No. SC91948

IN THE

Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

DAVID BRYAN MILLER,

Appellant.

Appeal from the Harrison County Circuit Court
Third Judicial Circuit
The Honorable Jack Peace, Judge

RESPONDENT'S SUBSTITUTE BRIEF

CHRIS KOSTER
Attorney General

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

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

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF FACTS

Mr. Miller appeals from his convictions of six sexual offenses committed against his daughter, E.M.: statutory sodomy in the first degree, § 566.062, RSMo 2000; child molestation in the first degree, § 566.067, RSMo 1994; deviate sexual assault, § 566.070, RSMo 2000; sexual misconduct, § 566.083, RSMo 2000; endangering the welfare of a child in the first degree, § 568.045, RSMo Cum. Supp. 2003 and 2005;[1] and incest, § 568.020, RSMo 2000 (Tr. 301-302; L.F. 13-14).

* * *

The victim, E.M., was born on December 3, 1991 (Tr. 21). In October, 1995, E.M.'s family moved to a farm in Hatfield, Missouri (Tr. 22, 79). Because he had had back surgery before they moved to Hatfield, Mr. Miller did not work (Tr. 80). Over time, Mr. Miller recovered from his surgery and he was able to do more on the farm "when it suited him" (Tr. 81-82). Although Mr. Miller was disabled, his injury did not prohibit him from engaging in sexual intercourse with his wife, A.M. (Tr. 83-84).

---

[1] The statutory definition of first-degree endangering the welfare of a child (§ 568.045) changed during the charged time period (for count 8) of December 3, 2004, to December 3, 2005 (*see* L.F. 14). But the only change to the section was in subsection 1, subdivision (5), which is not at issue in this case. (Mr. Miller was charged under subdivision (2) (*see* L.F. 14).)

While they lived on the farm, it appeared to A.M. (E.M.'s mother) that Mr. Miller's relationship with E.M. was fine (Tr. 85). A.M. never suspected that anything was amiss (Tr. 96-97). A.M. spent her days working on the farm (Tr. 80, 82-83). Mr. Miller would send boys out to help with farm work; E.M. would stay in the house (Tr. 85). Mr. Miller was harder and rougher on the boys, and he did not make E.M. do the same types of chores (Tr. 85).

When E.M. was six years old, Mr. Miller subjected E.M. to sexual contact (Tr. 34). E.M. was on a loveseat, and Mr. Miller got on the loveseat behind her (Tr. 34). Mr. Miller pulled down her shorts and touched her "butt" and hip with his hands (Tr. 34). Mr. Miller then "pulled down his pants" and "stuck his penis between [E.M.'s] legs" (Tr. 34). Mr. Miller "slowly moved [his penis] back and forth" (Tr. 35). Mr. Miller told E.M. "not to tell anybody" (Tr. 35). A.M. was asleep in her bedroom (Tr. 35). E.M. recalled that a family friend, Monte Parkhurst, was "passed out" on the floor (Tr. 34).

E.M. didn't tell anyone what had happened because she "was too afraid" (Tr. 35). E.M. was afraid because she knew that Mr. Miller had been hiding the fact that he had been "hitting [her] mom" (Tr. 35-36). E.M. saw Mr. Miller hit her mother on "many occasions" (Tr. 46-47).

As E.M. matured physically, Mr. Miller "started touching [her] and feeling [her] more" (Tr. 37). When E.M. was seven years old, Mr. Miller "stuck his finger in [her] vagina" (Tr. 37). Eventually, Mr. Miller "made [E.M.] do oral sex, . . . anal

sex, vaginal intercourse, basically everything" (Tr. 37). The first instance of oral sex occurred after E.M was six years old and before she was twelve (Tr. 38). Mr. Miller tried to have sex with E.M. when she was six or seven years old, but it "hurt" (Tr. 38). E.M. told Mr. Miller multiple times that it hurt, and she told him "no" (Tr. 38).

Between the time that E.M. was six and twelve years old, instead of sexual intercourse, Mr. Miller "would do something else, oral sex or whatever he wanted" (Tr. 42). Mr. Miller "made [E.M.] put [her] mouth on his penis" (Tr. 42). Usually, Mr. Miller did not ejaculate in E.M.'s mouth (Tr. 42). Mr. Miller would also "pull [E.M.] up on [her] knees and stick his penis in [her] butt" (Tr. 43). Mr. Miller engaged in anal intercourse with E.M. more than once before she was twelve (Tr. 43).

Around the time E.M. started to menstruate, Mr. Miller "was able to penetrate [her] with his penis and then he started having sex with [her]" (Tr. 38). When E.M. was twelve years old, Mr. Miller used a vibrator on her (Tr. 40). E.M. was twelve when Mr. Miller first had sexual intercourse with her (Tr. 40). Mr. Miller dragged her into his bedroom and told her to take off her clothes (Tr. 40). E.M. took off her clothes, and Mr. Miller took off his clothes (Tr. 40). E.M. was afraid of Mr. Miller (Tr. 40). Mr. Miller then had sex with E.M. (Tr. 40). E.M. felt "a lot of pain" (Tr. 41). E.M. told Mr. Miller it hurt, but Mr. Miller "never stopped" (Tr. 41). E.M. asked Mr. Miller, "could you stop?", but Mr. Miller said

"no" and went on (Tr. 41).

After that incident, until E.M. was fourteen years old, Mr. Miller engaged in sexual intercourse with E.M. "Too many times to count" (Tr. 41). E.M. said that if she was "lucky" it only occurred once a week, but, otherwise, Mr. Miller had sexual intercourse with her two or three times a week (Tr. 41). Mr. Miller would make everybody leave the house to do chores or "whatever he could think of," and then he would drag E.M. to the bedroom and have sex with her (Tr. 42). After Mr. Miller started having sexual intercourse with E.M., he engaged in anal intercourse with E.M. only on "a very rare occasion" (Tr. 43).

After E.M. started to menstruate, Mr. Miller "was always worried about getting [her] pregnant so he started using a condom" (Tr. 43). Mr. Miller's condom use was sporadic—it "Depended on if he was in a hurry or not" (Tr. 43).

Mr. Miller and A.M. divorced in August 2005 (Tr. 44, 78). At that time, Mr. Miller was living with his girlfriend, and A.M. remained in the farm house until December 2005 (Tr. 44-45, 78, 228).

After A.M. and E.M. moved out, E.M. would sometimes visit Mr. Miller (*see* Tr. 51). When she visited, E.M. would try to take a friend with her (Tr. 51). E.M. explained that when her friend was awake, nothing would happen, and, thus, if E.M. fell asleep first, she was usually safe (Tr. 51).

E.M. testified that she thought the last time Mr. Miller had sex with her was on the weekend of January 21, 2006 (Tr. 51). E.M. testified that she spent that

weekend at the farmhouse, and she recalled that she did not have a friend with her (Tr. 51-52, 68). E.M. testified that Mr. Miller had sex with her two or three times that weekend (Tr. 52). (This testimony about the weekend of January 21, 2006, was the basis for counts 1, 2, and 7 (*see* L.F. 13-14). The jury found Mr. Miller not guilty of these counts (Tr. 301-302).[2])

When E.M. was fourteen years old, E.M. told a friend, M.B., what was happening (Tr. 44). E.M. had not disclosed what was happening earlier because she was afraid of Mr. Miller (Tr. 35-36, 46-47, 50-51). Over the years, E.M. had "seen him hit [her] mother many times" (Tr. 50). E.M. had also occasionally seen Mr. Miller hit her brothers (Tr. 50). E.M. stated that Mr. Miller did not hit her in the same way, and that she was only spanked with a belt or "something little" (Tr. 36). E.M. feared that if she did not have sex with Mr. Miller that he would hurt her or someone else in the family (Tr. 50). E.M. did not disclose the sexual abuse because she was afraid that Mr. Miller would hurt her, that Mr. Miller would take her and run, or that Mr. Miller would hurt her mother (Tr. 50-51).

---

[2] The jury also found Mr. Miller not guilty on count 10. That count was submitted to the jury as involving sexual intercourse between January 30, 2005, and January 31, 2005. There was no specific testimony as to those two days in 2005. (The date range submitted to the jury was apparently an inadvertent error, as the charged date range was January 30, 2004, to January 31, 2005 (*see* L.F. 14; Tr. 297-299).)

When E.M. told M.B. what was happening, she asked M.B. not to tell anyone "because [E.M.] was in fear of what [Mr. Miller] would do and what he's capable of doing" (Tr. 53). But M.B. told E.M.'s mother (Tr. 53). And, thereafter, A.M. and one of A.M.'s friends (A.E.) took E.M. to the police (Tr. 53-54).

On January 31, 2006, two sheriff's deputies, Eric Rimmer and Josh Eckerson, served an order of protection on Mr. Miller and told him that they were investigating allegations of sexual abuse (Tr. 108). Deputy Eckerson obtained permission to search the house (Tr. 109, 112-113). Deputy Rimmer sat with Mr. Miller at the kitchen table and talked to him about the order of protection (Tr. 109). Deputy Rimmer advised Mr. Miller of the *Miranda* warnings, and Mr. Miller stated that he understood his rights (Tr. 109-110). Deputy Rimmer mostly talked to Mr. Miller about the order of protection (Tr. 110).

During the search, Deputy Eckerson asked Mr. Miller if he had any condoms, and Mr. Miller retrieved a box from under the bathroom sink (Tr. 121, 127). The condoms were up under the sink, and Mr. Miller said that he kept them hidden there "from his children so they wouldn't question or know what he was doing in his spare time" (Tr. 121-122).

After the search, Deputy Eckerson asked Mr. Miller to come to the station for an interview (Tr. 110-111). At the station, Deputy Rimmer again advised Mr. Miller of the *Miranda* warnings (Tr. 111). Mr. Miller signed a *Miranda* form and agreed to speak to the officers (Tr. 111-113). Mr. Miller said something about his

divorce, and said that he "thought his ex-wife had put [E.M.] up to it" (Tr. 111, 123). Mr. Miller denied the allegations of sexual abuse (Tr. 113, 123). After the interview, Deputy Eckerson put Mr. Miller under a 24-hour investigative hold (Tr. 112).

Trial commenced on May 5, 2009 (Tr. 2). Mr. Miller sought to present the testimony of Donald Shenburger, but Mr. Shenburger had not been endorsed (Tr. 130-153). Mr. Miller presented the testimony of Christopher Miller (one of his sons) and Lachelle Williams, a pediatric nurse (Tr. 154, 195). Mr. Miller also testified (Tr. 211).

Christopher Miller described the farmhouse and some of the sleeping arrangements (Tr. 158-166). He testified about the work that he and his brother and Mr. Miller did on the farm (Tr. 166-169). He testified that E.M. did "not really" work much on the farm (Tr. 168). He testified that sometimes Mr. Miller told him and his brother to go and finish their chores (Tr. 169). He testified that his mother also did work on the farm (Tr. 169-170).

Christopher testified that he did not meet Monte Parkhurst until 1999 or 2000 (Tr. 173). He recalled one day when Mr. Miller locked the door to the master bedroom, and he was "pretty sure" E.M. was in the master bedroom (Tr. 174). He testified that on January 21, 2006, they got some fencing supplies together so they could repair the fence (Tr. 178). He testified that Don Shenburger and his grandfather arrived that night, and that they all worked together the next day

(Tr. 178-179). He testified that they also worked all day on Saturday (January 22) (Tr. 179-180). He testified that Mr. Miller never went into the house for any period of time that day (Tr. 180).

He testified that E.M. and one of E.M.'s friends arrived at the house at about 10:00 or 11:00 a.m., while the men were working on the fence (Tr. 181). He testified that E.M.'s friend was still at the house that evening, and that Mr. Miller and E.M. were never gone together that evening (Tr. 181). He testified that the men all worked together the next day, and that Mr. Miller never went into the house, except for lunch, when they all went inside together (Tr. 182-183). He testified that Mr. Miller slept for a while after working on the fence, but that Mr. Miller then went to work (Tr. 183-184). He testified that he never saw any inappropriate contact between Mr. Miller and E.M. (Tr. 184).

Mr. Miller also presented the testimony of Lachelle Williams, the pediatric nurse who performed a SAFE examination on E.M. (Tr. 197-198). She testified that she did not find anything abnormal (Tr. 206-207). The lack of physical findings was consistent with a 14-year-old girl who had never had sexual intercourse (Tr. 208). On cross-examination, she testified that 95% of the examinations she performs result in "normal" findings (Tr. 209). She testified that the hymen "heals easily so it's possible for sexual contact to occur without any injury at all" (Tr. 209). She testified that a lack of physical findings did not preclude sexual abuse (Tr. 210).

Mr. Miller testified that when he first moved to Hatfield toward the end of 1996, he was disabled due to a back injury (Tr. 218-220). He testified that he was unable to work from 1996 to 1999 (Tr. 220). He testified that he slowly began to improve after surgery in 1999, and that he returned to work in 2003 (Tr. 220-221). He testified that he and his wife "separated" toward the end of 2003, but that they still lived in the same house (Tr. 222). He testified that he had heart trouble at the end of 2003, but that he recovered and was working "full steam" in 2004 (Tr. 222-223).

Mr. Miller testified that his divorce was final in the middle of 2005 (Tr. 233). He testified that his wife did not immediately move out, and that she stayed in the house another six months (Tr. 233). He testified that E.M. visited on the weekend of January 21, 2006 (Tr. 234-235). He testified that his father and Don Shenburger arrived at about 8:00 p.m., and that the next day they worked all day building fence (Tr. 235-236). He testified that E.M. and a friend arrived on Saturday morning, and that he did not see them all day, except perhaps at lunch time (Tr. 237). He testified that the next day, the men worked again, and that he did not see E.M. and her friend (Tr. 238). He testified that after working on the fence, he slept until he had to go to work (Tr. 238).

Mr. Miller denied molesting E.M. at any time (Tr. 229, 230). He testified that it was not possible for anything to have happened in 1996 with Monte Parkhurst lying on the floor because they did not meet Mr. Parkhurst until 1999

(Tr. 229-230, 239). He denied having sex with E.M. on the weekend of January 21, 2006 (Tr. 239). He testified that he never had any sort of sexual intercourse with E.M., and that he did not put his penis between her legs in 1996 (Tr. 239).

On cross-examination, Mr. Miller admitted that it was possible he had, at some point, been alone with E.M. in the house, but he testified that he did not ever recall being alone with E.M. in the house (Tr. 246-247). Mr. Miller admitted that he had not told the deputies anything about having multiple people over at his house on the weekend of January 21 (Tr. 251-252).

The jury found Mr. Miller guilty of first-degree statutory sodomy (count 3), first-degree child molestation (count 4), deviate sexual assault (count 5), sexual misconduct (count 6), first-degree endangering the welfare of a child (count 8), and incest (count 9) (Tr. 301-302). The jury found Mr. Miller not guilty of second-degree statutory rape (count 1), sexual assault (count 2), incest (count 7), and first-degree statutory rape (count 10) (Tr. 301-302).

On June 16, 2009, the trial court sentenced Mr. Miller as follows: for first-degree statutory sodomy (count 3), fifty years; for first-degree child molestation (count 4), ten years; for deviate sexual assault (count 5), seven years; for sexual misconduct (count 6), four years; for first-degree endangering the welfare of a child (count 8), five years; and for incest (count 9), four years (L.F. 118-120; Supp.Tr. 79). On June 25, 2009, Mr. Miller filed his notice of appeal (Tr. 123).

On June 21, 2011, the Court of Appeals, Western District, reversed Mr.

Miller's conviction for first-degree child molestation (count 4) for lack of sufficient evidence. The Court of Appeals affirmed the remaining convictions and sentences.

On December 6, 2011, this Court granted Mr. Miller's application for transfer.

ARGUMENT

I.

The trial court did not err in overruling Mr. Miller's motion for judgment of acquittal as to counts 3, 5, 6 and 8. (Responds to Points I, III, and IV of Mr. Miller's brief.)

In points I, III, and IV, Mr. Miller challenges the sufficiency of the evidence to support his convictions on counts 3, 5, 6, and 8 (App.Sub.Br. 33, 48, 52). For the reasons that follow, the evidence was sufficient to support Mr. Miller's convictions for first-degree statutory sodomy (count 3), deviate sexual assault (count 5), sexual misconduct (count 6), and first-degree endangering the welfare of a child (count 8).

A. The standard of review

Review is limited to determining whether there was sufficient evidence from which a rational finder of fact could have found the defendant guilty beyond a reasonable doubt. *State v. Chaney*, 967 S.W.2d 47, 52 (Mo. banc 1998). The reviewing court accepts as true all of the evidence favorable to the state, including all favorable inferences drawn from the evidence, and disregards all evidence and inferences to the contrary. *Id.* "When reviewing the sufficiency of evidence supporting a criminal conviction, the Court does not act as a ' "super juror" with veto powers,' *State v. Grim*, 854 S.W.2d 403, 414 (Mo. banc 1993), but gives great deference to the trier of fact." *Id.*

B. The evidence was sufficient

1. Count 3 (first-degree statutory sodomy) and count 5 (deviate sexual assault)

In his first point, Mr. Miller asserts that, although there was evidence that he inserted his finger into E.M.'s vagina when E.M. was seven years old (or between December 3, 1998, and December 3, 1999), there was no evidence that he did so between December 3, 2004, and December 3, 2005 (App.Sub.Br. 37). Mr. Miller further observes that count 3 (first-degree statutory sodomy) and count 5 (deviate sexual assault) both alleged that he inserted his finger into E.M.'s vagina between December 3, 2004, and December 3, 2005 (*see* L.F. 75, 78). Thus, he asserts that the lack of evidence of digital penetration of E.M.'s vagina during that specific time period requires reversal on counts 3 and 5 (App.Sub.Br. 36-42).

Mr. Miller's argument is without merit. There was evidence that he inserted his finger into the victim's vagina when she was seven years old (Tr. 37). Evidence that Mr. Miller inserted his finger into the victim's vagina (along with the victim's age and the lack of consent) was the material conduct that the state had to prove to support Mr. Miller's convictions for statutory sodomy in the first degree and deviate sexual assault. *See* §§ 566.062 and 566.070, RSMo 2000. The exact timing of the offenses was not an element of either offense.

" 'Defendant's argument is fundamentally flawed because it ignores the well-settled law of this state that, in sex offense cases, time is not of the

essence.' " *State v. Bunch*, 289 S.W.3d 701, 703 (Mo.App. S.D. 2009) (quoting *State v. Carney*, 195 S.W.3d 570, 571 (Mo.App. S.D. 2006)). Indeed, this principle is often cited and applied, and it has long been the law in Missouri. *See State v. Celis-Garcia*, 344 S.W.3d 150, 154 n. 4 (Mo. banc 2011) ("Because time is not of the essence in a statutory sodomy case, such a change does not impact the Court's decision."); *State v. Palmer*, 306 S.W.2d 441 (Mo. 1957) ("Time is not of the essence of the offense [rape by carnal and unlawful knowledge of a female child under the age of sixteen years] of which defendant was charged and convicted."); *State v. Bowers*, 29 S.W.2d 58, 59 (Mo. 1930) ("Time is not the essence of the crime of rape."); *State v. Belknap*, 221 S.W. 39, 44 (Mo. 1920) ("Time was not of the essence of this offense [statutory rape on a female child of the age of nine years]"); *State v. Cannafax*, 344 S.W.3d 279, 287 (Mo.App. S.D. 2011); *State v. Sprinkle*, 122 S.W.3d 652, 659 (Mo.App. W.D. 2003); *State v. Sexton*, 929 S.W.2d 909, 917 (Mo.App. W.D. 1996); *State v. Ellis*, 710 S.W.2d 378, 383-384 (Mo.App. S.D. 1986).[3]

[3] Mr. Miller's reliance on cases like *State v. Bisans*, 104 S.W.3d 805 (Mo.App. W.D. 2003), *State v. Edsall*, 781 S.W.2d 561 (Mo.App. S.D. 1989), and *Cole v. Arkansas*, 333 U.S. 196 (1948), is misplaced. In those cases, where the state charged one of multiple ways of committing an offense, the state either failed to prove the charged *conduct* (*e.g.*, *Bisans*) or the conviction was upheld on appeal based on a finding that the defendant had committed conduct other than the conduct

" 'Because time is not an essential element of the crime, "the state is not confined in its evidence to the precise date stated in the information, but may prove the offense to have been committed on any day before the date of the information and within the period of limitation." ' " *State v. Bunch*, 289 S.W.3d at 703. And, here, because the victim was only seventeen years old at the time of trial (Tr. 21), the evidence of the offenses between the dates of December 3, 1998, and December 3, 1999, was well within the period of limitation.[4] *See* § 556.037, RSMo Cum. Supp. 2009 (prosecutions for sexual offenses involving a person eighteen years or younger must commence "within twenty years after the victim reaches the age of eighteen").

Mr. Miller also asserts and notes in a footnote that the evidence was also insufficient to support count 5, because there was no evidence that "the charged act of digital penetration was carried out without [E.M.'s] consent" (App.Br. 39-40 n. 1). But E.M. never testified that she gave Mr. Miller consent, and it can be reasonably inferred that the sexual conduct was without consent. The victim testified that Mr. Miller told her not to "tell," a fact that demonstrated Mr.

---

charged in the information (*e.g.*, *Cole*). *See Bisans*, 104 S.W.3d at 807-808; *Edsall*, 781 S.W.2d at 564-565; *Cole*, 333 U.S. at 197-201.

[4] The definitions of the two offenses were the same during both time periods. *See* §§ 566.062 and 566.070, RSMo 1994, and §§ 566.062 and 566.070, RSMo 2000.

Miller's consciousness of guilt (Tr. 35). Additionally, the victim testified that Mr. Miller "made" her engage in the acts of sexual abuse that were perpetrated upon her (Tr. 37). Moreover, when Mr. Miller first tried to have sexual intercourse with the victim when she was six or seven years old, the victim told him "no" (Tr. 38). Given this testimony, rational jurors could have concluded that Mr. Miller's sexual activities were not consensual, and that he inserted his finger in E.M.'s vagina without her consent.

Additionally, any implicit assent by E.M. did not constitute consent. Under § 556.061.(5), "Assent does not constitute consent if . . . It is given by a person who by reason of youth . . . is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense." Here, the victim was seven years old when Mr. Miller subjected her to sexual contact by inserting his finger into her vagina. She was not capable of consent.

2. Count 6 (sexual misconduct involving a child)

In his third point, Mr. Miller asserts that the evidence was insufficient to support his conviction on count 6, sexual misconduct involving a child (App.Sub.Br. 48). As charged, the offense of sexual misconduct involving a child required the state to prove that Mr. Miller "knowingly exposed his genitals" to E.M., who was less than fourteen years old, for the purpose of arousing or gratifying the sexual desire of any person (L.F. 14). *See* § 566.083.1.(2), RSMo

2000. Mr. Miller asserts that "the record is devoid of any evidence, presented through the testimony of E.M.M., that she saw [his] penis during the incident at the farmhouse that occurred when E.M.M. was six years old" (App.Sub.Br. 49).

But Mr. Miller is incorrect. E.M.'s testimony gave rise to a fair inference that she saw Mr. Miller's penis. She testified that she turned her head and saw that Mr. Miller had gotten behind her on the loveseat (Tr. 34). She testified that after he pulled down her shorts, Mr. Miller pulled down his shorts and "stuck his penis in between [her] legs" (Tr. 34). A rational finder of fact could have concluded that this testimony was a recitation of what E.M. actually saw, and, thus, that E.M. saw Mr. Miller's penis when he pulled down his shorts and "stuck his penis" between E.M.'s legs.

Additionally, there was other evidence that Mr. Miller exposed his penis to E.M. when she was six years old. E.M. testified that when she was six years old, Mr. Miller made her put his penis in her mouth and perform oral sex on numerous occasions (Tr. 37-38). Rational jurors could have concluded that Mr. Miller exposed his penis to the victim on those occasions, and that the victim saw his penis as he forced her to put it in her mouth.

3. Count 8 (first-degree endangering the welfare of a child)

In his fourth point, Mr. Miller asserts that the evidence was insufficient to support his conviction on count 8, endangering the welfare of a child in the first degree (App.Br. 49). As charged in this case, the state had to prove that the

defendant engaged in "sexual conduct" with E.M. between December 3, 2004, and December 3, 2005; that the sexual conduct was "sexual contact;" that E.M. was less then seventeen years old; that Mr. Miller was E.M.'s parent; and that Mr. Miller acted knowingly (*see* L.F. 82). § 568.045.1(2), RSMo Cum. Supp. 2005.

In arguing that the evidence was insufficient, Mr. Miller acknowledges that there was evidence that he engaged in "sexual intercourse" and "deviate sexual intercourse" with E.M. during the charged time period, but he argues that because his conduct satisfied the definition of those terms, it did not satisfy the definition of "sexual contact" (App.Br. 51-52). He asserts that, given the different statutory definitions, "It is clear . . . that 'sexual contact' is a subset of the broader category of 'sexual conduct' that is limited to other sexual acts other than sexual intercourse or deviate sexual intercourse" (App.Br. 52).

But the definition of "sexual contact" is very broad, and it includes the acts of sexual intercourse and anal intercourse. During the charged time period, "sexual contact" was defined as "any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, or such touching through the clothing, for the purpose of arousing or gratifying sexual desire of any person." § 566.010.(3), RSMo Cum. Supp. 2005. The act of "sexual intercourse" involves the "penetration" (and, thus, "touching") of the female sex organ with the male sex organ. *See* § 566.010.1.(4), RSMo Cum. Supp. 2005. Thus, there is no way to engage in sexual intercourse

without also engaging in sexual contact. (In making this assertion, Respondent is only referring to the *conduct* of the actor; "sexual contact" has an additional *mens rea* (to arouse or gratify) that is not part of the definition of "sexual intercourse.")

Consequently, because there was evidence that Mr. Miller engaged in sexual intercourse with E.M. during the charged time period, there was plainly sufficient evidence to conclude that he had sexual contact with E.M. Likewise, because there was evidence that Mr. Miller engaged in anal intercourse with the victim, there was plainly evidence that Mr. Miller touched E.M. with his genitals and thereby subjected the victim to sexual contact.

Mr. Miller points out that the definition of "sexual contact" does not specifically incorporate the definitions of "sexual intercourse" or "deviate sexual intercourse," and, thus, he argues that the legislature clearly intended to exclude the specific conduct set forth in the latter two definitions from the definition of "sexual contact" (App.Br. 52). But Mr. Miller's interpretation of the statute is contrary to the plain language of the statute. (And because the language of the statute is not ambiguous, there is no need to apply rules of statutory construction.) The plain language of the statute reveals that "sexual contact" is a category of conduct that encompasses a broad range of sexual activity. The definition of "sexual contact" twice employs the phrase "any touching," making plain that any touching of the genitals (including penetration of the female sex organ with the male sex organ) meets the definition of sexual contact.

The relevant principle here is that "if two criminal statutes proscribe the same behavior, the prosecutor has the discretion of charging the defendant under either statute." *State v. Pembleton*, 978 S.W.2d 352, 355-356 (Mo.App. E.D. 1998). Here, in selecting which type of "sexual conduct" to charge, the prosecutor was free to select any type that was supported by Mr. Miller's conduct.

In short, there was sufficient evidence that Mr. Miller subjected E.M. to sexual contact when she was thirteen years old (between December 3, 2004, and December 3, 2005). E.M. testified that Mr. Miller repeatedly engaged in sexual intercourse with her during that time period, and that Mr. Miller occasionally (but "rarely") engaged in anal intercourse with her (Tr. 41-43). Any one of these acts constituted sexual contact. Points I, III, and IV should be denied.

II.

There was sufficient evidence to support a conviction on count 4 (first-degree child molestation), but because the trial court plainly erred in submitting Instruction No. 8 (the verdict director for count 4), the conviction on that count should be reversed and remanded for a new trial. (Responds to Points II and V of Mr. Miller's brief.)

In his second point, Mr. Miller asserts that the evidence was insufficient to support count 4, first-degree child molestation (App.Sub.Br. 43). He asserts that there was no evidence that he touched the victim's genitals through her clothing (as submitted in Instruction No. 8) between December 3, 1997, and December 3, 1998 (App.Sub.Br. 45). Mr. Miller also notes that, during the charged time period, the term "sexual contact" was not defined to include touching through the clothing (App.Sub.Br. 47 n. 2).

In his fifth point, Mr. Miller raises a related claim and asserts that the trial court plainly erred in submitting Instruction No. 8, the verdict director for count 4 (App.Sub.Br. 57-58). Instruction No. 8 alleged that Mr. Miller touched E.M.'s genitals "through the clothing" (L.F. 77). But Mr. Miller points out that the definition of "sexual contact" during the charged time period of December 3, 1997, to December 3, 1998, did not include "touching through the clothing" (App.Sub.Br. 58-59). Thus, he asserts that he was erroneously convicted of a crime that did not exist during the charged time period (App.Sub.Br. 57-62).

A. The standard of review

Instructional error constitutes plain error when it is clear the trial court so misdirected or failed to instruct the jury that it is apparent the error affected the verdict. *State v. Beeler*, 12 S.W.3d 294, 300 (Mo. banc 2000).

B. Instruction No. 8 failed to properly instruct the jury

Mr. Miller is correct in his assertion that Instruction No. 8 erroneously directed the jury's verdict, but he is incorrect in his assertion that there was insufficient evidence to support a charge of child molestation during the charged time period. In count 4, Mr. Miller was charged with committing the offense of child molestation in the first degree between the dates of December 3, 1997, and December 3, 1998 (L.F. 13).

During the charged time period, child molestation in the first degree was defined as follows: "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." § 566.067, RSMo 1994. At that time, "sexual contact" meant "any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, for the purpose of arousing or gratifying sexual desire or any person[.]" § 566.010.(3), RSMo 1994.

As is evident, during the charged time period, sexual contact did not include touching through the clothing. That specific manner of engaging in sexual contact was not added to the definition of sexual contact until 2002. *See*

§ 566.010.(3), RSMo Cum. Supp. 2002. Accordingly, it was plain error to submit that means of touching E.M. in Instruction No. 8 (*see* L.F. 77).

But while there was plainly instructional error in Instruction No. 8 (and count 4 should be reversed in light of the error), there was sufficient evidence presented that Mr. Miller subjected E.M. to sexual contact during the charged time period. *See generally State v. Johnson*, 316 S.W.3d 491, 498 (Mo.App. W.D. 2010) ("The question of sufficiency arises before the case is put to the jury and is really an issue of whether the case should have been submitted to the jury.") (quoting *State v. Beggs*, 186 S.W.3d 306, 312 (Mo.App. W.D. 2005)).

It is, of course, true that when a crime may be committed in one of various ways, the state must present sufficient evidence of the variant that the state elects to charge. Here, the information did not identify the specific type of sexual contact that Mr. Miller committed. But while that omission might have justified a request for a bill of particulars, it did not render the evidence presented at trial insufficient to support a finding that Mr. Miller subjected E.M. to "sexual contact" during the charged time period. Thus, the question that should be resolved is whether the trial court erred in concluding that there was sufficient evidence to submit the offense of first-degree child molestation to the jury.

And, based on the evidence before it, the trial court did not. If the state had properly instructed the jury that Mr. Miller touched the victim's genitals, the evidence would have fairly supported the inference that Mr. Miller touched the

victim's genitals with his penis. The victim testified that when she was six or seven years old, Mr. Miller attempted to engage in sexual intercourse with her (Tr. 38). The victim testified that it "hurt," and she said that Mr. Miller attempted it multiple times (Tr. 38). Additionally, during that same time period, beginning when E.M. was six years old, Mr. Miller forced the victim to engage in oral sex, and he put his penis in her mouth (Tr. 37-38). The victim testified that from the age of six to the age of twelve, Mr. Miller engaged in "oral sex or whatever [Mr. Miller] wanted," including anal intercourse (Tr. 42-43).

Based on this testimony, and given the numerous instances of sexual activity between Mr. Miller and E.M., there was sufficient evidence to support a finding that Mr. Miller attempted to engage in sexual intercourse with the victim when she was six years old, and that in so doing, he touched her genitals with his penis. In addition, there was sufficient evidence to support the conclusion that Mr. Miller touched E.M. with his penis. Indeed, in attempting to penetrate her vagina with his penis, he necessarily would have touched E.M. with his penis. Moreover, when he made E.M. put his penis in her mouth, he touched E.M. with his penis. And, finally, when he engaged in anal intercourse with E.M., he touched her with his penis.

Finally, the first instance of sexual activity that E.M. described involved Mr. Miller touching E.M. with his penis. E.M. testified that Mr. Miller "pulled down his pants" and "stuck his penis between [E.M.'s] legs" (Tr. 34). Mr. Miller

"slowly moved [his penis] back and forth" (Tr. 35). This testimony also could have supported the conclusion that Mr. Miller touched E.M.'s genitals with his penis. E.M. testified that Mr. Miller pulled down her shorts, and when she said that he put his "penis between [her] legs," rational jurors could have understood this to mean that Mr. Miller put his penis in her crotch and on her genitals when he moved his penis back and forth. *See State v. Ray*, 852 S.W.2d 165, 169 (Mo.App. S.D. 1993) (victim's testimony that the defendant "licked her 'in the private' between her legs" was sufficient to prove that the defendant licked the victim's genitals). *See generally State v. Loazia*, 829 S.W.2d 558, 562 (Mo.App. E.D. 1992) (an example of the phrase "between the legs" being used in place of a direct reference to genitals). In short, there was ample evidence that Mr. Miller subjected E.M. to sexual contact (either by touching her genitals or touching her with his genitals) between the charged dates of December 3, 1997, and December 3, 1998.

But while the evidence would have been sufficient to support a proper submission on count 4, Instruction No. 8 alleged that Mr. Miller touched E.M.'s genitals "through the clothing" (L.F. 77). As outlined above, such touching was not conduct that fell within the applicable definition of sexual contact during the charged time period. Thus, while there *was* sufficient evidence that Mr. Miller subjected the victim to "sexual contact" as that term was defined in the relevant time period, the verdict director led the jury to convict Mr. Miller without a

finding that Mr. Miller actually committed any of the various types of conduct that could support the conviction. And inasmuch as a defendant has a right to have every fact found beyond a reasonable doubt by the jury, count 4 should be reversed and remanded for a new trial, where the jury can be properly instructed on the elements of the offense. Point II should be denied, but Point V should be granted, and count 4 should be reversed and remanded for a new trial.

III.

The trial court did not plainly err in failing to declare a mistrial *sua sponte* after the state elicited (and commented on) evidence that Mr. Miller had failed to mention certain facts about the weekend of January 21, 2006, when he talked to the police after receiving the *Miranda* warnings. (Responds to Point VI of Mr. Miller's brief.)

In his sixth point, relying on *Doyle v. Ohio*, 426 U.S. 610 (1976), Mr. Miller asserts that the state improperly commented on his post-arrest, post-*Miranda* silence when the state presented, and commented on, evidence that Mr. Miller did not "volunteer an exculpatory explanation for some of the charges after he had received Miranda warnings" (App.Sub.Br. 64).

A. This Court should decline to grant plain error review of this claim

Mr. Miller did not object to the prosecutor's questions or comments as an improper comment on post-*Miranda* silence (Tr. 109-110, 251-252, 286-287). Mr. Miller's motion for new trial also failed to assert this claim (L.F. 110-117).

"In order to preserve an error in the admission of evidence at trial, it is necessary to object to the evidence at trial and to assert the error in the motion for new trial." *State v. Campbell*, 147 S.W.3d 195, 205 (Mo.App. S.D. 2004). When an error is not preserved for appellate review, review, if any, is limited to plain error review. *See State v. Cummings*, 134 S.W.3d 94, 104 (Mo.App. S.D. 2004).

"Historically, Missouri courts reject invitations to criticize trial courts for

declining to *sua sponte* take action on behalf of a party during witness examinations." *State v. D.W.N.*, 290 S.W.3d 814, 819 (Mo.App. W.D. 2009). "Uninvited interference by the trial judge in trial proceedings is generally discouraged, as it risks injecting the judge into the role of participant and invites trial error." *State v. Roper*, 136 S.W.3d 891, 902 (Mo.App. W.D. 2004); *see State v. Drewel*, 835 S.W.2d 494, 498 (Mo.App. E.D. 1992) ("We do not expect trial judges to assist counsel in the trial of a lawsuit . . . . They preside to judge a lawsuit. *Sua sponte* action should be exercised only in exceptional circumstances.").

The *sua sponte* declaration of a mistrial can result in irremediable prejudice for both the defendant and the state. Except when there is "manifest necessity," the Double Jeopardy Clause bars retrial if a judge grants a mistrial without the defendant's request or consent. *State v. Tolliver*, 839 S.W.2d 296, 299 (Mo. banc 1992). Moreover, when there is no request, the defendant's "valued right" to have the trial completed by a particular tribunal is implicated. *Id.*

Here, there was no manifest necessity to declare a mistrial, and the drastic remedy of declaring a mistrial would have deprived Mr. Miller of his right to have the case decided by a jury that was favorably inclined toward his side. Indeed, had the trial court declared a mistrial in this case, Mr. Miller would not have been acquitted on counts 1, 2, 7, and 10 by this particular jury, and he might not have had such good fortune with a subsequent jury. In short, an uninvited declaration of mistrial could have derailed the defense strategy and increased the

possibility of error. And absent "manifest necessity" it would have barred the state on double-jeopardy grounds from seeking a retrial. Thus, this Court should decline to grant plain error review.

B. The standard of review

Plain errors affecting substantial rights may be considered in the discretion of the court if it appears on the face of the record that the alleged error so substantially affected defendant's rights that a miscarriage of justice or manifest injustice would occur if the error were not corrected. *State v. Mayes*, 63 S.W.3d 615, 624 (Mo. banc 2001). Whether manifest injustice occurred depends on the facts and circumstances of the particular case, and the defendant bears the burden of establishing manifest injustice amounting to plain error. *Id.*

C. The state did not commit repeated *Doyle* violations

The first alleged *Doyle* violation was not a *Doyle* violation at all. During the direct examination of Deputy Rimmer, the prosecutor asked the following:

Q. What were you doing while Deputy Eckerson is searching the residence?

A. I was sitting with Mr. Miller at his kitchen table.

Q. At any point did you read him his Miranda rights?

A. Yes, I did.

. . .

Q. And did he acknowledge that he understood his rights?

A. Yes, he did.

Q. How did he do that?

A. Verbally by telling me he understood.

Q. And at that time did you have him fill out the Miranda form that acknowledges waiver of rights?

A. I don't believe I did at that time.

Q. At that time, okay. But he told you he understood his rights?

A. Yes, sir.

Q. And did he waive those rights?

A. No, sir.

Q. Did you speak to him at all about the investigation?

A. I mostly spoke to him about the order of protection.

(Tr. 109-110).

This series of questions showed merely that Mr. Miller did not fill out the *Miranda* form and formally waive his rights while at his house. When Deputy Rimmer said that Mr. Miller did not waive his rights, he was referring back to his previous testimony that he did not think that Mr. Miller filled out the form that "acknowledges waiver of rights" (Tr. 109-110). There was no suggestion that Mr. Miller invoked his right to remain silent or requested counsel; to the contrary, Deputy Rimmer testified that he "mostly spoke to [Mr. Miller] about the order of protection" (Tr. 110). In other words, Deputy Rimmer's testimony did not refer to

any post-*Miranda* silence; rather, it merely referred to the fact that Deputy Rimmer did not have Mr. Miller fill out the waiver form at that time. It was not evident, plain error for the trial court to allow this testimony without resorting to *sua sponte* remedial action.

In fact, it immediately became apparent that Mr. Miller had not invoked his right to remain silent, because Deputy Rimmer testified that Mr. Miller again received the *Miranda* warnings at the sheriff's office, that Mr. Miller signed the *Miranda* form and waived his rights, and that Mr. Miller talked to the deputies about the allegations of sexual abuse (Tr. 111). Mr. Miller told the deputies that he thought "his ex-wife had put [E.M.] up to it" (Tr. 111).

Finally, even if the state's questions about the initial lack of a waiver could be viewed as a *Doyle* violation, Mr. Miller cannot demonstrate manifest injustice because defense counsel elicited the same information on cross-examination of Deputy Rimmer:

Q. [Mr. Miller] invited you in his house?

A. Correct.

. . .

Q. Sat down and talked to you?

A. Yes, sir.

Q. He signed a Miranda when you advised him of that, isn't that right?

A. Not at the house.

Q. But at the house he told you he'd talk to you, isn't that right?

A. Yes, sir.

Q. You took him to the police department, right?

A. To the sheriff's department, yes.

Q. And he talked to you?

A. Yes, sir.

Q. And he denied doing this, didn't he?

A. Yes, sir.

(Tr. 112-113). It is well settled that "a defendant cannot be prejudiced by allegedly inadmissible evidence if he offers evidence to the same effect." *State v. Myers*, 997 S.W.2d 26, 35 (Mo.App. S.D. 1999).

The remaining alleged *Doyle* violations are related. First, on cross-examination of Mr. Miller, the prosecutor asked the following questions:

Q. You testified that you were busy working January 21st and 22nd with all these people, all these witnesses on the farm with you and isn't it true that police officers came and spoke to you approximately January 30th or 31st?

A. Uh-huh.

Q. At that time did you give those police officers the name of all of these witnesses who would have been able to vouch for the fact

that you were working all weekend?

A. They never asked me who was there or what was going on or anything.

. . .

Q. And at the time you were interviewed by the police back there on January 30th or January 31st of 2006 you understood that these were very serious charges, correct?

A. Yes.

Q. And wouldn't you agree that that would have been the time for you to speak up and say hey, I couldn't have done anything weekend. I had people with me all weekend. I was working.

A. I had mentioned something to the police, not of that issue but basically I was told by the police officers that they're just here to deliver papers, and that's what they told me.

Q. Well, you were mirandized not once but twice, correct?

A. I remember one time.

Q. You were taken over to the law enforcement center and they sat down and talked to you, correct?

A. Yes.

Q. And you had an opportunity to talk to those police officers and say and tell them your side of the story, correct?

A. Yes.

Q. But you chose not to say hey, I couldn't have done that that weekend, I was doing this, I was working putting in fence and I've got lots of witnesses. You didn't tell the police that at that time, did you?

A. No, I didn't.

(Tr. 250-252).

Based on this testimony, the prosecutor argued:

Well, I would suggest to you that in 2006, in January, the end of January, 2006 when the police knocked on his door and sat down and talked to him he understood the nature of the charges and if he was – had an alibi of something to tell the police, a reasonable person would say now what day are you talking about? And if he truly had an alibi at that time where all these people were at his house on the 21st and 22nd he would have told the police in 2006. But here we are three years later and that's when it's come out. It didn't come out when he had the opportunity to tell the police and clear himself three years ago. He didn't say no, I had people there. You can check with these people. Here are their names, you call them and they'll tell you I was out working these fences all that day. But he didn't do that.

[DEFENSE COUNSEL]: Your Honor, objection. He testified that they didn't ask him about those days.

(Tr. 286-287).

In *Doyle v. Ohio*, the Court held that after a person has been arrested and advised of the *Miranda* warnings, "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." 426 U.S. at 618. The Court explained that "[s]ilence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights." *Id.* at 617. "Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested." *Id.*

Here, however, Mr. Miller did not remain silent, and he was properly impeached with his post-*Miranda* statements. In *Anderson v. Charles*, 447 U.S. 404 (1980), the Court limited the scope of *Doyle* and held that the State can use voluntary, post-*Miranda* statements to impeach a defendant's trial testimony, even if the State asks about a defendant's failure to tell the police certain details. *Id.* at 408-409. The Court reasoned that "[s]uch questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent." *Id.* at 408. The Court acknowledged that "[e]ach of two inconsistent descriptions of events may be said to involve 'silence' insofar as it omits facts included in the other version," but the

Court concluded that "*Doyle* does not require any such formalistic understanding of 'silence[.]' " *Id.* at 409.

In *State v. Prince*, 311 S.W.3d 327, 338 (Mo.App. W.D. 2010), the Court of Appeals pointed out that the rule against the admissibility of an accused's post arrest, post-*Miranda* silence does not apply if the accused chooses not to exercise his or her right to remain silent and elects, instead, to make a statement. "If the accused voluntarily speaks post-*Miranda*, he can be impeached on his statements and his selective silence." *Id.* (citing *State v. Hutchison*, 957 S.W.2d 757, 763 (Mo. banc 1997)).

Mr. Miller did not remain silent; he voluntarily talked to the deputies. He responded to the deputies' questions about the allegations, denied the allegations, and suggested that his ex-wife had put E.M. up to it. Thus, because Mr. Miller gave a statement about the alleged crimes, it was proper for the state to impeach Mr. Miller's subsequent trial testimony by pointing out that his first statement had omitted some of the critical facts that Mr. Miller had testified to on direct examination. As the prosecutor argued, it stands to reason that Mr. Miller would have mentioned the people he had at his house because the final allegation was that he had engaged in sexual intercourse with E.M. just nine or ten days before he was questioned by the police. *See generally State v. Myers*, 997 S.W.2d at 31-32 ("Where a defendant offers an explanation for his conduct under circumstances suggesting he naturally would have given the explanation earlier,

if true, his previous silence may be used for impeachment purposes if his silence was not the result of an exercise of a constitutional right.").[5]

Pointing out that certain facts are new, or that the defendant did not mention those new facts in a voluntary post-*Miranda* statement is permissible. *See State v. Antwine*, 743 S.W.2d 51, 70 (Mo. banc 1987) ("having elected to make a statement to the police, a defendant who remained 'selectively silent' may be impeached by omissions in that statement"); *United States v. Ochoa-Sanchez*, 676 F.2d 1283, 1284-1287 (9th Cir. 1982) (a prosecutor "may probe all post-arrest statements and the surrounding circumstances under which they were made, including defendant's failure to provide critical details"); *State v. Bell*, 931 A.2d 198, 207-212 (Conn. 2007) (prosecutor presented evidence of, and extensively impeached the defendant with, numerous omissions in his post-*Miranda* interrogation); *Wade v. Commonwealth*, 724 S.W.2d 207, 208-209 (Ky. 1986) (where the defendant embellished his trial testimony with new helpful facts, it was proper for the State to impeach the defendant with the fact that he had been silent about those facts in his post-*Miranda* statement).

Citing *State v. Stuart*, 456 S.W.2d 19, 22 (Mo. banc 1970), and *State v. Roth*,

[5] Although *Myers* dealt with pre-*Miranda* silence, the principle would seem to be equally applicable to post-*Miranda* selective silence, for, in either event, the defendant has not been induced to remain silent by the *Miranda* warnings.

549 S.W.2d 652, 653-655 (Mo.App. K.C.D. 1977), Mr. Miller asserts that the state's questions and comments were improper because he was never asked about that particular weekend in January (App.Sub.Br. 66-67). In *Roth*, the defendant made a statement after receiving the *Miranda* warnings, and that statement was not consistent with his subsequent self-defense testimony at trial. 549 S.W.2d at 653. The state attempted to argue the defendant's failure to give the same explanation after his arrest, but the Court concluded that the state's argument was an improper comment on the defendant's post-*Miranda* silence. *Id.* at 653-655. But the problem with *Roth* is that it was decided three years prior to *Anderson v. Charles*, which, as discussed above, held that if the defendant is not silent about the crime after the *Miranda* warnings, he can be impeached with his earlier, inconsistent statement about the crime. Thus, in that regard, *Roth* is no longer good law. Mr. Miller's reliance on *Stuart* is also misplaced because in *Stuart* the defendant was not asked any questions at all about the crime, and the defendant made no statements whatsoever. 456 S.W.2d at 22. Thus, that case involved a defendant who stood silent in the face of an accusation.

Here, by contrast, Mr. Miller did not stand silent; rather, he talked to the deputies about the allegations, he denied them, and he suggested that his ex-wife had put E.M. up to making the allegations. And, as discussed above, given the close proximity in time between the date of the final allegations and the date of the interrogation, it stands to reason that Mr. Miller would have mentioned the

impossibility of the allegations of sexual misconduct on January 21, 2006. In short, whether Mr. Miller's silence about the allegations on the weekend of January 21 was due to the lack of a good answer or the absence of specific questions by the police was properly a question for the jury to resolve.

Respondent acknowledges that the Court recently held that post-*Miranda* statements that merely constitute a "general denial" of guilt are not sufficiently "substantive" to allow impeachment of the defendant's trial testimony with the selective silence that is inherent in a general denial. *State v. Brooks*, 304 S.W.3d 130, 133 (Mo. banc 2010). But *Brooks*, too, is distinguishable from Mr. Miller's case because the defendant in *Brooks* did not make any statements about the murder he was suspected of committing, and he wholly refused to give pertinent responses. A "general denial" like the one in *Brooks*—the defendant said he had "nothing to hide" and "didn't do nothing at all"—should be distinguished from the more specific denials (and the suggestion that E.M.'s mother had put the victim up to the allegations) that occurred in Mr. Miller's case.

Additionally, respondent would note that since the Court's decision in *Brooks*, the United States Supreme Court decided *Berghuis v. Thompkins*, 130 S.Ct. 2250, 2256-57, 59-60 (2010), a case in which the Court ruled that a defendant, who "was '[l]argely' silent during the interrogation, which lasted about three hours," had not invoked his right to remain silent during that lengthy period of persistent silence. The Court rejected the defendant's claim that he had invoked

his right to remain silent, and the Court held that an invocation of the right to remain silent must be "unambiguous." *Id.* at 2260.

In analyzing the issue, the Court pointed out that "There is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously." *Id.* The Court observed: "A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that 'avoid[s] difficulties of proof and ... provide[s] guidance to officers' on how to proceed in the face of ambiguity." *Id.* The Court then pointed out that "If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression 'if they guess wrong.' " *Id.* "Treating an ambiguous or equivocal act, omission, or statement as an invocation of *Miranda* rights 'might add marginally to *Miranda*'s goal of dispelling the compulsion inherent in custodial interrogation[, b]ut as *Miranda* holds, full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process." *Id.*

While the *Berghuis* case examined an alleged *Miranda* violation, it is arguable that similar principles should be applied in the *Doyle* context, *i.e.*, that protected post-*Miranda* silence as contemplated by *Doyle* should only encompass a defendant's unequivocal silence.

Finally, even if the prosecutor's questions and argument did cross the

Doyle line, Mr. Miller cannot demonstrate manifest injustice. The prosecutor's questions and argument were designed to show that Mr. Miller had recently fabricated his defense to the allegations in counts 1, 2, and 7 (all of which were alleged to have occurred on January 21 and January 22, 2006) (*see* L.F. 73, 74, 81). But the jury found Mr. Miller not guilty on those counts. Thus, it is plain that the jury was not affected by this alleged error, and that Mr. Miller did not suffer a manifest injustice from the prosecutor's allegedly erroneous questions and argument. Point VI should be denied.

IV.

The trial court did not abuse its discretion in excluding the testimony of Donald Shenburger. (Responds to Point VII of Mr. Miller's brief.)

In his seventh point, Mr. Miller asserts that the trial court abused its discretion in excluding the testimony of Donald Shenburger (App.Sub.Br. 70).

A. The standard of 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. Hopper*, 315 S.W.3d 361, 366 (Mo.App. S.D. 2010) (citing *State v. Walkup*, 220 S.W.3d 748, 757 (Mo. banc 2007)). But the sanction is "used sparingly against a defendant in a criminal case because of the trial court's duty to ensure a fair trial by allowing the defendant to put on a defense." *Id.*

"When it comes to applying evidentiary principles or rules, the erroneous exclusion of evidence in a criminal case creates a rebuttable presumption of prejudice." *Id.* at 367. "The state may rebut this presumption by proving that the error was harmless beyond a reasonable doubt." *Id.*

"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." *Id.* This Court "will reverse where it can be shown that the trial court's action has resulted in fundamental unfairness to the defendant." *Id.*

B. The trial court did not abuse its discretion because Mr. Shenburger's testimony was merely cumulative to the testimony of Mr. Miller and Christopher Miller

After the state had completed its case-in-chief, the defense sought to endorse Donald Shenburger (Tr. 130). The prosecutor objected to the late endorsement and argued that the state had not been made aware of the witness or given any means of contacting the witness (Tr. 131). The prosecutor requested that Mr. Shenburger not be allowed to testify (Tr. 131).

Defense argued that Mr. Shenburger was not a surprise witness, and he stated that he thought he had endorsed Mr. Shenburger earlier (Tr. 131-133). Defense counsel then outlined Mr. Shenburger's testimony, and, after further argument by the parties, counsel was allowed to make an offer of proof (Tr. 133-153). Ultimately, due to the lateness of the endorsement, the trial court ruled that it would not permit Mr. Shenburger to testify (Tr. 153).

Here, while a less drastic remedy might have been sufficient, the trial court did not abuse its discretion because Mr. Shenburger's testimony was merely cumulative to other evidence presented by the defense. As the offer of proof revealed, Mr. Shenburger was prepared to testify that he (along with Mr. Miller, Christopher Miller, and others) repaired fences at Mr. Miller's home on the weekend of January 21, 2006 (Tr. 140-146). His testimony would have established that the men worked all day fixing fences, that E.M. and her friend were not with

the men, and that Mr. Miller slept in a chair in the living room (Tr. 140-146). In short, his testimony tended to prove that Mr. Miller could not have engaged in sexual intercourse with E.M. on the weekend of January 21, 2006.

But such testimony was merely cumulative. Both Mr. Miller and Christopher Miller offered the same testimony at trial (Tr. 176-184, 235-238). Thus, as a matter of law, the trial court did not abuse its discretion.

C. Any error in excluding Mr. Shenburger's testimony was harmless beyond a reasonable doubt

Because Mr. Shenburger's testimony was merely cumulative, any error in excluding it was harmless beyond a reasonable doubt. In fact, it is plainly apparent that the trial court's ruling was not fundamentally unfair to Mr. Miller. The jury acquitted Mr. Miller of all of the crimes that were alleged to have occurred on the weekend of January 21, 2006 (Tr. 301-302). Thus, because Mr. Shenburger's testimony only provided a defense as to those counts, any error in excluding his testimony was harmless beyond a reasonable doubt.

Mr. Miller points out that Mr. Shenburger "provided the only additional testimony from a non-relative undermining E.M.M.'s credibility" (App.Sub.Br. 73). But that is not entirely correct, as Mr. Miller also sought to undermine E.M.'s credibility with the testimony of the pediatric nurse who examined E.M. after the allegations came to light (Tr. 195-208).

But, in any event, there is no reason to conclude that further testimony

undermining E.M.'s account of the weekend of January 21, 2006, would have aided Mr. Miller. In light of the not-guilty verdicts on counts 1, 2, and 7, the jury was plainly convinced that E.M.'s testimony could not be trusted as it pertained to the weekend of January 21, 2006. Nevertheless, the jury still credited E.M.'s other allegations of sexual misconduct. Consequently, because Mr. Shenburger could only further impeach E.M.'s account of the weekend of January 21, any error in excluding his testimony was harmless beyond a reasonable doubt. Point VII should be denied.

V.

The trial court did not abuse its discretion in permitting the state to present evidence of Mr. Miller's abusive acts in the home, and the trial court did not plainly err in failing to intervene *sua sponte* when the prosecutor asked Mr. Miller whether he was receiving disability checks even though he was able to work. (Responds to Point VIII of Mr. Miller's brief.)

In his eighth point, Mr. Miller asserts that the trial court erred in permitting the state to present evidence of uncharged crimes (App.Sub.Br. 75). He first asserts that it was error to admit evidence that Mr. Miller physically abused members of his household (App.Sub.Br. 75-76). He next asserts that the prosecutor improperly suggested that Mr. Miller "committed some sort of fraud against the federal government by receiving benefits to which he was not legally entitled" (App.Sub.Br. 76).

A. Preservation and the standard of review

Mr. Miller objected to the admission of evidence about physical abuse he committed against members of his household (Tr. 47). He also included this claim in his motion for new trial (L.F. 110-112). Thus, this part of Mr. Miller's claim was preserved for appellate review.

With regard to evidence about the disability checks, aside from an objection that one of the prosecutor's questions was argumentative, Mr. Miller did not object (Tr. 248-250). Mr. Miller did not include any claim in his motion or

new trial regarding the disability checks (L.F. 110-117). Thus, this part of Mr. Miller's claim was not preserved.

For the part of Mr. Miller's claim that was preserved for review, the admissibility of evidence is reviewed for abuse of discretion. *State v. Nabors*, 267 S.W.3d 789, 793 (Mo. App. E.D. 2008). For the part of Mr. Miller's claim that was no preserved, review is for plain error. *See State v. Washington*, 260 S.W.3d 875, 879 (Mo. App. E.D. 2008).

B. Evidence of Mr. Miller's abusive acts against other members of the household was admissible to explain the victim's fear of Mr. Miller and her consequent failure to disclose the sexual abuse

On direct examination, E.M. testified that she didn't tell anyone what had happened when the sexual abuse started because she "was too afraid" (Tr. 35). E.M. was afraid because she knew that Mr. Miller had been hiding the fact that he had been "hitting [her] mom" (Tr. 35-36). E.M. testified that she saw Mr. Miller hit her mother on "many occasions" (Tr. 46-47, 50-51). E.M. occasionally saw Mr. Miller hit her brothers (Tr. 50).

In admitting this testimony, the trial court stated that it would allow the testimony because E.M.'s fear of Mr. Miller was relevant to explain "why she didn't report" what was happening (Tr. 47). The trial court limited the victim's testimony to instances of abuse that she "saw and observed" (Tr. 49; *see* Tr. 4-5). The trial court's ruling was not an abuse of discretion.

Missouri courts have recognized that, when prior bad acts have an impact on the timing of disclosure, the evidence of such prior bad acts may be relevant and admissible. Prior bad acts may be "admissible to explain that a witness's fear of the defendant led to a delay in reporting a matter to the police." *State v. Hitchcock*, 329 S.W.3d 741, 750 (Mo.App. S.D.2011). In *State v. Leitner*, 945 S.W.2d 565 (Mo. App. S.D. 1997), the Court held that evidence of a prior assault against a witness was relevant to explain the reasons for that witness's initial statement to the police that the victim's injuries were accidental. *Id.* at 568, 575. Likewise, in *State v. Still*, 216 S.W.3d 261 (Mo. App. S.D. 2007), the Court held that, in a child abuse case, evidence that the defendant had assaulted the mother of the victims several years prior to the offense was relevant to explain the mother's failure to initially cooperate in the police investigation. *Id.* at 268-270. Similarly, in *State v. Ficke*, 892 S.W.2d 814 (Mo. App. S.D. 1995), the Court held that evidence of acts of vandalism committed by a defendant against the victim's family was relevant to the issue of whether a delay in reporting an alleged sodomy was the product of fear of the defendant. *Id.* at 817. And, finally, in *State v. Davenport*, 839 S.W.2d 723 (Mo. App. S.D. 1992), the Court noted, in a rape trial, that prior acts of violence by a defendant against persons other than the victim of which the victim was aware are relevant to the issue of whether a delay in reporting was attributable to the victim's fear of the defendant. *Id.* at 728.

In short, while evidence of uncharged crimes is generally not admissible to

prove the propensity of a defendant to commit the crime charged, *State v. Haslett*, 283 S.W.3d 769, 781 (Mo. App. S.D. 2009), such evidence is admissible if it is legally and logically relevant. *State v. Madison*, 302 S.W.3d 763, 768 (Mo. App. S.D. 2010). And, here, Mr. Miller's acts of violence were relevant to explain why the victim would give in to Mr. Miller's demands and remain silent for so many years.

This was a legitimate issue in the case, as attacking E.M.'s credibility was a key component of the defense strategy. In opening statement, defense counsel told the jury that E.M. had made up "a story" because she was upset about her parents' divorce (Tr. 18). Defense counsel then argued that it was incredible to believe that the sexual abuse could have continued for eight years, stating: "you're going to hear that this happened over an eight-year period. Supposedly it happened from the time she was six years old until the time she's 14" (Tr. 19).

In closing argument, defense counsel again argued that E.M. was upset by the divorce and "ma[de] up a story" (Tr. 269). Counsel repeatedly argued that the victim's story was not credible because the sexual abuse "supposedly" occurred for eight years without detection (Tr. 272, 274-275, 277-278, 280).

At least implicit in these arguments regarding lack of detection was the suggestion that E.M. was not credible because she did not divulge what was happening (her lack of disclosure was one reason the abuse was not detected earlier). But, of course, there was another possible explanation for the victim's

reticence—her fear of Mr. Miller. Accordingly, it was within the trial court's discretion to allow the jury to consider whether the real reason behind the victim's silence (and Mr. Miller's ability to avoid detection) was the dominion Mr. Miller exercised over his family through physical violence and the threat of physical violence.

C. Mr. Miller cannot claim manifest injustice from evidence related to his disability checks because he testified on direct examination about receiving the checks after he was no longer disabled

Mr. Miller next argues that the state improperly suggested that he engaged in some sort of fraud in accepting social security disability checks (App.Sub.Br. 78). The allegedly improper evidence was elicited as follows:

Q. What years did you have this land?

A. '93 or I mean '03, '04 and probably part of '05.

Q. Were you working farming this land and taking care of these cows?

A. Yes. At that time, yes.

Q. Were you still collecting social security disability during this time when you were working on farming?

A. Yes.

Q. And I want to make sure I understand your testimony correction, your testimony is that there were three years where you

still received social security disability benefits from the government and you were able and capable and were in fact working?

A. Right.

Q. And I want to make sure I'm also clear and you're saying that our government refused to stop giving you social security checks?

A. Yes.

Q. Did you send those checks back?

[DEFENSE COUNSEL]: Your Honor, I'll object, it's argumentative, it's not relevant.

THE COURT: Overruled.

EXAMINATION CONTIUES BY [THE PROSECUTOR]:

Q. Mr. Miller, did you send those checks back if you didn't think you needed them any more?

A. No, they didn't want them back.

Q. Did you ever attempt to send any of that money back to the government?

A. No, I didn't, but I talked to them about it and they told me that they had a nine-month spend down is what they called it and they told me to go ahead and work and they would put me on a nine-month spend down. And that's exactly what I did.

Q. Well, I want to make sure I'm clear on your testimony, you

didn't just keep getting social security benefits for nine months from the time you thought you were ready to go back work, you got them for three years, correct?

A. Exactly. And I called them about it.

Q. But you didn't send the checks back?

A. There was a time there when we were separated I didn't even get the checks. They went directly into a checking account. We had two checking accounts and one was for farm use only, loans to buy cattle, feed, operation funds, and one was for my social security check which the bills and stuff were paid out of and after I moved out, she had total control of that account. The only account that I was taking care of was the farm-use account.

. . .

Q. And when did you feel like you but you received checks well into 2006, correct?

A. The beginning of '06, yes. I – I'm fairly sure that I got my last check, it was probably like the first month or something like that of '06.

. . .

Q. So for three years you got 500 and some odd dollars and you weren't disabled from our government?

A. Um, yes.

(Tr. 248-250).

Mr. Miller faults the state for "injecting" this issue into the case (App.Sub.Br. 78). But, in fact, Mr. Miller injected this issue by testifying on direct examination about his disability checks and the fact that he was capable of working while he received his checks:

Q [by defense counsel]. And when did you start farming?

A. Well, I took my advice from my doctor and he said take it easy because I would probably end up being back for surgery in less than 10 years. But he released me on where I couldn't work, but I was trying to slowly do it myself, and I'd say in '03 I started back to work pretty much full time.

Q. 2003?

A. Yes.

Q. And did you try to get off social security?

A Yes, for three years.

Q. Tell the jury about that.

A. In '03 I had contacted social security disability and told them that I was going back to work which was farming and they told me that they had to give it like a nine-month trial and when the nine months are passed I'd call them and told them I'm working, I'm

working on the farm and they asked me questions like do I still have back problems and stuff and I said yeah, I live with it, I'm trying to work through it. They refused basically to take me off social security and again in '04 I called them and tried to get off social security. Well, they done the same thing over and over and it was like in '06 they finally released me to off social security to go back to work.

Q. So you were working on the farm?

A. Right.

Q. Living on your disability?

A. Up 'til yeah, yeah.

(Tr. 221-222).

It is well settled that "a defendant cannot be prejudiced by allegedly inadmissible evidence if he offers evidence to the same effect." *State v. Myers*, 997 S.W.2d 26, 35 (Mo.App. S.D. 1999). Thus, here, where Mr. Miller testified that he received disability checks for three years after he had returned to working on the farm "full time," he cannot claim that the state's subsequent questions about that topic resulted in manifest injustice.

Moreover, the state's questions bore upon an important issue. On direct examination, Mr. Miller testified about his work history on the farm because he wanted to establish that he was actively working on the farm during the charged time periods. This was an important issue for the defense because E.M. testified

that the sexual abuse often occurred when everyone else was out working on the farm, and E.M.'s mother testified that Mr. Miller did not work on the farm for a period of time due to his being disabled after having back surgery. (E.M.'s mother backed up her testimony that Mr. Miller was disabled and not working by testifying that Mr. Miller received disability checks after his surgery (Tr. 81).)

Mr. Miller, thus, felt constrained to explain how it was that he had received disability checks while being capable of working full time on the farm. And inasmuch as Mr. Miller broached the subject on direct examination, the state was well within the proper bounds of cross-examination to probe the plausibility of Mr. Miller's explanation. The scope of cross-examination of the defendant "may cover all matters within a fair purview of the direct-examination." *State v. Haley*, 73 S.W.3d 746, 752 (Mo.App. W.D. 2002). "On appeal, an appellant 'cannot complain about cross-examination as to matters first brought into the case by the accused's testimony on direct examination.' " *Id.*

In addition, the state did not elicit evidence that Mr. Miller engaged in any fraud. The state's theory of the case was that Mr. Miller was partially disabled and that Mr. Miller's receipt of disability checks was evidence that supported E.M.'s and E.M.'s mother's testimony that Mr. Miller was not working (and, thus, had the opportunity to sexually abuse E.M.). To that end, the prosecutor's questions were not designed to show that Mr. Miller engaged in fraud; rather, the prosecutor's questions were designed to show that Mr. Miller was not being

truthful about his ability to work—i.e., the prosecutor was attempting to show that Mr. Miller's claim that the government would not stop sending him money was implausible. This is evident from the state's closing argument:

> I would suggest to you that the person that has the most motivation to lie is Mr. Miller and I would suggest to you that he has already come in today and lied to you. He has the most motivation to come here today and lie to you, and we're talking about a man who told you that he told social security in 2003 that he was ready to go back to work and they refused to take the money back, that our government refused, said, no, keep the money, no we want you to have the money. Is that a believable guy? Really.

(Tr. 287). In short, because Mr. Miller broached the subject of receiving disability checks when he was not disabled, the state was entitled to probe that topic and argue Mr. Miller's lack of credibility. Point VIII should be denied.

VI.

The trial court did not plainly err in failing to declare a mistrial *sua sponte* after the state argued in closing argument that January 21 and January 22, 2006, were "cold, cold" days, because the trial court sustained defense counsel's objection and defense counsel stated that he was satisfied with the trial court's ruling. In any event, there was no manifest injustice. (Responds to Point IX of Mr. Miller's brief.)

In his ninth point, Mr. Miller asserts that the trial court plainly erred in failing to declare a mistrial *sua sponte* after the prosecutor argued in closing "regarding the purported temperature at the scene of the crime on the dates of January 21 and 22 of 2006" (App.Sub.Br. 81). Mr. Miller points out that there was no evidence of the temperature on those dates (App.Sub.Br. 81).

A. Plain error review is not warranted

The prosecutor's argument about the temperature at the farm on January 21 and January 22 (which is highlighted) was made as follows:

> You have to wonder about [Mr. Miller's] testimony in general and the honesty of his testimony. He doesn't remember a lot of dates, but boy gosh he does remember that they were there January 21st and 22nd fencing. And he also testified that it was like 50 or 60 degrees

that day.[6] He remembers that. He was quite, quite certain that it was very warm that day until the question about whether or not there was 12 miles away, you know, in Lamoni, Iowa it was quite a bit colder that day. It's a January day and he said it was 50 or 60 and he's quite certain about that. But when I questioned about that, about the temperature in Lamoni, Iowa that day all of a sudden he says well, um, well, he was wearing a lot of coveralls that day. Oh, um, there were a lot of brush fires along the fence that day. No, his hands weren't cold. He wasn't wearing gloves. He didn't notice the cold on his hands.[7] *He's stringing fence wire in bare hands in a cold, cold day and he's not noticing the cold.*

[DEFENSE COUNSEL]: Your Honor, objection, there is no evidence of the temperature that day.

---

[6] This argument was supported by Mr. Miller's testimony (Tr. 240).

[7] These comments about Mr. Miller's responses after the hypothetical question about the temperature in Lamoni, were also a fair comment on the evidence (*see* Tr. 241-242). Additionally, while there was no evidence of the temperature in Lamoni, the prosecutor indicated that she had records showing the temperature there (Tr. 244), and Mr. Miller has never alleged that the prosecutor lacked a good faith basis for her questions.

THE COURT. Objection will be sustained. The jury will remember the evidence.

[DEFENSE COUNSEL]: And instruct the jury to disregard that part of her argument, Your Honor?

THE COURT: All right, will you approach the bench, please?

(The following proceedings were held at the bench, out of the hearing of the jury.)

[DEFENSE COUNSEL]: Your Honor, I would instruct the jury to disregard any comments about temperature. There's no evidence I've heard about the temperature that day.

[THE PROSECUTOR]: There was evidence of temperature that day.

THE COURT: About specific temperature. We never got any evidence. You argued around it. Is that satisfactory?

[DEFENSE COUNSEL]: Yes, Your Honor.

(Tr. 266-268).

This Court should decline to review for plain error. The *sua sponte* declaration of a mistrial can result in irremediable prejudice for both the defendant and the state. Except when there is "manifest necessity," the Double Jeopardy Clause bars retrial if a judge grants a mistrial without the defendant's request or consent. *State v. Tolliver*, 839 S.W.2d 296, 299 (Mo. banc 1992). Moreover, when there is no request, the defendant's "valued right" to have the

trial completed by a particular tribunal is implicated. *Id.*

Here, there was no manifest necessity to declare a mistrial, and the drastic remedy of declaring a mistrial would have deprived Mr. Miller of his right to have the case decided by a jury that was favorably inclined toward his side. Indeed, had the trial court declared a mistrial in this case, Mr. Miller would not have been acquitted on counts 1, 2, 7, and 10 by this particular jury, and he might not have had such good fortune with a subsequent jury. In short, an uninvited declaration of mistrial could have derailed the defense strategy and increased the possibility of error. And absent "manifest necessity" it would have barred the state on double-jeopardy grounds from seeking a retrial. Thus, this Court should decline to grant plain error review.

Additionally, although the record is unclear whether the jury heard the trial court state that there was no evidence about the temperature, it appears that the jury might have heard that comment, as defense counsel affirmatively stated (after requesting a curative instruction) that the trial court's ruling and comments were "satisfactory" (Tr. 268). An affirmative statement of satisfaction should preclude a subsequent claim that further relief was necessary. *See State v. Mabry*, 602 S.W.2d 1, 2 (Mo.App. W.D. 1980) ("If the more drastic remedy of a mistrial is warranted, it is the responsibility of counsel to request that relief. Where no such request is made, it is assumed that counsel is satisfied that the corrective action taken by the court is adequate. Subsequent complaint that additional corrective

measures were needed comes too late."). *See generally State v. Hall*, 319 S.W.3d 519, 523 (Mo.App. S.D. 2010) ("It has long been held that ' "[p]lain error relief as to closing argument should rarely be granted and is generally denied without explanation." ' ").

B. To the extent that the prosecutor misstated the evidence, the prosecutor's brief comment did not have a decisive effect on the jury

A claim of plain error alleging errors committed in closing arguments does not justify relief on appeal unless the defendant proves that the error had a "decisive effect" on the jury. *State v. Griffin*, 202 S.W.3d 670, 681 (Mo.App. W.D. 2006). Here, the prosecutor's comment that January 21 and January 22 were "cold, cold" days was of little import.

The intended effect of the prosecutor's argument was to cast doubt on Mr. Miller's account of repairing fences on those days. But inasmuch as the jury acquitted Mr. Miller of all of the counts that were alleged to have occurred on January 21 and January 22, it is apparent that the prosecutor's argument about the temperature had no effect upon the jury. Point IX should be denied.

VII.

The trial court did not err in denying Mr. Miller's motion for new trial due to "cumulative" error. (Responds to Point X of Mr. Miller's brief.)

In his tenth point, Mr. Miller asserts that the trial court erred in overruling his motion for new trial "because the cumulative effect of each of the aforementioned errors so infected the proceedings with unfairness that elementary principles of justice demand that [Mr. Miller] receive a second and untainted trial" (App.Sub.Br. 84).

There were no "cumulative" errors in this case that warrant reversal of all of Mr. Miller's convictions. In his first four points, Mr. Miller alleged that the evidence was insufficient. But as discussed above in respondent's Points I and II, the evidence was sufficient on all counts.

As discussed in respondent's Point II, there was an instructional error on count 4, but that error had no effect on any of the other counts. (Additionally, the instructional error was not included in the motion for new trial, so it could not have contributed to the alleged cumulative error alleged in the point relied on.)

As discussed in respondent's Point III, the alleged *Doyle* violations were not *Doyle* violations. Moreover, even if the prosecutor's questions and comments about Mr. Miller's failing to mention who was at his house on the weekend of January 21 is found to be a *Doyle* violation, the error was harmless because Mr. Miller was acquitted of the counts related to that weekend. Thus, it cannot be

said that this alleged error "tainted" the trial and rendered it unfair. (Additionally, the *Doyle* claim was not included in the motion for new trial, so it could not have contributed to the alleged cumulative error.)

As discussed in respondent's Point IV, the trial court's excluding Donald Shenburger was not an abuse of discretion, and, in any event, any error in excluding Mr. Shenburger was harmless beyond a reasonable doubt because Mr. Shenburger's testimony only would have undermined the victim's account of what happened on January 21, 2006. But, again, Mr. Miller was acquitted of all counts related to the weekend of January 21, 2006.

As discussed in respondent's Point V, the prosecutor did not elicit or argue improper evidence of uncharged crimes.

And, finally, as discussed in respondent's Point VI, the prosecutor's brief comment about the "cold" temperature on January 21 and January 22, 2006, was cured by the trial court and did not result in manifest injustice. Mr. Miller was acquitted of all counts related to January 21 and January 22; thus, it is apparent that the prosecutor's attempt to impeach Mr. Miller's account of those days was unavailing (Additionally, this claim of error was not included in the motion for new trial, so it could not have contributed to the alleged cumulative error.) Point X should be denied.

CONCLUSION

With the exception of the conviction on count 4, the Court should affirm Mr. Miller's convictions and sentences.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/ s/ Shaun J Mackelprang

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. The attached substitute brief complies with Rule 84.06(b) and contains 15,651 words, excluding the cover, this certification, the signature block, and the appendix, as counted by Microsoft Word;

2. That this substitute brief was filed electronically with the Clerk of the Missouri Supreme Court using the CM/ ECF system;

3. A notification of the filing of this substitute brief was sent through the eFiling system, this February 27, 2012, to:

KENT E. GIPSON
LAW OFFICE OF KENT GIPSON, LLC
121 East Gregory Boulevard
Kansas City, MO 64114
Tel.: (816) 363-4400
Fax: (816) 363-4300
kent.gipson@kentgipsonlaw.com

CHRIS KOSTER
Attorney General

/ s/ Shaun J Mackelprang

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627
P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent