No. SC91006

In the

Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

ANTONIO ANDREWS,

Appellant.

Appeal from St. Louis City Circuit Court
Twenty-Second Judicial Circuit
The Honorable Dennis M. Schaumann, Judge

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

Appellant appeals from a St. Louis City Circuit Court judgment convicting him of first-degree murder and armed criminal action for the August 15, 2007 shooting death of St. Louis police officer Norvelle Brown. Defendant was given the statutorily-mandated sentence of life without parole on the murder conviction and a consecutive 50-year sentence on the armed criminal action conviction. Since Defendant has challenged the constitutionality of § 211.071, RSMo Cum. Supp. 2009 (the juvenile certification statute), the Court of Appeals, Eastern District, where this appeal was originally lodged, determined that it did not have jurisdiction over this appeal and transferred it to this Court. MO. CONST. art V, § 11. Since this appeal involves the validity of a state statute, this Court has jurisdiction over it. MO. CONST. art. V, § 3.

STATEMENT OF FACTS

Defendant was indicted in St. Louis City Circuit Court on one count of first-degree murder and one count of armed criminal action for the August 15, 2007 shooting death of St. Louis City police officer Norvelle Brown. (L.F. 25-26). Defendant's indictment followed a hearing in the circuit court's juvenile division on the juvenile officer's motion to dismiss the juvenile proceedings against Defendant, who was fifteen years old when the shooting occurred. (L.F. 12). The juvenile officer's petition to dismiss alleged that Defendant was "not a proper subject to be dealt with under the provisions of the juvenile code." (L.F. 12-13). After considering the criteria delineated under § 211.071.6, RSMo Cum. Supp. 2009, the juvenile court dismissed the juvenile officer's petition and transferred Defendant's case to the St. Louis Circuit Attorney to allow Defendant "to be prosecuted under the general laws of the State of Missouri."[1] (L.F. 12-22). In making this determination, the

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[1] Defendant has not appealed the juvenile court's findings and judgment on the dismissal of juvenile-court jurisdiction in this case. Defendant's only claim relating to the juvenile proceedings is that the juvenile-certification statute (§ 211.071, RSMo Cum. Supp. 2009), is unconstitutional on its face

juvenile court found that: the crime alleged involved "viciousness, force and violence"; Defendant had a "repetitive pattern of offenses," including possession of a gun when he was 14 years old; Defendant was "both sophisticated and streetwise" and tested positive for marijuana when he was arrested; Defendant had no "extreme emotional problems" or "diagnosed learning disability"; Defendant had a good relationship with both parents; insufficient time existed to rehabilitate Defendant in the juvenile justice system because the Division of Youth Services is not required to retain juveniles after they reach 18 years old, and, in the court's experience, the Division was not likely to request extension of its jurisdiction past the age of 18; the juvenile justice system had no suitable programs and facilities for Defendant; and Defendant was beyond rehabilitation under the juvenile code. (L.F. 14-21).

Defendant was tried by a jury on August 10-12, 2009, with Judge Dennis M. Schaumann presiding. (L.F. 8-9, 71-73, 79-80). Defendant contests the sufficiency of the evidence to support his convictions. Viewed in the light most favorable to the jury's verdicts, the evidence at trial showed the following:

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because it does not provide for a jury determination on the issue of whether the juvenile court should retain jurisdiction in particular cases. (Point I).

Around 9 p.m. on August 15, 2007, Defendant, 15-year-old Lamont Johnson, 18-year-old Xavier McCully, and Montez Jackson, were on the front porch of Defendant's grandmother's house on Semple Avenue in St. Louis. (Tr. 253-54, 280, 331; State's Exhibits 22 and 23).[2] Also on the porch were two loaded handguns, a .38 caliber revolver and a .357 caliber pistol. (Tr. 255-56; State's Exhibits 19-21, 22 and 23).

Defendant asked Lamont if he would walk with him down Semple Avenue to a local Chinese take-out restaurant, which they referred to as "the Chinaman," to get something to eat. (Tr. 257-58, 318; State's Exhibits 22 and 23). After Lamont agreed to go, Defendant asked Xavier to let him carry the .357 for protection. (Tr. 281; State's Ex. 22). When Xavier, who had

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[2] State's Exhibits 22 and 23 are the video-recorded statements of Xavier McCully and Lamont Johnson taken by police on August 17, 2007, two days after Officer Brown was shot. (Tr. 262-63, 272, 282-83, 288). Because he was a juvenile at the time, Lamont's statement (State's Ex. 23) was given to police while his mother was present. (Tr. 262-63, 272, 276, 338, 339; State's Ex. 23). After Xavier, who testified under a grant of prosecutorial immunity (Tr. 279-80; L.F. 35-37), and Lamont testified at trial inconsistently with their recorded statements, these video-recorded statements were admitted into evidence and shown to the jury without objection. (Tr. 263, 283, 288-89).

purchased the .357 earlier that evening, would not let Defendant have it, Defendant put the .38 in his pocket. (State's Exhibits 22 and 23). Defendant and Lamont, who did not have a gun, then left Xavier and Montez on the porch and walked down Semple toward the restaurant. (Tr. 257-58, 331; State's Exhibits 22 and 23).

As Defendant and Lamont were walking south on Semple Avenue, the murder victim, Officer Norvelle Brown, drove by them in a marked patrol car going the opposite direction. (Tr. 259, 331; State's Exhibits 22 and 23). Officer Brown turned his car around, drove up to Defendant and Lamont, and asked them how old they were. (Tr. 259, 318-19, 332; State's Exhibits 22 and 23). Defendant and Lamont did not answer and "stutter jumped" as a prelude to running away. (Tr. 260; State's Ex. 23). Although Officer Brown told them not to run, they did anyway. (Tr. 260-61, 319, 333; State's Exhibits 22 and 23). Officer Brown then pursued them in his patrol car. (State's Ex. 23).

As Defendant and Lamont were running away from Officer Brown, Xavier left the porch and ran toward them so he could take the gun from Defendant and hide it. (State's Ex. 22). With Officer Brown still chasing them, Defendant and Lamont eventually stopped on a vacant lot in an alley off Semple. (State's Exhibits 22 and 23). Defendant told Lamont that he was tired of the officer chasing them and that he was going to shoot Officer

Brown. (State's Ex. 23). As Lamont resumed running into the street, Defendant pulled the gun out of his pocket and held it behind him. (State's Ex. 23). When Officer Brown pulled into the alley, stopped his car, and got out, Defendant raised the gun and shot Officer Brown. (State's Exhibits 23 and 24).[3]

Defendant then threw his .38 caliber gun and continued running. (Tr. 321; State's Exhibit 23). Officers found a .38 caliber revolver lying next to a tree not far from Officer Brown's body. (Tr. 220-23, 229-30; State's Ex. 15A). The gun, which was operable, contained four live rounds and one spent cartridge. (Tr. 244-45; State's Ex. 15B). Police recovered the six-shot .357 caliber revolver from Defendant's grandmother's front porch. (Tr. 223-24,

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[3] State's Exhibit 24 is the audio-taped statement twenty-one-year-old Thomas Weeks gave to police on August 20, 2007, five days after the shooting. (Tr. 304). After Mr. Weeks testified at trial and made statements inconsistent with what he had told police, the audiotape of his police interview was admitted into evidence and played for the jury without objection. (Tr. 300). Mr. Weeks had voluntarily gone to police for the purpose of telling them that the .38 used in the shooting did not belong to Xavier McCully and that the guns recovered from the porch belonged to him. (Tr. 302, 338-39; State's Ex. 24).

255; State's Exhibits 19-21). It contained six live rounds and had not been fired.[4] (Tr. 245-48).

Other officers responding to Officer Brown's distress call found his patrol car parked in the alley with the driver's door open and the engine running. (Tr. 214-15, 353; State's Exhibits. 5-7). The officers, who found Officer Brown lying on the sidewalk, put him in a police car and rushed him to the hospital. (Tr. 197-98).

Officer Brown died that night from a gunshot wound to the chest. (Tr. 204). The bullet entered near his upper shoulder blade and traveled through the upper part of his lung. (Tr. 202-04; State's Exhibits 3 and 4). The bullet went through the pulmonary artery and pulmonary vein, the major blood vessels coming out of the heart. (Tr. 203-04). Since the bullet went completely through Officer Brown's body, no bullet fragments remained. (Tr. 203). The medical examiner testified, however, that the wounds were consistent with a .38 caliber bullet. (Tr. 209).

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[4] Officer Brown's service revolver, a 9 millimeter Beretta semi-automatic pistol, was found near some blood stains about 100 feet from where he lay on the sidewalk. (Tr. 218, 223, 227-29; State's Exhibits 10 and 11). The gun had one spent cartridge jammed inside it. (Tr. 241-42).

The next day, Defendant told Xavier McCully that the police may question him about the incident. (State's Ex. 22). Thomas Weeks, who lived on Semple and knew Defendant, told police that Defendant admitted to him that he shot Officer Brown after the officer tried to get him on the ground. (Tr. 303; State's Ex. 24).

Within a couple of days after the shooting, Defendant walked by Xavier McCully's house, which was located on Semple, and told Xavier's younger brother Donte, who had given a statement to police after the shooting, that Donte had "got the block hot." (Tr. 323, 334). Donte responded that it was Defendant who had "got the block hot."[5] (Tr. 323, 334-35).

Defendant did not testify at trial or present any evidence, other than playing the remainder of the 911 tape that the State had played for the jury earlier in trial. (Tr. 364-65, 372-73; State's Ex. 26).

The jury, which received verdict-directing instructions for both first- and second-degree murder, found Defendant guilty of first-degree murder

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[5] In response to a leading question by defense counsel on cross-examination, Donte agreed that Defendant replied that he "didn't have anything to do with that." (Tr. 324). Donte's sister, Morneisha Goins, who was with Donte when Defendant came by, did not remember Defendant making this reply. (Tr. 334-35).

and armed criminal action. (Tr. 427). The Court sentenced Defendant, who had waived jury sentencing, to life without the possibility of parole for first-degree murder and to a consecutive fifty-year sentence for armed criminal action. (Tr. 439-40; L.F. 109-12).

ARGUMENT

I (constitutional claims).

The trial court did not err in overruling Defendant's motion to declare Missouri's juvenile-certification statute (§ 211.071, RSMo Cum. Supp. 2009) unconstitutional because the Sixth Amendment right to a jury trial in criminal prosecutions, as interpreted by the United States Supreme Court in *Apprendi v. New Jersey*, does not apply to a juvenile court's consideration of the criteria outlined in the statute in determining whether to relinquish its jurisdiction and allow a criminal prosecution of a juvenile under the general law.

Moreover, the imposition of the statutorily-mandated sentence of life without parole on a juvenile convicted of first-degree murder does not violate the Eighth Amendment's Cruel and Unusual Punishments Clause.

In Point I of his brief, Defendant raises two distinct constitutional claims. First, he argues that § 211.071, RSMo Cum. Supp. 2009, is unconstitutional on its face because it does not provide for a jury determination of the criteria outlined in the statute that a juvenile court must consider in deciding whether to relinquish its jurisdiction over a juvenile and allow a prosecution under the general law. He relies on the

United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," to support his argument that certifying a juvenile to stand trial as an adult requires findings of fact that increases the penalty on a juvenile for the crime of first-degree murder.

Second, he argues that the imposition of the statutorily-mandated sentence of life without parole on a juvenile convicted of first-degree murder that was committed before that juvenile's eighteenth birthday constitutes cruel and unusual punishment under the Eighth Amendment. He contends that in the time that has elapsed following the United States Supreme Court's 2005 decision in *Roper v. Simmons*, 543 U.S. 551 (2005), which held that the Eighth Amendment prohibited the imposition of capital punishment on a defendant who murdered before reaching the age of 18, a national consensus has developed against the imposition of life-without-parole sentences on juvenile murderers.

As explained below, both of these claims are without merit. The several state and federal courts that have considered these precise claims have uniformly rejected them.

A. The record regarding Defendant's constitutional claims.

Defendant filed a pretrial motion asking the trial court to declare Missouri's juvenile-certification statute, § 211.071 unconstitutional because it did not provide for a jury determination of "facts" that increased the maximum punishment a juvenile could face on a criminal conviction and because a life-without-parole sentence imposed on a juvenile constituted cruel and unusual punishment under the Eighth Amendment. (L.F. 42-68). The trial court overruled this motion before trial began. (Tr. 7-8). Defendant renewed this motion during the instructions conference, and the court overruled it again. (Tr. 380-81). Defendant raised this claim in his motion for new trial. (L.F. 99-104).

B. Standard of review.

"A statute is presumed to be constitutional and will not be invalidated unless it 'clearly and undoubtedly' violates some constitutional provision and 'palpably affronts fundamental law embodied in the constitution.'" *Board of Educ. v. State*, 47 S.W.3d 366, 368-69 (Mo. banc 2001) (quoting *Linton v. Missouri Veterinary Med. Bd.*, 988 S.W.2d 513, 515 (Mo. banc 1999) and *State v. Stokely*, 842 S.W.2d 77, 79 (Mo. banc 1992)). Any doubt concerning a statute's constitutionality must be resolved in favor of its validity. *See State v. Mahurin*, 799 S.W.2d 840, 842 (Mo. banc 1990). Courts presume statutes

are constitutional and will find otherwise only when they plainly contravene some constitutional provision. *Id.*

C. Juvenile-certification proceedings under Missouri's juvenile code.

Under Missouri law, juvenile or family courts have "exclusive original jurisdiction in proceedings . . . involving any child who is alleged to have violated a state law or municipal ordinance prior to attaining the age of seventeen years . . . ." Section 211.031.1(3), RSMo Cum. Supp. 2009. But if a person between twelve and seventeen years of age has committed a felony offense, the juvenile court may, *in its discretion*, dismiss the juvenile court proceeding and transfer the case to a court of general jurisdiction for prosecution:

> If a petition alleges that a child between the ages of twelve and seventeen has committed an offense which would be considered a felony if committed by an adult, the court may, upon its own motion or upon motion by the juvenile officer, the child or the child's custodian, order a hearing and may, in its discretion, dismiss the petition and such child may be transferred to the court of general jurisdiction and prosecuted under the general law . . . .

Section 211.071.1, RSMo Cum. Supp. 2009. But if the petition alleges that the child has committed certain violent offenses, including first-degree

murder, the juvenile court is required to hold a hearing and "may in its discretion, dismiss the petition and transfer the child to a court of general jurisdiction for prosecution under the general law." *Id.* The notice of hearing under this provision "shall contain a statement that the purpose of the hearing is to determine whether the child is a proper subject to be dealt with under the provisions of this chapter," and if he or she is not, that "the petition will be dismissed to allow for prosecution of the child under the general law." Section 211.071.4, RSMo Cum. Supp. 2009.

In determining "whether the [juvenile] is a proper subject to be dealt with under the provisions of" the juvenile code and "whether there are reasonable prospects of rehabilitation within the juvenile justice system, § 211.071.6, requires the juvenile court to consider the following criteria:

> (1) The seriousness of the offense alleged and whether the protection of the community requires transfer to the court of general jurisdiction;
>
> (2) Whether the offense alleged involved viciousness, force and violence;
>
> (3) Whether the offense alleged was against persons or property with greater weight being given to the offense against persons, especially if personal injury resulted;
>
> (4) Whether the offense alleged is a part of a repetitive pattern of offenses which indicates that the child may be beyond rehabilitation under the juvenile code;

(5) The record and history of the child, including experience with the juvenile justice system, other courts, supervision, commitments to juvenile institutions and other placements;

(6) The sophistication and maturity of the child as determined by consideration of his home and environmental situation, emotional condition and pattern of living;

(7) The age of the child;

(8) The program and facilities available to the juvenile court in considering disposition;

(9) Whether or not the child can benefit from the treatment or rehabilitative programs available to the juvenile court; and

(10) Racial disparity in certification.

Section 211.071.6, RSMo Cum. Supp. 2009. In compliance with the statute, the juvenile court in this case issued a written report in which it explained its consideration of these criteria in deciding to relinquish juvenile-court jurisdiction over Defendant and allowing him to be prosecuted under the general law.[6] (L.F. 12-22).

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[6] Defendant does not challenge the juvenile court's decision to relinquish its jurisdiction over Defendant in this case.

D. The rule announced in *Apprendi* does not apply to Missouri's juvenile-certification proceedings.

Defendant relies on *Apprendi* and its progeny, to support his claim that Missouri's juvenile-certification statute (§ 211.071) is unconstitutional on its face because it fails to provide the right to a jury trial in considering the criteria to determine whether a juvenile should remain within the juvenile justice system or whether the juvenile should be transferred to a court of "general jurisdiction and prosecuted under the general law." Section 211.071.1 and .6. More specifically, Defendant argues that the ten criteria that the legislature has directed the juvenile court to consider in determining whether a juvenile who has been charged with a crime should remain in the juvenile justice system or be transferred to a court of general jurisdiction are the equivalents of "facts" that increase the range of punishment. He contends that these "facts" must be found by a jury under the Sixth Amendment as interpreted by the Court in *Apprendi*. A close reading of *Apprendi* and its progeny reveals that Defendant's argument is without merit.

The issue in *Apprendi* was whether the Sixth Amendment, made applicable to the States through the Due Process Clause of the Fourteenth Amendment, "requires that a factual determination authorizing an increase

in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." *Apprendi*, 530 U.S. at 469. The defendant in *Apprendi* pleaded guilty to two counts of second-degree possession of a firearm for an unlawful purpose, which was punishable by imprisonment for between five and ten years. *Id.* at 468-70. But under the plea agreement, the prosecutor reserved the right to seek a higher, or "enhanced," sentence on the ground that the offense was committed with a biased purpose, or, in other words, was a hate crime. *Id.* A separate state statute provided for an "extended term" of imprisonment if the trial judge found, by a preponderance of the evidence, that the defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity. *Id.* at 468. The defendant argued that the factual finding made by the judge that resulted in the imposition of an enhanced sentence should have been made by a jury and found beyond a reasonable doubt. The Supreme Court agreed and, applying the Sixth-Amendment right to a trial by jury, held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 476, 490.

The Court has extended its holding in *Apprendi* to other situations in which the states or Congress have passed statutes providing for enhanced punishment for offenders based on the existence of specific facts, which, if found, serve to increase the offender's punishment beyond the statutory maximum. *See, e.g., Ring v. Arizona*, 536 U.S. 584, 602, 609 (2002) (the finding of statutory aggravating circumstances necessary for the imposition of capital punishment); *Blakely v. Washington*, 542 U.S. 296, 304-05 (2004) (facts allowing a sentence exceeding the "standard" range in Washington's sentencing system); *United States v. Booker*, 543 U.S. 220, 244 (2005) (facts prompting an elevated sentence under then-mandatory Federal Sentencing Guidelines); *Cunningham v. California*, 549 U.S. 270, 293-94 (2007) (facts permitting imposition of an "upper term" sentence under California's determinate sentencing law). The common feature in all these cases was a legislative scheme that required the finding of specific, discrete facts to impose a sentence on a criminal defendant above what would otherwise be the statutory maximum for the offense committed.

Defendant's reliance on this line of cases to support his argument that Missouri's juvenile-certification statute is unconstitutional under the Sixth Amendment on the ground that it does not require a jury to determine the ten enumerated criteria beyond a reasonable doubt is unavailing. Nothing in *Apprendi* or its progeny suggests that the Sixth Amendment right to a jury

trial applies to juvenile-certification proceedings, or that such proceedings require the finding of specific, discrete facts that serve to increase the sentence for an offense committed by a juvenile above the statutory maximum. Defendant's argument to the contrary contains several fundamental flaws.

The Sixth Amendment provides that in "all *criminal prosecutions*, the accused shall enjoy the right to a . . . trial by an impartial jury . . . ." U.S. CONST. amend. VI (emphasis added). The United States Supreme Court has stated that juvenile court proceedings are not considered "criminal prosecutions" within the meaning of the Sixth Amendment. *McKeiver v. Pennsylvania*, 403 U.S. 528, 541 (1971) (holding that a trial by jury is not constitutionally required for juvenile court adjudications); *see also Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (citing *McKeiver* with approval). A right to a jury trial in juvenile proceedings is also not required under the Missouri Constitution. *See In re Fisher*, 468 S.W.2d 198 (Mo. 1971) (citing *State v. Heath*, 181 S.W.2d 517 (Mo. 1944)).

In *Kent v. United States*, 383 U.S. 541 (1966), the Court held that juvenile-certification proceedings do not violate the Constitution as long as they provide for a hearing, the right of the juvenile to be represented by counsel, the right to access the juvenile's records, and a decision setting forth the reasons why jurisdiction is being relinquished. *Id.* at 557-62. But the

Court cautioned that it did "not mean by [its holding] to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing," only that it "measure up to the essentials of due process and fair treatment." *Id.* Defendant does not otherwise complain that his juvenile-certification hearing failed to comply with due process.

Missouri's juvenile code expressly provides that juvenile proceedings are not considered criminal prosecutions. Under the code, the taking of any juvenile into custody for violating the law "is not considered an arrest." Section 211.131.1, RSMo 2000. Moreover, Missouri law clearly provides that any adjudication by the juvenile courts is not considered a conviction and the juvenile is not branded a criminal:

> No adjudication by the juvenile court upon the status of a child shall be deemed a conviction nor shall the adjudication operate to impose any of the civil disabilities ordinarily resulting from conviction nor shall the child be found guilty or be deemed a criminal by reason of the adjudication.

Section 211.271.1, RSMo 2000. In fact, no juvenile can be charged with, or convicted of, a crime unless the case is transferred to a court of general jurisdiction pursuant to the juvenile-certification proceedings:

> No child shall be charged with a crime or convicted unless the case is transferred to a court of general jurisdiction as provided in this chapter.

Section 211.271.2, RSMo 2000.

The purpose of the juvenile code is not the criminal prosecution of juveniles, but the "rehabilitation of erring youths." *In the interest of A.D.R. v. Rone*, 603 S.W.2d 575, 580 (Mo. banc 1980). A juvenile under the jurisdiction of the juvenile courts is neither convicted of a criminal offense, nor punished if the juvenile is found to have committed what would otherwise constitute a criminal offense. Instead, a juvenile found to have committed such an offense can be, among other things, placed under supervision in the home, committed to the custody a public agency or institution authorized by law to care for children, placed with the Division of Youth Services, or ordered to make restitution or perform community service. Section 211.181.3, RSMo Cum. Supp. 2009. The length of a juvenile's commitment is "for an indeterminate period of time," but in no event can it continue past the juvenile's twenty-first birthday. Section 211.231.1, RSMo 2000. The juvenile court may enter a length-of-stay order, with a corresponding minimum-review date, for any juvenile found to have violated the law and placed with the Division of Youth Services. Section 211.181.3(3), RSMo Cum. Supp. 2009.

But none of these dispositions constitute punishment within the purview of the Sixth Amendment as interpreted in *Apprendi* and its progeny. The punishment in Missouri for first-degree murder for anyone committing that crime before their eighteenth birthday is life imprisonment without the possibility for probation or parole. *See* Section 565.020.2, RSMo 2000; *Roper*, 543 U.S. at 568.[7] The statutory maximum punishment for that crime is fixed by statute and is not increased based on the determinations a juvenile court makes in a certification proceeding.

The focus of juvenile-certification proceedings is the determination of which court has appropriate jurisdiction, not with findings of fact that authorize an increase in the maximum statutory punishment. The juvenile code is concerned, in part, with jurisdiction over persons under the age of seventeen who are alleged to have violated the law. The legislature,

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[7] The statute actually provides that "if a person has not reached his sixteenth birthday at the time of the commission of the crime, the punishment shall be imprisonment for life without eligibility for probation or parole, or release except by act of the governor." Section 565.020.2, RSMo 2000. The only other authorized punishment for first-degree murder is death, but, under *Roper*, this sentence cannot be imposed on anyone who committed the crime before their eighteenth birthday.

recognizing that not all juveniles can be cared for and treated within the juvenile justice system, provided a mechanism—the juvenile-certification proceeding—to determine whether the juvenile court should retain jurisdiction of the juvenile, or whether that juvenile's case should be transferred to a court of general jurisdiction. For some offenses, including the one with which Defendant was charged, the legislature determined that they were serious enough to warrant a mandatory certification proceeding. The purpose of the certification proceeding is not to increase the range of punishment for any offense, which is set by statute in the criminal code, but to provide a mechanism for a judicial determination of which court should properly exercise jurisdiction over a juvenile.

The jurisdictional aspect of the juvenile-certification proceeding is perhaps best illustrated by the structure of Missouri law as it applies to juveniles. Before 1995, Missouri law provided that "no person" could be convicted of any offense committed before that person's fourteenth birthday. Section 562.081.1, RSMo 1994. But in 1995, the legislature repealed this statute. The effect of this repeal would have meant that anyone, regardless of their age, could have been prosecuted under the general law in the criminal justice system for any offense. But the legislature had already provided the juvenile courts with exclusive jurisdiction over anyone under the age of seventeen who was alleged to have violated the law. Section

211.031.1(3), RSMo 1994. This meant that courts of general jurisdiction had no authority to institute criminal proceedings against a juvenile for the commission of any criminal offense. But this grant of exclusive jurisdiction to the juvenile courts was not absolute. The legislature realized that the juvenile courts were ill-equipped to handle and treat all juveniles, especially those alleged to have committed certain serious offenses. Consequently, it included within the juvenile code a juvenile-certification proceeding requiring that a judicial determination be made as to the appropriateness of a juvenile court retaining jurisdiction over a juvenile in certain cases.

The juvenile court's consideration of the statutorily-defined criteria in determining whether it should retain jurisdiction over a juvenile in no way resembles the findings of fact increasing the maximum punishment a defendant faced that was at issue in *Apprendi* and its progeny. Determination of those criteria does not increase the statutory maximum punishment the juvenile will face; it only determines which court has proper jurisdiction over the juvenile. The statutory maximum punishment is established by statutes found in the criminal code, not by a juvenile court in a certification proceeding.

Any lingering doubt about whether the Sixth Amendment's right to a jury trial, as interpreted by the Court in *Apprendi* and later cases, applies to

juvenile-certification proceedings, should be dispelled by the Court's most recent addition to the *Apprendi*-line of cases.

In *Oregon v. Ice*, 129 S. Ct. 711 (2009), the Court held that the Sixth-Amendment right to a jury trial, as interpreted by the Court in *Apprendi*, did not apply to findings of fact required under state law as a predicate to imposing consecutive, rather than concurrent, sentences on an offender. *Id.* at 714-15. In reaching this holding, the Court explained that the holdings of *Apprendi* and its progeny were based on the historic jury function of deciding whether the State has proved each element of the offense beyond a reasonable doubt and that the Court had not extended these holdings beyond the offense-specific context of those cases:

> Those decisions are rooted in the historic jury function—determining whether the prosecution has proved each element of an offense beyond a reasonable doubt. They hold that it is within the jury's province to determine any fact (other than the existence of a prior conviction) that increases the maximum punishment authorized for a particular offense. Thus far, the Court has not extended the *Apprendi* and *Blakely* line of decisions beyond the offense-specific context that supplied the historic grounding for the decisions.

Id. at 714. The Court noted that application of *Apprendi's* rule to other contexts must be consistent with "longstanding common-law practice." *Id.* at

717 (quoting *Cunningham*, 549 U.S. at 281). "The rule's animating principle is the preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense." *Id.* In determining whether the legislature has encroached "on the jury's traditional domain" given it by the Sixth Amendment, the Court considers "whether the finding of a particular fact was understood as within 'the domain of the jury . . . by those who framed the Bill of Rights.'" *Id.* (quoting *Harris v. United States*, 536 U.S. 545, 557 (2002)) (plurality opinion). "In undertaking this inquiry," the Court noted that it must "remain cognizant that administration of a discrete criminal justice system is among the basic sovereign prerogatives States retain." *Id.* Because the "decision to impose sentences consecutively is not within the jury function that 'extends down centuries into the common law,'" the Court held that the rule in *Apprendi* did not apply. *Id.* (quoting *Apprendi*, 530 U.S. at 477).

The Court also noted that it did not want to extend the holding in *Apprendi* beyond its constitutional moorings since this could thwart "modern legislative statutory protections meant to temper the harshness of the historical practice":

> [L]egislative reforms regarding the imposition of multiple sentences do not implicate the core concerns that prompted our decision in *Apprendi*. There is no encroachment here by the judge upon facts historically

found by the jury, nor any threat to the jury's domain as a bulwark at trial between the State and the accused. Instead, the defendant—who historically may have faced consecutive sentences by default—has been granted by some modern legislatures statutory protections meant to temper the harshness of the historical practice.

Id. at 718.

The Court also rejected the defendant's argument that since the state legislature had deviated from tradition and enacted a statute that hinges consecutive sentences on fact findings, *Apprendi's* rule must be applied. *Id.* The Court noted that the scope of the Sixth Amendment right to a jury trial is delineated by the historical role of the jury at common law and that it does not attach to every contemporary state law that requires predicate findings of fact:

> It is no answer that, as [defendant] argues, he was *entitled* to concurrent sentences absent the fact findings Oregon law requires. In [defendant]'s view, because the Oregon Legislature deviated from tradition and enacted a statute that hinges consecutive sentences on fact findings, *Apprendi's* rule must be imported. As we have described, the scope of the constitutional jury right must be informed by the historical role of the jury at common law. It is therefore not the case

that, as Defendant suggests, the federal constitutional right attaches to every contemporary state-law "entitlement" to predicate findings.

Id. (citations and internal quotation marks omitted).

The Court's decision not to broaden *Apprendi's* reach beyond what was necessary to protect the core concerns of the Sixth Amendment was also influenced by the respect that must be given the States' sovereign interest in administering their criminal justice systems:

> States' interest in the development of their penal systems, and their historic dominion in this area, also counsel against the extension of *Apprendi* that [defendant] requests. Beyond question, the authority of States over the administration of their criminal justice systems lies at the core of their sovereign status. We have long recognized the role of the States as laboratories for devising solutions to difficult legal problems. This Court should not diminish that role absent impelling reason to do so.

Id. at 718-19.

The creation of juvenile codes and the placing of juvenile offenders within the exclusive jurisdiction of juvenile courts is a relatively modern legislative development. *See Hidalgo v. State*, 983 S.W.2d 746, 750 n.8 (Tex. Crim. App. 1999) (noting that the first juvenile court was created in Illinois in 1899 and that by 1925 all but 2 states had juvenile court systems). It was

certainly not known when the Bill of Rights was adopted. In those days, juvenile offenders were treated no differently than adult offenders and were prosecuted in courts of general jurisdiction. Because States have chosen to "temper the harshness of historical practice" and preclude criminal prosecution of certain juveniles, but allow for the relinquishment of juvenile-court jurisdiction in specific cases through juvenile-certification proceedings, does not mandate application of the Sixth Amendment right to a trial by jury. This should be especially true in light of the Supreme Court's previous holdings in which it has held that while certain rights enumerated within the Bill of Rights apply to juvenile-court adjudications, the Sixth Amendment right to a jury trial does not. *See In re Gault*, 387 U.S. 1 (1967) (applying various due process rights to juvenile proceedings including notice of charges, right to counsel, right of confrontation and cross-examination, and privilege against self-incrimination); *In re Winship*, 397 U.S. 358 (1970) (proof-beyond-reasonable-doubt standard applies to delinquency proceedings); *Breed v. Jones*, 421 U.S. 519 (1975) (double-jeopardy protection applies to delinquency proceedings); *but see McKeiver*, 403 U.S. at 541 (holding that a trial by jury is not constitutionally required for juvenile court adjudications).

Finally, the courts in every jurisdiction having juvenile-certification statutes similar to Missouri's have concluded that *Apprendi's* rule does not apply to juvenile transfer or certification proceedings and that there is no

constitutional right to a jury determination respecting the transfer of a juvenile's case to a court of general jurisdiction. *See State v. Jones*, 47 P.3d 783 (Kan. 2002), *cert. denied*, 537 U.S. 980 (2002) (*Apprendi* does not apply to juvenile waiver hearings because they only determine "which system will be appropriate for a juvenile offender"); *Gonzales v. Tafoya*, 515 F.3d 1097, 1116 (10th Cir. 2008), *cert. denied*, 129 S.Ct. 211 (2008); *United States v. Miguel*, 338 F.3d 995, 1004 (9th Cir. 2003) ("*Apprendi* does not require that a jury find the facts that allow the transfer to district court. The transfer proceeding establishes the district court's jurisdiction over a defendant."); *United States v. Juvenile*, 228 F.3d 987, 990 (9th Cir. 2000) (rejecting the claim that the transfer of a juvenile to an adult court increases punishment and holding that it "merely establishes a basis for district court jurisdiction") (internal quotation marks omitted); *People v. Beltran*, 765 N.E.2d 1071, 1075-76 (2002) (concluding that *Apprendi* does not apply to a decision to prosecute the defendant as an adult because a transfer hearing "is dispositional, not adjudicatory"); *Caldwell v. Commonwealth*, 133 S.W.3d 445, 452-53 (Ky. 2004) (adopting the "jurisdiction" argument); *State v. Rodriguez*, 71 P.3d 919, 927-28 (Ariz. Ct. App. 2003) (holding that a juvenile transfer statute "is not a sentence enhancement scheme and, therefore, does not implicate *Apprendi* . . . [because it] does not subject [a] juvenile to enhanced punishment; it subjects the juvenile to the adult criminal justice system"); *In*

re Welfare of J.C.P., 716 N.W.2d 664, 668 (Minn. Ct. App. 2006); *State v. Kalmakoff*, 122 P.3d 224, 227 (Alaska App. 2005); *Bucio v. Sutherland*, 674 F. Supp.2d 882, 901 (S.D. Ohio 2009).

The two courts that have applied *Apprendi's* rule in juvenile-certification proceedings were in states that have juvenile-certification statutes radically different than Missouri's statute and the statutes involved in the cases cited above. In *State v. Rudy B.*, 216 P.3d 810 (N.M. Ct. App. 2009), relied on by Defendant, the court, after noting that "New Mexico's statutory system of handling juvenile cases is unusual," held that *Apprendi's* rule applied because in New Mexico all juveniles are tried in juvenile court after which the judge may sentence certain offenders as adults following an amenability hearing, which does not involve a jurisdictional determination and in which the juvenile judge finds facts that may result in an increase in the maximum punishment the juvenile may face. *Id.* at 814-25. After the court of appeals decision in *Rudy B.*, the New Mexico Supreme Court granted certiorari to hear this case, where it remains pending. *See State v. Rudy B.*, 224 P.3d 650 (N.M. Sep 15, 2009).

In *Commonwealth v. Quincy Q.*, 753 N.E.2d 781 (Mass. 2001), overruled on other grounds by *Commonwealth v. King*, 34 N.E.2d 1175, 1201 n. 28 (Mass. 2005), the court held that *Apprendi's* rule applied because New Jersey's "youthful offender statute authorizes judges to increase the

punishment for juveniles convicted of certain offenses beyond the statutory maximum otherwise permitted for juveniles" if certain factual findings are made. *Id.* at 789. This scheme is readily distinguishable from Missouri's juvenile-certification proceedings.

The trial court did not err in overruling Defendant's motion to declare Missouri's juvenile-certification statute unconstitutional on the ground that it did not provide the right to a jury trial.

E. The Eighth Amendment does not prohibit life-without-parole sentences on juvenile murderers.

In his second constitutional claim, Defendant claims that his sentence of life without parole for first-degree murder violates the Eighth Amendment's Cruel and Unusual Punishments Clause because he was less than 18 years old when he committed the murder. Defendant has failed to carry his burden of establishing an Eighth Amendment violation. Recent United States Supreme Court decisions do not indicate that such a punishment imposed on a juvenile murderer would offend the Eighth Amendment, and every court that has considered this issue has so held.

In *Roper v. Simmons* the Court held that the Eight Amendment prohibited the execution of murderers who committed their offenses before their eighteenth birthday. *Roper*, 543 U.S. at 568, 578-79. But in analyzing

the deterrent effect of imposing the death penalty on juvenile offenders, the Court stated that it was "worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person." *Id.* at 572.

Earlier this year, the Court held that the Eight Amendment prohibits the imposition of life-without-parole sentences on juveniles who commit *non-homicide* offenses. *See Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010) ("This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole."). In reaching this holding, the Court noted that only six jurisdictions prohibited life without parole sentences for juvenile offenders. *Id.* at 2023. Forty-four other states, the District of Columbia, and the federal government allow the imposition of a life-without-parole sentence to be imposed on juvenile offenders, even those as young as 13. *Id.* Only seven states limited that sentence to homicide offenses. *Id.*

To support its decision to draw a constitutional line against life-without-parole sentences for juveniles committing non-homicide offenses, the Court observed that there "is a line 'between homicide and other serious violent offenses against the individual.'" *Id.* at 2027 (quoting *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2659-60 (2008)). "This is because '[l]ife is over for the victim of the murderer . . . .'" *Id.* (quoting *Coker v. Georgia*, 433 U.S. 584,

598 (1977)) (alteration in original). "Although an offense like robbery or rape is a 'serious crime deserving serious punishment,' those crimes differ from homicide in a moral sense." *Id.* (quoting *Enmund v. Florida*, 458 U.S. 782, 797 (1982)). The Court qualified its holding by stressing that a State need not release the non-homicide offender during his or her "natural life": "Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives." *Id.* at 2030. The Constitution requires only that States provide a meaningful opportunity for release, but only for juvenile *non-homicide* offenders.

Other cases considering the effect of the holding in *Roper* have determined that its application is limited beyond the capital-punishment context. "*Roper* held that executing a person for conduct that occurred before the offender was eighteen violates the Eighth Amendment, but it permitted imposing a sentence of life imprisonment based on conduct that occurred when the offender was a juvenile." *United States v. Salahuddin*, 509 F.3d 858, 863 (7th Cir. 2007). "The Court's reasoning in *Roper* was based 'in large measure on the "special force" with which the Eighth Amendment applies when the state imposes the ultimate punishment of death.'" *Id.* at 864 (quoting *United States v. Mays*, 466 F.3d 335, 340 (5th Cir. 2006)). "The reasoning in *Roper* therefore applies 'with only limited, if any, force outside of

the context of capital punishment.'" *Id.* (quoting *United States v. Feemster*, 483 F.3d 583, 588 (8th Cir.2007)).

In *Harmelin v. Michigan*, 501 U.S. 957 (1991), the Court held that a sentencing scheme that calls for an automatic life without parole sentence, rather than an individualized punishment determination, is not "cruel and unusual" under the Eighth Amendment. *Id.* at 995-96.

At least one Missouri court has considered the application of *Roper* in sentencing a defendant to a term of years for an offense committed when he was a juvenile. In *Burnett v. State*, 311 S.W.3d 810 (Mo. App. E.D. 2009), the court held that the imposition of a 60-year sentence for child kidnapping, first-degree assault, forcible sodomy, and attempted forcible rape on a defendant who was only fifteen when he committed the offenses did not violate the Eight Amendment. *Id.* at 814-16. In reaching this holding, the court explained why it "decline[d] to extend the reasoning of *Roper*" to the sentence imposed in that case:

> We note initially that *Roper* operates only to prohibit the imposition of the death penalty on juvenile offenders. It is quite clear that the *Roper* Court envisioned the possibility that serious crimes, such as this one, committed by a young offender might deserve a long prison sentence: "When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot

> extinguish his life . . . ." In fact, the *Roper* Court affirmed the Missouri Supreme Court's decision, which re-sentenced the defendant to life imprisonment without eligibility for probation. Additionally, the United States Supreme Court has stated that decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of a prison sentence. Because Roper was based largely on the "special force" with which the Eighth Amendment applies to imposition of the death penalty, it does not compel us to consider the factors articulated therein in non-capital cases.

Id. at 815-16 (citations and footnote omitted) (quoting *Roper*, 543 U.S. at 574). This reasoning militates against the application of *Roper* to a life-without-parole sentence for a juvenile convicted of first-degree murder.

Finally, the courts in other jurisdictions that have considered the claim Defendant raises here have uniformly rejected it. *See State v. Allen*, 958 A.2d 1214, 1233-36 (Conn. 2008) (declining to extend *Roper* to a life-without-parole sentence imposed on murderer who was under 18); *Wallace v. State*, 956 A.2d 630, 641 (Del. 2008) (declining to extend *Roper* to a life-without-parole sentence imposed on a 15-year-old murderer); *State v. Craig*, 944 So.2d 660, 662-63 (La. App. 2006), *cert. denied*, 552 U.S. 1062 (2007) (declining to extend *Roper* to a life-without-parole sentence imposed on a 17-year-old murderer);

State v. Pierce, 225 P.3d 1146, 1146-48 (Ariz. App. 2010) (declining to extend *Roper* to a natural-life sentence imposed on 16-year-old convicted of first-degree murder).

The trial court did not err in overruling Defendant's motion to declare the imposition of a life-without-parole sentence on Defendant, who was found to have committed first-degree murder, as a violation of the Eighth Amendment's ban on cruel and unusual punishments.

II (sufficiency).

The trial court did not err in overruling Defendant's motion for judgment of acquittal on the first-degree murder charge because sufficient evidence existed to establish that Defendant deliberated before shooting Officer Brown with a .38 caliber pistol.

Defendant challenges his first-degree murder conviction only on the ground that the evidence was insufficient to prove the element of deliberation. But the record contains both direct and circumstantial evidence showing that Defendant deliberated before raising his gun and shooting Officer Brown.

A. Standard of review.

When considering sufficiency-of-evidence claims, this Court's review is limited to determining whether the evidence is sufficient for a reasonable juror to find each element of the crime beyond a reasonable doubt. *State v. Freeman*, 269 S.W.3d 422, 425 (Mo. banc 2008); *State v. O'Brien*, 857 S.W.2d 212, 215-16 (Mo. banc 1993). Appellate courts do not review the evidence de novo; rather they consider the record in the light most favorable to the verdict:

> To ensure that the reviewing court does not engage in futile attempts to weigh the evidence or judge the witnesses' credibility, courts employ "a

> legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution." Thus, evidence that supports a finding of guilt is taken as true and all logical inferences that support a finding of guilt and that may reasonably be drawn from the evidence are indulged. Conversely, the evidence and any inferences to be drawn therefrom that do not support a finding of guilt are ignored.

O'Brien, 857 S.W.2d at 215-16 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "An appellate court 'faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *State v. Chaney*, 967 S.W.2d 47, 54 (Mo. banc 1998) (quoting *Jackson v. Virginia*, 443 U.S. at 326); *see also Freeman*, 269 S.W.3d at 425 (holding that an appellate court should "not weigh the evidence anew since 'the fact-finder may believe all, some, or none of the testimony of a witness when considered with the facts, circumstances and other testimony in the case'") (quoting *State v. Crawford*, 68 S.W.3d 406, 408 (Mo. banc 2002)).

Appellate courts do not act as a "super juror with veto powers"; instead they give great deference to the trier of fact. *State v. Grim*, 854 S.W.2d 403, 405 (Mo. banc 1993); *State v. Chaney*, 967 S.W.2d at 52. Appellate courts

may neither determine the credibility of witnesses, nor weigh the evidence. *State v. Villa-Perez*, 835 S.W.2d 897, 900 (Mo. banc 1992). It is within the trier of fact's province to believe all, some, or none of the witnesses' testimony in arriving at the verdict. *State v. Dulany*, 781 S.W.2d 52, 55 (Mo. banc 1989). Circumstantial evidence is given the same weight as direct evidence in considering the sufficiency of the evidence. *Grim*, 854 S.W.2d at 405-06.

B. The evidence was sufficient to prove the element of deliberation.

The first-degree murder statute provides that:

> A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.

Section 565.020.1, RSMo 2000. To find Defendant guilty of first-degree murder, the jury was instructed to find that Defendant shot Officer Brown "after deliberation, which means cool reflection upon the matter for any length of time no matter how brief. (L.F. 88).

In a murder case, "even when the State's case is entirely circumstantial, all evidence upon the whole record tending to support the guilty verdict must be taken as true, contrary evidence must be disregarded and every reasonable inference tending to support the verdict must be indulged." *State v. Morris*, 564 S.W.2d 303, 304 (Mo. App. Spr. Dist. 1978).

"[A]ll the elements of a homicide case may be proved circumstantially." *Id.* at 309; *see also State v. Blair*, 298 S.W.3d 38, 45 (Mo. App. W.D. 2009).

"The deliberation necessary to support a conviction of first-degree murder need only be momentary; it is only necessary that the evidence show that the defendant considered taking another's life in a deliberate state of mind." *State v. Jones*, 955 S.W.2d 5, 12 (Mo. App. W.D. 1997). "Deliberation ordinarily is established through circumstances surrounding the crime." *Zink v. State*, 278 S.W.3d 170, 180 (Mo. banc 2009). "Deliberation required for conviction for murder in first degree may 'be proved by indirect evidence and inferences reasonably drawn from circumstances surrounding the killing.'" *State v. Smith*, 185 S.W.3d 747, 758-59 (Mo. App. S.D. 2006) (quoting *State v. Howard*, 896 S.W.2d 471, 480 (Mo. App. S.D. 1995). "The inference of deliberation can be strengthened by the fact that a defendant left the scene of the crime immediately after shooting without checking on the victim; that defendant failed to procure aid for the victim; and that defendant disposed of the weapon used in the shooting." *Id.* at 759. "In addition, failure to seek medical help for a victim strengthens the inference that the defendant deliberated." *State v. Strong*, 142 S.W.3d 702, 717 (Mo. banc 2004).

In Defendant's case, the State adduced direct evidence of Defendant's mental state before he shot Officer Brown. In the videotaped statement Defendant's companion, Lamont Johnson, gave police, he said that during

Officer Brown's pursuit of him and Defendant, they stopped running in a vacant lot near the alley where Officer Brown was shot. (State's Ex. 23). After they stopped, Defendant told Lamont that he was "tired" of being chased and that he was going to shoot Officer Brown. (State's Ex. 23). Defendant then retrieved the .38 caliber revolver from his pocket and held it behind him. (State's Ex. 23). Moments later, Officer Brown pulled his car into the alley and got out of his car. (State's Exhibits 23 and 24). Defendant raised his gun and, consistent with what he had just told Lamont, he fatally shot Officer Brown. (State's Ex. 23). Defendant also admitted shooting Officer Brown to a neighbor, Thomas Weeks. (State's Ex. 24).

Beyond this direct evidence of deliberation, the circumstances of the crime establish proof of deliberation. Defendant, who was carrying a handgun in his pocket, was stopped by Officer Brown. (Tr. 259, 318-19, 332; State's Exhibits 22 and 23). Presumably not wanting to be caught with a gun in his pocket, Defendant ran from the officer. One of Defendant's friends, Xavier McCully, came to Defendant's aid in an effort to retrieve the gun so it could be hidden from the officer. (State's Ex. 22). The jury could reasonably infer that Defendant, who was tired from being pursued, sought to end the pursuit and prevent his arrest by shooting the officer.

Other circumstantial evidence of deliberation adduced at trial included the fact that Defendant threw the murder weapon away after shooting

Officer Brown, that he immediately fled the scene after the shooting, and that he failed to check on Officer Brown or seek assistance for him after he had been shot. (Tr. 220-23, 229-30, 321; State's Ex. 23).

The fact that some of the evidence received at trial was admitted without objection as the prior inconsistent statement of a testifying witness does not affect the sufficiency analysis. Missouri law provides that "[n]otwithstanding any other provisions of law to the contrary, a prior inconsistent statement of any witness testifying in the trial of a criminal offense shall be received as substantive evidence, and the party offering the prior inconsistent statement may argue the truth of such statement." Section 491.074, RSMo 2000. *See also State v. Irby*, 254 S.W.3d 181 (Mo. App. E.D. 2008) (holding that a witness's videotaped statement to police was properly admitted into evidence when the witness testified at trial inconsistently with statements he made during the police interview).

To support his argument, Defendant relies on *State v. Hudson*, 154 S.W.3d 426 (Mo. App. S.D. 2005), in which the court held that the evidence was *sufficient* to support the murder conviction. But such an approach is entirely unhelpful in deciding the issue in this case. Sufficiency claims, especially in circumstantial-evidence cases, are determined on a case-by-case basis and turn on the specific evidence presented in that particular case. *See State v. Simmons*, 724 S.W.2d 728, 730 (Mo. App. E.D. 1987) ("Recognizing

that circumstantial evidence cases are factually unique, courts resolve sufficiency of the evidence questions in them on a case by case basis."). Relying on cases in which courts held that the evidence was sufficient sheds no light on deciding whether the evidence in this, or any other, case is insufficient.

The record contains sufficient evidence to prove that Defendant deliberated before shooting Officer Brown. The trial court did not err in overruling Defendant's motion for judgment of acquittal to the charge of first-degree murder.

III (police in courtroom).

The trial court did not err in overruling Defendant's motion seeking a court order requiring all non-testifying police officers to wear civilian clothes in the courtroom because Defendant failed to make a record establishing that these circumstances occurred or that he was prejudiced.

Defendant filed a pretrial motion in limine asking that the trial court order all non-testifying police officers attending the trial to wear civilian clothing. (L.F. 38). The trial court overruled the motion, but instructed counsel that if they saw anything that would infringe upon either party's right to a fair trial, counsel should bring it to the court's attention. (Tr. 9-8). During the course of the trial, Defense counsel neither made a record about, nor directed the trial court's attention to, the presence of non-testifying, uniformed police officers inside the courtroom and that the presence of any such officers was prejudicing Defendant's right to a fair trial. In Defendant's motion for new trial, defense counsel alleged that uniformed police officers attended Defendant's trial and that this was "coercive and intimidating to the jury." (L.F. 105).

This Court should reject this claim of error on at least two grounds. First, Defendant failed to make a record establishing either the presence of

any non-testifying and uniformed police officer and how the presence of any such officers affected Defendant's right to a fair trial. To the extent that Defendant's motion for new trial contained allegations concerning the presence of uniformed officers in the courtroom, it is insufficient to preserve this matter for appellate review. "Factual allegations in a motion for new trial are not self-proving." *State v. Smith*, 944 S.W.2d 901 (Mo. banc 1997). In any event, the motion alleges, at most, that uniformed officers attended the trial. The allegations in the motion suggesting that the officers' presence was "coercive and intimidating" is entirely speculative and consists of nothing more than counsel's opinion.

Even if uniformed officers attended Defendant's trial, Defendant cannot establish that he was prejudiced or that the officers' presence was "coercive and intimidating." In fact, the record suggests just the opposite.

During jury selection, defense counsel asked the jury panel if any of them would feel that the presence of "many, many police officers in the courtroom" during trial "would influence them." (Tr. 146-47). No one responded. In response to another question, a few veniremembers stated that the presence of police officers may influence them. (Tr. 148-55). But no veniremember, except one, said that they were not assertive enough to defend his or her verdict. (Tr. 155-56). The record shows that no one who responded

that he or she may have been influenced by the presence of police officers in the courtroom served on Defendant's jury. (Tr. 146-56, 177-78).

Defendant failed to make a record establishing the presence of non-testifying, uniformed police officers, or that the presence of any officers affected Defendant's right to a fair trial. Consequently, he has failed to establish that the trial court erred in overruling his motion to require non-testifying police officers to dress in civilian clothes or that he was prejudiced by the trial court's failure to do so.

CONCLUSION

The trial court did not commit reversible error in this case.

Defendant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 10,567 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 22nd day of September, 2010, to:

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