

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

State of Missouri

**v.
Roxie W. Nibarger**

RESPONDENT,

APPELLANT.

DOCKET NUMBER WD68834
DATE: December 15, 2009

Appeal From:

Platte County Circuit Court
The Honorable Abe Shafer IV, Judge

Appellate Judges:

Division Three: Mark Pfeiffer, Presiding Judge, Karen King Mitchell and Cynthia L. Martin,
Judges

Attorneys:

Shaun J. Mackelprang, Jefferson City, MO, for respondent.

Melinda K. Pendergraph, Columbia, MO, for appellant

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

State of Missouri,

RESPONDENT,

v.

Roxie W. Nibarger,

APPELLANT.

No. WD68834

Platte County

Before Division Three Judges: Mark Pfeiffer, Presiding Judge, Karen King Mitchell and Cynthia L. Martin, Judges

Roxie Nibarger appeals the trial court's judgment convicting him of one count of attempted statutory sodomy in the first degree and two counts of child molestation in the first degree. Nibarger contends that the trial court erred in: (1) entering a judgment of conviction for attempted statutory sodomy, and (2) overruling his motion for judgment of acquittal at the close of all the evidence.

AFFIRMED.

Division Three holds:

(1) Statutory sodomy in the first degree has a statutorily proscribed punishment of life imprisonment. As a result, statutory sodomy in the first degree is to be treated as a class A felony pursuant to, and for the limited purposes set forth in, section 557.021.3. Consequently, section 564.011 permits the offense of attempt to commit statutory sodomy in the first degree to be punished as a class B felony, employing the range of punishment for a class B felony set forth in section 558.011. A class B felony is subject to the range of punishment of five to fifteen years imprisonment. Section 558.011. In this case, Nibarger was sentenced to ten years imprisonment. This is well within the statutorily authorized range of punishment for a class B felony. Nibarger was thus appropriately punished upon conviction for attempt to commit statutory sodomy in the first degree under sections 564.011 and 558.011.

(2) The phrase "outside the code" in section 557.021.3 refers to unclassified offenses. Section 557.021.3 directs the proper range of punishment for attempts to commit unclassified offenses by characterizing the completed offense as a classified offense, thus permitting the attempt to commit the offense to be classified pursuant to the framework set forth in section 564.011 and punished pursuant to the framework set forth in section 558.011.

(3) Though the alleged offenses occurred in the same episode on October 27, 2005, each alleged offense required proof of a fact not required by the other. Each count required proof that Nibarger touched a different and distinct part of A.N.'s body. As such, Nibarger was properly

convicted of multiple violations of Section 566.067.1, and Nibarger's claim of double jeopardy must fail.

Opinion by: Cynthia L. Martin, Judge

December 15, 2009

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