the body of Irene Sisk" and ropes from the body of Irene (Tr. 869, 870). After argument by counsel, the court noted that it still did not find the evidence exculpatory and again sustained the State's objection (Tr. 873).

Prior to Missouri Highway Patrol Criminalist William Randall's direct examination, appellant again revisited the issue of hair evidence (Tr. 988). Appellant asked "to be allowed to recross-examine Officer Windham, get into this testimony, and then get this testimony from this next witness in front of this jury" (Tr. 988). After argument by counsel, the trial court noted that it was not persuaded by the case law relied upon by appellant, **State v. Butler**, 951 S.W.2d 600 (Mo. Banc 1997) (which will be discussed below), and stated "I don't believe that testimony is exculpatory,and it will not be admitted." (Tr. 993-994).

As part of appellant's second offer of proof, Randall testified that he tested hairs seized from the Sisk residence and none of the hairs were consistent with appellant's hair (Tr. 996).

Specifically, Randall testified that he tested a hair that was "included in one of the knots" from the ropes taken from Irene and it was not consistent with appellant's hair (Tr. 996). Defendant then marked and admitted into evidence Defendant's Exhibits AA and Y, Randall's lab and type-written reports (Tr. 999). Defense Exhibits AA and Y demonstrate that only hairs found on or near telephones and a tire cover were tested against Candy and Irene with none of those hairs matching Candy and Irene (Def.Ex. AA and Y). So, none of the hairs found near or on the bodies of Candy and Irene were tested against their samples.

Prior to closing arguments, appellant again raised the issue of the hair evidence (Tr. 1181). Appellant argued that the two facts he would argue before the jury was that a hair found in the knots binding Irene and a hair found on Candy's thigh did not match appellant (Tr. 1182-1183). After objection by the State, the court again noted that it did not find the evidence to be exculpatory and let its previous ruling stand (Tr. 1183).

At the hearing on the motion for new trial, appellant raised the issue of the hair evidence and provided the court with this Court's opinion in **State v. Thompson**, 68 S.W.3d 393 (Mo.banc 2002),noting that the defendant in that case was allowed to elicit non-matching evidence on cross-examination of the State's witnesses (Sen.Tr. 3-4). The State argued that **Thompson** was distinguishable as the hairs here were never tested (Sent.Tr. 6). Appellant correctly pointed out that here there was evidence that the hairs were tested (Sent.Tr. 7). The trial court denied appellant's motion for new trial (Sent. Tr.7).

Standard of Review

"Trial courts have discretion to determine the relevancy of evidence, and appellate courts will reverse that determination only upon a showing of abuse of discretion." **State v. Wolfe**, 13 S.W.3d 248, 258 (Mo.banc 2000). A trial court will be found to have abused 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; 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." **State v. Hirt**, 16 S.W.3d 628, 634 (Mo.App.W.D. 2000).

This Court has stated that in Missouri evidence must be both logically and legally relevant in order to be admissible and defined the relevance standard as follows:

> Evidence is logically relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence, or if it tends to corroborate evidence which itself is relevant and bears on the principal issue of the case. The determination of legal relevance- the balancing of the probative value of the proffered evidence against its prejudicial effect on the jury - rests within the sound discretion of the trial court.

State v. Tisius, 92 S.W.3d 751, 760 (Mo. banc 2002).

Furthermore, "[d]isconnected and remote acts, outside the crime itself cannot be separately proved for such purpose; and evidence which can have no other effect than to cast a bare suspicion on another, or to raise a conjectural inference as to the commission of the

crime by another, is not admissible." **State v. Rousan**, 961 S.W.2d 831, 848 (Mo.banc 1998), *cert. denied*, 524 U.S. 961 (1998). "Evidence that another person had an opportunity or motive for committing the crime is not admissible without proof that the other person did some act directly connecting that person with the crime." **State v. Davidson**, 982 S.W.2d 238, 242 (Mo.banc 1998). So therefore, evidence incriminating another cannot pass the legal relevance standard if it does not "directly connect" the other person with the crime.

Appellant's offers of proof failed

In this case, the trial court did not abuse its discretion in rejecting appellant's offers of proof because the offers of proof did not provide relevant or material evidence. The purpose of an offer of proof is to provide the substance of the excluded evidence in sufficient detail to demonstrate its relevancy amd materiality. **State v. Bowens**, 964 S.W.2d 232, 238 (Mo.App.E.D. 1998). As stated above, evidence is relevant if it tends to prove or disprove a fact in evidence or if it corroborates other relevant evidence. **State v. Tisius**, 92 S.W.2d at 760. However, the sole fact that evidence is logically relevant does not require its admission. **Rousan**, 961 S.W.2d at 238.

Here, appellant argues that non-matching hair evidence found on both victims "is beyond exculpatory: it is startling evidence that a jury could not ignore" (App.Br. 65). However, the evidence only establishes that hairs found in the victims bedrooms were "different from the hair standards" of appellant (Def.Ex. AA and Y). The proposed evidence did not exclude the victims themselves! Considering that the hairs were found in their own respective bedrooms, it does not disprove appellant as the murderer because the hairs did not exclude the victims.

Even the hairs found on Candy's thigh and in the knots used to tie Irene's hands cannot exclude the likely possibility that the hairs belonged to the victims. Furthermore, there was no evidence from the offers of proof that the hairs seized were human. Although the State's question to Officer Windham suggested that Candy had two cats and a dog, the record confirms the presence of one dog on the day of the murders (Tr. 576, 871). Windham testified that he did not have a background in differentiating between human and animal hair (Tr. 871). He stated that he seized every hair that he saw (Tr. 871).

Not only was the proposed evidence not logically relevant, but it was not legally relevant as well. As noted above, evidence incriminating another will only be admitted if such evidence directly connects such person to the crime. **Davidson**, 982 S.W.2d at 242.

The reasoning behind the requirement of having evidence of the other "suspect" be directly connected to the crime has been explained by this Court in **State v. Wise**, 879 S.W.2d 494, 511 (Mo. banc 1994), as follows:

> [E]vidence that another had an opportunity or motive to commit the crime charged is, without more, not relevant to any issue involved. Evidence that one person had an opportunity to commit the crime would not exculpate defendant, who also had the opportunity, and committed the crime. The rationale applies with equal force to evidence of another's motive to commit the crime charged. Criminal defendants offer evidence of another person's opportunity and motive to raise doubts of their guilt by casting suspicion on another. Because of the high tendency of such evidence to confuse and

> misdirect attention from the issues of the case, courts allow the evidence only where the defendant is able to tie the evidence to proof that the other person committed an act directly connecting him with the crime.

(Emphasis added, citations omitted).

Here, evidence that hairs found at the scene were not consistent with appellant's hair does not exculpate him as it is entirely possible that the hairs belonged to the victims. The evidence offered by appellant fails to make any connection between the hair evidence and another, and even if a person was named there would still have to be evidence directly connecting such person to the crime. For instance, if the hairs found at the scene matched a family friend, such evidence would be inadmissible to merely cast suspicion on that family friend without establishing a nexus to the crime. As such, the evidence offered here did not prove a fact in issue and would only serve to confuse the issues and misdirect the jury's attention.

Despite appellant's attempt to argue that the rule is not applicable here because he was not attempting to identify a particular person as guilty, but was "simply attempting to present evidence to show that he did not commit the crime" (App.Br. 72), his argument fails as his true intent for presenting such evidence is revealed earlier in his brief:

> That the hair in the knotted rope binding Irene's hands did not come from [appellant] suggests that someone other than [appellant] tied that knot. If someone other than [appellant] tied the knot, then under the state's own theory, someone other than [appellant] killed Irene.

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> Non-matching hair found underneath Cand[y], on her pillow, and on the floor next to her bed would very likely have been left by the person who sexually assaulted and killed her. Somebody other than [appellant] left the hair.

(App.Br. 64-65). Therefore, as is evident by appellant's argument, he does want the evidence admitted as an attempt to cast a bare suspicion on another.

It does not matter that appellant has not identified a particular person as the perpetrator because the rule has long been applied and proffered evidence has been excluded in cases where the "other" suspect was not necessarily named or identified. *See* **State v. Miller**, 368 S.W.2d 353, 360 (Mo. 1963) (evidence that another unknown person other than defendant left tools at the scene suggesting that this person had the opportunity to commit burglary); **State v. LaRette**, 648 S.W.2d 96 (Mo. banc 1983) (evidence of obscene telephone calls received by the victim during the year prior to her slaying); **State v. Bolanos,** 743 S.W.2d 442, 447 (Mo.App., W.D. 1987) (testimony about assault upon neighbor of victim by a person other than defendant while defendant was in jail); **State v. Brown**, 916 S.W.2d 420, 422-423 (Mo.App. E.D. 1996) (testimony from a witness that on the night of robbery, he "overheard another person, other than defendant, discussing a robbery similar to the one involving" defendant); **State v. Brown**, 958 S.W.2d 574, 581 (Mo.App., W.D. 1997) (evidence that the victim's checkbook had been stolen the same week as the murder and someone had tried to cash one of the stolen checks); **State v. Davis**, 32 S.W.3d 603, 611 (Mo.App. E.D. 2000) (evidence of a "another condom found near the crime scene, a condom wrapper, a smear from the condom,

and bloodstained sheets from defendant's basement" to bolster theory that someone named "Jeff" was the perpetrator found to create "confusion and speculation" without a discernable connection to crime). In all of these cases the courts maintained their healthy skepticism regarding the relevancy and admissibility of such evidence.

In fact, all of the cases cited above are more on point with the case at bar than the main cases relied on by appellant at trial and here on appeal, **State v. Butler**, 951 S.W.2d 600 (Mo. banc 1997) and **State v. Thompson**, 68 S.W.3d 393 (Mo. banc 2002). The above-cited cases dealt with the relevancy and admissibility of proposed evidence. By contrast, **Butler** centers around an ineffective assistance of counsel claim based on trial counsel failing to investigate and adduce evidence connecting another to the crime. **Id**. at 606. At trial, counsel had attempted to introduce evidence that the victim's nephew had a motive and opportunity to commit the murder. **Id**. The trial court rejected the evidence because there was nothing directly connecting the nephew to the crime **Id**. The non-matching physical evidence was but one of four areas of evidence that this Court found trial counsel should have investigated and discovered in an effort to have the evidence incriminating the nephew properly admitted at trial. **Id**. at 607-608. If anything, **Butler** underscores the strength of the rule that evidence incriminating another must be directly connected to the crime.

Thompson centers around the issue of prejudice from not allowing the defendant to say in opening statement the evidence he intended to elicit on cross-examination, including lack of forensic evidence from car linking the defendant to the murder and non-matching fingerprints and shoeprints left near the crime scene. **Id**. at 395. This Court found prejudice

given that the State's case was circumstantial and the "kind of case where an effective opening can make a difference." **Id**. Thus, **Thompson** stands for the proposition that defendants can no longer be deprived of an opportunity "to make an opening statement that referred to cross-examination testimony" and that reversal from the denial of that will only be required when there is prejudice. Incidentally, that a bloody shoe print left at the scene does not match appellant is evidence that is far more probative than a non-matching hair. Intuitively, one knows that hair could be transferred or left behind at any time and in an innocent manner whereas a bloody shoe print left near a crime scene is not something that could so innocently be left behind.

Appellant argues that in general all hair comparison evidence should be admissible because "what's good for the goose is good for the gander" as the State often is permitted to present evidence of when seized hair matches the defendant (App.Br. 69-70). This argument is nonsensical. The fact remains that physical evidence seized from the scene of the crime, the victim, or from the defendant that matches a defendant or victim has a high probative value as it **directly** connects the defendant to the crime or victim. While non-matching evidence could be helpful or relevant if found where you would expect the perpetrator of the crime to leave it and it excludes the defendant or other innocent people who could have left the hair behind, those facts are not before us here. Also, it is not surprising that physical evidence matching appellant was not left behind because appellant admitted to the police that he had taken measures to not leave fingerprints or the bloody jacket he had worn behind (Tr. 1111,

1114). Furthermore, upon denying that he sexually assaulted Candy, appellant warned the police that they would not find any semen at the murder scene (Tr. 1114, 1143).

Appellant cites several Missouri cases and implies that the issue of whether "non-matching hair is exculpatory and admissible" has been decided (App.Br. 70-71). However, in **State v. Glear**, 696 S.W.2d 820 (Mo.App. E.D. 1985); **Onken v. State**, 803 S.W.2d 139 (Mo.App., W.D. 1991); and **Snowdell v. State**, 90 S.W.3d 512 (Mo.App. E.D. 2002), the Court of Appeals was not presented with that issue. In **Glear**, the Court was merely listing the evidence that was brought out at trial to demonstrate how the State's case was weak. **Snowdell** is a DNA post-conviction rape case where the Court noted that appellant presented evidence at his trial that pubic hair obtained from the victim's pubic region did not match the defendant.

And when citing to **Onken** and presumably quoting from the case, appellant states that "'evidence favorable to and tending to exculpate' defendant comprised lab technician's notes stating that 'one strand of hair discovered in the victim's bed did not match those of defendant' or infant victim's mother" (App.Br. 71). However, in **Onken** the Court denied appellant's discovery violation claim because it was not raised first in a direct appeal and therefore did not get to the merits. The quote that the non-matching hair was "favorable and tending to exculpate" the defendant was the Court's stating what the defendant was arguing and **not** the Court's decision on the matter.

Also, the out-of-state cases appellant relies on are distinguishable from the case at bar (App.Br. 70-71). In **State v. Hicks**, 536 N.W.2d 487 (Wisc.App. 1995), the Court reversed

because the critical issue at trial was identification and the state assertively and repetitively used the inconclusive hair evidence as affirmative evidence of the defendant's guilt. In **Dilosa v. Cain**, 279 F.3d 259, 261-265 (5th Cir. 2002), the defendant claimed that two black males were the perpetrators and the state's case rested on lack of black hair evidence. The Court found prejudice from a discovery violation because the jury did not hear that there was evidence of "Negroid type hair" on the bed next to the victim's body and in tape on a window where the pane had been removed. In **Hoffman v. Florida**, 800 So.2d 174, 175, 179-180 (Fla. 2001), the Court found a discovery violation from the state's withholding evidence that hairs found in the victim's hands excluded the defendant, his co-defendant and **both victims**. The facts from the case at bar do not come close to the facts in those cases as far as the probative value of the non-matching hair.

Appellant argues that he should have been allowed to elicit the hair evidence because it was fair cross-examination of the State's direct examination citing **State v. Clark**, 646 S.W.2d 409 (Mo.App., W.D. 1983), (App.Br. 72-73), and because Section 491.070, RSMo 2000, provides "'[a] party to a cause, civil or criminal, against whom a witness has been called and given some evidence, shall be entitled to cross-examine said witness . . . on the entire case'" (App.Br. 74). Although Section 491.070 does so provide and the Court in **Clark** did say that "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, or prove his version with

reference thereto," 646 S.W.2d at 412, the trial court still has the discretion whether to exclude the evidence if it is irrelevant or when the court finds that no adverse inference was made from the first party's evidence. Here, as argued above, evidence of the hairs not being consistent with appellant was not legally relevant. Also, the State's testimony on direct examination that hair samples were taken from appellant did not raise an adverse inference that his hair matched any left at the scene. In order to invoke the rule that appellant had a right to rebut the State's direct examination, witnesses from the State would have had to say that appellant's hair was tested against the hair found at the scene without an explanation of the results. That did not happen here.

In sum, as appellant was the proponent of the evidence, it was his burden to establish that the evidence was admissible by demonstrating its materiality and relevance. **State v. Williamson**, 935 S.W.2d 374, 375 (Mo.App., S.D. 1996). His failure to do so must defeat his claim.

B. APPELLANT'S PLAIN ERROR CLOSING ARGUMENT CLAIM

Appellant's claim that the prosecutor's statement in closing argument was an improper comment on excluded evidence also fails (App.Br. 75-76).

Preservation of Claim on Appeal and Standard of Review

As appellant concedes, this claim can only be reviewed for plain error (App.Br. 85), because he did not object to this testimony at trial and did not include the claim in his Motion for New Trial (Tr. 1225, L.F. 230-276). However, claims of error in closing argument may be waived if no objection at trial is made. **State v. Parker**, 886 S.W.2d 908, 922-923 (Mo. banc

1994), *cert. denied* 514 U.S. 1098 (1995). In the absence of an objection, the trial court's options are narrowed to uninvited interference with summation and a corresponding increase of error by such intervention. **State v. Clemmons**, 753 S.W.2d 901, 907-908 (Mo. banc 1988), *cert. denied* 488 U.S. 948 (1988).

The plain error rule is to be used sparingly and does not justify review of every trial error which has not been properly preserved for review. **State v. McMillin**, 783 S.W.2d 82, 98 (Mo. banc 1990), *cert. denied*, 498 U.S. 994 (1990). It is well settled that relief should rarely be granted on assertion of plain error to matters contained in closing argument, for trial strategy looms as an important consideration and such assertions are generally denied without explication. **State v. Cobb**, 875 S.W.2d 533, 537 (Mo. banc 1994), *cert. denied* 513 U.S. 896 (1994). In the case at bar, defense counsel did not give the trial court that chance as no objection to the prosecutor's comments was made. Without an objection to the comment by the prosecutor, this court should not review this claim for plain error as trial strategy is an important consideration.

Analysis

If this Court decides to review this claim, however, the trial court did not commit plain error by not intervening, sua sponte, when it permitted the prosecutor's comment. During the State's rebuttal closing argument the prosecutor argued as follows:

> Now, ladies and gentlemen, defense counsel would have you believe that this individual is an innocent man. **There is not one shred of evidence in this that points any direction but to him**. The person who wrote "things for first

> entrance, gun," and above that, "bag, handcuffs," above that, "pockets, twelve foot of rope in two six-foot pieces." Are we planning a church picnic? The man who kept and fondled the handcuffs he planned about . . .

(Tr. 1225) (emphasis added).

As a general proposition, it is not improper for the State to comment on the defendant's failure to present corroborating evidence. **State v. Macon**, 845 S.W.2d 695, 696 (Mo.App. E.D. 1993) ("comments about Defendant's lack of corroborating evidence are not prohibited and do not constitute an improper shifting of the burden of proof, especially in light of the court's clear instructions on the State's burden"); **State v. Wolfe**, 793 S.W.2d 580, 588 (Mo.App. E.D. 1990). It is, however, improper for the prosecutor to comment on evidence that has been excluded by the trial court. **State v. Luleff**, 729 S.W.2d 530, 532 (Mo.App. E.D. 1987). Whether that error requires reversal depends on the circumstances of the particular case, and particularly on the strength of the other evidence and whether the prosecutor intentionally misrepresented the facts in making the comment. **State v. Roberts**, 838 S.W.2d 126, 131 (Mo.App. E.D. 1992). Contrary to appellant's assertion, the prosecutor'\'s argument in this case was not improper.

In the case at bar, the prosecutor argued that there "was not one shred of evidence in this that points any direction but to him" and then she proceeded to list items of evidence from the State's case that pointed to him. As the prosecutor had argued throughout trial, the State's position [and the trial court's position] was that the hair evidence appellant wanted to elicit was not exculpatory. With or without the excluded hair evidence, there was not one shred of

evidence that pointed to any direction but to appellant. This is not a case where the prosecutor's argument was a direct and specific comment on appellant's excluded evidence as occurred in the cases cited by appellant **State v. Weiss**, 24 S.W.3d 198, 203 (Mo.App., W.D. 2000); **State v. Luleff**, 729 S.W.2d 530, 535 (Mo.App. E.D. 1987); and **State v. Price**, 541 S.W.2d 777, 778 (Mo.App. E.D. 1976). *See also* **State v. Hammonds**, 651 S.W.2d 537 (Mo.App. E.D. 1983).

Should this Court decide to review appellant's claim, respondent asserts that the trial court did not plainly err in failing to sua sponte intervene in the prosecutor's argument as it was a proper argument on the strength of the State's evidence and the weakness of appellant's.

C. APPELLANT WAS NOT PREJUDICED BY THE EXCLUSION OF EVIDENCE NOR DID HE SUFFER A MANIFEST INJUSTICE FROM THE PROSECUTOR'S COMMENT

Finally, appellant has failed to show how he was prejudiced because of the absence of the hair evidence. Even if appellant's offers of proof had not failed, the exclusion of evidence that hair seized from the victims' bedroom was not consistent with appellant but was not excluded as coming from the victims could not have prejudiced the defense. Even if the evidence could be viewed as relevant and admissible, the exclusion of such evidence is not always regarded as reversible error. **State v. Pisciotta**, 968 S.W.2d 185, 189 (Mo.App., W.D. 1998). Rather, the improper exclusion of relevant and admissible evidence will be deemed to be harmless if the reviewing court can declare beyond a reasonable doubt that its exclusion "was not prejudicial to the fairness of the defendant's trial." **Id**.

In arguing that the State's case was not strong, appellant discounts the direct evidence provided by his voluntary confession to murdering the Sisks. An "[a]ppellant's admission that he [killed] a man was direct evidence of his guilt." **State v. Stokes**, 638 S.W.2d 715, 723 (Mo. banc 1982); *see also* **State v. LaRette**, 648 S.W.2d at 103 ("Defendant's suggestion that the person responsible for the obscene telephone calls may have been the killer ignores defendant's multiple admissions that he choked, struck, slashed and stabbed [the victim]").

Even taking away appellant's confession, which is direct evidence of his guilt, appellant cannot establish that he was prejudiced by the exclusion of the evidence or that he suffered a manifest injustice from the prosecutor's comment during closing argument because there was overwhelming evidence of guilt including the following:

* Evidence directly corroborating factual details in appellant's confession, including (1) the bank teller who cashed a check for a man in the company of Candy Sisk and driving a car identical in make, model and color to that driven by appellant, (2) the partially filled-out check found at the murder scene and (3) the man who saw Irene in the backseat of a light-colored car near the bank two days before learning about the murders;

* Appellant's statement that his motive for going to the Sisks' residence was to take money and to get out of town because of his fear that he would not pass a urine test, corroborated by (1) the evidence above, (2) by the fact that the victims' purses had been ransacked and (3) by the fact that after confessing to Officer Hinesly he observed that "the ironic thing" about his situation was that

he had since learned that he probably wouldn't have to go back to jail for "just failing one piss test";

* Evidence suggesting that animus against Shirley Niswonger, Candy's mother, may have been a possible motive for murdering the Sisks, including the fact that Niswonger had told appellant several months before the murder that she wanted to break up with appellant and that she was disturbed by a letter he wrote approximately a month before the murders and

* The fact that appellant had made repeated attempts to visit the Sisks the day before the murder, and his statement to Samantha Simmons that he was going to Tallapoosa because someone "owed him some money";

* The fact that a car fitting the description of the one driven by appellant was seen driving slowly in front of the Sisk residence less than three hours before the victims' bodies were discovered;

* The fact that the man who came to the Sisk house a short time later told Irene Sisk that he had "a Christmas gift for Candy from her mother in jail," given that appellant was acquainted with Candy and had personal knowledge that her mother was incarcerated;

* The fact that this man drove a car of the same make, model and color as that driven by appellant;

* The presence of a number of blood spots and traces on the automobile that had been driven by appellant and that was found at appellant's residence, and

the fact that one of these blood samples was determined by DNA analysis to be consistent with a mixture of Irene Sisk's blood and that of another;

* The fact that a microscopic analysis of the numerous ropes found at appellant's residence established that two of them were consistent in color, composition and construction with the ropes that had been used to bind the victims;

* The discovery of notes in appellant's room listing the name "Candace," giving directions to the Sisk house, and describing preparations to be made for entry, including a gun, handcuffs and a rope, corroborated by appellant's possession of handcuffs and rope and the use of rope to bind the victims;

* The fact that appellant told a friend the day before the murder that he had no money, contrasted with his multiple expenditures beginning only a few hours after the killings;

* Appellant's display of a consciousness of guilt by checking into a motel, and appearing a "little edgy" while doing so instead of going to his home in the same city, a short time after the murders, and his telling of multiple inconsistent stories when questioned by police;

* Appellant's possession or disposition shortly after the murders of numerous items that were consistent with having been fruits or instrumentalities of the crime, including a VCR, telephones, a videotape of "Independence Day."

Respondent realizes that in the first appeal, this Court stated that as to the evidence from the first trial "reasonable minds may differ with respect to whether there is overwhelming evidence of guilt in this case." **State v. Barriner**, 34 S.W.3d 139, 151 (Mo. banc 2000). However, this Court had to decide "whether the prejudice resulting from improper admission of evidence [such as from the bondage sex videotapes and admission of dildos and bondage magazines] is out-come determinative, requiring reversal." **Id**. Here, there was not a "volume of erroneously admitted evidence" as from the first trial and the claim here is whether the exclusion of legally irrelevant hair evidence prejudiced appellant and whether appellant suffered a manifest injustice from the prosecutor's comment during closing argument.

This Court also noted that much of the evidence to which the State pointed to as overwhelming evidence in the first appeal "either should not have been admitted or is consistent with appellant's defense that he visited both victims, went to the bank with them, borrowed money from them, and then left without harming them." **Id**. at 152. However, appellant's defense at this trial differed from the first trial in that appellant's theory of innocence was that the state had not proven beyond a reasonable doubt that he had gone to the house and urged the jury not to convict the wrong person (Tr. 1206-1208, 1218). Therefore, the evidence from the first trial that this Court discounted because it was consistent with appellant's defense, can be used *here* to demonstrate the overwhelming evidence of guilt presented to this jury.

In sum, the proposed evidence was not legally relevant as it was improper evidence casting a bare suspicion on another. But even assuming that the proffered evidence had been relevant and that the trial court had abused its discretion in refusing to allow appellant to elicit

this evidence, appellant cannot show prejudice from its exclusion. Nor can appellant show that he suffered a manifest injustice from the State's proper closing argument. Based on the foregoing, appellant's claim on appeal must fail.

II.

THE TRIAL COURT DID NOT ERR, PLAINLY OR OTHERWISE, IN ALLEGEDLY REFUSING TO ALLOW APPELLANT TO CROSS-EXAMINE SAMANTHA SIMMONS WHETHER SHE WAS AWARE A NEWSPAPER ARTICLE CAME OUT ABOUT THE CASE OFFERING A REWARD THE DAY SHE WENT TO THE POLICE WITH INFORMATION ABOUT APPELLANT BECAUSE (1) APPELLANT DID ASK HER IF SHE WAS AWARE OF A REWARD AND SHE ANSWERED NEGATIVELY AND (2) APPELLANT FAILED TO MAKE AN OFFER OF PROOF SHOWING THAT HE COULD HAVE ADDUCED ADDITIONAL FAVORABLE TESTIMONY FROM HER.

Appellant alleges that the "trial court erred in sustaining the state's objection and refusing to allow the defense to cross-examine [Simmons] about whether she was 'aware' or 'heard' of a newspaper article about the case offering a reward and in excluding Defendant's Exhibit B: the newspaper article about the Sisk killings and the reward" (App.Br. 89). However, appellant's claim fails because the record shows that appellant was able to question Simmons regarding a reward.

Facts

Appellant only mentions in his brief what occurred after the State objected to questioning by the defense whether Simmons was aware of an article mentioning a reward and she had responded negatively (App.Br. 90). The record actually shows that prior to trial State's witness, Samantha Simmons, was asked at a deposition hearing whether she knew about a reward

and she had denied any such knowledge (Tr. 663). At a pre-trial motion hearing, Officer Steven Hinesly testified that when he interviewed Simmons and her husband Daniel during the day on December 19, 1996, the day the article came out, neither mentioned a reward to him (Mot.Tr. 103).

At trial, Samantha Simmons testified that she had learned the police were looking for a "clean-cut man in a white Ford Taurus" one or two days after appellant had visited her house at night (Tr. 644). The next day, Simmons drove by the house she had driven by with appellant "to be sure" appellant was the man they were looking for because he "kind" of fit the police's description (Tr. 644-645). It was after she recognized the house and saw the "yellow tape" around it that she went to the Dexter Police Department with information about appellant driving by the Sisk house the night before the murders (Tr. 646). On cross-examination appellant questioned her about when the first time was that she had heard about the murders as follows:

Q: [Defense counsel] Okay. So do you believe that's the first thing you saw was a 10:00 p.m. news broadcast a couple of days later after that?

A: I believe so. I'm not too sure.

Q: Well, did you ever see anything in the newspaper?

A: I think I did, but it was the news broadcast.

Q: Okay. Were you aware that the newspaper came out talking about this case?

A: Not at that time, no.

Q: Okay. Were you aware that a newspaper came out talking about this case and offering a reward?

A: No.

STATE: Objection. Irrelevant.

COURT: Sustained.

(Tr. 657-658) (emphasis added).

At the conclusion of Simmons' cross-examination, appellant asked to approach the bench and the following exchange occurred:

DEFENSE: Judge, I would like to go into a line of questions with this witness concerning a reward that was advertised in the paper on the same day that she and her husband went to the police.

STATE: [Mr. Bock] Your honor, they already have a deposition from this witness in which she says she did not know about the reward.

STATE: [Ms. Smith] Why don't you just show the judge the article you propose to use?

DEFENSE: I don't have it marked yet, Judge.

STATE: [Ms. Smith] Because that's not the real purpose for this article.

COURT: Objection will be sustained.

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STATE: [Ms. Smith] And are you now offering this at that time, again, having shown it to the Judge?

DEFENSE: Certainly, I would offer it as part of the record.

STATE: [Ms. Smith] Okay. Same objection.

COURT: Yes. The objection is sustained.

(Tr. 663-664). Defendant's Exhibit BB, an\ copy of an article from the Daily American Republic of Poplar Bluff dated December 19, 1996, was marked and admitted into evidence (Tr. 664).

B. Appellant questioned Simmons whether she was aware of a reward and she answered negatively.

Appellant is correct in noting that a criminal defendant has the right to confront and effectively cross-examine the witnesses against him at trial. **Pennsylvania v. Ritchie**, 480 U.S. 39, 51, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). However, effective cross-examination does not equate to cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. **Kentucky v. Stincer**, 482 U.S. 730, 739, 107 S.Ct. 2658, 96 L.Ed.2d 63l (1987). "The scope of cross-examination and the determination of matters that may bear on a witness' credibility are largely within the discretion of the trial court." **State v. Dunn**, 817 S.W.2d 241, 245 (Mo. banc 1991), *cert. denied*, 503 U.S. 992 (1992). "Among the reasons for permitting trial judges wide latitude for the purpose of imposing reasonable limits on cross-examination are concerns about prejudice, confusion of the issues, and interrogation that is only marginally relevant." **Id**. It is within the trial court's discretion to restrict cross-examination, even when there are questions that may be relevant to establish an element of the defense. **Id**. at 244-245.

Here, contrary to appellant's assertion that there was a "total exclusion" of "all evidence" of "whether [Simmons] was aware of a newspaper article offering a financial reward for information about the murders," (App.Br. 95-96), the record demonstrates that appellant did ask her about her knowledge of a newspaper article about the case without objection by the State (Tr. 657-658). Simmons answered negatively (Tr. 658). Then, appellant specifically asked Simmons "were you aware that a newspaper came out talking about this case and offering a reward" and she again answered, "no" (Tr. 658). It matters not that the State's objection to the second question was sustained because it was after the question had been asked and answered and the State failed to ask for the answer to be stricken and for the jury to be instructed to disregard it (Tr. 658). Therefore, the testimony was "still available for the jury's consideration." **State v. Hirt**, 16 S.W.3d 628, 634 (Mo.App., W.D. 2000).

For example, in **Hirt**, the Court of Appeals found that the State's objection to testimony from a defense witness was improperly sustained by the court on hearsay grounds. **Id**. However, the Court found that the defendant had "not shown that his right to a fair trial was prejudiced by the trial court's sustaining the state's objection" because the jury heard the testimony and was not instructed to disregard it. **Id**. *See also* **State v. Crow**, 63 S.W.3d 270, 277 (Mo.App., W.D. 2001); and **State v. Archuleta**, 955 S.W.2d 12, 16 (Mo.App., W.D. 1997) ("[w]here there is no objection until after the evidence is given and the objecting party does not move to strike the evidence or withdraw it from the jury's consideration, the question of admissibility is not reviewable"). Here, because appellant was able to question Simmons about her knowledge of the newspaper article and his questions\ over a reward was answered before

the court sustained the State's objection to the second question **and** the State failed to move for the testimony to be stricken, appellant's claim is refuted by the record and his claim must fail.

C. Appellant's claim also fails because appellant failed to make an offer of proof showing that he could have adduced additional favorable testimony from her. The court sustained the State's objection to appellant's question asking Simmons whether she was aware of a newspaper article offering a reward on three separate occasions (Tr. 658, 663, 664). After all three rulings by the court, appellant failed to make an offer of proof. Where an objection to proffered evidence is sustained, the proponent must make an offer of proof in order to preserve the matter for appellate review. **State v. Seiter**, 949 S.W.2d 218, 224 (Mo.App. E.D. 1997). The offer must show what evidence will be given if the witness is allowed to testify, the purpose and object of the testimony, and all facts necessary to establish its admissibility. **State v. Tisius**, 92 S.W.3d 751, 767-768 (Mo. banc 2002); **State v. Nettles**, 10 S.W.3d 521, 528 (Mo.App.E.D. 2000). "The preferred method of making an offer of proof is to question the witness on the stand out of the jury's hearing." **State v. Dodd**, 10 S.W.3d 546, 556 (Mo.App.W.D. 1999). "An offer of proof is required to allow the trial court to consider the testimony in context and to make an informed ruling as to its admissibility." **Id.** Where an appellant fails to make a specific and definite offer of proof, he is not entitled to review. **State v. Williamson**, 935 S.W.2d 374, 375 (Mo.App. S.D. 1996).

In light of appellant's failure to make an offer of proof, he is entitled, at most, to plain error review in this case. "The 'plain error' rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review."

State v. Roberts, 948 S.W.2d 577, 592 (Mo.banc 1997), *cert. denied,* 118 S.Ct. 711 (1998). Appellant must demonstrate that manifest injustice or a miscarriage of justice will occur if the error is not corrected. **Id.**

In the present case, the trial court did not plainly err in sustaining the state's objection because appellant made no offer of proof in this case and as noted above, appellant was not prejudiced because appellant did ask Simmons if she had heard of a reward and she answered negatively. So, appellant got to ask precisely the question that he now claims on appeal he was not allowed to ask by the court. Apparently appellant did not get the answer he wanted - that she had heard of the reward- but he was able to present the idea before the jury of a possible motive for Simmons to come forward with evidence against appellant. So to that extent he was not prejudiced. If appellant's claim really is that he wanted to explore more about the reward, because she had already answered that she was not aware of it, appellant needed to demonstrate to the court in the form of an offer of proof what favorable testimony from her he could adduce. Absent the offer of proof, appellant cannot show that he was prevented from eliciting anything else on the subject of the reward that was relevant and admissible. **State v. Johnson**, 858 S.W.2d 254, 256 (Mo.App.E.D. 1993); and **State v. Schneider**, 736 S.W.2d 392, 401 (Mo.banc 1987) *cert. denied* 484 U.S. 10437 (1988) (cases where the defendant failed to make offer of proof as to what evidence would have been adduced in cross-examination of witness).

In sum, the record demonstrates that appellant did not suffer a manifest injustice from the trial court's actions in sustaining the State's objection to his questioning of Samantha

Simmons. Because appellant did ask Simmons about her knowledge of a reward and he failed to make an offer of proof, appellant's claim is meritless and must fail.

III.

THE TRIAL COURT DID NOT PLAINLY ERR IN ALLOWING THE STATE'S QUESTIONING OF STATE'S WITNESS SHIRLEY NISWONGER BECAUSE THE INQUIRY ABOUT APPELLANT'S REACTION TO THE VARIOUS BREAK-UPS DURING HIS AND NISWONGER'S RELATIONSHIP AND THE FACT APPELLANT WROTE A LETTER THAT DISTURBED HER APPROXIMATELY A MONTH BEFORE THE MURDERS WAS LOGICALLY AND LEGALLY RELEVANT IN THAT IT TENDED TO SHOW THAT APPELLANT'S MOTIVE FOR THE MURDER OF NISWONGER'S DAUGHTER, CANDY SISK, WAS HIS ANIMUS AGAINST NISWONGER.

Appellant contends on appeal that the trial court erred in admitting Niswonger's testimony that he got mad and angry when she broke up with him and that he wrote a disturbing letter (App.Br. 97-98).

A. Facts

At trial, Shirley Niswonger, the mother of Candy Sisk, explained how her three-year relationship with appellant was marked by a series of fights and separations (Tr. 679-680). The following exchange then occurred:

Q: [State] Okay. In August of 1996, were you still boyfriend and girlfriend with the defendant?

A: Off and on, yes.

Q: Okay. Now you say "off and on." If you would break up with the defendant, how would he react to that?

A: He would get mad. He would show up, like, come to my mom's and - -

DEFENSE COUNSEL: Objection, Your Honor. May we approach?

THE COURT: Yes.

DEFENSE COUNSEL: I don't know how far she intends to go with this, but I know there are some allegations of fights between the two of them.

STATE: Uh-uh. We're not going to do any of that.

DEFENSE COUNSEL: I mean, that's irrelevant, so, just with that understanding.

THE COURT: All right.

(Tr. 684). The prosecutor then stated, "No. I'm just going to show that he gets angry when they break up, and that's it." The questioning resumed:

Q: [state]Without getting into specifics, if you would break up with the defendant, how would he react?

A: He would be mad. He would get angry.

Q: Okay. And in August of 1996, what was your relationship when you got sent up to prison?

A: Well, we had split up, and we both was [sic] trying to get back together. And when I went back to Tipton, he wrote me a letter.

****

Q: Okay. So during this time period in August of 1996, you still had contact with the defendant?

A: Yes.

Q: At any point in there, did you finally break off your relationship with the defendant?

A: Yes. I told him that it was probably better that he go his way and I go my way, because we were just making both - - each other miserable. And I wasn't going to go back down to Poplar Bluff after I got back out again.

Q: Okay. And did you hear from the defendant again after that?

A: I got a letter from him around November of '96, and it was real - -

DEFENSE COUNSEL: Objection. May we approach?

THE COURT: Is it neccessary?

STATE: She's not going to get into the substance of the letter, but it goes to show the state of mind of the witness.

THE COURT: Do you still object?

DEFENSE COUNSEL: Yes.

THE COURT: All right. Come up.

DEFENSE COUNSEL: I think she's going to say what the letter read.

STATE: And that it was weird. And that after that, she decided not to contact him at all.

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THE COURT: What is your objection to that?

DEFENSE COUNSEL: Well, she says that the letter - - the stuff was weird –

STATE: She is not going to talk about that. Absolutely not. That's why we're not going into specifics of the letter. But the thing is that her breaking it up and calling off the things with the defendant and not getting back with him is one of the reasons he picked Candi. It's motive.

THE COURT: All right. But you're not going into the contents?

STATE: No sir. No, sir. No.

THE COURT: Okay. Overruled.

Q: [state] Without getting into the contents of that letter, simply what was your reaction to it?

A: I was disturbed by it.

Q: Okay. And after that, did you have any contact or correspondence with the defendant until after the time your daughter died?

A: No.

(Tr. 684-687) (emphasis added).

B. Standard of Review

Appellant's complaint against Niswonger testifying that he got "mad" and "angry" and showed up at her mother's house is not preserved for appeal because appellant did not object to it at trial. Appellant did object to Niswonger's testimony regarding their periodic break-ups on the grounds that he did not want Niswonger to testify about "fights between the two of them" (Tr. 684). However, when the prosecutor stated that Niswonger was not going to testify about

the fights, defense counsel answered "I mean that's irrelevant, so just with that understanding" (Tr. 684). The prosecutor then elicited from Niswonger that appellant would be mad and angry when they broke up *without objection* (Tr. 684-685).

The grounds asserted on appeal are limited to those stated at trial. **State v. Ellsworth**, 908 S.W.2d 375, 378 (Mo.App. E.D. 1995). Appellant may not broaden the objection presented to the trial court, nor rely on a theory different than the one offered at trial. **Id.** Where the grounds have been changed on appeal, nothing has been preserved for review. **Id.** Because appellant's theory on appeal is different from the objection he asserted at trial, reversal would be appropriate only if the appellate court finds plain error. **State v. McKibben**, 998 S.W.2d 55, 60 (Mo.App.W.D. 1999). Also, as appellant concedes (App.Br. 99-100), his claim regarding appellant getting mad and angry is not preserved because it was not raised in his Motion for New Trial (L.F. 242). **State v. Winfield**, 5 S.W.3d 505, 511 (Mo. banc 1999), *cert. denied* 120 S.Ct. 967 (2000); Supreme Court Rule 30.20.

Furthermore, appellant's claim pertaining to appellant writing a disturbing letter is also not preserved because appellant failed to make a specific legal objection that set forth a legal basis. **State v. Morrow**, 968 S.W.2d 100, 118 (Mo. banc 1998), *cert. denied* 525 U.S. 896 (1998); **State v. Beatty**, 849 S.W.2d 56, 61 (Mo.App., W.D. 1993). When the court asked what appellant's objection was to testimony regarding the letter, appellant stated, "Well, she says that the letter - - the stuff was weird- -"(Tr. 687). Upon reassurances that Niswonger would not get into the contents of the letter, the court overruled appellant's objection and the state elicited from Niswonger that appellant was "disturbed" by it (Tr. 687).

The plain error rule is to be used sparingly, and may not be used to justify a review of every claim that has not been preserved for appellate review. **State v. Roberts**, 948 S.W.2d 577, 592 (Mo. banc 1997), *cert. denied* 522 U.S. 1056 (1998). Unless a claim of error facially establishes substantial grounds for believing that "manifest injustice" or a "miscarriage of justice" has resulted, an appellate court will refuse to exercise its discretion to review for plain error. **State v. Johnston**, 957 S.W.2d 734, 741-742 (Mo. banc 1997), *cert. denied* 522 U.S. 1150 (1998); **State v. Scurlock**, 998 S.W.2d 578, 585-586 (Mo.App., W.D. 1999); see Supreme Court Rule 30.20.

B. Niswonger's testimony is not evidence of other misconduct by appellant and was legally relevant evidence of motive.

Appellant's writing of a letter that "disturbed" Niswonger and his reaction of getting "mad," "angry," and showing up at Niswonger's mother's house was not "evidence of other crimes." Although as appellant correctly notes (App.Br. 109), this evidentiary doctrine is not strictly limited to evidence of criminal acts, neither does it apply to all possible evidence concerning a defendant but also "probably covers other wrongful acts and conduct to the extent that it conveys to the jury the type of prejudice that accompanies a disclosure that the defendant has engaged in criminal conduct."

(Emphasis supplied.) **State v. Sladek**, 835 S.W.2d 308, 313 (n. 1) (Mo. banc 1992) (Thomas, J., concurring); *see* **State v. Cole**, 887 S.W.2d 712, 714 (n. 2) (Mo.App., E.D. 1994). In **State v. Bernard**, 849 S.W.2d 10 (Mo. banc 1993), this Court confirmed that the application of the rule on evidence of other crimes required, at the very least, a wrongful act by the defendant:

The general rule concerning the admission of uncharged crimes, wrongs, or acts is that evidence of prior uncharged misconduct is inadmissible for the purpose of showing the propensity of the defendant to commit such crimes

(Emphasis supplied; citation omitted.) **Id**. at 13.

Courts have not applied the evidence of other crimes doctrine to acts that were not criminal because they were not misconduct or because no such inference of propensity existed.[3] Neither appellant's act of writing a letter that disturbed Niswonger or getting angry and upset and showing up at Niswonger's mother's house were by any definition "misconduct" or a wrongful act, and they did not in any way suggest that he had a propensity to commit criminal offenses.

Applying general principles of relevance of evidence, the trial court could not have committed plain error in admitting the evidence in question. Evidence is relevant if it tends to prove or disprove a fact in issue, or if it corroborates evidence that is relevant and bears on

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[3]E.g., **State v. Stewart**, 18 S.W.3d 75 (Mo.App.,E.D. 2000) (defendant's wearing of a lab coat); **State v. Clayton**, 995 S.W.2d 468, 481-482 (Mo. banc 1999), *cert. denied* 120 S.Ct. 543 (1999) (defendant's dislike of jail guard); **State v. Simmons**, 955 S.W.2d 729, 738 (Mo. banc 1997), *cert. denied* 522 U.S. 1129 (1998) (photograph of defendant pretending to strangle woman in jest); **State v. Basile**, 942 S.W.2d 342, 355-356 (Mo. banc 1997), *cert. denied* 522 U.S. 883 (1997) (defendant's mention that his girlfriend was pregnant); **State v. Brown**, 902 S.W.2d 278, 287 (Mo. banc 1995), *cert. denied* 516 U.S. 1031 (1995) (witness had seen defendant "become violent").

a principal issue. **State v. Strughold**, 973 S.W.2d 876, 887 (Mo.App. E.D. 1998). Motive can be relevant in a criminal prosecution even if, as in the present case, it is not an element of the crime charged. **State v. Hill**, 866 S.W.2d 160, 163-164 (Mo.App., S.D. 1993). Parties generally have wide latitude in developing evidence of motive. **State v. Shurn**, 866 S.W.2d 447, 457 (Mo. banc 1993), *cert. denied*, 513 U.S. 837 (1994).

In the present case, the existence of an acrimonious relationship between appellant gave him a palpable motive to harm her daughter. Evidence that appellant would get mad and angry whenever they broke up coupled with evidence that he wrote her a letter that disturbed her approximately one month before the murders and after Niswonger decided to "finally break off" the relationship gave rise to a reasonable inference that appellant had a motive to murder and sexually abuse Niswonger's daughter, Candy Sisk, in part because he was angry at Niswonger and wanted to get back at her. Evidence is logically relevant if "it has some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial" (citation omitted). **Id**.

Appellant's contends that "[t]here was no evidence the murders occurred because [Niswonger] broke up with [appellant]; there was only the state's assertion that this was [appellant's] motive"(App.Br. 111). However, as this Court recently stated in **State v. Anderson**, 76 S.W.3d 275, 277 (Mo. banc 2002), "[l]ogical relevance has a very low threshold." It was not necessary for the state to prove appellant's motive beyond a reasonable doubt. The trial judge could not have abused his discretion in concluding that appellant's threat against Niswonger's son was logically relevant on the issue of motive.

Even if the legal principles governing evidence of other crimes were applicable to this evidence, contrary to the principles and authorities discussed above, appellant's reactions to Niswonger's attempts to break off their relationship were also logically and legally relevant as defined in **State v. Bernard**, 849 S.W.2d at 13. For the reasons stated above, this evidence had "some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial" (citation omitted). **Id**. Since this evidence in no way suggested that appellant had a propensity to commit crimes, "its probative effect outweigh[ed] its prejudicial value" (citation omitted). **Id**.

Nor could the trial court have abused its discretion in finding this evidence to be legally relevant, meaning that "its probative effect outweighs its prejudicial value." **Id**. Although appellant admitted in his confession that he went to the Sisk residence because he needed money (Tr. 1110), his defense at trial was designed to blunt the impact of that motive evidence: appellant's theory of innocence was that the state had not proven beyond a reasonable doubt that he had gone to the house and urged the jury not to convict the wrong person (Tr. 1206-1208, 1218). In light of this defense, evidence that appellant bore a grudge against the mother of one of the victims was particularly important, and appellant's reaction to the break-ups was crucial in establishing a reasonable inference of that motive. Where, as here, "the defendant claims innocence, evidence of motive . . . is relevant." **State v. Belton**, 949 S.W.2d 189, 195 (Mo.App., W.D. 1997), *quoting* **Shurn**, 866 S.W.2d at 457.

Furthermore, the probative effect of the motive evidence far outweighs the prejudice of having the jury hear that appellant was angry and mad when they broke up and that he was

capable of writing a letter that disturbed Niswonger. *See* Basile, 942 S.W.2d at 356 (in considering evidence that the defendant treated his girlfriend "fairly bad" this Court found that "[g]iven all the evidence in this case, this short reference to a past non-crime cannot be held to have had a decisive effect on the outcome so as to result in manifest injustice").

Moreover, contrary to appellant's assertion (App.Br. 103), the prejudicial effect of the testimony about appellant's emotional reactions was minimal. It is nonsensical for appellant to suggest that evidence that appellant became angry and upset during break-ups and that he wrote a letter that disturbed Niswonger after she attempted to finally break-up with him would constitute evidence of appellant's propensity to viciously stab her daughter and Candy's grandmother to death (App.Br. 98).

For example, appellant argues that evidence that when appellant "got 'mad' and 'angry' and then 'show[ed] up' at her mother's house" was evidence that appellant had done a similar thing in this case: "he was mad and angry at [Niswonger], he went to her daughter's house, and he killed [Niswonger's] daughter and her grandmother" (App.Br. 110). Yet, nowhere in Niswonger's testimony does she state that whenever appellant got mad and angry with her he would go to her mother's house and behave in any violent or threatening manner as to suggest to the jury that appellant had a propensity to viciously stab Niswonger's relatives whenever he gets angry with her. Appellant's premise does not acknowledge **Bernard**'s holding that there is a difference between inadmissible propensity evidence and evidence that is legally relevant as to motive. The mere fact that appellant had become mad and angry or wrote a disturbing letter to Niswonger, without any result, did not suggest that appellant was a person of violence

or bad character--what it did reflect was the state of his relationship with Niswonger, which is what made it logically and legally relevant on the issue of motive.[4]

C. Admission of the evidence was not a manifest injustice

Alternatively, even if the complained of testimony was irrelevant, its admission did not rise to the level of a miscarriage of justice. The admission of irrelevant or inadmissible evidence, otherwise free of prejudice, cannot constitute reversible error. **State v Scott**, 560 S.W.2d 879, 881 (Mo.App. E.D. St.L.D. 1977). Irrelevant or immaterial evidence is excluded, not because it is inflammatory or prejudicial, but because its admission has a tendency to draw the jury's attention from the issues it has been called upon to resolve. **Id**. In fact, in most cases, "[i]rrelevancy . . . operates to mitigate a claim of prejudice." **State v. Lager**, 744

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[4]Appellant cites various cases for the proposition that the "family connection- - Cand[y] was Shirley's daughter - - [does not] make" the complained-of testimony logically or legally relevant (App.Br. 112) *citing* **State v. Lancaster**, 954 S.W.2d 27 (Mo.App. E.D. 1997); **State v. Sexton**, 890 S.W.2d 389 (Mo.App., W.D. 1995); **State v. Olson**, 854 S.W.2d 14 (Mo.App., W.D. 1993); **State v. Kitson**, 817 S.W.2d 594 (Mo.App. E.D. 1991). However, in those cases the state introduced evidence of uncharged non-criminal or criminal *sexual* misconduct where the charges were for *sexual* crimes. Thus, it was not the propriety of using a familial connection that was improper but that in those cases the evidence was used as propensity evidence. As argued above, the evidence introduced here was used as propensity evidence nor could it be perceived as such.

S.W.2d 453, 457 (Mo.App., W.D. 1987). So, irrelevancy would also certainly operate to mitigate a claim of a miscarriage of justice.

In the present case, Niswonger's testimony regarding their relationship was not inherently prejudicial on its face. That is to say, if the jury chose to believe that the existence of their acrimonious relationship did not furnish the motive for the Candy's murder, the evidence was simply innocuous and could not have affected the jury's verdict or prejudiced the appellant to any extent. Therefore, even if the challenged evidence was irrelevant, inadmissible or non-probative, it could not furnish appellant with grounds for reversal based on a claim of manifest injustice.

Appellant attempts to raise the specter of all the inadmissible evidence this Court found occurred at the last trial by suggesting that the same error occurred here (App.Br. 106). Appellant argues that this Court found that "the status of [appellant's] romantic relationship with [Niswonger] had no connection to the charged offenses" (App.Br. 107). However, this Court did not so specifically hold but instead held as follows:

> Niswonger's testimony was not legally relevant to prove appellant's motive. **Stewart**, cited by the state, is distinguishable. In **Stewart**, the defendant threatened both his victim and the victim's mother. **Stewart**, 18 S.W.3d at 86. In the present case, there is no allegation that appellant threatened Candy Sisk or Irene Sisk. Nor is there evidence that appellant threatened Candy's mother, Niswonger. The prejudicial effect of Niswonger's testimony substantially outweighs its probative value in that it may have led the jury to

convict appellant on the propensity evidence. The trial court erred in admitting the evidence.

Id. at 148. The error this Court found in the previous trial was in "allowing Niswonger to testify that appellant once threatened to take Niswonger's son into the woods and shoot him." **Id**. at 149, 151. This Court did not expressly find that Niswonger's testimony or other evidence regarding Niswonger's and appellant's relationship was irrelevant or inadmissible as to motive. What this Court apparently found offensive was that evidence of appellant's threat to kill Niswonger's son could have been used by the jury as evidence of his propensity to kill her daughter. The evidence here regarding Niswonger's and appellant's relationship does not come close to the improper evidence from the last trial.

Also, it was not solely evidence of the death threat that caused this Court to find outcome determinative prejudice but "the sheer volume of the erroneously admitted evidence . . . the number of references highlighting the improperly admitted evidence . . . [and that] the prosecutor's elicitation of the evidence . . . was not inadvertent." **Id.** Here, although the state did argue that appellant's anger about the relationship ending was his motive for killing Candy in the manner that he did (Tr. 1226), the state did not elicit or mention again the "disturbing letter" or that appellant "showed up" at Niswonger's mother's house when angry.

Finally, here, a manifest injustice could not have resulted, because there was overwhelming evidence of appellant's guilt as evidenced by his own admission to the police and as outlined in Point I above. *See* **State v. Neil**, 869 S.W.2d 734, 737 (Mo.banc 1994).

In sum, no basis exists under the above facts and law for a conclusion that appellant suffered manifest injustice.

IV.

A.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN OVERRULING APPELLANT'S MOTIONS FOR A CONTINUANCE AND FOURTH CHANGE OF VENUE BECAUSE ONLY TWO JURORS HAD HEARD ABOUT THE ARTICLE AND NONE OF THE JURORS HAD FORMED OPINIONS ON APPELLANT'S GUILT.

B.

THE TRIAL COURT DID NOT PLAINLY ERR OR ABUSE ITS DISCRETION WITH RESPECT TO APPELLANT'S MOTION FOR SPECIFIC INDIVIDUAL VOIR DIRE OF EACH VENIREPERSON ON THE ISSUE OF WHAT SPECIFIC INFORMATION THEY HAD LEARNED FROM A NEWSPAPER ARTICLE BECAUSE APPELLANT WAIVED HIS CLAIM AS TO THE PROCEDURES USED IN THE FIRST THREE PANELS AND WITH RESPECT TO ALL FIVE PANELS THE VOIR DIRE PERMITTED WAS SUFFICIENT TO UNCOVER BIAS FROM THE ARTICLE AS QUESTIONING REVEALED WHETHER VENIREPERSONS HAD HEARD ABOUT THE CASE, THE SOURCE OF INFORMATION, WHETHER THEY HAD FORMED AN OPINION, AND IF SO, WHETHER THEY COULD SET THAT OPINION ASIDE.

Appellant claims that the trial court erroneously overruled defense motions pertaining to issues of pre-trial publicity (App.Br. 114). Specifically, he claims the court erroneously overruled defense motions "for a continuance and change of venue or alternatively to select

a jury from another county or alternatively for individual voir dire of jurors who had read or hear about the case" (App.Br. 114).

Although appellant attempts to characterize this claim as one of prosecutorial misconduct, the essence of his claim is that his trial was unfair because of the venirepersons exposure to pre-trial publicity. However, appellant's claim fails based on well-settled Missouri and United States Supreme Court law.

Facts

At the first trial there was a change of venue from New Madrid to Dent County. **State v. Barriner**, 34 S.W.3d 139 (Mo.banc 2000). Upon remand by this Court for a re-trial, the parties stipulated to a change of venue from Dent County to Franklin County (L.F. 1). Subsequently, two more changes of venue were granted to Audrain and then Warren Counties upon appellant's request based on scheduling and preparation problems (Tr. 2, 4, L.F. 52-70, 119). The day before trial, an article about the case appeared in the Metro section of the St. Louis Post-Dispatch (Tr. 2, Def. Ex. 1). The next morning, defense counsel informed the court about the article, noting that this was the only publicity she had seen on the case (Tr. 2-6). Counsel moved for dismissal with prejudice, or for a continuance and change of venue, or for the opportunity to select a jury from another county (Tr. 6-9). The court denied the motions and proposed placing the venirepersons into small panels of 18 to be examined on pre-trial publicity and other issues before conducting general voir dire (Tr. 9). The parties agreed (Tr. 9).

Voir dire on the issues of pre-trial publicity and death qualification was conducted in five small groups of differing sizes (Tr. 25-507). During the questioning of each panel, the prosecutor asked whether the venirepersons had heard or read anything about the case (Tr. 25, 112, 192, 263, 366). Both the prosecutor and defense counsel then questioned those who had answered affirmatively whether they had formed an opinion on appellant's guilt, and if so, whether the venirepersons could set aside that opinion and judge the case just on the evidence presented at trial (Tr. 25, 62).[5]

Of the 97 prospective jurors who were summoned, 30 had read or heard about the article from the Post-Dispatch and one had remembered the case from seeing a "picture from years ago" (Tr. 26-32, 112-116, 173, 192-193, 263-266, 268, 273, 286-291, 367-370, 372, 496). Of those 31 venirepersons who had read or heard about the article or the case, 21 stated that they could be fair and set aside what they read or heard (Tr. 26-30, 114-116, 173-174, 264-266, 268, 273, 286-291, 367-369, 379, 496), and only 4 of those indicated they had formed an opinion but that they could set it aside (Tr. 26-27, 264-266, 268, 367-368, 379). Of the 31 who had read or heard about the case, 10 had formed an opinion and stated that they could not set their opinions aside (Tr. 26, 112-113, 192, 193, 263, 265-266, 287, 370, 372). All of 10 venirepersons were excused for cause (Tr. 89, 171, 243, 339-340, 428). Of the 31

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[5] Although not always specifically asked what their source of information had been, most venirepersons volunteered whether they read about the article, had heard others talk about the article or had heard about the case from some other source (Tr. 25, 28, 114-117, 192, 263-266, 273, 282, 286-291, 367-368, 370, 372, 496).

venirepersons who had read or heard about the case **only 2** served as jurors (Tr. 496, L.F. 170). The jurors had not read the article but had heard about it from people at work or at a gas station (Tr. 496-497). Neither formed an opinion on appellant's guilt and they both stated they could be fair, set aside what they had heard and follow the court's instructions (Tr. 496-498).

Motions for Continuance for an opportunity to obtain a Change of Venue

As to appellant's claim that he was entitled to a fourth change of venue (App.Br. 114), whether to grant or deny a change of venue rests within the trial court's discretion, and its ruling will not be disturbed absent an abuse of discretion. **State v. Feltrop**, 803 S.W.2d 1, 6 (Mo. banc 1991), *cert. denied* 501 U.S. 1262 (1991). The relevant question is not whether the community remembered the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt of the defendant. **Patton v. Yount**, 467 U.S. 1025, 104 S.Ct. 2885, 2891, 81 L.Ed.2d 847 (1984). An abuse of discretion exists only when the record shows that the inhabitants of the county are so prejudiced against the defendant that a fair trial cannot occur there. **State v. Feltrop**, **supra** at 6. The trial court is in a better position than the appellate court to assess the effect of publicity on the minds of the community and to determine whether the residents of the county are so prejudiced against the defendant that a fair trial would not be possible. **Id**.

It is not required that the jurors be totally ignorant of the facts and issues involved. **Irvin v. Dowd**, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961).

> In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the

> vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Id., 366 U.S. at 722-723.

For example, in **Patton v. Yount**, the United States Supreme Court found that the pretrial publicity did not make a fair trial impossible in the county where the crime occurred, even though all but 2 of the 163 venirepersons had heard about the case and 126, or 77%, admitted that they would carry an opinion into the jury box. 467 U.S. 1025. This was because, although many people still carried strong opinions about the case, there was no longer a huge wave of public passion that 4 years had passed since the time of the murder. **Id**. at 1032-1033.

Thus, it is normally within the legitimate province of a trial court to conclude that the jurors were not prejudiced, regardless of whatever publicity they have seen, **State v. Schneider**, 736 S.W.2d 392, 403 (Mo. banc 1987), *cert. denied* 484 U.S. 1047 (1988), as long as the jurors state that they can be fair and impartial. **State v. Kinder**, **supra** at 321-322.

Here, the record demonstrates that there was no extraordinary pretrial publicity or widespread public hostility towards appellant that created a circus atmosphere and created a

presumption that venirepersons answers about being unbiased could not be trusted. On the contrary, it shows that some publicity occurred and that individuals who held fixed opinions about appellant's innocence or guilt readily volunteered that they were biased and were struck from the panel. There was no huge wave of public passion and bitter prejudice against appellant in Warren County. The trial occurred six years after the crime had been committed in southern Missouri. The fact remains, appellant cannot point to a single person who served on the jury who had fixed opinions as to his guilt and threatened his right to a fair trial. *See* **State v. Hall**, 982 S.W.2d 675, 682 (Mo. banc 1998), *cert. denied* 118 S.Ct. 1375 (1998). He therefore has failed to show actual prejudice from the trial of his case in Warren County as he cannot meet that burden by "speculation" in that he has the burden of proving prejudice "as a demonstrable reality." **Beck v. Washington**, 369 U.S. 541, 558, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962). He does not attempt to meet this burden.

Thus, the trial court did not abuse its discretion when it denied appellant's motion for a continuance for an opportunity to obtain a fourth change of venue.

Claim for Individual Voir Dire

Appellant's claim that the trial court erred in denying his motion for individual voir dire is not preserved for appeal. At trial, counsel moved for dismissal with prejudice, or for a continuance and change of venue, or for the opportunity to select a jury from another county (Tr. 6-9). The court denied the motions and proposed placing the venirepersons into small panels of 18 to be examined on pre-trial publicity and other issues before conducting general voir dire (Tr. 9). The parties agreed (Tr. 9). By agreeing to the trial court's proposal, appellant

waived any claim as to the procedures used. Therefore, appellant's failure to raise this claim below is fatal on appeal. "One who would challenge a jury panel must do so before trial by pleading and proving fatal departures from the basic procedural requirements." **State v. Sumowski**, 794 S.W.2d 643, 647 (Mo.banc 1990). On appeal an accused may not broaden the objection made at trial. **State v. Clark**, 26 S.W.3d 448, 457 (Mo.App., S.D. 2000). "The failure to make a timely and proper objection constitutes a waiver." **State v. Sumowski**, **supra**.

Moreover, appellant does not request plain error. **Id**. at 648. Nor does he attempt to show that manifest injustice occurred by alleging that the trial court's actions resulted in a biased juror serving on his case. *See* **Morrow v. State**, 21 S.W.3d 819, 827 (Mo.banc 2000), 121 S.Ct. 1140 (2001). Therefore, as to the first three panels, appellant's claim regarding specific individual voir dire has been waived.

Individual voir dire is not required in death penalty cases. **State v. Christeson**, 50 S.W.3d 251, 262 (Mo.banc 2001). "Whether to conduct voir dire individually or in small groups is within the control of the trial court and is not a basis for reversal of a conviction absent a showing of both an abuse of discretion and actual prejudice." **State v. Ervin**, 835 S.W.2d 905, 917 (Mo. banc 1992), *cert. denied* 507 U.S. 954 (1993), *quoting* **State v. McMillin**, 783 S.W.2d 82, 94-95 (Mo. banc 1990), *cert. denied* 498 U.S. 881 (1990).

A trial court abuses its discretion in limiting questioning in voir dire if the questioning "permitted does not allow for the discovery of bias, prejudice, or impartiality." **State v. Barton**, 998 S.W.2d 19, 25 (Mo. banc 1999), *cert. denied* 120 S.Ct. 945 (2000). As noted

earlier, the relevant question is whether the jurors had such fixed opinions about the case that they could not impartially judge the defendant's guilt or innocence under the law. **Id.** There is no federal constitutional right to question venirepersons about the content of any publicity to which they have been exposed. **Mu'Min v. Virginia**, 500 U.S. 415, 431-32, 111 S.Ct. 1899, 1908, 114 L.Ed.2d 493 (1991).

In the case at bar, the voir dire uncovered whether the venirepersons had learned anything at all about the case, the source of that information, whether they had formed an opinion about the case, and, if so, whether they could set that opinion aside. This questioning was sufficient to uncover any bias that could form the basis of a challenge for cause. In **Barton**, this Court held that the was no abuse of discretion in the trial court's refusing to allow the defendant to ask the venirepersons the source of any information they had; the venirepersons were asked whether they had been exposed to publicity, if they had formed an opinion about the case, and, if so, whether they could put that opinion aside, and defense counsel was permitted some questioning on the amount of publicity and their opinions on that publicity, and that questioning was sufficient to determine whether the venirepersons could be fair, unbiased, and impartial. **State v. Barton**, 998 S.W.2d at 24-26. In the case at bar, not only was the questioning found acceptable in **Barton** followed, but the court additionally allowed questioning and answers from the venirepersons about the source of the their information (Tr. 25, 28, 114-117, 192, 263-266, 273, 282, 286-291, 367-368, 370, 372, 496). Furthermore, this Court noted that what was "[m]ost important" was that "the record is clear that none of the jurors selected for the trial indicated that they held an opinion about [the

defendant's] guilt before the evidence was presented or that they could not decide his guilt or innocence based on the evidence." **State v. Christeson**, 50 S.W.3d 251, 263 (Mo.banc 2001). Here, the record is clear that none of the jurors who served at trial held an opinion about appellant's guilt. Thus, there was no abuse of discretion, let alone manifest injustice, in the trial court's conduct of voir dire.

Buried in appellant's argument but not in his point relied on is the claim that "this Court cannot ratify the trial court's refusal to quash [the fourth] panel or to allow more detailed questioning of all jurors who indicated they had heard or read about the article" (App.Br. 126-127). When the prosecutor asked the fourth panel whether anyone had "heard anything, discussed anything, or read anything or seen anything on the Internet about this case" (Tr. 262), seven venirepersons responded that they had read or heard about the case (Tr. 263-266, 273). After questioning Venireperson Schnaath about how he had heard others talking about the article in the jury room, the trial court allowed defense counsel to pursue the issue of the article further with the group (Tr. 285). Counsel asked the panel if anyone had heard about the article to respond even if they had not personally read the article (Tr. 286). Seven more venirepersons indicated that they had heard others talking about the article in the jury room (Tr. 286-291). Of the 14 venirepersons from the fourth panel who stated that they read or heard about the case, 4 stated that they had formed opinions that they could not set aside (Tr. 263, 265, 266, 287). Those four venirepersons in addition to seven more from the 14 who had said they read or heard about the case were excused for cause based on their inability to be fair or on some other basis (Tr. 339-342, 504). The trial court denied appellant's motion to quash the

fourth panel and noted that there wasn't "any reason to believe that any of the jurors have deliberately concealed anything from counsel's voir dire" (Tr. 295).

Even if members of fourth panel could be viewed as being particularly biased (which the record does not reflect that they were) there is no evidence that these venirepersons influenced others from the four other panels, much less the jurors who served at trial. This is particularly true considering the fact that only one of the members from the fourth panel served as a juror (Tr. 221, 247-347, L.F. 165-166, 170). Again, the relevant inquiry is not precisely what they learned about the case from pretrial publicity, but whether they could set that information and any fixed opinions aside. Any members from the fourth panel who stated that they could not set their opinions aside were excused for cause. Appellant cannot establish prejudice.

Because the record shows that appellant suffered no prejudice from the venire panel's exposure to pre-trial publicity, appellant's claim based on an alleged ethical violation is meritless. Whether or not the prosecutor's conduct amounted to an ethical violation is not the issue here, as the record shows appellant received a fair trial. *See* **State v. Clemons**, 946 S.W.2d 206, 217 (Mo. banc 1997). In **Clemons**, the prosecutor was found in contempt of deliberately violating the trial court's order not to mention Charles Manson during argument and the defendant asked for a reversal based on the prosecutor's misconduct. **Id**. This Court denied his claim and stated that "the criminal component of due process analysis in cases involving prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." **Id**. (*citing* **Smith v. Phillips**, 455 U.S. 209, 219, 71 L.Ed.2d 78, 102 S.Ct. 940

(1982)). Appellant does not cite nor is respondent aware of any case law where an otherwise valid conviction was reversed based solely on a prosecutor's violation of an ethical duty relating to pre-trial publicity.[6] Therefore, appellant's reliance on out-of-state cases is misplaced, and his point must fail.

[6]**Bush v. Kentucky**, 839 S.W.2d 550 (Ky 1992), cited by appellant is inapposite as it was an instance where one of the venirepersons who ultimately served as a juror indicated she **was** influenced by a newspaper article about the case **and** the court found two other instances of reversible error when it stated that it considered the prosecutor's misconduct "grounds for reversal."

V.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SUPPRESS BECAUSE HIS STATEMENTS WERE VOLUNTARY IN THAT (1) THE COURT WAS NOT COMPELLED TO ADOPT APPELLANT'S SELF-SERVING CONSTRUCTION OF THIS EVIDENCE AS DEMONSTRATING A THREAT AGAINST APPELLANT BY THE INTERROGATING OFFICERS, AND (2) EVEN IF THE EVIDENCE AT ISSUE WERE CONSTRUED AS SHOWING A THREAT, THE FACTUAL CONTEXT ESTABLISHES THAT IT WAS NOT A "CREDIBLE THREAT" THAT WOULD RENDER APPELLANT'S CONFESSION INVOLUNTARY.

Appellant contends that trial court erred in "overruling [his] amended motion to suppress" in that his statements were not voluntary as they were "coerced by a combination of circumstances" (App.Br. 130, 133). Appellant claims that his statement was not voluntary as evidenced by "his refusal to sign a waiver of his rights, his incoherent condition during interrogation, Officer Hinsely's intimidating and threatening revelation that Irene's nephew was a sheriff, and both officers' display of their guns" (App.Br. 130).

The standard of appellate review for this claim is well-settled:

> When reviewing a trial court's ruling on a motion to suppress, the inquiry is limited to whether the court's decision is supported by substantial evidence. . . . . Deference is given to the trial court's superior opportunity to determine the credibility of witnesses. . . . As in all matters, a reviewing court gives

deference to the trial court's factual findings and credibility determinations, but reviews questions of law de novo.

(Citation omitted.) **State v. Rousan**, 961 S.W.2d 831, 845 (Mo. banc 1998), *cert. denied* 524 U.S. 961 (1998). In considering the sufficiency of the evidence to sustain the trial court's ruling, the appellate court considers both the record made at the pretrial suppression hearing and the evidence presented at trial. **State v. Deck**, 994 S.W.2d 527, 534 (Mo. banc 1999), *cert. denied* 120 S.Ct. 508 (1999); **State v. Woolfolk**, 3 S.W.3d 823, 828 (Mo.App., W.D. 1999).

A. The Relevant Facts

Prior to trial, appellant filed an amended motion to suppress (L.F. 152-159). At the pre-trial motion hearing, appellant stated that he was adopting the testimony from the suppression hearing at the first trial but wanted to add to the testimony with additional questions for Officer Hinesly (Mot.Tr. 99). After hearing testimony, appellant asked the court to take judicial notice of the transcript and hearing from the first suppression hearing and the court stated it would and took the issue under advisement (Mot.Tr. 117-118). Appellant and respondent both agree that it is not clear where the trial court ultimately ruled on the motion. However, at trial when appellant first objected to testimony regarding his statements based on his "previously filed motion", the trial court overruled his objection and showed it as continuing and the parties treated the motion as if it had already been overruled (Tr. 542-543).

Viewed in the light most favorable to the trial court's ruling, the evidence relevant to the voluntariness of appellant's statement is as follows: at around 4:15 pm on Wednesday, December 18, two days after the murders, appellant was contacted at his residence by Lieutenant Steven Hinesly of the Missouri State Highway Patrol and Deputy Scott Johnson of the Butler County Sheriff's Office (Prev.Tr. 5-7, 15-16, 27, 65, Tr. 1093). Lieutenant Hinesly informed appellant that they were investigating the homicide of Candy Sisk, to which appellant replied, "Candy is dead?" but asked for no further details (Prev.Tr. 6, Tr. 1094). Hinesly asked appellant if he would come to Highway Patrol headquarters and talk to them about this matter; appellant acted "nervous" but agreed to accompany the officers (Prev.Tr. 6-7, 27-28, Tr.1094-1095).

When they arrived at Patrol headquarters, Lieutenant Hinesly determined that appellant had an active warrant for his arrest on an unrelated charge of burglary, and he advised appellant of that fact and read him his Miranda rights (Prev.Tr. 8-9, 28-29). Appellant agreed to talk, indicated he understood his rights and signed a waiver of his rights (Prev.Tr. 8-9, 29, Tr. 1095). Lieutenant Hinesly informed appellant that Irene Sisk was also dead, and appellant responded, "Was Irene dead too?" but made no further inquiry (Prev.Tr. 7, Tr.1095). At Hinesly's request, appellant described his relationship with Candy's mother, Shirley Niswonger, and his acquaintance with Candy and other members of the family (Prev.Tr. 7, Tr.1096); among other things, he related that he had accompanied Niswonger to the Sisk house when she had gone there to borrow money, and stated his impression that the Sisks were "well-to-do" (Tr. 1096-1097).

When asked where he had been at the time of the murders, appellant first said that he had spent Sunday night at a motel with a girlfriend, and that on Monday before noon he had made trips to the towns of Fisk, Cape Girardeau and Sikeston (Tr. 1099-1100). Lieutenant Hinesly challenged appellant's account, pointing out that it was impossible for appellant to have traveled to all three of those places in a single morning, whereupon appellant changed his story, saying that he had been at the home of a friend named Kevin Dennis on Monday morning, where he had bought and consumed some methamphetamine and had also put up some sheetrock for Dennis (Tr. 1101-1102). Hinesly told appellant that he would check out appellant's story with Dennis, after which appellant was booked into the Butler County Jail on the burglary charge (Prev.Tr. 9-10, Tr. 1102). While being taken to the jail, he consented to a search of his residence (Prev.Tr. 10, 29-30, Tr. 1129).

At around 9:00 pm the next evening (Thursday, December 19), appellant was interviewed a second time by Lieutenant Hinesly and Deputy Johnson in the Sheriff's Office at the Butler County Courthouse (Prev.Tr. 10-11, Tr. 1106-1107). Hinesly told appellant that, based upon the information that had been developed since the previous interview, he felt that appellant was definitely involved in the murders and that he wanted to discover the "why" of these crimes (Prev.Tr. 11-12, 31, Tr.1107). Hinesly again informed appellant of his Miranda rights, and appellant said that he was willing to talk to the officers, but refused to sign a written waiver form (Prev.Tr. 12, 35-36, Tr. 1107). In the course of the subsequent questioning, which lasted several hours, Hinesly commented that a nephew of Irene Sisk was a sheriff somewhere in Southern Missouri and that in his opinion the nephew would want to see appellant in prison

(Mot.Tr. 108). Hinsely also alluded to what he thought the nephew would like to see happen to appellant (Mot.Tr.116, Tr. 139).[7] At one point during the questioning, appellant began acting strangely, rolling his eyes and breathing deeply, and the officers handcuffed him for their own safety (Prev.Tr. 74, Mot.Tr. 105,Tr.1137-1138). Hinesly said, "stay with me Cecil" and "can you hear me?"(Mot.Tr. 105,Tr. 1137). After a few minutes appellant "seemed fine" and the officers continued with the interview (Mot.Tr. 106). Hinesly did not think medical attention was necessary (Mot.Tr. 106, Tr. 1138).

Appellant told Hinesly that he wanted to tell the truth but that he just couldn't and that he would "let the evidence speak for itself" (Tr. 1108). After repeating that he wanted to tell the truth but could not several times, appellant asked to talk to his brother Belvi (Prev.Tr. 12-13, 67-68, Tr. 1108). Appellant's brother was contacted by telephone and came to the Sheriff's Office, where he spoke privately with appellant for about five minutes (Prev.Tr. 13, 38-40, 43-44, 69-71, Tr. 1109). When the interview with Hinesly and Johnson resumed, appellant broke down crying and blurted out, that he did not mean to kill them, "but they wouldn't quit screaming and wouldn't shut up," and for the next five or six minutes he confessed to the crime without any questioning or prompting by the officers (Prev.Tr. 12, 45-46, Tr. 1109-1110).

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[7] During cross-examination at the first trial, Hinesly testified that he also told appellant that he didn't care what happened to appellant if appellant was not going to be honest or show remorse (Prev.Tr. 1298-1300).

Appellant said that he had become concerned that he had failed a urinalysis for the presence of controlled substances (Tr. 1110), and that he had gone to the Sisk house in order to get money to leave town (Prev.Tr. 45, Tr. 1110). He claimed that his intent had been to tie up Irene and Candy Sisk in a manner so that they could free themselves later and seek help (Prev.Tr. 45, Tr. 1110). According to appellant, Candy and Irene Sisk had disagreed over whether to surrender money to appellant, and Irene Sisk had started to write out a check but did not sign it (Tr. 1110). Appellant stated that Candy had then written a check and that he had taken the Sisks to the bank, where Candy cashed her check (Tr. 1110). When they returned to the Sisk residence, appellant said, he had tied them up, but that as he was leaving the house he saw that Irene Sisk had already gotten free and was looking at him out of the kitchen window (Prev.Tr. 45-46, Tr. 1111). Appellant alleged that Irene Sisk had reached for a knife as he was retying her, and he also said that the victims wouldn't stop screaming, and that he "shut them up" (Prev.Tr. 46, Tr. 1111). He denied sexually assaulting Candy Sisk, and said that officers would not find any semen at the murder scene (Prev.Tr. 49, Tr. 1114, 1143). Appellant said that he had worn gloves when he had gone to the Sisk residence so that his fingerprints would not be discovered by police, and that he had later thrown the camouflage jacket that he had been wearing out the window of his car because it had blood on it (Tr. 1111,1114). When he returned to Poplar Bluff, appellant checked into the Tower Motel because he was afraid that he had been followed (Tr. 1112).

A short time after this interview concluded, as appellant was being returned to the jail, Hinesly contacted appellant and asked him a few more questions, and also inquired if appellant

would be willing to make a videotaped or written statement (Prev.Tr. 13-14, 48-50, Mot.Tr.114-115, Tr. 1115). Appellant said that he was too tired to make a videotaped statement that night, but that he might do it the next day (Prev.Tr. 14, Tr. 1115). Appellant observed that "the ironic thing" about his situation was that he had since learned that he probably wouldn't have had to go back to jail for "just failing one piss test" (Tr. 1115). At no time during any of the interviews by Hinesly and Johnson did appellant ask to have an attorney present, nor did the officers threaten to harm appellant (Prev.Tr. 37-38, 45, 66-68, Mot.Tr.109, 112).

Appellant chose not to take the stand at trial, but his testimony at the suppression hearing from the first trial was that he had requested an attorney during questioning, and his request had been refused by Lieutenant Hinesly and Deputy Johnson (Prev.Tr. 52, 57-60). He claimed that he had not mentioned this fact to his brother at the time of their visit because he had heard of past violence committed by deputy sheriffs in Butler County, and he did not want his brother to be harmed (Prev.Tr. 58-59). Appellant alleged that, after he had spoken with his brother, Hinesly had pointed his pistol at appellant's head and threatened to kill him, and had later threatened to throw appellant out of a window (Prev.Tr. 52-53, 55-57, 60-61). Appellant asserted that, after the second of these alleged threats, he had falsely confessed to the murders because he was "scared for [his] life" (Prev.Tr. 54-56). Appellant did not allege any other threats by the interrogating officers, and he said that "no threats" had been made against him prior to his visit with his brother (Prev.Tr. 57).

B. Appellant's Claim That His Confession Was

Coerced By "Threats" By the Officers

Appellant claims that his confession was coerced by Hinesly's comment that a nephew of Irene Sisk was a sheriff somewhere in Southern Missouri and that in his opinion the nephew would want to see appellant in prison, as well as by alluding to what he thought the nephew would like to see happen to appellant (Mot.Tr.108, 116, Tr. 1139). Appellant asserts that it was an "implicit" threat that if appellant "did not make a confession or statement, he would end up in Irene's nephew's jail" (App.Br. 134-135).

However, the trial judge was not compelled to adopt appellant's aggressively self-serving construction of the evidence. Lieutenant Hinesly testified that he mentioned Irene's nephew because he wanted appellant "to know that there was somebody in that family in law enforcement that cared" (Mot.Tr. 110). One reasonable construction of this comment is that Hinesly was telling appellant that, even though the victim's nephew bore a grudge against him, he was not at risk because Hinesly--not the nephew--was questioning him. The question on appeal is not whether appellant can assemble the evidence in a manner that suggests that he was threatened, but rather whether the evidence is sufficient to sustain the trial court's ruling. **State v. Rousan**, **supra**, 961 S.W.2d at 845. The evidence at bar amply supports the denial of appellant's motion to suppress his inculpatory statement.

Even ignoring these principles and assuming arguendo that the comments by Hinesly could be construed as a threat of some kind, they would still fail to establish that the trial court erred in concluding that appellant's statement was voluntary. "The test for voluntariness is whether, under the totality of the circumstances, the defendant was deprived of free choice to

admit, to deny, or to refuse to answer and whether physical or psychological coercion was of such a degree that the defendant's will was overborne at the time he confessed" (citation omitted). **State v. Ervin**, 979 S.W.2d 149, 160 (Mo. banc 1998), *cert. denied* 525 U.S. 1169 (1999); see **Schneckloth v. Bustamonte**, 412 U.S. 218, 225-226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). This determination is made from a review of the totality of the circumstances. **Id**. at 226-227. Where, as here, it is alleged that a confession was obtained by a threat, the question is whether it was a "credible threat" and whether, under the totality of the circumstances, it rendered the defendant's confession involuntary. **Arizona v. Fulminante**, 499 U.S. 279, 285-288, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).

The statements cited by appellant could not be called a "credible threat" under any definition of that term. Saying that another law enforcement officer, somewhere in Southern Missouri, wished appellant ill--even considered together with an assertion that the interrogator did not care what happened to appellant if he did not tell the truth--did not state or imply that appellant would be harmed if he did not confess to the murders. Giving Lieutenant Hinesly's statement the most negative possible reading, the most that he said was that if appellant had been in the jail in the county where the nephew of Irene Sisk was sheriff, Hinesly believed that he would be in danger of retaliation. Hinesly did not say (a) that appellant was going to be sent to this unspecified jail, (b) that the victim's nephew was coming to where appellant was incarcerated, or (c) that the nephew's alleged hostility would be affected in the slightest by whether or not appellant admitted his guilt.

In fact, Hinesly specifically denied telling appellant that the nephew would like to harm him and that the nephew was traveling to the Butler County jail to cause harm to appellant while he would do nothing to interfere (Mot.Tr. 109). These facts are drastically different from those in **Arizona v. Fulminante**, **supra**, where the United States Supreme Court found a "credible threat" from the fact that the defendant, an inmate at a correctional institution, was the victim of "rough treatment" by other prisoners and was told by his questioner that he would *only* receive protection from them if he confessed to the crime. **Id**., 499 U.S. at 282-283, 287.

Appellant also claims that his waiver was involuntary as evidenced by his refusal to sign a waiver of rights (App.Br. 130). However, there is no requirement that appellant's waiver be in writing and no requirement that appellant sign his waiver. The only requirement is that one is informed of his right to remain silent under Miranda and understands that right. **State v. Bucklew**, 973 S.W.2d 83, 87-88 (Mo. banc 1998). A defendant may waive his rights by orally indicating a willingness to cooperate in police questioning without signing a written waiver. **State v. Day**, 987 S.W.2d 824, 825 (Mo.App.E.D. 1999); *see also* **State v. Urhahn**, 621 S.W.2d 928, 931 (Mo.App.E.d. 1981). There was no evidence that appellant did not understand his rights, that his faculties were impaired, or that he was coerced. It was a knowing and intelligent waiver.

Additionally, appellant claims that his "physical and mental condition "deteriorated to the point that he was incoherent- - possibly having a seizure- - and very vulnerable to such coercive tactics" (App.Br. 138-139). However, it is well settled that a valid waiver of Miranda

rights may be made despite an injury to the defendant. *See, e.g.*, **State v. Lang**, 795 S.W.2d 598, 602 (Mo.App. E.D. 1990); **State v. Luster**, 750 S.W.2d 474, 479 (Mo.App., W.D. 1988) (citing cases); **State v. Thomas**, 522 S.W.2d 74, 76-77 (Mo.App. St.L.D. 1975). "There is no constitutional prohibition against a seriously wounded person confessing to the commission of a crime . . .Unless there is evidence to indicate that he was suffering severe pain or that he did not fully understand the subject matter of the conversation" **State v. Maynard**, 707 S.W.2d 810, 813-14 (Mo.App. W.D. 1986) (*citing* **State v. Granberry**, 484 S.W.2d 295, 300 (Mo. banc 1972)).

Here, Hinesly testified that at one point appellant started acting strangely, rolling his eyes and breathing deeply, and the officers handcuffed him for their own safety (Prev.Tr. 74, Mot.Tr. 105,Tr.1137-1138). Hinesly said, "stay with me Cecil" and "can you hear me?"(Mot.Tr. 105,Tr. 1137). Hinesly did not think medical attention was necessary (Mot.Tr. 106, Tr. 1138). And after a few minutes appellant "seemed fine" and the officers continued with the interview (Mot.Tr. 106). Thus, there was no evidence that appellant's temporary condition of rolling his eyes and breathing deeply caused him severe pain or rendered him incapable of understanding the subject matter of the conversation as is required in the physical injury line of cases. Upon resuming the interview, appellant did not request medical attention and he proceeded to confess to the crimes in detail.

Moreover, viewing the totality of the circumstances surrounding appellant's confession, the statements at issue could not have overborne appellant's will in deciding whether or not to admit his guilt. *See* **Schneckloth v. Bustamonte**, **supra**, 412 U.S. at 226-227 (discussion of

relevant factors). Appellant was no stranger to the criminal justice system: he had a prior felony drug conviction (Tr. 1292), and he was incarcerated on a warrant for another previous offense unrelated to the murders at bar (Prev.Tr. 7-8). He was twice advised that he did not have to talk to the officers, but nevertheless chose to do so (Prev.Tr. 8-9, 12, 28-29, 35-36, Tr. 1095, 1107). No evidence was offered that appellant was mentally infirm or otherwise particularly susceptible to coercion. Appellant repeatedly told the officers that he wanted to confess (Tr. 1108), and he was given an opportunity at his own request to speak in private with his brother before questioning resumed (Prev.Tr. 13, 38-40, 43-44, 69-71, Tr. 1108). Appellant's admission of guilt was not dragged out of him by the questioners: he blurted out that he had not meant to kill the victims and spoke about his crime for the next five or six minutes without further prompting (Prev.Tr. 12, 45-46, Tr. 1109-1110).[8] Viewing the evidence as a whole, the trial court did not err in denying appellant's motion to suppress statements and in overruling his trial objection to this evidence. For similar analyses, see **State v. Williams**, 951 S.W.2d 332, 334-335 (Mo.App., S.D. 1997); **Haak v. State**, 695

[8] Appellant characterizes the evidence as the officers' "display[ing]" their guns in an effort to suggest one of the numerous relevant factors was present in determining whether there was coercive police activity (App.Br. 130). However, there is a difference between officers holding a gun to a defendant's head and officers who have their service weapons in their holsters as was the case here (Mot.Tr. 106-107). *See* **State v. Love**, 831 S.W.2d 631, 634 (Mo.App., W.D. 1992) (consent to search voluntary where the officer "reholstered his weapon" and "no weapon was pointed towards defendant" at the time of consent).

N.E.2d 944, 947-949 (Indiana 1998); **Hood v. State**, 329 Ark. 21, 947 S.W.2d 328, 333-335 (1997); **State v. Carroll**, 138 N.H. 687, 645 A.2d 82, 86-87 (1994); and **United States v. Heatley**, 994 F.Supp. 477, 482 (S.D. N.Y. 1998).

For the reasons stated above, appellant's present claim of error should be rejected.

VI.

THIS COURT SHOULD, IN THE EXERCISE OF ITS INDEPENDENT REVIEW, AFFIRM APPELLANT'S SENTENCES OF DEATH BECAUSE (1) THEY WERE NOT IMPOSED UNDER THE INFLUENCE OF PASSION, PREJUDICE OR ANY OTHER ARBITRARY FACTOR; AND (2) APPELLANT'S SENTENCES ARE NOT EXCESSIVE OR DISPROPORTIONATE TO THOSE IN SIMILAR CASES, CONSIDERING THE CRIMES, THE STRENGTH OF THE EVIDENCE, AND THE DEFENDANT.

As his sixth point on appeal, appellant invokes this Court's duty of independent sentence review under Section 565.035.3, RSMo 2000, arguing that "there is good reason to find the state's evidence insufficiently strong to support a sentence of death in this case" and citing various of his claims of trial error as evidence that appellant's "sentences of death are excessive and disproportionate" (App. Br. 142-152).

Contrary to appellant's assertions, the proportionality review conducted by this Court is not a requisite under the due process clause, or under any other provision of the United States Constitution. **Morrow v. State**, 21 S.W.3d 819, 829-830 (Mo.banc 2000), *cert. denied*, 531 U.S. 1171 (2001).[9]

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[9] **Cooper Industries, Inc. v. Leatherman Toolgroup, Inc.**, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001), cited by appellant, does not support his claim: this decision concerned the review of punitive damage awards and did not purport to overrule, modify or even address **Pulley v. Harris**, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), which held that proportionality review is not constitutionally required in an otherwise valid capital

Under the mandatory independent review contained in §565.035.3, RSMo 2000, this Court has to determine:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
>
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstance found;
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime the strength of the evidence and the defendant.

This Court's proportionality review is designed to prevent freakish and wanton application of the death penalty. **State v. Ramsey**, 864 S.W.2d 320, 328 (Mo.banc 1993), *cert. denied* 511 U.S. 78 (1994).

1. Sentence was not imposed under the influence of passion, prejudice, or any other improper factor and the statutory aggravating circumstances were supported by the evidence and are valid

The record shows that appellant's sentences were not imposed under the influence of prejudice, passion or any other improper factor. Appellant's argument on this matter is just a rehash of the arguments that were shown to be without merit in other parts of this brief.[10]

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sentencing system.

[10]Appellant also cites **Cooper Industries, Inc.**, **supra**, for the proposition that the

In addition, the statutory aggravating circumstances were supported by the evidence and are valid. The evidence presented at trial supported the jury's findings of the statutory aggravating circumstances that:

> (1) the murder of Irene [Candy] Sisk was committed while the defendant was engaged in the commission of another unlawful homicide of Candy [Irene] Sisk;
>
> (2) the defendant murdered Irene [Candy] Sisk for the purpose of the defendant receiving money or any other thing of monetary value from Irene or Candy Sisk;
>
> (3) the murder of Irene [Candy] Sisk involved torture and depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible and inhuman;
>
> (4) the murder of Irene [Candy] Sisk was committed while the defendant was engaged in the perpetration of robbery;

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alleged trial errors he cites should be considered in evaluating the reliability and appropriateness of the verdict of death (App. Br. 146-147). **Cooper Industries** has nothing whatsoever to say on this issue. Appellant's argument is superfluous, however, because §565.035.3(1) already directs this Court to review the record for "arbitrary factor[s]" that could have caused the trier of fact to assess punishment based upon something other than the relevant facts and law.

(5) the murder of Irene [Candy] Sisk was committed while the defendant was engaged in the perpetration of kidnapping; and

(6) Irene [Candy] Sisk was a potential witness in a pending prosecution or investigation and was killed as a result of her status as a potential witness.

(L.F. 202-203, 209-210). § 565.032.2 (2),(4),(7),(11), and (12) RSMo 2000.

From the evidence the jury could reasonably infer that Irene and Candy Sisk did not accompany appellant to a bank and give him a thousand dollars in cash simply because they desired to do so, but rather because he forced them to. This inference is supported by the facts that appellant had attempted to enter the Sisk house under the pretext that he had a Christmas gift for Candy from her mother in jail (Tr. 571), that he wore gloves upon entering to avoid leaving fingerprints (Tr. 1114), that Candy Sisk had been released from the hospital after back surgery only the day before and was under doctor's instructions not to leave the house for six weeks (Tr. 562, 565, 569), that appellant had planned in advance to bring a weapon when he went to the residence (Tr. 826; St.Ex. 131-132), and that he had planned in advance to tie up the victims after the money had been taken (Tr. 826, 1110; St.Ex 131-132). Based upon this inference, the evidence was sufficient to establish that appellant committed the murders while he was engaged in the crimes of robbery and kidnapping, §565.032.2(2), RSMo 2000. The fact that appellant not only took one thousand dollars in cash from the victims but also looted property, including a VCR, after he murdered them establishes that the murders were committed for the purpose of receiving money or any other thing of monetary value. Section

565.032.2(4). The findings of these statutory aggravating circumstances are valid (L.F. 202-203, 209-210).

2. Sentence is not disproportionate

As to whether the sentences of death imposed upon appellant are "excessive or disproportionate to the penalty imposed in similar cases, considering . . . the crime, the strength of the evidence and the defendant," §565.035.3(3), the facts of this case closely resemble those in such cases as **State v. Roberts**, 948 S.W.2d 577, 585, 607 (Mo. banc 1997), *cert. denied* 522 U.S. 1056 (1998); **State v. Hunter**, 840 S.W.2d 850, 855, 869 (Mo. banc 1992) *cert. denied* 509 U.S. 926 (1993); and **State v. Ervin**, 835 S.W.2d 905, 912-913, 927 (Mo. banc 1992) *cert. denied* 507 U.S. 954 (1993), in which "the defendant invades a home and murders the occupant in order to obtain something of value." **State v. Roberts**, **supra** at 607. Also like **Ervin** and **Hunter**, the defendant committed multiple murders at the same time, a factor that this Court has cited as supporting sentences of death. *See also* **State v. Shafer**, 969 S.W.2d 719, 723-727, 741 (Mo. banc 1998), *cert. denied* 525 U.S. 969 (1998); **State v. Clemons**, 946 S.W.2d 206, 233 (Mo. banc 1997), *cert. denied* 522 U.S. 968 (1997); **State v. Barnett**, 980 S.W.2d 297 (Mo.banc 1998), *cert. denied*, 525 U.S. 1161 (1999);and **State v. Johnston**, 968 S.W.2d 123 (Mo.banc 1998), *cert. denied* 525 U.S. 935 (1998). As in such cases as **State v. Barton**, 998 S.W.2d 19, 29 (Mo.banc 1999), *cert. denied* 528 U.S. 1121 (2000); and **State v. Clayton**, 995 S.W.2d 468, 484 (Mo.banc 1999), *cert. denied* 528 U.S. 484 (1999), appellant murdered victims who were defenseless: Both Irene

and Candy's hands were tied while he repeatedly stabbed them (Tr. 577, 579, 803, 1048; St.Ex. 44, 118-119, 120-123).

This Court has upheld death sentences in many cases where, as in the case at bar, defendants murdered their victims to eliminate a witness and avoid arrest. *See* **State v. Middleton**, 998 S.W.2d 520, 531 (Mo. banc 1999), *cert. denied*, 528 U.S. 1167 (2000); **State v. Deck**, 994 S.W.2d 527, 545 (Mo.banc 1999), *cert. denied*, 528 U.S. 1009 (1999); **State v. Copeland**, 928 S.W.2d 828, 851 (Mo.banc 1996), *cert. denied*, 519 U.S. 1126 (1997); **State v. Richardson**, 923 S.W.2d 301, 330 (Mo. banc 1996), *cert. denied*, 519 U.S. 972 (1996); **State v. Tokar**, 918 S.W.2d 753, 773 (Mo. banc 1996), *cert. denied*, 519 U.S. 933 (1996); **State v. Gray**, 887 S.W.2d 369, 389 (Mo. banc 1994), *cert. denied*, 514 U.S. 1042 (1995).

The great weight of evidence establishing appellant's guilt was enumerated in respondent's Point I, **supra**. It suffices to note that appellant admitted to the murders of Irene and Candy Sisk, and that his confession is corroborated by a vast array of circumstantial evidence.

The nature of appellant is demonstrated not just by the fact that he tortured two helpless victims to death, but also by his refusal to own up to the full scope of his crimes: his admission to the murders was highly self-serving and included a denial--contrary to unequivocal physical evidence--that he had sexually abused Candy Sisk. Appellant's casual attitude toward the taking of two human lives is illustrated by his observation that he found it "ironic" that his motive for committing these crimes had been based upon a mistaken factual assumption (Tr. 1115).

These circumstances, added to the fact that appellant was no stranger to the criminal justice system (Tr. 1292), support the sentences of death assessed by the jury.

Accordingly, appellant's sentences of death for the murder of Irene and Candy Sisk should be affirmed.

VII.

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S PRETRIAL MOTION TO QUASH THE INFORMATION BECAUSE THE STATUTORY AGGRAVATING CIRCUMSTANCES THAT THE STATE INTENDED TO SUBMIT IN THE PUNISHMENT PHASE WERE NOT REQUIRED TO BE PLED IN THE INFORMATION IN THAT (A) APPELLANT RECEIVED PRETRIAL NOTICE OF THE STATUTORY AGGRAVATING CIRCUMSTANCES UNDER SECTION 565.005, RSMO 2000, WHICH SATISFIED APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION AGAINST HIM; (B) APPRENDI V. NEW JERSEY AND RING V. ARIZONA DO NOT MAKE SUCH REQUIREMENTS FOR THE INFORMATION; AND (C) THIS FORM OF NOTICE VIOLATES NO PROVISION OF THE MISSOURI CONSTITUTION.

Under §565.005.1, RSMo 2000, the State is required to give notice to the defendant "[a]t a reasonable time before the commencement of the first stage of [a capital trial]" of the statutory aggravating circumstances that it intends to submit in the event that the defendant is convicted of first degree murder. The State did so in this case (Prev.L.F. 27-29). Appellant alleged in a pretrial motion that the information filed against him was defective because the State did not plead in the information the statutory aggravating circumstances it intended to submit at his trial, which he claimed was required under the holding of **Apprendi v. New Jersey**, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (L.F. 77-86). Appellant's motion was overruled (Mot.Tr. 77-78). Appellant now argues on appeal that because the

information did not plead any aggravating circumstances as to the two offenses of first degree murder, "the offenses charged against [appellant] were unaggravated first degree murders for which the only authorized sentence is [life without probation or parole]" and as such the trial court lacked jurisdiction to sentence appellant to death (App.Br. 152-153).

This same claim was recently raised and denied by this Court in **State v. Tisius,** 92 S.W.3d 751, 766-767 (Mo.banc 2002). This Court noted that Tisius' argument was premised on the notion that (1) "the aggravating circumstances were additional elements of first-degree murder punishable by death" and therefore needed to be pled in the original information and (2) "the combined effect of sections 565.020 and 565.030.4 creates two types of first-degree murder," one that is "unenhanced" and the other that is "aggravated" or "capital" murder. **Id**. at 766. Appellant raises the exact claims here (App.Br. 154-157). This Court found that appellant's contention was without merit, stating in relevant part, that:

> As held in [State v. Cole, 71 S.W.3d 163, 177 (Mo. banc 2002)] the two statutes Appellant cites serve different functions: section 565.020 defines the single offense of first-degree murder with the range of punishment including life imprisonment or death; section 565.030 merely delineates trial procedure. The Appellant's contention of a violation of *Apprendi* is without merit: pursuant to section 565.005.1, the State gave Appellant notice that it would seek the death penalty, and the aggravating circumstances were proved to a jury beyond a reasonable doubt. "The maximum penalty for first-degree murder in Missouri is death, and the required presence of aggravating facts or circumstances to

> result in this sentence in no way increases this maximum penalty." [citation omitted].

Just as in **Tisius**, **supra**, appellant's claim is without merit, as the State gave appellant notice of its intent to seek the death penalty and the aggravating circumstances were found beyond a reasonable doubt by the jury. Appellant's claim must fail.

Even without this Court's recent decisions finding claims such as these without merit,(decisions which appellant plainly ignores and fails to mention in his brief) appellant's reliance on **Apprendi** to support his claim would still fail. Appellant's construction of **Apprendi** as creating a requirement that statutory aggravating circumstances be pled in the indictment or information is refuted by the language of that decision. The issue presented to the United States Supreme Court in that case was "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." **Id**. 530 U.S. at 469. Relying upon the guarantee under the Sixth and Fourteenth Amendments of a trial by jury, the Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." **Id**. 530 U.S. at 476, 490. Thus, the holding of **Apprendi** concerned what matters must be submitted to and found by a jury, not what must be contained in an indictment or information.

If the plain language of the holding in **Apprendi** was not sufficient to dispose of appellant's reliance upon that decision, it would be demolished by the fact that the Supreme Court expressly stated that it was not addressing what must be alleged in the charging document:

> Apprendi has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment. . . . [The Fourteenth] Amendment has not . . . been construed to include the Fifth Amendment right to "presentment or indictment of a Grand Jury" that was implicated in our recent decision in Almendarez-Torres v. United States, 523 U.S. 224, 140 L.Ed.2d 350, 118 S.Ct. 1219 (1998). We thus do not address the indictment question separately today.

Apprendi v. New Jersey, **supra**, 530 U.S. at 476 (n. 3).

The brief of appellant ignores the stated holding of **Apprendi** and the footnote quoted above, and relies exclusively upon language from a previous decision, **Jones v. United States**, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.3d 311 (1999), which was quoted in **Apprendi Id**. 530 U.S. at 476 (App.Br. 154). The issue before the Supreme Court in **Jones** was how to construe the federal carjacking statute: whether particular statutory language was an "element" of the crime, in which case it was required to be alleged in the indictment and found by the jury; or whether it was a "sentencing factor" that need not be charged and could be found by the court. **Id**. 526 U.S. at 230-232.[11] The majority opinion found that the statutory language

[11]This distinction between "elements" and "sentencing factors" was later abolished in

constituted an element of the crime, but noted in extended *dicta* its view that sentence enhancements might also violate due process if not charged and found by the trial jury. **Id.** 526 U.S. at 240-250.[12] The majority summarized its view as being that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." **Id**. 526 U.S. at 246 (n. 6). Thus, that the quotation from **Jones** was not a holding of **Apprendi** is established by (1) the statement in **Apprendi** that it was not addressing what must be pled in the indictment; (2) the fact that the quotation from **Jones** cites the Fifth Amendment to the United States Constitution which, in the context of indictments, applies to the federal government (as in **Jones**) but not to the states (as in **Apprendi**); and (3) the rejection of this construction of **Apprendi** by other jurisdictions.[13] Appellant's claim that **Apprendi** supports his argument is meritless.

Apprendi, 530 U.S. at 478-490.

[12]That this was *dicta* was confirmed in **Apprendi**, 530 U.S. at 472-473.

[13]E.g., **State v. Nichols**, 201 Ariz 234, 33 P.3d 1172, 1174-1176 (2001); **People v. Ford**, 198 Ill.2d 68, 761 N.E.2d 735, 738 (n. 1) (2001), *cert. denied* 153 L.Ed.2d 845 (2002); **State v. Mitchell**, 353 N.C. 309, 543 S.E.2d 830, 842 (2001), *cert. denied* 122 S.Ct. 475 (2001); **United States v. Sanchez**, 269 F.3d 1250, 1257-1262 (11th Cir. 2001), *cert. denied* 122 S.Ct. 1327 (2002).

Ring v. Arizona, 122 S.Ct. 2428 (2002), also cited by appellant (App.Br.157), which for the first time held that the Sixth and Fourteenth Amendments do not allow "a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty," confirms that it does not, any more than did **Apprendi**, hold that statutory aggravating circumstances must be pled in the indictment or information. The Supreme Court noted that the issue before it was limited:

> Ring's claim is tightly delineated: he contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. . . . Ring does not contend that his indictment was constitutionally defective. See Apprendi, 530 U.S., at 477, n. 3 (Fourteenth Amendment "has not . . . been construed to include the Fifth Amendment right to 'presentment or indictment of a Grand Jury'").

Ring, **supra**.

Appellant's reliance on **Harris v. United States**, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002), does not help him here as it involved federal drug and firearms statutes and therefore is based upon the Indictment Clause of the Fifth Amendment, which does not apply to the states. **Apprendi**, **supra**, 530 U.S. at 477 (n. 3). The only constitutional provision that is relevant to state charging documents is the Sixth Amendment requirement that an accused "be informed of the nature and cause of the accusation," which has been applied to the states through the Fourteenth Amendment. **Blair v. Armontrout**, 916 F.2d 1310, 1329 (8th Cir. 1990), *cert. denied* 502 U.S. 825 (1991). The difference between the rights guaranteed

by the Fifth Amendment on the one hand and the Sixth and Fourteenth Amendments on the other is instructive in demonstrating the absence of merit in appellant's argument. The Indictment Clause of the Fifth Amendment specifies that criminal charges must be initiated by a grand jury indictment and requires that all elements of the criminal offense charged be stated in the indictment. **Almendarez-Torres v. United States**, 523 U.S. 224, 228, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1997).[14]

The Sixth and Fourteenth Amendments, by contrast, require only that a criminal defendant receive notice of the "nature and cause of the accusation" and does not specify the form that notice must take.[15] Even legally insufficient charging documents have been held not to violate the Sixth Amendment when the defendant received actual notice of the charge against him. **Hartman**, **supra**, 283 F.3d at 194-196; **Blair**, **supra**. Under the law of Missouri, appellant was entitled to, and received, notice before trial of the statutory aggravating

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[14]At the time of its decision in **Ring**, **supra**, the Supreme Court had before it a claim in a federal death penalty case that the Fifth Amendment required that statutory aggravating circumstances be pled in the indictment. It remanded that case for reconsideration in light of **Ring**. **United States v. Allen**, 247 F.3d 741 (8th Cir. 2001), **remanded** 2002 U.S.Lexis 4893 (June 28, 2002).

[15]"[T]he states are not bound by the technical rules governing federal criminal prosecutions" under the Fifth Amendment. **Blair v. Armontrout**, **supra**. Fifth Amendment decisions are therefore of "little value" in evaluating state indictments or informations. **Hartman v. Lee**, 283 F.3d 190, 195 (n. 4) (4th Cir. 2002).

circumstances that the state intended to offer in the punishment phase. Nothing in **Apprendi**, **Ring**, or any other pertinent authority supports appellant's claim that this notice provision violates the Sixth and Fourteenth Amendment to the United States Constitution.

Based on the foregoing, appellant's final claim on appeal must fail.

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 26,196 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

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

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 25th day of March, 2003, to:

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APPENDIX

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