IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	SC96770
	)	
MAVERICK SWAN HOLMSLEY,	)	
	)	
Appellant.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI,
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
TWENTY-FIRST JUDICIAL CIRCUIT
THE HONORABLE KRISTINE A. KERR, JUDGE

APPELLANT'S AMENDED SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

A St. Louis County jury convicted Appellant, Maverick Swan Holmsley, of four counts of the unclassified felonies of sodomy in the first degree and attempted sodomy in the first degree, violations of Section 566.060, RSMo. On October 11, 2016, the circuit court sentenced Holmsley to a term of imprisonment of five years in the Missouri Department of Corrections on each count, to be served concurrently.

Holmsley timely filed his Notice of Appeal on October 14, 2016. On August 29, 2017, the Court of Appeals, Eastern District, issued an opinion affirming the convictions. Mo. Const. Art. V, § 3; Section 477.050.

This Court ordered transfer on December 19, 2017 after Holmsley's application. Mo. Const. Art. V, § 9; Rule 83.04.

STATEMENT OF FACTS

On August 10, 2014, Appellant Maverick Holmsley was charged with counts of sodomy in the first degree and attempted sodomy in the first degree for incidents that happened at his high school. L.F. 1. The State of Missouri charged that Maverick aided or encouraged others in engaging in deviate sexual intercourse with high school football teammates through the use of forcible compulsion. L.F. 15. The State did not charge that the incidents were for the purpose of sexual gratification, but rather, alleged Maverick and the other children committed these acts with the intent to "terrorize" other student athletes Section 566.010, RSMo.

In August of 2014, Holmsley was about to begin his senior year at The Principia, a school in St. Louis County, Missouri. Tr . 49. Principia is a religious institution. Tr. 50. To attend the school, a child must be a practicing Christian Scientist, or a child of a practicing Christian Scientist. Tr. 194. Fifty to sixty percent of the kids board at the school. Tr. 195. Both boys and girls attend Principia. Tr. 51.

That summer, Principia conducted a football and soccer camp for its high school boys. Tr. 51. Camp lasted about two and a half weeks. Tr. 54. Older players led team practices. Tr .60. These "captain-led practices"

consisted of the student captains of the football team conducting warm-ups, leading drills, and giving younger players pointers on improvement. Tr. 60. A typical day at football camp consisted of breakfast, a morning practice, a Bible lesson, an afternoon practice, a team activity, dinner, then lights out. Tr. 59. Maverick was a team captain. Tr. 60, 318. All at the camp at the time of the incident, all the students involved were varsity football players. Tr. 318.

JG was sixteen at the time of trial. Tr. 49. As a freshman, the summer of 2014, he attended football camp. Tr. 51, 53. All students lived in the dorms during camp. Tr. 53. On August 9, 2014, both football and soccer campers took a school bus to see a movie off campus, Teenage Mutant Ninja Turtles. Tr. 63, 280. The group returned to the dorms about 10:30 p.m. Tr. 63. Lights out was at 10:30 p.m. Tr. 282. JG and his roommate went to bed. Tr. 63. Around 1:00 a.m., the door to his room suddenly opened. Tr. 64, 73. Somebody pulled off his sheets and covers. Tr. 64. Two boys grabbed him and held his arms against the wall. Tr. 65. Maverick was holding one of JG's arms. Tr. 66. There were about five boys. Tr. 73. JG testified another boy stuck something "up my butt." Tr. 67. "It felt like a pencil." Tr. 67. The intrusion was through his boxers and

athletic shorts. Tr. 67, 75. The boys then left. Tr. 68. At trial, JG testified the incident affected him deeply; that he had nightmares two years later, and would sometimes see the faces of his teammates when simply walking around. Tr. 71. The day after the incident, JG characterized it as a prank. Tr. 89.

SHG was seventeen at the time of trial. Tr. 92. He lived in Los Angeles. Tr. 92. SHG attended Principia his freshman and sophomore years. Tr. 93. When SHG was a freshman, he attended football camp at Principia. Tr. 95-96. SHG described that in the dorms, older boys were assigned to be "hall chiefs." Tr. 98. These boys were tasked with watching over the halls. Tr. 98. Maverick was a hall chief, along with others. Tr. 98.

SHG described similar behavior as JG: that a group of boys stormed into his room after curfew, dragged him out of bed while laughing, and threw him on the floor. Tr. 105. Somebody took a hard object and "tried to put it in my rear" through SHG's basketball shorts and boxer shorts. Tr. 105, 107, 132, 134. The boys were laughing and making references to a character in the Ninja Turtles movie they had watched that night. Tr. 107, 129, 131. This was the same group of boys that previously included Maverick, but unlike JG, SHG could not identify the perpetrators until they

were leaving. Tr. 108, 132. He didn't know who assaulted him. Tr. 130. After the incident, SHG went to sleep. Tr. 109, 132. He too described the incident as "a bad prank." Tr. 135.

The next morning, another boy teased SHG and showed him a round, tube-like object. Tr. 113. The boy left the object under a couch in a common area. Tr. 116, 118. Maverick asked SHG the next morning, "How did you sleep?" Tr. 119.

BP testified similarly to the other boys. In August of 2014, he was about to begin his sophomore year. Tr. 276. He played football at school and had gone to football camp the summer before. Tr. 278. The night of the incident, he did not sleep in his assigned room. Tr. 283. After curfew, he had moved his mattress to the floor of another room, between two beds. Tr. 283, 284, 285, 297. At some point later, he woke up when several kids had entered the room and were pinning down his arms and legs. Tr. 287. A boy stuck a pencil into his anus through his athletic shorts. Tr. 288. Maverick was one of the boys holding him down. Tr. 289. The next morning, before church, Maverick approached BP. Tr. 291. Maverick apologized for what they had done. Tr. 291. CA, a boy sleeping in the same room as BP,

testified that the boys were all laughing. Tr. 321. After the kids left, Maverick stayed behind. Tr. 321. He asked BP if he was all right. Tr. 321.

Similar to the others, KK testified that a group of four boys stormed into his room, laughing, roughhousing, and perhaps calling him names. Tr. 152, 154. A group of four boys entered. Tr. 152. One of the boys "stuck his fingers in my butt." Tr. 152. Others, including Maverick, were present. Tr. 152. Maverick may or may not have sat on KK's leg. Tr. 153, 168. Eighteen at the time of trial, KK had been a member of the soccer team. Tr. 148. Generally, the soccer camp and football camps did activities separately, but both teams attended the Ninja Turtles movie that night. Tr. 148, 150. Soccer camp was stricter than football camp; kids generally did not ignore curfew. Tr. 149, 162. The soccer team never "pranked" or played jokes on the football team. Tr. 162.

Generally speaking, adult supervision in the dorms during the school year consisted of "house pops" who lived in an apartment somewhere in the three-level building, and who allegedly performed "parental functions" in the dorm. Tr. 120, 123. During football camp, however, there was no such direct supervision. Tr. 123. The record is contradictory as to whether adults were sleeping on the floor where these incidents took place. Tr. 124, 294.

During camp, the children had a "lot more freedom" than during the school year. Tr. 124. It was common for students at camp to joke and play around. Tr. 124. Kids violated curfew and routinely left their rooms. Tr. 126. Coach Warrick, who was in charge of the camp, didn't spend the night in the dorms. Tr. 127. It was the understanding of the Dean of Students, Lee Fletcher-McGookin, that house parents and coaches would ensure the kids went to bed at curfew during sports camps. Tr. 229.

Clark Shutt was a school administrator. Tr. 174. He oversaw the management of the boys' dorms. Tr. 174. Shutt lived year-round in a three-bedroom apartment on a different floor from where the campers stayed. Tr. 175-176, 295. During sports camps, he worked with the coaches as far as overseeing the dorm. Tr. 176. He had "minimal involvement" with the football camp other than making rounds in the dorms at night as the children were supposedly settling down. Tr. 186.

On August 9, 2014, the day of charged incidents, he noticed that Maverick and three other boys had moved some of their belongings into one of the small apartments on the second floor that was sometimes used for staff. Tr. 177. He let the coaches know. Tr. 178. They talked to the boys

after practice, and instructed them to move their stuff back into their assigned rooms. Tr. 179.

Later that night, about 11:30 p.m., Shutt checked the apartment to make sure the boys had obeyed. Tr. 179. The boys had ignored the instructions. Tr. 179. The boys were still camped out in the small apartment. Tr. 179. Shutt let the incident go. Tr. 179.

The next morning, August 10, 2014, Shutt received a text from a concerned parent regarding an incident the night before. Tr. 179. Shutt consulted with Ms. Fletcher-McGookin, who lived on campus as well. Tr. 183, 221. Living near the dorms, she was occasionally called out at late hours to deal with various problems. Tr. 222.

The day after the incidents, boys had attended church that morning and were heading out for an organized paintball activity that afternoon. Tr. 183, 188, 223. Shutt intended to round up the four to five boys that were allegedly involved in the incident, and talk to them. Tr. 183, 198. After paintball, the boys spoke to Fletcher-McGookin and Warrick, the football coach. Tr. 190.

When Fletcher-McGookin learned of the incident, before speaking with the boys, she contacted school principal Travis Brantingham. She also

called several lawyers involved with the school legal department. Tr. 197, 226, 227. Her intention was to interview the students involved, determine the appropriate punishment and if a crime had been committed, and if necessary contract Children's Services or the police. Tr. 227. When she spoke to the five boys involved, she took them as a group into the quiet room, which was used for study and prayer. Tr. 199, 224, 225. She told them she "understood that there had been some pranking the night before" and that she would like to know what happened. Tr. 199.

After talking to the boys, she released the children to their parents. Tr. 207. Later that night, she met with eight other students, including BP and JG. Tr. 209. After speaking with them, she decided to involve the police. Tr. 212. She also called the Children's Division hotline. Tr. 213. In these phone calls, she described the incident as a prank. Tr. 231. She was concerned the students might have been harmed by the prank. Tr. 232.

Fletcher-McGookin was given a plastic item three to six inches long. Tr. 214. She gave it to the police. Tr. 215. She later went to the homes of the five boys involved. Tr. 216. All were dismissed from school. Tr. 217, 234. Maverick later wrote letters apologizing to JG and MP for his behavior. Tr. 217. The trial court excluded the letters themselves (State's

Exhibits 7 and 7A), based upon the State's failure to lay a sufficient foundation or properly authenticate the documents. Tr. 220.

Brantingham, the school principal, was new to the job at the time of this incident. Tr. 237. The day after this incident, he received concerning test messages from a parent, as well as Clark Shutt. Tr. 238. Brantingham, Shutt, and Fletcher-McGookin agreed to meet after church. Tr. 239. When the boys returned from their paintballing activity, Shutt met them at the bus. Tr. 240, 251. While speaking to the boys, Maverick became "very distraught." Tr. 241. "I think it hit him heavily." Tr. 241. "And it started to sink in what was occurring." Tr. 241.

Brantingham spoke separately to some of the students who had been targeted. Tr. 245, 257. BP was "stoic and reserved, but it was evident that he was deeply hurt." Tr. 245. JG looked like a "shaken young man." Tr. 246. KK's demeanor was similar to JG's. Tr. 246. He "struggled to communicate with me what had happened the night before." Tr. 247. Brantingham told the boys "they were loved, and told them they were cared for, and I was going to do everything I could to protect them." Tr. 247.

In closing, the prosecutor argued,

> *You never got to see the apology letters the state mentioned. Well, why didn't you see the apology letters? I showed them to Lee Fletcher McGookin, Travis Brantingham . . . he talked to you about them. But you didn't get to see them. Why? Because the defense objected. They didn't want you to see them.*

Tr. 404. Holmsley objected, and asked for a curative instruction directing the jury to disregard. Tr. 8. The court overruled the objection. Tr. 406.

Later in closing argument, the prosecutor discussed the "to terrorize" *mens rea* of the offense, which was contested at trial. Tr. 8. While deviate sexual intercourse can include conduct "done for the purpose of arousing or gratifying the sexual desire of any person or for the purpose of terrorizing the victim," the State had alleged Holmsley aided or encouraged others with "the purpose of terrorizing the victim" and the jury was so instructed. Section 566.010, RSMo. Even though Holmsley was not charged with acting "for the purpose of arousing or gratifying the sexual desires of any person," the prosecutor argued: "Defense counsel wants you to look at only part of the definition . . . The definition goes on and it allows for either sexual gratification, which is an option or done to terrorize." Tr. 404-405.

At sidebar, Holmsley objected that this constituted improper argument and the trial court sustained Holmsley's objection outside the presence of the jury. Tr. 406. The trial court explained to the prosecutor at sidebar, "No, you can't do that. We can't talk about things that we chose not to put in the instructions before the jury." Tr. 406-407. Holmsley requested a curative instruction asking the jury to disregard the improper statement. Tr. 407. In response to the request, the prosecutor offered to "rephrase" her argument, after which Holmsley again requested a curative instruction, stating "We would prefer the Court instruct." Tr. 408. The trial court denied Holmsley's request for a curative instruction, stating, "I'm sure you would, but I'm not going to beat people up. I'm going to let her rephrase." Tr. 408.

During deliberations, the trial court made a record in chambers, informing the parties: "Approximately 6:45, my bailiff left the jury room door shut, I believe locked, came kind of running back here and said to me, One of the jurors opened the door – she said, either kept opening or has opened the door, and is trying to come out, and she said, They're trying to make me [do] things I don't want to do. I'm not going to deliberate. I can't deliberate. I'm going to leave." Tr. 417.

The trial court proposed bringing the jury into the courtroom and

inquiring of the foreperson as to whether one or more of the jury's number "may have difficulties with the deliberative process." Tr. 418. Without objection from either party, the trial court said, "All right. That's what the Court's going to do then." Tr. 419. The trial court, however, did not bring the jury back and inquire of the foreperson. Instead, time passed and the jury indicated by written note that it was "making progress after a break and additional discussion." Tr. 420.

Based on the bailiff relaying the statement from the juror that she felt coerced to do something she did not want to do, Holmsley asked for a mistrial. Tr. 421. The trial court denied the motion. Tr. 426. The jury then returned a verdict and the trial court polled the jury. Tr. 426.

Later that night, after the jury was released from service, the trial court questioned Bulus, the bailiff, about what happened during deliberations. Tr. 434. Bulus testified, "The door opened, and the tall Juror Number 12 said she had to leave, she couldn't do it no more, she was being forced into something she didn't believe in." Tr. 436. Bulus said Juror 12 was "crying, very upset," that the juror "kept walking past me," and that she "kept gently guiding her back [into the jury room] with a little hug." Tr. 436. Bulus testified she locked the jury room (which does not preclude jurors

from leaving but does preclude anybody from entering the room) and reported this to the judge. Tr. 437. Bulus said Juror 12 later came "back out again," and that Bulus "told her that she needed to remain with her group, that, you know, she needed to comply, and work as a team." Tr. 437-438. Bulus clarified that in her initial encounter with Juror 12, Bulus said, "No, that you can't [leave], you must remain, you have to stay and work as a team." Tr. 440. Holmsley was never permitted to question Bulus directly. Tr. 440.

Holmsley filed a timely motion for a new trial, arguing, *inter alia*, that this improper communication and the juror separation warranted relief. L.F. 182. On August 22, 2016, the trial court found Juror 12 committed misconduct by attempting "to flee the deliberative process" and by making "contact with the Court's bailiff" therefore causing improper communication between the bailiff and the juror. L.F. 241-244. The trial court correctly concluded that "there has been a rebuttable presumption of prejudice created and that the burden has shifted to the State to produce evidence which overcomes it." L.F. 243-244. On August 31, 2016, the trial court heard evidence presented by the State. L.F. 245.

At the evidentiary hearing, the State elicited the testimony of Juror 12

and presented no other witnesses or evidence. Tr. (8/31/2016) at 53. Juror 12 admitted that she tried to leave the room during deliberations. *Id.* at 59. She testified that Bulus was at the door and told the juror she "would go to jail" if she came out of the room. *Id.* at 61. Juror 12 testified she never left the jury room. *Id.* at 66. Instead, she testified, "I went back into the room, I did not want to go to jail." *Id.* at 68. She described Bulus as having both her arms raised on the door frame. *Id.* at 68. The juror said, "I would have had to run over her to get out." *Id.* She testified that she does not know whether any of the other jurors observed the interaction between her and the bailiff. *Id.* at 70. She testified that, if the bailiff had not threatened her with jail, she would have forced her way out of the jury room. *Id.* at 73.

At the evidentiary hearing, after the State rested, Holmsley requested the opportunity to elicit the testimony of Bulus. Tr. (8/21/2016) at 74. Holmsley argued the defense has "never had an opportunity to actually directly question Ms. Bulus" and that there is "more than one fact witness to the conversation that occurred between Juror No. 12 and Donna Bulus." *Id.* 74. The defense also argued that the interaction "was clearly within hearing range and vision range of the remaining jurors. And the State has provided no evidence at all as to whether or not this affected or prejudiced any of the

other 11 jurors that obviously sat on this jury and returned a verdict." *Id.* at 82-83. The defense argued that "the State in order to overcome the presumption not only has to show that it didn't have any improper influence on Juror No. 12 in this specific case, but on the 11 other jurors as well" and that "[n]o evidence was presented to that issue at all, period." *Id.* at 84.

In a September 6, 2016 written order, the trial court denied Holmsley's motion for new trial, stating: "The Court finds that the state has sustained its burden of showing that this juror was not subject to improper influences." L.F. 246.

On October 11, 2016, after guilty verdicts, the trial court sentenced Holmsley to terms of imprisonment of five years in the Missouri Department of Corrections, ordering each sentence to be served concurrently. L.F. 248-252.

This timely-filed appeal followed. L.F. 254

POINTS RELIED ON

I. The trial court abused its discretion in overruling Holmsley's motion for new trial based upon presumptively prejudicial juror misconduct, a violation of Holmsley's rights to a fair and impartial jury and to due process of law, U.S. Const. Amend V, VI, XIV and Mo. Const. Art. I, §§ 10, 18, and 22(a), because the State failed to rebut the presumption of prejudice after Juror 12 twice attempted to flee deliberations, made improper contact with the court's bailiff while leaving the room, and caused a scuffle with the bailiff that led to the bailiff telling the juror she would go to jail, in that, after this dramatic incident, the trial court erroneously found the State had met its burden to rebut the presumption of prejudice through simply presenting testimony from Juror 12, and finding "the state has sustained its burden of showing that *this juror* was not subject to improper influences." Without testimony from *the jury* that witnessed this scene, the State failed to overcome a presumption that jurors were subject to improper influences.

Smotherman v. Cass Regional Medical Center, 499 S.W.2d 709 (Mo. banc 2016)

State v. Babb, 680 S.W.2d 150 (Mo. banc 1984)

State v. Thompson, 955 S.W.2d 828 (Mo. App. 1997)

Travis v. State, 66 S.W.3d 1 (Mo. banc 2002)

U.S. Const. Amend. V, VI, XIV

Mo. Const. Art. I, §§ 10, 18(a)

II. The trial court abused its discretion in overruling Holmsley's objection to the State's closing argument telling the jury that that the jury "never got to see" Holmsley's letters of apology to JG and MP "because the defense objected" and "[t]hey didn't want you to see them," a violation of Holmsley's rights to due process of law and a fair trial, U.S. Const. Amend. V, VI and XIV and Mo. Const. Art. I, §§ 10 and 18(a), because this argument was improper, in that it misled the jury and argued facts not in evidence, when the reason the exhibits were excluded was because the trial court ruled they were inadmissible under the rules of evidence due to insufficient authentication. The State misled the jury in stating otherwise, prejudicing Holmsley's defense by causing a wrongful inference that the letters would have been damaging to Holmsley.

State v. Price, 541 S.W.2d 777 (Mo. App. 1976)

State v. Nelson, 957 S.W.2d 327 (Mo. App. 1997)

State v. Reyes, 108 S.W.3d 161 (Mo. App. 2003)

U.S. Const. Amend V, VI, XIV

Mo. Const. Art. I, §§ 10 and 18(a)

III. The trial court abused its discretion in refusing to give an instruction to disregard, after sustaining Holmsley's meritorious objection to the State's improper remarks during closing argument to a *mens rea* relating to sexual gratification that was not charged, a violation of Holmsley's rights to due process of law and a fair trial, U.S. Const. Amend. V, VI and XIV and Mo. Const. Art. I, §§ 10 and 18(a), because this abuse of discretion was an acknowledgment that the State's remarks were prejudicial and improper, but unreasonably did not cure that prejudice by failing to instruct the jury that it must disregard the harmful and improper remarks. The error prejudiced Holmsley's defense—it allowed the State to introduce an inflammatory concept of sexual gratification where the State did not allege or prove that mental state, and there is a reasonable probability the argument inflamed and misled the jury. The trial court simply sustaining an objection, outside the presence of the jury, did not cure the problem.

State v. Roberts, 838 S.W.3d 126 (Mo. App. 1992)

State v. Nelson, 957 S.W.2d 327 (Mo. App. 1997)

U.S. Const. Amend V, VI, XIV

Mo. Const. Art. I, §§ 10 and 18(a)

ARGUMENT

I. The trial court abused its discretion in overruling Holmsley's motion for new trial based upon presumptively prejudicial juror misconduct, a violation of Holmsley's rights to a fair and impartial jury and to due process of law, U.S. Const. Amend V, VI, XIV and Mo. Const. Art. I, §§ 10, 18, and 22(a), because the State failed to rebut the presumption of prejudice after Juror 12 twice attempted to flee deliberations, made improper contact with the court's bailiff while leaving the room, and caused a scuffle with the bailiff that led to the bailiff telling the juror she would go to jail, in that, after this dramatic incident, the trial court erroneously found the State had met its burden to rebut the presumption of prejudice through simply presenting testimony from Juror 12, and finding "the state has sustained its burden of showing that *this juror* was not subject to improper influences." Without testimony from *the jury* that witnessed this scene, the State failed to overcome a presumption that jurors were subject to improper influences.

Preservation and Relevant Facts

On June 17, 2016, at about 7:10 p.m., the court's bailiff told the judge that a juror was trying to leave the jury room. Tr. 417. The court spent time gathering the parties to address the issue. Tr. 420. The court proposed bringing the jury into the courtroom and asking about any difficulties. Tr. 420. But before the court could do that, at 7:32 p.m., the jury sent a note. Tr. 420. The note said, "We are making progress after a break and additional discussion." Tr. 420.

Based on information that one juror was attempting to leave and stating she was "being forced to do something she didn't want to do" as relayed by the bailiff, the defense requested a mistrial, which was denied. Tr. 420, 426. At 7:58 p.m., less than 30 minutes later, the jury returned with guilty verdicts. Tr. 426. The jury was polled and each stated the verdict was his or hers. Tr. 428.

That same evening, after the jury was discharged, the bailiff testified under questioning by the court. Tr. 435. She testified that as while sitting outside the jury room, she saw the door open. Tr. 435. "The door opened, and the tall Juror [12] said she had to leave, she couldn't do it no more, she

was being forced into something she didn't believe in." Tr. 436. She was crying. *Id.* She was "very upset." *Id.*

The bailiff put her back in the jury room, and shut and locked the door (it could be opened from the inside). Tr. 436-437. The bailiff reported the incident, and the court instructed the bailiff to return to her post outside the jury room to ensure the juror did not attempt to leave again. Tr. 237. A short time later, Juror 12 in fact attempted to leave again. Tr. 437. The bailiff again cautioned her that she must "remain with her group, that, you know, she needed to comply, and work as a team." Tr. 438, 440. The bailiff could see into the room. Tr. 438. She could see that the juror "apparently sat down with the other jurors, but appeared petulant and "still wouldn't look at anybody." Tr. 438. After about ten or fifteen minutes, there was a knock on the door, and the jury delivered the note stating they were making progress. Tr. 439.

After making this record the night of the verdict, the defense made unsuccessful objections consistent with its previous request for mistrial, and the proceedings concluded. Tr. 442-444.

Holmsley filed a timely motion for new trial on July 11, 2016 raising this issue as juror misconduct warranting an evidentiary hearing and a new

trial. L.F. 182. On August 22, 2016, the trial court found that Juror 12 committed misconduct by attempting "to flee the deliberative process" and by making "contact with the Court's bailiff" therefore causing improper communication between the bailiff and the juror. L.F. 241-244. The court held an evidentiary hearing on August 31, 2016.

At the evidentiary hearing, the State elicited the testimony of Juror 12. Tr. (8/31/2016) 53. Juror 12 admitted that she tried to leave the room during deliberations. *Id.* at 59. She testified that bailiff Bulus, who was at the door, told her she "would go to jail" if she came out of the room. *Id.* at 61. She testified that she never left the jury room. *Id.* at 66. Instead, she testified, "I went back into the room, I did not want to go to jail." *Id.* at 68. She described Bulus as having both her arms raised on the door frame. *Id.* at 68. She said, "I would have had to run over her to get out." *Id.* She testified that she does not know if any of the other jurors observed the interaction between her and the bailiff. *Id.* at 70. She testified that, if the bailiff had not threatened her with jail, she would have left. *Id.* at 73.

At the evidentiary hearing, after the State rested, Holmsley asked for the opportunity to question Bulus. Tr. (8/31/2016) 74. Holmsley argued that the defense has "never had an opportunity to directly question Ms.

Bulus" and that there is "more than one fact witness to the conversation that occurred between Juror No. 12 and Donna Bulus." *Id.* The defense also argued that the interaction "was clearly within hearing range and vision range of the remaining jurors. And the State has provided no evidence at all as to whether or not this affected or prejudiced any of the other 11 jurors that obviously sat on this jury and returned a verdict." *Id.* at 82-83.

The defense argued that "the State in order to overcome the presumption not only has to show that it didn't have any improper influence on Juror 12 in this specific case, but on the 11 other jurors as well" and that "[n]o evidence was presented to that issue at all, period." *Id.* at 84.

In a written order entered on September 6, 2016, the trial court denied Holmsley's motion for new trial on these grounds, stating: "The Court finds that the state has sustained its burden of showing that this juror was not subject to improper influences." L.F. 246.

This point of error is preserved for appellate review because the defense raised timely and specific objections, and the issue was included in Holmsley's motion for new trial. Rule 29.11(d); L.F. 182. If the issue was found to be unpreserved, Holmsley asked for plain error review under Rule 30.20.

Standard of Review

"Juror misconduct during a felony trial requires reversal for a new trial, unless the State affirmatively shows that the jurors were not subjected to improper influences as a result of the misconduct." *State v. Thompson*, 955 S.W.2d 828, 830 (Mo. App. 1997). Juror misconduct during deliberations creates a rebuttable presumption of prejudice, which the State must overcome with sufficient evidence. *State v. Babb*, 680 S.W.2d 150, 152 (Mo. banc 1984).

This Court reviews the trial court's denial of a motion for new trial on juror misconduct grounds for abuse of discretion. *Smotherman v. Cass Regional Medical Center*, 499 S.W.2d 709, 712 (Mo. banc 2016).

Discussion of Error

The trial court denied this claim via written order stating, "The Court finds that the state has sustained its burden of showing that this juror was not subject to improper influences. *State v. Babb*, 680 S.W.2d 150 (Mo. banc 1984)." L.F. 246.

But it could not be more clear that the State did not meet its burden to demonstrate *the jury*—not just the offending juror—was not subject to

improper influences from Juror 12's outbursts, attempts to leave the jury room, and physical contact with the bailiff.

To put it plainly, Juror 12 caused a scene. This included twice attempting to separate from the other jurors, exclaiming that the others were making her do something she didn't want to do, and making contact with the bailiff, who had to physically guide her back into the jury room, urging her to work with the group but also threatening that if she left the room, she would go to jail.

It was inadequate to simply ask Juror 12, who eventually acquiesced and stayed with the group for another 30 minutes until they reached guilty verdicts, if the incident affected her verdict. Because the court did not do enough to ensure this unusual problem did not affect the verdict, this case must be reversed for a new trial.

When juror misconduct happens, the court must ensure the verdict was not influenced by the improper conduct. *Babb*, cited by the trial court, is a case noting the correct standard. In *Babb*, a tornado siren sounded while the jurors were deliberating on a robbery case in Pettis County, Missouri. *Babb*, 680 S.W.2d at 151. The jurors were escorted to the basement along with crowds of other people. *Id.* A deputy escorted them, and they waited

in a separate room, but there was no door, and they were perhaps exposed to witnesses and to the general public. *Id.* This Court remanded for a hearing, where the State would have the opportunity to rebut the presumption that the jury was subject to improper influences. *Id.* "The verdict will be set aside, unless the state affirmatively shows that the jurors were not subject to improper influences." *Id.*

Since *Babb*, this Court and lower courts have consistently held that where there has been a possibility that the jury has been exposed to misconduct or outside influences, a presumption of jury prejudice arises that the State may rebut with substantial evidence. In *Smotherman*, 499 S.W.3d at 710, a slip and fall case, the jury returned with a defense verdict. Afterwards, the plaintiff filed a motion for new trial after one juror told an attorney she had researched the weather the day of the incident. *Id.* As the case involved a slippery floor in a bathroom allegedly caused by a leaky soap dispenser, the plaintiff alleged the juror may have been searching for a weather-related reason for the slippery floor, which would benefit the defense. *Id.* at 713. As is the correct procedure, the trial court held a hearing not only to determine what the offending juror did, but whether her misconduct affected the verdict of the other jurors. There is naturally no

way to know if non-offending jurors saw misconduct, or were otherwise exposed to it, without *asking them.*

In *Smotherman*, nine jurors testified. 499 S.W.3d at 712. The juror who conducted the investigation admitted that she had Googled the weather forecast. *Id.* Most of the jurors who testified, however, did not recall ever hearing anything about the weather during deliberations. *Id.* The jurors who did recall a comment about the weather testified it made no difference to their deliberations. This Court affirmed, finding that the court acted within its discretion in finding the presumption of prejudice had been rebutted. *Id.* In fact, the testimony of the *non-offending* jurors was particularly credible on the question of what happened, and the effect of the misconduct. *Id.* at 715.

The reason that testimony from the non-offending jurors is important is that an offending juror has, of course, been guilty of misconduct. She is more likely to attempt to diminish the effect of her bad conduct. The testimony of non-offending jurors is more likely to be honest about the effect, if any, of the offending juror's conduct. It is an abuse of discretion for the trial court to solely rely upon the offending juror's *own view* of the impact of her offense.

Travis, where this Court granted a new trial based upon juror misconduct, is consistent with this idea. 66 S.W.3d 1, 3 (Mo. banc 2002). *Travis* was a wrongful death case involving a car accident. A juror made a trip to the scene of the accident over the lunch hour, during a break in the testimony of Travis' accident reconstruction expert. *Id.* Travis sought a new trial because that juror had obtained evidence that related to the driver's sight distance, a contested issue at trial. *Id.* The offending juror, while conceding she was guilty of gathering extrinsic evidence, testified the excursion had no effect whatsoever on her verdict. *Id.* But like in *Smotherman*, this Court noted that "little weight" should be "given to the offending juror's assessment of the effect of [his or her] conduct." *Travis*, 66 S.W.3d at 4. In *Travis*, the "lone testimony of the offending juror, who denied the potential effect of her actions, was not sufficient to overcome the presumed prejudice." *Smotherman*, 499 S.W.3d at 713 (*citing Travis*, at 2, 6).

This Court and lower courts have long held that when there is juror contamination or misconduct, the testimony of the offending party not particularly credible on what damage the juror caused. To rebut the presumption of prejudice, the court must go further and see that the non-

offending jurors were unaffected. *See Middleton v. Kansas City Public Service Co.*, 152 S.W.2d 154, 159-160 (Mo. 1941) (nearly identical "form" affidavits of non-offending jurors were not sufficient evidence to rebut the presumption of prejudice created by a juror's misconduct); *Consol. Sch. Dist. No. 3 of Grain Valley v. W. Mo. Power Co.*, 46 S.W.2d 174, 180 (Mo. 1931) (holding there was no abuse of discretion in denying new trial when a non-offending juror swore out an affidavit stating offending juror never shared information with her); *State v. Herndon*, 224 S.W.3d 100-103 (Mo. App. 2007) (holding there was no abuse of discretion when "all of the jurors . . . testified that their deliberations were not influenced by anyone outside the jury"); *State v. Hayes*, 637 S.W.2d 33, 38-39 (Mo. App. 1982) (holding no abuse of discretion when an alternate juror was improperly present but all twelve jurors presented affidavits stating the alternate did not participate or influence deliberations).

Here, this incident's effect on the remaining jurors is unknown. Only the non-offending jurors can say if they saw the incident, and if so, how it affected the verdict. On this point, based on the State's failure to rebut the presumption of prejudice that was caused by this unusual incident, Holmsley deserves a new trial on Point I.

II. The trial court abused its discretion in overruling Holmsley's objection to the State's closing argument telling the jury that that the jury "never got to see" Holmsley's letters of apology to JG and MP "because the defense objected" and "[t]hey didn't want you to see them," a violation of Holmsley's rights to due process of law and a fair trial, U.S. Const. Amend. V, VI and XIV and Mo. Const. Art. I, §§ 10 and 18(a), because this argument was improper, in that it misled the jury and argued facts not in evidence, when the reason the exhibits were excluded was because the trial court ruled they were inadmissible under the rules of evidence due to insufficient authentication. The State misled the jury in stating otherwise, prejudicing Holmsley's defense by causing a wrongful inference that the letters would have been damaging to Holmsley.

Preservation

Defense counsel objected to the State's comments during closing argument. Tr. 405. The trial court overruled the objection. Tr. 406. Counsel included the allegation of error in a timely-filed motion for new trial. L.F. 194-195. The error is properly preserved for appellate review under Rule 29.11(d).

Standard of Review

The trial court has broad discretion in determining the scope of closing arguments. *State v. Nicklasson*, 967 S.W.2d 596, 615 (Mo. banc 1998). Unless an abuse of that discretion prejudices the defendant, an appellate court will not disturb the trial court's ruling on such matters. *State v. Roman*, 961 S.W.2d 831, 851 (Mo. banc 1998). "[A] conviction will be reversed for improper argument only if it is established that the comment of which appellant complains had a decisive effect on the jury's determination [and]... [t]he burden is on the defendant to prove the decisive significance." *State v. Parker*, 856 S.W.2d 331, 333 (Mo. banc 1993).

Discussion of Error

The trial court excluded State's Exhibits 7 and 7A, described as "apology letters" written by Holmsley, by sustaining a defense objection based on authentication. Tr. 220. But after the trial court excluded this evidence, the prosecutor argued in closing:

> *You never got to see these apology letters that the State mentioned. Well, why didn't you see the apology letters? I showed them to Lee Fletched-McGookin, Travis Brantingham, the Principal, he talked to*

you about them. But you didn't get to see them. Why? Because the defense objected. They didn't want you to see them.

Tr. 404. Holmsley objected. Tr. 406. Counsel argued the comments were improper and asked the jury be instructed to disregard. Tr. 405. The trial court overruled the objection. Tr. 406.

"A prosecutor arguing facts outside the record is proper and highly prejudicial." *State v. Nelson*, 957 S.W.2d 327, 329 (Mo. App. 1997). "Assertions of fact not proven amount to unsworn testimony by the prosecutor." *Id.* "Efforts to inflame the passions and prejudices of the jury by reference to facts outside the record are condemned by ABA standards and constitute unprofessional conduct." *Id.* (*citing State v. Burnfin*, 771 S.W.2d 908, 912 (Mo. App. 1989)). The prosecutor may prosecute with vigor and strike blows but he is not at liberty to strike foul ones." *Id.*

In *Nelson*, the Court of Appeals reversed a first-degree murder conviction because the prosecutor improperly argued to the jury facts not in evidence. The prosecutor referenced a statement the defendant allegedly made to the police and argued that the statement "wasn't coming in." *Nelson*, 9576 S.W.2d at 329. The Court explained, "neither the statement nor the fact that defendant made the statement to police was in evidence."

Id. at 330. The Court held that "he prosecutor argued facts outside the record" and the "trial court's permitting the prosecutor to make such as argument, over defendant's objection, constituted reversible error." *Id.*

Here, the prosecutor offered two letters into evidence: Exhibits 7 and 7A, both alleged to be "apology" statements by Holmsley. Tr. 220. But as in *Nelson*, the defendant's alleged statements were not admitted into evidence. *Id.* Nevertheless, the prosecutor argued an adverse inference because the jury it "never got to see these apology letters." Tr. 404. The prosecutor argued, "the defense objected. They didn't want you to see them." Tr. 404. These comments were nearly identical to those in *Nelson*, where the prosecutor stated the defense "didn't want [the jury] to see them." Tr. 404. This conduct was misleading, improper, and highly prejudicial because in fact the letters were inadmissible due to the State's failure to lay a foundation and properly authenticate them. "It is an established rule in our state that it is improper for a prosecutor, or defense attorney, to argue matters that the court has excluded." *Price*, 541 S.W. at 778.

Courts look to three factors when determining when improper comment in closing argument was so "injurious that a new trial" is required: (1) "whether the trial court gave a cautionary instruction," (2) "whether the

trial court gave a curative type instruction to disregard the improper comment," and (3) "the strength of the state's case." *Price*, 541 S.W.2d at 779 (reversing a defendant's conviction because the trial court failed to give a curative instruction).

Arguing to the jurors that they couldn't see the letters because the defense "didn't want you to see them" was misleading; the statements were excluded by the court pursuant to a meritorious object that faulted to the State for failing to adequately lay a path of admissibility under the rules of evidence. The improper remarks undermined the defense argument that an over-the-clothing touching intended as a prank in a high school dormitory was not intended by Maverick to "terrorize" anybody.

The improper argument alluded to something unknown in the apology letters that the State implied would be harmful to Maverick's defense, which is an unfair characterization given the letters were not excluded based on their content. Under these facts—where at least one juror was struggling with a verdict due to the ages of the children involved—this error meets the standard of "a reasonable probability that, in the absence of the trial court's abuse of discretion, the verdict would have been different." *State v. Reyes*, 108 S.W.3d 161, 168 (Mo. App. 2003) (internal citation omitted).

Holmsley deserves a new trial on Point II.

III. The trial court abused its discretion in refusing to give an instruction to disregard, after sustaining Holmsley's meritorious objection to the State's improper remarks during closing argument to a *mens rea* relating to sexual gratification that was not charged, a violation of Holmsley's rights to due process of law and a fair trial, U.S. Const. Amend. V, VI and XIV and Mo. Const. Art. I, §§ 10 and 18(a), because this abuse of discretion was an acknowledgment that the State's remarks were prejudicial and improper, but unreasonably did not cure that prejudice by failing to instruct the jury that it must disregard the harmful and improper remarks. The error prejudiced Holmsley's defense—it allowed the State to introduce an inflammatory concept of sexual gratification where the State did not allege or prove that mental state, and there is a reasonable probability the argument inflamed and misled the jury. The trial court simply sustaining an objection, outside the presence of the jury, did not cure the problem.

Preservation

As in Point II, defense counsel objected to the State's comments during closing argument. Tr. 405. The trial court overruled the objection. Tr. 406. Counsel included the allegation of error in a timely-filed motion for

new trial. L.F. 194-195. The error is properly preserved for appellate review under Rule 29.11(d).

Standard of Review

The trial court has broad discretion in determining the scope of closing arguments. *State v. Nicklasson*, 967 S.W.2d 596, 615 (Mo. banc 1998). Unless an abuse of that discretion prejudices the defendant, an appellate court will not disturb the trial court's ruling on such matters. *State v. Roman*, 961 S.W.2d 831, 851 (Mo. banc 1998). Where objection to improper argument is sustained and defense counsel requests "the court to instruct the jury to disregard the prosecutor's argument," it is error for the trial court not to give the requested curative instruction. *State v. Roberts*, 838 S.W.2d 126, 131 (Mo. App. 1992).

Discussion of Error

The act of deviate sexual intercourse requires the State to prove that the act was "done for the purpose of arousing or gratifying the sexual desire of any person or for the purpose of terrorizing the victim." Section 566.010, RSMo. In this case, in an example of common sense and proper exercise of prosecutorial discretion, the State of Missouri acknowledged that this incident was not for the purpose of sexual gratification in any way.

Accordingly, the jury was *not* instructed on a sexual gratification. L.F. 138, 141, 144, 147.

The prosecutor made the inappropriate argument in closing that: "defense counsel wants you look at only part of the definition . . . the definition goes on, and allows for either sexual gratification, which is an option, or done to terrorize. Tr. 404-405. Nowhere was this alternative method of charging this offense based upon sexual gratification before the jury.

Holmsley lodged an objection. Tr. 407. The trial court correctly sustained the objection, *outside the presence of the jury*, explaining to the prosecutor at sidebar that "No, you can't do that. We can't talk about things that we chose not to put in instructions before the jury." Tr. 406-407. Holmsley asked for a curative instruction. Tr. 407. The trial court refused to instruct the jury to disregard. Tr. 44. She merely offered, "Unless you want me to say, the jury is to be guided by the instructions of law that are before them now, and not what other possibilities could have been." Tr. 408. The court did not give a curative instruction, instead asking the State to "rephrase" her argument. Tr. 408. The defense responded, "We would

prefer the Court instruct." *Id.* The trial court still refused, stating, "I'm sure you would, but I'm not going to beat [the prosecutor] up." *Id.*

A curative instruction would have protected Holmsley's right to a fair trial, and would not have unduly "beat up" the State. Regardless, when the State stops out of line, introducing improper and salacious ideas of sexual gratification, at least some attention should be drawn to the issue, to impress upon the jury that it should be given no weight.

As in Point II, "a prosecutor's arguing facts outside the record is improper and highly prejudicial." *Nelson*, 957 S.W.2d at 329. "Assertions of fact not proven amount to unsworn testimony by the prosecutor." *Id.* Indeed, as has been explained, "[efforts] to inflame the passions and prejudices of the jury by reference to facts outside the record are condemned by ABA standards and constitute unprofessional conduct. The prosecutor may prosecute with vigor and strike blows but he is not at liberty to strike foul ones." *Id.* (*citing Burnfin*, 771 S.W.2d at 912).

As argued in Point II, Courts look to three factors when determining when improper comment in closing argument was so "injurious that a new trial" is required: (1) "whether the trial court gave a cautionary instruction," (2) "whether the trial court gave a curative type instruction to disregard the

improper comment," and (3) "the strength of the state's case." *Price*, 541 S.W.2d at 779 (reversing a defendant's conviction because the trial court failed to give a curative instruction).

Unlike in Point II, where an objection was improperly overruled, the trial court correctly sustained this objection. But where a trial court sustains an objection but fails, after request, to use "its authority to minimize any prejudice by ordering the comments stricken or issuing cautionary instructions," the court fails at its "duty to ensure that every defendant receives a fair trial, which requires the exercise of its discretion to control obvious prosecutorial misconduct." *Id.* This principle is so important that courts are expected to neutralize "obvious prosecutorial misconduct *sua sponte*" in some cases. *Id.*

Here, the defense requested the instruction. Tr. 408. These curative instructions are an instruction from the court that carry weight; a jury is "presumed to follow the trial court's instructions" *State v. Salazar*, 414 S.W.3d 606, 621 (Mo. App. 2013). Here, the jury was left in the dark as to how, if in any way, they were to use the State's argument in its deliberations. A jury cannot be expected to follow an instruction that is not given.

The prejudice cannot be overstated in this particular case. The trial centered upon whether the State proved that Holmsley's purpose was to terrorize his teammates, rather than this high school senior intending something more innocuous, despite the harm that unintentionally occurred.

The State of Missouri veering into sexual innuendo was harmful. It served only to recklessly mislead and confuse the jury that some sexual gratification component existed in the case. Naturally, references to sexual gratification or misconduct outside the record is among the most prejudicial of error when improperly placed before the jury. *See State v. Ellison*, 239 S.W.3d 603, 604 (Mo. banc 2007) (uncharged sex acts); *State v. Nelson*, 178 S.W.3d 638 (Mo. App. 2005) (same); *State v. Alexander*, 875 S.W.2d 924 (Mo. App. 1994) (irrelevant sexual items introduced); *State v. Barriner*, 34 S.W.3d 139 (Mo. App. 2005) (irrelevant sexual proclivities).

The trial court's desire not to "beat up" on the prosecutor was unreasonable, and an abuse of discretion. Holmsley's right to a fair trial outweighed the personal feelings of the prosecutor.

Holmsley deserves a new trial on Point III of this appeal.

CONCLUSION

For the reasons stated in Points I, II and III, Appellant respectfully requests a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g) I certify that on March 13, 2018, a true and correct copy of the foregoing brief was served via the efiling system to the Office of the Attorney General, P. O. Box 899, Jefferson City, Missouri 65101. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I certify that this brief includes the information required by Rule 55.03. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 14 point font, and does not exceed 15,500 words, 1,100 lines, or fifty pages. The word-processing software identified that this brief contains **9, 381** words.

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