No. SC95816

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

TORRIS CASTON,

Appellant.

Appeal from the Circuit Court of St. Louis City
Twenty-Second Judicial Circuit
The Honorable John Francis Garvey, Jr., Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Defendant appeals his convictions, after a jury trial, of one count of second-degree statutory rape and two counts of second-degree statutory sodomy.

Defendant seeks reversal of his convictions on six grounds: that the trial court erred in submitting Instruction Nos. 5 and 12 to the jury, because the instructions violated Defendant's right to a unanimous verdict; that the State committed a *Brady* violation by failing to disclose a photograph of Defendant in dance pants; that there was insufficient evidence to convict Defendant of second-degree statutory rape; that the trial court violated its duty to maintain an appearance of neutrality; that the trial court erred by excluding evidence of Victim's mental health; and that the trial court erred by excluding testimony about Defendant's police interview. (Def.'s Br. 19-24).

Count I of the indictment charged Defendant with second-degree statutory rape in that, "on or about February 4, 2005 to October 17, 2005, in the City of St. Louis, State of Missouri, the defendant had sexual intercourse with [Victim] and at that time [Victim] was less than seventeen years old and the defendant was twenty-one years of age or older." (L.F. 20).

Counts II and III charged Defendant with second-degree statutory sodomy in that, "on or about May 1, 2004 to October 17, 2005, in the City of St. Louis, State of Missouri, the defendant had deviate sexual intercourse"

with Victim, when Victim was younger than 17 and Defendant was older than 21. (L.F. 20-21). The deviate sexual intercourse charged in Count II was Defendant putting his mouth on Victim's genitals. (L.F. 20). The deviate sexual intercourse charged in Count III was Defendant putting his penis in Victim's mouth. (L.F. 21).

Viewed in the light most favorable to the verdicts, the evidence at trial showed the following. Victim was born on October 18, 1988. (Tr. 285). Defendant was born on October 27, 1946. (Tr. 607). Victim met Defendant when Victim was in sixth grade. (Tr. 287). Defendant was the dance teacher at Victim's school. (Tr. 288). Students had the option of taking dance or gym, and Defendant tried to convince Victim to take dance. (Tr. 288). Victim began taking dance classes from Defendant when she was in seventh grade. (Tr. 288, 290). Victim looked up to Defendant, talked to him about things going on in her life, and considered him to be a mentor. (Tr. 290).

Defendant and his wife opened a private dance studio in fall of 2001, in Webster Groves, Missouri. (Tr. 552, 565). Defendant told Victim that when she graduated from middle school in 2003, she could come take dance classes at his studio. (Tr. 290). Victim's mother said no because they could not afford it and Victim was in too many other activities. (Tr. 290). Defendant and Victim worked out an arrangement, wherein Victim could take classes for free in exchange for Victim helping "with things around the studio." (Tr. 290-

91).

Victim started taking dance classes at Defendant's studio in summer of 2003. (Tr. 292-93). Victim met Defendant's wife at the studio; Defendant's wife also taught dance there. (Tr. 294). Victim developed a close relationship with Defendant and his wife. (Tr. 303). Defendant's wife became "like a big sister"[1] to Victim. (Tr. 303). Victim went over to Defendant's house, and she watched TV and worked on costumes with Defendant's wife. (Tr. 303-04). Defendant's house was in St. Louis City. (Tr. 607).

Defendant gave Victim rides home from dance class. (Tr. 293). When he took her home, he "gradually started putting his hand on [Victim's] knee," and this "led up to kissing [Victim] in the car before [she] would get out." (Tr. 305). When they would kiss, there was "tongue involved." (Tr. 308). Defendant called Victim on the phone at night, and he told Victim that he loved her. (Tr. 307-08, 312). Defendant told Victim to tell people that she had a boyfriend. (Tr. 308).

In the spring or summer of 2004, when Victim was 15, she spent the night at Defendant's house. (Tr. 313-14). Victim was getting dressed in the guest room after taking a shower when Defendant came in. (Tr. 316). Defendant performed oral sex on Victim, and Victim performed oral sex on Defendant. (Tr. 316, 318, 396). Victim did not believe that any other sexual

[1] Defendant's wife was born in 1977. (Tr. 710).

contact occurred in 2004, but the kissing continued. (Tr. 321-22).

In February of 2005, Defendant's dance studio put on a show called Hearts and Flowers. (Tr. 326). Victim had a role in the show. (Tr. 328). After one of the show rehearsals, Defendant and Victim had sexual intercourse at the studio. (Tr. 329-32). That was the first time Defendant and Victim had sexual intercourse. (Tr. 433). Defendant and Victim had sexual intercourse in the studio one other time after that. (Tr. 333-34).

Defendant and Victim also had sexual intercourse at Defendant's house. (Tr. 336). Victim could not "put a number on how many times" they had sexual intercourse at Defendant's house; there were "[s]o many." (Tr. 336). When asked if they had sex "daytime, nighttime [or] what time of day," Victim answered, "[a]ll different times." (Tr. 336). They had sexual intercourse in the "living room, the office, [Defendant's] bedroom, and the guest bedroom." (Tr. 337). Every time they had intercourse in the living room, Defendant used a condom. (Tr. 337). They had intercourse in the office more than one time, and Defendant always used condoms. (Tr. 338).

By August of 2005, Defendant "end[ed] up going into the hospital." (Tr. 340). Around that time, Victim "stopped going" to the dance studio because she "felt like it was an easy time to escape." (Tr. 341).

In September of 2005, Victim got a job at Pier 1. (Tr. 342-43, 402). Defendant came into Pier 1 to buy a piece of furniture for the studio's

Nutcracker performance. (Tr. 343). The day that Defendant went to Pier 1, Victim went over to his house after she left work. (Tr. 343-44). Victim spent the night at Defendant's house, and they had sexual intercourse. (Tr. 344). Victim was 17 by that point in time; she had turned 17 in October of 2005. (Tr. 345; *see* Tr. 285). After they had intercourse that time, Victim did not "remember anything more ever physically happening with the defendant." (Tr. 345).

Victim started college in the fall of 2006. (Tr. 345). While Victim was at college, she saw a counselor. (Tr. 348). Victim talked with the counselor about "what happened with" Defendant. (Tr. 348). Victim's focus was to "get over everything" and "be able to move on." (Tr. 350). Victim eventually decided to report what had happened to the police. (Tr. 350). "One of the main things" that led her to report "was driving past the studio and seeing him teaching other classes and realizing that maybe it could happen to other people and that [she] didn't want that to happen." (Tr. 350). In summer of 2010, Victim reported to the police what had happened. (Tr. 352).

* * *

At the conclusion of the trial, the jury found Defendant guilty of all three charges. (L.F. 321-23). Defendant was sentenced to serve a total of ten years in the Missouri Department of Corrections. (Tr. 845).

ARGUMENT

I.

The trial court did not abuse its discretion in submitting Instruction Nos. 5 and 12 to the jury, nor did Defendant suffer prejudice from the claimed instructional error.

A. Preservation and standard of review.

During trial, defense counsel objected to Instruction Nos. 5 and 12 "pursuant to the Celis Garcia case." (Tr. 788-89). Defendant raised this claim of error in his motion for new trial. (L.F. 355-56).

Because this claim of error was preserved, the standard of review is abuse of discretion. *See State v. Watson*, 407 S.W.3d 180, 184 (Mo. App. E.D. 2013) (reviewing the defendant's preserved claim of error—that the jury instructions violated his right to a unanimous verdict—for abuse of discretion). A court should not give an instruction that conflicts with substantive law. *Id.*

"To reverse on grounds of instructional error, the party claiming the error must establish prejudice because the instruction misdirected, misled or confused the jury." *Children's Wish Found. Int'l, Inc. v. Mayer Hoffman McCann, P.C.*, 331 S.W.3d 648, 654 (Mo. banc 2011); *see also Watson*, 407 S.W.3d at 184. To prove prejudice, the defendant must show a reasonable

likelihood that the jury misapplied the instruction to deprive him of his constitutional right. *See State v. Erwin*, 848 S.W.2d 476, 483 (Mo. banc 1993).

B. Relevant record.

Count I of the indictment charged Defendant with second-degree statutory rape in that, "on or about February 4, 2005 to October 17, 2005, in the City of St. Louis, State of Missouri, the defendant had sexual intercourse with [Victim] and at that time [Victim] was less than seventeen years old and the defendant was twenty-one years of age or older." (L.F. 20).

Instruction No. 5 provided that:

> As to Count I, if you find and believe from the evidence beyond a reasonable doubt:
>
> First, that on or about February 5, 2005 to October 17, 2005, in the City of St. Louis, State of Missouri, the defendant had sexual intercourse with [Victim], and
>
> Second, that at that time [Victim] was less than seventeen years of age, and
>
> Third, that at that time defendant was twenty-one years of age or older,
>
> then you will find the defendant guilty under Count I of statutory rape in the second degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

(L.F. 333). Instruction No. 12 provided that:

You have heard evidence of multiple acts of sexual intercourse between the defendant and [Victim] between February 4, 2005 and October 17, 2005. If you find beyond a reasonable doubt that the defendant knowingly had sexual intercourse with [Victim], all twelve of you must agree as to the existence of the same act or acts of sexual intercourse. The burden rests upon the State to prove beyond a reasonable doubt each and every element of each offense charged.

(L.F. 340). In the State's closing argument, the prosecutor advised the jury:

The Judge also read you an instruction that pertains back to Count I. You heard evidence of multiple acts of sexual intercourse at the house. [Victim] talks about at least three different rooms that it happens in. Possibly the bedroom, if it falls within the time range for that Pier 1 incident.

As a jury, you don't have to agree that all of them occurred, but if you -- if you say, well, I don't know about one, you all have to agree as to which one. Or you could say it was all of them. Or it

was these two of them. Or it was these four of them. Okay? But you can't say, well, I believe that it happened in the office, but I believe that it happened in the bedroom, and that be a guilty verdict. Does that make sense to everybody?

You all have to agree either it happened in the guest bedroom, it happened in the living room, it happened in the office, or it happened in all of them or in some of them. Okay? Just that it happened during that date range and you agreed to the same acts. That's what that instruction means.

(Tr. 798).

C. Instruction Nos. 5 and 12 protected Defendant's right to a unanimous verdict, and complied with the holding of *State v. Celis-Garcia*, 344 S.W.3d 150 (Mo. banc 2011).

Defendant argues that the trial court erred in submitting Instruction Nos. 5 and 12 to the jury because the instructions did not require the jury to agree on a specific act of misconduct, thus his right to a unanimous jury verdict was violated.[2] (Def.'s Br. 25). But Instruction Nos. 5 and 12 protected

[2] Defendant premises this claim of error on both the United States and Missouri constitutions; however, the United States Constitution does not

Defendant's right to a unanimous verdict, and complied with the holding of *State v. Celis-Garcia*, 344 S.W.3d 150 (Mo. banc 2011).

A criminal defendant has a right to a unanimous jury verdict. *Celis-Garcia*, 344 S.W.3d at 155. For a verdict to be unanimous, the jurors must be in substantial agreement as to the defendant's act that forms the basis of a finding of guilt. *Id.* The danger of a non-unanimous verdict may arise in a "multiple acts" case. *See id.* at 155-59. A multiple acts case occurs when a defendant is charged in a single count with multiple, distinct criminal acts, and each of those acts could serve as the basis for a criminal charge. *Id.* at 155-56.

This was a multiple acts case. Defendant was charged in Count I with having sexual intercourse with Victim in the City of St. Louis on or about February 4, 2005, to October 17, 2005. (L.F. 20). There was testimony that Defendant and Victim had sexual intercourse multiple times in the City of St. Louis during the charged time frame, and Victim testified that she and Defendant had intercourse in Defendant's living room, office, bedroom, and guestroom. (Tr. 336-38).

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require a unanimous verdict in state prosecutions. *See Celis-Garcia*, 344 S.W.3d at 155.

In *Celis-Garcia*, this Court described two ways in which a defendant's right to a unanimous verdict could be protected in a multiple acts case. *See* 344 S.W.3d at 157-58. The Court held that a defendant's right to a unanimous verdict would be protected if the State elected a particular criminal act on which to rely to support the charge, or if the verdict director specifically described the separate criminal acts presented to the jury and the jury was instructed that it must agree unanimously that at least one of those acts occurred. *Id.* at 157.

Defendant argues that his right to a unanimous verdict was violated because the State did not elect a particular criminal act to support the charge and the verdict director did not describe the separate criminal acts presented to the jury. (Def.'s Br. 28). Specifically, Defendant argues that if the State does not elect a particular criminal act upon which it will rely, the verdict director must describe the separate criminal acts, which did not occur here. (Def.'s Br. 32). But *Celis-Garcia* should not be read to require that the specific criminal acts must be described in the verdict director if the jury is given an appropriate unanimity instruction.

In determining how to ensure a unanimous verdict in a multiple acts case, the Court in *Celis-Garcia* reviewed case law from Missouri and other states. *See* 344 S.W.3d at 157. The Court first discussed the Missouri case of *State v. Jackson*, and noted that in *Jackson*, "this Court stated that to avoid

violating a defendant's right to a unanimous jury verdict in a multiple acts case, the state should be required to 'elect' the specific act on which it asks the jury to convict." *See id.* (citing *Jackson*, 146 S.W. 1166, 1168 (Mo. 1912)).

The Court then looked to other states that have addressed the issue, and noted that other states have allowed an option besides election, namely, giving the jury a unanimity instruction: "Other states have guaranteed a unanimous verdict by allowing a prosecution to either elect the particular criminal act on which it will rely to support the charge or to require the trial court to specifically instruct the jury that it must agree on the same underlying conduct." *Id.* (citing cases).

After reviewing cases from other states, the Court "agree[d] that a defendant's right to a unanimous verdict would be protected in a multiple acts case by" either election of a specific criminal act or "the verdict director specifically describing the separate criminal acts presented to the jury and the jury being instructed that it must unanimously agree that at least one of those acts occurred." *Id.* Thus, the Court described two situations in which a defendant's right to a unanimous verdict would be protected; it was not holding that, if the jury receives a proper unanimity instruction, the only way a defendant's right would be protected were if the verdict director also listed the specific acts of criminal conduct. This reading is supported by the fact

that the authority upon which the Court relied did not require that the specific acts be listed.

None of the cases relied upon by the Court required that specific acts be described in the instructions if the jury is given a unanimity instruction. Rather, the cases simply held that a defendant's right to a unanimous verdict is protected if the jurors are instructed that they must unanimously agree as to the act that forms the basis of the conviction. *See State v. Muhm*, 775 N.W.2d 508, 518-20 (S.D. 2009); *State v. Gardner*, 889 N.E.2d 995, 1005-06 (Ohio 2008); *State v. Voyles*, 160 P.3d 794, 800 (Kan. 2007); *State v. Arceo*, 928 P.2d 843, 874-75 (Haw. 1996); *Woertman v. People*, 804 P.2d 188, 192 (Colo. 1991); *State v. Kitchen*, 756 P.2d 105, 108 (Wash. 1988).[3]

The Court also relied on Corpus Juris Secundum in holding that a defendant's right to a unanimous verdict would be protected if the jury were given an appropriate unanimity instruction. *See Celis-Garcia*, 344 S.W.3d at 157 (citing 23A C.J.S. Criminal Law § 1647 (2006)). Like the cases cited from other states, Corpus Juris Secundum does not support that the criminal acts

[3] The Court also cited *State v. Brown*, 762 S.W.2d 135 (Tenn. 1988). *Brown*, however, held that to protect a defendant's right to a unanimous verdict, the state must elect a criminal act to rely upon for conviction. *See* 762 S.W.2d at 137. *Brown* did not address the option of a unanimity instruction. *See id.*

must be specifically described in the verdict director if the jury receives a unanimity instruction.[4] Corpus Juris Secundum merely provides that, "When a defendant has committed several criminal acts but is charged with only one count in a criminal case, either the prosecution may elect the act it will rely on to support such count or the trial court must instruct the jury that it must unanimously agree that the defendant committed the same criminal act." 23A C.J.S. Criminal Procedure and Rights of the Accused § 1690 (2016).

The authority upon which the Court relied in *Celis-Garcia* held that giving an appropriate unanimity instruction to the jury protects the defendant's right to a unanimous verdict. The authority did not require that the specific criminal acts also be listed in the verdict director, and *Celis-Garcia* should be read consistently with this authority so as to not impose such a requirement. *Cf. Watson*, 407 S.W.3d at 185-86 ("authority upon which our Supreme Court relied in *Celis-Garcia* suggests that an instruction specifically telling the jury they must unanimously agree to one act, even

[4] The Court cited to 23A C.J.S. Criminal Law § 1647 (2006). The current version of Corpus Juris Secundum's treatment of the topic of verdict unanimity in a multiple acts case is found at 23A C.J.S. Criminal Procedure and Rights of the Accused § 1690 (2016).

without further specificity regarding acts in evidence, will uphold the defendant's rights in a case where multiple identical acts are alleged").

Respondent acknowledges that in *Celis-Garcia*, the Court indicated that the verdict director should describe the specific criminal acts. *See* 344 S.W.3d at 158. The Court stated that, "As noted above, to comply with the constitutional mandate that the jury reach a unanimous verdict, the verdict director not only must describe the separate criminal acts with specificity, but the court also must instruct the jury to agree unanimously on at least one of the specific criminal acts described in the verdict director." *Id*. But in so stating, the Court was emphasizing the importance of a unanimity instruction, and explaining why merely describing the criminal acts in the verdict director without a unanimity instruction did not adequately protect the defendant's right to a unanimous verdict in that case.

Considering the context of the Court's statements, and the authority upon which the Court relied, *Celis-Garcia* should not be read to require that specific acts be listed in the verdict director when an appropriate unanimity instruction is given to the jury. As noted above, many other states do not impose such a requirement. The likely reason is because listing the specific acts is unnecessary when a unanimity instruction is given to the jury. An appropriate unanimity instruction fully protects a defendant's right to a

unanimous verdict, and listing the specific acts in the verdict director is not necessary to the protection of that right in every case.

That an appropriate unanimity instruction, by itself, is sufficient to protect the defendant's right to a unanimous verdict is evident from the Court's analysis in *Celis-Garcia*. The Court's concern with the instructions in *Celis-Garcia* was that they "allowed each individual juror to determine which incident he or she would consider in finding [the defendant] guilty of statutory sodomy." 344 S.W.3d at 156. Thus, the jurors could have convicted the defendant "if they found that she engaged or assisted in hand-to-genital contact with the children during an incident in her bedroom, *or* on the enclosed porch, *or* in the shed, *or* in the bathroom." 344 S.W.3d at 156 (emphasis in original). This possibility, and thus the Court's concerns, would have been eliminated had the jurors been further instructed that they had to unanimously agree as to which act or acts constituted the basis for the conviction.

The crux of the Court's opinion in *Celis-Garcia* was that there must be an assurance of a unanimous verdict. A unanimous verdict is assured in a multiple acts case if the jury is given an appropriate unanimity instruction, even if the specific criminal acts are not described in the verdict director.

To that end, here, Defendant's right to a unanimous verdict was protected. Instruction No. 12 required that, for the jury to find Defendant had

sexual intercourse with Victim, "all twelve of [the jurors] must agree as to the existence of the same act or acts of sexual intercourse." (L.F. 340). Instruction No. 12 prevented Defendant's conviction for statutory rape from resting on acts of sexual intercourse that were not unanimously agreed upon by the jurors. The instruction was consistent with substantive law, and thus, the trial court did not err in submitting the instruction to the jury. *See Watson*, 407 S.W.3d at 185 (an instruction that told the jurors they must unanimously agree on the act constituting the crime was consistent with substantive law requiring a unanimous verdict).

In arguing that his right to a unanimous verdict was violated, Defendant compares this case to *Hoeber v. State*, 488 S.W.3d 648 (Mo. banc 2016). (Def.'s Br. 29-31). *Hoeber*, however, is distinguishable. In *Hoeber*, the defendant was convicted of two counts of first-degree statutory sodomy. 488 S.W.3d at 650. The defendant sought post-conviction relief, alleging that his trial counsel was ineffective for failing to object to the verdict directors. *Id.* The verdict directors "both failed to identify a specific act or incident despite testimony at trial regarding multiple incidents of [the defendant] inappropriately touching S.M., the victim." *Id.* This Court held that trial counsel rendered ineffective assistance of counsel by not objecting to the verdict directors. *Id.* at 650-51.

The important distinction between *Hoeber* and this case is that the jurors here received Instruction No. 12: they were instructed that they had to unanimously agree as to the same act or acts of sexual intercourse. The jury received no such instruction in *Hoeber*; therefore, the defendant's right to a unanimous verdict was not protected. Because the jury here received a unanimity instruction, *Hoeber* is not controlling.

Instruction Nos. 5 and 12 protected Defendant's right to a unanimous verdict, and the trial court did not err in submitting these instructions. Point I of Defendant's brief should be denied.

D. Defendant did not suffer prejudice.

Should this Court find that instructional error occurred, reversal would not be warranted because Defendant failed to show that he suffered prejudice from the claimed error. Defendant claims that Instruction No. 5 did not comply with the law because it did not specifically describe the acts of sexual intercourse. But there was no reasonable probability that the jury was misdirected, misled, or confused in light of Instruction No. 12 and the State's closing argument.

Instruction No. 12 ensured that Defendant's right to a unanimous verdict was protected by requiring the jurors to agree on the same act or acts of sexual intercourse. Defendant was only charged with one count of statutory rape, and Instruction No. 12 referred to the time frame set forth in

Instruction No. 5—the verdict director for the statutory rape charge. (L.F. 340). Thus, Instruction No. 12 ensured that to convict Defendant of statutory rape, the jurors were required to agree on the act or acts of intercourse that constituted the basis for the conviction. The jury is presumed to have followed the instructions. *See State v. McFadden*, 369 S.W.3d 727, 752 (Mo. banc 2012).

Further, in the State's closing argument, the prosecutor reminded the jury that Instruction 12 pertained to Count I, the statutory rape charge. (Tr. 798). The prosecutor acknowledged that the jury had heard "evidence of multiple acts of sexual intercourse at the house" and reiterated that the jury must unanimously agree as to the existence of an act of intercourse to find Defendant guilty of that act of intercourse. (Tr. 798). The prosecutor specifically described the criminal acts that had been presented to the jury: "You all have to agree either it happened in the guest bedroom, it happened in the living room, it happened in the office, or it happened in all of them or in some of them." (Tr. 798). The prosecutor further reminded the jury that they all had to agree that "it happened during that date range." (Tr. 798). The State's closing argument ensured that the jurors were not misled or confused into thinking that they could convict on differing acts of sexual intercourse.

The facts here present a different scenario than those in *State v. Rycraw*, No. ED103044, 2016 WL 5390198, (Mo. App. E.D. Sept. 27, 2016). In

Rycraw, the Eastern District held that the verdict directors allowed for non-unanimous verdicts. 2016 WL 5390198, at *12. The State argued that reversal was not warranted because the defendant did not suffer prejudice in light of the State's closing argument. *Id.* The Eastern District recognized that the prosecutor "went through each count" during closing argument and "assigned a specific act to each count," but found that this did not protect the defendant's right to a unanimous verdict: the plain language of the instructions allowed for non-unanimous verdicts and the jury was instructed that arguments were not evidence. *Id.*

The important distinction between *Rycraw* and this case is that the trial court in *Rycraw* did not give a unanimity instruction. Here, unlike in *Rycraw*, the plain language of the instructions did not allow for non-unanimous verdicts. Here, unlike in *Rycraw*, the closing argument highlighted to the jury what was already stated in the instructions: that the jurors had to unanimously agree as to the act or acts that constituted the basis of the crime.

In light of the instructions and the State's closing argument, there was no reasonable probability that the jurors were misdirected into believing that they could convict Defendant of statutory rape based on differing acts of sexual intercourse. Defendant did not suffer prejudice from any claimed error in the jury instructions, and Point I of Defendant's brief should be denied.

II.

The trial court did not abuse its discretion in denying Defendant's motion for new trial, because the State did not commit a *Brady* violation by failing to disclose a photograph of Defendant in dance pants.

A. Standard of review.

This Court reviews the denial of a *Brady*-based motion for new trial for abuse of discretion. *See State v. Reed*, 334 S.W.3d 619, 625 (Mo. App. E.D. 2011). An abuse of discretion occurs if the trial court's ruling is clearly against the logic of the circumstances, and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *See State v. Sanchez*, 186 S.W.3d 260, 264-65 (Mo. banc 2006).

B. Relevant record.

Victim testified about the first time she and Defendant had sexual intercourse, which was in the dance studio. (Tr. 329-32). It occurred after a rehearsal for Hearts and Flowers, and Defendant was wearing jeans and a t-shirt at that rehearsal. (Tr. 327-32). Victim testified that Defendant "unzipped his pants" and he did not pull his pants all the way down, but "left them unzipped." (Tr. 331).

Victim testified that it was normal for Defendant to wear sweatpants when he rehearsed with his dancers. (Tr. 417).

Defendant testified that he wore "warmup pants" or sweatpants to rehearsals, and those pants did not have zippers in "the crotch." (Tr. 568-69). Defendant testified that he did not ever do rehearsals in jeans. (Tr. 570).

In rebuttal, the State called Amanda Cobet to testify. (Tr. 762). Amanda was a student at Defendant's dance studio at the same time that Victim was a student. (Tr. 762, 766). Amanda testified that Defendant usually wore "T-shirt, jeans" when he taught classes, and it was not unusual to see Defendant in jeans and a T-shirt in rehearsals. (Tr. 765, 780). Amanda also testified that, "usually on Saturdays," Defendant would wear "tights" to rehearsals rather than jeans. (Tr. 765).

The State showed Amanda photographs that were taken of her, another dancer, and Defendant. (Tr. 766-69). The photographs showed them rehearsing for the 2005 Hearts and Flowers production. (Tr. 766). Defendant was wearing jeans in the photographs. (Tr. 767-68). The photographs were not all taken on the same day, and Amanda did not remember what days they were taken. (Tr. 768, 772, 778). The photographs were admitted into evidence. (Tr. 767).

In his motion for new trial, Defendant alleged that Amanda "turned over to the prosecution" the rehearsal photographs, and that included in the photographs was one of Defendant wearing "sweatpants or dance pants" during a rehearsal. (L.F. 356). Defendant alleged that the State's failure to

disclose this photograph of Defendant in dance pants was a *Brady* violation. (L.F. 356-58).

C. There was no *Brady* violation.

Pursuant to *Brady v. Maryland*, the State is required to disclose evidence in its possession that is favorable to the defendant and material to guilt or punishment. *State v. Goodwin*, 43 S.W.3d 805, 812 (Mo. banc 2001). "A *Brady* violation occurs if: (1) the evidence is favorable to the accused because it is exculpatory or impeaching; (2) the evidence was suppressed by the state either willfully or inadvertently; and (3) the suppression must have prejudiced the defendant." *Id.*

No *Brady* violation occurred here because the evidence was not exculpatory and Defendant did not suffer prejudice. In the context of determining a *Brady* violation, "prejudice" is interchangeable with "materiality." *State v. Moore*, 411 S.W.3d 848, 856 (Mo. App. E.D. 2013). The materiality standard is established if the evidence "could reasonably be taken to put the whole case in such a different light as to as to undermine confidence in the verdict." *Id. Brady* does not require the prosecution to disclose all exculpatory and impeachment material; rather, it need only disclose the evidence that, if suppressed, would deprive the defendant of a fair trial. *Id.*

The photograph of Defendant in dance pants was not material. First, the photograph did not impeach Victim's or Amanda's testimony. Although Victim testified that Defendant was wearing jeans the first time they had intercourse at the studio (Tr. 329-31), Victim also testified that it was normal for Defendant to wear dance pants to rehearsal. (Tr. 417-18). Amanda testified that Defendant wore "tights" rather than jeans to Saturday rehearsals. (Tr. 765). The photograph at issue shows Defendant wearing dance pants at a rehearsal. (L.F. 357). There was no claim that the photograph was taken the night that Defendant and Victim had intercourse, when Victim testified that he was wearing jeans. (*See* L.F. 356-58). As such, the photograph did not rebut Victim's or Amanda's testimony that Defendant sometimes wore jeans and sometimes wore dance pants to rehearsals.

Moreover, the photograph would not have established that Defendant was telling the truth when he testified that he did not ever do rehearsals in jeans. The photograph depicted one rehearsal in which Defendant wore dance pants; it did not purport to show what Defendant wore to every rehearsal.[5]

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[5] Because the photograph did not impeach Victim's or Amanda's testimony, and did not prove that Defendant was telling the truth, the photograph also failed the first requirement of a *Brady* violation: that the evidence be favorable to the accused because it is exculpatory or impeaching.

Finally, the evidence regarding what pants Defendant wore during rehearsal was not relevant to whether Defendant had sexual intercourse with Victim at his house, as charged in Count I. Defendant was not on trial for statutory rape related to the sexual intercourse that occurred at the dance studio. Thus, the photograph of Defendant wearing dance pants was not probative of the crimes charged, and could not reasonably be taken to put the whole case in such a different light as to as to undermine confidence in the verdict.

In short, the photograph was not relevant, it did not rebut Victim's or Amanda's testimony, and it did not prove Defendant was telling the truth. The absence of the photograph at trial did not undermine confidence in the verdict; therefore, the photograph was not material. To that end, the State did not commit a *Brady* violation for failing to disclose the photograph of Defendant in dance pants, and the trial court did not abuse its discretion in overruling Defendant's motion for new trial. Point II of Defendant's brief should be denied.

III.

The State presented sufficient evidence to convict Defendant of second-degree statutory rape.

Defendant argues that the evidence was insufficient to convict him of second-degree statutory rape because "there was no evidence or reasonable inference" to support that Victim was "under the age of 17 at the time of the charged act of sexual intercourse in the city of St. Louis or that the acts occurred within the time frame alleged in the indictment and in the jury instructions." (Def.'s Br. 40).

A. Standard of review.

In reviewing a challenge to the sufficiency of the evidence, this Court is limited to determining "whether the State has introduced sufficient evidence for any reasonable juror to have been convinced of the defendant's guilt beyond a reasonable doubt." *State v. Jeffrey*, 400 S.W.3d 303, 312-13 (Mo. banc 2013). "This is not an assessment of whether the Court believes that the evidence at trial established guilt beyond a reasonable doubt but rather a question of whether, in light of the evidence most favorable to the State, any rational fact-finder could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 313. The Court does not reweigh the evidence; it accepts as true all evidence supporting the verdict, including all

favorable inferences that can be drawn therefrom, and disregards all evidence and inferences to the contrary. *Id.*

B. Relevant record.

Count I of the indictment charged Defendant with second-degree statutory rape in that, "on or about February 4, 2005 to October 17, 2005, in the City of St. Louis, State of Missouri, the defendant had sexual intercourse with [Victim] and at that time [Victim] was less than seventeen years old and the defendant was twenty-one years of age or older." (L.F. 20).

In the spring or summer of 2004, when Victim was 15, she spent the night at Defendant's house. (Tr. 313-14). Defendant and Victim had oral sex. (Tr. 315-16). Victim did not believe that any other sexual contact occurred in 2004, but the kissing continued. (Tr. 321-22).

In February of 2005, Defendant's dance studio put on a show called Hearts and Flowers. (Tr. 326). Victim had a role in that show. (Tr. 328). After one of the rehearsals for that show, Defendant and Victim had sexual intercourse at the studio. (Tr. 329-32). That was the first time Defendant and Victim had sexual intercourse. (Tr. 433). Defendant and Victim had sexual intercourse in the studio one other time after that. (Tr. 333-34).

Defendant and Victim had sexual intercourse at Defendant's house, which was in the City of St. Louis. (Tr. 314, 336). Victim could not "put a number on how many times" they had sexual intercourse at Defendant's

house; there were "[s]o many." (Tr. 336). They had sexual intercourse in the "living room, the office, [Defendant's] bedroom, and the guest bedroom." (Tr. 337). Every time they had intercourse in the living room, Defendant used a condom. (Tr. 337). They had intercourse in the office more than one time, and Defendant always used condoms. (Tr. 338).

By August of 2005, Defendant "end[ed] up going into the hospital." (Tr. 340). Around that time, Victim "stopped going" to the dance studio because she "felt like it was an easy time to escape." (Tr. 341).

In September of 2005, Victim got a job at Pier 1. (Tr. 342-43, 402). Defendant came into Pier 1 to buy a piece of furniture for the studio's Nutcracker performance. (Tr. 343). The day that Defendant went to Pier 1, Victim went over to his house after she left work. (Tr. 343-44). Victim spent the night at Defendant's house, and they had sexual intercourse. (Tr. 344). Victim was 17 by that point in time; she had turned 17 in October of 2005. (Tr. 345; *see* Tr. 285). After they had intercourse that time, Victim did not "remember anything more ever physically happening with the defendant." (Tr. 345).

C. The evidence was sufficient.

The State presented sufficient evidence that Defendant and Victim had sexual intercourse at Defendant's house between February 4, 2005 and October 17, 2005, when Victim was younger than 17.

Defendant and Victim had sexual intercourse for the first time in February of 2005. (Tr. 326, 329-32, 433). Thereafter, they had sexual intercourse at Defendant's house in St. Louis City too many times to count. (Tr. 314, 336). They had intercourse in the living room, the office, Defendant's bedroom, and the guest bedroom. (Tr. 337). They had intercourse multiple times in the living room and office. (Tr. 337-38).

In August of 2005, when Victim was still 16, Defendant "end[ed] up going into the hospital" and Victim "stopped going" to the dance studio because she "felt like it was an easy time to escape." (Tr. 340-41).

In September of 2005, Victim got a job at Pier 1. (Tr. 342-43, 402). Victim turned 17 on October 18, 2005. (*See* Tr. 285). After Victim turned 17, Defendant came into Pier 1 to buy furniture for the studio's Nutcracker performance. (Tr. 343, 345). That night, Defendant and Victim had intercourse at Defendant's house. (Tr. 344). That was the last night Victim remembered having sexual intercourse with Defendant. (Tr. 345).

From this evidence, the jury could reasonably infer that Defendant and Victim had sexual intercourse at Defendant's house between February 4, 2005 and October 17, 2005. Although Victim did not testify to specific dates that she had intercourse with Defendant at his house, the jury could have reasonably inferred that one of the many instances of sexual intercourse occurred at Defendant's house between February of 2005, when they started

having intercourse, and August of 2005, when Defendant went to the hospital and Victim quit going to the studio because she wanted to escape. Victim was younger than age 17 during that entire time period.

Defendant argues that the evidence was insufficient because Victim "was unable to provide any testimony as to her age at the time of any of the alleged acts of sexual intercourse in the City of St. Louis." (Def.'s Br. 42). But Victim was not required to provide specific dates that she and Defendant had sexual intercourse, or specifically testify as to her age on the dates they had intercourse. *See State v. Wilson*, 256 S.W.3d 58, 63 (Mo. banc. 2008) (*abrogated on other grounds by Mitchell v. Kardesch*, 313 S.W.3d 667, 679 n.9 (Mo. banc 2010)) ("While the victim did not give specific dates [of sexual intercourse], [the defendant] cites to no authority that she was required to do so, and the case law would not support such an argument.").

Rather, the dates that the intercourse occurred could be inferred from Victim's testimony about events she recalled during the relevant time frame. *See id.* (the State presented sufficient evidence that sexual intercourse occurred during the charged time frame: the victim "recalled that [intercourse] occurred during those time periods because of other events that occurred near those times"). Victim's testimony established a beginning and an ending for her sexual relationship with Defendant, and would have

allowed a reasonable juror to infer that Defendant had sexual intercourse with Victim before she turned 17 on October 18, 2005.

Finally, Defendant argues that "[d]ouble jeopardy concerns also require a finding that the evidence was insufficient." (Def.'s Br. 43, relying on *State v. Miller*, 372 S.W.3d 455 (Mo. banc 2012)). *Miller*, however, is distinguishable.

In *Miller*, this Court reversed the defendant's convictions for statutory sodomy and deviate sexual intercourse. 372 S.W.3d at 468. The Court found that the evidence was insufficient to convict Defendant, because there was no evidence that those acts occurred between December 2004 and December 2005, as charged. *See id.* Instead, the only evidence was that the acts occurred between December 1998 and December 1999. *See id.* The Court noted that allowing the defendant's convictions to stand would violate the prohibition against double jeopardy. *See id.*

Conversely, here, there was sufficient evidence presented that Defendant had sexual intercourse with Victim during the time period charged. Unlike in *Miller*, double jeopardy concerns were not implicated here because the evidence established that Defendant committed the crime charged in the indictment. As such, *Miller* does not support Defendant's claim that his convictions must be reversed.

The State presented sufficient evidence from which a jury could reasonably infer that Defendant and Victim had sexual intercourse at

Defendant's house in St. Louis City between February 4, 2005 and October 17, 2005, when Victim was younger than 17. Point III of Defendant's brief should be denied.

IV.

The trial court's comments did not result in Defendant being deprived of a fair and impartial trial; therefore, no plain error occurred.

Defendant argues that the trial court clearly erred by "repeatedly criticizing counsel's witness examination and the presentation of Defendant's case-in-chief" and by "injecting itself into the case by making rulings, objections and comments sua sponte all in the presence of the jury." (Def.'s Br. 46).

A. Preservation and standard of review.

Defense counsel did not raise any objection at trial to the trial court's comments, thus Defendant is only entitled to plain error review of this claim. *See State v. Jackson*, 836 S.W.2d 1, 6 (Mo. App. E.D. 1992); *see also Riggs v. Dep't of Soc. Servs.*, 473 S.W.3d 177, 186 (Mo. App. W.D. 2015) (to preserve a claim of error regarding the trial court's alleged prejudicial remarks, the party must object to the remarks when made at trial; including the claim of error in a motion for new trial, without seasonably objecting at trial, does not preserve the issue).

When a claim is reviewed for plain error, the court reverses only if it finds that manifest injustice or a miscarriage of justice has resulted from the trial court error. *See State v. Johns*, 34 S.W.3d 93, 103-04 (Mo. banc 2000).

"The standard of review for examining the conduct of a trial judge is whether the trial court's conduct is such as to prejudice the minds of the jury against the defendant thereby depriving the defendant of a fair and impartial trial." *Jackson*, 836 S.W.2d at 6. Whether the defendant suffered prejudice depends on the context and words in each case. *Id.* "The burden of demonstrating that the trial court's action resulted in a manifest injustice is allocated to the defendant." *Id.*

B. Relevant record.[6]

During defense counsel's cross-examination of Victim, the prosecutor asked to approach the bench. (Tr. 372). The court answered, "No. You guys love the sidebars. Just state your objection." (Tr. 372).

During direct examination of Victim's mother, the prosecutor asked Victim's mother a question and defense counsel objected. (Tr. 452). The prosecutor advised that she would ask another question, and the court admonished her to "let [the court] rule." (Tr. 452). Later, the prosecutor objected to defense counsel's cross-examination of Victim's mother. (Tr. 480).

[6] In the appendix to his substitute brief, Defendant listed the trial court's comments that he argues are inappropriate. (*See* App'x A-15 – A-18). Respondent does not restate those comments in this section of its argument.

Before the court could rule on the objection, defense counsel asked another question. (Tr. 480). The court stated:

> "[Defense counsel], can I rule on an objection? Both of you guys are just your own worst enemy. Just calm down and let me rule."

(Tr. 480).

The court asked the prosecutor if she had any re-direct questions for Victim's mother. (Tr. 502). The prosecutor responded, "Very briefly, Your Honor." (Tr. 502). The court said, "Promises, promises." (Tr. 502). The prosecutor advised that she had "three questions." (Tr. 503). The trial court later interrupted the prosecutor's questioning and stated: "We're at five questions now." (Tr. 503).

During the State's direct examination of one of its witnesses, defense counsel objected to the prosecutor's question as prohibited by a motion in limine. (Tr. 515). The trial court sustained defense counsel's objection, and told the prosecutor: "Yeah, stop there. Sustained. Just get to it." (Tr. 515).

During the State's cross-examination of Defendant, defense counsel objected on the grounds of "[a]sked and answered." (Tr. 646). The court sustained the objection and advised the prosecutor, "You made your point." (Tr. 646).

During the State's cross-examination of Defendant's wife, defense counsel objected to the prosecutor's attempt to impeach the witness. (Tr. 722-23). The court advised the prosecutor:

> Well, I -- I think, as far as impeachment goes, because of the limitation we have had of the statement, we can't lay that part of the foundation; however I think, [prosecutor] you should be directing her attention that it was in fact her who made the statement. . . . And the page number and the line. And then ask her whether or not that is accurate.

(Tr. 723).

When the prosecutor referred to the previous trial while questioning Defendant's wife, the following exchange occurred:

> The court: Stop it.
>
> [The prosecutor]: I know. I'm sorry.
>
> The court: Stop it. You know, you file these motions and we follow it to the law, and then you keep on doing that.

(Tr. 724). The court again told the prosecutor to "[s]top it." (Tr. 725).

C. The trial court did not plainly err.

A judge must maintain a neutral attitude, avoid any demonstrated hostility, and avoid conduct which might be construed as indicating the judge's belief as to the guilt of the defendant. *Jackson*, 836 S.W.2d at 6.

Factors to consider in determining the propriety of a judge's comments include whether the judge volunteered the comment, whether the comment was made in response to an objection as part of the court's ruling, whether the comment was made in front of the jury, and whether the jury could have construed the comment to prejudice the defendant. *Id.* at 7. "There is no error as long as the trial judge does not express an opinion as to the nature, content, or truthfulness of evidence," or "indicate a belief in either the guilt or innocence of the accused." *Id.*

The propriety of a judge's comments depends "largely upon his tone of voice, facial expressions and other similar factors which give content to the trial episodes and ruling thereon." *Id.* Because those factors are not reflected in the appeal record, this Court must "largely defer to the trial court's superior vantage point to appraise the trial situation." *Id.*

Here, the trial court did not violate its duty to maintain an appearance of neutrality because the trial court did not express an opinion as to the nature, content, or truthfulness of evidence, or indicate a belief in either the guilt or innocence of Defendant. Although the trial court commented on defense counsel's pace, repetition, and form of questions, such comments were not improper. A judge may explain the basis for his ruling on objections. *See id.* at 6-7. When the trial court sustained the State's objections, the trial court

was permitted to explain that the objections were sustained because defense counsel was seeking to elicit cumulative or repetitive testimony.

Additionally, a judge has great discretion to impose reasonable limits on cross-examination to avoid cumulativeness, waste of time, undue delay, and marginally relevant interrogation. *State v. Jones*, 299 S.W.3d 324, 329 (Mo. App. W.D. 2009). Thus, the trial court was permitted to *sua sponte* place reasonable limits on defense counsel's cumulative questioning, and to guide defense counsel through the proper impeachment process. *See State v. Watts*, 813 S.W.2d 940, 942-43 (Mo. App. E.D. 1991) ("As the helmsman of the trial process, a trial judge should be able to keep the process from becoming weighted down with the accumulation of cumulative evidence and free of undue harassment of witnesses."); *Jackson,* 836 S.W.2d at 6 (a judge may correct counsel, as long as it is not done in a contemptuous manner).

Although Defendant argues that the trial court admonished and criticized defense counsel (Def.'s Br. 47, 50), a trial judge's criticism or reprimand of counsel during trial is not necessarily improper or indicative of bias. *See State v. Moffitt*, 754 S.W.2d 584, 589 (Mo. App. S.D. 1988). "The reprimanding of counsel during the progress of trial is largely within the discretion of a trial court" and the "mere criticism of counsel is not ordinarily considered the ground for reversal." *Id.*; *see also State v. Holcomb*, 956 S.W.2d 286, 297 (Mo. App. W.D. 1997) (the defendant was not denied a fair and

impartial trial because of the trial court's criticism of defense counsel's tactics).

Moreover, Defendant ignores that certain of the critical comments made by the trial court were the result of defense counsel's failure to follow the court's orders. For example, the trial court instructed defense counsel and the prosecutor to allow the court to rule on objections. (Tr. 480). When the trial court told defense counsel: "Hold it. . . . I've told you this about seven times now," defense counsel was attempting to continue questioning the witness after the State objected. (*See* Tr. 575).

Another example occurred during Defendant's opening argument. Prior to opening statements, the trial court granted the State's motion in limine, and ordered that evidence of Defendant's police interview be excluded. (*See* Tr. 256-57). In Defendant's opening statement, defense counsel told the jury:

> After she makes her statements to the police, they wire her up for a phone call, and subsequently they bring [Defendant] in to interrogate him. And the entire interview is videotaped. And they -- for two hours they questioned him. And they try every technique they know of, and he maintains consistently throughout that two hours nothing happened, he did not have sex with that woman. Every trick in the book, and he never says --

[Prosecutor]: Objection, Your Honor.

The court: Sustained, [Defense counsel], we talked about this.

[Defense counsel]: Every technique they can think about --

[Prosecutor]: Objection, Your Honor.

[The court]: [Defense counsel.] All right. Do you have any more opening statement? Because I'm going to shut it down now. If you want to disobey me, then I have a power also.

So do you have anything more?

[Defense counsel]: Yes, I do.

The court: All right. Are you going to listen to the Court's ruling?

[Defense counsel]: I believe I did, Your Honor.

The court: No, you didn't. You didn't. Not even close. You may proceed. You have been warned.

[Defense counsel]: Two hours. Two hours during this interrogation and he never admits to anything. . . .

(Tr. 282-84). Defendant categorizes this exchange as "inappropriate behavior" by the trial judge who "interrupted" Defendant's opening statement. (Def.'s Br. 60-61). But the record showed that the exchange was prompted by the State's objection to defense counsel repeatedly disobeying the trial court's ruling on the motion in limine. The trial court was within its discretion to admonish defense counsel for repeatedly ignoring the court's ruling. *Cf. United States v. Dowdy*, 960 F.2d 78, 81 (8th Cir. 1992) (an attorney must

comply with the court's rulings, and has no right to resist an adverse ruling by the trial court).

Defendant also argues that the trial court expressed an opinion that the jury did not have to listen to certain testimony because "it ha[d] nothing to do with . . . this case." (Def.'s Br. 63). The comment to which Defendant refers occurred during the direct examination testimony of Danny Taylor, a man who taught at the dance studio after Victim quit attending. (Tr. 732-33, 736-37). When defense counsel questioned Danny, the following exchange occurred:

> Q. [by defense counsel] Okay. I'm talking now about the old academy.
>
> A. Oh, okay. Then the old academy, the front room was for classes, and then the back room was for company.
>
> Q. Okay. So that -- would there be -- in other words, would the younger students be in the front room, and the more advanced students in the back?
>
> A. Yes, sir.
>
> [Prosecutor]: Judge, this is cumulative.
>
> The court: That's been brought into evidence, we know that the rooms are there, your client has testified to it, the alleged victim has testified to it, his wife has testified to it, everyone has

testified to this. I don't understand this. Why are we doing this again?

[Defense counsel]: Because the point is that he doesn't know [Victim's sister], and at some time in the past that was a big issue. And I want to explain why that -- he would not know [Victim's sister] but might know [Victim].

The court: But we don't need all this -- what does that have to do with anything in this case?

[Defense counsel]: I will have to approach.

The court: I will allow you to go, we'll see how this goes, but we already know this. The -- I -- the jury know this, all right? They know the layout of the place. They know where the students go. This repetition is just mind numbing, [defense counsel]. And we need to get on with this case. This case will never end.

[Defense counsel]: Yes, it will.

The court: So I'll allow you to do this, but please do not repeat anything else that we already know about. And it's already been admitted.

(Tr. 736-37).

The trial court's question—"what does that have to do with anything in this case?"—was not a comment on the evidence. In *Holcomb*, the Court held

that the trial court's question—"what difference does it make?"—was not a comment on the evidence. 956 S.W.2d at 297. The Court found it to be a "comment on the relevancy of that particular inquiry," but it was "not a comment expressing the court's view of the evidence overall." *Id.*

Similarly, here, the trial court's question was a comment on the relevancy of Danny's knowledge of Victim's sister. It was a comment on a particular inquiry, not a comment expressing the court's view on the evidence overall. The trial court did not err in making such a comment. *See State v. Koonce*, 731 S.W.2d 431, 437-38, 442 (Mo. App. E.D. 1987) (the trial court's comments to defense counsel that "we already covered that material," "be a little more careful" when asking questions, and "[y]ou handle that counsel table and I'll try to work this end of the room," were not comments on the evidence, and thus were not error).

Even if it were determined that the trial court's comments were improper, reversal would not be warranted because Defendant did not suffer a manifest injustice from the comments. *See State v. Webber*, 982 S.W.2d 317 (Mo. App. S.D. 1998); *State v. Hudson*, 950 S.W.2d 543 (Mo. App. W.D. 1997).

In *Webber*, the prosecutor objected on relevance grounds to defense counsel's direct examination of the defendant. 982 S.W.2d at 320. In the presence of the jury, the trial court told defense counsel that he was "having trouble seeing the relevancy here." *Id.* at 320 & n. 3. After defense counsel

explained what the relevance of the defendant's testimony would be, the trial court said, "Well, just make it snappy because I don't think it amounts to much." *Id.* at 320. The Court found that trial court's comments "did not indicate the court's belief with regard to the guilt of [the defendant], and it was not degrading to the defense." *Id.* at 321. As such, the Court found that no manifest injustice resulted. *Id.*

In *Hudson*, the trial court told defense counsel, in the presence of the jury, that he was interrupting the witness and misleading her, and that "[t]his [was] ridiculous." 950 S.W.2d at 547. The Court found that the judge did not violate his duty to remain impartial because he did not express an opinion on the evidence nor did he comment on the defendant's guilt or innocence. *Id.* at 548. The judge's comment was "directed at controlling the court proceedings" and no manifest injustice resulted from the comment. *Id.* at 549.

As in *Hudson* and *Webber*, the trial court's comments here were directed at controlling the court proceedings, they did not indicate any belief as to whether Defendant was guilty, and they did not express an opinion as to the evidence such that Defendant was deprived a fair trial. No manifest injustice resulted from the trial court's comments.

In support of his argument, Defendant cites to *State v. Houston*, a case in which the Court found that a manifest injustice resulted from the trial

court's comments. 139 S.W.3d 223, 229-30 (Mo. App. W.D. 2004). In *Houston*, the trial court told the pro se defendant, in the presence of the jury, that: "You have cross-examined, at length, everybody. And most of what you've asked has been immaterial and irrelevant." *Id.* at 228. The Court found that this "clearly communicated to the jury" a disbelief in the defendant's defense, because the defendant did not present any evidence and instead relied solely on his cross-examination to defend against the charge. *Id.*

Conversely, here, the trial court did not communicate a disbelief in Defendant's defense. The trial court commented that defense counsel was presenting cumulative evidence, but, unlike in *Houston*, the trial court did not "essentially [tell] the jury that [Defendant's] defense was immaterial and irrelevant." *See id.* Thus, *Houston* is distinguishable.

Moreover, in the context of this case, Defendant did not suffer a manifest injustice because the trial court also admonished the State and guided the prosecutor through the impeachment process.

When the prosecutor asked to approach the bench, the trial court denied her request, stating "No. You guys just love the sidebars." (Tr. 372). The trial court called the prosecutor and defense counsel their own worst enemies. (Tr. 480). The trial court sustained defense counsel's objection, and told the prosecutor that she had "made [her] point." (Tr. 515). The trial court

instructed the prosecutor on the proper process of impeaching Defendant's wife. (Tr. 722-23).

The trial court's comments to the prosecutor counter Defendant's argument that the court "displayed a clear preference for the State." (*See* Def.'s Br. 51). For example, when the prosecutor said she had brief re-direct, the trial court commented, "Promises, promises." (Tr. 502). The trial court interrupted the prosecutor's re-direct to advise her that she had asked five questions, when she said she only had three. (Tr. 503). The trial court told the prosecutor to "[j]ust get to it." (Tr. 646) When the prosecutor referred to the previous trial during questioning, the trial court admonished her: "Stop it. You know, you file these motions and we follow it to the law, and then you keep doing that. . . . Stop it."[7] (Tr. 274-75). The trial judge made the same type of comments to the prosecutor as he did to defense counsel, indicating that the judge merely had an expressive personality rather than a bias for or against either party. As such, the trial court's comments did not prejudice the minds of the jury against Defendant.

[7] Although this comment occurred at a sidebar, it still supports that the trial court was not "an ally" of, and did not have "an obvious bias" for the State, as Defendant contends.

Finally, it is notable that not once during the four-day trial did defense counsel object or make any reference to the harshness or alleged bias of what Defendant characterizes on appeal as the "barrage" and "fusillade" of negative comments.[8] (*See* Def.'s Br. 56). This lack of objection is telling of the demeanor of the trial judge and the mood in the courtroom, aspects which cannot be gleaned from comments parsed from the transcript and compiled into a list.[9] Defendant did not show that the trial court's comments were so prejudicial that he was deprived a fair trial, and thus suffered a manifest injustice, where the trial court's comments were apparently not worthy of a single objection during a four-day trial.

The trial court did not commit plain error. Point IV of Defendant's brief should be denied.

[8] Counsel for Defendant on appeal also represented Defendant at trial.

[9] *See* App'x A-15 – A-18.

V.

The trial court did not plainly err in excluding evidence of Victim's mental health.

A. Relevant record.

The State filed a motion in limine, seeking to prohibit Defendant from presenting evidence that Victim had received treatment for depression or other mental health concerns. (L.F. 283-84).[10]

At trial, defense counsel cross-examined the counselor Victim saw during college. (Tr. 518-19). The counselor testified that she and Victim discussed Victim's relationships, Victim having discord with Victim's mother, and Victim's concern about her weight and body image. (Tr. 518). Victim "talked a lot about her own problems with her body image," and "[t]hat seemed to be one of her major concerns." (Tr. 519). Defense counsel asked:

Q. Do you know if [Victim] has any psychiatric background?

[Prosecutor]: Objection, Your Honor.

The court: What's the objection?

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[10] The transcript and legal file do not reflect a ruling on the motion. Defendant asserts that "[t]hese matters were brought up before the Court and in an in-chamber conference but not included into the transcript." (Def.'s Br. 66 n.13).

[Prosecutor]: Motion in limine.

The court: Sustained.

A. Can you repeat it, please?

The court: No, he can't.

A. I'm sorry.

Q. [by defense counsel]: Did you review any other medical records about her?

[Prosecutor]: Objection, Your Honor.

The court: Sustained. This is off limits.

(Tr. 521). After the jury reached a verdict, but before the verdict was announced, defense counsel sought to make an offer of proof regarding evidence of Victim's depression and medication:

The court: The jury is not down yet. We've been informed they've reached a verdict; however, Mr. – defense counsel wants to make a record.

[Defense counsel]: Yes, Your Honor. I talked with [the prosecutor], there was a certain issue that we had concerning offer of proof and the Court's ruling on motions in limine and testimony, and I wanted to make sure that was done before the record was closed.

She and I have agreed that, for the most part, the entire offer of proof will be contained in the testimony from the county

trial where there weren't any restrictions on the issues concerning the depression . . . . So we'd like to be able to submit that by agreement as the offer of -- testimonial offer of proof as to what the evidence would have been presented in that regard.

. . .

And I'm asking the Court leave to submit it based upon an offer of proof that's not testimonial, by agreement of [the prosecutor], so the record is preserved.

The court: So the testimony in the St. Louis County trial regarding the depression of the victim?

[Defense counsel]: Medication.

The court: Medication. . . . By agreement that's what your offer of proof will be, you'll be attaching those parts of the transcript to this court record?

[Defense counsel]: Yes. [The prosecutor] has said that she's willing to e-mail to the Court the e-mail she received from the court reporter, which will have those transcripts.

(Tr. 827-29).[11] The St. Louis County trial transcript contained the following exchange between Victim and defense counsel:

> Q [by defense counsel]: Would you talk to [Defendant and his wife] about your emotional state?
>
> A [by Victim]: Sometimes.
>
> Q. Did you talk to them and other students in the class about you being depressed?
>
> A. Yes.
>
> Q. Being diagnosed with depression? Did -- I meant -- Let me rephrase the question so we're clear. Okay? I'm asking you whether you told them or other students whether or not you'd been diagnosed with being depressed?
>
> A. Is this a medical question? Do I have to answer this?

---

[11] The St. Louis County trial transcript that was submitted as the offer of proof was not included in the original record on appeal in this case. Defendant filed a motion for leave to supplement the record on appeal with the transcript on May 10, 2016, the day before oral argument. Subsequent to the argument, the Eastern District granted the motion to supplement the record. *See* Memorandum Supplementing Order Affirming Judgment Pursuant to Rule 30.25(b) at 16 n.5.

Q. Well, I don't think it is a medical question, but I think it's been brought out already. Did you tell them?

A. Yes.

Q. Okay. And did you tell them you were also taking medication and drugs for the depression?

A. Yes.

Q. And did you tell the students that as well?

A. Yes.

Q. Did you talk to the students and [Defendant and his wife] about eating disorders?

A. No.

Q. Never mentioned it?

A. No.

Q. Did you ever complain to them about your mother?

A. Yes.

Q. And do you remember indicating in the deposition when you would complain to [Defendant] about your mother, he wouldn't say anything. He'd just remain silent?

A. No.

Q. You don't remember that?

A. No.

Q. Would you sometimes cry in class?

A. Yes.

Q. Did you sometimes go out in the parking lot and cry?

A. I think that occurred once.

Q. And when those things would happen, would that be because you were feeling a lot of stress and anxiety as a result of your home situation?

A. Partly.

Q. Excuse me?

A. Partly.

Q. And you talked a lot about your situation at home, didn't you?

A. I guess.

Q. I don't want you to guess. Did you talk to [Defendant and his wife] and other students about the problems that you were having at home?

A. Yes.

(Ex. A to Motion to Supplement Record 121-23).

B. The trial court did not plainly err.

Defendant argues that the trial court erred in prohibiting Defendant from "referencing [Victim's] mental health diagnoses or treatment, including counseling, received prior to, during, or subsequent to the time she claimed

the acts in the indictment occurred." (Def.'s Br. 64). "Specifically, [Defendant] was prohibited from eliciting testimony regarding [Victim's] eating disorders and treatment for depression." (Def.'s Br. 64-65). Defendant argues that, because of the trial court's ruling, he could not "put evidence before the jury that [Victim] had battled with depression and relationship difficulties," and that "she had a history of blaming others for when things went wrong." (Def.'s Br. 65). Defendant argues that this evidence would have shown that "these mental problems were some of the reasons that caused her to make the present allegations." (Def.'s Br. 65). Defendant's claim is not preserved for appeal, however, because Defendant did not make a timely offer of proof regarding the evidence that was excluded.

A motion in limine is interlocutory in nature; therefore, the motion, in and of itself, "preserves nothing for appeal." *State v. Chambers*, 234 S.W.3d 501, 511 (Mo. App. E.D. 2007). "To preserve the matter for appeal, the proponent of the evidence must attempt to present the excluded evidence at trial, and if an objection to the proposed evidence is raised and sustained, the proponent must then make an offer of proof." *Id.* The offer of proof must be made at trial, at the time of the objection. *See id.*; *see also Anderson v. Wittmeyer*, 895 S.W.2d 595, 601 (Mo. App. W.D. 1995). This is because trial judges should be given the opportunity to decide the evidentiary question "in

light of the circumstances that exist when the questioned evidence is actually proffered." *Chambers*, 234 S.W.3d at 511-12.

Defendant did not preserve this claim for appeal because he did not make an offer of proof during trial when the State's objection was sustained. Although an appellate court has discretion whether to review an unpreserved matter for plain error, this Court should not choose to do so here. *See id.* at 512 (declining to review the defendant's unpreserved claim for plain error because the defendant did not make an offer of proof at trial); *see also State v. Whitaker*, 405 S.W.3d 554, 558-59 (Mo. App. E.D. 2013) (plain error review is discretionary and should be used sparingly).

Nonetheless, should this Court choose to review Defendant's claim, the Court should affirm the trial court's ruling because Defendant failed to show he suffered a miscarriage of justice or manifest injustice from the exclusion of this evidence. "Plain errors affecting substantial rights may be considered in the discretion of the court if it appears on the face of the record that the error alleged so substantially affected defendant's rights that a miscarriage of justice or manifest injustice would occur if the error were not corrected." *State v. Mayes*, 63 S.W.3d 615, 624 (Mo. banc 2001). To warrant reversal, there must be a reasonable probability that the trial court's error affected the outcome of the trial. *State v. McKay*, 459 S.W.3d 450, 456 (Mo. App. E.D.

2014). The defendant bears the burden of showing that plain error occurred. *Mayes*, 63 S.W.3d at 624.

Here, Defendant failed to show that he suffered a manifest injustice from the exclusion of this evidence. Defendant argues that the offer of proof—the transcript of Victim's St. Louis County trial testimony—would have shown that Victim had a history of blaming others and making false accusations. (Def.'s Br. 65). But the transcript contained no evidence supporting this theory. Rather, according to the transcript, Victim told Defendant, Defendant's wife, and other students about problems she was having at home, and that she had been diagnosed with depression and was taking medication for depression. (Ex. A to Motion to Supplement Record 121-23). Per the transcript, Victim complained to Defendant and his wife about Victim's mother, and Victim sometimes cried in class. (Ex. A to Motion to Supplement Record 121-23). This evidence does not support that Victim had a history of blaming others or making false accusations. In short, the offer of proof did not contain the evidence that Defendant represented it contained, nor did it contain evidence supporting Defendant's innocence.

Additionally, there was no reasonable probability that the evidence Defendant sought to admit would have affected the outcome of the trial. Defendant argues that he was "unduly prejudiced" by the trial court's exclusion of evidence regarding Victim's counseling, eating disorders,

treatment for depression, and relationship difficulties. (Def.'s Br. 63-66). But the jury heard evidence that Victim received counseling, that she had discord with her mother, and that she had "major concerns" with her body image (Tr. 518-19) and, nonetheless, found Defendant guilty. Moreover, such evidence was not helpful to Defendant. Although Defendant contends that such evidence would have shown Victim's motive to falsely accuse Defendant of repeated sexual abuse, it is more likely that the evidence would have hurt Defendant because it would have shown that he preyed upon a depressed child with a difficult home life. As such, the exclusion of this evidence did not result in manifest injustice.

Because the claim was not preserved, and no manifest injustice resulted from the exclusion of this evidence, Point V of Defendant's brief should be denied.

VI.

The trial court did not plainly err by excluding testimony about Defendant's police interview.

A. Relevant record.

Prior to trial, the State filed a motion in limine seeking to prohibit defense counsel "from eliciting any testimony or making any comment about the substance of Defendant's interview at the Webster Grove's Police Department." (L.F. 288). Specifically, the State sought to exclude testimony from Defendant and his wife "about what the detectives told Defendant and/or [Defendant's wife] during the course of the interview," and what Defendant and his wife told the detectives. (L.F. 288-89). This included testimony that the detectives informed them that the detectives would bring Victim to the police station to confront Defendant, that the police would charge Victim with filing a false police report, that police offered to let Defendant take a polygraph examination, and that Defendant denied the allegations. (L.F. 289).

At a pre-trial hearing, defense counsel argued that the interview was "being offered for the fact that these officers continued to make him promises in order to try and secure a confession, and he never confessed." (Tr. 256). The State argued that the interview was hearsay and irrelevant. (Tr. 256-57).

The trial court granted the State's motion in limine, stating: "I think it's irrelevant to what end the police said all these things. He did not confess, and, so, for that reason, I'm going to exclude the recording of the interrogation by the Webster Groves Police Department." (Tr. 257-58).

After the jury reached a verdict, but before the verdict was announced, defense counsel sought to make an offer of proof regarding the police interview. (Tr. 827-29). Defense counsel informed the court that the St. Louis County trial transcript contained the evidence that Defendant sought to admit regarding the police interview. (Tr. 828-29).

On appeal, Defendant filed a portion of the St. Louis County trial transcript, but that portion did not contain any testimony regarding Defendant's police interview. (*See* Ex. A to Motion to Supplement Record 121-23).

B. The trial court did not plainly err.

Defendant did not preserve this claim for appeal because he did not make an offer of proof. *See Chambers*, 234 S.W.3d at 512. Defendant failed to describe what evidence he sought to admit regarding the police interview; although defense counsel said the St. Louis County trial transcript contained the evidence regarding the police interview, the transcript filed on appeal did not refer to the police interview. As such, this Court should decline to review

this claim. *See id.*; *Whitaker*, 405 S.W.3d at 558-59 (plain error review is discretionary and should be used sparingly).

Should the Court choose to review Defendant's claim, reversal is not warranted under plain error review. Defendant argues that the trial court erred in "prohibiting defense counsel from commenting or eliciting testimony concerning the interview" of Defendant and his wife by the Webster Groves Police Department because the evidence was not hearsay. (Def.'s Br. 71, 74-75). Defendant contends that the statements were "not offered for the truth of what the police said but just the opposite, that what the police told him and his wife was not true and the statements and threats were part of an attempt to coerce or trick [Defendant] into making incriminating statements." (Def.'s Br. 71). But whether the police attempted to coerce or trick Defendant into making incriminating statements was not relevant.

Evidence is logically relevant if it tends to prove or disprove a fact in issue. *State v. Morton*, 238 S.W.3d 732, 736 (Mo. App. E.D. 2007). Defendant did not make any incriminating statements in the interview, thus the detectives' attempts to "coerce or trick" him into making incriminating statements did not tend to prove or disprove a fact in issue at trial.

Defendant argues that the evidence was relevant because it weighed in favor of his veracity when testifying at trial, "which was a major issue in the case." (Def.'s Br. 72-73). Defendant contends that the evidence would have

shown that he "consistently denied the allegations" Victim made against him and he "continued to maintain his innocence." (Def.'s Br. 72-73).

But if the evidence were used for that purpose, then the evidence would have been inadmissible hearsay because Defendant would be attempting to use his own out-of-court statement that he was innocent as proof of his innocence. "As a general rule, a defendant cannot create exculpatory evidence by introducing self-serving, hearsay statements." *State v. Marshall*, 410 S.W.3d 663, 672 (Mo. App. S.D. 2013) (the defendant's statement to his sister that "he was not the perpetrator" was inadmissible self-serving hearsay). As such, the trial court did not plainly err in excluding Defendant's self-serving hearsay statements.

Further, the trial court did not plainly err in excluding Defendant's statements during the police interview because the statements constituted improper bolstering. The use of prior consistent statements constitutes improper bolstering when out-of-court statements are offered only to be duplicative or corroborative of trial testimony. *State v. Hudson*, 230 S.W.3d 665, 668 (Mo. App. E.D. 2007). Here, Defendant testified at trial that he was innocent (Tr. 553, 555-56, 582-83, 587, 588, 593, 596, 607), and his prior declarations to the police of his innocence were merely duplicative of his trial testimony. To that end, Defendant did not suffer a manifest injustice from the exclusion of the evidence because there was no reasonable probability

that, had the jury heard additional testimony from Defendant proclaiming his innocence, the outcome of the trial would have been different.

Testimony about the police interview was inadmissible; therefore, the trial court did not plainly err by excluding it. Point VI of Defendant's brief should be denied.

CONCLUSION

The Court should affirm Defendant's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 13,495 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word software; and

2. That a copy of this notification was sent through the eFiling system on this 21st day of November, 2016, to:

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