

IN THE SUPREME COURT
FOR THE STATE OF MISSOURI

No. SC93745

THOMAS ESS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

On Appeal from the Circuit Court of Monroe County
State of Missouri
The Honorable Rachel L. Bringer, Circuit Judge

APPELLANT'S SUBSTITUTE OPENING BRIEF

Respectfully Submitted,

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- II. **The trial court erred in: (1) overruling Defendants motion for a judgment of acquittal at the close of the State's evidence and at the**

close of all the evidence; (2) submitting instruction six to the jury; (3) accepting the guilty verdicts; and (4) sentencing Defendant as to Count II because the State failed to provide sufficient evidence of each and every element of the offense necessary to find the Defendant guilty beyond a reasonable doubt, and thereby violated Defendant's rights to due process, a fair trial, a unanimous verdict, and freedom from double jeopardy, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), 19, and 22(a) of the Missouri Constitution in that the State failed to present any evidence of W.L.'s age at the time the offense was Alleged to have occurred or that the acts alleged occurred within the time-frame alleged in the amended Information and in jury instruction number six. 48

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United States Constitution and Article I, Sections 10, 18(a), 19, and 22(a) of the Missouri Constitution, in that the State presented evidence of multiple acts of alleged oral sodomy that allegedly occurred within the time frames stated in the Amended Information, yet the verdict directors did not specify any one of these incidents, thereby making it unclear as to which incident Defendant was found guilty and furthering the possibility that the jurors failed to unanimously find the same incident of sodomy; for instance, that some jurors could have found that Defendant committed sodomy in the downstairs bedroom, but not in the upstairs bedroom, while other jurors could have found that he committed sodomy in the upstairs bedroom but not in the downstairs bedroom. 55

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JURISDICTIONAL STATEMENT

Appellant Thomas Ess was found guilty of two counts of statutory sodomy in the first degree under §566.062 RSMo (1995), two counts of statutory sodomy in the second degree under §566.064 RSMo (1995) and one count of attempted child molestation in the first degree under §566.067 RSMo (1995) and §564.011 RSMo (1995) on December 13, 2011 in the Circuit Court of Monroe County, Missouri after a trial by jury, the Honorable Rachel L. Bringer presiding. He was acquitted on Count III of the six-count indictment. Appellant was sentenced on February 2, 2012, and received sentences of twenty years each on Counts I and II, to run consecutively, seven years on Count IV, to run concurrently to Counts I and II, four years on Count V, to run concurrently to Counts I and II, and seven years on Count VI, to run consecutively to Counts I and II, for a total of forty-seven years to serve. A Notice of Appeal with the Missouri Court of Appeals, Eastern District, was timely filed in Circuit Court on February 7, 2012, and that court entered its order on September 3, 2013. After a Motion for Rehearing En Banc or for Transfer was denied on October 8, 2013, this Court sustained a motion for transfer pursuant to Mo. Sup. Ct. Rule 83.04 on February 22 of this year.

STATEMENT OF FACTS

Thomas Ess (Ess) was charged by Information on March 3, 2011 with two counts of statutory sodomy in the first degree, one count of attempted statutory sodomy in the first degree, one count of child molestation and two counts of statutory sodomy in the second degree for events which allegedly occurred between 1995 and 2000 and involving his two stepsons, W.L. and B.L. LF:7-8.¹

W.L. was Ess's oldest stepson. Ess married W.L.'s mother in August of 1991 and they moved to the house in Paris, Missouri. Tr:457. W.L. and Ess generally got along well, and spent a lot of time with each other, taking part in joint activities, such as camping and playing video games together. Tr:339. W.L. would also tag along with Ess to work and help him with various jobs in order to earn money. TR:339. The two were close "buddies," and they spent a lot of time together. Tr:339. W.L. pursued these

¹ In the original felony information, the end date of the offenses in Counts I and II was April 30, 1999. LF:7. As W.L. was born on 5/1/1984, this would have put him above the age of 14 for one year that was covered by the information.Tr:271. On November 30, 2011, the State filed an amended information, amending to change these dates to April 30, 1998, presumably to assure that the charge would not cover any time period when W.L. was over 14 years old, as this was an element of the offense. LF:37. The November 30 information was the only amended information that was filed in this case.

activities and liked spending time with his stepfather. Tr:346. Family members said they were inseparable. Tr:460. They did not try to hide this bond, and were openly close with each other in public. Tr:355.

Growing up, W.L. was something of a troublemaker. He got poor grades and was the class clown in his school. Tr: 339. In his younger years, he did not like to go to his birth-father's house, because he made W.L. do chores. Tr:340. As he reached his older teenage years, Ess and W.L. began to grow apart as well. One source of conflict involved a four-wheeler Ess had purchased in his own name for W.L., with the provision that W.L. would make payments to Ess. Tr:340. W.L. never did, and the four-wheeler eventually was repossessed. Tr:341. Another source of problems was W.L.'s decision to drop out of school and move to his birth-father's house. Tr:342.

As W.L. grew older, other sources of conflict and tension in his relationship with Ess emerged. There was an incident where he borrowed a truck from Ess and did not return it, and another incident where he borrowed a camper and never brought it back. Tr:347. There were also a number of disagreements concerning W.L.'s treatment of Ess's foster children, Bobby and Stephen. W.L. would engage in a lot of activities with Stephen, but would not take Bobby along because Bobby had behavioral issues. Ess and W.L. would argue about this, because Ess did not think W.L. was treating Bobby fairly. Tr:348.

The conflict between Ess and W.L. also extended to their relationships with other

members of the family. Because of W.L.'s failure to return tools and things he borrowed and do things he had promised to do, Ess stopped loaning W.L. things and money. Ess would often complain that W.L. wouldn't pay back money or return tools or other things he borrowed. Tr:357. Ess and W.L.'s mother would in turn then get in arguments when Ess learned that W.L.'s mother was giving W.L. money behind his back. Tr:357. Just prior to W.L. making these allegations, there was a continuing conflict within the family regarding the time that W.L. allowed Ess and his wife to visit with W.L.'s daughter, Taylor. Tr:470. It was in the context of an argument concerning this conflict that W.L. first claimed that Ess had sexually abused him when he was a child. Tr:313, 470.

At the time, W.L. was twenty-six years old. Tr:311,469. Though he claimed that this abuse occurred nearly every night for a period of more than three years while other people were sleeping in the same house, he had never told anyone about it. Tr:312. During this time, W.L. engaged in numerous activities with Ess, and even pursued time alone with him. Tr:339-340;346. Not long before making these allegations, W.L. had written to the Department of Social Services, recommending Ess as an appropriate foster father for two young boys. Tr:323-324.

Ess was charged with six counts based on allegations made by W.L. and two additional allegations made by his brother, B.L. The trial began on December 12, 2011. During voir dire, the court specifically and repeatedly spoke to the jury as to the importance of finding a fair jury without preconceived notions about the case and defense

counsel and the prosecuting attorney both asked questions aimed at delineating any partiality. In a private meeting with only the judge and the attorneys, one potential juror stated that she knew this case too well to serve on the jury, that she had heard a lot about it, and talked to a number people about the case, and did not think she could find Ess guilty of the allegations. Tr:123-124. “I am so in favor of the defense, it is not even funny” she said, commenting on the opinions she had formed based on what she had heard from people she knew. Tr:124. She, along with two other people who knew the Defendant from the community were struck for cause by the State. Tr:229-232. At a lunch break during voir dire, juror number three (“Crigler”) stated to other jurors his belief that this was “an open and shut case.” Tr:730. He was shushed by one of the other jurors and nobody present disclosed to the Court that Crigler had made the comment, even though shortly after that break, defense counsel specifically asked whether anyone on the panel had any pre-conceived notions about the case. Tr:738;182. Because Crigler did not disclose his bias, he was not struck as a juror, either for cause or otherwise. He sat as final juror in judgment of Thomas Ess and ultimately found him guilty. Tr:240.

At trial, W.L. testified that the sexual abuse began when he was around eleven with some uncomfortable touching, progressed over a period of years to oral sodomy, and lasted through when he was sixteen or seventeen. Tr:285-287;332-333. He was not specific as to dates or years when the various acts occurred. He also testified that he moved bedrooms three times when he lived in the house in Monroe County: he started out

in a downstairs bedroom ("Bedroom 1"), where he lived with his brother; then he moved to the smaller upstairs bedroom ("Bedroom 2"); after that he moved back to a downstairs bedroom, where he lived by himself ("Bedroom 3"); finally, he moved back up to the larger upstairs bedroom ("Bedroom 4")². Tr:276;336. He testified that he did not remember any abuse occurring in Bedroom 2, but he did recall abuse occurring in both Bedroom 4, and what he described as "the downstairs bedroom."³ Tr:289. This was

² The various bedrooms that W.L. lived in are highly relevant to the arguments in this brief. For purposes of clarity, counsel has designated and identified them by number throughout this brief, as above. They were not identified in this manner at trial, but merely by description.

³ Throughout W.L.'s testimony, he often refers to "the downstairs bedroom." It is often unclear whether he is referring to the time period where he lived in the downstairs bedroom with Brian, before he ever lived upstairs ("Bedroom 1") or the time period where he lived in the bedroom downstairs *after* having lived in the smaller upstairs bedroom ("Bedroom 2") for a period of time. It is also unclear whether there was more than one downstairs bedroom and therefore whether reference to "Bedroom 1" (the downstairs bedroom he lived in with Brian) and "Bedroom 3" (the downstairs bedroom he lived in by himself, after having lived in the smaller upstairs bedroom) are actually the same physical space. Counsel refers to them in this brief separately as Bedroom 1 and Bedroom 3 in order to give some context to the timing and physical place of events,

different than what he had said in a previous statement, where he had stated that the abuse occurred only in an upstairs bedroom. Tr:334-338;352. Defense emphasized this prior inconsistent statement repeatedly throughout his cross-examination. Tr:334-338;352.

W.L. said he could only remember one specific incident where Ess had put his penis in W.L.'s mouth. Tr:294. He did not say when it happened or how old he was, but he did remember that he was living in Bedroom 4 (the larger upstairs bedroom that was the last bedroom he moved into) at the time. Tr:294.

B.L., who was 22 years old at the time he testified, also testified to two alleged incidents of improper touching by Ess. Tr:382. In one of these incidents, he said that Ess laid down next to him and held his hand between Ess's legs, on the outside of his clothes until he fell asleep. Tr:390-392. On another, he said that Ess had laid behind him and tried to unzip his pants. Tr:393.

Nona Henry, W.L. and B.L.'s grandmother also testified. She told a story of a night around Christmas of 1997 when Ess and W.L. were in W.L.'s bedroom for the entire time, while everyone else was gathered in the living room. Tr:440. W.L. was still living in what she called "the downstairs bedroom"⁴ at that time. Tr:440.

which was somewhat vague and confusing when presented at trial. A table designating each bedroom and the testimony associated with it is attached in the appendix at A26-A27.

⁴ It is unclear from her testimony whether this was Bedroom 1 (when W.L. was

At the motion for a judgment of acquittal at the close of the state's evidence, it was brought to the court's attention that under the 1995 version of the child molestation statute, a touching that occurred "through the clothing" was not criminal. The State argued that hand to genital contact that occurred through the clothing could nonetheless be considered a substantial step toward a skin-to-skin contact, and requested that the court overrule the motion with regards to an "attempt" to commit child molestation. The court did so, and the prosecutor agreed to file an amended information charging the attempt as opposed to child molestation itself. Tr:506;551-556. The amended information was never filed.

Nine witnesses took the stand and testified as character witnesses, including Nick Doerhoff, a nineteen year-old boy who had lived with Ess for the past two years and for whom Mr. Ess had served as a mentor and a father figure. Tr:565. Ess also testified on his own behalf, describing the conflict that had arisen between W.L. and Ess over the years and vehemently denying all allegations. Tr:578-619 . Defense counsel offered to submit proof that Ess had submitted to a polygraph test and computer voice stress tests and that the results of both tests indicated that Ess was being truthful in his denials. Tr:522. This request was denied by the court. Tr:522.

living in the downstairs bedroom with Brian) or Bedroom 3 (when W.L. was living downstairs in a room by himself, after he had already lived in the smaller bedroom upstairs for a period of time).

The jury acquitted Ess of Count III, in which W.L. had alleged that Ess attempted to have W.L. to perform anal sex on him, and found him guilty on all other counts. Mr. Ess obtained an extension of ten days in which to file his motion for new trial pursuant to Mo. Sup. Ct. Rule 29.11(b). Because the extended deadline fell on a Saturday, the motion was due on Monday, January 9, 2012. Tr:694. On the morning of January 10, defense counsel's secretary filed the new trial motion after being told by a court clerk the day before that it could not be filed without a notary stamp. At the February 2, 2012 hearing on the motion, defense counsel explained:

My secretary came up on the day to file a motion for new trial, and she's a notary, so she was getting the affidavit notarized and she left her stamp behind. She called the clerk and asked if she could file it without the stamp, and they told her no She wasn't able to get back to get the stamp and get back in time and actually filed the motion first thing the following morning.

Tr: 701. The Court granted Defendant's motion to file-stamp the motion showing that it was filed on January 9, 2012. Tr: 702.

Along with his new trial motion, defense counsel filed an affidavit signed by Charles McGinnes, who had served as venireperson number 26, saying that during a break in jury selection, he heard Crigler remark that this was an "open and shut case." At the hearing on the Motion For A New Trial, both Mr. McGinness and another venire-

person testified to these comments. Tr:732-734;Tr:737-738.⁵

The court overruled the motion for a new trial, and sentenced Ess to 20 years each on counts I and II, to run consecutively to one another, seven years on count IV to run consecutive to counts I and II, and four years and seven years on counts V and VI, respectively, to run concurrently with the other counts. An appeal followed to the Court of Appeals in the Eastern District of Missouri, in which Ess raised five points on appeal. The Appeals Court issued its judgment on September 3, 2014, reversing the decision of the trial court denying a motion for new trial, and finding that remand was required for the trial court to issue a specific finding as to whether a nondisclosure had occurred and whether that nondisclosure was intentional. *Thomas Ess v. State*, No. ED98038, Opinion of the Court of Appeals (September 3, 2013)(hereinafter, “App.Op.”) at 19-20. The Court also reversed with regard to the issue raised in Point V, finding that there was insufficient evidence to submit Count V, the crime of attempted sexual molestation in the first degree, to the jury. App.Op. at 23-24. The State timely filed a motion for rehearing or in the alternative to transfer, which was denied by the court of appeals. This Court granted transfer on February 4, 2014.

⁵ The other venire-person who testified recalled that Crigler had said something about the case, but did not recall specifically what he had said. Tr:737-738.

POINTS RELIED ON

I. The trial court erred in failing to grant a new trial based on the claim of juror misconduct because juror number three was not impartial and his participation on the panel and as a juror violated defendant's rights to a fair trial and to due process of law under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 and 18(a) of the Missouri Constitution as well as his independent fair trial rights guaranteed by sections §494.470.2 RSMo and §547.020 RSMo in that juror number three had formed a clear opinion on the case prior to hearing any testimony or argument and it was never established that this juror could set aside his prior opinions regarding the guilt of the Defendant and give the Defendant a fair trial.

Joy v. Morrison, 254 S.W.3d 885 (Mo. banc 2008)

Massey v. Carter, 238 S.W.3d 198 (Mo.App. W.D. 2007)

Novelo v. Yates, 2009 WL 2578925 (C.D.Cal. 2009)

Tobb v. Menorah Medical Center, 825 S.W.2d 638 (Mo.App.W.D. 1992)

II. The trial court erred in: (1) overruling Defendants motion for a judgment of acquittal at the close of the State's evidence and at the close of all the evidence; (2) submitting instruction six to the jury; (3) accepting the guilty

verdicts; and (4) sentencing Defendant as to Count II because the State failed to provide sufficient evidence of each and every element of the offense necessary to find the Defendant guilty beyond a reasonable doubt, and thereby violated Defendant's rights to due process, a fair trial, a unanimous verdict, and freedom from double jeopardy, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), 19, and 22(a) of the Missouri Constitution in that the State failed to present any evidence of W.L.'s age at the time the offense was alleged to have occurred or that the acts alleged occurred within the time-frame alleged in the Amended Information and in jury instruction number six.

City of Albany v. Crawford, 979 S.W.2d 574 (Mo.App.W.D.1998)

State v. Miller, 372 S.W.3d 455 (Mo.2012)

Woolford v. State, 58 S.W.3d 87 (Mo.App. E.D., 2001)

III. The trial court plainly erred and abused its discretion in: (1) submitting instructions five and eight to the jury; (2) accepting the guilty verdicts with regard to Counts I and IV; and (3) in sentencing Defendant, because the verdict directors failed to specify a particular incident and thereby violated Defendants rights to due process, a fair trial, a unanimous verdict, and

freedom from double jeopardy, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), 19, and 22(a) of the Missouri Constitution, in that the State presented evidence of multiple acts of alleged oral sodomy that allegedly occurred within the time frames stated in the Amended Information, yet the verdict directors did not specify any one of these incidents, thereby making it unclear as to which incident Defendant was found guilty and furthering the possibility that the jurors failed to unanimously find the same incident of sodomy; for instance, that some jurors could have found that Defendant committed sodomy in the downstairs bedroom, but not in the upstairs bedroom, while other jurors could have found that he committed sodomy the upstairs bedroom but not in the downstairs bedroom.

State v. Celis-Garcia, 344 S.W.3d 150 (Mo. 2011)

- IV. The trial court erred in submitting instruction number nine to the jury and in accepting the verdict of guilty and sentencing Defendant as to Count V because: (1) instruction nine did not properly instruct the jury upon attempt to commit sexual molestation in that at the time alleged in the instruction, §566.067 required that the victim be less than twelve years of age, not less**

than fourteen years of age and instruction nine did not include this element of the offense; (2) the charges did not comply with the requirements of Supreme Court Rule 23.01 and §545.240 RSMo in that the prosecuting attorney failed to file a signed, written, verified information amending Count V; (3) an amendment under Supreme Court Rule 23.08 was improper in that the improperly amended charge both charged a new and different offense and deprived the Defendant of a defense; and (4) the instruction did not properly instruct on the law in that it did not make clear that touching “through the clothing” did not constitute sexual contact for the purpose of the child molestation statute, all in violation of Defendants rights to due process of law and to be charged only by an indictment or information under the Fifth and Fourteenth Amendment to the United States Constitution, and Article I, Sections 10 and 17 of the Missouri Constitution.

State v. Doolittle, 896 S.W.2d 27, 30 (Mo. banc 1995)

State v. Langston, 229 S.W.3d 289 (Mo.App. S.D. 2007)

State v. Wallace, 976 S.W.2d 24 (Mo.App. E.D. 1998)

V. **The trial court erred in overruling Defendant’s motion for judgment of acquittal at the close of the State’s evidence and motion for judgment of acquittal at the close of all evidence and in submitting instruction number nine because there was insufficient evidence presented by the State of all the essential elements of the offense of attempt in that the State did not present any evidence that the Defendant had the purpose of committing the offense of Child Molestation in the First Degree in that no evidence was presented of any attempt or that Defendant acted with the purpose being touched by B.L. underneath Defendant’s clothing, as was required by §566.067 at the time, thereby depriving Defendant of his rights to due process, a fair trial, a unanimous verdict, and freedom from double jeopardy, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), 19, and 22(a) of the Missouri Constitution.**

State v. O'Dell, 684 S.W.2d 453 (Mo.App. S.D. 1984)

ARGUMENT

- I. **The trial court erred in failing to grant a new trial based on the claim of juror misconduct because juror number three was not impartial and his participation on the panel and as a juror violated defendant's rights to a fair trial and to due process of law under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 and 18(a) of the Missouri Constitution as well as his independent fair trial rights guaranteed by sections §494.470.2 RSMo and §547.020 RSMo in that juror number three had formed a clear opinion on the case prior to hearing any testimony or argument and it was never established that this juror could set aside his prior opinions regarding the guilt of the Defendant and give the Defendant a fair trial.**

Standard of Review

A trial court's failure to grant a new trial based on juror misconduct is reviewed for an abuse of discretion. *State v. Chambers*, 891 S.W.2d 93 (Mo. 1994).

The court of appeals reviewed this issue only for plain error resulting in manifest injustice, finding that because there was no authority for the trial court to order the motion to be file-stamped January 9, 2012, the Motion for New Trial must be taken as having been untimely filed and the error not properly preserved. App.Op. at 9-10. However, the court of appeals was mistaken as to this particular point of law. The Circuit Court in this

case had the power to enter an order “nunc pro tunc” to correct the clerical error made by the circuit clerk and defense counsel’s administrative staff. *Soskin v. Wolfson*, 999 S.W.2d 261 (Mo.App. E.D., 1999). The record in this case reflects that defense counsel’s secretary was advised by the clerk that the new trial motion would not be accepted and filed absent the notary seal. The record was uncontested as to this point. This error in judgment on the part of the court clerk meant that the new trial motion, which was ready to be filed on January 9, was not filed on that date. The failure of the motion to be timely filed was primarily the result of an error on the part of a court clerk and defense counsel’s secretary. No attorney or judge was involved in this error. This is the very definition of “clerical error” which is at the heart of the court’s equitable power to enter nunc pro tunc orders. The trial court’s order that the Motion for A New Trial be shown as filed on January 9, 2012 should stand, and this error should be considered properly preserved.

A failure to affirm the trial court’s nunc pro tunc order would also violate the principles of equal protection and defendant’s due process rights. Local Rule 2.1(c) for the Tenth Judicial Circuit (which includes Monroe County) requires that, “The Clerk’s office is deemed always open.” The undisputed record with regard to this issue suggests that the clerk’s office closed at some point shortly after defense counsel’s secretary got off the phone with a court clerk. This would indicate that the clerk’s office was closed, and was not “always open” for filing as required by Local Rule 2.1(c). The trial court’s order deeming the motion filed on January 9 was therefore correct, and this issue should

be reviewed for an abuse of discretion.

Argument

Both the Sixth Amendment to the United States Constitution and Article 1, section 22(a) of the Missouri Constitution guarantee defendants in a criminal case the right to a trial by an impartial jury of their peers. The right to a jury trial also requires the verdict be based only on the evidence produced at trial. *Turner v. Louisiana*, 379 U.S. 466, 472-73(1965) ("[T]rial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel."); "The right to unbiased and unprejudiced jurors is foundational to the judicial process." *In re Berg*, 342 S.W.3d 374, 387 (Mo.App. S.D., 2011) (citing *Speck v. Abell-Howe Co.*, 839 S.W.2d 623, 626 (Mo.App.1992)). "It is fundamental that jurors should be thoroughly impartial as between the parties. The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to a trial by jury guaranteed by the Constitution." *Id.* (further citations omitted). The right to a fair and impartial jury is a basic right, and Missouri statute mandates that a new trial be granted where the jury "has been guilty of any misconduct tending to prevent a fair and due consideration of the case." §547.020.3 RSMo.

Under §494.470.1 RSMo, "no person who has formed or *expressed an opinion* concerning the matter or any material fact in controversy in any case that may influence

the judgment of such person,” may be sworn in as a juror. (Emphasis added).

Additionally, §494.470.2 establishes the grounds for challenging a potential juror for cause and states that “[p]ersons whose opinions or beliefs preclude them from following the law as declared by the court in its instructions are ineligible to serve as jurors on that case.” As explained in *Joy v. Morrison*, “[t]he critical question in these situations is always whether the challenged venireperson indicated **unequivocally** his or her ability to fairly and impartially evaluate the evidence” 254 S.W.3d 885, 891 (Mo. banc 2008); See also *Ray v. Gream*, 860 S.W.2d 325, 334 (Mo. banc. 1993) (emphasis added) “Initial reservations expressed by venirepersons do not determine their qualifications; consideration of the entire voir dire examination of the venireperson is determinative.” *Joy*, 254 S.W.3d at 891.

However, where the information on which the allegation of juror bias is based is withheld or otherwise not provided by the potential juror during voir dire, the standard changes. Defendant's ability to exercise his right to a fair and impartial jury mandates that potential jurors answer fully and truthfully all questions posed to them during voir dire. *State v. Martin*, 755 S.W.2d 337 (Mo.App. E.D. 1988). A juror's nondisclosure of material which has been requested during voir dire can be intentional or unintentional. *Groves v. Ketcherside*, 939 S.W.2d 393 (Mo.App.W.D. 1996). Where a juror intentionally fails to disclose information requested on voir dire, bias and prejudice are inferred. *Tobb v. Menorah Medical Center*, 825 S.W.2d 638 (App. W.D. 1992). Once

intentional concealment of information requested of a potential juror on voir dire is found, bias and prejudice must be presumed to have influenced the verdict. *Rife v. State Farm Mut. Auto. Ins. Co.* 833 S.W.2d 42 (Mo. App. W.D. 1992).

In this case, juror number three (hereinafter “Crigler”) made clear his strong bias against the Defendant when he disclosed to other jurors, prior to seeing a shred of evidence or hearing any testimony, his belief that this was “an open and shut case.” Tr:730. He hid this despite numerous questions by the prosecutor, defense counsel, and the court itself soliciting disclosure. His bias was clear, his non-disclosure was intentional, and prejudice to the Defendant is both presumed and absolutely appropriate.

A. In this case, bias and prejudice must be presumed based on the trial record and the evidence presented by Defendant because the nondisclosure was intentional.

1. Whether there was a nondisclosure.

For purposes of determining whether a disclosure was intentional or unintentional, the duty to disclose is triggered only after a clear question has been asked. *Massey v. Carter*, 238 S.W.3d 198, 201(Mo.App. W.D. 2007)(citing *Brines v. Cibis*, 882 S.W.2d 138, 139 (Mo. banc 1994)). Failure to answer is considered nondisclosure, which can be either intentional or unintentional. *Id.* A clear question is one that solicits a layperson to provide the undisclosed information. *Id.* (citing *Ewing v. Singleton*, 83 S.W.3d 617, 621 (Mo.App. W.D.,2002). “The interpretation depends on the context of the question as well

as the wording of the question.” *Id.*

In this case, there is no doubt that the questions presented by the various parties in the case were aimed at soliciting the exact information that Crigler kept hidden; i.e., whether he had already made any decision about any aspect of the case. Specifically, Defense Counsel asked, “How many of you have a preconceived notion about the guilt or innocence of Tom Ess at this point?” Tr:182. No person on the panel raised his/her hand. *Id.* Defense counsel then followed up with, “If you have to vote right now, how many people would vote guilty at this point?” *Id.* No hands. *Id.* Defense Counsel then said, “Raise your hand if you would vote guilty at his point.” *Id.* Again, no hands. Defense Counsel also discussed reasonable doubt and asked whether anyone would have difficulty applying the reasonable doubt standard or the presumption of innocence standard. *Id.* Again, no hands.

The court and the prosecutor also asked questions aimed at soliciting bias. At the beginning of voir dire, the court specifically instructed the jury that the Defendant was presumed to be innocent, and that the state had the burden of proving him guilty. Tr:41. The court than asked the panel if there was anyone who could not “for any reason” follow that instruction. Crigler was silent. Then the prosecutor -- after stating during his voir dire numerous times the importance of fairness and impartiality and explaining the importance of evaluating the case on the basis of the evidence and the standard of reasonable doubt -- specifically asked Crigler whether there was any reason he could not

or just would not “be a good juror for this particular case.” Tr:95. Crigler responded in the negative. *Id.* Clearly this was not a “full, fair, and truthful” (*Massey*, 238 S.W.3d at 200) response to the prosecutor’s question. It is absolutely clear that in failing to disclose his belief that this was “an open and shut case,” and by deliberately avoiding a truthful response to these straightforward, unequivocal questions, Crigler was withholding information that was clearly being solicited by defense counsel, the prosecutor, and the court. This was unquestionably nondisclosure, if not an outright, bold-faced lie.

2. *Whether the nondisclosure was intentional.*

Intentional non-disclosure occurs where it is not reasonable that a juror misunderstood the question and the juror actually remembers the experience or the purported forgetfulness is unreasonable. *Tobb*, 825 S.W.2d at 643; See also *Massey*, 238 S.W.3d 198. In making this determination, courts will look to the proximity in time and the significance of the experience as well as whether the potential juror could have been confused as to whether the information or experience he failed to disclose was actually being solicited by the question being posed. 238 S.W.3d at 201.

In *Massey*, the court evaluated whether a juror’s failure to disclose the fact that he had been party to a collections lawsuit was an intentional non-disclosure. *Id.* The court determined that because counsel had stated the question generally before following-up with more specific questions, there was no reasonable grounds for the juror to have been confused. *Id.* Further, the court determined that it was unreasonable for him to not have

understood that he was being sued in a collections lawsuit, and that both his stated motive in not telling the court and, “the recent vintage of his litigation experience” made any claim of forgetfulness unreasonable. *Id.*; *See also State v. Endres*, 698 S.W.2d at 591, 596 (Mo. App. E.D. 1985). (It was unreasonable for a juror in a murder prosecution to fail to remember the shooting death of her half-brother six weeks before trial, even though the juror had neither seen or known her brother until she viewed him at the funeral home.)

In this case, there is no question that non-disclosure was intentional. All parties, as well as the court, made it absolutely clear that the purpose of voir dire was to aid them in selecting fair jurors who had not formed opinions about the case. Even absent the very clear and specific question posed by defense counsel, there is no reasonable possibility that Crigler did not know that his pre-conceived notions about the case were the exact information that defense counsel, the State, and the court were seeking to ascertain. Crigler’s eagerness to completely disregard the instructions of the court was also evident in his response when discovered talking about the case by a juror who had taken his oath seriously when admonished by the court not to discuss the case. Crigler did not argue with the venire-member who shushed him or tell him that he was wrong when he stated that they were not to be discussing the case. Rather, Crigler simply quieted his conversation, a clear acknowledgment that he was aware of the restriction placed on him by the court and was blatantly violating it. Tr:733.

Moreover, there is no question as to the closeness in time between the experience

and the question which solicited no response. The comments made by Crigler to the other jurors were made during lunch-time on the first day of trial, which occurred directly after the prosecution's voir dire and directly before defense counsel began. Crigler did not "forget" that he thought this was an open and shut case. He simply chose to lie about it. As stated in *Williams by and through Wilford v. Barnes Hosp*, "[The potential juror's] nondisclosure was unreasonable under the circumstances. His reckless disregard for his responsibilities as a potential juror are tantamount to intentional concealment." 736 S.W.2d 33, 38 (Mo. 1987).

As the court of appeals in this case correctly noted concerning Crigler's concealment:

Given this extensive record, we cannot find a reasonable inability to comprehend the information solicited from the members of the venire, namely whether any of them had already formed opinions or conclusions or held biases about the case. Defense counsel's question—"how many of you have a preconceived notion about the guilt or innocence of [the defendant] at this point?"—could not have been more clearly articulated. These questions render it unreasonable that Juror 3 might fail to understand that the parties wanted to know whether any venireperson had a bias for or against either side.

App. Op. at 15. This nondisclosure was clearly intentional.

3. *The presumption of prejudice.*

Where a juror intentionally fails to disclose information requested on voir dire, bias and prejudice are inferred. *Tobb*, 825 S.W.2d 638. Once intentional concealment of information requested of potential juror on voir dire is found, bias and prejudice must be presumed to have influenced the verdict. *Rife*, 833 S.W.2d 42 (Mo.App.W.D. 1992). A finding of intentional concealment is tantamount to a *per se* rule mandating a new trial. *Barnes Hosp.*, 736 S.W.2d at 37 (citing *Frenette v. Clarkchester Corp.*, 692 S.W.2d 834, 836 (Mo.App.1985); *Anderson v. Burlington Northern Railroad Co.*, 651 S.W.2d at 178 (Mo.App.1983)). In this case, prejudice must be presumed.

B. Even if the nondisclosure was unintentional, bias must be presumed based on the nature of the comments and what the record reflects regarding the background of Crigler.

Unintentional nondisclosure occurs where the experience forgotten was insignificant or remote in time, or where the juror could reasonably have misunderstood the question presented. *Tobb*, 825 S.W.2d at 643 (citing *Barnes Hosp.*, 736 S.W.2d at 36)). Both parties are entitled to unbiased jurors whose experiences, even innocently and reasonably undisclosed, will not prejudice the resolution of the cause. *Id.* Where *unintentional* nondisclosure exists, the inquiry is whether, under the circumstances, the juror's presence on the jury did or may have influenced the verdict so as to prejudice the party seeking a new trial. *Id.* (citing *Davis v. Kansas City Public Service Co.*, 233 S.W.2d

679, 685 (1950); *Barnes Hosp.*, 736 S.W.2d at 37, 39).

As previously established, this is clearly not a case of unintentional nondisclosure. However, even were this nondisclosure unintentional, the record clearly established that the juror's presence "did or may have influenced the verdict." This is not a case where the nondisclosure bore no direct relationship to the case. *See e.g. Barnes Hosp*, 736 S.W.2d at 36 (A juror's unintentional failure to disclose information regarding a contract lawsuit she had filed against someone who had worked on her roof did not require a new trial because the claim "was simply not of the sort that would produce bias against a health care provider or a major corporate entity such as appellant"). In this case, the undisclosed information was the fact that the juror himself had already made his mind up about the case, prior to hearing a single witness, or seeing a single piece of evidence, and from the outset of trial, he was in complete violation of the court's orders.⁶

⁶ Because Crigler concealed his bias from the court and the various parties by failing to answer any of the questions regarding possible sources of bias, it is unclear from the record what the source of that bias was. He did report that he followed the news, so could have gained knowledge of the case through that means. Tr:164. However, defense counsel asked questions regarding a number of possible sources of information and whether they would effect the jurors views of the case and Crigler either failed to respond or responded that it did not create any bias in him. Because he lied about his ability to presume innocence and put the State's evidence to the test the law

This is not the first case where a court has been required to determine whether a comment by a juror that a case was an “open and shut case” violated a defendant’s rights to a fair trial. In *Novelo v. Yates*, 2009 WL 2578925 (C.D.Cal. 2009), a district court in California was presented with a question in a habeas corpus proceeding of whether the trial court should have granted a new trial based on a juror comment made prior to deliberations that the case was “open and shut.” An observer of the trial had sat outside of the courtroom with a juror after most of the evidence had been presented, but before deliberations had begun, and it was at that time that the juror made the comment. During a conversation with the observer, the juror stated, “This case is easy. I saw it in the paper. It’s an open and shut case.” The district court granted habeas corpus relief, finding that the trial court’s determination that the comment “merely stated an opinion and did not reflect any impropriety” was an unreasonable determination of the facts in light of the record presented. *Id.* at 14.

This case presents a much stronger case of bias than that in *Yates*. In *Yates*, the evidence had already been presented to the jury, and the juror had a basis in evidence for forming an opinion about the case. In this case, no evidence had been presented and no

requires, it is no stretch to believe he would have also been willing to lie about the source of his bias. However to some extent, the reason for the bias is irrelevant because the bias itself is clear by his comment that he had already formed an opinion on the case.

argument had been made. Crigler had seen or heard nothing that would give him a legally legitimate basis for having formed an opinion about the case. The presumption of innocence was at its most vital point, and Defendant stood accused, but innocent before the jury. Under the law, the presumption of innocence applies unless and until the State presents sufficient evidence to overcome that presumption and find the defendant guilty beyond a reasonable doubt. LF:61. In *Yates*, the State had already presented significant evidence that pointed toward guilt. Nonetheless, the district court recognized the inherent danger in letting a citizen be judged by someone who had totally lost the ability to be fair and impartial and follow the law. In this case, as in *Yates*, the bias was clear by the comment itself, and requires reversal.

C. The State made no attempt to rebut the presumption of prejudice.

Where a presumption of prejudice applies in a case alleging juror misconduct, the burden shifts to the State to overcome that presumption. *State v. Stephens*, 88 S.W.3d 876, 883 (Mo. Ct. App. 2002). To rebut the presumption of prejudice, the non-movant must show that the jurors were not subjected to improper influence as a result of the misconduct. *Id.* (citing *State v. Smith*, 944 S.W.2d 901, 921 (Mo. banc 1997); *State v. Brown*, 939 S.W.2d 882, 883 (Mo. banc 1997); *State v. Chambers*, 891 S.W.2d 93, 101 (Mo. banc 1994)).

In this case, the State had every opportunity to rebut the presumption of prejudice. The State received a copy of the new trial motion with the attached affidavit three weeks

prior to the sentencing. LF:83-87; SLF. Mo.Sup Ct. Rule 29.11(f) provides that where a motion for a new trial is supported by affidavits, “[d]epositions and oral testimony may be presented in connection with after-trial motions.” The State made no attempt to do this. The State was well aware of the record in the case, as well as the testimony that would be presented at the hearing on the motion for new trial. Had the state chosen to, it could have easily summoned Crigler and utilized his testimony in an attempt to explain his actions. It made no attempt to do so. Prejudice was obvious.

D. Defendant met his burden under *Mayes*.

In its order denying the motion for a new trial, the trial court relied on *State v. Mayes*, 63 S.W.3d 615, 626 (Mo 2001) and urged that Ess had failed to present sufficient evidence of intentional concealment because Defendant had not presented the testimony of Crigler himself and because the comments were not given in context and did not specifically indicate which side the juror favored. LF:90-91. However, this was not the rule adopted in *Mayes*. The *Mayes* Court noted that "a defendant alleging juror misconduct during voir dire must present ‘evidence through testimony or affidavits of any juror, *or other witness* either at trial or at the hearing on his motion for new trial.'" *Id.* at 625-26 (emphasis supplied). Appellant did just that. *Mayes* "failed to offer either an affidavit or testimony of [the offending juror], or other evidence" in support of his claim of juror misconduct. Thus, the record in *Mayes* was devoid of any evidence to support the claim. The claim was rejected because counsel failed "to call the juror *or otherwise*

establish the facts . . . " *Id.* (emphasis supplied).

Not only did Defendant comply with the requirements of *Mayer*, but that rule is the one that this Court should adopt. Adopting a rule, as the State in its motion to transfer proposes, that juror misconduct can only be established by the sworn statement of the offending juror would place an impossible burden on any appellant seeking to prove juror misconduct. The juror may refuse to sign an affidavit even if its allegations are truthful. He may be unreachable or even dead. If subpoenaed to court, he can invoke his Fifth Amendment rights and refuse to answer questions that may possibly incriminate him. See e.g. *State ex rel Robinson v. Hartenbach*, 754 S.W.2d 568 (Mo. Banc 1988)(criminal contempt statute was applicable to misconduct of jurors and their misconduct could be punished by fines and a sentence of imprisonment).

The Court of Appeals correctly noted in its opinion,

[T]o require a defendant to produce an affidavit from a biased juror confessing to an intentional nondisclosure of material information, or to forego any relief, places an impossible burden on a defendant. Missouri courts have already recognized that a juror's statement that misconduct did not affect deliberations has little probative value because of the common tendency of jurors to minimize the effect of misconduct.

App. Op. at 19 (citing *Dorsey*, 156 S.W.3d at 832 (quoting *Travis v. Stone*, 66 S.W.3d 1, 5 (Mo. banc 2002))

Perhaps most importantly though, the rule proposed by the State would be a terrible policy. The law of evidence is fairly broad and leaves with the proponent of error the discretion of determining how to present it, and with the trier of fact the task of determining whether that party has met that burden. In no other area of the law is there a rule requiring the presentation of a single particular *type* of evidence. The rule proposed by the State in this case would impose the completely unprecedented, unjust and illogical requirement that a party somehow convince a wrong-doer to admit his deceit in court in order for that party to prove that a wrong had been done. In no other area of the law does anything close to this requirement exist. Adopting such a rule would create an impossible burden for a Defendant seeking to enforce his right to a fair and impartial jury. The public shame associated with being called before court for having committed perjury under oath combined with the possibility of criminal prosecution or a contempt citation if he admits the falsehood makes it such that the offending juror has little or no incentive to come forward and admit the truth.

While the State would undoubtedly be delighted with a rule saddling criminal defendants with an impossible burden that is found nowhere else in the law, this Court should not adopt this rule or even take it under consideration. Demanding that litigants prove a dissembling juror's misconduct only through that juror's incriminating confession would have the effect of guaranteeing that it could never be proven, thus making any hope that a litigant would challenge the impartiality of a juror a non-starter. The rule

proposed by the State is an impractical, unworkable, and absurd assault on the rights of a defendant to a fair jury composed of impartial jurors that is guaranteed by the Constitutions of both Missouri and the United States. *See In re Berg*, 342 S.W.3d at 387 (citing *Speck*, 839 S.W.2d 623, 626 (Mo.App.1992) ("It is fundamental that jurors should be thoroughly impartial as between the parties. . . . The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to a trial by jury guaranteed by the Constitution."))

E. This issue requires reversal on all counts and a new trial.

i. There is no issue as to the credibility of the witnesses called by the defense and a new trial is warranted.

At the hearing on the motion for a new trial, the State presented no evidence and did not argue that the witnesses were biased or otherwise not credible. The only cross-examination conducted regarding the first juror who testified was to ask whether he had said anything to the Court after hearing the comment. There was no cross-examination whatsoever of the second juror who testified. TR:740. There was no cross-examination whatsoever of the second juror who testified. The State's argument did not give any reason for questioning the testifying juror's credibility, but rather urged that one could not know from the statement itself and without further context which side the declarant favored⁷. The Court did not make any finding that the jurors who testified were biased or

⁷ The State itself has acknowledged how ridiculous this argument is: "Respondent

otherwise not credible.

The Motion for New Trial and attached affidavits were filed on January 9 or January 10, depending on how one calculates the date of filing. LF:83. The hearing was not held until February 2nd. Between January 10th and February 2nd, the State had ample opportunity to contact and subpoena witnesses for the hearing on the motion for a new trial, or to request a continuance of the sentencing if more time was needed to investigate and subpoena witnesses. It did not do so. Remanding for new hearing would do nothing but give the State the opportunity to present evidence that should have been presented at the original hearing, but that was not presented. It would constitute a policy of giving the state multiple chances to "get it right" on a new trial motion, thus violating the principles of fairness and due process and promoting inefficiency in the judicial system.

Doing so would also encourage the kind of "prosecutorial laxity" that Missouri Appeals courts have condemned time and again. See *State v. Cullen*, 39 S.W.3d 899 (Mo.App. E.D., 2001); *State v. Jennings*, 815 S.W.2d 434 (Mo.App. E.D. 1991); *State v. McGowan*, 774 S.W.2d 855, 858 (Mo.App. W.D.1989) (criticizing "prosecutorial laxity" in failing to comply with the timeliness requirements regarding proof of alleged persistent offender status.) Similarly here, it is the well-established practice in courts of this State

would agree that a statement that the case was ‘open and shut’ . . . would seem to connote that the case was ‘open and shut’ in favor of the State.” (Respondent’s Brief, hereinafter “R.B.” at 19).

that evidence with regard to a particular motion is presented at a hearing on that motion, or with further leave of the Court prior to the court making its decision. As previously cited, the law is clear that once a defendant has met his burden of showing that presumption of prejudice is merited or that prejudice exists, the burden shifts to the State to overcome that presumption. *State v. Stephens*, 88 S.W.3d 876, 883 (Mo. Ct. App. 2002). In this case, the State did not ask or seek the opportunity to present additional evidence, but rather stated that it had no evidence to present and rested its case on its argument at the time of the hearing. The State should not now be allowed to take a second bite at the apple in this manner.

ii. Even under the standard of manifest injustice, a new trial is required.

The pre-trial opinions of Crigler were clearly stated and intentionally not disclosed. After failing to state his pre-trial conclusions despite being clearly asked numerous times in a variety of ways, he sat on a jury in judgement of Thomas Ess and rendered a verdict which resulted in the loss of Mr. Ess's freedom for 47 years, a sentence, which is a likely life sentence for Mr. Ess. There is no question that his participation on the jury that decided Mr. Ess's fate violated his right to a fair trial.

As the Appellate Court for the Eastern District of Missouri acknowledged, there are numerous cases where courts have considered plain-error review. App. Op. at 10 (citing *State v. Starnes*, 318 S.W.3d 208, 216 (Mo. App.W.D. 2010))(citing *State v.*

Johnson, 150 S.W.3d 132, 136 (Mo. App. E.D. 2004)) (although defendant filed motion for new trial some 17 days late, Court found plain error resulting in manifest injustice when trial court sentenced the defendant to sentence greater than maximum authorized); *State v. Pullum*, 281 S.W.3d 912 (Mo. App. E.D. 2009)(despite defendant's failure to raise issue at any time in trial or post-trial proceedings, entry of judgment on conviction not charged in substitute information, and which was not a lesser-included offense of charged offense, constituted plain error requiring reversal); *State v. Lopez-McCurdy*, 266 S.W.3d 874 (Mo. App. S.D. 2008)(given nature of newly-discovered evidence, this was not extraordinary case where plain-error relief was warranted); *Langston*, 229 S.W.3d 289(defendant filed motion for new trial 25 days late, but Court reversed and remanded for new trial when trial court plainly erred in submitting verdict-director to jury that did not require jury to decide all essential elements of offense); *Johnson*, 150 S.W.3d 132 (record clearly indicated that defendant improperly sentenced, resulting in manifest injustice and miscarriage of justice, notwithstanding failure to timely file motion for new trial); *State v. Stanley*, 124 S.W.3d 70 (Mo. App. S.D. 2004)(defendant failed to include claim of error in motion for new trial, and while defendant's claim of plain error was facially substantial, error was cured when defendant voluntarily testified on his own behalf); and *State v. Brown*, 615 S.W.2d 626 (Mo.App.S.D. 1981)(although defendant filed motion for new trial one to two days late, Court reviewed transcript, legal file, and briefs, concluded no manifest injustice or miscarriage of justice occurred, and deemed

plain error review unnecessary). In this case, a juror concealed his bias from the court and sat among a group of twelve people that adjudged him guilty of crimes that resulted in a sentence of imprisonment for what is, in all practicality the rest of Mr. Ess's natural life. He was completely denied the right to a fair trial by an impartial jury, and this was a manifest injustice.

II. The trial court erred in: (1) overruling Defendants motion for a judgment of acquittal at the close of the State's evidence and at the close of all the evidence; (2) submitting instruction six to the jury; (3) accepting the guilty verdicts; and (4) sentencing Defendant as to Count II because the State failed to provide sufficient evidence of each and every element of the offense necessary to find the Defendant guilty beyond a reasonable doubt, and thereby violated Defendant's rights to due process, a fair trial, a unanimous verdict, and freedom from double jeopardy, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), 19, and 22(a) of the Missouri Constitution in that the State failed to present any evidence of W.L.'s age at the time the offense was Alleged to have occurred or that the acts alleged occurred within the time-frame alleged in the amended Information and in jury instruction number six.

Standard of Review

Appellate review of a challenge to the sufficiency of the evidence to support a criminal conviction requires a determination of whether sufficient evidence was presented from which a reasonable trier of fact might have found the defendant guilty beyond a reasonable doubt. *State v. Eppenauer*, 957 S.W. 2d 501, 503 (Mo. App. 1997). The reviewing court accepts as true all evidence and inferences favorable to the verdict and disregards evidence and inferences to the contrary. *Id.* However, in making such a determination, a court of appeals may not supply missing evidence or give the State the benefit of unreasonable, speculative or forced inferences. *State v. Taylor*, 407 S.W. 3d 153, 159 (Mo.App.E.D. 2013); *State v. Whalen*, 49 S.W. 3d 181, 184 (Mo. Banc 2001).

For the same reasons as articulated under the Standard of Review section in Point I this issue should be reviewed under the normal standards for reviewing sufficiency of the evidence errors and not merely for plain error resulting in manifest injustice.

Argument

- A. The State failed to present sufficient evidence to make a submissible case as to the essential element of W.L. being under the age of fourteen at the time of the alleged acts.**

The State has the burden to prove each and every element of the charged offense beyond a reasonable doubt. *Woolford v. State*, 58 S.W.3d 87, 89 (Mo.App. E.D., 2001).

"A conviction is prohibited 'except upon evidence that is sufficient fairly to support a

conclusion that every element of the crime has been established beyond a reasonable doubt'." *Id.* (citing *Jackson v. Virginia*, 443 U.S. 307, 314–15 (1979); *State v. Rowe*, 838 S.W.2d 103, 111 (Mo.App. E.D.1992); *State v. Smith*, 33 S.W.3d 648, 652 (Mo.App.W.D. 2000). "Substantial evidence is 'competent evidence from which the jury can reasonably decide the case.'" *Id.* (citing *State v. Boone Retirement Center*, 26 S.W.3d 265, 272 (Mo.App.W.D. 2000).

Defendant was charged in Count II with having had "deviate sexual intercourse with another person who is less than fourteen years old." 566.062.1 RSMo (1995). An essential element of that charge was that the alleged victim was less than 14 years old. In this case, the State failed to present any evidence whatsoever as to the age of W.L. at the time of the act alleged in Count II. According to W.L.'s own testimony, there was only one time he could specifically remember putting his mouth on the Defendant's genitals. Tr:294. At no time in his testimony did W.L. or any other witness state what year it was when this occurred or even an estimated age at the time. The State does not dispute this fact. See R.B. at 20-22.

Moreover, even accepting all inferences in favor of the verdict (See App.Op. at 21, citing *Pullem*, 281 S.W.3d at 915), no set of reasonable inferences from the evidence presented would suggest that W.L. was under fourteen years of age at the time of that particular event. W.L.'s testimony, combined with other testimony presented by the State specifically suggested that the act did not occur within the time frame specified in the

amended information and in the jury instructions. W.L. specifically testified that this event occurred when he was living in Bedroom 4. Tr:294. Nona Henry, Defendant's grandmother, testified as to events that occurred on Christmas of 1997, and further testified that at the time, W.L. was still living in the "room downstairs." Tr:440. It is unclear from her testimony whether she was referring to Bedroom 1 or Bedroom 3. However, between Christmas of 1997 (the date at which Ms. Henry testified W.L. was still living downstairs) and May 1, 1998 (W.L.'s fourteenth birthday), there is a time period of only four months. There was no testimony presented that W.L. moved to Bedroom 4 shortly after Christmas of 1997, or even any testimony that when he was living in the "downstairs bedroom" around Christmas of 1997, this was the second time he was living there (i.e., the time directly preceding his move to Bedroom 4, where the abuse is alleged to have occurred - what counsel has named, "Bedroom 3") and not the first (the time directly preceding his move to Bedroom 2 - what counsel has named "Bedroom 1", where he lived downstairs with Brian). Additionally, W.L.'s testimony suggested that the abuse progressed through the years, and that this act occurred toward the end of the time period during which W.L. was being abused. Tr:270-294. Since the abuse allegedly ended around the year 2000, when W.L. was sixteen years old, the testimony presented by the State and all reasonable inferences that could be derived therefrom strongly suggested that this act occurred after April 30, 1998 -- after W.L. had turned fourteen.

This Court must base its answer to the question of whether the evidence was

sufficient to establish that the victim's age was less than fourteen on the evidence actually presented and "may not supply missing evidence or give the State the benefit of unreasonable, speculative or forced inferences." *Taylor*, 407 S.W.3d at 159; *Whalen*, 49 S.W.3d at 184. In this case, every reasonable inference supports the conclusion that W.L. was over the age of fourteen at the time of the alleged acts.

It is well-established that the victim's age of "less than fourteen" was an essential element of the offense that must be proven beyond a reasonable doubt. See *City of Albany v. Crawford*, 979 S.W.2d 574 (Mo.App.W.D.1998)(holding that where proof of age was an element of the offense, the evidence is insufficient where no proof of age is offered). The state failed to present any evidence whatsoever as to this element of the offense. Reversal is required as to Count II.

B. Double jeopardy concerns also require a finding that the evidence was insufficient because the State failed to prove the timing of when the alleged acts occurred.

"[E]ven though the exact date of a charged offense is not an element of the crime, the indictment or information must allege the time of the alleged offense with reasonable particularity; that is, it must be specific enough to ensure notice to the defendant, assurance against double jeopardy, and reliability of a unanimous verdict." *State v. Miller*, 372 S.W.3d 455, 464-465 (Mo.2012) (citing 41 AM JUR.2D Indictments and Information § 128.) "When time is not an element of the offense, but the State includes a time period

in the information and mirroring instructions, the time period included in the information and mirroring instructions implicate a defendant's double jeopardy rights and preclude the State from using evidence of the uncharged offense to prove the separate charged offense at trial." *Id.* at 468. "When the State chooses to file an information and submit parallel jury instructions charging the defendant with specific conduct during a specific period of time, the State should not be permitted to secure a conviction with respect to specific conduct occurring during a . . . different period of time from that stated in the information and instruction." *Id.* at 465. This would not provide the defendant with adequate notice of the evidence that the State intends to present at trial. *Id.* (Further citations omitted).

In *Miller*, evidence was presented that the acts of sexual abuse occurred between December 3, 1998 and December 3, 1999, but the charging documents and the jury instructions allowed the jury to find the Defendant guilty based on acts that allegedly occurred between December 3, 2004 and December 3, 2005. *Id.* at 463. The Missouri Supreme Court found that the even though the evidence suggested the defendant was guilty of the acts themselves, the state's failure to prove the specified time period meant that there was insufficient evidence to convict. *Id.* Commenting that, "the State is required to prove the elements of the offense it charged, not the one it might have charged," the Court found that double jeopardy concerns prevented any other result:

If his convictions on [the specified counts] are allowed to stand based on this record, nothing would preclude the State, in the future, from charging [the

defendant] with separate first-degree statutory sodomy and deviate sexual assault charges arising out of the same offense [on the dates they actually occurred]. It would be a violation of the United States and Missouri constitutions for this Court to allow the State that opportunity

Id. at 467 - 468.

In this case, just as in *Miller*, the State presented insufficient evidence of when the alleged offense in Count II occurred. Also, as in *Miller*, the same double jeopardy concerns exist. If this Court were to allow this conviction to stand, there is nothing to stop the State from attempting to charge and convict the Defendant with putting his genitals in the mouth of W.L. at some point after May 1, 1998 based on the exact same evidence as was presented at this trial. Reversal is required on this Count.

C. Even if reviewed under a standard of plain error resulting in manifest injustice, this error requires reversal as to this count.

In *State v. Langston*, 229 S.W.3d 289 (Mo.App. S.D.,2007), the court of appeals ruled that reversal was required where the court mis-instructed the jury as to an essential element of the offense, even where a new trial motion had not been timely filed and the error had thus not been properly preserved. In finding that the error was plain and resulted in manifest injustice, the court specifically stated, “This instruction positively misdirected the jury as to an essential element of the State's case, and the error resulted in a manifest injustice to Defendant because she was convicted of felony stealing without

the jury being required to decide all of the essential elements of that offense.” *Id.* at 296.

Similarly here, the trial court erred in even submitting the case with regard to Count II to the jury because the State did not present sufficient evidence “of all the essential elements of [the] offense.” This error was plain and resulted in a manifest injustice in that Mr. Ess was convicted of this charge and sentenced to 20 years in prison with regard to it when the State did not meet their most minimal burden of presenting evidence as to the essential element of the offense of the victim’s age, much less the much higher burden of proving the age beyond a reasonable doubt. This error requires reversal.

III. The trial court plainly erred and abused its discretion in: (1) submitting instructions five and eight to the jury; (2) accepting the guilty verdicts with regard to Counts I and IV; and (3) in sentencing Defendant, because the verdict directors failed to specify a particular incident and thereby violated Defendants rights to due process, a fair trial, a unanimous verdict, and freedom from double jeopardy, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), 19, and 22(a) of the Missouri Constitution, in that the State presented evidence of multiple acts of alleged oral sodomy that allegedly occurred within the time frames stated in the Amended Information, yet the verdict directors did not specify any one of these incidents, thereby making it

unclear as to which incident Defendant was found guilty and furthering the possibility that the jurors failed to unanimously find the same incident of sodomy; for instance, that some jurors could have found that Defendant committed sodomy in the downstairs bedroom, but not in the upstairs bedroom, while other jurors could have found that he committed sodomy in the upstairs bedroom but not in the downstairs bedroom.

Standard of Review

An unpreserved claim of error can be reviewed only for plain error, which requires a finding of manifest injustice or a miscarriage of justice resulting from the trial court's error. *State v. Celis-Garcia*, 344 S.W.3d 150 (Mo. 2011)(citing *State v. Severe*, 307 S.W.3d 640, 642 (Mo. banc 2010)). For instructional error to constitute plain error, the defendant must demonstrate the trial court “so misdirected or failed to instruct the jury’ that the error affected the jury's verdict.” *State v. Dorsey*, 318 S.W.3d 648, 652 (Mo. banc 2010) (citing *State v. Salter*, 250 S.W.3d 705, 713 (Mo. banc 2008)).

Argument

The instructions as to Count I and IV failed to properly instruct the jury that they must agree on a specific incident of sodomy beyond a reasonable doubt. As to Count I, the verdict-directing instruction (Instruction 5) read as follows:

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about between January 1, 1995 and April 30, 1998, in the County of Monroe, State of Missouri, the defendant knowingly put his mouth on the genitals of W.L., and

Second, that such conduct constituted deviate sexual intercourse, and

Third, that at the time, W.L. was a child less than fourteen years old, then you will find the defendant guilty under count I of statutory sodomy in the first degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

As used in this instruction, “deviate sexual intercourse” is any act involving the genitals of one person and the mouth of another person done for the purpose of arousing or gratifying the sexual desire of any person.

LF:71

As to Count IV, the verdict-directing instruction (Instruction number 8) was as follows:

As to Count IV, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about between May 1, 1998 and May 1, 2000, in the County of Monroe, State of Missouri, the defendant knowingly put his mouth on the genitals of W.L., and

Second, that such conduct constituted deviate sexual intercourse, and

Third, that at the time, W.L. was a child less than seventeen years of age, then you will find the defendant guilty under count IV of statutory sodomy in the second degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

As used in this instruction, "deviate sexual intercourse" is any act involving the genitals of one person and the mouth of another person done for the purpose of arousing or gratifying the sexual desire of any person.

LF:73

“The Missouri Constitution provides, in pertinent part, ‘[t]hat the right of trial by jury as heretofore enjoyed shall remain inviolate. . . .’ *Celis-Garcia*, 344 S.W.3d at 155 (citing Mo. Const. art. I, sec. 22(a)). Courts have interpreted the phrase “as heretofore enjoyed” as protecting “all the substantial incidents and consequences that pertain to the right to jury trial at common law.” *Id.* (citing *State v. Hadley*, 815 S.W.2d 422, 425 (Mo. banc 1991) (citing *State ex rel. St. Louis, K. & N.W. Ry. v. Withrow*, 133 Mo. 500, 36 S.W. 43, 48 (1896)). One of the “substantial incidents” protected by Article I, Section 22(a) is the right to a unanimous jury verdict. *Hadley*, 815 S.W.2d at 425 (citing *State v. Hamey*, 168 Mo. 167, 67 S.W. 620, 623 (1902)). For a jury verdict to be unanimous, and thus enforceable, “the jurors [must] be in substantial agreement as to the defendant's acts, as a preliminary step to determining guilt.” *Id.* (citing 23A C.J.S. Criminal Law § 1881

(2006); *State v. Jackson*, 242 Mo. 410, 146 S.W. 1166, 1169 (1912) (“The defendant is entitled to a concurrence of the minds of the 12 jurors upon one definite charge of crime.”)).

In a case where one charge can encompass multiple alleged acts, a defendant's right to a unanimous verdict must still be protected. *Id.* at 156 -157. This must be assured in one of two ways: either (1) the state must elect the particular criminal act on which it will rely to support the charge or (2) the verdict director must specifically describe the separate criminal acts presented to the jury and the jury must be instructed that it must agree unanimously that at least one of those acts occurred. *Id.* at 157.

In *State v. Celis-Garcia*, the Missouri Supreme Court evaluated whether it was plain error for the trial Court to instruct using verdict directors which neither specified a particular criminal act nor instructed the jury that it must agree unanimously as to the details surrounding the specific act that the jury found to have occurred. In *Celis-Garcia*, the defendant was accused of multiple acts of sodomy. *Id.* Testimony described at least seven different acts of hand to genital contact, but the verdict directors simply gave a date range and failed to reference any specific acts. The Court ruled that even though defendant had not objected to the verdict directors, the submission of the verdict directors was plain error resulting in manifest injustice that required reversal. *Id.* at 159. Because the defense relied on evidentiary inconsistencies as to each individual act, such that it was possible that jurors did not agree upon the same specific act, the error had resulted in

manifest injustice. *Id.* As to counts I and IV, this case is nearly identical to *Celis-Garcia*, and reversal is required as to each of these counts.

A. Reversal is required as to Count I.

The verdict director as to Count I charged that at some point between January 1, 1995 and April 1, 1998, the Defendant put his mouth on the genitals of W.L. somewhere within the boundaries of Monroe County. LF:72. W.L. alleged that over the course of his time living in the house in Monroe County, the acts of sexual abuse occurred “over a hundred” times. Tr:359. As in *Celis-Garcia*, because the verdict director failed to direct the jury that they must agree as to a specific act of mouth to genital contact, the conviction must be reversed.

Also, as in *Celis-Garcia*, Ess’s defense was dependent on him creating reasonable doubt as to each particular act, and therefore the error was plain and resulted in manifest injustice. Because W.L. failed to testify as to the specific identifying details of each individual act, the only way to distinguish the acts described was by identifying the room in the house in which they occurred. During the course of his time in the house in Monroe County, W.L. changed bedrooms at least three times: when he first moved into the house, he lived in the downstairs bedroom with his brother Brian (hereinafter, “Bedroom 1”). Tr:276. At some point, they converted the attic into a full upstairs, and he moved into the smaller upstairs bedroom (hereinafter, “Bedroom 2”). Tr:288. After that, he moved back into the bedroom downstairs, where he lived by himself for a period of

time (hereinafter, "Bedroom 3"). Tr:336. Finally, he moved into the larger bedroom upstairs, where he lived until he moved out of the house (hereinafter, "Bedroom 4"). Tr:336. W.L. gave no time frame indicating how long he was in each bedroom or when he moved from one to another. During questioning, W.L. stated that the abuse had occurred in his bedroom, and specifically in both "the downstairs bedroom" and Bedroom 4. Tr:334-338. Like in *Celias-Garcia*, W.L. was clearly testifying to multiple separate and distinct incidents of oral sodomy, and the verdict director failed to specify which incident the jury should agree upon.

Also as in *Celias-Garcia*, Ess's defense was reliant not just upon undermining the credibility of W.L. generally, but on evidentiary inconsistencies as to each particular allegation. Defense counsel spent a substantial portion of his cross-examination of W.L. attempting to establish that the mouth to genital contact alleged in Count I did not begin to occur until W.L. moved to "the upstairs bedroom."⁸ Tr:334-338;352. W.L. himself had testified that he did not recall abuse occurring when he was living in Bedroom 2. Tr:289. Since Bedroom 2 and Bedroom 4 were the only bedrooms he lived in upstairs, the combination of these two statements would imply that the abuse did not begin occurring until W.L. moved into the last bedroom he ever lived in within the house, Bedroom 4. Further, Nona Henry testified that as of Christmas Eve, 2007, W.L. was still living in "the

⁸ He did not at this point specify whether he meant bedroom 2 or bedroom 4 when he said "the upstairs bedroom."

downstairs bedroom." Tr:440. At that time, W.L. was just four months shy of his fourteenth birthday. Therefore, if the jury believed that the abuse did not occur until W.L. moved into "the upstairs bedroom," it must have believed that W.L. moved into the upstairs bedroom at some time prior to his fourteenth birthday in order to find him guilty of the offense.

Therefore, as in *Celis-Garcia*, it was possible, and even likely that the jurors disagreed as to what specific acts occurred. Some jurors may have found that the abuse occurred in one of the downstairs bedrooms - Bedroom 1 or 3 - if they believed that the abuse started before W.L. moved upstairs. Other jurors may have believed that W.L.'s prior inconsistent statement had established that the abuse did not occur until W.L. moved to Bedroom 4, and drawn the conclusion that, even though no testimony was presented as to the issue, W.L. had moved upstairs at some point prior to his fourteenth birthday. It is therefore possible, and even likely, that the jurors disagreed as to the specific time-frame and location of the alleged acts, because the verdict director did not require them to agree upon it, and the evidence itself was not clear.

In other words, Defendant had available different defenses as to each charge presented with regard to allegations of mouth to genital contact that occurred prior to W.L.'s fourteenth birthday: First, as to any allegations of oral sodomy that may have allegedly occurred in either Bedroom 1 or Bedroom 3, the defense was that because W.L. had previously stated that the oral sodomy did not occur until he moved "upstairs," and

since it never occurred in Bedroom 2 (the smaller upstairs bedroom), it could not have occurred until he moved into Bedroom 4 and therefore could not have ever occurred in either Bedroom 1 or Bedroom 3. As to any alleged oral sodomy that may have occurred in Bedroom 2 (the smaller bedroom upstairs), the defense was that W.L. himself had testified that no abuse occurred in that bedroom. Tr:294. Finally, as to any alleged oral sodomy that may have occurred once W.L. had moved to Bedroom 4, Nona Henry had specifically testified that W.L. was living downstairs until at least Christmas Eve of 1997. Tr:440. That leaves a very small time-frame -- essentially from January through April of 1998 -- for W.L. to have moved to the larger upstairs bedroom and for this alleged abuse to have occurred before W.L. turned fourteen. The State presented no evidence that W.L. moved to Bedroom 4 during that specific time period. It therefore could not prove beyond a reasonable doubt that any oral sodomy had occurred before W.L. turned fourteen.

Individual jurors were free to believe or disregard any of these defenses. As in *Celias-Garcia*, the defenses as to Count I were largely dependent on exactly where and when the specific incidents of abuse occurred, and inconsistent statements made by the defendant's accusers as to each specific incident of abuse. From the general nature of the verdict, it is impossible to determine with any degree of certainty whether the jury agreed on one specific act in one specific place at one specific time or whether they simply believed that it "happened" at some point during a forty-month period in a home in

Monroe County. The Court's failure to require the jury to agree upon one these incidents fundamentally deprived the Defendant of his ability to defend himself as to Count I. It was a plain error resulting in manifest injustice, and it requires reversal as to this count.

B. Reversal is required as to Count IV

The verdict director as to Count IV alleged that on or about between May 1, 1998 and May 1, 2000 the defendant put his mouth on the genitals of W.L. LF:75. According to his own testimony then, this would have occurred sometime between when W.L. was between the ages of fourteen and sixteen. Tr:271 (W.L. was born on 5/1/84). As in Count I, because W.L. had alleged in a prior statement that the oral sodomy did not occur until he moved upstairs (Tr:335), and because he alleged at trial that he did not remember any oral sodomy or other abuse occurring when he was in the small bedroom upstairs, the defendant had a viable defense as to any alleged oral sodomy that may have occurred in bedrooms 1, 2, and 3. Additionally as in Count I, because there was no specific testimony as to when W.L. moved to the larger bedroom on the third floor, and this was the only place it was possible for the oral sodomy to have occurred, Defendant had a viable defense as to any alleged incident that may have occurred in bedroom 4 because the State could not prove its case beyond a reasonable doubt⁹. As in Count 1, the court's failure to require the jury to agree upon one these incidents fundamentally deprived the Defendant

⁹ See Point II, *supra*: double jeopardy concerns required that the jury find that this occurred within the specific time-frame indicated in the amended information.

of his ability to defend himself as to this count. It was a plain error resulting in manifest injustice, and it requires reversal.

C. This point should be reviewed for plain error because the defense was focused on determining and then calling into question the exact times places of the alleged incidents.

State v. Leisure, 361 S.W.3d 458 (Mo.App. W.D. 2012) does not preclude plain error review because Ess's defense was focused partly on emphasizing inconsistencies as to the exact times and places where alleged acts occurred. Cross-examination is one of the most fundamental parts of any defense. In *Leisure*, the court emphasized that the cross-examination of defense counsel was almost exclusively focused on inconsistent statements made by the victim, and therefore concluded that this defense was a general defense mounted against the credibility of the defendant's accuser and not one focused on the specific acts alleged, and plain error review was not merited. *Id.* at 464 (examination of the victim focused on her inconsistent statements made to police and prosecutors and in her preliminary hearing testimony regarding the instances of rape and therefore the defense was a "general" defense and plain error review was not merited.).

Here, while a general defense was mounted as to the credibility of Mr. Ess's accusers, this was not the only defense. A significant portion of the cross-examination was clearly focused on establishing the locations of the different acts alleged in an attempt to distinguish one from another. Tr:334-338, 352. For example, defense counsel

pointed out inconsistent statements made by W.L. as to whether the molestation began in the downstairs bedroom or in the larger bedroom upstairs, thereby emphasizing specific “evidentiary inconsistencies” (see *Celis-Garcia*, 344 S.W.3d at 159) as to any molestation alleged to have occurred in the upstairs bedroom or in any of the bedrooms he lived in before he moved upstairs. Defense counsel also utilized cross-examination to emphasize the contradictory stories that W.L. told about when the molestation occurred. Defense counsel’s very specific question, “Which version [of events] are [the jury members] to pick?” (Tr:337) emphasized the exact point made by this Court in the *Celis-Garcia* case: the jurors must pick one. By this questioning, defense counsel was clearly trying to compel the witness, the prosecution, and the jury to choose a specific act or incident of conduct that occurred in a specific place at a specific time as a basis for the conviction, as the Missouri and United States Constitutions require the fact-finder to do. The instructions read to the jury in this case however, did not instruct the jurors as to this fundamental Constitutional mandate. As in *Celis-Garcia*, this was plain error and requires reversal.

Respondent argued in the court of appeals that because the testimony established that the acts occurred when W.L. was between fourteen and sixteen, and the acts were charged as having occurred when W.L. was less than 17, this point should be denied as to Count IV. Respondent completely missed the thrust of the argument. The point is not that the State had not proven W.L.’s age at the time of this offense, but rather that defense

counsel, through his cross-examination had launched a defense as to oral sodomy that may have occurred in each specific bedroom. As to bedrooms 1, 2 and 3, defense counsel took great care during cross-examination to point out a prior statement where W.L. had stated that the abuse did not occur until he moved to “the upstairs bedroom.” Tr:335. Because the jurors were not required to agree as to when or where the abuse occurred, some could have accepted this specific defense while others rejected it. The failure to require the jury to unanimously agree as to the time and place of the alleged acts was thus plain error as to both counts I and IV and requires reversal as to those counts.

IV. The trial court erred in submitting instruction number nine to the jury and in accepting the verdict of guilty and sentencing Defendant as to Count V because: (1) instruction nine did not properly instruct the jury upon attempt to commit sexual molestation in that at the time alleged in the instruction, §566.067 required that the victim be less than twelve years of age, not less than fourteen years of age and instruction nine did not include this element of the offense; (2) the charges did not comply with the requirements of Supreme Court Rule 23.01 and §545.240 RSMo in that the prosecuting attorney failed to file a signed, written, verified information amending Count V; (3) an amendment under Supreme Court Rule 23.08 was improper in that the improperly amended charge both charged a new and different offense and deprived the Defendant of a defense; and (4) the instruction did not properly

instruct on the law in that it did not make clear that touching “through the clothing” did not constitute sexual contact for the purpose of the child molestation statute, all in violation of Defendants rights to due process of law and to be charged only by an indictment or information under the Fifth and Fourteenth Amendment to the United States Constitution, and Article I, Sections 10 and 17 of the Missouri Constitution.

Standard of Review

Whether a jury is properly instructed is a question of law. *Rice v. Bol*, 116 S.W.3d 599, 606 (Mo.App. W.D.2003). “To reverse a jury verdict on the ground of instructional error, it must appear that the offending instruction misdirected, misled, or confused the jury, resulting in prejudice” *Id.* “For prejudice to be found sufficient to reverse for instructional error, the error must have materially affected the merits and outcome of the case.” *Id.*

For the same reasons as articulated under the Standard of Review Section in Point I, *supra*, this issue should be reviewed *de novo* as a question of law and not merely for plain error resulting in manifest injustice.

Argument

The verdict directing instruction (instruction number 9) given to the jury as to Count V in this case read as follows:

As to Count V, if you find and believe beyond a reasonable doubt that:

First, that on or about between January 1, 1995 and July 25, 1996 in the County of Monroe, State of Missouri, the Defendant caused Brian Luntsford to touch the defendant's genitals through the clothing while in the bed of Brian Luntsford, and

Second, that such step was a substantial step toward the commission of Child Molestation in the First Degree, and

Third, that defendant engaged in such conduct for the purpose of committing child molestation in the first degree,

Then you will find the Defendant guilty under Count V of child molestation in the first degree.

However unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, than you must find the Defendant not guilty of that offense.

A person commits the crime of Child Molestation in the First Degree when he causes the victim to touch his genitals, does so for the purpose of gratifying his sexual desire, and when the victim is *less than fourteen years old*.

As used in this instruction, "substantial step" means conduct that is strongly corroborative of the defendant's purpose to complete the offense of Child Molestation in the First Degree. It is no defense that it is factually or legally impossible to commit the crime of Child Molestation in the First Degree if such offense could have been committed had the circumstances been as the Defendant

believed them to be.

LF:76. (Emphasis added).

Article I, sections 17 and 18 (a) of Missouri Constitution provide that, "no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information" and that each criminally accused person has a right "to demand the nature and cause of the accusation." Read together, these provisions clearly provide that a defendant has "the right to be tried only on the offense charged." *State v. Ellison*, 239 S.W.3d 603, 606 (Mo. 2007). These rights were violated in this case and this error requires reversal.

A. Reversal is required because both the charging document and instruction number nine misstated the elements of the offense.

During the time period alleged in the Information, §566.067 RSMo (1995) stated: "A person commits the crime of child molestation in the first degree if he subjects another person who is less than twelve years of age to sexual contact." This is the version of the statute under which Defendant was charged and that was in effect on the dates defendant was alleged to have committed the offense. In 2001, the statute was amended to include children under fourteen. §566.067 RSMo (2001). Before the amendment, the crime child molestation in the first degree applied only to acts perpetuated on children less than twelve years of age. However, the charging document and the instruction submitted to the jury only required that the jury find the child was less than 14 years of age. It thereby

incorrectly instructed them as to the law.

“A verdict-directing instruction must contain each element of the charged offense and require the jury to find every fact necessary to constitute the essential elements of that offense.” *State v. Doolittle*, 896 S.W.2d 27, 30 (Mo. Banc 1995). The amended information in this case incorrectly charged as to the principal offense and the verdict director incorrectly instructed as to attempt offense, resulting in an instruction on an offense that did not exist when it was alleged to have been committed. The jury in this case never made the statutorily- required finding that the B.L. was less than twelve years of age at the time of the offense, but rather only that he was less than fourteen.

As the United States Supreme Court recently stated in *Apprendi v. New Jersey*:

At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of *every element of the crime with which he is charged*, beyond a reasonable doubt.

530 U.S. 466, 476-477 (2000)(citations omitted)(emphasis added).

In this case, the defendant was not charged, the jury was not instructed, and the jury did not find beyond a reasonable doubt that the child was less than twelve years of

age, an essential element of the offense.

In *State v. Miller*, the Missouri Supreme Court reiterated the importance of the jury being instructed on each and every element. *Miller*, 372 S.W.3d 455. In *Miller*, the defendant was charged with first-degree child molestation, between the dates of December 3, 1997, and December 3, 1998. At that time, first-degree child molestation was defined as: “subject[ing] another person who is less than twelve years of age to sexual contact,” and “sexual contact” meant “any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, for the purpose of arousing or gratifying sexual desire of any person[.]” *Id.* at 471. During the period encompassed by Miller’s charges of first-degree child molestation, “sexual contact” did not include touching through the clothing. Because the circuit court submitted a verdict director to the jury allowing the jury to find Miller guilty of the crime of first-degree child molestation for an act that was not proscribed during the charged period, it committed plain error that affected the jury's verdict. *Id.*

Similarly, in *State v. Langston*, 229 S.W.3d 289 (Mo.App. S.D. 2007), the court had falsely instructed that to find the defendant guilty of a felony stealing that occurred the jury must find that the defendant had stolen property with a value of more than \$500.00, when the law at the time the crime was allegedly committed actually required a finding that the defendant had stolen property with a value of more than \$750.00. *Id.* at 293. The court found that the instruction was plain error resulting in manifest injustice:

“This instruction positively misdirected the jury as to an essential element of the State's case, and the error resulted in a manifest injustice to Defendant because she was convicted of felony stealing without the jury being required to decide all of the essential elements of that offense.” *Id.* at 295.

The charge and instruction which misstated an essential element of the offense deprived the Defendant of his rights of due process of law and his right to a jury trial. As the Supreme Court reminded us in *Burks v. U.S.*:

[R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. . . . [I]t is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair re-adjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.

437 U.S. 1, 15 (1972.)

This error requires reversal.

B. Reversal is required because no amended information was filed.

Article I, Section 17 of the Missouri Constitution and §545.010 RSMo (2000) specifically requires that, all felonies be prosecuted by indictment or information.

Additionally, “[a]ll informations shall state the name of the prosecuting attorney and be verified by his oath or by the oath of some person competent to testify as a witness in the case, or be supported by the affidavit of such person, which shall be filed with the information.” §545.240 RSMo (2000). Missouri Supreme Court Rule 28.01 further requires that all informations be, “in writing, signed by the prosecuting attorney, and filed in the court having jurisdiction of the offense.” None of these requirements were met with regard to the offense submitted under instruction number nine in this case because no written information was ever filed amending the offense. See SLF: 1-8¹⁰.

Due process requires that a defendant not be convicted of an offense not charged in the information or indictment. *State v. Muhammad*, 334 S.W.3d 164 (Mo.App. E.D., 2011)(citing *State v. Smith*, 592 S.W.2d 165, 165 (Mo. banc 1979); *State v. Pullum*, 281 S.W.3d 912, 916 (Mo.App. E.D.2009). Accordingly, a trial court may not instruct on an offense not specifically charged unless it is a lesser-included offense. *Smith*, 592 S.W.2d at 165; *State v. Shipley*, 920 S.W.2d 120, 122 (Mo.App. E.D.1996). Oral amendments of

¹⁰ The fact that no amended information was filed once trial began is reflected in the docket sheets. In order to verify that the docket sheets were accurate, the undersigned personally traveled to the Monroe County courthouse to search the paper file and determine whether there was any amended information filed after November 30, 2011. Counsel discovered that the amended information filed on November 30, close to two weeks prior to trial, was the only amended information that was ever filed in this case.

charges in a criminal case are normally rejected because they do not comply with the essential requirements for a proper charge. *State v. Hicks*, 221 S.W.3d 497, 503 (Mo.App. W.D., 2007)(citing *State v. Hughes*, 731 S.W.2d 54 (Mo.App. E.D. 1987)). Convicting an accused of a crime for which he was not charged represents a classic example of "manifest injustice" or "miscarriage of justice." *State v. Gant*, 586 S.W.2d 755, 762 (Mo.App. W.D. 1979).

This is not a case where the facts support affirming the conviction despite the lack of a written information. In this case, the State clearly recognized that under the law based on the 1995 amendments to the statutes and the effect of those amendments as recognized in *State v. Wallace*, 976 S.W.2d 24 (Mo.App. E.D. 1998), it could not make its case with regard to the offense, since the offense charged required at the time that any hand to genital contact occur not through, but underneath the clothing¹¹. Tr:552. It

¹¹Through 1994, sexual contact was defined so as to include “any such touching through the clothing.” Section 566.010(3) RSMo (1994). That definition was changed in 1995, by deleting the quoted language. Section 566.010(3) RSMo (1995). *Wallace* makes clear that the version of the statute that does not contain the words “through the clothing” should be understood to criminalize only skin to skin contact, and that contact which occurs “through clothing” during that time should have been charged under a different statute. 976 S.W.2d at 25. In this case, the State agreed that contact which occurred “through” (or on top of) clothing, and therefore was not skin to skin contact, was not a

therefore decided to suggest that the information could be amended again to charge an "attempt" since an attempt purportedly did not require the additional element that the contact occur underneath the clothing. Tr:552. No second amended information was written or sworn to and no pleading was filed with the court.

C. Reversal is required because an amendment was not authorized.

Supreme Court Rule 23.08 provides, in pertinent part: Any information may be amended or an information may be substituted for an indictment at any time before verdict or finding if: (a) no additional or different offense is charged, and (b) a defendant's substantial rights are not thereby prejudiced. The test for determining if a defendant's substantial rights have been prejudiced is "whether a defense to the charge as originally made would be equally available after the amendment and whether defendant's evidence would be equally applicable after, as well as before, the amendment." *State v. Bratton*, 779 S.W.2d 633, 634 (Mo. App. 1989)(citing *State v. Carter*, 771 S.W.2d 844 (Mo. App. 1989).

In this case, both provisions of rule were violated. First, an "attempt" is a different offense from the underlying offense. See §564.011 RSMo (defining an attempt to commit any crime as a separate crime in and of itself). Second, the Defendant's rights were substantially prejudiced because the amendment made unavailable to him a defense

violation of the statute in 1995. TR:552. It sought to orally amend the charge with the specific purpose of depriving Defendant of this defense. *Id.*

that was available under the previous information: namely, that the hand to genital contact was not skin to skin and therefore did not meet the requirements of the statute as clearly set out in *State v. Wallace*, 976 S.W.2d 24 (Mo.App. E.D. 1998)(holding that the 1995 amendments to the statute clearly required that any hand to genital contact be through the clothing). This is a case where the State amended the information with the clear purpose of depriving the defendant of a defense. Tr: 552. Under Rule 23.08, this amendment was not authorized and was prejudicial.

D. Reversal is required because instruction nine did not clearly state that a touch that occurred “through the clothing” did not constitute “sexual contact” for purposes of the child molestation statute, §566.067 RSMo (1995).

Under *Wallace*, it is clear that under the version of the child molestation statute that was in effect in 1995, touching “through the clothing” was not sufficient to convict under the child molestation statute. The statute at the time required that the contact be skin-to-skin contact. 976 S.W.2d 24. The instruction given in this case required only that the jury find that the actions of the defendant were a substantial step toward, “caus[ing] the victim to touch his genitals.” That this touching occurred, not “through the clothing,” but rather underneath it was an essential element of the offense that the court did not instruct on. Based on the evidence presented, if the jury believed the testimony of B.L., it could have easily found that, the touching was a “substantial step” toward a touching

“through the clothing.” However, for defendant to have been guilty of this offense, under the statute and the case law, he must have had a purpose of going underneath the clothing as well. This fact was never made clear to the jury, in the instructions or otherwise, and the jury made no finding that defendant had a purpose of being touched or touching B.L. underneath his clothing.

E. Even if evaluated under plain error review, this error requires reversal.

The previously cited case, *State v. Langston*, clearly establishes that a failure to properly instruct the jury as to an essential element of the offense is plain error resulting in manifest injustice. 229 S.W.3d 289. In finding that the error was plain and resulted in manifest injustice, the court specifically stated, "This instruction positively misdirected the jury as to an essential element of the State's case, and the error resulted in a manifest injustice to Defendant because she was convicted of felony stealing without the jury being required to decide all of the essential elements of that offense." *Id.* at 296. See also *Miller*, 372 S.W.3d 455 (It was plain error resulting in manifest injustice for the court to fail to instruct that conviction required that a touching occur through the clothing, even despite the fact that the evidence presented by the State suggested that the element was actually present.)

In this case, exactly as in *Langston*, Defendant was found guilty of a crime without any finding by a jury as to an essential element of the offense. To say that this was

anything other than plain error resulting in manifest injustice would be the equivalent of saying that it doesn't matter if the defendant was convicted without a trial because he was probably guilty anyway, and set a dangerous precedent of making a court of appeals a fact-finder, a province rightfully reserved for juries and trial-courts. *See Hawkeye-Security Ins. Co. v. Thomas Grain Fumigant Co.*, 407 S.W.2d 622, 630 (Mo.App. 1966) (A jury is the trier of fact while law of case is sole responsibility of court, and neither may invade or trespass upon special field and province of the other); *Waters v. Bankers' Life Ass'n of Des Moines, Iowa*, 50 S.W.2d 183 (Mo.App., 1932)("[T]he jury are sole judges of facts") Reversal is required as to this count.

V. The trial court erred in overruling Defendant's motion for judgment of acquittal at the close of the State's evidence and motion for judgment of acquittal at the close of all evidence and in submitting instruction number nine because there was insufficient evidence presented by the State of all the essential elements of the offense of attempt in that the State did not present any evidence that the Defendant had the purpose of committing the offense of Child Molestation in the First Degree in that no evidence was presented of any attempt or that Defendant acted with the purpose being touched by B.L. underneath Defendant's clothing¹², as was required by §566.067 at the time,

¹² In Appellant's opening brief on appeal, this portion of this point read, ". . . that Defendant acted with the purpose to touch B.L. underneath his clothing . . ." Respondent

thereby depriving Defendant of his rights to due process, a fair trial, a unanimous verdict, and freedom from double jeopardy, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), 19, and 22(a) of the Missouri Constitution.

Standard of Review

Appellate review of a challenge to the sufficiency of the evidence to support a criminal conviction requires a determination of whether sufficient evidence was presented from which a reasonable trier of fact might have found the defendant guilty beyond a reasonable doubt. *Eppenauer*, 957 S.W.2d at 503. The reviewing court accepts as true all evidence and inferences favorable to the verdict and disregards evidence and inferences to the contrary. *Id.*

For the same reasons as articulated under the Standard of Review Section in Point I, *supra*, this issue should be reviewed under the normal standard for reviewing sufficiency of evidence and not merely for plain error resulting in manifest injustice.

Argument

Under §564.011 RSMo (1995), in order to prove attempt, there must be a showing

pointed out that this language is unclear and could be read to mean a touching underneath B.L.’s clothing, as opposed to “underneath Defendant’s clothing” as the argument portion of the point-relied on suggested. The language in the Point relied on has been changed to more clearly reflect the intended meaning of this language.

of an act that was, “strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense.” Attempt requires a specific intent to perform the acts of which the defendant is accused. *State v. O'Dell*, 684 S.W.2d 453, 461 (Mo.App. S.D. 1984)(citing *State v. Gonzales*, 652 S.W.2d 719 (Mo.App.1983). As previously established, at the time of this alleged offense, child molestation in the first degree did not include contact that occurred “through the clothing.” The evidence presented with regard to this count was that the Defendant had laid down behind B.L., positioned B.L.’s hands on top of Defendant’s pants in the area of his penis, and held it there. There was no evidence presented that defendant had made any attempt to unzip or in any way remove his own pants or made any attempt to place B.L.’s hands inside of his pants.

The evidence did suggest that defendant had at that time perhaps completed another crime. See §566.090 RSMo (1995)(defining “sexual misconduct in the first degree” as engaging in conduct which would constitute sexual contact except “that the touching occurs through the clothing without that person's consent.”) However, the prosecutor did not charge this crime, and the elements of this crime were not presented to a jury.

The State must be held to its burden and cannot be permitted to evade the charges of the legislature by simply vaguely defining an offense as an “attempt” when statute had clearly defined it otherwise. There was no evidence presented that the defendant took any

step - - substantial or otherwise - - toward having B.L. touch him through his clothing.

As the court of appeals correctly found with regard to this point:

Under the facts presented here, the defendant's placement of B.L.'s hand on the defendant's penis over his clothing and keeping B.L.'s hand there until B.L. fell asleep does not constitute conduct that is strongly corroborative of the firmness of the defendant's purpose to complete commission of the offense of first-degree child molestation, which at the time in question required a touching underneath the clothing.

App.Op. at 24.

As with Count II, the court's submission to the jury of an offense to the jury that never should have been submitted to the jury requires reversal, even if considered only under plain error review.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the Judgment of the Circuit Court be reversed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 18th day of March, 2014, one true and correct copy of the foregoing brief, were served via the court's electronic filing system on:

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned counsel hereby certifies that pursuant to Rule 84.06(c) this brief:

1) contained the information required by Rule 55.03; 2) complies with the limitations in Rule 84.06(b); and 3) contains 17,969 words determined using the word count in WordPerfect 12. A copy of this brief was submitted, in WordPerfect 13 format, via electronic copy. All digital copies of this brief were scanned for viruses and found to be virus free as required pursuant to Rule 84.06(h).

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