No. SC96770

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

MAVERICK HOLMSLEY,

Appellant.

Appeal from the Circuit Court of St. Louis County
Twenty-First Judicial Circuit
The Honorable Kristine A. Kerr, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Appellant (Defendant), Maverick Holmsley, appeals his convictions of two counts of sodomy in the first degree and two counts of attempted sodomy in the first degree, for which he was sentenced to a total of five years in prison.

The State initially charged Defendant with six counts of sodomy in the first degree. (L.F. 15-17.) After Defendant filed a motion for a bill of particulars, the State filed a response to the motion and an Information in Lieu of Indictment charging Defendant with four counts of sodomy in the first degree and two counts of attempted sodomy in the first degree. (L.F. 19-22, 34-35, 36-38.) The State dismissed two counts of sodomy before trial. (L.F. 94.)

On June 14 and 17, a jury trial was held. (Tr. 23-426.) The jury found Defendant guilty as charged. (Tr. 416-26; L.F. 167-78.) The court sentenced Defendant to five years in prison for each count, running concurrently. (L.F. 248.)

Viewed in the light most favorable to the verdict, the evidence at trial showed the following:

In August 2014, the boys' football and soccer teams from Principia High School attended sports camps at the high school. (Tr. 51, 96, 144, 279.) The boys from each of the teams stayed in the dorms at the high school during the camps. (Tr. 53, 96, 144.) While at camp, the boys' days consisted of meals, practices, bible study, and team activities. (Tr. 59, 97, 146-47, 279-80.)

On the evening of August 9, 2014, the teams went to see a movie at a local movie theatre. (Tr. 62, 101, 281.) When the movie ended, the boys went back to their dorm rooms and eventually went to sleep. (Tr. 63, 101, 281.)

Then, in the early-morning hours of August 10, 2014, five rising seniors, including Defendant, went to four underclassmen's dorm rooms, room by room, held the boys down and sodomized them. (Tr. 64-69, 104-05.)

J.G. was a rising freshman at Principia the summer of 2014. (Tr. 49.) He attended the football sports camp that summer and was assigned to stay in the dorm with the rest of the team. (Tr. 53-54.) J.G. knew Defendant from working out together during the summer, but they were not really friends. (Tr. 62.)

On the night of August 9, 2014, when the team returned from the movie, J.G. brushed his teeth and went to bed. (Tr. 63.) The dorm rooms did not have locks on them, but J.G. shut the door and turned off the light. (Tr. 63.) J.G. went to bed wearing gym shorts and boxer shorts. (Tr. 64.)

In the middle of the night, J.G. awoke when his door was slammed open. (Tr. 64.) The five upperclassmen, including Defendant, rushed in, threw the covers off of J.G., and pinned him up against the wall with his knees on his bed. (Tr. 64-65.) Defendant was holding J.G.'s arm and shoulder against the wall, and Defendant's face was right next to J.G.'s. (Tr. 66.) J.G. tried to struggle and fight back, but he could not. (Tr. 66.)

While Defendant and the other boys were holding J.G. against the wall, one of the boys "shoved something up [J.G.'s] butt[,]" that felt like a pencil. (Tr. 67.) The boys never took J.G.'s clothes off, but the pencil penetrated J.G.'s anus through his shorts. (Tr. 67-68.) The incident lasted only a minute, and then the boys left the room. (Tr. 68-69.) J.G. was scared, and he continued to have trouble sleeping as of the time of trial because of the incident. (Tr. 69, 71.)

In August 2014, B.P. was a rising sophomore at Principia. (Tr. 276.) B.P. was on the football team, and he attended the August football camp with

his teammates. (Tr. 278.) B.P. knew Defendant as his teammate on the football team, but they were not friends. (Tr. 280.)

On August 9, 2014, after the football team got back from the movie, B.P. waited until after curfew and then moved his mattress from his assigned room to the room of two of his friends. (Tr. 283, 318.) B.P. put the mattress on the floor in between the two beds. (Tr. 284.) B.P. was wearing athletic shorts when he finally went to bed. (Tr. 286.)

At some point in the night, after B.P. had fallen asleep, he was awoken when he was pinned down on all four of his limbs. (Tr. 287, 320.) B.P. recognized the people who were holding him down, and one of those people was Defendant. (Tr. 288, 321.) B.P. struggled, but he could barely move. (Tr. 288, 321.) One of the boys then "repeatedly stuck a pencil into [B.P.'s] anus." (Tr. 288.) B.P.'s shorts remained on, but the penetration was still painful. (Tr. 289.) B.P.'s friend who was in the room heard B.P. screaming. (Tr. 321.)

The next morning, B.P. woke and went back to his dorm room. (Tr. 291.) Defendant and one of the other boys came to B.P.'s room, and Defendant apologized for what had happened and said that "they had done it to [B.P.] the worst of anybody." (Tr. 292.)

S.G. was a rising freshman who was attending football camp during the summer of 2014. (Tr. 96-97.) S.G. knew who Defendant was because they were both on the football team, but they were not friends. (Tr. 100.)

On the night of August 9, after the team got back from the movie, S.G. went back to his dorm room and used his phone. (Tr. 100-01.) The door to S.G.'s room was closed and the light was out. (Tr. 104.) S.G. went to bed wearing basketball shorts. (Tr. 103.)

In the middle of the night, five people came into S.G.'s room, dragged him out of bed, and threw him on the floor in between the two beds. (Tr. 104-

05.) S.G. was tossed onto his stomach and kicked. (Tr. 105.) The boys held S.G. down, and one of them tried to put a hard object into his anus through his shorts. (Tr. 105, 108.) S.G. struggled, but he could not get up. (Tr. 105.) S.G. could not see the boys until they left, but when they opened the door, he saw Defendant. (Tr. 108.)

The next morning, Defendant asked S.G., "[h]ow did you sleep." (Tr. 119.) One of the boys who was with Defendant in S.G.'s room showed S.G. a hard pipe-like object. (Tr. 114-15.) S.G. told school officials about the object, and it was collected by the dean of students and given to police. (Tr. 115-17, 214-15.)

K.K. was a rising sophomore at Principia in the summer of 2014. (Tr. 144-45.) K.K. attended sports camp at the school for soccer that summer. (Tr. 144.) K.K. knew Defendant from being in school together, but they were not friends. (Tr. 147.)

On August 9, 2014, K.K. got back from a movie and went right to bed because his dad, the soccer coach, was very strict about curfew. (Tr. 150-51.) K.K. went to sleep in just boxer shorts and a t-shirt. (Tr. 151.) The lights were off in his room, and the door was shut. (tr. 151.)

At around 1:20 a.m., on August 10, 2014, four people, including Defendant, came into K.K.'s room. (Tr. 152.) They held K.K. down on his bed with one person holding each of K.K.'s limbs. (Tr. 153.) One of the boys then "stuck his fingers in [K.K.'s] butt." (Tr. 153.) K.K. struggled to get free, but he could not move. (Tr. 155.) K.K. was scared. (Tr. 154.) The four boys then left K.K's room. (Tr. 154.)

Later that day, the dean of students and the principal received information about an incident in the boys' dorm. (Tr. 197, 239.) The dean of students and the principal conducted an investigation into the incident. (Tr.

197, 239-40.) As part of that investigation, the dean of students and the principal spoke with the five boys, including Defendant, who had allegedly been involved in the incident. (Tr. 198, 239-45.) The boys all agreed that they were involved. (Tr. 206, 207.) Defendant did not say anything at the meeting, but he was very distraught, and he agreed by nodding his head to what was being said. (Tr. 241.)

After speaking with the boys, the dean of students spoke with some of the alleged victims. (Tr. 212.) After speaking with two of the targeted boys, she called the school's lawyer, who then called police. (Tr. 212-13.)

Later, Defendant gave apology letters to the dean of students that were written to J.G. and B.P. (Tr. 217.)

Defendant did not testify at trial. (Tr. 335-36.) He called the principal of the school to testify on his behalf. (Tr. 337-38.)

ARGUMENT

I. (Alleged juror misconduct)

The trial court did not err in overruling Defendant's Motion for New Trial because any alleged juror misconduct did not influence the jury's verdict, and Defendant was not prejudiced.

A. The record pertaining to this claim

During jury deliberations, the trial court received a note from the jury stating that "[o]ne of our jurors has stated that she would be unable to convict (vote guilty) unless she knows what the sentence would be. She says she doesn't believe a 17-year-old should be tried as an adult. Wants to be able to petition the Court for lenience." (Tr. 416.) The court responded with a note that stated, "[t]he jury will be guided by the evidence as they recall it and the instructions of law as provided by the Court." (Tr. 416.)

Nearly an hour later, the bailiff alerted the trial court that one of the jurors had opened the door of the jury room and tried to leave. (Tr. 417.) The trial court told counsel that it wanted to bring the jurors back into the courtroom and inquire of the foreperson whether further deliberations would assist the jury. (Tr. 418.) Following a short recess, the trial court received a note from the jury that stated, "we are making progress after a break and additional discussion." (Tr. 420.) After discussion with the parties, the court overruled Defendant's request for a mistrial and for further inquiry and decided to allow the jury to continue deliberating. (Tr. 419-26.) Shortly thereafter, the jury returned its verdicts. (Tr. 426-29.)

After polling the jury, Defendant asked to inquire of the one juror that attempted to leave the jury room. (Tr. 430.) The trial court refused, stating that it was "not allowed to question the jurors separately and independently, and otherwise pierce their verdict." (Tr. 430.) Defendant then asked that the

trial court inquire of the bailiff under oath as to what happened when the juror tried to leave. (Tr. 433-34.) The trial court agreed to inquire, and the parties agreed that the trial court would ask the questions. (Tr. 434.)

The bailiff testified that "[t]he 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.) The bailiff testified that the juror was "crying, very upset[,]" and "[s]he kept walking past me. I kept . . . guiding her back with a little hug." (Tr. 436.) The bailiff also testified that when the juror came back out again, "I told her that she needed to remain with her group, that, you know, she needed to comply, and work as a team." (Tr. 438.) The bailiff testified that she never told the jurors what kind of verdict they had to reach or that they had to agree with each other. (Tr. 441.)

Defendant argued that this interaction interfered with the jury process. (Tr. 442.) The trial court stated that it was a very challenging situation for the bailiff because she was charged with keeping the jury together. (Tr. 443.)

Defendant again raised this issue in his motion for new trial. (L.F. 184-91.) After hearing argument, the trial court denied Defendant's request to further interview the bailiff, but found 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. 241-44; Tr. III 39-52.)

On August 31, 2016, an evidentiary hearing was held. (Tr. III 53.) Juror No. 12 testified that she tried to leave the jury room, but she did not leave because the bailiff told her she would go to jail:

> Q. [By prosecutor:] . . . Okay. At some point during the deliberations when you and the other jurors were discussing, did you try to leave the room?
>
> A. Yes.
>
> Q. And when you tried to leave the room did you in fact open the door of the jury room?

A. Yes.

Q. When you opened the door was the bailiff [ ] standing there?

A. Yes.

Q. And did she, in fact, make you stay in the room?

A. My feet did not go past the threshold.

Q. Okay. That was actually my next question. So you never even left the room; is that correct?

A. No.

Q. Okay. And you – when the bailiff . . . tried to make you stay in the jury room she wasn't forceful, was she?

A. No.

* * *

Q. . . . [Juror No. 12], you stated that the bailiff [ ] was not forceful when she encouraged you to go back in the room?

A. Yes.

Q. Okay. And what if anything did she say to you regarding going back into the room?

A. She said if I came out of the room I would go to jail.

(Tr. III 60-61.) Juror No. 12 also testified that the bailiff did not discuss anything about the case with her and did not influence her verdict:

Q. Okay. Did – at any point did [the bailiff] say to you her opinion or thoughts on the case that you were here for?

A. No.

Q. All right. At any point did she tell you whether or not she thought [Defendant] was guilty?

A. No. . . . We didn't talk.

Q. Okay. At any point did she discuss anything about the case with you?

A. No.

Q. She just made you go back in the jury room; correct?

A. Yes.

Q. Okay. Did your interaction with her in that hallway –

A. No, it was – I was not in the hallway.

Q. Okay. . . . Did you in fact go all the way back in the jury room and shut the door.

A. I never left the jury room.

Q. Okay. So you were standing there with the door open?

A. Yes.

Q. In the doorway?

A. Yes.

Q. And is that where you had your conversation with [the bailiff]?

A. Yes.

Q. Okay. At some point did you go back all the way into the room and shut the door?

A. Yes.

Q. And at some point was a jury – was a verdict returned by the jurors?

A. Yes.

* * *

Q. . . . Did you're [sic] interaction with the bailiff, [ ], affect your ability to follow the instructions?

A. No.

Q. [Juror No. 12], after the verdict – after the jury finished deliberating, isn't it true you all came in here to announce the verdict to the Court?

A. Yes.

Q. And when the verdict was ready to the Court do you recall the Judge polling the jury?

A. Yes.

* * *

Q. Do you recall the Judge saying to you after the jury was – after the verdict was read, Juror No. 12, is this your verdict?

A. Yes.

Q. And how did you respond?

A. Yes.

(Tr. III 63-65.)

On cross-examination, Juror No. 12 clarified that she wanted to leave the jury room, but the bailiff was standing in the doorway when she opened the door:

> Q. [By defense counsel:] And you mentioned that you actually never set foot outside the actual jury room?
>
> A. True.
>
> Q. And I think you even said that you didn't – you opened the door?
>
> A. Um-hum.
>
> Q. And was the bailiff sitting right – was she standing or sitting right outside?
>
> A. She was standing right there.
>
> Q. Okay. And that was your first interaction with the bailiff is when you opened the door?
>
> A. Yes.
>
> Q. And you testified that – you testified that you had a conversation, a very brief conversation with her; is that right?
>
> A. There was no conversation.
>
> Q. Okay. Well, let me ask you this: when you opened the door did you say anything to her?
>
> A. Probably. I don't remember, but I wanted to get out of there.
>
> * * *
>
> Q. And do you recall specifically what you may have said to her at that time?
>
> A. No, I'm sorry, I don't.
>
> Q. That's okay. And you said she made some comments to you; is that right?
>
> A. Yes.
>
> Q. And I believe you testified that the bailiff indicated to you that if you came out of the room you would go to jail?

A. Yes.

Q. And do you recall if you responded in any way to that statement?

A. I don't remember. I – I went back into the room, I did not want to go to jail.

(Tr. III 67-68.) Juror No. 12 also testified that she had no physical contact with the bailiff:

Q. When you had this interaction with the bailiff was there any physical contact at all between the two of you?

A. Not that I recall. She had both her arms on the things of the door.

Q. Like the door frame?

A. Yeah.

Q. So was she physically preventing you from walking out of the jury room?

A. No, she didn't prevent me but I would have had to run her over to get out.

Q. So it is fair to say that – that she was blocking the doorway?

A. Yes.

Q. Okay. And the only way you could have gotten past her would have been run right over her, as you just stated?

A. I guess. I don't know.

(Tr. III 68-69.) Juror No. 12 then reiterated that her interaction with the bailiff had no effect on her verdict:

Q. Do you recall if the bailiff ever said to you that you needed to comply?

A. Comply with what?

Q. I don't know, I'm just asking if she – if you recall her using those words at all?

A. No.

Q. No, you don't recall?

A. No, I don't recall.

Q. Do you recall if the bailiff ever said to you that you need to go back in and work as a team?

A. Something like that. I don't know if that was the exact words, but that I needed to stay in the room and we needed to work together.

Q. Okay. So what you recall is she said you need to go back in there or you'll go to jail; right?

A. That's backwards.

Q. Okay. You tell me what you remember?

A. I said I wanted to get out of here, I was very, very upset, and she said if you come out you will go to jail.

Q. When she said that to you –

A. Then I went back in the room.

Q. Okay. When she said that statement to you that you just told me about going to jail, what did you understand that to mean?

A. That you can't just walk out of a jury deliberation room, if you do that you're breaking a law.

Q. At that point you said that you went back into the room?

A. Right.

Q. And joined the rest of your jurors, is that correct?

A. Yes.

Q. The incident or the contact that you had with the bailiff, [ ], do you have any knowledge as to whether any of the other jurors observed that interaction?

A. I don't know, they were in the room and there was the door.

Q. Okay. When you went back into the jury room you continued deliberations; is that correct?

A. Yes.

* * *

Q. . . . Did the statement that [the bailiff] made to you have any affect [sic] on your verdict?

A. No.

* * *

> Q. . . . [Juror Number 12], if – if the bailiff had not stopped you and turned you around and made that statement to you about going to jail would you have left the jury room?
>
> A. Yes.

(Tr. III 69-73.) After the hearing, Defendant again sought to elicit testimony from the bailiff, but that request again was denied by the trial court. (Tr. III 74-75.)

In its memorandum and order, the trial court ruled that the State had sustained its burden of showing that there was no prejudice:

> The Court finds that Juror #12 clearly, and without equivocation, stated that the interactions between herself and the bailiff had no effect on this juror's deliberations or her ability to follow the Court's instructions. Juror #12 made these statements to counsel for both parties, on direct and under cross examination.

(L.F. 246.)

B. Standard of review

"This Court will not disturb a trial court's ruling on a motion for new trial based on juror misconduct unless the trial court abused its discretion." *State v. West*, 425 S.W.3d 151, 154 (Mo. App. W.D. 2014) (citing *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 86-87 (Mo. banc 2010)). "A trial court abuses its discretion if its ruling 'is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.'" *Id.* (citing *Fleshner*, 304 S.W.3d at 86-87).

C. Defendant is not entitled to any relief

Section 547.020, RSMo, provides that a trial court may grant a new trial "[w]hen the jury has been separated without leave of the court, after retiring to deliberate upon their verdict, or has been guilty of any misconduct tending to prevent a fair and due consideration of the case[.]" "Prejudice is presumed from misconduct involving improper third party contact with

jurors." *State v. White*, 138 S.W.3d 783, 786 (Mo. App. W.D. 2004) (citing *State v. Babb*, 680 S.W.2d 150, 152 (Mo. banc 1984)). "When the improper contact intrudes upon the deliberative process, the State can avoid a new trial only by presenting evidence of a 'lack of prejudice' to the defendant." *Id.* (quoting *State v. Hayes*, 637 S.W.2d 33, 38 (Mo. App. E.D. 1982)). "The trial court has broad discretion in determining whether the State has demonstrated the harmlessness of an improper jury contact." *Id.* (citing *State v. Klaus*, 730 S.W.2d 571, 580 (Mo. App. E.D. 1987)). The court "is not required to hear testimony from jurors to rule on a motion for new trial that is brought on allegations of juror misconduct." *West*, 425 S.W.3d at 155 (citing *State v. Chambers*, 891 S.W.2d 93, 101 (Mo. banc 1994)).

In the instant case, the bailiff took an oath to keep the jury together and to not communicate with the jury without an order of the court. Juror No. 12's act of opening the door with the intention to leave required the bailiff to either allow the jury to separate or to communicate with the juror immediately without leave of the court in order to keep her in the room. The bailiff communicated with the juror only to keep her from exiting the room and then told the court what had occurred. This communication, which was necessary to prevent the separation of the jury, should not be considered error or misconduct, and prejudice should not be presumed.

If prejudice is presumed, the State rebutted that presumption by proving that Defendant was not prejudiced from the contact because the bailiff, in telling Juror No. 12 not to leave the room, did nothing to influence the jury in its deliberations.

Defendant argues that Juror No. 12 "caused a scene," and that "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." (Defendant's brief at 31.) But the relevant issue here wasn't whether Juror No. 12 caused a scene in front of her fellow jurors. The fact that Juror No. 12 may have caused a scene in the jury room is a secret of the jury room that should not be explored by the court. "The rule is perfectly settled, that jurors speak through their verdict, and they cannot be allowed to violate the secrets of the jury room, and tell of any partiality or misconduct that transpired there, nor speak of the motives which induced or operated to produce the verdict." *Babb*, 680 S.W.2d at 152. The only relevant inquiry here was what happened between Juror No. 12 and the bailiff and whether the contact between the bailiff and Juror No. 12 prejudiced Defendant. It did not.

Defendant next argues that the trial court applied the incorrect legal standard in finding that Juror No. 12 was not subject to improper influence because not all of the jurors testified that they were not influenced by the bailiff. (Defendant's brief at 31.) This argument is without merit, however, because Juror No. 12 was the only juror that had any contact with the bailiff, and if she was not subject to improper influence by the interaction, none of the other jurors were subject to improper influence. Defendant relies on *Babb*, *Smotherman v. Cass Regional Medical Center*, 499 S.W.3d 709 (Mo. banc 2016), and *Travis v. Stone*, 66 S.W.3d 1 (Mo. banc 2002), to support his argument that the trial court should have heard evidence from all of the jurors; but those cases are inapposite.

In *Babb*, after the case was submitted to the jury, there was a tornado warning that required the jury to move to a storm shelter in the basement of the courthouse. 680 S.W.2d at 151. The jury was kept in a separate room from others, but the room did not have a door. *Id*. Court personnel, spectators, and potentially witnesses from the trial were in an adjoining

room. *Id*. This Court found that there was insufficient evidence in the record to determine whether there was any improper influence on the jury, but that jurors "may testify in support of their verdict, that no disturbing influence was brought to bear upon them, and that they were not interfered or tampered with." *Id*. at 152. The Court, therefore, remanded the case so the trial court could rehear the motion for new trial. *Id*.

Defendant cites *Babb* for the proposition that "[t]he verdict will be set aside, unless the state affirmatively shows that the jurors were not subject to improper influences." (Defendant's brief at 32.) But this statement was not the holding in *Babb*. Instead, this excerpt of a quote was cited in *Babb* as the holding in *State v. Dodson*, 92 S.W.2d 614, 615 (1936): "[We] have consistently ruled, in felony cases, that if the separation or misconduct of the jury took place during the progress of the trial, the verdict will be set aside, unless the state affirmatively shows that the jurors were not subject to improper influences."

The Court in *Babb*, instead, adopted a different standard from that held in *Dodson* for potential misconduct that occurred after the case was submitted but before the verdict:

> We are persuaded "that the stronger reasons and the weight of authority sustain the rule that, where a motion for a new trial is made on account of communications to the jury during their deliberations, there is a rebuttable legal presumption that they were prejudicial to the moving party, that this presumption may in some cases be overcome with evidence, and that where competent evidence is offered it is the duty of the trial court to hear and consider it, and that when it does so, and decides the motion thereon, its decision is discretionary, and is reviewable . . . [on appeal] for abuse of discretion only. . . ."

Babb, 680 S.W.2d at 152 (quoting *Chambers v. U.S.*, 237 F. 513, 521 (8th Cir. 1916) (internal citations omitted)). *Babb* is not directly on point because in this case, there was evidence presented about the contact between the bailiff

and Juror No. 12, and the evidence rebutted any presumption of prejudice from the contact.

In *Smotherman*, a juror in a slip-and-fall case told the plaintiff's attorney after the verdict that he had Googled the weather for the day of the fall and found that there was significant snowfall forecasted for that day. 499 S.W.3d at 712. The trial court found that there was no prejudice from this extraneous evidence, in part because of testimony from eight other jurors that "the interjection of the extraneous evidence consisted of an isolated remark which was either not heard by the other jurors or was appropriately discarded by them." *Id.* at 714. This Court affirmed, finding that "the trial court properly applied the law presuming prejudice from misconduct but found the prejudice rebutted by the credible testimony of eight jurors who complied with the court's instructions." *Id.*

This Court, in *Smotherman*, did not hold that the testimony of non-offending jurors is always required in every instance of juror misconduct. Instead, the Court stated the proper rule for considering misconduct consisting of improperly gathering evidence outside of trial:

> Missouri Follows the Mansfield Rule, which provides that a juror's testimony about juror misconduct is generally not admissible to impeach a jury's verdict. Nonetheless, juror testimony is admissible to establish that a juror committed misconduct by improperly gathering evidence outside of trial.
>
> Although the trial court found that the juror's research constituted misconduct, merely proving that a juror obtained extraneous evidence against the court's instructions does not automatically entitle a moving party to a new trial. Instead, such misconduct raises a presumption of prejudice, and the burden shifts to the opposing party to rebut that presumption. . . . To be prejudicial, the extraneous evidence obtained from the juror misconduct must be material to the consequential facts of the case.

Id. at 712.

Similarly, in *Travis*, a juror in a wrongful death case went to the scene of the accident so that she could better "understand the testimony presented at trial." 66 S.W.3d at 3. This Court found that, "although [the juror] stated that her observations did not enter into deliberations, it must be assumed that her visit had an impact on her decision making, which in turn influenced her participation in the jury deliberations." *Id.* at 5.

Defendant argues that the Court made this decision because the only testimony was from the offending juror. (Defendant's brief at 34-35.) But that is not correct. It was the extreme prejudice of the outside evidence, not the lack of juror testimony, that caused the Court to order a new trial. *Id.* at 6. In fact, the Court cited to *Middleton v. Kansas City Public Service Co.*, 152 S.W.2d 154 (Mo. 1941), a case where nine of the jurors made affidavits regarding the misconduct:

> Ultimately, the case is governed by *Middleton*. The errant juror in that case also contended that the measurements he made did not influence his verdict or change the result. There were even affidavits submitted by nine other jurors to the effect that any measurements [the juror] may have made had no effect on the verdict. This Court nevertheless held that the trial court abused its discretion in denying the motion for new trial, because the presumption of prejudice was quite strong, and the statements of the jurors minimizing the effect of the misconduct were entitled to very little weight.

Travis, 66 S.W.3d at 6.

The instant case is different from *Smotherman* and *Travis* in that there was no extraneous evidence injected into deliberations. Therefore, there was no need for the trial court to hear testimony from other jurors about whether such evidence influenced the verdict.

Defendant also cites to several other cases to support his argument that *Smotherman* requires evidence that both the offending juror and the non-offending jurors were not prejudiced, but these cases also are inapposite.

(Defendant's brief at 35) (citing *Middleton*, 152 S.W.2d 154 (Mo. 1941); *Consol. Sch. Dist. No. 3 of Grain Valley v. W. Mo. Power Co.*, 46 S.W.2d 174 (Mo 1931); *State v. Herndon*, 224 S.W.3d 97 (Mo. App. W.D. 2007); *State v. Hayes*, 637 S.W.2d 33 (Mo. App. E.D. 1982)).

In *Middleton*, a juror went out and measured the height of the fender of the vehicle model that was involved in a collision with a streetcar. 152 S.W.2d at 156-57. The juror alleged after the verdict that his measurements did not influence his verdict or any of the other jurors. *Id.* at 158. The juror also presented affidavits of nine jurors stating that they did not discuss the evidence during trial. *Id.* The trial court found that the juror committed misconduct, but there was no showing that the misconduct influenced the verdict. *Id.* This Court, however, found that "[w]e are unable to say from the whole record that the active interest and evident attitude of the [the juror], and his independent search for and acquisition of facts outside the record, did not influence the verdict or that defendant was not prejudiced by the misconduct of this juror." *Id.* at 161.

In *Grain Valley*, a juror sought outside information about what would happen to a transformer when it blew up. 46 S.W.2d at 180. Although there were several affidavits from jurors, and some of the information in them conflicted, the appellate court found that there was no prejudice to the defendant because "the information gained as to what would happen to a transformer under the given circumstances was not in conflict with the substance of defendant's own evidence[,]" and "[t]he determination of [prejudice] is largely within the discretion of the trial judge." *Id.*

In *Herndon*, many of the jurors were allowed to use their cell phones to make personal and business calls during a break in deliberations, and one juror spoke to an alternate juror who was not deliberating, but who told the

deliberating juror that she believed the defendant was innocent. 224 S.W.3d at 100-01. In order to rebut the presumption of prejudice, the State called all 12 jurors and the two alternates to testify. *Id*. at 101. The court found that there was no prejudice based on the outside communications: "Although [the defendant] was presumptively prejudiced by [the alternate juror's] communication with a juror and by the numerous cellular telephone calls made by many of the jurors during jury deliberation, the evidence established that the jury's deliberation was not affected by these calls." *Id*. at 102.

In *Hayes*, the trial court forgot to release the alternate juror before deliberations, and the alternate went into the jury room with the rest of the jurors for an hour. 637 S.W.2d at 36. The State presented an affidavit from the alternate stating that he did not participate in the deliberations. *Id*. The jury foreman testified that he did not recall the content of the single comment the alternate made during the deliberations. *Id*. at 38. The State also presented affidavits from all 12 of the jurors stating that the alternate did not participate in the deliberations and did not influence their verdict. *Id*. This Court found that the trial court did not abuse its discretion in refusing the grant a mistrial. *Id*. at 39.

None of these cases specifically required testimony or affidavits from all of the jurors to find that the defendants were not prejudiced. In *Herndon*, many of the jurors had outside communications with people via cell phone, so it follows that all of the jurors would be called to testify about those contacts. And in *Hayes*, the alternate juror sat in deliberations for nearly an hour, and the jury foreman could not remember the content of the alternate's comments. Again, it follows that all of the jurors would be asked whether this intrusion affected their deliberations. In the instant case, however, even if the other jurors observed the brief interaction between Juror No. 12 and the

bailiff, they did not have contact with the bailiff and there was nothing of substance said between Juror No. 12 and the bailiff that could have influenced the verdict or prejudiced Defendant.

Instead, this case is more like *State v. Kirk*, 636 S.W.2d 952 (Mo. 1982). In *Kirk*, the judge sent the bailiff into the jury room with menus at 5:30 p.m., and the bailiff told the jurors that "it would take an hour to serve a meal so they should order dinner unless they could reach a verdict within any reasonable time of less than one hour." *Kirk*, 636 S.W.2d at 955. The jury told the bailiff that they did not need dinner, and they reached a verdict 45-minutes later. *Id.* at 955-56. This Court found that no prejudice resulted from the bailiff's communication with the jury, stating that "[t]his Court is satisfied the foregoing communication had no effect whatever on the jury's deliberations or the verdict." *Id.* at 956.

In the instant case, the interaction between the bailiff and Juror No. 12 was very brief and limited to the bailiff blocking the doorway and telling the juror that she could not leave the room. Nothing substantive was said between the two, and the juror indicated that it wasn't even a conversation. Once she was told that she was not allowed to leave the jury room, the juror turned around, went back into the room, and continued to deliberate. The juror also testified that the interaction did not influence her verdict. If this brief interaction did not influence the juror who was involved, it surely did not influence the verdicts of other jurors who might have witnessed Juror No. 12 open the door and then be told she could not leave. In fact, after this occurrence, the jury sent a note to the trial court stating that they were making progress in their deliberations. And when the jury was polled, all of the jurors expressed that the verdict was their verdict. This was further proof that there was no improper influence on the verdict and that Defendant was

not prejudiced. Therefore, the trial court did not err in overruling Defendant's motion for new trial.

II. (Closing argument – apology letters)

The trial court did not abuse its discretion in overruling Defendant's objection to the prosecutor's rebuttal closing argument because the argument was not improper, and there was no prejudice.

A. The record pertaining to this claim

The dean of students testified that she told the five students involved in the incident that they could write apology letters to the victims. (Tr. 216.) The dean of students testified that she received apology letters written by Defendant. (Tr. 216.) When the State attempted to introduce the letters as evidence, Defendant objected, and the dean of students could not authenticate them because they were not given to her directly by Defendant. (Tr. 217-19.) The principal also testified that he was aware that Defendant had written apology letters. (Tr. 257.)

During the State's initial closing argument, the prosecutor argued that the evidence, including the apology letters, proved that Defendant was guilty: "What other evidence do you have that [Defendant] did this? And I don't have much time. Well, you heard from the Dean of Students and you heard from the Principal that [Defendant] wrote apology letters." (Tr. 375.)

During Defendant's closing argument, defense counsel attempted to point out inconsistencies in the testimony of the administrators. (Tr. 397-98.) Defense counsel specifically mentioned the apology letters: "But, you know, the fact of the matter is, we never saw apology letters. You know, the prosecution promised you these apology letters in opening statement. We never saw any apology letters written by [Defendant]." (Tr. 397.)

Then, in the State's rebuttal closing argument, the prosecutor told the jury that they didn't get to see the letters because defense counsel objected:

> Now, [defense counsel] argued and said to you, 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 [the dean of students]. [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.)

Defendant then made an untimely objection, arguing that the prosecutor's argument about the apology letters was improper. (Tr. 405.) The trial court overruled Defendant's objection, stating that the reference to the letters was an invited response. (Tr. 406.)

Defendant included this issue in his motion for new trial. (L.F. 194.)

B. Standard of review

"Typically a trial court has broad discretion in controlling the scope of closing argument and the trial court's rulings will be cause for reversal only upon a showing of abuse of discretion resulting in prejudice to the defendant." *State v. Hall*, 319 S.W.3d 519, 522 (Mo. App. S.D. 2010) (citing *State v. Forrest*, 183 S.W.3d 218, 226 (Mo. banc 2006); *State v. Edwards*, 116 S.W.3d 511, 537 (Mo. banc 2003)). "In ruling on the propriety of the closing argument, the challenged comment must be interpreted in light of the entire record rather than in isolation." *Id.* (quoting *State v. Blakeburn*, 859 S.W.2d 170, 174 (Mo. App. W.D. 1993)). "Further, 'there must be a reasonable probability that the verdict would have been different had the error not been committed' by the trial court." *Id.* at 523 (quoting *State v. Johns*, 34 S.W.3d 93, 116 (Mo. banc 2000)).

"However, '[t]he standard of review for alleged error in closing argument depends upon whether defense counsel objects.'" *Id.* (quoting *State v. Lockett*, 165 S.W.3d 199, 205 (Mo. App. E.D. 2005)). "[F]ailure to properly object to closing argument at the time it is made to a jury results in a waiver of any right to complain of the argument on appeal, even if the point is preserved in an after trial motion." *Id.* (quoting *State v. Samuels*, 88 S.W.3d

71, 83 (Mo. App. W.D. 2002) (additional citations omitted)). "This is because 'if the objection is not timely, the trial court has no opportunity to take corrective action at the time the remarks were made.'" *Id.* (quoting *Samuels*, 88 S.W.3d at 83 (additional citations omitted)). "Therefore, when counsel does not object to an allegedly improper argument at the time it is made, the error is not preserved for review." *Id.* (quoting *State v. Lingle*, 140 S.W.3d 178, 190 (Mo. App. S.D. 2004)).

Here, Defendant did not object to the State's mention of the apology letters until he objected to another comment made by the State. This objection was untimely, and therefore, did not preserve anything for appellate review. If this Court decides to review Defendant's claim, it should do so only for plain error.

"[I]t is within this Court's discretion to review this issue pursuant to Rule 30.20." *Hall*, 319 S.W.3d at 522. "It has long been held that '[p]lain error relief as to closing argument should rarely be granted and is generally denied without explanation.'" *Id.* (quoting *State v. Crowe*, 128 S.W.3d 596, 600 (Mo. App. W.D. 2004); *State v. Garner*, 14 S.W.3d 67, 76 (Mo. App. E.D. 1999)). "In order to establish that the [trial] court committed plain error during closing arguments, [a defendant] must make a sound, substantial showing that manifest injustice or a miscarriage of justice will result if [this Court fails to] grant relief.'" *Id.* (quoting *Crowe*, 128 S.W.3d at 601).

C. Defendant is not entitled to any relief

"'[W]hen complained of remarks come in the rebuttal portion of argument by the [S]tate, the trial court may consider whether the comments were invited' in that '[t]he [S]tate may go further by way of retaliation in answering the argument of the defendant than would normally be allowed.'" *Hall*, 319 S.W.3d at 523 (quoting *State v. Pratt*, 858 S.W.2d 291, 292 (Mo.

App. E.D. 2010)). "The State 'has considerable leeway to make retaliatory arguments at closing' and it 'may retaliate to an issue raised by the defense even if [the] comment would be improper.'" *Id*. (quoting *State v. Sanchez*, 186 S.W.3d 260, 265 (Mo. banc 2006)).

Here, the trial court did not abuse its discretion or plainly err in overruling Defendant's untimely objection to the State's argument that the defense did not want the jury to see the apology letters. The State made this comment only after defense counsel pointed out to the jury that the State had promised that the jury would see apology letters but then never showed them. The State's mention of the apology letters in rebuttal closing, therefore, was reasonable to answer the comments made by the defense.

Defendant cites to *State v. Nelson*, 957 S.W.2d 327 (Mo. App. E.D. 1997), to support his argument that the State's argument was improper. (Defendant's brief at 38-39.) *Nelson* is distinguishable. In *Nelson*, the State referenced a statement to police that the defendant had made, but "neither the statement, nor the fact that defendant made the statement to police was in evidence." *Nelson*, 957 S.W.2d at 329. Here, in contrast, there was testimony from two witnesses that Defendant had written the apology letters. Therefore, the State did not mention facts not in evidence, but simply rebutted the defense's argument that the jury never saw any apology letters written by Defendant.

Defendant also relies on *State v. Price*, 541 S.W.2d 777 (Mo. App. E.D. 1976). (Defendant's brief at 39-40.) But *Price* is inapposite. In *Price*, the appellate court found that the State's reference in closing argument to two witnesses that the defendant did not call was improper and prejudicial because "[t]he prosecutor himself had requested the court to exclude these witnesses[,]" and "[a]ny comment on their failure to testify was, therefore,

within the rule which prohibits comment on excluded testimony and was improper." *Price*, 541 S.W.2d at 778. In the instant case, however, the State did not comment independently on excluded evidence, and the State did not cause the evidence to be excluded.

This case is more like *State v. Sanchez*, 186 S.W.3d 260, 265 (Mo. banc 2006), and *State v. Hall*, 319 S.W.3d 519, 522 (Mo. App. S.D. 2010).

In *Sanchez*, this Court found that the State's argument in rebuttal closing that "if there were [irrational thoughts] you would have heard from some doctors[,]" was not improper because "it was rebutting the numerous remarks made by [the defendant's] counsel as to [the defendant's] irrational behavior in the closing argument." 186 S.W.3d at 265.

In *Hall*, the parties agreed to stipulate that the defendant had no criminal record, but the defense never introduced the stipulation at trial. 319 S.W.3d at 521. During his closing argument, defense counsel mentioned to the jury that the defendant had no criminal history. *Id.* Then, during the State's rebuttal closing, the prosecutor told the jury that the State never said that the defendant did not have a criminal record in front of the jury. *Id*. The appellate court found that this statement by the prosecutor was not error because "it was [the defendant's] counsel who first stated in closing argument that the State had stipulated [the defendant] had no prior criminal conviction, although such a stipulation had not been introduced at trial." *Id.* at 524.

Similarly, in the instant case, it was defense counsel who raised the issue of the apology letters not being admitted into evidence during Defendant's closing argument. The State, therefore, had "considerable leeway to make retaliatory arguments at closing," and the trial court did not err,

plainly or otherwise, in overruling Defendant's objection to this proper retaliatory argument.

Further, Defendant has not proved that the State's comments were prejudicial or rose to the level of manifest injustice or a miscarriage of justice. The jury heard from two witnesses that Defendant had written apology letters. The jury saw the State attempt to enter these letters into evidence over Defendant's objections. (Tr. 216-19.) The jury also heard defense counsel's statements during closing that the State promised apology letters but the jury never saw them. The jury knew that they did not see the letters because Defendant objected. The State never referenced anything specific in the apology letters, only that they existed. Therefore, the comments by the State were only confirming what the jury saw happen at the trial. This comment by the State, responding to defense counsel's comment about the letters, did not affect the outcome of trial.

III. (Closing argument – alternative *mens rea*)

The trial court did not abuse its discretion in refusing Defendant's request to give a curative instruction after the prosecutor mentioned sexual gratification in closing argument because Defendant was not prejudiced by the trial court's decision.

A. The record pertaining to this claim

In the jury instructions, the verdict directors defined "deviate sexual intercourse" as "a sexual act involving the penetration, however slight, of the anus by a finger, instrument or object done for the purpose of terrorizing [the victim]." (L.F. 138, 141, 143-44, 147, 150, 152, 154, 156.)

During the State's rebuttal closing argument, the prosecutor argued that the crime was a sex act:

> Now, the defense made a big deal, they said this is not a sex act. And I ask you, if this isn't a sex act, what is it? It's not a medical exam. It's a sex act. By definition, this is a sex act. Defense counsel wants you to look at only part of the definition, just like they only showed you part of the video of the interview of the boys with police. The definition goes on, and it allows for either sexual gratification, which is an option, or done to terrorize.

(Tr. 404-05.) Defendant objected, arguing that it was improper argument. (Tr. 405.) The trial court agreed and stated that "[n]o, you can't do that. We can't talk about things that we chose not to put in instructions before the jury." (Tr. 406.) Defendant sought a curative instruction, but the trial court decided to allow the prosecutor to rephrase:

> [Defense counsel:] . . . But, I mean, the objection that you're sustaining, would you instruct on that or just move on? I mean, because she already said it.
>
> THE COURT: I'm going to let her say, I'm going to direct you back to the instructions of law provided by the Court. In other words, I don't like to shake my finger at lawyers.
>
> [Defense counsel:] I gotcha.

> THE COURT: But I guess I would point out, I would ask you just to focus on the instructions that we've given them, not what we could have given them, or what we should have given them, but what they have before them. So if you could say, I'm going to draw your attention to the instructions of law that you have before you and explain to you why you should convict under them.
>
> [Prosecutor:] Okay. So you need me to go back to it?
>
> THE COURT: Unless you just 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.
>
> [Prosecutor:] Yeah.
>
> [Defense counsel:] That's fine, Judge, we're fine if you instruct.
>
> [Prosecutor:] Okay. No, thank you, Judge, I'll just rephrase it. Sure.
>
> [Defense counsel:] We would prefer the Court instruct.
>
> THE COURT: I'm sure you would, but I'm not going to beat people up. I'm going to let her rephrase.
>
> [Defense counsel:] Okay. You may rephrase.
>
> [Prosecutor:] Thank you, [defense counsel].
>
> [Defense counsel:] You're welcome.

(Tr. 407-08.)

The prosecutor then rephrased her argument, mentioning only the part of the definition submitted in the jury instructions:

> We were talking about the defense arguing that this is not a sex act. When the defense pointed the sex act wording out, they didn't look at the whole definition. And I ask you to look at the entire definition of deviate sexual intercourse, which goes on to talk about done with – to terrorize.

(Tr. 409.)

Defendant included this issue in his motion for new trial. (L.F. 194-95.)

B. Standard of review

"A trial court maintains broad discretion in the control of closing arguments." *State v. Smith*, 422 S.W.3d 411, 415 (Mo. App. W.D. 2013) (quoting *State v. Middleton*, 995 S.W.2d 443, 455 (Mo. banc 1999)). "The '[t]rial court's rulings on objections to closing arguments are reviewed for abuse of discretion; however, when a proper objection is made, the trial courts should exclude statements that misrepresent the evidence or the law or statements that tend to confuse the jury.'" *Id.* (quoting *State v. Brightman*, 388 S.W.3d 192, 201 (Mo. App. W.D. 2012); *State v. Deck*, 303 S.W.3d 527, 543 (Mo. banc 2010) (internal quotations omitted)). "Unless that discretion has been clearly abused to the prejudice of the accused, the trial court's ruling should not be disturbed on appeal[.]" *Id.* (quoting *State v. Kriebs*, 978 S.W.2d 460, 466 (Mo. App. S.D. 1998)). "Even if a trial court is found to have abused its discretion by allowing improper closing argument, to warrant reversal of a conviction, the defendant also must establish that such abuse prejudiced him or her." *Id.* (quoting *State v. Williams*, 24 S.W.3d 101, 124 (Mo. App. W.D. 2013)). "To establish prejudice, the defendant must show that there is a reasonable probability that, in the absence of the trial court's abuse, the verdict would have been different." *Id.* (quoting *Williams*, 24 .S.W.3d at 124).

C. Defendant is not entitled to any relief

First, the prosecutor did not commit misconduct and did not misstate the law. The prosecutor only stated the definition of deviate sexual intercourse, including the part about sexual gratification that was not included in the jury instructions. Although this prong of deviate sexual intercourse was not required in order to prove that Defendant committed sodomy in the first degree, it was a reasonable inference from the evidence

presented at trial that the boys committed the acts of sodomy both for the purpose of terrorizing the victims and for sexual gratification, and it served to contradict Defendant's arguments during closing argument that the act was not a sex act and was instead a prank.

Next, to the extent that this statement was error because the jury was not instructed that deviate sexual intercourse can be proven by the act being for the purpose of sexual gratification, the trial court gave the appropriate relief in allowing the prosecutor to rephrase her argument.

Defendant complains of the relief given by the trial court and argues that it was improper for the State to argue facts outside the record. Defendant cites *Price*, 541 S.W.2d at 779, in arguing that "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.' [ ] This principle is so important that courts are expected to neutralize 'obvious prosecutorial misconduct *sua sponte*' in some cases." (Defendant's brief at 46.) This language does not appear in *Price*, however; it does appear in *State v. Roberts*, 838 S.W.2d 126, 131 (Mo. App. E.D. 1992). Neither case supports Defendant's argument.

In *Roberts*, the prosecutor made the following arguments during closing: "(1) defendant was the 'coolest, most collected' liar he had seen in five years of prosecuting; (2) it was his job to speak for the victim's family; (3) the jury should remember the people who loved the victim; (4) the jury should imagine what were the victim's last thoughts before dying; and (5) the jury should put itself in the victim's place on his last night." *Id.* at 129. The Eastern District found that, although the trial court erred in its responses to

these arguments, the error was not reversible error: "The prosecutor's requests to the jurors to place themselves in the place of the victim were neither isolated nor accidentally made. Their effect, therefore, was objectionable. Nonetheless, we have not adopted a *per se* rule of mandatory reversal in all cases in which objectionable comments are made by a prosecutor." *Id.* at 131.

This case is nothing like *Roberts* because, here, the prosecutor's correct statement of the definition of deviate sexual intercourse including part of the definition not given in the jury instructions was made only once. This was not prosecutorial misconduct, and the trial court did not err in allowing the prosecutor to rephrase her argument without that part of the definition.

In *Price*, the prosecutor argued in closing that the defendant presented no evidence to support her defense even though there were two witnesses who could have testified. 541 S.W.2d at 778. Those two witnesses had been excluded from testifying at the request of the prosecutor. *Id.* The defendant objected to the State's closing argument, but the trial court overruled the objection. *Id.* The appellate court reversed for a new trial, finding that the defendant "was clearly injured by the failure of the court to sustain the objection." *Id.* at 779.

Price is nothing like the instant case. And, neither *Price* nor *Roberts* requires the court to give a curative instruction.

Instead, "[a] trial judge *may* address an error in argument by giving a curative instruction." *State v. Johnson*, 22 S.W.3d 183, 191 (Mo. banc 2000) (citing *State v. Neff*, 978 S.W.2d 341, 346 (Mo. banc 1998) (emphasis added)). As stated above, "[a] trial court maintains broad discretion in the control of closing arguments." *Smith*, 422 S.W.3d at 415 (quoting *Middleton*, 995

S.W.2d at 455). The trial court here controlled closing argument by allowing the prosecutor to rephrase her argument. This was not error.

Further, even if the trial court should have given a curative instruction following the prosecutor's statement, the trial court's failure to do so was not prejudicial and does not require reversal.

Defendant argues that "[t]he State of Missouri veering into sexual innuendo was harmful[,]" and "[i]t served only to recklessly mislead and confuse the jury that some sexual gratification component existed in the case." (Defendant's brief at 47.) Defendant then cites multiple cases where sexual misconduct was brought into non-sex cases. (Defendant's brief at 47.) But this is not a case where sexual issues were inserted into a non-sex case; this case was a sex case in that Defendant was charged with multiple sexual offenses. The jury reasonably could have believed, in light of the evidence, that some sexual gratification component existed in this case, and that is why Defendant and the other boys chose sodomy as their method of terrorizing the victims. Just because the jury did not have to find sexual gratification to convict, they still could believe it was a part of the case. Therefore, there can be no prejudice from the prosecutor's mention of sexual gratification.

Finally, even if the prosecutor's statement could be considered a misstatement of the law, "[m]isstatements of the law are not deemed reversible error when the proper law is given to the jury because we assume the jury followed the law as stated in the instructions." *Smith*, 422 S.W.3d at 416 (citing *State v. Chism*, 252 S.W.3d 178, 186 (Mo. App. W.D. 2008)). Here, the jury was properly instructed. In addition, the prosecutor barely mentioned sexual gratification before defense counsel objected. The prosecutor made no argument that the jury could convict on anything other than the correct mens rea included in the jury instructions. Therefore, the

trial court did not abuse its discretion in allowing the prosecutor to rephrase her argument, and Defendant was not prejudiced by the trial court's decision.

CONCLUSION

The trial court did not commit reversible error, and Defendant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) in that it contains 10,499 words excluding the cover, certificate required by Rule 84.06(c), and signature block.

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