No. SC98077

IN THE

Supreme Court of Missouri

IN THE MATTER OF THE CARE AND TREATMENT OF D. N.,

Appellant.

Appeal from the Circuit Court of Clark County
1st Judicial Circuit, Probate Division
The Honorable Rick R. Roberts, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Treatises

STATEMENT OF FACTS

Mr. Darrell D. N. (Offender) appeals from a Clark County Circuit Court judgment committing him to the custody of the Department of Mental Health as a sexually violent predator (SVP). (D32).

The State filed a petition seeking to civilly commit Offender as an SVP. (D1, p. 6; D2). The petition alleged that Offender had been convicted of the sexually violent offense of sexual abuse and that there was probable cause to establish that he was an SVP as supported by attached affidavits, including the End of Confinement Report, the Multidisciplinary Team's SVP Assessment Form, and the Prosecutor's Review Committee's Vote. (D2, p. 1; D3; D4; D5). Offender was tried by a jury in June 2017. (D1, pp. 22-24). The jury unanimously found that Offender was a sexually violent predator. (D1, p. 24; Tr. 549). The trial court entered an order committing Offender to the Department of Mental Health for control, care, and treatment. (D1, p. 24; D32; Tr. 549-50).

Offender does not contest the sufficiency of the evidence to support the judgment. (App. Br. 19-26). Viewed in the light most favorable to the verdict, the evidence presented at trial showed the following:

Dr. Harry Goldberg, a forensic clinical psychologist, testified that, in his opinion, Offender met the criteria for an SVP. (Tr. 258-59, 323). Dr. Goldberg testified that he had evaluated whether Offender had a mental abnormality under Missouri law and whether Offender was more likely than not to engage

in sexually violent acts as a result of that mental abnormality. (Tr. 268, 270-71). Dr. Goldberg testified that Offender had been convicted of a sexually violent offense—sexual abuse, and a certified court record of the judgment of conviction was admitted into evidence. (Tr. 269; State's Ex. 3). Dr. Goldberg testified that in conducting his evaluation he reviewed police reports, probation-and-parole reports, court documents, psychiatric treatment records, two SVP evaluations, medical records, and his interview of Offender. (Tr. 266-67, 326). Dr. Goldberg testified that he looked for a "pattern of behavior" that caused "distress or dysfunction." (Tr. 272, 332).

Offender's first recorded incident of sexually deviant behavior occurred in 1989, for which he pleaded guilty to indecent contact with a child—his eight-year-old son. (Tr. 273-74). Offender's son disclosed that Offender had placed his penis against his buttocks while they were in the living room and that Offender had pulled down the child's shorts and fondled his penis. (Tr. 273-74). Additionally, Offender had placed his penis in the boy's mouth during an earlier incident. (Tr. 274). Offender told his son not to tell anyone. (Tr. 274). Offender was placed on probation for two years and received psychological treatment. (Tr. 274, 278, 329).

Dr. Goldberg testified that Offender had consistently denied committing this offense since his plea. (Tr. 275). Dr. Goldberg testified that Offender claimed that his son had insisted on taking a shower with him and that he had

merely washed his son's buttocks and genital area. (Tr. 275). Offender further claimed that the boy's mother had made the child make the allegations because she wanted custody of him. (Tr. 275). Offender also claimed that his son had later said that the incident had never happened, though Offender's ex-wife testified that Offender's son had not recanted the allegations to her. (Tr. 276-77, 388, 504).

In 1992, Offender pleaded guilty to sodomy after entering an 18-year-old's bedroom while she was sleeping, penetrating her vagina with his hand, and licking her breasts and vagina. (Tr. 279). The victim awoke to what she thought was her boyfriend. (Tr. 279). She said, "Mike, I'm going to turn on the light," and Offender replied, "[Victim], don't turn on the light." (Tr. 279). The victim then attempted to turn on the light several times, but Offender knocked it down and pushed the victim into the closet. (Tr. 279). Eventually, the victim was successful in turning on the light and saw Offender before he fled. (Tr. 279). Offender was sentenced to five years' imprisonment, he completed the Missouri Sex Offender Treatment Program (MOSOP) in prison, and he was released on parole in 1995. (Tr. 280-81, 362-63). Offender told Dr. Goldberg that he had been drinking heavily that night, that he had believed that he was in his ex-girlfriend's apartment, and that it was "just a mistake." (Tr. 280). Offender did not claim that the girl was awake when he first began touching her. (Tr. 280).

In 1997, two allegations of misconduct were made against Offender, but he was never arrested or charged as a result. (Tr. 282-84). First, Offender's sister-in-law, who was mentally disabled, deaf, mute, and lived next door to Offender with her parents, was observed in a disheveled state, crying, and with bruises and scratching that suggested something sexual in nature had occurred, while Offender was observed nearby also with disheveled clothes. (Tr. 282-84, 334-36, 373-74, 385). Second, Offender was observed sitting in a car and staring at some "young" girls who were playing outside in their bathing suits. (Tr. 283-84). Offender claimed that he was "supposed to do something with an adolescent girl, do some kind of video out there." (Tr. 284). Offender was in his 30s at the time. (Tr. 284).

Between 1997 and 2000, Offender molested his stepson when he was four to seven years old. (Tr. 285, 337, 406). Offender's stepson reported three specific incidents, though he testified that it had happened "[a] lot." (Tr. 286, 337-38, 406). When Offender's stepson was four and again when he was seven, Offender sucked on and fondled his stepson's penis. (Tr. 286, 406). When Offender's stepson was in preschool or kindergarten, Offender placed his penis inside "where he goes poop." (Tr. 286, 406). Offender's stepson also reported that Offender had made him touch him. (Tr. 286). Offender's stepson testified that the sexual abuse made him "very angry" and suicidal. (Tr. 412). Offender was never charged with molesting his stepson, and he consistently denied the

allegations, claiming that his stepson had made them up because he had never liked Offender. (Tr. 286-87, 367, 505).

In 2004, Offender committed a sexual offense against his mentally disabled sister-in-law. (Tr. 287-88). Offender's stepson observed Offender on top of the victim in the bedroom, so he ran and told his mother, who was sleeping on the couch. (Tr. 287, 386, 398, 405). Offender's wife then went to the bedroom and saw that both Offender and her sister had their pants down and that Offender had an erection. (Tr. 287, 386, 398). Offender told his wife that "if he couldn't get it from [her], he had to get it from somewhere." (Tr. 287, 386). Offender's stepson testified that he had seen Offender on top of the victim a few times before. (Tr. 405-06). Offender threatened to shoot and kill himself in front of his wife and stepson before eventually leaving the residence. (Tr. 288, 387, 405). Offender pleaded guilty to sexual abuse, received a sentence of 15 years, and completed MOSOP for a second time. (Tr. 288, 362-63).

Dr. Goldberg testified that Offender had provided "a lot of different versions of what happened" with his sister-in-law. (Tr. 288). Offender initially told police that she had grabbed him around the neck and that he had accidentally touched her vagina when he fell down. (Tr. 288-89). Offender later admitted to the officers that he had had sex with his sister-in-law "in order to get back at his wife, because she was having an affair with his brother." (Tr. 289). Offender similarly told Dr. Goldberg that he had believed that his wife was having an

affair with his brother and that he was angry. (Tr. 289). But Offender also told Dr. Goldberg that someone had grabbed his neck while he was in the bedroom and that he then started having sex with that person. (Tr. 289). Offender said he wasn't sure who the person was at first but that he stopped when he realized that it was his sister-in-law and not his wife. (Tr. 289). Offender never stated that he was attracted to his sister-in-law. (Tr. 290). Offender had also told a doctor that he had wanted to have sex with his sister-in-law because "he could get away with it" "since she couldn't do anything." (Tr. 290).

Offender received probation for driving while under the influence in 1981, and he subsequently violated the conditions of that probation by selling marijuana. (Tr. 291). Offender incurred several additional probation violations thereafter. (Tr. 291). Offender was also convicted of nonsupport of a child in 2001. (Tr. 291-92). Offender blamed that incident on his wife for "mishandling the money." (Tr. 292). Finally, Offender violated the terms of his probation for nonsupport when he committed the sexual offense against his sister-in-law. (Tr. 292).

Dr. Goldberg used the Diagnostic & Statistical Manual (DSM-5) to diagnose Offender with three disorders: 1) pedophilic disorder, sexually attracted to males, nonexclusive type; 2) other specified paraphilic disorder, nonconsensual sex; and 3) other specified personality disorder, antisocial personality. (Tr. 293-94). Dr. Goldberg diagnosed Offender with pedophilic disorder based on the

two incidents involving his son and stepson, which established a pattern of conduct, indicating that he was attracted to children. (Tr. 295-96). Dr. Goldberg diagnosed Offender with paraphilic disorder based on the four incidents in which Offender had sexually abused vulnerable individuals who were incapable of consenting, including the two children, his mentally-disabled sister-in-law, and the woman who was initially asleep. (Tr. 296-97). Dr. Goldberg found that this attraction was "intense and persistent" because Offender had chosen this type of behavior despite the availability of sexual relationships with other consenting, adult females. (Tr. 296-97). Finally, Dr. Goldberg diagnosed Offender with a type of personality disorder based on his violation of social norms, impulsivity, aggressiveness, reckless disregard for others' safety, and lack of remorse, which was further supported by testimony by Offender's ex-wife and stepson. (Tr. 298, 381-84, 389, 403-04, 407). Dr. Goldberg testified that those three disorders together constituted a mental abnormality. (Tr. 301-03, 346).

Dr. Goldberg also opined that Offender's mental abnormality caused him to be more likely than not to engage in acts of predatory sexual violence if not confined in a secure facility. (Tr. 303, 323). Dr. Goldberg used four actuarial scales—the Static-99R, the Static-2002R, the SORAG, and the VRAG-R—to estimate Offender's risk of reoffending. (Tr. 304-05). The Static-99R and the Static-2002R indicated that Offender was within the "above average risk

range" or 79.6 percentile of sex offenders, based on static or unchanging factors. (Tr. 308-09). Dr. Goldberg testified that the SORAG and VRAG, which applied to both sexually violent and non-sexually violent offenders, indicated that Offender was within the "moderate to moderate high range." (Tr. 310). Dr. Goldberg further noted that while the research generally indicated that an offender's risk decreases upon reaching the age of 40, Offender had committed sexual abuse in his mid-40s, indicating that Offender's risk was comparatively higher. (Tr. 312, 352). Additionally, Dr. Goldberg testified that it was uncommon for an offender to have victimized both children and adults, indicating that Offender was "even . . . riskier." (Tr. 376).

Additionally, Dr. Goldberg evaluated Offender's dynamic risk factors, using a Structured Risk Assessment – Forensic Version (SRA-FV), which indicated that Offender was within the moderate range based on Offender's sexual interest in children, sexual preoccupation or sex drive, callousness, grievance thinking, and dysfunctional coping. (Tr. 313). Dr. Goldberg emphasized that Offender had not admitted to his sexual deviancy regarding children or nonconsensual sex and had not adequately addressed those issues despite having repeatedly undergone treatment. (Tr. 301-02, 318-22, 328). Dr. Goldberg also noted that Offender still blamed others for his actions. (Tr. 322). Dr. Goldberg concluded that Offender was more likely than not to engage in predatory sexual acts if not confined in a secure facility. (Tr. 323).

Dr. Jeff Kline, a certified forensic examiner and psychologist for the Department of Mental Health, testified on Offender's behalf that it was his opinion that Offender did not meet the criteria for an SVP. (Tr. 414, 446, 465). Dr. Kline had been appointed by the court to perform an evaluation of Offender. (Tr. 419). Like Dr. Goldberg, Dr. Kline reviewed thousands of pages of records and interviewed Offender. (Tr. 419-20, 422). Dr. Kline testified that when evaluating an offender for a mental abnormality, he looks at the offender's sexual offending behaviors, treatment behaviors, and the offender's statements in treatment about their past behaviors. (Tr. 421). Dr. Kline specifically opined that Offender did not suffer from a mental abnormality as defined by Missouri law and that Offender did not meet the criteria of a sexually violent predator. (Tr. 423-24, 433, 446-47, 465).

Dr. Kline did not find that Offender suffered from a pedophilic disorder. (Tr. 424). While Dr. Kline acknowledged that Offender had committed sexual offenses against children, "[he] didn't feel that there was enough evidence in the record to suggest that [Offender] had a sexual preference or an intense interest in sex with children" because "sometimes people commit sexual offenses even if they're not necessarily attracted . . . towards children." (Tr. 425). Dr. Kline emphasized that Offender had not admitted being sexually attracted to children while in treatment and that there was not any other evidence of such an attraction such as possession of child pornography. (Tr.

425). Dr. Kline admitted that the DSM provides for a diagnosis of pedophilic disorder if there is evidence of recurrent behaviors persisting for six months and the presence of multiple victims. (Tr. 450).

Dr. Kline also testified that he did not find that Offender suffered from a paraphilic disorder involving non-consent. (Tr. 428). Dr. Kline testified that "[p]eople can't consent for lots of different reasons. Sometimes it's legal reasons, sometimes it's age, sometimes it's because they're unconscious, sometimes it's because of a disability. And so when you say the person has a paraphilic disorder, non-consent, you need to make sure that they have a sexual attraction to a specific type of non-consent." (Tr. 428). Dr. Kline testified that "there isn't a commonality, a common thread, among [Offender's] four victims that would meet criteria for a paraphilic disorder." (Tr. 428, 454-55). Dr. Kline further testified that "committing those offenses doesn't mean he has a paraphilic disorder . . . that makes him commit these offenses." (Tr. 431).

Finally, Dr. Kline acknowledged that "[o]ne of the things that [they] look at is whether or not a person has any type of disorder that affects their sexual offending, and personality disorders can do that." (Tr. 441). But Dr. Kline did not find that Offender had a personality disorder because "[he] couldn't find enough information to really suggest that [Offender] has that kind of set of behaviors." (Tr. 442).

Offender testified about the treatment he completed in MOSOP and that he

"made a choice then and there to go a different direction and not be that guy no more." (Tr. 479-80, 493, 501). Offender also testified about his past sexual offenses. (Tr. 481-501). Offender testified in regard to the incident with his son that his son threw a fit in order to take a shower with him and so he "got him all soapy," but that he pleaded guilty to a sex offense "[b]ecause . . . it was just a bench trial and their mom had been arrested." (Tr. 481-82). Offender denied that he had ever done anything wrong with his son. (Tr. 503). Offender testified that the second incident occurred when he was "really, really drunk" and had "used quite a bit of coke," that he went into an apartment under the mistaken belief that it was where his girlfriend was partying, and that he thought the girl in bed was his girlfriend. (Tr. 484-86, 505). Offender testified that he didn't remember saying the victim's name. (Tr. 506). Offender testified that the incident with his sister-in-law occurred because it was "[r]evenge seeking towards [his] wife to make her feel bad like she made [him] feel bad" and that it was never about sex. (Tr. 488, 490). But Offender also testified that "for a little bit, [he] thought . . . [he] was having sex with [his] wife." (Tr. 507). Offender admitted that minimizing and downplaying his responsibility was a risk factor for reoffending. (Tr. 509-10). When asked if he was "going to ever reoffend sexually again," Offender answered, "If I said no, then it would [be] a lie. If I say yes, there's a possibility, then I would be right." (Tr. 513-14). Offender testified, "Anybody that comes in here and says that, 'No, I'm going

to go out and I'm never going to reoffend,' that's crap. That's—That's just crap. It's not true." (Tr. 514).

ARGUMENT

I. (Voir Dire – Critical Fact)

The trial court did not abuse its discretion in prohibiting Offender from disclosing the specific ages of his child victims during voir dire because the critical fact that Offender's victims included children was disclosed and it was therefore unnecessary to further disclose the children's specific ages in order to explore any related bias that the venire members might have held, nor was Offender prevented from discovering such bias.

Offender claims that he was prevented from uncovering bias during voir dire when the trial court prohibited him from informing the venire of the specific ages of his two child victims. But the venire was informed that Offender's victims included children, and Offender explored and discovered venire members' resulting bias against him.

A. The record regarding this claim.

In a motion in limine, the State asked the trial court to prohibit Offender from "asking in explicit detail or discussing in explicit detail [his] offenses," including the "ages of victims." (Tr. 16; D21, pp. 1-2). The State argued that it would be an "improper commitment" if Offender "g[a]ve all the gory details of

[his] offenses and sa[id], in light of that, could you consider . . . not SVP." (Tr. 16).

Offender's counsel responded, "I think it's a completely relevant question to ask during voir dire . . . if anybody has strong feelings about [the number of victims or the ages of those victims] that would cause them to be biased and impartial." (Tr. 17). Offender's counsel argued that "if that causes them to have a bias towards [Offender], . . . where they're not going to consider any other evidence to the contrary that he meets criteria, . . . that's a relevant question that we need to ask the jurors to determine if they . . . can be fair and impartial at this trial." (Tr. 17).

The trial court initially denied the State's motion. (Tr. 17).

During voir dire, the State's attorney told the venire, "I expect that you'll hear that the disorders we're going to be talking about include . . . an attraction to children, . . . and I expect you'll hear that [Offender] has victimized several people in his history." (Tr. 60). The State's attorney followed by asking, "So does anyone have any kind of personal issues that are weighing on their minds about this subject matter that they say I just cannot follow the law the Judge is going to give me on this case." (Tr. 60-61). Three venire members expressed concerns that they could not be fair to Offender as a result, including two who specifically cited personal experiences involving child victims. (Tr. 61-63).

Offender's counsel later stated to the venire, "One question I want to ask, you're likely to hear evidence that [Offender] has a victim that is 10 years old and an alleged victim that was 10 years old at the time of the offense." (Tr. 169). The State's attorney objected "based on [her] pretrial motion." (Tr. 169). The trial court "[s]ustained, pursuant to the motion this morning." (Tr. 169).

Offender's counsel immediately followed by asking, "How many people have children that are young kids? . . . Quite a few people." (Tr. 169). Offender's counsel then stated, "[T]he one thing that I'm worried about is based on the evidence that you may hear in this case that the – the natural urge to protect them is going to come into play when you're looking at the evidence and weighing the evidence." (Tr. 169). Offender's counsel asked, "Is there anybody . . . that is worried that because of having kids or grandkids that are small that that's going to be in the back of your mind when you're looking at the evidence and . . . if you don't feel that the State has met their burden, that because of the fact that you have kids, that you're going to vote to – that he meets criteria because you'd rather be safe than sorry because of those close to you?" (Tr. 170). Two venire members responded affirmatively, and Offender's counsel confirmed that it was because they had "young" or "younger" "kids." (Tr. 170-71).

The State objected as to the relevance of the inquiry, stating that the jury doesn't have to "set aside a desire to protect the community or be fair." (Tr.

172). Offender's counsel responded, "The issue is that my follow-up with the 10-year-old is that people that have that – that are going to hear that evidence that it's going to hit too close at home that they would have kids, they're going to associate that [Offender's] offending is against like them – like their kids, that they want to protect them, and that's going to be hard for them to set aside that – that feeling as to weigh the evidence, and that based on that solely that he has a kid victim, so I have to go generally ask, you know. And the question was, the fact that you have this, is that going to overrule what the evidence is and you're going to use that feeling of protection to look beyond the scope of what the evidence is and use that as – in your deliberations in making a determination of whether or not he meets the criteria." (Tr. 172-73). The trial court allowed Offender's counsel to pursue that line of inquiry. (Tr. 173). Juror 51 then agreed that because she had "small grandkids" it would be hard for her to listen to all of the evidence or be fair to Offender. (Tr. 174).

Offender's counsel asked other venire members, "[W]hen you're looking at the evidence and you're weighing the evidence, and you're looking at whether or not the State has met their burden, the thought of protecting them is going to come into play?" (Tr. 175). Offender's counsel also asked, "The issue is, is it going to be so emotional for you that when you're listening to the evidence that you're not going to be able to [be] fair and impartial, that you're going to hear it, you're going to be one-sided, you're not going to take it all in and make up

your mind at the end during deliberations." (Tr. 176-77). Four venire members responded and indicated that it would be hard for them to be fair to Offender. (Tr. 174-76). Juror 53 specifically admitted that even "where the State hasn't met their burden, and [she] heard evidence of a child, that [she's] going to probably side with the State no matter what." (Tr. 207-09).

After selecting the jury, Offender's counsel stated as an offer of proof that "[he] would have asked questions regarding the victims, namely that there are two male victims that were ages 10, both of them." (Tr. 241).

Offender included this claim of error in his motion for a new trial. (D37, pp. 6-7).

B. Standard of review.

"[T]he trial judge is vested with the discretion to judge the appropriateness of specific questions" in voir dire. *State v. Oates*, 12 S.W.3d 307, 310 (Mo. banc 2000). "[T]he nature and extent of the questions counsel may ask are discretionary with that court." *State v. Clark*, 981 S.W.2d 143, 146 (Mo. banc 1998) (quoting *State v. Smith*, 649 S.W.2d 417, 428 (Mo. banc 1983)). "Likewise, the trial judge is in the best position 'to judge whether a disclosure of facts on *voir dire* sufficiently assures the defendant of an impartial jury without at the same time amounting to a prejudicial presentation of the evidence.'" *Id.* (quoting *State v. Leisure*, 749 S.W.2d 366, 373 (Mo. banc 1988)). "The discretion of the trial judge in striking this difficult balance will be upheld, absent abuse."

State v. Antwine, 743 S.W.2d 51, 59 (Mo. banc 1987). "Where reasonable persons can differ about the propriety of the action taken by the trial court, no abuse of discretion will be found." *State v. Lutes*, 557 S.W.3d 384, 394 (Mo. App. W.D. 2018) (quoting *State v. Johnson*, 207 S.W.3d 24, 40 (Mo. banc 2006)). "An appellate court will find reversible error only where an abuse of discretion is found and the defendant can demonstrate prejudice." *Oates*, 12 S.W.3d at 311. "Even where error occurs, to entitle defendant to relief, the prohibition on voir dire must have caused a 'real probability of injury.'" *State v. Edwards*, 116 S.W.3d 511, 529 (Mo. banc 2003) (quoting *State v. Betts*, 646 S.W.2d 94, 98 (Mo. banc 1983)).

C. The trial court did not abuse its discretion in prohibiting Offender from disclosing the specific ages of his victims to the venire because the critical fact that his victims included children was disclosed and Offender was not prevented from discovering any related bias.

"The purpose of voir dire is to discover bias or prejudice in order to select a fair and impartial jury." *Clark*, 981 S.W.2d at 146; *see also In re Care and Treatment of Wolfe*, 291 S.W.3d 829, 832 (Mo. App. W.D. 2009). "Discovery of the nature and extent of an individual's bias requires not only deep probing as to opinions held but also the revelation of some portion of the facts of the case." *Leisure*, 749 S.W.2d at 373. "On the other hand, counsel is not permitted to try the case on *voir dire* by a presentation of facts in explicit detail." *Id.* "Counsel

also may not seek to predispose jurors to react a certain way to anticipated evidence." *Clark*, 981 S.W.2d at 147. "Every fact need not be disclosed to prospective jurors." *Id.* "Only those critical facts—facts with substantial potential for disqualifying bias—must be divulged to the venire." *Id.* "A case involving a child victim can implicate personal bias and disqualify prospective jurors." *Id.*

Here, the trial court did not preclude disclosure of the critical fact that Offender's sexual victims included children, nor was Offender prevented from discovering any resulting bias among the venire. Indeed, the venire was informed by the State's attorney that Offender's alleged disorders included "an attraction to children, . . . and . . . that [Offender] has victimized several people in his history." (Tr. 60). Three venire members subsequently expressed concerns that they could not be fair to Offender as a result, including two who specifically cited personal experiences involving child victims. (Tr. 61-63). Additionally, Offender's counsel repeatedly referred to "young," "younger," and "small" "kids" while attempting to discover whether venire members would be personally biased against Offender out of a desire to protect such children and whether that bias would prevent them from considering all of the evidence before reaching a decision as to whether Offender met the criteria of an SVP. (Tr. 169-71, 173-77). As a result, several venire members responded that it

would be hard for them to be fair and impartial to Appellant due to their personal relationships with children. (Tr. 170-71, 173-76, 207-09).

The facts of this case are therefore distinguishable from *Clark*. In *Clark*, one of the defendant's murder victims was a three-year-old girl. *Clark*, 981 S.W.2d at 145. This Court held that "the trial court improperly limited the scope of voir dire" because defense counsel was "completely precluded" from revealing to the venire that the case involved a child victim and that "[d]ue to the sweeping nature of the trial court ruling in this case, the defense could not attempt to discover [the related] bias." *Clark*, 981 S.W.2d at 145, 147. This Court reversed the trial court's judgment "[b]ecause the trial court barred *all* inquiry into a critical fact during voir dire." *Id.* at 148 (emphasis added). In identifying the critical fact, this Court stated, "A case involving a *child victim* can implicate personal bias and disqualify prospective jurors," and it emphasized the significance of the victim being a "child" five times. *Id.* at 147. (emphasis added). *Clark* is therefore distinguishable from the present case because the defendant in that case was wholly prohibited from disclosing that one of his alleged victims was a child, but here that critical fact was disclosed to the venire and Offender was permitted to explore for potential, related bias. (Tr. 60-63, 169-71, 173-77).

Instead, this case is more analogous to *State v Baumruk*, 280 S.W.3d 600, 614 (Mo. banc 2009). In that case, the trial court prohibited defense counsel

from divulging to the venire that the defendant had attempted to kill eight people in addition to his wife, but it permitted defense counsel to reveal more generally that the defendant had shot at "other people." *Id*. This Court held that "[t]he specific number of people is not a critical fact" and that "[t]he inability of defense counsel to articulate the specific number of individuals at whom [the defendant] shot did not infringe on [his] right to an impartial jury." *Id*. This Court also held that "[the defendant] fails to demonstrate any real probability of prejudice as nothing in the record supports a finding that venire members would have responded differently to the knowledge that [the defendant] shot at eight people as opposed to knowing that [he] shot at people in addition to his wife." *Id*.

Similarly, in *Wolfe*, the Western District Court of Appeals found that "the circuit court allowed *voir dire* questioning on the critical facts"—"[the offender's] diagnosis of pedophilia" and that "he has attractions to prepubescent girls . . . [or] young girls." *Wolfe*, 291 S.W.3d at 833 (Mo. App. W.D. 2009). The court held that "[b]eyond the fact that [the offender] had multiple convictions, imprisonments, and institutionalizations for sexual[ly] abusing children, there was no further need to inform the venire of the ages of the victims" because such "additional facts . . . were not necessary to explore juror bias." *Id*.

Because the venire was informed of the critical fact that Appellant's victims included "children," which was reasonably sufficient to arouse any disqualifying bias the venire members might have held against Offender as a result, the trial court did not abuse its discretion in prohibiting additional, unnecessary disclosure of the specific ages of Offender's child victims. (Tr. 60). *Cf. State v. Ousley*, 419 S.W.3d 65, 74 (Mo. banc 2013) ("The question presented the jury with only the portion of the facts of the case likely to give rise to disqualifying bias, and with no more of the facts than were required to discover the targeted bias."); *State v. Delancy*, 258 S.W.3d 110, 114 (Mo. App. E.D. 2008) (emphasis added) ("[T]he victim in this case is not part of a particular *class* . . . who may engender . . . prejudice against the defendant."). Moreover, as evidenced by Offender's counsel's inquiries regarding "young," "younger," and "small" "kids" and the responses from several venire members that they could not be fair to Offender as a result, the trial court's ruling did not prevent Offender from discovering any related bias or result in a real probability of prejudice. (Tr. 169-71, 173-77, 207-09).

Offender's first point should be denied.

II. (Dr. Kline's Risk Assessment)

The trial court did not plainly err in excluding Dr. Kline's assessment of Offender's future dangerousness because it was irrelevant under section 632.480(5) without being linked to a mental abnormality, which Dr. Kline testified that he did not find in Offender, and Offender did not suffer a manifest injustice as a result.

Offender claims that the trial court erred in prohibiting his expert from testifying about Offender's risk of reoffending because such testimony was necessary to rebut the State's proof of this essential element. But the trial court permitted Dr. Kline to identify alleged flaws in the State's expert's risk assessment, and Dr. Kline's opinion regarding Offender's risk of reoffending was irrelevant following his opinion that Offender did not suffer from a mental abnormality, given the required causative link between the two elements.

A. The record regarding this claim.

In a pretrial motion in limine, the State asked the trial court to prohibit Dr. Kline from testifying about Offender's risk level. (D19). The State alleged that Dr. Kline had found that Offender did not suffer from a mental abnormality. (D19, p. 1). The State argued that "[t]herefore, testimony regarding risk absent a finding of mental abnormality is irrelevant as it cannot assist the jury in determining whether [Offender] has a mental abnormality causing him to be

more likely than not to engage in predatory acts of sexual violence" under section 632.480. (D19, pp. 1-2). The State restated that "[b]ecause the two elements are causally related in the statute, it would be irrelevant for someone—a doctor who has not found a mental abnormality to testify as to risk, because without a mental abnormality, there could be nothing to base a risk assessment on." (Tr. 12). The State further argued that "[t]heir expert will testify, 'I didn't find mental abnormality; and, therefore, there is no risk.'" (Tr. 13). The trial court sustained the State's motion. (Tr. 14).

During direct examination of Dr. Kline, Offender's counsel approached the bench and told the trial court, "At this time, Your Honor, I would like to begin examining Dr. Kline about risk assessments, specifically the substance that Dr. Goldberg testified to regarding the validity of the VRAG-R and SORAG and whether or not they're widely accepted in the community, . . . what they mean and what they predict, and so as rebuttal evidence to Dr. Goldberg. I just wanted to get a—if I can be allowed to inquire into that or if the pretrial ruling --." (Tr. 433-34). The State responded, "Sure, I think he can impeach Dr. Goldberg's testimony about it being reliable." (Tr. 434). The trial court stated, "You have a right, under my . . . ruling, you're given the ability to cross-examine on those issues." (Tr. 434).

Offender's counsel then elicited from Dr. Kline in open court that he was familiar with the VRAG-R and SORAG instruments and that there were

"issues" with using them in an SVP case. (Tr. 435). Dr. Kline testified that the "two tests . . . overlap quite a bit" and that "[they] don't know if doing that that way makes his decision-making better." (Tr. 436). Dr. Kline also noted that the SORAG was "very old." (Tr. 436-38). Dr. Kline testified that the VRAG-R "combine[s] both sex offenses" and "other offenses, like assault . . . or murder" and that there is therefore a concern that the VRAG-R "overpredicts" the risk of committing a sexually violent offense. (Tr. 439-40). Dr. Kline also noted that the VRAG-R had not been validated outside of the original, small sample. (Tr. 441).

Later, in an offer of proof, Dr. Kline testified that he used the Static-99R and the Stable-2007 to come to a psychological opinion as to Offender's risk of reoffending. (Tr. 467-69). Dr. Kline testified that the Static-99R indicated that Offender was in the above-average risk category, with the same score that Dr. Goldberg found. (Tr. 468, 476). Dr. Kline testified that the "question that [he was] looking to answer when looking at [Offender's] future risk" was "[w]hether or not, as a result of a mental abnormality, is he more likely than not to commit . . . a predatory sexually violent offense, if not confined to a secure facility." (Tr. 469). Dr. Kline testified that "[he] didn't feel like [Offender] met the standard." (Tr. 469).

This claim of error was not included in Offender's motion for new trial. (D37).

B. Standard of review.

"The determination of whether to admit evidence is within the sound discretion of the trial court." *In re Care and Treatment of Murrell*, 215 S.W.3d 96, 109 (Mo. banc 2007). "A trial court will be found to have abused its discretion when a ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Id.* "This Court's direct appeal review is for prejudice, not mere error, and the trial court's decision will be reversed only if the error was so prejudicial that it deprived the defendant of a fair trial." *Id*. at 109-10. "Trial court error is not prejudicial unless there is a reasonable probability that the trial court's error affected the outcome of the trial." *Id*. at 110.

Because Offender failed to raise this claim of error in his motion for new trial, it is unpreserved for appellate review. (D37). *See In re Care and Treatment of Mitchell*, 544 S.W.3d 250, 254 (Mo. App. S.D. 2017); Rule 78.07(a). "Rule 84.13 provides that this court may consider 'plain errors affecting substantial rights in the discretion of the court, though not raised or preserved, when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.'" *Id*. (quoting Rule 84.13(c)).

C. The trial court did not plainly err in excluding Dr. Kline's risk assessment of Offender that was not linked to a mental abnormality, and Offender did not suffer a manifest injustice as a result of the trial court's ruling.

"Missouri's SVP statute requires a finding that, to be committed, the individual 1) has a history of past sexually violent behavior; 2) a mental abnormality; and 3) *the abnormality creates a danger to others* if the person is not incapacitated." *Murrell*, 215 S.W.3d at 105 (emphasis added); *see also* § 632.480(5), RSMo Cum. Supp. 2017 (defining a "[s]exually violent predator" as "any person who suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility"). Thus, under Missouri law, whether a person is more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility is only relevant if that risk is caused by a mental abnormality. *See Murrell*, 215 S.W.3d at 101 ("[A]n SVP statute allowing for civil commitment must require a finding of future dangerousness and a link between that finding and the existence of a 'mental abnormality' . . . .").

Here, Dr. Kline testified, in contrast to the State's expert witness, Dr. Goldberg, that he did not believe that Offender suffered from a mental abnormality or any of the disorders that Dr. Goldberg had diagnosed him with. (Tr. 423-25, 428, 433, 442, 447). Because Dr. Kline opined that Offender did

not suffer from a mental abnormality, and thus any assessment by Dr. Kline of Offender's future dangerousness could not have been based on the result of a mental abnormality, the trial court did not plainly err in excluding Dr. Kline's opinion as to Offender's risk of reoffending as irrelevant. *See In re Care and Treatment of A.B.*, 334 S.W.3d 746, 753 n. 3 (Mo. App. E.D. 2011) (finding the offender's expert's "opinion on the second prong, as to whether [the offender] is more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility, to be irrelevant because he did not find [the offender] to have a mental abnormality at all").

Additionally, while Offender claims that "[Dr. Kline's] testimony was necessary to rebut the State's evidence and explain why [Offender's] actuarial scores and dynamic risk factors did not lead to a conclusion that he was more likely than not to commit predatory acts of sexual violence if not confined," the trial court permitted Offender to elicit testimony from Dr. Kline concerning alleged flaws in Dr. Goldberg's use of the SORAG and VRAG-R to evaluate Offender's risk. (App. Br. 20; Tr. 304-05, 434-41, 468). Indeed, Dr. Kline testified that there was a concern that the VRAG-R "overpredicts" the risk of committing a sexually violent offense, as well as to the reasons for that concern. (Tr. 435-41). Moreover, during the offer of proof, Dr. Kline merely testified that he used a different instrument than Dr. Goldberg to evaluate Offender's dynamic risk without stating the specific result, explaining why his method

would have reached a different result than Dr. Goldberg's method, or why his method was more accurate or reliable. (Tr. 467-69). Therefore, Defendant has failed to establish that a manifest injustice resulted from the trial court's ruling.

Finally, Offender has failed to show that a manifest injustice resulted from the exclusion of evidence alleging that he was not more likely than not to engage in predatory acts of sexual violence, especially considering the other evidence presented at trial, including his own testimony. When asked if he was "going to ever reoffend sexually again," Offender answered, "If I said no, then it would [be] a lie. If I say yes, there's a possibility, then I would be right." (Tr. 513-14). Offender testified, "Anybody that comes in here and says that, 'No, I'm going to go out and I'm never going to reoffend,' that's crap. That's—That's just crap. It's not true." (Tr. 514).

Offender's second point should be denied.

III. (Juror Unanimity)

The trial court did not plainly err in submitting Instruction No. 6 because it did not violate Offender's statutory right to a unanimous verdict, in that in determining that Offender was a sexually violent predator, the jury unanimously found that Offender suffered from a mental abnormality that made him more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility, and it was not further required to unanimously agree on the specific mental abnormality that Offender suffered from, nor was there evidence from which the jury could have found that Offender suffered from multiple mental abnormalities.

Offender claims that his right to a unanimous verdict was violated because Instruction No. 6 did not require the jury to identify the specific mental abnormality that Offender suffered from. But the statute did not require unanimity as to the specific facts underlying the jury's finding of a mental abnormality. Additionally, Defendant did not suffer a manifest injustice as a result of the submission of Instruction No. 6 because there wasn't any evidence presented at trial that Offender suffered from multiple mental abnormalities.

A. Standard of review.

Defendant concedes that this claim is unpreserved for appellate review and requests plain-error review. (App. Br. 42-43; Tr. 518-21). "An unpreserved claim of error can be reviewed only for plain error, which requires a finding of manifest injustice or a miscarriage of justice resulting from the trial court's error." *State v. Celis-Garcia*, 344 S.W.3d 150, 154 (Mo. banc 2011); *see also* Rule 84.13(c). "For instructional error to constitute plain error, the [offender] must demonstrate the trial court 'so misdirected or failed to instruct the jury that the error affected the jury's verdict.'" *Celis-Garcia*, 344 S.W.3d at 154 (quoting *State v. Dorsey*, 318 S.W.3d 648, 652 (Mo. banc 2010)).

B. The trial court did not plainly err in submitting Instruction No. 6 to the jury because it did not violate Offender's statutory right to a unanimous verdict.

Section 632.495.1 provided that a jury's determination of "whether . . . the person is a sexually violent predator" "shall be by unanimous verdict." § 632.495.1, RSMo Cum. Supp. 2009. A "sexually violent predator" was defined in pertinent part as "any person who suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility . . . ." § 632.480(5), RSMo Cum. Supp. 2017. A "mental abnormality" was defined as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the

person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." § 632.480(2), RSMo Cum. Supp. 2017.

In accordance with section 632.480, Instruction No. 6 required the jury to find that Offender "suffers from a mental abnormality" and "that this mental abnormality makes [him] more likely than not to engage in predatory acts of sexual violence if he is not confined in a secure facility." (D36, p. 9). Instruction No. 6 further defined "mental abnormality" in a manner consistent with section 632.480(2) and *In re Care and Treatment of Thomas*, 74 S.W.3d 789, 791 (Mo. banc 2002). (D36, p. 9). Additionally, Instruction No. 4 stated, "Your verdict must be agreed to by each juror. The verdict must be unanimous and must be signed by each juror." (D36, p. 7). The verdict form was signed by all of the jurors, and each of the jurors affirmed when polled that they agreed with the verdict. (D36, p. 11; Tr. 549).

"For a jury verdict to be unanimous, 'the jurors must be in substantial agreement as to the defendant's acts, as a preliminary step to determining guilt.'" *Celis-Garcia*, 344 S.W.3d at 155 (quoting 23A C.J.S. *Criminal Law* § 1881 (2006)). But "[a] 'jury need only be unanimous as to the ultimate issue of guilt or innocence, and need not be unanimous as to the means by which the crime was committed.'" *State v. Richter*, 504 S.W.3d 205, 211 (Mo. App. W.D. 2016) (quoting *State v. Fitzpatrick*, 193 S.W.3d 280, 292 (Mo. App. W.D. 2006));

see also State v. West, 551 S.W.3d 506, 523 (Mo. App. E.D. 2018); *Richardson v. United States*, 526 U.S. 813, 817 (1999) ("[A] federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime."). In *Richter*, for example, "[t]he jurors necessarily reached a unanimous decision that [the defendant] knowingly put [the victim] at substantial risk to [his] life, body or health," and "[i]t did not destroy jury unanimity to offer the jury an instruction in the disjunctive as to means," which were "unclear." *Richter*, 504 S.W.3d at 212; *see also West*, 551 S.W.3d at 524 ("[T]he jury should not have been required to unanimously find which specific means Defendant used to recklessly cause Victim's death in order to find her guilty of involuntary manslaughter in the first degree.").

Similarly, here, the statute required only that the jury unanimously agree that Offender suffered from a mental abnormality that made him more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility, not that Offender suffered from a specific mental abnormality. *See* § 632.480(5), RSMo Cum. Supp. 2017. Because Instruction No. 6 required the jury to find the essential elements of a sexually violent predator under section 632.480, the jury was not further required to unanimously agree as to what was akin to the "means" of those elements. (D36, pp. 7, 9). *See In re*

Detention of Sease, 201 P.3d 1078, 1082-86 (Wash. Ct. App. 2009) (holding that "the State need not prove beyond a reasonable doubt which mental abnormality or personality disorder causes a person to be an SVP"). The trial court did not plainly err in submitting Instruction No. 6 because it did not violate Offender's statutory right to a unanimous verdict.

Additionally, even if the jury were required to unanimously agree on a particular mental abnormality under section 632.495.1, this is not a case in which the jury could have found from the evidence that Offender suffered from multiple mental abnormalities. "A multiple acts case arises when there is evidence of multiple, distinct . . . acts, each of which could serve as the basis for a . . . charge, but the defendant is charged with those acts in a single count." *Celis-Garcia*, 344 S.W.3d at 155-56. In *Celis-Garcia*, for example, "[t]he state presented evidence of multiple, separate instances of hand-to-genital contact committed against both victims, any one of which would have supported the charged offenses." *Id*. at 158. In contrast, here, while Dr. Goldberg testified that he diagnosed Offender with three disorders, he also explicitly testified that those three disorders worked in combination to constitute a mental abnormality and that none of the disorders individually constituted a mental abnormality. (Tr. 293-94, 301-03, 346). Because there was no evidentiary basis to support jury findings of different mental abnormalities, this case was not analogous to the "multiple acts" case presented in *Celis-Garcia*. Therefore,

Offender's right to a unanimous verdict was not violated, and he did not suffer a manifest injustice as a result of the submission of Instruction No. 6.

Offender's third point should be denied.

IV. (Ineffective Assistance – PC Hearing)

Offender's counsel was not ineffective for failing to challenge the qualifications of the end-of-confinement-report author, Dr. Webb, at the probable cause hearing because she was qualified as a provisional licensed psychologist to determine whether Offender met the criteria of a sexually violent predator under sections 632.483.2(3) and 337.010(4), and Offender failed to establish that he was prejudiced as a result of counsel's alleged errors.

Offender claims that counsel provided ineffective assistance at the probable cause hearing by failing to object to the qualifications of the end-of-confinement-report author. But Dr. Webb was qualified under the statute as a provisional licensed psychologist to provide an opinion as to whether Offender was a sexually violent predator, and Offender has failed to establish that he was prejudiced by counsel's alleged errors.

A. The record regarding this claim.

On June 6, 2017, the day before the trial began, Offender filed a motion to dismiss the petition "or in the alternative order[ ] a new end of confinement be prepared by a qualified examiner." (D1, pp. 21-22; D23, p. 1). The motion alleged that "[t]he author of the End of Confinement Report, Angela Webb, is statutorily ineligible to provide the necessary and required determination

found in [s]ection 632.483.2(3)" because she "is not a licensed psychologist within the meaning of [c]hapter 337 of RSMo." (D23, p. 1). Offender conceded that "Angela Webb is provisionally licensed as a psychologist," but the motion alleged that Dr. Webb had "failed her licensing exam [on] three occasions since the original hearing on this matter." (D23, pp. 1-2). The motion concluded that "[d]ue to the newly discovered issues with the foundation of Dr. Webb's opinion expressed both at the preponderance hearing as well as in the end of confinement report, [Offender's] case should not proceed further until this deficiency in the referral process is cured." (D23, p. 2).

During the pretrial hearing on Offender's motion, Offender's counsel again conceded that Dr. Webb "was provisionally licensed at the time of the probable cause hearing [and] continues to be provisionally licensed." (Tr. 19). Offender's counsel further stated that he had "deposed Amy Griffith, who was [Dr. Webb's] supervisor during the end-of-confinement report on this case." (Tr. 20).

The trial court denied Offender's motion to dismiss. (Tr. 23).

During the trial, Dr. Kline also testified that Dr. Webb was a provisional licensed psychologist. (Tr. 427).

Offender's counsel renewed the motion for remand for a probable cause determination, which the trial court denied. (Tr. 473).

B. Standard of review.

"Under the 'meaningful hearing' standard, this Court would determine—based on the record on appeal—whether counsel provided [the offender] with a meaningful SVP hearing." *In re Care and Treatment of Grado*, 559 S.W.3d 888, 898 (Mo. banc 2018).

"*Strickland* would require [the offender] to show by a preponderance of the evidence: '(1) his or her counsel failed to exercise the level of skill and diligence that a reasonably competent counsel would in a similar situation, and (2) he or she was prejudiced by that failure.'" *Id.* (quoting *Mallow v. State*, 439 S.W.3d 764, 768-69 (Mo. banc 2014)). There is a "strong presumption that counsel's conduct was reasonable and effective." *Id.* (quoting *Smith v. State*, 370 S.W.3d 883, 886 (Mo. banc 2012)). "Trial strategy decisions may only serve as a basis for ineffective counsel if they are unreasonable." *Id.* (quoting *Zink v. State*, 278 S.W.3d 170, 176 (Mo. banc 2009)). "In order to prove the prejudice prong of *Strickland*, the question is whether 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

C. Offender's counsel was not ineffective for failing to challenge the qualifications of the end-of-confinement report author because she was a provisional licensed psychologist and therefore qualified.

As an initial matter, Offender claims that his counsel was ineffective "at the probable cause hearing" because he did not "challenge the end of confinement report, or the qualifications of the author." (App. Br. 22, 50). But Offender fails to cite to support in the record regarding the events of the probable cause hearing. (App. Br. 50). Moreover, the transcript of the probable cause hearing is not part of the record on appeal. "Because it is [Offender's] burden to provide [the court] with this record and he has failed to do so, we assume that it is supportive of the probate court's decision below." *In re Care and Treatment of Bradley*, 440 S.W.3d 546, 554 (Mo. App. W.D. 2014).

Even if Offender's counsel did not object at the probable cause hearing to the qualifications of the end-of-confinement-report author to opine as to whether Offender met the criteria of a sexually violent predator, counsel was not ineffective for failing to make the non-meritorious objection.

Section 632.483 provided in pertinent part that the Department of Corrections "shall provide the attorney general and the multidisciplinary team . . . with . . . [a] determination by . . . a psychologist *as defined in section 632.005* as to whether the person meets the definition of a sexually violent predator." § 632.483.2(3), RSMo Cum. Supp. 2014 (emphasis added). Section 632.005

defined a "psychologist" as "a person licensed to practice psychology under chapter 337 with a minimum of one year training or experience in providing treatment or services to mentally disordered or mentally ill individuals." § 632.005(20), RSMo Cum. Supp. 2011. Section 337.010(4) defined a "licensed psychologist" in pertinent part as "any person . . . who holds a current and valid, whether temporary, provisional or permanent, license in this state to practice psychology." § 337.010(4), RSMo Cum. Supp. 2008.

Here, Defendant recognizes on appeal, and the record showed, that Dr. Angela Webb, the author of the end-of-confinement report, was a provisional licensed psychologist at the time she authored the report and at the time of the probable cause hearing. (App. Br. 49; Tr. 19, 427; D3, p. 9). Therefore, contrary to Offender's claim that Dr. Webb was an "unlicensed psychologist," she was in fact a licensed psychologist under section 337.010 and qualified under section 632.483 to determine whether Offender met the criteria of a sexually violent predator. (App. Br. 22). *See In re Care and Treatment of Bohannon*, 583 S.W.3d 490, 495 (Mo. App. S.D. 2019) ("Under the plain language of the statute, Dr. Webb thus qualified as a psychologist for purposes of section 632.483, which triggers the process by which end of confinement review is implemented."). Moreover, contrary to Offender's claim that Dr. Webb was not "a qualified expert," "licensed psychologists . . . are permitted by law to evaluate persons and make diagnoses of mental disorders." (App. Br. 22). *In re*

Johnson v. State, 58 S.W.3d 496, 499 (Mo. banc 2001); *see also* § 337.015.3, RSMo 2000 ("The practice of psychology includes . . . diagnosis . . . of mental and emotional disorder or disability."). Because Offender has failed to establish that an objection at the probable cause hearing to Dr. Webb's qualifications as the end-of-confinement author would have been successful, he has also failed to establish that trial counsel was ineffective for allegedly failing to make such an objection. *See Grado*, 559 S.W.3d at 899 (quoting *Zink*, 278 S.W.3d at 188) ("[T]rial counsel is not ineffective for failing to make non-meritorious objections.").

Additionally, Offender claims that counsel was ineffective for failing to "bring to the attention of the court that Dr. Webb . . . had failed her examinations." (App. Br. 22, 51). But Offender's own motion to dismiss, which was filed approximately 9 months after the probable cause hearing, alleged that Dr. Webb had "failed her licensing exam [on] three occasions since the original hearing on this matter" and that "[d]ue to the newly discovered issues with the foundation of Dr. Webb's opinion . . . [Offender's] case should not proceed further until this deficiency in the referral process is cured." (D1, pp. 11, 21; D23, pp. 1-2). Thus, to the extent that Offender claims counsel should have brought such information to the court's attention at the probable cause hearing, the record refutes that such information would have been available at that time.

Moreover, Dr. Webb's alleged failure to pass the licensing exams would, at best, have gone to her credibility and the weight of her testimony. The court's task at the probable cause stage of an SVP commitment is to act as a "gatekeeper merely to determine if the State's evidence raises a triable issue of fact." *In re Care and Treatment of Tyson*, 249 S.W.3d 849, 852-53 (Mo. banc 2008) (quoting *In re Care and Treatment of Martineau*, 242 S.W.3d 456, 460 (Mo. App. S.D. 2007)). "This gatekeeping role does not allow the court to weigh evidence or make credibility determinations." *Id*. Offender thus cannot show that the outcome of the proceeding would have been different had counsel raised the issue of Dr. Webb's failed examinations in an effort to show a lack of probable cause. *Cf. In re Care and Treatment of Kirk*, 520 S.W.3d 443, 454 (Mo. banc 2017).

Finally, Offender has failed to show that he was prejudiced as a result of counsel's alleged errors. The State's petition was supported by the end-of-confinement report, which indicated that it had been reviewed by Dr. Amy Griffith, a licensed psychologist, as well as the multidisciplinary team and prosecutor's review committee reports. (D2-5; Tr. 20). There was therefore sufficient evidence, aside from Dr. Webb's opinion, from which the trial judge could have found probable cause to believe that Offender was a sexually violent predator, and Offender has failed to establish a reasonable probability that the outcome would have been different but for counsel's alleged errors. *See In re*

Care and Treatment of Amonette, 98 S.W.3d 593, 600 (Mo. App. E.D. 2003); *Martineau*, 242 S.W.3d at 460.

Moreover, "even in a criminal proceeding, 'a defendant's substantive rights are not affected by a preliminary hearing.'" *Martineau*, 242 S.W.3d at 460. "The jury's finding that [the offender] is a[n] SVP . . . arguably subsumes 'probable cause' in this context." *Id*. "The faulty end-of-confinement report essentially now has been supplanted by the new evaluation. Any errors in it, so long as the prosecution does not attempt to admit it at trial, could not be prejudicial." *State ex rel. State v. Parkinson*, 280 S.W.3d 70, 77 (Mo. banc 2009). Offender has therefore failed to establish that he was prejudiced by counsel's alleged errors at the probable cause hearing when the jury found after a trial that Offender was a sexually violent predator, without the benefit of Dr. Webb's opinion. (D1, p. 24).

Offender's fourth point should be denied.

V. (Juror Nondisclosure)

The trial court did not plainly err in failing to grant a new trial due to juror nondisclosure because Offender failed to present any evidence establishing that any venire members who were allegedly biased against Offender because "it runs in the family" failed to disclose such bias during voir dire or actually served on the jury that ultimately determined that Offender was a sexually violent predator, nor is it plainly apparent from the face of the record.

Offender claims that he is entitled to a new trial because venire members intentionally failed to disclose their belief that Offender's family was composed of sexual offenders. But the record does not plainly establish that any nondisclosure occurred or that any biased venire members actually served on Offender's jury.

A. The record regarding this claim.

Offender's motion for new trial did not include a claim of error regarding juror misconduct. (D37). After the trial court denied Offender's motion for new trial, the court asked Offender's counsel if there was "[a]nything further for this record." (Tr. 552). Offender's counsel replied, "Yes, Your Honor. It has come to my attention that a member of the jury panel has approached counsel for my client's brother in Cause No. 16CK-CR00382-01 . . . to discuss sort of

the bias that was going on with the jury panel, and that based on that, I would like to—in the way jury selection went, like to point to the Court that I feel that I was ineffective in representing my client by not filing a motion for change of venue." (Tr. 552). The State's attorney responded, "This is the first I'm hearing about it." (Tr. 552).

Offender's counsel alleged that the venire person had told Offender's brother's attorney that "people in that county don't like that family" and that there had been "a change of venue filed in that case." (Tr. 553). Offender's counsel confirmed that the venire member in question was not chosen to serve on the jury in this case. (Tr. 553). The State's attorney responded, "[A]s to the bad blood, I guess, in this county towards this family, that was thoroughly, thoroughly, thoroughly explored during voir dire." (Tr. 553). Offender's counsel did not offer anything further when given the opportunity by the trial court. (Tr. 553).

The trial court stated, "For the record, [Offender's counsel], the Court recalls the voir dire process, and the thoroughness of the presentation which you made . . . . And at this time, I will not disturb the ruling I've just made, based upon that additional information." (Tr. 553).

B. Standard of review.

"A trial court's ruling as to the existence of juror misconduct will not be disturbed absent a finding of abuse of discretion on review." *State v. Smith*, 944 S.W.2d 901, 921 (Mo. banc 1997).

Offender did not raise this claim of error in his motion for new trial, and he requests plain-error review. (D37; App. Br. 53). *See* Rule 78.07(a) ("In jury tried cases, . . . allegations of error must be included in a motion for a new trial in order to be preserved for appellate review."). "Unpreserved issues 'can only be reviewed for plain error, which requires a finding that manifest injustice or a miscarriage of justice has resulted from the trial court error.'" *In re Care and Treatment of Braddy*, 559 S.W.3d 905, 909 (Mo. banc 2018); *see also* Rule 78.08 ("Plain errors affecting substantial rights may be considered at a hearing on motion for a new trial, in the discretion of the court, though not raised in the motion . . ., when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.").

C. The trial court did not plainly err in failing to grant a new trial because it is not plainly apparent from the record that juror nondisclosure occurred or that Offender was prejudiced as a result.

As an initial matter, at no time did Offender's counsel raise an issue of juror nondisclosure before the trial court. (Tr. 552-53). Instead, Offender's counsel merely alleged that a venire member had "discuss[ed] sort of the bias that was

going on with the jury panel" and that "people in that county don't like that family." (Tr. 552-53). The only related claim of error that Offender's counsel raised was that he had provided ineffective assistance by not filing a motion for change of venue due to the allegedly prevalent bias in the county against Offender and his family. (Tr. 552). "An issue raised for the first time on appeal and not presented to or decided by the trial court is not preserved for appellate review." *In re Care and Treatment of Burgess*, 72 S.W.3d 180, 184 (Mo. App. S.D. 2002).

Even if the issue had been raised in Offender's motion for new trial, "[f]actual allegations in a motion for new trial are not self-proving." *Smith*, 944 S.W.2d at 921. "[An offender] alleging juror misconduct during voir dire must present 'evidence through testimony or affidavits of any juror, or other witness either at trial or at the hearing on his motion for new trial.'" *State v. Mayes*, 63 S.W.3d 615, 625-26 (Mo. banc 2001) (quoting *Portis v. Greenhaw*, 38 S.W.3d 436, 445 (Mo. App. W.D. 2001)). Here, Offender failed to offer an affidavit or testimony of the venire member or any other evidence to support a claim of juror nondisclosure. (Tr. 552-53). Nor does the record show that the trial court prohibited Offender from presenting such evidence at the hearing on his motion for new trial. (Tr. 552-53). Moreover, while Offender's counsel referenced Cause No. 16CK-CR00382-01, no records from that case or other related evidence was offered by Offender in this case. "Material not received in

evidence at trial is not a part of the record on appeal." *McQuary v. State*, 241 S.W.3d 446, 453 (Mo. App. W.D. 2007). "Without evidence that the relevant information existed, the trial court could not evaluate whether or not [a venire member] intentionally concealed any such information." *Smith*, 944 S.W.2d at 921; *see also Mayes*, 63 S.W.3d at 626 ("Because of counsel's failure to call the juror or otherwise establish the facts, this Court could only speculate as to whether any nondisclosure occurred at all, much less intentional disclosure."). Therefore, the trial court did not plainly err in failing to grant a new trial on the basis of juror nondisclosure.

Even if the facts as alleged by Offender on appeal were true, he has failed to establish that the trial court plainly erred in failing to find that juror nondisclosure occurred or that he suffered a manifest injustice a result. "In determining whether to grant a new trial, the court must determine whether a nondisclosure occurred at all, and, if so, whether it was intentional or unintentional." *Mayes*, 63 S.W.3d at 625. "Nondisclosure can occur only after a clear question is asked during voir dire." *State v. Ess*, 453 S.W.3d 196, 203 (Mo. banc 2015). "A venireperson's silence to an unequivocal question establishes juror nondisclosure, if the information is known to the juror." *Id*. at 204. "[B]ias and prejudice will normally be presumed if a juror intentionally withholds material information." *Mayes*, 63 S.W.3d at 625. "[The offender's] right to a fair trial was violated when [the nondisclosing juror] served on the jury that

ultimately convicted him after this intentional nondisclosure." *Ess*, 453 S.W.3d at 206.

Here, Offender alleges that "prospective jurors [in this case] expressed opinions about [Offender], his family, and his guilt" and that "some jurors thought that 'it runs in the family.'" (App. Br. 59-60). While those facts, if true, might establish that those unidentified venire members had a disqualifying bias against Offender, they fail to establish that such venire members failed to disclose such bias during voir dire. Indeed, the State's attorney asked during voir dire, "[A]nyone think that they might be familiar with [Offender's] name or his face? His name is [D.N.]," and eight venire members responded affirmatively, with several commenting that they were familiar with Offender's brother, that his brother had been arrested, and that there were "issues in that family." (Tr. 65-72, 146-66). For example, Juror No. 56 repeatedly admitted that "[he] would be biased" because he had heard rumors and stories about Offender's family, particularly his brother. (Tr. 69-70, 147-50). Most of those prospective jurors were questioned privately at the noon recess about their familiarity with Offender and his family and whether they could be fair and impartial, and they were then released for lunch. (Tr. 145-66). Moreover, all eight venire members who expressed a familiarity with Offender and his family—Jurors No. 3, 10, 25, 35, 52, 56, 64, and 66—were subsequently struck for cause. (Tr. 214-31). It is not therefore plainly apparent

from the record that any venire members failed to disclose their bias against Offender and his family or that any such venire member who failed to so disclose actually served on the jury, thereby prejudicing Offender. *Cf. Ess*, 453 S.W.3d at 206 ("[The offender's] right to a fair trial was violated when [the nondisclosing juror] served on the jury that ultimately convicted him after this intentional nondisclosure."); *State v. Gill*, 167 S.W.3d 184, 194 (Mo. banc 2005) ("The only constitutional requirement is that the jury actually seated must be made up of qualified and impartial jurors.").

Defendant's fifth point should be denied.

VI. (Ineffective Assistance – Change of Venue)

The trial court did not err in denying Offender's claim of ineffective assistance of counsel because Offender has failed to allege sufficient facts or prove that counsel was ineffective for failing to investigate the venire prior to voir dire or that he was prejudiced by counsel's failure to file a motion for change of venue.

Offender claims that trial counsel was ineffective for failing to discover the community's general bias against Offender and his family and for failing to move for a change of venue. But Offender has failed to allege sufficient facts or prove that trial counsel had a reason to investigate the potential bias of the community against Offender, that a reasonable investigation would have revealed that bias, or that he was prejudiced by counsel's alleged failure to move for a change of venue.

A. The record regarding this claim.

After the trial court had denied Offender's motion for new trial, Offender's counsel told the trial court

> I would like to—in the way jury selection went, like to point to the Court that I feel that I was ineffective in representing [Offender] by not filing a motion for change of venue, one, because I wasn't aware of [Offender's] brother's pending sex case that had

> significant feelings and opinions that were related to the jury panel. Had I investigated that, I probably would have filed a motion related to that. And then also sort of the family of [Offender] in this community and their sort of the bad blood and the feelings generally about the community and this family, I had no knowledge of until we started jury selection, and I feel that I should have investigated that prior to trial, and because of that, I was ineffective.

(Tr. 552).

The trial court stated that it "recall[ed] the voir dire process, and the thoroughness of the presentation which [counsel] made," "was very impressed with the quality of the defense," and "believe[d] that [Offender] received fair and . . . decent representation." (Tr. 553-54). The trial court denied the motion. (Tr. 553-54).

B. Standard of review.

The standard of review applicable to ineffective-assistance claims is outlined in Point IV. *See* Point IV at 46.

C. Offender failed to allege sufficient facts or prove that counsel was ineffective for failing to investigate the venire or that he was prejudiced as a result of counsel's alleged failure to move for a change of venue.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* "[I]nquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions . . . ." *Id.*

Here, Offender failed to allege sufficient facts to overcome the presumption that's counsel's failure to investigate was reasonable under the circumstances. Instead of alleging facts establishing that counsel had a reason to suspect that the community as a whole might be generally biased against Offender and his family, Offender alleges only that "[c]ounsel had no reason not to investigate." (App. Br. 65). Moreover, counsel told the trial court that "[he] wasn't aware of [Offender's] brother's pending sex case that had significant feelings and opinions that were related to the jury panel" and that "[he] had no knowledge" of the "bad blood and the feelings generally about . . . this family . . . until [they] started jury selection." (Tr. 552). Because Offender has failed to allege or prove

that counsel had some notice before trial of Offender's family's poor reputation in the community or that Offender's brother had a pending criminal sex case, he has failed to overcome the presumption that counsel's failure to investigate was reasonable under the circumstances. *See Smulls v. State*, 71 S.W.3d 138, 152 (Mo. banc 2002) ("[I]mportantly, counsel would not know the need to conduct these investigations until the alleged[ ] . . . remarks were made . . . *after the trial had commenced*.").

Additionally, Offender has failed to allege sufficient facts regarding the investigation that counsel should have conducted or what that investigation would have revealed. *See Ervin v. State*, 423 S.W.3d 789, 794 (Mo. App. E.D. 2013) ("[T]o succeed on a claim for ineffective assistance of counsel for failing to investigate, the movant must specifically allege and prove what the information was that counsel failed to discover, whether a reasonable investigation would have revealed the evidence, and how the information would have helped the movant."). For example, Offender does not claim that counsel failed to review juror questionnaires that demonstrated the potential bias of the venire. (App. Br. 63-65). *See Knese v. State*, 85 S.W.3d 628, 632-33 (Mo. banc 2002) ("At a minimum, counsel should have read the questionnaires, and voir dired to determine whether they could serve as jurors. Failure to do so is ineffective assistance of counsel."). Instead, Offender merely alleges that "[r]easonably competent counsel would have investigated, and reasonable

investigation would have revealed the tainted jury pool, as is evidenced by the answers given in voir dire." (App. Br. 63). Without establishing the method and scope of the investigation counsel should have conducted, that such investigation was reasonable for counsel to have undertaken under the circumstances, or that such an investigation would have revealed the community's general bias against Offender and his family, Offender has failed to allege sufficient facts or prove that trial counsel was ineffective.

Additionally, even if trial counsel should have been aware of some pre-existing bias in the community against Offender and his family, Offender has failed to show that counsel was ineffective for failing to file a motion for change of venue. Even when trial counsel has failed to apply for a change of venue as a matter of right under Rule 51.03, the offender must still prove that he was actually prejudiced by the failure to transfer the case to another county. *See Matthews v. State*, 175 S.W.3d 110, 114-15 (Mo. banc 2005). Offender has failed to establish that he was so prejudiced in this case.

In support of his argument that he was prejudiced, Offender alleges that "because of the failure [to move for a change of venue], [Offender] was tried by a jury pool which believed his entire male family line were child molesters" and cites statements made during voir dire by Jurors No. 3, 10, 25, 52, 56, 66, and 71. (App. Br. 25, 63). But Jurors No. 3, 10, 25, 52, 56, 66, and 71 were all struck for cause and did not serve on the jury that ultimately found that Offender was

a sexually violent predator. (Tr. 167, 214-16, 218-19, 221, 226, 246). Because Offender's claim of prejudice relies solely on the statements of venire members who were struck for cause and did not serve on the jury, Offender has failed to establish that he was prejudiced by trial counsel's alleged failure to file a motion for change of venue. *See Hightower v. State*, 1 S.W.3d 626, 627-30 (Mo. App. S.D. 1999); *Jones v. State*, 824 S.W.2d 441, 442 (Mo. App. E.D. 1991).

Offender's sixth point should be denied.

VII. (Incomplete Transcript)

Offender has failed to establish that he has been deprived of his right to appellate review as a result of the allegedly incomplete transcript because he has failed to show that any of the alleged omissions concerned any of his claims on appeal, thereby prejudicing him.

Offender claims that the transcript contains repeated use of the word "indiscernible' and that the incompleteness of the transcript deprived him of his right to appellate review. But Offender has failed to establish that the incompleteness of the transcript affected any of his claims on appeal.

A. The record regarding this claim.

Before voir dire, the trial court stated, "since we do not have a court reporter, you will note that we have a podium here with the microphone." (Tr. 34). The State's attorney noted, "I wish I had known that there was no live court reporter," and the trial court concurred, "Would have been nice." (Tr. 35). The trial court further noted, "Since we have no funds available and they cannot tax those as costs to my position." (Tr. 36). Offender's counsel then apparently tested the range of the recording microphone. (Tr. 36).

B. Standard of review.

"An appealing party is entitled to a full and complete transcript for the appellate court's review." *State v. Middleton*, 995 S.W.2d 443, 466 (Mo. banc 1999). "However, a record that is incomplete or inaccurate does not automatically warrant a reversal." *Id*. "[The defendant] is entitled to relief on this point only if he exercised due diligence to correct the deficiency in the record *and* he was prejudiced by the incompleteness of the record." *Id*.

C. Offender has failed to establish that any alleged omissions in the transcript prejudiced his appeal.

Even assuming *arguendo* that Offender has exercised due diligence to correct the deficiencies in the record, Offender has failed to establish that any of the omissions in the transcript prejudiced his appeal. Of the specific indiscernible sidebars cited by Offender, there is nothing to indicate that those occurring on page 40 or page 76 were relevant in any way to review of his claims on appeal, nor has Offender explained how they were. (Tr. 40, 76). From the surrounding context, the indiscernible sidebar conference that occurred on page 86 appears to concern the trial court's misunderstanding of defense counsel's question, "Do we want to take the sidebars up," which apparently referred to questioning venire members in private and which occurred later, beginning on page 146. (Tr. 86, 144-46). The indiscernible sidebar conference that occurred on page 89 appears to concern the State's objection to a line of

inquiry not at issue on appeal. (Tr. 89). Offender also cites a statement made by the State's attorney to the trial court during a sidebar conference on pages 97 and 98, which also concerned the State's objection to a line of inquiry not at issue on appeal and which was overruled by the trial court. (Tr. 97-98). Finally, the indiscernible sidebar conference that occurred on page 515 appears from the context to concern whether to adjourn for the evening, having concluded the presentation of evidence. (Tr. 514-15). Offender has therefore failed to show that any omissions in the record prejudiced his appeal. *See State v. Koenig*, 115 S.W.3d 408, 416 (Mo. App. S.D. 2003).

Offender's final point should be denied.

CONCLUSION

This Court should affirm the trial court's judgment committing Offender to the Department of Mental Health as a sexually violent predator.

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 14,303 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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