

Summary of SC91948, *State of Missouri v. David Bryan Miller*

Appeal from the Harrison County circuit court, Judge Jack N. Peace
Argued and submitted March 27, 2012; opinion issued July 3, 2012

Attorneys: Miller was represented by Kent E. Gipson of the Law Office of Kent Gipson LLC in Kansas City, (816) 363-4400; and the state was represented by Shaun J. Mackelprang of the attorney general's office in Jefferson City, (573) 751-3321.

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: A man appeals his convictions for multiple crimes involving his sexual abuse of his minor daughter. In a unanimous decision written by Judge Zel M. Fischer, the Supreme Court of Missouri affirms the convictions in part, reverses them in part and remands (sends back) the case. The convictions for first-degree statutory sodomy and deviate sexual assault are reversed, and the case is remanded for entry of a judgment of acquittal as to these charges. The dates the state used in the charges and the evidence presented as to when the conduct actually occurred differed by six years, and allowing the convictions to stand would not prevent the state from refile charges for the correct dates, violating constitutional double jeopardy protections. The conviction for first-degree child molestation also is reversed, and the case is remanded for further proceedings. The trial court's instruction as to this charge was based on the wrong version of the statute, allowing the jury to find the man guilty for conduct that was not criminal during the charged period. The man's remaining convictions are affirmed. The evidence was sufficient to support them, the court did not abuse its discretion in allowing in certain evidence the man challenged, the man was not prejudiced by certain comments the prosecutor made or in admitting certain testimony by the daughter, and the effect of any errors in the man's trial did not deprive him of a fair trial in violation of his due process rights under the state or federal constitution.

Facts: David Miller's 14-year-old daughter informed a friend in December 2005 that her father had been abusing her sexually since she was 6 years old. The friend told her mother, who talked to the daughter's mother, and ultimately the daughter was taken to the police station, where she informed officers that her father had abused her sexually at his farm house in Hatfield from the time she was 6 years old. In January 2006, officers served an order of protection on Miller at his Hatfield home, searched his home with his permission and, at some point, warned Miller of his right to counsel pursuant to *Miranda v. Arizona*. The state ultimately charged Miller with 10 counts alleging that he sexually molested, raped and sodomized his daughter over an eight-year period from December 1997 into January 2006 at his family residence in Harrison County. Following a trial, the jury found Miller guilty of six of the counts – one count each of first-degree statutory sodomy, first-degree child molestation, deviate sexual assault, sexual molestation of a child, first-degree endangering the welfare of a child and incest. He was sentenced to concurrent terms in prison of 50 years for the sodomy conviction, 10 years for the child molestation conviction, seven years for the deviate sexual assault conviction, five years for the endangering conviction, and four years each for the sexual molestation and incest convictions. Miller appeals.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

Court en banc holds: (1) There was insufficient evidence that Miller committed first-degree statutory sodomy and deviate sexual assault during the time period alleged in the charge. The verdict-directing instructions for these charges told the jury the charged crimes were alleged to have occurred between December 2004 and December 2005. Although time is not essential in child sexual abuse cases, as it can be impossible to ascertain specific dates of abuse, a time element included in the jury instruction may not be so overbroad as to nullify a defendant's alibi defense, and Rule 23.01(b)(3) requires that the charge state the date and place of the offense as definitely as can be done. Appellate courts have found that periods of time ranging from 24 days to six years and six months are sufficient for notice and due process purposes. When the state files a charge and submits jury instructions that accuse a defendant of specific conduct during a specific time period, however, the state should not be permitted to secure a conviction with respect to conduct occurring during a substantially different time period. Here, the charge alleged that Miller committed the acts constituting first-degree statutory sodomy and deviate sexual assault between December 2004 and December 2005. The only evidence the state presented that tended to prove this conduct, however, was limited to when the daughter was 7 years old, or between December 1998 and December 1999. If the convictions for these two charges were allowed to stand on this record, nothing would preclude the state, in the future, from charging him with separate charges arising out of the same conduct, which violates the double jeopardy clauses of the state and federal constitutions. Miller's convictions for first-degree statutory sodomy and deviate sexual assault, therefore, are reversed, and the case is remanded for an entry of judgment of acquittal on those counts.

(2) The evidence was sufficient to support Miller's conviction for sexual misconduct involving a child based on his daughter's testimony. A rational finder of fact could have concluded that the facts giving rise to the charge occurred as the daughter said they did. His conviction for this charge, therefore, is affirmed.

(3) The evidence was sufficient to support Miller's conviction for first-degree endangering the welfare of a child. Miller concedes there was evidence at trial that he engaged in conduct constituting "sexual intercourse" and "deviate sexual intercourse" with his daughter during the charged time period, but he argues that this conduct did not also meet the definition of "sexual contact" as required under the statute for first-degree endangering the welfare of a child. The language of section 566.010, RSMo, however, is plain and not ambiguous. A person cannot engage in "sexual intercourse" or "deviate sexual intercourse" with another person without one of those persons engaging in "sexual contact" because the former acts involve the "touching of another person with the genitals" and "touching of the genitals or anus of another person, or the breast of a female person." Here, the daughter testified that her father repeatedly engaged in sexual intercourse with her between December 2004 and December 2005, when she was 13 years old, and that he occasionally engaged in anal intercourse with her. Either of these acts necessarily involved Miller "touching another person with [his] genitals." A reasonable juror could have inferred from the evidence that Miller's conduct constituted "sexual contact" as defined in section 566.010. Miller's conviction for first-degree endangering the welfare of a child, therefore, is affirmed.

(4) The circuit court erred in submitting the verdict-directing instruction relating to first-degree child molestation. Miller was charged with this crime for conduct alleged to have occurred between December 1997 and December 1998. At the time, “sexual contact” as defined by the applicable statute did not include touching through clothing. That specific manner of engaging in sexual contact was not added to the statutory definition until 2002. The instruction the court used, however, was based on the later statutory definition rather than the one in effect at the time Miller allegedly committed the crime. Because the court’s instruction allowed the jury to find Miller guilty of the crime for an act that was not criminal during the charged period, it committed plain error that affected the jury’s verdict. As such, Miller’s conviction for first-degree child molestation is reversed, and the case is remanded.

(5) Any comment the state made during trial of Miller’s silence after he was arrested and read his *Miranda* rights did not result in manifest injustice or a miscarriage of justice. The jury found Miller not guilty of the charges to which these comments might have applied.

(6) The circuit court did not abuse its discretion in excluding a particular witness offered by the defense. The court precluded the defense witness as a sanction for Miller’s failure to endorse this witness formally or in a timely manner. The witness’s testimony merely would have tended to prove that Miller did not engage in sexual intercourse with his daughter on two particular days in January 2006. This testimony would have been cumulative (redundant) to testimony from other defense witnesses about activities taking place on the farm during that weekend. Further, Miller was acquitted of all counts for which the witness’s testimony about the events of those two days would have been relevant, and Miller can demonstrate no prejudice from the witness’s exclusion.

(7) The circuit court did not abuse its discretion in admitting the daughter’s testimony that Miller physically abused certain members of his household. She testified that she did not tell anyone what had happened when the sexual abuse started because she “was too afraid,” saying her fear resulted from the fact that Miller had hit her mother on “many occasions” and sometimes hit her brothers. The circuit court allowed testimony about any abuse the daughter “saw and observed,” finding it relevant to why the daughter had not come forward to report the abuse sooner in light of Miller calling into question his daughter’s credibility. Although evidence of prior uncharged bad acts is not admissible for showing a defendant’s propensity to commit certain acts, such evidence may be admissible to present a complete and coherent picture of events that transpired. Here, the evidence of Miller’s abuse toward the daughter’s mother and brothers tends to give a complete and coherent picture by explaining why the daughter did not speak up for eight years about the ongoing abuse. Further, evidence of prior bad acts may be admissible to explain a witness’s delay in reporting a matter to the police, as the daughter’s testimony did here.

(8) The circuit court did not abuse its discretion in admitting evidence about Miller accepting disability payments for nearly three years after which he no longer was disabled. Miller provided testimony on direct examination as part of his defense. As such, admitting such evidence did not constitute plain error.

(9) Miller was not prejudiced by certain statements by the prosecutor about the purported temperature at the scene of the crimes alleged to have occurred on two days in January 2006. The

prosecutor's argument referred to the temperature outside on the two dates in question. Further, Miller was acquitted of all the charges for which those dates were relevant.

(10) The effect of any errors at Miller's trial did not deprive him of a fair trial in violation of his due process rights under the state and federal constitutions. A defendant, however, is entitled to a fair trial, not a perfect one. Further, this Court has rejected the "cumulative error" theory, noting that numerous non-errors cannot add up to error.