No. SC97658

In the Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

DUANE MICHAUD,

Appellant.

Appeal from Greene County Circuit Court
Thirty-First Judicial Circuit
The Honorable Thomas Mountjoy, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Duane Michaud is appealing his conviction and sentence for attempted enticement of a child, section 566.151, RSMo. Cum. Supp. 2006. (D.13 pp.1-3). Appellant was tried by a jury on August 15-16, 2017, before Judge Thomas E. Mountjoy. (D.1 p.20). Appellant does not contest the sufficiency of the evidence to support his conviction. Viewed in the light most favorable to the verdict, the following evidence was adduced at trial:

Victim was born in February of 1998. (Tr. 313). In 2012, when Victim was fourteen years old, she and her brother lived in Springfield with their older sister ("Sister") and her new husband ("Brother-in-Law"). (Tr. 313-15, 340). Appellant was Brother-in-Law's friend, and he moved into the house shortly before Sister and Brother-in-Law were married. (Tr. 315-16, 338, 340). Appellant slept on a couch in the living room, while Victim had her own bedroom. (Tr. 317, 341).

One night, Appellant and Victim were watching TV in the living room.[1] (Tr. 318). Appellant had been drinking earlier in the evening. (Tr. 318). He told Victim that his back hurt from sleeping on the couch. (Tr. 319).

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[1] The other occupants of the house were also in the living room, but had fallen asleep. (Tr. 319).

Appellant reached his hand out to Victim, who took it and walked Appellant to her room. (Tr. 319-20).

Appellant laid down on the bed and told Victim that he was lonely. (Tr. 320). He asked Victim if she would lie down with him. (Tr. 321). Victim lay her back, while Appellant lay on his side, facing Victim. (Tr. 321). Appellant put his left arm and leg over Victim's body. (Tr. 321). Appellant repeated that he was lonely. (Tr. 321). He started kissing Victim's neck and face, while repeatedly saying, "Tell me when to stop." (Tr. 321-22).

Appellant started moving his hand towards Victim's pant line. (Tr. 322). He again said, "Tell me when to stop." (Tr. 323). As his hand crossed over her belly button, Victim nudged Appellant's hand away from her body with her arm. (Tr. 323). Appellant then tried to put his fingers inside of Victim's mouth. (Tr. 323). Victim pushed her lips together to prevent that from happening. (Tr. 323-24).

Victim got up out of bed and left the house. (Tr. 324). She called her boyfriend and told him what had happened. (Tr. 324-25). Victim returned to Sister's house, but found that the door was locked. (Tr. 326). Victim started to walk away, but Brother-in-Law answered the door. (Tr. 326). Victim was still on the phone with her boyfriend, so she handed the phone to Brother-in-Law, and the boyfriend relayed what Victim had told him. (Tr. 326). Brother-in-Law told Victim that he would talk to Sister in the morning. (Tr. 327). Sister

talked to Victim the next morning, and they went to stay at the home of Brother-in-Law's parents. (Tr. 327, 342). Before they left, Sister confronted Appellant by asking, "What the fuck were you thinking?" (Tr. 342). Appellant's only response was, "I don't know." (Tr. 342). Sister and Victim returned to the home after being told that Appellant had left. (Tr. 343).

The incident was not reported to the police until 2013. (Tr. 327). Victim had gotten into an argument with her father about the age difference between her and T.H., a new boyfriend she was then seeing. (Tr. 328). Victim was fifteen, while T.H. was eighteen. (Tr. 328). Victim wanted to deflect her father's anger away from T.H., so she told him that Appellant had raped her.[2] (Tr. 328-29). Father called the police. (Tr. 329).

When the police contacted Appellant, he initially denied that he had ever lived at Sister and Brother-in-Law's home. (Tr. 353-54). Appellant eventually changed his story and said that he might have stayed at the house on one or two occasions. (Tr. 354). Appellant said that Brother-in-Law had confronted him about allegations made by Victim of inappropriate touching. (Tr. 354). Appellant denied that any inappropriate touching had taken place.

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[2] Victim testified that she did not understand the distinction between rape and other forms of sexual misconduct, and used that word because she believed that was what had happened to her. (Tr. 329).

(Tr. 355). He said that he did not remember anything about the night in question. (Tr. 355).

Appellant did not testify. (Tr. 389). T.H., the ex-boyfriend who was the subject of the fight between Victim and her father, testified for the defense. (Tr. 328, 381). Victim had previously testified that she could not recall whether she had told T.H. about the incident with Appellant. (Tr. 329). She also testified that her clothing had never been removed during the incident. (Tr. 330-31). T.H. testified that Victim had told him that Appellant had forced himself onto her and taken off her underpants. (Tr. 381-82). T.H. admitted on cross-examination that he did not remember word-for-word what Victim had told him, but had only a general idea of what she said. (Tr. 383).

The jury found Appellant guilty of attempted enticement of a child. (Tr. 420). The jury returned a penalty phase verdict of five years' imprisonment, which the court imposed. (Tr. 436, 444).

ARGUMENT

I.

No instructional error (responds to Appellant's Points I and II).

Appellant's first two points raise interrelated claims of instructional error that Respondent will address in a single response. In his first point, Appellant claims that the trial court erred in refusing his Not-in-MAI verdict directing instruction that would have required the jury to find that he knew Victim was less than fifteen-years-old. In his second point, Appellant claims that the court erred in refusing his converse instruction that would have required the jury to find him not guilty unless he knew that Victim was less than fifteen-years-old. Both of Appellant's points fail because the court instructed the jury in accordance with MAI and the substantive law.

A. Underlying Facts.

The verdict directing instruction was submitted to the jury as Instruction No. 5 and followed MAI-CR 3d 320.37.2, the approved MAI-CR instruction for attempted enticement of a child. (D.9 pp.6-7; D.10 pp.5-6). That instruction read, in pertinent part, as follows:

> 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 [Victim], started rubbing the lower stomach of [Victim], 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, no matter how 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.

(D.10 pp.5-6).

Appellant proffered the following Not-in-MAI verdict directing instruction that combined the MAI-CR approved instructions for enticement of a child and attempted enticement of a child:

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 [Victim], started rubbing the lower stomach of [Victim], 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 [Victim] was 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 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.

(D.7 pp.1-2). The instruction went on to define the terms "substantial step," "sexual conduct," "sexual intercourse," "deviate sexual intercourse," and "sexual contact." (D.7 p.2).

Appellant also proffered the following converse instruction:

> Unless you find and believe from the evidence beyond a reasonable doubt,
>
> First, that the defendant, while laying down on a bed next to [Victim], starting rubbing the lower stomach of [Victim], 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 old to engage in sexual conduct, and
>
> Third, that the defendant knew that [Victim] 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. ___.

(D.7 p.3). Appellant's motion for new trial claimed error in the submission of Instruction No. 5, the refusal of his proffered verdict directing instruction, and the refusal of his proffered converse instruction. (D.8 pp.1-2).

B. Standard of Review.

This Court will reverse the circuit court's decision to submit an instruction only if the instructional error misled the jury and is so prejudicial that it deprives the defendant of a fair trial. *State v. Collings*, 450 S.W.3d 741, 766 (Mo. 2014). MAI instructions are presumptively valid and, when applicable, must be given. *Id.* An instruction which is an accurate statement

of the law and supported by the evidence does not prejudice the defendant. *State v. Avery*, 275 S.W.3d 231, 233 (Mo. 2009).

C. Analysis.

As an initial matter, the Court of Appeals opinion raised the question of which version of MAI-CR is applicable to this case. The Court of Appeals concluded that MAI-CR 4th applied because Appellant's trial took place after January 1, 2017. (SD35293 slip op. at 2 n.2). The MAI-CR 4th instructions are to be used for all trials occurring on or after January 1, 2017, provided that the instruction reflects the substantive law concerning the offense. *See* MAI-CR 4th 100.3 How to Use This Book; Effective Dates (Jul. 1, 2017). However, the MAI-CR 4th verdict directing instructions for both enticement of a child and attempted enticement of a child state that those instructions apply to offenses committed on or after January 1, 2017. MAI-CR 4th 420.60 Notes on Use ¶ 1 (Jul. 1, 2017); MAI-CR 4th 420.62 Notes on Use ¶ 1 (Jul. 1, 2017). While there does not appear to be any relevant substantive difference between the two versions of the instructions, it does appear that MAI-CR 3d was properly used. Respondent will cite to MAI-CR 3d for the verdict directing instructions and to MAI-CR 4th for any other applicable instructions.

The approved instruction for attempted enticement of a child does not require the jury to find that the defendant either knew or reasonably believed

that the victim was less than fifteen years of age. MAI-CR 3d 320.37.2 (Jan. 1, 2011). By contrast, the approved instruction for enticement of a child does require that finding. MAI-CR 320.37.1 (Jan. 1, 2011). The question directly raised by Appellant is whether the approved instruction for attempted enticement fails to follow the substantive law by not requiring the jury to find, as an element of the offense, that the defendant knew or reasonably believed that the victim was under the age of fifteen. *See State v. Taylor*, 238 S.W.3d 145, 148 (Mo. 2007) (noting that when an approved jury instruction conflicts with the statute, the statute prevails). The answer to that question will also determine whether the approved instruction for enticement of a child correctly states the law, or whether it needs to be revised to drop any reference to knowledge or belief as to the victim's age.

1. *Knowledge or awareness of age is not an element of enticement.*

The elements of an offense are derived from the statute establishing the offense, or when relevant, common law definitions. *State v. Wurtzberger*, 265 S.W.3d 329, 335 (Mo. App. E.D. 2008). The offense of enticement of a child is established by the provisions of section 566.151, RSMo, which states in relevant part:

> 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.

§ 566.151.1, RSMo Cum. Supp. 2006.

As the above language shows, and as other court opinions have noted, the statute contains no requirement that the defendant either know or reasonably believe that the person being enticed is less than fifteen years of age. *State v. Fleis*, 319 S.W.3d 504, 507 n.2 (Mo. App. E.D. 2010); *State v. Osborn*, 318 S.W.3d 703, 713 (Mo. App. S.D. 2010). In both *Fleis* and *Osborn*, the verdict directing instructions submitted the issue of the defendant's knowledge or belief of the victim's age, and since the State in those cases did not challenge the propriety of those instructions, treated that element as one that the State had to prove.[3] *Fleis*, 319 S.W.3d at 507 and 507 n.2; *Osborn*, 318 S.W.3d at 713-14.

There is also at least one case that has stated that the defendant's knowledge of the victim's age is an element of attempted enticement. *State v.*

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[3] *Osborn* involved the completed crime of enticement and, as noted above, the approved jury instruction for that offense does require a submission demonstrating the defendant's knowledge or belief concerning the victim's age. *Osborn*, 318 S.W.3d at 705, 713-14; MAI-CR 3d 320.37.1.

Davies, 330 S.W.3d 775, 787 (Mo. App. W.D. 2010). Other cases have made passing references to the existence of evidence that the defendant knew the victim's age, without explicitly analyzing whether that is an element of the office. *State v. Faruqi*, 344 S.W.3d 193, 202-03 (Mo. 2011); *State v. Almaguer*, 347 S.W.3d 636, 639 (Mo. App. E.D. 2011); *State v. Smith*, 330 S.W.3d 548, 553 (Mo. App. S.D. 2010); *State v. Sears*, 298 S.W.3d 561, 565 (Mo. App. E.D. 2009); *State v. Wadsworth*, 203 S.W.3d 825, 833 (Mo. App. S.D. 2006). To the extent those cases are read as requiring a mental state not authorized by the statute, they should no longer be followed.

It is the legislature, and not the courts, that has the authority to define the mental state that comprises the *mens rea* element of crimes. *State v. Fanning*, 939 S.W.2d 941, 945 (Mo. App. W.D. 1997). The legislature does that in two ways. It either places the culpable mental state within the statute creating the offense, or it permits the application of a culpable mental state through the provisions of section 562.021, RSMo. As previously noted, section 566.151,RSMo contains no language requiring that the defendant know or reasonably believe that the person being enticed is less than fifteen years of age. And the provisions of section 562.021, RSMo, demonstrate why knowledge of or belief about age is not an element of the offense.

Section 562.021, RSMo specifies that when the definition of an offense prescribes a culpable mental state with regard to a specific element, that

mental state shall be required only as to that specified element, "and a culpable mental state shall not be required as to any other element of the offense." § 562.021.2, RSMo 2000. The legislature placed the culpable mental state of "purposely" in section 566.151, RSMo.

In its brief in the Court of Appeals, Respondent argued that the mental state of purposely applied to the specific element of "persuades, solicits, coaxes, entices, or lures whether by words, actions, or through communication via the Internet or any electronic communication." Judge Scott's dissenting opinion concluded that the mental state applied to the element of "engaging in sexual conduct." (SD35293, Scott, J., dissenting, slip op. at 3). On reflection, and in light of the statutory language quoted above, Judge Scott's conclusion appears to be correct.

Appellant cites to two decisions from this Court where a culpable mental state of knowingly was imputed into a statute. *State v. Self*, 155 S.W.3d 756 (Mo. 2005); *State v. Minner*, 256 S.W.3d 92 (Mo. 2008). Those cases are distinguishable because the statutes in issue contained no reference to a culpable mental state. *Self*, 155 S.W.3d at 761 (sections 167.031 and 167.061); *Minner*, 256 S.W.3d at 95 (sections 195.218 and 195.211). Those cases thus fall under the provisions of section 562.021.3, which states that:

> 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 purposefully or knowingly[.]

§ 562.021.3, RSMo 2000.

Appellant also cites to two cases where knowledge of age was found to be a required element of endangering the welfare of a child. *State v. Hopkins*, 873 S.W.2d 911, 912 (Mo. App. E.D. 1994); *State v. Nations*, 676 S.W.2d 282, 284 (Mo. App. E.D. 1984). The statute being construed in those cases provided that a person committed the crime of endangering the welfare of a child if:

> He [or she] knowingly encourages, aids or causes a child less than seventeen years old to engage in any conduct which causes or tends to cause the child to come within the provisions of . . . section 211.031[.]

Hopkins, 873 S.W.2d at 913 (citing § 568.050.1(2), RSMo Cum. Supp. 1993); *Nations*, 676 S.W.2d at 283 (citing § 568.050.1(2) 1978). Those cases fell under the provisions of subdivision one of section 562.021, which provides that:

> If the definition of any offense prescribes a culpable mental state but does not specify the conduct, attendant circumstances

> or result to which it applies, the prescribed culpable mental state applies to each such material element.

§ 562.021.1, RSMo 2000. Those cases are thus inapposite to this case, where the enticement statute prescribes the culpable mental state of purposely, but only as to the element of engaging in sexual conduct.

A case that does apply the provisions of section 562.021.2, RSMo, and is thus more persuasive, is *State v. Purifoy*, 495 S.W.3d 822, 824 (Mo. App. S.D. 2016). At issue in that case was the statute creating the offense of unlawful possession of a firearm. *Id.* The statute read, in relevant part, 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 the United States which, if committed within this State would be a felony[.]

Id. (citing § 571.070.1(1), RSMo Cum. Supp. 2010). The defendant claimed that the State was required to prove that he knew of his prior felony conviction. *Id.* Applying section 562.021.2, RSMo, the Court of Appeals concluded that the culpable mental state of knowingly appeared only in the

first element dealing with possession of a firearm, and did not apply to the second element of a prior felony conviction. *Id.*

The legislature's choice to prescribe a culpable mental state for only one element of the offense demonstrates that it did not intend that a mental state be prescribed for any other element, and under section 562.021.2, RSMo, that choice precludes the courts from prescribing an additional mental state as an element of the offense that the State must prove.

2. *Knowledge or awareness of age is instead an affirmative defense.*

As pointed out in Judge Scott's dissenting opinion in the Court of Appeals, the affirmative defense statute codified in section 566.020, RSMo further demonstrate that knowledge or belief as to age is not an element on which the State bears the burden of proof. (SD35293, Scott, J., Dissenting, slip op. at 3-5). As applicable to this case, subsection two provides that:

> Whenever in this chapter the criminality of conduct depends on a child being under seventeen years of age, it is an affirmative defense that the defendant reasonably believed that the child was seventeen years of age or older.

§ 566.020.2, RSMo Cum. Supp. 2013. "An affirmative defense is an independent bar to liability with respect to which the defendant carries the burden of persuasion that 'does not serve to negative any facts of the crime which the State must prove in order to convict' the defendant." *Faruqi*, 344

S.W.3d at 201 n.3 (quoting *Patterson v. New York*, 432 U.S. 197, 207 (1977)). Generally, where an exception is part of the section which defines the offense, the burden is on the State to plead and prove that the defendant is not within the exception. *State v. Balbirnie*, 541 S.W.3d 702, 711 (Mo. App. W.D. 2018). However, when the exception is found in a separate clause or part of the statute disconnected from the definition of the offense, the exception is not for the prosecution to negate, but for the defendant to claim as a matter of affirmative defense. *Id.*

Section 566.151, RSMo contains no language creating a defense of mistake of age. Because the affirmative defense of knowledge or belief as to age appears only in a separate statute, the burden of pleading and proving that defense fell on Appellant.

It does not appear that Appellant would have been entitled to an affirmative defense instruction since he did not present any evidence to suggest that he was unaware of Victim's age or that he reasonably believed her to be seventeen years of age or older. The issue was not raised in Appellant's opening statement. (Tr. 310-12). In closing argument, counsel noted a lack of evidence that Appellant knew the Victim was under 15, but that does not suffice as he bore of the burden of proving that the Victim was seventeen years of age or older. (Tr. 411).

Even if Appellant had been entitled to an instruction on the affirmative defense of lack of knowledge or belief as to age, his proposed instruction did not follow the proper format for submitting an affirmative instruction. *See* MAI-CR 4th 404.11(F) (Jul 1, 2017); MAI-CR 4th 404.02 (Jul. 1, 2017). For instance, Appellant cites to three statutes where section 566.020.2 applies, and notes that the approved instructions contain language for submitting an affirmative defense. But the format for doing so is to include a paragraph, immediately at the end of the sentence that reads "then you will find the defendant guilty . . .", that reads as follows:

> [U]nless you find and believe from the evidence that it is more probably true than not true that the defendant reasonably believed [*identify victim*] was seventeen years of age or older at the time of the offense.

MAI-CR 4th 420.26 Notes on Use ¶ 7 (Jul. 1, 2017); MAI-CR 4th 420.18 Notes on Use ¶ 4 (Jul. 1, 2017); MAI-CR 4th 420.22 Notes on Use ¶ 12 (Jul. 1, 2017).

Appellant did not proffer an instruction that submitted knowledge or belief as to age in the proper format for submitting an affirmative defense. A trial court does not err in refusing a flawed instruction. *State v. Blurton*, 484 S.W.3d 758, 768 (Mo. 2016).

3. *Any error from submitting the instruction was harmless.*

In the event that this Court were to find that knowledge or belief as to age was an element that should have been included in the verdict-directing instruction, the failure to include that element was harmless. An instructional error will be held harmless when the Court can declare its belief that it was harmless beyond a reasonable doubt. *State v. Ferguson*, 887 S.W.2d 585, 587 (Mo. 1994). That standard will generally not be met where a substantial issue exists regarding the defendant's state of mind. *Id.* In this case, as explained in the previous subsection, Appellant did not raise any issue as to his knowledge or belief of Victim's age. Since no substantial issue existed as to Appellant's state of mind, it can be said that any error in the verdict directing instruction was harmless beyond a reasonable doubt. *Cf. id.*

4. *Proposed converse instruction did not follow the law.*

Because Instruction No. 5 followed MAI-CR 3d 320.37.2, which correctly stated the law, the court did not err in submitting that instruction and rejecting Appellant's Not-in-MAI verdict director. And because the verdict directing instruction submitted to the jury was correct, the court also correctly rejected Appellant's proffered converse instruction. The elements covered in a converse instruction must be taken from the verdict director. *State v. Matthews*, 37 S.W.3d 847, 851 (Mo. App. S.D. 2001); MAI-CR 4th 408.02 (Jul. 1, 2017). Appellant sought to converse an element that was not

contained in the verdict director submitted to the jury – that being his knowledge of Victim's age. (D.7 p.3: D.10 pp.5-6). Appellant was not entitled to have his converse instruction submitted because it did not strictly comply with MAI-CR 4th 408.02 and its Notes on Use. *Id.*

The court did not err in submitting the State's proffered instruction and in rejecting the instructions proffered by the defense. Appellant's points should be denied.

II.

The trial court did not plainly err in excluding inadmissible opinion evidence about Victim's truthfulness and veracity (responds to Appellant's Point III).

Appellant claims that the trial court erred in sustaining the State's objection to his cross-examination question posed to Victim's sister about whether Victim had a tendency to exaggerate. But the question on its face violated the rule against personal opinions as to a witness's truthfulness and credibility, and Appellant did not make an offer of proof to demonstrate why the evidence would have been admissible.

A. Underlying Facts.

The State filed pretrial Motions in Limine that sought to preclude any reference to specific instances of a State's witness being untruthful about collateral matters, and to preclude any reference or evidence elicited from a witness regarding whether that witness finds another witness credible.[4] (Tr.

[4] The motion was not included in the Legal File and Appellant states in his brief that he was unable to find any hyperlinked entries to the circuit court case on CaseNet that reflect the filing of such a motion. The motion does appear in a hyperlinked entry dated August 14, 2017, but Appellant's

19, 21). The court sustained the motion after defense counsel said that he had no objection to either provision. (Tr. 19, 21).

The following exchange occurred during defense counsel's cross-examination of Victim's sister:

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

(Tr. 348). Appellant's motion for new trial included a claim that the trial court erred in sustaining the State's objection to the question about Victim's "history of exaggeration[.]" (D.8 pp.2-3). The motion did not elaborate on why the court's ruling was erroneous. Counsel did not present any argument on the motion when it was taken up by the trial court. (Tr. 440).

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difficulty in identifying it is understandable given that entry is captioned "Hearing held."

B. Standard of Review.

To preserve a claim of improperly excluded evidence, the proponent of the evidence must attempt to present the excluded evidence at trial, and if it remains excluded, make a sufficient offer of proof. *State v. Hunt*, 451 S.W.3d 251, 263 (Mo. 2014). The purpose of an offer of proof is to preserve the evidence so the appellate court understands the scope and effect of the questions and proposed answers. *Id.* Offers of proof must show what the evidence will be, the purpose and object of the evidence, and each fact essential to establishing admissibility. *Id.* Offers of proof must be specific and definite. *Id.* Even upon cross-examination, where it appears defense counsel has knowledge of an anticipated answer, error in refusing evidence is not preserved for review unless an offer of proof is made. *State v. Hodges*, 529 S.W.3d 28, 30-31 (Mo. App. S.D. 2017).

Issues that were not preserved may be reviewed for plain error only, which requires the reviewing court to find that manifest injustice or a miscarriage of justice has resulted from the trial court error. *State v. Baumruk*, 280 S.W.3d 600, 607 (Mo. 2009). Review for plain error involves a two-step process. *Id.* The first step requires a determination of whether the claim of error facially establishes substantial grounds for believing that manifest injustice or a miscarriage of justice has resulted. *Id.* All prejudicial error, however, is not plain error, and plain errors are those which are

evident, obvious, and clear. *Id.* If plain error is found, the Court then must proceed to the second step and determine whether the claimed error resulted in manifest injustice or a miscarriage of justice. *Id.* at 607-08.

C. Analysis.

Because a question posed by counsel is not evidence, Appellant should have supplied Sister's answer to the cross-examination question in order to comply with the requirement of making an offer of proof. *Hodges*, 529 S.W.3d at 31 n.3. In the absence of an offer of proof, any discussion of Appellant's claim would be advisory, which is a sufficient ground to deny the point. *Id.* at 31. For example, Sister may have answered the question in the negative, in which case Appellant would not have been prejudiced by the court's ruling.

Even if Sister had given the answer that counsel seemingly expected, application of the offer of proof rule is particularly apt since the question seemed to violate the general rule regarding impeaching the credibility of a witness:

> As with any witness, who testifies at trial, a victim in a sex offense case places her reputation for truthfulness at issue by taking the stand, and the defense may impeach the victim's testimony by evidence of her poor reputation for truthfulness and veracity if it is shown that the person is familiar with the general reputation of the witness in the neighborhood or among the

> people with whom the witness associates. Conversely, it is irrelevant what the person personally knows of the general conduct of the witness to be impeached because personal opinion as to a witness's truthfulness and veracity is immaterial and not admissible.

State v. Schnelle, 398 S.W.3d 37, 42 (Mo. App. W.D. 2013). Defense counsel's question asked the witness for a personal opinion and did not reference Victim's reputation for truthfulness in the relevant community. The question as stated was thus improper and the court correctly sustained the objection.

The question also was inconsistent with defense counsel's pre-trial statement that he did not object to the State's motion in limine that barred any reference to untruthfulness on collateral issues, or comments on the credibility of a witness. (Tr. 19-20). Counsel failed to explain to the court why his question was permissible in light of that prior acquiescence to the motion in limine, and his motion for new trial gave no further insight as to why the question would have been permissible.

The arguments that Appellant now makes as to why the purported evidence was admissible were not raised before the trial court. A defendant may not claim error on an evidentiary issue on a theory not presented to or decided by the trial court. *State v. Wright*, 376 S.W.3d 696, 704 (Mo. App. E.D. 2012); *State v. Hill*, 250 S.W.3d 855, 858 (Mo. App. S.D. 2008).

Appellant has failed to demonstrate plain error resulting in manifest injustice by the trial court. His point should be denied.

CONCLUSION

In view of the foregoing, Respondent submits that Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the limitations in Supreme Court Rule 84.06, and contains 6,216 words as calculated under the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2010 software.

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