No. 86857

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

VINCENT McFADDEN,

Appellant.

Appeal from the Circuit Court of St. Louis County, Missouri
21st Judicial Circuit, Division 15
The Honorable John A. Ross, Judge

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

JEREMIAH W. (JAY) NIXON
Attorney General

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P. O. Box 899
Jefferson City, MO 65102
(573) 751-332l
(573) 751-5391 (fax)
shaun.mackelprang@ago.mo.gov
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

This appeal is from convictions of murder in the first degree, § 565.020, RSMo 2000, and armed criminal action, § 571.015, RSMo 2000, obtained in the Circuit Court of St. Louis County, the Honorable John A. Ross presiding. Appellant was sentenced to death for the offense of murder in the first degree; this Court has jurisdiction. Article V, § 3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Vincent McFadden, was charged in St. Louis County, as a prior offender, with murder in the first degree, §565.020, RSMo 2000, and armed criminal action, § 571.015, RSMo 2000(L.F.420-421). A jury found appellant guilty of both offenses(L.F.462-463; Tr.530). The facts were as follows:

On July 3, 2002, in the late afternoon or early evening, appellant and Michael Douglas encountered Todd Franklin and Mark Silas in the vicinity of the 6200 block of Lexington, in Pine Lawn, St. Louis County(State'sEx.78-C,p.2;*see* Tr.32-33,76,80-81). The men talked, and then they walked up Lorraine and cut through a vacant lot to Lexington(State'sEx.78-C,p.2). In the lot, appellant and Douglas asked Franklin if he had a gun(State'sEx.78-C,p.2-3). Franklin indicated he did not, and he started to walk away(State'sEx.78-C,p.3). Douglas pulled out a cap gun and fired, "like to check and see if [they] had a gun"(State'sEx.78-C,p.2-3).

Franklin and Silas took off; Douglas fired two shots with the cap gun as Franklin ran across the lot(State'sEx.78-C,p.3;Tr.78,80,90). Franklin crossed Lexington and ran to his next-door neighbor's house, where his neighbor, Gregory Hazlett, and some others were working on Hazlett's house(Tr.77,79,113-114,116,119). Appellant called out, "What you running for, you b---- a-- n-----"(Tr.80). Appellant and Douglas then crossed the street, "laughing like why you all running"(State's Ex.78-C,p.3; Tr.120). They made small talk about working, and Hazlett joked, "You all ain't going to do no work. You're playboys"(Tr.83-84). Hazlett noticed Douglas "kind of hiding behind the

honeysuckle"(Tr.84,120-121). Hazlett, who had seen the first two cap-gun shots, got a "funny feeling"(Tr.80,86).

As Hazlett went toward his back door, Douglas pulled out a large caliber handgun and shot Franklin in the head(State'sEx.78-C,p.3;Tr.86,121,311). Franklin fell, and Douglas shot him again; Douglas then started to run away(State'sEx.78-C,p.3-4;Tr.87,121,312). Appellant stopped Douglas in the street(Tr.87-88). Appellant took the gun, went back to where the victim lay, and said, "I'm going to make sure you're dead, motherf----er"(Tr.88,122). Silas fled(State'sEx.78-C,p.4; Tr.33). Appellant fired three more shots into the back of Franklin's neck, and then he fled(*see* Tr.88,122,313;State'sEx.78-C,p.5).[1] The gunshot wounds were fatal; Franklin died at the scene(Tr.69,322).

An investigation ensued(Tr.88-89,153). Expended bullets and bullet fragments were seized at the scene and from the victim's body(Tr.181-183,222-223). Later examination showed that they were .44 caliber slugs, and that all of them could have been fired from the same gun(Tr.238). Two of the slugs were definitely fired from the same gun(Tr.240). The police found a cigar on the ground near the victim(Tr.163). Subsequent analysis revealed the presence of appellant's right thumb print on the cigar(Tr.163,166-167,210-217).

The police interviewed Silas that night, and Silas implicated appellant(State'sEx.78-

[1] Appellant was picked up by his girlfriend shortly thereafter(somewhere around Crescent or Bailey), and together they drove to appellant's mother's house on Magnolia(Tr.260-261).

C;Tr.298). Silas identified appellant in a photograph(Tr.302,421;State'sEx.75-A). Hazlett did not talk to the police at the scene; he feared that it would get out that he was "the one who told on [appellant]"(Tr.112). Hazlett went to the police station later that night and gave a statement implicating appellant(Tr.89,112-113,406-410,414). One of the men at Hazlett's house, Glenn Zackary, also did not initially give a statement(Tr.124). But ten months later, Zackary gave a statement(T.124-125). He identified appellant in a photographic line-up(Tr.125-126).

The victim had previously testified against Corey and Lorenzo Smith, two members of the Six Deuce Bloods(Tr.257-258,269-273,353-354). Appellant(a.k.a. "Scooby Deuce") was also a Six Deuce(Tr.233-234,257-258,353). He believed the victim was "soft" and a "snitch"(*see* Tr.283). The day after the murder, appellant told his girlfriend, Evelyn Carter, that he felt "good" about killing the victim because the victim had gotten his "homies in trouble"(Tr.282-283,288). Appellant gave Carter some "details," and Carter understood that appellant was referring to Corey and Lorenzo(Tr.283). Shortly thereafter, appellant moved to California(Tr.354).

On May 17, 2003, the police learned that appellant was at a Travelodge motel in St. Charles(Tr.252-253). When appellant came to the door, the police forced their way in and arrested him(Tr.256).

At trial, which was held in March, 2005, appellant did not testify, but he offered the testimony of his sister and his mother in an attempt to prove that he was at his mother's house on Magnolia just minutes after the murder(Tr.335-352,360-378). Appellant presented

telephone records to corroborate certain aspects of his alleged alibi(Tr.395-402). The jury found appellant guilty of first-degree murder and armed criminal action(Tr.530).

In penalty phase, the state presented evidence of appellant's prior convictions(Tr.563-571); evidence of appellant's prior criminal conduct, including the murder of his girlfriend's sister, Leslie Addison(Tr.585); evidence that appellant attempted to prevent his girlfriend, Eva Addison, from testifying against him(State'sEx.148-C);[2] and evidence that appellant had 18.4 grams of crack when arrested(Tr.628-630). The state presented victim-impact evidence through Patricia Franklin, the victim's mother(Tr.707).

Appellant did not testify, but he presented the testimony of friends, family members, a neuropsychologist, a juvenile officer, and an educator with a Ph.D. in Development Specialty and Developmental Epistemology(Tr.720-1000). The jury found five statutory aggravators – four serious assaultive convictions and depravity of mind – and it assessed a sentence of death(Tr.1069-1070; Supp.L.F.32-33).

On April 22, 2005, the court sentenced appellant to death and to a term of life imprisonment(Sent.Tr.12-13). This appeal followed.

---

[2] Appellant later told Eva, "I'm sorry for killing your little sister. I still love you and my son and your family"(Tr.704).

ARGUMENT

I.

Because appellant did not carry his burden of showing that the prosecutor's race-neutral explanations were a pretext to hide purposeful discrimination, the trial court did not clearly err in denying appellant's *Batson* challenges.

Appellant asserts that the trial court clearly erred in overruling his *Batson* challenges to five of the state's peremptory strikes(App.Br.45). He claims the prosecutor engaged in purposeful racial discrimination in violation of *Batson v. Kentucky*,476 U.S. 79(1986).

A. The Standard of Review

Appellate courts review the trial court's *Batson* determination for clear error. *State v. Hampton*,163 S.W.3d 903,904(Mo.banc2005). A trial judge's determination that a peremptory strike was made on racially neutral grounds is entitled to great deference on appeal and will only be overturned if shown to be clearly erroneous leaving the reviewing court with the definite and firm impression that a mistake was made. *State v. Edwards*,116 S.W.3d 511,525(Mo.banc2003).

B. The Prosecutors Were not Engaged in Purposeful Discrimination

"Under the Equal Protection Clause, a party may not exercise a peremptory challenge to remove a potential juror solely on the basis of the juror's gender, ethnic origin, or race." *State v. Marlowe*,89 S.W.3d 464,468(Mo.banc2002). The resolution of a *Batson* challenge involves three steps: first, the defendant must raise a *Batson* challenge with regard to one or more specific venirepersons struck by the state and identify the cognizable racial group to

which the venireperson belongs; second, the state must provide reasonably specific and clear race-neutral explanations for the strike; and third, if the prosecutor articulates an acceptable reason for the strike, the defendant must then show that the state's proffered reasons for the strikes were merely pretextual and that the strikes were racially motivated. *Id.*

"Although the prosecutor must present a comprehensible reason, '[t]he second step of this process does not demand an explanation that is persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices." *Rice v. Collins*,126 S.Ct 969,973-974(2006). "Th[e] final step involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'" *Id.*

"A key factor to be considered in determining pretext is '[t]he existence of similarly situated white jurors who were not struck . . . .' " *State v. Edwards*,116 S.W.3d at 525. Other factors have also been considered probative; a non-exclusive list includes:(1) the plausibility of the explanations in light of the facts and circumstances of the case;(2) the degree of logical relevance between the proffered explanation and the case, in terms of the crime charged, the nature of the evidence, and the potential punishment;(3) the prosecutor's demeanor or statements, as well as the demeanor of the venireperson;(4) the court's past experiences with the prosecutor; and(5) objective factors bearing on the state's motive to discriminate on the basis of race, such as conditions prevailing in the community and the race of the defendant, the victim, and the material witnesses. *Id.*at 527.

That said, "the justification for peremptory strike need not rise to the level of

justification for a challenge for cause." *State v. Jones*,979 S.W.2d 171,185(Mo.banc1998). If the prosecutor's perception of the venireperson is based on past experience, hunches, or "horse sense," the perception can survive *Batson* if it is based on a racially-neutral factor. *State v. Morrow*,968 S.W.2d 100,114(Mo.banc1998). Because of the subjective nature of peremptory challenges, the reviewing court places great reliance on the trial court's judgment when it comes to assessing the legitimacy of an explanation. *Id.*

Here, after appellant raised a *Batson* challenge to the state's strikes, the prosecutors stated multiple race-neutral reasons for each strike(V.D.Tr.666-673). Defense counsel was invited to respond(V.D.673-675), and then trial court determined that the prosecutors had not engaged in purposeful racial discrimination(V.D.676-677). The trial judge observed(1) that he had "known Mr. Waldemer for 15 plus years, and never had any experience with him that would indicate that he would ever use a peremptory challenge in a racially motivated manner";(2) that he had known Mr. Bishop for four years, and that he had "never had any experience where he has exercised strikes in a racially motivated manner";(3) that there were multiple "race neutral reasons for each of the strikes"; and(4) that there were "no similarly situated jurors who [were] not stricken"(V.D.Tr.676-677). The court also observed: "And although there may be a similarly situated juror for one of the reasons, there is no juror similarly situated in the Court's view . . . ."(V.D.Tr.677). The trial court also noted that race did not appear to be a factor in the underlying crime, inasmuch as the defendant, the victim, and most of the main witnesses were African Americans(V.D.679).

1. Venireperson Warford

The prosecutors' race neutral reasons for striking Warford were(1) that her cellular telephone kept ringing during the court's instructions;(2) that her cellular telephone also rang during small-group questioning,(3) that, as evidenced by her "fiddling" with her ringing cellular telephone, she was distracting other jurors and not taking the process seriously; and(4) that she expressed concern over being gone from work for a week(V.D.Tr.668-669).

In attempting to show pretext, defense counsel argued that Warford "immediately started fumbling" with her telephone, and that counsel's impression was that she was simply "having trouble getting it turned off"(V.D.Tr.673). Counsel pointed out that Warford "had the opportunity to bring up whether or not" her work situation "continued to be a problem"(V.D.Tr.673). And counsel asserted that Venireperson Ruebel was similarly situated because she "mentioned she had an audit going on at her job"(V.D.Tr.673-674).

The trial court did not clearly err in crediting the prosecutor's explanation. There was plainly support for the prosecutor's observation that Warford fiddled with her telephone, failed to turn it off in a timely fashion and thereby appeared to be taking the proceedings less seriously. Defense counsel acknowledged that Warford's telephone rang, and that Warford did not turn off her telephone in a timely fashion; thus, this race-neutral reason (although not noted in the record at the time it occurred) was plainly not imagined or made up. Defense counsel attempted to put a positive spin on Warford's conduct, but the trial court did not clearly err in crediting the prosecutor *See Hernandez v. New York*,500 U.S. 352,369(1991)(where there are two permissible views, the factfinder's choice cannot be clearly erroneous.'")(plurality opinion). Thus, regardless of what was actually going on in

Warford's mind, the trial court did not clearly err in determining that the prosecutor's stated race-neutral reason was not a pretext to mask purposeful discrimination.

Warford also had sequestration issues. She explained that she was one of three area managers for a cleaning company, that one of the area managers was out of commission due to a "brain concussion," that the other area manager had his own area to supervise, and that she did not know if her boss would "allow [her] to be out because [she has] to handle all buildings in the evening"(V.D.Tr.115). Thus, even if Warford was able to arrange her schedule, it was reasonable for the prosecutor to worry that Warford – due to her position of responsibility – might harbor concerns about an extended absence from work – concerns that could affect her ability to maintain focus and commitment to the case.

Appellant asserts that Venireperson Roebel was similarly-situated(App.Br.51). But the record shows that Ruebel was not similarly situated. When asked about sequestration, Ruebel said that her employer was going through an audit, that she was one of the "key people," and that her employer had sent along a letter describing the "hardship"(V.D.Tr.163). The letter said she was a "cashier"(V.D.Tr.163). Ruebel confirmed that and agreed, when asked by the court, that the company could probably fill her shoes(V.D.Tr.163). Ruebel then stated that the audit would actually start in two weeks, on March 16, 2005(V.D.Tr.164), well after the expected period of sequestration would end (trial ended March 11, 2005).

Thus, Ruebel did not have a serious sequestration issue. The difference between Ruebel and Warford was further illustrated by the fact that Ruebel was a "cashier," as opposed to one of only two available "area managers." In short, it is apparent why the state

ultimately attached little or no significance to Ruebel's responses. Additionally, Ruebel was not similarly situated because, unlike Warford, she never engaged in conduct that led the prosecutors to suspect that she was not taking the proceedings seriously.

Turning from Ruebel's alleged similarities with Warford, appellant argues that Ruebel had an undesirable characteristic that should have led the state to strike her, namely, that she was "familiar with Pine Lawn"(App.Br.53). Appellant points out that this was a reason that the State gave for striking black jurors, and he concludes that Ruebel's presence on the jury was indicative of discrimination(App.Br.53). But there are two problems with this argument. First, Ruebel was *not* similarly situated with Warford. Warford had two strikes against her that Ruebel did not. Thus, Ruebel's alleged "familiarity" with Pine Lawn would not have made her less desirable than Warford. Second, the record does not show that Ruebel had any real "familiarity" with Pine Lawn. She stated only that she had an aunt and uncle who had lived there, that she had no relatives who currently lived there, and that she did not know what street her aunt and uncle had lived on(V.D.Tr.535-536).

Appellant also argues pretext based the prosecutors failing to strike Venireperson Black, whom the state had previously moved to strike for cause and who allegedly was not a good juror for the state(App.Br.50;*see* V.D.Tr.43-46,49,64-65). But appellant never made this claim at trial; thus, the prosecutor was never given any opportunity to explain why Black was kept.

Appellant bore the burden of persuasion, and it was incumbent upon him to carry that burden of proof at trial. *State v. Taylor*,18 S.W.3d 366,371-372(Mo.banc2000)(where the

defendant failed to identify similarly situated venirepersons at trial, this Court held that the "Defendant failed to establish that the State's justification for striking these venirepersons was mere pretext"); *State v. Maynard*,954 S.W.2d 624,635(Mo.App.W.D.1997)("Mr. Maynard did not object at the trial court level to the prosecution's striking Ms. Bassa due to her participation in a non-verdict trial. Mr. Maynard, therefore, may not challenge Ms. Bassa's removal on that ground."). This makes sense, because it is only at trial that the prosecutor is available to explain why he chose to strike one venireperson over another.

Here, if appellant had asserted at trial that the prosecutors' explanation appeared to be pretextual in light of the fact that Black had not been struck, the prosecutors would have had an opportunity to explain why Black was more desirable that Warford. The trial court then could have factored that additional information into its determination of whether the prosecutor was telling the truth or purveying a pretext.

Appellant, of course, speculates that Black survived because the state was discriminating. But there are other plausible explanations. For example, while the state did move to strike Black for cause(V.D.Tr.64-65), the prosecutors may have determined, after further reflection, that they agreed with the trial court's determination that Black had committed himself to scrupulously following the trial court's instructions(*see* V.D.60-65). It is easy to understand why the prosecutors would have kept such a juror while choosing to strike another who had shown signs of not taking the proceedings seriously and who, due to a long sequestration, might be diverted by work-related concerns. Moreover, Black had other traits that might have recommended him to the state. For example, he felt that he had been

treated fairly by the police and the court after an arrest for DWI(V.D.Tr.541-542). He had also served as the police commissioner for the City of Maryland Heights for seven years(Tr.596). In short, Black's presence on the jury was easily attributable to something other than purposeful discrimination against African Americans, and the trial court did not clearly err in failing to engage in contrary speculation.

Lastly, appellant attempts to find purposeful discrimination by arguing that Warford was a strong juror for the state(and better than Ruebel or Black)(App.Br.54). Appellant points out that Warford's father had been murdered, and that she had a working relationship with the University City Police(App.Br.54). But neither of these traits was particularly good. Warford did not believe the police had done a "good job" in her father's case(V.D.Tr.514). And, when asked whether she thought the police had done a good job or bad job, Warford somewhat sarcastically responded: "They never found out. Obviously it was a good job if they found out"(V.D.Tr.514). As for her relationship with the University City Police, Warford explained that she served on a board that heard complaints and grievances from police officers who had gotten in trouble with the department and wanted to dispute their reprimands(V.D.Tr.603-604). This did not make Warford a strong juror for the state.

2. Venireperson Nevills

The prosecutor's race-neutral reasons for striking Nevills were(1) that she was "an employee of St. Louis City School District, which in [his] experience have a disproportionate number of very liberal or not necessarily prolonged [sic] law enforcement employees;"(2) that she had sequestration issues in light of her employment and in light of her being a full-

time student near the end of the term;(3) that she said she lived in a high-crime area but had never heard shots fired – a fact that was relevant to the evidence that the state intended to present at trial;(4) that she was familiar with Pine Lawn, inasmuch as her father had lived on Ravenwood – a fact that was relevant because the prosecutor wanted to be sure that the jurors relied on the evidence and not on current personal knowledge of Pine Lawn(inasmuch as Pine Lawn had changed greatly since the murder)(V.D.Tr.666-668).

Defense counsel did not challenge these race-neutral explanations. Defense counsel challenged some of the state's reasons, but only as to Warford, Sams, and Byas(V.D.Tr.673-675). "A defendant's failure to challenge the State's race-neutral explanation in any way waives any future complaint that the State's reasons were racially motivated, and leaves nothing for this Court to review." *State v. Taylor*,944 S.W.2d 925,934(Mo.banc1997). Accordingly, this Court should decline to review appellant's challenge to the state's striking Nevills.

Nevertheless, respondent would note that the trial court did not clearly err in crediting the prosecutors' explanations. Nevills testified that she was a registered nurse and that she worked for the public schools(V.D.Tr.112). The jury list showed that she worked for the St. Louis Public Schools(Supp.L.F.8). In the prosecutor's experience, many employees of the St. Louis Public School System were very liberal and not necessarily pro law enforcement(V.D.Tr.666). On its face, this was a race-neutral explanation.

Citing *State v. Edwards*,116 S.W.3d at 525-528, appellant argues that this Court has "rejected the notion that a juror's employment . . . is *per se* sufficient to justify a peremptory

strike"(App.Br.55). But *Edwards* is materially distinguishable. In *Edwards* this Court stated that "If the mere incantation of the phrase 'he is a postal worker' were sufficient to overcome any showing of pretext, the third step of the *Batson* test would be illusory." *Id.* at 526. A key element of this holding, however, was that the defense had made a "showing of pretext." Here, appellant made no showing of pretext. Had appellant done so, the prosecutor could have elaborated on his reasoning.

In any event, to the extent that this single reason might not have been sufficient to support the state's strike, the state provided additional race-neutral reasons to support its strike of Nevills. "Employment, together with other reasons which are found to be race neutral, are sufficient." *State v. Hinkle*,987 S.W.2d 11,13(Mo.App.E.D.1999).

The state's second race-neutral reason was Nevills' problems with sequestration(V.D.Tr.666-667). She testified that she was "in a position where they can find somebody for a day or so, but to be out that long it would be difficult to be replaced"(V.D.Tr.112). She also testified that she was a "full time evening student coming to the end of a term, and this wouldn't be a good time to be off"(V.D.Tr.112).

In light of this testimony, the trial court did not clearly err in concluding that the state's reasoning was race-neutral. Nevills was obviously worried about missing a week of school, and it was wholly reasonable for the prosecutors to fear that Nevills might lose focus or become diverted by her concerns over missing a week of school at the end of the term.

Appellant claims that Venireperson Ruebels was similarly situated(App.Br.60). But that is plainly not the case. It was not simply Nevills' work-related hardship that factored into

the prosecutors' evaluation of Nevills' situation. Additionally, as discussed above, Ruebels had no substantial sequestration issue.

The prosecutors' third reason for striking Nevills was that she had lived in a high-crime area but had never heard gunshots(V.D.Tr.667). This reason, too, was supported by Nevills' testimony(V.D.Tr.529-530). As for why this was significant, the prosecutor explained that the case involved a high crime area, and that there would be testimony from witnesses who had heard and could identify gunshots, and from witnesses who had initially confused the gunshots with the sound of fireworks(V.D.Tr.667). Thus, the prosecutor apparently thought it was better to have people on the jury who had actually heard gunshots, and who would better understand what the witnesses were describing.

Appellant contests this, arguing that(1) the rationale had no true bearing to the case;(2) the State failed to inquire of the entire panel whether they could distinguish gunshots from firecrackers; and(3) a similarly-situated white juror was not struck(App.Br.58). But, contrary to appellant's first assertion, there was evidence of gunshots(or the sound of fireworks); thus, there was a rational basis – even if only limited – for seeking jurors who had had life experiences that helped them understand such testimony. As for appellant's second assertion, there was no reason to make such an inquiry of the panel, because the prosecutor did not strike Nevills based on any inability to distinguish between gunshots and fireworks. And, finally, as for appellant's third assertion, Venireperson Fitzpatrick was not similarly situated.

Fitzpatrick testified that she lived in the Central West End and that she had not heard "gun fire at night or anything like that"(V.D.Tr.532). Thus, she, like Nevills, had not heard

gunshots. But this single similarity with Nevills did not render Fitzpatrick and Nevills similarly situated for purposes of *Batson*. As set forth above, Nevills was struck for a variety of reasons, including this third reason. But it is plain that this third reason was less weighty than the first and second reasons. Indeed, appellant acknowledges as much when he argues that the third reason was "just a minor fact"(App.Br.58). Appellant cannot realistically believe that this similarity rendered Nevills and Fitzpatrick similarly situated.

The state's fourth race-neutral reason was Nevills' familiarity with Pine Lawn(V.D.Tr.667-668). Nevills testified that her father had lived in Pine Lawn for a number of years, but that she did not currently have any relatives living in Pine Lawn(V.D.Tr.534-535). She did recall, however, that her father had lived on Ravenwood(Tr.535).

Appellant argues that this testimony did not show any "present knowledge" of Pine Lawn(App.Br.60). Thus, he argues that the prosecutors' stated fear that she might rely on present knowledge was mere pretext. But the trial court did not have to reach that conclusion. The trial court could have concluded, for example, that the prosecutor was simply mistaken in his recollection of what Nevills had actually said on that point.

Appellant points out that the state "failed to strike five white venirepersons familiar with Pine Lawn," namely, Venirepersons Ruebel, Swartstrom, Smith, Kemper, and Dickerson-Capvano(App.Br.60-61). But the problem with this argument is twofold. First, this single similarity is not sufficient to render any of the five venirepersons "similarly situated" with Nevills. As discussed above, there were two weightier reasons for removing Nevills. Second, like Nevills, none of the five testified about having "present knowledge" of Pine

Lawn(*see* V.D.Tr.534-537). Thus, to the extent that the prosecutors' strikes were aimed at folks with present knowledge of Pine Lawn, none of these white venirepersons fit the bill.[3]

3. Venireperson Byas

The prosecutors' race-neutral reasons for striking Byas were(1) she knew the Upchurch family – a fact that was relevant because there was a connection between that family and an endorsed defense witness and between that family and Evelyn Carter, a state's witness;(2) she had "a number of questions about . . . accomplice liability" that the prosecutor had not been able to resolve;(3) she had investment property in Pine Lawn and was, therefore, familiar with Pine Lawn – a fact that was relevant because the prosecutor wanted to be sure that the jurors relied on the evidence and not on current personal knowledge of Pine Lawn(inasmuch as Pine Lawn had changed greatly since the murder); and(4) she had unrealistic expectations about scientific evidence in criminal cases(V.D.Tr.671-673).

Defense counsel argued that if Byas had any bias, it was not likely it would be a "bias in favor of the defendant"(V.D.Tr.675). In response, the prosecutor said, "I don't want any relative of any witness, either me or them to be on this jury"(V.D.Tr.676). The prosecutor

---

[3] With regard to Dickerson-Capvano, it should also be noted that the defense, in an unusual move, stated that it was using one of its peremptory strikes against her *prior* to the state's making its peremptory strikes(V.D.Tr.664-665). Accordingly, Dickerson-Capvano was not in the pool of eligible jurors when the state made its strikes.

also noted that appellant had not named any similarly-situated venirepersons(V.D.Tr.676).

The trial court did not clearly err in crediting the prosecutor's explanations. As the prosecutor made plain, it was not merely any bias that Byas might have in favor of appellant; rather, the prosecutor's concern extended to Byas' connection to any witness, including one of the state's penalty phase witnesses(V.D.Tr.672). Thus, when the prosecutor said that he did not "want any relative of any witness . . . on this jury," the suggestion that Byas was a blood or legal "relative" was merely an unintended slip where the prosecutor plainly intended to say that he did not want anyone *related* or connected to any witness on the jury. This was a valid race-neutral reason, and far from showing racial discrimination, it showed that the prosecutor was scrupulously avoiding any potential for partiality on the jury.

Because appellant did not further challenge the state's reasons at trial, appellant should not be heard to raise new arguments. *State v. Maynard*,954 S.W.2d 624,635(Mo.App.W.D.1997). In any event, the trial court did not clearly err in determining that the prosecutor's other reasons also were not pretextual.

As for the state's second reason for striking Byas, appellant correctly points out that the prosecutor was mistaken when he said that she had questions about accomplice liability(App.Br.63). Venirepersons Jordan, Creaser and Crum had questions about accomplice liability, but it does not appear that Byas expressed any concern about the concept(V.D.Tr.485-490). Appellant argues that upholding a strike not supported by evidence is clearly erroneous. But that is not necessarily correct. *See State v. Hampton*,163 S.W.3d 903(upholding the trial court's determination that there was a *Batson* violation,

which was based on the alleged presence of a similarly situated juror, even though a review of the record later revealed that there was no similarly situated venireperson).

Appellant's burden at this stage is to show that the prosecutor engaged in purposeful discrimination. Thus, simply pointing out that the prosecutor made a mistake in recalling something about a particular juror does not show that the prosecutor engaged in purposeful discrimination.

As for the prosecutor's third reason – that Byas was familiar with Pine Lawn, in light of the fact that she owned investment property there – appellant focuses on the fact that the prosecutor commented on whether he thought it was a good investment(App.Br.63). He argues that the wisdom of investing in Pine Lawn properties "was completely irrelevant to jury selection"(App.Br.63). Thus, he again sees pretext. But the problem with appellant's argument is that the prosecutor was not striking Byas because of her poor investment strategy; rather, he was striking her because she had current knowledge of Pine Lawn and he did not want any juror basing a decision on anything other than the testimony of the witnesses(V.D.Tr.672).

Appellant takes issue with that reason as well, arguing that there were a number of other white jurors – Swartstrom, Ruebel, Smith, Kemper, and Dickerson-Capvano – who were also familiar with Pine Lawn(App.Br.63-64). But the problem with this argument is twofold. First, the five white venirepersons were not similarly situated, because they did not

have "present knowledge" of Pine Lawn(*see* V.D.Tr.534-537).[4] Second, this single similarity is not sufficient to render any of the five named venirepersons "similarly situated" under *Batson*, for, as will be discussed next, the prosecutor had a strong, race-neutral reason for striking Byas that none of these five jurors shared.

The state's final reason for striking Byas was that she had, based on her limited exposure to forensic practices, unrealistic expectations about scientific evidence in criminal cases(V.D.Tr.672-673). The prosecutor pointed out that there was very little scientific evidence – one fingerprint – linking appellant to the crime. The prosecutor expressed concern that Byas would "expect more" and be unable to set aside her expectations(V.D.Tr.673). The trial court did not clearly err in crediting this explanation.

Byas expressed a strong interest in forensic studies and practices, and she expressed her belief that "If you are going to do it, you are going to get caught with the technology that they have today"(V.D.Tr.612-614). She expressed excitement, for example, about the topic of "balistics, how they can match up the bullets with the hole in the wall"(V.D.Tr.614).(In this case, the state had only limited tool-mark evidence regarding the bullets). Then, when asked if she could set aside what she had learned from her own studies and only consider the

---

[4] With regard to Dickerson-Capvano, it should also be noted that the defense, in an unusual move, stated that it was using one of its peremptory strikes against her *prior* to the state's making its peremptory strikes(V.D.Tr.664-665). Accordingly, Dickerson-Capvano was not in the pool of eligible jurors when the state made its strikes.

evidence, she indicated that she would "[p]robably think about both of them"(V.D.Tr.615-616). When asked more directly if she could follow the court's instruction, her first response was: "I would consider what the Judge would tell me to. I am sure I would probably think about the other thing too"(V.D.Tr.616). She finally indicated she would follow the court's instructions(V.D.Tr.616).

Based on this record, the prosecutor reasonably feared that Byas ultimately might not be able to set aside her personal knowledge in considering the case. Appellant disagrees and states that he thinks Byas would have been "a strong juror or the State"(App.Br.65). He argues that "Byas' strong belief in the accuracy of fingerprints would have served the state well"(App.Br.65). But this observation misses the point. The state was not concerned about any juror's belief in the accuracy of fingerprints(indeed, given the wide acceptance of fingerprint evidence, this was probably the last thing on the prosecutor's mind); rather the state was concerned that Byas would have unrealistic expectations about the evidence she believed the state *ought* to be able to produce in a criminal case(e.g., wondering why appellant's DNA was not found on the cigar). Appellant also suggests that Byas would have been a strong juror because, like Warford, she had had a family member murdered(App.Br.65). But the murder of Byas' brother was never solved. This could have left Byas with *bad* feelings toward law enforcement.

Lastly, appellant argues that the state failed to strike a similarly situated juror – Louis Smith – who allegedly had some similar exposure to police lab work(App.Br.65). But it was not Louis Smith who gave those responses. A review of the record reveals that the responses

were given by Venireperson Harton, whom defense counsel addresses, but who is not then correctly identified(*see* V.D.Tr.610). Defense counsel *had* been addressing Louis Smith, but then she stated that she was confusing Smith with Harton(V.D.Tr.610).

According to the transcript, "*Smith*" then says, "Yes, I was going to raise my hand after you were finished with him"(V.D.Tr.610). But since Smith had just been answering the previous questions, it is apparent that this statement should have been attributed to Harton. Additionally, in the questions that follow, defense counsel refers to Kentucky, and "Smith" refers to his previous job with the "State Health Department"(V.D.Tr.610). But it was Harton who had previously talked about his job in the "State Health Department in Kentucky in the mid '80's"(V.D.Tr.523).

In an event, because Harton also survived the state's strikes, appellant's argument raises the issue of whether he was similarly situated. It is plain from the record that Harton was not similarly situated with Byas. Harton's exposure to a court case in the 1980s certainly was not analogous to Byas' current exposure to forensic training and practices, and neither was Harton's work on training aids for drug dogs, or Harton's exposure to "Interesting kind of gruesome stories in the federal lab"(*see* V.D.Tr.523,610-611). Harton also did not express the excitement or expectations that Byas expressed when talking about forensics in criminal cases.

4. Venireperson Glover

The prosecutors' race-neutral reasons for striking Glover were(1) that she was "elderly, very opinionated, corrected both myself and defense counsel about questions," and

that because of her "hard headed and opinionated" personality "she would not be . . . a very good juror in discussing views and considering the views of other jurors";(2) that she had a medical condition that could affect her ability to finish the trial;(3) that she had had a sister who lived in Pine Lawn, whose house had been firebombed; and(4) that she remembered reading about the case in the newspaper(V.D.669-670).

Defense counsel did not challenge these race-neutral explanations. Defense counsel challenged some of the state's reasons, but only as to Warford, Sams, and Byas(V.D.Tr.673-675). "A defendant's failure to challenge the State's race-neutral explanation in any way waives any future complaint that the State's reasons were racially motivated, and leaves nothing for this Court to review." *State v. Taylor*,944 S.W.2d at 934. Accordingly, this Court should decline to review appellant's challenge to the state's striking Glover.

Nevertheless, respondent would note that the trial court did not clearly err in crediting the prosecutors' explanations. A review of the record gives the impression that Glover was opinionated, well informed, and generally very sure of herself – even to the point of interrupting defense counsel to correct a misstatement(*see* V.D.Tr.156-158,176,181,186,521-523,531,535,566-568,633-634,641).[5] Defense counsel did not contest the prosecutor's

[5] Contrary to appellant's claim, Glover was not struck because she "lives in a high crime area but denied that it is high crime"(App.Br.66). When the prosecutor referred to this testimony from Glover, the prosecutor was simply citing it as an example of how Glover was "hard headed and opinionated"(V.D.Tr.669).

characterization of Glover, and the trial judge, who was also personally present for Glover's responses, was in the best position to determine whether the prosecutor was simply covering purposeful discrimination with an unsubstantiated "demeanor" justification.

Moreover, it was not simply Glover's "demeanor" that caused the state to strike her. As the prosecutor pointed out, she had a sequestration issue and a general health issue. She was having difficulty with an ulcer that was giving her pain and "tremendous problems" during jury selection(V.D.Tr.552,566-567). Her doctor wanted to see her during the week that they jury was supposed to be sequestered, and when asked about her condition, Glover stated that she had had problems the day before(V.D.Tr.552,567). She pointed out that she was doing better, but that she did not know how she would be doing "when I go home"(V.D.Tr.567). Nevertheless, consistent with her general attitude, she expressed a willingness "to serve if it can be arranged"(V.D.Tr.567).

It was reasonable for the prosecutor to be concerned about her well being and ability to finish out the trial. Glover had already experienced pain, and there was no guarantee that she would not get worse and have to be excused from service. This was a risk that the prosecution reasonably sought to avoid, and it cannot be said that the trial court, under these circumstances, clearly erred in determining that this explanation was not pretextual.

Appellant claims that the state failed to strike a similarly situated juror, Venireperson Spalinger, who was "questioned at length regarding his problem with anxiety attacks"(App.Br.67). But Spalinger was not similarly situated. Unlike Glover, Spalinger's condition had not actually flared up during voir dire, caused him any discomfort or affected

his ability to serve(V.D.Tr.578-580). Rather, Spalinger had simply personally questioned whether sequestration might cause him to suffer a panic attack(V.D.Tr.578-579). Spalinger had successfully controlled his condition with medication for several years, and after discussing his condition at length, Spalinger said "I don't think it will be a problem, but I did want to mention it"(V.D.Tr.578-583).

The state's third reason for striking Glover was that she had had a sister who lived in Pine Lawn, whose house had been firebombed in an unsolved case. Appellant points out that there were white venirepersons who also had family in Pine Lawn, but he does not name any particular venireperson. In any event, this single similarity is not sufficient to render appellant's unidentified venireperson "similarly situated" with Glover. As discussed above, there were other, weightier reasons for striking Glover, namely, her uncertain medical condition and her hard-headed personality.

Appellant also speculates that Glover would have been a good juror for the state because of the unsolved firebombing of her sister's home. He points out that this would have fit in with some of the state's theories – e.g., "that [appellant] and his gang terrorized Pine Lawn," and that the jurors should convict "if they cared about the people in Pine Lawn"(App.Br.68)(as discussed below, in Point IV, the state did not argue the second theory). It is certainly true that appellant and his gang terrorized people in Pine Lawn, but there is no reason to believe that Glover would have considered her deceased sister's experience(whenever it was) in deciding this case. Glover said she would follow the court's instructions(*see* V.D.Tr.157-158); and, consequently, it cannot be said that her knowledge

of the firebombing would have affected anything.

The state's final reason for striking Glover was that she remembered reading about the case in the newspaper. Appellant points out that Venireperson Kemper also read about the case in the paper, and he argues that the presence of this "similarly situated" juror is indicative of discriminatory intent. But again, this single similarity is not sufficient to render Kemper "similarly situated" with Glover. There were other, weightier reasons for striking Glover.

5. Venireperson Sams

The prosecutors' race-neutral reasons for striking Sams were(1) his agitated attitude, which conveyed to the prosecutor that "He didn't want to be here";(2) the fact that he was sleeping during general voir dire on a couple of occasions;(3) his question and apparent confusion over how to handle conflicting witnesses;(4) the fact that he lived in Jennings but failed to voice any familiarity with Pine Lawn; and(5) his unwillingness to talk about his nephews who were in law enforcement(V.D.Tr.670-671).

Defense counsel argued(1) that she had not felt any hostility from Sams;(2) that Venireperson Sharpe had also asked a question, albeit about accomplice liability, and she had not been struck; and(3) that Sams had only been reticent about his nephews because he had told them he would not reveal their locations(V.D.Tr.674-675). Defense counsel did not challenge the fact that Sams had been sleeping during voir dire, and she did not address the fact that Sams had not voiced any familiarity with Pine Lawn.

Under these circumstances, the trial court did not clearly err in crediting the state's

reasons. As the record shows, while defense counsel said she never felt any hostility from Sams, that was not inconsistent with the state's explanation. The prosecutor had initially used the word "hostile," but the prosecutor then stated that "hostile" was too strong a word. The prosecutor stated that Sams seemed agitated, and that it seemed that Sams did not want to be there(V.D.Tr.670). Defense counsel never suggested that either of these explanations were not supported by the record.

And, in fact, the record supported the state's claim that Sams was agitated. When the prosecutor was asking whether the veniremembers would require additional eyewitnesses even if they believed one eyewitness beyond a reasonable doubt, Sams suddenly asked: "You got aggravation and what do they get, the crime attorney, the defense attorneys, they got an eye witness. How do that work? It's up the jury or who are you going to believe?(V.D.Tr.494-495). To this somewhat accusatory, agitated and slightly baffling question, the prosecutor simply said, "Right," apparently at a loss for words(V.D.Tr.495). Sams then said, "You said only one eye witness"; the prosecutor said, "I'm sorry"; and Sams asked, "What if there is more than one eye witness? You got one, she got one. How do that work?(V.D.Tr.495). The prosecutor then chose to frame a new question and to ask Sams whether he could decide, between two witnesses, who was telling the truth and who was lying(V.D.Tr.495). Sams said "Yes," but the prosecutor was ultimately unconvinced that Sams understood the concept(V.D.Tr.670-671).

Based on this record, the trial court did not clearly err in determining that the prosecutor truthfully believed both that Sams was agitated and that Sams had not understood

the concept they had discussed. Moreover, while defense counsel tried to point to another venireperson who had also asked a question and challenged the prosecutor about accomplice liability, the venireperson counsel referred to, Venireperson Sharpe, had not asked any such question(*see* V.D.Tr.485-491). Additionally, the questions that were asked about accomplice liability simply reflected the common concern that many lay people express when considering the concept, namely, that a person will be unjustly punished for conduct that they did not actually join in.

As for the state's second reason, appellant concedes that sleeping during voir dire is a race-neutral justification, *see State v. Hall*,955 S.W.2d 198,205-206(Mo.banc1997), but he argues that this justification was insufficient in light of the "numerous non-race-neutral explanations" offered by the state in this case(App.Br.70). But in fact, appellant has not identified a single "non-race-neutral explanation" among the numerous reasons that were provided by the state in support of its various strikes.

As for the state's fourth reason, appellant seems to think that the state was striking Sams because he was familiar with Pine Lawn; thus, appellant argues that this was pretextual because the state did not strike five white jurors who were also familiar with Pine Lawn(App.Br.71). But appellant's argument misses the point. It was not "familiarity" with Pine Lawn that underlay this justification for striking Sams; rather it was his silence and the concomitant possibility that he had not been forthcoming in all of his answers.

As for the state's fifth reason – Sams's reticence in talking about his nephews in front of the panel – the record shows that Sams asked to approach the bench when asked about his

nephews who were in law enforcement(V.D.Tr.607). The prosecutor thought this was strange and illogical, and, to a certain extent, it was. No one was asking questions that would have compromised their safety or disclosed sensitive information. And while it can be said, as appellant argues on appeal, that Sams was simply being "conscientious for his nephew's safety," it can also be said that Sams was just acting strangely.

In short, the prosecutor laid out five race-neutral reasons for striking Sams: that he was agitated and did not want to be there, that he was sleeping at times, that he had shown confusion about how to handle conflicting witnesses, that he had seemingly failed to disclose his familiarity with Pine Lawn, and that he had been strangely reticent when asked about his nephews in law enforcement. These concerns had a basis in the record; and, accordingly, the trial court did not clearly err in crediting the prosecutor's responses and determining that the prosecutor's reasons were not a pretext to cover purposeful discrimination.

II.

This Court should decline to review appellant's second point – that the trial court abused its discretion in allegedly excluding evidence that Gregory Hazlett had been previously charged with forcible rape and armed criminal action – because the trial court did not make the ruling appellant attributes to it. To the extent that appellant is challenging the court's ruling that appellant would be allowed to ask Hazlett if he had a weapon on June 17, 2004, but that he would *not* be allowed to ask whether Hazlett had brandished that weapon at Theresa Bradley, the claim cannot be reviewed and is without merit, because appellant did not make an offer of proof or otherwise show that he could present any relevant evidence to impeach Hazlett's testimony.

Appellant claims that the trial court erred and abused its discretion in excluding evidence that Gregory Hazlett had been previously charged with forcible rape and armed criminal action(App.Br.75). He argues that Hazlett opened the door to the nature of the previously pending charges when Hazlett "attempted to explain away his prior conviction" for unlawful use of a weapon by "testifying that he only carried a gun because he heard rumors after [the victim's] death that he too would be killed"(App.Br.75).

A. The Standard of Review

The trial court has broad discretion in determining the admissibility of substantive evidence and in determining the extent and scope of cross-examination. *Black v. State*,151 S.W.3d 49,55(Mo.banc2004). "Although cross-examination is a fundamental component of confrontation, it is not unlimited." *State v. Russell*,625 S.W.2d 138,141(Mo.banc1981). "A

trial court has broad discretion to disallow repetitive and harassing interrogation, to limit attacks on general credibility, and to preclude attempts to elicit irrelevant, collateral or stale matters." *Id.*

B. Appellant's Claim – That the Trial Court Prevented him From Questioning Hazlett About His Previously Pending Charges for Forcible Rape and Armed Criminal Action – Lacks a Factual Basis

1. Factual background

Gregory Hazlett was one of the state's three eyewitnesses(Tr.86-88,122;State'sEx.78-C). Before trial, the parties agreed that the defense would be allowed to elicit that Hazlett had been previously charged with certain crimes, but that those charges had been dismissed(Tr.5-6). The defense wanted to elicit this fact to "bring out maybe the possibility that [Hazlett's] thinking that he may get some benefit because these charges have since been dismissed"(Tr.6).

The parties agreed the defense would not be "getting into the actual name of the charge" or "the underlying facts of the charge," "unless something comes up in court while Mr. Hazlett is testifying"(Tr.6-7). The trial court stated that if "something occurs that would cause you to deviate from that agreement," then the parties should approach the bench and discuss it at the bench(Tr.7).

On cross-examination, defense counsel elicited that Hazlett had a prior conviction for unlawful use of a weapon(Tr. 102).

Q Mr. Hazlett, you have a conviction for unlawful use of a weapon. Is that

correct?

A Yes.

Q. And that happened when?

A. July 27th, after I was threatened, that's when I start carrying it.

Q So you only started carrying guns and using guns when?

A. I've been using guns all my life. I hunt, fish, outdoorsman, but I got caught with a .9 millimeter pistol, and that's what my conviction was for.

Q. Okay.

A. After [the victim's] murder, I got scuttlebutt that I was going to be killed.

Q. Okay. [Appellant] never threatened you, has he?

A. I don't know. Not personally.

Q. And you're saying it was only in July when you got threatened about Vincent's case that you started using a gun?

A. Yeah. Yes.

Q. Okay. Do you recall being arrested on June 17th of 2004?

(Tr.102-103). At that point, the prosecutor objected and asked to approach(Tr.103).

When the prosecutor stated his concern that defense counsel was about to ask about the previously pending charges, defense counsel argued that Hazlett had "opened the door by saying the only reason he got a weapon is because my client has made threats toward

him"(Tr.103). The trial court noted that Hazlett had testified that appellant had not made threats against him(Tr.103-104). The court asked what counsel intended to ask(Tr.104). Counsel outlined two questions that she wanted to pose: first, whether Hazlett had "a weapon on June 17th of 2004", and whether Hazlett "was arrested for that"(Tr.104-105).

The trial court stated that the arrest was not relevant, but that counsel could ask Hazlett whether he had a weapon on June 17, 2004(Tr.105). Counsel then asked if she could ask Hazlett "if he brandished [the weapon] at a woman named Theresa Bradley?"(Tr.105).[6] The court stated that that fact was irrelevant, because "The only issue that you've identified that's relevant is he said he didn't start carrying a gun until this incident"(Tr.105).

The prosecutor pointed out that that fact did not contradict or impeach Hazlett in any way, because Hazlett had testified that he started carrying a gun in July 2002(well before June 17, 2004)(Tr.105). Defense counsel noted that Hazlett had said that his conviction occurred in July(Tr.105), and she also pointed out(apparently based on pre-trial disclosures) that the conviction was obtained in 2004(Tr.105). Noting that Hazlett had not stated what year he was convicted, the court reiterated that it would allow counsel to ask Hazlett whether he had had a gun on June 17, 2004(Tr.106). Defense counsel made no request that she be

---

[6] Counsel's intended questions were apparently based upon the state's disclosure that Hazlett had been charged in June 2004 with unlawful use of a weapon(*see* L.F.436). In other words, it is plain that these proposed questions about an arrest in June 2004 *did not* refer to Hazlett's earlier arrest in July 2002 for forcible rape and armed criminal action(*see* L.F.436).

allowed to question Hazlett about the charges for forcible rape and armed criminal action that had been leveled against Hazlett in 2002.

When cross-examination continued, defense counsel elicited that Hazlett had been arrested for the conduct underlying the unlawful use of a weapon conviction on July 22, or July 23, 2002(Tr.106). Hazlett indicated that his conviction was ultimately obtained in 2004(*see* Tr.106, "It [the case] carried on for two years,"). Defense counsel never tried to ask Hazlett whether he had been charged with forcible rape and armed criminal action in 2002, or whether he had used a gun during a forcible rape prior to the time that he started carrying the gun that led to his conviction for unlawful use of a weapon.[7]

2. Appellant's claim lacks a factual basis

As is evident, appellant never attempted to present evidence that Hazlett was charged, in 2002, with forcible rape and armed criminal action. Thus, the trial court never prevented appellant from eliciting evidence of the charges(or, for that matter, evidence that Hazlett committed the *acts* charged in 2002). Rather, as the record shows, the trial court ruled that appellant would be allowed to ask Hazlett whether he had had a gun on June 17, 2004, but that appellant would not be allowed to ask whether Hazlett was arrest in 2004(for unlawful

[7] Notably, counsel also never asked the question that the trial court had approved(Tr.106-109). Instead, adhering to the pre-trial agreement between the parties, counsel limited her questions to whether Hazlett had been previously charged on two other occasions, and whether those charges had been dismissed(Tr.106-109).

use of a weapon), or whether Hazlett had brandished a gun at Theresa Bradley in 2004.

The one question that the court decided to allow was apparently allowed on the theory that it might impeach Hazlett's testimony that he had only started carrying a gun in "July." But when it became apparent that Hazlett had been carrying that gun(a .9 millimeter handgun) in July *2002*, defense counsel apparently concluded that asking about Hazlett's carrying a gun in June 2004 simply had little or no impeachment value.

In short, appellant's point relied on alleges that the trial court "exclud[ed] evidence of the nature of the charges [forcible rape and armed criminal action] that had been pending against Gregory Hazlett"(App.Br.75). But that is simply not accurate. The trial court was never asked to determine whether appellant should be allowed to elicit evidence of the charges that were brought against Hazlett in 2002.

3. Excluding the nature of the charges would have been proper

Even if the trial court had ruled as appellant asserts, such a ruling would have been correct. "Generally, witness credibility may not be impeached by showing 'a mere arrest, investigation, or criminal charge which has not resulted in a conviction.'" *State v. Wise*,879 S.W.2d 494,510(Mo.banc1994). This is because an arrest or a charge is not *evidence* of any actual wrongdoing – a principle that the jury was ultimately apprized of(*see* L.F.450).

There are, however, exceptions to the general rule, including:(1) where the inquiry demonstrates a specific interest of the witness;(2) where the inquiry demonstrates the witness' motivation to testify favorably for the state; or(3) where the inquiry demonstrates that the witness testified with an expectation of leniency. *Id.* Inquiry into prior arrests or

charges can also be permitted when the witness "opens the door" by claiming, for example, that he or she has never been in "trouble." *See State v. Campbell*,868 S.W.2d 537,539-540(Mo.App.E.D.1993).

Here, Hazlett's previously pending charges were not relevant to impeach Hazlett's credibility on any of these grounds. The charges had been dismissed, and the dismissals were not part of a deal to secure Hazlett's testimony(Tr.110-111;*see also* L.F.436,"Mr. Hazlett was not given or offered anything in exchange for his testimony."). Accordingly, the dismissed charges had no impeachment value. *Middleton v. State*,80 S.W.3d 799,806(Mo.banc2002) (absent evidence of an agreement, the state was not required to disclose that charges against a state's witness had been dismissed prior to trial, because the "dismissals resolved the charges" and removed any "incentive to lie in order to obtain favorable treatment").

Additionally, Hazlett did not open the door to additional questions about his prior arrests and charges. He did not, for example, claim that he had never been in any other "trouble." He did not deny that he had been charged with other crimes or otherwise suggest that the only charge that had been leveled against him was the charge that he ultimately pled guilty to. Indeed, to the contrary, when defense counsel asked about the prior charges in general terms, Hazlett readily admitted that he had been charged on two previous occasions(Tr.106-109).[8] Thus, there was nothing about Hazlett's testimony that opened the

[8] This is not to say that Hazlett was willing to admit that he had actually *committed* the charged offenses. To the contrary, with regard to the 2004 charge of unlawful use of a

door to asking Hazlett about the names of his previously pending charges.

Appellant argues otherwise, asserting: "When Hazlett attempted to explain away the conviction [for unlawful use of a weapon], by implying that he was only carrying the weapon for self-protection, defense counsel should have been allowed to delve further into the facts of that conviction *and elicit that Hazlett had been charged with armed criminal action in connection with a rape* and may have also brandished the gun at his girlfriend's daughter"(App.Br.80-81)(emphasis added). To support this assertion, appellant cites various cases that stand for the proposition that when a witness attempts to "blunt the impact" of a prior convictions or otherwise equivocates about the conduct underlying the prior conviction, the witness may then be asked about the details of the crime underlying the prior conviction. *See e.g. Taylor v. State*,173 S.W.3d 359,366(Mo.App.S.D.2005).

But appellant's reliance upon those cases is misplaced. When a person attempts to disavow a prior conviction, the person is then subject to cross-examination about the details of the *conviction*.(to preclude him from giving a false impression).[9] But it does not follow that a person who attempts to explain his conduct underlying a prior conviction must then be subject to cross-examination about any and all previous *charges* of improper conduct.

---

weapon, where his girlfriend's daughter was the alleged victim, Hazlett said that "It was all a bunch of bologna anyway"(Tr.108-109).

[9] Appellant's claim that Hazlett left the jury with a false impression of his prior conduct is addressed below in Part C.

C. To the Extent that Appellant is Alleging that the Court Erred in Precluding Him From Asking Hazlett About Brandishing a Gun in 2004(or Other Bad Acts Related to the 2002 Charges), the Trial Court did not Plainly Err

Though not asserted in his point relied on, appellant also argues that he should have been allowed to elicit evidence of Hazlett's prior bad acts to impeach Hazlett's testimony that he had started carrying a gun in July 2002, after hearing rumors that he was going to be killed.

1. Preservation and the standard of review

Claims not included in a point relied on are not preserved for appellate review. *State v. Dowell*,25 S.W.3d 594,605(Mo.App.W.D.2000). To preserve an evidentiary claim, the proponent of evidence must attempt to elicit the evidence, and, if an objection to the evidence is sustained, he or she must make an offer of proof. *State v. Purlee*,839 S.W.2d 584,592(Mo.banc1992).

"For relief under the plain error rule to be warranted, a defendant must demonstrate 'the error so substantially affected the defendant's rights that a manifest injustice or a miscarriage of justice would inexorably result if the error were to be left uncorrected.' " *State v. Cummings*,134 S.W.3d 94,104(Mo.App.S.D.2004). The defendant bears the burden of establishing manifest injustice. *State v. Mayes*,63 S.W.3d 615,624(Mo.banc2001).

2. Appellant cannot establish plain error or manifest injustice

"A witness cannot be impeached by proof of a bad reputation for morality or proof of any specific act indicating moral degeneration." *State v. Wolfe*,13 S.W.3d

248,258(Mo.banc2000). Impeaching testimony should be confined to the real and ultimate object of the inquiry, which is the reputation of the witness for truth and veracity. *Id.* Specific acts of misconduct, without proof of bias or relevance, are collateral, with no probative value. *Id.*

Here, appellant failed to establish that the alleged prior bad acts had any relevance or impeachment value. Appellant claims that he should have been allowed to impeach Hazlett's credibility by eliciting(1) that Hazlett had brandished a gun at his girlfriend's daughter in June 2004, and(2) that Hazlett had brandished a gun during a rape(App.Br.81-82,84). The problem with both of these assertions, however, is that appellant failed to make an offer of proof; thus, it is not at all apparent that Hazlett would have admitted to committing any of these acts. In fact, to the contrary, when asked about the brandishing that allegedly occurred in June 2004, Hazlett said that it was a "bunch of bologna"(Tr.108-109). Questions alone would not have impeached Hazlett.

Additionally, with regard to whether appellant brandished a gun at his girlfriend's daughter in June 2004, it is plain that such evidence had no impeachment value. Hazlett's testimony was that he started carrying a gun in July 2002. The fact that he was carrying a gun in June 2004, almost two years later, is simply not inconsistent with his testimony.

With regard to the alleged brandishing of a weapon during a rape in July 2002, the trial court did not plainly err in "excluding" such evidence, because, as discussed above, appellant never sought to elicit such testimony. Additionally, there is no evidence that the alleged weapon that was used during the alleged rape was a gun. The offense of armed

criminal action can be committed with several kinds of deadly weapons or with any number of dangerous instruments. Here, it is not apparent what kind of deadly weapon or dangerous instrument was allegedly used during the alleged rape; thus, appellant cannot show that testimony about these acts would have impeached Hazlett's testimony that he had only started carrying a gun in July 2002. And even if it were true that Hazlett used a gun during the alleged rape, it is not apparent *when* the alleged rape occurred. Hazlett was arrested and charged in July 2002, but the alleged rape could have occurred *after* Hazlett started to carry a gun(as outlined above, Hazlett testified that he started carrying a gun sometime after July 3, 2002).

In short, contrary to appellant's unsupported assertion that Hazlett's "claim [was] false"(App.Br.81), there is no evidence that Hazlett, in explaining why and when he started to carry a gun, misstated the truth, lied, or omitted anything. Accordingly, the trial court properly limited appellant's attempt to impeach Hazlett with specific bad acts.

III.

The trial court did not plainly err in admitting various pieces of evidence that were admissible to prove appellant's motive and identity, and to explain why a state's witness had changed his story and was adamantly refusing to testify.

Appellant asserts that the trial court plainly erred or abused its discretion in admitting various pieces of evidence(App.Br.86). He argues that the evidence fell into two categories of generally inadmissible evidence: evidence of his bad character, and evidence of his prior uncharged crimes(App.Br.86). These claims were not preserved; thus, review, if any, is limited to plain-error review.

A. The Standard of Review

"For relief under the plain error rule to be warranted, a defendant must demonstrate 'the error so substantially affected the defendant's rights that a manifest injustice or a miscarriage of justice would inexorably result if the error were to be left uncorrected.' " *State v. Cummings*,134 S.W.3d 94,104(Mo.App.S.D.2004). The defendant bears the burden of establishing manifest injustice. *State v. Mayes*,63 S.W.3d 615,624(Mo.banc2001).

B. The Various Pieces of Evidence Were Properly Admitted

1. Appellant's gang membership

Appellant first contends that the trial court improperly admitted evidence of his gang membership(App.Br.89). He agues that evidence of gang membership was impermissible evidence of his bad character, and that the state relied on it to show that he was a person with criminal propensities(App.Br.89).

This Court should decline to review this claim. Where "counsel has affirmatively acted in a manner precluding a finding that the failure to object was a product of inadvertence or negligence," even plain error review is waived. *State v. Mead*,105 S.W.3d 552,556(Mo.App.W.D.2003). "When a party affirmatively states that it has no objection to evidence an opposing party is attempting to introduce, for instance, plain error review is unavailable." *Id.* Here, counsel affirmatively acted in a manner precluding a finding that the failure to object was a product of inadvertence or negligence.

Prior to eliciting evidence that appellant belonged to the Six-Deuce Bloods, the parties discussed what the state intended to elicit(Tr.229-232). The state explained that it was going to elicit appellant's admissions at a prior court proceeding that he was a member of the Six-Deuce Bloods, and that he was known as "Scooby Deuce"(Tr.229). Defense counsel made sure that the prosecutor only intended to state that appellant's testimony was at "a prior court hearing"(Tr.229-230). The trial court then asked if defense counsel had any objection, and defense counsel stated: "I think he probably can get into it"(Tr.230).

After brief discussion about an "objection" based on Fifth Amendment grounds, the trial court made sure that defense counsel was not objecting on any other grounds(Tr.231, "But that's the nature of the objection. Simply that?"). Defense counsel again stated the Fifth Amendment objection, and the trial court stated, "Okay. That objection will be overruled"(Tr.231-232). The court then asked if the defense was satisfied with the state's characterizing the previous testimony as occurring at a "prior court proceeding"(Tr.232). Defense counsel said that that was "fine"(Tr.232).

The state elicited evidence of appellant's gang membership without objection(Tr.233-234).[10] Later, the state elicited additional evidence that appellant, Corey Smith and Lorenzo Smith were all members of the same gang, and that appellant's nickname was "Scooby Deuce"(Tr.257-259,353). This evidence, too, was elicited without objection.

As is evident, appellant made no objection on the grounds now asserted. Indeed, to the contrary, when the evidence was first discussed, defense counsel stated, "I think he probably can get into it"(Tr.230). This was not an express statement of "no objection," but it was certainly an express acknowledgment that the defense had no relevant objection to the *substance* of the evidence – especially in light of the trial court's repeated attempts to elicit whether counsel had any grounds(aside from the Fifth Amendment concern that was raised) for an objection.

Even if the apparent waiver is disregarded, the trial court did not plainly err. When evidence of gang membership is introduced to prove the bad character or the propensity of the accused to commit the charged crime, it is irrelevant. *State v. Beal*,966 S.W.2d 9,13(Mo.App.W.D.1997). "Such evidence, however, may be probative and admissible if it tends to prove a motive for the crime, the possible bias of defense witnesses who are shown to be members of the defendant's gang, a common design or purpose in crimes committed by a group, or the identification of the defendant." *Id.* Wide latitude is generally allowed in

---

[10] The evidence showed that appellant made his admission that he was an "ex-gang member" on December 15, 2004 – well after the murder in this case(Tr.234).

developing evidence of motive. *State v. Clayton*,995 S.W.2d 468,482(Mo.banc1999).

Here, appellant's gang membership was admissible to prove motive. The evidence showed that appellant, Corey Smith and Lorenzo Smith were all members of the Six-Deuce Bloods(Tr.257-259). The victim had been a witness against Corey and Lorenzo Smith in a previous case, in which both Smith brothers eventually pled guilty and received prison sentences(Tr.269-275). These events led appellant to conclude that the victim was "soft" and a "snitch"(*see* Tr.283). That appellant killed the victim in retaliation for the victim's actions against his fellow gang members was shown by the testimony of Evelyn Carter, who testified that appellant had told her(the day after the murder) that he felt "good" about killing the victim because the victim had gotten his "homies in trouble"(Tr.282-283,288). Appellant told Carter some of the "details," and Carter understood that appellant was referring to Corey and Lorenzo Smith(Tr.283). Under such circumstances, evidence of appellant's gang membership legitimately tended to prove appellant's guilt. *See State v. Seddens*,878 S.W.2d 89,92-93(Mo.App.E.D.1994)(evidence that the defendant "flashed a Bloods sign" and was wearing red, along with testimony about the "the practices, symbols, terminology and history of street gangs" was relevant to prove that "the motive for the shooting was gang rivalry"); *State v. Williams*,18 S.W.3d 461,467-468(Mo.App.E.D.2000)(evidence that the defendant was involved in other gang-related shootings was relevant to show the defendant's motive in committing the charged offenses); *see generally Dawson v. Delaware*,503 U.S. 159,167(1992)("we conclude that Dawson's First Amendment rights were violated by the admission of the Aryan Brotherhood evidence in this case, because the evidence proved

nothing more than Dawson's abstract beliefs"); *State v. Driscoll*,55 S.W.3d 350,354-355(Mo.banc2001)(discussing whether membership in the Aryan Brotherhood was admissible to show motive and concluding, under the facts of that case, that the link was too tenuous).

Appellant's gang membership was also admissible to provide a complete and coherent picture of the crime. "The general ban on evidence of uncharged crimes or wrongful acts does not bar evidence of the circumstances or the sequence of events surrounding the offense charged." *State v. Wolfe*,13 S.W.3d 248,262(Mo.banc2000). "This evidence is admissible to present a complete and coherent picture of the events that transpired." *Id.*

Here, appellant's gang membership provided a motive, but it also tended to explain why appellant – in broad daylight, and in the presence of several possible witnesses – believed that he could, with impunity, stand over the defenseless victim and fire two more shots into the back of the victim's neck. A killer will generally act in secret to avoid the consequences of the law, but as is commonly known, there are killers who believe, based on their status or power or position(e.g., in a gang), that they are untouchable. Thus, here, where appellant did not act in secret, it was reasonable to infer that appellant believed he was untouchable, i.e., that appellant was relying on his membership in the Six-Deuce gang to provide protection and shield him from the consequences of the law. This was an important fact that completed the picture and made appellant's actions more understandable. Indeed, the prosecutor argued as much in closing argument, saying, "he killed this young man in broad daylight in front of all these witnesses because he thought he was scary enough that

no one would dare testify against him after they saw him execute a witness"(Tr.476).

In short, this was a gang-related murder, and appellant's membership in the gang was admissible both to show his motive and to provide a complete and coherent picture of the crime. Indeed, inasmuch as the murder was committed in broad daylight and in the presence of several potential witnesses, appellant's gang membership, aside from showing appellant's motive, legitimately tended to prove why appellant thought he could commit murder with impunity, and it explained why witnesses would be reluctant to come forward.

Appellant acknowledges that gang membership can be admissible, but he asserts that "[t]he State simply presented insufficient nexus between gang membership and the crime to support the admission of this highly prejudicial evidence"(App.Br.90-91). He points out that there was no evidence that the other shooter, Michael Douglas, was also a member of the Six-Deuce Bloods; that there was no evidence of "gang signs" or "gang colors;" that there was no evidence that he or Douglas said "anything gang-related at the time of the shooting;" and that there was no "expert testimony about the Six Deuce Bloods to explain that [appellant] would have been obligated to shoot [the victim], or would have gained prestige in the gang by doing so"(App.Br.91).

But the absence of additional evidence showing a connection to gang activity does not change the fact that appellant admitted he was a member of a gang, that appellant and the Smith brothers were part of the same gang, and that appellant – the day after the murder – told his girlfriend that he felt good about killing the victim because the victim was a "snitch" who had gotten his "homies"(the Smith brothers) "in trouble." This was a sufficient nexus

to tie appellant's actions to his gang membership, for it legitimately tended to prove why *appellant* would either act together with Douglas or recruit Douglas to assist with the murder.

Appellant argues the evidence was unduly prejudicial – that the state could have shown his motive by simply presenting evidence that he and the Smith brothers were friends or "homies"(App.Br.91-92). But that would have stripped the evidence of much of its *probative* value. Indeed, it was precisely *because* appellant and the Smith brothers shared the peculiarly strong bond of gang membership that the evidence legitimately tended to provide a plausible motive for murder. Moreover, as discussed above, appellant's gang membership was not relevant only to show appellant's motive; it also provided a complete and coherent picture of the crime.

2. Evidence of threats

Appellant next asserts that "the State repeatedly elicited testimony that [he] or perhaps others acting on his behalf had threatened and tampered with witnesses"(App.Br.93-94). But this assertion is without merit – both because the state did not repeatedly elicit evidence of threats(indeed, some of the evidence was specifically elicited by appellant) and because the evidence the state elicited legitimately bore upon the credibility of Mark Silas.

a. Testimony of Mark Silas

On direct examination of Mark Silas, the prosecutor attempted to elicit Silas' eyewitness account of the murder(*see* Tr.33-38). But Silas was unwilling to recount the events that he had previously – in a taped statement made on the day of the murder – described to the police(*see* Tr.33-42). Indeed, contrary to his earlier statement to the police,

in which he plainly described the shooting, Silas essentially recanted and said that he had not seen who fired the shots(*see* Tr.38;State'sEx.78-C).

During a recess, the prosecutor attempted to refresh Silas' recollection by playing the tape, but Silas, even immediately after listening to the tape, claimed(back in the presence of the jury) that he could not recall what he had said to the police(Tr.42-47). After further fruitless questioning, the prosecutor was granted leave to treat Silas as a hostile witness(Tr.49-52). Silas adamantly continued to insist that he had not seen the actual shooting, and that he had no recollection of what he had told the police(Tr.53-55).

The prosecutor then asked Silas the following questions, which were designed both to show that Silas was a reluctant witness and to explain why Silas might have recanted his testimony(i.e., because Silas was afraid for his life):

Q (By [the prosecutor]) All right. Let's go back a couple months. My investigator served you with a subpoena for a deposition in this case, didn't he?

A. Yeah

Q And you didn't show up for that deposition. Is that correct?

[Defense counsel]: Judge, objection.

[Silas]: I don't remember.

[Defense counsel]: It's not relevant.

[The prosecutor]: It goes to his – I'm sorry.

THE COURT: The objection will be overruled.

Q (By [the prosecutor]) You didn't show up for that deposition, did you.

A. No.

Q Why didn't you show up for the deposition?

[Defense counsel]: Objection. This is not relevant.

[Silas]: I had stuff to do. I don't remember. I could have been at work. Anything.

Q (By [the prosecutor]) Didn't you tell my investigator that you didn't want to come in in this case because you didn't want to get killed?

[Defense counsel]: Objection.

[Silas]: No.

[Defense counsel]: Completely improper question.

THE COURT: Sustained.

[Defense counsel]: I ask that the jury be instructed to disregard.

THE COURT: The last question will be stricken. Ladies and gentlemen, you'll disregard the last question.

Q (By [the prosecutor]) Did you ever explain to my investigator why you didn't want to come in on this case?

A. No.

Q You never explained to him any reason why you don't want to be here today?

A. I just told him I didn't want to be here.

Q And it's true you don't want to be a witness in this case today?

A. No.

Q And if you were not in custody, you would not be here today. Is that fair to say?

A. Yes.

Q And we served you with another subpoena for another deposition after you didn't show up for the first one. Is that correct?

A. I only got two subpoenas: the first one and this one that you got me here now for.

Q We were only able to take your deposition because we ambushed you at work. I showed up, defense attorney showed up and a court reporter. And we took you into a conference room when you got off your shift. And that's the only way we could get you to give a deposition in this case. Correct?

A. No.

Q Isn't that what we did?

A. That's what you did, but that's not – you could have found me. You know where I stay.

Q Would you have voluntarily come in for a deposition had we not shown up at your work and surprised you at the end of your shift?

A. No. Probably not.

(Tr.55-58). Silas then continued to claim that he could not recall anything he had said in his taped statement(Tr.58-60).

Later, still on direct examination,[11] and after Silas had continued to claim that he could not recall what he had told the police, Silas was questioned as follows:

Q Now, when you – last Friday you talked to my investigator, Ed McGee. Is that correct?

A. Yes.

Q And did you tell my investigator why you did not want to testify in this case?

A. I don't remember.

Q You don't remember telling my investigator why?

A. No.

Q Do you have a family, Mr. Silas?

A. Yes.

Q How many children do you have?

A. Two.

Q What's the age of the oldest?

---

[11] Silas' direct examination was interrupted when he invoked the Fifth Amendment(Tr.60). It resumed after he had had an opportunity to consult with counsel(Tr.194-195).

A. Two

Q Are you working currently?

A. Yes.

Q Where do you work?

A. It don't have anything to do with the case.

Q You don't want to answer that question?

A. No.

Q If I asked you where you lived, would you tell me?

A. No.

(Tr.197-198). Then, on re-direct examination, after defense counsel elicited that Silas did not "want to be involved," but that Silas was "not lying," "whatever [he] may have said to the police in this case earlier"(Tr.205), the prosecutor asked the following:

Q Why don't you want to be involved? Tell this jury why you don't want to be involved.

A. I just don't want to be involved.

Q Why is that?

A. Because I have a family. I have other stuff to be involved in.

(Tr.206). With regard to preservation, because there was no objection to any of the challenged testimony(with the exception of the objection that was sustained), because there was no further request for relief after the court sustained the one objection that was made and instructed the jury to disregard, and because this claim was not included in appellant's

motion for new trial(L.F.507-546), appellant's claim can only be reviewed for plain error.

As for Silas' testimony that "No," he had not told the investigator that he did not want to testify because he was afraid of being killed, this was not evidence of a threat made by anyone. To the contrary, Silas claimed that he had never expressed any such fear, and he offered no testimony that appellant or anyone else had ever threatened him. Indeed, even if the jury believed that Silas was lying when he said "No," evidence that Silas feared being killed was not necessarily evidence that any threat had been made. Silas – to the extent that he believed he might be killed if he testified – may have simply been expressing the rational fear of any person who testifies against a cold-blooded executioner.

Additionally, with regard to Silas' testimony that he had not expressed concern over being killed, it cannot be said that the trial court plainly erred in admitting the testimony. To the contrary, the trial court *sustained* appellant's objection and instructed the jury to disregard(Tr.56-57). In short, the trial court *did not* admit this challenged bit of evidence, the relief granted was sufficient to remove any prejudice, and appellant requested no further relief. Accordingly, this claim should be denied. *State v. Thompson*,985 S.W.2d 779,787(Mo.banc1999)("Generally, sustaining a defendant's objection and admonishing the jury to disregard an improper reference [to an uncharged crime] suffices to cure any error of this sort."); *State v. Noble*,591 S.W.2d 201,206(Mo.App.S.D.1979)(court's remedial action, especially in light of the strong evidence of guilt, was sufficient to remove any prejudice from witness' testimony that "The reason I don't(sic) come forth with the direct statement before is because I have been getting telephone calls threatening my life.").

With regard to the remainder of Silas' testimony(or, indeed, with regard to *all* of the challenged testimony), it is plain that Silas never testified that anyone had ever threatened him. Rather, as stated above, the prosecutor's questions were designed to show both that Silas was a reluctant witness and to explain why Silas had had a change of heart and decided not to cooperate with the prosecution(i.e., because Silas feared for his life and the well being of his family, regardless of whether anyone had actually communicated a direct threat). This was a proper line of questioning.

"Generally, anything 'having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness, including the surrounding facts and circumstances, is proper to be shown and considered in determining the credit to be accorded' the testimony of a witness." *State v. Allen*,714 S.W.2d 195,199(Mo.App.S.D.1986). "A witness is subject to impeachment by a showing of a motive for the witness's testimony which might bear on his credibility." *State v. Mercer*,611 S.W.2d 392,396(Mo.App.S.D.1981).[12] "A witness may be cross-examined as to whether he has testified as the result of duress or fear, or as to whether he has been influenced or tampered with." *Id.* "A party may prove the motives operating upon the mind of a witness by any competent evidence." *Id.* "The cross-examiner is allowed great latitude in questioning a witness to ascertain his motive for testifying." *Id.*

Here, where the state was confronted with a hostile witness who had no desire to testify, and who had essentially recanted his earlier statement to the police, the state was

[12] As outlined above, Silas was found to be a hostile witness(Tr.52).

entitled to elicit evidence that had a legitimate tendency to explain the witness' recent change of heart and the witness' reluctance to cooperate with law enforcement. *See State v. Mercer*,611 S.W.2d 395-396(witness who denied that his favorable defense testimony was prompted by fear of the defendant was properly impeached with his previous testimony that he had overheard a threat that his "house would go up in two weeks if charges were not dropped"); *State v. May*,587 S.W.2d 331,335-336(Mo.App.E.D.1979)("The fact that defendant could not be linked to the threats, did not eradicate fear as the motive for the witness' inconsistent statements. The purpose of the testimony was not to show a consciousness of guilt but to explain the matters brought out on cross-examination."); *see also State v. Morrow*,968 S.W.2d 100,113(Mo.banc1998)(a witness' "feelings of guilt and remorse were relevant to explain why she failed to tell the police" in her initial statement about certain facts); *State v. Allen*,714 S.W.2d at 199(prosecutor properly elicited fact that one witness had only allowed another witness to talk to the prosecutor after the prosecutor had agreed to waive the death penalty against the witness' mother).

Citing *State v. Hicks*,535 S.W.2d 308(Mo.App.Spr.D.1976), appellant argues that evidence of threats against witnesses – when those threats cannot be tied to the defendant – are inadmissible(App.Br.96). But appellant's reliance upon *Hicks* is misplaced. In *Hicks* the prosecutor outlined in opening statement that a witness had received a threat of being blown up, and then the prosecutor elicited testimony that the witness had, in fact, been threatened over the telephone. *Id.* at 310. The prosecutor's purpose in eliciting the evidence was to show the defendant's consciousness of guilt. *Id.* The Court of Appeals held, after pointing out that

the prosecutor had no basis for believing that he could connect the threats to the defendant, that the trial court should have granted the defendant's request for a mistrial instead of simply sustaining the objection and instructing the jury to disregard. *Id.* at 310-314.

The case at bar is plainly different. First, the claim was not preserved, and appellant never asked for a mistrial. Second, the state did not elicit evidence of specific threats. Third, the evidence in question was not elicited from a witness who testified against the defendant and who offered the testimony to show appellant's consciousness of guilt; rather, as discussed above, the evidence was elicited to explain why Silas – a hostile witness – had had a change of heart and decided to recant his earlier statement to the police and *not* testify against appellant. In short, unlike *Hicks*, the evidence here plainly bore upon Silas' credibility and was properly admitted.

Finally, appellant claims that the prosecutor exacerbated the prejudice that allegedly arose from Silas' testimony because he argued in closing that Silas was afraid of appellant, and that Silas feared that appellant would harm his children(App.Br.97-98). But appellant's argument is not well taken. The evidence plainly provided a basis for reasonably inferring that Silas changed his testimony because he was afraid and concerned for the well-being of his family, particularly his children.[13] Thus, in arguing Silas' credibility, the prosecutor's

[13] The prosecutor did not argue that appellant would harm a two-year-old child; rather, when viewed in context, the evidence and the prosecutor's arguments were designed to show that Silas was concerned about whether *he* would be there for his children(*see* Tr.206, "[I

arguments were permissible. *State v. Petty*,967 S.W.2d 127,141-142(Mo.App.E.D.1998)(the prosecutor properly argued, based on evidence that witnesses had been reluctant, that the witnesses were afraid of the defendant); *State v. Billington*,744 S.W.2d 833,836(Mo.App.E.D.1988)(where the victim had testified about fears of retribution for testifying, it was proper for the prosecutor to argue that fact in closing, in an attempt to bolster the victim's credibility).

b. Testimony of Gregory Hazlett

Appellant also challenges evidence that defense counsel elicited on cross-examination of Gregory Hazlett(App.Br.95-96).

Q Mr. Hazlett, you have a conviction for unlawful use of a weapon. Is that correct?

A. Yes.

Q And that happened when?

A. July 27, after I was threatened, that's when I start carrying it.

Q So you only started carrying guns and using guns when?

A. I've been using guns all my life. I hunt, fish, outdoorsman, but I got caught with a .9 millimeter pistol, and that's what my conviction was for.

---

don't want to be involved,] Because I have a family;" Tr.477, "He [Silas] has children now, two of them.").

Q Okay.

A. After Todd's murder, I got scuttlebutt that I was going to be killed.

Q Okay. [Appellant] never threatened you, has he?

A. I don't know. Not personally.

Q And you're saying it was only in July when you got threatened about [appellant's] case that you started using a gun?

A. Yeah. Yes.

(Tr.102-103).

As is plainly evident, this testimony was specifically elicited by defense counsel. And, contrary to appellant's claim on appeal(App.Br.95-96), evidence of a threat was not simply "volunteered" by Hazlett. Counsel expressly sought to elicit that Hazlett had started to carry a gun after being threatened(Tr.102-103). Accordingly, appellant cannot assert error. "A defendant may not complain about evidence brought into the case by his lawyer's own questions or conduct." *State v. Kelley*,953 S.W.2d 73,89(Mo.App.S.D.1997)("It was defense counsel – not the prosecutor – who asked [the witness] if he had been specifically threatened by any person."). Moreover, where a defendant fails to object and actively joins in the presentation of evidence to the jury, he may not argue later that the admission of the evidence was error. *Id.*

And, as with the foregoing claim, because there was evidence of Hazlett's fear of being killed(and specifically of Hazlett's fear of appellant), it was proper for the prosecutor to argue those facts in closing. *See State v. Petty*,967 S.W.2d at 141-142; *State v.*

Billington,744 S.W.2d at 836. This claim should be denied.[14]

3. Evidence of uncharged crimes

Lastly, appellant argues that the trial court plainly erred in admitting impermissible evidence of uncharged crimes(App.Br.99-100). Appellant characterizes the evidence in question as evidence showing that he had had previous "Run-In's with the Law"(App.Br.99-100). But the evidence in question – a "wanted" poster, fingerprint card, and the "Book 'Em" database – was simply evidence that established appellant's identity(and presence at the scene), and none of it constituted clear evidence of uncharged crimes.

Generally, evidence of uncharged crimes, wrongs, or acts is inadmissible to show an accused is predisposed to criminal conduct. *State v. Goodwin*,43 S.W.3d 805,815(Mo.banc2001). Vague references to uncharged crimes do not violate this rule. *Id.* "Proffered evidence will run afoul of this rule if it shows that the defendant has committed, been accused of, been convicted of or definitely associated with another crime or crimes." *State v. Hornbuckle*,769 S.W.2d 89,96(Mo.banc1989).

Appellant first points to evidence that his photograph was on the wall at the Pine Lawn police station(App.Br.99). He points out that the photograph was a "Wanted" poster that contained his identifying information(App.Br.99). But this evidence did not constitute evidence of uncharged crimes. The jury was never told that the photograph was a "Wanted"

---

[14] The propriety of the prosecutor's closing arguments is discussed in greater detail in Point IV.

poster, and any potentially prejudicial information was redacted from the exhibit(Tr.41-42,296,302;State'sEx.75-A).[15] Thus, the jury was never informed that appellant had had a previous "run in" with the police. The fact that the picture was on the wall at the police station was not, in itself, evidence of an uncharged crime. Such a vague reference – without any reference to a specific bad act – did not run afoul of the rule against uncharged crimes. *See State v. Smith*,973 S.W.2d 548,549(Mo.App.E.D.1998)(evidence that defendant's photograph came from police "record room" did not constitute evidence of other crimes); *State v. Young*,943 S.W.2d 794,798-799(Mo.App.W.D.1997)(admission of a "mug shot" or an official police photograph, is not evidence of prior crimes unless there is also accompanying testimony that reveals prior arrests or convictions).

Appellant next points to a question wherein the prosecutor asked whether the fingerprint examiner had matched a latent fingerprint "with known prints that were on file for Vincent McFadden"(App.Br.100). The witness, however, did not testify that the prints were "on file;" rather, the witness simply stated that she had "matched [the latent fingerprint] with the fingerprint card bearing the name of Vincent McFadden"(Tr.213). Indeed, her carefully-worded answer seemed to indicate that she was not willing to say that she had appellant's fingerprints "on file"(*see* Tr.213). In any event, to the extent that this testimony suggested that the police had appellant's fingerprints "on file," such testimony was not

[15] It should be noted that the defense affirmatively waived any review of the admission of the photograph(Tr.296). *See State v. Mead*,105 S.W.3d 552,556(Mo.App.W.D.2003).

evidence of uncharged crimes. *State v. Morrow*,968 S.W.2d at 111-112("Fingerprint cards, in and of themselves, do not constitute evidence of a prior crime.").

Finally, appellant claims that an officer testified that he obtained appellant's photograph for use in a photographic line-up by using the police department's "Book 'Em System"(App.Br.100). But the officer did not expressly state that he obtained appellant's photograph from the Book 'Em System. Rather, the officer's testimony can be understood to mean that he obtained the other random photographs that he included in appellant's photographic line-up from the Book 'Em System(*see* Tr.415). The jury would not have necessarily understood this testimony to mean that appellant's photograph was already in the Book 'Em database. *Cf. State v. Quinn*,693 S.W.2d 198,199-200(Mo.App.E.D.1985)(the officer specifically testified that he obtained the defendant's photograph from "robbery books and my crime books").

The jury also would not have necessarily concluded that every photograph in the Book 'Em System was the photograph of a criminal. *Cf. id.*(the defendant's photograph came from the officer's "robbery books and . . . crime books"). There certainly was no testimony along those lines, and it is mere speculation to conclude that the jury reached that conclusion. Indeed, the jury could have easily concluded that the Book 'Em System was simply a tool used by the police to collect photographs for later use in line-ups, to enable the police to eventually "book" people who were identified in those line-ups. In short, any reference to an uncharged crime was so vague that it did not constitute evidence of uncharged crimes. *See State v. Morrow*,968 S.W.2d at 111-112(no evidence of uncharged crimes when a police

officer merely testified that he obtained the defendant's name for the fingerprint card from an old "booking sheet"); *State v. Smith*,973 S.W.2d at 549(defendant's photograph came from police "record room").

IV.

The trial court did not plainly err as to any of the various claims appellant asserts as to guilt and penalty-phase closing arguments.

Appellant claims that the trial court abused its discretion or plainly erred in overruling objections or failing to intervene *sua sponte* at various points during the state's guilt and penalty-phase closing arguments(App.Br.102). None of these claims was preserved.

A. The Standard of Review

Courts especially hesitate to find plain error in the context of closing argument. *State v. Edwards*,116 S.W.3d 511,536(Mo.banc2003). A conviction will be reversed based on plain error in closing argument only when it is established that the argument had a decisive effect on the outcome of the trial and amounts to manifest injustice. *Id.* at 536-537.

B. Guilt-phase arguments

1. "send a message"

Appellant first asserts that the prosecutor's send-a-message argument was improper because it inflamed the jury's passion or prejudice and diverted it from deciding guilt based on the facts of the case(App.Br.104). The prosecutor, after pointing out that this case involved the murder of a young man who had been a witness against two gang members(Tr.474), made the following argument:

> Your verdict will send a message. Your verdict will send a message to them and to all the people in St. Louis County, and specifically in Six-Deuce territory:

> That if you come in and you testify and you tell the truth, the police will do their job, the prosecutor will do his job, and the jury will do their job, and you can get justice in Clayton.
>
> If you just say, I don't care, what you're saying to them – if you believe them, what you're saying is, Don't bother us with your problems. Settle it your own way, on your own time in your neighborhood.
>
> And we can't do that. Pine Lawn is in St. Louis County. It is our community.

(Tr.475). There was no objection to this argument, and no challenge to this argument was raised in appellant's motion for new trial(Tr.475; L.F.507-546).

This argument was proper. "The prosecutor is allowed to argue that the jury should send a message that criminal conduct will not be tolerated." *State v. Phillips*,940 S.W.2d 512,520(Mo.banc1997); *State v. Smith*,944 S.W.2d 901,919(Mo.banc1997). "A prosecutor may argue the need for strong law enforcement, the prevalence of crime in the community, and that conviction of the defendant is part of the jury's duty to uphold the law and prevent crime." *State v. Roberts*,948 S.W.2d 577,593(Mo.banc1997). "The prosecutor may urge the jury to consider the effect upon society if the law is not upheld." *Id*.

Here, the prosecutor's argument was within these bounds. It merely pointed out that the jury's verdict would convey a message to the community, specifically, that crime would not be tolerated, or, perhaps more precisely, that crime would not be allowed to control the lives of people living in St. Louis County(and particularly in Six-Deuce territory). This type

of argument has been repeatedly upheld. *See State v. Smith*,944 S.W.2d at 919("People need to know we will not stand for brutal, senseless murders with aggravating circumstances. We will not standing [sic] for you killing an old woman just because she's there, just because she's a witness.").

Appellant asserts that the prosecutor's argument implied that the jury had "a role other than as the impartial arbiter of the facts"(App.Br.104). But throughout closing argument, the prosecutor consistently argued the evidence and reasonable inferences from the evidence and urged the jury to find appellant guilty based on the evidence(Tr.448-477). The prosecutor's subsequent comments about the message that would be sent by the verdict was not an invitation to disregard the evidence.

Appellant also asserts that the prosecutor's comments suggested to the jury that "they were uncaring and that a not guilty verdict would result in the people of Pine Lawn resorting to street justice"(App.Br.102,104). But this is an exaggeration. The prosecutor was simply arguing against nullification and in favor of upholding the law. Additionally, even if the argument suggested that people would resort to street justice, the argument was proper. *State v. Roberts*,948 S.W.2d at 593("The prosecutor may urge the jury to consider the effect upon society if the law is not upheld."); *State v. Simmons*,944 S.W.2d 165,181-182(Mo.banc1997)(prosecutor argued, "This struggle goes to what goes on every day in society. We have to take a stand and take control of our streets. [They're our] streets, [they're our] homes. If we can't be protected in our homes, we can't be protected anywhere.").

Appellant passingly acknowledges Missouri's law on the subject of send-a-message

arguments, but, citing various cases from other jurisdictions, he asserts that "send a message" arguments are not proper(App.Br.104-106, citing, e.g., *Payton v. State*,785 So.2d 267,270(Miss.1999)("Mississippi jurors are not messenger boys."). But these cases are inconsistent with this Court's precedents, and they should not be followed.

It should not be assumed, as appellant urges, that a jury will understand(and accept) a send-a-message plea as an invitation to abandon its role, disregard the evidence, and simply decide the case based on the general need to inform the community that crime will not be tolerated. To indulge in such assumptions bespeaks a general belief that jurors are ultimately incapable of understanding and carrying out their duties. But that is plainly not the case. *See generally State v. Clayton*,995 S.W.2d 468,479(Mo.banc1999)("the instructions given to the jury safeguard against harm that might otherwise result from exaggerated closing argument by either prosecutor or defendant"); *State v. Madison*,997 S.W.2d 16,21(Mo.banc1999)("a jury is presumed to know and follow the instructions").

It should be noted that appellant, in making this argument, cites to a United States Supreme Court decision, *Shannon v. United States*,512 U.S. 573(1994). But appellant's selective quotations from that case should not be applied to the question here. The Court in *Shannon* was not examining the propriety of closing arguments; rather, the Court was examining whether a trial court should instruct the jury about specific consequences that flow to a defendant after an NGRI verdict. *Id.* at 579. The rule described there applies to jury instructions, and it is intended to ensure that jurors determine guilt based on the facts, as opposed to the type of sentence the jury might desire.

Had the mind of the Court been engaged in analyzing the propriety of a prosecutor's closing argument(and the permissible bounds of persuasion), it likely would have turned to a precedent that this Court has occasionally turned to in analyzing such claims: *Berger v. United States*,295 U.S. 78(1935). There, the Court stated:

> while [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id. at 88(emphasis added). It is precisely this balance between allowing "hard blows" and disallowing "foul ones" that this Court has struck. *See e.g. State v. Link*,25 S.W.3d 136,147-148(Mo.banc2000).

2. "do your job"

Appellant also asserts that the prosecutor improperly argued that it was the jury's "job" to reach a guilty verdict(App.Br.104). He bases this claim upon the following:

> The witnesses are the people that happen to be there when he chose the victim, at the time he chose the victim, and he chose the witnesses that were there. And we brought them in. They told you what happened.
>
> The police did their job. I did mine. I ask for you to do your job.
>
> Please, I pray, find this man guilty of this deliberate killing of an innocent man who just had – all he did was testify against one of his friends. Please find him guilty. Thank you.

(Tr.521-522). There was no objection to this argument, and no challenge to this argument was raised in appellant's motion for new trial(Tr.475; L.F.507-546).

This argument was proper. "A prosecutor may argue . . . that conviction of the defendant is part of the jury's duty to uphold the law and prevent crime." *State v. Roberts*,948 S.W.2d at 593. A prosecutor may make "a legitimate appeal to the jury to uphold the law and to do its duty." *State v. Schwer*,757 S.W.2d 258,264(Mo.App.E.D.1988).

In *Schwer*, for example, the prosecutor argued, "they can do their job; we can do our job, but it means nothing unless you do your job, too." *Id.* The Court upheld this argument because it was a legitimate appeal that the jury carry out its duties. *See State v. Roberts*,948 S.W.2d at 593(the prosecutor properly argued: "You are the last line of protection in this system; it is up to you whether you protect the citizens of St. Louis County or you don't"); *State v. Ramsey*,864 S.W.2d 320,332(Mo.banc1993)(prosecutor argued, "[O]ur job is to hold Roy Ramsey accountable based on the evidence and the reasonable inferences and the instruction of the law.").

In short, the prosecutor made a legitimate appeal that the jury carry out its duties. That the prosecutor also asked the jury to find the defendant guilty does not mean that the jury was subjected to any undue pressure to convict out of a sense of duty, or to avoid shame, or out of any misunderstanding of its duty under the law. The jury would have understood that the prosecutor was simply advocating for the verdict that the state believed was warranted by the evidence. *Cf. United States v. Young*,470 U.S. 1,18(1985).

3. Comments about witnesses' fears

a. comments about Mark Silas

Appellant next contends that the state improperly argued facts not in evidence, or that the state drew inferences that were not supported by the evidence(App.Br.106). As discussed above, in Point III, the evidence showed that Mark Silas had, on the day of the murder, given a taped statement to the police that implicated appellant(*see* State'sEx.78-C). At trial Silas testified that he had not seen the murder, and he adamantly refused to acknowledge any incriminating aspect of his taped statement(Tr.33-60,197-198). The prosecutor argued:

> By testifying that he didn't see who shot him, Mark Silas is trying to get – remove himself from the situation. That's obvious. He's trying to get himself out of being a witness, because he saw what happens when somebody testifies against a Six-Deuce member.
>
> * * *
>
> He saw what happens if you come in and you testify. He saw it with his own eyes. So he's saying, Well, yeah, the defendant's there, but I didn't see what he did. I ran.

(Tr.452)(emphasis added). The prosecutor continued:

> [The police] have already interviewed [Silas] once, got him in his taped statement, and concluded it by 8:05 p.m. that night. And you know I asked him – I asked him, Mr. Silas, where do you work? And he wouldn't tell me.
>
> He knows I know where he works. . . . He's not afraid of me. He's not afraid of you. He's afraid of that man right there. He's afraid of what's going

to happen to him if he gets out.

I asked him, Where do you live? He wouldn't tell me. He's the only witness where we asked where he lived. I knew he's not going to tell me. He's noting [sic] going to say it in front of him where he lives.

[DEFENSE COUNSEL]: Judge I object to specifically implying that Mr. McFadden made threats in this case.

THE COURT: Objection will be overruled. Ladies and gentlemen, you'll be guided by your recollection of the evidence and the reasonable inference to be drawn from the evidence. You may proceed, counsel.

[THE PROSECUTOR]: I'm not saying the defendant threatened him. He saw the defendant murder his friend. He knows he's dangerous. He knows he's a cold-blooded killer, because he saw him.

(Tr.454-455). Finally, in wrapping up his closing argument, the prosecutor argued:

They know what the stakes were when they came in. Mark Silas didn't have children when he gave that statement the night of the murder. The defendant wasn't in the same room as him when he gave that statement. He has children now, two of them. Young ones.

You know why he didn't want to testify about what he did. He doesn't have to say a word. Mark Silas saw it.

(Tr.477). These were proper arguments.[16]

The prosecutor is "entitled to argue reasonable inferences from the evidence." *State v. Edwards*,116 S.W.3d at 537. "This includes 'the right, within the limits of closing argument, to provide the State's view on the credibility of witnesses.'" *Id.*

Here, the evidence showed that Silas was a reluctant and hostile witness. Silas adamantly refused to acknowledge the content of his earlier taped statement to the police(even after it was played for him during a recess), and he offered testimony that essentially recanted his earlier account(Tr.33-60,197-198;State'sEx.78-C). In stark contrast, Silas' earlier account to the police plainly incriminated appellant(State's Ex.78-C). It was in that context that the prosecutor elicited that Silas had not willingly been deposed, that Silas did not want to testify, that Silas had two very young children, that Silas was not willing to testify about where he worked or lived, and that Silas did not want to be involved in the case because he had a family(Tr.55-58,197-198).

From this evidence, it was reasonable for the prosecutor to infer that Silas was trying to remove himself from the case, and that Silas had changed his story and refused to testify

[16] Although defense counsel lodged an objection to one part of this argument, the claim was not raised in appellant's motion for new trial(L.F.507-546). In fact, none of the remaining guilt-phase challenges were preserved for review, either because there was no objection or because the claim was not raised in appellant's motion for new trial(or both).

out of fear of retribution or death.[17] There is no question, in light of Silas' earlier statement to the police, that Silas knew exactly what appellant was capable of doing, and it was reasonable to infer that Silas also knew, as is commonly known, that murderers can(and do) exact retribution against those who testify against them(either personally or through their associates).

Appellant argues that the prosecutor's comments misstated the evidence because there was no evidence Silas "knew what [appellant's] alleged motive was"(App.Br.107-108). But, while there was no direct evidence that Silas knew appellant's motive, it was reasonable to infer that Salis had deduced exactly why the victim was killed. Indeed, there is no reason to believe that appellant's motive was, or remained, a secret. To the contrary, when appellant's girlfriend asked appellant about the murder, appellant readily told her that he felt good about the murder, that he had killed the victim because the victim was "soft," that he had killed the victim because the victim had gotten his "homies" into trouble, and that he was going out to celebrate(Tr.282-283,288). These were the brazen revelations of a criminal who believed that he was untouchable, and it was reasonable to infer that they were the kinds of revelations that

---

[17] As noted above, the prosecutor did not argue that appellant would harm a two-year-old child; rather, when viewed in context, the evidence and the prosecutor's arguments were designed to show that Silas was concerned about whether *he* would be there for his children(*see* Tr.206, "[I don't want to be involved,] Because I have a family;" Tr.477, "He [Silas] has children now, two of them.").

would have been published, if for no other reason than to intimidate the community and to maintain appellant's untouchable status. Indeed, there was other evidence that Gregory Hazlett, another witness, had heard rumors that he was going to be killed(Tr.102-103).

Even if the prosecutor's comments went too far, there is no possibility that the prosecutor's comments resulted in manifest injustice. The gravamen of the prosecutor's arguments was not that Silas knew precisely why appellant had killed Todd Franklin, but that Silas was terrified of testifying against a cold-blooded killer. This was an argument that was wholly supported by reasonable inferences from the evidence, and there is no reason to believe that any alleged exaggeration in the prosecutor's closing comments had a decisive effect. *State v. Clayton*,995 S.W.2d at 479.

b. Comment that the victim knew "how dangerous these people are"

Appellant also challenges a comment the prosecutor made about knowledge the victim had about Lorenzo and Corey Smith's dangerous natures(App.Br.106).

> Todd Franklin was murdered for the sole reason because he had the audacity to come to Clayton and testify truthfully against two people who victimized him in Pine Lawn. That's why he was executed.
>
> * * *
>
> He stood up and he told the police what Lorenzo and Corey Smith did to him. And he came in for the deposition knowing how dangerous these people are. He lives in that area. He lives in Six-Deuce territory. Right in the heart of it: 6219. Six Deuce: 6219.

(Tr.457). This was proper argument.

As stated above, the prosecutor is "entitled to argue reasonable inferences from the evidence." *State v. Edwards*,116 S.W.3d at 537. Here, the prosecutor merely argued facts that had been presented to the jury. It was reasonable to infer that the victim, when he testified against the Smith brothers, knew exactly how dangerous they were. He had, after all, been victimized by them in the earlier incident(Tr.269-270). And, contrary to appellant's characterization of the prosecutor's comments, this comment was not made to show that appellant was a criminal simply by virtue of his gang membership(and association with the Smith brothers); rather, in making reference to the criminals who had previously victimized Todd Franklin(the Smith brothers), the prosecutor was simply reminding the jury of the motive that underlay appellant's crime and highlighting just how unjustified the murder of Franklin was(a reality that stood in stark contrast to appellant's insinuation that the murder was justified by Franklin's "soft[ness]").

c. Comment about appellant's belief that witnesses would be afraid to testify

Appellant also challenges an argument that the prosecutor made about *appellant's* state of mind(App.Br.106-107).

> Please, please find him guilty, because he is, because he killed this young man in broad daylight in front of all these witnesses because he though he was scary enough that no one would dare testify against him after they saw him

execute a witness.

[DEFENSE COUNSEL]: Objection to what Mr. McFadden thought and that Mr. McFadden is implied that he threatened someone.

THE COURT: The objection will be overruled. Ladies and gentlemen, you'll be guided by your recollection of the evidence and the reasonable inferences to be drawn from the evidence.

(Tr.476). This argument, too, was proper.

As the record shows, appellant committed murder in broad daylight, in the presence of several people(Tr.76-88,116-122,200-202,264;State'sEx.78-C). This brazen conduct, especially in light of appellant's gang membership, gave rise to a reasonable inference that appellant believed he was untouchable, i.e., that, as a member of the Six Deuce Bloods he could act with impunity in the neighborhood. Thus, it was reasonable to infer from the evidence that appellant believed he was "scary enough" to intimidate everyone.

d. Comment about Glenn Zackary

Appellant also challenges a comment made on rebuttal about Glenn Zackary's late disclosure to the police(App.Br.107).

Zackary, [defense counsel] makes a big deal about Zackary not coming forward. It's a lot more dangerous for his cousin if his cousin is the sole cooperating eyewitness. It's a lot easier to kill one guy, one witness, and get away with it. It's hard if you know there are two coming in.

(Tr.509). This was proper argument, made in direct response to arguments made by defense

counsel.

In closing argument, defense counsel had argued:

> what about this other guy, Glenn Zackary? That's his [Gregory Hazlett's] cousin. Now, you want to talk about it's not okay for witnesses to come in and lie? This is Glenn Zackary.
>
> Ten months after this happens, Mr. Zackary marches down to the police station, goes in and tells them a complete pack of lies.
>
> * * *
>
> Why would he march into the police station and tell them a bunch of lies about what he knew in this case? Why would he do that, especially if there are supposedly threats against witnesses?
>
> * * *
>
> He's out on the street this whole time. Why would he do that? Obviously there's an agenda going on here. We don't know what it is.

(Tr.490,495).

As for why Zackary had not come forward sooner, the prosecutor had elicited that Zackary had not wanted "to be involved initially"(Tr.151). This begged the question of why Zackary had changed his mind, and, in closing, defense counsel attempted to capitalize on that unanswered question with the foregoing arguments. But in so doing, defense counsel opened the door to the state's response.

"Considerably more leeway is granted when argument is retaliatory." *State v.*

Mease, 842 S.W.2d 98, 109 (Mo.banc 1992). Here, retaliation was particularly justified because it was defense counsel who had successfully *kept out* evidence that would have explained why Zackary chose to come forward in such a dangerous climate (*see* Tr.147-148). Indeed, in stating her objection, defense counsel stated that she expected Zackary to say, "I didn't come forward until my cousin had been threatened, and then I decided to come forward to be in solidarity with my cousin" (Tr.148). Thus, it was plainly disingenuous for counsel to later argue, "Why would he do that? Obviously there's an agenda going on here. We don't know what it is."

In short, the prosecutor's response to defense counsel's rhetorical question was proper. The evidence showed that Hazlett had heard rumors that he was going to be killed (Tr.102-103). The evidence also showed that Hazlett and Zackary were cousins (Tr.116). Because of their relationship, it was reasonable to surmise that Zackary would be concerned for Hazlett's well being, and that Zackary would be willing to aid his cousin. Moreover, as the prosecutor pointed out – based on simple common sense – it is harder to eliminate two witnesses than it is to eliminate one witness. Thus, it was not unwarranted to argue that Zackary had come forward in an attempt to protect his cousin.

e. Comment about the fears of citizens living in Six Deuce territory

Appellant next argues that the prosecutor improperly implied that the Six-Deuce Bloods were criminals (App.Br.107).

> I made a big deal about this being Six-Deuce territory. That's because of the fear involved with the law-abiding citizens that are stuck living there.

I don't mean to denigrate the whole area. I don't mean to say they are all criminals. There are good, hard-working people that live in Pine Lawn.

(Tr.510-511). This was proper argument.[18]

To the extent that this comment touched upon appellant's gang membership, there was certainly evidence of appellant's gang membership, and there was evidence that the murder took place in Six-Deuce territory. To the extent that appellant is taking issue with the prosecutor's suggesting that people in the neighborhood feared the Six-Deuce Bloods(App.Br.107), this was plainly a reasonable inference from the evidence. There was, for example, evidence that Hazlett was afraid of appellant, and that Hazlett did not talk to the police at the scene because he was afraid that it would get out that he was "the one who told on him"(Tr.112,414). Other evidence showed that witnesses were reluctant to come forward, and that they were reluctant to testify against appellant(Tr.33-60,151). It was also apparent that appellant believed that he could act with impunity in the community – a belief that can be reasonably attributed to appellant's belief that he and his gang had intimidated the community into submission.

To the extent that appellant is taking issue with the prosecutor's suggestion that the Six-Deuce Bloods were criminals, the evidence showed that some of the Six-Deuce Bloods were, in fact, criminals. This was shown by evidence of the Smith brothers' prior convictions

---

[18] Again, there was no objection to this comment, and the claim was not raised in appellant's motion for new trial(L.F.507-546).

and by appellant's complicity in the cold-blooded murder of Todd Franklin – a murder that was prompted by Franklin's having testified against the Smith brothers. Thus, to the extent that the prosecutor branded the Six-Deuce Bloods as criminals, it was a brand that was supported by the evidence. But it was not a brand that was applied indiscriminately to show appellant's criminal propensity. Rather, as discussed above, appellant's gang membership was used to show his motive and to provide a complete and coherent picture. It was never suggested simply in the abstract that Six Deuce Bloods were criminals, and that appellant, simply because he was a Six Deuce Blood, was more likely to commit murder.

f. Comments about Gregory Hazlett

Appellant next contends that the prosecutor made an improper comment related to Gregory Hazlett(App.Br.107).

> Defense counsel implies that there were deals with Mr. Hazlett.
>
> I'll tell you what. I'd rather have him in custody. That man wouldn't have to worry at night if he gets killed. I won't have to worry as the months and the weeks approach in this case –
>
> [DEFENSE COUNSEL]: Objection to [the prosecutor's] characterization of worrying about his witnesses.
>
> THE COURT: The objection will be overruled.
>
> [THE PROSECUTOR]: They're implying I made a secret deal. They know it's not a deal.

(Tr.512-513). This was proper argument, made in response to arguments made by defense

counsel.

As stated above, "Considerably more leeway is granted when argument is retaliatory." *State v. Mease*,842 S.W.2d at 109. A prosecutor "is permitted to retaliate to an argument made by the defense 'even if the prosecutor's comment would be improper.'" *Aaron v. State*,81 S.W.3d 682,697(Mo.App.W.D.2002)(quoting *State v. Walls*,744 S.W.2d 791,798(Mo.banc1988)).

Here, although there was no evidence to support the allegation, defense counsel suggested in her closing that the prosecution had made some sort of secret deal with Hazlett to dismiss Hazlett's previously pending charges in exchange for his testimony(Tr.489-490). The state was entitled to respond to this baseless accusation. Thus, when the state pointed out that it would rather have Hazlett in custody to safeguard his life,[19] the state was simply pointing out that it made little sense for the state to make deals with Hazlett(and thereby keep Hazlett *out* of custody). In short, appellant invited this response, and it was not plainly erroneous to allow it.

4. The "B.S. alibi"

Finally, as to guilt-phase closing argument, appellant takes issue with the prosecutor's comment on the believability of his alleged alibi(App.Br.107). The prosecutor stated: "You don't just have to take the five eyewitnesses, five eyewitnesses plus the cigar, plus their B.S. alibi"(Tr.511). This argument, while perhaps somewhat indecorous, was otherwise proper.

[19] It must be noted that Hazlett *had* testified about a threat to his life(Tr.102-103).

It is entirely proper for the prosecutor to comment on the evidence, suggest reasonable inferences that can be drawn therefrom, and to disparage the credibility of the defendant's version of events. *See State v. Edwards*,116 S.W.3d at 538 In doing so, it is permissible for the prosecutor to "even belittle and point to the improbability and untruthfulness of specific evidence." *State v. Kreutzer*,928 S.W.2d 854,872(Mo.banc1996).

Here, the prosecutor had, in closing argument, commented extensively on the evidence that purported to support appellant's alleged alibi(Tr.466-471). The prosecutor concluded that discussion by arguing: "This is not an alibi. This is just a bunch of bologna, to put it politely. They're just trying to help their relative escape justice"(Tr.471). It was only later, on rebuttal, that the prosecutor labeled appellant's defense a "B.S. alibi"(Tr.511). Again, while perhaps somewhat indecorous, this argument was intended simply to summarize the prosecutor's earlier analysis; it was a comment on the credibility of appellant's alibi evidence, and it was intended to point out the improbability of appellant's alibi evidence. And, to that extent, the comment was proper. *See People v. Mitcham*,824 P.2d 1277,1314(Cal.1992)(it was a fair comment to argue: "I talked to you earlier about dazzling, you know, dazzle you with BS. Well, they can baffle you with BS; and that's what they're trying to do."); *Doty v. State*,820 S.W.2d 918,923(Tex.App.-Fort Worth 1991)(prosecutor said, "That's BS and you know it and I know it"); *see also State v. Weaver*,912 S.W.2d 499,513(Mo.banc1995)(calling the defense a "cock and bull story").

To the extent that this colloquialism failed to maintain the decorum of the court, respondent submits that it did not result in manifest injustice. Indeed, there is no reason to

believe that the prosecutor's comment had a decisive effect on the jury's verdict. *See State v. Condon*,789 N.E.2d 696,714-716(Ohio App. 1 Dist.2003)(in a case where the defendant had taken improper pictures of corpses, it was error, but not reversible error, when the prosecutor argued, "he has the audacity to come into this courtroom in front of you, in front of the relatives of these victims, and refer to this bullsh-- project as art"); *State v. Stewart*,514 N.W.2d 559,564(Minn.1994)(prosecutor's error in characterizing the defendant's testimony as "crap" was harmless); *People v. Clay*,463 N.E.2d 929,937(Ill.App.1984)(not reversible error for the prosecutor to characterize the defense case as "a ridiculous bunch of crap").

C. Penalty-phase arguments

Appellant contends that the prosecutor improperly stated his opinion that the death penalty was the appropriate sentence(App.Br.109-110).

> And all of you said individually to me and to defense counsel, in the appropriate case at the appropriate time you could render a death sentence if you thought it was appropriate.
>
> And *what other case other than this for a cold-blooded killer, an executioner, what other case than this is it appropriate?*
>
> [DEFENSE COUNSEL]: I'm going to object. That's improper closing argument.
>
> THE COURT: The objection will be overruled.

(Tr.1044-1045). In concluding his rebuttal, the prosecutor argued:

> *The only just verdict for a cold-blooded killer like him is death.*

If not him, who?

[DEFENSE COUNSEL]: Your Honor, I'm going to object. This is improper closing argument.

THE COURT: The objection will be overruled.

[THE PROSECUTOR]: *If not in this case, when?*

He earned it. He's worked at it. He's done everything he can to qualify for the death penalty. He's killed two people on two separate occasions both unarmed. The second one maybe because the first one felt so good.

Return a just verdict in this case.

(Tr.1066-1067)(emphasis added). Because the objections failed to state any legal grounds, this claim was not preserved for review.

In any event, these arguments were proper. "A prosecutor may not argue facts outside the record." *State v. Storey*,901 S.W.2d 886,900(Mo.banc1995). In arguing for a sentence of death, "[p]rosecutors may discuss the concept of mercy in their closing arguments because mercy is a valid sentencing consideration, and in that connection may argue that the defendant should not be granted mercy." *State v. Deck*,994 S.W.2d 527,543(Mo.banc1999). The sentencing decision must, however, " 'rest on [an] individualized inquiry,' under which the 'character and record of the individual offender and the circumstances of the particular offense' are considered." *State v. Storey*,901 S.W.2d at 902.

Here, the prosecutor's comments were simply an argument that appellant, in light of his crime, his character, and record, was deserving of the death penalty. Such arguments have

repeatedly been upheld by this Court. *State v. Forrest*,No.SC86518,slip op.at 11-12(Mo.banc2006)("I'm tempted to say and I think I will. How many people do you get to kill before you stop them cold? *If not now, when? If not here, where?*"(emphasis added)); *Middleton v. State*,80 S.W.3d 799,816-817(Mo.banc2002)("It's your decision, ladies and gentlemen, but justice here absolutely demands that these two people's deaths are avenged and that they, this defendant get the death penalty for it, the highest punishment you can give for a crime like this. *If you can't give the death penalty for this crime, what kind of crimes are you going to give the death penalty for?*"(emphasis added)); *State v. Lyons*,951 S.W.2d 584,596(Mo.banc1997)("If this crime doesn't deserve the death penalty, then what crime does? If this criminal does not deserve the death penalty, what criminal would?"(emphasis added).

Appellant claims that the prosecutor's argument constituted a personal opinion, and he asserts that the prosecutor was suggesting, by virtue of his position as prosecutor, that the jury should accept his personal evaluation that the death sentence was warranted. But that is simply not true. As is plain from the record, the prosecutor based his argument on the crime and the evidence in aggravation. *Cf. Shurn v. Delo*,177 F.3d 622,665(8th Cir.1999)("I'm the top law enforcement officer in this county and I'm the one that decides in which cases to ask for the death penalty and which cases we won't."); *State v. Evans*,820 S.W.2d 545,547(Mo.App.E.D.1991)("If this man were innocent I wouldn't bring a charge.").

Lastly, appellant contends that the prosecutor improperly argued that he would have killed Eva Addison if he had known that she was hiding nearby(App.Br.111). He asserts that

there was no evidence to support this argument(App.Br.111).

> His explanation is he was mad at Todd Franklin because two of his friends went to prison. So he executed him. He was mad a Leslie because she wouldn't leave town fast enough. And then he executed her.
>
> The only reason why Eva Addison is alive today, he didn't know she was hiding in the bushes.

(Tr.1044).[20] This argument was a reasonable inference from the evidence.

In penalty phase, Eva Addison testified that she encountered appellant on May 15, 2003, at about 11:30 p.m., at 31 Blakemore(Tr.573). She described how he told her and her sister, Leslie Addison, "Yo ho's are banned from Pine Lawn," and "Yo ho's got to go"(Tr.577-578). When Leslie made some sort of reply, appellant asked her, "Do you love your brother?"(referring to their deceased brother)(Tr.580). Leslie responded that she loved her brother, and appellant said, "Well, B----, you're going to see him tonight"(Tr.581).

Shortly thereafter, Leslie left that location and Eva followed(Tr.582-583). Eva warned Leslie that appellant was coming, but Leslie waved Eva off(Tr.583). Eva hid behind some bushes and watched as appellant and Leslie exchanged words(Tr.583-585). Appellant pointed a gun at Leslie and, despite her pleas, shot her in the head(Tr.585).

It was reasonable to infer that appellant killed Leslie for the simple reason that she

---

[20] There was no objection to this comment, and the claim was not raised in appellant's motion for new trial(L.F.507-546).

refused to submit to his command to get out of Pine Lawn. And if appellant was willing to kill Leslie over this insignificant perceived slight, it was reasonable to infer that, but for the fact that Eva was hiding in the bushes, she, too, could have been a victim of appellant's mercurial and capricious violence.

V.

Because Venireperson Townsend could not consider the full range of punishment after a finding of guilt beyond a reasonable doubt, the trial court did not abuse its discretion in striking Townsend for cause.

Appellant contends that the trial court abused its discretion in striking Venireperson Townsend for cause(App.Br.113). The trial court struck Ms. Townsend because it found that she was incapable of considering the full range of punishment and applying the proper burden of proof(V.D.Tr.275-276).

A. The Standard of Review

"The trial court is in the best position to evaluate a venireperson's commitment to follow the law and is vested with broad discretion in determining the qualifications of prospective jurors." *State v. Taylor*,134 S.W.3d 21,29(Mo.banc2004). "The trial court's 'ruling on a challenge for cause will not be disturbed on appeal unless it is clearly against the evidence and constitutes a clear abuse of discretion.' " *Id.*

B. Venireperson Townsend's Views Prevented or Substantially Impaired her Ability to Fulfil Her Duties

"Venirepersons may be excluded from the jury when their views would prevent or substantially impair the performance of their duties as jurors in accordance with the court's instructions and their oaths." *Id.* "A challenge for cause will be sustained if it appears that the venireperson cannot consider the entire range of punishment, apply the proper burden of proof, or otherwise follow the court's instructions in a first degree murder case."*Id.*

"The trial court possesses broad discretion in determining whether a prospective juror is prepared to give both the defendant and the state a fair trial and consider the full range of punishments the law permits if the defendant is found guilty." *State v. Harris*,870 S.W.2d 798,805(Mo.banc1994). "[T]here will be situations where the trial judge is left with a definite impression that a prospective juror would be unable to faithfully and impartially apply the law . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror." *Id.*(quoting *Wainwright v. Witt*,469 U.S. 412,424-426(1985)).

In the case at bar, Venireperson Townsend expressed views that showed that she was incapable of considering the full range of punishment upon a finding of guilt:

> [THE PROSECUTOR]: Anybody else? Miss Townsend, do you also believe that I should have to proof beyond a reasonable doubt, any possible doubt that the defendant was guilty before you consider the death penalty?
>
> VENIREMAN TOWNSEND: Yes.
>
> [THE PROSECUTOR]: You would require that I prove more than that before you consider returning a verdict of death?
>
> VENIREMAN TOWNSEND: A verdict for the death penalty, yes.
>
> THE COURT: So you're indicating that you would hold the State to a higher burden of proof?
>
> VENIREMAN TOWNSEND: Yes.
>
> THE COURT: Okay.
>
> [THE PROSECUTOR]: I assume you could sit as a juror and deliberate

in a guilt phase and follow the instructions that says I have to prove guilty beyond a reasonable doubt in a guilt phase, when we get to penalty, you require more than that for the penalty; is that a fair statement?

VENIREMAN TOWNSEND: Yes, sir.

(V.D.Tr.255-256). Defense counsel elicited the following:

[DEFENSE COUNSEL]: Now I want to ask you, I got a little confused when you were talking to [the prosecutor] about the burden of proof, whether it was the guilt phase or the penalty phase. I kind of wanted to go over that with you so I can be clear. The burden of proof in a criminal case, the guilt part of it is beyond a reasonable doubt; you understand that?

VENIREMAN TOWNSEND: Yes.

[DEFENSE COUNSEL]: Are you going to require him to prove more than beyond a reasonable doubt just to find someone guilty or not guilty of murder in the first degree?

VENIREMAN TOWNSEND: No, no.

[DEFENSE COUNSEL]: As to the statutory aggravating circumstances, the burden of that is beyond a reasonable doubt also. Are you going to require him to prove more than beyond a reasonable doubt just as to the statutory aggravating circumstances?

VENIREMAN TOWNSEND: No. Can I elaborate or just no?

[DEFENSE COUNSEL]: You can elaborate if you want to. Maybe I

might be going where you're going. My next question is by the time you got to where are you thinking about the death penalty –

VENIREMAN TOWNSEND: Yes, ma'am.

[DEFENSE COUNSEL]: You really want to in your heart of hearts know that the person is guilty; is that what are you telling me?

VENIREMAN TOWNSEND: Yes, ma'am.

[DEFENSE COUNSEL]: You really want to in your heart of hearts know that the person is guilty; is that what are you telling me?

VENIREMAN TOWNSEND: Yes, with the death penalty.

[DEFENSE COUNSEL]: But you don't have a problem following the instructions of the law as to just the guilt part and finding aggravating circumstances?

VENIREMAN TOWNSEND: Not –

[DEFENSE COUNSEL]: It is when you get to this making your personal decision about the death penalty you want the ability to in your heart of the hearts, you're satisfied in your heart that the person is guilty?

VENIREMAN TOWNSEND: Yes.

(V.D.Tr.266-267). The trial court then questioned Venireperson Townsend.

THE COURT: Miss Townsend, I may be a little bit confused. I just wanted to be clear what you were saying, because at one point you indicated that you would hold the State to a greater burden of proof. And so I want to be

clear, can you clarify it for me at all?

VENIREMAN TOWNSEND: Yes, sir. Yes, your Honor, beyond a reasonable doubt I can go for guilty without parole, locked in prison if I would need to sentence somebody to death. In my heart of hearts I would want him to have proved that it was an absolute.

THE COURT: So before you could consider the death penalty, you would want the State to prove something beyond a reasonable doubt what I have indicated to you is the burden of proof; is that what you are saying?

VENIREMAN TOWNSEND: Yes, your Honor.

THE COURT: So in that respect are you saying to me that you could not the follow the instructions of law as given by –

VENIREMAN TOWNSEND: Let me think on this a second. That is the instructions that you would give me that I would have to follow your advice. But I just – I just feel strongly that I just want to be proven that if he's guilty – Does that make sense?

THE COURT: It does. . . .

(V.D.Tr.269-270).

Based on Townsend's responses, the prosecutor moved to strike for cause, pointing out that she "requires a higher burden of proof and guilt before she would be able to consider the death penalty"(V.D.Tr.272-273). Defense counsel disagreed, arguing that Townsend had stated that she would apply the proper burden of proof in deciding guilt and finding statutory

aggravators(V.D.Tr.273). As for Ms. Townsend's other responses, defense counsel argued that Ms. Townsend had only meant that she would apply a higher burden of proof in making her decision at "the last step," i.e., in deciding whether she would ultimately impose a sentence of death(V.D.Tr.273). The court ruled:

> I think she has said some things that are equivocal. She has gone back and forth a little bit, but she has clearly stated on a couple of occasion that she would require proof beyond a reasonable doubt, all doubt before she could consider the death penalty. For that reason I think she clearly states to me that she would hold the state to a greater burden of proof, and she would require proof beyond a reasonable doubt. All doubt, so for that reason, those reasons and her manner and way of answering those questions, she seemed clear to me that she was going to hold the State to a greater burden of proof, beyond the proof before she would consider the death penalty.

(V.D.Tr.275-276). The trial court did not abuse its discretion.

Upon a finding of guilt, a juror must be able to realistically consider the full range of punishment, including the death penalty. It is apparent from Townsend's responses that she could not realistically consider imposing a sentence of death upon a finding of guilt beyond a reasonable doubt. Instead, before Townsend could realistically consider a death sentence, she had to be convinced of appellant's guilt beyond any possible doubt – appellant's guilt had to be "absolute." This Court has upheld strikes on similar facts. *See State v. Anderson*,79 S.W.3d 420,436(Mo.banc2002); *State v. Clayton*,995 S.W.2d 468,476(Mo.banc1999); *State*

v. Middleton,995 S.W.2d 443,460(Mo.banc1999); *State v. Rousan*,961 S.W.2d 831,839-840(Mo.banc1998).

Appellant argues that Townsend's remarks simply indicated that she believed that the meaning of reasonable doubt was different – i.e., heightened – in death-penalty cases(App.Br.117). But that is not what Townsend said, and the trial court was not obligated to read such a meaning into her responses. In any event, Townsend certainly knew that the death sentence was a possibility in this case; thus, in discussing the burden of proof that attached to the finding of guilt, Townsend would have been thinking about the allegedly heightened standard that appellant suggests was in her mind. And, yet, she plainly stated that she could not realistically consider imposing a death sentence unless the prosecution proved something even greater than that.

Appellant also argues that Ms. Townsend's comments were consistent with Missouri law because jurors can refuse to impose a death sentence based on residual doubt(App.Br.118-119). It is certainly true that jurors can refuse to impose a death sentence based on residual doubt(a jury is *never* required to impose a sentence of death and can decline to do so for any reason), but that does not change the basic premise that each juror must be qualified to serve. Each juror must be capable of realistically considering the full range of punishment after a finding of guilt. Here, Townsend was not capable of realistically considering the full range of punishment.

VI.

The trial court did not abuse its discretion in admitting evidence of appellant's unadjudicated crimes in penalty phase, because the evidence was relevant to the jury's determination of an appropriate individualized sentence. Additionally, the trial court did not err in submitting Instruction 19, because the instruction properly instructed the jury on how to consider aggravating and mitigating evidence.

Appellant contends that the trial court erred and abused its discretion in admitting evidence of his unadjudicated crimes and in submitting Instruction 19(App.Br.121). He argues that unadjudicated crimes are unduly prejudicial, and that Instruction 19 should have required the jury to find any aggravating facts(and not just the statutory aggravators) beyond a reasonable doubt(App.Br.126). Citing *State v. Debler*,856 S.W.2d 641(Mo.banc1993), he invites this Court to depart from its precedents which have held otherwise.

A. The Standard of Review

"A trial court has broad discretion to admit or exclude evidence at trial." *State v. Madorie*,156 S.W.3d 351,355(Mo.banc2005). "This standard of review compels the reversal of a trial court's ruling on the admission of evidence only if the court has clearly abused its discretion." *Id.*

On claims of instructional error, an appellate court will reverse only if there is error in submitting an instruction and prejudice to the defendant. *State v. Forrest*,No.SC86518,slip op.at 13(Mo.banc2006).

B. Evidence of Appellant's Unadjudicated Crimes was Properly Admitted

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. *State v. Cole*,71 S.W.3d 163,174(Mo.banc2002).

It was, therefore, within the trial court's discretion to admit evidence that appellant murdered Leslie Addison, that appellant tampered with Eva Addison, and that appellant was involved in dealing crack cocaine. *State v. Forrest*, slip op.at 5(unadjudicated drug use and possession); *State v. Strong*,142 S.W.3d 702,719-720(Mo.banc2004)(unadjudicated prior assaults); *State v. Johns*,34 S.W.3d 93,113(Mo.banc2000)(unadjudicated murders, burglaries, and robberies); *State v. Middleton*,995 S.W.2d 443,463(Mo.banc1999)(two unadjudicated murders).

C. The Jury was Properly Instructed

This Court has repeatedly held that the penalty-phase instructions, including those patterned after MAI-CR 3d 314.44, correctly instruct the jury on how to consider aggravating and mitigating evidence, and that it is not necessary to instruct the jury to find aggravating facts – aside from the statutory aggravators – beyond a reasonable doubt. *See State v. Forrest*, slip op.at 13-14; *State v. Strong*,142 S.W.3d at 719-720; *State v. Glass*,136 S.W.3d 496,517(Mo.banc2004); *State v. Taylor*,134 S.W.3d 21,30(Mo.banc2004).

VII.

The trial court did not abuse its discretion in admitting evidence in penalty phase of a taped conversation between appellant and Eva Addison.

Appellant contends that the trial court abused its discretion in admitting a recorded telephone conversation between appellant and Eva Addison, in which appellant attempted to convince Addison – sometimes using threats – not to testify against him (App.Br.129). He claims an inadequate foundation, and he asserts that the tape contained the inadmissible hearsay of a man named "Slim"(Antoine Dickens) who acted as an intermediary by relaying appellant's words to Addison and Addison's words to appellant(App.Br.129).

A. The Standard of Review

"A trial court has broad discretion to admit or exclude evidence at trial." *State v. Madorie*,156 S.W.3d 351,355(Mo.banc2005). "This standard of review compels the reversal of a trial court's ruling on the admission of evidence only if the court has clearly abused its discretion." *Id.*

B. The Trial Court did not Abuse its Discretion in Admitting the Tape

The taped telephone conversation was ultimately admitted during the testimony of Eva Addison, one of the speakers on the tape. Addison testified that she received a telephone call on May 27, 2003(appellant was arrested on May 17, 2003)(Tr.252-253,586). She testified that the call was from the St. Louis County jail(appellant was incarcerated there(*see* Tr.696)),

and that she talked to a person named "Slim"(Tr.586).[21] She testified that she recognized appellant's voice(Tr.586-587), and she testified that she had since listened to a recording, and that it was an accurate recording of the conversation(Tr.587).

Defense counsel objected on relevance grounds to portions of the tape(Tr.587-588). Counsel also objected to references to uncharged crimes(Tr.591-594). The trial court ruled that one portion should be redacted, and the parties agreed to halt Addison's testimony and continue it after the conversation had been redacted(Tr.595).

The next day, defense counsel lodged additional objections to the admission of the tape, including a hearsay objection to statements by Antoine "Slim" Dickens(Tr.634-637). The court pointed out that Dickens' statements were not being offered for the truth of the matters asserted(Tr.638). The court observed that Dickens was "really more of a conduit," and that, accordingly, Dickens' statements were not hearsay(Tr.638). The court also pointed out that Dickens was "a coconspirator with [appellant] in the commission or the attempt to commit, at least under the State's theory, the offense of tampering with a witness"(Tr.640).

Eva Addison was eventually recalled to the stand(Tr.677). She testified that she was familiar with appellant's voice, and she testified that she had listened to State's Exhibit 148-B earlier that day(the redacted tape)(Tr.678-679). She then testified that the tape was a fair

---

[21] The tape itself contained a recorded message that said: "This is MCI. This call is subject to monitoring and/or recording. I have a collect call from – Tony – an inmate at St. Louis County Jail"(State's Ex.148-C).

and accurate recording of the conversation she had had with “Slim” and appellant on May 27, 2003(Tr.679).

When the prosecutor sought to admit the tape, defense counsel renewed the previous objections and added an objection to foundation(Tr.679). The trial court asked what aspect of foundation the defense was contesting, and defense counsel pointed out that there had been no testimony about who made the tape and how the tape was made(Tr.680). The prosecutor pointed out that Addison had identified the recording as fair and accurate, and that Addison had identified the speakers on the tape(Tr.680). He then argued that it was not necessary to show “who actually pushed the button and hit the ‘record’ button”(Tr.680).

The trial court asked whether counsel was suggesting that the tape had been tampered with aside from being redacted(Tr.681). Defense counsel agreed that the tape had been redacted by agreement, and when asked again whether the defense was suggesting that the tape had been tampered with, counsel asserted, “That’s not something we could tell without any type of other witness”(Tr.681). The trial court overruled the foundation objection and admitted the tape(Tr.681-682).

1. There was an adequate foundation for the tape

Under these facts, there was an adequate foundation for the tape. A proper foundation for the admission of a tape-recorded conversation ordinarily includes:(1) the device was capable of recording accurately;(2) the operator of the recording device was competent to operate it;(3) the recording is authentic and correct;(4) changes, additions and deletions have not been made to the recording;(5) the recording has been preserved in an acceptable

manner;(6) the speakers are identified; and(7) the conversation was voluntary and without inducement." *State v. Fletcher*,948 S.W.2d 436,439(Mo.App.W.D.1997)(citing *State v. Wahby*,775 S.W.2d 147,153(Mo.banc1989)).

Appellant argues that "[v]irtually every requirement" was missing(App.Br.131). In particular, he argues that the state failed to establish the second, third, fourth, and sixth requirements(App.Br.131-132). But defense counsel only objected at trial based on the second and fourth requirements(Tr.680-681); thus, any arguments beyond those objections should only be reviewed, if at all, for plain error. *See State v. Schuster*,92 S.W.3d 816,823(Mo.App.S.D.2003)("A general objection to 'lack of foundation' will not preserve alleged errors because it fails to direct the trial court's attention to the specific foundational element considered deficient.").

In any event, as for the first requirement, "Generally, the existence of a tape recording satisfies the first element[.]" *State v. Wahby*,775 S.W.2d at 153. Here, of course, there was a recording, and Addison testified that the recording was a fair and accurate recording of her conversation with appellant and Dickens(Tr.587,679). Thus, the first requirement was satisfied.

As for the second requirement, while the actual operator of the recording equipment was not called to testify, the evidence showed that appellant called from the St. Louis County Jail, and that the telephone call was recorded(in some fashion) by the institution. It was reasonable for the trial court to infer that the St. Louis County Jail had a lot of experience recording telephone calls, and that its agents were therefore "competent to operate" recording

devices(like most ordinary people). Indeed, under such circumstances, the existence of the tape, coupled with the fact that it was a fair and accurate recording of the conversation, was sufficient to show that the operator of the equipment was competent.[22] *See State v. Fletcher*,948 S.W.2d at 440("The second element, competence of the recording operator, can reasonably be inferred from Officer Maddux's testimony [that the recordings were complete and accurate], as well as his eleven years of experience as a law enforcement officer.").

The third, fourth, and fifth requirements were established by Addison's testimony that the recording was fair and accurate. As set forth above, she testified that she had listened to the tape prior to her testimony, and that the tape was a fair and accurate recording of the conversation between her and appellant and Dickens(Tr.587,678-679). This was sufficient to establish that the recording was authentic and correct, and that the recording had not been altered. Moreover, it was sufficient to eliminate appellant's chain-of-custody claim. *Id.*("The state is not required to show 'hand-to-hand' custody. The state must only prove 'reasonable assurance' that the evidence was not tampered with. Furthermore, once the recordings are fairly identified . . . 'the chain of custody issue is moot.'"(citation omitted)).

---

[22] With tape recordings, the first two requirements listed in *Wahby* seem somewhat unnecessary; for if there is an accurate tape, it seems self evident that the recording device was capable of recording, and that the operator was competent. These requirements seem more appropriate when dealing with devices such as breathalyzers, which must be accurately calibrated and utilized by trained personnel to obtain accurate results.

Appellant attempts to argue that Addison was "not competent" to testify that the recording was fair and accurate(App.Br.132). He claims that Dickens "was the only one who heard both Eva and [appellant]," and he claims that Addison "primarily relied on Slim to tell her what [appellant] was saying"(App.Br.132). But appellant's assertions are not supported by the record. Addison never suggested at trial that she could not hear appellant talking in the background. To the contrary, she expressly testified that she could hear appellant's voice(Tr.586-587), and, as is evident from the tape, appellant's voice was plainly audible. In fact, there were instances where Addison simply responded directly to appellant(State'sExhibit 148-C,pp.6,8-11,13-15,24,26-27,29-30,32). There were, of course, times when appellant's voice became inaudible, and instances where Addison indicated that she had not heard appellant(*see* State'sExhibit 148-C,pp.13,21,35), but those brief instances do not change the fact that the tape was a fair and accurate recording of the telephone conversation as heard by Addison. Addison was plainly competent to testify that the recording was a fair and accurate recording of what she said and heard.

As for the sixth requirement, Addison identified herself, and she identified appellant's voice in the background. *See State v. Gardner*,955 S.W.2d 819,823(Mo.App.E.D.1997)("lay opinion of voice identification of an audio tape is admissible as a foundation for introduction of the tape"). This was a sufficient foundation(even without any testimony that she recognized Dickens' voice), because Dickens' statements were essentially irrelevant to the conversation. Dickens was involved in the conversation, but only insofar as he was a conduit for appellant and Addison's words. Accordingly, since none of Dickens' statements were

admitted for their truth, any lack of foundation as to his identity did not affect the admissibility of the tape.

Finally, as to the seventh requirement, it was apparent that the conversation was voluntary, and appellant does not claim otherwise. Appellant called Addison, and it was plain that he was directing his part of the conversation, and that he wanted to talk to Addison.

2. Dickens' Statements were not Hearsay

Appellant also argues that the tape was improperly admitted because "Everything that Slim stated that [appellant] told him was hearsay"(App.Br.133). But appellant is incorrect.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. *State v. Gilmore*,22 S.W.2d 712,718(Mo.App.W.D.1999). The admission of a party opponent is not hearsay. *Id.*

Here, the conversation was admitted into evidence because it contained *appellant's* admissions. Indeed, in light of the fact that Dickens was plainly acting as a mere conduit and simply trying to repeat appellant's statements verbatim(albeit with some errors), Dickens' statements obviously had no independent evidentiary value. Dickens was, in the general sense of the word, merely a translator; and, accordingly, the trial court correctly determined that his recitation of appellant's admissions was not hearsay. *See State v. Spivey*,710 S.W.2d 295,297(Mo.App.E.D.1986)(a translator's interpretation of a defendant's statements is admissible as an admission).

Admittedly, there were moments on the tape where appellant's voice was inaudible, making it less certain that Dickens was correctly relaying appellant's words. But, in light of

Dickens' consistent efforts to simply relay appellant's words, it was reasonable to infer that Dickens continued to do so. In any event, even if Dickens' statements in those limited instances should not have been admitted, any error was harmless. Dickens simply did not convey much substantial aggravating evidence that was not mirrored in appellant's recorded statements.

VIII.

Because it was not necessary to plead the aggravating circumstances in the indictment, and because the jury was properly instructed as to the "serious assaultive conviction" aggravators, the trial court did not err in imposing a sentence of death.

Citing *Apprendi v. New Jersey*,530 U.S. 466(2000), and its progeny, appellant raises two claims: first, that he was not charged with "aggravated" first-degree murder because the aggravating circumstances were not pled in the indictment; and second, that Instruction 18 did not properly require the jury to find that appellant's prior convictions were "serious assaultive" convictions(App.Br.134).

A. It was not Necessary to Plead Aggravating Circumstances in the Indictment

"This Court has addressed this claim numerous times before, and the omission of statutory aggravators from an indictment or information charging the defendant with first-degree murder does not deprive the sentencing court of jurisdiction to impose the death penalty." *State v. Zink*,No.SC86358,slip op.at 11-12(Mo.banc2005); *see State v. Gill*,167 S.W.3d 184,193-194(Mo.banc2005); *State v. Cole*,71 S.W.3d 163,171(Mo.banc2002).

B. Instruction 18 Properly Instructed the Jury in Determining Whether Appellant had Serious Assaultive Convictions

Appellant next argues that Instruction 18 did not require the jury to find the facts necessary to support the four "serious assaultive conviction" aggravators(App.Br.136). He argues that the language of the instruction simply presumed that the convictions, if they existed, were "serious" and "assaultive"(App.Br.136).

Instruction 18 set forth the serious-assaultive-conviction aggravator as follows:

> 1. Whether the defendant has a serious assaultive conviction in that he was convicted of Assault in the First Degree on February 4, 2005 in Division 15 of the St. Louis County Circuit Court for events that occurred on April 4, 2002 for shooting Daryl Bryant.

(L.F.489-490). The instruction required the jury to find the aggravators beyond a reasonable doubt(L.F.49-490).

As is evident, the instruction expressly required the jury to determine whether appellant had a "serious assaultive conviction" in light of a previous conviction of assault or armed criminal action. Thus, the jury *was* instructed to determine both that appellant had the conviction and that the conviction was a "serious assaultive" conviction.

Additionally, this Court has repeatedly held that it does not violate *Apprendi* to allow the trial court to determine that certain convictions are serious and assaultive, and to simply require the jury to determine whether the convictions exist. *State v. Williams*,97 S.W.3d 462,474(Mo.banc2003); *State v. Mayes*,63 S.W.3d 615,640(Mo.banc2001); *State v. Johns*,34 S.W.3d 93,114 n.2(Mo.banc2000). "Allowing the court to determine, as a matter of law, whether prior convictions are 'serious assaultive criminal convictions' does not interfere with the jury's mandate to find the facts." *State v. Williams*,97 S.W.3d at 474.

IX.

Because the jury found the "depravity of mind" aggravator beyond a reasonable doubt, and because the jury was expressly instructed that it could only make that finding if it also made the requisite factual finding set forth in Instruction 18, the trial court did not plainly err in accepting the jury's verdict or in failing to conduct an inquiry to determine whether the jury made the requisite finding.

Appellant asserts that the jury failed to make the requisite factual finding to support its determination that the murder involved "depravity of mind"(App.Br.138). He therefore claims that the trial court plainly erred in accepting the jury's verdict or that the trial court plainly erred in failing to conduct an inquiry to determine whether the jury had made the requisite factual finding to support the "depravity of mind" aggravator(App.Br.138).

A. The Standard of Review

Because this claim was not preserved by timely objection, and because the claim was not included in appellant's motion for new trial(L.F.507-546), review is for plain error resulting in manifest injustice. The defendant bears the burden of establishing manifest injustice. *State v. Mayes*,63 S.W.3d 615,624(Mo.banc2001).

B. Because the Jury Made the Requisite Factual Findings, There was no Error in Accepting The Jury's Verdict

In determining appellant's sentence, the jury found five statutory aggravators beyond a reasonable doubt, including the "depravity of mind" aggravator set forth in § 565.032.2.(7), RSMo 2000(Supp.L.F.32-33). The foreperson filled out the verdict form and wrote out the

depravity-of-mind aggravator as follows:

> 5. The murder of Todd Franklin involved depravity of mind and, as a result thereof, the murder was outrageously and wantonly vile, horrible and inhuman.

(Supp.L.F.32-33). The foreperson *did not* write out the limiting factual finding that the jury was required to make under Instruction 18 to support the depravity-of-mind aggravator. But this was not error, and it did not render the jury's verdict unreliable.

Instruction 18 instructed the jury to write out the "the statutory aggravating circumstances . . . which you found beyond a reasonable doubt." That is precisely what the foreperson did. The limiting factual determination was *not* identified as part of the aggravating circumstance, but as a factual determination that the jury had to make to support the aggravating circumstance(L.F.489-490). Thus, the foreperson followed the instructions to the letter and only wrote the aggravating circumstance that the jury had found beyond a reasonable doubt. This was not error.

And there was no unreliability in the verdict. The jury was instructed that it could "only" find the depravity-of-mind aggravator if it made the requisite factual finding included in Instruction 18(L.F.489-490). The jury is presumed to follow the jury instructions, *State v. Whitfield*,107 S.W.3d 253,263(Mo.banc2003), and there is no reason to believe the jury wrote in the depravity-of-mind aggravator in the absence of the requisite factual finding. *Cf.State v. Smith*,944 S.W.2d 901,919-920(Mo.banc1997).

This Court recently considered a similar claim in *State v. Zink*,No.SC86358,slip op.at

11(Mo.banc2005). In a footnote, the Court noted that the jury had been specifically instructed to make the relevant factual determination before finding the depravity-of-mind aggravator. *Id.*at 11 n.24. Thus, the Court state, "The verdict form for aggravating circumstances may have been inartfully completed by the jury, but this does not negate the fact that the necessary findings were made to support this aggravator." *Id.*

CONCLUSION

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

Respectfully submitted,

JEREMIAH W.(JAY) NIXON
Attorney General

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P. O. Box 899
Jefferson City, MO 65102
(573) 751-332l
(573) 751-5391(fax)
shaun.mackelprang@ago.mo.gov
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

(1) That the attached brief complies with the limitations contained in this Supreme Court Rule 84.06(b), and that the brief, excluding the cover, the certificate of service, this certificate, the signature block, and appendix, contains 27,889 words(as determined by WordPerfect 9 software);

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

(3) That two true and correct copies of the brief, and a copy of the floppy disk containing a copy of the brief, were mailed, postage prepaid, this _____ day of February, 2006, to:

ROSEMARY E. PERCIVAL
818 Grand Boulevard, Suite 200
Kansas City, Missouri 64106
(816) 889-7699
(816) 889-2088

JEREMIAH W.(JAY) NIXON
Attorney General

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-3321
(573) 751-5391(fax)
shaun.mackelprang@ago.mo.gov