

IN THE  
MISSOURI SUPREME COURT

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STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	No. SC 89240
	)	
MIKE PERRY,	)	
	)	
Appellant.	)	

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APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI  
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 8  
THE HONORABLE STEVEN R. OHMER,  
JUDGE AT JURY TRIAL AND SENTENCING

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APPELLANT'S REPLY BRIEF

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## JURISDICTIONAL STATEMENT

Appellant Mike Perry adopts the first paragraph of the jurisdictional statement set out in Appellant's Brief, Statement and Argument, filed on March 10, 2008, in the Missouri Court of Appeals, Eastern District. To his initial jurisdictional statement, Mr. Perry adds that the Missouri Court of Appeals, Eastern District transferred this case to this Court prior to opinion because Mr. Perry made a real and substantial challenge to the validity of a state statute and consequently, this Court has exclusive jurisdiction over Mr. Perry's appeal. Mo. Const., Art. 5, § 3; Mo. Const., Art. 5, § 11; Rule 83.01.

## STATEMENT OF FACTS

Appellant Mike Perry also adopts the statement of facts set out in Appellant's Brief, Statement and Argument, filed on March 10, 2008 in the Missouri Court of Appeals, Eastern District. Appellant Perry (Mr. Perry) will cite to the appellate record as follows: Trial Transcript (ED 89969), "(Tr.)"; Sentencing Transcript (ED 89969), "(S. Tr.)"; Legal File (ED 89969), "(L.F.)"; and, Respondent's Brief (SC 89240), "(Resp. Br.)."

**REPLY POINT - I.**

**The alleged foot-to-crotch contact that occurred between Mr. Perry and N.M. was ambiguous and equivocal, and consequently, the nature of the contact did not alone demonstrate a sexual purpose or an intentional touching. Moreover, a review of all of the relevant circumstances, including the absence of remarks by Mr. Perry at the time of the touching, his actions immediately before and after the touching, and Mr. Perry's overall conduct, demonstrates the insufficiency of the evidence. This Court should reverse Mr. Perry's conviction of child molestation in the first degree and discharge him.**

*Baker v. State*, 781 S.W.2d 688 (Tex. App. – Fort Worth 1989);

*State v. Brown*, 586 A.2d 1085 (R.I. 1991);

*State v. Love*, 134 S.W.3d 719 (Mo. App. S.D. 2004).<sup>1</sup>

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<sup>1</sup> Appellant Perry specifically responds to Points I, II, and III, and Arguments I, II, and III of respondent's brief and does not waive Point IV, Argument IV of Appellant's Statement, Brief, and Argument, filed on March 10, 2008.

## REPLY POINT - II.

Neither evidence of the alleged offense nor evidence of Mr. Perry's alleged prior act of rubbing his butt on N.M.'s lap justified the prosecutor's unfair characterization of Mr. Perry as a "sexual predator" or the prosecutor's argument that Mr. Perry was "grooming" N.M. for the more serious crime of "rape." Though defense counsel did not object to the prosecutor's improper and highly prejudicial closing argument, the closing argument constituted plain error. This Court should reverse Mr. Perry's conviction.

*State v. Taylor*, 216 S.W.3d 187 (Mo. App. E.D. 2007);

*State v. Jackson*, 155 S.W.3d 849 (Mo. App. W.D. 2005);

*State v. Stockbridge*, 549 S.W.2d 648 (Mo. App. K.C.D. 1977);

*State v. Heinrich*, 492 S.W.2d 109 (Mo. App. K.C.D. 1973).

**REPLY POINT - III.**

**Section 491.075 is unconstitutional, and unconstitutional as applied to Mr. Perry. This Court should reverse Mr. Perry's conviction.**

*State v. Nyhammer*, 396 N.J. Super. 72, 932 A.2d 33 (2007);

*State v. Rohrich*, 132 Wash.2d 472, 939 P.2d 697 (1997);

*State v. Noah*, 284 Kan. 608, 162 P.3d 799 (2007).

**REPLY ARGUMENT - I.**

**The alleged foot-to-crotch contact that occurred between Mr. Perry and N.M. was ambiguous and equivocal, and consequently, the nature of the contact did not alone demonstrate a sexual purpose or an intentional touching. Moreover, a review of all of the relevant circumstances, including the absence of remarks by Mr. Perry at the time of the touching, his actions immediately before and after the touching, and Mr. Perry's overall conduct, demonstrates the insufficiency of the evidence. This Court should reverse Mr. Perry's conviction of child molestation in the first degree and discharge him.**

Appellant Perry briefly responds to Point I and Argument I of respondent's brief. In its brief, respondent relies on *State v. Love*, 134 S.W.3d 719 (Mo. App. S.D. 2004) in arguing that there was sufficient evidence that Mr. Perry touched N.M. through her clothing for the purpose of arousing or gratifying his sexual desire (Resp. Br. 12). In *Love*, the Southern District held that there was sufficient evidence that the defendant had sexual contact with three of four separate child victims. *Love*, 134 S.W.3d at 723.

Respondent overlooks, however, that the sexual contact that occurred in *Love* was hand-to-breast or hand-to-crotch, and not socked foot-to-crotch. There is less likelihood that hand-to-breast or hand-to-crotch contact is unintentional,

as one presumably intends to touch that which he or she consciously extends his or her hand to touch.

A foot-to-crotch touch such as the one that occurred in Mr. Perry's case is much more ambiguous and equivocal. When the touch occurred, Mr. Perry was lying down with a baby on the living room couch on which he slept and N.M. was lying at the other end of the same couch (Tr. 332, 342-343, 345, 368, 393, 441, 461-462). The relative position of their bodies on the crowded couch alone created a possibility that Mr. Perry's feet, which were resting on the couch, would unintentionally touch N.M.'s body, including N.M.'s vaginal area. That Mr. Perry and N.M. were sleeping on the couch at the time only increased the possibility that innocent, inadvertent bodily contact would occur while they tossed and turned in their sleep.

Consequently, contrary to respondent's argument, the nature of the contact that occurred did not, by itself, demonstrate a sexual purpose or evidence an intentional touching. Under the circumstances, Mr. Perry had a legitimate, innocent reason for the contact - that of unconsciously and unknowingly touching N.M. while she slept across from him on the same crowded living room couch.

Moreover, a review of all of the relevant circumstances will reveal that the purpose of the contact was not arousal or gratification of sexual desire. The

absence of remarks by Mr. Perry at the time of the touching, his actions immediately before and after the touching, and Mr. Perry's overall conduct demonstrate the insufficiency of the evidence. *See, e.g., Baker v. State*, 781 S.W.2d 688, 689 (Tex. App. – Fort Worth 1989) (reversing due to absence of evidence that the defendant laughed, smiled, or made any remarks during the contact to indicate his intent to satisfy his sexual desire); *see also State v. Brown*, 586 A.2d 1085, 1088 (R.I. 1991) (reversing because there was no evidence of conduct or conversation on the part of the defendant from which to infer a purpose of sexual arousal or gratification).

This Court should reverse Mr. Perry's conviction and discharge him.

## REPLY ARGUMENT - II.

Neither evidence of the alleged offense nor evidence of Mr. Perry's alleged prior act of rubbing his butt on N.M.'s lap justified the prosecutor's unfair characterization of Mr. Perry as a "sexual predator" or the prosecutor's argument that Mr. Perry was "grooming" N.M. for the more serious crime of "rape." Though defense counsel did not object to the prosecutor's improper and highly prejudicial closing argument, the closing argument constituted plain error. This Court should reverse Mr. Perry's conviction.

Appellant Perry briefly responds to Point II and Argument II of respondent's brief. Respondent asserts that the prosecutor's statement that Mr. Perry was a "sexual predator" who was "grooming" N.M. for "something bigger" was supported by evidence of another "sexual act" against N.M. where Mr. Perry allegedly "straddled [N.M.'s] abdomen and thrust against it" (Resp. Br. 17).

Though respondent cites to transcript page 346 and State's Exhibit #1 in support of this assertion, respondent mischaracterizes N.M.'s statements in the cited portions of transcript and videotape. N.M. said nothing about "straddling" or "thrusting" (Tr. 346; State's Exhibit #1). N.M. said that Mr. Perry sat on her stomach and rolled around (Tr. 346). Also, on videotape, N.M. described and

demonstrated with two stuffed animals how Mr. Perry allegedly sat on her lap *with his back to her* and rubbed his butt on her lap (Tr. 346; State's Exhibit #1).

This act about which N.M. spoke on videotape and at trial was uncharged, did not result in "sexual contact" under section 566.010(3), and did not constitute "sexual conduct" as defined in section 566.010(2). Nor is there any evidence that it was a "simulated sex act" as respondent implied, rather than simply unwelcome bodily contact (*see* Resp. Br. 17).

Evidence of this unwelcome bodily contact did not justify the prosecutor's unfair characterization of Mr. Perry as a "sexual predator" or the prosecutor's argument that Mr. Perry was "grooming" N.M. for the more serious crime of "rape" (*see* Tr. 596-597). The evidence did not support such an undeserved characterization, as there was no evidence at trial that Mr. Perry had a criminal history or a pattern of preying upon and molesting children.

Though defense counsel failed to object to the prosecutor's closing argument, a finding of plain error from the prosecutor's closing remarks is "by no means unprecedented." *State v. Taylor*, 216 S.W.3d 187, 195 (Mo. App. E.D. 2007) (citing *State v. Jackson*, 155 S.W.3d 849, 854 (Mo. App. W.D. 2005)). In *Jackson*, the Western District found plain error in the trial court's failure to intervene *sua sponte* when the prosecutor argued the following in a statutory rape trial: "It is a matter of law. He is the father of that child," and "You don't really

even have to worry about whether you're making the right decision if you find him guilty because it's already been decided." 155 S.W.3d at 853-854. In *State v. Stockbridge*, 549 S.W.2d 648, 651-652 (Mo. App. K.C.D. 1977), the court found plain error resulted when in closing the prosecutor called a defendant with no prior criminal record a "professional" or "pro" car thief.

Moreover, in *State v. Heinrich*, 492 S.W.2d 109, 114-116 (Mo. App. K.C.D. 1973), the court held the prosecutor's inflammatory closing argument foreclosed the possibility of a fair and impartial trial and reversed the defendant's conviction for plain error. There, the prosecutor argued in closing that the defendant should not be let out of a cage because he would hurt someone, and that the jury should convict the defendant so that he would never again walk the streets and commit crime. *Heinrich*, 492 S.W.2d at 115.

This Court should similarly reverse Mr. Perry's conviction because the prosecutor's closing argument deprived Mr. Perry of a fair and impartial trial, and resulted in plain error.

### REPLY ARGUMENT - III.

**Section 491.075 is unconstitutional, and unconstitutional as applied to Mr. Perry. This Court should reverse Mr. Perry's conviction.**

Appellant Perry briefly responds to Point III and Argument III of respondent's brief in which respondent argues that section 491.075 is not unconstitutional as applied to Mr. Perry because N.M. testified at trial and defense counsel cross-examined her (Resp. Br. 24).

Simply putting a child on the stand, however, is not sufficient to eliminate all Confrontation Clause concerns. The opportunity to cross-examine means more than affording the defendant the opportunity to hail the child to court. *State v. Rohrich*, 132 Wash.2d 472, 478, 939 P.2d 697 (1997). The Confrontation Clause requires that the child describe the acts of alleged sexual contact if the child takes the stand to testify. *Id.* at 481-482. When the child does not testify on examination about the specific act of sexual contact, then the defense is deprived of a sufficient opportunity for cross-examination. *Id.* at 482; *see also State v. Noah*, 284 Kan. 608, 617-619, 162 P.3d 799 (2007) (finding the Confrontation Clause was violated because the defendant did not have sufficient opportunity to cross-examine the victim at the preliminary hearing, and the trial court admitted the unavailable victim's testimonial hearsay at trial).

In *State v. Nyhammer*, 396 N.J. Super. 72, 87-89, 932 A.2d 33 (2007), the child victim took the stand to testify at trial, but a New Jersey Superior Court later held that the child's inability to testify at trial about material facts or to recall her prior statements deprived the defendant of an adequate and meaningful opportunity for cross-examination. In reversing the defendant's convictions and remanding for a new trial, the court noted, "Although a defendant is not guaranteed 'cross-examination that is effective in whatever way, and to whatever extent,' the opportunity for cross-examination must be more than a mere sham." *Nyhammer*, 396 N.J. Super. at 89 (citing *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) and *California v. Green*, 399 U.S. 149, 158 (1970)).

Given the absence of an opportunity for the defendant to adequately and meaningfully cross-examine the child before or at trial, the court held the trial court's admission at trial of the victim's testimonial hearsay statements violated the defendant's confrontation rights under *Crawford v. Washington*, 541 U.S. 36 (2004). *Id.* at 88-90.

Similarly, the trial court's admission of N.M.'s out-of-court statements under section 491.075 violated Mr. Perry's confrontation rights under *Crawford*. Mr. Perry also did not have an opportunity for adequate and meaningful cross-examination at trial.

N.M. did not testify about the alleged sexual contact on direct-examination. She did not testify that Mr. Perry touched her vagina or vaginal area with his foot, and only testified that he had placed his foot under her nightgown (Tr. 348). When asked what Mr. Perry had done with his foot, she said, "I don't want to say" (Tr. 348).

N.M.'s inability to testify about the alleged sexual contact on direct-examination prohibited defense counsel from engaging N.M. in a thorough cross-examination that would have exposed to the jury the weaknesses in the State's case. It also placed Mr. Perry in "a constitutionally impermissible Catch-22" of eliciting facts on cross-examination about which parts of Mr. Perry's body touched N.M.'s body or waiving his confrontation rights. See *Rohrich*, 132 Wash.2d at 478.

Consequently, respondent is incorrect in stating that section 491.075 is not unconstitutional as applied to Mr. Perry. This Court should reverse Mr. Perry's conviction.



## CONCLUSION

WHEREFORE, based on the arguments in Appellant's Statement, Brief, and Argument, filed on March 10, 2008, and on the arguments in this Reply Brief, Appellant Mike Perry requests that the Court reverse his convictions and discharge him, or in the alternative, that the Court reverse his convictions and grant him a new trial.

Respectfully submitted,

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**CERTIFICATE OF SERVICE AND COMPLIANCE**

Pursuant to Missouri Supreme Court Rule 84.06, I hereby certify that on this 13<sup>th</sup> day of June 2008, a true and correct copy of the foregoing reply brief and a floppy disk containing the foregoing brief were mailed postage prepaid to the office 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 page limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, and uses Calisto MT 13 point font. The word-processing software identified that this brief contains \_\_\_\_\_ words, excluding the cover page, signature block, and certificates of service and of compliance. Finally, I hereby certify that the enclosed diskette has been scanned for viruses with McAfee VirusScan Enterprise 7.1.0 software and found virus-free.

Respectfully submitted,

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