No. SC89833

IN THE

Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

BRIAN J. DORSEY,

Appellant.

Appeal from the Boone County Circuit Court
Thirteenth Judicial Circuit
The Honorable Gene Hamilton, Judge

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from a Boone County judgment sentencing Mr. Dorsey to death on each of two counts of murder in the first degree, § 565.020, RSMo 2000. The trial was had in Boone County after a change of venue from Callaway County. Because the circuit court imposed sentences of death, this Court has jurisdiction. MO. CONST., Art. V, § 3.

STATEMENT OF FACTS

On December 23, 2006, in the evening, Mr. Dorsey called his cousin, Traci Sheley and asked to borrow some money (Tr. 579). Traci told Mr. Dorsey that she did not have the money, and Mr. Dorsey said that he had to go – that he had to call someone else (Tr. 579). Mr. Dorsey "sounded a little different, maybe a little shaky" (Tr. 579).

Mr. Dorsey also called his cousin, Sarah Bonnie, and told her that he needed some money for drugs (Tr. 579-580). Mr. Dorsey told Sarah that there were two people (drug dealers) in his apartment, and that he needed help (Tr. 570, 580). Sarah agreed to help, and she and her husband, Ben Bonnie, drove over to Mr. Dorsey's house (Tr. 580, 596-597). Ben called a friend, Darin Carel, and told him that he needed some help getting some people out of Mr. Dorsey's apartment (Tr. 596). Traci also responded to a call asking her to meet Ben and Sarah at Mr. Dorsey's apartment (Tr. 564).

Ben and Sarah arrived first at Mr. Dorsey's apartment, and shortly thereafter, Darin arrived (Tr. 580, 596-597). When Traci arrived, she found Sarah and Darin standing on the sidewalk outside (Tr. 580, 597). A woman and a man – the drug dealers – then left the apartment, and Ben told everyone else to "Come on in" (Tr. 581, 597). Inside the apartment, Sarah told Mr. Dorsey to pack some clothes, so that he could spend the night at Ben and Sarah's house (Tr. 581). Mr. Dorsey grabbed

some clothes, and everyone left (Tr. 581-582). Ben, Sarah, Darin, and Mr. Dorsey all went to Ben and Sarah's house (Tr. 598). Traci returned to her house, picked up some members of her family and drove over to Ben and Sarah's house (Tr. 582). Ben and Sarah lived in Callaway County, on County road 372 (Tr. 636).

At some point after they had all arrived at Ben and Sarah's house, Sarah's mother, Diana Mosier arrived with Jade (Tr. 540). It had been planned that Jade would stay at the Mosier household that night, but when Jade learned that Mr. Dorsey was going to be at her house, she wanted to go home to see him (Tr. 540). When Ms. Mosier and Jade arrived at the house, Ben and Sarah, Mr. Dorsey, Darin Carel, and Traci and Jon Sheley (along with three of their children) were already at the house (Tr. 540, 564-565).

The women spent some time visiting, and Sarah cooked up some "hanky-pank" (a dish consisting of hamburger, sausage, onions, garlic and Velveeta cheese); and the men spent some time in the "shop," drinking beer and shooting pool (Tr. 542, 565-566, 598-599). Before playing pool, the men had to clean off the pool table (Tr. 566, 599-600). Jon Sheley noticed a shotgun on the pool table (Tr. 566). Darin picked up the shotgun and checked to see if it was dirty; he noticed that the gun (a single-shot 20-guage shotgun) was not loaded (Tr. 600).

Eventually, the members of the Sheley family left (Tr. 542, 568, 586). At some point after that, Ms. Mosier left (Tr. 542, 568, 586), and at some point after she left,

Darin left (Tr. 568, 586, 601-602). Sarah asked Darin to spend the night, but he declined (Tr. 601-602).

That night, as Ben and Sarah lay in bed, Mr. Dorsey obtained the single-shot shotgun from the garage and loaded it (Tr. 961). He stood over Ben and Sarah's bed, and then he shot Sarah in the jaw, killing her instantly (Tr. 717, 961; State's Exhibits 28-29). This shot was a close-range shot from about twelve to fourteen inches away (Tr. 720). Mr. Dorsey then pressed the shotgun up against Ben's head, just below his right ear, and shot Ben in the head, killing him instantly (Tr. 719, 961; State's Ex. 16). The shotgun was a single-shot gun that had to be emptied and reloaded before another shot could be fired (Tr. 826-827). Mr. Dorsey then engaged in sexual intercourse with Sarah (Tr. 847-848).[1]

After shooting the victims, Mr. Dorsey went through a wallet and scattered items from the wallet next to Sarah's dead body (Tr. 891-892; State's Ex. 20). Mr. Dorsey took Sarah's social security card and put it in his pocket (Tr. 759-760). Mr. Dorsey also collected various pieces of property from the victims' home, including

[1] This fact is inferred from evidence of intact sperm, and evidence of Y chromosome DNA that eliminated Ben as the source of the sperm but could not eliminate Mr. Dorsey as the source of the sperm. In addition to the fact that Mr. Dorsey was the only other male present, other evidence supports the inference that Mr. Dorsey took steps to clean his semen from the victim's body.

some jewelry (including Sarah's wedding ring), a camera bag, a DVD player, a CD player, some CDs, a "Bambi II" DVD, a medical kit for Sarah's Crohn's disease, some old cellular telephones, and some guns (*see* Tr. 550-552, 558-560, 577-578, 587-589, 600-601, 792-799, 805). And, finally, at some point after the murders, Mr. Dorsey poured bleach on Sarah's torso, genitals, and thighs (*see* Tr. 672-676, 678-680; State's Exs. 14, 20-21, 33-34). Mr. Dorsey put the bottle of bleach in the bathroom sink, and he left the house in Sarah's white Grand Am (Tr. 585, 675-676).

Mr. Dorsey drove to Jefferson City, where he met up with Patricia Cannella and tried to pay her what he owed her with "items he said was his" (Tr. 605). Mr. Dorsey had borrowed money from Ms. Cannella for drugs (Tr. 605). When Mr. Dorsey arrived, it was about 1:00 a.m. (December 24), and Mr. Dorsey was driving a white car that he said was his (Tr. 606). Mr. Dorsey had been drinking, and he appeared to be intoxicated (Tr. 606, 611). Mr. Dorsey tried to get rid of some "merchandise" that night, including some rifles and some cellular telephones (Tr. 607, 617, 628).[2] Ms. Cannella later (on Decmeber 28) turned over various pieces of the victims' property to the police (Tr. 608-610, 623-624).

On the morning of December 24, Ben and Sarah Bonnie failed to show up for family pictures at Ben's parents' house (Tr. 803). Eventually, Ben's parents, Gregg

[2] With Ms. Cannella's help, Mr. Dorsey sold his cellular phone that night for ten dollars (Tr 630, 632-633). Mr. Dorsey's telephone was later recovered (Tr. 768-769).

and Marilyn Bonnie, became worried and decided to call Sarah's parents and have them drive over and check on Ben and Sarah (Tr. 533-534, 543, 803). Amber Bonnie (Ben's sister-in-law) spoke to Ms. Mosier (Sarah's mother) and asked Ms. Mosier to go over and check on them (Tr. 543, 803).

Sarah's parents then drove over to the house; they arrived at about 1:15 p.m. (Tr. 533, 544). When they arrived, they noticed that Sarah's white Grand Am was missing (Tr. 534, 544). The front storm door was closed, but the interior door was open (Tr. 515). Upon entering the house, Sarah's parents found four-year-old Jade sitting on the couch, drinking chocolate milk, eating chips, and watching television (Tr. 535, 544-545).

Jade jumped up and was glad to see her grandparents (Tr. 535). She told them that she had tried to wake her mother, but that she had been unable to get her out of bed (Tr. 535). She said, "Nana, I've been trying to get her up all morning, and she won't wake up" (Tr. 545). Sarah's parents then called for Sarah and knocked on the bedroom door, but they also got no response (Tr. 535, 545).

The doors into the bedroom were locked, so Mr. Mosier obtained a screwdriver and forced open the lock (Tr. 536, 545). Upon entering the room, Mr. Mosier saw Ben and Sarah lying in their bed, and he told Ms. Mosier to get Jade and get out of the house (Tr. 536, 545-546). Ms. Mosier saw blood on Sarah's face, and she noticed that one of Sarah's legs was bloody and hanging off the side of the bed

(Tr. 546; State's Exs. 13-14, 20-21). Mr. Mosier then touched each of the bodies and determined that Ben and Sarah were dead (Tr. 536). Before leaving the room, Mr. Mosier pulled a cover over the top of Sarah (Tr. 536-537).

Ms. Mosier went into the kitchen and screamed (Tr. 546). Mr. Mosier came out of the bedroom a moment later and said, "They're both dead" (Tr. 546). They went outside and called the police (Tr. 546).

Members of the Callaway County Sheriff's Office responded to the call (Tr. 635-636). When they arrived, they found the Mosiers and Jade outside the house (Tr. 638). They went inside the house, and made sure no one else was inside (Tr. 639). When they entered the bedroom, they found Ben and Sarah Bonnie in their bed (Tr. 641; State's Exs. 13-16, 20-21). A gunshot wound was visible just below Ben's ear, and Sarah was covered in blood (Tr. 641; State's Exs. 16, 20-21). Ben was kneeling beside the bed, and his upper body was facedown on the bed (State's Ex. 15). Sarah was lying face up, with her head about six inches from Ben's head, and with her left leg hanging off the side of the bed (State's Exs. 16, 20-21). She was wearing only a t-shirt (State's Exs. 20-21).

Later in the afternoon, Gregg Bonnie and Amber drove over to the house, as they had not heard back from the Mosiers (Tr. 804, 812). When they arrived at the house, they saw numerous police vehicles (Tr. 804). Mr. Mosier informed them that Ben and Sarah were both dead (Tr. 805). Gregg Bonnie then returned home and told

Marilyn Bonnie that Ben and Sarah had been shot (Tr. 813-814)

The investigation revealed various details. Sarah's stomach and genital area was not bloody, and her sides, genital area, and legs (including her inner thighs) had "pour" marks on them (Tr. 676, 678-679; State's Exs. 14, 20-21, 33-34). The liquid had been poured after Sarah was shot, as the pour marks washed away blood in streaks (Tr. 679; State's Exs. 14, 20-21). Additionally, the liquid that had been poured on the victim's torso and legs was apparently bleach, as the room smelled of bleach, there was a bleached out area on the carpet next to the victim that appeared to have been caused by dripping liquid, and there was a bottle of bleach in the bathroom sink (Tr. 672-676). The contents of a wallet had been scattered next to the victim, between her legs, and on her genital area (Tr. 680; State's Ex. 21).

An autopsy revealed that Sarah died from a single shot from a shotgun (Tr. 716-717; State's Exs. 28-29). The shot caused extensive injury to her brain and spinal cord, and death was instantaneous (Tr. 717). Ben also died from a single shot from a shotgun (Tr. 721). The shot caused extensive injury to his neck and brain (Tr. 721).

A sexual assault kit, including vaginal swabs, was obtained from the Sarah's body (Tr. 702, 714, 724-725). An initial screening test revealed the possible presence of semen on the vaginal swabs, but additional testing could not confirm the presence of semen (Tr. 839). Soaps, detergents, and cleansers can prevent the confirmation of semen (Tr. 840-841). Further examination of the vaginal swabs

revealed the presence of intact sperm cells (Tr. 841). "Routine" DNA testing of the vaginal swabs revealed only Sarah's DNA (Tr. 842). But Y chromosome DNA (from the sperm cells) was present on the vaginal swabs (Tr. 847). The Y chromosome DNA from both swabs was consistent, and Mr. Dorsey (along with males from a common paternal lineage) could not be eliminated as the source of the Y chromosome DNA (Tr. 847). Statistically, the Y chromosome DNA profile would not be expected in more than .23 percent of the Caucasian population (Tr. 849). Both Darin Carel and Ben Bonnie were eliminated as the source of the Y chromosome DNA profile (Tr. 845-847).

On December 25, at 11:00 p.m., Mr. Dorsey called his mother and told her that he had been trying to kill himself, but that he was too scared (Tr. 874). Eventually, at about 3:00 a.m., on December 26, Mr. Dorsey told his parents where he was, and they went and picked him up (Tr. 875-876). They spent the rest of the night at a motel, and later that day, Mr. Dorsey turned himself in at the sheriff's office (Tr. 652, 762-763). Mr. Dorsey admitted that he was "the right guy concerning the deaths of the Bonnies" (Tr. 764). At that time, Sarah's social security card was found in Mr. Dorsey's left back pocket (Tr. 759-760).

Also on December 26, the police found Sarah's car on County Road 4038 (Tr. 730-731, 733, 735-736). Some of the victims' property was still inside the car (Tr. 742-751). Ben's single-shot, 20-guage shotgun was in the trunk (Tr. 751, 799, 805). The

exterior lights had been disabled – one of them was missing, and the wires to the remaining lights had been cut (Tr. 753).

On December 27, 2006, the state filed a complaint in Callaway County Circuit Court, alleging that Mr. Dorsey had committed two counts of murder in the first degree (L.F. 1, 17). On March 27, 2007, the state filed an information, charging Mr. Dorsey with two counts of murder in the first degree (L.F. 26). In April 2007, the case was transferred to Boone County (L.F. 4). On May 3, 2007, the state filed its notice of intent to seek the death penalty (L.F. 33).

On March 10, 2008, Mr. Dorsey withdrew his previous pleas of not guilty and enters pleas of guilt as to each count of murder in the first degree (Tr. 88-89). The Court questioned Mr. Dorsey and determined that his decision to plead guilty was knowing, intelligent, and voluntary (L.F. 89-100). In entering his plea, Mr. Dorsey admitted that he knowingly shot both victims and caused their deaths; that he did so after deliberation; and that he stole various items from them, including Sarah's car, and tried to sell those items (L.F. 95-97).

A separate penalty phase was held in August 2008 (Tr. 104). In the penalty phase, Ms. Mosier (Sarah's mother) testified about the effects of the murder on her life (Tr. 552-553). She stated that she and Mr. Mosier were raising Jade, and she testified that she had been forced to retire from work (Tr. 552-553). She recounted how Jade required counseling and suffered from nightmares (Tr. 553). She also

testified on cross-examination that she was aware of Mr. Dorsey's drug problems, that she knew that he would call family members and ask for money, and that he had been depressed and attempted suicide (Tr. 555-556). Sarah's sister, Krista Shikles, offered testimony about the effect of Sarah's murder, and Traci Sheley also testified about the destruction the murders had cause in the family (Tr. 560-561, 590). Ben's brother, Jake Bonnie, testified about the loss he felt (Tr. 799-800). Ben's father testified about the great loss he felt, and Ben's mother testified about the harm she suffered and the destruction to the family (Tr. 806-807, 813).

In addition, evidence of Mr. Dorsey's prior crimes was presented through the testimony of Sharon Newlin and the testimony of three Jefferson City police officers (Tr. 704, 770, 775, 781). Ms. Newlin testified about a hit-and-run accident that Mr. Dorsey had been involved in on Highway 54, on April 23, 2006 (Tr. 704-709). She testified that when she told Mr. Dorsey that she had called the police, Mr. Dorsey got into his car and drove away (Tr. 708). A copy of Mr. Dorsey's felony conviction for leaving the scene of an accident was admitted into evidence (Tr. 710).

Officer Chris Gosche testified that he came into contact with Mr. Dorsey on January 30, 2005, and seized a rock of crack cocaine that fell from Mr. Dorsey's jacket (Tr. 782). A copy of Mr. Dorsey's felony conviction for possession of a controlled substance was admitted into evidence (Tr. 783).

Officer Charles Duncan testified that he had contact with Mr. Dorsey on

November 29, 2004, when Mr. Dorsey appeared to be under the influence of narcotics (Tr. 770-771). He then described how Mr. Dorsey had, within an hour, "almost hit our patrol vehicle head on" (Tr. 770). Mr. Dorsey failed field sobriety tests, and Officer Duncan arrested him for driving while intoxicated (Tr. 773-774, 777). At the time of that arrest, Officer Gary Campbell found a plastic bag of crack cocaine in Mr. Dorsey's jacket (Tr. 777-778). A copy of Mr. Dorsey's conviction for felony possession of a controlled substance was admitted into evidence (Tr. 778).

A probation and parole officer also testified that Mr. Dorsey had not succeeded in drug court (Tr. 786). She further testified that Mr. Dorsey was on probation at the time he murdered Ben and Sarah (Tr. 788).

Mr. Dorsey presented the testimony of five family members, three friends (or acquaintances), and a psychologist (Tr. 856, 902, 907, 915, 920, 927, 933, 970, 974, 982, 989). The family members and friends identified some of Mr. Dorsey's good traits while also acknowledging that Mr. Dorsey had had problems with drugs and alcohol (*see e.g.* Tr. 864-873 (appellant's mother's testimony)). The psychologist testified that Mr. Dorsey suffered from major depressive disorder, recurrent (Tr. 944), The psychologist further opined that Mr. Dorsey met the criteria for alcohol dependence and cocaine dependence (Tr. 945). He did not opine that Mr. Dorsey was "insane," but he opined that Mr. Dorsey's conditions "contributed" to the incident (Tr. 946, 948). He opined that Mr. Dorsey's decision-making ability was

"impaired" (Tr. 957, 960).

In addition, Mr. Dorsey testified (Tr. 883). He admitted that he was responsible for the murders, and he admitted that he had "really destroyed" his family (Tr. 885). He claimed not to remember everything about the murders, but he said that he knew that he had killed them (Tr. 890). He recalled having the gun, and he recalled thinking about taking his own life (Tr. 891). He claimed not to remember taking the victims' property, but he did admit some recollection of trying to get rid of the property (Tr. 891-892). He also claimed not to remember engaging in sexual intercourse with Sarah (Tr. 899).

Unlike Mr. Dorsey's trial testimony, other testimony from the psychologist revealed that Mr. Dorsey had told the psychologist about seeing the "shotgun and shells" in a corner (Tr. 961). Mr. Dorsey also admitted to his psychologist that he recalled "standing over their bed," and that he recalled "shooting Sarah and then Ben" (Tr. 961).

The jury assessed sentences of death on each count of murder in the first degree (Tr. 1042-1043). On November 10, 2008, the trial court purported to sentence Mr. Dorsey to death, but the Court only pronounced one sentence and failed to identify either count (Tr. 1055). On that same day, Mr. Dorsey filed his notice of appeal (L.F. 237). Subsequently, on December 1, 2008, the trial court sentenced Mr. Dorsey to death for each murder (Tr. 1058).

ARGUMENT

I.

Mr. Dorsey's sentences are not disproportionate.

In his first point, Mr. Dorsey argues that sentences of death are not warranted and he asserts that this Court, in the exercise of its independent proportionality review, should reduce his sentences to sentences of life imprisonment (App.Br. 35).

A. The standard of review

Under § 565.035, this Court must review any sentence of death imposed by a circuit court. § 565.035.1, RSMo 2000. In reviewing the sentence, this Court is directed to 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 finding of a statutory aggravating circumstance; and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant. § 565.035.3, RSMo 2000.

This Court is directed to "include in its decision a reference to those similar cases which it took into consideration." § 565.035.4, RSMo 2000. After review of the death sentence, the Court may (1) affirm the sentence; (2) set the sentence aside and resentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor; or (3) set the sentence aside and

order a new penalty phase proceeding. § 565.035.5, RSMo 2000. This Court is further directed to "accumulate the records of all cases in which the sentence of death or life imprisonment without probation or parole was imposed after May 26, 1977, or such earlier date as the court may deem appropriate." § 565.035.6, RSMo 2000. To accomplish this task, the Court is allowed an assistant appointed by the court, and "The assistant shall provide the court with whatever extracted information the court desires with respect [to the accumulated records], including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant." *Id*. The Court is further authorized to employ a staff "to compile such data as are deemed by the supreme court to be appropriate and relevant to the statutory questions concerning the validity of the sentence." *Id*.

B. Mr. Dorsey's sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor

With regard to this aspect of the Court's review, Mr. Dorsey first argues that his sentence was brought about by the arbitrary factor that Instruction No. 10 was erroneous, in that it referred to both Counts I and II in advising the jury to "consider all the evidence in deciding whether to assess and declare the punishment at death" (App.Br. 38-39). But as discussed in Point II, below, this technical error did not introduce any arbitrary factor into the jury's deliberations, because (1) the jury would have been instructed to consider the same evidence if properly instructed,

and (2) any risk of "arbitrary and wanton" jury discretion was eliminated by the various instructions that guided the jury's deliberations and required the jury to assess an individualized sentence as to each count of murder.

Mr. Dorsey further asserts that his sentences were "arbitrary and capricious" because there was insufficient evidence to support the statutory aggravator that he forcibly raped Sarah Bonnie (App.Br. 39-40). Specifically, he argues that there was no evidence of "forcible compulsion" (App.Br. 40). But as discussed in Point III, below, there was ample evidence that Mr. Dorsey engaged in sexual intercourse with the victim by the use of "forcible compulsion." Indeed, Mr. Dorsey shot and killed Sarah Bonnie to overcome her resistance.

Mr. Dorsey next asserts that his sentences are unreliable because two of the aggravating circumstances submitted as to each murder were "duplicative" (App.Br. 40-41). But as discussed in Point VII, below, none of the aggravators were duplicative. Thus, this claim, too, is without merit.

Mr. Dorsey also argues that his sentences were the result of passion or unfair prejudice, in light of four allegedly "gruesome" photographs that were presented to the jury (App.Br. 41-43). But as discussed in Point V, below, the photographs were properly admitted (and not admitted solely to arouse emotion), as they legitimately tended to prove Mr. Dorsey's guilt, the nature of Mr. Dorsey's crimes, the nature and location of the victim's wounds, and the aggravating circumstances. Moreover,

the photographs aided the jury in understanding the testimony of witnesses, and they were not unduly prejudicial in any event.

Finally, Mr. Dorsey asserts that his sentences were rendered unreliable by improper comments by the prosecutor during voir dire and closing argument (App.Br. 43-45). But as discussed in Point IV, below, none of the prosecutor's arguments were improper.

In sum, none of the alleged errors identified by Mr. Dorsey caused his sentences of death to be "imposed under the influence of passion, prejudice, or any other arbitrary factor."

C. The evidence supports the aggravating circumstances found by the jury

With regard to the murder of Ben Bonnie, the jury found three aggravating circumstances:

> 1. [That] the murder of Benjamin Bonnie was committed while the defendant was engaged in the commission of another unlawful homicide of Sarah Bonnie.
>
> 2. [That] the defendant murdered Benjamin Bonnie for the purpose of the defendant receiving money or any other thing of monetary value from Benjamin Bonnie or another.
>
> 3. [That] the murder of Benjamin Bonnie involved depravity of mind and [that], as a result thereof, the murder was outrageously and

wantonly vile, horrible and inhuman.

(*see* L.F. 176, 190). The jury was instructed that it could only find "depravity of mind" (the third aggravator) if it found "That the defendant killed Benjamin Bonnie as a part of defendant's plan to kill more than one person and thereby exhibited a callous disregard for the sanctity of all human life" (L.F. 176).

Mr. Dorsey does not here reiterate the alternative argument that he makes in Point VII – that the evidence was insufficient to support the "depravity of mind" aggravator. But for the reasons discussed below in Point VII, respondent submits that the evidence was sufficient to support that aggravating circumstance, as there was sufficient evidence that Mr. Dorsey killed Ben as part of a "plan" to kill more than one person. Indeed, as set forth above in Respondent's Statement of Facts, the evidence supports the inference that Mr. Dorsey obtained a single-shot gun and enough ammunition to kill both victims, that Mr. Dorsey deliberated before killing the victim's, and that Mr. Dorsey then killed both victims as part of a plan to deprive them of their property and to rape Sarah.

With regard to the first two circumstances, there was ample evidence that Mr. Dorsey killed Ben while engaged in another unlawful homicide. In fact, in closing argument, defense counsel conceded the existence of that aggravating circumstance (Tr. 1019-1020). Mr. Dorsey does not dispute that he committed the murder for the purpose of receiving money or anything of monetary value, and the evidence amply

supports that conclusion.

With regard to the murder of Sarah Bonnie, the jury found four aggravating circumstances:

> 1. [That] the murder of Sarah Bonnie was committed while the defendant was engaged in the commission of another unlawful homicide of Benjamin Bonnie.
>
> 2. [That] the defendant murdered Sarah Bonnie for the purpose of the defendant receiving money or any other thing of monetary value from Benjamin Bonnie or another.
>
> 3. [That] the murder of Sarah Bonnie involved depravity of mind and [that], as a result thereof, the murder was outrageously and wantonly vile, horrible and inhuman.
>
> 4. [That] the murder of Sarah Bonnie was committed while the defendant was engaged in the perpetration of rape.

(L.F. 178, 191). The jury was instructed that it could only find "depravity of mind" (for the third aggravator) if it found "That the defendant, while killing Sarah Bonnie or immediately thereafter, had sexual intercourse with her" (L.F. 178). The jury was further instructed (for the fourth aggravator) that "A person commits the crime of forcible rape if the person has sexual intercourse with another person by the use of forcible compulsion" (L.F. 178). (The phrase "forcible compulsion" was also defined.

(L.F. 178).)

As outlined above, and as argued in Point III, Mr. Dorsey argues that the fourth aggravating circumstance – the "rape" aggravator – was not supported by sufficient evidence (App.Br. 39-40, 60), But for the reasons discussed below in Point III, respondent submits that this aggravator was supported by sufficient evidence.

As to the other aggravating circumstances, Mr. Dorsey does not dispute the sufficiency of the evidence, and the evidence amply supports each circumstance. As outlined above in Respondent's Statement of facts, there was ample evidence that Mr. Dorsey killed Sarah while engaged in another unlawful homicide, that the murder was committed for pecuniary gain, and that the murder involved "depravity of mind," based on Mr. Dorsey's desire for sexual gratification with the murder victim.

D. Mr. Dorsey's sentences are not excessive or disproportionate to the penalty imposed in similar cases

Lastly, the Court is directed to determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant.

1. Similar cases – the crime

There are many similar cases where the death penalty has been imposed and upheld by this Court. The Court has often upheld death sentences when more than

one victim was murdered. *See State v. Deck*, --- S.W.3d ----, 2010 WL 290450 *21 (Mo. banc 2010) (citing numerous cases); *State v. Taylor*, 298 S.W.3d 482, 513 (Mo. banc 2009) (citing *State v. Anderson*, 79 S.W.3d 420, 446 (Mo. banc 2002); *State v. Christeson*, 50 S.W.3d 251, 273 (Mo. banc 2001); and *State v. Smith*, 32 S.W.3d 532, 559 (Mo. banc 2000)). The Court has also often upheld death sentences imposed for murders committed for the purpose of pecuniary gain. *See State v. Deck*, 2010 WL 290450 at *21 (citing *State v. Ringo*, 30 S.W.3d 811, 826 (Mo. banc 2000); *State v. Worthington*, 8 S.W.3d 83, 93 (Mo. banc 1999); and *State v. Middleton*, 998 S.W.2d 520, 531 (Mo. banc 1999)). A death sentence has also been upheld where the murders were part of a plan to kill more than one person. *Middleton*, 998 S.W.2d at 531. In light of these similar cases, the sentences of death imposed in Mr. Dorsey's case were not disproportionate.

Additionally, in *State v. McLaughlin*, 265 S.W.3d 257, 277 (Mo. banc 2008), this Court affirmed a sentence of death where the defendant raped the victim at the time of the murder. This Court further observed that if "the rape occurred wholly or partially after death, the crime would be even more depraved." *Id*. Similarly, here, the evidence supported an inference that the defendant raped Ms. Bonnie immediately before he killed her or after she was already dead. The sentence of death for the murder of Sarah Bonnie was not disproportionate.

Recently, in *State v Deck*, 2010 WL 290450, four members of the Court stated,

in two concurring opinions, that a review of "similar" cases should include a review of similar cases where a sentence of death was *not* imposed. *See id*. at 23 ("The legislature's directive in section 565.035.6 that records be compiled of 'all cases in which the sentence of death or life imprisonment without probation or parole was imposed' clearly communicates its intent that factually similar cases with sentences of life imprisonment be considered in the proportionality review.") (Breckenridge, J., concurring in part and concurring in result); *id*. at *24 ("Section 565.035 requires consideration of all 'other similar cases,' which includes those in which a life sentence resulted, in determining whether the sentence of death is excessive or disproportionate in light of the crime, the defendant and the strength of the evidence.").

As the lead opinion in *Deck* pointed out, however, including such cases in this Court's proportionality review represents a departure from numerous previous decisions of the Court. *See id*. at *20 ("This argument [that life-sentence cases should be considered in proportionality review] has been repeatedly rejected by this Court.") (citing as examples *State v. Johnson*, 207 S.W.3d 24, 50-51 (Mo. banc 2006); *State v. Smith*, 32 S.W.3d 532, 559 (Mo. banc 2000); and *State v. Clay*, 975 S.W.2d 121, 146 (Mo. banc 1998)). Nevertheless, it appears that this rule has been reconsidered by a majority of the Court.

The question, then, is how to conduct proportionality review. It is a well-

settled principle that "This Court's proportionality review is designed to prevent freakish and wanton application of the death penalty." *Id.* at *19 (citing *State v. Ramsey*, 864 S.W.2d 320, 328 (Mo. banc 1993)). And, a review of the opinions in *Deck* indicates that a majority of the Court still holds to this basic principle. *Id.*; *see id.* at *24 ("While such language ["freakish and wanton"] is not found in section 565.035, I think the principal opinion is correct that the language of section 565.035.3 supports the conclusion that proportionality review is intended for this Court to identify and correct only the imposition of aberrant death sentences.") (Breckenridge, J., concurring). Thus, it would appear that the first order of business would be to ascertain whether the sentences in this case were "freakish and wanton," or "aberrant," when compared to other cases.

Here, given the facts of Mr. Dorsey's case, and given the fact that sentences of death have been upheld in many similar cases, respondent submits that the sentences in this case were not "aberrant." Indeed, given the heinous nature of the crimes in this case, given the safeguards that prevent "arbitrary and wanton" jury discretion, and given the steps that the jury must complete to assess an appropriate individualized sentence, respondent submits that the sentences imposed in this case were wholly justified.

To the extent that a review of similar cases where death was *not* imposed can cast some light upon this issue, respondent further submits that the cases identified

by Mr. Dorsey do show that his sentences were "aberrant" or "disproportionate or excessive." Mr. Dorsey first cites to *State v. Little*, 861 S.W.2d 729, 730 (Mo.App. E.D. 1993) – a case in which a defendant, who was a class X offender, was found guilty of three counts of murder in the first degree, one of murder in the second degree, two counts of forcible rape, two counts of robbery in the first degree, and one count of attempted forcible rape. The evidence of guilt in the case was overwhelming, as the "defendant had made detailed confessions on television equipment for each of the murders and the related charges involving sexual offenses and robberies." *Id*. at 731. The state sought the death sentence on each count of murder in the first degree, but the jury assessed life sentences on each count. *Id*. at 731. Accordingly, Mr. Dorsey suggest that because the defendant in *Little* did not receive death sentences, his own sentences must be disproportionate.

But Mr. Dorsey's reliance on this case is misplaced. A comparison of Mr. Dorsey's case with the *Little* case reveals *not* that Mr. Dorsey's sentence is aberrant, but that Mr. Little's sentence was aberrant. In fact, the Court in *Little* observed that some people would call the result in *Little* "a legal miracle." *Id*. at 732. In short, it is not the "legal miracles" in otherwise heinous cases that should be used to gauge whether sentences in other heinous cases are disproportionate.

Indeed, Mr. Dorsey's reliance on *Little* aptly reveals one of the inherent problems that accompanies the consideration of life-sentence cases, namely, that it is

often not wholly understandable, or ascertainable, *why* a jury decided to impose a life sentence in any given case. A defendant can be removed from consideration as a candidate for the death penalty at various stages and for various reasons. If a jury extends mercy, for example, to a particular defendant, it does not violate the Constitution, and it does not render a similarly situated defendant's death sentence disproportionate within any recognized meaning of the Eighth Amendment – so long as the similarly situated defendant's death sentence was not "wantonly and freakishly" imposed.

In *McClesky v. Kemp*, 481 U.S. 279, 306 (1987), for example, the petitioner argued that the sentence in his case was disproportionate to the sentences in other murder cases, because other similar murderers did not receive the death penalty. In rejecting the claim, the United States Supreme Court stated:

> absent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner, McClesky cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did not receive the death penalty.

Id. at 306-307. *See generally Walton v. Arizona*, 497 U.S. 639, 655-656 (1990) (in rejecting a claim that an aggravator did not "distinguish his case from cases in which the death sentence ha[d] not been imposed," the Court stated that it would not overturn the Arizona Supreme Court's proportionality review, because the death sentence

was not "wantonly and freakishly" imposed).

In short, while respondent recognizes that a majority of the Court has concluded that similar, life-sentence cases should be considered in conducting proportionality review, respondent submits that there may be good reason to exclude many such cases from this Court's review. Indeed, in respondent's view, while nothing would *preclude* this Court from considering an appropriate life-sentence case, respondent submits that § 565.035 does not compel the consideration of any given case. Indeed, in light of the statutory language quoted above, respondent submits that this Court retains absolute discretion to request (and consider) whatever information that it deems relevant. *See State v. Deck*, 2010 WL 290450 at *21.

Mr. Dorsey also cites the case of "Levi King," who, according to Mr. Dorsey, "pled guilty in Pulaski County . . . to two sentences of life without probation or parole in Case No. 07PU-CR00040-01;" and the case of "Richard DeLong," who, according to Mr. Dorsey, "strangled a mother, who was carrying her full-term unborn child, and her other three children . . . [and] received sentences of life without probation or parole" (App.Br. 49). But it is not apparent from these brief descriptions that those cases were anything like Mr. Dorsey's case. In the "King" case, from Mr. Dorsey's short description, it appears that Mr. King may have received a plea bargain. In addition, it is not apparent whether any of the statutory

aggravating circumstances (or other facts in aggravation) were similar to the facts and circumstances of Mr. Dorsey's case. Likewise in the "DeLong" case. In fact, it is not apparent whether the prosecutor even sought a sentence of death in either case.

Mr. Dorsey also cites *State v. Beishline*, 926 S.W.2d 501, 505 (Mo.App. W.D. 1996) – a case in which the defendant was charged with one count of murder in the first degree, and where there was evidence that the defendant may have been involved in some other unrelated murders. But *Beishline* is not a similar case. The murder in that case was not committed while the defendant was engaged in the commission of another unlawful homicide; the murder was not committed for pecuniary gain; the murder did not involve "depravity of mind" based on a finding that the murder was part of a plan to kill more than one person; the murder did not involve "depravity of mind" based on a finding that the defendant engaged in sexual intercourse with the murdered victim; and the murder was not committed contemporaneously with a forcible rape.

2. The strength of the evidence

Here, the strength of the evidence is overwhelming. There is no question that the defendant murdered both victims after deliberation, because the defendant pled guilty and admitted those facts (Tr. 95-97). Additionally, with regard to the first aggravating circumstance for each murder, the defense conceded that the state had proved its existence (Tr. 1019-1020). With regard to the "pecuniary gain" aggravator

the evidence was also overwhelming. And, finally, with regard to the "depravity of mind" aggravators, and the "rape" aggravator, there was ample evidence to support the jury's findings.

3. The defendant

In arguing this point, Mr. Dorsey points out that various family members and friends have written or testified on his behalf. He also asserts that he has shown some remorse, that he has some good qualities, and that he does not have a violent history. But while appellant is correct in some of these assertions, to some extent, the evidence still demonstrated that sentences of death are justified for Mr. Dorsey.

In committing these murders, Mr. Dorsey aggravated an ongoing criminal history. Indeed, as the record shows, Mr. Dorsey was on probation from his previous felony when he committed the murders (Tr. 788). Mr. Dorsey had three prior felonies, and two of his felonies involved accidents or near accidents while driving a motor vehicle. The near-accident involved driving while intoxicated – conduct that put people in the community at great risk.

In committing these murders, Mr. Dorsey also exhibited a callous disregard for human life and a willingness to murder for virtually no reason. He owed his drug dealer about $280, and he murdered the victims so that he could gather up their belongings to trade them or sell them for drugs. The type of greed and self-centeredness that underlies such conduct is wholly reprehensible.

In committing these murders, Mr. Dorsey also raped and harmed a person who was engaged in trying to help him. Moreover, the evidence suggests that he probably raped Sarah Bonnie after she had died. As this Court stated in *State v. McLaughlin*, such actions are even more depraved than the rape of a living person. 265 S.W.3d at 277.

It is true that Mr. Dorsey has suffered from drug problems and depression, but the defendant's unbridled use of drugs merely shows the disregard he has for the law, his own wellbeing, and the wellbeing of his family. Additionally, while appellant had had problems, he was also given multiple opportunities to change (e.g., drug court). Indeed, he had a very supportive family. But in the end, he turned on helpful members of his family and brutally murdered them in the home that they had opened up to him as a refuge. The sentences in this case were not disproportionate. This point should be denied.

II.

The trial court erred in not giving two separate instructions based on MAI-CR3d 314.46 (one for each count), but the error did not result in manifest injustice.

In his second point, Mr. Dorsey alleges that the trial court plainly erred in submitting Instruction No. 10 (App.Br. 52). Instruction No. 10 was based on MAI-CR 3d 314.46, and it stated:

> *As to Count I and Count II*, you are not compelled to fix death as the punishment even if you do not find the existence of facts and circumstances in mitigation of punishment sufficient to outweigh the facts and circumstances in aggravation of punishment. You must consider all the evidence in deciding whether to assess and declare the punishment at death. Whether that is to be your final decision rests with you.

(L.F. 181) (emphasis added). Mr. Dorsey asserts that the reference to "Count I and Count II" was improper because it "told the jury to consider the evidence as to *both* counts in deciding the punishment on each and thus allowed the jury to sentence [him] to death on each count based on evidence applicable to the other count" (App.Br. 52).

A. The standard of review

Because he did not object to Instruction No. 10 at trial (*see* Tr. 993-996), Mr.

Dorsey requests plain error review of this claim (App.Br. 54). "For instructional error to rise to the level of plain error, the trial court must have so misdirected or failed to instruct the jury so that it is apparent that the instructional error affected the verdict." *State v. Deck*, 994 S.W.3d 527, 540 (Mo. banc 1999). "[P]lain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative[.]" *Deck v. State*, 68 S.W.3d 418, 427 (Mo. banc 2002).

B. Submission of a single instruction based on MAI-CR 3d 314.46 did not so misdirect the jury as to result in manifest injustice

The general instructions for MAI-CR 3d 314 state that MAI-CR 3d 314.46 must be given in the penalty phase, as part of a series of several other instructions. *See* MAI-CR 3d 314.00, Note on Use 5. The general instructions further state that "If there is more than one count of murder in the first degree where the death penalty was not waived, *repeat this series of instructions for each such count*." *Id*. (emphasis added). Thus, by giving only one instruction based on MAI-CR 3d 314.46, the trial court failed to comply with the general instructions.

But this error did not so misdirect the jury as to result in manifest injustice. In arguing that he was prejudiced, Mr. Dorsey argues that Instruction No. 10 "told the jury that its verdicts on both Counts need not be separate and independent" (App.Br. 54). Mr. Dorsey asserts specifically that Instruction No. 10 "allowed the jury to consider together, in its final and most challenging step, the evidence from

separate counts in determining the ultimate punishment as to each such Count" (App.Br. 58). As an example, Mr. Dorsey points out that, under Instruction No. 10, it would have been possible for "the jury, in deciding whether to impose death . . . for Sarah's murder, to consider the impact of Ben's murder on Ben's family – his brother, his mother, and his father" (App.Br. 58). In other words, it would have allowed the jury to consider a harm that flowed from Ben Bonnie's murder in imposing a sentence for Sarah's murder. In support of his claim, Mr. Dorsey relies primarily on *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *State v. Cooey*, 544 N.E.2d 895 (Ohio 1989).

But Mr. Dorsey's arguments do not compel reversal in this case. In using a single instruction, the trial court did not alter the instructions that the jury otherwise would have received in any appreciable fashion. If two instructions had been used, the same alleged deficiency would have been present in Mr. Dorsey's case. Indeed, even if two instructions had been employed, each instruction still would have told the jury to "consider all the evidence in deciding whether to assess and declare the punishment at death." *See* MAI-CR 3d 314.46. No differentiation among the various pieces of evidence would have been made in separate instructions, and, thus, the jury's deliberations would have followed the same course.

The question, then, is whether MAI-CR 3d 314.46 is correct in telling the jury – at this point in its deliberations – to "consider all the evidence." In *Woodson*, the

United States Supreme Court was analyzing an "automatic" death-penalty statute – a statute that set the punishment at death upon a finding of guilt for the offense of murder in the first degree. 428 U.S. at 286. In concluding that such statutes were unconstitutional, the Court observed that such statutes have various constitutional infirmities. First, the Court concluded that an automatic sentence of death did not comport with "the evolving standards of decency that mark the progress of a maturing society." *Id*. at 301. Second, the Court concluded that such statutes do "not fulfill *Furman*'s[3] basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." *Id*. at 303. And third, the Court observed that the statute failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." *Id*. at 303.

But Missouri's death-penalty statute does not suffer from these infirmities, and, in fact, MAI-CR 3d 314.46 – which instructs the jury that it is not "compelled" to assess a death sentence, and that it must consider "all the evidence" – eliminates some of the constitutional infirmities found in *Woodson*. Indeed, in instructing the jury that it "must consider all the evidence in deciding whether to assess and declare the punishment at death," the instruction fulfills *Woodson*'s requirement for

[3] *Furman v. Georgia*, 408 U.S. 238, 309-310 (1972).

"particularized consideration of relevant aspects of the character and record of each convicted defendant."

And, contrary to Mr. Dorsey's claim of error, it is not impermissible to tell the jury to consider evidence of *other* crimes (and the nature and effect of those crimes) in evaluating the defendant's character and record. Indeed, a defendant's other criminal acts, the nature of those acts, and the harm caused by those acts all cast light upon the defendant's character and aid the jury in determining an appropriate individualized sentence for murder. *See State v. Middleton*, 995 S.W.2d 443, 463 (Mo. banc 1999) (Evidence of two unadjudicated murders was admissible in penalty phase for a third murder, because "In the penalty phase of a capital trial, the character and history of the defendant, including prior crimes committed by that defendant, are admissible as relevant to the sentencing." Thus, "The evidence in question [the murder of two other victims] was used to help the jury to understand the prior acts of [the defendant] for the purpose of determining his punishment for the murder of [a third individual].").

This does not mean that the jury has "arbitrary and wanton" discretion in deciding whether to impose a sentence of death. But the requisite channeling of the jury's discretion occurs in multiple steps – not just the final step.

For instance, as to each count, the jury in Mr. Dorsey's case was required to find one or more statutory aggravators beyond a reasonable doubt (L.F. 176, 178).

The jury was required to find individual aggravators for each murder, and, thus, each murder was individually identified as a murder that fell within a narrower class of murders that justifies a more severe sentence. Second, as to each count, the jury was required to determine whether the evidence in mitigation of punishment outweighed the evidence in aggravation of punishment (177, 180). This "weighing" step was individual as to each count, with each instruction referring back to the aggravating circumstances found as to that murder (Tr. 177, 180); thus, the error that occurred in *State v. Cooey* did not occur in Mr. Dorsey's case. *Cf.* 544 N.E.2d at 917 ("the trial court erred in combining the aggravating circumstances related to *both* murders, and weighing all of them collectively against the mitigating factors).

In short, there is simply no reason to believe that the jury was under the impression that it did not have to render an individual sentence as to each count.[4] In fact, in addition to the other instructions, there were two separate "verdict mechanics" instructions, and those instructions reminded the jury of the process

[4] Mr. Dorsey points out that the jury sent out a note asking if they could "do a secret ballet [sic] vote between us to determine the proper penalty Before working through final Instructions" (App.Br. 58, citing L.F. 188). He asserts that this note should have "sent up a warning flare" (App.Br. 58). But the jury's apparent desire to conduct a straw poll does not reflect any confusion about the instructions generally, and it does not reveal any problem with Instruction No. 10 in particular.

that had to be applied to each count (L.F. 182-184; Supp.L.F. 1-2). The fact that Instruction No. 10 referred to both counts would have simply indicated to the average reader that the "consider all evidence" directive had to be applied to both counts individually. This point should be denied.

III.

There was sufficient evidence to support the statutory aggravator that Mr. Dorsey murdered Sarah Bonnie while perpetrating a rape.

In his third point, Mr. Dorsey argues that "Since there was no evidence that any sexual contact occurred before Sarah [Bonnie's] death, the State could not prove beyond a reasonable doubt that [Mr. Dorsey] had sexual intercourse with Sarah without her consent by the use of forcible compulsion" (App.Br. 61). Mr. Dorsey admits that "the evidence may have been sufficient for a jury to conclude that [he] had sexual intercourse with Sarah's body," but he argues that "Since there is no evidence . . . that Sarah was alive for the sexual assault, the State's evidence fails on that essential element of the offense" (App.Br. 64). Mr. Dorsey argues, "For 'forcible compulsion and 'reasonable resistance' to come into play, the sexual assault victim must, for any step of the offense, be alive and thus capable of having his or her will overborne" (App.Br. 64). In other words, Mr. Dorsey argues that the state must prove that some part of the sexual aspect of forcible rape must occur while the victim is still alive and able to resist (App.Br. 64).

In making this argument, Mr. Dorsey fundamentally misunderstands the offense of forcible rape. Here, the victim *was* alive for a "step of the offense," or, in other words, she was alive during part of the forcible rape, because she was alive when Mr. Dorsey shot her with the shotgun and caused her death. The crime of

"forcible rape" is not merely the sexual intercourse that occurs in committing the offense; rather, forcible rape is "sexual intercourse with another person by the use of forcible compulsion." § 566.030, RSMo 2000. Thus, because the victim was alive when Mr. Dorsey shot her (and thereby overcame her resistance to sexual intercourse), there was sufficient evidence that he forcibly raped her. *See State v. McLaughlin*, 265 S.W.3d 257, 269 (Mo. banc 2008) ("in a forcible rape prosecution, where defendant has rendered the victim 'permanently unconscious' as a part of a course of continuous conduct that resulted in the rape, the state has met its burden of proving forcible compulsion").

In fact, in *State v. McLaughlin*, this Court flatly rejected the theory that a rape victim must be alive during some part of the sexual intercourse that occurs during the offense of forcible rape. In *McLaughlin*, the defendant argued that he could not have raped the victim (and that he only committed necrophilia or desecration of a corpse) because he stabbed the victim to death before engaging in sexual intercourse with the victim. *Id*. at 268. But this Court rejected that argument and adopted the "ongoing criminal assault" rule, which holds that "where the forcible compulsion that leads to the rape begins before the death of the victim, the defendant is guilty of rape even if the jury believes defendant killed the victim before penetration or before the sexual assault was concluded." *Id*.

In adopting this rule, the Court noted that there were sound policy reasons for

adopting this rule, as holding otherwise could encourage rapists to kill their victims. *Id*. at 268-269 (citing *State v. Brobeck*, 751 S.W.2d 828, 832 (Tenn. 1988)). This Court also observed that " 'If the element of force is satisfied where the defendant has used less than deadly force to overcome the victim's resistance so as to allow him to have carnal knowledge of the victim, the element of force is surely no less satisfied when the defendant has used deadly force to accomplish his aim.' " *Id*. at 269 (quoting *Lipham v. State*, 364 S.E.2d 840, 842 (1988)).[5]

Mr. Dorsey acknowledges this Court's opinion in *McLaughlin*, but he argues that the facts of his case are different. (App.Br. 64-67). Mr. Dorsey argues that "here, there is no evidence that any action in furtherance of a sexual assault occurred before Sarah was killed" (App.Br. 67). But this is simply incorrect. Mr. Dorsey shot the victim while she was alive, and this was an "action in furtherance of a sexual assault" (as it constituted force that overcame the victim's resistance to the sexual intercourse).

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[5] This Court also cited a concurring opinion in *State v. Honie*, 57 P.3d 977, 997 (Utah 2002) (Durrant, J., concurring), which observed, in holding that the ongoing criminal assault rule was appropriate, that it was not likely that "the legislature, in enacting the corpse desecration statute, intended it to apply, to the exclusion of other statutes relating to sexual assault, in cases where a defendant's single, continuous assault on a victim results in the victim's death and in sexual contact."

It appears that Mr. Dorsey is arguing that the defendant must commit some sort of overtly "sexual" act while the victim is still alive. For instance, he observes that in *Lipham*, "the court expressly noted that the physical evidence was consistent with the defendant lying atop the victim as he shot her" (App.Br. 67). But Mr. Dorsey cites no case to support his claim that such an act must be committed while the victim is alive, and, indeed, such a rule is inconsistent with *McLaughlin*.

In fact, in deciding *McLaughlin*, this Court analyzed the defendant's claim at face value, accepting his assertion that he first killed the victim and then engaged in sexual intercourse with her. Thus, the facts of *McLaughlin*, at least as contemplated by this Court in deciding the issue, are not distinguishable from the factual scenario posited by Mr. Dorsey. Indeed, in *McLaughlin*, this Court specifically stated that forcible rape occurs if the deadly force and the sexual intercourse occur "in a series of closely related acts." 265 S.W.3d at 269. In other words, if a defendant shoots and kills a person, and if the defendant then undresses that person and engages in sexual intercourse with that person, the defendant is guilty of forcible rape.

In sum, under the "ongoing criminal assault" rule, Mr. Dorsey's conduct constituted forcible rape. He used deadly force to overcome Sarah Bonnie's resistance, and even if he did not engage in sexual intercourse with her before she actually expired, the deadly force and his act of sexual intercourse with her shortly after he killed her was sufficient to support a finding of forcible rape. "It is rape

where defendant both kills and sexually assaults a victim in a single, continuous act, *or in a series of closely related acts*, and where, as a part of the course of conduct, defendant uses forcible compulsion against the victim, even if portions of the rape, including penetration, occur once the victim already has been killed." *Id*. (emphasis added). This point should be denied.

IV.

The trial court did not plainly err in failing to declare a mistrial *sua sponte* after the prosecutor made certain comments in voir dire and closing argument.

In his fourth point, Mr. Dorsey asserts that the trial court committed plain error during voir dire and closing argument when it failed to declare a mistrial *sua sponte* in response to various comments made by the prosecutor (App.Br. 69). Mr. Dorsey asserts that the prosecutor engaged in "repeated, intentional misconduct" (App.Br. 71).

A. The standard of review

Mr. Dorsey concedes that defense counsel did not object to any of the prosecutor's challenged comments (App.Br. 71). Thus, he requests plain error review. "Plain error requires a finding of 'manifest injustice or miscarriage of justice.' " *State v. Johnson*, 284 S.W.3d 561, 573 (Mo. banc 2009).

"Plain error relief is rarely appropriate for claims involving closing arguments because the decision to object is often a matter of trial strategy." *Id*. "Closing arguments must be examined in the context of the entire record." *Id*. Under plain error review, a conviction will be reversed for improper closing argument only when it is established that the argument had a decisive effect on the outcome of the trial and amounts to manifest injustice. *State v. Middleton*, 995 S.W.2d 443, 456 (Mo. banc 1999). The burden to prove a decisive effect is on the appellant. *State v. Parker*,

856 S.W.2d 331, 333 (Mo. banc 1993).

B. The trial court did not plainly err in failing to declare a mistrial *sua sponte* during voir dire

Ordinarily, "The nature and extent of questioning on voir dire is within the trial court's discretion and will not be disturbed absent an abuse of discretion." *State v. Gill*, 167 S.W.3d. 184, 192 (Mo. banc 2005). Here, because there was no objection to the allegedly improper statements, Mr. Dorsey is asserting that the trial court should have intervened *sua sponte* and declared a mistrial.

During the questioning of each small panel during voir dire, the prosecutor made various comments and asked questions designed to inform the potential jurors generally about the process that the jurors would follow in assessing punishment (Tr. 342-345, 392-394, 442-446). In asking these questions, Mr. Dorsey alleges that the prosecutor misstated the law in various ways (App.Br. 72-73).

First, Mr. Dorsey argues that the prosecutor improperly referred to the "warrant" step that is no longer part of Missouri's statutory scheme. He points out that the prosecutor, after discussing the statutory-aggravator step, made the following statement:

> The second thing that I must prove beyond a reasonable doubt is that all of the facts of the case, taken as a whole, *warrant* the death penalty. All right. Let me say that again. All the facts, not just the

statutory aggravation, but everything, and that they're not outweighed by any mitigating factors that may be proven.

So I have to prove that the case, as a whole, warrants the death penalty, and you all have to agree to that.

(Tr. 344) (emphasis added).

Mr. Dorsey is correct that the "warrant" step has been eliminated (*compare* § 565.030.4, RSMo 2000 and § 565.030.4, RSMo Cum. Supp. 2009), but the elimination of that step in the statute does not preclude the use of the word "warrant" when talking about the penalty-phase process generally. Indeed, it is not likely that the jury attached any special significance to that term.

In any event, notwithstanding the elimination of the "warrant" step, the prosecutor's comment was not a misstatement of the law. Under § 565.032, a jury must be instructed to find (1) whether a statutory aggravator exists, and (2) "whether the evidence as a whole *justifies* a sentence of death or a sentence of life imprisonment." § 565.032.1(1)-(2), RSMo 2000 (emphasis added). Accordingly, it is not a misstatement of the law to say that the state must prove that a sentence of death is "warranted" or justified.[6] *See generally State v. Christeson*, 50 S.W.3d 251, 266

[6] This requirement – that the sentence be justified – is accomplished through the various instructions that follow the aggravating-circumstance instruction. *See State v. McLaughlin*, 265 S.W.3d 257, 264-265 (Mo. banc 2008).

(Mo. banc 2001) (in analyzing various comments said to be misstatements of the law during voir dire, the Court found no plain error and observed that "in context, most of these statements were legitimate attempts to explain the mechanics of the trial process and the role of the jury in assessing evidence presented by the state or the defendant").

Mr. Dorsey next argues that the prosecutor misstated the law when he made the following comment:

> But in that process of weighing them, you weigh all of the facts in the case, aggravating circumstances, and mitigating circumstances, and if you find unanimously, you know, those mitigating factors just aren't enough to overcome or outweigh the aggravating facts taken as whole, then that step go [sic] is over and you now go to step three. And that is decision time with both options open.

(Tr. 345). But, in fact, this was a correct statement of the law. Under § 565.030, the jury must impose a sentence of life imprisonment if it "concludes that there is evidence in mitigation of punishment . . . which is sufficient to outweigh the evidence in aggravation." § 565.030.4(3), RSMo Cum. Supp. 2009; *see also* MAI-CR 3d 314.44 ("If each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the facts or circumstances in aggravation of punishment, then you must return a verdict fixing defendant's punishment at

imprisonment for life . . . .").

Despite the language of the statute (and the applicable MAI), Mr. Dorsey argues that it is improper to place the burden on the defendant at this stage of the jury's deliberations (App.Br. 73). He also argues that because the finding at this stage of the proceedings makes him "eligible" for death, the finding must be proved by the state beyond a reasonable doubt (App.Br. 72-73). But Mr. Dorsey is incorrect on both counts. *State v. Johnson*, 284 S.W.3d 561, 588 (Mo. banc 2009) ("Appellant's argument that the instruction improperly shifts the burden of proof has been rejected by the United States Supreme Court and this Court" (citing *Kansas v. Marsh*, 548 U.S. 163, 170-171 (2006)); *Zink v. State*, 278 S.W.3d 170, 193 (Mo. banc 2009) ("Only findings of fact that increase the penalty for a crime beyond the prescribed statutory maximum are required to be found by a jury beyond a reasonable doubt. This Court previously has recognized this distinction and held that steps two and three do not need to be found by a jury beyond a reasonable doubt.").[7]

[7] Mr. Dorsey quotes *Kansas v. Marsh* for the proposition that "although the defendant appropriately bears the burden of proffering mitigating circumstances – a burden of production – he never bears the burden of demonstrating that mitigating circumstances outweigh aggravating circumstances" (App.Br. 73). But in making this statement the Court was not outlining what is constitutionally permissible in penalty-phase proceedings; rather, the Court was merely describing the process

Mr. Dorsey finally argues that the prosecutor misstated the law when he stated that in the "final step," the jury's "choice, whether for death or life in prison without parole, must be unanimous, either way" (Tr. 345). Mr. Dorsey asserts that this was erroneous because "Although any decision for death must be unanimous, the same is not true for a life without parole verdict" (App.Br. 73).

But while Mr. Dorsey is correct that a life sentence can occur when the jury is not unanimous about certain facts (e.g., which facts are sufficiently mitigating, *see Mills v. Maryland*, 486 U.S. 367, 384 (1988)), the prosecutor was correct in stating that under Missouri law – in the final step – the decision to assess a life sentence must be unanimous. This is reflected in the "verdict mechanics" instruction which states (with regard to the final step) that "If you *unanimously* decide, after considering all of the evidence and instructions of law, that the defendant must be punished for the murder . . . by imprisonment for life . . . your foreperson will sign the verdict form so fixing punishment." MAI-CR 3d 314.48 (emphasis added). The jury is further instructed that if (in the final step) it cannot "agree upon the punishment, your

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followed under the Kansas statute. *Kansas v. Marsh*, 548 U.S. 178-179. The Court had made plain earlier that "a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." *Id*. at 588-589. The propriety of this step in Missouri's statutory scheme is discussed in greater detail in Point VI.

foreperson will complete the verdict form and sign the verdict form stating that you are unable to decide or agree upon the punishment." *Id*.

Of course, it is possible for the jury to reach a verdict of a life sentence under circumstances where the jury may not be unanimous as to the propriety of that result. But the prosecutor made that plain, as well. Before talking about the "final step," the prosecutor outlined how a non-unanimous jury would be required to assess a life sentence if they did not unanimously agree on at least one statutory aggravator (Tr. 444-445). The prosecutor also mentioned how (in the second step), each juror could give different weight to different mitigating evidence (Tr. 445-446).

In sum, in giving the potential jurors a general understanding of the penalty-phase procedures, the prosecutor did not misstate the law. The prosecutor correctly informed the potential jurors that the state would have to prove that a death sentence was warranted, and the prosecutor properly pointed out that the jury would be asked to determine whether the mitigating evidence outweighed the aggravating evidence, and (if it reached the final step) whether it unanimously agreed that life imprisonment (or death) was the appropriate sentence in light of all of the evidence.

C. The trial court did not plainly err in failing to declare a mistrial *sua sponte* during closing argument

Mr. Dorsey also identifies various comments in closing argument that he

believes were improper. First, he argues that it was improper for the prosecutor to state, "And so if you find one of [the statutory aggravtors] for one or both of the counts, then step one is satisfied . . . Then you go to that step two" (App.Br. 73-74). Mr. Dorsey asserts that this argument could have convinced the jury to conclude that "if they found a statutory aggravator as to either Count, step one was satisfied as to both Counts" (App.Br. 74). This, of course, would not comport with Missouri law, but a review of the record conclusively reveals that the jury was not misled as Mr. Dorsey suggests.

The prosecutor's statements were made as follows:

> Let me mention to you something about these instructions. Instructions Numbers 6 and 8 set out the list of possible statutory aggravating circumstances as the Court just read them to you. That is – that is step one, as we discussed in the jury selection process, that you must go to and determine whether or not the State has proven one or more of those statutory aggravating circumstances.
>
> And there's slightly different ones for each count. That is for the murder of Ben Bonnie and for the murder of Sarah. So you have to make those decisions independently.
>
> And so if you find one of them for one or both of those counts, then step one is satisfied. We'll talk about those in a minute, but right

now I want to talk about the process.

(Tr. 998-999). These introductory comments were not improper, and they did not mislead the jury into believing that it could ignore the express language of the instructions.

First, as evident, the prosecutor was merely giving the jury a brief overview of the process. The prosecutor made that intent plain, and there is no reason to believe that the jury understood it as anything other than a brief overview. Second, although it could have been more clear, it was reasonably clear that the prosecutor was merely stating that if the jury found "one [aggravator] for one or both of those counts, then step one [was] satisfied" for one or both counts, depending on the aggravator or aggravators found by the jury. Third, because the prosecutor reminded the jury that there were different aggravators for each count, and because the prosecutor also stated that they had to be found "independently," the prosecutor's meaning was clear. Finally, because the instructions required different aggravators to be found for each count, and because the jurors listed the aggravators that they found for each count, there is no possibility that the jury simply found one aggravator for one count and deemed Mr. Dorsey eligible for a death sentence on both counts (*see* L.F. 176, 178, 190-191).

Mr. Dorsey acknowledges the jury's written findings of the seven different aggravating circumstances, but he speculates that the jury "may well have decided

[his] punishment using a process not condoned by either the statutes or the Instructions" (App.Br. 74). He argues, "After all, they asked the court, 'Can we do a secret ballet [sic] vote between us to determine the proper penalty before working through final instructions?'" (App.Br. 74). But the mere fact that the jury asked about doing a straw poll "before working through final instructions" does not suggest that the jury ignored the procedures set out in the instructions. To the contrary, the jury's note indicates that the jury fully intended to follow the court's instructions. "Jurors are presumed to follow the court's instructions." *See State v. Forrest*, 183 S.W.3d 218, 230 (Mo. banc 2006).

Finally, with regard to this alleged error, there is no possibility of manifest injustice. In closing argument, defense counsel argued, "There's no question, that first step in this case, that there is aggravating factors. We concede that" (Tr. 1020). (Defense counsel made this concession specifically with regard to the aggravating circumstance which posited that Mr. Dorsey had killed each victim during the commission of another homicide (Tr. 1019-1020).)

Mr. Dorsey next argues that the prosecutor made improper arguments in rebuttal closing argument (App.Br. 74-77). But none of the prosecutor's comments in rebuttal closing argument were improper, particularly when viewed in light of defense counsel's closing argument.

In closing argument, defense counsel argued that Mr. Dorsey "feels shame,

and he's capable of feeling shame" (Tr. 1016). Defense counsel then suggested that "The question for you is going to be: Is there enough humanity left in him, after what he has done, that he is worth to at least remain in prison for the rest of his life?" (Tr. 1016). Defense counsel then opined that based on what the witnesses had said, that there was "enough [humanity] left in him" (Tr. 1016).

Defense counsel then discussed the concept of justice, stating:

> You know, we talk about redemption, forgiveness, all those things. We talk about them and we hear about them on Sundays a lot. It's not a question for you to forgive him. It's not a question for you to grant him redemption. But it is a question for you, based upon the evidence that you've heard, about whether you can punish him by locking him up for the rest of his life and would that be justice?

(Tr. 1017).

After discussing some of the evidence, defense counsel then outlined the testimony of the various witnesses who testified on Mr. Dorsey's behalf; and, in particular, defense counsel pointed out that "the reason for that testimony is to show you that [Mr. Dorsey] does have something inside of him that good people like and that good people can feel devoted enough and understanding enough to come in here and" testify on Mr. Dorsey's behalf (Tr. 1021). Finally, after discussing more evidence offered in mitigation, defense counsel argued that the jury needed to

consider the "whole person" and "do justice with a sentence of life without parole" (Tr. 1022-1023).

In response to these arguments, the prosecutor made the various arguments that Mr. Dorsey now challenges on appeal. In particular, Mr. Dorsey first argues that the prosecutor unfairly characterized Mr. Dorsey as "evil," which "encouraged the jury to decide [his] sentence based on an external source of law and on passion and prejudice" (App.Br. 75). But a review of the prosecutor's rebuttal reveals that the prosecutor was merely arguing against defense counsel's plea for mercy; the prosecutor argued:

> That's not – Now, is there good and evil in every human being?
>
> Of course there is.
>
> The proportions are different from one person to the next, perhaps, but we all have the capacity to do great evil and to do great good. That's not the point here. It never was.
>
> The question is: Given everything you know, what is the appropriate punishment for this man and this case, taking all of the facts into consideration? Because these acts and the repercussions of those acts on these families is evil. And make no mistake, friends, there is evil in the world.
>
> A much smarter man than I am once said, "The only thing

necessary for evil to triumph is for good men to do nothing."

Well, what I'm afraid of is, if you do not come back with the most severe penalty, it will have the impact of having done nothing.

(Tr. 1026).

Contrary to Mr. Dorsey's assertion, the prosecutor did not argue that Mr. Dorsey was "evil" and, thus, deserving of a death sentence. Rather, in response to defense counsel's argument that there was "enough" humanity (i.e., enough kindness or benevolence) in Mr. Dorsey to warrant mercy, the prosecutor responded by mentioning the abstract concept of "good and evil in every human being" and admitting that "good" and "evil" can be found in varying proportions in any person. The prosecutor then argued that the real issue for the jury to consider in deciding punishment was the "evil" nature of the acts and consequences that were shown by the evidence.

These arguments highlighted the heinous (or "evil") nature of Mr. Dorsey's crimes and the terrible consequences that his crimes had meted out on the families of the victims. Such arguments were permissible, as they focused the jury's attention on facts and circumstances that were relevant in assessing an appropriate sentence.

Moreover, in arguing that a life sentence would be the equivalent of "doing nothing" – a course of action that would allow "evil" to triumph – the prosecutor was merely arguing that a life sentence would not be just, or conversely, that mercy

was not appropriate. A similar argument was upheld in *State v. Forrest*, 183 S.W.3d at 228, because it properly "interrelate[d] with the concept of whether the jury should be merciful[.]" As is well settled, "Prosecutors may discuss the concept of mercy in their closing arguments because mercy is a valid sentencing consideration, and in that connection may argue that the defendant should not be granted mercy." *Id*.

Mr. Dorsey argues that the "prejudice arising from this comment was exacerbated when [the prosecutor] later told the jurors to 'Do your duty'" (App.Br. 75). He asserts that "Since [the prosecutor] had just told them that imposing a life sentence was tantamount to doing nothing, and that they need not grant him mercy, telling them to "do their dury" clearly meant to sentence [Mr. Dorsey] to death" (App.Br. 75). But this assertion is untenable. The "do nothing" comment was separated from the "duty" comment by nearly five minutes of oral argument (according to the time notations in the margin) (Tr. 1026, 1029).

In any event, even if the "duty" comment had been made in conjunction with the "do nothing" comment, it would not have been improper. In *Forrest v. State*, 290 S.W.3d 704, 717 (Mo. banc 2009), this Court considered the following argument:

> You could send him to prison, he knows all about prison. *I suggest to you that's tantamount to doing nothing*. It's not enough. Three people are dead. Society is depending upon you. *Do your duty*. It doesn't have to

be easy. It shouldn't be. But it needs doing.

(emphasis added). This Court rejected the defendant's claim that the argument was improper, concluding that it was a permissible argument along the lines of urging the jury to uphold the law. *Id*. This Court observed that "It is permissible for the State to address in closing arguments 'the need for strong law enforcement, the prevalence of crime in the community, and that conviction of the defendant is part of the jury's duty to uphold the law and prevent crime.' " *Id*. Additionally, the Court observed that "The State may also 'urge the jury to consider the effect upon society if the law is not upheld.' " *Id*. *See also State v. Schwer*, 757 S.W.2d 258, 264 (Mo.App. E.D. 1988) (a prosecutor may make "a legitimate appeal to the jury to uphold the law and to do its duty.").

Mr. Dorsey next asserts that the prosecutor "personalized the case to himself, injecting his own code of ethics and moral responsibility, and likening it to lessons learned in church" (App.Br. 76). The challenged argument was made as follows:

> There was some talk about redemption. Well, you know, the way I was raised, forgiveness is conditioned upon repentance, and repentance is conditioned upon taking responsibility. I don't think that that Sunday-morning lesson necessarily translates directly into the law, but it does tell us something in this case.
>
> And that is, if you look at this situation, the moment he sat on

> that witness stand and supposedly – and testified to you and told you about this case, the defendant has yet to take responsibility fully for his actions.
>
> The plea of guilty. All right. I'll give him that. That's a good start. But he sat on that witness chair and told you he didn't remember doing it, didn't he? He didn't argue that he had done it, but he didn't remember doing it. And yet he told the doctor he did.

(Tr. 1026-1027).

But, like defense counsel's references to "redemption" and "forgiveness" (and hearing about them "on Sundays") (Tr. 1017), the prosecutor's similar, passing references to "forgiveness," "repentance," and a "Sunday-morning lesson" were not designed to inject a personal "code of ethics" or "moral responsibility" from "church" into the case. In fact, to the contrary, the prosecutor acknowledged that Sunday-morning lessons would not "necessarily translate[] directly into the law." Nevertheless, the prosecutor was correct when he observed that such principles do "tell us something in this case." Indeed, the general concepts of forgiveness and repentance relate directly to the concept of mercy, and, as discussed above, mercy is a valid sentencing consideration. Moreover, the prosecutor mentioned those concepts as a means of segueing into a discussion about "responsibility" – a concept that lies at the heart of sentencing. As such, these comments were wholly proper.

Finally, Mr. Dorsey argues that the prosecutor misled the jury about the concept of mercy (App.Br. 76-77). The challenged argument was made as follows:

> I think what you heard from the defense is a very eloquent plea for mercy. And that's a fine thing. It's what they should have done. But I want you to keep something in mind.
>
> Mercy is something that is granted to the weak and the innocent by the strong. You're strong in the sense that, as a group, you have the power to render sentence in this case. So you are the strong, I suppose.
>
> But when you talk about the weak and the innocent, that man does not qualify.

(Tr. 1029). Mr. Dorsey asserts that this argument "improperly limited the jury's belief that it could consider mercy as it rendered its verdict" (App.Br. 77). He argues that "to tell a jury that mercy can only be granted to the innocent eliminates mercy from consideration in the penalty phase of a capital case" (App.Br. 77).

But, of course, the prosecutor did not argue that mercy can only be granted to the innocent. Rather, the prosecutor argued that it should only be granted "to the weak and the innocent" (Tr. 1029). Thus, even assuming that the jury accepted the prosecutor's concept of mercy, it could have concluded that Mr. Dorsey was "weak" and deserving of mercy. For instance, in discussing Mr. Dorsey's problems with drugs and alcohol, the prosecutor had previously stated, "I don't know whether

[Mr. Dorsey] is just *weak* or whether he was just self-centered" (Tr. 1024) (emphasis added). The prosecutor then went on to argue that the evidence hinted that Mr. Dorsey was self-centered, but the jury was free to draw other conclusions and determine that Mr. Dorsey was weak.

Moreover, as Mr. Dorsey acknowledges, this Court has previously held that a virtually identical argument was a proper discussion of mercy. *State v. Forrest*, 183 S.W.3d at 228 (the prosecutor argued, "the defense made a rather eloquent plea for mercy, but I want you to understand what mercy is. Mercy is something that is given by the powerful to the weak and the innocent. You have power. He's not innocent."). This point should be denied.

V.

The trial court did not abuse its discretion in admitting State's Exhibits 20, 21, 28, and 29.

In his fifth point, Mr. Dorsey asserts that the trial court abused its discretion in admitting State's Exhibits 20, 21, 28, and 29 – four color photographs that depicted the victims at the scene of the crime and the gunshot wound to Sarah Bonner's jaw (App.Br. 78). He argues that the photographs were "largely irrelevant to any question before the jury, they were used solely to engender passion and prejudice and their duplicative nature compounded the prejudice from each individual photograph" (App.Br. 78).

A. The standard of review

"A trial court has broad discretion in the admission of photographs, and its decision will not be overturned absent an abuse of discretion." *State v. Johnson*, 244 S.W.3d 144, 161 (Mo. banc 2008).

B. State's Exhibits 20, 21, 28, and 29 were relevant and not unfairly prejudicial

"A photograph is not inadmissible just because other evidence described what is shown in the photograph." *Id*. "Additionally, even if a photograph is inflammatory, it should not be excluded if it is relevant." *Id*.

"Generally, if photographs are gruesome, it is because the crime itself was

gruesome." *Id*. "[G]ruesome photographs are admissible if they: (1) show the nature and location of wounds; (2) enable jurors to better understand the testimony at trial; and (3) aid in establishing an element of the State's case." *Id*. at 161-162. As this Court has repeatedly held, "Gruesome crimes produce gruesome, yet probative, photographs, and a defendant may not escape the brutality of his own actions." *State v. Strong*, 142 S.W.3d 702, 721 (Mo. banc 2004).

Initially, respondent would note that all of the challenged exhibits would ordinarily have been admissible in the guilt phase of a capital trial in proving the defendant's guilt. As such, even if these exhibits did not bear directly upon any of the state's statutory aggravators, there should be no bar against admitting them in a penalty-phase retrial. *See* § 565.032.1.(2), RSMo 2000 (in determining whether the evidence as a whole justifies a sentence of death or a sentence of life, "the trier shall consider all evidence which it finds to be in aggravation or mitigation of punishment, including evidence received during the first stage of the trial . . . .").

In any event, all of the challenged exhibits were also admissible for legitimate purposes in the penalty phase.

1. The crime scene photographs (State's Ex. 20 and 21)

State's Exhibit 20 depicted the position of both victims in their bed (State's Ex. 20). It was the only visual depiction of the crime scene that showed the relative positions of both of the victims' bodies, including the placement of their bodies on

(or partially on) the bed. Thus, on that basis alone, it was useful in understanding the testimony of the various witnesses who testified about what they found upon entered the victims' bedroom.

The exhibit was also relevant to prove multiple facts that were necessary to the state's case. For instance, for the jury to reach a conclusion on some of the aggravating circumstances, the jury had to have some idea of how the murders were committed. With regard to each victim, the jury was asked to determine whether the murder of the victim was committed during the commission of another unlawful homicide (L.F. 176, 178). State's Exhibit 20 showed the close proximity of the victims in their bed, and, accordingly, it legitimately tended to prove that each victim was killed contemporaneously with the other victim.

With regard to the murder of Ben Bonnie, the jury was asked to determine whether Mr. Dorsey exhibited "depravity of mind," in that he killed Ben Bonnie as "a part of [his] plan to kill more than one person and thereby exhibited a callous disregard for the sanctity of all human life," and "whether, as a result thereof, the murder was outrageously and wantonly vile, horrible and inhuman" (L.F. 176). State's Exhibit 20 was relevant to prove this aggravator, as it tended to support a finding that the murders were committed in a series of closely-related acts according to a plan.

State's Exhibit 21 depicted Sarah Bonnie at the crime scene, but this

photograph showed more of her torso and her genital area (State's Ex. 21). Certain additional details were visible in the photograph, namely, "pour" marks through the blood on Sarah's side, and a wallet and its contents beside and between Sarah's legs (State's Ex. 21). (State's Exhibit 20 also showed some pour marks on Sarah Bonnie's side, but the marks are at the edge of the picture, and not as many are visible (State's Ex. 20).)

This exhibit was also relevant to prove multiple aggravating circumstances. For instance, with regard to each murder, the jury was asked to determine whether Mr. Dorsey murdered the victim "for the purpose of the defendant receiving money or any other thing of monetary value from Benjamin Bonnie or another" (L.F. 176, 178). State's Exhibit 21 depicts a wallet next to Sarah's hip, and it shows the contents of her wallet scattered next to her and between her legs. The photograph strongly proves that the defendant's purpose in committing the murders was, among other things, a desire for pecuniary gain, as the photograph tends to show that Mr. Dorsey went through Sarah Bonnie's wallet while standing over her dead body, extracted what he wanted, and discarded the remainder on and around her body.

State's Exhibit 21 was also relevant to the aggravators that dealt with the forcible rape of Sarah Bonnie and sexual intercourse with Sarah Bonnie. The jury was asked to determine whether the murder of Sarah Bonnie "involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly

vile, horrible and inhuman" (L.F. 178). To make a finding of depravity, the jury had to find that Mr. Dorsey, "while killing Sarah Bonnie or immediately thereafter, had sexual intercourse with her" (L.F. 178). The jury was also asked to determine whether the murder was committed while Mr. Dorsey was engaged in the forcible rape of Sarah Bonnie – a crime that included sexual intercourse with her (L.F. 178).

State's Exhibit 21 revealed that Sarah Bonnie was wearing only a t-shirt, and that her genitals were exposed. In addition, the pour marks on the side of her body tended to support an inference that Mr. Dorsey took steps to eliminate his semen from Sarah Bonnie's body by pouring bleach on her body. The pour marks through the blood indicated that a liquid was poured on her body after the murder; there was other evidence showing that bleach was poured on Sarah's body (i.e., the bleached out carpet next to the bed and the bleach bottle in the bathroom sink); and, finally, there was evidence that cleansing agents can be used to eliminate semen (Tr. 840-841; State's Ex. 14).

Finally, when State's Exhibits 20 and 21 are viewed together, the two exhibits reveal the depravity of mind that Mr. Dorsey exhibited when he engaged in sexual intercourse with the victim. In particular, when viewed together, it is apparent that Mr. Dorsey must have engaged in sexual intercourse with the dead or dying victim while she lay within arm's reach of her murdered husband. Accordingly, these two exhibits were relevant to prove that sexual intercourse with the victim under such

circumstances was "outrageously and wantonly vile, horrible and inhuman."[8]

In sum, given the relevant facts that State's Exhibits 20 and 21 legitimately tended to prove, it was not an abuse of discretion to admit them into evidence. Moreover, while the photographs depicted some blood and blood spatter, the degree of gore was not extreme; thus, there is no reason to believe that Mr. Dorsey was unfairly prejudiced. To the contrary, because the nature of Mr. Dorsey's crimes was highly relevant to an appropriate assessment of sentence, the accurate portrayal of Mr. Dorsey's crimes was of paramount importance.

2. The autopsy photographs

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[8] Because the photographs in this case were relevant to prove the state's aggravating circumstances, Mr. Dorsey's reliance on *Spears v. Mullin*, 343 F.3d 1215 (10th Cir. 2003), is misplaced. In that case, a federal court granted a habeas petition, concluding that the gruesome photographs (which depicted post-mortem injuries) could not prove Oklahoma's "heinous, atrocious, or cruel" aggravator, because that aggravator required "conscious suffering" on the part of the victim. *Id*. at 1227. Here, by contrast, the photographs supported the state's aggravators. Additionally, respondent questions the value of the *Spears* case, since, in Missouri, evidence related to the nature of the offense should be admissible in the penalty phase generally, even if it does not directly support an aggravating circumstance. *See* § 565.032.1(2), RSMo 2000.

State's Exhibits 28 and 29 were autopsy photographs, and they depicted the gunshot wound to Sarah Bonnie's jaw, with each photograph showing a different angle (State's Ex. 28, 29). The medical examiner who described Sarah's injuries used these exhibits to describe her fatal injury and the bruising in the vicinity of the injury (Tr. 716-717). Thus, because these photographs were helpful in understanding the expert's testimony, and in depicting the nature of Sarah's injury (her gunshot wound is not visible in State's Exhibits 20 and 21), it was not an abuse of discretion to admit them. *See State v. Murray*, 744 S.W.2d 762 (Mo. banc 1988) ("The autopsy photographs at issue here are relevant because they show the nature and location of the victims' wounds and because they enabled the jury to better understand the testimony of the deputy medical examiner who had performed the autopsy."); *State v. Wood*, 596 S.W.2d 394, 403 (Mo. banc 1980) (photographs which depicted the victim's partially clothed body in a state of partial decomposition "were not improperly admitted because they were relevant to identify the victim, to show the nature and location of the injury, to illustrate the character of the weapon, to show the degree of the crime, to show the cause of death, and to show the surroundings in which the body was found").

In addition, respondent submits that these two photographs were not unduly inflammatory or prejudicial. These two pictures were not gory. In fact, they were clinical photographs that showed little or no blood. Indeed, it was apparent that

Sarah's skin had been cleaned of blood, so that the nature of the injuries would be more apparent (State's Exs. 28, 29). *See State v. Jackson*, 499 S.W.2d 467, 472 (Mo. 1973) ("there was nothing more inflammatory about this exhibit [a photograph of the victim in the morgue] than there would be in almost any photograph of a dead body"). This point should be denied.

VI.

The trial court did not err in submitting Instructions No. 7 and No. 9, because they accurately instructed the jury.

In his sixth point, Mr. Dorsey asserts that the trial court erred in submitting Instructions No. 7 and No. 9 – the instructions that submitted the "weighing" step to the jury (App.Br. 89). Mr. Dorsey argues that these instructions "improperly place the burden of proof on the defense; fail to require the State to prove an eligibility step beyond a reasonable doubt; are contrary to § 565.030 RSMo by requiring that the jury unanimously find that mitigators outweigh aggravators to impose life; allow the jury to consider constitutionally-impermissible evidence in aggravation of punishment, and insulate the jury's decision from appellate review by not requiring that it make written findings on the second step" (App.Br. 89).

A. The standard of review

Because he did not object to these instructions at trial (*see* Tr. 993-996), Mr. Dorsey requests plain error review of this claim (App.Br. 54). "For instructional

error to rise to the level of plain error, the trial court must have so misdirected or failed to instruct the jury so that it is apparent that the instructional error affected the verdict." *State v. Deck*, 994 S.W.3d 527, 540 (Mo. banc 1999). "[P]lain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative[.]" *Deck v. State*, 68 S.W.3d 418, 427 (Mo. banc 2002). In addition, "MAI instructions are presumptively valid and, when applicable, must be given to the exclusion of other instructions." *State v. Zink*, 181 S.W.3d 66, 74 (Mo. banc 2005).

B. The instructions properly submitted the "weighing" step to the jury

All of Mr. Dorsey's claims stem from his incorrect understanding of the "weighing" step under § 565.030.4(3), RSMo Cum. Supp. 2009. Citing *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003); *Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendia v. New Jersey*, 530 U.S. 466 (2000); *Kansas v. Marsh*, 548 U.S. 163 (2006); and § 565.030.4, RSMo Cum. Supp. 2009, Mr. Dorsey asserts that the "weighing" step involves a factual finding that increases the range of punishment and, thus, must be found beyond a reasonable doubt (App.Br. 95). But as this Court has repeatedly held, the "weighing" step does not involve such a finding.

In *Apprendi v. New Jersey*, 530 U.S. at 476, the United States Supreme Court held that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be . . . submitted to a jury, and proven beyond a reasonable doubt."

The Court subsequently applied this rule in *Ring v. Arizona*, 536 U.S. at 609, to hold that "a sentencing judge, sitting without a jury," could not "find an aggravating circumstance necessary for imposition of the death penalty." Rather, because aggravating circumstances increase the range of punishment (to include the death sentence), "the Sixth Amendment requires that they be found by a jury" beyond a reasonable doubt. *Id*.

Shortly after *Ring* was decided, this Court decided *State v. Whitfield*, 107 S.W.3d 253 – a case in which the jury deadlocked and the trial judge made the requisite statutory findings and imposed a sentence of death. On appeal, this Court applied *Ring* to Missouri's penalty-phase procedures and concluded that statutory aggravators had to be submitted to the jury and found beyond a reasonable doubt. *Id*. at 258-259. The court then analyzed whether the remaining three steps under the then-current version of § 565.030.4 were subject to *Ring*'s requirements. With regard to the "weighing" step, the court concluded that the jury's determination of "whether the evidence in mitigation outweighs the evidence in aggravation" was a factual finding that made the defendant death "eligible." *Id*. at 259-261. Thus, the court concluded that the weighing step was not a step that could be conducted by a judge sitting without a jury, and, accordingly, the court concluded that the judge had violated *Ring* when the judge made that factual finding. *Id*. at 261-262.

Citing *Whitfield* (along with its analysis of *Apprendi* and *Ring*), Mr. Dorsey

argues that the weighing step involves a "death-eligibility finding[]" that is the "functional equivalent of an element," and that, accordingly, "the burden of proof beyond a reasonable doubt falls squarely on the State" (App.Br. 96). But Mr. Dorsey's reliance on *Whitfield* is misplaced.

While the Court indicated in *Whitfield* that the weighing step constituted a factual determination that made the defendant "death eligible," the Court has since held that, under Missouri law, the weighing step is not a factual determination that must be proved beyond a reasonable doubt, because it is not a factual finding that *increases* the range of punishment. In fact, in *Zink v. State*, 278 S.W.3d 170, 192-193 (Mo. banc 2009), the Court rejected a claim that was identical to Mr. Dorsey's claim, holding that the weighing step did not "require[] a finding of a fact that may increase Mr. Zink's penalty." *Id*. at 193. The court explained:

> [The weighing step does not] require[] a finding of a fact that may increase Mr. Zink's penalty. Instead, the jury is weighing evidence and all information before them. Only findings of fact that increase the penalty for a crime beyond the prescribed statutory maximum are required to be found by a jury beyond a reasonable doubt. This Court previously has recognized this distinction and held that steps two and three [step three was the weighing step at Mr. Zink's trial] do not need to be found by a jury beyond a reasonable doubt. See *State v. Glass*, 136

S.W.3d 496, 520-21 (Mo. banc 2004); *State v. Gill*, 167 S.W.3d 184, 193 (Mo. banc 2005).

Id. In short, the weighing step is not a determination that must be made beyond a reasonable doubt, as it is not a factual finding that increases the maximum punishment. *See State v. Gill*, 167 S.W.3d 184, 193 (Mo. banc 2005) ("Although section 565.030.4 expressly requires the jury to use the reasonable doubt standard for the determination of whether any statutory aggravators exist, the statute does not impose the same requirement on the determination of whether evidence in mitigation outweighs evidence in aggravation.").

And, in fact, contrary to Mr. Dorsey's claim, the plain language of § 565.030.4 does not premise an increase in a capital defendant's sentence upon any finding made during the weighing step. Instead, the statute provides, in relevant part, that "If the trier concludes that there is evidence in mitigation of punishment . . . which is sufficient to outweigh the evidence in aggravation of punishment," the trier of fact "shall assess and declare punishment at life imprisonment." § 565.030.4(3), RSMo Cum. Supp. 2009. In other words, the weighing step involves a factual finding that *limits* the range of punishment to life imprisonment.[9] (Nevertheless, according to

[9] In light of this statutory language, by arguing that Missouri's weighing step should be subject to a beyond-a-reasonable-doubt standard of proof, Mr. Dorsey is essentially arguing either that a defendant in Missouri should be required to prove

Missouri law, it must be submitted to the jury.)

Mr. Dorsey points out that the state admitted various types of evidence in aggravation (in addition to the statutory aggravators), and that the jury was not instructed in the weighing step to apply any particular burden of proof to that evidence (App.Br. 96-99). He cites *State v. Debler*, 856 S.W.2d 641, 657 (Mo. banc 1993), for the proposition that "unadjudicated bad acts lack the reliability of prior convictions," and he argues that "without some instruction guiding the jury's consideration of that evidence, it is likely that the jury's verdicts were based on emotion, not reason and common sense, and thus were rendered unreliable" (App.Br. 99).

But this very claim was rejected by this Court in *State v. Glass*, 136 S.W.3d 496, 517 (Mo. banc 2004). As the Court stated:

> This Court has repeatedly rejected the claim that the admission in the penalty phase of unadjudicated bad acts violates due process because the state is not required to prove those acts beyond a reasonable doubt. *See State v. Ferguson*, 20 S.W.3d 485, 500 (Mo. banc

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beyond a reasonable doubt that he is entitled to a life sentence due to the strength of the mitigating evidence, or (more likely) that this Court should rewrite the statute to require finders of fact to determine beyond a reasonable doubt that the evidence in aggravation outweighs the evidence in mitigation.

2000); *State v. Kinder*, 942 S.W.2d 313, 331 (Mo. banc 1996). "The trial court has discretion during the punishment phase of trial to admit whatever evidence it deems helpful to the jury in assessing punishment." *State v. Six*, 805 S.W.2d 159, 166 (Mo.1991).

Glass's reliance on *Debler* is misplaced. This Court has consistently noted that the error in *Debler* was lack of notice. There is no merit to the claim that *Debler* required the jury to be instructed on what weight to give evidence of unadjudicated criminal acts. *State v. Christeson*, 50 S.W.3d 251, 269-70 (Mo. banc 2001); *State v. Ervin*, 979 S.W.2d 149, 158 (Mo. banc 1998).

Glass, 136 S.W.3d at 517. *See also State v. Forrest*, 183 S.W.3d 218, 229 (Mo. banc 2006) ("these instructions in no way preclude the jury from giving proper effect to the overall burden of proof or the burden with proving aggravating circumstances and properly weighing the mitigating evidence").

Finally, Mr. Dorsey argues that the "weighing" step instructions were erroneous because they put the "burden of proof on the defense" in establishing that the evidence in mitigation outweighed the evidence in aggravation (App.Br. 100). But because the weighing step does not involve a factual finding that increases the range of punishment, it does not violate the Constitution to place the burden of proving that mitigating circumstances outweigh aggravating circumstances on the

defendant. As the United States Supreme Court held in *Walton v. Arizona*, 497 U.S. 639, 650 (1999), "So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency."[10]

In *Kansas v. Marsh*, 548 U.S. 163, the United States Supreme Court recently affirmed the ongoing validity of this principle. In *Marsh*, the Court examined a Kansas statute that directed the jury to sentence a defendant to death if it found that the evidence in aggravation was not outweighed by the evidence in mitigation. *Id*. at 166. The defendant argued that the statute "establishe[d] an unconstitutional presumption in favor of death because it directs imposition of the death penalty when aggravating and mitigating circumstances are in equipoise." *Id*. at 166-167. But the Court rejected the defendant's challenge, holding that the case was controlled by the decision in *Walton*.

The Court reiterated that "a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently

[10] In *Ring*, the Court partly overruled *Walton*. 536 U.S. at 609 ("we overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty").

substantial to call for leniency." *Id*. at 170-171. The Court observed that "a jury must have the opportunity to consider all evidence relevant to mitigation, and that a state statute that permits a jury to consider any mitigating evidence comports with that requirement." *Id*. at 171. And, significantly, the Court stated "that while the Constitution requires that a sentencing jury have discretion, it does not mandate that discretion be unfettered; the States are free to determine the manner in which a jury may consider mitigating evidence." *Id*. Thus, although the statute required the jury to impose a sentence of death if it unanimously found that the evidence in aggravation was not outweighed by the evidence in mitigation, the Court concluded that it comported with the requirements of the Constitution. *Id*. at 173.

The Court explained further that even if *Walton* did not expressly answer the question, the Court's various prior precedents dictated the same outcome. The Court pointed out that, with regard to mitigation evidence, the Court's jurisprudence was quite limited. As the Court stated, "In aggregate, our precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence." *Id*. at 175. The Court then observed that it had "never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required." *Id*. "Rather, this Court has held that the States enjoy ' "a constitutionally permissible range of

discretion in imposing the death penalty." ' " *Id*. And, under those general principles – in addition to the holding in *Walton* – the Court concluded that the Kansas death-penalty statute satisfied the Constitution.

Likewise, here, Missouri's statutory scheme satisfies the Constitution. Under Missouri's capital sentencing scheme, a defendant is allowed to present any evidence in mitigation; the jurors are not required to unanimously find or agree upon any particular mitigating fact; and the jurors are both directed and allowed to impose a life sentence if they find that the mitigating evidence outweighs the aggravating evidence, or if they simply conclude under all of the circumstances not to impose a sentence of death.

In sum, because it is permissible to place a burden on the defendant to prove "mitigating circumstances sufficiently substantial to call for leniency," and because the weighing step does not increase the range of punishment, Mr. Dorsey's claims are without merit. This point should be denied.

VII.

The trial court did not err in submitting Instructions No. 6 and No. 8, because the statutory aggravating circumstances contained in those instructions were not duplicative, and each aggravator served its purpose of legitimately narrowing the class of persons eligible for the death penalty. Additionally, the aggravators were supported by sufficient evidence.

In his seventh point, Mr. Dorsey argues that some of the statutory aggravating circumstances submitted to the jury were duplicative (App.Br. 102). He asserts that the duplicative aggravating circumstances allowed the jury to "double-count them," and that, as a consequence, the jury's verdicts were unreliable (App.Br. 102). In the alternative, Mr. Dorsey argues that the evidence was insufficient to submit two of the aggravators (App.Br. 102).

A. The standard of review

This Court will reverse on a claim of instructional error only if there is an error in submitting an instruction and that error results in prejudice to the defendant. *State v. Zink*, 181 S.W.3d 66, 74 (Mo. banc 2005).

B. The statutory aggravating circumstances were not duplicative

The mere fact that aggravating circumstances are factually related does not render them duplicative. *See State v. Jones*¸749 S.W.2d 356, 365 (Mo. banc 1988). Even aggravators that are based on the same criminal conduct will not be duplicative if

"they emphasize different facets of criminal activity." *Id*. *See State v. Basile*, 942 S.W.2d 342, 360 (Mo. banc 1997) (rejecting claim of duplicative aggravators because they "emphasize different facets of [the same] criminal activity." (bracketed material in original)).

"For a statutory aggravating circumstance to narrow the class of persons to whom the death penalty may be applied, that circumstance must satisfy two tests: (1) it may not apply to every defendant convicted of murder, and (2) the circumstance must not be unconstitutionally vague." *State v. Worthington*, 8 S.W.3d 83, 88-89 (Mo. banc 1999) (citing *Tuilaepa v. California*, 512 U.S. 967, 972 (1994)).

1. The murder of Benjamin Bonnie

With regard to the murder of Benjamin Bonnie, the jury found three aggravating circumstances:

> 1. [That] the murder of Benjamin Bonnie was committed while the defendant was engaged in the commission of another unlawful homicide of Sarah Bonnie.
>
> 2. [That] the defendant murdered Benjamin Bonnie for the purpose of the defendant receiving money or any other thing of monetary value from Benjamin Bonnie or another.
>
> 3. [That] the murder of Benjamin Bonnie involved depravity of mind and [that], as a result thereof, the murder was outrageously and

wantonly vile, horrible and inhuman.

(*see* L.F. 176, 190). The jury was instructed that it could only find "depravity of mind" (the third aggravator) if it found "That the defendant killed Benjamin Bonnie as a part of defendant's plan to kill more than one person and thereby exhibited a callous disregard for the sanctity of all human life" (L.F. 176).

Mr. Dorsey asserts that the first and third aggravators were impermissibly duplicative (App.Br. 104-105). But while the two aggravators both related to the fact that Mr. Dorsey killed two people, they emphasized different aspects of the murder. The first aggravator focused on the fact that Mr. Dorsey actually *accomplished* the deed of murdering more than one person, and the third aggravator focused on the fact that Mr. Dorsey *planned* to kill more than one person. This sufficiently differentiated the aggravators. *See State v. Anderson*, 79 S.W.3d 420, 441-442 (Mo. banc 2002) (rejecting claim that the aggravators of "multiple homicides" and "depravity of mind" based on a plan to kill more than one person were duplicative). *See also State v. Carter*, 955 S.W.2d 548, 558-559 (Mo. banc 1997) (rejecting claim that aggravators were duplicative, where aggravators included the aggravators of "multiple homicides" and "depravity of mind" based on a plan to kill more than one person).

The same result has been reached in examining other aggravators. For instance, in *State v. Jones*, the defendant asserted that two of the aggravators found

in his case were duplicative and led to an impermissible "doubling" effect in the jury's deliberations. 749 S.W.2d at 365. The two aggravators in question were the "pecuniary gain" aggravator (that the murder was for the purpose of receiving money or anything of value) and the "robbery" aggravator (that the murder was committed during a robbery or attempted robbery). *Id*. This Court held that the aggravators were not duplicative, because, while they were related factually, "they emphasize[d] different facets of criminal activity." Specifically, the Court observed that "The first one [pecuniary gain] has to do with the defendant's greed, and the third [robbery] with the use of force." *Id*. *See also State v. Basile*, 942 S.W.2d at 360 (aggravator of murdering for another to receive money or other property was not duplicative of acting as an agent of another).

Mr. Dorsey cites to the principle that aggravators must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder" (App.Br. 105). But each of the allegedly duplicative aggravators submitted as to Ben Bonnie's murder accomplished this task. Not all murderers kill more than one person, and not all murderers plan to kill more than one person. Moreover, both circumstances justify the imposition of a more severe sentence.

2. The murder of Sarah Bonnie

With regard to the murder of Sarah Bonnie, the jury found four aggravating

circumstances:

> 1. [That] the murder of Sarah Bonnie was committed while the defendant was engaged in the commission of another unlawful homicide of Benjamin bonnie.
>
> 2. [That] the defendant murdered Sarah Bonnie for the purpose of the defendant receiving money or any other thing of monetary value from Benjamin Bonnie or another.
>
> 3. [That] the murder of Sarah Bonnie involved depravity of mind and [that], as a result thereof, the murder was outrageously and wantonly vile, horrible and inhuman.
>
> 4. [That] the murder of Sarah Bonnie was committed while the defendant was engaged in the perpetration of rape.

(L.F. 178, 191). The jury was instructed that it could only find "depravity of mind" (for the third aggravator) if it found "That the defendant, while killing Sarah Bonnie or immediately thereafter, had sexual intercourse with her" (L.F. 178). The jury was further instructed (for the fourth aggravator) that "A person commits the crime of forcible rape if the person has sexual intercourse with another person by the use of forcible compulsion" (L.F. 178). (The phrase "forcible compulsion" was also defined. (L.F. 178).)

Mr. Dorsey argues that the third and fourth aggravators were duplicative

(App.Br. 104-105). But while the two aggravators both related to the fact that Mr. Dorsey had sexual intercourse with Sarah Bonnie, they emphasized different aspects of the murder. The third aggravator focused on Mr. Dorsey's "depravity of mind" in committing the murder – it highlighted the fact that he sought sexual gratification during the murder, including the fact that he likely engaged in sexual intercourse with the victim's corpse. The fourth aggravator focused on the forcible rape that Mr. Dorsey committed contemporaneously with the murder, i.e., the fourth aggravator highlighted the fact that Mr. Dorsey committed two violent crimes simultaneously. Indeed, because forcible rape has no required culpable mens rea, the fourth aggravator was, in that regard, completely separate from the third aggravator. These differences sufficiently differentiated the aggravators.

Additionally, the allegedly duplicative aggravators submitted as to Sarah Bonnie's murder accomplished the task of genuinely narrowing the class of persons eligible for the death penalty. Not all murderers display the depravity of mind that Mr. Dorsey displayed in engaging in sexual intercourse with his victim (or his victim's corpse), and not all murderers commit additional forcible crimes contemporaneously with murder. Moreover, both of these circumstances justify the imposition of a more severe sentence.

3. Even if one aggravator was invalid, there was no prejudice

Finally, even if one of the aggravating circumstances considered by the jury

was invalid, Mr. Dorsey would not be entitled to a new penalty phase. With regard to the murder of Ben Bonnie, the jury found three aggravating circumstances, and with regard to the murder of Sarah Bonnie, the jury found four aggravating circumstances. The invalidation of one aggravating circumstance would not affect Mr. Dorsey's death eligibility. *See State v Gill*, 167 S.W.3d at 193 ("Even if the first and third aggravators were invalid, a defendant is 'death eligible' where, as here, at least one valid statutory aggravator was found."). Mr. Dorsey recognizes this principle, but he requests that this Court reconsider it in light of the holding in *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003) (App.Br. 106-107). But there is nothing in *Whitfield* that compels a different result, and, in fact, since *Whitfield*, the Court has held that the invalidation of one aggravating circumstance (among multiple aggravators) is irrelevant, as it does not affect the defendant's death-eligibility during that threshold step of the jury's deliberations. *State v Gill*, 167 S.W.3d at 193.

Mr. Dorsey argues that the inclusion of invalid aggravators skews the jury's deliberations during the so-called "weighing" step (App.Br. 106). He points out that the jury – if it finds aggravators beyond a reasonable doubt – is instructed to then determine whether there are facts and circumstances in mitigation that outweigh the facts and circumstances in aggravation of punishment (App.Br. 106). He thus argues that "if an improper [aggravator] is thrown into the mix [in the weighing] step, the balance is changed and any resulting death sentence cannot stand" (App.Br. 106).

But the number of statutory aggravators is not given any special significance in the weighing step. In fact, the jury is instructed that in considering the weighing step, it "may consider all of the *evidence* including evidence presented in support of the statutory aggravating circumstances submitted . . ., and evidence presented in support of mitigating circumstances submitted in this instruction" (emphasis added) (*see* L.F. 177). In other words, whether identified as a statutory aggravator or not, the evidence presented is what guides the jury in the weighing step. Thus, even if it could be said that an aggravator was duplicative, it would not alter the jury's deliberations during the weighing step, as the evidence would remain unchanged. *See State v. Black*, 50 S.W.3d 778, 791-792 (Mo. banc 2001).

C. The aggravating circumstances were supported by sufficient evidence

In the alternative, Mr. Dorsey argues that there was insufficient evidence to support the "depravity of mind" aggravator for the murder of Ben Bonnie and the "rape" aggravator for the murder of Sarah Bonnie (App.Br. 107-108). As discussed above in Point III, there was sufficient evidence that Mr. Dorsey raped Sarah Bonnie.

With regard to the depravity of mind aggravator, Mr. Dorsey asserts that there was insufficient evidence of a "plan" to kill more than two people (App.Br. 107-108). But there was ample evidence that Mr. Dorsey acted according to a plan. A "plan" is merely a "scheme" for doing something. *See* WEBSTERS NEW AMERICAN DICTIONARY, p. 449 (1995).

Here, the evidence showed that the victims were shot while they were in bed (Tr. 961; State's Exs. 20-21). The evidence also showed that Mr. Dorsey obtained the shotgun and shells he used to kill the victims from an outbuilding (Tr. 961). Mr. Dorsey then stood over the victims before shooting them (Tr. 961). He then shot Sarah in the jaw from close range, killing her instantly (Tr. 717, 961; State's Exs. 28-29). Mr. Dorsey then pressed the shotgun up against Ben's head, just below his right ear, and shot him in the head, killing him instantly (Tr. 719, 961; State's Ex. 16). The shotgun was a single-shot shotgun that had to be reloaded before each shot (Tr. 826-827). The evidence also showed that Mr. Dorsey raped Sarah Dorsey during or shortly after the murder, and that Mr. Dorsey then stole various items from the victims (Tr. 550-552, 558-560, 577-578, 587-589, 600-601, 792-799, 805, 847-848).

From these facts, the jury could have readily concluded that Mr. Dorsey formed a plan to kill both victims. For instance, it is evident that Mr. Dorsey planned for both murders, as he had to carry additional ammunition for the single-shot shotgun. Rational jurors also could have concluded that Mr. Dorsey planned to kill both victims so that he could obtain and retain their property. Rational jurors also could have concluded that Mr. Dorsey intended to rape Sarah Bonnie, and, thus, that Mr. Dorsey planned to kill them both to prevent resistance and to avoid capture. In short, the evidence and reasonable inferences supported a finding that Mr. Dorsey planned to kill both victims. This point should be denied.

CONCLUSION

Mr. Dorsey's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Rule 84.06(b) and contains 20,734 words, excluding the cover, this certification, the signature block, and the appendix, as determined by Microsoft Word 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

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