IN THE
SUPREME COURT OF MISSOURI

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No. SC86358

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STATE OF MISSOURI,

Respondent,

vs.

DAVID STANLEY ZINK,

Appellant.

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APPEAL FROM THE CIRCUIT COURT OF ST. CLAIR COUNTY
TWENTY-SEVENTH JUDICIAL CIRCUIT
THE HONORABLE WILLIAM J. ROBERTS, JUDGE

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RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from a conviction obtained in the Circuit Court of St. Clair County for murder in the first degree, § 565.020, RSMo,[1] for which Appellant was sentenced to death. Therefore, the Supreme Court of Missouri has exclusive appellate jurisdiction. Article V, § 3, Missouri Constitution (as amended 1982).

[1] All statutory references are to RSMo 2000 unless otherwise indicated.

STATEMENT OF FACTS

On October 1, 2001, Appellant was charged by information with one count each of kidnapping, § 565.110, RSMo; murder in the first degree, § 565.020, RSMo; and armed criminal action, § 571.015, RSMo. (L.F. 58). The State filed its Notice of Intent to Seek the Death Penalty on that same day. (L.F. 60). Count II, charging murder in the first degree was severed from the remaining counts, and Appellant was tried by a jury on that count on July 12-29, 2004, before Judge William J. Roberts. (L.F. 44-46, 1048). Appellant does not contest the sufficiency of the evidence to support his conviction. Viewed in the light most favorable to the verdict, the evidence at trial showed:

Appellant freely admitted, throughout pre-trial, trial, and sentencing, that he intentionally killed Amanda Morton. (Tr. 701, 897-98, 1815, 3797-98). On the evening of July 11, 2001, Morton was visiting her boyfriend, Devan Lee, at his home in Springfield. (State's Ex. 85).[2] Morton was 19 years old and lived with her parents in Strafford. (Tr. 1993, 1996). She had a 1:00 a.m. curfew, and left Lee's home at about 12:30 a.m. on July 12th. (State's Ex. 85). Lee did not observe Morton drinking any alcoholic beverages or taking any drugs while she was with him, and he described her as sober when she left. (State's Ex. 85). Morton called Lee on her cell phone after she left, and the two were talking when Lee heard "a slam," that he believed was caused by Morton dropping her cell

[2] The testimony of Devan Lee and Kenneth Clark was introduced through videotaped depositions which were marked as State's Exhibits 85 and 86, respectively.

phone. (State's Ex. 85). Morton picked the phone up, and told Lee that somebody had just run into the back of her car. (State's Ex. 85).

The vehicle that ran into Morton's car was Appellant's truck. (State's Ex. 22, 67). The collision happened at the Interstate-44 off-ramp at the intersection of Highway 125 near Strafford. (State's Ex. 86). Appellant testified that he had been at some bars in Springfield, and had gotten lost while attempting to return to his father's home in rural St. Clair County. (State's Ex. 22, 67). Appellant had been paroled from a maximum security federal prison in February after serving twenty years of a thirty-three year sentence for kidnapping, aggravated rape, and escape. (Tr. 2902-04, 3660-61, 3827-28).

Lee heard a sound like someone knocking on Morton's car window, and then heard a male voice ask Morton for her driver's license. (State's Ex. 85). Lee advised Morton to roll up her window and lock her door. (State's Ex. 85). Morton apparently did not take that advice, as a passing motorist saw a man and a woman, presumably Morton and Appellant, standing outside the vehicles. (Tr. 1905). The woman was investigating the rear end of the car while talking on a cell phone. (Tr. 1905, 1913).

Lee drove from his home to the scene of the accident. (State's Ex. 85). When he arrived, he found Morton's car, along with several police cars. (State's Ex. 85). Morton had called a Highway Patrol dispatcher to report the accident. (Tr. 1868). Before a trooper could arrive, Strafford Police Officer Kenneth Clark discovered Morton's abandoned car while patrolling the area. (State's Ex. 86). The car was sitting by the side of the highway with the engine running, the headlights and hazard lights on, and the driver's side window

down. (State's Ex. 85, 86). A Greene County deputy and a Highway Patrol trooper arrived at the scene in response to Morton's dispatch call, and Clark's call for back-up. (State's Ex. 86; Tr. 1929). Morton's driver's license was found inside the car, along with her purse, billfold, clothing, medication, and a credit card. (State's Ex. 85, 86; Tr. 2120, 2140). The car keys were still in the ignition. (State's Ex. 86). Morton's parents were called and went to the scene. (State's Ex. 85; Tr. 1997). They searched throughout Strafford, but were unable to locate Morton. (State's Ex. 85; Tr. 2001-02). Officer Clark also searched several nearby businesses without success. (State's Ex. 86). Morton's parents, Lee, and Strafford Police attempted to call Morton's cell phone, but were unable to reach her. (State's Ex. 86; Tr. 2001).

At about 5:30 a.m. on July 12th, Appellant checked into a motel at an isolated location near Camdenton. (Tr. 2004, 2006-08, 2013-15). Appellant filled out a registration card in his own name. (Tr. 2009-10, 2038). As he was doing that, Morton came into the lobby. (Tr. 2010-11). The owner of the motel, Lloyd Fuller, testified that Morton stared at him with large eyes, and that she seemed "to be kind of tightened up and pulling herself together . . . ." (Tr. 2011-12). Fuller also noticed that Morton acted like she was excited and was trembling a little. (Tr. 2012). Fuller thought that she was scared about something, but he wasn't sure what it was. (Tr. 2012).

When Fuller checked the premises about 8:00 or 9:00 that morning, he found that the room rented to Appellant was vacant, and the key had been left inside. (Tr. 2016-17). The bed had been slept in and the shower used, but nothing else in the room had been

disturbed. (Tr. 2046-47). Fuller was watching a television newscast later that evening, and saw a story about Morton's disappearance. (Tr. 2017-18). Morton's picture was shown on the newscast, and Fuller recognized her as the woman who had been with Appellant. (Tr. 2018, 2040). Fuller called the authorities, and Greene County Sheriff's investigators traveled to the motel to interview Fuller. (Tr. 2018-19; 2126-27, 2270). They also searched the room that he had rented to Appellant, even though the room had already been cleaned and rented to another customer. (Tr. 2019, 2024, 2046, 2128).

Fuller gave investigators the registration card that Appellant had filled out. (Tr. 2019). The investigators called back to Springfield and relayed the information they had gathered at the motel. (Tr. 2129). St. Clair County Sheriff Ronald Snodgrass was contacted and went to Appellant's residence, along with Sergeant Jimmie Stewart. (Tr. 2221-22, 2271, 2632). Snodgrass had met Appellant a few months previously when his father brought him in to register as a sex offender. (Tr. 2223). Snodgrass talked with Appellant's father and learned that Appellant had not returned home until roughly 10:00 that morning, and that Appellant was asleep. (Tr. 2243). Snodgrass woke Appellant up and asked him if he would go to the Sheriff's office to talk with Highway Patrol investigators about leaving the scene of an accident. (Tr. 2225-26). Appellant initially stated that he was not in an accident and didn't have anything to say. (Tr. 2226). Appellant eventually relented, and rode to the Sheriff's office with his father. (Tr. 2227). Sheriff Snodgrass followed in his vehicle, while Sergeant Stewart stayed behind to watch Appellant's truck. (Tr. 2227).

Appellant arrived at the Sheriff's Department at about 8:30 p.m., and investigators from Greene County and the Highway Patrol arrived about an hour later. (Tr. 2228, 2273). Snodgrass introduced Appellant to the investigators, and they took Appellant back to an interview room. (Tr. 2228, 2273). The investigators read Appellant the *Miranda*[3] warnings, and Appellant indicated both verbally and in writing that he understood his rights and wished to waive them. (Tr. 2274-75, 2277-78). Appellant initially denied any knowledge of Morton's disappearance. (Tr. 2279, 2343). But after being told that he had been seen at the accident scene near Strafford and at the Camden County motel with Morton, Appellant eventually confessed to killing Morton and told investigators her body was buried at Mt. Zion Cemetery. (Tr. 2229, 2280-81; State's Ex. 22).[4]

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[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[4] The audio tape of Appellant's confession given on July 13, 2001, was marked as State's Exhibit 22 and played for the jury. (Tr. 2349, 2361). A subsequent videotaped statement given by Appellant on August 6, 2001, was marked as State's Exhibit 67 and played for the jury. (Tr. 2640).

In his initial confession and in a subsequent taped statement, Appellant told investigators that he went to Warsaw and Springfield, where he drank at some bars and became intoxicated. (State's Ex. 22, 67). Appellant left Springfield to return home and got lost on Interstate-44. (State's Ex. 22, 67). He went up the exit ramp at Strafford, and collided with the rear of Morton's car. (State's Ex. 22, 67). In his initial confession, Appellant said that Morton voluntarily left with him, but later threatened to call the police if he did not take her back to her car. (State's Ex. 22). In the later statement, Appellant stated that Morton did not have any choice but to go with him, and that it was a kidnapping when he took her, but not after she got into the car. (State's Ex. 67).

Appellant stated that he killed Morton because he was worried that he would go back to prison if she did call police. (State's Ex. 22, 67). After deciding to kill her, Appellant took Morton to the cemetery and tied her up. (State's Ex. 67). Appellant said that he tied the rope around her neck while he considered how he should kill her. (State's Ex. 67). He told Morton to look up, and then broke her neck. (State's Ex. 67). She continued to make some sounds, so he strangled her with the rope. (State's Ex. 67). Appellant then searched for a spot to bury the body and dragged her by the rope to the location he had chosen. (State's Ex. 67). Worried that Morton might revive, he tried to cut her spinal cord with a knife. (State's Ex. 67). He covered the body with some leaves and then went home and got a shovel. (State's Ex. 67). Appellant returned to the cemetery and covered the body with dirt. (State's Ex. 67).

After Appellant confessed, Snodgrass and the investigators went to the cemetery, but were unable to locate the body. (Tr. 2230). They called back to the jail and asked that Appellant be brought over. (Tr. 2130, 2230, 2285-86). Three officers drove Appellant, who gave them directions on how to reach the cemetery. (Tr. 2132, 2287). Once he arrived at the cemetery, Appellant led the officers straight to the spot where he buried Morton's body. (Tr. 2132-33, 2230, 2287). He told the officers that they would find Morton buried facedown and indicated the direction her head would be pointing. (Tr. 2288). He also pointed out a tree that he said he had tied Morton to prior to her death. (Tr. 2289). When Morton's body was uncovered, it was found to be buried just as Appellant had described. (Tr. 2289). Appellant also told officers that the twine that he used to tie Morton up could be found by the side of the road. (Tr. 2335). A Highway Patrol investigator found some bailing twine less than a half-mile from the cemetery entrance. (Tr. 2509).

The body was found partially undressed, with the bra rolled down and the right breast exposed. (Tr. 2440, 2450). Leafy debris and mud had collected on the right breast. (Tr. 2440). A large quantity of leafy material and mud had been forced into Morton's mouth. (Tr. 2425). An autopsy disclosed blunt force injuries on the mouth. (Tr. 2427). Bruises were observed on both ears. (Tr. 2427-28). Blood and mud were found mixed in Morton's hair. (Tr. 2428). Two cuts were found on the back of the neck that fractured a vertebra and bruised the spinal cord. (Tr. 2428-29, 2462-63). Large hemorrhages under the eyes were consistent with strangulation, as were some blood dots observed behind the left ear, ligature

marks on the neck, bruises inside the neck, near the voice box, a broken hyoid bone, and a broken thyroid cartilage. (Tr. 2426, 2431, 2433, 2442, 2458-60).

Defensive wounds were observed on Morton's right forearm. (Tr. 2436). No offensive wounds were observed. (Tr. 2437). Ligature marks were observed on the left wrist, which would be consistent with being tied-up. (Tr. 2437). Scratches were noted on the left wrist and forearm, the left upper arm, and on the front part of the upper legs. (Tr. 2437-38). Five ribs on the right side and three on the left side were broken. (Tr. 2465). The right lung was partially deflated. (Tr. 2464-65). Bruising was seen over the left collarbone and along the breastbone, as was a scrape across the chest, just below the breasts. (Tr. 2438). Both nipples were bruised. (Tr. 2441). Bruises and scrapes were also observed on the buttocks and the backside of the legs. (Tr. 2442-43). An internal examination disclosed several bruises under the scalp, some bruising of the brain and some bleeding outside the brain and under the scalp. (Tr. 2456-57). Intestinal bruising was also found that would be consistent with a blunt-force injury to the belly. (Tr. 2466). Discoloration was observed near the area between the vagina and the anus and was labeled as an "apparent bruise." (Tr. 2467). In all, more than fifty blunt force injuries were noted. (Tr. 2468). The autopsy concluded that Morton's neck had been broken at the 5th cervical vertebra, and that the cause of death was the breaking of the neck, which injured the spinal cord and stopped her breathing. (Tr. 2468-69).

A sexual assault kit containing swabs taken from Morton's vagina and anus was tested, and disclosed the presence of semen in Morton's anus. (Tr. 2570-71). DNA tests

matched the semen to Appellant. (Tr. 2572-73). A toxicology report found no indications of alcohol in Morton's system. (Tr. 2418). Tests conducted on a liquid substance found in Morton's car were negative for the presence of alcohol. (Tr. 2561). Appellant's truck was searched and hair samples were recovered that were consistent with Morton's hair. (Tr. 2549). Bluish paint transfer was found on the truck's front grill. (Tr. 2550-51, 2632-33). Tests done on the paint transfer showed it was indistinguishable from a paint sample taken from the trunk of Morton's car. (Tr. 2550-55).

Following Appellant's motion for a change of venue, this Court issued an order directing that a jury be selected in Lafayette County (L.F. 20, 22). Appellant's motion to represent himself was granted after his motion to dismiss the public defender's office from representing him was denied. (L.F. 546; Tr. 596). The public defenders were to continue assisting Appellant. (Tr. 597). Appellant and the public defenders eventually worked out an arrangement where they split trial duties. (Tr. 1757).

Prior to the State resting its case in the guilt phase of the trial, the court found beyond a reasonable doubt that Appellant was a prior offender, based on two Texas convictions for aggravated rape and a Kansas conviction on two counts of burglary. (Tr. 2688-92; L.F. 1076). Appellant presented 35 witnesses and testified in his own behalf. (Tr. Index). His defenses were that he did not deliberate before killing Morton, and that he did not abduct her from the accident scene. The jury was instructed on murder in the first degree, murder in the second degree, and voluntary manslaughter. (L.F. 1084, 1086, 1087). A defense instruction was also submitted directing the jury to acquit Appellant of murder in

the first degree if it found that he was unable to deliberate due to mental disease or defect. (L.F. 1085). Following evidence, argument, and instruction, the jury found Appellant guilty of murder in the first degree. (L.F. 45, 1093).

Following evidence, argument, and instructions in the penalty phase of the trial, the jury recommended that Appellant be sentenced to death. (L.F. 1118). The jury found the following statutory aggravating circumstances beyond a reasonable doubt: (1) Appellant had two or more serious assaultive convictions, namely a June 22, 1980 aggravated rape and a July 11, 1980 aggravated rape, both in Dallas County, Texas; (2) that the murder of Amanda Morton was committed for the purpose of avoiding a lawful arrest of Appellant; and (3) that the murder of Amanda Morton involved depravity of mind, and as a result thereof, was outrageously and wantonly vile, horrible and inhuman. (L.F. 1118). Appellant appeared for sentencing on September 7, 2004. (L.F. 46). His motion for new trial was denied, and the court sentenced Appellant to death. (L.F. 46). This appeal follows. (L.F. 47). Additional facts pertaining to the claims of error raised by Appellant will be set forth in the argument portion of this Brief.

ARGUMENT

I.

The trial court did not abuse its discretion or cause manifest injustice when it sustained the State's objection and refused to admit into evidence Defense Exhibit 1092, a report prepared by the Strafford Police Department, because the State did not withhold the report from Appellant, the content of the report was not relevant to any issue in the case, and Appellant was not prejudiced by exclusion of the report, in that the State disclosed the report to Appellant as soon as it was obtained from the Strafford Police Department, whether or not Amanda Morton left voluntarily with Appellant was not probative of Appellant's guilt or innocence of murder in the first degree and evidence that Morton may have violated her curfew on a previous occasion was not probative of whether she left voluntarily with Appellant, and admission of the report would not have changed the outcome of the trial.

Appellant contends the trial court abused its discretion in refusing to admit Defense Exhibit 1092, a police report indicating that Amanda Morton was out past her curfew less than two weeks before her murder, because the exhibit refuted testimony that Morton habitually obeyed her curfew. Appellant also contends the State engaged in prosecutorial misconduct by failing to timely disclose the police report and by objecting to the report, thus denying him the opportunity to counter the impression that Morton would not have violated her curfew by voluntarily driving off with Appellant.

On April 5, 2004, the trial court granted the State's motion to preserve the testimony of Strafford Police Officer Kenneth Clark by deposition. (Tr. 649). Clark was the first officer on the scene of Amanda Morton's disappearance, and was unable to testify live at trial because he was entering military service and was to eventually be deployed to Iraq. (Tr. 644). Appellant had previously taken a discovery deposition of Clark, and determined from that deposition that Morton had been an informant or a witness in a previous case. (Tr. 607, 610-11). On March 1, 2004, Appellant filed a *pro se* "Motion for Discovery (Records That Show Amanda Morton's Arrest and Contact with Law Enforcement)." (L.F. 599). The trial court heard arguments on the motion that same day, and made a verbal order that any records of Amanda Morton's arrests or convictions be produced. (Tr. 611). At the April 5, 2004, hearing, Appellant indicated that he had not been provided with any reports of an incident where Amanda Morton was an informant. (Tr. 655). The trial court responded by noting that would be neither an arrest nor a conviction. (Tr. 655). Appellant responded that he still wanted any such reports produced prior to Clark's preservation deposition, and the trial court suggested that Appellant obtain a subpoena duces tecum. (Tr. 655). Although not part of the record, Appellant apparently did obtain a subpoena for the deposition. (Tr. 3376, 3378).

The initial search by Strafford Police did not turn up any records relating to Amanda Morton prior to her disappearance. (Tr. 3378). Subsequent to Officer Clark's preservation deposition, a record was discovered that listed Amanda Morton as a witness to an event occurring on or about June 30, 2001. (Tr. 3378). The report was provided to the

prosecutor, who immediately disclosed a copy to Appellant, on July 12, 2004. (Tr. 3376, 3378). Officer Clark's preservation deposition was played at trial on July 15, 2004. (Tr. 1981). Also testifying that day was Amanda Morton's mother. (Tr. 1996). Deborah Morton told the jury that Amanda had a 1:00 a.m. curfew. (Tr. 1997). Appellant did not cross-examine her. (Tr. 1997). Greene County Sheriff's Deputy Phil Corcoran testified on July 16, 2004, about his investigation into Amanda Morton's disappearance. (Tr. 2118-21). He testified that he spoke with Amanda's family and was told that she was very respectful of her curfew. (Tr. 2121). Appellant cross-examined Corcoran about whether Devan Lee had told him that Morton was erratic in keeping her curfew. (Tr. 2148-49). Corcoran denied that Lee had made that statement. (Tr. 2149).

Appellant brought a motion on July 24, 2004, to introduce the police report of the June 30, 2001 incident to which Amanda Morton had been a witness. (Tr. 3376). Appellant claimed the report was relevant because the incident that Amanda Morton witnessed happened between 2:00 and 2:30 a.m., and thus refuted the testimony that Amanda always obeyed her curfew. (Tr. 3377). The State objected on the grounds that whether Amanda routinely made her curfew was not relevant to any issue in the case. (Tr. 3379). The trial court sustained the objection on those grounds. (Tr. 3380).

A. Standard of Review.

In his Motion for New Trial, Appellant alleged the trial court erred in refusing to admit the report, because the report was relevant. (L.F. 1166). The motion did not allege prosecutorial misconduct or discovery violations.

The trial court is vested with broad discretion to determine the relevancy of evidence and whether evidence should be admitted or excluded, and that determination will be reversed only on a showing of abuse of discretion. *State v. Wolfe*, 13 S.W.3d 248, 258 (Mo. banc 2000); *State v. Middleton*, 995 S.W.2d 443, 452 (Mo. banc 1999). Review on direct appeal is for prejudice, not mere error, and this Court will reverse only if the error was so prejudicial that it deprived Appellant of a fair trial. *Middleton*, 995 S.W.2d at 452. An allegation of error must be contained in a motion for new trial to be preserved for review, and the theory raised in that motion cannot be broadened on appeal. *State v. Barnett*, 980 S.W.2d 297, 303 (Mo. banc 1998). Issues that were not properly preserved for review may be reviewed for plain error only, requiring this Court to find manifest injustice or miscarriage of justice has resulted from the trial court error. *Middleton*, 995 S.W.2d at 452; Supreme Court Rule 30.20.

B. Prosecutor did not commit misconduct.

Appellant's allegations of prosecutorial misconduct, which can be reviewed only for plain error, boil down to two contentions. One is that the prosecutor failed to timely disclose the police report despite Appellant's discovery requests. The other is that the

prosecutor knowingly elicited false testimony regarding Amanda Morton's compliance with her curfew. Neither contention is well taken.

1. Prosecutor did not withhold report from Appellant.

Appellant filed a motion on July 24, 2004, requesting that the Strafford Police Department report provided to him twelve days earlier be introduced into evidence. (Tr. 3376). Appellant argued that he had previously requested that the report be produced at the time of Officer Clark's preservation deposition, and that he had subpoenaed the report, but that it had not been produced at that time. (Tr. 3376). The prosecutor explained why the report was not disclosed at the time of the deposition:

> MR. AHSENS: Your Honor, we provided this to the defense after it was - - in fact, there was, as I recall, a request to the Strafford Police to find any such document relating to anything Amanda Morton may have been a witness to, which is what this is. This contains her witness statement to an incident that occurred - - I believe the report dated anyway, June 30th, 2001.
>
> Ah, that search at the time that they made their subpoena requests was unsuccessful, but these reports were later discovered inadvertently sometime later and provided to me, at which time I disclosed them. Apparently, they were filed under names which could not be directly associated with Miss Morton because she was neither a Defendant nor a direct party. Ah, that being the case, the discovery - - as far as the discovery issue is concerned, I provided it as soon as I had it.

(Tr. 3378). The prosecutor provided a reasonable explanation for why the report was not disclosed to Appellant until the day that jury selection began. By the time Appellant made his motion to introduce the report, the trial court had ample opportunity to observe counsel for both parties and to determine their credibility. The trial court apparently found the prosecutor's explanation credible, and this Court should defer to that finding. *See, State v. Anderson*, 79 S.W.3d 420, 444-45 (Mo. banc 2002) (trial court entitled to believe prosecutor's explanation of why he chose to seek death penalty); *State v. Rousan*, 961 S.W.2d 831, 845 (Mo. banc 1998) (in all matters, a reviewing court gives great deference to a trial court's credibility determinations).

Appellant cites *Brady v. Maryland* for the proposition that nondisclosure of exculpatory or mitigating evidence violates due process even when the nondisclosure is unwitting. *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963). *Brady* is distinguishable because it dealt with the complete failure to disclose certain evidence until after trial, not a supplemental disclosure of evidence on the first day of jury selection. *Id.* at 84. *Brady* is also inapplicable because it "requires the state to disclose evidence favorable to the accused when the evidence is material to guilt or punishment." *State v. Shafer*, 969 S.W.2d 719, 740 (Mo. banc 1998). Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* at 741. As argued more fully below, the police report in question was not relevant or material to any issue in the case, and earlier disclosure of the report to Appellant would not have changed the outcome of the trial.

Furthermore, in examining *Brady* claims, this Court has noted that, "'[the] prosecution has no obligation to disclose evidence of which the defense is already aware and which the defense can acquire.'" *Williams v. State*, 2005 WL 1432379 at *3 (Mo. banc, June 21, 2005), *quoting*, *State v. Brooks*, 960 S.W.2d 479, 494 (Mo. banc 1997). The defendant in *Williams* filed discovery requests seeking the medical records of two prosecution witnesses. *Williams*, 2005 WL 1432379 at *3. This Court noted that counsel could have acquired those records by directing the request at the entities holding the records. *Id.*

Appellant in this case requested production of a report generated by the Strafford Police Department. While Rule 25.03 obligates the State to make good faith efforts to obtain materials held by other governmental agencies, it also provides that the defendant can seek a subpoena or other appropriate court order if those efforts are unsuccessful. Supreme Court Rule 25.03(C). Appellant sent the Department a subpoena duces tecum for Officer Clark's deposition. (Tr. 3376). The Department did not locate the report until after the deposition was taken, and prior to the commencement of trial. (Tr. 3378). A copy of the report was disclosed to Appellant as soon as the State received it. (Tr. 3378). Appellant had a copy of the report in his possession prior to the testimony of any witnesses who provided evidence regarding Amanda Morton's curfew. (Tr. 1997, 2121). The State did not withhold evidence in its possession and did not violate *Brady*.

2. Prosecutor did not elicit false testimony.

During the State's case-in-chief, the prosecutor elicited testimony from Amanda Morton's mother, Deborah Morton, that Amanda had a 1:00 a.m. curfew. (Tr. 1997). Deborah Morton testified that the curfew was enforced by placing an alarm clock set for 1:00 a.m. in the living room, with Amanda turning-off the alarm clock when she returned home. (Tr. 1997). No further testimony was elicited from Deborah Morton as to Amanda's compliance with the curfew. Appellant did not cross-examine Deborah Morton, or Amanda's sister, Sarah, who also testified. (Tr. 1995, 2002).

Greene County Sheriff's Department Deputy Phil Corcoran also testified for the State. (Tr. 2117). Corcoran testified that he was assigned to investigate a missing persons case, and went to the Morton home, where he talked with Amanda's parents and sister. (Tr. 2118). Corcoran discussed the investigation he conducted at the Morton home, and some of the evidence he discovered during that investigation. (Tr. 2118-21). The prosecutor then asked Corcoran:

> Q. Okay. Did you find any other information out at the Morton residence while you were there?
>
> A. I discussed with the family Amanda's habits and what have you, and you know, her - - her responsibilities, and in regard to her curfew. I learned that she was very prompt and respectful of curfew. And also learned that she made a phone call to her house at about 1:04 in the morning.

(Tr. 2121). Appellant cross-examined Corcoran about whether Devan Lee had made a statement to him that Amanda Morton was erratic about keeping her curfew. (Tr. 2149). Corcoran testified that he did not recall such a comment. (Tr. 2149).

Appellant contends that Corcoran's testimony created the false impression that Morton habitually obeyed her curfew. But Corcoran testified truthfully as to what he was told by Morton's family members during the course of his investigation. *See*, *State v. Hamilton*, 791 S.W.2d 789, 794 (Mo. App. E.D. 1990) (no prosecutorial misconduct where State elicited testimony that did not constitute perjury). The fact that Morton was apparently out past her normal curfew time on one occasion does not refute Corcoran's testimony, nor does it refute what Morton's family told Corcoran. There was no evidence elicited suggesting that Morton always obeyed her curfew. Appellant points to no evidence that Morton disobeyed her curfew on any other occasions. In fact, the circumstances under which Morton was out past her normal curfew time on June 30, 2001, were not developed, so that it cannot be said whether or not Morton had permission from her parents to be out later than normal on that night. Appellant had the information from the Strafford Police report available to him to cross-examine Deborah Morton on those issues, but he chose not to do so.

C. The police report was not relevant to any issue in the case.

The trial court denied Appellant's motion to offer the police report into evidence on the grounds that the subject matter of the report was not relevant to any issue in the case. (Tr. 3380). Appellant contends the report was relevant to refute the contention that he kidnapped Morton.

> The general rule in Missouri is that evidence must be both logically and legally relevant in order to be admissible. 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) (internal quotation marks omitted).

Whether Amanda Morton was kidnapped, or whether she left the scene of the accident with Appellant voluntarily was not a matter of consequence to the jury's determination of guilt. The issues for the jury to decide were whether Appellant caused Morton's death, his mental state at the time, the existence of any of the aggravating factors submitted by the State, whether the existence of those aggravating factors warranted a sentence of death, and whether any mitigating factors outweighed the aggravating factors. (L.F. 1084-87, 1110-13). Whether or not Appellant kidnapped Morton had no bearing on the issue of whether he caused her death, an issue to which Appellant freely admitted his guilt, and it had no bearing on his mental state at the time of Morton's death. The only aggravating circumstance submitted by the State that would arguably have been implicated by the kidnapping issue was that the murder was committed while Appellant was engaged in the perpetration of forcible sodomy, an aggravating circumstance that the jury declined to find. (L.F. 1110).

In any event, the issue of whether Morton left the accident scene with Appellant voluntarily is completely separate from the issue of whether Morton had consensual sex with Appellant. The initial accident between Appellant and Morton happened at about 1:00 a.m. on July 12, 2001. (Tr. 1868,

3850). Appellant testified that he and Morton had anal intercourse at the El Kay Motel near Camdenton. (Tr. 3862-63). Appellant did not check into the motel until about 5:30 a.m. (Tr. 2006). Even under Appellant's version of the facts, Morton leaving the accident scene voluntarily with Appellant would not prove that she consented to remaining in his presence for the next four-and-a-half hours, that she consented to riding with Appellant from Strafford to Camdenton, or that she consented to having sex with him. There would have been ample time and opportunity for Morton to change her mind about being with Appellant, and the testimony of the motel owner supports the inference that Morton was there against her will. (Tr. 2011-12).

Even if the kidnapping issue was relevant, Morton's habits regarding her curfew were not probative as to whether she left the accident scene with Appellant voluntarily or under compulsion. Even if Morton did miss her curfew on occasion, that does not lead to the conclusion that this 19-year-old woman would voluntarily ride-off in the middle of the night with a 41-year-old man whom she did not know. (Tr. 1996; L.F. 58).

D. Appellant was not prejudiced by exclusion of the report.

Even if the trial court erred in excluding the report, Appellant was not prejudiced. A trial court's exclusion of admissible evidence creates a presumption of prejudice that is rebuttable by the facts and circumstances of the particular case. *State v. Barriner*, 111 S.W.3d 396, 401 (Mo. banc 2003). Overwhelming proof of guilt rebuts that presumption. *Id.* Prejudice also requires a finding of a reasonable probability that the trial court's error affected the outcome of the trial. *Id.*

The overwhelming evidence of Appellant's guilt begins with his consistent admissions at trial that he intentionally killed Amanda Morton. (Tr. 3797-98). The only issue that was truly contested in the

trial's guilt phase was Appellant's mental state at the time he killed Morton. (Tr. 3798; L.F. 1085-87). Exclusion of the police report had no bearing on the jury's determination of whether Appellant was guilty of murder in the first degree. It also had no bearing on the jury's determination of the existence of aggravating circumstances supporting the death penalty. As noted above, the only aggravating circumstance submitted that the report might have been relevant to was the allegation that the murder was committed during the commission of forcible sodomy. (L.F. 1110). The jury did not find that aggravating circumstance to be present. (L.F. 1118). Only one aggravating circumstance had to be found by the jury to support the death penalty. *State v. Brown*, 902 S.W.2d 278, 289 (Mo. banc 1995). The jury found three aggravating factors, two of which are undisputed. (L.F. 1118). Admission of the police report would have had no bearing on the aggravating circumstance determination.

There was ample other evidence to suggest that Morton had been taken from the accident scene by force. Her car was left running by the side of the road with the lights on. (Tr. 1934; State's Ex. 85, 86). Morton's purse was still inside the car, as were numerous personal items, such as her billfold, driver's license, medication, and credit card. (State's Ex. 85, 86; Tr. 2120, 2140). If no evidence regarding Morton's curfew habits had been elicited, the jury could still have reasonably inferred from the condition of Morton's abandoned car that she was taken from the scene against her will. In closing argument, the prosecutors used the condition of the car and the items left behind to support the inference that Morton was kidnapped, and made no reference to her curfew habits. (Tr. 3892, 3967). The jury also heard Appellant's statements to police that Morton did not have a choice but to get into his truck, and that it was a kidnapping when he took her, but not after she got into the

truck. (State's Ex. 67). Given the overwhelming evidence of Appellant's guilt and the substantial evidence from which the jury could conclude that Morton was taken against her will, it is unreasonable to believe the jury's verdict was influenced by Deputy Corcoran's isolated comment that Morton was respectful of her curfew. Appellant suffered no prejudice from the exclusion of the report.

Appellant's theory that the State failed to timely disclose the report also does not merit reversal unless there is a reasonable likelihood that the failure to disclose the evidence affected the result of the trial. *Rousan*, 961 S.W.2d at 843. The defendant in *Rousan* alleged that the State violated discovery rules by failing to disclose a witness's statement that the defendant admitted to killing one of the victims. *Id.* The defendant was convicted on an accomplice liability theory. *Id.* at 843-44. This Court noted that the jury had to have necessarily rejected the witness's testimony in order to convict the defendant on that theory. *Id.* at 844. This Court found that earlier disclosure of the evidence would thus not have affected the outcome of the trial. *Id.* As already noted, the jury in this case did not find the existence of the aggravating circumstance that Morton was murdered while Appellant was engaged in the perpetration of forcible sodomy. (L.F. 1118). Appellant would not have gained any benefit from being able to cross-examine Officer Clark about the police report, and earlier disclosure of the report would not have changed the outcome of the trial.

II.

The trial court did not err in denying Appellant's motion to replace counsel, in granting Appellant's motion to represent himself, and in not interfering with counsel's strategic decision to present a diminished capacity defense because Appellant did not demonstrate good cause to replace counsel, Appellant made a knowing and voluntary waiver of counsel, and the trial court did not have the authority to interfere with counsel's strategic decisions, in that Appellant and appointed counsel were able to work together despite some differences so that there was not a total breakdown in communication, Appellant was questioned extensively about the disadvantages of representing himself so that he made the choice to waive counsel with his eyes wide open, and Appellant agreed to let counsel present a diminished capacity defense and the court had no authority to interfere absent an explicit request from Appellant that counsel remain silent. (Responds to Appellant's Points II, III, IV, and V).

Appellant raises four separate points regarding his representation at trial. Because these points are interrelated, Respondent will address them together. Appellant's points allege error as to the following issues: (1) the trial court's denial of Appellant's motion to replace counsel; (2) whether Appellant's waiver of counsel during the guilt phase of the trial was knowing, voluntary, and intelligent, and (3) the presentation of two separate defenses, with Appellant presenting a sudden passion defense in support of a voluntary manslaughter conviction and counsel presenting a mental illness charge in support of a murder in the second degree conviction.

The initial Complaint and Request for Warrant was filed in the trial court on July 13, 2001. (L.F. 48). Assistant Public Defenders Cynthia Short and Thomas Budesheim entered their appearances

on behalf of Appellant on September 27, 2001. (L.F. 19). Budesheim was granted leave to withdraw from the case on February 6, 2003, and Short was allowed to withdraw on September 2, 2003. (L.F. 24, 29). Assistant Public Defender David Kenyon filed an entry of appearance on July 15, 2003, and a motion to withdraw on June 14, 2004. (L.F. 27, 38). Assistant Public Defender Thomas Jacquinot made a court appearance on Appellant's behalf on January 6, 2003. (L.F. 23). Assistant Public Defender Curtis Winegarner filed an entry of appearance on December 5, 2003. (L.F. 32). Jacquinot and Winegarner remained in the case through sentencing. (L.F. 46-47).

Short and Budesheim filed a motion for a change of venue on October 3, 2001. (L.F. 19; Tr. 15). Appellant filed a *pro se* motion two days later to withdraw the change of venue request. (L.F. 19; Tr. 15). At a hearing on November 5, 2001, Appellant withdrew his *pro se* motion and indicated that it stemmed from a misunderstanding of the effect of the change of venue motion filed by his attorneys. (Tr. 15-19). The trial court also questioned Appellant about a statement contained in a letter filed with the *pro se* motion, where Appellant referred to the public defender as, "[m]y attorney that is provided by the people attempting to kill me . . .." (Tr. 20). Appellant indicated that he had some concern that the prosecutor, the public defender, and the judge were all paid by the State. (Tr. 22). Appellant stated that he did not think the public defender would conspire with the prosecutor to kill him, but did say that he would speak his mind if his attorneys did something that did not make sense to him. (Tr. 22).

On October 16, 2002, Appellant sent a letter to the trial court with an attached Motion for Restraining Order and Motion to Compel Public Defenders to Allow Defendants Review or Provide Copies of Discovery Material in their Possession. (L.F. 23, 122). In the motion, Appellant referred to

the Public Defender System as "the State's Organization." (L.F. 122). He also accused the public defenders of putting their sensitivity and sympathy for the victim's family ahead of his rights under the Sixth and Fourteenth Amendments. (L.F. 123). The motion contended that the public defenders had provided Appellant with 532 pages of discovery material, but refused to provide any more material after he pointed out "untruthful" information in the discovery documents. (L.F. 123). The motion further alleged that the public defenders had shown little interest in defending the guilt phase of the trial, and that their interest in preventing imposition of the death penalty conflicted with his interests. (L.F. 124).

At a June 12, 2003 hearing, Judge Roberts told Appellant that he did not think it was proper for him to discuss those matters with Appellant, so he had forwarded Appellant's letter to the State Public Defender. (Tr. 138-39). Judge Roberts asked Appellant whether he was better satisfied with the progress of his case since the letter was sent, and if he was satisfied with Jacquinot's representation. (Tr. 139, 147). Appellant responded, "[w]ell, since we've had a, an understanding, to put it mildly, we have been getting along a little better the last couple of days." (Tr. 147). Appellant indicated that he was already thinking about issues he could raise in a post-conviction claim of ineffective assistance of counsel. (Tr. 150-51).

Appellant also stated that his conflict was with Cynthia Short, and that Jacquinot was the only person doing any work on his case. (Tr. 152). Appellant later went on to say that he would have fired Jacquinot if he were a private attorney, that he liked Jacquinot, but that they had serious difficulties in certain areas. (Tr. 153-54). Appellant declined to identify the specific issues where he had disagreements with counsel, citing a desire to protect the attorney-client privilege. (Tr. 150). The trial

court encouraged Appellant to try and resolve any problems with the public defenders, and if that did not work, to bring the matters before the court. (Tr. 148).

At a September 2, 2003 hearing, the trial court granted Short's motion to withdraw, and considered Appellant's August 23, 2003, *pro se* Motion to Dismiss Public Defenders, Specifically Thomas Jacquinot as Defense Attorneys, and Appoint Real Defense Attorneys; Motion to Continue Trial Date; and Motion to Compel Defense Attorneys to Provide Copies of All Documents to Defendant. (Tr. 457; L.F. 457). The motion restated the earlier allegation that the public defenders had not done enough to investigate the guilt phase of the trial. (L.F. 457-87). It contended that his defense "hinged upon the fact that he did not kidnap the victim," but the public defenders were not interested in defending against the kidnapping charge. (L.F. 476-77).

The motion also alleged that Jacquinot had sent the court a proposed jury questionnaire that proposed to tell the jurors that Appellant had confessed to murdering the victim. (L.F. 465). Appellant alleged disagreements with Jacquinot over the evidence that was presented at a suppression hearing, including whether Appellant should testify, and alleged that Jacquinot had been unprepared for the hearing. (Tr. 467-71). The motion alleged a conflict with the entire Public Defender System, and asked that they be dismissed and "real attorneys" be appointed. (L.F. 480). In the alternative, the motion sought to have Jacquinot dismissed and another attorney appointed. (L.F. 481). The court took the matter under advisement and issued an order on February 6, 2004, denying the motion to dismiss Jacquinot, and sustaining the motion to have defense counsel supply Appellant with copies of all documents received. (Tr. 547; L.F. 546).

Appellant filed a Motion to Represent Himself on March 1, 2004. (L.F. 604). Appellant again raised his claim that the public defenders had failed to investigate the guilt phase of his case. (L.F. 604). The motion alleged that part of Appellant's defense theory would be that Tom Jacquinot and Cynthia Short could be proved to be working in concert with the State to obtain a conviction, and that both attorneys would be called as witnesses "to prove said fact in Defendant's Justification and Self-Defense theory . . .." (L.F. 605). Appellant also complained that Jacquinot's witness list contained the names of people whom Appellant had specifically asked not be called to testify. (L.F. 606). The court heard argument on the motion the same day it was filed. (Tr. 551-52).

Appellant indicated that he did not want any of the three appointed lawyers to represent him, but that he did not feel capable of conducting the trial himself. (Tr. 554-55). Appellant said that he would need help in securing the presence of witnesses at trial and in questioning expert witnesses. (Tr. 555-57). In particular, Appellant stated that he would not know how to question Dr. Benedict about the diminished capacity defense. (Tr. 556). Appellant also expressed that he might need some help with jury instructions and evidentiary issues. (Tr. 558-59). The court then engaged in extensive questioning of Appellant to ensure that he understood the nature and seriousness of the charges and potential sentences, and to ensure that Appellant understood the difficulties he would encounter if he represented himself. (Tr. 561-65, 576-89). At the conclusion of that questioning, the trial court told Appellant, "I find it difficult to find to the words to attempt to tell you how foolish it seems to me for you to go this as your own lawyer in view of what you are facing . . . is there anything I can do to talk you out of representing yourself in this case . . .?" (Tr. 589-90). When Appellant refused to back down

from his motion, the trial court had him sign the Waiver of Counsel form required by statute. (Tr. 594-95; L.F. 576). § 600.051.1, RSMo 2000.

The court found that it had no choice but to permit Appellant to proceed to trial without legal counsel. (Tr. 596). The court then asked Appellant who would assist him with the tasks that Appellant had indicated he could not perform. (Tr. 596). Appellant indicated that either Winegarner or Kenyon would be fine, but that he would still try to call Jacquinot as a witness. (Tr. 597). The court indicated that any testimony about the effectiveness of Jacquinot's representation would not be admissible at trial, and then ordered that all lawyers presently assigned to the case aid and assist Appellant in the preparation of his defense. (Tr. 597). The court then took up numerous other motions filed by Appellant *pro se*, including a Notice of Affirmative Defenses, that listed the defenses of diminished capacity, justification, and self-defense. (Tr. 624; L.F. 577).

At a hearing on April 5, 2004, the trial court again warned Appellant of the dangers of self-representation, and encouraged him to let Jacquinot handle some of the more difficult issues. (Tr. 739). Appellant indicated an unwillingness to do so, and the court advised Appellant that he should let the court know if he changed his mind about representing himself. (Tr. 740).

On June 11, 2004, Jacquinot and Winegarner filed a motion asking the court to review its order allowing Appellant to represent himself. (L.F. 780-86). The motion was taken up at a hearing on June 28, 2004, and Appellant indicated that he still did not think his attorneys had done anything on the guilt phase of the case, and he still did not want them to represent him. (Tr. 767-68). The court discussed with Appellant the defenses he planned to offer, and Appellant indicated that after studying the jury instructions on justification, he had determined that the evidence might not support that defense. (Tr.

774-75). Jacquinot indicated that he was prepared to offer the diminished capacity defense and to put on evidence refuting the allegation that Appellant kidnapped Morton. (Tr. 775). The court questioned what the conflict was between Appellant and the attorneys, in light of Jacquinot's representations that he was prepared to offer Appellant's defenses. (Tr. 775). Appellant responded that he did not understand the diminished capacity defense and that he still did not believe that the public defenders had investigated anything. (Tr. 776).

After Jacquinot presented extensive argument on his motion, Appellant confirmed that he wanted Jacquinot to handle the penalty phase of the trial, but that he did not want him calling certain people as witnesses. (Tr. 788). Appellant also stated, "if I'm competent enough to stand trial, then I think I'm competent enough to do the trial." (Tr. 789). The court entertained more discussion on the motion and again asked Appellant if he wanted to represent himself in the guilt phase of the trial. (Tr. 794). When Appellant indicated that he did, the court declared that he would take Jacquinot's motion with the case, and that he would grant the motion if he felt Appellant was "being bulldozed" and not getting a fair trial. (Tr. 795-96).

Appellant next appeared in court on July 6, 2004, at which time the trial court acknowledged receiving a letter from Appellant, stating that Appellant wished to have the court conduct voir dire during the guilt phase of the trial and wanted Jacquinot to conduct voir dire in the punishment, or "death qualification" phase. (Tr. 839-40; L.F. 952-54). Appellant also indicated for the first time his desire to submit an instruction on voluntary manslaughter based on sudden passion arising from adequate cause. (Tr. 880-81). Jacquinot indicated to the court that he had some concerns about that issue:

> The reason that Mr. Zink is bringing this up at this point is because I have discussed this - - this issue with him in some - - some detail, you know, about the nature of adequate cause and the standard that you, as judge, I would think would apply in that, is that term "adequate cause" is usually in reference to society, at large, what a reasonable, for the most part, law-abiding citizen would view as adequate cause and provocation.
>
> I fear that Mr. Zink believes that it might be possible for him to have the standard shifted to [a] more subjective one based upon his 20 years of experience being a prisoner in a maximum security penal environment. Ah, that type of adequate cause would not necessarily give rise to a homicide case . . . .

(Tr. 884-85). After hearing that criticism of his proposed sudden passion defense, Appellant, for the first time, directly criticized the diminished capacity defense:

> I don't really like this defense they've got with this diminished capacity. I really don't want to put it on. But we talked about it this afternoon. And I guess I'm going to allow it. But to be honest with you, I think it's a bunch of hog wash; always have.

(Tr. 887). Jacquinot told the court that he would put on evidence supporting the sudden passion defense if the court would allow it, and that he would do so to the best of his ability. (Tr. 888-89). But he also noted that there was a high risk that the evidence might be excluded. (Tr. 889). Jacquinot indicated that he would like an advisory opinion on whether the evidence would be admissible, but the court declined to do so. (Tr. 888-89).

Jacquinot sent a letter to the court on July 8, 2004, submitting his witness list. (L.F. 974). In the letter, Jacquinot also stated that Appellant's current intent was to represent himself in the guilt phase and present a primary defense of manslaughter, while allowing counsel to present an alternative defense of diminished capacity. (L.F. 974). Jacquinot again stated that he did not believe the defenses to be inconsistent, and that he had previously presented both defenses in the same case. (L.F. 974-75). Jacquinot went on to say that he did not believe manslaughter to be a rational, reasonable, or viable option under the facts of this case, that Appellant's concept of reasonable and adequate cause was guided by mental illness, and that allowing the defense would give Appellant "a false hope that is fueled by his illness." (L.F. 975). Jacquinot urged the court to reconsider his motion to rescind Appellant's self-representation. (L.F. 974).

The trial court again questioned Appellant about his decision to represent himself prior to the beginning of voir dire on July 12, 2004:

> THE COURT: Mr. Zink, let me ask you, because you placed this in some of the papers that have been sent to me about voir dire questioning.
>
> First of all, do I understand that you agree that you caused the death of Amanda L. Morton.
>
> THE DEFENDANT: That's going - - yeah, I did cause the death of Amanda Morton.
>
> THE COURT: All right.
>
> And secondly, you have indicated this morning . . . you do not intend at this time to advance the defense of diminished mental capacity. Is that true?

THE DEFENDANT: That's absolutely correct.

THE COURT: Okay. Have you talked that over with your lawyers?

THE DEFENDANT: The last time the knife went in my back was the other day, and I don't believe we need to talk about it any further [Laughter].

THE COURT: Is there any way that I can talk you into letting Mr. Jacquinot and Mr. Winegarner represent you in this case?

THE DEFENDANT: Yeah, if they'll put on my defense, absolutely.

THE COURT: Okay.

THE DEFENDANT: They completely refuse and straight up lied to you in that letter saying my defense is not valid.

The reason they don't want me to put on my defense is because it shows that Dr. Benedict and their entire defense of diminished mental capacity is based on a lie. And that's why they don't want me to put on my witnesses and put on my defense.

But, if they want to put on my defense, they're more than welcome to take the case over. But their defense is not going to happen as long as I'm controlling the issue.

THE COURT: All right. So two things come to mind. You're still going to let Mr. Jacquinot do the Phase II or death qualification portion of the voir dire; is that true?

THE DEFENDANT: That's true.

THE COURT: All right. We will proceed on that assumption.

Mr. - - would you like any further time to discuss what you just stated about your defenses with Mr. Jacquinot?

THE DEFENDANT: Well, I believe - -

THE COURT: Or, Mr. Winegarner or both of them?

THE DEFENDANT: I believe both of them are aware. If they want to state on the record that they're willing to take over the case at this point and put on my defense, they're more than welcome to state that and take over at this point. Otherwise, if they're going to persist in trying to put that diminished mental capacity defense on, I'm going to maintain control of the case and I'm going to put on my defense, because it's the only valid defense that's available.

THE COURT: Mr. Jacquinot.

MR. JACQUINOT: Your Honor, you know I've inquired for guidance from the Court.

The Court, although it has not heard the evidence, has had an opportunity to review the taped statement that Mr. Zink gave to Investigator Stewart, as well as the taped statement he gave to Mr. Knowles. Also heard all the evidence in the suppression hearing of the time line leading up to this.

You've reviewed the report of the medical examiner as well as some of the photographs from the autopsy.

And you can sit here and instruct me as a judicial officer that you could reasonably foresee instructing the jury on the theory of voluntary manslaughter, were I to attempt to pursue it in this case, then I would attempt to go forward.

It puts me in a very awkward situation where, you know, we have proffered a defense of diminished mental capacity. And it's my belief, you know, that David, in many cases, believes that the provocation that occurred in this case is reasonable. But, that belief is based upon his diminished capacity.

And I think that the Court would not, under any circumstances imaginable, find that Miss Morton's actions constituted provocation in a way that, that would lead to an instruction in this case.

So, I can't get up here and announce that I'm going to proceed on a defense when I think it's - - it's overwhelmingly the case where the court isn't even going to allow that instruction to go to the jury.

That's why, you know - -

THE COURT: I'm - -

MR. JACQUINOT: - - it's not a manslaughter case. If I thought - - if I thought we even had a one in 10 or a one in four chance of getting the instruction, then we could make that the primary theory of the defense and put the diminished capacity on the back burner.

Those two defenses can be presented in the same case. I've done it before. It just comes down to whether - - whether the provocation was reasonable or the person felt that they were provoked because of mental illness.

But I don't see - - it's a death penalty case. The Court's reviewed at least the facts surrounding the manner in which the death was caused. And I don't see you submitting manslaughter in this case. And that's the defense that David is talking about.

So that's - - I sort of put it on you again. I put it on you in court last time; put it on you in the letter. That's the position I'm in. I can't sit here and say I'm going to offer this defense and then get shut out in the instructions conference.

THE COURT: Well, I am not going to prejudge the facts in this case, or the law in this case. When it becomes the appropriate time in this trial, I will do just exactly that based on the evidence that comes out at this trial and is admitted and is the law of this case. So I cannot give you any assurance, Mr. Jacquinot.

(Tr. 897-903). The issue of Appellant's representation was next taken up at a recess during the last day of voir dire:

THE COURT: . . . Mr. Zink, I again suggest to you that you may wish to have Mr. Jacquinot and Mr. Winegarner present and represent your defense from here on out. I think you would be much better served. I think that you're doing yourself a detriment by not letting them conduct the defense for you in this case. And, of course, this is a case where the death penalty is possible. The prejudice to yourself is extreme, if that occurs. And, you know, I think you ought to reconsider your decision to represent yourself and turn it over to those gentlemen.

THE DEFENDANT: Well, like I said before, I'm all for turning it over to them, provided they put on my defense and not the diminished mental capacity. Because I - -

THE COURT: Well, - -

THE DEFENDANT: I don't believe that defense has any merit, in my opinion.

THE COURT: All right. Now, are you willing to put on his defense or defenses as they - - you understand them to be at this time, Mr. Jacquinot?

MR. JACQUINOT: I - - I - - I want to really have one more talk with him before we start tomorrow and see if we can come to an agreement where we can put them both on.

* * * *

THE COURT: Number two, Mr. Zink, it would be my thought that waiving any defense in a first-degree murder case that could be proved up is not a wise or a good thing for any defense lawyer to do, or for an individual to do representing himself. Because, who knows who might - - you might think it's, quote, hog wash, unquote. But, you know, there's one or more people on this jury that might not think it is.

THE DEFENDANT: I understand that. And it goes to the motion that I filed on the day that we came up here. I believe it was the 12th that I handed you several motions. And one of 'em dealt specifically with that issue. So, I mean, it's on record the way that I feel about that defense.

THE COURT: I understand.

THE DEFENDANT: And, you know, if you read that, I believe that they're inconsistent, myself. And, if the Public Defenders aren't going to do it, and help me,

which by putting on their defense, they have to disqualify my defense. And I disagree with that.

They're coming up here and basically telling you something, in Court, that isn't accurate, or it certainly isn't what I believe to be accurate, so.

THE COURT: If I understand things, you're going to admit to causing the death of Amanda Morton?

THE DEFENDANT: I am going to admit that that is not going to be in dispute.

THE COURT: So, why are the defenses - - I don't see how diminished mental capacity and any other defenses you might have are inconsistent.

THE DEFENDANT: Okay. I can explain that.

Their diminished mental capacity is based on Dr. Benedict's diagnosis. He's the psychologist for the defense. He based - - that defense is based on the diagnosis that I have an intimit - - how do you pronounce that?

THE COURT: Intermittent?

THE DEFENDANT: Intermittent explosive disorder.

Well, the witnesses in which I am going to call and present have known me since I was 11, 12 years old, all the way up till I was 18.

And then, this BOP official that we spoke of yesterday, Linda Martinez, was my direct supervisor for the last two years, plus she's been at the same job that I was in for, like, since '96 to 2001.

They all know that I don't get in fights. I don't mess with people. I don't bully people. And that's in direct contrast to what that explosive disorder is. I don't go off. You see what I'm saying?

* * *

THE COURT: What I'm saying is, don't give up any defense, at any time, until you're - - it's not proved or you can't use it for some reason.

* * * *

THE DEFENDANT: I agree wholeheartedly with what you're saying. I had anticipated . . . putting on both defenses and in the opening statements, ah, contrasting the difference - -

* * * *

THE COURT: You and Mr. Jacquinot discuss this in the long recess that we're going to have after we do this. We'll talk again about this Thursday before Court convenes in Osceola.

THE DEFENDANT: That'll be fine.

MR. JACQUINOT: I think - - I think some of the things David has said may just be a misunderstanding. I think there's a way we can do them together.

I mean, what he's explained is intermittent explosive disorder isn't at all what Dr. Benedict will testify about.

(Tr. 1729-36).

The next day, prior to opening statements, Appellant reaffirmed that he wished to represent himself, with the assistance of Jacquinot and Winegarner. (Tr. 1751-52). The court again advised Appellant of the risk involved in representing himself, and Appellant acknowledged that he understood the risk. (Tr. 1752). The court advised Appellant to inform the court if he wished at any point in the proceedings to turn the defense over to Jacquinot or Winegarner. (Tr. 1752). The court considered and overruled a Motion to Appoint Real Attorney, filed by Appellant that same day. (Tr. 1753; L.F. 1050). Jacquinot told the court that Appellant would consider allowing Jacquinot to do part of the opening statement concerning the diminished capacity defense, while Appellant talked about the facts of the case in the remainder of the opening. (Tr. 1757). The court granted that request, and Jacquinot and Appellant both gave opening arguments, with no objection by Appellant to that arrangement. (Tr. 1758, 1797, 1819, 1821).

Appellant and the attorneys split duties throughout the remainder of the guilt phase of the trial. Appellant conducted direct and cross-examination on some witnesses, while Jacquinot and Winegarner did the same for the majority of the witnesses. *See*, Tr. Index. Appellant and Jacquinot both gave closing arguments. (Tr. 3901, 3916). Prior to the beginning of the sentencing phase of trial, Appellant indicated to the court that he was turning the defense back over to his attorneys and was no longer representing himself. (Tr. 3984).

As the foregoing demonstrates, Appellant asserted two rights protected by the Sixth and Fourteenth Amendments: the right to appointed counsel and the right to self-representation. *Gideon v. Wainwright*, 372 U.S. 335, 339-40 (1963); *Faretta v. California*, 422 U.S. 806, 818 (1975). Those rights have been described as mutually exclusive. *Hamilton v. Groose*, 28 F.3d 859, 862 (8th

Cir. 1994). Appellant now comes before this Court contending that he should have received different counsel and that he should not have been allowed to represent himself. But the trial court, faced with the varying arguments and rationales put forth by Appellant throughout the course of the proceedings, acted reasonably to protect the conflicting rights asserted by Appellant.

A. Standard of Review.

The determination of whether defense counsel should be allowed to withdraw is a matter within the discretion of the trial court. *State v. Owsley*, 959 S.W.2d 789, 792 (Mo. banc 1997). This Court reviews for abuse of discretion and "indulge[s] every intendment in favor of the trial court." *Id.*

In reviewing a waiver of counsel, this Court must determine whether the waiver was made knowingly and intelligently. *State v. Hunter*, 840 S.W.2d 850, 857 (Mo. banc 1992). The test for whether the waiver is made knowingly and intelligently "depends on the 'particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused.'" *Id.* at 858, *quoting*, *Wilkins v. State*, 802 S.W.2d 491, 501 (Mo. banc 1991).

B. Appellant did not show good cause for substitution of counsel.

As an indigent defendant, Appellant was entitled to appointed counsel, but was not entitled to the appointed counsel of his choice. *Humphrey v. State*, 502 S.W.2d 251, 252-53 (Mo. 1973); *State v. Clay*, 11 S.W.3d 706, 714 (Mo. App. W.D. 2000). "Requests by criminal defendants for new counsel raise difficult issues requiring courts to weigh conflicting factors - - the need to ensure effective legal representation, the need to thwart abusive delay tactics, and the reality that a person accused of a crime is often genuinely unhappy with an appointed counsel who is nonetheless doing a

good job." *Hunter v. Delo*, 62 F.3d 271, 274 (8th Cir. 1995). Because of those tensions, the standards for granting motions to substitute counsel are strict. *Id.*

A defendant must show "justifiable dissatisfaction" with his appointed counsel to warrant substitution of counsel. *Id.*; *State v. Gilmore*, 697 S.W.2d 172, 174 (Mo. banc 1985). Justifiable dissatisfaction includes such things as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant. *Hunter*, 62 F.3d at 274. The right to counsel does not, however, involve the right to a "meaningful relationship" between the defendant and counsel. *Id.* To prevail on a claim of irreconcilable conflict, Appellant must produce objective evidence of a total breakdown in communications between himself and counsel. *Owsley*, 959 S.W.2d at 792.

Appellant alleges that he had an irreconcilable conflict with appointed counsel based on his perceptions that: counsel failed to adequately investigate his case, counsel focused on the penalty phase of the trial to the detriment of the guilt phase, counsel was not competent, and counsel refused to pursue Appellant's desired defense. Appellant's complaints about counsel do not rise to the level of "justifiable dissatisfaction" that entitled him to appointment of substitute counsel.

1. Record does not support claim of failure to investigate.

Appellant supports his argument of inadequate investigation by relying on statements made by counsel in motions for continuance. (L.F. 101-04, 134-45, 488-510). In a motion filed on January 15, 2003, counsel pointed out to the trial court that a capital case typically takes from two-and-a-half to three years to get ready for trial, and that Appellant's case was not ready for trial because older capital

cases had to be disposed of before counsel could turn his full attention to getting Appellant's case trial-ready. (L.F. 136, 140). But that does not mean that counsel was doing nothing on Appellant's case.

The first allegation that counsel was not adequately investigating the case came in Appellant's *pro se* motion filed on October 16, 2002. (L.F. 122). That motion alleged that counsel had shown little interest in defending the guilt phase of the trial. (L.F. 124). Prior to that date, counsel had sent discovery requests to the prosecutors, had opposed the State's request for a court order requiring Appellant to provide hair samples, and had provided Appellant with copies of 532 pages of discovery material received from the State. (L.F. 19, 21, 22, 123). Those are just the activities that can be gleaned from studying the trial court's docket sheets. The continuance motions indicate other activity was also taking place. The motion filed on January 15, 2003, indicated that counsel had identified and contacted potential expert witnesses. (L.F. 137). The motion also indicated that the progress in preparing Appellant's case for trial was only slightly behind the model schedule for putting together a capital case. (L.F. 140).

In a brief filed the day after Appellant filed his motion to dismiss the public defenders, counsel detailed several personnel changes that had taken place in the public defender's office and argued that the turnover had impeded preparation of the case. (L.F. 498-505). The motion also stated that work on the case had accelerated and was ongoing, though nowhere near complete. (L.F. 508).

These statements of counsel do not demonstrate an irreconcilable conflict or a justifiable dissatisfaction warranting a change in counsel. It is not uncommon for clients of lawyers to feel that their case is not getting the time and attention it deserves, and is progressing too slowly. Counsel's statements in the continuance motions indicate that every effort was being made to diligently represent

Appellant in the face of very difficult and challenging circumstances facing the Public Defender System. Appellant was not entitled to the appointment of private counsel, and appointment of a different public defender would not have resolved those circumstances. In light of counsel's contention that preparation had been impeded by attorney and staff turnover, it seems likely that appointment of new counsel would have only exacerbated the situation further. *See*, *United States v. Long Crow*, 37 F.3d 1319, 1324 (8th Cir. 1994) (defendant's dissatisfaction might be repeated with new counsel). Furthermore, the only specific complaint about trial preparation that Appellant raised before the trial court was that counsel was focusing too much on the penalty phase of the trial to the detriment of the guilt phase. (L.F. 124, 457-87, 604). Counsel disputed that assertion, and advised the court that the opposite was true. (L.F. 504).

Good cause for substitution of counsel is not determined solely on the subjective standard of what the defendant perceives. *McKee v. Harris*, 649 F.2d 927, 932 (2d Cir. 1981). Appellant has not provided any objective evidence that appointed counsel willfully failed to investigate his case, and his own conclusory allegations that counsel ignored the guilt phase of his trial do not make a showing of good cause.

2. Disagreements over trial strategy do not warrant substitution of counsel.

Appellant's stated concerns about counsel's competence boil down to a disagreement with counsel's trial strategy, in particular with counsel's decisions regarding the presentation of evidence at the suppression hearing. (L.F. 466-72). While Appellant also complained that counsel had proposed a

jury questionnaire that acknowledged that Appellant had confessed to killing Morton,[5] Appellant himself told the jury as early as his opening statement that he killed Morton, that it was a homicide, and that the jury's role was to determine the degree of homicide. (L.F. 466-67; Tr. 1815). Given that admission, the jury questionnaire issue fails to rise to the level of good cause for substitution of counsel.

The eventual disagreement over what defense to present at trial also represents a difference of opinion over trial strategy. Disagreement over strategy, including the refusal to present a proposed defense, "does not constitute 'justifiable dissatisfaction' because the determination of what witnesses to call is a matter of trial strategy and the decision is best left to counsel." *Gilmore*, 697 S.W.2d at 174. This Court has found that the public defender's refusal to present the defendant's proposed alibi defense did not create an irreconcilable conflict where the record showed that counsel and the defendant were able to work together despite the disagreement. *State v. Turner*, 623 S.W.2d 4, 11 (Mo. banc 1981).

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[5] While the trial court had considered the idea of putting together a specific jury questionnaire for Appellant's case, the court eventually decided not to send any questionnaire to prospective jurors other than the standard questionnaire used by the Circuit Court of Lafayette County. (Tr. 772).

As an initial matter, it should be pointed out that Appellant did not raise any objections to the diminished capacity defense in his original motion to replace counsel. (L.F. 457-87). Appellant stated in that motion that his defense "hinged upon the fact that he did not kidnap the victim." (L.F. 477). Appellant did not complain of a disagreement with the diminished capacity defense until after the court had granted his motion for self-representation. (Tr. 596, 887). The trial court should not be convicted of error in denying the first motion to replace counsel based on a reason that was not put before the court. *Star v. Burgess*, 160 S.W.3d 376, 378 n.2 (Mo. banc 2005). The next motion to dismiss counsel, and the only one filed after Appellant expressed any disagreement with the diminished capacity defense, was not filed until the day prior to opening statements. (Tr. 1753; L.F. 1050). The trial court did not err in overruling that late-filed motion. *Turner*, 623 S.W.2d at 11.

Although Appellant made various statements that he did not trust counsel, particularly Jacquinot, the record indicates that counsel and Appellant were able to function cooperatively during the course of the pre-trial and trial proceedings. Counsel filed and argued several pre-trial motions, without any objection from Appellant, and actively assisted in discovery. (L.F. 23-33, 37-46). Appellant specifically requested that Jacquinot handle the penalty phase of the voir dire process, and the penalty phase of the trial. (Tr. 788, 839-40; L.F. 952-54). Even after winning his motion to represent himself, Appellant agreed to allow Jacquinot to participate in the guilt phase of the trial by presenting evidence on the diminished capacity defense. (Tr. 974, 1757). Jacquinot also indicated a willingness to present Appellant's defenses to the best of his ability, despite any misgivings he might have about the viability of some of those defenses. (Tr. 775, 888-89). The record indicates that Jacquinot recalled one witness and elicited testimony from another, both at Appellant's express direction. (Tr. 2215-16, 3176-77).

While friction undoubtedly existed between Appellant and his appointed counsel, Appellant has not demonstrated the complete breakdown in communication that is required to support a showing that he was entitled to new counsel due to an irreconcilable conflict. *Owsley*, 959 S.W.2d at 792.

Appellant cites to several out-of-state cases to support his claim that substitute counsel should have been appointed. Those cases are distinguishable. In *State v. Moody*, defense counsel admitted to yelling at the defendant, telling the defendant he did not care about his case, and threatened to quit if the defendant called the press. *State v. Moody*, 968 P.2d 578, 581 (Ariz. 1998). Counsel also admitted that he and the defendant were "almost at blows," and told the court at one point that, "it would be the happiest day in my life if you took me off the case." *Id.* The record in this case is devoid of any evidence of such unprofessional conduct on the part of Appellant's counsel. Appellant at one point told the court that he and counsel had disagreements, but it did not reach the level where they engaged in fisticuffs with each other. (Tr. 152). The mere fact that Appellant might not have liked the tone or substance of some of counsel's statements does not constitute good cause for substitution of counsel. *McKee*, 649 F.2d at 932; *Vogel v. State*, 31 S.W.3d 130, 147 (Mo. App. W.D. 2000) (merely disagreeing with the advice of counsel over trial strategy is insufficient to establish a total breakdown in communication).

United States v. Mullen, also cited by Appellant, involved a disagreement between the defendant and private counsel who had been retained by her family. *United States v. Mullen*, 32 F.3d 891, 893 (4th Cir. 1994). The defendant alleged that the attorney had refused to let her see discovery materials, that he "used a tone of voice emulating force and threats," and that he failed to answer her questions. *Id.* The attorney filed a motion to withdraw, while the defendant filed a motion asking for

appointed counsel. *Id.* The attorney told the court at one hearing that he and the defendant had not communicated for over a month. *Id.* The facts of that case show a complete breakdown in communication between lawyer and client. As noted previously, the record in this case does not reflect the complete lack of communication that occurred in *Mullen*.

United States v. Walker also involved a situation where the defendant refused to speak to the attorney or to assist in preparation of the case. *United States v. Walker*, 915 F.2d 480, 483 (9th Cir. 1990). Again, the record in this case does not indicate such a total breakdown in communication or in cooperation. Another factor in *Walker* was that the trial court made only a perfunctory inquiry into the defendant's complaints against counsel, and focused the inquiry on counsel's competence, rather than on the nature of defendant's dissatisfaction. *Id.* The trial court in this case conducted numerous and extensive inquiries into the various complaints raised by Appellant.

3. Trial court was entitled to find Appellant's claims not credible.

In considering a motion for substitution of counsel, the trial court is able to determine the credibility of the defendant's contentions and the true reason for any communication problems between the defendant and counsel. *Long Crow*, 37 F.3d at 1325. The only consistent claims that Appellant made throughout the course of the proceedings was that the public defenders, as state employees, were working against his interests, and that counsel was focusing too heavily on the penalty phase of the trial. As noted above, the objective evidence in the record as to counsel's activities does not support those claims. In addition, the trial court was able to observe counsel's advocacy on Appellant's behalf. By denying the motion to substitute counsel, the trial court would necessarily have had to find Appellant's claims to not be credible.

The same would be true of Appellant's claims regarding the diminished capacity defense. Appellant's position on that defense was far from consistent. When Appellant filed his *pro se* motion to dismiss the public defenders, he claimed that his defense "hinged upon the fact that he did not kidnap the victim." (Tr. 477). No mention was made of the diminished capacity defense. (L.F. 457-87). The first time Appellant talked about the diminished capacity defense was during argument on his motion to allow self-representation. (Tr. 556). Appellant indicated that he would need counsel's help in presenting the defense because he did not know how to question his expert witness. (Tr. 556). Appellant even filed a *pro se* Notice of Affirmative Defenses that listed the diminished capacity defense. (Tr. 624). Appellant never directly criticized the diminished capacity defense until four months later, and only after Jacquinot questioned the viability of Appellant's proposed manslaughter theory. (Tr. 884-87). Between that date and the trial, the court was presented with conflicting statements about whether Appellant would let Jacquinot present the diminished capacity defense, so long as the manslaughter defense was also presented. (L.F. 974; Tr. 897-903). Appellant did eventually consent to allowing both defenses to be presented. (Tr. 1757). Given the timing of, and inconsistencies in, Appellant's complaints about the diminished capacity defense, the trial court could have reasonably found that those complaints were not credible.

C. The trial court did not err in accepting Appellant's waiver of counsel.

The Sixth Amendment right to counsel contains a parallel right to waive counsel and proceed *pro se*. *Clay*, 11 S.W.3d at 712. As noted above, waiver of the right to counsel must be made knowingly and intelligently. *Hunter*, 840 S.W.2d at 857. That standard is met when the defendant is "made aware of the dangers and disadvantages of self-representation, so that the record will establish

that he knows what he is doing and his choice is made with eyes wide open." *Faretta*, 422 U.S. at 835. Before accepting Appellant's waiver of counsel, the trial court questioned Appellant extensively about the risks and dangers he faced in trying the case himself. (Tr. 561-65, 576-89). The court continued to warn Appellant of those risks after accepting the waiver, and before trial commenced. (Tr. 739). The record shows that Appellant made his waiver with a full awareness of the risk he was taking.

The right to waiver of counsel has been codified in Missouri, and permits the court to accept waiver where the defendant is made aware of: (1) the charge against him; (2) his right to trial by jury; (3) the maximum possible sentence on the charge; (4) that any sentencing recommendations by the prosecutor are not binding on the judge; (5) that a sentence of confinement is likely upon a finding of guilt; and (6) that if indigent, the defendant has the right to appointed counsel. § 600.051, RSMo. 2000. The trial court informed Appellant of the information required by statute, and Appellant signed a written waiver form indicating that he had been so informed. (Tr. 594-95; L.F. 576).

Once the trial court found that Appellant was competent to stand trial, and that he had knowingly and voluntarily waived the right to counsel, no further findings were needed. *Wise v. Bowersox*, 136 F.3d 1197, 1202 (8th Cir. 1998). The court did not need to find that Appellant could conduct his defense effectively or as effectively as an attorney. *Id.* Even if the court believed that Appellant wished to pursue a poor defense theory, that alone would not be sufficient to deny Appellant the right to waive counsel. *Id.*, *see also*, *Shafer*, 969 S.W.2d at 728 ("the right to waive counsel is the right knowingly to proceed in ignorance").

Appellant nonetheless contends the waiver was not valid because: (1) the trial court failed to consider his background and mental health history, and (2) the trial court failed to advise him of the role that stand-by counsel would play. Neither contention has merit.

The second contention can be answered simply. Appellant indicated just prior to voir dire that he was fully aware that he had the right to control the defense that was presented:

> THE DEFENDANT: I believe both of them are aware. If they want to state on the record that they're willing to take over the case at this point and put on my defense, they're more than welcome to state that and take over at this point. Otherwise, if they're going to persist in trying to put that diminished mental capacity defense on, I'm going to maintain control of the case and I'm going to put on my defense, because it's the only valid defense that's available.

(Tr. 899-900). Appellant later changed his mind about allowing the diminished capacity defense, and the ultimate arrangement of how the defense would be conducted was worked out between Appellant and counsel. (Tr. 1757). "'Once a *pro se* defendant invites or agrees to any substantial participation by [standby] counsel, subsequent appearances by counsel must be presumed to be with the defendant's acquiescence, at least until the defendant expressly and unambiguously . . . request[s] that standby counsel be silenced.'" *United States v. Swinney*, 970 F.2d 494, 498 (8th Cir. 1992), *quoting*, *McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984). Absent any such request, the trial court did not have the discretion to interfere with the trial tactics of Appellant or counsel, nor to "otherwise restrict the function of advocacy fairly and ethically practiced." *State v. Hendrix*, 646 S.W.2d 830, 833 (Mo. App. W.D. 1982).

The contention that the trial court failed to consider Appellant's mental health history puts Appellant at odds with himself. In Points III and IV of his brief, which will be addressed below, Appellant argues that the trial court erred in permitting the diminished capacity defense to be presented, in part because it was not the defense that he wished to present. In Point V of his brief, Appellant then argues that he should not have been allowed to represent himself because the court did not determine whether his paranoid personality disorder may have affected his decision-making. Appellant thus essentially argues that his mental illness prevented him from making a rational decision about representing himself, but did not prevent him from rationally deciding what defense he should present at trial.

The United States Supreme Court has outlined a two-part inquiry into a defendant's mental state when waiving the right to counsel. *Godinez v. Moran*, 509 U.S. 389, 400 (1993). The first part of the inquiry is whether the defendant is competent to waive the right to counsel. *Id.* That standard is the same as the standard for competence to stand trial, which focuses on the defendant's ability to understand the proceedings against him. *Id.* at 400, 401 n.12. The second part of the inquiry is whether the waiver is knowing and voluntary, which focuses on whether the defendant actually does understand the significance and consequences of his decision, and whether the decision is uncoerced. *Id.* Appellant does not argue that he was not competent to stand trial, but does contend the trial court did not sufficiently inquire into his mental condition to ensure the waiver was knowing and voluntary.

The *Wilkins* case that Appellant relies on is distinguishable on two counts. First, that case involved a defendant who not only waived counsel, but also waived his right to a trial and pleaded guilty to a capital murder charge. *Wilkins v. Bowersox*, 145 F.3d 1006, 1008 (8th Cir. 1998). Here,

Appellant not only maintained his right to stand trial, but he received extensive assistance from counsel in contesting the charge against him. *See, State v. Quinn*, 565 S.W.2d 665, 676 (Mo. App. St.L.D. 1978) (no plain error in accepting waiver of counsel where public defender actively assisted defendant throughout trial).

The extent of the trial court's colloquy with Appellant before accepting his guilty plea also distinguishes this case from *Wilkins*. The trial court in *Wilkins* was criticized for asking leading questions that failed to allow the defendant to articulate his reasoning process, and for failing to inform him of defenses, lesser included offenses, or the full range of punishment he might receive. *Wilkins*, 145 F.3d at 1012. The trial court also failed to acknowledge undisputed expert testimony presented at a Rule 24.035 hearing that the defendant's waivers and pleas had not been knowing, voluntary, and intelligent. *Id.* at 1013-15. Conversely, the trial court in this case engaged in an extensive colloquy with Appellant before accepting his waiver of counsel. (561-65, 576-89).

The court confirmed Appellant's understanding that he was charged with murder in the first degree, and that the range of punishment was life without parole or the death penalty. (Tr. 562). Appellant acknowledged that, "[i]t doesn't get any more serious than the State asking for the death penalty . . . ." (Tr. 563). The court questioned Appellant about his educational background, and his experience with, and knowledge about, criminal jury trials. (Tr. 563-65). Appellant was questioned in detail about the various components of a capital trial, and his experience in doing such things as selecting a jury, giving an opening statement, questioning witnesses, dealing with objections, filing motions for judgment of acquittal, making closing arguments, and presenting mitigating evidence in the penalty phase. (Tr. 576-79, 581-83). The court explained to Appellant that the public defenders knew how to do

many things at a trial that Appellant could not do, such as get witnesses to trial, question experts, draft jury instructions, and comply with the rules of evidence. (Tr. 565-66). The court also questioned Appellant about his understanding that the public defenders were prepared to present a diminished capacity defense on his behalf. (Tr. 580). The court also explained to Appellant that the prosecutor was experienced in trying capital murder cases, and had Jacquinot recount his experience in trying both capital and non-capital cases. (Tr. 585-89). The court further explained to Appellant that he would be treated just like any other lawyer if allowed to represent himself. (Tr. 586-87, 589). Finally, the court read to Appellant the statutory waiver form prior to Appellant signing it. (Tr. 594-95). The court also vigorously tried to persuade Appellant to not waive his right to counsel, and offered to give Appellant the chance to confer with counsel before proceeding with the waiver. (Tr. 589-94).

The extensive colloquy between the court and Appellant about the dangers and disadvantages of self-representation properly ensured that Appellant's waiver was knowing and voluntary. *Wise*, 136 F.3d at 1203. Appellant's answers demonstrated that he knew the risks involved in proceeding *pro se*. The court also had the opportunity to extensively observe Appellant throughout the pre-trial proceedings and could ascertain whether Appellant made his choice "with eyes wide open." *Faretta*, 422 U.S. at 835. In his brief, Appellant argues that there was a real basis for Appellant to mistrust his appointed counsel, but then suggests that his waiver of counsel may not have been rational because of his paranoid personality disorder. Those positions are difficult to reconcile. If Appellant had valid reason to mistrust his attorneys, then it cannot be said that his decision to waive counsel was based on an irrational distrust. The record also does not reflect that Appellant's decision to waive counsel was motivated by an irrational evaluation of his own ability to proceed *pro se* or by an irrational

misunderstanding of the consequences of waiving counsel. The record supports a finding that Appellant knowingly and voluntarily waived his right to counsel, and the trial court did not err in accepting the waiver.

D. No error in permitting diminished capacity defense to be presented.

In his third and fourth points on appeal, Appellant argues that the trial court erred in not stepping-in and taking action to ensure that appointed counsel did not present a diminished capacity defense against Appellant's wishes. As noted above, the decision to allow presentation of a diminished capacity defense was made by Appellant after consulting with counsel, and absent any assertion that counsel had exceeded the bounds of Appellant's consent, the trial court did not have the discretion to interfere with the trial tactics of Appellant or counsel. *Hendrix*, 646 S.W.2d at 833; *Swinney*, 970 F.2d at 498.

The history of this case lends particular support to the court's not intervening in the manner that Appellant now suggests. Appellant's position on the diminished capacity defense was anything but consistent. At the same time that he filed his motion for self-representation, Appellant filed a *pro se* Notice of Affirmative Defenses that listed the diminished capacity defense, along with justification and self-defense. (L.F. 577). At the hearing on the motion for self-representation, Appellant had stated that he did not know how to present the diminished capacity defense, but never indicated that he disagreed with it. (Tr. 556). Appellant never criticized the defense until Jacquinot raised concerns about the viability of Appellant's proposed voluntary manslaughter instruction. (Tr. 880-81, 884-87). Throughout the course of pre-trial proceedings, the court had heard Appellant suggest several potential defense theories that he wanted to present. (Tr. 590, 738, 773-75, 880-81). Because Appellant's

position had changed so many times before, the court had no reason to doubt that Appellant had again changed his mind and that it was Appellant's decision to permit counsel to present the diminished capacity defense in conjunction with the other defenses Appellant wanted to present.

Appellant's argument that he was forced to choose between his right to counsel and his right to present a defense is not well taken. The United States Supreme Court has indicated that the decision-making rights of defendants represented by counsel are strictly limited. In *Jones v. Barnes*, the Court noted that the ABA Model Rules of Professional Conduct require a lawyer to abide by a client's decision as to a plea to be entered, whether to waive jury trial, and whether the client shall testify. *Jones v. Barnes*, 463 U.S. 745, 753 n.6 (1983). The Court went on to say, "[w]ith the exception of these specified fundamental decisions, an attorney's duty is to take professional responsibility for the conduct of the case, after consulting with his client." *Id.* The Court recently reaffirmed that stance in *Florida v. Nixon*, noting that a defendant has the ultimate authority to determine whether to plead guilty, waive a jury, testify in his own behalf, or take an appeal, but that an attorney's duty to consult with the client "does not require counsel to obtain the defendant's consent to 'every tactical decision.'" *Florida v. Nixon*, 125 S. Ct. 551, 560 (2004), *quoting*, *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988).

The *McKaskle* decision also contradicts Appellant's assertion by finding that "[a] defendant's invitation to counsel to participate in the trial obliterates any claim that the participation in question deprived the defendant of control over his defense." *McKaskle*, 465 U.S. at 182. The Court could not have reached that conclusion if the defendant had both the right to counsel and the right to dictate the defense strategy. In fact, as noted previously, a defendant does not automatically have good cause to

discharge appointed counsel just because he disagrees with counsel's strategic decisions on whether or not to present a certain defense. *Turner*, 623 S.W.2d at 11. This Court has found no error in denying a defendant's request to represent himself, where the defendant wished the assistance of counsel but wanted to be named attorney of record in order to prevent counsel from making "certain strategic decisions" with which he disagreed. *State v. Hampton*, 959 S.W.2d 444, 448 (Mo. banc 1997). In doing so, this Court implicitly rejected the defendant's argument that attorneys, "are to advise and represent, not to replace or second-guess the defendant." *Id.*

Appellant does not have both the right to counsel and the right to determine how his defense will be presented. Even if he did, he waived the latter right when he consented to allow counsel to present the diminished capacity defense, and the trial court did not err in failing to interfere with the presentation of that defense.

III.

The trial court did not plainly err in failing to *sua sponte* prevent the State from suggesting on cross-examination that defense expert Kenneth Benedict should not be believed because he was from out-of-state and did not abuse its discretion in overruling the defense objection when the State asked defense expert Mark Cunningham on cross-examination whether he had ever testified as to why a defendant should be executed, because the questions were proper and did not result in manifest injustice or prejudice, in that the questions were designed to test the veracity and credibility of Benedict and the bias of Cunningham, and when viewed in context of all the evidence presented in both the guilt and penalty phases of the trial, the questions were not reasonably likely to have affected the outcome of either phase of the trial. (Responds to Appellant's Point VI).

Appellant alleges the trial court: (1) plainly erred in failing to *sua sponte* prevent the State from suggesting on cross-examination that defense expert Kenneth Benedict should not be believed because he was from out-of-state; and (2) abused its discretion in overruling the defense objection when the State asked defense expert Mark Cunningham on cross-examination whether he had ever testified as to why a defendant should be executed.

A. Standard of Review.

Trial courts retain broad discretion in deciding the permissible scope of cross-examination, and an appellate court will not reverse a conviction absent an abuse of that discretion. *State v. Goodwin*, 43 S.W.3d 805, 817 (Mo. banc 2001). Failure to object during cross-examination fails to preserve the issue for review. *State v. Knese*, 985 S.W.2d 759, 771 (Mo. banc 1999). Issues that were not properly preserved for review may be reviewed for plain error only, requiring this Court to find manifest injustice or miscarriage of justice has resulted from the trial court error. *Middleton*, 995 S.W.2d at 452.

B. Dr. Benedict's cross-examination.

Appellant called Dr. Kenneth Benedict, a licensed psychologist from North Carolina, to testify during the guilt phase of the trial. (Tr. 2946). Benedict was hired by the Public Defender's office to evaluate Appellant. (Tr. 2955-56). Benedict testified on direct examination about the fees he was charging the Public Defender for his work on the case. (Tr. 2955-56). Benedict testified that he diagnosed Appellant with Attention Deficit Hyperactivity Disorder that developed into Intermittent Explosive Disorder as Appellant reached adulthood, with Paranoid Personality Disorder, and with Narcissistic Personality Disorder. (Tr. 2989, 3029, 3066). He also expressed the opinion that Appellant's mental illness was substantial enough to impair or eliminate his ability to deliberate. (Tr. 3112).

The State cross-examined Dr. Benedict about the fees he was charging for his work on Appellant's case and the amount of time he had spent on the case. (Tr. 3130-32). Appellant complains about the following portion of the cross-examination:

Q. How many clinical psychologists are there in North Carolina, if you know?

A. I would only be able to give you a rough approximation.

Q. That's fine. Your approximation is fine with me.

A. Oh, 5,000.

Q. And you're flying halfway across the country, almost literally in order to get here; correct?

A. That's correct.

Q. And would you expect then that there are literally thousands of other clinical psychologists between here and your office?

A. I would think.

Q. And, probably hundreds of them here in Missouri?

A. Yes.

Q. Not to mention additional numbers of forensic psychologists and other persons - -

A. (Witness nodded head.) Correct.

Q. - - who are in your field.

* * * *

Q. Well, can you explain, sir - - and we've talked about there being quite a few clinical psychologists and forensic psychologists in the world; particularly, in the eastern half of the United States, why it was necessary to go all the way to North Carolina to find you?

A. I would have to refer you to the legal team. I don't know.

(Tr. 3133, 3135). Appellant did not object to the State's questions, and asks this Court for plain error review.

One of Appellant's criticisms of the cross-examination appears to be that it created inferences based on facts that were not in evidence. It's not clear what those facts are, since Dr. Benedict testified as to the existence of other forensic psychologists in North Carolina, Missouri, and points in between. Even if the questions did assume facts not in evidence, the cases that Appellant cites in support of his argument stand for the proposition that character witnesses cannot be questioned on facts not in evidence. *State v. Selle*, 367 SW.2d 522, 529-30 (Mo. 1963); *State v. Creason*, 847 S.W.2d 433, 488 (Mo. App. W.D. 1993). An expert witness, however, may be cross-examined about facts not in evidence to test his qualifications, skills, and credibility, or to test the validity or weight of his opinions. *Goodwin*, 43 S.W.3d at 817; *Brooks*, 960 S.W.2d at 492. The prosecutor's questions were designed to test the witness's credibility, so that to the extent the questions may have involved facts outside the record, they were not improper for that reason.

Appellant's main complaint is that the State's cross-examination suggested that the defense had to go outside Missouri to obtain an expert who would provide an opinion favorable to Appellant. This Court has recently stated that, "[a]s a general rule, a witness may be asked any questions on cross-examination that tend to test accuracy, veracity, or credibility, or shake the witness' credit by injuring his or her character." *Black v. State*, 151 S.W.3d 49, 55 (Mo. banc 2004). Applying that standard, the questions asked by the State on cross-examination were proper attempts to test Dr. Benedict's veracity

or credibility. The trial court thus did not err in not *sua sponte* interfering with the State's cross-examination.

Appellant supports his contrary argument with a case from the Court of Appeals for the Western District that says it is not proper to suggest that an expert should not be believed because he is from out-of-state, or to imply, without foundation, that a party could not find a Missouri expert. *Perkins v. Runyan Heating & Cooling Srvcs.*, 933 S.W.2d 837, 842 (Mo. App. W.D. 1996). *Perkins* dealt with the propriety of closing argument, as did the two non-Missouri cases that Appellant cites in support of his argument. *Id.*; *Regan v. Vizza*, 382 N.E.2d 409, 411 (Ill. Ct. App. 1978); *State v. Smith*, 770 A.2d 255, 264 (N.J. 2001). The Western District has previously found that cases involving the propriety of closing argument are not controlling or persuasive on allegations of error involving cross-examination. *State v. Francis*, 997 S.W.2d 74, 77 (Mo. App. W.D. 1999).

While Appellant makes a passing reference to the prosecutor's statement in closing argument that the defense "had to go clear to Carolina to get [Benedict], and [he] charges 'em $300 an hour to come testify here," (Tr. 3896), the main thrust of Appellant's argument concerns the cross-examination of Benedict. Even if Appellant's allegation of error is read to encompass the State's closing argument, neither the closing argument nor the cross-examination resulted in manifest injustice to Appellant.

Plain error review of assertions regarding closing argument and examination of witnesses is discouraged because uninvited interference by the trial judge risks injecting the judge into the role of a participant and invites trial error. *State v. Roper*, 136 S.W.3d 891, 902 (Mo. App. W.D. 2004); *State v. Crowe*, 128 S.W.3d 596, 601 (Mo. App. W.D. 2004). Reversal is not warranted under plain error review unless the error has a decisive effect on the jury's determination. *State v. Shurn*, 866

S.W.2d 447, 460 (Mo. banc 1993). To meet that standard, Appellant has the burden of demonstrating a reasonable probability that the verdict would have been different had the error not been committed. *Crowe*, 128 S.W.3d at 600.

Claims of manifest injustice involving closing argument and examination of witnesses have been rejected where there is substantial evidence of guilt. *Roper*, 136 S.W.3d at 903; *State v. Dixon*, 70 S.W.3d 540, 549 (Mo. App. W.D. 2002). Overwhelming evidence supports the jury's verdict in this case. Appellant's admissions that he killed Morton, and his statement to police that he decided to kill her long before he actually committed the act and that he thought about how he should kill her, support the jury's finding that the murder was committed after deliberation. (State's Ex. 67). Deliberation is also supported by the fact that Morton was tied-up before she was killed and by the numerous wounds inflicted on her. *See, State v. Cole*, 71 S.W.3d 163, 169 (Mo. banc 2002) (deliberation could be inferred from numerous stab wounds inflicted after victim was unable to resist). There was also Appellant's statement that he strangled Morton because she was still breathing after he broke her neck, and that he attempted to cut her spinal cord with a knife to ensure that she was dead. (State's Ex. 67).

Given that evidence, it is unlikely the jury would have reached a different verdict absent either the cross-examination or the statement made in closing argument. An additional reason why the closing argument did not result in manifest injustice is that the reference to Dr. Benedict was brief and was not the major theme of the argument. *Nelson v. Waxman*, 9 S.W.3d 601, 606 (Mo. banc 2000). Appellant has not met his burden of showing he is entitled to plain error relief in connection with Dr. Benedict's examination.

C. Dr. Cunningham's cross-examination.

Dr. Mark Cunningham, a clinical and forensic psychologist, testified for Appellant during the punishment phase of the trial. (Tr. 4121). Dr. Cunningham had conducted research on the characteristics and capabilities of death-row inmates, including an evaluation of the Potosi Correctional Center. (Tr. 4128). He was hired by the Public Defender's office to perform a capital sentencing evaluation, which involves examining factors that contribute to mitigation, and examining Appellant's likelihood of adjusting to prison without serious violence. (Tr. 4139-41, 4330). During cross-examination, the prosecutor questioned Dr. Cunningham on his experience in testifying in capital cases:

Q. That's what I'm trying to get at. So what I'm - - we're getting at is that 90 percent of your livelihood comes from this type of evaluation, leading up to and including testimony?

A. From capital evaluations at all phases - - sometimes in appellate level rather than a trial level - - perhaps 85 to 90 percent of my income is derived from capital consultations at one phase or another.

Q. And that is, as I understand it, exclusively at the request of the defendant?

A. I've only been called by the defense in capital cases up till now. Although I've offered the prosecution my willingness to consult and present this data should they request it as well.

Q. Have you ever testified for the defense or anyone else, for that matter, as to why a Defendant needed - - should be executed?

A. Well, first, sir, again, I don't ever testify for anybody. But, I - -

MR. JACQUINOT: Your Honor, - -

[Counsel approached and the following sidebar proceedings were had:]

MR. JACQUINOT: That is mere misconduct. Nobody is allowed to testify whether somebody should be executed, and I would request a sanction of a mistrial or the sanction of a, immediately directing a verdict for life without parole as it is highly improper to do that.

MR. REED: Bias; prejudice of the witness.

MR. AHSENS: Goes to bias and prejudice of the witness.

MR. JACQUINOT: He's asking to testify to something that no one's allowed to allude to. Mr. Ahsens knows no one is allowed to testify to such, and that's where the misconduct lies in that question.

MR. AHSENS: There is no misconduct.

THE COURT: Overruled. Let's proceed.

[Proceedings resumed in open Court, as follows:]

A. It is never my testimony - -

THE WITNESS: Do you want me to answer the question or not?

MR. AHSENS: No.

Q. (By Mr. Ahsens) Sir, let me just put it to you this way. I'll be very direct about it. You, in fact, oppose the death penalty as a matter of personal belief, do you not?

A. No, sir, not at all. I have no opinion about the death penalty one way or the other. And would consult with the Defense or the State and present the best scientific data that I have available.

(Tr. 4337-39). Appellant contends the State's cross-examination was improper because the prosecutor knew that no expert could recommend that a defendant be executed.

The case that Appellant relies on for the proposition that an expert cannot testify that a defendant should be executed actually stands only for the proposition that the opinions of the victim's family on punishment is not admissible. *State v. Taylor*, 944 S.W.2d 925, 938 (Mo. banc 1997). This Court has, however, stated previously that an expert witness's function does not extend to recommending punishment. *State v. Nickens*, 403 S.W.2d 582, 587 (Mo. banc 1966).

When viewed in context, the purpose of the cross-examination was to explore whether Dr. Cunningham's opinions were affected by a bias against the death penalty. Cross-examination of a witness to determine possible bias is permissible, and the parameters of such cross-examination are within the broad discretion of the trial court. *State v. Leisure*, 796 S.W.2d 875, 880 (Mo. banc 1990). While Dr. Cunningham could not directly offer an opinion on whether or not Appellant should receive the death penalty, his testimony was designed to bring forth mitigating evidence that the jury could use to find that the death penalty was not warranted in this case. Viewed in that light, the question that Appellant finds objectionable was designed to elicit whether Dr. Cunningham had ever testified about the existence of aggravating factors that a jury could use to find that the death penalty was warranted in a particular case. The prosecutor did not directly ask Dr. Cunningham whether he had

recommended the death penalty, and while the question might have been more artfully worded, it was not improper.

Even if this Court concludes that the trial court erred in overruling the objection, that error does not merit reversal in the absence of prejudice to Appellant. *Id.* at 879. The burden is on Appellant to show both error and resulting prejudice. *Id.* Prejudice requires a showing of outcome-determinative error. *State v. Barriner*, 34 S.W.3d 139, 150 (Mo. banc 2000). The prosecutor extensively cross-examined Dr. Cunningham. (Tr. 4315-40). The cross-examination covered Dr. Cunningham's qualifications, the sources of data underlying his testimony, his fees, and his participation in other capital murder cases. (Tr. 4315-40). Part of the information elicited was that in every capital case in which Dr. Cunningham had testified, he did so at the request of the defense. (Tr. 4332-33). The question that drew the objection represented the flip side of that testimony. So to an extent, the question was merely cumulative to unobjectionable questions that had been previously put to the witness. The prosecutor also did not dwell on the subject. Even though the objection was overruled, he went on to another question that better articulated the point he had been trying to make. (Tr. 4338-39). The question thus raised no inference with the jury because it was not answered.

Even if, as Appellant contends, the question did raise an improper inference of bias with the jury, Appellant was entitled to try and refute, weaken, or remove that inference on redirect examination. *State v. Love*, 134 S.W.3d 719, 725 (Mo. App. S.D. 2004). Appellant chose not to redirect Dr. Cunningham, perhaps because Cunningham had already weakened or removed any unfavorable inferences by directly denying that he had any bias against the death penalty. (Tr. 4339, 4340). Finally, it should be noted that Dr. Cunningham was one of fifteen witnesses who testified for the defense in the

penalty phase of the trial, while five witnesses testified for the State. (Tr. Index). The penalty phase evidence was extensive. (Tr. 4006-4513). Dr. Cunningham testified at length. (Tr. 4121-4340). In light of all that evidence, it is not reasonably likely that one question that the prosecutor failed to pursue changed the outcome of the penalty phase of the trial.

IV.

The trial court did not err, plainly or otherwise, in overruling defense motions in limine and objections to the use of the terms "murder," "kidnapping," "abduction" and "crime scene," because use of the terms did not state a conclusion that invaded the province of the jury and the use of the terms did not prejudice Appellant, in that those terms are shorthand descriptions and words of common currency that may properly be used by witnesses, the use of the terms was brief and infrequent in the context of the entire trial, many of the instances Appellant complains of came in answers elicited by his cross-examination, and Appellant testified himself that manslaughter is murder. (Responds to Appellant's Point VII).

Appellant claims the trial court abused its discretion in overruling his motion in limine and permitting the prosecutors and witnesses to use terms such as "murder," "kidnapping," "abduction," and "crime scene" during the course of the trial.

Appellant filed a *pro se* Motion in Limine to prevent the use of the terms, "crime scene," "murder," and "victim." (L.F. 843). That motion stated that, "[t]here is no dispute that Miss Morton was a victim of a homicide." (L.F. 844). The motion objected to referring to Morton as a victim of a kidnapping, and to referring to her car as a crime scene, again in relation to a kidnapping. (L.F. 844). Appointed counsel subsequently filed a Motion in Limine to prevent the use of the term, "murder." (L.F. 960). Both motions were overruled during pre-trial proceedings. (Tr. 831, 864). Highway Patrol Trooper Joe Boix was the fourth witness to testify for the State during the guilt phase of the trial. (Tr. Index). During his testimony, the State offered its Exhibit 1, which was a map showing the Springfield-Strafford area and the intersection of Interstate-44 and Highway 125. (Tr. 1922-23).

When the map was offered into evidence, Appellant objected on the basis of, "that terminology that we talked about . . . in pretrial." (Tr. 1923). Appellant asked for, and was granted, a continuing objection, "for all three of those issues." (Tr. 1924). Appellant's motion for new trial alleged error in the denial of the motions in limine. (L.F. 1161).

A. Standard of Review.

A trial court's ruling on a motion in limine is interlocutory in nature, and only an objection made at trial when the evidence is offered will preserve the issue for appellate review. *State v. Cardona-Rivera*, 975 S.W.2d 200, 207 (Mo. App. S.D. 1998). Appellant's Motion for New Trial alleged error in the trial court's overruling of the motions in limine, but not in the subsequent overruling of objections and admission of evidence. (L.F. 1161-62). This Court does not appear to have addressed the question of whether that allegation in a motion for new trial preserves the issue for review. The Southern District of the Court of Appeals has found that a new trial motion referring only to the denial of a motion in limine is not sufficient, so that the claim of error is only subject to plain error review. *Id.* The Western District has found a similar allegation to lack the desired specificity, but determined that the claim could be reviewed as preserved trial error because the detailed grounds for objection presented to the trial court, and repeated in the motion for new trial, were sufficient to apprize both the trial and appellate court of the ruling under attack and the reasons therefor. *State v. Pennington*, 24 S.W.3d 185, 189 (Mo. App. W.D. 2000).

A properly preserved allegation of error in the admission of evidence is reviewed for abuse of discretion. *Wolfe*, 13 S.W.3d at 258; *Middleton*, 995 S.W.2d at 452. Review on direct appeal is for prejudice, not mere error, and this Court will reverse only if the error was so prejudicial that it deprived

Appellant of a fair trial. *Middleton*, 995 S.W.2d at 452. Issues that were not properly preserved for review may be reviewed for plain error only, requiring this Court to find manifest injustice or miscarriage of justice has resulted from the trial court error. *Id.*

B. Terms were permissible short-hand descriptions and not legal conclusions.

Appellant contends the terms contained in the motion in limine were impermissible because their use constituted a conclusion and invaded the province of the jury. There appears to be no Missouri law on point, but the Eighth Circuit has ruled that two witnesses' use of the word "stolen" was not prejudicial, and that witnesses should be allowed to use such short-hand descriptions in giving their testimony. *United States v. Gray*, 464 F.2d 632, 636 (8th Cir. 1972). Witnesses in other states have similarly been permitted to use such terms as "raped," *State v. See*, 271 S.E.2d 282, 284 (N.C. 1980); "stolen," *Stone v. United States*, 385 F.2d 713, 716 (10th Cir. 1967); and "attacked," *People v. Hooker*, 279 P.2d 784, 789 (Cal. Ct. App. 1955).

Other courts have found that words such as "bribe," "kickback," "payoff," and "escape" are words of common currency that are routinely reported in the media, and do not constitute words calling for a legal conclusion. *United States v. Long*, 534 F.2d 1097, 1100 (3d Cir. 1976); *State v. Okumura*, 584 P.2d 117, 119 (Haw. 1978). A trial court's ruling that the prosecutor's use of the word "threaten" in a cross-examination question called for a conclusion was found erroneous. *State v. Debo*, 222 N.E.2d 656, 659 (Ohio Ct. App. 1966).

The words "crime scene," "murder," and "victim" are words of common currency that are part of the vernacular of the public and of the media.[6] Use of those terms does not constitute a conclusion and does not invade the province of the jury. The trial court did not err, plainly or otherwise, in permitting those terms to be used.

C. Appellant not prejudiced by the use of those terms.

Even if the trial court erred in allowing use of the terms that Appellant complains of, Appellant has not shown he was prejudiced by the ruling. Reversal due to the improper admission of evidence requires a finding that "the erroneously admitted evidence so influenced the jury that, when considered

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[6] In his argument, Appellant also complains about the use of the terms "kidnapping" and "abduction." However, neither of these terms was included in either of the motions in limine filed by Appellant. *See*, *Barnett*, 980 S.W.2d at 303 (the theory raised in the motion for new trial cannot be broadened on appeal). In any event, both terms are words of common currency.

with and balanced against all of the evidence properly admitted, there is a reasonable probability that the jury would have reached a different conclusion but for the improperly admitted evidence." *Barriner*, 34 S.W.3d at 150. Testimony in the guilt and penalty phases of the trial lasted over the course of fifteen working days, involved dozens of witnesses and takes up more than 2,600 pages of transcript. (Tr. Index). In his brief, Appellant only identifies two witnesses who used the terms "crime scene," "abduction," and "kidnapped." The term "kidnapped" was used once, the term abduction was used twice, and the term "crime scene" was used seven times. (Tr. 2059, 2062, 2073, 2077, 2089, 2090, 2091, 2109, 2511). Appellant also complains about one instance where the prosecutors used the word "abduction," and eight instances where they used the word "murder." (Tr. 2206, 2270, 2340, 2625, 2632, 2637, 2781, 2783).

Both uses of the word "abduction" by a witness came during the course of a single answer by Greene County Deputy Mark Smith, who explained that the procedures used in his investigation of Morton's vehicle were driven by his belief that an abduction had occurred. (Tr. 2062). All but one of Deputy Smith's uses of the term "crime scene" came during the defense's cross-examination. (Tr. 2062, 2073, 2077, 2089, 2090, 2091, 2109). The last of those references was not a direct reference to a particular location as a crime scene, but an explanation that he uses a Tyvex suit in his work to prevent him from contaminating a crime scene. (Tr. 2109). The single reference to the word "kidnapped" was also elicited during Appellant's cross-examination of Highway Patrol Sergeant Raymond Kaiser. (Tr. 2511). A defendant cannot claim prejudice on account of testimony produced by his own counsel. *State v. Campbell*, 122 S.W.3d 736, 742 (Mo. App. S.D. 2004).

The use of the complained-of terms by both witnesses and prosecutors was brief and was usually made in passing. The frequency with which those terms appear, in the context of all the testimony and evidence presented to the jury, is extremely minimal, so that it cannot be said those statements, when balanced against all the properly admitted evidence, changed the jury's verdict.

Appellant also should not be heard to complain that the term "murder" prejudiced him because the jury had to consider whether to convict him of first or second degree murder, or of voluntary manslaughter. In his own testimony on direct examination, Appellant stated that manslaughter, "is, in fact, a murder." (Tr. 3723). Appellant cannot be prejudiced when he "voluntarily testifie[s] to the same matters when he was on the stand on his own behalf, upon questioning of his own counsel." *State v. Davis*, 400 S.W.2d 141, 150 (Mo. 1966), *see also*, *State v. Reynolds*, 517 S.W.2d 182, 183 (Mo. App. St.L.D. 1974) (police officer's description of items as burglary tools not prejudicial where defendant used the same terminology in his cross-examination of officer).

Also, the term "murder" is the word most laypeople associate with any intentional killing. The jury was instructed on the elements it had to find to support the charges of murder in the first degree, murder in the second degree, and voluntary manslaughter. (L.F. 1084, 1086, 1087). A jury is presumed to know and follow the trial court's instructions. *State v. Madison*, 997 S.W.2d 16, 21 (Mo. banc 1999). Appellant has not demonstrated a reasonable probability that the occasional use of the word "murder" throughout this lengthy trial misled the jury and rendered it unable to follow the court's instructions.

V.

The trial court did not abuse its discretion in granting a hardship excuse to Veniremember Kronshage because the excuse is supported by the record and a qualified panel of jurors was tendered for peremptory strikes, in that Kronshage's medical condition and that of his wife constituted a valid hardship, particularly since the jury would be sequestered in another community for two weeks, and the State used only six of its nine peremptory strikes against veniremembers who had expressed reservations about the death penalty, so that even if Kronshage had been on the panel tendered for peremptory strikes, the State would still have been able to remove all those veniremembers who expressed reservations about voting for the death penalty. (Responds to Appellant's Point VIII).

Appellant claims the trial court erred and abused its discretion in *sua sponte* discharging venireperson Byron Kronshage for hardship. During voir dire on Monday, July 12th, Kronshage was one of several veniremembers who asked to speak to the judge outside the presence of the other veniremembers:

> THE COURT: Hi, Mr. Kronshage.
>
> One of the bailiffs indicated to me that you wanted to talk to me.
>
> VENIREPERSON KRONSHAGE: Well, I guess I should have said something this morning. But, my wife has got congestive heart failure.
>
> THE COURT: Okay.
>
> VENIREPERSON KRONSHAGE: And I had cardioversion this last spring.
>
> THE COURT: Say that again.

VENIREPERSON KRONSHAGE: A cardioversion, where they stop your heart and start it up again.

THE COURT: Okay, and - -

VENIREPERSON KRONSHAGE: And I'm on Coumadin, which I got to get tested next week for.

THE COURT: All right.

VENIREPERSON KRONSHAGE: You know, your protile (sic) levels.

THE COURT: And where is that testing done?

VENIREPERSON KRONSHAGE: At Blue Springs.

THE COURT: Is that something any hospital can do or does it have to - -

VENIREPERSON KRONSHAGE: They've got a standing order at Blue Springs. That's all I know.

THE COURT: All right. Say you're on the jury and we could arrange for that to be done in the area that you would be. Let's say that it's something that can be done there.

VENIREPERSON KRONSHAGE: Yeah. Well, it's just how thin your blood is. That's - -

THE COURT: Well, I understand.

VENIREPERSON KRONSHAGE: Yeah.

THE COURT: But they take a drop or something and they send it to the lab?

VENIREPERSON KRONSHAGE: Yes.

THE COURT: And the lab gives a reading. And it's either too thick or too thin. If it's okay, nothing's done; see you later. And, if it needs adjusting, - -

VENIREPERSON KRONSHAGE: You have to get different Coumadin.

THE COURT: I hear you.

VENIREPERSON KRONSHAGE: I didn't think about it until I got to looking at the calendar and realized it was next Wednesday when I have to have it tested.

THE COURT: All right. And does your local physician here set that up?

VENIREPERSON KRONSHAGE: It's through Cardiologist Consultants in Kansas City, St. Luke's hospital.

THE COURT: And, okay. And who is your cardiologist there?

VENIREPERSON KRONSHAGE: Dr. Lasiter.

THE COURT: L-A-S-I-T-E-R?

VENIREPERSON KRONSHAGE: Yeah. Well, any of those Cardiology Consultants will.

THE COURT: Yeah, he's the one you usually see?

VENIREPERSON KRONSHAGE: Yeah, he's the one I usually see. Although, I seen Dr. Angles last. And I've seen Dr. Tracey Stevens, too.

THE COURT: And they're all with that outfit?

VENIREPERSON KRONSHAGE: Yeah. There's 28, 29, or something like that.

THE COURT: Yeah. Okay, thank you for sharing that with us. I appreciate it.

(Tr. 1097-1100). Subsequent to that exchange, the State began voir dire on the penalty phase of the trial. (Tr. 1111). Kronshage responded to that questioning by stating that he thought that he could vote for the death penalty, but that he would have a hard time with it and he would be hesitant. (Tr. 1131, 1134). He also stated that he did not think he would be able to sign a death verdict if he were the jury foreman. (Tr. 1133). The State moved to strike Kronshage for cause on the basis that he would not be able to vote for the death penalty. (Tr. 1229). Appellant objected and the trial court overruled the State's challenge. (Tr. 1229). At the end of the voir dire questioning, the trial court excused thirteen jurors for the rest of the day, with instructions that they return at 1:00 p.m. the following Wednesday. (Tr. 1249-50). Kronshage was not one of the thirteen. (Tr. 1249).

When the time came for making peremptory strikes, Appellant's counsel noted that Kronshage was not on the petit panel, and he expressed the opinion that Kronshage was inadvertently stricken from the list of persons eligible for the petit panel. (Tr. 1712). The trial court then made a record of what had taken place with Kronshage:

> THE COURT: All right. The official excuses or non excuses from the first day are contained upon this sheet, entitled, WJR II, 7/12/04. I excused Byron Kronshage at the end of the day on July the 12th, '04, by my markings on this.
>
> We have reviewed the record this morning. And the record does not say that I excused him for any reason. So, in order to place of [sic] record the reason for what I did on July the 12th, '04, at the end of the day, I excused Mr. Kronshage for hardship based upon his wife's congestive heart failure; his problem, which included putting a pacemaker in, and his need to have his, I believe the word is protein levels checked

regularly; the next one being Thursday of next - - the word Thursday of next week comes to mind. And, the need for the lab testing for that, and the adjustment of his medication, if his protein levels were not correct.

So, that is what I did on July the 12th '04. And I'm placing that of record today. He is not on the final panel.

(Tr. 1719). The trial court acknowledged that the parties were not informed of the hardship strike at the time it was made. (Tr. 1720).

A. Standard of Review.

The trial court has substantial discretion to excuse persons from jury service on the basis of undue hardship, and the trial court's ruling is reviewed for abuse of discretion. § 494.430(4), RSMo 2000; *State v. Murray*, 744 S.W.2d 762, 770 (Mo. banc 1988).

B. Trial court did not abuse its discretion in finding an extreme hardship.

Appellant contends the trial court abused its discretion in excusing Kronshage because the record does not support that jury service would have imposed an extreme hardship. The trial court acted well within its discretion. Kronshage not only had substantial health problems himself, but he had a wife with congestive heart failure who would have been left alone while Kronshage was sequestered in Osceola for the two week trial. (Tr. 1097). Kronshage was scheduled to undergo testing during the trial that could have resulted in his medication being adjusted. (Tr. 1097-1100).

No abuse of discretion was found where a venireperson who expressed reservations about the death penalty was granted a hardship excuse because his brother was hospitalized. *State v. Ramsey*, 864 S.W.2d 320, 336 (Mo. banc 1993). A trial court's routinely excusing jurors who provided

documented medical excuses was found to not be an abuse of discretion. *Anderson*, 79 S.W.3d at 431. This Court has also upheld hardship excuses for parents for whom jury service would result in their children being left alone for substantial periods of time. *Murray*, 744 S.W.2d at 770-71. That situation is similar to Kronshage's need to look after his wife. Kronshage's situation is within the realm of what the undue hardship statute envisions, and the trial court did not abuse its discretion in granting a hardship excuse.

Appellant tries to argue that this Court should not believe the trial court's explanation, and relies on a notation made on the jury sheet, "13 for sure," as an indication that Kronshage had not been given a hardship excuse at the end of the day. (L.F. 1062). As noted above, the trial court called in thirteen jurors at the end of the day's session, and instructed them to return the following Wednesday. (Tr. 1249-50). Kronshage was not one of the thirteen. (Tr. 1249). Two of the people in that group were veniremembers against whom Appellant had made challenges for cause that the court took under advisement. (Tr. 1249, 1252-53). The following morning, the court sustained the challenge made against veniremember Dewey and overruled the challenge to veniremember Meyer. (Tr. 1253). The jury sheet reflects that thirteen persons were still on the panel at the end of their voir dire session, but that veniremember Dewey was later stricken. (L.F. 1062). The sheet shows Kronshage's name as being crossed off. (L.F. 1062). The record thus does not support Appellant's argument that the trial court believed Kronshage was still on the panel at the end of the day.

C. Appellant not prejudiced by trial court's decision.

Appellant cannot show prejudice where a venireperson is excused for reasons unrelated to the person's scruples against the death penalty and a full panel of qualified jurors is tendered for peremptory

challenges. *Taylor*, 944 S.W.2d at 933; *State v. Reuscher*, 827 S.W.2d 710, 714 (Mo. banc 1992). The record shows that Kronshage was excused for reasons unrelated to any views he expressed about the death penalty. (Tr. 1719). As the prosecutor in this case correctly noted, a veniremember's views on the death penalty or any other issue should have no bearing on that person's eligibility for a hardship excuse. (Tr. 1717).

Appellant argues that the State effectively received an extra peremptory challenge as a result of the hardship excuse. This Court rejected a similar argument in another capital case. *State v. Sweet*, 796 S.W.2d 607, 612 (Mo. banc 1990). The veniremember in that case had expressed some reservations about the death penalty and was ambivalent about her ability to listen to the evidence because jury service would have caused her to miss her son's birthday and a program at school. *Id.* The trial court had stated a general policy that it would make a "court strike" for any person who had a personal problem serving on the jury, but instead of striking the veniremember from the panel, the court placed her near the end of the panel, which effectively struck her from the jury. *Id.* This Court found no merit to the defendant's argument that the trial court's strike effectively gave the State an extra peremptory challenge. *Id.*

The record also does not support the allegation made in Appellant's Point Relied On that the trial court's ruling tipped the scales toward death. Appellant notes that if Kronshage had remained on the panel, the State probably would have used a peremptory strike to remove him. To the extent that Appellant has correctly surmised that the State would have peremptorily struck Kronshage, his presence on the venire panel would not have impeded the State's ability to remove all of the veniremembers who expressed reservations about the death penalty. Of the nine persons who were

struck peremptorily by the State, three of those persons stated unequivocally that they could vote for the death penalty. (L.F. 1065; Tr. 1156, 1185-86, 1589, 1607, 1650). Both of the veniremembers struck from the alternate pool also gave unequivocal assurances that they could vote to impose the death penalty. (L.F. 1065; Tr. 1614, 1621, 1672-73). The reasonable conclusion is that even if Kronshage had been on the panel tendered for peremptories, the State would still have been able to strike all the veniremembers who had expressed some ambivalence about imposing the death penalty. The record thus does not show that the trial court tipped the scales towards death.

Appellant has also failed to show, and does not even argue, that the tendered panel of jurors was unqualified. Absent any showing that the panel was not qualified, no error results from Kronshage's removal. *Reuscher*, 827 S.W.2d at 714.

VI.

The trial court did not abuse its discretion in excluding from evidence a portion of the discovery deposition of Strafford Police Officer Kenneth Clark and a taped conversation between a Greene County Deputy and a dispatcher because the excluded evidence was not relevant to any issue in the case, in that Appellant's theory that the evidence would show law enforcement manipulated evidence to make it appear Amanda Morton was kidnapped had no bearing on the jury's determination of whether Appellant had the requisite mental state to be found guilty of murder in the first degree, or on the existence of any of the aggravating circumstances submitted to the jury. (Responds to Appellant's Point IX).

Appellant claims the trial court abused its discretion when it sustained the State's objection and refused to admit: (1) excerpts from Officer Clark's discovery and trial depositions; and (2) an audio tape of a radio conversation between the Greene County Sheriff's dispatcher and another officer, because the evidence was relevant to Appellant's theory that the police agencies had engaged in a cover-up and had destroyed evidence.

A. Standard of Review.

The trial court is vested with broad discretion to determine the relevancy of evidence and whether evidence should be admitted or excluded, and that determination will be reversed only on a showing of abuse of discretion. *Wolfe*, 13 S.W.3d at 258; *Middleton*, 995 S.W.2d at 452. Review on direct appeal is for prejudice, not mere error, and this Court will reverse only if the error was so prejudicial that it deprived Appellant of a fair trial. *Middleton*, 995 S.W.2d at 452.

B. Clark's deposition.

As part of it's case-in-chief, the State played the videotaped deposition of Strafford Police Officer Kenneth Clark. (Tr. 1981; State's Ex. 86). Clark had previously given a discovery deposition, and Appellant used that deposition in his cross-examination during the video deposition that was played at trial. (Tr. 3381; State's Ex. 86). Appellant proffered specific portions of the deposition that he wanted to read to the jury. (Tr. 3386-88). The State objected on grounds of relevance, and that the testimony in the discovery deposition was not inconsistent with the testimony in the video deposition. (Tr. 3389). The court sustained the objection to two of the proffered portions of the discovery deposition, and overruled the objections to the remaining portions. (Tr. 3389-90). Appellant read those portions of the deposition to the jury. (Tr. 3516-21). The portion that the trial court excluded reads as follows:

Q. And one of the things that you related was that there may have been some previous problems concerning jurisdictional issues between the police department in Strafford and the county agency. Were you aware of those problems prior to - - or issues, problems, whatever you want to - - were you aware of that prior to this night?

A. All I knew is what other officers had told me.

Q. And what had they told you?

* * * *

A. They had said they had a robbery, armed robbery, at one of the motels we got up there - - the only motel actually. And the sheriff's office came in and tried to take it over. There was an officer up there that - - I guess he got mad and

wasn't going to give it to them. They just started arguing. So the sheriff says, "All right. We're not going to take any more calls over for you unless you specifically request it." I didn't know that the chief had to request it.

Q. As a law enforcement officer, were you involved in that robbery investigation at all or was that something before your - -

A. That was before I came.

(Tr. 3389-90; App., A34).

C. Recording of dispatch conversation.

Appellant offered into evidence a tape recording of a conversation between Greene County Sergeant Randall Gibson and dispatcher Louis Cook that took place on July 12, 2001. (Tr. 3335, 3346-47). Appellant was particularly interested in having the jury hear the following portion of the tape (Tr. 3341):

SGT. GIBSON: Well, I - - I don't know how big a shit storm this is going to stir up. Ah, I think the family is alleging or implying that the police didn't do all that they could or should have done. And it looks like we're in the clear, because this sounds like a Highway Patrol and - -

DISPATCHER COOK: And Strafford PD kind of thing.

SGT. GIBSON: Strafford PD kind of thing.

DISPATCHER COOK: Uh-huh.

SGT. GIBSON: You know, we're - - I don't know. You might want to kind of flag the tape for that, for that whole spot (sic) period of time, because it may yield

some answers that somebody in administration may be asking you at - - at some point that you don't have the answer to right there in front of you. And I - - I don't know. If you're not real certain, I wouldn't try to go ahead and make a recording, because I had someone try that once and they inadvertently erased it which we don't want - -

DISPATCHER COOK: (Laughter.)

SGT. GIBSON: - - we don't want to do that here.

DISPATCHER COOK: No. I'll let J.R. do that. I don't mess with that machine.

SGT. GIBSON: Okay.

Alrighty. Well, I'm headed out there. And I'll - - as soon as I know something, I'll fill you in.

(Tr. 3351-52; Def.'s Ex. 711).

The State objected to the tape as irrelevant and based on multiple levels of hearsay. (Tr. 3337-38). The trial court listened to the tape and voir dired Sergeant Gibson outside the presence of the jury about the meaning of some of his comments to Dispatcher Cook, particularly Gibson's use of the term "flag it." (Tr. 3336, 3344, 3346). Defense counsel was also permitted to voir dire Gibson. (Tr. 3350).

Gibson testified that he was the Patrol Division Supervisor for the day shift and was talking to the dispatcher by cell phone at about 10:00 a.m., while driving from one end of Greene County to the other. (Tr. 3347-48). Gibson was trying to learn what had happened earlier that morning at the Intersection of Interstate-44 and Highway 125, what the Greene County Sheriff's Department's role was in the situation, and to try and get an explanation for why several requests for Patrol Division

Services were being made for that part of the county. (Tr. 3348). Gibson testified that when he told Cook to "flag" part of the dispatch tape, he meant that Gibson should make note of the location on the tape of the portion relating to Morton's disappearance, so that a recording of that portion could be made without having to listen to hours of tape. (Tr. 3347). Gibson also said that he cautioned the dispatcher about how tapes sometimes were inadvertently erased while being copied, because he wanted to prevent that from happening. (Tr. 3351). Gibson testified that he did not know of anyone who had doctored or erased any of the tapes. (Tr. 3349).

D. The excluded statements were not relevant to any issue in the case.

The theory under which Appellant wanted to present the excluded evidence is that law enforcement agencies had destroyed or manipulated evidence to hide the fact that Morton went with him voluntarily. (Appellant's Brf., p. 126). In other words, Appellant was contesting the allegations that he kidnapped and raped Morton. The excluded evidence does not support Appellant's claims. Even if it did, Appellant was being tried only for murder in the first degree. Whether or not Amanda Morton was kidnapped was not a matter of consequence to the jury's determination of guilt on that charge. Since the statements that Appellant wanted to offer did not bear on the principal issue of the case, the statements were not relevant and were properly excluded. *Tisius*, 92 S.W.3d at 760.

E. Appellant was not prejudiced by exclusion of the statements.

Even if the trial court erred in excluding the evidence, Appellant was not prejudiced. A trial court's exclusion of admissible evidence creates a presumption of prejudice that is rebuttable by the facts and circumstances of the particular case. *Barriner*, 111 S.W.3d at 401. Overwhelming proof of

guilt rebuts that presumption. *Id.* Prejudice also requires a finding of a reasonable probability that the trial court's error affected the outcome of the trial. *Id.*

As noted in Point One, Appellant admitted at trial that he intentionally killed Amanda Morton, so that the only contested issue was his mental state at the time of the murder. (Tr. 3797-98; L.F. 1085-87). Exclusion of the statements had no bearing on the jury's determination of whether Appellant was guilty of murder in the first degree. Since kidnapping was not an aggravating circumstance submitted to the jury, the statements also had no bearing on the jury's determination of the existence of aggravating circumstances supporting the death penalty. In addition, there was sufficient evidence, as outlined in Point I, from which the jury could reasonably infer that Morton was kidnapped. (Tr. 1934, 2120, 2140; State's Ex. 85, 86). There is no reasonable probability that the outcome of the trial would have been changed by admission of the statements, and Appellant was not prejudiced by their exclusion.

VII.

The trial court did not err, plainly or otherwise, in overruling Appellant's objections to Instructions 19 and 21 and in refusing Appellant's proposed Instructions 19A, 21A, and 21B because Instructions 19 and 21 were MAI-approved instructions that conform to the substantive law, in that the instructions correctly outline the process set forth in § 565.030, RSMo to determine whether the death penalty is warranted and do not impermissibly shift the burden of proof or misdirect the jury as to the evidence it can consider in weighing aggravating circumstances against mitigating circumstances. (Responds to Appellant's Point X).

Appellant claims the trial court erred in overruling his objections to Instructions 19 and 21 and refusing his proposed Instructions 19A, 21A and 21B. He claims that Instructions 19 and 21 improperly shifted the burden to Appellant to prove he was eligible for a sentence of life without parole. Appellant also contends that the trial court plainly erred in submitting Instructions 19 and 21 because they permitted the jury to weigh all the evidence of aggravating circumstances submitted at trial against the mitigating evidence, rather than restrict the jury to considering only the aggravating evidence that it found beyond a reasonable doubt.

At the penalty phase instruction conference, Appellant objected to Instructions 19 and 21 on the basis that the instructions conflicted with § 565.030, RSMo, by placing the burden on Appellant to obtain a unanimous verdict from the jury that mitigating factors outweigh aggravating factors before a life sentence can be imposed. (Tr. 4505-06; L.F. 1097-1103). *See,* § 565.030.4, RSMo Supp. 2004. Instruction 19 was based on MAI-CR 3d 313.44A, while Instruction 21 was based on MAI-CR 3d

313.48A. (Tr. 4508). Appellant proffered a non-MAI alternative for Instruction 19 and two non-MAI alternatives for Instruction 21. (Tr. 4505; Supp. L.F. 2-8). The trial court overruled Appellant's objection and submitted the MAI-approved instructions. (Tr. 4512). Appellant preserved that objection by including it in his motion for new trial. Supreme Court Rule 28.03. Appellant failed to preserve his claim that instructions 19 and 21 were erroneous because they did not instruct the jury to weigh only the evidence supporting the aggravating circumstances that the jury actually found beyond a reasonable doubt, against the mitigating evidence. Appellant failed to make that objection before the jury retired to deliberate, and did not include the claim in his motion for new trial. *Id.* (L.F. 1205-08).

A. Standard of Review.

Appellant must show both error in submitting an instruction and prejudice in order to be entitled to reversal on a properly-preserved claim of instructional error. *Taylor*, 944 S.W.2d at 936. A claim of instructional error that was not properly preserved can be reviewed for plain error only. *State v. Baker*, 103 S.W.3d 711, 723 (Mo. banc 2003). Instructional error does not rise to the level of plain error unless Appellant can demonstrate that the trial court so misdirected or failed to instruct the jury that it is evident the instructional error affected the jury's verdict. *Id.*

B. Instructions 19 and 21 did not erroneously shift burden of proof to Appellant.

Appellant relies on *State v. Whitfield* to argue that the State has the burden of proving beyond a reasonable doubt that imposition of the death penalty was warranted. *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003). This Court recently rejected a similar argument. *State v. Glass*, 136 S.W.3d 496, 521 (Mo. banc 2004). In *Glass*, this Court noted that *Whitfield* stood for the proposition that the first three steps of the death eligibility determination must be made by the jury, not

by a judge. *Id.*, *see*, § 565.030.4, RSMo Supp. 2004. This Court noted that nothing in *Whitfield* or in § 565.030.4 requires the jury to make the findings in the second and third steps beyond a reasonable doubt. *Glass*, 136 S.W.3d at 521. This Court has also recently rejected the argument advanced by Appellant that the State has the burden of proving that the mitigating circumstances must be insufficient to outweigh aggravating circumstances. *State v. Taylor*, 134 S.W.3d 21, 30 (Mo. banc 2004).

Instructions 19 and 21 were appropriately patterned after the MAI approved instructions.[7] MAI instructions are presumptively valid and are to be given, when applicable, to the exclusion of any other instruction. *State v. Storey*, 40 S.W.3d 898, 912 (Mo. banc 2001). As *Glass* and *Taylor* demonstrate, Instructions 19 and 21, and the MAI-approved instructions on which they were based, do not conflict with the substantive law, and the trial court did not err in giving those instructions.

Appellant's argument that Instructions 19 and 21 should have directed the jury to consider only the aggravating circumstances that it found beyond a reasonable doubt ignores the provisions of § 565.032, RSMo. That statute provides that a jury, "shall not be instructed upon any specific evidence which may be in aggravation or mitigation of punishment, but shall be instructed that each juror shall

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[7] Instruction 19 appears to have been taken from the October 1, 1994, version of MAI-CR 3d 313.44A instead of the September 1, 2003, modified version of that instruction. The only difference between the two is that the 1994 version instructs the jury that it "may consider all of the evidence presented in both the guilt and punishment phases of the trial," while the 2003 version deletes the phrase, "in both the guilt and punishment phases of the trial."

consider any evidence which he considers to be aggravating or mitigating." § 565.032.1(2), RSMo 2000. Instructions 19 and 21 followed the substantive law and were properly submitted to the jury.

In support of his argument, Appellant speculates that the jury may have considered evidence regarding the allegation of sodomy, even though it did not find that aggravating circumstance beyond a reasonable doubt. Speculation that an alleged error in an instruction would have influenced the jury's verdict is insufficient to make a showing of plain error. *Taylor*, 134 S.W.3d at 30. Appellant also fails to provide any logical explanation as to why the jury would find the evidence insufficient to support the aggravating circumstance of sodomy, and then turn around and weigh that evidence against the mitigating circumstances.

Appellant's claim is also precluded because his proffered alternate instructions did not contain the language that he contends should have been included in the MAI-approved instructions. Any alleged defect in the MAI-approved instructions were thus not readily apparent to defense counsel and therefore not likely to mislead the jury. *Dierker Assocs., D.C., P.C. v. Gillis*, 859 S.W.2d 737, 749 (Mo. App. E.D. 1993).

VIII.

The trial court did not plainly err in accepting the jury's recommendation of death and sentencing Appellant to death because the verdict clearly demonstrates the jury's intent to impose a penalty of death and the aggravating circumstances supporting that determination. Instruction No. 17 presented the jury with only one factual scenario or limiting definition under which it could find the depravity-of-mind aggravating circumstance and even though the written verdict did not fully set out that limiting definition, there is no evidence suggesting the jury relied on any facts other than those set forth in Instruction No. 17 in finding the depravity of mind aggravator beyond a reasonable doubt. (Responds to Appellant's Point XI).

Appellant claims the trial court plainly erred in accepting the jury's recommendation of death, or in the alternative, in failing to conduct an inquiry, after the jury found the existence of the "depravity of mind" aggravator, but did not write out the limiting definition supporting that aggravator.

Instruction No. 17 submitted four statutory aggravating circumstances to the jury. (L.F. 1110-11). The fourth aggravating circumstance submitted was:

> Whether the murder of Amanda L. Morton involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible and inhuman.
>
> You can make a determination of depravity of mind only if you find: that the defendant committed repeated and excessive acts of physical abuse upon Amanda L. Morton and the killing was therefore unreasonably brutal.

(L.F. 1111). In its verdict imposing the death penalty, the jury found three of the aggravating circumstances submitted beyond a reasonable doubt. (L.F. 1118). One of the findings written on the jury form was that:

> The murder of Amanda L. Morton involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible and inhuman.

(L.F. 1118). Appellant did not object when the verdict was returned and seeks plain error review of his claim that the verdict was invalid because the verdict form did not state that Appellant "committed repeated and excessive acts of physical abuse upon Amanda L. Morton and the killing was therefore unreasonably brutal." (Tr. 4562-64).

A. Standard of Review.

Verdicts are not to be tested by technical rules of construction. *Reuscher*, 827 S.W.2d at 718. In determining the validity of a verdict, the overriding objective is to ascertain the jury's intent. *Id.* If the jury's intent is clearly discernible, the verdict is good though it may be irregular in form. *Id.* That rule applies to capital cases. *Id.* at 719. If the intent to impose a penalty of death is clear and the aggravating circumstance upon which that determination was made is sufficiently identified, a death sentence may stand. *Id.* Where no objection is made to a verdict before the jury is discharged, the claimed irregularity is reviewed for plain error. *Id.* at 717.

B. No error, plain or otherwise, in accepting the jury's verdict.

Appellant argues that the absence of the language noted above renders the depravity of mind aggravator constitutionally invalid, and creates a risk that the jury considered an aggravating factor that it did not find beyond a reasonable doubt. Appellant again relies on *Whitfield* for the proposition that the

jury cannot be presumed to have made the requisite finding. The portion of *Whitfield* that Appellant cites is distinguishable from this case. *Whitfield* noted that a presumption is allowed during the first step of the death qualification proceeding, where the jury determines the presence of an aggravating factor. *Whitfield*, 107 S.W.3d at 263, *citing*, *State v. Smith*, 944 S.W.2d 901, 919-20 (Mo. banc 1997). That is the exact stage of the proceedings implicated in Appellant's argument. *Whitfield* also involved a different burden of proof. The standard of review for determining whether the jury properly found the existence of an aggravating circumstance requires the defendant to prove prejudicial error. *Whitfield*, 107 S.W.3d at 263. The claim of error in *Whitfield* arose from a judgment entered on a judge's findings instead of a jury, which shifted the burden to the State to prove harmless error beyond a reasonable doubt. *Id.* This Court found that a presumption is inadequate to meet such a high burden of proof. *Id.* That higher burden of proof does not apply, and it is appropriate in this case to apply the presumption that the jury followed the instructions. *See*, *Id.*

The instructions advised the jury that it could make a determination of depravity of mind *only* if it found that Appellant "committed repeated and excessive acts of physical abuse upon Amanda L. Morton and the killing was therefore unreasonably brutal."
(L.F. 1111). The Eighth Circuit has found that a similar instruction sufficiently guided the jury, even though the jury in that case also omitted the specific finding from its verdict. *Tokar v. Bowersox*, 198 F.3d 1039, 1051 (8th Cir. 1999). Even though this jury inquired about the meaning of the term "depravity," it was given only one factual scenario to consider in connection with that aggravating circumstance, and there is no evidence to suggest that the jury improperly applied a different factual scenario in making its finding. (Tr. 4561; L.F. 1111). Furthermore, when the verdict is read in

conjunction with Instruction No. 17, the jury's intent to impose the death penalty is clear, and the aggravating circumstance is sufficiently identified. *Reuscher*, 827 S.W.2d at 719; *Storey* 40 S.W.3d at 912 (jury instructions are not to be viewed in isolation, but are to be taken as a whole to determine whether error occurred).

The omission of the language from the verdict also did not cause a manifest injustice because the jury found two other statutory aggravating circumstances beyond a reasonable doubt, and Appellant does not challenge the sufficiency of those findings. Because only one valid statutory aggravating circumstance is needed to consider imposition of the death penalty, a defective additional aggravating circumstance usually affords a defendant no basis for relief. *Anderson*, 79 S.W.2d at 442. The Eighth Circuit has likewise found that because Missouri is a non-weighing state, a jury's finding of an invalid aggravating factor does not invalidate a death verdict when the jury finds the existence of at least one valid aggravating factor. *Tokar*, 198 F.3d at 1051. Any error in the verdict form returned by the jury did not cause prejudice, much less manifest injustice, and does not warrant the relief Appellant seeks.

IX.

The trial court did have jurisdiction and authority to sentence Appellant to death because Appellant received constitutionally sufficient notice of the statutory aggravating circumstances that the State intended to prove in the event of a guilty verdict, in that the State filed a Notice of Intent to Seek the Death Penalty on the same day that it filed an information against Appellant, and the Notice listed the statutory aggravating circumstances the State intended to prove. (Responds to Appellant's Point XII).

Appellant alleges the trial court lacked jurisdiction and authority to sentence him to death because the indictment failed to plead facts making Appellant death eligible. On October 1, 2001, the State filed an information charging Appellant with one count each of kidnapping, murder in the first degree, and armed criminal action, and filed a separate Notice of Intent to Seek the Death Penalty on that same day. (L.F. 58, 60). That Notice listed four aggravating circumstances that the State intended to prove in support of the death penalty. (L.F. 60).

A. Standard of Review.

The test for the sufficiency of an indictment or information is whether it contains all the essential elements of the offense as set out in the statute creating the offense. *State v. Stringer*, 36 S.W.3d 821, 822 (Mo. App. S.D. 2001). The indictment or information must also clearly advise the defendant of the facts constituting the offense so that he may prepare an adequate defense and prevent retrial on the same charge in case of an acquittal. *Id.* at 822-23. Claims that the information or indictment fail to show the jurisdiction of the court or to charge an offense may be raised for the first time on appeal. *Id.*

However, the trial court's jurisdiction is not dependant upon the sufficiency of the indictment or information. *State v. Parkhurst*, 845 S.W.2d 31, 35 (Mo. banc 1992).

Appellant filed a pre-trial motion challenging the lack of aggravating factors in the information and raised the issue in his motion for new trial. (L.F. 738-60, 1208-10). Neither motion specifically claimed that the trial court lacked jurisdiction and authority to sentence Appellant to death.

B. Appellant received constitutionally sufficient notice of aggravating facts.

The State is required by statute to give the defendant notice "[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. § 565.005.1, RSMo 2000.

This Court has repeatedly rejected Appellant's arguments that this Court's decision in *Whitfield*, and the United States Supreme Court decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002), require that the aggravating facts supporting imposition of the death penalty must be pled in the indictment or information, rather than in a separate filing. *State v. Strong*, 142 S.W.3d 702, 711, 712 (Mo. banc 2004); *Glass*, 136 S.W.3d at 513; *State v. Edwards*, 116 S.W.3d 511, 543-44 (Mo. banc 2003); *State v. Gilbert*, 103 S.W.3d 743, 747 (Mo. banc 2003); *Tisius*, 92 S.W.3d at 766-67; *Cole*, 71 S.W.3d at 171. Appellant's claim that Missouri's statutory scheme creates the separate offenses of aggravated first degree murder and unaggravated first degree murder has been found by this Court to be "meritless." *Cole*, 71 S.W.3d at 171, *see also, Taylor*, 134 S.W.3d at 31-32. Appellant offers no persuasive reason for this Court to reverse its recent precedents.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned assistant attorney general hereby certifies that:

(1) The attached brief complies with the limitations set forth in Supreme Court Rule 84.06, in that it contains 27,890 words as calculated pursuant to the requirements of Supreme Court Rule 84.06; and

(2) A copy of the brief has been supplied to the Court in diskette form on a diskette that has been scanned and found to be virus free; and

(3) A true and correct copy of the attached brief and a diskette containing a copy of this brief were mailed on September 12, 2005, to:

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ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

IN THE
SUPREME COURT OF MISSOURI

———————————

No. SC86358

———————————

STATE OF MISSOURI,

Respondent,

vs.

DAVID STANLEY ZINK,

Appellant.

———————————

APPEAL FROM THE CIRCUIT COURT OF ST. CLAIR COUNTY
TWENTY-SEVENTH JUDICIAL CIRCUIT
THE HONORABLE WILLIAM J. ROBERTS, JUDGE

———————————

RESPONDENT'S APPENDIX

———————————

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APPENDIX TABLE OF CONTENTS

CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned assistant attorney general hereby certifies that:

(1) That the attached appendix includes the information required under Supreme Court Rule 84.04; and

(2) That a true and correct copy of the attached appendix was mailed on September 12, 2005, to:

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