In the Missouri Court of Appeals
Eastern District
DIVISION FOUR

STATE OF MISSOURI,	)	No. ED104918
	)	
Respondent,	)	Appeal from the Circuit Court
	)	of St. Louis County
vs.	)	15SL-CR00587-01
	)	
MAVERICK HOLMSLEY,	)	Honorable Kristine A. Kerr
	)	
Defendant/Appellant.	)	FILED: August 29, 2017

OPINION

Maverick Holmsley (Defendant) appeals from the judgment upon his convictions following a jury trial for two counts of sodomy in the first degree and two counts of attempted sodomy in the first degree, in violation of Section 566.060, RSMo 2000.[1] The trial court sentenced Defendant to five years' imprisonment on each count, to be served concurrently. We affirm.

Factual and Procedural Background

Viewed in the light most favorable to the verdict, the following evidence was adduced at trial:[2]

[1] Unless otherwise indicated, all further statutory references are to RSMo 2000 as amended.
[2] The State initially charged Defendant with six counts of sodomy in the first degree involving six separate victims. After Defendant filed a motion for a bill of particulars, the State filed a response to the motion and an Information in Lieu of Indictment charging Defendant with four counts of sodomy and two counts of attempted sodomy. Prior to trial, the State *nolle prossed* Counts V and VI.

In August 2014, Principia High School ("Principia") was hosting sports camps at the high school that members of the boys' football and soccer teams were attending. During the camps, the boys resided in the dorms at Principia.

On the evening of August 9, 2014, the football team went out to see a movie. After the movie ended, the boys went back to the dorms where they eventually went to sleep.

In the early-morning hours of August 10, 2014, Defendant, along with four other rising seniors, went to the dorm rooms of four underclassmen, entered each victim's room, held each victim down, and attempted to sodomize or sodomized him.

Later that day, the dean of students and the principal received information about an incident in the boys' dorm. The dean of students and the principal testified that they conducted an informal investigation into the incident, which included meeting with the five alleged perpetrators, including Defendant, who had been involved in the incident. The boys all admitted that they were involved. However, the principal testified that, at the meeting, Defendant did not say anything; he seemed very "distraught," and he agreed only by nodding his head to what the other boys were saying.

The dean of students testified that after speaking with the boys, she spoke with some of the alleged victims. After speaking with two of the victims, she called the school's lawyer, who then called police. The dean also testified that Defendant gave apology letters to her that were addressed to two of the four victims.

The State charged Defendant and his other four teammates with four counts of sodomy and two counts of attempted sodomy. Defendant pleaded not guilty on all counts and the case proceeded to trial.

Following the presentation of evidence, the jury found Defendant guilty as charged. The trial court sentenced Defendant to five years in prison for each count, to run concurrently. This appeal follows. Additional facts will be included in the discussion section below, as needed, to further address the points on appeal.

Standard of Review

We review a trial court's denial of a motion for new trial for an abuse of discretion. State v. Kilgore, 505 S.W.3d 362, 366 (Mo. App. E.D. 2016). Under this standard, we must determine whether the trial court's ruling constituted an abuse of discretion because it clearly offends the logic of the circumstances or was arbitrary and unreasonable. Id. Therefore, an abuse of discretion is found when reasonable persons could not differ as to the propriety of the action taken by the court. Id.

Juror Misconduct

In Point I, Defendant argues the trial court erred in overruling Defendant's motion for new trial based on juror misconduct because the State failed to rebut the presumption of prejudice. We disagree.

We will not disturb a trial court's ruling on a motion for new trial based on juror misconduct unless the trial court abused its discretion. State v. West, 425 S.W.3d 151, 154 (Mo. App. W.D. 2014); State v. Moore, 366 S.W.3d 651, 652 (Mo. App. E.D. 2012). We defer to the trial court because, "[t]he trial court hears the evidence concerning the alleged misconduct and is, therefore, in the best position to determine the credibility and intent of the parties and to determine any prejudicial effect of the alleged misconduct." Mathis v. Jones Store Co., 952 S.W.2d 360, 364 (Mo. App. W.D. 1997). The trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before it and is so arbitrary and unreasonable

as to shock the sense of justice and indicate a lack of careful consideration. St. Louis City. v. River Bend Estates Homeowners' Ass'n, 408 S.W.3d 116, 134 (Mo. banc 2013). "In reviewing a trial court's order denying a motion for a new trial, the evidence is viewed in a light most favorable to the trial court's order." Id. Moreover, every case rests upon its own particular facts and a great deal of discretion is vested in the trial judge "who sits as an intimate observer of the whole chain of events." Mathis, 952 S.W.2d at 364.

Here, during jury deliberations, the trial court received a note from the jury stating that "[o]ne of our jurors has stated that she would be unable to convict (vote guilty) unless she knows what the sentence would be. She says she doesn't believe a 17-year-old should be tried as an adult. Wants to be able to petition the Court for lenience." The court responded with a note that stated, "[t]he jury will be guided by the evidence as they recall it and the instructions of law as provided by the Court."

Almost an hour later, the bailiff alerted the trial court that one of the jurors had opened the door of the jury room and tried to leave. The trial court told counsel that it wanted to bring the jurors back into the courtroom and inquire of the foreperson whether further deliberations would assist the jury. Following a short recess, the trial court received a note from the jury that stated, "we are making progress after a break and additional discussion." After discussion with the parties, the court overruled Defendant's request for a mistrial and for further inquiry and decided to allow the jury to continue deliberating. Shortly thereafter, the jury returned its verdicts.

After polling the jury, Defendant asked to inquire of the one juror that attempted to leave the jury room. The trial court refused, stating that it was "not allowed to question the jurors separately and independently, and otherwise pierce their verdict." Defendant then asked that the

trial court inquire of the bailiff under oath as to what happened when the juror tried to leave. The trial court agreed to inquire, and the parties agreed that the trial court would ask the questions.

The bailiff testified that "[t]he door opened, and the tall Juror Number 12 said she had to leave, she couldn't do it no more, she was being forced into something she didn't believe in." The bailiff testified that the juror was "crying, very upset[,]" and "[s]he kept walking past me. I kept. . . guiding her back with a little hug." The bailiff also testified that when the juror came back out again, "I told her that she needed to remain with her group, that, you know, she needed to comply, and work as a team." The bailiff testified that she never told the jurors what kind of verdict they had to reach or that they had to agree with each other.

Defendant argued that this interaction interfered with the jury process. The trial court stated that it was a very challenging situation for the bailiff because she was charged with keeping the jury together.

After hearing argument, the trial court denied Defendant's request to further interview the bailiff, but found that "there has been a rebuttable presumption of prejudice created and that the burden has shifted to the State to produce evidence which overcomes it."

On August 31, 2016, the trial court held an evidentiary hearing on the matter. Juror No. 12 testified that she tried to leave the jury room, but she did not leave because the bailiff told her she would go to jail. She also testified that the bailiff did not discuss anything about the case with her and did not influence her verdict.

On cross-examination, Juror No. 12 testified that she wanted to leave the jury room, but that the bailiff was standing in the doorway when she opened the door. She also testified that she had no physical contact with the bailiff. She then reaffirmed that her interaction with the bailiff had no effect on her verdict:

Q. Do you recall if the bailiff ever said to you that you needed to comply?
A. Comply with what?
Q. I don't know, I'm just asking if she—if you recall her using those words at all?
A. No.
Q. No, you don't recall?
A. No, I don't recall.
Q. Do you recall if the bailiff ever said to you that you need to go back in and work as a team?
A. Something like that. I don't know if that was the exact words, but that I needed to stay in the room and we needed to work together.
Q. Okay. So what you recall is she said you need to go back in there or you'll go to jail; right?
A. That's backwards.
Q. Okay. You tell me what you remember?
A. I said I wanted to get out of here, I was very, very upset, and she said if you come out you will go to jail.
Q. When she said that to you—
A. Then I went back in the room.
Q. Okay. When she said that statement to you that you just told me about going to jail, what did you understand that to mean?
A. That you can't just walk out of a jury deliberation room, if you do that you're breaking a law.
Q. At that point you said that you went back into the room?
A. Right.
Q. And joined the rest of your jurors, is that correct?
A. Yes.
Q. The incident or the contact that you had with the bailiff, [ ], do you have any knowledge as to whether any of the other jurors observed that interaction?
A. I don't know, they were in the room and there was the door.
Q. Okay. When you went back into the jury room you continued deliberations; is that correct?
A. Yes.

* * *

Q. . . . Did the statement that [the bailiff] made to you have any affect (sic) on your verdict?
A. No.

* * *

Q. . . . [Juror Number 12], if—if the bailiff had not stopped you and turned you around and made that statement to you about going to jail would you have left the jury room?
A. Yes.

After the hearing, Defendant again sought to elicit testimony from the bailiff, but that request again was denied by the trial court. In its order, the trial court ruled that the State had sustained its burden of showing that there was no prejudice:

> The Court finds that Juror #12 clearly, and without equivocation, stated that the interactions between herself and the bailiff had no effect on this juror's deliberations or her ability to follow the Court's instructions. Juror #12 made these statements to counsel for both parties, on direct and under cross examination.

Here, contrary to Defendant's assertions, the State rebutted the presumption of prejudice by presenting evidence that Juror No. 12 attempted to leave the jury room, but was stopped by the bailiff who was standing outside. The State also proved that the other jurors were not subject to improper influences because the bailiff, in telling Juror No. 12 not to leave the room, did nothing to influence the jurors in their deliberations.

As previously noted, a trial court's decision regarding alleged juror misconduct will not be disturbed on appeal absent a finding of abuse of discretion. Moore, 366 S.W.3d at 652. The appropriate test for juror and party misconduct is as follows:

> Parties and jurors should avoid all appearance of evil, and if any contact motivated by improper design appears, the jury should ordinarily be discharged or a new trial granted, regardless of the existence of actual prejudice. Accidental and casual contacts with jurors are of rather common occurrence and often unavoidable. If the contact has been wholly innocent, a mistrial should not ordinarily be granted unless it can reasonably be found that there was some improper influence on the jury. Where a juror, by some inquiry or voluntary statement has raised a question as to his impartiality, the question becomes essentially one of fact, and primarily this decision rests with the trial court.

Mathis, 952 S.W.2d at 364 (quoting Sunset Acres Motel, Inc. v. Jacobs, 336 S.W.2d 473, 479 (Mo. 1960)). Under this rule, communications that involve extrinsic evidentiary facts or "facts bearing on trial issues but not properly introduced at trial" require a new trial. See McBride v. Farley, 154 S.W.3d 404, 405-06 (Mo. App. S.D. 2004) (finding a trial court had abused its

discretion in denying a motion for new trial when it was discovered the jury coordinator had told members of the jury the case had been tried before and the prior trial resulted in a hung jury). In contrast, a new trial is not required where the contacts involve unrelated matters, or brief pleasantries. See Chilton v. Gorden, 952 S.W.2d 773, 780 (Mo. App. S.D. 1997) (any contact with jurors by defendant and her husband, during which they allegedly spoke about farming, cattle, and the weather, while improper, did not warrant new trial); see also Moore, 366 S.W.3d at 652 (no abuse of discretion found when trial court declined to question or strike juror in prosecution for child molestation based upon juror's brief encounter outside courtroom with victim's school counselor where there was no discussion of case). Furthermore, the question is essentially a factual one, and the trial court is in the best position to determine the credibility of the witnesses and any prejudicial effect of the alleged misconduct because it hears the evidence regarding the alleged misconduct. Mathis, 952 S.W.2d at 365.

Here, the contact between Juror No. 12 and the bailiff was brief and any potential influence upon the non-offending jurors was not material to the jury's deliberations in convicting Defendant. Therefore, any presumption of prejudice that would arise if the alleged juror misconduct in question was proven was rebutted. In determining whether prejudice resulted from alleged juror misconduct due to a juror's obtaining extraneous evidence, an important factor is the materiality of the evidence to the "consequential facts of the case." Smotherman v. Cass Regional Medical Center, 499 S.W.3d 709, 712 (Mo. banc 2016) (citing State v. Stephens, 88 S.W.3d 876, 883-84 (Mo. App. W.D. 2002)). Immaterial evidence is not prejudicial. Travis v. Stone, 66 S.W.3d 1, 6 (Mo. banc 2002). To be "material," evidence must "[h]av[e] some logical connection with the consequential facts." Travis, 66 S.W.3d at 6 (quoting BLACK'S LAW DICTIONARY 991 (7th Ed. 1999)).

Defendant relies on Smotherman and Travis to support his argument that the trial court should have heard evidence from all of the jurors. As the State correctly points out, however, the instant case is different from both Smotherman and Travis in that here, there was no extraneous evidence provided by a juror.

In Smotherman, a juror in a slip-and-fall case told the plaintiff's attorney after trial that he had Googled the weather for the day of the fall and found that there was significant snowfall forecasted for that day. Smotherman, 499 S.W.3d at 712. The trial court found that there was no prejudice from this extraneous evidence, in part because of testimony from eight other jurors that "the interjection of the extraneous evidence consisted of an isolated remark which was either not heard by the other jurors or was appropriately discarded by them." Id. at 714. In Travis, a juror in a wrongful death case went to the scene of the accident so that she could better "understand the testimony presented at trial." Travis, 66 S.W.3d at 3. The Missouri Supreme Court found that, "although [the juror] stated that her observations did not enter into deliberations, it must be assumed that her visit had an impact on her decision making, which in turn influenced her participation in the jury deliberations." Id. at 5.

Here, the interaction between the bailiff and Juror No. 12 was very brief and limited to the bailiff blocking the doorway and telling the juror that she could not leave the room. Nothing substantive was said between the two. Once Juror No. 12 was told that she was not permitted to leave the jury room, the juror turned around, went back into the room, and continued to deliberate. The juror also testified repeatedly that the interaction did not influence her verdict. See State v. Morris, 662 S.W.2d 884, 888-89 (Mo. App. S.D. 1983) (Mistrial was not required after alternate juror entered the jury room when the jury retired to deliberate where alternate

stated unequivocally that he had not begun deliberations when he was brought to the bench by bailiff after jury indicated they wanted exhibits, and request for exhibits did not refute alternate's statement, particularly in light of his explanation that he had not even gotten out of the bathroom when the court sent for him ten minutes after jury retired).

Moreover, the interaction at issue did not influence the verdicts of other jurors who simply might have witnessed Juror No. 12 open the door and then be told she could not leave. See State v. Kirk, 636 S.W.2d 952, 955-66 (Mo. banc 1982) (No perceivable prejudice or coercion resulted from bailiff's instruction to jury that they should fill out dinner menus unless they believed they could reach verdict in less than one hour, when the jury advised bailiff that they did not wish to order as they thought they would be reaching a verdict in less than an hour).

This Court is satisfied the brief and inconsequential encounter between Juror No. 12 and the bailiff had no effect whatever on the jury's deliberations or the verdict. When the jury was polled, all of the jurors unequivocally expressed that the verdict was their verdict. This was sufficient to prove that there was no improper influence on the verdict and that Defendant was not prejudiced and, therefore, there was no need for the trial court to hear testimony from other jurors about whether the encounter influenced their verdict. The trial court did not err and abuse its discretion in overruling Defendant's motion for new trial. Point I is denied.

Verdict Directors

In Point II, Defendant argues the trial court erred in submitting the verdict directors on all counts because there was a variance between the instructions, the charging document, and the bill of particulars, and such variance prejudiced Defendant in that the jury instructions failed to require the State to prove the allegations contained within the bill of particulars. We disagree.

We review claims of instructional error *de novo*, evaluating whether the instruction was supported by the evidence and the law. State v. Richie, 376 S.W.3d 58, 64 (Mo. App. E.D. 2012). We review the evidence in the light most favorable to the party submitting the instruction. Id. In order to warrant reversal on grounds of instructional error, the party challenging the instruction must show that "the offending instruction misdirected, misled or confused the jury, and prejudice resulted." Id. For prejudice to be found, the error must have materially affected the merits and outcome of the case. State v. Julius, 453 S.W.3d 288, 299 (Mo. App. E.D. 2014).

"The purpose of a bill of particulars is limited to informing the defendant of the offense so as to enable him to sufficiently prepare his defense." State v. Doolen, 759 S.W.2d 383, 385 (Mo. App. S.D. 1988). The bill of particulars is not a substitute for an indictment or an amendment of an information; it "merely describes with greater particularity the essential facts contained in a valid information or indictment." Id.; Rule 23.04. "Before a variation between the assertions made in a bill of particulars concerning the details of a crime and proof on the point offered at trial can be regarded as prejudicial error, it must be prejudicial to the defense of the defendant, in that it hampered his ability to sufficiently prepare his defense, and was material to the merits of the case." Id.

In Doolen, the court held that a variance between explanation in bill of particulars, concerning what method defendant used in making sexual contact with the victim, and the method described by the victim in his trial testimony was not of such magnitude to mandate reversal particularly where defendant presented an alibi defense. Id. The bill of particulars had alleged defendant touched the victim's genitals but the victim denied that any touching had occurred while describing other forms of contact which were also included in the bill of

particulars. Id. The court found that the variance was neither prejudicial nor material in that it did not hamper defendant in the preparation and presentation of his defense. Id.

"A variance alone is not conclusive to the question of whether there is reversible error." State v. Lee, 841 S.W.2d 648, 650 (Mo. banc 1992). "[A] variance, to justify reversal, should be material and prejudicial to the rights of the accused." Id. A variance is prejudicial only if it affects the defendant's ability adequately to defend against the charges presented in the information and given to the jury in the instructions. Id.

Here, the State originally charged Defendant with six counts of sodomy or attempted sodomy in the first degree in that "on or about August 10, 2014, in the County of St. Louis, State of Missouri, the defendant, acting with others, knowingly had deviate sexual intercourse with [the victim], by the use of forcible compulsion." The six counts[3] differed only in the initials of each individual victim. Defendant filed a motion for Bill of Particulars.

The State filed its response further detailing the charges:

1. In regard to Count I, [Defendant], acting with others, knowingly had deviate sexual intercourse with J.G. Specifically, Defendant [ ], and others, held J.G. down, while J.G.'s anus was penetrated with a pencil. Victim identified [Defendant].
2. In regard to Count II, [Defendant], acting with others, knowingly had deviate sexual intercourse with B.P. Specifically, Defendant [ ], and others, held B.P. down on his stomach, while a (sic) B.P.'s anus was penetrated with a pencil. Defendant [ ] later apologized to B.P. Victim identified [Defendant].
3. In regard to Count III, [Defendant], acting with others, attempted to have deviate sexual intercourse with S.G. Specifically, Defendant [ ], and others, came into his room, pulled him out of bed and attempted to penetrate his anus with an object. S.G. identified Defendant [ ] standing above him during the incident.
4. In regard to Count IV, [Defendant], acting with others, attempted to have deviate sexual intercourse with K.K. Specifically, Defendant [ ], and 3 others came into his dorm room after midnight. One individual held him down while another attempted to penetrate his anus with his finger. Victim

[3] Only four of the six counts are at issue in the instant appeal.

identified [Defendant] as being present.

In addition to the Indictment, the State also filed an Information in Lieu of Indictment. With respect to the challenged instructions, Instruction No. 7 stated:

> As to Count I, if you find and believe from the evidence beyond a reasonable doubt:
>
> First, that on or about August 10, 2014, in the County of St. Louis, State of Missouri, the defendant or Josh Brewer or Luke DeNicholas or Jason Bemis or Richardo (sic) Loma, penetrated the anus of J.G. with a finger or object; and
>
> Second, that such conduct constituted deviate sexual intercourse, and
>
> Third, that defendant or Josh Brewer or Luke DeNicholas or Jason Bemis or Richardo (sic) Loma did so by the use of forcible compulsion, and
>
> Fourth, that defendant or Josh Brewer or Luke DeNicholas or Jason Bemis or Richardo (sic) Loma did so knowingly, then you are instructed that the offense of sodomy in the first degree has occurred, and if you further find and believe from the evidence beyond a reasonable doubt:
>
> Fifth, that with the purpose of promoting or furthering the commission of that sodomy in the first degree, the defendant acted together with or aided Josh Brewer or Luke DeNicholas or Jason Bemis or Ricardo Loma in committing the offense, then you will find the defendant guilty under Count I of sodomy in the first 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.
>
> As used in this instruction, the term "deviate sexual intercourse" means a sexual act involving the penetration, however slight, of the anus by a finger, instrument or object done for the purpose of terrorizing J.G.
>
> As used in this instruction, "forcible compulsion" means physical force that overcomes reasonable resistance.

Instruction No. 11 stated:

> As to Count II, if you find and believe from the evidence beyond a reasonable doubt:
>
> First, that on or about August 10, 2014, in the County of St. Louis, State of Missouri, Jason Bemis penetrated the anus of B.P. with an object, and
>
> Second, that such conduct constituted deviate sexual intercourse, and
>
> Third, that Jason Bemis did so by the use of forcible compulsion, and
>
> Fourth, that Jason Bemis did so knowingly, then you are instructed that the offense of sodomy in the first degree has occurred, and if you further find and believe from the evidence beyond a reasonable doubt:
>
> Fifth, that with the purpose of promoting or furthering the commission of that sodomy in the first degree the defendant aided or encouraged Jason Bemis in

committing the offense, then you will find the defendant guilty under Count II of sodomy in the first 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.

As used in this instruction, the term "deviate sexual intercourse" means a sexual act involving the penetration, however slight, of the anus by a finger, instrument or object done for the purpose of terrorizing B.P.

As used in this instruction, "forcible compulsion" means physical force that overcomes reasonable resistance.

Instruction No. 15 stated:

As to Count III, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about August 10, 2014, in the County of St. Louis, State of Missouri, the defendant or Josh Brewer or Luke DeNicholas or Jason Bemis or Richardo (sic) Loma tried to penetrate the anus of S.G. with a finger or object, and

Second, that such conduct was a substantial step toward the commission of the offense of sodomy in the first degree of S.G., and

Third, that the defendant or Josh Brewer or Luke DeNicholas or Jason Bemis or Richardo (sic) Loma did so knowingly, and

Fourth, that the defendant or Josh Brewer or Luke DeNicholas or Jason Bemis or Richardo (sic) Loma engaged in such conduct for the purpose of committing such sodomy in the first degree of S.G., then you are instructed that the offense of attempted sodomy in the first degree has occurred, and if you further find and believe from the evidence beyond a reasonable doubt:

Fifth, that with the purpose of promoting or furthering the commission of that attempted sodomy in the first degree the defendant aided or acted together with Josh Brewer or Luke DeNicholas or Jason Bemis or Richardo (sic) Loma in committing the offense, then you will find the defendant guilty under Count III of any attempt to commit sodomy in the first 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.

A person commits the crime of sodomy in the first degree when he knowingly has deviate sexual intercourse with another person by the use of forcible compulsion.

As used in this instruction, the term "deviate sexual intercourse" means a sexual act involving the penetration, however slight, of the anus by a finger, instrument or object done for the purpose of terrorizing S.G.

As used in this instruction, "forcible compulsion" means physical force that overcomes reasonable resistance.

As used in this instruction, the term "substantial step" means conduct that is strongly corroborative of the firmness of the defendant's purpose to complete the commission of the offense of sodomy in the first degree.

Instruction No. 17 stated:

As to Count IV, if you find and believe from the evidence beyond a reasonable doubt:

First, that one or about August 10, 2014, in the County of St. Louis, State of Missouri, Josh Brewer tried to penetrate the anus of K.K. with a finger or object, and

Second, that such conduct was a substantial step toward the commission of the offense of sodomy in the first degree of K.K., and

Third, that Josh Brewer did so knowingly, and

Fourth, that Josh Brewer engaged in such conduct for the purpose of committing sodomy in the first degree of K.K., then you are instructed that the offense of attempted sodomy in the first degree has occurred, and if you further find and believe from the evidence beyond a reasonable doubt,

Fifth, that with the purpose of promoting or furthering the commission of that attempted sodomy in the first degree the defendant aided or encouraged Josh Brewer in committing the offense, then you will find the defendant guilty under Count IV of attempted sodomy in the first 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.

A person commits the crime of sodomy in the first degree when he knowingly has deviate sexual intercourse with another person by the use of forcible compulsion.

As used in this instruction, the term "deviate sexual intercourse" means a sexual act involving the penetration, however slight, of the anus by a finger, instrument or object done for the purpose of terrorizing K.K.

As used in this instruction, "forcible compulsion" means physical force that overcomes reasonable resistance.

As used in this instruction, the term "substantial step" means conduct that is strongly corroborative of the firmness of the defendant's purpose to complete the commission of the offense of sodomy in the first degree.

During the instructions conference, Defendant objected to these instructions arguing that the instructions should match the bill of particulars. Defendant offered alternative instructions; however, the trial court refused to give them.

Here, contrary to Defendant's assertions, any variance between the charging document, the bill of particulars, and the verdict directors did not prejudice Defendant because he was on

notice as to what the charges against him were, and he was able to adequately defend against the charges. Doolen, 759 S.W.2d at 385. Defendant's defense was that he did not participate in the attacks, that he did not have the *mens rea* to support an attempted sodomy or sodomy conviction, and that the incident was just a "prank." Therefore, the specific object used in the penetration of each victim was irrelevant to Defendant's defense.

Finally, unlike in State v. Moseley, 735 S.W.2d 46 (Mo. App. W.D. 1987), Defendant was not charged with one crime and convicted of another, but instead was charged with having attempted or deviate sexual intercourse with four boys under a theory of accomplice liability. See Moseley, 735 S.W.2d at 48 (Failure of trial court to modify definition instruction as to deviate sexual intercourse and sexual conduct to conform definition of sexual conduct to that proscribed touching which information and bill of particulars charged was reversible error). The trial court did not err in submitting the verdict directors on all counts. Point II is denied.

Closing Argument

In Points III and IV, Defendant argues the trial court erred and abused its discretion in (1) overruling defense counsel's objection to the State's argument during closing argument that Defendant did not want the jury to see the apology letters written to the victims because such argument was improper and prejudicial, and; (2) refusing defense counsel's request for a curative instruction after the prosecutor mentioned "sexual gratification" in closing argument and prejudicing Defendant because the jury was asked to convict Defendant on an alternative *mens rea* that was not charged and not included in the jury instructions. We disagree.

The trial court has broad discretion in controlling the scope of closing argument, and the court's rulings will be reversed only upon a showing of abuse of discretion resulting in prejudice to the defendant. State v. Tinsley, 143 S.W.3d 722, 734 (Mo. App. S.D. 2004). A trial court

abuses its discretion when its ruling is clearly against the logic of the circumstances before it and when the ruling is so arbitrary as to shock a sense of justice and indicate a lack of careful consideration. State v. Overton, 261 S.W.3d 654, 663 (Mo. App. S.D. 2008). Prejudice exists where "there is a reasonable probability that, in the absence of the abuse, the verdict would have been different." State v. Barton, 936 S.W.2d 781, 786 (Mo. banc 1996).

"However, '[t]he standard of review for alleged error in closing argument depends upon whether defense counsel objects.'" State v. Hall, 319 S.W.3d 519, 522 (Mo. App. S.D. 2010). "[F]ailure to properly object to closing argument at the time it is made to a jury results in a waiver of any right to complain of the argument on appeal, even if the point is preserved in an after trial motion." Id. "This is because 'if the objection is not timely, the trial court has no opportunity to take corrective action at the time the remarks were made.'" Id. "Therefore, when counsel does not object to an allegedly improper argument at the time it is made, the error is not preserved for review." Id.

With respect to Point III, the trial court did not err in overruling defense counsel's objection to the State's argument during closing argument that Defendant did not want the jury to see the apology letters.

The record shows that the dean of students testified at trial that she told the five students involved in the incident that they could write apology letters to the victims and that she received apology letters written by Defendant. When the State attempted to introduce the letters as evidence, Defendant objected, and the dean of students testified that she could not authenticate them because they were not given to her directly by Defendant. Later, the principal of the school testified that he was aware that Defendant had written apology letters.

During the State's initial closing argument, the prosecutor argued that the evidence, including the apology letters, established that Defendant was guilty.

During Defendant's closing argument, defense counsel attempted to point out inconsistencies in the testimony of the administrators and specifically mentioned the apology letters: "But, you know, the fact of the matter is, we never saw apology letters. You know, the prosecution promised you these apology letters in opening statement. We never saw any apology letters written by [Defendant]."

Thereafter, during the State's rebuttal closing argument, the prosecutor told the jury that they did not get to see the letters because defense counsel objected:

> Now, [defense counsel] argued and said to you, You never got to see these apology letters that the State mentioned. Well, why didn't you see the apology letters? I showed them to [the dean of students]. [The principal], he talked to you about them. But you didn't get to see them. Why? Because the defense objected. They didn't want you to see them.

At this point, Defendant made an untimely objection, arguing that the prosecutor's argument regarding the apology letters was improper. The trial court overruled Defendant's objection, stating that the reference to the letters was an "invited response."

Here, as Defendant did not object to the State's mention of the apology letters during the State's initial closing argument and not until he objected to another comment made by the State during the State's rebuttal closing argument, this objection was untimely. Therefore, review is only for plain error. "In order to establish that the [trial] court committed plain error during closing arguments, [a defendant] must make a sound, substantial showing that manifest injustice or a miscarriage of justice will result if [this Court fails to] grant relief." Hall, 319 S.W.3d at 523. "[W]hen complained of remarks come in the rebuttal portion of argument by the [S]tate, the trial court may consider whether the comments were invited' in that '[t]he [S]tate may go

further by way of retaliation in answering the argument of the defendant than would normally be allowed.'" Id. "The State 'has considerable leeway to make retaliatory arguments at closing' and it 'may retaliate to an issue raised by the defense even if [the] comment would be improper.'" Id.

Here, the trial court did not abuse its discretion or plainly err in overruling Defendant's untimely objection to the State's argument that the defense did not want the jury to see the apology letters. The State made this comment only after defense counsel pointed out to the jury that the State had promised that the jury would see apology letters but then never showed them. The State's mention of the apology letters in rebuttal closing was reasonable to respond to the comments made by defense counsel. Under the invited error doctrine, a party who has introduced evidence pertaining to a particular issue may not complain when the opposite party introduces related evidence intended to rebut or explain that evidence. State v. Ellis, 512 S.W.3d 816, 837 (Mo. App. W.D. 2016). Moreover, this comment by the State did not rise to the level of manifest injustice or a miscarriage of justice changing the outcome of trial. Point III is denied.

Curative Instruction

With respect to Point IV, again, the trial court did not err or abuse its discretion in refusing defense counsel's request for a curative instruction after the prosecutor mentioned "sexual gratification" in closing argument.

Here, the jury instructions defined "deviate sexual intercourse" as "a sexual act involving the penetration, however slight, of the anus by a finger, instrument or object done for the purpose of terrorizing [the victim]."

During the State's rebuttal closing argument, the prosecutor argued that the crime was a sex act:

> Now, the defense made a big deal, they said this is not a sex act. And I ask you, if this isn't a sex act, what is it? It's not a medical exam. It's a sex act. By definition, this is a sex act. Defense counsel wants you to look at only part of the definition, just like they only showed you part of the video of the interview of the boys with police. The definition goes on, and it allows for either sexual gratification, which is an option, or done to terrorize.

Defendant objected, arguing that it was improper argument and the trial court sustained the objection, explaining that: "We can't talk about things that we chose not to put in instructions before the jury." At this point, Defendant sought a curative instruction, but instead the trial court allowed the prosecutor to rephrase:

> THE COURT: I'm going to let her say, I'm going to direct you back to the instructions of law provided by the Court. In other words, I don't like to shake my finger at lawyers.
> [Defense counsel:] I gotcha.
> THE COURT: But I guess I would point out, I would ask you just to focus on the instructions that we've given them, not what we could have given them, or what we should have given them, but what they have before them. So if you could say, I'm going to draw your attention to the instructions of law that you have before you and explain to you why you should convict under them.
> [Prosecutor:] Okay. So you need me to go back to it?
> THE COURT: Unless you just want me to say, the jury is to be guided by the instructions of law that are before them now, and not what other possibilities could have been.
> [Prosecutor:] Yeah.
> [Defense counsel:] That's fine, Judge, we're fine if you instruct.
> [Prosecutor:] Okay. No, thank you, Judge, I'll just rephrase it. Sure.
> [Defense counsel:] We would prefer the Court instruct.
> THE COURT: I'm sure you would, but I'm not going to beat people up. I'm going to let her rephrase.
> [Defense counsel:] Okay. You may rephrase.
> [Prosecutor:] Thank you, [defense counsel].
> [Defense counsel:] You're welcome.

The prosecutor then rephrased her argument, mentioning only the part of the definition submitted in the jury instructions:

> We were talking about the defense arguing that this is not a sex act. When the defense pointed the sex act wording out, they didn't look at the whole definition. And I ask you to look at the entire definition of deviate sexual intercourse, which goes on to talk about done with—to terrorize.

While the trial court's rulings on objections to closing arguments are reviewed for abuse of discretion, "when a proper objection is made, the trial court should exclude statements that misrepresent the evidence or the law or statements that tend to confuse the jury." State v. Smith, 422 S.W.3d 411, 415 (Mo. App. W.D. 2013). However, even if a trial court is found to have abused its discretion by allowing improper closing argument, to warrant reversal of a conviction, the defendant also must establish that such there is a reasonable probability that, in the absence of the trial court's abuse, the verdict would have been different. Id.

Here, the record demonstrates that the prosecutor began to discuss a *mens rea* that was not charged or instructed in the case, whereupon defense counsel objected. The trial court sustained the objection and allowed the prosecutor to rephrase.[4]

Even assuming the trial court should have given a curative instruction following the prosecutor's improper statement, the trial court's failure to do so does not require reversal when "the proper law is given to the jury because we assume the jury followed the law as stated in the instructions." Smith, 422 S.W.3d at 416. Here, the jury was properly instructed. As such, the trial court did not abuse its discretion in allowing the prosecutor to rephrase her argument nor was the Defendant prejudiced by this action. We find no error, plain or otherwise. Point IV is denied.

Motion to Dismiss

[4] We note that we need not resolve whether or not there was a waiver in the statement by defense counsel, "You may rephrase," because there was no prejudice and the result would not have been any different.

In Point V, Defendant argues the trial court erred in denying his motion to dismiss Counts III and IV of the Information for failure to charge an offense because neither count sufficiently alleged the elements of sodomy in the first degree or attempted sodomy in the first degree. We disagree.

Whether an information fails to state an offense is a question of law, which we review *de novo*. State v. Metzinger, 456 S.W.3d 84, 89 (Mo. App. E.D. 2015). "The Sixth Amendment of the United States Constitution and article I, section 18(a) of the Missouri Constitution guarantee a defendant the right 'to be informed of the nature and cause of the accusation. . . .'" Id. at 91. Rule 23.01 requires that, to be sufficient, an indictment or information must state: (1) the name of the defendant; (2) the essential facts constituting the offense charged; (3) the time and place of the offense charged; (4) the section of the statutes alleged to have been violated; and (5) the name and degree, if any, of the offense charged. State v. Rousseau, 34 S.W.3d 254, 258 (Mo. App. W.D. 2000). In other words, the indictment or information must contain all of the essential elements as set out by the statute creating the offense. Metzinger, 456 S.W.3d at 91. "Measured by these standards, the test of the sufficiency of an indictment is whether it contains all the essential elements of the offense as set out in the statute and clearly apprises defendant of the facts constituting the offense in order to enable him to meet the charge and to bar further prosecution." Id.

Here, the record shows that in the Information in Lieu of Indictment, the State charged Defendant in Counts III and IV with attempted sodomy in the first degree in that "on or about August 10, 2014, in the County of St. Louis, State of Missouri, the defendant, acting with others, knowingly attempted to have deviate sexual intercourse with [the victim] by the use of forcible compulsion."

On the day of trial and after the jury was selected, Defendant filed a Motion to Dismiss Counts III and IV for Failure to Charge an Offense. The trial court denied the motion but also informed the parties that it was not a final ruling and that it would review the motion while the State gave its opening statement. After reviewing the motion and the case law cited to it, the trial court denied Defendant's motion to dismiss.

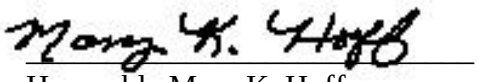
As mentioned above, the test for the sufficiency of an indictment or information is whether it contains all the elements of the offense and clearly apprises the defendant of the facts constituting the offense. Metzinger, 456 S.W.3d at 91. However, in charging the inchoate crime of attempt, the State need not be as explicit and specific as when charging the completed crime. See State v. Heslop, 842 S.W.2d 72, 76 (Mo. banc 1992) (Information which stated that defendant "attempted to appropriate a motor vehicle, a 1989 Ford pickup truck" which was in possession of dealer, was sufficient to charge defendant with crime of attempted stealing; the State was not required to charge in specific, step-by-step detail, defendant's "attempt to appropriate"); see also Henderson v. State, 789 S.W.2d 498, 501 (Mo. App. E.D. 1990) (Information sufficiently alleged conduct constituting substantial step toward kidnapping to charge defendant with attempted kidnapping, where it was alleged that defendant followed victim in his car, pointed gun at victim, and ordered her to get into his car, for purpose of committing kidnapping; it was not necessary that information allege actual and specific attempt to make or perform each and every element of completed crime of kidnapping).

Here, the Information for Counts III and IV stated that Defendant "acting with others, knowingly attempted to have deviate sexual intercourse with [the victim] by the use of forcible compulsion." The conduct constituting the substantial step was the actual attempt to achieve the result of the sodomy. Therefore, the Information for Counts III and IV was sufficient to charge

Defendant with attempted sodomy, and the trial court did not err in denying Defendant's motion to dismiss. Point V is denied.

Conclusion

The judgment is affirmed.



Honorable Mary K. Hoff

Colleen Dolan, Presiding Judge and Lisa S. Van Amburg, Judge: concur