

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
v.)	No. SC91427
)	
DANIEL M. PRIMM)	
)	
Appellant.)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 11
THE HONORABLE BRYAN L. HETTENBACH, JUDGE

APPELLANT'S STATEMENT, BRIEF, AND ARGUMENT

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INDEX

TABLE OF AUTHORITIES 3

JURISDICTIONAL STATEMENT 7

STATEMENT OF FACTS.....11

POINTS RELIED ON17

ARGUMENT20

CONCLUSION43

CERTIFICATE OF SERVICE AND COMPLIANCE.....44

APPENDIX45

TABLE OF AUTHORITIES

CASES

<i>In re J.A.H.</i> , 293 S.W.3d 116 (Mo. App. E.D. 2009)	18, 35
<i>State v. Barriner</i> , 34 S.W.3d 139 (Mo. banc 2000).....	32
<i>State v. Batiste</i> , 264 S.W.3d 648 (Mo. App. W.D. 2008)	17, 26, 27, 33
<i>State v. Bernard</i> , 849 S.W.2d 10 (Mo. banc 1993)	23, 24, 26, 28
<i>State v. Berwald</i> , 186 S.W.3d 349 (Mo. App. W.D. 2005).....	28
<i>State v. Bewley</i> , 68 S.W.3d 613 (Mo. App. S.D. 2002)	37
<i>State v. Blackmon</i> , 941 S.W.2d 526 (Mo. App. E.D. 1996)	25
<i>State v. Boyd</i> , 59 S.W.3d 926 (Mo. App. E.D. 2001).....	38
<i>State v. Chism</i> , 252 S.W.3d 178 (Mo. App. W.D. 2008).....	17, 31
<i>State v. Collins</i> , 669 S.W.2d 933 (Mo. banc 1984).....	31
<i>State v. Douglas</i> , 797 S.W.2d 532 (Mo. App. W.D. 1990)	27
<i>State v. Edwards</i> , 116 S.W.3d 511 (Mo. banc 2003)	28
<i>State v. Ellison</i> , 239 S.W.3d 603 (Mo. banc 2007)	17, 23, 24
<i>State v. Frezzell</i> , 251 S.W.3d 380 (Mo. App. E.D. 2008).....	30
<i>State v. Graham</i> , 641 S.W.2d 102 (Mo. banc 1982).....	27
<i>State v. Grim</i> , 854 S.W.2d 403 (Mo. banc 1993).....	35

<i>State v. Harris</i> , 870 S.W.2d 798 (Mo. banc 1994)	25
<i>State v. Herndon</i> , 224 S.W.3d 97 (Mo. App. W.D. 2007)	37
<i>State v. Hogan</i> , 297 S.W.3d 597 (Mo. App. E.D. 2009)	25
<i>State v. Johnson</i> , 161 S.W.3d 920 (Mo. App. S.D. 2005)	22, 29, 32
<i>State v. Love</i> , 134 S.W.3d 719 (Mo. App. S.D. 2004)	18, 38
<i>State v. Magouirk</i> , 890 S.W.2d 17 (Mo. App. S.D. 1994)	27
<i>State v. Mayes</i> , 63 S.W.3d 615 (Mo. banc 2001)	28
<i>State v. McGee</i> , 284 S.W.3d 690 (Mo. App. E.D. 2009)	19, 41
<i>State v. Neil</i> , 869 S.W.2d 734 (Mo. banc 1994)	30
<i>State v. Ray</i> , 945 S.W.2d 462 (Mo. App. W.D. 1997)	21
<i>State v. Reichert</i> , 854 S.W.2d 584 (Mo. App. S.D. 1993)	39
<i>State v. Scott</i> , 298 S.W.3d 913 (Mo. App. E.D. 2009)	19, 41, 42
<i>State v. Sims</i> , 952 S.W.2d 286 (Mo. App. W.D. 1997)	28
<i>State v. Sladek</i> , 835 S.W.2d 308 (Mo. banc 1992)	23, 28
<i>State v. Smith</i> , 33 S.W.3d 648 (Mo. App. W.D. 2000)	35
<i>State v. Spray</i> , 174 Mo. 569, 74 S.W. 846 (1903)	23
<i>State v. Swederska</i> , 802 S.W.2d 183 (Mo. App. E.D. 1991)	21
<i>State v. Taylor</i> , 126 S.W.3d 2 (Mo. App. E.D. 2003)	37

<i>State v. Thurman</i> , 272 S.W.3d 489 (Mo. App. E.D. 2008)	25, 27, 28
<i>State v. Vorhees</i> , 248 S.W.3d 585 (Mo. banc 2008)	17, 25
<i>State v. Walkup</i> , 220 S.W.3d 748 (Mo. banc 2007)	21
<i>State v. Washington</i> , 92 S.W.3d 205 (Mo. App. W.D. 2002)	35
<i>Tabor v. State</i> , 193 S.W.3d 873 (Mo. App. S.D. 2006)	40

STATUTES

Section 546.550	19
Section 566.010	36, 37
Section 566.034	8, 18, 37
Section 566.064	8
Section 566.068	8

RULES

Rule 29.11	34
Rule 29.12(c)	19, 40
Rule 30.20	19, 40
Rule 83.02	10

CONSTITUTIONAL PROVISIONS

Mo. Const. Art. I, Sec. 10.....	6, 17, 18, 19, 20, 33, 34, 39
Mo. Const. Art. I, Sec. 17.....	6, 17, 20, 22, 23, 33
Mo. Const. Art. I, Sec. 18(a).....	6, 17, 20, 22, 23, 33, 39
Mo. Const. Art. V, Sec. 10	10
U.S. Const. Amend. V.....	6, 17, 18, 19, 20, 33, 39
U.S. Const. Amend. VI	6, 17, 20, 33
U.S. Const. Amend. XIV	6, 17, 18, 19, 20, 33

OTHER AUTHORITIES

Black’s Law Dictionary (5th ed. 1979)	27
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JURISDICTIONAL STATEMENT

In the Circuit Court of the City of St. Louis, Cause No. 0822-CR05437-01, the State of Missouri alleged Appellant, Daniel M. Primm, committed:

- Count 1, the class C felony of statutory rape in the second degree;
- Count 2, the class C felony of statutory sodomy in the second degree;
- Count 3, the class A misdemeanor of child molestation in the second degree;
- Count 4, the class C felony of statutory sodomy in the second degree;
- Count 5, the class C felony of statutory rape in the second degree;
- Count 6, the class C felony of statutory sodomy in the second degree;
- Count 7, the class A misdemeanor of child molestation in the second degree;
- Count 8, the class C felony of statutory rape in the second degree;
- Count 9, the class A misdemeanor of child molestation in the second degree;
- Count 10, the class C felony of statutory rape in the second degree;
- Count 11, the class C felony of statutory sodomy in the second degree;

- Count 12, the class A misdemeanor of child molestation in the second degree;
- Count 13, the class A misdemeanor of child molestation in the second degree;
- Count 14, the class C felony of abuse of a child;
- Count 15, the class C felony of statutory sodomy in the second degree;
- Count 16, the class C felony of statutory rape in the second degree;
- Count 17, the class C felony of statutory sodomy in the second degree.¹

The jury acquitted Mr. Primm of Counts 15, 16, and 17. The State entered a notice of *nolle prosequi* on Count 14 before trial. The State entered notices of *nolle prosequi* on Counts 4, 7, and 13 at the close of its case because it failed to present evidence on those counts.

¹ Statutory rape in the second degree is a violation of Section 566.034; statutory sodomy in the second degree is a violation of Section 566.064; child molestation in the second degree is a violation of Section 566.068. All citations will be to RSMo 2000, unless otherwise indicated. Appellant will cite to the Record on Appeal as “Tr.” for the transcript and “L.F.” for the legal file.

The jury found Appellant guilty of the remaining counts on September 16, 2009, and renumbered the counts for purposes of sentencing as Counts 1-10. On October 29, 2009, the court orally pronounced a total sentence of twenty years as follows:

- 15 years for Count 1, the class C felony of statutory rape in the second degree, consecutive with Counts 2, 5, and 9;
- 5 years for Count 2, the class C felony of statutory sodomy in the second degree, consecutive with Counts 1, 3, 4, 6, 7, 8 and 10;
- 1 year for Count 3, the class A misdemeanor of child molestation in the second degree, concurrent with all counts;
- 15 years for Count 4, the class C felony of statutory rape in the second degree, consecutive with Counts 2, 5, and 9;
- 5 years for Count 5, the class C felony of statutory sodomy in the second degree, consecutive with Counts 1, 3, 4, 6, 7, 8, and 10;
- 15 years for Count 6, the class C felony of statutory rape in the second degree, consecutive with Counts 2, 5, and 9;
- 1 year for Count 7, the class A misdemeanor of child molestation in the second degree, concurrent with all counts;

- 15 years for Count 8, the class C felony of statutory rape in the second degree, consecutive with Counts 2, 5, and 9;
- 5 years for Count 9, the class C felony of statutory sodomy in the second degree, consecutive with Counts 1, 3, 4, 6, 7, 8 and 10;
- 1 year for Count 10, the class A misdemeanor of child molestation in the second degree, concurrent with all counts.²

Appellant filed a timely notice of appeal on November 3, 2009.

The Missouri Court of Appeals, Eastern District, issued an opinion on November 16, 2010, affirming the convictions and remanding with directions to correct the clerical mistake in the sentence and judgment that resulted in an additional year of imprisonment. This Court transferred the case on January 25, 2011 after Appellant filed an application for transfer. Jurisdiction lies in the Supreme Court of Missouri. Mo. Const. Art. V, Sec. 10; Rule 83.02.

² Contrary to the oral pronouncement of sentence, the written sentence and judgment states that Count 10 is consecutive to 1, 3, 4, 6, 7, 8 and 10. L.F. 134.

STATEMENT OF FACTS

T.B. and R.C. alleged their great uncle, Daniel Primm, committed crimes against them in the City of St. Louis and in St. Louis County.³ In the Circuit Court of the City of St. Louis, Cause No. 0822-CR05437-01, the State of Missouri charged that Appellant, Mr. Primm, committed seventeen criminal counts: the class C felony of statutory rape in the second degree (Counts 1, 5, 8, 10, and 16), the class C felony of statutory sodomy in the second degree (Counts 2, 4, 6, 11, 15, and 17), and the class A misdemeanor of child molestation in the second degree (Counts 3, 7, 9, 12, and 13). L.F. 28-31. The State entered a notice of *nolle prosequi* before trial on Count 14, the class C felony of abuse of a child. Tr. 7.

Mr. Primm, age forty-six at time of trial, owned a moving business. Tr. 235. He was married and had three daughters. Tr. 318. T.B., his great niece, was born March 11, 1994. Tr. 230, 231, 258, 259. In January of 2008, when she was fourteen, she lived at 2206 Indiana in the City of St. Louis. Tr. 230, 231. She spent

³ The jury acquitted Mr. Primm of Counts 15 through 17 relating to R.C.

Appellant will discuss her testimony only as it relates to the points raised on appeal.

time at Mr. Primm's house in St. Louis County with his two daughters. Tr. 232.

T.B. would skate, go to the mall, and to the movies with her cousins. Tr. 232.

T.B. alleged Mr. Primm took her to the parking lot of a fruit company near North Market and Broadway in the City of St. Louis in his moving truck. Tr. 237, 259. He told her to pull her pants down and touch his penis. Tr. 237, 238. He got on top of her and put his mouth on her breasts and vagina. Tr. 238, 239.

T.B. also alleged that Mr. Primm came to her house in the City of St. Louis when her mother was away. Tr. 240. They had sexual intercourse in her room. Tr. 241. He put his finger in her vagina. Tr. 241. On another occasion, they had sexual intercourse on the dining room floor. Tr. 245. Appellant also touched her vagina. Tr. 246.

The next incident occurred in the City of St. Louis near the fruit company, but this time in a blue Ford Expedition SUV. Tr. 243, 247. He touched her vagina and her breasts. Tr. 244, 248. They had sexual intercourse. Tr. 247. She touched his penis. Tr. 244, 247.

Another incident happened at his house in St. Louis County. Tr. 239, 242. At his house, Appellant pulled her pants down, pulled his own pants down, and "got on top" of T.B. Tr. 234-235.

After sex acts, Appellant would sometimes give her money. Tr. 254. He would tell her not to tell her mother. Tr. 254. He had always given her money and presents growing up. Tr. 256. T.B. told her mother about these incidents in August of 2008. Tr. 247, 263.

R.C. testified about several charged sex acts in the City of St. Louis. Tr. 282-299. She also testified that Mr. Primm asked her to have sex while at his house in St. Louis County and she refused. Tr. 299. He asked if he could touch her “butt” instead. Tr. 299. After fondling her, he gave her some money and a bag of marijuana. Tr. 299.

Mr. Primm denied touching T.B. and R.C. inappropriately or having sex with them. Tr. 320-322.

Pretrial, the defense moved to exclude testimony about uncharged sex offenses alleged to have taken place in St. Louis County as well as testimony that Mr. Primm gave R.C. marijuana. Tr. 20. The State responded that the evidence about uncharged allegations “completes the circumstances of what happened here” and demonstrated that Mr. Primm gave R.C. and T.B. things of value after he abused them. Tr. 20. Defense counsel argued that the evidence was more prejudicial than probative of guilt. Tr. 21.

Appellant was acquitted of Counts 15, 16, and 17, relating to R.C. L.F. 47; Tr. 118, 120, 122. The State entered notices of *nolle prosequi* on Counts 4 and 7 at the close of its case because it failed to present evidence on those counts. L.F. 70. It entered a notice of *nolle prosequi* on Count 13 because it was a duplicate of Count 11. L.F. 71.

The jury found Mr. Primm guilty of Counts 1 (statutory rape in the second degree), 2 (statutory sodomy in the second degree), 3 (child molestation in the second degree), 5 (statutory rape in the second degree), 6 (statutory sodomy in the second degree), 8 (statutory rape in the second degree), 9 (child molestation in the second degree), 10 (statutory rape in the second degree), 11 (statutory sodomy in the second degree), and 12 (child molestation in the second degree). L.F. 45-47.

The original counts were renumbered after the *nolle prosequi* dismissals and acquittals, and on October 29, 2009, the court orally pronounced a total sentence of twenty years as follows:

- 15 years for Count 1, the class C felony of statutory rape in the second degree, consecutive with Counts 2, 5, and 9;

- 5 years for Count 2, the class C felony of statutory sodomy in the second degree, consecutive with Counts 1, 3, 4, 6, 7, 8 and 10;
- 1 year for Count 3, the class A misdemeanor of child molestation in the second degree, concurrent with all counts;
- 15 years for Count 4, the class C felony of statutory rape in the second degree, consecutive with Counts 2, 5, and 9;
- 5 years for Count 5, the class C felony of statutory sodomy in the second degree, consecutive with Counts 1, 3, 4, 6, 7, 8, and 10;
- 15 years for Count 6, the class C felony of statutory rape in the second degree, consecutive with Counts 2, 5, and 9;
- 1 year for Count 7, the class A misdemeanor of child molestation in the second degree, concurrent with all counts;
- 15 years for Count 8, the class C felony of statutory rape in the second degree, consecutive with Counts 2, 5, and 9;
- 5 years for Count 9, the class C felony of statutory sodomy in the second degree, consecutive with Counts 1, 3, 4, 6, 7, 8 and 10;
- 1 year for Count 10, the class A misdemeanor of child molestation in the second degree, concurrent with all counts.

Tr. 412-415.⁴ The Court stated its intention to impose a total sentence of twenty years of imprisonment. Tr. 415. Contrary to the oral pronouncement of sentence, the written sentence and judgment stated that Count 10 is consecutive to Counts 1, 3, 4, 6, 7, 8 and 10, for sentences totaling twenty-one years. L.F. 134.

This timely-filed appeal followed. L.F. 138.

⁴ Mr. Primm was found to be a prior and persistent felony offender for convictions from 1981 and 1991. Tr. 312-315; L.F. 31.

POINTS RELIED ON

I - The trial court abused its discretion in admitting, over objection, testimony that Appellant had committed similar uncharged crimes against T.B. and R.C. and provided illegal drugs to R.C. in St. Louis County, because admission of that evidence violated Appellant's rights to due process of law, a fair trial, and right to be tried only for the charged offenses as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 17, and 18(a) of the Missouri Constitution, in that the evidence did not fall into any of the recognized alternate purposes justifying testimony about uncharged misconduct, and thus was admitted only to show the propensity of the defendant to commit the charged crimes or that he was a person of criminal character and more likely to be guilty of the charged crimes.

State v. Ellison, 239 S.W.3d 603 (Mo. banc 2007)

State v. Vorhees, 248 S.W.3d 585 (Mo. banc 2008)

State v. Batiste, 264 S.W.3d 648 (Mo. App. W.D. 2008)

State v. Chism, 252 S.W.3d 178 (Mo. App. W.D. 2008)

U.S. Const. Amend V, VI, and XIV

Mo. Const. Art. I, Sec. 10, 17, and 18(a)

II - The trial court erred in overruling Appellant's motion for judgment of acquittal at the close of the evidence as to Count 1, because there was no evidence to support that count of statutory rape in the first degree alleging sexual intercourse that occurred in a moving truck, in that the State presented evidence that Appellant had deviate sexual intercourse in the moving truck (Count 2) and subjected T.B. to sexual contact in the moving truck (Count 3), but there was no testimony or other evidence about sexual intercourse in the moving truck. The court's ruling violated Appellant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 10 of the Missouri Constitution.

Section 566.034.1

In re J.A.H., 293 S.W.3d 116 (Mo. App. E.D. 2009)

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

U.S. Const. Amend. V, XIV

Mo. Const. Art. I, Sec. 10

III - The trial court plainly erred in entering its written sentence and judgment, because it did not conform to the oral pronouncement of sentence, in that the oral pronouncement of sentence for Count 10 was one year concurrent with other counts, and the written sentence states that Count 10 is consecutive with other counts. The written sentence and judgment is plainly erroneous, causing an additional year of incarceration and thus a manifest injustice, because it is contrary to the court's oral pronouncement of sentence, which is an error that violates Appellant's rights to due process of law and right to be present at sentencing and can be corrected by this Court *nunc pro tunc*.

State v. Scott, 298 S.W.3d 913 (Mo. App. E.D. 2009)

State v. McGee, 284 S.W.3d 690 (Mo. App. E.D. 2009)

Section 546.550

Rule 30.20

Rule 29.12(c)

U.S. Const. Amend. V, XIV

Mo. Const. Art. I, Sec. 10

ARGUMENT

I - The trial court abused its discretion in admitting, over objection, testimony that Appellant had committed similar uncharged crimes against T.B. and R.C. and provided illegal drugs to R.C. in St. Louis County, because admission of that evidence violated Appellant's rights to due process of law, a fair trial, and right to be tried only for the charged offenses as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 17, and 18(a) of the Missouri Constitution, in that the evidence did not fall into any of the recognized alternate purposes justifying testimony about uncharged misconduct, and thus was admitted only to show the propensity of the defendant to commit the charged crimes or that he was a person of criminal character and more likely to be guilty of the charged crimes.

Preservation

Appellant filed a motion in limine seeking to exclude evidence about the marijuana. L.F. 55; Tr. 20-21. The court deferred its ruling on that evidence. Tr. 21. Later, the parties discussed the uncharged sex crimes in St. Louis County. Tr. 219-225. Appellant specifically objected at trial to the admission of the St. Louis County uncharged crimes. Tr. 233, 294, 299. He included the issue in his motion

for new trial. L.F. 125-126. The issue is preserved for appellate review. Rule 29.11(d).

Standard of Review

Generally, a trial court enjoys broad discretion in determining the relevance of evidence. *State v. Ray*, 945 S.W.2d 462, 467 (Mo. App. W.D. 1997). Appellate courts will generally not interfere with the trial court's ruling on the admission of evidence, but will do so if the court believes there is a clear showing of an abuse of that discretion. *Id.* "Courts in this state frequently say that the admissibility of evidence is within the discretion of the trial court." *State v. Walkup*, 220 S.W.3d 748, 756 (Mo. banc 2007). "That is true, in many instances, but is not accurate where an evidentiary principle or rule is violated, especially in criminal cases." *Id.*

Where the admissibility of evidence of separate and distinct crimes is at issue, "[t]he test of admissibility is whether the logical relevancy of the separate crime . . . tends to prove a material fact in issue." *State v. Swederska*, 802 S.W.2d 183, 185 (Mo. App. E.D. 1991). If "[t]his requisite degree of relevancy cannot be clearly perceived, the accused should enjoy the benefit of the doubt and the evidence of a separate crime rejected." *Id.* "In all cases in which evidence of

uncharged misconduct is offered, the dangerous tendency and misleading probative force of this class of evidence require that its admission should be subjected by the courts to rigid scrutiny.” *State v. Johnson*, 161 S.W.3d 920, 925 (Mo. App. S.D. 2005).

Discussion

In addition to testimony about charged crimes, R.C. alleged that Mr. Primm asked her to have sex at his house in St. Louis County, and she refused. Tr. 299. After fondling her “butt,” he gave her money and a bag of marijuana. Tr. 299. In addition to her testimony about the charged crimes, T.B. alleged another example of sexual abuse at Appellant’s house in St. Louis County. Tr. 235. He pulled her pants down. Tr. 235. He then exposed his penis and “got on top of” her. Tr. 235.

Article I, Section 17 of the Missouri Constitution provides that “no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information.” Article I, Section 18(a) states “[t]hat in criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation. “

Based on sections 17 and 18(a), this Court “has long maintained a general prohibition against the admission of evidence of prior crimes.” *State v. Ellison*, 239 S.W.3d 603, 606 (Mo. banc 2007). “Evidence of uncharged crimes, when not properly related to the cause of trial, violates a defendant’s right to be tried for the offense for which he is indicted.” *Id.* As a general rule, “evidence of prior misconduct is inadmissible for the purpose of showing the propensity of the defendant to commit such crimes.” *State v. Bernard*, 849 S.W.2d 10, 13 (Mo. banc 1993). “Under the general rule of exclusion, the rationale is that although the fact that the defendant committed another crime on a prior occasion has some probative value, this probative value is outweighed by the unfair prejudice that would be injected by informing the jury of the prior crime.” *State v. Sladek*, 835 S.W.2d 308, 314 (Mo. banc 1992) (Thomas, J., concurring).

“The law shields defendants from the perception that a person who has acted criminally once will do so again.” *Ellison*, 239 S.W.3d at 606. This rule is “universally recognized and [is] firmly established in all English-speaking lands.” *Id.* (quoting *State v. Spray*, 174 Mo. 569, 74 S.W. 846, 851 (1903)). “Evidence of prior criminal acts is *never* admissible for the purpose of demonstrating the defendant’s propensity to commit the crime with which he is presently charged.”

Id. (citing *Bernard*, 849 S.W.2d at 13); see also *State v. Davis*, 211 S.W.3d 86, 88 (Mo. banc 2006).

Mr. Primm was not charged with any crime in St. Louis County. And yet, R.C. alleged that Mr. Primm asked her to have sex at his house in Cool Valley. Tr. 299. When she refused, he fondled her. Tr. 299. He then gave her marijuana. Tr. 299. T.B. was also allowed to testify about an allegation in St. Louis County. Tr. 235. Mr. Primm allegedly exposed himself to her. Tr. 235. He pulled down her pants, and “got on top of” her. Tr. 235. This testimony about these uncharged criminal acts violated Missouri’s “general prohibition” against the admission at a criminal trial of evidence of uncharged crimes. *Ellison*, 239 S.W.3d at 606.

Evidence of other, uncharged misconduct may be admissible under some circumstances. Such evidence may be admissible if it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; or (5) the identity of the person charged with commission of the crime on trial. *Bernard*, 849 S.W.2d at 13.

Additionally, such evidence may be admissible when the evidence is necessary “to present a complete and coherent picture of the events that transpired.” *State*

v. Thurman, 272 S.W.3d 489, 495 (Mo. App. E.D. 2008); *State v. Harris*, 870 S.W.2d 798, 810 (Mo. banc 1994).

The evidence must be logically relevant through one of these alternate uses, with “some legitimate tendency to establish directly the accused’s guilt of the charges for which he is on trial.” *State v. Vorhees*, 248 S.W.3d 585, 587 (Mo. banc 2008); *State v. Hogan*, 297 S.W.3d 597, 601 (Mo. App. E.D. 2009). It must also be legally relevant, with its probative value outweighing its prejudicial effect. *State v. Burns*, 978 S.W.2d 759, 760 (Mo. banc 1998). The common mistake is to “assume admissibility any time there is logical relevance.” *State v. Blackmon*, 941 S.W.2d 526, 529 (Mo. App. E.D. 1996). Admission of such evidence requires “careful consideration of legal relevance” or the prejudicial impact, as well as logical relevance. *Id.*

As for the testimony that Appellant allegedly gave R.C. marijuana, the State argued that while the evidence was evidence of an uncharged crime, “it completes the circumstances of what happened here, and . . . one of the things that the victim will testify to is that after one of the times that she was abused by her uncle, he gave her marijuana.” Tr. 20. “And I think that kind of goes into the whole totality of the circumstances and that he would give the girls things and he

abused them.” Tr. 20. In response, defense counsel argued it was “proof of uncharged crimes,” that the prejudice would far outweigh any probative value, and that it was not any part of the elements of what the State charged. Tr. 21.

The State argued it needed to present the alleged sex crimes in St. Louis County to show a coherent picture of the surrounding circumstances of the charged crimes. Tr. 219. The State maintained the evidence went to, “how the girls remember what happened . . . what led up to even the things happening in the city.” Tr. 219, 224. The State also argued it showed an absence of mistake and a common scheme or plan. Tr. 224, 295.

The testimony about uncharged, similar sex crimes was, first, not relevant to motive. *Bernard*, 849 S.W.2d at 13. In *State v. Batiste*, 264 S.W.3d 648 (Mo. App. W.D. 2008), the Court of Appeals discussed evidence of uncharged crimes to show motive in child abuse cases. The State charged the defendant in *Batiste* with hitting a child with a wooden board. *Id.* at 651. At trial, however, the State introduced evidence that the defendant whipped the same child with a belt and an extension cord. *Id.* The State argued the uncharged examples of child abuse against the victim were not propensity evidence, but rather went to the defendant’s “motive to commit the alleged crime.” *Id.* at 652.

The Court of Appeals disagreed. *Batiste*, 264 S.W.3d at 652. A “motive” is defined as the “[cause] or reason that moves the will and induces action” and “[an] inducement, or that which leads or tempts the mind to indulge a criminal act.” *Id.* (citing Black’s Law Dictionary 914 (5th ed. 1979)). “The evidence that Batiste had committed previous acts of abuse against J.A.V. did not explain why he abused J.A.V. on March 27, 2006.” *Id.* “Any notion that it was offered to prove motive was erroneous.” *Id.*

Other cases have reached the opposite conclusion under similar facts, allowing the use of uncharged crimes against the same child in sexual abuse cases to show motive. In *State v. Thurman*, the Court of Appeals held that “prior sexual conduct by a defendant towards the victim is admissible as it tends to establish a motive, that is satisfaction of the defendant’s sexual desire for the victim.” 272 S.W.3d 489, 495 (Mo. App. E.D. 2008) (citing *State v. Magouirk*, 890 S.W.2d 17, 17 (Mo. App. S.D. 1994), *State v. Graham*, 641 S.W.2d 102, 105 (Mo. banc 1982) and *State v. Douglas*, 797 S.W.2d 532, 533 (Mo. App. W.D. 1990)). But an allegation that Mr. Primm committed similar sex crimes does not demonstrate a “cause” or a “reason” that induced the charged acts in St. Louis City. *Batiste*, 264 S.W.3d at 652. A “motive” is a reason that explains why a person was compelled

to commit a criminal act. *See State v. Edwards*, 116 S.W.3d 511, 533 (Mo. banc 2003) (evidence that defendant had not paid child support was relevant to show his motive to have ex-wife killed to avoid paying child support); *State v. Mayes*, 63 S.W.3d 615, 628-29 (Mo. banc 2001) (evidence that defendant was charged with sex crimes against step-daughters from a previous relationship was admissible to show motive in killing wife for her refusal to testify in that case). In *Batiste*, evidence that the defendant struck the child with an extension cord did not provide a “reason” for the charged act of striking the same child with a board. *Id.*

Similarly, evidence that Mr. Primm committed similar uncharged crimes did not provide a reason for the charged acts in St. Louis City. “The satisfaction of the defendant’s sexual desire for the victim” may be a common element of the charged and uncharged crimes, but one act does not provide a motive for the other. *Thurman*, 272 S.W.3d at 495. Also, motive is often a question in criminal cases. *State v. Sims*, 952 S.W.2d 286, 292 (Mo. App. W.D. 1997). This exception, if applied broadly and imprecisely, would apply in nearly all criminal cases and “swallow[] up the underlying rule of exclusion.” *State v. Berwald*, 186 S.W.3d 349, 360 (Mo. App. W.D. 2005) (*quoting Bernard*, 849 S.W.2d at 16, 17; *Sladek*, 835 S.W.2d at 315 (Thomas, J., concurring)).

The St. Louis County allegations were also unnecessary to show a coherent story of events. Tr. 20, 219, 224. This use is a variation on the “common scheme or plan” exception, and the cases sometimes use the terms interchangeably. *State v. Wright*, 934 S.W.2d 575, 584 (Mo. App. S.D. 1996). “The cases which have allowed the application of the series or sequence of events exception have typically involved interrelated clusters of events, crime sprees, or situations where other exceptions were also applicable, such as deliberation, motive, identity, or intent.” *Johnson*, 161 S.W.3d at 927. The “series or sequence of events” exception is “narrowly read” and “historically used in robbery and homicide cases.” *Id.*

In *Johnson*, the Court of Appeals found that a series or sequence of events exception did not apply where the State had alleged sexual molestation of two girls living in the defendant’s house. 161 S.W.3d at 927. The Court found there was no evidence that “tended to show the defendant had some overarching plan and the separate acts of sexual misconduct were part of that plan.” *Id.* Like in *Johnson*, the charged acts in this case involved two teenagers, and there was no evidence that the separate acts of misconduct were part of any “overarching plan.” *Id.* The St. Louis County evidence happened chronologically before the charged

crimes and could have easily have been excluded without affecting the coherence of the State's story. Tr. 235.

Likewise, this evidence was not admissible to show a “common scheme or plan of criminal activity.” *Bernard*, 849 S.W.2d 10 at 13; *Sladek*, 835 S.W.2d at 311. In *Bernard*, this Court explained that the common scheme or plan exception cannot be invoked where the evidence reveals only that the charged and uncharged crimes are a series of similar crimes. *State v. Neil*, 869 S.W.2d 734, 736-737 (Mo. banc 1994), citing *Bernard*, 849 S.W.2d at 14. Instead, the evidence must show that the uncharged crime was part of a “larger plan” and part of the same “general criminal enterprise” for which the defendant is being tried. *Id.* Like with the series or sequence of events exception, the common scheme or plan exception cannot be invoked where the evidence reveals only that the charged and uncharged crimes are a “series of similar crimes.” *Id.*

In *Neil*, for example, this Court held that uncharged evidence of robbery committed on October 28 was simply part of a string of “similar crimes,” when the charged robberies were on July 31 and October 14. *Id.* In *State v. Frezzell*, 251 S.W.3d 380, 385 (Mo. App. E.D. 2008), the State used evidence of other assaults against correctional officers. But “[f]or evidence of the prior conduct . . . to be

admissible under the common scheme or plan exception, the State had to show that the Defendant's conduct embraced the commission of the prior conduct violations and the charged offenses in such a way that proof of the prior conduct violations would have a legitimate tendency to prove the charged offenses.” *Id.* “It is not enough to show that Defendant's prior conduct violations were committed in a fashion similar to the charged offenses.” *Id.*

Because other permissible uses - such as to show identity, an absence of mistake or accident, or intent - were not at issue under the facts of case, the challenged evidence tended to only show that Mr. Primm had allegedly abused R.C. and T.B. on other occasions, as well as having given R.C. drugs, and was, therefore, more likely to have committed the charged crimes. *See State v. Chism*, 252 S.W.3d 178, 185 (Mo. App. W.D. 2008) (finding admission of testimony about prior act of choking against same victim to be an abuse of discretion).

The use of uncharged crimes is “highly prejudicial,” which is why such evidence should be received only when there is a “strict necessity.” *State v. Collins*, 669 S.W.2d 933, 936 (Mo. banc 1984). In determining whether this evidence is prejudicial, the court will examine the similarity of the charged offense to the properly admitted evidence, the amount of evidence erroneously

admitted and extent to which the parties referred to or emphasized it during trial, and whether or not the erroneously admitted evidence was admitted inadvertently. *State v. Barriner*, 34 S.W.3d 139, 150 (Mo. banc 2000).

The uncharged sexual conduct that R.C. and T.B. alleged in St. Louis County was similar in character to the charged conduct. The State referred to the testimony during closing argument. Tr. 385. Finally, the evidence reached the jury intentionally, not inadvertently. *Barriner*, 34 S.W.3d at 150. In contrast, the properly-admitted evidence against Mr. Primm consisted only of the testimony of R.C. and T.B., which the jury had to weigh against Mr. Primm's testimony.

Where, as here, the jury's task was to simply weigh the credibility of the accusers against Mr. Primm's denials on the stand, the use of propensity evidence allowed the State to unfairly burden the defendant. Mr. Primm was forced not only to defend the charges brought against him, but also somehow address uncharged allegations of similar crimes of which he had no notice. "[T]o admit proof of crimes other than the one with which the accused is charged would require him to defend any number of charges about which the indictment gives him no information." *Johnson*, 161 S.W.3d at 925-926.

This evidence was only probative to show Mr. Primm had a tendency to commit crimes similar to the charged crimes, and was therefore more likely to be guilty of the charged offenses. The credibility determinations in this case were a close call, as evidenced by the jury's acquittal on Counts 15, 16 and 17 relating to R.C. L.F. 47. On the remaining counts, the uncharged crime evidence was significant enough "to have affected the jury's deliberations." *Batiste*, 264 S.W.3d at 654.

Using this evidence at trial deprived Mr. Primm of his right to be tried only for the charged offense, to due process of law, and to a fair trial under the U.S. Constitution, Amends. V, VI, and XIV, and Article I, Sections 10, 17, and 18(a) of the Missouri Constitution. Appellant asks for a new trial.

II - The trial court erred in overruling Appellant's motion for judgment of acquittal at the close of the evidence as to Count 1, because there was no evidence to support that count of statutory rape in the first degree alleging sexual intercourse that occurred in a moving truck, in that the State presented evidence that Appellant had deviate sexual intercourse in the moving truck (Count 2) and subjected T.B. to sexual contact in the moving truck (Count 3), but there was no testimony or other evidence about sexual intercourse in the moving truck. The court's ruling violated Appellant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution.

Preservation

Counsel moved for judgment of acquittal at the close of the State's case and at the close of the evidence. Tr. 309-310, 343-344; L.F. 65-66, 67-68. The issue of the sufficiency of the evidence supporting the convictions was included in the timely-filed motion for acquittal notwithstanding the verdict, or in the alternative, for a new trial, though not necessary for preservation purposes. Tr. 126-127; Rule 29.11(d); Rule 29.11(d)(3).

The issue is preserved for appellate review. *State v. Washington*, 92 S.W.3d 205, 207 (Mo. App. W.D. 2002).

Standard of Review

The State has the burden and must prove each and every element of a criminal case beyond a reasonable doubt. *In re J.A.H.*, 293 S.W.3d 116, 120 (Mo. App. E.D. 2009); *State v. Smith*, 33 S.W.3d 648, 652 (Mo. App. W.D. 2000). Review of claims challenging the sufficiency of the evidence is limited to a determination of whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt. *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993). The reviewing court views the evidence in a light most favorable to the verdict, considering all favorable inferences and disregarding all evidence and inferences contrary to the verdict. *Id.*

Discussion

The State charged three counts from acts it said occurred in the moving van: the class C felony of statutory rape (Count 1), the class C felony of statutory sodomy (Count 2), and the class A misdemeanor of child molestation in the first degree (Count 3). L.F. 28. Count 1 charged sexual intercourse in the moving van. L.F. 28. Count 2 charged that Appellant engaged in deviate sexual

intercourse in the moving van, which is defined in relevant part as, “any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object.” L.F. 28; Section 566.010(1). Count 3 alleged Appellant subjected T.B. to sexual contact in the moving van, defined as touching another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person. L.F. 28; Section 566.010(1).

T.B. testified that Mr. Primm had a moving company. Tr. 235. He had a moving van as part of his business. Tr. 236. He took her by a fruit company in the van. Tr. 236. He told her to pull her pants down. Tr. 237. Then, he “got on top of me and started touching my breasts and all that” with his mouth. Tr. 238. Then, he told her to touch his penis. Tr. 238. Then, “[t]hat’s when he started doing it then. He had -- that’s when he started doing like kissing me and stuff, and then after that he told me to pull my pants back up.” Tr. 238. The prosecutor clarified what T.B. was saying by asking, “You said he touched your breasts with his mouth?” and T.B. answered, “Yes.” Tr. 239. The prosecutor then asked, “did he used his mouth to touch you anywhere else on your body?” and T.B. responded,

“My vagina.” Tr. 239. The prosecutor asked, “And after he touched his mouth to your vagina, did he touch you with any other parts of his body?” and T.B. responded, “No.” Tr. 239. Then, T.B. testified, “that’s when he took me home.” Tr. 239.

The elements of the crime of statutory rape in the second degree are that a person commits that crime, “if being twenty-one years of age or older, he has sexual intercourse with another person who is less than seventeen years of age.” Section 566.034.1. “Sexual intercourse” is defined as, “any penetration, however slight, of the female sex organ by the male sex organ, whether or not an emission results.” Section 566.010(4). “To satisfy this element there must be some evidence of penetration.” *State v. Taylor*, 126 S.W.3d 2, 3 -4 (Mo. App. E.D. 2003), quoting *State v. Bewley*, 68 S.W.3d 613, 617-18 (Mo. App. S.D. 2002); *State v. Herndon*, 224 S.W.3d 97, 99 (Mo. App. W.D. 2007).

The State did not present evidence that T.B. and Appellant had sexual intercourse in the moving truck. L.F. 78; Tr. 230-257. There was no direct or circumstantial evidence of penetration constituting sexual intercourse in the moving van, as charged in Count 1. Where the State fails to present evidence on a charged count, the evidence is insufficient and that count must be vacated. *See*,

e.g., State v. Love, 134 S.W.3d 719, 723 (Mo. App. S.D. 2004) (where, in multi-count case, the State failed to present evidence on Count III, court vacated conviction on appeal); *State v. Boyd*, 59 S.W.3d 926, 927 (Mo. App. E.D. 2001) (where State conceded it failed to present evidence on one charge of multi-count sexual abuse case).

T.B. did testify about sexual intercourse in a blue Ford Expedition on another occasion (Tr. 247), but that act was charged in Count 10 of the indictment, and submitted as Instruction 12, which had been renumbered as Count 8. L.F. 29, 85. She also testified about two incidents of sexual intercourse at the house on Indiana. Tr. 241, 245. Those acts were also charged and instructed separately. L.F. 29 (Counts 5 and 8); L.F. 81, 83 (Instructions 8 and 10). Also, it is worth noting that the State candidly admitted at the close of its case that it failed to present evidence on several of the charged counts, specifically, Counts 4, 7, and 14. Tr. 345; L.F. 70-71. It entered notices of *nolle prosequi* on those counts. L.F. 70-71. The State also failed to present evidence to support Count 1.

The evidence does not support the conviction on Count 1, the motions for judgment of acquittal should have been granted, and the jury should not have

been instructed on Count 1. *State v. Reichert*, 854 S.W.2d 584, 603 (Mo. App. S.D. 1993); L.F. 78. The conviction is in violation of Appellant's rights to due process and to a fair trial, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 10 and 18(a) of the Missouri Constitution. Count 1 must be vacated.

III - The trial court plainly erred in entering its written sentence and judgment, because it did not conform to the oral pronouncement of sentence, in that the oral pronouncement of sentence for Count 10 was one year concurrent with other counts, and the written sentence states that Count 10 is consecutive with other counts. The written sentence and judgment is plainly erroneous, causing an additional year of incarceration and thus a manifest injustice, because it is contrary to the court's oral pronouncement of sentence, which is an error that violates Appellant's rights to due process of law and right to be present at sentencing and can be corrected by this Court *nunc pro tunc*.

Preservation and Standard of Review

This error is subject to plain error review. Rule 30.20. Appellate courts will remand cases that contain clerical errors resulting from oversight or omission. *Tabor v. State*, 193 S.W.3d 873, 880 (Mo. App. S.D. 2006); Rule 29.12(c). The remedy is to remand the case with directions to amend the sentence and judgment to reflect the correct sentence. *Id.*

Discussion

In its oral pronouncement of sentence on Count 10, the class A misdemeanor of child molestation in the second degree, the sentencing court

stated, “On Count Ten, child molestation second degree, defendant will be sentenced to one year MSI.” Tr. 414. Count 10 was to be served concurrent with 1, 3, 4, 6, 7, and 8. Tr. 414. Counts 2, 5, and 9 were concurrent with each other but consecutive to the remaining concurrent counts. Tr. 414, 415.

But the written sentence and judgment states that Count 10 is consecutive with Counts “1, 3, 4, 6, 7, 8, and 10 [sic].” This has resulted in a twenty-one year sentence that is contrary to the oral pronouncement of sentence and contrary to the court’s stated intention that the total sentence equal twenty years. Tr. 414-415.

“If there exists in the record a basis to support an amendment to the judgment and the trial court's intentions regarding the defendant's sentence are clear from the record, such mistakes can be corrected by a *nunc pro tunc* order, which is used to make the record conform to what was actually done.” *State v. Scott*, 298 S.W.3d 913, 918 (Mo. App. E.D. 2009). Here, the written sentence and judgment is inconsistent with the oral pronouncement of sentence. The oral sentence controls over an inconsistent writing. *State v. McGee*, 284 S.W.3d 690, 713 (Mo. App. E.D. 2009).

In such cases, this court will remand to the trial court for instructions to amend the sentence and judgment. *Scott*, 298 S.W.3d at 918. Appellant asks that this Court remand his case to the trial court to correct the sentence and judgment to reflect that Count 10 is to be served concurrently with Counts 1, 3, 4, 6, 7 and 8.

CONCLUSION

On Point I, Appellant asks for a new trial.

On Point II, Appellant asks the Court to vacate Count 1 because the State did not present evidence on that count.

On Point III, Appellant asks this Court to also remand the case to the trial court for a correction *nunc pro tunc*, because Count 10 of the written sentence and judgment erroneously states that count is consecutive to other counts.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rules 84.06(g) and 83.08(c), I hereby certify that on this 9th day of March 2011, two true and correct copies of the foregoing brief and a floppy disk containing the foregoing brief were mailed postage prepaid to Mr. John W. Grantham of the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the word count limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, using Plantagenet Cherokee 13-point font. The word-processing software identified that this brief contains **8,411** words. Also, the enclosed diskette has been scanned for viruses with a currently updated version of Symantec Endpoint Protection software and found to be virus-free.

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APPENDIX

Sentence and JudgmentA1

Instruction 5A10

Section 566.010A11

Section 566.034A12

Section 566.064A13

Section 566.068A14