No. SC84036

IN THE
SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI,

Respondent,

vs.

MICHAEL A. TISIUS,

Appellant.

Appeal from the Circuit Court of Boone County, Missouri
Honorable Frank Conley, Judge

BRIEF OF RESPONDENT

JEREMIAH W. (JAY) NIXON
Attorney General

JOHN M. MORRIS
Assistant Attorney General
Missouri Bar No. 25208

P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-3321

Attorneys for Respondent

I N D E X

TABLE OF AUTHORITIES

Decisions

Constitutional Provisions, Statutes and Rules

JURISDICTIONAL STATEMENT

This appeal is from a conviction of two counts of first degree murder, §565.020, RSMo 2000, obtained in the Circuit Court of Boone County and for which appellant received two sentences of death. Because of the sentences of death imposed, the Supreme Court of Missouri has exclusive appellate jurisdiction over this appeal. Article V, §3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

The appellant, Michael A. Tisius, was charged by information in the Circuit Court of Randolph County on September 29, 2000 with two counts of first degree murder, aiding the escape of a prisoner, first degree burglary and armed criminal action (L.F. 13-15).[1] By consent of the parties, a change of venue was granted to the Circuit Court of Boone County (L.F. 31-32). Appellant's trial on the two counts of first degree murder began on July 30, 2001 before the Honorable Frank Conley with the selection of a jury from St. Charles County (Tr. 121). The charges of aiding the escape of a prisoner, first degree burglary and armed criminal action were later nolle prossed by the state (L.F. 260).

Appellant contests the sufficiency of the evidence to sustain his conviction of two counts of first degree murder. Viewed in the light most favorable to the verdict, the evidence at trial showed the following: in early June of 2000, appellant and Roy Vance were cellmates at the Randolph County Jail in Huntsville, Missouri (Tr. 597-598, 761-762, 794-796; S.Ex. 1). Appellant and Vance discussed a scheme whereby appellant, whose release was impending, would return to the jail and help Vance to escape (Tr. 795-797, 835, 881-882). The plan was that appellant would come into the jail with a firearm, force the guards into a cell, and give his gun to Vance, who would then take charge of the escape operation (Tr. 835, 842, 855). Appellant said that he would get Vance out of jail (Tr. 795-796).

Appellant was released on Tuesday, June 13, and got in touch with Vance's girlfriend, Tracie Bulington, who said that she wanted to go through with Vance's escape plan (Tr. 767, 794-795, 797, 804,

---

[1]The record on this appeal consists of the four-volume trial transcript ("Tr."), a two-volume legal file ("L.F."), a supplemental legal file ("Supp.L.F."), a second supplemental legal file ("2ndSupp.L.F."), and various state's exhibits ("S.Ex.") and defendant's exhibits ("D.Ex") as designated.

842). On Saturday, June 17, Bulington drove from Macon to Columbia with a woman named Heather Douglas to pick up appellant and drive him back to Macon, where he and Bulington were going to stay at Douglas's home (Tr. 764-766, 768, 773-774). During the ride, Douglas heard appellant talking to Bulington about various ways of breaking Vance out of jail, including the idea of locking the jailers in a cell (Tr. 767-768). They told Douglas that they were "just joking around" (Tr. 768, 774-777).

The Randolph County Jail in Huntsville was a two-story brick building (Tr. 597, 602-603; S.Ex. 2). The front door of the jail was kept locked, but could be remotely opened by the officers inside when visitors rang a doorbell (Tr. 598, 615, 798-799; S.Ex. 4). Inside the front door was a small foyer, and to the right behind a counter was the dispatch area, where the officers working at the jail were stationed (Tr. 600-602, 609-610, 663-665; S.Ex. 3-10). A hall led from the dispatch area to the jail cells in the rear of the building (Tr. 597, 625-626, 668; S.Ex. 3, 13-15). Beginning on or about Saturday, June 17, and continuing over several days, appellant and Bulington made multiple visits to the jail building (Tr. 755-760, 762). At around 1:30 or 2:00 one morning, they were admitted in the front door of the jail and delivered a pack of cigarettes to an officer on duty with the request that it be given to Vance (Tr. 755-756). Requests for delivery of articles to inmates was common, but the time of their visit was considered unusual by the officers (Tr. 755). A day or two later, appellant and Bulington returned to the jail with a pair of socks for Vance, and also asked for information about Vance's court date (Tr. 756-757). On this occasion, they were noted by the officers to be acting "real funny," nervous and erratic, sufficiently so that an officer followed them outside as they left and a police report was written about their visit (Tr. 757-759).

During their several-day stay with Heather Douglas, appellant and Bulington made references in her presence to being "on a mission" (Tr. 768-769); when Douglas asked what that meant, they told her

not to worry about it (Tr. 769). They described taking cigarettes to Vance at the jail and of having gotten information from a "stupid deputy" (Tr. 769). At other times, they would stop talking when Douglas came into the room (Tr. 771). Appellant and Bulington kept clothing and other items in Bulington's automobile, and one day when Douglas was in the car she saw a pistol under some other items on the floorboard of the vehicle (Tr. 770-771, 819-820). This .22 caliber firearm had been taken by Bulington from her parents' house (Tr. 697-701, 887-888).

At around 2:00 p.m. on Wednesday, June 21, appellant discussed the escape plan with Vance by telephone (Tr. 835). Sometime that day, he tested the pistol by firing it into the air (Tr. 888). Between 5:00 and 6:00 that afternoon, appellant visited Rebecca Kilgore, who lived with other persons at a residence a few blocks from the jail, while Bulington sat outside in her car (Tr. 779-783, 786-789). Appellant asked Kilgore for a loan of money, and said that he would pay it back "when he got his boy Roy out of jail" (Tr. 782, 786, 789, 793, 839, 888). Kilgore refused to give appellant any money (Tr. 782). At around 11:30 that night, appellant tried to flag down a car in which Kilgore was riding, but it did not stop (Tr. 783-786, 790-793).

At 12:15 a.m. (Thursday, June 22), appellant and Bulington returned to the Randolph County Jail, rang the doorbell and were admitted (Tr. 797-799, 835, 842, 891). Appellant was carrying concealed in his pants the pistol that Bulington had given him (Tr. 842, 891). The officers on duty were Leon Egley, a jail supervisor and dispatcher, and Jason Acton, a jail attendant and dispatcher (Tr. 613-614). Appellant and Bulington told the officers that they were there to deliver cigarettes to Vance, and spent ten minutes making conversation with Egley and Acton (Tr. 835-836, 842-843, 882, 891-892). Appellant then produced the pistol and, from a distance of two to four feet, shot Jason Acton once in the left forehead,

killing him instantly (Tr. 579-580, 592, 836, 838-839, 843, 854, 875-877, 882-883, 886, 891-892; S.Ex. 10-11, 21-22). Leon Egley began to move, and appellant shot him at least once from a distance of four or five feet, and Egley fell to the ground (Tr. 606, 799, 836, 839, 843, 854, 883, 886, 892). Both officers were unarmed (Tr. 666, 754).

Appellant took keys from the dispatch area and went back to the cell where Vance was confined (Tr. 799-800, 804-805, 836, 843, 854, 883, 892). He tried to open Vance's cell, but none of the keys worked, so he went back to the dispatch area to search for more keys (Tr. 800-801, 805, 836, 843, 854, 883, 892-893). While he was there, Leon Egley grabbed Bulington's legs from where he was lying on the floor, and appellant shot Egley several more times at a distance of two to three feet (Tr. 801, 836-837, 843, 854, 883-884, 887, 893). Egley suffered a total of five gunshot wounds, three to the forehead, a graze wound to the right cheek and a wound to the upper right shoulder (Tr. 587-590; S.Ex. 24-30).

When they were unable to find the key to release Vance from his cell, appellant fled the jail with Bulington in Bulington's automobile (Tr. 837, 843, 854, 884, 893). He threw the keys he had taken from the dispatch area out of the car window on the way out of town (Tr. 837, 843, 885). Appellant and Bulington drove north until they reached Highway 36 and then headed west (Tr. 837; S.Ex. 39). While crossing a bridge on Highway 36, Bulington wrapped the pistol in a blue cloth and threw it out of the automobile (Tr. 838, 843, 864, 884-885). After they had passed through St. Joseph and crossed the Kansas state line, Bulington's car broke down, and appellant and Bulington continued on foot (Tr. 837, 885-886).

While appellant and Bulington were still in the Randolph County Jail, Deputy Sheriff Wilburt White returned to the jail after responding to a call (Tr. 596-599). As he mounted the front porch of the building,

he heard a slamming or banging sound and saw a man he subsequently identified as appellant pointing a pistol over the counter into the dispatch area (Tr. 603-606). White heard approximately four reports and saw appellant turn to the woman next to him and repeatedly say, "get him" (Tr. 606, 611). White attempted to call for assistance on his radio and, when there was no answer, ran to the nearby home of a fellow officer to get help (Tr. 607-608, 615-617). White and other officers returned to the jail and discovered the body of Jason Acton, and also found Leon Egley lying on the floor gasping for breath (Tr. 608-609, 618-621, 629; S.Ex. 10-11). Egley went into cardiac arrest on the way to the hospital and could not be revived (Tr. 640-642). The cause of his death was injuries to his brain resulting from the multiple gunshot wounds to his head (Tr. 591).

Shortly before 6:00 that morning, a motorist found pieces of a pistol and a blue cloth near a bridge on Highway 36 (Tr. 677-696; S.Ex. 39-49). Later that morning, a Kansas law enforcement officer saw appellant and Bulington as they were walking west on Highway 36 in Wathena, Kansas, a town not far from the Kansas-Missouri line (Tr. 806-808; S.Ex. 39). The officer subsequently learned that persons fitting that description were suspects in the murders at the Randolph County Jail, and he located and questioned them (Tr. 808-811, 817-818). Upon discovering their identities and that there were Missouri warrants for their arrest, the officer arrested appellant and Bulington (Tr. 811-813, 818).

Early that afternoon, appellant was questioned at a Kansas jail by an officer of the Missouri State Highway Patrol (Tr. 646, 825-826). After waiving his Miranda rights, appellant initially denied any memory of the shooting at the Randolph County Jail, but ultimately confessed to the murders of Jason Acton and Leon Egley (Tr. 825-893). Appellant also admitted to these offenses in a spontaneous statement to an officer at the Boone County Jail ten months after his apprehension (Tr. 894-898). DNA

analysis of bloodstains on the jeans worn by appellant indicated that the genetic material in the blood was consistent with that of Jason Acton (Tr. 740-742). An examination of the bullets recovered from the victims indicated that they were comparable in their general rifling characteristics with the pistol recovered from Highway 36 (Tr. 728-734).

The defense conceded that appellant had killed Jason Acton and Leon Egley, but argued that appellant did not deliberate upon these murders and was therefore guilty of second degree murder (Tr. 569-574). The only defense evidence presented was a stipulation of fact by the parties (Tr. 909-910). At the close of the evidence, instructions and arguments of counsel, the jury found appellant guilty as charged of two counts of first degree murder (Tr. 949-951; Supp.L.F. 21-22).

In the punishment phase of trial, the state presented evidence concerning the impact of the victims' deaths upon their families (Tr. 970-1001), and that appellant had made a "shooting" motion with his hand at a jail guard while confined in a Missouri jail shortly after his apprehension (Tr. 1002-1013). The state also called as a witness Tracie Bulington, who provided further details concerning the murders (Tr. 1014-1063). Bulington related that appellant was dissatisfied with the .22 caliber pistol that she had provided him and made efforts to obtain a more powerful weapon (Tr. 1019, 1024-1025); that he made a conscious decision to commit the crimes when Jason Acton was one of the jail attendants, stating that Acton did not have "enough heart to play hero" (Tr. 1021-1022); that for a period of approximately forty-five minutes before going to the jail, appellant drove around with Bulington in her car and played a rap song about "mo' murda" (more murder) over and over (Tr. 792, 1026-1030; S.Ex. 67); and that after listening repeatedly to the "mo' murda" song, appellant told Bulington that it was "getting about time" to enter the jail, that he was going to "go in with a blaze of glory" and that he "had to do what he had to do" (Tr. 1031-1032,

1055-1056). While appellant and Bulington were making conversation with the victims shortly before the shootings, appellant had already drawn his pistol and was holding it next to his leg below the counter (Tr. 1035).

The defense called eleven witnesses in the punishment phase to testify about mitigating aspects of appellant's character and history (Tr. 1064-1240).

The jury returned sentences of death against appellant for the murders of Jason Acton and Leon Egley, finding one statutory aggravating circumstance in the murder of Acton and three in the murder of Egley (Tr. 1298-1300; Supp.L.F. 39-40). The court imposed the sentences assessed by the jury (Tr. 1303-1306). Appellant brings this appeal from his convictions and sentences.

ARGUMENT

IA.

THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN OVERRULING APPELLANT'S OBJECTION TO THE INTRODUCTION IN THE PUNISHMENT PHASE OF STATE'S EXHIBIT 67, A RAP SONG ABOUT "MO' MURDA" (MORE MURDER) THAT APPELLANT LISTENED TO OVER AND OVER FOR SOME FORTY-FIVE MINUTES BEFORE MURDERING DEPUTY SHERIFFS ACTON AND EGLEY BECAUSE (A) THIS EVIDENCE WAS RELEVANT TO SUPPORT THE INFERENCE THAT APPELLANT HAD ABANDONED THE CONSPIRATORS' ORIGINAL PLAN TO LOCK THE JAIL GUARDS IN A CELL AND INSTEAD HAD DECIDED TO KILL THEM IN THAT, CONSIDERED WITH APPELLANT'S STATEMENT THAT HE INTENDED TO "GO IN WITH A BLAZE OF GLORY," THE JURY COULD REASONABLY INFER THAT APPELLANT WAS PREPARING HIMSELF TO COMMIT MURDER BEFORE HE ENTERED THE JAIL; AND (B) THE ADMISSION OF THIS EVIDENCE DID NOT VIOLATE APPELLANT'S FIRST AMENDMENT RIGHT TO ENJOY MUSIC OF HIS CHOICE IN THAT IT WAS RELEVANT EVIDENCE OF HIS STATE OF MIND.

From the beginning of the trial, the defense conceded that appellant had murdered Deputy Sheriffs Jason Acton and Leon Egley at the Randolph County Jail (Tr. 569-574). The disputed issue of fact, in both the guilt and the punishment phases, was appellant's state of mind when he did so. Defense counsel argued in the guilt phase that appellant had not deliberated upon the murders of Deputies Acton and Egley (Tr. 569-574, 921-937) and, after the jury returned guilty verdicts of first degree murder, contended that

even if he had deliberated appellant was less culpable and should not be sentenced to death because he had shot Acton and Egley "out of panic, not as part of an overall plan" (Tr. 1263-1273).

The evidence relied upon by the defense in its punishment-phase argument that appellant had killed the victims out of panic and should not be sentenced to death was:

1. That the escape plan originally discussed by appellant, Roy Vance and Tracie Bulington did not involve killing the jailers but instead locking them in a cell at gunpoint (Tr. 795-796, 802-803, 835, 842, 855, 1018, 1047-1048, 1055-1056; see Tr. 1264-1265);

2. That, in statements to police after the murders, appellant claimed that he had been frightened and unable to speak and "just started shooting," that everything seemed like a dream and that he did not know why he shot the officers (Tr. 843, 855, 859-860, 875-877, 882-883, 891-892, 1059-1061; see Tr. 1269-1271); and

3. That various statements and conduct by appellant during the attempted jailbreak suggested that he had not planned the murders in advance (see Tr. 1265-1269).

The state disputed the defense account of appellant's state of mind and contended that appellant had made a conscious decision to kill the jail guards before he entered the jail, and therefore was deserving of a sentence of death (Tr. 1256-1257, 1287-1289, 1292). As support for this inference, the state principally relied upon the following evidence:

1. That appellant expressed his dissatisfaction before the murders with the .22 caliber pistol that Tracie Bulington had provided him, and made efforts to get a firearm of a larger caliber (Tr. 1019, 1024-1025; see Tr. 1292);

2. That from approximately 11:30 p.m. to when he entered the jail at 12:15 a.m., appellant drove

around with Bulington and played over and over a single rap song with the refrain "mo' murda" (more murder) (Tr. 792, 1026-1030; S.Ex. 67; see Tr. 1257);

3. That, after listening repeatedly to the "mo' murda" song, appellant told Bulington that it was "getting about time" to enter the jail, that he was going to "go in with a blaze of glory" and that he "had to do what he had to do" (Tr. 1031-1032, 1055-1056; see Tr. 1256-1257, 1292); and

4. That, as he was standing at the counter of the dispatch area making conversation with Acton and Egley, appellant had already drawn his pistol and was holding it out of sight against his leg (Tr. 1035; see Tr. 1257, 1289).

In her punishment-phase testimony, Bulington identified the "mo' murda" song that appellant had repeatedly listened to before the murders, and the state was permitted over defense objection to play it to the jury (Tr. 1026-1031, 1041; S.Ex. 67).[2] The trial court sustained a defense objection to the state's offer of a written copy of the song's lyrics (Tr. 1031). Appellant's first claim of error on appeal is that the trial court erred in permitting this song to be introduced and played to the jury as punishment-phase evidence (App.Br. 38-67). The trial court has broad discretion in the admission or rejection of demonstrative evidence. State v. Black, 50 S.W.3d 778, 787 (Mo. banc 2001), cert. denied 122 S.Ct. 1121 (2002).

A. This Evidence Was Relevant to Support a Reasonable Inference That Appellant Planned in Advance to Kill the Victims

Appellant contends that the "mo' murda" song should not have been admitted because it was irrelevant to the issue of appellant's state of mind (App.Br. 38-39, 43, 46-49). Evidence is relevant if it

[2]The brief of appellant quotes what purport to be some of the lyrics of this song (App.Br. 42). To counsel's ear, the words spoken are almost completely incomprehensible except for the constant refrain of "mo' murda" (see S.Ex. 67).

tends to prove or disprove a fact in issue or corroborates other relevant evidence. State v. Mayes, 63 S.W.3d 615, 630-631 (Mo. banc 2001); see also State v. Anderson, No. SC84035 (Mo. banc May 28, 2002), slip op. at 2. Even if logically relevant, evidence may be excluded because it is not legally relevant–that its prejudicial effect is such that "its costs outweigh its benefits." Id. The trial court's determination of these issues will not be disturbed absent an abuse of discretion. Id.

1. Logical Relevance

Viewing this exhibit in light of the evidence as a whole, the trial court did not abuse its discretion in permitting it to be played to the jury. The fact that appellant spent some forty-five minutes before the murders at bar listening over and over to the same song about homicide, followed immediately by his declaration that he intended to "go in with a blaze of glory" and that he "had to do what he had to do," supports the state's inference that appellant was "psyching himself up" for killings that he had already decided to commit (Tr. 955). This inference, and the fact that appellant drew his pistol well before he began shooting, refutes the defense theory that he was not deserving of a sentence of death on the ground that he had not planned in advance to murder Deputies Acton and Egley, but instead killed them out of panic. The inference drawn by the state from the "mo' murda" song was reasonable under the circumstances, and indeed was far more plausible than the defense argument that appellant had not planned the murders because his attempted jailbreak was not well-executed (Tr. 1265-1267).

In disputing the relevance of this evidence, appellant slaughters an array of straw men. At no time did the prosecution state, suggest or imply that listening to rap music "caused" appellant to commit the murders (App.Br. 47-49). Whether the song artists were themselves violent persons, whether their product had artistic merit, and whether the song advocated violence or simply described it (App.Br. 48-50) were

not addressed by the prosecution and had nothing whatever to do with the relevance of this evidence. The state did not offer the "mo' murda" song on the theory that anyone who listens to music endorses the theme or message of that composition (App.Br. 46-47, 55-56). The relevance of this evidence was nothing more or less than that a person who listens to the same song about "murda" over and over for forty-five minutes, while en route to commit a crime with a gun, and who then declares that he intends to "go in with a blaze of glory" can be reasonably inferred to be preparing himself mentally to commit murderous acts.

The mental state of a defendant can seldom be proven by any means other than circumstantial evidence. State v. McIntyre, 63 S.W.3d 312, 315 (Mo.App., W.D. 2001). This is a classic instance in which an assortment of facts, some otherwise unremarkable, combine to throw light on a defendant's thoughts and intentions before the commission of a crime. The probative value of the challenged evidence can be illustrated by the fact that, while appellant's "blaze of glory" statement was important in itself, it gained in significance and context when considered in light of the fact that he listened to a song about "murda" for the previous forty-five minutes.

2. Legal Relevance

Appellant's only detectable argument as to "unfair prejudice" that might have counterbalanced the probative value of this evidence, State v. Anderson, supra, is that the jurors would be offended by "the song's coarse language, replete with profanity, vivid images of violence, and offensive racial and sexual references" and might conclude that listening to rap music "was a reason Mike [*sic*] should die" (App.Br. 42, 59-60). Appellant's premise that the jurors would have been able to comprehend the lyrics of this song, other than the constant refrain of "mo' murda," is debatable.[3] But even if this assumption is made,

[3]Respondent wonders how many repetitions of the song were required to compile the partial lyrics listed in appellant's brief

appellant offers no plausible explanation as to why jurors would attribute the song's foul language and offensive references to appellant, let alone decide that appellant should be executed simply because he listened to rap music.

Appellant's theory of prejudice is even less tenable, if that is possible, in light of the fact that this evidence was introduced in the punishment phase. The well-settled purpose of the punishment phase in a capital trial is to present evidence concerning the defendant's character and history, including prior crimes, that would be prejudicial had it been presented to a jury that was adjudicating the defendant's guilt. State v. Ervin, 979 S.W.2d 149, 158 (Mo. banc 1998), cert. denied 525 U.S. 1169 (1999).[4] In the punishment phase of this case, the jury learned that appellant had stolen CD's from a department store (Tr. 1120), that he had been repeatedly suspended from school for fighting, cursing teachers and sexual harassment (Tr. 1117-1118, 1121, 1124, 1239-1240) and that he had skipped school and flunked the sixth grade (Tr. 1092, 1100). And all of this testimony came from the defense witnesses! Given the nature of the evidence in the punishment phase, the notion that the jury would have been inflamed by the mere fact that appellant had listened to rap music, and would have been more likely to sentence him to death as a result, is preposterous.

3. Absence of Prejudice

Under the facts and authorities discussed above, the trial court could not have abused its discretion in admitting State's Exhibit 67 in the punishment phase. But even assuming the contrary, the exclusion of

---

(App.Br. 42). The jury heard this exhibit once.

[4]Respondent knows of no decision by this Court, and appellant has offered none, that has addressed the concept of legal relevance in connection with punishment-phase evidence.

this evidence could not possibly have altered the sentences of death that were assessed by the jury in this case. In evaluating a claim of prejudice arising from the admission of legally irrelevant evidence, the issue is whether or not such evidence was "outcome determinative": whether the erroneously-admitted evidence, considered in the light of the evidence as a whole, created a reasonable probability that the jury would have reached a different result but for its admission. State v. Barriner, 34 S.W.3d 139, 150 (Mo. banc 2000).

Even without the evidence that appellant "psyched himself up" to commit murder before entering the Randolph County Jail, the state demolished appellant's theory that he did not plan to kill Deputies Acton and Egley and did so out of mere panic. Appellant's assertion to Tracie Bulington that he intended to "go in with a blaze of glory," and the fact that he drew his weapon well before beginning his attack, cannot be construed in any way other than as a preexisting plan to shoot the officers. That, combined with the fact that appellant shot two unarmed law enforcement officers in the course of a planned jailbreak, and that he finished one of them off moments later with more gunshots, makes this anything but a close case on the issue of punishment. No reasonable probability exists that the jury would have reached a different result on punishment had the challenged evidence not been admitted.

B. The Admission of This Evidence Did Not Violate Appellant's First Amendment Rights

Appellant also argues that the admission of State's Exhibit 67 violated his right under the First Amendment to "play and enjoy music of his choice," relying upon the holding of the United States Supreme Court in Dawson v. Delaware, 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992) (App.Br. 43-46, 51-57).

As appellant concedes (App.Br. 44-45), this is not an alternative claim of error, but rather is based upon his supposition that the evidence at issue was logically irrelevant. In Dawson, the state introduced evidence in the punishment phase of a capital trial that the defendant, who had escaped from a Delaware prison before committing the charged murder, had an Aryan Brotherhood tattoo on his hand. Id., 503 U.S. at 160-161. The parties entered into a stipulation that the Aryan Brotherhood was a "white racist prison gang" that originated in the California prison system, and that separate gangs bearing the same name operated in prisons in other states. Id., 503 U.S. at 161-162. The Supreme Court of the United States noted that the state had failed to show that the Aryan Brotherhood gang in the Delaware prison system had endorsed or committed any unlawful acts, or that the defendant's association with the gang had any relevance to his murder of the victim in the case at bar. Id., 503 U.S. at 165-167.[5] The Supreme Court framed the issue before it as follows:

> The question presented in this case is whether the First and Fourteenth Amendments prohibit the introduction in a capital sentencing proceeding of the fact that the defendant was a member of an organization called the Aryan Brotherhood, where the evidence has no relevance to the issues being decided in the proceeding. We hold that they do.

Id., 503 U.S. at 160 (emphasis supplied). The court expressly noted that evidence of activity protected by the First Amendment was admissible in the punishment phase of a capital trial when it was relevant to

[5]The court observed that "Delaware might have avoided this problem if it had presented evidence showing more than mere abstract beliefs on Dawson's part, but on the present record one is left with the feeling that the Aryan Brotherhood evidence was employed simply because the jury would find these beliefs morally reprehensible." Id., 503 U.S. at 167.

the determination of punishment. Id., 503 U.S. at 164; see also State v. Driscoll, 55 S.W.3d 350, 353-354 (Mo. banc 2001).

Unlike the facts presented in Dawson, the significance of the evidence in the case at bar was not that appellant entertained specific beliefs or was a member of a particular organization, but simply that he listened to a violent piece of music as part of preparing to commit a violent crime. The content of the music–its genre, the views it expressed, the motivations of its artists–was of no significance, only the mental state that appellant sought to create within himself by repeatedly playing it. Even assuming that appellant's First Amendment rights are implicated in these circumstances, Dawson has no application to this case because State's Exhibit 67 was in fact relevant to appellant's state of mind in committing the murders, and therefore to his punishment. Each and every decision cited by appellant in support of his argument (App.Br. 51-57) bases its holding on the conclusion that the evidence before it was irrelevant.

Since the "mo' murda" song was logically relevant to the issue of whether appellant planned the murders in advance, it is unnecessary for this Court to engage in constitutional harmless error analysis.[6] Nevertheless, no conceivable possibility exists that, but for the playing of State's Exhibit 67, appellant would not have been sentenced to death for the murders of Deputies Acton and Egley. See Part A3 of this argument, supra. Therefore, this evidence would have been harmless beyond a reasonable doubt even had

---

[6]Appellant denies that harmless error analysis is possible, relying upon Flanagan v. State, 109 Nev. 50, 846 P.2d 1053, 1058 (1993), which based its holding upon dicta in a Supreme Court decision rendered before Dawson. The Supreme Court authorized harmless error review in Dawson (503 U.S. at 168-169), and this Court conducted such an analysis when presented with a claim on this issue. State v. Driscoll, supra, 55 S.W.3d at 356-357. Other jurisdictions have done likewise. E.g., State v. Leitner, 34 P.3d 42, 56-57 (Kans. 2001); State v. Marsh, 177 Wis.2d 643, 502 N.W.2d 899, 902-903 (1993).

it been erroneously admitted. See State v. Black, 50 S.W.3d 778, 786 (Mo. banc 2001), cert. denied 122 S.Ct. 1121 (2002).

Appellant's claim of error is meritless.

IB.

THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION OR COMMIT MANIFEST INJUSTICE IN ADMITTING THE "MO' MURDA" SONG THAT APPELLANT LISTENED TO BEFORE THE MURDERS, BECAUSE (1) THE PROSECUTION HAD NO OBLIGATION TO DISCLOSE TRACIE BULINGTON'S ORAL STATEMENT ON THE MORNING OF HER TESTIMONY THAT SHE COULD IDENTIFY THE SONG THAT APPELLANT HAD LISTENED TO IN THAT SUCH DISCLOSURE IS NOT REQUIRED UNDER SUPREME COURT RULE 25.03 OR ANY OTHER AUTHORITY; AND (2) EVEN HAD SUCH AN OBLIGATION EXISTED, APPELLANT COULD NOT HAVE SUFFERED PREJUDICE FROM THIS NONDISCLOSURE IN THAT THE DEFENSE COULD NOT HAVE COUNTERED HIS EVIDENCE EVEN IF IT HAD HAD ADVANCE KNOWLEDGE OF IT.

Several weeks before trial, the defense took a deposition of Tracie Bulington at the Audrain County Jail (Tr. 1028, 1048). In this deposition, Bulington was able to identify the name of the CD album that appellant had played before the murders, the name of the rap group that had made it, and the fact that the specific song that appellant had listened to contained the words "mo' murda" (Tr. 1028-1029). She said that she did not remember the name of the song (Tr. 1028). The defense obtained a copy of this CD before trial and determined that the words "mo' murda" appeared in two of the songs on the album (Tr. 1028, 1030).

On the morning that the punishment phase began, the state played the CD to Bulington, and she was able to identify the song that appellant had listened to (Tr. 953-954, 1027-1028). When Bulington

testified that morning as the last witness before the noon recess and was asked to identify the song, the defense objected on the ground that it was unfairly surprised and argued that the state should have played the CD to Bulington "in advance of trial" or given the defense notice that it intended to do so (Tr. 1027-1030, 1063).[7] The court overruled this objection (Tr. 1030). In his motion for new trial, appellant alleged that the defense had been prepared to rely on the fact that Bulington could not say which song appellant had listened to, and again complained that the defense had not been made aware of this fact "prior to trial" (L.F. 252-253).

On appeal, appellant advances an entirely different claim: that the failure of the prosecution to disclose that Bulington could identify the "mo' murda" song in the interval of one or more hours between when the CD was played to Bulington and when she was asked about it on the stand violated the state's continuing duty of disclosure (App.Br. 66-67). Appellant is not at liberty to change his theory of error on appeal, and his failure to present this claim to the trial court means that it should be reviewed, if reviewed at all, only for the presence of manifest injustice. State v. Winfield, 5 S.W.3d 505, 515 (Mo. banc 1999), cert. denied 528 U.S. 1130 (2000); Supreme Court Rule 30.20.

Contrary to appellant's claim, the state did not have an obligation to disclose Bulington's so-called change of testimony (App.Br. 67)–more accurately, her new statement based upon additional information. Under Supreme Court Rule 25.03(A)(1), the state must disclose statements by a witness if they are "written

[7]When asked why the defense had not itself played the CD to Bulington to see if she could identify the song in the several weeks after her deposition, defense counsel responded that, unlike the prosecution, "we weren't able . . . [to] go into the jail and at our leisure and speak with her" (Tr. 1030). A fair translation of this statement is that the defense never requested to speak to Bulington for the purpose of playing her the CD.

or recorded."[8] No evidence exists, and appellant does not allege, that Bulington's identification of the rap song on the morning of her testimony was reduced to writing. See State v. Armontrout, 8 S.W.3d 99, 110 (Mo. banc 1999), cert. denied 529 U.S. 1120 (2000) for similar facts.

The fact that appellant's pretrial discovery motions contained language broader than that authorized by Rule 25.03 (L.F. 38, 43; see App.Br. 61-62) was of no significance unless the court found "good cause" for the additional disclosure under Supreme Court Rule 25.04. See State v. Wolfe, 13 S.W.3d 248, 259-260 (Mo. banc 2000), cert. denied 531 U.S. 845 (2000). Here, the state objected before trial to appellant's broad requests for material beyond the scope of Rule 25.03 (Tr. 4-9), and the court did not find good cause, but instead directed the state to disclose materials "in accordance with the discovery rules" (2ndSupp.L.F.). Therefore, appellant's claim that the state violated its legal duty of disclosure is meritless.

Even had the prosecution failed to comply with a rule of discovery, which it did not, appellant suffered no possible prejudice. The trial court has discretion in the imposition of sanctions for violation of the discovery rules, and its ruling will be overturned only upon a showing of fundamental unfairness to the defendant. State v. Rousan, 961 S.W.2d 831, 843 (Mo. banc 1998), cert. denied 524 U.S. 961 (1998). While complaining that he was "surprised" by Bulington's testimony (App.Br. 67), appellant offers no explanation in his brief on appeal as to what he could have done to respond to this evidence if he had had advance knowledge of it. In his Motion for New Trial, appellant asserted that, given time, he could have

---

[8] A broader obligation of disclosure would have existed had this been "evidence of unconvicted misconduct" that the state was seeking to introduce in the punishment phase. State v. Thompson, 985 S.W.2d 779, 792 (Mo. banc 1999). Bulington's statement about what rap song appellant had listened to is not, by any plausible construction of that term, "unconvicted misconduct."

located a witness to testify that the song identified by Bulington "had nothing to do with shooting jail guards" (L.F. 253). But, as discussed in respondent's Point IA, supra, the subject or theme of this song was completely irrelevant to the purpose for which it was offered by the state: to show that appellant repeatedly played a violent song to "psych himself up" to commit violence (Tr. 955). Appellant has failed to show that, had disclosure been made, he would have acted differently and that this difference would have affected the outcome of his trial. State v. Armontrout, supra, 8 S.W.3d at 111.

Absent the slightest basis for a conclusion that the defense could have countered this evidence had it had advance knowledge of it, appellant could not have suffered fundamental unfairness or manifest injustice even if the state had had a duty to disclose it. Therefore, appellant's unpreserved claim of error should be rejected.

II.

THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION OR COMMIT MANIFEST INJUSTICE IN EXCUSING FOR CAUSE VENIREPERSON PATTI LOU GRANT BECAUSE THE COURT REASONABLY CONCLUDED FROM GRANT'S TESTIMONY THAT SHE WAS SUBSTANTIALLY IMPAIRED IN HER ABILITY TO CONSIDER THE IMPOSITION OF A SENTENCE OF DEATH IN THAT GRANT INITIALLY TESTIFIED THAT SHE COULD NEVER RETURN A DEATH SENTENCE, AND THEN STATED THAT SHE COULD DO SO ONLY IF, IN HER SUBJECTIVE PERCEPTION, THE CRIME WAS "HORRENDOUS" OR "TERRIBLE."

During the death-qualification portion of voir dire, the state described in detail the issues presented to the jury in the punishment phase and examined each prospective juror about his or her ability to follow the law (Tr. 422-433). Venireperson Patti Lou Grant responded as follows:

> [Mr. Ahsens, prosecutor]: Ms. Grant, final point of decision. Could you vote for the death penalty?
>
> VENIREMAN GRANT: No.
>
> MR. AHSENS: Excuse me.
>
> VENIREMAN GRANT: No.
>
> MR. AHSENS: Again, do you have any similar reservations about life in prison without parole?
>
> VENIREMAN GRANT: No.
>
> MR. AHSENS: Is this a belief that you held prior to coming in here today?

VENIREMAN GRANT: Yes.

MR. AHSENS: So this is something that you have thought about, given some consideration to?

VENIREMAN GRANT: Yes.

MR. AHSENS: I take it then that there is no point in trying to talk you out of it. And it is as they say your final answer?

VENIREMAN GRANT: Yes.

MR. AHSENS: Thank you so much.

Tr. 433-434.

The defense sought to rehabilitate Ms. Grant and other venirepersons who said that they were unable to fairly consider a sentence of death:

[Mr. Kenyon, defense counsel:] Ms. Kennard and Ms. Grant, and I guess I'll just ask all of you kind of en masse here. Ms. Kennard, Ms. Grant, Mr. Jameson, and Ms. Goldman, has there been anything that has been said that I've said or anybody else has said since the prosecutor has been up here and you gave your answers to the prosecutor, is there anything that has been said that makes you believe that if you found that [appellant] did this terrible crime, killed these two jail guards, could any one of you realistically consider the death penalty?

No.

VENIREMAN GRANT: It would have to be horrendous.

MR. KENYON: It would have to be?

VENIREMAN GRANT: The crime would have had to have been terrible.

MR. KENYON: Okay. And if the crime was, I'm assuming then from that answer that if the crime was terrible enough, that you could actually, you might even though you might be leaning away from the death penalty, you really want to stay away from the death penalty, the facts of the crime could be so horrible that you could?

VENIREMAN GRANT: Yes.

MR. KENYON: Conceive of yourself of voting for the death penalty?

VENIREMAN GRANT: Yes.

MR. KENYON: That was Ms. Grant.

Tr. 466-467. The state requested that Ms. Grant be excused for cause and the court granted that request without defense opposition (Tr. 531). Appellant contends on appeal that the excusal of venireperson Grant violated the holding of Wainwright v. Witt, 469 U.S. 412, 417-424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) (App.Br. 67-79). Since appellant failed to contest at trial that this venireperson was subject to excusal on the ground that she was unable to fairly consider the full range of punishment, his present claim of error is reviewable only for the presence of manifest injustice. Supreme Court Rule 30.20.[9]

The standard for determining whether a prospective juror may be excused for cause based upon his or her views on punishment is whether those views would "'prevent or substantially impair the

[9]Appellant asserts that this claim was preserved because defense counsel made a "continuing objection" during the death-qualification examination (App.Br. 72-73, n. 6). This continuing objection, however was based solely upon a pretrial motion concerning the questions that should be permitted in this phase of voir dire (Tr. 528-532; L.F. 89-92). Appellant never asserted at trial, as he does on appeal, that Ms. Grant's testimony did not support her excusal for cause under the applicable death-qualification standard.

performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, supra, 469 U.S. at 424, quoting Adams v. Texas, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). The qualifications of a prospective juror are not determined from a single response, but rather from the entire examination. State v. Christeson, 50 S.W.3d 251, 265 (Mo. banc 2001), cert. denied 122 S.Ct. 406 (2001). The trial court is in the best position to evaluate the qualifications of a venireperson and has broad discretion in making that determination. Id.

The fact that venireperson Grant contradicted herself about her ability to follow the law as to punishment–first stating categorically that she could never vote for a death sentence and then asserting that she could for a "terrible" or "horrendous" crime–is itself sufficient to sustain the trial court's exercise of discretion. "A juror's equivocation about his ability to follow the law in a capital case together with an unequivocal statement that he could not sign a verdict of death can provide a basis for the trial court to exclude the venireperson from the jury" (citation omitted). State v. Rousan, 961 S.W.2d 831, 840 (Mo. banc 1998), cert. denied 524 U.S. 961 (1998); see also State v. Christeson, supra. The trial judge's exercise of discretion has been upheld in cases presenting similar facts. See, e.g., State v. Storey, 40 S.W.3d 898, 905 (Mo. banc 2001), cert. denied 122 S.Ct. 272 (2001) (venireperson first said that he could never return a sentence of death, then stated that he could in a "very severe case"); and State v. Winfield, 5 S.W.3d 505, 510-511 (Mo. banc 1999), cert. denied 528 U.S. 1130 (2000) (venireperson first said that she "[didn't] think she could" assess death, then stated that she could follow the law).

Even aside from the self-contradictory nature of Grant's testimony on this issue, the best answer that defense counsel was able to elicit from her was that she could consider a sentence of death in a "terrible" or "horrendous" case (Tr. 466). These are terms with no objectively-identifiable meaning.

Appellant's claim of error is, in essence, that the trial court abused its discretion in not permitting Grant to serve as a juror on the off-chance that, once she heard all of the evidence, she might then decide that it was a "terrible" or "horrendous" crime, and might therefore see fit to follow the law as to punishment. Nothing in Witt compels trial courts to gamble on whether prospective jurors will follow the law. For similar facts, see State v. Clayton, 995 S.W.2d 468, 475-476 (Mo. banc 1999), cert. denied 528 U.S. 1027 (1999) (venireman stated that he could only vote for death in "extreme cases").

In attacking the ruling of the trial court excusing venireperson Grant, appellant relies upon footnote 21 in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), discussed at length in Wainwright v. Witt, supra (App.Br. 73-74, 79). Appellant's theory that the state was required to show that Grant was "irrevocably committed, before the trial has begun, to vote against the penalty of death," Witherspoon v. Illinois, supra, 391 U.S. at 522 (n. 21)–and that any equivocation by Grant in her refusal to consider a sentence of death therefore meant that she could not be excused for cause–ignores the fact that this footnote was expressly rejected as *dicta* in Witt. Id., 469 U.S. at 417-424. The Supreme Court stated that "[d]espite [a] lack of clarity in the printed record, . . . there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." Id., 469 U.S. at 425-426. Appellant's notion that Grant could not be removed unless she categorically refused to consider a sentence of death is flatly refuted by Witt.[10]

---

[10]Appellant also offers the novel assertion that Ms. Grant's testimony that she could consider the death penalty in some hypothetical circumstance must be given weight because "it is presumed that each juror follows the court's instructions" (App.Br. 77). Of course, Ms. Grant was not yet a juror, and her ability or inability to follow the law was not a matter for presumption, but a question of fact to be determined by the trial court during voir dire. State v. Christeson, supra.

Szuchon v. Lehman, 273 F.3d 299 (3rd Cir. 2001), cited as "similar" and "instructive" by appellant (App.Br. 78-79), is factually irrelevant to the present case. There, a venireperson stated only that he "did not believe in capital punishment" but was never asked anything about his ability to impose it as a juror. Id. at 329. This statement was deemed insufficient by itself to establish that this venireperson's ability to consider the full range of punishment was substantially impaired. Id. at 329-330. In the case at bar, by contrast, venireperson Grant was expressly and repeatedly asked about her ability to impose a sentence of death and gave contradictory answers (Tr. 433-434, 466-467), supporting a reasonable conclusion that her ability to follow the law was substantially impaired.

Appellant's unpreserved claim of error is meritless.

IIIA.

THE CIRCUIT COURT DID NOT ERR IN OVERRULING APPELLANT'S MOTION FOR ACQUITTAL AT THE CLOSE OF ALL THE EVIDENCE BECAUSE SUFFICIENT EVIDENCE WAS PRESENTED AT TRIAL TO ESTABLISH THAT APPELLANT DELIBERATED UPON THE MURDERS OF DEPUTY SHERIFFS JASON ACTON AND LEON EGLEY IN THAT (1) THE JURY COULD REASONABLY INFER THAT APPELLANT MADE PREPARATIONS IN ADVANCE TO KILL THE DEPUTIES, (2) APPELLANT SHOT EGLEY FIVE TIMES IN TWO DIFFERENT INCIDENTS, AND (3) APPELLANT MADE NO ATTEMPT TO SEEK AID FOR THE VICTIMS BUT INSTEAD FLED THE STATE AND DISPOSED OF INCRIMINATING EVIDENCE.

Point III of the appellant's brief contains two legally-distinct claims of error: first, that the evidence presented at trial was insufficient to establish that appellant deliberated upon the murders of Deputy Sheriffs Jason Acton and Leon Egley; and second, that appellant's sentences of death should be reduced to life imprisonment in this Court's statutorily-mandated review of capital sentences (App.Br. 79-87). These claims will be addressed separately.

In reviewing a claim of insufficiency of evidence, an appellate court accepts as true the evidence in the light most favorable to the state, affording the state all reasonable inferences drawn from the evidence and disregarding contrary evidence and inferences. State v. Goodwin, 43 S.W.3d 805, 815 (Mo. banc 2001), cert. denied 122 S.Ct. 234 (2001); State v. Chaney, 967 S.W.2d 47, 52 (Mo. banc 1998), cert. denied 525 U.S. 1021 (1998). Proof of the intent element of deliberation, defined in §565.002(3), RSMo 2000 as "cool reflection for any length of time no matter how brief," must ordinarily be provided through

the circumstances surrounding the crime. State v. Ferguson, 20 S.W.3d 485, 497 (Mo. banc 2000), cert. denied 531 U.S. 1019 (2000).

Appellant brought a concealed pistol into the Randolph County Jail and, after making conversation for some ten minutes with the two deputies on duty, produced the pistol and shot Jason Acton in the forehead from a distance of two to four feet, killing him. He then turned his pistol on Leon Egley and shot him one or more times from four or five feet away. Later, when Egley showed signs of life by grabbing the leg of Tracie Bulington, appellant shot Egley several more times at close range. Egley suffered a total of five gunshot wounds, three to the forehead. The jury's inference that appellant deliberated upon the murders of Acton and Egley is supported by the following facts:

1. Evidence of Appellant's Preparation for the Murders

The jury could reasonably infer that, by bringing a concealed weapon into the jail and by making conversation with Deputies Acton and Egley to put them at ease, appellant was preparing to murder the victims. Evidence that a defendant prepared to commit murder–and therefore had an opportunity to abandon that plan before carrying it out–supports an inference of deliberation. See State v. Johnston, 957 S.W.2d 734, 747-748 (Mo. banc 1997), cert. denied 522 U.S. 1150 (1998); and State v. Roberts, 948 S.W.2d 577, 590 (Mo. banc 1997), cert. denied 522 U.S. 1056 (1998).

Appellant cites evidence that the original scheme discussed by appellant, Roy Vance and Tracie Bulington was to put the jailers into a cell at gunpoint and asserts that this was his plan when he entered the jail (App.Br. 82-83). Such an argument ignores the appellate standard of review for sufficiency claims and asserts, in effect, that the jurors were required to believe appellant's self-serving account of his intentions. Appellant's factual hypothesis of innocence as to first degree murder was squarely presented to the jurors

at trial and was unanimously rejected by them, as they were entitled to do.

2. Appellant's Murder of Leon Egley By Multiple Gunshots

Appellant shot Deputy Egley a total of five times–three times in the head–in two separate incidents. Evidence of multiple wounds or repeated blows may support an inference of deliberation. State v. Ervin, 979 S.W.2d 149, 159 (Mo. banc 1998), cert. denied 525 U.S. 1169 (1999); State v. Clay, 975 S.W.2d 121, 139 (Mo. banc 1998), cert. denied 525 U.S. 1085 (1999). The fact that appellant shot Egley three times in the head at close range reinforces a reasonable inference that appellant coolly reflected on the victim's death.

3. Appellant's Conduct After the Murders

Appellant's conduct after shooting the victims is also relevant in determining whether or not he deliberated upon their murder. See State v. Feltrop, 803 S.W.2d 1, 12 (Mo. banc 1991), cert. denied 501 U.S. 1262 (1991) (failure to seek medical assistance for victim); State v. Williams, 945 S.W.2d 575, 580 (Mo.App., W.D. 1997) (disposing of the murder weapon).

Appellant's failure to seek assistance for Deputies Acton and Egley, the latter of whom was lying on the floor gasping for breath (Tr. 618-619), and his subsequent flight from the state and disposal of evidence, also support the jury's finding that he deliberated upon the murders. State v. Feltrop, supra; State v. Williams, supra; State v. Moore, 949 S.W.2d 629, 633 (Mo.App., W.D. 1997).

Appellant's sufficiency challenge rests, in its entirety, upon his attempt to reargue on appeal the version of the facts that was offered by the defense at trial and was rejected by the jury: that appellant did not reflect upon the killings of Deputies Acton and Egley, but instead shot them out of "panic" (App.Br. 82-83; see Tr. 569-574). The fact that appellate courts do not reweigh the evidence in reviewing sufficiency

claims, State v. Ervin, supra, is fatal to his argument. The trial court could not have erred in overruling appellant's motion for judgment of acquittal.

IIIB.

THIS COURT SHOULD, IN THE EXERCISE OF ITS INDEPENDENT REVIEW, AFFIRM APPELLANT'S SENTENCES OF DEATH BECAUSE (1) THEY WERE NOT IMPOSED UNDER THE INFLUENCE OF PASSION, PREJUDICE OR ANY OTHER ARBITRARY FACTOR; AND (2) APPELLANT'S SENTENCES ARE NOT EXCESSIVE OR DISPROPORTIONATE TO THOSE IN SIMILAR CASES, CONSIDERING THE CRIMES, THE STRENGTH OF THE EVIDENCE AND THE DEFENDANT.

As an alternative to his attack upon the sufficiency of the evidence, appellant invokes this Court's duty of independent sentence review under §565.035.3, RSMo 2000, arguing that the evidence that he deliberated upon the murders of Deputies Jason Acton and Leon Egley was "not sufficiently strong" and citing various of his claims of trial error as evidence that his punishment-phase hearing was unfair (App.Br. 83-87). Contrary to the assertions in appellant's brief (App.Br. 85-86), the proportionality review conducted by this Court is not a requisite under the due process clause, or under any other provision of the United States Constitution. Morrow v. State, 21 S.W.3d 819, 829-830 (Mo. banc 2000), cert. denied 531 U.S. 1171 (2001).[11]

Appellant's allegation that the punishment verdict was the result of "passion, prejudice or any other arbitrary factor," §565.035.3(1), rests entirely upon the claims of error advanced in Points I, II, V and VI

---

[11]Cooper Industries, Inc. v. Leatherman Toolgroup, Inc., 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001), cited by appellant, does not support his claim: this decision concerned the review of punitive damage awards and did not purport to overrule, modify or even address Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), which held that proportionality review is not constitutionally required in an otherwise valid capital sentencing system.

of the appellant's brief (App.Br. 84-85).[12] His claim that some, but not all, of the statutory aggravating circumstances found by the jury are not supported by evidence, §565.035.3(2), is raised in Point VII of his brief (App.Br. 109-125). For the reasons stated in the equivalent points in the respondent's brief, appellant's arguments are meritless.

As to whether appellant's sentence of death was "excessive or disproportionate to the penalty imposed in similar cases, considering . . . the crime, the strength of the evidence and the defendant," §565.035.3(3), the murders of Deputies Acton and Egley resemble–but are more egregious than–the killing of law enforcement officers in State v. Clayton, 995 S.W.2d 468, 484 (Mo. banc 1999), cert. denied 528 U.S. 1121 (2000); State v. Sweet, 796 S.W.2d 607, 617 (Mo. banc 1990), cert. denied 499 U.S. 932 (1991); and State v. Mallett, 732 S.W.2d 527, 542-543 (Mo. banc 1987), cert. denied 484 U.S. 933 (1988). The punishment-phase testimony of Tracie Bulington established that, unlike the above cases, appellant formed the intent to kill the officers before he ever encountered them: he made efforts to obtain a larger-caliber pistol in the days before the murders, said to Bulington that he was going to "go in with a blaze of glory," and spent forty-five minutes before these crimes "psyching himself up" for what he intended to do. The fact that appellant committed multiple murders also refutes the notion that his sentences are excessive or disproportionate. See State v. Johnson, 22 S.W.3d 183, 193 (Mo. banc 2000), cert. denied

[12] Appellant also cites Cooper Industries, Inc. v. Leatherman Toolgroup, Inc., supra, for the proposition that the alleged trial errors he cites should be considered "in evaluating the reliability and proportionality of the verdict of death" (App.Br. 32). Cooper Industries has nothing whatsoever to say on this issue. Appellant's argument is superfluous, however, because §565.035.3(1) already directs this Court to review the record for "arbitrary factor[s]" that could have caused the trier of fact to assess punishment based upon something other than the relevant facts and law.

531 U.S. 935 (2000); State v. Wolfe, 13 S.W.3d 248, 265 (Mo. banc 2000), cert. denied 531 U.S. 845 (2000).

The strength of the evidence in this case could hardly be greater given the defense concession at trial that appellant had murdered Deputies Acton and Egley (Tr. 569-574). Appellant's notion that the evidence of his deliberation upon these murders was insufficient is refuted by the facts and authorities discussed in respondent's Point IIIA, supra, and his cool reflection upon these murders was further established by the punishment-phase testimony of Tracie Bulington described above.

Appellant's relative youth and the fact that he had not previously been in "serious trouble" (App.Br. 86) do not support his argument that his sentence is disproportionate. That has been true in a number of past cases in which sentences of death have been upheld by this Court. See State v. Hutchison, 957 S.W.2d 757, 768 (Mo. banc 1997) and cases cited therein. It would be strange indeed if a defendant who committed the deliberate murder of two law enforcement officers as part of an attempted jailbreak could evade the death penalty for his crimes by asserting, in essence, that he hadn't done anything like that before.

Viewing the trial record as a whole, it cannot be said that appellant's murders of Deputies Acton and Egley are "plainly lacking circumstances consistent with those in similar cases in which the death penalty has been imposed." State v. Ramsey, 864 S.W.2d 320, 327-328 (Mo. banc 1993), cert. denied 511 U.S. 1078 (1994). Accordingly, appellant's sentences of death should be affirmed.

IV.

THE CIRCUIT COURT DID NOT ERR IN OVERRULING APPELLANT'S PRETRIAL MOTION TO QUASH THE INFORMATION BECAUSE THE STATUTORY AGGRAVATING CIRCUMSTANCES THAT THE STATE INTENDED TO SUBMIT IN THE PUNISHMENT PHASE WERE NOT REQUIRED TO BE PLED IN THE INFORMATION IN THAT (A) APPRENDI V. NEW JERSEY AND RING V. ARIZONA DO NOT SO HOLD; (B) APPELLANT RECEIVED PRETRIAL NOTICE OF THE STATUTORY AGGRAVATING CIRCUMSTANCES UNDER SECTION 565.005, RSMO, WHICH SATISFIED APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION AGAINST HIM; AND (C) THIS FORM OF NOTICE VIOLATES NO PROVISION OF THE MISSOURI CONSTITUTION.

Under §565.005.1, RSMo 2000, the state is required to give notice to the defendant "[a]t a reasonable time before the commencement of the first stage of [a capital trial]" of the statutory aggravating circumstances that it intends to submit in the event that the defendant is convicted of first degree murder. The state did so in this case (L.F. 187-188). Appellant alleged in a pretrial motion that the information filed against him was defective because the state did not plead in the information the statutory aggravating circumstances it intended to submit at his trial, which he claimed was required under the holding of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (L.F. 224-227). Appellant's motion was overruled (Tr. 123-125). Although phrased as a challenge to the charging documents in this case, appellant's contention is, in effect, that §565.005.1 is unconstitutional under

Apprendi.

Appellant's construction of Apprendi as creating a requirement that statutory aggravating circumstances be pled in the indictment or information is refuted by the language of that decision. The issue presented to the United States Supreme Court in that case was "whether 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." Id., 530 U.S. at 469. Relying upon the guarantee under the Sixth and Fourteenth Amendments of a trial by jury, the Supreme Court 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., 530 U.S. at 476, 490. Thus, the holding of Apprendi concerned what matters must be submitted to and found by a jury, not what must be contained in an indictment or information.

If the plain language of the holding in Apprendi was not sufficient to dispose of appellant's reliance upon that decision, it would be demolished by the fact that the fact that the Supreme Court expressly stated that it was not addressing what must be alleged in the charging document:

> Apprendi has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment. . . . [The Fourteenth] Amendment has not . . . been construed to include the Fifth Amendment right to "presentment or indictment of a Grand Jury" that was implicated in our recent decision in Almendarez-Torres v. United States, 523 U.S. 224, 140 L.Ed.2d 350, 118 S.Ct. 1219 (1998). We thus do not address the indictment question separately today.

Apprendi v. New Jersey, supra, 530 U.S. at 476 (n. 3).

The brief of appellant ignores the stated holding of Apprendi and the footnote quoted above, and relies exclusively upon language from a previous decision, Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.3d 311 (1999), which was cited in Apprendi as "foreshadowing" that decision. Id., 530 U.S. at 476 (App.Br. 89). The issue before the Supreme Court in Jones was how to construe the federal carjacking statute: whether particular statutory language was an "element" of the crime, in which case it was required to be alleged in the indictment and found by the jury; or whether it was a "sentencing factor" that need not be charged and could be found by the court. Id., 526 U.S. at 230-232.[13] The majority opinion found that the statutory language constituted an element of the crime, but noted in extended *dicta* its view that sentence enhancements might also violate due process if not charged and found by the trial jury. Id., 526 U.S. at 240-250.[14] The majority summarized its view as being that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Id., 526 U.S. at 246 (n. 6).

This *dicta* from Jones certainly "foreshadowed" the holding of Apprendi that any factor that increased the range of punishment must be found by a jury, but the fact that the quotation from Jones was not a holding of Apprendi is established by (1) the statement in Apprendi that it was not addressing what must be pled in the indictment; (2) the fact that the quotation from Jones cites the Fifth Amendment to the United States Constitution which, in the context of indictments, applies to the federal government (as in

[13]This distinction between "elements" and "sentencing factors" was later abolished in Apprendi, 530 U.S. at 478-490.

[14]That this was dicta was confirmed in Apprendi, 530 U.S. at 472-473.

Jones) but not to the states (as in Apprendi);[15] and (3) the rejection of this construction of Apprendi by numerous other jurisdictions.[16] Appellant's claim that Apprendi supports his argument is meritless.

After the filing of appellant's brief, the United States Supreme Court rendered its decision in Ring v. Arizona, 2002 U.S.Lexis 4651 (June 24, 2002), which for the first time held that the Sixth and Fourteenth Amendments do not allow "a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." Id. at *44-*45. An examination of that decision confirms that it does not, any more than did Apprendi, hold that statutory aggravating circumstances must be pled in the indictment or information. The Supreme Court noted that the issue before it was limited:

> Ring's claim is tightly delineated: he contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. . . . Ring does not contend that his indictment was constitutionally defective. See Apprendi, 530 U.S., at 477, n. 3 (Fourteenth Amendment "has not . . . been construed to include the

---

[15]Disturbingly, the brief of appellant substitutes "Fourteenth" for "Fifth" within this quotation without brackets or explanation (App.Br. 89).

[16]E.g., Poole v. State, 2001 Ala.Crim.App.Lexis 173 (August 31, 2001) at *31-*45, on remand 2002 Ala.Crim.App. Lexis 36 (February 1, 2002); State v. Nichols, 201 Ariz 234, 33 P.3d 1172, 1174-1176 (2001); People v. Ford, 198 Ill.2d 68, 761 N.E.2d 735, 738 (n. 1) (2001), cert. denied 2002 U.S.Lexis 5010 (June 28, 2002); State v. Mitchell, 353 N.C. 309, 543 S.E.2d 830, 842 (2001), cert. denied 122 S.Ct. 475 (2001); United States v. Sanchez, 269 F.3d 1250, 1257-1262 (11th Cir. 2001), cert. denied 122 S.Ct. 1327 (2002).

Fifth Amendment right to 'presentment or indictment of a Grand Jury'").

Ring v. Arizona, supra at *26 (n. 4).

Appellant also cites various decisions of the United States Supreme Court preceding Apprendi as supporting his argument that the statutory aggravating circumstances were required to be pled in the information (App.Br. 92). None of these authorities are apposite and some are based upon the Indictment Clause of the Fifth Amendment, which does not apply to the states. Apprendi v. New Jersey, supra, 530 U.S. at 477 (n. 3). The only constitutional provision that is relevant to state charging documents is the Sixth Amendment requirement that an accused "be informed of the nature and cause of the accusation," which has been applied to the states through the Fourteenth Amendment. Blair v. Armontrout, 916 F.2d 1310, 1329 (8th Cir. 1990), cert. denied 502 U.S. 825 (1991). The difference between the rights guaranteed by the Fifth Amendment on the one hand and the Sixth and Fourteenth Amendments on the other is instructive in demonstrating the absence of merit in appellant's argument. The Indictment Clause of the Fifth Amendment specifies that criminal charges must be initiated by a grand jury indictment and requires that all elements of the criminal offense charged be stated in the indictment. Almendarez-Torres v. United States, 523 U.S. 224, 228, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1997).[17]

The Sixth and Fourteenth Amendments, by contrast, require only that a criminal defendant receive notice of the "nature and cause of the accusation" and does not specify the form that notice must take.[18]

---

[17] At the time of its decision in Ring v. Arizona, supra, the Supreme Court had before it a claim in a federal death penalty case that the Fifth Amendment required that statutory aggravating circumstances be pled in the indictment. It remanded that case for reconsideration in light of Ring. United States v. Allen, 247 F.3d 741 (8th Cir. 2001), remanded 2002 U.S.Lexis 4893 (June 28, 2002).

[18] "[T]he states are not bound by the technical rules governing federal criminal prosecutions" under the Fifth Amendment. Blair

Even legally insufficient charging documents have been held not to violate the Sixth Amendment when the defendant received actual notice of the charge against him. Hartman v. Lee, supra, 283 F.3d at 194-196; Blair v. Armontrout, supra. Under the law of Missouri, appellant was entitled to, and received, notice before trial of the statutory aggravating circumstances that the state intended to offer in the punishment phase. Nothing in Apprendi, Ring or any other pertinent authority supports appellant's claim that this notice provision violates the Sixth and Fourteenth Amendment to the United States Constitution.

Appellant additionally asserts, without argument or citation of authority, that the notice provision in §565.005.1 conflicts with Article I, Sections 10 ("due process"), 14 (courts open to every person), 18(a) (right to demand nature and cause of accusation) and 21 (cruel and unusual punishments) of the Missouri Constitution (1945). As in many previous instances before this Court in which the Missouri Constitution has been cited indiscriminately and without explanation, nothing in the language of these sections, or in any decisional authority known to respondent, supports appellant's attack upon §565.005.1. See State v. Black, 50 S.W.3d 778, 784 (n. 1) (Mo. banc 2001), cert. denied 122 S.Ct. 1121 (2002).

Accordingly, appellant's challenge to the constitutionality of §565.005.1 is without merit.

---

v. Armontrout, supra. Fifth Amendment decisions are therefore of "little value" in evaluating state indictments or informations. Hartman v. Lee, 283 F.3d 190, 195 (n. 4) (4th Cir. 2002).

V.

THE CIRCUIT COURT DID NOT ERR OR COMMIT MANIFEST INJUSTICE IN SUSTAINING A STATE'S OBJECTION TO PUNISHMENT-PHASE TESTIMONY BY APPELLANT'S MOTHER, PATTY LAMBERT, THAT APPELLANT HAD TOLD HER AFTER HIS ARREST THAT HE WAS "SORRY" FOR THE MURDERS BECAUSE THIS STATEMENT WAS INADMISSIBLE IN THAT IT WAS HEARSAY OFFERED FOR THE TRUTH OF THE MATTER ASSERTED, IT WAS NOT ADMISSIBLE UNDER ANY EXCEPTION TO THE HEARSAY RULE, AND IT LACKED ANY CORROBORATION OF ITS RELIABILITY. FURTHER, APPELLANT COULD NOT HAVE SUFFERED PREJUDICE FROM THE EXCLUSION OF THIS STATEMENT BECAUSE IT WAS CUMULATIVE TO NUMEROUS OTHER STATEMENTS OF REMORSE BY APPELLANT ADMITTED IN THE GUILT PHASE OF TRIAL.

One of the witnesses presented by the defense in the punishment phase was appellant's mother, Patty Lambert (Tr. 1064-1125). Most of Ms. Lambert's testimony pertained to appellant's character and childhood (Tr. 1064-1109), but the defense also attempted to elicit testimony about a conversation she had had with appellant after his arrest:

> [Mr. Kenyon, defense counsel:] Did Michael attempt to express to you remorse for what he had done?
>
> MR. AHSENS [Prosecutor]: Objection. Hearsay.
>
> THE COURT: Sustained. Proceed.
>
> MR. KENYON: May we approach the bench, please.

(Counsel approached the bench and the following proceedings were had:)

MR. KENYON: Your Honor, I would anticipate that one of the big things the State is hitting on here and what they're going to focus on in their closing argument is they're going to try and show that Mike lacked remorse for what happened here. And I think that is certainly relevant in order for us to be able to put on a defense we have to be able to demonstrate that there was remorse.

THE COURT: Well, just tell me what the exception is. I didn't make the rules. The rules say that statements made out of court are hearsay. Just tell me what the exception is.

MR. KENYON: Okay. The exception is this. What I would anticipate. I would like to make this as an offer of proof. As an offer of proof I would say that if Mrs. Lambert would answer that question, that Michael was crying on the phone and said, "I'm sorry, mom. I'm sorry." And he said it in tears and then hung up the phone. And that's it. And I think that's, I think that, I think that's relevant. And I think –

THE COURT: How can she tell us that he's in tears?

MR. KENYON: She could hear him sobbing.

THE COURT: She could hear a noise.

MR. KENYON: She could hear crying. I think we can recognize crying over the phone.

MR. AHSENS: Well, perhaps.

MR. KENYON: Present sense impression, exception to the hearsay.

THE COURT: The court will adhere to the ruling. The objection is sustained. Let's proceed.

MR. KENYON: Now, Judge, I'm sorry. I don't want to get in trouble so I want to –

THE COURT: And it will. I treat it as an offer of proof. And the offer of proof is refused.

MR. KENYON: Yes, sir. Can I without getting into anything that he said, can I get into what he sounded like on the phone when he called her? I mean that's certainly legitimate, isn't it? That he was sobbing on the phone. And I won't say anything about what he says.

THE COURT: You can ask her if he was sobbing on the telephone.

(The following proceedings were had in open court:)

Q. When Michael called you on the phone shortly after he was arrested, did he appear to be sound to be crying? Was he crying on the phone?

A. Yes, he was.

MR. KENYON: I don't have anything further, Your Honor.

Tr. 1110-1112. Appellant contends that the trial court erred in refusing to admit appellant's statement to his mother (App.Br. 93-100). To the extent that the theories of admissibility offered by appellant on appeal were never presented to the trial court, his claim of error should be reviewed, at most, for the presence of manifest injustice. State v. Winfield, 5 S.W.3d 505, 515 (Mo. banc 1999), cert. denied 528 U.S. 1130 (2000); Supreme Court Rule 30.20.

The inability of trial defense counsel to articulate any legal ground for the admission of appellant's statement to his mother (Tr. 1111) is hardly surprising: the offered testimony was transparently an attempt to permit appellant to testify in the punishment phase without the inconvenience of taking the stand and subjecting himself to cross-examination. Hearsay is "'any out-of-court statement that is used to prove the truth of the matter asserted and that depends on the veracity of the statement for its value.'" Smulls v. State, 71 S.W.3d 138, 148-149 (Mo. banc 2002), quoting Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 47, 59 (Mo. banc 1999). "Stated another way, evidence is hearsay only if its evidentiary value depends on drawing an inference from the truth of the statement." Id. Contrary to appellant's assertion, offered for the first time on appeal, his statement that he was "sorry" was not admissible on the theory that it was offered only to show his state of mind (App.Br. 97-98)–in fact, appellant was asking the jury to take his statement to his mother as true and use its truth to infer his remorse.

Appellant's other newly-hatched arguments are that his statement to his mother was admissible as an "excited utterance," State v. Williams, 673 S.W.2d 32, 33-35 (Mo. banc 1984), and on the principle that where one party introduces one part of an act or transaction, the other party is entitled to introduce the remainder. State v. Clark, 646 S.W.2d 409, 412 (Mo.App., W.D. 1983) (App.Br. 98).[19] Appellant's offer of proof is silent on when appellant's conversation with his mother occurred, but he committed the murders at 12:15 a.m. and was not arrested until late that morning, so it is difficult to see how his statement was "made under the immediate and uncontrolled domination of the senses as a result of the shock produced by an event." State v. Edwards, 31 S.W.3d 73, 78 (Mo.App., E.D. 2000). Nor did the

[19]The latter principle appears to be a variant of the "rule of completeness." See State v. Skillicorn, 944 S.W.2d 877, 891 (Mo. banc 1997), cert denied 522 U.S. 999 (1997).

prosecution attempt to introduce any part of appellant's statement to his mother, so appellant's notion that the state "opened the door" to his hearsay assertion of contrition is meritless.

Appellant's only detectable argument at trial, which he repeats on appeal, is that the statement in question was admissible simply because it was "relevant" (Tr. 1111; App.Br. 97, 99). If relevance was the same thing as admissibility, the hearsay rule and many other legal limitations intended to guard the reliability of evidence would not exist. The United States Supreme Court has held that a state's rules of evidence may sometimes be required to give way in the punishment phase of a capital trial, but only when there are "substantial reasons . . . to assume its reliability." Green v. Georgia, 442 U.S. 95, 97, 99 S.Ct. 2150, 60 L.Ed.3d 738 (1979); see also State v. Phillips, 940 S.W.2d 512, 517 (Mo. banc 1997). In Green, the Supreme Court ruled that the statement of a witness against his penal interest should have been admitted in the punishment phase, even though the State of Georgia did not recognize statements against penal interest as admissible, because there was ample corroboration of the reliability of the statement. Id.; see Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).[20] By contrast, there is not the slightest basis to assume the reliability of appellant's statement: it is classic self-serving hearsay, made many hours after the murders and at a time when a defendant would be expected to find ways to mitigate his crime. Accordingly, the trial court could not have erred in declining to admit this evidence.

Even aside from the correctness of the trial court's ruling, appellant's protestation that he should receive a new trial because of the exclusion of appellant's statement to his mother takes on a quality of unreality in light of the fact–unacknowledged by appellant–that repeated statements of remorse by appellant

[20]The Supreme Court in Green considered "most important" the fact that the state had presented this very statement in the prosecution of Green's codefendant. Id, 442 U.S. at 97.

were introduced during the state's evidence in the guilt phase of trial. Appellant said in his oral and written statements to the interrogating officers that he was to blame for the murders, that he knew what he had done was wrong and could never be fixed, and that "I know I deserve whatever I get and got coming to me" (Tr. 843, 859-860, 862, 879, 882, 884, 889). He even stated that he intended to call his mother and ask for her forgiveness (Tr. 867, 889). This and other evidence was argued by the defense as proof of his remorse in both the guilt and the punishment phases (Tr. 931-932, 935, 1273-1277). Under these circumstances, appellant's could not possibly have suffered prejudice, let alone manifest injustice, from the exclusion of his hearsay statement to his mother even had it been admissible.

VI.

THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION OR COMMIT MANIFEST INJUSTICE IN SUSTAINING THE STATE'S OBJECTIONS IN THE GUILT AND PUNISHMENT PHASES TO DEFENDANT'S OFFER OF A LETTER FROM ROY VANCE, SOLICITING THE HELP OF A PERSON NAMED "KARL" IN THE PLOT TO FREE VANCE FROM JAIL, BECAUSE (A) THIS LETTER WAS INADMISSIBLE HEARSAY IN THAT THE CO-CONSPIRATOR EXCEPTION TO THE HEARSAY RULE DOES NOT APPLY TO PERMIT A CONSPIRATOR TO PRESENT OUT-OF-COURT STATEMENTS OF A FELLOW CONSPIRATOR, AND (B) THE LETTER WAS IRRELEVANT IN THAT IT DID NOT MITIGATE APPELLANT'S CONDUCT OR BEAR ON ANY OTHER DISPUTED ISSUE.

During the cross-examination of a state's witness in the guilt phase of trial, the defense attempted to introduce a letter that purported to have been written by Roy Vance, the person whom appellant had attempted to free from the Randolph County Jail, to someone named "Karl" (Tr. 869-870).[21] This letter read as follows:

> Karl:
>
> I know what Tracie is talking to you about sounds crazy but if done right it could be really simple with atleast an hour or two to get away. There's no button for help and the cameras don't record anything so they wouldn't even have a clue who did it. Under

[21]Karl was mentioned in other testimony as a mutual friend of appellant and Tracie Bulington (Tr. 1016). His last name was not given.

normal circumstances I would never ask but we're family me , you and Tracie and need to be together as one. There isn't any of them that work here with enough heart to play hero as long as it's done right. I hate to even ask but it isn't anything that I wouldn't do for you and Carl with your situation with Betty they wouldn't give you any warning. You'd just be arrested and never see daylight again. Why let that happen when we could all be together. Think about it and if you decide to Tracie will explain the lay out.

Love Ya My Brother,

Roy

P.S. Keep your head up and your heart strong.

L.F. 259. This letter was seized from Tracie Bulington's automobile after appellant's and Bulington's apprehension in the State of Kansas (Tr. 819-821, 869-870). The state objected to this document on hearsay grounds (Tr. 870-871), and defense counsel claimed that its contents were admissible under the hearsay exception of statements by a co-conspirator (Tr. 871, 873). The trial court declined to admit this letter, noting that no foundation had been laid that it had actually been written by Vance (Tr. 871, 873-874).

When Bulington testified as a punishment-phase witness, defense counsel showed her the letter and elicited from her that its handwriting "looks like Roy's" (Tr. 1057). The defense then reoffered the letter into evidence, and the state objected that it was both hearsay and irrelevant (Tr. 1058). Appellant's counsel again argued that this document was admissible under the co-conspirator exception to the hearsay rule, but made no attempt to explain how it was relevant to any issue in the case (Tr. 1058). The court sustained the state's objection to this evidence (Tr. 1058). Appellant made no subsequent offer of proof

regarding the letter or its relevance.

In his Motion for New Trial, appellant alleged for the first time that the letter in question was relevant mitigating evidence in that it showed that murder of the jail guards was not part of the plan, and also that it suggested that the role of Tracie Bulington in the plot was greater than her testimony indicated (L.F. 253-254). He advances a similar claim in his brief on appeal (App.Br. 100-109). Since appellant offered no such explanation to the trial court when he sought to introduce this evidence, his claim of error is unpreserved for appellate review. "When an objection is sustained to proffered evidence, the offering party must show its relevancy and materiality by way of an offer of proof in order to preserve the issue for appellate review" (citation omitted). State v. Nettles, 10 S.W.3d 521, 528 (Mo.App., E.D. 1999); see also State v. Hemby, 63 S.W.3d 265, 268 (Mo.App., S.D. 2001). The trial court was not compelled to guess at the alleged relevance of appellant's proffered evidence when its relevance had been expressly challenged by the prosecution. Therefore, appellant's claim of error should be reviewed, at most, for the presence of manifest injustice. Supreme Court Rule 30.20.

A. This Evidence Was Inadmissible Hearsay

Appellant's theory that he was entitled to introduce into evidence the statements of a fellow conspirator for his own benefit (App.Br. 103) is refuted by the very authorities he cites. "The statement of one conspirator is admissible against another under the coconspirator exception to the hearsay rule . . . " (emphasis supplied). State v. Pizzella, 723 S.W.2d 384, 388 (Mo. banc 1987); see also State v. Ferguson, 20 S.W.3d 485, 496 (Mo. banc 2000), cert. denied 531 U.S. 935 (2000). This principle is confirmed by the Federal Rules of Evidence, which classifies the co-conspirator exception as a variant of

an admission by a party-opponent,[22] and by similar rules in other states.[23] Respondent has been unable to locate a single state or federal decision in which a defendant was permitted to invoke this principle of law to adduce out-of-court statements by a fellow conspirator, and appellant has cited no such authority.

Nor was there the slightest corroboration of the reliability of the statements in the letter such that this state's general prohibition against hearsay might be required to give way in the punishment phase of a capital trial. Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.3d 738 (1979); State v. Phillips, 940 S.W.2d 512, 517 (Mo. banc 1997). The only fact of record about this letter is that its handwriting "looks like Roy's" (Tr. 1057); no evidence whatever was offered that might support the reliability of the statements contained therein. The trial court could not have abused its discretion in excluding this document for no other reason than that it was inadmissible under the rules of evidence of this state.

B. This Evidence Was Irrelevant

But even aside from the inadmissibility of the letter, appellant's assertion that it was "crucial" evidence (App.Br. 105)–or relevant to any disputed issue in the case–is wholly meritless. His claim that this letter showed that "there was no plan to kill the jailers" (App.Br. 105-106) ignores the fact that this had

---

[22]Federal Rule of Evidence 801(d) provides in relevant part:

> A statement is not hearsay if–
>
> * * *
>
> (2) Admission by party-opponent. The statement is offered against a party and is .
>
> . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

[23]E.g., Leedom v. State, 796 S.2d 1010, 1019-1020 (Miss. 2001); State v. Tangie, 616 N.W.2d 564, 569 (Iowa 2000); Acklin v. State, 790 So.2d 975, 999 (Ala.Crim.App. 2000), cert. denied 533 U.S. 936 (2001).

already been established through the state's witnesses, including Tracie Bulington (Tr. 802-803, 835, 842, 855, 1018, 1047-1048, 1055-1056), and that the existence and nature of the initial plan was not disputed by the state. The theory of the prosecution was not that the plan discussed by appellant and Roy Vance had been to kill the jail guards, but rather that appellant later decided to deviate from the plan, as demonstrated by his statements and conduct shortly before the murders.[24]

Nor did the letter show that "[Roy] Vance and Tracie [Bulington] were the primary planners and that Vance was directing the plan" (App.Br. 106). That Vance attempted to recruit another person into the plot, and that the letter said that Bulington "will explain the lay out," does not support an inference that either was the mastermind in the conspiracy or reduce appellant's role in the murders. Appellant also demonstrated his capacity for independent action by attempting to obtain a larger firearm, by test-firing the murder weapon and, ultimately, by departing from the original plan by shooting to death two unarmed officers.[25] Particularly frivolous is appellant's claim that the letter in question would somehow have supported his theory that he murdered the victims "under extreme duress or under the substantial domination of another person" (App.Br. 107; see Supp.L.F. 28, 34). The evidence presented at appellant's trial indicates that, if appellant had actually been "dominated" by Vance or Bulington, he would not have committed the murders.

---

[24]See the discussion of the conflicting theories of the parties in respondent's Point IA, supra.

[25]Nor would it have served to impeach Bulington's testimony. While Bulington testified that she was a reluctant participant in the plan (Tr 1051-1052), she admitted her full participation in it, including obtaining the murder weapon, accompanying appellant in reconnoitering the jail and driving him to and from the scene of the crime (Tr. 1016-1026, 1032, 1039-1040). Contrary to appellant's assertion (App.Br. 107), nothing in Bulington's testimony suggested that she was unaware of the layout of the jail.

The trial court had broad discretion in determining the admissibility and relevance of evidence. State v. Anderson, No. SC84035 (Mo. banc May 28, 2002), slip op. at 2; State v. Johns, 34 S.W.3d 93, 111 (Mo. banc 2000), cert. denied 121 S.Ct. 1745 (2001). The court could not have abused its discretion or committed manifest injustice in refusing to admit evidence that was both inadmissible and irrelevant.

VII.

THIS COURT SHOULD, IN THE EXERCISE OF ITS INDEPENDENT REVIEW, AFFIRM APPELLANT'S SENTENCES OF DEATH BECAUSE THE STATUTORY AGGRAVATING CIRCUMSTANCES FOUND BY THE JURY AS TO THESE MURDERS ARE SUPPORTED BY THE EVIDENCE. APPELLANT'S CLAIM THAT TWO OF THE THREE STATUTORY AGGRAVATING CIRCUMSTANCES FOUND AS TO THE MURDER OF LEON EGLEY WERE INVALID ON THE GROUND THAT THEY WERE "DUPLICATIVE" IS MERITLESS UNDER THE WELL-SETTLED LAW OF THIS STATE.

In determining that appellant was eligible for the death penalty for his murders of Deputy Sheriffs Jason Acton and Leon Egley, the jury found the following statutory aggravating circumstances:

Murder of Jason Acton:

That Acton was a peace officer engaged in the performance of his official duties, §565.032.2(8), RSMo 2000;

Murder of Leon Egley:

1. That the murder was committed while appellant was engaged in the murder of Acton, §565.032.2(2);

2. That the murder was vile, horrible or inhuman in that it involved depravity of mind, §565.032.2(7). The jury was instructed that depravity of mind could not be found unless it determined that appellant killed Egley "as part of [his] plan to kill more than one person and thereby exhibited a callous disregard for the sanctity of all human life"

(Supp.L.F. 26).

3. That Egley was a peace officer engaged in the performance of his official duties.

Supp.L.F. 39-40.

Appellant offers no dispute, nor could he, that Deputies Acton and Egley were peace officers engaged in the performance of their official duties. His attacks upon the statutory aggravating circumstances found by the jury are (1) that the "depravity of mind" circumstance found as to the murder of Egley was unsupported on the ground that there was no basis for an inference that appellant intended to kill more than one person (App.Br. 113-119); (2) that the statutory aggravating circumstances of depravity of mind and that Deputy Egley was murdered while appellant was engaged in the murder of Deputy Acton were "duplicative" (App.Br. 119-120); and (3) that all of the statutory aggravating circumstances found as to both murders were invalid because they were not pleaded in the information, which appellant alleges was required under Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (App.Br. 122-124). The last of these arguments has already been dealt with in respondent's Point IV, supra, and will not be readdressed here.

A fatal defect in appellant's remaining attacks upon his sentences of death is that, even if they were taken as true, a valid statutory aggravating circumstance was still found by the jury as to both murders. A statutory aggravating circumstance is a legal conclusion whose only function is to limit the discretion of the sentencer in a capital case by premising a defendant's eligibility for the death penalty upon the proof of specifically-defined facts. Tuilaepa v. California, 512 U.S. 967, 971-972, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994); State v. Worthington, 8 S.W.3d 83, 88 (Mo. banc 1999), cert. denied 529 U.S. 1116 (2000). In "non-weighing" states such as Missouri, "the finding of an aggravating circumstance does not

play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 873-874, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); see State v. Brooks, 960 S.W.2d 479, 496 (Mo. banc 1997), cert. denied 524 U.S. 957 (1998) (Missouri is a "nonweighing" state). Instead, the sentencer considers all of the evidence in arriving at a decision on punishment. Stringer v. Black, 503 U.S. 222, 229-230, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992); State v. Worthington, supra, 8 S.W.3d at 88.[26]

For this reason, the invalidity of some but not all of the statutory aggravating circumstances found by a capital sentencer does not affect the validity of a sentence of death. State v. Goodwin, 43 S.W.3d 805, 819-820 (Mo. banc 2001), cert. denied 122 S.Ct. 272 (2001); State v. Taylor, 18 S.W.3d 366, 377-378 (Mo. banc 2000), cert. denied 531 U.S. 901 (2000). Therefore, even if the evidence had been insufficient to permit a reasonable inference that appellant planned in advance to kill both of the officers, which it is not, appellant's claim that he would be entitled to a new punishment determination as to the murder of Leon Egley is meritless.[27]

---

[26]Section 565.030.4, RSMo 2000 expressly distinguishes between statutory aggravating circumstances, which are conclusions from the evidence used to determine eligibility for the death penalty, and evidence in aggravation and mitigation of punishment, which the sentencer considers in deciding whether the defendant should receive a sentence of death. The same distinction is made in the form punishment-phase instructions. See, e.g., MAI-CR 3d 313.41A.

[27]There was an ample basis for the jury to infer that appellant intended to kill both Acton and Egley from (1) his statements and conduct shortly before the murders, particularly his statement that he intended to "go in with a blaze of glory" and the fact that he drew his pistol and held it concealed before opening fire; and (2) the fact, noted by the prosecutor (Tr. 1256), that appellant could not

Appellant's argument that two of the three statutory aggravating circumstances found as to the Egley murder were invalid on the ground that they were "duplicative" has, as he acknowledges (App.Br. 120), been rejected in numerous past decisions of this Court. State v. Anderson, No. SC83680 (Mo. banc May 14, 2002), slip op. at 32-33; State v. Christeson, 50 S.W.3d 251, 271 (Mo. banc 2001), cert. denied 122 U.S. 406 (2001). Since the only function of statutory aggravating circumstances is to determine eligibility, and since only one statutory aggravating circumstance is necessary for that purpose, it does not matter if they "duplicate" or not. Appellant's attacks upon the statutory aggravating circumstances found by the jury are meritless.

---

have killed just one of the officers and carried out his plan to release Roy Vance from jail.

VIII.

THE CIRCUIT COURT DID NOT ERR IN OVERRULING APPELLANT'S OBJECTION TO THE PRESENCE OF CAMERAS IN THE COURTROOM DURING HIS TRIAL BECAUSE (A) THEIR PRESENCE DID NOT VIOLATE APPELLANT'S DUE PROCESS RIGHTS IN THAT FILMING WAS CONDUCTED UNDER THE SAFEGUARDS SET OUT IN OPERATING RULE 16 OF THIS COURT, AND THERE IS NO EVIDENCE WHATEVER THAT APPELLANT WAS PREJUDICED BY THEIR PRESENCE; AND (B) THE ABSENCE OF NOTICE TO THE PARTIES CONTEMPLATED BY OPERATING RULE 16.03(B) DOES NOT ENTITLE APPELLANT TO A NEW TRIAL IN THAT APPELLANT SUFFERED NO PREJUDICE FROM THE ABSENCE OF NOTICE.

On the morning of the second day of trial, after jury selection and before opening statements, defense counsel objected to the presence of cameras and media personnel in the courtroom (Tr. 544-545).[28] The court noted that it had granted permission for their presence seven weeks before trial, as authorized under Supreme Court Operating Rule 16, and stated its impression that notice had been sent to the parties as directed by Operating Rule 16.03(b) (Tr. 545, 549-550; see L.F. 6). Both the defense and the state denied receiving such a notice (Tr. 545, 547-548).

The court stated that, given the apparent absence of notice, it would afford the defense an opportunity to argue why cameras should not be permitted at appellant's trial (Tr. 546). Defense counsel

[28]The record suggests that there was at least one video camera in the courtroom, but it is unclear whether another video or still camera was present (Tr. 544-550).

contended that their presence would pressure the jurors to convict appellant and sentence him to death, that they might also influence the testimony of witnesses, and that the absence of notice to the defense violated Operating Rule 16.03(b) (Tr. 546-547). The court overruled appellant's objection, noting its experience in past cases that jurors did not pay attention to cameras (Tr. 549).

Appellant argues on appeal that (1) the presence of cameras in the courtroom violated his Fourteenth Amendment right to due process of law, and (2) the absence of the notice contemplated by Operating Rule 16.03(b) also entitles him to a new trial (App.Br. 125-134).

A. Due Process

As appellant concedes (App.Br. 130), the use of cameras during trial is not a *per se* violation of the Due Process Clause. Chandler v. Florida, 449 U.S. 560, 579-580, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981); see also State v. Simmons, 944 S.W.2d 165, 179 (Mo. banc 1997), cert. denied 522 U.S. 953 (1997). The issue, as noted in Chandler, is whether a defendant in a particular case can demonstrate actual prejudice from the presence of the broadcast media:

> [A] defendant has the right on review to show that the media's coverage of his case – printed or broadcast – compromised the ability of the jury to judge him fairly. Alternatively, a defendant might show that broadcast coverage of his particular case had an adverse impact on the trial participants sufficient to constitute a denial of due process.

Id., 449 U.S. at 581. The Supreme Court in Chandler found no such prejudice from the presence of cameras under the facts of that case: the court noted the existence of significant safeguards imposed by the State of Florida to minimize their impact and to protect the fairness of trials, and relied in particular upon the fact that the defense had not sought to present actual evidence that the jurors had been influenced by

the media coverage, but instead had offered only "generalized allegations of prejudice." Id., 449 U.S. at 576-577. The court described the kind of prejudice that must be shown to establish a violation of due process:

> To demonstrate prejudice in a specific case a defendant must show something more than juror awareness that the trial is such as to attract the attention of broadcasters. Murphy v. Florida, 421 U.S. 794, 800 (1975). No doubt the very presence of a camera in the courtroom made the jurors aware that the trial was thought to be of sufficient interest to the public to warrant coverage. . . . But the appellants have not attempted to show with any specificity that the presence of cameras impaired the ability of the jurors to decide the case on only the evidence before them or that their trial was affected adversely by the impact on any of the participants of the presence of cameras and the prospect of broadcast.

Chandler v. Florida, supra, 449 U.S. at 581.

Precisely the same is true in the case at bar. Operating Rule 16 places stringent limits, both legal and technical, upon the use of cameras in the courtroom. Such equipment must be designed and operated in as unobtrusive a manner as possible, with no indication to jurors or participants as to when recording is taking place. Rule 16.04. Restrictions are placed upon who and what can be filmed, including a prohibition of the depiction of jurors and prospective jurors. Rule 16.02. The trial judge is afforded broad authority to exclude cameras if "such coverage would materially interfere with the rights of the parties to a fair trial," Rule 16.02(b), and the defense is given an opportunity (and received it in this case) to object to the presence of broadcast media. Rule 16.03(c). Aside from the notice provision discussed infra, appellant

offers no allegation that Operating Rule 16 was not followed in all respects.

In alleging that he was prejudiced by the presence of cameras, appellant offers nothing more than "generalized allegations" and rank speculation. He asserts that because the prosecutor stated in open court that a particular witness "has requested that she not be videotaped" (Tr. 762-763), this could have caused the jurors to sympathize with the witness and attribute "her predicament and discomfort to [appellant]" (App.Br. 131). There is not the slightest support in the record for this allegation and, as in Chandler, appellant requested no opportunity to present any such evidence. As that decision makes clear, a claim that jurors "could" have been influenced by the presence of cameras is insufficient to demonstrate a violation of appellant's due process rights.

A similarly speculative claim was rejected by this Court in State v. Simmons, supra. In Simmons, the defendant alleged on appeal that the presence of cameras in the courtroom might have affected the testimony of two of the state's witnesses. Id., 944 S.W.2d at 179. This Court cited the requirement that claims of prejudice from media coverage be supported by evidence and noted that the defendant "has not produced such evidence nor does his argument offer more than hopeful speculation." Id. The same is true here.

B. Operating Rule 16

Operating Rule 16.03(b) states as follows:

> All requests by representatives of the news media to use photographic equipment, television cameras, or electronic sound recording equipment in the courtroom shall be made to the media coordinator in writing at least five days in advance of the scheduled proceeding. The media coordinator, in turn, shall give notice in writing of said request to

> counsel for all parties, parties appearing without counsel, and the judge at least four days in advance of the time the proceeding is scheduled to begin. In addition, the media coordinator shall file a copy of the notice with the clerk of the court in the county in which the proceeding is being held. These times may be extended or reduced by court order. When the proceeding is not scheduled at least five days in advance, however, the media coordinator shall give notice of the request as soon as practicable after the proceeding has been scheduled.

Appellant does not appear to argue that this provision is mandatory, but instead that its violation in this case was prejudicial to him (App.Br. 132-133).[29] He claims that had notice been given, he would have been able to object to the presence of cameras before trial and the court would have had more time to consider the defense objections in the absence of the media (App.Br. 132). However, his arguments on appeal against the presence of cameras are essentially the same as those raised by the defense at trial, and the reasoning of the court in overruling his objection (Tr. 549) affirmatively refutes the notion that the court would have ruled differently had it been presented with this objection earlier.

Appellant also contends that had defense counsel received advance notice of the television coverage, they "could have voir dired the jury [panel] – or at the very least, considered whether they wished to voir dire the jury [panel] – on whether the presence of cameras in the courtroom would affect them" (App.Br. 133). Given appellant's equivocation as to whether he would even have raised the issue

---

[29]This Court has held that where a provision states that something "shall" be done within a certain time but does not prescribe a consequence if it is not, the provision is directory, not mandatory. Frager v. Director of Revenue, 7 S.W.3d 555, 557 (Mo. banc 1999). No sanction is provided for a failure to comply with the notice provision of Rule 16.03(b).

in voir dire–and his argument that the mere use by the prosecutor of the word "videotape" in front of the jury was prejudicial–this assertion does not supply a basis for a conclusion that he received an unfair trial.

Finally, appellant complains that the lack of notice denied him the opportunity to ascertain whether any of his defense witnesses did not wish to be videotaped (App.Br. 133). He omits to note that two and a half days passed between his objection to the presence of cameras and the testimony of the first defense witness (Tr. 544, 953, 1063-1064). Appellant's only objection to the filming of any of his witnesses occurred after the testimony of that witness had already begun (Tr. 1162-1163). While it is unfortunate if the wishes of any defense witness on this issue was not honored, it is not attributable to a lack of notice, nor would it impinge upon the fairness of appellant's trial.

Appellant's claim of error is meritless.

IX.

APPELLANT'S CLAIM THAT THE TRIAL COURT ERRED IN SUSTAINING THE STATE'S OBJECTION TO PUNISHMENT-PHASE TESTIMONY BY DR. SHIRLEY TAYLOR THAT APPELLANT WOULD NOT BE A DANGER TO OTHERS IF SENTENCED TO LIFE IMPRISONMENT IS FACIALLY MERITLESS BECAUSE THE TRIAL COURT DID NOT SUSTAIN THE STATE'S OBJECTION–RATHER, DEFENSE COUNSEL WITHDREW THIS LINE OF INQUIRY AFTER BEING ASSURED THAT THE STATE WOULD NOT ARGUE THAT APPELLANT WOULD PRESENT A DANGER IN THE FUTURE.

Appellant contends that "[t]he trial court erred in sustaining the state's objections and refusing to allow defense counsel to elicit Dr. Shirley Taylor's opinion [in the punishment phase] that [appellant] would not be a danger to others in prison if sentenced to prison for life without probation or parole" (App.Br. 134).

The difficulty with appellant's attack upon the trial court's ruling is that it never happened. The colloquy cited by appellant is as follows:

> Q. [by Mr. Kenyon, defense counsel:] And were you able to make an assessment of what type of a future danger Michael might present in the penitentiary?
>
> MR. AHSENS [prosecutor]: I'm going to object to that. I think that's clearly improper, Your Honor. Calls for a conclusion I don't think anybody can predict.
>
> MR. KENYON: Well, if, may we approach the bench on that, please, Your Honor.

(Counsel approached the bench and the following proceedings were had:)

MR. AHSENS: Your Honor, if I touch future dangerousness, he would be screaming mistrial. That's inappropriate evidence.

MR. KENYON: I mean psychologists all the time have to make assessments of future dangerousness in terms of whether somebody gets a, somebody [is] committed into a mental facility part of the process of getting them out is having psychologists evaluate them. Make some kind of decision as to whether or not they present –

THE COURT: What does this question have to do with the decision that this jury has to make?

MR. KENYON: Well, I think that, I think future dangerousness, I think future dangerousness is something that a prosecuting attorney is going to argue in the penalty phase.

MR. AHSENS: I don't think I'm allowed to.[30]

THE COURT: He's not allowed to argue such a thing that I know of. If you don't kill him, he will be dangerous.

MR. KENYON: If Mr. Ahsens is willing to stipulate now he's not going to get up in the closing argument and say you know you need to sentence this man to death because he's going to be in the penitentiary some day, if you sentence him to life in prison, some other inmate is going to manipulate him into doing something horrible. If he's not going to

---

[30]This is true in noncapital cases, State v. Chapman, 936 S.W.2d 135, 140 (Mo.App., E.D. 1997), but an exception to this rule has been recognized in the punishment phase of a capital trial. State v. Chambers, 891 S.W.2d 93, 107 (Mo. banc 1994).

make that argument then I'm fine.

THE COURT: He's not going to make that argument. He may plan to make that argument but he's not going to make that argument.

MR. KENYON: Thank you.

(The following proceedings were had in open court:)

MR. KENYON: Thank you, Dr. Taylor. I don't have any further questions.

Tr. 1228-1229.

As this record demonstrates, no objection was ever sustained by the trial court, and defense counsel chose not to pursue the issue of future dangerousness after it was made clear to him that it would not be an issue argued by the state. An appellant cannot complain of the "exclusion" of evidence that he does not choose to offer. State v. Richardson, 923 S.W.2d 301, 320 (Mo. banc 1996), cert. denied 519 U.S. 972 (1996); State v. McMillin, 783 S.W.2d 82, 97 (Mo. banc 1990), cert. denied 498 U.S. 1055 (1990).

Appellant attempts to surmount his withdrawal of this line of inquiry by claiming that the prosecutor improperly raised the issue of future dangerousness in its subsequent argument (App.Br. 136-137). Even if this assertion was true, which it is not, appellant does not explain how the trial court could have "erred" when it made no ruling. Is it appellant's position that the court should have forced defense counsel to ask the questions that counsel decided to forego? This would be an extraordinary construction of the role of trial courts.[31]

---

[31]Moreover, appellant's claim that the issue of his future dangerousness was raised by the prosecutor is frivolous. The argument cited by appellant (Tr. 1256-1257, 1259, 1291, 1295; see App.Br.

Appellant also asserts that the issue of future dangerousness was "implicated" by the facts of the case, citing Kelly v. South Carolina, 534 U.S. 246, 122 S.Ct. 726, 151 L.Ed.2d 670 (2001) (App.Br. 139-141). Once again, this makes no difference even if true: the evidence in question was excluded by a strategic decision of counsel, not by a ruling of the trial judge. Moreover, Kelly holds only that if a defendant's future dangerousness is placed at issue, the jury must be instructed that the alternative punishment of life imprisonment is served without the possibility of parole. Id., 122 S.Ct. at 728, 151 L.Ed.2d at 676. Since all Missouri juries are informed that life imprisonment for first degree murder is served without the possibility of parole (Supp.L.F. 24; see MAI-CR 3d 313.31), the relevance of this authority to appellant's allegation of error is nonexistent. Appellant's claim is meritless.

136-137) was that appellant's murders of two law enforcement officers was inherently deserving of the death penalty, not that appellant would kill law enforcement officers, or anyone else, in the future. That appellant's strained construction of the state's argument was not the view of trial counsel or the court below is demonstrated by the absence of defense objections or court admonishments to the prosecutor's statements.

X.

THE CIRCUIT COURT DID NOT ERR IN OVERRULING APPELLANT'S OBJECTION TO THE SUBMISSION IN THE PUNISHMENT PHASE OF THE VERDICT MECHANICS INSTRUCTION, MAI-CR 3D 313.48A, BECAUSE THIS INSTRUCTION DOES NOT MISLEAD THE JURY INTO BELIEVING THAT IT WAS NOT REQUIRED TO FIND THAT THE EVIDENCE IN AGGRAVATION OF PUNISHMENT OUTWEIGHED THE EVIDENCE IN MITIGATION OF PUNISHMENT BEFORE RETURNING A SENTENCE OF DEATH IN THAT (A) THIS INSTRUCTION DOES NOT PURPORT TO LIST ALL OF THE STEPS IN THE CAPITAL SENTENCING PROCESS, AND (B) THE JURY WAS SEPARATELY INSTRUCTED THAT IT WAS REQUIRED TO FIND THAT THE AGGRAVATING EVIDENCE OUTWEIGHED THE MITIGATING EVIDENCE BEFORE IT COULD ASSESS A DEATH SENTENCE.

Finally, appellant attacks the verdict mechanics instruction, MAI-CR 3d 313.48A, that was submitted as to each of the two counts in the punishment phase of trial (App.Br. 142-148). As he acknowledges (App.Br. 145), the identical contention has been rejected by this Court in recent decisions. State v. Cole, 71 S.W.3d 163, 175-176 (Mo. banc 2002); State v. Storey, 40 S.W.3d 898, 912 (Mo. banc 2001), cert. denied 122 S.Ct. 272 (2001). Appellant asserts that this claim is raised only "to preserve it for federal review" (App.Br. 145).

A. Statutory and Instructional Background

Under the law of Missouri at the time of appellant's offense, capital sentencing was a four-step

process. Section 565.030.4, RSMo 2000.[32] Each of these four steps is conveyed to the sentencing jury by a separate MAI-CR instruction form:

Decisional Step	MAI-CR 3d
1. Finding at least one statutory aggravating circumstance–§565.030.4(1)	313.40
2. Finding that aggravating evidence warrants a sentence of death–§565.030.4(2)	313.41A
3. Finding that aggravating evidence outweighs mitigating evidence–§565.030.4(3)	313.44A
4. Deciding not to impose a death sentence ("life option")–§565.030.4(4)	313.46A

Instructions describing each of these four steps was submitted to the jury for both of the two murder counts (Supp.L.F. 26-29, 32-35).

The verdict mechanics instruction is given after these instructions and explains to the jury how to fill out the punishment-phase verdict forms. As submitted at appellant's trial, the first of two verdict mechanics instructions read as follows:

> You will be provided with forms of verdict for your convenience. You cannot return any verdict imposing a sentence of death unless all twelve jurors concur in and agree

[32]For crimes committed after August 28, 2001, there is still a four-step process, but some of the steps have changed. Section 565.030.4, RSMo Supp. 2001. The punishment-phase instruction forms have since been revised to conform to this statutory amendment. See MAI-CR 3d 314.48 (effective 9-1-02).

to it, but any such verdict should be signed by your foreperson alone.

As to Count I, if you unanimously decide, after considering all of the evidence and instructions of law given to you, that the defendant must be put to death for the murder of Leon Egley, your foreperson must write into your verdict all of the statutory aggravating circumstances submitted in Instruction No. 24 which you found beyond a reasonable doubt, and sign the verdict form so fixing the punishment.

If you unanimously decide, after considering all of the evidence and instructions of law, that the defendant must be punished for the murder of Leon Egley by imprisonment for life by the Department of Corrections without eligibility for probation or parole, your foreperson will sign the verdict form so fixing the punishment.

If you are unable to unanimously find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt as submitted in Instruction No. 24, or if you are unable to unanimously find that there are facts and circumstances in aggravation of punishment which warrant the imposition of a sentence of death, as submitted in Instruction No. 25, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

If you do unanimously find that matters described in Instructions No. 24 and 25, but are unable to agree upon the punishment, your foreperson will sign the verdict form stating that you are unable to decide

or agree upon the punishment. In such case, the Court will fix the defendant's punishment at death or at imprisonment for life by the Department of Corrections without eligibility for probation or parole. You will bear in mind, however, that under the law, it is the primary duty and responsibility of the jury to fix the punishment.

When you have concluded your deliberations you will complete the applicable form to which all twelve jurors agree and return it with all unused forms and the written instructions of the Court.

Emphasis supplied; Supp.L.F. 30-31. The other verdict mechanics instruction is identical except for the name of the victim and instructional cross-references (Supp.L.F. 36-37).

The fourth paragraph of this instruction (the first paragraph in bold) advises the jury that, if it is unable to agree on either of the first two steps in the four-step process, it is required to return a verdict of life imprisonment. The fifth paragraph (the second bold paragraph) tells the jury that if it is unable to agree upon punishment after the first two steps, it must return a verdict stating that it is unable to agree upon the punishment.[33] Since it does not matter which step the trier is unable to agree upon after the first two steps, the instructions submitting the third and fourth steps are not specifically cross-referenced in this instruction.

---

[33]This distinction exists because of the specific language of §565.030.4: it states that the trier must return a verdict of life imprisonment if it does not find one of the first two steps. An inability of the jurors to agree on either of the first two steps, therefore, mandates a sentence of life imprisonment. By contrast, the jury is required to return a sentence of life imprisonment only if it "concludes" or "decides" that the third or fourth steps are not present, which authorizes the court to assess punishment if the jury is unable to agree at this stage.

Appellant's entire argument is that, because no specific reference was made in the verdict mechanics instructions to the instructions that advises the jury of the third step, that the aggravating evidence must outweigh the mitigating evidence (Supp.L.F. 28, 34), the jury was misled in believing that this was not a prerequisite to the imposition of a death sentence (App.Br. 146-148).

B. Appellant's Claim is Meritless

Appellant's argument suffers from two fatal defects. First, the premise underlying appellant's argument, that the instruction form in question "takes the jury, step by step, through the deliberation process" (App.Br. 146), is faulty. This instruction not a verdict director–it is a verdict mechanics instruction. That is, it did not purport to summarize the elements of proof required for the trier to reach a decision on punishment, but instead told the trier how to fill out the verdict forms based upon certain eventualities that might arise during their deliberations. Nothing in this instruction states or suggests that it contains a comprehensive list of the requirements for returning a sentence of death. Therefore, no need existed to list all of the steps in the capital sentencing process in this instruction.

Second, as this Court noted in Storey, appellant's theory that this instruction could have misled the jurors ignores the well-settled principle that an instruction is not to be considered in isolation, but rather is to be read together with all of the instructions as a whole. Id., 40 S.W.3d at 912; see also Boyde v. California, 494 U.S. 370, 378, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990). Examining the instructions as a whole–including Instruction Nos. 26 and 31, which expressly informed the jurors that they were required to find that the evidence in aggravation outweighed the evidence in mitigation before returning a sentence of death (Supp.L.F. 28, 34)–it is frivolous for appellant to contend that the jury could have labored under the misapprehension that this was not a prerequisite for a capital sentence.

For these reasons, appellant's attack upon MAI-CR 3d 313.48A is meritless.

CONCLUSION

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

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

JOHN M. MORRIS
Assistant Attorney General
Missouri Bar No. 25208

P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-3321

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains _____words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 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, postage prepaid, this ___ day of, _____, 2001, to:

Ms. Deborah B. Wafer
Assistant Public Defender
1221 Locust Street, Suite 410
St. Louis, MO 63103

JEREMIAH W. (JAY) NIXON
Attorney General

JOHN M. MORRIS
Assistant Attorney General
Missouri Bar No. 25208

P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-3321

Attorneys for Respondent