In the Missouri Court of Appeals
Eastern District

DIVISION THREE

STATE OF MISSOURI,	)	No. ED102938
	)	
Respondent,	)	Appeal from the Circuit Court
	)	of St. Charles County
vs.	)	
	)	
JORDAN L. PRINCE,	)	Hon. Nancy L. Schneider
	)	
Appellant.	)	Filed: June 20, 2017

OPINION

Jordan L. Prince ("Prince") appeals from the judgment of the Circuit Court of St. Charles County following jury verdicts convicting him of first-degree murder, felony abuse of a child, and forcible sodomy. We would reverse the judgment and remand the case for further proceedings. However, because this is an issue of first impression and involves a question of general importance, we transfer the case to the Missouri Supreme Court pursuant to Rule 83.02.[1]

Factual and Procedural Background

We review the facts in the light most favorable to the verdict. *State v. Johnson*, 284 S.W.3d 561, 568 (Mo. banc 2009). On the evening of December 2, 2012, Prince's girlfriend and her four-month-old baby girl ("Victim") spent the night at Prince's home. The next morning,

[1] All rule references are to Missouri Supreme Court Rules (2017).

while Prince's girlfriend was asleep, Victim was sexually assaulted in her anus and sustained multiple bruises to her face, chest, and various parts of her body. Victim's anus was penetrated with a large object, causing numerous internal tears, including one approximately 6 cm in length. These injuries caused Victim to lose more than one-third of her blood supply. Victim was also strangled to death. According to the medical examiner, Victim died from strangulation but would have died from the internal injuries inflicted by the sexual assault if she had not been strangled. Prince was arrested and charged with three counts: first-degree murder, in violation of RSMo § 565.020[2] (Count I); felony abuse of a child, in violation of Section 568.060 (Count II); and felony forcible sodomy, in violation of Section 566.060 (Count III).

During the jury trial, over Prince's objection, the State introduced evidence of Prince's pornography use. The State also introduced evidence of Prince's juvenile records from Idaho related to a 2004 adjudication of juvenile delinquency for "lewd and lascivious" conduct with a minor. The State admitted Prince's juvenile records through the testimony of the police detective who interrogated Prince in this case. The detective read substantial portions of Prince's juvenile records to the jury, including the allegations of lewd and lascivious conduct with a minor, the criminal statute defining the acts as a felony under Idaho law, and the certified adjudication showing Prince admitted to committing the acts alleged. The State also introduced into evidence video clips of the interrogation where Prince acknowledged his juvenile record. Prince did not testify at trial.

After Prince was charged, but before his jury trial occurred, the Missouri Constitution was amended to allow relevant evidence of a defendant's prior criminal acts to be introduced as evidence of the defendant's propensity to commit the crime charged in a prosecution for a crime

[2] All statutory references are to RSMo 2000, unless otherwise indicated.

of a sexual nature involving an underage victim. MO. CONST. art. I, § 18(c) (2014) ("Article I, Section 18(c)" or the "Amendment").

Prior to trial, Prince filed a motion *in limine* to exclude all evidence from his juvenile records as well as his pornography use. Prince argued the juvenile records were not legally relevant, contained inadmissible testimonial hearsay, and were inadmissible under Section 211.271, which governs the admissibility of juvenile records. Concerning his pornography use, Prince argued the evidence was neither logically nor legally relevant.

Prince also filed a motion *in limine* seeking to exclude all evidence of prior criminal acts, arguing Article I, Section 18(c) was an *ex post facto* law as applied to his case, and admitting any evidence of prior criminal conduct as propensity evidence would violate his constitutional rights to due process and a fair trial by an impartial jury as guaranteed by the Missouri Constitution and the United States Constitution. The trial court largely denied these motions, excluding only Prince's psychological evaluation, and admitted the remainder of Prince's juvenile records as well as evidence of Prince's use of pornography.

During trial, the State called a police detective to testify regarding Prince's juvenile records. Prince objected and moved for a mistrial. The court denied the request. When the State offered the juvenile records for admission, Prince again objected, renewing his arguments from the motions *in limine*. The court overruled the objection and admitted the evidence. The court also denied Prince's request to give a limiting instruction when the evidence was presented to the jury.

At the conclusion of evidence, the court instructed the jury it could consider any evidence that Prince committed other criminal acts "on the issue of demonstrating the defendant's

propensity to commit the crimes of abuse of a child and forcible sodomy with which he is presently charged."[3]

During deliberations, the jury sent a request to the judge asking to see "the paperwork for the defendant's prior crime against a child that occurred in another state." The court provided the jury portions of Prince's juvenile records, including the petition listing the factual allegations for the charge of lewd and lascivious conduct, as well as the juvenile court's decree indicating Prince admitted to the charges.

The jury found Prince guilty of all charges, and the court accepted the verdicts. Prince waived jury sentencing and the court sentenced him to three consecutive terms of life imprisonment. This appeal follows.

Points on Appeal

Prince raises four points on appeal. In Point I, Prince argues the trial court erred in admitting evidence of his 2004 juvenile adjudication from Idaho for lewd and lascivious conduct with a minor because this propensity evidence was not "relevant evidence of prior criminal acts," in that his juvenile records were neither logically "relevant" nor evidence of a "criminal act," as required by Article I, Section 18(c). In Point II, Prince argues the trial court erred in admitting evidence of his 2004 juvenile adjudication because it was not legally relevant in that its probative value was substantially outweighed by the danger of unfair prejudice. In Point III, Prince argues the trial court erred in admitting evidence of his 2004 juvenile adjudication because his conduct pre-dated the 2014 enactment of Article I, Section 18(c) and applying this Amendment to him retroactively violated the *ex post facto* clause of the United States and Missouri Constitutions. In

[3] The court's instruction was based on MAI-CR 3d 310.12 (1995) and Pattern Instruction 2.08A from United States Court of Appeals for the Eighth Circuit, but modified to incorporate language from Article I, Section 18(c) permitting the use of evidence of prior criminal acts as evidence of the defendant's propensity to commit the crime charged. *See State v. Ellison*, 239 S.W.3d 603, 605 (Mo. banc 2007).

Point IV, Prince argues the trial court erred in admitting evidence concerning the viewing of pornographic websites on Prince's cellphone and computer because the evidence was neither logically nor legally relevant.

Discussion

We first address Point III, finding Article I, Section 18(c) is not an *ex post facto* law as applied in this case. Next, we address Point I, finding the trial court erred in admitting Prince's juvenile court records under Article I, Section 18(c), and that Prince suffered prejudice as a result. Because our holding in Point I is dispositive, we do not reach the merits of Points II and IV. However, due to the general importance of the issue raised in Point I, we transfer the case to the Missouri Supreme Court, pursuant to Rule 83.02.

I. Article I, § 18(c) of the Missouri Constitution Is Not an *Ex Post Facto* Law

In Point III, Prince argues the trial court erred in admitting evidence of his 2004 juvenile adjudication records because his conduct predated the 2014 enactment of Article I, Section 18(c) and applying this Amendment to him retrospectively violated the *ex post facto* clause of the United States and Missouri Constitutions. We disagree.

A. Standard of Review

Whether a defendant's constitutional rights have been violated is a question of law which this court reviews *de novo*. *State v. Sisco*, 458 S.W.3d 304, 312 (Mo. banc 2015).

B. Analysis

The Missouri Supreme Court recently decided this issue in *State ex rel. Tipler v. Gardner*, 506 S.W.3d 922, 923 (Mo. banc 2017). In *Tipler*, the defendant filed a writ of prohibition challenging the trial court's authority to apply Article I, Section 18(c). The defendant argued that the constitutional Amendment would be impermissibly retrospective as applied to

him because his conduct occurred prior to the enactment of the Amendment. *Id*. The Court held that Article I, Section 18(c), as adopted in 2014, is not unconstitutionally retrospective in operation as applied to "trials occurring on or after the effective date of the amendment, regardless of when the crimes are alleged to have occurred." *Id*. at 923.

The Court found that "[n]othing in article I, section 18(c) pertains to the criminality of particular conduct," and the Amendment is a purely procedural rule governing the admissibility of evidence at trial. *Id*. at 925. The Court concluded the Amendment only "pertains to 'prosecutions' and, therefore, applies prospectively to all trials occurring after the effective date of that amendment," which was December 4, 2014. *Id*. at 927; *see also State v. Rucker*, 512 S.W.3d 63, 68 (Mo. App. E.D. 2017) (applying *Tipler* and holding Article I, Section 18(c) is not an *ex post facto* law as applied to trials occurring after the amendment's effective date). Therefore, it is not unconstitutional to apply Article I, Section 18(c) to a trial occurring after December 4, 2014.

We find *Tipler* is controlling and are therefore bound by the Supreme Court's holding. We reject Prince's argument that Article I, Section 18(c) was retrospectively applied to his case in violation of the *ex post facto* clause of the United States and Missouri Constitutions. Article I, Section 18(c) became effective on December 4, 2014, and therefore applies to all trials occurring after that date. Although Prince was charged prior to December 4, 2014, his trial began on March 23, 2016. Therefore, the trial court did not violate the *ex post facto* clause when it admitted relevant evidence of Prince's prior criminal acts as propensity evidence, pursuant to Article I, Section 18(c). Point III is denied.

II. Juvenile Records Not Admissible Under Article I, Section 18(c)

In Point I, Prince argues the trial court erred in admitting his 2004 juvenile adjudication records from Idaho for lewd and lascivious conduct with a minor because this propensity evidence was not "relevant evidence of prior criminal acts," in that his juvenile records were neither logically "relevant" nor evidence of a "criminal act," as required by Article I, Section 18(c). We agree that a defendant's juvenile records are not admissible ***evidence***.

A. Standard of Review

A trial court's ruling concerning the admissibility of evidence is reviewed only for abuse of discretion. *Cox v. Kan. City Chiefs Football Club, Inc.*, 473 S.W.3d 107, 114 (Mo. banc 2015). However, Missouri rules of evidence are procedural rules of law derived from statutes, the common law, and the Constitution. *State v. Walkup*, 220 S.W.3d 748, 757 (Mo. banc 2007); *see also Tipler*, 506 S.W.3d at 923 (Article I, Section 18(c) is a procedural rule of evidence). The interpretation and application of a rule of evidence is a question of law this Court reviews *de novo*. *Rowe v. Farmers Ins. Co.*, 699 S.W.2d 423, 428 (Mo. banc 1985) (interpreting a rule of evidence as a matter of law); *see also United States v. Young*, 753 F.3d 757, 771 (8th Cir. 2014); *United States v. Roy*, 408 F.3d 484, 492 (8th Cir. 2005) ("We review the district court's interpretation and application of the rules of evidence de novo. . . .").

B. Analysis

As a general rule, courts have consistently held that "evidence of prior uncharged misconduct is inadmissible for the purpose of showing the propensity of the defendant to commit such crimes." *State v. Barriner*, 34 S.W.3d 139, 144 (Mo. banc 2000) (citations and quotations omitted). The exception to this rule is Article I, Section 18(c) of the Missouri Constitution, which states:

> Notwithstanding the provisions or sections 17 and 18(a) of this article to the contrary, in prosecutions for crimes of a sexual nature involving a victim under eighteen years of age, relevant ***evidence*** *of prior criminal acts,* whether charged or uncharged, is admissible for the purpose of corroborating the victim's testimony or demonstrating the defendant's propensity to commit the crime with which he or she is presently charged. The court may exclude relevant evidence of prior criminal acts if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.

MO. CONST. art. I, § 18(c) (emphasis added). Evidence of prior uncharged misconduct may be admissible for certain other purposes, such as to prove motive, opportunity, intent, identity, absence of mistake, and common scheme or plan. *Barriner*, 34 S.W.3d at 145. However, the only time such evidence is admissible for the purpose of proving a defendant's *propensity* to commit the crime charged is when such evidence is admissible under Article 1, Section 18(c). *Compare State v. Ellison*, 239 S.W.3d 603, 605-06 (Mo. banc 2007) (holding admission of evidence of prior criminal conduct as propensity evidence violates Article I, Sections 17 and 18(a) of the Missouri Constitution, decided prior to the enactment of Article I, Section 18(c)), *and State v. Burns*, 978 S.W.2d 759, 762 (Mo. banc 1998) (same), *with Rucker*, 512 S.W.3d at 68 (holding evidence of prior uncharged conduct is admissible as propensity evidence, decided after enactment of Article I, Section 18(c)).

Here, the State introduced Prince's juvenile records for lewd and lascivious conduct with a minor. The trial court admitted the records as proof of a prior criminal act under Article I, Section 18(c). The court then instructed the jury it could consider Prince's juvenile records as evidence of Prince's propensity to commit the crimes of a sexual nature with which he was charged. While deliberating, the jury requested to see Prince's juvenile records, and the court provided them. The trial court erred in admitting Prince's juvenile records unless the records were admissible under Article I, Section 18(c). Therefore, we must decide whether the admission of Prince's juvenile records as evidence was proper under Article I, Section 18(c).

The arguments of both Prince and the State focus on whether acts committed by a juvenile are criminal. Prince argues the acts of a juvenile are "delinquent," rather than criminal. Thus, because Article I, Section 18(c) only applies to "evidence of prior *criminal* acts," the Amendment does not apply and the trial court erred in allowing the State to admit records of Prince's juvenile adjudication. The State argues that Article I, Section 18(c) applies to all "prior criminal acts, charged or uncharged," and because Prince's juvenile records establish he committed a criminal act under Idaho law, they were admissible to demonstrate propensity. We find the dispositive issue in Point I is not whether Prince's acts were *criminal*, but whether a defendant's juvenile records may properly be considered "***evidence*** of a prior criminal act" within the meaning of Article I, Section 18(c) (emphasis added).

As explained below, we would reverse and remand, holding that a defendant's juvenile records are not "evidence" admissible under Article I, Section 18(c) because Section 211.271(3) provides that a defendant's juvenile records are "*not* lawful or proper *evidence*." (emphasis added).[4] Therefore, the trial court erred in admitting Prince's juvenile records as propensity evidence during the guilt phase of his criminal trial. Because we find the admissibility of a defendant's juvenile records under Article I, Section 18(c) is an issue of first impression and raises a question of general importance, we transfer this case to the Missouri Supreme Court, pursuant to Rule 83.02. *See State ex rel Nothum v. Walsh*, 380 S.W.3d 557, 561 (Mo. banc 2012) (accepting transfer from appellate court pursuant to Rule 83.02).[5]

[4] The issue of the applicability of Section 211.271 was argued before the trial court in Prince's motion *in limine* to exclude his juvenile records from trial. Any pretrial order concerning the admissibility of evidence is interlocutory and unreviewable. *State v. Evans*, 639 S.W.2d 820, 822 (Mo. banc 1982). However, Prince further raised the issue in his motion for judgment of acquittal or a new trial. Although not fully articulated in his brief, we address the merits because the issue concerns an important question of law. Under the *de novo* standard or review, this Court has an independent duty to ascertain the applicable law and apply it accordingly.

[5] Moreover, even if we found the trial court properly concluded that a defendant's juvenile records are admissible under Article I, 18(c), it "resulted in a conviction based on evidence that could not have been admitted in the

1) Records of a Defendant's Juvenile Adjudication are Not Lawful or Proper Evidence During the Guilt Phase of a Criminal Trial

Under Missouri law, juvenile adjudications are not criminal convictions and a defendant's juvenile records are "*not* lawful and proper *evidence*." Section 211.271(3) (emphasis added); *see State v. Arbeiter*, 449 S.W.2d 627, 633 (Mo. 1970).

> [A]ll admissions, confessions, and statements by the child to the juvenile officer and juvenile court personnel and all evidence given in cases under this chapter, as well as all reports and records of the juvenile court, are not lawful or proper evidence against the child and shall not be used for any purpose whatsoever in any proceeding, civil or criminal, other than proceedings under this chapter.

Section 211.271(3).

The admission of a defendant's juvenile records as substantive evidence during the guilt phase of a criminal trial is reversible error. *Arbeiter*, 449 S.W.2d at 633 (applying Section 211.271(3) and reversing defendant's conviction where State relied on evidence from defendant's juvenile proceeding to establish his guilt in a subsequent criminal trial); *see also State v. Mahurin*, 799 S.W.2d 840, 843-44 (Mo. banc 1990) (holding that Section 211.271(3)'s prohibition on using juvenile records as evidence in subsequent proceedings is intended to protect the juvenile). In *Harling v. United States*, a case cited approvingly by the Missouri Supreme Court in *Arbeiter*, the U.S. Circuit Court of Appeals for the D.C. Circuit stated:

> [T]he principles of "fundamental fairness" govern in fashioning procedures and remedies to serve the best interests of the child. It would offend these principles to allow admissions made by the child in the noncriminal and non-punitive setting of juvenile proceedings to be used later for the purpose of securing his criminal conviction and punishment. Such a practice would be tantamount to a breach of faith with the child, since he cannot be charged with knowledge of either his privilege against self-incrimination or the Juvenile Court's power to waive its jurisdiction and subject him to criminal penalties. Moreover, if admissions obtained in juvenile proceedings before waiver of jurisdiction may be introduced in an adult

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absence of this new provision." *Tipler*, 506 S.W.3d at 928. This would raise another issue of first impression and general importance, as the Missouri Supreme Court has not yet considered whether such a conviction "violates a state or federal constitutional right that article I, section 18(c) did not — or, in the case of federal constitutional guarantees, cannot — alter." *Id.*

> proceeding after waiver, the juvenile proceedings are made to serve as an adjunct to and part of the adult criminal process. This would destroy the Juvenile Court's parens patriae relation to the child and would violate the non-criminal philosophy which underlies the Juvenile Court Act.

Harling v. United States, 295 F.2d 161, 163-64 (D.C. Cir. 1961).

In *Arbeiter*, the Supreme Court concluded that Section 211.271(3)'s prohibition against using evidence from juvenile adjudications in subsequent criminal trials was effectively a statutory codification of the rule announced by the D.C. Circuit in *Harling*. In considering whether "[Section 211.271(3)] has, in effect, prescribed a rule similar to that laid down in *Harling*," the Court concluded that "considerations of 'fundamental fairness' alluded to in *Harling* do not permit the state, in the harsh adversary arena of the criminal courts, to take advantage of the procedures and attitudes which it promotes under the Juvenile Code." *Arbeiter*, 449 S.W.2d at 633.

Here, the trial court admitted Prince's juvenile records for "lewd and lascivious conduct with a minor" under Article I, Section 18(c), disregarding Section 211.271(3), which provides that such records are "not lawful or proper evidence." Therefore, we must consider whether Section 211.271(3) conflicts with Article I, Section 18(c) as applied in Prince's case, which is a question of law this court reviews *de novo*. *Peters v. Johns*, 489 S.W.3d 262, 266 (Mo. banc 2016).

In determining whether a statute conflicts with a constitutional provision, "[t]he first principle of such an inquiry is that a duly enacted statute is presumed to be constitutional." *Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503, 512 (Mo. banc 1991).

> An act of the legislature carries a strong presumption of constitutionality. The supreme court [sic] will not invalidate a statute unless it clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied in the constitution. Nonetheless, if a statute conflicts with a constitutional provision or provisions, the supreme court [sic] must hold the statute invalid.

State ex rel. Nixon v. Kinder, 89 S.W.3d 454, 456 (Mo. banc 2002).

We find Section 211.271(3) does not "clearly and undoubtedly contravene" Article I, Section 18(c). *See id*. Article I, Section 18(c) addresses the admissibility of evidence and permits "relevant *evidence* of prior criminal acts" to be introduced as proof of the defendant's propensity to commit the crime charged in a prosecution for a crime of a sexual nature. MO. CONST. art. I, § 18(c) (emphasis added); *Tipler*, 506 S.W.3d at 923. In contrast, Section 211.271(3) provides that a defendant's juvenile records "are *not* lawful or proper *evidence* against the child and shall not be used for any purpose whatsoever in any proceeding, civil or criminal." Section 211.271(3); *State v. Miner*, 657 S.W.2d 332, 332-33 (Mo. App. E.D. 1983) (emphasis added) (quoting Section 211.271(3)).

We find there is no conflict between Section 211.271(3) and Article I, Section 18(c) of the Constitution because the statute can be read in harmony with the constitutional Amendment. Section 211.271(3) addresses whether a defendant's juvenile records are evidence. Article I, Section 18(c) addresses whether certain relevant evidence is admissible for the purpose of proving a defendant's propensity to commit the crime charged. Because Article I, Section 18(c) only addresses the admissibility of "relevant evidence," it does not govern the admissibility of a defendant's juvenile records, which are "not . . . evidence" under Section 211.271(3). Therefore, Article I, Section 18(c) did not provide a legal basis for the court to arrest the execution of Section 211.271(3), and the court erred by admitting juvenile records protected by statute. *Clark v. Austin*, 101 S.W.2d 977, 980 (Mo. 1937) ("The judiciary can only arrest the execution of a statute when it conflicts with the Constitution.").

By comparing the plain language of these two unambiguous provisions, it reasons that, because a defendant's juvenile records are "*not* lawful or proper *evidence*" in any civil or

criminal proceeding under Section 211.271(3) (emphasis added), they cannot logically be considered "*evidence* of a defendant's prior criminal acts" in a criminal prosecution under Article I, Section 18(c) (emphasis added). Any other result would require us to conclude that the word "evidence" has a different meaning in the statute than in the constitutional Amendment. We decline to disregard the plain language of these laws in search of a constitutional conflict because doing so would violate both the primary rule of statutory construction as well as the doctrine of constitutional avoidance. *See McCollum v. Dir. of Revenue*, 906 S.W.2d 368, 369 (Mo. banc 1995) ("The words contained in the statute or ordinance should be given their plain and ordinary meaning and should be interpreted to avoid absurd results."). Moreover, to conclude otherwise would render the protections within Section 211.271(3) a nullity and "destroy the Juvenile Court's *parens patriae* relation to the child and would violate the non-criminal philosophy which underlies the Juvenile Court Act." *Arbeiter*, 449 S.W.2d at 630.

Even if we were to find the plain language of Article I, Section 18(c) conflicts with Section 211.271(3), the statute would only be held invalid if the conflict was "irreconcilable." *McCollum* 906 S.W.2d at 369. However, there is no irreconcilable conflict where a reasonable interpretation of the statute resolves the conflict. *See Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838-39 (Mo. banc 1991). Where two interpretations of a statute are reasonable but only one is constitutional, "the constitutional interpretation is presumed to have been intended." *Id*. We find it is reasonable to interpret the word "evidence" as having the same meaning in the statute as it does in the Constitution. "[A] fundamental rule of statutory interpretation requires that if any provision of our Constitution may be concerned . . . we give that interpretation of the statutes which will harmonize the statutory provisions with the Constitution." *State ex rel. R. Newton McDowell, Inc. v. Smith*, 67 S.W.2d 50, 56 (Mo. 1933). It would be unreasonable to

construe Section 211.271(3) and Article I, Section 18(c) in a way that ascribes different meanings to the word "evidence" because this would inject discord into our rules of evidence, a body of laws that should be construed together in harmony. *See Union Elec. Co. v. Dir. of Revenue*, 425 S.W.3d 118, 122 (Mo. banc 2014) (laws dealing with the same subject matter are *in pari materi*, and should be read together in harmony).

Moreover, there are long-standing presumptions that existing laws are not repealed by a subsequent enactment absent express language to the contrary, and that general laws do not repeal more specific laws concerning the same subject. *State ex rel. R. Newton McDowell, Inc.*, 67 S.W.2d at 57.

> It is the established rule of construction that the law does not favor repeal by implication but that where there are two or more provisions relating to the same subject matter they must, if possible, be construed so as to maintain the integrity of both. It is also a rule that where two statutes treat of the same subject matter, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although later in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject matter as far as coming within its particular provisions.

Id.; *see Wrightsman v. Gideon*, 247 S.W. 135, 137 (Mo. 1922); *State ex rel. Waterworth v. Clark*, 204 S.W. 1090, 1092 (Mo. 1918).

Article I, Section 18(c) did not repeal Section 211.271(3), either expressly or impliedly. The Amendment contains the language "[n]otwithstanding the provisions or sections 17 and 18(a) of this article to the contrary." This language expressly repeals contrary provisions in Article I, Sections 17 and 18(a).[6] *See Earth Island Inst. v. Union Elec. Co.*, 456 S.W.3d 27, 34 (Mo. banc 2015). However, Article I, Section 18(c) did not say "notwithstanding *any* other provision of law," which would have indicated an "intent for that later-adopted [law] to prevail"

[6] As discussed *supra*, Article I, Sections 17 and 18(a) are the provisions previously cited as authority for excluding the use of propensity evidence in criminal trials. *See Ellison*, 239 S.W.3d at 606; *Burns*, 978 S.W.2d at 762.

over any previously enacted laws "to the extent [they] are inconsistent." *Id*. (emphasis added). If the drafters of Article I, Section 18(c) had intended to repeal Section 211.271(3) or any other laws, they could have done so by either saying "notwithstanding any other provision of law" or expressly identifying the laws they intended to repeal in the language of the Amendment. *See id*. We decline to presume Article I, Section 18(c) implicitly repealed Section 211.271(3). *See State ex rel. R. Newton McDowell, Inc.*, 67 S.W.2d at 57.

Our holding is further supported by the fact that Section 211.271(3) is a specific rule of evidence while Article 1, Section 18(c) is general rule of evidence. Specific enactments prevail over general enactments where both concern the same subject matter unless they are "irreconcilably inconsistent." *See id.*; *State ex rel. Osborne v. Goeke*, 806 S.W.2d 670, 672 (Mo. banc 1991). As explained above, Section 211.271(3) and Article I, Section 18(c) are not irreconcilably inconsistent, therefore the more specific provision should be read as an exception to the more general provision. Section 211.271(3) is a narrow rule dealing only with a specific category of documents, juvenile records. Article 1, Section 18(c) is a broad rule dealing with the admissibility of propensity evidence generally, regardless of its source. Therefore, because Section 211.271(3) is more specific, it should be interpreted as an exception to the general rule that propensity evidence admissible is under Article 1, Section 18(c).

It is clear from the language of Article I, Section 18(c) that, as a general rule, it was intended to leave other aspects of the rules of evidence intact. For example, the Article I, Section 18(c) only applies to "*relevant* evidence," indicating it was not intended to disturb the other rules of evidence concerning relevancy. *See* MO. CONST. Art. I, § 18(c) (emphasis added). The Amendment also reaffirms the rule that a trial court has discretion to exclude evidence "if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice."

Id. These two express limitations make it clear that Article I, Section 18(c) was not intended as a *per se* rule categorically allowing the admission of any and all information concerning a defendant's prior criminal conduct. Evidence of a defendant's prior criminal acts, although generally admissible to prove propensity in certain instances, may still be excluded if the court concludes it is irrelevant or unfairly prejudicial.

The State argues that the trial court did not err because Prince's juvenile records were evidence of a "*crime*, charged or uncharged," thus falling within the scope of Article I, Section 18(c). We reject the State's argument because, as discussed *supra*, Section 211.271(3) protects a defendant's juvenile records, which are not evidence. Accordingly, Prince's juvenile records are not admissible under Article I, Section 18(c). The court's error in this case was not that it admitted propensity evidence of Prince's criminal act, but rather that it allowed the State to introduce Prince's *juvenile records* to prove Prince committed this prior criminal act. Even where certain facts are relevant, the State cannot attempt to prove the existence of those relevant facts using otherwise improper or inadmissible evidence. *See State v. Mease*, 842 S.W.2d 98, 110 (Mo. banc 1992).[7]

We find there is no direct conflict between Section 211.271(3) and Article I, Section 18(c) of the Missouri Constitution. Therefore, the trial court erred in admitting Prince's juvenile records, which were protected under Section 211.271(3).[8]

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[7] The State may have been able to prove that Prince committed the criminal act while he was a juvenile using other evidence not derived directly from his juvenile court proceedings. *See State v. Owens*, 582 S.W.2d 366, 376 (Mo. App. S.D. 1979). "Section 211.271(3) does not necessarily mean . . . that the lips of one who testified in the juvenile proceedings are sealed so that he may not be a witness in a subsequent criminal proceeding." *Id*. (holding "[t]he purpose of [Section 211.271(3)] was, therefore, not violated in the case by permitting the victim to testify at time of trial after she had testified to substantially the same facts at the juvenile waiver hearing.").

[8] The fact that Prince's juvenile records are from an Idaho court does not affect our holding. Juvenile records do not lose their legal status as juvenile records merely because they were produced in another state. *See State v. Rellihan*, 662 S.W.2d 535, 546 (Mo. App. W.D. 1983); *see also State v. Ryan*, 813 S.W.2d 898, 903 (Mo. App. S.D. 1991). Section 211.271(3) is a procedural rule of evidence, and "the law of the forum governs the admissibility of

2) The Improper Admission of a Defendant's Juvenile Records as Propensity Evidence is Prejudicial Error

Having found that the trial court erred in admitting Prince's juvenile records, we review this error for prejudice, not mere error. *See State v. Burton*, 320 S.W.3d 170, 176 (Mo. App. E.D. 2010). "Trial court error in the admission of evidence is prejudicial if the error so influenced the jury that, when considered with and balanced against all of the evidence properly admitted, there is a reasonable probability that the jury would have reached a different conclusion without the error." *State v. Miller*, 372 S.W.3d 455, 472 (Mo. banc 2012).

Prior to the enactment of Article I, Section 18(c), the Missouri Supreme Court consistently reversed convictions where evidence of a defendant's prior criminal acts were improperly admitted by the trial court as propensity evidence in the erroneous belief such evidence was admissible by statute. *See Ellison*, 239 S.W.3d at 605-06; *Burns*, 978 S.W.2d at 762.[9] In *Ellison*, the Supreme Court held that "[e]vidence of a defendant's prior criminal acts, when admitted purely to demonstrate the defendant's criminal propensity, violates one of the constitutional protections vital to the integrity of our criminal justice system," which is "the right to be tried only on the offense charged." *Ellison*, 239 S.W.3d at 606-08. Because we have found that Article I, Section 18(c) does not apply to juvenile records, the prejudice Prince suffered is the same as if the Amendment had not been enacted. Therefore, the Supreme Court's holdings in *Ellison* and *Burns* are applicable to Prince's case.

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evidence." *Id*.; *Pittman v. Ripley Cty. Mem. Hosp.*, 318 S.W.3d 289, 293 (Mo. App. S.D. 2010). Evidence is inadmissible in Missouri when obtained in another state under circumstances that would have rendered it inadmissible under Missouri's rules of procedure. *See State v. Simon*, 680 S.W.2d 346, 353 (Mo. App. S.D. 1984) (holding that the admissibility of a juvenile confession obtained by out-of-state authorities is controlled by the law of the forum state).

[9] In both *Ellison* and *Burns*, the Supreme Court reversed convictions without conducting any analysis concerning whether the error was prejudicial.

"Evidence of a prior conviction is highly prejudicial when introduced originally by the state." *State v. Nolan*, 499 S.W.2d 240, 253 (Mo. App. E.D. 1973). In *Nolan*, this Court held that the State's improper reference to a defendant's prior conviction was so prejudicial that even the "inference . . . that the defendant has been formerly convicted . . . constitutes such a serious matter that it rises to the level of prejudice." *Id*. at 253. The court reversed the defendant's conviction due to the State's improper reference to the defendant's criminal record during closing arguments. *Id*. at 254. The court found this error was prejudicial despite the fact that the State had not introduced any evidence of the conviction, and the reference to it was merely by way of argument unsupported by the evidence. *Id*. The court stated, "We cannot say that the injection of this inference of a prior conviction was harmless." *Id*.

We find persuasive this Court's holding in *Nolan* that "[e]vidence of a prior conviction is highly prejudicial when introduced originally by the state." We cannot conclude that the erroneous admission of Prince's prior criminal acts as propensity evidence did not influence the jury when balanced against all the properly admitted evidence. The jury specifically requested to see these records during deliberations, and the court provided them to the jury. The admission of Prince's juvenile records is substantially more than a mere improper reference to a prior criminal conviction, which this Court found to be prejudicial error in *Nolan*. *See id*. at 253. Given these facts, as well as the Supreme Court's holdings in *Ellison* and *Burns*, we cannot say Prince suffered no prejudice in this case. We find there is a "reasonable probability that the jury would have reached a different conclusion" if the court had properly excluded Prince's juvenile records as required by Section 211.271(3). S*ee Miller*, 372 S.W.3d at 472.

We acknowledge there may be instances where the erroneous admission of evidence of a defendant's prior criminal acts does not rise to the level of prejudice. *See, e.g.*, *State v. Bell*, 488

S.W.3d 228, 251 (Mo. App. E.D. 2016); *Richardson v. State*, 617 S.W.2d 76, 78 (Mo. App. E.D. 1981). We also recognize the admission of a defendant's prior criminal acts as propensity evidence is not necessarily unfairly prejudicial when *properly* admitted under Article I, Section 18(c). *See Rucker*, 512 S.W.3d at 68. However, the fact that Article I, Section 18(c) permits the use of such evidence in certain instances does nothing to mitigate the prejudice Prince suffered in this case because the Amendment was not applicable, making the prejudice the same as if Article I, Section 18(c) had not been enacted.

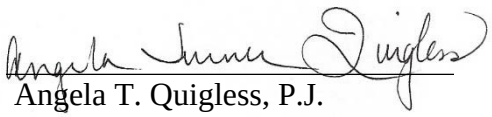
Therefore, we find Prince suffered prejudice as a result of the trial court's erroneous admission of his juvenile records as propensity evidence. Point I is sustained.

III. Prince's Arguments Concerning the Relevance of Evidence are Moot

Our holding in Point I that the trial court erred in admitting Prince's juvenile records under Article I, Section 18(c) is dispositive. Therefore, we need not reach the merits of Prince's arguments concerning the relevancy of evidence in Points II and IV. *City of O'Fallon v. CenturyLink, Inc.*, 491 S.W.3d 276, 282-83 (Mo. App. E.D. 2016). Points II and IV are dismissed as moot. *Burns*, 978 S.W.2d at 762.

CONCLUSION

For the foregoing reasons, we would reverse the judgment and remand for further proceedings, holding that the trial court erred in admitting Prince's juvenile court records under Article I, Section 18(c) and that Prince suffered prejudice as a result. However, because this is an issue of first impression in Missouri and involves a question of general importance, we transfer this case to the Missouri Supreme Court, pursuant to Rule 83.02.



Angela T. Quigless, P.J.

Lisa Van Amburg, J., Concurs.
Robert G. Dowd Jr., J., Opinion concurring in result.

In the Missouri Court of Appeals
Eastern District
DIVISION THREE

STATE OF MISSOURI,	)	No. ED102938
	)	
Respondent,	)	Appeal from the Circuit Court
	)	of St. Charles County
vs.	)	
	)	Hon. Nancy L. Schneider
JORDAN L. PRINCE,	)	
	)	Filed: June 20, 2017
Appellant.	)	

OPINION CONCURRING IN RESULT

I concur in the result because I agree that this case presents an issue of first impression that is of general importance and should be transferred to the Supreme Court under Rule 83.02. But I write separately because I find no error in the admission of Defendant's juvenile records under Article I, Section 18(c) of the Missouri Constitution (2014). Therefore, I would affirm the judgment on his convictions and must, respectfully, dissent from the majority opinion.[1]

After several failed attempts to pass legislation on this issue, the General Assembly by joint resolution proposed to the voters a constitutional amendment that allows for the admission in a child sex case of "relevant evidence of prior criminal acts, whether charged or uncharged" to prove the defendant's propensity to commit the charged crimes. Article I, Section 18(c). The majority

[1] I do agree with the majority opinion that according to *State ex rel. Tipler v. Gardner*, Article I, Section 18(c) applies prospectively to all trials after its enactment and thus applying it in this case would not violate the ex post facto clause of the United States and Missouri Constitutions. 506 S.W.3d 922, 923 (Mo. banc 2017).

opinion concludes that juvenile records are not admissible under this constitutional provision because, according to the juvenile code, those records and other evidence from juvenile court proceedings are not "lawful and proper evidence." Section 211.271.3 RSMo 2000. But using a statute to define the meaning of this voter-approved constitutional amendment violates the primary rule of construction applicable here: "to give effect to the intent of the voters who adopted the [provision] by considering the plain and ordinary meaning of the words used." *Johnson v. State*, 366 S.W.3d 11, 25 (Mo. banc 2012). The plain and ordinary meaning is the meaning that "the people commonly understood the words to have when the provision was adopted." *Id*. The commonly-understood meaning of a word is normally found in the dictionary. *Id*.

"Evidence" is generally defined in the dictionary as "an outward sign" and "something that furnishes or tends to furnish proof." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 788 (2002). This plain meaning cannot be qualified by the technical way the term is used in Section 211.271.3—deeming juvenile records not to be "lawful and proper evidence"—because that is not the definition adopted by the people when they approved this constitutional provision in 2014, but rather an expression of the legislature from decades earlier. *See Akin v. Missouri Gaming Commission*, 956 S.W.2d 261, 264 (Mo. banc 1997). Because the meaning of "evidence" is clear and unambiguous on its face, the general assembly's language elsewhere in the statutes cannot vary its meaning. *See id.* (declining to use a statute defining river to include areas that were not "river-based," which was enacted prior to constitutional provision, because it would alter the voters' intent in adopting that provision to legalize *only* "river-based" gambling). When the voters approved Article I, Section 18(c), therefore, they commonly understood the phrase "relevant evidence of prior criminal acts, whether charged or uncharged" broadly to include all relevant prior acts whether committed when the defendant was a juvenile or an adult and to be admissible as

evidence of a defendant's propensity to commit the charged crime. There is nothing on the face of the constitutional provision that would indicate the voters intended to exclude juvenile acts from the evidence that is admissible under this provision.

Not only does reliance on Section 211.271.3 improperly vary the plain meaning of the term "evidence," excluding from that term everything derived from a juvenile proceeding would contravene the purpose and intent of Article I, Section 18(c). This amendment was part of an effort to make child sex cases easier to prosecute—they are typically difficult to prove because the age of the victim makes testifying challenging or impossible, there are usually no witnesses because these crimes tend to occur in secret and there is often no longer any physical evidence because the crimes frequently go unreported for too long. *See generally Editorial: Amendment 2 Offers Special Help for Child Abuse Victims*, ST. LOUIS POST-DISPATCH, October 14, 2014; *see also More Harmful Initiatives Than Good Ones on Missouri's November 4 Ballot*, KANSAS CITY STAR, October 3, 2014. To eliminate an entire category from the "evidence" the voters' wanted to be admissible as an additional tool for prosecutors by excluding any evidence that came from a juvenile proceeding would contravene the purpose of this provision. Those juvenile records could be very important to the overall goal of better protecting children from sexual offenders given that "by some estimates, one third or more of all sex offenders are under the age of 18" and "[m]ost begin to offend sexually in adolescence." Hal Arkowitz & Scott O. Lilienfield, *Once a Sex Offender, Always a Sex Offender? Maybe Not*, SCIENTIFIC AMERICAN, April 3, 2008.

For similar reasons, I disagree with Defendant's argument in his brief that an act committed by a juvenile is a "delinquent act" for which he cannot be deemed a "criminal" according to Section 211.271.1 and, therefore, such an act cannot be a "prior *criminal* act" under Article I, Section 18(c). Again, the goal is to interpret the intent of the voters in passing this constitutional

amendment. In doing so, the meaning of "prior criminal act" must be read in conjunction with the rest of the phrase "whether charged or uncharged." *See Pearson v. Koster*, 367 S.W.3d 36, 48 (Mo. banc 2012) (phrases must be considered in their entirety to ascertain meaning and give effect to every word used). Thus, even under Defendant's arguments and the majority's opinion regarding "evidence," prior acts committed while a defendant was a minor but for which he was never "charged" in a juvenile proceeding would be admissible. The juvenile code's protections in Section 211.271 would not apply to evidence of that prior act that did not come from a juvenile court proceeding. It would be an absurd result if *adjudicated* criminal acts committed while the defendant was under juvenile court jurisdiction were *inadmissible* but *non-adjudicated* criminal acts committed by the defendant while he was a minor but not under juvenile court jurisdiction were *admissible*. Moreover, as discussed above, it is not proper to resort to the juvenile code to vary the plain meaning of the phrase "prior criminal acts, whether charged or uncharged." *See Akin*, 956 S.W.2d at 264. Rather, as shown above, the voters intended to allow prior criminal acts to be admitted to prove propensity regardless of whether the defendant was a juvenile or an adult at the time of the prior act.

The protections afforded juveniles in Section 211.271 are not lost in our interpretation of what the voters' intended here. Part of what was adopted in this provision is a requirement that the evidence be "relevant," thus allowing for an argument about the probative value of acts committed by juveniles, an argument Defendant makes as discussed below. The people also approved the last sentence of the provision, which gives courts discretion to exclude evidence of prior acts if the probative value is substantially outweighed by the danger of unfair prejudice. Thus, a court may find it unfairly prejudicial to allow the jury to consider a defendant's juvenile record as propensity evidence depending on the circumstances of the case. But to conclude that

juvenile records are never admissible to show a defendant's propensity is contrary to the voters' intent.

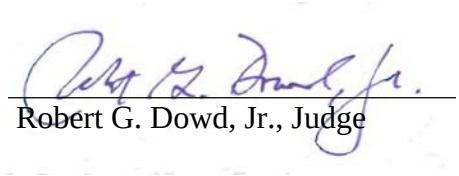
In this case, Defendant argues that his prior act of "manual/genital contact" with a six year old cousin when he was fifteen—nine years before the charged crime—is too remote and too factually dissimilar to this anal sexual assault of a four-month old by a 24-year old to be logically or legally relevant. First, Defendant has failed to demonstrate how the gap in time destroys the probative value of this prior sexual offense against a child, particularly given that he was incarcerated for three of the nine-year time lapse. Second, both of these crimes involved sex acts with much younger female children in his family done for the satisfaction of Defendant's deviant sexual desire. The differences in the manner of the crimes do not, in my opinion, destroy the probative value the prior act has with respect to his propensity to commit the charged crime. Nor has Defendant shown that the probative value of the prior act was substantially outweighed by the danger of unfair prejudice in this case, such that the trial court abused its discretion in admitting evidence about that prior act. Defendant's arguments about the danger of unfair prejudice go back to remoteness and factual dissimilarity, about which I am unpersuaded.

Even if it were erroneous to admit the prior juvenile act adjudicated in Idaho, I would find no prejudice in light of the other evidence at trial that supported Defendant's conviction. First, I note that Defendant has wholly failed to meet his burden of demonstrating outcome-determinative prejudice in his brief—relying solely on the fact that the jury asked to see video clips where Defendant is discussing the prior crimes and asked for the paperwork from that prior incident. The jury also asked for a number of other things, and I do not find any of their questions indicative of their reliance solely on the prior act for a determination of guilt. Second, there was significant other evidence supporting the guilty verdict: Defendant admitted he caused the victim's death by

strangulation and the medical examiner found that the sexual assault occurred close in time to her death, Defendant admitted he was the only one with access to the victim during the relevant time frame, and his DNA was found in blood, along with the victim's blood, on the blanket she was on at the time of the crime. Evidence about Defendant's demeanor at the hospital before and after the child died, his statements to police and other conduct after the crime further support conviction here. Therefore, I strongly disagree with the majority's conclusion that there is a reasonable probability Defendant would have been acquitted of this horrific crime but for the admission of that prior act.

Finally, and for similar reasons, I would find no prejudicial error in the admission of the pornography evidence, including pre-teen and incest pornography. First, it was within the trial court's discretion to admit this evidence to rebut Defendant's claim that he had been rehabilitated of his deviant sexual desires after leaving his sexually dysfunctional family, to show he was motivated to commit this crime by a desire to have sex with young girls in his family, to show that the anal injuries could not have been an accident caused by rocking the victim too hard on his knee (as he claimed) but were instead a result of him living out the sexual acts he fantasized about while he viewed that pornography. Second, and again, Defendant wholly fails to demonstrate that there is a reasonable probability that he would have been acquitted but for the admission of this pornography evidence.

For the foregoing reasons, I would deny all points on appeal and affirm the judgment.



Robert G. Dowd, Jr., Judge