No. SC97910

IN THE

# Supreme Court of Missouri

**STATE OF MISSOURI**,

*Respondent*,

v.

**JEFFREY WATERS**,

*Appellant*.

Appeal from the Circuit Court of Pulaski County
25th Judicial Circuit
The Honorable John D. Beger, Judge

## RESPONDENT'S SUBSTITUTE BRIEF

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## JURISDICTIONAL STATEMENT

Having granted transfer after opinion by the court of appeals, this Court has jurisdiction to hear Defendant's appeal. MO. CONST. art. V, §§ 3, 10; Rule 83.04; Rule 83.09. Appellant argues that this Court does not have jurisdiction because there has not been a final, appealable judgment. (Def's Br. 5-8). The State addresses this issue more fully in Point I of this brief. *See infra* at 20-31.

## STATEMENT OF FACTS

Mr. Jeffrey Waters (Defendant) appeals a Pulaski County Circuit Court judgment convicting him of statutory sodomy in the first degree and attempted statutory sodomy in the first degree, for which he was sentenced to a total of 18 years' imprisonment. (D41).

Defendant was charged as a prior offender with first-degree statutory rape in the first degree (Count I), for having sexual intercourse with 12-year-old S.E., on or about November 10, 2015; first-degree statutory sodomy (Count II), for inserting his finger into S.E.'s vagina, on or about November 10, 2015; incest (Count III), for engaging in sexual intercourse with his biological daughter, S.E., on or about November 10, 2015; and attempted first-degree statutory sodomy (Count IV), for an incident occurring on or about November 11, 2015. (D32, pp. 1-2). The trial court found Defendant to be a prior offender. (Tr. 1136). The jury found Defendant guilty of Counts II and IV as charged, but it was unable to reach a verdict on Counts I and III, and a mistrial was declared as to those counts. (D34, pp. 8, 10; D37, pp. 3, 7; Tr. 1229-30, 1237). The trial court subsequently sentenced Defendant to 10 years' imprisonment on Count II and 8 years' imprisonment on Count IV, to be served consecutively. (D41; Sent. Tr. 34).

Defendant does not challenge the sufficiency of the evidence to support the convictions. (Def's Br. 27-28). Viewed in the light most favorable to the

verdict, the evidence presented at trial showed the following:

S.E. (Victim) testified that she was born in January 2003, and that she was 12 years old when Defendant, her biological father, raped her. (Tr. 632, 634-35, 638-39). Victim was living at Defendant's house, along with K.W., Victim's stepmother (Stepmother); Victim's younger half-sister; and Stepmother's three children. (Tr. 634, 636-37). Victim normally shared a bedroom with some of the other children. (Tr. 647).

Victim testified that leading up to the nights in question, Defendant had been treating her "like [she] was a princess"—letting her play video games and watch TV, even though she was grounded, and buying her four or five different types of candies that she wanted. (Tr. 639, 641-44). Stepmother was away at the hospital because she had recently given birth. (Tr. 639, 651). While Stepmother was away, Defendant asked Victim to be his "cuddle buddy" in bed. (Tr. 640, 647). Victim had been having trouble sleeping, and Defendant told her to take some pink medicine to help her sleep, which she did. (Tr. 659, 715). Victim watched some television and eventually fell asleep on Defendant's bed. (Tr. 647-49).

At approximately, 4 a.m., Victim woke up, and her underwear and pants were down to her ankles. (Tr. 645-46, 649-50). Defendant was naked on the bed in front of Victim and was "put[ting] his fingers inside of [Victim], inside of [her] privates." (Tr. 653-54). Defendant pulled Victim's pants

completely off and put his tongue inside of her. (Tr. 654). Victim was scared, did not understand what was going on, and pretended to be asleep. (Tr. 654-55). Defendant then started to have sex with Victim by getting on top of her and "put[ting] his privates into [hers]," which she also described as "put[ting] his dick inside of [her]" or "in [her] vagina." (Tr. 638, 655). Defendant did not wear a condom. (Tr. 772). Defendant "did it over and over again." (Tr. 655). Victim was on her back until Defendant eventually turned Victim onto her stomach and "got semen on [her] back" in what felt like "an S shape." (Tr. 656-58). Defendant got off of Victim, Victim started to walk out of the room, and Defendant asked her if she wanted a cigarette. (Tr. 658). Victim testified that she unlocked the door to leave and that it had not been locked when she had been watching television. (Tr. 658-59).

Victim went to her bedroom and wiped the semen from her back onto the nightgown she had been wearing, which Stepmother had given her early in her pregnancy. (Tr. 650-51, 660). Victim "shoved" the nightgown into her drawer and went to the bathroom to change into different clothes. (Tr. 660). Victim cried and didn't know what to do. (Tr. 660, 663). Victim tried looking for the phone to call 911, but she couldn't find it, and she was scared that if she used the phone locator button the beeping would draw Defendant's attention. (Tr. 739-40, 804-05). Victim considered running away, but she decided not to. (Tr. 805). Victim went to the couch and tried to hide by

covering herself up with pillows. (Tr. 663).

The next night, Victim went back to Defendant's room because "[she] was afraid that he would notice that [she] was gone" and "[she] didn't want to know what would happen." (Tr. 679, 696-97). Stepmother had still not returned to the house. (Tr. 679). Victim fell asleep in Defendant's bed, and at some point she again awoke to find that her underwear and pants were down around her thighs and that Defendant was naked and rubbing his finger "from [her] privates to [her] butt." (Tr. 697-99). Victim "got up and tried [her] hardest to pull up [her] pants," but Defendant grabbed her, put his arms around her, and "locked his hands together." (Tr. 698). Victim was eventually able to get away, went to her bedroom, and lay down. (Tr. 699). Defendant came into her room, said he was sorry, told her that it wouldn't happen again, and asked her to come back to his room. (Tr. 699). Victim said, "No," and Defendant left. (Tr. 699-700).

Victim testified that when she went to school that week she told her friends, H.C. and M.K., that Defendant had raped her and that she didn't know what she was supposed to do. (Tr. 664-65, 679, 700). Victim again spoke to H.C. that night, and Victim eventually agreed to let H.C. "hotline it," despite Victim's fear that she would "lose [her] dad." (Tr. 701-02, 766, 869, 874, 998-99).

On November 13, 2015, at approximately 6:50 p.m., DFS called the

Pulaski County Sheriff's Department for assistance after receiving a hotline call regarding sexual contact between a juvenile and her father. (Tr. 430, 438, 468). Deputy Lynn Bays responded to the location, along with a DFS worker. (Tr. 468-69, 703). Stepmother answered the door, and she permitted the deputy and the DFS worker to speak privately with Victim on the front porch. (Tr. 469-70). Victim then disclosed that her father, Defendant, had molested and raped her in a manner consistent with her trial testimony. (Tr. 471-72). Deputy Bays contacted the head of their child sex crimes division, Detective Nicole Cunningham, who directed Deputy Bays to gather any clothing that Victim had worn at the time of the incident, as well as the bed sheets from Defendant's bed. (Tr. 382, 473). Deputy Bays asked Victim and Stepmother to collect those items for him. (Tr. 473, 703-04). Stepmother went downstairs to the "laundry room[/]master bedroom" and collected the bedding, and Victim went to her bedroom on the opposite end of the house and collected "a white-with-black-polka-dotted shirt, blue female panties[,] and blue pajama bottoms with a Care Bear on it." (Tr. 474-76, 494, 650, 653). Victim testified that she got the blouse out of the dresser drawer in her bedroom, which is where she had "shoved it in" after the incident because "[she] didn't want to see it anymore." (Tr. 652-53, 704-05). Stepmother testified that Defendant had washed the bedding the night before she got home from the hospital. (Tr. 1060). Deputy Bays observed that the master

bedroom downstairs had a television, a computer, a washer and dryer, and assorted bedroom items, as well as a lock on the door. (Tr. 494-95, 1053-54).

Later that evening, at approximately 9:30 p.m., Detective Cunningham conducted a forensic interview of Victim at the child advocacy center. (Tr. 377-81, 383, 433, 703, 705-06). The forensic interview was recorded, and a copy of that recording was admitted into evidence and published to the jury. (Tr. 386-91, 407). During the interview, Victim stated that on Tuesday evening, November 10, 2015, three days earlier, she was at home with Defendant, her brothers, and her sisters, but Stepmother was at the hospital. (Tr. 395). Defendant had asked Victim to be his "cuddle buddy" while Stepmother was away, and he had invited the children to watch a movie in his room, so Victim went into Defendant's room and watched TV, though she was the only one of the children to do so. (Tr. 395-96). Defendant provided Victim with an unidentified pink liquid that was supposed to "make her sleep," and Victim fell asleep on Defendant's bed. (Tr. 396). Victim later woke up when she felt Defendant pull her pants down to her ankles. (Tr. 396). Defendant began "fingering" her, which Victim clarified as placing his finger "in her private area," and then he "raped" her, which Victim described as "put[ting] his dick . . . in [her]." (Tr. 396). Victim said she was "scared," "paralyzed," "confused," and that she "didn't know what to do." (Tr. 396, 424). As Victim turned to try to get away from Defendant, he pulled out of her and

ejaculated in an "up-down-up" pattern on her back over her right side. (Tr. 396, 422-23). Victim said that Defendant gave the nightgown back to her. (Tr. 447). Victim was able to get away, unlocked the door, and cried in her bedroom. (Tr. 396-97). Unable to go to sleep, Victim went out to the couch. (Tr. 397). Victim also discussed the "second incident" that occurred on the following night, Wednesday, November 11, 2015. (Tr. 397-98).

A SAFE exam was performed at the child advocacy center later that night. (Tr. 382, 719, 925, 967, 987). Debra Ballard, a sexual assault nurse practitioner, performed the forensic examination. (Tr. 434, 927). The examination revealed no findings of any physical injury. (Tr. 932-33). Ms. Ballard testified that "[i]n 95 percent of sexual assaults there is no physical injury to a female's body" and that such findings do not rule out that a sexual assault occurred. (Tr. 932, 939, 959, 961-63, 965, 975-77). Victim also had no abnormal physical findings, including signs of a sexually transmitted disease (STD), though Ms. Ballard testified that it was unlikely that an STD would transfer after one act of sexual intercourse and that Victim did not have any "open areas" on her skin that would make the risk of infection more likely. (Tr. 956, 981-82). Victim admitted that she was later tested for STDs to determine whether she had contracted any from Defendant; the tests revealed that Victim did not have any STDs. (Tr. 769-71). Swabs of Victim's mouth, anus, vagina, and labia majora were taken during the SAFE exam,

but laboratory analysis found no semen on the swabs. (Tr. 552-56, 948-952).

The nightgown from the first incident was submitted to the Missouri Highway Patrol Crime Lab for analysis. (Tr. 505-06, 652). Of 15 stains that were located on the nightgown, 1 was tested, and it was confirmed to be consistent with semen. (Tr. 529-32). Further, that stain was found to contain DNA consistent with Defendant's. (Tr. 546-51).

Detective Anthony Narug interviewed Defendant on December 1, 2015. (Tr. 606-09). Defendant told the detective that on the night in question he had invited the kids into his room to watch a movie and that Victim, his biological daughter, was the only one who came in. (Tr. 612-13). Defendant admitted that his wife was at the hospital because their newborn was in the NICU. (Tr. 613). Defendant said that Victim lay down at the end of the bed to watch a movie and that they both fell asleep. (Tr. 612). Defendant admitted that at some point Victim woke up and left the room crying, but Defendant claimed that he did not know why. (Tr. 612). Defendant admitted that he had given Victim a pink liquid medicine to help her sleep. (Tr. 612, 1107). Defendant also admitted that he had had a few beers that night. (Tr. 614). In response to Victim's allegations, Defendant claimed that Victim was "oversexual" for her age, that she had a sexually explicit imagination, and that she was making it up. (Tr. 613).

Defendant testified on his own behalf and denied raping his daughter,

rubbing his hands on her private parts, or attempting to sodomize her. (Tr. 1097). Defendant also testified that he had three STDs—genital warts, herpes, and hepatitis B, two of which he had had for several years. (Tr. 1098-99). Defendant admitted that he had no medical training regarding sexually transmitted diseases and did not know whether herpes was transmitted every time he had sexual intercourse. (Tr. 1107).

Defense counsel was permitted to read from a deposition of D.S., the father of Stepmother's other children, in which he related that Victim had told him that she didn't like Stepmother, that she didn't like living with Stepmother and Defendant, and that she wanted to live with her biological mother. (Tr. 1032-33, 1037). Stepmother similarly testified that she and Victim "did not get along that well" because she was "getting [Victim] in trouble for the things she was doing wrong, and [Victim] didn't seem to take that very well." (Tr. 1043). Stepmother testified that Victim told her "[m]ost of the time she lived with [them]" that she hated Stepmother, that Stepmother was not her mother, and that she wanted to live with her mother. (Tr. 1050). Defendant also testified that Victim had told him "[o]n many occasions" that she wanted to live with her mother. (Tr. 1099).

Stepmother testified that Victim had displayed behavioral issues and that when Victim tried to explain her behavior, "it didn't ever seem to be the truth." (Tr. 1034-35, 1106). G.P. testified that his family and Defendant's

family interacted quite frequently. (Tr. 893). Regarding Victim's reputation for truthfulness, G.P. testified that "[y]ou'd be lucky to be told the truth," but he admitted that he was not familiar with Victim's current reputation for truthfulness because the last time he had seen Victim was the week before the alleged incident. (Tr. 896-902). Defendant also called Victim's middle school guidance counselor, who testified that Victim had a reputation at the school of not being "very truthful." (Tr. 848). A teacher at the middle school and mother of Victim's guardian at the time of trial testified that Victim's current reputation in the school was that she was truthful. (Tr. 890-91).

Defendant called Victim's younger half-sister, who testified that when Deputy Bays and the DFS worker were at the house, she saw Victim retrieve the nightgown and her red sweatpants from Defendant's and Stepmother's dirty laundry basket while Victim, Stepmother, and Deputy Bays were in Defendant's and Stepmother's bedroom. (Tr. 1016-18, 1021-22). Stepmother also testified that she saw Victim pull the nightgown out of Stepmother's dirty clothes basket in Stepmother's room while Deputy Bays was present. (Tr. 1058-59). On rebuttal, Deputy Bays reiterated his testimony that Victim went to her bedroom, not the dirty laundry basket in Stepmother's bedroom, and retrieved a "white with black polka-dot shirt, blue pajama bottoms with a Care Bear[,] and blue female undergarments." (Tr. 1122-24).

Stepmother denied that she had ever given Victim her nightgown. (Tr.

1054-55). Stepmother further testified that she wore the nightgown on the evening of Thursday, November 12, 2015, before she and Defendant had sexual intercourse. (Tr. 1055-57). Stepmother testified that Defendant ejaculated on her back and that she "had [Defendant] pick [her] nightgown up off the floor and wipe [her] back off." (Tr. 1057-58). On cross-examination, Stepmother admitted that she had previously stated in her deposition that she had returned to the house on Saturday, November 14th. (Tr. 1068-73). Stepmother also admitted that she had visited Defendant in the Dixon City Jail and that the visits were supervised by an officer in the room. (Tr. 1088-89). Stepmother admitted that she understood Defendant could be in serious trouble and that she didn't want him to be in serious trouble. (Tr. 1094-95).

In rebuttal, Officer Gary Brankel testified that he had supervised a visit between Stepmother and Defendant at the Dixon City Jail. (Tr. 1113-15). Officer Brankel testified that he had overheard Stepmother and Defendant, while they prepared for his defense at trial, discuss a sexual encounter that they had allegedly had the night before the incident. (Tr. 1116, 1119). Officer Brankel testified that "[t]hey spoke about that they had sex in the so-called doggy position and that the nightgown was pulled up on her back and he ejaculated onto the nightgown." (Tr. 1117). Officer Brankel testified that he "found it odd that they were rehashing . . . a sexual act" and that "[i]t's never happened in any other visitations." (Tr. 1120).

In sentencing Defendant, the trial court noted that it found sufficient credible evidence to support the jury's verdict. (Sent. Tr. 33). Specifically, the trial court cited Deputy Bays' testimony that "[Stepmother] left the front door and turned to the left and returned with the bedding. [Victim] left the front door, turned to the right, came back with the clothing she had on that night, including the nightgown," and that "the pattern of ejaculate on the nightgown was consistent with [Victim's] testimony." (Sent. Tr. 33).

## ARGUMENT

### I. (Jurisdiction)

**This Court has jurisdiction to hear Defendant's appeal because the trial court rendered a final, appealable judgment as to Counts II and IV of the amended information when it imposed sentence as to those counts.**

**A. The record regarding jurisdiction.**

Defendant was charged by amended information with four counts—first-degree statutory rape in Count I, first-degree statutory sodomy in Count II, incest in Count III, and attempted statutory sodomy in Count IV. (D32). The jury found Defendant guilty as to Counts II and IV as charged, but it was unable to reach a verdict on Counts I and III, and the trial court declared a mistrial as to those counts. (D34, pp. 8, 10; D37, pp. 3, 7; Tr. 1229-30, 1237). The trial court subsequently sentenced Defendant to 10 years' imprisonment as to Count II and 8 years' imprisonment as to Count IV. (D41; Sent. Tr. 34). The trial court further ordered those sentences executed and that Defendant be transported to the custody of the Department of Corrections. (Sent. Tr. 34; D41, p. 2; D42, p. 1; D51). After the trial court pronounced Defendant's sentences, it asked, "Does the State have an announcement as far as Counts I and III?" to which the prosecutor replied, "Not at this time, Judge." (Sent. Tr.

36). Defendant timely filed a notice of appeal as to the convictions in Counts II and IV. (D1, pp. 22-24; D42).

**B. A final, appealable judgment was rendered as to Counts II and IV of the amended information upon the imposition of sentence for those two counts.**

"The right to appeal is purely statutory." *State v. Smiley*, 478 S.W.3d 411, 414 (Mo. banc 2016) (quoting *State v. Burns*, 994 S.W.2d 941, 941 (Mo. banc 1999)). Section 547.070 provides, in pertinent part: "In all cases of final judgment rendered upon any indictment or information, an appeal to the proper appellate court shall be allowed to the defendant[.]" § 547.070, RSMo 2016; *see also* Rule 30.01(a) ("After the rendition of final judgment in a criminal case, every party shall be entitled to any appeal permitted by law.").

"In a criminal case, a judgment is final when sentence is entered or 'when the trial court enters an order of dismissal prior to trial which has the effect of foreclosing any further prosecution of the defendant *on a particular charge*[.]" *Smiley*, 478 S.W.3d at 415 (emphasis added) (quoting *Burns*, 994 S.W.2d at 942); *see also State ex rel. Wagner v. Ruddy*, 582 S.W.2d 692, 694 (Mo. banc 1979) ("The very term 'sentence' has been defined to mean 'judgment or final judgment.'"); *State v. Pruitt*, 169 S.W.2d 399, 400 (Mo. 1943) (internal citation omitted) ("In its technical legal sense the sentence

generally constitutes and has the same meaning as judgment or final judgment or determination against [the] accused in a criminal case."); *Berman v. United States*, 302 U.S. 211, 212 (1937) ("Final judgment in a criminal case means sentence. The sentence is the judgment.").

Accordingly, in *State v. Bracken*, the Eastern District recognized that it had "consistently applied the long-standing rule that a judgment becomes final in a criminal case when sentence is entered or imposed." *State v. Bracken*, 333 S.W.3d 48, 52 (Mo. App. E.D. 2010). In *Bracken*, the defendant was indicted on 16 charges. *Id.* at 50. After trial, the jury returned a guilty verdict on 2 of those counts, but it deadlocked on the remaining 14. *Id.* at 52. The Eastern District held that because "sentences have been imposed on Counts 15 and 16, . . . judgment as to those counts is final for purposes of appellate review." *Id.* at 53.

In so holding, the Eastern District expressly declined to follow a line of cases from the Southern District that had "extended the rule to require judgment and sentence be entered on all counts in a criminal petition in order to confer appellate jurisdiction." *Id.* at 53. In *State v. Thomas*, the Southern District held that the defendant's appeal was "premature for the reason that there has been no disposition of one count of the two-count information." *State v. Thomas*, 801 S.W.2d 504, 505 (Mo. App. S.D. 1991). In that case, the defendant was charged with two counts of first-degree assault.

*Id*. After trial, the jury returned a verdict of guilty on Count II, but it was unable to reach a verdict on Count I. *Id*. Despite the fact that the defendant had been sentenced on Count II, the Southern District held the defendant's appeal in abeyance, requiring a disposition of Count I before it would reinstate the appeal. *Id*.

*Thomas* expressly relied on *State v. Wakefield*, 689 S.W.2d 809 (Mo. App. S.D. 1985). *Id*. In *Wakefield*, the defendant was charged with six counts, but the trial court failed to inform the jury of the sixth count, so only five counts were submitted to the jury. *Wakefield*, 689 S.W.2d at 810-11. The jury found the defendant guilty as to the five counts submitted, and the trial court sentenced the defendant as to those counts, but Count VI remained unresolved. *Id*. at 811. Relying in part on *Wagner*, the Southern District held that "no final, appealable judgment ha[d] been entered" because "a criminal judgment is final . . . for the purposes of . . . triggering the defendant's right of appeal when the sentence and judgment finally disposes of all issues in the criminal proceeding, leav[ing] no questions to the future judgment of the court." *Id*. at 812.

But upon imposition of sentence, a criminal charge against a defendant is finally disposed of and leaves no questions for future judgment of the trial court. *See Wagner*, 582 S.W.2d at 693 ("The judgment in a criminal case is final for purposes of appeal when the judgment and sentence is entered.");

*Berman*, 302 U.S. at 213 ("[The sentence] stood as a final determination of the merits of the criminal charge."). The fact that there is a final judgment as to one or more charges is not negated by the fact that other charges remain pending. Moreover, it would be incongruous to deny a defendant the right to appeal a conviction until all of the criminal charges in an information or indictment had been resolved, but permit a defendant to appeal if those same unresolved charges were contained in a separate filing. *See United States v. Powell*, 24 F.3d 28, 30 (9th Cir. 1994) ("[T]he Government could have charged the counts in separate indictments, in which case the charges contained in each indictment would be tried and appealed separately.").

Indeed, in other contexts, Missouri courts, including this Court, have recognized a final, appealable judgment as to a particular charge, even though other counts in the same indictment or information had not yet been resolved. In *State v. Honeycutt*, this Court held that "[t]he circuit court's judgment granting [the defendant's] motion to dismiss the third count [in a three-count indictment] on constitutional grounds is a final judgment from which the State may appeal." *State v. Honeycutt*, 421 S.W.3d 410, 413 (Mo. banc 2013). In *State v. Thompson*, the Western District relied on *Honeycutt* in holding that a trial court's dismissal of one count in a two-count information constituted a final, appealable judgment. *State v. Thompson*, 2019 WL

1768418 at *2 (Mo. App. W.D. April 23, 2019).[1] Similarly, in *State v. March*, the Eastern District held that the trial court's pretrial dismissal of one count in a three-count indictment was a "final, appealable judgment as it purports to preclude any further prosecution on that charge[.]" *State v. March*, 130 S.W.3d 746, 748 (Mo. App. E.D. 2004) (citing *Burns*, 994 S.W.2d at 942); *but see State v. Storer*, 324 S.W.3d 765, 766 (Mo. App. S.D. 2010) (holding that "[a]lthough the trial court . . . dismissed the first four counts of the information with prejudice, it left the two additional counts pending against Defendant" and that "the judgment, therefore, is not final for purposes of appeal").

In *State v. Kimberley*, the trial court suspended imposition of sentence on Count I, but it imposed a sentence on Count II. *State v. Kimberley*, 103 S.W.3d 850, 854-55 (Mo. App. W.D. 2003). Because no sentence had been imposed on Count I, the Western District held that it was not a final, appealable judgment and dismissed the appeal as to that count. *Id.* at 855; *see State v. Lynch*, 679 S.W.2d 858, 860 (Mo. banc 1984) ("[S]uspended imposition of sentence is not a final judgment for purposes of appeal."). But the Western District rejected the argument that the appeal was not ripe until

[1] The Court of Appeals issued its mandate in *Thompson* on September 4, 2019.

both counts in the two-count information had been disposed of, holding that the appeal as to Count II could go forward. *Kimberley*, 103 S.W.3d at 855.

Federal and other state courts have also found a final, appealable judgment in similar cases. In *United States v. Abrams*, the defendant was indicted on 13 counts, and the jury returned a guilty verdict on 3 of those counts, but it was unable to reach a unanimous decision on the remaining 10 counts. *United States v. Abrams*, 137 F.3d 704, 705-06 (2nd Cir. 1998). The defendant was sentenced as to the three counts and was serving his sentence at the time of the appeal. *Id.* at 706. As to the 10 outstanding counts, the government represented to the district court that it did not intend to retry those counts if the convictions on the three counts were affirmed. *Id.* at 707.

The Second Circuit stated that, similar to Missouri law, its "jurisdiction extend[ed] to appeals from 'all final decisions of the district courts'" and that "a judgment of conviction that includes a sentence of imprisonment constitutes a final judgment for all other purposes." *Id.* (quoting 28 U.S.C. § 1291 (1994); 18 U.S.C. § 3582(b) (1994)). The Second Circuit reasoned that "[a]lthough the litigation as framed in the indictment may not yet have run its course, the counts of conviction have been resolved and the sentence is ready for execution. The unresolved counts have in effect been severed, and will be resolved another time in a separate judgment." *Id.*; *see also Powell*, 24 F.3d at 30 ("[E]ach conviction on severed counts should be separately

appealable upon the imposition of sentence."); *Wakefield*, 689 S.W.2d at 812-13 (Crow. J.., dissenting) (finding that "[t]here was . . . a de facto severance of Count VI from the other five" and that "a severance has in fact taken place by the trial, and resultant judgment, on Counts I through V").

The Second Circuit recognized that the Seventh Circuit in *United States v. Kaufmann*, 951 F.2d 793, 795 (7th Cir. 1992), had reached a contrary result, but it stated that "that case represents the minority approach." *Abrams*, 137 F.3d at 707; *see also United States v. Kaufmann*, 985 F.2d 884, 891 (7th Cir. 1993) (finding that its "novel[ ] . . . approach to the matter of finality" had not been "followed by [its] sister circuits" and that "[i]n fact, several circuits have . . . entertained an appeal on one count of a criminal indictment while other counts of the indictment were unresolved").

The Second Circuit held that the "unacceptable ramification" of the "minority approach" would be that the defendant "would be serving his sentence without acquiring the right to appeal it." *Abrams*, 137 F.3d at 707; *see also United States v. King*, 257 F.3d 1013, 1021 (9th Cir. 2001) ("In sum, the court's interest in ensuring a defendant has the right to appeal a sentence when he begins serving it outweighs the government's concerns about piecemeal appellate review."); *Wakefield*, 689 S.W.2d at 813 (Crow, J., dissenting) ("[M]ust appellate review be kept in limbo until the remaining

counts are reduced to judgment? Would [such a] procedure be fair to an incarcerated defendant?").

The Second Circuit further found that even if execution of the sentence was stayed pending appeal, the minority approach "would substantially delay the execution of a valid conviction and sentence, force trials that may never be needed, and impose expense and burden on the prosecution and the defense—undesirable results that are not mandated by the jurisdictional statute." *Abrams*, 137 F.3d at 707; *see also United States v. Leichter*, 160 F.3d 33, 37 (1st Cir. 1998) (Campbell, J., dissenting) ("Another trial would be wasteful and futile so long as the possibility exists that the convictions under the already tried counts will be affirmed on appeal, perhaps rendering further proceedings unnecessary from the government's perspective."). The Second Circuit therefore held that it had jurisdiction to hear the defendant's appeal. *Abrams*, 137 F.3d at 707; *see also Nebraska v. McCave*, 805 N.W.2d 290, 304 (Neb. 2011) (following "[t]he majority approach" espoused in *Abrams* and *King*); *New Mexico v. Catt*, 435 P.3d 1255, 1267 n. 7 (N.M. Ct. App. 2018) (citing *King*, *Abrams*, and *McCave* in support of its holding that "Defendant [was] 'sufficiently aggrieved' to permit her immediate appeal.").

Defendant nevertheless argues that the plain language of Rules 29.07(c) and 30.01(a) contemplate only one final judgment.[2] (Def's Br. 7). Rule 29.07(c) provides that "[a] judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence." Contrary to Defendant's argument, Rule 29.07(c) supports the proposition that a judgment of conviction is final upon the imposition of sentence. *See Wagner*, 582 S.W.2d at 693. It is further consistent with Rule 29.07(c) to recognize a judgment of conviction as to one count when a sentence has been imposed, regardless of whether there is a judgment of conviction as to any other count. Rule 30.01(a) provides that "[a]fter the rendition of final judgment in a criminal case, every party shall be entitled to any appeal permitted by law." Rule 30.01(a) simply requires that a criminal appeal follow a final judgment, without defining "final judgment," much less defining it in a way so as to require a sentence for every count in an information or indictment.

Even if the rules were construed so as to provide for only one final judgment per "case," such a rule would not preclude an appeal here if the

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[2] Defendant previously argued to the Court of Appeals that "[b]ecause a sentence has been imposed for Counts II and IV, there is a final, appealable judgment even though Counts I and III have not been resolved." (Def's Sugg. Oppo. 1).

unresolved counts were deemed to have been severed from the case. *See Abrams*, 137 F.3d at 707 ("The unresolved counts have in effect been severed, and will be resolved in another time in a separate judgment."); *Powell*, 24 F.3d at 30 (quoting *Oregon v. Smith*, 785 P.2d 1081 (Or. Ct. App. 1990) ("[W]hen the charges were severed, they became separate cases, so that the first trial resulted in a final judgment on the offenses that had been tried[.]").

Finally, Defendant argues that all of the counts in a multi-count indictment or information should be resolved before a defendant has the right to appeal in order to "best protect[ ] a defendant's rights." (Def's Br. 8). Defendant argues that "[t]he State should be required to make a decision to adjudicate either by trial, plea, or dismissal of the pending charges, prior to appeal" in order to satisfy his "right to have all issues disposed of in his case in a timely manner." (Def's Br. 8). But if this Court agrees that it has jurisdiction to hear Defendant's appeal as to Counts II and IV because a final judgment exists as to those two counts, it follows that the trial court did not render a final judgment as to the two unresolved counts and thus retained jurisdiction over those counts. *See Powell*, 24 F.3d at 31-32 ("[W]e conclude that [the defendant's] first appeal did not divest the district court of jurisdiction to try to the remaining severed . . . count."); *Wagner*, 582 S.W.2d at 695 (holding that "the trial court had exhausted its jurisdiction upon entry of the judgment and sentence"). Therefore, should a defendant wish to

demand a speedy retrial as to any remaining unresolved counts, he would be free to do so.

This Court should hold that there is a final, appealable judgment as to Counts II and IV.

## II. (Voir Dire)

**The trial court did not plainly err in allegedly prohibiting the defense from asking individual veniremembers about their answers in the pretrial juror questionnaire because the court asked the venire the four questions from the questionnaire, including whether there was anyone who could not be fair to both sides based on the nature of the charges, which was sufficient to unequivocally assure their impartiality and to qualify them to serve as jurors. (Responds to Appellant's Point I.)**

### A. The record regarding this claim.

On April 24, 2017, two days before voir dire commenced, the trial court provided the venire with questionnaires "specific to the type of case . . . to be tried" and asked the panel to fill them out "honestly, truthfully[,] and to the best of [their] ability." (Pre. Tr. 3; Tr. 2, 57; D29). The trial court further stated that "[t]he questionnaire will be kept confidential from everyone besides the attorneys in this case and the Court." (Pre. Tr. 3; D29).

Question 20 of the questionnaire asked: "Have you, any member of your immediate family or close friend ever been the victim of molestation, rape or any other kind of sexual abuse?" (D57, p. 3). Question 33 asked: "In this criminal case the defendant is charged with statutory rape, statutory sodomy, incest and attempted statutory sodomy. On a scale of 1 to 10 (1—strongly

disagree, 10—strongly agree) please indicate by circling the number that best represents your thoughts regarding the following statements: [A] If I hear someone is accused of child molestation I feel that they did it. [B] Children do not lie about being molested. [C] Persons accused of molestation are lying when they say they did not do it. [D] I cannot be fair (whether to the defendant or the State) in this kind of case." (D57, p. 4).

On her questionnaire, Juror No. 5 circled "9" as to Question 33[A], "8" as to Question 33[B], "8" as to Question 33[C], and "8" as to Question 33[D]. (D57, p. 24).

Prior to voir dire, defense counsel told the trial court, "I think from looking at some of those [questionnaires], I think we can strike them for cause, a lot of them on can you be fair and they put 10, I could not be fair in this type of case." (Tr. 56). The prosecutor responded, "I don't think you can do that because the jurors were not sworn by the Court to answer those questions." (Tr. 56-57). The trial court then stated, "I would tend to agree with that. I think what you can do, [defense counsel], is after the jury is sworn, you can say that in the questionnaire some of you indicated whether or not you could be fair, and as to jurors, you know, this number, that number, this number, that number, is your opinion still the same?" (Tr. 57).

Upon the commencement of voir dire, the venire was sworn in. (Tr. 59). The trial court instructed the venire that "[t]he charge of any offense is not

evidence and it creates no inference that any offense was committed or that the Defendant is guilty of an offense. The Defendant is presumed to be innocent unless and until during your deliberations upon your verdict you find him guilty." (Tr. 60). The trial court asked, "Is there any of you who, if selected as a juror, could not for any reason follow that instruction? If so please raise your hand," and no veniremembers raised their hand. (Tr. 61). The trial court further instructed the jury, "It is your duty to follow the law as the Court gives it to you in the instructions, even though you may disagree with it." (Tr. 61). When the court asked, "Are there any of you who would not be willing to follow all instructions that the Court will give to the jury?" again no veniremembers raised their hand. (Tr. 61).

During the State's voir dire, the prosecutor asked, "Is there anybody here who just knowing what you know at the moment thinks that the Defendant is guilty right now?" and no veniremembers raised their hand. (Tr. 82). The prosecutor also told the jury that "one of [its] jobs today and in this trial is to determine the credibility of the witnesses." (Tr. 114). The prosecutor then asked, "Is there anybody here who doesn't think that they would be able to determine the credibility of witnesses?" and no veniremembers raised their hand. (Tr. 114). The prosecutor further asked, "Does it bother you to have to determine the credibility of somebody's testimony or whether somebody is telling the truth or a lie? Anybody have a problem with that?" and no

veniremembers raised their hand. (Tr. 115).

Juror No. 10 stated outside the hearing of the venire that within the last two years his daughter had disclosed to him that she had been inappropriately touched for years as a child by her stepgrandfather. (Tr. 164-65). The trial court asked, "Is there anything about that that would cause you to be unable to be a juror in this case?" and Juror No. 10 responded, "I don't believe so, sir." (Tr. 165). The trial court asked, "Do you think you could be fair and impartial?" and Juror No. 10 responded, "Yes, sir." (Tr. 166). Defense counsel stated that he didn't have any questions for Juror No. 10. (Tr. 166).

After disclosing and being questioned about her experience as a victim of domestic violence, Juror No. 11 was asked, "Do you think you could be fair and impartial?" and she answered, "Yes, sir." (Tr. 167-68). After confirming that the domestic assault did not involve sexual abuse, defense counsel stated, "I don't have anything else, Your Honor." (Tr. 169).

When the prosecutor asked whether any of the veniremembers worked with children, Juror No. 15 raised her hand. (Tr. 127). Juror No. 15 stated that she was a pastor and that she worked with children ranging from 5 to 14 years old. (Tr. 129). Juror No. 15 denied that there was "anything about that experience that cause[d] [her] concern listening to this sort of evidence." (Tr. 129). When asked if she had ever had children in her church lie to her, Juror No. 15 responded, "Oh, yes," and confirmed that it was a normal occurrence.

(Tr. 129-30).

Juror No. 16 disclosed that when he was a child, he and his siblings were sexually assaulted by their father, who was subsequently convicted. (Tr. 175-76). The trial court asked, "[W]ould that prevent you from being fair—fair and impartial in this case?" and Juror No. 16 responded, "Absolutely not, sir." (Tr. 176). The trial court asked, "You don't think you'd have a problem with the nature of the allegation or listening to the testimony?" and Juror No. 16 responded, "Not at all, sir." (Tr. 176). Defense counsel was permitted to ask several follow-up questions about the circumstances of the sexual assaults. (Tr. 176-77).

Defense counsel began his questioning of the venire by confirming that they had filled out the questionnaires, that they had signed their names, and that the answers they had given were truthful. (Tr. 236). After asking Jurors No. 1 and 4 about their answers to Question No. 33 on the questionnaire, the prosecutor asked to approach and objected, stating, "Judge, part of the instructions on these questionnaires was that the answers would remain confidential." (Tr. 239). The trial court agreed, telling defense counsel, "I don't want you questioning any jurors individually about their answers in front of any other jurors because, as [the prosecutor] says, they were intended to be confidential." (Tr. 240). The trial court agreed that defense counsel had "established that the answers to the questionnaires . . . that those answers

are still viable and correct under oath." (Tr. 240).

The prosecutor then further noted, "Judge, part of the problem is you asked a subjective question like 1 through 10 and you can't logistically object to whatever bondage, if you agree or disagree or strongly disagree. Who's to say how that person subjectively actually understood what the question was asking and when answering. Because I would say that 5 could be neutral because it's in the middle of 1 or 10, or agree or disagree. . . . And so each answer we don't know exactly what they mean." (Tr. 241). The prosecutor noted that "at least four that I can count off the top of my head – where the juror indicated – you know, they were scribbled because they were confused and they wrote on there, sorry. I'm confused." (Tr. 242-43). The trial court told defense counsel, "[G]o ahead with your voir dire, but do not ask them questions individually about the questionnaire. At the end of voir dire I'm gonna ask them again if there's anybody who feels they're unable to serve impartially as a juror in this case." (Tr. 242). Defense counsel asked if at the end he could ask to bring them up to the bench individually, and the trial court preliminarily agreed that he could. (Tr. 244).

At the end of defense counsel's questioning, he asked the trial court if he could then bring up the veniremembers individually to ask them about their answers on the questionnaires. (Tr. 272-73). When the trial court asked, "How many are we talking about?" defense counsel answered, "It's most of

them, Judge." (Tr. 273). The trial court ruled, "I'm not gonna bring them up individually. You can ask them as a group . . . if they're not able to be fair in this case, and you can inquire of them individually." (Tr. 273). The trial court told the attorneys, "The questionnaires can be used for background, but I'm not gonna rely on them solely and only to strike people from the venire." (Tr. 273). By agreement, the trial court then asked the entire venire, "Is there anybody here, other than those who have already so indicated, who feel they could not be fair and impartial in this case given [the] nature of the . . . allegations?" and no veniremembers raised theirs hand. (Tr. 274). At defense counsel's request, the trial court also asked, "Is there anybody here who has formed any preconceived notions about the charges against the Defendant just based on the nature of the charges?" and no veniremember raised their hand. (Tr. 275). The trial court again read the instruction that the charge is not evidence that Defendant was guilty, and again no veniremembers indicated that they would not be able to follow that instruction. (Tr. 275).

When asked if there was anything else they wanted to ask, both the prosecutor and defense counsel requested that the trial court ask the four questions from Question No. 33 on the questionnaire, and defense counsel further requested that the trial court ask them if any of them had a preconceived opinion about the case. (Tr. 275-76). The trial court agreed to do so and asked defense counsel, "After those questions and any individual

questioning that needs to be done as a result of the answers to those questions, are you then done with your voir dire?" and defense counsel answered, "Yes." (Tr. 276). The trial court then asked the venire, "Is there anybody here who, if they hear someone is accused of child molestation, feels that they did it just because of the accusation?" and no venire members raised their hand. (Tr. 277). The trial court asked, "Is there anyone here who feels children would never lie about being molested?" and Jurors No. 32 and 51 raised their hand and answered a few follow-up questions. (Tr. 277-78). The trial court asked, "Is there anybody here who feels if somebody is accused of molesting a child, they are lying when they say they did not do it?" and no veniremembers raised their hand. (Tr. 278). The trial court asked, "[I]s there anybody here who feels because of the nature of the charges, that they cannot be fair to both sides if they sit as a juror in this case?" or "[i]n other words, who would go into it with a preconceived notion?" and Jurors No. 51 and 45 raised their hand. (Tr. 279). When asked if he was done, defense counsel initially expressed a desire for the trial court to ask if the venire members had "preformed opinions," but the trial court stated that it had just asked that question. (Tr. 279-80). Defense counsel then said, "Well, all right. That's fine." (Tr. 280).

While discussing potential strikes for cause, defense counsel stated, "Judge, I have a number that I want to strike based on the answers given . . .

in the questionnaires." (Tr. 282-83). Defense counsel indicated that "it has primarily to do with that Question 33 and whether or not they've been molested before," which was asked in Question 20. (Tr. 283). Among those that defense counsel moved to strike for cause based on their answers in the questionnaire were Jurors No. 5, 10, 11, 15, 16, 22, 30, and 35, all of whom ultimately served on the jury. (Tr. 284-300, 311-12, 1192, 1230-33; D53; D54). The prosecutor again objected to striking any potential jurors based solely on their answers contained in the questionnaire. (Tr. 285). The prosecutor argued that "Question 33 is inherently vague and we don't know the subjective reasoning behind some of the answers they gave." (Tr. 285-86). The trial court added that "the questionnaires were given and filled out by the jurors before they were instructed this morning as to the burden of proof, wherein they're instructed that the filing of a charge is not evidence, and the Defendant's presumed innocent until proven guilty." (Tr. 287). The trial court further noted that "after they were given that instruction and . . . given Question 33, the four-part question again, during voir dire, nobody else indicated an inability to be fair and impartial or have preconceived notions other than" three particular veniremembers. (Tr. 287-88). As a result, the trial court denied Defendant's motions to strike for cause based solely on answers in the questionnaire. (Tr. 288-300). Further, the prosecutor noted

that Jurors No. 10 and 16 personally indicated during voir dire that they could be fair and impartial. (Tr. 290, 293).

**B. Preservation and standard of review.**

After the jury returned its verdict on May 3, 2017, the trial court granted defense counsel's request for additional time to file a motion for a new trial and explicitly stated that it would be due on Tuesday, May 30, 2017, following the weekend and Monday holiday. (Tr. 1235; D1, p. 19). Prior to sentencing, the court denied Defendant's motion for a new trial, finding that it had been untimely filed on June 2, 2017, having been due on May 30, 2017, under Rule 29.11. (Sent. Tr. 2-6; D1, p. 21). *See* Rule 29.11(b) ("A motion for a new trial . . . shall be filed within fifteen days after the return of the verdict. On application of the defendant made within fifteen days after the return of the verdict and for good cause shown the court may extend the time for filing of such motions for one additional period not to exceed ten days."); *see also State v. Langston*, 229 S.W.3d 289, 294 (Mo. App. S.D. 2007) ("The time limitations in Rule 29.11(b) for filing a motion for a new trial are mandatory."). Accordingly, Defendant concedes that his claim of error is unpreserved and requests plain-error review under Rule 30.20. (Def's Br. 33). *See id*. at 295 (reviewing a claim for plain error when the claim had not been raised in a timely motion for a new trial).

"Whether to grant Defendant's request for review for plain error is at the discretion of this court." *State v. Garrison*, 276 S.W.3d 372, 374 (Mo. App. S.D. 2009). "In making this determination, we employ a two-step analysis." *Id*. "We must first determine, based on a consideration of the facts and circumstances of each case, 'whether, on the face of the claim, plain error has, in fact occurred.'" *Id*. (quoting *State v. Stanley*, 124 S.W.3d 70, 77 (Mo. App. S.D. 2004)). "Plain error is evident, obvious and clear error." *Id*. "If facially substantial grounds are found to exist, we then move to the second step of this analysis and determine whether manifest injustice or a miscarriage of justice has actually occurred." *Id*. (quoting *Stanley*, 124 S.W.3d at 77).

Generally, "[t]he trial court is vested with wide discretion in the conduct of voir dire." *State v. Nicklasson*, 967 S.W.2d 596, 608 (Mo. banc 1998). "The nature and extent of questioning on voir dire is within the discretion of the trial judge." *Id*. "Where appellant claims the trial court abused its discretion, appellant has the burden of showing 'a real probability that he was thereby prejudiced.'" *Id*. (quoting *State v. Gray*, 887 S.W.2d 369, 382 (Mo. banc 1994)). "The trial court abuses its discretion and reversal is required only if the voir dire permitted does not allow the discovery of bias, prejudice or impartiality in potential jurors." *Id*. at 609.

**C. The trial court did not plainly err in allegedly prohibiting the defense from asking individual veniremembers about the answers they gave in the juror questionnaire.**

Defendant claims that "[t]he trial court plainly erred in prohibiting the defense from asking prospective jurors about the answers they gave in the juror questionnaires . . . in that some jurors' answers in open court to these questions were inconsistent with their questionnaires which revealed these biases, prejudices and partialities against accused and for the accuser." (Def's Br. 27). Defendant admits that "the defense may not have been able to prove that the jurors who indicated bias, prejudice, or partiality in their questionnaires should be struck for cause," and he does not now claim that the court erred in denying any of Defendant's motions to strike for cause based on their answers in the questionnaire. (Def's Br. 27, 36). But Defendant concludes that it was "not fair . . . to deprive the defense the basic opportunity to use juror questionnaires to determine whether a potential juror can be fair and impartial." (Def's Br. 36).

It is not clear from the record that the trial court prohibited defense counsel from following up with those veniremembers whose in-court answers were allegedly inconsistent with their questionnaires or if counsel simply didn't do so. (Def's Br. 31). While early on in defense counsel's questioning the trial court directed defense counsel not to "question[ ] any jurors individually

about their answers in front of any other jurors," the trial court explained that it was so ruling "because, as [the prosecutor] says, [the questionnaires] were intended to be confidential." (Tr. 240). Defendant does not claim that the trial court abused its discretion in seeking to maintain confidentiality of the questionnaire answers. (Def's Br. 27, 29-38).

When defense counsel subsequently sought to question individual jurors about their questionnaire answers in private at the bench, the trial court asked, "How many are we talking about?" and defense counsel answered, "It's most of them, Judge." (Tr. 273). Defense counsel did not attempt to limit the individual questioning to the nine prospective jurors identified on appeal. (Tr. 273; Def's Br. 32). The trial court responded, "I'm not gonna bring them up individually. You can ask them as a group . . . if they're not able to be fair in this case, and you can inquire of them individually." (Tr. 273). Defense counsel attempted to clarify the court's ruling, saying, "I understand the Court's overruling this, as I understand it, and it's my request to bring them up individually," and the trial court responded, "I am, yes." (Tr. 273-74). The record thus supports the conclusion that the trial court was concerned with inefficiency when it prohibited defense counsel from bringing up "most" of the panel and questioning them one by one. "In general, our courts have held that the parties have no right to voir dire the panel members separately." *State v. Guy*, 770 S.W.2d 362, 366 (Mo. App. S.D. 1989); *see also State v.*

*Kreutzer*, 928 S.W.2d 854, 861 (Mo. banc 1996) ("The decision to conduct voir dire either individually or in small groups is a matter within the control of the trial court."); *Pollard v. Whitener*, 965 S.W.2d 281, 288 (Mo. App. W.D. 1998) ("While the efficient administration of jury resources is to be encouraged, it cannot be accomplished at the price of an arbitrarily limited voir dire examination.").

Moreover, after the trial court then addressed the venire as a whole, asking them if there was anyone who felt that "they could not be fair and impartial in this case given [the] nature of the . . . allegations" and whether anyone had "formed any preconceived notions about the charges against the Defendant," it specifically asked defense counsel, "[I]s there anything else you want to ask?" (Tr. 274-76). Defense counsel responded by requesting that the trial court ask the panel the four questions from Question No. 33 on the questionnaire and whether any of them had a preconceived opinion about the case. (Tr. 275-76). The trial court agreed to do so and asked defense counsel, "After those questions and any individual questioning that needs to be done as a result of the answers to those questions, are you then done with your voir dire?" and defense counsel answered, "Yes." (Tr. 276). After asking the aforementioned questions, the trial court again asked if defense counsel was done inquiring of the venire, and defense counsel ultimately indicated that he was. (Tr. 280). Defense counsel did not seek at that point to question either

the venire or individual veniremembers about their allegedly inconsistent answers on the questionnaire or explore why their in-court answers to the court's questions of the panel were ostensibly different from their questionnaire answers. (Tr. 275-76). Instead, defense counsel subsequently sought to strike several potential jurors for cause based solely on their questionnaire answers. (Tr. 284-300). Thus, it is not clear from the record that the trial court prohibited defense counsel from asking veniremembers follow-up questions about their allegedly inconsistent questionnaire answers, and this Court should exercise its discretion to deny Defendant's request to review his claim for plain error.

Even assuming *arguendo* that the trial court prohibited defense counsel from asking veniremembers about their allegedly inconsistent questionnaire answers, the trial court did not plainly err in doing so. The trial court questioned the venire using the four prompts of Question No. 33 from the questionnaire. (D57, p. 4; Tr. 277-79). Specifically, the trial court asked the panel: "Is there anybody here who, if they hear someone is accused of child molestation, feels that they did it just because of the accusation?"; "Is there anyone here who feels children would never lie about being molested?"; "Is there anybody here who feels if somebody is accused of molesting a child, they are lying when they say they did not do it?"; and "[I]s there anybody here who feels because of the nature of the charges, that they cannot be fair

to both sides if they sit as a juror in this case?" or "[i]n other words, who would go into it with a preconceived notion?" (Tr. 277-79). Additionally, the trial court instructed the jury for a second time that the charge is not evidence that Defendant was guilty and again asked if anyone would not be able to follow that instruction. (Tr. 275).

At most, the prospective jurors' pretrial answers on the questionnaire's sliding number scale indicated that they partially agreed with the prompt, which constituted equivocal reservations about their ability to determine without bias whether Defendant was guilty of the charged offense. "Mere equivocation is not enough to disqualify a juror." *Garrison*, 276 S.W.3d at 376 (quoting *Joy v. Morrison*, 254 S.W.3d 885, 890 (Mo. banc 2008)). "Initial reservations expressed by venirepersons do not determine their qualifications." *Id.* (quoting *Joy*, 254 S.W.3d at 891). "A venireperson is not automatically excluded for cause simply because he or she may have formed an opinion." *State v. Barton*, 998 S.W.2d 19, 25 (Mo. banc 1999). "The relevant question is whether the jurors had such fixed opinions about the case that they could not impartially judge the defendant's guilt or innocence under the law." *Id.*

"There is no doubt that when a venireman gives an equivocal or otherwise uncertain answer of his (or her) ability to hear the evidence and adjudge the cause without bias or prejudice, then it becomes the trial court's duty to make

some independent inquiry of qualification." *Guy*, 770 S.W.2d at 366. "If prejudices are discovered, an inquiry should take place to reveal whether a juror can set aside prejudices and impartially fulfill his or her obligations as a juror." *State v. Edwards*, 116 S.W.3d 511, 529 (Mo. banc 2003). "Where a venireperson's answer suggests a possibility of bias, but upon further questioning that person gives unequivocal assurances of impartiality, the bare possibility of prejudice will not disqualify such rehabilitated juror nor deprive the trial court of discretion to seat such venireperson." *Garrison*, 276 S.W.3d at 377 (quoting *State v. Clark-Ramsey*, 88 S.W.3d 484, 489 (Mo. App. W.D. 2002)). "The critical question in these situations is always whether the challenged venireperson indicated unequivocally his or her ability to fairly and impartially evaluate the evidence." *Joy*, 254 S.W.3d at 891. "A prospective juror may only be rehabilitated 'if the rehabilitation is responsive to the indication of partiality, providing there is a clear, unequivocal assurance that the juror would not be partial.'" *White v. State*, 290 S.W.3d 162, 166 (Mo. App. E.D. 2009). "A venireperson's silence may constitute an unequivocal assurance of impartiality sufficient for the purpose of rehabilitation." *Garrison*, 276 S.W.3d at 377.

Here, the possibility of bias on the part of some of the potential jurors was discovered as a result of the trial court having permitted defense counsel to include Question No. 33 in the pretrial juror questionnaire. (D57, p. 4). The

trial court further recognized that defense counsel established during voir dire that the veniremembers' responses on the questionnaire were true. (Tr. 236, 240). Thus, the necessary and relevant question to follow was whether the veniremembers could fairly and impartially consider the evidence and adjudge Defendant's guilt without bias, despite any preconceived notions that they tended to have. The trial court's questions of the panel as a whole were sufficient to unequivocally assure their impartiality, making any follow-up questions by defense counsel unnecessary. *See Garrison*, 276 S.W.3d at 377 ("[T]he challenged venirepersons' silence following the prosecutor's attempt to rehabilitate the panel was sufficient, within the trial court's discretion, to unequivocally assure their impartiality and to qualify them to serve as jurors."); *Guy*, 770 S.W.2d at 367 ("The trial court's rehabilitation of [the] veniremen . . . was, in our opinion, sufficient even though the prospective jurors were not individually questioned."). Additionally, the trial court reasonably relied on the fact that the juror questionnaires were completed before the trial court had instructed the veniremembers on the presumption of innocence and that the charge of an offense is not evidence of guilt, and that after they were so instructed, none of the challenged veniremembers indicated an inability to be fair and impartial. (Tr. 287-88). *See State v. Ess*, 453 S.W.3d 196, 205 (Mo. banc 2015) ("This Court recognizes the justice system presumes jurors, when properly instructed, will set aside any

preconceived notions or premature conclusions about the case."). Therefore, the trial court did not plainly err in its exercise of control over the nature and extent of questioning in voir dire, and Defendant did not suffer a manifest injustice.

Defendant's first point should be denied.

## III. (Impeachment Evidence)

**The trial court did not plainly err in excluding alleged impeachment evidence regarding Officer Brankel's 2012 application for a Type III permit for the operation of a breath alcohol analyzer because there was no evidence that Officer Brankel had admittedly made a false statement therein and any probative value of the evidence as to Officer Brankel's character for truth or veracity did not outweigh its prejudicial value. Even if the exclusion of such evidence constituted plain error, it did not result in a manifest injustice. (Responds to Appellant's Point II.)**

### A. The record regarding this claim.

On cross-examination of Gary Brankel, defense counsel's first question was "[W]ho is Michael Plummer?" (Tr. 1117). The prosecutor objected and a sidebar was held. (Tr. 1117-18). The prosecutor objected that the anticipated line of inquiry was irrelevant. (Tr. 1118). Defense counsel explained that Michael Plummer had been Officer Brankel's boss and that he had been "accused of filing false affidavits on an alcohol-reported training." (Tr. 1118). The trial court confirmed that Officer Plummer was the one who had been accused. (Tr. 1118). Defense counsel alleged that Officer Brankel had "[p]articipated in it, in that statement that he signed"—that he had "signed papers saying that he attended the classes when he didn't." (Tr. 1118-19).

The trial court confirmed that Officer Brankel had not been convicted of an offense, but defense counsel stated that Officer Brankel had been given immunity. (Tr. 1118). Defense counsel further alleged that Officer Brankel had "admitted that there was a false affidavit that he signed to get his alcohol license." (Tr. 1118-19). The trial court sustained the objection. (Tr. 1119).

Defense counsel was permitted to examine Officer Brankel in an offer of proof. (Post Tr. 25). Officer Brankel testified that he had been in law enforcement for 17 years and had had six Type III permits for the operation of breath alcohol analyzers prior to 2012. (Post Tr. 25-27). Prior to applying for a Type III permit in 2012, Officer Brankel's previous Type III permit had lapsed, so he was required to apply for a new permit rather than a renewal. (Post Tr. 26, 29, 35). Officer Brankel testified that he was aware that the requirements for a new Type III permit included a 40-hour course and a multiple-choice exam, as well as the application itself. (Post Tr. 26-27, 29, 32, 34). Officer Brankel testified that Michael Plummer, the city's police marshal at the time, provided him with the permit application, which Officer Brankel then signed. (Post Tr. 28, 32). Officer Brankel testified that, while the application indicated "after the fact" that Officer Plummer had provided him with the necessary training—which Officer Plummer never provided, Officer Brankel had signed the application "prior to the training" when it "had no

dates filled in." (Post Tr. 29, 32, 35-36). Officer Brankel testified that Officer Plummer "gave [them] sign-in sheets and the applications and had [them] fill them out, and he was scheduling the 40 hours of training." (Post Tr. 32). Officer Brankel testified that he did not know if Officer Plummer had submitted his permit application to the Department of Public Health or not. (Post Tr. 31-32, 40). Officer Brankel did not obtain a permit because he did not receive the necessary training. (Post Tr. 29, 41). Officer Brankel further testified that Officer Plummer gave him an exam and an answer sheet and told him "not to miss too many" and "to make sure . . . [he] didn't get a perfect score." (Post Tr. 36-37). Officer Brankel agreed that Officer Plummer provided him with the answers to the exam and that he "copied" the answers. (Post Tr. 36). Officer Brankel confirmed that he was granted immunity to testify in the case against Officer Plummer. (Post Tr. 31).

**B. Standard of review.**

As in Defendant's first point, Defendant concedes that his claim is unpreserved and requests plain-error review. (Def's Br. 41). The applicable standard of review for plain-error claims is outlined in Point II. *See supra* at 41.

Generally, "[t]he admissibility of evidence lies within the sound discretion of the trial court and will not be disturbed absent abuse of discretion." *Mitchell v. Kardesch*, 313 S.W.3d 667, 674-75 (Mo. banc 2010) (quoting

*Nelson v. Waxman*, 9 S.W.3d 601, 603 (Mo. banc 2000)). "This standard gives the trial court 'broad leeway in choosing to admit evidence,' and its exercise of discretion will not be disturbed unless it 'is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration.'" *Id.* at 675 (quoting *State v. Freeman*, 269 S.W.3d 422, 426-27 (Mo. banc 2008)). "In part, such broad leeway is granted to ensure the probative value of admitted evidence outweighs any unfair prejudice." *Id.*

**C. The trial court did not plainly err in excluding evidence that Officer Brankel's supervisor added false information to his Type III permit application and gave him answers to the exam, and the exclusion of such evidence did not result in a manifest injustice.**

Defendant claims that "[t]he trial court plainly erred when it refused to allow evidence that Officer Brankel lied and cheated in an attempt to receive a permit to use a breath alcohol analyzer" because "this evidence was relevant to challenge the credibility of Officer Brankel." (Def's Br. 28). In support, Defendant alleges that "Officer Brankel signed his application for a Type III permit after not attending the required classes and cheating on the test." (Def's Br. 41). Defendant argues that Officer Brankel's "willingness to lie and cheat in his capacity as a police officer is . . . relevant and probative as to credibility." (Def's Br. 43).

"[C]ross-examination . . . long has been permitted to impeach a witness on his or her character for truth and veracity." *Mitchell*, 313 S.W.3d at 676-77. "When a person . . . is being questioned on the witness stand, then long-standing Missouri law holds that the person may be asked about specific instances of his or her own conduct that speak to his or her own character for truth or veracity, even where the issue inquired about is not material to the substantive issues in the case." *Id.* at 677. "By contrast, parties traditionally have been limited in introducing extrinsic evidence" and "generally may do so . . . only if the subject of the impeachment is material to the issues rather than collateral." *Id.* at 679-80.

But "*Mitchell* does not stand for the proposition that all dishonest statements are admissible for purposes of impeaching a witness' character for truth and veracity." *State v. Winfrey*, 337 S.W.3d 1, 10 (Mo. banc 2011). "[T]he admission of such evidence is subject to the trial court's discretion in limiting or excluding such evidence when its probative value is outweighed by its prejudicial effect." *Id.* "Regarding the probative value of prior lies, the Court stated, 'the fact that a person has told a lie on an irrelevant issue that is remote in time or subject may make the [ ] evidence of little value in determining the witness' character for truth and veracity.'" *Id.* (quoting *Mitchell*, 313 S.W.3d at 681-82). In such cases, "the risk of prejudice and the distraction of a mini-trial would outweigh the benefit of allowing such

evidence." *Mitchell*, 313 S.W.3d at 682. "The nature of false statements and circumstances under which they are made is needed to determine whether such statements are admissible to impeach a witness's character for truth and veracity." *Id.*

Here, contrary to Defendant's claim, Officer Brankel did not admit to lying or signing a false application "after not attending the required classes and cheating on the test." (Def's Br. 41, 43; Tr. 1118-19). Instead, Officer Brankel testified that while he signed the application, he did so at a time when his supervisor was "scheduling the 40 hours of training," before any information had been filled in, and that only later did his supervisor, Officer Plummer, add false information to the application. (Post Tr. 29, 32, 35-36). Officer Brankel further testified that he did not know whether Officer Plummer had submitted the application to the Department of Public Health. (Post Tr. 31-32, 40). Because the evidence presented in Defendant's offer of proof did not clearly establish that Officer Brankel knowingly made a false statement, the trial court did not plainly err in excluding such evidence, in that its probative value was not so great as to clearly outweigh the likely prejudice of distraction and a mini-trial on a collateral issue.

Additionally, while Officer Brankel admitted that Officer Plummer provided him with the answers to the exam and that he "copied" those answers, it is not clear that such evidence was admissible as being probative

of Officer Brankel's character for truth and veracity. (Post Tr. 36). Officer Brankel testified that he had been in law enforcement for 17 years and had had six Type III permits for the operation of breath alcohol analyzers prior to 2012. (Post Tr. 25-27). Thus, while Officer Brankel admitted that he "copied" the answers that Officer Plummer had given him, there is no evidence indicating that those answers were not the same as Officer Brankel would have otherwise given or that he used the answers because he felt that he was incapable of answering the questions on his own. Nor was there any evidence that Officer Brankel had affirmatively sought assistance on the exam, rather than having it thrust upon him by the initiative of a superior officer. The evidence did not therefore clearly establish that Officer Brankel acted dishonestly, but rather it established an act of general immorality. "[A] witness may not be impeached by evidence that his or her 'general moral character is bad.'" *Mitchell*, 313 S.W.3d at 677; *see also State v. Adams*, 51 S.W.3d 94, 101 (Mo. App. E.D. 2001) (holding that the trial court did not abuse its discretion in precluding cross-examination regarding the witness's alleged history of thefts, *inter alia*, because "the credibility of a witness cannot be attacked by showing a specific act of immorality").

Moreover, the nature and circumstances of Officer Brankel's conduct further supports the conclusion that the trial court did not plainly err in excluding such evidence. In *Mitchell*, the Court found that the probative

value of the defendant's prior false statement outweighed its prejudicial value in part because the defendant had lied out of a "desire to hide facts so as to avoid embarrassment," which he could have similarly done at trial in his testimony regarding the events at issue. *Mitchell*, 313 S.W.3d at 679. Here, the evidence showed that Officer Brankel's conduct related to the permit application was the result of following the directions of his supervisor, Officer Plummer, rather than of his own design. (Post Tr. 28, 32, 36-37). There is no evidence to suggest that Officer Brankel would have had a similar motivation for his testimony at trial, especially given that Officer Plummer had been removed from his position as Officer Brankel's supervisor at some point before trial and that Officer Brankel had actually testified against Officer Plummer. (Tr. 1113; Post Tr. 31). Thus, even assuming that the evidence was probative of Officer Brankel's character for truth and veracity, that probative value was minimal under the circumstances.

Relatedly, the prejudicial value of the excluded evidence was high, given the danger that the jury could have inferred Officer Brankel's guilt by association with Officer Plummer, regardless of his actual conduct. Indeed, defense counsel began the cross-examination by asking, "[W]ho is Michael Plummer?" (Tr. 1117). Defense counsel's question thus emphasized Officer Plummer and his wrongdoing, rather than focusing on Officer Brankel's particular conduct. The prosecutor quickly objected and asked to approach,

seeking to preclude the line of inquiry outside the hearing of the jury, which reasonably suggests that even the mention of the former local police chief before the jury carried significant potential prejudice. (Tr. 1117-18). Moreover, in support of the questioning, defense counsel told the trial court that Officer Plummer had been Officer Brankel's boss and that he had been "accused of filing false affidavits on an alcohol-reported training." (Tr. 1118). The trial court responded by confirming that Officer Plummer had been the one who had been accused. (Tr. 1118). Defense counsel alleged that Officer Brankel had "[p]articipated in it." (Tr. 1118-19). The trial court then confirmed that Officer Brankel had not been convicted of an offense, but defense counsel emphasized that he had been given immunity. (Tr. 1118; Post Tr. 31). Therefore, the trial court did not plainly err in excluding the alleged impeachment evidence because the prejudicial risk of the inference of guilt by association outweighed any minimal probative value the evidence otherwise had. *See State v. Johnson*, 968 S.W.2d 686, 691 (Mo. banc 1998) ("The general rule is that it is error to tell a jury about codefendants who have pleaded guilty because it taints the trial with the unfair implication of guilt by association."); *State v. Helms*, 265 S.W.3d 894, 900 (Mo. App. S.D. 2008) (quoting *State v. McCarthy*, 567 S.W.2d 722, 724 (Mo. App. K.C.D. 1978)) ("The basic rationale underlying the holdings that this is prejudicial error is

that it is irrelevant and incompetent because it infers that since the confederate was guilty the defendant must therefore by guilty.").

Finally, even if the trial court plainly erred in excluding such evidence, it did not result in a manifest injustice. Officer Brankel's testimony at trial merely showed that Stepmother had previously spoken to Defendant about her testimony regarding the circumstances that resulted in the presence of Defendant's semen on the nightgown. (Tr. 1054-58, 1113-20). It did not, however, establish that Stepmother's testimony was false. The probative value of Officer Brankel's testimony was therefore minimal. At most, the alleged impeachment evidence of Officer Brankel would have given the jury less reason to discredit Stepmother's testimony regarding the nightgown. But the alleged impeachment evidence of Officer Brankel would not have similarly affected Deputy Bays' testimony that Victim had retrieved the nightgown from her bedroom and not from Stepmother's bedroom. (Tr. 474-76, 650-53, 1122-24).

Moreover, Stepmother's testimony contradicted only that Defendant had ejaculated on the nightgown after having sexual intercourse with Victim. (Tr. 650-51, 655-60). But the jury did not reach a verdict on the two counts alleging that Defendant had had sexual intercourse with Victim. (D34, pp. 7-10; Tr. 1229-30, 1237). As such, Defendant did not clearly suffer a manifest

injustice as the result of the exclusion of evidence that was not directly relevant to the offenses for which he was ultimately convicted.

Defendant's second point should be denied.

## CONCLUSION

This Court should affirm Defendant's convictions and sentences.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains 13,395 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word 2016 software; and that pursuant to Rule 103.08, the brief was served upon all other parties through the electronic filing system.

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