No. SC92720

In the
Missouri Supreme Court

STATE OF MISSOURI,

Respondent,

v.

CHRISTOPHER COLLINGS,

Appellant.

Appeal from the Circuit Court of Phelps County
Twenty-Fifth Judicial Circuit
The Honorable Mary W. Sheffield, Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Appellant, Christopher Collings, was charged in the Circuit Court of Barry County with murder in the first degree[1] (L.F. 61). The State later filed a notice of aggravating circumstances alleging three aggravating circumstances: that the murder was outrageously wanton and vile involving torture or depravity of mind; that the murder was committed while Appellant was involved in the perpetration of rape; and that the victim was a potential witness in a pending investigation related to Appellant's rape of her (L.F. 227). Following a change of venue to Pettis County, this cause went to trial on February 27, 2012, the Honorable Mary W. Sheffield presiding (L.F. 54).

The sufficiency of the evidence as to deliberation is at issue in this appeal. Viewed in the light most favorable to the verdict, the following evidence was adduced: The victim, nine-year-old Rowan Ford, was the daughter and youngest child of Colleen Munson[2] (Tr. 3618). In November 2007, they lived at their two-story home in Stella, Missouri, with Munson's husband, David Spears (Tr. 3621-3626). Appellant, a friend of Spears, had

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[1]Appellant was also charged with forcible rape and statutory rape in the first degree, but those offenses were severed before trial.

[2]Ms. Munson's name at the time of the offense was Colleen Spears. Respondent uses her name at the time of the trial for the sake of clarity.

stayed with the family for about a six-week period shortly before November (Tr. 3627). The victim slept in her own room, often on the floor, and Appellant slept on a couch in the basement (Tr. 3628-3629, 3631). According to Appellant, the victim called him "Uncle Chris" (Tr. 3882).

On the evening of November 2, 2007,[3] Appellant and Spears were working at a local farm when their friend, Nathan Mahurin, arrived to meet them and spend the evening together (Tr. 3706-3709). After work, Appellant had to pick up a goat he had purchased, and, after doing so, they then went to Appellant's family's property near Wheaton in Barry County to drop off the goat (Tr. 3709-3710). At the property, Mahurin saw an old "double-wide-looking trailer," a camper, and several old vehicles (Tr. 3713). Appellant said that the camper was his (Tr. 3713). After leaving the goat, the three stopped at a residential living center to see Appellant's father, then went to a nearby liquor store to buy 2-3 six-packs of a malt liquor beverage (Tr. 3716-3718). They then went to Spears's house to drink and play pool (Tr. 3720). In addition to the malt liquor, Appellant and Spears were drinking a "clear liquid" (Tr. 3717-3718).

[3]Most of this account of the evening comes from Nathan Mahurin's testimony. Any reference to "Mahurin's version of events" later in this statement of facts refers to this account.

Munson, Rowan, and Spears's mother Myrna were also at the Spears residence that night (Tr. 3647). Munson left for her overnight shift at work at 8:30 p.m.; as it was a Friday night, the victim was still awake (Tr. 3647-3648). Myrna also left the house at some point, and Spears was supposed to stay home with the victim overnight while Munson was at work (Tr. 3649, 3723).[4]

During the evening, Appellant and Mahurin went to a convenience store in Stella for more alcohol, bringing it back to the house where the three men continued to drink (Tr. 3721-3723). At some point, Appellant asked Mahurin to drive him home (Tr. 3724). Mahurin and Appellant convinced Spears to go with them; Mahurin did not remember if the victim was still awake and did not check on her, although he was "pretty sure" Spears did (Tr. 3724). The three stopped in Wheaton for more alcohol, then went to Appellant's property, where Spears and Mahurin drank and all three smoked marijuana (Tr. 3726-3727). After about an hour, Mahurin and Spears left sometime between 11:00 and 11:30 p.m. because Mahurin needed to get home (Tr. 3727, 3729-3730). Because Mahurin was intoxicated, he decided to take back roads "fairly slowly" back to Spears's house in Stella instead of the

[4]According to Myrna's penalty-phase testimony, she was only at the house for about a half-hour (Tr. 5887).

faster, more direct highway route (Tr. 3728-3729, 3734). Mahurin dropped Spears off between 10-20 minutes after leaving Appellant's and was home by midnight (Tr. 3734-3735).

Munson got home around 9:00 the next morning (Tr. 3650). Spears was asleep on a couch (Tr. 3650). The victim would typically meet Munson outside or in the bathroom when Munson arrived home from work, but did not do so this morning (Tr. 3650). Munson looked around for the victim, but could not find her (Tr. 3650-3651). She woke Spears and asked where the victim was, and Spears said that the victim had gone to a friend's house (Tr. 3560-3651). Spears could not identify the friend, however, and the victim had not taken her bike as she would typically do (Tr. 3652-3653). Munson started walking around the neighborhood to see if she could find the victim, including going by the church the victim went to, but could not find her (Tr. 3653). Munson wanted to call the police, but Spears initially resisted, insisting the victim was at a friend's house (Tr. 3653). But, as evening approached, Spears eventually called the Newton County Sheriff's Department (Tr. 3654-3655). Spears also called Mahurin and left him a message about the victim being missing (Tr. 3738-3739).

Deputies took the report of the victim's disappearance and started a search for her, including contacting school children to discover the "friend"

Spears had mentioned, taking statements from family members, and sending out search teams (Tr. 3655, 3763-3765). During this time, Munson discovered Spears had left the victim home alone that night; she kicked him out of the house (Tr. 3657-3658). Overnight, deputies learned of Appellant's name as one of the last people to be at the house when the victim was last seen (Tr. 3766-3767).

The next morning, Sunday, November 4, deputies made contact with Appellant and set up a meeting in the parking lot of a local restaurant (Tr. 3769). Appellant arrived in his white Dodge pickup truck and remained inside as the deputies gathered around to speak to Appellant (Tr. 3771-3772). His account of the evening was generally consistent with Mahurin's account, although he did not mention smoking marijuana and said that Spears and Mahurin left because Appellant was feeling tired (Tr. 3772-3773). He said he had not talked to Spears since that night and had no idea what had been going on (Tr. 3773). Appellant was cooperative, polite, and apparently concerned, acting as if he wanted to help find the victim (Tr. 3773, 3859, 3873).

Later, Appellant went to the Spears residence and briefly spoke with Munson (Tr. 3658, 3661-3664). Appellant said that he had spoken to a deputy that day and would be willing to do what he could to help, including looking

for the victim (Tr. 3664-3665). He said he would check in on Munson again (Tr. 3665).

The next day, Monday, November 5, FBI personnel started arriving to assist in the search for the victim (Tr. 3783). FBI evidence technicians seized and searched a pickup truck belonging to Spears (Tr. 4904, 4995). Law enforcement had also looked at a Suburban at Myrna's residence that she said she had loaned to Spears on the night in question (Tr. 3903-3905).

Meanwhile, Newton County deputies asked to speak with Appellant again, and Appellant said that he would be "glad to" do so, so he voluntarily drove himself to the sheriff's office to give a statement (Tr. 3875-3878). Appellant was again apparently "very forthcoming" and "very helpful" and gave a version of events generally consistent with his earlier statement (Tr. 3878-3881). He said that after Spears and Mahurin left his property, he did not leave the property again that night because he had to get up early (Tr. 3881). He said he did not have any knowledge of the victim's whereabouts or what happened to her (Tr. 3881-3882).

Later, Wheaton Chief of Police Clinton Clark was on patrol just west of Wheaton when he passed Appellant driving the other way (Tr. 4515-4516). Appellant flagged Clark down, so Clark, who had known Appellant for about 17 years, pulled into a parking lot and Appellant pulled beside him (Tr. 4512,

4516). Appellant said he had been in Newton County all day trying to help law enforcement find the victim (Tr. 4517-4518). Clark told Appellant it was good for him to help and that he needed to keep doing whatever he could to help (Tr. 4518). Clark noticed that Appellant was not his normal self; he appeared excited and a little upset (Tr. 4519).

That night, Appellant went back to Munson's house (Tr. 3666). He was there when FBI agents arrived at the house, and one of the agents asked Appellant to speak to him, which Appellant was "more than willing to do" (Tr. 3928). Appellant said he had talked to Newton County officials and volunteered that he had "been talking" to Chief Clark about the case (Tr. 3930-3931). He told the agent about his relationship with Spears and talked about the night of the disappearance (Tr. 3931-3940). He again claimed he had stayed home that night after Spears and Mahurin left (Tr. 3941). He claimed that he had spoken to Spears the morning of November 4 and had asked Spears, "What did you do? Where did you go?" (Tr. 3944). Appellant said that he believed Spears was involved in the victim's disappearance and offered to wear a wire to help in the investigation (Tr. 3944-3945). He recommended that the police look for the victim at Jolly Mill (where Appellant and Spears used to hang out) or Longview (where Spears grew up) (Tr. 3945).

The next day, Tuesday, November 6, as the search for the victim continued, law enforcement were focusing their investigation on Spears, interviewing him, taking him out for a car ride around the area, doing a thorough search of the Spears home, and seizing and searching Myrna's Suburban (Tr. 3905, 3946, 3955, 4905-4909, 4966). Also on that day, on his own initiative, Appellant went to Clark's office to speak about the case (Tr. 4520, 4522). Appellant again said he had been to Newton County to help authorities find Appellant (Tr. 4520). Clark told Appellant that if he knew about anything that could help find the victim he needed to provide that help (Tr. 4523). Appellant said that he did not know what happened to the victim, that he had always loved her, and that he would not have done anything to hurt her (Tr. 4521-4523). Clark sensed that "something wasn't right" with Appellant and that he appeared "apprehensive," but wanted to tell Clark something (Tr. 4524, 4640-4641). It seemed that something was bothering Appellant, as he would not make eye contact, which was unusual (Tr. 4638-4639). Clark told Appellant that Appellant knew where he was if there was anything Clark could do to help him (Tr. 4523). After this conversation, Clark contacted the FBI and told them that Appellant had been making contact with him and that Clark was willing to do anything they needed to help (Tr. 4525).

On Wednesday, November 7, FBI agents again interviewed Appellant (Tr. 3946-3948, 3967). Appellant drove himself to the interview and was cooperative (Tr. 3976). The agents also took Appellant to lunch during the meeting (Tr. 3976). Appellant gave consent to search his property and a safe he had at the Spears house, and voluntarily provided a buccal DNA sample (Tr. 3948-3950, 3970-3975, 4457-4461). Appellant gave the same general details as before (Tr. 3951). They asked about some information Spears had given to provide an alibi, but Appellant said that information was not true (Tr. 3951, 3979, 3985). As the conversation progressed, however, Appellant became "more emotional, more tense, more nervous" when asked about the victim (Tr. 3984). He denied that he had enough time to have left his property and gotten to the Spears residence before Mahurin and Spears got home (Tr. 3980). When he was asked if he had any involvement in the disappearance, he "clearly" became more upset and again denied any involvement or knowledge (Tr. 3984). He said if they were accusing him of having anything to do with the disappearance, he was not going to talk to them anymore (Tr. 3959, 3984). This ended the interview (Tr. 3963-3964).

Law enforcement subsequently searched Appellant's property and adjacent property that evening (Tr. 4072-4075, 4158-4178, 4910, 4996-4997). They also searched property adjacent to Myrna's residence (Tr. 4910).

Meanwhile, Appellant went to see Clark again (Tr. 4525-4526). Appellant was upset because of the earlier interview and said he was going to "dummy up" on other law enforcement officers (Tr. 4527, 4645-4646). He said, "[I]f I have anything else to say, I'll talk to you" (Tr. 4646). Even though Appellant was not in custody, Clark believed Appellant should be advised of his rights, so he gave Appellant a rights form and had Appellant read it and ask if there was anything he did not understand (Tr. 4527-4528). He told Appellant that Appellant did not have to speak to Clark unless he wanted to (Tr. 4528). Appellant signed the form and agreed to speak to Clark (Tr. 4529). Clark told Appellant that he felt there was something on Appellant's mind and asked if he knew anything about the victim's disappearance (Tr. 4530). Clark said that he did not know what was going on or how deep Appellant was involved, but that he felt like there was something Appellant needed to tell him (Tr. 4655). Appellant dropped his head and his eyes started to water (Tr. 4655-4656). At that point, however, someone else came into the police department, interrupting them (Tr. 4531). Appellant stood up, said he had to go give his father a shot, and left (Tr. 4531). Clark then contacted the FBI, telling them that he believed Appellant was near a "breaking point" for providing information and advised them that they should not question Appellant the next day (Tr. 4531).

On Thursday, November 8, law enforcement continued to do field searches, re-interviewed Spears, and searched Myrna's house (Tr. 3954, 4042-4043, 4180-4181, 4911). They searched the area between Myrna's house and Longview, one of the locations Appellant had earlier suggested (Tr. 3945, 4042). That afternoon, they got some information about a sinkhole known as Fox Cave in McDonald County near Powell, and wanted to search it (Tr. 4043-4044, 4911). An FBI agent and firefighter were unable to find the sinkhole that evening (Tr. 4912-4913).

The next morning, Friday, November 9, two McDonald County deputies went to the sinkhole (Tr. 4045). The hole was 20-30 feet from the road in a heavily wooded area, and there was a "log or old tree" lying across the majority of it (Tr. 4188-4190). Using ropes, one of the deputies entered the hole, stood on a ledge inside the hole, and, looking down into the hole with a flashlight, saw what he believed to be the victim's body (Tr. 4051-4055). Law enforcement responded to the scene and went down into the hole, which opened up into a limestone cave (Tr. 4044, 4083-4093). The victim was at the bottom of the cave, but not directly below the hole; her body was almost against one of the walls, as if it had slid behind some rock outcroppings (Tr. 4228, 4230). The victim was nude from the waist down except for a sock (Tr. 4101, 4238-4239). She had a ligature mark around her neck and trauma,

blood, and tissue damage to her vaginal area (Tr. 4100, 4231-4233, 4239, 4244). Her face was covered with leaves (Tr. 4239). When the victim was rolled onto a body bag, her back and buttocks could be seen (Tr. 4095-4097, 4238). The leaves on her face fell off, but many remained stuck to her body (Tr. 4251). There was blood, potential tissue damage, and possible fecal matter on her buttocks and the back of her thighs (Tr. 4238, 4255). After the victim was secured in the body bag, her body was lifted out of the hole by rope and taken to Cox South Hospital in Springfield to be secured until the autopsy could be conducted (Tr. 4097, 4869-4870).

Chief Clark heard the news that morning that the victim had been found (Tr. 4533). Around 1:00 p.m., Clark was notified by his office that Appellant and Appellant's father were going "all over town" trying to find Clark (Tr. 4535). Clark went to the office to get his patrol car, looked around town for Appellant, then went out to Appellant's property, but could not find Appellant (Tr. 4536-4540). As he was heading back to the highway, he got a call from Appellant asking where he was (Tr. 4540). Appellant said that somebody had been following him "all over everywhere in a gray minivan" and that he had been "all over the area…trying to shake it" (Tr. 4541). He asked if it was "some of you guys," and Clark said he had no idea who it was (Tr. 4541). Clark was concerned someone was "after" Appellant and told

Appellant to go straight his office, but Appellant said he was close to the property and would meet Clark there (Tr. 4541-4542).

When Appellant arrived, Appellant again asked about the minivan; Clark said that, as far as he knew, no one in law enforcement had a gray minivan (Tr. 4542). Clark told Appellant that they needed to go to the office and offered to have Appellant followed him, but Appellant said he wanted to ride with Clark (Tr. 4543). There was little or no conversation on the short drive to the office (Tr. 4544). When they arrived, Clark had Appellant have a seat at his desk (Tr. 4544). Appellant looked "really upset" and "emotional" (Tr. 4544). Clark told Appellant, "[W]e need to talk. There's [sic] some things that you need to tell me. There's [sic] some things I need to know" (Tr. 4545). But, before asking any more questions, Clark used a rights form (different than the one from two days earlier) to again advise Appellant of his rights (Tr. 4545). Appellant indicated that he understood his rights and agreed to talk (Tr. 4545-5456). Appellant was not in custody, not restrained, and had not been told he was under arrest (Tr. 4546).

Clark told Appellant, "[W]ell, son, it's over….We found Rowan's body this morning" (Tr. 4547). Appellant dropped his head and his eyes started to water (Tr. 4547). Clark, believing that Spears had "done something" with the victim and that Appellant knew what had happened, said, "[T]here is

something in your heart and on your mind that you need to tell me, Chris. You can't live with this. You need to tell me what happened" (Tr. 4547). Appellant "kind of" shook his head affirmatively (Tr. 4547). After again saying that law enforcement had the body, Clark said, "You need to tell me what David's done with Rowan" (Tr. 4548). Appellant "rose up" in his seat as if surprised and looked at Clark "kind of funny" (Tr. 4548). Then, because the office was busy with other people around doing business, Appellant said he could not talk there (Tr. 4547-4548). Clark recommended they go somewhere else, and Appellant recommended going to the Muncie Bridge (Tr. 4549). Clark agreed (Tr. 4549). As Appellant stood up, he held out his arms as if to allow Clark to handcuff him; Clark told him he did not need to do that (Tr. 4554-4555). Clark contacted the Barry County Sheriff's Department to tell them he and Appellant were going to the bridge and told them to go to his office in Wheaton (Tr. 4550-4551). The two then went to the bridge in Clark's patrol car (Tr. 4551-4554).

At the bridge, Appellant again stuck out his hands as if he wanted Clark to handcuff him (Tr. 4554). Clark again refused, saying that there "may come a time when I'll have to do that, but I don't think that's necessary right now" (Tr. 4554). Appellant said something to the effect of, "[W]ell, for what I'm about to tell you, you will" (Tr. 4554). Clark asked if Appellant wanted

him to ask questions or just to tell it in his own words; Appellant chose the latter (Tr. 4555).

Appellant, tearful, told Clark of the events leading up to getting to his property consistently with his earlier statements (Tr. 4555-4558). Appellant said that they went to his property because they wanted to smoke marijuana and he had some there (Tr. 4559). When he said they all got "pretty F'ed up," Clark asked, "[O]n one little joint?" (Tr. 4560). Appellant said, "[O]h, hell no…. I rolled a hog log," referring to a very large marijuana cigarette (Tr. 4560). After they "really got messed up on that," Mahurin said his wife would get mad at him for staying out so late, so he and Spears were going to leave (Tr. 4560). But Mahurin told Appellant that he was going to "back-road" a little because he was afraid to come through town where Clark was on duty, and would drink the rest of the alcohol and smoke a little more pot (Tr. 4560). After they left, Appellant said that he knew that, if he hurried, he could get to the Spears house and get the victim "out of there" before Mahurin and Spears got there (Tr. 4561). He got in his pickup and took the direct highway route to the Spears house (Tr. 4561-4562).

Appellant entered the house, used the downstairs bathroom, then went to the victim's bedroom (Tr. 4562). She was sleeping on the floor under a blanket (Tr. 4562). He took the blanket off of her, picked her up, and carried

her to his truck (Tr. 4562). He said that the victim did not wake up during this (Tr. 4562). He drove her back to his property (Tr. 4562-4563).

Appellant said that, at the farm, he took the victim out of the truck and into his camper trailer, where he laid her on the bed still asleep (Tr. 4563). He removed her pants and panties, leaving her top clothed (Tr. 4567, 4570). He then said, "I had sex with her" in the "missionary position" and also "used my finger a little bit" (Tr. 4563-4564). While the victim struggled a little at first, she soon stopped (Tr. 4564).

After he was done, Appellant grabbed the victim by the arms and held her in front of him facing away from him (Tr. 4564). He walked her outside, where there was enough moonlight that he could see a little bit (Tr. 4565). As they got outside, the victim looked over her shoulder back at Appellant, and he believed she recognized him (Tr. 4565). There was an old truck sitting nearby with a coil of "chicken house rope" in the bed (Tr. 4565). He then said he unspooled some of the cord, looped it around her neck, and "pulled it tight," demonstrating for Clark with his fists clenched pulling his arms away from each other (Tr. 4565, 4575). The victim struggled a little then fell to the ground; Appellant stayed with her, keeping the rope tight until she stopped moving (Tr. 4566). He said that he then picked up her body and laid her in the back of his truck (Tr. 4566).

He said that he planned on dumping the victim off of the Muncie Bridge, but then thought that someone would find her too quickly (Tr. 4568). So he drove to Fox Church Hill, knowing there were caves around there (Tr. 4569). He parked by one of the caves and threw the victim's body in (Tr. 4569). He tried to cover the hole with branches and limbs, but they kept falling in (Tr. 4570). He then got back into his truck and drove back to his property (Tr. 4570).

At the property, he burned the victim's pants and panties and the rope he had used to kill her in a stove sitting in the yard (Tr. 4570). He went in the camper and turned on the light, finding blood all over his foam mattress and his clothes, which he said he had kept on during the rape, as he just "unzipped my pants, pulled it out of my boxers and…went at it" (Tr. 4570-4571). He changed into fresh clothes and planned to burn the mattress and clothes in a burn barrel near a calf barn (Tr. 4571). Afraid that someone would see the flame, he dragged the burn barrel into the building then burnt the evidence in the barrel (Tr. 4571). He said he then went back into the trailer, laid on the floor, and stared at the ceiling until dawn (Tr. 4572).

After Appellant finished confessing, Clark told him they needed to go back to town (Tr. 4572-4573). Clark allowed Appellant to sit in the front of his patrol car and smoke while going back into town (Tr. 4572-4573). Clark

told Appellant he would have to tell others his statement, and Appellant said, "I know" (Tr. 4573). Clark contacted Barry County detectives and the FBI and told them to come to Wheaton (Tr. 4574).

At the station, deputies from Barry County and Newton County and an FBI agent listened as Appellant retold his statement after again being advised of his rights (Tr. 3787-3788, 4573-4574, 4715, 4810, 4815). Appellant appeared sober and aware of his surroundings and was "downcast," looking down at the table as he spoke (Tr. 3860-3861). Appellant also signed a consent form to search his property (Tr. 3854, 4778-4780, 4817-4818). Afterwards, Clark took Appellant to the Barry County Sheriff's Office, where Appellant gave a videotaped statement (Tr. 4575-4576, 4821-4828; St. Exh. 94). Appellant's confession was surprising because all of the law enforcement officers had been operating under the assumption that Appellant was going to say that Spears had killed the victim and that Appellant only knew about it (Tr. 4689-4690). But at no point during the interviews had Appellant said that Spears had anything to do with the crimes (Tr. 3855).

Newton County deputies subsequently re-interviewed Spears, who apparently implicated himself in the crimes (Tr. 3856, 4830, 4852; Def. Exh. 748). Upon learning about this, Barry County deputies and Clark again interviewed Appellant, who denied any involvement by Spears (Tr. 4784-

4786: Def. Exh. 748).

While Appellant was being interviewed, evidence technicians were searching Appellant's property (Tr. 4263-4265). Among the many pieces of evidence located and/or seized were a metal spool in the bed of a silver pickup truck and some white cord or twine on and in the truck (Tr. 4265-4272, 4490-4492). More rope or wire was found in the bed of Appellant's white truck (Tr. 4290). There was a 55-gallon drum converted into a cooking stove outside with ashes in it, another 55-gallon burn barrel in the calf barn with unidentifiable burnt remnants in it, and an open area burn pile with a piece of "string or cordage" in it (Tr. 4294-4302, 4321-4334, 4923-4925). Items were seized from the bed and cab of Appellant's white truck and both the bed and cab were vacuumed to collect the remaining evidence (Tr. 5000-5006, 5025-5037).

The autopsy of the victim revealed that she was killed by ligature strangulation—something flexible had been put around her neck, cutting off blood flow to the brain (Tr. 5222). The ligature wound wrapped around her neck, stopping only at one portion in the back consistent with her ponytail being in the way of the rope (Tr. 5200, 5212-5221, 5225-5228). With enough pressure, the victim would have lost consciousness in "roughly" ten seconds, would have quit breathing in 2-3 minutes, and would have been irretrievably

brain damaged and therefore brain dead in twelve minutes (Tr. 5224). The victim also suffered a "very painful" laceration, inflicted while alive, of about 3/4" from the back of her vagina almost all the way to her anus, consistent with blunt force trauma caused by an adult male penis, which resulted in significant bleeding (Tr. 5209-5212). The victim had additional small injuries to her face and arm inflicted prior to death and significant facial trauma likely inflicted after death caused by being thrown into the cave (Tr. 5196-5202). The victim had signs of decomposition consistent with her body having been in moisture (Tr. 5266-5269). The only clothes the victim was wearing was a shirt and socks (Tr. 5271). During the autopsy, a rape kit was collected, including vaginal swabs, blood samples, and tape lifts from the victim's pubic area (Tr. 5231, 5244-5249).

Some hairs that appeared suitable for DNA testing were found in the evidence from Appellant's white truck (Tr. 5389-5406, 5444). DNA tests on one of those hairs produced a partial DNA profile consistent with the victim's DNA (Tr. 5438-5440, 5444). Only 1 in 328,700 Caucasian people would have the same partial DNA profile (Tr. 5443). Additionally, two hairs found in one of the pubic area tape lifts from the rape kit appeared to be a Caucasian "pubic region hair" which were "microscopically similar" to Appellant's pubic hair (Tr. 5526).

Appellant presented no guilt-phase witnesses (Tr. 5548).

Appellant was found guilty of first-degree murder (L.F. 680). During the penalty phase, the State presented victim impact testimony from six witnesses (Tr. 5731-5838). One of those witnesses, the victim's older sister, also testified that, while she was under the age of 18 and both she and Appellant were living at the Spears' home, Appellant repeatedly rubbed against her, grabbed her buttocks and breasts, and made sexual comments, including comments about "waiting 'til [she] was a certain age" (Tr. 5814-5816, 5821).

Appellant presented two witnesses to suggest residual doubt about David Spears's possible involvement in the murder (Tr. 5886-5933). He presented five background witnesses and an expert in "human development" to posit that Appellant suffered from "severe disorganized disassociative attachment disorder" and "intermittent explosive personality disorders" (Tr. 6128-6130, 6162, 6274). The expert attributed these developmental disorders to Appellant's life experiences, including "severe emotional neglect" before birth and during the first six months of his life and later "confusion in his connections with other people" (Tr. 6274). The background evidence also showed that Appellant was bullying and assaultive from a young age, often targeting those younger than him (Tr. 6244, 6255, 6334-6336. 6341-6342).

While in a juvenile facility, he was verbally aggressive and threatening towards staff (Tr. 6340). He also had repeatedly sexually assaulted his younger stepsister (starting when she was age 11) and had "sexual fantasies about young females" (Tr. 6263, 6298-6300, 6367).

The jury found two aggravating circumstances (that the murder was outrageously wanton and vile involving torture and that the victim was a potential witness to Appellant's rape of her) and recommended a sentence of death (L.F. 696; Tr. 6508-6510). The court followed this recommendation and sentenced Appellant to death (L.F. 769-770). This appeal followed.

ARGUMENT

I.

The trial court did not clearly err in denying Appellant's motion to suppress statements and in admitting Appellant's incriminating statements at trial because there was sufficient evidence, in the light most favorable to the court's ruling, that Appellant's conversation to Chief Clark at Muncie Bridge, during which Appellant fully admitted committing the murder, was made voluntarily with knowledge and understanding of his rights.

Appellant claims that the trial court erred in denying his motion to suppress statements and in admitting his statements at trial because Appellant's initial full confession to Chief Clark at Muncie Bridge[5] was involuntary due to improper "exploit[ation]" of Chief Clark's relationship with Appellant, Appellant's fear of "vigilante justice," and Appellant's being "worn

[5]Appellant's argument that the "fruit of the poisonous tree" doctrine should bar his confessions following the Muncie Bridge conversation shows that Appellant's statements at the bridge are the linchpin of Appellant's claim, i.e. if those statements were admissible, then the subsequent statements were either admissible or cumulative and therefore harmless (App. Br. 67-68).

down" by repeated questioning during the week prior to his confession (App. Br. 51-61, 65-66). He also complains that his waiver of his rights was unknowing and intelligent because he was not advised of his rights prior to the Muncie Bridge conversation, and because his subsequent statements made after being advised of his rights were the product of an improper "two-step interrogation" (App. Br. 61-65). But there was sufficient evidence, in the light most favorable to the court's ruling, demonstrating that Appellant's statements made during the Muncie Bridge conversation were voluntary and that Appellant had been advised of his rights and knowingly and intelligently waived them. Therefore, the trial court did not clearly err in admitting Appellant's statements.

A. Standard of Review

In reviewing the trial court's ruling on a motion to suppress, the appellate court is limited to determining whether the trial court's ruling was supported by substantial evidence. *State v. Edwards*, 116 S.W.3d 511, 530 (Mo. banc 2003). All evidence elicited at both the suppression hearing and trial, and the reasonable inferences rising therefrom, are to be viewed in the light most favorable to the trial court's ruling. *Id.* The appellate court defers to the trial court's finding of facts, credibility determinations, and weight to be accorded the evidence, but reviews questions of law *de novo*. *State v.*

Rousan, 961 S.W.2d 831, 845 (Mo. banc 1998); *State v. Abeln*, 136 S.W.3d 803, 808 (Mo. App., W.D. 2004). The trial court's determination on a motion to suppress will only be reversed if clearly erroneous. *Id.* "If the ruling is plausible, in light of the record viewed in its entirety, we should not reverse, even if we would have weighed the evidence differently." *State v. Williams*, 277 S.W.3d 848, 851 (Mo. App., E.D. 2009); *see also City of Springfield v. Hampton*, 150 S.W.3d 322, 325 (Mo. App., S.D. 2004).

B. Appellant's Statement was Voluntary

The Due Process Clause bars involuntarily obtained confessions from being admissible at trial. A confession is involuntary when the totality of the circumstances shows that law enforcement officers created physical or psychological coercion sufficient to deprive the defendant of a free choice to admit, deny, or refuse to answer the examiner's questions. *State v. Faruqi*, 344 S.W.3d 193, 203 (Mo. banc 2011). In determining whether a defendant's confession resulted from improper coercion, this Court considers a range of factors relating to the defendant, including his or her age, experience, intelligence, gender, lack of education, infirmity, and unusual susceptibility to coercion. *Id.* The Court also considers such factors as whether the defendant was advised of his rights, the length of the detention, the repeated and prolonged nature of the questioning, and the use of coercive techniques

such as deprivation of food or sleep. *Id.* A defendant's mental condition, by itself and apart from police coercion, should never dispose of the inquiry into the voluntariness of a statement. *Colorado v. Connelly,* 479 U.S. 157, 164 (1986). "Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." *Id.*

The totality of the circumstances shows that Appellant's statements were voluntary. Appellant was 32 years old, had a normal IQ, and had earned his GED (Tr. 6243, 6354). Appellant apparently had experience with his rights to remain silent and counsel, as, when Clark said on November 7 that he was going to read Appellant his rights, Appellant said, "[T]hat's fine. Hell, you've read them to me before" (Supp. Tr. 578). There was no evidence of any physical or mental infirmity which made Appellant especially subject to coercion. The record actually shows that Appellant was able to withstand persistent questioning by Clark and other officers when, during his second recorded interview on November 9, they tried to get Appellant to admit that Spears was involved in the crime, and Appellant refused to do so (Supp. Exh. I). Thus, Appellant's personal characteristics support the trial court's finding of voluntariness.

Despite Appellant's arguments that Appellant was not advised of his rights prior to the Muncie Bridge conversation, the motion court found that Clark had advised Appellant of his rights prior to the bridge conversation when Appellant and Clark initially arrived at the Wheaton Police Department (L.F. 549, 566). This was supported by Clark's testimony, which the court found credible, and thus was supported by sufficient evidence. (Supp. Tr. 596-604, 666-667, 4545-4546; L.F. 559).

Appellant argues that other evidence shows that he was not advised of his rights prior to this conversation (App. Br. 63-65). But this argument violates the standard of review, as the court's acceptance of Clark's testimony on this issue requires the rejection of evidence and inferences contrary to the court's ruling. *Rousan*, 961 S.W.2d at 845. Further, the other evidence Appellant relies on did not conclusively show that the rights were read after the bridge conversation. Appellant wrote on the form that the time was 3:00, which was after he and Clark returned from the bridge (Tr. 656-657, 668-669). But Clark did not know where that time came from, as Clark did not give him that time (Supp. Tr. 667). Clocks may not have been reset due to the switch back from daylight savings time the previous weekend (Supp. Tr. 752-753). Appellant may have been wearing a watch with the wrong time (Supp. Tr. 753). Appellant may have simply guessed. The trial court was free to

believe Clark's testimony of the earlier signing and disbelieve Appellant's written assertion that he waived his rights at 3:00 p.m., as the court was free to believe or disbelieve all or part of any of the evidence. *Abeln*, 136 S.W.3d at 808; *State v. Emmett*, 346 S.W.3d 418, 420 (Mo. App., S.D. 2011). Thus, Appellant's claim that he was not advised of his rights is meritless. As there was sufficient evidence to support the trial court's conclusion that Appellant was informed of his rights prior to incriminating himself, that factor supports a finding of voluntariness.

The "length of detention" factor also supports a finding of voluntariness, as Appellant was not in custody at any time prior to or during the Muncie Bridge conversation. By necessity, "custodial interrogation" requires that the questioning be initiated by law enforcement. *State v. Werner*, 9 S.W.3d 590, 595 (Mo. banc 2000). But here, it was Appellant who initiated not only the November 9 conversation, but every contact with Chief Clark that week. Appellant flagged Clark down from his truck on Monday, November 5, to speak with him (Tr. 4515-4516). Appellant came to Clark's office on November 6 and November 7 on his own initiative, freely leaving both times (Tr. 4520-4531). Appellant actively sought out Clark on November 9, calling the office and saying he had been looking for Clark "all morning," calling Clark personally, meeting up with Clark, and voluntarily choosing to

go to the office with Clark (Tr. 4535-4543). Initiating contact supports a finding that Appellant was not in custody. *Werner*, 9 S.W.3d at 595. When advised of his rights, Appellant was told he had the right to refuse to answer any questions and stop answering at any time, showing that he understood the conversation was voluntary, supporting a finding that Appellant was not in custody (St. Exh. 92). *Id.* Appellant maintained unrestrained freedom of movement and the conversation was not police dominated; Clark repeatedly told Appellant there was no need to handcuff him (even after Appellant confessed), he allowed Appellant to sit in the front of the patrol car and smoke on the way back to the station, he deferred to Appellant's choice of location for the conversation, and he allowed Appellant to simply tell his story (Tr. 4549, 4554-4555, 4572-4573). This also supports a finding that Appellant was not in custody. *Id.* In light of all of this evidence, and consistent with the trial court's findings (L.F. 566), Appellant was not in custody until after the Muncie Bridge conversation. Thus, there was no detention of Appellant at all, and the "length of detention" factor supports the finding of voluntariness.

The "repeated or prolonged questioning" factor also supports a finding of voluntariness. While Clark had spoken to Appellant three times prior to his confession, these meetings were brief and there was actually little or no

questioning during any of them. The first two conversations were generally about Appellant helping law enforcement, and Appellant left the third prior to being questioned (Tr. 4517-4523, 4525-4531). While Appellant had also been questioned by other officials on several occasions between Sunday and Wednesday, Appellant willingly agreed to these meetings and believed he was free to terminate them at any time and his requests to stop talking or not talk about certain things were honored (Tr. 3769, 3875-3878, 3928; Supp. Tr. 763-764, 994-995). Moreover, from his voluntary conversation with Clark on the evening of November 7 until his confession on the afternoon of November 9, he talked to no one in law enforcement, and thus had more than a day and a half of rest from talking to police prior to his statement (Tr. 4531). Therefore, the evidence in the light most favorable to the court's ruling shows that the November 9 statement was not influenced by prolonged or repeated questioning, which supports the finding of voluntariness.

The final factor set out in *Faruqi*, the "use of coercive techniques such as deprivation of food or sleep," also favors the finding of voluntariness. In *Faruqi*, the claim of coercion was rejected as "there nothing in the record indicating that the physical conditions of [the] interview were coercive,"; citing the lack of handcuffs and two-hour length of the interview. *Faruqi*, 344 S.W.3d at 203. The Muncie Bridge conversation was even shorter than that,

and, like *Faruqi*, there was no use of handcuffs or other physical coercion used (Tr. 4554-4555; Supp. Tr. 656-657, 664, 668).

Appellant claims he was subjected to improper psychological coercion by the police. First, he argues that Clark was improperly used as a "false friend" to coerce his testimony (App. Br. 51-57, 61). It is true that Appellant and Clark had a friendship of some degree prior to the murders and that officers eventually decided that Appellant would be more willing to confess to Clark than anyone else (Tr. 3960-3961, 4609-4615). But this did not rise to the level of holding Clark out as an improper "false friend."

In *Spano v. New York*, 360 U.S. 315 (1959), relied upon by Appellant, the United States Supreme Court criticized the police use of the defendant's childhood friend, now a young police officer, to repeatedly lie to the defendant and tell him that the police officer would lose his job, leading to trouble for the officer, his pregnant wife, and his three young children, unless the defendant confessed. *Id.* at 319, 322. The court found that this "false friend" technique of preying on Appellant's sympathies for his friend was improper and, combined with other improperly coercive techniques during the various interviews, resulted in an involuntary confession. *Id.* at 321-24

Even a cursory reading of *Spano* shows that, other than the fact that Clark was a friend of Appellant's, this case is nothing like *Spano*. There was

no subterfuge involved in this case. Clark did not press Appellant to confess to the murder to avoid some false harm. Clark testified that he never said he would "look the other way" or that nothing would "happen to" Appellant if he made incriminating statements to Clark and got in trouble, thus appearing to act as a friend who could provide some kind of benefit in exchange for a confession (Supp. Tr. 579). In fact, Clark did not even expect Appellant to confess, but instead to implicate Spears (Tr. 4548). The extent of Clark's urging of Appellant to say what was on his mind was simply to alleviate the apparent distress Appellant appeared to be under (Tr. 4530, 4547). Appellant acknowledged this during his later recorded interviews, as he said he "bad[ly]" wanted to tell Clark about the murder as early as Monday, that the murder was "eating at" Appellant, that it was "in my mind" to tell Clark about the murder before they met that day, and that all Clark had done was "offer me a friendly ear" (Supp. Exh. H). A confession that is motivated by a guilty conscience and not from a source of official coercion does not render a statement involuntary. *Connelly*, 479 U.S. at 170-71. Thus, the record supported the conclusion that Appellant's confession was voluntary and not the result of an improper "false friend" technique.

Appellant also argues that he was improperly coerced to confess by the threat of vigilante justice (App. Br. 57-59). To the extent that Appellant

actually believed that he could suffer some form of unlawful retribution from the citizenry, this cannot support a claim of unconstitutional coercion, as law enforcement is not the source of such coercion. *Id.* Appellant argues that Clark "exploited" that fear because he told Appellant "I'm not here 24 hours a day, Chris. I can't guarantee your safety, you know, all the time" (Supp. Tr. 595-596). But this was not improperly coercive. First, as Clark explained, he had legitimate concerns about Appellant's welfare; he even ruled out going to the public park for the conversation because there were too many people there and people had seen Appellant come into the police station (Tr. 4541, 4549, 4668, 4670). Thus, Clark's statement about being able to protect Appellant was not a "tactic," but a true expression of concern. Second, Clark did not state that he would be unwilling to protect Appellant from vigilante justice unless Appellant confessed. The cases Appellant relies upon appear to require such a *quid pro quo* between protection from mob violence and the defendant's willingness to testify. *See, e.g., Payne v. Arkansas* 356 U.S. 560, 564-65 (1958). Finally, that Appellant did not believe Clark's statement was the equivalent of a threat not to protect him from violence can be seen from Appellant's later recorded statements that his statement had not been coerced due to threats from any law enforcement source (Supp. Exh. H, I). Therefore, Appellant's claim that his confession was coerced by an official

threat that he would be subjected to vigilante justice is contrary to the record.

In light of the above, the totality of the circumstances show that Appellant's statement was voluntary, as there was evidence supporting the finding of voluntariness for each of the factors set out in *Faruqi*. Therefore, the trial court did not clearly err in finding that Appellant's confession was voluntary.

C. Appellant's Statement was Knowing and Voluntary

Appellant also claims that his statements at the Muncie Bridge were unknowing and involuntary because he was not advised of his rights prior to the conversation and that the subsequent confession back at the police station and later recorded confessions were the result of an improper two-stage interrogation under *Missouri v. Seibert*, 542 U.S. 600 (2004) (App. Br. 61-65). But these arguments are meritless. If one is advised of his rights prior to making a statement, understands those rights, and then makes voluntary statements, it is "absurd" to say there was not a knowing and intelligent waiver of those rights. *State v. Gilbert*, 103 S.W.3d 743, 750 (Mo. banc 2003). Here, as explained above, there was sufficient evidence that Appellant was advised of his rights prior to the Muncie Bridge conversation (Supp. Tr. 596-604, 666-667, 4545-4546; L.F. 559). Appellant indicated that he understood those rights (St. Exh. 92). Thus, Appellant's statement was knowing and

intelligent. Further, because the first confession was made after Appellant was advised of his rights, and because Appellant was not in custody at the time, there could have been no *Seibert* violation, which prohibits the admission of a second warned statement after police intentionally withhold *Miranda* warnings prior to an initial custodial confession. *Seibert*, 542 U.S. at 609-17. Therefore, Appellant's challenges to the knowing and intelligent nature of his waiver of rights and subsequent confession are meritless.

Because there was sufficient evidence to support the trial court's conclusion that Appellant's statement at Muncie Bridge was voluntary, knowing, and intelligent, the trial court did not clearly err in overruling Appellant's motion to suppress and admitting the statements. Appellant's point must fail.

II.

The trial court did not plainly err in various evidentiary rulings at the suppression hearing because the "excluded" defense evidence was actually considered by the court on its merits. Further, Appellant has not overcome the presumption that the trial court did not consider the allegedly erroneously admitted evidence for any improper purpose. Moreover, none of the alleged errors were outcome-determinative.

Appellant raises several claims of allegedly erroneous evidentiary rulings at the suppression hearing (App. Br. 69-84). But the evidence Appellant claims was improperly "excluded" was actually considered by the trial court and rejected on its merits, was irrelevant to the admissibility of Appellant's Muncie Bridge conversation with Chief Clark, or was cumulative to other evidence on the same issues.[6] Further, Appellant did not overcome the presumption that the trial court did not consider the allegedly erroneously admitted evidence for any improper purpose. Moreover, none of

[6]As explained in Point I, *supra*, the admissibility of this interview was the linchpin of the entire suppression issue, as any previous statements by Appellant were not inculpatory and any subsequent statements were essentially cumulative to the Muncie Bridge conversation.

the alleged errors were outcome-determinative. Therefore, Appellant failed to prove plain error resulting in a manifest injustice.

A. Standard of Review

As Appellant concedes, his claims of error regarding the admission of evidence at the suppression hearing were not included in his motion for new trial and thus were not preserved for appeal (App. Br. 70; L.F. 716-767). Rule 29.11(d). Review is only available for plain error. Rule 30.20. Plain error only exists when the claimed error facially establish grounds to believe an error resulting in a manifest injustice has resulted and when the error actually resulted in a manifest injustice. *State v. Baumruk*, 280 S.W.3d 600, 607-08 (Mo. banc 2009). Plain error can only result in a new trial if the error was outcome-determinative. *State v. Baxter*, 204 S.W.3d 650, 652 (Mo. banc 2006).

B. "Excluded" Evidence was Actually Considered on the Merits

Appellant's first claim is that the trial court failed to consider a video recording of an interview Chief Clark had with Appellant on November 14, after Appellant had already been charged and arraigned and was already represented by counsel (App. Br. 72-80). The video showed that Appellant had asked to speak to Clark about an issue unrelated to the case, but that Clark repeatedly asked about the charged offenses, even after Appellant told Clark that he could not talk about that because had been advised by his

lawyer not to do so (Def. Supp. Exh. 551). Appellant claims that, because the video showed the extent of Clark's pressure to get Appellant to make statements, revealed Clark's use of "long-standing friendship and trust" with Appellant to pressure Appellant into making statements, and showed Clark allegedly violating Appellant's constitutional rights, the tape should have been considered by the court as evidence that Clark also previously acted inappropriately on November 9 before and during the Muncie Bridge conversation (App. Br. 74-80).

But the record refutes Appellant claim because it shows that the trial court actually did consider the video for the reasons Appellant offered it and rejected the inferences Appellant wanted drawn from it. The court viewed the video as part of an offer of proof to demonstrate that Clark's testimony about doing nothing to pressure or coerce Appellant's statements at Muncie Bridge was not believable (Supp. Tr. 849, 864-865, 873). The court withheld ruling on the offer of proof until ruling on the motion to suppress (Supp. Tr. 873-874).

In its findings and facts and conclusions of law, the court discussed the contents of the November 14 video, then made the following finding:

> The statements made by the Defendant on Novembe 14, 2007 as an offer of proof by the defense

> is refused for the purpose of the offer of proof – to attack the Defendant's prior statements to Chief Clint Clark made prior to and on November 9, 2007. The November 14, 2007 interview…does not operate to invalidate the Defendant's voluntary statements made through November 9, 2009.

(L.F. 570). While Appellant refers to this ruling as simply the court "sustain[ing] the State's objection" to the videotape, the court's ruling means more than that. Even though the court said that the offer of proof is "refused," (L.F. 570), the rest of the court's discussion shows that the court was not stating that the evidence was inadmissible and could not be considered. Instead, the court's finding that the November 14 "does not operate to invalidate the Defendant's voluntary statements" shows that the court did not believe that the evidence was so compelling as to overcome its finding, based on other evidence, that Appellant's Muncie Bridge confession was voluntary. Thus, the trial court actually did view the recording, consider the merits of Appellant's reason for offering the recording, and found that the recording did not require a finding that the earlier statement was involuntary. Therefore, the trial court actually considered this allegedly "excluded" evidence and found it unpersuasive. The appellate court defers to

the trial court's judgment as to the credibility of the witnesses and the weight to be given to the evidence in reviewing the ruling on a motion to suppress. *State v. Richmond*, 133 S.W.3d 576, 578 (Mo. App., S.D. 2004); *State v. Abeln*, 136 S.W.3d 803, 808 (Mo. App., W.D. 2004). Because the trial court disregarded the weight of the November 14 evidence on its merits and not due to inadmissibility, and concluded that the November 14 interview did not invalidate Chief Clark's credibility regarding the Muncie Bridge conversation, Appellant's claim that the court excluded the evidence is meritless.

The same is true of Appellant other claim of "excluded" evidence. Appellant claims that the trial court refused to consider evidence that law enforcement officers also used someone David Spears knew as a "false friend" to get him to make incriminating statements (App. Br. 80-81). During the examination of Newton County deputy Chris Jennings, Appellant elicited that Jennings sought the help of Mark Bridges, county coroner and former employer, with whom Spears had "good rapport" (Supp. Tr. 95-96). When Appellant asked if Jennings had Bridges wear a wire to talk to Spears, the State objected to relevance (Supp. Tr. 97). The court sustained that objection, but permitted an offer of proof (Supp. Tr. 100). During the offer, Bridges testified that he did not know about Bridges wearing a wire (Supp. Tr. 101-

102). That ended the offer of proof (Supp. Tr. 102).

Jennings then testified that he had Bridges present with him when interviewing Spears on November 9 (Supp. Tr. 103). The State again objected, but the court overruled it to allow Appellant to demonstrate that law enforcement was using specific people that the suspects would want present when speaking to the suspects (Supp. Tr. 103-105). But Appellant only asked some questions about whether Jennings considered the coroner to be "law enforcement" and whether he knew if the FBI used Bridges well.

A review of this record shows that Appellant was not prohibited from inquiring about the use of Bridges and did so (Supp. Tr. 95-105). While the court did sustain one relevance objection, that was only to the issue of whether Bridges was wearing a wire while talking to Spears, which the offer of proof showed that Bridges did not know about at the time (Supp. Tr. 97-102). Appellant does not explain how the deputies having Bridges wear a wire was at all relevant to show that they were utilizing Bridges as a confidant for Spears. Otherwise, the court overruled two objections to the examination, and Appellant was allowed to present testimony about Bridges' relationship with Spears and the fact that law enforcement utilized him when talking with Spears because of that relationship (Supp. Tr. 95-106). That Appellant did not seek more evidence on the issue was not due to the

court's rulings, but to counsel's choice not to explore further. Thus, the court gave Appellant ample opportunity to present evidence on the issue he now claims he was prevented from offering. Therefore, Appellant's claim that the court "excluded" relevant evidence of Bridges being used as a "false friend" is unsupported by the record.

C. There was No Showing the Court Improperly Considered Any Inadmissible Evidence

Appellant also faults the court for allowing the State to introduce evidence that Appellant took lie detector and voice stress analysis tests during the week between the disappearance and the murder and that Appellant claimed that he and the victim's 18-year-old sister had a sexual encounter sometime prior to the disappearance (App. Br. 81-83). The State did elicit evidence that Appellant took voice stress analysis and polygraph tests (Supp. Tr. 148-158), but it was not offered to prove or have the court speculate about whether or not Appellant was telling the truth, but only to show the context for such things as the manner and number of times he was advised of his rights and interviewed (Supp. Tr. 148-154, 192-202).

The results of polygraph examinations, as well as the fact that such tests were taken, offered or refused, "generally are inadmissible in Missouri criminal *trials*." *State ex rel. Kemper v. Vincent*, 191 S.W.3d 45, 49 (Mo. banc

2006)(emphasis added). But, when the credibility of a confession is at issue, and evidence of the circumstances surrounding that confession are essential in determining credibility, this Court has held that testimony about the circumstances of the taking of such exams can be admissible even in jury trials. *Id.* at 49-50. Here, the fact that Appellant took the tests was not the purpose of the testimony—the fact that he was interviewed and/or advised of his rights at certain times was why the evidence was offered. This evidence went to the very issue justifying admission in the jury trial in *Kemper*—the circumstances surrounding Appellant's confession.

Moreover, this was not a trial (which the rule explicitly applies to), but a suppression hearing before a judge. In a bench-tried case, it is presumed that any inadmissible or improper evidence was not prejudicial unless it is apparent the decision was based on that evidence, as the court is presumed to disregard improper material. *State v. Ray*, 407 S.W.3d 162, 171 (Mo. App., E.D. 2013); *State v. Finley*, 403 S.W.3d 625, 629-630 (Mo. App., S.D. 2012). Here, the court clearly did not use the fact that Appellant took the tests to speculate on the results of the tests or to question his credibility because of the tests, as it said it would not consider it for such issues (Supp. Tr. 152-154). The court even sustained objections to some of the testimony related to the tests out of concern that it limit its exposure to the topic (Supp. Tr. 202-

206). While the court's findings of fact and conclusions of law mention "testing," the court's conclusions do not use the tests for credibility purposes, but to explain the circumstances of Appellant's interactions with police, vital to a determination of the issues regarding the admissibility of the confession (L.F. 541, 564). Therefore, the record does not show any reliance by the court on any improper inference or consideration of the voice stress or polygraph tests, and Appellant has not overcome the presumption that the court did not consider improper evidence.

Likewise, Appellant has not shown any improper reliance on testimony that he told police about an alleged consensual sexual encounter with the victim's 18-year-old sister (Tr. 1008-1010). While the evidence of an apparently legal sexual encounter seems to have had little relevance to the suppression issues,[7] the findings and conclusions only make passing reference to the limited testimony, saying in the finding of facts that Appellant "described his relationship with" the Spears family members including the sister with no other detail and not mentioning it at all in the conclusions of law. Thus, the record shows that the court did not consider the

[7]The prosecutor was concerned about making sure to litigate the voluntariness of this statement in case it could be relevant in rebuttal in case Appellant chose to testify during the penalty phase (Supp. Tr. 1003-1007).

substance of this statement at all in deciding the suppression issues, and therefore Appellant failed to overcome the presumption that the trial court did not improperly consider the evidence.

D. There was No Manifest Injustice

Finally, Appellant did not prove that he suffered a manifest injustice. No law required the court to find that Chief Clark violated Appellant's rights and coerced Appellant's confession on November 9 because he may have violated Appellant's rights on November 14 (which the trial court did not believe). No law required the court to conclude that Appellant's statements on November 9 to Chief Clark were improperly coerced by their relationship because other law enforcement officers had Spears talk to a friend of his (which the trial court apparently found irrelevant). And the record showed that the court drew no improper inference or conclusion from the allegedly improperly admitted evidence. Thus, Appellant has failed to demonstrate that these alleged errors had any effect at all on the outcome of the suppression hearing. Because plain error is outcome-determinative, Appellant's failure to demonstrate any affect on the court's ruling from these alleged errors must defeat his claim. *Baxter*, 204 S.W.3d at 652.

III.

The trial court did not err in denying Appellant's motion for judgment of acquittal because there was sufficient evidence of deliberation in that Appellant's actions before, during, and after the crime supported the reasonable inference that Appellant coolly reflected on the victim's murder.

Appellant claims that there was insufficient evidence of deliberation because his statements to police established that he did not plan to murder the victim but only did so in a panic when she saw him after the rape (App. Br. 85-89). But Appellant's actions before, during, and after supported the reasonable inference that Appellant coolly reflected on the victim's murder, and therefore there was sufficient evidence of deliberation.

A. Standard of Review

Review of the sufficiency of the evidence is limited to whether there was sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt. *Williams v. State,* 386 S.W.3d 750, 753-54 (Mo. banc 2012). The evidence and all reasonable inferences from the evidence are viewed in the light most favorable to the verdict; any evidence and inferences contrary to the verdict are disregarded. *Id.* at 754. This Court does not determine whether it believes that the evidence at trial

established guilt beyond a reasonable doubt but rather determines only whether, in light of the evidence most favorable to the State, any rational fact-finder could have found the essential elements of the crime beyond a reasonable doubt. *Id.* In reviewing the sufficiency of the evidence, an appellate court does not act as a "super juror with veto powers," but gives great deference to the trier of fact. *Id.*

B. There was Sufficient Evidence

In order to convict Appellant of murder in the first degree, the State had to present evidence that Appellant knowingly caused the victim's death after deliberation upon the matter. § 565.020.1, RSMo 2000. "'Deliberation' means cool reflection for any length of time no matter how brief." § 565.002(3), RSMo 2000. Proof of deliberation does not require that the defendant contemplated his actions over a long period of time. *State v. Bateman*, 318 S.W.3d 681, 687 (Mo. banc 2010). The deliberation necessary to support a conviction of first-degree murder need only be momentary; the evidence must only show that the defendant considered taking another's life in a deliberate state of mind. *State v. Attwood*, 294 S.W.3d 144, 145 (Mo. App., S.D. 2009); *State v. Miller*, 220 S.W.3d 862, 868 (Mo. App., W.D. 2007); *State v. Davis*, 905 S.W.2d 921, 923 (Mo. App., E.D. 1995). A deliberate act is a "free act of the will" done to accomplish some unlawful purpose and while

not under the influence of sudden violent passion. *Miller*, 220 S.W.3d at 868. The element of deliberation, like any state of mind, may be proven from the circumstances surrounding the crime. *State v. Tisius*, 92 S.W.3d 751, 764 (Mo. banc 2002).

Here, Appellant's conduct before, during, and after the murder supported the reasonable inference that Appellant coolly reflection upon the murder. First, Appellant's actions prior to the murder supported the inference that Appellant planned to kidnap the victim, rape her, and kill her. Prior to going to the victim's home to kidnap her, Appellant knew that Mahurin and Spears would be going back to Stella slowly on back roads, and he reasoned that, if he went quickly enough to the victim's house, he could get her out before Spears got home (Tr. 4561). Appellant then went to the victim's house and kidnapped her, keeping her from waking up so as to avoid discovery and resistance (Tr. 4561-4563). Appellant took her back to his property, where he was alone and relatively isolated and could commit his crimes without fear of being discovered (Tr. 4563). These steps indicated planning, i.e., steps taken in advance to facilitate the crime, which is evidence of deliberation. *State v. Roberts*, 948 S.W.2d 577, 589 (Mo. banc 1997). It is true that Appellant, in his statements, denied that he had any plan to kill the victim and even denied a plan to rape her until after he

kidnapped her (Tr. 4693; St. Exh. 94). But the jury was not required to believe Appellant's self-serving statements, as the jury was free to believe or disbelieve all, part, or none of any of the evidence. *State v. Hineman*, 14 S.W.3d 924, 927 (Mo. banc 1999). Because this evidence suggested planning and thus deliberation prior to the murder, the jury was free to draw that reasonable inference from the planning evidence. *Id.*

Second, Appellant's actions during the crimes provided a reasonable inference of deliberation. The fact that Appellant raped the victim provided a motive for him to kill her—to avoid being prosecuted for the rape (Tr. 4564). While Appellant's statement indicated that he attempted to prevent the victim from seeing him during and after the rape (Tr. 4563-4565), the jury could have rejected this statement. Such a rejection was reasonable, as it was unreasonable to conclude that Appellant only intended to kidnap and rape the victim without being detected when he could not possibly know that he would be able to prevent the victim from seeing him during the entire time necessary to take her from the house, transport her to his property, put her in the trailer, rape her, put her back in the truck without her recognizing it, transport her home, and get her back in her house. Rational jurors could reasonably infer from Appellant's acts of first raping and then killing the victim that he always intended to kill the victim after the rape, thus

establishing cool reflection.

Further, the method of killing also supported an inference of deliberation. Appellant claimed that he strangled the victim for a "few minutes" (St. Exh. 94). Dr. Norton testified that, while the victim would have been unconscious relatively quickly, it would have taken 2-3 minutes for her to stop breathing (Tr. 5222-5224). An inference of deliberation may be drawn when a defendant commits a murder which, because of the particular method of attack, required some time to complete. *State v. Glass*, 136 S.W.3d 496, 514 (Mo. banc 2004). Because Appellant had ample opportunity to stop killing the victim and chose not to, the inference of deliberation from his failure to stop is permissible. *Id.* Therefore, Appellant's actions during the crimes supported an inference of deliberation.

Finally, Appellant's actions after the crime support an inference of deliberation. To avoid detection, Appellant disposed of the victim's body in a remote location, attempted to hide that location, and destroyed physical evidence of the crimes (Tr. 4566-4571). He even had the presence of mind to think through different locations, picking the one that would conceal the body the longest, and to hide the burn barrel he destroyed some evidence in so the flame would not be detected (Tr. 4567-4568, 4571). Disposing of evidence supports a reasonable inference of deliberation. *State v. Tisius*, 92 S.W.3d

751, 767 (Mo. banc 2002). He also repeatedly lied to police throughout the week following the crimes about his involvement (Tr. 3772-3773, 3881-3882, 3941-3945, 3980, 4517-4518, 4521-4523). Lying to police to conceal the murder is evidence of deliberation. *See, e.g., State v. Strong*, 142 S.W.3d 702, 717 (Mo. banc 2004). While it is possible that Appellant could have also done these things after committing a non-deliberated murder, that fact does not destroy the reasonableness of the inferences that these actions demonstrated deliberation. That another conclusion could have possibly been reached is irrelevant. "While the jury was not compelled to find deliberation from the evidence, the evidence was sufficient to support the jury's verdict that Appellant deliberated before committing two counts of first degree murder." *Tisius*, 92 S.W.3d at 764. Thus, Appellant's actions after the murder also permitted the reasonable inference of cool reflection. Therefore, there was sufficient evidence from Appellant's actions before, during, and after the murder that Appellant deliberated upon the victim's murder.

IV.

The trial court did not err in admitting items of physical evidence recovered from Appellant's property or testimony about DNA and hair analysis because all of the evidence was logically and legally relevant and Appellant was not prejudiced as Appellant conceded at trial that he admitted to raping and murdering the victim and destroying evidence of the crime.

Appellant raises multiple claims of error in the admission of various pieces of evidence, including pieces of fiberglass resembling string or twine, ashes seized from the outdoor cooking stove, DNA testimony comparing the victim's DNA with the partial profile from a hair found in the bed of Appellant's truck, and hair comparison evidence of a "pubic region hair" found on the victim and Appellant's pubic hair (App. Br. 90-98). But all of the evidence was logically and legally relevant and therefore admissible and Appellant suffered no prejudice, as he conceded at trial that he admitted raping and murdering the victim and destroying the evidence. Thus, there was no error in admitting this evidence.

A. Standards of Review

As to all but Appellant's DNA claim, a trial court's ruling regarding the admissibility of evidence is reviewed for abuse of discretion. *State v. Winfrey*,

337 S.W.3d 1, 5 (Mo. banc 2011). The trial court abuses its discretion when its ruling is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration. *Id.* This Court reviews the trial court for prejudice, not mere error, and reverses only if the error was so prejudicial that it deprived the defendant of a fair trial, i.e., a reasonable probability that the court's error affected the outcome of the trial. *Id.*

As Appellant concedes, his claim as to the DNA evidence was not included in his motion for new trial and is therefore not preserved (App. Br. 91; L.F. 716-767). Rule 29.11(d). Review is available only for plain error. Rule 30.20. Plain error only exists when the claimed error facially establishes grounds to believe an error resulting in a manifest injustice has resulted and when the error actually resulted in a manifest injustice. *State v. Baumruk*, 280 S.W.3d 600, 607-08 (Mo. banc 2009). Plain error can only result in a new trial if the error was outcome-determinative. *State v. Baxter*, 204 S.W.3d 650, 652 (Mo. banc 2006).

Evidence must be logically and legally relevant to be admissible. *State v. Anderson*, 306 S.W.3d 529, 538 (Mo. banc 2010). Logical relevance refers to the tendency of evidence to make the existence of a material fact more or less probable. *Johnson v. State*, 406 S.W.3d 892, 902 (Mo. banc 2013). Legal

relevance weighs the evidence's probative value against unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness. *Id.*

B. There was No Abuse of Discretion in Admitting Crime Scene Evidence

Appellant's first claim is that the court erred in admitting State's Exhibit 39A, identified by various witnesses as a piece of string (Tr. 4333-4334), nylon string (Tr. 4334, 4373), cord or "cordage" (Tr. 4299-4302), something that looked like twine (Tr. 5415), and fiberglass strands (Tr. 5409-5412), seized from an open burn pile on Appellant's property (App. Br. 92). He argues that because subsequent tests showed it was not string, but strands of fiberglass, it was not relevant (App. Br. 92). He claims that the evidence was unduly prejudicial because the prosecutor continued to refer to it as string or cord and thus somehow "misled the jurors to believe that the law enforcement officers found the murder weapon" on his property (App. Br. 92-94). Appellant's claims are meritless.

First, while Appellant disputes that the object seized from the burn pile could have been a cord or string, there is no reasonable dispute that the object *appeared* to be a string or cord to every witness who saw it, even the criminalist who concluded that he believed it was not "string" because it was

comprised of fiberglass strands (Tr. 4299-4302, 4333-4334, 4373, 5414). In light of all of that testimony, and despite Appellant's claims to the contrary, the reasonable inference could have been drawn that object was a cord or string made out of fiberglass.[8] As the evidence specialist who seized the object testified, the object looked like a nylon string when he seized it, but it did not look like that at the time of trial due to examination by the lab (Tr. 4340). Thus, by the time the criminalist examined it, it may not have looked the same as it orginally had when seized. Further, that microscopic examination showed the object was actually made of fiberglass instead of nylon or other fiber does not automatically mean, as Appellant suggests, that the object was not originally a string, cord, twine, or thin rope (Tr. 4515). Therefore, there

[8]Apparently unknown to the criminalist, cords, strings, or ropes, made out of fiberglass and similar in appearance to what is popularly known as "nylon cord," exist. *See, e.g.,* "Fiberglass Rope and Braid," Fiberglass Tex.com, http://www.fiberglasstex.com/rope&braids.htm (last accessed December 12, 2013)(showing various woven fiberglass cords); "Industrial Cords," *Threads Technolgy India*, http://www.threadstechnology.com/industrial-cords.html (last accessed December 12, 2013)(showing both fiberglass and nylon cords).

was a reasonable inference to be drawn from all of the testimony about the string that it was indeed a string.

That the item could reasonably have been perceived to be string or cord renders Appellant's claim meritless, as the presence of burnt string or cord at the scene was probative. Appellant admitted that he used what he called "chicken house rope" to commit the murder (Tr. 4565). Thus, the presence of any rope, cord, string, or twine that could be considered "chicken house rope" at the scene was relevant, as it corroborated Appellant's statement that he had access to such an item, even if State's Exhibit 39A was not the actual object used to commit the murder. Evidence which corroborates other relevant evidence bearing on the principal issues in the case is logically relevant. *State v. Davis*, 318 S.W.3d 618, 639-40 (Mo. banc 2010).

Moreover, the State did not have any witness or scientific evidence to identify the murder weapon despite the thorough efforts to seize and examine copious amounts of evidence. Prior to trial, the State had reason to believe that, based on discovery or pretrial hearings, Appellant would be attacking the quality of the investigation at trial (L.F. 473-474). The State had the right to anticipate such a challenge and present evidence showing the condition of the crime scene and the efforts made to investigate it. Evidence is relevant "to show the condition of the crime scene and the nature of the police

investigation," even if the evidence does not link the defendant to the crime. *State v. Griffin*, 756 S.W.2d 475, 483 (Mo. banc 1988).

Further, the evidence was not unduly prejudicial. First, despite Appellant's argument to the contrary, the State never suggested that State's Exhibit 39A was the murder weapon. Tellingly, Appellant does not cite to any portion of the transcript where the prosecutor even hinted that the object might be the murder weapon (App. Br. 92-94). That the prosecutors' questions called the object a "string" or "cord" did not suggest that the object was the murder weapon, but only used the same terms to identify the object that the witnesses themselves used—they called it a string or a cord because it appeared to the witnesses to be a string or a cord. Moreover, it was the State who called the criminalist and elicited on direct examination that he did not believe the object was a string or cord, but strands of fiberglass (Tr. 5409-5512). Thus, the State did the opposite of suggesting the object was the murder weapon by essentially telling the jury that the State did not believe it was the murder weapon. Therefore, Appellant's claim of deception by the prosecution is meritless.

Further, even if Appellant was correct and the fiberglass did not connect Appellant to the crime, the prejudicial effect of the evidence would have been minimal to nonexistent. As this Court noted regarding evidence

from the scene not linking the defendant to the crime in *Griffin*, "[E]ven had the evidence been irrelevant, defendant could hardly have been prejudiced by evidence showing no connection between himself and the crime." *Griffin*, 756 S.W.2d at 483. Even if not involved in the murder, the prejudicial effect of the evidence was so low that its probative value regarding the crime scene and investigation outweighed it. Thus, the evidence was logically and legally relevant and therefore admissible.

Likewise, State's Exhibit 40, the burnt remnants found in and recovered from the outdoor wood-burning stove, was admissible. In his statement, Appellant claimed he burnt the victim's clothing and the murder weapon in that stove (Tr. 4570). The fact that there were ashes resulting from the burning of something in it had some tendency to corroborate Appellant's reported use of the stove. Further, as noted above, evidence showing the condition of the crime scene and the nature of the police investigation is relevant even if the evidence does not link the defendant to the crime. *Griffin*, 756 S.W.2d at 483. As one officer testified, they seize everything that "might appear" to have evidentiary value, even if those items do not wind up having such value (Tr. 3898). Finally, also as noted above, if Appellant was correct and there was nothing connecting these ashes to the crime, Appellant could not have been prejudiced by such evidence. *Id.*

Therefore, the probative value of the ashes outweighed any prejudicial effect, rendering the evidence admissible.

C. There was No Abuse of Discretion in Admitting Comparison Evidence

Appellant challenges a DNA comparison made between the victim's DNA and a partial DNA profile from a hair found in the bed of Appellant's truck, arguing that the partial profile was "so weak that it lacked true probative value" (App. Br. 94-96). But the evidence was admissible. Missouri courts have recognized that testimony comparing the DNA of a participant in the crime with a partial DNA profile developed from physical evidence is relevant to the issue of identity and may be relied on by the jury. *See, e.g., State v. Harding*, 323 S.W.3d 810, 817-18 (Mo. App., W.D. 2010)(partial DNA profile evidence was admissible even though there was no statistical frequency testimony); *State v. Rockett*, 87 S.W.3d 398, 404-05 (Mo. App., W.D. 2002)(partial DNA profile from a condom matching the defendant with a statistical frequency of 1 in 900 million, although below the standard the lab used to find a "match," was probative evidence of identification); *State v. Abdelmalik*, 273 S.W.3d 61, 64 (Mo. App., W.D. 2008)(partial DNA profile that did not eliminate the defendant as the source of the DNA could be relied on by the jury). Thus, the fact that a full DNA profile could not be developed

does not automatically disqualify the DNA evidence.

The criminalist tested a hair found in the bed of Appellant's truck (Tr. 5036-5037, 5398-5403, 5434, 5444). A partial DNA profile at six loci containing female characteristics was developed, four of which could be used for comparison (Tr. 5435-5440). The victim's DNA was consistent with that partial profile at all four comparable loci; the odds of any other Caucasian person matching that partial profile was 1 in 328,700 (Tr. 5438-5443). Even though it was not a full profile that could eliminate every other person on Earth as the contributor of the hair, this partial profile tended to show that the hair was the victim's hair. That evidence connected Appellant to the crime and corroborated his statement that he put the victim's body in the bed of the truck (Tr. 4566), making the evidence very probative. The fact that it was a partial profile did not make the evidence unduly prejudicial for admission purposes; that fact went to the weight of the evidence for the jury to consider. *Rockett*, 87 S.W.3d at 405. Therefore, the partial DNA profile evidence was admissible.

Appellant's challenge to the hair comparison evidence should likewise fail. The forensic examiner compared two hairs recovered from a tape hinge lift of the victim's pubic area with Appellant's pubic hair (Tr. 3994-3998, 4027, 4890, 5509-5513). She concluded that the two hairs were "pubic region

hairs," and not actually pubic hairs; the hairs were from an area of the body "slightly outside' the pubic region, such as the hairs running onto the leg or stomach from the pubic area (Tr. 5513-5514). She testified that the hairs were of "limited value" for comparison purposes (Tr. 5544); thus, she would not be able to testify to any kind of definitive "association" between those hairs and Appellant's sample hairs such as that they were "consistent" with Appellant's hairs (Tr. 5511, 5526-5527, 5540). But she did testify that she could properly conclude that the hairs were "microscopically similar" to Appellant's pubic hairs; they were similar in color, diameter variation, distribution of medulla cells, and size, distribution, and variation of pigment granules in the cortex (Tr. 5526-5527, 5535-5536, 5538, 5543-5545). At no point was there any testimony that such a comparison between two similar-but-not-same hairs was improper or invalid (Tr. 5499-5545).

Just as with partial DNA cases, even though the expert could not state with certainty that the hairs "matched" Appellant or even that they were "consistent" with Appellant's hair because of the difference of types of hair, the expert's testimony that they were microscopically similar to Appellant's supported a reasonable inference that the hairs may have been Appellant's or, at the very least, that Appellant could not be ruled out as the source of the hairs. Scientific comparisons that conclude that the defendant was a

"possible" source of the evidence and that he could not be "ruled out" as the contributor are still permissible. *See Harding*, 323 S.W.3d at 818-19. The "limited value" of the evidence went to its weight, not its admissibility. *Id.*, citing *Rockett*, 87 S.W.3d at 405. Therefore, it was not improper for the court to admit the hair comparison testimony.

D. There was No Prejudice

Finally, Appellant's point must fail because, even if any of the above evidence had been improperly admitted, Appellant was not prejudiced. In his guilt-phase opening statement, Appellant conceded that he had committed both the rape and the murder (Tr. 3609-3612). In closing argument, Appellant stated that he bore the "legal responsibility" for the victim's death and that it was a "intentional, knowing killing" (Tr. 5596-5596). Instead of challenging that he committed the rape and murder, his defense was that he did not deliberate and thus was only guilty of second-degree murder (Tr. 3612, 5597-5598, 5605, 5621). Because the challenged evidence, at most, only identified Appellant as the perpetrator of acts that he conceded committing at trial as part of his defense strategy, Appellant could not have suffered prejudice from any of this evidence. *See, e.g., State v. Grubbs*, 724 S.W.2d 494, 501 (Mo. banc 1987)(no prejudice from evidence suggesting that someone implicated the defendant in the killing when the defendant confessed to the

killing and was relying on a defense that the killing was manslaughter instead of murder).

V.

The trial court did not abuse its discretion in admitting photographs of the victim in the sinkhole in which Appellant dumped the victim's body and autopsy photographs because the photos were relevant, the court carefully considered the admissibility of each photograph, and the jury was not improperly influenced to decide the case due to passion or prejudice.

Appellant claims error in the admission of nine photos of the victim's body in the sinkhole where Appellant dumped her body and fifteen autopsy photos, arguing that the photographs were improperly duplicative and prejudicially gruesome (App. Br. 99-107). But the photographs were relevant to show the scene of part of the crime (where Appellant dumped the victim's body), the nature of the victim's wounds, the condition and location of the body, to corroborate Appellant's confession, and to aid the eyewitnesses and pathologist in explaining their testimony. Moreover, the court's rulings do not show a lack of careful consideration, as the court thoroughly reviewed the offered pictures and excluded two photos because they were duplicative. Finally, Appellant was not prejudiced, as the record suggests that the photos did not prevent the jury from properly considering the evidence for the relevant reason instead of allowing the photographs to improperly influence

it to decide the case due to passion or prejudice from the photos. Therefore, there was no abuse of discretion.

A. Standard of Review

A trial court's ruling regarding the admissibility of evidence is reviewed for abuse of discretion. *State v. Winfrey*, 337 S.W.3d 1, 5 (Mo. banc 2011). The trial court abuses its discretion when its ruling is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration. *Id.* This Court reviews the trial court for prejudice, not mere error, and reverses only if the error was so prejudicial that it deprived the defendant of a fair trial, i.e., a reasonable probability that the court's error affected the outcome of the trial. *Id.*

B. There was No Abuse of Discretion

"Photographs are relevant if they show the scene of the crime, the identity of the victim, the nature and extent of the wounds, the cause of death, the condition and location of the body, or otherwise constitute proof of an element of the crime or assist the jury in understanding the testimony." *State v. Rousan*, 961 S.W.2d 831, 844 (Mo.banc 1998). If a photograph is relevant, it should not be excluded simply because it may be inflammatory. *Id.* "Insofar as photographs tend to be shocking or gruesome, it is almost always because the crime is shocking or gruesome." *Id.* Gruesome crimes

produce gruesome, yet probative, photographs, and a defendant may not escape the brutality of his own actions. *State v. Feltrop*, 803 S.W.2d 1,11 (Mo. banc 1991). Further, a photograph is not rendered inadmissible simply because other evidence described what is shown. *Id.* "The State cannot be unduly limited as to the matter of satisfying its quantum of proof." *State v. Sandles*, 740 S.W.2d 169, 177 (Mo. banc 1987).

Here, the photographs were admissible, as they were relevant for numerous reasons. First, there were ten photographs from the sinkhole that were admitted, nine of which Appellant objected to as being duplicative and prejudicial (Tr. 4194-4225; St. Exh. 145-147, 149-150, 158-162). FBI photographer Robert Stuart used the challenged photographs to explain or show several relevant facts: how the victim appeared in the sinkhole (Tr. 4228); how the body had interacted with the unusual geologic features of the cave to account for the condition of the body (Tr. 4229-4232, 4252-4253); that the body had suffered injuries consistent with sexual assault and the condition of those injuries (Tr. 4231-4233, 4244); the condition of the body, including the victim's state of partial undress and debris on and around the body (Tr. 4233, 4239, 4244); the process by which the body was examined in the cave and evidence surrounding the body was identified and collected (Tr. 4238-4239, 4241-4243); and the appearance of the ligature marks which

eventually were determined to be the cause of death (Tr. 4251-4253).

Moreover, the photos generally were all from different angles and several were taken at different points as the body was being moved, thus demonstrating that they were not wholly duplicative (St. Exh. 145-147, 149-150, 158-162). The photos helped the jury understand the discovery and recovery of the body, the identification of her injuries, and the process by which evidence was collected. The photos also helped corroborate elements of Appellant's statement, including: that he had raped her (Tr. 4563), that he had strangled her with cord (Tr. 4565-4566), that he had dumped her body into the sinkhole from many feet above the surface (Tr. 4569), and that he had tried to cover the hole with debris that fell in the hole (Tr. 4570). Therefore, the sinkhole photographs were admissible for numerous relevant reasons.

Likewise, the challenged autopsy photographs (St. Exh. 179-184, 186-193, 196[9]) were relevant for the pathologist to explain the autopsy and his findings, including: the identification and general appearance of the victim at

[9]Appellant never explains why State's Exhibit 195, a photograph of the victim's socks after they were taken off of her body, was in any way improperly prejudicial, as the photograph is not gruesome (App. Br. 104-107; St. Exh. 195).

the autopsy (Tr. 5189-5195; St. Exh. 179); identification and explanation of the victim's pre-mortem injuries consistent with the crime, including those explaining the rape and murder (Tr. 5200-5202; St. Exh. 180-184, 186-190); the victim's post-mortem injuries consistent with being dumped in the sinkhole (Tr. 5196-5199, 5203; St. Exh. 182, 191); and the effect of decomposition consistent with the victim having been in the hole for a week (Tr. 5203, 5266-5268; St. Exh. 182, 192-193). The photos helped the doctor explain the cause and mechanism of death (Tr. 5222-5229). The photos also helped further corroborate Appellant's statements about the manner and timing of the crime (Tr. 4563, 4565-4566, 4569-4570). Therefore, the autopsy photos were relevant and admissible.

Moreover, the care the trial court exercised in reviewing the photographs and ruling on each shows that the trial court carefully considered the admissibility of each photo. The court had long hearings outside the presence of the jury to review each photo, hear arguments on each photo, and rule on each photo, prior to allowing any testimony about the photos (Tr. 4196-4225, 5144-5176). The court showed that it was willing to exclude photos it truly believed were improperly duplicative, as it excluded two of the sinkhole photos for that reason (Tr. 4206, 4223). In light of the thorough consideration of each photograph by the court, it cannot be said that

any of the court's rulings was clearly against the logic of the circumstances and was so unreasonable as to indicate a lack of careful consideration. *Winfrey*, 337 S.W.3d at 5. Thus, there was no abuse of discretion. *Id.*

Finally, the record does not support Appellant's assertions that the photos were so disturbing that the jury was unable to view them reasonably and not use them to improperly decide the case on passion or prejudice. First, a question asked by one of the jurors showed that the jury was far more concerned with doing their jobs well than by the discomfort the evidence might cause. When defense counsel complained that pictures would be placed on the screen, the prosecutor stated they would not to displayed on the screen, but instead planned to pass them to the jurors (Tr. 5145, 5151). But early in the pathologist's testimony using the photos, one of the jurors asked, "Can she put it up on the screen? No?" (Tr. 5197). This showed that the jury, having already seen photos from the sinkhole, was not afraid to examine the evidence in the best way possible for doing its job.

Further, the jury's guilt-phase deliberations suggest that the jury was not so overcome by any prejudicial effect of the photos that it was prevented from carefully reviewing the evidence and reaching a decision based on reason instead of passion. Although Appellant had conceded every element of the case except deliberation, the jury still deliberated over three hours on

that single issue (Tr. 5641-5657). The jury asked to see Appellant's first recorded statement again and view pictures from his property (Tr. 5641-5642), showing that it was focused on evidence it truly believed was relevant to deliberation, not merely on attempting to convict Appellant because of the photos. Appellant's argument that the jury was so "shock[ed]" by the photos that the photos "fatally infected the trial" is not only speculative, it appears to be contrary to the record and severely underestimates the ability of jurors to seriously and soberly do the job they are called to do. Because the record suggests the jurors were not led to decide the case for any improper reason due to the photos, Appellant failed to demonstrate a reasonable probability that the photos affected the outcome of the trial. Thus, Appellant failed to establish prejudice, and his claim must fail.

VI.

The trial court did not err in not granting a mistrial due to alleged improper personalization or failing to interfere with argument that statements about David Spears's alleged involvement in the crime should not be considered because the arguments were permissible.

Appellant raises multiple claims of error during closing argument (App. Br. 108-116). First, Appellant claims that the court erred in denying a mistrial due to alleged "improper personalization" by the prosecutor during the guilt-phase argument for demonstrating how Appellant claimed he committed the murder (App. Br. 110-113). Second, Appellant claims that the State "disparaged defense counsel" and directed the jury to disregard relevant mitigation evidence by arguing that statements about Spears's alleged involvement in the crimes was meant to distract and confuse (App. Br. 113-115). But the arguments were permissible, and therefore there was no error.

A. Standards of Review

Appellant's personalization claim was preserved by objection and mistrial request (Tr. 5625-5627, 5629-5631). The denial of a motion for mistrial is reviewed for an abuse of discretion. *State v. Fassero*, 256 S.W.3d

109, 115 (Mo. banc 2008). An abuse of discretion occurs when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Id.* The failure to grant a mistrial will only be reversed if the error was so prejudicial that its effect could not have been removed by instruction to the jury. *Carter v. State*, 253 S.W.3d 580, 581 (Mo. App., S.D. 2008).

Appellant's other claim is not preserved, and review may only be made for plain error. Rule 30.20. Plain error only exists when the claimed error facially establish grounds to believe an error resulting in a manifest injustice has resulted and when the error actually resulted in a manifest injustice. *State v. Baumruk*, 280 S.W.3d 600, 607-08 (Mo. banc 2009). Under plain error review, Appellant must prove that the allegedly improper arguments had a decisive impact on the trial's outcome. *State v. Dorsey*, 318 S.W.3d 648, 655 (Mo. banc 2010).

B. There was No Abuse of Discretion

Improper personalization can occur when the prosecutor asks the jurors to imagine that they, or some other person, is in the victim's situation or at the crime scene. *Glass v. State*, 227 S.W.3d 463, 474 (Mo. banc 2007). Appellant does not point to any statement by the prosecutor where he told

the jury to imagine being strangled as the victim was, and there were no such statements in the challenged argument (Tr. 5626, 5628-5629). Instead, Appellant, relying on *State v. Rhodes*, 988 S.W.2d 521 (Mo. banc 1999), seems to be arguing that any demonstration of the crime by the prosecutor, even if based on the descriptions or demonstrations in evidence, constitutes improper personalization (App. Br. 110-113). But Appellant misinterprets *Rhodes*. In that case, the prosecutor not only demonstrated the crime, but encouraged the jury to do the same while imagining what it was like to be beaten and killed like the victim. *Id.* at 528. But the argument in *Rhodes* was improper not because of the mere act of demonstrating the crimes, but the prosecutors invitation for the jury to put themselves in the victim's shoes while doing so. *Id.* at 528-29. Thus, the Court concluded the argument was like that in *State v. Storey*, 901 S.W.3d 886, 901 (Mo. banc 1995), on which Appellant also relies, in which, without demonstration, the prosecutor told the jury to imagine being killed as the victim was. *Rhodes*, 988 S.W.2d at 529; *Storey*, 901 S.W.2d at 901.

Here, there were no statements at all that the jurors should imagine themselves being killed like the victim, but merely demonstrations based on the evidence. The prosecutor held his hands out as Appellant had demonstrated he held the rope while choking her and remained silent for less

than thirty seconds (Tr. 5625, 5627). This Court has held that a prosecutor is entitled to make such silent demonstrations in a capital case guilt phase to argue that the amount of time the crime took was evidence of deliberation. *Glass*, 227 S.W.3d at 474; *see also State v. Knese*, 985 S.W.2d 759, 772-73 (Mo. banc 1999)(five-minute period of silence to demonstrate how long Knese stood on the victim's neck was not personalization, but proper argument to show how much time he had to consider his actions). Likewise, the demonstration here was relevant to show that the "few minutes" Appellant said he held the cord tight on the victim's neck gave him considerable time to reconsider his actions, and therefore was a proper comment on the contested issue of deliberation (Tr. 5627; St. Exh. 94). Thus, just as in *Glass* and *Knese*, the demonstration, without any invitation for the jurors to place themselves in the victim's shoes, was proper.

Appellant also faults the prosecutor for "ignor[ing] the court's instruction" by continuing to hold his hands and demonstrate Appellant's description of the crime (while speaking) after the court said "not to go any further with this" (Tr. 5627-5629; App. Br. 111). But the record shows that the prosecutor believed the court's statement was about his silent demonstration, as he was surprised that the defense was arguing that he could not demonstrate the crime based on the evidence (Tr. 5629, 5631). The

court also did not believe that the prosecutor was violating any order: the court had noticed the prosecutor continuing to hold his hands and did not admonish the prosecutor (Tr. 5630) and said it was overruling Appellant's objection because all the prosecutor was doing was demonstrating based on the evidence (Tr. 5631). During this objection, Appellant made it clear that he was not objecting to the prosecutor's words, but only his actions (Tr. 5630). But this admission must defeat Appellant's claim, as the only cases he cites in support of his personalization claim required words inviting the juror to place themselves in the victim's shoes. *Rhodes*, 988 S.W.2d at 529; *Storey*, 901 S.W.2d at 901. Without such words, mere demonstration is not improper personalization. *Glass*, 227 S.W.3d at 474. Therefore, the prosecutor's argument was not improper personalization, and the trial court did not abuse its discretion.

C. There was No Plain Error

As to Appellant's plain error claim, disparagement of the defense only occurs when a prosecutor makes a personal attack on defense counsel. *State v. Steele*, 314 S.W.3d 845, 852 (Mo. App., W.D. 2010). A prosecutor's argument attacking defense counsel's techniques or trial tactics, as opposed to his integrity or character, is permissible. *Id.*; *see also Knese*, 985 S.W.2d at 775 (arguments criticizing the defense theory of the case is permissible, as a

"primary purpose" of the State's argument is to discredit the defense's theory of the case). Further, it is error for the prosecutor to misstate the law so as to lower the State's burden. *Storey*, 901 S.W.2d at 902.

Here, the prosecutor argued that evidence about Spears's alleged confession contained in the Appellant's second recorded interview should not be considered by the jury because Spears was not on trial (Tr. 6503). The prosecutor said, "It's just something to distract you with. Distract and confuse. Distract and confuse. Try to get some -- some little thing burrowed down deep, something to distract and confuse you. Don't let it happen." (Tr. 6503). The prosecutor argued that the case was about Appellant and the victim and that the mitigation evidence did not outweigh the aggravating evidence (Tr. 6503). The prosecutor argued that the jury's duty did not include trying to reconcile Spears's alleged statements with Appellant's confessions, and reminded the jury that, even according to Spears's alleged statement, Appellant was the one who killed the victim (Tr. 6504; Def. Exh. 784). The prosecutor argued that Spears was not on trial and had nothing to do with Appellant's punishment (Tr. 6504). The prosecutor then reminded the jury that it was "free to believe and give weight to whatever you want on that second video" (Tr. 6504).

This argument did not improperly disparage defense counsel, as it was focused on trial tactics, i.e., attempting to inject residual doubt about Spears's alleged participation in the offense. Further, it did not misstate the law or misinstruct the jury that it *could* not consider the evidence about Spears's alleged confession. To the contrary, the prosecutor specifically argued that the jury was free to give the alleged statements whatever weight it wanted (Tr. 6504). Instead, the prosecutor merely argued that the jury *should* not consider the evidence about Spears because the evidence was not compelling evidence that should mitigate Appellant's sentence. Such argument is not improper, but is within the permissible bounds of argument meant to "discredit the defendant's theory of the case." *Knese*, 985 S.W.2d at 775. Further, consistent with the prosecutor's argument, the jury was correctly instructed that it could consider any evidence it deemed mitigating in considering whether mitigating circumstances outweighed aggravating circumstances (L.F. 689). Where the jury is correctly instructed on how to weigh mitigating and aggravating circumstances, there is no plain error from an alleged misstatement of the law regarding that process, as jurors are presumed to follow the instructions. *State v. McFadd*en, 391 S.W.3d 408, 420-21 (Mo. banc 2013). Therefore, there was no plain error.

VII.

The trial court did not abuse its discretion in overruling Appellant's objection to penalty-phase defense witness Dale Pickett's testimony about the death penalty because the testimony did not violate the rule against testimony about the appropriate sentence in a particular case, was permissible impeachment evidence of prior inconsistent statements and bias, and was not prejudicial.

Appellant claims that the State's penalty-phase questioning of Appellant's birth father Dale Pickett elicited improper, prejudicial testimony about Pickett's opinion of the death penalty (App. Br. 117-125). But the testimony did not violate the rule against victim impact testimony about the appropriate sentence in this case, as it was not a plea by a victim nor did it seek an opinion about the sentence Appellant should receive. Moreover, the evidence was permissible impeachment evidence, as the cross-examination demonstrated Pickett's prior inconsistent statements and bias, as Pickett's prior statements about the earlier murder of his brother were inconsistent with his direct testimony that mercy should be given because "[a]nybody can change." Finally, Appellant was not prejudiced, as there was no reasonable probability that the brief examination of Pickett had any effect on the verdict. Thus, there was no abuse of discretion.

A. Standard of Review

A trial court's ruling regarding the admissibility of evidence is reviewed for abuse of discretion. *State v. Winfrey*, 337 S.W.3d 1, 5 (Mo. banc 2011). The trial court abuses its discretion when its ruling is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration. *Id.* This Court reviews the trial court for prejudice, not mere error, and reverses only if the error was so prejudicial that it deprived the defendant of a fair trial, i.e., a reasonable probability that the court's error affected the outcome of the trial. *Id.*

B. There was No Abuse of Discretion

Appellant's claim of error is based on precedent holding that neither a victim's family member nor an expert may give an opinion about the appropriateness of a particular sentence (App. Br. 121). *State v. Taylor*, 944 S.W.2d 925, 938 (Mo. banc 1997), citing *Payne v. Tennessee*, 501 U.S. 808, 830 n. 2 (1991); *State v. Roll*, 942 S.W.2d 370, 378 (Mo. banc 1997); *State v. Nickens*, 403 S.W.2d 582, 587 (Mo. 1966). But the cross-examination of Pickett did not violate these holdings. First, the questions asked by the prosecutor did not call for Pickett to express an opinion as to what sentence Appellant should receive. Instead, they were questions about Pickett's beliefs about the death penalty in general:

Q. Mr. Pickett, you believe in the death sentence, don't you?

A. No I do not.

Q. When your brother was murdered…you wanted the death penalty to be given?

…

A. I wanted to be the one to kill him.

(Tr. 5979-5980). Cross-examination of penalty-phase defense witnesses about their general personal opinions of the death penalty has been upheld as such questions are relevant to the witness's possible bias. *See, e.g., Com. v. Ballard*, No. 636 CAP, slip op. at 20, 2013 WL 6124340, *10 (Pa. Nov. 21, 2013); *Braley v. State*, 572 S.E.2d 583, 594 (Ga. 2002); *West v. State*, 725 So.2d 872, 886-87 (Miss. 1998), *abrogated on other grounds by Jackson v. State*, 860 S.E.2d 653 (Miss. 2003); *People v. Mickel*, 814 P.2d 290, 322 (Cal. 1991). Because the questions here were not designed to seek an opinion on an appropriate sentence, but on the witness's views of capital punishment in general, they did not violate the rule against testimony about the appropriate sentence in a specific case.

Second, Pickett was neither a family member of the victim offering victim impact evidence nor an expert witness. That the bar against opinion

evidence about a particular sentence has been limited to those two types of witnesses is apparent from the impact such testimony would have. A plea from the family or friends of a murder victim for the defendant's death could provide the jury a reason to base a death verdict on that emotional plea, not the evidence. An opinion about an appropriate sentence given by one deemed an expert could cause jurors to improperly defer to the expert's judgment instead of its own on an issue the jury is capable of deciding without an expert's opinion, thus invading the province of the jury. But testimony by the family member of the defendant in a capital case about the potential punishment does not pose the same danger of improperly influencing the jury. It would be expected that the defendant's close family members would want to plead for mercy and that the lack of such a plea might create a negative inference. *State v. Moore*, 585 A.2d 864, 879-80 (N.J. 1991). Such pleas for mercy often resemble an opinion about the appropriate sentence. *State v. Dickerson*, 716 S.E.2d 895, 907 (S.C. 2011). Thus, all testimony that resembles an opinion about the appropriate sentence by a defendant's family member do not violate the precedents Appellant relies on.

In this case, the testimony was admissible not simply to show that Appellant's biological father believed in the death penalty, but to impeach his credibility. At the end of his direct examination, Pickett testified:

> Well, I know that my son made a serious mistake. Mistakes is [sic] something that everybody makes. Regardless of what happens, I still love my son and everything and I'll still be there for him. But I know a man can change. Anybody can change. I have. It's basically about the only thing I know to say.

(Tr. 5961). Thus, Pickett told the jury his plea for mercy was not just based on his desire to see his son's life spared, but was based on his belief that Appellant should be spared because everyone makes mistakes and everyone has the ability to change.

But this testimony was inconsistent with a previous statement Pickett made about the man who killed his brother, whom he personally wanted to kill (Tr. 5979-5980). The prosecutor's questions thus showed that Pickett did not believe that "everybody makes mistakes" and should be spared because "anybody can change" (Tr. 5961). Prior inconsistent statements are admissible. § 491.074, RSMo 2000. Moreover, the cross-examination showed Pickett's bias, as his testimony was actually not an accurate profession that all men can change, but was a false statement motivated by his desire to help Appellant. Cross-examination about any issue is permissible if it shows the

bias or interest of the witness because bias or interest could affect the reliability of the witness's testimony on any issue. *Winfrey*, 337 S.W.3d at 8. Because the testimony about Pickett's views of the death penalty exposed prior inconsistent statements and bias, it cannot be said that the trial court abused its discretion.

Appellant also failed to establish prejudice. The two questions about this issue were a miniscule part of the nearly twenty pages of cross-examination of Pickett and almost fifty pages of total examination of Pickett (Tr. 5934-5987). Pickett was but one of nine defense penalty-phase witnesses presented over two days and fifteen total penalty-phase witnesses presented over three days (Tr. 5886-6411). The testimony was isolated and not unduly emphasized, as it was neither at the beginning or end of the examination, the prosecutor did not return to the topic during the examination, and the testimony was not mentioned by the State in closing argument (Tr. 5934-5987; 6463-6481, 6502-6507). In the context of the entire trial, an isolated improper question typically will not result in reversible prejudice. *See, e.g., State v. Walters*, 241 S.W.3d 435, 439 (Mo. App., W.D. 2007)(argumentative question not prejudicial); *Neal v. State*, 99 S.W.3d 571, 578 (Mo. App., S.D. 2003)(misstatement of fact in question not prejudicial). In light of the entire record, the minimal effect that the two isolated questions would have had did

not establish a reasonable probability of any effect on the trial.

Further, Appellant's suggestion that it was the State that "knocked the breath" out of Pickett's testimony is meritless (App. Br. 125). Part of Appellant's mitigation theory was that Pickett was an awful person whose "betrayal" of Appellant warranted at least some of the blame for Appellant's actions in raping and murdering the victim (Tr. 6139, 6154-6161, 6164-6166, 6169, 6171, 6274-6275). The jury heard that Pickett was a drug user and alcoholic who was so often drunk that Appellant's older brother had to take care of the infant Appellant, had been jailed for shooting someone, and had been in prison before and after that (Tr. 5939, 5941-5942, 5968-5970, 5986, 6139). Even according to the defense, Pickett was not meant to be well-regarded by the jury. The fact that two questions were asked to show that Pickett lied about his reasons for requesting mercy for Appellant could not have so diminished the jury's assessment of Pickett as to have created a reasonable probability that the questions affected the trial.

Finally, Appellant also argues that the prosecutor committed misconduct by not following a pretrial order to approach the bench before eliciting evidence based on an argument that the other party had "opened the door" to such evidence (App. Br. 120-121). But the discussion and related order Appellant cites dealt with possible defense evidence of Appellant's

exculpatory statements, not a general discussion of the issue of parties approaching when it was believed that any testimony would open the door to any issue (Tr. 895-899). The discussion also preceded trial by more than a year (Tr. 753). The lapse of time and lack of clarity as to the meaning of the purported order demonstrates that there was no intentional violation of a pretrial ruling by the prosecutor. Further, the "critical component of due process analysis in cases involving prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *State v. Clemons*, 946 S.W.2d 206, 217 (Mo. banc 1997). As shown above, there was no abuse of discretion or prejudice in admitting the evidence. Thus, the fact that the prosecutor did not first approach the bench to discuss the two questions before the permissible questions were allowed could not have affected the fairness of the trial. Appellant's prosecutorial misconduct argument is meritless.

VIII.

The trial court did not err in not requiring the State to prove that aggravating circumstances had to outweigh mitigating circumstances because prior precedent of the United States Supreme Court and this Court do not require aggravating circumstances to outweigh mitigating circumstances.

Appellant claims that Instruction No. 17 improperly shifted the burden of proving that mitigating circumstances outweighed aggravating circumstances, arguing that the State was required to prove that aggravating circumstances outweighed mitigating circumstances (App. Br. 126-128). But the United States Supreme Court has held that the states can constitutionally require the defendant to prove that mitigating circumstances outweigh aggravating circumstances in a capital case. *Kansas v. Marsh*, 548 U.S. 163, 170-71 (2006). Thus, this Court has repeatedly rejected claims similar to Appellant's claim. *See, e.g., State v. Deck*, 303 S.W.3d 527, 548 (Mo. banc 2010); *State v. Johnson*, 284 S.W.3d 561, 588-89 (Mo. banc 2009); *State v. Forrest*, 183 S.W.3d 218, 228-29 (Mo. banc 2006). Appellant's does not present any argument as to why these holdings were wrong. *Deck*, 303 S.W.3d at 548.

IX.

The trial court did not err in not requiring the State to plead aggravating circumstances in the charging document to properly allege "aggravated first-degree murder" because prior precedent of this Court does not require aggravating circumstances to be pled in the charging document

Appellant claims that the State's failure to plead the aggravating circumstances in the charging document prevented the trial court from sentencing Appellant to death for a crime "never pled in the information," "aggravated first-degree murder" (App. Br. 129-131). But this Court has repeatedly rejected claims identical to Appellant's claim, holding that there is only a single crime of murder in the first degree, for which death is a statutorily permitted punishment, and therefore the allegation of aggravating circumstances does not increase the maximum penalty for that offense. *See, e.g., State v. Deck*, 303 S.W.3d 527, 549-50 (Mo. banc 2010); *State v. Johnson*, 284 S.W.3d 561, 589 (Mo. banc 2009); *State v. Baumruk*, 280 S.W.3d 600, 617-18 (Mo. banc 2009). Appellant's does not present any argument as to why these holdings are wrong. *Deck*, 303 S.W.3d at 550.

X.

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

Under the mandatory independent review procedure contained in § 565.035, this Court must determine:

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

the evidence and the defendant.

§ 565.035.3, RSMo 2000.

The first factor supports upholding the jury's imposition of death. Appellant's argument that the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor simply rehashes his earlier claims of error regarding the photographs of the victim (especially those regarding the rape), the prosecutor's guilt-phase closing argument, and the questioning of Dale Pickett about the death penalty (App. Br. 132-133). As shown earlier, none of these alleged errors were actual errors or resulted in any undue prejudice. Where the allegations of prejudice are based on meritless claims of error, those alleged errors do not demonstrate that the death sentence was imposed due to passion, prejudice, or other arbitrary factors.

Appellant presents no argument that the aggravating factors found by the jury were unsupported by evidence (App. Br. 132-138). Appellant subjected the nine-year-old victim to the "very painful" act of rape which lacerated her from her vagina almost to her anus (Tr. 5209-5212). The victim cried during the rape, evidencing the fact that she was subjected to pain (Def. Exh. 748). Then, after being led from the trailer outside, as the victim was strangled, she did not die quickly and she suffered (St. Exh. 94). While Dr.

Norton testified that she may have lost consciousness in ten seconds, that was only if there was enough pressure to cut off arterial flow to the brain (Tr. 5222-5223). She would have struggled with the ligature while she remained conscious, thus being aware that her death was imminent (Tr. 5224-5225). She received other wounds prior to death (Tr. 5201-5202). Thus, the evidence supported the finding that Appellant inflicted physical torture on the victim prior to her death. *See, e.g., State v. Preston*, 673 S.W.2d 1, 11 (Mo. banc 1984).

There was also sufficient evidence that Appellant killed the victim to prevent her from being a witness in the investigation of the rape. This circumstance exists when "a reasonable trier of fact can infer that the defendant foresaw an investigation and killed the victim to eliminate that threat." *State v. Shafer*, 969 S.W.2d 719, 739 (Mo. banc 1998). Appellant admitted he killed the victim because she would be able to identify him as her rapist, establishing his desire to eliminate the threat of the investigation (Tr. 4565). Because the evidence of aggravating circumstances was sufficient, the second factor in independent review is met.

As to the third factor, Appellant first argues that several traits about himself and the investigation of the case warrant overturning his sentence (App. Br. 133-136). None of these warrant overturning the sentence. First,

Appellant argues he confessed, accepted full responsibility for his crimes, and was remorseful for his actions (App. Br. 133-134). Appellant also champions his refusal to implicate Spears and make "an innocent man pay the price for his crime" (App. Br. 134-13). It is true that Appellant *eventually* confessed to the crimes and *eventually* attempted to exculpate Spears (Tr. 4555-4572, 4785-4786). But this was only after a week of repeatedly lying to numerous law enforcement officials (Tr. 3772-3773, 3878-3882, 3931-3940, 3976, 3980, 4521-4523), pretending to cooperate and feigning concern about the victim (Tr. 3664-3665, 3733, 3859, 3873, 3878-3881, 3928, 3951, 4517-4518, 4520-4523), and attempting to implicate Spears in the crime and offering to wear a wire to collect evidence against him (Tr. 3944-3945, 3951, 3979, 3985), all while countless people searched in vain for the dead victim. Efforts to hide evidence and provide police with false information prior to confessing do not make that subsequent confession a compelling reason to overturn the sentence. *See, e.g., State v. Deck*, 303 S.W.3d 527, 553 (Mo. banc 2010)(confession after hiding evidence and giving police false alibis found not to warrant relief under proportionality review). Further, this Court has upheld death sentences even when there appeared to be evidence of remorse. *See, e.g., State v. Jones*, 979 S.W.2d 171, 180, 187 (Mo. banc 1998). Appellant's eventual confession, remorse and refusal to implicate Spears do

not warrant relief.

Appellant also argues that the "strange circumstances" of the investigation warrant reversal of the death sentence (App. Br. 134). This argument rehashes claims regarding the giving of Appellant's statements raised in Points I and II which the trial court rejected and which were not meritorious. Appellant also suggests that the failure to tape Appellant's statement at the Wheaton police station was improper, but such recording is not required. *U.S. v. Tykarsky*, 446 F.3d 458, 477 (3rd Cir. 2006); *U.S. v. Smith-Balthier*, 424 F.3d 913, 925-26 (9th Cir. 2005). Thus, the absence of such recording is irrelevant.

Appellant cites his purported intoxication at the time of the murder as a reason for granting relief (App. Br. 136). First, the extent of Appellant's intoxication depends almost exclusively on Appellant's self-serving statements (St. Exh. 94; Tr. 4560). All of the alcohol and marijuana were shared by three men that night (Tr. 3721-3722). Nathan Mahurin testified that Appellant had stopped drinking when they were at Appellant's property and was only smoking during that time, suggesting that Appellant was not as intoxicated as he claimed (Tr. 3727). Further, while there was no evidence that Appellant's intoxication rendered him unable to think clearly, plan, and deliberate, his admissions showed that he had the logical ability to reason

and plan his crimes: he knew he had to beat Spears and Mahurin back to the house to kidnap the victim (Tr. 4561), keep the victim from looking at him (Tr. 4563-4565), kill the victim to conceal his identity once she did identify him (Tr. 4565), dispose of the body in a remote location after concluding it would be found too soon elsewhere (Tr. 4568), attempt to further conceal the entrance to the sinkhole (Tr. 4570), destroy the physical evidence of the crime (Tr. 4570-4571), and put the burn barrel into a building to prevent the flame from being seen (Tr. 4571). In light of all of this evidence of rational thought, it cannot be said that Appellant was so intoxicated that it should affect proportionality review.

Appellant also claims his mitigation evidence supports reversal (Tr. 135). There is, however, no evidence that the jury found this evidence credible, and there is no reason for this Court to regard it as such. This is especially true of the "developmental" evidence, proffered by the expert witness regularly employed by the Public Defender System to provide mitigation testimony about childhood problems creating murderers (Tr. 6282-6283, 6285-6290), who suggested that most of Appellant's problems were due to the allegedly poor circumstances of his birth parents from the womb through the first six months of his life, before he could know about them or have any memory of any treatment by them (Tr. 6274, 6311-6312). Much of

this evidence was refuted by his brother, who suggested Appellant was relatively well treated as an infant (Tr. 6003-6004). On the other hand, Appellant ignores that Appellant's background showed: that he had a normal IQ (Tr. 6243); that he was regularly assaultive, including "beating up little kids" (Tr. 6255, 6334-6341); and that he repeatedly sexually harassed and assaulted minor girls and had sexual fantasies about young females (Tr. 5814-5816, 5821, 6298-6300, 6367). Regardless, even if Appellant's childhood could have somehow been considered difficult, that does not warrant setting aside the sentence. *State v. Brooks*, 960 S.W.2d 749, 503 (Mo. banc 1997).

In addition to the background evidence above that demonstrates that the defendant's character does not warrant overruling the sentence, the evidence of guilt was strong. Appellant gave a detailed confession to the crime (Tr. 4555-4572). As explained in Point III, the evidence of Appellant's conduct before, during, and after the crime demonstrated deliberation. Physical evidence of the rape, disposal of the body, and evidence found on the victim and in the bed of his truck corroborated his confession (Tr. 4051-4055, 5209-5212, 5438-5444, 5526). The strength of the evidence supports the jury's sentence.

Finally, a comparison of other cases where death was imposed demonstrates that Appellant's sentences were not excessive or

disproportionate. Appellant's case is nearly identical to *State v. Johnson*, 207 S.W.3d 24 (Mo. banc 2006). In *Johnson*, as in this case, the defendant was a friend of the child victim's family who took advantage of an opportunity to kidnap the victim for the purpose of having sex with her. *Id.* at 31. Johnson, like Appellant, took the victim to a remote location to rape her. *Id.* at 31-32. Johnson then attempted to rape the victim but was unable to do so, whereas Appellant succeeded in committing his rape. *Id.* at 32. Johnson, like Appellant, murdered the victim to prevent his sexual assault from being detected. *Id.* Johnson, like Appellant, attempted to conceal the victim and evidence of the crime. *Id.* Like Appellant, Johnson initially denied involvement in the crime before confessing, although he did not mislead investigators as long as Appellant did. *Id.* at 32-33. And like Appellant, Johnson claimed at trial that he did not deliberate, but, unlike Appellant, presented evidence that he suffered from a mental disease which prevented him from deliberating. *Id.* at 34. This Court held that Johnson's death sentence for his "heinous killing of a small child" was neither excessive nor disproportionate. *Id.* at 51. The same is true in this case.

In addition to *Johnson*, this Court has repeatedly found that the death penalty is appropriate for murders where the defendant kidnapped a young victim, sexually abused the victim, murdered the victim, and carelessly

discarded the victim. *State v. Glass*, 136 S.W.3d 496, 521-22 (Mo. banc 2004); *State v. Ferguson*, 20 S.W.3d 485, 497 (Mo. banc 2000); *Brooks*, 960 at 502; *State v. Nunley*, 923 S.W.2d 911, 926 (Mo. banc 1996); *State v. Brown*, 902 S.W.2d 278, 300–01 (Mo. banc 1995). There are other cases where the death sentence has been upheld where the defendant sexually assaulted and then asphyxiated his victim and "many cases" where the defendant killed his victim during or after a sexual assault. *State v. Davis*, 318 S.W.3d 618, 645 (Mo. banc 2010)(and cases cited therein). The number of cases where death has been upheld under circumstances similar to this case supports the finding in this case that Appellant's sentence is not disproportionate.

Appellant points out five cases which he alleges are similar where juries recommended life sentences (App. Br. 136-138). Of those, only two, *State v. Greathouse*[10] and *State v. Davis*, 963 S.W.2d 317 (Mo. App., W.D. 1997), had victims which were minors, as both girls were teenagers (App. Br. 136-137). Even though these two cases included the sexual assault and subsequent murder of teenage victims, Appellant cannot explain the circumstances showing why those defendants received life sentences which

[10]There was no published opinion in the *Greathouse* case, but it may presumably be considered due to records of all first-degree murder convictions being collected by this Court. *See Davis*, 318 S.W.3d at 643-45.

would have no bearing in this case, such as if the evidence of guilt left some room for the jury to choose a life sentence due to residual doubt, if the defense presented much stronger mitigation evidence than Appellant did in this case, or if the jury simply elected to extend mercy where mercy was not required. Because the circumstances leading to the jury's choice of life in those cases are unknown, it cannot be said that the mere fact that those defendants received life sentences shows that Appellant's death sentence is either excessive or disproportionate. Thus, those cases do not compel a finding that Appellant's sentence is disproportionate.

CONCLUSION

In view of the foregoing, Appellant's convictions and sentences should be affirmed.

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 22,214 words as determined by Microsoft Word 2007 software; and

2. That a copy of this notification was sent through the eFiling system on this 13th day of December, 2013, to:

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