

No. 83914

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**IN THE  
MISSOURI SUPREME COURT**

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**STATE OF MISSOURI,**

*Respondent,*

vs.

**JAMES R. NIEDERSTADT,**

*Appellant.*

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**Appeal from the Circuit Court of Scott County,  
State of Missouri  
The Honorable David Dolan, Judge**

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**RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT**

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## **JURISDICTIONAL STATEMENT**

This appeal is from a conviction for forcible sodomy, § 566.060, RSMo 1986, obtained in the Circuit Court of Scott County, Missouri, following a bench trial, for which appellant was sentenced to twenty-five years of imprisonment in the Missouri Department of Corrections. The Court of Appeals, Southern District, overturned appellant's conviction and sentence in **State v. Niederstadt**, SD23612 (Mo.App., S.D. July 23, 2001). This Court has jurisdiction as it sustained respondent's application for transfer pursuant to Supreme Court Rule 83.04. Article V, § 10, Missouri Constitution (as amended 1982).

## **STATEMENT OF FACTS**

James R. Niederstadt, appellant, was charged by information in the Circuit Court of Scott County, Missouri on July 22, 1998, with the felony of forcible sodomy, § 566.060 RSMo 1986, (Count I) and the class D felony of sexual abuse in the first degree, § 566.100 RSMo 1986 (Count II) (L.F. 1). Count II was dismissed by the State on January 3, 2000, and appellant's charge on Count I proceeded to trial before the court, the Honorable David A. Dolan presiding (L.F. 22).

Appellant contests the sufficiency of the evidence to sustain his conviction. Viewed in the light most favorable to the verdict, the following evidence was adduced at trial:

In June of 1990, Suzanna Cosier, the victim, moved from Gambia, West Africa, to the United States (Tr. 7, 30). Cosier, the daughter of missionary parents, was born an American citizen on December 9, 1975 (Tr. 7). In June of 1991, Cosier moved from Philadelphia, Pennsylvania, to Malden, Missouri, to attend high school (Tr. 8). While in Malden, Cosier lived with appellant and his wife and family and attended school at Calvary Baptist Academy in Campbell, Missouri (Tr. 8-9).

After Cosier had lived with appellant and his family for about a month, appellant began to make sexual advances towards Cosier (Tr. 9). In July and August of 1991, appellant kissed Cosier on her lips and fondled her on her breasts and between her legs on several occasions (Tr. 9, 10). On one of these occasions, after the fondling began, Cosier tried to “get away” from appellant by running away from appellant's home (Tr. 11). Cosier however returned the same day she ran away (Tr. 11).

When Cosier started school at Calvary Baptist Academy in August, she began getting in trouble occasionally with teachers and was given a detention (Tr. 11). As punishment for receiving the detention, appellant whipped Cosier approximately five times on her bottom with a belt (Tr. 12). Appellant continued to whip Cosier on other occasions when she was “rebellious and needed it” (Tr. 12). These whippings occurred approximately once a month (Tr. 13). During these whippings, appellant also struck Cosier on her back and legs, leaving bruises so severe that it hurt when Cosier walked and she had difficulty participating in her physical education classes at school (Tr. 13). Sometimes after beating Cosier, appellant would come into her room the next morning, take her clothes off, pull her underwear down, and count her bruises out loud (Tr. 19).

On one occasion, appellant tried to strangle Cosier following a beating (Tr. 21). Appellant squeezed Cosier's neck so hard “his face went red” and he kept saying “I could kill you right now. I could kill you right now” (Tr. 22). He eventually released his hold on Cosier's neck and walked out of the room (Tr. 22).

The incidents of fondling continued throughout the school year, occurring most often in the early morning (Tr. 14). Cosier slept on the top bunk of a bunk bed and appellant would come into her room and put his hands under her clothes and her underwear (Tr. 14). While he touched her, appellant would masturbate (Tr. 16).

On one occasion in March of 1992, appellant put his finger in Cosier's vagina (Tr. 16). Cosier was feeling sick and was sleeping in her room when she woke after feeling pain and discovered that appellant had his finger in her vagina (Tr. 16-17). Cosier was not aware that

appellant was in her room until she woke up (Tr. 43). After Cosier told appellant to stop, appellant told Cosier that he was just checking her temperature (Tr. 17). At trial, Cosier testified that there were additional occasions during March when appellant penetrated her vagina with his fingers (Tr. 18).

In October 1992, Cosier ran away from the Niederstadt home for a second time (Tr. 46-47). Cosier testified that she ran away because appellant “beat [her] and did sexual things to [her] in the morning” (Tr. 46-47).

Cosier left the Niederstadt home in 1993 to attend college in Florida (Tr. 28). She began psychiatric treatment in 1994 after experiencing nightmares and flashbacks to the time she spent at the Niederstadt home (Tr. 44, 47).

At the close of the State's evidence and at the close of all evidence, appellant moved for a judgment of acquittal for the reason that the State failed to adduce all of the elements of the crime charged (L.F. 7, 8). The court overruled both motions (L.F. 7, 8).

On February 24, 2000, the court found appellant guilty of forcible sodomy (L.F. 22). On March 3, 2000, appellant moved for a judgment of acquittal pursuant to Rule 27.07(c) on the grounds that the State failed to make a submissible case by failing to produce any evidence of forcible compulsion, a necessary element of forcible sodomy (L.F. 9, 22). On April 13, 2000, appellant was sentenced to twenty-five years of imprisonment (L.F. 23). Appellant filed his notice of appeal that same day (L.F. 13, 23).

On direct appeal, the Southern District reversed the trial court's holding, and ordered appellant to be discharged, on the grounds that the evidence was insufficient because there was no evidence that appellant used persuasion or force to constitute forcible compulsion.

This Court granted respondent's application for transfer on September 25, 2001.

**POINT RELIED ON**

**THE TRIAL COURT DID NOT ERR BY OVERRULING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THE STATE PRESENTED SUFFICIENT EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD FIND THE FORCIBLE COMPULSION ELEMENT OF THE CRIME OF FORCIBLE SODOMY IN THAT THE VICTIM TESTIFIED AND APPELLANT ADMITTED TO THE USE OF PHYSICAL FORCE AGAINST THE VICTIM OVER THE TIME PERIOD OF APPROXIMATELY A YEAR, WHICH OVERCAME ANY REASONABLE RESISTANCE.**

**MOREOVER, UPON HOLDING THAT THE EVIDENCE WAS INSUFFICIENT TO CONVICT APPELLANT OF FORCIBLE SODOMY, THE COURT OF APPEALS SHOULD HAVE ENTERED A CONVICTION FOR THE LESSER OFFENSE OF SEXUAL ABUSE IN THE THIRD DEGREE UNDER § 566.120 RSMO 1986 BECAUSE THE EVIDENCE WAS SUFFICIENT FOR THE TRIAL COURT TO FIND EACH OF THE ELEMENTS OF THE LESSER OFFENSE AND THE JUDGE WAS REQUIRED TO FIND THOSE ELEMENTS TO ENTER THE CONVICTION ON THE GREATER OFFENSE OF FORCIBLE SODOMY.**

**State v. Kilmartin**, 904 S.W.2d 370 (Mo.App., W.D. 1995);

**State v. Spencer**, 50 S.W.3d 869 (Mo.App., W.D. 2001);

**State v. Nixon**, 858 S.W.2d 782 (Mo.App., E.D. 1993);

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

Section 556.061(12), RSMo 1986;

Section 556.061(12)(a);

Section 566.060, RSMo 1986;

Section 566.095, RSMo 1986;

Section 566.120, RSMo 1986;

Supreme Court Rule 83.04;

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

## ARGUMENT

**THE TRIAL COURT DID NOT ERR BY OVERRULING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THE STATE PRESENTED SUFFICIENT EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD FIND THE FORCIBLE COMPULSION ELEMENT OF THE CRIME OF FORCIBLE SODOMY IN THAT THE VICTIM TESTIFIED AND APPELLANT ADMITTED TO THE USE OF PHYSICAL FORCE AGAINST THE VICTIM OVER THE TIME PERIOD OF APPROXIMATELY A YEAR, WHICH OVERCAME ANY REASONABLE RESISTANCE.**

**MOREOVER, UPON HOLDING THAT THE EVIDENCE WAS INSUFFICIENT TO CONVICT APPELLANT OF FORCIBLE SODOMY, THE COURT OF APPEALS SHOULD HAVE ENTERED A CONVICTION FOR THE LESSER OFFENSE OF SEXUAL ABUSE IN THE THIRD DEGREE UNDER § 566.120 RSMO 1986 BECAUSE THE EVIDENCE WAS SUFFICIENT FOR THE TRIAL COURT TO FIND EACH OF THE ELEMENTS OF THE LESSER OFFENSE AND THE JUDGE WAS REQUIRED TO FIND THOSE ELEMENTS TO ENTER THE CONVICTION ON THE GREATER OFFENSE OF FORCIBLE SODOMY.**

Appellant contends that the trial court erred in denying his motions for judgment of acquittal on the charge of forcible sodomy because there was insufficient evidence to prove

the element of forcible compulsion (App.Br. 6). Appellant argues that Cosier's testimony did not demonstrate the use of any physical force or threat (App.Br. 6).<sup>1</sup>

Appellant was charged with one count of sodomy which required proof that appellant had deviate sexual intercourse without the consent of the victim, and by the use of “forcible compulsion.” § 566.060, RSMo 1986. Specifically, the information charged appellant as follows:

. . . in that on or about during March, 1992, . . . the defendant had deviate sexual intercourse with Suzanna Cosier, to whom he was not married, without the consent of Suzanna Cosier by the use of forcible compulsion.

(L.F. 1).

#### **A. Standard of Review**

In determining the sufficiency of the evidence, a reviewing court accepts as true all the evidence favorable to the State, including all favorable inferences drawn from the evidence, and disregards all contrary evidence and inferences. **State v. Silvey**, 894 S.W.2d 662, 673 (Mo.banc 1995); **State v. Grim**, 854 S.W.2d 403, 405 (Mo.banc 1993), **cert. denied**, 510 U.S. 997, 114 S.Ct. 562, 126 L.Ed.2d 462 (1993); **State v. Smith**, 11 S.W.3d 733, 736 (Mo.App., E.D. 1999). An appellate court neither weighs the evidence, **State v. Villa-Perez**,

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<sup>1</sup> Appellant does not deny that the State proved he had deviate sexual intercourse with the sixteen-year-old victim. Instead, he contends that the State failed to prove that he used forcible compulsion to assault the victim in March 1992 (App.Br. 6).

835 S.W.2d 897, 900 (Mo.banc 1992), nor determines the reliability or credibility of the witnesses. **State v. Marlow**, 888 S.W.2d 417, 421 (Mo.App., W.D. 1994).

**B. The evidence was sufficient to establish forcible compulsion.**

The incident that led to the charge of forcible sodomy occurred in March 1992. During that incident, Cosier was asleep in her bedroom resting because she was sick with the flu (Tr. 16, 17). Appellant came into Cosier’s room and penetrated her vagina with his finger (Tr. 43). When she woke, appellant told Cosier he was just checking her temperature (Tr. 16, 17).

In reversing appellant’s conviction, the Court of Appeals referred to **State v. Kilmartin**, 904 S.W.2d 370 (Mo.App., W.D. 1995), concluding that “unlike in *Kilmartin*, there are no facts in this case of persuasion or force. Defendant appeared while S.C. was sleeping. He initiated the act while she slept. Defendant’s actions caused her to awaken. There was no evidence of forcible compulsion, as Section 556.061(12) defines that term, before or after S.C. awoke.”

Under § 556.061(12), “Forcible compulsion” is defined as either:

- (a) Physical force that overcomes reasonable resistance; or
- (b) A threat, express or implied, that places a person in reasonable fear of death, serious physical injury or kidnapping of himself or another person.

§ 556.061(12), RSMo 1986.

The Court of Appeals’ conclusion that there was no evidence of forcible compulsion “before or after [the victim] awoke” was erroneous. Forcible compulsion *was* present *at the*

*point in time that the victim awoke* and found appellant's finger in her vagina. The Court of Appeals failed to address the second element of forcible compulsion set out above and, thus, failed to give proper weight to evidence of prior incidents where appellant beat and fondled Cosier in its assessment of whether forcible compulsion was present. Here, after Cosier awoke, although appellant made no express orders or threats to Cosier, the sexual act itself was sufficient to constitute an "implied" threat when considered in conjunction with appellant's history of fondling Cosier.

In **State v. Spencer**, 50 S.W.3d 869 (Mo.App., W.D. 2001), the Court of Appeals determined that "the law does not require or expect the utmost resistance to sexual assault when it appears that such resistance would be futile or would provoke more serious injury." *See also* **Kilmartin**, *supra*.

"The rule is well established in Missouri that one may be guilty of rape [or sodomy] even though the woman offers no physical resistance if she submits through fear of personal violence." **State v. Nixon**, 858 S.W.2d 782, 786 (Mo.App., E.D. 1993). *See also* **State v. Koonce**, 731 S.W.2d 431, 439 (Mo.App., W.D. 1987). "Resistance never comes into play where a threat (constructive force) is employed." **Nixon**, *supra*; **Koonce**, *supra*.

In **State v. Davenport**, 839 S.W.2d 723, 728 (Mo.App., S.D. 1992), the Court of Appeals found that evidence of the defendant's physical abuse of the victim's mother was relevant to the issue of forcible compulsion and was arguably admissible on that basis even though it technically constituted evidence of other crimes. The Court of Appeals reviewed the admissibility of this evidence in other cases, and found several states that approved the use of

prior physical abuse of the victim as evidence of “forcible compulsion.” **Id.** at 726-28. *See* **People v. Barlow**, 88 A.D.2d 668, 451 N.Y.S.2d 254, 256 (1982) (victim was afraid of her 300-pound father who had physically abused their mother -- evidence went to establish the element of “forcible compulsion”); **People v. Valasquez**, 141 S.D.2d 882, 530 N.Y.S.2d 208 (1998) (victim was afraid of step-father because he had “attacked” her mother -- established element of “forcible compulsion”); **State v. Pancake**, 170 W.Va. 690, 296 S.E.2d 37, 41 (1982) (victim had seen defendant hit her sister and put a cigarette out on her sister's face -- relevant to establish the “fear”, a major element of proof for first-degree sexual assault).

In addition, the Court of Appeals has analogized this type of evidence to establish an essential element of the crime to that type of evidence allowed to establish a claim of self-defense:

Returning to Missouri, we note that in **State v. Waller**, 816 S.W.2d 212 (Mo.banc 1991), our Supreme Court held that in a homicide case where the accused claims self-defense, the trial court may permit the accused to introduce evidence of the victim's prior specific acts of violence of which the accused had knowledge, provided such acts are reasonably related to the crime with which the accused is charged. **Id.** at 216[2]. Such evidence is relevant to the reasonableness of the accused's apprehension that the victim was about to inflict bodily harm on him. **Id.** at 216[5].

By the same logic, it is arguable that in forcible rape prosecutions, evidence of prior acts of violence by the accused against third parties within the victims knowledge should be admissible where the victim testifies she did not consent but submitted because she feared the accused would injure her if she resisted.

**Davenport**, *supra* at 728. While **Davenport** dealt primarily with the issue of whether such evidence was “arguably admissible,” the implicit underpinning of this logic recognizes that this evidence goes to establish the element of forcible compulsion necessary in a conviction for rape or sodomy.

In **Kilmartin**, the Court of Appeals addressed a sufficiency question regarding forcible compulsion in a conviction for sodomy wherein the appellant had told his victim that he would not use force even though he could. 904 S.W.2d at 373. The Western District not only viewed appellant's statement as a veiled threat, but found that the totality of circumstances amounted to force that would have intimidated the eleven-year-old victim, overcoming any reasonable resistance:

The totality of the circumstances determines whether this was physical force which would overcome reasonable resistance. Reasonableness is that which is “suitable under the circumstances.” BLACK'S [LAW DICTIONARY] at 1265 (6th ed. 1990). Such circumstances in this context would include the ages of the victim and the accused, the atmosphere and setting of the incident; the extent to which the accused was in a position of the authority, domination and

control over the victim; and whether the victim was under duress. “[T]he law does not require or expect the utmost resistance to sexual assault when it appears that such resistance would be futile or would provoke more serious injury.”

**Id.** at 374. The Western District found that there was sufficient evidence of physical force to support a conviction of forcible sodomy. **Id.**

In the instant case, appellant’s history of abusing Cosier was sufficient to place her in reasonable fear of serious physical injury. Cosier was rightfully scared of appellant and her submission out of fear and without resistance was well supported by a history showing that such resistance would be futile. When appellant first began to fondle Cosier in July and August of 1991, Cosier tried to “get away from him” by running away from appellant’s home (Tr. 11). Later when appellant began coming into Cosier’s bedroom in the morning to fondle her, Cosier often tried to get up from bed before he came in and leave her room to sleep in different areas of the house so that he would not find her (Tr. 25). As evidenced by the multiple beatings, the incident where appellant attempted to strangle Cosier, and the repeated fondling, appellant was clearly capable of inflicting pain on Cosier and did so regularly and apparently without compunction.

Moreover, Cosier was a sixteen-year-old child (Tr. 7). In fact, a jury could reasonably infer that she was more naive than a typical sixteen-year-old raised in the United States. Cosier had seen little television and had received no sex education classes in her schooling in West Africa or in Malden (Tr. 20). Cosier told the court that she had only had one “boyfriend” and

that she and her boyfriend had never kissed or “engaged in any other conduct besides kissing” because “we weren’t supposed to touch each other at boarding school” (Tr. 20). Cosier had never had any intimate physical contact with any man prior to appellant’s contact with her (Tr. 20). Cosier was placed alone in the home of appellant, and had no family members close by to consult with or to look to for support (Tr. 8). She tried to contact a teacher about appellant’s whippings but was only asked, “Don’t you think you deserved it then?” (Tr. 21). Cosier was young, naive, and had exhausted all of her options for resisting appellant.

Appellant principally relies on **State v. Daleske**, 866 S.W.2d 476 (Mo.App., W.D. 1993) to support his claim that forcible compulsion was not sufficiently proven in this case. In **Daleske**, the Western District held that the definition of "forcible compulsion" in the sodomy statute did not encompass the inherent compulsion arising from the dependency and age of a child when the child was introduced to sexual activities. **Id.** at 479. However, the Western District, itself, distinguished this case in **Kilmartin**, 904 S.W.2d at 370. The court found that **Daleske** involved only the submission of the definition of forcible compulsion under § 556.061(12)(b), concerning the use of a threat that “places a person in reasonable fear of death, serious physical injury, or kidnapping of himself or another,” and did not submit the alternative definition involving the actual use of “physical force which would overcome reasonable resistance” as found in § 556.061(12)(a). **Kilmartin**, *supra*. The court stated:

Because the **Daleske** court's holding did not concern § 556.061(12)(a), it made the suggestion in passing and did not consider whether the totality of the circumstances would render

the force exerted to be sufficient. We do not find any guidance in Daleske.

Kilmartin, *supra*.

Similarly, in State v. Thiele, 935 S.W.2d 726 (Mo.App., E.D. 1996), the Eastern District found that the Western District's holding in State v. Daleske was inapposite when the evidence was clear that the victim only submitted to the defendant's "requests" out of fear of personal violence. The Thiele court held that the victim's belief that she would be harmed, in conjunction with the physical force defendant applied against her, constituted sufficient evidence of forcible compulsion to sustain defendant's conviction. Id. at 729.

In summary, there was sufficient evidence that appellant committed the act of forcible sodomy on Cosier, without her consent, and by the use of forcible compulsion by the use of physical force stemming from a history of violence toward her person in the face of refusing or confronting appellant. The trial court did not err in overruling appellant's motion for judgment of acquittal at the close of the evidence.

**B. The proper remedy was conviction of the lesser offense of sexual assault in the third degree.**

Even if this Court determines that forcible compulsion was not present on the facts of the instant case, the Court of Appeals should have entered a conviction of the lesser offense of sexual abuse in the third degree under § 566.120, RSMo 1986. Where, as here, “a conviction of a greater offense has been overturned for insufficiency of the evidence, the reviewing court may enter a conviction for a lesser offense if the evidence was sufficient for

the jury to find each of the elements and the jury was required to find those elements to enter the ill-fated conviction on the greater offense.” **State v. O’Brien**, 857 S.W.2d 212, 220 (Mo.banc 1993); **State v. Trotter**, 5 S.W.3d 188 (Mo.App., W.D. 1999); **State v. Granger**, 966 S.W.2d 27 (Mo.App., E.D. 1998). “If the greater of two offenses includes all the legal and factual elements of the lesser, the greater includes the lesser; but if the lesser offense requires the inclusion of some necessary element not so included in the greater offense, the lesser is not necessarily included in the greater.” **State v. Barnard**, 972 S.W.2d 462, 465 (Mo.App., W.D. 1998); **State v. Neighbors**, 613 S.W.2d 143, 148 (Mo.App., W.D. 1980).

The elements of the two crimes, summarized according to the facts shown by the State’s evidence, may be outlined as follows:

**Sodomy:**

1. Appellant was not married to the victim;
2. The victim was subjected to deviate sexual intercourse (a sexual act involving the genitals of the victim and the hand of the defendant);
3. The victim did not give consent; and
4. The act was committed by the use of forcible compulsion.

*See* § 566.062, RSMo 1986.

**Sexual Abuse in the Third Degree:**

1. Appellant was not married to the victim;

2. The victim was subjected to sexual contact (touching of the genitals for the purpose of arousing or gratifying the sexual desire of any person); and
3. The victim did not give consent.

*See* § 566.095, RSMo 1986.

The first and the third statutory elements of sodomy and sexual abuse in the third degree, as identified above, are identical. The second element of each offense is virtually identical as well; sexual abuse in the third degree is a lesser offense of sodomy due to the fact that the definition of sodomy includes the specification that deviate sexual intercourse is a “*sexual act* involving the genitals of the victim and the hand of the defendant,” which puts it in the purview of the sodomy statute which requires that the act was committed “for the purpose of arousing or gratifying the sexual desire of any person.” To assert otherwise, would be to ignore the statutory language and give the language “sexual act” no meaning whatsoever. Clearly the words “sexual act” were placed in the definition to distinguish between the innocuous acts of a medical professional, for example, from acts committed for the purpose of sexual gratification. Thus, sexual abuse in the third degree qualifies as a lesser included offense of forcible sodomy. *See* **Barnard**, *supra* at 462 (“sexual contact” is an element of “deviate sexual intercourse”).

As such, should this Court determine that the evidence was insufficient to convict appellant of forcible sodomy, this Court should enter a conviction for the lesser offense of sexual abuse in the third degree.



**CONCLUSION**

In light of the foregoing, respondent respectfully requests that appellant's conviction and sentence be upheld.

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 \_\_\_\_\_ words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
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