In the Missouri Court of Appeals
Eastern District

DIVISION FOUR

STATE OF MISSOURI,	)	
	)	No. ED112791
Respondent,	)	
	)	
v.	)	
	)	
JEFFREY LEMATTY,	)	
	)	Filed: January 13, 2026
Appellant.	)	

Appeal from the Circuit Court of Montgomery County
The Honorable Jason Lamb, Judge

Introduction

Jeffrey Lematty (Defendant) appeals the judgment entered upon his conviction of rape in the first degree and burglary in the second degree. He argues the trial court committed instructional error, improperly allowed certain evidence, and improperly determined his expert witnesses was unqualified to testify about sexual assault exams, all of which affected the outcome of his trial. Defendant also contests the sufficiency of the evidence to convict him of burglary. Because we find plain error in the verdict directing instruction for second-degree burglary, we reverse Defendant's conviction for that offense. In all other respects, we affirm.

Factual and Procedural Background

The State charged Defendant with first-degree rape and second-degree burglary for incidents occurring on or about June 5, 2021. The evidence, in the light most favorable to the jury's verdicts of guilty on both counts, was the following.

Defendant and P.N. (Victim) were co-workers. Victim did not know Defendant well and had only worked one shift with him before the underlying events of this case took place. On the evening of June 4, 2021, Victim had plans to meet some friends at a bar after work. Defendant asked if he could go along, and Victim said yes. Before she left work, Victim added Defendant as a friend on Snapchat, a social media app. Victim met her friends, D.O. and M.P., along with M.P.'s boyfriend (Boyfriend), at the bar around 10 or 11 p.m. Defendant arrived at the bar about an hour after Victim arrived.

During the evening, Victim was drinking, and Defendant bought Victim several drinks. D.O. and M.P. both noticed Victim was becoming intoxicated, and M.P. asked the bartender to stop serving Victim. After they had been there a few hours, M.P. went to the bathroom, and when she came out, Victim and Defendant were gone. Victim's friends were concerned for her, so they decided to go to her apartment, which was just down the street from the bar, to check on her. They drove to Victim's apartment, and Boyfriend waited in the car while D.O. and M.P. went to the door.

While standing outside Victim's apartment, D.O. and M.P. saw Defendant through a window, walking around in Victim's apartment, naked from the waist down. They banged on Victim's apartment door, and Defendant held the door closed to prevent them from entering. D.O. and M.P. began screaming for Boyfriend, and when Boyfriend appeared,

Defendant let them inside. Defendant said, "I'm not doing anything, just sleeping on the couch."

D.O. went to Victim's room, and saw Victim coming out of her closet with no pants on. She was trying to put shorts on, but she had both legs through one of the leg holes. Victim passed out and fell into D.O.'s arms. D.O. and M.P. carried Victim to Boyfriend's car, and they drove her to her mother's house, which was a few minutes away. M.P. was concerned because she knew Victim could have seizures.

Victim was unconscious during the drive to her mother's house, and when they got there, they called an ambulance. A paramedic administered a hard sternum rub, intended to elicit a painful response, but Victim did not respond. Victim vomited while being carried to the ambulance, but she did not open her eyes or say anything, and she did not respond when paramedics inserted an IV in the ambulance.

Victim arrived at the hospital after 2:15 a.m. She was in critical condition and had to be intubated to assist her with breathing. Victim's mother informed a nurse of a possible sexual assault, and the nurse administered a sexual assault kit. The results did not show any injuries or the presence of any semen, which the nurse testified is not uncommon, even in cases of sexual assault. Victim's blood alcohol content was .218 at 2:20 a.m., at the hospital. A toxicologist testified that Victim's blood alcohol content at 1 a.m. would have been .238, and she would not have been capable of giving or denying consent at that time.

Victim's sister (Sister) was present at the hospital with Victim. While waiting with Victim, who was unconscious, Sister noticed that Victim's phone was receiving messages from Snapchat. Sister opened Victim's phone, which was unlocked, and looked at the

messages. Because Snapchat messages usually disappear after being opened, Sister took pictures of the messages with her own cell phone. The messages came in between 3:30 and 4 a.m., from a person who identified himself as "Dallas" and "from work." Victim and her friends all testified that Defendant went by the name, "Dallas." One of the messages read, "Your [*sic*] on the pill right? I came in you twice. I can buy you the morning after pill if you aren't. I had a lot of fun hope you did too. You seemed like you had fun." Victim's Snapchat account was set to "friends only," meaning she could only receive messages from people she had added as friends.

While Victim was at the hospital, a police officer (Officer) returned to Victim's apartment with her friends. Officer took several photographs but did not collect any evidence at that time. A few hours later, around 5:15 or 5:30 a.m., Officer was patrolling the area and saw lights on in Victim's apartment and someone in the apartment. Shortly thereafter, Officer observed Defendant come around the corner of the building and go toward Defendant's car, which was still parked at the bar down the street. Officer called the police captain (Captain) to assist, and they stopped Defendant at his vehicle and brought him to the police station. They told Defendant they were stopping him because he was in a residence where he should not have been at the time. Officer testified that on the way to the station, Defendant said, "I don't know why [Victim] would say that. We didn't have sex. I guess she just didn't like it." Captain testified Defendant "advised that he had done nothing to [Victim]. He also advised that they had had sex on the night before, and he continued to make utterances of that." Captain also testified that Defendant said Victim had given him permission to be in her apartment.

At the police station, Officer performed a routine pat-down of Defendant and found a knife in Defendant's rear waistband, up against Defendant's back. Officer also found a pair of red underwear in Defendant's pocket, that had been at Victim's apartment the first time Officer was there, and appeared in the initial photographs Officer took. Defendant told Officer that Victim gave the underwear to him. Defendant told police that Victim had invited him to her apartment after they were at the bar, they had sex, and Defendant had gone to sleep on the couch. Defendant testified that Victim was gone when he woke up.

At trial, Victim testified she had noticed a knife missing from her apartment after this incident. She identified both the knife and underwear police found on Defendant as hers, and she testified she did not give Defendant permission to take either of them. She also testified she did not remember leaving the bar or giving Defendant permission to be in her apartment. She testified she did not consider the evening a date with Defendant and she did not give him permission to have sex with her. She could not recall whether they actually had sex. The last thing she remembered from that night was being at the bar, and the next event she remembered was waking up at the hospital.

The jury found Defendant guilty of first-degree rape and second-degree burglary as charged. The trial court sentenced Defendant to concurrent terms of 50 years for rape and 7 years for burglary.

Point One – Instruction 7 Did Not Prejudice Defendant

Regarding Defendant's conviction for first-degree rape, he argues the trial court's Instruction 7, the verdict director for the lesser-included offense of rape in the second degree, erroneously referred in its introductory paragraph to the alternate lesser-included

offense of attempted first-degree rape, rather than to the primary offense of first-degree rape, and thereby failed to test the disputed element of whether Defendant knew Victim was unable to consent, which deprived Defendant of a fair trial. We disagree.

Standard of Review

We review the trial court's decision of whether to give a requested lesser-included instruction *de novo. State v. Jackson*, 433 S.W.3d 390, 395 (Mo. banc 2014). In claims of instructional error, we reverse only if any such error misled the jury and was so prejudicial that it deprived the defendant of a fair trial. *State v. Zetina-Torres*, 482 S.W.3d 801, 810 (Mo. banc 2016) (citing *State v. Nash*, 339 S.W.3d 500, 511-12 (Mo. banc 2011)). "Prejudice occurs when an erroneous instruction may have influenced the jury adversely." *Id.* (citing *State v. Belton*, 153 S.W.3d 307, 310 (Mo. banc 2005)). "However, there is no prejudice if an instruction is an accurate statement of law and supported by the evidence." *Id.* (citing *State v. Avery*, 275 S.W.3d 231, 233 (Mo. banc 2009)).

Analysis

At trial on the charge of first-degree rape, the State requested that the trial court instruct the jury on the lesser-included offense of attempted first-degree rape, and Defendant requested an instruction on the lesser-included offense of second-degree rape. The former tests the element of penetration, and the latter tests the element of Defendant's knowledge on the issue of consent. As relevant here, first-degree rape requires the defendant to know the victim was manifestly unable to consent, whereas second-degree rape requires the defendant to know the victim has not consented.

Missouri courts have used this "testing the elements approach" to determine whether the failure to give a particular lesser-included instruction is prejudicial to the defendant. *State v. Jensen*, 524 S.W.3d 33, 39 (Mo. banc 2017). The question is whether the element in the excluded instruction was nevertheless "tested" by the jury's consideration of other instructions. In *Jensen*, the defendant had been charged with first-degree murder, and the trial court had instructed the jury on second-degree murder and voluntary manslaughter, but had refused an instruction on involuntary manslaughter. *Id.* at 36-37. The differential element between second-degree murder and voluntary manslaughter had to do with the influence of sudden passion arising from adequate cause, whereas the differential element between second-degree murder and involuntary manslaughter was whether the defendant acted knowingly or recklessly. *Id.* at 40. Because there was no instruction that "tested" the latter, allowing the jury to decide between knowingly or recklessly, the trial court's refusal of the involuntary manslaughter instruction was prejudicial. *Id.*

Here, the trial court did provide verdict directors for both requested lesser-included offenses, which distinguishes this case from *Jensen*. Instruction 5 was the verdict director for first-degree rape, followed by Instruction 6 for attempted first-degree rape, and Instruction 7 for second-degree rape. The introductory paragraph of Instruction 7 read as follows:

> As to Count I, if you do not find the defendant guilty of attempted rape in the first degree as submitted in Instruction 6, you must consider whether he is guilty of rape in the second degree.

Defendant's argument is not that the trial court failed to instruct the jury on second-degree rape, but that the introductory paragraph of the instruction misled the jury by implying

second-degree rape was a lesser-included offense of attempted first-degree rape, rather than of first-degree rape. He argues that because Instruction 7 did not refer back to first-degree rape, the jury was not truly able to test the element of Defendant's knowledge regarding Victim's consent—the main issue in this case.

We find no Missouri case addressing such an argument concerning a verdict director's introductory paragraph. Defendant points out MAI 404.02, Notes on Use 3(b):

> For each lesser graded or lesser included verdict directing instruction, the introductory paragraphs will read:
>
> If you do not find the defendant guilty of [*name of offense from immediately higher verdict director*] as submitted in Instruction No. _____, you must consider whether he is guilty of [*name of offense from the lesser verdict director*] under this instruction.

Defendant argues this shows that the instruction for second-degree rape should have referred to first-degree rape in Instruction 5, because that is the primary offense, of which second-degree rape is a lesser included offense. The State responds that attempted first-degree rape is a more serious crime than second-degree rape, and therefore attempted first-degree rape was the "immediately higher" offense and appropriately named in Instruction 7. The State further argues that lesser-included offenses should be listed in descending order, per the Supreme Court of Missouri's opinion in *State v. Hibler*, 5 S.W.3d 147 (Mo. banc 1999). However, *Hibler* prescribed this approach where the case concerned lesser degrees of the same offense—in that case, first-, second-, and third-degree assault—and each subsequent lesser degree was a lesser-included offense of the higher degree. *Id.* at

151. Here, in contrast, second-degree rape is not a lesser-included offense of attempted first-degree rape.[1]

We interpret the MAI Notes on Use to mean that a lesser-included offense should refer to the immediately higher offense *within which the lesser offense is included*.[2] The Note refers to the lesser-included instruction as "*the lesser verdict director*," meaning "lesser graded or lesser included" as specified at the outset of the Note. Because second-degree rape is not a lesser graded or lesser included offense in relation to attempted first-degree rape, Instruction 7 more appropriately should have referred to first-degree rape in Instruction 5. However, the issue here is whether the failure to do so in Instruction 7 so misled the jury that they were unable to test the differential element present in second-degree rape; namely, Defendant's knowledge of Victim's manifest inability to consent due to intoxication compared with Defendant's knowledge that Victim had not consented. We conclude the jury did have an opportunity to test this element.

The trial court read aloud each of the instructions to the jury, making it plain that the jury was to consider all three verdict directors regarding Count I. Defendant speculates that the jury disregarded this instruction and "never reached" Instruction 7 after choosing

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[1] A "nested" lesser-included offense is one that "consists of a subset of the greater offense's elements … [and] is separated from the greater offense by one differential element for which the State bears the burden of proof." *State v. Burkhalter*, 632 S.W.3d 850, 855 n.2 (Mo. App. W.D. 2021) (internal alterations and citations omitted). This is distinct from an "included" offense under Section 556.046, which is instead an alternative offense established by the same facts as the charged offense. *Id.*

[2] Following *Hibler*'s directive, it is most logical, for example, for the third-degree assault verdict director to refer to the second-degree assault instruction, rather than the first-degree assault instruction.

between first-degree rape and attempted first-degree rape due to the introductory paragraph of Instruction 7. This argument is unpersuasive. Trial courts do not instruct juries to take the verdict directors one-by-one and stop when they reach guilty, nor may we presume juries do this; rather, we presume they read and follow all instructions. *Avery*, 275 S.W.3d at 234; *State v. Burnett*, 481 S.W.3d 91, 96 (Mo. App. E.D. 2016). The instructions for any lesser or alternative offenses do not directly admonish the jury to compare the elements or explicitly point out the differential elements. Instead, it is left to the jury to examine the elements in each of the verdict directors and apply them as appropriate to the evidence.

Here, Instruction 7 accurately laid out the elements of second-degree rape, and Instruction 5 accurately laid out the elements of first-degree rape. The differential element of Defendant's knowledge regarding Victim's consent was therefore before the jury and was adequately tested in this case. There was nothing to prevent the jury from convicting Defendant of second-degree rape had they found the evidence better met the elements contained in Instruction 7. *See State v. McIlvoy*, 629 S.W.2d 333, 338-39 (Mo. banc 1982) ("[T]here can be no reversible error in the giving of an instruction on a lesser grade of an offense when the jury has found the defendant guilty of a higher grade of that offense, unless an error exists in the former instruction which prevents the jury from convicting on the lesser grade"). Defendant was not prejudiced by any error in the introductory paragraph of Instruction 7. Point denied.

Point Two – The Trial Court Did Not Err in Admitting Snapchat Messages

Defendant argues the trial court abused its discretion in admitting evidence submitted by the State, consisting of photos of messages that Victim's phone received

through Snapchat, from a person purporting to be "Dallas … from work." Defendant argues such messages lacked foundation because they were not properly authenticated, and their erroneous admission deprived Defendant of a fair trial. We disagree.

Standard of Review

The trial court has broad discretion to admit or exclude evidence, and we review the trial court's decision for an abuse of that discretion. *State v. Lumzy*, 713 S.W.3d 729, 738 (Mo. App. E.D. 2025) (citations omitted). Whether a party has laid a sufficient foundation for the admission of evidence is also within the trial court's discretion. *Id.* A trial court's ruling is an abuse of discretion when it is "clearly against the logic and 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.* In the event we find error, we will reverse only where the error was prejudicial, meaning it "caused outcome-determinative prejudice materially affecting the merits of the action." *Id.*

Analysis

"Authenticating text messages requires that the party seeking admission of this evidence show that the messages were actually written by the person who allegedly sent them." *Id.* (internal quotations omitted). Proof of authenticity must consist of something "beyond mere confirmation that the number belonged to a particular person," but also should not be "unduly burdensome." *Id.* at 739 (quoting *State v. Abdi*, 611 S.W.3d 536, 540 (Mo. App. E.D. 2020); *State v. Francis*, 455 S.W.3d 56, 71 (Mo. App. E.D. 2014)). For example, "[t]he proponent of a text message may present 'an admission by the author [that] he or she wrote the message or by discovering something distinctive about the text

message that can identify the author.'" *Id.* (quoting *State v. Hein*, 553 S.W.3d 893, 897 (Mo. App. E.D. 2018)).

Here, Victim testified that she added Defendant as a friend on Snapchat the same day they met at the bar. She stated her Snapchat profile was set to "friends only," meaning only people who she had added as friends could send her messages. Sister testified that the person sending the messages identified himself as "Dallas … from work." She testified the avatar attached to the profile of the person sending messages was a male character with short blond hair, and that the content of the messages referenced a sexual encounter the night before between Victim and the person sending the messages. These details provide distinctive information indicating Defendant is the person who sent the messages, which constitutes a sufficient foundation for admissibility here.[3] *See id.* So long as there was sufficient evidence to justify the trial court's admission of this evidence as authentic, it was up to the jury to "assess any weaknesses as to the authenticity of the evidence in determining the weight and credibility of the authentication of the text messages."[4] *Id.* (quoting *State v. Samsinak*, 688 S.W.3d 259, 266 (Mo. App. S.D. 2024)).

[3] We note further that defense counsel seemed to concede authenticity in closing argument when he said, "Obviously, there's something wrong. She's not responding to him, for whatever reason. He doesn't know she's in the hospital." The only evidence in the record of Defendant reaching out to Victim and Victim not responding was through these disputed Snapchat messages. Sister testified she opened and took pictures of the messages, but she did not respond.

[4] For example, Defendant argues the messages allege Defendant ejaculated twice inside Victim, yet the sexual assault exam found no semen. The jury was able to take this into account in determining what weight to give these messages or whether they actually came from Defendant.

Moreover, while there was sufficient evidence to justify the trial court's admission of the messages, even were we to find an error in admission here, Defendant cannot show he was prejudiced. The content of the messages was used to establish the element that Defendant had sex with Victim. Two other witnesses testified Defendant admitted as much to the police, and Defendant did not contest this element at trial.[5] *See State v. Matlock*, 717 S.W.3d 277, 287 (Mo. App. E.D. 2025) (complaining party not entitled to assert prejudice if challenged evidence is cumulative); *Hein*, 553 S.W.3d at 899 (finding no prejudice where improperly authenticated letter contained evidence similar to other evidence admitted at trial). Point denied.

Point Three – The Trial Court Did Not Abuse Its Discretion in Excluding Defendant's Expert's Testimony Regarding Sexual Assault Exams

Defendant argues the trial court improperly excluded testimony from Defendant's expert witness (Expert), finding Expert was not qualified as an expert in the area of sexual assault exams. We find the trial court's decision did not amount to an abuse of discretion here, and regardless, Defendant was not prejudiced by the exclusion of Expert's opinion.

Standard of Review

The trial court has broad discretion to admit or exclude evidence at trial, and we will find error only where the trial court has abused that discretion. *State v. Carpenter*, 605 S.W.3d 355, 358-59 (Mo. banc 2020). As stated above, an abuse of discretion occurs only where the court's decision is "clearly against the logic and circumstances then before the

[5] Defendant notes in his brief that trial counsel's theme and repeated argument was "regret, not rape."

court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Lumzy*, 713 S.W.3d at 738. Further, we review the trial court's actions "for prejudice, not mere [evidentiary] error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial." *Carpenter*, 605 S.W.3d 355, 358-59 (quoting *State v. Naylor*, 510 S.W.3d 855, 862 (Mo. banc 2017) (alteration in original)).

Analysis

At trial, Defendant sought to qualify Expert as an expert in both the areas of forensic toxicology and of emergency medicine, specifically as it relates to performing sexual assault exams. Expert testified that he had practiced medicine for 37 years at the time of trial, and he was a professor of emergency medicine and medical toxicology at Washington University in St. Louis. His residency training was in emergency medicine, and he was board-certified as an emergency physician. He further received fellowship training in medical toxicology. Expert testified he had been trained during his emergency medicine residency to perform sexual assault exams. During the first ten years of his career, he had personally performed approximately six sexual assault exams, but he had not performed any since then.[6] In Expert's deposition prior to trial, Expert stated he had not received any recent training or kept up with current literature pertaining to sexual assault exams, specifically whether physical injury would necessarily be present in all cases of sexual

[6] Expert testified both in his deposition and in his offer of proof at trial that his experience performing sexual assault exams took place during the first ten years of his 37-year career. Later in his offer of proof, when asked the most recent time Expert had performed a sexual assault exam, he answered, "Probably not in the last ten years."

assault. When asked whether it was possible that a sexual assault could occur with no physical findings, Expert stated he could not give that blanket statement without getting into the details of the case. He recognized there might be current research on that issue but stated he had not kept up on such literature. The trial court allowed Expert to offer an opinion in the area of forensic toxicology but excluded any opinion testimony regarding sexual assault exams or the results of Victim's exam in this case.

Section 490.065.2 governs the admissibility of expert testimony in a criminal case:

> (1) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact understand the evidence or determine a fact in issue;
>
> (b) The testimony is based on sufficient facts or data;
>
> (c) The testimony is the product of reliable principles and methods; and
>
> (d) The expert has reliably applied the principles and methods to the facts of the case[.]

Simply put, expert testimony that is "relevant, reliable, and proffered by a qualified expert," is admissible. *State v. Aaron*, 665 S.W.3d 401, 406 (Mo. App. E.D. 2023).

Here, Defendant's offer of proof established that Expert had received training in administering sexual assault exams and had performed them himself approximately six times, but decades prior to trial. Defendant sought to introduce Expert's testimony specifically on the issue of whether Expert would expect signs of physical injury from an

involuntary sexual penetration while Victim was unconscious, but Expert admittedly had not read any literature pertaining to research on that issue.

Given the particular circumstances of this case, we cannot say the trial court's decision here amounted to an abuse of discretion. Generally, "[t]he extent of an expert's experience or training in a particular field goes to the weight, not the admissibility, of the testimony." *State v. Minor*, 648 S.W.3d 721, 733 n.6 (Mo. banc 2022). However, the trial court's role as a gatekeeper importantly ensures an expert's opinion is based on sufficient facts or data, the product of reliable principles and methods, and specialized knowledge that will aid the trier of fact. Section 490.065.2; *see also Gephardt v. Am. Honda Motor Co., Inc.*, 627 S.W.3d 37, 44 (Mo. App. W.D. 2021). Here, the most recent sexual assault exam Expert had performed was between 10 and 27 years prior to trial. Expert admitted not being familiar with research related to the specific issue of whether injuries are commonly absent, even in cases of sexual assault, and specifically, nonconsensual intercourse while a victim is unconscious. He did not comment on whether he was trained regarding that particular issue, or whether any of the six exams he had performed at least 10 years prior to trial implicated the issue of whether sexual assault had occurred despite lack of any apparent injury. Expert stated he had testified in one other court case involving a child molestation where there was bruising in the child's genitals, which Expert found indicated sexual assault. Given all of this, it was within the trial court's discretion to conclude that Expert failed to establish the requisite specialized knowledge to testify to the relevant issue here, concerning an unconscious victim, and that Expert's experience and knowledge was outdated to the point of potentially confusing the jury, rather than aiding

the jury. *Cf. Gebhardt*, 627 S.W.3d at 45 (finding no abuse of discretion where trial court found analytical gap between data and expert's opinions; expert failed to explain his methodology or point to studies, tests, publications, or other support for his findings); *Larson v. Downing*, 197 S.W.3d 303, 304-05 (Tex. 2006) (trial court did not abuse discretion in excluding testimony of surgeon who had not performed relevant procedure in over 11 years and had never taught procedure). Thus, we cannot say here the trial court abused its discretion in excluding it. *See State v. Michael*, 234 S.W.3d 542, 547 (Mo. App. E.D. 2007) (where reasonable minds can disagree about trial court's ruling, trial court has not abused its discretion).

Moreover, based on the Expert's offer of proof at trial, we cannot conclude that this exclusion prejudiced Defendant. "The purpose of an offer of proof is to insure that the trial court and opposing counsel understand what evidence is being offered and its relevance to the case." *State v. Townsend*, 737 S.W.2d 191, 192 (Mo. banc 1987). The preferable method of submitting an offer of proof is for the witness to testify in front of the court outside the hearing of the jury, though other methods are acceptable. *Id.*

Defendant argues, based on Expert's pretrial deposition, that Expert would have testified that based on his experience and training, if sexual intercourse was involuntary, he would have expected to see physical signs indicating as much during Victim's exam. Defendant argues Expert's deposition testimony was the only evidence to contest the State's evidence that a lack of physical signs of involuntary intercourse is common in sexual assault exams, even in cases of rape. However, the following colloquy took place at trial, during defense counsel's examination of Expert for Defendant's offer of proof:

> Q: … Is it a common thing to have a sexual assault examination be conducted and not to find abusive trauma?
>
> A: Yes, sir.
>
> Q: And the fact that you don't have abusive trauma doesn't necessarily mean that there wasn't a sexual assault?
>
> A: That's correct.

From this offer of proof, it is difficult to see what Expert's testimony would have added to the defense on this issue of physical findings of involuntary sex. The offer of proof did not provide any evidence to contradict the testimony of the nurse who performed Victim's sexual assault exam and the State's expert in this area, who both testified that it is common to find no physical signs of injury even in cases of sexual assault. The court may "assume that the party making the offer of proof has stated it as fully and favorably as he can." *Id.* Thus, we cannot conclude from this offer of proof that Defendant was prejudiced by the trial court's exclusion of this testimony, even if it had been erroneously excluded. Point denied.

Point Four – The Trial Court Did Not Err in Admitting Evidence of Defendant's Failure to Appear at an Earlier Trial Setting

Defendant argues the trial court abused its discretion in admitting evidence of Defendant's failure to appear at the initial setting for trial because Defendant missed his trial setting due to a mental health episode, rather than to avoid prosecution. Defendant argues, therefore, that the evidence was more prejudicial than probative, constituted evidence of an uncharged bad act, and prejudiced him. We disagree.

Standard of Review

As stated above, we review the trial court's admission of evidence for an abuse of discretion, reversing only where an error in admission prejudiced Defendant. *See Lumzy*, 713 S.W.3d at 738.

Analysis

Prior to trial, Defendant filed a motion *in limine* seeking to exclude evidence that he had failed to appear at the initial trial setting in this case. The motion explained that after an arrest warrant issued, police located Defendant at his home. Defendant was experiencing a mental health episode and was holding a gun to his head, threatening to take his own life. Police were able to disarm Defendant and transport him to the hospital. Defendant sought to exclude records of his failure to appear, as well as records of the circumstances of his arrest and subsequent hospitalization. The trial court denied the motion and overruled Defendant's renewed objection at trial.

At trial, the State presented evidence in the form of the docket sheet in the case, showing that Defendant's trial was initially set for April 15, 2024. The docket sheet also showed that Defendant failed to appear, and that a warrant issued for his arrest. Defendant did not present any evidence regarding the circumstances on April 15, 2024. During closing, the State argued that Defendant's failure to appear for trial was evidence of his consciousness of guilt, and told the jury, "you are allowed to consider whether those are actions of an innocent person." Defense counsel argued during closing that people deal with stress differently, and one way is by hiding. He noted the seriousness of the charges against Defendant and said, "I submit to you that Defendant was scared when he didn't show up last time."

Evidence of a defendant's arrest for failure to appear is admissible evidence of flight to show consciousness of guilt. *See State v. Bowles*, 23 S.W.3d 775, 782 (Mo. App. W.D. 2000) (flight from pretrial matters); *State v. Chapman*, 876 S.W.2d 15, 18 (Mo. App. E.D. 1994) (evidence of flight may include escape from jail or failure to appear which occurs subsequent to defendant's initial arrest); *State v. Cotton*, 621 S.W.2d 296, 300 (Mo. App. E.D. 1981) (failure to appear at trial). "Defendant's explanation for the flight goes only to the weight of the evidence and not its admissibility." *Chapman*, 876 S.W.2d at 18; *see also Cotton*, 621 S.W.2d at 300 (rejecting defendant's arguments that evidence of failure to appear amounted to evidence of uncharged crime and improper comment on defendant's failure to testify). The trial court did not abuse its discretion in admitting evidence that Defendant failed to appear for his previous trial setting. Point denied.

Points Five and Six – Defendant's Conviction of Second-Degree Burglary is Reversed Due to Plain Error in Instruction 8

Points Five and Six assert separate bases for reversal of Defendant's conviction of second-degree burglary. In Point Five, Defendant challenges the sufficiency of the evidence to support his conviction, and in Point Six, Defendant argues the verdict director for second-degree burglary misstated the law, amounting to plain error. Because we find reversal is warranted due to such instructional error in Point Six, we need not consider whether the evidence was sufficient to convict Defendant in Point Five. Thus, we deny Point Five as moot.

In Point Six, Defendant argues the trial court plainly erred in giving Instruction 8, the verdict director for second-degree burglary, which stated that if the jury found and

believed from the evidence beyond a reasonable doubt that Defendant "knowingly entered or remained unlawfully" in Victim's residence for the purpose of committing stealing therein, they would find Defendant guilty of burglary in the second degree. Defendant argued this instruction misstated the law and permitted the jury to convict Defendant of burglary only if he "knowingly entered" Victim's apartment, rather than if he knowingly entered the apartment *unlawfully*. We agree.

Standard of Review

Defendant concedes his claim of instructional error was not preserved, but he asks us to exercise our discretion to review it for plain error. Plain error review involves a two-step process:

> The first step requires a determination of whether the claim of error facially establishes substantial grounds for believing that manifest injustice or miscarriage of justice has resulted. All prejudicial error, however, is not plain error, and plain errors are those which are evident, obvious, and clear. If plain error is found, the court then must proceed to the second step and determine whether the claimed error resulted in manifest injustice or a miscarriage of justice.

Minor, 648 S.W.3d at 731 (quoting *Grado v. State*, 559 S.W.3d 888, 899-900 (Mo. banc 2018) (quoting *State v. Baumruk*, 280 S.W.3d 600, 607-08 (Mo. banc 2009)).

Analysis

The second-degree burglary statute, Section 569.070.1, provides the following:

> A person commits the offense of burglary in the second degree when he or she knowingly:
>
> (1) Enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein.

In relevant part, the applicable Missouri Approved Instruction (MAI) for second-degree burglary, MAI 423.54, provides the following template:

> First, that (on) (on or about) [date], in the State of Missouri, the defendant knowingly (entered) (remained) unlawfully (in) (a building) (an inhabitable structure) located at [*Briefly describe the location.*] and (owned) (possessed) by [*name of owner or possessor*]

When drafting an instruction using a pattern instruction, the drafter chooses the appropriate language in parentheses to fit the facts of the case. *See* MAI-CR 4th, "Format of Instructions and Verdict Forms" ("In the instructions, parentheses enclose words or phrases that will be either omitted or included, depending upon the facts of the case being submitted"). In this pattern instruction, "entered" and "remained" are in parentheses because either can constitute this element of second-degree burglary under Section 569.070.1. Neither the guidance at the beginning of MAI-CR 4th nor the Notes on Use for this particular instruction specify what to do if a drafter desires to include both terms listed in the pattern instruction.

Here, the State chose to include both "entered" and "remained," simply adding "or" in between them, for the wording of Instruction 8:

> First, that on or about June 5, 2021, in the State of Missouri, the defendant knowingly entered or remained unlawfully in an inhabitable structure located at [Victim's address], and possessed by [Victim]

The State argues that both "knowingly" and "unlawfully" modify both "entered or remained" in this instruction, but Defendant argues this sentence structure created two alternative bases for conviction: "knowingly entered," or "remained unlawfully," relieving

the State of its burden of proof to show by the evidence that Defendant's act was both knowing and unlawful. Reading the instruction on its face, both interpretations are possible.

Section 569.070.1, by repeating both "knowingly" and "unlawfully," makes clear the proper interpretation, and exposes Instruction 8's conflict with substantive law. *See State v. Carson*, 941 S.W.2d 518, 520 (Mo. banc 1997) ("MAI-CR and its Notes on Use are 'not binding' to the extent they conflict with the substantive law"). The State's instruction did not technically deviate from the MAI here because the MAI does not specify how to include both alternatives.[7] However, the fact that an ambiguity exists allowing the jury to convict Defendant simply for knowingly entering Victim's apartment, without the modifier "unlawfully," potentially excused the State from its burden of proof on a contested issue. *See State v. Mangum*, 390 S.W.3d 853, 861(Mo. App. E.D. 2013) (appellate court more likely to find plain error "where the instruction did not merely allow a wrong word or some other ambiguity to exist, but excused the State from its burden of proof on a contested element of the crime").

Further, the evidence here would have permitted such a result. The State charged Defendant with entering or remaining in Victim's apartment for the purpose of committing stealing. The bulk of the evidence and argument focused on Defendant's return to Victim's apartment after she had gone to the hospital, coupled with items found in Defendant's possession that went missing between when Officer initially took pictures at Victim's

[7] While including both alternatives is not prohibited by the MAI, we do not consider the unraised issue of whether such disjunctive submission, if properly mirroring the statutory language, would have implicated unanimity concerns here. *See* MAI-CR 404.02, Notes on Use 7.

apartment and when police returned to take additional pictures after Defendant's arrest. However, Defendant's statement to the police was that he had permission to enter with Victim and he never left.[8] Depending which version of events the jury believed, they could have found Defendant was in Victim's apartment lawfully and also that Defendant stole Victim's items. Under Instruction 8 as written, these conclusions would impermissibly permit the jury to find Defendant guilty of second-degree burglary. Thus, we find the trial court plainly erred in giving Instruction 8. *See State v. Cooper*, 215 S.W.3d 123, 127 (Mo. banc 2007) (finding plain error where burglary instruction omitted "unlawfully" after "knowingly entered"); *State v. Harney*, 51 S.W.3d 519, 535 (Mo. App. W.D. 2001) (plain error where verdict director essentially omitted essential element of offense and evidence failed to establish omitted element beyond serious dispute). Point Six is granted.

Conclusion

Because we find the trial court's Instruction 8 constituted plain error, we reverse Defendant's conviction for second-degree burglary and remand to the trial court for further proceedings. In all other respects, we affirm.



GARY M. GAERTNER, JR., JUDGE

Rebeca Navarro-McKelvey, P.J., and James M. Dowd, J., concur.

[8] The State notes that this statement of Defendant prompted the State to include "remained" in the charge and the verdict director.