

No. 85500

**IN THE
MISSOURI SUPREME COURT**

STATE OF MISSOURI,

Respondent,

v.

CASEY N. POND,

Appellant.

**Appeal from the Circuit Court of Jasper County, Missouri
The Honorable William C. Crawford, Judge**

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... 2

JURISDICTIONAL STATEMENT 4

STATEMENT OF FACTS 5

ARGUMENT

Point I - Appellant properly proven to be prior offender 9

Point II - Appellant not entitled to instruction on first degree

child molestation..... 20

Point III - Appellant opened door to testimony regarding evidence

of fabrication..... 27

CONCLUSION..... 36

CERTIFICATE OF COMPLIANCE AND SERVICE..... 37

APPENDIX..... A-1

TABLE OF AUTHORITIES

Cases

State v. Armentrout, 8 S.W.3d 99 (Mo.banc 1999) 34

State v. Barnard, 972 S.W.2d 462 (Mo.App.W.D. 1998)..... 25

State v. Brown, 58 S.W.3d 649 (Mo.App.S.D. 2001).....24, 26

State v. Brown, 902 S.W.2d 278 (Mo.banc 1995),*cert. denied* , 516 U.S. 1031 (1995) 10,

State v. Garrison 975 S.W.2d 460 (Mo.App.S.D. 1998)..... 20

State v. Hampton, 50 S.W.3d 298 (Mo.App.S.D. 2001)..... 21

State v. Kelley , 953 S.W.2d 73 (Mo.App.S.D. 1997) 18

State v. Larson, 79 S.W.3d 891 (Mo.banc 2002).....13, 15

State v. Lingar, 726 S.W.2d 728 (Mo.banc 1987)..... 34

State v. McFall, 866 S.W.2d 915 (Mo.App.S.D. 1993)..... 18

State v. McKibben, 998 S.W.2d 55 (Mo.App.W.D. 1999)..... 32

State v. McNaughton, 924 S.W.2d 517 (Mo.App.W.D. 1996)..... 20

State v. Mouse, 989 S.W.2d 185 (Mo.App.S.D. 1999) 20

State v. Patterson, 729 S.W.2d 226 (Mo.App.S.D. 1987)..... 13

State v. Pond, No. 25137 (Mo.App.S.D., June 27, 2003)4, 16

State v. Roberts, 948 S.W.2d 577 (Mo.banc 1997), *cert. denied*, 118 S.Ct. 711 (1998) 9, 3

State v. Robinson, 26 S.W.3d 414 (Mo.App.E.D. 2000) 25

State v. Skillicorn, 944 S.W.2d 877 (Mo.banc 1997) 34

State v. Smith, 966 S.W.2d 1 (Mo.App.W.D. 1997) 20

State v. Talkington, 25 S.W.3d 657 (Mo.App.S.D. 2000).....13, 15

State v. Varvera, 897 S.W.2d 198 (Mo.App., S.D. 1995)10, 33

State v. Wings, 867 S.W.2d 607 (Mo.App.E.D. 1993) 18

Other Authorities

Article V, §10, Missouri Constitution (as amended 1982) 4

Supreme Court Rule 24.02.....13, 14

Supreme Court Rule 29.07..... 14

Supreme Court Rule 30.27..... 4

Supreme Court Rule 83.04..... 4

§557.036, RSMo 17-19

§558.016, RSMo 200012, 13, 15, 16

§566.062, RSMo 2000 4

JURISDICTIONAL STATEMENT

This appeal is from a conviction for first degree statutory sodomy, §566.062, RSMo 2000, obtained in the Circuit Court of Jasper County, and for which appellant was sentenced to fifteen years. The Missouri Court of Appeals, Southern District, reversed appellant’s conviction and sentence. *State v. Pond*, No. SD25137 (Mo.App.S.D., June 27, 2003). It denied appellant’s motion for rehearing on July 30, 2003.

This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. On September 30, 2003, pursuant to Supreme Court Rules 30.27 and 83.04, this case was transferred to this Court. Therefore, this Court now has jurisdiction of this appeal pursuant to Article V, §10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Casey Pond, was charged by information with first degree statutory sodomy (LF 7). An amended information was subsequently filed, charging appellant as a prior offender in that on or about August 20, 1999, appellant pled guilty to the felony of unlawful use of a weapon (LF 4, 9). On June 27, 2002, this case went to trial before a jury in the Circuit Court of Jasper County, the Honorable William C. Crawford presiding (LF 4). A mistrial was declared following voir dire and strikes for cause because the jury panel was insufficient for each side to have six peremptory strikes (LF 5; Tr. 20). The case went to trial before a jury again on July 9, 2002, in the Circuit Court of Jasper County, the Honorable William C. Crawford presiding (Tr. 21).

Appellant does not challenge the sufficiency of the evidence to support his conviction. Viewed in the light most favorable to the verdict, the evidence adduced at trial showed the following:

On May 25, 2000, 10-year-old Alyssa Stewart went to visit her Aunt Kathy and Uncle William Rigney who lived in a trailer in Jasper County (Tr. 199, 200-201, 229, 247). Alyssa was very close to the Rigney's daughter, Namioka (Tr. 201, 246). That night, Alyssa's grandparents, Willard and Judy Pond, arrived sometime between 8 and 9 p.m. along with Alyssa's 20-year-old uncle, appellant, and her aunt, Karren Kessinger (Tr. 201, 230, 247). Appellant was Kathy Rigney's brother (Tr. 229). Appellant came because he had a court appearance on May 26 (Tr. 246-247, 388).

The adults stayed up to talk while Alyssa and Namioka made a pallet on the floor

in the living room and went to sleep (Tr. 204, 247-248). Appellant was sleeping on the couch and Alyssa's Aunt Karren was asleep in the room as well (Tr. 204-205, 248, 254). Alyssa awoke in the middle of the night and found appellant beside her (Tr. 207). Appellant was pressing Alyssa's "private area" between her legs with his fingers (Tr. 207). His hands were under her clothes and his fingers were inside her body and it hurt (Tr. 207). Appellant's fingers were in her vagina (Tr. 210). Alyssa said nothing but prayed silently that appellant would stop (Tr. 208). Appellant stopped and then grabbed her hand and tried to put it inside his boxer shorts (Tr. 209). Alyssa made a fist and pulled her hand away (Tr. 209). Alyssa went into the bathroom to get away from appellant (Tr. 209). Eventually, Alyssa came back out into the living room, but she lay down so that Namioka was between her and appellant (Tr. 210).

The next morning, Alyssa told Namioka what happened (Tr. 211, 250). Alyssa's hands were shaking and her eyes were big (Tr. 249). That same morning, appellant put his arm around Alyssa and pulled her close and told Kathy Rigney, "Alyssa said that she loved me last night." (Tr. 212). Later that day, after appellant's court appearance, appellant had an argument with his parents because he wanted to leave immediately and they wanted to stay an extra day (Tr. 235). It was unusual for appellant to want to leave so quickly (Tr. 235).

On July 4 of that year, Alyssa told her Aunt Kelly what happened but she did nothing about it (Tr. 211). Therefore Alyssa did not tell her parents (Tr. 211).

Alyssa and her family moved to Webb City. Alyssa wrote a letter to a friend who

lived in Carthage (Tr. 214). Alyssa also told another school friend, Brittany Frazier, about what had happened (Tr. 214). In December, 2001, Alyssa's father, Ofc. Brady Stewart of the Carthage Police Department, was going through his daughter's overloaded school backpack to remove some items when he discovered a note (Tr. 188). The note indicated that a relative had "hurt" her (Tr. 188). Stewart and his wife questioned their daughter, who told them that appellant had touched her vagina and had hurt her (Tr. 188). Their daughter indicated that this had occurred the last time appellant had visited, which was May 26 (Tr. 192). She remembered that date because appellant had to be there for a court appearance (Tr. 192-193).

Stewart told his sister-in-law, Kathy Rigney (Tr. 233). Mrs. Rigney asked her daughter Namieka about it and Namieka confirmed that Alyssa had told her that something had happened between her and appellant (Tr. 233).

After discussing the matter with his wife, Stewart decided to talk to an investigator in the Joplin Police Department (Tr. 189). Stewart spoke with Det. Darren Gallup, the child abuse investigator with the Joplin Police Department (Tr. 259). Gallup set up an interview of Alyssa at the Children's Center (Tr. 263).

In appellant's case-in-chief, his family members testified that they did not arrive at William and Kathy Rigney's residence until 5:00 a.m. on May 26 (Tr. 281, 323, 353) and that the victim, Alyssa, was not there when they arrived and only came by for a few minutes just before the Ponds left to go to court with appellant (Tr. 289, 326, 329, 359-360).

Appellant also testified in his defense and denied ever touching Alyssa except to hug her good-bye (Tr. 392).

The state presented rebuttal evidence. Clint Pullin, an investigator for Hood County, Texas, was asked by the Joplin police to talk to appellant, who was in Pullin's jurisdiction (Tr. 405-407). Pullin took a statement from appellant, who said that Alyssa and Namieka were asleep on the living room floor when appellant and his parents and sister arrived at 6 a.m. (Tr. 409).

At the close of evidence, instructions, and argument by counsel, the jury found appellant guilty of first degree statutory sodomy (LF 5, 34; Tr. 470). Having found appellant to be a prior offender (LF 4, 14; Tr. 20, 22), the trial court sentenced appellant to fifteen years (LF 5, 38-39; Tr. 493).

ARGUMENT

I.

THE TRIAL COURT DID NOT PLAINLY ERR IN FINDING APPELLANT TO BE A PRIOR OFFENDER AND REMOVING SENTENCING FROM THE JURY BECAUSE THE STATE PROVED APPELLANT TO BE A PRIOR OFFENDER IN THAT APPELLANT WAS ADJUDICATED GUILTY OF UNLAWFUL USE OF A WEAPON PRIOR TO THE DATE ON WHICH HE COMMITTED THE STATUTORY SODOMY FOR WHICH HE WAS TRIED AND CONVICTED IN THE PRESENT CASE.

Appellant contends that the trial court plainly erred in finding him to be a prior offender because appellant believes that even though he pled guilty to unlawful use of a weapon prior to committing the sodomy for which he was tried in the present case, he was not sentenced for his prior crime until the day after he had committed the sodomy act for which he was tried in the present case.

A. Standard of review.

"The 'plain error' rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review." *State v. Roberts*, 948 S.W.2d 577, 592 (Mo.banc 1997), *cert. denied*, 118 S.Ct. 711 (1998).

Appellant must demonstrate that manifest injustice or a miscarriage of justice will occur if the error is not corrected. *Id.* "[U]nless a claim of plain error facially establishes substantial grounds for believing that 'manifest injustice or miscarriage of justice has resulted,' this Court will decline to exercise its discretion to review for

plain error under Rule 30.20." *Id.*, citing *State v. Brown*, 902 S.W.2d 278, 284 (Mo.banc 1995), *cert. denied* , 516 U.S. 1031 (1995).

"Relief under the plain error standard is granted only when an alleged error so substantially affects a defendant's rights that a manifest injustice or miscarriage of justice inexorably results if left uncorrected. Appellate courts use the plain error rule sparingly and limit its application to those cases where there is a strong, clear demonstration of manifest injustice or miscarriage of justice. The determination of whether plain error exists must be based on a consideration of the facts and circumstances of each case. A defendant bears the burden of demonstrating manifest injustice or miscarriage of justice." *State v. Varvera*, 897 S.W.2d 198, 201 (Mo.App., S.D. 1995) (citations omitted).

B. Facts.

On August 20, 1999, appellant appeared in the Jasper County Circuit Court and entered a plea of guilty to unlawful use of a weapon (St.Exh. 2). The court found his plea to have been made voluntarily and with full understanding of the consequences of his plea and with his understanding of his right to a jury trial and all other rights appurtenant thereto (St.Exh. 2). The trial court also found a factual basis for appellant's plea (St.Exh. 2). The trial court "[t]herefore accepts the plea of guilty to the charge of unlawful use of a weapon, a D felony." (St.Exh. 2).

The trial court went on to note that appellant requested a presentence investigation and ordered the Board of Probation and Parole to conduct one on

appellant's behalf (St.Exh. 2). Sentencing was deferred and the trial court deferred its decision as to whether to accept or reject the plea *agreement* (St. Exh. 2). More precisely, the trial court deferred its decision as to whether it would follow the plea agreement or not in sentencing appellant.

The night before appellant appeared in court to be sentenced on the unlawful use of a weapon charge, he sodomized his niece. The next morning, May 26, 2000, appellant appeared in the Jasper County Circuit Court where he received a sentence of two years on the unlawful use of a weapon charge (St.Exh. 1, 2). The court suspended execution of the sentence and placed appellant on five years probation (St.Exh.1, 2).

Appellant was subsequently charged in the present case with the statutory sodomy of his niece (LF 7). Prior to trial, the state filed an amended information charging appellant as a prior offender in that on or about August 20, 1999, appellant pled guilty to the felony of unlawful use of a weapon (Tr. 13; LF 4,9). Defense counsel objected, noting that while appellant entered a plea of guilty on or about August 20, 1999, the trial court purportedly deferred accepting the guilty plea until May 26, 2000, and so there was no final conviction until May 26, 2000 (Tr. 14). The trial court overruled appellant's objection (Tr. 14-15).

As proof of appellant's prior offender status, the state offered two exhibits (Tr. 16). The first was a certified copy of the sentence and judgment which reflected that appellant was charged with one count of unlawful use of a weapon for a crime that occurred on July 14, 1999, and that appellant was formally sentenced therefor on May

26, 2000 (Tr. 16). The state then offered a certified copy of the docket sheet in the case, which reflects that on August 20, 1999, appellant pled guilty to unlawful use of a weapon and that the court accepted appellant's plea (Tr. 17).

The trial court again considered appellant's objections and overruled them (Tr. 19). The trial court found appellant to be a prior offender, holding specifically that the trial court had accepted appellant's plea and found him guilty on August 20, 1999 (Tr. 19).

C. The trial court did not plainly err in finding appellant to be a prior offender.

A person is a prior offender if he has pleaded guilty to or been found guilty of one felony. §558.016.2, RSMo 2000. "The pleas or findings of guilty shall be prior to the date of commission of the present offense." §558.016.6, RSMo 2000.

In the present case, appellant pled guilty to unlawful use of a weapon on August 20, 1999 (St. Exh. 2). The trial court accepted appellant's guilty plea to that charge on August 20, 1999 (St. Exh. 2). He committed the present offense sometime during the night or early morning hours of May 25-May 26, 2000. Under the plain language of the statute, appellant's plea and/or finding of guilt was prior to the date of the commission of the present offense. The trial court did not plainly err in finding him to be a prior offender.

Appellant rests his entire argument on the fact that he was not sentenced for the prior offense until May 26, 2000, after he had committed the present offense. There is nothing whatsoever in the statutory language that says that the date of sentencing is in

any way relevant to determining whether someone is a prior offender or not.

Appellant argues that under Supreme Court Rule 24.02, the trial court could have rejected his plea at any time prior to sentencing and therefore the plea was not final (App.Br. 22). The problem with appellant's argument is that it ignores the plain language of the statute regarding what is a prior offender. The plain language of the statute requires that the plea or finding of guilt be prior to the offense. The statute makes no reference to sentencing. "Where the language of a statute is plain and unambiguous, there is no room for construction and the statute will be given effect as written." *State v. Patterson*, 729 S.W.2d 226, 227 (Mo.App.S.D. 1987).

Appellant asserts that the plea was not "final," though, because the court could have rejected it. Section 558.016, however, makes no reference to the finality of a plea or finding of guilt. Moreover, it is not necessary for a defendant to be sentenced in order for an adjudication to be used to determine prior and persistent offender status. For example, a defendant may receive a suspended imposition of sentence and have that adjudication treated as a conviction for certain purposes, including determination of prior and persistent offender status, despite the fact that he had not been sentenced and thus had not received a final judgment. *See, e.g., State v. Larson*, 79 S.W.3d 891, 894 n. 9 (Mo.banc 2002) (listing collateral consequences of suspended imposition of sentence); *State v. Talkington*, 25 S.W.3d 657, 658 (Mo.App.S.D. 2000).

Appellant relies on the notation on the docket sheet which states that the trial court deferred acceptance of the plea agreement until the sentencing date and contends

that this means that appellant's guilty plea had not been made or accepted. Appellant ignores the notation on the same docket sheet which states that the trial court "[t]herefore accepts the plea of guilty to the charge of unlawful use of a weapon, a D felony." (St.Exh. 2).

Appellant equates accepting the plea with accepting the "plea agreement" but these are not the same thing. A plea is made and accepted when the trial court determines that the defendant understood all of his rights and the charges against him and that there was a factual basis for the plea. Supreme Court Rule 24.02(c). Accepting a "plea agreement" is merely a reference as to whether or not the trial court will sentence the defendant pursuant to the terms of the plea agreement. Supreme Court Rule 24.02(d)(3). The fact that the court may determine it does not wish to follow the sentencing terms of a plea agreement does not mean that a defendant has not pled guilty. As a practical matter, under Rule 24.02(d)(4)), if a court rejects the plea *agreement*, it merely informs the defendant that it will not follow the plea agreement, and gives the defendant the opportunity to withdraw his plea, which by necessity had to already have been made, else there would be nothing to withdraw.

Appellant argues, however, that the plea must be "unconditionally accepted" and this does not occur if the plea *agreement* has not been accepted because appellant could withdraw his plea. Whether or not appellant has the opportunity to withdraw his plea or not is irrelevant because a guilty plea still counts as a prior conviction for purposes of proving someone to be prior offender even if that plea can be withdrawn. For

example, Supreme Court Rule 29.07(d) states that a defendant may make a motion to withdraw his guilty plea before sentence is imposed or when imposition of sentence is suspended. Under appellant's argument, then, if a defendant received a suspended imposition of sentence, this could not count as a conviction for purposes of later proving the defendant a prior offender because a defendant can always file a motion to withdraw his plea if he receives a suspended imposition of sentence. However, caselaw is clear that a suspended imposition of sentence does count as a prior conviction for purposes of proving someone to be a prior offender. *See, e.g., State v. Larson, supra; State v. Talkington, supra.*

It is true that *if* the trial court decides not to be bound by the terms of the plea agreement, under most circumstances the defendant would be allowed the opportunity to withdraw his plea. If indeed a plea were withdrawn or vacated or set aside, it then could no longer be used to prove someone as a prior offender because the plea would no longer exist. But as long as a plea of guilt has been made and has been accepted by the trial court, under the plain language of §558.016 it can be used to prove someone to be a prior offender. There is no authority to the contrary.

The bottom line is that §558.016.2 states that a prior offender is "one who has pleaded guilty to or has been found guilty of one felony." The statute does not use the words "conviction" or "final adjudication" and says nothing about whether or not the defendant has been sentenced or whether or not he may still withdraw the plea or whether or not he may otherwise collaterally attack his guilty plea. The fact that, as in

this case, the trial court deferred acceptance of the plea *agreement* so as to allow for a presentence investigation does not in any way mean that the defendant has not already pled guilty. Indeed, the record in this case affirmatively shows that the trial court had accepted appellant's guilty plea. This occurred prior to the offense in this case, and thus, appellant was properly determined to be a prior offender, and sentencing was properly done by the trial court, not the jury.

In sum, under the plain and ordinary meaning and construction of §558.016, appellant's plea of guilt or finding of guilt occurred prior to the commission of the present offense. The trial court therefore did not plainly err in relying on that prior plea of guilt to find that appellant was a prior offender. Appellant's claim is thus without merit and should be denied.

D. If appellant were not prior offender, proper remedy is to remand for trial on sentencing only.

Should this Court agree, however, with the Court of Appeals, Southern District, and hold that appellant was not properly proven to be a prior offender, the proper remedy would not be a new trial on all issues, as the Court of Appeals, Southern District, determined, but rather a new trial solely on the issue of sentencing.

1. Facts.

Appellant was convicted for one count of first degree statutory sodomy and sentenced as a prior offender. The Court of Appeals, Southern District, found that the trial court erred in finding appellant to be a prior offender and remanded the case for

a new trial on all issues in its opinion filed on June 27, 2003. *State v. Pond*, No. 25137 (Mo.App.S.D. June 27, 2003). The Court did not address the merits of any guilt-phase issues.

On that same date, June 27, 2003, the Governor signed Senate Bill No. 5, which immediately went into effect pursuant to an emergency clause. Senate Bill No. 5, in pertinent part, amended §557.036, RSMo, changing trial procedure so that "Where an offense is submitted to the jury, the trial shall proceed in two stages. At the first stage, the jury shall decide only whether the defendant is guilty or not guilty of any submitted offense. The issue of punishment shall not be submitted to the jury at the first stage."

Rather, if a defendant is found guilty at the first stage, the second stage of the trial shall proceed, at which the issue "shall be the punishment to be assessed and declared." The state and defendant will be able to present evidence supporting or mitigating punishment and argue the issue of punishment to the jury.

2. Analysis.

In light of §557.036, which now provides for a bifurcated trial process in which, after guilt has been determined, a second trial proceeding presenting the issue of sentencing to the jury would be held, the proper remedy when reversing solely on a sentencing issue is to remand for retrial only on the issue of sentencing.

On June 27, 2003, the same date that the Court of Appeals handed down its opinion in this matter, Governor Holden signed Senate Bill No. 5, which immediately went into effect pursuant to an emergency clause. As discussed above, Senate Bill No.

5, in pertinent part, amended § 557.036 to provide for a bifurcated trial proceeding, wherein guilt would be determined in the first trial stage and then punishment would be determined in a second trial proceeding wherein both the state and the defendant would be able to offer evidence and argue in support of or mitigation of punishment.

While appellant's initial trial preceded institution of the bifurcated trial procedure under §557.036, the new procedure is applicable to appellant's trial on remand as the amendment deals with procedural matters. *See, e.g. State v. Kelley*, 953 S.W.2d 73, 78-79 (Mo.App.S.D. 1997); *State v. Wings*, 867 S.W.2d 607 (Mo.App.E.D. 1993). Although prior caselaw held that a defendant is entitled to a new trial on all issues where the evidence is insufficient to support a finding of prior offender, *see, e.g., State v. McFall*, 866 S.W.2d 915 (Mo.App.S.D. 1993), these cases were all decided prior to imposition of the new two-stage trial procedure. Therefore, the holdings of these cases are no longer apposite, and under current procedural law, where the error is only in reference to sentencing, it is necessary only to remand for a new sentencing trial.

Appellant contends that §1.160 prohibits the application of the amended §557.036 to appellant's case. To the contrary, while §1.160 does provide that no prosecution commenced previous to or at the time of a statutory amendment shall be affected by the amendment, it creates an exception for changes in procedural law, noting "That all such proceedings shall be conducted according to existing procedural laws."

Thus, § 557.036, as amended by Senate Bill 5, is applicable to appellant's case because it is a change in procedural law.

Appellant observes that prior to Senate Bill 5, the same jury would decide guilt or innocence and punishment, and that if there were an error in that a defendant was improperly found to be a prior offender, the case would be remanded for a new trial on all issues (App.Br. 32-33). Appellant asserts that the same should happen after the passage of Senate Bill 5 because all the changes in §557.036 do is change when additional punishment evidence is presented to the jury (App.Br. 33). However, as a matter of judicial economy, it makes no sense to remand for an entire new trial on all issues when it is procedurally possible to have a retrial solely on the issue of sentencing.

E. Conclusion.

In sum, the trial court did not err in allowing appellant to be sentenced as a prior offender because appellant was properly found to be a prior offender in that he pled guilty prior to committing the crime at issue in the present case. If appellant was not properly found to be a prior offender, then the proper remedy would be to remand for a new sentencing trial only.

II.

THE TRIAL COURT DID NOT ERR IN REFUSING TO SUBMIT INSTRUCTION "A", OFFERED BY APPELLANT SUBMITTING THE LESSER INCLUDED OFFENSE OF CHILD MOLESTATION IN THE FIRST DEGREE BECAUSE APPELLANT WAS NOT ENTITLED TO THE INSTRUCTION IN THAT THERE WAS NO EVIDENCE THAT PROVIDED A BASIS TO ACQUIT APPELLANT OF THE GREATER OFFENSE OF STATUTORY SODOMY.

Appellant contends that the trial court erred in refusing to submit instruction "A," which would have instructed the jury on the lesser included offense of first degree child molestation. Appellant believes he was entitled to this instruction because there was allegedly evidence which would allow the jury to acquit him of statutory sodomy and convict him of child molestation in that there was evidence which allegedly suggested that appellant did not penetrate the victim's vagina.

A defendant is entitled to an instruction on a lesser included offense only if there is an evidentiary basis for both acquittal for the greater offense and conviction for the lesser offense. *State v. Smith*, 966 S.W.2d 1, 5 (Mo.App.W.D. 1997). A defendant is not entitled to a lesser included offense instruction merely because the jury might disbelieve some of the state's evidence or decline to draw some or all of the permissible inferences. *State v. McNaughton*, 924 S.W.2d 517, 527 (Mo.App.W.D. 1996); *State v. Garrison* 975 S.W.2d 460, 461-62 (Mo.App.S.D. 1998); *State v. Mouse*, 989 S.W.2d 185, 192 (Mo.App.S.D. 1999); *State v. Hampton*, 50 S.W.3d 298, 302 (Mo.App.S.D. 2001).

In the present case, in order to find appellant guilty of statutory sodomy in the first degree, the jury had to find that appellant inserted his finger into the victim's vagina, that such conduct constituted deviate sexual intercourse – a sexual act involving the penetration, however slight, of the female sex organ by a finger for the purpose of arousing or gratifying the sexual desire of any person – and that the victim was less than twelve years old at the time. (LF 27).

In order to get an instruction for child molestation, the evidence had to demonstrate that one of the above elements did not exist and that all of the following did exist: that appellant touched the genitals of the victim for the purpose of arousing his own sexual desire, and that the victim was less than twelve years old (LF 32).

In the present case, appellant was not entitled to an instruction on the lesser included offense of child molestation because there was not an evidentiary basis for an acquittal of the greater offense.

The evidence at trial demonstrated that appellant penetrated the victim. The victim testified at trial that appellant "was pressing in my private area between my legs with his fingers" under her clothes (Tr. 207). When asked for more details, she explained, "His fingers were in my body and it hurt." (Tr. 207). She testified that appellant had his fingers "in [her] vagina." (Tr. 210).

Appellant, however, points to the following testimony as support for an instruction on child molestation:

Testimony of victim's father:

Q. Did you or your wife then question your daughter?

A. Yes, sir. We did.

Q. And who did she indicate hurt her?

A. Casey Pond.

Q. Did she tell you what he had done to her?

A. Initially, she just said that he had touched her private area, vagina area, and then stated that he hurt her.

(Tr. 188).

Cross-examination of the victim:

Q. All right. And you told your mother that Casey touched you?

A. Yes, sir.

Q. You didn't tell your mother that he penetrated you, did you?

A. At the time, no.

Q. You didn't tell your father that either, did you?

A. No, sir.

Q. You testified at an earlier hearing back on February of this year?

A. Yes, sir.

Q. And I believe at that earlier hearing do you recall testifying that Casey pushed on your private area?

A. Yes, sir.

Q. But you didn't say that he penetrated your private area, did you?

A. It hurt, sir. I don't remember what exactly I said.

(Tr. 224).

Testimony of victim's 10-year-old cousin:

Q. Did [victim] tell you something that happened?

A. Yes.

Q. What did she tell you?

A. She told me that her Uncle Casey was touching her at a bad spot and he tried to stick her hand down his pants.

Q. He tried to stick her hand down his pants?

A. Yes.

Q. And did she - did she show what the bad - in the bad spot what that meant?

A. Yes.

Q. What part of her did she mean?

A. It was the bottom area of her.

Q. On the front?

A. Yes.

Q. The girl's private parts?

A. Yes.

(Tr. 250).

According to appellant, this testimony demonstrated that appellant did not penetrate the victim. However, none of the evidence cited by appellant negates or

contradicts testimony that appellant penetrated the victim's vagina. The victim told her parents that appellant had touched her vaginal area and hurt her; this is consistent with penetration. While the victim testified on cross-examination that she had not told her parents she was penetrated, she never at any time or in any statement *deny* that she had been penetrated. The fact that the then 10-year-old victim may have said to her parents or to her 8-year-old cousin, "He touched me" instead of the more detailed statement, "he penetrated me," does not support an acquittal for first degree statutory sodomy. Obviously, if appellant penetrated her, he also touched her. The evidence, thus, does not support an acquittal of the greater defense.

In *State v. Brown*, 58 S.W.3d 649, 655-656 (Mo.App.S.D. 2001), the defendant argued that the trial court erred in refusing to give an instruction on first degree child molestation as a lesser-included offense of statutory sodomy. The Court of Appeals, after reviewing the elements of the crime and the evidence in the case, noted that the evidence would have permitted charging the defendant with and finding her guilty of both statutory sodomy and child molestation. *Id.* However, the Court of Appeals found "no basis . . . for acquitting defendant of statutory sodomy in the first degree and convicting her of child molestation in the first degree. There was no basis for an acquittal for the greater offense but a conviction for the lesser." *Id.* at 656. While the evidence would have supported a conviction for either crime, it did not support an acquittal of the greater and thus, the trial court did not err in refusing to give an instruction on the lesser included offense.

Similarly in the present case, while the evidence might have supported a conviction for either the greater or the lesser crime, there was no evidence to support an acquittal of the greater. Thus the trial court did not err.

This case is not like those in which an instruction on a lesser-included offense was called for. In *State v. Robinson*, 26 S.W.3d 414, 417-418 (Mo.App.E.D. 2000). the Court of Appeals, Eastern District, remanded because of the failure to give an instruction on the lesser-included of child molestation, but in that case, there was affirmative evidence that there was no penetration, in that a doctor testified for the defendant that there were no physical signs of digital penetration.

Again, in *State v. Barnard*, 972 S.W.2d 462, 466 (Mo.App.W.D. 1998), there was affirmative evidence of no penetration, in that the defendant admitted touching the victim but denied penetration, while the victim testified that there was penetration. Since there was evidence to actually acquit of the greater offense, in that there was affirmative evidence that there was, in fact, no penetration, the instruction for the lesser included offense was called for.

No such evidence exists in this case. There is no evidence that there was no penetration. The evidence appellant cites to is consistent with and does not contradict the existence of penetration. Appellant thus was not entitled to an instruction on the lesser included offense. *State v. Brown, supra*. His claim is thus without merit and should be denied.

III.

THE TRIAL COURT DID NOT PLAINLY ERR IN OVERRULING APPELLANT'S OBJECTION AND ALLOWING THE STATE TO ASK DETECTIVE GALLUP ON REDIRECT WHETHER HE HAD SEEN ANY INDICATIONS THAT THE CHILD VICTIM HAD REASON TO FABRICATE BECAUSE APPELLANT OPENED THE DOOR TO THIS ISSUE DURING CROSS-EXAMINATION IN THAT APPELLANT CHALLENGED THE THOROUGHNESS OF THE DETECTIVE'S INVESTIGATION AS TO THE CREDIBILITY OF THE VICTIM'S CLAIM AND ELICITED TESTIMONY TO SUGGEST THAT DET. GALLUP HAD FAILED TO DETERMINE, VIA INVESTIGATIVE TECHNIQUES, WHETHER THE VICTIM HAD REASON TO FABRICATE

Appellant contends that the trial court plainly erred in overruling his objection to Detective Gallup's testimony that he was not aware of any reasons the victim would have been subject to a suggestive response and that he was not aware of any information that would indicate that there had been fabrication in the case (App.Br. 34). Appellant asserts that Gallup's testimony was an impermissible opinion as to the credibility of his sources of information, invaded the province of the jury, and improperly vouched for the victim's credibility.

A. Facts.

Detective Darren Gallup testified that Brady Stewart informed him of allegations of sex abuse involving Stewart's daughter (Tr. 259). Gallup, a Joplin police detective, determined that the incident did not occur within the Joplin city limits and

informed the prosecutor's office (Tr. 260). Gallup assisted in the investigation, however (Tr. 260). He spoke with Mr. and Mrs. Stewart and a couple of witnesses (Tr. 260). He spoke briefly with the victim, Alyssa, but did not interview her (Tr. 260). Gallup, who had investigated over 500 child abuse investigations, testified that in his experience, it was not unusual for a ten year old girl not to tell her parents that she had been sexually molested (Tr. 261). Gallup said the fact that a child does not immediately tell an adult does not mean that the incident did not occur (Tr. 261-262).

Defense counsel then engaged in a cross-examination to suggest that Det. Gallup did nothing to determine whether Alyssa was telling the truth or not:

Q. Now, in carrying out these investigations you're a police officer, right?

A. Yes.

Q. Your effort is in trying to build a case that you can present to the prosecutor's office, is that right?

A. To find the fact to present the truth, yes.

Q. And it's important that you find the truth, is that correct?

A. Yes.

Q. And have you found that there are times when children who are eight or ten years of age have trouble distinguishing the truth from a lie?

A. I don't know about distinguishing the truth from a lie. I mean that's a case-by-case basis.

Q. Isn't it part of your interview techniques that early on in the interview you establish whether or not they understand the difference between a truth and a lie?

A. Yes.

*** * ***

Q. My question is, officer, don't you need to determine whether or not they know the difference between the truth and a lie?

A. Yes.

Q. Okay. And it's important because young children can sometimes make up stories?

A. Sure.

Q. Young children are susceptible to suggestion?

A. Yes.

Q. That perhaps in certain circumstances where the children - maybe there's problems within the home, that there's maybe an ongoing divorce or custody issue and there are times when these children are being pushed and pulled in opposite directions?

A. Uh, when you're working on these cases you try to look for everything that might be going on in a home and so on and so forth. The suggestibility could come from that or a number of different things.

Q. As a matter of fact even the - even an interviewer had to be

careful in dealing with young children that their questions aren't suggestive or leading or you know helping the child to build on this story, isn't that right?

A. Which is what - yes. That's why we go through a lot of training.

Q. All right. And that is because you want to sort out whether the child is being truthful or if there's something else going on in the child's life that is causing them to fabricate their story?

A. You try to determine if a child is being truthful, yes.

Q. Okay. Did you - you did not conduct an interview of Namioka, the eight-year-old cousin, of Alyssa?

A. No.

Q. You didn't conduct an interview of Alyssa, herself?

A. I didn't conduct it, no.

Q. And so you did not use your techniques, your interview techniques, to try and discern if they were being truthful or if there were other issues present in their lives?

A. I didn't conduct an interview.

Q. Okay.

(Tr. 264-267).

On redirect, the following exchange then took place:

Q. Detective, did you review any of the investigative reports that

were prepared by the Jasper County Division of Family Services?

A. Yes.

Q. Did you see anything in those reports in the way the investigation was –

BY MR. TOLEN [defense counsel]: Your Honor, I'm going to object to the hearsay –

BY THE COURT: I haven't heard the question yet. Finish the question.

Q. (By Mr. Podleski) Did you see anything in those reports that would indicate fabrication in this case?

BY MR. TOLEN: I object to the hearsay nature of the question and the inferential hearsay that –

BY THE COURT: Objection sustained.

Q. (By Mr. Podleski) Mr. Tolen, asked you about divorce and reasons for suggestiveness. Are you aware of any reasons that this child would have been subject to a suggestive response in making the statements that she did?

A. No.

Q. Were you aware of any information from any source of any evidence that would indicate that there's fabrication in this case?

BY MR. TOLEN:

Objection, Your Honor. Again, it's calling for hearsay.

BY THE COURT:

Overruled. He can answer that.

A. (By the Witness) No.

(Tr. 267-268).

B. Standard of review.

Appellant's objection at trial was on the grounds of hearsay, but his claim of error on appeal is not that the question called for hearsay, but rather that it called for an impermissible opinion, vouched for the testimony of the victim, and invaded the province of the jury. Because appellant's theory on appeal is different from the objection he asserted at trial, he has failed to preserve for appellate review his claim. *State v. McKibben*, 998 S.W.2d 55, 60 (Mo.App.W.D. 1999). "When a matter is not preserved for appeal, reversal is appropriate only if the appellate court finds plain error." *Id.* Appellant acknowledges that he is only entitled, at most, to plain error review (App.Br. 36).

"The 'plain error' rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review." *State v. Roberts*, 948 S.W.2d 577, 592 (Mo.banc 1997), *cert. denied*, 118 S.Ct. 711 (1998). Appellant must demonstrate that manifest injustice or a miscarriage of justice will occur if the error is not corrected. *Id.* "[U]nless a claim of plain error facially

establishes substantial grounds for believing that 'manifest injustice or miscarriage of justice has resulted,' this Court will decline to exercise its discretion to review for plain error under Rule 30.20." *Id.*, citing *State v. Brown*, 902 S.W.2d 278, 284 (Mo.banc 1995), *cert. denied* , 516 U.S. 1031 (1995).

"Relief under the plain error standard is granted only when an alleged error so substantially affects a defendant's rights that a manifest injustice or miscarriage of justice inexorably results if left uncorrected. Appellate courts use the plain error rule sparingly and limit its application to those cases where there is a strong, clear demonstration of manifest injustice or miscarriage of justice. The determination of whether plain error exists must be based on a consideration of the facts and circumstances of each case. A defendant bears the burden of demonstrating manifest injustice or miscarriage of justice." *State v. Varvera*, 897 S.W.2d 198, 201 (Mo.App. S.D. 1995) (citations omitted).

C. Trial court did not plainly err because appellant opened the door to the issue.

The trial court did not plainly err in overruling appellant's objection to Det. Gallup's testimony. Appellant, through his cross-examination of Gallup, attacked the thoroughness of Det. Gallup's investigation as to the credibility of the victim's claims and opened the door to the issue of whether Det. Gallup was aware of any information that would indicate that the victim might have had a reason to fabricate. Because appellant opened the door, the state, on redirect, was entitled to refute the inferences raised by the defense's cross-examination, even if the evidence was otherwise

inadmissible.

On cross-examination, as set out above, defense counsel repeatedly asked Det. Gallup about investigative techniques, trying to find out what the truth was, indicators that a child might have reason to fabricate, whether young children are susceptible to suggestion, factors that might indicate possible suggestion made to the child, and whether Det. Gallup himself used any techniques to try to determine whether or not the victim and her cousin were being truthful or not as to their allegations.

"It is well established that on redirect examination, it is proper to examine a witness on any matter which tends to refute, weaken or remove unfavorable inferences resulting from testimony on cross-examination, notwithstanding that the facts elicited may be prejudicial to the defendant." *State v. Lingar*, 726 S.W.2d 728, 734 (Mo.banc 1987). "Furthermore, where the defendant has injected an issue into the case, the State may be allowed to admit otherwise inadmissible evidence in order to explain or counteract a negative inference raised by the issue defendant injects." *Id.* at 734-735. *See also State v. Armentrout*, 8 S.W.3d 99, 111 (Mo.banc 1999); *State v. Skillicorn*, 944 S.W.2d 877, 891-892 (Mo.banc 1997).

Appellant's cross-examination suggested that Det. Gallup had not bothered to make any determination as to the truth of the victim's allegations. Appellant opened the door to the issue of whether Det. Gallup had investigated the veracity of the victim's claims and the state was entitled to rebut this negative inference by asking him whether, in fact, he had seen any information which would indicate that there was reason for the

victim to fabricate.

Appellant cannot now on appeal argue that Det. Gallup's testimony on redirect was an improper lay opinion when appellant's own cross-examination explored Det. Gallup's expertise as to interviewing child witnesses and whether he looked for indications of fabrication or suggestion in their stories. Appellant cannot ask Det. Gallup about indications of fabrication or suggestion and whether he bothered to look for these in his investigation, and then complain when the state asks the detective whether he had seen any such indications.

Ultimately, it cannot be said that the trial court's decision resulted in a manifest injustice or miscarriage of justice when appellant's own cross-examination opened the door on the issue of Det. Gallup's expertise and thoroughness as to his investigation of the child victim's allegations. Appellant opened the door, and the state was entitled to rebut appellant's cross-examination. Thus there was no plain error in overruling appellant's objection. Appellant's claim is without merit and should be denied.

CONCLUSION

In view of the foregoing, respondent submits that appellant's conviction and sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b)/Local Rule 360 of this Court and contains _____ words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ____ day of December, 2003.

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**IN THE
MISSOURI SUPREME COURT**

STATE OF MISSOURI,

Respondent,

v.

CASEY N. POND,

Appellant.

**Appeal from the Circuit Court of Jasper County, Missouri
The Honorable William C. Crawford, Judge**

RESPONDENT'S APPENDIX

TABLE OF CONTENTS

Sentence and Judgment..... A-2