CASE NO._____

IN THE
Supreme Court of the United States

KEVIN JOHNSON,

Petitioner,

v.

TROY STEELE,
WARDEN, POTOSI CORRECTIONAL CENTER,

Respondent.

On Petition for Writ of Certiorari to
the United States Court of Appeals for the Eighth Circuit

APPENDIX Volume II of II

Joseph W. Luby*
Assistant Federal Defender
Federal Community Defender Office
for the Eastern District of Pennsylvania
601 Walnut Street, Suite 545 West
Philadelphia, PA 19106
(215) 928–0520
joseph_luby@fd.org

Rebecca E. Woodman
Rebecca E. Woodman, Attorney
at Law, L.C.
1263 W. 72nd Terrace
Kansas City, MO 64114
(785) 979-3672
rewlaw@outlook.com

*Counsel of record for Petitioner, Kevin Johnson
Member of the Bar of the Supreme Court

Counsel for Petitioner, Kevin Johnson

APPENDIX CONTENTS

Volume I

Volume II

74.06(b)(4) only if the circuit court that rendered it (1) lacked subject matter jurisdiction; (2) lacked personal jurisdiction; or (3) entered the judgment in a manner that violated due process. *Id.* In his point relied on and in the text of his argument, Mr. Goins challenges the sufficiency of the evidence. A challenge to the sufficiency of the evidence does not raise a jurisdictional or constitutional issue that would render a judgment "void." Instead, a challenge to the sufficiency of the evidence is simply an allegation of error that should be raised on appeal. Mr. Goins challenged the sufficiency of the evidence on appeal and lost. This point is denied.

The judgment is affirmed.

All concur.

Kevin JOHNSON, Jr., Appellant,

v.

STATE of Missouri, Respondent.

No. SC92448.

Supreme Court of Missouri,
En Banc.

July 16, 2013.

Rehearing Denied Oct. 1, 2013.

Background: Defendant moved for post-conviction relief after his conviction for first-degree murder and his sentence of death were affirmed, 284 S.W.3d 561. The Circuit Court, Saint Louis County, Gloria Clark Reno, J., denied relief. Defendant appealed.

Holdings: The Supreme Court, George W. Draper III, J., held that:

(1) defendant did not show that defense counsel were ineffective for declining to present a defense of diminished capacity based on defendant's alleged acute stress disorder (ASD);

(2) reenactment video was a fair representation of evidence presented by the state and, thus, was admissible as demonstrative evidence;

(3) defendant was not entitled to an evidentiary hearing on his claim that defense counsel were ineffective for failing to object to the presence of uniformed police officers in the courthouse;

(4) defendant did not show that defense counsel were ineffective for not objecting to the state's closing argument on deliberation;

(5) defendant was not entitled to an evidentiary hearing on his claim that Missouri's statutory scheme for the death penalty was unconstitutional;

(6) defendant was not entitled to an evidentiary hearing on his claim that defense counsel were ineffective for failing to seek to replace a juror who allegedly began to sleep during counsel's closing argument;

(7) defendant did not show that defense counsel were ineffective for allegedly failing to present a certain argument that the state's explanation for using peremptory strike against a prospective juror was pretextual; and

(8) defendant did not establish that defense counsel were ineffective for not calling a witness to testify that defendant was a good and loving father.

Affirmed.

Breckenridge, J., concurred in part and dissented in part and filed opinion in which Stith, J., concurred.

1. Criminal Law ⚿1134.90

A motion court's judgment in a postconviction proceeding is clearly erroneous only if an appellate court is left with a definite and firm impression that a mistake has been made. V.A.M.R. 29.15(k).

2. Criminal Law ⚿1652

In a proceeding on a motion for postconviction relief, an evidentiary hearing is not mandatory when the motion and record conclusively show that the movant is not entitled to relief. V.A.M.R. 29.15.

3. Criminal Law ⚿1575

In a proceeding on a motion for postconviction relief, a court will not draw factual inferences or implications in the motion from bare conclusions or from a prayer for relief. V.A.M.R. 29.15.

4. Criminal Law ⚿1652

For a defendant to be entitled to an evidentiary hearing in a proceeding on a motion for postconviction relief, the motion must (1) allege facts, not conclusions, warranting relief, (2) raise factual matters that are not refuted by the file and record, and (3) raise allegations that resulted in prejudice. V.A.M.R. 29.15.

5. Criminal Law ⚿1519(4), 1615

To be entitled to postconviction relief for ineffective assistance of counsel, a movant must show by a preponderance of the evidence that his or her trial counsel failed to meet the *Strickland* test, under which the movant must demonstrate that (1) his or her counsel failed to exercise the level of skill and diligence that a reasonably competent counsel would in a similar situation and (2) he or she was prejudiced by that failure. U.S.C.A. Const.Amend. 6; V.A.M.R. 29.15.

6. Criminal Law ⚿1612(2)

A movant who seeks postconviction relief based on ineffective assistance of counsel must overcome the strong presumption that counsel's conduct was reasonable and effective; to overcome this presumption, the movant must identify specific acts or omissions of counsel that, in light of all the circumstances, fell outside the wide range of professional competent assistance. U.S.C.A. Const.Amend. 6; V.A.M.R. 29.15.

7. Criminal Law ⚿1884

Trial strategy decisions may be a basis for ineffective counsel only if that decision was unreasonable. U.S.C.A. Const. Amend. 6.

8. Criminal Law ⚿1891

Strategic choices by counsel made after a thorough investigation of the law and the facts relevant to plausible opinions are virtually unchallengeable as ineffective assistance. U.S.C.A. Const.Amend. 6.

9. Criminal Law ⚿1519(4)

To establish relief under *Strickland* in a proceeding on a motion for postconviction relief, the movant must prove prejudice. U.S.C.A. Const.Amend. 6; V.A.M.R. 29.15.

10. Criminal Law ⚿1519(3)

Strickland prejudice occurs when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. U.S.C.A. Const.Amend. 6.

11. Criminal Law ⚿1959

Strickland prejudice in a death-penalty case is a reasonable probability that, but for counsel's deficient performance, the jury would have concluded the balance of aggravating and mitigating circumstances did not warrant death. U.S.C.A. Const. Amend. 6.

12. Criminal Law ⚿1912

Defendant did not show that defense counsel rendered ineffective assistance in a

death-penalty case by declining to present a defense of diminished capacity based on defendant's alleged acute stress disorder (ASD); counsel were concerned that the jury would lose focus or become alienated, counsel knew that the state could introduce its own experts had counsel presented expert testimony on diminished capacity, counsel presented testimony regarding defendant's upbringing and the mental anguish that was feeling at the time of the charged incident, and counsel believed that the state had robust evidence of deliberation. U.S.C.A. Const.Amend. 6.

13. Criminal Law ⚿1922, 1924

Selection of witnesses and evidence are matters of trial strategy, virtually unchallengeable in a claim of ineffective assistance of counsel. U.S.C.A. Const. Amend. 6.

14. Criminal Law ⚿1884

No matter how ill-fated it may appear in hindsight, a reasonable choice of trial strategy cannot serve as a basis for a claim of ineffective assistance. U.S.C.A. Const. Amend. 6.

15. Criminal Law ⚿1882

When considering a claim of ineffective assistance of counsel, the question is not whether counsel could have or even, perhaps, should have made a different decision but rather whether the decision made was reasonable under all the circumstances. U.S.C.A. Const.Amend. 6.

16. Constitutional Law ⚿4594(1)

If the state suppresses evidence that is favorable to a defendant and material to either the guilt or penalty phase, due process is violated. U.S.C.A. Const.Amend. 14.

17. Criminal Law ⚿1991

A *Brady* violation contains three components: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching, (2) the evidence must have been suppressed by the state, either willfully or inadvertently, and (3) prejudice must have ensued.

18. Criminal Law ⚿1992

Evidence is material for *Brady* purposes only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

19. Criminal Law ⚿438(8)

Reenactment video was a fair representation of evidence presented by the state at a trial in a death-penalty case and, thus, was admissible as demonstrative evidence, even though defendant argued that police officers in the video were not the same heights as victim officer and defendant; the state clarified that the officers in the video were not the same heights as victim officer and defendant.

20. Criminal Law ⚿661

A trial court has wide discretion in admitting evidence.

21. Criminal Law ⚿404.5

Demonstrative evidence may be admissible as long as it is both logically and legally relevant.

22. Criminal Law ⚿338(1)

"Logical relevance" of evidence refers to the tendency to make the existence of a material fact more or less probable.

See publication Words and Phrases for other judicial constructions and definitions.

23. Criminal Law ⚿338(7)

"Legal relevance" of evidence weighs the evidence's probative value against unfair prejudice, confusion of the issues, mis-

leading the jury, undue delay, waste of time, or cumulativeness.

See publication Words and Phrases for other judicial constructions and definitions.

24. Criminal Law ⚿404.5

When assessing the relevance of demonstrative evidence, a court must ensure that the evidence is a fair representation of what is being demonstrated and that it is not inflammatory, deceptive, or misleading.

25. Criminal Law ⚿1968

Trial counsel is not ineffective for failing to preserve a nonmeritorious argument. U.S.C.A. Const.Amend. 6.

26. Criminal Law ⚿1655(6)

Defendant who was sentenced to death for murder of a police officer was not entitled to an evidentiary hearing on his claim, in a motion for postconviction relief, that defense counsel rendered ineffective assistance by failing to object to the presence of uniformed police officers in the courthouse; defendant alleged only that "there were a number of uniformed police officers in the hallway and in the courtroom," the jury was sequestered, there was no reason to believe that the jury contacted any officer who might have been in the hallway, and defendant did not present any facts that would support an ultimate conclusion that the presence of officers in the courthouse could have influenced the outcome of the trial. U.S.C.A. Const.Amend. 6; V.A.M.R. 29.15.

27. Criminal Law ⚿633.5

A trial court has wide discretion in determining whether to take action to avoid an environment for trial in which there is not a sense or appearance of neutrality.

28. Criminal Law ⚿1519(10)

Counsel's failure to impeach a witness will not warrant postconviction relief unless the testimony offers a defense to the charged crimes. V.A.M.R. 29.15.

29. Criminal Law ⚿1935

If a prior inconsistent statement by a state's witness does not give rise to a reasonable doubt as to a defendant's guilt, such impeachment evidence is not the basis for a claim of ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

30. Criminal Law ⚿1944

Defendant did not show that he was prejudiced at a trial for capital murder by defense counsel's lack of an objection to the state's closing argument on deliberation, and thus defendant did not establish ineffective assistance of counsel; the jury was instructed properly on deliberation, and strong evidence was presented as to defendant's guilt. U.S.C.A. Const.Amend. 6.

31. Criminal Law ⚿1883

Strickland standard of prejudice is less rigorous than the plain-error standard. U.S.C.A. Const.Amend. 6.

32. Criminal Law ⚿1944

An attorney's failure to object during closing arguments only results in ineffective assistance of counsel if it prejudices the accused and deprives him of a fair trial. U.S.C.A. Const.Amend. 6.

33. Criminal Law ⚿1429(2), 1451, 1655(1)

Defendant whose sentence of death was affirmed on direct appeal was not entitled to an evidentiary hearing on his postconviction claim that Missouri's statutory scheme for the death penalty was unconstitutional; the claim was not cognizable on a motion for postconviction relief, and defendant did not identify any reason for his failure to assert the constitutionality validity of the death penalty on direct appeal. V.A.M.R. 29.15.

34. Criminal Law ⚿1451

Claims challenging the constitutionality of the death penalty are for direct appeal and are not cognizable on a motion for postconviction relief. V.A.M.R. 29.15.

35. Criminal Law ⚿1655(6)

Defendant was not entitled to an evidentiary hearing on his claim, in a motion for postconviction relief, that defense counsel rendered ineffective assistance in a death-penalty case by failing to seek to replace a juror who allegedly began to sleep during counsel's closing argument; there was no evidence that one or more jurors actually fell asleep, and even if a juror fell asleep during closing argument and missed a portion of counsel's argument, defendant still would have had a jury that was attentive during the presentation of the evidence. U.S.C.A. Const. Amend. 6; V.A.M.R. 29.15.

36. Criminal Law ⚿2069

Closing argument by the attorneys is not evidence to be considered by the jury.

37. Jury ⚿33(5.15)

Use of peremptory strikes of venirepersons on the basis of race is unconstitutional.

38. Jury ⚿33(5.15)

A successful *Batson* challenge requires compliance with the following procedure: (1) a defendant must challenge one or more specific venirepersons struck by the State and identify the cognizable racial group to which they belong, (2) the state must provide a race-neutral reason that is more than an unsubstantiated denial of discriminatory purpose, and (3) the defense must show that the state's explanation was pretextual and the true reason for the strike was racial.

39. Criminal Law ⚿1655(6)

To obtain an evidentiary hearing on a postconviction motion alleging ineffective assistance of counsel, a movant needs to allege facts showing that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney and that movant was thereby prejudiced. U.S.C.A. Const. Amend. 6; V.A.M.R. 29.15.

40. Criminal Law ⚿1888

If it is easier to dispose of a postconviction claim of ineffective assistance of counsel on the ground of lack of sufficient prejudice, that course should be followed. U.S.C.A. Const.Amend. 6.

41. Criminal Law ⚿1901

Defendant did not show that he was prejudiced by defense counsel's alleged failure to show that the state's explanation for using peremptory strike against a prospective juror in a death-penalty case was pretextual, as the third step of a *Batson* challenge, and thus defendant did not establish ineffective assistance of counsel, where defendant did not make any allegation as to what response counsel should or could have made. U.S.C.A. Const.Amend. 6.

42. Criminal Law ⚿1901

Defendant did not show that defense counsel rendered ineffective assistance by allegedly failing to present a certain argument that the state's explanation for using peremptory strike against a prospective juror in a death-penalty case was pretextual, as the third step of a *Batson* challenge; defendant did not explain how he was prejudiced or how the result of his trial would have been different. U.S.C.A. Const. Amend. 6.

43. Criminal Law ⚿1652

Purpose of an evidentiary hearing on a motion for postconviction relief is to

determine whether the facts alleged in the motion are accurate, not to provide the movant with an opportunity to produce new facts. V.A.M.R. 29.15.

44. Criminal Law ⚿1961

Defendant did not show that a witness's testimony that defendant was a good and loving father would have presented him with a viable defense at the penalty phase of a death-penalty case, and thus defendant did not establish that defense counsel were ineffective for not calling the witness to testify; the witness's testimony would have been cumulative of testimony that had been presented already. U.S.C.A. Const.Amend. 6.

45. Criminal Law ⚿1923, 1924

When a defendant asserts a claim of ineffective assistance of counsel for failing to investigate and call witnesses, the defendant must plead and prove that (1) trial counsel knew or should have known of the existence of the witness, (2) the witness could be located through reasonable investigation, (3) the witness would testify, and (4) the witness's testimony would have produced a viable defense. U.S.C.A. Const. Amend. 6.

46. Criminal Law ⚿1924

Trial counsel's decision not to call a witness to testify is presumptively a matter of trial strategy and will not support a claim of ineffective assistance of counsel unless the defendant clearly establishes otherwise. U.S.C.A. Const.Amend. 6.

Kent Denzel, Public Defender's Office, Columbia, for Johnson.

Daniel N. McPherson, Attorney General's Office, Jefferson City, for the State.

GEORGE W. DRAPER III, Judge.

Kevin Johnson (hereinafter, "Movant") was convicted by a jury of first-degree murder, section 565.202, RSMo 2000.[1] The trial court adopted the jury's recommendation and sentenced Movant to death. This Court affirmed his conviction in *State v. Johnson*, 284 S.W.3d 561 (Mo. banc 2009). Movant's motion for postconviction relief pursuant to Rule 29.15 was overruled by the motion court after an evidentiary hearing on five of the fourteen allegations of error. Movant appeals. This Court has exclusive jurisdiction over this appeal because a sentence of death was imposed. Mo. Const. art. V, sec. 10; order of June 16, 1988. The judgment denying Movant post-conviction relief is affirmed.

Factual and Procedural History

On July 5, 2005, police officers were in the Meachem Park neighborhood investigating the ownership of a vehicle, suspected to be owned by Movant, who was wanted for a probation violation. At the same time, Movant's younger brother suffered a seizure inside his home. Movant's family sought assistance from the police officers who were already in the neighborhood. The police officers called for an ambulance, attempted to assist inside the house, and additional police officers, including Sergeant William McEntee (hereinafter, "Sgt. McEntee"), were called to the scene. Movant's brother was taken to the hospital, but he passed away from a preexisting heart condition.

Later that day, Movant retrieved his black, nine millimeter handgun from his vehicle. Movant told friends he believed the police officers were so busy looking for him that they let his brother die.

1. All further references herein are to RSMo 2000 unless otherwise indicated.

Sgt. McEntee returned to the Meachem Park neighborhood that evening, responding to a report of fireworks in the neighborhood. As Sgt. McEntee spoke with three juveniles about the fireworks report, Movant approached his vehicle. Movant squatted down to see through the passenger window and said something to the effect of, "you killed my brother." Movant then fired his handgun approximately five times. Sgt. McEntee was struck in the head and upper torso. One of the juveniles was struck in the leg. Movant reached inside Sgt. McEntee's car and took his gun.

Sgt. McEntee's car then rolled down the street, hitting a parked car and a tree. Sgt. McEntee got out of his car and fell forward onto his knees, unable to talk due to his injuries and blood in his mouth. Movant approached, told everyone who had gathered to get out of his way, and Movant shot Sgt. McEntee approximately two more times in the head. When Sgt. McEntee collapsed, Movant rifled through Sgt. McEntee's pockets. Movant shot Sgt. McEntee a total of seven times in the head and upper torso.

Movant left Meachem Park, cursing and claiming, "that m—— f—— let my brother die, he needs to see what it feels like to die." Movant spent several days at a family member's apartment while arrangements were made for him to surrender.

Movant was tried and convicted. Movant was sentenced to death. This Court affirmed the conviction and sentence on direct appeal. *Johnson,* 284 S.W.3d at 589.

Movant sought post-conviction relief through a Rule 29.15 motion. The motion court held an evidentiary hearing on five of his claims and entered judgment overruling Movant's motion in its entirety. Movant appeals the denial of post-conviction relief.

Standard of Review

[1] This Court will affirm the judgment of the motion court unless its findings and conclusions are clearly erroneous. Rule 29.15(k); *Johnson v. State,* 333 S.W.3d 459, 463 (Mo. banc 2011). The motion court's judgment is clearly erroneous only if this Court is left with a definite and firm impression that a mistake has been made. *Forrest v. State,* 290 S.W.3d 704, 708 (Mo. banc 2009) (quoting *Goodwin v. State,* 191 S.W.3d 20, 26 (Mo. banc 2006)). The motion court's findings are presumed correct. *McLaughlin v. State,* 378 S.W.3d 328, 336–37 (Mo. banc 2012). Additionally, a movant bears the burden of proving the asserted "claims for relief by a preponderance of the evidence." Rule 29.15(f).

[2–4] Pursuant to Rule 29.15, an evidentiary hearing is not mandatory when the motion and record conclusively show that the movant is not entitled to relief. *Lamastus v. State,* 989 S.W.2d 235, 236 (Mo.App. E.D.1999). Courts "will not draw factual inferences or implications in a Rule 29.15 motion from bare conclusions or from a prayer for relief." *Morrow v. State,* 21 S.W.3d 819, 822 (Mo. banc 2000). To be entitled to an evidentiary hearing, Movant's motion must: (1) allege facts, not conclusions, warranting relief; (2) raise factual matters that are not refuted by the file and record; and (3) raise allegations that resulted in prejudice. *Id.*

[5] To be entitled to post-conviction relief for ineffective assistance of counsel, a movant must show by a preponderance of the evidence that his or her trial counsel failed to meet the *Strickland* test in order to prove his or her claims. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under *Strickland,* a movant must demonstrate that: (1) his

or her counsel failed to exercise the level of skill and diligence that a reasonably competent counsel would in a similar situation, and (2) he or she was prejudiced by that failure. *Id.* at 687, 104 S.Ct. 2052.

[6–8] A movant must overcome the strong presumption that counsel's conduct was reasonable and effective. *Smith v. State,* 370 S.W.3d 883, 886 (Mo. banc 2012). To overcome this presumption, a movant must identify "specific acts or omissions of counsel that, in light of all the circumstances, fell outside the wide range of professional competent assistance." *Zink v. State,* 278 S.W.3d 170, 176 (Mo. banc 2009). Trial strategy decisions may be a basis for ineffective counsel only if that decision was unreasonable. *Id.* "[S]trategic choices made after a thorough investigation of the law and the facts relevant to plausible opinions are virtually unchallengeable . . . ." *Anderson v. State,* 196 S.W.3d 28, 33 (Mo. banc 2006).

[9–11] To establish relief under *Strickland,* a movant must prove prejudice. Prejudice occurs when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Deck v. State,* 68 S.W.3d 418, 429 (Mo. banc 2002) (citing *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052). Prejudice in a death penalty case is "a reasonable probability that, but for counsel's deficient performance, the jury would have concluded the balance of aggravating and mitigating circumstances did not warrant death." *Forrest v. State,* 290 S.W.3d 704, 708 (Mo. banc 2009) (quoting *State v. Kenley,* 952 S.W.2d 250, 266 (Mo. banc 1997)).

1. Diminished Capacity

[12] Movant asserts the motion court clearly erred in denying his claim that his trial counsel were ineffective for failing to investigate and present a diminished capacity defense. Movant claims counsel should have adduced testimony from two expert witnesses regarding his acute stress disorder (hereinafter, "ASD"), which would have demonstrated Movant was not capable of deliberation. Movant believes that had counsel presented this evidence to the jury, there was a reasonable probability that the jury would have imposed a life sentence.

Movant claims his trial counsel should have presented the testimony of psychologist Dr. Daniel Levin (hereinafter, "Dr. Levin") and Dr. Donald Cross (hereinafter, "Dr. Cross") to prove he suffered from ASD at the time of the murder. Both of Movant's experts testified at the post-conviction hearing. Dr. Levin testified he was retained by post-conviction counsel to conduct a psychological evaluation of Movant to determine whether he suffered from a mental impairment, mental illness, or mental defect at the time of the murder that would interfere with his ability to deliberate. In addition to the documents Dr. Levin reviewed in preparation for his trial testimony, Dr. Levin reviewed additional documents from the Division of Family Services and other records to form his opinion. Dr. Levin testified at the evidentiary hearing that he believed Movant suffered from ASD at the time of the murder and that ASD would have impacted Movant's ability to deliberate. Dr. Levin stated he could have prepared the same evaluation prior to trial.

Dr. Cross also was retained by post-conviction counsel to conduct a psychological evaluation of Movant. Dr. Cross interviewed Movant three times, interviewed other family members, and reviewed records. Dr. Cross testified it was his opinion Movant was experiencing ASD at the time of the murder and that ASD would have impaired Movant's ability to coolly reflect and make rational, reasonable decisions.

Movant's trial counsel also testified. Counsel Karen Kraft (hereinafter, "Kraft") testified she decided as a matter of trial strategy not to pursue a diminished capacity defense because she believed Movant's story was compelling in relationship to the time the murder happened after his brother's death. Kraft stated that had the defense presented a mental health expert, the State would have sought its own evaluation of Movant. Kraft testified she did not want to turn Movant's story into one of competing mental health experts.

Counsel David Steele (hereinafter, "Steele") testified he did not want to present evidence of all of the specific instances of abuse and neglect Movant suffered in his preschool years. Steele noted he believes a jury tends to have a certain tolerance and a certain time frame in which it is receptive to hearing evidence. Steele worried that he would lose the jury's attention and focus if it were to hear repetitive, cumulative evidence. Steele believed the jury could understand the emotions a person would go through after losing a brother and how those emotions would affect Movant's ability to deliberate. Steele stated there were risks in making something too complex for the jury to follow and a risk the State's expert would testify Movant did not suffer from a mental disease or defect. Accordingly, Steele testified there was a strategic decision made not to pursue a diminished capacity defense.

Counsel made a strategic decision as to how much evidence to present regarding Movant's upbringing during the penalty phase. Counsel did not present expert testimony regarding Movant's mental state, but counsel introduced testimony regarding Movant's social history, which formed the basis for believing Movant suffered from ASD. The jury heard that, as a young child, Movant was abandoned by both of his parents, and he went without food, clothing and decent shelter due to his mother's neglect, which stemmed from her drug addiction. Movant was sent to live in a series of homes and was abused physically by his aunt. Those experiences caused psychological scars that were reopened by the death of his brother. Counsel also elicited evidence of Movant's mental state at the time of the shooting.

The motion court made an extensive record of the evidentiary hearing on Movant's Rule 29.15 motion. The motion court found there was a reasonable strategic decision for not presenting a diminished capacity defense. It further found that Movant was not prejudiced because his counsel presented and argued evidence demonstrating his emotional state at the time of the murder. The motion court stated that Dr. Levin's testimony presented in the penalty phase was similar to the evidence which Movant now claims should have been presented.

[13, 14] "The selection of witnesses and evidence are matters of trial strategy, virtually unchallengeable in an ineffective assistance claim." *Vaca v. State*, 314 S.W.3d 331, 335 (Mo. banc 2010) (quoting *Anderson*, 196 S.W.3d at 37). No matter how ill-fated it may appear in hindsight, a reasonable choice of trial strategy cannot serve as a basis for a claim of ineffective assistance. *Id.*

The record indicates trial counsel was aware of a potential diminished capacity defense. However, counsel made a deliberate choice to not pursue this strategy. Counsel was concerned that the jury would lose focus or become alienated. Counsel also knew that if they presented expert testimony regarding Movant's diminished capacity, the State could then introduce its own experts, challenging the diagnosis of ASD. Movant's counsel presented testimony regarding Movant's upbringing and the mental anguish he was feeling at the time

of the shooting. Further, both of Movant's trial counsel believed the State had robust evidence of deliberation.

[15] "The question in an ineffective assistance claim is not whether counsel could have or even, perhaps, should have made a different decision, but rather whether the decision made was reasonable under all the circumstances." *Henderson v. State,* 111 S.W.3d 537, 540 (Mo.App. W.D.2003). Just because a jury returns a guilty verdict does not mean that defense counsel was ineffective. *Middleton v. State,* 103 S.W.3d 726, 737 (Mo. banc 2003). Movant has not overcome the strong presumption that counsel rendered adequate assistance, exercising reasonable professional judgment. *State v. Kinder,* 942 S.W.2d 313, 335 (Mo. banc 1996). Counsel were not ineffective for failing to present the testimony of Drs. Levin and Cross.

2. Brady [2] *violation*

Movant claims the motion court clearly erred in failing to grant him an evidentiary hearing on his assertion that the State failed to disclose that Jermaine Johnson (hereinafter, "Witness") received a benefit in exchange for testifying against Movant. Movant asserts that, had the State disclosed its role in continuing Witness' probation, there is a reasonable probability the jury would have looked less favorably on Witness' testimony, and the jury would not have found Movant deliberated. Movant believes there was clear error in not finding a *Brady* violation.

[16–18] If the State suppresses evidence that is favorable to a defendant and material to either the guilt or penalty phase, due process is violated. *Brady,* 373 U.S. at 87, 83 S.Ct. 1194. A *Brady* violation contains three components: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene,* 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). "Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Taylor v. State,* 262 S.W.3d 231, 240 (Mo. banc 2008) (quoting *Anderson,* 196 S.W.3d at 36–37).

Witness testified for the State during the guilt phase of the trial. Witness stated he had been with Movant prior to Sgt. McEntee's shooting. Witness then saw Movant along side of Sgt. McEntee's vehicle. Witness stated he saw a gun in Movant's hand and saw him put the gun through the car window. When Witness heard the gunfire, he could see Sgt. McEntee's head jerking. Then he saw Movant open the car door and take Sgt. McEntee's pistol.

Further, Witness testified he only decided to speak with the police about Sgt. McEntee's murder after he violated his probation, hoping to receive some favorable treatment. He testified that he was still on probation and that a deal with the State had not been made in exchange for his testimony. Witness testified his probation had not been revoked for the incident.

On cross-examination, Movant's counsel inquired about the status of his probation and his interactions with Movant prior to the shooting. Witness stated he did not attend his probation hearing. Witness also testified that, in the moments before the shooting, Movant never made threatening comments or spoke about getting revenge for his brother's death.

2. *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Movant believes the State violated *Brady* by failing to disclose information that Witness expected a benefit in exchange for his trial testimony and that Witness received a continuance of his probation violation during the pendency of Movant's trial. The motion court found this claim was refuted by the record.

Both Movant and the State questioned Witness about his probation violation. Witness testified he had no deals with the State for favorable treatment in exchange for his testimony. Witness' motivation for testifying was presented to the jury. The motion court noted that Witness' probation violation had not "gone away" nor had his case been dismissed. Witness' testimony was corroborated by three additional witnesses who all saw Movant shoot Sgt. McEntee numerous times. Further, Movant's trial counsel elicited favorable testimony from Witness regarding Movant immediately prior to the shooting.

Movant fails to demonstrate that Witness' expectation of some unknown benefit prejudiced Movant, especially when some of the testimony elicited from Witness was favorable to Movant. Witness testified regarding his hopes the State would do something for him, but explained he did not receive a deal. This information was brought out on direct examination by the State and further explored by Movant's counsel in cross-examination. Movant presented an affidavit by Witness at the evidentiary hearing which stated that Witness only expected to receive a benefit; Witness had not received an undisclosed deal with the State. The motion court did not clearly err.

3. Failure to object to video

[19] Movant alleges the motion court clearly erred in denying his claim that his trial counsel were ineffective for failing to object to the admission of the reenactment video (hereinafter, "Exhibit 88") without an evidentiary hearing. Movant claims that Exhibit 88 was inadmissible as improper demonstrative evidence because it was an inaccurate representation of what he said had happened. Movant asserts that Exhibit 88 was unduly prejudicial because the persons who portrayed Movant and Sgt. McEntee were of different heights.

[20–24] A trial court has wide discretion in admitting evidence. *State v. Freeman*, 269 S.W.3d 422, 426 (Mo. banc 2008). Demonstrative evidence may be admissible as long as it is both logically and legally relevant. *State v. Brown*, 337 S.W.3d 12, 15 (Mo. banc 2011). "Logical relevance refers to the tendency 'to make the existence of a material fact more or less probable.' " *Id.* (quoting *State v. Anderson*, 306 S.W.3d 529, 538 (Mo. banc 2010)). Legal relevance weighs the evidence's probative value against "unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness." *Freeman*, 269 S.W.3d at 427 (quoting *State v. Anderson*, 76 S.W.3d 275, 276 (Mo. banc 2002)). "Therefore, when assessing the relevance of demonstrative evidence, a court must ensure that the evidence is a fair representation of what is being demonstrated and that it is not inflammatory, deceptive or misleading." *Brown*, 337 S.W.3d at 15.

Movant claims that Exhibit 88 is not accurate because it does not represent his testimony and that the officers in Exhibit 88 were not the same height as Sgt. McEntee and he. Thus, Movant asserts Exhibit 88 was not a fair representation because it was deceptive and misleading.

[25] Movant's argument is incorrect. The trial court did not abuse its discretion in admitting Exhibit 88 because it was a fair representation of the evidence pre-

sented by the State. The State clarified that the officers in Exhibit 88 were not the same heights as Sgt. McEntee and Movant. While Exhibit 88 may not have been to Movant's satisfaction, it is clear Exhibit 88 was supported by the evidence adduced at trial. Had Movant's trial counsel objected, it would have been nonmeritorious. Trial counsel is not ineffective for failing to preserve a nonmeritorious argument. *Baumruk v. State,* 364 S.W.3d 518, 539 (Mo. banc 2012); *McLaughlin,* 378 S.W.3d at 357. The motion court did not clearly err.

4. Failure to object to presence of police officers

[26] Movant alleges the motion court clearly erred in denying him an evidentiary hearing on his claim that his trial counsel were ineffective for failing to object to the presence of uniformed police officers in the courthouse. Movant believes the presence of the uniformed police officers in the courtroom and the hallways was designed to send a message to the jury to find Movant guilty.

[27] The motion court found that the jury was sequestered throughout the proceedings and was not in contact with any of the spectators at any point in the trial proceedings or that any officer present caused any disturbance to the proceedings. The motion court further found Movant failed to demonstrate any prejudice. A trial court has wide discretion in determining whether to take action to avoid an environment for trial in which there is not a "sense or appearance of neutrality." *State v. Baumruk,* 85 S.W.3d 644, 650 (Mo. banc 2002).

Here, Movant failed to demonstrate facts which would warrant relief. The only allegation Movant made in his post-conviction motion as to the number of police officers was that "there were a number of uniformed police officers in the hallway and in the courtroom." There is no reason to believe the sequestered jury came into contact with any officer who may have been in the courthouse hallway. Further, Movant fails to present any fact that would support the ultimate conclusion that the presence of officers in the courthouse could have influenced the outcome of Movant's trial. Movant only sets forth mere conclusions without any factual support.[3]

During the course of any trial, there could be a large number of uniformed police officers in the courthouse and walking in the hallways. Police officers are frequently called to testify in trials, which requires their presence in the courthouse. The motion court did not err.

5. Failure to impeach

Movant claims the motion court clearly erred in denying his claim that his trial counsel were ineffective for failing to impeach one of the State's witnesses with a prior inconsistent statement without an evidentiary hearing. Movant alleges trial counsel should have established that Norman Madison's (hereinafter, "Madison") statements to the police and at trial were allegedly inconsistent. Movant claims this

3. The dissent cites two cases, neither of which are Missouri cases, in which the defendants set forth compelling factual reasons wherein an evidentiary trial would be necessary to determine whether the presence of the police officers would have influenced the outcome of the trial. *See Ward v. State,* 105 So.3d 3, 5 (Fla.Dist.Ct.App.2012) (finding "there were enough officers in the audience to make 'the courtroom looked like a policeman's benefit.' "); *Shootes v. State,* 20 So.3d 434 (Fla. Dist.Ct.App.2009) (estimating the number of uniformed police officers to be between thirty-five and seventy). Movant set forth no such factual allegation.

inconsistency went to the issue of deliberation.

[28, 29] Failure to impeach a witness will not warrant post-conviction relief unless the testimony offers a defense to the charged crimes. *Black v. State,* 151 S.W.3d 49, 55 (Mo. banc 2004); *Baumruk,* 364 S.W.3d at 533. "If a prior inconsistent statement by a [S]tate's witness does not give rise to a reasonable doubt as to Movant's guilt, such impeachment evidence is not the basis for a claim of ineffective assistance of counsel." *State v. Twenter,* 818 S.W.2d 628, 640 (Mo. banc 1991).

The motion court found that Madison's prior inconsistent statements were brought out during his testimony. Further, the motion court found Movant failed to establish he suffered prejudice.

Movant fails to identify or allege any impeachable statement by Madison that would have offered him a viable defense. This mere allegation does not give rise to reasonable doubt of Movant's guilt. The motion court did not clearly err.

6. Failure to object during closing argument

[30] Movant claims the motion court clearly erred in denying him an evidentiary hearing on his claim that his trial counsel was ineffective for failing to object to statements made by the state during closing argument. Movant asserts his trial counsel should have objected to statements by the State, which lessened the State's burden of proof regarding the definition of deliberation. The motion court found the proposed objections had no merit and Movant failed to demonstrate either a deficient performance or prejudice by his trial counsel.

Movant also raised this issue in his direct appeal, claiming there was plain error in the State's closing argument. *Johnson,* 284 S.W.3d at 573. This Court found the State properly defined "deliberation." *Id.* at 574. During the State's argument, "in the process of arguing the deliberation element [the State] used the terms 'deliberation,' 'cool reflection,' and 'conscious decision.' " *Id.* While the term "conscious decision" is not the language used in the instruction, this Court determined there was no plain error because the State recited the actual language of the instruction and the jury is presumed to follow the instructions of the court. *Id.*

[31] However, the determination there was no plain error prejudice resulting from the State's comments does not end the inquiry because the *Strickland* standard of prejudice is less rigorous than the plain error standard. *Deck v. State,* 381 S.W.3d 339, 358 (Mo. banc 2012). *Strickland* prejudice requires only that there is a reasonable probability that the result would have been different. *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. The "theoretical difference in the two standards of review will seldom cause a court to grant postconviction relief after it has denied relief on direct appeal. . . ." *Deck v. State,* 68 S.W.3d 418, 428 (Mo. banc 2002) (citing *Strickland,* 466 U.S. at 697, 104 S.Ct. 2052). There are only a "small number of cases in which the application of the two tests will produce different results." *Id.*

[32] "An attorney's failure to object during closing arguments only results in ineffective assistance of counsel if it prejudices the accused and deprives him of a fair trial." *Zink,* 278 S.W.3d at 187. Even assuming, *arguendo,* Movant's counsel should have objected to the State's closing argument, Movant cannot demonstrate prejudice. The jury was instructed properly on deliberation. *Johnson,* 284 S.W.3d at 574. The State read the definition of deliberation in its closing argument while explaining how it believed the evi-

dence presented showed Movant knowingly caused Sgt. McEntee's death after Movant deliberated. "Any deficiencies in the [State's] argument were corrected by the trial court's instructions to the jury." *State v. Clemons,* 946 S.W.2d 206, 230 (Mo. banc 1997). "Counsel is not ineffective for failing to make non-meritorious objections." *McLaughlin,* 378 S.W.3d at 357. Given there was strong evidence presented demonstrating Movant's guilt and the trial court's instructions to the jury were proper, the motion court did not err.

7. Appearance before the jury in restraints

Movant claims the motion court clearly erred in denying him an evidentiary hearing on his claim that his trial counsel were ineffective for failing to object to the shackling device concealed under his clothing. Movant asserts that because he walked with a limp and made a noise when he sat, the shackling device was made "visible." Accordingly, Movant believes he was deprived of his right to a fair trial.

Movant admits that his leg restraint was concealed under his clothing and was not visible to the jury. He infers the jury knew he was shackled because he walked with a limp and there was a noise [4] when he sat. Movant argues that this was structural error in his trial, and he does not have to meet the standard for *Strickland* prejudice due to *Deck v. Missouri,* 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005).

This Court previously has addressed this argument. *Zink v. State,* 278 S.W.3d at 185–86. Additionally, the United States Supreme Court in *Deck* addressed the situation wherein the defendant's leg restraints were actually visible to the jury during his trial, finding a due process violation. *See Deck,* 544 U.S. at 633, 125 S.Ct. 2007. In comparison, the situation in *Zink* involved restraints that were concealed from the jury's view. *Zink,* 278 S.W.3d at 186. In *Zink,* this Court noted that the ruling in *Deck* "was limited to restraints that are visible, in that it expressly noted that the trial court did not explain 'why, if shackles were necessary, [the trial court] chose not to provide for shackles that the jury could not see-apparently the arrangement used at trial.' " *Zink,* 278 S.W.3d at 186 (quoting *Deck,* 544 U.S. at 634–35, 125 S.Ct. 2007).

Movant's allegations are similar to those in *Zink.* Movant's leg restraints were not visible, and there was no fact presented demonstrating the jury ever knew Movant was restrained. Movant does not allege prejudice; rather, Movant erroneously relies upon the belief there was structural prejudice such as in *Deck.* Movant has failed to meet his burden. The motion court did not clearly err.

8. Death penalty statute is unconstitutional

[33] Movant alleges the motion court erred in denying him a hearing on his claim that Missouri's statutory scheme for the death penalty is unconstitutional. Movant claims Missouri's death penalty statute is unconstitutional as arbitrary and capricious in that it does not genuinely narrow the class of people eligible for the death penalty. Movant sought to introduce a law review article [5] in support of his claim.

4. Movant only asserts there was noise associated with his leg restraint and makes a bare allegation that someone could hear the noise when he sat.

5. Katherine Barnes et al., *Place Matters (Most): An Empirical Study of Prosecutorial Decision–Making in Death–Eligible Cases,* 51 ARIZ. L.REV. 305 (2009).

[34] This exact argument has been addressed previously by this Court. *McLaughlin*, 378 S.W.3d at 357. "Claims challenging the constitutionality of the death penalty are for direct appeal and are not cognizable on a motion for post-conviction relief." *Id.* Movant fails to identify any reason for his failure to assert the constitutionality validity of the death penalty on direct appeal. The motion court did not clearly err in its decision to deny Movant an evidentiary hearing on this claim.

9. Sleeping jurors

[35] Movant claims the motion court erred in denying him an evidentiary hearing on his claim that counsel were ineffective for failing to seek to replace an allegedly sleeping juror. Movant claims there was at least one juror who began to sleep during defense counsel's closing argument and that juror missed important points in his counsel's argument. Movant avers the juror would have to be dependent on the other jurors' opinions. Movant asserts he should have been given a hearing to determine whether Movant could demonstrate prejudice.

The motion court clearly did not err in denying Movant's claim, finding Movant made a mere allegation and failed to demonstrate any prejudice. Movant declared at least one juror might have fallen asleep during closing argument. This is not a fact that would entitle Movant to relief; there is no evidence that one or more jurors actually fell asleep. *See State v. Ferguson*, 20 S.W.3d 485, 507–08 (Mo. banc 2000).

[36] Additionally, Movant failed to demonstrate how he was prejudiced. The only statement in Movant's motion that could be construed to be an allegation of prejudice is that he "was subjected to a verdict by a jury which had not considered all of the argument in the case." Assuming, *arguendo*, a juror fell asleep during closing argument and missed a portion of counsel's argument, Movant still would have had a jury that was attentive during the presentation of the evidence. "Closing argument by the attorneys is not evidence to be considered by the jury." *State v. Kenley*, 952 S.W.2d at 270. The motion court did not clearly err.

10. Batson [6] *challenge*

Movant claims the motion court clearly erred in denying his claim without an evidentiary hearing that his trial counsel were ineffective for failing to object properly to alleged *Batson* violations during voir dire. Movant alleges his trial counsel failed to make a complete and proper *Batson* objection to the strikes of venirepersons John Clark and Debra Cottman, and failed to make any *Batson* objection to the strikes of venirepersons Cleeta Jackson and Harry Stephenson. Accordingly, Movant argues he was prejudiced because trial counsel's performance violated his rights to a fair trial.

[37, 38] The use of peremptory strikes of venirepersons on the basis of race is unconstitutional. *Batson*, 476 U.S. at 84, 106 S.Ct. 1712. A successful *Batson* challenge requires compliance with the following procedure:

> First, a defendant must challenge one or more specific venirepersons struck by the State and identify the cognizable racial group to which they belong. Second, the State must provide a race-neutral reason that is more than an unsubstantiated denial of discriminatory purpose. Third, the defense must show that the State's explanation was pretex-

6. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

tual and the true reason for the strike was racial.

State v. McFadden, 191 S.W.3d 648, 651 (Mo. banc 2006) (footnotes omitted).

[39, 40] To obtain an evidentiary hearing on a post-conviction motion, a movant needs to "allege facts showing that counsel's performance did not conform to the degree of skill, care and diligence of a reasonably competent attorney and that movant was thereby prejudiced." *Barnett v. State*, 103 S.W.3d 765, 769 (Mo. banc 2003), *see also Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052.

a. Clark

[41] The motion court found that trial counsel made a *Batson* objection regarding this venireperson and the State's reasons for the strike were race neutral as the venireperson stated he would not sign a death verdict, was not strong on the death penalty, potentially would hold the State to a higher burden, and exhibited inappropriate behavior during voir dire. Movant's trial counsel made a *Batson* objection after the State used a strike on this venireperson. The State presented its argument that, *inter alia*, this venireperson stated he would not sign a death verdict. Movant's counsel had no response.

In his post-conviction motion, Movant alleges that his counsel were ineffective for failing to show the State's strike was pretextual or race motivated. However, Movant fails to make any allegation as to what response counsel should or could have made.

b. Cottman

[42] Movant's trial counsel made a *Batson* objection after the State used a strike on this venireperson. On direct appeal, Movant's counsel argued the State's reason for this strike was pretextual because another member of the venirepanel was a foster parent but was not struck. This Court found the State's reason for not striking this venireperson was not pretextual in that this venireperson was the only one who provided services to Annie Malone, the same organization that assisted Movant. *Johnson*, 284 S.W.3d at 571.

In his post-conviction motion, Movant alleges his trial counsel should have stated that the State's reasons for striking this venireperson were pretextual because, had the State been interested in discovering if the venirepanel had been involved with agencies that assisted Movant, the State would have questioned the venirepanel in more detail. However, Movant does not attempt to demonstrate how this has prejudiced him or how the result of his trial would have been different.

c. Jackson and Stephenson

The motion court found that venireperson Jackson stated that her son had been prosecuted by the Saint Louis County Prosecutor for murder and was acquitted after spending approximately one year in custody. The motion court found that venireperson Stephenson had chaired a prison ministry at his church, which involved writing letters to prisoners. Movant's trial counsel did not make a *Batson* objection after the State used a strike on Jackson and Stephenson.

The only advocacy presented to this Court regarding Jackson and Stephenson was the assertion that the motion court's findings are clearly erroneous and this Court "must disregard the motion court's 'gratuitous observations' regarding race-

neutral reasons that the prosecutor did not even give as to jurors Jackson and Stephenson."

It is axiomatic that the State did not present race-neutral reasons at trial because there was no *Batson* objection as to these venirepersons. There was no need for the State to clarify its position regarding these two venirepersons. However, the record is clear; there were race-neutral reasons regarding the reasons the State wished to strike these venirepersons. Further, the trial court specifically questioned trial counsel as to whether a *Batson* challenge would be made regarding venireperson Stephenson so as to prevent this issue from being raised in a post-conviction motion.

Movant failed to present any argument as to why his counsel could have been ineffective for failing to raise a *Batson* objection to these venirepersons. Movant also fails to present any argument as to how he was prejudiced by the alleged inaction of his trial counsel.

[43] In this point on appeal, Movant is unable to demonstrate prejudice by making the statement that if selected for a jury, a venireperson merely on the basis of his or her race, would not vote for the death penalty. This allegation is "to engage, at best, in mere speculation and, at worst, in the stereotyping that *Batson* and its progeny strive to prevent." *Morrow,* 21 S.W.3d at 827 (quoting *State v. Loazia,* 829 S.W.2d 558, 570 (Mo.App. E.D.1992)). Any allegation that Movant should be granted an evidentiary hearing to develop his arguments also fails. "The purpose of an evidentiary hearing is to determine whether the facts alleged in the motion are accurate, not to provide [Movant] with an opportunity to produce new facts." *Morrow,* 21 S.W.3d at 827. The motion court did not clearly err.

11. Failure to present mitigation evidence

[44] Movant alleges the motion court clearly erred in denying his claim regarding the failure of his counsel to call Lavonda Bailey (hereinafter, "Bailey") as a witness in the penalty phase of his trial. Movant claims Bailey would have testified he was a good and loving father. Movant believes Bailey's testimony would have countered the evidence presented that Movant assaulted his daughter's mother, Bailey's daughter, and that Movant then would have received a life sentence.

[45, 46] Regarding a claim of ineffective assistance of counsel for failing to investigate and call witnesses, Movant must plead and prove that: "(1) trial counsel knew or should have known of the existence of the witness; (2) the witness could be located through reasonable investigation; (3) the witness would testify; and (4) the witness's testimony would have produced a viable defense." *Glass v. State,* 227 S.W.3d 463, 468 (Mo. banc 2007) (quoting *Hutchison v. State,* 150 S.W.3d 292, 304 (Mo. banc 2004)). A trial counsel's decision not to call a witness to testify is presumptively a matter of trial strategy and will not support Movant's claim of ineffective assistance of counsel unless Movant clearly establishes otherwise. *Whited v. State,* 196 S.W.3d 79, 82 (Mo. App. E.D.2006).

At the evidentiary hearing, Bailey testified that she was not contacted by counsel to testify at trial, but that she would have been willing and able to do so. Bailey would have testified Movant had a good relationship with his daughter, he cared for his daughter for multiple days at a time in Bailey's home, he saw his daughter every day, and she considered him a good father. Bailey further stated that after Movant was arrested and he could no long-

er physically visit his daughter, he called his daughter every week and his daughter sometimes visited him in prison. Bailey was aware of the incident wherein Movant pleaded guilty to assaulting Bailey's daughter, the mother of Movant's daughter.

Movant's counsel also testified at the evidentiary hearing. Each stated they did not contact Bailey because Movant had led them to believe they were not on good terms and Bailey's testimony would not be helpful. Further, Movant's counsel did present additional evidence from multiple family members and educators that Movant had a loving relationship with his daughter at trial.

The motion court found that Bailey's testimony would have been cumulative and would not have provided Movant with a viable defense. Further, the motion court determined that it was reasonable for counsel not to investigate fully calling Bailey as a witness because Movant gave them the impression that Bailey did not have a positive opinion of him and that Movant had assaulted Bailey's daughter.

Bailey's testimony would have been cumulative of testimony, which already had been presented. *See Bucklew v. State,* 38 S.W.3d 395, 398 (Mo. banc 2001) (counsel not ineffective for failing to call a witness whose testimony would be cumulative to that of other witnesses). Movant has not demonstrated that Baliey's additional testimony would have presented him a viable defense. *Glass,* 227 S.W.3d at 468. The motion court's findings were not clearly erroneous.

Conclusion

Movant failed to prove the motion court clearly erred in denying him postconviction relief. The judgment is affirmed.

RUSSELL, C.J., FISCHER, WILSON and TEITELMAN, JJ., concur.

BRECKENRIDGE, J., concurs in part and dissents in part in separate opinion filed.

STITH, J., concurs in opinion of BRECKENRIDGE, J.

PATRICIA BRECKENRIDGE, Judge.

I concur in the portion of the principal opinion that affirms the denial of 13 of Kevin Johnson's post-conviction claims. I do not concur, however, in the principal opinion's holding that Mr. Johnson failed to plead sufficient facts to require an evidentiary hearing on his claim that his trial counsel were ineffective for not objecting to the presence of numerous uniformed police officers in the courtroom and halls during his trial. Other jurisdictions have also held that, in fact-specific circumstances, the attendance of numerous uniformed police officers during criminal proceedings may be inherently prejudicial to the defendant. Therefore, I respectfully dissent.

The motion court must hear evidence of a post-conviction claim when: (1) the movant alleges facts, not conclusions, warranting relief; (2) "the facts alleged ... raise matters not refuted by the files and records in the case; and (3) the matters of which movant complains ... have resulted in prejudice." *Morrow v. State,* 21 S.W.3d 819, 822 (Mo. banc 2000). To sufficiently allege a claim of ineffective assistance of counsel, a post-conviction movant must allege facts that would show that his counsel failed to exercise the level of skill and diligence that a reasonably competent counsel would in a similar situation and that he was prejudiced by that failure. *See Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In his Rule 29.15 motion, Mr. Johnson alleged that his trial counsel were ineffective because they failed to object to the presence of "numerous uniformed police officers" in the hallways and the courtroom during voir dire and the guilt and penalty phases of his trial. He alleges that this was "an obvious display of support for the victim in the case" and "a cry for justice for the victim and a call for harsh punishment for [Mr. Johnson]." He further alleges in his motion that he was denied his right to a fair trial and a fair and impartial jury because the presence of the uniformed officers "necessarily impacted the jury's consideration of the case and its consideration of punishment." He asserts that his trial counsel should have moved to exclude the uniformed police officers from observing the trial or, alternatively, from wearing their uniforms when they observed the trial.

The motion court denied Mr. Johnson an evidentiary hearing on this claim, finding that there had not been any prejudice because the jury had been sequestered and had no contact with any of the officers who attended the trial. The principal opinion agrees. In so holding, both appear to have misunderstood the nature of Mr. Johnson's claim. As Mr. Johnson explains in his brief, he did not claim that he did not receive an impartial trial because of the possibility of contact between the jury and the attending officers. Instead, he claims that the presence of numerous uniformed officers, in an obvious show of support for their fallen comrade and his family, allowed the officers to convey the message to the jury to remember the police officer victim and to convict and harshly punish Mr. Johnson, and that this message was not subject to cross-examination.

"Due Process requires that the accused receive a trial by an impartial jury free from outside influences." *Sheppard v. Maxwell,* 384 U.S. 333, 362, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). When a criminal defendant has the right to a trial by jury, the Sixth and Fourteenth amendments entitle that defendant to a panel of impartial, indifferent jurors whose verdict must be based on evidence developed at the trial. *Morgan v. Illinois,* 504 U.S. 719, 726–27, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992); *Irvin v. Dowd,* 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). Furthermore, an essential component of a fair and impartial trial is a jury that proceeds under the presumption that the accused is innocent of the charges. *Delo v. Lashley,* 507 U.S. 272, 278, 113 S.Ct. 1222, 122 L.Ed.2d 620 (1993); *Estelle v. Williams,* 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976).

To safeguard the presumption of innocence, "courts must be alert to factors that may undermine the fairness of the fact-finding process" and "carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Williams,* 425 U.S. at 503, 96 S.Ct. 1691. *See also Estes v. Texas,* 381 U.S. 532, 560, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965) (Warren, C.J., concurring) (stating that one of the roles of the trial court is to guard against "the intrusion of factors into the trial process that tend to subvert" the impartiality of the proceedings). Indeed, the Supreme Court has stated that:

> The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny. Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience.

Williams, 425 U.S. at 504, 96 S.Ct. 1691 (internal citations omitted). Because of the risk that outside factors may affect the outcome of a trial proceeding, the Supreme Court has determined that a proceeding may be inherently prejudicial when " 'an unacceptable risk is presented of impermissible factors coming into play.' " *Holbrook v. Flynn*, 475 U.S. 560, 570, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986) (citing *Estelle v. Williams*, 425 U.S. 501, 505, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976)).

Although neither case found in favor of the accused, the Supreme Court's opinions in *Williams* and *Flynn* provide the standards applicable to Mr. Johnson's case.[1] In *Williams*, the Supreme Court found that the Fourteenth Amendment precludes a state from forcing an accused to stand trial in identifiable jail attire because that "clothing is so likely to be a continuing influence throughout the trial that ... an unacceptable risk is presented of impermissible factors coming into play." 425 U.S. at 505, 96 S.Ct. 1691. In *Flynn*, the defendant claimed he was prejudiced by the presence of four uniformed state troopers on the front row of the spectators' section, behind the defendant. 475 U.S. at 562, 106 S.Ct. 1340. These troopers were at the hearing to provide courtroom security for the six defendants on trial while the usual security officers were unavailable. *Id.* at 563, 106 S.Ct. 1340. Under those circumstances, the Court found:

> Whenever a courtroom arrangement is challenged as inherently prejudicial, therefore, the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether "an unacceptable risk is presented of impermissible factors coming into play."
>
> * * *
>
> *We do not minimize the threat that a roomful of uniformed and armed policemen might pose to a defendant's chance of receiving a fair trial.* But we simply cannot find an unacceptable risk of prejudice in the spectacle of four such officers quietly sitting in the first row of a courtroom's spectator section.... Four troopers are unlikely to have been taken as a sign of anything other than a normal official concern for the safety and order of the proceedings. Indeed, any juror who for some other reason believed defendants particularly dangerous might well have wondered why there were only four armed troopers for the six defendants.

475 U.S. at 570–71, 106 S.Ct. 1340 (internal citations omitted) (emphasis added).

The United States Supreme Court recently heard a case raising a similar issue of spectator interference. In *Carey v. Musladin*, the defendant asserted in his petition for habeas relief that he was deprived of a fair trial because several members of the victim's family sat in the front row of the spectator's gallery during the trial wearing buttons with a photograph of

1. Both *Williams* and *Flynn* were cited for the Supreme Court's decision in *Deck v. Missouri*, 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005), reversing this Court's opinion in *State v. Deck*, 136 S.W.3d 481 (Mo. banc 2004). In *Deck*, the defendant was compelled to attend the sentencing phase of his trial while wearing shackles. *Deck II*, 544 U.S. at 625, 125 S.Ct. 2007. While the Supreme Court recognized that sentencing phase did not also require the same presumption of innocence as the guilt phase, it found that visible shackles during the penalty phase of a capital proceeding may create an impermissible influence on the sentencing jury. *Id.* at 632–33, 125 S.Ct. 2007. Importantly, the Supreme Court noted that certain courtroom practices are inherently prejudicial because the possible negative effects of those practices cannot be reflected in a trial transcript. *Id.* at 635, 125 S.Ct. 2007.

the victim. 549 U.S. 70, 72–73, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006). In its analysis, the Supreme Court recognized "that certain courtroom practices are so inherently prejudicial that they deprive the defendant of a fair trial." *Id.* at 72, 127 S.Ct. 649. The Court distinguished *Flynn* and *Williams,* addressing state-sponsored courtroom practices, from the facts of *Musladin,* in which the conduct of the victim's family was challenged by the defendant. The Court noted that it had not yet decided a case in which spectators' conduct was claimed to have denied a defendant the right to a fair trial. *Id.* at 76, 127 S.Ct. 649. Because the Supreme Court never previously had made a decision about spectator interference, it unanimously denied the defendant's habeas petition on the narrow ground that the law was not clearly settled, as required by the Anti-terrorism and Effective Death Penalty Act of 1996, 110 Stat. 1219. *Id.* at 76–77, 127 S.Ct. 649.[2]

Despite the lack of a Supreme Court decision specifically addressing private-actor courtroom conduct, Justice Souter notes in his concurring opinion that the application of the clearly established standards of *Williams* and *Flynn* require courts to examine "whether a practice or condition presents 'an unacceptable risk ... of impermissible factors coming into play' in the jury's consideration of the case." *Id.* at 82, 127 S.Ct. 649 (Souter, J., concurring). Justice Souter states that he refrained from ruling against the majority only because he did not feel that the buttons, under the facts presented to the Court, rose to an "unacceptable level." *Id.* at 79, 127 S.Ct. 649 (Stevens, J., concurring), 83 (Souter, J., concurring).

Mr. Johnson's case presents an interesting hybrid of the state-sponsored courtroom practice cases and those cases making spectator-conduct claims identified in *Musladin.* While the State may not have directed the numerous uniformed officers to attend Mr. Johnson's proceedings, as spectators, they nevertheless were wearing their uniforms as law enforcement officers, an unmistakable symbol of state authority. *Daniels v. City of Arlington,* 246 F.3d 500, 504 (5th Cir.2001); *State v. Jones,* 483 So.2d 433, 439 (Fla.1986); *Duncan v. State,* 163 Ga.App. 148, 294 S.E.2d 365, 366 (1982). Missouri courts have yet to decide such a claim. For this reason, guidance can be found in two Florida cases that addressed how a large contingent of uniformed law enforcement officer-spectators present during a criminal hearing, and not attending to fulfill some public assignment, may create such "an unacceptable risk ... of impermissible factors coming into play." *Ward v. State,* 105 So.3d 3 (Fla.Dist.Ct. App.2012); *Shootes v. State,* 20 So.3d 434 (Fla.Dist.Ct.App.2009). In *Ward,* the defendant alleged, in his motion for postconviction relief on the basis of ineffective assistance of counsel, that "there were enough officers in the audience to make 'the courtroom look like a policeman's benefit.' " 105 So.3d at 5. The defendant pleaded that the officers' open show of support for their fallen comrade " 'influenced the jury to convict [the] defendant out of fear and sympathy, rather than because the State had proven its case beyond a reasonable doubt.' " *Id.* The Florida appeals court found these claims were facially sufficient to show that the defendant's counsel was ineffective for failing to object to the pres-

2. In reaching its narrow holding, the Supreme Court recognized that "lower courts have diverged widely in their treatment of defendants' spectator-conduct claims." *Id.* at 76, 127 S.Ct. 649. While the lower courts recognize that spectator conduct may pose an unacceptable risk to the fairness of a criminal proceeding, their conclusions vary depending on the degree of the risk influence created by the circumstances of the cases. *Id.*

ence of the uniformed officers and ordered a remand to obtain evidence to refute those claims. *Id.*

In *Shootes*, a large number of officers, estimated between 35 and 70, attended the trial. 20 So.3d at 436. While acknowledging that the presence "of courtroom observers wearing uniforms, insignia, buttons, or other indicia of support for the accused, the prosecution, or the victim of the crime does not automatically constitute denial of the accused's right to a fair trial," the Florida appeals court found that "there are situations where the atmosphere in the courtroom might infringe on the defendant's right to a fair trial." *Id.* at 439. Furthermore, the court noted that, when such an issue is raised, courts must examine the issue on a case-by-case basis to consider the "totality of the circumstances." *Id.* (citing *Sheppard v. Maxwell*, 384 U.S. 333, 352, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966)). Under the circumstances, where the officers were not present as added security or for the purpose of providing testimony [3], a jury would become "susceptible to the impression that the officers are there 'to communicate a message to the jury.' " *Id.* (citing *Woods v. Dugger*, 923 F.2d 1454, 1459 (11th Cir.1991)). This, along with additional outside influences in the case, "created an unacceptable risk that the jury's determination of the credibility of witnesses and findings of fact would be tainted by impermissible factors not introduced as evidence or subject to cross-examination." [4] *Id.* at 440.

3. The Florida appeals court considered additional factors—the number of spectators identifiable as law enforcement personnel, whether they were grouped together in the audience or interspersed among other attendees, and the officers' proximity to the jury. *Shootes*, 20 So.3d at 439.

4. These Florida courts are not the only ones to have examined interference in the form of uniformed officers attending proceedings as spectators, either using the *Williams* and *Flynn* reasoning, or based on different reasoning.

In some of those cases, courts have found that the attendance of numerous officers during proceedings was inherently prejudicial to the defendant. *See, e.g., Balfour v. State*, 598 So.2d 731, 756 (Miss.1992) (''[W]e note that it capital murder cases where the victim was a member of law enforcement, the *potential exists* for a coercive atmosphere when uniformed law officers sit together in a group. Consequently, we discourage this practice.''); *United States v. Johnson*, 713 F.Supp.2d 595, 617 (E.D.La.2010) (finding that trial court erred by allowing 40 uniformed officers to attend the hearings, and that it ''should have granted the defense['s] motion [by] insist[ing] that any appearances by law enforcement in the audience be in plain clothes'').

Other cases, while recognizing that the presence of officers may cause prejudice to a defendant, did not find prejudice where a lower court took remedial actions. *See, e.g., Bell v. Com.*, 264 Va. 172, 563 S.E.2d 695, 713 (2002) (upholding the trial court's decision to partially deny motion to exclude officers from wearing uniforms while attending as spectators while it recognized that ''if too many officers attended the trial as spectators while in uniform, it could create 'an oppressive atmosphere.' ''); *Phillips v. State*, 70 P.3d 1128, 1137 (Alaska Ct.App.2003) (acknowledging that the ''appearance of law enforcement officers *en masse* in the spectator gallery posed a threat that the jurors would feel implicit pressure to return a verdict favorable to law enforcement interests or sentiment,'' and that the presiding judge did not err in refusing to grant a mistrial because he had limited the amount of officers who could be present) *People v. Cummings*, 4 Cal.4th 1233, 18 Cal. Rptr.2d 796, 838, 850 P.2d 1 (1993) (en banc) (recognizing the balancing right of officers to attend public proceedings, it found no abuse of discretion in the trial court's decision to suggest that police officers attend the hearing in civilian clothes when possible and to rule that if more than two or three uniformed officers were present at the same time, the court would entertain a renewed motion to exclude them).

Still others, while not finding prejudice, specifically recognize the possibility or threat of prejudice. *See, e.g., People v. Grady*, 40 A.D.3d 1368, 1374, 838 N.Y.S.2d 207 (2007) (while finding that there was not a problem of

Here, Mr. Johnson's motion alleged that there were numerous uniformed officers, in the courtroom and in the hallways during voir dire and both phases of the trial, attending the proceedings as a show of support for a fallen officer and to sway the jury to convict Mr. Johnson. As noted by Mr. Johnson, the jury's decision to give him a death sentence, under these circumstances, was vastly different from the result of his previous trial, in which the jury allegedly hung at 10–2 in favor of a non-capital second degree murder conviction. The presence of the uniformed officers reasonably may have created an outside influence on the jury, affecting the presumption of innocence necessary for a fair trial and impacting the harshness of the sentence imposed.

Because the state does not argue that these allegations are refuted by the record, and because, if the facts as alleged are true, it appears there is a reasonable probability that the jury would have concluded the balance of aggravating and mitigating circumstances did not warrant death, Mr. Johnson should have been afforded an evidentiary hearing on this issue. Accordingly, without making any determination as to whether Mr. Johnson did receive a fair trial, I would find that Mr. Johnson has alleged facts, unrefuted by the record, that show he was prejudiced by his trial counsel's failure to object to the presence of "numerous uniformed officers" during his trial. I would remand to the motion court to conduct an evidentiary hearing on the issue. As to the principal opinion's disposition of all other claims, I concur.

inappropriate influence, noting that ''the show of support for [another officer] by uniformed members of law enforcement, who were seated in the back two rows of the courtroom and who stood in unison when he entered the courtroom to testify, was not appropriate because such conduct may have a secondary effect of influencing the jury'').

Lastly, yet other cases ruled that their presence in their specific circumstances were not prejudicial or that sufficient facts were not alleged that would allow a finding of prejudice. *See, e.g., Kearse v. State,* 969 So.2d 976, 989 (Fla.2007) (''[T]he mere presence of [police] officers was insufficient to demonstrate a hostile courtroom. . . .''); *Commonwealth v. Philistin,* —— Pa. ——, 53 A.3d 1, 32–33 (2012) (finding that failing to object to officers' presence during guilt phase of hearing was not ineffective assistance of counsel because appellant could not demonstrate that verdict would have differed after undisputed evidence was presented, and that pleading regarding sentencing phase were inadequate); *Commonwealth v. Gibson,* 597 Pa. 402, 448, 951 A.2d 1110 (2008) (finding that the allegations, which did not detail the number of officers at the proceeding or allege that they caused any disruption, were insufficient to show that the defendant was prejudiced by their presence at the hearing); *Brown v. State,* 132 Md.App. 250, 752 A.2d 620, 629–631 (2000) (''Appellant has failed to demonstrate that the presence of an unknown number of uniformed police officers at trial created an unacceptable risk of impermissible factors coming into play and was so inherently prejudicial that appellant was denied a fair trial.''); *Pratt v. State,* 228 Ga.App. 567, 492 S.E.2d 310 (1997) (finding that the presence of twenty-five uniformed correctional officers after close of evidence by prior to jury instructions did not create inherent prejudice depriving defendant of a fair trial); *Howard v. State,* 941 S.W.2d 102, 118–19 (Tex.Crim.App.1996) (en banc) (absent a showing of overt conduct or expression, the presence of 20 uniformed peace officers among 80 spectators did not deprive defendant of a fair trial); *Hansen v. State,* 592 So.2d 114, 143–44 (Miss.1991) (holding that the trial court did not abuse its discretion by finding that, among the 40 spectators present, the six uniformed officers that commingled with the rest of the spectators did not prejudice the defendant and require a mistrial).

should have been properly promulgated as a rule, but it also invalidated the agency's determination of the hospital's benefits that was based on the void rule. *Little Hills*, 236 S.W.3d at 643–44. Similarly, here, the division denied the Youngs' petitions for BFC subsidy based on standards and procedure that should have been promulgated as a rule; therefore, the division's denial is void.

The Youngs further ask this Court to remand this case with directions to find that the Youngs are eligible for the BFC program. In this regard, section 453.073, is not helpful. It states that the monetary amount of a subsidy to an adopted child is determined with "reference to the needs of the child, including consideration of the physical and mental condition, and age of the child in each case. . . ." *Id.* The correct monetary amount can be determined only after the necessary rules to make a BFC subsidy eligibility determination have been promulgated.

This Court is cognizant that the Youngs first applied for the BFC subsidy five years ago and seek a long-awaited conclusion to this matter. The division should proceed expeditiously with adoption of the necessary rules and a determination of the Youngs' application for the BFC subsidy. If the division decides that the Youngs are entitled to the BFC subsidy, the subsidies should be awarded retroactively as allowed by law. *See J.P. v. Department of Social Services*, 752 S.W.2d 847, 851 (Mo.App. 1988).

The circuit court judgment affirming the division's decision to deny the Youngs' application for BFC subsidy is reversed, and the case is remanded. The circuit court shall remand the matter to the division so that the division expeditiously can determine the Youngs' application.

Stith, C.J., Price, Teitelman and Russell, JJ., and Hardwick and McGraw, Sp.JJ, concur.

Wolff and Fischer, JJ., not participating.

STATE of Missouri, Respondent,

v.

Kevin JOHNSON, Appellant.

No. SC 89168.

Supreme Court of Missouri,
En Banc.

May 26, 2009.

Rehearing Denied June 30, 2009.

Background: Defendant was convicted in the Circuit Court, St. Louis County, Melvyn W. Wiesman, J., of first-degree murder, and he was sentenced to death. Appeal followed.

Holdings: The Supreme Court, William Ray Price Jr., J., held that:

(1) trial court acted within its discretion in declining to grant a new trial based on a juror's failure to disclose in voir dire and at trial that she knew a state's witness;

(2) the state's race-neutral reasons for using a peremptory strike against a prospective juror were not pretextual;

(3) evidence was sufficient to support a conviction for first-degree murder;

(4) trial court's refusal to give defendant's requested instructions on second-degree murder without sudden passion and voluntary manslaughter was neither erroneous nor prejudicial;

(5) evidence was sufficient to support findings of death-penalty aggravators;

(6) the death sentence was not disproportional or excessive; and

(7) defendant waived his *Miranda* rights by orally agreeing to talk and engaging in a five-hour police interview.

Affirmed.

Richard B. Teitelman, J., concurred in part and dissented in part and filed opinion.

1. Criminal Law ⚿1134.71

On direct appeal, the Supreme Court reviews a death-penalty conviction for prejudice, not mere error, and will reverse the trial court's decision only when the error was so prejudicial that the defendant was deprived of a fair trial.

2. Criminal Law ⚿1162

Prejudice exists when there is a reasonable probability that a trial court's error affected the outcome of the trial.

3. Criminal Law ⚿1030(1)

Non-preserved issues are reviewed for plain error, where the error resulted in manifest injustice or a miscarriage of justice.

4. Criminal Law ⚿1144.13(2.1), 1153.1

On direct appeal, evidence is reviewed in the light most favorable to the verdict, and trial court's evidentiary rulings are reviewed for abuse of discretion.

5. Criminal Law ⚿923(4)

Trial court acted within its discretion in declining to grant a new trial for first-degree murder based on a juror's failure to disclose in voir dire and at trial that she knew a state's witness; juror was not instructed at any time what to do in the unlikely event that she recognized a witness during trial, and although juror should have brought this to trial court's attention, her silence was not unreasonable.

6. Jury ⚿131(18)

Juror non-disclosure during voir dire requires a two-prong analysis; first, non-disclosure occurs when the juror reasonably can comprehend the information solicited by the question asked, and second, it must be determined whether the non-disclosure is intentional or unintentional.

7. Criminal Law ⚿1139
Jury ⚿131(18)

When determining whether juror non-disclosure occurred, a response is reasonable based on the language and context, and the question's clarity is subject to de novo review.

8. Jury ⚿131(18)

"Intentional juror non-disclosure" occurs when the juror actually remembers the experience or that it was of such significance that his purported forgetfulness is unreasonable.

See publication Words and Phrases for other judicial constructions and definitions.

9. Jury ⚿131(18)

When material information is intentionally withheld by a juror, bias and prejudice are presumed.

10. Jury ⚿131(18)

"Unintentional juror non-disclosure" involves an insignificant or remote experience, misunderstanding the question, or disconnected information.

See publication Words and Phrases for other judicial constructions and definitions.

11. Criminal Law ⚿923(1)

For unintentional juror non-disclosure, a new trial is warranted when the verdict is prejudicially influenced.

12. Criminal Law ⚿923(1)

A trial court has discretion to grant a new trial on the ground of juror nondisclosure.

13. Jury ⚿33(5.15)

The state's race-neutral reasons for using a peremptory strike against a prospective juror in a capital case, which were juror's unwillingness to answer death-penalty questions and her role as a foster parent with an agency that provided services to defendant as a youth, were not pretextual, even though defendant argued that another member of the venire was also a foster parent but not struck; no other venire member was involved with the agency, which was significant because it previously provided services to defendant.

14. Jury ⚿33(5.15)

A peremptory strike may not be based on an improper purpose, such as race or gender, and is objected to by a *Batson* challenge.

15. Jury ⚿33(5.15)

A *Batson* challenge has three components: (1) the defendant must object that the state's peremptory challenge is based on an improper purpose, (2) the state has the burden to prove a race-neutral reason for the strike, and (3) the defendant has the burden to prove the reason is pretextual.

16. Jury ⚿33(5.15)

To determine if pretext exists in the state's reason for using a peremptory strike, the Supreme Court considers a nonexclusive list of factors including the explanation in light of the circumstances, similarly situated jurors not struck, the relevance between the explanation and the case, the demeanor of the state and excluded venire members, the trial court's prior experiences with the prosecutor's office, and objective measures relating to motive.

17. Criminal Law ⚿1158.17

A trial court's ruling on a *Batson* challenge is reversed only for clear error.

18. Homicide ⚿1139

Evidence was sufficient to support a conviction for first-degree murder based on the killing of a police officer; defendant, who had an outstanding warrant, retrieved his gun from his vehicle after his brother was taken to a hospital and expressed his belief that police did not help his brother because they were focused on finding him, defendant approached victim's patrol car two hours later, squatted down to see into the window, and said "you killed my brother" before firing his handgun approximately five times at victim's head and upper body, and defendant later shot victim two more times in his head. V.A.M.S. § 565.020.

19. Criminal Law ⚿1159.2(7)

A sufficiency-of-the-evidence argument is reviewed to determine if a reasonable juror had enough evidence to find the defendant guilty beyond a reasonable doubt.

20. Criminal Law ⚿1144.13(4, 5)

When reviewing the sufficiency of the evidence, evidence and inferences favorable to the state are accepted, and contrary evidence and inferences are disregarded.

21. Criminal Law ⚿1134.51

An instructional error is reviewed for an error in submitting the instruction and prejudice.

22. Criminal Law ⚿805(1)

Pattern jury instructions are presumed valid.

23. Criminal Law ⚿1038.1(4)

Any error in the state's use of "conscious decision" in arguing the deliberation element of first-degree murder was not plain error, even though "conscious decision" was neither an element nor description of first-degree or second-degree murder. V.A.M.S. §§ 565.020, 565.021.

24. Criminal Law ⚿1037.1(1)

Plain-error review of a closing argument not objected to will be considered only if there is a sound, substantial manifestation, a strong, clear showing, that injustice or miscarriage of justice will result if relief is not given.

25. Criminal Law ⚿1163(2), 1171.1(2.1)

A conviction is reversed due to an improper closing argument when the argument had a decisive effect on the jury's determination; the burden is on the defendant to show a decisive effect.

26. Criminal Law ⚿2063

A trial court is vested with discretion regarding closing arguments.

27. Criminal Law ⚿1134.16

Entire record is considered when interpreting a closing argument, not an isolated segment.

28. Criminal Law ⚿798(.6)

An acquittal-first instruction requires a defendant to be acquitted of a greater offense before the lesser offense is considered.

29. Criminal Law ⚿878(3), 1171.1(3)

If an acquittal is first required, a deadlocked jury could not consider a lesser offense; however, an acquittal-first argument will be upheld if the strength of the evidence of deliberation precludes a finding of prejudice.

30. Criminal Law ⚿1173.3
Homicide ⚿1456

Trial court's refusal to give defendant's requested instructions on second-degree murder without sudden passion and voluntary manslaughter as lesser-included offenses of first-degree murder was neither erroneous nor prejudicial; trial court submitted instructions on first-degree murder and on second-degree murder as a lesser-included offense, and the jury found defendant guilty of first-degree murder as the greater offense.

31. Criminal Law ⚿770(2)

A defendant is entitled to a jury instruction when the evidence, viewed in light most favorable to the defendant, establishes a theory or supports contrary results.

32. Criminal Law ⚿795(2.5)

A jury instruction on a lesser-included offense is required when the evidence provides a basis both for the acquittal of the greater offense and the conviction for the lesser offense.

33. Criminal Law ⚿795(1), 1173.3

Failure to give a different lesser-included offense instruction is neither erroneous nor prejudicial when instructions for the greater offense and one lesser-included offense are given and the defendant is found guilty of the greater offense.

34. Sentencing and Punishment ⚿1679

Evidence was sufficient to show that defendant knowingly created a great risk of death to more than one person by means of a weapon that would normally be hazardous to the lives of more than one person, as a death-penalty aggravator; defendant shot victim, who was a police officer, multiple times, and a bullet struck a juvenile standing next to victim's patrol car. V.A.M.S. § 565.032(2).

35. Sentencing and Punishment ⚿1684

Evidence was sufficient to show that murder of police officer involved depravity of mind and was outrageously and wantonly vile, horrible, and inhuman, as a death-penalty aggravator; the murder involved two distinctly separate shootings within a short period of time, and victim was seriously injured and helpless at the time of the second shooting. V.A.M.S. § 565.032(2).

36. Sentencing and Punishment ⚿1731

Evidence was sufficient to show that murder was committed against a peace officer while engaged in the performance of his official duty, as a death-penalty aggravator; victim, who was a police officer, was responding to a call and was in his patrol car when defendant shot him. V.A.M.S. § 565.032(2).

37. Sentencing and Punishment ⚿1726, 1731

Death sentence for first-degree murder was not disproportionate or excessive; victim was a police officer, and victim had already been shot and was helpless when defendant shot him two more times in his head.

38. Sentencing and Punishment ⚿1784(2)

Deference is given to a jury's decision to recommend a death sentence when there was sufficient evidence from which a reasonable juror could have found that the mitigating evidence did not outweigh the aggravating evidence.

39. Jury ⚿108

Trial court acted within its discretion in a capital case in removing for cause a prospective juror who stated that she could not see any case where the death penalty would be appropriate and later stated that perhaps death would be an appropriate punishment for genocide.

40. Criminal Law ⚿1152.2(2)

A strike of a prospective juror for cause is reviewed for abuse of discretion.

41. Jury ⚿108

Standard to remove a juror for cause because of his or her position on the death penalty is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

42. Jury ⚿108

While a juror's qualification in a capital case is determined from the entire voir dire and not from a single response, the trial court may give more weight to a single response when presented with conflicting testimony regarding a prospective juror's ability to consider the death penalty.

43. Jury ⚿85

In determining a juror's qualifications in a capital case, the trial court is granted broad discretion given its position to observe the juror.

44. Criminal Law ⚿412.2(5)

Defendant waived his *Miranda* rights by orally agreeing to talk and engaging in a five-hour police interview, even though defendant did not sign a waiver.

45. Criminal Law ⚿414

The state must prove that a challenged statement complied with the guidelines established in *Miranda* and was voluntary.

46. Criminal Law ⚿412.2(5)

A defendant may waive his *Miranda* rights by orally indicating his willingness to cooperate with the police questioning despite refusing to sign a written waiver.

47. Criminal Law ⚿412.1(4)

Miranda rights may be invoked at any time by giving a clear, consistent expression of a desire to remain silent.

48. Criminal Law ⚿1137(5)

Defendant waived plain-error review of his claim that his *Miranda* rights were violated with respect to a police interview, where defendant affirmatively stated that he had no objection to the admission of the interview at trial.

49. Criminal Law ⚿1036.1(1)

An objection to the admission of evidence must be made to preserve the issue for appeal.

50. Criminal Law ⚿1030(1)

Plain-error review would apply when no objection is made due to inadvertence or negligence.

51. Criminal Law ⚿1137(1)

Plain-error review is waived when counsel has affirmatively acted in a manner precluding a finding that the failure to object was a product of inadvertence or negligence.

52. Criminal Law ⚿1137(5)

Plain-error review does not apply when a party affirmatively states that it has no objection to evidence an opposing party is attempting to introduce.

53. Sentencing and Punishment ⚿1752

A trial court has discretion to admit evidence deemed helpful to the jury in the penalty phase of a capital murder trial.

54. Sentencing and Punishment ⚿1763

A victim-impact statement is admissible at the penalty phase of a capital murder trial to show the victim was a unique individual.

55. Sentencing and Punishment ⚿1763

A victim-impact statement violates the federal and state constitutions only when it is so unduly prejudicial that it renders the capital murder trial fundamentally unfair.

56. Sentencing and Punishment ⚿1763, 1766

Victim-impact statement by victim's son was not hearsay at the penalty phase of a capital trial; the statement was offered to show the effect of the crime on the son and his feelings, not for the truth of any factual matter asserted therein.

57. Criminal Law ⚿419(1)

A "hearsay statement" is any out-of-court statement that is used to prove the truth of the matter asserted and depends on the veracity of the statement for its value.

See publication Words and Phrases for other judicial constructions and definitions.

58. Criminal Law ⚿662.8

A victim-impact statement is not subject to the Confrontation Clause. U.S.C.A. Const.Amend. 6.

59. Criminal Law ⚿662.3

Confrontation Clause does not operate to bar the admission of testimony relevant only to a capital-sentencing authority's selection decisions. U.S.C.A. Const.Amend. 6.

60. Sentencing and Punishment ⚿1771

A jury in a capital case is not required to find mitigating evidence or non-statutory aggravating factors, including victim-impact statements, beyond a reasonable doubt.

61. Sentencing and Punishment ⚿1780(3)

Jury instruction on depravity of mind, as a death-penalty aggravating factor, was not unconstitutionally vague, where trial

court instructed jury that it could make a determination of depravity of mind only if it found defendant committed repeated and excessive acts of physical abuse upon victim and the killing was therefore unreasonably brutal. V.A.M.S. § 565.032(2); MAI Criminal 3d No. 314.40.

Deborah B. Wafer, Office of Public Defender, St. Louis, MO, for Appellant.

Chris Koster, Atty. Gen., Daniel N. McPherson, Asst. Atty. Gen., Jefferson City, MO, for Respondent.

WILLIAM RAY PRICE, JR., Judge.

I. Introduction

A jury found Kevin Johnson (Appellant) guilty of one count of first-degree murder, pursuant to section 565.020,[1] for killing Sgt. William McEntee and recommended the death penalty. The trial court adopted the jury's recommendation and sentenced Appellant to death. This Court has exclusive jurisdiction. Mo. Const. art. V, sec. 3. The judgment is affirmed.

II. Facts[2]

Appellant had an outstanding warrant for a probation violation resulting from a misdemeanor assault. Around 5:20 in the evening of July 5, 2005, Kirkwood police, with knowledge of the warrant, began to investigate a vehicle believed to be Appellant's at his residence in the Meacham Park neighborhood. The investigation was interrupted at 5:30 when Appellant's younger brother had a seizure in the house next door to Appellant's residence. The family sought help from the police, who provided assistance until an ambulance and additional police, including Sgt. McEntee, arrived. Appellant's brother was taken to the hospital, where he passed away from a preexisting heart condition. Appellant was next door during this time, and the police suspended their search for Appellant and never saw Appellant.

After the police left, Appellant retrieved his black, nine millimeter handgun from his vehicle. When talking with friends that evening, Appellant explained his brother's death as, "that's f____ up, man. They wasn't trying to help him, that he was too busy looking for me." Around 7:30, two hours after Appellant's brother had the seizure, Sgt. McEntee responded to a report of fireworks in the neighborhood and Appellant was nearby. As Sgt. McEntee spoke with three juveniles, Appellant approached Sgt. McEntee's patrol car and squatted down to see into the passenger window. Appellant said "you killed my brother" before firing his black handgun approximately five times. Sgt. McEntee was shot in the head and upper torso, and one of the juveniles was hit in the leg. Appellant reached into the patrol car and took Sgt. McEntee's silver .40 caliber handgun.

Appellant proceeded to walk down the street with the black and silver handguns. He then saw his mother and her boyfriend. Appellant told his mother, "that m____ f_____ let my brother die, he needs to see what it feel[s] like to die." His mother replied, "that's not true." Appellant left his mother and continued to walk away.

Meanwhile, Sgt. McEntee's patrol car rolled down the street, hit a parked car, and then hit a tree before coming to rest. Sgt. McEntee, alive but bleeding and un-

1. All statutory references are to RSMo 2000, unless otherwise noted.

2. The facts are reviewed in the light most favorable to the verdict. *State v. Johnson,* 207 S.W.3d 24, 31 (Mo. banc 2006).

able to talk, got out of the patrol car and sat on his knees. Appellant reappeared, shot Sgt. McEntee approximately two times in the head, and Sgt. McEntee collapsed onto the ground. Appellant also went through Sgt. McEntee's pockets.

Sgt. McEntee was shot a total of seven times in the head and upper torso. Six of the wounds were serious but did not render Sgt. McEntee unconscious or immediately incapacitated. One wound was a lethal injury that caused Sgt. McEntee's death. All seven wounds were from a nine millimeter handgun.

Appellant left the scene cursing and drove to his father's house. Appellant spent three days at a family member's apartment before arrangements were made for Appellant to surrender to a family member who was a police officer.

Appellant was indicted on one count of first-degree murder, one count of first-degree robbery, one count of first-degree assault, and three counts of armed criminal action. The murder count was severed from the other counts. Appellant's first trial ended with a hung jury in the guilt phase. In this trial, the jury deliberated for four hours before finding Appellant guilty of first-degree murder. In the penalty phase, the jury spent four hours deliberating and found the following aggravating factors present: (1) "the defendant by his act of murdering Sgt. William McEntee knowingly created a great risk of death to more than one person by means of a weapon that would normally be hazardous to the lives of more than one person;" (2) "the murder of Sgt. William McEntee 'DID' involve depravity of mind, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman;" and (3) "the murder of Sgt. William McEntee was committed against a peace officer while engaged in the performance of his official duty."

III. Standard of Review

[1–4] On direct appeal, this Court reviews a death penalty conviction for prejudice, not mere error, and will reverse the trial court's decision only when the error was so prejudicial that the defendant was deprived of a fair trial. *State v. Johnson*, 207 S.W.3d 24, 34 (Mo. banc 2006) (*Johnson I*). Prejudice exists when there is a "reasonable probability that the trial court's error affected the outcome of the trial." *Id.* Non-preserved issues are reviewed for plain error, where the error resulted in manifest injustice or a miscarriage of justice. *Id.* Evidence is reviewed in the light most favorable to the verdict and is reviewed for abuse of discretion. *State v. Johns*, 34 S.W.3d 93, 103 (Mo. banc 2000).

Appellant raises eleven points on appeal. Each point is denied.

IV. Point One: Juror Non-disclosure

[5] In the first point, Appellant argues the trial court erred in overruling the motion for new trial because juror Broome failed to disclose in voir dire and at trial that she knew a State's witness, Det. Scognamiglio. Appellant learned after the trial that Broome knew Scognamiglio and raised the issue in a motion for new trial. The record shows that during voir dire, the State read the list of police witnesses, including Scognamiglio, and asked:

> Are any of those names familiar to anybody as County police officer?
>
> Anybody—let me start back with the jury box. Anybody know, friends with County police officers—or I won't even limit it to County. Close friends with police officers, law enforcement officers.

Broome disclosed that her stepbrother is a police officer. She did not disclose she knew Scognamiglio. At the post-trial

hearing, Broome stated that she knew Scognamiglio from working with his wife. She said she did not respond at voir dire or during trial because:

> it didn't register to me because he listed off a bunch of people, and I really didn't put two and two together because I hadn't seen him in over at least two and a half years. And when I seen him on the stand, I didn't—I'm like, oh. I didn't know what I could do. I had no idea. If I should have said, I didn't know.

Broome further testified at the hearing that she told her husband, "I had seen Don [Scognamiglio] there, and he was one of the ones who had brought evidence in that seemed to be the same evidence as the first time we had seen the previous pictures or trial."

The trial court overruled the motion and found Broome's conduct was not non-disclosure or, at worst, was unintentional non-disclosure. The trial court made the following findings in a written order:

> Juror # 1 [Broome] was asked, after the list of witnesses was read: "Are any of those names familiar to anyone as county police officers?["] The juror did not respond to that. The credible evidence before this court is that the juror did not know Don Scognamiglio as a county police officer, although she had been aware that he was a police officer. Her relationship with the officer was peripheral to her familiarity with his wife. She never socialized with the officer and his wife but only knew him as one who occasionally appeared at work. The court finds the juror's denial that the mention of his name in the midst of a list of 12 officers did not register with her as someone she knew was credible. She had not seen or had contact with him for a few years.
>
> The remainder of the question by the prosecutor to which there was a response sought was if "Anybody—let me start back with the jury box. Anybody know, friends with County police officers—or I won't even limit it to County. Close friends with police officers, law enforcement officers." There is no credible evidence before this court that the juror was close friends with any officers including the County Detective other than the friendships the juror disclosed during voir dire.
>
> Clearly, even if the court were to find that the juror's conduct could be interpreted as non-disclosure, which it does not, there is no credible evidence that the non-disclosure would be intentional. At the very worst it would [be] unintentional. Also there is no credible evidence before the court that the Defendant was prejudiced by any non-disclosure that would have resulted.

[6–12] Juror non-disclosure during voir dire requires a two-prong analysis. *State v. Mayes,* 63 S.W.3d 615, 625 (Mo. banc 2001). First, non-disclosure occurs when the juror reasonably can "comprehend the information solicited by the question asked." *Id.* A response is reasonable based on the language and context, and the question's clarity is subject to *de novo* review. *Nadolski v. Ahmed,* 142 S.W.3d 755, 765 (Mo.App.2004). Second, it must be determined whether the non-disclosure is intentional or unintentional. *Mayes,* 63 S.W.3d at 625. Intentional non-disclosure occurs when the juror "actually remembers the experience or that it was of such significance that his purported forgetfulness is unreasonable." *Id.* When material information is intentionally withheld, bias and prejudice are presumed. *Id.* Unintentional non-disclosure involves an insignificant or remote experience, misunderstanding the ques-

tion, or disconnected information. *Williams v. Barnes Hosp.*, 736 S.W.2d 33, 36–37 (Mo. banc 1987). For unintentional non-disclosure, a new trial is warranted when the verdict is prejudicially influenced. *Mayes*, 63 S.W.3d at 625. The trial court has discretion to grant a new trial. *Id.*

Broome was not instructed at any time what to do in the unlikely event that she recognized a witness during trial. While Broome should have brought this to the trial court's attention, her silence is not unreasonable.

The trial court's written findings, made after observing the trial and hearing the evidence, are supported by evidence in the record. The trial court did not abuse its discretion in overruling the motion. The point is denied.

V. Point Two: *Batson* Challenge

[13] In the second point, Appellant argues the trial court erred in overruling a *Batson*[3] challenge for juror Cottman. The State used a peremptory challenge to strike Cottman and Appellant made a *Batson* challenge. In response to the *Batson* challenge, the State's race-neutral reasons were Cottman's unwillingness to answer death penalty questions and her role as a foster parent with Annie Malone Children's Home, which provided services to Appellant as a youth. Appellant's only response was that another juror was a foster parent. The trial court allowed the strike.[4] Appellant preserved this point by

3. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

4. The relevant portion of the transcript is:

MR. McCULLOCH [State]: Judge, I note that Cottman, I felt when we were questioning her in small groups was not antagonistic towards me but not all that willing to answer the questions regarding the death penalty and other issues surrounding that.

Also as a development in the large group, she was a foster parent for the Annie Malone Children's Home. She indicated that she still sees a lot of the kids that she was a foster parent for during that time now that they have grown up some. I don't know what the age group is, but they were around the Defendant's age based on her time frame of when she said she was a foster parent down there. *And since there will be evidence in this case, particularly if we get to a second half, there will be evidence that the Defendant was at least for some period of time in Annie Malone's custody, I don't want anybody associated with Annie Malone. I assume she has probably—rightly so I suggest, but a very high opinion of Annie Malone, anything that went on there. I think that's not something that would be favorable to our position regarding the Defendant's time away from home.*

THE COURT: Any response from defense?

MS. KRAFT [Defense]: *I would note for the record that Juror Robert Bayer, who is a white male, also stated that he was a foster parent at one point in time, and the State has not struck Mr. Mayer.*

MR. McCULLOCH: Mayer or Bayer?

MS. KRAFT: Bayer, I'm sorry. Mr. Bayer.

THE COURT: I don't recall that. Is Annie Malone in some way connected with the Defendant in this case?

MS. KRAFT: Yes, he spent some time there. He spent some time at Annie Malone's.

MR. McCULLOCH: *With Mr. Bayer, he was a foster parent for a brief period of time, in fact for St. Vincent's. No connection to Annie Malone. And that I think is a completely different situation.*

THE COURT: Okay. Anything else from the defense?

MS. KRAFT: In addition, I would state that Mr. Fenton, who was one of the—no, I'm sorry, he's not in the alternate group. Never mind.

THE COURT: *Okay. I don't believe—I can't recall that there were any other jurors who were foster parents for Annie Malone or connected with Annie Malone other than the juror who's not on this—either the primary panel or the alternate panel, Juror 77, who had some connection with Annie Malone, but I think he was the only other one with Annie Malone, am I correct?*

MS. KRAFT: I believe so.

THE COURT: *Okay. The motion to strike for cause will be granted. I will allow that strike. I believe there is a racially-neutral basis for the strike.*

objecting at trial and raising the issue in the motion for new trial.

[14, 15] A peremptory strike may not be based on an improper purpose, such as race or gender, and is objected to by a *Batson* challenge. *Johnson I,* 207 S.W.3d at 35. A *Batson* challenge has three components: (1) the defendant must object that the state's peremptory challenge is based on an improper purpose, (2) the state has the burden to prove a race-neutral reason for the strike, and (3) the defendant has the burden to prove the reason is pretextual. *State v. Edwards,* 116 S.W.3d 511, 524 (Mo. banc 2003).

[16, 17] To determine if pretext exists, this Court considers a non-exclusive list of factors including: the explanation in light of the circumstances; similarly situated jurors not struck; the relevance between the explanation and the case; the demeanor of the state and excluded venire members; the court's prior experiences with the prosecutor's office; and objective measures relating to motive. *Id.* at 527. The trial court's ruling is reversed only for clear error. *Id.* at 525.

Failing to raise a *Batson* challenge with the trial court does not preserve the argument for appeal. *State v. Strong,* 142 S.W.3d 702, 713 (Mo. banc 2004). However, when the non-preserved claim involves a constitutional issue, it is reviewed for plain error. *Id.* at 714.

During voir dire, Appellant argued the State's explanation for striking Cottman was pretextual because another member of the venire was also a foster parent but not struck. A review of the record shows no other venire member was involved with Annie Malone Children's Home, which was significant because it previously provided services to Appellant. The trial court did not err in finding the explanation was not pretextual.

Because the trial court found one race-neutral reason to strike Cottman, it is unnecessary to review Appellant's argument that Cottman's unwillingness to answer death qualification questions was pretextual. *See State v. Taylor,* 18 S.W.3d 366, 370 n. 6 (Mo. banc 2000).

Appellant also argued that the prosecutor's demeanor and that the trial court's previous experience with the prosecutor's office warrants pretextual behavior. As noted above, the prosecutor's decision to strike Cottman was not pretextual. There is no evidence that the State engaged in improper behavior to constitute a *Batson* violation regarding Cottman. A previous *Batson* violation by the same prosecutor's office does not constitute evidence of a *Batson* violation in this case, absent allegations relating to this specific case.

The trial court did not err. The point is denied.

VI. Point Three: Trial Court Errors

In the third point, Appellant argues: A) the trial court erred in overruling the motion for judgment of acquittal; B) the trial court erred in submitting the first-degree murder jury instruction because section "565.002(3)'s definition of deliberation, 'cool reflection for any amount of time no matter how brief,' reduces the distinction between first and second degree murder to imperceptibility;" and C) the trial court committed plain error in: 1) allowing the State to "[r]epeatedly argu[e] that [Appellant's] conscious decision to shoot was deliberation, Prosecutor McCulloch misled the jury, contravened the law, and created manifest injustice: a conscious decision to

MR. McCULLOCH: Peremptory strike, Judge. (Emphasis added).

kill is *second* degree murder" (emphasis in original); 2) "allowing argument that the jury had to acquit [Appellant] of first-degree murder to consider second-degree murder;" and 3) submitting "[i]nstruction 5, the first-degree murder verdict-director, [which] failed to require unanimity as to each element of first-degree murder."

A. Motion for Judgment of Acquittal

[18–20] Appellant alleges the trial court erred in overruling the motion for judgment of acquittal. A sufficiency of the evidence argument is reviewed to determine if a reasonable juror had enough evidence to find the defendant guilty beyond a reasonable doubt. *State v. Salter*, 250 S.W.3d 705, 710 (Mo. banc 2008). Evidence and inferences favorable to the state are accepted, and contrary evidence and inferences are disregarded. *Id.*

The record shows Appellant retrieved his gun from his vehicle after his brother was taken to the hospital and expressed his belief that the police did not help his brother because they were focused on finding him. Two hours later, Appellant approached Sgt. McEntee's patrol car, squatted down to see into the window, and said "you killed my brother" before firing his handgun approximately five times at Sgt. McEntee's head and upper body. Appellant took Sgt. McEntee's silver gun and walked down the street with both guns. He then saw his mother and told her "that m___ f____ let my brother die, he needs to see what it feel[s] like to die." After leaving his mother, Appellant walked around the neighborhood and came to Sgt. McEntee, whose patrol car had rolled down the street and hit a tree. Appellant approached Sgt. McEntee and shot him two more times in the head. Appellant drove to his father's house and later went to a family member's apartment for several days until he surrendered to police. The trial court did not err in overruling the judgment of acquittal as a reasonable juror had sufficient evidence to find Appellant guilty beyond a reasonable doubt.

B. Distinction between First–Degree and Second–Degree Murder

[21, 22] Appellant argues that the definition of "deliberation" in the first-degree murder jury instruction reduces the distinction between first-degree and second-degree murder and is unconstitutionally vague. Appellant objected during the instruction conference and raised the point in the motion for new trial. An instructional error is reviewed for an error in submitting the instruction and prejudice. *State v. Zink*, 181 S.W.3d 66, 74 (Mo. banc 2005). MAI instructions are presumed valid. *Id.*

The Court has previously found first-degree murder is distinguished from second-degree murder by deliberation.[5] *Strong*, 142 S.W.3d at 717. Deliberation is defined as a "cool reflection for any length of time no matter how brief." Section 565.002(3).

The first-degree murder instruction[6] provided was based on MAI–CR3d 314.02,

5. First-degree murder is defined as "knowingly causes the death of another person after deliberation upon the matter," section 565.020.1, and second degree murder is defined as "knowingly causes the death of another person," section 565.021.1.

6. First-degree murder jury instruction:

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about July 5, 2005, in the County of St. Louis, State of Missouri, the defendant caused the death of Sgt. William McEntee by shooting him, and

Second, that defendant knew or was aware that his conduct was practically certain to cause the death of Sgt. William McEntee, and

which included the statutory definition of "deliberation." The instruction adequately sets out the additional element of deliberation to distinguish first-degree murder. There is also no evidence Appellant was prejudiced.

The statutory definition of "deliberation" is not unconstitutionally vague. This Court has rejected the claim that first-degree murder is unconstitutionally vague for failing to distinguish first-degree and second-degree murder. *See State v. Forrest,* 183 S.W.3d 218, 231 (Mo. banc 2006).

The trial court did not err in submitting the instruction.

C. Plain Errors

Three of Appellant's arguments were not preserved as Appellant did not object at trial or raise the points in the motion for new trial. These points are reviewed for plain error. *Johnson I,* 207 S.W.3d at 43. Plain error requires a finding of "manifest injustice or miscarriage of justice." *Id.* at 34.

1. Conscious Decision Argument

[23] Appellant argues the trial court erred in allowing the State, during its closing argument, to:

> blatantly misle[a]d the jury to believe that if [Appellant] consciously or knowingly decided to kill a police officer, he had "coolly reflected" and deliberated. These arguments eliminated deliberation, cool reflection, from the elements the jury had to find to convict [Appellant] of first degree murder.

Appellant also argues "a conscious decision to kill someone, without more, is second degree murder."

The State in its closing argument first defined deliberation as "cool reflection upon the matter for any length of time no matter how brief"[7] and went on to say "*you make a conscious decision to go after somebody and kill them, that is cool reflection.*" The State proceeded to use the terms "deliberation," "cool reflection," and "conscious decision" to illustrate Appellant's actions.

[24–27] Plain error review of a closing argument not objected to will be considered only if "there is a sound, substantial manifestation, a strong, clear showing, that injustice or miscarriage of justice will result if relief is not given." *Johnson I,* 207 S.W.3d at 49. A conviction is reversed due to an improper closing argument when the argument "had a decisive effect on the jury's determination." *Id.* The burden is on the criminal defendant to show a decisive effect. *Id.* Rarely is plain error relief granted for a closing argument claim, absent an objection, because it may be a strategic decision by counsel. *Id.* The trial court is vested with discretion regarding closing arguments. *Edwards,* 116 S.W.3d at 537. The entire record is considered when interpreting a closing argument, not an isolated segment. *Id.*

The term "conscious decision" is neither an element nor description of first-degree or second-degree murder. *See* sections 565.020, 565.021. Conscious is defined as

> Third, that defendant did so after deliberation, which means cool reflection upon the matter for any length of time no matter how brief,
> then you will find the defendant guilty of murder in the first degree.
> However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of murder in the first degree.
> MAI–CR3d 314.02.

7. The same definition of "deliberation" is in the jury instruction for first-degree murder, MAI–CR3d 314.02, and the statute defining deliberation, section 565.002(3).

"perceiving, apprehending, or noticing with a degree of controlled thought or observation: recognizing as existent, factual, or true." Webster's Third New International Dictionary, 482 (1993). Decision is defined as "a determination arrived at after consideration." *Id.* at 585.

In the context of the State's entire closing argument, the State argued both deliberation and conscious decision. The State initially defined "deliberation" and in the process of arguing the deliberation element used the terms "deliberation," "cool reflection," and "conscious decision." Although the term "conscious decision" is not used in the instruction, the use of this phrase in closing argument, especially after reciting the actual language of the instruction, was not plain error.[8] Furthermore, it is presumed the jury followed the instruction, *see Tisius v. State,* 183 S.W.3d 207, 217 (Mo. banc 2006), which properly defined "deliberation."

2. Acquittal First Argument

Appellant argues that allowing the State to argue "the jury had to acquit [Appellant] of first-degree murder to consider second-degree murder was plain error contrary to law."

The jury instruction for second degree murder provides, "If you *do not find* the defendant guilty of murder in the first degree, you must consider whether he is guilty of murder in the second degree." MAI–CR3d 314.04 (emphasis added). In closing arguments, the State read the instruction and explained "you're considering Murder in the First Degree, which *is only if you decide that he didn't commit Murder in the First Degree that you even get to Murder in the Second Degree.*" (Emphasis added).

[28, 29] An acquittal first instruction requires the defendant to be acquitted of the greater offense before the lesser offense is considered. An acquittal first instruction is: "[i]f you determine that the defendant is not guilty of the crime of ____ you may consider the lesser included crime of ____." *State v. Allen,* 301 Or. 35, 717 P.2d 1178, 1180 (1986) (citing comments to UCrJI No. 1009, Uniform Criminal Jury Instruction for Lesser Included Offense Order of Deliberation). Thus, if an acquittal is first required, a deadlocked jury could not consider a lesser offense. *State v. Wise,* 879 S.W.2d 494, 517 (Mo. banc 1994) (*overruled* on other grounds by *Joy v. Morrison,* 254 S.W.3d 885 (Mo. banc 2008)). However, an acquittal first argument will be upheld if "the strength of the evidence of deliberation precludes a finding of prejudice." *Tisius,* 183 S.W.3d at 217.

The second-degree murder jury instruction in Missouri, MAI–CR3d 314.04, is not an acquittal first instruction. *Wise,* 879 S.W.2d at 517. The instruction does not require the defendant to be found "not guilty" on the greater offense, first-degree murder, before the lesser-included offense, second-degree murder, is considered. *Id.* Instead, a lesser-included offense may be considered if the jury does "not find the defendant guilty of the greater offense." *Id.* Thus, a lesser-included offense may be considered when the jury is deadlocked on the greater offense. *Id.*

The difference between the State's closing argument and MAI–CR3d 314.04 is minimal. Regardless, this Court assumes that the jury followed the instruction of the court, *see State v. Bowman,* 741 S.W.2d 10, 15 (Mo. banc 1987), which was a proper instruction mirroring MAI–CR3d 314.14. "Additionally ... the strength of the evidence of deliberation precludes a

8. We do not reach whether the term "conscious decision" was error at all.

finding of prejudice." *Tisius*, 183 S.W.3d at 217.[9]

3. Unanimity for Elements of First–Degree Murder

Appellant argues the first-degree murder jury instruction did not require unanimity for each element of first-degree murder.

The first-degree murder instruction provided, "unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of murder in the first degree." MAI–CR3d 314.02. The jury was also instructed:

> You will then discuss the case with your fellow jurors. Each of you *must decide the case for yourself* but you should do so only after you have considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.
>
> Your verdict, whether guilty or not guilty, *must be agreed to by each juror.* Although the *verdict must be unanimous,* the verdict should be signed by your foreperson alone.
>
> When you have concluded your deliberations, you will complete the applicable form to which you *unanimously agree* and return it with all the unused forms and the written instructions of the Court.

MAI–CR3d 302.05 (emphasis added).

The instructions require unanimity as to each element. *See State v. Johnston*, 957 S.W.2d 734, 752 (Mo. banc 1997) (finding no constitutional error when the trial court refused to further explain the jury instructions when the jury asked if each element had to be unanimously agreed to). The instruction is not erroneous.

D. Conclusion

For the third point, the trial court did not err. The point is denied.

VII. Point Four: Lesser–Included Offense Instructions

[30] In the fourth point, Appellant argues the trial court erred in refusing to give jury instructions for second-degree murder without sudden passion and voluntary manslaughter.

[31, 32] A defendant is entitled to a jury instruction when the evidence, "viewed in light most favorable to the defendant," establishes a theory or supports contrary results. *State v. Avery*, 120 S.W.3d 196, 200 (Mo. banc 2003). A jury instruction for a lesser-included offense is required when the evidence "provides a basis both for the acquittal of the greater offense and the conviction of the lesser offense." *Id.* at 205.

[33] The failure to give a different lesser-included offense instruction is neither erroneous nor prejudicial when instructions for the greater offense and *one* lesser-included offense are given and the defendant is found guilty of the greater offense. *State v. Glass*, 136 S.W.3d 496, 515 (Mo. banc 2004); *Johnston*, 957 S.W.2d at 751–52.

Appellant requested instructions for second-degree murder without sudden passion [10] and voluntary manslaughter.[11] The trial court refused Appellant's request and

9. See pages 11–12 for a discussion of evidence applicable to this point.

10. Appellant's proposed jury instruction for second-degree murder without sudden passion:

> If you do not find the defendant guilty of murder in the first degree, you must consider whether he is guilty of murder in the second degree under this instruction.
> If you find and believe from the evidence beyond a reasonable doubt:

submitted instructions for first-degree murder [12] and second-degree murder.[13] The failure to give instructions for the different lesser-included offenses was not erroneous or prejudicial as the jury was instructed as to a lesser-included offense and found Appellant guilty of the greater offense. The trial court did not err and the point is denied.

VIII. Point Five: Improper Sentence

In the fifth point, Appellant makes the following arguments: A) "the trial court erred in sentencing [Appellant] to death violating due process, fundamental fairness, and reliable, proportionate sentencing;" B) "[n]umerous trial errors, strong mitigating evidence, and a previous jury not finding [Appellant] guilty of first degree murder show this is an inappropriate case for death;" and C) "Missouri's lack of standards afford prosecutors unguided discretion in seeking death sentences resulting in inconsistent application of the death penalty. To safeguard against the arbitrariness of unguided prosecutorial discre-

> First, that on or about July 5, 2005, in the County of St. Louis, State of Missouri, the defendant caused the death of Sgt. William McEntee by shooting him, and
> Second, that defendant knew or was aware that his conduct was practically certain to cause the death of Sgt. William McEntee, and
> Third, that defendant did not do so under the influence of sudden passion arising from adequate cause,
> then you will find the defendant guilty of murder in the second degree.
> However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of murder in the second degree. As used in this instruction, the term ''sudden passion'' means passion directly caused by and arising out of provocation by St. William McEntee or another acting with Sgt. William McEntee which passion arose at the time of the offense. The term ''adequate cause'' means cause that would reasonably produce a degree of passion in a person of ordinary temperament sufficient to substantially impair an ordinary person's capacity for self-control.
>
> MAI–CR3d 314.04.

11. Appellant's proposed jury instruction for voluntary manslaughter:

> If you do not find defendant guilty of murder in the second degree, you must consider whether he is guilty of voluntary manslaughter.
> If you find and believe from the evidence beyond a reasonable doubt:
> First, that on or about July 5, 2005, in the County of St. Louis, State of Missouri, the defendant caused the death of Sgt. William McEntee by shooting him, and
> Second, that defendant knew or was aware that his conduct was practically certain to cause the death of Sgt. William McEntee, then you will find the defendant guilty of voluntary manslaughter.
> However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of voluntary manslaughter.
>
> MAI–CR3d 314.08.

12. See footnote 6 for the submitted first-degree murder instruction, MAI–CR3d 314.02.

13. The submitted jury instruction for second-degree murder:

> If you do not find the defendant guilty of murder in the first degree, you must consider whether he is guilty of murder in the second degree under this instruction.
> If you find and believe from the evidence beyond a reasonable doubt:
> First, that on or about July 5, 2005, in the County of St. Louis, State of Missouri, the defendant caused the death of Sgt. William McEntee by shooting him, and
> Second, that defendant knew or was aware that his conduct was practically certain to cause the death of Sgt. William McEntee, then you will find the defendant guilty of murder in the second degree.
> However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of murder in the second degree.
>
> MAI–CR3d 314.04.

tion, when the state seeks death, it should be required to afford the accused an opportunity to avoid a death sentence by pleading guilty to first degree murder or a lesser offense."

A. Proportionality Review

This Court is statutorily required to engage in a proportionality review and determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstance found;

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant.

Section 565.035.3.

1. Passion, Prejudice and Arbitrary Factors

Appellant does not allege, and a review of the record does not indicate, the death sentence was influenced by passion, prejudice, or arbitrary factors.

2. Aggravating Factors

[34–36] The evidence supports beyond a reasonable doubt the jury's findings of three aggravating factors. Appellant "knowingly created a great risk of death to more than one person by means of a weapon that would normally be hazardous to the lives of more than one person" when he shot Sgt. McEntee multiple times and a bullet struck a juvenile standing next to the patrol car. The act involved depravity of mind and the murder was "outrageously and wantonly vile, horrible, and inhuman," as the act involved two distinctly separate shootings within a short period of time and Sgt. McEntee was seriously injured and helpless at the time of the second shooting. The act was "committed against a peace officer while engaged in the performance of his official duty" as Sgt. McEntee was responding to a call and was in his patrol car.

3. Similar Cases

[37] The death sentence is neither excessive nor disproportion in this case. This Court has upheld death sentences when a police officer was killed. *See State v. Tisius,* 92 S.W.3d 751, 765–66 (Mo. banc 2002) (*Tisius I*); *State v. Clayton,* 995 S.W.2d 468, 484 (Mo. banc 1999); *State v. Johnson,* 968 S.W.2d 123, 135 (Mo. banc 1998). This Court has also upheld death sentences where an injured and helpless victim is subject to a fatal blow. *See Tisius I,* 92 S.W.3d at 765–66; *State v. Cole,* 71 S.W.3d 163, 177 (Mo. banc 2002); *Johns,* 34 S.W.3d at 118; *State v. Middleton,* 995 S.W.2d 443, 467 (Mo. banc 1999).

B. Trial Errors, Mitigating Evidence

Appellant alleges that "[n]umerous trial errors, strong mitigating evidence, and a previous jury not finding [Appellant] guilty of first degree murder show this is an inappropriate case for death." This Court found no trial errors when reviewing the record; thus, the alleged errors did not make the sentence unreliable. *See Johnson I,* 207 S.W.3d at 50.

[38] During the punishment phase, Appellant presented mitigating evidence of childhood abuse and neglect and good character. Deference is given to the jury's decision when "there was sufficient evidence from which a reasonable juror could have found that the mitigating evidence did not outweigh the aggravating evi-

dence." *State v. Johnson*, 244 S.W.3d 144, 157–58 (Mo. banc 2008). On reviewing the evidence, a reasonable juror could properly find the mitigating evidence of Appellant's childhood and good character did not outweigh the aggravating factors. This Court has upheld the death penalty despite evidence of childhood neglect. *See id.* at *157; State v. Brooks*, 960 S.W.2d 479, 503 (Mo. banc 1997).

Appellant also alleges the strength of the evidence is insufficient to support the sentence because his first trial ended when the jury could not reach a verdict. A prior mistrial is not dispositive on imposing the death sentence. *See State v. Barton*, 240 S.W.3d 693 (Mo. banc 2007) (death penalty upheld after two prior mistrials and a conviction reversed).

C. Prosecutorial Discretion

Appellant argues his death sentence should be set aside due to prosecutorial discretion in seeking the death penalty. This Court has rejected this argument. *State v. Barnett*, 980 S.W.2d 297, 309 (Mo. banc 1998).

D. Conclusion

Point five is denied.

IX. Point Six: Strike for Cause

[39] In the sixth point, Appellant argues the trial court erred in striking Juror Tompkins for cause. The State struck juror Tompkins for cause due to her position on the death penalty. During voir dire the following exchange occurred:

> MR. McCULLOCH [State]: Ms. Tompkins, let me ask you the questions. Do you think the death penalty is the appropriate punishment in some cases?
>
> VENIREPERSON TOMPKINS: *I really could not see any case where it would be appropriate. I do feel I am somewhat impartial. I can be convinced otherwise, but I really do not see any case where the death penalty is appropriate.*
>
> MR. McCULLOCH: And other than what you may have read or heard about this case and setting that aside, you haven't heard any of the facts, you haven't heard any evidence in this case, correct?
>
> VENIREPERSON TOMPKINS: Right, I mean, I don't even think with Jeffrey Dahmer, you know, things like that. You know, I'm—
>
> MR. McCULLOCH: From what you know through the media about the facts in that case—let me ask you the question directly. *I'm not going to ask you what they are, but can you imagine a set of circumstances where you would think death is the appropriate punishment?*
>
> VENIREPERSON TOMPKINS: *I've been sitting here as you asked and I'm trying to think, and I mean, maybe genocide or something like that.*
>
> MR. McCULLOCH: Involving mass murder?
>
> VENIREPERSON TOMPKINS: Yeah.
>
> MR. McCULLOCH: Okay. Let me ask you, in this case you have heard a couple of times already, if the jury finds Kevin Johnson guilty of Murder in the First Degree, we go into that second phase, the jury makes the decision that at least one aggravating circumstance exists beyond a reasonable doubt, and then the jury weighs the mitigating evidence against the aggravating evidence. If you as a juror on a jury decide that the evidence in aggravation outweighs the evidence in mitigation, would you automatically at that point—the only decision left is which punishment is appropriate, which one do we impose. *Would*

you exclude the death penalty as a possible punishment?

VENIREPERSON TOMPKINS: *Unless something, you know, tremendously—you know, something within the evidence that is given can convince me otherwise, I really don't think that—I think there would be only one option unless something real extraordinary happened that I saw.*

MR. McCULLOCH: As you have been sitting here for the last half hour or so, you haven't been able to think of something that would be that extraordinary, have you?

VENIREPERSON TOMPKINS: No.

MR. McCULLOCH: Okay. And believe me, I don't want to put words in your mouth, but it sounds like other than in the case of mass murder—genocide. Not even mass murder. Genocide, you don't think death would be a possibility for you?

VENIREPERSON TOMPKINS: I mean, not that I can think of unless something is presented that I never thought about, you know, somewhat possible.

. . . .

MS. KRAFT [Defense]: Okay. Thank you. Ms. Tompkins, with regard to the issue on the death penalty versus life without parole, is it possible that you could hear some evidence as you sat in this courtroom that would convince you that the death penalty was the appropriate punishment?

VENIREPERSON TOMPKINS: Anything is possible.

MS. KRAFT: Okay. So you haven't ruled out the possibility in your own mind that that could happen?

VENIREPERSON TOMPKINS: No. I mean, even when she spoke of, you know, someone being psychopathic, I thought I would—in that situation, if I was would told to consider it, I might be open. *Most of me says it's not a possibility, but I'm open.*

MS. KRAFT: *Okay. So you're not entirely closed off to the idea that you could hear something that would make you think that death would be an appropriate punishment?*

VENIREPERSON TOMPKINS: *Right.*

MS. KRAFT: *Even in this case?*

VENIREPERSON TOMPKINS: Uh-huh.

MS. KRAFT: Is that yes?

VENIREPERSON TOMPKINS: *Yeah.*

MS. KRAFT: Okay. And you wouldn't automatically reject any kind of mitigating evidence that you might hear, evidence presented on Kevin's behalf, his background, upbringing, that kind of thing?

VENIREPERSON TOMPKINS: I wouldn't reject any evidence.

MS. KRAFT: Okay. You wouldn't reject any that the State presented either?

VENIREPERSON TOMPKINS: No.

(Emphasis added).

The following exchange occurred when the State struck Tompkins:

MR. McCULLOCH [State]: I move to strike for cause Juror No. 32, Ms. Tompkins. Ms. Tompkins made it initially very clear she didn't think death was ever appropriate. She modified it somewhat to genocide cases, perhaps to something a little more nebulous, a psychopath would be better off executed. It's real clear she will reject that automatically as a—death automatically as a possible punishment in the case.

THE COURT: Response?

MS. KRAFT [Defense]: Yes, because Ms. Tompkins did say it was possible

that something could be presented in this courtroom that would convince her that death would be an appropriate punishment in this case.

THE COURT: Any objection?

MR. McCULLOCH: I think like the previous panel, Judge, a credibility issue there. Yes, this is a different situation, but she said, yeah, I got an opinion, but I can. I think credibility is the appropriate word, but certainly she talked about maybe genocide, a psychopath is better off executed. It think it's very clear that she is not going to consider death as a possible punishment in this case, noting for the record there will be no evidence of genocide.

THE COURT: *Based upon the answer that she gave and the Court's view of her body language and assessing her credibility, she could not consider the death penalty.* The motion to strike for cause will be sustained.

(Emphasis added).

Appellant raised this issue in the motion for new trial.

[40, 41] A strike for cause is reviewed for abuse of discretion. *Tisius I,* 92 S.W.3d at 763. The standard to remove a juror for cause because of his or her position on the death penalty is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Id.* (quoting *Wainwright v. Witt,* 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)).

[42, 43] While a juror's qualification is determined from the entire voir dire and not from a single response, the trial court may give more weight to a single response when presented with "conflicting testimony regarding a prospective juror's ability to consider the death penalty." *Id.* In determining a juror's qualifications, the trial court is granted broad discretion given its position to observe the juror. *State v. Ringo,* 30 S.W.3d 811, 816 (Mo. banc 2000).

This case is similar to *Tisius I,* where this Court found no abuse of discretion in striking a juror for cause when the juror unequivocally opposed the death penalty and later supported it only for terrible crimes. 92 S.W.3d at 762–63. The trial court acted within its discretion. The point is denied.

X. Point Seven: *Miranda* Rights

In the seventh point, Appellant argues the trial court plainly erred in admitting Appellant's interview with the police into evidence because he did not waive his constitutional rights under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

A.

Appellant surrendered three days after Sgt. McEntee was killed. Appellant was given his *Miranda* rights when taken into custody and again before he was interviewed. Appellant gave a response to the *Miranda* rights before the interview was taped, but it was inaudible and a written waiver was not signed. The transcript of the interview shows the conversation, in context, as:

DETECTIVE [N]ESKE [14]: Okay. We're going to talk about some things, all right? Before you make any answers, say anything, I want you to listen to what I have to say, all right? I'm going to read you your rights, okay? Just advise you of all that stuff. I'm going to talk to you for a minute before

14. The transcript of the interview mistakenly names Det. Neske as Det. Meske.

you make any decisions, okay? Can you do that for me?

KEVIN JOHNSON: Yeah.

DETECTIVE [N]ESKE: All right. I want you to speak loud and clear, okay? I have trouble hearing sometimes, all right?

KEVIN JOHNSON: Yeah.

DETECTIVE [N]ESKE: You know you have the right to remain silent. You know anything you say can be used against you in a court of law. You're entitled to talk to an attorney, have an attorney present. If you can not afford an attorney, one will be appointed to you. *Do you understand all of that?*

KEVIN JOHNSON: (inaudible).

DETECTIVE [N]ESKE: *Okay. We all know why we're here?*

KEVIN JOHNSON: Yeah.

(Emphasis added).

At trial, Det. Neske testified that he read Appellant his *Miranda* rights and that Appellant wanted to speak with police. Det. Neske's testimony was:

Q [State]: And we heard testimony earlier that when he was taken into custody he had been advised of his rights. Was he advised of his rights again?

A [Det. Neske]: Yes, I was told by Detective Bradley that his rights were read upon him being placed in his custody. And when Detective—or Officer Bales and I entered the interview room, I orally advised him of his rights.

Q *Did he understand those rights, indicated that he understood them?*

A *Yes, he did.*

Q Including the right to remain silent?

A Yes.

Q *Did he agree to waive the rights and speak with you?*

A *Yes, he wanted to talk to me.*

Q Without a lawyer, or did he ask for an attorney or anything along those lines?

A Never asked for an attorney.

Q *Wanted to talk to you about this occurrence?*

A Yes.

(Emphasis added).

After Appellant was advised of his rights, the interview commenced and lasted for more than five hours. At three points in the interview, Appellant stated "I don't want to talk to you now. You want—," "I don't want to answer no more questions," and "I don't want to answer your questions." After making these statements, Appellant continued to engage in the conversation, either answering the questions directly or stating he did not know. He never asked for an attorney.

Appellant did not file a motion to suppress his statements, as shown by the record:

MR. MONAHAN [State]: There are no motions to suppress on file. I was anticipating they might file some I had discussions with Ms. Kraft that apparently there will be none that will be filed. That's a matter of trial strategy for her. I just wanted to get that out in the open that that's what's going on.

THE COURT: *Do you anticipate filing any motions to suppress?*

MS. KRAFT [Defense]: *Not unless something comes up somehow in these jail phone calls that we have received.*

THE COURT: That's either evidence seized or statements or identification?

MS. KRAFT: That's correct.

THE COURT: Okay. Thank you.

(Emphasis added).

Appellant also did not object when the recording of the statement was offered into evidence, as shown by the transcript:

Q [Mr. McCulloch, State] Let me show you what we've marked as State's Exhibit 70. Do you recognize this?

A [Det. Neske] Yes, that's the DVD that I download from the interview.

. . . .

MR. McCULLOCH [State]: Judge, at this time, I would offer State's Exhibit 70 into evidence.

THE COURT: Any objection?

MS. KRAFT [Defense]: No.

THE COURT: Exhibit 70 will be admitted.

B.

1. Miranda Rights

[44–46] *Miranda* rights inform a criminal defendant of his constitutional rights during the interrogation process. *State v. Simmons,* 944 S.W.2d 165, 173 (Mo. banc 1997). The state must prove a challenged statement complied with the guidelines established in *Miranda,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, and was voluntary. *State v. Groves,* 646 S.W.2d 82, 84 (Mo. banc 1983). A defendant may waive his *Miranda* rights by "orally indicating his willingness to cooperate with the police questioning" despite refusing to sign a written waiver. *Id.* at 85. In *Groves,* this Court found, on plain error review, the defendant was fully aware of his *Miranda* rights without a written waiver when a police officer testified the defendant did not object to the interview and freely talked with police. *Id.* at 83–85. From the record, it is evident that Appellant indicated his willingness to talk with police by orally agreeing to talk and engaging in a five-hour interview, despite not signing a waiver.

[47] *Miranda* rights may be invoked at any time by giving "a clear, consistent expression of a desire to remain silent." *Simmons,* 944 S.W.2d at 173–74. Appellant did not invoke his *Miranda* rights at any point. Appellant's statements did not convey a clear desire to remain silent and he continued to talk after making each statement. Appellant's constitutional rights were not violated.

2. Waiver of Appellate Review

[48–52] Additionally, Appellant's strategic decision not to object to the admission of the statement constituted a waiver. An objection to the admission of evidence must be made to preserve the issue for appeal. *Johnson v. State,* 189 S.W.3d 640, 646 (Mo.App.2006). Plain error review would apply when no objection is made due to "inadvertence or negligence." *State v. Mead,* 105 S.W.3d 552, 556 (Mo.App. 2003). Plain error review is waived when "counsel has affirmatively acted in a manner precluding a finding that the failure to object was a product of inadvertence or negligence." *Id.* Plain error review does not apply when "a party affirmatively states that it has no objection to evidence an opposing party is attempting to introduce" or for a trial strategy reason. *Id.* at 556. Appellant affirmatively stated "no objection" to the admission of the interview, thereby waiving plain error review of his constitutional rights.

3. Substantial Right

Appellant's argument that his constitutional right to remain silent was violated and that the interview is inadmissible was not objected to or preserved. This Court has discretion to review a point regarding a substantial right not preserved. Rule 30.20. This Court finds no plain error as Appellant failed to show a manifest injustice resulted from the actual interview or admission of the interview into evidence.

C.

The trial court did not plainly err. The point seven is denied.

XI. Point Eight: Aggravating Circumstances

In the eighth point, Appellant argues the trial court erred in: A) overruling Appellant's objection to admitting and reading a victim impact statement from Sgt. McEntee's son as it was hearsay and invited the sentence to be based on passion and emotion; and B) submitting the aggravating circumstances jury instruction, MAI–CR3d 314.40, and refusing to submit Appellant's modified aggravating circumstances instruction as the jury was not instructed how to consider non-statutory aggravating factors.

A. Victim Impact Statement

Appellant argues the trial court erred in overruling Appellant's objection to admitting and reading a victim impact statement from Sgt. McEntee's son as it was hearsay and invited the sentence to be based on passion and emotion. Appellant also raised constitutional arguments related to aggravators and the Confrontation Clause.

Sgt. McEntee's wife read a letter their then nine-year-old son wrote to his father. The son was twelve years old at the time of the trial and did not testify in the guilt or penalty phases. Appellant objected to the letter's admission as hearsay, and the State defended the exhibit as a victim impact statement from a twelve-year-old. The trial court judge overruled the objection and admitted the letter. On cross examination, Appellant did not ask Mrs. McEntee any questions about the letter.

The son's letter is as follows:

> Day one. The next day. I was all shook up about what happened. I did not go outside until five o'clock.
>
> Day two. Coming out. I was still sad but I came out and went to my friend's house, Michael. I had a good time, but I miss him.
>
> Day three. Lay out. It was hard to get past. I was about to burst, but I didn't. I sat in a room for seven hours wondering why I still didn't know, nobody does know except the guy who did it.
>
> Day four. Funeral. It was sad day for me and everyone else. Then it was the end. Everyone said their goodbyes, and they left. Then I wondered why.
>
> Those are the four most saddest days of my life. I am still sad today, and I wonder why. It has been three to four months from then, and we are doing better.
>
> I am sad because he was the best coach ever and no one who could take my dad's spot, nobody. He was also my baseball coach, and I am sad about him not being there when I need him and I am lonely, when I kick a soccer ball. He was the greatest dad ever. He was ready for soccer season, and someone took his life away. I was so mad. I was in shock that night. I thought he would be okay, but I was wrong. He had passed away.
>
> Dad, if you hear me right now, I love you.

[53–55] The trial court has discretion to admit evidence deemed helpful to the jury in the penalty phase. *State v. Clark*, 197 S.W.3d 598, 600 (Mo. banc 2006). A victim impact statement is admissible to show the victim was a unique individual. *Forrest*, 183 S.W.3d at 225. Evidence of the specific harm a defendant caused may be presented in the sentencing phase for the jury to "assess meaningfully the defendant's moral culpability and blameworthiness." *State v. Basile*, 942 S.W.2d 342, 359 (Mo. banc 1997). A victim impact statement violates the federal and state constitutions only when it "is so unduly prejudicial that it renders the trial funda-

mentally unfair." *Forrest,* 183 S.W.3d at 225.

[56, 57] "A hearsay statement is any out-of-court statement that is used to prove the truth of the matter asserted and depends on the veracity of the statement for its value." *State v. Kemp,* 212 S.W.3d 135, 146 (Mo. banc 2007). The victim impact statement offered during the sentencing phase was offered to show the effect of the crime on the victim's son and his feelings, not for the truth of any factual matter asserted therein.

In *Basile,* this Court found the trial court properly overruled a motion to exclude a family member's victim impact statement read by another family member. 942 S.W.2d at 358–59. The letter described the victim and the effect the crime had on the family. *Id.* at 358. This Court found the letter admissible because it "was directed at [the] defendant's moral culpability in causing harm to the victim and her family." *Id.* at 359. Sgt. McEntee's son's letter is similar to the letter in *Basile* as the son described how he felt and the impact his father's death had on his life.

A victim impact statement is not offered to prove an element of the charged offense or a statutory aggravating circumstance. As this Court said in *Basile:*

> Under our statutes, there is no requirement that the victim impact statement evidence be related to the specific aggravators submitted by the State. It is sufficient that it is relevant to inform the jury as to the effect of the crime for which the defendant is being sentenced even if no instruction is given regarding the evidence.

942 S.W.2d at 359. Here, the son's letter was not used to support any of the three statutory aggravating circumstances and was only used to show the effect of the crime on the son. The letter was properly used as a victim impact statement because it addressed the effect of the crime.

[58, 59] A victim impact statement is not subject to the Confrontation Clause. "The Confrontation Clause does not operate to bar the admission of testimony relevant only to a capital sentencing authority's selection decisions." *United States v. Fields,* 483 F.3d 313, 326 (5th Cir.2007). In *Fields,* the challenged hearsay statements related to non-statutory aggravating factors and were not barred by the Confrontation Clause because the factors were not used to determine if the defendant was eligible for the death penalty. *Id.* at 325. *See also United States v. Wallace,* 408 F.3d 1046, 1048 (8th Cir.2005).

B. Aggravating Circumstances Jury Instructions

Appellant argues the trial court erred in submitting the aggravating circumstances jury instruction, MAI–CR3d 314.40, and refusing to submit Appellant's modified aggravating circumstances instruction, because the jury was not instructed how to consider the non-statutory aggravating factors.

The State submitted the MAI jury instruction for aggravating circumstances,[15] which the trial court accepted. Appellant

15. The submitted jury instruction for statutory aggravating circumstances:

> In determining the punishment to be assessed against the defendant for the murder of Sgt. William McEntee, you must first consider whether one or more of the following statutory aggravating circumstances exists:
>
> 1. Whether the defendant by his act of murdering Sgt. William McEntee knowingly created a great risk of death to more than one person by means of a weapon that would normally be hazardous to the lives of more than one person.
> 2. Whether the murder of Sgt. William McEntee involved depravity of mind and

submitted a modified aggravating circumstances instruction,[16] which instructed the jury to consider the non-statutory aggravating circumstances only if they are found beyond a reasonable doubt. During the instruction conference, Appellant objected to the State's proposed instruction because it does not address the burden of proof for non-statutory circumstances. The trial court refused to submit the modified instruction. Appellant relies on *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003); and *State v. Whitfield*, 837 S.W.2d 503 (Mo. banc 1992).

[60] Under section 565.030.4, the jury is required to find a statutory aggravating circumstance beyond a reasonable doubt. *State v. Gill*, 167 S.W.3d 184, 193 (Mo. banc 2005); section 565.030.4(2). The reasonable doubt standard does not apply to mitigating evidence, *Gill*, 167 S.W.3d at 193, or non-statutory aggravating factors, including victim impact statements, *see Forrest*, 183 S.W.3d at 226. Appellant's reliance on *Ring*, *Apprendi*, and *Whitfield* is misplaced. This Court has stated that under *Ring* and *Apprendi* only evidence functionally equivalent to an element, including statutory aggravating circumstances, must be found beyond a reasonable doubt. *Clark*, 197 S.W.3d at 601. The trial court was not obligated to instruct the jury to find non-statutory aggravators, including a victim impact statement, beyond a reasonable doubt.

C. Conclusion

The trial court did not err. Point eight is denied.

XII. Point Nine: Depravity of Mind

[61] In the ninth point, Appellant argues the trial court erred in overruling the objection to the statutory aggravating circumstances instruction because the de-

> whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find that the defendant committed repeated and excessive acts of physical abuse upon Sgt. William McEntee and the killing was therefore unreasonably brutal.
>
> 3. Whether the murder of Sgt. William McEntee was committed against a peace officer while engaged in the performance of his official duty.
>
> You are further instructed that the burden rests upon the state to prove at least one of the foregoing circumstances beyond a reasonable doubt. On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as to the existence of that circumstance. Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing statutory aggravating circumstances exist, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Department of Corrections without eligibility for probation or parole.
>
> MAI–CR3d 314.40.

16. Appellant's proposed modified jury instruction for non-statutory aggravating circumstances, based on MAI–CR3d 314.40:

> *If you have, unanimously and beyond a reasonable doubt, found that one or more of the statutory aggravating circumstances submitted in Instruction No. __ exists, you must next consider whether any other aggravating evidence exists. In deciding whether any other aggravating evidence exists, you may consider all of the evidence presented in both the guilt and the punishment stages of trial. You are further instructed that the burden rests upon the state to prove, beyond a reasonable doubt, evidence of non-statutory aggravating circumstances. On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as to the existence of that circumstance. You must list at the bottom of this instruction each non-statutory aggravating circumstance, if any, that you have unanimously found to exist beyond a reasonable doubt.*

(Modifications in italics).

pravity of mind factor is unconstitutionally vague.

The statutory aggravating circumstances instruction included the "depravity of mind" factor. The relevant portion of the instruction, based on MAI–CR3d 314.40:

> In determining the punishment to be assessed against the defendant for the murder of Sgt. William McEntee, you must first consider whether one or more of the following statutory aggravating circumstances exists:
>
> . . . .
>
> 2. Whether the murder of Sgt. William McEntee involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find that the *defendant committed repeated and excessive acts of physical abuse upon Sgt. William McEntee and the killing was therefore unreasonably brutal.*
>
> (Emphasis added).

Appellant's objection to the factor as unconstitutionally vague was overruled.

During deliberations, the jury asked for the definition of "depravity of mind" to which the trial court directed the jury to the instructions provided. The jury then requested a dictionary, which was denied. The jury found beyond a reasonable doubt that the murder of Sgt. McEntee involved depravity of mind.[17] Appellant renewed his objection to the instruction as unconstitutionally vague in the motion for new trial.

This Court has previously found the instruction is not unconstitutionally vague as sufficient guidance is provided. *Johnson I,* 207 S.W.3d at 46. The "depravity of mind" factor requires evidence to support at least one factor established in *State v. Preston,* 673 S.W.2d 1, 11 (Mo. banc 1984). *State v. Griffin,* 756 S.W.2d 475, 490 (Mo. banc 1988); *see also* MAI–CR–3d 314.40, Notes on Use 8(D). The *Preston* factors are:

> mental state of defendant, infliction of physical or psychological torture upon the victim as when victim has a substantial period of time before death to anticipate and reflect upon it; brutality of defendant's conduct; mutilation of the body after death; absence of any substantive motive; absence of defendant's remorse and the nature of the crime.

673 S.W.2d at 11. The notes to MAI–CR3d 314.40 provide ten phrases that may be used, depending upon the facts of a case, to comply with the *Preston* factors.[18] MAI–CR–3d 314.40, Notes on Use 8(B), (D). In this case, the instruction used the phrase "that the defendant committed repeated and excessive acts of physical abuse

17. The jury also found beyond a reasonable doubt the two other aggravating circumstances, great risk of death by a hazardous weapon and the act was committed against a peace officer.

18. The ten phrases that may be used to find depravity of mind are:

> [1] That the defendant inflicted physical pain or emotional suffering on [name of victim] and that defendant did so for the purpose of making [name of victim] suffer before dying.
>
> [2] That the defendant committed repeated and excessive acts of physical abuse upon [name of victim] and the killing was therefore unreasonably brutal.
>
> [3] That the defendant killed [name of victim] after he was bound or otherwise rendered helpless by (defendant) (or) ([name or describe person acting with defendant]) and that defendant thereby exhibited a callous disregard for the sanctity of all human life.
>
> [4] That the defendant killed [name of victim] knowing that [name of victim] was physically disabled and helpless and that defendant thereby exhibited a callous disregard for the sanctity of all human life.

upon Sgt. William McEntee and the killing was therefore unreasonably brutal," which the jury found beyond a reasonable doubt. The instruction was not vague as the specific language defines "depravity of mind."

There was no error in submitting the instruction, and Appellant was not prejudiced. The point is denied.

XIII. Point Ten: Mitigating Circumstance Instruction

In the tenth point, Appellant argues the trial court erred in overruling Appellant's objection to the mitigating circumstances instruction and refusing Appellant's modified instruction. Appellant argues the state, not the defendant, has the burden to prove the mitigating factors outweigh the aggravating factors.

In the penalty phase instruction conference, the mitigating circumstances instruction [19] was offered over Appellant's modi-

> [5] That the defendant, while killing [name of victim] or immediately thereafter, purposely mutilated or grossly disfigured the body of [name of victim] by (an act) (acts) beyond that necessary to cause his death.
> [6] That the defendant, while killing [name of victim] or immediately thereafter, (had sexual intercourse with her) (sexually violated her (by inserting a [Describe object.] into the (anus) (vagina) of [name of victim]) (by inserting his penis into the (mouth) (anus) of [name of victim])).
> [7] That the defendant killed [name of victim] as a part of defendant's plan to kill more than one person and thereby exhibited a callous disregard for the sanctity of all human life.
> [8] That the defendant's selection of the person he killed was random and without regard to the victim's identity and that defendant's killing of [name of victim] thereby exhibited a callous disregard for the sanctity of all human life.
> [9] That the defendant killed [name of victim] for the purpose of causing suffering to another person and thereby exhibited a callous disregard for the sanctity of all human life.
> [10] That the defendant killed [name of victim] for the sole purpose of deriving pleasure from the act of killing and thereby exhibited a callous disregard for the sanctity of all human life.
>
> MAI–CR3d 314.40, Notes on Use 8(B) (brackets and parentheses in original).

19. The submitted jury instruction for evidence in aggravation and mitigation:

> If you have unanimously found beyond a reasonable doubt that one or more of the statutory aggravating circumstances submitted in Instruction No. 12 [statutory aggravating instruction] exists, you must then determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh facts and circumstances in aggravation of punishment.
> In deciding this question, you may consider all of the evidence presented in both the guilt and the punishment stages of trial, including evidence presented in support of the statutory aggravating circumstances submitted in Instruction No. 12, and evidence presented in support of mitigating circumstances submitted in this instruction.
> As circumstances that may be in mitigation of punishment, you shall consider:
> 1. Whether the defendant has no significant history of prior criminal activity.
> 2. Whether the murder of Sgt. William McEntee was committed while the defendant was under the influence of extreme mental or emotional disturbance.
> 3. The age of the defendant at the time of the offense.
> You shall also consider any other facts or circumstances which you find from the evidence in mitigation of punishment.
> It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. If each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the facts or circumstances in aggravation of punishment, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

fied instruction [20] and objections. The three objections Appellant raised were: (1) the instruction did not contain a burden of proof that the aggravating factors must outweigh the mitigating factors; (2) the burden of proof is shifted to the Appellant to prove the mitigating factors outweigh the aggravating factors; and (3) the jury was not informed that when the aggravating and mitigating factors are given equal weight, life without parole is the proper verdict. The trial court accepted the instruction as submitted by the State.[21] Appellant preserved this point in the motion for new trial.

Appellant's argument that the instruction improperly shifts the burden of proof has been rejected by the United States Supreme Court and this Court. The United States Supreme Court stated:

> So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional

MAI–CR3d 314.44.

20. Appellant's proposed modified jury instruction for evidence in aggravation and mitigation, based on MAI–CR3d 314.44:

> As to Count I, if you have unanimously found beyond a reasonable doubt that one or more of the statutory aggravating circumstances submitted in Instruction No. __ exists, you must then determine whether there are facts or circumstances in mitigation of punishment *and, if so, whether the aggravating circumstances that you, unanimously and beyond a reasonable doubt have found to exist, outweigh the mitigating circumstances.*
>
> *The state bears the burden of proving beyond a reasonable doubt that the aggravating circumstances that you have unanimously found outweigh the mitigating circumstances.*
>
> In deciding whether there are facts and circumstances in mitigation of punishment, you may consider all of the evidence presented in both the guilt and the punishment stages of trial.
>
> *However, the only aggravating evidence that you may consider in determining whether the aggravating evidence outweighs the mitigating evidence is that aggravating evidence that you have unanimously and beyond a reasonable doubt found to exist.*
>
> As circumstances that may be in mitigation of punishment, you shall consider:
>
> 1. Whether the defendant has no significant history of prior criminal activity.
> 2. Whether the murder of William McEntee was committed while the defendant was under the influence of extreme mental or emotional disturbance.
> 3. The age of the defendant at the time of the offense
>
> You shall also consider *all* other facts or circumstances which you find from the evidence in mitigation of punishment. It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. In weighing the aggravating and mitigating evidence, each juror must decide, individually, what mitigating evidence exists. *However, the only aggravating evidence that may be weighed against the mitigating evidence is the aggravating evidence that all jurors unanimously find to exist beyond a reasonable doubt. If all the jurors do not agree that the state has proved beyond a reasonable doubt that the evidence in aggravation of punishment outweighs the evidence in mitigation of punishment, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.*

(Modifications are in italics).

21. The approved instruction was typed by the State but would have been submitted by Appellant. After Appellant objected to the instruction and offered a modified version, Appellant said it "would be more appropriate for the State to submit it since I made some objections to it." The State responded, "I don't think I should be in the business of submitting mitigating evidence, but—" when the trial court judge marked the State as submitting the instruction.

rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency.

Kansas v. Marsh, 548 U.S. 163, 170–71, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006) (quoting *Walton v. Arizona*, 497 U.S. 639, 650, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) (*overruled on* other grounds by *Ring*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556)).

This Court has also rejected the argument in *State v. Taylor*, 134 S.W.3d 21, 30 (Mo. banc 2004).

The trial court did not err. The point is denied.

XIV. Point Eleven: Indictment

In the eleventh point, Appellant argues the trial court erred in overruling the motion to quash the information or preclude the death penalty because the State did not plead the statutory aggravators in the indictment.

Appellant was indicted for first-degree murder, first-degree robbery, first-degree assault, and three counts of armed criminal action. The State later filed notice of aggravation pursuant to section 565.005.1(1). Appellant raised this argument in a pre-trial motion and in the motion for new trial.

Appellant relies on *Ring*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556, and *Apprendi*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, for the proposition that statutory aggravators must be included in the charging document because it is the "functional equivalent of an element of a greater offense." This Court has repeatedly rejected the argument because "Missouri's statutory scheme recognizes a single offense of murder with a maximum sentence of death, and the required presence of aggravating facts or circumstances to result in this sentence in no way increases this maximum penalty." *Johnson I*, 207 S.W.3d at 48. *See also, e.g., Gill*, 167 S.W.3d at 193–94; *Glass*, 136 S.W.3d at 513, *State v. Gilbert*, 103 S.W.3d 743, 747 (Mo. banc 2003). Notice of statutory aggravators, as required by section 565.005.1, "stands in lieu of charging them in the information or indictment." *Johnson I*, 207 S.W.3d at 48.

The State was not required to include the statutory aggravators in the indictment and filed the necessary notice. The trial court did not err. The point is denied.

XV. Conclusion

The trial court's judgment is affirmed.

STITH, C.J., RUSSELL, WOLFF, BRECKENRIDGE and FISCHER, JJ., concur; TEITELMAN, J., concurs in part and dissents in part in separate opinion filed.

RICHARD B. TEITELMAN, Judge, concurring in part and dissenting in part.

I respectfully dissent from the principal opinion to the extent that it finds no *Batson*[1] violation with respect to the state's peremptory strike of Ms. Cottman.

In response to appellant's *Batson* challenge, the state offered two justifications for striking Ms. Cottman: her past association with the Annie Malone Children's Home and her alleged unwillingness to answer questions regarding whether she could impose the death penalty. A review of the record demonstrates that neither justification is race-neutral.

As a child, appellant was under the legal custody of the Division of Family Services.

1. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

The division placed appellant in several children's homes, including Father Dunne's, St. Joseph's Home for Children and the Annie Malone Children's Home. The state justified its strike of Ms. Cottman, in part, because she had served as a foster parent for children placed with the Annie Malone Children's Home. The state's justification has a factual, race-neutral relationship to this case because both Ms. Cottman and appellant share an association with the Annie Malone Children's Home. There are, however, two critical flaws in the state's justification.

First, the logical relevance of appellant's and Ms. Cottman's association with Annie Malone Children's Home applies with equal force to any other juror who was associated with an agency or organization that provided services to appellant. There were at least four white jurors who had substantial contacts with the division, which had legal custody of appellant for most of his childhood. None of these jurors was stricken. The failure to strike similarly situated white jurors severely undermines the race-neutrality of the state's strike. *Miller–El v. Dretke*, 545 U.S. 231, 247, 125 S.Ct. 2317, 162 L.Ed.2d 196(2005).

A second and related flaw is that the state did not ask any other jurors, including some who had experience with the division and the foster care system, if they were familiar with the Annie Malone organization or any of the several other private organizations that had offered services to appellant during his childhood. If the state's concerns regarding Ms. Cottman's service were truly race-neutral, then it follows that the prosecutor would have asked the remaining jurors if they, like Ms. Cottman, had any past association with any of these organizations. The state's failure to ask this simple question of similarly situated white jurors indicates the state's concern regarding Ms. Cottman's association with Annie Malone Children's Home was not race-neutral and was, instead, an impermissible pretextual "makeweight" justification for striking Ms. Cottman. *See Miller–El*, 545 U.S. at 246, 125 S.Ct. 2317.

The state also justified its strike of Ms. Cottman by arguing that she exhibited an "unwillingness" to answer questions during the death-qualification voir dire. The state asked nearly all the prospective jurors if they could consider imposing the death penalty. Ms. Cottman, like most other jurors, responded with short and direct answers to the question posed. The state did not raise an issue as to her demeanor regarding any unwillingness by Ms. Cottman to answer questions during voir dire. Instead, the state first raised this issue in response to appellant's *Batson* challenge. If Ms. Cottman exhibited by her demeanor an unwillingness to answer the state's questions, this demeanor is not reflected in the record. A "strike based on vague references to attributes like demeanor are largely irrelevant to one's ability to serve as a juror and expose venirepersons to peremptory strikes for no real reason except their race." *State v. McFadden*, 191 S.W.3d 648, 655 (Mo. banc 2006); quoting *State v. Edwards*, 116 S.W.3d 511, 550 (Mo. banc 2003)(Teitelman, J., concurring). The state's vague allegation of an unfavorable demeanor is not apparent in the record and should not be considered a sufficient rebuttal to appellant's initial *Batson* objection. *Id.*

In light of the totality of the foregoing facts and circumstances, I am left with a definite and firm conviction that the trial court erred in overruling appellant's *Batson* challenge to the state's peremptory strike of Ms. Cottman. Therefore, I respectfully dissent from the principal opinion to the extent that it finds no *Batson* violation with respect to the state's per-

emptory strike of Ms. Cottman. The *Batson* violation requires the judgment to be reversed and the case to be remanded. I concur in all other parts of the principal opinion.

Bernice MITCHELL, Appellant,

v.

Joseph EVANS, M.D., Surgical Care of Independence, Inc, Sol H. Dubin, M.D., Orthopedic Associates of Kansas City, Inc, Robert L. Bowser, M.D., Jeff Richardson, C.R.N.A., and Independence Anesthesia, Inc., Respondents.

No. WD 66959.

Missouri Court of Appeals,
Western District.

May 13, 2008.

Motion for Rehearing and/or Transfer to Supreme Court Denied July 1, 2008.

Application for Transfer Sustained Nov. 25, 2008.

Case Retransferred June 30, 2009.

Court of Appeals Opinion Readopted July 8, 2009.

Background: Patient's mother brought wrongful-death medical malpractice action against doctor, orthopedic surgeon, anesthesiologist, and nurse. Following a jury trial, the Circuit Court, Jackson County, Vernon E. Scoville, III, J., entered judgment in favor of defendants. Mother appealed.

Holdings: The Court of Appeals, Ronald R. Holliger, J., held that:

(1) mother preserved for appellate review her claim that trial court erred when giving jury instructions by using court-drafted verdict directors;

(2) verdict director stating that doctor failed to establish adequate hemodynamic stability before allowing surgery was warranted;

(3) verdict director stating that orthopedic surgeon failed to establish hemodynamic stability was warranted;

(4) verdict director stating that anesthesiologist failed to assure that endotracheal tube with inflated cuff around it was placed for use with general anesthesia before surgery was warranted; and

(5) trial court's error in failing to give mother's verdict directors prejudiced mother and thus constituted reversible error.

Reversed and remanded.

1. Appeal and Error ⇨232(3)

Patient's mother preserved for appellate review her claim that trial court erred when giving jury instructions by using court-drafted verdict directors rather than mother's verdict directors in wrongful-death medical malpractice action; when court announced that it intended to give verdict directors that were not tendered by either party, mother objected that mother's proposed instructions were "a fair and appropriate statement of the ultimate fact issues and did not detail the facts as much as what the Court did and is giving." V.A.M.R. 70.03.

2. Trial ⇨277

Purpose behind rule governing objections to jury instructions is to put the trial court on notice of both the fact of objection and the reasons. V.A.M.R. 70.03.