Missouri Court of Appeals
Southern District

In Division

STATE OF MISSOURI,

Respondent,

v.

KENNETH LEE CANDAY,

Appellant.

No. SD38867

Filed: January 29, 2026

APPEAL FROM THE CIRCUIT COURT OF PEMISCOT COUNTY

Honorable Joshua D. Underwood, Judge

AFFIRMED

A jury found Kenneth Canday guilty of first-degree robbery, two counts of first-degree kidnapping, two counts of second-degree assault, third-degree assault, resisting arrest, unlawful use of a weapon, and five counts of armed criminal action. He raises four points on appeal. We affirm because Canday has not made a facial showing of clear and obvious instructional error, and his other points are fatally multifarious such that they cannot be considered on the merits.

Background

The victim ("Victim") in this case was lured to his friend's house, where he was directed to sit in a chair. Canday, who was holding a knife, entered the room with another man ("Co-Defendant"). Victim was punched, choked, cut with a knife, and burned. While Victim was being assaulted, his phone was taken from him so he could not call for help. After threating to kill Victim and his son if he went to the police, Canday and Co-Defendant let Victim leave.

Police went to a different house to arrest Canday the next day. He barricaded himself in the house and refused to let anyone enter or leave. After a seven-hour standoff, a police tactical team entered the house and arrested Canday. Victim's phone was found in that house.

Points I and III (Instructional Plain Error Claims)

Canday's first claim of error is that the verdict director for first-degree robbery was based on the pattern language in MAI-CR 4th § 424.00 contrary to its Note on Use 2, which requires the verdict director to be based on MAI-CR 4th § 404.00.[1] His third point relied on asserts that the third-degree assault verdict director did not include the accomplice liability introductory paragraph beginning, "A person is responsible …," as required by MAI-CR 4th § 404.04 Note on Use 3.

[1] MAI-CR 4th references are to Missouri Approved Instructions – Criminal, Fourth Edition (effective July 1, 2024).

To preserve a claim of instructional error, a party must state a distinct objection and the grounds for the objection before the jury retires to consider its verdict, and that objection also must be raised in a motion for new trial. Rule 28.03.[2] The verdict directors now at issue were read to and given to the jury without objection by the defense. Canday concedes his first and third points relied on were not preserved for appellate review. He requests plain error review under Rule 30.20.

Plain error review is discretionary and to be used sparingly. ***State v. Jones***, No. SC101104, 2025 WL 3758789, at *4 (Mo. banc Dec. 29, 2025). "The plain language of Rule 30.20 demonstrates not every allegation of plain error is entitled to appellate review." ***Id.*** at *3. The appellant bears the burden of establishing a "plain error affecting substantial rights" and a "manifest injustice or miscarriage of justice" as used in Rule 30.20. ***Id.*** at *4. A request for plain error review may be resolved in one of five ways:

1. Declining plain error review when an appellant fails to facially establish substantial grounds that the circuit court committed plain error, *i.e.*, evident, obvious, and clear error;

2. Declining plain error review when an appellant fails to facially establish substantial grounds that the circuit court committed an error affecting substantial rights;

3. Declining plain error review when an appellant fails to facially establish substantial grounds that any alleged error the circuit court committed resulted in manifest injustice or miscarriage of justice;

4. Declining to exercise its discretionary authority to review for plain error; or

[2] Rule references are to Missouri Court Rules (2024).

5. Determining an appellant facially established substantial grounds that the circuit court committed plain error affecting substantial rights resulting in manifest injustice or miscarriage of justice, warranting exercise of the appellate court's discretion to review and grant relief.

Id. at *5.

"Instructional error seldom constitutes plain error." ***State v. Hayes***, 678 S.W.3d 111, 113 (Mo.App. S.D. 2023) (quoting ***State v. Jones***, 619 S.W.3d 138, 146 (Mo.App. E.D. 2021)). "Even if the instructional error is evident, obvious, and clear, the defendant must demonstrate that the trial court so misdirected or failed to instruct the jury as to cause manifest injustice or a miscarriage of justice." ***State v. Brandolese***, 601 S.W.3d 519, 531 (Mo. banc 2020) (citation modified). Manifest injustice or miscarriage of justice occurs when it is apparent the error affected or tainted the verdict. ***State v. McKeown***, 699 S.W.3d 533, 536 (Mo.App. S.D. 2024).

Canday has not facially established that the trial court committed evident, obvious, and clear error in basing its first-degree robbery verdict director on the pattern language in MAI-CR 4th § 424.00, which contains the required language for a standard first-degree robbery charge. Canday's argument is premised on the mistaken assumption that he could *only* be liable for the robbery as an accomplice. The robbery was charged, argued to the jury by the State, and submitted to the jury on the theory that Canday forcibly obtained and kept Victim's phone while displaying a knife. We do not reach Canday's manifest injustice argument because he has failed to show any trial court error.[3]

[3] The State notes that defense counsel may have had a strategic reason not to object to the lack of accomplice liability language in the first-degree robbery verdict director. Counsel's closing argument highlighted testimony that tended to show it was

Canday also has not facially established that the trial court evidently, obviously, and clearly erred when it did not include the "A person is responsible …" introductory paragraph in the third-degree assault verdict director. That introductory paragraph must be "included in all verdict directing instructions *based on MAI-CR 4th 404.04*" unless it is given as a separate instruction. MAI-CR 4th 404.04 Note on Use 3 (emphasis added). The third-degree assault verdict director in this case was based on MAI-CR 4th § 419.14, *not* § 404.04. The offense was charged and submitted to the jury on the theory that Canday caused physical injury to Victim by choking him. Because the case was submitted to the jury based on the standard third-degree assault pattern language in MAI-CR 4th § 419.14, the "A person is responsible …" introductory paragraph in MAI-CR 4th § 404.04 was not applicable.[4] We decline plain error review of Points I and III.

Points II and IV

Canday's second and fourth points are both multifarious in that they each combine multiple claims of error in one point. ***State v. Blacksure***, 690 S.W.3d 629, 634 (Mo.App.

Co-Defendant, not Canday, who took the phone from Victim, which would, if believed, support acquittal on a principal-only theory of liability.

[4] Applicability of this paragraph to the verdict director actually given is separate from another instructional issue not raised as a point relied on in this appeal: whether the third-degree assault verdict director *should* have been based on MAI-CR 4th § 404.04 rather than § 419.14. Because some evidence tended to show that it was Co-Defendant, not Canday, who choked Victim, the defense could have insisted on, or the court *sua sponte* could have given, a third-degree assault verdict director based on MAI-CR 4th § 404.04. *See* MAI-CR 4th § 404.04 Note on Use 4. As with the robbery charge, defense counsel may have had strategic reasons to prefer the language in the typical third-degree assault verdict director to a verdict director modified to include liability as a principal or as an accessory.

S.D. 2024). Multifarious claims of error violate Rule 84.04, which is made applicable to briefs in criminal appeals by Rule 30.06(c). ***Id.*** at 634. They generally preserve nothing for review and are subject to dismissal. ***Id.*** We prefer to resolve points on the merits, and we have discretion to review multifarious points on the merits when we can readily discern and separate independent claims of error in a point relied on. ***State v. Hernandez***, 659 S.W.3d 614, 619-20 (Mo.App. W.D. 2022). We cannot do so in this case.

The common thread in Canday's second and fourth points appears to be a complaint about principal/accomplice liability, which he frames as an issue with the sufficiency of the evidence and the wording of the first-degree robbery and third-degree assault verdict directors. The sufficiency of the evidence to support a conviction and the sufficiency of the evidence to support the *giving* of a verdict director involve the same test–did the State make a submissible case? However, these challenges are separate and distinct from a challenge to the *form* or *wording* of a verdict director that was given. ***State v. Baum***, 711 S.W.3d 498, 502, 506-07 (Mo.App. W.D. 2025).

A claim of evidentiary insufficiency tests whether there was sufficient evidence from which the trier of fact reasonably could have found the defendant guilty. ***State v. Claycomb***, 470 S.W.3d 358, 362 (Mo. banc 2015), *as modified* (Aug. 4, 2015). "The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ***State v. Winter***, 719 S.W.3d 738, 746 (Mo. banc 2025) (citation modified). Courts review these claims by comparing the evidence to the elements of the charged offense as set forth in the statute creating that offense. ***Id.*** at

745-46. The comparison is *not* between the evidence and the verdict director. ***Baum***, 711 S.W.3d at 505 n.8. Even if there is a variance between the charge and the verdict director, it does not affect a sufficiency-of-the evidence analysis. ***Id.*** An evidentiary insufficiency claim need not be raised below; it may be raised and reviewed for the first time on appeal. ***Claycomb***, 470 S.W.3d at 361-62.

An evidentiary insufficiency claim is different than a variance claim. "A variance occurs when the conduct described in the charging instrument differs from the conduct described in the jury instructions." ***State v. Fisher***, 705 S.W.3d 664, 683 (Mo.App. W.D. 2024) (quoting ***State v. Cruz-Basurto***, 581 S.W.3d 51, 56 (Mo.App. W.D. 2019)). Courts review variance claims by comparing the charging document with the verdict director, determining whether a material variance occurred, and if so, whether it was prejudicial. *See, e.g.*, ***State v. Myers***, 720 S.W.3d 11, 18-21 (Mo.App. W.D. 2025); ***State v. Borst***, 643 S.W.3d 586, 592 (Mo.App. W.D. 2022); ***State v. Ganaway***, 624 S.W.3d 361, 367 (Mo.App. E.D. 2021). "Variances are material when they affect whether the accused received adequate notice; variances are prejudicial when they affect the defendant's ability to defend against the charges." ***Myers***, 720 S.W.3d at 17 (quoting ***State v. Glass***, 136 S.W.3d 496, 520 (Mo. banc 2004), *as modified on denial of reh'g* (July 1, 2004)). "A variance is not fatal, and will not require reversal, unless it submits a new and distinct offense from that with which defendant was charged." ***Id.*** (quoting ***Glass***, 136 S.W.3d at 520).

Because variance claims are claims of instructional error, ***Ganaway***, 624 S.W.3d at 367, they are subject to the Rule 28.03 preservation requirements as discussed in our

resolution of Points I and III. Unpreserved variance claims may be reviewed only under the plain error standard. ***State v. King***, 674 S.W.3d 218, 228 (Mo.App. W.D. 2023).

Canday's second and fourth points relied on so commingle and obfuscate these separate concepts and claims such that appellate review is not possible.

> It is not proper for the appellate court to speculate as to the point being raised by the appellant and the supporting legal justification and circumstances. To do so would cast the court in the role of an advocate for the appellant, which we cannot be. Instead, our role is to review specifically challenged trial court rulings, not to sift through the record to detect possibly valid arguments.

Baum, 711 S.W.3d at 506 (citation modified). For this reason, we must dismiss Points II and IV.

Conclusion

We decline plain error review of Points I and III because Canday has not facially established substantial grounds that the trial court committed plain error, *i.e.*, evident, obvious, and clear error. ***Jones***, 2025 WL 3758789, at *5. Points II and IV are fatally multifarious and preserved nothing for review. ***Blacksure***, 690 S.W.3d at 634. We affirm the judgment and convictions.

JACK A. L. GOODMAN, J. – OPINION AUTHOR

JENNIFER R. GROWCOCK, C.J. – CONCURS

BRYAN E. NICKELL, J. – CONCURS