

No. SC89240

In the
Missouri Supreme Court

STATE OF MISSOURI,

Respondent,

v.

MIKE PERRY,

Appellant.

Appeal from the Circuit Court of the City of St. Louis
Twenty-Second Judicial Circuit, Division 8
The Honorable Steven R. Ohmer, Judge

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from a conviction for child molestation in the first degree, § 566.067, RSMo 2000, obtained in the Circuit Court of the City of St. Louis, and for which appellant was sentenced to seven years in the custody of the Department of Corrections. This appeal was transferred to this Court from the Missouri Court of Appeals, Eastern District, as appellant raises a challenge to the constitutionality of § 491.075, RSMo. Therefore, jurisdiction lies in this Court. Mo. Const., Art. V, § 3 (as amended 1982).

STATEMENT OF FACTS

Appellant, Mike Perry, was charged by indictment with one count of child molestation in the first degree (L.F. 11). This cause went to a trial by jury in the Circuit Court of the City of St. Louis beginning on April 23, 2007, the Honorable Steven R. Ohmer presiding (L.F. 5).

The sufficiency of the evidence is at issue in this appeal. Viewed in the light most favorable to the verdict, the following evidence was adduced: During the summer and fall of 2005, N.M., the six-year-old victim, lived in an apartment in the City of St. Louis with her mother, R.Z., her mother's fiancé, K.R. (who the victim considered her father), and their infant son, whom they called "KJ" (Tr. 331-332, 365-366, 431, 537-538). That summer, K.R. invited appellant, a close childhood friend who was having problems finding housing, to stay with the family in an effort to get him "on his feet" and into his own apartment (Tr. 332, 367-369, 441, 538-539). During the time he lived there, appellant slept on the couch in the living room of the apartment (Tr. 332, 368). Sometime around August, appellant started to babysit the children for a few hours each work day (Tr. 370, 441, 544).

One morning, after R.Z. and K.R. had left for work, the victim came into the living room, where appellant and KJ were lying on the couch, and asked if she could also lie on the couch (Tr. 344, 441, 462). He told her to lie on the opposite end that he and KJ were lying, which she did (Tr. 342, 442, 462; St. Exh. 1). Sometime after that, appellant put his foot inside of the victim's nightgown and rubbed her vagina through her underwear with his socked foot, moving it in a circular motion (Tr. 344, 348, 358-359, 481, 501, 568; St. Exh.

1). This made the victim feel “horrible” (Tr. 345, 347). On another occasion, while the victim was lying down watching television, appellant sat on top of her abdomen and thrust his “butt” back and forth against her (Tr. 346, 486; St. Exh. 1).

Later in the day that appellant rubbed his foot against the victim’s vagina, appellant told K.R. that he was concerned that the victim was doing things that she should not be doing, like rubbing him on his arm and leg and “wobbling up and down on his foot,” which made him uncomfortable (Tr. 443, 542). At that time, K.R. “blew off” the comment, not being “ready to deal with that” (Tr. 567).

The next night, K.R. and R.Z. were in their bedroom around 9:30 p.m. when R.Z. heard the victim’s voice coming from the living room (Tr. 345, 371; St. Exh. 1). This was unusual, because the victim had already been put to bed and did not normally leave her room after going to bed (Tr. 371-372). R.Z. opened her bedroom door and saw the victim lying on the floor of the living room (Tr. 371-372). R.Z. called the victim to her bedroom and started to talk to her about it when K.R. said he wanted to talk to the victim alone (Tr. 373). R.Z. waited outside while K.R. talked to the victim about touching “in general” (Tr. 543, 568). When R.Z. (who was listening outside the door) heard something about touching, she went into the room and said she wanted to know what was going on (Tr. 374). The victim told her that appellant had touched her with his foot (Tr. 374). When R.Z. asked, “What do you mean,” the victim said that appellant had touched her vagina with his foot (Tr. 375). R.Z. and K.R. then fought about whether or not to kick appellant out of the house, and K.R., who believed appellant (who had approached him first), decided to let him stay (Tr. 375-376,

568-569, 581). R.Z., however, refused to allow the victim to be left alone with appellant anymore (Tr. 377).

On October 7, 2005, about two weeks after the victim first reported appellant's molestation, K.R. changed his mind about whom to believe, realizing he had made a mistake (Tr. 549-550, 568-569).¹ R.Z. told appellant that he had to leave, which he did (Tr. 377-378, 549). The next day, appellant returned to the house to try to get belongings he had left at the house (Tr. 380, 551-552). K.R. told appellant that he was not welcome there and that appellant's belongings were outside in the trash (Tr. 380, 552-553). The two argued outside the apartment, and, at some point, R.Z. came out of the apartment holding a knife (Tr. 381). Both appellant and R.Z. called the police regarding the confrontation (Tr. 381-382).

The victim, R.Z., and appellant were all questioned at police headquarters about the incident (Tr. 382, 433). After speaking with the victim and R.Z., Detective Georgia Beene interviewed appellant, who admitted that the touching occurred, but claimed that he was asleep when the victim started moving up and down on his, waking him up (Tr. 436-437, 441-442). Appellant was then placed under arrest (Tr. 438, 444).

The police had R.Z. take the victim to Children's Hospital for an exam (Tr. 382-383; St. Exh. 1). Later, the victim was interviewed at the Child Advocacy Center by forensic

¹Revealed during a hearing regarding the introduction of the victim's statements under § 491.075, but not introduced at trial, was evidence that K.R. and R.Z. learned on that day from the mother of appellant's child that appellant had "done stuff" to other children (Tr. 59-60).

interviewer Luzette Wood (Tr. 350, 383, 474). After initially attempting to avoid talking about the molestation by saying that she had not been touched (which was not uncommon for child victims of sexual abuse), the victim disclosed both acts of sexual abuse to Wood (Tr. 479-486; St. Exh. 1).

Appellant presented the testimony of three witnesses, including K.R., to support a defense of fabrication of the allegations by the victim and her mother (Tr. 520-583).

Appellant was found guilty of first-degree child molestation (L.F. 70). The court sentenced appellant to seven years imprisonment (L.F. 81; Sent. Tr. 26-27). This appeal follows.

ARGUMENT

I.

The trial court did not err in overruling appellant’s motion for judgment of acquittal at the close of all the evidence and convicting appellant of child molestation in the first degree because there was sufficient evidence that appellant touched the victim for the purpose of arousing or gratifying sexual desire in that the sexual nature of the act itself, appellant’s other sexually-oriented contact with the victim, and appellant’s attempt to avoid being accused of sexually molesting the victim by blaming her for the incident demonstrated a purpose of arousing or gratifying sexual desire.

Appellant claims that there was insufficient evidence that the contact between him and the victim occurred for the purpose of arousing or gratifying sexual desire, arguing that a lack of testimony that appellant had a physical or audible reaction to the contact, coupled with appellant’s claim to police that contact with the victim made him feel “uncomfortable,” failed to establish the required element (App.Br. 19-23).

In examining the sufficiency of the evidence, appellate review is limited to a determination of whether there is sufficient evidence from which a reasonable trier of fact might have found a defendant guilty beyond a reasonable doubt. State v. Chaney, 967 S.W.2d 47, 52 (Mo. banc 1998). The appellate court does not act as a “super juror” with veto powers, but gives great deference to the trier of fact. Id. In applying the standard, the appellate court accepts as true all of the evidence favorable to the state, including all favorable inferences drawn from the evidence, and disregards all evidence and inferences to

the contrary. Id. Further, “an appellate court ‘faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.’” Id. at 53, quoting Jackson v. Virginia, 443 U.S. 307, 326 (1979). “[T]his inquiry does not require a court to ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Id. at 52, quoting Jackson, 443 U.S. at 318-19.

To prove that appellant committed child molestation in the first degree, the State was required to prove that appellant subjected the victim to sexual contact. § 566.067, RSMo 2000. To prove sexual contact, the State had to prove that appellant touched the victim’s genitals through the clothing for the purpose of arousing or gratifying his own sexual desire (L.F. 65). § 566.010, RSMo Cum. Supp. 2007. The purpose of the requirement that the touching be for the purpose of arousing or gratifying sexual desire is to exclude innocent touching from being deemed criminal conduct. State v. Love, 134 S.W.3d 719, 723 (Mo.App., S.D. 2004). In determining whether or not a touching was done for the purpose of arousing or gratifying sexual desire, direct evidence of intent being seldom available, a fact-finder looks at the circumstances of the particular case. Id. Such intent can also be inferred from the act itself. State v. McIntyre, 63 S.W.3d 312, 315 (Mo.App., W.D. 2001).

Here, there was sufficient evidence that appellant touched the victim's vagina through her underwear with the purpose of arousing or gratifying his sexual desire. First, the nature of the act itself demonstrated that it was done for a sexual purpose. Under the circumstances, there was no legitimate innocent reason for appellant to be touching the victim's genitals. While appellant attempts to define the touching as "innocent and most likely inadvertent," the victim's description of the touching showed that appellant put his foot on her vagina and rubbed his foot around in a slow, circular motion, showing a definite purpose to actually be touching the vagina, as opposed to it being an inadvertent touching (St. Exh. 1; Tr. 481, 501). Such intentional rubbing of the vaginal area, even through clothing, is sufficient to demonstrate a purpose of arousing or gratifying sexual desire. See Love, 134 S.W.3d at 723 (the defendant, while acting as Santa Claus, rubbed one victim's crotch area with his hand and another victim's breast with his hand through their clothing; both instances were sufficient to show the prohibited purpose).

Further, appellant had also engaged in another sexual act with the victim when he straddled her "stomach" and rubbed his "butt" back and forth (Tr. 346; St. Exh. 1). In her videotaped interview with the Child Advocacy Center, the victim demonstrated appellant's actions with stuffed animals, clearly showing that appellant thrust his pelvic area against her repeatedly in a sexual manner (St. Exh. 1). Motive to commit a crime involving sexual misconduct may be shown by evidence of other acts of sexual misconduct toward the same victim. State v. Barrett, 41 S.W.3d 561, 564 (Mo.App., S.D. 2001). Thus, appellant's other

sexually-oriented act committed against the victim showed that appellant had a motive to engage in sexual contact with the victim for the purpose of gratifying his sexual desires.

Finally, appellant's actions in going to the victim's father and accusing the victim of acting sexually towards him and then in lying to the police and saying that the victim was "wobbling" up and down on his foot showed that he knew he had committed an intentional and improper act against the victim and wanted to cover up the intent behind his actions by blaming the victim before she could report the abuse. Exculpatory statements, proven false, evidence a consciousness of guilt. State v. Rodden, 728 S.W.2d 212, 219 (Mo. banc 1987). While appellant points to his statements accusing the victim to support the theory that he did not engage in the contact for the purpose to arouse or gratify sexual desire (App.Br. 22-23), it is clear from the jury's finding of guilt that they rejected that inference, finding appellant's statements of innocence false. Thus, appellant's devious attempt to deflect his guilt showed that he was well aware that he had molested the victim.

Because the evidence of the act itself, appellant's other sexual acts committed against the victim, and appellant's lying to deflect his guilt by blaming the victim all support the inference that appellant touched the victim for the purpose of arousing or gratifying sexual desire, there was sufficient evidence to support this element. Therefore, the trial court did not err, and appellant's first point on appeal must fail.

II.

This court should refuse to review appellant’s claim that the trial court failed to sua sponte interfere with guilt-phase closing argument as such claims are typically denied without explication. In any event, the trial court did not plainly err in not interfering sua sponte with the prosecutor’s closing argument that appellant was a “child molester” and a “sexual predator” who was “grooming” the victim for a more serious sexual crime because the argument was not improper in that the argument was based on the evidence showing that appellant had engaged in two different sexual acts of increasing seriousness with the victim, not on any facts outside the evidence.

Appellant claims that the trial court plainly erred in failing to interfere with the prosecutor’s closing argument that appellant was a “child molester” and “sexual predator” who was “grooming” the victim in order to be able to later commit more serious sexual crimes against her, contending that the argument was improperly inflammatory and based on facts outside the record (App.Br. 24-31). But because the argument was a permissible comment based on the evidence that appellant had committed two sexual acts of increasing seriousness with the victim, the trial court did not plainly err in refusing to interfere with the argument.

A. Facts

During the opening portion of the State’s closing argument, the prosecutor, while explaining how the evidence showed that appellant had the purpose to arouse or gratify his sexual desire, stated:

Also, [the victim] told you that he -- and on the DVD, that he also, at one point, rubbed himself. She showed you with stuffed animals, rubbed himself on her abdomen. She showed the demonstration of how he did it.

You notice in the corner of that video, you couldn't really see her, but she was doing that, she was moving her hips around. That also points to why the defendant was touching her. Take his actions as a whole and look at everything he did to her.

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 that vagina.

You heard [the victim] 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 [the victim] for something bigger. This was a touch that was sexually motivated.

(Tr. 597-597). There was no objection to this argument (Tr. 597).

B. This Court Should Not Review Appellant's Claim

Appellant concedes that his claim is not preserved for appeal because there was no objection at trial (App.Br. 24). Statements made in closing argument will rarely amount to plain error, and any assertion that the trial court erred for failure to intervene *sua sponte* overlooks the fact that the absence of an objection by trial counsel may have been strategic in nature. State v. Cole, 71 S.W.3d 163, 171 (Mo. banc 2002). Without an objection, “the trial court’s options are narrowed to uninvited interference with summation and a corresponding increase of error by such intervention.” State v. Clemmons, 753 S.W.2d 901, 907-08 (Mo. banc 1988). Because trial strategy looms as an important consideration in any trial, assertions of plain error regarding matters contained in closing argument are generally denied without explication. State v. Chavez, 128 S.W.3d 569, 577 (Mo. App., W.D. 2004). Therefore, this Court should choose not to exercise its discretionary ability to review for plain error, and deny appellant’s claim without review.

C. Standard of Review

If this Court chooses to review appellant’s claim, review is only available, if at all, for plain error. Supreme Court Rule 30.20. Review for plain error is only merited when an alleged error so substantially affected appellant’s rights that a miscarriage of justice or manifest injustice would occur if the error is not corrected. State v. Williams, 97 S.W.3d 462, 470 (Mo. banc 2003). A conviction will be reversed based on plain error in closing argument only when it is established that the argument had a decisive effect on the outcome of the trial and amounts to manifest injustice. State v. Edwards, 116 S.W.3d 511, 536-37

(Mo. banc 2003). Appellant bears the burden of proving a manifest injustice. State v. Mayes, 63 S.W.3d 615 (Mo. banc 2001). Plain error will seldom be found in unobjected to closing argument. State v. Sanchez, 186 S.W.3d 260, 265 (Mo. banc 2006).

D. The Prosecutor’s Argument was Not Plainly Erroneous

Prosecutors are permitted to argue reasonable inferences, so long as they stay within the record, i.e., they can draw conclusions based on the evidence. Glass v. State, 227 S.W.3d 463, 473-74 (Mo. banc 2007). Here, the prosecutor’s argument was permissible because it was based on the evidence. As to the statement that appellant was a “child molester,” that was clearly supported by the evidence that appellant committed the crime of first-degree child molestation. As to the statement that appellant was a “sexual predator” who was “grooming” the victim for more serious sexual activity, this was supported by the evidence of the charged offense and appellant’s other sexual act against the victim where he straddled her abdomen and thrust against it (Tr. 346; St. Exh. 1). As the charged offense was committed the day before the victim told her parents about it and appellant was no longer left alone with appellant after that night, the reasonable inference was that the thrusting incident occurred at an earlier time. Thus, appellant first engaged in a simulated sexual act with the victim, and then moved on to touching her genitals through the clothing. This supports the inference that appellant was indeed engaging in acts increasing in seriousness with the intention of making her more comfortable with the acts so that he could commit more serious sexual acts with her in the future. Therefore, the evidence supported the inference that appellant was acting like a sexual predator grooming his victim for worse crimes. An

argument that a defendant is a “predator” is permissible so long as it is supported by the evidence. State v. Roberts, 948 S.W.2d 577, 595 (Mo. banc 1997).

Because the argument that appellant was a child molester and sexual predator who was grooming the victim for more serious sexual crimes was supported by evidence, the argument was permissible. Therefore, the trial court did not plainly err in refusing to interfere with the prosecutor’s closing argument, and appellant’s second point on appeal must fail.

III.

The trial court did not err in admitting statements made by the victim to other witnesses under § 491.075 on the basis that § 491.075 is unconstitutional due the alleged “abrogation” of the “sufficient indicia of reliability” test in Crawford v. Washington because § 491.075 is not unconstitutional, either facially or as applied to appellant, in that Crawford did not abrogate the “sufficient indicia of reliability” test in all cases, but affirmed its continued use in all cases except those involving testimonial hearsay where the declarant was unavailable and there was no opportunity for cross-examination, and the victim testified in this case, and was therefore available for cross-examination and was actually cross-examined by appellant.

Appellant claims that Missouri trial courts cannot constitutionally admit statements of child victims under § 491.075 because that statute is unconstitutional, arguing that the United States Supreme Court “abrogated” the “sufficient indicia of reliability” test found in the section in Crawford v. Washington; thus, he argues, the statute cannot be constitutionally applied (App.Br. 32-39). But because Crawford did not fully abrogate the “sufficient indicia of reliability” test in all cases, but actually affirmed its continued use in all cases except those involving testimonial hearsay where the declarant was unavailable and there was no opportunity for cross-examination, and because the victim actually testified in this case and was therefore available for and was actually cross-examined by appellant, § 491.075 is neither facially unconstitutional nor unconstitutional as applied to appellant.

A. Standard of Review

Appellant raised this issue in a pre-trial motion to have § 491.075 declared unconstitutional for the reasons raised in this appeal, raised it again at the § 491.075 hearing, and received a continuing objection on the basis of that motion (L.F. 46-49; Tr. 63-64, 362-363). Thus, his claim is preserved for review. Review of a claim that a statute is unconstitutional is reviewed *de novo*. Murrell v. State, 215 S.W.3d 96, 102 (Mo. banc 2007). Statutes are presumed to be constitutional, and this Court resolves any doubt in favor of the statute's constitutionality and makes "every reasonable intendment to sustain the constitutionality of the statute." Id.

B. § 491.075 is Not Facially Unconstitutional

This Court has previously ruled that § 491.075 is constitutional in response to claims that it violates a defendant's federal or state due process, equal protection, and confrontation rights, in those situations where the victims are available and testify at trial. State v. Wright, 751 S.W.2d 48, 51-53 (Mo. banc 1988); State v. Hester, 801 S.W.2d 695, 696-697 (Mo. banc 1991). Appellant argues that § 491.075 is now facially unconstitutional, however, 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)" (App.Br. 36). But this assertion is fundamentally flawed, as the Supreme Court did not wholly abrogate the "indicia of reliability test. Thus, appellant has not demonstrated that § 491.075 is facially unconstitutional.

To show facial unconstitutionality, appellant must show that there is no conceivable set of circumstances under which § 491.075 is valid. As the United States Supreme Court has explained:

A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [an] Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an “overbreadth” doctrine outside the limited context of the First Amendment.

United States v. Salerno, 481 U.S. 739, 745 (1987). Here, even in the wake of Crawford, there are various circumstances in which the admission of evidence under § 491.075 is wholly valid.

“The Sixth Amendment’s Confrontation Clause provides that, ‘[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.’” Crawford, 541 U.S. at 42. Thus, before certain types of hearsay statements may be admitted, the demands of the Confrontation Clause must be satisfied. See id. at 68. But as the Court made clear, not all hearsay statements are treated the same under the Confrontation Clause.

In particular, the Court clarified, “Where testimonial [hearsay statements are] at issue [i.e., where such out-of-court statements are going to be admitted *in the absence* of the witness at trial] . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross examination.” Id. at 68; see id. at 59 (“Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”). But, conversely, “Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law – as does [Ohio v.]Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.” Id. at 68.

In Ohio v. Roberts, 448 U.S. 56 (1980), the Court held that the out-of-court statements of an unavailable witness could be admitted if they bore “adequate ‘indicia of reliability.’” Id., 448 U.S. at 66. And, as the foregoing reveals, under Crawford, this test is still valid for “nontestimonial” hearsay statements. Indeed, under Crawford, with regard to nontestimonial statements, the states are afforded “flexibility in their development of hearsay law,” including approaches like those in Roberts and those that “exempt[] such statements from Confrontation Clause scrutiny altogether.” Crawford, 541 U.S. at 68. Thus, even after Crawford, nontestimonial out-of-court statements can still be admitted under § 491.075 without violating the Confrontation Clause. Because there are circumstances where § 491.075 can be validly applied, it cannot be said that § 491.075 is unconstitutional on its face. Salerno, 481 U.S. at 745; see also State v. Roberts, 948 S.W.2d 577, 604 (Mo. banc

1997) (the defendant claimed that § 565.030.4 was facially unconstitutional because it did not place limits on victim-impact evidence admissible at sentencing; the Court rejected the claim, pointing out that the Due Process Clause of the Fourteenth Amendment provides such a limit, namely, that victim impact evidence may not be so unduly prejudicial that it renders the trial fundamentally unfair).

In addition to the foregoing, § 491.075 is also not facially unconstitutional, because, while it employs the indicia-of-reliability test, it simultaneously requires either that the witness testify at trial or that the witness (if absent from trial) be unavailable. § 491.075.1.(1)-(2), RSMo 2000. Thus, inasmuch as § 491.075 premises admissibility on both indicia-of-reliability and either presence at trial or unavailability, there will be many instances (e.g., whenever the declarant testifies at trial) in which out-of-court statements—both testimonial and nontestimonial—will be properly admitted. Indeed, as the Court made plain in Crawford, “when the declarant appears for cross examination at trial, the Confrontation Clause places *no constraints at all* on the use of his prior testimonial statements.” 541 U.S. at 59 n. 9 (emphasis added). Thus, if the declarant testifies at trial (as occurred in appellant’s case), then the admission of his or her out-of-court statements is not constrained at all by the Confrontation Clause. In short, where a witness testifies at trial, his or her out-of-court statements—even if testimonial—would be properly admitted under § 491.075, even after the decision in Crawford. Therefore, it cannot be said that § 491.075 is facially unconstitutional.

B. § 491.075 is Not Unconstitutional as Applied to Appellant

There is, of course, a category of out-of-court statements that, if admitted under § 491.075, would violate the Confrontation Clause. As this Court held in State v. Justus, 205 S.W.3d 872, 878-81 (Mo. banc 2006), “testimonial” out-of-court statements cannot be properly be admitted under § 491.075 unless the declarant was unavailable and was previously subject to cross-examination. But, while that possibility exists, the out-of-court statements in appellant’s case do not fall into that category. And, of course, appellant “has no standing to raise other hypothetical instances in which the statute might be unconstitutionally applied.” State v. Kerr, 905 S.W.2d 514, 515 (Mo. banc 1995).

In appellant’s case, the victim testified at trial and was subjected to cross-examination (Tr. 328-361). Thus, the admission of her out-of-court statements did not run afoul of the Confrontation Clause. Crawford, 541 U.S. at 59 n. 9 (“when the declarant appears for cross examination at trial, the Confrontation Clause places *no constraints at all* on the use of his prior testimonial statements”)(emphasis added); State v. Benwire, 98 S.W.3d 618, 628 (Mo.App. W.D. 2003) (“the requirements of the Confrontation Clause were satisfied when K.T. testified at trial and was subject to cross examination”); State v. Mann, 35 S.W.3d 913, 916 (Mo.App. S.D. 2001). Thus, regardless of whether or not the victim’s out-of-court statements were “testimonial” as contemplated by Crawford,² the victim’s presence at trial

²Under Justus, the statements to Luzette Wood at the Child Advocacy Center would have likely been testimonial, but the statements to her mother would not, as they were not to a state actor for the purpose of proving past events for later criminal prosecution, but for the

and appellant's opportunity to confront and cross-examine her was all that the Confrontation Clause required. See Crawford, 541 U.S. at 68-69 ("Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.").

Appellant attempts to circumvent the above conclusion by stating that "N.M. was available to testify at trial and took the stand," but that "her reluctance to testify about her allegations deprived [appellant] of the opportunity for full and effective cross-examination to which . . . he is entitled" (App.Br. 39). But appellant's claim is without merit. First, whether the opportunity to confront and cross-examine the witness in this case was fruitful has no bearing on the constitutionality of § 491.075. The statute's requirement that the declarant testify at trial is wholly consistent with, and satisfies, the demands of the Confrontation Clause; thus, if appellant felt that his confrontation rights were somehow violated at trial due to the victim's alleged "reluctance," he should have raised a free-standing confrontation claim, not a claim that § 491.075 itself was unconstitutional.

Second, contrary to appellant's claim, he did have a full and fair opportunity to confront and cross-examine the victim. As the record shows, N.M. took the stand and was subjected to cross-examination (Tr. 328-361). This was sufficient to satisfy the purpose of a mother trying to figure out how to protect her child (Tr. 375). See Justus, 205 S.W.3d at 878-80. The fact that the mother did not contact the police upon hearing the statements shows that the purpose of eliciting the statements had nothing to do with prosecution (Tr. 422-23).

Confrontation Clause. “[T]he Confrontation Clause is satisfied where a defendant has a full and fair opportunity to bring out a witness’ bad memory and other facts tending to discredit his [or her] testimony.” State v. Howell, 226 S.W.3d 892, 896 (Mo.App. S.D. 2007) (citing United States v. Owens, 484 U.S. 554, 559-60 (1988), and rejecting the defendant’s argument that he was denied a full and fair opportunity to cross-examine due to the witness’s inability to recall her previous statements or the details of the offense). “The Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” Owens, 484 U.S. at 559. Similarly, in Delaware v. Fensterer, 474 U.S. 15 (1985), the Court stated:

The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness’ testimony.

Id. at 21-22. Thus, appellant had a “full and fair opportunity to confront and cross-examine” the victim as contemplated by the Confrontation Clause.

Finally, appellant's contention about the victim's purported reluctance to testify is simply wrong. While the victim was unwilling to answer the specific question on direct examination of what exactly appellant had done to her, she did testify to all of the surrounding circumstances of the crime (Tr. 329-349). On cross-examination, she answered all of appellant's questions about the crime, including affirming that she had told defense counsel in an interview that appellant "wobbled his feet on [her] private parts." (Tr. 350-361). Thus, appellant not only had the opportunity for a full and fair cross-examination, but actually conducted a full and fair cross-examination.

Because N.M. testified at trial and was subject to cross-examination, appellant's right to confrontation was not violated by the admission of N.M.'s out-of-court statements. Therefore, it cannot be said that § 491.075 was, as employed in this case, unconstitutional.

In light of the foregoing, appellant's third point on appeal must fail.

IV.

The trial court did not plainly err or abuse its discretion in admitting the testimony of the victim’s mother, R.Z., and Child Advocacy Center forensic interviewer Luzette Wood about statements the victim made to them about the crime under § 491.075 because the statements were admissible, in that they possessed sufficient indicia of reliability, and appellant suffered no prejudice or manifest injustice, as the testimony was cumulative to the victim’s testimony on both direct and cross-examination and the testimony of defense witness K.R.

Appellant claims that the trial court “clearly erred and abused its discretion” in admitting out-of-court statements of the victim under § 491.075, arguing that the statements did not bear sufficient indicia of reliability due to an alleged lack of spontaneity and consistency and the victim’s alleged “motive to fabricate and propensity to lie” (App.Br. 40-46). But because the victim’s statements were sufficiently spontaneous and consistent, were made with a credible mental state, were not the product of a motive to fabricate, and showed unexpected knowledge of sexual subject matter, and because the evidence admitted by the State at trial was merely cumulative to other evidence elicited by both the State and the defense, the trial court neither plainly erred or abused its discretion.

A. Preservation and Standards of Review

Appellant paints his claim with a broad brush in arguing that his claim is preserved by trying to treat the statements as one single object to which he objected (App.Br. 40-41). The record shows, however, that there were three different challengeable statements admitted by

the State, to which he only adequately objected to two. First, appellant points to a continuing objection he made prior to the introduction of any of the victim's out-of-court statements (Tr. 361-362). This objection, however, was explicitly limited by appellant to appellant's constitutional challenge to § 491.075, not to the court's finding of sufficient indicia of reliability (Tr. 361-362). Appellant objected, and received a continuing objection, to the victim's statements to her mother, and to Wood's *testimony* as to the victim's statements (Tr. 374, 481). Thus, objections to these statements are preserved for appeal.

As to those statements, trial courts are vested with broad discretion over the admissibility of evidence, and appellate courts will not interfere with those decisions unless there is a clear showing of an abuse of that discretion. State v. Winfield, 5 S.W.3d 505, 515 (Mo. banc 1999). The trial court clearly abuses that discretion when a 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. Brown, 939 S.W.2d 882, 883-84 (Mo. banc 1997). If reasonable persons can differ about the propriety of an action taken by the court, it cannot be said the trial court abused its discretion. Id. Further, appellate courts review the trial court's decision for prejudice, and not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial. State v. Johns, 34 S.W.2d 93, 103 (Mo. banc 2000). Prejudice is established by showing a reasonable probability that the verdict would have been different had the error not occurred. State v. Ringo, 30 S.W.3d 811, 820 (Mo. banc 2000). The

defendant bears the burden of proving both error and prejudice. State v. Morin, 873 S.W.2d 858, 867 (Mo.App., S.D. 1994).

Appellant did not, however, object to the introduction of the *DVD* of the victim's interview with Wood, and in fact affirmatively stated, "No objection," to its introduction (Tr. 477). Generally, an affirmative statement of "No objection" waives all appellate review of the admission of that evidence. State v. Starr, 492 S.W.2d 795, 801 (Mo. banc 1973); State v. McWhorter, 240 S.W.3d 761, 763 (Mo.App., S.D. 2007). While this Court recognized an exception to this rule when it was clear from the record that the parties had a "mutual understanding" that the evidence was objected to and was meant to be considered a proper continuing objection, State v. Baker, 103 S.W.3d 711, 716-17 (Mo. banc 2003), this exception does not apply here. First, by objecting after this statement of "no objection," to testimony about the statements, appellant showed a full awareness of the need to still object to evidence of the statements. Second, it appears from appellant's thorough cross-examination of Wood about perceived denials of improper touching by the victim and Wood's continued efforts to examine the victim after those alleged denials and from defense counsel's closing argument on the video, including repeated appeals to the jury to request to view the DVD during deliberations, that appellant strategically wanted the video statement to be admitted so that the defense could use the video to attack the victim's credibility (Tr. 486-501, 507-509, 599, 610). Thus, any claim appellant may be raising as to the statements on the DVD must be considered waived.

Should this Court believe that appellate review of appellant's claim as to the statements on the DVD was not waived, review can only be for plain error due to appellant's failure to object. Supreme Court Rule 30.20. Review for plain error is only merited when an alleged error so substantially affected appellant's rights that a miscarriage of justice or manifest injustice would occur if the error is not corrected. State v. Williams, 97 S.W.3d 462, 470 (Mo. banc 2003). A conviction will be reversed based on plain error in closing argument only when it is established that the argument had a decisive effect on the outcome of the trial and amounts to manifest injustice. State v. Edwards, 116 S.W.3d 511, 536-37 (Mo. banc 2003). Appellant bears the burden of proving a manifest injustice. State v. Mayes, 63 S.W.3d 615 (Mo. banc 2001).

B. The Statements were Admissible Under § 491.075

Section 491.075, RSMo 2000, allows the out-of-court statements of a child twelve years or younger to be admitted at trial if:

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

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

....

§ 491.075.1, RSMo 2000. Among the non-exclusive factors considered in evaluating whether or not there were "sufficient indicia of reliability" include: 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 similar age. State v. Porras, 84 S.W.3d 153, 157 (Mo. App., W.D. 2002). The Court looks at the totality of the circumstances in reaching its decision. Id. While the State bears the burden of producing evidence supporting the admission of the statements, it does not need to prove that the statements are reliable—once the State presents sufficient indicia of reliability, the statements are presumptively admissible. Id. at 158.

1. The Statements were Spontaneous and Consistent

Under the totality of the circumstance surrounding the victims' statements to her mother and Wood, the trial court did not abuse its discretion or plainly err in admitting the statements, as there was sufficient evidence from which the trial court could find sufficient indicia of reliability. First, the statements were spontaneous and consistent. The statements to R.Z. came in response to a request from R.Z. to know what the victim was talking about and then to a question asking, "What do you mean?" (Tr. 374-375). Statements of a child witness simply responding to questions asked of the child are considered spontaneous so long as the statements are not prompted, coaxed, or cajoled from the witness. State v. Gillard, 986 S.W.2d 194, 197 (Mo.App., S.D. 1999). R.Z. did not suggest any answer in her questions and only asked about the touching in the first place because she had already heard the victim talking about touching (Tr. 37, 374). Thus, the statement to R.Z. was spontaneous under the law.

The statement made to Wood was even more spontaneous. While the statement was made during an interview of the victim, the victim did not disclose any abuse until she

spontaneous said, “I’m scared” and that she did not want to be there (St. Exh. 1). In response to the victim’s statements, Wood said things such as “Tell me about that” (Tr. 11, 495, 504-505; St. Exh. 1). The victim said, “I wish I was never, ever, ever here. You know why? Because things happened that I didn’t want to happen in my life.” (St. Exh. 1). When Wood said, “Like what?” the victim said, “Like getting touched in the wrong spot,” after which she disclosed the abuse (St. Exh. 1). Clearly, this was not “prompted, coaxed, or cajoled” by Wood, but was as spontaneous as the situation could have possibly allowed.

Further, the statements to R.Z. and Wood were consistent with each other and with other evidence. In both, the victim disclosed that appellant had touched her vagina with his foot (Tr. 11, 37, 355, 374-375, 481; St. Exh. 1). These were also consistent with another statement made to R.Z. but not introduced at trial (Tr. 38), statements made to defense witness K.R. (Tr. 558-559, 568), statements made to defense counsel and witnessed by counsel’s investigator (Tr. 358-359, 529), and to the victim’s direct testimony that appellant put his foot under her nightgown and did something that made her feel “horrible” and her cross-examination testimony that she said that appellant touched her private parts (Tr. 345, 347-348, 355, 358-359).

Appellant points to no contradiction of fact in the victim’s reports, but instead focuses only on her initial denials during the forensic interview to show that the statements were inconsistent (App.Br. 44). As Wood explained, these statements were not actual statements of fact that the crime did not happen, but was merely a defense mechanism to keep from having to discuss the unpleasant events (Tr. 479-480). The trial court was obviously free to

believe this testimony to reach the proper understanding that there was no actual inconsistency, and that the victim's behavior was actually not unusual for a victim of child sexual abuse. Therefore, it cannot be said that there was insufficient evidence that statements were spontaneous and consistent.

2. The Victim's Mental State was Appropriate

The second factor to establish indicia of reliability—the victim's mental state—also supports the trial court's decision. During both statements, the victim, while somewhat reluctant—as would be expected in such a case (Tr. 479-480), was able to state what happened to her (Tr. 347-348, 481; St. Exh. 1). In the interview with Wood, the victim did several things showing an appropriate mental state: while she was generally talkative during the interview, she acted in a more evasive manner when asked about the abuse, looking away, getting up to focus on something else, and even covering her mouth so she would not talk about “the family's business,” showing that she understood that what happened was something uncomfortable that she would not want to talk about, as opposed to a false story she was willing to tell (St. Exh. 1). She even regretted that she had said she had been touched in a “wrong spot,” realizing she would now have to talk about it (St. Exh. 1). She used details in her description which showed authenticity, such as the relative positions of people in the room, and used physical demonstrations to show what she could not explain (Tr. 480-481). Therefore, her mental state while making these statements was certainly appropriate for a victim of sexual touching.

3. The Evidence Refuted a Motive to Fabricate

Appellant focuses on this factor, arguing that the victim did not want to get in trouble for her improper sexual actions, so she had a motive to lie to stay out of trouble, which was consistent with a “propensity” to tell lies to stay out of trouble (App.Br. 45). Appellant overstates this evidence, however, as the evidence provided by the witnesses supports the finding that the victim’s statements here were not motivated by a desire to lie to avoid punishment, but were simply recitations of the truth. While both of her parents admitted that the victim had trouble with lying, both described that trouble as the type of lying typical for children, i.e., denying having done something that it was clear she had done to avoid trouble—far different than making a serious accusation against someone she had no reason to dislike (Tr. 421-422, 547). R.Z. described the victim’s ability to lie like this, saying that the victim would only “take it so far” and would not be able to keep the lie straight (Tr. 422). Thus, as opposed to demonstrating that the statements were unreliable, this testimony showed that this was not the type of lie the victim would tell; here, she repeatedly told the same version of events to “a lot” of different people, and maintained that version of events from the time of their occurrence up through trial. Therefore, the evidence showed that the statements were not the product of her typical tendency to tell childhood lies, but was an honest account of what happened.

4. The Victim Had Unusual Knowledge of Sexual Activity

The victim also showed unusual sexual knowledge for a six-year-old girl when describing appellant’s other sexual-oriented behavior with her to Wood. After telling Wood

that appellant had rubbed his “butt” on her stomach, she demonstrated what he did using stuffed animals (St. Exh. 1). Her demonstration clearly showed a simulated sex act, with appellant thrusting his pelvic area against her (St. Exh. 1). Thus, she had unusual knowledge of sexual activity, supporting a finding of sufficient indicia of reliability.

Because the statements to R.Z. and Wood were sufficiently spontaneous and consistent, the victim’s mental state while disclosing was appropriate, the evidence refuted appellant’s claim of a motive to fabricate and supported a finding of reliability, and the victim had some unusual knowledge of sexual activity for her age, there was sufficient indicia of reliability to support the trial court’s decision to admit the statements. Therefore, the trial court did not abuse its discretion or plainly err in admitting the statements.

C. Appellant Suffered Neither Prejudice Nor Manifest Injustice

Finally, appellant did not suffer prejudice or manifest injustice from the admission of the victim’s statements to R.Z. and Wood because these statements were merely cumulative to the victim’s own testimony and to evidence introduced through appellant’s cross-examinations and by his own witnesses. After the victim testified on direct examination that appellant had put his foot under her nightgown and had done something that made her feel “horrible,” and that appellant had rubbed himself against her stomach, appellant established in cross-examination that the victim had told Wood that appellant had touched her private parts and that she had told defense counsel that appellant “wobbled his feet” on her private parts (Tr. 344-347, 355, 358-359). Thus, appellant was the first party to introduce evidence of the victim’s out-of-court statements. Appellant also called defense counsel’s investigator,

who also testified that the victim had said that appellant was moving his foot on her private parts (Tr. 529). Appellant also called K.R., who testified on direct that he reported to the police that the victim had told him that appellant put his foot in between her legs (Tr. 558-559). This opened the door to K.R.'s cross-examination testimony (without defense objection) that the victim had told him that appellant put his feet in between her legs and started massaging her vagina (Tr. 568).

The above shows that the testimony by R.Z. and Wood was not prejudicial. “Any error in receiving evidence is not considered prejudicial where similar evidence has been received elsewhere in the case without objection.” State v. Roller, 31 S.W.3d 152, 157 (Mo.App., S.D. 2000), citing State v. Brown, 949 S.W.2d 639, 642 (Mo.App., E.D. 1997); State v. Matheson, 919 S.W.2d 553, 557-58 (Mo.App., W.D. 1996). It clearly was not plain error, as an “allegedly wrongful admission of hearsay testimony does not constitute plain error if such testimony is merely cumulative to other evidence properly admitted.” State v. Goodwin, 43 S.W.3d 805, 818 (Mo. banc 2001). Thus, because appellant presented evidence cumulative to the challenged evidence, he could not have suffered prejudice or a manifest injustice from the admission of other evidence demonstrating the same facts.

For the foregoing reasons, appellant's final point on appeal must fail.

CONCLUSION

In view of the foregoing, appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 8759 words, excluding the cover, this certification and the appendix, as determined by Microsoft Word 2003 software; and

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

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 16th day of May, 2007, to:

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APPENDIX

Sentence and Judgment A-1