IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	No. SC91427
	)	
DANIEL M. PRIMM	)	
	)	
Appellant.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 11
THE HONORABLE BRYAN L. HETTENBACH, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant adopts and incorporates the jurisdictional statement in his opening brief.

STATEMENT OF FACTS

Appellant adopts and incorporates the statement of facts in his opening brief.

POINTS RELIED ON AND ARGUMENT

Appellant adopts and incorporates the Points Relied On in his opening brief as well as the Argument in Point III.

REPLY ARGUMENT I

The State points to *State v. Schaal*, 806 S.W.2d 659, 664 (Mo. banc 1991), *State v. Graham*, 641 S.W.2d 102, 105 (Mo. banc 1982), *State v. Basque,* 485 S.W.2d 35, 37 (Mo. 1972), and *State v. Baker,* 300 S.W. 699, 702 (Mo. 1927) in support of its argument that this Court has generally allowed evidence of uncharged misconduct committed against same victim. Resp. Br. 20-21. But in fact, this Court heavily scrutinizes attempts by prosecutors to present evidence of uncharged crimes or misconduct, when such evidence is offered for no legitimate purpose.

Missouri's rule generally prohibiting such evidence is based on Article I, Sections 17 and 18(a) of the Missouri Constitution. In *State v. Burns*, this Court struck down Section 566.025, RSMo 1994, which authorized the use of evidence to show the defendant's propensity to commit certain acts of sexual misconduct. 978 S.W.2d 759, 760 (Mo. banc 1998). This Court, applying the reasoning in *State v. Bernard*, 849 S.W.2d 10, 13 (Mo. banc 1993), found that by allowing evidence of uncharged allegations to prove propensity to commit crimes, the defendant would be forced to defend against uncharged allegations of misconduct, as well as the charged crime. *Burns*, 978 S.W.2d at 761-62 (*citing Bernard*, 849 S.W.2d at 16).

A revised version of Section 556.025 added a balancing test, similar to Federal Rule 414, which weighed the probative value of such evidence against its prejudice. Section 566.025, RSMo 2000. That statute was also struck down by this

Court. *State v. Ellison,* 239 S.W.3d 603, 606 (Mo. banc 2007). This Court reiterated that under the Missouri Constitution, "evidence of prior criminal acts is *never* admissible for the purpose of demonstrating the defendant's propensity to commit the crime with which he is presently charged." *Id.*

Accordingly, decisions such as *State v. Graham* and *State v. Basque*, relied upon by the State, are not useful to the extent they hold that uncharged allegations demonstrate the "probability" that the defendant committed the charged crime against a certain person. Resp. Br. 21; *Graham*, 641 S.W.2d at 105; *Basque*, 485 S.W.2d at 37. Evidence admitted to show the probability the defendant committed the charged crimes against a certain person based on other crimes against that person is another name for propensity evidence, which Missouri law does not allow. *Ellison*, 239 S.W.3d at 606; *State v. Vorhees*, 248 S.W.3d 585, 591 (Mo. banc 2008) (holding signature *modus operandi* evidence is "actually just propensity evidence by another name").

As the State points out, Federal Rule of Evidence 414 allows such evidence to demonstrate that the defendant had a "disposition of character, or propensity, to commit child molestation." Resp. Br. 24-25. And it follows that states that do not have constitutional provisions similar to Article I, Sections 17 and 18(a) generally allow propensity evidence in sex abuse cases. Resp. Br. 25-29 (collecting out-of-state cases upholding use of uncharged allegations of misconduct to show, among

other things, "propensity," "disposition to commit sex crimes" and the "lustful disposition" of the defendant). Certainly, it is true that many states and federal rules allow evidence to prove the defendant's propensity to commit sex crimes. Resp. Br. 25-29.

Missouri, however, does not. *Burns*, 978 S.W.2d at 761-62; *Ellison*, 239 S.W.3d at 606; *Vorhees*, 248 S.W.3d at 591. Missouri's relatively strict treatment of uncharged crime evidence in sex offenses cases is consistent and fair. Many rules specifically targeting criminal sex offenders are based on an assumption that these offenders are more likely than other criminals to commit the same crime again and again. *F.R. v. St. Charles County Sheriff's Dept.,* 301 S.W.3d 56, 65 (Mo. banc 2010) (noting, "rather than assuming that the [recidivism] rates are high [for sex offenders], one should look at the data. Of the five categories of felony offenders in Missouri's correctional population . . . sex offenders have the lowest rates of recidivism.") Other jurisdictions allow this evidence in sex abuse cases either under a propensity theory, or a loose application of the exceptions, when there is simply no reason to do so.

This Court should not bend or loosely apply the limited exceptions to the general rule against propensity evidence as the State proposes. The State argues that the uncharged-crime evidence in this case demonstrated (1) motive, (2) a

common scheme or plan, and (3) was necessary to show the defendant's plan and preparation. Resp. Br. 21.

As to the motive exception, the State attempts to distinguish the reasoning of the Court of Appeals, Western District in *State v. Batiste*, 264 S.W.3d 648, 649 (Mo. App. W.D. 2008); Resp. Br. 32. In that case, the Court of Appeals remanded for a new trial when the State introduced an uncharged incident of child abuse against the same child as charged in the indictment. *Id.* The Court held that the uncharged allegation was not probative as to motive because "[t]he evidence that Batiste had committed previous acts of abuse against J.A.V. did not explain why he abused J.A.V. on March 27, 2006." *Id.*

The State takes issue with that reasoning, asserting it is contrary to *State v. Bolden*, 494 S.W.2d 61 (Mo. 1973) because "[i]mplict in the court's ruling in *Bolden* . . . is a recognition that in a prior act of violence against the same victim, the defendant has a similar motive, to harm the victim[,] as he does in the charged crime." Resp. Br. 32. The State misinterprets *Bolden*, however. In that case, an element of the charged crime of assault was the "intent to kill with malice aforethought." 494 S.W.2d at 66. The defendant admitted shooting his wife, but denied that he had the requisite intent or malice aforethought because the shooting was in the heat of an argument. *Id.* Accordingly, this Court found that a

prior incident where the defendant had broken his wife's jaw to be probative to the contested issue of intent and premeditation. *Id.*

In this case, in contrast, the State does not appear to argue that Mr. Primm put intent at issue. Rather, Mr. Primm denied that he committed the charged acts at all. *State v. Nelson,* 178 S.W.3d 638, 643 (Mo. App. E.D. 2005) (holding that intent is not at issue in sex abuse case where defendant did not claim he accidentally or innocently touched victim's body part). "[T]here is no reason to introduce prejudicial evidence where there is no actual controversy as to the defendant's knowledge or intent." *Nelson*, 178 S.W.3d at 643 (*citing State v. Dudley*, 912 S.W.2d 525, 529 (Mo. App. W.D. 1995)).

Additionally, the State argues that what constitutes a "motive" is different in sex cases than in other criminal cases. This is yet another attempt, however, to loosely or imprecisely apply an exception to the general rule against propensity evidence to encompass sex crimes and no others. The State argues, "[i]n Defendant's case, as will be the case in most sex cases, Defendant's crimes were not a reaction to circumstances, but required planning, waiting, and preparation." Resp. Br. 33. The State argues that each of the "acts" were connected and "intended to cause the next act to be easier to accomplish." Resp. Br. 33. But it is not clear how evidence about other, similar, sexual activity supplies a reason for the charged sexual activity, or even whether the "reason" for the charged sexual

activity is an actual controversy in this case. Evidence of uncharged sexual conduct does not explain why Mr. Primm engaged in the specific charged crimes. "The satisfaction of the defendant's sexual desire for the victim" is not a motive and is thus an erroneous application of that exception. *Graham*, 641 S.W.2d at 105.

Further, the evidence was unnecessary to demonstrate a common scheme or plan that applied to both charged and uncharged crimes. Resp. Br. 22. There was no evidence of an overarching plan in this case; there was simply testimony from R.C. and T.B. about individual sexual acts. Like in *State v. Johnson,* the allegations in this case involved sexual activity with two teenagers that the defendant knew well. 161 S.W.3d 920 (Mo. App. S.D. 2005). There was no evidence that the separate acts of misconduct were part of any "overarching plan." *Id.* Here, as in *Johnson*, there was no evidence that "tended to show the defendant had some overarching plan and the separate acts of sexual misconduct were part of that plan." *Id.*

None of the recognized exceptions apply to this evidence. Courts presume that evidence of other crimes is prejudicial if it is inadmissible under any of the exceptions. *Nelson*, 178 S.W.3d at 643. And "[a]n appellate court has no way of knowing—and should not speculate about—what evidence a jury did or did not believe and the extent to which that evidence entered into the jury's decision-making process." *State v. Davis*, 738 S.W.2d 517, 519 (Mo. App. S.D. 1987). "[T]he

record must demonstrate that the jury disregarded or could not have been influenced by the evidence." *Id.*

Given that both R.C. and T.B. made similar allegations and the jury acquitted Mr. Primm of several of the charges, it is not unreasonable to believe that the jury was influenced by evidence of other crimes and misconduct tending to show a criminal propensity, a tendency to commit sex crimes, or that Appellant was simply a bad person. Mr. Primm, for no legitimate reason, had to defend against uncharged allegations of misconduct as well as the charged crimes. *Burns*, 978 S.W.2d at 761-62.

Using this evidence at trial deprived Mr. Primm of his right to be tried only for the charged offense, to due process of law, and to a fair trial under the U.S. Constitution, Amends. V, VI, and XIV, and Article I, Sections 10, 17, and 18(a) of the Missouri Constitution. Appellant asks for a new trial.

REPLY ARGUMENT II

The State maintains it presented sufficient evidence on Count 1, the crime of second-degree statutory rape, focusing on T.B.'s testimony:

> That's when he started doing it then. He had – , that's when he started like kissing me and stuff.

Tr. 239. The State argues that the phrase, "he started doing it then" was sufficient evidence of sexual intercourse, focusing on the words, "doing it," which it argues is a slang term for sexual intercourse. Resp. Br. 39. The State also points to T.B.'s testimony with respect to other charged counts where she testified that Appellant had asked her, "do you want to do it" and "let's do it." Resp. Br. 39-40.

But in making these arguments, the State needlessly complicates this issue. T.B.'s testimony was ambiguous. The prosecutor immediately clarified the ambiguous testimony that is at issue. Tr. 239. The prosecutor reviewed T.B.'s prior testimony by asking, "You said he touched your breasts with his mouth?" Tr. 239. T.B. answered, "Yes." Tr. 239. The prosecutor then asked, "did he used his mouth to touch you anywhere else on your body?" Tr. 239. T.B. responded, "My vagina." Tr. 239. The prosecutor then asked, "And after he touched his mouth to your vagina, did he touch you with any other parts of his body?" and T.B.

responded, "No." Tr. 239. T.B. concluded, "[T]hat's when he took me home." Tr. 239.

By focusing its response on the question of whether the statement, "doing it then . . . that's when he started like kissing me and stuff" is evidence of sexual intercourse, the State does not consider the totality of the witness's testimony. The prosecutor reviewed what touching, exactly, the witness alleged. Tr. 239. There was no evidence of sexual intercourse presented to support Count 1. Tr. 239. The State should have simply conceded that it failed to present evidence on Count 1, as it did with Counts 4, 7, and 14 at trial. Tr. 345; L.F. 70-71. Count 1 must be vacated.

CONCLUSION

On Point I, Mr. Primm asks for a new trial.

On Point II, he asks the Court to vacate Count 1 because the State did not present evidence on that count.

On Point III, as the state concedes, the Court should remand the case to the trial court for a correction *nunc pro tunc*, because Count 10 of the written sentence and judgment erroneously states that count is consecutive to other counts.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rules 84.06(g) and 83.08(c), I hereby certify that on this 26th day of April, 2011, two true and correct copies of the foregoing brief and a

floppy disk containing the foregoing brief were mailed postage prepaid to Mr. John W. Grantham of the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the word count limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, using Plantagenet Cherokee 13-point font. The word-processing software identified that this brief contains **2,585** words. Also, the enclosed diskette has been scanned for viruses with a currently updated version of Symantec Endpoint Protection software and found to be virus-free.

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