No. SC90618

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

GREGORY BOWMAN,

Appellant.

Appeal from St. Louis County Circuit Court
Twenty-first Judicial Circuit
The Honorable David Lee Vincent, Judge

RESPONDENT'S BRIEF

CHRIS KOSTER
Attorney General

TERRENCE M. MESSONNIER
Assistant Attorney General
Missouri Bar No. 42998

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Direct Phone: (816) 889-5031
Fax: (573) 751-5391
terrence.messonnier@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

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JURISDICTIONAL STATEMENT

Appellant, Gregory Bowman, was convicted in the Circuit Court of St. Louis County after trial by jury of capital murder. L.F. 3, 17-19, 137-39, Tr. 468-70.[1] Upon the jury's recommendation, the trial court sentenced Appellant to death. L.F. 3, 18, 122-23, 135-39, Tr. 593-95, 615.

As the sentence imposed was death, exclusive jurisdiction over this appeal lies with this Court. Mo. Const. art. V, § 3.

[1] References to the record shall be abbreviated as follows in this brief: "L.F." for references to the Legal File; "Mot. 11/25 Tr." for references to the Transcript of the Motion Hearing dated November 25, 2008; "Mot. 2/5 Tr." for references to the Transcript of the Motion Hearing dated February 2, 2009; "Jur. Tr." for references to Volume I of the Trial Transcript; "Tr." for references to Volume II of the Transcript of the Trial and Sentencing Hearing, and "S.R." for references to the Supplemental Record.

STATEMENT OF FACTS

In the spring of 1977, when V.R. was sixteen years old, V.R., and her brother, D.R., were living with their father and stepmother in Brentwood. Tr. 32-34. At the end of the school year, D.R. and V.R. went to Kansas City to live with their mother and stepfather. Tr. 35-36.

Late in the evening of June 4, 1977, V.R. met up with Bobby Keener at V.R.'s stepfather's gas station where Mr. Keener worked. Tr. 36-37, 45-46. Mr. Keener had family in Brentwood, and regularly visited them. Tr. 37, 46. On this date, V.R. decided to go to Brentwood with Mr. Keener. Tr. 36-37, 47.

When they arrived in Brentwood, Mr. Keener and V.R. stopped at Mr. Keener's mother's house. Tr. 47. Later that day, Mr. Keener and V.R. went to Six Flags. Tr. 47-48.

Upon leaving Six Flags in the evening of June 5, V.R. and Mr. Keener began to return to Mr. Keener's mother's house. Tr. 48. However, while driving, V.R. saw some friends standing outside a restaurant. Tr. 48-49. V.R. decided to stay there with her friends, and let Mr. Keenan know that she would meet back at Mr. Keenan's mother's house later. Tr. 48-49. Mr. Keenan did not see V.R. again after she left with her friends. Tr. 49, 51. When V.R. did not show up at Mr. Keenan's mother's house, he spent several days trying to find her before he had to return to Kansas City. Tr. 51, 54.

One of those friends was Mark Dover, a waiter who worked in the restaurant. Tr. 59, 63. The restaurant was owned by Mr. Dover's uncle, and Mr. Dover had been sent to the restaurant to pick up alcohol for a graduation party for his cousin. Tr. 60. While he

was at the restaurant, Mr. Dover saw V.R. getting out of Mr. Keenan's car and talked with V.R. Tr. 63-64. V.R. asked Mr. Dover if she could go to the party with Mr. Dover. Tr. 64. Mr. Dover told her no. Tr. 64-65. When Mr. Dover left, V.R. was still on the parking lot. Tr. 65.

Elizabeth Conkin was a friend of V.R. Tr. 70. On June 5, at around 10:30 p.m., Ms. Conkin was walking on Brentwood Boulevard when she encountered V.R. near White Avenue. Tr. 71-72, 85. At that time, V.R. was with a male who appeared to be in his twenties with shaggy blonde hair. Tr. 72. This male had his arm around V.R. Tr. 74. Ms. Conkin called out to V.R. and tried to meet up with V.R, but the male pulled her in tighter and V.R. and the male began to walk faster. Tr. 74-75. Ultimately, Ms. Conkin stopped trying to catch up with V.R. and the male and let them walk away. Tr. 75-76. During this encounter, V.R. did not say anything to Ms. Conkin. Tr. 76. Ms. Conkin did not know the male who was with V.R. Tr. 77.

On June 6, at around 8:30 p.m., a body was found in a remote part of St. Louis County near the intersection of Melrose and Manchester. Tr. 97-98. The body appeared to be a white female between the ages of seventeen and twenty. Tr. 99. The woman had ligature on the neck and a large gash in the shoulder and neck area. Tr. 100. Photographs were taken of the body, and D.J. later identified the body as being V.R. r. 40-41, 100. When V.R. was found, her shirt was a third of the way up her body, and her bra was stuffed in her mouth. Tr. 102-03.

One of the officers at the scene was Detective Gregory Moore. Tr. 96-97. While an investigator from the Medical Examiner's Office was looking at V.R.'s body at the

scene, Detective Moore saw that the identification label from the bra was stuck to the skin of V.R., and that the victim's panties were still on the body. Tr. 105. Detective Moore also noticed what appeared to be blood on V.R.'s shirt. Tr. 105.

The body was then taken to the morgue, and an autopsy was performed on June 7, 1977. Tr. 108. Detective Moore and Detective Don Lewis were at the autopsy. Tr. 108-09. At the autopsy, Detective Lewis seized the clothes of V.R. Tr. 109. Photographs were taken during the autopsy. Tr. 109-10.

At trial, Detective Moore identified the jeans, panties, bra, and shirt recovered from the body of V.R. Tr. 106-07. Detective Moore also testified that these items were in the same substantial condition as when they were originally recovered. Tr. 106-07.

Dr. William Drake performed the autopsy. Tr. 299. The autopsy started at approximately 9:45 a.m. Tr. 299.

During the exterior exam, Dr. Drake noticed ligature consisting of two shoe strings around the neck near the thyroid cartilage, with a deep ligature mark in the skin beneath the strings. Tr. 303. There was a knot in the string with hair and grass caught inside the knot. Tr. 303. There was also grass and weeds grasped in the V.R.'s right hand. Tr. 304. There was also a knife wound to the neck, but it did not go deep enough to enter a major artery or vein. Tr. 304-05. There were defensive wounds on the arm. Tr. 305-06.

Dr. Drake also took at least one vaginal smear in which he noticed a significant amount of sperm. Tr. 307-08, 324. However, Dr. Drake did not know what happened to the slide that he made of that vaginal smear. Tr. 308, 324.

Based on the autopsy, Dr. Drake concluded that V.R. was strangled to death. Tr. 309-10. Based on the degree of rigor mortis, the body temperature, and the state of maggot infestation, Dr. Drake estimated a time of death sometime in the morning of June 6. Tr. 311-15.

Walter Medej knew Appellant during 1977, and was able to identify Appellant from photographs taken in the late 1970s, including the photograph of a police line-up. Tr. 283-85. Mr. Medej did not know V.R., and had never seen her or heard her name. Tr. 285-86.

Similarly, neither D.R. nor Mr. Keenan nor Mr. Dover knew Appellant or recognized him from any photographs. Tr. 41-42, 51-52, 65-66. Ms. Conkin did not know Appellant. Tr. 78.

Margaret Walsh works at the St. Louis County Police Crime Laboratory. Tr. 166. The crime laboratory is accredited to conduct DNA testing and using testing techniques and protocols which are accepted in the scientific community. Tr. 169-75. The process includes several precautions to prevent contamination and to detect contamination when it occurs. Tr. 175-76.

In 2006, Ms. Walsh received evidence regarding this case, including an evidence box. Tr. 142-46, 177. Those items were unopened when Ms. Walsh received them. Tr. 177-78. Inside the evidence box, Ms. Walsh found a bra that was identified as being seized from V.R.'s mouth, ladies underwear from V.R., a blue and white sweater from V.R., blue jeans from V.R., a shoestring that had been tied around V.R.'s neck, and some grass or weeds that were found in V.R.'s hand. Tr. 106-07, 179-80. Apparently, a blood

sample and hair samples had been taken from V.R., but those items were no longer in the box. Tr. 180. There were also some fingernail and toenail clippings from V.R. inside the box. Tr. 180-81.

After opening the box, Ms. Walsh examined the clothes recovered at the autopsy which she found inside the box. Tr. 106-07, 182-88. Testing revealed the possible presence of semen in the underwear, and the possible presence of blood on the shirt, bra, and shoestring. Tr. 182-88. Sperm was located on the inside of the underwear. Tr. 216. Ms. Walsh took cuttings from the underwear for DNA testing. Tr. 183-85, 192-93. Ms. Walsh also took cuttings from the shirt. Tr. 204.

Ms. Walsh was able to develop a partial profile containing DNA from two people from the non-sperm genetic material in the cutting from the underwear. Tr. 193. One of those two individuals was a male. Tr. 193. A profile was also developed from the sperm fraction comprised of the DNA of one individual. Tr. 192-93.

Ms. Walsh developed DNA profiles from two different cuttings from the shirt – a partial profile and a "good" profile. Tr. 205. The profiles indicated that they came from two different females. Tr. 205-06.

James Rokita was an officer with the Belleville Police Department. Tr. 149. Officer Rokita knew Appellant and identified him as a participant in a line-up from 1978. Tr. 151-53. Officer Rokita was also able to identify a photograph of Appellant from the 1970's. Tr. 152-54.

At the request of the St. Louis County Police, Officer Rokita faxed a copy of a DNA profile of Appellant to Ms. Walsh. Tr. 154. Ms. Walsh compared the DNA which

she had recovered from the sperm fraction to that profile, and determined that Appellant's DNA matched the DNA from the sperm fraction. Tr. 194.

In 2007, Officer Goldsteen showed Ms. Conkin a photograph of the line-up from 1978 that included Appellant. Tr. 78-82, 153. Ms. Conkin identified Appellant as looking similar to the male that was with V.R. Tr. 78-79, 81, 152-53.

After Ms. Walsh had received the profile from Officer Rokita, she informed Officer Joseph Burgoon about the match, and requested that he obtain a buccal swab from Appellant. Tr. 157, 194-95. Officer Burgoon then obtained a search warrant for a DNA sample from Appellant. L.F. 31-37, Tr. 157-58. Subsequently, Officer Burgoon executed that search warrant and took a buccal swab from Appellant. Tr. 159-61.

After receiving that buccal swab, Ms. Walsh developed a profile from that buccal swab to compare with the profile developed from the sperm fraction and the profiles developed from the non-sperm fraction. Tr. 195. Appellant's DNA could not be excluded from being one of the contributors of the non-sperm fraction. Tr. 199. Appellant's profile was consistent with being the contributor of the DNA in the sperm fraction. Tr. 203. On the comparison with the sperm fraction, the estimated frequency was approximately 1 in 460 trillion for a Caucasian. Tr. 203. Appellant's DNA matched the non-sperm fraction at 6 of the 13 loci, and the sperm fraction at all thirteen loci. Tr. 199, 203, 275.

In 2008, Officer Burgoon also obtained buccal swabs from the parents of V.R. Tr. 162. After developing profiles from those buccal swabs, Ms. Walsh sent those profiles to a company that does paternity testing to compare to the "good" profile from V.R.'s shirt.

Tr. 206-07, 344-45. Dr. Karol Elias determined that the profiles from V.R.'s parents were consistent with V.R.'s parents being the parents of the female whose blood was found on V.R.'s shirt. Tr. 206-07, 344-49. When Ms. Walsh compared that profile to the female contributor to the non-sperm fraction, Ms. Walsh determined that the victim could not be excluded as the female contributor to the non-sperm fraction. Tr. 212-13.

Dr. Mary Case, the current medical examiner for St. Louis County, reviewed materials from the case. Tr. 357-59. According to Dr. Case, some of the indicators of sexual assault include the removal of clothing and the fatal wound involving some type of close contact such as a strangling or a stabbing. Tr. 355-57. Based on her review of the materials, Dr. Case came to the conclusion that this case probably involved a sexual assault. Tr. 359-60. Dr. Case indicated that she could not conclusively state that it was a sexual assault, but that she believed it to be very likely. Tr. 362.

Appellant was charged by indictment with capital murder. L.F. 2-3, 19-20.

Appellant filed a motion to suppress the DNA evidence. L.F. 8, 22-39. Appellant alleged that the original comparison of his DNA to the DNA in this case was improper because the original comparison used a DNA sample provided by Appellant in an Illinois case, and that, because the search warrant was based on that comparison, the search warrant was also invalid. L.F. 23-24, 29, 31-37. Specifically, Appellant claimed that the provision of the profile from that Illinois DNA sample to Missouri law enforcement violated his rights to privacy under Illinois law and exceeded the scope of his consent to the provision of the DNA in Illinois, and thereby also violated the Fourth Amendment. L.F. 22-25, 27.

Subsequently, the motion to suppress DNA evidence was called for hearing. L.F. 9. At this hearing, both parties treated the issue as being a matter of law. Mot. 2/5 Tr. 3-9. While no formal stipulation was entered into, the parties treated the Illinois order regarding the original provision of DNA as if it was in evidence, but did not agree on the exact circumstances that led to the order being issued. Mot. 2/5 Tr. 3-9. The motion to suppress was denied without a formal evidentiary hearing. Mot. 2/5 Tr. 9.

Appellant filed a motion to preclude the death penalty on the ground that, under the facts of the case, the death penalty would be disproportionate under *State v. Chaney*, 967 S.W.2d 47 (Mo. banc 1998). L.F. 42-48.

Appellant filed multiple motions related to victim impact testimony during the penalty phase. L.F. 12, 49-58.

The State filed multiple motions in limine. L.F. 12, 14-15, S.R. 45-53. One of the matters contained within these motions was a request to exclude evidence that some other person killed V.R., including any evidence that Kevin Kiger killed V.R. S.R. 47-49. Another matter concerned any attempt to introduce evidence about two inconclusive vaginal slides. S.R. 50.

Appellant also filed a motion in limine regarding the testimony by Dr. Case. L.F. 13, 68-70. Subsequently, Appellant filed a supplement to that motion. L.F. 14, 81-86. In relevant part, Appellant alleged that the testimony was improper because the conclusions of Dr. Case were not to a reasonable degree of certainty. L.F. 68-70, 81-86.

Appellant filed four motions addressed to testimony about the analysis of the DNA. L.F. 14-16, 74-80, 90-105, Tr. 16-20. None of these motions raised any

allegations related to chain of custody on the evidence from the crime scene. L.F. 74-80, 90-105, Tr. 16-20.

As to the State's motions in limine, the trial court sustained the motion in limine with regards to evidence of alternative suspects subject to any offer of proof that Appellant might choose to make, and also sustained the motion in limine with regards to the vaginal slides. L.F. 65-66, 88.

All of Appellant's motions were denied. L.F. 14, 87-88. L.F. 15, 88.

At the start of the trial, Appellant asked for a continuing objection based on his pre-trial motions. Tr. 20. The trial court indicated that it would consider any objections to matters subject to the motions in limine to have been made. Tr. 20.

When the State offered the panties from the crime scene into evidence, the sole objection was as to the adequacy of the identification, and Appellant's counsel indicated that he was not making any other chain of custody objection. Tr. 107.

Appellant also objected when Dr. Case testified that the murder of V.R. was a probable sexual assault. Tr. 360-61.

During the State's case-in-chief for the guilt phase, Appellant's counsel attempted to cross-examine Detective Moore regarding Mr. Kiger, who had been a potential suspect at the time that the case was originally investigated. Tr. 126, 128. An offer of proof was made regarding this potential evidence. Tr. 128-39. To the extent that the offer of proof regarded testimony by Detective Moore to statements from other people, the State objected on the grounds of hearsay. Tr. 129.

In that offer of proof, it was indicated that Nancy Dearinger, a former girlfriend of Mr. Kiger's had made a statement. Tr. 129-30. Ms. Dearinger did not make any accusation related to the killing of V.R. Tr. 131. However, Ms. Dearinger did claim that Mr. Kiger had taken one of her paring knives, and Detective Moore thought that the wound to V.R. could have been made by that type of knife. Tr. 132-33.

In addition, Ms. Dearinger told officers that Mr. Kiger kept a collection of loose keys, and the only item that appeared to have been taken from V.R. was a key. Tr. 133-34. Ms. Dearinger also told officers that Mr. Kiger only used matches to light his cigarettes, and a matchbook was found near the body. Tr. 134.

Ms. Dearinger also claimed that Mr. Kiger was familiar with the area where the body was found. Tr. 136-37.

When Detective Moore later confronted Mr. Kiger about his involvement in the murder of V.R., Mr. Kiger denied knowing V.R. Tr. 135. There were apparently some witnesses to Mr. Kiger having met V.R. Tr. 135-36.

During the State's case-in-chief, Appellant's counsel introduced some evidence, and attempted to introduce other evidence, regarding two vaginal slides. In particular Officer Burgoon testified that, while obtaining the evidence from the V.R. case for the laboratory, he found two vaginal slides that were labeled as being connected with the case. Tr. 163-64. Appellant's counsel sought to ask Ms. Walsh, and later Dr. Drake, about these slides. The State objected based on the lack of foundation. Tr. 250.

The offers of proof with Ms. Walsh and Dr. Drake indicated that the slides were found by Officer Burgoon, and Ms. Walsh did not have knowledge of where or how

Officer Burgoon had found these slides. Tr. 254-55, 260-61. Apparently, the slides were labeled with the names of two other females, but with case numbers associated with the V.R. autopsy. Tr. 259. Dr. Drake did not recognize either name. Tr. 336-37. The offer of proof also included testimony that the DNA from the slides matched neither V.R. nor Appellant. Tr. 256-58.

The offer of proof with Ms. Walsh also indicated that, apparently, Dr. Drake made at least one vaginal slide during the autopsy by Dr. Drake. Tr. 253-54, 260. In a deposition, Dr. Drake remembered making the slides, but could not testify if he had labeled the slide or slides. Tr. 260. In that deposition, Dr. Drake was further unable to state what happened to the slide after he turned it over to the medical examiner's office for filing. Tr. 260. When he testified at trial, Dr. Drake indicated that he did not know what had happened with the slides. Tr. 308.

While the trial court found that Appellant may have demonstrated the potential relevance of this evidence, any testimony from Ms. Walsh regarding the slides being associated with the case was hearsay. Tr. 264. Furthermore, the trial court indicated that there was no foundation established to connect the slides found by Officer Burgoon to the autopsy of V.R. Tr. 264. While the State offered to make Officer Burgoon available for further examination, Appellant did not call Officer Burgoon back to the stand. Tr. 4-5, 264.

During his guilt phase case, Appellant called Mary Rindahl. Tr. 375. Ms. Rindahl was a schoolmate of V.R. Tr. 375. Ms. Rindahl claimed that she saw V.R. at 11:00 a.m. on June 6, 1977. Tr. 376-77.

Appellant also made an offer of proof regarding testimony from Ms. Dearinger. Tr. 395-410. Ms. Dearinger testified that she had dated Mr. Kiger in the summer of 1977. Tr. 396-97.

Ms. Dearinger stated that Mr. Kiger smoked Camel cigarettes (which were found at the scene of the murder of M.L.) and used matches instead of a lighter. Tr. 399. Ms. Dearinger also indicated that Mr. Kiger collected loose keys. Tr. 399.

With regards to Mr. Kiger's potential involvement in the case, according to Ms. Dearinger, Mr. Kiger seemed to be acting somewhat out of character around June 6, 1977. Tr. 398. Ms. Dearinger also indicated that, on at least one occasion, she had been with Mr. Kiger to the location where V.R.'s body was found, and that Mr. Kiger seemed to be familiar with that area. Tr. 397-98. However, Mr. Kiger never made any statements to Ms. Dearinger about V.R. Tr. 399-400.

Ms. Dearinger indicated that she had been contacted by police in 1977 regarding the possible involvement of Mr. Kiger in three homicides. Tr. 401. Besides V.R., the other two victims were E.A. and M.L. Tr. 401. E.A. was a former girl-friend of Mr. Kiger. Tr. 401.

According to Ms. Dearinger, at some point during the summer of 1977, Mr. Kiger said that he had done something terrible, and that he had left something behind that he needed to retrieve. Tr. 402. However, Mr. Kiger was not more specific about what the "terrible" thing was, and Ms. Dearinger did not know where he went to retrieve whatever had been left behind. Tr. 402-03.

Ms. Dearinger stated that she and Mr. Kiger had been to the parks where V.R. and M.L. were found. Tr. 403. She also acknowledged seeing a key ring with the letter "A" on it (potentially similar to E.A.'s key ring), and that a paring knife had gone missing from her kitchen. Tr. 403-04.

Ms. Dearinger did state that Mr. Kiger was discharged from his place of employment on the morning of June 6, and that, to get to or return from his place of employment, Mr. Kiger would normally have driven near where Ms. Rindahl believed that she had seen V.R. Tr. 406-07.

As part of the offer of proof, Appellant submitted several exhibits. Tr. 408-09. These exhibits consisted of records from the homicide investigations. According to these records, M.L. was strangled with a venetian blind cord and was left in a park. S.R. 2. On the other hand, E.A. was found apparently drowned in her bathtub. S.R. 16-17. During the investigation of one of these two cases, apparently M.L.'s, Mr. Kiger's fingerprint was found in the victim's car. S.R. 30, 40.

The records also contain the interview of Ms. Dearborn, and other information apparently provided by Ms. Dearborn. These reports indicated that Mr. Kiger's acting funny consisted of drinking, drug use, and a temper and that this coincided with the loss of Mr. Kiger's employment. S.R. 6, 12. As with her live testimony, Ms. Dearborn noted in that interview that she and Mr. Kiger had either been in the vicinity of the place where the victims were killed or talking about the vicinity near the time of the offense. S.R. 8. Ms. Dearborn also indicated that on the morning of June 6, Mr. Kiger left their apartment

at around 7:00 a.m. S.R. 13. Ms. Dearborn also mentioned seeing a key with an "A." shortly after E.A.'s death. S.R. 34.

In connection with the E.A. case, Jane Huey, an earlier girlfriend of Mr. Kiger, told the officers that she had talked to Mr. Kiger about the death of E.A. and he had denied involvement in the death of E.A., but that his mannerisms had alarmed her. S.R. 32.

After receiving the offers of proof regarding Mr. Kiger and the vaginal slides, the trial court sustained the State's objections to that evidence. Tr. 409.

The jury returned its verdict finding Appellant guilty of capital murder. L.F. 17, 113, Tr. 468-69.

Upon return of the jury's verdict on the guilt phase, Appellant renewed his earlier proportionality and victim impact evidence motions. Tr. 472-74. Those motions were denied. L.F. 115, Tr. 475. Objections based on those motions were deemed to be continuing. Tr. 475.

During the penalty phase, the State called Cynthia Suchaczewski. Tr. 479. Ms. Suchaczewski was assaulted and robbed by Appellant in Illinois in 1972 when she was eighteen years old. Tr. 479-80. Appellant had approached Ms. Suchaczewski from behind and held a knife to her throat. Tr. 479-80. Appellant made Ms. Suchaczewski walk approximately fourteen blocks to a backyard where Appellant made her get undressed. Tr. 480-81. Appellant then grabbed Ms. Suchaczewski's purse, dumped out the contents, and took off with the money. Tr. 481.

Ms. Suchaczewski further testified that since the time of the crime, until she got remarried five years prior to the trial, she had kept her number unlisted because she was scared that Appellant would get out of prison. Tr. 482-83.

In the case involving Ms. Suchaczewski, Appellant was convicted of aggravated robbery, aggravated battery, and unlawful restraint. Tr. 484.

The State also called P.M. Tr. 484. P.M. was assaulted by Appellant in 1972 when she was fifteen years old. Tr. 484-85. Appellant approached P.M. from behind and held a knife to her throat. Tr. 485. Appellant then had P.M. walk approximately six blocks to an isolated area where he had her undress. Tr. 486-87. Appellant got on top of P.M., but, before he could penetrate her, P.M. told Appellant that she had a newborn baby. Tr. 487. Appellant then decided to let P.M. go, but warned her that, if she told anybody, he would kill her. Tr. 488.

The State also called Jeanne Feurer. Tr. 490. Ms. Feurer was assaulted by Appellant in 1978, after encountering Appellant at a laundromat. Tr. 490-92. Appellant had asked Ms. Feurer to put a dollar into the coin machine for him. Tr. 490-91. As Ms. Feurer walked to the coin machine, Appellant grabbed her and stuck a knife to her throat. Tr. 491. Appellant then made Ms. Feurer walk out to the parking lot. Tr. 491.

Ms. Feurer tried to get away, but Appellant dragged her over to a car and eventually threw her into that car. Tr. 491. Appellant then drove off with Ms. Feurer in the car. Tr. 492.

Ms. Feurer continued to struggle with Appellant and attempted to escape or kick Appellant out of the car while he was driving. Tr. 492-93. At one point, Appellant

threatened that he would kill Ms. Feurer if she kept trying to escape. Tr. 492. Ms. Feurer was eventually able to get a door open and to jump out of the car. Tr. 493.

Appellant was convicted of kidnapping and unlawful restraint in the case involving Ms. Feurer. Tr. 495.

Officer Rokita was recalled as a witness to testify regarding his involvement in the investigations into the deaths of El.W. and R.J. Tr. 495-96. El.W. disappeared in April of 1978 when she was fourteen years old. Tr. 496-97. The body of El.W. was found in an isolated field south of Belleville, Illinois on May 5, 1978. Tr. 497. El.W. had been raped and strangled. Tr. 498-99. R.J. disappeared in July 1978. Tr. 499. The body of R.J. was not found until July 24, 1979, in an isolated area of Monroe County, Illinois. Tr. 499-500.

Detective Robert Miller was also called regarding those two cases. Tr. 501. Detective Miller interviewed Appellant regarding the deaths of El.W. and R.J. Tr. 503. Prior to interviewing Appellant, Detective Miller advised Appellant of his Miranda rights. Tr. 503.

In that interview, Appellant admitted that he had been driving around looking for someone to pick up when he spotted a girl near a high school. Tr. 504. Appellant stated that he then grabbed that girl (apparently El.W.), putting a knife to the throat, and got her into his car. Tr. 504-05. He then drove that girl to the location south of Belleville where her body was found where he raped her and strangled her with a shoe string or a cord of some type. Tr. 505.

Appellant also admitted to a similar incident where he found a young lady (apparently R.J.) at an ATM machine. Tr. 506. Appellant walked up that lady and dragged her at knife point into his car. Tr. 506. Appellant then drove that lady to Monroe County where he raped her and strangled her. Tr. 506-07.

Subsequently, Appellant recanted these admissions. Tr. 513.

Et.W., the mother of El.W., testified regarding the impact of the death of El.W. on the family. Tr. 510-11. Et.W. indicated that El.W. had been involved in a play and was a cheerleader. Tr. 510. Et.W. also indicated that El.W. had just won a prize for a history paper and that they were supposed to go to an award ceremony the week after El.W. died. Tr. 511.

Et.W. also indicated that El.W. had two older siblings – one a sister and the other a brother who had Downs syndrome. Tr. 511. Et.W. testified briefly about the impact of El.W.'s death on her brother. Tr. 511-12.

D.R. was also recalled to testify about the impact of the death of V.R. D.R. indicated that, due to the problems with their parents, he and V.R. were very close. Tr. 516. D.R. also testified about the problems that he and V.R. had growing up, and what led to them going to Kansas City in the summer of 1977, and to V.R. going to Brentwood with Mr. Keener. Tr. 516-17, 519-22.

D.R. indicated that V.R. was talented and had won an art contest in school, as well as lettering in gymnastics and maintaining a 4.0 average. Tr. 517-18.

D.R. indicated that, for almost thirty years, he and his family did not know what had happened to V.R. Tr. 522. That, as a result of not knowing who had killed V.R. and

the possibility that it was an acquaintance, D.R. and his girlfriend had decided to leave the St. Louis area and live near Springfield. Tr. 522-23.

Appellant testified on his own behalf during the penalty phase. Tr. 535. Appellant acknowledged his involvement in the cases with Ms. Suchaczewski and Ms. Feurer. Tr. 537-38. However, he denied that there was any sexual part to the assault involving Ms. Suchaczewski. Tr. 563-64. Appellant "did not deny" the allegations involving P.M. Tr. 564-65.

With regards to the El.W. and R.J. cases, Appellant claimed that he had been in jail with Danny Stark, and that Mr. Stark seemed to know a lot about those cases. Tr. 542-43. Appellant claimed that Mr. Stark convinced him that, if Appellant confessed to being involved in those two murder cases, it would delay Appellant's transfer to prison on the Feurer case. Tr. 544-45. According to Appellant, Mr. Stark and he had a plan that would allow Appellant to escape from the jail. Tr. 544-45. Appellant claimed that he was scared to go to prison, and thus followed Mr. Stark's suggestion. Tr. 544-46.

Appellant acknowledged making statements to Detective Miller about the El.W. and R.J. cases. Tr. 546-47. However, he refused to acknowledge that he admitted to abducting, raping, and killing El.W. and R.J. Tr. 562-63. Appellant also stated that, in the last conversation with Detective Miller about those cases, he recanted his earlier admissions. Tr. 547.

Appellant also testified regarding his time in custody on this case, and his previous incarcerations. Tr. 551-55. Appellant stated that he had one minor discipline incident while in custody on this case. Tr. 551-52. Appellant admitted to one minor discipline

incident while in custody in Illinois. Tr. 554-55. Appellant testified regarding the jobs that he had been assigned to while in custody in Illinois and Missouri, and claimed to have picked up skills from some of those assignments. Tr. 551-54.

Appellant claimed that he had suffered a head injury in an accident back in 1972, and that he had attempted suicide around that time. Tr. 555-56.

On cross-examination, Appellant admitted that he was paroled from the case involving Ms. Suchaczewski in early 1977, and that the case involving V.R. and the cases involving El. W., R.J., and Ms. Feurer all took place in 1977 and 1978. Tr. 559-60. Appellant could not state where he was trying to go or why he needed somebody in the car with him when he kidnapped Ms. Feurer. Tr. 557-59.

In its verdict assessing the punishment at death, the jury found that Appellant had a substantial history of serious assaultive convictions based on his convictions involving Ms. Suchaczewski. L.F. 122, Tr. 594. The jury also found that the murder of V.R. involved depravity of mind based on the random selection of the victim. L.F. 122-23, Tr. 594. The jury also found that Appellant had been convicted of kidnapping. L.F. 123, Tr. 594-95. Additionally, the jury found that Appellant had threatened a teenage girl (apparently P.M.) in Illinois in 1972 and abducted and murdered El.W. and R.J. L.F. 123, Tr. 595.

Appellant filed a motion for new trial. L.F. 18, 124-33. The trial court denied Appellant's motion for new trial. Tr. 605. After a brief discussion of the fact that Appellant did not want a sentencing assessment report to be prepared and that Appellant did not want the court to review a mental assessment that had been prepared (apparently

in the 1970s), the court took up the matter for sentencing. Tr. 605-10. The trial court then sentenced Appellant to death. L.F. 134-39, Tr. 615-16, 624-25.

Appellant filed his notice of appeal to this Court. L.F. 140-41.

ARGUMENT

Point I (Motion to Suppress)

The trial court did not plainly err in denying Appellant's motion to suppress without an evidentiary hearing as to the genetic sample obtained pursuant to a search warrant because Appellant failed to plead sufficient facts to demonstrate that the affidavit supporting the warrant contained information that was obtained in an illegal search in that the transfer of the results of DNA analysis from Illinois to Missouri was not a search. As Appellant did not otherwise challenge the validity of the search warrant, the trial court did not err in denying the motion to suppress as to the genetic sample provided pursuant to the search warrant. As to the sample provided to Illinois authorities, the trial court did not err in denying the motion to suppress without an evidentiary hearing because the motion itself revealed that the sample was provided pursuant to an Illinois court order, and did not reveal a valid basis for collaterally attacking that order.

A. Preservation & Standard of Review

This issue comes before this Court in an unusual posture. Based on the records in this case, there apparently was no formal evidentiary hearing in this cause. Likewise, there were no formal stipulations in lieu of an evidentiary hearing. Instead, there was an argument in which some facts contained in Appellant's motion to suppress appeared to be conceded, and other facts appeared to be disputed, and the trial court then denied the motion to suppress without an evidentiary hearing. Mot. 2/5 Tr. 3-9.

At that hearing, in the motion for new trial, and on appeal, Appellant has never suggested that the trial court erred in failing to grant a hearing. L.F. 124, Mot. 2/5 Tr. 3-9, Tr. 20, 600-01, Appellant's Brief at 44-59. Instead, Appellant argues that the trial court should have granted the motion to suppress. Appellant's Brief at 44, 59. In doing so, Appellant assumes that the facts as pled in his motion should be taken to be true. Appellant's Brief at 50-52. In making this argument, Appellant ignores the standard of review and the rules governing motions to suppress in cases involving a search warrant.

As a general rule, when a search warrant has been issued, this Court reviews the decision of the judge who issued the search warrant. *State v. Neher*, 213 S.W.3d 44, 48-49 (Mo. banc 2007). In doing so, this Court only considers the affidavit supporting the search warrant. *Id.* at 49. That affidavit is examined in a common sense manner, and the warrant will be upheld if the affidavit establishes a substantial basis supporting the finding of probable cause. *Id.* A motion to suppress should be granted only if the review of the affidavit shows that the issuance of the search warrant was clearly erroneous. *Id.*

There is an exception to the general rule when the motion to suppress indicates that the affidavit contained false statements or omitted material facts. Under *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1977), if a defendant makes a prima facie showing that a search warrant contained false statements and those false statements are essential to the finding of probable, a defendant is entitled to hearing at which the defendant bears the burden of proof to demonstrate that those statements are false. 438 U.S. at 155-56, 98 S.Ct. at 2676. Missouri courts have treated the rule in *Franks* as also applying to allegations that relevant matters were intentionally omitted from a search

warrant that had the effect of making the affidavit misleading. *State v. Dawson,* 985 S.W.2d 941, 950 (Mo. App. W.D. 1999).

Missouri courts have applied a variation of the *Franks* rule in cases in which a warrant application has included information allegedly obtained as a result of an invalid search. *See, e.g., State v. Oliver,* 293 S.W.3d 437, 443 (Mo. banc 2009). As with the circumstance in which information included in the affidavit is false, when information in a search warrant is the result of an invalid search, the reviewing court excludes that information and determines whether the remaining information in the affidavit supports the issuance of the warrant. *Id.* *Oliver* does not explicitly address whether, in this circumstance, the burden of proof regarding the validity of the initial search referenced in the affidavit is placed on the State or the defendant. In the absence of authority on this issue, Respondent would respectfully suggest that, as in other *Franks* situations, the burden of proof should rest with the person challenging the validity of the search warrant. If a hearing had been held, this Court would review the factual findings of the trial court in the light most favorable to the ruling of the trial court. *Oliver,* 293 S.W.3d at 442.

Because Appellant has never argued that he was entitled to a hearing, any claim that he pled sufficient facts in his motion to suppress to warrant a hearing should be reviewed for plain error. Plain error review is a two-step process. *State v. Baumruk,* 280 S.W.3d 600, 607 (Mo. banc 2009). First, this Court determines whether there are facial grounds for believing that plain error has occurred with error being plain error only if the error is "evident, obvious, and clear." *Id.* Second, if plain error is found, this Court then determines whether that error constitutes manifest injustice. *Id.*

To the extent that there may be certain facts which this Court deems to have been stipulated at the trial level, whether such facts demonstrate a violation of the Fourth Amendment is an issue to be reviewed de novo. *See, e.g., State v. Berry,* 92 S.W.3d 823, 828 (Mo. App. S.D. 2003).

B. Factual Background and Summary of Theories

Based on the motion to suppress, the documents attached to that motion, the discussion of the motion during the motion hearing, the evidence at trial, and the discussion of this issue at the hearing on the motion for new trial, there appears to be some facts which were not in dispute regarding the sequence of events. Apparently, Appellant was originally convicted in connection with the murders of El.W. and R.J. L.F. 22. In 2001, the Circuit Court of St. Clair County, Illinois vacated those convictions. L.F. 22. At some point in 2001, a motion was filed or made regarding the taking of a genetic sample in the El.W. case. L.F. 22, Mot. 2/5 Tr. 4-5. Appellant did not object to that motion and consented to the granting of the motion.[2] L.F. 22-23, 27, Mot. 2/5 Tr. 4-6. The order entered by the Circuit Court of St. Clair County provided that the sample

[2] The motion and the argument on that motion do not reveal the basis on which the original convictions were vacated. L.F. 22-26, Mot. 2/5 Tr. 3-9. In his brief, Appellant suggests that the convictions were reversed due to problems with Appellant's statements to the police, but that claim is not supported in the record. Appellant's Brief at 107 n. 8. The motion and argument also do not reveal who made the request for the genetic testing. L.F. 22-26, Mot. 2/5 Tr. 3-9.

would be delivered to the Metro-East Forensic Laboratory of the Illinois State Police, but was silent regarding what the Laboratory would do with the genetic material or what the Laboratory could do with the results of any analysis performed on the genetic material. L.F. 27.

Subsequent to the entry of the order, the genetic sample of Appellant was analyzed, and a profile of Appellant was developed. L.F. 23. In 2007, Officer Rokita made contact with the St. Louis County Police Department, obtained a copy of the profile of Appellant from the Illinois State Police Forensic Laboratory, and forwarded that profile to the St. Louis County Police Department. L.F. 23-24, 29, 35-36, Mot. 2/5 Tr. 3-4, Tr. 154, 600-01. A comparison of Appellant's profile to a profile developed from DNA obtained from the underwear of V.R. indicated that the two profiles were consistent, and a search warrant was obtained for a new genetic sample from Appellant. L.F. 24, 29, 31-37, Mot. Tr. 2/5 4-5, Tr. 157-58, 194-95.

There are, however, several factual issues suggested by the motion to suppress which were not discussed during the arguments, and, as such, Appellant's allegations regarding those matters should not be treated as having been found to be true for the purpose of this appeal. In particular, Appellant alleged that the seizure of Appellant's profile from the Forensic Laboratory was outside the scope of his consent to the provision of the DNA. L.F. 24. However, the record in this case does not include the motion – whether written or oral – that led to the order issued by the Circuit Court of St. Clair County nor does it include any hearing which was conducted on that motion. The record merely includes the order. L.F. 27. As such, to the extent that the terms and

circumstances of Appellant's consent to the initial provision of his genetic material to Illinois State Police Forensic Laboratory are relevant to the issues on appeal, Appellant's allegations regarding those matters should be treated as true solely for the purposes of deciding whether or not an evidentiary hearing is necessary to allow this Court to resolve Appellant's claims.

In order to determine whether or not the trial court should have granted an evidentiary hearing, or whether the search warrant affidavit, on its face, reveals that the search warrant should not have been granted, it is necessary to begin with the basic theory of the case set forth by Appellant at the trial court and in his arguments to this court. As an initial point, Appellant does not contest that the search warrant affidavit taken as a whole demonstrated probable cause to take a genetic sample. L.F. 22-25, Appellant's Brief at 44-59. Instead, Appellant argues that the provision of his profile to Officer Rokita by the Illinois State Police (and the subsequent transfer of that information to Ms. Walsh by Officer Rokita) was an illegal search and seizure, and that the search warrant is tainted by its inclusion of the results of DNA analysis based on that illegal search and seizure. L.F. 24-25, Mot. 2/5 Tr. 4-5, 8-9, Tr. 600-02, Appellant's Brief at 55-59.

In particular, Appellant has two, somewhat related, theories about why the provision to Officer Rokita of the analysis of the genetic sample was an illegal seizure. First, Appellant claims that this case should be analyzed as a "consent" case, and that the scope of his consent to the taking of his genetic sample limits the subsequent uses of that sample. L.F. 24, 124, Mot. 2/5 Tr. 8, Appellant's Brief 45-55. Second, Appellant claims

that he has a right to privacy in the results of the genetic analysis performed by the Illinois State Police under the Illinois Genetic Privacy Act, that the provision of the results of the genetic analysis to Officer Rokita violated those rights to privacy, and that, as a result, the provision of the results of the genetic analysis to Officer Rokita was an illegal search and seizure in violation of the Fourth Amendment. L.F. 124, Mot. 2/5 Tr. 4-5, 8, Tr. 600-01, Appellant's Brief at 55-59.

As will be discussed further below, Appellant's theory of the case does not accurately reflect the law in several different material ways. First, and most importantly, under traditional Fourth Amendment, only the initial seizure of the genetic material in this case was a search. Regardless of whatever state law rights may or may not have been violated in Illinois, there are no Fourth Amendment privacy rights in the results of tests performed on evidence or potential evidence seized in a valid search. Second, even if Illinois rights were to be considered, Illinois law does not create a privacy right in the results of the type of analysis performed in this case. As such the only search performed prior to the issuance of the search warrant was the original provision of the blood sample.

As to the original provision of the blood sample, Appellant's attempts to use "consent" to restrict the use of that blood sample is equally flawed. In "consent" cases, the issue of consent goes solely to whether or not the defendant consented to the initial search. None of these cases require a defendant to also consent to the subsequent use of the items found in that search. Even if such a rule could be imported into consent cases, the initial seizure was not actually a "consent" seizure but, rather, was a seizure pursuant to a court order. An analysis of cases involving consent reveal that the consent doctrine

is not particularly useful in analyzing cases involving the provision of materials pursuant to court orders. Instead, there is a separate line of cases involving subpoenas and discovery orders that should be applied to seizures done pursuant to court orders. Under those cases, whether or not Appellant objected to the seizure is not relevant to the validity of the seizure.

C. Traditional Fourth Amendment Analysis – Search Limited to Initial Seizure

Appellant's theory of this case requires this Court to recognize a constitutionally protected privacy interest in the results of analysis performed on items seized by law enforcement. Such a theory would drastically alter traditional Fourth Amendment analysis.

A good starting point for this analysis is what the courts have held regarding "searches" of the body of the defendant. Such an analysis reveals that courts have been concerned solely with the intrusiveness of the search, and not with the potential uses of the information revealed by the search. For example, in *Schmerber v. California,* 384 U.S. 757, 86 S.Ct. 1826 (1965), the analysis focused on the intrusiveness of the search of the body in finding that the taking of a blood sample was a search subject to the restrictions of the Fourth Amendment. 384 U.S. at 769-70, 86 S.Ct. at 1835. Similarly, in *Cupp v. Murphy,* 412 U.S. 291, 93 S.Ct. 2000 (1972), the Supreme Court held that fingernail scrapings involved the degree of intrusion that warranted the application of the restrictions of the Fourth Amendment. 412 U.S. at 295, 93 S.Ct. at 2003. However, in holding that fingernail scrapings were subject to the Fourth Amendment, the Supreme

Court distinguished fingernail scrapings from hair samples and fingerprints which the Supreme Court indicated were not subject to the Fourth Amendment. *Id.*

Appellant offers no precedent for his suggestion that there is a separate and distinct privacy interest in tests performed on blood or items seized from the body allowing challenges to later uses of such items even if the initial seizure is proper. While this issue has not been directly considered in Missouri, other courts have considered this issue in the context of DNA testing, and rejected Appellant's position.

In *Haskell v. Brown,* 677 F.Supp.2d 1177 (N.D. Cal. 2009), the United States District Court for the Northern District of California rejected a request for an injunction against a California law that required all pre-trial detainees (a category that would include Appellant) to provide a DNA sample as the challenge to that statute was unlikely to prevail on the merits. As part of that case, the district court also rejected the claim that the search of that DNA sample against the CODIS database would be a separate violation. *Id.* at 1199-1200 n. 10.

In *Segundo v. State,* 270 S.W.3d 79 (Tx. Crim. App. 2009), the Texas Court of Criminal Appeals rejected a claim from a defendant that his Fourth Amendment rights were implicated by the retention of his DNA in CODIS (the national DNA database) after his period of supervision ended. *Id.* at 99-100. In so doing, the Texas Court of Criminal Appeals held that the storage and use of a validly obtained DNA sample did not implicate Fourth Amendment rights. *Id.* Similar conclusions have been reached by multiple courts. *See, e.g., Wilson v. Collins,* 517 F.3d 421, 428 (6th Cir. 2008); *United States v. Amerson,* 483 F.3d 73, 86-87 (2nd Cir. 2007); *Johnson v. Quander,* 440 F.3d 489, 498-

500 (D.C. Cir. 2006); *State v. Hauge,* 103 Hawaii 38, 48-53, 79 P.3d 131, 141-46 (Hawaii 2003); *Scott v. Werholtz,* 38 Kan.App.2d 667, 171 P.3d 646 (Kan. App. 2007); *State v. Gregory,* 158 Wash.2d 759, 825-29, 147 P.3d 1201, 1236-38 (Wash. 2006).

In *Pharr v. Commonwealth,* 50 Va.App. 89, 646 S.E.2d 453 (Va. App. 2007), the Virginia Court of Appeals examined a case with similar facts to the present case. In that case, the defendant had consented to the provision of his DNA in one case. 50 Va.App. at 92, 646 S.E.2d at 454. The detectives in the original case had obtained the defendant's consent by expressly telling the defendant that they wanted the DNA to compare to evidence in that case. *Id.* The detective later decided that DNA testing was not needed in the case for which the sample was obtained, but, upon noticing similarity to an unsolved case, had a profile developed from the defendant's genetic sample and compared it to the profile from the unsolved case. 50 Va.App. at 92-93, 646 S.E.2d at 454-55. The Virginia Court of Appeals held that, even though the defendant's consent was based on his belief that the DNA would be used in the case in which he was asked to provide a buccal swab, in the absence of an express restriction on its subsequent use in other cases, there was no violation of the Fourth Amendment when his genetic material was analyzed and compared to evidence in other cases. 50 Va.App. at 97-100, 646 S.E.2d at 456-58; *see also Commonwealth v. Gaynor,* 443 Mass. 245, 252-56, 820 N.E.2d 233, 242-44 (Mass. 2005); *State v. Notti,* 316 Mont. 345, 71 P.3d 1233 (Mont. 2003); *Herman v. State,* 122 Nev. 199, 204-07, 128 P.3d 469, 472-73 (Nev. 2006).

In short, the overwhelming majority of the states that have examined this issue have found that there is no privacy interest implicated by the subsequent use of a genetic

sample which was obtained legally. The essence of the holding in these cases is that the results of any DNA analysis is merely a piece of personal information that can be compared to other records for the purpose of identification, similar to the way that fingerprints may be used. *See, e.g., Segundo,* 270 S.W.3d at 79-100. Respondent respectfully submits that this Court should follow the majority rule.

Furthermore, to the extent that Appellant contends that there is a constitutionally recognized privacy interest in the subsequent use of genetic samples which were initially lawfully provided, it is based on Illinois law. Appellant's Brief at 55-59. While, as discussed below, Respondent disagrees with Appellant's interpretation of Illinois law and believes that there is no state law privacy interest, Appellant's theory that a state law privacy interest gives rise to a Fourth Amendment privacy interest is incorrect and contrary to decisions of the United States Supreme Court.

In *Virginia v. Moore,* 553 U.S. 164, 128 S.Ct. 1598 (2007), the United States Supreme Court considered the impact of state law on the Fourth Amendment in the context of a claim of an unconstitutional arrest. In that case, the officers arrested the defendant on a charge for which Virginia law required that a summons be issued, and searched the defendant incident to that arrest. 553 U.S. at 166-67, 128 S.Ct. at 1601-02. The Supreme Court found that, while states may give additional privacy protections beyond what the Fourth Amendment requires, such additional state law privacy protections did not create additional rights under the Fourth Amendment, and the violation of such state rights did not create a Fourth Amendment violation. 553 U.S. at 171-74, 128 S.Ct. at 1604-06. In reaching this conclusion, the Supreme Court considered

its prior holdings in cases involving both searches and seizures. *Id.* As such, for the purposes of applying the Fourth Amendment, the fact that Illinois law may create some additional privacy rights does not mean that the violation of Illinois law would demonstrate a Fourth Amendment violation.

Even if Illinois law is considered on determining what constitutes a search, in the context of its CODIS statute, the Illinois Supreme Court, like the other jurisdictions noted above, has held that the use of the information stored in CODIS by law enforcement agencies is not a separate search for Fourth Amendment purposes. *In re Lakisha M.*, 227 Ill.2d 259, 277, 882 N.E.2d 570, 581 (Ill. 2008). Based on the reasoning in *Lakisha M.*, there is no reason to believe that Illinois courts would reach a different conclusion on DNA profiles that have not been entered into CODIS. However, Appellant claims that, for non-CODIS cases, he has additional rights under the Illinois Genetic Privacy Act. Appellant's Brief at 55-58.

D. Order and Illinois Law on Further Disclosure

Even if this Court were to determine that what qualifies as a reasonable expectation of privacy for purposes of this case is based on the law in Illinois, Appellant's theory still fails. To determine what Appellant's reasonable expectations were, this Court should examine the actual court order and the Illinois Genetic Privacy Act. Respondent respectfully contends that such a review will demonstrate that Illinois law would have permitted the sharing of this information with other law enforcement agencies, and, as such, that Appellant should not have expected his information to be kept secret from other interested law enforcement agencies.

On its face, the court order in this case puts no restrictions on the disclosure of the results of the genetic testing to law enforcement agencies. L.F. 27. As such, the question is whether Illinois law creates such a restriction that would eliminate the need to include such a restriction in the court order.

At the trial level and before this Court, Appellant's sole authority for a state law restriction on law enforcement sharing the information generated in one case from a genetic test with other law enforcement agencies is the Illinois Genetic Privacy Act – Illinois Compiled Statutes, chapter 410, Section 513.[3] L.F. 124, Mot. 2/5 Tr. 4-5, 7-9, Tr. 600, Appellant's Brief at 55-58. This statute has apparently never been interpreted by Illinois appellate courts. As such, there is no binding authority on whether or not the acts of Officer Rokita violated that act, and this Court must determine how it believes that the courts of Illinois would decide this issue if it was presented to them.

Appellant specifically cites in his brief to Section 15 and Section 30 of the Illinois Genetic Privacy Act. Appellant's Brief at 55-58. The essence of Appellant's argument is

[3] Appellant also briefly argues that there is no express authorization to share such information. Appellant's Brief at 58-59. However, Respondent would respectfully submit that holding, as Appellant seems to suggest, that law enforcement agencies can only share information if specifically authorized to share information would impose a huge burden on efforts to solve crimes involving multiple jurisdictions. Appellant offers no authority for requiring express statutory authorization, and this Court should not interpret Illinois statutes in that manner.

that the tests done in this case are "genetic testing." However, a look at the definition section of the Illinois Genetic Privacy Act reveals that not all DNA analyses are considered to be genetic testing for the purpose of the Illinois Genetic Privacy Act.

Section 10 of the Genetic Privacy Act creates a narrow definition of "genetic information" and "genetic testing." Under the definitions, information about the results of a DNA test are genetic information only if the information is about "the individual's genetic tests" or information about "the genetic tests of a family member" including the possible manifestation of a disease or disorder. "Genetic testing" and "genetic tests" are limited to "a test or analysis of human genes . . . [or] DNA . . . that detect genotypes, mutations, chromosomal changes, abnormalities, or deficiencies . . . that (i) are linked to physical or mental disorders or impairments, (ii) indicate a susceptibility to illness . . . or (iii) indicate genetic or chromosomal damage."

A look at the intent section and the floor debate on this statute indicates that it was not intended to reach the type of DNA testing involved in this case. Section 5 of the Genetic Privacy Act includes legislative finding and a statement of intent. Those findings indicate a desire to encourage individuals to voluntarily undergo genetic testing for the purpose of improving public health. The floor debate over the bill indicates that the primary concern was the possibility that the results of genetic testing might have an impact on the availability of health insurance if people submitted to voluntary testing. Appendix at A-16-A-33.

A review of that debate indicates why the statute that was enacted includes language dealing with law enforcement agencies obtaining access to genetic testing. The

Genetic Privacy Act was enacted at a time when testing of the human genome was at its infancy with each year likely to reveal new tests for diseases. Appendix at A-18, A-20. At that time, it was (and to some extent still is) impossible to determine whether any tests that might be used to identify suspects in a criminal case might also reveal something about the health of the suspect (thereby bringing those tests under the statute). As such, it made sense to include an exception for law enforcement to the restrictions contained in that statute.

To the best of Respondent's knowledge and understanding, none of the loci used for DNA identification currently are markers for any genetic disease. *Haskell*, 677 F.Supp.3d at 1190 & n. 1. While the Genetic Privacy Act would create an exception for law enforcement uses if, at some point in the future, markers for genetic diseases were used as a means of identifying suspects,[4] the Genetic Privacy Act does not apply to loci that are not markers for genetic diseases.

Even if the definition section and the intent section were ignored to more broadly apply the Genetic Privacy Act than intended, there would still be the exception for law enforcement purposes. Section 15(b) authorizes the disclosure of genetic testing to a peace officer involved in an investigation or prosecution. While Appellant argues for a narrow interpretation that would limit that disclosure to only the investigation in which

[4] It could also potentially apply if, as discussed in *Haskell*, at some future date, the current "junk" loci were determined to have some genetic implications. 677 F.Supp.3d 1190 n. 1.

the genetic sample was provided, that argument ignores that the boundaries between one investigation and another are not as straightforward as Appellant suggests.

As Appellant notes in Point II of his brief, there are circumstances when a crime committed against a separate victim can be admissible to prove identity. Especially with regards to the case involving El.W., there are significant similarities between the murders of El.W. and V.R. as both murders involve high school students, a knife, a sexual assault, and strangling with shoe strings. Current Illinois law permits the introduction of evidence of other crimes under some circumstances. *See* Code of Criminal Procedure, Illinois Compiled Statutes, Chapter 725, Section 5/115-7.3.

As such, Respondent respectfully submits that, under Illinois law, Officer Rokita validly obtained Appellant's DNA Profile from the Illinois State Police Department and was free to communicate with other law enforcement agencies to determine if Appellant's DNA matched any other unsolved cases. Furthermore, as noted in Part C of this Point above, even if Illinois law were violated, such a violation would not translate into a violation of the Fourth Amendment. That leaves Appellant's claim that this use of this profile invalidated his original consent to the court's order.

E. Consent Issues

Appellant argues that his Fourth Amendment rights were violated as the transfer of the profile from Illinois to Missouri exceeded the scope of his consent when he provided his DNA. Appellant's Brief at 45-55.

As previously noted in Part C, in those states which have examined this issue, in the absence of an express limitation on the subsequent use of the DNA sample, the fact

that the subsequent use differs from the original purpose of the sample has not been deemed to invalidate the initial consent. *Gaynor*, 443 Mass. at 252-56, 820 N.E.2d at 242-44; *Pharr*, 50 Va.App. at 97-100, 646 S.E.2d at 456-58. In his motion, Appellant merely asserted that the use exceeded the scope of his consent, not that it violated an express limitation on his consent. L.F. 22-23, 27. Likewise before this Court, Appellant merely argues that the use exceeded the scope of his consent. Appellant's Brief at 50-52. However, as the opinions in *Gaynor* and *Pharr* note, the explanation or understanding of how the product of the search might later be used does not alter the actual scope of the search in the absence of an express agreement that the items seized will only be used for that purpose.

Even if Appellant's theory that his personal understanding of the purpose of providing the genetic sample somehow restricted the scope of the consent to the taking of his genetic sample, Appellant's argument is based entirely on the position that this case should be analyzed under the "consent" exception to the search warrant requirement. This analysis is flawed. Instead, the proper analysis should be based on the law governing the scope of judicially-mandated disclosures.

The fundamental flaw in Appellant's theory is that the doctrine of "consent" evolved in the context of searches conducted outside of judicial proceedings. The typical consent case involves contact between a law enforcement officer and a defendant (or other person with authority over the place or thing being searched) prior to the commencement of formal criminal proceedings. *See, e.g., Florida v. Jimeno*, 500 U.S. 248, 111 S.Ct. 1801 (1990); *State v. Glass*, 136 S.W.3d 496 (Mo. banc 2004); *State v.*

Brand, 309 S.W.3d 887 (Mo. App. W.D. 2010); *State v. Allen*, 277 S.W.3d 314 (Mo. App. S.D. 2010). Especially when the consent is not reduced to writing, such cases require the courts to determine whether consent was given and the scope of that consent based on the communications between the officer and the potential suspect. *Jimeno*, 500 U.S. at 251, 111 S.Ct. at 1803-04; *State v. Hyland*, 840 S.W.2d 219, 221-22 (Mo. banc 1992); *State v. Garcia*, 930 S.W.2d 469, 472 (Mo. App. S.D. 1996). Likewise, some of the DNA consent cases from other states also involve consent given directly to law enforcement. *See, e.g., Gaynor*, 443 Mass. at 255-56, 820 N.E.2d at 245; *Pharr*, 50 Va.2d at 91-92, 646 S.E.2d at 454.

The question of consent occurring in the context of a brief informal encounter between law enforcement and a unrepresented person without the assistance of counsel is a vastly different circumstance than the situation that arises in a court proceeding when a party has the ability to consult with counsel at length before choosing whether to object to or consent to a request posed by the opposing party. The rules designed for informal encounters do not translate well to formal court proceedings.

A good example of the problems with applying "consent" doctrine to court orders is shown by the case law on the impact of a show of authority. Submission to a search after a show of lawful authority does not qualify as consent. *Bumper v. North Carolina*, 391 U.S. 543, 548-50, 88 S.Ct. 1788, 1792 (1967); *State v. Middleton*, 43 S.W.3d 881, 886 (Mo. App. S.D. 2001).

Like a claim that an officer has the right to conduct a search without consent, a request for discovery asserts that the State has the right to compel the defendant to submit

to a search without consent. Upon receipt of that request, that party and their counsel must make an initial determination of whether to agree to that request or to contest it in court. Part of that determination necessarily involves an analysis of whether an objection will have merit. In other words, by consenting to the request, the party that is the subject of the request is arguably merely submitting to the assertion of authority.

If a defendant does not consent, the trial court must determine the reasonableness of the request subject to the rules noted below on court-ordered disclosures. However, if "consent" takes the analysis outside of those rules, a defendant gets to make a collateral attack on the court order by claiming that the consent was coerced by the claim of authority, even if the court would likely have granted the request over objection.

In the present case, as Appellant acknowledged in his motion to suppress, he "consented" to the taking of his DNA for testing in the context of a court order from the Circuit Court of St. Clair County Illinois. L.F. 22-23, 27. As that court order clarifies, Appellant consented to the entry of the court order.[5]

In short, the better approach for analyzing this situation comes from the case law on court-ordered disclosures. A consent to a court order is better understood as an

[5] Even if this case should be analyzed as a "consent" case, because no evidentiary hearing was requested or ordered, the exact circumstances of the court order are not before this Court. If the scope of Appellant's consent is relevant, the appropriate remedy would be an evidentiary hearing to determine the circumstances surrounding Appellant's consent.

acknowledgment that the request for disclosure is proper under the law than as the waiver of rights typically involved in cases involving consent to requests by law enforcement officers.

F. Court-Ordered Disclosure

At the time that the Fourth Amendment was adopted, there were no formal rules governing discovery procedures, and the primary means for a court to order the seizure of materials was by a warrant. Over the years, however, as discussed further below, courts have examined the relationship of other types of court orders to the Fourth Amendment. Respondent believes that there are no material differences between discovery orders in a criminal case, discovery orders in a civil case, and subpoenas. Under the facts of this case, by consenting to the issuance of the court order on discovery, Appellant waived any objections to the scope of that order, and that order – not Appellant's consent to that order – governs the analysis of this issue.

While the issue of criminal discovery orders has apparently not been directly addressed in Missouri, several cases have addressed the relationship between court orders and the Fourth Amendment. In *State v. Taylor*, 943 S.W.2d 675 (Mo. App. W.D. 1997), the Western District, in the context of a claim that it was improper for the State to use a search warrant in light of the discovery procedures of Rule 25.06, described the ability of the State to request disclosure under Rule 25.06 and the ability of the State to obtain a search warrant as alternative means to discover potential evidence. *Id.* at 678. In the context of subpoenas, this Court has described the Fourth Amendment as being implicated only to the extent of requiring that the subpoena be appropriately limited in

scope. *Johnson v. State,* 925 S.W.2d 834, 836-37 (Mo. banc 1996). The United States Supreme Court has reached a similar conclusion about subpoenas. *See*, *e.g.*, *Donovan v. Lone Steer, Inc.,* 464 U.S. 408, 104 S.Ct. 769 (1983).

As the U.S. Supreme Court noted in *Donovan,* a party who is served with a subpoena has the opportunity to object to that subpoena in court prior to being compelled to comply with that subpoena. 464 U.S. at 415, 104 S.Ct. at 773. Likewise, a party like defendant who believes that a request to submit to testing or the provision of a genetic sample has the opportunity to object in court to that request. As such, court discovery orders should be analyzed on the same basis as a grand jury or investigative subpoena.

While there are no Missouri cases directly addressing this issue, other jurisdictions have concluded that discovery orders are similar to subpoenas or do not implicate the Fourth Amendment. In *Metro Equipment Corporation v. Commonwealth,* 74 Mass.App.Ct. 63, 904 N.E.2d 432 (Mass. App. 2009), the Massachusetts Court of Appeals noted discovery requests and subpoenas were similar. 74 Mass.App.Ct at 71, 904 N.E.2d at 440. In *United States v. Bell,* 217 F.R.D. 335 (M.D.Pa. 2003), the United States District Court for the Middle District of Pennsylvania found that a discovery request in a civil tax enforcement case did not violate any Fourth Amendment privacy interests of the party that was requested to produce documents. *Id.* at 342-43. In *Luminella v. Marcocci,* 814 A.2d 711 (Pa. Super. 2002), the Pennsylvania Superior Court found that the application of the Fourth Amendment to a civil discovery request for drug testing was limited to a determination of whether the request to compel the drug test was reasonable. *Id.* at 720-22.

In Illinois, in *People v. Treece,* 159 Ill.App.3d 397, 511 N.E.2d 1361 (Ill. App. 1987), the Appellate Court of Illinois considered whether the Fourth Amendment applied to a criminal discovery request. The Appellate Court found that a court order under Illinois Rule 413 eliminated the need for a search warrant. 159 Ill.App.3d at 1406-07, 511 N.E.2d at 1366-67.

Respondent would respectfully suggest that this Court follow the approach taken in these cases and determine that the Fourth Amendment only has limited application to disclosure pursuant to discovery requests in civil and criminal cases. This approach is both logical and compatible with the purposes of the Fourth Amendment, and the alternative would cause substantial practical complications.

A discovery request, whether for genetic materials, or for documents, or for other materials, may result in the production of evidence that is itself admissible or can provide a lead to other potential evidence. The lead can involve evidence of other crimes. For example, in a case involving tax fraud, a defendant may make certain claims about expenses to demonstrate that they did not knowingly falsify their tax returns. In response, the State might seek to compel disclosure of the defendant's business records to verify those claims. A review of those records might show probable cause to believe that other crimes have been committed such as improper disposal of toxic wastes, and such records might be the basis for a search warrant regarding those other crimes. Under Appellant's theory, the State would not be able to pursue those other crimes because the information was obtained via a discovery request.

While the process for obtaining a court order for discovery may differ from a warrant, as noted by this Court in *Johnson* and the U.S. Supreme Court in *Donovan* in the context of subpoena requests, the process contains substantial safeguards against unreasonable requests that unduly violate the privacy interests of a defendant. In particular, Illinois law provides such protections.

Like Rule 25.06 in Missouri, Illinois Rule 413 permits the taking of hair, blood, or other materials from a defendant's body. As such, by not objecting to the court's order or requesting other protections, Appellant waived any opportunity to claim that the order or the discovery request were improper.

As Appellant did not object to the court's order in his Illinois case, he should not now be heard to argue for the inclusion of any limitations not contained within the plain language of the court's order. As noted above in Part D, the order in this case clearly allowed the taking of Appellant's genetic sample. As there were no restrictions contained in that order, this Court should adopt the holdings of other states and find that the subsequent use of the results of that testing in the investigation of other cases does not constitute a violation of the Fourth Amendment.

Point I should be denied.

Point II (Kevin Kiger)

The trial court did not abuse its discretion in excluding evidence regarding Kevin Kiger as an alternative suspect because there was insufficient evidence directly connecting Kevin Kiger to the death of V.R. in that: 1) evidence connecting Kevin Kiger to the death of M.L. and E.A. does not tend to demonstrate that Kevin Kiger killed V.R. in that the details of those two homicides were not similar to the details of the death of V.R.; 2) evidence that Mr. Kiger was familiar with the area in which a murder occurred and may have been near a location where V.R. might have been prior to her murder, that Mr. Kiger was acting weird around the time of the murder, that his girlfriend was missing a paring knife, and that Mr. Kiger used matchbooks to light cigarettes do not rise to the level of acts directly connecting Mr. Kiger to the murder of V.R.

The decision of the trial court regarding the admission of evidence is reviewed for abuse of discretion and resulting prejudice. *State v. Taylor*, 298 S.W.3d 482, 491 (Mo. banc 2009). The trial court abuses its discretion when its ruling is "clearly against the logic of the circumstances." *Id.*

In the context of the admission of evidence regarding alternative suspects, evidence suggesting motive or opportunity to commit a crime is not admissible in the absence of some evidence that the alternative suspect did some act directly connecting that suspect with the crime alleged. *State v. Davidson*, 982 S.W.2d 238, 242 (Mo. banc 1998). Likewise, evidence of other bad acts unconnected to the alleged crime itself is not

admissible for the purpose of casting "bare suspicion" on an alternative suspect. *State v. Chaney*, 967 S.W. 2d 47, 54-55 (Mo. banc 1998) (evidence related to neighbor being a pedophile inadmissible to cast suspicion on pedophile as alternate suspect in killing of friend of defendant's step-daughter); *State v. Castro*, 276 S.W.3d 358, 361 (Mo. App. S.D. 2009) (evidence of presence of another person with propensity to molest children not admissible to prove that alternative person molested victim); *State v. Riley*, 213 S.W.3d 80, 92-93 (Mo. App. W.D. 2006) (evidence that other person in household had used drugs subsequent to date of offense not admissible in possession case to prove that the other person was the person who possessed the drugs in question).

In this case, Appellant sought to introduce two types of evidence related to Mr. Kiger. The first category of evidence purported to connect Appellant to the deaths of E.A. and M.L. The second category of evidence purported to connect Appellant directly to the death of V.R. As neither category of evidence does actually provide a direct connection between Mr. Kiger and the death of V.R., the trial court did not err in excluding such evidence.

With regards to evidence connecting Mr. Kiger to the deaths of M.L. and E.A., such evidence does not connect Mr. Kiger to the death of V.R. Appellant contends that this evidence was admissible because the murders of M.L. and E.A. were "strikingly similar" and shared a "modus operandi" with the death of V.R. Appellant's Brief at 69, 84. Even putting aside potential hearsay problems with proving the circumstances of the murders of E.A. and M.L., which were apparently investigated by other officers than the

witnesses in this case, a closer look at the three murders reveals that the similarities were minimal.

E.A. died in January of 1977 when she was twenty-three years old. S.R. 16, 18. E.A. was initially believed to have died by drowning, though ultimately no cause of death was determined. S.R. 16, 33. E.A. was found in her bathtub. S.R. 17-18. E.A. was a former girlfriend of Mr. Kiger. S.R.9-10, 23-27, Tr. 401. There was no indication in the reports that E.A. had been cut or strangled. S.R. 16-36.

M.L. died in mid-July 1977 when she was seventeen years old. S.R. 2. M.L. was strangled with a venetian blind cord. S.R. 2. M.L. was apparently unknown to Mr. Kiger (or at least to Nancy Dearinger, the girlfriend of Mr. Kiger). S.R. 3. M.L. was found in Blackburn Park in Webster Groves, Missouri. S.R. 2. There was no indication in the report on the M.L. case that any of M.L.'s clothes had been removed, or that M.L. had been cut with a knife. S.R. 2-11.

V.R. died in early June 1977 when she was sixteen years old. Tr. 32, 36, 97-98. V.R. was strangled with a shoe string. Tr. 303, 309-10. V.R. was cut with a knife of some type. Tr. 304-05. V.R.'s body was found in Greensfelder Park in an isolated area in the southwest part of St. Louis County. S.R. 12, Tr. 97-98. At the time that she was found, V.R.'s bra had been removed and stuffed in her mouth. Tr. 102-03.

These facts do not demonstrate a modus operandi.[6] The only apparent similarities between the three deaths are that all three involve women and that, at one point, Mr. Kiger was a potential suspect in all three cases. For the murders of M.L. and V.R., there were three additional "similarities" of the age of the victims, the victim being strangled, and the victim being left in a park. Such minor similarities do not meet the traditional requirements for a modus operandi.

A claim that two offenses share a modus operandi is often raised in cases involving the introduction of evidence of similar crimes committed by a defendant to prove identity. *See, e.g., State v. Davis,* 211 S.W.3d 86, 88-89 (Mo. banc 2006). The general rule in such circumstances is that, when two crimes share a modus operandi, evidence connecting a defendant to the uncharged crime may be introduced to prove that the defendant committed the charged crime. *Id.* To qualify as a modus operandi, however, "there must be more than mere similarity between the crime charged and the uncharged crime. The charged crime and the uncharged crime must be nearly "identical" and their methodology so unusual and distinctive that they resemble a "signature" of the

[6] Appellant appears to imply, as another factor showing a connection, that the offenses should be deemed similar because law enforcement interviewed Ms. Dearinger about all three cases. Appellant's Brief at 69-70, 84. If that qualified as a sufficient modus operandi, it would be relatively easy for the State to introduce other crimes evidence regarding other cases in which a defendant was a suspect by merely conducting a joint investigation with regards to one potential common witness.

defendant's involvement in both crimes." *Id.* at 89, *quoting State v. Bernard*, 843 S.W.2d 10, 17 (Mo. banc 1993).

In *Davis*, the claim was that two robberies were sufficiently similar. 211 S.W.3d at 87-89. In *Davis,* there were multiple common features including both robberies being committed within four days and five miles of each other by two stocky white males carrying similar guns, wearing dark ski masks and gloves, both robberies involved one of the robbers calling the other robber "Ed," and in both robberies cash and rolled coins were taken. *Id.* at 89. However, there were differences between the two robberies including different robbers talking (in one the taller robber, and in the other the shorter robber); the robber who talked was the person who called the other robber "Ed"; in only one of the robberies were threats made that somebody could be shot; and in one robbery both robbers collected the money, while, in the other robbery, one of the two robbers stayed by the door. *Id.* This Court found that, under these circumstances, the two robberies were neither identical or unique. *Id.*

In *State v. Conley*, 873 S.W.2d 233 (Mo. banc 1994), this Court considered a case of child molestation in which the defendant used similar techniques with all of his victims to gain their confidence and progress to sexual activities. *Id.* at 235-36. While finding that the techniques were similar, this Court found that they were not sufficiently distinctive to qualify as a modus operandi. *Id.* at 236.

In *Bernard,* this Court considered multiple acts of the defendant, finding that some rose to the level of a signature, but that others did not.[7] *Id.* at 18-19. In particular, this Court found that evidence that the defendant in *Bernard* made the victims run naked in front of his car was a signature, but found that showing photographs of other nude victims, putting ice cream or ice cream topping on the victims, and having the victims masturbate in church were not so distinctive as to be signatures. *Id.*

In this case, there are no common features between the death of E.A. and the death of V.R. The closest similarity is that both E.A. and V.R. were female. Like was the case in *Davis,* the differences between this case and the murder of E.A. far outweigh the similarities. Aside from the six year difference in age, the method of killing was different (an apparent drowning versus strangulation); the location where the body was found was different (the victim's apartment versus abandoned in an isolated park); the degree of association was different (ex-girlfriend versus unconfirmed attempt to associate).[8] If Mr.

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[7] Respondent recognizes that the "corroboration" exception in *Bernard* has since been rejected. However, the "corroboration" exception which was applied in *Bernard* and *Conley* was based on the identity exception, and, as such, the analysis of what qualifies as a signature crime in *Bernard* still offers guidance for cases involving the identity exception.

[8] Appellant claims that there was actual evidence that Mr. Kiger knew V.R. Appellant's Brief at 82. This statement is inaccurate. The offer of proof on this issue

Kiger had been charged with the murder of V.R., it is practically certain that the trial court would have found that evidence connecting Mr. Kiger to the murder of E.A. did not meet the identity exception.

While there were additional similarities between the murder of M.L. and V.R. – including age, the fact of strangulation, and the abandoning of the body in parks – there were still substantial differences including the item used to strangle the victim (shoe stings versus venetian blind cord), the locations of the parks, the use of another weapon in the case involving V.R., and the removal of the bra of V.R. but not the bra of M.L.

Furthermore, the few similarities between the death of V.R. and the death of M.L. do not rise to the level of a signature offense. Strangulation is not an uncommon method of murder. In 1977, nationally, there were 1,431 deaths by strangulation or beatings. Department of Commerce, Statistical Abstract of the United States 1980 at 188, Table 314. Likewise, there are multiple reported cases involving the use of some object to assist in strangulation. *See, e.g., State v. Glass,* 136 S.W.3d 496, 503-04 (Mo. banc 2004) (bra strap); *State v. Worthington,* 8 S.W.3d 83, 86 (Mo. banc 1999) (rope or cord); *State v. Myers,* 291 S.W.3d 292, 294 (Mo. App. S.D. 2009) (dog leash); *State v. Abdelmalik,* 273 S.W.3d 61, 63 (Mo. App. W.D. 2008) (unknown ligature). Given the different items used to strangle V.R. and M.L., there is no element in common between the two murders that rises to the level of a signature.

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was uncorroborated and unconfirmed hearsay that Mr. Kiger may have known V.R. Tr. 135-36.

As neither the death of M.L. nor the death of E.A. involved any "signature" that was shared with the murder of V.R., the trial court did not abuse its discretion in excluding such evidence.

As to the evidence that supposedly shows a connection between Mr. Kiger and the death of V.R., that evidence does not approach the type of evidence that has been found to be a direct connection in prior cases, and more closely resembles the evidence that has been deemed to be inadmissible.

Appellant relies, in part, on *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1767 (2005). Appellant's Brief at 62-64. While Missouri courts have apparently not considered the impact of *Holmes* on the rule regarding evidence connecting other suspects to a crime, a close look at *Holmes* indicates that the problem with the procedures in South Carolina are not implicated by the traditional rule in Missouri.

As set forth in *Holmes*, the rule in South Carolina (or at least the reasoning of the South Carolina Supreme Court in the underlying decision) regarding evidence connecting a person other than the defendant to the crime charged had two components. 547 U.S. at 323-24, 126 S.Ct. at 1731. The first component of the test – somewhat analogous to Missouri's rule – required that the defendant demonstrate that such evidence created a reasonable inference as to the defendant's innocence and that, to do so, the evidence had to do more than raise a "bare suspicion." *Id.* The second component of the test – which is not found in the Missouri rule – held that, when the evidence of a defendant's guilt is strong, evidence of the guilt of the alternative suspect did not create a reasonable inference as to the defendant's innocence. 547 U.S. at 324, 126 S.Ct. at 1731.

The United States Supreme Court, in analyzing whether the South Carolina rule violated a defendant's rights, specifically noted that the petitioner did not attack the traditional rule adopted by multiple states including Missouri contained in the first part of the South Carolina rule. 547 U.S. at 327, 126 S.Ct. at 1733 (specifically citing to *Chaney* in a footnote as an example of the traditional rule). Instead, the focus of the Supreme Court was on the second part of the rule which conditioned admissibility of evidence showing an alternative suspect on the trial court's assessment of the strength of the prosecution's case. 547 U.S. at 328-31, 126 S.Ct. at 1734-35. It was this rule that based admissibility of such evidence on the strength of the prosecution's case that the Supreme Court found to be invalid.[9] *Id.*

Because the *Holmes* decision did not involve, and cited favorably to, the rule used in Missouri, this Court should find that *Holmes* does not have any impact on the traditional Missouri rule. Appellant cites to *State v. Barriner*, 111 S.W.3d 396 (Mo. banc 2003), *State v. Kelley*, 953 S.W.2d 73 (Mo. App. S.D. 1997), and *State v. Woodworth*, 941 S.W.2d 679 (Mo. App. W.D. 1997), as cases demonstrating that his proposed

[9] Despite the holding in *Holmes* that the issue of admissibility of evidence against an alternative suspect may not be based on the strength of the prosecution's case, Appellant appears to be suggesting that the trial court should have assessed the strength of the State's case against him and relaxed the rules because the State's case was, in his opinion, "weak." Appellant's Brief at 82.

evidence should be treated as admissible. Appellant's Brief at 64-67, 85. However, none of these three cases supports Appellant's argument.

In *Barriner*, this Court found that the trial court should have permitted the defendant to question witnesses about hair strands found at the scene (including some on the body of one of the victims and others on ropes used to tie the other victim) that did not match the defendant. 111 S.W.3d at 399-400. Those hair strands had been tested and found to not match the defendant or the victims. *Id.* at 399. There was no indication that those hair strands had been found to match a specific alternative suspect, and, instead, were introduced to demonstrate that an unknown person may have been present at the scene. *Id.* at 400-01. This Court found that such evidence which showed the presence of a potential alternative suspect did meet the requirement of direct evidence of the guilt of another. *Id.*

In this case, the evidence that Appellant seeks to introduce is not physical evidence which would create a direct inference that another person was present at the time of the crime, but rather more general evidence indicating that Mr. Kiger was a potential suspect. As such, the requirements in *Barriner* are not met.[10]

[10] The only evidence even remotely similar to the *Barriner* evidence is the book of matches found at the crime scene. Tr. 134-35. But a book of matches is a non-unique item that any person, including Appellant, could discard. In any event, Appellant never made an offer of proof that he did not possess a book of matches at that time. Likewise, there is no indication regarding where in the crime scene that the book of matches was

In *Kelley*, the supposed evidence connecting the alternative suspect to the crime was the alternative suspect making phone calls about the homicide shortly before the body was discovered. 953 S.W.3d at 90. The Southern District found that such evidence did not demonstrate a direct connection between the alternative suspect and the homicide, and, as such, was not admissible. *Id.*

In *Woodworth*, the excluded evidence was the prior statement of the surviving victim in an assault and murder case that he had seen the assailant and the assailant was somebody other than the defendant. 941 S.W.2d at 690. Needless to say, such evidence by an eyewitness to the offense that a different person committed the offense meets the requirement for direct evidence. In the present case, no witness testified that they saw Mr. Kiger strangle V.R. or even that they saw Mr. Kiger with V.R.[11] As such, this case is readily distinguishable from *Woodworth.*

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found. In the absence of such evidence, that book of matches does not have the same exculpatory value as the hair in *Barriner.* Furthermore, Appellant never requested to separately ask about the matches, and, as the book of matches was apparently mentioned in a laboratory report and was shown in a photograph, the presence of the book of matches may have been in evidence.

[11] The closest evidence that Appellant has to the evidence in *Woodworth* is the testimony of Elizabeth Conkin. Ms. Conkin stated that, on the night prior to V.R.'s death, she saw V.R. with a white male who was slender through the hips and had shaggy blonde hair. Tr. 77-78. Ms. Conkin identified a photograph of Appellant from that

Instead, this case falls into the general circumstance of evidence that merely indicates that the alternative suspect might have had the opportunity to commit the offense without any direct evidence of guilt. For example, in *Chaney,* this Court was faced with evidence that a known pedophile lived near the victim, lied to the police about his whereabouts, and may have been familiar with the area where the body was found. 967 S.W.2d at 54-55. This Court found that such evidence merely cast a bare suspicion on the alternative suspect, and did not constitute direct evidence of the alternative suspect's involvement in the murder. *Id.* at 55.

In *State v. Rousan,* 961 S.W.2d 831 (Mo. banc 1998), the defendant sought to introduce evidence that another person had a motive for killing the victim and had been considered a potential suspect by law enforcement and family members of the victim. *Id.* at 848. This Court found that such evidence did not show any act directly connecting that alternative suspect to the murder. *Id.*

As this Court noted in explaining the basis for the rule in *State v. Wise,* 879 S.W.2d 494 (Mo. banc 1994), evidence that another person had the opportunity to

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general time period as matching the face and the hips of the person who was with V.R. Tr. 78-79, 81. No offer of proof was made with Ms. Conkin as to whether or not Mr. Kiger resembled the person whom she saw with Appellant. Instead, Appellant relies on Ms. Dearborn's description of Mr. Kiger as generally matching the general description given by Ms. Conkin. Appellant's Brief at 75, 83. This vague potential match is substantially different from the positive identification in *Woodworth.*

commit the crime does not exonerate a defendant who also had the opportunity to commit the crime. *Id.* at 511. As such, it is not enough to demonstrate that an alternative suspect had opportunity or motive, but rather, before evidence about an alternative suspect can properly be introduced before the jury, there must be evidence demonstrating some act connecting Appellant to the crime.

In this case, there is no such direct evidence. In fact, most of Appellant's evidence merely demonstrates potential opportunity. For example, Appellant cites to evidence that Mr. Kiger was familiar with the area where V.R.'s body was found and may have been there with Ms. Dearborn in late May or early June, and to evidence that Mr. Kiger may have been near an area where Mary Rindahl may have seen V.R.[12] Appellant's Brief at 71-72. This evidence is a classic example of mere opportunity as neither actually places Mr. Kiger with V.R. prior to her death.

The remainder of the evidence that Appellant claims connects Mr. Kiger to the murder involves a large degree of speculation to distinguish Mr. Kiger from numerous other individuals residing in the St. Louis area at the time of the offense. For example, Appellant claims that Mr. Kiger had access to (and may have taken) a paring knife belonging to Ms. Dearborn, and that a paring knife could have caused the knife wounds suffered by V.R. Appellant's Brief at 83-84. Likewise, Appellant claims that Mr. Kiger

[12] Ms. Rindahl testified that she saw V.R. at approximately 11:00 a.m. on June 6. Tr. 376-77. However, Dr. Drake estimated the time of V.R.'s death at sometime between 1:00 a.m. and 9:00 a.m. on June 6. Tr. 311-15.

liked to collect keys and there was a key ring missing from V.R. Appellant's Brief at 74. Similarly, Appellant points to Mr. Kiger potentially matching a general description given by Ms. Conkin of a person seen with V.R. shortly prior to her death. Appellant's Brief at 82. Appellant also points to the matchbook found near V.R. Appellant's Brief at 74-75.

However, for all of these pieces of evidence, the link is speculative. Ms. Dearborn provided no specific details about the missing paring knife that would permit the inference that the missing paring knife was the knife used in the murder of V.R. In the absence of such details, the fact that Mr. Kiger had access to such a knife would merely demonstrate that Mr. Kiger had the opportunity to commit the offense. Likewise, there was no testimony about the matchbook found at the crime scene that would connect the matchbook to Mr. Kiger as opposed to other smokers (or anyone else) in the greater St. Louis area.[13]

As to the fact that Mr. Kiger collected keys, there was no indication in the record that Mr. Kiger ever had possession of the key ring that went missing from V.R. While Ms. Dearborn remembered seeing a key ring that potentially matched E.A.'s key ring, there was no evidence regarding her seeing a key ring that matched V.R.'s.

As to the description from Ms. Conkin of the person with V.R., as noted above, the description was very generic – hair color, build, and race – and could have matched several individuals, with Ms. Conkin specifically identifying Appellant as matching the description. Other than a general description by Ms. Dearborn indicating that Mr. Kiger

[13] There was no evidence as to whether or not Mr. Bowman was a smoker.

also could fit within Ms. Conkin's description, there was no evidence that Mr. Kiger, as opposed to other blond-haired twenty-somethings in the St. Louis area, was the person who was seen with V.R.

That leaves testimony about Mr. Kiger's mental state and statements that he had done something wrong. However, as Appellant's brief notes, Mr. Kiger was involved with or potentially involved in other homicides during this time period as well as losing his employment. As this Court noted in *Chaney*, evidence of consciousness of guilt is not evidence that an alternative suspect committed any act directly connecting the alternative suspect to the crime at hand. 967 S.W.2d at 55.

In short, Appellant's evidence, whether taken separately or together, indicates why the police might have been interested in pursuing Mr. Kiger as a potential suspect in the absence of other leads. It does not, however, demonstrate that Mr. Kiger took any act directly connecting Mr. Kiger to the death of V.R. As such, evidence intended to cause the jury to speculate about whether Mr. Kiger could be an alternative suspect was not admissible in this case, and the trial court properly excluded such evidence.

Point II should be denied.

Point III (Sufficiency)

The trial court did not err in denying Appellant's motion for judgment of acquittal and entering a judgment of conviction because there was sufficient evidence that Appellant was the person who killed V.R. in that Elizabeth Conkin saw a person resembling Appellant with V.R. late in the evening on June 5, 1977, Dr. Drake estimated a time of death in the early morning hours of June 6, 1977, Appellant's semen was found on the inside of V.R.'s underwear, and the bra of V.R. had been removed and stuffed in her mouth indicating a potential sexual element to the murder.

This Court reviews the sufficiency of the evidence in the light most favorable to the finding of guilt. *State v. Belton,* 153 S.W.3d 307, 309 (Mo. banc 2005). This Court makes all reasonable inferences in support of that finding and disregards all evidence and inferences contrary to the finding. *Id.* Evidence is sufficient to support guilt if a reasonable inference supports guilt even if other "equally valid" inferences do not. *State v. Freeman,* 269 S.W.3d 422, 424-25 & n. 4 (Mo. banc 2008). The credibility and weight to be given to testimony is a matter for the fact-finder to determine. *State v. Crawford,* 68 S.W.3d 406, 408 (Mo. banc 2002). The fact-finder may believe all, some, or none of the testimony of any witness. *Id.*

Appellant attempts to distinguish this case from several other cases in which evidence was found to be sufficient. Appellant's Brief at 91-99. In making these distinctions, Appellant ignores evidence supporting the verdict, relies on evidence which the jury could have disregarded, or misstates the evidence.

As an initial point, in his argument, Appellant cites to the testimony of Ms. Rindahl to demonstrate that V.R. was still alive at 11:00 a.m. on June 6 to assert the argument that the State had to prove that he was with V.R. after 11:00 a.m. Appellant's Brief at 91. As noted below, there was actually evidence that contradicted the testimony of Ms. Rindahl and indicated that V.R. died prior to when Ms. Rindahl claimed to have seen V.R., and, as such, even aside from the ability of the jury to reject the testimony of any witness, the jury was not required to credit the testimony of Ms. Rindahl.

There were several key pieces of evidence as to the identity of the killer of V.R. The first piece of evidence was the testimony of Ms. Conkin. Ms. Conkin observed V.R. walking with a person that Ms. Conkin did not know at around 10:30 p.m. on June 5.[14] Tr. 72-75, 77. Ms. Conkin did not know Appellant. Tr. 78. Ms. Conkin identified person 6 in a photograph from a line-up as somebody that she thought she recognized as the person that was with V.R.[15] Tr. 78-79, 81. Appellant was person 6 in that line-up. Tr. 153. The photograph for the line-up was taken in 1978. Tr. 153.

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[14] This location was approximately twenty-four miles from the place where V.R.'s body was found.

[15] Ms. Conkin identified Appellant by the face and the hips, but thought the hair style was slightly different. Tr. 78-79, 81. However, the line-up was conducted at least seven months after Ms. Conkin saw Appellant. Tr. 153. A reasonable jury could consider the possibility that Appellant's hair style might change over that period of time.

Furthermore, Ms. Conkin indicated that when she tried to catch up with V.R. and this other person, this other person pulled V.R. closer and quickened their step as they walked away. Tr. 75.

The second piece of evidence was the time of death. The evidence indicated that the body of V.R. arrived at the morgue and went into the cooler between 12:40 a.m. or 2:00 a.m. on June 7, 1977. Tr. 311-13, 359. Based on the body temperature, the degree of rigor mortis, and the stage of maggots in the body, Dr. Drake estimated that the time of death was twenty-four hours prior to the body being placed in the cooler, plus or minus eight hours. Tr. 312-14. In particular, based on the degree of rigor mortis, Dr. Drake estimated the time of death at twenty-two to twenty-four hours prior to the time that the body was placed into the cooler. Tr. 313-14. Based on the degree of rigor mortis, the time of death would have been between 1:00 a.m. and 4:00 a.m. on June 6.

Third, Appellant's semen was found on the inside of V.R.'s underwear. Tr. 106-07, 179-80, 182-85, 192-93, 194-95, 199, 203, 216, 275-76. As such, despite Appellant's claim to the contrary, this evidence supports a reasonable inference that Appellant and V.R. had a sexual encounter of some type.

Fourth, V.R.'s friends and family did not know Appellant. Tr. 41-42, 51-52, 65-66, 78. Likewise, Appellant's friend had never heard of V.R. Tr. 285-86. This supports an inference that V.R.'s only contact with Appellant was when she first encountered him on the evening of June 5.

Fifth, when the body of V.R. was found, her shirt was pulled up and her bra was stuffed in her mouth. Tr. 102-03. Even aside from the other indicators of sexual assault

noted by Dr. Case, the appearance of the body would support an inference that there was a sexual component to the death of V.R.

The combination of this evidence would support an inference that Appellant had some type of sexual contact with V.R. around the time of her death, and that V.R. was killed by the person with whom she had sexual contact on the morning of June 6. Furthermore, the absence of the semen of any other individual supports the inference that Appellant was the person who sexually assaulted V.R. at the time of her death.

In several cases, courts have found that the presence of DNA of a defendant on a victim is sufficient to prove the identity of the person responsible for the death of the victim. *See, e.g., Freeman,* 269 S.W.3d at 424-27; *State v. Abdelmalik,* 273 S.W.3d 61, 63-66 (Mo. App. W.D. 2008); *State v. Calhoun,* 259 S.W.3d 53, 56-57 (Mo. App. W.D. 2008).

The Western District in *Abdelmalik* specifically held that when "DNA material is found in a location, quantity, and type inconsistent with casual contact," and that DNA sufficiently identifies the defendant as the contributor of the DNA, the evidence is sufficient to support a finding of guilt. 273 S.W.3d at 66.

Furthermore, as the Western District noted in *Calhoun,* the standard of review involves consideration of all of the evidence in the case, including evidence which the defendant claims to have been improperly admitted. 259 S.W.3d at 58.

Appellant attempts to distinguish *Freeman* on the basis of claims about the significance of the DNA evidence. Appellant's Brief at 93-94. Respondent would respectfully suggest that the presence of semen in the underwear of the victim of an

apparent sexual assault is at least as significant as the presence of DNA on the stockings or neck as was the case in *Freeman.* Appellant also tries to claim, as noted above, that, unlike in *Freeman,* and in *State v. Kinder*, 942 S.W.2d 313 (Mo. banc 1996), nobody saw him with V.R. prior to her death. Appellant's Brief at 93-94. However, that claim ignores the testimony of Ms. Conkin identifying Appellant as the person who was with V.R.[16] Tr. 78-79, 81, 153.

Even if, as Appellant asserts, the sole evidence connecting Appellant to the homicide were the DNA evidence, as noted in *Abdelmalik,* other jurisdictions have held that DNA evidence standing alone can be sufficient evidence of guilt. 273 S.W.3d at 56 n. 3. *See, e.g., State v. Toomes,* 191 S.W.3d 122, 127-32 (Tenn. Crim. App. 2005) (DNA evidence sufficient to demonstrate that defendant was person who sexually assaulted victim); *Roberson v. State,* 16 S.W.3d 156, 167-71 (Tx. App. 2000) (DNA evidence from semen sufficient to prove that defendant was person who sexually assaulted victim).

[16] To the extent that Appellant argues regarding the impact of evidence that he did not know V.R., that evidence cuts both ways as a distinction from *State v. Chaney*, 967 S.W.2d 47 (Mo. banc 1998), *Freeman,* and *Kinder*. On the one hand, it eliminates potential motives. On the other hand, it eliminates alternative explanations for Appellant's DNA being on V.R. Determining the weight to be given to the fact that Appellant did not know V.R. was the jury's obligation, and this Court should not hold that such evidence is per se exculpatory.

As noted by the Tennessee Court of Criminal Appeals in *Toomes,* DNA evidence is analogous to fingerprint evidence. 191 S.W.3d at 130. In *State v. Grim,* 854 S.W.2d 403, 411-14 (Mo. banc 1993), this Court examined whether a fingerprint found at the scene of a crime under suspicious circumstances – with no other evidence connecting a defendant to the murder – was sufficient, and held that it was. Just as a fingerprint on the property of the victim in a case of burglary and murder is sufficient to identify the defendant for those charges, Respondent would respectfully submit that the presence of DNA in semen is sufficient to identify the defendant in a case of sexual assault and murder.

Ultimately, as this Court noted in *Chaney,* the issue is not whether there are alternative explanations of the evidence, even equally valid explanation of the evidence, that are inconsistent with guilt. 967 S.W.2d at 53-54. Instead, the question is whether there is evidence and inferences from that evidence supporting a finding of guilt.

Taking the evidence in the light most favorable to a finding of guilt, the evidence and the inferences from this evidence indicated as follows:

1) V.R. went to Kansas City at the end of May, 1977, and was in Kansas City through June 4, 1977. Tr. 35-36.

2) On June 4, 1977, V.R. left Kansas City and went to St. Louis with Robert Keener. Tr. 36-37, 45-47. V.R. was with Mr. Keener until he dropped her off outside a restaurant at around 9:00 p.m. on June 5. Tr. 47-49, 68. V.R. was supposed to meet back up with Mr. Keener at his mother's house return to Kansas City with Mr. Keener. Tr. 51.

3) V.R. was next seen about a half mile to a mile away from the restaurant by Elizabeth Conkin at around 10:30 p.m. Tr. 71-72, 85. At that time, V.R. was in the company of a person who looked like Appellant. Tr. 78-79. When Ms. Conkin tried to get closer to talk to V.R., V.R. and the other person began to walk faster.[17] Tr. 74-75.

4) At some point during the encounter with V.R., Appellant ejaculated on or in V.R.[18]

5) V.R. was killed shortly after she was seen with and/or had sex with Appellant. Tr. 85, 312-14. The homicide had sexual overtones consistent with her being killed during a sexual assault. Tr. 359-61.

In light of all of this evidence, it was not unreasonable for the jury to use the presence of Appellant's DNA on V.R. to conclude that Appellant was, in fact, the person

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[17] The jury could reasonably infer that V.R. and the other person were walking faster because Appellant wanted to avoid being seen by Ms. Conkin.

[18] As V.R. was in Kansas City or with Mr. Keener, prior to the evening of June 5, it was reasonable for the jury to infer that Appellant's semen did not come from a sexual encounter prior to the evening of June 5 despite Appellant's attempts to suggest that the forensic examiners could not state when the semen got on V.R. Tr. 244. Vaginal smears did show the presence of sperm, but there was no evidence introduced at trial as to the source of the sperm. Tr. 307. However, given that the semen in her underwear was from Appellant, it would not have been unreasonable for the jury to infer that the sperm in her vagina also came from Appellant.

seen by Ms. Conkin with V.R. at 10:30 p.m. It was not unreasonable for the jury to infer that Appellant was the person trying to get away from Ms. Conkin because he did not want anybody to see him with V.R. It was not unreasonable to infer that Appellant took V.R. against her will to an isolated location such as Greensfelder Park to have sex with her, and, in fact, had sex with V.R. Lastly, it was not unreasonable for the jury to infer that, as Appellant was the person who had sex with V.R., he also was the person who killed her.

Point III should be denied.

Point IV (Other Crimes/Victim Impact)

The trial court did not plainly err in admitting evidence regarding the details of other crimes that Appellant had committed because other crimes evidence is admissible in the penalty phase of a capital murder case and the evidence in this case was not excessive in that it consisted primarily of a simple recitation of the details of the offense. Furthermore, to the extent that such recitations contained some victim impact evidence, the trial court did not plainly err or abuse its discretion because such evidence was not excessive in that it was brief and did not contain extensive details or other information of the type that has been found to be unduly prejudicial.

For preserved issues, the decision of the trial court regarding the admission of evidence is reviewed for abuse of discretion and resulting prejudice. *State v. Taylor*, 298 S.W.3d 482, 491 (Mo. banc 2009). The trial court abuses its discretion when its ruling is "clearly against the logic of the circumstances." *Id.*

For unpreserved issues, review is limited to plain error review. Plain error review is a two-step process. *State v. Baumruk*, 280 S.W.3d 600, 607 (Mo. banc 2009). First, this Court determines whether there are facial grounds for believing that plain error has occurred with error being plain error only if the error is "evident, obvious, and clear." *Id.* Second, if plain error is found, this Court then determines whether that error constitutes manifest injustice. *Id.*

To preserve a claim of error for appeal, a party must timely make a specific objection to the evidence at trial and must raise the same claim on appeal. *State v. Moore*, 303 S.W.3d 515, 522-23 (Mo. banc 2010). In the present case, Appellant filed

several pre-trial motions related to victim impact evidence. L.F. 49-58. While those motions noted that the evidence would include testimony about other crimes that he had committed, he only claimed that such evidence was improper victim impact evidence. L.F. 49-50. Prior to the start of the penalty phase, Appellant renewed his motions and received a continuing objection based on those motions. Tr. 473-75. In the motion for new trial, Appellant again alleged that all of the evidence in the penalty phase was impermissible victim impact evidence, noting that some of the evidence concerned matters for which he had not been convicted. L.F. 142-44.

Both at trial and on appeal, Appellant's theory appears to be that all evidence of the facts of other crimes that Appellant has committed qualifies as victim impact evidence. L.F. 49-58, Appellant's Brief at 99-109. Appellant cites no authority for this proposition. As this Court has previously described it, victim impact evidence is evidence offered to demonstrate the uniqueness of the victim of a defendant's crime and the specific harm caused by that crime. *State v. Johnson*, 284 S.W.3d 561, 583 (Mo. banc 2009). Evidence of other crimes committed by a defendant is not victim impact evidence, but rather is a separate factor going to the character of a defendant. To the extent that Appellant's arguments at the trial level and to this Court are based on victim impact principles, any claim that evidence that Appellant committed or may have committed other crimes was not proper other crimes evidence was not preserved for appeal.

Review on this matter is further complicated by the fact that at trial and on appeal, Appellant makes a blanket argument that all of the evidence was improper. Appellant's

Brief at 103-09. Appellant does not identify what about any particular piece of evidence was improperly inflammatory and exceeded the scope of permissible victim impact testimony. Respondent would respectfully submit that a motion in limine that makes general statements of the permissible scope of victim impact evidence without individualized objections to any victim impact evidence that Appellant believed was unduly prejudicial is not adequate to preserve the claim for review.

In any case, the evidence of the facts of the other cases – the assault on Ms. Suchaczewski, the assault on P.M., the kidnapping of Ms. Feurer, and the murders of Et.W. and R.J. – were properly introduced as other crimes evidence. The State is permitted as part of the penalty phase to introduce evidence of other crimes committed by a defendant as part of the evidence in aggravation or non-statutory aggravating circumstances in a trial. *See State v. Bucklew*, 973 S.W.2d 83, 96 (Mo. banc 1998); *State v. Grubb,* 724 S.W.2d 494, 500 (Mo. banc 1987). Such evidence can include evidence of crimes for which a defendant has not been convicted. *Bucklew,* 973 S.W.2d at 96. As such, Appellant's claim that this evidence was inadmissible because he has not been convicted for the sexual assault of P.M. or the murders of El.W. or R.J. does not accurately state the law in Missouri.

It is within the discretion of the trial court to determine the scope of evidence regarding prior bad acts, including evidence of unconvicted offenses. *State v. Johns,* 34 S.W.3d 93, 112-14 (Mo. banc 2000). In *Johns,* this Court found that it was not excessive to produce testimony from twenty-one witnesses to prove six burglaries and two murders during the penalty phase. *Id.* In the present case, the state produced five witnesses to

prove five crimes including two murders, all consisting of very brief testimony. Tr. 478-513. Furthermore, as *Johns* notes, one of the main concerns with evidence of uncharged offenses is the issue of notice. *Id.* at 113-14. In this case, the State filed their notice of aggravating circumstances over two months prior to trial, and Appellant raised no objection regarding the timeliness or completeness of the State's notice. L.F. 11.

Furthermore, to the extent that there was actual victim impact evidence, none of that evidence exceeded the scope that this Court has previously found to be permissible. Victim impact evidence is only impermissible if it is so unduly prejudicial as to render the trial unfair. *State v. Middleton*, 995 S.W.2d 443, 465 (Mo. banc 1999). In *Johnson,* this Court found that it was permissible to read a letter from the victim's son describing how his father's murder made him sad, and how much he missed his father. 284 S.W.3d at 583-84. In *State v. Forrest,* 183 S.W.3d 218 (Mo. banc 2006), this Court found it permissible for the family of the victim to describe the hardships that the family had gone through after the murder, even hardships unrelated to the murder. *Id.* at 225. In *Storey v. State,* 175 S.W.3d 116 (Mo. banc 2005), this Court rejected claims that victim impact evidence was improper when the victim impact included a witness stating that she could only see the victim by going to the cemetery, other witnesses characterizing the murder as brutal and heinous, other witnesses talking about how the victim had helped one of the witnesses with his learning, another witness claimed that the trauma connected with the murder and subsequent proceedings had contributed to the death of a member of the family, and evidence which contained references to the impact of the murder on the spirituality of the family and friends of the victim. *Id.* at 132-35. Likewise, in *State v.*

Storey, 40 S.W.3d 898 (Mo. banc 2001), this Court approved victim impact evidence which included poems, a photograph of a memorial garden, a school newsletter, a poem, and a eulogy with the only improper evidence being a photograph of the victim's tombstone. *Id.* at 908-10.

By way of contrast to these decisions, the victim impact evidence in the present case was minimal. Ms. Suchaczewski's victim impact testimony was limited to stating that she had kept her number unlisted out of fear, and that she prayed that nothing would happen to her grandchildren. Tr. 482-83. P.M.'s victim impact testimony was limited to stating that the crime that Appellant had committed against her had been with her every day since it happened. Tr. 489. There was no victim impact evidence with Ms. Feurer. Tr. 491-95. Et.W. described how El.W. had been a good child and what she had accomplished in school prior to her death. Tr. 510. Et.W. also stated that they thought about El.W.'s death all of the time, and that El.W.'s younger brother, who had Down's syndrome was really hurt when El.W. died. Tr. 510-11. All of this evidence was substantially milder than the evidence presented in *Storey* and *Forrest.*

The primary victim impact evidence came from D.R. Like the relatives of the decedent in *Forrest,* D.R. talked about the hardships that the family had gone through, as part of explaining his close relationship with his sister. Tr. 516-21. Such comments were also similar to the victim impact testimony in *State v. Gill,* 167 S.W.3d 184, 195-97 (Mo. banc 2005). D.R. also talked very briefly about the impact of the crime, and the length of the investigation, on him and his family. Tr. 522-23.

In short, the actual victim impact evidence stayed within the confines that have previously been approved by this Court, and Appellant has failed to carry the burden of showing that this evidence was improperly inflammatory. The actual evidence that Appellant had committed these other crimes is not victim impact evidence, and was properly before the jury as evidence of Appellant's character.

Point IV should be denied.

Point V (Strike Aggravating Circumstances/Independent Review)

The trial court did not err or abuse its discretion in failing to strike the State's First Amended Notice of Evidence in Aggravation because Appellant failed to raise a cognizable objection to that Notice in that a claim that the death penalty would be disproportionate is a claim properly raised to this Court under Section 565.014, RSMo. 1978. On the independent review conducted by this Court, the sentence of death should be upheld in that the sentence of death was not the product of passion or prejudice, the evidence supported both statutory aggravating circumstances found by the jury, and the sentence is not disproportionate as the evidence in aggravation is similar to multiple other cases in which the death penalty was imposed. Furthermore, to the extent that Appellant's argument is based on claims related to the strength of the evidence, strength of the evidence is not a factor in proportionality review under Section 565.014. Additionally, even if it were, the evidence is sufficiently strong in light of the multiple aggravating factors present in this case.

In his point relied on Appellant argues that the trial court should have precluded the jury from considering the death penalty (and therefore struck the State's notice of evidence in aggravation) because the sentence of death is disproportionate. Appellant's Brief at 41-42, 109-10. In his argument, Appellant proceeds to argue that this Court

should find that the death penalty is disproportionate under Section 565.035, RSMo. 2000.[19] Appellant's Brief at 110-19.

To the extent that Appellant claims that the trial court should not have permitted the State to proceed because this Court's independent review might result in this Court finding that the death penalty should be reversed, such a claim is not supported by any reference to any authority, and is erroneous. The 1977 version of the homicide code established a procedure governing the imposition of the death penalty that made a distinction between the trial level and the appellate level.

At the trial level, the first requirement was that the defendant be found guilty of capital murder in Section 565.001, RSMo. 1978. Section 565.006.1, RSMo. 1978. If the defendant was found guilty, the fact-finder would then proceed to have a penalty phase at which the factors set forth in Section 565.012, RSMo. 1978, would be considered. Section 565.006.1, RSMo. 1978. Under Section 565.008, RSMo. 1978, if the fact-finder

[19] The current homicide code, with some minor revisions, has been in effect since 1984. Section 565.001, RSMo. 2000, specifically provides that the current code only governs offenses committed after July 1, 1984, and that the trial and appellate review of all offenses committed prior to July 1, 1984, is to be governed by the law in effect at the time that the offense was committed. While Section 565.014, RSMo. 1978, the law in effect at the time that this offense was committed, is similar in most respects to Section 565.035, RSMo. 2000, there are some significant differences as will be discussed below.

did not recommend the imposition of death, the sentence would be life imprisonment with the defendant not eligible for parole until he had served fifty years.

Section 565.012, RSMo. 1978, contained the statutory aggravating and mitigating circumstances that the jury was to consider. Under Section 565.012, the fact-finder had to find at least one statutory aggravating circumstance before it could impose a sentence of death. Section 565.012.5. Assuming that the fact-finder found that one aggravating circumstance, it was then to consider whether there was a sufficient aggravating circumstances warranting the imposition of death and whether there were mitigating circumstances which outweighed the aggravating circumstances. Section 565.012.1(4).

As the summary of this procedure reveals, the fact-finder, at no time, was required to determine whether the death penalty was disproportionate when compared to other cases. That requirement exists solely in the provisions governing appellate review of the sentence by this Court in Section 565.014.3(3), RSMo. 1978. As such, the trial court did not err or abuse its discretion by allowing the jury to make the initial determination given to it under Section 565.012.

On this Court's independent review, this Court first considers whether the death penalty was the product of passion, prejudice, or any other arbitrary factor. Section 565.014.1(1). Appellant does not specifically argue this factor in this point. Appellant's Brief at 110-19. The only potentially improper penalty phase evidence or argument noted by Appellant in his brief is the claim regarding victim impact evidence raised in Point IV. The only potentially improper guilt phase evidence or argument noted by Appellant in his brief is the claim regarding Dr. Case's testimony about sexual abuse raised in Point VIII.

Respondent stands on the arguments made in response to those two points as to why that evidence was properly admitted. Under the facts of this case, the evidence of Appellant's prior misconduct, its impact on the victim, and the expert testimony as to why the facts of this case were consistent with Appellant having sexually assaulted V.R. were properly before the jury, and any improper prejudice was minimal. Respondent respectfully submits that the record does not show that the sentence was imposed under the influence of passion or prejudice.

This Court also considers whether the evidence supports the jury's finding of a statutory aggravating circumstance. The jury in this case found two statutory aggravating circumstances – a prior history of serious assaultive convictions and that the offense was outrageously wanton or vile. L.F. 122-23.

As to the first circumstance, the testimony and exhibits revealed that Appellant had been convicted of armed robbery, aggravated battery, and unlawful restraint in the incident involving Ms. Suchaczewski. Tr. 479-84. Ms. Suchaczewski specifically testified that Appellant held a knife on her during those offenses. Tr. 479. This Court has previously found that a conviction for armed robbery qualifies as a serious assaultive conviction. *State v. Amrine,* 741 S.W.2d 665, 672 (Mo. banc 1987).

As to the second circumstance, the jury based its finding that the killing of V.R. was outrageously wanton or vile in that she was randomly selected. L.F. 122-23. As noted in the previous point, the evidence in this case indicated that Appellant was unknown to the victim's family and friends prior to the date of the killing, and V.R. was unknown to Appellant's friends, supporting the inference that there was no association

between Appellant and V.R. prior to the evening of June 5. Tr. 41-42, 51-52, 65-66, 78, 285-86. Submission of the aggravating circumstance that a murder was outrageously wanton and vile on the basis of the random selection of the victim has previously been upheld in *State v. Ferguson,* 20 S.W.3d 485, 500 (Mo. banc 2000).

That leaves the claim of proportionality. Appellant's primary argument that this case is disproportionate is this Court's holding in *State v. Chaney,* 967 S.W.2d 47 (Mo. banc 1998), regarding the impact of the strength of the evidence on proportionality. Appellant's Brief at 110-19. However, Appellant ignores that the review in this case is conducted under the 1977 version of proportionality review, not the current version. Section 565.035, RSMo. 2000, mandates that this Court consider the strength of the evidence as part of its proportionality review. Section 565.014, RSMo. 1978, only authorized this Court to consider the crime and the defendant. As such, that part of *Chaney* regarding the strength of the evidence of guilt is not legally applicable to the present case as Section 565.001, RSMo. 2000, requires this Court to conduct appellate review of this matter using the law in effect at the time of the offense.

Furthermore, even if this Court were to consider the strength of the evidence, as noted in Point III, Respondent believes that the evidence in this case is stronger than was found in *Chaney.* In *Chaney,* the victim was a friend of the defendant's stepdaughter and had been visiting the defendant's house prior to her disappearance. 967 S.W.2d at 49-50. The primary evidence against the defendant in *Chaney* was the presence of material similar to that found in the defendant's van on the victim, hair possibly belonging to the victim found in the van, and hair that might belong to the defendant found on the victim.

Id. at 51-52. As to the hair possibly belonging to the victim, testing indicated that less than 0.5% of the population could match that hair.[20] *Id.* In holding that the evidence was weak, this Court noted the absence of more conclusive identification evidence like blood or a fingerprint. *Id.* at 60. In this case, there was that type of conclusive evidence – Appellant's semen found in the underwear of the victim. Tr. 106-07, 179-80, 182-85, 192-93, 194-95, 199, 203, 216, 275-76. Furthermore, unlike in *Chaney*, where the DNA evidence was somewhat inconclusive – only limiting the person in the defendant's vehicle to 0.5% of the population – the evidence in this case effectively limited the DNA found on the victim to Appellant or an identical twin. Tr. 203.

In addition, the holding in *Chaney* also took into consideration the relative lack of evidence in aggravation outside of the circumstances of the murder itself, and the strength of the evidence in mitigation. 967 S.W.2d at 60. The evidence in aggravation in *Chaney* consisted almost entirely of uncharged misconduct involving unspecified sexual and physical assaults on his wife and her family. *Id.* at 58. In the present case, the evidence in aggravation consists of multiple serious felony convictions and two murders which were apparently still pending at the time of trial. In addition in *Chaney*, there was apparently substantial mitigation evidence regarding the defendant's reputation in the community. 967 S.W.2d at 60. In the present case, the only evidence in mitigation was

[20] While DNA testing was done for the hair of the victim in *Chaney*, based on the population estimate, it appears that only some loci could be tested.

Appellant's self-serving claim that he had been a good inmate while in prison. Tr. 551-56.

This Court was faced with a similar claim to Appellant's in *State v. Barton*, 240 S.W.3d 693 (Mo. banc 2007). In rejecting the claim in *Barton*, this Court found two major distinctions from *Chaney*. First, this Court noted the presence of blood evidence connecting the defendant to the victim. 240 S.W.3d at 710. Respondent would respectfully submit that the semen evidence in this case is similar to the blood evidence in *Barton*. Second, this Court noted the other evidence in aggravation in *Barton* consisted of prior convictions for assault. *Id.* Respondent would note that Appellant's record is even more serious than the record of the defendant in *Barton*.

In short, the statutory basis for this Court's holding in *Chaney* does not apply to a murder committed in 1977. Furthermore, the facts in this case are readily distinguishable from *Chaney*, and *Chaney* should not be read, as Appellant implies, as creating a per se rule against imposing the death penalty in a case based on circumstantial evidence.

The remainder of Appellant's argument is that his case is not quite as bad as some other cases in which the death penalty was imposed. Appellant's Brief at 113-14. Appellant's argument misses the essence of proportionality review. Proportionality review is not designed to find the absolute worst case and hold that the death penalty may only be imposed for that circumstance. Instead, the purpose of proportionality review is to prevent the freakish or wanton imposition of the death penalty. *State v. Black*, 50 S.W.3d 778, 793 (Mo. banc 2001). Upon consideration of all of the evidence at trial, the

circumstances of this case reveal that this case is substantially similar to the type of circumstances previously found to warrant the death penalty.

The jury found that Appellant had committed at least three murders in his life – the murder of V.R., and the murders of El.W. and R.J. L.F. 123. The jury also found that Appellant had committed three other offenses involving Ms. Suchaczewski, P.M., and Ms. Feurer. L.F. 122-23. The evidence indicated that several of these offenses, including the murders of V.R. and El.W., had sexual components, or potential sexual components. Tr. 102-03, 216, 307-08, 324, 359-60, 481-82, 487, 498.

In *Ferguson*, this Court upheld the death penalty in the case of a random victim who had been kidnapped and sexually assaulted on a defendant who had two prior assaults. 20 S.W.3d at 494. In addition, there was mitigating evidence presented in *Ferguson* of the defendant's good character and history of psychological problems. *Id.* at 493-94. By way of contrast, Appellant's mitigation evidence consisted primarily of his own testimony that he had been well behaved while incarcerated, and had a previous head injury. Tr. 551-56.

The death penalty has been affirmed as proportionate in the following cases involving defendants who had been involved in multiple homicides. *State v. Taylor*, 134 S.W.3d 21 (Mo. banc 2004); *State v. Smith*, 32 S.W.3d 532 (Mo. banc 2000); *State v. Nicklasson*, 967 S.W.2d 596 (Mo. banc 1998); *State v. Skillicorn*, 944 S.W.2d 877 (Mo. banc 1998); *State v. Hunter*, 840 S.W.2d 850 (Mo. banc 1992).

The death penalty has been affirmed in the following cases in which there was evidence that the victim was sexually assaulted or the defendant had a history of sexual

assaults. *State v. McLaughlin,* 265 S.W.3d 257 (Mo. banc 2008); *State v. Zink,* 181 S.W.3d 66 (Mo. banc 2005); *State v. Glass,* 136 S.W.3d 496 (Mo. banc 2004); *State v. Link,* 25 S.W.3d 136 (Mo. banc 2000); *State v. Worthington,* 8 S.W.3d 83 (Mo. banc 1999); *State v. Nunley,* 923 S.W.2d 911 (Mo. banc 1996).

In light of the numerous cases imposing the death penalty under circumstances similar to or less significant than the circumstances in the present case, this Court should conclude that the imposition of the death penalty in this case is neither wanton nor freakish.

Point V should be denied.

Point VI (DNA Test Results)

The trial court did not plainly err in permitting Margaret Walsh to testify about DNA test results because:

1) **this issue is not properly before this Court as claims of inadequate chain of custody must be timely raised or are waived and the claim made by Appellant was not timely raised in that the sole objection at trial was as to the adequacy of identification; and**

2) **there was an adequate chain of custody to give reasonable assurances that the evidence was in the same condition as when seized and had not been improperly altered or contaminated in that Detective Moore and Dr. Drake specifically identified the underwear as the underwear that was removed from V.R. at the autopsy, Detective Moore testified that the underwear was still in the same substantial condition, and there is no reasonable likelihood of contamination as the DNA tests were performed on the underwear prior to Appellant being a suspect in the case.**

For unpreserved claims of error, review is limited to plain error review. Plain error review is a two-step process. *State v. Baumruk,* 280 S.W.3d 600, 607 (Mo. banc 2009). First, this Court determines whether there are facial grounds for believing that plain error has occurred with error being plain error only if the error is "evident, obvious, and clear." *Id.* Second, if plain error is found, this Court then determines whether that error constitutes manifest injustice.

For preserved issues, the decision of the trial court regarding the admission of evidence is reviewed for abuse of discretion and resulting prejudice. *State v. Taylor*, 298 S.W.3d 482, 491 (Mo. banc 2009). The trial court abuses its discretion when its ruling is "clearly against the logic of the circumstances." *Id.*

To preserve a claim of error for appeal, a party must timely make a specific objection to the evidence at trial and must raise the same claim on appeal. *State v. Moore*, 303 S.W.3d 515, 522-23 (Mo. banc 2010). Furthermore, claims of error related to chain of custody or other foundational issues normally must be made at the time that the evidence is offered or such claims are waived. *State v. Stewart*, 18 S.W.3d 75, 90 n. 5 (Mo. App. E.D. 2000); *State v. Blue*, 875 S.W.2d 632, 633 (Mo. App. E.D. 1994).

Appellant raised several challenges at the trial court to testimony regarding DNA evidence, and the exhibits from which that evidence was obtained. However, a comparison of Appellant's arguments on appeal to the arguments made prior and during the testimony of Ms. Walsh reveals that the issues raised on appeal are not the issues raised at trial.

Prior to trial, not counting the motion to suppress, Appellant filed four motions related to testimony about the DNA evidence L.F. 74-77, 78-80, 90-100, 101-05. While the motions raised questions about the expertise of the witnesses, the timeliness of disclosure, and whether sufficient loci had been compared to allow any proper conclusions, none of the motions made any suggestion that there was an inadequate chain of custody. L.F. 74-77, 78-80, 90-100, 101-05.

At the start of trial, Appellant obtained a continuing objection based on his pre-trial motions. Tr. 18-20. However, since none of the pre-trial motions addressed chain of custody, that continuing objection did not preserve any of the claims related to chain of custody raised on appeal.

At the time that V.R.'s underwear was introduced into evidence, Appellant objected on the basis of foundation. Tr. 107. When the trial court attempted to determine if Appellant was objecting based on the lack of evidence as to "what he did with them," trial counsel responded "No, he failed to specifically identify them." Tr. 107. As such, the only specific objection regarding foundation made at that point in time was the lack of evidence from the witness, Detective Gregory Moore, identifying the panties.

During the testimony of Karlyn Rensing, mention was made of the panties being found in a sealed box (apparently Exhibit 10). Tr. 143, 147. Detective Moore had previously identified the box as containing "other" items seized from the residence of Mr. Keener's mother. Tr. 115-16. No motion to strike the underwear or any of the other exhibits was made during the testimony of Ms. Rensing. Tr. 141-48.

During the testimony of Margaret Walsh, Ms. Walsh testified about the process of opening the box, how the items were packaged, how she performed initial tests on those items and took cuttings from some of those items, how she performed DNA analysis on the cuttings, and the results of that DNA analysis. Tr. 179-94. No objection was made at any point during this testimony. Tr. 179-94. After Ms. Walsh testified about obtaining a DNA sample from Appellant, Ms. Walsh's lab report was offered. Tr. 196. At that time, the only objection made was that some of the data on the lab report concerned matters not

yet in evidence. Tr. 196-98. When the cuttings from the shirt and the underwear were offered, Appellant's trial counsel stated "no objection." Tr. 204. No other objections were made during Ms. Walsh's testimony. Tr. 204-83. At one point, there was a recess for an offer of proof (regarding the vaginal slides), during which Appellant's counsel complained that Detective Moore had testified about underwear that "[h]e thinks was on the body, but he's not sure." Tr. 282-83.

In his motion for judgment of acquittal at the close of the State's evidence, Appellant again raised that the identification of the panties was inadequate in light of other evidence suggesting that the underwear on which the tests were performed (primarily photographs) might not be the underwear taken from the body. Tr. 369.

The first time that the issue of contamination or the chain of custody after the initial seizure was raised was in Appellant's motion for new trial. L.F. 147-48. Even in that motion, Appellant conceded that positive identification is an adequate chain of custody. L.F. 148.

As no objection based on the inadequacy of the evidence of the chain of custody related to contamination was raised at trial, this issue is not properly preserved for appeal.

As this Court has previously stated, an adequate chain of custody is established when the trial court is satisfied "as to the identity of the exhibits and that the exhibits are in the same condition when tested as when the exhibits were originally obtained." *State v. Link*, 25 S.W.3d 135, 146 (Mo. banc 2000). There is no requirement of proof of hand-to-hand custody or proof that eliminates all possibility of tampering. *Id.* Instead, "the trial court may assume, absent a showing of bad faith, ill will or proof, that officials

having custody of the exhibits properly discharged their duties and that no tampering occurred." *Id.*

When an exhibit is positively indentified at trial, chain of custody is no longer required to prove that the item introduced at trial is the item previously taken into custody. *State v. Gott*, 191 S.W.3d 113, 117 (Mo. App. S.D. 2006); *State v. Sammons*, 93 S.W.3d 808, 810 (Mo. App. E.D. 2002); *State v. Clifford*, 815 S.W.2d 3, 8 (Mo. App. W.D. 1991). Any alleged weakness in such an identification goes to the weight to be given the evidence by the jury, not its admissibility. *Gott*, 191 S.W.3d at 117.

In this case, Detective Gregory Moore, when shown Exhibit 3C, testified "[t]hese would have been the panties worn by the victim, I recall the brown lace trim." Tr. 106. When asked whether this exhibit was "in substantially the same condition as when you saw them on the victim at the crime scene," Detective Moore answered "Yes." Tr. 106-07. Dr. William Drake, when asked about Exhibit 3C also stated that Exhibit 3C were the panties from the autopsy but noted that certain features of the panties were not clearly shown in the photographs from the autopsy. Tr. 317, 323.

Appellant cites to *State v. Burnfin*, 771 S.W.2d 908 (Mo. App. W.D. 1989), as authority for holding that the chain of custody in this case was inadequate. Appellant's Brief at 120-23. However, the facts in *Burnfin* are substantially different than the present case. In *Burnfin*, the Western District noted that no witness identified the blood on which testing was performed as the blood taken from the victim. 771 S.W.2d at 913-14. As such, it is inapplicable to a case in which two witnesses positively identified the item tested.

Appellant also claims that the evidence that some items were missing from the box raises concerns about the reliability of the tests requiring the exclusion of the objects. Appellant's Brief at 122.

The evidence presented at trial indicated that the box containing the underwear was sealed when it was delivered to the laboratory. Tr. 142-43. Once inside the laboratory, the box was opened by Ms. Walsh and the items inside were compared to an inventory list. Tr. 179-81. The comparison of the items in the box to the inventory list showed that two items were missing. Tr. 179-81. One of the two items was a vial of blood, but a note on the inventory list showed that the blood had originally been placed in the laboratory's icebox and subsequently destroyed. Tr. 180. The other items were hair samples. Tr. 180.

Likewise, Appellant notes that there was a flood at the storage facility during the 1980s. Tr. 163-64, Appellant's Brief at 121. However, there was no evidence that the box or the items in the box showed any indication of water damage. Tr. 141-48, 155-64, 166-282.

While the missing hair samples raise some concerns about the custody of the evidence, and the flood raises other concerns, these concerns properly go to the weight of the evidence under the circumstances of this case. As the underwear was positively identified, the question for admissibility goes primarily to the possibility of contamination. Since the evidence in question is DNA, contamination would require that Appellant's DNA be present in the laboratory prior to the testing performed by Ms. Walsh. However, the testing on the underwear was done prior to the obtaining of

Appellant's buccal swab. Tr. 192-95. Furthermore, the underwear had been stored in a ziplock bag separate from the other clothes. Tr. 182-87. Under these circumstances, any concerns about the theoretical possibility of contamination properly goes to the weight of the evidence.

In an analogous case to the present one, *Dosset v. State,* 216 S.W.3d 7 (Tx. App. 2006), the Texas Court of Appeals dealt with a case in which it was possible that the DNA evidence may have been exposed to mold, fungus, or moisture. *Id.* at 21-22. The Texas Court of Criminal Appeals found that evidence indicating the possibility of exposure was insufficient to render the DNA evidence inadmissible. *Id.* In another cold case, in which the DNA profile from the evidence was developed prior to the receipt of any DNA from the defendant, the Ohio Court of Appeals found that any claim of contamination went to the weight of the DNA evidence not its admissibility. *State v. Hunter,* 169 Ohio.App.3d 65, 861 N.E.2d 898 (Ohio App. 2006).

Because Dr. Drake and Detective Moore positively identified the underwear on which the DNA tests were performed as the underwear that had been on V.R., Ms. Walsh's testimony about the DNA tests performed on that underwear was properly admitted. In the absence of any evidence indicating how that underwear could have been contaminated with Appellant's DNA at a time when the lab did not otherwise possess any items with Appellant's DNA, concerns about the way that the underwear was handled over the years between its initial seizure and the DNA test went toward the weight to be given to the DNA test not its admissibility.

Point VI should be denied.

Point VII (Unidentified Slides)

The trial court did not abuse its discretion or plainly err in excluding the cross-examination of Margaret Walsh about the circumstances in which two slides were found with the autopsy number assigned by the medical examiner to the autopsy of V.R. on the basis of relevancy because that was not the actual ruling of the trial court in that the ruling of the trial court was that the evidence which Appellant sought to introduce through Ms. Walsh was hearsay as the actual person who found the slides was Officer Joseph Burgoon, and Ms. Walsh's knowledge was based on what Officer Burgoon told her. Furthermore, the offer of proof also contained evidence regarding the tests that Ms. Walsh performed on the slides and such evidence was not admissible or relevant because there was an inadequate foundation to demonstrate that the slides were actually from the autopsy of V.R., and, as such, the trial court was entitled to reject the entire offer of proof. Even if the evidence about the existence of the slides should have been admitted to demonstrate problems with the way that the physical evidence was maintained in this case such evidence would have been cumulative to other evidence presented regarding the missing blood and hair samples, other testimony about the existence of the two vaginal slides, and the inability to find the slide which Dr. William Drake did create from a vaginal smear from V.R., and, as such, there was no prejudice from the exclusion of this testimony.

For preserved issues, the decision of the trial court regarding the admission of evidence is reviewed for abuse of discretion and resulting prejudice. *State v. Taylor,* 298

S.W.3d 482, 491 (Mo. banc 2009). The trial court abuses its discretion when its ruling is "clearly against the logic of the circumstances." *Id.*

For unpreserved claims of error, review is limited to plain error review. Plain error review is a two-step process. *State v. Baumruk,* 280 S.W.3d 600, 607 (Mo. banc 2009). First, this Court determines whether there are facial grounds for believing that plain error has occurred with error being plain error only if the error is "evident, obvious, and clear." *Id.* Second, if plain error is found, this Court then determines whether that error constitutes manifest injustice.

For claims related to the erroneous exclusion of evidence, a party must make an offer of proof demonstrating showing what the evidence will be, the relevance of the evidence, and every fact necessary to establish its admissibility. *State v. Tisius,* 92 S.W.3d 751, 767 (Mo. banc 2002). When an offer of proof contains both admissible and inadmissible evidence, a trial court does not abuse its discretion in denying the entirety of the offer of proof. *State v. Broussard,* 57 S.W.3d 902, 911 (Mo. App. S.D. 2001); *State v. Nettles,* 10 S.W.3d 521, 525 (Mo. App. E.D. 1999); *State v. Raine,* 829 S.W.2d 506, 511 (Mo. App. W.D. 1992).

Appellant claims on appeal that the trial court erred in excluding evidence regarding the "two slides that Dr. Drake collected during the autopsy" because the evidence was relevant. Appellant's Brief at 42, 123. Based on the argument section of the brief, it appears that the evidence that Appellant claimed was erroneously excluded was testimony from Margaret Walsh regarding her work with the two slides. Appellant's Brief at 124-28,

However, contrary to Appellant's point of error, this testimony was not excluded on relevancy grounds. Instead, the trial court found that, while the evidence might be relevant, any testimony from Ms. Walsh regarding how the slides came to be associated with the case was hearsay. Tr. 264

This ruling came about after Appellant sought to ask Ms. Walsh about two vaginal slides. Tr. 250. An objection was made regarding the foundation for those slides. Tr. 250. Appellant then presented an offer of proof. Tr. 253-61.

In the offer of proof, Ms. Walsh indicated that she learned about the two vaginal slides from Officer Joseph Burgoon, and that Officer Burgoon located the slides and brought them to her.[21] Tr. 253-54. In the offer of proof, Ms. Walsh indicated that there was a toxicology report related to the V.R. case that had the same numbers as was found on the slides. Tr. 254-56.

Ms. Walsh further testified that Officer Burgoon believed that those two slides "may" have been the slides that Dr. Drake took from V.R. in 1977. Tr. 256. Testing on those slides apparently excluded both Appellant and V.R., though at least one of the contributors of DNA on those slides was a female. Tr. 256-59. Ms. Walsh also indicated

[21] Neither the offer of proof nor the testimony from Officer Burgoon indicated where he found these slides. Tr. 163, 253-54. The testimony from Officer Burgoon merely indicated that he found two slides "relative" to the case and that they were numbered 77-181 and 77-1574.

that the two slides had the names of females on the labels, but that she and Officer Burgoon were not able to determine who those two persons were. Tr. 258-59.

At the conclusion of the offer of proof, the trial court stated that the "only thing that I can see right now is that this is a witness testifying as to hearsay." Tr. 264. The trial court went on to say, "obviously, you know, there's some mix-up which could be relevant. I don't know, but right now, this witness is only knowing about hearsay." Tr. 264. After this ruling, the State indicated that it would make Officer Burgoon available. Tr. 264. Appellant did not, however, opt to put Officer Burgoon back on the stand. Tr. 5, 375-410.

As the discussion related to the offer of proof indicates, there were two issues raised during the offer of proof. The first issue was that there were two vaginal slides that had somehow become associated with the case but nobody could determine how those slides were associated with the case or how those slides came to be associated with the case. Tr. 253-56, 258-65. The second issue was that testing on those slides excluded Appellant from being associated with those slides. Tr. 256-58. On the first issue, the trial court rejected the offer of proof because the testimony from Ms. Walsh was hearsay, not because it was irrelevant. Tr. 263. On the second issue, after Appellant rested and had been unable to lay any foundation with Dr. Drake that the two slides actually came from the autopsy, the trial court sustained the State's objection on the grounds of an inadequate foundation. Tr. 250, 409.

As Appellant challenges neither of the actual grounds on which the evidence was excluded at trial, he is unable to demonstrate that the trial court erred. However, even if Appellant had challenged the other grounds for the exclusion both rulings were correct.

As to the first issue, the trial court indicated that any testimony from Ms. Walsh regarding the details of how the slides were found would be hearsay. Hearsay is "an out-of-court statement that is used to prove the truth of the matter asserted and that depends upon the veracity of the statement for its value." *Taylor,* 298 S.W.3d at 492. Hearsay also can include testimony which is based on statements made by another. *State v. Courtney*, 258 S.W.3d 117, 119 (Mo. App. S.D. 2008); *Broussard,* 57 S.W.3d at 911-12.

In the present case, it is clear that Appellant sought to have Ms. Walsh testify regarding information that had been provided to her by Officer Burgoon. Ms. Walsh was not the individual who searched for and found the two slides. Instead, the evidence – both from Officer Burgoon's testimony and from the offer of proof -- indicated that it was Officer Burgoon who found those slides and determined that the numbers on them were associated with the autopsy of V.R. Tr. 163, 253-54, 259-61. Furthermore, it was Officer Burgoon who investigated the connection of the two women named on the slides to the case and was unable to discover any connection at least with regards to one of the two slides. Tr. 259-61. To the extent that Appellant merely wanted to establish that two slides were found by Officer Burgoon under circumstances that cast doubt on the procedures for maintaining the evidence from the murder of V.R., the trial court correctly ruled that Ms. Walsh did not have the personal knowledge to testify regarding those matters.

However, the offer of proof and arguments by trial counsel indicated a secondary purpose as well, to use the fact that tests on the slide excluded Appellant from being the contributor of the semen on those slides to imply that he was not the person who killed V.R. On that issue, the trial court correctly ruled that Appellant failed to adequately lay a foundation that the slides that Ms. Walsh tested were the actual slides created by Dr. Drake.

As noted in the previous point, an adequate chain of custody is established when the trial court is satisfied "as to the identity of the exhibits and that the exhibits are in the same condition when tested as when the exhibits were originally obtained." *State v. Link*, 25 S.W.3d 135, 146 (Mo. banc 2000). However, for the two slides examined by Ms. Walsh, there was no evidence meeting either requirement.

In particular, Dr. William Drake testified that, once he made a slide, he was not the person responsible for labeling the slide. Tr. 324-25, 331-32. Dr. Drake was unable to testify regarding who the two people who were named on the slide were or their relation to the case. Tr. 336-37. Dr. Drake was never specifically asked to indentify either of the two slides. Tr. 321-34, 336-37. Dr. Drake was asked about the case numbers for the V.R. autopsy, but Dr. Drake indicated that other people assigned those numbers. Tr. 325-28.

Based on the evidence from Dr. Drake, the chain of custody on the vaginal slides is very similar to the chain of custody that was found to be flawed in *State v. Burnfin*, 771 S.W.2d 908, 913-14 (Mo. App. W.D. 1989) (chain of custody inadequate when no witness identified tested blood as the blood drawn from the victim). Like in *Burnfin*, no

witness identified either of the two vaginal slides as coming from V.R. As such, the trial court did not err in excluding evidence regarding the tests performed on those vaginal slides.

Even if the trial court should have let Appellant question Ms. Walsh about what she had learned from Officer Burgoon about the slides, there was no prejudice, and thus no manifest injustice because any such evidence would have been cumulative to other evidence regarding problems with the maintenance of the evidence in this case. When evidence which was allegedly improperly excluded is cumulative to other evidence which was admitted, any error in the exclusion of such evidence is harmless. *State v. Gilbert*, 121 S.W.3d 341, 346 (Mo. App. S.D. 2003); *State v. Uka*, 25 S.W.3d 624, 627 (Mo. App. E.D. 2002).

In this case, the jury heard from Dr. Drake that he had no idea what happened to the vaginal slide that he took from V.R. Tr. 307-08, 331-32. The jury also heard from Ms. Walsh that the blood sample and the hair sample from the autopsy were missing with no explanation as to what had happened to the hair sample. Tr. 180, 246-48. Additionally, while Detective Moore was present when Detective Don Lewis took custody of V.R.'s clothes at the autopsy, he did not specifically recall what Detective Lewis did with the clothes once he had taken custody of them. Tr. 125-26. Furthermore, Officer Burgoon did testify that he found these two slides, and that there was a flood at the building where the evidence was stored. Tr. 163-64. As such, there was substantial evidence before the jury of the difficulty that the State had in accounting for what happened to the evidence over the thirty years that the case was dormant, which was the

point that Appellant claims he should have been able to make to the jury through the excluded testimony. Thus, there is no reasonable likelihood that the exclusion of evidence from Ms. Walsh that Officer Burgoon was unable to determine the actual connection, or lack thereof, of the two vaginal slides that he found to this case made any difference in the verdict.

Point VII should be denied.

Point VIII (Sexual Assault)

The trial court did not abuse its discretion in admitting testimony from Dr. Mary Case that V.R. was probably sexually assaulted because the testimony was proper expert testimony in that there is no requirement that an expert must expressly state that her conclusion is to a reasonable degree of scientific certainty. In this case, the testimony of Dr. Case was designed to explain for the jury why the details from the crime scene were indicators that the murder of V.R. was likely to have involved a sexual assault, a matter not within the expertise of the average juror.

The decision of the trial court regarding the admission of evidence is reviewed for abuse of discretion and resulting prejudice. *State v. Taylor,* 298 S.W.3d 482, 491 (Mo. banc 2009). The trial court abuses its discretion when its ruling is "clearly against the logic of the circumstances." *Id.*

Dr. Mary Case, the present medical examiner was called to explain the significance of certain facts noted by Officer Gregory Moore at the crime scene and Dr. William Drake during the autopsy. In particular, Dr. Case testified the following can be indicators of a probable sexual assault: the victim being strangled, the victim being stabbed, the crime occurring in a secretive location, and the clothing having been removed. Tr. 355-57. Dr. Case indicated that "probable sexual assault" is not something that can be found "beyond a reasonable degree of medical certainty." Tr. 357. Based on her review of the evidence in this case, Dr. Case found that the fact that V.R. was strangled, the fact that there was a cut to V.R.'s neck, the fact that the body was found in an isolated area, and the fact that V.R.'s bra was removed and V.R.'s shirt was partially

lifted indicated that V.R. was probably sexually assaulted. Tr. 359-61. Dr. Case also indicated that the lack of injury to the genital area did not make a difference in determining that there was a sexual assault. Tr. 360.

In pre-trial motions, Appellant objected to Dr. Case testifying that this case was a probable sexual assault. L.F. 68-70, 81-86. In relevant part, this objection was based on the fact that Dr. Case's would be unable to state that her conclusion was "to a reasonable degree of scientific certainty." L.F. 69, 81, 85. Prior to the start of the testimony, Appellant's trial counsel received a general continuing objection based on his pre-trial motions. Tr. 18, 20. After Dr. Case testified that the murder of V.R. involved a prior sexual assault, Appellant again objected but did not state any specific reason for the objection. Tr. 360-61. Again, in the motion for new trial, in relevant part, Appellant claimed that this conclusion was inadmissible because it was not to a reasonable degree of scientific certainty. L.F. 125-26.

On appeal, Appellant again limits his complaints to the fact that the conclusions of Dr. Case were not to a reasonable degree of scientific certainty. Appellant's Brief at 128-32. Appellant does not question the expertise of Dr. Case or that the information that she relied on was the type that an expert like Dr. Case would reasonably rely on. Appellant's Brief at 128-32. Instead, Appellant claims that Dr. Case's testimony would not help the jury because it was speculative due to the fact that it was not to a reasonable degree of scientific certainty. Appellant's Brief at 128-32.

Appellant relies primarily on this Court's ruling in *State v. Storey,* 40 S.W.3d 898 (Mo. banc 2001). Appellant's Brief at 130-32. In *Storey,* the defendant sought to

introduce evidence regarding a future event – the classification status of the defendant by the Department of Corrections for the entirety of his sentence. *Id.* at 910. This Court found that such testimony was speculative because it involved predicting what the future classification policies of the Department of Corrections would be. *Id.* Needless to say, *Storey*'s holding that a court does not need to permit an expert to speculate regarding the unpredictable future has no relevance to the degree of certainty that an expert must have regarding a past event.

There are several basic requirements for expert testimony. The primary requirement – and the one challenged by Appellant in this case – is that the testimony must aid the jury. *See, e.g., State v. Harris,* 305 S.W.3d 482, 490 (Mo. App. E.D. 2010). Testimony aids the jury if it regards a matter upon which jurors, for want of experience or knowledge, would be unable to draw the proper conclusions from the facts. *Id.*

However, Appellant makes no argument that the average juror is capable of recognizing all of the signs of a probable sexual assault or determining all of the evidence in this case which were indicators of a probable sexual assault. Instead, his argument essentially boils down to the fact that characterizing the evidence as supporting the probability of a sexual assault is not the same as saying that the evidence demonstrates that the victim was definitely sexually assaulted. But there is a vast difference between a finding of probability as to a past event and the type of speculation as to a future event involved in *Storey.*

The testimony to which Appellant objects is similar to testimony offered by Dr. Case in *State v. Knese,* 985 S.W.2d 759 (Mo. banc 1999). As in the present case, in

Knese, Dr. Case testified that the victim of the murder was also the probable victim of a sexual assault. *Id.* at 768-69. This Court found that such testimony was proper. *Id.*

The "reasonably certain" standard to which Appellant refers is often found in cases involving causation (both criminal and civil) and damages. *See, e.g., State v. Buchli*, 152 S.W.3d 289, 297-98 (Mo. App. W.D. 2004); *Bynote v. National Super Market, Inc.*, 891 S.W.2d 117, 125 (Mo. App. E.D. 1991).

In the present case, however, the evidence related to probable sexual assault goes not to causation but rather to help the jury understand how the evidence fits together – particularly the circumstances of the homicide which in turn would effect the weight to be given to the presence of Appellant's semen on the victim's clothing. The cause of death in this case – part of an element of the case – was strangulation not sexual assault. The fact that V.R. was probably sexually assaulted provided a motivation for the death of V.R. However, motive is not an element of the offense. *State v. Norman*, 243 S.W.3d 466, 469 (Mo. App. S.D. 2007). As such, a degree of uncertainty regarding expert opinion on motive should not be treated similarly to uncertainty over an issue like causation.

This case provides a textbook example of the attempt to import "magical" legal terminology into scientific fields where that terminology may not comfortably fit. Dr. Case testified that there were several indicators that would lead an expert in the field of pathology to conclude that this case may have involved a sexual assault. Tr. 359-61. It is clear that Dr. Case's qualification regarding the lack of "reasonable certainty" went to the inability to state that this case conclusively involved a sexual assault. Dr. Case's

testimony, however, did make it clear that she had sufficient certainty to testify that the evidence was consistent with the likelihood that a sexual assault had taken place. That determination was both relevant to the issues in the case and involved matters beyond the expertise of the jury. As such, questions as to the degree of certainty properly go to the weight to be given to Dr. Case's testimony, not its admissibility.

Point VIII should be denied.

CONCLUSION

The judgment of the trial court should be affirmed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

_____
TERRENCE M. MESSONNIER
Assistant Attorney General
Missouri Bar No. 42998

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-332l
Direct Phone: (816) 889-5031
Fax: (573) 751-5391

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 27,512 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and

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

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 14th day of October, 2010, to:

Stephen B. Evans
2245 S. Kingshighway Boulevard, Suite 410
St. Louis, Missouri 63110
Attorney for Appellant

_____

Terrence M. Messonnier
Assistant Attorney General
Missouri Bar No. 42998

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321
Direct Phone: (816) 889-5031
Fax (573) 751-5391

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI