IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	**No. SC97658**
	)	
DUANE MICHAUD,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI
THIRTY-FIRST JUDICIAL CIRCUIT
THE HONORABLE THOMAS E. MOUNTJOY, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Duane Michaud was convicted of attempted child enticement under §566.151. The conviction occurred following a jury trial in Greene County before the Honorable Thomas E. Mountjoy. Duane was sentenced to a non-paroleable five year sentence, as required under §566.151 in the Department of Corrections.

After the Missouri Court of Appeals, Southern District, issued its opinion in S.D.35293, this Court granted respondent's application for transfer pursuant to Rule 83.04. This Court has jurisdiction of this appeal under Article V, Section 10, Mo. Const.

STATEMENT OF FACTS

I. Charges And Respondent's Evidence

Duane Michaud was charged with attempted enticement of a child under §566.151(effective until December 31, 2016). (L.F.#3p.1-3).[1]

It was alleged that between June 20, 2012 and August 10, 2012 that Duane was 21 years of age or older and he "laid down next to J.H.[2] on a bed and started rubbing J.H.'s lower stomach, and such conduct was a substantial step toward the commission of the crime of enticement of a child by attempting to persuade a person less than fifteen years of age to engage in sexual conduct, and was done with the purpose of committing such enticement of a child."(L.F.#3p.1).

J.R. was born February 5, 1998(Tr.313). In 2012, J.R. was fourteen(Tr.313). J.R. got married in August, 2016(Tr.312-13). Trial took place in August, 2017, when J.R. was nineteen(Tr.313).

J.R.'s siblings are Harley Hayes, Dusty Glenn, and Alisha Brock(Tr.313-14).

J.R. was living in Springfield with her sister, Alisha, Alisha's boyfriend, David, and her brother, Harley(Tr.313-15). Alisha and David got married during the

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[1] The record is referenced as follows: (1) Legal File (L.F.#_p._); and (2) Trial Transcript (Tr.)

[2] At trial, J.H. testified that she had subsequently married and her initials are now J.R.(Tr.312-13). The instructions referred to her as J.R. (L.F.#10p.5-7), and therefore, she is referred to here as "J.R."

time J.R. lived with them(Tr.313-15). There were three bedrooms - J.R.'s, Harley's, and Alisha's and David's(Tr.315).

While J.R. lived with Alisha and David, Duane also lived in the same house(Tr.315-16). Duane was David's friend(Tr.315-16). Duane slept on the couch in the living room(Tr.316-17). Duane was more that twenty-one years old when he lived in the house(Tr.316-17).

J.R. reported that she was sitting on a couch watching television in the living room(Tr.317-18). There were two couches and J.R. was sitting on one and Duane was sitting on the other(Tr.318).

J.R. testified that Duane was drinking that night(Tr.318). J.R. testified that Duane said that his back was hurting from sleeping on the couch(Tr.319) J.R. testified that she offered to let Duane sleep in her bedroom and she would sleep on the couch(Tr.319). J.R. reported that Duane reached out his hand towards her to take him to J.R.'s bedroom(Tr.319). J.R. testified that she took Duane's hand and walked him to her bedroom(Tr.320).

J.R. testified that Duane got into bed and said that he was lonely and asked her to lie down on the bed with him(Tr.320). J.R. reported that she lay down on the bed(Tr.320). J.R. was lying on her back and Duane was lying on his side facing J.R.(Tr.320). J.R. reported that Duane placed his leg and his arm over her body and said multiple times he was lonely(Tr.320-22). While Duane's leg and arm were over J.R., she felt she could have easily gotten up out of bed(Tr.321).

J.R. reported that Duane kissed her neck and face multiple times and said multiple times for J.R. to tell him when to stop(Tr.321-22). J.R. reported that as Duane was kissing her that his hand moved from her torso towards her pant line while telling her to tell him when to stop(Tr.322-23). J.R. testified that when Duane's hand got below her belly button that she nudged his hand away from her(Tr.323). J.R. reported that Duane then tried to put his fingers in her mouth, but she kept her lips closed(Tr.323-24). At that point, J.R. got up and went outside the house(Tr.324).

While J.R. was outside it was nighttime and she called her then boyfriend, Isaac, to report what had happened(Tr.324-25,332). J.R. went back to her sister's house, but the door was locked(Tr.325-26). As J.R. walked away, David, opened the door(Tr.326). J.R. reported that she was crying(Tr.326). David asked J.R. why she was outside and she handed the phone to David while J.R.'s boyfriend recounted to David what J.R. had reported(Tr.326).

Once inside J.R. went to her bedroom(Tr.327). Duane was lying on the couch(Tr.330). The next morning Alisha took J.R. to David's parents' house(Tr.327).

Over a year later, in 2013, the police got involved in the accusations that J.R. made against Duane(Tr.327). During 2013, J.R. got into a fight with her father over her 18 year old ex-boyfriend, Tyler Hopson, while she was then 15 years old(Tr.328). The fight with J.R.'s father involved how much older Hopson was than she was(Tr.328). When J.R.'s father wanted to get a restraining order against Hopson, J.R. told her father that Duane had "raped" her because she thought that what Duane

did constituted rape(Tr.328-29,335). J.R. said that Duane raped her to get J.R. and Hopson out of trouble with J.R.'s father(Tr.335). J.R.'s father called the police in response to J.R. claiming that Duane raped her(Tr.329).

J.R. is uncertain when the incident in question happened(Tr.330). There was no flirtation between J.R. and Duane(Tr.330-31). J.R. did not remove any clothing(Tr.331). Duane did not unzip his pants, say he wanted to have sex with J.R., have an erection, touch J.R.'s vagina or breasts, place his penis in her vagina or place his hands under J.R.'s clothing(Tr.331,335).

The day after the alleged incident, J.R. told Alisha that she did not think what had happened was a big deal(Tr.334).

Alisha Brock recounted that J.R. is her sister(Tr.337). Alisha married David Brock on May 26, 2012(Tr.338). Alisha testified that Duane would have been about 27 years old in 2012(Tr.339).

In 2012, Alisha and David lived with J.R. and Harley at 804 North Park Avenue in Springfield(Tr.340). Shortly after Alisha and David married, Duane came to live with them(Tr.340-41). Alisha recounted that she and her husband shared a bedroom and Harley and J.R. each had their own bedrooms, while Duane slept on the couch(Tr.341).

David reported to Alisha what J.R. reported to him the day after it happened(Tr.341). Alisha reported that she asked Duane what he had been thinking

when he did what was alleged(Tr.341-42). Alisha testified that Duane's response was that he did not know(Tr.341-42).

Alisha testified that after learning what J.R. alleged happened she, J.R. and Harley went and stayed with Alisha's in-laws(Tr.342). They returned to their house when David told Alisha that Duane was no longer staying with them(Tr.343).

Alisha recounted that J.R. was staying with Alisha and her husband because J.R. could not stay with her parents(Tr.343).

There were times while J.R. stayed with Alisha that Alisha allowed J.R. to drive Alisha's car, while accompanied by Alisha, on the back roads because J.R. was almost 15 years old(Tr.343-44).

J.R. asked Alisha not to report to the police the alleged incident involving Duane(Tr.344). Alisha testified that it was possible that she had told the police that Duane just did not respond at all and just sat there when she asked him what he was thinking(Tr.344-45).

Alisha never saw Duane act inappropriately towards anyone(Tr.347-48).

After the alleged morning in question, Alisha did not hear any more until about a year and a half later, a long time(Tr.348). The alleged incident only surfaced then because J.R. got in trouble with her boyfriend(Tr.348).

When counsel asked Alisha whether in the summer of 2012 J.R. had a tendency to exaggerate, respondent objected on the grounds it was asking a witness to

comment on the credibility of another witness(Tr.348). That objection was sustained(Tr.348).

Springfield Detective Chelsea Taylor became involved in investigating Duane in October, 2013 for acts alleged to have occurred in May, 2012(Tr.352,356-57). Duane voluntarily spoke to Taylor on the phone in February, 2014(Tr.352-53,356-57). Duane's date of birth is October 23, 1983(Tr.353). Initially, Duane stated that he had not stayed at Alisha's and David's house(Tr.353-54). Duane later stated that he might have stayed at their house on one or two occasions(Tr.354). Duane denied all allegations of any inappropriate contact with J.R.(Tr.354-55,358-59). Duane indicated that he had no memory of the night of the alleged acts(Tr.355).

II. Defense Case

Tyler Hopson testified that J.R. told him that Duane "molested her"(Tr.381). J.R. told Hopson that Duane forced himself onto her and took off her underwear(Tr.381-82).

III. Instruction Conference

The Court submitted verdict directing Instruction 5 modeled on MAI-CR3d 320.37.2(L.F.#9p.6-7;L.F.#10p.5-6)(Tr.366-73). Defense counsel objected to Instruction 5(Tr.367-73). Defense counsel offered a non-MAI alternative verdict director (Instruction A) (Tr.366-73;L.F.#7p.1-2).

The Court submitted converse Instruction 6 modeled on "MAI-CR3d 408.02"(L.F.#9p.8;L.F.#10p.7).[3] Defense counsel objected to Instruction 6(Tr.366-73). Defense counsel offered a non-MAI alternative converse (Instruction B) modeled on "MAI-CR3d 408.02"(Tr.366-73;L.F.#7p.3).[4]

Both alternative instructions included that in order to convict Duane, the jury had to find that Duane knew that J.R. was less than 15 years old, something not required to be found under the instructions given to the jury(Tr.366-73)(L.F.#7p.1-3). Those submissions were based in part on §562.021 governing mental states(Tr.369-70). The court rejected the non-MAI instructions on the ground that this Court expects trial courts to follow the MAI instructions as written(Tr.370-72;L.F.#7p.1-3).

IV. Closing Argument

A. Respondent's Intial Argument

In respondent's initial closing argument, the prosecutor argued the acts that J.R. reported emphasizing repeatedly that J.R. was 14 years old(Tr.391-92). The prosecutor continued arguing that the reason the charge here did not turn into something worse was a 14 year old girl made the decision to take actions to stop

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[3] While the bottom of Instruction 6 references "MAI-CR3d 408.02," (L.F.#9p.8) the MAI-CR3d series does not have a 408.02. Note on Use 1 to MAI-CR4d 408.02 states that it is a revision of MAI-CR3d 308.02.

[4] Like the converse the court submitted, Instruction B referenced MAI-CR3d rather than MAI-CR4d.

Duane(Tr.396). The prosecutor went through each step of Instruction 5 and highlighted step "Second" that the acts alleged were intended to persuade a person less than 15 years old to engage in sexual conduct(Tr.397-98).

The prosecutor argued it was definitively established J.R. was 14 when the alleged acts occurred because they occurred around when Alisha and David got married in May, 2012(Tr.398). The prosecutor also argued that J.R. was 14 at the alleged time because J.R. testified that was her age(Tr.399). The prosecutor argued that there was "no doubt" that Duane's actions and words were intended to persuade a 14 year old into sexual conduct(Tr.400). The prosecutor continued that Duane had "one purpose," which was sexual conduct with a 14 year old(Tr.401).

B. Defense Argument

Defense counsel argued that there was no evidence Duane knew that J.R. was under 15 years old(Tr.410-11). Counsel urged that there could not be a "conscious object," as provided for in Instruction 5, where it was not established Duane knew J.R. was less than 15 years old(Tr.411). Counsel urged that there was evidence J.R. was driving a car, and to drive with a learner's permit, you must be 15 years old(Tr.411).

C. Respondent's Rebuttal Argument

Respondent argued that Duane knew that J.R. was less then fifteen years old because while a person can legally drive with a permit at fifteen years old, Alisha

testified that when she drove with J.R. they took back roads because J.R was not yet fifteen(Tr.416).

V. Guilt Verdict

The jury found Duane guilty based on Instruction No. 5(Tr.420;L.F.#10p.10).

VI. Defense Punishment

J.R. testified knowing that the range of punishment was 5 to 30 years that she felt the minimum of 5 years was an appropriate sentence(Tr.427).

Duane's father, Steven Michaud, testified that at the time of trial Duane was then working for a cookie packing company in Texas(Tr.428-29). Steven recounted that he raised Duane as a single parent because Duane's mother abandoned them(Tr.429). Steven urged the jury to impose the minimum sentence because he believed that Duane would honorably serve his time(Tr.430). Also, Steven urged the jury impose the minimum to allow Duane to someday put his life together and Steven would help Duane to do that(Tr.430).

VIII. Deliberations/Punishment Matters

The jury sent a question to the court asking if it could recommend a 1 year sentence with 4 years of probation(Tr.435). The court directed the jury to follow the instructions(Tr.435,443). The jury returned a five year sentence(Tr.436;L.F.#11p.5).

Under §566.151, the range of punishment was five to thirty years with no eligibility for probation, parole, conditional release or suspended sentence before

serving five years in prison. The court sentenced Duane to a non-paroleable five year sentence, as required under §566.151(L.F.#12p.1-3).

This appeal followed.

POINTS RELIED ON

I.

REFUSED VERDICT DIRECTOR

INSTRUCTION "A"

The trial court erred in denying the request to submit Verdict Directing Instruction "A," requiring the jury to find Duane Michaud knew J.R. was less than fifteen years old, because that ruling denied Duane his right to due process, U.S. Const. Amend. XIV and Mo. Const. Art. I, §10, in that Instruction 5 did not require the jury make such a finding and Duane's knowing J.R. was less than fifteen years old was an element of the offense that respondent was required to prove and that the jury had to find and Duane was denied the opportunity to have the jury consider his defense he did not know J.R. was less than fifteen or alternatively Instruction "A" was required because Duane's knowing J.R. was less than fifteen years old was an affirmative defense that was required to be instructed on in the verdict director.

State v. Self, 155 S.W.3d 756 (Mo. banc 2005);

State v. Minner, 256 S.W.3d 92 (Mo. banc 2008);

State v. Carson, 941 S.W.2d 518 (Mo. banc 1997);

State v. Osborn, 318 S.W.3d 703 (Mo.App., S.D. 2010);

U.S. Const. Amend. XIV;

Mo. Const. Art. I, §10;

§566.151;

§562.016;

§562.021;

§302.130;

MAI-CR3d 320.37.1;

MAI-CR4d 420.60;

MAI-CR3d 320.37.2;

MAI-CR4d 420.62.

II.

REFUSED CONVERSE INSTRUCTION "B"

The trial court erred in denying the request to submit Converse Instruction "B," requiring the jury to find Duane Michaud not guilty unless he knew J.R. was less than fifteen years old, because that ruling denied Duane his right to due process, U.S. Const. Amend. XIV and Mo. Const. Art. I, §10, in that Converse Instruction 6 did not require the jury make such a finding and Duane's knowing J.R. was less than fifteen years old is an element of the offense that respondent was required to prove and the jury had to find and without such finding Duane was required to be found not guilty.

State v. Self, 155 S.W.3d 756 (Mo. banc 2005);

State v. Minner, 256 S.W.3d 92 (Mo. banc 2008);

State v. Carson, 941 S.W.2d 518 (Mo. banc 1997);

State v. Osborn, 318 S.W.3d 703 (Mo.App., S.D. 2010);

U.S. Const. Amend. XIV;

Mo. Const. Art. I, §10;

§566.151;

§562.016;

§562.021;

§302.130

MAI-CR3d 320.37.1;

MAI-CR4d 420.60;

MAI-CR3d 320.37.2;

MAI-CR4d 420.62.

III.

LIMITING CROSS-EXAMINATION OF ALISHA BROCK

The trial court abused its discretion in sustaining respondent's objections to cross-examination of Alisha Brock about whether J.R. had a tendency to exaggerate because that ruling denied Duane his right to an adequate meaningful opportunity for confrontation and his due process right to present a defense, U.S. Const. Amends VI and XIV and Mo.Const. Art. I §10 and §18(a), in that the accuracy of the details J.R. reported Duane engaged in was crucial to the determination of innocence or guilt so that if J.R. was prone to exaggeration the jury might not have believed Duane committed the acts as they were attributed to Duane by J.R. and that were necessary to convict Duane.

U.S. v. Owens, 484 U.S. 554 (1988);

Crane v. Kentucky, 476 U.S. 683 (1986);

Rock v. Arkansas, 483 U.S. 44 (1987);

Haynam v. Laclede Electric Cooperative Inc., 827 S.W.2d 200 (Mo. banc 1992);

U.S. Const. Amends VI;

U.S. Const. Amends XIV;

Mo.Const. Art. I §10;

Mo.Const. Art. I §18(a).

ARGUMENT

I.

REFUSED VERDICT DIRECTOR

INSTRUCTION "A"

The trial court erred in denying the request to submit Verdict Directing Instruction "A," requiring the jury to find Duane Michaud knew J.R. was less than fifteen years old, because that ruling denied Duane his right to due process, U.S. Const. Amend. XIV and Mo. Const. Art. I, §10, in that Instruction 5 did not require the jury make such a finding and Duane's knowing J.R. was less than fifteen years old was an element of the offense that respondent was required to prove and that the jury had to find and Duane was denied the opportunity to have the jury consider his defense he did not know J.R. was less than fifteen or alternatively Instruction "A" was required because Duane's knowing J.R. was less than fifteen years old was an affirmative defense that was required to be instructed on in the verdict director.

The trial court erred in refusing to submit verdict directing Instruction "A" which required the jury find Duane knew that J.R. was less than 15 years old. Duane's knowing that J.R. was less than 15 years old was an element respondent was required to prove and the jury was required to find in order to convict him. Instruction 5 did not require the jury to make such a finding, and thereby, relieved respondent of its burden of proving an element of the offense. Relieving respondent

of proving that element denied Duane his right to due process. Alternatively Duane's knowing J.R. was less than fifteen years old was an affirmative defense that was required to be instructed on in the verdict director as provided for in Instruction A.

I. Standard Of Review

Under Rule 28.02(a) the court is required to instruct the jury on all questions of law arising in the case that are necessary to render a verdict. *State v. Plunkett*, 473 S.W.3d 166, 171-72 (Mo.App., W.D. 2015). The giving or failure to give an instruction or verdict form in violation of Rule 28.02 or any applicable Notes On Use constitutes error and the prejudicial effect is to be judicially determined. *Id.* at 171. The trial court's refusal to give an instruction is reviewed *de novo*. *Id.* at 171-72. Reversal is required where error resulted in prejudice. *Id.* at 172. Prejudice exists if there is a reasonable probability the trial court's error affected the outcome. *Id.* at 172.

II. Preservation

The court submitted verdict directing Instruction 5 modeled on MAI-CR3d 320.37.2(L.F.#9p.6-7;L.F.#10p.5-6)(Tr.366-73).[5] Defense counsel objected to

[5] The pertinent instructions for purposes of this appeal are Enticement of A Child (MAI-CR3d 320.37.1 and MAI-CR4d 420.60) and Attempted Enticement of A Child (MAI-CR3d 320.37.2 and MAI-CR4d 420.62). The Court of Appeals noted that trial took place on August 14, 2017, and therefore, the applicable MAI version was MAI-CR4d. *State v. Michaud*, S.D.35293 (Mo.App., S.D. December 17, 2018) Slip op. at 2

Instruction 5(Tr.367-73). Defense counsel offered a non-MAI alternative verdict director (Instruction A) (Tr.366-73;L.F.#7p.1-2). The court rejected the non-MAI instruction on the ground that this Court expects trial courts to follow the MAI instructions as written(Tr.370-72;L.F.#7p.1-2).

The motion for new trial re-alleged this matter as error, and therefore, this claim is fully preserved(L.F.#8p.1-2).

III. Child Enticement

Section 566.151 (effective until December 31, 2016) (emphasis added) defining child enticement provided:

> 1. A person at least twenty-one years of age or older commits the crime of enticement of a child if that person persuades, solicits, coaxes, entices, or lures whether by words, actions or through communication via the internet or any electronic communication, any person who is less than fifteen years of age for the **purpose of engaging in sexual conduct**.

The definition of child enticement must be considered in conjunction with §562.021.3, governing culpable mental state. Section 562.021.3 provides:

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n.2. The Court of Appeals also noted that for the pertinent instructions there were no "substantive change[s]" from MAI-CR3d to MAI-CR4d. *State v. Michaud*, S.D.35293 (Mo.App., S.D. December 17, 2018) Slip op. at 2 n.2. This brief references both applicable MAI-CR3d and MAI-CR4d.

3. Except as provided in subsection 2 of this section and section 562.026, if the definition of any offense does not expressly prescribe a culpable mental state for any elements of the offense, a culpable mental state is nonetheless required and is established if a person acts purposely or knowingly; but reckless or criminally negligent acts do not establish such culpable mental state.

Section 562.016 defining purposely and knowingly (effective until December 31, 2016) (bold in original) provided:

2. A person **"acts purposely"**, or with purpose, with respect to his conduct or to a result thereof when it is his conscious object to engage in that conduct or to cause that result.

3. A person **"acts knowingly"**, or with knowledge,:

(1) With respect to his conduct or to attendant circumstances when he is aware of the nature of his conduct or that those circumstances exist; or

(2) With respect to a result of his conduct when he is aware that his conduct is practically certain to cause that result.

Because §566.151 does not provide a mental state for enticement of a child (or attempted enticement), the required mental state is knowingly under §562.021.3.

The language "for the **purpose** of engaging in sexual conduct" does not furnish the mental element for child enticement under §566.151. Section 566.010 (2) (effective until December 31, 2016) (bold in original) defined "sexual conduct" as follows:

(2) "**Sexual conduct**", sexual intercourse, deviate sexual intercourse or sexual contact;

Instead "purpose" as applied in the child enticement statute, 566.151, is descriptive of an outcome of sexual intercourse, deviate sexual intercourse, or sexual contact and not the required mental element for child enticement.

In the Court of Appeals, respondent relied on §562.021.2 to argue "purpose," is the required mental element. Section 562.021.2 provides:

2. If the definition of an offense prescribes a culpable mental state with regard to a particular element or elements of that offense, the prescribed culpable mental state shall be required only as to specified element or elements, and a culpable mental state shall not be required as to any other element of the offense.

Respondent's argument was that §566.151's use of "purpose" constituted the mental element for child enticement. Respondent's position was that "purpose" in §566.151 applied to "persuades, solicits, coaxes, entices, or lures whether by words, actions or through communication via the internet or any electronic communication" but not "less than fifteen years of age." (Resp. Ct. App. Br. at 16-17). Respondent's argument was premised on §562.021.2's directive that the prescribed culpable mental state applied to a specified element or elements and not as to any other element of the offense. However, "purpose" as used in the child enticement statute is not the mental element, but instead descriptive of an outcome of sexual intercourse, deviate sexual

intercourse, or sexual contact under §566.010 (2). Moreover, respondent offered no explanation for why "purpose" applied to "persuades, solicits, coaxes, entices, or lures whether by words, actions or through communication via the internet or any electronic communication" but not "less than fifteen years of age."(Resp. Ct. App. Br. at 16-17).

In *State v. Self*, 155 S.W.3d 756, 758 (Mo. banc 2005), the defendant was convicted of failing to cause her child to attend school regularly in violation of compulsory school attendance laws. This Court reversed Self's conviction relying on §562.021.3's provision that where a statute does not set forth a culpable mental state then respondent is required to establish the person acted purposely or knowingly. *Id.* at 758, 761-62. This Court reasoned that the compulsory school attendance statutory provisions did not specify a required mental state, and therefore, §562.021.3 governed such that purposely or knowingly applied. *Id.* at 761-62. This Court in *Self* noted that a culpable mental state will be imputed to each statutory element unless such imputation would be inconsistent with the statute's purpose or produce an absurd or unjust result. *Id.* at 762. This Court continued: "[l]egislative intent not to require a culpable mental state for each element of the crime must be clearly apparent before a particular statute will be construed not to require proof of such culpability." *Id.* at 762. In *Self*, respondent was required to prove that Ms. Self acted knowingly or purposely to cause her child not to attend school regularly. *Id.* at 762.

Duane's case is like *Self* in that the child enticement statute §566.151 does not specify any mental element and under §562.021.3 the mental element must be knowingly or purposely. *See Self*. Furthermore, there is no legislative intent to not require a culpable mental state for each element which includes the child was "less than fifteen years of age for the purpose of engaging in sexual conduct." *See Self*.

Judge Scott's Southern District dissent relied on the decision in *State v. Purifoy*, 495 S.W.3d 822 (Mo.App., S.D. 2016). *See State v. Michaud*, S.D.35293 (Mo.App., S.D. December 17, 2018) Scott, J. dissenting op. at 2-3. In *Purifoy*, the defendant was convicted of unlawful possession of a firearm. *Purifoy*, 495 S.W.3d at 823. Purifoy had a prior felony conviction for unlawful use of a weapon. *Id*. at 823. Purifoy challenged the sufficiency as to the unlawful possession of a firearm on the grounds respondent failed to establish that Purifoy knew he had a prior felony conviction for unlawful use of a weapon.

> The unlawful possession of a firearm statute in *Purifoy* provided as follows:
>
> 1. A person commits the crime of unlawful possession of a firearm if such person knowingly has any firearm in his or her possession and:
>
> (1) Such person has been convicted of a felony under the laws of this state, or of a crime under the laws of any state or of the United States which, if committed within this state, would be a felony;

The *Purifoy* Court found the evidence was sufficient by applying §562.021.2 to conclude that "knowingly" applied only to having a firearm in his possession and not to having a prior conviction of a felony. Unlike *Purifoy*, where there was a specified mental element, §566.151 has no mental element requirement, and therefore, as discussed, it is §562.021.3 that has to be looked to and which supplies "knowingly."

Section 564.011.1 (effective until December 31, 2016) (bold in original) (underlining added) defines an attempt as follows:

> 1. A person is guilty of attempt to commit an offense when, with the purpose of committing the offense, he does any act which is a substantial step towards the commission of the offense. A **"substantial step"** is conduct which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense.

An attempt has two elements: (1) the purpose to commit the underlying offense; and (2) the doing of an act which is a substantial step toward the commission of that offense. *State v. Rayburn*, 457 S.W.3d 760, 762 (Mo.App., E.D. 2014).

Under the §564.011.1 attempt statute, "with the purpose of committing the offense" means, as applied to the §566.151.1 child enticement statute, "the purpose of engaging in sexual conduct," which as discussed is not the required mental element for enticement of a child under §566.151.1. For the previously discussed reasons, under *Self*, the required mental state for §566.151.1 is knowingly or purposely.

In Duane's case, as between knowingly and purposely the mental state, under §562.021.3, must be knowingly. In *State v. Minner*, 256 S.W.3d 92, 94-95 (Mo. banc 2008), the defendant was convicted of delivering a controlled substance within 1000 feet of public or government assisted housing in violation of §§195.218 and 195.211. Respondent presented evidence that the drug transaction took place less than 1000 feet from a government assisted housing apartment. *Id.* at 94. Sections 195.218 and 195.211 did not provide for a required specific mental state and this Court looked to §562.021.3 to resolve that question. *Id.* at 95. The *Minner* Court noted that under §562.021.3 the required mental state was either knowingly or purposely. *Id.* at 95. This Court ruled that respondent was required to prove Minner knew he was within 1000 feet of the government assisted apartment. *Id*. at 95. Respondent's evidence was insufficient because respondent failed to prove Minner knew he was within 1000 feet of such apartment. *Id.* at 95. The reason knowingly applied, rather than purposely in *Minner*, was that a person can "know" their distance from government assisted housing, while it does not follow they "purposely" their distance from such housing. The same is true in Duane's case. A person can know another person's age, but they do not "purposely" someone's age. Thus, as between "knowingly" and "purposely" in Duane's case under §562.021.3 the mental state must be whether Duane "knew" J.R. was less than fifteen years old. *See Minner*. Because §562.016.2 and §562.016.3 define "purposely" and 'knowingly" for criminal law statutes and

because of how this Court treated them in *Minner*, the required mental state here is knowingly.

IV. Southern District's Mental Element Discussion

The Southern District's majority opinion referred to the required mental element here as being knowledge, awareness, or belief. *State v. Michaud*, S.D.35293 (Mo.App., S.D. December 17, 2018) slip op. at 6, 10.

In some cases belief, rather than knowledge, is the applicable mental element for an attempt to commit child enticement. Application of "belief "is limited though to the class of attempt to commit child enticement cases arising under §566.151.2. Section 566.151.2 provides:

> 2. It is not an affirmative defense to a prosecution for a violation of this section that the other person was a peace officer masquerading as a minor.

In this line of cases, police officers pose as thirteen or fourteen year old teenage girls in electronic chats where the defendants then seek to engage in sexual conduct with those girls. The defendants in the police masquerading cases "believed" they were communicating with a thirteen or fourteen year old which is why in this class of cases "belief" is the applicable mental element whether the charge was enticement or attempted enticement. *See, e.g.*, *State v. Wadsworth*, 203 S.W.3d 825, 827, 833-36 (Mo.App., S.D. 2006) (attempted enticement officer described himself as a thirteen year old girl); *State v. Almaguer*, 347 S.W.3d 636, 637-41 (Mo.App., E.D. 2011) (enticement officer portrayed self as fourteen year old girl); *State v. Smith*, 330

S.W.3d 548, 552-53, 557 (Mo.App., S.D. 2010) (enticement officer posed as fourteen year old); and *State v. Faruqi*, 344 S.W.3d 193, 198, 202-03 (Mo. banc 2011) (attempted enticement officer posing as fourteen year old girl).

In *State v. Fleis*, 319 S.W.3d 504, 505-08 (Mo.App., E.D. 2010), the defendant was convicted of attempted child enticement based on a police officer electronic chat and there was sufficient evidence where the officer identified herself as a fourteen year old girl because Fleis believed he was chatting with a fourteen year old. The verdict director in *Fleis* required the jury to find that the defendant "believed that Officer Stough was a 14 year old child." *Id.* at 507. In discussing the age factor, the *Fleis* Court observed that "[o]ne of the elements" the verdict director required the jury to find was that Fleis "believed" the child involved was under fifteen years old. *Id.* at 507.

In *State v. Davies*, 330 S.W.3d 775, 781 (Mo.App., W.D. 2010), the defendant was convicted of child enticement, but the Western District amended the conviction to attempted child enticement. In *Davies*, a sheriff's office had interns pose as underage children and engaged in electronic chats. *Id.* at 781-82. The intern represented to Davies that she was thirteen years old. *Id.* at 782. There was sufficient evidence to convict Davies of attempted child enticement because he communicated with someone he believed to be under fifteen years old. *Id.* at 787.

The police masquerading cases are to be contrasted with the situation where the defendant had actual knowledge the child was under fifteen years old. In *State v.*

Sears, 298 S.W.3d 561, 565 (Mo.App., E.D. 2009), the defendant was convicted of attempted enticement based on his encounter with a girl and there was sufficient evidence as to age of the child because the defendant knew she was a middle school student, and therefore, less than fifteen years old. Because Duane's case is not a police masquerading case, it is like *Sears* in that respondent was required to show Duane knew J.R. was less than fifteen years old.

V. Applications Of Knowledge Of Child's Age As An Element

In *State v. Osborn*, 318 S.W.3d 703, 705 (Mo.App., S.D. 2010), the defendant was convicted of three counts of first degree child endangerment. Osborn challenged the sufficiency of the evidence on the grounds respondent failed to establish the defendant knew the victims were under the age of seventeen. *Id.* at 712-13. In addressing the sufficiency claim, the *Osborn* Court stated there were "four elements" to the offense. *Id.* at 712. "Element" number three was "the victim was less than seventeen years old." *Id.* at 712. The verdict director options for first degree endangering the welfare of a child by engaging in sexual conduct with a child less than seventeen years old (option #2) all list as an "element," and require a finding, that the child victim "was then less than seventeen years of age" and a finding the defendant acted "knowingly" as to all matters in the verdict director. *See* MAI-CR3d 322.10 and MAI-CR4d 422.10. The *Osborn* Court found that under the totality of the circumstantial evidence that there was sufficient evidence that the defendant knew the

victims were less than seventeen years old. *Osborn*, 318 S.W.3d at 713. Similarly, in Duane's case his knowledge J.R. was less than fifteen years old was an element respondent was required to prove.

The *Osborn* Court's decision is also instructive because it found that respondent failed to present sufficient evidence on a count of child enticement. In particular, respondent's evidence was insufficient because respondent failed to present evidence the defendant "knew" the victim was under fifteen years old. *See Osborn*, 318 S.W.3d at 713-14. The *Osborn* Court observed that although §566.151 does not require the defendant knew the victim was under fifteen years old, respondent acknowledged and conceded that the approved MAI provides that the defendant must have known or been aware that the victim was under fifteen years old. *Id.* at 713-14. The *Osborn* Court noted that respondent had not argued that the instruction did not accurately reflect "the elements" of the offense, but on rehearing it argued that knowledge of the victim's age was an affirmative defense with the burden of that affirmative defense falling on the defense. *Id.* at 713-15.

In *State v. Nations*, 676 S.W.2d 282 (Mo.App., E.D. 1984), the defendant was convicted of endangering the welfare of a child who was less than seventeen years old. That conviction was based on §568.050 RSMo 1978 which prohibited generally endangering the welfare of a child without specifying degrees of endangering. *Nations*, 676 S.W.2d at 283. Respondent's evidence was insufficient because it failed

to prove the defendant knew the child was less than seventeen years old. *Id.* at 284-86.

In *State v. Hopkins*, 873 S.W.2d 911, 911-12 (Mo.App., E.D. 1994), the defendant was convicted of second degree endangering the welfare of a child as provided for under §568.050 RSMo Supp. 1993. Hopkins was charged in the information with "knowingly" having encouraged, aided, and caused "a child less than seventeen years old" to engage in conduct consisting of consumption of intoxicating beverages while the defendant drove an automobile carrying the minor as a passenger. *Hopkins*, 873 S.W.2d at 911. The *Hopkins* Court noted that the state was required to prove the defendant "*knew*" the victim was less than seventeen years old. *Id.* at 912 (italics in original). Hopkins' conviction was reversed because there was insufficient evidence he knew the victim was under seventeen years old. *Id.* at 912-13.

Section 568.050 (effective January 1, 2017) defines second degree endangering the welfare of a child. Section 568.050 has multiple subsections prohibiting varied conduct and the required mental state varies according to the particular acts. The mental states can be criminal negligence, knowingly, or recklessly. *See* §568.050. Portions of §568.050 prohibit acting knowingly where the acts prohibited involve "a child less than seventeen years of age." Where the mental state is knowingly and involves "a child less than seventeen years of age" (option #2) the jury is instructed it

must find that the defendant knew the child was less than seventeen years of age. *See* MAI-CR3d 322.11 and MAI-CR4d 422.11.

The decisions in *Osborn*, *Nations*, *Hopkins*, and the referenced MAIs all recognize that when an offense specified that the child was less than a designated age the jury was required to find the defendant knew the child was less than the designated age. That is what was required to happen here, but the court refused to require the jury find that Duane knew that J.R. was less than fifteen years old.

VI. Verdict Director Submitted - Instruction 5

Instruction 5 provided:

> If you find and believe from the evidence beyond a reasonable doubt:
>
> First, that between June 20, 2012 and August 10, 2012 in the County of Greene, State of Missouri, the defendant, while laying down on a bed next to J.R., started rubbing the lower stomach of J.R., and
>
> Second, that such conduct was a substantial step toward the commission of the offense of enticement of a child by attempting to persuade a person less than fifteen years of age to engage in sexual conduct, and
>
> Third, that defendant engaged in such conduct for the purpose of committing such enticement of a child, and
>
> Fourth, that the defendant was twenty−one years of age or older,
>
> then you will find the defendant guilty of attempted enticement of a child.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

A person commits the crime of enticement of a child if he is a person at least twenty one years of age or older and he persuades, solicits, coaxes, entices, or lures a person less than fifteen years of age for the purpose of engaging in sexual conduct with the defendant.

As used in this instruction, the term "substantial step" means conduct that is strongly corroborative of the firmness of the defendant's purpose to complete the commission of the offense of enticement of a child.

As used in this instruction, "sexual conduct" means sexual intercourse, deviate sexual intercourse or sexual contact.

As used in this instruction, "sexual intercourse" means any penetration, however slight, of the female sex organ by the male sex organ, whether or not an emission results.

As used in this instruction, the term "deviate sexual intercourse" means any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object done for the purpose of arousing or gratifying the sexual desire of any person.

As used in this instruction, "sexual contact" means any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, or such touching through the clothing, for the purpose of arousing or gratifying sexual desire of any person.

As used in this instruction, a person acts purposely, or with purpose, with respect to the person's conduct or to a result thereof when it is his or her conscious object to engage in that conduct or to cause that result.

(L.F.#9p.6-7;L.F.#10p.5-6).

VII. Alternative Verdict Director Offered - Instruction "A"

Alternative verdict director Instruction A provided:

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

First, that between June 20, 2012 and August 10, 2012 in the County of Greene, State of Missouri, the defendant, while laying down on a bed next to J.R., started rubbing the lower stomach of J.R., and

Second, that such conduct was a substantial step toward the commission of the offense of enticement of a child by attempting to persuade a person less than fifteen years of age to engage in sexual conduct, and

Third, that defendant engaged in such conduct for the purpose of committing such enticement of a child, and

Fourth, that the defendant knew that J.R. was less that [sic] fifteen years of age, and

Fifth, that the defendant was twenty-one years of age or older,

then you will find the defendant guilty of attempted enticement of a child.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

A person commits the crime of enticement of a child if he is a person at least twenty one years of age or older and he persuades, solicits, coaxes, entices, or lures a person less than fifteen years of age for the purpose of engaging in sexual conduct with the defendant.

A person acts purposely, or with purpose, with respect to the person's conduct or to a result thereof when it is his or her conscious object to engage in that conduct or to cause that result.

As used in this instruction, the term "substantial step" means conduct that is strongly corroborative of the firmness of the defendant's purpose to complete the commission of the offense of enticement of a child.

As used in this instruction, "sexual conduct" means sexual intercourse, deviate sexual intercourse or sexual contact.

As used in this instruction, "sexual intercourse" means any penetration, however slight, of the female sex organ by the male sex organ, whether or not an emission results.

As used in this instruction, the term "deviate sexual intercourse" means any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object done for the purpose of arousing or gratifying the sexual desire of any person.

As used in this instruction, "sexual contact" means any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, or such touching through the clothing, for the purpose of arousing or gratifying sexual desire of any person. (L.F.#7p.1-2) (emphasis added).

Instruction 5 and Instruction A differ as to what the jury was required to find in that Paragraph “Fourth” of Instruction A required the jury find Duane knew J.R. was less than 15 years old whereas Instruction 5 did not require the jury make such a finding in order to convict Duane.

Paragraph “Fourth” of Instruction A does contain an obvious typographical error. Paragraph “Fourth” stated:

Fourth, that the defendant knew that J.R. was less that [sic] fifteen years of age, and

(L.F.#7p.1). Where "that" appears it is obvious "than" was intended.

"The ultimate test of accuracy for an instruction is whether it precisely follows substantive law and whether it will be correctly understood by a jury composed of average lay people." *State v. Woods*, 723 S.W.2d 488, 513 (Mo.App., S.D. 1986). In *Woods*, the Southern District affirmed the defendant's conviction where the verdict director said "fine" rather than "find" because it was "convinced that a jury of average lay people would have understood" what was intended. *Id.* at 513. *See*, *also*, *State v. Crump*, 596 S.W.2d 76, 78 (Mo.App., S.D. 1980) (affirming conviction where challenge was based on "minor" typographical mistakes in instructions); and *State v. Walker*, 654 S.W.2d 129, 132-33 (Mo.App., W.D. 1983) (affirming conviction where "of" appeared in instruction where "or" should have appeared because "obviou[s]" typographical error could not have misled jury and citing to the *Crump* decision).

Instruction A's typographical error would have been corrected before submission to the jury. Even if that typographical error was not corrected, Instruction A precisely followed the substantive law and would have been understood by this jury of average lay people. *See*, *Woods*, *Crump*, and *Walker*.

VIII. Instruction 5 Violated Due Process

The Due Process Clause requires that the State prove each factual element of the charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364

(1970). A verdict director must contain each element of the offense charged and require the jury to find every fact necessary to constitute the essential elements of the offense charged. *State v. Cooper*, 215 S.W.3d 123, 125-26 (Mo. banc 2007). "A violation of due process arises when an instruction relieves the State of its burden of proving each and every element of the crime and allows the State to obtain a conviction without the jury deliberating on and determining any contested elements of that crime." *Id.* at 126.

The instructions together must require a finding of all the ultimate facts necessary to sustain a verdict. *State v. Swartz*, 517 S.W.3d 40, 58 (Mo.App., W.D. 2017). It is error to remove an essential element of a case from the jury's consideration. *Id.* at 58.

The trial court rejected the non-MAI instructions offered (verdict director and converse - Point II) on the ground that this Court expects trial courts to follow the MAI instructions as written(Tr.370-72;L.F.#7p.1-3).

Instruction 5 removed the required element from the jury's consideration that Duane knew that J.R. was less than fifteen years old, and therefore, violated due process. *See*, *Winship* and *Cooper*.

MAI Instructions and their Notes On Use are not binding to the extent they conflict with the substantive law. *State v. Carson*, 941 S.W.2d 518, 520 (Mo. banc 1997); and *State v. Erwin*, 848 S.W.2d 476, 483-84 (Mo. banc 1993). Procedural rules adopted by MAI cannot change the substantive law and must be interpreted in

light of the existing statutory and case law. *Carson*, 941 S.W.2d at 520. *Erwin*, 848 S.W.2d at 483-84.

In *Carson*, the pattern MAI-CR3d 325.16 verdict director failed to require the jury find the defendant acted knowingly on a conviction for second degree drug trafficking. *Carson*, 941 S.W.2d at 519-20. Under the substantive law, the jury was required to find Carson acted knowingly. *Id.* at 522-23. Because lack of knowledge was the defense, Carson's conviction had to be reversed based on the erroneous pattern instruction having been given. *Id.* at 523.

Similarly, in *State v. Jones*, 865 S.W.2d 658, 661-62 (Mo. banc 1993), the defendant was convicted of unlawful possession of a concealed firearm and the jury was instructed under MAI-CR3d 331.28, which failed to specify a required culpable mental state. Because the pattern MAI did not require a finding Jones knew of the presence of the concealed weapon, it was prejudicial error to convict him without such a finding. *Id.* at 662. The *Jones* Court referred the matter of the defects in MAI-CR3d 331.28 to the MAI-CR Committee for correction. *Id.* at 662.

This case is like *Carson* and *Jones* because the corresponding form MAI did not require the jury find Duane acted knowingly on a required element - that he knew J.R. was less than 15 years old. Like *Carson* and *Jones* the trial court was not required to give the form MAI because it conflicted with the substantive law requirement that respondent was required to prove that Duane knew J.R. was less than 15 years old. *See Carson* and *Erwin*.

Under §302.130 (effective until August 27, 2012 and as reenacted effective August 28, 2012), a person can obtain a driver's license instructional permit when that person is "at least fifteen years of age."

Alisha testified that there were times while J.R. stayed with Alisha that she allowed J.R. to drive her car, while accompanied by Alisha, on the back roads because J.R. was almost 15 years old(Tr.343-44).

Defense counsel argued that there was no evidence Duane knew that J.R. was under 15 years old(Tr.410-11). Counsel urged that there could not be a "conscious object," as provided for in Instruction 5, where it was not established Duane knew J.R. was less than 15 years old(Tr.411). Counsel urged that there was evidence J.R. was driving a car, and to drive with a learner's permit, you must be 15 years old(Tr.411).

Respondent argued that Duane knew that J.R. was less then fifteen years old because while a person can legally drive with a permit at fifteen years old, Alisha testified that when she drove with J.R. they took back roads because J.R was not yet fifteen(Tr.416).

The failure to instruct the jury that it was required to find that Duane knew J.R. was less than fifteen years old was prejudicial because the defense argued to the jury that there was reason for Duane to have believed that J.R. was at least fifteen years old because she was driving a car during the time Duane stayed in the same house as J.R. *See, Plunkett*. The prosecutor's countering with J.R. drove on back roads

because she was not fifteen years old placed directly in contention Duane's knowledge of J.R.'s age at the time when Duane stayed in the same house and whether Duane knew J.R.'s age. *See Plunkett*. That there was such a dispute about Duane's knowledge of J.R.'s age made it critical that the jury be required to find that Duane knew that she was less than fifteen years old.

It is presumed that the jury followed the instructions as submitted to it and not as expanded by the parties' arguments. *State v. Escobar*, 523 S.W.3d 545, 551 (Mo.App., W.D. 2017); and *State v. Beck*, 557 S.W.3d 408, 418 (Mo.App., W.D. 2018). The jury was not instructed that it had to find that Duane knew that J.R. was less than fifteen years old, and therefore, respondent was not required to have the jury find a required element. *See, Cooper*.

The Fourteenth Amendment's Due Process Clause and the Sixth Amendment guarantee a defendant a meaningful opportunity to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986). Because the jury was not instructed on Duane's defense, that he did not know that J.R. was less than fifteen years old, he was denied a meaningful opportunity to present a complete defense. *See Crane*. There was evidence that J.R. was driving and therefore had to be at least fifteen years old(Tr.343-44). Even though defense counsel argued that J.R.'s driving evidence supported Duane did not know that J.R. was under fifteen (Tr.410-11), the jury could not give effect to both the evidence and counsel's argument because the jury was presumed to have followed the instructions and the verdict director did not offer them

the opportunity to consider Duane did not know J.R. was less than fifteen years old. *See Escobar* and *Beck*. The absence from the verdict director that Duane knew that J.R. was under fifteen denied him the opportunity to present a complete defense. *See Crane*.

The reasoning applied in *State v. Osborn*, 318 S.W.3d 703 (Mo.App., S.D. 2010) on the three counts of child endangerment as to the three youths' age issue is instructive. "Element" number three was "the victim was less than seventeen years old." *Id.* at 712. The *Osborn* Court found that under the totality of the circumstantial evidence that there was sufficient evidence that the defendant knew the youths were less than seventeen years old. *Id.* at 713. One of the pieces of circumstantial evidence the *Osborn* Court relied on was that the defendant allowed the three boys to drive a car in secluded unpopulated areas giving rise to "a reasonable inference" the defendant knew the boys were not eligible to get licenses because they were under sixteen years old. *Id.* at 712-13 (relying on §302.060 - sixteen years old age requirement to get a license). Section 302.130.1 authorizes a person to obtain a driver's permit who is "at least fifteen years of age." In Duane's case, there was evidence that supported J.R. was at least fifteen and Duane did not know she was less than fifteen because J.R. had been driving and to do so legally under §302.130.1 J.R. was required to be "at least fifteen years of age."(Tr.343-44,410-11). Thus, the failure to instruct the jury, as proffered in Instruction A Paragraph Fourth that Duane knew

that J.R. was less than fifteen years old was prejudicial and deprived him of the opportunity to present his defense to the jury.

Moreover, that the jury should have been instructed to find that Duane knew J.R. was less than fifteen years old is underscored because had he been charged with the substantive offense of child enticement, rather than an attempt, the jury would have been instructed under MAI-CR3d 320.37.1 (currently MAI-CR4d 420.60) that it was required to find Duane knew J.R. was less than fifteen years old. The form MAI-CR3d 320.37.1 (currently MAI-CR4d 420.60) verdict director for the completed act of enticement of a child now provides in its MAI-CR4d 420.60 (bold and underlining added) (italics in original) format:

ENTICEMENT OF A CHILD

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

First, that (on) (on or about) [*date*], in the State of Missouri, the defendant (persuaded) (solicited) (coaxed) (enticed) (lured) [*Identify victim.*] by [*Describe the words or actions of the defendant, such as "suggesting in an e-mail that they go to a motel room."*], and

Second, that the defendant did so for the purpose of engaging in sexual conduct with [*Identify victim*.], and

Third, that at that time, [*Identify victim.*] was less than fifteen years of age, and

Fourth, that [*Insert one of the following. Omit brackets and number.*]

[1] the defendant (knew) (or) (was aware) that [*Identify victim.*] was less than fifteen years of age,

[2] it was the defendant's purpose to have sexual conduct with a person less than fifteen years of age,

and

Fifth, that the defendant was twenty-one years of age or older,

then you will find the defendant guilty (under Count _____) of enticement of a child.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

As used in this instruction, "sexual conduct" means sexual intercourse, deviate sexual intercourse or sexual contact.

As used in this instruction, "sexual intercourse" means any penetration, however slight, of the female sex organ by the male sex organ, whether or not an emission results.

As used in this instruction, the term "deviate sexual intercourse" means (any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person) (or) (a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or

object) done for the purpose of (arousing or gratifying the sexual desire of any person) (terrorizing [*Identify victim.*]).

As used in this instruction, "sexual contact" means any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, or such touching through the clothing, for the purpose of arousing or gratifying sexual desire of any person.

In contrast the form MAI for Attempted Enticement of A Child MAI-CR3d320.37.2 (currently MAI-CR4d 420.62) lacks a Paragraph Fourth requiring a finding that the defendant knew or was aware the child was less than fifteen years old. The Attempted Enticement Verdict Director MAI-CR3d320.37.2 (currently MAI-CR4d 420.62) now provides in its MAI-CR4d 420.62 (italics in original) format:

ATTEMPTED ENTICEMENT OF A CHILD

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

First, that (on) (on or about) [*date*], in the State of Missouri, the defendant [*Describe the words or actions of the defendant, such as "suggesting in an e-mail that a child less than fifteen years of age go to a motel room with defendant." Do not use the word "attempt."*], and

Second, that such conduct was a substantial step toward the commission of the offense of enticement of a child by attempting to (persuade) (solicit) (coax)

(entice) (lure) a person less than fifteen years of age to engage in sexual conduct, and

Third, that defendant engaged in such conduct for the purpose of committing such enticement of a child, and

Fourth, that the defendant was twenty-one years of age or older,

then you will find the defendant guilty (under Count _____) of attempted enticement of a child.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

A defendant commits the offense of enticement of a child if the defendant is at least twenty-one years of age or older and the defendant persuades, solicits, coaxes, entices, or lures a person less than fifteen years of age for the purpose of engaging in sexual conduct with the defendant.

As used in this instruction, the term "substantial step" means conduct that is strongly corroborative of the firmness of the defendant's purpose to complete the commission of the offense of enticement of a child. (It is no defense that it was factually or legally impossible to commit enticement of a child if such offense could have been committed had the circumstances been as the defendant believed them to be.)

As used in this instruction, "sexual conduct" means sexual intercourse, deviate sexual intercourse or sexual contact.

As used in this instruction, "sexual intercourse" means any penetration, however slight, of the female sex organ by the male sex organ, whether or not an emission results.

As used in this instruction, the term "deviate sexual intercourse" means (any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person) (or) (a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object) done for the purpose of (arousing or gratifying the sexual desire of any person) (terrorizing [*Identify victim*]).

As used in this instruction, "sexual contact" means any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, or such touching through the clothing, for the purpose of arousing or gratifying sexual desire of any person.

Alternative Instruction A's language provided: "Fourth, that the defendant knew that J.R. was less that [sic] fifteen years of age."(L.F.#7p.1-2). The Enticement of A Child form MAI-CR3d 320.37.1 (emphasis added) (currently MAI-CR4d 420.60) Paragraph Fourth uses "(knew) (or) (was aware)." Counsel properly chose between alternatives using "knew." Either "knew" or "was aware" was correct.

Section 562.016.3 (effective until December 31, 2016) (bold in original) (underlining added) provides:

> 3. A person **"acts knowingly"**, or with knowledge,:
>
> (1) With respect to his conduct or to attendant circumstances when he is aware of the nature of his conduct or that those circumstances exist; or
>
> (2) With respect to a result of his conduct when he is aware that his conduct is practically certain to cause that result.

A person acting knowingly is defined in terms of being "aware," and therefore, counsel's use of "knew" was proper. Moreover, the form verdict director for the completed offense of Child Enticement provides that there is "no legal difference" between "knew" and "was aware." *See* MAI-CR3d 320.37.1 Note On Use 5 and MAI-CR4d 420.60 Note On Use 4.

IX. Same Verdict Director Applied If An Affirmative Defense

The dissenting opinion rejected Duane's claim because it considered knowledge that J.R. was less than fifteen years old an affirmative defense. *State v. Michaud*, S.D.35293 (Mo.App., S.D. December 17, 2018) Scott, J. dissenting op. at 3-5. If this Court concludes that Duane knowing J.R. was less than fifteen years old is an affirmative defense, then it was error to refuse to give Instruction A because in other like offenses the affirmative defense appears in the verdict director. Thus, Instruction A should have been given.

A. Child Sex Offenses - Belief Child Is Seventeen Or Older

Section 566.020.2 (effective January 1, 2017) provides that for offenses in that Chapter where criminality depends upon a child being less than seventeen years old that it is an affirmative defense that the defendant reasonably believed that the child was seventeen years of age or older.

Section 566.071 (effective January 1, 2017) prohibits fourth degree child molestation. Section §566.064 (effective January 1, 2017) prohibits second degree statutory sodomy. Section 566.068 (effective January 1, 2017) prohibits second degree child molestation. For all of these offenses, the corresponding MAIs provide that language denominating the affirmative defense of belief the victim was seventeen years of age or older when submitted appears in the verdict director. *See* MAI-CR4d 420.26 Note on Use 7 (fourth degree child molestation); MAI-CR4d 420.18 Note on Use 4 (second degree statutory sodomy); and MAI-CR4d 420.22 Note On Use 12 (second degree child molestation).

That these offenses recognize as an affirmative defense the defendant's belief that the child was seventeen years of age or older gets included in the verdict director demonstrates why if Duane's knowledge J.R. was less than fifteen years old constituted an affirmative defense that it was properly included in the verdict director as was done in Instruction A.

B. Child Sex Offenses Where Marriage

Is The Defense

Section 566.023 (effective January 1, 2017) provides that marriage to the victim is an affirmative defense to charges under §566.032 (effective January 1, 2017) (first degree statutory rape and attempt to commit), §566.034 (effective January 1, 2017) (second degree statutory rape), §566.062 (effective January 1, 2017) (first degree statutory sodomy and attempt to commit), and §566.064 (effective January 1, 2017) (second degree statutory sodomy). The corresponding MAIs provide that language denominating the affirmative defense of marriage to the victim when supported by evidence appears in the verdict director. *See* MAI-CR3d 320.03 Note on Use 5 and MAI-CR4d 420.06 Note On Use 9 (first degree statutory rape and attempt to commit); MAI-CR3d 320.05 Note On Use 3 and MAI-CR4d 420.08 Note on Use 4 (second degree statutory rape); MAI-CR3d 320.11 Note On Use 6 and MAI-CR4d 420.16 Note On Use 15 (first degree statutory sodomy and attempt to commit); and MAI-CR3d 320.13 Note On Use 3 and MAI-CR4d 420.18 Note On Use 5 (second degree statutory sodomy).

That marriage to the victim is an affirmative defense to such child sex offenses and that such affirmative defense appears in the verdict director is instructive why if Duane's knowing J.R. was less than fifteen years old is an affirmative defense, then placing it in the verdict director was proper.

C. Other Offenses Not Involving Child Sexual Acts

Section 568.010 (effective January 1, 2017) declares bigamy to be a crime. Under §568.010.2 and 568.010.3 a person does not commit bigamy if he reasonably believed he was eligible to marry and the defendant has the burden to inject the issue of reasonable belief as to eligibility to remarry. When a defendant does inject evidence of a reasonable belief as to eligibility to marry, that affirmative defense is instructed on in the verdict director. *See* MAI-CR3d 322.02.1 Note On Use 2; MAI-CR3d 322.02.2 Note On Use 2; MAI-CR4d 422.02.1 Note on Use 2; and MAI-CR4d 422.02.2 Note On Use 2.

Section 578.012 (effective January 1, 2017) prohibits animal abuse. Section 273.033.1 (effective August 28, 2009) creates an affirmative defense to killing or injuring a dog where a person was in reasonable apprehension of imminent harmful contact for themselves or another person. MAI-CR3d 332.62 Note On Use #4 provides that where there is evidence to support the affirmative defense, then it appears in the verdict director.

Section 565.115 (effective January 1, 2017) prohibits child kidnapping. Section 565.115.2 provides that it is an affirmative defense where the person reasonably believed that the person's actions were necessary to preserve the child from danger to his or her welfare. Where evidence is presented to support the affirmative defense, then it appears in the verdict director. *See* MAI-CR3d 319.58 Note on Use 4; MAI-CR4d 419.29 Note On Use 4.

Whether Duane knowing that J.R. was less than fifteen years old was an element of the offense or an affirmative defense, Instruction A should have been given to the jury to decide that issue. That there are the many just noted other offenses with MAIs that identify certain matters as affirmative defenses with MAIs providing guidance as how to instruct on the particularized affirmative defenses, while the child enticement MAIs do not discuss affirmative defenses, supports that Duane knowing that J.R. was less than fifteen years old was actually an element of the offense and not an affirmative defense.

In order for an affirmative defense to be submitted it must be supported by the evidence and if it is submitted the defendant has the burden of persuasion that the defense is more probably true than not. *State v. Barton*, 552 S.W.3d 583, 587 (Mo.App., W.D. 2018) and §556.056 (effective until January 1, 2017). Assuming that Duane knowing that J.R. was less than fifteen years old was an affirmative defense, there was evidence to support it. Section 302.130.1 authorizes a person to obtain a driver's permit who is "at least fifteen years of age." There was evidence that J.R was driving a car (Tr.343-44), and therefore evidence, to support that Duane did not know J.R. was less than fifteen years old. Because there was evidence to support that Duane did not know J.R. was less than fifteen years old Instruction A should have been given for the jury to decide that issue.

X. Conclusion

It was error for the trial court to refuse to submit Instruction A. Whether Duane knew that J.R. was less than fifteen years old was either an element of the offense or an affirmative defense and the jury should have been required to decide that issue and been instructed as provided for in Instruction A.

This Court should reverse for a new trial at which the jury is properly instructed on the issue of whether Duane knew that J.R. was less than fifteen years old.

II.

REFUSED CONVERSE INSTRUCTION "B"

The trial court erred in denying the request to submit Converse Instruction "B," requiring the jury to find Duane Michaud not guilty unless he knew J.R. was less than fifteen years old, because that ruling denied Duane his right to due process, U.S. Const. Amend. XIV and Mo. Const. Art. I, §10, in that Converse Instruction 6 did not require the jury make such a finding and Duane's knowing J.R. was less than fifteen years old is an element of the offense that respondent was required to prove and the jury had to find and without such finding Duane was required to be found not guilty.

The trial court erred in refusing to submit converse Instruction "B" which required the jury find Duane not guilty unless he knew that J.R. was less than 15 years old. Duane's knowing that J.R. was less than 15 years old was an element respondent was required to prove and the jury was required to find in order to convict him and without such finding was required to be found not guilty. Instruction 6 relieved respondent of its burden of proving an element of the offense. Relieving respondent of proving that element denied Duane of his right to due process.[6]

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[6] The basis for this Point II claim is effectively the same as that presented in Point I as to the Verdict Director. Because of that identity, the detailed Arguments contained in Point I are incorporated here as if set forth in their entirety and equally applicable to

Standard Of Review

Under Rule 28.02(a) the court is required to instruct the jury on all questions of law arising in the case that are necessary to render a verdict. *State v. Plunkett*, 473 S.W.3d 166, 171-72 (Mo.App., W.D. 2015). The giving or failure to give an instruction or verdict form in violation of Rule 28.02 or any applicable Notes On Use constitutes error and the prejudicial effect is to be judicially determined. *Id.* at 171. The trial court's refusal to give an instruction is reviewed *de novo*. *Id.* at 171-72. Reversal is required where error resulted in prejudice. *Id.* at 172. Prejudice exists if there is a reasonable probability the trial court's error affected the outcome. *Id.* at 172.

Preservation

The Court submitted converse Instruction 6 identified as based on "MAI-CR3d 408.02"(L.F.#9p.8;L.F.#10p.7). Defense counsel objected to Instruction 6(Tr.366-73). Defense counsel offered a non-MAI alternative converse (Instruction B) identified as based on "MAI-CR3d 408.02"(Tr.366-73;L.F.#7p.3).[7]

Point II. Where possible to avoid wholesale duplication, matters discussed in Point I are discussed in abbreviated fashion.

[7] As discussed in footnotes 3 and 4, MAI-CR 408.02 is in the MAI-CR 4th series, not the 3rd series.

The motion for new trial re-alleged that it was error to refuse to submit the Instruction B converse(L.F.#8p.2).[8] Thus, this claim is fully preserved.

Submitted Converse - Instruction 6

Converse Instruction 6 provided as follows:

> Unless you find and believe from the evidence beyond a reasonable doubt,
>
> First, that the defendant, while laying down on a bed next to J.R., started rubbing the lower stomach of J.R., and
>
> Second, that such conduct was a substantial step toward the commission of the offense of enticement of a child by attempting to persuade a person less than fifteen years of age to engage in sexual conduct, you must find the defendant not guilty of attempted enticement of a child as submitted in Instruction No. 5.

(L.F.#9p.8;L.F.#10p.7).

Defense Converse - Instruction B

Converse Instruction B provided:

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[8] The motion for new trial alleged it was error to submit Instruction 5 as the converse (L.F.#8p.2), the converse was actually Instruction 6(L.F.#9p.8;L.F.#10p.7). The motion for new trial correctly referenced the defense converse as Instruction B(L.F.#8p.2).

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

First, that the defendant, while laying down on a bed next to J.R., started rubbing the lower stomach of J.R., and

Second, that such conduct was a substantial step toward the commission of the offense of enticement of a child by attempting to persuade a person less than fifteen years of age to engage in sexual conduct, and

Third, that the defendant knew that J.R. was less than fifteen years of age,

you must find the defendant not guilty of attempted enticement of a child as submitted in Instruction No. ____.

(L.F.#7p.3) (emphasis added).

Instruction 6 Violated Due Process

The purpose of a converse is to demonstrate that the plaintiff failed in its burden to prove some element of its case. *McLaughlin v. Hahn*, 199 S.W.3d 211, 216 (Mo.App., W.D. 2006).

The Due Process Clause requires that the State prove each factual element of the charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). A verdict director must contain each element of the offense charged and require the jury to find every fact necessary to constitute the essential elements of the offense charged. *State v. Cooper*, 215 S.W.3d 123, 125-26 (Mo. banc 2007). "A

violation of due process arises when an instruction relieves the State of its burden of proving each and every element of the crime and allows the State to obtain a conviction without the jury deliberating on and determining any contested elements of that crime." *Id.* at 126.

The instructions together must require a finding of all the ultimate facts necessary to sustain a verdict. *State v. Swartz*, 517 S.W.3d 40, 58 (Mo.App., W.D. 2017). It is error to remove an essential element of a case from the jury's consideration. *Id.* at 58.

The trial court rejected the non-MAI instructions offered on the ground that the this Court expects trial courts to follow the MAI instructions as written(Tr.370-72;L.F.#7p.1-3).

Instruction 6 removed the required element from the jury's consideration that Duane knew that J.R. was less than fifteen years old, and therefore, violated due process. *See*, *Winship* and *Cooper*.

As discussed in Point I and incorporated here the MAI Instructions and their Notes On Use are not binding. *See*, *State v. Carson*, 941 S.W.2d 518, 520 (Mo. banc 1997); and *State v. Erwin*, 848 S.W.2d 476, 483-84 (Mo. banc 1993).

As discussed in Point I, omitting the requirement for the jury to find a defendant acted knowingly based on erroneous MAI instructions is prejudicial. *See Carson* and *State v. Jones*, 865 S.W.2d 658 (Mo. banc 1993).

Omitting from the converse that Duane knew J.R. was less than fifteen years old was prejudicial because the closing arguments of both sides focused on whether Duane knew J.R. was less than fifteen years old. *See* Point I discussion of closing arguments.

The failure of the submitted converse to require the jury find that Duane knew that J.R. was less than fifteen years old allowed respondent to avoid satisfying its burden of proof on all of the required elements. *See* Point I discussion of *State v. Cooper*, 215 S.W.3d 123 (Mo. banc 2007).

This Court should conclude that the failure to require the jury find Duane knew J.R. was less than fifteen years old, as omitted under the converse submitted, was prejudicial and requires a new trial.

III.

LIMITING CROSS-EXAMINATION OF ALISHA BROCK

The trial court abused its discretion in sustaining respondent's objections to cross-examination of Alisha Brock about whether J.R. had a tendency to exaggerate because that ruling denied Duane his right to an adequate meaningful opportunity for confrontation and his due process right to present a defense, U.S. Const. Amends VI and XIV and Mo.Const. Art. I §10 and §18(a), in that the accuracy of the details J.R. reported Duane engaged in was crucial to the determination of innocence or guilt so that if J.R. was prone to exaggeration the jury might not have believed Duane committed the acts as they were attributed to Duane by J.R. and that were necessary to convict Duane.

On cross-examination of Alisha Brock, the trial court sustained respondent's objection to questioning Alisha whether J.R. was prone to exaggeration in the summer of 2012, when J.R. lived with Alisha. That ruling denied Duane his right to confrontation and his due process right to present a complete defense. The accuracy of what J.R. reported Duane did was critical to the jury's decision on innocence or guilt. If J.R. was prone to exaggeration, then the jury might not have believed Duane committed the acts as they were attributed to Duane by J.R. and that were necessary to convict Duane.

Standard of Review

Admission of evidence is committed to the trial court's discretion. *State v. Anderson*, 76 S.W. 3d 275, 276 (Mo. banc 2002). A trial court has broad discretion in deciding the scope of cross-examination. *State v. Gaines*, 316 S.W.3d 440, 447 (Mo. App., W.D. 2010). In matters involving the admission of evidence, review is for prejudice that denied the defendant a fair trial. *Id.* at 447.

Preservation

The motion for new trial alleged it was error to have sustained respondent's trial objection(L.F.#8p.2-3). Thus, this claim was preserved.

Prejudicial Limitation of Cross-Examination

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. Amend. VI. The Sixth Amendment's Confrontation Clause gives an accused the right to be confronted with the witnesses against him. *U.S. v. Owens*, 484 U.S. 554, 557 (1988). That right "has long been read as securing an adequate opportunity to cross-examine adverse witnesses." *Id.* at 557. *See also State v. Johnson*, 700 S.W.2d 815, 817 (Mo. banc 1985) (right to confrontation encompasses a "meaningful opportunity" to challenge veracity).

The Fourteenth Amendment's Due Process Clause and the Sixth Amendment guarantee a defendant a meaningful opportunity to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986). Presenting a complete defense includes

the right to present testimony favorable to the defense. *Rock v. Arkansas*, 483 U.S. 44, 55-56 (1987).

J.R. and Alisha Brock are sisters(Tr.313-14). J.R was living with Alisha when the acts at issue were alleged to have happened(Tr.340-41). On cross-examination of Alisha Brock the following occurred:

> Q. Now, going back again to the summer of 2012 when she [J.R.] was staying with you, did she have a tendency at that time to exaggerate --
>
> [THE PROSECUTOR]: I'm going to object. I think this is asking a witness to comment on the credibility of another witness.
>
> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: I have nothing further.

(Tr.348).

"Reputation evidence is available to impeach any witness in any lawsuit, civil or criminal." *Haynam v. Laclede Electric Cooperative Inc*., 827 S.W.2d 200 (Mo. banc 1992) (citing *State v. Thompson*, 299 S.W.2d 468, 473 (Mo. 1957)). Counsel's attempted impeachment went to J.R.'s reputation for exaggeration.

Respondent's case was premised on J.R.'s testimony that Duane committed specific acts constituting attempted enticement of a child. J.R. reported that Duane kissed her neck and face multiple times and said multiple times for J.R. to tell him when to stop(Tr.321-22). J.R. reported that as Duane was kissing her that his hand moved from her torso towards her pant line while telling her to tell him when to

stop(Tr.322-23). J.R. testified that when Duane's hand got below her belly button that she nudged his hand away from her(Tr.323). J.R. reported that Duane then tried to put his fingers in her mouth, but she kept her lips closed(Tr.323-24). At that point, J.R. got up and went outside the house(Tr.324).

Casting doubt on J.R.'s credibility by presenting evidence she had a reputation for exaggeration was critical because the jury had to believe the specific details of what J.R. reported Duane did. Precluding evidence of J.R.'s reputation for exaggeration was prejudicial and denied Duane a fair trial because respondent's case was premised on the jury believing the specific detailed acts J.R. reported Duane committed. *See*, *Gaines*. The exclusion of the attempted cross-examination of Alisha violated Duane's right to confront the witnesses against him and his due process right to present his defense. *See*, *Owens*, *Johnson*, *Crane* , and *Rock*.

Respondent's Court of Appeals Arguments

In the Court of Appeals, respondent argued this claim was not preserved because an offer of proof was not made(Resp. Ct. App. Br.19-20). In *State v. Williams*, 724 S.W.2d 652, 656 (Mo.App., E.D. 1986) respondent argued that a claim that the court improperly limited cross-examination was not preserved because the defendant failed to make an offer of proof. That preservation claim was rejected on multiple grounds. Offers of proof are not typically required as to matters going to cross-examination. *Id.* at 656. An offer of proof is not required when it would serve

no purpose. *Id.* at 656. Where relevance is clear offers of proof are generally not required when evidence is sought through cross-examination. *Id.* at 656.

This claim was preserved because the evidence sought to be elicited occurred on cross-examination. *See Williams*. From the question posed, counsel was looking to Alisha to endorse the view that her sister J.R. was inclined to exaggeration, and therefore, an offer of proof would not have served any purpose. *See Williams.* The relevance was clear because the inquiry was directed at attempting to challenge J.R.'s rendition of the acts J.R. reported Duane engaged in as constituting child enticement *See* Tr.321-24 and *Williams*. Thus, this claim was preserved. *See Williams.*

Respondent also asserted that the intended evidence was inadmissible because it constituted "reputation for truthfulness in the community"(Resp. Ct. App. Br.20-21 relying on *State v. Schnelle*, 398 S.W.3d 37 (Mo.App., W.D. 2013)). The question did not seek reputation for truthfulness in the larger community, but instead sought from J.R.'s sister, Alisha, whether at the time of the alleged acts Alisha had known J.R. to be inclined to exaggerate. Whether J.R. had been pre-disposed to exaggeration went to the credibility of what J.R. reported that Duane was alleged to have done to J.R. *See* Tr.321-24. The question did seek to cast doubt on the reliability of J.R.'s reporting, but it did not seek to have Alisha express an opinion on whether J.R. was generally not a credible witness.

Respondent asserted that the inquiry was directed at a "collateral issue"(Resp.Ct. App. Br.21). J.R.'s inclination to exaggerate was not a collateral

matter. Alisha was called to testify that J.R. lived with her (Tr.340-41) in a household that included Duane (Tr.340-41) and in response to what J.R. reported Duane allegedly did Alisha then took actions to keep Duane away from J.R.(Tr.341-43).

Respondent asserted that it "filed" a pretrial motion to preclude any reference to specific instances of a state's witness being untruthful about collateral matters and to preclude any reference or evidence from a witness regarding whether that witness finds another witness credible(Resp. Ct. App. Br.18 referencing Tr. 19, 21 only and not the text of any motion). Undersigned counsel searched the on-line Casenet trial court record docket sheets for *State v. Michaud* Greene Co. No. 1431-CR01698-01 and did not find any hyperlinked entry to support such a state's motion in limine was ever "filed" in the circuit court.[9]

The transcript record does reflect discussions about a state's motion in limine and defense counsel had no objection to refraining from referencing specific instances of state's witnesses being untruthful about collateral matters and whether a witness finds another witness believable or credible(Tr.19, 21).

Respondent asserted defense counsel was obligated to explain to the trial court "why his question was permissible in light of that prior acquiescence to the motion in limine"(Resp. Ct. App. Br.21). This Court should not even consider this argument from respondent because the record reflects respondent never "filed" its motion in the

[9] The docket entries (L.F.#1p.20) and the Legal File itself do reflect that a defense motion in limine was filed(L.F.#4p.1-4).

circuit court so that there could be a proper complete record before this Court for its review and consideration of the arguments respondent made at trial. Moreover, as discussed, *supra*, the question did not reference a witness' untruthfulness about a collateral matter and it did not ask Alisha to express a general opinion about J.R.'s credibility.

This Court should order a new trial.

CONCLUSION

For all the reasons discussed, this Court should order a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, William J. Swift, hereby certify to the following.

The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 14, 270 words, which does not exceed the 31,000 words allowed for an appellant's brief.

This brief has been scanned for viruses using a Symantec VirusScan program, which was updated in May, 2019. According to that program, the brief provided to this Court and to the Office of the Missouri Attorney General is virus-free.

A true and correct copy of the attached brief with brief appendix have been served electronically using the Missouri State Courts electronic filing system this 21st day of May, 2019, on Assistant Attorney General Daniel McPherson at dan.mcpherson@ago.mo.gov at the Office of the Missouri Attorney General, P.O. Box 899 Jefferson City, Missouri 65102.

/s/ William J. Swift
William J. Swift