

No. SC90775

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*In the  
Supreme Court of Missouri*

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**STATE OF MISSOURI,**

**Respondent,**

**v.**

**GEORGE BIGGS,**

**Appellant.**

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**Appeal from Greene County Circuit Court  
Thirty-First Judicial Circuit  
The Honorable Thomas Mountjoy, Judge**

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**RESPONDENT'S BRIEF**

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## **JURISDICTIONAL STATEMENT**

This appeal arises from Defendant George Biggs's conviction of abuse of a child, obtained in Greene County Circuit Court, for which Defendant was sentenced as a prior and persistent offender to seven years of imprisonment.

In this appeal, Defendant raises the following five claims of error: (1) that section 491.075 is unconstitutional in that it allows a defendant to be convicted on the basis of hearsay, and therefore seven-year-old victim L.Y.'s out-of-court statements were improperly admitted; (2) that the admission of L.Y.'s out-of-court statements violated Defendant's constitutional right to confrontation; (3) that the admission of L.Y.'s out-of-court statements impermissibly bolstered his trial testimony; (4) that the jury should have been instructed on the "lesser-included offense" of third-degree assault; and (5) that the evidence was insufficient to sustain Defendant's conviction for abuse of a child.

Because Schroeder challenges the constitutional validity of a Missouri statute, this Court has exclusive jurisdiction. MO. CONST. art. V, § 3.

## STATEMENT OF FACTS

George Biggs (“Defendant”) was charged in Greene County Circuit Court with one count of abuse of a child (§ 568.060)<sup>1</sup> (L.F. 6). In October 2009, Defendant was tried by a jury before the Honorable Thomas Mountjoy (L.F. 4; Tr. 91, 94).

Defendant challenges the sufficiency of the evidence to support his conviction. Viewed in the light most favorable to the jury’s verdict, the evidence showed as follows:

In June 2007, seven-year-old L.Y. went to visit his father, Defendant, for Father’s Day (Tr. 155, 176, 240). Defendant kept L.Y. for about five weeks—on July 27, L.Y.’s mother (“Mother”) went to Defendant’s house to pick up her son (Tr. 177, 240-41).

Since birth, L.Y. had suffered from a medical condition that rendered him unable to control his bowels (Tr. 154-55, 188, 192, 210-212). As a result, L.Y. frequently had accidents—defecating in his pants—sometimes without even knowing it (Tr. 154-55, 188, 192, 211). Mother took L.Y. to see a gastrologist when he was

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<sup>1</sup> All statutory citations herein are to RSMo Cum. Supp. 2006 unless otherwise noted.

three or four years old, but the accidents continued (Tr. 210-12, 316).

During L.Y.'s five-week visit with his father in 2007, L.Y. soiled himself a number of times (Tr. 243-45, 250). In response, Defendant would take L.Y. into the master bedroom, have L.Y. bend over the bed, naked, and then spank L.Y.'s bottom with a belt (Tr. 166, 188, 241-46, 277). After one such session, Defendant's wife went into the bedroom to find bits of feces on the floor, on the bed, and on the belt that Defendant had used (Tr. 247-48, 304). Only after Defendant finished imposing discipline was L.Y. permitted to clean himself up (Tr. 246).

When Mother arrived at Defendant's house on July 27, L.Y. rushed outside to greet her and hugged her more tightly than usual (Tr. 158, 182-83). L.Y.'s godmother, Gayla Hancock, had come along, and she helped L.Y. into the car (Tr. 159). Almost immediately after Mother, Ms. Hancock, and L.Y. drove away, L.Y. asked if he could lie down (Tr. 161-62, 184-85). He said that he had bruises on his bottom because his dad "whopped [his] butt" (Tr. 162). Ms. Hancock told L.Y. that he needed to stay buckled in, but that they would be home soon (Tr. 162-63).

After the three arrived at Ms. Hancock's house, L.Y. continued to complain (Tr. 163, 185). Mother took L.Y. into the bedroom and asked him to show her his

bruise (Tr. 163, 185-86). L.Y. was reluctant at first, but after further prodding he lowered his pants and showed her his injuries (Tr. 185-86). L.Y. had welts and bruises all over his bottom and the backs of his legs (Tr. 163, 187-88; St. Ex. 4-8). He explained again, “Daddy whopped me with a belt” (Tr. 188). When Ms. Hancock saw the injuries, she advised Mother to call the authorities (Tr. 165). L.Y. interrupted, saying “Don’t call the police. My daddy will get mad and spank me” (Tr. 166-67).

Even though L.Y. was frightened, Mother decided to call the police (Tr. 193). The responding officer, Curt Ringgold, spoke with L.Y. and photographed the injuries (Tr. 277-79). L.Y. told Officer Ringgold that his father had often spanked him as punishment for having accidents (Tr. 277). He said that it had happened every day (Tr. 277). Officer Ringgold observed that the bruising on L.Y.’s bottom “wrapped around,” consistent with belt strikes (Tr. 280). And the various bruises also appeared to be in different stages of healing, indicating that some were old while others were new (Tr. 281).

A few weeks later, Mother took L.Y. to the Child Advocacy Center (“CAC”) where he was interviewed by forensic interviewer Rachel Happel (Tr. 334). During the interview, L.Y. said that when he stayed with Defendant,

Defendant “whopped”<sup>2</sup> him with a belt as punishment when L.Y. “pooped on himself” (St. Ex. 13). L.Y. explained that Defendant whopped him “every day and night” on his bare bottom and that the beatings caused bruises (St. Ex. 13). The interview was video-recorded (Tr. 336; St. Ex. 13).

After the CAC interview, an investigator looked at L.Y.’s buttocks to see whether any injuries were still visible (Tr. 306). Although the bruising had mostly faded, the investigator could still see the lateral lines of the bruises, as well as some scarring from the initial laceration (Tr. 306).

The police contacted Defendant, who voluntarily agreed to be interviewed (Tr. 292-94). This interview was also video-recorded (Tr. 295; St. Ex. 11). Defendant admitted that during L.Y.’s summer 2007 visit, he had spanked L.Y. with his belt on at least three or four occasions (St. Ex. 11). He said that the last time he had spanked L.Y. was two days before Mother came to his house and picked up L.Y. (St. Ex. 11). Defendant denied that he had ever spanked L.Y.’s bare bottom (St. Ex. 11). He also denied that the bruises on L.Y.’s backside could have been caused by the spanking, insisting that the belt he used was too lightweight to have caused that much damage (St. Ex. 11). He speculated that L.Y.’s little brother may have inflicted the injuries while the boys roughoused

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<sup>2</sup> For the sake of consistency, Respondent adopts the transcript’s spelling of the word “whopped” (*see e.g.* Tr. 162).

together (St. Ex. 11). But Defendant admitted that L.Y.'s little brother had not stayed with L.Y. at Defendant's house that month—the only people who had been in the house were Defendant, his wife Allena, his daughter, and L.Y. (St. Ex. 11).

Before trial, the State notified Defendant that it intended to use L.Y.'s out-of-court statements to Mother, Ms. Hancock, Officer Ringgold, and CAC interviewer Happel as substantive evidence as permitted by section 491.075 (L.F. 9-10, 13-14). The court held hearings regarding these statements and found that they each bore sufficient indicia of reliability to be admissible under the statute, provided that L.Y. was made available for cross-examination (Tr. 69, 120).

At trial, Ms. Hancock, Mother, and Officer Ringgold testified about L.Y.'s out-of-court disclosures of abuse, and the State played the video-recording of Ms. Happel's interview with L.Y. (Tr. 161-62, 166-67, 184-85, 188, 277; St. Ex. 13).

Defendant's wife testified that on two different occasions during the summer 2007 visit, Defendant had spanked L.Y. as punishment for his accidents, but she said she wasn't sure whether he had used a belt both times or only once (Tr. 241, 243).

L.Y., who was nine years old at the time of the trial, denied that he had had any "accidents" when he had visited his father in 2007 and claimed that he did not remember whether anyone had ever hit him with a belt (Tr. 218, 224-25).

Defendant did not testify (Tr. 376).

The jury found Defendant guilty of abuse of a child (Tr. 435; L.F. 46, 48). The court sentenced Defendant as a prior and persistent offender to seven years of imprisonment (Tr. 148-49, 456; L.F. 46, 48).

## **ARGUMENT**

### **I. (§ 491.075 – due process and equal protection)**

**This Court should not reach Defendant’s constitutional challenge to section 491.075 because the evidence in question was independently admissible under sections 491.074 and 492.304. Moreover, the admission of L.Y.’s out-of-court statements to Mother, Ms. Hancock, Officer Ringgold, and CAC interviewer Rachel Happel did not violate Defendant’s constitutional rights to due process and equal protection.**

In his first point, Defendant argues that the admission of victim L.Y.’s out-of-court disclosures of abuse to Mother, Gayla Hancock, Officer Ringgold, and Rachel Happel violated his constitutional rights to due process and equal protection. App. Br. at 23-34. He contends that the admission of hearsay statements under section 491.075 violates the Due Process Clause because it allows defendants to be convicted on the basis of hearsay alone, which cannot, Defendant argues, prove guilt beyond a reasonable doubt. App. Br. at 27-32. And he argues that section 491.075 violates the Equal Protection Clause because the statute creates two classes of criminal defendants—those who are charged under Chapters 565, 566, 568, and 573 RSMo and those who are not—and treats the two

classes differently, with the former class subject to conviction on the basis of a child witness's hearsay statements and the latter class immune to such evidence. App. Br. at 32-34.

First, this Court need not decide the constitutional questions posed by Defendant because the evidence that he claims was unconstitutionally admitted under section 491.075 was independently admissible under sections 491.074 and 492.304. Thus, this Court can and should reject Defendant's claim of error without reaching the constitutional question.

In any event, Defendant's constitutional challenges to section 491.075 lack merit. The Due Process Clause does not create a *per se* bar to the admission of hearsay. Due process simply requires that the defendant be permitted to present a complete defense and that the evidence admitted at trial, including hearsay evidence, satisfy a minimum threshold of reliability. Because the admission of hearsay evidence under section 491.075 does not limit a defendant's ability to present a defense and is contingent upon the existence of sufficient indicia of reliability, the statute is consistent with the strictures of the Due Process Clause.

Further, the admission of hearsay evidence under section 491.075 does not violate the Equal Protection Clause. The statute does not implicate a suspect class or a fundamental right. And the law is supported by at least a rational basis—the recognition that child victims of certain crimes may have particular difficulty providing clear, cogent testimony at trial regarding their ordeals, and that the

admission of their prior disclosures, if they are found to be reliable, is necessary to bring the perpetrators of these crimes to justice.

**A. Standard of review**

Statutes are presumed constitutional and will be found unconstitutional only if they clearly contravene a constitutional provision. *State v. Pribble*, 285 S.W.3d 310, 313 (Mo. banc 2009). If at all feasible, the statute must be interpreted in a manner consistent with the constitution, and any doubt about the constitutionality of a statute will be resolved in favor of the statute’s validity. *State v. Stokely*, 842 S.W.2d 77, 79 (Mo. banc 1992). The party challenging the validity of the statute has the burden of proving that the act “clearly and undoubtedly” violates constitutional limitations. *Franklin County ex rel. Parks v. Franklin County Comm’n*, 269 S.W.3d 26, 29 (Mo. banc 2008).

**B. Analysis**

1. The Court need not address the constitutionality of section 491.075 because the out-of-court statements admitted in this case were independently admissible under sections 491.074 and 492.304.

As a rule, this Court will decide a constitutional question only when necessary to the disposition of the case presented. *State ex rel. Williams v. Marsh*, 626 S.W.2d 223, 227 (Mo. banc 1982). A trial court’s decision to admit evidence must be affirmed on appeal unless there is no reasonable basis in the record to support it. *State v. Fears*, 217 S.W.3d 323, 327 (Mo. App. S.D. 2007). In this

case, the Court need not reach Defendant's constitutional challenge to section 491.075 because the out-of-court statements about which Defendant complains were independently admissible as prior inconsistent statements under sections 491.074 and 492.304.

Section 491.074 states that “[n]otwithstanding any other provisions of law to the contrary, a prior inconsistent statement of any witness testifying in the trial of a criminal offense shall be received as substantive evidence, and the party offering the inconsistent statement may argue the truth of such statement.” The erroneous admission of evidence under section 491.075 does not warrant reversal where the statements would have been admissible under 491.074 as prior inconsistent statements. *See State v. Brethold*, 149 S.W.3d 906, 910 (Mo. App. E.D. 2004). Where “a witness claims not to remember if a prior statement was or was not made, a proper foundation was laid to admit the prior inconsistent statement.” *State v. Reed*, 282 S.W.3d 835, 838 (Mo. banc 2009) (citation omitted).

At trial, L.Y. claimed not to remember what he said to Mother or Ms. Hancock on the way home from Defendant's house in the summer of 2007, nor could he remember talking to Officer Ringgold or CAC interviewer Rachel Happel (Tr. 222-24). But in his recorded CAC interview, L.Y. acknowledged that he talked about the abuse on the ride home from Defendant's, that he had told his mom about the bruises, and that he had talked to the police about what had

happened (St. Ex. 13). Because L.Y.'s out-of-court statements, inconsistent with his denials at trial, would have been admissible under section 491.074, this Court may affirm Defendant's conviction without reaching the question of whether section 491.075 is constitutional.

In addition, the videotaped CAC interview was admissible under section 492.304, which authorizes the admission of visual and aural recordings of children under the age of 14 who are alleged to be victims of crimes under the provisions of chapter 565, 566, or 568. L.Y. was seven years old at the time of the alleged offense (and at the time that the interview was conducted) (Tr. 175, 218). And he was alleged to have been the victim of child abuse, charged under section 568.060 (L.F. 6). State's Exhibit 13, the videorecording of Rachel Happel's interview with L.Y., satisfied the requirements of section 492.304 and was admissible thereunder.

Because the out-of-court statements about which Defendant complains were independently admissible under sections 491.074 and 492.304, this Court may dispose of this case without addressing Defendant's contention that section 491.075 is unconstitutional. For this reason, Point I should be denied.

2. The admission of hearsay statements under section 491.075 does not violate due process.

Defendant's argument that the admission of L.Y.'s hearsay statements violates the Due Process and Equal Protection Clauses fails on the merits, as well. Hearsay is defined as an "out-of-court statement that is used to prove the truth of the matter asserted and that depends on the veracity of the statement for its value." *State v. Taylor*, 298 S.W.3d 482, 492 (Mo. banc 2009). "Generally, courts exclude hearsay because the out-of-court statement is not subject to cross-examination, is not offered under oath, and is not subject to the fact finder's ability to judge demeanor at the time the statement is made." *Id.* (quoting *Bynote v. Nat'l Super Markets, Inc.*, 891 S.W.2d 117, 120 (Mo. banc 1995)).

In asserting that the admission of hearsay evidence under section 491.075 violates due process, Defendant makes the sweeping argument that "[h]earsay is not competent and substantial evidence," and that the use of hearsay in a criminal case (as section 491.075 authorizes under certain circumstances) violates a defendant's right to be convicted only upon evidence that proves his guilt beyond a reasonable doubt. App. Br. at 27-32.

Defendant's due-process claim is flatly contrary to settled Missouri law. In *State v. Wright*, 751 S.W.2d 48, 53 (Mo. banc 1988), this Court considered and rejected a defendant's due-process challenge to section 491.075. The Court noted that "the prevalent theme in due process cases is that in a criminal prosecution the accused must be allowed to present a complete defense." *Id.* "If the defendant is afforded a reasonable opportunity to submit to the jury in his defense all of the

facts bearing upon the issues, there is no basis for finding that he has been denied due process.” *Id.* This Court observed that section 491.075 in no way prohibits a defendant from presenting a complete defense or obstructs his ability to meaningfully respond to the charges; the statute “merely allowed the jury to consider certain relevant evidence offered by the state.” *Id.*

*Wright* is directly on point. The State’s introduction of L.Y.’s out-of-court statements did not in any way disable Defendant from presenting a complete defense. His due-process claim should be summarily rejected.

Furthermore, Defendant’s argument that section 491.075 violates due process because it allows for the introduction of hearsay evidence, which he claims is inherently incompetent and insubstantial, is unsupported by the law. In *California v. Green*, 399 U.S. 149 (1970), the United States Supreme Court recognized that “considerations of due process, wholly apart from the Confrontation Clause, might prevent convictions where a reliable evidentiary basis is totally lacking . . . .” *Id.* at 165 n.15. But the Court rejected the proposition that “the Constitution is necessarily violated by the admission of a witness’ prior inconsistent statement for the truth of the matter asserted.” *Id.* at 165 n.15; *accord United States v. Johnson*, 378 F.Supp.2d 1051, 1066-67 (N.D. Iowa 2005) (“The admissibility of evidence over a due process challenge turns on the ‘reliability’ of such evidence”).

In cases where the Confrontation Clause is not implicated,<sup>3</sup> due process simply requires “that some minimal indicia of reliability accompany a hearsay statement.” *United States v. Petty*, 982 F.2d 1365, 1369 (9<sup>th</sup> Cir. 1993) (citing *United States v. Reid*, 911 F.2d 1456, 1463-64 (10<sup>th</sup> Cir. 1990)). This interpretation of the due-process requirement is consistent with Missouri’s approach to the exceptions to the general hearsay prohibition; hearsay evidence may be admitted “when circumstances assure the trustworthiness of the declarant’s statement.” *Taylor*, 298 S.W.3d at 492.

Section 491.075 specifically requires that hearsay evidence must bear sufficient indicia of reliability before it may be admitted under the statute. The section, as it existed in summer 2007 when the charged offense occurred, reads in pertinent part as follows:

1. A statement made by a child under the age of fourteen relating to an offense under chapter 565, 566, or 568, RSMo, performed with or on a child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of this state as substantive evidence to prove the truth of the matter asserted if:

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<sup>3</sup> Defendant’s Confrontation-Clause challenge to the admission of the hearsay statements is addressed in Point II, *infra*.

(1) The court finds, in a hearing conducted outside the presence of the jury that the time, content and circumstances of the statement provide sufficient indicia of reliability . . . .

§ 491.075. Thus, under the express terms of the statute, hearsay testimony may be admitted only if it is found to be reliable.

In this case, the trial court listened to the proffered testimony from Mother, Ms. Hancock, Officer Ringgold, and Ms. Happel before trial and determined that L.Y.'s out-of-court statements to each of those witnesses bore sufficient indicia of reliability to be admissible under section 491.075 (Tr. 69, 120). In light of this finding, the due process provisions of the United States and Missouri Constitutions did not bar the admission of these statements at trial.

To support his contention that hearsay evidence is *per se* incompetent, Defendant cites *Hill v. Norton & Young, Inc.*, 305 S.W.3d 491 (Mo. App. E.D. 2010), in which the Eastern District Court of Appeals recently reversed an administrative decision denying unemployment benefits because the decision relied exclusively on hearsay evidence. *Id.* at 494-95. In reaching its decision, the Eastern District turned to the regulation governing the use of hearsay at unemployment hearings, which states that, "Hearsay which is timely objected to shall not constitute competent evidence which, by itself, will support a finding of fact." *Id.* at 494 (quoting 8 CSR 10-5.015(10)(B)(4)). The Court determined that the claimant had timely objected to the use of hearsay, and thus the hearsay upon

which the administrative decision was based was not competent evidence and could not support the decision. *Id.* at 495.

Nothing in *Hill* can be construed to announce a *per se* rule that “[h]earsay is not competent and substantial evidence,” as Defendant suggests. App. Br. at 30. Instead, the “competence” of hearsay evidence in a particular proceeding depends on the rule of law under which a party seeks to admit it. In Defendant’s case, section 491.075 authorized the use of L.Y.’s hearsay statements if they were found to be reliable by the trial court (and other procedural requirements were met). The trial court’s findings satisfied the minimum threshold of reliability necessary to satisfy the Due Process Clause.

Defendant also contends that, as a matter of due process, a criminal conviction cannot stand if an out-of-court statement is the “sole evidence of prosecution.” App. Br. at 27 (citing *State v. Pierce*, 906 S.W.2d 729, 735 (Mo. App. W.D. 1995)). But this argument is directed not at the admissibility of the hearsay evidence, but instead at the sufficiency of the evidence offered to sustain his conviction.

*Pierce* illustrates the difference. In *Pierce*, the defendant was charged with statutory rape. 906 S.W.2d at 730. At trial, the State introduced a videotaped statement by the alleged victim in which the victim said that she had engaged in sexual intercourse with the defendant. *Id.* at 732. At trial, however, the victim said that she had only told the authorities what they wanted to hear and that the

allegations were all lies. *Id.* No physical evidence was presented showing that the victim had engaged in sexual intercourse with the defendant. *Id.*

The Western District held that because the victim's single out-of-court statement was expressly repudiated by her at trial and was uncorroborated by any other evidence, the evidence was insufficient to support the verdict. *Id.* at 735. But the court explicitly noted that, despite the insufficiency of evidence, the out-of-court statement was unquestionably admissible under section 491.074, which authorized the admission of prior inconsistent statements as substantive evidence. *Id.* at 734. Indeed, the court took special pains to identify the "difference between *admissibility* of the prior statement, and the *sufficiency* of the evidence derived from one piece of evidence." *Id.* at 735 (emphasis original). Due process did not prevent the admissibility of the out-of-statement, the court reasoned, but it did require that some corroboration for the statement be presented before the conviction could stand. *Id.*

Defendant ignores the plain language of *Pierce* and argues that the inherent unreliability of hearsay statements bars their admissibility as a matter of due process, irrespective of any statute authorizing their admission as substantive evidence. *Pierce* does not stand for that proposition, nor does any other case cited

by Defendant.<sup>4</sup> To the contrary, *Pierce* strongly supports the trial court's determination that L.Y.'s out-of-court statements were admissible as substantive evidence, despite L.Y.'s inconsistent testimony when he took the stand.

Defendant has presented no authority whatsoever to support his claim that the admission of a child witness's out-of-court statements under section 491.075 violates the Due Process Clause. And this Court's precedent holds otherwise. *See e.g. Wright*, 751 S.W.2d at 53. L.Y.'s out-of-court statements were not subject to exclusion on due process grounds.

3. The admission of hearsay statements under section 491.075 does not violate equal protection.

The United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. Similarly, the Missouri Constitution states that "all persons are created equal and are entitled to equal rights and opportunity under the law." MO. CONST. art. I, § 2. This Court has held that Missouri's equal protection clause provides the same protections as the United States Constitution. *In re the Care and Treatment of Coffman*, 225 S.W.3d 439, 445 (Mo. banc 2007).

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<sup>4</sup> Defendant challenges the sufficiency of the evidence to support his conviction in Point V. Thus, Respondent addresses that issue in detail in the appropriate point below.

In analyzing equal-protection claims, this Court recognizes that “equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.” *Doe v. Phillips*, 194 S.W.3d 833, 845 (Mo. banc 2006) (quoting *Romer v. Evans*, 517 U.S. 620, 631 (1996)). Thus, “not all distinctions in treatment of individuals or groups are invalid.” *Phillips*, 194 S.W.3d at 845. “A law may properly treat different groups differently, but it may not treat similarly situated persons differently unless such differentiation is adequately justified.” *Id.* Where a statutory classification “does not involve a suspect class or a fundamental right, it need only be ‘rationally related to a legitimate state interest’ to comply with the equal protection clauses.” *St. John’s Mercy Health System v. Division of Employment Sec.*, 273 S.W.3d 510, 515 (Mo. banc 2009).

Again, this Court’s opinion in *Wright* is instructive. In *Wright*, the defendant claimed that the application of section 491.075 violated his right to equal protection. 751 S.W.2d at 51-52. The defendant sought to invoke the strict scrutiny standard because, he claimed, “defendants charged with offenses under chapters 565, 566, and 568 constitute a suspect class and section 491.075 thwarts his fundamental right of confrontation.” *Id.* The Court rejected the defendant’s assertion that his group of criminal defendants constituted a suspect class, noting that such a classification had already been deemed non-suspect in *State v.*

*Williams*, 729 S.W.2d 197 (Mo. banc 1987). *Wright*, 751 S.W.2d at 51. And the Court found that the statute posed no confrontation problem because it permitted the introduction of out-of-court statements only if they were found to be reliable, complying with the then-governing rule relating to confrontation set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980). *Wright*, 751 S.W.2d at 51-52.

In this case, Defendant does not attempt to argue that defendants charged under chapters 565, 566, 568, and 573 constitute a suspect class. App. Br. at 33. Nor does he claim that section 491.075 facially violates his right to confrontation. App. Br. at 33. Instead, he claims that the section affects a different fundamental right—“that being proven guilty beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” App. Br. at 33. But Defendant completely misunderstands the effect of section 491.075. Nothing in the statute relieves the State of its burden to prove every element of a charged offense beyond a reasonable doubt. Instead, the statute simply permits the jury to consider additional reliable evidence. *See* § 491.075; *Wright*, 751 S.W.2d at 53.

“Fundamental rights are those rights that are deeply rooted in this Nation’s history and traditions, and implicit in the concept of ordered liberty.” *State v. Pike*, 162 S.W.3d 464, 470 (Mo. banc 2005). Criminal defendants do not have a “deeply rooted” or traditional right to the *per se* exclusion of hearsay evidence. To the contrary, numerous *exceptions* to the general rule that hearsay is inadmissible are considered “firmly rooted” in the law. *See e.g. State v. Justus*, 205 S.W.3d

872, 878 n.7 (Mo. banc 2006) (noting that non-testimonial hearsay evidence may be admissible against a criminal defendant if it falls within a “firmly rooted” hearsay exception) (citing *Roberts*, 448 U.S. at 66). Thus, the mere fact that section 491.075 permits, in certain circumstances, that hearsay evidence may be admitted at trial does not mean that a fundamental right is implicated.

Because section 491.075 involves neither a suspect class nor a fundamental right, the section must be upheld if it has any rational relationship to a legitimate state interest. *See St. John’s Mercy Health System*, 273 S.W.3d at 515. For Defendant to prevail under the rational basis test, he must show that the law “has no reasonable basis and is purely arbitrary.” *Pike*, 162 S.W.3d at 471. When undertaking this analysis, “this Court will not substitute its judgment for that of the legislature as to the wisdom, social desirability or economic policy underlying a statute.” *Id.*

In *Wright*, this Court had no difficulty finding a rational basis to support the enactment of section 491.075:

[T]he state has a strong interest in protecting children, and child abuse presents unusual evidentiary problems because the victim’s testimony is often the only direct evidence linking the accused to the crime. Additionally, § 491.075 reflects a policy determination that in some child abuse cases the victim’s out-of-court statements may possess sufficient probative value to contribute to the judicative process; indeed, such

statements may on occasion be *more* reliable than the child's testimony at trial, which may suffer distortion from the trauma of the courtroom setting or become contaminated by contacts and influences prior to trial.

751 S.W.2d at 52.

Defendant's case perfectly illustrates the importance of permitting a child-abuse victim's out-of-court statements to be admitted at trial. According to multiple adult witnesses, L.Y. had disclosed to them that his father had spanked him repeatedly with a belt, causing bruising (Tr. 161-62, 166-67, 184-85, 188, 277; St. Ex. 13). Photographs of the bruises, taken by police at the time of disclosure, were shown to the jury (Tr. 165; St. Ex. 4-8). But during his trial testimony, L.Y. said that he did not show any part of his body to his mother at the time of the alleged disclosure (Tr. 223). This testimony was plainly inconsistent with the photographs showing extensive bruising. L.Y.'s denials at trial are understandable—his father was sitting just across the courtroom (Tr. 225-26) and the nine-year-old boy did not want to accuse his father of abuse, especially when he had previously indicated that he feared retaliation from Defendant if the authorities were contacted (Tr. 166-67). Without the ability to admit a child's out-of-court disclosures, child-abuse cases, especially those where the accused is a member of the victim's family, would often be impossible to prosecute because victims like L.Y. are naturally reluctant to testify against the abuser. Section

491.075 is supported by a rational basis and thus does not violate the Equal Protection Clause. Point I should be denied.

## II. (§ 491.075 - confrontation)

**The trial court did not abuse its discretion in admitting evidence from Mother, Gayla Hancock, Officer Ringgold, and CAC interviewer Rachel Happel regarding L.Y.'s out-of-court disclosures over Defendant's Confrontation Clause objection. Because L.Y. testified at trial and was available for cross-examination, the admission of his out-of-court statements did not pose a confrontation problem.**

In his second point, Defendant contends that the admission of L.Y.'s out-of-court statements through Mother, Gayla Hancock, Officer Ringgold, and State's Exhibit 13 (the video-recorded CAC interview) violated his right to confront witnesses against him. App. Br. at 35-37. Defendant recognizes that L.Y. testified at trial, but observes that in his trial testimony, L.Y. said that the abuse did not happen or claimed that he did not remember. App. Br. at 36-37. Defendant contends that due to the nature of L.Y.'s trial testimony, L.Y. was "essentially unavailable" and Defendant was deprived of "meaningful cross-examination." App. Br. at 36-37.

This argument is without merit. L.Y. took the stand at trial and answered every question asked of him—even if his answer to many questions was "I don't know" or "I don't remember." Both this Court and the United States Supreme Court have held that a defendant is not deprived of his right to confrontation simply because the witness in question cannot or does not provide the substantive

testimony that might be expected at trial. *See State v. Perry*, 275 S.W.3d 237 (Mo. banc 2009); *United States v. Owens*, 484 U.S. 554 (1988). Because L.Y. testified and was available for cross-examination, Defendant’s right to confrontation was vindicated. The trial court did not err in overruling Defendant’s Confrontation Clause objection to the out-of-court statements offered by the State.

**A. Standard of review**

Whether a defendant’s constitutional right to confrontation was violated by the admission of evidence is a question of law that is reviewed *de novo*. *State v. March*, 216 S.W.3d 663, 664-65 (Mo. banc 2007).

**B. Analysis**

The United States and Missouri Constitutions guarantee criminal defendants the right to confront their accusers. U.S. CONST. amend. VI. (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him); MO. CONST. art. I, § 18(a) (“[I]n criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face”). Because of the constitutional right to confrontation, an absent witness’s out-of-court testimonial statements may be admitted only if the witness is unavailable and the defendant had a prior opportunity to cross-examine. *Crawford v. Washington*, 541 U.S. 36, 59 (2004); *State v. Justus*, 205 S.W.3d 872, 878 (Mo. banc 2006). When the declarant appears at trial for cross-examination, however, “the

Confrontation Clause places no constraints at all on the use of his prior testimonial statements.” *Crawford*, 541 U.S. at 59 n.9.

Defendant concedes that L.Y., the declarant of each statement he sought to exclude, testified at trial and was available for cross-examination. App. Br. at 36. But he argues that because L.Y.’s testimony regarding the essential elements of the charge was “that it did not happen, he could not remember, or he did not know,” L.Y. was essentially unavailable and Defendant could not meaningfully cross-examine. App. Br. at 36-37.

This argument has been made and rejected before, both by the United States Supreme Court and by this Court. In *United States v. Owens*, the United States Supreme Court found no Confrontation Clause violation from the admission of a victim’s prior identification of the defendant as his assailant, even though the victim testified at trial that he could not remember seeing his assailant, nor could he remember the basis for his original identification. 484 U.S. 554, 556-60 (1988). The Court noted that “[t]he Confrontation Clause guarantees only ‘an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’” *Id.* at 559 (quoting *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987)). A witness’s poor memory or unwillingness to repeat prior statements does not create a confrontation problem; instead, it gives the defense an opportunity to exploit the discrepancies between the alleged prior statements and the live testimony:

The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.

*Id.* at 558 (quoting *Delaware v. Fensterer*, 474 U.S. 15, 21-22 (1985)).

In *State v. Perry*, 275 S.W.3d 237 (Mo. banc 2009), this Court reached the same conclusion. In *Perry*, the victim of child molestation made several specific out-of-court statements about what the defendant had done to her, but at trial refused to repeat a key allegation at trial. *Id.* at 240-41. The defendant complained that because of the victim's reticence, he had been denied a meaningful opportunity to cross-examine her. *Id.* at 244.

This Court rejected the defendant's claim. *Id.* The Court noted that it has "long been the law that the prosecution may rely on out-of-court statements concerning the crime as substantive evidence," and that when that occurs, "the defense can bring out the fact that the witness has not repeated certain of his or her prior statements at trial as a fact in defendant's favor, going to credibility." *Id.* (citing *Maryland v. Craig*, 497 U.S. 836, 851 (1990)). Because the defendant had the opportunity to question the victim about why she had not repeated her previous

description and to argue that her failure to do so “negated its credibility,” this Court found no Confrontation Clause violation. *Id.* The Court also recognized that although defense counsel would have had to weigh “his desire not to bully a child witness and to not repeat her most damning allegations, this is the type of strategy decision that occurs in any cross-examination.” *Id.*

Missouri courts have consistently found no Confrontation Clause violation from the admission of out-of-court statements where a victim, despite being reluctant to testify, nevertheless took the stand and was available for cross-examination. In *State v. Tanner*, 220 S.W.3d 880, 884-885 (Mo.App. S.D. 2007), for example, the victim provided her name, her age, and her father’s name during direct examination, but said that she did not recall telling an interviewer anything about her father and denied that she had ever told a lie about her father. *Id.* On cross-examination, the victim reiterated her age and said that she did not know where she had discussed her father with an interviewer. *Id.* at 885.

On appeal, the defendant asserted that the victim had not testified at trial, and, thus, that the trial court had erred in admitting the victim’s out-of-court statements under section 491.075. *Id.* at 884. The court rejected this argument, concluding that the victim had, in fact, testified as required by section 491.075. The court pointed out that the victim’s testimony had established some relevant facts, including the victim’s age, which was necessary (as it was in Defendant’s case) to find the defendant guilty of the charged offense. *Id.* at 886. The court

further observed that the victim “was available on the stand and that the defendant could have, if he so chose, cross-examined her more vigorously about her out-of-court statements. *Id.*

Here, L.Y. took the stand and answered a number of background questions, including questions about his age and family (Tr. 218-21). When he was questioned about the alleged abuse, L.Y. became evasive, answering, “I don’t remember” to most of the questions, and denying outright some critical facts, such as whether he had ever had an “accident” when he stayed at Defendant’s house (Tr. 222-25). On cross-examination, Defendant had every opportunity to question L.Y. about any and all of his prior statements. The fact that Defendant preferred to elicit testimony about L.Y.’s happy times with Defendant shows not that he lacked an opportunity to cross-examine L.Y. about his prior accusations, but instead that he simply chose not to (Tr. 226-29).

As in *Tanner*, Defendant had a full and fair opportunity to confront his accuser and cross-examine him. *See also State v. Hester*, 801 S.W.2d 695, 697 (Mo. banc 1991) (child witness answered two or three questions but then failed to answer the prosecutor’s remaining questions; but because defense counsel did not seek to cross-examine, there was no confrontation violation); *State v. Howell*, 226 S.W.3d 892, 896-97 (Mo. App. S.D. 2007) (defendant’s right to confrontation was not violated by admission of victim’s prior statements even though victim testified at trial that she did not remember where the defendant had touched her); *State v.*

*Galindo*, 973 S.W.2d 574, 575-579 (Mo.App. S.D. 1998) (although the victim offered no meaningful testimony that could be the subject of effective cross-examination, the victim still testified and could have been cross-examined about her out-of-court statements had the defendant chosen to do so).

In support of his assertion that L.Y. was “unavailable” as a witness, Defendant cites to *State v. Jankiewicz*, 831 S.W.2d 195, 197-99 (Mo. banc 1992), a case in which this Court stated that an uncooperative witness whose answers were unresponsive did not “testify” for purposes of section 491.075. But Defendant’s reliance on *Jankiewicz* is misplaced for at least three reasons.

First, the Court’s discussion on the issue of whether the victim “testified” was *dicta*. The question that resulted in reversal in *Jankiewicz* was whether the trial court had properly conducted the “reliability” determination in light of the United States Supreme Court’s then-recent decision in *Idaho v. Wright*, 497 U.S. 805 (1990). It was the trial court’s failure to conduct a proper reliability determination (because it did not have *Idaho v. Wright* to guide it) that led this Court to reverse. Significantly, the Court would have reversed and remanded *regardless* of whether the witness in question had testified or had been unavailable to testify. Thus, inasmuch as the Court’s brief discussion about the witness’s unavailability was unnecessary to the Court’s holding, it was *dicta*. See *Brooks v. State*, 128 S.W.3d 844, 852 n. 1 (Mo. banc 2004) (“[S]tatements ... are *obiter dicta* [if] they [are] not essential to the court’s decision of the issue before it.”) (White,

C.J., dissenting).

Second, even if the Court's observation is not considered *dicta*, the case is distinguishable from the case at bar. In *Jankiewicz*, the Court pointed out that defense counsel explicitly attempted to ask the victim about her out-of-court statements but could not get a response. 831 S.W.2d at 198. Here, on the other hand, as in *Hester*, *Tanner*, and *Galindo*, Defendant failed to ask L.Y. about his out-of-court statements (Tr. 226-29); thus, Defendant cannot show that he was deprived of any opportunity to cross-examine the victim.

Third, it is not apparent from the Court's brief characterization of the record in *Jankiewicz* what type of relevant questions the witness actually answered (if any). The Court in *Jankiewicz* simply stated:

The victim was called to the stand, but for the most part she was uncooperative and her answers were unresponsive. Many of the questions directed to her did not ask what had happened to her, but rather what she previously told the questioning attorney on deposition. She gave no testimony from the stand which incriminated the defendant. She did not confirm either the making or the accuracy of the prior statements introduced into evidence and appeared to deny some of them.

831 S.W.2d at 198. By contrast, in Defendant's case, L.Y. answered several factual questions, and when asked what had happened to him, he answered, although his answers were more favorable to the defense than to the State in that

they indicated that he could not remember being hit with a belt nor could he remember any circumstances surrounding the alleged disclosures. In short, the record here reveals that the victim did testify, and, thus, the facts of this case are more closely analogous to *Tanner* than to *Jankiewicz*.

Defendant complains that he was put in a difficult position in deciding how and whether to cross-examine L.Y. “to get him to admit that someone put him up to making statements he could not remember or that someone told him to say something about something he says never happened.” App. Br. at 37. But Defendant ignores the fact that he already got the best testimony from L.Y. that he could have hoped for—L.Y. denied the accidents, denied that Defendant got angry with him, denied that he ever showed Mother any bruises, denied that he had spoken with CAC interviewer Happel, and said that he could not remember whether he had been struck with a belt (Tr. 223-25). It is not clear what additional favorable evidence Defendant thought he could elicit from L.Y. on cross-examination. *See California v. Green*, 399 U.S. 149, 160 (1970) (recognizing that a defendant’s ability to attack a witness’s previous statement where the witness has changed his story at trial is actually enhanced because “the witness, favorable to the defendant, should be more than willing to give the usual suggested explanations for the inaccuracy of his prior statement”).

In effect, Defendant is arguing that he had a constitutional right to have L.Y. provide incriminating testimony against him so that he would have the

chance to attack it. There is no such right. Defendant's right to confront L.Y. was fulfilled by his having the opportunity to cross-examine. This is true even though L.Y.'s direct testimony was so favorable to Defendant that there was not much left for defense counsel do to. Because Defendant had a full and fair opportunity to confront L.Y. at trial, the Confrontation Clause did not bar admission of L.Y.'s out-of-court statements to Mother, Ms. Hancock, Officer Ringgold, or Ms. Happel. Point II should be denied.

### III. (§ 491.075 – bolstering)

**The trial court did not abuse its discretion in admitting L.Y.’s out-of-court statements to Mother, Ms. Hancock, Officer Ringgold, CAC interviewer Rachel Happel over Defendant’s “bolstering” objection. The statements did not bolster L.Y.’s trial testimony, nor did they improperly bolster one another.**

In his third point, Defendant argues that the trial court erred in admitting the testimony of Mother, Ms. Hancock, Officer Ringgold, and Rachel Happel, and also erred in admitting State’s Exhibit 13—the videotaped CAC interview—because “said testimony and Exhibit 13 improperly bolstered the testimony of [L.Y.] and each other.” App. Br. at 38. Defendant does not identify any particular statements that he believes constituted improper bolstering. App. Br. at 38-40. Instead, he simply asserts that “being able to present the same evidence six times gives the State a great advantage over a Defendant. . . .” App. Br. at 39.

Defendant’s argument has no merit. L.Y.’s out-of-court statements, in which he claimed that Defendant bruised him by spanking him repeatedly with a belt, were completely different from his in-court testimony, in which L.Y. denied remembering that anyone had struck him with a belt. Further, the out-of-court statements were not duplicative of one another and each had independent value. The trial court did not abuse its discretion in admitting the statements as substantive evidence of Defendant’s guilt.

**A. Standard of review**

This Court reviews a trial court’s evidentiary rulings for abuse of discretion. *State v. Davis*, 318 S.W.3d 618, 630 (Mo. banc 2010). “A trial court’s decision to admit evidence is an abuse of discretion when it is clearly against the logic of the circumstances then before the court, and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration.” *Id.*

**B. Analysis**

“Improper bolstering occurs when an out-of-court statement of a witness is offered solely to duplicate or corroborate trial testimony.” *State v. Forrest*, 183 S.W.3d 218, 224 (Mo. banc 2006) (quoting *State v. Wolfe*, 13 S.W.3d 248, 257 (Mo. banc 2000)). “However, if the out-of-court statement is offered for relevant purposes other than corroboration and duplication . . . there is no improper bolstering.” *Id.*

Missouri courts have repeatedly and consistently held that the admission of a child-abuse victim’s out-of-court statements to adults, including those made during a forensic interview, does not constitute improper bolstering. *See State v. Redman*, 916 S.W.2d 787, 792 (Mo. banc 1996); *State v. Silvey*, 894 S.W.2d 662, 672 (Mo. banc 1995); *State v. Ramsey*, 864 S.W.2d 320, 329 (Mo. banc 1993); *State v. Gaines*, 316 S.W.3d 440, 450 (Mo. App. W.D. 2010); *State v. Bunch*, 289 S.W.3d 701, 705-06 (Mo. App. S.D. 2009); *State v. Smith*, 136 S.W.3d 546, 549-

50 (Mo. App. W.D. 2004); *State v. Skipper*, 101 S.W.3d 350, 352-54 (Mo. App. S.D. 2003); *State v. Gollaher*, 905 S.W.2d 542, 545-46 (Mo. App. E.D. 1995); *State v. White*, 873 S.W.2d 874, 877 (Mo. App. E.D. 1994). This is because the statements a child-victim makes to others are not entirely duplicative of the child's trial testimony, but involve the different circumstances surrounding the making and consistency of those statements, which have probative value apart from the victim's testimony alone. *See Redman*, 916 S.W.2d at 792; *White*, 873 S.W.2d at 877. "A child victim's out-of-court statements possess unique strengths and weaknesses and are distinct evidence from the child's trial testimony." *Gaines*, 316 S.W.3d at 450.

To obtain relief on a claim of improper bolstering, a defendant must point to specific parts of the record to support his argument that the admission of evidence was "wholly duplicative" of trial testimony. *See Bunch*, 289 S.W.3d at 706. It is not sufficient for the defendant to make a "conclusory generalization" that bolstering occurred. *Id.* (citing *Smith*, 136 S.W.3d at 551).

In this case, Defendant offers nothing more than a "conclusory generalization" that the State was able to "present the same evidence six times" by presenting testimony from Mother, Gayla Hancock, Officer Ringgold, and Rachel Happel, in addition to offering State's Exhibit 13 and calling L.Y. to testify at trial. App. Br. at 38-39. But Defendant does not point to any specific out-of-court

statements that he believes were actually duplicative of L.Y.'s testimony at trial. App. Br. at 38-39.

Nor could he. L.Y. testified that he remembered spending time at Defendant's house in summer 2007, but that he did not remember anyone hitting him with a belt (or anything else) (Tr. 221-25). He said that his mother and Ms. Hancock picked him up from Defendant's house, but he did not remember what he told Mother and he did not show her anything on his body (Tr. 222-23). And he testified that he did not remember talking to a police officer or to CAC interviewer Rachel Happel (Tr. 223-24).

The out-of-court statements did not duplicate this in-court testimony. In fact, they did the opposite. Mother testified that on the way home from Defendant's house, L.Y. told her that he had a bruise (Tr. 184). When they got home, L.Y. showed her his bruised buttocks and said that Defendant had "whopped" him with a belt (Tr. 188). Ms. Hancock also recalled L.Y.'s statement from the ride home, but recalled that L.Y. had said then that he had bruises on his bottom because his dad "whopped [his] butt" (Tr. 162). Officer Ringgold testified that he spoke to L.Y. later, and that L.Y. told him that Defendant spanked him with a belt every day because L.Y. "has accidents" (Tr. 277). And during the video-recorded CAC interview, L.Y. told interviewer Rachel Happel that Defendant spanked him with a belt on his bare bottom every day as punishment for pooping on himself and that the spankings caused bruises (St. Ex. 13). This

evidence obviously did not “duplicate” L.Y.’s trial testimony—it contradicted it. L.Y.’s out-of-court statements cannot be characterized as “bolstering” his in-court testimony.

Further, the out-of-court statements did not “bolster” one another. A child victim’s out-of-court statements can be considered bolstering only if they are entirely duplicative. *See Redman*, 916 S.W.2d at 792. Even where multiple witnesses testify about *a single statement* of a child that they all observed, the testimony of those witnesses is not improper bolstering because each witness is testifying “to his or her own recollection of [the victim’s] statement and the circumstances surrounding the interview.” *Id.* Each witness’s testimony supports the consistency of the victim’s account and, therefore, has independent probative value. *Id.*

Here, L.Y.’s statements to Ms. Hancock, Mother, Officer Ringgold, and Ms. Happel were not duplicative of one another. The circumstances of each statement was different—first, L.Y. spontaneously disclosed his injury to Ms. Hancock and Mother in the car, then he provided additional detail to Mother after they got home, and later he included still more specifics as he spoke to Officer Ringgold and finally Ms. Happel (Tr. 161-62, 166-67, 184-85, 188, 277; St. Ex. 13). The circumstances of each statement, in addition to the content of the statements, was probative of the credibility of L.Y.’s allegations—an issue especially important in light of his trial testimony, where he essentially denied that

anything had happened. The trial court acted well within its discretion in allowing the State to offer evidence of all of L.Y.'s prior disclosures to assist the jury in determining whether to believe L.Y.'s out-of-court allegations or his in-court denials.

To support his argument that the admission of L.Y.'s out-of-court statements was improper bolstering, Defendant relies solely on this Court's decision in *State v. Seever*, 733 S.W.2d 438 (Mo. banc 1987). In *Seever*, this Court held that the admission of a video-recorded pre-trial interview with a child victim was improper bolstering where the child testified at trial and the video and trial testimony "covered the same precise ground." *Id.* at 441. Because the "bolstering" was a "departure from the normal course of trial proceedings" not expressly contemplated by section 492.304, which generally allowed for the admission of recorded statements, this Court reversed the defendant's conviction. *Id.*

It is highly questionable whether *Seever* is still good law. After *Seever* was decided, the legislature amended section 492.304 to state, "If the visual and aural recording of a verbal or nonverbal statement of a child is admissible under this section and the child testifies at the proceeding, it shall be admissible in addition to the testimony of the child at the proceeding whether or not it repeats or duplicates the child's testimony." § 492.304.3, RSMo 1992. Thus, the holding of *Seever*—

that a videotape that entirely duplicates the victim's trial testimony is inadmissible—has been expressly abrogated by statute.

And in *Silvey*, this Court refused to extend the holding of *Seever* to prevent the admission of other out-of-court statements that overlap with the victim's trial testimony. 894 S.W.2d at 672. The Court reasoned that the victim's out-of-court statements to her mother, her sister, and a social worker were “informal and not planned as a substitute for [the victim's] testimony, and did not bolster her trial testimony because, even taken together, they did not repeat her testimony such that the victim essentially testified twice. *Id.* As noted above, Missouri courts have consistently recognized that a victim's out-of-court disclosures have probative value beyond mere “repetition” and do not constitute improper bolstering. *See e.g. Gaines*, 316 S.W.3d at 450.

To the extent *Seever* states a rule of law that retains any vitality, Defendant's case is distinguishable. None of L.Y.'s out-of-court disclosures were intended to substitute for his trial testimony. He spontaneously disclosed his injuries to Mother and Ms. Hancock, and his interviews with Officer Ringgold and Ms. Happel were investigative in nature (Tr. 162, 166, 184, 188, 276, 345). And, as argued above, the out-of-court statements did not duplicate L.Y.'s trial testimony; in fact, they contradicted his in-court testimony. Defendant's objection to the admission of L.Y.'s out-of-court statements on the ground that the

statements bolstered his testimony was without merit and was properly overruled.

Point III should be denied.

#### **IV. (refused instruction)**

**The trial court did not abuse its discretion in refusing to submit “Instruction A”—a purported “lesser-included offense” instruction on third-degree assault—as offered by the defense. Third-degree assault is not a lesser-included offense of abuse of a child. Thus, defense “Instruction A” was defective as a matter of law and was properly refused.**

In his fourth point, Defendant argues that the trial court abused its discretion in refusing to submit “Instruction A” to the jury, which purported to be a “lesser-included offense” instruction on third-degree assault. App. Br. at 41-44. Defendant contends that because the evidence would have supported an of acquittal of abuse of a child and conviction of third-degree assault, he was entitled to the instruction. App. Br. at 42-43.

Defendant’s argument fails because, despite his insistence to the contrary, third-degree assault is not a lesser-included offense of abuse of a child. Thus, the trial court did not err in refusing to submit the instruction.

##### **A. Additional facts**

Defendant was charged with the class C felony of “abuse of a child,” as set forth in section 568.060 (L.F. 6). The information alleged that Defendant committed the charged offense in that he “knowingly inflicted cruel and inhuman punishment upon [L.Y.], a child less than seventeen years old, by striking him with a belt” (L.F. 6).

During the instruction conference near the end of the trial, Defendant asked the court to submit “Instruction A,” a verdict director for third-degree assault (Tr. 369-70; L.F. 30). The offered instruction read as follows:

If you do not find the defendant guilty of abuse of a child as submitted in Instruction No. 5, you must consider whether he is guilty of assault in the third degree under this instruction.

If you find and believe from the evidence beyond a reasonable doubt:

That on or between June 17<sup>th</sup> and July 27<sup>th</sup>, 2007, in the County of Greene, State of Missouri, the defendant recklessly caused physical injury to [L.Y.] by striking him with a belt, then you will find defendant guilty under this instruction of assault in the third degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

As used in this instruction, the term “recklessly” means to consciously disregard a substantial and unjustifiable risk that circumstances exist or that a result will follow and such disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation.

(L.F. 30).

The prosecutor opposed the submission of Instruction A, arguing that third-degree assault was not a lesser-included offense of abuse of a child (Tr. 370). The prosecutor pointed out that third-degree assault requires proof of injury or attempt to cause injury, whereas abuse of a child has no injury requirement (Tr. 370). Because third-degree assault requires proof of at least one element not required by abuse of a child, the prosecutor argued, it is not a lesser-included offense (Tr. 370). The trial court agreed and refused the instruction (Tr. 372).

**B. Standard of review**

“A trial court is required to instruct the jury on a lesser-included offense only if there is a basis in the evidence for acquitting the defendant of the offense charged and convicting the defendant of the lesser offense.” *State v. Thomas*, 161 S.W.3d 377, 380 (Mo. banc 2005) (citing § 556.046.2). The court must view the evidence in the light most favorable to the defendant. *Id.* If in doubt, the court should instruct on the lesser-included offense. *Id.*

**C. Analysis**

In determining whether a trial court erred in refusing to give a lesser-included offense instruction, the reviewing court must consider two questions: “(1) was the offense a lesser-included offense, and (2) was the evidence such that it was error not to give the instruction.” *State v. Stewart*, 296 S.W.3d 5, 16 (Mo. App. S.D. 2009); accord *State v. Nolan*, 872 S.W.2d 99, 104 (Mo. banc 1994) (finding no error in trial court’s refusal to give first-degree trespass instruction

because first-degree trespass was not a lesser-included offense of the charged offense of first-degree burglary); *State v. Fields*, 739 S.W.2d 700, 703-05 (Mo. banc 1987) (holding that trial court properly refused sexual abuse instructions because the sexual abuse instructions as offered did not state lesser-included offenses of the charged offense of sodomy). Where the offered instruction does not state an actual lesser-included offense, it cannot be submitted to the jury even if the evidence would support a conviction for that offense. *See Fields*, 739 S.W.2d at 704. “[T]he legislature is at liberty to provide that the same conduct may constitute different offenses.” *Id.* at 705. “If such is done, the prosecutor has the discretion to decide which offense is charged.” *Id.*

In this case, the trial court correctly refused Defendant’s third-degree assault instruction because third-degree assault is not a lesser-included offense of abuse of a child—the offense with which Defendant was charged. An offense is “included” in another only if at least one of three criteria is met:

- (1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
- (2) It is specifically denominated by statute as a lesser degree of the offense charged; or
- (3) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein.

§ 556.046.1. Third-degree assault, as defined in Instruction A, did not meet any of the three criteria to be considered a lesser-included offense of abuse of a child.

First, third-degree assault cannot be established by proof of the same or less than all the facts required to establish the commission of abuse of a child. In evaluating whether one offense is included in another, the Court must focus on the statutory elements of each offense, not the evidence adduced at trial. *State v. McTush*, 827 S.W.2d 184, 188 (Mo. banc 1992). “If each offense requires proof of a fact that the other does not, then the offenses are not lesser included offenses, notwithstanding a substantial overlap in the proof offered to establish the crimes.” *Id.*; see also *State v. Derenzy*, 89 S.W.3d 472, 474 (Mo. banc 2002) (“The elements of the two offenses must be compared in theory without regard to the specific conduct alleged.”).

The crime of “abuse of a child,” as charged in this case, has three elements. The State must prove that the defendant (1) knowingly (2) inflicted cruel and inhuman punishment (3) upon a child less than 17 years old. § 568.060.1(1); (L.F. 6). Assault in the third degree, as presented in Instruction A, requires proof that the defendant (1) recklessly (2) caused physical injury (3) to another person. § 565.070.1(1); (L.F. 30). Third-degree assault requires proof of physical injury, whereas child abuse does not; child abuse requires proof that cruel and inhuman punishment was inflicted *and* that the victim was less than 17 years old, whereas third-degree assault requires proof of neither. Because each offense requires proof

of at least one element that the other does not, neither offense is included in the other. *Cf. State v. Horton*, No. ED93475, slip op. at 6-7 (Mo. App. E.D. Sept. 21, 2010)<sup>5</sup> (holding that because second-degree assault requires proof of physical injury whereas child abuse did not, the former is not a lesser-included offense of the latter).

The second and third criteria outlined by section 556.046.1 for identifying lesser-included offenses clearly do not apply in this case. Third-degree assault is not “specifically denominated by statute as a lesser degree” of child abuse, nor does third-degree assault consist of an attempt to commit child abuse. *See* §§ 556.046, 565.070.1(1), 568.060.1(1).

Defendant notes that “[a]ssault in the third degree has been held to be a lesser included offense of first degree assault.” App. Br. at 43 (citing *State v. Hibler*, 5 S.W.3d 147, 151 (Mo. banc 1999)). But, as this Court noted in *Hibler*, “third degree assault is specifically denominated by statute as a lesser degree of the offense charged [first-degree assault].” 5 S.W.3d at 151. The same is not true of third-degree assault and child abuse. *Hibler* has no relevance to Defendant’s case.

And Defendant’s reliance on *State v. Pond*, 131 S.W.3d 792, 794 (Mo. banc 2004), is also misplaced. In *Pond*, this Court stated that a “defendant is entitled to

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<sup>5</sup> This decision is not yet final.

an instruction on any theory the evidence establishes.” *Id.* at 794. But the Court’s analysis began by recognizing that the instruction that the defendant sought to offer—first-degree child molestation—was a lesser-included offense of the charged offense—statutory sodomy. *Id.* at 793. Nothing in *Pond* suggests that a defendant is entitled to any instruction he wishes—the tendered instruction must involve an offense that is included in the crime charged. Indeed, had Instruction A been offered and Defendant convicted of third-degree assault, such a conviction would have been in error because Defendant was never charged with assault. *See State v. Moseley*, 735 S.W.2d 46, 49 (Mo. App. E.D. 1987) (jury was improperly instructed on sexual abuse because sexual abuse, as submitted, was not a lesser-included offense of the charged offense of sodomy).

Because third-degree assault is not a lesser-included offense of child abuse, the trial court did not err in refusing to submit Defendant’s Instruction A to the jury. Point IV should be denied.

## V. (sufficiency of evidence)

**The evidence presented at trial was sufficient to permit a reasonable jury to find beyond a reasonable doubt that Defendant was guilty of abuse of a child.**

In his final point, Defendant contends that the evidence was insufficient to sustain his conviction for child abuse. Primarily, he complains that there was no “direct evidence” proving that Defendant’s striking L.Y. with a belt caused any injury—that evidence, he insists, was all hearsay that should not have been admitted. App. Br. at 46-47. Defendant also argues that there was no evidence that he “knew he was inflicting cruel and inhumane [*sic*] treatment.” App. Br. at 47.

Defendant’s claim should be rejected. The State’s evidence, viewed in the light most favorable to the verdict, was more than sufficient to allow the jury to conclude that Defendant knowingly inflicted cruel and inhuman punishment upon seven-year-old L.Y. by violently striking him with a belt.

### A. Standard of review

Appellate review is limited to determining whether sufficient evidence exists from which a reasonable fact-finder might have found the defendant guilty beyond a reasonable doubt. *State v. Freeman*, 269 S.W.3d 422, 425 (Mo. banc 2008). In applying this standard, the “evidence and all reasonable inferences therefrom are viewed in the light most favorable to the verdict, disregarding any

evidence and inferences contrary to the verdict.” *Id.* As this Court explained in *State v. Grim*,

If an appellate court sets itself up to select between two or more acceptable inferences, it ceases to function as a court and functions rather as a juror, actually a ‘super juror’ with veto powers. It is not the function of the court to decide the disputed facts; it is rather the court’s function to assure that the [fact-finder], in finding the facts, does not do so based on sheer speculation.

854 S.W.2d 403, 414 (Mo. banc 1993).

## **B. Analysis**

As noted in Point IV, *supra*, the offense of “abuse of a child” requires proof of three elements: that the defendant (1) knowingly (2) inflicted cruel and inhuman punishment (3) upon a child less than 17 years old. § 568.060.1(1). There is no dispute in this case as to the third element; L.Y. was seven years old at the time of the alleged abuse (Tr. 175-76). And the State’s evidence was sufficient to prove beyond a reasonable doubt each of the remaining two elements. For ease of analysis, Respondent will address them in reverse order.

1. The evidence was sufficient to prove that Defendant inflicted cruel and inhuman punishment upon L.Y.

First, the evidence was sufficient to prove that Defendant “inflicted cruel and inhuman punishment” upon L.Y. This Court has recognized that evidence showing that a defendant struck a child hard enough to cause visible, lingering bruises is sufficient to make a submissible case that the defendant inflicted “cruel and inhuman punishment” upon the child. *State v. Sumowski*, 794 S.W.2d 643, 646 (Mo. banc 1990) (“The direct and circumstantial evidence that defendant struck [the victim] in the face with sufficient force to cause bruises which would be visible two days later is a sufficient showing” that the defendant inflicted cruel and inhuman punishment); *see also State v. Still*, 216 S.W.3d 261, 266 (Mo. App. S.D. 2007) (holding that punishment is “cruel and inhuman” where a child is “struck with sufficient force and violence so as to leave severe bruises”); *State v. Silvey*, 980 S.W.2d 103, 107 (Mo. App. S.D. 1998) (defendant inflicted “cruel and inhuman punishment” by spanking his stepsons with a wooden paddle hard enough to cause severe bruising that persisted for several days); *State v. Lauer*, 955 S.W.2d 23, 26 (Mo. App. S.D. 1997) (evidence that defendant spanked child with enough force to result in serious bruising was sufficient to show “cruel and inhuman punishment”).

Here, the evidence overwhelmingly showed that Defendant caused severe bruising to L.Y.’s buttocks and upper thighs by spanking him hard with a belt on multiple occasions. Almost immediately after Mother and Ms. Hancock had picked L.Y. up from Defendant’s house, L.Y. told them that he had bruises

because Defendant “whopped” his bottom as punishment for having accidents on himself (Tr. 161-62, 166, 184, 188). During the subsequent investigation, L.Y. told Officer Ringgold and CAC interviewer Rachel Happel that his father spanked him every day (Tr. 277; St. Ex. 13). The jury viewed photographs showing the bruises and lacerations on L.Y.’s buttocks and legs (Tr. 165; St. Ex. 4-8). As Officer Ringgold testified, the marks were “linear” and wrapped around L.Y.’s leg, consistent with being struck with a belt (Tr. 280-82; St. Ex. 4-8). Additionally, in his interview with an investigator, Defendant admitted spanking L.Y. with his belt on multiple occasions during L.Y.’s summer 2007 visit (St. Ex. 11). He said that the last time he spanked L.Y. was two days before the boy was picked up by Mother and Ms. Hancock (St. Ex. 11). Although Defendant denied that he hit L.Y. hard enough to cause any bruising, he admitted that there was no one else in his house who could have done it (St. Ex. 11). This evidence was more than sufficient to permit the jury to find beyond a reasonable doubt that Defendant had inflicted cruel and inhuman punishment upon L.Y.

Defendant argues that the primary evidence showing that L.Y.’s bruises were caused by him was inadmissible hearsay, and therefore the evidence was insufficient to prove the charged offense. App. Br. at 46-47. But this argument misunderstands the law. Even if the Court finds that the hearsay was improperly admitted, reversal for insufficient evidence is not the appropriate remedy. Reversing a defendant’s conviction on the basis of insufficient evidence triggers

the Double Jeopardy Clause and precludes retrial. *State v. Self*, 155 S.W.3d 756, 764 (Mo. banc 2005). But the “[e]rroneous admission of evidence does not preclude retrial ‘even though when such evidence is discounted there may be evidentiary insufficiency.’” *State v. Kinkead*, 983 S.W.2d 518, 519 (Mo. banc 1998) (quoting *State v. Wood*, 596 S.W.2d 394, 398 (Mo. banc 1980)). Of course, as explained in Point I, L.Y.’s out-of-court statements were properly admitted. But if this Court concludes that the statements were improperly admitted and that Defendant was thereby prejudiced, the proper remedy would be to remand for a new trial, not to declare the evidence insufficient and discharge Defendant entirely. *See e.g. Kinkead*, 983 S.W.2d at 519.

Moreover, the State made a submissible case on the issue of “cruel and inhuman punishment” even without L.Y.’s out-of-court statements. Defendant’s admission that he spanked L.Y. with his belt on more than one occasion during the summer 2007 visit (St. Ex. 11), his acknowledgement that no one else in the house spanked L.Y. (St. Ex. 11), and the photographs depicting extensive bruising on L.Y.’s backside, taken the day Mother and Ms. Hancock picked L.Y. up from Defendant’s house (St. Ex. 4-8; Tr. 273-79), constituted sufficient evidence of Defendant’s guilt to allow the case to be submitted to the jury.

2. The evidence was sufficient to prove that Defendant acted knowingly in inflicting cruel and inhuman punishment upon L.Y.

A person acts “knowingly” when he is aware that his conduct is “practically certain” to cause a particular result. § 562.016.3(2). Direct evidence of a person’s mental state is seldom available, so proof of a criminal defendant’s mental state will often depend upon circumstantial evidence and permissible inferences. *Perry*, 275 S.W.3d at 248. The factfinder may infer a defendant’s intent from surrounding facts or from the act itself. *Still*, 216 S.W.3d at 266.

In this case, Defendant’s intent could reasonably be inferred from the fact that he continued to spank L.Y. with his belt despite L.Y. having obvious bruises from the spankings. The evidence showed that the bruises on L.Y.’s backside were at different stages of healing, indicating that some of the injuries were older than others (Tr. 281). L.Y. told Officer Ringgold and CAC interviewer Rachel Happel that Defendant spanked him every day (Tr. 277; St. Ex. 13). Additionally, Defendant confessed that he had spanked L.Y. just two days before Mother picked L.Y. up from Defendant’s house, and had spanked him three or four times before that on other days during L.Y.’s month-long visit (St. Ex. 11). The evidence also showed that Defendant spanked L.Y.’s bare bottom (Tr. 166, 247-48). Although he denied it at first, Defendant eventually admitted during his interview with the police that he had seen marks on Defendant’s backside (St. Ex. 11). From this, the jury could conclude that Defendant had seen bruises and therefore knew that his spankings were causing injury to L.Y., but continued to do it anyway. Thus, the

jury could find beyond a reasonable doubt that Defendant knowingly inflicted cruel and inhuman punishment upon L.Y.

The inference that Defendant knowingly inflicted cruel and inhuman punishment when he spanked L.Y. was further strengthened by Defendant's attempt during the police interview to minimize what he had done. "A permissible inference of guilt may be drawn from the acts or conduct of a defendant, subsequent to an offense, if they tend to show a consciousness of guilt and a desire to conceal the offense or a role therein." *State v. Chaney*, 967 S.W.2d 47, 53 (Mo. banc 1998) (quoting *State v. Isa*, 850 S.W.2d 876, 894 (Mo. banc 1993)).

Early in Defendant's interview with police, Defendant tried to downplay the extent of the spanking (St. Ex. 11). He said that he would give L.Y. two or three "licks" at the most, always with L.Y.'s pants pulled up (St. Ex. 11). He also said that he never noticed any marks on L.Y. aside from sores caused by L.Y. soiling his pants (St. Ex. 11). But later in the interview Defendant revised upward the number of "licks" from the spankings, saying that he would give three or four (St. Ex. 11). And he eventually admitted that he had seen some marks on L.Y., but claimed that he thought that L.Y. got them from roughhousing with his little brother (St. Ex. 11).

The jury, however, could have easily discredited Defendant's comment that he thought the marks were caused by L.Y.'s brother, especially in light of evidence that L.Y. had been with Defendant for over a month, and that L.Y.'s

brother had not been living with them (Tr. 176-77, 239-40; St. Ex. 11). And the jury could also have disbelieved Defendant's story that L.Y. kept his pants on when spanked. L.Y. told Ms. Hancock that Defendant made him submit to the spankings naked (Tr. 166). And Defendant's wife testified that after the last spanking she found bits of fecal matter on the bed, on the floor, and on Defendant's belt (Tr. 247-48)—an unlikely result had L.Y.'s pants been pulled up when the spanking was administered. Defendant's attempt to offer a false explanation for the bruises and minimize the extent of the spankings is indicative of his intent.

The evidence was sufficient to support a reasonable inference that Defendant knowingly inflicted cruel and inhuman punishment upon seven-year-old L.Y. Point V should be denied.

## CONCLUSION

The trial court did not commit reversible error in this case. Defendant's conviction should be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT  
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## CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 12,446 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2007 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 15<sup>th</sup> day of November, 2010, to:

Michael Baker  
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**APPENDIX**

Sentence and Judgment .....A1