In the Missouri Court of Appeals
Eastern District
DIVISION FOUR

STATE OF MISSOURI,	)	No. ED98038
	)	
Respondent,	)	Appeal from the Circuit Court
	)	of Monroe County
vs.	)	
	)	Honorable Rachel Bringer Shepherd
THOMAS A. ESS,	)	
Appellant.	)	Filed: September 3, 2013

The defendant, Thomas Ess, appeals the judgment entered by the Circuit Court of Monroe County following his conviction by a jury of two counts of first-degree statutory sodomy, two counts of second-degree statutory sodomy, and one count of attempted first-degree child molestation. The jury acquitted the defendant of one count of attempted first-degree statutory sodomy. The defendant waived jury sentencing, and the trial court sentenced him to a total of 47 years of imprisonment.

In five points on appeal, the defendant challenges the trial court's failure to grant a new trial based on juror bias, the sufficiency of the evidence, and the jury instructions. We conclude, given the critical deficiencies of the judgment denying the motion for new trial, that a manifest injustice or miscarriage of justice will result if the present judgment is allowed to stand on the existing record. We reverse the denial of the defendant's motion, and remand to the trial court for reconsideration and entry of detailed findings of fact and conclusions of law. Furthermore, we conclude that the evidence was insufficient to convict the defendant of attempted first-degree child molestation. We reverse the

judgment of the trial court regarding this conviction and vacate the four-year sentence associated therewith.

Factual and Procedural Background

The State charged the defendant by first amended felony information with Counts I and II, first-degree statutory sodomy in violation of section 566.062 RSMo. (1994); Count III, attempted first-degree statutory sodomy; Counts IV and VI, second-degree statutory sodomy in violation of section 566.064 RSMo. (1994 & 2000); and Count V, first-degree child molestation in violation of section 566.067.[1] The State alleged that the defendant committed these offenses against his stepsons, W.L. and B.L., many years before, at various times between 1995 and 2003.

During voir dire, the State, the defense, and the court all discussed with the venire the need for an impartial jury that was free of bias and willing to decide the case only after hearing all of the evidence. The court explained that "[a] trial of a criminal case begins with the selection of a jury of qualified and impartial people." The court continued that the failure of venirepersons to fully and truthfully answer questions during voir dire could force the parties to retry the case.

The State asked whether anyone was unable to be fair and impartial. Juror 3 did not respond. Defense counsel asked whether anyone held a bias in favor of law enforcement that would pose a problem with being a fair and impartial juror in this trial. He also asked, "how many of you have a preconceived notion about the guilt or innocence of [the defendant] at this point?" Juror 3 did not respond. The court announced shortly thereafter that it would recess for lunch at about noon and resume at 1:15 p.m. Juror 3 also listened to numerous discussions by both counsel with other

[1] All statutory references are to RSMo. (1994) except as otherwise indicated.

venirepersons throughout voir dire about whether the venirepersons could be fair and impartial. He did not, at any time on the record, profess any bias or indicate that he had already made up his mind about the case. The defense completed voir dire soon after lunch, at about 1:40 p.m.

The evidence viewed in the light most favorable to the verdict is as follows. W.L. was born in May 1984. He was a child when his mother met and married the defendant. W.L. testified that his family moved to the house in Paris, Missouri when he was nine or ten years old. W.L. explained that when the family first moved in, he shared a downstairs bedroom off the living room with his younger brother, B.L. He testified that no sexual touching occurred in this bedroom while W.L. shared it with B.L. When the family finished the house's attic space to add two bedrooms upstairs, W.L. moved to the smaller upstairs bedroom. He stated that no sexual contact with the defendant occurred while W.L. had the smaller upstairs bedroom. W.L. moved back to the downstairs bedroom, which he alone occupied. He testified that incidents of sexual contact occurred while he occupied this downstairs bedroom for the second time, on his own. Finally, W.L. moved to the larger upstairs bedroom although he did not remember how old he was at that time. Sexual contact with the defendant continued while W.L. occupied the larger upstairs bedroom. W.L. occupied the larger upstairs bedroom until he moved out of the house at around the age of 17.

W.L. testified that the defendant began hugging and kissing him a lot about the time that he, W.L., turned eleven. The defendant then began getting in bed with W.L. at night and rubbing W.L.'s back or leg, and eventually the defendant progressed to touching W.L.'s genitals. The contact progressed to hand-to-genital contact and then to

oral-to-genital contact. W.L. testified that the oral-to-genital contact began when he was around twelve, and he specifically remembered one incident when the defendant had W.L. place his mouth on the defendant's penis in the larger upstairs bedroom. W.L. also described one incident when the defendant sought to have W.L. penetrate him anally, but this act was not consummated.

B.L. was born in July 1989. He testified that the family moved to the house in Paris, Missouri while he was in preschool and that he started kindergarten in Paris. B.L. testified to three incidents involving the defendant. The first occurred when B.L. was about five years old. He stated that he had just gone to bed when the defendant lay down in the bed behind him, had B.L. turn onto his other side to face the defendant, placed B.L.'s hand on the defendant's penis over the defendant's pants, "and wanted me to hold it between his legs while I slept." B.L. continued, explaining that he felt uncomfortable and tried to move his hand, but the defendant "just kept wanting me to hold it in that spot." B.L. did not remember whether the defendant had an erection. B.L. testified that he fell asleep, and when he awoke, the defendant had left the room. B.L. also described an incident some years later when the defendant tried to unzip B.L.'s pants.[2] B.L. described a third incident when he was in the sixth grade, and the defendant touched B.L.'s genitals directly with his hand.

The boys' maternal grandmother testified. She described a visit to the defendant's home on Christmas Eve 1997, when W.L. would have been 13 years old. The grandmother explained that she observed the defendant go into W.L.'s downstairs

[2] The State did not charge the defendant with any offense related to this second incident that B.L. described.

bedroom, close the door, and remain in the bedroom all evening while the rest of the family visited in the living room across the hall.

The boys' mother also testified. She described how the defendant seemed to favor W.L., giving him gifts far beyond what he gave to the other children and spending time with W.L. to the exclusion of her and the other children. The mother described the defendant and W.L. as inseparable. She explained how W.L. revealed to her the allegations against the defendant while she and W.L. were engaged in a disagreement over W.L.'s daughter's visits with her and the defendant.

The defendant testified and denied all of the allegations. He explained that his relationship with B.L. had never been particularly good, and that his relationship with W.L. deteriorated during W.L.'s teenaged years.

The jury convicted the defendant of Counts I and II, first-degree statutory sodomy of W.L.; Count IV, second-degree statutory sodomy of W.L.; Count V, attempted first-degree child molestation of B.L.; and Count VI, second-degree statutory sodomy of B.L. The jury acquitted the defendant of Count III, attempted first-degree statutory sodomy of W.L. The jury returned its verdicts on December 13, 2011.

The defendant obtained an extension of ten days in which to file his motion for new trial pursuant to Rule 29.11(b). Because the extended deadline, 25 days after the verdict, fell on a Saturday, the motion for new trial was due on Monday, January 9, 2012. The defendant filed his motion for new trial one day late, on January 10, 2012.[3] 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

[3] The defendant's appellate counsel neither tried the case nor handled the post-trial motions.

> 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.

The trial court attempted to accommodate the late filing by granting the defendant's request to show the motion filed on the due date, January 9, 2012. The State did not object to this maneuver, taking no position on the matter. The trial court then heard the defendant's motion for new trial, including witnesses' testimony.

The defendant's motion for new trial alleged, *inter alia*, that he was entitled to a new trial based on misconduct by Juror 3, who ultimately served on the jury. The defendant alleged that Juror 3 held a bias against the defendant, announcing to other members of the venire at the lunch break during voir dire that "[t]his is an open and shut case," and that Juror 3 intentionally failed to disclose this bias during voir dire. The defendant submitted a supporting affidavit from Venireperson 26 stating that "[d]uring a break taken before the end of jury selection, after the court admonished the panel not to discuss the case, I heard [Juror] 3 remark to other nearby jurors that 'this is an open and shut case,' indicating to me that he believed defendant to be guilty." According to Venireperson 26's affidavit, another venireperson then hushed Juror 3 as if to admonish him in accordance with the court's instruction not to discuss the case. The State filed no response whatsoever.

At the hearing on the motion for new trial, Venireperson 26 testified and affirmed that the information to which he swore in his affidavit was true. He testified that he was sitting on a bench in the hall directly opposite Juror 3 right after lunch, during a break in voir dire. Venireperson 26 first testified that Juror 3 said it was "a cut-and-dry [sic] case." Defense counsel pointed out that Venireperson 26 in his affidavit identified the phrase "this is an open-and-shut case." Defense counsel asked, "[d]o you recall now

which one it was?" Venireperson 26 responded, "Yes. Yes. Open and shut." He confirmed that those were the actual words. When defense counsel asked about the context of Juror 3's statement and what Venireperson 26 thought Juror 3 meant, the trial court sustained the State's objections, limiting Venireperson 26's testimony to words he reported that Juror 3 had said or not said. Defense counsel again asked Venireperson 26, "[t]hose are the words you recall him [Juror 3] saying: This is an open-and-shut case?" Venireperson 26 replied, "Yes. Yes." He did not hear Juror 3 say anything before or after the "open-and-shut-case" comment. Venireperson 26 explained that he did not know what to do or whom to tell when he heard this statement and so did not report it. After the trial, someone commented to Venireperson 26 about the verdict, and that individual then helped Venireperson 26 report what he had heard. The State briefly cross-examined Venireperson 26, but did not meaningfully impeach him.

Juror 25 also testified, over the State's objection, that he heard Juror 3 say something about the case although he did not hear precisely what Juror 3 said. Juror 25 explained that he told Juror 3 that they were not to talk about the trial in the hall. The State did not cross-examine Juror 25. The State presented no evidence whatsoever, did not meaningfully impeach either witness's credibility, and did not suggest any apparent reason for the witnesses to lie.

In its February 2, 2012 judgment, the trial court assessed the claim asserted in the defendant's motion as an allegation of undisclosed bias on the part of Juror 3 and a separate allegation of improper communication about the trial by the same juror. The court made no witness credibility determinations, and gave no indication that it did not believe that Juror 3 made the comment alleged. The court sustained the State's

objections and did not allow Venireperson 26 to testify to the context in which Juror 3 made the comment or to his, Venireperson 26's, impression of what Juror 3 meant by the comment. Nonetheless, the court noted from the bench and in its written judgment that Venireperson 26 gave no indication of the context of the comment and "presented no information about the mannerism, tone, or gestures of juror three indicating an undisclosed bias."[4] Once in its oral pronouncement from the bench and twice in its written judgment, the court pointed out that the witnesses did not say that Juror 3 indicated a bias in favor of either the State or the defendant. The court made no express finding whether or not a nondisclosure occurred, and made no express findings whether or not it was intentional. Instead, the trial court denied the defendant's motion for new trial, concluding "that there is not sufficient evidence to support Defendant's contention that juror three intentionally concealed a bias or prejudice *against defendant*." (Emphasis added.) The court then considered the alleged statement from Juror 3 as improper communication about the trial and concluded that, "[t]here is no evidence that any communication from juror three improperly influenced the decision of juror twenty-five."

The trial court sentenced the defendant to 20 years on Counts I and II, first-degree statutory sodomy of W.L, and seven years on Count VI, second-degree statutory sodomy of B.L., all to be served consecutively. The court also sentenced the defendant to seven years on Count IV, second-degree statutory sodomy of W.L., and to four years on Count V, attempted first-degree child molestation of B.L., both sentences to be served concurrently with the others. This appeal follows.

[4] The court repeatedly refers to "panel member eleven" as the witness testifying to Juror 3's statement, but the record, motion for new trial, and supporting affidavit make clear that Venireperson 26,Charles McGinness, is the witness on this matter. Venireperson 11 was named Benne, and ultimately served on the jury as its foreperson.

Discussion

In five points on appeal, the defendant challenges the trial court's failure to grant a new trial based on juror bias, the sufficiency of the evidence, and the jury instructions. Before we address the defendant's substantive arguments, we must consider the nature of our review given the late filing of the defendant's motion for new trial. Except for questions regarding the court's jurisdiction over the offense charged, whether the indictment or information states an offense, or the sufficiency of the evidence, allegations of error in jury-tried cases must be included in a motion for new trial to be preserved for appellate review. Rule 29.11(d).

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 one additional period not to exceed ten days if the defendant requests the extension within the original 15-day period. Pursuant to Rule 29.13(b), the trial court may, with the defendant's consent, order a new trial on its own initiative before the entry of judgment and imposition of sentence, but not later than 30 days after return of the verdict.

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). Missouri courts have interpreted the filing deadlines set forth in Rule 29.11(b) as absolute such that once the deadline of 15 or 25 days has passed, a defendant may not file an original or amended motion even to allege, as a basis for new trial, newly discovered evidence that was not discoverable until after the filing deadline had passed. *State v. Stephens*, 88 S.W.3d 876, 880 (Mo. App. W.D. 2002). "A motion

filed after the maximum time is a nullity." *Bartlik*, 363 S.W.3d at 391. Untimely motions are treated procedurally as though the motion were never filed. *State v. Langston*, 229 S.W.3d 289, 294 (Mo. App. S.D. 2007). Likewise, "[s]upplemental motions filed after the time the motion for new trial is due are a nullity." *State ex rel. Baker v. Kendrick*, 136 S.W.3d 491, 493 (Mo. banc 2004). The trial court lacks authority to grant an untimely motion filed pursuant to Rule 29.11(b) or to grant a new trial on its own initiative pursuant to Rule 29.13(b) more than 30 days after the verdict. *Langston*, 229 S.W.3d at 294; *Dorsey v. State*, 156 S.W.3d 825, 829 (Mo. App. W.D. 2005). Moreover, we are aware of no authority possessed by the trial court that authorizes the court to deem a motion for new trial filed one day earlier than the motion was actually filed, absent the motion for new trial having been lodged with the court clerk.

The failure to timely file a motion for new trial, however, does not preclude this Court's review of any alleged error. *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)). Our research has identified numerous cases where the Court considered plain-error review, despite the defendant's failure to include the claim presented on appeal in a timely motion for new trial. *Starnes*, 318 S.W.3d 208 (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).

Thus, we may consider plain errors affecting substantial rights when the error complained of affects so substantially the rights of the defendant that manifest injustice or miscarriage of justice will result if left uncorrected. Rule 30.20; *Pullum*, 281 S.W.3d at 916. This is such a case.

Juror Bias

In his first point on appeal, the defendant claims the trial court erred in denying his motion for new trial based on juror misconduct. He contends that Juror 3 had formed a clear opinion on the case prior to hearing any evidence, and it was never established

that Juror 3 could set aside his prior opinions regarding the defendant's guilt and give the defendant a fair trial.

Normally, the question of whether to grant a motion for new trial is left to the trial court's sound discretion. *Stephens*, 88 S.W.3d at 881. However, in the context of plain-error review, we will reverse the trial court's denial of a motion for new trial only where we determine that the trial court's ruling was an obvious and clear abuse of discretion that affected a substantial right of the defendant and resulted in a manifest injustice or miscarriage of justice. *Id*.

"[I]n criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury of the county." Mo. Const. art. 1, sec. 18(a). "[N]o 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 . . . shall be sworn as a juror in the same cause." Section 494.470.1 RSMo. (2000). It is well-established that a defendant has a right to a fair and impartial jury. *White v. State*, 290 S.W.3d 162, 165 (Mo. App. E.D. 2009). "[A]n 'impartial jury' is one where *each and every one* of the twelve members constituting the jury is totally free from partiality whatsoever." *Id*. *(*quoting *Presley v. State,* 750 S.W.2d 602, 606 (Mo. App. S.D.1988) (emphasis in original)). To qualify as a juror, a venireperson must be able to enter upon that service with an open mind, free from bias and prejudice. *Id*.

Venirepersons have a duty to answer all questions fully, fairly, and truthfully during voir dire. *State v. Mayes*, 63 S.W.3d 615, 624 (Mo. banc 2001). A venireperson's failure to respond to an applicable question can deprive counsel of information needed to exercise a peremptory challenge or a challenge for cause. *Id*. at 625. In determining

whether to grant a new trial, the court must determine whether a nondisclosure occurred at all, and if so, whether the nondisclosure was intentional or unintentional. *Id.*

"Nondisclosure can occur only after a clear question is asked during voir dire." *State v. McFadden*, 391 S.W.3d 408, 418 (Mo. banc 2013). Intentional nondisclosure occurs when: 1) there is no reasonable inability to comprehend the information solicited by the question asked of the juror, and 2) the juror remembers the experience, or the experience was of such significance that the juror's purported forgetfulness is unreasonable. *Id*. We will normally presume bias and prejudice if a juror intentionally withholds material information. *Id.* Accordingly, a finding of intentional nondisclosure of a material issue is tantamount to a *per se* rule mandating a new trial. *Id.*

On the other hand, unintentional nondisclosure occurs, for example, where the experience forgotten was insignificant or remote in time, or where the venireperson reasonably misunderstands the question posed. *Id*. If the nondisclosure was unintentional, a new trial is warranted only where prejudice resulted from the nondisclosure that may have influenced the jury's verdict. *Id.* In the case of unintentional nondisclosure, the party seeking the new trial has the burden of proving prejudice. *Id*. Allegations of nondisclosure are not self-proving and must be proven. *Id*. The record must support all allegations of nondisclosure and prejudice. *Id*.

Here, the court explained to the venire that "[a] trial of a criminal case begins with the selection of a jury of qualified and impartial people." The court continued that the failure of venirepersons to fully and truthfully answer questions during voir dire could force the parties to retry the case. The State explained that it was looking for jurors who could be fair, who could listen to the evidence before making a decision, who could make

their decision based on the evidence, and who would not bring in opinions from the outside. The State asked whether anyone was unable to be fair and impartial, and whether anyone had a concern about the presumption of innocence. Juror 3 did not respond. Because he had not previously spoken, the State specifically asked Juror 3 whether there was any reason that Juror 3 would be unwilling to serve or would not be a good juror for this particular case. Juror 3 responded, "Not really." The State concluded by asking the venire if there was anything that anyone wished to add about his or her ability to serve as a juror. Again, Juror 3 did not respond.

Early in its voir dire, the defense explained that both sides wanted fairness, and defense counsel explained that his job at that point was to discern any biases held by the potential jurors. Defense counsel asked whether anyone held a bias in favor of law enforcement that would pose a problem with being a fair and impartial juror in this trial. He also asked "how many of you have a preconceived notion about the guilt or innocence of [the defendant] at this point?" Juror 3 offered no response. The court announced that it would recess for lunch at about noon and resume at 1:15 p.m. According to Venireperson 26, it was right after lunch while sitting outside the courtroom that Juror 3 made the open-and-shut-case comment. After the lunch break, the defense continued with its voir dire, and asked if everyone would listen to the evidence and let the defendant have his say. Juror 3 did not respond. The defense concluded by asking if anyone had anything further they wanted to say or had thought of in response to an earlier question. Again, Juror 3 did not respond. Juror 3 also listened to numerous discussions by both counsel with other venirepersons about whether they could be fair and impartial for a multitude of reasons, and sat mute.

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. Furthermore, Juror 3 allegedly made the open-and-shut-case comment near the end of voir dire, after the State had completed its questioning of the venire and the defense had completed about two-thirds of its questioning. We conclude that any purported forgetfulness about Juror 3's opinion or change in his attitude during voir dire would be unreasonable.

The State argues in its brief that "a venireperson's alleged opinion that this was an 'open and shut' case could have changed during trial, or [for] that matter, through voir dire." This argument lacks merit for a number of reasons. First, a juror who has already formed an opinion on the case, whether in favor of the prosecution or in favor of the defense, is prohibited from serving on the jury in the first instance. In addition, contrary to the State's assertion in its brief, Juror 3's alleged comment did not occur early in voir dire but occurred near the end of the process. And this comment allegedly occurred shortly after the defense expressly asked whether anyone had a preconceived notion about the defendant's guilt or innocence, and Juror 3 offered no response. The State's contention that Juror 3 could have thought this was an open and shut case right after lunch—around 1:15 p.m.—but could have changed his mind and become free of any

partiality by the time voir dire ended—at about 1:40 p.m. according to the record—is preposterous. If we were to accept this unsupported speculation, no court could ever conclude that a juror was biased because the bias might have miraculously evaporated moments after the juror's conduct evidencing bias.

In addition, the court's judgment stated that Venireperson 26 testified that Juror 3 said "*[i]t was* an open and shut case." This is a misstatement of Venireperson 26's testimony. Venireperson 26 testified that Juror 3 said "*[t]his is* an open and shut case," and he confirmed that those were the words Juror 3 used. "*It was* an open and shut case" arguably could be construed to refer to some matter other than the instant trial, while "*[t]his is* an open and shut case" does not suffer that infirmity.

We reiterate that a defendant has a right to a fair and impartial jury. *White*, 290 S.W.3d at 165. An impartial jury is one where *each and every one* of the twelve jurors is totally free from partiality whatsoever. *Id*. Most persons would probably interpret the comment, "this is an open and shut case," to mean that the person expressing such an opinion believed the case to be open and shut in favor of the State. Even the State acknowledges that such a comment suggests a bias in favor of the State. But whether a venireperson is biased in favor of the prosecution or the defense is not the key issue. *See generally Rife v. State Farm Mut. Auto Ins. Co.*, 833 S.W.2d 42, 43-44 (Mo. App. W.D. 1992). Intentional nondisclosure is the key issue. In *Rife*, the Court held that the defendant was entitled to new trial when a juror intentionally failed to disclose that he had been named a defendant in two recent lawsuits, without examining which party the juror might have been biased against. *Id*.

"[N]o 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 . . . shall be sworn as a juror in the same cause." Section 494.470.1 RSMo. (2000). Every member of the jury should be "totally free from partiality whatsoever." *White*, 290 S.W.3d at 165. This principle is aptly demonstrated by the events involving Venireperson 2. Venireperson 2 responded to the State's inquiry about the ability to be fair and impartial. Speaking with the court and counsel privately in chambers, Venireperson 2 revealed that she had heard much about the case and the anticipated evidence, that she could not be open-minded, and that she could not find the defendant guilty under any circumstances. The court promptly and properly struck Venireperson 2 for cause because she admitted her bias.

If Juror 3 made a comment clearly demonstrating bias, to the effect that "this is an open and shut case," but did not reveal this opinion during voir dire when expressly asked whether he had a preconceived notion about the defendant's guilt or innocence, then Juror 3 intentionally failed to disclose a bias prohibiting his service on the jury. A finding of intentional nondisclosure of a material issue is tantamount to a *per se* rule mandating a new trial. *McFadden*, 391 S.W.3d at 418.

In its judgment, the trial court did not find that the witnesses were not credible, nor did the trial court determine that Juror 3 did not say "[t]his is an open and shut case." Unless the trial court believes, based on the evidence, that Juror 3 did not earnestly make the alleged open-and-shut-case comment, then the defendant was deprived of his constitutional right to a fair and impartial jury.

The trial court noted more than once that the defendant presented no evidence from Juror 3. We, too, are mystified by the failure of either the State or the defense to call Juror 3. The trial court relied on *Mayes* wherein the Missouri Supreme Court stated "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." 63 S.W.3d at 626. We find several problems with the trial court's reliance on this statement, however. First, the *Mayes* Court stated that "a defendant alleging juror misconduct during voir dire must present 'evidence through testimony or affidavits of *any juror, or other witness . . . .*'" *Id*. at 625-26 (emphasis added)(*quoting Portis v. Greenshaw*, 38 S.W.3d 436, 445 (Mo. App. W.D. 2001)). *Mayes* then states that the defendant must present an affidavit from the juror who is accused of intentional nondisclosure and for this proposition cites *State v. Potter*, 711 S.W.2d 539, 541 (Mo. App. E.D. 1986). *Id*. at 626. *Potter*, in turn, relies on *State v. Salkil*, 649 S.W.2d 509, 516 (Mo. App. S.D. 1983), and *Salkil* cites *see State v. Coy*, 550 S.W.2d 940, 942 (Mo. App. K.C.D. 1977). While the defendant in *Coy* did indeed obtain an affidavit from the juror in question, the *Coy* Court never held that a defendant *must* produce an affidavit from the juror accused of intentional nondisclosure in order to establish such intentional nondisclosure or that any other evidence would be insufficient. 550 S.W.2d 941-44. In fact, it was the State that obtained an affidavit from the juror in *Coy* admitting more fully to his ongoing business relationship with the sheriff's office that led the Court to determine that an intentional nondisclosure had occurred warranting a new trial. *Id*.

Furthermore, the *Mayes* Court affirmed the judgment denying the defendant's motion for new trial on this point because the defendant failed to offer evidence from the juror, "or other evidence," or "otherwise establish the facts" that the juror committed an intentional nondisclosure. 63 S.W.3d at 626.[5] The *Mayes* Court itself did not restrict the defendant to an affidavit from the accused juror as the sole means of establishing an intentional nondisclosure. An admission of undisclosed bias from the juror in question would certainly be the most direct means to establish an intentional nondisclosure and to obtain relief. But to 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. *Dorsey*, 156 S.W.3d at 832 (*quoting Travis v. Stone*, 66 S.W.3d 1, 5 (Mo. banc 2002)).

We conclude, given the numerous critical deficiencies of the judgment denying the motion for new trial, that a manifest injustice or miscarriage of justice would inevitably result if the present judgment is allowed to stand on the existing record. We reverse the trial court's judgment denying the defendant's motion for new trial on the basis of intentional nondisclosure on the part of a juror, and remand for reconsideration. The trial court shall enter more detailed findings of fact and conclusions of law explaining its reasoning. In its discretion, the trial court may allow the parties to adduce further evidence on this matter. Upon reconsideration, the trial court must determine whether a nondisclosure occurred—whether Juror 3 made the open-and-shut comment or

[5] The *Mayes* Court also noted a slight difference in the questions posed on the jury questionnaire and during voir dire that were the subject of the claim of nondisclosure. 63 S.W.3d at 626.

not—and whether any nondisclosure was intentional given the record of voir dire. Unless the trial court is prepared to conclude that the words "this is an open and shut case" were not earnestly said, then the court should grant the defendant's motion for new trial.

Sufficiency of the Evidence

In his second and fifth points, the defendant claims the trial court erred in denying his motions for judgment of acquittal at the close of the State's evidence and at the close of all the evidence because the evidence was insufficient to convict him of first-degree statutory sodomy of W.L. and attempted child molestation of B.L., respectively.

We review the denial of a motion for acquittal to determine if the State adduced sufficient evidence to make a submissible case. *Pullum*, 281 S.W.3d at 915. Our role is to determine whether sufficient evidence was produced at trial so that a reasonable person could conclude that the defendant was guilty. *Id.* In determining whether the evidence is sufficient to support a conviction, we view the evidence and all reasonable inferences therefrom in the light most favorable to the verdict, and we disregard all contradictory evidence and inferences. *Id*. We defer to the jury's superior ability to assess the credibility of witnesses and the weight and value of their testimony. *Id.* It is within the province of the jury to believe all, some, or none of any witness's testimony in reaching its verdict. *Id*.

In his second point, the defendant claims the State failed to present sufficient evidence to convict him of first-degree statutory sodomy of W.L. as charged in Count II. The defendant argues that the State failed to present any evidence of W.L.'s age at the time of the alleged offense or any evidence that the acts occurred within the time-frame alleged in the amended information and specified in the verdict-director.

In Count II, the State charged the defendant with first-degree statutory sodomy in that on or about between January 1, 1995 and April 30, 1998, the defendant, for the purpose of arousing or gratifying his own sexual desire, had deviate sexual intercourse with W.L., a child less than fourteen years of age, by having W.L. place his mouth on the defendant's genitals.

At the time in question, section 566.062.1 provided that "[a] person commits the crime of statutory sodomy in the first degree if he has deviate sexual intercourse with another person who is less than fourteen years old." "Deviate sexual intercourse" meant "any act involving the genitals of one person and the mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object done for the purpose of arousing or gratifying the sexual desire of any person." Section 566.010(1).

W.L. described how the sexual conduct to which the defendant subjected him progressed from hand-to-genital contact to oral-to-genital contact when he was around twelve years old, which would have been roughly between May 1996 and May 1997 given that W.L. was born in May 1984. W.L. testified that he remembered one incident where the defendant had W.L. put his mouth on the defendant's genitals. W.L. stated that this occurred in the larger upstairs bedroom, the last bedroom that W.L. occupied before moving out of the house.

In accord with our standard of review, we accept as true all evidence favorable to the verdict, including all favorable inferences drawn from the evidence, and we disregard all evidence and inferences to the contrary. *Pullum*, 281 S.W.3d at 915. We conclude that the evidence was sufficient to allow a reasonable juror to find that the defendant had

W.L. place his mouth on the defendant's genitals when W.L. was around twelve years old, which would have been within the timeframe alleged in the State's second amended information. We deny the defendant's second point.

In his fifth point, the defendant claims the State failed to present sufficient evidence to convict him of attempted first-degree child molestation of B.L. He argues that the State failed to present any evidence that the defendant acted with the purpose to touch B.L. underneath his clothing as required by section 566.067 for the offense of first-degree child molestation at the time the alleged offense occurred. The defendant's brief shows confusion about the specific act charged in Count V. A review of the record makes clear that the State charged the defendant with having B.L. touch the defendant, and the jury was likewise instructed.

The State charged the movant with first-degree child molestation of B.L. in that between January 1, 1995 and July 25, 1996, the defendant, for the purpose of arousing or gratifying his own sexual desire, knowingly subjected B.L., who was less than 14 years of age, to sexual contact by placing B.L.'s hand on the defendant's genitals. At the time in question, section 566.067.1 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." "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 the sexual desire of any person[.]" Section 566.010(3).

Prior to 1995, the statutory definition of "sexual contact" included the phrase "or such touching through the clothing." *State v. Hale*, 285 S.W.3d 393, 394 (Mo. App. E.D.

2009). The legislature removed that phrase effective January 1, 1995 and then reinserted it into the definition in 2002. Section 566.010(3); *Hale*, 285 S.W.3d at 394. Consequently, to support a conviction for child molestation for acts occurring during the period charged here, the State would have to prove that the touching occurred beneath the clothing.

During trial, at the court's prompting, the State realized and acknowledged that at the time in question, touching through the clothing did not constitute "sexual contact" as defined in section 566.010(3) and thus could not support a conviction for first-degree child molestation pursuant to section 566.067. Without amending the information, the State submitted to the jury an instruction for attempted first-degree child molestation.

A person is guilty of attempt to commit an offense when, with the purpose of committing the offense, he does any act which constitutes a substantial step toward commission of the offense. Section 564.011.1. A "substantial step" is conduct that is strongly corroborative of the firmness of the actor's purpose to complete commission of the offense. *Id*.

Here, B.L. testified to an incident that occurred when he was about five years old. He had just gone to bed when the defendant lay down in the bed behind him, had B.L. turn onto his other side to face the defendant, placed B.L.'s hand on the defendant's penis over the defendant's pants, "and wanted me to hold it between his legs while I slept." B.L. continued, explaining that he felt uncomfortable and tried to move his hand, but the defendant "just kept wanting me to hold it in that spot." B.L. did not remember whether the defendant had an erection. B.L. testified that he fell asleep, and when he awoke, the defendant had left the room.

Under the facts presented here, the defendant's placement of B.L.'s hand on the defendant's penis over his clothing and his 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 touching underneath the clothing. The evidence was insufficient for a reasonable juror to find beyond a reasonable doubt that the defendant placed B.L.'s hand on his penis, but over his pants, with the purpose of committing first-degree child molestation, and that this act constituted a substantial step toward committing the offense of first-degree child molestation.[6]

We grant the defendant's fifth point and reverse the conviction for Count V of attempted first-degree child molestation and vacate the four-year sentence associated therewith.

Instructional Error

The defendant complains of instructional error in his third and fourth points. The defendant did not preserve either of these claims for our review. Rule 29.11(d). The defendant failed to include either claim in his motion for new trial, and the motion for new trial was untimely in any event. Given our reversal of the defendant's conviction for attempted first-degree child molestation, the claim of instructional error regarding this offense is moot, and we deny the defendant's fourth point as such. We decline to review the defendant's remaining claim for plain error, and thus deny the defendant's third point.

Conclusion

[6] The more appropriate charge in this case would have been first-degree sexual misconduct under section 566.090, which at the time in question included engaging in conduct that would constitute sexual contact except that the touching occurs through the clothing and without that person's consent.

We conclude, given the numerous critical deficiencies of the judgment denying the motion for new trial, that a manifest injustice or miscarriage of justice will inevitably result if the present judgment is allowed to stand on the existing record. We reverse the denial of the defendant's motion, and remand to the trial court for reconsideration and entry of detailed findings of fact and conclusions of law. We leave it to the trial court's discretion whether to receive additional evidence on remand.

Furthermore, we conclude that the evidence was insufficient to convict the defendant of attempted first-degree child molestation. We reverse the judgment of the trial court regarding this conviction and vacate the four-year sentence associated therewith. We remand the cause to the trial court.

Lawrence E. Mooney

LAWRENCE E. MOONEY, PRESIDING JUDGE

PATRICIA L. COHEN, J., and
KURT S. ODENWALD, J., concur.