No. SC89119

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

SAMUEL A. FREEMAN,

Appellant.

Appeal from Ripley County Circuit Court
Thirty-Sixth Judicial Circuit
The Honorable David A. Dolan, Special Judge

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from a conviction obtained in the Circuit Court of Ripley County for murder in the first degree, Section 565.020, RSMo,[1] for which Appellant was sentenced to life imprisonment without the possibility of parole. Following a Missouri Court of Appeals, Southern District opinion reversing Appellant's conviction, this case was transferred to this Court pursuant to this Court's order upon Respondent's Application for Transfer. Therefore, jurisdiction lies in this Court. Mo. Const. art. V, § 10; Supreme Court Rule 83.04.

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

STATEMENT OF FACTS

On November 14, 2005, Appellant was charged by information in Butler County Circuit Court with murder in the first degree, Section 565.020, RSMo, and forcible sodomy, Section 566.060, RSMo. (L.F. 8).[2] The case was transferred on a change of venue to the Circuit Court of Ripley County. (L.F. 3). The State filed its Notice of Intent to Seek the Death Penalty on February 22, 2006, and filed an amended information that same day to correct a typographical error. (L.F. 4). A First Amended Notice of Intent to Seek the Death Penalty was filed on July 27, 2006. (L.F. 5). The charge of forcible sodomy was dismissed on August 9, 2006. (L.F. 5; 2d Supp. L.F. 1).

Appellant was tried by a jury on September 5-9, 2006, before Judge David A. Dolan. (L.F. 6). Appellant contests the sufficiency of the evidence to support his conviction. Viewed in the light most favorable to the verdict, the evidence at trial showed:

Appellant was at the VFW club in Poplar Bluff on the evening of May 6, 1992. (Tr. 125, 129, 131, 178-79). He was a regular customer at the club. (Tr. 132, 179). Another regular was the victim,[3] who worked in the pharmacy at the Veteran's

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[2] The record on appeal will be cited as follows: Trial Transcript (Tr.); Sentencing Transcript (Sent. Tr.); Legal File (L.F.); Supplemental Legal File (Supp. L.F.); Second Supplemental Legal File (2d Supp. L.F.).

[3] *See* § 566.226, RSMo Supp. 2007, prohibiting the public disclosure of any information in a court record that could be used to identify any victim of a sexual assault.

Administration Medical Center in Poplar Bluff. (Tr. 19-20, 130). Appellant and the victim were both at the club for approximately four to five hours on the evening of May 6, 1992. (Tr. 131-32, 148, 173, 177). The victim drank beer, while Appellant drank both beer and shots of Galliano liqueur. (Tr. 134-35, 139, 185). Appellant emptied out the Galliano bottle and asked to take it home to add to his bottle collection. (Tr. 141, 143, 186).

Appellant tried flirting with the victim a couple of times that evening. (Tr. 192). The two were seen arguing with each other later on. (Tr. 146, 151, 158). The witnesses who observed the argument did not overhear what it was about, even though Appellant and the victim both had raised voices. (Tr. 158-60). Appellant tried to buy the victim a beer after the argument, but she refused it. (Tr. 184). None of the witnesses who were present at the VFW saw any physical contact between Appellant and the victim, and Appellant testified that he could not recall any physical contact other than that he might have tapped the victim on the shoulder. (Tr. 159, 184, 598).

The victim left the bar at about 10:38 p.m. (Tr. 141, 143-44, 177, 189-90). Appellant had left about fifteen minutes earlier, taking the empty Galliano bottle with him. (Tr. 141-42, 188-89). As Appellant was leaving, he dropped the bottle and it bounced on the floor a couple of times, but did not break. (Tr. 188).

The victim lived in an apartment that was less than a quarter of a mile from the VFW.[4] (Tr. 20, 308). Her nude body was found in the apartment the next day by her mother. (Tr. 15-16, 34-36). The victim was lying on the bed with her head facing toward the foot of the bed. (Tr. 39-40, 54, 87). Blankets covered the bottom portion of her body, while her top was uncovered. (Tr. 54). A knee-length nylon stocking was knotted around her neck and a similar stocking was on her right leg and foot.[5] (Tr. 40, 56, 62, 86). The stocking around the neck was tied tight enough to leave an impression after it was removed. (Tr. 86-87). A piece of toilet paper with a pink seashell pattern was found underneath the victim's shoulder. (Tr. 72, 273, 282). Other pieces of pink seashell toilet paper were found in a trash can, and a roll of toilet paper with that pattern was found in the bathroom. (Tr. 280-82). Toilet paper with a blue seashell pattern, pieces of tissue, and paper towels were found in the bedroom and on the bathroom floor. (Tr. 73-74, 274-82). An earring that had been knocked out of the victim's right ear was found on the bedroom floor. (Tr. 67-68, 87).

An autopsy disclosed a sizeable bruise inside the scalp behind the victim's right ear. (Tr. 92). The bruise was caused before the victim died and could have been made by a hand or some other hard object with a smooth surface. (Tr. 92, 94, 95). The victim

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[4] The precise distance between the apartment and the VFW was measured at 1,241.8 feet. (Tr. 308).

[5] Appellant testified that the victim had been wearing blue jeans while she was at the VFW. (Tr. 598-99).

had a cataract in her right eye that would have obscured her field of vision on that side. (Tr. 17-18, 88-89).

Additional bruising was seen on the victim's thigh and on her buttocks, adjacent to the vaginal opening. (Tr. 64, 103, 105-06). The bruises on the buttocks were associated with penetration and occurred just before or during the time of death. (Tr. 106). Bruising and scratches were also discovered on the inside of the victim's vagina. (Tr. 66, 103, 108-09). The testifying pathologist[6] said that the injuries were caused by something other than a penis. (Tr. 108). He said the injuries were caused by something rigid, with a corner or an edge to it. (Tr. 110). The pathologist said that the object could have been something like a dildo, or something of that shape. (Tr. 111). The object would have had to be narrow enough to fit in the vagina and long enough to reach the paracervical area, probably six or eight inches long. (Tr. 112). The object would also have had to have a flange, or be bigger at one end than at the other, in order to cause both the injuries inside the vagina and the bruising on the buttocks. (Tr. 113, 115-16). Blood was found on the outside of the vagina that was determined to have been from an assault rather than from the victim's menstrual cycle. (Tr. 104).

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[6] The medical examiner who performed the autopsy was deceased by the time the case came to trial, and another pathologist who reviewed the autopsy report and the supporting documentation, including photographs, testified as to his opinions based on those materials. (Tr. 78-79, 82, 86).

The autopsy report listed the cause of death as strangulation by the nylon stocking. (Tr. 99). The autopsy also showed that the victim's larynx and the hyoid bone in the neck were fractured. (Tr. 95-96). The testifying pathologist said that the stocking could not have caused those fractures, but that they instead resulted from manual strangulation. (Tr. 96). The pathologist testified that the manual strangulation could have happened at the same time that the stocking was tied around the victim's neck. (Tr. 98).

Appellant was questioned by the police on May 11 and 22, 1992, and denied committing the murder. (Tr. 205, 211, 212-13). He did admit that he and the victim had an argument because she thought that he was taking advantage of some teenagers in a pool game. (Tr. 210). Appellant told police that on the night of May 6th he had been wearing blue jeans, a blue jeans jacket, and a t-shirt under the jacket. (Tr. 214). Several people were interviewed by police, but no arrests were made and the investigation eventually ground to a halt. (Tr. 218, 224).

The investigation resumed in 2005, and in April of that year, some of the evidence collected from the victim's apartment was submitted to the Highway Patrol for DNA analysis. (Tr. 426). DNA was extracted from six different areas on the toilet paper found underneath the victim's shoulder. (Tr. 446-47). A mixture of male and female DNA was found in all six areas. (Tr. 448). The DNA profiles indicated that the DNA in all six areas was from the same two people. (Tr. 448). A mixture of male and female DNA was also found on the stocking tied around the victim's neck. (Tr. 427, 429). The female DNA found on the toilet paper and the stockings was consistent with the victim's. (Tr. 440-41, 449).

Analysts were able to determine a major contributor of the DNA found on one of the areas tested on the toilet paper. (Tr. 449). The major contributor was the male. (Tr. 449). The DNA profile of the major contributor on the toilet paper was compared to the male profile found on the nylon, and the two profiles were found to be consistent with each other. (Tr. 450-51). Poplar Bluff Police and Highway Patrol investigators obtained a buccal swab from Appellant on August 30th. (Tr. 305, 311). Appellant's DNA was determined to be consistent with the DNA profiles found on the toilet paper, including that of the major contributor. (Tr. 455-57). The analyst who made the comparisons testified that he would expect the major component from the toilet paper to show up in the population once in every 6.131 quadrillion[7] people. (Tr. 461-62). The population of the planet at the time of trial was just under seven billion people. (Tr. 463). Appellant's DNA was also consistent with the male DNA found on the nylon. (Tr. 465, 468). The analyst was unable to do a population frequency analysis on the stockings. (Tr. 465).

Appellant was questioned by investigators when he gave the buccal swab, and said that he did not really know the victim very well, though he again admitted they had an argument about a pool game the night before her body was found. (Tr. 320). Appellant also said that he had never dated or kissed the victim and did not know where she lived. (Tr. 320). Appellant denied touching or having any physical contact with the victim while they were at the VFW. (Tr. 320). Appellant said that he wore a blue jeans jacket

[7] The figure appears as quadzillion at one point in the transcript, but that appears to be a transcription error. (Compare Tr. 462, line 2 to Tr. 62, line 21 to Tr. 63, line 2).

and blue jeans on the night of May 6th. (Tr. 323). He told the investigators that after leaving the VFW that night, he walked to his parent's home, which was located about a mile from the club. (Tr. 320, 344).

Appellant also told the investigators that he still had a bottle collection. (Tr. 321). When asked if he had a Galliano bottle, Appellant said that he did, and that he had given it to his nephew, who lived in the basement of his home. (Tr. 322). Appellant consented to a search of his home, and a 750-milliliter Galliano bottle was recovered. (Tr. 339-40).

Appellant presented testimony from the man who was the victim's upstairs neighbor on the night of her murder. (Tr. 518-19). Everett Nichols testified that on that night, he heard a car drive up and looked out his window to see the victim walking to her apartment. (Tr. 520). Nichols said he saw a man approach as the victim was struggling to open the door. (Tr. 521-22). Nichols did not see the man get out of a vehicle and said that he did not see any other vehicle in the area. (Tr. 522). He described the man as wearing Wrangler-brand jeans; square-toed biker boots with a silver buckle on the side; long, wavy hair; and white hands with the fingernails cut straight across. (Tr. 523-25).

Nichols admitted on cross-examination that the man was visible for fifteen to twenty seconds and that street lights in front of the apartment cast shadows in the area. (Tr. 528, 531). Nichols also admitted that he did not provide police with any of the details that he testified to in court, and that he first described those details to Appellant's attorney a couple of months before trial. (Tr. 532, 536-38). In the description that Nichols did give to police the day after the murder, he said the man was wearing faded blue jeans and a dark jacket, and estimated his height and weight at five-feet-five inches

tall and 140 to 150 pounds. (Tr. 536-38). Nichols admitted that the man could have been as tall as five-feet-eight inches tall and that his weight estimate could be off by ten or fifteen pounds in either direction. (Tr. 537). At the time of the murder, Appellant was five-feet-eight inches tall and weighed 160 pounds. (Tr. 209, 587).

Appellant's father testified that he remembered getting up at 3:00 on the morning of May 7, 1992, to go to work. (Tr. 546). Mr. Freeman said that he heard Appellant snoring in his bedroom. (Tr. 546). Mr. Freeman also testified on cross-examination that he went to bed at 10:00 the evening of May 6th, and that Appellant had not yet come home. (Tr. 550). Mr. Freeman admitted that he did not know Appellant's whereabouts between the time he went to sleep and when he woke up. (Tr. 551).

Appellant testified and repeated the story he had given to police about the victim getting upset with him over his pool game with the teenage boys. (Tr. 573). He said that he did not consider the argument to be a big deal. (Tr. 573). Appellant also said that he sat next to the victim a couple of times and talked, and offered to buy her a beer, which she refused. (Tr. 573, 592). Appellant also said that he may have taken an empty Galliano bottle home with him, but could not be sure. (Tr. 574). He did admit to collecting bottles of different shapes and sizes, including the Galliano bottle that he gave to his nephew. (Tr. 581-82). Appellant said he walked straight home after leaving the VFW on May 6, 1992. (Tr. 574). Appellant said that he did not know where the victim's apartment was and had not visited it. (Tr. 579). Appellant testified that he was wearing blue jeans and a faded blue jean jacket that night, but said that he did not own any square-

toed biker boots and wore his hair short, in a military-style cut. (Tr. 571, 579-80, 587). He denied murdering the victim. (Tr. 580).

After the jury found Appellant guilty of murder in the first degree, it proceeded to the sentencing stage of trial and returned a verdict of life imprisonment without the possibility of parole. (Tr. 667-68; Sent. Tr. 3-4; L.F. 6). The court imposed that sentence on November 16, 2006. (Sent. Tr. 3, 27-28; L.F. 6, 41-44). This appeal follows. (L.F. 6, 46-47).

ARGUMENT

I.

Sufficient evidence supports the jury's verdict.

Appellant claims there was insufficient evidence to support his conviction. But, the jury's verdict is supported by substantial evidence, including a dispute between the victim and Appellant; the presence of Appellant's DNA on a piece of toilet paper found under the victim's shoulder; the presence of DNA consistent with Appellant's on a stocking tied around the victim's neck; injuries on the victim that were consistent with having been caused by the Galliano bottle that Appellant took from the VFW; and testimony that a man who was about the same height and weight as Appellant was seen approaching the victim's apartment, located near the VFW, as she was returning home.

A. Standard of Review.

When considering sufficiency of evidence claims, this Court's review is limited to determining whether the evidence is sufficient for a reasonable juror to find each element of the crime beyond a reasonable doubt. *State v. O'Brien*, 857 S.W.2d 212, 215-16 (Mo. banc 1993). Appellate courts do not review the evidence de novo; rather they consider the record in the light most favorable to the verdict:

> To ensure that the reviewing court does not engage in futile attempts to weigh the evidence or judge the witnesses' credibility, courts employ "a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution." Thus, evidence that supports a finding of guilt is taken as true and all logical inferences that

> support a finding of guilt and that may reasonably be drawn from the evidence are indulged. Conversely, the evidence and any inferences to be drawn therefrom that do not support a finding of guilt are ignored.

Id. at 215-16 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "An appellate court 'faced with a record of historical facts that supports conflicting inferences must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *State v. Chaney*, 967 S.W.2d 47, 54 (Mo. banc 1998) (quoting *Jackson*, 443 U.S. at 326).

Appellate courts do not act as a "super juror with veto powers"; instead they give great deference to the finder of fact. *State v. Grim*, 854 S.W.2d 403, 405 (Mo. banc 1993); *Chaney*, 967 S.W.2d at 52. Appellate courts may neither determine the credibility of witnesses, nor weigh the evidence. *State v. Villa-Perez*, 835 S.W.2d 897, 900 (Mo. banc 1992). It is within the trier of fact's province to believe all, some, or none of the witnesses' testimony in arriving at the verdict. *State v. Dulaney*, 781 S.W.2d 52, 55 (Mo. banc 1989). Incriminating evidence developed during the defendant's case may be considered in determining the sufficiency of the evidence. *State v. Meuir*, 138 S.W.3d 137, 143 (Mo. App. S.D. 2004). Circumstantial evidence is given the same weight as direct evidence in considering the sufficiency of the verdict. *Grim*, 854 S.W.2d at 405-06.

B. Analysis.

1. Appellant's claim relies on the discredited circumstantial evidence and equally valid inference rules.

The essence of Appellant's argument is that the DNA on the stocking and toilet paper found at the murder scene could have gotten on those items when the victim carried them outside her home. He proposes that the victim might have carried the toilet paper in her purse as a tissue, and that she would have been wearing the stocking that was later found tied around her neck, so that Appellant's DNA got on those items while he and the victim were at the VFW. (Appellant's Brf., pp. 24, 27).

Appellant's argument focuses on inferences from the evidence that do not support the jury's verdict of guilty. This methodology, which is entirely contrary to this Court's standard of review, is simply a disguised effort to resurrect the circumstantial evidence and equally valid inference rules that this Court has expressly and unequivocally rejected.

The demise of those rules began in *State v. Grim*, in which this Court considered whether the long-standing circumstantial evidence rule conflicted with the modern standard of appellate review in deciding sufficiency of the evidence claims. *Grim*, 854 S.W.2d at 405-08. The circumstantial evidence rule provided that:

> Where the conviction rests on circumstantial evidence, the facts and circumstances to establish guilt must be consistent with each other, consistent with the guilt of the defendant and inconsistent with any reasonable theory of his innocence.

Id. (quoting *State v. Pritchett*, 327 Mo. 1143, 39 S.W.2d 794, 796-97 (Mo. 1931)).

After noting that this rule was based on the court's historic distrust of circumstantial evidence cases and recognizing that the modern view was to treat circumstantial evidence the same as direct evidence, the Court held in *Grim* that circumstantial evidence cases should no longer be held to a higher standard of review, and it rejected the rule as a standard for reviewing sufficiency of evidence claims. *Id.* at 406-07.

While analyzing the sufficiency of the evidence in *Grim*, the Court addressed the dissent's argument that certain evidence in the case supported inferences of innocence as well as guilt. *Id.* at 413. The Court first rejected that argument by finding that the two "inferences [were] not equally valid." *Id.* at 413. But the Court also rejected the argument on the ground that the dissent's approach conflicted with the applicable standard of review for sufficiency claims, which requires appellate courts to accept "as true all the evidence favorable to the state, including all favorable inferences drawn from the evidence." *Id.* at 413-14 (quoting *Dulaney*, 781 S.W.2d at 55). The Court stated that if "an appellate court sets itself up to select between two or more acceptable inferences, it ceases to function as a court and functions rather as a juror, actually a 'super juror' with veto powers." *Id.* at 414. The Court went on to hold that the defendant's bloody thumbprint found on the victim's wallet, which was sitting on the kitchen table inside her residence where her body was discovered, was sufficient evidence alone upon which the jury could find the defendant guilty of second-degree murder. *Id.* at 408-14.

Five years later, in *State v. Chaney*, this Court considered whether the equally valid inferences rule survived the holding in *Grim*. After acknowledging that the facts in

Chaney "undeniably support[ed] conflicting inferences," the Court noted that the defendant's "conviction would require reversal only under a rule" that required the prosecution to "disprove every reasonable hypothesis except that of guilt." *Chaney*, 967 S.W.2d at 54.

The defendant in *Chaney* argued that the evidence against him was insufficient under the equally valid inferences rule, one unique to Missouri courts, which stated that when "two equally valid inferences can be drawn from the same evidence, the evidence does not establish guilt beyond a reasonable doubt. *Id.* (quoting *State v. Roberts*, 709 S.W.2d 857, 862 (Mo. banc 1986)) *see also State v. Dunson*, 979 S.W.2d 237, 241 (Mo. App. W.D. 1998) ("The equally valid inferences rule provides that when 'the evidence presents two equally valid inferences, one of the defendant's guilt and the other of his innocence, it does not, as a matter of law, establish guilt beyond a reasonable doubt.'"). The Court held in *Chaney* that the "equally valid inferences rule was effectively abolished by *State v. Grim*." *Chaney*, 967 S.W.2d at 54. The rule was expressly discarded because it conflicted with an appellate court's standard of review for sufficiency of the evidence claims:

> [T]he equally valid inferences rule conflicts with and renders meaningless the requirement that the appellate court presume that the trier of fact drew all reasonable inferences in favor of the verdict. Because the equally valid inferences rule is at war with the due process standard governing an appellate court's review of the sufficiency of evidence, the equally valid inferences rule should no longer be applied.

Id. (citation omitted). Under the sufficiency standard now employed by the courts, even if the evidence fails to rule out the possibility of an innocent explanation, that simply creates a question of fact for the jury. *State v. Woodworth*, 941 S.W.2d 679, 689 (Mo. App. W.D. 1997).

Although he is careful not to refer to the circumstantial evidence and equally valid inference rules in his brief, Appellant's argument is fundamentally indistinguishable from the concepts embodied in those rules. When the evidence and the reasonable inferences therefrom are viewed under the proper standard, they are sufficient for a reasonable juror to find Appellant guilty of the charged crime.

2. DNA evidence.

Appellant's DNA was found on a piece of toilet paper with a pink seashell pattern, that was found underneath the victim's shoulder. (Tr. 72, 273, 282). Other pieces of pink seashell toilet paper were found in a trash can, and a roll of toilet paper with that pattern was found in the bathroom. (Tr. 280-82). DNA was extracted from six different areas on the toilet paper found under the victim's shoulder. (Tr. 446-47). Analysts were able to determine a major contributor on one of those areas. (Tr. 449-51). Appellant's DNA profile was consistent with the DNA profile of the major contributor, and the analyst who made the comparisons testified that he would expect that profile to show up in the population once in every 6.131 quadrillion people. (Tr. 455-57, 461-62). For comparison purposes, the world's population at the time of the trial was approaching seven billion people. (Tr. 463). *See State v. Rockett*, 87 S.W.3d 398, 404 (Mo. App. W.D. 2002) (jury entitled to give substantial weight to DNA expert's testimony that DNA

found at the murder scene was consistent with the defendant's, and that a similar match would occur with a statistical frequency of one out of every 900 million people). That statistical match leaves no reasonable doubt that it is Appellant's DNA on the toilet paper, and Appellant does not dispute that the DNA is his.

DNA consistent with Appellant's profile was found a nylon stocking that was tied around the victim's neck so tightly that it left an impression after it was removed. (Tr. 86-87, 465, 468). While a statistical match could not be made on that DNA sample, it was determined to be consistent with the profile of the major contributor on the toilet paper, and Appellant does not dispute that it is his DNA on the nylon. (Tr. 449-51, 465). The autopsy report listed the cause of death as strangulation by the nylon stocking. (Tr. 99). The evidence also showed that the victim was manually strangled, and that the manual strangulation could have occurred at the same time that the stocking was tied around the victim's neck. (Tr. 96, 98).

The DNA evidence thus linked Appellant to two items located on or near the victim's body. One of those items, the stocking, was identified as the instrument of the murder. A reasonable juror could conclude from the evidence that Appellant touched the items during the course of the murder – that his DNA got on the stocking when he was using it to strangle the victim or while he was choking her with his hands while the stocking was wrapped around the victim's neck, and that his DNA got on the toilet paper when he got it from the bathroom and used it to try and clean up the scene.

Appellant attacks those reasonable inferences by arguing that DNA is easily transferred, that only a miniscule amount of DNA was found, and that DNA profiles were

found on the tissue and the stocking that could not be attributed to anyone. Appellant contends that the only reasonable inference from those facts is that the toilet paper and the stocking had been taken outside of the victim's apartment, at which time Appellant's DNA got on those items. While Appellant criticizes the inferences supporting the verdict as being speculative, it is, in fact, his theory that is based on speculation and that does not comport with the evidence at trial.

The evidence at trial does not establish that DNA is transferred as easily as Appellant claims. DNA analyst Jason Wycoff testified about various means by which DNA can be transferred from one person to another, but noted that those transfers were possibilities and that DNA does not always get transferred when one person makes contact with another. (Tr. 465-67, 481-85). The jury could properly consider from that testimony and from the other evidence whether it was more reasonably likely that Appellant's DNA got on the toilet paper and the stocking during the course of the murder, or whether it was transferred under different circumstances. The evidence supports the jury's conclusion.

The theory that Appellant's DNA was transferred onto the stocking while he and the victim were at the VFW overlooks his own testimony that the victim was wearing blue jeans. (Tr. 598-99). There is no direct evidence that the victim was wearing those nylons at the VFW. Even if the jury inferred that she did wear the nylons at the VFW, none of the witnesses who were present there that evening saw any physical contact between Appellant and the victim. (Tr. 159, 184). Appellant testified that he could not recall any physical contact with the victim, other than possibly tapping her on the

shoulder. (Tr. 598). There is nothing in the record to indicate that Appellant sneezed or coughed in the vicinity of the victim, and more particularly, onto her stockings. Given those facts, it is not reasonably likely that Appellant's DNA got onto the stockings while he and the victim were at the bar. DNA expert Jason Wycoff testified that Appellant's DNA potentially got on the stocking because he had his hand around them while he was choking the victim to death. (Tr. 500). That conclusion was the more reasonable one for the jury to draw based on the evidence presented.

The theory that the victim carried toilet paper in her purse is not only speculative, it does not comport with the evidence or with common sense. Appellant did not testify that he saw the victim carrying pink shell toilet paper while she was at the VFW, nor did he testify that he wiped his nose or hands on any toilet paper given to him by the victim. Appellant's theory requires the jury to believe that the victim carried toilet paper in her purse (which seems unlikely by itself) to the VFW, where she allowed the toilet paper to be exposed to Appellant's DNA, but nonetheless took it home with her so that the "real murderer" could then take it from her purse and place it under her shoulder at or near the time of the murder. That theory is absurd.

While there is no evidentiary support for the theory that the victim carried the toilet paper outside of her apartment, there is evidence suggesting that the victim had visitors to her apartment, thus suggesting a possible source for the unidentified DNA found on the toilet paper. A friend of the victim testified that he and his wife were at the victim's apartment approximately two days before the murder. (Tr. 246-47). The friend also testified that he was never asked to provide a DNA sample to the police. (Tr. 250-

51). The theory that the unidentified DNA was placed on the toilet paper by visitors to the apartment is not only consistent with the jury's verdict, it is much more reasonable than the wildly speculative theory that Appellant suggests this Court rely on to veto the jury's guilty verdict.

When the evidence supports conflicting inferences, it is properly left to the jury to resolve those conflicting inferences. *Chaney*, 967 S.W.2d at 53. While the contrary inferences suggested by Appellant are possible, they are not necessary and thus do not justify overturning the jury's verdict. *Grim*, 854 S.W.2d at 413.[8] As the United States Court of Appeals for the Ninth Circuit has noted, "[t]he existence of some small doubt based on an unsupported yet unrebutted hypothesis of innocence is not sufficient to invalidate an otherwise legitimate conviction." *Taylor v. Stainer*, 31 F.3d 907, 910 (9th Cir. 1994).

In a case that contains some parallels to this case, the United States Court of Appeals for the Eighth Circuit found that the forensic evidence was sufficient to support the defendant's conviction for bank robbery and firearms charges. *United States v. McCarthy*, 244 F.3d 998, 999 (8th Cir. 2001). A stocking cap was recovered from the

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[8] The Western District, in a decision that was not final as of the drafting of this Brief, upheld a verdict for murder in the first degree, concluding that the defendant's theory on the DNA evidence "is a possibility, but the evidence, viewed in a light most favorable to the verdict established a sound basis for the jury's concluding to the contrary." *State v. Calhoun*, 2008 WL1716647 at *2 (Mo. App. W.D., Apr. 15, 2008).

getaway car and submitted to the crime laboratory for DNA analysis. *Id.* The criminalist who analyzed the cap found dandruff, several hairs on the inside and outside of the cap, and an enzyme found in saliva. *Id.* at 1000. The dandruff was compared to the defendant's genetic profile and was determined to be a match. *Id.* The criminalist testified that fifty-one people out of ten billion would have matched the profile. *Id.* The criminalist conceded on cross-examination that he did not know how long the dandruff had been on the cap. *Id.* Of the thirteen hairs recovered from the inside of the stocking cap, only five were suitable for testing. *Id.* Only one hair was matched to the defendant, the others were inconclusive. *Id.* Of the fifteen hairs collected from the outside of the stocking cap, four were matched to the defendant and the remaining eleven were inconclusive. *Id.* The saliva was not tested. *Id.* The defendant presented a theory that the hat looked similar to one that he wore while taking smoke breaks at a drug-rehabilitation center. *Id.* The defendant testified that the hat was one of many that was on a coat rack, and that he and other residents would randomly grab the hats and wear them while outside, and then return them to the rack when they were finished smoking. *Id.* The court found that the DNA evidence, in combination with other evidence, was sufficient to support the defendant's conviction. *Id.* at 1001.

McCarthy, like this case, involved DNA samples that were matched to the defendant and additional DNA samples that could not conclusively be linked to any person. The statistical probability used to match the DNA to the defendant in *McCarthy* was far lower than the statistical probability used to match the DNA in this case to Appellant. The evidence also suggested an innocent explanation for how the defendant's

DNA was associated with the clothing item recovered from a location connected to the crime. The court found that it was up to the jury to weigh that evidence. *Id.* It was likewise up to the jury in this case to assess the relative strengths and weaknesses of the DNA and other evidence presented in this case.

In *Sandoval v. State*, the Texas Court of Appeals affirmed a murder conviction, in part due to the presence of Appellant's DNA in a bandana found near the crime scene. *Sandoval v. State*, 2004 WL1453453 at *1 (Tex. Ct. App., June 20, 2004) (not designated for publication). As was the case here, the source of the DNA stain (blood, semen, sweat, etc.) was apparently undetermined. *Id.* at *2. Samples of hair were found in the victim's hand that did not match the defendant. *Id.* at *3. Forensic testing on other items did not link the defendant to the murder. *Id.* The defendant also argued that the DNA testing on the bandana was flawed and subjected the bandana to possible contamination. *Id.* An expert witness for the State could not state whether someone intentionally placed the defendant's DNA on the bandana or whether the presence of the DNA resulted from police mishandling. *Id.* The court nonetheless found that the jury's verdict was supported by the evidence. *Id.*

In a Maryland murder case, a DNA sample was found in the victim's right front pants pocket. *Jones v. State*, 943 A.2d 1, 7 (Md. Ct. Spc. App. 2008). Expert testimony established that the defendant could not be excluded as a minor contributor of the DNA. *Id.* Under Appellant's theory, that evidence would be insufficient because the DNA could have gotten on the victim during some other encounter, such as a handshake, and then retransferred into the pants pocket when the victim put his own hand into the pocket.

The court found, however, that the presence of the defendant's DNA in the victim's pocket was sufficient to link him to the crime scene. *Id.* at 14.

Appellant devotes much of his argument to distinguishing DNA evidence from fingerprint evidence.[9] Cases where fingerprints have been placed on mobile objects are still relevant to the jury's ability to resolve conflicting inferences as to whether the evidence was placed at the crime scene during the course of the crime, or under innocent circumstances.

In *State v. Rockett*, the defendant's fingerprint was found on a condom box recovered at the scene of a rape. *Rockett*, 87 S.W.3d at 403. The defendant argued the fingerprint could not establish his guilt because it was found on a moveable object that he testified to having given to his co-defendant prior to the date of the attack. *Id.* The court found that "[i]t was up to the jury to determine whether they believed that Appellant had put his fingerprint on the condom box on an innocent occasion or at the time of the attack . . . ." *Id.* at 405.

In *State v. Maxie*, the defendant's thumbprint was found on a cardboard box top found in the bedroom of a murder victim's apartment. *State v. Maxie*, 513 S.W.2d 338,

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[9] Appellant theorizes that fingerprint evidence is easily obliterated while DNA evidence is not. That is not always the case, however. A fingerprint analyst testified that in some circumstances, a fingerprint can remain on a surface for years. (Tr. 389). DNA analyst Wycoff testified that DNA will degrade over time, although it can last for a long time under certain conditions. (Tr. 417-18).

342 (Mo. 1974). The defendant lived across the street from the victim, but denied knowing her, denied ever having been in the apartment, and denied ever having seen the box top before. *Id.* The defendant argued that the box top was easily portable and there was no evidence when the thumbprint was put on it. *Id.* He theorized that the thumbprint could have gotten on the box top if he picked it up and put it in the trash, and the victim's husband later picked it up and brought it into his home. *Id.* at 342-43. This Court decided the issue under the now-abandoned circumstantial evidence rule discussed above. *Id.* at 343. The Court found that even under that more stringent standard, the defendant's denials of knowing the victim, having been in the apartment, or having seen the box top before ruled out any reasonable possibility that the thumbprint was placed on the box top in innocent circumstances. *Id.*

Evidence that a defendant's fingerprint was found on a box of shells was thus deemed sufficient to support a murder conviction, even though there was also evidence indicating that the defendant may have handled the box prior to the date of the murder. *Woodworth*, 941 S.W.2d at 689, 690.[10] As the court noted, "'the mere existence of other possible hypotheses is not enough to remove the case from the jury.'" *Id.* at 689 (quoting *State v. Nash*, 621 S.W.2d 319, 323 (Mo. App. W.D. 1981)) *see also Taylor*, 31 F.3d at 910 (finding that fingerprint evidence should be able to support a conviction even when it is theoretically possible the defendant left his prints but did not commit the crime). Just

[10] The conviction was reversed, however, due to exclusion of evidence directly linking another suspect to the crime. *Id.* at 690.

as it was up to the jury in the *Woodworth* case to decide whether the fingerprint was put on the box on an innocent occasion or at the time of the killing, so it was up to the jury in this case to determine if Appellant's DNA got on the toilet paper and stocking on an innocent occasion or during the course of the murder. *See Woodworth*, 941 S.W.2d at 689.

3. Other evidence.

The State presented additional evidence that linked Appellant to the murder. Appellant was seen leaving the VFW with an empty Galliano liqueur bottle on the night before the victim's body was found. (Tr. 141-42, 188-89). Galliano bottles are narrow at the top and widen from top to bottom. (State's Ex. 52). They have a screw-on top, so that the outside of the cap is ridged, and the threads are exposed when the cap is removed. (State's Ex. 52).

The victim had a sizeable bruise behind her right ear that could have been made by a hard object with a smooth surface. (Tr. 92, 94, 95). The force of the blow knocked the earring out of the victim's right ear. (Tr. 67-68, 87). Not only would the bruising be consistent with being made by the bottle, but the fact that the blow was struck on the right side of the head, the side where the victim's vision was obscured, creates an inference that the attacker knew the victim and thus knew that he could sneak up on her from that side.

The victim also had bruises on her buttocks, adjacent to the vaginal opening. (Tr. 64, 103, 105-06). The bruises on the buttocks were associated with penetration and occurred just before or during the time of death. (Tr. 106). Bruising and scratches were

also discovered on the inside of the victim's vagina. (Tr. 66, 103, 108-09). The testifying pathologist said that the injuries were caused by something other than a penis that was rigid, with a corner or an edge to it. (Tr. 108, 110). The pathologist said that the object could have been something like a dildo, or something of that shape. (Tr. 111). The object would have had to be probably six or eight inches long and have a flange, or be bigger at one end than at the other, in order to cause both the injuries inside the vagina and the bruising on the buttocks. (Tr. 113, 115-16).

The jury could have found from that evidence that Appellant hit the victim in the head with the empty Galliano bottle and then sodomized her with the neck of the bottle. The scratching and bruising could have been caused either by the ridges on the outside of the cap or by the threads at the top of the bottle if the cap was off. There was also evidence that Appellant dropped the bottle, but did not break it when he left the VFW. (Tr. 188). That raises at least a possibility that the bottle could have been chipped, with the chipped area creating some of the scratches found inside the vagina. The bruises outside the vaginal area and around the buttocks were consistent with the wider base of the bottle striking that area as the neck of the bottle was being thrust into the vagina.

Sufficient evidence was found to sustain a murder conviction in *State v. Kinder* where there was evidence the defendant possessed a metal pipe on the night of the murder, the victim's injuries were consistent with being beaten with a blunt, heavy object, and the defendant's DNA was found at the scene. *State v. Kinder*, 942 S.W.2d 313, 330-31 (Mo. banc 1996). In this case, the combination of Appellant's DNA, plus

the evidence placing him in possession of an object that could have caused other injuries found on the victim, is sufficient for a jury to find him guilty beyond a reasonable doubt.

The evidence also showed that the victim and Appellant had an argument earlier in the evening, and that the victim rebuffed Appellant's attempts to make amends. (Tr. 146, 151, 158, 184). That followed Appellant's earlier, and apparently unsuccessful, attempts to flirt with the victim. (Tr. 192). Evidence that the victim previously crossed the defendant in some manner is sufficient to establish motive. *State v. Kennedy*, 107 S.W.3d 306, 311 (Mo. App. W.D. 2003). The manner in which the victim was killed and the nature of the injuries to her vaginal area suggest that the killer wanted to exercise his dominance over the victim and humiliate her. The jury could have considered the events in the bar and Appellant's alcohol consumption in reasonably concluding that he was angry enough with the victim to follow her the short distance from the VFW to her apartment (Tr. 308), where he assaulted her and then killed her to cover-up his actions.

Additional evidence to support that inference came from testimony from the victim's neighbor that he saw a man who was roughly the same height and weight as Appellant approaching the victim's apartment as she was arriving home. (Tr. 520-22, 536-38, 587). The neighbor also testified that he did not see the man get out of a vehicle and did not see any vehicles in the area. (Tr. 522). That is consistent with the evidence that Appellant did not have a vehicle and left the VFW on foot. (Tr. 320, 344).

The final portion of Appellant's argument is that the State advanced inconsistent theories during closing arguments. Respondent disputes Appellant's characterization of the closing arguments as inconsistent. But even if they are, that has nothing to do with

sufficiency of the evidence and does not entitle Appellant to relief. *See State v. Carter*, 71 S.W.3d 267, 272 (Mo. App. S.D. 2002) (State is not estopped from taking inconsistent positions in a criminal prosecution). In addition, Appellant has raised no claim of error concerning the State's closing argument.

While Appellant tries to argue that the evidence does not support the inferences that the jury would have reached to convict him, there was substantial evidence from which the jury could have inferred that Appellant murdered the victim. Appellant devotes much of his argument to presenting alternative inferences that could have been drawn from the evidence. Where other permissible inferences exist, "the question of which version of the facts actually happened is precisely the sort of issue that should be left to a jury to decide." *Grim*, 854 S.W.2d at 413. The alternative inferences suggested by Appellant are not so inescapable as to justify upsetting the jury's verdict. *Id.*

II.

The trial court did not abuse its discretion in admitting a Galliano liqueur bottle into evidence.

Appellant claims the trial court erred in admitting Galliano liqueur bottles into evidence because they were not legally or logically relevant to the crime charged. The trial court did not abuse its discretion in admitting the bottle because it was relevant demonstrative evidence connecting Appellant to the charged murder.

A. Underlying Facts.

Two witnesses testified that Appellant was carrying an empty Galliano liqueur bottle when he left the VFW on the night before the victim's body was found. (Tr. 141-

42, 188-89). Galliano is packaged in different size bottles, and the witnesses disagreed on whether Appellant took the larger size or the smaller size bottle. (Tr. 137-38, 186).

The victim had a sizeable bruise behind her right ear that could have been made by a hard object with a smooth surface. (Tr. 92, 94, 95). She also had bruises on her buttocks, adjacent to the vaginal opening. (Tr. 64, 103, 105-06). The bruises on the buttocks were associated with penetration and occurred just before or during the time of death. (Tr. 106). Bruising and scratches were also discovered on the inside of the victim's vagina. (Tr. 66, 103, 108-09). The testifying pathologist said that the injuries were caused by something other than a penis that was rigid, with a corner or an edge to it. (Tr. 108, 110). The object would have had to be probably six or eight inches long and be wider at one end in order to cause both the injuries inside the vagina and the bruising on the buttocks. (Tr. 112-13, 116).

When questioned by investigators in 2005, Appellant said that he had a Galliano bottle that he had given it to his nephew, who lived in the basement of his home. (Tr. 322). Appellant consented to a search of his home, and a 750-milliliter Galliano bottle was recovered. (Tr. 339-40). Appellant's nephew had filled the bottle with a colored fluid that resembled the actual liqueur. (Tr. 582). That bottle was admitted into evidence as State's Exhibit 52. (Tr. 137-38, 342-43). Police obtained a smaller Galliano bottle as a sample. (Tr. 343). That bottle was marked as State's Exhibit 53 and was not admitted into evidence, although it was shown to the VFW employee who testified that Appellant

had taken a smaller bottle of Galliano with him. (Tr. 186, 343).[11] She testified that Exhibit 53 was the same type of bottle that Appellant took with him. (Tr. 187).

B. Standard of Review.

As noted above, only one bottle was actually introduced into evidence. A second bottle was displayed to the jury, but Appellant's Point Relied On alleges only that the trial court erred in admitting bottles. This Court does not consider arguments raised in the argument portion of the brief which are not encompassed in the point relied on. *State v. Daggett*, 170 S.W.3d 35, 42 (Mo. App. S.D. 2005). Appellant has thus not properly preserved any claim related to the display of the bottle that was not admitted into evidence.

To the extent that Appellant's claim is properly preserved, the trial court's decision to admit or exclude evidence is reviewed for abuse of discretion and will be reversed only upon a showing of a clear abuse of that discretion. *State v. Forrest*, 183 S.W.3d 218, 223 (Mo. banc 2006). Abuse of discretion occurs when a ruling is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration. *Id.* On direct appeal, this Court reviews for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial. *Id.* Trial court error is

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[11] State's Exhibit 53 was sent to the jury during deliberations along with the remainder of the exhibits. (Tr. 657-58). Appellant did not object to that bottle being sent back and did not raise that as an allegation of error in the Motion for New Trial. (Tr. 657-58; L.F. 13-14).

not prejudicial unless there is a reasonable probability that it affected the outcome of the trial. *Id.*

C. Analysis.

Appellant claims the bottle should not have been admitted into evidence because it bears no connection to the charged crime. "There is no absolute rule that demonstrative evidence of a weapon unconnected with the defendant or offense charged is inadmissible." *State v. Silvey*, 894 S.W.2d 662, 667 (Mo. banc 1995). A demonstrative exhibit is admissible if it is relevant, if it fairly represents the conditions which it is offered to show, and it is not inflammatory, deceptive, or misleading. *Id.* In *Silvey*, this Court upheld the admission of a butterly knife that was similar to a knife that the defendant allegedly used to intimidate his victim. *Id.* at 668.

Both this Court and the Court of Appeals have followed *Silvey* in upholding the admission of demonstrative evidence. This Court upheld the admission of a .40-caliber handgun that was not the murder weapon. *State v. Carter*, 955 S.W.2d 548, 561 (Mo. banc 1997). This Court noted that the State emphasized that the gun was not the murder weapon, and defense counsel had ample opportunity to cross-examine regarding the demonstrative weapon. *Id.* In *State v. Kinder*, this Court rejected a claim that counsel was ineffective for failing to object to admission of a metal pipe. *Kinder*, 942 S.W.2d at 336-37. This Court ruled the pipe was admissible because it fairly represented the pipe that the defendant was seen carrying on the night of the murder. *Id.* at 337. The Southern District upheld the admission of a pruning shear purchased by the State for use at trial. *State v. Beardon*, 926 S.W.2d 483, 484, 485 (Mo. App. S.D. 1996). The court

found no abuse of discretion, even though witnesses disagreed as to whether the exhibit was similar to the weapon actually used by the defendant. *Id.* That court also upheld a medical examiner's use of a knife that was not the murder weapon to demonstrate the angle of penetration and depth of the stab wound. *State v. Walker*, 971 S.W.2d 356, 360-61 (Mo. App. S.D. 1998). The Eastern District Court of Appeals has upheld the admission of guns as demonstrative exhibits, even though none of the guns were connected to the defendant. *State v. Douthit*, 846 S.W.2d 761, 763 (Mo. App. E.D. 1993), *overruled on other grounds by State v. Carson*, 941 S.W.2d 518, 520, 523 (Mo. banc 1997); *State v. Huff*, 831 S.W.2d 752, 754 (Mo. App. E.D. 1992); *State v. Woods*, 637 S.W.2d 113, 117 (Mo. App. E.D. 1982).

The Galliano bottles meet the conditions set forth in *Silvey*. They were relevant because they helped tie Appellant to the murder. Evidence is relevant if it tends to prove or disprove a fact in issue, or if it corroborates evidence that is relevant and bears on a principal issue. *State v. Pierce*, 927 S.W.2d 374, 376 (Mo. App. W.D. 1996); *State v. Bounds*, 857 S.W.2d 474, 477 (Mo. App. E.D. 1993).

The State presented evidence from which the jury could have found that during the course of the murder, Appellant struck the victim in the head and sodomized her with the Galliano bottle that he took from the VFW. That evidence was bruising showing that the

victim was struck in the head with a hard, smooth object;[12] and scratches inside her vagina that were caused by an object that was rigid, with a corner or an edge to it, that was probably six or eight inches long with a wider at one end than at the other. (Tr. 108, 100, 112-13, 116).

That evidence, combined with the DNA evidence, was probative in establishing Appellant's identity as the murderer. The bottles aided the jury by allowing the jurors to compare the shape and dimensions of the bottles to the injuries suffered by the victim. Evidence that the bottle may have been used to hit the victim in the head and sodomize her during the course of the murder was also probative on the issue of deliberation. *See State v. Glass*, 136 S.W.3d 496, 514 (Mo. banc 2004) (deliberation may be inferred where victim suffered multiple wounds or repeated blows).

The bottles fairly represented the conditions that they were offered to show, as two witnesses testified that the exhibits resembled the bottle that Appellant took from the VFW.[13] (Tr. 137, 186-87). That distinguishes this case from those cited by Appellant,

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[12] Appellant continually asserts that the evidence shows only that the victim was struck with a fist. The testimony, however, was that the bruise found behind her right ear was consistent with being caused by a fist or by some other other hard object. (Tr. 95).

[13] Appellant repeatedly mentions the fact that State's Exhibit 52, the bottle seized from Appellant's home, was filled with liquid. The evidence clearly established, however, that the liquid was put in the bottle by Appellant's nephew. (Tr. 582). The

where firearms or pictures of firearms were admitted without any evidence either that a firearm was involved in the crime, or that the exhibit resembled the firearm that was actually used or that was seen in the defendant's possession. *See State v. Anderson*, 76 S.W.3d 275, 277 (Mo. banc 2002); *State v. Merritt*, 460 S.W.2d 591, 594 (Mo. 1970); *State v. Baker*, 434 S.W.2d 583, 587 (Mo. 1968); *State v. Smith*, 357 Mo. 467, 473, 209 S.W.2d 138, 141-42 (Mo. 1948); *State v. Wynne*, 353 Mo. 276, 287, 182 S.W.2d 294, 299 (Mo. 1944).

Although one might argue that guns by themselves may be inflammatory, the bottles certainly are not. The use of the bottles in this case was not deceptive or misleading. One bottle was clearly identified as having been bought by the police for demonstration purposes, and the State did not argue that the bottle recovered from Appellant in 2005 was the actual bottle used in the crime. (Tr. 343). In fact, the State argued that Appellant had disposed of that bottle shortly after the murder. (Tr. 623, 648, 650-51) s*ee Silvey*, 894 S.W.2d at 668 (no likelihood of deception where State did not express or imply that the knife shown at trial was the actual knife owned by the defendant). The trial court did not abuse its discretion in admitting the bottle, and Appellant's point should be denied.

State was, of course, obligated to present the bottle in the same condition that it was in when seized by police.

III.

The trial court did not abuse its discretion in excluding Defendant's Exhibit P, a note purportedly written by Appellant's mother in 1992 that placed him at home after midnight on the night of the murder.

Appellant contends the trial court erred in excluding Defendant's Exhibit P, which purported to be a note written by Appellant's mother in 1992, and which Appellant contended provided him with an alibi. The trial court did not abuse its discretion in excluding the note because it was hearsay that did not fit within any recognized exception.

A. Underlying Facts.

Prior to beginning his case-in-chief, Appellant sought a ruling from the court on the admissibility of Defendant's Exhibit P, a handwritten note purportedly written by Appellant's mother, who was deceased at the time of trial. (Tr. 504). The undated note bore a signature reading, "Shirley Ann Freeman." (Appellant's Brf., App., p. A6). The note read:

> In May 1992 the girl killed from VFW Andrew was at home by 12:15. He cooked a pizza in microwave. I got up and had Cake. He was in his bedroom. The police never ask me. Because I had a stroke.

(Appellant's Brf., App., p. A6).

Appellant's sister, Pearl Cornett, testified in an offer of proof. (Tr. 510). Cornett said that she found the note a few days after her mother passed away on July 6, 2004. (Tr. 511). The note was in a filing cabinet and Cornett left it there. (Tr. 512). Cornett

testified that her mother suffered a stroke in 1991 that left her unable to speak, so several notes were contained in her personal belongings, including some that were written before the victim's murder. (Tr. 511-12). Cornett identified the writing on the note as being her mother's. (Tr. 512).

In August of 2005, Cornett retrieved the note and took it to the sheriff's office. (Tr. 513). Cornett said that she was prompted to retrieve the note after she found out that officers had searched Appellant's house in connection with the victim's murder. (Tr. 513, 515). Following the offer of proof, the court denied the request to allow the note to be introduced into evidence. (Tr. 515).

B. Standard of Review.

A trial court has broad discretion to admit or exclude evidence at trial, and the trial court's ruling will be reversed only if the court had clearly abused that discretion. *Forrest*, 183 S.W.3d at 223. Abuse of discretion occurs when a ruling is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration. *Id.* On direct appeal, this Court reviews for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial. *Id.* Trial court error is not prejudicial unless there is a reasonable probability that it affected the outcome of the trial. *Id.*

C. Analysis.

Hearsay statements are out-of-court statements offered to prove the truth of the matter asserted and depend on the veracity of the statement for its value. *State v. Bennett*, 218 S.W.3d 604, 610 (Mo. App. S.D. 2007). Hearsay statements are generally excluded

because the out-of-court statement is not subject to cross-examination, is not offered under oath, and the fact-finder is not able to judge the declarant's demeanor and credibility as a witness. *State v. Link*, 25 S.W.3d 136, 145 (Mo. banc 2000). Appellant wished to offer the note to prove that he was at home when the victim was murdered. The note is therefore hearsay. *See Bennett*, 218 S.W.3d at 610. Hearsay statements can nonetheless be admissible if they fall within one of the recognized exceptions to the hearsay rule. *Id.*

Appellant does not dispute that the note is hearsay, nor does he identify any existing exception to the hearsay rule that would have permitted the note to be admitted into evidence. Appellant instead argues that this Court should recognize a residual exception to the hearsay rule, while acknowledging that such an exception has not been recognized by this Court. *See State v. Bell*, 950 S.W.2d 482, 485 (Mo. banc 1997) (Limbaugh, J., concurring).

In the ten years since the concurring opinion in *Bell* suggested that Missouri should adopt a residual hearsay exception, neither this Court nor any Missouri court has held that the residual hearsay exception is part of Missouri jurisprudence. The trial court in the present case cannot be said to have clearly abused its discretion in failing to apply an exception to the hearsay rule which has never been adopted in Missouri. *See, e.g.*, *State v. Cullen*, 39 S.W.3d 899, 906-07 (Mo. App. E.D. 2001) (trial court does not have duty to intentionally commit error).

Furthermore, even if Missouri did recognize the residual hearsay exception, Appellant's offer of proof at trial did not demonstrate that his evidence was admissible

under that exception. The residual hearsay exception, as set out in the Federal Rules of Evidence, is as follows:

> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Fed. R. Evid. 807.

For evidence to be admissible under a residual hearsay exception, the proponent must show (1) the necessity of admitting otherwise admissible hearsay and (2) factors which support the reliability and trustworthiness of such hearsay. *Bell*, 950 S.W.2d at 486 (Limbaugh, J., concurring). To show necessity, the proponent must show that the hearsay pertains to a material fact and that evidence of similar probative value cannot be otherwise obtained. *Id.* To show trustworthiness, the proponent must show factors such as the motivation for speaking truthfully, the timing of the statement, the basis of the declarant's knowledge, the spontaneity of the statement, and the circumstances surrounding the statement. *Id.*

On the surface, the note appears to meet the showing of necessity by providing an alibi. However, the State never established a precise time of death,[14] and there is a significant gap in time between when the victim left the bar and when Appellant was allegedly seen cooking pizza in the microwave. Appellant contends that it would have taken a half hour to walk from the victim's apartment to his home, but he does not cite to anything in the record to support that assertion. Even if that assertion is true, it is neither unbelievable or fantastic that Appellant could have committed the murder, including the act of sodomy, and wiped away his fingerprints in the forty-five minutes or more that would have been available to him to leave the apartment and be home by 12:15. The testifying pathologist said that the strangulation itself would have taken no more than three to five minutes. (Tr. 99). The penetration injuries were inflicted immediately before or during the time of death. (Tr. 106). And the presence of several pieces of tissue lying about the bedroom and bathroom are indicative of someone in a rush. (Tr. 72-74, 273-82). The note does not, therefore, conclusively establish that Appellant could not have killed the victim.

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[14] The closest estimate that the pathologist could testify to was that the victim died between six and eighteen hours before her body was found. (Tr. 116). The body was found about 2:00 p.m. on May 7th. (Tr. 116). Since the victim was last seen alive shortly after 10:38 p.m. on May 6th, that puts the cause of death at anywhere from that time to about 8:00 a.m. on May 7th. (Tr. 177).

Even if the necessity showing is met, the statement still does not pass the reliability and trustworthiness test. The circumstances surrounding the statement raise numerous questions. First, there is no way to determine when the note was actually written, so two of the factors used to establish trustworthiness, the timing and spontaneity of the statement, do not aid Appellant and do not work in favor of admissibility.

Also, the statement was purportedly discovered by Appellant's sister in 2004, but sat in a drawer for close to a year before being produced after the police questioned Appellant. That raises questions as to the authenticity of the note. Appellant and his parents were questioned by police during the initial investigation in 1992, but that investigation apparently went cold until 2005. If the mother wrote the note in 1992, why did she not turn it over to the police, particularly since the note complains that the police did not question her about Appellant's whereabouts on the night of the murder? There is no apparent motive for the mother to write the note at a later time, since there does not appear to have been an active investigation aimed at her son between 1992 and her death in 2004. It is suspicious to say the least that the note suddenly surfaced when Appellant became the focus of the revived investigation. That timing calls into question whether the note was, in fact, written by Appellant's mother or whether it was forged by Appellant's sister or someone else.

That leads to the final factor for assessing trustworthiness, the motivation of the declarant to speak truthfully. Whether the note was written by Appellant's mother or Appellant's sister, both women have a powerful motive to lie – saving their loved one from a murder conviction. When that motive is combined with the questionable

circumstances surrounding the note's appearance, there are simply not enough guarantees of reliability and trustworthiness to support admission of the note. The trial court cannot be said to have abused its considerable discretion in refusing the note, given its questionable validity and limited probative value. Nor can it be said that admission of the note would have changed the outcome of the trial, since the note does not conclusively provide Appellant with an alibi.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06, and contains 11,670 words as calculated pursuant to the requirements of Missouri Supreme Court Rule 84.06, as determined by Microsoft Word 2003 software; and

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

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 25th day of April, 2008, to:

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APPENDIX