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IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

STATE OF MISSOURI,

Respondent,

v.

QUINTIN GRAY,

Appellant.

Appeal from the Circuit Court of the City of St. Louis, Missouri
Twenty-Second Judicial Circuit, Division 2
The Honorable Michael K. Mullen, Judge

APPELLANT'S STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

In the Circuit Court of St. Louis City, Cause No. 0922-CR04019, the State of Missouri charged that Appellant Quintin Gray committed one count of the class A felony of first-degree murder in violation of Section 565.020, one count of the class A felony of abuse of a child–causing death in violation of Section 568.060, one count of the class A felony of trafficking in the second degree in violation of Section 195.233, and one count of the class A misdemeanor of possession of marijuana under 35 grams in violation of Section 195.202.[1] The Honorable Michael K. Mullen granted Appellant's motion to sever the drug counts.

On December 14, 2009, Judge Mullen presided over the jury trial against Appellant. A jury found Appellant guilty of murder in the second degree and abuse of a child – causing death. On February 19, 2010, Judge Mullen sentenced Appellant to two concurrent terms of twenty-five years of imprisonment in the Missouri Department of Corrections. Appellant timely filed his notice of appeal on February 22, 2010.

This appeal does not involve any issues reserved for the exclusive jurisdiction of the Supreme Court of Missouri. Jurisdiction lies in this Court. Mo. Const., Art. V, Section 3; Section 477.050, RSMo.

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[1] All statutory references are to RSMo 2000 unless otherwise indicated. Appellant will cite to the record on appeal as follows: Legal File,"(L.F.)," Trial and Sentencing Transcript, "(Tr.)," and Appendix, "(A)."

STATEMENT OF FACTS

Appellant and Ashley Turner[2] started living together around September of 2007 on South Grand with Ms. Turner's three-year-old daughter, M.T. (Tr.424-425;471). Appellant has two children, Quintin Jr. ("Junior") and Kiara (Tr.428). Junior was four years old (Tr.49). Junior lived with his mother Lakeita, but would spend time at Appellant's and Ashley's apartment (Tr.428).

According to Ashley, M.T. was potty trained at two-years-old (Tr.446-447). M.T. never had any accidents and was very prissy (Tr.447). M.T. was a healthy child without a heart problem (Tr.447).

Ashley never saw Appellant discipline M.T. (Tr.471). Disciplining M.T. was Ashley's job (Tr.471). On February 23, 2008, Ashley used a house shoe to hit M.T. twice in her butt and once on the arm (Tr.472;480). Ashley also hit M.T. with a belt twice (Tr.472-473).

Ashley worked at Mary Margaret Day Care and Penn Station (Tr.427). She would work from 6 a.m. until 4:30 p.m. at the day care (Tr.427). On most days, M.T. would either go with Ashley to work at the day care or stay with Ashley's mother, Vicki Turner (Tr.427).

The weekend before February 25, 2008, Appellant, Ashley, Junior and M.T. stayed together at the apartment (Tr.429). During that weekend, Junior

[2] Appellant means no disrespect to the individuals in this case, but will refer to them by their first names.

urinated on himself and got in trouble with Appellant (Tr.484-485). Appellant whooped Junior with a belt for urinating on himself (Tr.485).

It snowed all weekend so the kids played outside at night (Tr.429). Appellant took the kids outside to play and walk their three pitbull dogs in the backyard (Tr.430). Two of the pitbulls were about 18 to 20 pounds, and the other was a puppy from 5 to 8 pounds (Tr.430;460). Ashley stayed in the house to clean up (Tr.430).

M.T. wore long-johns, jeans, a shirt and a big puffy coat to play outside in (Tr.432). M.T. did not wear gloves or mittens (Tr.453). Junior and M.T. played and "rough hous[ed]" with the dogs for about 15 minutes (Tr.430-431). The dogs jumped on M.T. (Tr.431). Junior and M.T. also slipped and fell in the snow (Tr.431-432). All of the playing and rough-housing outside resulted in little nicks and scratches on M.T.'s palms and knees (Tr.431;459;453;459). M.T. also had a welt under her eye and had possibly bitten her lip (Tr.453;462-463). Ashley was not concerned about M.T.'s injuries (Tr.431;459).

After the kids came in the apartment, Ashley bathed Junior and M.T. (Tr.432). She did not see any other injuries on M.T. (Tr.432). After their bath, Ashley fed them noodles and Kool-Aid (Tr.433). M.T. did not eat much, but threw up what little she ate (Tr.433;467-468). M.T. had been constipated for a day or two and had a stomach ache that night (Tr.433;468-469). M.T. was a little lethargic and not herself (Tr.468-469).

Ashley took M.T. to the bathroom (Tr.433). M.T. had a bowel movement and felt much better (Tr.434;468). At about 10:00 or 11:00 p.m., Ashley dressed M.T. and Junior in their pajamas and gave them Tylenol cold for children because Junior had a cold (Tr.434). M.T. did not have a cold, but Ashley did not want M.T. to come down with a cold (Tr.434). The kids went to bed about 11:00 p.m. (Tr.435).

Appellant and Ashley stayed up (Tr.435). Ashley could hear the kids talking and moving around (Tr.435). Ashley did not hear anybody crying or screaming in pain (Tr.435). Appellant and Ashley went to bed around 1:00 or 2:00 a.m. (Tr.435).

The next morning on February 25, 2008, Ashley got up around 6:00 a.m. and was running late for work (Tr.435). Appellant, M.T., and Junior were sleeping (Tr.469). Ashley's mother, Vicki, was there to pick her up (Tr.435-436). Ashley peeked in M.T.'s room and saw Junior and M.T. sleeping (Tr.469-470). Ashley decided to leave M.T. with Appellant and Junior because she was running late and she wanted to leave someone to play with Junior (Tr.435-436).

Neachelle Gentry lived with her family below Appellant's and Ashley's apartment (Tr.298). That morning, Neachelle heard a lot of heavy walking in the apartment above hers (Tr.300). She thought it sounded like heavy furniture was being moved across the floor (Tr.300). The constant noise lasted about 30 or 40 minutes (Tr.300;304). She did not hear voices (Tr.300;303).

Ashley called Appellant around 8:00 or 9:00 a.m. to see if the kids were up (Tr.437). At 10:30 to 11:00 a.m., Appellant called on her lunch break and a friend from work drove Ashley from work to the apartment (Tr.438).

When Ashley came in the apartment, she saw the paramedics performing cardiopulmonary resuscitation ("CPR") on a naked M.T. on the floor in M.T.'s bedroom (Tr.438;456). The paramedics took M.T. in an ambulance with Ashley to the hospital (Tr.439). Ashley's friend from work took Appellant and Junior to the hospital (Tr.439).

M.T. arrived at the hospital at 12:09 p.m. (Tr.522). She was in full cardiac arrest, meaning she was not breathing and her heart was not beating (Tr.522). Dr. James Gerard tried to resuscitate M.T. (Tr.517-518). Dr. Gerard saw multiple abrasions, lacerations and bruises on her body, and a contusion on her forehead (Tr.523). Dr. Gerard continued giving CPR to M.T. and gave her different medications to try to get her heart beating again (Tr.523). M.T. did not respond in any way and died (Tr.524).

After the emergency room workers stopped trying to resuscitate M.T., Ashley held her and looked at her face (Tr.476). Ashley did not notice any injuries as she held M.T. tight (Tr.481-482).

Detective Jimmie Hyatt spoke to Ashley (Tr.379). Ashley told Detective Hyatt that M.T. scraped the top layer of her skin off her leg, bruised her left leg between the knee and ankle, pinched her lip, had a "whelp" under her eye, and had a couple bumps on her forehead from slipping and falling in the snow over the

weekend (Tr.926-918). Ashley also said M.T. had a bruise on her hand from trying to catch herself as she fell (Tr.917-918). Ashley told Detective Hyatt that she left M.T. that morning because M.T. was not feeling well and she wanted to leave her home to play with Junior (Tr.919).

Ashley admitted "popping" M.T.'s bottom once with her house shoes on the Saturday before M.T.'s death (Tr.927;929). She also popped M.T.'s bottom once or twice with a belt (Tr.927-929). After being hit, M.T. puckered her lower lip, backed away, and walked away from Ashley (Tr.928). Ashley did not see any injuries on M.T. from her hitting M.T. (Tr.928).

After talking to Ashley, Detective Hyatt went to the apartment with Appellant with consent to search it (Tr.380;382). Detective Hyatt wanted to see if he could find anything that could possibly have caused the injury to M.T. (Tr.380). Detective Hyatt saw the water was still running in the bathtub (Tr.381).

There was a pair of underwear soiled with feces in the bathtub (Tr.381,402). Evidence Technician Unit Officer Doug Eatherton seized the underwear, some of M.T.'s clothes, and a slip-on house shoe (Tr.404;408-409;417). Detective Hyatt and Officer Eatherton never seized any bed sheets because they did not feel they were relevant or had any value (Tr.382;402). They did not see any urine, feces, or physical evidence to analyze on any bed sheets (Tr.389;401). Officer Eatherton photographed a brown belt in the living room, but did not seize it because he did not think it was involved in the case

(Tr.405;418;420). Before taking Appellant back to the homicide office, Detective Hyatt did the scene reenactment video with Appellant (Tr.381;382).

While at the hospital, Detective Robert Jauer heard from a chaplain at the nurse station that Junior said he saw M.T. "getting whipped" (Tr.318-319). Consequently, Detective Jauer sat with Junior at the nursing station as Junior colored (Tr.319-320). Detective Jauer showed Junior his badge and told him that he was a police officer (Tr.319-320). Detective Jauer asked Junior where his mommy and daddy were (Tr.320). Junior pointed to the examination room and said his sister was in there (Tr.320). Detective Jauer asked what happened and Junior said Appellant had whipped M.T. with a black belt and his fist (Tr.322). Detective Jauer did not ask Junior any other questions about the investigation because it was a cursory interview and a more detailed interview would be conducted at the Children's Advocacy Center by a trained forensic specialist (Tr.323). Detective Jauer never asked what Junior meant by "whipped" or being spanked (Tr. 335).

Detective Jauer and his partner took Junior to the Children's Advocacy Center (Tr.324). Interview specialist Beverly Tucker interviewed Junior (Tr.341;347). The interview was recorded (Tr.349). Ms. Tucker knew Junior's previous statement because Detective Jauer told her about it (Tr.347). Even though Beverly Tucker was not ready to end the interview, Junior ended the interview (Tr.349).

After leaving the Children's Advocacy Center, Detective Jauer and his partner fed Junior and then dropped him off with his grandmother who was working at Arby's (Tr.325;334-335;338). During the drive, Junior told the officers that Appellant gave M.T. a bath after whipping her (Tr.327). Detective Jauer asked Junior what happened after the bath and Junior did not answer (Tr.338).

Shortly after being dropped off at Arby's, child abuse and neglect investigator Christina Hemkens interviewed Junior at Arby's (Tr.27;364). Ms. Hemkens did not know that Junior had already been interviewed by the Children's Advocacy Center (Tr.376). Ms. Hemkens was there with Junior's grandmother Mary Lee Ellison and Junior's mother Lakita Burke (Tr.30;367). Ms. Hemkens interviewed Junior alone in a booth in the back of the Arby's (Tr.30;368). Ms. Hemkens and Junior chatted about 10 minutes before she questioned him about the incident (Tr.369).

Ms. Hemkens asked Junior what happened today and he responded that Appellant "whopped" his friend M.T. (Tr.369). Ms. Hemkens asked why M.T. received the "whooping" (Tr.369). Junior said M.T. was not listening and urinated in her bed (Tr.369-370;372). Junior then said Appellant gave M.T. a bath and subsequently, M.T. got sick (Tr.370;373). After M.T. got sick, Junior said Appellant tried to make M.T. be alive by pushing on her stomach (Tr.370;373). Appellant pushed three times (Tr.370;373).

Ms. Hemkens also asked Junior what "whooped" was and Junior said it meant Appellant choked M.T. with a belt, threw her to the ground, and punched her in the chest (Tr.370;372). Junior said M.T. was not crying (Tr.374). Junior said during part of the whooping, he was watching cartoons and sleeping (Tr.374-375). Ms. Hemkens did not ask any more questions because Junior was getting antsy (Tr.371). They talked for about 20 minutes (Tr.371).

Forensic pathologist and assistant medical examiner Dr. Jane Turner performed the autopsy on M.T. and documented her injuries (Tr.616-617;624). M.T. was 40 inches tall and 45 pounds (Tr.621). M.T.'s mid-forehead had a 1.5-by-.7-centimeter, tan purple contusion (Tr.624). There was a 1.7-by-1.1-centimeter speckled abrasion on M.T.'s left forehead, which was associated with a 2-by-1.5-centimeter faint tan contusion (Tr.624). There was a 3-by-1.5-centimeter faint purple contusion on M.T.'s left temple, a .2-by-.1-centimeter superficial scratch inferior to the right lateral eye, a 1-by-.5-centimeter faint red contusion on the right inferior cheek, a .5-by-.5-centimeter abrasion on the right inferior cheek, and a .5-by-.5-centimeter abrasion on the right inferior posterior cheek (Tr.624).

M.T. also had injuries on her chin and lips (Tr.625). There was a 2-by-2-centimeter abrasion on her chin, a .3-by-.2-centimeter abrasion on the base of her chin, a .5-by-.4-centimeter abrasion to her left lower lip, a .6-by-.5-centimeter abrasion/contusion on her mid-lower lip, a .5-by-.4-centimeter abrasion/contusion on her right lower lip, and several areas of abrasion on the upper lip measuring up to 4-millimeters in greatest dimension (Tr.625).

There was a 4-by-2-centimeter purple contusion on the left cheek which was associated with a .4-by-.1-centimeter superficial linear scratch and a .8-by-.1-centimeter superficial linear scratch (Tr.625). There was a 2.5-by-1.1-centimeter abrasion inferior to the left lateral eye (Tr.625). There was a 2-by-1.5-centimeter faint purple contusion on left posterior cheek, which was associated with two .1-centimeter punctuate abrasions (Tr.625).

M.T. had injuries on her arms (Tr.625-626). There was a 1-by-.1-centimeter speckled linear abrasion on the right posterior arm (Tr.625-626). There was a 3-by-.1-centimeter healing linear abrasion on the right dorsal medial forearm, .2-by-2-centimeter abrasion on the left proximal lateral forearm, a .1-by-.1-centimeter abrasion on the left elbow, and a 1.2-by-1-centimeter purple contusion on the left ventral wrist (Tr.626). On her left ventral forearm, there was an arch-shaped, curvilinear, tan, hyperpigmented area of skin which was 4-by-2.5-centimeters in total area, 5-centimeters in length and .2-centimeters in width (Tr.626). The arch shaped area of skin was associated with a .3-by-.2-centimeter abrasion on the superior aspect and a .2-by-.1-centimeter abrasion on the inferior aspect (Tr.626).

There were also injuries on M.T.'s back and buttocks (Tr.626-627). There was a 1-by-.8-centimeter faint purple contusion on the left lateral back and a 1.5-by-.9-centimeter abrasion on the left lower back (Tr.626). There was a .8-by-.5-centimeter abrasion on the left buttock, a .8-by-.7-centimeter abrasion on the left buttock, and a .4-by-.4-centimeter abrasion on the right buttock (Tr.627). There

was an ill-defined purple contusion involving the bilateral buttock in association with superficial subcutaneous hemorrhage (Tr.627).

There was a 2.8-by-1-centimeter dark red abrasion/contusion on the left anterior lateral leg (Tr.627). There were two .1-centimeter healing abrasions posterior to the right lateral malleolus[3] and two healing abrasions inferior to the left lateral malleolous measuring .5-by-.1-and-.1-by-.1 (Tr.627). There was a scar on the back of M.T.'s right hand that was a previously healed thermal injury and not associated with her death (Tr.627).

When Dr. Turner made a Y-shaped incision on M.T's chest and abdomen, she saw 500 milliliters of blood in the abdominal cavity (Tr.641-642). Dr. Turner thought 500 milliliters was about 30 to 33 percent of M.T.'s circulating blood volume and opined that M.T. had suffered significant amount of blood loss (Tr.642-643).

Dr. Turner did not find any hemorrhage or injury to the strap muscles which are muscles in the front of the neck (Tr.643). She found hemorrhage in the tissue around the para-esophageal and para-tracheal areas, indicating that her neck was manipulated (Tr.643-644). Dr. Turner found no evidence of a belt or any type of ligature object mark on M.T.'s neck (Tr.702).

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[3] Malleolus is a rounded bony prominence, such as those on either side of the ankle joint. See http://medical-dictionary.thefreedictionary.com/malleolus(last visited January 18,2011).

Dr. Turner examined M.T.'s heart and found nothing wrong with it (Tr.644). Dr. Turner believed M.T.'s heart stopped because she lost a significant volume of blood (Tr.644-645). Dr. Turner did not find any evidence of a cardiac dysrhythmia[4] or arrhythmia[5] (Tr.654).

Dr. Turner found M.T.'s lungs were normal (Tr.645). She found acute congestion in M.T.'s lungs and this is a normal autopsy finding. In the process of dying, the heart starts to shut down or beat irregularly producing blood accumulation in the lungs (Tr.645). The acute congestion meant that M.T. was alive for awhile after she was injured (Tr.645).

M.T. had hemorrhage in both the mesentery and omentum (Tr.645-646). The mesentery is fat that is attached to the intestines and omentum is a layer of fat that hangs down from the large intestine and covers the small intestines (Tr.646). M.T. had hemorrhage in the para-colonic tissue (Tr.646).

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[4] Dysrhythmia is an abnormality in an otherwise normal rhythmic pattern. See http://medical-dictionary.thefreedictionary.com/dysrhythmia(last visited January 18,2011).

[5] Arrhythmia is an irregularity in the force or rhythm of the heartbeat. See http://medical-dictionary.thefreedictionary.com/arrhythmia(last visited January 18,2011).

M.T. had contusions in the cranial area (Tr.647). There was an internal hemorrhage on the left side of the scalp and another one on the right side close to the front (Tr.648). There was swelling of the brain indicating a lack oxygen to the brain (Tr.648).

M.T. had three significant injuries to her liver (Tr.649). There were two lacerations or tears in the liver, and a collection of blood on the top surface of the liver (Tr.648-649). The laceration on the left side of the lower part of the liver measured 3-by-1-by-1-centimeter (Tr.650). The laceration on the right side of the liver, but close to the left on the back side of the liver measured 4.5-by-2.2-centimeters (Tr.650). The collection of blood on the surface of the liver measured 3.5-by-2.5-centimeters (Tr.650).

Dr. Turner opined that liver lacerations are common in motor vehicle deaths (Tr.651). A liver laceration can be caused by a sudden, forceful blow such as a kick, punch, or a person dropping the weight of his or her knee on another's abdomen (Tr.712;714). She did not believe that pushing on someone's chest or doing compressions to the stomach could cause a liver laceration because compressions are not the same as sudden, forceful blows (Tr.651-652). Dr. Turner did not believe any manner of CPR could cause a liver laceration (Tr.652). Dr. Turner believed given that the location of lacerations in M.T.'s liver, she quickly lost blood (Tr.652).

Dr. Turner determined the cause of death was abdominal blunt trauma (Tr.652). Dr. Turner also found that the injuries in M.T.'s neck were suggestive of

strangulation[6] (Tr.653). She did not see anything else, externally or internally, that would have caused M.T.'s death (Tr.653). Dr. Turner could not give a time frame for M.T.'s death (Tr.736-737). Dr. Turner concluded that M.T's heart had not stopped before the liver lacerations because had her heart stopped, there would not have been blood in M.T.'s abdomen (Tr.654-655). Dr. Turner believed M.T. died because of the severity and location of the lacerations to her liver (Tr.656).

Detective Hyatt interviewed Ashley two times and recorded the interviews (Tr.388). The day after M.T.'s death, Ashley talked to Detective Hyatt (Tr.440;388). Ashley did not know how or what killed M.T. (Tr.439-440). Ashley stayed in a relationship with Appellant after M.T.'s death (Tr.430-440). On April 7, 2008, after Ashley learned about the autopsy results, she went to talk to Detective Hyatt again and to see the pictures of M.T. (Tr.440-441;388-389;392). After the meeting with Detective Hyatt, Ashley did not stay with Appellant (Tr.441).

The State charged Appellant committed one count of first-degree murder, one count of abuse of a child – causing death, one count of trafficking in the

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[6] Dr. Turner originally testified in a deposition that the manipulation of the neck was likely from intubation, which is the placement of a flexible plastic tube into the trachea (windpipe) to maintain an open airway or to serve as a conduit through which to administer certain drugs (Tr. 702-704). See http://en.wikipedia.org/wiki/Tracheal_intubation(last visited January 12,2011).

second degree, and one count of possession of marijuana under 35 grams (L.F.8-10). The trial court granted Appellant's motion to sever the drug counts (L.F.203). On December 14, 2009, Judge Mullen presided over the jury trial against Appellant (Tr.2;9).

At trial, the State called Neachelle Gentry, Junior, Detective Robert Jauer, Beverly Tucker, Christina Hemkens, Detective Jimmy Hyatt, Officer Doug Eatherton, Ashley Turner, Vickie Turner, Dr. James Gerard, and Dr. Jane Turner (Tr.297-743).

Junior testified that he did not know how M.T. ended up in the ambulance or why she was in the hospital (Tr.311;314). Junior did not see Appellant get mad at M.T. (Tr.311;314). Junior did not remember talking to the police about M.T., but remembered that he was a lot bigger when he talked to them (Tr.311-312).

Over defense's objection, Ashley and her mother Vicki Turner[7] testified about how Appellant burned M.T.'s hand with hot water before Christmas of 2007 (Tr.443-444;502-507). M.T.'s whole hand was scalded and blistered (Tr.444). Vicki thought it was a first or second degree burn (Tr.511). Ashley took her to the emergency room (Tr.445). M.T. was treated with antibiotics, cream and Tylenol (Tr.445). After being burned, M.T. always wanted to be with Ashley and Vicki (Tr.445;511-512). Ashley heard that the burn happened because M.T. was playing

[7] Vicki had been convicted of six counts of sexual assault, three counts of deviate sexual assault, and one count of endangering the welfare of a child (Tr.509, 513).

in the bathroom with water and the dogs tripped her (Tr.445). Later, M.T. told Ashley and Vicki that Appellant burned her hand (Tr.446).

Over the defense counsel's objection, the State requested and the court allowed Dr. Gerard to testify that M.T.'s injuries were consistent with abusive treatment (Tr.507-508). Dr. Gerard first testified it was rare to see any external signs of injury from any kind of resuscitation (Tr.524). When starting CPR in the hospital, they first use a bag mask device, which helps the patient to breathe (Tr.524). It is common to see faint redness around the mouth and nose as a result of using a bag mask device (Tr.524). After viewing M.T.'s injuries, Dr. Gerard testified the injuries were absolutely inconsistent with falling down and hitting her head from a minor fall or from chest compressions from CPR (Tr.525). Dr. Gerard did not think any kind of push or compression done properly or improperly during CPR would cause injury, unless it was a very forceful blow (Tr.529).

Dr. Gerard had never seen a liver injury caused by CPR (Tr.545;550-552). Dr. Gerard was familiar with literature about liver lacerations and CPR (Tr.547). Dr. Gerard believed whether CPR can cause liver laceration is an interesting and different topic (Tr.547). Dr. Gerard thought a liver laceration by CPR would be extremely rare (Tr.552).

Dr. Gerard trains people in CPR (Tr.553). In one study, complications are extremely rare when non-trained people perform CPR (Tr.553-554). The most common mistakes in CPR are not applying enough force with the compression or not compressing quickly enough (Tr.554).

Dr. Gerard opined that even if a very high force was delivered to the abdomen, there might not be any visible external signs of trauma (Tr.561). Bruising would depend on how easily a person bruises, the type of force, how localized, and how quick the force was (Tr.562). Dr. Gerard believed M.T.'s cause of death was liver laceration (Tr.570).

Dr. Turner testified about her autopsy results and her determination of M.T's cause of death (Tr.624-656). Dr. Turner had not seen any reliable published literature and believed that it was highly improbable that CPR could cause a liver laceration (Tr.657). Dr. Turner had never seen improperly performed CPR cause liver laceration (Tr.658).

Dr. Turner did not have any literature to support her conclusion that 30 percent of M.T.'s blood loss was sufficient to cause her death (Tr.673-674). She based her conclusion on her observations and her work at Saint Louis University in consultation with trauma surgeons (Tr.674-675).

Dr. Turner was aware that M.T. had complained of a stomach ache and vomited the night before she died (Tr.675-676). Dr. Turner agreed that a stomach ache and vomiting are consistent with trauma to the abdomen (Tr.676). Dr. Turner also agreed that a liver laceration could cause a stomach ache and vomiting (Tr.676). Dr. Turner believed that it was impossible that M.T.'s liver could have been lacerated the night before because the lacerations were next to large blood vessels, which would have resulted in rapid blood loss (Tr.676).

Dr. Turner agreed that M.T.'s left leg injury, and the injury to the left side of her lower back, and buttocks could have been sustained within a day or two and were consistent with playing and falling (Tr.706-707). When determining the cause of death, Dr. Turner agreed that patient history is just as important as the actual examination of the body and that she should use all of the information in order to determine if the physical findings are explainable and consistent with the patient history (Tr.711-712).

Defense counsel requested that the 911 tape be played to the jury, arguing it was admissible under the business records exception and under the excited utterance exception to the hearsay rule (Tr.493-499;947). The State objected and stated that the 911 call was self-serving hearsay (Tr.495-497). The trial court denied Appellant's request to play the 911 tape (Tr.498-499). Defense counsel made an offer of proof with Appellant's 911 call tape, which was marked as Appellant's Exhibit E (Tr.947). The tape was played outside the presence of the jury to the trial court (Tr.947).

The defense called Dr. Thomas Young, Dr. Mary Case, and Detective Hyatt (Tr.745-930). Defense counsel requested to ask Dr. Thomas Young how CPR can cause liver lacerations (Tr.499). The State objected because Dr. Young used Appellant's hearsay statements on the 911 call to make his determinations of how M.T. possibly died (Tr.499-500). The trial court sustained the State's objection and would not allow defense counsel to question Dr. Young (Tr.499-502).

Dr. Young is a forensic pathologist (Tr.745). Dr. Young is a former Jackson County medical examiner in private practice (Tr.751-754). Dr. Young left the Jackson County medical examiner office because he did not get along with his new elected boss (Tr.751). Dr. Young also testified that the local prosecutor was not happy with him about some case findings (Tr.878-879). Specifically, Dr. Young testified in a case to have a no-contest plea set aside (Tr.879-880). The court found Dr. Young's reasoning was not credible because Dr. Young knew the defendant's mother (Tr.879-880).

In M.T.'s case, Dr. Young reviewed the available information (Tr.749). He reviewed M.T.'s medical records, M.T.'s autopsy report including a medical legal investigator's report, photographs of M.T., and the police reports (Tr.755-756;886-887). Dr. Young's opinion to the reasonable degree of medical certainty was that lacerations to the liver did not cause M.T.'s death because the lacerations to the liver were an artifact of CPR (Tr.756;887). The repeated compressions on the chest and the abdomen were what caused the tears in the liver (Tr.756).

Dr. Young did not have any problems with the observations or documentation of Dr. Turner, but he had a problem with Dr. Turner's conclusions (Tr.795). Dr. Young was certain that the cause of death was not due to liver lacerations (Tr.796).

In the State's cross-examination of Dr. Young, the prosecutor asked what killed M.T. and Dr. Young testified her cause of death was undetermined (Tr.793-795). He was unable to state the basis for his conclusion about the cause of death

because of the court's ruling (Tr.793-795). Dr. Young testified that something was missing because there was not enough for him to be able to determine the cause of death (Tr.793-794). The State asked if Dr. Young claimed it was possible that improper CPR caused M.T.'s death or caused her liver laceration and Dr. Young replied it was his opinion that the liver lacerations were consistent with CPR (Tr.797-798).

Defense counsel requested that the trial court permit Dr. Young to testify to his opinion that CPR caused M.T.'s liver lacerations and the basis for his opinion (Tr.815). Defense counsel argued the State opened the door to the testimony on cross-examination of Dr. Young (Tr.815). The defense argued that from Dr. Young's opinion, the jury could infer the cause of death was unknown (Tr.815-820). The trial court denied the defense counsel's request (Tr.819).

In Dr. Young's opinion, M.T. would have needed to lose more than half of her blood volume to cause death (Tr.758). Since M.T. was 45 pounds, she had an estimated total blood volume of 1,640 milliliters (Tr.758). M.T. would have needed to lose more than 820 milliliters to lose over half of her blood volume (Tr.758). Dr. Young did not believe that the 500 milliliters of blood in M.T.'s abdomen was sufficient to cause her death (Tr.758;788). The autopsy report stated there was no hypoxia or tissue damage due to lack of oxygen (Tr.761). The autopsy report also stated there was no organ damage consistent with hypoxia (Tr.761).

Dr. Young believed it was possible for a person, who was untrained in CPR, to lacerate a liver by doing frantic, improper, chest or abdominal compressions (Tr.762-763). The liver is suspended in place in the body by a series of ligaments (Tr.763). The ligaments are connected to the diaphragm and to the abdominal wall (Tr.763-764). Dr. Young opined that when the body, chest wall, or even the abdomen are being pushed so that areas flatten and stretch, the ligaments are strained and pulled in different directions (Tr.764;767). As a result of the pulling of these ligaments, the liver can tear (Tr.764).

Dr. Young has four cases involving massive injury of internal organs from improperly performing CPR and he is aware of another case from Chicago (Tr.781). Dr. Young was aware of the study that complications are extremely rare when CPR is performed, but recalled the study was based on CPR performed by people who were trained in CPR (Tr.781-782).

Dr. Young did not see anything in the autopsy report to support that the blood collection on M.T.'s liver was a hemotoma, which is a collection of blood that formed a mass (Tr.764-765). Dr. Young agreed with the neuropathologist's report about the finding of bilateral brain swelling, which was normal because it is a result of lack of oxygen (Tr.768-769).

Dr. Young reviewed the photographs of M.T.'s injuries to determine if they were postmortem or antemortem (Tr.769-770). An antemortem injury occurs before the heart stops, before death, and may bleed (Tr.769). Because the heart is pumping blood, an antemortem injury may bleed and will look red (Tr.770). A

postmortem injury occurs after the heart stops pumping blood and after death (Tr.770). Postmortem injuries typically look pale because there is no bleeding (Tr.770). They will dry out and turn a tan or brown color, not red (Tr.770-771).

Dr. Young determined the injuries on M.T.'s face were postmortem (Tr.632;779-780;State Exhibit 47). Dr. Young determined the injury on M.T.'s left cheek was postmortem because it was pale (Tr.632;770-771;State's Exhibit 29 and 58). The abrasions, bruising, and swelling to M.T.'s forehead and injury above the left eyebrow were postmortem because there was no redness or bleeding (Tr.534-535;631;772-773;State Exhibits 28 and 44). Dr. Young could not determine whether the injury in the middle of M.T.'s forehead was antemortem or postmortem (Tr.633;780;State Exhibit 48).

Dr. Young determined that the large bruise on M.T.'s left forearm near her wrist was antemortem (Tr.541;771;State's Exhibit 36). The deep abrasion and bruise on M.T.'s left forearm was also antemortem (Tr.539;772;State Exhibit 34). Dr. Young could not determine whether the injuries to M.T.'s buttocks were antemortem or postmortem because after death, a lot of blood settles on a person's backside due to gravity (Tr.549;635;773-774;776-777;State Exhibit 40, 41, and 50). Dr. Young determined the stippling on M.T.'s chin was postmortem because it was pale (Tr.536;774-775;State's Exhibit 30).

Dr. Young determined the color change in the chin was postmortem injury, but the darkish-red-brown injury to the lip area was antemortem (Tr.537;631;775-776;State Exhibit 31 and 45). The darkish-red injury on M.T.'s left leg appeared

antemortem (Tr.637;777;State's Exhibit 49). The injuries on M.T.'s palm and thumb were antemortem (Tr. 538;777;State's Exhibit 32). The injury to M.T.'s left side was postmortem (Tr. 543;777-778;State's Exhibit 39). Dr. Young could not determine whether the injury to M.T.'s lower back was postmortem or antemortem (Tr.635-636;778;State's Exhibit 52). The dot-like scars on the skin above the belly button and small abrasions on the upper abdomen, and areas of redness to M.T.'s abdomen were recent antemortem (Tr.542;778-779;State's Exhibit 38).

Dr. Young did not see anything wrong with M.T.'s heart after reviewing six general heart tissue slides (Tr.791;895). Dr. Young asked for additional heart tissue slides, but there were not any additional slides available (Tr.792;892). Dr. Young did not believe the heart was examined thoroughly enough (Tr.892). Dr. Young opined that a heart can stop even if it looks structurally normal (Tr.782).

Dr. Young opined, hypothetically, if a child is in a bathtub with hot water and goes into cardiac arrest, injuries on the body could be postmortem even though the skin is not being supplied with any blood supply, the water can delude the postmortem (Tr.788). Dr. Young opined that the findings on M.T. were consistent with the hypothetical (Tr.788).

Dr. Mary Case examined M.T.'s brain (Tr.905-906). Her brain was normal with no evidence of any puss, exudates, or hemorrhage (Tr.909;910). There was no cerebral edema (Tr.912;915).

Before the defense rested, defense counsel made an offer of proof with Detective Hyatt on the video reenactment with Appellant (Tr.937-946). Detective Hyatt explained the St. Louis Police Department always recreates the scene after a child's death to get the defendant's version of the child's death and to help with the report writing (Tr.938;941-942). The video reenactment tape was marked as Defense Exhibit D and played to the court (Tr.946).

Additionally, defense counsel made an offer of proof on Appellant's 911 call tape, which was marked as Appellant's Exhibit E (Tr.947). The tape was played outside the presence of the jury to the trial court (Tr.947).

Further, defense counsel made an offer of proof that Dr. Young would have explained how liver lacerations may be caused by improper CPR (Tr.947-950). Dr. Young would have testified that based on the information that he had about the 911 operator's instructions to Appellant on how to properly perform CPR after Appellant had already improperly performed CPR for some time, and the continuous pressure to the area where the liver is located caused the liver to lacerate (Tr.948-949). Dr. Young also would have testified the cause of death was undetermined because he knew that M.T. went into cardiac arrest and the liver laceration did not produce enough blood to cause her death (Tr.949). Dr. Young would have testified that without more information, he could not tell what the actual cause of death was because he did not have enough heart tissue to work with to decide what caused her heart to stop (Tr.949). Further, Dr. Young would have testified that M.T.'s postmortem injuries would have been from the fall in the

bathroom when she hit her forehead and face on the faucet after she went into cardiac arrest and any splashing of water to the face could have deluded the postmortem appearance of her facial injuries (Tr.949-950).

A jury found Appellant guilty of murder in the second degree and abuse of a child – causing death (L.F.238-242;Tr.1007-1008). Trial counsel timely filed the motion for new trial on December 21, 2009 (L.F. 244-259). On February 19, 2010, the trial court denied Appellant's motion for new trial (L.F.244-259;Tr.1023-1024). Judge Mullen sentenced Appellant to to two concurrent terms of twenty-five years of imprisonment in the Missouri Department of Corrections (L.F.260-263;Tr.1029). Appellant timely filed his notice of appeal on February 22, 2010 (L.F.265-268).

To avoid repetition, further facts may be set forth in the Argument portion of this brief.

POINTS RELIED ON

I.

The trial court erred in precluding Appellant from introducing and playing Appellant's 911 call as Appellant's Exhibit E because the 911 call contained statements that qualified under the excited utterance exception to hearsay and it was fundamentally unfair to prohibit the admission of the 911 tape as an exhibit in that it substantially prejudiced Appellant and affected the outcome of the trial. The exclusion of the 911 call denied Appellant's rights to due process of law, to present a defense, and to a fair trial in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. The exclusion of 911 tape had a decisive effect on the jury's verdict.

State v. Boyland, 728 S.W.2d 583(Mo.App.E.D.1987);

State v. Williams, 673 S.W.2d 32(Mo.banc1984);

U.S.Constitution,Amendments V,VI,andXIV;and,

Missouri Constitution,Article I,Sections 10 and 18(a).

II.

The trial court erred in precluding Appellant from introducing and playing Appellant's reenactment video as Appellant's Exhibit D because the reenactment video was a part of the police investigation, the State opened the door to this evidence, and it was fundamentally unfair to prohibit the admission of Appellant's reenactment video. Its exclusion substantially prejudiced Appellant and affected the outcome of the trial. The exclusion of the video reenactment denied Appellant's rights to due process of law, to present a defense, and to a fair trial in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. The excluded video had a decisive effect on the jury's verdict.

State v. Anderson, 862 S.W.2d 425(Mo.App.E.D.1993);

State v. Richardson, 838 S.W.2d 122(Mo.App.E.D.1992);

U.S.Constitution,Amendments V,VI,andXIV;and,

Missouri Constitution,Article I,Sections 10 and 18(a).

III.

The trial court erred and abused its discretion in overruling Appellant's objection and request for a mistrial when the prosecutor elicited evidence from Ashley and Vicki that Appellant had burned M.T.'s hand with hot water because the evidence was not legally relevant, was more prejudicial than probative of Appellant's commission of the charged crimes, and deprived Appellant of his rights to due process, to a fair trial, and to be tried only for the charged offenses in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10, 17 and 18(a) of the Missouri Constitution, in that the jury used it as improper propensity evidence and substantive evidence of Appellant's guilt. This evidence was unnecessary to the jury's deliberation of Appellant's guilt, more prejudicial than probative, and played a decisive role in the jury's determination of Appellant's guilt.

State v. Clover, 925 S.W.2d 853(Mo.banc1996);

State v. Wren, 643 S.W.2d 800(Mo.1983);

U.S.Constitution,Amendments V,VI,andXIV;and,

Missouri Constitution,Article I,Sections 10,17,and 18(a).

IV.

The trial court erred and abused its discretion in permitting Dr. James Gerard to testify over defense counsel's objection that injuries on M.T. were indicative of child abuse in violation of Appellant's rights to due process of law, to a fair trial, and to be judged by a fair and impartial fact-finder, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the testimony was outside the doctor's expertise for which he was qualified to testify, and invaded the province of the finder of fact on the ultimate issue of Appellant's guilt. Dr. Gerard's improper testimony had a decisive effect on the jury's verdict.

State v. Clements, 789 S.W.2d 101(Mo.App.S.D.1990);

State v. Hendrix, 883 S.W.2d 935(Mo.App.W.D.1994);

U.S.Constitution,Amendments V,VI,andXIV;and,

Missouri Constitution,Article I,Sections 10 and 18(a).

V.

The trial court abused its discretion in excluding Dr. Thomas Young's testimony that (1) M.T.'s liver lacerations were caused by improper CPR; (2) the cause of death was undetermined because he knew that M.T. went into cardiac arrest and the liver laceration did not produce enough blood to cause her death; (3) without more information, he could not tell what the actual cause of death because he did not have enough heart tissue with which to decide what caused her heart to stop; and, (4) M.T.'s postmortem injuries would have been from the fall in the bathroom when she hit her forehead and her face on the faucet after she went into cardiac arrest and any splashing of water to the face could have deluded the postmortem appearance of her facial injuries in violation of Appellant's rights to due process of law, a fair trial, and to be judged by a fair and impartial fact-finder, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the testimony was not solely based on Appellant's statements, but also on the statements by emergency personnel in the police reports and further, the State opened the door to this testimony by asking Dr. Young on cross-examination what was the cause of death and why it was undetermined. Dr. Young's testimony would have had a decisive effect on the jury's verdict.

State v. Candela, 929 S.W.2d 852(Mo.App.E.D.1996);

State v. Haslett, 283 S.W.3d 769(Mo.App.S.D.2009);

U.S.Constitution,Amendments V,VI,andXIV;and,

Missouri Constitution,Article I,Sections 10and18(a).

VI.

The trial court erred in denying Appellant's motion for judgment of acquittal at the close of the evidence and in entering judgment and sentence against Appellant for conventional murder in the second degree and abuse of a child resulting in death, in violation of Appellant's rights against double jeopardy, to due process and to a fair trial, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I, Sections 10 and 18(a) of the Missouri Constitution, and Section 556.041 because Appellant's convictions and sentences for murder in the second degree and for abuse of a child resulting in death constitute multiple punishments for the same offense, in that striking M.T. constituted a single, indivisible continuous transaction, so that no distinct or separate act upon which to predicate abuse of a child resulting in death exists.

State v. Nichols, 865 S.W.2d 435(Mo.App.E.D.1993);

State v. Johnson, 245 S.W.3d 288(Mo.App.W.D.2008);

Sections 556.041,565.020,and568.060;

U.S.Constitution,Amendments V,VI,andXIV;and,

Missouri Constitution,Article I,Sections 10 and 18(a).

ARGUMENTS

I.

The trial court erred in precluding Appellant from introducing and playing Appellant's 911 call as Appellant's Exhibit E because the 911 call contained statements that qualified under the excited utterance exception to hearsay and it was fundamentally unfair to prohibit the admission of the 911 tape as an exhibit in that it substantially prejudiced Appellant and affected the outcome of the trial. The exclusion of the 911 call denied Appellant's rights to due process of law, to present a defense, and to a fair trial in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. The exclusion of 911 tape had a decisive effect on the jury's verdict.

Preservation of Error

Defense counsel requested that the 911 tape be played to the jury and argued it was admissible under the business records exception and the excited utterance exception to the hearsay rule (Tr.493-499;947). The State objected on the basis that the 911 call was self-serving hearsay (Tr.495-497). The trial court denied Appellant's request to play the 911 tape (Tr.498-499). Defense counsel made an offer of proof with Appellant's 911 call tape, which was marked as Appellant's Exhibit E (Tr.947). The tape was played outside the presence of the jury to the trial court (Tr.947).

Appellant included this error in a timely filed motion for new trial which was denied (L.F.253-255;Tr.1023-1024). Should this Court determine that the point is not properly preserved, plain error review is requested. Rule 30.20.

Standard of Review

It is recognized that utterances made under stressful circumstances and relating to the event producing the stress have sufficient reliability to require that they be considered by the trier of the fact, rather than being excluded at the threshold by the trial judge. State v. Williams, 673 S.W.2d 32, 34 (Mo.banc1984). The trial judge has a measure of discretion and does not have to admit studied attempts at exculpation but the question of admissibility is basically a question of law subject to appellate review. Id. at 35.

Analysis

The Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." Crane v. Kentucky, 476 U.S. 683, 688 (1986). The denial of the opportunity to present relevant and competent evidence negating an essential element of the State's case may constitute denial of due process. State v. Ray, 945 S.W.2d 462, 469 (Mo.App.W.D.1997). Further, a defendant has a constitutional right to a fair and impartial trial. State v. Hill, 817 S.W.2d 584, 587 (Mo.App.E.D.1991).

An alleged "excited utterance" is viewed by Missouri courts as presumably inadmissible because it is hearsay. State v. Kemp, 919 S.W.2d 278, 280 (Mo.App. W.D.1996). The party offering the statement as an exception to the rule against

hearsay has the burden of making a sufficient showing of spontaneity to render the statement admissible. Id. Moreover, "[t]he utterance must be made under the immediate and uncontrolled dominion of the senses and during the time when consideration of self-interest could not have been brought to bear through reflection or premeditation." Id.

If a statement otherwise meets the "excited utterance" test it should not be excluded simply because it is helpful to the declarant's position.[8] The trial court's discretion is not a complete answer. See extensive discussion, Straughan v. Asher, 372 S.W.2d 489, 496 (Mo.App.1963). The proponent of evidence does not have to show that the evidence is without flaw, or that the jury could not find it to be reflective rather than spontaneous, if it meets the general standards for admissibility. See State v. Williams, 673 S.W.2d 32, 35 (Mo.banc 1984). Utterances coming so soon after exciting incident, and demonstrative of the defendant's intent, should be weighed by the jury rather than by the trial judge. See Id.

In State v. Griffin, 662 S.W.2d 854, 858 (Mo.banc1983), the Supreme Court gave a rather wide application to the excited utterance exception and held

[8] Kuzuf v. Gebhardt, 602 S.W.2d 446, 452 (Mo.banc1980); Bennette v. Hader, 87 S.W.2d 413, 416 (Mo.1935); Walsh v. Table Rock Asphalt Construction Company, 522 S.W.2d 116, 121 (Mo.App.Spd.1975).

that statements which are essentially testimonial may qualify as excited utterances if made under conditions of stress.

Missouri Courts have routinely found statements on 911 tapes constituted excited utterances. See State v. Hedges, 193 S.W.3d 784, 788 (Mo.App.E.D.2006)(holding that statements by the wife during a 911 call shortly after part of her ear had been bitten off by Defendant were admissible as an excited utterance); State v. Bennett, 218 S.W.3d 604, 612 (Mo.App.S.D.2007) (holding both 911 calls were admissible as excited utterances to show that the 911 dispatcher's questions and the victim's answers constituted an interrogation conducted to enable police assistance to meet an ongoing emergency).

The trial court erred in excluding Appellant's 911 call as an excited utterance because the proper foundation was laid in order to admit and play Appellant's Exhibit E to the jury (Tr.493-499;947). The State conceded that the 911 tape was filed under the business records exception (Tr.493-499;945-947;498-499).

The State's objection for excluding the 911 tape was that it was self-serving hearsay from Appellant (Tr.495-496). Appellant's 911 call was made as he frantically performed CPR on M.T.'s body. See Appellant's Exhibit E. As he received instructions about performing CPR, Appellant made statements indicating that he was not sure if M.T. was alive. See Appellant's Exhibit E; See Williams, 673 S.W.2d at 34(holding defendant's statements uttered within 15 seconds of shooting were admissible under excited utterance);State v. Boyland,

728 S.W.2d 583, 585 (Mo.App.E.D.1987)(holding statements made by defendant to witnesses immediately after fatal shooting were admissible as excited utterance and it was for jury to determine whether these statements were reflective rather than spontaneous).

Appellant was prejudiced by the trial court's refusal to admit and play the 911 call because the jury did not get to hear evidence of who made the 911 call and when it was made (L.F.253). Additionally, Appellant was prejudiced because the jury did not hear evidence that Appellant called 911 within minutes or less of M.T. going into cardiac arrest and there was no evidence to the contrary (L.F.253-254).

It affected the jury's verdict. The jury was led to believe that Appellant never called 911(Tr.437-438). There was only Ashley's testimony that she called Appellant around 8:00 or 9:00 a.m. to see if the kids were up, and Appellant called Ashley during her lunch break, making her go straight to the apartment (Tr.437-438). Appellant was prejudiced because the jury did not hear a complete picture of the morning M.T. died. See Appellant's Exhibit E. By playing the 911 tape, the jury would have been able to hear panic in Appellant's voice and his struggling to do all in his power to frantically perform CPR on M.T.'s body. See Appellant's Exhibit E.

If this Court determines the trial court erroneously excluded the 911 tape, Appellant anticipates that the State will argue that the evidence of guilt was overwhelming. But this was a close case as evidenced by the expert disagreement

on the cause of death, the jury's approximate five hours of deliberation, and the three jury questions during deliberations (Tr.652;570;947-950;1002-1008;L.F. 237). Two of the jury's questions were about viewing all of the evidence, including photos and medical records, and these questions showed the jury was considering all of the available evidence in determining M.T.'s cause of death because the jury was not uncertain (Tr.1002-1008;L.F.237).

The trial court erred in precluding Appellant from introducing and playing Appellant's 911 call as Appellant's Exhibit E because the 911 call contained statements that qualified under the excited utterance exception to hearsay and it was fundamentally unfair to prohibit the admission of the 911 tape as an exhibit in that it substantially prejudiced Appellant and affected the outcome of the trial. The exclusion of 911 tape had a decisive effect on the jury's verdict. This Court should reverse Appellant's convictions and remand for a new trial.

II.

The trial court erred in precluding Appellant from introducing and playing Appellant's reenactment video as Appellant's Exhibit D because the reenactment video was a part of the police investigation, the State opened the door to this evidence, and it was fundamentally unfair to prohibit the admission of Appellant's reenactment video. Its exclusion substantially prejudiced Appellant and affected the outcome of the trial. The exclusion of the video reenactment denied Appellant's rights to due process of law, to present a defense, and to a fair trial in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. The excluded video had a decisive effect on the jury's verdict.

Preservation of Error

Before the defense rested, defense counsel made an offer of proof with Detective Hyatt about the video reenactment tape with Appellant (Tr.937-946). Appellant included this error in a timely filed motion for new trial, which was denied (L.F.257;Tr.1023-1024). Should this Court determine that the point is not properly preserved, plain error review is requested. Rule 30.20.

Standard of Review

The trial court has broad discretion in determining the admissibility of evidence. State v. Johnson, 207 S.W.3d 24, 42 (Mo.banc2006). However, it does not have unfettered discretion. Williams, 673 S.W.2d at 32. When a trial court

abuses its discretion in admitting evidence, reversal is appropriate. Id. The decision to admit evidence is an abuse of discretion where it is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration. State v. Dismang, 151 S.W.3d 155, 160-161 (Mo.App.S.D.2004).

Factual Background

During the State's direct examination, Detective Hyatt testified about a reenactment video made with Appellant (Tr.381). Before taking Appellant back to the homicide office, Detective Hyatt did the scene reenactment video with Appellant (Tr.381-382). Before the defense rested, defense counsel conducted an offer of proof with Detective Hyatt about the video reenactment tape with Appellant (Tr.937-946). Detective Hyatt explained the St. Louis Police Department always recreates the scene after a child death to get the defendant's version of the child's death and to help with the report writing (Tr.938;941-942). The video reenactment tape was marked as Defense Exhibit D and played to the court (Tr.946).

Analysis

The Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." Crane, 476 U.S. at 688. The denial of the opportunity to present relevant and competent evidence negating an essential element of the State's case may constitute denial of due process. State v. Ray, 945

S.W.2d 462, 469 (Mo.App.W.D.1997). Further, a defendant has a constitutional right to a fair and impartial trial. State v. Hill, 817 S.W.2d 584, 587 (Mo.App.E.D.1991).

Motion pictures or videotapes are admissible if they are relevant and their prejudicial effect does not outweigh their probative value. State v. Mease, 842 S.W.2d 98, 108 (Mo.banc1992). Videotaped confessions and crime scene videos are admissible. State v. Anderson, 862 S.W.2d 425, 431-432 (Mo.App.E.D.1993); State v. Richardson, 838 S.W.2d 122, 124-125 (Mo.App.E.D.1992). Courts have expressed concerns, however, about the dangers associated with an actor playing the role of the defendant in a crime scene videotape. See e.g., State v. Caudill, 789 S.W.2d 213, 215-216 (Mo.App.W.D.1990).

The State's objection to the video reenactment was that it included exculpatory statements from Appellant (Tr.386-387). Here, the trial court abused its discretion in excluding Appellant's reenactment video because it was a part of the police investigation (Tr.938;941-942). "[A]n out-of-court statement offered not for the truth of the matter asserted, but to explain subsequent police conduct, is not hearsay and is therefore, admissible assuming it is relevant." State v. Douglas, 131 S.W.3d 818, 824 (Mo.App.W.D.2004). "It is well established that such testimony is admissible to explain the officer's conduct, supplying relevant background and continuity to the action." State v. Brooks, 618 S.W.2d 22, 25 (Mo.banc1981). "However, when such out-of-court statements go beyond what is

necessary to explain subsequent police conduct, they are hearsay." Douglas, 131 S.W.3d at 824.

The reenactment video would have shown the jury a complete picture of the apartment, what Appellant appeared like that day, and why the police continued to investigate. See Appellant's Exhibit D. See State v. Barnes, 345 S.W.2d 130, 132 (Mo.1962)(holding testimony as to a statement tending to explain subsequent conduct of the testifying witness is admissible); State v. Brooks, 618 S.W.2d 22, 25 (Mo.banc1981)(holding police officer's testimony of informant's observation properly offered to show police officer's conduct).

Appellant was prejudiced by the trial court's refusal to admit and play the reenactment video because the jury did not get to see and hear evidence of what was a basis for the subsequent police conduct in this case. Additionally, Appellant was prejudiced because the jury heard evidence that there was a reenactment video without being allowed to see it (Tr.381). Consequently, jurors were allowed to speculate as to what this tape contained (Tr.381).

It affected the jury's verdict. Appellant was prejudiced because the jury did not get a complete picture of the apartment, what Appellant appeared like that day, and why the police continued to investigate the jury hear a complete picture of the morning M.T. died. See Appellant's Exhibit D.

If this Court finds that the State's objection based on hearsay was meritorious, then Appellant argues the trial court should have permitted Appellant

to play the video reenactment because the State opened the door to the video during its direct examination of Detective Hyatt (Tr.381).

A party can waive its right to claim error on appeal by eliciting the inadmissible evidence itself, either directly by counsel's own questions, or indirectly by counsel's elicitation of some testimony from the witness that "opens the door" or "invites opposing counsel to respond in kind." John O'Brien, *THE HEARSAY WITHIN CONFRONTATION*, 29 St.LouisU.Pub.L.Rev. 501, 540 (2010) citing Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence Section 103.14 (2ded.1997).

The trial court in erred finding that Detective Hyatt's testimony glossed over the reenactment quickly and did not open the door (Tr.386-387). In this case, Detective Hyatt testified about a reenactment video made with Appellant (Tr.381). Before taking Appellant back to the homicide office, Detective Hyatt did the scene reenactment video with Appellant (Tr.381-382). Policemen are experienced witnesses who normally have a duty to testify about matters involving their official conduct. See e.g. Briscoe v. LaHue, 460 U.S. 325, 366 (1983). Here, the State was required to inform Detective Hyatt not to talk about the video reenactment if the State did not want to open the door to this evidence (Tr.386-387). Consequently, once Detective Hyatt talked about the reenactment, the door was opened for Appellant to play the reenactment tape.

If this Court finds the reenactment was erroneously excluded, Appellant anticipates that the State will argue that the evidence was overwhelming. But this

was a close case evidenced by the expert disagreement on the cause of death, the jury's approximate five hours of deliberation, and the three jury questions during deliberations (Tr.652;570;947-950;1002-1008;L.F. 237). Two of the jury's questions were about viewing all of the evidence, including photos and medical records, and these questions showed the jury was considering all of the available evidence in determining M.T.'s cause of death because the jury was not uncertain (Tr.1002-1008;L.F. 237).

The trial court erred in precluding Appellant from introducing and playing Appellant's reenactment video as Appellant's Exhibit D because the reenactment video was a part of the police investigation, the State opened the door to this evidence, and it was fundamentally unfair to prohibit the admission of Appellant's reenactment video. Its exclusion substantially prejudiced Appellant and affected the outcome of the trial. The excluded video had a decisive effect on the jury's verdict. This Court should reverse Appellant's convictions and remand for a new trial.

III.

The trial court erred and abused its discretion in overruling Appellant's objection and request for a mistrial when the prosecutor elicited evidence from Ashley and Vicki that Appellant had burned M.T.'s hand with hot water because the evidence was not legally relevant, was more prejudicial than probative of Appellant's commission of the charged crimes, and deprived Appellant of his rights to due process, to a fair trial, and to be tried only for the charged offenses in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10, 17 and 18(a) of the Missouri Constitution, in that the jury used it as improper propensity evidence and substantive evidence of Appellant's guilt. This evidence was unnecessary to the jury's deliberation of Appellant's guilt, more prejudicial than probative, and played a decisive role in the jury's determination of Appellant's guilt.

Preservation of Error

Over defense's objection, Ashley testified about how Appellant burned M.T.'s hand with hot water before Christmas of 2007 (Tr.443-446). Before Vicki testified, defense counsel objected to Vicki's testimony about this burn incident (Tr.502-507). At first, the trial court agreed with defense counsel and found no hearsay exception permitted the evidence (Tr.504). Defense counsel requested both a mistrial and an instruction as a remedy, but both were denied (Tr.505-506).

The State argued Vicki would testify about how M.T. acted differently after her hand was burned and the relationships between everybody (Tr.506).

In Appellant's motion for a new trial, defense counsel alleged trial court error in overruling Appellant's objections to Ashley's and Vicki's testimony and in overruling his request for a mistrial based on evidence of uncharged crimes (L.F.252-253). The court overruled Appellant's new trial motion (L.F.244-259;Tr.1023-1024).

Because Appellant made timely objections to the evidence at trial and included a claim of error about the admission of the evidence in his new trial motion, he has preserved this point. Rule 29.11(d). Should this Court determine that the point is not properly preserved, plain error review is requested. Rule 30.20.

Standard of Review

The trial court has broad discretion in determining the admissibility of evidence. Johnson, 207 S.W.3d at 42. However, it does not have unfettered discretion. Williams, 673 S.W.2d at 35. When a trial court abuses its discretion in admitting evidence, reversal is appropriate. Id. The decision to admit evidence is an abuse of discretion where it is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration. Dismang, 151 S.W.3d at 160-161.

Review of a trial court's ruling on a motion for a mistrial is for an abuse of discretion. State v. Clover, 925 S.W.2d 853, 856 (Mo.banc1996). Because a mistrial is a "drastic remedy," it should only be granted in extraordinary circumstances. Id. An admonition to the jury "generally cures the prejudicial effect of prosecutorial comment." State v. Wren, 643 S.W.2d 800, 802 (Mo.1983).

Facts

Over defense's objection, Ashley and Vicki testified about how Appellant burned M.T.'s hand with hot water before Christmas of 2007 (Tr.443-444;502-507). M.T.'s whole hand was scalded and blistered (Tr.444). Vicki thought it was a first or second degree burn (Tr.511). Ashley took her to the emergency room (Tr.445). M.T. was treated with antibiotics, cream, and Tylenol (Tr.445). After being burned, M.T. always wanted to be with Ashley and Vicki (Tr.445;511-512). Ashley heard that the burn happened because M.T. was playing in the bathroom with water and the dogs tripped her (Tr.445). Later, M.T. told Ashley and Vicki that Appellant burned her hand (Tr.446). Dr. Turner testified that the scar on the back of M.T.'s right hand was a previously healed thermal injury that was not associated with her death (Tr.627).

Argument

Evidence of uncharged crimes or prior misconduct of a defendant "is admissible if the evidence is logically relevant, in that it has some legitimate tendency to establish directly the accused's guilt of the charges for which he is on

trial ... and if the evidence is legally relevant, in that its probative value outweighs its prejudicial effect." Clover, 925 S.W.2d at 855. Although evidence of other, uncharged crimes may be admitted to show motive, intent, the absence of mistake or accident, common scheme or plan, or the identity of the person charged, such evidence should be excluded where "the prejudicial effect outweighs the necessity for and probative value of the testimony." State v. Collins, 669 S.W.2d 933, 936 (Mo.banc1994).

Evidence of uncharged, collateral criminal conduct is prejudicial to a defendant because it "may result in a conviction founded upon crimes of which the defendant is not accused." State v. Shaw, 636 S.W.2d 667, 671 (Mo.banc1982). It also forces an accused "to defend any number of charges about which the indictment gives him no information." State v. Atkinson, 293 S.W.2d 941, 944 (Mo.1956). Furthermore, it may lead the jury to convict the defendant simply because he is a "bad man" or "tempt[] the jury to find the defendant guilty of being a criminal rather than being guilty of the particular crime charged." State v. Garrett, 825 S.W.2d 954, 957 (Mo.App.E.D.1992).

The finding of prejudice based on collateral evidence of other crimes or wrongdoing is not limited to situations where an actual crime or conviction has occurred. These "principles clearly cover any wrongdoing that could have been the subject of a criminal charge and probably cover other wrongful acts and conduct to the extent that [such acts or conduct could convey] to the jury the type of prejudice that accompanies a disclosure that the defendant has engaged in

criminal conduct." State v. Sladek, 835 S.W.2d 308, 313 n. 1 (Mo.banc1992) (Thomas, J., concurring); see also State v. Bernard, 849 S.W.2d 10, 13 (Mo.banc1993) (stating, "The general rule concerning the admission of evidence of uncharged crimes, wrongs, or acts is that evidence of prior uncharged misconduct is inadmissible for the purpose of showing the propensity of the defendant to commit such crimes").

Evidence of other crimes, wrongs, or acts is generally inadmissible because "showing the defendant's propensity to commit a given crime is not a proper purpose for admitting evidence, [as] such evidence 'may encourage the jury to convict the defendant because of his propensity to commit such crimes without regard to whether he is actually guilty of the crimes charged.'" State v. Burns, 978 S.W.2d 759, 761 (Mo.banc1998). The admission of such evidence violates the defendant's right to be tried only for the offenses charged in the indictment or information. Mo.Const.,Art.I,Section 17; see also State v. Dunn, 309 S.W.2d 643, 645 (Mo. banc1958).

Evidence of other, uncharged misconduct has a legitimate tendency to prove the specific crime charged when it tends to establish: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; or (5) the identity of the person charged with the commission of the crime on trial. Bernard, 849 S.W.2d at 13. The five enumerated exceptions have sometimes been difficult to define and apply. Id.

Evidence of prior misconduct that does not fall within one of the five enumerated exceptions may nevertheless be admissible if the evidence is logically and legally relevant. Id.

In Appellant's case, none of the Bernard exceptions apply. Ashley's and Vicki's statements had no probative value in proving that Appellant was guilty of the charged crimes (Tr.443-446;502-507). Furthermore, the admission of the prejudicial evidence forced Appellant to defend against evidence that Appellant burned M.T.'s hand with hot water before Christmas of 2007 (Tr.443-444;502-507).

In analyzing the prejudicial effect of references to other crimes evidence, the courts generally examine five factors:

> 1) whether the statement was, in fact, voluntary and unresponsive [to the prosecutor's questioning if the prosecutor asked the question] ... or whether the prosecution "deliberately attempted to elicit" the comments ...; 2) whether the statement was singular and isolated, and whether it was emphasized or magnified by the prosecution, ...; 3) whether the remarks were vague and indefinite, or whether they made specific reference to crimes committed by the accused, ...; 4) whether the court promptly sustained defense counsel's objection to the statement, ... and instructed the jury to disregard the volunteered statement, ...; and 5) whether in view of the other evidence

presented and the strength of the state's case, it appeared that the comment played a decisive role in the determination of guilt.

State v. Costa, 11 S.W.3d 670, 677 (Mo.App.W.D.1999).

First, Ashley's and Vicki's testimony was responsive to the prosecutor's questioning (Tr.443-444, 502-507); State v. Silas, 885 S.W.2d 716, 720 (Mo.App. W.D.1994). Second, the testimony was not singular and isolated (Tr.443-444;502-507). Id. Third, the testimony was not vague or indefinite, but was a specific reference to potential uncharged crimes of endangering the welfare of a child, assault in the second degree, or abuse of child because Ashley and Vicki testified that Appellant burned M.T.'s hand. See Sections 568.050,565.050,and 568.060.

Fifth, this Court considers whether in view of the other evidence presented and the strength of the State's case, it appeared that the comment "played a decisive role in the determination of guilt." Costa, 11 S.W.3d at 677.

This was a close case evidenced by the expert disagreement on the cause of death, the jury's approximate five hours of deliberation, and the three jury questions during deliberations (Tr.652;570;947-950;1002-1008;L.F.237). Two of the jury's questions were about viewing all of the evidence, including photos and medical records, and these questions showed the jury was considering all of the available evidence in determining M.T.'s cause of death because the jury was not uncertain (Tr.1002-1008;L.F.237).

Further, Dr. Turner testified that the scar on the back of M.T.'s right hand was a previously healed thermal injury that was not associated with her death

(Tr.627). At trial, there is no evidence that Appellant made self-incriminating statements or statements indicating consciousness of guilt. State v. Wiley, 522 S.W.2d 281, 292-93 (Mo.banc1975); State v. Dreiling, 830 S.W.2d 521, 524-25 (Mo.App.W.D.1992). Since the State's evidence of Appellant's guilt was not overwhelming, Ashley and Vicki's testimony had a decisive effect on the jury.

The trial court, therefore, violated Appellant's constitutional rights and abused its discretion in allowing the State to elicit, over defense objection, Ashley's and Vicki's testimony that Appellant had burned M.T.'s hand. Such prejudicial evidence could only lead to the "spurious presumption of guilt in the minds of the jurors." Clover, 924 S.W.2d at 856. The error was prejudicial because the jury inferred Appellant's criminal propensity from the testimony.

The testimony played a decisive role in the jury's determination of Appellant's guilt (Tr.443-446;502-507). By allowing the State to continue to question both Ashley and Vicki, the court condoned the State's act of eliciting the improper references. See Collins, 669 S.W.2d at 936 (stating, "[t]he trial court expressly sanctioned the improper evidence by overruling the objection and allowing the examination to continue"). Although an admonition to the jury "generally cures the prejudicial effect of prosecutorial comment," Wren, S.W.2d at 802, that did not happen in this case and the prejudice to the defendant cannot be ignored.

The trial court erred and abused its discretion in overruling Appellant's objection and request for a mistrial when the prosecutor elicited evidence from

Ashley and Vicki that Appellant had burned M.T.'s hand with hot water because the evidence was not legally relevant, was more prejudicial than probative of Appellant's commission of the charged crimes, in that the jury used it as improper propensity evidence and substantive evidence of Appellant's guilt. This evidence was unnecessary to the jury's deliberation of Appellant's guilt, more prejudicial than probative, and played a decisive role in the jury's determination of Appellant's guilt. This Court should reverse Appellant's convictions and remand for a new trial.

IV.

The trial court erred and abused its discretion in permitting Dr. James Gerard to testify over defense counsel's objection that injuries on M.T. were indicative of child abuse in violation of Appellant's rights to due process of law, to a fair trial, and to be judged by a fair and impartial fact-finder, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the testimony was outside the doctor's expertise for which he was qualified to testify, and invaded the province of the finder of fact on the ultimate issue of Appellant's guilt. Dr. Gerard's improper testimony had a decisive effect on the jury's verdict.

Preservation of Error

Over defense counsel's objection, the State requested and the court allowed Dr. Gerard to testify that M.T.'s injuries were consistent with abusive treatment (Tr.507-508;545). In Appellant's motion for a new trial, defense counsel alleged trial court error in overruling Appellant's objection and allowing Dr. Gerard to testify that injuries on M.T. were indicative of child abuse because there was no foundation for his testimony (L.F. 251). The court overruled Appellant's new trial motion (L.F. 244-259;Tr. 1023-1024).

Because Appellant made timely objections to the evidence at trial and included a claim of error about the admission of the evidence in his new trial motion, he has preserved this point. Rule 29.11(d). Should this Court determine

that the point is not properly preserved, plain error review is requested. Rule 30.20.

Standard of Review

Admission of expert testimony is within the sound discretion of the trial court. State v. Sloan, 915 S.W.2d 592, 596 (Mo.App.E.D.1995). And as a general rule, an expert may testify to his or her opinion regarding an ultimate issue in a criminal case. State v. Candela, 929 S.W.2d 852, 867 (Mo.App.E.D.1996). Nonetheless, an expert witness may not invade the province of the fact-finder. State v. Hendrix, 883 S.W.2d 935, 940 (Mo.App.W.D.1994). An expert's opinion "should never be admitted unless it is clear that the jurors themselves are not capable, for want of experience of knowledge of the subject, to draw correct conclusions from the facts proved. Sloan, supra.

Analysis

Dr. Gerard is a physician at St. Louis University and works at Cardinal Glennon Children's Medical Center (Tr.517). He tried to resuscitate M.T. (Tr.522-523). Dr. Gerard was not qualified as an expert in the area of child abuse (Tr.517-615). Dr. Gerard testified that he would absolutely have considered M.T.'s injuries consistent with abusive behavior or suspicion of abusive types of injuries (Tr.545).

Dr. Gerard's opinion should never have been admitted because it is clear that the jurors themselves were capable of drawing their own conclusions whether M.T.'s injuries were consistent with child abuse. His "opinion" was based on

nothing more than M.T.'s injuries (Tr.545). How is that conclusion beyond the capability of the fact-finder to draw? Obviously it is not beyond the capability of a layperson. Despite his experience in the emergency room, Dr. Gerard could point to nothing beyond the ability of a layperson which he possessed to draw this conclusion (Tr.545). That simply fails the test.

Not only was Dr. Gerard's testimony outside the scope of his expertise, but it also went to the motive and the mental state of Appellant on the issue of whether Appellant had abused M.T. This invaded the province of the fact-finder, the jury, to determine the motive of the person committing the acts. The Southern District Court of Appeals noted the distinction between opinion evidence of a mental condition that may be relevant on the issue of intent and opinion evidence of the existence of that intent. State v. Clements, 789 S.W.2d 101, 109 (Mo.App.S.D.1990). The latter is impermissible. Id. Dr. Gerard's opinion went to the existence of an intent to commit child abuse, went to an attempt to commit child abuse, and impermissibly invaded the province of the fact-finder. See, e.g., State v. Taylor, 663 S.W.2d 235, 240-241 (Mo.banc1984)(holding inadmissible testimony from a psychiatrist that the victim was not fantasizing when she described the rape);State v. Williams, 858 S.W.2d 796, 800-801 (Mo.App.E.D.1993)(holding inadmissible testimony from a doctor who said that sexually abused children "essentially don't lie");State v. Foster, 244 S.W.3d 800, 803 (Mo.App.S.D.2008) (holding inadmissible testimony from a doctor that most

of his sexual-abuse complainants are telling the truth based on his years of training and experience in giving him a sense about children's truthfulness).

Therefore, the improper testimony prejudiced Appellant. Because the trial court erred in admitting Dr. Gerard's testimony that he absolutely considered M.T.'s injuries were consistent with abusive behavior or suspicion of abusive type of injuries, Appellant's convictions must be reversed and the cause remanded for a new trial.

V.

The trial court abused its discretion in excluding Dr. Thomas Young's testimony that (1) M.T.'s liver lacerations were caused by improper CPR; (2) the cause of death was undetermined because he knew that M.T. went into cardiac arrest and the liver laceration did not produce enough blood to cause her death; (3) without more information, he could not tell what the actual cause of death because he did not have enough heart tissue with which to decide what caused her heart to stop; and, (4) M.T.'s postmortem injuries would have been from the fall in the bathroom when she hit her forehead and her face on the faucet after she went into cardiac arrest and any splashing of water to the face could have deluded the postmortem appearance of her facial injuries in violation of Appellant's rights to due process of law, a fair trial, and to be judged by a fair and impartial fact-finder, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the testimony was not solely based on Appellant's statements, but also on the statements by emergency personnel in the police reports and further, the State opened the door to this testimony by asking Dr. Young on cross-examination what was the cause of death and why it was undetermined. Dr. Young's testimony would have had a decisive effect on the jury's verdict.

Preservation of Error

Defense counsel requested to ask Dr. Thomas Young how CPR can cause liver lacerations (Tr.499). The State objected because Dr. Young used Appellant's statements on the 911 call to make his determination (Tr.499-500). The trial court sustained the State's objection and would not allow defense counsel to question Dr. Young (Tr.499-502).

During the State's cross-examination of Dr. Young, the prosecutor asked what killed M.T. and Dr. Young testified her cause of death was undetermined without being able to give his reasons why (Tr.793;794-795). Dr. Young testified that something was missing because there was not enough for him to be able to determine the cause of death (Tr.793-794). The State asked if Dr. Young was claiming it was possible that improper CPR caused M.T.'s death or caused her liver laceration and Dr. Young replied it was his opinion that the liver lacerations were consistent with CPR (Tr.797-798).

Defense counsel requested that Dr. Young be able to give his opinion that CPR caused M.T.'s liver lacerations and to explain why the cause of death was undetermined because the State had opened the door to such testimony on cross-examination (Tr.815). The defense argued by refusing to allow Dr. Young to give his opinion, the jury could infer that he did not know the cause of death and cannot tell you why (Tr.815-820). The trial court denied the defense's request (Tr.819). The court overruled Appellant's new trial motion (L.F.244-259;Tr.1023-1024).

Because Appellant made timely requests to allow Dr. Young's testimony at trial and included a claim of error about the admission of the evidence in his new trial motion, he has preserved this point. Rule 29.11(d). Should this Court determine that the point is not properly preserved, plain error review is requested. Rule 30.20.

Standard of Review

Admission of expert testimony is within the sound discretion of the trial court. Sloan, 915 S.W.2d at 596. And as a general rule, an expert may testify to his or her opinion regarding an ultimate issue in a criminal case. Candela, 929 S.W.2d at 867.

Analysis

The trial court abused its discretion in excluding Dr. Thomas Young's opinions about M.T.'s injuries and her cause of death based on his review of M.T.'s medical records, and M.T.'s autopsy report including a medical legal investigator's report, photographs of M.T., and the police reports (Tr.755-756;886-887).

Generally, an expert may rely on hearsay evidence as support for opinions, as long as that evidence is of a type reasonably relied upon by other experts in the field; such evidence need not be independently admissible. State v. Brown, 998 S.W.2d 531, 549 (Mo.banc1999). In Candela, this Court held medical records and police reports can be relied upon by expert witnesses in giving their opinions. 929 S.W.2d at 866.

Dr. Young should have been able to testify as Dr. Douglas Anderson did in State v. Haslett, 283 S.W.3d 769, 777 (Mo.App.S.D.2009). In Haslett, the trial court allowed Dr. Anderson, who neither observed nor performed the autopsy on the child, to testify about the autopsy performed by a different doctor. Id. In Haslett, Dr. Anderson acknowledged that he did not perform the autopsy on the child, which was actually performed by another doctor. Id. Very similar to Dr. Young's work, Dr. Anderson reviewed the autopsy report of the examining doctor; autopsy worksheets; the child's medical records; photographs taken at the scene of the crime; photographs taken during the autopsy; and "microscopic slides." Id. Based on the foregoing documentation, he rendered his own conclusions and opinions as to what caused the child's death. Dr. Anderson did not speak on Dr. Spence's behalf and was basically offering a second opinion, which was common in his area of expertise. Id. As in Haslett, Dr. Young was entitled to offer a second opinion to the cause of death of M.T. 283 S.W.3d 777.

Appellant was prejudiced because by refusing to allow Dr. Young to give his opinions about M.T.'s injuries and cause of death, the jury was lead to believe that Dr. Young could not explain why M.T.'s cause of death was undetermined and could not give them an opinion why M.T. died (Tr.815-820). Appellant was also prejudiced because this case was a battle of the experts about what caused M.T.'s death and the defense was precluded from eliciting an alternative explanation for M.T.'s injuries and death (Tr.815-820).

Dr. Young would have explained how liver lacerations may be caused by improper CPR (Tr.947-950). Dr. Young would have testified that based on the information that he had about the 911 operator's instructions to Appellant on how to properly perform CPR after Appellant had already improperly performed CPR for some time, and the continuous pressure to the area where the liver is located caused the liver to lacerate (Tr.948-949). Dr. Young also would have testified the cause of death was undetermined because he knew that M.T. went into cardiac arrest and the liver laceration did not produce enough blood to cause her death (Tr.949). Dr. Young would have testified that without more information, he could not tell what the actual cause of death was because he did not have enough heart tissue to work with to decide what caused her heart to stop. (Tr.949). Further, Dr. Young would have testified that M.T.'s postmortem injuries would have been from the fall in the bathroom when she hit her forehead and face on the faucet after she went into cardiac arrest and any splashing of water to the face could have deluded the postmortem appearance of her facial injuries (Tr.949-950).

If this Court finds that the State's objection based on hearsay was meritorious, trial court should have permitted Dr. Young to testify about opinion that CPR caused M.T.'s liver lacerations and his explanation on why the cause of M.T.'s death was undetermined because the State opened the door by its cross-examination (Tr.815).

A party can waive its right to claim error on appeal by eliciting the inadmissible evidence itself, either directly by counsel's own questions, or

indirectly by counsel's elicitation of some testimony from the witness that "opens the door" or "invites opposing counsel to respond in kind." John O'Brien, *THE HEARSAY WITHIN CONFRONTATION*, 29 St.LouisU.Pub.L.Rev. 501, 540 (2010) citing 1 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence Section 103.14 (2ded.1997).

In Appellant's case, defense counsel requested that Dr. Young should be allowed to give his opinion that CPR caused M.T.'s liver lacerations and what were the reasons that he could not determine M.T.'s cause of death because the State opened the door by its cross-examination (Tr.815). The defense argued by refusing to allow Dr. Young to give his opinion, the jury could infer that he did not know the cause of death and cannot tell them why M.T. died (Tr.815-820). After defense counsel made this request and the trial court denied the defense's request finding her questions did not rise to the level of opening the door, the State stated that, "I'm done with that area" (Tr.819).

In this case, the State repeatedly opened the door by its cross-examination (Tr.793;794-795;797-798). First, the prosecutor asked Dr. Young point-blank what killed M.T. and Dr. Young was forced to say he did not know and it was undetermined because of the court's ruling (Tr.793;794-795). Dr. Young testified that something was missing because there was not enough for him to be able to determine the cause of death (Tr.793-794). Second, the State asked if Dr. Young was claiming it was possible that improper CPR caused M.T.'s death or caused her liver laceration forcing Dr. Young to testify that it was his opinion that the liver

lacerations are consistent with CPR (Tr.797-798). Consequently, once the State repeatedly asked Dr. Young about his conclusions, knowing he could not give his full answer because of the court's ruling, the door was opened for Dr. Thomas Young to testify about his conclusions the case (Tr.947-950).

The trial court abused its discretion in excluding Dr. Thomas Young's testimony that (1) M.T.'s liver lacerations were caused by improper CPR; (2) the cause of death was undetermined because he knew that M.T. went into cardiac arrest and the liver laceration did not produce enough blood to cause her death; (3) without more information, he could not tell what the actual cause of death because he did not have enough heart tissue with which to decide what caused her heart to stop; and, (4) M.T.'s postmortem injuries would have been from the fall in the bathroom when she hit her forehead and her face on the faucet after she went into cardiac arrest and any splashing of water to the face could have deluded the postmortem appearance of her facial injuries in that the testimony was not solely based on Appellant's statements, but also on the statements by emergency personnel in the police reports and further, the State opened the door to this testimony by asking Dr. Young on cross-examination what was the cause of death and why it was undetermined. Dr. Young's testimony would have had a decisive effect on the jury's verdict. Appellant's convictions must be reversed and the cause remanded for a new trial.

VI.

The trial court erred in denying Appellant's motion for judgment of acquittal at the close of the evidence and in entering judgment and sentence against Appellant for conventional murder in the second degree and abuse of a child resulting in death, in violation of Appellant's rights against double jeopardy, to due process and to a fair trial, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I, Sections 10 and 18(a) of the Missouri Constitution, and Section 556.041 because Appellant's convictions and sentences for murder in the second degree and for abuse of a child resulting in death constitute multiple punishments for the same offense, in that striking M.T. constituted a single, indivisible continuous transaction, so that no distinct or separate act upon which to predicate abuse of a child resulting in death exists.

Preservation of Error

Appellant's assertion that his convictions for both murder in the second degree and abuse of a child resulting in death violated his rights against multiple punishments for the same conduct was properly preserved. Trial counsel objected to the submission of both offenses because submission of both violated double jeopardy and due process (Tr.954). Counsel further included these issues as claims of error in Appellant's motion for new trial (L.F.257).

Because Appellant made timely objections to the evidence at trial and included a claim of error regarding the admission of the evidence in his new trial

motion, he has preserved this point. Rule 29.11(d). Should this Court determine that the point is not properly preserved, plain error review is requested. Rule 30.20.

Standard of Review

Whether a defendant's double jeopardy rights have been violated and issues of statutory interpretation are both questions of law, which an appellate court reviews *de novo.* State v. Simmons, 270 S.W.3d 523, 531 (Mo.App.W.D.2008); State v. Mullenix, 73 S.W.3d 32, 34 (Mo.App.W.D.2002).

Discussion

The Sixth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, prohibits multiple punishments for the same offense, and similarly forbids the state from splitting a single crime into separate parts and then prosecuting the offense in piecemeal (sometimes referred to as the "merger" doctrine; State v. Williams, 24 S.W.3d 101 (Mo.App.W.D.2000)). U.S.Const.,Amend.VI;State v. Nichols, 865 S.W.2d 435, 437 (Mo.App.E.D.1993). Under the double jeopardy doctrine, the State cannot split a single crime and prosecute it in separate parts; otherwise the State could prosecute a defendant as many times as there are parts into which an offense is susceptible of being divided. State v. Cunningham, 193 S.W.3d 774, 782 (Mo.App.S.D.2006).

In this case, Appellant was convicted of conventional murder in the second degree and abuse of a child resulting in death (L.F.230;232). In order to convict

Appellant of conventional murder in the second degree, the jury was instructed and required to find (1) that Appellant caused the death of M.T. by striking her, (2) that he knew or was aware that his conduct was causing or was practically certain to cause the death of M.T. or that it was Appellant's purpose to cause serious physical injury to or to cause the death of M.T.; and, (3) that Appellant did not do so under influence of sudden passion arising from adequate cause (L.F. 230).

In order to convict Appellant of abuse of a child resulting in death, the jury was instructed and required to find (1) that Appellant repeatedly struck M.T.; (2) that in doing so, Appellant inflicted cruel and inhuman punishment upon M.T.; (3) that M.T. was then less than seventeen years old; (4) that Appellant knew his conduct was inflicting cruel and inhuman punishment upon a child less than seventeen years old; and, (5) that M.T. died as a result of injuries sustained from this conduct (L.F.232).

In both counts, striking M.T. constituted a single, indivisible transaction (L.F.230;232). Appellant's convictions and sentences for both conventional murder in the second degree and abuse of a child, resulting in death, thus violate the prohibition of the Sixth Amendment of multiple punishments for the same offense, and against splitting a single crime into separate parts and prosecuting the offense piecemeal. See Nichols, 865 S.W.2d at 437.

Furthermore, while multiple punishments do not violate the Double Jeopardy Clause if the legislature specifically authorizes cumulative punishments under two statutes that proscribe the same conduct, the Missouri Legislature

clearly did not intend to permit multiple punishments for an uninterrupted, continuing course of conduct. Section 556.041;see State v. Johnson, 245 S.W.3d 288, 293(Mo.App.W.D.2008). When the same conduct of a person may establish the commission of more than one offense, he may be prosecuted for each such offense. Id. He may not, however, be convicted of more than one offense if:

> The offense is defined as a continuing course of conduct and the person's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses.

Section 556.041.4.

Where the language of a statute is clear, courts must give effect to the language as written. Dorsey v. State, 115 S.W.3d 842, 844 (Mo.banc2003). Courts do not have the authority to read into a statute a legislative intent that is contrary to its plain and ordinary meaning. Id. Neither the abuse of a child resulting in death statute nor the murder in the second degree statute provides that specific periods of the prohibited conduct constitute separate offenses. Sections 565.021 and 568.060. Therefore, because Appellant's striking M.T. was an indivisible, uninterrupted course of conduct, his convictions and sentences for both conventional murder in the second degree and abuse of a child resulting in death are in violation of the plain language of Section 556.041.4, as well as his rights against double jeopardy.

Appellant acknowledges that in State v. Coody, 867 S.W.2d 661, 665-666 (Mo.App.S.D.1993), the Western District stated convicting for child abuse and felony murder resulting from that child abuse did not violate double jeopardy. Additionally, the Western District agreed with the Coody case in State v. Mendoza, 115 S.W.3d 873, 876 (Mo.App.W.D.2003). The reasoning in both cases was that felony murder may be premised on "any felony" other than murder or manslaughter, so double jeopardy and merger was not implicated by a conviction on both abuse and felony murder. Coody, 867 S.W.2d 665-666; Mendoza, 115 S.W.3d at 876. However, Appellant's case is distinguishable because he was not convicted under felony murder, but conventional murder in the second degree (L.F.230).

Appellant also acknowledges that two Court of Appeals cases appear to conclude that the General Assembly intended to abrogate the common law "merger" doctrine, which is a judicially-created means of limiting or barring the application of the felony-murder rule whenever the act causing the homicide is indivisible from the act providing the basis for the underlying felony. State v. Williams, 24 S.W.3d 101 (Mo.App.W.D.2000); State v. Bouser, 17 S.W.3d 130 (Mo.App.W.D.1999). However, Appellant respectfully suggests that these opinions are distinguishable, because they overlook the General Assembly's codification of the doctrine in Section 556.041.

In Williams, the Court reasoned that because the General Assembly provided in Section 565.021 that any penalty for second-degree murder can be in

addition to the penalty for any related felony ***except*** murder or manslaughter, it intended to eliminate the merger doctrine. 24 S.W.3d at 117. In Bouser, the Court similarly held that the Missouri legislature intended that only convictions for murder or manslaughter will merge with a felony murder conviction, based on the language of Section 565.021. 17 S.W.3d 140. But neither of these opinions discussed the application of Section 556.041(4), or construed that section together with Section 565.021.2.

All consistent statutes relating to the same subject are construed together as though constituting one act, and the rule of construction in such instances proceeds upon the supposition that the statutes in question are intended to be read consistently and harmoniously in their several parts and provisions." Neske v. City of St. Louis, 218 S.W.3d 417, 424 (Mo.banc2007). If two statutes can be reasonably reconciled, it is the duty of appellate courts to do so and to give effect to both. Levinson v. State, 104 S.W.3d 409, 412-413 (Mo.banc2003). Sections 565.021.2 and 556.041(4) both address when multiple punishments are permissible, and must be construed, if possible, to give effect to both sections.

Construing sections Section 565.021 and 556.041 to give effect to both provisions, Appellant asserts that in Section 565.021.1(2), the legislature enumerated the ***types*** of felonies which can serve as predicate felonies for felony murder. However, it did not abrogate the requirement of Section 556.041 that the predicate felony ***must still be a separate felony***. The language of Section 565.021.2 – that the punishment for second degree murder shall be in addition to

the punishment for commission of a related felony or attempted felony, other than murder or manslaughter – does not dictate a contrary interpretation. It is difficult to conceive of a case where murder or manslaughter would ***not*** merge with felony murder, or constitute an "uninterrupted continuing course of conduct." Section 556.041.4. As such, Section 565.021.2 simply provides that murder and manslaughter ***per se*** merge with felony murder, as a specific example of the types of multiple punishments which Section 556.041(4) prohibits. Any contrary interpretation would render Sections 565.021 and 556.041 in conflict and would render Section 556.041(4) meaningless.

Because Appellant's striking M.T. was a continuous, uninterrupted course of conduct constituting a single act, his convictions and sentences for both conventional murder in the second degree and abuse of a child resulting in death violate his rights against double jeopardy. This Court should reverse and vacate his convictions and sentences for conventional murder in the second degree and abuse of a child resulting in death, and remand the case for a new trial.

CONCLUSION

WHEREFORE, based on his argument in Points I-VI of his brief, Appellant requests that this Court reverse his convictions requests a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Missouri Supreme Court Rule 84.06(g) and Special Rule 361, I hereby certify that on this 18th day of January, 2011, a true and correct copy of the foregoing brief and a floppy disk containing the foregoing brief were mailed postage prepaid to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

_____
Timothy Forneris

CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Special Rule 360. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed 15,500 words excluding the cover page, table of contents, table of authorities, and signature block. The word-processing software identified that this brief contains 15,498 words, including the cover page, signature block, and certificates of service and of compliance. In addition, I hereby certify that the enclosed diskette contains the brief and appendix, has been scanned for viruses with Symantec Endpoint Protection, and found virus-free.

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No. ED 94420

In the

Missouri Court of Appeals

Eastern District

STATE OF MISSOURI,

Respondent,

v.

QUINTIN GRAY,

Appellant.

Appeal from Circuit Court of the City of St. Louis
Twenty-second Judicial Circuit
The Honorable Michael K. Mullen, Judge

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from a conviction of child abuse and murder in the second degree, following a jury trial in the Circuit Court of the City of St. Louis. This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. Therefore, jurisdiction lies in the Missouri Court of Appeals, Eastern District. Mo. Const. art. V, § 3; § 477.050, RSMo 2000.

STATEMENT OF FACTS

Appellant, Quintin Gray, was charged by indictment with murder in the first degree and abuse of a child resulting in death (L.F. 8-10).[1] The cause went to trial by jury on December 14-18, 2009, in the Circuit Court of the City of St. Louis, the Honorable Michael K. Mullen presiding (L.F. 4-6).

Viewed in the light most favorable to the verdict, the following evidence was adduced.

The death of M.T.

M.T., the daughter of Ashley Turner, was born on September 14, 2004 (Tr. 424). On February 24, 2008, Turner and M.T. lived with Appellant in an apartment at 4734 South Grand in St. Louis (Tr. 380, 425-26, 428-29). Appellant was not M.T.'s father (Tr. 425). Appellant's son, Quintin Gray Jr. ("Quintin Jr."), lived with his mother but also spent time with his father and Turner (Tr. 428). M.T. and Quintin Jr. played outside in the snow late in the evening (Tr. 429-31). M.T. fell when playing, and had little dents in her palms from catching herself on the gravel, and she had a little nick on her knee and a welt under her eye (Tr. 453). M.T. sometimes got scratches from playing with Turner's dogs (Tr. 430-31). Turner supervised the children's bath after they came inside, and did not notice any other injuries on M.T. (Tr. 432). Turner cooked some noodles for the children, but M.T. ate a little bit and spat them out (Tr. 433, 467-68, 479). M.T. sat on the floor and looked like she had a

[1] Separate counts of trafficking and possession of marijuana were later severed (L.F. 8-10, 203).

stomach ache (Tr. 468, 479). M.T. had been constipated, but she had a bowel movement and felt much better (Tr. 433-34). M.T. was a bit lethargic, and not really herself (Tr. 468-69). Turner went to the store and got some 7-Up for M.T. (Tr. 468). M.T. had no history of heart problems (Tr. 447).

On Monday, February 25, 2008, Turner left for work sometime around 6:00 a.m., while M.T. and Quintin Jr. stayed with Appellant (Tr. 425, 436). That morning, Neachelle Gentry, a neighbor in the apartment below, heard sounds from Turner and Appellant's apartment up above her—sounds like heavy walking or moving heavy furniture across the floor, which continued constantly for 30 to 45 minutes (Tr. 298, 300, 303-05). Gentry did not hear the sound of any voices (Tr. 300, 303).

Around 10:30 or 11:00 that morning, Turner received a phone call from Appellant, and rushed home (Tr. 437). Turner found M.T. lying naked on the floor in her room, and the paramedics were there (Tr. 438). Turner saw a pair of M.T.'s shorts in the bathtub with feces on it (Tr. 457-58). This was not the pair that M.T. had worn to bed the previous night (Tr. 458). M.T. was potty-trained and very prissy, and never had accidents either while awake or asleep (Tr. 446-47). M.T. had injuries that she did not have the night before (Tr. 453-54). Turner had cleaned the apartment the previous night, and items were on the living room floor that were not there when she left for work (Tr. 451-52). Turner rode in the ambulance with M.T. to the hospital (Tr. 438-39).

Dr. James Gerard was the treating physician in the emergency room at Cardinal Glennon Children's Medical Center (Tr. 517-19, 522). When M.T. arrived at Cardinal Glennon, she was in full cardiac arrest (Tr. 522). M.T. had multiple abrasions, lacerations,

and bruises, and a contusion, or area of swelling, on her forehead (Tr. 523). Most of the injuries appeared to be fresh (Tr. 523). Although the Cardinal Glennon staff continued CPR, administered medications to try to get her heart beating again, and used a breathing tube on her, M.T. had no chance of survival, as she was in full cardiac arrest and was not responding neurologically in any way (Tr. 523-24). M.T. died that day (Tr. 524).

Detective Jimmy Hyatt, with the St. Louis Police Department, went to the apartment (Tr. 378, 380). Detective Hyatt found the underwear with fecal matter in it in the bathtub (Tr. 381). An involuntary bowel movement may be caused by the process of dying, and is quite common because a person loses the function of the bladder and bowel while dying (Tr. 700). An involuntary bowel movement could also be caused by a blow to the abdomen (Tr. 721). Another officer informed Detective Hyatt that the water was still running when he got there, and he had turned it off (Tr. 381). Detective Hyatt did not notice any urine or feces on the bed sheets (Tr. 389). Officer Eatherton, with the Evidence Technician Unit, found a brown leather belt in the living room (Tr. 381, 412-13, 418-19, 421).

Detective Robert Jauer went to Cardinal Glennon Hospital and interviewed Quintin Jr., who told him that his daddy had whipped his sister with a belt and his fist (Tr. 316-22). The police detectives took Quintin Jr. to the Child Advocacy Center for an interview, and then left him with his grandmother at a Steak 'N Shake restaurant where she worked (Tr. 324-25, 510). During the drive, Quintin Jr. told the detectives that his daddy gave his sister a bath after she got a whipping (Tr. 327).

Christina Hemkens, a child abuse and neglect investigator, interviewed Quintin Jr. (Tr. 363-64, 367). Hemkens asked Quintin Jr. what had happened that day, and he replied

that his father had whooped his friend, M.T. (Tr. 369). Hemkens asked why M.T. received the whooping, and Quintin Jr. informed her that it was because M.T. was not listening and because she had peed in the bed (Tr. 369-70). Hemkens asked what happened after that, and Quintin Jr. responded that Appellant gave M.T. a bath, and after that, she got very sick (Tr. 370). Hemkens asked what happened after that, and Quintin Jr. stated that Appellant had tried to make M.T. be alive by pushing on her stomach, and he did that three times (Tr. 370). Hemkens asked Quintin Jr. to define what a whooping was, and he said that Appellant choked her with a belt, threw her to the ground, and punched her in the chest (Tr. 370).

The autopsy.

Dr. Jane Turner, a forensic pathologist and assistant medical examiner for the City of St. Louis, performed an autopsy on M.T. on February 26, 2008 (Tr. 616, 618, 640). Dr. Turner concluded that the cause of death was abdominal blunt trauma (Tr. 652). Dr. Turner found the following external injuries on M.T.:

1.5 by .7 cm. tan purple contusion on mid forehead;

1.7 by 1.1 cm. speckled abrasion, associated with 2 by 1.5 cm. faint tan contusion, on left forehead;

3 by 1.5 cm. faint purple contusion on left temple;

.2 by .1 cm. superficial scratch inferior to right lateral eye;

1 by .5 cm. faint red contusion on right inferior cheek;

.5 by .5 cm. abrasion on right inferior cheek;

.5 by .5 cm. abrasion on right inferior posterior cheek;

2 by 2 cm. abrasion on chin;

.3 by .2 cm. abrasion on base of chin;

.5 by .4 cm. abrasion on left lower lip;

.6 by .5 cm. abrasion/contusion on mid lower lip;

.5 by .4 cm. abrasion/contusion on right lower lip;

several areas of abrasion on upper lip measuring up to 4 mm. in greatest dimension;

4 by 2 cm. purple contusion on left cheek, associated with .4 by .1 cm. superficial linear scratch and .8 by .1 cm. superficial linear scratch;

2.5 by 1.1 cm. abrasion inferior to left lateral eye;

3 by 1.5 cm. faint purple contusion on left posterior cheek, associated with two .1 cm. punctuate abrasions;

1 by .1 cm. speckled linear abrasion on right posterior arm;

3 by .1 cm. healing linear abrasion on right dorsal medial forearm;

.2 by .2 cm. abrasion on left proximal lateral forearm;

.1 by .1 cm. abrasion on left elbow;

1.2 by 1 cm. purple contusion on left ventral wrist;

arch-shaped curvilinear tan hyperpigmented area of skin, 4 by 2.5 cm. in total area, .5 cm long by .2 cm. wide, on left ventral forearm, continuous with 4 by .2 cm. curvilinear area of hyperpigmented skin on left dorsal forearm;

arch-shaped area of skin associated with .3 by .2 cm. abrasion on superior aspect and .2 by .1 cm. abrasion on inferior aspect;

1 by .8 cm. faint purple contusion on left lateral back;

1.5 by .9 cm. abrasion on left lower back;

.8 by .5 cm. abrasion on left buttock;

.8 by .7 abrasion on left buttock;

.4 by .4 cm. abrasion on right buttock;

Ill-defined purple contusion involving the bilateral buttock in association with superficial subcutaneous hemorrhage;

2.8 by 1 cm. dark red abrasion/contusion on left anterior lateral leg;

two .1 cm. healing abrasions posterior to the right lateral malleolus (ankle); and

two healing abrasions inferior to the left lateral malleolus measuring .5 by .1 and .1 by .1 (Tr. 624-27, 697).

Dr. Turner observed no external post mortem damage (damage occurring after the body has died) on M.T. (Tr. 627-28). Any one of these external injuries, but not all of them, could have been the result of a fall (Tr. 722). Dr. Turner observed a scar on the back of M.T.'s right hand that had the appearance of a previously healed thermal injury (Tr. 627).

Dr. Turner, found approximately 500 ml of blood, which would have been 30-33 percent of M.T.'s circulating blood volume, accumulated in M.T.'s abdominal cavity (Tr. 641-42). This represented a significant amount of blood loss to the rest of the body, which, Turner found, would have caused the brain and other parts of the body to shut down, the blood pressure to drop, and the patient to go into shock (Tr. 643). This volume of blood would have displaced her abdominal organs and made her abdominal wall more tense (Tr. 642-43).

Dr. Turner also observed hemorrhaging in the tissues around the para-esophageal and para-tracheal areas, which meant that the neck was manipulated, although Dr. Turner could

not tell how the neck was manipulated (Tr. 643-44, 701-06). Dr. Turner also observed hemorrhaging involving the left strap muscles in the neck (Tr. 722, 729-30). Dr. Turner found no evidence of ligature strangulation (Tr. 702). Dr. Turner found that the injuries to the neck were possibly an artifact from manipulation of the neck to intubate (Tr. 703).

Dr. Turner found nothing wrong with M.T.'s heart, but found that the heart would have stopped due to the loss of a significant volume of blood (Tr. 644-45).

Dr. Turner found acute congestion in the lungs, which was a normal autopsy finding because the heart starts to shut down or beat irregularly when the person is in the process of dying, and this produces a backwash of blood accumulating in the lungs, and acute congestion (Tr. 645). This meant that M.T. was alive for a while after the injury (Tr. 645).

Dr. Turner observed hemorrhaging in the mesentery (the fat attached to the intestines), in the omentum (a layer of fat that hangs down from the large intestine and covers the small intestines), and in the para-colonic tissues (Tr. 645-46). The hemorrhaging was most pronounced on the right side, which is next to the liver (Tr. 646).

Dr. Turner noted that the anus was dilated and appeared reddened (Tr. 647).

Dr. Turner found contusions or hemorrhages internally on the scalp—one on the left side of the scalp and one on the right side, close to the front (Tr. 647-48). There was also a cerebral edema, or swelling of the brain, which could be caused by any kind of insult to the brain, such as loss of oxygen (hypoxia) (Tr. 648).

Dr. Turner found two very large lacerations in the middle of the liver, and a collection of blood, or hematoma, on the top surface of the liver (Tr. 649). One of the lacerations, on the lower left side of the liver, was 3 by 1 cm., and the other laceration, on the right side but

close to the left on the back side of the liver, was 4.5 by 2.2 cm., which was also close to the large blood vessels that go to and from the liver (Tr. 650). The hematoma was 3.5 by 2.5 cm. (Tr. 650). The inferior vena cava, a large blood vessel that brings blood back to the heart, was located next to one of the lacerations (Tr. 651). The hepatic veins, which are large vessels, branch off from the inferior vena cava (Tr. 651). The portal veins and hepatic arteries, which bring blood into the liver, were in the middle of the lacerated area (Tr. 651). Thus, the lacerations were in areas where one would expect to see quite a bit of blood—about 500 ml (Tr. 651). The blood was in the abdominal cavity as a result of the liver lacerations (Tr. 710). The amount of blood in the abdominal cavity showed that M.T.'s liver was lacerated before the heart stopped, as the heart was still pumping (Tr. 716).

In Dr. Turner's experience, liver lacerations are common in motor vehicle deaths (Tr. 651). In her experience, compression to the stomach or pushing on someone's chest would not cause a liver laceration, as sudden, forceful blows cause the tissue to become disrupted rather than absorbing energy, and compressions are not sudden, forceful blows (Tr. 651-52). Examples of a sudden, forceful blow include a punch or kick to the abdomen, or someone dropping the weight of their knee on the abdomen (Tr. 712). In Dr. Turner's experience, she had never seen CPR cause a liver laceration (Tr. 652, 657). Given that the lacerations were in the same area as the large blood vessels, the lacerations would bleed very quickly (Tr. 652).

Dr. Turner determined that the manner of death was homicide, and that M.T. died from the liver lacerations (Tr. 653, 655). The bleeding from the liver lacerations caused M.T. to die within two hours after the lacerations occurred (Tr. 733-34).

Dr. Turner did not see any external injury associated with a blow to the abdomen, but it is common to see internal injury to the abdominal organs without any external injury to the abdominal wall because the abdominal wall is soft (Tr. 653-54).

Dr. Turner found that all of the external injuries, with the exception of the previous burn injury on the hand, occurred at or about the same time as M.T.'s death (Tr. 678-79, 706-07, 718, 725-26). The injuries to M.T.'s left leg, lower back, and buttocks could have been consistent with playing and falling (Tr. 706-07).

The trial.

Dr. Gerard testified that M.T.'s injuries were not consistent with a minor fall, playing with dogs, or having chest compressions performed (Tr. 525). Dr. Gerard testified that it would be extremely, extremely unlikely for a three-year-old, with no underlying history of heart disease, to present that way as a result of an arrhythmia or some kind of primary heart defect (Tr. 527). He stated that children with cardiac arrhythmias usually have that because of myocarditis, an underlying infection to the heart, and children who have myocarditis usually have symptoms, such as being short of breath or very tired or very weak, for days or weeks (Tr. 526-27). Dr. Gerard had seen only one case in which a child's heart had stopped beating due to a blow to the heart (Tr. 525). Dr. Gerard testified that, in his experience, children received liver lacerations from accidental trauma only in situations such as high-speed traffic accidents, ATV or motorcycle accidents, or falling from a great height such as a second or third story (Tr. 527-28). He stated that CPR or a compression to the stomach would not cause a liver laceration because a child's chest wall is very elastic (Tr. 528-29).

Dr. Gerard testified that M.T.'s liver lacerations were consistent with an intentionally inflicted injury to the patient (Tr. 591, 602).

Dr. Turner testified that the rapidity of the blood loss, and not the amount of the blood loss, is what causes the body to go into shock, due to the decrease in blood pressure (Tr. 674-75). Sometime subsequent to her deposition, Dr. Turner received information that there was an allegation that strangling may have occurred (Tr. 704). Considering that information, Dr. Turner testified that the soft tissue hemorrhage in M.T.'s neck was consistent with strangling or an artifact from manipulation of the neck in order to intubate (Tr. 644, 703-04).

Appellant filed a motion for judgment of acquittal at the close of all the evidence, and the trial court denied the motion (Tr. 955-56; L.F. 213-14).

The jury found Appellant guilty of murder in the second degree (Count I) and child abuse resulting in death (Count II) (L.F. 230, 232, 239, 242). Appellant filed a motion for new trial, and the trial court denied the motion (L.F. 244-59).

The trial court sentenced Appellant as a prior and persistent offender to concurrent sentences of twenty-five years in the custody of the Missouri Department of Corrections on each count (L.F. 260-63). This appeal followed.

ARGUMENT

I. (911 tape)

The trial court did not err in excluding the tape of a 911 call, as Appellant placed the 911 call, and the statements therein were self-serving hearsay.

A. Additional facts.

Apparently the trial court had a discussion with counsel in chambers (Tr. 442), and stated that the tape of a 911 call placed by Appellant would not be admitted into evidence (Tr. 493; Defendant's Ex. E). Out of hearing of the jury, defense counsel stated that she would like to revisit the issue (Tr. 493). The State objected on grounds that the statements on the tape could not be admitted as excited utterances because they were self-serving (Tr. 495-96). Defense counsel argued that the first part of the tape could be admitted for the limited purpose of completing the picture of what happened, to show that Appellant called 911 (Tr. 498). The trial court ruled that the tape would not be admitted (Tr. 499).

Appellant made an offer of proof as to the 911 tape (Tr. 947; Defendant's Ex. E). The State stipulated that the foundation was laid for the tape to qualify as a business record, but did not waive its objection to the hearsay statements on the tape (Tr. 495-96, 947). On the 911 call, Appellant requested an ambulance at 4734 South Grand (Defendant's Ex. E). Appellant stated that his daughter was not breathing (Defendant's Ex. E). Appellant stated that she was still making noise, and asked repeatedly if that meant that she was still alive (Defendant's Ex. E). Appellant stated that he was doing CPR (Defendant's Ex. E). The dispatcher gave Appellant instructions on how to breathe into M.T.'s mouth and give her CPR (Defendant's Ex. E). Appellant stated that he had been doing CPR on her for about ten

minutes (Defendant's Ex. E). The dispatcher asked what happened, and Appellant said that he had no idea—that M.T. woke up, was light-headed and wasn't moving around, but had a bowel movement in her "drawers," so he took her in the bathroom and washed her up, and then she started hitting her lip and her head on the bathtub (Defendant's Ex. E).

B. Preservation and the standard of review.

Appellant preserved this issue in his motion for new trial (L.F. 253-55).

"A trial court has broad discretion to admit or exclude evidence at trial." *State v. Kemp*, 212 S.W.3d 135, 145 (Mo. banc 2007). "This standard of review compels the reversal of a trial court's ruling on the admission of evidence only if the court has clearly abused its discretion." *Id*. "That discretion is abused when a ruling is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration." *Id*. "Additionally, on direct appeal, this Court reviews . . . for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial." *Id*. "Trial court error is not prejudicial unless there is a reasonable probability that the trial court's error affected the outcome of the trial." *Id*. at 145-46.

C. The trial court did not err in excluding the 911 tape, as Appellant placed the 911 call, and the statements therein were self-serving hearsay.

Appellant argues that the statements on the 911 tape were excited utterances and thus did not come within the definition of hearsay. The State stipulated that the tape itself was a business record, but objected—on grounds of hearsay—to the admissibility of Appellant's statements on the tape (Tr. 947). In *State v. Edwards*, 31 S.W.3d 73, 77-78 (Mo. App. W.D. 2000), the Court held that the tape of a 911 call qualified as a business record, but the

statements on the tape were subject to further analysis to determine whether they were admissible under an exception to the hearsay rule. *See also State v. Bennett*, 218 S.W.3d 604, 611 n. 4 (Mo. App. S.D. 2007).

"A hearsay statement is any out-of-court statement that is used to prove the truth of the matter asserted and that depends on the veracity of the statement for its value." *Kemp*, 212 S.W.3d at 146. "The excited utterance exception to the rule against hearsay applies when: (1) a startling event or condition occurs; (2) the statement is made while the declarant is still under the stress of the excitement caused by the event and has not had an opportunity to fabricate the story; and (3) the statement relates to the startling event." *Bennett*, 218 S.W.3d at 610. In *Bennett*, the Court explained the rationale for the exception for excited utterances: "Excited utterances are inherently trustworthy because 'the startling nature of the event is speaking though the person instead of the person speaking about the event.'" *Id*. (quoting *Kemp*, 212 S.W.3d at 146). "Among the factors to be considered in determining whether an excited utterance exists are: [1] the time between the startling event and the declaration, [2] whether the declaration is in response to a question, [3] whether the declaration is self-serving, and [4] the declarant's physical and mental condition at the time of the declaration." *Kemp*, 212 S.W.3d at 146.

"The essential test for admissibility of a spontaneous statement or excited utterance is neither the time nor place of its utterance but whether it was made under such circumstances as to indicate it is trustworthy." *Id*. "This exception is premised on the idea that where the statement is made under the immediate and uncontrolled domination of the senses as a result of the shock produced by the event, the utterance may be taken as expressing the true belief

of the declarant." *Id*. In the reported Missouri cases allowing an excited utterance exception for 911 calls, the speakers were the victims of the crime, who were still under the stress of the events. *Kemp*, 212 S.W.3d at 138 (woman ran to neighbor's residence hysterical and half naked after boyfriend had held her at gunpoint); *Bennett*, 218 S.W.3d at 608-09 (boy reported that three people with guns kicked in door, committed robbery, and were still in the apartment with his mother and little brothers); *Edwards*, 31 S.W.3d at 77 (woman reporting that boyfriend had cut her with a knife); *State v. Hedges*, 193 S.W.3d 784, 788 (Mo. App. E.D. 2006)(woman made call shortly after husband had bitten off part of her ear); *State v. Thomas*, 272 S.W.3d 421, 424 (Mo. App. E.D. 2008)(assault victim describing his injuries). In those cases, the declarations by the victims could not possibly have been self-serving.

In *Thomas*, 272 S.W.3d at 429, the Court held that statements in another 911 call, placed by the defendant, were properly excluded. In that case, the defendant's son had reportedly been the victim of a hit-and-run accident, and the defendant called 911 before arriving at the scene and assaulting the persons allegedly involved in the accident. *Id*. at 424-25. There the Court held that the trial court did not plainly err in refusing to allow into evidence the tape of the defendant's 911 call; the Court held that the defendant's statements were self-serving in reporting that a hit-and-run accident had occurred with his son's car. *Id*. at 429. Futher, the defendant's call in that case did not amount to an excited utterance because the defendant was not present during the alleged accident and he was not angry or agitated when he arrived at the scene of the accident. *Id*.

Similarly, in *State v. Smith*, 265 S.W.3d 874, 876-78 (Mo. App. E.D. 2008), the Court held that the trial court did not plainly err in excluding a police officer's testimony that the

defendant told him that the victim had come at her with a knife, as the statement was made some time after the defendant had stabbed the victim, the statement was in response to a question from the officer, the statement was self-serving, and the defendant had calmed down from an excited state. Though the claim of error was not preserved in *Smith*, that case is supportive of the principle that a self-serving statement is not reliable and does not come within the excited utterance exception. *Id*. at 878.

Appellant relies on *State v. Williams*, 673 S.W.2d 32, 35 (Mo. banc 1984), where the prosecutor objected to a defendant's out-of-court statement on the basis that it was self-serving, and the Court stated: "If a statement otherwise meets the 'excited utterance' test it should not be excluded simply because it is helpful to the declarant's position." In *Williams*, 673 S.W.2d at 33-35, the Court held admissible the defendant's statement, made within seconds after the shooting, that "the gun was unloaded and I didn't mean to shoot her." Under *Kemp*, the more recent authority from the Missouri Supreme Court, whether the statement is self-serving is but one factor, among other enumerated factors, to be considered in determining the reliability of the statement. 212 S.W.3d at 146. This Court is "constitutionally bound to follow the most recent controlling decision of the Supreme Court of Missouri." *In re Pogue*, 315 S.W.3d 399, 403 (Mo. App. S.D. 2010).

In the present case, it is not possible to tell exactly how long Appellant's statements on the 911 call were made after M.T.'s injuries. The medical examiner's testimony showed that the injuries, except for the burn on the hand, occurred at or about the same time as M.T.'s death (Tr. 678-79, 706-07, 718, 725-26). However, the fact that the downstairs neighbor heard sounds like heavy walking and moving of furniture for a constant 30-45

minutes leads to an inference that a considerable period of time may have elapsed between the injuries and the 911 call (Tr. 451-52). The fact that Turner returned to find the apartment in disarray also supports that inference (Tr. 451-52). Further, Appellant stated on the tape that he had been performing CPR for approximately ten minutes (Defendant's Ex. E). The guiding principle is whether the circumstances provide indicia of reliability. In this case, they do not. Appellant's demeanor was fairly calm on the 911 call, until he became emotional over the realization that M.T. was not coming back (Defendant's Ex. E). In the present case, Appellant placed the 911 call when the victim was either dead or seriously injured, and Appellant could obviously have been implicated in a crime, thus the statements were not made under circumstances that indicate that they were trustworthy. Appellant had sufficient time to reflect upon an exculpatory statement.

Appellant also relies on generalized statements in *Williams* regarding the degree of discretion afforded to the trial judge: "The trial judge has a measure of discretion, and does not have to admit studied attempts at exculpation, but the question of admissibility is basically a question of law subject to appellate review. Discretion is not a complete answer." 673 S.W.2d at 35. Further, "the proponent of evidence does not have to show that the evidence is without flaw, or that the jury could not find it to be reflective rather than spontaneous, if it meets the general standards for admissibility." *Id*. "Utterances coming so soon after the shooting, and demonstrative of the defendant's intent, should be weighed by the jury rather than by the trial judge. This is especially so when there is no eyewitness testimony." *Id*. In *Williams*, the statement in question was made within seconds after the shooting. 673 S.W.2d at 33-35. Here, according to Appellant's statements, he had been

performing CPR for approximately ten minutes (Defendant's Ex. E), which would have given him time to concoct a story.

In *Kemp*, 212 S.W.3d at 145-46, where the sole issue was the admissibility of statements made by the victim in a 911 call, the Court relied upon the standard of review frequently cited in recent cases: "[a] trial court has broad discretion to admit or exclude evidence at trial." "This standard of review compels the reversal of a trial court's ruling on the admission of evidence only if the court has clearly abused its discretion." *Id*. "[T]hat discretion is abused when a ruling is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration." *Id*. "Additionally, on direct appeal, this Court reviews the trial court for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial." *Id*. "Trial court error is not prejudicial unless there is a reasonable probability that the trial court's error affected the outcome of the trial." *Id*. To the extent that *Williams*, 673 S.W.2d at 35, and like cases may suggest a different standard, *Kemp* should be followed as the more recent authority.

In *Straughan v. Asher*, 372 S.W.2d 489, 496 (St. L. Ct. App. 1963), which Appellant also cites for the proposition that the question of admissibility of an excited utterance is for determination by the appellate court, the statements at issue were nevertheless held inadmissible because they divulged facts antecedent to the occurrence itself. Appellant also cites *State v. Boyland*, 728 S.W.2d 583, 585-86 (Mo. App. E.D. 1987), where the Court held that statements made by the defendant, within minutes of a fatal shooting, were admissible as excited utterances. However, in *State v. Stottlemyre*, 752 S.W.2d 840, 843 (Mo. App. W.D.

1988), the Court distinguished *Boyland* and *Williams*, 673 S.W.2d 32. In *Stottlemyre*, 752 S.W.2d at 843, the Court held that exculpatory statements made to a trooper approximately ten minutes after an accident were not admissible as excited utterances. There the Court stated that the defendant obviously knew that he was in potential trouble with the police, the inference was clear that he had reason to exculpate himself and enough time to fabricate a statement, he made no other exculpatory statements to any of the people who arrived before the trooper, and the facts did not indicate that he was under such stress as would make his later statement an excited utterance. *Id.*; *see also State v. Williams*, 716 S.W.2d 452, 454 (Mo. App. S.D. 1986) (trial court did not err in refusing to admit statement made to ambulance driver fifteen to twenty minutes after shooting, as defendant had ample time to fabricate the statement).

Here, Appellant's statements on the 911 call were not admissible as evidence. Again, the timing of Appellant's statements in relation to M.T.'s injuries was uncertain in this case. Appellant's statements were extremely self-serving. Further considering the factors set forth in *Kemp*, 212 S.W.3d at 146, Appellant's physical and mental condition were normal at the time of the declarations—he had no injury inflicted upon him. Some of Appellant's statements were in response to the dispatcher's question as to what happened (Defendant's Ex. E). As in *Smith*, 265 S.W.3d at 878, this factor weighs against the admissibility of the statement. Further, "[t]he reason why hearsay is generally inadmissible is because the person who made the offered statement is not under oath or subject to cross-examination." *State v. Steele*, 314 S.W.3d 845, 850 (Mo. App. W.D. 2010). Appellant was not available for cross-examination.

Appellant argues that this evidence was necessary to complete the picture, and that otherwise, the jury did not know who called 911. The complete picture of the crime is relevant, but may not be proved by inadmissible hearsay. *State v. Chambers*, 891 S.W.2d 93, 103 (Mo. banc 1994). Appellant states that the jury was led to believe that Appellant never called 911, but there is nothing in the record to support that assertion.

The trial court did not err in excluding the statements from Appellant's 911 call. Appellant's point should be denied.

II. (scene re-enactment video)

The trial court did not err in precluding Appellant from playing and admitting his scene re-enactment video into evidence, as the video contained Appellant's self-serving hearsay statements.

A. Additional facts.

During the State's direct examination of Detective Hyatt, the following exchange occurred:

> Q: And what relevant things did you see in the apartment as to what happened that day?
>
> A: It was kind of hard to tell. We did a scene reenactment video.

(Tr. 381).

Out of hearing of the jury, the Assistant Circuit Attorney stated that Detective Hyatt, despite being instructed not to, had mentioned the scene reenactment video, but any further inquiry would be inappropriate because it would be hearsay (Tr. 386). Defense counsel stated that the detective had been instructed and had mentioned the video anyway, and she wanted to ask him about it (Tr. 386). The Assistant Circuit Attorney stated that questioning as to the reenactment video would make clear that Appellant had made an exculpatory statement (Tr. 387). The trial court responded:

> I think, Ms. Szczucinski, you glossed over it quickly enough. Once the detective figured it out, it seemed like it is something he did on accident, and I don't think any more attention was drawn to i[t] than necessary, so I am not

going to allow you [Ms. Llewellyn] to cross-examine Detective Hyatt on the scene reenactment."

(Tr. 387).

Appellant made an offer of proof of the scene reenactment video (Tr. 937-47; Defendant's Ex. D). On the video, Appellant stated that M.T. was unresponsive while still in bed, and was making a noise (Defendant's Ex. D). Appellant stated that M.T. had a bowel movement while she was still in bed, so he took her to the bathroom, took her panties off, and washed her up, but she fell forward and hit her head in the bathtub (Defendant's Ex. D). He stated that he tried to revive her, and he called 911 but they hung up on him, so he called back to 911 (Defendant's Ex. D). He said that he was blowing and pressing on her stomach to get her to come back, and before the 911 personnel told him how to do it, he wasn't holding her nose (Defendant's Ex. D). Appellant demonstrated how he pushed on M.T.'s chest, as the 911 personnel told him to do (Defendant's Ex. D).

B. Preservation and the standard of review.

Appellant preserved this issue in his motion for new trial (L.F. 257). This Court reviews the trial court's ruling for an abuse of discretion. *Kemp*, 212 S.W.3d at 145.

C. The trial court did not err in precluding Appellant from playing and admitting his scene re-enactment video into evidence, as the video contained the self-serving hearsay statements of Appellant.

"Hearsay evidence is an out of court statement used to prove the truth of the matter asserted." *Steele*, 314 S.W.3d at 850.

Appellant argues that the State opened the door to this evidence. "[A] party may open the door to otherwise inadmissible testimony from the opposing side if it first introduces such evidence." *Union Elec. Co. v. Metropolitan St. Louis Sewer Dist*., 258 S.W.3d 48, 57 (Mo. banc 2008). Detective Hyatt's mention of the reenactment video was completely nonresponsive to the question as to what he saw in the apartment (Tr. 381), and he apparently overlooked an instruction not to mention the reenactment video (Tr. 386). He merely mentioned the fact that the police had made a reenactment video; he did not repeat any statements made in the video (Tr. 381). Therefore, the State did not open the door to the admission of the reenactment video.

Appellant also argues that the tape was admissible to show subsequent police conduct. "[A]n out-of-court statement offered not for the truth of the matter asserted, but to explain subsequent police conduct, is not hearsay and is therefore, admissible assuming it is relevant." *State v. Allison*, 326 S.W.3d 81, 90 (Mo. App. W.D. 2010). "It is well established that such testimony is admissible to explain the officer's conduct, supplying relevant background and continuity to the action." *Id*. "However, when such out-of-court statements go beyond what is necessary to explain subsequent police conduct, they are hearsay." *Id*.

The reenactment video (Defendant's Ex. D) was not offered for the purpose of showing subsequent police conduct, and did nothing to supply background and continuity. Rather, the sole purpose of offering the video was to get Appellant's self-serving statements into evidence without an opportunity for cross-examination. "A self-serving statement is one made by a party in his own interest at some place and time out of court, and does not include testimony which he gives as a witness at the trial." *Gamble v. Browning*, 277 S.W.3d 723,

729 (Mo. App. W.D. 2008). "The rule excluding self-serving declarations is a part of the hearsay rule." *Id*. "A party's self-serving utterances are not admissible unless they fall within some exception to the hearsay rule[.]" *Id*. "The general rule is that declarations of a party favorable to himself which are not part of the res gestae are hearsay, self-serving and inadmissible as evidence in his favor." *Id*. "A party cannot make evidence for himself by his own declarations." *Id*.

Appellant's statements on the reenactment video (Defendant's Ex. D) were out-of-court statements offered for the truth of the matter asserted. *Steele*, 314 S.W.3d at 850. These statements fall within the definition of hearsay, and no exception applies, especially as Appellant was not available for cross-examination. *Id*.

Appellant's point should be denied.

III. (prior act of abuse)

The trial court did not err in allowing Turner to testify as to a prior act of abuse by Appellant, as such evidence went to intent, and the trial court did not err in allowing Vickie to testify as to M.T.'s subsequent reaction.

A. Additional facts.

During the State's direct examination of Turner, defense counsel asked the trial court if counsel could approach the bench, and defense counsel stated that she anticipated that Turner would be asked about a previous burn on M.T. (Tr. 442). Defense counsel objected on the basis of relevance and hearsay (Tr. 442). The trial court indicated that a prior discussion of the issue with counsel was in chambers (Tr. 442). The Assistant Circuit Attorney argued that previous incidents of violence or abuse have been held admissible in cases dealing with child deaths as showing motive, intent, or lack of mistake (Tr. 442-43). The trial court ruled that the testimony would be allowed (Tr. 443).

Turner testified that a couple of days before Christmas in 2007, she left M.T. home alone with Appellant (Tr. 441-43). When she got home, Turner found that M.T. had a burn on her hand, which blistered her whole hand (Tr. 444). Turner took M.T. to the emergency room, and she was treated with antibiotics, some cream to put on it, and Tylenol (Tr. 444-45). After that incident, M.T. always wanted to stay with Turner's mother, Vickie (Tr. 445, 475). Turner stated that she was told that M.T. was in the bathroom playing in the water, and the dogs came in and tripped her "or something" (Tr. 445). Turner then testified that Vickie later told her something different, and that M.T. told Turner and Vickie that Appellant had burned her hand (Tr. 446).

Before Vickie testified, defense counsel made an objection on the basis of hearsay, outside the hearing of the jury, to Vickie's anticipated testimony regarding the burn to the hand (Tr. 502-03). Defense counsel also objected on the basis that this was "bad character evidence" (Tr. 506). The trial court ruled that Vickie could testify as to M.T.'s demeanor, and not as to what M.T. told her about the burn on the hand (Tr. 506-07).

Defense counsel also requested that the trial court declare a mistrial due to Turner's testimony as to what M.T. told her regarding the burn to the hand (Tr. 505). The trial court denied the request for a mistrial (Tr. 505). Defense counsel then requested that that portion of Turner's testimony be excluded and that the jury be instructed to disregard that testimony (Tr. 505). The trial court denied that request (Tr. 505).

Vickie testified that, shortly before Christmas 2007, she observed a burn on M.T.'s right hand, which she described as "close to a first-degree, second-degree burn, a big pus burn on her right hand, and her fingers was, like, stuck together" (Tr. 511). The Assistant Circuit Attorney then asked if anything about M.T.'s behavior changed when Vickie would take her home after the burn happened, and Vickie replied that M.T. would say that she wanted to go home with Vickie, and didn't want to go to her own home (Tr. 511-12). Vickie stated that a 7-11 sign was close to M.T.'s home, and whenever M.T. saw a 7-11 sign, she would sit up and say, "Granny, I am going home with you" (Tr. 511-12).

In the State's closing argument, the Assistant Circuit Attorney stated that Turner continued in her relationship with Appellant after M.T. died, and that she didn't want to think that her boyfriend would do this to her child, even though she "knew the only other time she had left [M.T.] alone with the defendant, [M.T.] ended up injured, had to go to the

hospital for a 2nd degree burn" (Tr. 967). The Assistant Circuit Attorney then stated that Turner had no idea why her perfectly healthy three-year-old daughter would die, but she didn't want to believe that Appellant hurt her, and she did not understand what had happened until she learned that M.T. died from blunt force trauma to the abdomen (Tr. 967). The Assistant Circuit Attorney then stated that Vickie testified as to how M.T.'s demeanor changed after the burn, and she wanted to go home with Granny every time she saw a 7-11 (Tr. 967-68).

B. Preservation and the standard of review.

Appellant raised the issue as to Turner's testimony in his motion for new trial (L.F. 252-53), and thus preserved that issue. Therefore, this Court reviews the trial court's ruling for an abuse of discretion as to the admissibility of her testimony. *Kemp*, 212 S.W.3d at 145. "A mistrial is a drastic remedy to be exercised only in those extraordinary circumstances in which the prejudice to the defendant cannot otherwise be removed." *State v. Garnett*, 298 S.W.3d 919, 924 (Mo. App. E.D. 2009). This Court reviews the trial court's refusal to grant a mistrial for an abuse of discretion. *Id*.

In his motion for new trial, Appellant stated that after Turner's testimony, the trial court ruled that Vickie was prohibited from testifying to the exact same information (L.F. 252-53). Appellant's motion for new trial did not assert that the trial court erred in allowing the testimony that Vickie gave (L.F. 244-59). Therefore, that issue is not preserved for appellate review. Supreme Court Rule 29.11(d). Supreme Court Rule 30.20 provides that an appellate court may, in its discretion, review plain errors affecting substantial rights when the court finds that a manifest injustice or miscarriage of justice has resulted. Whether or not

plain error has occurred is determined by reviewing the circumstances of each case. *State v. Millsap*, 244 S.W.3d 786, 789 (Mo. App. S.D. 2008). "Review of plain error under Rule 30.20 involves a two-step process." *State v. Nibarger*, 304 S.W.3d 199, 201 (Mo. App. W.D. 2009). First, the Court must determine if the claim on its face establishes substantial grounds to find that manifest injustice or miscarriage of justice has resulted. *Id*. "Not all prejudicial error can be deemed plain error." *Id*. "Plain error is evident, obvious, and clear error." *Id*. If plain error is evident on the face of the claim, then the Court may proceed to consider whether or not a miscarriage of justice or manifest injustice will occur if left uncorrected. *Id*. Where no plain error appears on the face of the claim, the Court should decline to exercise its jurisdiction to review the claim. *Id*.

C. The trial court did not err in allowing Turner to testify as to a prior act of abuse by Appellant, as such evidence went to intent, and the trial court did not err in allowing Vickie to testify as to M.T.'s subsequent reaction.

Appellant argues that the trial court erred in allowing Turner and Vickie to testify that Appellant burned M.T.'s hand, as such evidence was allegedly not legally relevant, and was more prejudicial than probative. However, Vickie's testimony did not link Appellant to the burning of M.T.'s hand, as the trial court carefully limited her testimony (Tr. 502-03, 506-07, 511-12). As to Turner's testimony, Appellant does not raise the hearsay issue raised at trial, thus that issue is not before the Court. *Bishop v. Metro Restoration Services, Inc.*, 209 S.W.3d 43, 47 (Mo. App. S.D. 2006).

"[A] criminal defendant can only be tried for the offenses which he or she is charged, and evidence of uncharged crimes, wrongs, or acts is inadmissible for the purpose of

showing a defendant's propensity to commit such crimes." *State v. Mabry*, 285 S.W.3d 780, 785 (Mo. App. E.D. 2009). However, evidence of uncharged misconduct is generally admissible when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan; or (5) identity of the defendant. *Id*. "[E]vidence of uncharged misconduct may be properly admitted when such evidence is logically and legally relevant to proving the crime charged- i.e., it has a legitimate tendency to establish the defendant's guilt of a charged crime and its probative value outweighs its prejudicial effect." *Id*. In *State v. Candela*, 929 S.W.2d 852, 871 (Mo. App. E.D. 1996), this Court stated that "[a] multitude of Missouri cases involving murder or assault have upheld the admission of prior misconduct of the defendant toward the victim as evidence of motive, intent, or absence of mistake or accident." The Court held that "[t]he evidence of abuse adduced at trial . . . was admissible to show an intent on defendant's part to cause serious physical injury to [the victim], and to refute defendant's claim that [the victim's] injuries were accidental." *Id*.; *see also State v. Williams*, 865 S.W.2d 794, 802 (Mo. App. S.D. 1993) (listing and analyzing "[m]any Missouri cases [that] have upheld the admissibility, in cases of murder or assault, of prior misconduct of the defendant directed toward the victim of the offense on trial"). Similarly, this Court has stated that "[w]hen considering the admissibility of a defendant's prior misconduct in adult abuse cases, . . . a defendant's history of threatening or violent conduct involving the same victim can be especially probative." *Mabry*, 285 S.W.3d at 785-86.

The present case is similar to other cases in which evidence of prior bad acts has been allowed. In *State v. Hopper*, 326 S.W.3d 143, 153 (Mo. App. S.D. 2010), the Court stated

that the defendant's prior act of placing residue of an illegal drug on the victim's tongue was probative of the defendant's feelings for the victim and his intentional disregard for the victim's well-being; the defendant's prior abuse of the victim fell under the "well-established exception to the prohibition of evidence of prior bad acts," as it tended to establish the defendant's intent to harm the victim and the absence of an accident in the victim's death. Similarly, in *State v. Franklin*, 854 S.W.2d 55, 58-59 (Mo. App. W.D. 1993), where the child victim died from peritonitis due to a tear in the small intestine caused by a blunt impact to the abdomen, the Court held that evidence of the victim's malnourishment was probative of the defendant's feelings for the child and was relevant as proof of the defendant's general animosity for the victim; the jury could infer from this evidence that the defendant intended to cause serious physical injury to the victim.

Further, Turner's testimony as to Appellant's possible involvement in the prior incident was very limited (Tr. 446). Turner first stated that she was told that M.T. was in the bathroom playing in the water, and the dogs came in and tripped her "or something" (Tr. 445); she did not state who "told" her this information. Turner then testified that her mother later told her something different, and that M.T. told Turner and her mother Appellant had burned her hand (Tr. 446). These two conflicting explanations could be weighed by the jury. The evidence as to the prior incident was admissible.

However, even if this evidence were not admissible, the trial court's judgment could be reversed only if outcome-determinative prejudice resulted. *Kemp*, 212 S.W.3d at 146. In determining whether evidence of other misconduct by the defendant is prejudicial, Missouri courts examine "(1) whether the statement was deliberately elicited by the prosecutor or was

a voluntary, unresponsive comment by the witness; (2) whether the statement was emphasized and magnified by the prosecutor or was a singular and isolated event; (3) whether the statement made specific reference to crimes committed by the defendant or was vague and indefinite; (4) if no objection is made to the statement, whether the reference was so prejudicial that its effect could not have been removed by direction to the jury; and (5) in view of the other evidence presented and the strength of the State's case, whether the statement played a decisive role in determining the defendant's guilt." *State v. Smiley*, 240 S.W.3d 214, 218 (Mo. App. S.D. 2007).

Appellant argues that "[t]his was a close case evidenced by the expert disagreement on the cause of death" (Appellant's Brief at 56), and that Turner and Vickie's testimony had a decisive effect on the jury. Turner's testimony as to the prior incident was rather vague and indefinite, as Turner testified as to M.T.'s conflicting stories as to what happened, and no specific information was given as to how Appellant might have burned her hand (Tr. 445-46). The Assistant Circuit Attorney did not magnify the testimony in question and did not even emphasize it strongly in closing argument; in fact, the Assistant Circuit Attorney emphasized that Turner was unsure at first as to what caused M.T.'s death (Tr. 967). Further, the State presented a strong case through convincing medical experts and other witnesses. Therefore, Turner's testimony as to the prior incident would not have had a decisive effect on the jury.

The trial court did not abuse its discretion in allowing Turner's testimony, and in refusing to grant a mistrial.

Appellant's claim as to Vickie's testimony does not on its face establish substantial grounds to find that manifest injustice or miscarriage of justice has resulted. *Nibarger*, 304 S.W.3d at 201. No plain error—"evident, obvious, and clear error"—appears on the face of the claim. *Id*. Therefore, this Court should decline to exercise plain error review of Appellant's claim as to Vickie's testimony. *Id*.

Appellant's point should be denied.

IV. (Dr. Gerard's testimony)

The trial court did not err in allowing Dr. Gerard to testify that M.T.'s injuries were consistent with child abuse.

A. Additional facts.

Out of hearing of the jury, the Assistant Circuit Attorney referred to an earlier ruling by the trial court that doctors would not be allowed to testify as to whether or not there was child abuse (Tr. 507). The earlier ruling was apparently in chambers (Tr. 442). The Assistant Circuit Attorney argued that the medical experts, especially Dr. Gerard, as the emergency room treating physician, should be allowed to testify that M.T.'s injuries were consistent with abusive treatment (Tr. 507). Defense counsel argued that the testimony would need to be clear as to what the doctor's basis was for making such a statement (Tr. 508). The trial court ruled that "You can ask him all those questions, what his basis is, and I'll allow him to testify to that" (Tr. 508).

Dr. Gerard was a graduate of St. Louis University Medical School and completed his pediatric residency training and a pediatric emergency medicine fellowship there (Tr. 517). Dr. Gerard had been employed at Cardinal Glennon for nineteen years, and had treated approximately 4,000 to 5,000 patients per year (Tr. 517, 584-85). Dr. Gerard was an associate professor of pediatric emergency medicine, was board certified in pediatric emergency medicine, and was licensed to practice medicine in the State of Missouri (Tr. 518).

When asked on direct examination if there was anything that he would consider to be consistent with M.T. coming in "covered in these injuries," Dr. Gerard testified that he

"would absolutely consider that consistent with abusive behavior or suspicion of abusive type of injuries" (Tr. 545).

In response to questioning on cross-examination, Dr. Gerard stated that he did not have any certification in the area of child abuse (Tr. 545-46).

B. Preservation and the standard of review.

Appellant preserved this issue in his motion for new trial (L.F. 251).

The admission of expert testimony is within the sound discretion of the trial court and shall not be overturned absent an abuse of discretion. *State v. Haslett*, 283 S.W.3d 769, 779-80 (Mo. App. S.D. 2009).

C. The trial court did not err in allowing Dr. Gerard to testify that M.T.'s injuries were consistent with child abuse.

Appellant argues that the trial court erred in allowing Dr. Gerard to testify that M.T.'s injuries were consistent with child abuse, as this was allegedly beyond the scope of his expertise, and invaded the province of the trier of fact as to the ultimate issue in the case.

"It is well-established law that expert testimony is admissible if it is clear that the subject of such testimony is one upon which the jurors, for want of experience or knowledge, would otherwise be incapable of drawing a proper conclusion from the facts in evidence." *Haslett*, 283 S.W.3d at 779. "In a criminal case, an expert may testify concerning his or her opinion on an ultimate issue, but the testimony must aid the jury and not invade the jury's province." *Id*. "In order to qualify as an expert, a witness must have knowledge or skill from education or experience that will aid the trier of fact." *State v. Blakey*, 203 S.W.3d 806,

816 (Mo. App. S.D. 2006). "The extent of an expert's experience or training in a particular field goes to the weight, not the admissibility, of the testimony." *Id*.

In *Haslett*, 283 S.W.3d at 779-80, the Court held that the trial court did not commit plain error in allowing a medical doctor to testify that a child's injuries were consistent with child abuse, where the doctor never opined on the defendant's guilt, and never testified or inferred that the defendant caused the injuries to the child. The Court held that the doctor's "testimony was allowable expert testimony in that it did not invade the province of the jury[,] and "[t]he jury was free to give [the doctor's] testimony the weight they thought it deserved and to draw the inferences they believed should be drawn from the evidence presented." *Id*. at 780.

In *Blakey*, 203 S.W.3d at 816, the Court held that the trial court did not err in allowing a paramedic to testify that a child's injuries were consistent with child abuse, where the witness had been a paramedic for years, had training in the proper care and treatment of critically ill or injured children, and had been heavily trained in recognition of child abuse. *See also State v. Hendrix*, 883 S.W.2d 935, 940 (Mo. App. W.D. 1994) (doctor's testimony did not invade province of the jury in stating that in his opinion, based on a review of the medical reports of the two young girls, the girls were victims of sexual abuse, where doctor specialized in child abuse and neglect); *State v. Mackey*, 822 S.W.2d 933, 937-38 (Mo. App. E.D. 1991) (testimony of two experts in sexual abuse, stating their personal beliefs that the victim suffered sexual abuse, did not invade province of the jury because it did not point to the defendant being the perpetrator of the offense charged; no plain error).

Dr. Gerard testified as to his extensive medical training and experience in the area of emergency medical treatment of children (Tr. 517-18). He was asked on cross-examination whether he had any certification in child abuse (Tr. 545-46), but Appellant did not establish that there is any type of medical certification in the area of child abuse. Dr. Gerard did not opine as to Appellant's guilt, and did not infer that Appellant caused the injuries to M.T. By virtue of his training and experience, Dr. Gerard was qualified to give his expert opinion that M.T.'s injuries were consistent with abuse, and this did not invade the province of the jury. Further, as the treating physician who observed M.T.'s injuries firsthand at the time of the incident, Dr. Gerard was in a superior position to assess the extent and impact of the injuries. The trial court did not abuse its discretion in allowing Dr. Gerard's testimony.

Appellant's point should be denied.

V. (Dr. Young's testimony)

The trial court did not err in refusing to allow Dr. Young to base his testimony on hearsay.

A. Additional facts.

Out of hearing of the jury, defense counsel addressed the scope of Dr. Young's anticipated testimony (Tr. 499). This issue had apparently been addressed in chambers; defense counsel stated that the trial court had ruled that Dr. Young could not testify that CPR caused a liver laceration because the information that Appellant was performing CPR came from the 911 tape (Tr. 499). Defense counsel argued that the State had introduced evidence through one of its witnesses that Quintin Jr. stated that he saw his dad pushing on M.T.'s stomach to make her alive (Tr. 499). The Assistant Circuit Attorney indicated that Dr. Young would be relying on Appellant's hearsay statements, and the trial court stated, "I agree. I'm not going to allow you to get that based on hearsay statements" (Tr. 499-502).

However, Dr. Young testified without objection, on direct examination, that lacerations to the liver did not cause M.T.'s death, and that lacerations to the liver are caused by CPR (Tr. 756). Dr. Young also testified that improperly performed CPR could cause liver lacerations (Tr. 762-64, 767-68, 809). He further testified that he had four cases of his own and knew of another case in Chicago involving massive injury to internal organs due to improperly performed CPR (Tr. 780-81). Dr. Young also testified that hemorrhaging in the fatty tissue in the abdomen could be caused by CPR or improper CPR (Tr. 782-83). Dr. Young stated that if there was a blow to someone who was living and there was damage to the internal organs, more than half of the blood volume would be in the belly, but that wasn't

the situation here, as the blood loss was insufficient to cause M.T.'s death (Tr. 785-88). He stated that the injuries on M.T's face and body were post mortem, except the injury to the lip (Tr. 787-88). Dr. Young further stated that these post mortem injuries were consistent with a child who goes into cardiac arrest when there is still water running on the skin, because where the skin is not being supplied with blood and there is a hot splash on the area, this will cause the surface skins to delude postmortem (Tr. 787-88). Dr. Young testified that the cause of death was undetermined, but M. T. did not die from liver lacerations because the bleeding into the belly was post mortem and was not a sufficient amount to cause death (Tr. 796, 894).

Dr. Young was asked on cross-examination if he claimed that it was very possible that improper CPR caused M.T.'s death or caused her liver laceration, and he answered that "It is my opinion that the liver lacerations are consistent with CPR" (Tr. 797-98). When asked on cross-examination whether M.T.'s liver laceration was due to compression, he stated that his opinion was that the liver laceration and the findings were consistent with CPR (Tr. 802). Dr. Young answered affirmatively when the Assistant Circuit Attorney stated that earlier he had talked about cases where improper CPR had caused liver lacerations, and she asked if he had mentioned that one of those cases was the current case (Tr. 868). Dr. Young stated that there was nothing on M.T. to tell him what killed her (Tr. 805).

Out of the hearing of the jury, during a recess, defense counsel stated that the earlier ruling had limited the defense from eliciting testimony from Dr. Young that CPR caused liver laceration in M.T.'s case, but the Assistant Circuit Attorney had asked that question, and Dr. Young had been trying not to answer that his opinion was that CPR caused M.T.'s

liver laceration (Tr. 816-17). The Assistant Circuit Attorney responded that the only limitation had been that the doctor could not say that he based anything on hearsay statements of witnesses (Tr. 817). Defense counsel responded that this was the issue because he had based his opinion on the fact that there was a 911 call instructing Appellant how to perform CPR, and based on this, Dr. Young determined that CPR was the cause of the liver laceration (Tr. 817). Defense counsel argued that the Assistant Circuit Attorney opened the door, but Dr. Young had been limited to saying that the liver laceration was consistent with CPR (Tr. 817-18). The trial court ruled that defense counsel could not go back and question Dr. Young about this (Tr. 818).

Defense counsel further argued that Dr. Young was limited in responding to the Assistant Circuit Attorney's question about the cause and manner of death, and had to say that it was undetermined, because of what Dr. Young's opinion was based upon (Tr. 818). The Assistant Circuit Attorney responded that Dr. Young should not be allowed to testify on the basis of hearsay, and the trial court stated that his ruling would remain the same (Tr. 820).

Dr. Young testified that he did not know what caused the post mortem injuries (Tr. 835-36).

Dr. Young testified that 500 ml of blood in the abdomen was not significant for dying from shock, and that this amount of blood would come from M.T.'s liver as a result of post mortem oozing and compressions (Tr. 840-41).

Dr. Young further stated that, in a person who is dead or in serious cardiovascular compromise, hot water could cause sloughing of the surface skin cells, and this scenario would fit the post mortem lesions in this case "nicely" (Tr. 842-43).

On redirect examination, Dr. Young was asked if he knew whether he received all of the slides that were taken from M.T.'s organs at the time of her autopsy, and he stated that he asked for additional sections of the heart because he didn't feel that the heart was examined thoroughly, especially for a cardiac arrest, and he was told that there were no additional slides (Tr. 892). Dr. Young stated that he needed additional slides of the heart because one of the causes of sudden cardiac death in a child that age is a viral infection of the heart muscle called viral myocarditis, but in order to make that diagnosis, one would need approximately six sections of the heart, and in this case there was only one section of the heart muscle rather than six (Tr. 893). Dr. Young stated that he did not know what caused M.T.'s heart to stop (Tr. 893).

On recross-examination, Dr. Young testified that the medical examiners should have done a more thorough examination of the heart than they did (Tr. 897).

On redirect examination, Dr. Young again testified that he would want to check for problems with M.T.'s heart because the liver lacerations and insufficient blood were a post mortem artifact and were not the cause of death: "You're not left with anything. And so at that particular point, you have to consider whether or not there is a sudden cardiac death and reasons for a sudden cardiac death" (Tr. 899-900). He stated that a problem with the heart could show up as sudden death even if there was no recorded history of heart disease (Tr. 900).

Because Dr. Young needed to return to Kansas City at the end of the day, the trial court allowed defense counsel to make an offer of proof by stating what questions she would ask Dr. Young, and what she believed his answers would be (Tr. 947-48). Defense counsel stated that she would have asked Dr. Young to explain why he thought the liver laceration was caused by improper CPR, and he would have testified that, based on the information that he had about 911 instructing Appellant how to properly perform CPR after Appellant had already improperly performed CPR for some time, the continuous pressure to an area where the liver is located, for a sustained amount of time, would cause the liver to lacerate (Tr. 948-49). Defense counsel stated that Dr. Young also would have testified about the cause of death being undetermined because he knew that M.T. went into cardiac arrest, he knew that the liver laceration did not produce enough blood to cause her death, and he did not have enough heart material to work with to decide what caused her heart to stop (Tr. 949). The trial court asked how this was different from what Dr. Young testified to, and she stated that he did not have an opportunity to say how he got to his conclusion that the cause of death was undetermined (Tr. 949).

Defense counsel also stated that she would have asked what caused the post mortem injuries to M.T., and that the State did ask that question but the defense was instructed not to go into any hearsay statements (Tr. 949). She stated that Dr. Young would have testified to his understanding that the post mortem injuries to M.T. were from a fall in the bathroom when she hit her forehead and her face on the faucet after she went into cardiac arrest, and if the water was running, any splashing of water on the face might have caused the post mortem injuries (Tr. 949-50).

B. Preservation and the standard of review.

This Court reviews preserved error as to admissibility of expert testimony for an abuse of discretion. *Haslett*, 283 S.W.3d at 779-80. Appellant's motion for new trial asserted that the trial court erred in granting the State's objection to Dr. Young's testimony that M.T.'s liver laceration was caused by Appellant improperly performing CPR, and to Dr. Young's testimony that the cause of death was undetermined (L.F. 255-57).

Other assertions of error as to Dr. Young's testimony were not raised in Appellant's motion for new trial (L.F. 244-59), and are thus under the plain error rule. Supreme Rule 29.11(d); Supreme Court Rule 30.20.

C. The trial court did not err in refusing to allow Dr. Young to base his testimony on hearsay.

Appellant argues that the trial court erred in excluding Dr. Young's testimony that M.T.'s liver lacerations were caused by improper CPR, that the cause of death was undetermined because he knew that M.T. went into cardiac arrest and the liver laceration did not produce enough blood to cause her death, and that, without more information, he could not tell what was the actual cause of death because he did not have enough heart tissue with which to decide what cause her heart to stop.

However, Dr. Young testified as to all of these subjects. Dr. Young answered affirmatively when the Assistant Circuit Attorney stated that earlier he had talked about cases where improper CPR had caused liver lacerations, and she asked if he had mentioned that one of those cases was the current case (Tr. 868). Though his earlier testimony did not specifically state that this was one of those cases (Tr. 780-81), the Assistant Circuit Attorney

apparently misunderstood that testimony, but his statement that this was one of those cases came in on cross-examination (Tr. 868). Dr. Young repeatedly testified that the liver laceration did not produce enough blood to cause M.T.'s death (Tr. 796, 840, 894, 899-900). Dr. Young also testified that he asked for additional sections of the heart tissue because he didn't feel that the heart was examined thoroughly, especially for a cardiac arrest, and he was told that there were no additional slides (Tr. 892). Dr. Young stated that he would have needed additional slides of the heart in order to make a diagnosis of myocarditis, but there was only one section of heart muscle available, rather than six (Tr. 893).

Appellant further argues that the trial court erred in excluding Dr. Young's testimony that M.T.'s post mortem injuries would have been from a fall in the bathroom when she hit her forehead and face on the faucet after going into cardiac arrest, and that any splashing of water to the face could have deluded the post mortem appearance of her facial injuries. However, Dr. Young did testify that the injuries on M.T's face and body were post mortem, except the injury to the lip, and these post mortem injuries were consistent with a child who goes into cardiac arrest when there is still water running on the skin, because where the skin is not being supplied with blood and there is a hot splash on the area, this will cause the surface skins to delude post mortem (Tr. 787-88). He further testified that, in a person who is dead or in serious cardiovascular compromise, hot water could cause sloughing of the surface skin cells, and this scenario would fit the post mortem lesions in this case "nicely" (Tr. 842-43).

Section 490.065, RSMo 2000, provides that the facts or data upon which an expert bases an opinion or inference "must be of a type reasonably relied upon by experts in the

field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable." "In recognition of the generally accepted principle that an expert acquires his knowledge and expertise from a number of sources, some of which may include inadmissible hearsay, an expert can rely on hearsay information in forming an opinion." *Whitnell v. State*, 129 S.W.3d 409, 416 (Mo. App. E.D. 2004). "An expert can rely on such information provided that those sources are not offered as independent substantive evidence, but rather serve only as a background for his opinion." *Id*. "Section 490.065.3 permits an expert to consider facts not in evidence in forming an opinion or inference, but a two-step approach must be used to determine the admissibility of that expert opinion." *Id*. "First, the facts or evidence must be of a type reasonably relied on by experts in the field in forming opinions or inferences on the subject." *Id*. "Second, the trial court must independently decide if the facts and data relied on by the expert meet a minimum standard of reliability, i.e., are otherwise reasonably reliable." *Id*. "The trial court has discretion in deferring to an expert's assessment of what data is reasonably reliable."

Any potential testimony from Dr. Young that M.T.'s post mortem injuries would have been from a fall in the bathroom, after going into cardiac arrest, would have been based on statements by Appellant. As Dr. Young was not there to observe the incident, testimony as to whether M.T. fell in the bathroom would be based on self-serving hearsay. A criminal defendant's self-serving declarations are not the type of evidence reasonably relied on by experts in the medical field in forming an opinion. Appellant argues that Dr. Young's testimony also would have been based on statements by emergency personnel in the police reports. However, any statements by emergency personnel as to what happened in the

bathroom would also have been based on hearsay statements by Appellant. Dr. Young was allowed to testify that the lacerated liver was caused by improper CPR (Tr. 868).

Appellant argues that the State opened the door to hearsay evidence, pointing to Dr. Young's response that the liver lacerations were consistent with CPR (Tr. 797-98). Dr. Young answered affirmatively when the Assistant Circuit Attorney asked if he had mentioned that one of those cases where improper CPR had caused liver lacerations was the current case (Tr. 868). His earlier testimony did not specifically state that this was one of those cases (Tr. 780-81). The Assistant Circuit Attorney apparently misunderstood that testimony, and there was no indication that she intentionally misstated it.

Appellant claims that the trial court's rulings precluded Dr. Young from expressing his expert opinion as to what caused M.T.'s death. Dr. Young clearly opined that a lacerated liver did not cause M.T.'s death (Tr. 796). He testified that he did not know what caused her heart to stop (Tr. 893), and that he would have wanted additional slides of the heart to determine if M.T. had myocarditis, but no additional slides were available (Tr. 892-93). The trial court's rulings did not preclude Dr. Young from rendering an opinion regarding the cause of death. Appellant's claim does not on its face establish substantial grounds to find that manifest injustice or miscarriage of justice has resulted from excluding any testimony of Dr. Young that would have been based on Appellant's self-serving declaration that M.T. suffered injuries from a fall in the bathtub. *Nibarger*, 304 S.W.3d at 201. No plain error—"evident, obvious, and clear error"—appears on the face of that claim. *Id*. Therefore, this Court should decline to exercise plain error review of Appellant's claim on that issue. *Id*.

As to the remainder of Dr. Young's testimony, he was allowed to testify as to the issues about which Appellant now complains, and the trial court did not err, plainly or otherwise.

Appellant's point should be denied.

VI. (constitutional issues)

The trial court did not err in denying Appellant's motion for judgment of acquittal and in entering judgment against Appellant for murder in the second degree and abuse of a child resulting in death.

A. Preservation and the standard of review.

Appellant argues that his convictions and sentences for murder in the second degree and abuse of a child resulting in death constitute multiple punishments for the same offense, in violation of his right to due process, right to a fair trial, and right not to be placed in double jeopardy, under the constitutions of the State of Missouri and the United States.

At trial, Appellant objected to the submission of instructions for murder and abuse of a child resulting in death, asserting that this violated due process and his right not to be placed in double jeopardy (Tr. 954). In his motion for new trial, Appellant alleged that the trial court erred in giving instructions for both crimes, as both offenses required proof of the same offense (L.F. 257). Appellant alleged that this violated his rights to a fair trial, equal protection, due process, effective assistance of counsel, and the right to confront witnesses, in violation of the state and federal constitutions, but Appellant did not specifically allege that this violated his right not to be placed in double jeopardy (L.F. 257). Therefore, his double jeopardy claim is not preserved for review. Supreme Court Rule 29.11(d); *see State v. Mendoza*, 115 S.W.3d 873, 875 (Mo. App. W.D. 2003). "This [C]ourt will decline to review an unpreserved double-jeopardy claim for plain error unless it is clear from the face of the record that the trial court had no power to enter the challenged convictions." *Mendoza*, 115 S.W.3d at 875.

This Court's review of a double jeopardy claim is *de novo*, and, thus, without deference to the circuit court's determination. *State v. Reando*, 313 S.W.3d 734, 738 (Mo. App. W.D. 2010).

B. Appellant's convictions for murder in the second degree and abuse of a child resulting in death did not violate his constitutional rights.

"Protection against double jeopardy violations is found in both the United States and Missouri constitutions." *State v. Johnson*, 245 S.W.3d 288, 293 (Mo. App. W.D. 2008). However, Mo. Const. art. I, §19 applies only to retrial after acquittal. *Id*. Because this case does not involve a retrial after acquittal, Mo. Const. art. I, §19 is not applicable here. *Id*. However, the Fifth Amendment to the United States Constitution, providing that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb, is made applicable to the states through the Fourteenth Amendment's Due Process clause. *Id*. "Double jeopardy analysis regarding multiple punishments is . . . limited to determining whether cumulative punishments were intended by the legislature." *Id*.

Section 565.021.1(1), RSMo 2000, provides that a person commits the crime of murder in the second degree if he knowingly causes the death of another person or, with the purpose of causing serious physical injury to another person, causes the death of another person. Section 568.060.1(1), RSMo 2000, provides that a person commits the crime of abuse of a child if such person knowingly inflicts cruel and inhuman punishment upon a child less than seventeen years old. Section 568.060.3(2), RSMo 2000, provides that abuse of a child is a class C felony, unless "[a] child dies as a result of injuries sustained from

conduct chargeable pursuant to the provisions of this section, in which case the crime is a class A felony[.]"

"[I]f the legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those statutes proscribe the 'same conduct,' the prosecution may seek and the court may impose cumulative punishment under those statutes in a single proceeding without offense to the double jeopardy clause." *State v. Coody*, 867 S.W.2d 661, 665 (Mo. App. S.D. 1993). In *Coody*, the Court held that convictions for child abuse and for felony murder resulting from that child abuse did not violate double jeopardy. *Id*.

Appellant acknowledges the holding of cases such as *Coody*, but argues that *Coody* is distinguishable because it involved felony-murder under § 565.021.1(2), RSMo 2000. Section 556.041, RSMo 2000, provides that "[w]hen the same conduct of a person may establish the commission of more than one offense he may be prosecuted for each such offense." Appellant relies on § 556.041(4), RSMo 2000, which provides that "[h]e may not, however, be convicted of more than one offense if . . . (4) [t]he offense is defined as a continuing course of conduct and the person's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses."

In *State v. Dudley*, 303 S.W.3d 203, 207 (Mo. App. W.D. 2010), the Court held that § 556.041 "only states a general, 'default' rule," and "[i]f the specific statute under which a defendant is convicted directly addresses the permissibility of cumulative punishments, that specific statute controls over the general directives of § 556.041." In *Dudley*, the Court noted that the felony murder statute specified that the punishment for felony murder shall be

"in addition to" the punishment for any underlying felony except murder and manslaughter. *Id*. at 208.

Section 568.060.3(2), RSMo 2000, is not specific as to whether the enhanced punishment for abuse resulting in the death of a child is cumulative to punishment under other statutes, such as § 565.021.1(1), RSMo 2000. However, under the first sentence of § 556.041, RSMo 2000, "[w]hen the same conduct of a person may establish the commission of more than one offense he may be prosecuted for each such offense."

Relying on § 556.041(4), RSMo 2000, Appellant argues that he may not be convicted of more than one offense because the offense is defined as a continuing course of conduct, and his course of conduct was uninterrupted. However, examples of a continuing course of conduct include crimes such as false imprisonment, bigamy, and operating a house of prostitution. *State v. Morrow*, 888 S.W.2d 387, 393 (Mo. App. S.D. 1994). In *State v. Barber*, 37 S.W.3d 400, 405 (Mo. App. E.D. 2001), the Court held that multiple flourishes of a weapon did not constitute a continuing course of conduct. Likewise, striking a child does not constitute a continuing course of conduct. Under § 556.041, RSMo 2000, the same conduct of a person may establish the commission of more than one offense, and he may be prosecuted for each such offense.

Appellant argues that cases abrogating the common law merger doctrine, such as *State v. Williams*, 24 S.W.3d 101 (Mo. App. W.D. 2000), are distinguishable because they overlook the "codification" of the doctrine in § 556.041, RSMo 2000. Under the merger doctrine, the "other felony" language of the felony murder statute, § 565.021.1, RSMo, did not include those acts of personal violence to the deceased which were necessary and

constituent elements of the homicide itself, and were therefore deemed to be merged into it. *Id*. at 111. However, other cases analyzing § 556.041, RSMo 2000, such as *Dudley*, 303 S.W.3d at 207, continue to recognize the abrogation of the merger doctrine. As the Court stated in *Johnson*, 245 S.W.3d at 295, "the legislature has provided in § 556.041 that the same conduct of a person may establish the commission of more than one offense and he may be prosecuted for each of such offenses unless certain conditions apply."

The prosecution of Appellant for murder in the second degree and abuse of a child resulting in death did not violate his constitutional rights. *Id*. Each crime required proof of an element that the other did not. To commit murder in the second degree, Appellant had to knowingly cause the death of another person or, with the purpose of causing serious physical injury to another person, cause the death of another person, but to commit abuse of a child resulting in death, Appellant had to knowingly inflict cruel and inhuman punishment upon a child less than seventeen years old.

Appellant's point should be denied.

CONCLUSION

The trial court did not err. Appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and Special Rule 360 of this Court, and contains 13,846 words, excluding the cover, Table of Contents, Table of Authorities, certification and appendix, as determined by Microsoft Word 2007 software; and

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

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 16th day of April, 2011, to:

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APPENDIX