**IN THE**
**SUPREME COURT OF MISSOURI**

**NO. SC83934**

**STATE OF MISSOURI,**

**Respondent,**

**v.**

**MARCELLUS WILLIAMS,**

**Appellant.**

**APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI**
**TWENTY-FIRST JUDICIAL CIRCUIT**
**THE HONORABLE EMMETT M. O'BRIEN, JUDGE**

# RESPONDENT'S BRIEF

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This appeal is from Appellant's convictions for first degree murder (§ 565.020, RSMo 2000), first degree burglary (§ 569.160, RSMo), first degree robbery (§ 569.020, RSMo 2000), and two counts of armed criminal action (§ 571.015, RSMo 2000). Appellant was sentenced to death on the murder conviction. Appellant also received consecutive sentences of thirty years on the burglary conviction, life imprisonment on the robbery conviction and two thirty-year sentences on the armed criminal action convictions. This Court has exclusive appellate jurisdiction over this appeal because a sentence of death was imposed. MO. CONST. art. V, § 3.

Appellant was charged in St. Louis County Circuit Court with one count of first degree burglary, one count of first degree murder, one count of first degree robbery, and two counts of armed criminal action for the stabbing death of Felicia Gayle in her University City home on August 11, 1998 (L.F. 86-89). Appellant was also charged as a persistent offender (L.F. 88-89). On June 4, 2001, a jury trial in St. Louis County Circuit Court commenced on these charges with the Honorable Emmett M. O'Brien presiding (L.F. 9 ). The sufficiency of the evidence to support Appellant's convictions is not challenged. Viewed in the light most favorable to the jury's verdict, the evidence at trial showed that:

On August 11, 1998, at approximately 8:30 a.m., Appellant dropped off his girlfriend, Laura Asaro, at her mother's house (Tr. 1841). Appellant, who was driving a dark blue Buick LeSabre, then drove to a bus stop where he caught a bus

that took him to University City (Tr. 1841, 2392). Appellant, who was broke and needed money, got off the bus and began looking for a house to break into (Tr. 2391-92). He came upon a house with a holly tree in the front that shielded the front door from the view of the neighbors (Tr. 1733, 2393, 2430-31). This was the house where the murder victim, Felicia Gayle, lived (Tr. 1705, 1730).

Felicia Gayle, known to her family and friends as Lisha, had also been up early that morning jogging (Tr. 1732, 2042-43). After stopping by her next door neighbor's house, she went home and showered in the upstairs bathroom (Tr. 2042-44).

Meanwhile, Appellant knocked on the doors to Ms. Gayle's house, and after no one answered, he knocked out a small window pane near the front door with a "chip" hammer (Tr. 2394, State's Exs. 22 and 24). Appellant, who was wearing gloves, reached his hand through the broken window, unlocked the door, and went inside (Tr. 1885, 2394). As Appellant reached the second floor, he heard the water running from the shower (Tr. 1850, 2394). Although he could have left the house, Appellant stayed because he had not finished looking for items to steal (Tr. 1850). Appellant went back downstairs, but the squeaky floors had given him away; Ms. Gayle, who was now out of the shower, called downstairs asking if anyone was there (Tr. 1775, 2395).

Appellant armed himself with a thirteen-inch butcher knife he found in a kitchen drawer and waited at the bottom of the stairs (Tr. 1850, 2115, 2396, 2413; State's Ex. 5). Ms. Gayle, clad only in the purple shirt that she wore after getting out of the shower, continued calling downstairs asking, "Who is down there?" (Tr. 1718, 1851, 2397). She gradually crept down the steps while repeatedly asking if anyone was there; Appellant lay in wait at the bottom of the stairs (Tr. 1851, 2397-98). As Ms. Gayle reached a landing on the stairs, Appellant saw her in a

mirror and concluded that if he could see her then she could see him (Tr. 2397-98). He decided that it was time to strike (Tr. 1882, 2398).

Appellant's first swing of the butcher knife struck Lisha in the right forearm tearing off a large piece of flesh and exposing the bone (Tr. 2152-54, 2398, 2413, State's Ex. 74). Appellant did not stop there. He repeatedly stabbed and cut her with the butcher knife while Lisha struggled with him (Tr. 2398, 2454). As Appellant slashed and stabbed her, Lisha Gayle cried out for her mother (Tr. 2398-99). After Ms. Gayle fell to the floor, but while she was still alive, Appellant thrust the butcher knife into her neck up to the hilt (Tr. 1851, 2398-99; State's Exs. 23, 301, 303). Appellant then twisted the knife until he heard a bone pop, bending the blade in the process (Tr. 2399, 1920, 2261-62). Appellant left the knife in Ms. Gayle's neck, and she convulsed for a few moments before she stopped moving (Tr. 1920, 2399; State's Exs. 23, 301, 303).

An autopsy revealed that Appellant stabbed or cut Lisha Gayle a total of 43 times (Tr. 2162). She suffered sixteen stab wounds, seven of which were fatal alone (Tr. 2163). Appellant stabbed Ms. Gayle in the neck, face, and chest (Tr. 2115). One neck wound cut her carotid artery, while another perforated Ms. Gayle's larynx, causing her to choke on her own blood (Tr. 2123l State's Ex. 76). Appellant's final stab wound to left side of Ms. Gayle's neck severed her carotid artery and fractured her vertebral column (Tr. 2121-22; State's Ex. 76).

One chest wound went into Ms. Gayle's chest wall and through her heart (Tr. 2127-28; State's Ex. 76). Another went through one side of her breast and out the bottom of it (Tr. 2128-29; State's Ex. 77). Another chest wound went through her left breast and into her stomach (Tr. 2134, State's Ex. 77). Yet another wound came from the back of her chest, through her right lung, and penetrated her heart (Tr. 2135-37; State's Ex. 75). She suffered two other chest wounds, one of which nearly penetrated her heart and one that went through her abdominal wall (Tr.

2138-41; State's Exs. 75, 82). Ms. Gayle also suffered a stab wound in the right temple that nearly went into her eye tissue, another stab wound to her right thigh, and three stab wounds to her arms (Tr. 2117; State's Ex. 303).

In addition to the stab wounds, Ms. Gayle suffered numerous cut wounds to both hands and upper arms, which were defense wounds (Tr. 2116, 2158). She also suffered cut wounds to her nipple, chin, face, knee, and thigh (Tr. 215-56).

Lisha Gayle was alive when she suffered these painful cut and stab wounds (Tr. 2163, 2167). It several minutes for her to bleed to death after receiving these wounds (Tr. 2163-64).

After he finished attacking Ms. Gayle, Appellant decided that it was time to leave (Tr. 2399-400). Appellant went upstairs, washed up in the bathroom, and put on a sweater from a drawer to cover up the blood he had on his shirt (Tr. 2400). Appellant also had blood on his boots and on his backpack (Tr. 1843, 2400). Appellant then grabbed Ms. Gayle's husband's Apple laptop computer and carrying case and Ms. Gayle's purse, putting both items in his backpack (Tr. 2395, 2400). Appellant had to move Ms. Gayle's body as he left out of the front door (Tr. 2401).

Appellant caught a bus back to his car and went and picked up his girlfriend, Ms. Asaro (Tr. 1842, 2401). Ms. Asaro noticed that Appellant was anxious and wanted to leave (Tr. 1842). She also thought it was strange that he was wearing a long-sleeved jacket in the middle of August, which was a different shirt than he had on when he dropped her off earlier that day (Tr. 1842-43). Ms. Asaro made Appellant take the jacket off and saw that he had blood on his shirt (Tr. 1843). Appellant claimed that he had been in a fight (Tr. 1843). Ms. Asaro also noticed the laptop computer in the car (Tr. 1843-44). Later that day, Appellant put the bloody clothes, which were new, in his backpack and threw all of it down a sewer claiming that he did not want them anymore (Tr. 1844-45).

The next day, while Ms. Asaro was looking in the trunk of the car, she saw Ms. Gayle's purse (Tr. 1847). She opened it and saw Lisha Gayle's Missouri State I.D. card (Tr. 1847, 1874; State's Ex. 135). Ms. Gayle carried an I.D. card in her purse and kept her driver's license in her car's glove compartment (Tr. 1779-82). Ms. Asaro also saw a black coin purse and several grocery coupons in it as well (Tr. 1847, 1881, 1976). Ms. Gayle carried a coin purse inside her purse and collected coupons, which she also kept in her purse (Tr. 1777-78, 1782). Believing that Appellant was cheating on her, Ms. Asaro demanded that Appellant tell her whose purse it was (Tr. 1848).

Appellant told her it was not what she thought and that the purse belonged to a lady that he had killed (Tr. 1848). Appellant then told her how he broke into Lisha Gayle's house and killed her (Tr. 1850-52). Appellant asked Ms. Asaro if she wanted the coupons or the purse and when she refused to take them he threw them away (Tr. 1881).

Appellant then grabbed Ms. Asaro by the throat and while choking her warned her not to tell or he would kill Ms. Asaro's children and her mother (Tr. 1853). Ms. Asaro saw Lisha's picture on the news and recognized her as the same person pictured on the I.D. card (Tr. 1856). Appellant would periodically ask Ms. Asaro if she was thinking about the murder and asked her not to tell anyone about it (Tr. 1859).

A day or two after the murder, Appellant took the laptop to a family friend, Glenn Roberts, who lived a few doors away from, and on the same street as, Appellant's grandfather (Tr. 1860-61, 1946, 1999-2000). Appellant exchanged the laptop for some crack cocaine (Tr. 1861).[1] After the murder, Ms. Asaro was

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[1]Glenn Roberts testified that he gave Appellant $150 or $250 for the laptop (Tr. 2001).

looking in the glove compartment of the Buick LeSabre and discovered a calculator and Post-Dispatch ruler (Tr. 1865-66; State's Exs. 4 and 5). Both of these were memorabilia from Ms. Gayle's employment as a reporter for the Post-Dispatch which she carried in her purse (Tr. 1770-71). The Post-Dispatch ruler measured columns and print sizes (Tr. 1774; State's Ex. 5).

On August 31, 1998, Appellant was arrested on unrelated charges and was incarcerated in the St. Louis City Workhouse (Tr. 1886, 2355). While he was there, Appellant wrote Ms. Asaro a letter expressing his hope that she would not tell abut the "U-City incident" (Tr. 1887).

From April until June 1999, Appellant and Henry Cole lived in the same dormitory at the St. Louis City Workhouse (Tr. 2363-65, 2382). Appellant and Mr. Cole knew each other because Mr. Cole's sister had a daughter named Coco whose father was Appellant's uncle–the brother of Appellant's mother (Tr. 2385-86). Mr. Cole was Coco's uncle and Appellant was her first cousin (Tr. 2385-86). Mr. Cole, whom Appellant knew as "Junior," and Appellant became friendly and talked everyday (Tr. 2387).

One evening in May 1999, Appellant and Mr. Cole saw a television news report about Lisha Gayle's murder remaining unsolved and that a reward of $10,000 had been offered (Tr. 2388-89). About thirty minutes after that broadcast, Appellant approached Mr. Cole and told him that he "pulled that" and that it was "his caper" (Tr. 2390). Mr. Cole was shocked and asked Appellant if he had really committed that crime (Tr. 2391). Appellant replied, "Yeah, I laid that down; I did that" (Tr. 2391). Over the next few weeks Mr. Cole and Appellant had approximately four conversations while the two sat on Mr. Cole's bunk, during which Appellant told Mr. Cole about the details of the crime (Tr. 2391-402). After their second conversation, Mr. Cole secretly kept notes about what Appellant had told him (Tr. 2403, 2420).

During these conversations, Appellant, in referring to his attack on Ms. Gayle, told Mr. Cole that she fought like a "mother-fucker," and that "the little bitch was fighting her ass off," and (Tr. 2398, 2454).

After Mr. Cole was released from the workhouse on June 4, 1999, he approached the University City police and told them about Appellant's involvement in Lisha Gayle's murder (Tr. 2419-21). During these conversations, Mr. Cole reported details that had never been reported in the press (Tr. 2464-65, 2830, 2833, 2836, 2844-47). On November 17, 1999, the University City police approached Ms. Asaro, who finally told them that Appellant had admitted to her that he had committed the murder (Tr. 1909-11).

In January 2000, after Appellant had been indicted for Ms. Gayle's murder, Appellant attempted to escape from the St. Louis City Workhouse, attacking and injuring a correctional officer in the process (Tr. 2618, 2673-75; State's Exs. 247 and 248).

On November 18, 1999, the police searched the Buick LeSabre and found the Post-Dispatch ruler and calculator in the glove compartment (Tr. 2275-77). The police also recovered the laptop computer belonging to Ms. Gayle's husband from Glenn Roberts (Tr. 2713-14).

During the guilt phase, Appellant presented evidence from his family members that they had seen Ms. Asaro in the trunk of the Buick and in possession of a laptop computer after the date that Appellant was incarcerated in the workhouse (Tr. 2777, 2805). Appellant also presented the testimony of a Post-Dispatch employee concerning the details of Lisha's murder that had been reported in that newspaper (Tr. 2820-54). During cross-examination, however, this employee testified that several details, which Ms. Asaro and Mr. Cole had previously reported to the police, had never been reported in the newspaper (Tr. 2830-54).

Appellant did not testify in his own behalf (Tr. 2989-90). The jury found Appellant guilty of all charges (Tr. 3073-77).

During the penalty phase, the State presented evidence detailing three of Appellant's previous convictions (Tr. 3107-67, 3184-91). The State also presented victim-impact testimony from Lisha Gayle's friends and family (Tr. 3201-78). Appellant presented testimony from several of Appellant's friends and family members, including his brothers, mother, and children (Tr. 3301-434).

The jury found the existence of each statutory aggravating circumstances submitted to them, and after considering all the evidence recommended a death sentence, which the trial court later imposed (L.F. 537;Tr. 3525). The trial court also sentenced Appellant to consecutive sentences of life imprisonment for the robbery conviction and thirty years imprisonment each for the burglary and armed criminal action convictions (Tr. 3525-26). This appeal followed.

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**The trial court did not err or abuse its discretion in refusing to allow the witness who purchased the laptop computer belonging to the murder victim's husband from Appellant to testify that Appellant had told him that he was selling or pawning the computer on behalf of his girlfriend because this testimony was self-serving hearsay and the "rule of completeness" did not apply in that the State never attempted to elicit any testimony from the witness concerning statements Appellant had made to him.**

Appellant's first claim is that the trial court erred in refusing to allow Appellant to elicit testimony from Glenn Roberts, the man to whom Appellant sold Lisha's husband's laptop computer, that Appellant had told Mr. Roberts that he was selling the computer on behalf of his girlfriend, Laura Asaro. Appellant asserts this testimony was admissible under the "rule of completeness." The trial

court properly rejected Appellant's attempt to elicit this self-serving testimony and correctly held that the "rule of completeness" did not apply because the State had not elicited any testimony concerning out-of-context statements Appellant had made.

"The trial court is vested with broad discretion to admit and exclude evidence at trial. Error will be found only if this discretion is clearly abused." *State v. Johns*, 34 S.W.3d 93, 103 (Mo. banc 2000), *cert denied*, 532 U.S. 1012 (2001).

At trial, the State presented the testimony of Glenn Roberts. Mr. Roberts lived at 5016 Emerson, which was on the same street and in the next block down from the residence of Appellant's grandfather, Walter Hill (Tr. 1999). Appellant's grandfather's address, 4940 Emerson, was also the address contained on Appellant's driver's license (Tr. 1886). Mr. Roberts knew Appellant and had been friendly for fifteen or twenty years with Appellant's grandfather and uncles, one of whom he described as his best friend, (Tr. 1999-2000, 2021).

The prosecutor then asked Mr. Roberts about a laptop computer Appellant sold or pawned to him in August 1998:

Q. Let me direct your attention to August of 1998. Did the defendant, Marcellus Williams, pawn a laptop computer to you?

[Appellant's Counsel]: Objection -- I am sorry, go ahead.

A. (The Witness) As to that date, I couldn't testify to that date, but at some point. That sounds pretty close. I guess it was like collateral. I gave him some money, he was supposed to come back and get the computer.

Q. ([The Prosecutor]) All right.

A. In relationship to the money, you know, it was financial. He said he had financial difficulties or something.

Q. How much money did you give him?

A. It was either a hundred fifty or either two hundred fifty, I don't remember.

Q. In return he gave you, what?

A. Zero.

Q. What did -- what piece of property did he give you?

A. It was a laptop computer.

Q. I am sorry, speak up, please.

A. It was a computer.

Q. What type of computer?

A. Laptop.

Q. Was it by itself or did it have a carry bag, black canvas carry bag with it?

A. It had a carry bag.

Q. Was -- is this the man that gave you the laptop right here?

[Appellant's Counsel]: Objection, your Honor; I believe he said he pawed [sic] it.

[The Prosecutor]: When I say gave --

The Court: Objection is sustained.

Q. ([The Prosecutor]) When I say, "gave", I mean, did this man right here physically hand you a laptop computer and a black carrying case that goes with it?

A. I believe it went in that order. I don't know exactly. I got it from him, but I don't know if he laid it down or he handed it to me. I can't recall exactly.

Q. Where was this transaction? Where did it occur?

A. It was in my house.

Q. At 5016 Emerson?

A. Yes, it was.

Q. Was anyone with him?

A. It was -- I believe -- like I say, it's been awhile. I believe he drove up, I think, it was somebody in a car, but he came into the house, he came to the house by himself.

Q. You say, "you believe", was Marcellus alone or was he not alone?

A. Well, he came in the house alone.

Q. He was--who was in the car?

A. I don't recall.

Q. Man or woman?

A. I believe it was a female.

Q. But you are not sure?

A. Not a hundred percent sure, no. Not a hundred percent sure.

Q. Were you inside or outside when he came over?

A. I was inside the house.

Q. Did you open the door?

A. Yes, I did.

Q. He was holding something?

A. I don't recall.

Q. He brought something to your house?

A. Yes.

Q. He had to be holding something?

A. I don't recall. I let him in, but I can't say one way or the other. I am pretty sure he did because, you know, he had it when he came in the house.

Q. And what else did he have, if anything, besides a laptop computer and a black carrying case?

A. Nothing as far as I was aware of.

Q. When he left your house where was the laptop computer?

A. It stayed in my house.

(Tr. 2000-03).

The prosecutor only asked questions describing how Mr. Roberts came into possession of the laptop; he did not ask Mr. Roberts about any statements Appellant made to him (Tr. 1999-2027). In fact, when Mr. Roberts attempted to volunteer statements Appellant made to him, the prosecutor objected:

Q. Why did you want the laptop?

A. Basically, he was saying he was having financial --

Q. I didn't ask you what he was saying, I asked you --

[Appellant's Counsel]: Judge, I believe this witness should be able to answer his question.

The Court: He has the opportunity to object that it is not responsive. The objection is sustained. Please just answer the question that is directly asked of you.

(Tr. 2003-04).

Mr. Roberts later turned the laptop over to the police (Tr. 2011-12). The laptop Appellant gave Mr. Roberts was the same one that belonged to the victim's husband and had been stolen from the victim's house on the day of the murder (Tr. 2297).

During cross-examination, Appellant's counsel attempted to elicit testimony from Mr. Roberts concerning statements Appellant made while giving Mr. Roberts the laptop. Mr. Roberts was asked what his "belief" was concerning who owned the computer (Tr. 2028-29). The trial court sustained the State's objection to that question (Tr. 2030).

Appellant's counsel informed the trial court that it wanted to ask about the hearsay statements Appellant made to Roberts because it was "relevant as to what the agreement was and who he actually believed was in ownership or possession of this computer" (Tr. 2037). Appellant's counsel informed the court that he wanted to elicit testimony that Appellant had told Mr. Roberts that he was pawning the computer on behalf of his girlfriend, Laura Asaro, and that she was the one who owned it (Tr. 2037-39). Appellant's counsel contended that this testimony was permissible under the "completeness doctrine":

> [Appellant's Counsel]: Judge, it is relevant as to what the agreement was and who he actually believed was in ownership or possession of this computer. It goes to the completeness doctrine.
>
> The Court: Who had possession? To his state of mind who was in possession of the computer?
>
> [Appellant's Counsel]: Who was in possession of the computer? This witness is going to say that he received the computer on behalf of Marcellus through Laura. Laura -- this witness is going to say it was Laura that --
>
> The Court: How would he know that?
>
> [Appellant's Counsel]: Because Marcellus told him that.
>
> The Court: Then Marcellus can tell us that. You are attempting to get in self-serving hearsay statements. The objection the [sic] sustained.

(Tr. 2037).

"The rule of completeness seeks to ensure that a *statement* is not admitted out

of context." *State v. Skillikorn*, 944 S.W.2d 877, 944 (Mo. banc 1977), *cert. denied*, 522 999 (1997) (emphasis added). "The rule is violated only when admission of the *statement* in an edited form distorts the meaning of the *statement* or excludes information that is substantially exculpatory to the declarant." *Id.* (emphasis added).

The State neither waived any objection it had to Appellant's counsel's attempt to elicit Appellant's self-serving hearsay statements from Mr. Roberts, nor did it open the door to allow Appellant to elicit these hearsay statements merely because Mr. Roberts made one isolated statement and volunteered that Appellant told him that he had financial difficulties. Mr. Roberts's statement on direct examination that Appellant said he had financial difficulties was not responsive to the prosecutor's question and when Mr. Roberts attempted to volunteer other statements the prosecutor objected on the grounds that the testimony was non-responsive. The State does not waive its objection to hearsay evidence on cross-examination simply because the witness made a volunteered, unsolicited remark during direct examination. *See State v. Riggins*, 987 S.W.2d 457, 465 (Mo. App. W.D. 1999).

Appellant's claim here is without merit. The trial court properly excluded this self-serving hearsay testimony

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**The trial court did not err in allowing the State to present evidence of Appellant's attempted escape from jail while the charges in this case were pending because this evidence was admissible in that it showed consciousness**

**of guilt for the crimes with which he was charged and it was for the jury to determine the weight of this evidence in considering whether Appellant had other reasons for attempting to escape.**

Appellant asserts that the trial court abused its discretion in allowing the State to present evidence of Appellant's attempted escape from the St. Louis City Workhouse. But this evidence was admissible under well-established law permitting evidence of a defendant's escape or attempted escape pending trial.

The standard of review here is the same as provided under Point I.

Near the close of State's case during the guilt phase, the prosecutor presented evidence that Appellant attempted to escape from the St. Louis City Workhouse on the evening of January 28, 2000. The State called two witnesses– Mathieu Hose, an inmate who had discussions with Appellant about the escape, and Captain Terry Schiller, a St. Louis City corrections officer whom Appellant assaulted during the escape attempt.

When he attempted to escape, Appellant was incarcerated at the St. Louis City Medium Security Jail, where he had been held since September 1, 1998 (State's Ex. 129) The record showed that on the day he attempted to escape, Appellant had been sentenced in St. Louis City Circuit Court to twenty years in prison for robbery, armed criminal action, and unlawful use of a weapon (State's Ex. 231).[2] But the record also showed that just before the attempted escape

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[2]Appellant's brief also states that just ten days before the escape attempt Appellant was "arraigned on multiple charges" and refers this Court to State's Exhibit 232 (Appellant's Brief, p. 51). Nothing in this exhibit refers to an arraignment date.

(January 6, 2000), Appellant had been indicted on the multiple charges, including first degree murder, involved in this case (L.F. 17-20).

As to the escape attempt itself, Mr. Hose testified that he, Appellant, and two other inmates discussed plans to escape from the workhouse (Tr. 2618). They discussed different plans concerning how to get out and what to do with the guards (Tr. 2618-19). Hose testified that Appellant proposed that the guards be killed (Tr. 2619).

Hose stated that on the escape attempt began as they were returning to the dormitory from the recreation area (Tr. 2621). Appellant struck one of the guards in the head with a metal bar, which "busted open" the guard's head (Tr. 2621-23, 2625, 2637; State's Exs. 234, 247, 248). The guard fell to the ground while other inmates picked up a table and tried to break out a window (Tr. 2628-30).

Captain Schiller testified that he rushed to the scene after hearing the words "officer down" and a plea for help (Tr. 2674). He saw Leslie Harrison, the guard Appellant had struck, bleeding like a "stuck pig from the top of his head" (Tr. 2676). While getting Officer Harrison to safety, Captain Schiller saw inmates trying to break out a window with a table (Tr. 2674). After putting Officer Harrison in an office, Captain Schiller returned to the area where the inmates were attempting to break out the window (Tr. 2674).

As Captain Schiller stepped through a doorway into the multi-purpose room, Appellant attacked him by attempting to hit him with an iron bar (Tr. 2674, 2689). Captain Schiller caught the bar before it hit him and he and Appellant wrestled over it (Tr. 2674-75). Appellant had obtained the metal bar from a weight machine in the gym (Tr. 2674-75, 2682; State's Ex.234).

"Proof of escape from jail is generally admissible to show consciousness of guilt." *State v. Middleton*, 998 S.W.2d 520, 528 (Mo. banc 1999), *cert. denied*,

528 U.S. 1054 (1999), *quoting State v .Thompson* , 985 S.W.2d 779, 789 (Mo. banc 1999). "Such evidence is admissible even where the defendant is being held on multiple charges at the time of the escape." *Id.* at 529. "Whether the escape was motivated by consciousness of guilt or another reason is for the jury." *Id.*

Appellant contends that evidence of the escape should have been excluded because its probative value was outweighed by its prejudicial effect (Appellant's Brief p. 51). Appellant contends that he had more reasons than simply the pending charges in this case to escape. But this Court has previously rejected that argument

In *State v. Hughes*, 596 S.W.2d 723 (Mo. banc 1980), a case nearly identical to the facts here, yet not mentioned in Appellant's Brief, the trial court allowed evidence of the defendant's escape while awaiting trial even though the defendant was already incarcerated and serving sentences for two other felony convictions. *Id.* at 724, 729-30. On appeal, the defendant argued that evidence of his escape should have been excluded because it had "only minimal probative value, and that . . . the prejudicial impact of the escape evidence outweigh[ed] its probative value. *Id.* at 728.

The *Hughes* court rejected this argument holding that merely because a defendant may have had reasons other than the pending charges to escape does not render all evidence of the escape inadmissible:

> [W]hether appellant's escape pending trial was motivated by consciousness of guilt or by some other consideration was a question of fact properly left for the jury. The existence of circumstances which indicate the escape was not motivated by consciousness of guilt may be considered by the jury to reduce the weight of the escape evidence, but it does not render the escape evidence inadmissible.

*Id.* at 729. *See also State v. Meeks*, 659 S.W.2d 306 (Mo. App. E.D. 1983) (evidence of escape admissible even though defendant had a separate charge pending and was serving a fifteen-year sentence for a wholly different crime when he escaped).

Policy considerations also militate against the rule advanced by Appellant. Under Appellant's proposed rule, evidence of escape would be excluded when a defendant has more than one case pending or is already incarcerated on other convictions, but it would allow such evidence if the defendant has only one case pending or has never been incarcerated. The *Hughes* court rejected this obviously unfair and illogical result:

> One consequence of this rule would be to permit evidence of escape against a person charged with only one offense but to exclude such evidence against a person charged with multiple offenses. "Such procedure would reward the professional criminal and punish the neophyte."

*Hughes*, 596 S.W.2d at 729 n.4, *quoting People v. Neiman*, 232 N.E.2d 805, 809 (Ill. App. 1967).

Appellant also complains that evidence of the escape attempt constituted a "mini-trial." First, the record refutes Appellant's "mini-trial" designation. The State presented only two witnesses whose testimony consumed a mere 83 pages of a 3538-page transcript. Second, the State was entitled to present evidence of how the attempted escape occurred. "Admission of the testimony as to how defendant's escape was effected was proper. *State v. Meeks*, 659 S.W.2d at 307 (the State was permitted to present evidence of an assault defendant committed during the escape even though it was evidence of other crimes); *see also State v. Sanders*, 842 S.W.2d 170, 175 (Mo. App. E.D.1992) (escape evidence consisted of the testimony of three police officers concerning the details of the escape and recapture).

Appellant's reliance on federal cases and those from other states is misplaced. Those cases have nothing to do with whether evidence of escape is admissible at a trial on charges that were pending at the time of the escape, but rather pertain to the issue of admitting evidence that the defendant fled a crime scene in a trial involving that crime. These federal decisions are not constitutionally based, but pertain only to evidentiary procedures to be employed in federal courts. *See State v. Whitfield*, 837 S.W.2d 503 (Mo. banc 1992). Moreover, these decisions are contrary to this Court's decisions not only allowing evidence of escape, but also evidence that a defendant has fled a crime scene. *State v. Johns*, 34 S.W.3d at 112 ("[E]vidence of flight is admissible to show a consciousness of guilt contrary to any theory of innocence").

Appellant's claim that the trial court erred in admitting evidence of Appellant's escape is without merit.

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**The trial court did not plainly err in allowing the State during voir dire to generally explain the process followed in a first-degree capital murder case by use of a "three-door analogy" because this explanation was not improper or misleading in that the analogy correctly explained the process and did not mislead the jurors on the specific provisions of § 565.030, RSMo 2000.**

Appellant next contends that the prosecutor's use during voir dire of a "three-door analogy" in explaining the process in a first-degree capital murder case was improper. Appellant suffered no manifest injustice in that the prosecutor's explanation was simply a general explanation of the entire process from consideration of guilt to sentencing and was not solely confined to explaining the mechanics of § 565.030.4, RSMo 2000.

Plain errors may be considered in the discretion of the court when the court finds that manifest injustice or a miscarriage of justice has resulted therefrom. Rule 30.20. The plain error rule should be used sparingly and does not justify a review of every alleged trial error that has not been properly preserved for appellate review. *State v. Hibler*, 21 S.W.3d 87, 96 (Mo. App. W.D. 2000).

Plain error review is essentially a two-step process. First, the court must determine whether the claim for review "facially establishes substantial grounds for believing that manifest injustice or miscarriage of justice has resulted." *Id.* If this is not found, then the court should decline to exercise its discretion to review a claim of error under Rule 30.20. *Id.* But not all prejudicial or reversible error is plain error. Plain errors are those which are "evident, obvious and clear. *Id.* If the court finds plain error, then the second step requires the court to determine whether the claimed error resulted in manifest injustice or a miscarriage of justice. *Id.* A plain error is one that "must impact so substantially upon the rights of the defendant that manifest injustice or a miscarriage of justice will result if uncorrected." *State v. Driscoll*, 711 S.W.2d 512, 515 (Mo. banc 1986).

Before death-qualification voir dire began, the trial court read to the jury MAI-CR 3d 300.03 (10-1-98). This instruction described the process followed in a capital case and instructed the jury concerning the findings it must make before it may return a death sentence. The court's instruction provided in part:

> For present purposes, you should be aware that a conviction of Murder in the First Degree does not automatically make the defendant eligible for the death penalty. Before the jury may consider imposing the death penalty, it must find unanimously and beyond a reasonable doubt that the evidence before it establishes the existence of at least one special fact or circumstance specified by the law called a statutory aggravating

> circumstance. If no statutory aggravating circumstance is found, the defendant cannot be sentenced to death. If the jury does find at least one statutory aggravating circumstance, it still cannot return a sentence of death unless it also unanimously finds that the evidence in aggravation of punishment taken as a whole warrants the death penalty, and that this evidence is not outweighed by evidence in mitigation of punishment. The jury is never required to return a sentence of death.

(Tr. 153-54). Against this backdrop, the attorneys began voir dire.

During death-qualification voir dire, the prosecutor, in explaining the process the jury would follow in this case, used an analogy of a hallway with three doors (Tr. 242). The first door was described as the "guilt or innocence door" with respect to the charge of first degree murder (Tr. 242, 385). The prosecutor explained that the first door is opened if the jury determines that the defendant is guilty of first degree murder (Tr. 242).

The second door was described as the "special or aggravating circumstance" door (Tr. 242, 386). The prosecutor explained that not all first degree murderers can be sentenced to death, and that before such a sentence can be considered there must be a special or aggravating circumstance (Tr. 386-87). The venire members were told that if the State did not prove the existence of a special or aggravating circumstance beyond a reasonable doubt, then the second door could not be opened (Tr. 664).

The prosecutor then told the venire members that the third door is the "death penalty door" (Tr. 387). The prosecutor explained that before the third door could be opened the jury would have to consider all the evidence in aggravation and mitigation of punishment in determining the appropriate sentence (Tr. 387-88). The prosecutor explained that only if the jury determines that the evidence in aggravation of punishment outweighs the mitigating evidence can the

jury consider opening the third door (Tr. 388). But he also told the venire members that the law never required the jury to impose the death penalty, even if the jurors believe that the aggravating circumstances outweigh the mitigating (Tr. 400, 656, 873, 904).

The prosecutor also explained to the venire members that the analogy was only to help the members understand the process, and that he was not instructing them on the law (Tr. 390). Appellant's counsel even referred to the prosecutor's three-door analogy when he conducted his voir dire (Tr. 568, 695, 1158, 1258-59).

During voir dire, Appellant's counsel advised the jury that the death penalty becomes an option only if all twelve jurors agree that a statutory aggravating circumstance exists (Tr. 295). This statement did not confuse the venire because it, just like the prosecutor's three-door analogy, implicitly assumes that the statutory aggravating circumstance found is sufficient to warrant the death penalty. Moreover, during guilt-phase closing arguments, Appellant's counsel reminded the jury of the prosecutor's three-door analogy and told them that not only must they find an aggravating circumstance to impose the death penalty, but that the circumstances they find must warrant imposition of the death penalty (Tr. 3492).

Appellant's claim centers on the provisions of § 565.030.4, concerning only the findings the jury must make in imposing a death sentence after a finding of guilt. In particular, Appellant complains that the prosecutor's analogy disregarded subdivision (2) of that section, which provided:

> If the trier does not find that the evidence in aggravation of punishment, including but not limited to evidence supporting the statutory aggravating circumstances listed in subsection 2 of section 565.032, warrants imposing the death sentence;

Section 565.030.4(2).[3]

"It is well settled that the nature and extent of questioning on voir dire is within the discretion of the trial judge, and only a manifest abuse of discretion and a probability of prejudice to the defendant will justify reversal." *State v. Armentrout*, 8 S.W.3d 99, 109 (Mo. banc 1999), *cert. denied*, 529 U.S. 1120 (2000). The jury instructions the trial court read before voir dire began and those submitted to the jury before its deliberations corrected any possible "imprecision" or ambiguity concerning the prosecutor's voir dire analogy. *State v. Storey*, 901 S.W.2d 886, 893 (Mo. banc 1995), *cert. denied*, 528 U.S. 895 (1999); *State v. Gray*, 887 S.W.2d 369, 379 (Mo. banc 1994), *cert. denied*, 514 U.S. 1042 (1995). Both this Court and the federal courts have rejected challenges to the use of the three-door analogy in explaining the trial process in a capital case.

In *State v. Tokar*, 918 S.W.2d 753 (Mo. banc 1999), *cert. denied*, 519 U.S. 933 (1996), the prosecutor, during voir dire, described the death penalty process as a "hallway having 'three doors,' through which the jurors had to proceed during [the defendant's] guilt and penalty phases":

> The first door represented the State's burden of proof regarding the defendant's guilt. The second door represented the State's burden of proof regarding the existence of at least one aggravating circumstance that warrants the death penalty. If the State met its burden of proof at the first two doors, the third and final door would have represented a decision on a sentence of death.

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[3]Although this subdivision was in effect at the time of Appellant's crime and trial, the General Assembly, effective August 28, 2001, deleted this subdivision in its entirety from the statute. 2001 Mo. Laws 1082.

*Id.* at 769. This Court cited to § 565.030 and held when one considers the analogy and arguments as a whole "there was no plain error in explaining the jurors' decision-making process in this way." *Id.* at 770. *See also State v. Ervin*, 979 S.W.2d 149, 162-63 (Mo. banc 1998), *cert. denied*, 525 U.S. 1169 (1999) (finding no manifest injustice or miscarriage of justice during voir dire by prosecutor's description of death penalty process as "a hallway with three doors"); *Roberts v. Bowersox*, 61 F.Supp.2d 896 (E.D. Mo. 1999) (prosecutor's use of three-door analogy during death-qualification voir dire, when viewed as a whole and in context, did not violate defendant's constitutional rights and did not mislead or unfairly influencing the jury); *Tokar v. Bowersox*, 1 F.Supp.2d 986 (E.D. Mo. 1998) (even assuming that three-door analogy was improper, defendant failed to show that its use "fatally infected the proceedings and rendered his sentence fundamentally unfair").

Fifteen days after death-qualification voir dire began, the court gave the jury its penalty-phase instructions, which included Instruction No. 23, patterned after MAI-CR 3d 313.41A. This instruction informed the jury that if it found one or more aggravating circumstances, then it must consider whether the facts of the case, taken as a whole, warrant imposition of the death penalty:

> As to Count II, if you have unanimously found beyond a reasonable doubt that one or more of the statutory aggravating circumstances submitted in Instruction No. 22 exists, then you must decide whether there are facts and circumstances in aggravation of punishment which, taken as a whole, warrant the imposition of a sentence of death upon the defendant.
>
> In deciding this question, you may consider all of the evidence presented in both the guilt and the punishment stages of trial, including evidence presented in support of the statutory aggravating circumstances submitted in Instruction No. 22. If each juror finds facts and circumstances

in aggravation of punishment that are sufficient to warrant a sentence of death, then you may consider imposing a sentence of death upon the defendant.

If you do not unanimously find from the evidence that the facts and circumstances in aggravation of punishment warrant the imposition of death as defendant's punishment, you must return a verdict fixing his punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

(L.F. 530).

The prosecutor's analogy was not limited to an explanation of just the provisions of § 565.030.4(2). His goal was to outline the general procedure to be followed in a capital murder case from the finding of guilt to the imposition of a death sentence. Implicit in the prosecutor's analogy was the fact that the aggravating circumstance found by the jury must warrant imposition of the death penalty. The prosecutor's use of this analogy and the trial court's failure to stop it did not result in manifest injustice or a miscarriage of justice. Appellant's claim has no merit.

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**The trial court did not clearly err in overruling Appellant's *Batson* objections to the State's peremptory strike of venirepersons Gooden, Singleton, and Fortson, because the State offered valid, race-neutral explanations for the strikes and Appellant failed to prove that these explanation were pretextual.**

Appellant next complains that the trial court clearly erred in overruling his *Batson* objections to the State's peremptory strike of three veniremembers. The record shows that the prosecutor offered valid, race-neutral explanations for the strikes that are supported by the record.

This Court reviews a trial court's decision on a *Batson* challenge under a clearly erroneous standard. An appellate court "may not reverse a trial court's decision as to whether the prosecutor discriminated in the exercise of his peremptory challenges unless it finds that decision clearly erroneous." *State v. Griffin*, 756 S.W.2d 475, 482 (Mo. banc 1982), *cert. denied*, 490 U.S. 1113 (1989). "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm impression that a mistake has been committed." *Antwine*, 743 S.W.2d 51, 66 (Mo. banc 1987), *cert. denied*, 486 U.S.1017 (1987), *quoting Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). "If the trial court's action is plausible under review of the record in its entirety, an appellate court may not reverse it although had it been sitting as the trier of fact it would have weighed the evidence differently." *State v. Brinkley*, 753 S.W.2d 927, 930 (Mo. banc 1988).

Deference to trial court findings on the issue of discriminatory intent makes particular sense, because the finding will largely turn on evaluation of credibility and the best evidence will often be the demeanor of the attorney who exercises the challenge. *See Hernandez v. New York*, 500 U.S. 352, 365 (1991). "The credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that is settled, there seems nothing left to review." *Id.* at 367.

Parties may not use peremptory challenges against venire members based "solely" on impermissible grounds, such as gender and race. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Batson*, 476 U.S. at 89. The Supreme Court has outlined a three-step approach in analyzing *Batson* claims:

> Under our *Batson* jurisprudence, once the opponent of peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come

> forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful discrimination.

*Purkett v. Elem*, 514 U.S. 765, 767 (1995). This Court has adopted this three-part test in determining whether peremptory strikes resulted from an impermissible motive.

> First, the defendant must object to the state's peremptory strike by identifying the protected group to which the venireperson belongs. The state must then provide a reasonably specific, clear, race-neutral and/or gender-neutral explanation for the strike. Once the state provides a legitimate explanation, the burden shifts to the defendant to show that the state's explanation was pretextual and that the strike was actually motivated by the venireperson's race or gender.

*State v. Barnett*, 980 S.W.2d 297, 302 (Mo. banc 1998), *cert. denied*, 525 U.S. 1161 (citations omitted).

Appellant complains that the prosecutor's explanations for his strikes were not plausible and should have been rejected by the trial court. But the Supreme Court rejected exactly this type of argument in *Purkett*. "The second step of this process does not demand an explanation that is persuasive, or even plausible." *Purkett*, 514 U.S. at 767-68. "At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez*, 500 U.S. at 360.

Appellant contends that the prosecutor's explanations for the strike should be rejected because they were clearly pretextual and were not related to the venire person's ability to perform as a juror. But the *Purkett* Court, in reversing a decision of the Eighth Circuit, directly rejected this type of analysis:

> The Court of Appeals appears to have seized on out admonition in *Batson* that to rebut a prima facie case, the proponent of a strike "must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges," and that the reason must be "related to the particular case to be tried." This warning was meant to refute the notion that a prosecutor could satisfy his burden of production by merely denying that he had a discriminatory motive or by merely affirming his good faith. What it means by a "legitimate reason" is not a reason that makes sense, but a reason that does not deny equal protection.

*Purkett*, 514 U.S. at 768-69, *quoting Batson*, 467 U.S. at 98 [citations omitted].

Finally, "the prosecutor's explanations need not rise to the level justifying exercise of a challenge for cause." *Batson*, 476 U.S. at 97. "*Batson* leaves room for the state to exercise its peremptory challenges on the basis of the prosecutor's legitimate 'hunches' and past experience. . . ." *State v. Antwine*, 743 S.W.2d at 65.

> Jury selection is, after all, an art and not a science. By their very nature, peremptory challenges require subjective evaluations of veniremen by counsel. Counsel must rely upon perceptions of attitudes based upon demeanor, . . . ethnic background, employment, marital status, age, economic status, social position, religion, and many other fundamental background facts. There is, of course, no assurance that perceptions drawn within the limited context of voir dire will be totally accurate. Counsel simply draws perceptions upon which he acts in determining the use of peremptory challenges.

*Id.* at 64.

After the state announced its peremptory challenges, Appellant raised a *Batson*[4] challenge to the State's strike of venire members Gooden, Singleton, and Fortson, each of whom were African-American (Tr. 1570).

The prosecutor explained that he struck venire member Gooden because his attire and the jewelry he wore were signs that he was liberal, that his appearance was similar to Appellant's in a manner totally unrelated to race, and that he was a postal clerk:

> [Gooden] had two earrings in his left ear, which I think is a sign of something, of liberal – people that wear earrings in their ear I find generally are more liberal. It makes a statement of some kind. They are trying to be different. They are trying to dress differently. And they are not conservative. I haven't met any conservative people that wear earrings in their ear. These are men, I'm talking about. He also came to court, I guess it was yesterday, whenever it was that we did the voir dire with him. He had a shirt with an orange dragon on it. It had Chinese or Arabic lettering on it. He had a large gold cross very prominent outside his shirt, which I thought was ostentatious looking. He also, to my view, looked very similar to the defendant. He reminded me of the defendant, in fact. He had the similar type glasses as the defendant. He has the same piercing eyes as the defendant. When I asked him about death, he said he believed that he could consider it. That was his response. I felt that he was weak on that area. He had gray shiny pants on with that wild shirt, as well. He also is a postal clerk, working for the U.S. Postal Service as a clerk. He is a mail processing supervisor, which is a patronage job. I find that postal service

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[4] *Batson v. Kentucky*, 476 U.S. 79 (1986).

> workers are very liberal. And I'm talking about mail handlers and clerks. People that work at the post office in that capacity, especially, are that way, it's been my experience when I go into the post office, seeing the people that work there. And on other juries, I tend to strike postal service employees.
>
> * * *
>
> He also had a goatee. He just reminded me–if you look at him and look at the defendant, they were quite similar in their appearance.

(Tr. 1586-87). During death-qualification voir dire, Mr. Gooden stated that he "believed" he could legitimately consider imposing the death penalty (Tr. 762).

Appellant complains that the prosecutor's statement that Mr. Gooden's appearance was similar to Appellant's was discriminatory on its face because both Mr. Gooden and Appellant are African-American. But the prosecutor's explanation had nothing to with race. The prosecutor explained that their similar appearance related to having the same type of glasses and the same piercing eyes, wearing a goatee, and having a quiet, bookish demeanor like Appellant (Tr. 1586, 1590-91). Although Appellant's counsel disagreed that Appellant and Mr. Gooden looked alike, this Court should defer to the trial court's finding that the prosecutor's reason was race neutral (Tr. 1591).

Appellant's reliance on *Johnson v. Love*, 40 F.3d 658, 660 (C.A.3 1994) is misplaced. In that case, the prosecutor struck the proposed juror precisely because of her race stating that he struck her because she was a "young black girl" and, consequently, would not show much sympathy to the murder victim. *Id.* at 662. Appellant's suggestion that the prosecutor must explain how his reasons for the strike pertain to the case was rejected in *Purkett*. The prosecutor's explanations for the strike, even those pertaining to similar appearances, were race-neutral and

was in no way was based *solely* on race. *See State v. Weaver*, 912 S.W.2d 499, 509 (Mo. banc 1995), *cert. denied*, 519 U.S. 856 (1996).

Appellant also complains that striking Mr. Gooden because of his job as a postal worker was pretextual. But employment is a valid race-neutral basis on which to base a strike. *State v. Smulls*, 935 S.W.2d 9, 15-16 (Mo. banc 1997), *cert. denied*, 520 U.S. 1254; *State v. Nicklasson*, 967 S.W.2d 596, 614 (Mo. banc 1998), *cert. denied*, 525 U.S. 1021 (1998). The courts have repeatedly held that a peremptory strike based on the employment of a prospective juror as a postal worker is valid under *Batson*. *See State v. Pepper*, 855 S.W.2d 500, 502-03 (Mo. App. E.D. 1993); *State v. Hudson*, 822 S.W.2d 477, 480-81 (Mo. App. E.D. 1991); *State v. Payton* , 747 S.W.2d 290, 293 (Mo. App. E.D. 1988). The prosecutor explained that in his experience postal workers were liberal and that he tended to strike them from all his juries (Tr. 1585-87).

Appellant contends that the prosecutor's reason was pretextual because the prosecutor did not strike venire member Jones, who also worked for the postal service. But the prosecutor explained that Mr. Jones was not a mail sorter or processor, but was a diesel mechanic (Tr. 1585-87). During voir dire, Mr. Jones stated that although he was employed by the postal service, he was a mechanic that worked on trucks and that he had nothing to do with the sorting or delivery of mail (Tr. 1479).

Appellant claims that the discriminatory nature of the prosecutor's peremptory strike of Mr. Gooden is proven by the prosecutor's failure to strike Mr. Jones, who again also worked for the postal service. Normally, a party would demonstrate this by showing that the venire member who was not struck was a similarly situated white venire member. But Appellant's argument instead proves that the prosecutor's strikes were not discriminatory because Mr. Jones was also an African-American, who, in fact, ultimately served on Appellant's jury (Tr.

1587, 1611; Supp. L.F. 1). If the prosecutor's intent was to keep African-Americans off Appellant's jury, why did he not also strike Mr. Jones on the ground that he worked for the post office? In short, Appellant is arguing that discriminatory intent can be shown by the prosecutor's peremptory strike of one African-American but not another.

Finally, contrary to Appellant's argument, the prosecutor's reliance on Mr. Gooden's attire and appearance was a valid race-neutral reason on which to base his strike. Mr. Gooden wore loud clothes and jewelry, and he had one ear double-pierced in which he wore two earrings. Moreover, Mr. Gooden had facial hair, including a goatee. The Supreme Court has held that striking a prospective juror simply on the ground that he has facial hair is race neutral and does not evince a discriminatory intent. *See Purkett*, 514 U.S. at 769 (rejecting a *Batson* claim against the peremptory strike of a prospective juror on the grounds that he had long hair and goatee-type beard). Certainly, the race-neutral reasons advanced by the prosecutor here are stronger than that were upheld in *Purkett*.

The prosecutor stated that he struck Mr. Singleton because he was not strong on the death penalty, stating that he saw no difference between life imprisonment and death, and because he was convicted in a court-martial of taking money he claimed not to have taken:

> He said, first of all, he thinks he could consider the death penalty. Again, that's not definite enough. If I have a strike available for someone that says they think they could, well, then I'll use it for that other person. And this person said that. I believe if you compare his comment about, I think I could, or -- I wrote down, thinks he could, it will not be as definite as the other jurors, all the other jurors that I have left on this jury. He also said he could not see any difference between death or life without parole, and that

one is not more lenient than the other. Well, how am I going to convince someone to vote for the death penalty when they think that life without parole is worse or just as bad? I think that's a cop-out so that they don't have to face the death penalty as an option. Also in 1988 he was found guilty in a court martial in the Army. He did forty-eight days in jail for wrongful appropriation of government funds. He said that his attorney convinced him to plead guilty when he didn't steal the money. And there again he's charged with a crime that he didn't commit. This is himself personally. And he said the evidence was there, but he didn't commit the crime. And so he pled guilty. I don't know how honest he was about that whole thing. But just the fact that he went through the court martial process in the Army, and then was discharged, although he said it was not discharged unfavorably. And there's always the possibility, I guess, that if you steal $160, which I think is what he said was involved, that that could be a felony. And I don't know the law necessarily on court martials, if those count to disqualify jurors. But I certainly wouldn't want to take the chance of having a juror, when I'm unsure of the law, under any circumstances that might have a felony conviction. He didn't say it was a misdemeanor. And here the defendant is charged with a crime that the defense has made quite clear that he doesn't admit committing. And Juror 65 [Mr. Singleton] could very well identify with the defendant on this.

(Tr. 1591-93).

The prosecutor's assertion that Mr. Singleton saw no distinction between life imprisonment and death is supported by Mr. Singleton's responses during death-qualification voir dire:

[The Prosecutor]: Well, I'll rephrase that. Do you think that you could also consider life in prison without the possibility of probation or parole?

Venireman Singleton: Yes, I could.

[The Prosecutor]: Would that be easier for you?

Venireman Singleton: I can't say. Both, either way, you know, when you think about it, life in prison without parole, or death. You know, you put a person away for the rest of their life. So I can't see any differences in it. Therefore, I can't see any difference in how you judge or weigh those. In other words, what I'm saying is, I could, you know, -- if I could vote for death, I could vote for life in prison without parole.

[The Prosecutor]: Do you think that one is more harsh than the other?

[Appellant's Counsel]: Judge, I'm going to object. You're implying that they lean one way or the other, to one punishment over the other.

The Court: The objection is sustained. Please rephrase your question.

[The Prosecutor]: Do you think that one punishment is a worse punishment than the other? I'm not asking you which one you favor, whether you lean towards this one or lean towards that one. I just would like to know, since you said that both of them are -- you didn't see any difference, I think you said. You didn't see any–

Venireman Singleton: What I–

[Appellant's Counsel]: Judge, I have to object to it, that there's no question before the juror.

The Court: Well, the question was, you didn't see any difference. Is that correct?

[The Prosecutor]: Yes.

[Appellant's Counsel]: Okay.

Venireman Singleton: I don't think one is any more lenient than the other.

[The Prosecutor]: Okay. Do you think they are equal?

[Appellant's Counsel]: Judge, I would object. That implies a leniency of one over the other.

The Court: The objection will be sustained.

[The Prosecutor]: What do you mean by, you don't think one is any more lenient than the other?

[Appellant's Counsel]: Judge, that's another form of the same question.

The Court: The objection is overruled.

[The Prosecutor]: Okay.

The Court: It's a followup to what the venireperson stated.

[The Prosecutor]: Yes.

Venireman Singleton: Well, basically once the person is convicted, then they are put away for the rest of their life. If there's life without parole, or probation, that means until the day he dies. The death penalty means he's put away until the State puts him to death. Either way, he's gone for the rest of his life.

(Tr. 763-66).

During general voir dire, Mr. Singleton admitted that in 1988 he was found guilty in a court-martial of stealing government funds, but insisted that he did not commit the crime:

Venireman Singleton: Well, what happened is, back in 1988 I was found guilty in a court martial.

[The Prosecutor]: Oh, a court martial?

Venireman Singleton: Yeah. I was in the Army. And I did 48 days, you know, confinement. And was reduced in rank. But I was allowed to stay on military duty. *Id.* got my honorable discharge. I'm still in the Reserves now. And I'm still serving in, you know, in the reserves.

[The Prosecutor]: Okay. What was the charge?

Venireman Singleton: Wrongful appropriation of government funds.

[The Prosecutor]: Did you–you went to trial on that?

Venireman Singleton: Yes.

[The Prosecutor]: You did not plead guilty? Did you plead guilty, or did you go to trial?

Venireman Singleton: On the advice of my lawyer, yes, I did. And I paid restitution.

[The Prosecutor]: Okay. So you went in to the court there, and you admitted your guilt?

Venireman Singleton: Yes.

[The Prosecutor]: On the advice of your lawyer?

Venireman Singleton: Yes.

[The Prosecutor]: Was that good advice or bad advice. In other words, I'm sort of trying to ask you if you were guilty, or did you just plead guilty because your lawyer told you to plead guilty.

Venireman Singleton: It was, you know–I think that, you know, it was one of those situations where I probably would have been found guilty, you know. The evidence was there. And so I just went ahead and did–paid restitution. And it was the easiest way to end the situation.

[The Prosecutor]: Okay. Do you mind if I ask you if you were guilty?

Venireman Singleton: Was I guilty?

[The Prosecutor]: Yeah. In other words, did you commit the crime? Or did you not commit the crime?

Venireman Singleton: No, I didn't commit the crime.

[The Prosecutor]: Okay. That's what I was wondering. But you think the evidence–

Venireman Singleton: Let me explain to you exactly what happened. *Id.* was working in a military nightclub. And I was the assistant manager at the club at the time. And a hundred sixty dollars came up missing out of a ten thousand dollar safe.

[The Prosecutor]: I see.

Venireman Singleton: So the night that it happened I was on duty. And, you know,–

[The Prosecutor]: So they jumped to the conclusion that–

Venireman Singleton: It was pretty much concluded that I did it. At the time I had some financial problems. And, you know, that was all brought up and everything. And so, you know, it was easiest for me to just go ahead and–it came out that, you know, with all the charges and everything, it was easier for me just to plead guilty and throw myself on the mercy of the Court and see if that would come out easier. But I had been given a bad conduct discharge and,–

[The Prosecutor]: Right.

Venireman Singleton: –you know, everything, so–

[The Prosecutor]: Was that a misdemeanor or a felony, or you don't know?

Venireman Singleton: I have no idea.

[The Prosecutor]: Okay. How much was the amount? You said $160?

Venireman Singleton: $160

[The Prosecutor]: Do you know what the range of punishment was for that?

Venireman Singleton: I think it was, I think the maximum was like six months.

(Tr. 1420-23).

Appellant's defense was that he did not commit the crimes with which he was charged. The prosecutor could have reasonably believed that Mr. Singleton might be biased toward Appellant based on the fact that Mr. Singleton thought he was unfairly accused and was then later convicted of a crime that he claimed he did not commit. *Compare State v. Shaw,* 14 S.W.3d 77, 83 (Mo. App. E.D. 1999) ("The State could have reasonably expected [the venire member] to be biased toward defendant–either consciously or subconsciously–because of their similar criminal backgrounds.").

Appellant also contends that the prosecutor failed to strike two other venire members who had misdemeanor convictions. But one venire member was convicted of receiving stolen property twenty-four years earlier, and he stated that he had no bad feelings toward the courts and was treated fairly (Tr. 1413-14 ). The other venire member, who was convicted of indecent exposure for urinating in public, received two days in jail and a $50 fine and admitted that he was drunk and urinated in some bushes (Tr. 1427). Unlike Mr. Singleton, neither of the other two venire members denied having committed the crime for which they were convicted.

Appellant also contends that striking Mr. Singleton based on his statement that death and life imprisonment were essentially the same punishment was also pretextual because Mr. Singleton also said that he could consider both sentences. Appellant, however, is confusing a race-neutral reason with one that would justify a strike for cause. Even if Mr. Singleton's response would not support a strike for cause, his response was certainly a sufficient race-neutral reason for a peremptory strike.

The prosecutor's race-neutral explanation for peremptorily challenging Mr. Fortson was that Mr Fortson kept his arms folded while the prosecutor questioned

him, that Mr. Fortson had been fired from his job for physically attacking a fellow employee after that person had verbally provoked him, and that Mr. Fortson appeared upset when other veniremembers laughed at him as he answered the prosecutor's questions concerning this incident:

> A couple reasons, your Honor. The most important reason is that he was fired from his previous job for violating work rule Number 21, which is provoking fighting or causing bodily injury. He was terminated for that. And when I asked what the circumstances were, he said that someone provoked him. And I asked him how, and he said verbally. And in response to a verbal attack, the defendant said he – I'm sorry, Juror Number 72 said that he put his hands on the person that verbally, I guess, hurt his feelings.
>
> And when I said, Could you explain what you mean by that, he said, I hit him three times. And then he indicated he hit him in the face three times. Well, that's an inappropriate response. You don't hit someone in the face three times, or anywhere, because they make some insulting words to you. That's not self-defense. That's an assault. And he seemed to feel that he was justified in doing it. And he tried to downplay or minimize his involvement by saying, I put my hands on someone. I think striking someone or punching someone three times, I think he said in the face, is more than putting my hands on him.
>
> So I just got a bad feeling from that juror. I think the defendant's going to show some, we are going to have some evidence of some assault that the defendant has committed. And I wouldn't want this juror to think, well, the defendant just put his hands on the guy, when we introduce evidence of an assault that occurred at the City Jail, when the defendant attempted to escape, which is part of the evidence in the case.

(Tr. 1603-05).

The prosecutor's explanations for the strike are supported by the exchange occurring between the prosecutor and veniremember Fortson during voir dire after the prosecutor asked him why he left his previous employment:

> The Prosecutor: Why did you leave there?
>
> Venireman Fortson: I was terminated.
>
> [The Prosecutor]: Why was that?
>
> Venireman Fortson: For violating Work Rule Number 21, which is confrontation with another employee.
>
> [The Prosecutor]: I would like to hear more about that. Can you tell me from here, or would you like to talk at the sidebar.
>
> Venireman Fortson: No, this is fine.
>
> [The Prosecutor]: Tell me what happened.
>
> Venireman Fortson: It's Work Rule Number 21, which means provoking, fighting, or causing bodily injury to another employee on company premises. So an employee provoked me, and my reaction was putting my hands on him. So I was terminated for touching him.
>
> [The Prosecutor]: I see. What did he do to provoke you?
>
> Venireman Fortson: Verbal abuse and, I guess, – I walked away two or three times. He kept insisting on the matter. And before I knew it, I had put my hands on him.
>
> [The Prosecutor]: When you say you put your hands on him, tell me exactly what you did.
>
> Venireman Fortson: I struck him with a combination of three punches.
>
> [The Prosecutor]: That's putting your hands on him.
>
> (Laughter)

(Tr. 1497-98).

Appellant contends that other venire members were not asked about why they left their previous employment, but the record shows that the prosecutor asked several venire members that very question (Tr. 1481, 1486, 1492, 1494). No other venire member responded that they had been terminated for physically assaulting a coworker. Moreover, the encounter between Mr. Fortson and the prosecutor, especially when the other venire members laughed at hearing what Mr. Fortson did, certainly justified the strike. One can safely assume that Mr. Fortson was not amused and likely felt some antipathy toward the prosecutor after the questioning. The prosecutor even apologized to Mr. Fortson after he had questioned him (Tr. 1500-01).

Appellant's *Batson* claims are without merit. The State offered race-neutral explanations for the strikes and Appellant failed to carry his burden of showing that these explanations were pretextual.

.

**The trial court did not clearly error in refusing to suppress and in admitting into evidence items the police found in the 1980 Buick LeSabre Appellant was driving on the day of the murder because the police search of the car did not violate Appellant's Fourth Amendment Rights in that Appellant had no standing to contest the search, the police had probable cause to search the vehicle without a warrant or consent under the "automobile exception," and the car's registered owner, Appellant's grandfather, gave written consent for the search.**

Appellant claims that evidence the police seized from "his car" should have been suppressed on the ground that Appellant's grandfather's consent to search the car was ineffective. Aside from the fact that Appellant's grandfather was the registered owner of the vehicle with authority to consent to the search, Appellant's

Point wholly ignores the issues of whether Appellant even has standing to contest the search or whether the police had probable cause to search the vehicle without obtaining anyone's consent.

When reviewing a trial court's ruling on a motion to suppress, appellate review is limited to determining whether the evidence is sufficient to support the trial court's ruling, *State v. Burkhardt*, 795 S.W.2d 399, 404 (Mo. banc 1990), and the facts and any reasonable inferences arising therefrom are to be stated most favorably to the order challenged on appeal. *State v. Blankenship*, 830 S.W.2d 1, 14 (Mo. banc 1992). "Evidence and inferences contrary to the order are to be disregarded." *State v. Hutchinson*, 796 S.W.2d 100, 104 (Mo. App. S.D. 1990).

This Court may consider the record of the pre-trial hearing on the motion to suppress and the evidence adduced at trial. *State v. Deck*, 994 S.W.2d 527, 534 (Mo. banc 1999), *cert. denied*, 528 U.S. 1009 (1999); *State v. Howard*, 973 S.W.2d 902, 908 (Mo. App. S.D. 1998). The evidence should be viewed in the light most favorable to the trial court's ruling. *State v. Peterson*, 964 S.W.2d 854, 856 (Mo. App. S.D. 1998). The reviewing court defers to the trial court's superior position to assess the credibility of witnesses and the weight of the evidence. *State v. Villa-Perez*, 835 S.W.2d 897, 902 (Mo. banc 1992); *Peterson*, 964 S.W.2d at 856; *Howard*, 973 S.W.2d at 908.

If the trial court's ruling on a motion to suppress is plausible in light of the record viewed in its entirety, this Court may not reverse. *State v. Page*, 895 S.W.2d 269, 271 (Mo. App. S.D. 1995); *State v. Adams*, 927 S.W.2d 483, 484 (Mo. App. W.D. 1996). An appellate court will not reverse the trial court's decision on a motion to suppress unless it is clearly erroneous. *State v. Milliorn*, 794 S.W.2d 181, 183 (Mo. banc 1990); *State v. Stevens*, 845 S.W.2d 124, 128 (Mo. App. E.D. 1993). Under this standard, the court reviews factual findings

only to determine if they are supported by substantial evidence. *State v. Ritter*, 809 S.W.2d 175, 177 (Mo. App. E.D. 1991); *Stevens*, 845 S.W.2d at 128. An appellate court may not substitute its discretion for that of the trial court, *Burkhardt*, 795 S.W.2d at 404, and may not reverse even if it believes that it would have made the decision differently. *Milliorn*, 794 S.W.2d at 184; *Stevens*, 845 S.W.2d at 128.

Appellant's complaint concerns the police search of a dark blue 1980 Buick LeSabre, in which the police found a calculator and a Post-Dispatch ruler, both identified as items that the murder victim, Lisha Gayle, kept in her purse (Tr. 1770-71, 1777). Lisha's purse was stolen from her house at the time of the murder (Tr. 1719). In the vehicle's trunk, the police found a spiral notebook in which the name "Glenn" was written next to a phone number belonging to Glenn Roberts, to whom Appellant sold the laptop computer belonging to Lisha's husband (Tr. 84, 1893, 2000, 2278, 2297). Appellant's fingerprints were found on the notebook (Tr. 2322).

In his brief, Appellant asserts standing to object to the police search based on the fact that he had previously slept in the Buick, kept his things in it, and that he had purchased it from his grandfather for $100 (Appellant's Brief, p. 96). But Appellant's witnesses testified that Appellant had given the Buick to Laura Asaro after he was incarcerated on August 31, 1998 (Tr. 2779). These same witnesses also testified that Laura had keys to the car and was in on several occasions after Appellant was incarcerated (Tr. 2774, 2781, 2792-93). The undisputed evidence also showed that Appellant's grandfather, Walter Hill, was the only registered owner of the Buick (Tr. 51, 2272-73; State's Exhibit ).

"Only defendants whose own Fourth Amendment rights have been violated are permitted to benefit from the exclusionary rule's protections." *State v. Toolen*, 945 S.W.2d at 631. "The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." *Id., quoting Rakas v. Illinois*, 439 U.S. at 130 n.1. "To determine whether a criminal defendant has a legitimate expectation of privacy in the place or thing searched, the defendant must have an actual subjective expectation of privacy in the place or thing searched and this expectation must be reasonable or legitimate." *Id.*

Appellant has failed to carry his burden of proving a reasonable expectation of privacy in the Buick. Viewing the evidence in the light most favorable to the court's ruling, the record showed that Appellant had given the car to Laura Asaro after he was incarcerated. The search of the vehicle occurred on November 18, 1999, more than a year after Appellant went jail on August 31, 1998 (Tr. 50, 2355). Appellant had been in continuous custody from the time he went to jail in August 1998 until the day of the search (Tr. 61-62). Appellant cannot challenge the search of a vehicle he does not own. *State v Damico*, 513 S.W.2d at 359 (Mo. 1974); *State v. Overstreet*, 694 S.W.2d 491, 494 (Mo. App. E.D. 1985). But a prosecutor may simultaneously maintain that a defendant criminally possessed the seized good but did not have an expectation of privacy in the vehicle or its contents. *Toolen*, 945 S.W.2d at 631.

Appellant offered no evidence that he had the authority or permission of the car's registered owner to possess the Buick. He therefore failed to carry his burden of proving that he had standing to contest the search.

Although Appellant has not proved that he had standing to challenge the search, he still contends that the registered owner of the Buick, his grandfather, did

not have authority to consent to the search. Appellant's argument is simply contrary to law and defies common sense.

When the police arrived at Walter Hill's residence, they advised him that Appellant, his grandson, was a suspect in a crime and asked him for permission to search the Buick, which was located on Mr. Hill's property (Tr. 50-52). Mr. Hill was the sole registered owner of the Buick (Tr. 62-63, 2272-73). Mr. Hill acknowledged that he owned the vehicle and agreed to the search, signing a consent to search form for the police (Tr. 67, 70-73). The police towed the car away, searched it, and returned it to Mr. Hill (Tr. 72, 82, 2713).

Appellant cites to no authority holding that the registered owner of a vehicle cannot consent to a search of that vehicle when that vehicle is located on the owner's property. The owner of a vehicle can always consent to a search. *See State v. Jackson*, 921 S.W.2d 130, 131 (Mo. App. E.D. 1996) (rejecting a claim of an illegal search when the owner, who was not the defendant, consented to the search); *United States v. Stapleton*, 10 F.3d 582, 584 (C.A.8 1993). In fact, the police can search a vehicle even if they only have a reasonable basis to believe that the person giving consent actually owns the vehicle. *United States v. Gillette*, 245 F.3d 1032, 1033 (C.A.8 2001).

Appellant contends that the police should have known that Appellant's grandfather did not have common authority over the Buick. This is true only if one ignores that fact that Department of Revenue records showed that Mr. Hill owned the Buick, that Mr. Hill told the police that he owned the Buick, and that the Buick was sitting on Mr. Hill's property adjacent to his residence. Appellant's claim that his grandfather could not consent to the search borders on the frivolous.

Appellant's Brief does not address the issue of whether the police had probable cause to search the Buick, and instead focuses solely on the authority of

the car's owner to consent to the search. But the record shows that the police had more than enough probable cause to search the Buick without a warrant despite whether anyone consented to the search.

Walter Hill, Appellant's grandfather, was the only registered owner of the Buick, and the vehicle was located on a vacant lot next to Mr. Hill's residence (Tr. 50, 62-63). In June 1999, some five months before the search, Henry Cole approached the police and told them that Appellant had admitted to him that he had killed Lisha Gayle and had stolen her purse and a laptop from her house (Tr. 2200, 2421-25; State's Exhibit 126). Appellant also admitted that he had told Ms. Asaro that he had committed the murder (Tr. 2414). Appellant had also told Mr. Cole that he kept "stuff" in the trunk of a Buick, which was parked at his "granddaddy's" house (Tr. 2434).

On November 17, 1999, the day before the search, Laura Asaro told the police that on the day of the murder, August 11, 1998, Appellant had driven the Buick to her mother's house, where he dropped her off (Tr. 1841, 2049; State's Exhibit 124). A few hours later, after Appellant had returned and picked her up she noticed blood on his clothes and backpack, which Appellant eventually threw down a sewer (Tr. 1843; State's Exhibit 124). Ms. Asaro also discovered Lisha's purse, containing Lisha's Missouri State I.D., grocery coupons, and a coin purse, in the trunk of the Buick (Tr. 58-59). Ms. Asaro testified at trial that she found a Post-Dispatch ruler and calculator that belonged to the victim in the Buick's glove compartment (Tr. 1865). Appellant admitted to Ms. Asaro that he had killed Lisha Gayle and took her purse (Tr. 60).

Ms. Asaro described the Buick to the police and told them that they could find the car at Appellant's grandfather's house (Tr. 54). Ms Asaro also told the police that there might be evidence of the crime in the car and that she and Appellant used to keep items, including clothing, in the trunk (Tr. 52, 64). The

police went to Appellant's grandfather's house and found an unlocked car matching the description given by Ms. Asaro, which they ultimately towed and searched, later returning it to Appellant's grandfather (Tr. 54).

This search of the Buick was proper under the "automobile exception" to the general requirement for search warrants. Under this well-established doctrine, law enforcement officers may search a vehicle if they have probable cause to believe that evidence of a crime is contained therein. *Chambers v. Maroney*, 399 U.S. 42 at 48-52 (1970); *State v. Lane*, 937 S.W.2d 721, 722 (Mo. banc 1997). The traditional grounding for this rule has been that the mobility of automobiles provided exigent circumstances" for dispensing with the warrant requirement. *Chambers v. Maroney*, 399 U.S. at 50-51; *State v. Milliorn*, 794 S.W.2d at 183. But a second and independent reason for the "automobile exception" is that the expectation of privacy in vehicles is "significantly less" than it is in a home or office. *California v. Carney*, 471 U.S. 386, 391-93 (1985); *South Dakota v. Opperman*, 428 U.S. 364, 367-68 (1976); *State v. Ritter* , 809 S.W.2d at 177. "Even in cases where an automobile was not immediately mobile, the lesser expectation of privacy resulting from its use as a readily mobile vehicle justified application of the vehicular exception" (citation omitted). *California v. Carney*, 471 U.S. at 391.

It is well-settled that, under the "automobile exception," a motor vehicle may be seized and searched by law enforcement authorities if they have probable cause to believe that evidence of a crime or contraband is present in the vehicle. *Lane*, 937 S.W.2d at 722; *Milliorn*, 794 S.W.2d at 183. "Exigent circumstances" are generally supplied for the warrantless seizure and search of an automobile because of its inherent mobility, and particularly in circumstances where an unapprehended defendant or third party could move the vehicle or tamper with its contents. *Id.*; *Burkhardt*, 795 S.W.2d at 404. Where probable cause has been

shown, it is of no legal significance whether the search of the vehicle is conducted immediately or later, after it has been transported into police custody. *Lane*, 937 S.W.2d at 722-23.

The concept of probable cause can be described, but it is not quantifiable. It has been characterized by the United States Supreme Court as follows:

[P]robable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief," *Carroll v. United States*, 267 U.S. 132, 162, 45 S.Ct. 280, 288, 69 L.Ed.2d 543 (1925), that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required. *Brinegar v. United States*, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed.2d 1879 (1949). Moreover, our observation in *United States v. Cortez*, 449 U.S. 411, 418, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981), regarding "particularized suspicion," is equally applicable to the probable-cause requirement:

"The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as fact-finders are permitted to do the same–and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Texas v. Brown*, 460 U.S. 730, 742 (1983).

The police had substantial probable cause to search the Buick without either a warrant or the consent of the owner or Appellant. The police do not need consent to search a vehicle when they have probable cause. *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973); *United States v. Navarro*, 90 F.3d 1245,

1254 (C.A.7 1996). They had information that Appellant had driven to and from the murder scene and that items he had stolen from Lisha's house were seen inside the vehicle. The fact that a vehicle was used as transportation to the scene of a crime justifies its warrantless search. *See State v. Weaver*, 912 S.W.2d at 521. In addition, Ms. Asaro, Mr. Cole, and who knows who else, knew that the police were interested in the Buick. It was imperative that the police seize the vehicle before someone tampered with it or moved it.

To the extent Appellant suggests that the Buick was his home because he occasionally slept in it, the record shows that his "home" for over a year before the search was the St. Louis City Workhouse. Moreover, the idea that an vehicle can be a "home" entitled to a greater privacy interest than a mere automobile was rejected in *California v. Carney*, in which the Court held that the automobile exception applied to a motor home, despite its potential or actual use as a residence. 471 U.S. at 414-15.

The trial court did not err in refusing to suppress the items seized during the search.

.

**The trial court did not plainly err in submitting Instruction No. 1, patterned after MAI-CR3d 302.01, or in failing to advise the jurors of their responsibilities concerning note-taking because the record shows that the trial court read to the jury the proper instruction, which included the paragraphs concerning note-taking by jurors.**

Appellant next complains that the trial court plainly erred in submitting Instruction Number 1, patterned after MAI-CR 3d 302.01, because the Instruction allegedly failed to include the additional language concerning note taking by the

jurors. Although the written instruction contained in the legal file does not include these paragraphs, the transcript shows that the trial court read the proper instruction, including the paragraphs concerning note taking, to the jury.

The trial court permitted the jurors to take notes during trial. If the jurors take notes, the Notes on Use to MAI-Cr 3d 302.01direct the trial court to read to the jury the optional paragraphs in addition to the standard instruction. The written instruction (Instruction No. 1) patterned after MAI-CR 3d 302.01 that is contained in the legal file, however, does not contain the additional language concerning note taking. But the transcript in this case shows that before opening statements were made, the trial court properly instructed the jury by reading MAI-CR 3d 302.01 in its entirety, which included the note taking paragraphs (Supp. Tr. 2-4). The instruction, as read to the jury, exactly tracks the language of MAI-CR 3d 302.01, including the note taking paragraphs:

> The Court: Instruction number 1. Those who participate in a jury trial must do so in accordance with established rules. This is true of the parties, the witnesses, the lawyers, and the judge. It is equally true of jurors.
>
> It is the Court's duty to enforce those rules and to instruct you upon the law applicable to the case. It is your duty to follow the law as the Court gives it to you.
>
> However, no statement, ruling, or remark that I may make during the trial is intended to indicate my opinion of what the facts are. It is your duty to determine the facts, and to determine them only from the evidence and the reasonable inferences to be drawn from the evidence. In this determination you alone must decide upon the believability of the witnesses and the weight and value of the evidence.

In determining the believability of a witness and the weight to be given to the testimony of the witness, you may take into consideration the witness's manner while testifying, the ability and opportunity of the witness to observe and remember any matter about which testimony is given, any interest, bias, or prejudice the witness may have, the reasonableness of the witness's testimony considered in the light of all the evidence in the case, and any other matter that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness.

Faithful performance by you of your duties as jurors is vital to the administration of justice. You should perform your duties without prejudice or fear and solely from a fair and impartial consideration of the whole case.

Each of you may take notes in this case, but you are not required to do so. You will be given notebooks. Any notes you take must be in those notebooks only. You may not take any notes out of the courtroom before the case is submitted to you for your deliberations. No one will read your notes while you are out of the courtroom. If you choose to take notes, remember that note-taking may interfere with your ability to observe the evidence and the witnesses as they are presented.

Do not discuss or share your notes with anyone until you begin your deliberations. During deliberations, if you choose to do so, you may use your notes and discuss them with other jurors. Notes taken during the trial are not evidence. You shouldn't assume that your notes or those of other jurors are more accurate than your own recollection or the recollection of other jurors.

After you have reached your verdict, your notes will be collected and destroyed. No one will read your notes.

(Supp. Tr. 2-4).

Appellant's Point Relied On does not contend that the trial court plainly erred on the ground that the instruction contained in the legal file differed from the instruction actually given to the jury, which, by itself, would not constitute plain error. Rather, he contends that the jurors were never properly instructed concerning the taking of notes. The transcript, however, shows that the jury was properly instructed by the trial court. Consequently, Appellant suffered no manifest injustice or a miscarriage of justice and his claim should be rejected.

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**The trial court did not plainly err in either allowing the State to present evidence during the penalty phase detailing the circumstances of Appellant's previous convictions or in allowing victim-impact testimony from the murder victim's friends and relatives because the law permits the State to present evidence not only to prove a previous conviction but to show the circumstances surrounding those crimes, and the victim-impact testimony offered by the State was not excessive.**

Appellant's Point Relied On apparently combines two separate claims for plain error review. The first is that during the penalty phase, the State attempted to use the victims of Appellant's previous crimes as "victim-impact" evidence for this crime. The second claim is that the State presented excessive "victim-impact" evidence and that "the sheer volume of this evidence overwhelmed the jury with emotion."

Appellant's claims have no merit. First, the evidence the State presented concerning Appellant's previous convictions is not "victim-impact" evidence. And, second, the evidence the State presented concerning the impact of

Appellant's murder on the victim and her family was neither excessive nor voluminous.

The standard of review here is for plain error (See Point III).

In an argument that this Court recently rejected in *State v. Cole*, 71 S.W.3d 163 (Mo. banc 2002), Appellant contends that evidence concerning Appellant's previous convictions constituted "victim-impact" evidence not authorized by § 565.030.4, RSMo 2000. That statute permits the State to present "evidence concerning the murder victim and the impact of the crime upon the family of the victim and others." But the record shows that State's evidence concerning Appellant's previous convictions was not offered as "victim-impact" evidence, but as evidence of Appellant's previous crimes, which is always admissible.

During the penalty phase, the State offered the testimony of a donut shop owner and the assistant manager of a fast-food restaurant, both of whom were robbed at gunpoint by Appellant (Tr. 3107, 3143). Appellant had been previously convicted of crimes relating to those robberies (Tr. 3194-97). The State also offered the testimony of a homeowner whose residence Appellant had burglarized by breaking out a window pane and unlocking a door (Tr. 3184). Finally, the State offered the testimony of two police officers who investigated the donut shop robbery and burglary. The testimony of these individuals related solely to the circumstances surrounding Appellant's commission of these crimes. The trial court did not permit the prosecutor to inquire about the impact these crimes had on the individuals who testified (Tr. 3118).

A separate punishment phase is provided in capital cases to permit the presentation of a wide range of evidence concerning the defendant's character and conduct, good and bad, without running the risk of placing irrelevant and possibly

prejudicial evidence before the jury during the guilt phase. *Gregg v. Georgia*, 428 U.S. 153 (1976). Because of the importance of the decision to be made and the need for an individualized determination of the appropriate sentence, the sentencing body should generally receive any and all evidence that aids it in making that decision. *State v. Morrow*, 968 S.W.2d 100, 114 (Mo. banc 1998), *cert. denied*, 525 U.S. 896 (1998); *State v. Kreutzer*, 928 S.W.2d 854, 874 (Mo. banc 1996), *cert. denied*, 519 U.S. 1083 (1997).

"[T]he trial court is vested with broad discretion in determining the admissibility of evidence offered at the penalty stage of a capital case." *State v. Johns*, 34 S.W.3d at 112 . This discretion includes the ability to admit whatever evidence during the penalty phase that the trial court deems helpful to the jury in assessing punishment. *Id.*

It is well-established that in the punishment phase, the state may present evidence of a defendant's prior convictions. *State v. Clay*, 975 S.W.2d 121, 138 (Mo. banc 1998), *cert. denied*, 525 U.S. 1085 (1999); *State v. Smulls*, 935 S.W.2d at 22-23; *State v. Wise*, 879 S.W.2d at 520-21; *State v. Whitfield*, 837 S.W.2d at 512. In fact, this Court recently reversed a death sentence on proportionality grounds based, in part, on the fact that the State failed to show that the defendant had any prior convictions. *State v. Chaney*, 967 S.W.2d 47, 60 (Mo. banc 1998), *cert. denied*, 525 U.S. 1021 (1998). Moreover, the State is not required to rely solely on certified copies to previous convictions, but may offer testimony or evidence detailing the facts of those crimes. *State v. Smulls*, 935 S.W.2d at 22-23 (testimony from three witnesses–the victim, the victim's neighbor, and a police officer–was not excessive and did not constitute a "mini-trial" in proving one previous robbery conviction). The State may also present evidence of crimes or other bad acts that have not resulted in a criminal conviction. *See State v. Johns*, 34 S.W.3d at 113-14 (the trial court did not err in allowing twenty-one witnesses

to testify about six burglaries and two execution-style murders that the defendant committed during the six months he evaded capture following the murder for which he was on trial).

In *Cole*, the defendant argued that the trial court plainly erred in allowing the State to present excessive evidence concerning his previous convictions, which he labeled as "victim-impact" evidence. This Court rejected the claim and held that evidence detailing the circumstances of a defendant's previous convictions is proper character evidence:

> "During the penalty phase, both the state and the defense may introduce any evidence pertaining to the defendant's character," including evidence detailing the circumstances of prior convictions, evidence of a defendant's prior unadjudicated criminal conduct, and evidence of the defendant's conduct that occurred subsequent to the crime being adjudicated.

71 S.W.3d at 174, *quoting State v. Christenson*, 50 S.W.3d 251, 257 (Mo. banc 2001), cert. denied,122 S. Ct. 406 (2001). This Court rejected the defendant's argument that this constituted "victim-impact" evidence of other crimes:

> This evidence is more that "victim impact evidence," which concerns the "personal characteristics of the victim and the emotional impact of the crimes on the victim's family."

*Cole*, 71 S.W.3d at 175, *quoting Payne v. Tennessee*, 501 U.S. 808, 817 (1991).

Appellant's argument that the State used evidence of his prior convictions as improper victim-impact evidence derives solely from the prosecutor's reference during closing argument that the lives of the people Appellant affected by his previous crimes will never be the same. Appellant did not object to this statement and he cites no other reference to any similar argument (Tr. 3486). Moreover, Appellant does not contend that this statement is a basis for plain error relief.

The general rule is that, "[d]uring closing argument a prosecutor is allowed to argue the evidence and all reasonable inferences from the evidence." *State v. Harris*, 870 S.W.2d 798, 814 (Mo. banc 1994), *cert. denied* 513 U.S. 953 (1994). The prosecutor's isolated statement is mere tautology. Common sense dictates that a victim of a violent crime, such as armed robbery, is going to be affected by that experience. The comment was appropriate in light of the jury's charge to consider all the evidence, including Appellant's previous convictions, in determining the appropriate sentence. Appellant's claim that this constituted victim-impact evidence from other crimes is without merit.

Appellant's second claim under this Point is that the State presented excessive victim-impact evidence. Appellant relies on *Payne v. Tennessee* in support of his argument, but the Supreme Court in *Payne* overruled cases that had prohibited victim-impact evidence in capital cases. 501 U.S. at 829. Instead, the Court held that a "State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." *Id.* at 827.

Consequently, "[v]ictim impact evidence is admissible under the United States and Missouri Constitutions." *State v. Storey*, 40 S.W.3d 898, 909 (Mo. banc 2001), *cert. denied*, 122 S.Ct 272 (2001); *State v. Roberts*, 948 S.W.2d 577, 604 (Mo. banc 1997), *cert. denied* 522 U.S. 1056 (1998). Punishment phase evidence, "may include, within the discretion of the court, evidence concerning the murder victim and the impact of the crime upon the family of the victim and others." Section 565.030.4. "The state is permitted to show the victims are individuals whose deaths represent a unique loss to society and to their family and that the victims are not simply 'faceless strangers.'" *State v. Roberts*, 948 S.W.2d at 604. "Victim impact evidence is simply another form or method of informing

the sentencing authority about the specific harm caused by the crime in question." *Payne v. Tennessee*, 501 U.S. at 825. "Victim impact evidence violates the Constitution only if it is so 'unduly prejudicial that it renders the trial fundamentally unfair.'" *Storey*, 40 S.W.3d at 909.

During the penalty phase, the State offered victim-impact testimony from seven witnesses: two of Lisha's friends, Lisha's next-door neighbor, Lisha's mother and sister-in-law, and Ebony McCray, a young girl Lisha had tutored and befriended, and Ebony's mother (Tr. 3201-84). During this testimony, the State offered into evidence pictures of Lisha and her family, the programs from memorial services held for Lisha, pictures of a memorial garden Lisha's neighbors established in her memory, birthday cards Lisha made, Christmas letters Lisha sent her family, and a letter Lisha wrote concerning the disposition of her personal items in the event of her death (Tr. 3229, 3235, 3226-27, 3238, 3240, 3245-49, 3251, 3255, 3261-65). Appellant did not object to any of this evidence. The State's victim-impact testimony spanned only 84 transcript pages out of a 3536-page transcript.

Appellant complains that this constituted excessive evidence rendering his trial fundamentally unfair. The record here offers no support for Appellant's claim. Ironically, Appellant relies on *Storey*, a case that upheld most, if not all, of the type of victim-impact evidence presented here.

In *Storey*, the State offered into evidence the testimony of two witnesses, who testified about the physical and emotional impact the victim's death had on them. The State also admitted into evidence photographs showing the victim with her class of handicapped students, a memorial garden built in the victim's memory, a memorial plaque in the garden, a balloon release ceremony at the victim's school, a memorial sketch of the victim, a school newsletter commemorating the victim's death, a picture of the victim's tombstone, and a

poem and eulogy about the victim that were read to the jury by the authors. *Storey*, 40 S.W.3d at 908-09. This Court held that this testimony and each of those exhibits, except the photograph of the tombstone, were properly admitted into evidence. Appellant's argument that the evidence presented in this case, which was of the same type as upheld in Storey, was unduly excessive is nonsensical.

Although no photograph of Lisha's tombstone was offered into evidence, Appellant contends that the letter Lisha wrote and that her mother read to the jury concerning Ms. Gayle's wishes for disposing of her personal items after her death was no different than the tombstone photograph at issue in *Storey*.

But Lisha Gayle's letter is of a vastly different nature than the tombstone photograph at issue in *Storey*. In that letter, the murder victim, in her own words, revealed the nature of her character and the impact her death would have on her family. The letter reflected 's selflessness and showed concern for her husband and her other family members in that it was written to ease their burden in distributing her personal property. Instead of drawing the jurors into the mourning process like the picture of a tombstone might, Ms. Gayle's letter gave the jury a brief glimpse into her character through her own words. This was simply further evidence of the loss Lisha Gayle's family and friends felt as a result of her murder.

Of course, this Court in *Storey* did not find that the introduction of the "irrelevant" tombstone photograph rendered the defendant's trial fundamentally unfair. *Id.* at 909. None of the victim-impact evidence the State presented here, to which Appellant made no objection, rendered Appellant's trial fundamentally unfair. Neither did its admission into evidence constitute manifest injustice or a miscarriage of justice. Appellant's point should be rejected.

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**The trial court did not plainly err in giving Instruction No. 22, outlining the statutory aggravating circumstances for the jury to consider, because:**

**Appellant is entitled to no relief in that at least one statutory aggravating circumstance must be considered valid by Appellant's failure to challenge it, and under Missouri law the jury is only required to find one aggravating circumstance to make a defendant eligible for the death penalty.**

**The State is not required to plead the statutory aggravating circumstances it intend to submit in the indictment or information in that (1) neither *Apprendi v. New Jersey* nor *Ring v. Arizona* contain such a requirement, and (2) Appellant received pretrial notice of these circumstances according to § 565.005, RSMo 2000, which satisfied Appellant's Sixth and Fourteenth Amendment rights to be informed of the nature and cause of the accusation against him.**

**The depravity-of-mind statutory aggravating circumstance is not unconstitutionally vague in that the limiting instruction the jury was given in this case sufficiently narrows the class of individuals eligible for the death penalty.**

**The perpetration-of-burglary statutory aggravating circumstance was supported by the evidence in that Appellant committed murder after he had unlawfully entered the victim's home and was beginning to steal items from it**

**The fact that certain statutory aggravating circumstances are duplicated is meaningless in that the finding of a statutory aggravating circumstance simply makes a defendant eligible for the death penalty following which the jury considers all the evidence.**

**The trial court properly considered whether Appellant's previous convictions legally constituted serious assaultive behavior before they were**

**submitted to the jury for their determination of whether, in fact, they actually occurred. Moreover, Appellant's armed criminal action convictions were required by law to be separately listed in the instruction to avoid confusing the jury.**

Appellant contends that the trial court erred in giving the jury Instruction No. 22, which instructed the jury on the aggravating circumstances that pertained to Appellant's case. Instruction No. 22, which was patterned after MAI-CR 3d 313.40, provided:

> In determining the punishment to be assessed under Count II against the defendant for the murder of Felicia Gayle, you must first unanimously determine whether one or more of the following statutory aggravating circumstances exists:
>
> 1. Whether the murder of Felicia Gayle 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:
>
> 1) That the defendant committed repeated and excessive acts of physical abuse upon Felicia Gayle and the killing was therefore unreasonably brutal.
>
> 2. Whether the murder of Felicia Gayle was committed while the defendant engaged in perpetration of burglary.
>
> A person commits the crime of burglary when he knowingly enters unlawfully in an inhabitable structure for the purpose of committing stealing therein.
>
> A person commits the crime of stealing if he appropriates property of another with the purpose to deprive her or him thereof, either without her or his consent or by means of deceit or coercion.

3. Whether the murder of Felicia Gayle was committed while the defendant was engaged in the perpetration of robbery.

A person commits the crime of robbery when he forcibly steals property.

4. Whether the defendant murdered Felicia Gayle for the purpose of the defendant receiving money or any other thing of monetary value from Felicia Gayle.

5. Whether the murder of Felicia Gayle was committed for the purpose of preventing a lawful arrest of defendant.

6. Whether the defendant was convicted of assault second degree on April 13, 1988, in the Circuit Court of the City of St. Louis, State of Missouri.

7. Whether the defendant was convicted of robbery first degree on January 28, 2000, in the Circuit Court of the City of St. Louis, State of Missouri.

8. Whether the defendant was convicted of armed criminal action on January 28, 2000, in the Circuit Court of the City of St. Louis, State of Missouri.

9. Whether the defendant was convicted of robbery first degree on May 25, 2001, in the Circuit Court of the County of St. Louis, State of Missouri.

10. Whether the defendant was convicted of armed criminal action on May 25, 2001, in the Circuit Court of the County of St. Louis, State of Missouri.

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

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

(L.F. 528-29).

In its verdict declaring Appellant's punishment as death, the jury found the existence of each of the aggravating circumstances submitted in Instruction No. 22 (L.F. 537).

Appellant's Point Relied On claims that the statutory aggravating circumstances numbered 1, 2, 3, 4, 6, 7, 8, 9, and 10 in Instruction No. 22 were invalid (Appellant's Brief, pp.33-34). The Argument section of his brief does the same (Appellant's Brief, pp. 116-33). Appellant does not challenge the statutory aggravating circumstance numbered 5 in the instruction (whether the murder was committed to avoid a lawful arrest).

In Missouri, a statutory aggravating circumstance is a legal conclusion which functions only to limit the discretion of the sentencing body in a capital case by premising the defendant's eligibility for the death penalty upon proof of specifically-defined facts. *Tuilaepa v. California*, 512 U.S. 967, 971-72 (1994); *State v. Worthington*, 8 S.W.3d 83, 88 (Mo. banc 1999), *cert. denied*, 529 U.S. 1116 (2000). In "non-weighing" states like Missouri, "the finding of an aggravating circumstance does not play a role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty." *Zant v. Stephens*, 462 U.S. 862, 873-74 (1983); *see also State v. Brooks*, 960 S.W.2d 479, 496 (Mo. banc 1997), *cert. denied*, 524 957 (1998) (Missouri is a "nonweighing"

state). Instead, after determining whether the defendant is eligible for the death penalty by the finding of a statutory aggravating circumstance, the sentencing body considers all the evidence in determining punishment. *Stringer v. Black*, 503 U.S. 222, 229-30 (1992); *State v. Worthington*, 8 S.W.3d at 88.

Consequently, Appellant's attacks on the remaining statutory aggravating circumstances outlined in Instruction No. 22 are ultimately to no avail. Appellant's conviction and sentence would be valid even if all the statutory aggravating circumstances he challenges were invalid, because only one valid statutory aggravating circumstance need exist to make a defendant eligible for the death sentence. Thus, any claims that additional aggravating circumstances were defective afford no basis for relief. *State v. Shafer*, 969 S.W.2d 719, 739 (Mo. banc 1998), *cert. denied*, 525 U.S. 969 (1998); *State v. Morrow*, 968 S.W.2d at 117. Respondent, however, will respond to the individual challenges Appellant has made to the statutory aggravating circumstances outlined in the instruction.

For the first time on appeal, Appellant's attacks Instruction No. 22 on the ground that the statutory aggravating circumstances outlined in the instruction were not pleaded in the information or indictment filed against Appellant.

Before addressing the merits of this challenge, the mechanics of Appellant's attack should be considered. In Appellant's Point Relied On, he cites as authority for this challenge the cases of *Apprendi v. New Jersey* and *Jones v. United States*. Yet, neither case is mentioned in Appellant's discussion of this particular challenge (Appellant's Brief, pp. 120-21). In fact, the case of *Jones v. United States* is not cited or mentioned anywhere in Appellant's Brief. Citations of authority contained in the points relied on, but not thereafter specifically mentioned in the argument section of the brief, are waived. *See State v. Johns*, 34 S.W.3d at107 n.1.

Under § 565.005.1, RSMo 2000, the state is required 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. The State did so in this case (L.F. 28-30, 128-30, 187, 219-22). Although phrased as a challenge to the charging document in this case, Appellant's real contention, as demonstrated in his Point Relied On, is that § 565.005.1 is unconstitutional under *Apprendi*.

Appellant's construction of *Apprendi* as creating a requirement that statutory aggravating circumstances be pled in the indictment or information is refuted by the language of that decision. The issue presented to the United States Supreme Court in that case was "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 469 (2000). Relying upon the guarantee under the Sixth and Fourteenth Amendments of a trial by jury, the Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 476, 490. Thus, the holding of *Apprendi* concerned what matters must be submitted to and found by a jury, not what must be contained in an indictment or information.

If the plain language of the *Apprendi* Court's holding were not sufficient to dispose of Appellant's reliance on that case, then it should be eviscerated by the fact that the Court *expressly stated* that it was not addressing what must be alleged in the charging document:

> Apprendi has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment. . .

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

*Apprendi*, 530 U.S. at 476 n.3.

Appellant ignores the stated holding of *Apprendi* and the footnote quoted above, but his argument is still without merit to the extent he relies on language from *Jones v. United States*, 526 U.S. 227 (1999), which was identified in *Apprendi* as "foreshadowing" the *Apprendi* decision. *Apprendi*, 530 U.S. at 476.

The issue in *Jones* concerned the construction of the federal carjacking statute. In particular, the issue focused on whether particular statutory language was an "element" of the crime, in which case it was required to be alleged in the indictment and found by the jury; or whether it was a "sentencing factor" that need not be charged and could be found by the court. *Jones*, 526 U.S. at 230-232.[5] The majority found that the statutory language constituted an element of the crime, but noted in extended *dicta* its view that sentence enhancements might also violate due process if not charged and found by the trial jury. *Id.* at 240-50.[6] The majority's view was that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.*. at 246 n.6.

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[5]This distinction between "elements" and "sentencing factors" was later abolished in *Apprendi*, 530 U.S. at 478-90.

[6]That this was *dicta* was confirmed in *Apprendi*, 530 U.S. at 472-73.

This *dicta* from *Jones* certainly "foreshadowed" the holding in *Apprendi* that any fact that increased the range of punishment must be found by a jury. That the Jones dicta concerning what must be pleaded in an indictment was not a holding in *Apprendi* is established by: (1) the statement in *Apprendi* that it was not addressing what must be pled in the indictment; (2) the fact that the quotation from *Jones* cites the Fifth Amendment to the United States Constitution which, in the context of indictments, applies to the federal government (as in *Jones*) but not to the states (as in *Apprendi*); and (3) the rejection of this construction of *Apprendi* by other jurisdictions.[7] Any claim that *Apprendi* supports his argument is without merit.

The United States Supreme Court's recent decision in *Ring v. Arizona*, 122 S.Ct. 2428 (2002), which for the first time held that the Sixth and Fourteenth Amendments do not allow "a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty," does not alter this analysis. *Id.* at 2443. An examination of that decision confirms that it does not, any more than *Apprendi*, hold that statutory aggravating circumstances must be pled in the indictment or information. The Supreme Court noted that the issue before it was limited:

> Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. . . . Ring does not contend that his indictment was

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[7] *See e.g.*, *Poole v. State*, 2001 Ala.Crim.App.Lexis 173 (as corrected April 8, 2002); *State v. Nichols*, 33 P.3d 1172, 1174-76 (Ariz. App. 2001); *State v. Mitchell*, 543 S.E.2d 830, 842 (N.C. 2001), *cert. denied*,122 S.Ct. 475 (2001); *United States v. Sanchez*, 269 F.3d 1250, 1257-62 (C.A.11 2001), *cert. denied*, 122 S.Ct. 1327 (2002).

constitutionally defective. *See Apprendi,* 530 U.S., at 477, n. 3 (Fourteenth Amendment "has not . . . been construed to include the Fifth Amendment right to 'presentment or indictment of a Grand Jury'").

*Id.* at 2437 n.4.

The Indictment Clause of the Fifth Amendment does not apply to the states. *Apprendi*, 530 U.S. at 477 n.3. The only constitutional provision relevant to state charging documents is the Sixth Amendment requirement that an accused "be informed of the nature and cause of the accusation," which has been applied to the states through the Fourteenth Amendment. *Blair v. Armontrout*, 916 F.2d 1310, 1329 (C.A.8 1990), *cert. denied*, 502 U.S. 825 (1991). The difference between the rights guaranteed by the Fifth Amendment and those guaranteed by the Sixth and Fourteenth Amendments is instructive. The Fifth Amendment's Indictment Clause specifies that criminal charges must be initiated by a grand jury indictment and requires that all elements of the criminal offense charged be stated in the indictment. *Almendarez-Torres v. United States*, 523 U.S. at 228.[8]

The Sixth and Fourteenth Amendments, by contrast, require only that a criminal defendant receive notice of the "nature and cause of the accusation" and do not specify the form that this notice must take.[9] Even legally insufficient

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[8]When it decided *Ring*, the Supreme Court had before it a claim in a *federal* death penalty case that the Fifth Amendment required that statutory aggravating circumstances be pleaded in the indictment. It remanded that case for reconsideration in light of *Ring*. *United States v. Allen*, 247 F.3d 741 (C.A.8 2001), *remanded* 122 S.Ct. 2653.

[9]"[T]he states are not bound by the technical rules governing federal criminal prosecutions" under the Fifth Amendment. *Blair v. Armontrout*, 916 F.2d at 1329. Fifth Amendment decisions are therefore of "little value" in evaluating

charging documents have been held not to violate the Sixth Amendment when the defendant received actual notice of the charge against him. *Hartman v. Lee*, 283 F.3d at 194-96; *Blair v. Armontrout*, 916 F.2d at 1329. Under Missouri law, Appellant was entitled to, and received, notice before trial of the statutory aggravating circumstances that the state intended to offer in the punishment phase. Nothing in *Apprendi*, *Ring*, or any other case supports Appellant's claim that this notice provision violates the Sixth and Fourteenth Amendment to the United States Constitution.

Accordingly, Appellant's challenge to the constitutionality of § 565.005.1 is without merit.

Next, Appellant claims that depravity of mind statutory aggravating circumstance is unconstitutionally vague (Appellant's Brief, p.122-25). Appellant acknowledges that this Court has repeatedly rejected this argument, including most recently in *State v. Cole*, but raises it here purportedly to preserve it for federal review (Appellant's Brief, p. 125 n.6).

The record shows that the jury was provided with a limiting definition from MAI-CR 3d 313.40, Note on Use 7 [2], for that circumstance:

> 1. Whether the murder of Felicia Gayle 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:

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state indictments or informations. *Hartman v. Lee*, 283 F.3d 190, 195 n.4 (C.A.4 2002).

(1) That the defendant committed repeated and excessive acts of physical abuse upon Felicia Gayle and that the killing was therefore unreasonably brutal.

(L.F. 528).

Appellant correctly asserts that this Court has repeatedly held that this statutory aggravating circumstance is valid and that the limiting instruction sufficiently narrows the class of individuals who are eligible for the death penalty:

> This Court has repeatedly held that the "depravity of mind language and limiting instruction provide sufficient guidance to the sentencing jurors such that the instruction is not unconstitutionally vague.

*Cole*, 71 S.W.3d at 172; *see also Johns*, 34 S.W.3d at 115; *State v. Johnson*, 22 S.W.3d 183, 191 (Mo. banc 2000), *cert. denied*, 531 U.S. 935 (2000); *State v. Knese*, 985 S.W.2d 759, 778 (Mo. banc 1999), *cert. denied*, 526 U.S. 1136 (1999); *State v. Ervin*, 979 S.W.2d at 165-66; *State v. Jones*, 979 S.W.2d 171, 185-187 (Mo. banc 1998), *cert. denied*, 525 U.S. 1112 (1999); *State v. Simmons*, 955 S.W.2d 752, 767-68 (Mo. banc 1997), *cert. denied*, 522 U.S. 1129 (1998).

Next, Appellant claims that aggravating circumstance number 2, which required the jury to consider whether Appellant murdered Felicia Gayle while he engaged in perpetration of burglary, was not supported by the evidence. Appellant's claim is based on the definition of burglary contained in the instruction:

> A person commits the crime of burglary when he knowingly enters unlawfully in an inhabitable structure for the purpose of committing stealing therein.

(L.F. 528).

Appellant's claim is difficult to understand since the record contains substantial evidence that Appellant killed Lisha Gayle while he was burglarizing her home. The record shows that Appellant entered the house by breaking a window pane near the front door and then unlocking the door (Tr. 2394). Appellant was looking for items to steal when he heard the shower on upstairs (Tr. 1850, 2394). Moments later, Ms Gayle came to the stairs and asked if anyone was in the house (Tr. 1851, 2395-97). Although Appellant had ample opportunity to leave before Lisha would have seen him, Appellant stayed, grabbed a knife, and brutally murdered Lisha because he had not finished looking for items to steal (Tr. 1850). After he killed her, Appellant then stole Ms. Gayle's purse and a laptop from the house (Tr. 2395-400). The record supports the jury's finding that Appellant murdered Lisha while perpetrating a burglary.

Appellant inexplicably focuses his argument on the fact that Appellant did not kill Lisha while *entering* her home, but the plain language of the instruction does not require that he do so. It simply requires the jury to find that Appellant committed the murder while he was perpetrating the burglary. Consequently, Appellant's claim has no merit.

Appellant's next asserts that aggravating circumstances two, three, and four were duplicative in that they all pertained to the same conduct. Aggravating circumstance number two required the jury to determine whether Appellant murdered Lisha while perpetrating a burglary (L.F. 528). Aggravating circumstance number three required the jury to determine whether Appellant murdered Felicia Gayle while perpetrating a robbery (L.F. 528). And aggravating circumstance number four required the jury to determine whether Appellant murdered Felicia Gayle for the purpose of receiving money or other item of monetary value (L.F. 528).

Appellant concedes that this Court has repeatedly rejected this argument, most recently in *State v. Anderson*, 79 S.W.3d 420 (Mo. banc 2002), but raises it here again purportedly to preserve it for federal review (Appellant's Brief, p. 128 n.8).

In *Anderson*, the defendant argued that two aggravating circumstances were duplicative because they pertained to the same conduct. The defendant in Anderson argued, similar to Appellant's argument here, that submitting both aggravating circumstances "allowed the jury to 'double-count the same conduct' in weighing aggravating circumstances against mitigating circumstances and deciding whether to sentence the defendant to death." This Court rejected that argument noting that it had "repeatedly rejected similar arguments that the statutory aggravating circumstances are impermissibly duplicative. *Id.* *See also State v. Ringo*, 30 S.W.3d 811, 824-25 (Mo. banc 2000), *cert. denied* , 532 U.S. 932 (2001) (rejecting claim that aggravating circumstances submitted to the jury, which included both the pecuniary gain and perpetration of robbery, were duplicative); *State v. Smulls*, 935 S.W.2d at 23 (rejecting claim that pecuniary-gain and perpetration-of-robbery aggravating circumstances were duplicative and improperly submitted to the jury). Because statutory aggravating circumstances merely open the door to the jury's consideration of capital punishment, at which point the jury considers all the evidence, the duplication theory, which Appellant advances here, is simply meaningless.

Appellant contends that statutory aggravating circumstances six through ten, all dealing with Appellant's prior convictions, are invalid because the trial court, not the jury, determined whether the convictions constituted serious assaultive behavior. Appellant also contends that the armed criminal action convictions should not be listed as separate aggravating circumstances.

The "determination of whether a prior offense is "serious assaultive" is a question of law for the court to decide." *State v. Mayes*, 63 S.W.3d 615 (Mo. banc 2001).

Appellant relies on *Apprendi v. New Jersey* and *Ring v. Arizona* to support his argument that the trial court unconstitutionally determined whether Appellant's previous convictions constituted serious assaultive behavior. Neither case, however, supports Appellant's argument.

In *Apprendi*, the Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. This Court's analysis of the trial court's and jury's respective roles in dealing with previous convictions contained in *State v. Taylor*, 18 S.W.3d 366 (Mo. banc 2000), *cert. denied*, 531 U.S. 901 (2000), demonstrates why Appellant's claim has no merit:

> The procedure employed here, in conformance with the MAI and accompanying notes, detracts in no way from the function of the trier of fact. The court must determine as a matter of law whether the prior convictions are "serious assaultive criminal convictions," and then the jury is allowed to determine as a matter of fact whether the defendant indeed had prior convictions . . .

*Id.* at 378; *see also State v. Johns*, 34 S.W.3d at 114 n.2 (holding that *Apprendi* does not apply because the issue of whether a conviction constitutes serious assaultive behavior is one of law, not fact).

Appellant bolsters his *Apprendi* argument by citing this Court to *Ring v. Arizona*. But *Ring* is inapposite to the issue Appellant raises here. In *Ring*, the Court simply held that Arizona's capital sentencing scheme in which the jury determined whether the defendant was guilty of first-degree murder, but the trial

judge alone determined whether an aggravating factor existed to make the defendant eligible for a death sentence. 122 S.Ct at 2443. In fact, the *Ring* Court expressly stated that the issue of whether the defendant had any previous convictions or whether the trial judge could make such a finding apart from the jury was not an issue in the case:

> Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. No aggravating circumstances related to past convictions in his case; Ring therefore does not challenge *Almendarez-Torres v. United States*, which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence.

*Id.* at 2437 n.4 [citation omitted].

In any event, *Ring* does not apply for the simple reason that the jury in Appellant's case did, in fact, determine whether Appellant had been previously convicted. Moreover, the jury here also determined that Appellant should be sentenced to death. In *Ring*, Arizona's capital sentencing scheme required that the judge alone determine the existence of an aggravating circumstance to make the defendant eligible for the death penalty and that the judge alone sentence the defendant to death. *Id.* at 2434-36. In any event, the jury found more than one statutory aggravating circumstance even without Appellant's previous convictions.

Appellant's claim that the armed criminal action convictions should not have been listed separately from the underlying felonies is also without merit. This same argument was raised and rejected by this Court in *State v. Harris*. In *Harris*, the defendant argued that the separately listing of his convictions, including one for robbery and one for armed criminal action occurring on the same date, improperly emphasized his convictions. 870 S.W.2d at 811-12. This Court

rejected the argument holding that because Missouri law permits the jury to consider the death penalty if it finds a single aggravating circumstance, including the finding of one previous conviction, each conviction must be listed as a separate aggravating circumstance in the instructions to avoid confusing the jury." *Id.* at 812. *See also State v. Black*, 50 S.W.3d 778, 792 (Mo. banc 2001), *cert. denied*, 122 S.Ct. 1121 (2002) ("The trial court properly listed the defendant's convictions separately); *State v. Clemmons*, 753 S.W.2d 901, 911-12 (Mo. banc 1988), *cert. denied*, 488 U.S. 948 (1998).

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**The trial court did not err in refusing to submit the statutory mitigator concerning whether Appellant was an accomplice in a murder committed by another person and that his participation was relatively minor because the record did not support the giving of that mitigator in that no evidence suggested that another person committed the murder or that Appellant's participation in the murder was relatively minor.**

Appellant's next claim is that the trial court erred in refusing to submit the statutory mitigator concerning whether Appellant was an accomplice to the murder committed by another and that his participation was relatively minor. The trial court did not err in refusing this mitigating instruction because the record contains no evidence to support it.

After presentation of the penalty-phase evidence, Appellant offered Instruction No. B concerning mitigating circumstances (Tr. 3455-56; L.F. 536). That instruction contained the following mitigating circumstances:

1. Whether the murder of Felicia Gayle was committed while the defendant was under the influence of extreme emotion disturbance.

2. Whether the defendant was an accomplice in the murder of Felicia Gayle and whether his participation was relatively minor.

3. The age of the defendant at the time of the offense.

(L.F. 356). The trial court refused to give this instruction because there was no evidence supporting mitigators one and two (Tr. 3355). Because the trial court did not include the first two mitigators, Appellant elected not to offer any instruction concerning mitigating circumstances to avoid highlighting a single mitigator (Tr. 3457). On appeal, Appellant challenges only the trial court's refusal to instruct on mitigating circumstance number two.

Appellant's proposed instruction was based on § 565.031.3(4), RSMo 2000, which provides as a mitigating circumstance that the "defendant was an accomplice in the murder in the first degree committed by another person and his participation was relatively minor." Consequently, to be entitled to an instruction on this mitigator, the record must contain evidence that: (1) the defendant was an accomplice to the murder that was committed by another person; and (2) the defendant's participation was relatively minor. The record in this case contains no evidence of either proposition.

"[A] statutory mitigating circumstance should be given upon request by the defendant if there is evidence to support the specific mitigating circumstance or circumstances requested." MAI-CR 3d 313.44A, Notes on Use 3. While *proof* of a statutory mitigator is not required, some evidence is. *Delo v. Lashley*, 507 U.S. 272, 277 (1993).

Appellant's sole evidentiary basis to support the instruction comes from the fact that several unidentified hairs and shoe print impressions were found at the murder scene and that, according to the testimony of Appellant's relatives, Laura

Asaro, Appellant's girlfriend, was seen carrying a laptop computer after Appellant had been incarcerated on August 31, 1998 (Tr. 2773, 2805, 2871).

Appellant's witness testified that several hairs were found on the rug near the victim's body (Tr. 2871). He testified that the hairs did not match Appellant, but that some matched the victim or her husband (Tr. 2871-72). He also stated that some hairs were not associated with the victim, her husband, or Appellant and that they came from some other person (Tr. 2867). But the witness conceded that dissimilar hairs can come from a single person (Tr. 2906-07).

Appellant's witness testified that it was possible that all the hairs came from either the victim or her husband, but that he believed that some hairs may have come from someone else that might have been in the house at some time (Tr. 2920). He also testified that the average person loses a hundred or more head and pubic hairs each day, and that, in fact, Appellant, who is not Caucasian, had a Caucasian pubic hair on the clothing the police seized from him (Tr. 2922-23).

The record also showed that several contractors and their workers had been in the victim's house within the month before the murder to do repair work following a lightning strike at their house (Tr. 1785-87). Moreover, the victim's husband testified that over the years hundreds of people had been in and out of their house and that the carpets had never been professionally cleaned (Tr. 1786-87).

Appellant's witness also testified that several shoe impressions, including some made in blood, were found near the body (Tr. 2871). Although at first the expert testified that the impressions were made by two different shoes, he conceded on cross-examination that same show made all the impressions (Tr. 2895). Appellant's witness stated that the shoe impressions did not match the tennis shoes the police took from Appellant twenty days after the murder was committed (Tr. 2898-99). Laura Asaro testified that Appellant wore Timberland

boots, not tennis shoes, on the day Lisha was murdered, and that Appellant threw his bloody clothes down the sewer following the murder (Tr. 1843, 1896). Both Ms. Asaro and Henry Cole testified that Appellant told them he was alone when he murdered Lisha (Tr. 1852, 2572). The expert testified that he did not know when the non-bloody impression was made, but concluded that the bloody shoe impressions were made at or near the time of the murder (Tr. 2893-96).

None of this evidence even remotely suggests that someone other than Appellant committed the murder. At best, it shows that someone other than Appellant left hairs at the crime scene, though no one knows when that might have been, and that the tennis shoes Appellant had on twenty days after the murder did not match the shoe impressions found at the crime scene. Appellant does not explain how he can leap to the conclusion that this shows that someone else committed the murder and that he was merely an accomplice. No evidence either directly or inferentially supports Appellant's argument that he was an accomplice in the murder committed by someone else.

Moreover, Appellant must also show that his participation in the murder was relatively minor. Again, the evidence Appellant relies on does not even show that the murder was committed by someone else, much less that his participation was relatively minor. The uncontested testimony, which came from Appellant's admissions, showed that he was alone when he committed the murder.

In *State v. Tabor*, 738 S.W.2d 506 (Mo. App. E.D. 1987), the defendant convicted of rape claimed that his counsel was ineffective for not seeking tests on unidentified pubic hairs collected in the victim's rape kit. *Id.* at 507. The court held that if one assumed that the pubic hairs were not the defendant's, that was not evidence excluding defendant from committing the crime. *Id.* "Any foreign hairs could have been from a person other than the rapist." *Id.*

Even if one generously assumes that there was evidence to support this mitigating instruction, Appellant was not prejudiced by the trial court's refusal to give it. Appellant was allowed to argue this mitigating evidence to the jury and give it legal effect under Instruction No. 24. This instruction informed the jury that in determining whether the facts and circumstances in mitigation of punishment outweighed those in aggravation of punishment it "may consider all of the evidence presented in both the guilt and punishment stages of trial" (L.F. 531). Moreover, this instruction told the jury that it "shall consider any facts or circumstances which you find from the evidence in mitigation of punishment" (L.F. 531).

Appellant's claim is without merit. The record did not support this mitigating instruction.

.

**The trial court did not plainly err in failing to intervene *sua sponte* and prevent statements the prosecutor made during guilt-phase closing argument because the prosecutor's statements were not improper personalization but instead were proper comments concerning the credibility of a witness. The trial court also did not err in overruling statements the prosecutor made during penalty-phase closing argument because the prosecutor's statements pertained to Appellant's lack of remorse and were in response to Appellant's arguments.**

Appellant's final claim concerns statements the prosecutor made during closing argument. The trial court did not plainly error in failing to *sua sponte* intervene during that argument because the prosecutor's comments were not objectionable.

One of Appellant's defenses concerned the credibility of Laura Asaro's testimony pertaining to Appellant's admission to her that he killed Lisha. During Ms. Asaro's cross-examination and Appellant's closing argument, Appellant stressed the fact that Ms. Asaro did not come forward with information that Appellant had admitted killing Lisha until over a year after Appellant committed the murder (Tr. 3028). Ms. Asaro testified that after Appellant admitted to killing Lisha, he grabbed Ms. Asaro's throat, choking her until she could not breathe, and told her not to tell anyone what he had said (Tr. 1853). Appellant then threatened to blow up Ms. Asaro's mother's house, where Ms. Asaro's children lived, and to kill her mother and children (Tr. 1853-54).

During closing argument, the prosecutor highlighted this evidence in explaining why Ms. Asaro's explanation of why she did not come forward sooner was credible:

> Why didn't she come forward? You saw it on the tape. She was scared to death. She said she didn't want the reward. What am I going to do with the reward? The reward isn't going to buy me my kids back. I was afraid. Tell that family I was afraid. She was scared to death. If the guy would do this to a woman over a laptop, what do you think that the guy would do -- what do you think he would do to She was scared to death. And if you've never felt that fear of having someone's hand around your neck to where you can't breathe (indicating), a man that size, that man's hand ripping your neck, -- and this little Laura was smaller than Lisha. She wasn't going to come forward. She was scared to death of that man. And rightfully so. Don't blame her a bit, do you?

(Tr. 3013).

Plain error relief is rarely appropriate for claims involving closing arguments. *State v. McDonald*, 661 S.W.2d 497, 506 (Mo. banc 1983), *cert. denied*, 471 U.S. 1009 (1985). Courts are especially reluctant to find plain error in the contest of closing argument because the decision to object is often a matter of trial strategy, and without an objection and request for relief, the court options are narrowed to uninvited interference with summation and a corresponding increase of error by such intervention. State v. Mayes, 63 S.W.3d at 633; *State v. Wise*, 879 S.W.2d 494, 516 (Mo. banc 1994), *cert. denied*, 513 U.S. 1093 (1995). "[R]elief should be rarely granted on assertions of plain error to matters contained in closing argument, for trial strategy looms as an important consideration and such assertions are generally denied without explication." *State v. Middleton*, 995 S.W.2d 443, 456 (Mo. banc 1999); *State v. Clay*, 975 S.W.2d at 134.

Under plain error review, a conviction will be reversed for improper argument only when it is established that the argument had a decisive effect on the outcome of the trial and amounts to manifest injustice." *State v. Middleton*, 995 S.W.2d at 456. "The burden is on the defendant to prove the decisive significance." *State v. Parker*, 856 S.W.2d 331, 333 (Mo. banc 1993).

Appellant argues that this was improper personalization. But personalized arguments are improper when they suggest personal danger to the jurors or their families from the defendant. *State v. Basile*, 942 S.W.2d 342, 352 (Mo. banc 1997), *cert. denied*, 522 U.S. 866 (1997). The argument here did not imply any such danger, but was a comment concerning the credibility of Ms. Asaro's explanation of why she did not come forward sooner. In other words, the prosecutor was asking the jury to consider how Appellant physically threatened Ms. Asaro in assessing whether she was credible. The jury, of course, was the

sole determiner of Ms. Asaro's credibility and its understanding of the manner in which Appellant threatened her was vital to their credibility determination.

Appellant contends that this comment is no different than the one made in *State v. Storey*, in which this Court held that the prosecutors' arguments were improper because they improperly "personalized" the crime to the jurors. But the prosecutor here was not personalizing the crime to the jurors, he was simply explaining why Ms. Asaro did not come forward sooner. Appellant's reliance on *Storey* is entirely misplaced.

Moreover, the argument made in Storey is not comparable in any sense to the statement the prosecutor made here. In *Storey*, the defendant in a capital murder case had alleged ineffective assistance of counsel for his lawyer's failure to object to various purportedly improper arguments by the prosecutor during the penalty phase. *Storey*, 901 S.W.2d at 900. Among the arguments at issue was the following:

> Think for just this moment. Try to put yourselves in Jill Frey's place. Can you imagine? And then—and then, to have your head yanked back by its hair and to feel the blade of that knife slicing through your flesh, severing your vocal cords, wanting to scream out in terror, but not being able to. Trying to breathe, but not being able to for the blood pouring down your esophagus.

*Id.* at 901. This Court held that this argument was "grossly improper" because it had asked the jurors to "put themselves in Jill Frey's place, then graphically detail[ed] the crime as if the jurors were the victims." *Id.* As a result of counsel's failure to object to this and several other improper arguments, which "contained egregious errors, each compounding the other," the court found counsel ineffective and reversed the defendant's death sentence. *Id.* at 901-03.

The basis for the Court's decision in *Storey* rests with the fact that the jurors do not have to relive the crime as if they were the victims to determine whether the State has proved the defendant's guilt or what punishment he should suffer. Here, of course, the prosecutor did not ask the jurors to relive the crime as if they were the victims, but

simply asked them to consider the physical threat Appellant made in determining Ms. Asaro's credibility. A function the law has specifically entrusted to them.

Appellant also relies on *State v. Rhodes*, 988 S.W.2d 521 (Mo. banc 1999). But the argument in *Rhodes* consisted of the prosecutor physically demonstrating how the crime occurred while at the same time graphically describing every detail of the crime:

> Try, try just taking your wrists during deliberations and crossing them and lay down and see how that feels (demonstrating). Imagine your hands are ties up. . . . And ladies and gentlemen, you're on the floor, and you're like that, with your hands behind your back, and this guy is beating you up. Your nose is broken. Every time you take a breath, your broken rib hurts. And finally, after you're back over on your face, he comes over and he pulls your head back so hard it snaps your neck. . . . Hold your breath. For as long as you can. Hold it for 30 seconds. Imagine it's your last one.

*Id.* at 529. This Court assailed this type of argument in which the crime is graphically detailed as if the jurors were the victims in a way that could only arouse fear in the jury. *Id.* Again, the argument at issue in this case in no way rises to the level of the argument condemned in *Rhodes*.

This is not a case where the jurors were asked to "relive the crime in graphic detail." *State v. Roberts*, 948 S.W.2d at 594. Nor is it a case where the prosecutor's argument contained numerous "egregious errors, each compounding the other" as was the case in *Storey*. *See State v. Kreutzer*, 928 S.W.2d at 873.

This Court has recently denied similar claims of personalization in closing argument. In *State v. Smith*, 944 S.W.2d 901 (Mo. banc 1997), *cert. denied*, 522 U.S. 954 (1997), the defendant challenged an argument "which described the murders from the point of view of the victims." *Id.* at 918. Noting that the argument had directly tracked the evidence at trial, the court held that this argument was not reversible error. *Id.* Likewise, in *State v. Roberts*, the defendant objected to the prosecutor's argument

discussing the details of the murder, which he described as "a horrible, horrible death" and "the most God-awful crime," and urged the jurors to "[t]hink about what [the victim] went through." *State v. Roberts*, 948 S.W.2d at 594-95. In holding that these comments were not improper, the court observed that, viewed in context of the entire argument, the comments at issue did not "present a situation like that in *Storey* where the jurors were asked to place themselves in the position of the victim and relive the crime in graphic detail." *Id.* at 595.

Appellant's claim that the prosecutor's statement concerning Appellant's physical threat to Ms. Asaro constituted improper personalization is without merit.

Appellant next complains about a statement the prosecutor made during penal-phase closing arguments in response to arguments Appellant's counsel had made to the jury seeking mercy and forgiveness for Appellant:

> [The Prosecutor]: Ladies and gentlemen, had he been in that home on August 11, 1998, asking for mercy --
>
> [Appellant's Counsel]: Objection, your Honor, now he's using me against my client.
>
> The Court: The objection is overruled. Please proceed.
>
> [The Prosecutor]: Had he [Appellant's Counsel] been in that home asking for mercy for Lisha Gayle, it would have fallen on deaf ears. Because that man was hellbent on brutalizing that woman, and destroying that woman. He was hellbent, and there was no stopping him. He had made up his mind. He wasn't done looking. In that house that night, that afternoon, there was one juror. That juror --
>
> [Appellant's Counsel]: Your Honor, I object. Can we approach?
>
> The Court: You may.
>
> (The following proceedings were had at the bench:)

[Appellant's Counsel]: Judge, now he's arguing exactly what I had in my motion in limine, about precluding the State from arguing during the death penalty phase that he exercised his right to a fair trial, and had a jury trial. And that he uses it against the defendant, simply because he's exercised his rights to due process. Such an argument draws a negative inference on the defendant's exercise of his Constitutional rights and is impermissible.

The Court: What are you going to say?

[The Prosecutor]: There was one juror in that house. He didn't give Lisha a fair trial. He was the judge, the jury, and executioner.

The Court: Okay. You may -- the objection will be overruled to the argument that what he gave to her was, he was the judge -- whatever that was.

[Appellant's Counsel]: Judge, can I have this federalized and Constitutionalized, and can I also have it going through his closing argument?

The Court: Yes. Overruled as to the last statement that he made.

[Appellant's Counsel]: Okay.

(The proceedings returned to open court).

The Court: Please proceed.

[The Prosecutor]: There was one juror in that home that afternoon. And that juror was the foreman, foreperson. And he decided without a trial, without hearing evidence, and without instructions of law, he decided Lisha Gayle must die. And that man is right there (indicating). And if there's one person in this courtroom that believes in the death penalty, it's that man right there.

(Tr. 3510-12).

The trial court has broad discretion in controlling the scope of closing argument, and the court's rulings will be reversed only upon a showing of abuse of discretion. *See State v Deck*, 994 S.W.2d at 900; *State v. Black*, 50 S.W.3d at 790. "Both parties have wide latitude in arguing during the penalty phase of a first degree murder case." *State v. Storey*, 40 S.W.3d at 911; *see also State v. Ringo*, 30 S.W.3d 811, 821 (Mo. banc 2000), *cert. denied*, 532 U.S. 932 (2001).

The trial court properly exercised its discretion here. The prosecutor's statement was fair rebuttal to Appellant's argument for mercy and justice. The prosecutor's use of rhetorical flourish to describe Appellant's lack of remorse and the brutality of the crime was not improper.

Even if the prosecution's argument was improper, reversal is appropriate only if it can be shown that the comment had a decisive effect on the jury's determination. *Storey*, 40 S.W.3d at 911. "In order for a prosecutor's statements to have such a decisive effect, there must be a reasonable probability that the verdict would have been different had the error not been committed." *Deck*, 994 S.W.2d at 543; *see also Storey*, 40 S.W.3d at 911. Appellant has failed to make such a showing here. This brief statement certainly did not have a decisive effect on the jury's verdict.

.

**This Court should, in the exercise of its independent statutory review, affirm Appellant's death sentence because: (1) the sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) the evidence supports the jury's findings of aggravating circumstances, and; (3) the sentence is not excessive or disproportionate to those in similar cases considering the crime, the strength of the evidence and the defendant. (Not Addressed in Appellant's Brief).**

Appellant does not contest whether this Court should affirm his death sentence after it conducts its mandatory review since he has elected not to brief this issue.

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

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

This Court's proportionality review is designed to prevent freakish and wanton application of the death penalty. *State v. Ramsey*, 864 S.W.2d 320, 328 (Mo. banc 1993), *cert. denied*, 511 1078 (1994).

Nothing in the record suggests, and Appellant has presented no argument, that his sentence was imposed under the influence of prejudice, passion, or any other improper factor.

The record supports the jury findings concerning each statutory aggravating circumstance. Appellant's murder of Felicia Gayle involved depravity of mind in that he repeatedly stabbed her with a butcher knife, leaving the knife sticking out of her neck. Appellant's murder was also committed while he was engaged in the perpetration of both burglary and robbery in that he killed the victim after breaking into her home and stole items out of it after killing her. This

circumstance also supports a finding that he murdered the victim to receive something of monetary value. The record also supports a finding that Appellant killed to avoid his lawful arrest in that the attacked began when the victim saw him after he was unlawfully in her home. Finally, each of Appellant's previous convictions were established in the record.

This was a brutal crime. Appellant picked a house at random to burglarize. Before he was seen he discovered someone was home, but instead of leaving before being seen, he chose to arm himself with a butcher knife because he was not yet done looking for property to steal. Appellant then waited at the bottom of the stairs before attacking Lisha Gayle, stabbing her repeatedly until she could struggle no longer, and then, in a final act of brutality, he plunged the butcher knife into her neck, twisting it until he broke a bone. He left the knife in her neck and took the victim's purse, a laptop, and perhaps some cheap jewelry as he left the house.

The evidence supporting Appellant's convictions was strong. Appellant admitted committing the murder to his girlfriend, Laura Asaro, and to a family relation, Henry Cole, with whom Appellant was incarcerated several months following the murder. In telling the police what Appellant had told them, both Asaro and Cole related specific details about the murder that only the killer would know. Details that were never made public by the police. The police also found a calculator and Post-Dispatch ruler the victim kept in her purse in the glove compartment of his car, and Appellant sold the laptop computer that was stolen from the victim's house to one of his neighbors, who was also a friend of Appellant's family.

Appellant's sentence was neither excessive nor disproportionate when compared to similar cases. *State v. Weaver*, 912 S.W.2d at 523 (murder of a

potential witness); *State v. Cole*, 71 S.W.3d at 177 (murder while engaged in the perpetration of a robbery; depravity of mind by repeated and excessive acts of physical abuse (repeated stabbing); fatal blow dealt to the victim while the victim was lying injured); *State v. Taylor*, 18 S.W.3d 366 (murder in the course of perpetrating a robbery); *State v. Storey*, 40 S.W.3d at 916 (excessive acts of brutality and abuse (beating and stabbing); murder while entering victim's home for pecuniary gain).

Moreover, Appellant had several previous convictions for armed robbery, burglary, and other violent crimes (Tr. 3167, 3193-97). This Court has previously upheld the death penalty in cases in which defendants had previous convictions similar to Appellant's. *State v. Black*, 50 S.W.3d at 792-93 (robbery and assault); *State v Amrine*, 741 S.W.2d 665, 672 (Mo. banc 1987) (first degree robberies).

Viewing the trial record as a whole, it cannot be said that Appellant's murder of Felicia Gayle are "plainly lacking circumstances consistent with those in similar cases in which the death penalty has been imposed." *State v. Ramsey*, 864 S.W.2d at 327-28. Accordingly, appellant's sentences of death should be affirmed.

The trial court did not commit reversible error in this case, and Appellant's death sentence was not contrary to Missouri law. Appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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The undersigned assistant attorney general hereby certifies that:

(1) That the attached brief complies with the limitations contained in Rule 84.06 in that it contains 27,611words, excluding the cover, this certification and any appendix, as determined by WordPerfect 9 software; and

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

(3) That a true and correct copy of this brief and a floppy disk containing a copy of this brief, were mailed, postage prepaid, on September 6, 2002, to:

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