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JURISDICTIONAL STATEMENT

Appellant was convicted after a jury trial in the Circuit Court of Crawford County, Missouri, of statutory rape in the first degree, Section 566.032.2,¹ and statutory sodomy in the first degree, Section 566.062.2. The Honorable William Camm Seay sentenced appellant to two consecutive terms of thirty years imprisonment for a total of sixty years. Notice of appeal was originally filed in the Southern District Court of Appeals, but that Court transferred to the Missouri Supreme Court pre-opinion pursuant to Rule 83.01, as this appeal challenges the constitutionality of Section 566.025. This Court has original jurisdiction over challenges to the validity of a statute of Missouri. Article V, Section 3, Mo. Const. (as amended 1982).

¹ Statutory citations are to RSMo 2000, unless otherwise indicated.

STATEMENT OF FACTS

Sufficiency of the evidence is at issue. The facts will be presented in the light most favorable to the verdicts. Appellant was charged with statutory rape in the first degree, Section 566.032.2, and statutory sodomy in the first degree, Section 566.062.2, in the Circuit Court of Crawford County (L.F. 11). The sodomy was charged as having deviate sexual intercourse with S.W. “by an act involving defendant’s hand and victim’s genitals” (L.F. 11, 55, 57).

Sydney White lived in Steelville with her mother, Gena Vorhees, her brothers Jeffrey and Ryan White, and her stepfather, appellant Shane Vorhees, in 2003 through 2005 (Tr. 213-215). Sydney was thirteen and fourteen years old during that time (Tr. 214, 223).

Sydney testified that appellant touched her “in a bad way” “between my legs and my butt” with “his hands or his private.” (Tr. 215-216). She said her butt was a place she goes to the bathroom with, “number two” (Tr. 216). He put his penis inside her butt, and in her mouth (Tr. 217, 220-221). She testified that before he did so, he spit in his hand and rubbed it on his penis (Tr. 217, 221). Sydney said he did not put it in her private (Tr. 217). Once he “peed in [her] mouth” (Tr. 218).

Sydney described another occasion when she was sitting in the sink and appellant put his mouth on her private (Tr. 219). On further questioning, Sydney testified that she has “another hole” besides her butt, “another opening down there” (Tr. 224-225). She agreed under questioning that appellant “tried” to put

his penis in that one, and spit on his hand and rubbed it on his penis before he did so (Tr. 225).

Sydney told her mother just before her fourteenth birthday (Tr. 5, 221). Sydney had been arguing with appellant and told him she was going to tell her mother what he had been doing, and Gena overheard it (Tr. 222). Sydney was angry with appellant that night, but she did not remember why (Tr. 227-228). Once in 2003, she told her parents that appellant was raping her, but when questioned by a caseworker, she said she made it up (Tr. 238-239). She was angry with appellant and wanted him out of the house (Tr. 239).

Gena Vorhees testified that she overheard Sydney say to appellant, “if mom only knew what you did, Shane” (Tr. 245). Gena questioned Sydney, who first told her mother that she would not believe her, then said appellant raped her (Tr. 245). Gena asked appellant if it was true (Tr. 246). He denied it, and offered to take a lie detector (Tr. 246). Gena went back to Sydney and asked her again; when Sydney said she was telling the truth, Gena took Sydney and her younger son and left the house (Tr. 246).

Gena testified that when they had sexual intercourse, appellant would sometimes lick his hand and wet his penis (Tr. 247). He wanted anal sex with her, but she did not like it (Tr. 248-249).

Sydney had no physical signs of abuse (Tr. 271-272, L.F. 37). Child Advocacy Center interviewer Connilee Boehne testified that a lack of physical findings was not unusual (Tr. 276).

Prior to trial, defense counsel filed a motion to declare Section 566.025 unconstitutional (L.F. 50-53, Tr. 25-28). That motion was overruled (Tr. 28). Counsel also moved to exclude evidence of other purported victims as improper propensity evidence (L.F. 29-31). The trial court conducted a pretrial hearing in order to decide whether the testimony of Jacqueline Wright was relevant and whether the probative value of her testimony outweighed the prejudice (Tr. 31).

In that pretrial offer of proof, Jacqueline testified that in 1991, she was six years old and living in a trailer park in Pulaski County (Tr. 32). Appellant, who was a friend of the family, frequented their home (Tr. 32). One night, appellant entered her bedroom and put a paper towel or cloth over her mouth (Tr. 33). He started fondling Jacqueline under her panties (Tr. 34). He spit on his hand and put it on his penis, and tried to put it in her (Tr. 35). Then he “peed” in her mouth, and it went all over her face and in her hair (Tr. 35). Jacqueline reported the incident at the time, but her mother did not believe her (Tr. 37).

Defense counsel argued that this was distinguishable by the age difference between the alleged victims, but the trial court was inclined to let it in (Tr. 40-42).

During voir dire, a venireperson stated that he could not be fair because “we were not able to arrive at a decision [in prior jury service] and then we read about it in the paper months later that he was arrested for the same thing” (Tr. 84). Later the same venireperson reiterated “I give the guy the benefit of the doubt last

time, and then, like I said, six months later his name's in the paper for doing the same damn thing again. It would be very hard for me [to set it aside]" (Tr. 118).²

Defense counsel questioned the venirepersons about their evaluation of the testimony of a propensity witness such as an earlier victim (Tr. 126). Several venirepersons responded, and agreed that "where there's smoke, there's fire" (Tr. 126-128).

During the evidentiary portion of trial, defense counsel objected when Jacqueline was called to testify, on the grounds that her testimony constituted improper propensity evidence, was unconstitutional, bolstering, hearsay, and the prejudice outweighed the probative value (Tr. 278). The objection was overruled and allowed to be continuing (Tr. 278). Counsel renewed the constitutional challenge to Section 566.025, and that was overruled (Tr. 296-297).

Jacqueline testified to the incident she described pretrial (Tr. 279-282). Her mother also testified that when Jacqueline was six, she made allegations about appellant, and the mother told her she was making it up (Tr. 290). She did have Jacqueline checked at the hospital, and they told her "there were signs she had been sexually messed with" (Tr. 290).

During the state's closing argument, the prosecutor argued that Jacqueline's testimony was corroboration for the accusations regarding Sydney (Tr. 311, 319-235). He argued that the reason Sydney was believable is because of the similar

² This venireperson was struck for cause (Tr. 195).

story told by Jacqueline (Tr. 319-325). He further argued that the deviate sexual intercourse that the jury must find to convict appellant of statutory sodomy was “peeing” in Sydney’s mouth (Tr. 313).

Instruction number 7, the verdict director on the statutory sodomy count, instructed the jury as follows:

INSTRUCTION NO. 7

As to Count II, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about and between the dates of February 2003 and October 2005, in the County of Crawford, State of Missouri, the defendant performed an act involving defendant’s hand and Sydney White’s genitals, and

Second, that such conduct constituted deviate sexual intercourse, and

Third, that at that time Sydney White was less than fourteen years old, then you will find the defendant guilty under Count I of statutory sodomy in the first degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

As used in this instruction, the term “deviate sexual intercourse” means 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 done for the purpose of arousing or gratifying the sexual desire of any person.

MAI-CR3d 320.11

Submitted by State

(L.F. 70).

The jury returned verdicts of guilty of both counts (Tr. 327, L.F. 74-75). On January 3, 2007, the Honorable William Camm Seay sentenced appellant to two consecutive terms of thirty years imprisonment (Tr. 330, 338, L.F. 83). Notice of appeal was filed that same day (L.F. 86).

POINTS RELIED ON

I.

The trial court erred in overruling defense counsel's objections to the testimony of Jacqueline Wright that appellant committed uncharged crimes of a sexual nature involving Jacqueline when she was under fourteen, because the testimony was admitted to prove appellant's propensity pursuant to Section 566.025, but that statute is unconstitutional on its face, in violation of appellant's rights to due process, a fair trial, and his rights to be tried only for the offense with which he is charged and to be informed of the charges against him, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 17 and 18(a) of the Missouri Constitution, in that this Court expressly found the former version of this statute unconstitutional in *State v. Burns*, 978 S.W.2d 759 (Mo. banc 1998), and the legislature's addition of a test for relevance to the statute after *Burns* did not cure its deficiencies because relevance was not the basis on which this Court decided *Burns*; rather the Court found that the admission of evidence solely to prove propensity violated the rights described above.

State v. Burns, 978 S.W.2d 759 (Mo. banc 1998);

State v. Bernard, 849 S.W.2d 10 (Mo. banc 1993);

State v. Reese, 274 S.W.2d 304 (Mo. 1954);

State v. Sladek, 835 S.W.2d 308 (Mo. banc 1992);

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

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

Section 566.025.

II.

The trial court abused its discretion in overruling defense counsel's motion in limine and admitting evidence of appellant's alleged acts against Jacqueline Wright, because admission of that evidence deprived appellant of his rights to due process and to be tried only for the crime with which he was charged, guaranteed by the 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 was not admissible under any of the exceptions to the rule excluding evidence of uncharged misconduct, and any probative value that this improper character evidence may have had to shed light on any material issue was clearly outweighed by its prejudicial impact and made it more likely that the jury would convict appellant on the charged offense relating to Sydney White.

State v. Bernard, 849 S.W.2d 10 (Mo. banc 1993);

State v. Payne, 135 S.W.3d 504 (Mo. App., W.D. 2004);

State v. Carter, 996 S.W.2d 141 (Mo. App., W.D. 1999);

State v. Worrell, 933 S.W.2d 431 (Mo. App., W.D. 1996);

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

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

Section 566.025.

III.

The trial court erred in overruling defense counsel's motions for judgment of acquittal and in imposing judgment and sentence against appellant for statutory sodomy in the first degree, because this violated appellant's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the evidence was insufficient to prove hand to genital contact beyond a reasonable doubt, which is how the state charged and instructed the sodomy count, because Sydney did not testify that appellant touched her genitals with his hand, nor could the jury infer such conduct from other evidence.

State v. Price, 980 S.W.2d 143 (Mo. App., E.D. 1998);

State v. Keeler, 856 S.W.2d 928 (Mo. App., S.D. 1993);

State v. Pope, 733 S.W.2d 811 (Mo. App., W.D. 1987);

State v. Grim, 854 S.W.2d 403 (Mo. banc 1993);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, Sec. 10;

MAI-CR3d 320.11; and

MACH-CR 20.08.

ARGUMENT

I.

The trial court erred in overruling defense counsel's objections to the testimony of Jacqueline Wright that appellant committed uncharged crimes of a sexual nature involving Jacqueline when she was under fourteen, because the testimony was admitted to prove appellant's propensity pursuant to Section 566.025, but that statute is unconstitutional on its face, in violation of appellant's rights to due process, a fair trial, and his rights to be tried only for the offense with which he is charged and to be informed of the charges against him, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 17 and 18(a) of the Missouri Constitution, in that this Court expressly found the former version of this statute unconstitutional in *State v. Burns*, 978 S.W.2d 759 (Mo. banc 1998), and the legislature's addition of a test for relevance to the statute after *Burns* did not cure its deficiencies because relevance was not the basis on which this Court decided *Burns*; rather the Court found that the admission of evidence solely to prove propensity violated the rights described above.

But for the testimony of Jacqueline Wright, there is a reasonable probability that appellant would not have been convicted of the statutory rape and statutory sodomy of his stepdaughter, Sydney White. Under this Court's opinions in *State v. Bernard*, 849 S.W.2d 10 (Mo. banc 1993), and *State v. Burns*, 978 S.W.2d 759

(Mo. banc 1998), Jacqueline's testimony would have been excluded as inadmissible propensity evidence. The evidence came in, however, under the legislature's new version of Section 566.025, and would not have been admitted absent the statute. This statute is unconstitutional on its face. It violates Article I, Sections 10, 17 and 18(a) of the Missouri Constitution, and the Sixth and Fourteenth Amendments to the United States Constitution.³ Appellant's convictions should be reversed.

Standard of review

This Court reviews issues of law *de novo*. ***State v. Justus***, 205 S.W.3d 872, 878 (Mo. banc 2006). Statutes are presumed to be constitutional. ***Suffian v. Usher***, 19 S.W.3d 130, 134 (Mo. banc 2000) (citations omitted). This Court will resolve all doubt in favor of the act's validity and may make every reasonable intendment to sustain the constitutionality of the statute. ***Westin Crown Plaza Hotel v. King***, 664 S.W.2d 2, 5 (Mo. banc 1984). If a statutory provision can be interpreted in two ways, one constitutional and the other not constitutional, the

³ When a state court admits evidence that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment to the United States Constitution provides a mechanism for relief. ***Lisenba v. California***, 314 U.S. 219 (1961).

constitutional construction shall be adopted. *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007).

Preservation

Prior to trial, defense counsel filed a motion to declare Section 566.025 unconstitutional (L.F. 50-53, Tr. 25-28). That motion was overruled (Tr. 28). Counsel also moved to exclude evidence of other purported victims as improper propensity evidence (L.F. 29-31). The trial court conducted a pretrial hearing on November 16, 2006, in order to decide whether the testimony of Jacqueline Wright was relevant and whether the probative value of her testimony outweighed the prejudice (Tr. 31).

During the evidentiary portion of trial, defense counsel objected when Jacqueline was called to testify, on the grounds that her testimony constituted improper propensity evidence, was unconstitutional, bolstering, hearsay, and the prejudice outweighed the probative value (Tr. 278). The objection was overruled and allowed to be continuing (Tr. 278). Counsel renewed the constitutional challenge to Section 566.025, and that was overruled (Tr. 296-297).

In defense counsel's motion for new trial, counsel asserted that the testimony of Jacqueline Wright violated appellant's "right to be tried only for the offense charged" and that the trial court should have sustained counsel's motion and objections "regarding prior bad acts for the grounds stated at the pre-trial conference on November 16, 2006 and stated on the day of trial" (L.F. 77-78).

Facts

The charged offenses were the statutory rape and statutory sodomy of appellant's stepdaughter, Sydney White (L.F. 56-57). During voir dire, defense counsel questioned the venire about their evaluation of the testimony of a propensity witness such as an earlier victim (Tr. 126). Several venirepersons responded, and agreed that "where there's smoke, there's fire" (Tr. 126-128).

Sydney testified at trial that appellant touched her "in a bad way" "between my legs and my butt" with "his hands or his private." (Tr. 215-216). She said her butt was a place she goes to the bathroom with, "number two" (Tr. 216). He put his penis inside her butt, and in her mouth (Tr. 217, 220-221). She testified that before he did so, he spit in his hand and rubbed it on his penis (Tr. 217, 221). Sydney said he did not put it in her private (Tr. 217). Once he "peed in [her] mouth" (Tr. 218).

Sydney described another occasion when she was sitting in the sink and appellant put his mouth on her private (Tr. 219). On further questioning, Sydney testified that she has "another hole" besides her butt, "another opening down there" (Tr. 224-225). She agreed under questioning that appellant "tried" to put his penis in that one, and spit on his hand and rubbed it on his penis before he did so (Tr. 225).

Jacqueline Wright testified that in 1991, she was six years old and living in a trailer park in Pulaski County (Tr. 279). Appellant, who was a friend of the family, frequented their home (Tr. 279-280). One night, appellant entered her

bedroom and put a paper towel or cloth over her mouth (Tr. 280). He started fondling Jacqueline under her panties (Tr. 281). He spit on his hand and put it on his penis, and tried to put it in her (Tr. 281). Then he “peed” in her mouth, and it went all over her face and in her hair (Tr. 281). Jacqueline reported the incident at the time, but her mother did not believe her (Tr. 282, 286).

During the state’s closing argument, the prosecutor argued that the testimony of Jacqueline was corroboration for the accusations regarding Sydney (Tr. 311, 319-235). He argued that the reason Sydney was believable was because of the similar story told by Jacqueline (Tr. 319-325).

Analysis

The general rule regarding evidence of uncharged misconduct is that it 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), citing *State v. Reese*, 274 S.W.2d 304, 307 (Mo. 1954). However, such evidence may be admissible if it is both logically relevant, meaning it has some legitimate tendency to establish the defendant’s guilt of the charged offense, and legally relevant, meaning that the prejudicial impact is outweighed by its probative value.

Bernard, 949 S.W.2d at 13.

In *Bernard*, this Court recognized five historical exceptions to the rule against admission of uncharged crimes evidence, and noted that these exceptions were those of *logical* relevance:

evidence of other, uncharged misconduct has a legitimate tendency to prove the specific crime charged when 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 the commission of the crime on trial.”

Id.; citing *State v. Sladek*, 835 S.W.2d 308, 311 (Mo. banc 1992). The Court went on to establish a separate “signature modus operandi” exception where “the identity of the wrongdoer is at issue.” *Bernard*, 849 S.W.2d at 17. For the uncharged misconduct to be admissible under this exception, the charged and uncharged crimes must be “nearly ‘identical’ and their methodology ‘so unusual and distinctive’ that they resemble a ‘signature’ of the defendant’s involvement in both crimes.” *Id.* (citation omitted). The Court cautioned that this comes closest to admitting evidence for propensity purposes, which “may encourage the jury to convict the defendant because of his propensity to commit such crimes without regard to whether he is actually guilty of the crime charged.” *Id.* at 16, 17.

Presumably in response to this Court’s *Bernard* decision, the legislature enacted Section 566.025, RSMo 1994. It provided:

In prosecutions under Chapter 566 or 568 involving a victim under fourteen years of age, whether or not age is an element of the crime for which the defendant is on trial, evidence that the defendant has committed other charged or uncharged crimes involving victims under fourteen years

of age shall be admissible for the purpose of showing the propensity of the defendant to commit the crime or crimes with which he is charged, provided that such evidence involves acts that occurred within ten years before or after the act or acts for which the defendant is being tried.

In *State v. Burns*, 978 S.W.2d 759 (Mo. banc 1998), this Court found that Section 566.025, RSMo 1994, was unconstitutional, in that it violated Article I, Sections 17 and 18(a) of the Missouri Constitution. Those sections guarantee a criminal defendant the right to be tried only for the offense charged. 978 S.W.2d at 760-761. The Court held that the “admission of uncharged crimes not tending to establish an element of the charged crime would, in effect, amount to trying the defendant for crimes not designated in the indictment.”

In other words, if the evidence does *not tend to establish* the charged crime – if the evidence is not *logically* relevant – it is not admissible. As this Court recognized in *Bernard* and reaffirmed in *Burns*, the exceptions to the uncharged crimes rule are those of *logical* relevance: motive, opportunity, identity and the like *tend to establish* the defendant’s guilt.

In an attempt to fix the Court’s concern, the legislature amended Section 566.025, that was found to be unconstitutional in *Burns*. The legislature did this by writing around the relevance requirement. If logical relevance made uncharged misconduct admissible under *Bernard* and *Burns*, then legal relevance would be addressed by the new statute. The statute is almost identical to the old, with the addition of the test for legal relevance:

In prosecutions pursuant to this chapter or chapter 568, RSMo, of a sexual nature involving a victim under fourteen years of age, whether or not age is an element of the crime for which the defendant is on trial, evidence that the defendant has committed other charged or uncharged crimes of a sexual nature involving victims under fourteen years of age shall be admissible for the purpose of showing the propensity of the defendant to commit the crime or crimes with which he or she is charged unless the trial court finds that the probative value of such evidence is outweighed by the prejudicial effect.

Section 566.025, RSMo 2000.

Yet legal relevance was not the problem with the first statute, so the addition of this test has not made it constitutional. It is true that this Court recognized in *Burns* that Section 566.025 as it existed made no provision for consideration of whether evidence was logically or legally relevant by its plain language. *Burns*, 978 S.W.2d at 761. But the constitutional violation was that the admission of propensity evidence that is not *logically* relevant offends Article I, Sections 17 and 18(a) of the Missouri Constitution. Article I, Section 17 provides, in pertinent part, “that no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information.” Article I, Section 18(a) provides, in pertinent part, “that in criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation.” *Burns*, 978 S.W.2d at 760.

This Court stated plainly in *Burns* that “Section 566.025 violates article I, sections 17 and 18(a) of the Missouri Constitution where the evidence is presented while guilt remains undecided.” *Id.* at 762. The addition of a test for legal relevance to the statute does not save it. Why? Because evidence that is not *logically* relevant violates the Missouri Constitution. *Burns*. And propensity evidence is not *legally* relevant. *Bernard*. And evidence of prior misconduct must be *both logically and legally relevant* to be admissible. *Bernard; Burns*. The statute adds nothing to the inquiry. The final sentence of the statute adds nothing to its meaning. It remains unconstitutional under *Burns*.

Prejudice

The testimony of Jacqueline Wright was admitted only under the statute. Absent the statute, it was inadmissible. See Point II. The trial court held a specific pretrial hearing to determine whether the testimony of Jacqueline Wright was relevant and whether the probative value of her testimony outweighed the prejudice (Tr. 31).

It is likely that without Jacqueline’s testimony, appellant would have been acquitted. Sydney White’s testimony was inarticulate and inconsistent. She had once before told her parents that appellant was raping her, but when questioned by a caseworker, she said she made it up (Tr. 238-239). She was angry with appellant and wanted him out of the house (Tr. 239). There was no physical evidence to support Sydney’s story (Tr. 271-272).

Furthermore, the jury was encouraged to convict appellant of the charged offenses because of the testimony of Jacqueline about the uncharged offense. During voir dire, defense counsel questioned the venire about their evaluation of the testimony of a propensity witness such as an earlier victim (Tr. 126). Several venirepersons responded, and agreed that “where there’s smoke, there’s fire” (Tr. 126-128). And during the state’s closing argument, the prosecutor argued that the testimony of Jacqueline was corroboration for the accusations regarding Sydney (Tr. 311, 319-235). He argued that the reason Sydney was believable is because of the similar story told by Jacqueline (Tr. 319-325).

In *State v. Johnson*, 161 S.W.3d 920 (Mo. App., S.D. 2005), the defendant was convicted of statutory sodomy in the first degree for an incident with a thirteen-year-old who was spending the night with his twenty-one-year-old female roommate. 161 S.W.3d at 922-923. The state also called as a witness a fifteen-year-old who was also present that night who testified that the defendant had committed a similar offense against her. *Id.* at 923-924. The Court of Appeals found that this was admitted solely for propensity, and was not relevant to any of the *Bernard* exceptions to the general rule against uncharged misconduct. *Id.* at 924-925.

The Court held that, other than admission under Section 566.025, which was not relevant in *Johnson* since the witness was fifteen, “similar sexual crimes with other persons are generally inadmissible for the purpose of showing propensity.” *Id.* at 926. And, “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.” *Id.*; citing *Burns*, 978 S.W.2d at 761.

This case is very similar to *Johnson*, and indicates that but for the new statute, the evidence here would not have been admissible. Interestingly, the *Johnson* court indicated in a footnote that the prior version of the statute had been found unconstitutional in *Burns*, but that Johnson “does not directly challenge the constitutionality of the latest enacted version of section 566.025.” *Johnson*, 161 S.W.3d at 926, n.6.

There is a reasonable probability that without the evidence from Jacqueline Wright, admitted under Section 566.025, appellant would have been acquitted. Appellant respectfully requests that this Court declare Section 566.025 unconstitutional under the Missouri Constitution and *State v. Burns*, reverse his convictions and remand for a new trial.

II.

The trial court abused its discretion in overruling defense counsel's motion in limine and admitting evidence of appellant's alleged acts against Jacqueline Wright, because admission of that evidence deprived appellant of his rights to due process and to be tried only for the crime with which he was charged, guaranteed by the 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 was not admissible under any of the exceptions to the rule excluding evidence of uncharged misconduct, and any probative value that this improper character evidence may have had to shed light on any material issue was clearly outweighed by its prejudicial impact and made it more likely that the jury would convict appellant on the charged offense relating to Sydney White.

Regardless of whether this Court finds Section 566.025 unconstitutional as appellant requests in Point I, the testimony of Jacqueline Wright and her mother should not have been admitted in this trial. The trial court abused its discretion in overruling defense counsel's motion in limine and in admitting into evidence the allegations of Jacqueline Wright that appellant molested her as well, because the evidence was not admissible under any of the *Bernard* exceptions⁴ and any

⁴ *State v. Bernard*, 849 S.W.2d 10, 13 (Mo. banc 1993).

probative value such evidence may have had was outweighed by its prejudicial effect. The erroneous admission of this evidence deprived appellant of his constitutional rights to due process, a fair trial, and to be tried only for the offense charged and requires that he be granted a new trial. When a state court admits evidence that is so unduly prejudicial that it renders the trial fundamentally unfair, it violates due process. *Lisenba v. California*, 314 U.S. 219 (1961).

Standard of review

Determination of the relevancy and admissibility of evidence is a matter clearly within the discretion of the trial court; review is for abuse of discretion. *State v. Collins*, 962 S.W.2d 421, 424 (Mo. App., W.D. 1998). "An abuse of discretion occurs when a trial court's ruling is clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." *In re Spencer*, 123 S.W.3d 166, 168 (Mo. banc 2003).

Even if the trial court finds evidence to be relevant, it must exclude that evidence if the prejudicial effect to the defendant outweighs other considerations that make the evidence useful to prove an issue in the case. *State v. Diercks*, 674 S.W.2d 72 (Mo. App., W.D. 1984). Evidence that tends to unnecessarily divert the jury's attention from the question before it should be excluded. *State v. Taylor*, 663 S.W.2d 235, 239 (Mo. banc 1984). The probative value of evidence

must not be outweighed by its tendency to create undue prejudice in the mind of the jury. *Id.*

Preservation

Prior to trial, defense counsel filed a motion in limine to exclude evidence of other purported victims as improper propensity evidence (L.F. 29-30). The trial court conducted a pretrial hearing pursuant to Section 566.025 to decide whether the testimony of Jacqueline Wright was relevant and whether the probative value of her testimony outweighed the prejudice (Tr. 31).

During the evidentiary portion of trial, defense counsel objected when Jacqueline was called to testify, on the grounds that her testimony constituted improper propensity evidence, was unconstitutional, bolstering, hearsay, and the prejudice outweighed the probative value (Tr. 278). The objection was overruled and allowed to be continuing (Tr. 278).

In defense counsel's motion for new trial, counsel asserted that the testimony of Jacqueline Wright violated appellant's right to be tried only for the offense charged and that the trial court should have sustained counsel's motion and objections regarding prior bad acts (L.F. 77-78).

Facts

The charged offenses were the statutory rape and statutory sodomy of appellant's stepdaughter, Sydney White (L.F. 56-57). During voir dire, defense

counsel questioned the venire about their evaluation of the testimony of a propensity witness such as an earlier victim (Tr. 126). Several venirepersons responded, and agreed that “where there’s smoke, there’s fire” (Tr. 126-128).

In addition to the testimony from Sydney and her mother concerning Sydney’s allegations against appellant, the state presented testimony from Jacqueline Wright who said that in 1991, she was six years old and living in a trailer park in Pulaski County (Tr. 279). Appellant, who was a friend of the family, frequented their home (Tr. 279-280). One night, appellant entered her bedroom and put a paper towel or cloth over her mouth (Tr. 280). He started fondling Jacqueline under her panties (Tr. 281). He spit on his hand and put it on his penis, and tried to put it in her (Tr. 281). Then he “peed” in her mouth, and it went all over her face and in her hair (Tr. 281). Jacqueline reported the incident at the time, but her mother did not believe her (Tr. 282, 286).

Analysis

In a sex case, evidence of prior misconduct is inadmissible for the sole purpose of showing the propensity of the defendant to commit such acts.

Bernard, 849 S.W.2d at 13; ***State v. Burns***, 978 S.W.2d 759 (Mo. banc 1998).

There is a reason why evidence of other sexual misconduct is excluded in the jury trial of a sexual offense: it is highly prejudicial. When evidence of uncharged misconduct is introduced to show the defendant's propensity to commit such crimes, the jury may improperly convict the defendant because of his propensity

without regard to whether he is actually guilty of the charged crime. *State v. Carter*, 996 S.W.2d 141, 143 (Mo. App., W.D. 1999), citing, *Burns*, 978 S.W.2d at 761. In *Burns*, this Court held that admission of such improper propensity evidence violated the defendant's right under the Missouri Constitution, Article I, Sections 17 and 18(a), to be tried only on the offense charged. *Id.* at 760.

Here, the prosecutor offered the evidence under Section 566.025. The state did not attempt to introduce the evidence under the general rule regarding uncharged crimes. Yet it would not have been admissible under any exception to the rule, and should not have been admitted under the statute.

Bernard exceptions

The general rule is that evidence of uncharged crimes may be admissible "if it 'tends to establish (1) motive, (2) intent, (3) identity, (4) the absence of mistake or accident, (5) or a common plan or scheme.'" *State v. Payne*, 135 S.W.3d 504, 507 (Mo. App., W.D. 2004) (quoting *State v. Harris*, 870 S.W.2d 798, 810 (Mo. banc 1994)). An additional exception provides that "evidence of uncharged crimes that are part of the circumstances or the sequence of events surrounding the offense charged may be admitted to present 'a complete and coherent picture of the events that transpired.'" *Id.* (citation omitted). However, evidence of other robberies in *Payne* was "logically relevant to whether Payne was guilty of the three other robberies for which he was charged, and its probative value was not outweighed by its prejudicial effect." 135 S.W.3d at 505.

The trial court did not find that Jacqueline’s testimony and that of her mother would come in under any of these exceptions. And certainly this evidence was *not* admissible for absence of mistake – this was not a baby being bathed, touched accidentally, or any of other circumstances which might evoke a “mistake” defense. Nor was this the type of common scheme or plan evidence contemplated by that defense. *See State v. Lawson*, 50 S.W.3d 363, 366 (Mo. App., S.D. 2001) (a common scheme or plan embraces the commission of two or more crimes so related to each other that proof of one tends to establish the other; evidence of defendant's contemporary possession of other drugs and a hand gun was logically and legally relevant to show that defendant knew of the drug manufacturing operation).

The state did argue that the evidence was admissible under the “signature modus operandi” exception because appellant allegedly spit on his hand before attempting to have intercourse with Sydney and with Jacqueline (Tr. 38-39). The prosecutor argued that this was “distinctive.” (Tr. 39).

This Court established the “signature modus operandi” exception in *Bernard*. 849 S.W.2d at 17. For the uncharged misconduct to be admissible under this exception, the charged and uncharged crimes must be “nearly ‘identical’ and their methodology ‘so unusual and distinctive’ that they resemble a ‘signature’ of the defendant’s involvement in both crimes.” *Id.* (citation omitted). The Court cautioned that this comes closest to admitting evidence for propensity purposes, which “may encourage the jury to convict the defendant because of his propensity

to commit such crimes without regard to whether he is actually guilty of the crime charged.” *Id.* at 16, 17.

It is clear that “spitting on his hand” or the acts of molestation that appellant allegedly perpetrated on Sydney or Jacqueline are not the type of “signature” that this Court had in mind in *Bernard*. That is a very narrow exception. In *Bernard*, this Court found that the defendant’s conduct in having his victims take off their clothes and run naked around his car was a “signature,” because it was so unusual and distinctive as to “earmark” it as the conduct of the defendant. 849 S.W.2d at 18. But this Court further found inadmissible under this new exception that Bernard possessed and showed nude photographs of the victims (members of a church youth group) to the group, and that he arranged sleepovers with the victims in order to sexually abuse them. *Id.* As in this case, where appellant spit on his hand, or “peed” in the alleged victims’ mouths, the Court found that Bernard’s conduct was “similar, even nearly identical, [but] not so unusual and distinctive as to be a signature of [his] *modus operandi*.” *Id.*

Section 566.025

Furthermore, this evidence was not admissible under the statute, as the prejudice outweighed any probative value. As discussed in Point I, it is likely that without Jacqueline’s testimony, appellant would have been acquitted. Sydney White’s testimony was inarticulate and inconsistent. She had once before told her parents that appellant was raping her, but when questioned by a caseworker, she

said she made it up (Tr. 238-239). She was angry with appellant and wanted him out of the house (Tr. 239). There was no physical evidence to support Sydney's story (Tr. 271-272).

And the jury was encouraged to convict appellant of the charged offenses because of Jacqueline's testimony about the uncharged offense. During voir dire, defense counsel questioned the venire about their evaluation of the testimony of an propensity witness such as an earlier victim (Tr. 126). Several venirepersons responded, and agreed that "where there's smoke, there's fire" (Tr. 126-128). And during the state's closing argument, the prosecutor argued that the testimony of Jacqueline was corroboration for the accusations regarding Sydney (Tr. 311, 319-235). He argued that the reason Sydney was believable is because of the similar story told by Jacqueline (Tr. 319-325).

In *State v. Sales*, 984 S.W.2d 183 (Mo. App., W.D. 1998), the Court of Appeals reversed the appellant's conviction where a witness was allowed to testify regarding an uncharged act of sodomy by the appellant. In *Carter, supra*, the appellant's conviction was reversed where prior sex offense convictions were used to argue the appellant's propensity. 996 S.W.2d at 143-144. See also *State v. Johnson*, 161 S.W.3d 920 (Mo. App., S.D. 2005) (discussed in Point I).

In *State v. Worrell*, 933 S.W.2d 431 (Mo. App., W.D. 1996), the Court of Appeals reversed where a questionnaire was admitted into evidence, which had been filled out by the defendant. The questionnaire indicated that the defendant (1) had manipulated a child to get sexual pleasure, and (2) that, at times, when he

had hugged or held a child, he had become sexually aroused. 933 S.W.2d at 434. The Court of Appeals held that the prejudice of this evidence outweighed its probative value and it should have been excluded. *Id.*

Here, too, the prejudice from admitting evidence of crimes against Jacqueline Wright outweighed any possible probative value, and violated appellant's rights to due process and to be tried only on the charged offense. Appellant therefore respectfully requests that this Court reverse his convictions and remand for a new and fair trial.

III.

The trial court erred in overruling defense counsel's motions for judgment of acquittal and in imposing judgment and sentence against appellant for statutory sodomy in the first degree, because this violated appellant's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the evidence was insufficient to prove hand to genital contact beyond a reasonable doubt, which is how the state charged and instructed the sodomy count, because Sydney did not testify that appellant touched her genitals with his hand, nor could the jury infer such conduct from other evidence.

Standard of review

When reviewing the sufficiency of the evidence, this Court must consider the evidence and all reasonable inferences reasonably drawn from the evidence in the light most favorable to the verdict. *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993). The test is whether the evidence, so viewed, was sufficient to make a submissible case from which rational jurors could have found beyond a reasonable doubt that appellant was guilty. *State v. Hopkins*, 841 S.W.2d 803, 804 (Mo. App., S.D. 1992). To support the conviction, the State must prove beyond a reasonable doubt that appellant committed each element of the offense charged. *State v. Johnson*, 741 S.W.2d 70, 73 (Mo. App., S.D. 1987). A challenge to the

sufficiency of the evidence to support a finding of guilt is based in the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Jackson v. Virginia*, 443 U.S. 307, 314-315 (1979).

Preservation

Defense counsel filed motions for judgment of acquittal at the close of the state's case and at the close of all the evidence (L.F. 58-61). Denial of those motions was listed as error in defense counsel's post-trial motion for judgment of acquittal or new trial (L.F. 81).

Facts

Appellant was charged with statutory sodomy in the first degree, as having deviate sexual intercourse with Sydney "by an act involving defendant's hand and victim's genitals" (L.F. 11, 55, 57). Sydney testified that appellant touched her "in a bad way" "between my legs and my butt" with "his hands *or* his private." (Tr. 215-216) (emphasis added). She said her butt was a place she goes to the bathroom with, "number two" (Tr. 216). He put his penis inside her butt, and in her mouth (Tr. 217, 220-221). She testified that before he did so, he spit in his hand and rubbed it on his penis (Tr. 217, 221). Sydney said he did not put it in her private (Tr. 217). Once he "peed in [her] mouth" (Tr. 218).

Sydney described another occasion when she was sitting in the sink and appellant put his mouth on her private (Tr. 219). On further questioning, Sydney

testified that she has “another hole” besides her butt, “another opening down there” (Tr. 224-225). She agreed under questioning that appellant “tried” to put his penis in that one, and spit on his hand and rubbed it on his penis before he did so (Tr. 225).

Instruction number 7, the verdict director on the statutory sodomy count, instructed the jury as follows:

INSTRUCTION NO. 7

As to Count II, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about and between the dates of February 2003 and October 2005, in the County of Crawford, State of Missouri, the defendant performed an act involving defendant’s hand and Sydney White’s genitals, and

Second, that such conduct constituted deviate sexual intercourse, and

Third, that at that time Sydney White was less than fourteen years old,

then you will find the defendant guilty under Count I of statutory sodomy in the first degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

As used in this instruction, the term “deviate sexual intercourse” means 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 done for the purpose of arousing or gratifying the sexual desire of any person.

MAI-CR3d 320.11

Submitted by State

(L.F. 70).

Analysis

Sydney described acts of deviate sexual intercourse. The prosecutor could have charged genital to anus contact, genital to mouth, or mouth to genital. But what he charged, and instructed, was hand to genital contact. The most that Sydney ever said in that regard was that appellant touched her “in a bad way” “between my legs and my butt” with “his hands *or* his private.” (Tr. 215-216) (emphasis added).

The State must prove the act it has alleged, *not what it might have alleged*. ***State v. Price***, 980 S.W.2d 143, 144 (Mo. App., E.D. 1998); *also see*, ***State v. Pope***, 733 S.W.2d 811 (Mo. App., W.D. 1987); ***State v. Palmer***, 822 S.W.2d 536, 540-41 (Mo. App., S.D. 1992). In ***Price***, the Court noted that in ***State v. Keeler***, 856 S.W.2d 928 (Mo. App., S.D. 1993):

the concurring opinion observed that it is exasperating that a defendant's villainous conduct goes unpunished, but such a woeful consequence may be the result of a failure to analyze the evidence and file an appropriate charge. We adopt a similar observation. Moreover, submission of the receiving charge is suspect where the State's closing argument acknowledged that the evidence would only support a finding that Defendant was the thief. *'The state is held to proof of the elements of the offense it charged, not the one it might have charged.'* *Id.* at 931.

980 S.W.2d at 144 (emphasis added). The Western District said much the same in *Pope*: "The allegation of the specific act might have been surplusage, *see* MACH-CR 20.08. But still, when the act was specified, the state was held to proof of that act [citations omitted], and the jury can convict only on that act." 733 S.W.2d at 813.

The prosecutor argued in closing that the deviate sexual intercourse that the jury must find to convict appellant of statutory sodomy was "peeing" in Sydney's mouth (Tr. 313). Yet this was not the charged offense, nor was it the offense instructed to the jury. The charged offense – hand to genital contact – was not proved, since Sydney said only that he touched her with his hand or his penis.

There was insufficient evidence to convict appellant of the sodomy count with which he was charged. He respectfully requests that this Court reverse his conviction of statutory sodomy in the first degree and discharge him.

CONCLUSION

For the reasons presented, appellant respectfully requests that this Court reverse his conviction of statutory sodomy in the first degree and discharge him, and that this Court reverse his conviction of statutory rape and remand for a new and fair trial.

Respectfully submitted,

Ellen H. Flottman, MOBar #34664
Attorney for Appellant
Woodrail Centre, 1000 W. Nifong
Building 7, Suite 100
Telephone: (573) 882-9855
FAX: (573) 884-4793
E-mail: Ellen.Flottman@mspd.mo.gov

Certificate of Compliance and Service

I, Ellen H. Flottman, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 8,339 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in June, 2007. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 2nd day of July, 2007, to Shaun Mackelprang, Chief Counsel, Criminal Appeals Division, P.O. Box 899, Jefferson City, Missouri, 65102.

Ellen H. Flottman

APPENDIX

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