

No. SC91427

*In the
Supreme Court of Missouri*

STATE OF MISSOURI,

Respondent,

v.

DANIEL M. PRIMM,

Appellant.

**Appeal from the City of St. Louis Circuit Court
Twenty-Second Judicial Circuit, Division Eleven
The Honorable Bryan L. Hettenbach, Judge**

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant (Defendant) appeals from a St. Louis City Circuit Court judgment convicting him of four counts of second-degree statutory rape,¹ three counts of second-degree statutory sodomy,² and three counts of second-degree child molestation,³ for which he was sentenced as a persistent offender to a total of twenty years imprisonment. The Missouri Court of Appeals, Eastern District, affirmed Defendant's conviction. On January 25, 2011, this Court sustained appellant's application for transfer pursuant to Supreme Court Rule 83.04, and therefore has jurisdiction over this case. Article V, § 10, Missouri Constitution (as amended 1982).

¹ Section 566.034. All statutory references are to RSMo 2000 unless otherwise noted.

² Section 566.064.

³ Section 566.068.

STATEMENT OF FACTS

Defendant was indicted as a persistent offender in St. Louis City Circuit Court with seventeen counts of sexual offenses against his nieces, T.B. and R.C. (L.F. 28-31).⁴ In Counts I through XIII, Defendant was charged with sexual offenses against T.B. as follows: four counts of second-degree statutory rape (Counts I, V, VIII and X), four counts of second-degree statutory sodomy (Counts II, IV, VI, and XI), and five counts of second-degree child molestation (Counts III, VII, IX, XII, and XIII). Counts XIV through XVII charged Defendant with sexual offenses against R.C., as follows: one count of the Class C felony abuse of a child (photographing R.C. while she was nude) (Count XIV), two counts of second-degree statutory sodomy (Counts XV and XVII), and one count of second-degree statutory rape (Count XVI). Count IX, abuse of a child, was dismissed before trial. (Tr. 6; L.F. 69).

Before the case was submitted to the jury, the court found beyond a reasonable doubt that Defendant was a persistent offender. (Tr. 4, L.F. 315). From September 8 to September 9, 2009, Judge Bryan L. Hettenbach presided over a jury trial of the charges. (Tr. 2-4). Defendant contests the sufficiency of the evidence to support his conviction for Count I, which charged him with the second-degree statutory rape of T.B. in a moving truck. Viewed in the light most favorable to the verdicts, the evidence adduced at trial showed the following:

⁴ The record on appeal consists of a legal file (L.F.) and a trial transcript (Tr.).

During 2008, Defendant's great niece, T.B., was fourteen years of age. (Tr. 230-231). T.B. often spent time at Defendant's home with Defendant's teenage daughters. (Tr. 232). Sometimes, Defendant would pick T.B. up at her house and take her to his home where they would spend time alone. (Tr. 234). Defendant began to complement T.B. about her body, telling her "You getting [sic] thick."⁵ (Tr. 234).

Once, in Defendant's house in St. Louis County, Defendant pulled T.B.'s pants down, laid her on a bed, pulled his own pants down, and then got on top of her. (Tr. 235).

On a later occasion, Defendant was driving T.B. home in his moving truck.⁶ (Tr. 236-237). En route, Defendant told T.B. that he needed to stop by a fruit company in the City of St. Louis. (Tr. 236-237). After he parked the moving truck at the fruit company, Defendant instructed T.B. to pull her pants down, and he did the same. (Tr. 237). Defendant got on top of T.B. and began touching her breasts with his mouth. (Tr. 238). At Defendant's instruction, T.B. touched Defendant's penis. (Tr. 238). At trial, T.B. described what happened next:

⁵ "Thick" is a slang term referring to "[a] woman with a perfect body, filled-in in places that are, by nature, designed to attract the opposite sex." See *Urbandictionary.com*, thick definition, <http://www.urbandictionary.com/define.php?term=thick> (last visited August 24, 2010).

⁶ Defendant owned a moving truck for his business. (Tr. 236).

Then that's when he started doing it then. He had – that's when he started doing like kissing me and stuff, and then after that he told me to pull my pants back up and then he – I got back in the front and he took me to my house.

(Tr. 238). Upon further questioning, T.B. elaborated that she was lying on her back during the encounter, and that Defendant also touched her vagina with his mouth. (Tr. 239). The prosecutor asked, “After he touched his mouth to your vagina, did he touch you with any other parts of his body?” (Tr. 239). T.B. responded, “No.” (Tr. 239)

On another occasion, Defendant went over to T.B.'s house in the City of St. Louis, to find T.B. alone in her bedroom. (Tr. 240). Defendant asked T.B., “Do you want to do it,” and told her to pull her pants down. (Tr. 240). As T.B. lay on the bed, Defendant covered his penis in petroleum jelly and then inserted his penis into T.B.'s vagina. (Tr. 241). During this encounter, Defendant also penetrated T.B.'s vagina with his finger. (Tr. 241).

On another occasion, Defendant drove T.B. back to the same fruit company in the City of St. Louis where he had taken her before. (Tr. 243). Defendant parked his blue sports utility vehicle between two trucks, made sure no one was coming, and then instructed T.B. to pull down her pants. (Tr. 243). Defendant lay down, and T.B. got on top of him. (Tr. 244). Defendant penetrated T.B.'s vagina with his finger and touched her breasts. (Tr. 244). Defendant instructed T.B. to touch his penis with her hand and she complied. (Tr. 244). Defendant also inserted his penis into T.B.'s vagina. (Tr. 247).

On another occasion, Defendant and T.B. were alone at T.B.'s house in the City of St. Louis when Defendant told T.B., “Let's do it.” (Tr. 245). T.B. lay down on the carpet on her back. (Tr. 243). Defendant rubbed petroleum jelly on his penis before inserting it into

T.B.'s vagina. (Tr. 245). With his penis in her vagina, Defendant began kissing T.B. on the lips. (Tr. 246). Defendant also touched T.B.'s vagina with his hands. (Tr. 246).

During 2008, Defendant was also spending a good deal of time with another of his great nieces, fifteen-year-old R.C.⁷ (Tr. 277-279). Defendant also began to tell R.C. that she was getting "thick." (Tr. 281).

One evening R.C. was at Defendant's house when she asked him for a ride to a friend's house. (Tr. 282). After she visited with the friend for a while, Defendant returned to pick her up. (Tr. 282). Defendant took R.C. to a hotel in St. Louis City where he told her to take off her shirt. (Tr. 283). After R.C. removed her shirt and brassiere, Defendant took pictures of her breasts using the digital camera embedded in his cellular phone. (Tr. 283). R.C. put her shirt back on, and Defendant instructed her to remove her pants. (Tr. 284). Defendant took more pictures of R.C. when she was nude from the waist down. (Tr. 284).

When R.C. began to put her pants back on, Defendant instructed her to stop. (Tr. 284). Defendant walked R.C. towards the bed where he laid her down. (Tr. 284). Defendant asked R.C. if anyone had ever performed oral sex on her. (Tr. 285). Defendant knelt on the floor and performed oral sex on R.C. while masturbating. (Tr. 285-286). When Defendant finished, he and R.C. got dressed and left the hotel room. (Tr. 286). Defendant gave R.C. some money before they drove away from the hotel. (Tr. 286-287).

⁷ Although Defendant was acquitted of all charges relating to R.C., a recitation of these allegations is necessary to address claims that Defendant raises on appeal.

On another occasion, Defendant called R.C.'s mother and told her that he had a job for R.C. to do. (Tr. 288). Defendant and R.C. drove to R.C.'s aunt's home in St. Louis City, ostensibly to check on the house because the lights had gone off. (Tr. 289). As Defendant was checking on the house, R.C. was observing herself in a mirror. (Tr. 290). Defendant approached R.C. and told her that she had a nice body. (Tr. 290). Defendant laid R.C. down on the couch and told her to remove her pants. (Tr. 290). Defendant told R.C. that she owed him a favor before he began to perform oral sex on her. (Tr. 290).

Defendant told R.C. that he loved her and that he would never hurt her. (Tr. 291). Then Defendant climbed on top of R.C. and put his penis in her vagina. (Tr. 291). When Defendant finished, they dressed and went to a fast-food restaurant. (Tr. 292). Defendant ordered food and then gave R.C. fifty to seventy dollars. (Tr. 292).

At another point in the same year, R.C. was at Defendant's home, in St. Louis County, babysitting one of Defendant's granddaughters. (Tr. 294-296). Defendant came home to find R.C. in the basement using Defendant's computer. (Tr. 296). Defendant told R.C., "You owe me a favor." (Tr. 296). Defendant led R.C. into his daughter's room he performed oral sex on her. (Tr. 297). Then Defendant climbed on top of R.C. and placed his penis in her vagina. (Tr. 297).

After they put their clothes back on, Defendant wiped something off of the sheets. (Tr. 298). Then, Defendant gave R.C. a cellular phone that he had purchased for her. (Tr. 293-294, 296).

On another occasion in Defendant's home, Defendant asked R.C. if he could perform oral sex on her again, and then have vaginal sex. (Tr. 298-299). R.C. informed Defendant

that she was menstruating. (Tr. 299). Five minutes later, Defendant asked R.C. if he could rub her buttocks. (Tr. 299). R.C. pulled her pants down and Defendant grabbed her buttocks. (Tr. 299). Afterward, Defendant told R.C. that he loved her, and that she was his favorite niece as he gave her a bag of marijuana and some money. (Tr. 299-300).

On August 21, 2008, R.C.'s mother began to question R.C. as to why she, normally a straight "A" student, had begun to fail her classes. (Tr. 273). Her mother had also noticed that R.C.'s behavior had changed and that she had become withdrawn. (Tr. 273). R.C. told her mother that Defendant had been sexually abusing her. (Tr. 272, 301).

Defendant testified and denied touching T.B. or R.C. inappropriately and denied having had sex with them. (Tr. 320).

Before the case was submitted to the jury, the prosecutor dismissed Counts IV (second-degree statutory sodomy of T.B. at her home in the bedroom) VII (second-degree child molestation of T.B. at her home in the bedroom), and XIII (second-degree child molestation of T.B. in the S.U.V.). (Tr. 345; L.F. 70). When it instructed the jury, the trial court renumbered the thirteen remaining charges in the same sequence as they had been in the indictment. (Tr. 345-346; L.F. 78-90).

After the close of evidence and arguments, the jury found Defendant guilty of Counts I through X. (Tr. 97, 99, 101, 103, 105, 107, 109, 111, 113, 115, 117). The jury returned verdicts of not guilty on Counts XI, XII, and XIII. (Tr. 118, 120, 122). On October 29, 2009, Judge Hettenbach sentenced Defendant to concurrent prison terms of fifteen years on the second-degree statutory rape counts, Counts I, IV, VI, and XIII; one year jail terms in the City of St. Louis Medium Security institution for the misdemeanor second-degree child

molestation counts, Counts III, VII, and X, to be served concurrently with one another and with the sentences for the second-degree statutory rape counts; and five year terms of imprisonment for the second-degree statutory sodomy counts, Counts II, V, and IX to be served concurrently with each other but consecutive to the sentences for the statutory rape counts. (Tr. 413-415; L.F. 128-136).⁸

⁸ The singular discrepancy between the oral pronouncement of judgment and the written order is the subject of Defendant's third point on appeal and is addressed in Respondent's Point III.

ARGUMENT

I. (uncharged crimes)

The trial court did not abuse its discretion in admitting testimony that Defendant had given R.C. marijuana after he had sexual intercourse with her or that he had also committed sex crimes against T.B. and R.C. at other times which were not charged in the indictment because the evidence was relevant to demonstrate Defendant's motive and to provide a complete picture of crimes. Moreover, Defendant suffered no unfair prejudice as a result of this evidence.

Defendant argues that the trial court abused its discretion in admitting evidence of uncharged crimes. Specifically, Defendant claims as error the admission of T.B.'s testimony about the first time that Defendant touched her inappropriately, which occurred at Defendant's house in St. Louis County. (Tr. 235). There, Defendant pulled T.B.'s pants down before pulling his own pants down and getting on top of her. (Tr. 235). Defendant also claims as error the admission of R.C.'s testimony that, at Defendant's house in St. Louis County, she declined his request to have sex because she was menstrating. (Tr. 298-299). At Defendant's request, R.C. pulled down her pants so that Defendant could touch her buttocks. (Tr. 299). Then, Defendant gave R.C. some cash and a bag of marijuana. (Tr. 299). Because these acts were admitted to show Defendant's motive in committing his charged crimes, as well as to show a common scheme or plan, his point is without merit. Moreover, Defendant cannot demonstrate that he was prejudiced by the admission of this evidence.

A. Standard of Review

The standard of review for the admission of evidence is abuse of discretion. *State v. Reed*, 282 S.W.3d 835, 837 (Mo. banc 2009). Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *State v. Stephens*, 88 S.W.3d 876, 881 (Mo. App. W.D. 2002). For evidentiary error to cause reversal, prejudice must be demonstrated. *Reed*, 282 S.W.3d at 837.

B. General law.

“The ‘well-established general rule’ concerning the admission of evidence of prior criminal acts ‘is that proof of the commission of separate and distinct crimes is not admissible unless such proof has some legitimate tendency to directly establish the defendant's guilt of the charge for which he is on trial.’” *State v. Voorhees*, 248 S.W.3d 585, 587 (Mo. banc 2008) (citing *State v. Reese*, 274 S.W.2d 304, 307 (1954)). As a general rule, evidence of prior uncharged misconduct is inadmissible for the purpose of showing the propensity of the defendant to commit similar crimes. *State v. Bernard*, 849 S.W.2d 10, 13 (Mo. banc 1993). But there are a number of exceptions to the general ban on evidence of prior criminal acts. *Voorhees*, 248 S.W.3d at 587. “These exceptions ‘are as well established as the rule itself’ and include: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; and (5) the identity of the person charged with the commission of the crime on trial.” *Id.* Additionally, evidence of

part of the circumstances or the sequence of events surrounding the offense charged may be admissible “to present a complete and coherent picture of the events that transpired.” *State v. Harris*, 870 S.W.2d 798, 810 (Mo. banc 1994) (citations omitted).

Evidence of a defendant's prior misconduct “is admissible if the evidence is logically relevant, in that it has some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial, and if the evidence is legally relevant, in that its probative value outweighs its prejudicial effect.” *Bernard*, 849 S.W.2d at 13. *See also State v. Reese*, 274 S.W.2d 304, 307 (Mo. banc 1955) (“The acid test is [the other crime's] logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced”). In the context of determining the legal relevance of uncharged crimes evidence, prejudice is a function of whether the admission of this evidence would cause a jury to convict as to the charged crimes simply because the defendant had engaged in prior bad acts or crimes, regardless of the logically relevant evidence in the case. *State v. Williams*, 976 S.W.2d 1, 4 (Mo. App. W.D. 1998); *State v. Barriner*, 34 S.W.3d 139, 150 (Mo. banc 2000). The balancing of the probative value of the evidence against its prejudicial effect lies within the sound discretion of the trial court. *Bernard*, 849 S.W.2d at 13.

C. The trial court did not abuse its discretion in admitting evidence that Defendant committed sexual crimes against T.B. and R.C. for which he was not charged.

In Defendant’s case, the evidence that he had committed sexual crimes against T.B. and R.C. in his home in St. Louis County demonstrated his motive, which was to satisfy his sexual desire for T.B. and R.C., the ongoing sexual relationship that Defendant had with the girls, and a commons scheme or plan to continue to molest them and to discourage their

disclosure of his crimes.⁹ This Court has consistently held that where a defendant is charged with committing a sexual crime against a child, evidence of acts of sexual misconduct committed at other times by the defendant against the same victim is generally admissible. *State v. Schaal*, 806 S.W.2d 659, 664 (Mo. 1991); *State v. Graham*, 641 S.W.2d 102, 105 (Mo. banc 1982); *State v. Basque* 485 S.W.2d 35, 37 (Mo. 1972); *State v. Baker*, 300 S.W.699, 702 (Mo. 1927). The Missouri Court of Appeals has consistently applied this rule. *State v. Thurman*, 272 S.W.3d 489, 495 (Mo. App. E.D. 2008); *State v. Magouirk*, 890 S.W.2d 17, 17 (Mo. App. S.D. 1994); *State v. Robertson*, 816 S.W.2d 952, 954 (Mo. App. E.D. 1991); *State v. Douglas*, 797 S.W.2d 532, 533 (Mo. App. W.D. 1990). This Court has reasoned that such evidence tends to establish a motive, which is the satisfaction of the defendant's sexual desire for the victim. *Graham*, 641 S.W.2d at 105. This Court has also reasoned that prior acts of intercourse as well as sexual activity short of intercourse with the same victim shows the relationship between the parties and the probability that the parties committed the specific act charged. *Graham*, 641 S.W.2d at 105; *Basque*, 485 S.W.2d at 37. Similar reasoning is recognized in the state's rape-shield law, section 491.015, which permits the defendant to introduce evidence of prior sexual contact between the defendant and the victim where the defense is consent. *Childs v. State*, 314 S.W.3d 862, 866 (Mo. App. W.D.

⁹ The Court of Appeals, Eastern District, held that the other crimes were also admissible under the *modus operandi* corroboration exception, which this Court has previously held to violate the Missouri Constitution. *Voorhees*, 248 S.W.3d 587. Nevertheless, the crimes were admissible to prove Defendant's motive and a common scheme or plan.

2010). Implicit in the statute is a recognition that the fact that two parties had a sexual relationship on prior occasions is probative as to whether they had sexual intercourse or contact on a particular occasion.

Defendant's uncharged crimes against T.B. and R.C. demonstrated both his motive, a common scheme or plan, and were necessary to show his plan and preparation. The uncharged acts that Defendant committed regarding T.B. progressed from complimenting her on her budding secondary sexual characteristics, to removing her clothes and lying on top of her naked. (Tr. 234-235). From there, it progressed to the charged acts, of repeated vaginal and oral sex. (Tr. 236-246). Defendant's earlier acts demonstrated his desire for T.B., but it also demonstrated that he was grooming her to be a regular sexual partner. Moreover, the fact that T.B. did not resist or inform other adults when the inappropriate comments and behavior began, made it more likely that she would not resist when Defendant had sexual intercourse with her.

Likewise, Defendant's uncharged acts towards R.C. provided a complete picture of his crimes, and demonstrated a common scheme or plan. Although the evidence concerned a sexual act, asking R.C. to have sex and touching her buttocks, that occurred after the charged acts, the entire episode demonstrated Defendant's plan to have R.C. as a regular sexual partner and to avoid detection. (Tr. 299-300). The evidence showed that Defendant typically gave R.C. money or gifts after he had sex with her. (Tr. 292, 293-294, 296, 299-300). Defendant would then later tell R.C. that she "owed" him more sex because of the money that he had given her as a way of pressuring her to have sex with him again. (Tr. 296). This would have not only had the effect of making R.C. have sex with him out of a

sense of guilt or obligation, but also would have made R.C. less likely to reveal the sexual encounters to others out of a sense that, because Defendant paid her, she could also be blamed for the encounters. Defendant would have known that her shame and fear would increase if she accepted marijuana from him. (Tr. 299-300).

Thus, the single uncharged incident, during which Defendant rubbed R.C.'s buttock, and gave her marijuana and cash, was admissible to show his scheme to make R.C. feel complicit in the sexual activities so that she would be less likely to reveal the sexual relationship to others. The conduct of a defendant which tends to show consciousness of guilt or a desire to conceal are admissible because it tends to show the defendant's guilt of the charged crime. *State v. Barton*, 998 S.W.2d 19, 28 (Mo. banc 1999). Moreover, defense counsel tried to discredit both girls by cross-examining them on why they took so long to disclose Defendant's crimes to their mothers. (Tr. 251, 305-306). The evidence of the other crimes was admitted to demonstrate Defendant's efforts to slowly acclimate T.B. to increasingly sexual behavior and to make R.C. feel complicit in his crimes so as to reduce the chances that they would disclose his crimes.

Defendant asks this Court to reconsider the rule that sexual conduct towards the victim is admissible to demonstrate the defendant's motive. But under the doctrine of *stare decisis*, a decision of this Court should not be lightly overruled, particularly where the opinion has remained unchanged for many years and is not clearly erroneous and manifestly wrong. *Eighty Hundred Clayton Corp. v. Director of Revenue*, 111 S.W.3d 409, 411, n. 3 (Mo. banc 2003) (citing *Southwestern Bell Yellow Pages, Inc. v. Director of Revenue*, 94 S.W.3d 388, 391 (Mo. banc 2002)). Furthermore, this Court reconsidered this rule as

recently as 1982 and “reaffirm[ed] its efficacy.” *Graham*, 641 S.W.2d at 105. Defendant has not demonstrated that the court’s reasoning in *Graham* was clearly erroneous or manifestly wrong.

The specific holding in *Graham*, that uncharged acts of sexual abuse against the same child victim are admissible to prove motive, is consistent with opinions from an overwhelming majority of other jurisdictions. In federal court, the issue is governed by Federal Rule of Evidence 414, which broadly permits the use of prior crimes evidence in cases involving the sexual abuse of a child:

In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant’s commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

F.R.E. 414(a). “This rule allows the prosecution to use evidence of a defendant's prior acts for the purpose of demonstrating to the jury that the defendant had a disposition of character, or propensity, to commit child molestation.”¹⁰ *U.S. v. Castillo*, 140 F.3d 874, 879 (10th Cir. 1998); *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1268 (9th Cir.2000); *U.S. v. Larson*, 112 F.3d 600, 604 (2d Cir. 1997). Because Federal Rule of Evidence 414 permits

¹⁰ Federal Rule of Evidence 414 has withstood constitutional attacks on claimed violations of due process, equal protection, and even cruel and unusual punishment. *Castillo*, 140 F.3d at 880, 883, 884; *U.S. v. LeMay*, 260 F.3d 1018, 1027 (9th Cir. 2001); *see also U.S. v. Mound*, 149 F.3d 799, 801 (8th Cir. 1998) (finding similar Rule 413 to not violate due process).

the use of such evidence to prove the defendant's propensity to commit certain crimes, it is a more liberal rule of admission of prior crimes evidence than the one set forth by this Court in *State v. Ellison*, 239 S.W.3d 603 (2007), and *Voorhees*, 248 S.W.3d at 587-588.

At least 20 states permit the use of uncharged acts in child-sex cases, regardless of whether it is the same or a different victim to prove either that the defendant had a similar motive to molest children, or to prove that the defendant had a propensity to molest children. *Campbell v. State*, 718 So.2d 123, 129 (Ala. Crim. App. 1997) (evidence of prior sexual crimes against victims with whom the defendant shared a similar relationship was admissible to prove defendant's motive in charged crime); Alaska Rule of Evidence 404(b)(4) (permits the admission of offenses against the same or different victim in cases involving the sexual assault or abuse of a minor); *State v. Roscoe*, 491, 910 P.2d 635, 642 (Ariz. 1996) (other bad acts involving sexual aberration are admissible to show defendant's propensity to commit similar crime); *People v. Falsetta*, 89 Cal. Rptr. 2d 847, 854 (Cal. 1999) (evidence of other sexual misconduct admissible to demonstrate defendant's disposition to commit sex crimes; such evidence does not violate due process); *People v. Snyder*, 874 P.2d 1076, 1079 (Colo. 1994) (evidence of later sexual abuse against same victim demonstrated overall plan to win trust of child, and defendant's "intent" to molest child); *People v. Villa*, 240 P.3d 343, 350 (Colo. App. 2009) (evidence that the defendant molested other children increased the probability that he had the intent to commit the charged crime); *State v. Gupta*, 297 Conn. 211, 224 (Conn. 2010) (prior sex crimes admissible to show defendant's propensity if they are close in time, involve similar circumstances, and were against victims similar to prosecuting witness); *McLean v. State*, 934 So.2d 1248, 1263 (Fla. 2006) (although evidence

of uncharged crimes violates due process when it is so prejudicial that it deprives the defendant of a fair trial, the admission of other crimes evidence under court rule modeled on F.R.E. 414 “does not violate due process when applied in a case in which the identity of the defendant is not an issue and the provision is used to admit evidence to corroborate the alleged victim’s testimony”); *Brown v. State*, 620 S.E.2d 394, 398 (Ga. App. 2005) (“In crimes involving sexual offenses, evidence of similar previous transactions is admissible to show the lustful disposition of the defendant and to corroborate the victim’s testimony.”); *People v. Donoho*, 788 N.E.2d 707, 717-718 (Ill. 2003) (statute permitting use of prior sex crimes to prove propensity does not violate equal protection or due process); Ind. Code Ann. § 35-37-4-15 (Michie 1998); *Martin v. Com.*, 170 S.W.3d 374, 380 (Ky. 2005) (*modus operandi* evidence admissible to show either: (1) the acts were committed by the same person, or (2) the acts were accompanied by the same *mens rea*; *modus operandi* evidence was properly used to establish the defendant’s motive for sexual gratification); *State v. Duke*, 625 So.2d 325, 331-332 (La. App. 3 Cir. 1993) (*modus operandi* evidence used to show that the defendant’s actions were neither accidental nor coincidental – it appears that the defense at trial was denial that the events occurred, not a denial of mal-intent); *State v. Ness*, 707 N.W.2d 676, 688 (Minn. 2006) (prior sexual misconduct against children other than the victim relevant to establish credibility of the victim under the common scheme or plan exception very similar to discussion of *modus operandi* corroboration exception rejected by *Voorhees*); *Derouen v. State*, 994 So.2d 748 (Miss. 2008) (no longer *per se* error to admit evidence of sexual crimes against children other than the victim); *State v. Stephens*, 466 N.W.2d 781, 785 (Neb. 1991). (evidence of other similar sexual conduct has independent

relevancy and may be admissible whether that conduct involved the complaining witness or third parties); *State v. Coningford*, 901 A.2d 623, 629 (R.I. 2006) (evidence of other crimes in child-sex case admissible to establish the defendant's intent of satisfying his own sexual gratification even though intent not challenged at trial); *State v. Bradley*, 57 P.3d 1139, 1146 (Utah App. 2002) ("evidence of prior acts of child abuse committed by the defendant against children other than the victim could be admissible to show intent" – even where defense was general denial of the acts); *State v. Rash*, 97 S.E.2d 71, 81 (W. Va. 2010) (collateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse to show the defendant had a lustful disposition towards the victim, or a lustful disposition toward children generally provided such evidence relates to incidents reasonably close in time to the incident(s) giving rise to the indictment); *State v. Davidson*, 613 N.W.2d 606, 617 (Wis. 2000) (Wisconsin courts permit a more liberal admission of other crimes evidence in sexual-assault cases, particularly those involving children, than in other cases; evidence of crimes against other victims are admissible to show the defendant's motive and, where the facts are sufficiently similar, to show a modus operandi); *Wease v. State*, 170 P.3d 94, 110 (Wyo. 2007) (similar sexual misconduct by the defendant generally admissible to prove the defendant's motive and intent and to corroborate the victims' testimony; where where it involved the same victims, it also demonstrated the natural progression of the events, the course of conduct, and defendant's patterns of conduct with the alleged victims; where a defendant denied any wrongdoing, such evidence goes to motive and intent).

Arkansas courts limited the admission of such evidence in child-sexual abuse cases to abuse against the same victim, or to other victims living in the same household as defendant

in cases involving incest. *Parish v. State*, 163 S.W.3d 843, 847 (Ark. 2004) (“When the alleged crime is child abuse or incest, we have approved allowing evidence of similar acts with the same or other children in the same household when it is helpful in showing a proclivity for a specific act with a person or class of persons with whom the defendant has an intimate relationship.”); *Hyatt v. State*, 975 S.W.2d 443, 444 (Ark. App. 1998) (prior acts committed against same victim demonstrate not only “depraved sexual instinct” of the defendant, but also familiarity between the parties, the antecedent conduct, and to corroborate the victim’s testimony).

At least 10 more states, in addition to Missouri, permit the introduction of uncharged sexual acts against the same victim on the basis that it demonstrates the defendant’s sexual desire for the victim, the relationship between the parties, or to corroborate the testimony of the victim. *State v. Moore*, 748 P.2d 833, 838 (Kan. 1987) (evidence of prior sexual relations between defendant and victim was admissible to establish relationship of parties, existence of continuing course of conduct, and to corroborate testimony of victim as to acts charged.) (disapproved on other grounds by *Carmichael v. State*, 872 P.2d 240, 245 (Kan. 1994)); *State v. Cox*, 781 N.W.2d 757, 762 (Iowa 2010) (prior sexual abuse admissible “to show a passion or propensity for illicit sexual relations with the particular person concerned in a criminal trial”); *Acuna v. State*, 629 A.2d 1233, 1236 (Md. 1993) (prior sexual crimes admissible to demonstrate lustful disposition only towards the same person); *Com. v. Clayton (No. 1)*, 827 N.E.2d 1273, 1278 (Mass. 2005) (prior sexual abuse of victim highly probative of defendant’s sexualized contact with the victim and his desire for her); *State v. Hicks*, 441 So.2d 1359, 1361 (Miss. 1983) (evidence of prior sexual crimes against same victim

admissible to show defendant's lustful disposition towards same) (*partially overruled by Derouen v. State*, 994 So.2d 748, 756 (Miss. 2008) (no longer *per se* error to admit evidence of sexual crimes against children other than the victim)); *State v. Arnold*, 333 S.E.2d 34, 37, (N.C. 1985) (evidence of similar sexual crimes against same victim demonstrates common scheme or plan); *Goodson v. State*, 354 P.2d 472, 474 (Okla. Cr. App. 1960) (in prosecution for statutory rape, evidence of other acts of intercourse was admissible for purpose of corroboration and as showing relation between the parties); *State v. McKay*, 787 P.2d 479, 480 (1990) (evidence of other similar criminal acts with the same child is admissible to show the specific sexual predisposition of the defendant towards that child); *Com. v. Knowles*, 637 A.2d 331, 333 (Pa. Super. Ct. 1994) (evidence of prior sexual relations between defendant and victim admissible to show passion or propensity for illicit sexual relations with victim); *Phelps v. State*, 5 S.W.3d 788, 797 (Tex. Ct. App. 1999) (prior sexual acts between the defendant and victim admitted under statute and showed why victim did not resist; admission of the evidence did not violate due process); *Ortiz v. Com.*, 667 S.E.2d 751, 757, (Va. 2008) (other crimes evidence is admissible when it "shows the conduct or attitude of the accused toward his victim, establishes the relationship between the parties, or negates the possibility of accident or mistake).

Thus, the overwhelming majority of states permit the use of uncharged sexual acts against the same child victim to demonstrate the defendant's motive and the relationship between the parties. In this regard, this Court's holding in *Graham* is in line with the federal courts and the majority of state courts. The list of jurisdictions that restrict the use of uncharged acts against the same victim to demonstrate the defendant's sexual desire for that

victim is short. Tennessee permits the use of uncharged sex crimes against children only when the indictment is not time specific and when the evidence relates to sex crimes that allegedly occurred during the time as charged in the indictment. *State v. Rickman*, 876 S.W.2d 824, 828-829 (Tenn. 1994). In *Getz v. State*, 538 A.2d 726, 733-34 (Del. 1988), the Delaware Supreme Court held that such acts are only admissible to prove an issue that has been contested by the defendant and a general plea of not guilty does not place the defendant's motive into issue. *Id.* The Delaware Supreme Court's holding in *Getz* that a not guilty plea does not place the defendant's motive into issue is in direct conflict with this Court's holding in *State v. Shurn*, 866 S.W.2d 447, 457 (Mo. banc 1993). Moreover, in a more recent case, the Delaware Supreme Court has approved the admission of prior sexual acts against the same victim to prove the defendant's intent and plan to molest the child while her mother was away from home, even though the defense was a denial that any such act happened. *Trump v. State*, 753 A.2d 963, 971-972 (Del. 2000).

In support of his argument that the rule should be reconsidered, Defendant cites to *State v. Batiste*, 264 S.W.3d 648, 649 (Mo. App. W.D. 2008). In *Batiste*, the defendant was charged with abusing his girlfriend's three-year-old son by striking his buttocks with a wooden board because he had misbehaved at daycare. *Id.* at 649. To prove motive, the state also presented substantial evidence, including medical testimony, that a month before the charged incident, the defendant whipped the boy with a belt, and an extension cord, and fractured the boy's arm. *Id.* The Court of Appeals took a narrow view of the concept of motive, holding that the evidence of the earlier abuse did not explain why the defendant abused the victim on the day in question. *Id.*

To the extent that *Batiste* defines “motive” so narrowly, it should not be followed or expanded beyond its own facts. First, *Batiste* is inconsistent with this Court’s prior pronouncement that prior acts of violence against the victim are admissible to show the defendant was motivated by animus towards the victim. *State v. Bolden*, 494 S.W.2d 61, 802 (Mo. 1973). Implicit in the court’s ruling in *Bolden*, is a recognition that in a prior act of violence against the same victim, the defendant has a similar motive, to harm the victim, as he does in the charged crime. The holding of *Batiste* seems to be that the prior crime only shows motive if the defendant committed the second crime because of the first crime. But *Bolden* permits the introduction of the uncharged crime if the defendant had the same motive in the uncharged crime as the charged crime.

Second, to the extent that the same or similar motive was lacking in *Batiste*, it is not clear that it will typically be lacking in child-sex cases. While the defendant in *Batiste* obviously had an ongoing animus towards the child, each act of abuse seemed to be participated by different circumstances. However, In Defendant’s case, as will be the case in most sex cases, Defendant’s crimes were not a reaction to circumstances, but required planning, waiting, and preparation. Each of Defendant’s acts were connected and intended to cause the next act to be easier to accomplish and the previous acts to be more concealed. Thus *Batiste*, which did not consider a common scheme or plan or other exceptions to uncharged crimes evidence is not helpful to crimes involving sexual crimes against children.

D. Defendant was not unfairly prejudiced by the admission of the uncharged acts.

This evidence’s relevance also greatly outweighed any risk of unfair prejudice, which was minimal at worst. In instances where uncharged crimes are admitted at trial, “prejudice

is a function of whether the admission of this evidence would cause a jury to convict as to the charged crimes simply because the defendant had engaged in prior bad acts or crimes, regardless of the logically relevant evidence in the case. *Williams*, 976 S.W.2d at 4; *Barriner*, 34 S.W.3d at 150. As there was no physical evidence in Defendant's case, the jury was effectively asked to choose between the victims' allegations and Defendant's denial of wrongdoing. Because the victims' testimony that Defendant committed sexual offenses against them at his home in St. Louis County was not independently corroborated, it was neither more nor less credible than the testimony about the charged offenses. Therefore, there was no reasonable likelihood that the evidence about the St. Louis County offenses caused the jury to find Defendant guilty of the charged offenses without regard to the direct evidence of those charges.

Moreover, the record demonstrates that the evidence of uncharged sexual offenses did not convince the jury to convict Defendant without regard to the strength or weakness of the direct evidence of the charged offenses. Although the state presented direct testimony that Defendant committed the charged offenses against R.C., the jury acquitted Defendant of those charges. (L.F. 88-90, 118, 120, 122). The fact that Defendant was found not guilty of the charges against R.C. despite her testimony about uncharged offenses demonstrates that the jury did not disregard the evidence about the charged offenses and find Defendant guilty because of the testimony about the uncharged offenses.

Furthermore, the record conclusively shows that Defendant was not prejudiced by the introduction of the evidence that he gave R.C. marijuana for two reasons. First, the state used the evidence in closing only to explain why the girls did not immediately disclose the

abuse. (Tr. 386). The prosecutor did not urge the jury to conclude that the fact that Defendant gave R.C. marijuana showed that he had a general propensity to commit crimes.

Second, and most conclusively, Defendant was not prejudiced by R.C.'s testimony that Defendant gave her marijuana after committing sexual offenses against her because the jury found Defendant not guilty of committing those same sexual offenses. (L.F. 88-90, 118, 120, 122). The only evidence that Defendant gave R.C. marijuana was R.C.'s testimony. Likewise, the only evidence admitted at trial that Defendant committed sexual offenses against R.C. was R.C.'s testimony. Consequently, it would be illogical to assume that the jury believed R.C.'s testimony about the marijuana. Thus, Defendant cannot demonstrate that this evidence caused the jury to convict him of the sexual offenses against T.B. without regard to the evidence of those crimes.

The evidence of Defendant's uncharged sexual crimes against the victims and the evidence that he gave marijuana to R.C. was probative as to his motive and admissible to show a complete and coherent picture of his crimes. Moreover, he cannot show that he suffered unfair prejudice by the admission of this evidence. His point is without merit and should be denied.

II. (sufficiency of the evidence: statutory rape)

The trial court did not err in overruling Defendant's motions for judgment of acquittal and in entering judgment and sentence on the jury's verdict of guilty on the charge of second-degree statutory rape because the evidence was sufficient to establish beyond a reasonable doubt that Defendant had sexual intercourse with T.B. who was then less than seventeen years old, in a moving truck.

Defendant was accused of committing multiple sexual offenses during each of four separate illicit sexual encounters with T.B. (L.F. 28-31). Because T.B. could not recall the exact date of each encounter, Defendant's crimes were distinguished in the indictment by reference to the locations where the four sexual episodes took place: a moving truck, Defendant's SUV, a bedroom in T.B.'s home, and the dining room in T.B.'s home. (L.F. 28-31).

Defendant challenges the sufficiency of the evidence to support Count I which charged him with second-degree statutory rape of T.B. in the moving truck. Specifically, Defendant claims that the evidence was insufficient to prove that he had sexual intercourse with T.B. during that episode. Because the state provided evidence to prove that Defendant had sexual intercourse with T.B. in the moving truck, his claim is without merit.

A. Standard of Review

When a criminal defendant challenges the sufficiency of the evidence to support his conviction, appellate review is limited to a determination of whether sufficient evidence exists from which a reasonable juror could have found the defendant guilty beyond a reasonable doubt. *State v. Oliver*, 293 S.W.2d 437, 444 (Mo. banc 2009). Furthermore,

when assessing a challenge to the sufficiency of the evidence, the court must accept as true all of the evidence favorable to the state, including all favorable inferences drawn therefrom, and disregard all evidence and inferences to the contrary. *Id.* The credibility and the effects of conflicts or inconsistencies in testimony are questions for the jury, and the appellate court will not interfere with the jury's role of weighing the credibility of witnesses. *State v. Coleman*, 263 S.W.3d 680, 683 (Mo. App. S.D. 2008). The appellate court does not act as a "super juror" with veto powers, but gives great deference to the finder of fact. *State v. Chaney*, 967 S.W.2d 47, 52 (Mo. banc 1998).

B. The evidence was sufficient to prove that Defendant had sexual intercourse with T.B. in the moving truck.

In Count I, Defendant was charged with second-degree statutory rape in violated of section 566.034, which provides:

A person commits the crime of statutory rape in the second degree if being twenty-one years of age or older, he has sexual intercourse with another person who is less than seventeen years of age.

§ 566.034, RSMo 2000. Count I (along with Counts II and III) related to acts which occurred in Defendant's moving truck. (L.F. 28). On appeal, Defendant does not dispute that, during the time alleged, he was older than twenty-one years of age and that T.B. was less than seventeen years of age. Defendant contests only the sufficiency of the evidence to prove that he had sexual intercourse with T.B. in the moving truck. See App. Br. 16.¹¹

Sexual intercourse is define as “any penetration, however slight, of the female sex organ by the male sex organ, whether or not an emission results.” § 566.010(4), RSMo Cum. Supp. 2006. The state presented evidence which, taken together with the reasonable inferences therefrom, enabled a reasonable juror to conclude that Defendant had sexual

¹¹ Defendant also concedes that the state presented evidence that he had deviate sexual intercourse and sexual contact with T.B. in the moving truck to support his convictions for Counts II (second-degree statutory sodomy) and III, (second-degree child molestation) respectively. See App. Br. 16.

intercourse with T.B. in the moving truck. Proof of penetration may be shown by direct or circumstantial evidence and slight proof of penetration is sufficient. *State v. Hill*, 808 S.W.2d 882, 890 (Mo. App. E.D. 1991).

During her testimony regarding the episode in the moving truck, T.B testified that Defendant instructed her to remove her pants and underwear. (Tr. 238). T.B. was lying on her back, and Defendant got on top of her and started touching her breasts with his mouth. (Tr. 238). Then Defendant instructed T.B. to touch his penis. (Tr. 238). T.B. was asked what happened after she touched Defendant's penis, and she responded:

That's when he started doing it then. He had --, that's when he started like kissing me and stuff.

(Tr. 239). There are several reasons to infer that when T.B. testified that Defendant was "doing it," that she was referring to sexual intercourse.

First, "doing it" is commonly used slang for sexual intercourse. *See* MARK ROGET AND JOHN BARTLETT, BARTLETT'S ROGET'S THESAURUS, (1st ed. 1996).

Second, when T.B. testified about other times that Defendant had sexual intercourse with her, she first described sexual intercourse as "doing it" before elaborating that Defendant penetrated her vagina with his penis. (Tr. 240-241, 245). In fact, T.B. testified that Defendant used the term; the episode that occurred in her bedroom began when Defendant asked T.B., "Do you want to do it?" (Tr. 240). When T.B. obeyed Defendant's command to remove her pants and lie down, Defendant immediately responded by lubricating his penis with petroleum jelly and inserting it into T.B.'s vagina. (Tr. 240-241). The episode in the dining room of T.B.'s home began when Defendant instructed her, "Let's

do it.” (Tr. 245). Again, after T.B. removed her clothes and lay down, Defendant lubricated his penis and inserted it into her vagina. (Tr. 245). Thus, the reasonable inference from T.B.’s testimony that Defendant started “doing it” to her in the moving truck is that Defendant penetrated her vagina with his penis.

Third, T.B.’s testimony about the moving-truck episode demonstrates that when she referred to “doing it,” she was referring to vaginal penetration. T.B. had already described the other sexual contact that Defendant had made with her which began with placing his mouth on her breasts and progressed to having T.B. touch his penis with her hands. (Tr. 237-238). When T.B. recounted that next, Defendant “started doing it,” she was describing an escalation of the sexual encounter, with a phrase that, as noted above, she used to describe vaginal penetration. (Tr. 238). T.B. testified that Defendant then touched her vagina with his mouth. (Tr. 239). A reasonable jury could have concluded that the encounter proceeded from Defendant kissing her breasts, to T.B. manually stimulating his penis, to sexual intercourse, to Defendant performing oral sex on T.B. T.B.’s statement that Defendant did not touch her with any other parts of his body after he touched his mouth to her vagina did not demonstrate that penetration did not take place, but only that it did not take place after the oral sex.

The victim’s description was sufficient to submit the case to the jury because “[t]here is no magical word to describe penetration.” *State v. Elmore*, 723 S.W.2d 418, 420 (Mo. App. W.D. 1986). There was sufficient evidence, taken together with the reasonable inferences therefrom, to prove that Defendant had sexual intercourse with T.B. in the moving

truck. The trial court did not err in submitting this case to the jury and Defendant's point should be denied.

III. (sentence)

The written judgment contains a clerical error that should be corrected with a *nunc pro tunc* order as provided for in Rule 29.12(c).

Defendant correctly points out that the written judgment in this case contains an error. In its oral pronouncement of sentence, the trial court sentenced Defendant to a one-year term of incarceration in the City of St. Louis Medium Security Institution on Count X, and ordered that his sentence for this charge would be served *concurrently with* the sentences for Counts I, III, IV, VI, VII, and VIII. (Tr. 413-414). The written judgment states, however, that the sentence for Count X is to be served *consecutively to* the sentences for Counts I, III, IV, VI, VII, and VIII. “Because a judgment derives its force from the rendition of the court’s judicial act and not from the ministerial act of its entry upon the record, an oral sentence generally controls over an inconsistent writing.” *State v. McGee*, 284 S.W.3d 690, 712 (Mo. App. E.D. 2008). This clerical error should be corrected with a *nunc pro tunc* order as provided for in Rule 29.12(c). *See id.*; *see also State v. Yung*, 246 S.W.3d 547, 556 (Mo. App. S.D. 2008).

CONCLUSION

The written judgment should be corrected to reflect the oral pronouncement of sentence. The trial court committed no other reversible error in this case. Defendant's convictions and sentences should otherwise be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 8949 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2007 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 this 7th day of April, 2011, to:

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APPENDIX

Sentence and Judgment	A1
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