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No. SC93172

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

GENE MORRIS JEFFREY,

Appellant.

Appeal from the Warren County Circuit Court
Twelfth Judicial Circuit
The Honorable Gael D. Wood, Judge

RESPONDENT'S BRIEF

CHRIS KOSTER
Attorney General

JESSICA P. MEREDITH
Assistant Attorney General
Missouri Bar No. 64029

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-9393
Fax: (573) 751-5391
Jessica.Meredith@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

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STATEMENT OF FACTS

This is an appeal from a Warren County Circuit Court judgment convicting Gene Morris Jeffrey ("Defendant") of four counts of sexual misconduct involving a child under 15 (§ 566.083, RSMo Cum. Supp. 2006). (L.F. 2-3). This case began when Defendant was charged by an amended information with two counts for his actions on November 10, 2010. (L.F. 13). Count I charged sexual misconduct involving a child by indecent exposure for knowingly exposing his genitals to A.K.O. (L.F. 13). Count II charged attempting the same crime against M.K.H. (L.F. 13). Defendant was also charged with the same two crimes for his actions against A.K.O. (Count III) and M.T. (Count IV, attempt) on January 22, 2010. (L.F. 13-14). Defendant was tried by a jury on March 14-15, 2012, with the Honorable Gael D. Wood presiding. (L.F. 6). The jury found Defendant guilty on all counts and recommended a sentence of 60 days each for Counts I and II, and 15 days and a fine each for Counts III and IV. (L.F. 6, 36-39, 44-47; Tr. 284-85, 300-01). The court imposed the jury's recommended sentences and ordered that Defendant serve them consecutively for a total of 150 days. (L.F. 6, 50-51; Tr. 306-07). The court also fined Defendant $250 each for Counts III and IV. (L.F. 6, 50-51; Tr. 306).

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Defendant contests the sufficiency of the evidence to support his convictions. Viewed in the light most favorable to the verdict, the evidence presented at trial showed:

In January 2010, M.T. (born 12/20/1999) was walking home from school when she passed by Defendant's house, which was located about a half mile away from Marthasville Elementary School. (Tr. 142-44, 173). She saw Defendant, who was completely nude, standing in the front doorway behind the clear storm door. (Tr. 144-45, 169-70; State's Ex. 4). Defendant was facing the street when she saw him. (Tr. 152; State's Ex. 4). Initially, M.T. did not tell anyone, because she was scared. (Tr. 145-46).

Shortly after that incident, on January 22, M.T. was walking in the same area with A.K.O. (born 4/2/1999), who was her schoolmate and neighbor. (Tr. 146-47, 153-54, 187, 189-90). A.K.O. saw Defendant standing naked in the front doorway, behind a storm door, with the main, wooden front door open. (Tr. 156, 166-67). Defendant was facing the street. (Tr. 157). A.K.O. could see him "[f]rom head to ankles." (Tr. 157). After she first saw Defendant in the door, she looked back and saw that the door was closed. (Tr. 182-83; State's Ex. 3).

A.K.O. said something to M.T. about the house, but M.T. did not look in its direction. (Tr. 147-48, 158). Both girls told A.K.O.'s mother, who reported the incident to the police . (Tr. 148, 158, 189-91).

Based on the girls' statements, Deputy Euen Jenkins went to Defendant's house. (Tr. 173-74). Defendant, who was in his early 70s, told Deputy Jenkins that he was retired. (Tr. 174; State's Ex. 5). He said that he had been nude in the doorway around the time in question because he had shut the front door before taking a shower at 3 p.m. (Tr. 174, 224; State's Ex. 5). Deputy Jenkins told Defendant that 10- and 11-year-old girls had seen him standing nude in the doorway. (Tr. 175). Defendant apologized, but denied seeing anybody outside. (Tr. 175, 178, 184; State's Ex. 5). After Deputy Jenkins investigated the January incident, A.K.O.'s mother believed that "it was just a confused old man, that it was a mistake on his part[.]" (Tr. 200).

A.K.O. again saw Defendant nude in November 2010. (Tr. 158, 213; State's Ex. 8). Defendant again was not wearing any clothes, but this time he was standing in front of a window with the blinds pulled halfway up. (Tr. 158-59, 215; State's Ex. 8). Defendant was facing the street and A.K.O. could see from his chest to his knees. (Tr. 159).

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As soon as she got home, A.K.O. told her mother about this incident. (Tr. 159-60, 191). A.K.O.'s mother drove A.K.O. back to Defendant's house, "to see what was going on." (Tr. 192). A.K.O.'s mother noticed that the blinds on the window nearest the front door "were pulled up unusually high" and that "[i]t would have been above your chest." (Tr. 192). She could see the furniture inside the house, but did not see anyone walking around inside as she drove past. (Tr. 194-95, 198-99).

As A.K.O.'s mother was driving toward Defendant's house, she saw another girl walking toward it from the opposite direction. (Tr. 193-94, 206). The girl was M.K.H. (born 11/26/1997), who lived down the street from Defendant and near A.K.O. and M.T. (Tr. 204-05). When M.K.H. was almost directly in front of the house, Defendant stepped in front of the window, nude. (Tr. 195, 198-99). M.K.H. did not see Defendant or anything inside the house, but A.K.O.'s mother could see him from just above his knees to his chest, including his genitals. (Tr. 195-96, 207). A.K.O.'s mother then drove directly in front of the house to block M.K.H.'s view. (Tr. 196). "As soon as [she] gunned the car, [Defendant] stepped out of the window." (Tr. 202). She picked up M.K.H. and then called the police. (Tr. 196-97, 206-07).

When Lieutenant Scott Schoenfeld later contacted Defendant at his home, Defendant denied raising his blinds. (Tr. 223-25; State's Ex. 10).

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Defendant said that he had been hunting on November 10, so the incident might have occurred when he got out of the shower. (Tr. 226-27; State's Ex. 10). Defendant denied ever standing nude in front of the window, but said that he had been sitting on the bed, and that he might have been getting some clothes. (Tr. 238). Defendant also told Lt. Schoenfeld that he "didn't see anybody looking this way." (State's Ex. 5).

Defendant did not present any evidence at trial. (Tr. 247).

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ARGUMENT

I (constitutionality)

The trial court did not err in denying Defendant's Motion to Dismiss Due to Unconstitutionality of the Statute because this Court has never declared that the language from section 566.083.1(1), RSMo Cum. Supp. 2006 is unconstitutional, and because the statute does not violate Defendant's rights under the First or Fourteenth Amendments.

A. Standard of review.

In determining whether a statute is constitutional, this Court conducts review *de novo. State v. Vaughn*, 366 S.W.3d 513, 517 (Mo. banc 2012) (citing *City of Arnold v. Tourkakis,* 249 S.W.3d 202, 204 (Mo. banc 2008)). "Statutes are presumed constitutional and will be found unconstitutional only if they clearly contravene a constitutional provision." *Id.* (citing *State v. Pribble,* 285 S.W.3d 310, 313 (Mo. banc 2009)).

B. The record pertaining to this claim.

Defendant was charged in 2012 for acts committed on January 22 and November 10, 2010. (L.F. 13-14).

Before trial, Defendant filed a Motion to Dismiss Due to Unconstitutionality of the Statute. (L.F. 11-12). In that motion, he asserted

that section 556.083 was declared unconstitutional in *State v. Beine*, 162 S.W.3d 483 (Mo. banc 2005). (L.F. 11).

After trial, in support of his motion for acquittal, Defendant argued that he "has a constitutional right to privacy in his own home, that there's been no evidence whatsoever that he's gone outside his own home or done anything that's not constitutionally protected by his right of free speech, especially within the right to privacy[.]" (Tr. 241-42). His counsel continued, "he's got a right to be in his house naked as a jaybird if he wants to be." (Tr. 242). The State argued that Defendant has a right to be naked in his own home, but cannot "stand in front of the window as 12-year-old girls are walking by." (Tr. 242). The trial court responded:

> [Defendant] you might find some strict constructionists who would agree with your interpretation. I'm not one of them, I'm afraid. If his house was out in the middle of the woods, that would be one thing, but when you're in the confines of urban or semi-urban areas, I think your conduct must be somewhat more proscribed.

(Tr. 242). The court denied Defense's motion for acquittal. (Tr. 243).

Defendant included this claim in his motion for new trial. (L.F. 48-49).

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C. Section 566.083.1(1), RSMo Cum. Supp. 2006, is constitutional.

As the party challenging section 566.083.1(1)'s validity, it is Defendant's burden to prove that it "clearly and undoubtedly violates the constitutional limitations." *See State v. Vaughn*, 366 S.W.3d 513, 517 (Mo. banc 2012) (citations omitted). "[I]f it is at all feasible to do so, statutes must be interpreted to be consistent with the constitutions." *Id.* (quoting *State v. Stokely,* 842 S.W.2d 77, 79 (Mo. banc 1992)).

Prior to 2005, the statute for sexual misconduct involving a child proscribed a person from "[k]nowingly expos[ing] the person's genitals to a child less than fourteen years of age *in a manner that would cause a reasonable adult to believe* that the conduct is likely to cause affront or alarm to a child less than fourteen years of age[.]" § 566.083.1(1), RSMo 2000 (emphasis added). In response to *State v. Beine*, 162 S.W.3d 483 (Mo banc 2005),[1] the legislature removed the "reasonable adult" language and added a

[1] In dicta, this Court in *Beine* stated that section 566.083.1(1), RSMo 2000 was unconstitutionally overbroad. 162 S.W.3d at 486-89; *see State v. Richard*, 298 S.W.3d 529, 531 (Mo. banc 2009) ("The constitutional analysis in *Beine* was unnecessary to resolve the case and, as a result, is dicta.").

scienter requirement for the latter clause. § 566.083.1(1), RSMo Cum. Supp. 2006.

Defendant here was charged with sexual misconduct involving a child, which prohibits a person from "[k]nowingly expos[ing] his or her genitals to a child less than fifteen years of age *under circumstances in which he or she knows that his or her conduct* is likely to cause affront or alarm to the child[.]"566.083.1(1), RSMo Cum. Supp. 2006.

1. This Court has never questioned the constitutionality of the language in section 566.083.1(1), RSMo Cum. Supp. 2006.

As amended, this statute mirrors section 566.093.1(1), RSMo 2000, which prohibits sexual misconduct against anyone: "A person commits the crime of sexual misconduct in the second degree if such person: (1) Exposes his or her genitals under circumstances in which he or she knows that his or her conduct is likely to cause affront or alarm." This Court has never questioned section 566.093's constitutionality. The language from both sections 566.093.1(1) and 566.083.1(1) satisfy constitutional demands.

"The *Beine* court explained the existing statute had two distinct elements: (1) knowingly exposing one's genitals to a child less than fourteen years of age and (2) exposing one's genitals in a manner that would lead a reasonable adult to believe the conduct would cause affront or alarm to a

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child less than fourteen years of age." *State v. Burgin*, 203 S.W.3d 713, 716 (Mo. App. E.D. 2006) (citing *Beine,* 162 S.W.3d at 486). In dicta,[2] this Court stated "that the requirement of knowing conduct did not extend to the second element." *Id.* (citing *Beine,* 162 S.W.3d at 486); *see also State v. Richard*, 298 S.W.3d at 531.

In construing the statutory terms in section 566.083.1(1), this Court in *Beine* embraced its earlier interpretations from *Moore*:

> "affront" as "a deliberately offensive act or utterance; an offense to one's self respect," and of "alarm" as "apprehension of an unfavorable outcome, of failure, or dangerous consequences; an occasion of excitement or apprehension." . . . "To be impolite is not enough. To be annoying is insufficient." "Affront" might connote an exhibition by a

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[2] Although the conviction in *Beine* was based on insufficient evidence, this Court went on to say, "this conviction also cannot stand because the portion of the statute upon which Mr. Beine was charged and convicted is patently unconstitutional." *Beine*, 162 S.W.3d at 486. This opinion suggested that section 566.083.1(1), RSMo 2000, was unconstitutionally overbroad because it prohibited "two types of conduct: some of which a person has no right to engage in and the other of which a person has a right to engage in." *Id.*

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man of his genitalia to a woman or girl. "Alarm" would indicate a suggestion of physical encounter to either a male or a female.

Beine, 162 S.W.3d at 486 (quoting *State v. Moore*, 90 S.W.3d 64, 67-69 (Mo. banc 2002)).

In *Beine*, this Court reversed the defendant's convictions because the evidence was insufficient to show "that the defendant [exposed his genitals] in a manner that would cause a reasonable adult to believe that such conduct was likely to cause affront or alarm to a child less than fourteen years of age." *Id.* at 485 ("The state is not required to show that any child was actually affronted or alarmed. There was no direct evidence as to how a reasonable adult might react to the appellant's behavior, and there is no citation that sheds any light on how that proposition might be established by evidence."). In that case, an adult male school counselor was convicted of four counts of sexual misconduct involving a child by indecent exposure for exposing himself to three elementary school male students while using the urinal in the restroom. 162 S.W.3d at 484-85. On one occasion, the defendant stood "3 or 4 feet away from the urinal and urinat[ed] in an arc." *Id.* at 484. The Court found insufficient evidence to support the conviction because the evidence "proves nothing about how the appellant's conduct might appear to a reasonable adult at the time it occurred[.]" *Id.* at 485.

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The amended statute includes the scienter requirement for both the first and second elements in that it prohibits a person "*[k]nowingly* expos[ing] his or her genitals to a child less than fifteen years of age *under circumstances in which he or she knows* that his or her conduct is likely to cause affront or alarm to the child[.]" § 566.083.1(1), RSMo Cum. Supp. 2006 (emphasis added). The legislature thus addressed the basis on which this Court questioned the constitutionality of the earlier statute, in dicta, in *Beine*.

2. Defendant's conviction did not violate his freedom of expression under the First Amendment.

Defendant's conduct in this case does not implicate the First Amendment freedom of expression. Under the First Amendment, "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. This freedom of expression is not unlimited: "[T]he States have greater power to regulate *nonverbal, physical conduct* than to suppress depictions or descriptions of the same behavior." *Miller v. California*, 413 U.S. 15, 26 n. 8 (1973) (emphasis added).

First Amendment protection may extend to certain forms of conduct *if* that conduct is expressive. *See, e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (sleeping overnight for homelessness

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awareness); *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (flag burning). However, even expressive conduct may be regulated if it is obscene. *Miller v. California*, 413 U.S. 15 (1973).[3]

The Supreme Court has rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea[.]" *Texas v. Johnson*, 491 U.S. at 404 (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). Not all conduct merits First Amendment protection. *See O'Brien*, 391 U.S. at 375 (statute prohibiting destruction of a draft card "on its face deals with conduct having no connection with speech.").

"Sex and nudity may not be exploited without limit . . . in places of public accommodation any more than live sex and nudity can be exhibited or

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[3] Under the *Miller* test, the State may regulate obscene expression if "(a) . . . the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) . . . the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller*, 413 U.S. at 24 (citations omitted).

sold without limit in such public places." *Id.* at 25-26. "At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection." *Id.* at 26. Defendant here makes no assertion that his conduct was expressive,[4] much less that its expression had any purpose meriting First Amendment protection.

"Being 'in a state of nudity' is not an inherently expressive condition." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000). Here, Defendant's conduct—being naked in front of a door and window—is not expressive conduct. To accept Defendant's argument would be to extend First Amendment protection far beyond its limits.

In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 563 (1991), the Supreme Court rejected "that the First Amendment's guarantee of freedom of expression prevents the State of Indiana from enforcing its public indecency law to prevent this form of dancing." There, the Court found that "nonobscene nude dancing performed for entertainment" may merit *some* First

[4] Expressive conduct may also be subject to reasonable time, place, and manner restrictions, but such an analysis is not necessary in this case because Defendant's conduct here was not expressive.

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Amendment protection, but "only marginally so." *Id.* at 565-66; *see also Ocello v. Koster*, 354 S.W.3d 187, 208 (Mo. banc 2011).

Unlike dancing, which has long been considered an art form, Defendant's act of standing nude and facing the street expresses nothing artistic or socially redeeming. *Cf. Doran v. Salem Inn, Inc.*, 422 U.S. 922, 933 (1975) (affirming injunctive relief from ordinance proscribing topless dancing because it "would prohibit the performance of the 'Ballet Africains' and a number of other works of unquestionable artistic and socially redeeming significance.").

As will be discussed more thoroughly in Point II, if anything, Defendant's conduct expressed an intention to cause affront or alarm to a child, the very thing proscribed by section 566.083.1(1), RSMo Cum. Supp. 2006. This prohibition is well outside First Amendment protection.

Defendant relies on *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), to support his First Amendment claim.[5] App. Br. at 22-24. His

[5] In *Erznoznik*, the manager of a drive-in theater challenged his conviction under an ordinance that made it unlawful "to exhibit . . . any motion picture, slide, or other exhibit in which the human male or female bare buttocks, human female bare breasts, or human bare public areas are shown, if such

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reliance is misplaced because there the Supreme Court found the ordinance to be overbroad, not in terms of the content's *visibility* to passerbys on the street, but based on the overbreadth of the *content* prohibited by the ordinance. *Id.* at 208-18 ("it sweepingly forbids display of all films containing any uncovered buttocks or breasts, irrespective of context or pervasiveness"). Its holding thus provides no support for Defendant's claim here.

Defendant's comparison to child-pornography jurisprudence is similarly irrelevant to his case. *See* App. Br. at 24-25. In that arena, States may not "use simple nudity, without more, as a way of defining child pornography." *Osborne v. Ohio*, 495 U.S. 103, 127 (1990). A photograph depicting "nudity, without more," such as one of a toddler in a bathtub, would not fit the definition of child pornography and thus may not be prohibited. It would not, as Defendant asserts, fall within an *exception* to a law prohibiting child pornography, which, like obscenity, is unprotected by the First Amendment.

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motion picture, slide, or other exhibit is visible from any public street or public place." *Id.* at 206-07. The city *conceded* that "its ordinance sweeps far beyond the permissible restraints on obscenity, and thus applies to films that are protected by the First Amendment." *Id.* at 208 (citing *Miller v. California*, 413 U.S. 15).

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In a different portion of his brief, Defendant acknowledges that this sort of language is a "qualifier [that] cures the overbreadth problem because it limits the statute's applicability to nudity involving a sexual component." App. Br. at 31 (citing *Osborne*, 495 U.S. at 113-14). Because Defendant's obscene conduct here was not protected by the First Amendment, section 566.083.1(1), RSMo Cum. Supp. 2006, did not violate his constitutional rights.

Defendant also asserts that his First Amendment claim "would be different if [he] was nude in public," but rather "[h]e was visible to members of the public only if they looked through his window." App. Br. at 25. He asserts that because the children could have averted their eyes from his genitals, punishing his exposure thereof violates his First Amendment rights. App. Br. at 25 (citing *Erzoznik*, 422 U.S. at 220 (citing *Cohen v. California*, 403 U.S. 15 (1971) ("Fuck the Draft" printed on a jacket) and *Spence v. Washington*, 418 U.S. 405 (1974) (United States flag with a peace symbol affixed, hung from an apartment window)). In those cited cases, the Supreme Court's suggestion that passerbys might avert their eyes from offensive speech applies only in the context of evaluating limits on *expressive* conduct, not public nudity *lacking* artistic value. Given Defendant's position, facing up against the door and window, he might as well have been standing outside on

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his lawn, clearly within view of the children walking by. Whether or not he exposed himself from behind a transparent window, Defendant exposed his genitals to the public here. The First Amendment does not protect this conduct.

3. The overbreadth doctrine does not apply to section 566.083.1(1), RSMo Cum. Supp. 2006.

Because section 566.083.1(1) does not infringe upon Defendant's rights under the First Amendment, the overbreadth doctrine does not apply.

The overbreadth doctrine exists because "the *First Amendment* needs breathing space and [ ] statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973) (citations omitted) (emphasis added). When the United States Supreme Court established the overbreadth doctrine, it "altered its traditional rules of standing to permit—in the *First Amendment area*—'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" *Id.* at 612 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)) (emphasis added). The

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doctrine allows litigants "to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.* "Invalidation for overbreadth is 'strong medicine that is not to be casually employed.'" *State v. Vaughn*, 366 S.W.3d 513, 518 (Mo. banc 2012) (quoting *United States v. Williams,* 553 U.S. 285, 293 (2008) (quoting *L.A. Police Dep't v. United Reporting Publ'g Corp.,* 528 U.S. 32, 39 (1999)).

Overbreadth does not apply here because Defendant's case does not involve his First Amendment rights. This case is distinguishable from *State v. Moore*, 90 S.W.3d 64, 65 (Mo. banc 2002), in which the defendant challenged section 566.095, RSMo 2000 on its face as an unconstitutional infringement on the right to free speech. In *Moore*, the statute criminalized a form of speech, the "solicit[ation of] another person to engage in sexual conduct[.]" *Id.* at 65 (quoting section 566.095, RSMo 2000). Because the statute involved both conduct and speech, this Court applied the overbreadth doctrine to the defendant's First Amendment challenge. *Id.* at 65-69 (noting that "First Amendment principles do not always require that a statute be struck down even though it is broadly drawn[,]" and finding, "the challenged section does not violate the constitutional guarantee of freedom of speech").

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Moore is distinguishable from this case because the statute here prohibits only conduct, and places no limits on speech.

In *State v. Richard*, 298 S.W.3d 529, 531 (Mo. banc 2009), the defendant asserted that section 571.030.1(5), which prohibits possession or discharge of a firearm while intoxicated, was overbroad and facially unconstitutional. This Court held that the overbreadth doctrine did not apply because it is limited to the First Amendment context. *Id.* (citing *United States v. Salerno,* 481 U.S. 739, 745 (1987); *Dombrowski,* 380 U.S. at 486); *see also State v. Mahan*, 971 S.W.2d 307, 312 (Mo. banc 1998) ("First Amendment facial overbreadth challenges are clearly concerned with the rights of free speech and expression."). Rejecting the defendant's assertion that under *Beine*, the overbreadth doctrine may be expanded beyond the First Amendment context, this Court stated, "[t]he dicta in *Beine* does not extend the long-standing precedent that limits the overbreadth doctrine to cases implicating First Amendment concerns." *Id.*

As in *Richard*, Defendant's case does not involve a First Amendment issue. The overbreadth doctrine thus has no application, and this Court should deny Defendant's claim that section 566.083.1(1) is facially unconstitutional.

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4. Defendant's conviction did not violate his right to privacy under the Fourteenth Amendment.

Even if this Court were to apply the overbreadth doctrine here, it should still find section 566.083.1(1), RSMo Cum. Supp. 2006, constitutional because it does not punish innocent conduct. Defendant claims that because he was in his home when he committed the proscribed act, his actions may not be considered criminal. Defendant's argument is untenable.

"[P]articularly where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 602, 615-16 (1973) (finding no overbreadth in a statute restricting the political activities of state classified civil servants). Under the overbreadth doctrine, "[a] statute should fall only if it is substantially overbroad and not readily reconstructed to avoid privileged activity . . . [because if it] is not substantially overbroad [it] is unlikely to have a drastic inhibitory impact." *State v. Moore*, 90 S.W.3d 64, 66 (Mo. 2002) (citation omitted).

Defendant's asserted right to roam about his home while nude, does not extend to a right to stand in the nude, up against a window, facing the street along which elementary school children are walking home. *Cf. Beine*, 162

S.W.3d at 487 (Although the *Beine* opinion asserts that "a person's right to use the public restrooms is about as fundamental a right as one can imagine," this Court held that language to be dicta in *Richard*, 298 S.W.3d at 531).

The fact that Defendant committed sexual misconduct while in his own home does not protect him from criminal charges. In *State v. Jeffries*, 272 S.W.3d 883, 886 (Mo. App. S.D. 2008), the Court of Appeals affirmed the defendant's conviction for sexual misconduct under section § 566.093.1, RSMo 2000, because he exposed his penis to a twelve-year-old[6] neighbor while they were both in his living room. Other courts have upheld similar convictions for a defendant's actions when he is inside his home. *See State v. Caston*, 996 So.2d 480, 483 (La. App. 2d Cir. 2008) (affirming the defendant's convictions for attempted indecent behavior with a juvenile and attempted obscenity for his actions while "standing at the open front doorway which had only a screen door"); *State v. Hackett*, 323 N.J. Super. 460, 467 (1999) (affirming the defendant's convictions for lewdness based on a child seeing him "standing nude inside his home approximately five feet from his front window").

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[6] Given the victim's age in *Jeffries*, it is not clear why the defendant was charged with general sexual misconduct (§ 566.093.1) rather than sexual misconduct involving a child (§ 566.083.1).

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"Neither the federal nor the Missouri constitutions expressly provide a right of privacy." *Cruzan by Cruzan v. Harmon*, 760 S.W.2d 408, 417 (Mo. banc 1988). Because any right to privacy under the Fourteenth Amendment does not include Defendant's actions here, section 566.083.1(1) is constitutional as applied to Defendant.

Defendant relies on *Caesar's Health Club v. St. Louis County*, 565 S.W.2d 783, 787 (Mo. App. St.L.D. 1978), and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65-66 (1973), for the proposition that the right to privacy protects against "unwarranted governmental intrusion into the 'personal intimacies of the home.'" App. Br. at 20. In *Slaton*, the Supreme Court summarized that its "prior decisions recognizing a right to privacy guaranteed by the Fourteenth Amendment included 'only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'" *Slaton*, 413 U.S. at 65 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) and *Roe v. Wade*, 410 U.S. 113, 152 (1973)). In cases of personal and fundamental rights, the Supreme Court has found a right to privacy in limited, specific areas. *See Lawrence v. Texas*, 539 U.S. 558 (2003) (right to consensual same-sex sexual conduct); *Roe v. Wade*, 410 U.S. at 152 (right to abortion); *Eisenstadt v. Baird*, 405 U.S. 438, 453-454 (1972) (single persons' right to contraceptives); *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (right to

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possess obscene material in home); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (right to interracial marriage); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (married persons' right to contraceptives); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (inmates' right to procreation).

Any right to privacy in the home is not unlimited. In *Slaton*, the Court emphasized the uniqueness of these privacy rights and stated, "Nothing, however, in this Court's decisions intimates that there is any 'fundamental' privacy right 'implicit in the concept of ordered liberty' to watch obscene movies in places of public accommodation." *Slaton*, 413 U.S. at 66, 69 ("hold[ing] that the States have a legitimate interest in regulating commerce in obscene material and in regulating exhibition of obscene material in places of public accommodation, incl[u]ding so-called 'adult' theaters from which minors are excluded."). The Court of Appeals has similarly interpreted that the privacy rights cases "in no way intimate that there exists an absolute and unqualified right of privacy, sexual or otherwise." *Caesar's Health Club*, 565 S.W.2d at 787-88 (finding no right to "engage[e] in acts of massage involving sexual touching, for hire" based on the right to privacy).

Even assuming that the right to privacy encompasses a right to "the personal intimacies of the home," Defendant's actions do not fall within it. The word 'personal' is defined as "of or peculiar to a certain person; private;

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individual[.]" WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1062 (1993). "Intimate" means "promoting a feeling of privacy, coziness, romance, etc." or "most private or personal." WEBSTER'S at 738. Defendant's standing nude in front of the window while children passed by was neither personal nor intimate. He exposed what may be allowable in an "intimate" setting of his home to the neighborhood and general public. He thereby waived any right to privacy he may have held.

Defendant's argument also ignores that in situations involving children, any right to privacy in the home may be evaluated more strictly. For instance, contrary to possession of other obscene materials which was held permissible in *Stanley v. Georgia*, the states may proscribe even the mere possession of child pornography. *Osborne v. Ohio*, 495 U.S. 103, 111 (1990) ("The difference here is obvious: The State does not rely on a paternalistic interest in regulating [the material owner's] mind. Rather, Ohio has [prohibited the possession of child pornography] in order to protect the victims of child pornography[.]").

Even in the Fourth Amendment context, in which invasions into the privacy of the home are more typically raised, the right to be free from unreasonable searches and seizures is not unlimited. The Fourth Amendment protects only a "reasonable expectation of privacy," which "will not always be

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an expectation of absolute privacy." *United States v. Wells*, 648 F.3d 671, 678 (8th Cir. 2011) (citing *Katz v. United States,* 389 U.S. 347, 349-52 (1967)). In that vein, "[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." *California v. Ciraolo*, 476 U.S. 207, 213 (1986). "What a person *knowingly exposes to the public*, even in his own home or office, is not a subject of Fourth Amendment protection." *Id.* (citing *Katz,* 389 U.S. at 351) (emphasis added).

In this case, nothing required that the victims shield their eyes while walking home from school. The record here shows that the victims were each walking down the street when the saw Defendant nude, and that the inside of the home was plainly visible from that sidewalk. (Tr. 144-45, 157-58, 194-95, 227-28; State's Ex. 2, 10). The incidents of Defendant's sexual misconduct did not invoke any of Defendant's constitutional privacy rights.

Because section 566.083.1(1) is constitutional on its face and as applied to Defendant, Defendant's claim does not merit relief.

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II (sufficiency)

The evidence was sufficient to sustain Defendant's convictions because the State showed that Defendant had the requisite knowledge that children could see him exposing himself through his windows and that his conduct was likely to cause affront or alarm.

A. Standard of review.

"When judging the sufficiency of the evidence to support a conviction, appellate courts do not weigh the evidence but accept as true all evidence tending to prove guilt together with all reasonable inferences that support the verdict and ignore all contrary evidence and inferences." *State v. Wooden*, 388 S.W.3d 522, 527 (Mo. banc 2013) (citing *State v. Latall*, 271 S.W.3d 561, 566 (Mo. banc 2008)). "In determining whether the evidence was sufficient to support a conviction, this Court asks only whether there was sufficient evidence from which the trier of fact reasonably could have found the defendant guilty." *Id.*

B. The relevant evidence at trial.

Defendant's house was located on Northridge, about a half mile away from Marthasville Elementary School. (Tr. 173). The State submitted a photograph of Defendant's house as State's Exhibit 2. (Tr. 155). The photograph depicts a children's fort and swing set directly to the left and

back of Defendant's house. (State's Ex. 2). Three windows on the house face the street. (State's Ex. 2). Also facing the street, Defendant had a clear glass storm door in front of his front door. (State's Ex. 2).

Defendant told Lt. Schoenfeld that he knew children rode their bikes around the neighborhood. (Tr. 236-37; State's Ex. 10). M.T. testified that, carrying backpacks, "[a]bout 50" kids would walk home from Marthasville Elementary School, and then there would be about ten children still walking by the time they reached Northridge Street. (Tr. 144).

When M.T. was walking home after school in January 2010, she saw Defendant nude behind his front door, which he had "open, and he had, like, a screen door, a see-through door." (Tr. 144-45). Defendant was facing the street. (Tr. 152). M.T. did not see Defendant quickly shut the door. (Tr. 150).

On the second occasion in January, A.K.O. saw Defendant nude, in the doorway, facing the street. (Tr. 157). A.K.O. could see him "[f]rom head to ankles." (Tr. 157). When A.K.O. saw him, she and M.T. were walking directly in front of the door. (Tr. 158). A.K.O. denied that Defendant "shut the door quick" as she walked past it. (Tr. 161).

Based on the girls' statements, Deputy Jenkins went to Defendant's house later that day. (Tr. 173-74). The State played for the jury an audio recording of Deputy Jenkins's conversation with Defendant. (Tr. 175-77;

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State's Ex. 5). Defendant told Deputy Jenkins that he was retired and that he had been nude around the time in question because that is when he takes a shower. (Tr. 174; State's Ex. 5). He also said that it is common for him to be nude in the front room after taking a shower. (State's Ex. 5). Defendant admitted that he had been standing at the front door, but shut it. (Tr. 174; State's Ex. 5). He said, "I didn't realize they saw me. . . . I sure didn't realize they could see into this house like that." (State's Ex. 5). Deputy Jenkins told Defendant that 10- and 11-year-old girls had seen him standing nude in the doorway, and that "the moms are really upset." (Tr. 175; State's Ex. 5). Defendant apologized, but denied seeing anybody outside. (Tr. 175, 178, 184; State's Ex. 5). As Deputy Jenkins left, Defendant said, "I will stay out of that doorway." (State's Ex. 5). After Deputy Jenkins investigated the January incident, A.K.O.'s mother believed that "it was just a confused old man, that it was a mistake on his part[.]" (Tr. 200).

In November of 2010, as A.K.O. was walking home from school, she again saw Defendant nude and standing in front of the window with the blinds pulled halfway up. (Tr. 158-59; State's Ex. 1). A.K.O. could see from his chest to his knees. (Tr. 159). Defendant was again facing the street. (Tr. 159).

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After A.K.O. went home and told her mother about the November incident, A.K.O.'s mother immediately drove A.K.O. back to Defendant's house, "to see what was going on." (Tr. 192). A.K.O.'s mother noticed that the blinds on the window nearest the front door "were pulled up unusually high" and that "[i]t would have been above your chest." (Tr. 192). She could see the furniture inside the house, but did not see anyone walking around inside as she drove past. (Tr. 194-95, 198-99).

As A.K.O.'s mother was driving toward Defendant's house, she saw M.K.H. walking from the opposite direction, toward Defendant's house. (Tr. 193-94). After she drove past, A.K.O.'s mother continued to watch the house as M.K.H. was walking past. (Tr. 194-95). A.K.O.'s mother described that when M.K.H. was almost directly in front of the house, Defendant "stepped in front of the window, *not walked up*, stepped in front of the window as if he took one step and faced directly towards the street. . . . *his toes had to be touching the wall*." (Tr. 195, 198-99) (emphasis added). Defendant was not wearing clothes, and A.K.O.'s mother could see from just above his knees to his chest, including his genitals. (Tr. 195-96). A.K.O.'s mother then drove directly in front of the house to block M.K.H.'s view. (Tr. 196). "As soon as [she] gunned the car, [Defendant] stepped out of the window." (Tr. 202).

M.K.H. testified that she would sometimes choose a different route home because Defendant "would look through his windows and watch [her and the other children] walk down the street." (Tr. 209).

When Lieutenant Scott Schoenfeld contacted Defendant at his home and explained the allegations, Defendant denied lifting his blinds. (Tr. 223-25; State's Ex. 10). He also denied that anything like that had happened before. (State's Ex. 10). When Lt. Schoenfeld asked if Defendant had talked to Deputy Jenkins about a similar incident, Defendant said, "Oh that was the front door. . . . And I said, 'I don't think anybody can see in that door,' and I still don't." (State's Ex. 10). Defendant said that he had been hunting on November 10, so the incident might have occurred when he got out of the shower. (Tr. 226-27; State's Ex. 10). Defendant showed Lt. Schoenfeld into which room he went after his shower. (Tr. 226-27; State's Ex. 10).

In that room, Lt. Schoenfeld noticed a fan positioned about two feet in front of the window. (Tr. 227; State's Ex. 10). With Defendant's permission, Lt. Schoenfeld opened the blinds and then went outside to see what was visible from the street through the window. (Tr. 227; State's Ex. 10). He "could clearly see the fan inside the room and further inside the room, but the fan for sure." (Tr. 228).

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When Lt. Schoenfeld told him that the first instance may have been an accident, "but this is starting to concern [him,]" Defendant had no response. (Tr. 228-29; State's Ex. 10). "I guess I just don't think about 'em looking in there." (State's Ex. 10). Defendant told Lt. Schoenfeld that he "didn't see anybody looking this way." (State's Ex. 10). During both interviews with the officers, Defendant mentioned his own son. (State's Ex. 5, 10).

C. The evidence was sufficient to show that Defendant had the requisite knowledge to sustain his conviction.

To show that Defendant committed sexual misconduct, the State was required to prove that he, "[k]nowingly expose[d] his . . . genitals to a child less than fifteen years of age under circumstances in which he . . . kn[ew] that his . . . conduct [wa]s likely to cause affront or alarm to the child[.]" § 566.083.1(1), RSMo Cum. Sup. 2006. Defendant challenges only whether he had the requisite knowledge that children could see him exposing himself and knowledge that his conduct was likely to cause affront or alarm. App. Br. at 34-42.

In Point I of Defendant's brief, he concedes that his November conduct met all of the required elements in section 566.083.1(1). App. Br. at 26-27. He specifically conceded, "he could reasonably foresee that people outside would see him"; "he would know the girls were under the age of fifteen because

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Officer Jenkins had told him they were ten and eleven following the January incident"; and "Officer Jenkins also told him back in January that the girls were traumatized when they saw him nude through the window." App. Br. at 27. The State also presented sufficient evidence to prove Defendant's knowledge for the January incidents.

According to section 562.016.3, RSMo 2000, the court here instructed the jury that a person had the requisite knowledge if:

> (a) with respect to his or her conduct or to attendant circumstances when the person is aware of the nature of his or her conduct or that those circumstances exist, or
>
> (b) with respect to a result of a person's conduct when he or she is aware that his or her conduct is practically certain to cause that result.

(L.F. 33). "The State may prove a defendant's knowledge by direct evidence and reasonable inferences drawn from the circumstances surrounding the incident." *State v. Burrell*, 160 S.W.3d 798, 802 (Mo. banc 2005).

1. Defendant had knowledge that he was exposing himself to children through his window and door.

In this case, the jury could reasonably have inferred that Defendant had knowledge that children walk past his house in the afternoon based on the totality of: (1) M.T.'s testimony that about ten kids would walk past

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Defendant's house on the way home from school; (2) Defendant's experience as a father; (3) his home's location half a mile from an elementary school; (4) his home's proximity to the street; (5) the playground equipment located behind and next to Defendant's house; and (6) Defendant's admitted knowledge that children rode their bikes around the neighborhood. (Tr. 173, 236-37; State's Ex. 2, 5, 10).

The State also presented sufficient evidence that Defendant had knowledge that passersby could see into his house. Nothing in the record suggests that Defendant's windows or door were tinted such that he could see out but no one could see in. M.K.H. testified that she would sometimes avoid passing Defendant's house on her way home because he "would look through his windows and watch [her and the other children] walk down the street." (Tr. 209). Based on common experience, the jury reasonably could have found that if Defendant could see out from his windows onto the street, passersby could see him inside. Lt. Schoenfeld's testimony that he "could clearly see" inside Defendant's bedroom also supports an inference that Defendant had knowledge that children could see into his open windows as they walked past. (Tr. 228; State's Ex. 10). The evidence that Defendant stood away from the window as A.K.O.'s mother drove past, and then "suddenly" stepped in front of the window "and faced directly towards the street" as M.K.H. walked in

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front of his house also supports an inference that Defendant had knowledge that passersby could see into his house. (Tr. 195, 198-99).

In analogizing the issue of Defendant's knowledge that he was visible to the public, this case is similar to *State v. Brown*, 360 S.W.3d 919 (Mo. App. W.D. 2012). In that case, the Court of Appeals found sufficient evidence to support the defendant's conviction for misdemeanor sexual misconduct under § 566.093, RSMo 2000, because the defendant "*should* know that masturbating in public . . . in clear view of bedroom windows . . . would likely cause similar affront or alarm." *Id.* at 923 (original emphasis). Defendant attempts to distinguish *Brown* because the Court of Appeals did not specifically evaluate whether Defendant had knowledge that he was exposing himself "*to a person*." App. Br. at 40. This interpretation misreads this Court's analysis of the knowledge requirement in *Moore*: "If ["circumstances in which he knows"] is simply the law's way of saying a person should know better, it falls to the courts to ascertain, by reference to the statute's words, what the person should know in advance of his conduct." *State v. Moore*, 90 S.W.3d 64, 68 (Mo. banc 2002). Although this Court was considering whether the defendant in *Moore* had the requisite knowledge that his conduct was likely to cause affront or alarm, the analysis is still relevant to the first element here. Because section 562.016.3 provides that a person's knowledge

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may be inferred from the "attendant circumstances," the *Brown* court's use of the term "should know" does not distinguish it from the circumstances here. In this case, Defendant should have known that children could see through his door and window based on the surrounding circumstances.

Other courts have upheld similar convictions for a defendant's actions when he is inside his home. *See State v. Caston*, 996 So.2d 480, 483 (La. App. 2d Cir. 2008) (affirming the defendant's convictions for attempted indecent behavior with a juvenile and attempted obscenity for his actions while "standing at the open front doorway which had only a screen door"); *State v. Hackett*, 323 N.J. Super. 460, 467 (1999) (affirming the defendant's convictions for lewdness based on a child seeing him "standing nude inside his home approximately five feet from his front window").

Based on the State's evidence and the reasonable inferences therefrom, the evidence was sufficient to show that Defendant knew or should have known that children could see into his house as they passed by on their way home from school.

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2. Defendant had knowledge that exposing himself to children would cause affront or alarm.

The State also presented sufficient evidence to show that Defendant knew his conduct was likely to cause affront or alarm. As discussed in Point I, this Court has interpreted the terms in section 566.083.1(1) as follows:

> "affront" as "a deliberately offensive act or utterance; an offense to one's self respect," and of "alarm" as "apprehension of an unfavorable outcome, of failure, or dangerous consequences; an occasion of excitement or apprehension." . . . "To be impolite is not enough. To be annoying is insufficient." "Affront" might connote an exhibition by a man of his genitalia to a woman or girl. "Alarm" would indicate a suggestion of physical encounter to either a male or a female.

Beine, 162 S.W.3d at 486 (quoting *State v. Moore*, 90 S.W.3d 64, 67-69 (Mo. banc 2002)).

Here, Defendant stood away from the window as A.K.O.'s mother drove past, and then "suddenly" stepped in front of the window "and faced directly towards the street" as M.K.H. walked in front of his house. (Tr. 195, 198-99). A.K.O.'s mother described, "His toes had to be touching the wall." (Tr. 195). Not surprisingly, some children may be reluctant to report such incidents. (Tr. 145-46) (M.T.'s testimony that when she first saw Defendant nude, she

was too scared to tell anyone). That Defendant did not want to be visible to an adult, but stepped out after A.K.O.'s mother had driven away from his house, supports a finding that Defendant was not only aware that he could be seen through the window by passersby on the street, but that he had knowledge that his conduct was likely to cause affront or alarm.

Although the record does not show that any adult drove by Defendant's house soon after the January incident, the circumstances of the November incident are still relevant to show that Defendant had the requisite knowledge in both instances. When Deputy Jenkins asked Defendant about the January incident, he admitted to being nude and standing at the door around the time the girls were walking home from school. (Tr. 174; State's Ex. 5). He said, "I sure didn't realize they could see into the house like that." (State's Ex. 5). When considered with his later actions and complete denial of standing near the window after the November incident, Defendant's statements support a reasonable inference that his conduct was likely to cause affront or alarm.

This case is distinguishable from *Beine*, in which a male school counselor was convicted of sexual misconduct involving a child by indecent exposure for exposing himself to three male students while using the urinal in the restroom. 162 S.W.3d at 484-85. These facts are distinguishable

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because unlike the defendant in *Beine*, for whom exposing himself in the restroom was necessary, Defendant here had no necessity to stand in front of his door or window, facing the street, fully nude. *Cf. Beine*, 162 S.W.3d at 485.

In *Beine*, considering that the boys to whom the defendant exposed himself "used such phrases as 'embarrassed' and 'funny' when talking about their reaction to the incident," this Court found insufficient evidence to support that the conduct "was likely to cause affront or alarm to a child less than fourteen years of age." *Id.* at 485-86. Because it "proves nothing about how the appellant's conduct might appear to a reasonable adult at the time it occurred," it further found insufficient that the State presented evidence showing that the defendant later realized "that something about the restroom encounter . . . bothered some boys." *Id.* at 485. This case is distinguishable because here, the State presented evidence to show that the girls were more than bothered, but affronted or alarmed by Defendant's conduct.

The evidence presented and reasonable inferences therefrom support the jury's finding that Defendant had knowledge that his conduct was likely to cause affront or alarm. As discussed in Point I, the fact that he was in his home does not immunize him from criminal prosecution. *See, e.g.*, *State v. Jeffries*, 272 S.W.3d 883, 886 (Mo. App. S.D. 2008) (affirming the defendant's

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conviction for sexual misconduct (§ 566.093.1, RSMo 2000) because he exposed his penis "not [ ] in a setting where his conduct might be considered common . . . [and] asked [the victim] if she was going to tell").

When considered in the totality of the circumstances, the State presented sufficient evidence to show that Defendant had the requisite knowledge to sustain his convictions for sexual misconduct and attempted sexual misconduct.

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CONCLUSION

The trial court did not commit reversible error in this case. Defendant's convictions and sentences should be affirmed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Jessica P. Meredith
JESSICA P. MEREDITH
Assistant Attorney General
Missouri Bar No. 64029

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-9393
Fax: (573) 751-5391
Jessica.Meredith@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 9,025 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and

2. That a copy of this notification was sent through the eFiling system on this 8th day of April, 2013, to:

Ellen H. Flottman
Office of the State Public Defender
1000 W Nifong, Building 7, Suite 100
Columbia, Missouri 65203

/s/ Jessica P. Meredith
JESSICA P. MEREDITH
Assistant Attorney General
Missouri Bar No. 64029

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-9393
Fax: (573) 751-5391
Jessica.Meredith@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI