

**IN THE MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

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**COMPLETE TITLE OF CASE**

STATE OF MISSOURI,

Respondent,

v.

VIRGIL JAMES KELSO,

Appellant.

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**DOCKET NUMBER WD74134**

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**DATE:** February 5, 2013

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**APPEAL FROM**

The Circuit Court of Saline County, Missouri  
The Honorable Dennis A. Rolf, Judge

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**JUDGES**

Division Two: Smart and Mitchell, JJ., CONCURRING.  
Hardwick, P.J., CONCURRING IN SEPARATE OPINION.

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**ATTORNEYS**

Chris Koster, Attorney General  
Jessica P. Meredith, Assistant Attorney General  
Jefferson City, MO

Attorneys for Respondent,

Margaret M. Johnston, Assistant Public Defender  
Columbia, MO

Attorney for Appellant.

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## MISSOURI APPELLATE COURT OPINION SUMMARY MISSOURI COURT OF APPEALS, WESTERN DISTRICT

STATE OF MISSOURI, )  
 )  
 Respondent, )  
 v. ) **OPINION FILED:**  
 ) **February 5, 2013**  
 VIRGIL JAMES KELSO, )  
 )  
 Appellant. )

**WD74134**

**Saline County**

**Before Division Two Judges:** Lisa White Hardwick, Presiding Judge, and James M. Smart, Jr., and Karen King Mitchell, Judges

Virgil Kelso appeals his conviction and sentence for first-degree child molestation based upon his act of having the victim (a child less than fourteen) place a condom on Kelso's penis. Kelso claims that the evidence was insufficient to support the jury's verdict finding him guilty in that the State alleged, but failed to prove, that Kelso caused the victim's hand to touch his genitals "through the clothing" insofar as a condom does not constitute "clothing."

**AFFIRMED.**

### **Majority Opinion holds:**

1. The presence or absence of clothing during a prohibited touching is not an element of first-degree child molestation.
2. The statutory definition of "sexual contact" does not limit the methods of prohibited contact to "through the clothing" or "skin-to-skin"; rather, its inclusion of the phrase, "or such touching through the clothing," is meant to indicate that the presence of clothing during a prohibited touching is inconsequential. "Sexual contact" can still occur even if a material other than clothing (*i.e.*, a bedsheet) is present during the prohibited touching.

3. The State's act of including the allegation that the touching occurred "through the clothing" in the verdict-director did not require the State to prove the presence of clothing in order to establish Kelso's guilt. As discussed above, the presence or absence of clothing is not an element of the crime for which Kelso was convicted; thus, the State had no duty to prove the existence of clothing.
4. Because the presence or absence of clothing is inconsequential, we need not decide whether a condom constitutes clothing.

**Majority Opinion by: Karen King Mitchell, Judge**

February 5, 2013

**Concurrence holds:**

I concur with the decision to affirm Kelso's conviction but disagree with the reasoning in the majority opinion. I would address the sole issue raised in Kelso's appeal and find that the State satisfied the requirement of "touching through the clothing" by presenting evidence that Kelso directed the victim to place a condom on his penis. I would further conclude that a condom constitutes clothing under Missouri law because it an article that is intended to be worn on or about the human body.

**Concurrence by: Lisa White Hardwick, Presiding Judge**

February 5, 2013

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