

No. SC93745

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**In the  
Supreme Court of Missouri**

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**STATE OF MISSOURI,**

**Respondent,**

**v.**

**THOMAS ESS,**

**Appellant.**

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**Appeal from the Circuit Court of Monroe County  
Tenth Judicial Circuit  
The Honorable Rachel L. Bringer, Judge**

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**RESPONDENT'S SUBSTITUTE BRIEF**

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## STATEMENT OF FACTS

Thomas Ess appeals the judgment entered upon a jury verdict convicting him of two counts of statutory sodomy in the first degree, two counts of statutory sodomy in the second degree, and one count of attempted child molestation in the first degree (L.F. 90-91).

### **The charges.**

The State filed an amended felony information on November 30, 2011 (L.F. 36). The trial court granted leave to allow the filing of the amended information (Tr. 23). The State charged the following:

#### Count I

. . . the defendant . . . committed . . . Statutory Sodomy in the First Degree, . . . in that on or about between January 1, 1995 and April 30, 1998, in the County of Monroe, State of Missouri, the defendant, for the purpose of arousing or gratifying the sexual desire of defendant, had deviate sexual intercourse with R.W.L., who was a child less than fourteen years of age, by putting defendant's mouth on the genitals of R.W.L. . . .

#### Count II

. . . the defendant . . . committed . . . Statutory Sodomy in the First Degree, . . . in that on or about between January 1, 1995 and April 30, 1998, in the County of Monroe, State of Missouri, the defendant, for the

purpose of arousing or gratifying the sexual desire of defendant, had deviate sexual intercourse with R.W.L., who was a child less than fourteen years of age, by having R.W.L. put R.W.L.'s mouth on defendant's genitals. . . .

#### Count IV

. . . the defendant . . . committed . . . Statutory Sodomy in the Second Degree, . . . in that on or about between May 1, 1998 and May 1, 2000, in the County of Monroe, State of Missouri, the defendant, for the purpose of arousing or gratifying the sexual desire of defendant, had deviate sexual intercourse with R.W.L., who was a child less than seventeen years of age, by putting defendant's mouth on the genitals of R.W.L. . . .

#### Count V

. . . the defendant . . . committed . . . Child Molestation in the First Degree, . . . in that on or about between January 1, 1995 and July 25, 1996, in the County of Monroe, State of Missouri, the defendant for the purpose of arousing or gratifying the sexual desire of defendant knowingly subjected B.L.L., who was less than fourteen years of age, to sexual contact by defendant placing B.L.L.'s hand on defendant's genitals. . . .

## Count VI

. . . the defendant . . . committed . . . Statutory Sodomy in the Second Degree, . . . in that on or about between July 26, 2001 and July 25, 2003, in the County of Monroe, State of Missouri, the defendant, for the purpose of arousing or gratifying the sexual desire of defendant, had deviate sexual intercourse with B.L.L., who was a child less than seventeen years of age, by putting defendant's hand on the genitals of B.L.L.

(L.F. 36-38).

### **The incidents.**

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

W.L. was born on May 1, 1984 (Tr. 271). W.L. was Appellant's stepson (Tr. 272-73). The family moved to a new home when W.L. was nine or ten years old, and W.L. shared a first-floor bedroom with his brother, B.L. (Tr. 272-76). When W.L. was approximately eleven years old, Appellant began lying in bed with him and rubbing his legs (Tr. 282-85). Over a period of years, the activity progressed to Appellant putting his hands on W.L.'s genitals and performing oral sex on W.L. (Tr. 286). Appellant put his hands on W.L.'s genitals and fondled W.L. almost every night over a period of years (Tr. 290, 359). Appellant sometimes fondled W.L. to the point of ejaculation and had W.L. fondle Appellant to the point of ejaculation (Tr.

289-92). Appellant normally made W.L. ejaculate in Appellant's mouth (Tr. 293). Appellant had W.L. perform oral sex on him one time; Appellant ejaculated as a result (Tr. 286, 294, 297-98, 318, 327-28).

None of these activities occurred while W.L. was sharing the first-floor bedroom with B.L. (Tr. 288). When the family built upstairs bedrooms, there was a smaller upstairs bedroom and a larger upstairs bedroom; W.L. moved to the smaller upstairs bedroom (Tr. 288). W.L. did not remember any abuse occurring in the smaller upstairs bedroom (Tr. 289). After a period of time, W.L. moved back to the first-floor bedroom (Tr. 336). The sexual activity with Appellant began when W.L. had the first-floor bedroom (Tr. 352). W.L. later moved to the larger upstairs bedroom (Tr. 288-89). By the time of trial, W.L. could not recall when he moved to the upstairs bedroom (Tr. 333). The incident when Appellant had W.L. perform oral sex on him occurred in the larger upstairs bedroom (Tr. 294).

The activities of touching W.L.'s genitals and oral sex on W.L. continued when W.L. was fourteen and fifteen years old (Tr. 286, 300).

B.L. was born on July 26, 1989 (Tr. 382). B.L. was W.L.'s brother and Appellant's stepson (Tr. 272-73). One night when B.L. was approximately five years old, Appellant came into B.L.'s bedroom, lay behind B.L., and placed B.L.'s hand between Appellant's legs (Tr. 387, 390). Appellant guided B.L.'s hand to touch Appellant's penis through Appellant's pants (Tr. 391-92). B.L. could feel Appellant's penis through Appellant's pants (Tr. 392). B.L. tried to move his hand

away, but Appellant wanted him to hold it there (Tr. 392). B.L. fell asleep and was not sure how long his hand was on Appellant's penis (Tr. 392). When B.L. woke up, Appellant was gone (Tr. 392). B.L. was confused and talked to his mother about the incident the next morning (Tr. 392). She confronted Appellant about the incident, and it did not recur (Tr. 392-93).

When B.L. was in the sixth grade and the family was staying at Appellant's uncle's place in the country for the summer, B.L. was in bed watching a movie when Appellant came in and lay next to him (Tr. 396-98). B.L. fell asleep and awoke to Appellant undoing B.L.'s zipper (Tr. 398-99). Appellant unzipped B.L.'s pants and put his hands around B.L.'s penis, feeling it (Tr. 399). B.L. got up, went in the bathroom, and shut the door (Tr. 399).

Appellant's sexual activity with W.L. stopped when W.L. was approximately sixteen years old (Tr. 305). W.L. had friends over as much as possible so that Appellant would not do anything to him (Tr. 305-06). W.L. also had a driver's license and a job (Tr. 305). W.L. eventually quit high school and went to live with his father (Tr. 306).

### **The trial.**

Appellant filed motions for judgment of acquittal at the close of the State's evidence and at the close of all the evidence (L.F. 46-47). Defense counsel argued the motions before the court (Tr. 504-08, 621-23). The trial court denied the motions (Tr. 508, 556, 623; L.F. 46-47).

The jury found Appellant guilty on Counts I, II, IV, V, and VI (L.F. 48-49, 51-53). The jury found Appellant not guilty on Count III, a charge that Appellant attempted to have W.L. penetrate him anally (L.F. 36-37, 50). The trial court sentenced Appellant to twenty years in the Missouri Department of Corrections on Count I; twenty years on Count II, to run consecutively to the sentence on Count I; seven years on Count IV, to run concurrently with the sentences on Counts I and II; four years on Count V, to run concurrently with the sentences on Counts I, II, and IV; and seven years on Count VI, to run consecutively to the sentences on Counts I and II (L.F. 92).

This appeal followed.

## ARGUMENT

### I. (alleged juror nondisclosure)

**The trial court did err, plainly or otherwise, in overruling Appellant's motion for new trial, as Appellant failed to establish that Juror Crigler failed to disclose a bias or prejudice against Appellant.**

#### A. Additional facts.

##### 1. Venireperson No. 3 (Crigler)

During voir dire, defense counsel asked if anyone had a preconceived notion about the guilt or innocence of the defendant and would vote "guilty" if they had to vote right at that moment (Tr. 182). Defense counsel also asked if anyone would have trouble applying the reasonable doubt standard and the presumption of innocence, and no one indicated any trouble (Tr. 182).

Defense counsel asked if there was anyone who did not like to argue and preferred to compromise (Tr. 191). Apparently, Venireperson No. 3 (Crigler) raised his hand (Tr. 191). He stated that he did not like to argue and that he preferred to compromise and "be done with it," but he also indicated that he would "stick to [his] guns" (Tr. 191-92). Defense counsel also asked if there was anyone who thought that if an allegation of sexual abuse was made, it must be true; no one indicated any trouble (Tr. 196). Defense counsel asked if there was anyone who would automatically disbelieve the defense witnesses just because they were

defense witnesses and probably knew the defendant; no one indicated any trouble (Tr. 195-96). The trial court allowed a lunch break shortly thereafter (Tr. 202-03).

Venireperson No. 3 (Crigler) served on the jury (Tr. 237-38).

## **2. The motion for new trial.**

Appellant obtained a 10-day extension of time to file a motion for new trial (Tr. 693-94). The motion for new trial was due on January 9, 2012 (Tr. 694). The trial court's docket sheet reflects that the motion for new trial was filed on January 10, 2012 (Supp. L.F. 2). Before arguing the motion for new trial, defense counsel explained to the court:

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 a stamp, and they told her no, which I don't—I mean, I think she could have. . . . 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 trial court accepted the motion as filed on January 9 (Tr. 702).

In his motion for new trial, Appellant asserted that Venireperson No. 3 was biased against Appellant, and during a recess in voir dire, had told other panelists that "this is an open and shut case" (L.F. 86-87). Appellant asserted that Venireperson No. 3 intentionally failed to disclose his bias (L.F. 86). In support, Appellant attached an affidavit of Charles McGinness, who stated that he was

Venireperson 26, and during a break in voir dire, he heard Venireperson No. 3 remark to other nearby panel members that “this is an open and shut case” (Supp. L.F. 9). McGinness stated that another panel member, whom he believed might have been Venireperson 25, responded, “shh,” as if to admonish Venireperson No. 3 in accordance with the court’s instructions not to discuss the case (Supp. L.F. 9).

The trial court held a hearing on the motion for new trial (Tr. 705). McGinness testified that he was No. 26 on the panel of prospective jurors (Tr. 726-27, 731). McGinness testified that right after lunch he heard Venireperson No. 3 tell the person sitting next to Venireperson No. 3 that it was a “cut-and-dry case” (Tr. 729-30). Defense counsel reminded McGinness that his affidavit quoted the comment as a statement that it was “an open-and-shut case,” and McGinness agreed that “open-and-shut” was the correct quote (Tr. 730). McGinness stated that Venireperson No. 3 was seated on a bench, and McGinness was on a bench facing him (Tr. 728). McGinness stated that Venireperson No. 25 made a “shh” sound (Tr. 731). McGinness stated that he did not bring up the issue with anyone until the trial was over (Tr. 735-36).

Lonnie Wolfe testified that he served as a juror, and during one of the breaks during jury selection, he heard Venireperson No. 3 say something (Tr. 737-38). Wolfe stated that he could not understand what Venireperson No. 3 said, but he knew it was about the case (Tr. 737-38). Wolfe testified that he could not gather whether Venireperson No. 3 had any sort a bias or preconceived notion about the

case (Tr. 738). When asked if he had “shushed” Venireperson No. 3, Wolfe stated that he said, “we’re not to talk about the trial here in the hall,” and “that was it” (Tr. 738).

The parties argued the motion for new trial on the juror nondisclosure issue (Tr. 740-47). The trial court denied the motion for new trial (Tr. 750-62). The trial court found that Venireperson No. 3 did not give an indication whether he favored the defendant or the State (Tr. 761).

The trial court issued a judgment and order denying the motion for new trial and sentencing Appellant to the Missouri Department of Corrections (L.F. 90-91). The trial court noted that defense counsel had given the panel members the opportunity to speak with the court privately about any issues at the conclusion of voir dire, but panel member No. 11 (McGinnes) did not raise any issues (L.F. 91). The trial court found that the defendant had presented no evidence regarding the context of the statement about which panel member No. 11 had testified (L.F. 91). The trial court found that:

“In order to prove intentional concealment by a juror, the defendant must, at a minimum, allege intentional concealment in his motion for new trial and file an affidavit from the juror setting forth the facts surrounding the alleged concealment which reveals prejudice to the defendant.” *State v. Mayes*, 63 S.W.3d 615, 626 (Mo. 2001).

The defendant presented no evidence from juror three. . . .

At the hearing on the Motion for New Trial, Defendant presented no evidence regarding the context of the statement about which panel member eleven testified. Panel member eleven presented no information about the mannerism, tone, or gestures of juror three indicating an undisclosed bias. The testimony from both panel member eleven and juror twenty-five reveal that juror three did not indicate that he favored either the state or the defendant. No evidence was presented from juror three. The Court finds that there is not sufficient evidence to support Defendant's contention that juror three intentionally concealed a bias or prejudice against defendant.

Regarding the communication from juror three to juror twenty-five [Wolfe], juror twenty-five testified that he did not understand what juror three said. He further testified that he did not gather or perceive that juror three had a preconceived bias or notion about the case. There is no evidence that any communication from juror three improperly influenced the decision of juror twenty-five.

(L.F. 90-91).

**B. The standard of review.**

Appellant argues that the trial court had the authority to enter an order nunc pro tunc to deem the motion for new trial as timely filed. Defense counsel stated that the motion was not filed when due on January 9, 2012, because his secretary did

not have her notary stamp for the affidavit (Tr. 701). However, there was no clerical error in any order by the trial court. Appellant points to no order that the trial court entered upon filing of the motion for new trial. Instead, the trial court's docket reflects that the motion for new trial was filed on January 10, 2012 (Supp. L.F. 2). An order nunc pro tunc would not have been appropriate because there was no order from the trial court that was corrected, and the error in timeliness of the filing was defense counsel's secretary's error, and not the trial court's (Tr. 701).

Rule 29.11(b) provides that a motion for new trial shall be filed within 15 days after return of the verdict, and for good cause shown, the trial court may extend the time for filing the motion for an additional period not to exceed ten days. The trial court has no authority to waive or extend the time for filing a motion for new trial beyond the time authorized by Rule 29.11(b). *State v. Bartlik*, 363 S.W.3d 388, 391 (Mo. App. E.D. 2012). However, the failure to timely file a motion for new trial does not preclude an appellate court's review of any alleged error. *State v. Starnes*, 318 S.W.3d 208, 216 (Mo. App. W.D. 2010). The Court may review for plain error. *Id.*

If this Court deems the motion for new trial to have been timely filed, then this Court reviews for abuse of discretion. *State v. Mayes*, 63 S.W.3d 615, 626 (Mo. banc 2001) (“[w]hether the requirements for grant of a new trial are met in a particular case based on juror nondisclosure rests in the sound discretion of the trial court”).

## C. Analysis.

### 1. Testimony from the juror is required.

Appellant argues that he should have been granted a new trial because Crigler failed to disclose that he had a bias about the case. “In determining whether to grant a new trial, the court must determine whether a nondisclosure occurred at all, and, if so, whether it was intentional or unintentional.” *Id.* In this case, Appellant failed to establish that a nondisclosure occurred at all. In *Mayer*, 63 S.W.3d at 625-26, this Court stated:

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.” *Portis [v. Greenhaw]*, 38 S.W.3d [436, 445 (Mo. App. W.D. 2001)]. Furthermore: Defendant has the burden of proving his allegations on a motion for a new trial . . . In order to prove intentional concealment by a juror, the defendant must, at a minimum, allege intentional concealment in his motion for new trial and file an affidavit from the juror setting forth the facts surrounding the alleged concealment which reveals prejudice to the defendant. *State v. Potter*, 711 S.W.2d 539, 541 (Mo. App. E.D. 1986).

Appellant argues that he satisfied the requirement set forth by this Court in *Mayer* because he presented evidence through testimony or affidavits of any juror or other witness. Appellant’ Brief at 37. This ignores this Court’s statement that “[i]n

order to prove intentional concealment by a juror, the defendant must, at a minimum, allege intentional concealment in his motion for new trial and file an affidavit from the juror setting forth the facts surrounding the alleged concealment which reveals prejudice to the defendant.” *Mayes*, 63 S.W.3d at 625-26 (quoting *Potter*, 711 S.W.2d at 541); *see also McHaffie by and through McHaffie v. Bunch*, 891 S.W.2d 812, 830, (Mo. banc 1995) (claim of nondisclosure was supported by affidavit of the juror in question, as well as affidavits of other jurors). The Missouri Court of Appeals, Southern District has followed this Court’s lead and has required that a claim on juror nondisclosure be factually supported with an affidavit or testimony from the non-disclosing juror. *State v. Lane*, 415 S.W.3d 740, 755 (Mo. App. S.D. 2013); *State v. Miller*, 415 S.W.3d 740, 743 (Mo. App. S.D. 2008).

In the present case, Appellant failed to present an affidavit or any testimony from Crigler himself. *Portis*, 38 S.W.3d at 445, required evidence through testimony or affidavits of any juror or other witness when the defendant alleges juror misconduct during voir dire. Juror misconduct is not limited to intentional concealment. For example, a prospective juror could commit misconduct by talking to the press during a break during voir dire, and this could be objectively observed by another witness. Thus, the *Potter* Court, 711 S.W.2d at 541, set forth the requirement, quoted approvingly by this Court in *Mayes*, 63 S.W.3d at 625-26, that the defendant must, at a minimum, allege intentional concealment in his motion for

new trial and file an affidavit from the juror setting forth the facts surrounding the alleged concealment which reveals prejudice to the defendant.

**a. Hearsay considerations.**

Appellant argues that such a requirement appears nowhere else in the law. Appellant's Brief at 39. However, Appellant presented the testimony of McGinnes, which was an out-of court statement as to what Crigler said. An out-of-court statement may be admissible to show that Crigler made a comment, but to the extent McGinnes's testimony was offered to show Crigler's state of mind—that Crigler believed that it was an open-and-shut case—the state of mind exception to the hearsay rule applies only in limited situations where hearsay declarations of mental condition are especially relevant. *State v. Rios*, 234 S.W.3d 412, 422 (Mo. App. W.D. 2007). For example, the state of mind exception to the hearsay rule permits admission of a contemporaneous statement relating to a person's existing intent to prove the person actually had such intent, if the intent is a relevant issue in the case. *Lunceford v. Houghtlin*, 326 S.W.2d 53, 69 (Mo. App. W.D. 2010). Respondent finds no case applying the state of mind exception to show juror bias or nondisclosure. On the contrary, this Court has required an affidavit or other testimony from the juror involved, *Mayer*, 63 S.W.3d at 625-26, and the Southern District has followed suit. *Lane*, 415 S.W.3d at 755; *Miller*, 415 S.W.3d at 743.

**b. “Burden” placed on defendant by requiring testimony from the juror.**

Appellant further argues that requiring an affidavit or testimony from the prospective juror places an “impossible burden” on the defendant. Appellant’s Brief at 38. However, noticeably absent in this case was any explanation as to why an affidavit or testimony from Crigler was not presented. Requiring the defendant to produce an affidavit or testimony of the prospective juror, or to at least explain why such affidavit or testimony is unavailable, places no greater burden on him than finding other witnesses. In fact, it should be easier and more direct to find the prospective juror who had the alleged bias than to interview other members of the venire panel in an attempt to find relevant information.

**c. Inconsistencies between McGinnes’s and Wolfe’s testimony—the evidence was not reliable**

In addition, in attempting to present evidence of the alleged comment in the present case, Appellant presented the inconsistent testimony of observers. McGinnes was corrected by defense counsel after initially stating that Juror No. 3 had said that the case was “cut and dry” (Tr. 729-30); at defense counsel’s suggestion, McGinnes then corrected his testimony, consistently with his affidavit, to state that Juror No. 3 had said that the case was “open and shut” (Tr. 730; Supp. L.F. 9). McGinnes’s testimony was not consistent with Wolfe’s, as Wolfe stated that he could not hear what Crigler said (Tr. 737-38), even though he was right next to

Crigler (Tr. 729), while McGinnes claimed that he heard the comment even though he was not right next to Crigler (Tr. 728-29). McGinnes testified that Juror No. 25 had made a “shh” sound (Tr. 731; Supp. L.F. 9), but Wolfe testified that he spoke audibly, stating, “we’re not to talk about the trial here in the hall” (Tr. 738). The “defendant has the burden of proving his allegations in a motion for a new trial.” *Id.* Thus, Appellant failed to present reliable evidence that Crigler made the alleged comment. There was not sufficient evidence to support Appellant’s contention that Juror No. 3 intentionally failed to disclose a bias or prejudice against Appellant, and the trial court’s finding was correct (L.F. 91).

Further, as Wolfe testified that he did not hear what Crigler said (Tr. 737-38), there was no evidence that Crigler’s comment influenced the other jurors either. McGinnes, who professed to hear the comment, did not serve on the jury (L.F. 91). Thus, not only did Appellant fail to establish an intentional nondisclosure of bias on Crigler’s part, but there was no evidence that the other jury members were tarnished, even if Crigler did make the comment.

**d. *Johnson v. McCullough* is distinguishable.**

In another case decided by this Court, the defendant, on his motion for new trial, supported his allegation of juror nondisclosure solely by presenting litigation records that he discovered on Casenet. *Johnson v. McCullough*, 306 S.W.3d 551, 555 (Mo. banc 2010). The defendant presented no testimony or affidavit from the juror in question, nor did he call any other witness to testify at the hearing on the motion

for new trial. *Id.* The trial court determined that nondisclosure was intentional. *Id.* This Court held that “[a]lthough the better practice here would have been for the party seeking a new trial to have deposed Mims, obtained an affidavit, or had her testify,” the trial court did not abuse its discretion in finding intentional nondisclosure and ordering a new trial. *Id.* at 558. *Johnson* is distinguishable because the determination of nondisclosure in that case was at least made on the basis of reliable evidence; namely, records from Casenet. Such is not the case here. Instead, the observations of Wolfe and McGinnes were inconsistent and unreliable, as detailed above. Further, in *Johnson*, this Court confirmed that the “better practice” is to have testimony from the juror himself or herself. *Id.* This Court gave no indication that the testimony of other witnesses would be acceptable. *Id.*

**2. The Defendant, not the State, has the burden of establishing grounds for a new trial.**

Finally, Appellant asserts that the State had ample opportunity to contact and subpoena witnesses for the hearing on the motion for new trial, but did not do so. Appellant’s Brief at 41. Appellant’s position is based on an incorrect understanding of the law, as it places the burden on the State to present the evidence on the defendant’s motion for new trial. The law plainly places the burden on the movant to establish the grounds for his motion for new trial. *Mayer*, 63 S.W.3d at 626 (quoting *Potter*, 711 S.W.2d at 541).

**3. Conclusion.**

Appellant has failed to demonstrate that the trial court erred, plainly or otherwise, in denying Appellant's motion for new trial.

Appellant's point should be denied.

## II. (sufficiency, Count II)

**The trial court did not err in overruling Appellant’s motions for judgment of acquittal, as there was sufficient evidence for a reasonable juror to find that Appellant committed statutory sodomy in the first degree by having W.L. place his mouth on Appellant’s genitals when W.L. was less than fourteen years old.**

### **A. The standard of review.**

“Appellate review of a claim of insufficient evidence supporting a criminal conviction ‘is limited to a determination of whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt.’” *State v. Whitby*, 365 S.W.3d 609, 614 (Mo. App. E.D. 2012) (quoting *State v. Chaney*, 967 S.W.2d 47, 52 (Mo. banc 1998)). This Court must “give great deference to the trier of fact, accepting as true all evidence and reasonable inferences favorable to the State, and disregarding all evidence and inferences to the contrary.” *Whitby*, 365 S.W.3d at 614. On appellate review, this Court must give great deference to the trier of fact, and does not sit as a super juror possessing the power to veto the result below. *State v. Morton*, 229 S.W.3d 626, 629 (Mo. App. S.D. 2007). This Court does not reweigh the evidence, resolve evidentiary conflicts, or decide the credibility of witnesses. *State v. Edwards*, 365 S.W.3d 240, 250 (Mo. App. W.D. 2012).

“The question of sufficiency arises before the case is put to the jury and is really an issue of whether the case should have been submitted to the jury.” *State v.*

*Johnson*, 316 S.W.3d 491, 498 (Mo. App. W.D. 2010) (quoting *State v. Beggs*, 186 S.W.3d 306, 312 (Mo. W.D. App.2005)).

## **B. Analysis.**

In Count II, the State charged that Appellant committed statutory sodomy in the first degree by causing W.L. to place his mouth on Appellant's penis when W.L. was less than fourteen years old (L.F. 36). Appellant argues that there was no evidence as to the year in which this incident occurred or W.L.'s age when this incident occurred.

Appellant argues that the evidence was insufficient to establish that the act occurred while W.L. was less than fourteen years old because Grandmother testified that W.L. had a downstairs bedroom when the family celebrated Christmas Eve in 1997 (Tr. 439-40), and W.L. testified that the act occurred in the upstairs bedroom (Tr. 294). However, this does not establish that the evidence was insufficient. Grandmother could have been mistaken as to the year, and even if she was not mistaken, the incident could have occurred in the upstairs bedroom between Christmas 1997 and the time W.L. turned fourteen on May 1, 1998 (Tr. 271).

Appellant relies on *State v. Miller*, 372 S.W.3d 455 (Mo. banc 2012). In that case, the evidence of the time period during which the conduct occurred did not match the time period set forth in the charging documents and instructions. *Id.* at 467-68. The Court thus held that there was a potential double jeopardy violation because the defendant could be retried for the same conduct of which he had

already been convicted. *Id.* at 468. The amended information asserted that the incident occurred “on or about between January 1, 1995 and April 30, 1998” (L.F. 36). In the present case, there was no disparity between the time period charged and instructed and the time period proven at trial; thus, there was no potential double jeopardy violation as in *Miller*.

In the present case, W.L. testified that the conduct with Appellant began with hugs and kisses but progressed to Appellant lying in bed with him and rubbing his legs (Tr. 282-85). W.L. testified that over a period of years, the conduct progressed to Appellant performing oral sex on W.L. and “him having me perform oral sex” (Tr. 286). W.L. also testified that he could only remember one specific act of Appellant having W.L. perform oral sex on Appellant (Tr. 294). The prosecutor specifically asked W.L., “As you got to fourteen and fifteen, what sexual activities, if any, continued?” (Tr. 300). W.L. responded, “All sexual activities discussed” (Tr. 300). Thus, there was sufficient evidence for a reasonable juror to infer that Appellant caused W.L. to place W.L.’s mouth on Appellant’s penis when W.L. was less than fourteen years old (Tr. 300).

Appellant’s point should be denied.

### III. (Instructions 5 and 8)

The trial court did not err, plainly or otherwise, in submitting Instructions 5 and 8 to the jury on Counts I (Appellant's mouth on W.L.'s genitals when W.L. was less than fourteen years old) and IV (Appellant's mouth on W.L.'s genitals when W.L. was less than seventeen years old), respectively, as the instructions were sufficiently specific as to the time periods during which the incidents occurred.

#### A. Additional facts.

The jury was instructed as follows:

#### Instruction No. 5

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 defendant's mouth on the genitals of [W.L.], and

Second, that such conduct constituted deviate sexual intercourse, and

Third, that at that 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.

Instruction No. 8

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 defendant's mouth on the genitals of [W.L.], and

Second, that such conduct constituted deviate sexual intercourse, and

Third, that at that time [W.L.] was less than seventeen years of age, and

Fourth, that at that time defendant was twenty-one years of age or older,

then you will find the defendant guilty under Count IV of statutory sodomy in the second degree.

(L.F. 72, 75).

**B. Preservation and the standard of review.**

Defense counsel objected to all of the verdict directors on the same basis as his motions for judgment of acquittal (Tr. 628-30). In arguing the motion for judgment of acquittal at the close of the State's evidence, defense counsel had argued that the charges failed to provide specific dates (Tr. 505). However, Appellant failed to

preserve the issue in his motion for new trial (L.F. 83-87), thus the issue is not preserved for appellate review. Supreme Court Rule 29.11(d).

An appellate court has the discretionary authority to review for plain error affecting a defendant's substantial rights "when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." Supreme Court Rule 30.20. "Rule 30.20 provides, in pertinent part, that 'plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted.'" *State v. Garth*, 352 S.W.3d 644, 652 (Mo. App. E.D. 2011). "The plain error rule should be used sparingly and does not justify a review of every alleged trial error that has not been properly preserved for appellate review." *Id.* (quoting *State v. Collins*, 290 S.W.3d 736, 743 (Mo. App. E.D. 2009)). "In determining whether to exercise [its] discretion under the plain error rule, [this Court] looks to determine whether on the face of the defendant's claim substantial grounds exist for believing the trial court committed a 'plain error' which resulted in manifest injustice or a miscarriage of justice." *Garth*, 352 S.W.3d at 562 (quoting *Collins*, 290 S.W.3d at 744). The defendant bears the burden of showing that an alleged error has produced such a manifest injustice. *Garth*, 352 S.W.3d at 562. Mere allegations of error and prejudice will not suffice. *Id.* For a defendant to carry his burden of establishing facial plain error, he must show that the alleged error had a decisive effect on the jury's verdict. *State v. Lloyd*, 205 S.W.3d 893, 906-07 (Mo. App. S.D. 2006).

“[I]nstructional error seldom constitutes plain error, which requires a defendant to demonstrate more than mere prejudice.” *State v. Tillman*, 289 S.W.3d 282, 291-92 (Mo. App. W.D. 2009)(quoting *State v. Darden*, 263 S.W.3d 760, 762 (Mo. App. 2008)). “For instructional error to rise to the level of plain error, the trial court must have so misdirected or failed to instruct the jury that it is apparent to the appellate court that the instructional error affected the jury's verdict.” *Id.* “In determining whether the misdirection likely affected the jury's verdict, an appellate court will be more inclined to reverse in cases where the erroneous instruction did not merely allow a wrong word or some other ambiguity to exist, but excused the State from its burden of proof on a contested element of the crime.” *Tillman*, 289 S.W.3d at 292.

In cases of preserved instructional error, “[a]n appellate court will reverse only if there is error in submitting an instruction and prejudice to the defendant.” *State v. Davies*, 330 S.W.3d 775, 789 (Mo. App. W.D. 2010) (quoting *State v. Forrest*, 183 S.W.3d 218, 229 (Mo. banc 2006)).

### **C. Analysis.**

Citing *State v. Celis-Garcia*, 344 S.W.3d 150, 155 (Mo. banc 2011), Appellant argues that the trial court erred in instructing the jury as to Counts I and IV because the jurors may not have been unanimous as to which incident they were finding Appellant guilty of.

The Missouri Constitution provides that “the right of trial by jury as heretofore enjoyed shall remain inviolate.” MO. CONST. art I, § 22(a). Rule 29.01(a) provides that the jury’s “verdict shall be unanimous . . . .” Article I, section 22(a) protects “the right to a unanimous jury verdict.” *Celis-Garcia*, 344 S.W.3d at 155. “For a jury verdict to be unanimous, ‘the jurors [must] be in substantial agreement as to the defendant’s acts, as a preliminary step to determining guilt.’” *Id.* (quoting 23A C.J.S. Criminal Law § 1881 (2006)).

In *Celis-Garcia*, 344 S.W.3d at 156-58, the Court held that the defendant’s right to a unanimous jury verdict was violated because there were multiple acts at issue and a broad time span of more than two years was included in the charge and the instruction; thus, the jury could have found the defendant guilty without agreeing as to the specific acts that she committed. The Court held that the error resulted in manifest injustice or a miscarriage of justice because the defense was focused on refuting specific instances. *Id.* at 158-59.

*Celis-Garcia* does not apply here because the defense was not focused on refuting specific instances of conduct. Instead, the defense was that no abuse had occurred at all, that the relationship between Appellant and the other family members became antagonistic, and that the victims thus fabricated the stories (Tr. 253-70, 657-76). In fact, defense counsel argued that there was no opportunity for an “alibi defense” because there was no specific date for the conduct (Tr. 655-57). In *State v. Lesieur*, 361 S.W.3d 458, 465 (Mo. App. W.D. 2012), the Court stated:

*Celis-Garcia* makes clear that, to establish manifest injustice based on an insufficiently specific verdict directed in a “multiple acts” case, the defendant must have mounted an incident-specific defense, which would have given the jury a basis to distinguish among the various incidents mentioned in the evidence. *Celis-Garcia* suggests that, where the defendant instead mounts a unitary defense to all alleged actions, attacking the victim’s credibility generally, manifest injustice does not exist.

In the present case, as in *Lesieur, id.*, the “defense was common to all of the sexual encounters described by the victim: a general attack on [his] credibility, and emphasis on the supposed implausibility of the account [he] gave.” Thus, *Celis-Garcia* is inapplicable.

As to Count I, Appellant suggests that the defense was built upon the bedroom in which an act might have occurred. Appellant’s Brief at 58-59 (Tr. 670-71). This was not a defense, but simply the victim’s testimony that he moved to different bedrooms (Tr. 288-89, 294, 336, 352). Appellant again argues that there was a “very small time frame” from January through April 1998 for this incident to have occurred in the upstairs bedroom before W.L. turned fourteen. Appellant’s Brief at 59. However, the incident could have occurred in this time frame. Further, W.L. testified that the acts of Appellant fondling him and performing oral sex on him continued to the ages of fourteen and fifteen (Tr. 300). This meant that such

activities also occurred before he was fourteen, and indeed, W.L. testified that the activities progressed over the years to Appellant performing oral sex on him (Tr. 286).

As to Count IV (another incident of Appellant placing his mouth on W.L.'s genitals), Appellant asserts that W.L.'s "own testimony" established that the act occurred when W.L. was between the ages of fourteen and sixteen. Appellant's Brief at 60. This is correct (Tr. 292, 300), and the State charged that this act of Appellant placing his mouth on W.L.'s penis occurred when W.L. was less than seventeen years of age (L.F. 37). Appellant argues that because there was no specific testimony as to when W.L. moved to the larger upstairs bedroom, Appellant had a viable defense as to this count. Appellant argues that 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. Appellant argues that the failure to require the jury to unanimously agree as to the time and place of the alleged acts was plain error. However, once again, Appellant had no defense to specific acts, as in *Celis-Garcia*, 344 S.W.3d at 156-58. Instead, similar to *Lesieur*, 361 S.W.3d at 465, his defense was that no abuse ever occurred and that W.L. made the allegations against him because his relationship with Appellant had soured (Tr. 253-70, 657-76). Thus, *Celis-Garcia* is inapplicable here.

Appellant's point should be denied.

#### IV. (Instruction No. 9: Count V)

**The trial court did not err, plainly or otherwise, in instructing the jury as to Count V (attempted child molestation in the first degree), as the instruction, when considered with the undisputed birth date of B.L., required a finding that the act occurred when B.L. was less than twelve years old, the State was not required to file an amended information to charge Appellant with attempt, and the trial court adequately instructed the jury as to attempted child molestation in the first degree.**

##### **A. Additional facts.**

Instruction No. 9 stated:

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

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

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

Third, that defendant engaged in such conduct for the purpose of committing such Child Molestation in the First Degree,

then you will find the defendant guilty under Count V of attempted child molestation in the first degree. . . .

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 the victim is a child less than fourteen years old.

As used in this instruction, the term “substantial step” means conduct that is strongly corroborative of the firmness of the defendant’s purpose to complete the offense of Child Molestation in the First Degree. . . .

(L.F. 76).

**B. Preservation and the standard of review.**

Defense counsel objected to Instruction No. 9 on the same basis as his motion for judgment of acquittal and on the basis that it did not conform to the evidence because there was no evidence that Appellant had the purpose to be touched underneath the clothing (Tr. 623, 629-30). In arguing the motion for judgment of acquittal at the close of all the evidence, defense counsel had argued that there was insufficient evidence of attempt on Count V because touching genitals through the clothing was not the same as an attempt to touch the genitals under the clothing (Tr. 621-23). Defense counsel did not object to Instruction No. 9 on grounds that it misstated the age of the victim (Tr. 623, 629-30).

In his motion for new trial, Appellant asserted that “[t]he trial court erred in allowing the state to amend Count V of its information in that said amendment did not correspond with the evidence in the case” (L.F. 84). Appellant did not raise any claim of instructional error (L.F. 83-87).

An appellate court has the discretionary authority to review for plain error affecting a defendant’s substantial rights “when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.” Supreme Court Rule 30.20. “Rule 30.20 provides, in pertinent part, that ‘plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted.’” *Garth*, 352 S.W.3d at 652. “The plain error rule should be used sparingly and does not justify a review of every alleged trial error that has not been properly preserved for appellate review.” *Id.* (quoting *Collins*, 290 S.W.3d at 743). “In determining whether to exercise [its] discretion under the plain error rule, [this Court] looks to determine whether on the face of the defendant's claim substantial grounds exist for believing the trial court committed a ‘plain error’ which resulted in manifest injustice or a miscarriage of justice.” *Garth*, 352 S.W.3d at 562 (quoting *Collins*, 290 S.W.3d at 744). The defendant bears the burden of showing that an alleged error has produced such a manifest injustice. *Garth*, 352 S.W.3d at 562. Mere allegations of error and prejudice will not suffice. *Id.* For a defendant to carry his burden of establishing facial plain

error, he must show that the alleged error had a decisive effect on the jury's verdict. *Lloyd*, 205 S.W.3d at 906-07.

“[I]nstructional error seldom constitutes plain error, which requires a defendant to demonstrate more than mere prejudice.” *Tillman*, 289 S.W.3d at 291-92 (Mo. App. W.D. 2009)(quoting *Darden*, 263 S.W.3d at 762). “For instructional error to rise to the level of plain error, the trial court must have so misdirected or failed to instruct the jury that it is apparent to the appellate court that the instructional error affected the jury's verdict.” *Id.* “In determining whether the misdirection likely affected the jury's verdict, an appellate court will be more inclined to reverse in cases where the erroneous instruction did not merely allow a wrong word or some other ambiguity to exist, but excused the State from its burden of proof on a contested element of the crime.” *Tillman*, 289 S.W.3d at 292.

In cases of preserved instructional error, “[a]n appellate court will reverse only if there is error in submitting an instruction and prejudice to the defendant.” *Davies*, 330 S.W.3d at 789 (quoting *Forrest*, 183 S.W.3d at 229).

## **C. Analysis.**

### **1. Age of victim.**

Appellant asserts error because Instruction 9 failed to require that the age of the victim be less than twelve years old (L.F. 76). This is a claim of plain error because it was not preserved by objection or by the motion for new trial (Tr. 623, 629-30; L.F. 83-86). Section 566.067, RSMo 1994, provided that “[a] person commits

the crime of child molestation in the first degree when he subjects another person who is less than twelve years of age to sexual contact.” The instruction stated that 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 the victim is a child less than fourteen years old (L.F. 76). The instruction misstated the required age of the victim (L.F. 76). However, there was no dispute that B.L. was born on July 26, 1989 (Tr. 382). The instruction required the jury to find that the conduct occurred “on or about between January 1, 1995 and July 25, 1996” (L.F. 76). Thus, B.L. would unquestionably have been less than twelve years old at the time.

Appellant relies on *Apprendi v. New Jersey*, 120 S.Ct. 2348, 2362-63 (2000), which emphasized the need for findings by a jury as to any fact that increases the penalty. Here, in light of the dates included in the verdict director, the jury necessarily found that the victim was less than twelve years of age (Tr. 382; L.F. 76). *Apprendi* does not apply here.

Appellant relies on *Miller*, 372 S.W.3d at 455, but that case is distinguishable because there the verdict director allowed the jury to find the defendant guilty of a crime that was not criminal during the charged period, based on a change in the definition of “sexual contact.”

Appellant also relies on *State v. Langston*, 229 S.W.3d 289, 296 (Mo. App. S.D. 2007), which is distinguishable because in that case the instruction failed to require a

finding that stolen property was of a sufficient value (\$750 or more) to constitute an offense, and defendant could have been convicted based on nothing more than her admission that she stole \$500—an inadequate amount—from her employer. In the present case, though the instruction stated that B.L. must have been under the age of fourteen rather than under the age of twelve, his date of birth was July 26, 1989 (Tr. 382), and the charge and instruction both asserted that the conduct occurred between January 1, 1995, and July 25, 1996 (L.F. 37, 76); thus, in order to find Appellant guilty in accordance with the instruction, the jury necessarily found that B.L. was less than twelve years old. Though the instruction was inappropriately worded as to the age, no element was missing from the jury’s findings. There was no plain error.

**2. The State was not required to file a second amended information to charge attempt.**

Appellant next claims that the instruction was erroneous because the State had failed to file a second amended information charging Appellant with attempted child molestation in the first degree rather than simply child molestation in the first degree. However, Appellant did not argue at trial that the State failed to file a second amended information (Tr. 623, 629-30), and his motion for new trial asserted, paradoxically, that the trial court erred in allowing the State to amend Count V (L.F. 84). Thus, Appellant’s argument, in its present form, was not preserved.

Appellant cites Rule 23.01 and § 545.240, RSMo 2000. Rule 23.01 provides:

(a) The indictment or information shall be in writing, signed by the prosecuting attorney, and filed in the court having jurisdiction of the offense. The indictment shall also be signed by the foreperson of the grand jury.

(b) The indictment or information shall:

(1) State the name of the defendant or, if not known, designate the defendant by any name or description by which the defendant can be identified with reasonable certainty;

(2) State plainly, concisely, and definitely the essential facts constituting the elements of the offense charged, including facts necessary for any enhanced punishment;

(3) State the date and place of the offense charged as definitely as can be done. If multiple counts charge the same offense on the same date or during the same time period, additional facts or details to distinguish the counts shall be stated;

(4) Cite the statute alleged to have been violated and the statutes that fix the penalty or punishment therefor; and

(5) State the name and degree, if any, of the offense charged.

All indictments or informations that are substantially consistent with the forms of indictments or informations that have been approved by

this Court shall be deemed to comply with the requirements of this Rule 23.01(b).

Section 545.240, RSMo 2000, provides:

Informations may be filed by the prosecuting attorney as informant during term time, or with the clerk in vacation, of the court having jurisdiction of the offense specified therein. All 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; the verification by the prosecuting attorney may be upon information and belief; all in the manner provided by supreme court rule. The names of the witnesses for the prosecution must be affixed to the information, in like manner and subject to the same restrictions as required in case of indictments.

These provisions govern the initial filing of an information, and do not mandate the filing of an amended information to charge attempt.

Appellant asserts that the State “recognized” that it could not make its case, and that the State suggested another amendment of the information. Appellant’s Brief at 71. The State did not “recognize” that it could not make its case. Instead, during the cited portion of the transcript, the special prosecutor recognized the changes in the law, and stated that Count V would be submitted as an attempt,

which was an included offense (Tr. 551-52). Although his co-counsel stated that the State would amend the charging documents to charge Count V as attempt (Tr. 556), there is no indication in the record that a second amended information was filed. In denying the motion for judgment of acquittal at the close of all the evidence, the trial court stated that it understood that Count V was being charged as an attempt (Tr. 623).

Rule 23.08 provides that “[a]ny information may be amended or substituted for an indictment at an time before verdict or finding if no additional or different offense is charged and if a defendant’s substantial rights are not thereby prejudiced[.]” The rule “has been uniformly and consistently construed to mean that ‘it is not permissible to amend an information if the effect of the amendment is to charge an offense different from the one originally charged.’” *State v. Robertson*, 764 S.W.2d 483, 484-85 (Mo. App. W.D. 1989) (quoting *State v. Amerson*, 661 S.W.2d 852 (Mo. App. S.D. 1983)). However, this principle does not apply if the subsequent charge is a lesser included offense of the initial charge since, in the contemplation of law, they are the same. *Robertson*, 764 S.W.2d at 485; *see also State v. Taylor*, 724 S.W.2d 531, 536 (Mo. App. W.D. 1986) (there was no fatal variance between the offenses charged by information and the instruction when the jury is instructed on lesser included offense). An attempt is a lesser included offense of the completed offense. Section 556.046.1, RSMo 1994; *State v. Messa*, 914 S.W.2d 53, 54 (Mo. App. W.D. 1996). Thus, the State was not required to file an amended information, as

Appellant was on notice of the charge. *See State v. Allen*, 756 S.W.2d 167, 170 (Mo. App. W.D. 1987) (no plain error where the trial court granted leave to amend the information and the docket reflected such, but the information was not actually amended by interlineations).

Inconsistently, Appellant argues that the State amended the information, and that it did so with the “clear purpose” of depriving him of a defense. Appellant’s Brief at 73. The State had no purpose of depriving Appellant of a defense (Tr. 552), and he was not deprived of a defense, as the attempt was a lesser included offense and he was on notice of the charges.

**3. The trial court adequately instructed the jury as to attempted child molestation in the first degree.**

Appellant finally alleges that the instruction did not clearly state that a touch that occurred “through the clothing” did not constitute sexual contact. Appellant’s Brief at 73. However, this was not the basis of Appellant’s objection at trial (Tr. 621-23, 629-30), and Appellant did not raise any claim of instructional error in his motion for new trial (L.F. 83-86), thus the issue was not preserved. Appellant asserts that in instructing on a substantial step towards touching of the genitals, the trial court should have instructed the jury that the touching of the genitals would be underneath the clothing. Appellant’s Brief at 73. Appellant asserts that the touching underneath the clothing was “an essential element of the offense that the court did not instruct on.” Appellant’s Brief at 73. An instruction as suggested by

Appellant would have confused the jury. The jury was instructed that it could find Appellant guilty of attempt if it found that he caused B.L. to touch Appellant's genitals through the clothing, and this was a substantial step toward the commission of child molestation in the first degree (L.F. 76). The jury was further instructed that a person commits the crime of child molestation in the first degree if the defendant causes the victim to touch the defendant's genitals, does so for the purpose of gratifying his sexual desire, and the victim is less than fourteen years old (L.F. 76). The instruction thus distinguished between touching the genitals and touching the genitals through the clothing (L.F. 76). The trial court was not required to instruct the jury that a touch through the clothing did not constitute sexual contact. That would have confused the issue.

Appellant further asserts that it was not made clear to the jury that the defendant must have had a purpose of going underneath the clothing. Appellant's Brief at 74. The instruction distinguished between touching and touching through the clothing (L.F. 76). The jury was instructed that a "substantial step" was conduct strongly corroborative of the defendant's purpose to complete the offense of child molestation in the first degree (L.F. 76). Thus, the instruction was clear as to the defendant's purpose, and the trial court did not err, plainly or otherwise.

Appellant's point should be denied.

## V. (sufficiency of the evidence: Count V)

**The trial court did not err in overruling Appellant’s motions for judgment of acquittal as to Count V, as there was sufficient evidence for a reasonable juror to find that Appellant committed attempted child molestation in the first degree.**

### A. The standard of review.

“Appellate review of a claim of insufficient evidence supporting a criminal conviction ‘is limited to a determination of whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt.’” *Whitby*, 365 S.W.3d at 614 (quoting *Chaney*, 967 S.W.2d at 52). This Court must “give great deference to the trier of fact, accepting as true all evidence and reasonable inferences favorable to the State, and disregarding all evidence and inferences to the contrary.” *Whitby*, 365 S.W.3d at 614.

### B. Analysis.

Appellant’s Point Relied On asserts that there was insufficient evidence as to Count V because the State did not present any evidence that he had the purpose of committing child molestation in the first degree in that there was no evidence of an attempt or that he acted with the purpose to touch B.L. underneath his clothing. Appellant’s Brief at 51. Appellant confuses the charges and the evidence. There was no charge or instruction for the offense of child molestation in the first degree by Appellant touching or attempting to touch B.L. underneath B.L.’s clothing (L.F.

37, 76). Instead, the charge and instruction involved Appellant causing B.L. to touch Appellant (L.F. 37, 76).

Appellant's Argument asserts that the evidence was insufficient because there was no evidence that Appellant made an attempt to unzip or remove his pants or made any attempt to place B.L.'s hands inside of Appellant's pants. Appellant's Brief at 52. Appellant argues that there was no evidence that he took any step, substantial or otherwise, toward having B.L. touch Appellant through Appellant's clothing. Appellant's Brief at 53. This theory was not presented in the Point Relied On. An argument that is not raised in the Point Relied On is not preserved for review. Supreme Court Rule 84.04(e); *Burg v. Dampier*, 346 S.W.3d 343, 354 (Mo. App. W.D. 2011). However, even if this Court reviews the issue *ex gratia*, it should find that the evidence was sufficient for a reasonable juror to conclude that Appellant committed the offense of attempted child molestation in the first degree.

Section 566.067, RSMo 1994, provided that “[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.” Section 566.010(3), RSMo 1994, defined “sexual contact” as “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[.]” Because the prior statute had specifically defined sexual contact to include touching through the clothing, § 566.010(3), RSMo 1986, but the legislature removed the reference to

touching through the clothing, effective January 1, 1995, this Court defined “sexual contact” after January 1, 1995, as not including touching through the clothing. *State v. Wallace*, 976 S.W.2d 24, 25 (Mo. App. E.D. 1998).

Section 564.011.1, RSMo 1994, provided:

A person is guilty of attempt to commit an offense when, with the purpose of committing the offense, he does any act which is a substantial step towards the commission of the offense. A “**substantial step**” is conduct which is strongly corroborative of the firmness of the actor’s purpose to complete the commission of the offense.

In sexual crimes, intent is usually inferred from circumstantial evidence. *State v. Browning*, 357 S.W.3d 229, 234 (Mo. App. S.D. 2012). Here, placing B.L.’s hand so that it touched Appellant’s penis through the clothing was a substantial step towards making B.L.’s hand have skin-to-skin contact with Appellant’s penis. *See State v. Walsh*, 713 S.W.2d 508, 509 (Mo. banc 1986) (conviction of attempted sexual misconduct (touching detective's genitalia through his clothing) was a substantial step toward the commission of the crime of sexual misconduct, and was upheld against equal protection challenge), *criticized on other grounds, Glossip v. Missouri Dep’t of Transp. and Hwy. Patrol Employees’ Retirement System*, 411 S.W.3d 796, 806 (Mo. banc 2013).

There was sufficient evidence from which a reasonable juror could find that Appellant committed the offense of attempted child molestation in the first degree.

Appellant's point should be denied.

## CONCLUSION

Appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and Special Rule 360 of this Court, and contains 10,939 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2007 software; and
2. That a copy of this notification was sent through the eFiling system on this 25<sup>th</sup> day of April, 2014, to:

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