No. _____

IN THE

Supreme Court of the United States

JEREMY BAUM,
Petitioner,
v.

STATE OF MISSOURI,
Respondent.

On Petition for a Writ of Certiorari
To the Supreme Court of Missouri

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX TO PETITION FOR CERTIORARI

Page

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	**WD85148**
v.	)	
	)	**OPINION FILED:**
	)	**March 4, 2025**
JEREMY BAUM,	)	
	)	
Appellant.	)	

Appeal from the Circuit Court of Johnson County, Missouri
The Honorable R. Michael Wagner, Judge

Before Division Three: Alok Ahuja, Presiding Judge, and Karen King Mitchell and Edward R. Ardini, Jr., Judges

Jeremy Baum appeals, following a jury trial, his convictions of sexual trafficking of a child in the second degree, § 566.211,[1] and promoting a sexual performance by a child, § 573.205, for which he was sentenced (with other convictions not at issue in this appeal) to a total of twenty-seven years' imprisonment.[2] Baum raises five claims on appeal, all directed at the sufficiency of the evidence presented at trial. Points I and V

[1] All statutory references are to the Revised Statutes of Missouri (Cum. Supp. 2018).

[2] Baum was also convicted of one count of second-degree statutory rape, § 566.034, and five counts of second-degree statutory sodomy, § 566.064. He does not challenge any of those convictions in this appeal.

challenge the sufficiency of the evidence to support both a conviction (Point I) and a verdict director (Point V) for sexual trafficking. Baum suggests that, because the evidence established that he was a participant in the acts alleged to be a sexual performance, he could not also be the audience and, without an audience, the conduct could not amount to a performance as required for the crime of sexual trafficking. In Points II, III, and IV, he challenges the sufficiency of the evidence to support both a conviction (Points II and III) and a verdict director (Point IV) for promoting a sexual performance. Baum argues that (1) the conduct underlying the charge was insufficient to prove a sexual performance and (2) what evidence there was showed the conduct occurred in Florida, rather than Missouri, and did not support a finding that he directed Victim to engage in a sexual performance. As laid out below, we do not believe any of Baum's points on appeal merit relief and, thus, we affirm.

Background[3]

Victim became Baum's stepdaughter after her mother and Baum married when Victim was two years old. Victim knew Baum as "dad" for her entire childhood. Baum and Mother divorced in 2015. After the divorce, Baum lived in Florida with Victim and Victim's half-brother (Brother) while Mother remained in New Mexico.

When Victim was fifteen years old, Baum became more physically affectionate; it began with Baum insisting that they nap together. Sometimes Baum would wrap his

[3] Because Baum challenges the sufficiency of the evidence supporting his convictions, we "must examine 'the evidence and inferences in the light most favorable to the verdict, ignoring all contrary evidence and inferences.'" *State v. McCord*, 621 S.W.3d 496, 498 (Mo. banc 2021) (quoting *State v. Niederstadt*, 66 S.W.3d 12, 14 (Mo. banc 2002)).

arms around Victim, and other times, he would have Victim lie on top of him. Victim did not want to nap with Baum, but she also did not want to upset him. Baum began kissing Victim longer than she was comfortable with and holding her hand in public. At one point, a family friend (Friend) observed Baum and Victim napping together when Victim was lying on top of Baum, and she expressed some concern to Baum; Baum did not see any problem with a father showing affection to his child. Friend also observed Victim wrap her arms around Baum in a way that was more symbolic of a romantic than familial relationship, and Friend again expressed concern to Baum. Baum made Friend feel that she was overreacting by suggesting that her concern arose only because Baum was a dad and that such behavior by a mom would not have been questioned.

Baum eventually began discussing masturbation with Victim; he claimed that he did so because he found a woman's razor in Victim's bed and assumed she had been using the handle for masturbation, though there is no evidence that this assumption was accurate. Victim was uncomfortable with the discussions, but Baum made her feel that it was a normal thing to discuss. She was expected to "keep him in the loop" and they had conversations about her own masturbation. Baum told Victim about his experiences with other women and how they were pleasured, and he purchased a hot pink vibrator for Victim to use. Baum taught Victim how to charge and operate the vibrator and suggested where and how she could use it to feel good. Victim was then expected to use the vibrator in private in the manner Baum had instructed. Baum also advised Victim that the vibrator was for external use, and she should tell him if she was ever interested in anything for internal use so he could obtain something for her.

Baum mentioned to Friend that he had discussed masturbation with Victim, claimed that Victim asked him how to do it, and then said he did not know how to respond, so he explained to Victim how he had pleasured women in the past. Friend told Baum that he had crossed the line by sexualizing himself to his daughter. Baum again accused Friend of overreacting because he was a dad rather than a mom, and they never discussed it again. Friend was not aware that Baum had purchased a vibrator for Victim.

Shortly thereafter, in October of 2018, Baum, Victim, and Brother moved from Florida to Warrensburg, Missouri; Victim was sixteen years old at the time. Baum's behavior with Victim not only continued but also escalated after the move. Victim began spending the night in Baum's bedroom, where they engaged in mutual masturbation, with Victim touching Baum's genitals while he touched hers or used the vibrator on her. During these times, Baum would direct Victim "where to please [her]self" and how to position her body; Baum also directed her manipulation of his genitals, suggesting "[w]here to put [her] hands, how fast to do it, when [she] needed to add lubrication." Baum praised Victim, telling her she was brave and how much he loved her. Baum "would tell [Victim] how beautiful [she] was. He would comment on [her] body. He would tell [her] how wet [she] was and how grown up [she] was as well." Victim continued to comply with Baum's requests because she did not want to upset him.

Baum's requests expanded from digital manipulation to oral; he began using his mouth on Victim's genitals and asked her to use her mouth on his genitals as a way of "giving back." Victim was very uncomfortable with Baum using his mouth on her genitals, and Baum became upset and offended, indicating that he was very good at oral

stimulation with other women and did not understand why Victim was not enjoying it. Victim felt terrible for upsetting Baum. Baum also attempted to vaginally penetrate Victim with his penis on two occasions but stopped because Victim said it hurt.

Baum took precautions to prevent Brother from discovering his activities with Victim. At night, Baum instructed Victim to go to bed in her room where she would wait for him to come get her after Brother had gone to sleep, and then Baum would close his bedroom door behind them. In the morning, Baum would get up first and check to see if Brother was awake; if he was, then Baum would distract Brother so that Victim could return to her own room and pretend to still be sleeping.

Despite Baum's efforts, Brother noticed some things that caused him concern. He saw Victim's hot pink vibrator charging on the floor of Baum's bedroom. One night when no one other than Baum, Victim, and Brother were home, Brother heard female "sex noises" coming from Baum's bedroom even though the lights and the television were off. And, on another occasion in May of 2020, Brother noticed Victim and Baum go into the downstairs bathroom together where they remained for a long time, prompting Brother to call Mother.

In response to Brother's phone call, Mother drove from New Mexico to Missouri, where she contacted the local police. The police told Mother to drive to the home, pick up Victim and Brother, and take them straight to Sedalia for forensic interviews. After the forensic interviews, Mother took Victim and Brother back to New Mexico with her.

Subsequent investigation led to a search of Baum's home, where officers discovered "a small pink vibrator as well as a large black, . . . three-prong vibrator, [and

multiple] bottles of lubrication." Both vibrators contained a mixture of DNA, but Victim was the major contributor on the pink one and Baum was the major contributor on the black one. The State charged Baum with one count of sexual trafficking of a child in the second degree, one count of promoting a sexual performance by a child, one count of second-degree statutory rape, and six counts of second-degree statutory sodomy.

At trial, Baum testified in his own defense. Baum admitted buying Victim a vibrator and teaching her how it worked in accordance with the manufacturer's instructions. Baum denied all other allegations.

Following the close of evidence, the State dismissed one of the second-degree statutory sodomy counts, but the remaining charges were submitted to the jury. The jury found Baum guilty as charged on the remaining counts. Baum waived jury sentencing, and the court sentenced him to twenty years' imprisonment for sexual trafficking of a child, eight years for promoting a sexual performance, seven years for statutory rape, and seven years for each count of statutory sodomy. The court ordered the trafficking and statutory rape sentences to run consecutively and the promotion of a sexual performance and statutory sodomy sentences to run concurrently for an aggregate sentence of twenty-seven years. Baum appeals.

Standard of Review

In Points I, II, and III, Baum challenges the sufficiency of the evidence to support his convictions in Counts I and II (second-degree trafficking of a child and promoting a sexual performance by a child, respectively). In Points IV and V, he challenges the sufficiency of the evidence to support submission of the verdict directors for Counts I and

II to the jury. "As a practical matter, the test for determining the sufficiency of the evidence to convict . . . and for determining the sufficiency of the evidence to support the giving of a verdict director . . . is ultimately the same[:] 'Did the State make a submissible case?'" *State v. Bradshaw*, 26 S.W.3d 461, 465 (Mo. App. W.D. 2000). Therefore, our standard of review for all of Baum's points is the same.

Our review of "a challenge to the sufficiency of the evidence supporting a criminal conviction is limited to a determination of whether the trier of fact reasonably could have found the defendant guilty." *State v. Blankenship*, 415 S.W.3d 116, 121 (Mo. banc 2013). In conducting this review, "[a]ll evidence and inferences favorable to the State are accepted as true, and all evidence and inferences to the contrary are rejected." *State v. Porter*, 439 S.W.3d 208, 211 (Mo. banc 2014). "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318 (1979), *superseded on other grounds by* 28 U.S.C. § 2254(d).

Analysis

In Points I and V, Baum challenges the sufficiency of the evidence presented at trial to support both his conviction of and the verdict director for sexual trafficking of a child. In Points II, III, and IV, Baum challenges the sufficiency of the evidence presented at trial to support both his conviction of and the verdict director for promoting a sexual performance. For ease of discussion, we address his points out of order.

I. There was sufficient evidence to support Baum's conviction for sexual trafficking of a child in the second degree.

In his first point on appeal, Baum argues that the State did not present evidence to support his conviction for sexual trafficking of a child in the second degree insofar as Baum's actions with Victim "did not constitute a 'sexual performance.'" We disagree.

"A person commits the offense of sexual trafficking of a child in the second degree if he . . . knowingly . . . entices . . . a person under the age of eighteen to participate in . . . a sexual performance[.]" § 566.211.1(1). Baum does not challenge Victim's age, his mental state, or whether his conduct constituted enticement; instead, his sole challenge is directed at whether Victim's conduct amounted to a "sexual performance."

A "sexual performance" is "any . . . exhibition which includes sexual conduct . . . , performed before an audience of one or more, whether in person or online or through other forms of telecommunication." § 566.200(15). Baum argues that none of the conduct he or Victim engaged in constituted a sexual performance because a sexual performance requires an audience and he could not be both audience and participant. We disagree.

For the purpose of § 566.211.1(1), a "sexual performance" need not be public, *State v. George*, 717 S.W.2d 857, 859 (Mo. App. S.D. 1986); and need not be visually observed by the intended audience, *Blankenship*, 415 S.W.3d at 122; *State v. Ragland*, 494 S.W.3d 613, 629-30 (Mo. App. E.D. 2016); *State v. Butler*, 88 S.W.3d 126, 129-30 (Mo. App. S.D. 2002). Instead, the focus of the statute is on the child's anticipated

behavior in response to some manner of instigation by the defendant. *See* § 566.200(15) (defining "sexual performance" as an "exhibition [that] includes sexual conduct"); *State v. Hartwein*, 648 S.W.3d 834, 851 (Mo. App. E.D. 2022), *cert. denied*, 143 S. Ct. 2444 (2023) (defining "entice" as "to incite, instigate") (quoting *Webster's Third New International Dictionary of the English Language Unabridged* 757, 913 (2002)). Thus, evidence that a defendant "instructed [the v]ictim on multiple occasions to masturbate," and "coached [the v]ictim how to stimulate herself sexually by touching her body" constituted sufficient evidence of "a substantial step toward the use of a child in a sexual performance." *Blankenship*, 415 S.W.3d at 123.[4] And "requir[ing a] child to perform [while the defendant] watche[s]," making the defendant "as much director as . . . audience" establishes sufficient evidence of a "sexual performance." *George*, 717 S.W.2d at 859.

Here, Victim testified that, after they moved to Missouri, she began spending the night in Baum's bedroom, where they engaged in what she called "mutual masturbation," including Baum directing Victim how to position her body and where to please herself, making him both director and audience. The fact that Baum was also a recipient of sexual contact in the same time frame does not eviscerate his role as audience when Victim masturbated in front of him.[5] The evidence that Baum offered Victim suggestions

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[4] It appears that the only reason the charged crime in *Blankenship* was an attempt, rather than a completed offense, was because the recipient of the defendant's instructions was neither a child nor actually engaged in the requested sexual conduct. Here, Victim was an actual compliant child who followed the same directions given in *Blankenship* when given by Baum.

[5] Though audience members often simply observe performances they attend, they also frequently participate in performances. For example, they might volunteer in a magic show, sing

on where to please herself and how to position her body supports a reasonable inference that Baum was observing Victim, just as the defendant in *George* "carefully view[ed] the occurrences" he directed.[6] 717 S.W.2d at 859. Therefore, regardless of what else was happening at the time, Baum remained an audience of Victim's masturbation.

The dissent claims "there is literally no evidence in the record that Baum 'enticed Victim to masturbate in front of him while he watched.'" (Dissent Op. at 2). While the dissent is correct that no witness expressly stated, "Baum enticed Victim to masturbate in front of him while he watched," sufficiency review requires that we view *both* the evidence *and* the reasonable inferences therefrom in the light most favorable to the State. Victim's express testimony established that, while Baum and Victim were in the same room together, Baum was "[t]elling [Victim] where to please [her]self, [her] position, things like that." As discussed above, the evidence that Baum offered Victim suggestions for improving her self-masturbation technique, by directing her where to please herself

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along during a concert, or be the recipient of an erotic dance. In none of these scenarios do the audience members cease being part of the audience simply as a result of participation with the performers. Baum could have been doing any number of things—including masturbating himself—while observing Victim, and none of it would have negated his role as audience of Victim's own masturbation. *See, e.g., State v. Butler*, 88 S.W.3d 126, 128 (Mo. App. S.D. 2002) (noting that the defendant's pants were unzipped when officers located him alone in his car by the payphone where the calls to the victim originated, yet still holding the evidence sufficient to support a finding that the defendant was the audience of a sexual performance).

[6] In making this observation, we do not suggest that a person must visually observe a performance to be an audience; both *Blankenship* and *Butler* hold otherwise. *State v. Blankenship*, 415 S.W.3d 116, 122 (Mo. banc 2013); *Butler*, 88 S.W.3d at 129-30. While visual observation is unnecessary, where (as here) the evidence supports a finding that the defendant watched the child engage in sexual conduct, a performance occurred before an audience. *State v. George*, 717 S.W.2d 857, 859 (Mo. App. S.D. 1986).

and how to position her body, viewed in the light most favorable to the State, supports a reasonable inference that Baum was watching Victim while she masturbated.

Baum acknowledges that, "if one person masturbated while the other one watched, that may very well constitute a performance" but then argues that "there was no evidence that [Baum] ever took pleasure from watching [Victim] masturbate while they were engaged in mutual masturbation," and, therefore, Baum's observation of Victim's masturbation did not make *him* an audience. Nothing in § 566.211.1(1) requires the observer to take pleasure in watching, and Baum's suggestion that Victim's masturbation while he observed did not amount to a "sexual performance" is directly contrary to the Missouri Supreme Court's holding in *Blankenship* that instructing a child to masturbate and coaching a child on how to do so would support a conviction for the use of a child in a sexual performance. *Blankenship*, 415 S.W.3d at 123.

In short, the evidence here supported the reasonable inference that Baum enticed Victim to masturbate in front of him while he watched. And that evidence is sufficient to establish a sexual performance as defined in § 566.200(15).[7] Thus, the evidence was sufficient to support Baum's conviction of trafficking a child in the second degree.[8]

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[7] Because the evidence of Victim's masturbation in front of Baum at his direction was sufficient to support his conviction for trafficking a child in the second degree, we need not consider the merits of his argument that mere exposure of a child's genitals during an incident of sexual abuse would be an overbroad interpretation of "sexual performance."

[8] The dissent faults our analysis for affirming Baum's conviction "based on different conduct than the jury relied on to convict him." (Dissent Op. at 2). That assertion is based on language in the verdict director suggesting that the "sexual performance" occurred when Baum and Victim "masturbate[ed] each other in the same room." The dissent claims that our analysis conflicts with *State v. Marks*, 670 S.W.3d 135 (Mo. App. W.D. 2023). But there are two major flaws in the dissent's argument. First, we noted in *Marks* that, while "a defendant may not be charged with one form of an offense and convicted of another, . . . th[at] principle relates to the

Therefore, we deny Point I.

II. Baum has failed to identify any instructional error warranting relief.

In Point V, Baum recasts his insufficiency of the evidence argument from Point I by shifting his focus to the verdict-directing instruction for sexual trafficking. But, in both Points I and V, Baum makes the same argument—that Victim's testimony did not demonstrate that Baum enticed Victim to "engage in a sexual performance." For the reasons set out above, we disagree.

The basis for Baum's claim that the verdict director should not have been given here is that the evidence presented at trial was not sufficient to support it. Thus, just like Baum's challenge in Point I, his claim in this point relates solely to the sufficiency of the evidence to support his conviction.[9] He argues, "the claimed error shows that [the] conviction is based on [a] verdict director based on *insufficient evidence*." (App. Br. 49)

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variance between the charging document and the jury instructions . . . . ***It does not affect the sufficiency analysis***." *Id.* at 141 (emphasis added). Second, the dissent ignores Baum's own, *repeated* acknowledgement that "[a] reviewing court bases its determination on the sufficiency of the evidence based on the way the defendant is charged, *not the way the jury was instructed*." (App. Br. 21-22, 26) (emphasis added) (citing *State v. Zetina-Torres*, 482 S.W.3d 801, 809 (Mo. banc 2016). And, even if—contrary to Baum's own assertion—we were to base our determination of sufficiency on the way the jury was instructed, as the dissent suggests, there is no question that, in this case, there was sufficient evidence to prove that Baum and Victim masturbated each other in the same room as alleged in the verdict director. Thus, we need not address the dissent's lengthy discussion of United States Supreme Court cases addressing due process violations in the context of instructional error.

[9] "As a practical matter, the test for determining the sufficiency of the evidence to convict . . . and for determining the sufficiency of the evidence to support the giving of a verdict director . . . is ultimately the same[:] 'Did the State make a submissible case?'" *State v. Bradshaw*, 26 S.W.3d 461, 465 (Mo. App. W.D. 2000).

(emphasis added).[10] The only relevant law he relies on addresses the required evidentiary support for jury instructions: "A jury instruction *must be supported by substantial evidence* and the reasonable inferences to be drawn therefrom." (App. Br. 54) (emphasis added) (quoting *State v. Hallmark*, 635 S.W.3d 163, 171 (Mo. App. E.D. 2021)). Even his claim of manifest injustice is directed at the sufficiency of the evidence when he argues, "to allow a conviction based on a verdict director *not supported by substantial evidence* constitutes a manifest injustice." (App. Br. 50) (emphasis added). And, though, in the alternative, he requests plain error review, his entire focus remains on the sufficiency of the evidence (for which plain error review is inapplicable).[11]

We have already determined in Point I that the evidence was sufficient to support Baum's conviction of second-degree trafficking of a child in that the evidence and reasonable inferences therefrom, support the conclusion that Baum enticed Victim to masturbate in front of him while he watched; thus, there was sufficient evidence that Baum enticed Victim to engage in a sexual performance, as the instruction required the jury to find. The instruction also required the jury to find that Baum and Victim "masturbate[ed] each other in the same room." There is no question that evidence was presented from which the jury could have concluded that this conduct occurred. Thus, there was sufficient evidence to support a conviction of sexual trafficking as instructed.

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[10] Though Baum made these assertions under Point IV, he expressly incorporated his arguments regarding preservation and the standard of review from Point IV into Point V. (App. Br. 53).

[11] *See State v. Claycomb*, 470 S.W.3d 358, 362 (Mo. banc 2015) ("Sufficiency of the evidence is reviewed on the merits, not as plain error.").

It is tempting to recast Baum's Point V as a challenge to the *form* of the instruction, but giving in to this temptation would improperly turn this court into Baum's advocate, given that his only challenge is to the *giving*, rather than the *form*, of the instruction. And a challenge to the sufficiency of the evidence to support an instruction is ***not*** the same as a challenge to the form of the instruction. *See, e.g., State v. Cummings*, 686 S.W.3d 709, 717 (Mo. App. E.D. 2024) ("Cummings cannot transform his evidentiary claim into a claim of instructional error."); *State v. Hughes*, 84 S.W.3d 176, 180 (Mo. App. S.D. 2002) (declining to reframe the appellant's instructional challenge on appeal from one directed at the sufficiency of the evidence to one directed at the form of the instruction). "It is not proper for the appellate court to speculate as to the point being raised by the appellant and the supporting legal justification and circumstances." *Boyd v. Boyd*, 134 S.W.3d 820, 823 (Mo. App. W.D. 2004). "To do so would cast the court in the role of an advocate for the appellant, which we cannot be." *Id.* at 824. Instead, our "role is to review specifically challenged trial court rulings, not to sift through the record to detect possibly valid arguments." *Smith v. City of St. Louis*, 395 S.W.3d 20, 29 (Mo. banc 2013).

Despite the alternative request for plain error review, Baum's Point V does not identify *any* error in the *form* of the instruction. Though his argument *alludes* to a question of statutory interpretation (whether "mutual masturbation," occurring "by [Baum and Victim] masturbating each other in the same room," as described by Victim and alleged in the verdict director constitutes a "sexual performance"), he still couches his claim as a challenge to the sufficiency of the evidence: "there is *no evidence* that

[Baum] and [Victim] engaging in mutual masturbation constituted a sexual performance." (App. Br. 54) (emphasis added). Baum never claimed that the instruction's language was erroneous in any way.

As further proof that his challenge does not involve the *form* of the instruction, Baum's argument focuses on whether there was sufficient evidence of "mutual masturbation," but the actual language of the verdict director uses the phrase, "masturbating each other in the same room"; the phrase "mutual masturbation" does not appear within the verdict director. Baum's Point V never addresses the actual language of the verdict director for sexual trafficking. Furthermore, Baum's requested relief on Point V is that "[t]his court should reverse [his] conviction . . . and order him discharged on this Count." Such relief would be appropriate only if his challenge to the sufficiency of the evidence prevailed. Were he challenging the form of the instruction, the proper relief to seek would be a reversal and remand for a new trial with a properly instructed jury. *State v. Neal*, 328 S.W.3d 374, 383 (Mo. App. W.D. 2010) ("The general rule is that the remedy for instructional error is to remand the case for a new trial.").

In short, Baum has not challenged the *form* of the instruction as erroneous in any way. And, because the first step in plain error review is identifying an error that is "evident, obvious, and clear," *State v. Minor*, 648 S.W.3d 721, 731 (Mo. banc 2022) (quoting *Grado v. State*, 559 S.W.3d 888, 899 (Mo. banc 2018)), where *no* error—of any kind—is raised, there is nothing to review. Because Baum alleged no error with respect to the *form* of the verdict director and his challenge to the *giving* of the verdict director is without merit, there is nothing else to review, plain or otherwise.

Therefore, we deny Point V.[12]

III. There was sufficient evidence to support both the conviction and verdict director for promoting a sexual performance.

In Points II and III, Baum argues that the evidence was insufficient to support his conviction for promoting a sexual performance insofar as Victim's private use of the pink vibrator did not constitute a "sexual performance" (Point II) and, even if it did, none of the relevant conduct occurred in Missouri (Point III). We disagree.

"A person commits the offense of promoting a sexual performance by a child if, knowing the character and content thereof, the person . . . directs any performance which includes sexual conduct by a child less than eighteen years of age." § 573.205.1. For the purpose of § 573.205.1, a "performance" is "any . . . exhibition performed before an audience of one or more." § 573.010(13). Baum does not dispute either Victim's age or that masturbation constitutes sexual conduct. Instead, he argues that the State failed to

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[12] The dissent mischaracterizes our analysis as suggesting that, because Baum failed to raise a challenge to the form of the instruction, "he cannot challenge the [verdict director] in *any* fashion – either as a sufficiency-of-the-evidence claim, or as a claim of instructional error." (Dissent Op. at 10). That is simply inaccurate. Baum raised a claim of instructional error, but he chose to frame it as one challenging the *giving* of an instruction based on insufficient evidence. Because we already determined in Point I that the evidence was sufficient to support the conviction, his instructional challenge based on insufficient evidence is simply meritless. What the dissent wants to analyze is a claim that Baum ***did not raise***—specifically, an allegation of error in the *form* of the instruction insofar as it suggested that the conduct alleged ("masturbating each other in the same room") satisfied the definition of "sexual performance." There is **no claim** in Baum's brief that the form or language of the verdict director for second-degree trafficking was erroneous *in any way*. Nonetheless, the dissent seeks to *both* raise this claim on Baum's behalf *and* find in his favor under the auspices of plain error review. Because the appellate court may not insert itself as an advocate on behalf of any party, we refuse to address the claim first raised *by the dissent* rather than either party to the appeal. Because the claim, *as presented*, in Point V is without merit, we deny it.

prove both that he directed a performance and that a performance occurred because Victim was alone in her room when she used the vibrator.[13]

With respect to directing a performance, Baum argues the dictionary definition of "direct" implies "that the person who is directing the performance is doing so *as the performance is going on*," and because Victim testified that she used the vibrator privately *after* receiving instructions from Baum, there was neither directing nor an audience, such that there could be no "performance" for purposes of § 573.205.1.

Baum's argument, however, is contrary to Missouri law. With respect to Baum's argument that directing must be simultaneous with performing, we disagree. In *Blankenship*, the defendant directed, through email, that a child "perform specific sexual acts and report to him that she had completed these acts." 415 S.W.3d at 118. After the law enforcement officer posing as the victim responded, indicating the acts were complete, the defendant would again direct performance of other acts and request a response when the acts were completed. *Id.* at 119. At one point, "Defendant also instructed [v]ictim to masturbate while thinking of him and to tell him about it *the next day*." *Id.* (emphasis added). The defendant continued to engage in the back and forth with the officer over the course of 67 emails over a three-month time span. *Id.* Because the defendant was communicating solely through email, there was no possibility of

[13] The dissent suggests that we should apply the rule of lenity here due to the possibility of "exhibition" having multiple meanings. But "[t]hat rule applies only when a criminal statute contains a 'grievous ambiguity or uncertainty,' and 'only if, after seizing everything from which aid can be derived,' the Court 'can make no more than a guess as to what [the legislative body] intended.'" *Ocasio v. United States*, 578 U.S. 282, 295 n.8 (2016) (quoting *Muscarello v. United States*, 524 U.S. 125, 138-39 (1998)). As evidenced by our analysis, that is not the case here.

simultaneous direction as Baum claims the statute requires. Yet the Missouri Supreme Court still held that the evidence was sufficient "to find Defendant attempted to use a child in a sexual performance." *Id.* at 122. But for the fact that there was no child involved (there was a law enforcement officer impersonating a child) and no one actually engaged in the sexual conduct the defendant requested, the conviction would have been for the completed offense, rather than simply an attempt. Thus, we reject Baum's argument that directing must be simultaneous with any performance.

We also reject Baum's claim that there was no audience simply because he was not physically present to watch Victim when she followed his instruction. A perpetrator need not visually observe the child for there to be a sexual performance, nor does the perpetrator need to be physically present. *Blankenship*, 415 S.W.3d at 118-19 (performance directed by email); *Butler*, 88 S.W.3d at 127 (performance directed by telephone); *Ragland*, 494 S.W.3d at 629 (no evidence that the defendant was present when directions were performed). Here, Victim testified that there were times when she had to talk to Baum about things that she did not want to talk about. Specifically, that Baum directed Victim to "keep him in the loop" regarding her vibrator usage and that they "would have conversations about [her] masturbation," making him an audience of her private performance in the same way the defendant in *Blankenship* was an audience when he "requested [that the v]ictim perform specific sexual acts and *report to him that she had completed these acts*." *Blankenship*, 415 S.W.3d at 118 (emphasis added).[14]

[14] The dissent criticizes our reliance on *Blankenship* because it "was decided at a time when 'performance [was] not defined statutorily.'" (Dissent Op. at 14-15) (quoting *Blankenship*,

Therefore, the fact that Victim used the vibrator privately in her room after Baum directed her to do so does not render the evidence insufficient. Because the evidence was sufficient to support Baum's conviction of promoting a sexual performance by a child, we deny Point II.

Baum further claims that none of the conduct alleged to support the offense of promoting a sexual performance occurred in Missouri; thus, the evidence establishes Missouri's jurisdiction is insufficient. We disagree.

"This state has jurisdiction over an offense that a person commits by his own conduct or the conduct of another for which such person is legally accountable if . . .

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415 S.W.3d at 121). But this argument ignores the fact that *Blankenship* relied on the plain and ordinary meaning of performance as "presentations, especially a theatrical one, before an audience." *Id.* at 122 (quoting *George*, 717 S.W.2d at 859). That definition was later adapted by the legislature in § 573.010(13) as "any . . . exhibition performed before an audience of one or more."

And, despite the fact "that we are constitutionally bound to follow the Missouri Supreme Court's most recent controlling decision on an issue," *State v. Escobar*, 523 S.W.3d 545, 554-55 (Mo. App. W.D. 2017), the dissent suggests that this definition "torture[s] the language" in such a way as to make sexual trafficking an "add-on" for every sexual offense. (Dissent Op. at 18). The basis for the dissent's assertion is that the other offenses for which Baum was convicted carried a maximum penalty of seven years, while sexual trafficking is punishable for "not less than ten years or life and a fine not to exceed two hundred fifty thousand dollars." § 566.211.3. But the only reason Baum's other offenses were subject to a maximum of seven years' imprisonment was because of Victim's age. If Victim had been under 14, Baum would have been facing similar sentences for the same additional offenses of statutory rape and statutory sodomy but in the first degree—"life imprisonment or a term of years not less than five years." §§ 566.032.2, 566.062.2.

Additionally, we reject the dissent's characterization of Baum's other offenses as "underlying." Sexual trafficking is a distinct offense from statutory rape and statutory sodomy and is not dependent upon either as an "underlying" or predicate offense for conviction. The elements of the offenses differ, and, here, they were based on distinct conduct. It appears that the dissent is again reaching for a legal analysis inapplicable to a sufficiency-of-the-evidence challenge. *See, e.g., State v. Liberty*, 370 S.W.3d 537, 546 (Mo. banc 2012), *superseded on other grounds by* § 573.037 (evaluating a double jeopardy challenge involving a claimed continuous course of conduct).

[c]onduct constituting any element of the offense or a result of such conduct occurs within this state." § 541.191.1(1). The elements of promoting a sexual offense, as charged, required the State to establish that Baum (1) directed (2) a performance (3) including sexual conduct (4) by a child less than eighteen years of age.

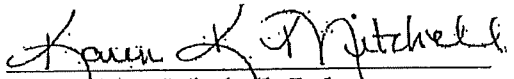
There is no dispute that Victim was a child less than eighteen years of age while she lived with Baum in Missouri. When Victim lived with Baum in Missouri (from October of 2018 to roughly May of 2020), she was 16-17 years of age. And the evidence established that she engaged in sexual conduct in the form of personal masturbation and reporting back to Baum about that masturbation while living with Baum in Missouri. Though the evidence indisputably showed that Baum purchased the vibrator, provided it to Victim, and gave *initial* instructions while they were in Florida, Victim also testified that, after providing instructions with the expectation of follow-through in Florida, Baum's same conduct both continued and escalated after they moved to Missouri. Accordingly, there was sufficient evidence that not just one but all elements occurred in Missouri.

Therefore, we deny Point III.[15]

[15] In Point IV, Baum argues that the court plainly erred in submitting Instruction 8, the verdict director for Count II (promoting a sexual performance) because the evidence was insufficient to support a finding that the offense occurred in Missouri on or between January 1, 2019, and October 18, 2019. Because this point raises the same issues as Point III, we will not separately address it. In light of our resolution of Point III, we likewise deny Point IV.

Conclusion

Because the evidence was sufficient to support both the verdict directors and Baum's convictions of trafficking of a child in the second degree and promoting a sexual performance by a child, we affirm the judgment below.



Karen King Mitchell, Judge

Edward R. Ardini, Jr., Judge, concurs.
Alok Ahuja, Presiding Judge, dissents in separate opinion.

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	**WD85148**
	)	
JEREMY BAUM,	)	**Filed: March 4, 2025**
	)	
Appellant.	)	

DISSENTING OPINION

A jury convicted Jeremy Baum of one count of second-degree statutory rape and five counts of second-degree statutory sodomy. Those convictions were based on Baum engaging in sexual intercourse, oral sex, and hand-to-genital contact with the minor Victim. Baum's convictions of those six class D felonies are amply supported by the evidence at trial, and Baum does not challenge them on appeal.

This appeal involves only Baum's *additional* convictions of one count of second-degree sexual trafficking of a child, and one count of promoting a sexual performance by a child. The simple fact is, Baum did not engage in child sex trafficking, and he did not direct the Victim to perform sexual acts before an audience. His convictions of the additional sex trafficking and promoting-a-performance offenses must accordingly be reversed.

The majority affirms Baum's conviction of sexual trafficking based on different conduct than the jury relied on to convict him. In addition, the majority affirms Baum's convictions of sexual trafficking and of promoting a sexual performance without evidence establishing an essential element of each offense: that Baum forced the Victim to engage in an "exhibition" of sexual conduct "performed before an audience." §§ 566.200(15) and 573.010(13).[1]

It is a denial of due process to affirm Baum's convictions for sexual trafficking and promoting a sexual performance based on a different theory than the one submitted to the jury, and where the evidence is plainly insufficient to prove the crimes. For these reasons, I respectfully dissent.

Discussion

I.

The majority opinion rejects Baum's challenge to the sufficiency of the evidence supporting his sex trafficking conviction on the basis that "the evidence and reasonable inferences therefrom, support the conclusion that *Baum enticed Victim to masturbate in front of him while he watched.*" Op. at 13 (emphasis added). As explained below in § II.B., there is literally no evidence in the record that "Baum enticed Victim to masturbate in front of him while he watched." But even if such evidence existed, this was not the act on which the jury relied to convict Baum of sexual trafficking. Jury Instruction Number 6, submitted by the State, was clear: in order to convict Baum of the sexual trafficking offense, the jury was required to find that he "enticed [the Victim] to engage in a sexual

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[1] Because the relevant offenses are alleged to have occurred between January 1, 2019 and May 14, 2020, statutory citations refer to the 2016 edition of the Revised Statutes of Missouri, updated by the 2018 Cumulative Supplement.

performance; *by masturbating each other in the same room . . . .*" (Emphasis added.)

Whether Baum watched the Victim masturbate herself is a different factual question, involving a different act, than the question the jury answered: whether Baum and the Victim "masturbat[ed] each other in the same room." The majority apparently believes that, in an appeal of a criminal conviction in which the defendant challenges the sufficiency of the evidence, this Court can itself sift through the trial evidence, and rely on *different acts* to sustain a conviction than the acts on which the jury relied. To the contrary, Baum's conviction for sexual trafficking can be affirmed based *only* on the specific acts the jury was required to find in order to return a guilty verdict. Baum was constitutionally entitled to have *a jury* determine whether he had committed acts constituting a criminal offense. Because only a jury, not this Court, is entitled to find the facts, we can affirm his convictions based only on the conduct on which the jury actually relied. This appeal is not a retrial; Baum's convictions must stand or fall on the findings the jury made, and the verdict it returned.

The majority opinion ignores our recent decision in *State v. Marks*, 670 S.W.3d 135 (Mo. App. W.D. 2023), which held that, in assessing the sufficiency of the evidence on appeal, "*we look to the verdict directing instruction* and determine whether sufficient evidence supports the jury's verdict as instructed." *Id.* at 141 (emphasis added).

Basic principles of criminal procedure require that we gauge the sufficiency of the evidence based on the elements the jury was required to find to return a guilty verdict. Unlike in many other countries, in the United States a criminal

defendant is entitled to have a jury determine each of the facts necessary to convict the defendant of a criminal offense.

> It has been settled throughout our history that the Constitution protects every criminal defendant "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." It is equally clear that the "Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged."

United States v. Booker, 543 U.S. 220, 230 (2005) (citations omitted). Both the United States and Missouri Constitutions require that the jury find the essential facts *unanimously* in felony cases. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020); *State v. Celis-Garcia*, 344 S.W.3d 150, 155 (Mo. 2011).

In addressing claims of evidentiary sufficiency, the critical issue is whether there was a sufficient evidentiary basis to support the factual determinations made by the jury in returning a guilty verdict. The Supreme Court of the United States adopted the constitutional standard of evidentiary sufficiency to ensure that the fact-finder, whether judge or jury, had properly discharged its responsibility to convict the defendant only on proof beyond a reasonable doubt.

> The [standard of proof beyond a reasonable doubt] requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the facts in evidence. . . . Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt. . . . [W]hen such a conviction occurs in a state trial, it cannot constitutionally stand.
>
> . . . .
>
> . . . [T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to

> determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. . . . [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. . . . The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law.

Jackson v. Virginia, 443 U.S. 307, 316-19 (1979) (citations and footnotes omitted).

The evidentiary-sufficiency standard adopted in *Jackson v. Virginia*, which we apply today, is meant to assure that "*the factfinder* [has] rationally appl[ied] th[e] [beyond-a reasonable-doubt] standard to the facts in evidence." *Id.* at 317 (emphasis added; footnote omitted). Thus, we must determine whether the evidence was sufficient to support the facts actually found by the jury, <u>not</u> whether the evidence may be sufficient to support some <u>other</u> facts, which a hypothetical jury *could have* found. In *Jackson v. Virginia* the Supreme Court explicitly stated that "the standard announced today does not permit a court to make its own subjective determination of guilt or innocence." *Id.* at 319 n.13.

Because a defendant has a constitutional right to have a jury unanimously determine that the evidence establishes the necessary facts beyond a reasonable doubt, the Supreme Court of the United States has repeatedly emphasized that a criminal conviction can only be affirmed based on the theory on which the case was submitted to the jury.

> [I]n a criminal case a defendant is constitutionally entitled to have the issue of criminal liability determined by a jury in the first instance. . . . This Court has never held that the right to a jury trial is satisfied when an appellate court retries a case on appeal under different instructions and on a different theory than was ever presented to the jury. Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury.

McCormick v. United States, 500 U.S. 257, 270 n.8 (1991); *accord*, *Presnell v. Georgia*, 439 U.S. 14, 16 (1978) ("'To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.'" (quoting *Cole v. Ark.*, 333 U.S. 196, 202 (1948)).

In *Ciminelli v. United States*, 598 U.S. 306 (2023), the Supreme Court recently refused to apply exactly the approach taken by the majority in this case: disregarding the basis on which the jury actually returned a guilty verdict, and instead constructing an entirely separate basis for conviction from the appellate court's own assessment of the evidence. In *Ciminelli*, the Court held that a conviction for wire fraud could not be based on actions which allegedly deprived a victim of intangible property rights. *Id.* at 309 (citation omitted). The Court instead held that "the federal fraud statutes criminalize only schemes to deprive people of traditional property interests." *Id.*

The jury in *Ciminelli* was instructed only on an intangible rights theory. The Government nevertheless contended that the Court could affirm the defendant's conviction based on a deprivation of "traditional property interests," even though the jury was not instructed on that theory. The Supreme Court disagreed:

> [T]he Government insists that [rejection of the "intangible property rights" theory] does not require reversal because we can affirm Ciminelli's convictions on the alternative ground that the evidence was sufficient to establish wire fraud under a traditional property-fraud theory. With profuse citations to the records below, the Government asks us to cherry-pick facts presented to a jury charged on the [intangible rights] theory and apply them to the elements of a *different* wire fraud theory in the first instance. In other words, the Government asks us to assume not only the function of a court of first view, but also of a jury. That is not our role.

Id. at 316-17 (citations omitted).

Like the Supreme Court of the United States, the Missouri Supreme Court has repeatedly admonished that, in conducting a sufficiency-of-the-evidence review, an appellate court "does not sit as a super juror." *State v. Stewart*, 560 S.W.3d 531, 533 (Mo. 2018). "Unless waived, the right to trial by jury means that the jury – *and only the jury* – will decide what the evidence does and does not prove beyond a reasonable doubt." *State v. Jackson*, 433 S.W.3d 390, 402 (Mo. 2014) (emphasis added). Under "[t]hese fundamental principles of procedural fairness," *Presnell*, 439 U.S. at 16, we must assess the sufficiency of the evidence in this case based on the acts on which the jury actually relied to convict Baum; we cannot affirm his convictions based on some *other* acts which we independently determine were proven by the evidence.

The majority claims that Baum "*repeated[ly]* acknowledge[d]" that the verdict-directing instruction was irrelevant to his sufficiency-of-the-evidence claim. Op. at 12 n.8. On the contrary, Baum argued that his conviction of sexual trafficking could be affirmed only on the basis of the mutual masturbation submitted in the verdict director. His brief explained:

> [I]n *Dunn v. United States*, 442 U.S. 100, 106 (1979), the United States Supreme Court stated:

> To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused.
>
> *See also Chiarella v. United States*, 445 U.S. 222, 236 (1980) (criminal conviction cannot be affirmed on the basis of a theory not presented to the jury); *Cole v. Arkansas*, 333 U.S. 196, 202 (1948).
>
> Additionally, . . . in *State v. Edwards*, 365 S.W.3d 240, 247-49 (Mo. App. W.D. 2012), the defendant was charged and convicted with statutory sodomy in general but without specifying a particular act, just that he engaged in deviate sexual intercourse with a child. In analyzing a challenge to the sufficiency, this Court noted that "per the jury's verdict director, the jury was limited to determining whether [the defendant] engaged in deviate sexual intercourse in the form of penile to anal contact with [the child]." *Id.* at 251.

Baum's brief presented a detailed and cogent argument that the sufficiency of the evidence to support his conviction of sexual trafficking had to be assessed based on the act submitted in the jury instruction: "masturbating each other in the same room."

Baum's sufficiency claim does not simply require us to determine whether each of the facts hypothesized in the verdict director was proven by sufficient evidence. We must <u>also</u> decide whether those facts are legally sufficient to establish the elements of the offense of which Baum was convicted. In gauging the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. at 319 (citation omitted). Thus, the sufficiency-of-the-evidence inquiry involves two fundamental steps, one legal and one factual: (1) determining what the essential elements of the offense <u>are</u> (a

legal question); and (2) assessing whether the evidence was sufficient to permit a jury to find those elements beyond a reasonable doubt (a *factual* question).

As one court explained: "'To assess the sufficiency of the evidence, we [1] first determine the elements of the offense and [2] then examine whether the evidence suffices to establish each element.'" *Simpson v. Carpenter*, 912 F.3d 542, 591 (10th Cir. 2018) (citation omitted). Another formulation likewise recognizes the dual legal and factual components of the sufficiency analysis: "Our role is 'limited to [1] ensuring that a valid legal theory supports the conviction and [2] that there is some evidence from which a rational jury could find in favor of that legal theory.'" *United States v. Johnson*, 916 F.3d 579, 589 (7th Cir. 2019) (citation omitted); *see also, e.g.*, *United States v. Henderson*, 2 F.4th 593, 598–99 (6th Cir. 2021) (observing that "when . . . a [sufficiency-of-the-evidence] challenge focuses on whether the statute under which the defendant was convicted covers the relevant conduct, it presents a legal question that we examine anew"); *United States v. Wheat*, 988 F.3d 299, 306 (6th Cir. 2021) (considering, as a sufficiency-of-the-evidence claim, "'the "legal" question whether the conduct the jury could reasonably have found to have occurred amounts to a conspiracy under the statute'" (citation omitted)).

The majority's blithe disregard of the verdict director essentially leaves a criminal defendant without <u>*any*</u> remedy where the defendant was convicted under a verdict director which was legally or factually insufficient to establish the charged offense. The majority holds that it is irrelevant to Baum's sufficiency-of-the-evidence claim that the sexual trafficking verdict director charged him with enticing the Victim to engage in a sexual performance "by masturbating each

other in the same room." The majority then goes further, and holds that Baum cannot raise this issue as a claim of *instructional error*, either. According to the majority, because Baum challenges "the *giving*, rather than the *form*, of the instruction," Op. at 14, he cannot challenge the manner in which the sexual trafficking offense was submitted to the jury in <u>any</u> fashion – either as a sufficiency-of-the-evidence claim, or as a claim of instructional error. Apparently, a claim that a circuit court instructed the jury on an offense which is unsupported by the evidence is entirely immune from appellate review.

If not reviewed as a sufficiency-of-the-evidence claim, at a minimum Baum is entitled to review of the verdict director as a claim of instructional error. "A verdict-directing instruction must contain each element of the offense charged and must require the jury to find every fact necessary to constitute essential elements of [the] offense charged." *State v. Stover*, 388 S.W.3d 138, 153-54 (Mo. 2012) (cleaned up). As explained below, the verdict director in this case did not require the jury to find facts sufficient to constitute the offense of sexual trafficking of a child. Even viewed through the lens of plain error review, the circuit court committed evident, obvious and clear error by submitting an instruction for sexual trafficking to the jury. *See, e.g., State v. Self*, 155 S.W.3d 756, 762-63 (Mo. 2005) ("'If the evidence is insufficient to sustain a conviction, plain error affecting substantial rights is involved from which manifest injustice must have resulted.'" (citation omitted)); *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. 2001) (same). Moreover, because the evidence is insufficient to support Baum's sexual trafficking conviction on <u>any</u> theory, a retrial would be barred even if this issue was viewed as a question of instructional error. *State v. Miller*,

372 S.W.3d 455, 471 n.8 (Mo. 2012). Indeed, because the evidence cannot justify Baum's sexual trafficking conviction on *any* basis, it is arguably unnecessary to decide whether this case is more appropriately decided based on the sufficiency-of-the-evidence argument in Point I, or the instructional-error claim in Point V, since both require reversal.

II.

The evidence was insufficient to support either Baum's conviction for sexual trafficking, or for promoting a sexual performance by a child, because there was no evidence that Baum made the Victim engage in an "exhibition" of sexual conduct "performed before an audience."

A.

Before considering the evidence presented at Baum's trial, it is necessary to construe the statutes defining the offenses of sexual trafficking and promoting a sexual performance.

As relevant here, "[a] person commits the offense of sexual trafficking of a child in the second degree if he or she knowingly . . . entices . . . a person under the age of eighteen to participate in . . . a sexual performance . . . ." § 566.211.1(1). A "sexual performance" is "any play, motion picture, still picture, film, videotape, video recording, dance, or exhibition which includes sexual conduct or nudity, performed before an audience of one or more, whether in person or online or through other forms of telecommunication[.]" § 566.200(15).

"A person commits the offense of promoting a sexual performance by a child if . . . the person promotes a performance which includes sexual conduct by a child less than eighteen years of age or produces, or directs any performance

which includes sexual conduct by a child less than eighteen years of age." § 573.205.1. For purposes of the promoting-a-sexual-performance offense, a "performance" includes "any play, motion picture film, videotape, dance or exhibition performed before an audience of one or more[.]" § 573.010(13).

Although the definitions of a "sexual performance" in §§ 566.200(15) and 573.010(13) vary somewhat, each definition includes three key terms, which are themselves undefined: a sexual performance requires an "exhibition" performed "before" "an audience."

"'In the absence of statutory definitions, the plain and ordinary meaning of a term may be derived from a dictionary, and by considering the context of the entire statute in which it appears.'" *State v. Hurst*, 663 S.W.3d 470, 474 (Mo. 2023) (citation omitted); *see also, e.g.*, *State v. Shaw*, 592 S.W.3d 354, 359 (Mo. 2019).

An "exhibition" is defined as "an act or instance of exhibiting,"[2] or as "a public show or showing." WEBSTER'S THIRD NEW INT'L DICTIONARY 796 (unabridged ed. 2002). The verb "exhibit" is defined in the relevant sense as

> to present to view: SHOW, DISPLAY : as
>
> a : to show . . . or display . . . outwardly *esp.* by visible signs or actions
>
> . . . .
>
> d : to show publicly : put on display in order to attract notice to what is interesting or instructive or for purposes of competition or demonstration

Id.; *see also* https://www.merriam-webster.com/dictionary/exhibit.

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[2] *See* https://www.merriam-webster.com/dictionary/exhibition.

The dictionary definitions of an "exhibition" requires that an item be "present[ed] to view," or "public[ly] show[n]." Interpreting "exhibition" to require a visual display is also justified by examining the other examples of a "performance" listed in the relevant statutes. In § 566.200(15), an "exhibition" is listed as a type of "performance" alongside a "play, motion picture, still picture, film, videotape, video recording, [or] dance"; in § 573.010(13), the other forms of "performance" are a "play, motion picture film, videotape, [or] dance." *Each* of the listed methods of presentation, in both definitions, involves a *visibly observable* phenomenon. Notably, although each definition includes a "videotape" (and one additionally includes a "video recording"), neither includes an *audio* recording. Moreover, neither statute suggests that a *verbal account* of a sexual act could constitute a "performance."

"Under the principle known as *noscitur a sociis*, this Court will 'look[ ] to the other words listed in a statutory provision to help it discern which of multiple possible meanings the legislature intended.'" *Alberici Constructors, Inc. v. Dir. of Revenue*, 452 S.W.3d 632, 638 (Mo. 2015) (quoting *Union Elec. Co. v. Dir. of Revenue*, 425 S.W.3d 118, 122 (Mo. 2014)); *see also* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 195 (2012) ("When several [words] are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar."). The surrounding terms must inform our reading of "exhibition." Consistent with the dictionary definition of "exhibition," the surrounding terms confirm that the victim must have presented her sexual performance to view, or shown it publicly.

Even if the term "exhibition" was subject to multiple meanings, some of which comprehend non-visual displays, caselaw requires that we adopt the narrowest reasonable construction of the term. "'Under the rule of lenity, an ambiguity in a penal statute will be construed against the government or party seeking to exact statutory penalties and in favor of persons on whom such penalties are sought to be imposed.'" *State v. McCord*, 621 S.W.3d 496, 498-99 (Mo. 2021) (quoting *State v. Graham*, 204 S.W.3d 655, 656 (Mo. 2006)); *see also, e.g.*, *State v. Knox*, 604 S.W.3d 316, 320 (Mo. 2020) ("The rule of lenity requires that criminal statutes be strictly construed against the State."; citing *State v. Salazar*, 236 S.W.3d 644, 646 (Mo. 2007)).

The correctness of interpreting "exhibition" to require a visual display is reinforced by the statutes' requirement that the "exhibition" occur "before" an "audience." The primary relevant meanings of the preposition "[b]efore" are "in the presence of," "face to face with," "forward of, "in front of," and "in the presence of." WEBSTER'S THIRD NEW INT'L DICTIONARY at 197; https://www.merriam-webster.com/dictionary/before. And "audience" is defined as "a group of listeners or spectators," or "a reading, viewing, or listening public." https://www.merriam-webster.com/dictionary/audience; *see also* WEBSTER'S THIRD NEW INT'L DICTIONARY at 142. These definitions confirm that a "sexual performance" requires a display of sexual conduct in front of a group of spectators.

In interpreting the term "sexual performance" to include non-visual displays, the majority relies on *State v. Blankenship*, 415 S.W.3d 116 (Mo. 2013). But *Blankenship* was decided at a time when "'performance' [was] not defined

statutorily." *Id.* at 121. The same is true of *State v. Ragland*, 494 S.W.3d 613, 629 (Mo. App. E.D. 2016) (interpreting § 556.061(31), RSMo Cum. Supp. 2013, which defined a sexual performance as "any performance, or part thereof, which includes sexual conduct by a child who is less than seventeen years of age," but without further defining a "performance"); *State v. Butler*, 88 S.W.3d 126, 129 (Mo. App. S.D. 2002) (involving same definition from § 556.061(31), RSMo 2000); and *State v. George*, 717 S.W.2d 857, 858-59 (Mo. App. S.D. 1986) (involving similar definition found in § 556.061(27), RSMo Supp. 1984).

Blankenship and the other cases cited by the majority turned to the dictionary, and to prior judicial constructions, to give meaning to the term "sexual performance." But as *Blankenship* itself stated, resort to dictionaries and caselaw definitions is only appropriate "'*[w]hen the Legislature has not defined a word.*'" 415 S.W.3d at 121 (emphasis added; citation omitted). *See also, e.g.*, *IBM Corp. v. Dir. of Revenue*, 491 S.W.3d 535, 539 (Mo. 2016) (""The plain meaning of words, as found in the dictionary, will be used *unless the legislature provides a different definition.*'"; emphasis added; quoting *Lincoln Industrial, Inc. v. Dir. of Revenue*, 51 S.W.3d 462, 465 (Mo. 2001)). "When the legislature provides a statutory definition, it 'supersedes the commonly accepted dictionary or judicial definition and is binding on the courts.'" *Cosby v. Treasurer of State*, 579 S.W.3d 202, 207 (Mo. 2019) (emphasis added; quoting *State ex rel. Jackson v. Dolan*, 398 S.W.3d 472, 479 (Mo. 2013)); *Crescent Plumbing Supply Co. v. Dir. of Revenue*, 565 S.W.3d 665, 669 (Mo. 2018) (""The legislature's own construction of its language by means of definition of the terms employed . . .

supersedes the commonly accepted dictionary or judicial definition and is binding on the courts.'"; citation omitted).

The majority's glib assertion that nothing has changed since *Blankenship* cannot be reconciled with the caselaw holding that the *statutory definition* of "performance" governs here – not earlier judicial glosses placed on a then-undefined term. The majority's disregard of the statutory text, in favor of now-outmoded caselaw, is highlighted by its failure to even quote the entirety of the statutory definitions of "sexual performance" – even though those statutory definitions, and our construction of those statutory definitions, are the lynchpin of this case.

Of course, the majority's confidence that nothing has changed since *Blankenship* also runs counter to the well-established principles that "[a] court must presume that the legislature acted with a full awareness and complete knowledge of the present state of the law," and that "when the legislature amends a statute, we presume the legislature intended to change the existing law." *Smith v. St. Louis Cnty. Police*, 659 S.W.3d 895, 898 (Mo. 2023) (cleaned up). Here, we must presume the General Assembly was aware of *Blankenship*'s definition of a "sexual performance," and that it intended to reject or modify the judicial construction by adopting a statutory definition limited to visual displays. We cannot uncritically rely on cases involving an undefined term to interpret statutes which now explicitly define "sexual performance."

For purposes of the offenses of which Baum was convicted, a "sexual performance" requires a visual display in front of spectators.

B.

With regard to Baum's conviction for sexual trafficking, there is no evidence in the record that the Victim exhibited herself to Baum, or that Baum observed anything, visually or otherwise, while he and the Victim were masturbating each other. Thus, there is no testimony that Baum's eyes were open, that he was looking at the Victim's hand on his penis or looking at her genitals as he stimulated them, that he was watching her face or body to see how she responded to his stimulation of her genitals, etc. In these circumstances, there was insufficient evidence to establish that Baum was an "audience" "before" whom the Victim "exhibit[ed]" herself while engaging in mutual masturbation. "When the evidence is utterly silent about the existence or non-existence of some fact, and the finder of fact draws from such silence a conclusion about that fact, this is mere supposition or speculation. It is not an inference, and certainly not a reasonable inference." *See State v. Shepherd*, 643 S.W.3d 346, 353 (Mo. 2022) (citation omitted).

Even if the evidence showed that Baum observed the Victim while committing the acts of statutory rape and statutory sodomy of which he was convicted, that would not be enough to support his separate conviction for sexual trafficking. Any incidental observation in which Baum engaged, while participating in sexual acts with the Victim, cannot render those acts "sexual performances." Presumably, during every sexual act, the perpetrator senses the victim, and the victim's participation in a sexual act, in some fashion, whether that be by sight, sound, touch, taste, or smell. I cannot conceive of a sexual act involving a minor victim in which the defendant is not aware of the minor's presence, and participation, in some fashion. The defendant's sensory perception

of the victim, during a sexual act in which the defendant is himself participating, is not enough to make the act a "performance." *If* the defendant's sensory perception of the victim were enough, *every* sexual offense in which a defendant forced a minor victim to participate would also constitute sexual trafficking.

We should be hesitant to torture the language of the definition of "sexual performance" to make the offense of sexual trafficking an "add-on" which the State could choose to charge in *every* sex-offense case. Second-degree sexual trafficking is an unclassified felony, punishable by a term of imprisonment of "not less than ten years or life and a fine not to exceed two hundred fifty thousand dollars." § 566.211.3. By contrast, Baum's underlying offenses of statutory rape, and second-degree statutory sodomy, are class D felonies punishable by imprisonment for no more than seven years, § 558.011.1(4), or a fine not to exceed $10,000. § 558.002.1(1). *Something* beyond simple participation in a sexual act with a minor must be necessary to establish sexual trafficking.

While the statutes of every State are different, courts in other jurisdictions have faced similar questions, and held that an adult's participation in a sexual act with a minor victim, standing alone, is not sufficient to turn the sexual act into a "sexual performance." Thus, in *State v. Clay*, 457 P.3d 330 (Or. App. 2019), the Court explained:

> Having considered the text, context, and legislative history of ORS 163.670, we conclude that the legislature did not intend ORS 163.670 to capture a person's observation of his own sexual abuse of a child or observation of a child's sexual or intimate parts while sexually abusing or preparing to sexually abuse the child. In effect, the "observation" that occurs in such a situation is incidental to the crime of sexual abuse and was not intended by the legislature to

> constitute the separate – and much more serious – crime of using a child in a display of sexually explicit conduct. Rather, we understand the crime of display to capture what is colloquially called child pornography, including live sex displays. That includes an audience of one – *i.e.*, a person making a visual recording of a child participating or engaging in sexually explicit conduct that he himself has caused to occur, or staging a live sex display involving a child for his own observation – but it does not include observation of one's own acts of sexual abuse against a child or observation of a child's sexual or intimate parts incidental to one's own acts of sexual abuse against a child.

Id. at 336 (footnote omitted); *see also Oquendo v. State*, 24 So.3d 746 (Fla. App. 2009) (reversing conviction for promoting sexual performance by a minor where the defendant instructed a minor to go into a bedroom with another man to have sex for money; concluding that "there was no 'performance' . . . shown by the evidence" where "[t]he door was shut, and no one else was in the room" other than the two participants); *Allen v. Commonwealth*, 997 S.W.2d 483, 487 (Ky. App. 1999) ("We do not believe that [a statute criminalizing the use of a minor in a sexual performance] is intended to apply to instances where one actively participates in sexual conduct with the minor."); *People v. Davis*, 631 N.E.2d 392, 405 (Ill. App. 1994) (no sexual performance where "all those present were participants to some extent").

The majority does not attempt to justify Baum's conviction of sexual trafficking by contending that a "sexual performance" occurred while Baum and the Victim were "masturbating each other in the same room" (the act hypothesized in the verdict director). In a single conclusory sentence in a footnote, the majority asserts that, even if it judged the sufficiency of the evidence based on the verdict director, "there is no question that, in this case, there was sufficient evidence to prove that Baum and Victim masturbated each other in the

same room as alleged in the verdict director." Op. at 12 n.8. I agree that the evidence supports a finding that Baum coerced the Victim into engaging in mutual masturbation with him – for which he was convicted of two counts of second-degree statutory sodomy. What the majority ignores, however, is that the verdict director required the jury to find *not only* that mutual masturbation had occurred; it *also* required the jury to find that, by engaging in that mutual masturbation, Baum "enticed [the Victim] to engage in a sexual performance." The majority simply ignores this additional, required finding. Further, the majority also ignores the fact that a sufficiency-of-the-evidence challenge does not merely require an appellate court to determine whether the evidence was sufficient for a jury to have found every fact hypothesized in the verdict director; the reviewing court must *also* determine whether the facts found by the jury meet the elements of a statutorily-defined offense.

Rather than contending that Baum's sexual trafficking conviction can be sustained on the theory the State chose to submit to the jury, the majority instead concludes that the evidence was sufficient to find that "Baum enticed Victim to masturbate in front of him while he watched." As explained in § I above, that is *not* the act the jury was required to find to convict Baum of sexual trafficking, and we cannot affirm Baum's conviction based on our own factual findings. But even if we were entitled to rely on the theory that Baum watched the Victim masturbate herself, there is no evidence in the record that ever happened. Through methodical questioning by the prosecutor, the Victim explicitly – and exhaustively – identified the sexual acts in which she and Baum engaged. Those

acts did *not* include performing acts of masturbation upon herself in Baum's presence.

The Victim testified that, when she moved with Baum to Missouri, the sexual behavior "escalated." Tr. 336:25. She explained:

> It went from naps and holding kisses longer to I was spending nights in his bedroom and he had me perform mutual masturbation and oral sex and eventually penetrative sex with him.

Tr. 337:1-5. The Victim testified quite specifically what "mutual masturbation" meant: "I mean I am touching his genitalia and he is touching mine or he is using the vibrator on me." Tr. 337:6-8.

After testifying regarding the acts of mutual masturbation, the Victim testified that she and Baum also engaged in mutual acts of oral sex.

> Q. You had just talked about when his hand was on your genitals and your hand was on his genitals. *Is there ever a time that something else was done?*
>
> A. Yes.
>
> Q. What was that?
>
> A. I performed oral sex on him and he did to me.

Tr. 339:8-15 (emphasis added).

The prosecution then asked the Victim, again, whether there were other sexual acts in which she engaged with Baum. She responded:

> Q. . . . When you were 16 years old, *did the defendant ever try anything with you other than what we have talked about so far?*
>
> A. We once – he once tried penetrative sex with me.

Tr. 350:22-24 (emphasis added).

This is the sum total of the sexual acts which Victim described: mutual masturbation; reciprocal performance of oral sex; and at least one attempt at sexual intercourse. (Each of those acts resulted in a separate conviction of statutory rape or statutory sodomy.) Notably, on cross-examination, the Victim agreed that, when questioned by police, she was asked "if you ever used the vibrator on yourself in front of [Baum] and you shook your head no." Tr. 365:12-15. She also acknowledged that, during a forensic interview, she told the interviewer that Baum had never watched her use the vibrator. Tr. 367:13-16. There is nothing in the Victim's testimony to support a jury finding that Baum watched her use the vibrator, or otherwise masturbate, on herself.

I recognize that, after describing what "mutual masturbation" meant, the Victim was asked whether Baum was "giving [her] any instructions on how to do that," to which she replied that he would be "[t]elling me where to please myself, my position, things like that." Tr. 337:12-16. This statement merely relates to what Baum *said*; that single statement cannot overcome the Victim's quite specific testimony as to the *sexual acts* Baum made her perform with him. Moreover, this single statement must be viewed in context, as a response to a question asking whether Baum ever gave her "any instructions on how to do *that*" – *i.e.*, mutual masturbation. In context, the Victim's response refers only to instructions on how the Victim should position herself, and enhance her pleasure, as she and Baum manipulated each other's genitals. Even if the Victim's response is construed as an instruction concerning self-masturbation, there is no evidence the Victim actually did so in Baum's presence. While I may agree that the evidence would be sufficient to support a sex trafficking conviction if Baum

had "enticed Victim to masturbate in front of him while he watched," that simply isn't this case.

C.

The evidence is also insufficient to support Baum's conviction for promoting a sexual performance by a child. The verdict director for this charge asked the jury to find that the relevant "performance" consisted of the Victim "engaging in personal masturbation after being instructed by the defendant on how to use a sexual device." (Presumably, the instruction refers to "personal masturbation" to distinguish from the act of "masturbating each other" which was the basis for the sex trafficking instruction.)

The Victim testified that, when she was 15 and still living with Baum in Florida, he bought her a vibrator and told her how to use it:

> Q. Was there a time in your life that he bought you anything for masturbation?
>
> A. He bought me a vibrator.

Tr. 333:9-11.

> Q. When he bought you the vibrator, did he show you how to use it?
>
> A. Yeah. He showed me the charger, how it charged and then there was a settings button on the back.
>
> Q. Did you ever have any conversations with him or did he tell you how to use it to please yourself better?
>
> A. We did talk about certain areas that it would feel good, yes.
>
> Q. And just for the record, okay, you pointed down here and pointed like in your vaginal area?
>
> A. Yes.

Q. . . . Did he ever show you ways to use it that would work better?

A. It was more tell, he didn't show.

Q. And then were you expected after he instructed you how to do that to go do it?

A. Yes.

Q. And did you?

A. Yes, privately.

Tr. 334:16-335:14. The Victim testified generally that this behavior continued when she moved with Baum to Missouri. Tr. 336:20-22.

Baum's acts of buying the Victim a vibrator and instructing her on how to use it, followed by her acts of masturbating "*privately*," did not constitute a "sexual performance." As discussed above in § II.A, to constitute a "sexual performance," the minor must engage in an "exhibition" of sexual conduct "before an audience." There is no basis in the evidence to conclude that the Victim masturbated in front of anyone.

The Victim testified that, starting when she was 15, she and Baum "would have conversations about my masturbation and I was expected to keep him in the loop." Tr. 332:10-12. These conversations were not frequent, however, and apparently did not occur more than every other week:

A. It was sporadic. Sometimes it would be he wouldn't talk to me for months and then would bring it up, sometimes it would be every other week.

Tr. 332:20-25. Notably, the Victim never testified that Baum asked her to describe her acts of masturbation to him, or that she did so.

Keeping Baum "in the loop," by discussing her masturbation with him "sporadic[ally]," does not convert the Victim's acts of masturbation into a "performance." Frankly, *even if* the Victim had described her acts of masturbation to Baum in detail – of which there is no evidence – this would not render her masturbation a "performance." A theater company's closed rehearsal does not become an "exhibition . . . before an audience" simply because a cast member later describes the rehearsal to a third party – even if the third party had requested a report beforehand. As explained above in § II.A, the definition of a "sexual performance," requiring an "exhibition . . . before an audience," must be read to require a visual display in front of spectators. This case does not meet that standard.

As explained in § II.A, cases like *State v. Blankenship*, 415 S.W.3d 116 (Mo. 2013), are not relevant here, because they did not involve the statutory definition of "sexual performance" which now applies. But those cases are distinguishable in any event, because with one exception, those cases involve real-time communication, even if not visual observation. Thus, in *Blankenship* there were at least two incidents, on July 7 and 8, 2010, in which Blankenship and his "victim" (actually an adult undercover police officer) exchanged e-mail messages in real-time, as Blankenship directed the "victim's" progressively more erotic actions, and the "victim" confirmed that she had performed them. *Id.* at 118-19. The fact that the conviction in *Blankenship* was based on these real-time e-mail exchanges between Blankenship and his "victim" on July 7-8, 2010, is confirmed by the detailed written Verdict in this bench-tried case, which found:

> The State's evidence showed that each time "K.D." responded to defendant that she had performed the act she was dared to perform,

> defendant dared her to perform another sexual act and if she did it, to "explain your answer and perform the dare as though I am watching you." The acts K.D. was dared to perform escalated in terms of their sexual nature as each successive email was sent by defendant.
>
> . . . Defendant in this case was an audience of one by reason of reading the emails purportedly sent by K.D. to him in response to his own to her. He admitted to S.D., K.D.'s mother, that he sent the emails and read the responses believing he was sending them to, and receiving them from, K.D. because they gave him "sexual release." As stated in Butler, "under the circumstances here, Defendant [attempted to exploit K.D.] in a way little different from any exploitation suffered in a visual sexual presentation." Butler at 130.

State v. Blankenship, SC93084, Legal File at 22-23 (filed March 26, 2013) (record citations omitted). Similarly, in *State v. Butler*, 88 S.W.3d 126 (Mo. App. S.D. 2002), the defendant directed the victim to engage in sexual acts during a telephone call.

Because they both involved real-time communications while the sexual acts were ongoing, neither *Blankenship* nor *Butler* supports the affirmance of Baum's conviction for promoting a sexual performance in this case.

The *one* case which is arguably inconsistent is *State v. Ragland*, 494 S.W.3d 613 (Mo. App. E.D. 2016). In *Ragland*, the defendant "showed [a minor victim] how to perform oral sex and ordered [two minor victims] to 'suck each other's penises.'" *Id.* at 629. Defendant contended on appeal that his convictions could not be affirmed "because there was no evidence that he *watched* [the two minor victims] engage in the sexual conduct." *Id.* In *Ragland*, the Court was focused on whether *visual observation* was necessary. The Court relied on *Butler*'s statement that the relevant statutes at the time "'do[ ] not limit the definition of a "sexual performance" to a visual performance,'" *id.* (quoting

Butler, 88 S.W.3d at 129), and *Blankenship*'s statement that "'[r]estricting the application of [the relevant statute] to visual performances only would frustrate the purpose of the statute.'" *Id.* (quoting *Blankenship*, 415 S.W.3d at 122). Thus, *Ragland* merely rejects the argument that a "performance" must be *visually observed*. *Ragland* cannot be read to decide an issue that was never presented, under a statutory definition which did not then exist: namely, whether an after-the-fact verbal report to a defendant is sufficient to render a sexual act a "performance." There is no evidence of such an after-the-fact report in this case; but even if there was, it could not sustain Baum's conviction.

Conclusion

Because the evidence was insufficient to support Baum's convictions of second-degree sexual trafficking, and promoting a sexual performance by a child, I respectfully dissent from the majority's affirmance of those convictions.

Alok Ahuja, Judge

IN THE CIRCUIT COURT OF JOHNSON COUNTY, MISSOURI, AT WARRENSBURG
CIRCUIT DIVISION

STATE OF MISSOURI	)	
	)	
Plaintiff,	)	
VS	)	CASE NO. 20JO-CR00514-01
	)	OCN KD001419
JEREMY BAUM	)	
	)	
Defendant.	)	PA File No. 101120219

FELONY INFORMATION

STATE OF MISSOURI)
) ss.
COUNTY OF JOHNSON)

COUNT I Sexual Trafficking Of A Child - 2nd Degree - Child Under 18 Years Of Age
Charge Code Number: 566.211-001Y20176405

Comes now Robert W. Russell, the Prosecuting Attorney of the County of Johnson, State of Missouri, upon information and belief, charges that the defendant, Jeremy Baum, in violation of Section 566.211, RSMo, committed the felony of sexual trafficking of a child in the second degree, punishable upon conviction under Sections 558.002 and 558.011, RSMo, in that on or between May 1, 2017 and May 31, 2020, in the County of Johnson, State of Missouri, the defendant knowingly enticed A.S. (DOB: 10/19/02), a child less than eighteen years of age to participate in a sexual performance.

COUNT II Promoting A Sexual Performance By A Child
Charge Code Number: 573.205-001Y20173699

Comes now Robert W. Russell, the Prosecuting Attorney of the County of Johnson, State of Missouri, upon information and belief, charges that the defendant, Jeremy Baum, in violation of Section 573.205, RSMo, committed the class C felony of promoting a sexual performance by a child, punishable upon conviction under Sections 558.002 and 558.011, RSMo, in that on or

MS. FISCHER: Thank you, Your Honor. At this time the State calls to the stand Alana Stratton.

THE COURT: Good morning. Please approach the bench, face the clerk and raise your right hand to be sworn.

ALANA STRATTON,

being first duly sworn, testified under oath as follows:

DIRECT EXAMINATION

BY MS. FISCHER:

Q. Good morning. Please introduce yourself to the jury.

A. My name is Alana Stratton.

Q. How old are you?

A. I am 18.

Q. What is your date of birth?

A. October 19, 2002.

Q. What do you like to do for fun?

A. I do a lot of drawing. I recently got into digital art and I have a big tablet. I do a lot of comic art.

Q. You said you like to draw comic art?

A. Yeah.

Q. What are some of the things you like to

draw?

A. So I like to draw fantasy stuff like knights and dragons and stuff. I haven't completed a comic yet, but I like to do story boards and panels and stuff like that.

Q. Do you have any idea what you want to be when you grow up?

A. I want to be an herbalist, an herbal consultant helps people with ailments by way of dietary changes and stuff like that, so kind of like a nutritionalist.

Q. You like to grow things?

A. I do. I have a garden at my bedside table. I have zucchinis and tomatoes growing right now.

Q. How long have you been growing things?

A. Probably the start of sophomore, junior year. A few years ago.

Q. Do you know somebody by the name of Jeremy Baum?

A. I do.

Q. And who is Jeremy Baum to you?

A. He is my stepdad.

Q. And was there ever a time that you called him anything other than stepdad?

A. It was dad, yes.

Q. And do you see him present here in the courtroom today?

A. Yes, he is the man in the purple tie.

MS. FISCHER: Your Honor, I ask the record reflect the witness has identified the defendant.

THE COURT: The record will so reflect.

BY MS. FISCHER:

Q. When you were little, we are going to go back. Can you tell me how old you were approximately when you met the defendant?

A. Two years old.

Q. How did you get to know him?

A. He was dating my mother at the time and they got married and he presumed the role as my stepdad.

Q. How long has he been your stepdad?

A. From two years old on.

Q. Did you have any kind of a close relationship with your biological father?

A. Not one I can recall.

Q. So let's talk about the defendant in your family. Did he live in the same house with

you?

A. Are you referring to Jeremy?

Q. Yes. Is that easier for you to call him Jeremy?

A. Yes. Thank you.

Q. Tell me how long you lived in the same house with him.

A. From about two on.

Q. Was there a time your mom and Jeremy got divorced?

A. Yes.

Q. Approximately how old were you?

A. I was about 11.

Q. How did that make you feel?

A. Confused and worried. I was upset and wasn't exactly sure why they had divorced.

Q. Did you blame anybody for the divorce?

A. No.

Q. Were you ever angry at your mom?

A. I was a little resentful towards her, yes.

Q. Was there a time that you moved out of state with the defendant?

A. Yes.

Q. When was that?

A. I was about 12.
Q. Where did you move with him?
A. Lynn Haven, Florida.
Q. Who moved with you?
A. My brother Nathan.
Q. How old is Nathan?
A. Nathan would have been ten or nine at that point.
Q. How did you get along with Nathan?
A. He was my little brother so he would pick on me a lot.
Q. Safe to say he was an annoying little brother?
A. Yeah.
Q. Were you guys very close when he was growing up?
A. Sure, about, yeah.
Q. Ever a time you guys weren't best friends and talk about everything?
A. We weren't that close.
Q. Typical little brother?
A. Yes.
Q. And how did you get along with the defendant?
A. When I moved to Florida, we became much

closer over time. I relied on him for a lot of things.

Q. Did your mom go with you?

A. She did not.

Q. How did that make you feel?

A. Upset. I wanted the family to stay together.

Q. Hard time, wasn't it?

A. Yes.

Q. When you were in Florida, approximately how long did you live there?

A. I lived there -- I was 12 and then we moved out after Hurricane Michael hit.

Q. Do you remember when Hurricane Michael was?

A. That was I believe October of 2018.

MS. FISCHER: I want to show you -- permission to approach, Your Honor?

THE COURT: You may.

BY MS. FISCHER:

Q. What has been marked as State's Exhibit No. 1 and ask if you recognize that?

A. I do.

Q. What is State's Exhibit No. 1?

A. That is a photo of me holding my

driver's license.

Q. How old were you in this photo?

A. I am 16.

Q. Does that fairly and accurately depict what you looked like when you were 16?

A. Yes.

MS. FISCHER: Your Honor, I offer into evidence State's Exhibit 1.

MR. HENSLEY: Where is this at?

MS. FISCHER: That is what I was getting ready to talk to her about.

MR. HENSLEY: No objection.

THE COURT: Thank you. Exhibit 1 will be received.

BY MS. FISCHER:

Q. Where was this picture taken at?

A. Destin, Florida.

Q. Who else was with you when you were there in Destin, Florida?

A. My brother, Nathan, and Jeremy.

Q. When your mom and the defendant got divorced, did you feel bad for him?

A. Yes.

Q. Tell me where all you lived with them, whether it was with just Jeremy or Jeremy and

your mom. Do you know what states you lived in?

A. Before the divorce, we lived in New Mexico.

Q. And had you ever lived anywhere else?

A. I had lived in Alaska.

Q. And then you moved to Florida with the defendant, with Jeremy? I mean, at some point. That was a bad question.

A. Yes.

Q. Thank you for correcting me. So you went from New Mexico to Florida?

A. Yes.

Q. And then from Florida you moved here to Missouri?

A. Correct.

Q. How did Jeremy and your brother get along?

A. I wouldn't say too well. We definitely had good days, but there was a lot of arguing. There would be more arguments with him and Nathan than him and I.

Q. How would you describe the defendant?

A. Quite controlling.

Q. Controlling like how?

A. Everything had to be a certain way and

he would get very frustrated when it wasn't.

Q. Ever any specific instances you can think of where you are like this is crazy, why is he reacting like that?

A. Yeah. I remember my brother and I were making dinner and we had recently gotten a new rice cooker. Jeremy at that point had always made the rice and from what I can recall he had a specific ratio. I remember going downstairs and asking him what the ratio was for the rice and the water and he had asked me if I had looked at the instruction kit, which I wasn't aware of and he got very upset that I didn't put any effort into looking at the instruction kit before asking him.

Q. And is that pretty typical?

A. Yes.

Q. Did you try to keep the defendant happy?

A. Yes.

Q. And how were some ways you would do that?

A. I would make sure everything was up to his standard constantly. I would also try to keep him happy by way of a lot of affection.

Q. Let's talk about how -- before we talk

about the affection, did the defendant date anybody in Florida?

A. He did.

Q. Who was that?

A. A woman by the name of Rachel.

Q. And when you moved to Missouri, did he date anybody?

A. I believe he went on a date with one woman. I don't remember her name.

Q. Let's talk about ways you would show him affection. Did you ever take naps with the defendant?

A. Yes.

Q. How old were you?

A. I would have had to have been 15 when it started.

Q. And where were you living then?

A. Florida.

Q. When I say take a nap or when you say take a nap, where were you?

A. Most of the time I was on the couch.

Q. How were you laying?

A. Sometimes he would be wrapping his arms around me on the couch and sometimes I would be on top of him.

Q. How did that make you feel?

A. Honestly I didn't really want to be there, but I also didn't want to make him upset. When he was upset, it would affect the entire house.

Q. Any other ways you were showing him affection?

A. He would kiss me a little bit longer than I was comfortable with.

Q. How did that make you feel?

A. Confused.

Q. Okay. Did you guys ever hold hands?

A. Yes.

Q. Anybody ever make any comments about that?

A. Not to me.

Q. Let me ask you when you would take naps with the defendant, how often would that happen? It's okay, take your time.

A. I would have to say maybe it was a few times a month, like a handful of times so like five times a month.

Q. How old were you when that stopped?

A. It didn't.

Q. Did anyone ever see you and Jeremy

napping together?

A. Jillian Kennedy.

Q. Who is Jillian Kennedy?

A. She is a family friend of ours.

Q. Did you meet her through Jeremy?

A. I did.

Q. And how did you get along with Jillian?

A. We were very close.

Q. Did Jillian say anything to you at that time?

A. No.

Q. Did Jillian come over to your house a lot?

A. Yes.

Q. How often would she come over?

A. Maybe about once a week.

Q. When Jillian was coming over, did you get to be very close with her?

A. We all would hang out together.

Q. Did you ever have any conversations with Jillian about girl stuff?

A. Occasionally, yeah. She was there when I started my period, so she was there for a lot of questions that I had.

Q. Were you expected to talk to anyone in

particular about stuff in your life?

A. Jeremy.

Q. Were you supposed to talk to anybody else?

A. There was no supposed to for everybody else.

Q. Were there times that you had to talk to him about stuff you didn't want to?

A. Yes.

Q. Can you tell me about that?

A. He and I would have conversations about my masturbation and I was expected to keep him in the loop.

Q. Can you tell me how old you were when that started?

A. I would have had to be 15.

Q. And was that something you were made to feel like it was normal?

A. Yes.

Q. How often would he talk to you about that?

A. It was sporadic. Sometimes it would be he wouldn't talk to me for months and then would bring it up, sometimes it would be every other week.

Q. Did he ever talk to you about more than your own personal experiences?

A. Yes. When we were talking about masturbation, he told me about his experiences with other women and how they were pleasured.

Q. How did that make you feel?

A. I feel like I wasn't supposed to know that. It was none of my business.

Q. Was there a time in your life that he bought you anything for masturbation?

A. He bought me a vibrator.

Q. Can you just briefly describe that to the jury?

A. It is a very small hot pink vibrator. It almost looks like a tube of lipstick.

Q. I am sorry, Alana, I am going to show you what has been marked as State's Exhibit No. 9 and ask if you recognize that?

A. I do.

Q. What is that?

A. That is the vibrator he bought me.

Q. Does that fairly and accurately represent what he bought you?

A. Absolutely.

MS. FISCHER: I will offer into

evidence State's Exhibit No. 9.

THE COURT: Thank you. Exhibit 9 will be received.

BY MS. FISCHER:

Q. Did you ever get in trouble with the defendant?

A. For things like the rice, yeah.

Q. Anything ever more than that?

A. No.

Q. Did how the defendant treat you ever change?

A. When I was living in Florida, there was hardly a time that we had incidents like that, but when I moved to Missouri, he was much more critical about how I did things in the house.

Q. When he bought you the vibrator, did he show you how to use it?

A. Yeah. He showed me the charger, how it charged and then there was a settings button on the back.

Q. Did you ever have any conversations with him or did he tell you how to use it to please yourself better?

A. We did talk about certain areas that it would feel good, yes.

Q. And just for the record, okay, you pointed down here and pointed like in your vaginal area?

A. Yes.

Q. Just so you know she can't see where you are pointing and I know this is uncomfortable and I am sorry. Did he ever show you ways to use it that would work better?

A. It was more tell, he didn't show.

Q. And then were you expected after he instructed you how to do that to go do it?

A. Yes.

Q. And did you?

A. Yes, privately.

Q. Did he ever talk to you about sex in general?

A. Yes.

Q. And what was that about?

A. A lot of it was safety oriented. He would always make it a point to come to him if I had had any questions.

Q. Did the defendant ever talk to you about if you wanted anything to use internally?

A. Yes.

Q. Tell me what happened.

A. It came up in a conversation about masturbation. The vibrator he gave me he told me it was more external use and if I wanted anything for internal use, I was to tell him.

Q. What was he going to do about it?

A. I believe he was going to give me another vibrator or tool for that.

Q. Did you ask him to buy that vibrator for you?

A. No.

Q. Were you wanting him to buy that for you?

A. No.

Q. Did you ever tell your mom back then what was going on?

A. No.

Q. Did you ever talk to your mom about masturbation or sex?

A. No.

Q. Did this behavior continue when you got to Missouri?

A. Yes.

Q. Did it change?

A. It escalated.

Q. And how did it escalate?

A. It went from naps and holding kisses longer to I was spending nights in his bedroom and he had me perform mutual masturbation and oral sex and eventually penetrative sex with him.

Q. So you used the term mutual masturbation. What do you mean by that?

A. I mean I am touching his genitalia and he is touching mine or he is using the vibrator on me.

Q. Is he giving you any instructions on how to do that?

A. Yes.

Q. And what was he doing?

A. Telling me where to please myself, my position, things like that.

Q. Would he tell you how to masturbate him better?

A. Yes.

Q. And tell me about that.

A. He would tell me about the movement of my hands was a big thing, just where to --

Q. Take your time. It is okay.

A. Where to put my hands, how fast to do it, when I needed to add lubrication.

Q. Let's talk about the first time that

that happened. How old were you in Missouri?

A. I was 16.

Q. Where were you the first time that happened?

A. The mutual masturbation?

Q. Yes. Thank you.

A. When I first started touching him, we were on a summer trip. We had a camper and everybody was out with friends and they were eating and I was in the trailer with him.

Q. Let's talk about the first time it happened here in Warrensburg in Johnson County. Is that where you are?

A. Yes.

Q. Okay. And how did that happen?

A. We were quite close already and it is something he had encouraged me to do. I remember I was given praise during it. He would tell me how brave I was.

Q. I am sorry, I can't hear you. You said he was giving you praise?

A. Yes. He was telling me how much that he loved me. He also told me I was very brave while I was doing it. Very much encouraging me to touch him, commenting on how erect he was because

of me.

Q. And you are 16 years old when this is happening?

A. Yes.

Q. How did that make you feel?

A. I didn't want to make him upset so I did as I was asked.

Q. You had just talked about when his hand was on your genitals and your hand was on his genitals. Is there ever a time that something else was done?

A. Yes.

Q. What was that?

A. I performed oral sex on him and he did to me.

Q. And so first let's talk about when you performed oral sex on him, talk about the first time that happened. Okay?

A. Yes.

Q. Where were you?

A. I was in his room.

Q. Was that here at the house in Warrensburg?

A. Yes.

Q. This is the outside of that house

(indicating)?

A. Yes.

Q. Is there pictures on the wall in that house?

A. Yes.

Q. And for the record those were State's Exhibits 4 and 5. Whose bedroom is this, State's Exhibit 6?

A. That is my bedroom.

Q. Does your bedroom always look that neat?

A. Sometimes it was messy, but I kept it pretty clean.

Q. And State's Exhibit No. 7, whose bedroom is that?

A. That is Nathan's bedroom.

Q. Is this what Nathan's bedroom looked like when you guys left?

A. He kept his room a bit messier.

Q. At times?

A. Yeah.

Q. Pretty neat kid though?

A. Yes.

Q. State's Exhibit No. 8, whose bedroom is that?

A. That is Jeremy's bedroom.

INSTRUCTION NO. 9

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

First, that on or between January 1, 2019 and October 18, 2019, in the State of Missouri, the defendant promoted a performance by A.S. (DOB: 10/19/2002), who was then less than seventeen years of age, and

Second, that the performance or any part thereof included A.S. engaging in personal masturbation after being instructed by the defendant on how to use a sexual device, and

Third, that defendant knew that A.S. was less than seventeen years of age, and

Fourth, that at that time the defendant promoted the performance, the defendant knew the character and content of that performance,

then you will find the defendant guilty under Count II of promoting a sexual performance under this instruction.

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.

IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. WD85148
	)	
JEREMY BAUM,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT
FROM THE CIRCUIT COURT OF
JOHNSON COUNTY, MISSOURI
SEVENTEENTH JUDICIAL CIRCUIT
THE HONORABLE MICHAEL WAGNER, JUDGE

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

Jeremy Baum ("Jeremy) appeals his convictions for one count of sexual trafficking of a child in the second degree, in violation of Section 566.211 RSMo. (2016) (Count I); promoting a sexual performance by a child, in violation of Section 573.205 RSMo. (2016) (Count II); one count of statutory rape in the second degree, in violation of Section 566.034 RSMo. (2016) (Count III); and five counts of statutory sodomy in the second degree, in violation of Section 566.064 RSMo. (2016) (LF 24).[1]

Jeremy was tried by a Johnson County Jury (LF 24). On January 31, 2022, the Honorable Michael Wagner sentenced Jeremy to twenty years in prison on Count I; eight years in prison on Count II; and seven years in prison on Counts III through VIII) (LF 24). Counts I and III were ordered to run consecutively with each other, while Counts II and IV through VII were order to run concurrently with each other and Counts I and III (LF 24). A timely notice of appeal was filed on February 1, 2022 (LF 25).

As this appeal involves none of the issues reserved to the exclusive appellate jurisdiction of the Supreme Court of Missouri, jurisdiction lies in the Missouri Court of Appeals, Western District. Article V, Section 3, Mo. Const.

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[1] The record on appeal consists of a Legal File (LF), a Transcript (TR), and a sentencing transcript (STR).

STATEMENT OF FACTS

Jeremy was charged by way of an information with one count of sexual trafficking of a child in the second degree (Count I); promoting a sexual performance by a child (Count II); one count of statutory rape in the second degree (Count III); and five counts of statutory sodomy in the second degree (Counts IV through VIII); Count IX was dismissed (LF 24).

Count I alleged that, "Jeremy...committed the felony of sexual trafficking in the second degree...in that on or between May 1, 2017 and May 31, 2020...the defendant knowingly enticed A.S. (D.O.B.: 10/19/02), a child less than eighteen years of age to participate in a sexual performance;" Count II alleged that, "Jeremy...committed the Class C felony of promoting a sexual performance by a child...in that on or between May 1, 2017 and May 31, 2020...the defendant knowingly directed or promoted a performance, knowing the character and content thereof, A.S. (D.O.B.: 10/19/02), a child less than seventeen years of age, in which defendant instructed or directed A.S. on the use of a sexual device."

A.S. was born on October 19, 2002 (TR 320). Jeremy is her step-dad, and she used to see him as dad (TR 321-22). A.S. lived in the same house with Jeremy since she was two years-old (TR 323). When A.S. was around twelve, she and her brother moved to Florida with Jeremy (TR 324). They moved back to Missouri in October of 2018 (TR 325). A.S. testified that Jeremy was controlling (TR 327). "Everything had to be a certain way and he would get very frustrated when it wasn't (TR 327-28). Beginning at age 15, A.S. would take naps with Jeremy (TR 329). The naps took

place on the couch (TR 329). This happened around five times per month (TR 330). A.S. did not like it but she did not want to make Jeremy upset (TR 330). Jeremy would also kiss A.S. longer than she felt comfortable, and this made her feel confused (TR 330). A.S. and Jeremy would also hold hands (TR 330). Jeremy also talked to A.S. about his sexual experiences with other women and how he pleased them sexually (TR 333).

A.S. testified that she and Jeremy talked about her masturbation, and Jeremy wanted her to "keep him in the loop" (TR 332). This started when A.S. was 15 (TR 332). They talked about this "sporadically" (TR 332). Sometimes they talked about it every other week, and sometimes several months would go by (TR 332).

A.S. testified that Jeremy bought her a vibrator (TR 333). Jeremy did this when A.S. was fourteen or fifteen and living in Florida (TR 350). Jeremy told A.S. about the charger and the vibrator settings and told A.S. about how using it would make her feel good (TR 334). Jeremy told A.S. "ways to use it that would work better" (TR 335). Jeremy told her about the vibrator, but did not show her (TR 335). Jeremy and A.S. did talk about certain areas where it would feel good to use the vibrator (TR 335). A.S. testified that after she was instructed on how to use it, she was then expected to use it (TR 335). A.S. used the vibrator privately (TR 335).

Jeremy also talked to A.S. about sex, though a lot of those conversations were "safety oriented" (TR 335). Jeremy wanted A.S. to come to him if she had any questions (TR 335). A.S. testified that Jeremy considered the use of the vibrator to be external and told A.S. she should tell him if she wanted anything for internal use (TR

336). Jeremy also told A.S. if she wanted to use a vibrator "internally," she was to come up to tell him (TR 336). The prosecutor then asked A.S., "Did this behavior continue when you got to Missouri?" (TR 336). A.S. said, "Yes" (TR 336). The prosecutor asked A.S. "Did it change?" (TR 336). A.S. testified that it escalated (TR 336). The prosecutor asked, "And how did it escalate?" A.S. gave examples of other types of activities, but A.S. did not testify to anything more about using the vibrator to masturbate or discussing her masturbation with Jeremy. Jeremy also told his girlfriend that he had talked to A.S. about masturbation when they were living in Florida (TR 385, 387-88).

When Jeremy, A.S. and Nathan came to Missouri, she and Jeremey started spending the night together, and "[Jeremy] had [A.S.] perform mutual masturbation and oral sex and eventually penetrative sex with him" (TR 337). The following testimony was elicited at trial:

> **PROSECUTOR:** So you used the term mutual masturbation. What do you mean by that?
>
> **A.S.:** I mean I am touching his genitalia and he is touching mine or he is using the vibrator on me.
>
> **PROSECUTOR:** Is he giving you any instructions on how to do that?
>
> **A.S.:** Yes
>
> **PROSECUTOR:** And what was he doing?
>
> **A.S.:** Telling me where to please myself, my position, things like that.

PROSECUTOR: Would he tell you how to masturbate him better?

A.S.: Yes

PROSECUTOR: And tell me about that.

A.S.: He would tell me about the movement of my hands was a big thing, just where to - -

PROSECUTOR: Take your time. It is okay.

A.S.: Where to put my hands, how fast to do it, when I needed to add lubrication.

(TR 337).

A.S. testified that when Jeremy touched her genitals, "[h]e would be stimulating various parts of [her] vulva and then he would occasionally penetrate with his fingers" (TR 342-43). A.S. was sixteen when this first happened (TR 338). Jeremy would give her praise while this happened (TR 338). Jeremy told A.S. how much he loved her and how brave she was (TR 338-39). Jeremy also told A.S. how beautiful she was, how "wet" she was, and how grown up she was (TR 343). There was one time where Jeremy touched A.S.'s vagina while they were on the upstairs couch (TR 344).

A.S. was sixteen the first time they performed oral sex on each other (TR 341). The oral sex happened in Jeremy's room (TR 339). The first time Jeremy put his mouth on A.S.' genitals, he was touching her with his hands "and then he brought his head down" (TR 342). This made A.S. uncomfortable and it only happened a few times (TR 342). A.S. also put her mouth on Jeremy's penis (TR 341). A.S. testified

she did not know what she was doing but [Jeremy] was trying to coach [her] through it (TR 341). A.S. would always go to bed in her room and then Jeremy came and got her (TR 344). In the morning, Jeremy would check to make sure Nathan did not see A.S. go back to her bedroom (TR 344). Jeremy used lubricant on A.S. (TR 345). Whenever A.S. told Jeremy she did not want to engage in any sexual acts, Jeremy would become sad, and that made A.S. feel guilty (TR 346-47).

A.S. testified that she did tell Children's Division that Jeremy bought he a vibrator but did not tell them about the sexual acts because she did not want to make Jeremy upset (TR 347-48). A.S. admitted telling law enforcement in New Mexico that nothing happened between her and Jeremy (TR 348-49). A.S. testified that she did not tell the forensic interviewer anything happened because she wanted to protect herself and Jeremy at the time (TR 349-50). She did tell him that Jeremy bought her a vibrator and told her how to use it (TR 350). Other witnesses also testified that A.S. had denied that Jeremy had engaged in sexual acts with her (TR 207, 214, 222).

A.S. testified that once when she was sixteen, Jeremey attempted to have sexual intercourse with her, but she told him that it hurt so he stopped (TR 350-51). It did happen again in Jeremy's bedroom when A.S. was seventeen (TR 351). A.S. later told what she and Jeremy had done in New Mexico on June 9, 2020 (TR 352). State's Exhibit 14, a phone call between Jeremy and A.S. was admitted into evidence over objection (TR 360).

After the State rested, Jeremy moved for a judgment of acquittal on Counts I and II in that there was not sufficient evidence to show that the behavior of A.S. constituted a performance (TR 457-58). The State responded:

> As to the sexual performance nothing says it has to be videotaped or photographed and it is in front of one or more persons. The victim testified that she had to do this in front of the defendant. That is one or more persons, she is there and he is there. She was doing exactly what he told her to do and exactly what he made her do. So the State feels that it has met its burden on each of those, Your Honor.
>
> Additionally, as for exhibition when she is forced to show her genitals to the defendant and he is rubbing those, that counts as exhibition.

(TR 461).

Jeremy took the stand in his own defense (TR 470). Jeremy admitted to buying a vibrator for A.S. (TR 481). He did this because he believed A.S. was using one end of a woman's razor to masturbate (TR 481). Jeremy testified he did not let her think she was doing anything wrong, but only that there were "items specifically made for the use of what [he] assumed she was doing (TR 482). Jeremy went over the instructions with A.S. on how to use it (TR 483). Jeremy denied ever watching A.S. use it (TR 483). Jeremy denied having sexual contact with A.S. (TR 483-84).

Regarding the recorded phone call, State's Exhibit 14, Jeremy testified the he knew the call was staged since his caller ID told him the phone being used to call him was A.S.'s mother's phone (TR 488-89). Jeremy testified he knew someone was recording the call, and he was reluctant to address the topics she was bringing up (TR 489-90). Jeremy testified that Nathan and A.S. slept in his bed with him (TR 492).

The defense objected to the submission of the instructions on Counts I and II (TR 533-34). The jury found Jeremy guilty on all counts (TR 581-82). The trial court sentenced Jeremy to twenty years in prison on Count I; eight years in prison on Count II; and seven years in prison on Counts III through VIII (LF 24). Counts I and III were ordered to run consecutively with each other, while Counts II and IV through VII were order to run concurrently with each other and Counts I and III (LF 24).

This appeal follows.

POINTS RELIED ON

I.

The trial court erred in overruling Jeremy's motion for judgment of acquittal at the close of all the evidence, accepting the jury's verdict, and imposing a sentence for Count I, because the State did not prove the offense beyond a reasonable doubt, in violation of Jeremy's right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the State did not present sufficient evidence from which a rational trier of fact could have reached a "subjective state of near certitude" that Jeremy enticed A.S. to participate in a sexual performance.

In re Winship, 397 U.S. 358 (1970);

Jackson v. Virginia, 443 U.S. 307 (1979);

State v. Blankenship, 415 S.W.3d 116 (Mo. banc 2013);

State v. Wilson, 55 S.W.3d 851 (Mo. App. W.D. 2001);

United States Constitution, Fourteenth Amendment

Missouri Constitution, Article I, Section 10;

Section 566.200 RSMo. (2000);

Section 566.211 RSMo. (2016);

Section 568.080 RSMo. (2000);

Section 573.010 RSMo. (2016);

Section 573.200 RSMo. (2016); and,

Rule 29.11 (2022).

II.

The trial court erred in overruling Jeremy's motion for judgment of acquittal at the close of all the evidence, accepting the jury's verdict, and imposing a sentence for Count II, because the State did not prove the offense beyond a reasonable doubt, in violation of Jeremy's right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the State did not present sufficient evidence from which a rational trier of fact could have reached a "subjective state of near certitude" that Jeremy promoted a performance by instructing A.S. how to use a sexual device.

In re Winship, 397 U.S. 358 (1970);

Jackson v. Virginia, 443 U.S. 307 (1979);

State v. Blankenship, 415 S.W.3d 116 (Mo. banc 2013);

State v. Wilson, 55 S.W.3d 851 (Mo. App. W.D. 2001);

United States Constitution, Fourteenth Amendment

Missouri Constitution, Article I, Section 10;

Section 573.010 RSMo. (2016);

Section 573.205 RSMo. (2016); and,

Rule 29.11 (2022).

III.

The trial court erred in overruling Jeremy's motion for judgment of acquittal at the close of all the evidence, accepting the jury's verdict, and imposing a sentence for Count II, because the State did not prove the offense beyond a reasonable doubt, in violation of Jeremy's right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the trial court lacked jurisdiction because the State did not present sufficient evidence from which a rational trier of fact could have reached a "subjective state of near certitude" that Jeremy promoted a performance by instructing A.S. how to use a sexual device in the State of Missouri.

In re Winship, 397 U.S. 358 (1970);

Jackson v. Virginia, 443 U.S. 307 (1979);

State v. Allen, 536 S.W.3d 241 (Mo. App. E.D. 2017);

State v. Wilson, 55 S.W.3d 851 (Mo. App. W.D. 2001);

United States Constitution, Fourteenth Amendment

Missouri Constitution, Article I, Section 10;

Section 541.191 RSMo. (2000);

Section 573.010 RSMo. (2016);

Section 573.205 RSMo. (2016); and,

Rule 29.11 (2022).

IV.

The trial court plainly erred in submitting verdict directing Instruction 8 to the jury, because this violated Jeremy's right to a fair trial and due process, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that there was not sufficient evidence to prove beyond a reasonable doubt that: (1) the offense took place in Missouri; and (2) the offense took place on or between January 1, 2019 and October 18, 2020. Submitting this Instruction was error that was evident, obvious, and clear, and a conviction based on a verdict director not supported by substantial evidence constitutes a manifest injustice.

In re Winship, 397 U.S. 358 (1970);

Jackson v. Virginia, 443 U.S. 307 (1979);

State v. Bradshaw, 26 S.W.3d 461 (Mo. App. W.D. 2000);

State v. Hallmark, 635 S.W.3d 163 (Mo. App. E.D. 2021);

United States Constitution, Fourteenth Amendment

Missouri Constitution, Article I, Section 10;

Section 573.010 RSMo. (2016);

Section 573.205 RSMo. (2016);

Rule 29.11 (2022);

Rule 30.20 (2022); and,

MAI-CR 4th 427.24.

V.

The trial court plainly erred in submitting verdict directing Instruction 6 to the jury, because this violated Jeremy's right to a fair trial and due process, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that there was not sufficient evidence to prove beyond a reasonable doubt that A.S. participated in a sexual performance by engaging in mutual masturbation with Jeremy. Submitting this Instruction was error that was evident, obvious, and clear, and a conviction based on a verdict director not supported by substantial evidence constitutes a manifest injustice.

In re Winship, 397 U.S. 358 (1970);

Jackson v. Virginia, 443 U.S. 307 (1979);

State v. Bradshaw, 26 S.W.3d 461 (Mo. App. W.D. 2000);

State v. Hallmark, 635 S.W.3d 163 (Mo. App. E.D. 2021);

United States Constitution, Fourteenth Amendment

Missouri Constitution, Article I, Section 10;

Section 573.010 RSMo. (2016);

Section 573.205 RSMo. (2016);

Rule 29.11 (2022); and,

Rule 30.20 (2022).

ARGUMENT

I.

The trial court erred in overruling Jeremy's motion for judgment of acquittal at the close of all the evidence, accepting the jury's verdict, and imposing a sentence for Count I, because the State did not prove the offense beyond a reasonable doubt, in violation of Jeremy's right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the State did not present sufficient evidence from which a rational trier of fact could have reached a "subjective state of near certitude" that Jeremy enticed A.S. to participate in a sexual performance.

"It is the duty of all courts of justice to take care, for the general good of the community, that hard cases do not make bad law."

--- *Seilert v. McAnally,* 122 S.W. 1064, 1068 (Mo. 1909) (citation and internal quotations omitted).

A. Preservation of Error

Claims regarding the sufficiency of evidence to sustain a criminal conviction are always preserved for appellate review, "even if not raised or not timely raised in the trial court." Mo. Sup. Ct. Rule 29.11(e), *State v. Claycomb*, 470 S.W.3d 358, 361 (Mo. banc 2015).

B. Standard of Review

The Due Process Clause protects a defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970); U.S. Const., Amend. 14; Mo. Const. Art. I, § 10. That requirement impresses "upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused," and thereby, symbolizes the significance that our society attaches to liberty. *Jackson v. Virginia,* 443 U.S. 307, 315 (1979).

"To determine whether the evidence presented was sufficient to support a conviction and to withstand a motion for judgment of acquittal, [a reviewing court] does not weigh the evidence but rather accepts as true all evidence tending to prove guilt together with all reasonable inferences that support the verdict[.]" *State v. Clark*, 490 S.W.3d 704, 707 (Mo. banc 2016). The reviewing court "disregard[s] contrary inferences, unless they are such a natural and logical extension that a reasonable juror would be unable to disregard them." *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993).

A reviewing court, however, "may not supply missing evidence, or give the [State] the benefit of unreasonable, speculative or forced inferences." *Clark*, 490 S.W.3d at 707. "A conviction without sufficient proof violates a defendant's due process rights as guaranteed by the Fourteenth Amendment." *Jackson v. Virginia*, 443 U.S. at 316. A reviewing court bases its determination on the sufficiency of the

evidence based on the way the defendant is charged, not the way the jury was instructed. *State v. Zetina-Torres,* 482 S.W.3d 801, 809 (Mo. banc 2016).

C. Relevant Facts

A.S. testified that she and Jeremy talked about her masturbation, and Jeremy wanted her to "keep him in the loop" (TR 332). This started when A.S. was 15 (TR 332). They talked about this "sporadically" (TR 332). Sometimes they talked about it every other week, and sometimes several months would go by (TR 332).

A.S. testified that Jeremy bought her a vibrator (TR 333). Jeremy did this when A.S. was fourteen or fifteen and living in Florida (TR 350). Jeremy told A.S. about the charger and the vibrator settings and told A.S. about how using it would make her feel good (TR 334). Jeremy told A.S. "ways to use it that would work better" (TR 335). Jeremy told her about the vibrator, but did not show her (TR 335). Jeremy and A.S. did talk about certain areas where it would feel good to use the vibrator (TR 335). A.S. testified that after she was instructed on how to use the vibrator, she was then expected to use it (TR 335). A.S. used the vibrator privately (TR 335).

Jeremy also talked to A.S. about sex, though a lot of those conversations were "safety oriented" (TR 335). Jeremy wanted A.S. to come to him if she had any questions (TR 335). A.S. testified that Jeremy considered the use of the vibrator to be external and told A.S. she should tell him if she wanted anything for internal use (TR 336). Jeremy also told A.S. if she wanted to use a vibrator "internally," she was to come up to tell him (TR 336). The prosecutor then asked A.S., "Did this behavior

continue when you got to Missouri?" (TR 336). A.S. said, "Yes" (TR 336). The prosecutor asked A.S. "Did it change?" (TR 336). A.S. testified that it escalated (TR 336). The prosecutor asked, "And how did it escalate?" A.S. gave examples of other types of activities, but A.S. did not testify to anything more about using the vibrator to masturbate or discussing her masturbation with Jeremy. Jeremy also told his girlfriend that he had talked to A.S. about masturbation when they were living in Florida (TR 385, 387-88).

When Jeremy, A.S. and Nathan came to Missouri, she and Jeremy started spending the night together, and "[Jeremy] had [A.S.] perform mutual masturbation and oral sex and eventually penetrative sex with him" (TR 337). The following testimony was elicited at trial:

> **PROSECUTOR:** So you used the term mutual masturbation. What do you mean by that?
>
> **A.S.:** I mean I am touching his genitalia and he is touching mine or he is using the vibrator on me.
>
> **PROSECUTOR:** Is he giving you any instructions on how to do that?
>
> **A.S.:** Yes
>
> **PROSECUTOR:** And what was he doing?
>
> **A.S.:** Telling me where to please myself, my position, things like that.
>
> **PROSECUTOR:** Would he tell you how to masturbate him better?
>
> **A.S.:** Yes

PROSECUTOR: And tell me about that.

A.S.: He would tell me about the movement of my hands was a big thing, just where to - -

PROSECUTOR: Take your time. It is okay.

A.S.: Where to put my hands, how fast to do it, when I needed to add lubrication.

(TR 337).

A.S. testified that when Jeremy touched her genitals, "[h]he would be stimulating various parts of [her] vulva and then he would occasionally penetrate with his fingers" (TR 342-43). A.S. was sixteen when this first happened (TR 338). Jeremy would give her praise while this happened (TR 338). Jeremy told A.S. how much he loved her and how brave she was (TR 338-39). Jeremy also told A.S. how beautiful she was, how "wet" she was, and how grown up she was (TR 343). There was one time where Jeremy touched A.S.'s vagina while they were on the upstairs couch (TR 344).

A.S. was sixteen the first time they performed oral sex on each other (TR 341). The oral sex happened in Jeremy's room (TR 339). The first time Jeremy put his mouth on A.S.' genitals, he was touching her with his hands "and then he brought his head down" (TR 342). This made A.S. uncomfortable and it only happened a few times (TR 342). A.S. also put her mouth on Jeremy's penis (TR 341). A.S. testified she did not know what she was doing but [Jeremy] was trying to coach [her] through it (TR 341). A.S. would always go to bed in her room and then Jeremy came and got her (TR 344). In the morning, Jeremy would check to make sure Nathan did not see

A.S. go back to her bedroom (TR 344). Jeremy used lubricant on A.S. (TR 345). Whenever A.S. told Jeremy she did not want to engage in any sexual acts, Jeremy would become sad, and that made A.S. feel guilty (TR 346-47).

After the State rested, Jeremy moved for a judgment of acquittal on Counts I and II in that there was not sufficient evidence to show that the behavior of A.S. constituted a performance (TR 457-58). The State responded:

> As to the sexual performance nothing says it has to be videotaped or photographed and it is in front of one or more persons. The victim testified that she had to do this in front of the defendant. That is one or more persons, she is there and he is there. She was doing exactly what he told her to do and exactly what he made her do. So the State feels that it has met its burden on each of those, Your Honor.
>
> Additionally, as for exhibition when she is forced to show her genitals to the defendant and he is rubbing those, that counts as exhibition.

(TR 461).

D. Analysis

Count I alleged that, "Jeremy...committed the felony of sexual trafficking in the second degree...in that on or between May 1, 2017 and May 31, 2020...the defendant knowingly enticed A.S. (D.O.B.: 10/19/02), a child less than eighteen years of age to participate in a sexual performance" (LF 2).

The information does not specify the "sexual performance" Jeremy enticed her to commit. In other words, it does not state what actions A.S. did that, under the law constitutes a sexual performance. The jury instructions, as well as the comments the State made when the defense argued Count I should be dismissed after the State had

rested (TR 459-60), demonstrate that the acts of mutual masturbation are what the State was referring to (LF 15:15). The sufficiency of the evidence, however, is not determined by how the jury is instructed. *See Zetina-Torres,* 482 S.W.3d at 809. However, in *Dunn v. United States,* 442 U.S. 100, 106 (1979), the United States Supreme Court stated:

> To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused.

See also Chiarella v. United States, 445 U.S. 222, 236 (1980) (criminal conviction cannot be affirmed on the basis of a theory not presented to the jury); *Cole v. Arkansas,* 333 U.S. 196, 202 (1948).

Additionally, this Court in *State v. Edwards,* 365 S.W.3d 240, 247-49 (Mo. App. W.D. 2012), the defendant was charged and convicted with statutory sodomy in general but without specifying a particular act, just that he engaged in deviate sexual intercourse with a child. In analyzing a challenge to the sufficiency, this Court noted that "per the jury's verdict director, the jury was limited to determining whether [the defendant] engaged in deviate sexual intercourse in the form of penile to anal contact with [the child]." *Id.* at 251.

Moreover, the basis for arguing the lack of sufficiency, that Jeremy's actions with A.S. did not constitute a sexual performance, apply to the other sexual acts as well.

1. Jeremy's actions with A.S. did not constitute a "sexual performance."

The statute Jeremy was convicted of violating was Section 566.211 RSMo. (2016). In pertinent part, a person commits sexual trafficking in the second degree if he:

> (1) Recruits, entices, harbors, transports, provides, or obtains by any means…a person under the age of eighteen to participate in a commercial sex act, a sexual performance, or the production of explicit sexual material as defined in section 573.010, or benefits, financially or by receiving anything of value, from participation in such activities;
>
> (2) Causes a person under the age of eighteen to engage in a commercial sex act, a sexual performance, or the production of explicit sexual material as defined in section 573.010; or
>
> (3) Advertises the availability of a person under the age of eighteen to participate in a commercial sex act, a sexual performance, or the production of explicit material as defined in section 573.010.

Section 566.200(15) RSMo. (2000) defines "sexual performance" as:

> [A]ny play, motion picture, still picture, film, videotape, video recording, dance, or exhibition which includes sexual conduct or nudity, performed before an audience of one or more, whether in person or online or through other forms of telecommunication[.]

"When analyzing a criminal statute, this Court must discern the legislature's intent from the statutory language and give effect to that intent." *State v. Blankenship,* 415 S.W.3d 116, 121 (Mo. banc 2013) (citation omitted). "This Court considers the words used in their plain and ordinary meaning." *Id.* (citation omitted). "When the legislature has not defined a word, we can examine other legislative or

judicial meaning of the word, and can also ascertain a word's plain and ordinary meaning from its definition in the dictionary." *Id.* at 121-22 (citation and internal quotations omitted). "[A] statute must be interpreted in light of the general principle that criminal statutes...must be construed strictly against the state and liberally in favor of the defendant." *State ex rel. Schmitt v. Crane,* 641 S.W.3d 357, 367 (Mo. App. W.D. 2021) (citation and internal quotations omitted).

An appellate court will not read any part of a statute in isolation, but consider the context of the entire statute and harmonize its provisions. *State v. Whipple,* 501 S.W.3d 507, 514 (Mo. App. E.D. 2016) (citation omitted). Further, this Court cannot be "guided by a single sentence...but [should] look to the provisions of the whole law, and to [sic] its object and policy." *State v. Rousseau,* 34 S.W.3d 254, 260 (Mo. App. W.D. 2000) (citation and internal quotations omitted). Moreover, this Court does not limit itself to one or two sentences when interpreting the meaning of words in a statute. *State v. Wilson,* 55 S.W.3d 851, 856 (Mo. App. W.D. 2001) (citation omitted). Additionally, this Court can consider the title of an act when construing the meaning of the act's provisions. *Rousseau,* 34 S.W.3d at 260, n. 6 (citation omitted). Finally, "to determine a statute's plain and ordinary meaning, the Court looks to a word's usage in the context of the entire statute, and statutes *in pari materia* with each other." *Gross v. Parson,* 624 S.W.3d 877, 885 (Mo banc 2021) (citations omitted).

The sexual acts that Jeremy and A.S. engaged in were not a play, motion picture, still picture, film, videotape, video recording or a dance. *See* Section 566.200 (15). Thus, the only term that could possibly apply is the term "exhibition," and the

prosecutor did argue that A.S. showing her genitals to Jeremy constituted an exhibition, and that Jeremy was the audience (TR 461). Applying the canons of statutory construction, however, shows the prosecutor's arguments have no merit.

There is no statutory definition for "exhibition." According to the Merriam-Webster On-Line Dictionary, "exhibition" is defined as "an act or instance of exhibiting;" "a public showing." [2] "Exhibiting" is defined as "to present to view."

Thus, a key component of a sexual performance, regardless of which type of performance, is that there be an audience. There is no statutory definition of "audience." According to the Merriam-Webster On-Line Dictionary, an "audience" is "a group of listeners or spectators;" "a reading, viewing, or listening public." [3]

Applying these statutory principles, including the principle that parts of a statute cannot be read in isolation or guided by a single sentence, a "sexual performance" must consist of a sexual display of nudity or some type of sexual conduct for an audience, and that audience must be separate and distinct from the actual participants. Plays, motion pictures, still pictures, films, videotapes, video recordings, and dances are all performances that have audiences that are separate and distinct from the participants. To construe "exhibition" differently would be to construe this term in isolation, and not in context of all of Section 566.200(15).

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[2] https://www.merriam-webster.com/dictionary/exhibition.

[3] https://www.merriam-webster.com/dictionary/audience.

Furthermore, it would require this Court to ignore the plain and ordinary meaning of the word "audience," as well as its meaning construed in Missouri case law.

In *State v. George,* 717 S.W.2d 857, 859 (Mo. App. S.D. 1986), the Court adopted a dictionary definition of performance, and it determined a performance consisted of "[a] presentation, especially a theatrical one, *before an audience.*" (emphasis added). In *George,* the defendant had his wife and son engage in sexual acts for him to watch. *Id.* The audience in this case was separate and distinct from the performers. In *State v. Butler,* 88 S.W.3d 126, 129 (Mo. App. S.D. 2002), the Court affirmed the holding in *George* as to what constituted a performance. *In Butler,* the defendant told the child over the phone to engage in sexual acts. *Id.* at 127. Again, the audience was separate and distinct from the performer. As mentioned, *supra,* the Supreme Court of Missouri affirmed this definition in *Blankenship. Id.* at 121-22. In *Blankenship,* the defendant communicated with the child, (or a person he thought to be the child), through email. *Id.* at 118-19. Once again, the audience was separate and distinct from the performer.

Applying these principles to the facts of this case show that while Jeremy committed many offenses by engaging in mutual masturbation with A.S., and while he encouraged her to engage in certain behaviors when he and A.S. engaged in mutual masturbation, he did not commit the offense of sexual trafficking in the second degree because he did not entice A.S. to participate in a "sexual performance" as defined under Section 566.200(15). There was no explicit audience as the evidence showed only that Jeremy and A.S. were involved. Nor was there any evidence that any of the

sexual acts they engaged in were being recorded or shown to anyone else. Additionally, there was no "exhibition" in the manner conveyed in Section 566.211(15).

If this Court construes Section 566.200(15) to include sexual acts between adults and children, in which the only "exhibition" before an "audience" are the child's genitals that are exposed because the adult is touching or masturbating them, then literally every child-sex act could be prosecuted under this statute. Similarly, if the charged acts in the present case are construed to be a "sexual performance," then every child-sex act could also be construed as a "sexual performance." While it is important not to construe a child-sex statute in such a way as to frustrate the purpose of the statute, that does not mean the statute should be construed so broadly as to include every child-sex act, particularly when the language of Section 566.211 shows that was not the purpose behind enacting the statutes. *See infra.*

This does not mean that the behavior of two people engaged in sexual acts could not *become* a "sexual performance." For example, if one person masturbated while the other one watched, that may very well constitute a performance. There was, however, no such testimony. The testimony was:

> **PROSECUTOR:** So you used the term mutual masturbation. What do you mean by that?
>
> **A.S.:** I mean I am touching his genitalia and he is touching mine or he is using the vibrator on me.
>
> **PROSECUTOR:** Is he giving you any instructions on how to do that?

A.S.: Yes

PROSECUTOR: And what was he doing?

A.S.: Telling me where to please myself, my position, things like that.

PROSECUTOR: Would he tell you how to masturbate him better?

A.S.: Yes

PROSECUTOR: And tell me about that.

A.S.: He would tell me about the movement of my hands was a big thing, just where to - -

PROSECUTOR: Take your time. It is okay.

A.S.: Where to put my hands, how fast to do it, when I needed to add lubrication.

(TR 337).

This testimony shows that both Jeremy and A.S. were both participating in a sexual act. It does not allow an inference that Jeremy stopped participating and became an audience. Moreover, there was no evidence that Jeremy ever took pleasure from watching A.S. masturbate while they were engaged in mutual masturbation.

2. Looking at Section 566.211 as a whole shows that it was enacted to prevent and punish the sexual exploitation of children under the age of eighteen by third parties, and, therefore, "sexual performance," as used in Section 566.211, is not applicable in cases like Jeremy's.

In addition to the analysis discussed, *supra,* the language of Section 566.211, when read as a whole, demonstrates that the purpose of Section 566.211, as well as

the other sexual trafficking offenses, is to prevent the sexual exploitation of children under the age of eighteen by third parties. Therefore, the term "sexual performance" is not applicable in cases such as Jeremy's.

The language of Section 566.211 shows that three actions are prohibited. The first prohibited action is making the child available to participate in a commercial sex act, a sexual performance, or the production of explicit sexual material. A person makes a child available to participate in these actions by recruiting, enticing, harboring, providing, or obtaining the child through any means. This prohibited action is addressed in Section 566.211.1(1).[4] The second prohibited action is benefitting from the participation of the child in these acts. Both prohibited actions are addressed in Section 566.211.1(1).

The third prohibited action is actually causing or making the child "engage" in a commercial sex act, a sexual performance, or the production of sexually explicit material. This prohibited action is addressed in Section 566.211.1(2). While the terms "participate," which is used in Section 566.211.1(1) and "engage" are similar, they must be given different meanings, as "[t]his Court must presume every word, sentence or clause has effect and that the legislature did not insert superfluous language." *State ex rel. Jones v. Eighmy,* 572 S.W.3d 503, 507, n. 4 (Mo. banc 2019) (internal citation and quotations omitted). The reason Section 566.211.1(1) uses the

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[4] Section 566.211.1(1) also prohibits people from financially benefitting from making children available to participate in sexual acts.

word "participate" is because this section is addressing the behavior of making the child available to participate in the prohibited acts, while Section 566.211.1(2) is prohibiting the behavior of actually making the child engage in the behavior. This is done because the person who makes the child available and the person who makes the child actually engage in the behavior may not be the same person.

The fourth prohibited action is advertising the availability of the child to participate in a commercial sex act, a sexual performance, or the production of sexually explicit material. This prohibited action is addressed in Section 566.211.1(3).

Section 566.200 defines "commercial sex act" as "any sex act on account of which anything of value is given to, promised, or received by any person[.]" Section 573.010 (6), in pertinent part, defines "explicit sexual material" as "any pictorial or three-dimensional material depicting human masturbation, deviate sexual intercourse, sexual intercourse, direct physical stimulation or unclothes genitals, sadomasochistic abuse, or emphasizing the depiction of postpubertal human genitals[.]"

Thus, the language of Section 566.211, *as a whole*, and not just one or two sentences, shows the purpose of this statute is to prohibit and punish the sexual exploitation of children under the age of eighteen by third parties. The person who violates this statute is obtaining, or causing, a child under the age of eighteen to be placed in situations where they are sexually exploited by another person or persons.

For example, Section 566.211 prohibits a person from obtaining, causing, or advertising the availability of, a child under the age of eighteen to be used in a

commercial sex act. A person violating Section 566.211 in this manner brings about the sexual exploitation of a child under the age of eighteen by a third party who is willing to pay to engage in any sex act with the child.

Section 566.211 also prohibits a person from obtaining, causing, or advertising the availability of, a child under the age of eighteen to be used in a sexual performance. A person violating Section 566.211 in this manner is bringing about the sexual exploitation by a third party who is willing to be an audience to the performance, either in person, or online, or through other forms of telecommunication.

Finally, Section 566.211 prohibits a person from obtaining, causing, or advertising the availability of, a child under the age of eighteen to participate in the production of explicit sexual material. A person violating Section 566.211 is bringing about the sexual exploitation of a minor by a third party who is willing to view the sexually explicit material.

Reading Section 566.211, as a whole, shows that this statute was enacted to prevent children from being obtained by any means and/or put into circumstances in which they are sexually exploited for the sexual gratification of third parties. This intent can also be shown by the statute's title. *See Rousseau,* 34 S.W.3d at 260, n. 6 (citation omitted). Moreover, the sexual trafficking offenses in Chapter 566 are

arguably separate from the other offenses in the chapter in that they have their own definitions, which only apply to the trafficking offenses.[5]

Section 566.211 was not enacted to prohibit people from using children who are already in their care, or whom they normally have access to, from engaging in sexual acts with that child. Even if Jeremy had A.S. masturbate so he could watch, this would not be a violation of Section 566.211.[6] They did not involve the actions of a person bringing about the sexual exploitation of a child under the age of eighteen for a third party.

Only by reading the terms "entice" and "sexual performance" in isolation, and separate from the rest of the statute, which this Court cannot do, can Jeremy's actions with A.S. be considered sexual trafficking in the second degree.

For example, when read in context, the term "entice" is one of several ways that a person can make the child available to participate in a "commercial sex act," a "sexual performance," or the production of "explicit sexual material." What Section 566.211.1(1) is clearly prohibiting is making a child *available* to participate, while Section 566.211.1(2) is prohibiting making a child actually perform in the acts.

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[5] https://revisor.mo.gov/main/OneChapter.aspx?chapter=566.

[6] This likely *would* be a violation of Section 573.200, which was formerly Section 568.080. The language is virtually identical and Section 568.080 is the relevant statute in *George, Butler,* and *Blankenship.*

The importance of this cannot be overstated, for the prosecutor charged Jeremy under subsection 1, which does not address the issue of the child actually performing these acts. Thus, what the prosecutor accused Jeremy of doing was enticing her to be available to participate in a sexual performance, not actually being a part of a sexual performance. Thus, even assuming, *arguendo,* that Section 566.211 applied to cases such as Jeremy's, which it does not, the appropriate section to have charged Jeremy under would have been subsection 2, which would have charged Jeremy for causing A.S. to actually be in a "sexual performance."

This Court would also have to read "sexual performance" in isolation as well, for when reading "sexual performance" in context with "commercial sex act" and the production of "explicit sexual material," it is clear that the "sexual performance" is for the benefit of a third party.

While caselaw makes it clear that child-sex statutes should not be interpreted to frustrate their purpose, that does not negate the rule of statutory construction that criminal statutes should be construed strictly against the state, that parts of a statute cannot be read in isolation, and that this Court cannot be guided by one or two sentences. Jeremy's actions of mutual masturbation with A.S., were indeed criminal acts, but, under the facts presented, they did not constitute a *sexual performance*. The language in Section 566.200 (15) shows this, and the language in Section 566.211 shows that the crime of sexual trafficking was not intended to apply to cases such as Jeremy's.

Rather, the purpose of Section 566.211 is to prohibit and punish the sexual exploitation of minors by third parties. The person who violates this statute is obtaining, or causing, a child under the age of eighteen to be placed in situations where they are sexually exploited by another person or persons. There was not even being an actual "sexual performance" here, nor was Jeremy was a third party.

The jury clearly believed A.S. Therefore, it is easy for this Court to conclude that Jeremy did make A.S. engage in these acts. These acts are horrible and make this case a hard case. However, "[i]t is the duty of all courts of justice to take care, for the good of the community, that hard cases do not make bad law." *Seilert v. McAnally,* 122 S.W. 1064, 1068 (Mo. 1909) (citation and internal quotations omitted). The rules of statutory construction are clear. Applying them to this case show that Jeremy did not commit the offense of sexual trafficking in the second degree by engaging in mutual masturbation, or any other sexual act, with A.S.

While the State did present sufficient evidence that Jeremy enticed A.S. to engage in sexual acts, the State failed to prove that Jeremy enticed A.S. into participating in a "sexual performance" as defined by Section 566.200(15) and applied in Section 566.211 This Court should reverse Jeremy's conviction on Count I and order him discharged on that Count.

II.

The trial court erred in overruling Jeremy's motion for judgment of acquittal at the close of all the evidence, accepting the jury's verdict, and imposing a sentence for Count II, because the State did not prove the offense beyond a reasonable doubt, in violation of Jeremy's right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the State did not present sufficient evidence from which a rational trier of fact could have reached a "subjective state of near certitude" that Jeremy promoted a performance by directing or instructing A.S. how to use a sexual device.

A. Preservation of Error

Jeremy incorporates the preservation of error from Point I here.

B. Standard of Review

Jeremy incorporates the standard of review from Point I here.

C. Relevant Facts

Jeremy incorporates the relevant facts from Point I here.

D. Analysis

Jeremy incorporates the analysis from Point I here.

Count II alleged that, "Jeremy…committed the Class C felony of promoting a sexual performance by a child…in that on or between May 1, 2017 and May 31, 2020…the defendant knowingly directed or promoted a performance, knowing the character and content thereof, A.S. (D.O.B.: 10/19/02), a child less than seventeen

years of age, in which defendant instructed or directed A.S. on the use of a sexual device[.]"

Section 573.205 states that "[a] person commits the offense of promoting a sexual performance by a child if....the person promotes a performance which includes sexual conduct by a child less than eighteen years of age or produces or directs any performance which includes sexual conduct by a child less than eighteen years of age." Section 573.010 (20) defines "sexual conduct" to include masturbation. Section 573.010 (16) defines promote as:

> [T]o manufacture, issue, sell, provide, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same, by any means including a computer[.]

Section 573.010 (23) defines "sexual performance" as "any performance, or part thereof, which includes sexual conduct by a child who is less than eighteen years of age[.]" Section 573.010 (13) defines "performance" as, "any play, motion picture film, videotape, or exhibition performed before an audience of one or more[.]"

Putting aside that the evidence shows Jeremy purchased the vibrator and directed or instructed A.S. on how to use it, as well as encouraging her to use it, while he and A.S. were in *Florida*,[7] applying the rules of statutory construction, particularly the rule that one part of a statute cannot be read in isolation, show that what Jeremy

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[7] This will be addressed in Point III, *infra*.

did when buying A.S. a vibrator and directing or instructing her in using it in no way constituted promoting a sexual performance.

Under Section 573.205, a person is guilty of promoting a sexual performance if he promotes, produces, or directs a performance, which includes sexual conduct by a child and is performed before an audience of one or more. As can be seen by the statutory definition of "promote," if a person promotes a "performance," he creates a performance or provides a performance to others through a variety of methods. There is no statutory definition of "produce." According to the Merriam-Webster On-Line Dictionary, "produce" is defined as "to make available for public exhibition or dissemination: such as (a) to provide funding for; (b) to oversee the making of; to cause to have existence or to happen: BRING ABOUT; to give being, form or shape to: MAKE *especially:* MANUFACTURE."[8]

As can be seen, the context of the meanings of "promote" and "produce" in Section 573.205 shows that these two terms relate to the creation and distribution of performances that contain sexual conduct of a child under the age of eighteen. Therefore, the term "direct" must be defined in such a way that it is harmonious with the terms "promote" and "produce." There is no statutory definition for "direct." According to the Merriam-Webster On-Line Dictionary, the term "direct" is defined as, "to carry out the organizing, energizing, and supervising of;" "to train and lead performances of;" "to act as a director of a show or musical ensemble."

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[8] https://www.merriam-webster.com/dictionary/produce.

These definitions of "direct" imply that the person who is directing the performance is doing so *as the performance is going on.* A director may give instruction to the performer, but he or she is there when the performer carries out his or her instructions. The evidence in this case showed that Jeremy bought A.S. a vibrator, directed or instructed her on how to use it, encouraged her to use it, and then A.S. used the vibrator *privately.* No language in either the relevant statutes or case law even remotely suggests that a child using a vibrator alone and privately constitutes a "performance." While using a vibrator would constitute sexual conduct, nothing about using a vibrator in private makes it a play, motion picture film, videotape, dance, or exhibition.

Moreover, the fact that the use of the vibrator was done privately demonstrates that there was no audience. Cases such as *George, Butler,* and *Blankenship* do hold that the audience does not have to visually perceive the performance, but in order for a person to be an audience, he or she has to be aware of what the performance consisted of. That can be done by being told as in *Butler,* or by reading emails as in *Blankenship.* What is required, however, is that there must be awareness of the performance.

It is true that Jeremy discussed A.S.'s masturbation with her and expected A.S. to "keep him in the loop." Assuming, *arguendo,* this made Jeremy an audience, there would still have to be evidence that Jeremy was told about what A.S. specifically did when she used the vibrator, and there would also have to be evidence that A.S. told

Jeremy contemporaneously with using the vibrator. There was, however, no evidence of either.

The specifics of what they talked about, as well as what it meant "to keep Jeremy in the loop," were never made clear, and it would be supplying missing evidence and giving the State the benefit of forced inferences to conclude that A.S. went into detail about what she did with the vibrator. *See Clark,* 490 S.W.3d at 707.

Moreover, the evidence showed that their discussions happened sporadically, as months would sometimes pass in between discussion about A.S.'s masturbation (TR 332). To be sure, had A.S. testified that she *did* discuss the details of her masturbation with Jeremy after each time she used it, then arguably there would have been sufficient evidence to prove that Jeremy was, in fact, an audience of A.S.'s sexual conduct. There was, however, no such testimony.

The State failed to present sufficient evidence that A.S.'s behavior constituted a performance. This Court should reverse Jeremy's conviction on Count II and order him discharged on that count.

III.

The trial court erred in overruling Jeremy's motion for judgment of acquittal at the close of all the evidence, accepting the jury's verdict, and imposing a sentence for Count II, because the State did not prove the offense beyond a reasonable doubt, in violation of Jeremy's right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the trial court lacked jurisdiction because the State did not present sufficient evidence from which a rational trier of fact could have reached a "subjective state of near certitude" that Jeremy promoted a performance by instructing A.S. how to use a sexual device in the State of Missouri.

A. Preservation of Error

Jeremy incorporates the preservation of error from Point I here.

B. Standard of Review

Jeremy incorporates the standard of review from Point I here and adds that "[a] claim challenging the trial court lacked jurisdiction because the State failed to prove the offense occurred within Missouri attacks the sufficiency of the evidence to support the conviction." *State v. Allen,* 536 S.W.3d 241, 243 (Mo. App. E.D. 2017) (citation omitted).

C. Relevant Facts

Jeremy incorporates the relevant facts from Point I here.

D. Analysis

"Missouri courts lack jurisdiction to prosecute violations of Missouri law unless the conduct constituting the offense, or some substantial portion of it, occurred within Missouri." *Allen,* 536 S.W.3d at 244. Section 541.191.1(1) states that Missouri has jurisdiction over an offense if any element of the offense is committed in Missouri. The elements of the offense are that Jeremy promoted a sexual performance by directing or instructing A.S. on the use of the vibrator that he bought for her. Even if what Jeremy did could constitute promoting a sexual performance, the evidence in this case clearly shows that this was done in Florida. There is no evidence that Jeremy gave any further direction or instruction on the use of a vibrator in Missouri. Thus, no element of the offense took place in Missouri.

In *Allen,* the defendant was convicted of first-degree tampering. *Id.* at 242. The owner of a truck went inside a bar and when he came out later, his truck was gone. *Id.* Five days later, the defendant was in Arkansas with a friend and traded the same truck that had been stolen in Missouri for a different vehicle. *Id.* at 243. The next day, the defendant drove the truck over to his friend's house. *Id.* The next day, the truck was found in the driveway of the friend's house. *Id.* The police seized the truck and arrested the defendant later that day. *Id.*

The defendant was charged with tampering, and the information alleged that the tampering took place in Perry County, Missouri. *Id.* The Court found that the State had failed to prove that Missouri had jurisdiction because it failed to prove the defendant was responsible for taking the truck in *Missouri.*

As with the defendant in *Allen,* the State failed to provide any evidence that Jeremy directed or instructed A.S. on the use of a vibrator in Missouri. The State had to prove that Jeremy *promoted* a performance by *instructing or directing* A.S. on how to use the vibrator and there is no evidence that happened in Missouri. A.S. was asked during her testimony if this type of behavior continued in Missouri, and she said that it did. However, it is not clear what "behavior" this was. A.S. had just testified: (1) that she and Jeremy held hands; (2) that Jeremy kissed her longer than she liked; (3) that she and Jeremy took naps on the couch; (4) that she and Jeremy talked about masturbation; (5) that she and Jeremy talked about using a vibrator; (6) that she and Jeremy talked about his actual sexual behavior with other women; and (7) that she and Jeremy talked about using a vibrator internally. Even under the standard of review, a fact-finder could not infer that the Jeremy continued to *direct or instruct* A.S. on how to use a vibrator. It would be giving the State the benefit of a forced inference to conclude that A.S.'s answer of "yes" to the question, "Did this behavior continue in Missouri?" was evidence that Jeremy directed or instructed A.S. on the use of the vibrator. Moreover, A.S.'s testimony about the sexual behavior between her and Jeremy escalating, as well as the specific details of their sexual encounters likely resulted in the jury inferring that the discussions and instruction about masturbation and using the vibrator privately no longer took place. Arguably, this inference is counter to the standard of review, but Jeremy respectfully submits this inference is the type that a reasonable juror would not be able to disregard. *See Grim,* 854 S.W.2d at 411.

Even if there was sufficient evidence to show that A.S. and Jeremy continued to discuss her use of the vibrator in Missouri, which there is not, there still would be insufficient evidence that he promoted this behavior by *directing or instructing* her on the use of it in Missouri. Thus, no element of the offense took place in Missouri.

The State failed to present sufficient evidence that Jeremy promoted a sexual performance in Missouri. This Court should reverse Jeremy's conviction on Count II and order him discharged on that count.

IV.

The trial court plainly erred in submitting verdict directing Instruction 8 to the jury, because this violated Jeremy's right to a fair trial and due process, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that there was not sufficient evidence to prove beyond a reasonable doubt that: (1) the offense took place in Missouri; and (2) the offense took place on or between January 1, 2019 and October 18, 2019. Submitting this Instruction was error that was evident, obvious, and clear, and a conviction based on a verdict director not supported by substantial evidence constitutes a manifest injustice.

A. Preservation of Error and Standard of Review

While Jeremy did object to the submission of the verdict directors, he did not put this issue in his motion for new trial. The standard of review for submitting a jury instruction not supported by the evidence is the same as the standard of review for insufficient evidence. *See State v. Bradshaw,* 26 S.W.3d 461, 465 (Mo. App. W.D. 2000) (noting that the test for determining the sufficiency of the evidence is the same as the test for the sufficiency of the evidence to give a verdict director).

If this Court does not agree that the standard of review for submitting a jury instruction not supported by the evidence is the same as the standard of review for insufficient evidence, then Jeremy respectfully requests this Court review this claim for plain error under Rule 30.20.

An appellate court "will not review a claim for plain error unless the claimed error facially establishes substantial grounds for believing that manifest injustice or miscarriage of justice has resulted." *State v. Clay,* 533 S.W.3d 710, 714 (Mo. banc 2017) (citation and internal quotations omitted). "Plain error review involves a two-step process." *State v. Speed,* 551 S.W.3d 94, 98 (Mo. App. W.D. 2018) (internal citation and quotation omitted). First, the Court must "determine whether the trial court committed evident, obvious and clear error affecting the defendant's substantial rights." *Id.* (internal citation and quotation omitted). If that is established by the appellant, the Court must then "decide whether the error actually resulted in manifest injustice or a miscarriage of justice." *Id.* (internal citation and quotation omitted). "Manifest injustice depends on the facts and circumstances of the particular case, and the defendant has the burden of establishing manifest injustice." *State v. Harvey,* 348 S.W.3d 169, 171 (Mo. App. E.D. 2011) (citation omitted). "Moreover, the strength of the state's case is a prime consideration in whether there was manifest injustice or miscarriage of justice." *State v. Primers,* 971 S.W.2d 922, 929-30 (Mo. App. W.D. 1998) (internal citation omitted). Finally, "plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative[.]" *Deck v. State,* 68 S.W.3d 418, 427 (Mo. banc 2002).

In this case, the claimed error does facially establish "substantial grounds for believing that manifest injustice or miscarriage of justice has resulted" because the claimed error shows that a conviction is based on verdict director based on insufficient evidence. Additionally, a failure to recognize that there is insufficient

evidence to submit a verdict director is evidence that is obvious, evident, and clear. Moreover, to allow a conviction based on a verdict director not supported by substantial evidence constitutes a manifest injustice. Therefore, plain error review is warranted.

B. Relevant Facts

Jeremy incorporates the relevant facts from Point I here and adds the following.

The trial court submitted the following verdict director:

INSTRUCTION NO. 8

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

First, that on or between January 1, 2019, and October 18, 2019, in the State of Missouri, the defendant promoted a performance by A.S. (DOB: 10/19/2002), who was less than seventeen years of age, and

Second, that the performance or any part thereof included A.S. engaging in personal masturbation after being instructed by the defendant on how to use a sexual device, and

Third, that defendant knew that A.S. was less than seventeen years of age, and

Fourth, that at that time the defendant promoted the performance, the defendant knew the character and content of that performance.

then you will find the defendant guilty under Count II of promoting a sexual performance under this instruction.

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.

MAI-CR 4th 427.24
Submitted by the State

(LF 15:15).

C. Analysis

Jeremy incorporates the analysis from Points I, II, and III here and adds the following.

"A jury instruction must be supported by substantial evidence and the reasonable inferences to be drawn therefrom." *State v. Hallmark,* 635 S.W.3d 163, 171 (Mo. App. E.D. 2021) (citation and internal quotations omitted). In this case, the actual act that constituted the promotion of the performance took place in Florida before Jeremy moved to Missouri. Moreover, Jeremy was not in Florida in 2019. Therefore, there was not sufficient evidence to submit Instruction Number 8. Judges are presumed to know the law and apply it in their decisions. *State v. Amick,* 462 S.W.3d 413, 415 (Mo. banc 2015). Therefore, the error in this case is evident, obvious, and clear. Moreover, submitting a verdict director not supported by substantial evidence allows a defendant to be convicted for an offense in which there is not sufficient evidence and this constitutes a manifest injustice.

This Court should reverse Jeremy's conviction on Count II and order him discharged on this Count.

V.

The trial court plainly erred in submitting verdict directing Instruction 6 to the jury, because this violated Jeremy's right to a fair trial and due process, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that there was not sufficient evidence to prove beyond a reasonable doubt that A.S. participated in a sexual performance by engaging in mutual masturbation with Jeremy. Submitting this Instruction was error that was evident, obvious, and clear, and a conviction based on a verdict director not supported by substantial evidence constitutes a manifest injustice.

A. Preservation and Standard of Review

Jeremy incorporates the preservation of error and standard of review from Point IV here.

B. Relevant Facts.

Jeremy incorporates the relevant facts from Point I here and adds the following.

INSTRUCTION NO.

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

First, that on or between January 1, 2019, and May 14, 2020, in the State of Missouri, the defendant enticed A.S. (DOB: 10/19/2002) to engage in a sexual performance; by masturbating each other in the same room, and

Second, that defendant did so knowingly, and

Third, that during such times A.S. was less than seventeen years of age,

then you will find the defendant guilty under Count I of sexual trafficking of a child in the second degree under this instruction.

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.

NON- MAI
Submitted by the State

(LF 15:13).

C. Analysis

Jeremy incorporates the analysis from Points I, II, III, and IV here and adds the following.

"A jury instruction must be supported by substantial evidence and the reasonable inferences to be drawn therefrom." *Hallmark,* 635 S.W.3d at 171 (citation and internal quotations omitted). In this case, there is no evidence that Jeremy and A.S. engaging in mutual masturbation constituted a sexual performance. Therefore, there was not sufficient evidence to submit Instruction Number 6. Judges are presumed to know the law and apply it in their decisions. *Amick,* 462 S.W.3d at 415.

Therefore, the error in this case is evident, obvious, and clear. Moreover, submitting a verdict director not supported by substantial evidence allows a defendant to be convicted for an offense in which there is not sufficient evidence and this constitutes a manifest injustice.

This Court should reverse Jeremy's conviction on Count II and order him discharged on this Count.

CONCLUSION

For the reasons stated in Points I and V, this Court should reverse Jeremy's conviction on Count I and order him discharged. For the reasons stated in Points II, III, and IV, this Court should reverse Jeremy's conviction on Count II and order him discharged.

Respectfully submitted,

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Certificate of Compliance

I, James Egan, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b) and Special Rule 41. The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, and this certificate of compliance, the brief contains 11,121 words, which does not exceed the 15,500 words allowed for an appellant's brief.

/s/ James Egan

James Egan

IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	No. WD85148
	)	
JEREMY BAUM,	)	
	)	
Appellant.		

Motion for Rehearing or Transfer

COMES NOW, Appellant, Jeremy Baum, by and through counsel, and moves for rehearing of this Court's opinion of March 4, 2025, pursuant to Rules 30.26 and 84.17. In the alternative, Jeremy requests that this cause be transferred to the Supreme Court of Missouri pursuant to Rule 30.27 and Rule 83.02 in light of the general interest and importance of the questions involved in this case. In support of this motion, Jeremy states:

A. The Majority Failed To Consider The Briefs Filed In The Case When It Was Before The Supreme Court Of Missouri, Despite An Assertion To The Contrary.

On January 10, 2025, the Supreme Court of Missouri retransferred Jeremy's case back to this Court. On that same day, this Court withdrew its opinion and resubmitted the case. Additionally, the briefs filed by the parties while this case was pending before the Supreme Court of Missouri also became part of the record. Also on that day, Jeremy filed a motion asking this Court to consider those briefs. One

reason was that Jeremy's substitute briefs addressed some of the analysis from this Court's original opinion. On January 21, 2025, this Court denied the motion, stating:

> [S]aid motion is denied as moot because the briefing in the Supreme Court of Missouri was made a part of the record upon this Court's receipt of the retransfer order from the Supreme Court.

Clearly, this Court was representing that since the substitute briefs were part of the record, they would be considered. Unfortunately, they were not. Aside from the language about transferring the case to the Supreme Court of Missouri, the opinions of the majority from May 14, 2024, and March 4, 2025, *are identical.* This belies the assertion that they would be considered. Moreover, any assertion that they were considered but that the arguments were not deemed to have any merit would be unavailing. Even if that was the case, which it is not, it is inconceivable that the majority would not have at least acknowledged considering them in a one sentence footnote.

Given that the substitute briefs are indeed part of the record, this Court should grant rehearing to and consider and address the arguments made in the substitute briefs.

B. A Conviction Cannot be Affirmed Based On a Theory Not Presented To The Jury, And This Court's Decision Is In Direct Conflict With Precedent From The Supreme Court Of The United States (SCOTUS).

While this motion will inevitably have to include some analysis from the dissenting opinion, Jeremy does not wish to be needlessly repetitive. Therefore,

Jeremy incorporates the analysis from the dissenting opinion on this issue here (Dissenting Opinion, pp. 3-11). Nevertheless, some repetition is necessary.

For instance, in *Dunn v. United States,* 442 U.S. 100, 106 (1979), SCOTUS stated:

> To uphold a conviction on a charge that was neither alleged in an indictment *nor presented to a jury at trial* offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused.

In Jeremy's case, however, the majority opinion did precisely that and affirmed Jeremy's conviction on the theory that there was sufficient evidence that Jeremy watched A.S. masturbate – a theory never presented to the jury at Jeremy's trial (Majority Slip Opinion, pp. 9-11). The jury was never asked to decide the theory promulgated by the majority but was instead asked to decide whether Jeremy and A.S. masturbated each other in the same room. The dissenting opinion stressed that there was no evidence that Jeremy watched A.S. masturbate herself,[1] but also pointed out

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[1]The dissent noted how the majority opinion had taken A.S.'s statements out of context (Dissenting Opinion, pp. 20-23). Jeremy agrees and incorporates that analysis here. Missouri has stressed the importance of not considering evidence out of context. *See* e.g., *State ex rel. Kemper v. Vincent,* 191 S.W.3d 45, 50-51 (Mo. banc 2006), which "holds that a party may introduce evidence of the circumstances of a writing, statement, conversation, or deposition so the jury can have a complete picture of the contested evidence introduced by the adversary." By taking A.S.'s statements out of context, the majority did not view her testimony in a light most favorable to the verdict. Rather, it essentially changed her testimony.

that even if there was, that "was not the act on which the jury relied to convict [Jeremy] of sexual trafficking" and that this violated due process and was in direct conflict with SCOTUS precedent (Dissenting Opinion, pp. 3-11, citing, *inter alia*, *Ciminelli v. United States*, 598 U.S. 306 (2023)). Jeremy will not repeat that analysis now but does incorporate it here.

Rather than address the dissent's arguments that a conviction cannot be affirmed on a different theory than what a jury decides, the majority opinion stated: (1) the dissent's reliance on *State v. Marks,* 670 S.W.3d 135 (Mo. App. W.D. 2023), was misplaced because *Marks* was really focused on variance and not sufficiency; (2) Jeremy repeatedly acknowledged that the sufficiency of the evidence is not determined by how the jury is instructed but on the elements of the offense; and (3) even if the Court were to determine sufficiency "based on the way the jury was instructed, as the dissent suggests, there was more than enough evidence to show that Jeremy and A.S. masturbated each other and, therefore, it was not necessary to address the dissent's lengthy discussion of United States Supreme Court cases addressing due process violations in the context of instructional error" (Majority Slip Opinion, pp. 11-12, n. 8). This analysis is fraught with problems.

First, the majority opinion took language from *Marks* out of context and made it look like the dissent had misconstrued the language from *Marks*. In order to fully demonstrate how the majority took the dissent's argument out of context, it is necessary to quote the *Marks* Court extensively to include the language used by both

this Court and the dissent. The language that the dissent relied on will be in **bold** and the language the majority relied on will be in *italics.*

In *Marks,* the defendant argued that there was insufficient evidence to convict him of domestic assault in the third degree. *Id.* at 140-41. In its analysis, the Court stated:

> To prove that a defendant has committed the offense of domestic assault in the third degree, the State must prove that the defendant has attempt[ed] to cause physical injury or knowingly cause[d] physical pain or illness to a domestic victim[.] Section 565.074. On appeal, Marks cites *Zetina-Torres* for the proposition that 'a reviewing court's limited determination on sufficiency review ... does not rest on how the jury was instructed but rather how the crime was charged. *Zetina-Torres*, 482 S.W.3d at 809. However, *Zetina-Torres* differed from the present case in that it did not involve an argument that the defendant was charged with having committed one form of the offense but the jury convicting him based on another. In *Zetina-Torres*, the defendant was charged with acting alone or in concert with his co-defendant to commit the offense, and the jury's finding of guilt was sufficiently supported by the evidence. *Id.* at 809. The quoted language comes from a United States Supreme Court case, *Musacchio v. United States*, 577 U.S. 237, 243-44, 136 S.Ct. 709, 193 L.Ed.2d 639 (2016), where the defendant was convicted by a jury instructed on an additional element not charged, and there was insufficient evidence to support the additional element. *Id.* This case is unlike *Musacchio* or *Zetina-Torres*, and so we need not look to the charging document in our sufficiency analysis. **Instead, we look to the verdict directing instruction and determine whether sufficient evidence supports the jury's verdict as instructed.** *Although the charging document is not irrelevant, and Marks is correct that a defendant may not be charged with one form of an offense and convicted of another, see Tillman, 289 S.W.3d at 292, this principle relates to the variance between the charging document and the jury instructions, which we already determined above was not plain error. It does not affect the sufficiency analysis, and we do not determine whether there*

was sufficient evidence for the jury to have found Marks guilty of the offense as charged in a document that was not before it.

Id. at 141. As the excerpt from *Marks* shows, this Court *did* look at the way the jury is instructed when determining sufficiency. This Court in *Marks* held *Zetina-Torres* and *Musacchio* did not apply since the verdict director was not adding an additional element. Further, the excerpt above shows that the *Marks* Court saw that the fact that the defendant had been charged in one way but instructed in another was more properly addressed in a variance analysis, not sufficiency. In other words, *the fact that the defendant is charged in one way but instructed in another does not affect the sufficiency analysis*. ***But the Marks Court still relied on the verdict director to determine sufficiency, and the majority opinion's analysis failed to acknowledge this***. Instead, the majority opinion's analysis implied that the *Marks* Court was stating that the issue in *Marks* was about variance and was irrelevant to sufficiency. The language from *Marks,* however, directly refutes this. [2] Thus, the majority opinion in Jeremy's case is in direct conflict with *its own* precedent with regards to the reliance of the verdict director when determining sufficiency. Moreover, as will be explained, *infra,* the majority's analysis in Jeremy's case is inconsistent with other cases on the issue of determining sufficiency, including cases in the Western District itself.

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[2] In *State v. Ess,* 463 S.W.3d 196, 202 (Mo. banc 2015), our Supreme Court held that the trial court erred in its analysis because it had taken language from a prior case out of context when it made an adverse ruling to the defendant. The majority opinion made the same mistake in Jeremy's case.

Second, the majority opinion took Jeremy's argument about how the Court needs to look at the way the defendant is charged and not how the jury is instructed grossly out of context. This is because while Jeremy did state this, he not only cited the SCOTUS cases the dissenting opinion relied on in its analysis, but also made it abundantly clear that when the charging document charges a defendant without specifying the alleged behavior, the Court needed to look at the verdict director (Appellant's original brief, p. 26; Appellant's substitute brief, pages 24-25). This is why Jeremy cited the *Edwards* case, because there, the charging document was not specific as to what action by the defendant made him guilty of deviate sexual intercourse and this Court looked to the verdict director for the specific theory.[3] Moreover, this "repeated acknowledgement" does not negate the overwhelming SCOTUS precedent, which Jeremy cited in both briefs, explicitly stating that a conviction cannot be affirmed on a different theory than that presented to the jury. In other words, Jeremy's acknowledgement the Court should ordinarily look at the charging document for sufficiency analysis neither discounts his argument that the jury instruction guided the Court's analysis under the circumstances in *Edwards,* and should have in Jeremey's case, nor excuses the majority opinion's failure to note that critical distinction.

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[3] *See State v. Edwards,* 365 S.W.3d 240, 249-250 (Mo. App. W.D. 2012), which is discussed more, *infra*. This discussion will show that the majority's opinion is in conflict with *Edwards* as well.

Finally, the majority opinion misconstrued the SCOTUS case law that both Jeremy and the dissent referred to in their analysis. That case law was not about due process violations in the context of instructional error. As just stated, it was about due process violations in the context of affirming a conviction on a different theory than the theory presented to the jury. Moreover, the majority opinion's analysis under its misreading of these cases is flawed because Jeremy's arguments were not that there was insufficient evidence that Jeremy and A.S. masturbated each other. Rather, the arguments were that this behavior did not constitute a sexual performance as defined by Section 566.200 (15). Therefore, as a matter of law, there was insufficient evidence to convict Jeremy for sex trafficking in the second degree under Section 566.211.

C. The Majority Opinion Erroneously Conflated Two Separate Acts to Support its Decision not to Grant Relief to Jeremy.

Related to this last point is the majority opinion's convoluted rationale for denying relief in Point I, that there was insufficient evidence to sustain a conviction for sex trafficking in the second degree; and Point V, that there was insufficient evidence to submit the verdict director for sexual trafficking in the second degree. Jeremy will address Point I first.

1. Point I

At the heart of Jeremy's argument was that there was insufficient evidence to sustain a conviction because a sexual performance requires an audience that must be separate and distinct from the performance (Appellant's Original Brief, pp. 27-32;

Appellant's Substitute Brief, pp. 39-48). The majority, however, while correctly stating the premise of Jeremy's argument, then proceeded to distort it on two separate occasions. Jeremy explicitly argued:

> Applying these principles to the facts of this case show that while Jeremy committed many offenses by engaging in mutual masturbation with A.S., and while he encouraged her to engage in certain behaviors when he and A.S. engaged in mutual masturbation, he did not commit the offense of sexual trafficking in the second degree because he did not entice A.S. to participate in a "sexual performance" as defined under Section 566.200(15). There was no explicit audience as the evidence showed only that Jeremy and A.S. were involved. Nor was there any evidence that any of the sexual acts they engaged in were being recorded or shown to anyone else. Additionally, there was no "exhibition" in the manner conveyed in Section 566.211(15).

(Appellant's Original Brief, pp. 30-31). *See also* pp. 25-26. In his Substitute Brief, Jeremy further clarified:

> It is vital in the present case to precisely define the actions constituting the alleged "performance" in the present case. Here, the "sexual performance," presented to the jury was not Jeremy watching A.S. masturbate herself or A.S. exposing her genitals to Jeremy while he masturbated her; rather it was Jeremey and A.S. masturbating each other. (LF 15:13). Thus, to constitute a sexual performance under Section 566.200 (15), Jeremy and A.S. would have to have masturbated each other before an audience. In Jeremy's case, there was no one who watched them masturbate each other.

(Appellant's Substitute Brief, p. 43).

Thus, Jeremy clearly was arguing that the only sexual performance possibly supported by the evidence was Jeremy and A.S. masturbating each other in the same

room; or, as A.S. referred to it, "mutual masturbation." The majority opinion, however, stated:

> The fact that Baum was also a recipient of sexual contact in the same time frame does not eviscerate his role as audience when Victim masturbated in front of him.

(Majority Slip Opinion, p. 9). This was the first distortion because Jeremy never argued that he could not be an audience because he was also a recipient of sexual contact while he watched A.S. masturbate. *Jeremy never argued that he watched A.S. masturbate, and he argued that the audience had to be separate and distinct from the performance of he and A.S. masturbating each other.*

Then, on page 11, the majority opinion stated:

> Baum's suggestion that Victim's masturbation while he observed did not amount to a "sexual performance is directly contrary to the Missouri Supreme Court's holding in *Blankenship*[.]

(Majority Slip Opinion, p. 11). This is the second distortion because, again, Jeremy never made this argument. Indeed, as the majority opinion stated a few lines prior, Jeremy acknowledged that "if one person masturbated while the other one watched, that may very well constitute a performance[.]" (Majority Slip Opinion, p. 11).

These distortions negate any validity to the majority's opinion. For the majority to base its analysis on an argument never made is an egregious violation of Jeremy's due process rights.

2. Point V

In order to address Point V, it is important for the verdict director to be laid out.

INSTRUCTION NO. 6

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

First, that on or between January 1, 2019, and May 14, 2020, in the State of Missouri, the defendant enticed A.S. (DOB: 10/19/2002) to engage in a sexual performance; by masturbating each other in the same room, and

Second, that defendant did so knowingly, and

Third, that during such times A.S. was less than seventeen years of age,

then you will find the defendant guilty under Count I of sexual trafficking of a child in the second degree under this instruction.

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.

NON- MAI
Submitted by the State

(LF 15:13).

As the first prong of the verdict director shows, the sexual performance the jury was being asked to rule on was the sexual performance of masturbating each other in the same room. But not only did there have to be evidence that Jeremy and

A.S. masturbated each other in the same room (which there was), there *also* had to be evidence that that behavior constituted a sexual performance. Jeremy's argument was that there was not sufficient evidence of this because a sexual performance requires an audience which is separate and distinct from the performance.

However, the majority opinion conflated its analysis. First, even though the instruction clearly referred to the Jeremy and A.S. masturbating each other in the same room, or, as A.S. called it, "mutual masturbation," the majority opinion stated it had already held in Point I there was sufficient evidence that Jeremy enticed Victim to engage in a sexual performance, and there was also sufficient evidence that they masturbated each other in the same room (Majority Slip Opinion, p. 13, 16, n. 12).

This analysis is misleading. The verdict director for Count I clearly indicates the sexual performance the jury deliberated on was Jeremy and A.S. masturbating each other in the same room, *not* Jeremy watching A.S. masturbate. While there was certainly sufficient evidence that Jeremy and A.S. masturbated each other in the same room, there was insufficient evidence that that constituted a sexual performance. Why? Because there was insufficient evidence of an audience that was separate and distinct.

The majority opinion further stated that Jeremy's argument was more properly an argument as to the form of the instruction and not the simple giving of the instruction (Majority Slip Opinion, pp. 14-15). The majority opinion, however, fails to explain how. In the first case, it cited, *State v. Cummings,* 686 S.W.3d 709, 717 (Mo. banc 2024), the defendant did not even raise a claim of instructional error at all. In

State v. Hughes, 84 S.W.3d 176, 180-81, n. 5 (Mo. App. S.D. 2002), the defendant argued that the trial court erred giving instructions because they were not in the proper form since there was no evidence that the defendant was the initial aggressor. The Court disagreed and held that there was. *Id.* at 181. The Court also held that the issue of withdrawing from the conflict was not raised by the defendant. *Id.* Again, this has no bearing on whether there was sufficient evidence to show that Jeremy and A.S. masturbating each other in the same room constitutes a sexual performance, and thus sufficient evidence to submit the verdict director. Form is not an issue. Because it ignored that Jeremy's argument focused solely on (in)sufficiency and not the form of the verdict director while still choosing to cite these cases, the majority's analysis was flawed.

The majority opinion's analysis has conflated and distorted the arguments that Jeremy made. In fact, the majority ***never*** gave ***any*** analysis as to why Jeremy and A.S. masturbating each other in the same room constituted a sexual performance and where there was evidence in the record showing there was an audience that was separate and distinct from the performance, either in Point I or Point V. This was erroneous.

D. The Majority Opinion's Sufficiency Analysis Is Not Only Inconsistent With SCOTUS Precedent, But Also With Case Law From The Eastern District, As Well As *its Own Precedent.* This Court Should Grant Rehearing So That It Can Address This Inconsistency.

As discussed, *supra,* this Court in *Marks* indicated that a sufficiency analysis was to be based on the verdict director. This Court did acknowledge the Missouri

Supreme Court's holding in in *Zetina-Torres* and the holding in *Musacchio* from SCOTUS. *Marks,* 670 S.W.3d at 141. But it also held that these two cases seem to only apply when the verdict director adds another element, which was not a claim Jeremy raised here. *Id.* Regardless of whether this is true, the majority opinion in Jeremy's case, in addition to being in direct conflict with the SCOTUS precedent cited by the dissent and by Jeremy in both his original and substitute briefs, is also in direct conflict with this Court's opinion in *Marks* in how sufficiency is determined.

But the majority opinion is not just in conflict with *Marks*. For example, looking to the verdict director to assist with a sufficiency analysis was precisely what this Court did in *Edwards,* 365 S.W.3d at 249-250. In *Edwards,* the defendant argued that the evidence was insufficient to sustain a conviction for statutory sodomy in the first degree. *Id.* at 249. As this Court noted, to sustain a conviction for first degree statutory sodomy, there must be sufficient evidence that the defendant engaged in deviate sexual intercourse with a child less than twelve. *Id.* This Court also noted that deviate sexual intercourse involved:

> any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object done for the purpose of arousing or gratifying the sexual desire of any person or for the purpose of terrorizing the victim.

Id. at 249-50.

Obviously, there are numerous ways a person can engage in deviate sexual intercourse. This Court addressed this by looking to the verdict director. "Here, *per*

the jury's verdict director, the jury was limited to determining whether Edwards engaged in deviate sexual intercourse in the form of penile to anal contact with B.E." *Id.* at 250. (emphasis added).

The Eastern District of this Court did the same in *State v. Simmons,* 233 S.W.3d 235, 238-39 (Mo. App. E.D. 2007). In *Simmons,* the defendant was convicted in Count 17 of second-degree statutory sodomy. *Id.* at 238. On appeal the defendant argued that there was insufficient evidence for this count "because there was no evidence that he forced Daughter to touch his penis with her hand." *Id.* In its analysis, the Court noted that in order for there be to be sufficient evidence, there had to be evidence that the defendant engaged in deviate sexual intercourse with his daughter. *Id.* The Court then gave the definition of deviate sexual intercourse, which is:

> any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object done for the purpose of arousing or gratifying the sexual desire of any person or for the purpose of terrorizing the victim ...

Id. at 238-39 (citing Section 566.010 RSMo. 2000). Obviously, there are numerous ways a person can engage in deviate sexual intercourse. What did the Court do? As in *Edwards*, it looked at the verdict director. *Id.* at 239. *Edwards* and *Simmons* are in conflict with the majority opinion as well as *Marks.* Thus, there are two cases from the Western District that are in conflict with the majority opinion.

But *Marks, Edwards,* and *Simmons* are not just in conflict with the majority opinion. They are in conflict with other cases from this Court, the Eastern District,

and the Supreme Court of Missouri. For example, in *State v. Gee,* 684 S.W.3d 363, 370 (Mo. App. W.D. 2024), this Court explicitly stated, "[o]ur review is based on how the crime was charged." There was no discussion as to comparing the way a crime is charged with how a jury is instructed. *Gee* cites this Court's decision in *State v. Rhymer,* 563 S.W.3d 714, 719 (Mo. App. W.D. 2018), where this Court stated, "[o]ur review is based on how the crime was charged." Again, no comparison to the way a jury has been instructed. What is also notable about *Rhymer* is that the State tried to argue that the defendant's conviction could be affirmed based on other parts of the statute that was not charged. This Court disagreed, stating:

> The State also argues that the evidence is sufficient to support portions of Section 565.110 for which Rhymer was not charged. "When an act constituting a crime is specified in the charge ... the State is held to the proof of that act." *State v. Palmer*, 822 S.W.2d 536, 541 (Mo. App. 1992). The State's sufficiency arguments for uncharged acts are irrelevant.

Rhymer, 563 S.W.3d at 721, n. 7. While it is true that the State in *Rhymer* was not arguing the conviction could be affirmed based on a different theory than what was submitted to the jury, the reasoning is just as applicable to Jeremy's case here: when the State pursues a specific theory, it must be held to that theory. *See id.*; *Gee*, 684 S.W.3d at 370.[4]

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[4]In *McKim v. Cassady,* 457 S.W.3d 831 (Mo. App. W.D. 2015), the defendant sought habeas relief on his murder conviction. *Id.* at 833. This Court denied relief, but it noted that the State argued that it should deny relief because even if the Court believed that the jury would have likely believed the victim dies from

The Eastern District of this Court and the Missouri Supreme Court also have held that the way a defendant is charged is the manner to determine sufficiency. For example, in *State v. Jackson-Bey,* 690 S.W.3d 181, 186 (Mo. banc 2024), the Court stated that a review of sufficiency does not rest on how the jury was instructed. The Court further stated:

> Instead, this Court reviews "whether there is sufficient evidence to support the charged crime, based on the elements of the crime as set forth by statute and common law and the evidence adduced at trial." *State v. Brown*, 558 S.W.3d 105, 109 (Mo. App. 2019) (internal quotations omitted).

In *Brown,* the Eastern District, citing *State v. Voss,* 488 S.W.3d 97, 108-10 (Mo. App. E.D. 2016), stated:

> [I]n determining a sufficiency of the evidence claim, we are not concerned with the language of the verdict-directing instruction submitted to the jury. Instead ... we are concerned only with whether there is sufficient evidence to support the charged crime, based on the elements of the crime as set forth by statute and common law and the evidence adduced at trial.

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methamphetamine, there was still evidence that the defendant may have still been involved. *Id.* at 848, n. 29. The Court noted this was a different theory than the theory the State presented at trial. Since the Court did not believe the defendant had met his burden, this Court did not address that argument. It did, however, cite to *McCormick v. United States,* 500 U.S. 257 (1991), where SCOTUS held that a court on appeal could not affirm a conviction on a legal or factual ground never submitted to the jury. In *State v. Dickerson,* 609 S.W.3d 839, 848 (Mo. App. E.D. 2020), the Eastern District, also citing *McCormick,* refused to consider whether there was sufficient evidence of the crime based on a different theory.

Id. at 109.

All of these cases from the Eastern District and Western District, as well as our Supreme Court, are in direct conflict with *Marks, Edwards,* and *Simmons* in how sufficiency is determined. This Court in *Marks* distinguished itself from the holding of *Zetina-Torres* by claiming the issue in *Marks* was not one of a verdict director adding an additional element. But the *Marks* Court offered no explanation as to why this would alter the way sufficiency was determined. And it would not change the fact that the defendant in *Marks* was accused in the charging document of causing physical injury. *Id.* a 140. Based on the case law cited in this motion, the sufficiency analysis should still be based on how he was charged. *Marks,* however, not only held that the verdict director was paramount, but it also completely diminished the importance of the charging document. *Marks* cannot be reconciled with the majority opinion, *Gee, Rhymer, Voss, Brown,* and *Jackson-Bey.*

But even if *Marks* was wrongly decided, something Jeremy takes no position on, there is still conflict between the majority opinion and *Edwards* and *Simmons*. Moreover, *Edwards* and *Simmons* show conclusively that *Zetina-Torres, Musacchio,* and *Jackson-Bey* cannot be taken to wholly omit the given jury instructions from a sufficiency analysis. Thus, this Court should grant rehearing to address this conflict.

Further, it is no coincidence that *Edwards* and *Simmons* were child-sex cases. In many child sex cases, the defendants are charged with statutory sodomy, which requires the State to prove that the defendant engaged in deviate sexual intercourse. As the definition of deviate sexual intercourse demonstrates, the are numerous way a

person can engage in this behavior. *See* section 566.010(3). There has to be a way to engage in a sufficiency review that comports with the principles of due process that the SCOTUS cases relied on by both Jeremy and the dissent discuss; and, in the context of child-sex cases, that way may necessarily entail looking at the verdict director.

Moreover, as cases such as *State v. Celis-Garcia,* 344 S.W.3d 150 (Mo. banc 2011) demonstrate, the number of actual sexual acts that the evidence shows is often greater than the number of charges a defendant faces. If the verdict director is completely ignored and sufficiency is reviewed *only* on the elements, then there will be numerous cases that a defendant's conviction is affirmed on a different theory than what was presented to the jury. SCOTUS has held time and again this is offensive to due process. *See Presnell v. Georgia*, 439 U.S. 14, 16 (1978); *McCormick*, 500 U.S. at 270 n.8; *Ciminelli v. United States*, 598 U.S. 306, 316-17 (2023).

The relevance of the verdict director then is not to use the *elements* in the verdict director to determine sufficiency, but to use the verdict director to ensure that sufficiency is based on the *same theory* that was presented to the jury when there are multiple acts that can meet the statutory elements of a charged offense. *See Ciminelli*, 598 U.S. at 316-17. This will most often happen in child-sex cases.

Thus, in *Edwards,* the issue of whether there was sufficient evidence the defendant engaged in deviate sexual intercourse had to be based on the theory of penile-anal contact. In *Simmons,* the issue of whether there was sufficient evidence the defendant engaged in deviate sexual intercourse based on the theory of penile-

hand contact. The only sure way for the reviewing Court to determine the State adduced sufficient evidence to support a conviction on that theory was to first discern the theory from the verdict director.

Similarly, there are many ways a defendant can engage in a sexual performance with a child. The theory *presented to the jury* was the "sexual performance" of Jeremy and A.S. masturbating *each other* in the same room. It was *not* Jeremy watching A.S. masturbate. Thus, the issue of whether there was sufficient evidence that Jeremy enticed A.S. to participate in a sexual performance must be based on the theory of Jeremy and A.S. masturbating each other in the same room. This is why the case law that Jeremy presented in his brief and referred to in the dissent are so critical and mandate a rehearing for this Court to squarely address that case law.

In a rehearing, this Court, starting with the premise that the alleged sexual performance was Jeremy and A.S. masturbating each other in the same room, would have to ask itself whether this act was conducted *before an audience.* It would have to answer what or who the audience was or even if there was an audience that was separate and distinct from the performance.

In its opinion, the majority stated that while members of an audience usually observe performances, they also participate in them as well (Majority Slip Opinion, p. 10, n. 5). The examples the majority opinion gives are: (1) volunteering in a magic show; (2) singing along at a concert; and (3), being the recipient of an erotic dance (Majority Slip Opinion, p. 10, n. 5). Putting aside this argument was made in the

context of the sexual performance being A.S. masturbating herself while Jeremy watched, the majority opinion's analogies are flawed for several reasons.

First, being a stationary recipient of an erotic dance does not make one a participant in it. Second, audience members singing along at a concert cannot be considered performers because they are simply not being watched by anyone else unlike the performers on stage. Finally, in a magic show, it is true that a volunteer *does* cease to be a member of the audience when he goes up on stage. He is now one of the performers. However, when he has finished with the magic trick, he goes back to his seat and ceases to be a participant and becomes a member of the audience. Finally, even if the members of an audience can temporarily become performers, in none of the scenarios do the performers become members of the audience.

Moreover, it is of vital importance that this Court remember that the word "audience" must be construed in its *plain and ordinary* meaning. An audience in its *plain and ordinary* meaning is separate and distinct from a performance. If this Court says that "technically, Jeremy could be considered an audience because he is watching A.S.," then it is not construing the term "audience" in its *plain and ordinary* meaning.

For example, in many plays or operas, there are scenes with many characters on the stage and one character giving a monologue or singing while the remaining characters either stop to listen or go about other business. Technically, the actors watching the actor give a monologue are an "audience." Under the *plain and*

ordinary meaning, however, those other actors are *not* an audience - they are part of the performance.

This Court has issued an opinion that is in direct conflict with SCOTUS precedent. It has unfairly cherry-picked phrases from its own case law as well as Jeremy's brief to support its analysis. It has also uncharitably distorted and conflated Jeremy's arguments. Further, it has deliberately avoided addressing the arguments from Jeremy's briefs and the dissent. Moreover, this opinion is in direct conflict with its own case law as well as the case law from other courts. Finally, this is a published opinion. It has precedential value and will be cited by the State to support affirming convictions on a different theory than that presented to the jury, thwarting bedrock due process protections for criminal defendants. The cases of *McKim,* 457 S.W.3d at 833, 848, n. 29 and *Dickerson,* 609 S.W.3d at 848 illustrate this point. A rehearing should be granted to remedy these issues.

E. Transfer is appropriate

Alternatively, this Court should grant transfer to the Supreme Court of Missouri in light of the general interest and importance of the question involved in this case. It is true that this Court transferred the case once before, but the Court did not address the issue of whether it violated SCOTUS precedent to affirm a conviction based on a different theory than that presented to the jury. Therefore, transfer is appropriate, particularly in light of the fact that this case, being published has precedential value.

Respectfully submitted,

/s/ James Egan

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April 1, 2025

IMPORTANT NOTICE

To All Attorneys/Parties of Record

STATE OF MISSOURI, RESPONDENT,

vs. WD85148

JEREMY BAUM, APPELLANT.

Please be advised that Appellant's motion for rehearing is **OVERRULED** and application for transfer to Supreme Court pursuant to Rule 83.02 is **DENIED.**

Kimberly K. Boeding
Clerk

ecc: All Attorneys of Record Notified Through E-filing System

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Plaintiff/Respondent,	)	Circuit Court No. 20JO-CR00514-01
	)	Court of Appeals No. WD85148
vs.	)	
	)	Supreme Court No.
JEREMY BAUM,	)	
	)	Court of Appeals, Western District
Defendant/Appellant.	)	Circuit Court for Johnson County
	)	

APPLICATION FOR TRANSFER

QUESTIONS PRESENTED

Comes now Appellant, by and through counsel, and, pursuant to Rule 83.04, applies for transfer on the following questions of general interest or importance:

1. Is a defendant's right to due process violated if his conviction is affirmed on a different theory than what was presented to the jury? And is the Western District's opinion in direct conflict with the following cases from the United States Supreme Court (SCOTUS): *Cole v. Arkansas,* 333 U.S. 196, 202 (1948); *Presnell v. Georgia,* 439 U.S. 14, 16 (1978); *Dunn v. United States,* 442 U.S. 100, 106 (1979); *Chiarella v. United States,* 445 U.S. 222, 236 (1980); *McCormick v. United States,* 500 U.S. 257, 270 n. 8 (1991); and, *Ciminelli v. United States,* 598 U.S. 306, 316-17 (2023)?
2. Does the plain and ordinary meaning of the word "audience," as well as the phrase "before an audience," in Section 566.211 mean that the "audience" must be separate and distinct from the performance?

I. FACTUAL BACKGROUND

Jeremy was convicted of one count of sexual trafficking of a child in the second degree (Count I); promoting a sexual performance by a child (Count II); one count of statutory rape in the second degree (Count III); and five counts of statutory sodomy in the second degree (Counts IV through VIII); Count IX was dismissed (LF 24).

Count I alleged that, "Jeremy…committed the felony of sexual trafficking in the second degree…in that on or between May 1, 2017, and May 31, 2020…the defendant knowingly enticed A.S. (D.O.B.: 10/19/02), a child less than eighteen years of age to participate in a sexual performance" (LF 2:1).

A.S. was born on October 19, 2002 (TR 320). Jeremy is her stepdad, and she used to see him as her dad (TR 321-22). A.S. lived in the same house with Jeremy since she was two years old (TR 323). Beginning at age 15, A.S. would take naps with Jeremy (TR 329). A.S. was living in Florida at the time (TR 329). The naps took place on the couch (TR 329). This happened around five times per month (TR 330). A.S. did not like it but she did not want to make Jeremy upset (TR 330). When Jeremy was upset, it would upset the entire house (TR 330). Jeremy would also kiss A.S. longer than she felt comfortable, and this made her feel confused (TR 330). A.S. and Jeremy would also hold hands (TR 330).

The prosecutor then asked A.S.:

> **PROSECUTOR:** Did this behavior continue when you got to Missouri?
>
> **A.S.:** Yes.
>
> **PROSECUTOR:** Did it change?
>
> **A.S.:** It escalated.
>
> **PROSECUTOR:** And how did it escalate?

A.S.: It went from naps and holding kisses longer to I was spending nights in his bedroom and he had me perform mutual masturbation and oral sex and eventually penetrative sex with him.

PROSECUTOR: So you used the term mutual masturbation. What do you mean by that?

A.S.: I mean I am touching his genitalia and he is touching mine or he is using the vibrator on me.

PROSECUTOR: Is he giving you any instructions on how to do that?

A.S.: Yes

PROSECUTOR: And what was he doing?

A.S.: Telling me where to please myself, my position, things like that.

PROSECUTOR: Would he tell you how to masturbate him better?

A.S.: Yes

PROSECUTOR: And tell me about that.

A.S.: He would tell me about the movement of my hands was a big thing, just where to - -

PROSECUTOR: Take your time. It is okay.

A.S.: Where to put my hands, how fast to do it, when I needed to add lubrication.

(TR 336-37). A.S. was sixteen when this first happened (TR 338). A.S. also testified that Jeremy encouraged her and told her how brave she was during the acts; however, she only did it because she did not want to make him upset (TR 338-39).

The State submitted the following verdict director for Count I:

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

First, that on or between January 1, 2019, and May 14, 2020, in the State of Missouri, the defendant enticed A.S. (DOB: 10/19/2002) to engage in a sexual performance; by masturbating each other in the same room, and

Second, that defendant did so knowingly, and

Third, that during such times A.S. was less than seventeen years of age,

then you will find the defendant guilty under Count I of sexual trafficking of a child in the second degree under this instruction.

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.

NON- MAI

Submitted by the State

(LF 15:13).

As the record demonstrates, the theory presented to the jury that Jeremy was guilty of sex trafficking in the second degree was that he and A.S. masturbated each other. Jeremy and A.S. masturbating each other was the sexual performance. The Western District, however, affirmed Jeremy's conviction on the basis that there was sufficient evidence that Jeremy watched A.S. masturbate (Slip Opinion, p. 10).

II. THE WESTERN DISTRICT'S OPINION IS IN DIRECT CONFLICT WITH PRECEDENT FROM SCOTUS.

For over seventy-five years SCOTUS has held that an appellate court may not affirm a conviction on a basis not presented to the jury. In *Cole v. Arkansas,* 33 U.S. 196, 200 (1948), SCOTUS reversed the conviction of multiple defendants after they were charged with violating Section 2 of Act 193. However, the Arkansas Supreme Court affirmed their convictions as if they had been tried for violating Section 1. *Id.* at 202. In reversing their convictions, SCOTUS stated:

> To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.

Id.

In *Presnell v. Georgia,* 439, U.S. 14, 15-16 (1978), the Georgia Supreme Court held that a death sentence could not be upheld "upon sodomy as constituting the bodily injury associated with the kidnapping." However, even though the jury was instructed that a sentence of death depended upon the jury finding aggravated sodomy, the Georgia Supreme Court upheld the death sentence because even though the jury had not made a finding that the defendant had engaged in forcible rape:

> [E]vidence in the record supported the conclusion that petitioner was guilty of that offense, which in turn established the element of bodily harm necessary to make the kidnaping a sufficiently aggravating circumstance to justify the death sentence.

Id. Citing *Cole,* SCOTUS reversed the death sentence. *Id.* at 17.

In *Dunn v. United States,* 442 U.S. 100, 104, (1979), the defendant was convicted on three counts of making a false declaration. In deciding whether the defendant was guilty, the jury was instructed to consider if a statement the defendant had made in September was inconsistent with his grand jury testimony. *Id.* at 103-04. The Tenth Circuit affirmed the conviction but did so based on the defendant's statements he made in October. *Id.* at 106. In reversing the convictions, SCOTUS stated, "[t]o uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process." *Id.* More notably, SCOTUS stated that "appellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial." *Id.* at 107. The Court also quoted the same language from *Cole* stated in this application. *Id.*

In *Chiarella v. United States,* 445 U.S. 222, 225, (1980), the defendant was convicted on several counts of violating the Securities Exchange Act of 1934. The Court reversed the convictions because it held that under the statute, the defendant's actions did not constitute a crime. *Id.* at 231. In its brief to SCOTUS, the Government proposed that the defendant could still be convicted on another theory. *Id.* at 235-36. SCOTUS rejected this argument, stating, "[w]e need not decide whether this theory has merit for it was not submitted to the jury." *Id.* at 236. Citing *Dunn,* it later stated that it could not "affirm a criminal conviction on the basis of a theory not presented to the jury[.]" *Id.* at 236.

In *McCormick v. United States,* 500 U.S. 257, 259 (1991), SCOTUS heard a case to "consider whether the Court of Appeals properly affirmed the conviction of petitioner, an elected public official, for extorting property under color of official right in violation of the Hobbs Act[.]" In its analysis, the Court noted that "the Court of Appeals affirmed the conviction on legal and factual grounds that were never submitted to the jury." The Court further stated:

> This Court has never held that the right to a jury trial is satisfied when an appellate court retries a case on appeal under different instructions and on a different theory than was ever presented to the jury. Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury.

Id. n. 8.

In *Ciminelli v. United States,* 598 U.S. 306, 308-09 (2023), the defendant was convicted of wire fraud under a "right to control theory." "Under the right-to-control theory, a defendant is guilty of wire fraud if he schemes to deprive the victim of potentially valuable economic information necessary to make discretionary economic decisions." *Id.* at 309 (citation and internal quotations omitted). SCOTUS reversed the conviction stating:

> We have held, however, that the federal fraud statutes criminalize only schemes to deprive people of traditional property interests.... Because "potentially valuable economic

> information" "necessary to make discretionary economic decisions" is not a traditional property interest, we now hold that the right-to-control theory is not a valid basis for liability under § 1343. Accordingly, we reverse the Second Circuit's judgment.

Id. In its brief, the Government conceded this issue. *Id.* at 316. However, the Government argued that the conviction could be affirmed under a different theory of wire fraud. *Id.* at 316-17. Citing *McCormick and Chiarella,* SCOTUS refused and reversed the convictions. *Id.* at 317.

These cases show that the principle of an appellate court not affirming a conviction on a different basis than the jury convicted on is black letter law and is a violation of a defendant's right to due process. Even if this Court does not feel that the issue of whether Jeremy engaged in a sexual performance is a question of general interest and importance, it should still accept Jeremy's application for transfer so that it can ensure that Missouri jurisprudence is not in conflict with SCOTUS jurisprudence. Indeed, one option for this Court would be to accept transfer, vacate the opinion of the Western District, and retransfer the case with an order to reconsider the case in light of the cases cited in this application. For example, in *State v. Faron Collins,* SC90643, this Court accepted transfer and immediately retransferred the case to the Court of Appeals for reconsideration in light of this Court's decision in *State v. Severe,* SC89948. This Court could do the same here.

Allowing the opinion from the Western District to stand would create substantial problems in sufficiency review. Even with the existing precedent, the Government still tried to argue to SCOTUS that the conviction could be affirmed on a different basis than what was presented to the jury. *See Ciminelli,* 598 U.S. at 316-17; *Chiarella,* 445 U.S. at 235-36. In Missouri, the State has also tried to do the same. For example, in *State v. Rhymer,* 563 S.W.3d 714, 721, n.7 (Mo. App. W.D. 2018), the State tried to argue that the evidence was sufficient to affirm a conviction on a different section of Section 565.110 than what was charged (and thus submitted to the

jury). The Western District refused stating the State is held to proving what it actually charged. *Id.*

In *McKim v. Cassady,* 457 S.W.3d 831 (Mo. App. W.D. 2015), the defendant sought habeas relief on his murder conviction. *Id.* at 833. The Western District denied relief but noted that the State argued that it should deny relief because even if the Court believed that the jury would have likely believed the victim died from methamphetamine, there was still evidence that the defendant may have still been involved. *Id.* at 848, n. 29. The Court noted this was a different theory than the theory the State presented at trial. Since the Court did not believe the defendant had met his burden for habeas relief, it did not address the State's argument. It did, however, cite to *McCormick v. United States,* 500 U.S. 257 (1991), where SCOTUS held that a court on appeal could not affirm a conviction on a legal or factual ground never submitted to the jury.

In *State v. Dickerson,* 609 S.W.3d 839, 848 (Mo. App. E.D. 2020), the Eastern District, also citing *McCormick,* refused to consider the State's argument whether there was sufficient evidence of the crime based on a different theory. Specifically, the Court stated:

> Just as we decline the State's invitation to consider whether the State proved first-degree sodomy based on conduct under a different aspect of the offense than charged or presented at trial, such as incapacity or forcible compulsion, likewise we reject Dickerson's invitation for us to consider any claims of error not raised in his points on appeal.

Id.

The importance of these cases cannot be overstated. Despite clear black letter law precedent to the contrary, the State has tried to have convictions affirmed on a different basis than what was submitted to the jury. If the Western District's opinion is allowed to stand, then not only will the State continue to make these arguments, but it will also have legal precedent to support these arguments. Missouri Courts will

have to address the issue at some point or allow legal principles in direct conflict with SCOTUS precedent to become part of Missouri jurisprudence. This is untenable.

There is no reason for this Court to allow this brand of avoidance creep to happen, and even it does not want to address the issue of whether Jeremy's action constituted a sexual performance under Section 565.211, it can do what it did in *Collins* to address this.

III. THE PLAIN AND ORDINARY MEANING OF THE WORD "AUDIENCE" AND THE PHRASE "BEFORE AN AUDIENCE" IN SECTION 566.200(15) IMPLIES THAT THE AUDIENCE MUST BE SEPARATE AND DISTINCT FROM THE PERFORMANCE.

"The rules of statutory interpretation are not intended to be applied haphazardly or indiscriminately to achieve a desired result." *Ivie v. Smith,* 439, S.W.3d 189, 203 (Mo. banc 2014) (citation and internal quotations omitted). "Instead, the canons of statutory interpretation are considerations made in a genuine effort to determine what the legislature intended." *Id.* (citation and internal quotations omitted). "Statutory interpretation should not be hyper-technical, but reasonable and logical and should give meaning to the statute." *Id.* (citation and internal quotations omitted). "When analyzing a criminal statute, this Court must discern the legislature's intent from the statutory language and give effect to that intent." *State v. Blankenship,* 415 S.W.3d 116, 121 (Mo. banc 2013) (citation omitted). "This Court considers the words used in their plain and ordinary meaning." *Id.* (citation omitted). "In the absence of statutory definitions, the plain and ordinary meaning of a term may be derived from a dictionary, and by considering the context of the entire statute in which it appears." *State v. Hurst,* 663 S.W.3d 470, 474 (Mo. banc 2023) (citation omitted). "[A] statute must be interpreted in light of the general principle that criminal statutes...must be construed strictly against the state and liberally in favor of the defendant." *State ex rel. Schmitt v. Crane,* 641 S.W.3d 357, 367 (Mo. App. W.D. 2021) (citation and internal quotations omitted). Indeed, "a penal statute [must] be

construed with a degree of strictness commensurate with the severity of the penalty it imposes, and where the penalty is onerous no one can be held to hace [sic] its provision unless his acts come within both the letter and spirit of the law." *Bullington v. State,* 459 S.W.2d 334, 341 (Mo. 1970) (citation omitted).

"This Court must presume every word, sentence or clause has effect and that the legislature did not insert superfluous language." *State ex rel. Jones v. Eighmy,* 572 S.W.3d 503, 507, n. 4 (Mo. banc 2019) (internal citation and quotations omitted). An appellate court will not read any part of a statute in isolation but consider the context of the entire statute and harmonize its provisions. *State v. Whipple,* 501 S.W.3d 507, 514 (Mo. App. E.D. 2016) (citation omitted). Further, this Court cannot be "guided by a single sentence...but [should] look to the provisions of the whole law, and to [sic] its object and policy." *State v. Rousseau,* 34 S.W.3d 254, 260 (Mo. App. W.D. 2000) (citation and internal quotations omitted). Moreover, this Court does not limit itself to one or two sentences when interpreting the meaning of words in a statute. *State v. Wilson,* 55 S.W.3d 851, 856 (Mo. App. W.D. 2001) (citation omitted). Finally, this Court can consider the title of an act when construing the meaning of the act's provisions. *Rousseau,* 34 S.W.3d at 260, n. 6 (citing *Bullington,* 459 S.W.2d at 341).

As discussed, *supra,* the sexual performance the jury deliberated on was that of Jeremy and A.S. masturbating each other. For purposes of Section 566.211, "sexual performance" is defined in Section 566.200 (15) RSMo. (Cum. Supp. 2011). Section 566.200(15) defines "sexual performance" as:

> [A]ny play, motion picture, still picture, film, videotape, video recording, dance, or exhibition which includes sexual conduct or nudity, performed before an audience of one or more, whether in person or online or through other forms of telecommunication[.]

The sexual acts that Jeremy and A.S. engaged in were not a play, motion picture, still picture, film, videotape, video recording or a dance. *See* Section 566.200 (15). Thus, the only term that could possibly apply is the term "exhibition," and

Jeremy does not dispute that he and A.S. masturbating each other could constitute an exhibition *if* there was an audience.

According to the Merriam-Webster On-Line Dictionary, an "audience" is "a group of listeners or spectators;" "a reading, viewing, or listening public." Thus, the plain and ordinary language of the definition of "audience" indicates that an audience be separate and distinct from the performance.[1] According to Merriam-Webster's on-line dictionary, "before" is defined as "forward of," "in front of," "in the presence of."[2] Thus, unquestionably, for there to be a "sexual performance" for purposes of Section 566.200(15),the "audience" must be separate and distinct from the performance. Since both Jeremy and A.S. were part of the performance, neither could be a part of the audience. This does not mean that Jeremy could not have stopped masturbating A.S. and stopped her from masturbating him and moved back and watched her masturbate. If, however he had done that, there would be a performance with an audience separate and distinct from the performer and her performance. In the opinion from the Western District, there was a dispute as to whether there was even sufficient evidence of Jeremy watching A.S. masturbate (Majority Slip Opinion, p. 11; Dissenting Slip Opinion, p. 17). Jeremy agrees with the dissenting opinion, but even if he is wrong, it is not relevant because that was not the theory presented to the jury.

In its opinion, the Western District stated that while members of an audience usually observe performances, they also participate in them as well (Majority Slip Opinion, p. 10, n. 5). The examples the majority opinion gives are: (1) volunteering in a magic show; (2) singing along at a concert; and (3), being the recipient of an erotic dance (Majority Slip Opinion, p. 10, n. 5). Putting aside this argument was made in the context of the sexual performance being A.S. masturbating herself while Jeremy watched, this analysis is flawed for several reasons.

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[1] https://www.merriam-webster.com/dictionary/audience.
[2] https://www.merriam-webster.com/dictionary/before.

First, being a stationary recipient of an erotic dance does not make one a participant in it. Second, audience members singing along at a concert cannot be considered performers because they are simply not being watched by anyone else unlike the performers on stage. Finally, in a magic show, it is true that a volunteer *does* cease to being a member of the audience when he goes up on stage. He is now one of the performers. However, when he has finished with the magic trick, he goes back to his seat and ceases to be a participant and becomes a member of the audience. Finally, even if the members of an audience can temporarily become performers, in none of the scenarios do the performers become members of the audience.

Moreover, it is of vital importance that this Court remember that the word "audience" must be construed in its *plain and ordinary* meaning. An audience in its *plain and ordinary* meaning is always separate and distinct from a performance. If this Court says that "technically, Jeremy could be considered an audience because he is watching A.S.," then it is not construing the term "audience" in its *plain and ordinary* meaning.

For example, in many plays or operas, there are scenes with many characters on the stage and one character giving a monologue or singing. Technically, the other on-stage actors watching the actor give a monologue are an "audience." Under the *plain and ordinary* meaning, however, those other actors are *not* an audience - they are part of the performance.

While Jeremy may have committed other offenses by engaging in mutual masturbation with A.S., he did not commit the offense of sexual trafficking in the second degree because he did not entice A.S. to participate or engage in a "sexual performance" as defined under Section 566.200(15). There was no audience.

If this Court construes Section 566.200(15) to include the actions alleged in the present case, then literally every child-sex act could be prosecuted under this statute. Jeremy respectfully submits that when considering this statute as a whole, this was not what the legislature was considering when it enacted this statute.

For all the foregoing reasons, transfer in this case is appropriate.

Respectfully submitted,

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Certificate of Service

I, James Egan, hereby certify that on this 16th day of April, 2025 a true and correct copy of Appellant's Application for Transfer and all attachments were emailed to Evan Buchheim, Assistant Attorney General, at Evan.Buchheim@ago.mo.gov, and that a Notice of Filing Appellant's Application for Transfer to the Missouri Supreme Court was e-filed in the Missouri Court of Appeals, Western District.

/s/ James Egan
James Egan

In the Supreme Court of Missouri

SC101055
WD85148

May Session, 2025

State of Missouri,
Respondent,

vs. (TRANSFER)

Jeremy Baum,
Appellant.

Now at this day, on consideration of the Appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Western District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Betsy Ledgerwood, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session, 2025, and on the 27th day of May, 2025, in the above-entitled cause.

Given under my hand and seal of
said Court, at the City of Jefferson,
this 27th day of May, 2025.

Betsy Ledgerwood, Clerk

Brianna Decker, Deputy Clerk

Supreme Court of Missouri

vs.

MANDATE

JUDGMENT

Mandate
Missouri Court of Appeals
Western District

STATE OF MISSOURI, RESPONDENT,	)	
vs. (JOHNSON)	)	WD85148 CIR.CT. 20JO-CR00514-01
JEREMY BAUM, APPELLANT.	)	

Now on this day the judgment is affirmed.
Opinion filed.

STATE OF MISSOURI – Sct.

I, KIMBERLY K. BOEDING, Clerk of the Missouri Court of Appeals, Western District, certify that the foregoing is a full, true and complete transcript of the judgment of the Missouri Court of Appeals, Western District, entered of record on the 4th day of March, 2025, in the above entitled cause.

Given under my hand and the seal of the Court, at Kansas City, Missouri, this 28th day of May, 2025.

Kimberly K. Boeding
KIMBERLY K. BOEDING, CLERK

ecc: All Attorneys of Record Notified Through E-filing System
cc: Circuit Court Clerk
Missouri Department of Corrections