

No. SC 93074

**In the
Supreme Court of Missouri**

STATE OF MISSOURI,

Respondent,

v.

JERRY OUSLEY,

Appellant.

**Appeal from the Circuit Court of the City of St. Louis
Twenty-second Judicial Circuit
The Honorable John J. Riley, Judge**

RESPONDENT'S SUBSTITUTE BRIEF

**CHRIS KOSTER
Attorney General**

**TIMOTHY A. BLACKWELL
Assistant Attorney General
Missouri Bar No. 35443**

**P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
tim.blackwell@ago.mo.gov**

**ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI**

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... 4
STATEMENT OF FACTS 7
ARGUMENT..... 16

I. (discovery sanction and surrebuttal)

The trial court did not abuse its discretion in excluding the testimony of Appellant’s mother and grandmother during Appellant’s case-in-chief, as Appellant failed to endorse them as witnesses until the business day before trial, nor did the trial court abuse its discretion in excluding the testimony of Appellant’s mother and grandmother in surrebuttal, as their proffered testimony was cumulative to Appellant's testimony, and Appellant was not prejudiced. 16

II. (voir dire)

The trial court did not abuse its discretion in refusing to allow defense counsel to ask the venire members if they could consider the possibility that two teenagers had consensual sex or if they would automatically rule out that possibility, as counsel is not permitted to try the case on voir dire or to inject the defendant’s argument into the voir dire examination; the question was not appropriately directed to facts with substantial potential for disqualifying bias; and Appellant was not prejudiced 26

III. (instruction)

The trial court did not plainly err by instructing the jury with Instruction No. 6, as the presence of a knowing mental state is not a required element of the offense of forcible rape and Appellant did not contest his mental state at trial. 41

CONCLUSION 50
CERTIFICATE OF COMPLIANCE AND SERVICE 51

TABLE OF AUTHORITIES

Cases

<i>Jones v. State</i> , 197 S.W.3d 227 (Mo. App. W.D. 2006)	32
<i>Owsley v. Brittain</i> , 186 S.W.3d 810 (Mo. App. W.D. 2006)	21
<i>Pollard v. Whitener</i> , 965 S.W.2d 281 (Mo. App. W.D. 1998).....	32
<i>State v. Baumruk</i> , 280 S.W.3d 600 (Mo. banc 2009).....	31, 32, 33, 39
<i>State v. Brand</i> , 309 S.W.3d 887 (Mo. App. W.D. 2010)	7
<i>State v. Bryant</i> , 756 S.W.2d 594 (Mo. App. W.D. 1988).....	48
<i>State v. Carney</i> , 195 S.W.3d 567 (Mo. App. S.D. 2006)	42
<i>State v. Carson</i> , 941 S.W.2d 518 (Mo. banc 1997).....	46
<i>State v. Clark</i> , 981 S.W.2d 143 (Mo. banc 1998)	31, 32, 33, 37, 38, 39
<i>State v. D.W.N.</i> , 290 S.W.3d 814 (Mo. App. W.D. 2009).....	43
<i>State v. Darden</i> , 263 S.W.3d 760 (Mo. App. 2008).....	43
<i>State v. Dennis</i> , 153 S.W.3d 910 (Mo. App. W.D. 2005)	45, 47, 48
<i>State v. Destefano</i> , 211 S.W.3d 173 (Mo. App. S.D. 2007).....	16, 17
<i>State v. Drudge</i> , 296 S.W.3d 37 (Mo. App. E.D. 2009).....	42
<i>State v. Ezell</i> , 233 S.W.3d 251 (Mo. App. W.D. 2007)	36
<i>State v. Finch</i> , 746 S.W.2d 607 (Mo. App. W.D. 1988)	35
<i>State v. Forrest</i> , 183 S.W.3d 218 (Mo. banc 2006)	24
<i>State v. Hall</i> , 319 S.W.3d 519 (Mo. App. S.D. 2010)	21
<i>State v. Hall</i> , 321 S.W.3d 453 (Mo. App. S.D. 2010)	43
<i>State v. Harris</i> , 664 S.W.2d 677 (Mo. App. E.D. 1984)	21

State v. Hopper, 315 S.W.3d 361 (Mo. App. S.D. 2010)..... 16

State v. Johnson, 207 S.W.3d 24 (Mo. banc 2006) 31

State v. Johnson, 62 S.W.3d 61 (Mo. App. W.D. 2001) 40

State v. Kleine, 330 S.W.3d 805 (Mo. App. S.D. 2011)..... 17, 22, 24, 39

State v. Lloyd, 205 S.W.3d 893 (Mo. App. S.D. 2006) 42

State v. Lutz, 334 S.W.3d 157 (Mo. App. S.D. 2011) 32

State v. Martin, 103 S.W.3d 255 (Mo. App. W.D. 2003) 20

State v. Martin, 815 S.W.2d 127 (Mo. App. S.D. 1991) 39

State v. Massey, 867 S.W.2d 266 (Mo. App. E.D. 1993)..... 20

State v. May, 587 S.W.2d 331 (Mo. App. E.D. 1979)..... 16, 22, 24, 51

State v. Miller, 372 S.W.3d 455 (Mo. banc 2012) 17

State v. Moore, 366 S.W.3d 647 (Mo. App. E.D. 2012) 16

State v. Neal, 328 S.W.3d 374 (Mo. App. W.D. 2010) 47

State v. Oates, 12 S.W.3d 307 (Mo. banc 2000) 31

State v. Pipes, 923 S.W.2d 349 (Mo. App. W.D. 1996)..... 16, 22, 23

State v. Scott, 298 S.W.3d 913 (Mo. App. E.D. 2009) 31

State v. Stover, 388 S.W.3d 138 (Mo. banc 2012) 24

State v. Tillman, 289 S.W.3d 282 (Mo. App. W.D. 2009) 43

State v. Watson, 755 S.W.2d 644 (Mo. App. E.D. 1988) 21

State v. Williams, 119 S.W.3d 674 (Mo. App. S.D. 2003) 22

State v. Williams, 742 S.W.2d 616 (Mo. App. W.D. 1987) 24

State v. Wright, 30 S.W.3d 906 (Mo. App. E.D. 2000)..... 46

Statutes

Section 562.021, RSMo 2000..... 45

Section 566.032, RSMo 1994..... 34

Section 565.026, RSMo 2000..... 45

Section 566.030, RSMo Supp. 1998 43

Section 566.034, RSMo 1994..... 34

Other Authorities

MAI-CR3d 320.02..... 44

Rules

Supreme Court Rule 25.05 17

Supreme Court Rule 30.20 42

STATEMENT OF FACTS

Appellant, Jerry Ousley, was charged by indictment with forcible rape (L.F. 12-13). The cause went to trial in the Circuit Court of the City of St. Louis on April 25-28, 2011, the Honorable John J. Riley presiding (Tr. Cover; L.F. 3-4).

The rape.

The sufficiency of the evidence is not at issue in this appeal. Viewed in the light most favorable to the verdict,¹ the following evidence was adduced.

On December 26, 1999, fourteen-year-old L.M. (Victim) was walking from Union Station to her home on Biddle Street in St. Louis, (Tr. 333-38). This was the first time her mother had allowed her to go to Union Station by herself, and L.M. had some Christmas money to spend (Tr. 300, 335). A car drove up and Appellant yelled out the window, trying to get her phone number (Tr. 338).² Appellant got out of the car and Victim tried to get away, but Appellant kept asking for her phone number and grabbed her from behind (Tr. 338-40). Appellant grabbed at her clothes and kept asking for her phone number, and she told him to stop (Tr. 340). Appellant got her in an alleyway, bent her over a parked car, and undid her pants (Tr. 340-41). Appellant inserted his penis in her vagina from the rear (Tr.

¹ *State v. Brand*, 309 S.W.3d 887, 890 n. 2 (Mo. App. W.D. 2010).

² At trial, Victim recognized that due to the passage of time, she was unable to positively identify the person who raped her (Tr. 355). However, the presence of Appellant's DNA, as well as her testimony that she did not know the defendant until the rape occurred (Tr. 355-56, 443-45, 447-48) support the inference that Appellant was the rapist.

341-43). Victim had never had a penis in her vagina, and it hurt (Tr. 342-43). Victim struggled and was able to run away after Appellant staggered back (Tr. 341-44). Victim ran home (Tr. 344). Victim had blood on her underwear (Tr. 345). Victim's mother called the police (Tr. 345).

The car on which the incident occurred was dirty, as if it had been parked there for a while, and "prints" were visible on the car in the position where Victim's body had been (Tr. 350, 352). A vaginal swab taken from Victim presumptively tested positive for seminal fluid and blood, but a stain test to a microscopic slide revealed no spermatozoa present (Tr. 387-89, 397). Vaginal fluid can sometimes give a false positive to presumptive testing for seminal fluid (Tr. 397-98). Cuttings from Victim's pants tested positive for seminal fluid (Tr. 391-94). A cutting from Victim's underwear tested positive for seminal fluid and blood (Tr. 395-96).

DNA testing of the vaginal swab showed only the DNA of Victim, which is not unusual because there is often so much DNA from the victim that it overwhelms any male DNA, especially if there is not much seminal fluid present (Tr. 442). DNA testing of a stain from Victim's pants showed that fraction one was Victim and fraction two was a mixture with Victim as the major contributor, with a smaller amount of DNA from Appellant (Tr. 443-44). DNA testing of another sample from Victim's pants showed that fraction one was a mixture with Victim as the major contributor, with a smaller amount of DNA from Appellant, and fraction two was a mixture with Appellant as the major contributor and a small amount of DNA from Victim (Tr. 444-45). DNA testing of another stain from Victim's pants showed that fraction one was a mixture with Appellant as the major

contributor and a smaller amount of DNA from Victim, and fraction two was a mixture with Appellant as the major contributor and too little DNA of the second individual to make a conclusive determination as to the source (Tr. 447-48). DNA testing of a sample from Victim's underwear showed that fraction one was a mixture with Victim as the major contributor and too little DNA from the second individual to make a conclusive determination as to the source, and fraction two was a mixture with Appellant as the major contributor and a smaller amount of DNA from Victim (Tr. 446-47). Only one in 300 billion people would have the same profile as Appellant (Tr. 449).

Exclusion of Yvonne's and Karen's testimony.

The complaint was filed on December 8, 2009 (L.F. 9). The State filed a request for disclosure on January 15, 2010 (L.F. 6). Appellant was arraigned on January 16, 2010 (L.F. 7). After a number of continuances requested by the prosecution, on October 20, 2010, the trial court ordered the cause set for trial on Monday, April 25, 2011 (Tr. 10; L.F. 4-6).

On Friday, April 22, 2011, Appellant filed a "supplemental witness endorsement" to endorse Yvonne Coburn, Karen Coburn, and the custodian of records from Barnes-Jewish Hospital (Tr. 10; L.F. 36). On Monday, April 25, 2011, the State filed a "State's Motion to Exclude Witnesses," seeking to exclude the testimony of those witnesses (Tr. 10; L.F. 37). Defense counsel argued that he was proceeding on a theory of a consent defense and that the testimony of Yvonne and Karen (Appellant's grandmother and mother, respectively), as well as the medical records, would corroborate that Appellant had suffered from a gunshot wound on December 2, 1999, and was not physically functioning such that he could have manhandled Victim (Tr. 11, 474, 476). Defense counsel argued:

We did not have contact with grandmother and mother up until last week. And standing alone, Judge, I would not have called grandmother and mother to testify in 1999 that they believed that he was hobbling around, because their memories, and the fact that they're grandmother and mother, I mean, who's going to believe grandmother and mother that Mr. Ousley was hobbling around in 1999.

So we were not able to contact them until last week through some glitch in their family communication between father and a divorced mom. We tried on numerous occasions to contact them as witnesses. No luck. Until father got out of the hospital, he had a heart attack, and told them to call my investigator, and that's when we interviewed them.

(Tr. 12). Defense counsel argued:

At that point then I told my investigator—he claims that I had him looking for a broken arm at BJC. And I told him that, you know, if there were medical records that existed for a shooting in the ass, that he needed to find them because that's what mom and everybody was saying. So he was able to produce the medical records within a half day after I told him that I was going to be held ineffective because we didn't have the proper records.

(Tr. 12-13).

The prosecutor stated that when she interviewed Yvonne and Karen that morning, they indicated that they had repeatedly been visiting with Appellant since he had been

incarcerated (Tr. 13). The prosecutor argued that the proffered medical records included no records from any follow-up appointment (Tr. 14). She argued:

You know, at this point in time, it puts me in a position of not being able to talk to any medical personnel about what the effects of this gunshot wound have been, what his position would have been on the 26th as opposed to the 2nd with regard to mobility, whether or not he received any follow-up treatment, whether or not he went to work, because according to the medical records it shows that he was working at the time, so on and so forth.

(Tr. 14). The prosecutor stated that the State was not requesting a continuance, and instead requested exclusion of the witnesses as a remedy for the late disclosure (Tr. 15-16).

The trial court ruled that Yvonne's and Karen's testimony would be excluded, but that the defense would be allowed to bring in a custodian of records and offer the medical records into evidence (Tr. 16-19).

Offer of proof of Yvonne's and Karen's testimony.

Appellant made an offer of proof as to Yvonne's and Karen's proffered testimony (Tr. 474-78). Yvonne identified herself as Appellant's grandmother and stated that Appellant and Karen (her daughter) were living with her in December 1999 (Tr. 474). Yvonne stated that she was not sure of the exact date when Appellant was shot, but it was "the first part of December" (Tr. 474-75). When asked if Appellant was restricted in his activity immediately after December 2, 1999, she stated that he was in bed and on crutches (Tr. 475). She stated that he was in bed for "about two weeks" and then was able to get up and about, "but he

wasn't out for a long time, maybe it was two months" (Tr. 475). She stated that as of December 26, "[h]e was still unable to get about well" (Tr. 475).

Karen identified herself as Appellant's mother (Tr. 476). She stated that Appellant was shot in December 1999, sustaining "back and leg" injuries (Tr. 477). She stated that he "laid around a lot" and couldn't "move around much" (Tr. 477). She stated that she could not remember how long he was laid up, but as of Christmas 1999, "he was always—he was laying around on the couch in our way, yes, sir" (Tr. 478). When asked if Appellant was able to walk, she stated that he was on crutches at that time (Tr. 478).

Appellant's testimony.

Appellant testified that he was "shot in the back the first week of December" (Tr. 480). Appellant stated that the bullet entered his right lower back, chipped his pelvis bone, traveled to the other side of his body, and lodged itself in the left side of his spine (Tr. 482). He stated that he was released from the hospital on December 3 and was told to "lay around in bed and not do too much because the bullet was lodged in [his] spine" (Tr. 481-82). Appellant testified as follows:

Q: Can you describe your condition when you first arrived home?

A: Well, basically, I had to lay around because I was scared because the doctor said if I do the wrong movement, the bullet can move in my back. So I was scared of being paralyzed because I didn't really know what was going on because I couldn't do physical therapy, because I didn't have medical insurance. So they really just sent me home and tell me to stay off my feet.

Q: Okay. How long from December the 3rd until the time you got home, how long were you off your feet?

A: I laid around for just a couple of months. Then after that, I started to get around crutches. I got around crutches for a couple weeks, then after that I limped around for probably another three weeks.

(Tr. 483). When asked what his physical condition was on Christmas 1999 and if he was able to walk, run, or jog, Appellant replied, “More like limp and hop” (Tr. 484).

Appellant further testified:

Q: . . . I want to turn your attention to December the 26th of 1999. First of all, you saw [Victim].

A: That’s correct.

Q: Did you—do you know her?

A: Not that I can remember. No, I don’t.

Q: Do you recall any sexual encounter that you may have had with [Victim]?

A: Not that I can remember. I—I had encounters with a lot of women back then.

(Tr. 484). Appellant stated that he and his friends had “a game . . . to get girls’ numbers and see who can have sex with the girls—that was—we just slept around a lot at that time. We were like hippies around the 90’s. We just smoked a lot of weed and had sex” (Tr. 485). Appellant stated that he “hung out” at St. Louis Centre “almost every day” and he “hung around Union Station every day” (Tr. 485). Appellant then testified that he did not

remember any specific encounter with Victim (Tr. 486). Appellant stated that he never raped anybody and never had sex with anybody in the alleyway by the Railton Hotel (Tr. 486-87).

On cross-examination, Appellant stated that he was between 6' 3" and 6' 4" in December 1999 (Tr. 488).³ Appellant testified that he was on crutches and was limping around, but he was capable of having sex, depending on what position was used, and he "wasn't in a lot of pain" (Tr. 498-500).

Rebuttal evidence.

In rebuttal, the State called Dr. Rebecca Aft, a surgeon at Barnes-Jewish Hospital who treated Appellant for the gunshot wound (Tr. 511-12). Dr. Aft testified that the bullet entered the right buttock area and tracked medially towards the left back (Tr. 512-13). She stated that Appellant had fractures in the iliac bone and sacrum (Tr. 513-15). She testified that Appellant was discharged from the hospital less than twenty-four hours after admission with no operative intervention required (Tr. 515). The discharge instructions stated that he could ambulate and resume all normal daily activities except running or contact sports (Tr. 515). Appellant was given Tylenol No. 3 for pain (Tr. 515). When asked if there was any concern that the bullet would lodge in Appellant's spine or paralyze him or anything like that, Dr. Aft answered, "This is very far away from his spinal canal . . . in front of the vertebral bodies is the spinal cord. And this was not even near that" (Tr. 516). When asked what the doctor would expect to see approximately three and one-half weeks after the injury,

³ The indictment was filed on January 13, 2010, and listed Appellant's height as 6' 5" and his weight as 300 pounds (L.F. 12).

Dr. Aft stated that “it depends on the patient” and “hopefully it would have mostly resolved by then” (Tr. 518-19). She stated that “he can probably ambulate” (Tr. 519). She stated that the patient was not discharged on crutches, and crutches would not be required for this injury (Tr. 519). She testified that this injury would not have required the patient to be on bed rest, and he was instructed to resume activity as tolerated (Tr. 520). Part of the treatment was to get up and make sure he could ambulate again (Tr. 520-21). Dr. Aft stated that if this injury occurred on December 2, most patients would have fully recovered from their pain by December 26 (Tr. 526).

Offer of surrebuttal evidence.

Following Dr. Aft’s testimony, defense counsel attempted to call Yvonne and Karen in surrebuttal (Tr. 527). The State objected on grounds that allowing them to testify would allow an “end run” around the sanction for late disclosure and that Yvonne and Karen had been present for Dr. Aft’s testimony and could change their testimony based on that (Tr. 527). The trial court noted that the defense had made an offer of proof as to what the anticipated testimony would be, and the court sustained the objection (Tr. 529).

The verdict and sentence.

The jury found Appellant guilty of forcible rape (L.F. 56). The trial court sentenced Appellant to fifteen years in the Missouri Department of Corrections (L.F. 66).

This appeal followed.

ARGUMENT

I. (discovery sanction and surrebuttal)

The trial court did not abuse its discretion in excluding the testimony of Appellant's mother and grandmother during Appellant's case-in-chief, as Appellant failed to endorse them as witnesses until the business day before trial, nor did the trial court abuse its discretion in excluding the testimony of Appellant's mother and grandmother in surrebuttal, as their proffered testimony was cumulative to Appellant's testimony, and Appellant was not prejudiced.

A. Preservation and the standard of review.

In his motion for new trial, Appellant asserted that the trial court erred in excluding Yvonne's and Karen's testimony (L.F. 61). Appellant thus preserved the issue for appellate review.

“In general, the decision to exclude evidence as a sanction for the violation of discovery rules is left to the discretion of the trial court.” *State v. Moore*, 366 S.W.3d 647, 653 (Mo. App. E.D. 2012). The appellate court will reverse “where it can be shown that the trial court's action has resulted in fundamental unfairness to the defendant.” *State v. Hopper*, 315 S.W.3d 361, 366 (Mo. App. S.D. 2010) (quoting *State v. Destefano*, 211 S.W.3d 173, 181 (Mo. App. S.D. 2007)).

The scope of rebuttal or surrebuttal testimony is subject to the broad discretion of the trial court, *State v. Pipes*, 923 S.W.2d 349, 353 (Mo. App. W.D. 1996), and will not be disturbed absent an abuse of discretion. *State v. May*, 587 S.W.2d 331, 337 (Mo. App. E.D. 1979). “A trial court abuses its discretion when its ruling is clearly against the logic of the

circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.” *State v. Kleine*, 330 S.W.3d 805, 808 (Mo. App. S.D. 2011).

B. The trial court did not abuse its discretion in excluding Yvonne’s and Karen’s testimony during Appellant’s case-in-chief, as Appellant failed to endorse them as witnesses until the business day before trial.

Supreme Court Rule 25.05 states that “on written request by the state, the defendant shall disclose to counsel for the state ... [t]he names and last known addresses of persons, other than defendant, whom defendant intends to call as witnesses at any hearing or at the trial[.]” “As a matter of law, no abuse of discretion exists when the court refuses to allow the late endorsement of a defense witness whose testimony would have been cumulative, collateral, or if the late endorsement would have unfairly surprised the State.” *Hopper*, 315 S.W.3d at 367 (quoting *Destefano*, 211 S.W.3d at 181)). Yvonne’s and Karen’s proffered testimony (Tr. 475-78) was plainly cumulative to Appellant’s testimony that he was incapacitated (Tr. 481-84). *See also State v. Miller*, 372 S.W.3d 455, 472 (Mo. banc 2012) (excluded testimony would have been cumulative and defendant was not prejudiced).

Further, the proposed evidence would not have been helpful to Appellant in light of the State’s medical evidence. The only conceivable benefit from Yvonne’s and Karen’s testimony would be an attempt to bolster Appellant’s story, but the jury weighed the evidence and obviously found Dr. Aft’s testimony more credible than Appellant’s. It is highly unlikely that the testimony of close relatives (the mother and grandmother), whom the jury would see as partial to the defendant, would aid in bolstering Appellant’s testimony up

against the medical testimony. Yvonne and Karen would have testified that Appellant “laid around a lot” (Tr. 477) and was not very ambulatory (Tr. 474-78). Dr. Aft, in contrast, offered specific testimony that the discharge instructions stated that Appellant could ambulate and should resume all normal daily activities except running or contact sports (Tr. 515), and that he was given Tylenol No. 3 for pain (Tr. 515). She stated that the recovery “depends on the patient” but “hopefully it would have mostly resolved” (Tr. 518-19) by the time of the incident. She testified that Appellant could “probably ambulate” and that crutches were not required for this injury (Tr. 519). In light of the fact that Yvonne’s and Karen’s proffered testimony was cumulative and would not have helped Appellant as opposed to the State’s medical evidence, the trial court did not abuse its discretion. *Hopper*, 315 S.W.3d at 367.

In *Hopper*, the Court set forth the standards for the imposition of discovery sanctions, and an analysis of those factors further demonstrates that the trial court did not abuse its discretion in this case. The *Hopper* Court stated:

The purpose of the criminal discovery rules, including Rule 25.05, is to eliminate surprise by allow[ing] both sides to know the witnesses and evidence to be introduced at trial. . . . In general, “[w]hen a party fails to comply with a discovery rule, the trial court may order disclosure of material and information, grant a continuance, exclude evidence or enter such orders it deems just given the situation. The exclusion of the testimony of witnesses whose identity has not been properly disclosed is among the sanctions authorized by Rule 25.18. In fashioning sanctions or remedies for a discovery

violation, generally the focus is the removal or amelioration of any prejudice which the State suffers due to the violation.

(internal quotations and citations omitted).

In *Hopper, id.* at 368, the Court also set forth the relevant considerations when a defense witness has been excluded as a remedy for a discovery violation:

In analyzing whether the trial court's exclusion of Defendant's witnesses was fundamentally unfair, we first consider the harm suffered by the State if [the witnesses] had been allowed to testify ... without prior disclosure. This is addressed in light of the purpose of the disclosure rule which was violated. Therefore, the review of the propriety of the trial court's action includes consideration of whether the State was unfairly surprised by [the alibi witness's] testimony and the harm, if any, it would have suffered by virtue of that surprise. The mere fact of late endorsement does not in itself show prejudice. The initial consideration, whether the State would have suffered prejudice by permitting the witness to testify, is important because where the prejudice to the State is nonexistent or negligible, the imposition of the drastic sanction of witness exclusion is not necessarily appropriate.

(internal quotations and citations omitted).

Here Appellant emphasizes that at the beginning of trial the prosecutor complained of her inability to obtain rebuttal medical evidence at a late date (Tr. 14) but the prosecutor somehow managed to present Dr. Aft's testimony in spite of the short notice. The fact that

the State was able to quickly recover did not negate the unfairness of the surprise to the State. It did mitigate the prejudice to the State.

After consideration of the harm to the State, the inquiry turns to the prejudice suffered by the defendant in excluding the testimony. This second inquiry is “ultimately the standard by which the exclusion of a witness must be tested[.]” *State v. Martin*, 103 S.W.3d 255, 261 (Mo. App. W.D. 2003). “To determine whether the exclusion of the witnesses’ testimony resulted in prejudice, the facts and circumstances of the particular case must be examined including: (1) the nature of the charge; (2) the evidence presented; and (3) the role the excluded evidence would have played in the defense’s theory.” *Hopper*, 315 S.W.3d at 369-70 (quoting *State v. Massey*, 867 S.W.2d 266, 269 (Mo. App. E.D. 1993)). Here, once again, the proffered evidence (Tr. 475-78) was completely cumulative to Appellant’s own testimony (Tr. 481-84) and would not have been helpful to Appellant. Appellant cannot demonstrate that he was prejudiced from the omission of cumulative testimony or that the trial court abused its discretion in excluding the testimony.

Further, in *Hopper*, 315 S.W.3d at 370, the Court stated:

Exclusion of a witness may be proper when no reasonable justification is given for the failure to disclose the witness. If an explanation tends to show good cause for the nondisclosure, exclusion of a significant defense witness would likely be an abuse of discretion.

In the present case, Appellant gave no reasonable justification or good cause for failing to disclose the witnesses. He argued that there was no success in contacting them due to the divorce between Appellant’s mother and father, but suddenly contact was made after

the father had been in the hospital (Tr. 12). The prosecutor, on the other hand, stated that when she interviewed Yvonne and Karen that morning, they indicated that they had repeatedly been visiting with Appellant since he had been incarcerated (Tr. 13). Although statements of counsel are not evidence, *State v. Hall*, 319 S.W.3d 519, 522 (Mo. App. S.D. 2010), counsel, as officers of the court, should be presumed to be truthful in their statements to the court, in the absence of evidence to the contrary. *See Owsley v. Brittain*, 186 S.W.3d 810, 820 n. 12 (Mo. App. W.D. 2006).

In other situations involving the defendant's family members or significant others, the appellate courts have found no reasonable justification for the failure to disclose the witnesses. *State v. Watson*, 755 S.W.2d 644, 646 (Mo. App. E.D. 1988) (no abuse of discretion in excluding testimony, as "Defendant offered no reasonable justification for his failure to disclose these witnesses, especially where one was his girlfriend and the other his aunt"); *Martin*, 103 S.W.3d at 261 (no fundamental unfairness resulted from exclusion of testimony of defendant's wife, as "no explanation, beyond counsel's neglect, was provided for the failure to disclose [her] as a witness"); *State v. Harris*, 664 S.W.2d 677, 680-81 (Mo. App. E.D. 1984) (sanction was proper where no reasonable justification was given for late endorsement, and "[i]t is inconceivable that . . . three alibi witnesses were undiscovered the three years prior to the second day of trial[, e]specially where two were relatives to the appellant and the third was his girlfriend"). Similarly, there was no reasonable justification in the present case. Further, defense counsel admitted that part of his reason for not disclosing them earlier was that Yvonne and Karen would not be believable witnesses (Tr.

12). The trial court did not abuse its discretion in excluding Yvonne's and Karen's testimony during Appellant's case in chief.

C. The trial court did not abuse its discretion in excluding Yvonne's and Karen's testimony in surrebuttal, as their proffered testimony was cumulative to Appellant's testimony, and Appellant was not prejudiced.

The scope of rebuttal or surrebuttal testimony is subject to the broad discretion of the trial court, *Pipes*, 923 S.W.2d at 353, and will not be disturbed absent an abuse of discretion. *May*, 587 S.W.2d at 337. "A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Kleine*, 330 S.W.3d at 808. The trial court did not abuse its discretion in excluding Yvonne's and Karen's testimony in surrebuttal and in not limiting its ruling to the defense's case in chief. Yvonne's and Karen's testimony would not have served to counter the State's rebuttal evidence, as they would have testified basically that Appellant "laid around a lot" (Tr. 477) and was not very ambulatory (Tr. 474-78). Dr. Aft, in contrast, had testified regarding the discharge instructions, pain medication, expected recovery, and lack of need for crutches (Tr. 515, 518-19).

Appellant cites *Williams*, 119 S.W.3d at 675, where the defendant, convicted of criminal nonsupport, had tape-recorded a conversation between the mother and himself wherein the mother had acknowledged that the defendant had not only paid support directly to her, but had paid more than he actually owed. The defendant was unable to locate the tape before trial began, and was able to produce it only after the defense had rested its case. *Id.*

Defense counsel asked to reopen the defense case or present surrebuttal evidence to impeach the mother's trial testimony, and the trial court excluded the evidence. *Id.* The Court held that there was no discovery violation because the tape recording was in the nature of rebuttal evidence, but the Court further held that even if the defendant had committed a discovery violation by failing to disclose the tape recording, the exclusion of the evidence was erroneous because it precluded the defendant from putting on a defense. *Id.* at 678-79.

Williams is distinguishable because the evidence in that case was not cumulative and was ultimately vital to the defense. *Id.* Because the tape had been misplaced, pre-trial disclosure of its existence would have been pointless, and the defendant had no other opportunity to introduce it until he found the tape, but his case was closed at that point. *Id.* at 675. In the present case, the defense made untimely disclosure of relatives who reasonably could have been located earlier, and their testimony was cumulative to Appellant's testimony in defense. Further, the *Williams* Court stated that there was no obligation to disclose rebuttal testimony and that it would not impose a discovery sanction for failure to disclose rebuttal evidence, *id.* at 677, 679 n. 9, but the evidence there was in the nature of surrebuttal or evidence that would have normally been offered as part of the defense case, not as rebuttal. Though the Court's opinion does not describe any rebuttal evidence that the State presented, the Court did state that the defense asked to reopen its case or, in the alternative, present rebuttal evidence. *Id.* at 676.

The exclusion of the testimony, which was cumulative, was within the trial court's discretion to control the scope of surrebuttal evidence. *Pipes*, 923 S.W.2d at 353. The trial court's ruling was not clearly against the logic of the circumstances before the court, nor was

it “so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.” *Kleine*, 330 S.W.3d at 808.

Further, the trial court's decision to admit or exclude evidence will not be reversed absent prejudice. *State v. Stover*, 388 S.W.3d 138, 156-57 (Mo. banc 2012); *State v. Williams*, 742 S.W.2d 616, 619 (Mo. App. W.D. 1987) (trial court's exclusion of surrebuttal evidence did not prejudice the defendant); *May*, 587 S.W.2d at 337 (trial court's exclusion of surrebuttal evidence did not prejudice the defendant). “Trial court error is not prejudicial unless there is a reasonable probability that the trial court's error affected the outcome of the trial.” *State v. Forrest*, 183 S.W.3d 218, 224 (Mo. banc 2006). Appellant argues that the trial court abused its discretion “[b]ecause the State suffered no prejudice,” Appellant's Brief at 30 (emphasis added), but the relevant inquiry is whether Appellant was prejudiced, and his brief sets forth no argument as to how he could have been prejudiced by the trial court's ruling excluding the surrebuttal evidence.⁴

Appellant may argue that he was prejudiced by the exclusion of Yvonne's and Karen's testimony because it would have supported his story that he was convalescing and was not capable of raping anyone. The jury obviously found Victim's testimony credible over Appellant's. The testimony of close relatives and Appellant simply would not have stacked up against the medical evidence. In fact, defense counsel admitted at trial that he was reluctant to call Yvonne and Karen because nobody would find the defendant's mother and grandmother believable (Tr. 12). Appellant's theory of consensual sex did not stack up

⁴ Appellant actually argued the issue in his application for transfer before this Court.

against the physical evidence either—that there were “prints” on the dirty car where Victim’s body had been (Tr. 352), and there was no credible reason for the fourteen-year-old Victim, walking on a shopping trip to Union Station alone for the first time in her life, to consent to sex outside on a dirty car in the wintertime (Tr. 300, 334, 352). Appellant has demonstrated no reasonable probability that the outcome of the trial would have been different if Yvonne’s and Karen’s testimony had been presented to the jury.

Appellant’s point should be denied.

II. (voir dire)

The trial court did not abuse its discretion in refusing to allow defense counsel to ask the venire members if they could consider the possibility that two teenagers had consensual sex or if they would automatically rule out that possibility, as counsel is not permitted to try the case on voir dire or to inject the defendant's argument into the voir dire examination; the question was not appropriately directed to facts with substantial potential for disqualifying bias; and Appellant was not prejudiced.

A. Additional facts.

At the beginning of voir dire, the prosecutor told the jury that “the defendant is charged with a forcible rape of 14 year old [L.M.]” occurring on December 26, 1999 (Tr. 48). Venireperson Schulte stated that she had worked with teenage girls in Atlanta who had been raped, so this case would be hard for her, and her experience would cause her to automatically believe a teenage girl (Tr. 52-53). Venireperson Schulte was struck for cause (Tr. 221), but she later volunteered that she had reconsidered and could be impartial (Tr. 270). The trial court later agreed with defense counsel that Schulte would remain struck for cause (Tr. 274).

During voir dire, the prosecutor and defense counsel questioned venire members as to experiences that they or their family members had with sex crimes and whether that affected their ability to hear the case impartially (Tr. 63-64, 66, 68-84, 86-96). The prosecutor asked the panel whether they would require anything as to forcible rape that was not in the instruction, and no one responded (Tr. 108). The prosecutor also told the panel that a witness had pled guilty to credit card fraud, and she explored how that would affect the

venire (Tr. 129-35). That witness was actually Victim, who pled guilty in 2006 to identity theft with regard to credit cards (Tr. 353-54), but that fact was not disclosed in voir dire (Tr. 129-35).

Venireperson Harlan asked the age of the defendant, and the prosecutor stated that the jury would learn that information during the trial (Tr. 138). Venireperson Harlan stated that this might affect her decision because maybe the Victim was promiscuous and the defendant was close in age (Tr. 138).

The following exchange occurred:

MS SZCZUCINSKI: Okay. Now, Miss Harlan, let me ask you this then: If you were to learn that they were close in age, okay, are you going to automatically say no way could there have been forcible rape if they're close to the same age?

VENIRE[PERSON] HARLAN: No.

MS. SZCZUCINSKI: So you could see that there could be that circumstance?

VENIRE[PERSON] HARLAN: Yeah, I just wanted to know how old he was at that time.

(Tr. 138).

No one responded when the prosecutor asked if there was someone who felt they could not make a credibility determination (Tr. 162).

Defense counsel questioned the prospective jurors as to their ability to correctly apply the burden of proof (Tr. 228-29). No one responded to his question whether the burden of

proof should change because the accusation was forcible rape as opposed to a less serious offense such as “spitting on the sidewalk” (Tr. 229-30).

Defense counsel also asked if any panelists could not carefully and impartially consider the testimony of a complaining witness who said she was raped (Tr. 231). Venireperson Smith responded that she might find the witness more believable if the witness had an emotional breakdown on the stand, and this could cause her to make an emotional decision rather than a rational decision, but the other panelists indicated that they could carefully and impartially consider the testimony (Tr. 231-33).

Defense counsel also told the prospective jurors that jurors must assign the weight that they are going to give to someone’s testimony (Tr. 230), and that inconsistencies “may go into your calculus as to what weight to give that witness’ testimony” (Tr. 235). When defense counsel asked the venire members if anybody disagreed with that, no one raised a hand (Tr. 235).

In response to defense counsel’s questioning whether anyone had a problem with returning a verdict of not guilty if the State did not prove its case beyond a reasonable doubt, no one raised a hand (Tr. 241).

Upon questioning by defense counsel, one venireperson who had personal experience with attempted rape and others with family members who had been raped indicated that they could consider the evidence impartially (Tr. 72-73, 245-48). One of Venireperson McKinney’s children had been raped by a family member (Tr. 83-84), and defense counsel asked her, “Are you automatically going to believe a witness who claims that they were raped?” (Tr. 261). Venireperson McKinney answered in the negative (Tr. 261).

Venireperson Klipp stated that there had been an incident with Venireperson Klipp's daughter's best friend, but "if it were my child, I would want everyone here to act with fairness and integrity at her trial, and I believe I can do that" (Tr. 261-62).

The following exchange occurred at the conclusion of defense counsel's voir dire:

MR. TAAFFE: Has anybody ruled out the possibility here of two teenagers, two young teenagers—

MS. SZCZUCINSKI: Objection, Your Honor. It's an improper question.

THE COURT: Well, we haven't heard it, but maybe we should hear it at the sidebar.

(The following proceedings were had at the bench:)

THE COURT: What are you going to ask the potential jurors?

MR. TAAFFE: Whether they can consider the possibility or do they automatically rule out the possibility of two teenagers that had consensual sex.

MS. SZCZUCINKI: It's essentially the theory of his defense. It's an improper question. It's not going into any theory of bias or prejudice.

THE COURT: That goes to—I'm not going to let you ask the question.

. . . That's that.

MR. TAAFFE: No, I have to think of another question. All right. I'm finished. I'll ask the closed question. Here's my issue. He was 19 at the time and she was 14. Sex occurred. He's not charged with statutory rape. He's charged with forcible.

THE COURT: Yes.

MR. TAAFFE: But I should be able to say, at least to the jury, if you hear evidence, you know, that two teenagers close in age had sexual intercourse and you believe that, does that automatically in your mind—does that mean automatically you’re going to find somebody guilty of forcible rape.

THE COURT: I think the question gets into why we’re here in terms of the jury finding the facts. The question that you’re proposing is designed to alert the jury as to what they’re going to be hearing, and I don’t think that’s what voir dire is all about. And also, I believe to some extent, it’s asking these people to make a commitment, which would certainly help you in the selection of who should hear the case. But I think that it goes beyond a neutral question to find out bias and prejudice, so I’m not going to let you ask the question.

(Tr. 263-65). Venireperson Kepner, who indicated that he would have trouble applying the instruction that the defendant was innocent until proven guilty, was struck for cause (Tr. 256-57, 273-74). Venireperson Morrison, when asked if anyone shared the same thoughts as Venireperson Kepner, initially stated “It’s in my thoughts” and “I’m thinking about it,” but when defense counsel asked her to explain what she was thinking about, she stated, “Well, you know, I hope that if I do get on the jury they have, you know, different people testifying and not just one person” (Tr. 256-57). Venireperson Morrison served on the jury (Tr. 279-80).

B. Preservation and the standard of review.

Appellant raised this issue in his motion for new trial (L.F. 61), thus the issue is preserved for appellate review.

The nature and extent of the questions counsel may ask on voir dire are discretionary with the trial court. *State v. Clark*, 981 S.W.2d 143, 146 (Mo. banc 1998). “An abuse of discretion occurs when the ruling is ‘clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.’” *State v. Scott*, 298 S.W.3d 913, 916 (Mo. App. E.D. 2009) (quoting *State v. Johnson*, 207 S.W.3d 24, 40 (Mo. banc 2006)). “Because rulings by the trial court are reviewed only for an abuse of discretion and ‘[a]n appellate court will find reversible error only where an abuse of discretion is found and the defendant can demonstrate prejudice,’ [the defendant] ‘has the burden of showing a real probability that he was prejudiced by the [alleged] abuse’” of discretion in the trial court’s control of voir dire. *State v. Baumruk*, 280 S.W.3d 600, 615 (Mo. banc 2009), *cert. denied*, 130 S.Ct. 144 (2009) (quoting *State v. Oates*, 12 S.W.3d 307, 310 (Mo. banc 2000)).

C. The trial court did not abuse its discretion in refusing to allow defense counsel to ask the venire members if they could consider the possibility that two teenagers had consensual sex or if they would automatically rule out that possibility, as counsel is not permitted to try the case on voir dire or seek a commitment from the venire, and Appellant was not prejudiced.

Appellant argues that the trial court erred in refusing to allow defense counsel to ask the venire members if they could consider the possibility that two teenagers had consensual sex or if they would automatically rule out that possibility.

1. Scope of voir dire questioning.

“The purpose of voir dire is to discover bias or prejudice in order to select a fair and impartial jury.” *Jones v. State*, 197 S.W.3d 227, 232 (Mo. App. W.D. 2006). Voir dire requires “the revelation of some portion of the facts of the case,” *Clark*, 981 S.W.2d at 147, as “[g]eneral fairness and ‘follow-the-law’ questions alone are insufficient to reveal juror bias.” *Scott*, 298 S.W.3d at 915. “An insufficient description of the facts jeopardizes appellant's right to an impartial jury.” *Clark*, 981 S.W.2d at 147. “[N]o fixed and inflexible rule may be laid down which may determine the extent to which counsel may go in the examination of jurors upon voir dire.” *Pollard v. Whitener*, 965 S.W.2d 281, 286 (Mo. App. W.D. 1998).

Trial courts “may exclude questions which are open-ended inquiries into a venire member's beliefs, misstate the law, arguably seek commitments from the jury panel, or confuse or mislead the venire members.” *Id.* at 282. A trial judge is vested with discretion to judge the appropriateness of specific questions and has wide discretion in the conduct of voir dire. *Baumruk*, 280 S.W.3d at 614. “Phrasing a voir dire question in such a manner which pre-conditions the panel members' mind to react, even subconsciously, in a particular way to anticipate evidence is an abuse of counsel's privilege to examine prospective jurors.” *State v. Lutz*, 334 S.W.3d 157, 163-64 (Mo. App. S.D. 2011).

Most importantly, counsel may not try the case on voir dire. *Clark*, 981 S.W.2d at 146. For example, argument or “a presentation of the facts in explicit detail” during voir dire is inappropriate. *Id.* “[W]hen the inquiry includes questions phrased or framed in such manner that they require the one answering to speculate on his own reaction to such an

extent that he tends to feel obligated to react in that manner, prejudice can be created. The limitation is not as to the information sought but in the manner of asking.” *Id.* “Only those critical facts—facts with substantial potential for disqualifying bias—must be divulged to the venire.” *Baumruk*, 280 S.W.3d at 614.

Appellant asserts that the trial court disallowed the question for two reasons: because the question was getting too far into the facts of the case and because the question was asking for a commitment. As to the latter, the trial court stated, “I believe to some extent, it’s asking these people to make a commitment, which would certainly help you in the selection of who should hear the case. But I think that it goes beyond a neutral question to find out bias and prejudice, so I’m not going to let you ask the question” (Tr. 265) (emphasis added).

Appellant claims that he needed to know whether the potential jurors had biases about teenagers having consensual sex. Appellant asserts that “teenagers’ having consensual sex is controversial[,]” that “[j]urors could have had biases about the issue based on their own experiences or their religious or moral beliefs.” Appellant’s Brief at 36. Appellant asserts that “[s]ome members of the venire panel, because of their experiences or beliefs, may have believed teenagers could never truly consent to sex[,]” and “[w]hile that may be a reasonable moral belief, it is not the law.” Appellant’s Brief at 36. Here the age of the Victim was already before the panel (Tr. 48). It is true that, under the statutes in effect at that time, there was nothing prohibiting persons in this age group from having consensual sex. A person could be charged with statutory rape in the first degree if he had sexual intercourse with another person who was less than fourteen years old, § 566.032, RSMo 1994; or statutory

rape in the second degree if, being twenty-one years of age or older, he had sexual intercourse with another person who was less than seventeen years old. Section 566.034, RSMo 1994. As Appellant was nineteen years old and Victim was fourteen years old (Tr. 334; L.F. 10), neither of those statutes would have applied here.

If the prospective jurors believed, for some reason, that teenagers could not consent to sexual activity, that would indeed be contrary to the law as in effect at that time, §§ 566.032 and 566.034, RSMo 1994, but Appellant fails to identify how anyone could have a moral or religious belief that teenagers cannot consent to sex. Although some people may hold religious and/or moral beliefs that sex outside of marriage is wrong, and many people may agree that consensual sexual activity at such a young age is an unwise choice, Appellant fails to show how such beliefs might be stretched to a belief that young teenagers are incapable of consenting, when that belief would be contrary to the law. In any event, the panel members were questioned on their ability to properly apply the burden of proof as set forth in the court's instructions (Tr. 228-29, 241, 262). The believability of a person who claimed to be raped was also explored by defense counsel in voir dire (Tr. 231-33, 261-62).⁵ Defense counsel also told the prospective jurors that jurors must assign the weight that they were to

⁵ Appellant argues that "the question had nothing to do with credibility." Appellant's Brief at 37. Consent was a part of Appellant's defense (as well as his claim of medical alibi), and a finding as to whether the act was consensual depended completely on the credibility of the witnesses; thus, whether the panel members would automatically rule out the possibility of two teenagers having consensual sex was related to credibility.

give to someone's testimony (Tr. 230), and that inconsistencies "may go into your calculus as to what weight to give that witness' testimony" (Tr. 235). When defense counsel asked the venire members if anybody disagreed with that, no one raised a hand (Tr. 235). Additionally, when Venireperson Harlan asked the age of the defendant, and stated that this might affect her decision because maybe the Victim was promiscuous and the defendant was close in age (Tr. 138), the prosecutor asked, "Now, Miss Harlan, let me ask you this then: If you were to learn that they were close in age, okay, are you going to automatically say no way could there have been forcible rape if they're close to the same age?" (Tr. 138). Venireperson Harlan answered in the negative, and the prosecutor responded, "So you could see that there could be that circumstance?" (Tr. 138). Thus, the questioning in this case was much more than "general fairness and 'follow-the-law' questions," *Scott*, 298 S.W.3d at 915, and afforded Appellant a full opportunity to uncover disqualifying biases among the panel members.

In *State v. Finch*, 746 S.W.2d 607, 613 (Mo. App. W.D. 1988), the Court held that defense counsel was entitled to learn whether any of the prospective jurors had a predisposition to accept as true the testimony of alleged rape victims. The Court held that litigants have the right to discover bias or prejudice on the part of prospective jurors, but more specifically, defense counsel had the right to explore whether the venire members had a bias in terms of a fixed partiality toward the testimony of a particular class of persons. *Id.* In the present case, defense counsel's overly broad question did not go to mere bias toward the testimony of a particular class of persons. Appellant's proposed question was not appropriately directed to facts with substantial potential for disqualifying bias because the

bias of the panel members regarding the believability of a rape victim had already been explored (Tr. 138, 231, 260-62). Further, the prosecutor did ask Venireperson Harlan if she would automatically say there could not have been forcible rape if the victim and defendant were “close to the same age” (Tr. 138). Thus, the subject had already been explored to an extent by the prosecution. Here, the proposed question was not truly designed to uncover bias or prejudice, but was an attempt by the defense to inject the defendant’s argument into the voir dire examination. *See State v. Lutz*, 334 S.W.3d 157, 163 (Mo. App. S.D. 2011). Thus, the trial court did not abuse its discretion in disallowing the questioning.

Appellant cites *State v. Ezell*, 233 S.W.3d 251, 253 (Mo. App. W.D. 2007), where the Court held that the prosecutor’s question as to whether the potential jurors would automatically disbelieve the testimony of the Victim because she did not report the abuse until months after it occurred did not improperly seek a commitment from the panel members. There the Court noted that:

There is a tendency by counsel and sometimes courts, to jump to the conclusion that every question containing the words “would you believe/disbelieve automatically,” connected to some fact of the case, improperly seeks a commitment as to the credibility of some party or witness in the case. Although such questions should be carefully considered by the trial court, they are not *per se* improper. The test is their relationship to a particular fact of the case and whether they are phrased in such a way as to uncover rather than to inject bias or prejudice. Here, it was a critical fact that the Victim had delayed nearly a year reporting the molestation. It was a fact

that the defense should and would repeatedly emphasize to attack the credibility of the Victim. The State was as entitled to ask whether any potential juror would dismiss such a late charge without hearing the evidence as the defense was entitled to (and did) ask whether any believed that a child would never lie about sexual abuse.

Id. at 253. Similarly, in the present case the defense was allowed to delve into the critical facts pertaining to believability and the consent defense (Tr. 260-62). The age group to which the Victim and the defendant belonged was not a “critical fact” in questioning the panel members as to factors that would affect their credibility determination, but in any event, the age of the victim was disclosed to the venire (Tr. 48), and the fact that Appellant was close to the same age was suggested in the prosecutor’s colloquy with Venireperson Harlan (Tr. 138).

Appellant also contends that this case is “like *Clark*,” 981 S.W.2d at 146. Appellant’s Brief at 37. In *Clark*, *id.* at 145, the defendant shot into a parked car and, despite a father’s screaming at the defendant to stop shooting because there were children in the car, moved around to the other side of the car, shooting all the way, and then shot a three-year-old girl and the father after they had fallen out the passenger door onto the ground—the father partially covering his daughter—in an apparent attempt to escape the assault. There the trial court ruled that defense counsel was not entitled to voir dire on the age of the child victim. *Id.* In his guilt-phase opening statement, the prosecutor referred to the child’s age three times and called her a “baby” eight times. *Id.* at 147. The record also reflected that one juror left the room crying after viewing autopsy photos of the child. *Id.* at 148. This Court noted

that “[a] case involving a child victim can implicate personal bias and disqualify prospective jurors[,]” and “[t]he trial court must strike for cause prospective jurors when they exhibit prejudicial bias because the victim is a child[,]” but the defense was not allowed to attempt to discover that bias. *Id.* at 147. The Court held that the trial court had abused its discretion by disallowing voir dire as to the age of the victim. *Id.*

Appellant argues that the present case is like *Clark* because prospective jurors could be biased due to the young age of the victim, and the prosecutors in both cases emphasized the youth of the victim in closing argument. *Id.* at 147-48; (Tr. 536, 539, 542, 558, 560, 563-64). *Clark*, however, was a capital case involving the murder of a very young (three-year-old) child and her father. *Id.* at 145. On those facts, the jury could have been easily swayed by sympathy for a victim of such tender years. In the present case, in contrast, the victim was fourteen years old, not a mere child, and the fact that the defendant sought to draw out was not so much the age of the victim and the defendant but whether the venirepersons believed, based on those facts, that teenagers could engage in consensual sex. Thus, the present case is very different from *Clark*.

The trial court did not abuse its discretion in disallowing the question in voir dire. The trial court’s ruling was not clearly against the logic of the circumstances before the court, nor was it “so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.” *Kleine*, 330 S.W.3d at 808.

2. Appellant was not prejudiced.

Appellant’s emphasis on the prosecutor’s closing argument is not relevant to the issue whether the voir dire question should have been allowed, but it does bear, to some degree,

upon Appellant's claim that he was prejudiced by not being allowed to ask the question. The party asserting an abuse of discretion in the trial court's control of the questioning of venirepersons has the burden of demonstrating a real probability that he was prejudiced. *State v. Martin*, 815 S.W.2d 127, 129 (Mo. App. S.D. 1991); *Baumruk*, 280 S.W.3d at 614. In *Clark*, 981 S.W.2d at 147, this Court noted that the defendant suffered a "real probability of injury[,]” in part because the prosecutor concluded his closing argument by referring to the victim as a "baby.”

Appellant asserts that "Jerry was prejudiced because he could not ferret out those potential jurors who categorically could not consider his consent defense.” Appellant's Brief at 37. However, in the present case the defense was allowed to explore whether the panel members had biases or prejudices that would cause them to automatically believe a witness who claimed she was raped (Tr. 261-62). The defense also questioned venire members on their ability to properly apply the burden of proof (Tr. 228-29, 241, 262), and if the sex was consensual, obviously they could not find forcible compulsion under the verdict directing instruction (L.F. 53). Defense counsel also told the prospective jurors that jurors must assign the weight that they were to give to someone's testimony (Tr. 230), and that inconsistencies "may go into your calculus as to what weight to give that witness' testimony” (Tr. 235). When defense counsel asked the venire members if anybody disagreed with that, no one raised a hand (Tr. 235). Additionally, when Venireperson Harlan asked the age of the defendant, and stated that this might affect her decision because maybe the Victim was promiscuous and the defendant was close in age (Tr. 138), the prosecutor asked, "Now, Miss Harlan, let me ask you this then: If you were to learn that they were close in age, okay, are

you going to automatically say no way could there have been forcible rape if they're close to the same age?" (Tr. 138). Venireperson Harlan answered in the negative, and the prosecutor responded, "So you could see that there could be that circumstance?" (Tr. 138). Thus, there was a suggestion in the questioning that the victim and the defendant were close in age, and Venireperson Harlan was asked to consider whether there could have forcible rape under those circumstances (Tr. 138). *See State v. Johnson*, 62 S.W.3d 61, 65 (Mo. App. W.D. 2001) (defendant was not prejudiced by failure to allow voir dire question when he was allowed to ask similar question).

Appellant has not demonstrated prejudice, as the same general topic was explored through other questions. The disallowance of one question as to whether the venire members believed that teenagers could consent did not deprive Appellant of his rights to a fair and impartial jury and due process of law.

Appellant's point should be denied.

III. (instruction)

The trial court did not plainly err by instructing the jury with Instruction No. 6, as a knowing mental state is not a required element of the offense of forcible rape and Appellant did not contest his mental state at trial.

A. Additional facts.

During the instruction conference, the following exchange occurred:

THE COURT: . . . the state offers a verdict director based on 320.01. Has the defendant had a chance to review this?

MR. TAAFFE: I have, Your Honor.

THE COURT: Any objections?

MR. TAAFFE: No.

THE COURT: Then this will be given and read as Instruction No. 6.

MS. SZCZUCINSKI: Your Honor, I will note for the record that that is the MAI that was in place in 1995.

THE COURT: Thank you. It's MAI-CR2d. I said we'd be using third. We're not. This is 2d. We're supposed to use the one that was applicable at the time of the alleged offense. We can all agree on that, this is the right instruction to be given?

MR. TAAFFE: Yes.

THE COURT: 320.01, 1995 version?

MR. TAAFFE: Yes.

(Tr. 532-33).

Instruction No. 6 instructed the jury regarding the elements of the offense as follows:

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

First, that on or about December 26, 1999, in the City of St. Louis, State of

Missouri, the defendant has sexual intercourse with [VICTIM], and

Second, that defendant did so by the use of forcible compulsion,

then you will find the defendant guilty of forcible rape.

(L.F. 53).

B. Preservation and the standard of review.

Appellant recognizes that defense counsel did not object to Instruction No. 6 at trial (Tr. 532-33). Appellant thus requests plain error review.

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; *State v. Carney*, 195 S.W.3d 567, 570 (Mo. App. S.D. 2006). Plain error review is utilized sparingly, and a defendant seeking such review bears the burden of showing that plain error has occurred. *State v. Lloyd*, 205 S.W.3d 893, 906-07 (Mo. App. S.D. 2006). Plain error review involves a two-step analysis. *State v. Drudge*, 296 S.W.3d 37, 40 (Mo. App. E.D. 2009). "First, the court must determine whether the trial court committed an evident, obvious and clear error, which affected the substantial rights of the appellant." *Id.* at 40-41. Only if this Court identifies plain error does the Court proceed to the second step of determining whether manifest injustice or a miscarriage of justice resulted. *Id.* at 41.

This Court's review of jury instructions for plain error is discretionary. *State v. Hall*, 321 S.W.3d 453, 457 (Mo. App. S.D. 2010). "[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)). "In the context of instructional error, plain error results when the trial court has 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, and cause[d] manifest injustice or miscarriage of justice." *State v. D.W.N.*, 290 S.W.3d 814, 827 (Mo. App. W.D. 2009). "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.

C. The trial court did not plainly err by instructing the jury with Instruction No. 6, as a knowing mental state is not a required element of the offense of forcible rape and Appellant did not contest his mental state at trial.

Section 566.030.1, RSMo Supp. 1998, provides that "[a] person commits the crime of forcible rape if such person has sexual intercourse with another person by the use of forcible compulsion."

MAI-CR3d 320.02 states:

(As to Count ____, if) (If) you find and believe from the evidence beyond a reasonable doubt:

First, that (on) (on or about) [*date*] in the (City) (County) of _____, State of Missouri, the defendant had sexual intercourse with [*name of Victim*], and

Second, that defendant did so by the use of forcible compulsion,
and

Third, that defendant did so knowingly,

(and)

(Fourth, that in the course of this conduct, the defendant [*Insert one of the following. Omit brackets and number.*]

[1] inflicted serious physical injury on [*name of Victim*],

[2] displayed a (deadly weapon) (or) (dangerous instrument) in a threatening manner,

[3] subjected [*name of Victim*] to sexual intercourse with more than one person,

[4] (for the purpose of arousing or gratifying the sexual desire of [*name of person*] (for the purpose of terrorizing [*name of Victim*] subjected [*name of Victim*] to deviate sexual intercourse by [*Describe acts constituting deviate sexual intercourse.*] with more than one person),

then you will find the defendant guilty (under Count ____) of forcible rape (under this instruction).

The fourth paragraph (a parenthetical) pertains to a 2006 statutory amendment, § 566.030, RSMo Supp. 2006, that is not applicable to Appellant’s crime committed in 1999.

The Notes on Use, paragraph 1, states:

Section 566.030, RSMo Supp. 2006. This is a revision of MAI-CR 3d 320.01 (9-1-01). This instruction applies to offenses committed on or after January 1, 1995[.]

The note then goes on to provide certain exceptions pertaining to statutory amendments not applicable here.

Appellant relies on § 562.021.3, RSMo 2000, which states that “[e]xcept as provided in . . . section 562.026,” a knowing mental state is required when not otherwise prescribed by statute. Section 565.026, RSMo 2000, provides that:

A culpable mental state is not required:

- (1) If the offense is an infraction and no culpable mental state is prescribe by the statute defining the offense; or
- (2) If the offense is a felony or misdemeanor and no culpable mental state is prescribed by the statute defining the offense, and imputation of a culpable mental state to the offense is clearly inconsistent with the purpose of the statue defining the offense or may lead to an absurd or unjust result.

In *State v. Dennis*, 153 S.W.3d 910, 920 (Mo. App. W.D. 2005), the Court held that the crime of forcible rape is a crime of strict liability and § 562.026 is applicable; thus “section 562.021 does not provide a culpable mental state” for the offense of forcible rape. Appellant recognizes the Western District’s holding in *Dennis, id.*, yet argues for a contrary

result here. However, the imposition of a culpable mental state to the offense of forcible rape is clearly inconsistent with the purpose of the statute defining the offense and would lead to an absurd or unjust result. Section 562.026, RSMo 2000. The MAI-CR3d and its Notes on Use are “not binding” to the extent that they conflict with the substantive law. *State v. Carson*, 941 S.W.2d 518, 520 (Mo. banc 1997). Thus, the trial court was not required to give an instruction with a knowing mental state pursuant to MAI-CR3d 320.02. The omission of a superfluous non-element from an instruction results in no prejudice to the defendant and is not error.

In addition, Appellant did not contest any mental state at trial. In *State v. Wright*, 30 S.W.3d 906, 910-12 (Mo. App. E.D. 2000), the defendant claimed plain error in the omission of a “knowing” mental state from the verdict director on a charge of forcible sodomy. The Court noted that “[i]t is well-settled that plain error does not result from a failure to instruct the jury on an uncontroverted element of the crime.” *Id.* at 912. The Court stated:

To commit this offense “knowingly,” defendant must have known that he was placing his penis in Victim's mouth and anus by forcible compulsion. In this case, defendant did not controvert that the acts of forcible sodomy were committed knowingly. He did not claim that the acts constituting forcible sodomy were committed recklessly, negligently, or accidentally. Rather, he claimed that the acts never occurred. He testified that Victim voluntarily came to his apartment, woke him up, and engaged in consensual intercourse. He denied that any other types of sexual acts occurred. He specifically testified that he did not kidnap, rape, or sodomize Victim. Thus the issue before the

jury was whether the events testified to by Victim happened at all. If the jury found those events occurred, there was substantial evidence, as set out in detail above, from which the jury could infer that defendant acted knowingly and not recklessly or negligently in committing the acts of forcible sodomy. Under these circumstances the failure to instruct on mental state on the sodomy counts was not plain error.

Id. In the present case, Appellant contends that the *mens rea* was contested at trial, as he claimed that he did not commit the crime. However, the Court found in *Wright, id.*, that the defendant's claim that he did not commit the crime was not the same as a controversion of the *mens rea*, and in the present case, proof of a culpable mental state was not required. *Dennis*, 153 S.W.3d at 920.

Appellant asserts that the jury's finding of forcible compulsion does not necessarily equate with a finding that he acted knowingly. However, Appellant seems to ignore the fact that it would be impossible to engage in sexual intercourse by the use of forcible compulsion without doing so knowingly, and again, as the Court held in *Dennis*, 153 S.W.3d at 920, proof of a culpable mental state is not required.

Appellant relies on *State v. Neal*, 328 S.W.3d 374, 381 (Mo. App. W.D. 2010), but that case is readily distinguishable. In that case the verdict director lacked the element that the defendant had threatened the immediate use of a deadly weapon or dangerous instrument, which was a necessary element for robbery in the first degree. *Id.* There the Court stated that "[t]he State's argument—that because Neal's primary defense was to attack K.L.'s credibility and suggest that she was lying about what happened that evening, therefore, he

was not contesting the allegation that he threatened to use a deadly weapon in connection with the robbery—strains the bounds of credulity.” *Id.* In the present case, there is no required mental state. *Dennis*, 153 S.W.3d at 920.

Appellant further contends that *State v. Bryant*, 756 S.W.2d 594, 595-97 (Mo. App. W.D. 1988), is instructive. Appellant’s Brief at 43. There the defendant claimed that the trial court had erred in submitting the pattern instruction applicable at that time, and that this was confusing to the jury because it improperly contained alternative mental states. *Bryant*, 756 S.W.2d at 595. The Court noted that “[r]ape must be committed either recklessly or knowingly, negligence is not enough.” *Id.* at 597. The Court held that the instruction was not confusing and the defendant was not prejudiced, as the evidence presented at trial would support a finding that the defendant knew that the sexual intercourse was accomplished without the consent of the Victim by forcible compulsion. *Id.* at 597. Appellant asserts that *Bryant* “demonstrates that using forcible compulsion can be a reckless, rather than knowing, act.” Appellant’s Brief at 44. However, in *Dennis*, 153 S.W.3d at 920 n. 4, the Court specifically held that to the extent that *Bryant* would find that the culpable mental state is as set forth in § 562.021, it should no longer be followed.

In summary, proof of a knowing mental state (or any mental state at all) is not required for the offense of forcible rape. *Dennis*, 153 S.W.3d at 920. The trial court was not required to give an instruction modeled after an MAI-CR3d that conflicts with the substantive law, but in any event, Appellant did not contest his mental state at trial, and it logically follows that a man could not commit the offense of forcible rape without doing so

knowingly. The trial court committed no error, and certainly there was no manifest injustice or miscarriage of justice. This Court should decline to review for plain error.

Appellant's point should be denied.

CONCLUSION

Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Timothy A. Blackwell
TIMOTHY A. BLACKWELL
Assistant Attorney General
Missouri Bar No. 35443

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
tim.blackwell@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

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 contains 12,254 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 8th day of May, 2013, to:

Roxanna A. Mason
1010 Market Street, Suite 1100
St. Louis, Missouri 63101

/s/ Timothy A. Blackwell
TIMOTHY A. BLACKWELL
Assistant Attorney General
Missouri Bar No. 35443
P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321
Fax (573) 751-5391

ATTORNEY FOR RESPONDENT
STATE OF MISSOURI