

Summary of SC89240, *State of Missouri v. Mike Perry*

Appeal from the St. Louis city circuit court, Judge Steven R. Ohmer.

Attorneys: Perry was represented by Gwenda R. Robinson of the public defender's office in St. Louis; and the state was represented by Richard Starnes and Shaun Mackelprang of the attorney general's office in Jefferson City.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: In a child molestation case, the defendant challenges the constitutional validity of a statute under which the trial court permitted introduction of the child victim's prior statement to supplement her in-court testimony about the defendant's touching of her. In a unanimous decision written by Chief Justice Laura Denvir Stith, the Supreme Court of Missouri affirms the conviction. Because the child testified at trial, the Confrontation Clause of the United States Constitution does not bar admission of her statements made to investigators prior to trial, and the evidence supports the conviction.

Facts: In 2005, Mike Perry began living in the home of a close friend, the friend's fiancée and the fiancée's six-year-old daughter. The child told her mother that Perry had put his socked foot under her nightgown and rubbed it in a circular motion over her vagina, outside her underwear. Perry denied the conduct and said he had found the child rubbing herself on his foot when he woke from a nap. Eventually, Mother called the police and Perry was arrested. The child repeated her assertions on videotape to investigators and also said that, on an earlier occasion, Perry had rubbed his "butt" on her stomach. Perry was charged with first-degree child molestation. At trial, the child talked about the events leading up to and surrounding the incident, saying that Perry put his foot under her nightgown. She then said that what he did made her feel uncomfortable and later, she said, it made her feel horrible, but she said she did not "want to say" exactly what he did with his foot. The state also introduced the child's videotaped interview, over Perry's objection that its introduction violated his right to confront the witness against him. The jury found Perry guilty, and he appeals.

AFFIRMED.

Court en banc holds: (1) Section 491.075, RSMo 2000 – which permits admission of out-of-court statements by a child witness if the statements demonstrate sufficient indicia of reliability – is not unconstitutional. A statute survives a facial challenge to its constitutional validity if it can be applied constitutionally in any circumstance, and the Confrontation Clause does not bar a court from considering whether statements are reliable in determining the statements' admissibility. The United States Supreme Court has simply said that, under the Confrontation Clause, regardless of reliability, a speaker's

testimonial statements made before trial are not admissible if the speaker does not testify as a witness at trial or if the defendant did not have a previous opportunity to “confront” the speaker through cross-examination. Because the statute can be applied constitutionally where the speaker testifies at trial or previously was subject to cross-examination, or where the statement is not testimonial in nature, it is not facially unconstitutional. Section 491.075 is also constitutional as applied to Perry because the child was present, testified and was subject to cross-examination at trial.

(2) The trial court did not commit plain error in failing, *sua sponte* (without any objection by the defense), to interrupt closing argument when the prosecutor compared Perry to a “sexual predator” and referred to him as a “child molester” who was “grooming” the child for a more serious crime. The “child molester” reference was supported by the evidence, and there is nothing inherently inflammatory or prejudicial about this argument in the context of a child molestation case. Nor was the prosecutor’s “grooming” comment prejudicial or suggestive that the prosecutor has special knowledge of facts unknown to the jury. While the comparison of Perry to a “sexual predator” was improper and is more troublesome to the Court, in light of the singular nature of the reference, the lack of suggestion of outside knowledge and counsel’s failure to object, this Court cannot say that the trial court committed plain error in failing to interrupt closing argument.

(3) The evidence was sufficient to support the jury verdict. There was evidence from the child – both at trial and in her pretrial statements to her mother – as well as from the mother and others that Perry had engaged in sexual contact with the child. In light of the child’s testimony and her consistent telling of the story, a reasonable juror could have found Perry’s attempted explanations to be false and to find him guilty, beyond a reasonable doubt, of first-degree child molestation.