

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

STATE OF MISSOURI,)
)
 Respondent,)
)
 v.) ED No. 89969
)
 MIKE PERRY,)
)
 Appellant.)

APPEAL TO THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT FROM THE CIRCUIT COURT
OF THE CITY OF ST. LOUIS, MISSOURI
DIVISION NUMBER 8
BEFORE THE HONORABLE STEVEN R. OHMER,
JUDGE AT JURY TRIAL AND SENTENCING

APPELLANT'S STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

The State charged Appellant Mike Perry with Count 1 of child molestation in the first degree in violation of § 566.067. On April 26, 2007, a jury found Mr. Perry guilty. On June 29, 2007, the Honorable Steven R. Ohmer sentenced Mr. Perry to seven years in the Missouri Department of Corrections. On July 9, 2007, Mr. Perry timely filed his notice of appeal.

As this appeal does not involve any of the categories reserved for exclusive jurisdiction of the Missouri Supreme Court, the Missouri Court of Appeals of the Eastern District has jurisdiction. Mo. Const., Art. 5, § 3 (as amended 1982); § 477.050. All statutory references are to RSMo 2000 unless otherwise stated.

STATEMENT OF FACTS

Appellant Mike Perry (Mr. Perry) will cite to the appellate record as follows: Trial Transcript, “(Tr.)”; Sentencing Transcript, “(S. Tr.)”; and, Legal File, “(L.F.)” Mr. Perry states the following facts and will cite other facts as necessary in the argument portion of his brief.

Raimiella Zahid, a former New Yorker, moved to St. Louis, Missouri with her fiancé, Mr. Kenneth Robinson, after he finished his tour in the Navy (Tr. 364-365, 385). In May of 2005, Ms. Zahid, Mr. Robinson, and Ms. Zahid’s six-year-old daughter, N.M., and baby boy, K.J., took up residence in an apartment at 1911 Senate (Tr. 331-332, 364, 386).

They had been at the address for a few weeks when Mr. Robinson ran into an old childhood friend, Mike Perry (Tr. 368, 386-387, 398). He had known Mr. Perry for twenty years and to help Mr. Perry “get on his feet,” Mr. Robinson arranged to have Mr. Perry move into the apartment with them (Tr. 368-369). Ms. Zahid did not know Mr. Perry that well (Tr. 390-391). She was not happy about the arrangement and she did not like Mr. Perry as a person (Tr. 368-369, 378).

Mr. Perry moved into their two bedroom apartment over Ms. Zahid’s objection and slept on the living room couch (Tr. 332, 368-369, 393). He paid bills and bought his own food (Tr. 387-388). He picked up behind himself and he

babysat the kids while Ms. Zahid was at work (Tr. 346, 370, 388, 390, 396, 421).

But Ms. Zahid wanted Mr. Perry out of her home (Tr. 392, 402-403, 428-429).

One night, Ms. Zahid heard N.M. up past her bedtime and opened her bedroom door to find N.M. stretched out on the floor watching television (Tr. 372, 396). Ms. Zahid and Mr. Robinson were in bed and N.M. should have been in bed too (Tr. 371-372).

Ms. Zahid called N.M. to her bedroom to talk, but Mr. Robinson told Ms. Zahid that he wanted to talk to N.M. alone (Tr. 373). Ms. Zahid pressed her ear against the door and listened to their conversation (Tr. 374). When she overheard N.M. tell Mr. Robinson "something about touching," she took over the conversation (Tr. 374, 404). She asked N.M. what was going on and N.M. said Mr. Perry "had touched her vagina with his foot" (Tr. 375, 404).

Ms. Zahid looked at Mr. Robinson and said Mr. Perry had to go right then (Tr. 375, 405). Mr. Robinson and Ms. Zahid argued over what to do, but Mr. Robinson eventually said that Mr. Perry could stay (Tr. 376). N.M., like any child, had told lies to get out of trouble in the past and she had behavioral problems for which they had disciplined her (Tr. 399-401). They did not know what to believe and did not want to believe it (Tr. 417, 423, 427). Neither of them called the police (Tr. 405).

Two weeks later on October 7, 2005, Ms. Zahid argued with Mr. Perry and told him that he had to leave (Tr. 378, 406). She did not feel that he had respect for her home, or that he cared about his relationship with Mr. Robinson (Tr. 379). When Mr. Robinson affirmed Ms. Zahid's decision, Mr. Perry left the home without gathering his belongings and Ms. Zahid threw his clothes in the garbage (Tr. 380, 406, 408).

The next day, October 8, 2005, Mr. Perry returned to the apartment for his clothes, but Mr. Robinson would not let him inside (Tr. 380-381). Mr. Robinson told Mr. Perry where his clothes were and began arguing outside with him (Tr. 380-381). Ms. Zahid also walked outside with a knife and told Mr. Perry he needed to go before she did something to harm him (Tr. 381, 408).

Ms. Zahid was "quite enraged" and she knew there "was no way that [she could] go back to that" (Tr. 381, 409). She decided that they could not resolve the issue with a "regular argument" (Tr. 381). So, she put the knife back into the drawer and dialed 911 (Tr. 381). She told the police that "there was a man at [her] house that had molested [her] daughter and they needed to come and get him" (Tr. 382).

Police took Ms. Zahid, N.M., and Mr. Perry to police headquarters where Detective Georgia Beene interviewed N.M. and Ms. Zahid (Tr. 382, 434, 436).

After the interview, Detective Beene told them to go to Children's Hospital and Children's Advocacy Center (Tr. 435-436, 444, 460).

Next, Detective Beene read Mr. Perry his rights and interrogated him (Tr. 438-439). Mr. Perry told Detective Beene that he was sitting on one end of the sofa with the baby when N.M. came to lie down on the sofa with them (Tr. 441, 461-462). He said that N.M.'s movement, up and down on his foot, awakened him from sleep (Tr. 442). He stated that he told N.M. in a stern voice, "I'm going to tell your father what you were doing when he gets home," and that N.M. walked back toward her room with her blanket (Tr. 442).

Mr. Perry said that when Mr. Robinson returned home at noon, he told him what N.M. had done (Tr. 443). He said Mr. Robinson responded "as though he wasn't really hearing what [Mr. Perry] was saying and then later . . . responded by saying that he would look into it" (Tr. 443). He stated that after Ms. Zahid found out what had occurred, she asked him to leave and that he was at the apartment to retrieve his belongings when the police arrived (Tr. 444).

Detective Beene neither audiotaped nor videotaped Mr. Perry's statement and according to Detective Beene, Mr. Perry refused to put his statement in writing (Tr. 442-443). Detective Beene arrested Mr. Perry (Tr. 444).

A month later, on November 14, 2005, Luzette Woods at the Children's Advocacy Center interviewed N.M. (Tr. 479). N.M. told Ms. Woods that she did

not know the difference between a lie and the truth (Tr. 491; State's Exhibit #1). Also, when Ms. Woods initially asked N.M. if anyone had touched her, she clapped her hand over her mouth and said that she wasn't supposed to tell family business (Tr. 491, 493, 505, 507; State's Exhibit #1).

Then, she said only her mother did that when she washed her up (Tr. 493; State's Exhibit #1). She said no one else had touched her in her private parts (Tr. 494, 503; State's Exhibit #1). She said that no one had touched her with their body parts, and that no one had ever asked her to do something to one of their body parts, but Ms. Woods was not satisfied with the answers (Tr. 494-496, 498; State's Exhibit #1).

Before the end of their thirty-four minute interview, N.M. told Ms. Woods that Mr. Perry had touched her vagina with his foot and showed Ms. Woods how he moved his foot in a circular motion (Tr. 481, 487; State's Exhibit #1). N.M. also told Ms. Woods that Mr. Perry had rubbed his butt on her (Tr. 486-487; State's Exhibit #1).

The State charged Mr. Perry with child molestation in the first degree (Tr. 444; L.F. 11). The State tried Mr. Perry on the charges from April 23, 2007 through April 26, 2007 (L.F. 5-6).

By the time of trial, N.M. was an eight-year-old first-grader (Tr. 329). She told the jury that Mr. Perry had done something to her that she did not like (Tr.

333). But when asked if she could say what Mr. Perry did to her that she did not like, she shook her head (Tr. 333). When asked a second time, she had no response at all and cried (Tr. 335).

After obtaining a glass of water, N.M. testified about playing word puzzles, doing homework, watching television, her favorite television show, "That's So Raven," her favorite color, pink, her room assignments, and helping with her new baby brother, but she would not testify about what Mr. Perry had done (Tr. 337-339). She said only that Mr. Perry "was being inappropriate" (Tr. 339). When asked if she could articulate what Mr. Perry had done, she shook her head (Tr. 339). When asked if she could tell the jury what made her feel uncomfortable, she said "no" and asked for a break (Tr. 340).

After the break, N.M. was more communicative (Tr. 342). She told the jury that Mr. Perry and K.J. were lying on one side of the couch in the living room and she was lying on the other side in her pink nightgown (Tr. 342, 345). But she said she "did not know" if she could say what had made her feel uncomfortable or horrible (Tr. 344-345). She said it was hard to say, and that she did not know if she wanted to try to tell the jury (Tr. 342).

Eventually, she informed the jury that Mr. Perry had put his foot under her nightgown (Tr. 348). But when asked what Mr. Perry had done with his foot, she said, "I don't want to say" (Tr. 348). She also stated that she did not tell her

mom and dad what Mr. Perry had done right away and waited until the next day (Tr. 345, 360). She did not know why (Tr. 345).

According to N.M., Mr. Perry had also done something that she did not like on another day (Tr. 346). She said that she was lying on her bed, watching television when Mr. Perry came into the room and sat on her stomach (Tr. 346). She said he kept rolling around on her stomach, making her feel horrible (Tr. 346-347).

The defense called Officer John Clobes to testify that Mr. Perry was the first person to call police after the argument at the apartment on October 8, 2005, and the public defender investigator to testify that in a deposition on April 18, 2007, N.M. said Mr. Perry was asleep when he moved his foot on her private parts (Tr. 529-530, 535). The defense also called Mr. Perry's childhood friend, Mr. Robinson (Tr. 537).

Mr. Robinson said Mr. Perry had approached him about N.M.'s behavior with sincerity in his face (Tr. 541, 552-553). N.M. was "touchy-feely," up under Mr. Perry, and doing things that a child her age should not be doing (Tr. 541-542). She was rubbing his arm and leg, and making him feel uncomfortable (Tr. 542).

Mr. Robinson testified that he did not believe Mr. Perry, but that N.M. was getting in trouble in school, not doing her household chores, disobeying, and

lying (Tr. 543-544). He had a discussion with N.M. in Ms. Zahid's presence (Tr. 543). When he spoke with N.M., N.M. did not tell him anything (Tr. 543). He told her what to do if somebody touched her or said something inappropriate (Tr. 543).

Days later, when N.M. told him that Mr. Perry had put his foot between her legs and massaged her vagina, he did not kick Mr. Perry out of the apartment and he did not call the police (Tr. 548-549, 568). Mr. Robinson thought N.M. was lying and so did Ms. Zahid (Tr. 559, 568-569).

But Ms. Zahid eventually kicked Mr. Perry out of the apartment (Tr. 549, 558). Mr. Robinson said Ms. Zahid felt Mr. Perry wasn't "pulling his weight" by contributing to the household, and Mr. Perry and Ms. Zahid were having "heated discussions" and "arguments" (Tr. 551). Mr. Robinson threw Mr. Perry's belongings in the trash (Tr. 556, 571).

Mr. Robinson said that Mr. Perry returned to the apartment the next day with a friend to get his belongings, but that he did not let him inside (Tr. 522, 554-555). When he told Mr. Perry that all of his belongings were in the trash, he, Mr. Perry, and Ms. Zahid exchanged words (Tr. 553). Mr. Robinson went inside and called the police (Tr. 553). Mr. Perry left quietly (Tr. 554).

On April 26, 2007, a jury found Mr. Perry guilty of child molestation in the first degree (Tr. 620; L.F. 70). On June 29, 2007, the Honorable Steven R. Ohmer

sentenced Mr. Perry to seven years in the Missouri Department of Corrections (S. Tr. 26; L.F. 80-83). On July 9, 2007, Mr. Perry timely filed his notice of appeal (L.F. 84-88). This appeal follows (L.F. 84-88).

POINT - I.

The trial court clearly erred in overruling Mr. Perry's motion for judgment of acquittal at the close of all of the evidence because the State failed to prove beyond a reasonable doubt that Mr. Perry touched N.M. for the purpose of arousing or gratifying sexual desire as required for Mr. Perry's conviction of child molestation in the first degree. There was no evidence showing that Mr. Perry had either a verbal or physical reaction to the contact, and no evidence indicating that the contact occurred for the purpose of arousing or sexually gratifying N.M. The trial court denied Mr. Perry's rights to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, § 10 of the Missouri Constitution. This Court must reverse Mr. Perry's conviction and discharge him.

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979);

State v. Love, 134 S.W.3d 719 (Mo. App. S.D. 2004);

State v. Gibson, 623 S.W.2d 93 (Mo. App. W.D. 1981);

U.S. Const., Amends V and XIV;

Mo. Const., Art. 1, § 10;

Rule 29.11; and

§§ 566.010 & 566.067.

POINT - II.

The trial court plainly erred, causing manifest injustice or a miscarriage of justice, in failing to *sua sponte* strike the prosecutor's closing arguments that Mr. Perry was a "child molester" and a "sexual predator" who was grooming N.M. for "something bigger" such as rape because the evidence did not support the improper and highly prejudicial arguments, and the arguments implied special knowledge of facts outside the evidence. The arguments had a decisive effect on the jury's verdict and resulted in manifest injustice. The trial court denied Mr. Perry's rights to due process of law and a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 1, §§ 10 and 18(a) of the Missouri Constitution. This Court must reverse Mr. Perry's conviction and remand for a new trial.

State v. Whitfield, 837 S.W.2d 503 (Mo. banc 1992);

State v. Jackson, 155 S.W.3d 849 (Mo. App. W.D. 2005);

State v. Smith, 599 N.W.2d 344 (S.D. 1999);

Kellogg v. Skon, 176 F.3d 447 (8th Cir. 1999);

U.S. Const., Amends V, VI, and XIV;

Mo. Const., Art. 1, §§ 10, 17, & 18(a); and,

Rules 29.12 and 30.20.

POINT - III.

The trial court clearly erred and abused its discretion in admitting N.M.'s out-of-court statements under § 491.075 because § 491.075 is unconstitutional in that it is based on the "indicia of reliability" standard abrogated by the Supreme Court's opinion in *Crawford v. Washington*, 541 U.S. 36 (2004), and admits testimonial statements that *Crawford* and the Confrontation Clause plainly meant to exclude. The trial court's admission of N.M.'s out-of-court statements under § 491.075 prejudiced Mr. Perry and violated his rights to due process of law, confrontation, and a fair trial in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 1, §§ 10 and 18(a) of the Missouri Constitution. This Court must reverse Mr. Perry's conviction and remand for a new trial.

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004);

State v. Justus, 205 S.W.3d 872 (Mo. banc 2006);

U.S. Const., Amends V, VI, and XIV;

Mo. Const., Art. 1, §§ 10 & 18(a);

§ 491.075; and,

Rules 29.11 and 30.20.

POINT - IV.

The trial court clearly erred and abused its discretion in admitting N.M.'s out-of-court statements under § 491.075 because the statements lacked sufficient indicia of reliability and trustworthiness, in that: the statements lacked spontaneity, the statements were materially contradictory or inconsistent, and N.M. had a motive to fabricate the statements and a propensity to lie. The trial court's ruling prejudiced Mr. Perry and denied his rights to due process of law, confrontation, and a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, §§ 10 and 18(a) of the Missouri Constitution. This Court must reverse Mr. Perry's conviction and remand for a new trial.

Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139 (1990);

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004);

State v. Justus, 205 S.W.3d 872 (Mo. banc 2006);

State v. Merrill, 990 S.W.2d 166 (Mo. App. W.D. 1999);

U.S. Const., Amends V, VI, and XIV;

Mo. Const., Art. 1, §§ 10 & 18(a);

§ 491.075; and,

Rules 29.11 and 30.20.

ARGUMENT - I.

The trial court clearly erred in overruling Mr. Perry's motion for judgment of acquittal at the close of all of the evidence because the State failed to prove beyond a reasonable doubt that Mr. Perry touched N.M. for the purpose of arousing or gratifying sexual desire as required for Mr. Perry's conviction of child molestation in the first degree. There was no evidence showing that Mr. Perry had either a verbal or physical reaction to the contact, and no evidence indicating that the contact occurred for the purpose of arousing or sexually gratifying N.M. The trial court denied Mr. Perry's rights to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, § 10 of the Missouri Constitution. This Court must reverse Mr. Perry's conviction and discharge him.

Preservation of the Error

Mr. Perry asserts that this assignment of trial court error is properly preserved for appellate review. Mr. Perry's defense counsel unsuccessfully moved for judgment of acquittal at the close of the State's case and at the close of all of the evidence (Tr. 511, 585). The trial court denied both motions (Tr. 511, 585). This issue is preserved for appellate review under Rule 29.11(d).

Standard of Review

In reviewing the sufficiency of the evidence, review is limited to a determination of whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt. *State v. Grim*, 854 S.W.2d 403, 405 (Mo. banc 1993). The Court accepts as true all of the evidence favorable to the state, including all *reasonable* inferences drawn from the evidence, and disregards all contrary evidence and inferences. *Id.*; *State v. Simmons*, 716 S.W.2d 427, 430 (Mo. App. W.D. 1986). The inferences must not be illogical or unreasonable, and must be drawn from established fact. *State v. Dixon*, 70 S.W.3d 540, 544 (Mo. App. W.D. 2002).

A challenge to the sufficiency of the evidence to support a conviction is based in the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *State v. O'Brien*, 857 S.W.2d 212, 215 (Mo. banc 1993). Conviction upon evidence that is insufficient to establish guilt beyond a reasonable doubt violates an accused's constitutional right to due process of law. *Jackson v. Virginia*, 443 U.S. 307, 316-318, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The State must prove beyond a reasonable doubt that the defendant committed each element of the offense charged. *Id.*; *State v. Taylor*, 126 S.W.3d 2, 4 (Mo. App. E.D. 2003). If the State does not prove beyond a reasonable doubt that the defendant committed each element of the charged offense, the evidence is insufficient to support a conviction, and this Court must reverse the trial court's

judgment. *Id.*; *Taylor*, 126 S.W.3d at 4 (reversing because the evidence was insufficient to support convictions for statutory rape and statutory sodomy).

Argument

In this case, the trial court clearly erred in overruling Mr. Perry's motion for judgment of acquittal at the close of all of the evidence because the State failed to prove beyond a reasonable doubt that Mr. Perry touched N.M. for the purpose of arousing or gratifying sexual desire as required for Mr. Perry's conviction of child molestation in the first degree. Under § 556.067, a person commits the crime of child molestation in the first degree if "he or she subjects another person who is less than fourteen years of age to sexual contact." "Sexual contact," as defined in § 566.010, RSMo Supp. 2005, is "any touching of another person with the genitals or anus of another person, or the breast of a female person, or such touching through the clothing, for the purpose of arousing or gratifying sexual desire of any person."

The State has the burden of proving every element of a criminal case, *State v. Simmons*, 233 S.W.3d 235, 238 (Mo. App. E.D. 2007), and the express mental element that the touching be for "the purpose of arousing or gratifying the sexual desire of any person" is required for conviction of child molestation. *State v. Cowles*, 203 S.W.3d 303, 308 (Mo. App. S.D. 2006). Proof of purpose is necessary to prevent conviction of defendants for innocent contacts and touches that are

purposely excluded by statute. *State v. Love*, 134 S.W.3d 719, 723 (Mo. App. S.D. 2004) (citing *State v. Gibson*, 623 S.W.2d 93, 100 (Mo. App. W.D. 1981)).

“In assessing whether a touching is for the purpose of arousing or gratifying sexual desire rather than innocent touching, a fact-finder looks at the circumstances of the particular case.” *Love*, 134 S.W.3d at 723. Since direct proof of purpose is not always available, it is usually inferred from circumstantial evidence. *State v. McMeans*, 201 S.W.3d 117, 121 (Mo. App. S.D. 2006); *State v. Martin*, 882 S.W.2d 768, 770 (Mo. App. E.D. 1994).

In this case, the State failed to prove beyond a reasonable doubt that Mr. Perry touched N.M. for the purpose of arousing or gratifying sexual desire as required for Mr. Perry’s conviction of child molestation in the first degree. There was no evidence showing that Mr. Perry had either a verbal or physical reaction to the contact. N.M. did not state in pre-trial statements or at trial, that she had observed anything during or after the contact that would have signified Mr. Perry’s sexual arousal or gratification such as an erection, ejaculation, fondling of Mr. Perry’s private parts, the removal of his clothing, or any other sexual behaviors.

Nor did N.M. state that she heard anything that indicated Mr. Perry’s arousal, gratification, or sexual intent during or after the contact. She did not state that Mr. Perry made any sounds indicating sexual arousal or gratification,

or that Mr. Perry verbally expressed that he enjoyed the contact which occurred. She did not state that Mr. Perry asked to repeat the same or similar contact, or that Mr. Perry told her to keep the contact a secret (*see* State's Exhibit #1). In her videotaped interview with Ms. Woods, she stated that Mr. Perry said *nothing* when the contact occurred (State's Exhibit #1).

On the other hand, Detective Beene testified that Mr. Perry said that when N.M.'s contact awakened him from sleep, he told N.M. that he would tell her father, Mr. Robinson, about it and that Mr. Perry did, in fact, tell Mr. Robinson the contact occurred (Tr. 442). He told Mr. Robinson that the contact made him feel uncomfortable (Tr. 542). N.M. similarly said the contact made her feel uncomfortable or horrible, and there was no evidence indicating that the contact aroused or sexually gratified N.M. (Tr. 344-345).

Rather, viewed in the light most favorable to the State, the evidence showed that N.M.'s brief contact with Mr. Perry's socked foot was not purposely done for sexual arousal or gratification, but innocent and most likely inadvertent.

Thus, the trial court denied Mr. Perry's rights to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, § 10 of the Missouri Constitution. This Court must reverse Mr. Perry's conviction and discharge him.

ARGUMENT - II.

The trial court plainly erred, causing manifest injustice or a miscarriage of justice, in failing to *sua sponte* strike the prosecutor's closing arguments that Mr. Perry was a "child molester" and a "sexual predator" who was grooming N.M. for "something bigger" such as rape because the evidence did not support the improper and highly prejudicial arguments, and the arguments implied special knowledge of facts outside the evidence. The arguments had a decisive effect on the jury's verdict and resulted in manifest injustice. The trial court denied Mr. Perry's rights to due process of law and a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 1, §§ 10 and 18(a) of the Missouri Constitution. This Court must reverse Mr. Perry's conviction and remand for a new trial.

Preservation of the Error and Standard of Review

Mr. Perry concedes that this assignment of error was not properly preserved for appellate review because defense counsel did not object to the challenged arguments and only later included an assignment of error in Mr. Perry's motion for new trial (Tr. 596-597; L.F. 72-77). Consequently, Mr. Perry respectfully requests that this Court exercise its discretion and review for plain error under Missouri Supreme Court Rule 30.20. Plain error lies only where

there are substantial grounds for believing that manifest injustice or a miscarriage of justice resulted. *State v. Parker*, 856 S.W.2d 331, 332-33 (Mo. banc 1993); Rule 29.12(b).

Under Rule 30.20, plain error will seldom be found in unobjected-to closing argument, *State v. Brooks*, 158 S.W.3d 841, 853 (Mo. App. E.D. 2005), and the trial court's failure to intervene *sua sponte* will seldom warrant reversal. *State v. Bristol*, 98 S.W.3d 107, 114-115 (Mo. App. W.D. 2003). Courts usually presume that defense counsel's failure to object to the closing argument is a matter of trial strategy, and "in the absence of objection and request for relief, the trial court's options are narrowed to uninvited interference with summation and a corresponding increase of error by such invitation." *State v. Mayes*, 63 S.W.3d 615, 632 (Mo. banc 2001) (citing *State v. Clemmons*, 753 S.W.2d 901, 907-908 (Mo. banc 1988)).

Nonetheless, the trial court can exercise *sua sponte* action in exceptional circumstances. *State v. Drewel*, 835 S.W.2d 494, 498 (Mo. App. E.D. 1992). And, upon review of an unobjected-to closing argument, the appellate court may find plain error in the trial court's failure to *sua sponte* strike a prosecutor's argument where the argument constituted a manifest injustice. *See, e.g., State v. Jackson*, 155 S.W.3d 849, 853-854 (Mo. App. W.D. 2005) (finding plain error in the trial court's failure to intervene *sua sponte* when the prosecutor argued the following

in a statutory rape trial: “It is a matter of law. He is the father of that child,” and “You don’t really even have to worry about whether you’re making the right decision if you find him guilty because it’s already been decided.”)

Argument

The trial court plainly erred, causing manifest injustice or a miscarriage of justice, in failing to *sua sponte* strike the prosecutor’s closing arguments that Mr. Perry was a “child molester” and a “sexual predator” who was grooming N.M. for “something bigger” such as rape because the evidence did not support the improper and highly prejudicial arguments, and the arguments implied special knowledge of facts outside the evidence.

Both Missouri and federal courts have consistently condemned deliberate introduction of prejudicial extraneous matter into trial proceedings by the prosecution. *Newlon v. Armontrout*, 885 F.2d 1328, 1336 (8th Cir. 1989).

Although prosecutors are given wide latitude during closing argument, as representatives of the government, they have a duty to ensure that the defendant gets a fair trial. *State v. Hubbard*, 659 S.W.2d 551, 558 (Mo. App. W.D. 1983).

There must be no conduct by argument, or otherwise, the effect of which is to inflame the prejudices or excite the passions of the jury against him. *State v.*

Long, 684 S.W.2d 361, 365 (Mo. App. E.D. 1984) (citing *State v. Tiedt*, 206 S.W.2d

524, 526-527 (Mo. banc 1947)). The prosecutor may prosecute with vigor and strike blows, but he is not at liberty to strike foul ones. *Long*, 684 S.W.2d at 365.

Here, in closing argument, the prosecutor struck a foul blow by arguing:

Now, look, a sexual predator is not going to immediately started [sic] with a rape. They're going to start small and see what they can get away with. That's why he started with his foot to her vagina.

You heard [N.M.] say how it made her feel. It made her feel horrible. This was a bad touch in the wrong spot.

This was a touch done by a child molester.

This man was grooming [N.M.] for something bigger.

(Tr. 596-597).

By calling Mr. Perry a "sexual predator" and a "child molester," the prosecutor improperly gave her personal opinion of Mr. Perry's culpability, and committed misconduct. *See, e.g., Kellogg v. Skon*, 176 F.3d 447, 451-452 (8th Cir. 1999) (references to the defendant as a "monster," "sexual deviant" and "liar" were improper personal expressions of the defendant's culpability and had no place in the courtroom); *see also State v. Smith*, 599 N.W.2d 344, 353-255 (S.D. 1999) (prosecutor's comments referring to defendant as a "monster," "sexual predator," and "pervert" were a "foul blow, abhorrent, and misconduct").

Such name-calling is “ill-advised” and “strongly discouraged” because it is prejudicial if the evidence does not support the prosecutor’s characterization of the defendant. *State v. Owsley*, 959 S.W.2d 789, 797 (Mo. banc 1997); *State v. Childers*, 801 S.W.2d 442, 445 (Mo. App. E.D. 1990). For example, the prosecutor in closing argument in *State v. Whitfield*, 837 S.W.2d 503, 513 (Mo. banc 1992) improperly called Whitfield, who had two prior unrelated homicide convictions, a “mass murderer” and a “serial killer.” The Missouri Supreme Court noted that such names were “associated with a small ghoulish class of homicidal sociopaths who repeatedly and cruelly murder for no apparent motive than to satisfy a perverse desire to kill or cause pain,” and that the evidence demonstrated Whitfield was neither a mass murderer nor a serial killer. *Id.* Consequently, the Missouri Supreme Court held the prosecutor’s argument was designed solely to inflame jurors against Whitfield and constituted error. *Id.*

Similarly, the prosecutor’s argument in Mr. Perry’s case was not supported by the evidence and was designed solely to inflame jurors against Mr. Perry. There was no evidence at trial demonstrating that Mr. Perry exhibited a pattern of molesting or preying on children, had a criminal history, or engaged in grooming. “Grooming” is a behavioral characteristic frequently attributed to habitual child sexual predators, and describes the predators’ conduct of establishing physical and psychological closeness with their child victims

through affection, praise, gift giving, and rewards. Barbara K. Schwartz & Henry R. Cellini, *The Sex Offender: New Insights, Treatment Innovations and Legal Developments* 15-4 (1997) note 2, at 17-8.

Though no facts at trial established that Mr. Perry possessed this behavioral characteristic or that Mr. Perry intended to eventually commit “something bigger” such as rape, the prosecutor improperly argued facts outside the evidence and implied special knowledge of facts outside the evidence. The prosecutor argued that though Mr. Perry had not “immediately started with a rape,” “[t]his man was grooming [N.M.] for something bigger” (Tr. 596-597).

A prosecutor may not argue facts outside of the record. *State v. Storey*, 901 S.W.2d 886, 900 (Mo. banc 1995) (citing *State v. Shurn*, 866 S.W.2d 447, 460 (Mo. banc 1993)). Nor may the prosecutor make statements that imply the prosecutor has knowledge of facts not in evidence pointing to the defendant’s guilt. *Peterson v. State*, 149 S.W.3d 583, 587 (Mo. App. W.D. 2004); *State v. Evans*, 820 S.W.2d 545, 547 (Mo. App. E.D. 1991). Assertions of fact that are not proven through evidence amount to unsworn testimony by the prosecutor. *State v. Nelson*, 957 S.W.2d 327, 329 (Mo. App. E.D. 1998) (citing *Storey*, 901 S.W.2d at 901).

In this case, the prosecutor’s unsworn testimony and improper name-calling were not only erroneous, but also prejudiced Mr. Perry and resulted in

manifest injustice. The State's evidence of Mr. Perry's guilt was weak. There were no eyewitnesses to the charged offense. There was no physical evidence corroborating N.M.'s allegations of molestation and the credibility of the State's star witness, N.M., was extremely doubtful. N.M.'s own parents did not believe her when they learned of the alleged incident, and they told investigators and the jury that N.M. had a tendency to lie (Tr. 399-401, 559, 568-569). Also, through her reluctance to testify at trial about the acts constituting the charged offense, and by contradicting herself on videotape as to whether anyone had touched her, N.M. did nothing to add to her already dubious credibility.

Meanwhile, Mr. Perry consistently maintained in conversations with police and Mr. Robinson before trial, and in statements and arguments at trial, that he did not purposely initiate any contact with N.M., but that N.M. touched him while he was asleep (Tr. 323-324, 441-442, 461-462, 603-604, 608-609). He argued that N.M. lied about what had happened to get out of trouble and that she reluctantly repeated her lies after others cajoled her into doing so (Tr. 605-606, 609).

Under the circumstances, absent the prosecutor's improper arguments, jurors would have had reasonable doubt about Mr. Perry's guilt of the charged offense because the touch that occurred between Mr. Perry and N.M. was arguably innocent contact and not done for the purpose of arousing or gratifying

Mr. Perry's sexual desire. The language in § 566.010, "for the purpose of arousing or gratifying sexual desire," is meant to exclude innocent contacts from criminal prosecution. See *State v. Gibson*, 623 S.W.2d 93, 100 (Mo. App. W.D. 1981).

Yet, the prosecutor's improper and highly prejudicial arguments had a decisive effect on the jury's verdict. Upon hearing the prosecutor's arguments about a "sexual predator" and "child molester" who was grooming N.M. for "something bigger" such as rape, jurors convicted Mr. Perry of child molestation in the first degree.

The trial court plainly erred, causing manifest injustice or a miscarriage of justice, in failing to *sua sponte* strike the prosecutor's improper and highly prejudicial closing arguments. In *Jackson*, the Western District reversed Jackson's conviction and remanded for a new trial because the trial court had not *sua sponte* stricken an improper closing argument by the prosecutor. 155 S.W.3d at 853-854.

This Court should do the same in Mr. Perry's case. The trial court denied Mr. Perry's rights to due process of law and a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 1, §§ 10 and 18(a) of the Missouri Constitution.

ARGUMENT - III.

The trial court clearly erred and abused its discretion in admitting N.M.'s out-of-court statements under § 491.075 because § 491.075 is unconstitutional in that it is based on the "indicia of reliability" standard abrogated by the Supreme Court's opinion in *Crawford v. Washington*, 541 U.S. 36 (2004), and admits testimonial statements that *Crawford* and the Confrontation Clause plainly meant to exclude. The trial court's admission of N.M.'s out-of-court statements under § 491.075 prejudiced Mr. Perry and violated his rights to due process of law, confrontation, and a fair trial in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 1, §§ 10 and 18(a) of the Missouri Constitution. This Court must reverse Mr. Perry's conviction and remand for a new trial.

Preservation of the Error

Mr. Perry asserts that this assignment of trial court error is properly preserved for appellate review. In order to preserve a constitutional issue for appellate review, a party must (1) raise the issue at the first available opportunity, (2) note the constitutional provision violated, (3) state the facts that constitute the constitutional violation, and (4) preserve the constitutional issue throughout the proceeding. *State v. Blair*, 175 S.W.3d 197, 199 (Mo. App. E.D. 2005).

On April 23, 2007, the date of the § 491.075 hearing, defense counsel filed a motion to declare § 491.075 unconstitutional as violative of Mr. Perry's right to confrontation under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article 1, §§ 18(a), 19, and 21 of the Missouri Constitution (L.F. 46, 49).

Defense counsel stated that § 491.075 is based on the previous standard in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) under which otherwise inadmissible hearsay statements were admissible if they bore "indicia of reliability" (L.F. 47). Defense counsel stated that since *Crawford* abrogated this standard, § 491.075 is no longer constitutional and that the trial court should preclude the admission of hearsay statements under § 491.075 (L.F. 48-49).

Defense counsel placed Mr. Perry's constitutional challenge on the record at the § 491.075 hearing, and renewed his objections to the admission of N.M.'s out-of-court statements at trial (Tr. 63, 68, 361-362). The trial court made the objection continuing, but overruled it (Tr. 69-70, 362).

Defense counsel objected to the admission of the statements at trial and subsequently included an assignment of trial court error in Mr. Perry's new trial motion (Tr. 361-362, 374, 481; L.F. 72-75). Consequently, this assignment of trial court error is properly preserved for appellate review. Rule 29.11(d).

However, if this Court finds this assignment of error was not properly preserved for appellate review, Mr. Perry respectfully requests plain error review under Rule 30.20.

Standard of Review

Challenges to the constitutionality of a statute are legal issues that are reviewed *de novo*. *Rizzo v. State*, 189 S.W.3d 576, 578 (Mo. banc 2006). The Missouri Supreme Court has exclusive jurisdiction over appeals involving the constitutional validity of a state statute, and this Court is divested of jurisdiction if it determines that Mr. Perry's constitutional challenge is real and substantial, and not merely colorable. *State v. Dillard*, 158 S.W.3d 291, 302 (Mo. banc 2005); Mo. Const., Art. 5, § 3. "A constitutional claim is merely colorable if [this Court's] preliminary inquiry discloses that the contention is so obviously unsubstantial and insufficient, in fact or in law, as to be plainly without merit." *Id.*

Should this Court determine it has jurisdiction to review Mr. Perry's assignment of trial court error, its review of the trial court's decision to admit N.M.'s out-of-court statements under § 491.075 is limited to a determination of whether it amounted to an abuse of discretion. *State v. Redman*, 916 S.W.2d 787, 792 (Mo. banc 1996); *State v. Werneke*, 958 S.W.2d 314, 318 (Mo. App. W.D. 1997). The trial court abuses its discretion when its ruling is clearly "against the

logic of the circumstances” and is “so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration”; if reasonable persons can differ about the propriety of the trial court’s actions, then the trial court has not abused its discretion. *State v. Costa*, 11 S.W.3d 670, 678-679 (Mo. App. W.D. 1999).

Argument

The trial court clearly erred and abused its discretion in admitting N.M.’s out-of-court statements under § 491.075 because § 491.075 is unconstitutional. Section 491.075 provides:

A statement made by a child under the age of fourteen relating to an offense under chapter 565, 566 or 568, RSMo, performed with or on a child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of this state as substantive evidence to prove the truth of the matter asserted if:

- (1) The court finds, in a hearing conducted outside the presence of the jury that the time, content and circumstances of the statement provide sufficient indicia of reliability; and
- (2) (a) The child testifies at the proceedings; or
(b) The child is unavailable as a witness; or

(c) The child is otherwise physically available as a witness but the court finds that the significant emotional or psychological trauma which would result from testifying in the personal presence of the defendant makes the child unavailable as a witness at the time of the criminal proceeding.

Though this Court is bound to adopt any reasonable reading of § 491.075 that will allow its validity and resolve all doubts in favor of its constitutionality, *State v. Burns*, 978 S.W.2d 759, 760 (Mo. banc 1998), these rules of construction do not save § 491.075. “A statute is presumed to be constitutional and will not be invalidated unless it clearly and undoubtedly violates some constitutional provision and palpably affronts fundamental law embodied in the constitution.” *Bd. of Educ. of St. Louis v. State*, 47 S.W.3d 366, 368-369 (Mo. banc 2001). But if a statute conflicts with a constitutional provision or provisions, this Court must hold the statute invalid. *State v. Kinder*, 89 S.W.3d 454, 459 (Mo. banc 2002).

Section 491.075 is invalid because it is based on the “indicia of reliability” standard abrogated by the Supreme Court’s opinion in *Crawford v. Washington*, 541 U.S. 36 (2004), and admits testimonial statements that *Crawford* and the Confrontation Clause plainly meant to exclude. The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with

the witnesses against him.” U.S. Const. VI. This clause is applicable to the states through the Fourteenth Amendment to the United States Constitution. *Pointer v. Texas*, 380 U.S. 400, 404, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965); U.S. Const. XIV; Mo. Const. Art. 1, § 18(a). And, the confrontation rights protected by the Missouri Constitution are the same as those protected by the Sixth Amendment to the United States Constitution. *State v. Schaal*, 806 S.W.2d 659, 662 (Mo. banc 1991); *State v. Hester*, 801 S.W.2d 695, 697 (Mo. banc 1991).

Previously, under the Supreme Court’s decision in *Ohio v. Roberts*, if the hearsay statements of a declarant, who was unavailable for cross-examination at trial, bore an “adequate indicia of reliability,” the right to confrontation was not violated through admission of the out-of-court statements. 448 U.S. at 66. Moreover, at trial, admission of the out-of-court statements of a child did not violate the Confrontation Clause if there were “particularized guarantees of trustworthiness” drawn from the totality of circumstances that surrounded the making of the statement and that rendered the declarant particularly worthy of belief. *Idaho v. Wright*, 497 U.S. 805, 819-820, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990) (relying on *Roberts*).

The Supreme Court’s decision in *Crawford*, however, altered this analysis. See *State v. Griffin*, 202 S.W.3d 670, 675 (Mo. App. W.D. 2006). *Crawford* abrogated its previous decision in *Roberts*, stating: “Dispensing with

confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.” *Crawford*, 541 U.S. at 62. In *Crawford*, the United States Supreme Court held the Confrontation Clause barred the admission of testimonial out-of-court statements (or hearsay) of a witness unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness. 541 U.S. at 68-69. Since *Crawford*, courts have found that the child sex victim’s statements to child protection workers and police are “testimonial” and that *Crawford* prohibits the admission of a child sex victim’s statements if the child sex victim is unavailable and the defendant did not have a prior opportunity to cross-examine the victim. See, e.g., *State v. Justus*, 205 S.W.3d 872, 880 n. 10 (Mo. banc 2006).¹

¹ The *Crawford* Court cited three formulations of the core class of testimonial statements: “*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially”; “extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions”; and, “statements that were made under circumstances which would lead an objective witness reasonably to

For example, in *Justus*, the trial court determined that there were sufficient indicia of reliability to admit the unavailable child victim's testimonial out-of-court statements to a social worker and investigator, and under § 491.075, admitted the child victim's statements at the defendant's trial on child molestation charges without giving the defendant an opportunity to cross-examine the child. 205 S.W.3d at 877-878. The Missouri Supreme Court pointed out that § 491.075 was subject to the Confrontation Clause and relied on *Crawford* in reversing the defendant's conviction of child molestation in the first degree, but declined to address the constitutionality of § 491.075 *sua sponte*. *Id.* at 878, 880-811.

Mr. Perry asks that this Court or the Missouri Supreme Court address the constitutionality of § 491.075. Mr. Perry acknowledges that the Missouri Supreme Court held § 491.075 constitutional in *State v. Wright*, 751 S.W.2d 48 (Mo. banc 1988). But Mr. Perry contends that as evidenced in *Justus*, Missouri trial courts' blanket, indiscriminate application of § 491.075 runs afoul of the Confrontation Clause and conflicts with post-*Wright* Supreme Court precedent in *Crawford*.

believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 51-52.

Mr. Perry further contends that the trial court's admission of N.M.'s out-of-court statements under § 491.075 prejudiced him and violated his right to due process of law, confrontation, and a fair trial in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 1, §§ 10 and 18(a) of the Missouri Constitution. First, the trial court admitted N.M.'s out-of-court statements under an unconstitutional statute. Second, N.M.'s out-of-court statements were undoubtedly testimonial, and though N.M. was available to testify at trial and took the stand, her reluctance to testify about her allegations deprived Mr. Perry of the opportunity for full and effective cross-examination to which *Justus* indicates he is entitled. Consequently, this Court must reverse Mr. Perry's conviction and remand for a new trial.

ARGUMENT - IV.

The trial court clearly erred and abused its discretion in admitting N.M.'s out-of-court statements under § 491.075 because the statements lacked sufficient indicia of reliability and trustworthiness, in that: the statements lacked spontaneity, the statements were materially contradictory or inconsistent, and N.M. had a motive to fabricate the statements and a propensity to lie. The trial court's ruling prejudiced Mr. Perry and denied his rights to due process of law, confrontation, and a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, §§ 10 and 18(a) of the Missouri Constitution. This Court must reverse Mr. Perry's conviction and remand for a new trial.

Preservation of the Error

Mr. Perry asserts that this assignment of trial court error is made in the alternative to Point III, Argument III, and is properly preserved for appellate review. The trial court held a § 491.075 hearing on April 23, 2007 at which Luzette Woods, Raimeilla Zahid, and Kenneth Robinson testified about N.M.'s statements to them out of court (Tr. 4-63). Though defense counsel asked the trial court to declare § 491.075 unconstitutional, argued the statements were unreliable, and stated the admission of the statements would violate Mr. Perry's confrontation rights under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354,

158 L.Ed.2d 177 (2004), the trial court found the statements had sufficient indicia of reliability and ruled to admit them (Tr. 63-64, 69-70; L.F. 46-49).

Defense counsel objected to the admission of the statements at trial and subsequently included an assignment of trial court error in Mr. Perry's new trial motion (Tr. 361-362, 374, 481; L.F. 75-76). Consequently, this assignment of trial court error is properly preserved for appellate review. Rule 29.11(d).

However, if this Court finds this assignment of error was not properly preserved for appellate review, Mr. Perry respectfully requests plain error review under Rule 30.20.

Standard of Review

This Court's review of the trial court's decision to admit N.M.'s out-of-court statements under § 491.075 is limited to a determination of whether it amounted to an abuse of discretion. *State v. Redman*, 916 S.W.2d 787, 792 (Mo. banc 1996); *State v. Werneke*, 958 S.W.2d 314, 318 (Mo. App. W.D. 1997). The trial court abuses its discretion when its ruling is clearly "against the logic of the circumstances" and is "so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration"; if reasonable persons can differ about the propriety of the trial court's actions, then the trial court has not abused its discretion. *State v. Costa*, 11 S.W.3d 670, 678-679 (Mo. App. W.D. 1999).

Argument

In this case, the trial court clearly erred and abused its discretion in admitting N.M.'s out-of-court statements under § 491.075 because the statements lacked sufficient indicia of reliability and trustworthiness. "Section 491.075 allows admission, under certain circumstances, of out-of-court statements made by a child victim regarding sex offenses." *State v. Justus*, 205 S.W.3d 872, 975 (Mo. banc 2006). Section 491.075 provides:

A statement made by a child under the age of fourteen relating to an offense under chapter 565, 566 or 568, RSMo, performed with or on a child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of this state as substantive evidence to prove the truth of the matter asserted if:

- (1) The court finds, in a hearing conducted outside the presence of the jury that the time, content and circumstances of the statement provide sufficient indicia of reliability; and
- (2) (a) The child testifies at the proceedings; or
- (b) The child is unavailable as a witness; or
- (c) The child is otherwise physically available as a witness but the court finds that the significant emotional or

psychological trauma which would result from testifying in the personal presence of the defendant makes the child unavailable as a witness at the time of the criminal proceeding.

“In order to maintain the delicate balance of preserving the rights of the accused and protecting the security of the child, it is essential that courts strictly construe § 491.075.” *State v. Merrill*, 990 S.W.2d 166, 170 (Mo. App. W.D. 1999). Missouri courts have adopted a totality of the circumstances test from *Idaho v. Wright*, 497 U.S. 805, 821, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), and in determining reliability consider (1) spontaneity and consistent repetition; (2) the mental state of the declarant; (3) the lack of a motive to fabricate; and (4) knowledge of subject matter unexpected of a child of a similar age. *Redman*, 916 S.W.2d at 790-791; *State v. Brethold*, 149 S.W.3d 906, 910 (Mo. App. E.D. 2004). The lapse of time between the occurrence of the acts and the victim’s report of the acts is also a factor to consider. *State v. Foster*, 854 S.W.2d 1, 6 (Mo. App. W.D. 1993).

Here, the trial court’s determination of reliability was erroneous.

- *N.M.’s statements lacked spontaneity.*

N.M. did not spontaneously volunteer that Mr. Perry had molested her, but only made statements accusing Mr. Perry of child molestation after structured or informal questioning about inappropriate touching (Tr. 10-12, 17-

18, 20-21, 30, 37, 51, 59-60; State's Exhibit #1). N.M. made statements about inappropriate touching to her father, Mr. Robinson, only after her mother, Ms. Zahid, caught her up past her bedtime and called her to him (Tr. 48-49, 57, 61; *see also* Tr. 373-374, 404).

N.M. reluctantly made statements about inappropriate touching to her mother, Ms. Zahid, only after Ms. Zahid overheard N.M.'s conversation with her father and prompted N.M. by asking N.M. what was going on (Tr. 36-37; *see also* Tr. 375, 404). N.M. was "resistant at first," but Ms. Zahid said to N.M., "touched you where?" (Tr. 37).

Also, N.M. made statements about inappropriate touching to interview specialist, Ms. Woods, only after having thrice denied that any touching had occurred (Tr. 18, 20-21, 30; *see also* Tr. 493-496, 503; State's Exhibit #1). She made her accusations while in a therapeutic interview in which the end goal was to coax her into accusing Mr. Perry of inappropriate touching on videotape.

- ***N.M.'s statements were materially contradictory and inconsistent.***

Since N.M. both accused Mr. Perry of touching her inappropriately and denied anyone, except her mother during washings, had ever touched her in the "wrong spot," her statements were materially contradictory and inconsistent (*see also* Tr. 494-496, 498, 503; State's Exhibit #1). As Ms. Woods fully acknowledged,

“[I]t would have been impossible for everything she said to have been reliable because she did contradict herself” (Tr. 25).

- *N.M. had a motive to fabricate the statements and a propensity to lie.*

N.M.’s statements were unreliable. N.M., who was possibly bipolar and had behavioral problems for which her parents had disciplined her in the past, had a motive to fabricate her statements that Mr. Perry had inappropriately touched her – that of getting out of and staying out of trouble (Tr. 44, 46; *see also* Tr. 399-401). Mr. Perry stated to police that he told N.M. that he would tell her father about the “touch” when he got home, and Mr. Robinson confirmed that Mr. Perry was the first to call N.M.’s conduct to Mr. Robinson’s attention (Tr. 53-54; *see also* Tr. 442). Mr. Perry got N.M. into trouble and according to N.M.’s own parents, N.M. had such a proclivity to lie “about things” and tell “stories” that initially they could not tell if N.M.’s accusations were true or false (Tr. 46, 55-56). They needed more to come to a conclusion about the veracity of N.M.’s accusations, and did not have enough (Tr. 56).

After weighing the enumerated factors, it is also clear that the trial court did not have enough to conclude that N.M.’s out-of-court statements were reliable or trustworthy. The logic of the circumstances compels a conclusion that authority figures, N.M.’s mother, N.M.’s father, and an interview specialist,

pressured and prompted an impressionable little girl into accusing Mr. Perry of inappropriate sexual contact out of court.

The admission of N.M.'s out-of-court statements prejudiced Mr. Perry at trial. The out-of-court statements served to bolster the credibility of N.M.'s trial testimony, as jurors heard N.M.'s accusation about "touching" over and over again from different adult witnesses. Had the trial court excluded N.M.'s out-of-court statements, reasonable jurors would have had significantly different impressions of N.M.'s credibility and would have had reasonable doubt about Mr. Perry's guilt.

The trial court erred and abused its discretion in admitting N.M.'s out-of-court statements. The trial court's ruling denied Mr. Perry's rights to due process of law, confrontation, and a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, §§ 10 and 18(a) of the Missouri Constitution. This Court must reverse Mr. Perry's conviction and remand for a new trial.

CONCLUSION

WHEREFORE, based on his arguments in Points I through IV of his brief, Appellant Mike Perry respectfully requests that the Court reverse his convictions and discharge him, or in the alternative, that the Court reverse his convictions and grant him a new trial.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND COMPLIANCE

I hereby certify that on this ____ day of March 2008, a true and correct copy of the foregoing brief and a floppy disk containing the foregoing brief were mailed postage prepaid to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102. Pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the limitations of Special Rule 360. The word-processing software identified that this brief contains _____ words, _____ lines, or ____ pages, excluding the cover page, signature block, table of contents, table of authorities, and certificates of service and of compliance. In addition, I hereby certify that the enclosed diskette has been scanned for viruses with McAfee VirusScan Enterprise 7.1.0 software and found virus-free.

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APPENDIX

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V.A.M.S. 491.075

Vernon's Annotated Missouri Statutes [Currentness](#)

Title XXXIII. Evidence and Legal Advertisements

 [Chapter 491. Witnesses \(Refs & Annos\)](#)

 [General Provisions \(Refs & Annos\)](#)

 **491.075. Statement of child under twelve admissible, when**

1. A statement made by a child under the age of fourteen relating to an offense under chapter 565, 566 or 568, RSMo, performed with or on a child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of this state as substantive evidence to prove the truth of the matter asserted if:

(1) The court finds, in a hearing conducted outside the presence of the jury that the time, content and circumstances of the statement provide sufficient indicia of reliability; and

(2) (a) The child testifies at the proceedings; or

(b) The child is unavailable as a witness; or

(c) The child is otherwise physically available as a witness but the court finds that the significant emotional or psychological trauma which would result from testifying in the personal presence of the defendant makes the child unavailable as a witness at the time of the criminal proceeding.

2. Notwithstanding subsection 1 of this section or any provision of law or rule of evidence requiring corroboration of statements, admissions or confessions of the defendant, and notwithstanding any prohibition of hearsay evidence, a statement by a child when under the age of fourteen who is alleged to be victim of an offense under chapter 565, 566 or 568, RSMo, is sufficient corroboration of a statement, admission or confession regardless of whether or not the child is available to testify regarding the offense.

3. A statement may not be admitted under this section unless the prosecuting attorney makes known to the accused or the accused's counsel his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the accused or the accused's counsel with a fair opportunity to prepare to meet the statement.

4. Nothing in this section shall be construed to limit the admissibility of statements, admissions or confessions otherwise admissible by law.

V.A.M.S. 566.067

Vernon's Annotated Missouri Statutes [Currentness](#)

Title XXXVIII. Crimes and Punishment; Peace Officers and Public Defenders

[Chapter 566](#). Sexual Offenses ([Refs & Annos](#))

➔**566.067. Child molestation in the first degree**

1. A person commits the crime of child molestation in the first degree if he or she subjects another person who is less than fourteen years of age to sexual contact.

2. Child molestation in the first degree is a class B felony unless:

(1) The actor has previously been convicted of an offense under this chapter or in the course thereof the actor inflicts serious physical injury, displays a deadly weapon or deadly instrument in a threatening manner, or the offense is committed as part of a ritual or ceremony, in which case the crime is a class A felony; or

(2) The victim is a child less than twelve years of age and:

(a) The actor has previously been convicted of an offense under this chapter; or

(b) In the course thereof the actor inflicts serious physical injury, displays a deadly weapon or deadly instrument in a threatening manner, or if the offense is committed as part of a ritual or ceremony, in which case, the crime is a class A felony and such person shall serve his or her term of imprisonment without eligibility for probation or parole.