IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	**No. WD66013**
	)	
DONALD J. ELLISON,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT
FROM THE CIRCUIT COURT OF LIVINGSTON COUNTY, MISSOURI
FORTY-THIRD JUDICIAL CIRCUIT
THE HONORABLE WARREN L. McELWAIN

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

Donald Ellison (hereinafter, Mr. Ellison) appeals his conviction for the class A felony of child molestation in the first degree, § 566.067, RSMo 2000.[1] On September 20, 2005, the Honorable Warren L. McElwain sentenced Mr. Ellison to twenty years imprisonment (Tr. 342; L.F. 42-44).[2] A timely notice of appeal was filed, *in forma pauperis*, on September 29, 2005 (L.F. 45-49; Tr. 350). This appeal does not involve any issue reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court, thus jurisdiction lies in the Missouri Court of Appeals, Western District. Article V, § 3, Mo. Const. (as amended 1982); § 477.070.

[1] All statutory references are to RSMo 2000, unless otherwise indicated.

[2]The Record on Appeal consists of a transcript (Tr.) and a legal file (L.F.).

STATEMENT OF FACTS

Initially a complaint was filed charging Mr. Ellison with two counts of statutory rape in the first degree, § 566.032, but the state dismissed one count prior to preliminary hearing (L.F. 2, 13). After preliminary hearing, an information was filed charging Mr. Ellison with two counts of statutory rape in the first degree, § 566.032, but later one count was again dismissed by the state (L.F. 2, 13, 15). Subsequently, Mr. Ellison was charged by amended information with the class A felony of child molestation in the first degree in the first degree, § 566.067 (L.F. 22-23; Tr. 7-8). The state said it was filing the amendment "based on testimony or evidence received at the deposition of the complaining witness and is intended to conform with the evidence that she gave at that time" (Tr. 7). Mr. Ellison had no objection to the amendment (Tr. 9). It was alleged that between June 1, 2003, and August 31, 2003, he subjected J.G., who was less than fourteen years old, to sexual contact (L.F. 22). It was later specified in the verdict director that Mr. Ellison touched the genitals of J.G. with his genitals (L.F. 33). It was also alleged that Mr. Ellison was a prior offender in that he had a 1992 conviction for the class C felony of sexual abuse, § 566.100 (L.F. 22).

Pretrial, the defense filed a Motion in Limine (L.F. 16-18). That motion moved the trial court to enter an order *in limine* prohibiting that state or any witness from referring to or offering evidence that Mr. Ellison touched women and/or children, other than J.G., in an inappropriate manner (L.F. 16). This evidence would violate Mr. Ellison's rights to due process, a fair trial, and to be

tried for only charged crimes, as guaranteed under United States and Missouri Constitutions (L.F. 16, 18). The prejudicial impact of such evidence would substantially outweigh any probative value it may have (L.F. 16). The jury would give such evidence undue weight (L.F. 16). Such evidence should not be admitted under § 566.025, *citing* ***State v. Johnson***, 161 S.W.3d 920 (Mo. App. S.D. 2005)[3] (L.F. 17).

The state filed a motion in limine requesting, in part, that Mr. Ellison not elicit any evidence or testimony that there was no physical evidence to support the charge and that J.G. had become pregnant by a person other than Mr. Ellison after the alleged charged acts attributed to Mr. Ellison (L.F. 19-20).

A jury trial was held on August 4-5, 2005, before the Honorable Warren L. McElwain (L.F. 5-8). On the morning of the first day of trial, Mr. Ellison noted that under § 566.025 the state intended to use Mr. Ellison's prior sexual abuse conviction as substantive evidence to show to the jury his propensity to commit

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[3] The Southern District of this Court in ***Johnson*** noted that a prior version of § 566.025, which did not require the trial court to determine whether the probative value of such evidence is outweighed by the prejudicial effect, was declared unconstitutional by the Missouri Supreme Court in ***State v. Burns***, 978 S.W.2d 759 (Mo. banc 1998). ***Johnson***, 161 S.W.3d at 926 n. 6. The ***Johnson*** court also noted that Johnson did not challenge the constitutionality of the latest enacted **§ 566.025**. ***Id***.

the charged crime (Tr. 10-11). Mr. Ellison noted that after the statute had been found to be unconstitutional by the Missouri Supreme Court in "*State versus Burns*,"[4] the legislature had "revamped it," adding that the evidence had to be more probative than prejudicial (Tr. 11). Mr. Ellison argued that his prior conviction was more prejudicial than probative (Tr. 11). Mr. Ellison was concerned that the jury would convict him based solely upon his prior conviction (Tr. 12).

The state argued that the prior conviction had probative value (Tr. 12). The state attempted to distinguish the ***Burns*** case by arguing that the prior conviction here was "charged" and had "been proven through [Mr. Ellison's] own plea of guilty" (Tr. 13). The state argued that under the statute the state could introduce the prior conviction to show "propensity" unless the trial court found "that the prejudicial value outweighs the probative value" and that the burden was on Mr. Ellison to show that the prejudice outweighed the probative value (Tr. 13).

Mr. Ellison reiterated that the jury would likely convict him based upon the prior conviction and that it was more prejudicial than probative (Tr. 14).

The trial court ruled:

> The Court notes that State versus Burns had to do with uncharged crime, found that that was unconstitutional based on that. However, this is not only a charged crime but one of which the defendant admitted that he was guilty

[4] *See*, ***State v. Burns***, 978 S.W.2d 759 (Mo. banc 1998).

of. So under 566.025 the Court is going to overrule defendant's motion in limine. The Court is going to find that the evidence of a prior conviction is more probative than prejudicial and will therefore allow the state to adduce the evidence of the prior conviction in Howell County.

(Tr. 14-15).

Regarding the state's Motion in Limine, the state argued that the "allegation is that there was sexual contact, not intercourse that would leave perhaps a wound or semen, or some other fluid, or hair." (Tr. 16). The state said that because J.G. had reported the charged offense a year later, there was no physical evidence (Tr. 16). The state also noted that J.G. had a SAFE examination but because it was done a year after the charged crime, "naturally, given the nature of the allegations, there was no findings" (Tr. 16). The state wanted the court to exclude any reference to the SAFE examination "because there just wasn't anything found" (Tr. 16).

Defense counsel for Mr. Ellison said she agreed with the state "up to a certain point," but argued that it was proper for her to comment on the fact that after the SAFE examination J.G's allegations changed (Tr. 16). If the court ordered defense counsel not to directly comment that there were no findings on the SAFE exam, defense counsel would not do so, but she believed that it was probative for the jury to know that J.G.'s allegations changed after the SAFE exam (Tr. 16-17).

The trial court indicated that Mr. Ellison could show that J.G.'s story had

changed over time (Tr. 17). The state again insisted that the jury should not hear evidence that J.G. even had a SAFE exam, noting that the results "were nothing" (Tr. 17-18). The state argued that what it was claiming had "happened in '03 was strictly sexual contact, which wouldn't produce any results in a SAFE exam in '04" (Tr. 18).

Defense counsel countered that the original allegations, if true, would have shown evidence on the SAFE exam (Tr. 18). J.G. took the SAFE exam and then the allegations changed to something that would not show up on a SAFE exam, which was very probative (Tr. 18-19). The state countered that acts of sexual intercourse "that occurs two years ago doesn't necessarily show up on a SAFE exam" (Tr. 19). Defense counsel said that the SAFE exam was just a year later (Tr. 19). The trial court took the matter under advisement (Tr. 19). Later, the state told the court that if it was going to allow evidence about the SAFE examination, it needed to know so that it could subpoena a doctor to explain the results (Tr. 21). No evidence concerning the SAFE examination was offered or introduced into evidence at trial.

The first piece of evidence that the jury heard or saw was State's Exhibit No. 1, which was a copy of Mr. Ellison's 1992 conviction for the class C felony of sexual abuse in the first degree, § 566.100, for subjecting a thirteen-year-old girl "to sexual contact without her consent by the use of forcible compulsion and in the course of such offense [Mr. Ellison] inflicted serious physical injury" to that girl (Tr. 127; State's Exhibit 1; Appendix). Mr. Ellison objected to that exhibit (Tr.

127). He incorporated by reference all of the arguments that he had previously made (Tr. 127-28). This violated his constitutional rights (Tr. 128). The prior conviction was not probative; rather, it was highly prejudicial (Tr. 128). The trial court overruled the objection, and Exhibit No. 1 was admitted into evidence (Tr. 128). Photocopies of the exhibit were passed to the jury (Tr. 128). The following testimony was then presented.

J.G. was born on June 11, 1994 (Tr. 166). Often her mother had Mr. Ellison and his wife baby-sit J.G. and her older brother, Jimmy, at the Ellison's house in Wheeling, Missouri (Tr. 130, 131-33, 148-49, 167-68, 191). Sometimes only Mr. Ellison baby-sat (Tr. 176). He told J.G.'s mother that he had a prior conviction for a sex offense (Tr. 147-48). During the summer of 2003, J.G. was at the Ellison's' house several times a week (Tr. 189). Her brother was with her except maybe once (Tr. 191).

On August 19, 2004, J.G. was at her next-door neighbor's slumber party (Tr. 134, 168). There were three other girls at that party who were about J.G.'s age (Tr. 169). Two of the girls seemed to be telling a secret about J.G. (Tr. 187). Later the other girls were complaining about rough their lives were when J.G. told them they did not know how it felt to be molested or raped (Tr. 169-70, 184-85). This was the first time she had told anybody that this had happened to her (Tr. 174, 178, 180). The other girls said J.G. was lying, which made her cry (Tr. 170, 185).

After the girls told her friend's mother, she walked J.G. over to J.G.'s house to speak to J.G.'s mother (Tr. 135, 170). The other girls followed (Tr. 135, 170). J.G. told her mother that Mr. Ellison had raped her (Tr. 135-36, 139-40, 171). She knew that "raped" meant when a male would put his penis in a female's vagina when she did not want it to happen (Tr. 171-72, 185). She had not told her mother before because Mr. Ellison had threatened to kill her (Tr. 174, 178, 180). A friend of her mother took J.G. and her mother to the sheriff's office (Tr. 136, 172).

After they arrived at the sheriff's office, J.G. spoke to a male deputy sheriff (Tr. 150-51, 172). She said that she had been raped by Mr. Ellison (Tr. 142, 151). She said it happened when Mrs. Ellison was away and after Mr. Ellison would send the other children to the park to play (Tr. 153). She said that it had happened three times (Tr. 153). She told him the last time "this" had happened was the "Summer of 2003" (Tr. 173). She did not tell the deputy sheriff "the whole story" because he was a male (Tr. 172-73). J.G. was reluctant to talk to him because he was a male, so he made arrangements for J.G. to speak with a female officer the following day (Tr. 137-38, 143, 152).

After J.G. and her mother returned from the sheriff's office, the girls who had called her a liar made her cards wherein they apologized and said that they would stick by her side and that they now believed her (Tr. 143-44, 186-87).

The next day, J.G. talked to a female deputy sheriff (Tr. 138, 156, 175). She told the deputy what had happened, including things that happened before the

summer of 2003 (Tr. 175-76, 178).[5] She said that these things started after her sixth or seventh birthday and ended around her ninth birthday (Tr. 157). J.G. described various sexual acts involving her and Mr. Ellison (Tr. 159, 162-63). About every time she went over to the Ellison residence "something sexual in nature usually occurred" (Tr. 160). She told the deputy that these acts happened "about 15 to 20 times, about every time I was over there" when only Mr. Ellison was doing the baby-sitting (Tr. 160, 189, 190). J.G. described several incidents of "vaginal intercourse" (Tr. 163-64). On one occasion she was not able to move her arms or legs; she believed he used a rope (Tr. 164, 181-82). J.G. mentioned that Mr. Ellison had showed her pornography on videotapes and on a computer (Tr. 161-62, 183-84). He also videotaped her once (Tr. 164, 180-81).[6] The deputy sheriff told J.G. that she was brave and smart (Tr. 160). She told J.G. she would help J.G. (Tr. 161).

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[5] Prior to her testimony J.G. was allowed in the courtroom to hear the other witnesses testify (Tr. 22). She was asked, "Now you heard all of the things that [the female deputy] told [defense counsel] you said. …. Did you tell her all those things?" (Tr. 175-76). J.G. replied, "yes," and when asked, "Did all those things take place?", she again replied, "yes" (Tr. 176).

[6] Evidence was presented that officers searched Mr. Ellison's residence after J.G. had made her allegations (Tr. 153-54, 164-65). There was no evidence presented that anything incriminating was discovered during that search.

When she was asked about these things by defense counsel during a preliminary hearing and at a deposition, she did not tell defense counsel about all of the things that she told the female deputy sheriff (Tr. 179).[7]

Regarding the charged offense, J.G. testified that in the summer of 2003, Mr. Ellison told her to sit on his bed, he walked in naked, he pulled her pants down, and "he tried to stick his penis in me, and he said it would go in about that far (indicating)" (Tr. 177). J.G. did not see whether or not "it was going in" (Tr. 177). She did not know whether or not "it went in" (Tr. 177). She could feel him "pushing on" her (Tr. 177). It hurt when he did "that" (Tr. 177). She told him to stop, but he did not stop (Tr. 177).

J.G.'s brother Jimmy, who was born on October 6, 1992, testified for the defense (Tr. 194). Mr. Ellison sometimes baby-sat him and J.G. (Tr. 195). J.G. was never at the Ellison's without Jimmy (Tr. 196). While there, sometimes he would play outside by himself (Tr. 196). Only once was he sent to the park without J.G. (Tr. 196-97). She did not go because she was sunburned (Tr. 196-

[7] During closing argument, defense counsel told the jury that at the deposition J.G. did not say that J.G. had raped her, rather the most that she said had happened was that Mr. Ellison tried to place his penis in her vagina (Tr. 230). During the deposition she also did not mention some of the other sex acts that she had told the female deputy about (Tr. 179, 230).

97). There were times that J.G. might have been alone with Mr. Ellison without Jimmy's knowledge (Tr. 199).

After the foregoing evidence was presented at trial, the trial court overruled Mr. Ellison's motion for judgment of acquittal at the close of the evidence (Tr. 205). During the instruction conference, Mr. Ellison objected to the giving of Instruction No. 7, which was patterned after MAI-CR3d 310.12 and read, "If you find and believe from the evidence that the defendant pled guilty to sexual abuse, an offense other than the one for which he is now on trial, you may consider that evidence on the issue of the propensity of the defendant to commit the crime with which he is charged (Tr. 207; L.F. 35). Mr. Ellison stated that he had filed a written motion and had objected at the time the prior conviction was offered into evidence (Tr. 207). Mr. Ellison incorporated by reference all of his arguments made in the written motion (Tr. 207-08). Mr. Ellison objected that the instruction violated his constitutional right to a fair trial (Tr. 208-09). The trial court overruled the objections (Tr. 208). The objection to the instruction was not included in the motion for new trial.

On August 5, 2005, the jury found Mr. Ellison guilty of the charged offense (Tr. 245; L.F. 39). The trial court gave him twenty-five (25) days in which to file a motion for new trial (Tr. 249).

On August 30, 2005, Mr. Ellison timely filed his Motion for Judgment of Acquittal or in the alternative, Motion for New Trial (L.F. 40-41). That motion raised two claims: (1) the trial court erred when it overruled Mr. Ellison's motions

for judgment of acquittal because the evidence was insufficient to convict him of child molestation in the first degree; and (2) the trial court erred when it overruled Mr. Ellison's motion to exclude evidence of his prior conviction for "sexual assault" (sic) because the evidence of that prior conviction violated Mr. Ellison's rights to due process, a fair trial, and to be tried for only the crime for which he was charged (L.F. 40-41).

On September 20, 2005, the trial court overruled the motion for new trial (Tr. 264) and sentenced Mr. Ellison to twenty years imprisonment (Tr. 342; L.F.). Mr. Ellison attempted to have a juror testify that Mr. Ellison's conviction was based on his prior conviction and not based on the other evidence presented at trial, but Mr. Ellison was not allowed to present that evidence as the trial court ruled that it would be an improper impeachment of the verdict (Tr. 253-63).

This appeal follows. Any further facts necessary for the disposition of this appeal will be set out in the argument portion of this brief.

POINTS RELIED ON

I.

The trial court abused its discretion in allowing the state to introduce evidence of Mr. Ellison's 1992 felony conviction for sexual abuse in the first degree of a different child over Mr. Ellison's objections, because § 566.025 unconstitutionally allows propensity evidence and this evidence was neither logically nor legally relevant, violating Mr. Ellison's rights to due process, a fair trial, and his right to be tried for the offense with which he is charged as guaranteed by 6th and 14th Amendments to the United States Constitution and Article I, §§ 10, 17 and 18(a) of the Missouri Constitution, in that the prior conviction, which was more than a decade old, was not logically relevant because it did not show motive, intent, absence of mistake or accident, common scheme or plan, identity, signature/*modus operandi*/corroboration or a continuation of a sequence of events that assisted in painting a coherent picture of the crime; Mr. Ellison's defense was that he did not have any sexual contact with J.G., and the state's use of a prior sex crime against a different child was introduced merely to show that Mr. Ellison had a propensity to commit this type of crime; the evidence was not legally relevant, i.e., the probative value was outweighed by the prejudicial effect; and § 566.025 does not require that the court find the evidence logically relevant and it allows the jury to consider the prior conviction as evidence of Mr. Ellison's propensity to commit the charged crime.

State v. Burns, 978 S.W.2d 759 (Mo. banc, 1998);

State v. Dudley, 912 S.W.2d 525 (Mo. App. W.D. 1996);

State v. Nelson, 178 S.W.3d 638 (Mo. App. E.D. 2005);

State v. Chiles, 847 S.W.2d 807 (Mo. App. W.D. 1992);

U.S. Const., Amends. VI and XIV;

Mo. Const., Art. I, §§ 10, 17, and 18(a); and

§ 556.046, 566.025, 566.067, 566.100.

II.

The trial court plainly erred in overruling Mr. Ellison's objections to the giving of Instruction No. 7, which was based on MAI-CR3d 310.12, because that instruction violated Mr. Ellison's rights to due process, a fair trial, and his right to be tried for the offense with which he is charged as guaranteed by 6th and 14th Amendments to the United States Constitution and Article I, §§ 10, 17 and 18(a) of the Missouri Constitution, resulting in a manifest injustice, in that the instruction told the jury that it could consider Mr. Ellison's prior conviction to sexual abuse "on the issue of the propensity of the defendant to commit the crime with which he is charged."

State v. Burns, 978 S.W.2d 759 (Mo. banc 1998);

State v. Frankenberg, 876 S.W.2d 286 (Mo. App. S.D. 1994);

State v. Carson, 941 S.W.2d 518 (Mo. banc 1997);

State v. Beck, 167 S.W.3d 767 (Mo. App. W.D. 2005);

U.S. Const., Amends. VI and XIV; and

Mo. Const., Art. I, §§ 10, 17 and 18(a);

§ 566.025;

Rule 28.03 and 30.20; and

MAI-CR3d 310.10 and 310.12.

III.

The trial court erred in overruling Mr. Ellison's motion for judgment of acquittal at the close of all the evidence, in accepting the jury's guilty verdict as to child molestation in the first degree, § 566.067, and in sentencing him for that offense, because the state did not prove beyond a reasonable doubt that Mr. Ellison touched the genitals of J.G. with his genitals, as it was charged in the verdict director, in violation of Mr. Ellison's rights to due process and to be tried for the offense with which he is charged, as guaranteed by the 14th Amendment to the U.S. Constitution and Art. I, §§ 10, 17, and 18(a) of the Missouri Constitution, in that when asked to describe what happened regarding the charged act, J.G. testified that while Mr. Ellison was naked he pulled her pants, down, "he *tried* to stick his penis in me, and he said it *would* go in about that far (indicating)", J.G. did not see whether or not "it was going in," she did not know whether or not "it went in," she could feel him "pushing on" her, and it hurt when he did "that," so her testimony did not establish that his genitals touched her genitals.

State v. Botts, 151 S.W.3d 372 (Mo. App. W.D. 2004);

State v. Dawson, 985 S.W.2d 941 (Mo. App. W.D. 1999);

State v. Jackson, 896 S.W.2d 77 (Mo. App. W.D. 1995);

State v. Keeler, 856 S.W.2d 928 (Mo. App. S.D. 1993);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, §§ 10, 17, 18(a);

§ 566.010 and 566.067; and

Rule 29.11(d)(3).

ARGUMENT

I.

The trial court abused its discretion in allowing the state to introduce evidence of Mr. Ellison's 1992 felony conviction for sexual abuse in the first degree of a different child over Mr. Ellison's objections, because § 566.025 unconstitutionally allows propensity evidence and this evidence was neither logically nor legally relevant, violating Mr. Ellison's rights to due process, a fair trial, and his right to be tried for the offense with which he is charged as guaranteed by 6th and 14th Amendments to the United States Constitution and Article I, §§ 10, 17 and 18(a) of the Missouri Constitution, in that the prior conviction, which was more than a decade old, was not logically relevant because it did not show motive, intent, absence of mistake or accident, common scheme or plan, identity, signature/*modus operandi*/corroboration or a continuation of a sequence of events that assisted in painting a coherent picture of the crime; Mr. Ellison's defense was that he did not have any sexual contact with J.G., and the state's use of a prior sex crime against a different child was introduced merely to show that Mr. Ellison had a propensity to commit this type of crime; the evidence was not legally relevant, i.e., the probative value was outweighed by the prejudicial effect; and § 566.025 does not require that the court find the evidence logically relevant and it allows the jury to consider the prior conviction as evidence of Mr. Ellison's propensity to commit the charged crime.

1) Introduction

Mr. Ellison was charged with child molestation in the first degree, **§ 566.067**, for allegedly subjecting J.G. to sexual contact between June 1, 2003, and August 31, 2003 (L.F. 22). It was specified in the verdict director that Mr. Ellison touched the genitals of J.G. with his genitals (L.F. 33). J.G. was either eight or nine at the time of the charged offense since she was born on June 11, 1994 (Tr. 166).

The first piece of evidence that the jury heard or saw was Mr. Ellison's 1992 conviction for the class C felony of sexual abuse in the first degree, **§ 566.100**, wherein he had subjected a thirteen-year-old girl, L.K.C., "to sexual contact without her consent by the use of forcible compulsion and in the course of such offense [Mr. Ellison] inflicted serious physical injury" to L.K.C. (Tr. 127; State's Exhibit 1; Appendix A-1 to A-4). Mr. Ellison did not testify at trial, so the conviction was not admissible for impeachment.

§ 566.025, which was amended in 2000, provides:

> In prosecutions pursuant to this chapter or chapter 568, RSMo, of a sexual nature involving a victim under fourteen years of age, whether or not age is an element of the crime for which the defendant is on trial, evidence that the defendant has committed other charged or uncharged crimes of a sexual nature involving victims under fourteen years of age shall be admissible for the purpose of showing the propensity of the defendant to

commit the crime or crimes with which he or she is charged unless the trial court finds that the probative value of such evidence is outweighed by the prejudicial effect.

Id.

Prior cases decided by this Court clearly hold that Mr. Ellison's prior conviction would be inadmissible evidence of uncharged crimes. E.g., ***State v. Carter,*** 996 S.W.2d 141 (Mo. App. W.D. 1999); ***State v. Dudley***, 912 S.W.2d 525 (Mo. App. W.D. 1996); ***State v. Sales***, 984 S.W.2d 183 (Mo. App. W.D. 1998); ***State v. Chiles***, 847 S.W.2d 807 (Mo. App. W.D. 1992). But for **§ 566.025**, the propensity evidence in this case would have been excluded. The question thus becomes whether or not this evidence was admissible because of **§ 566.025**.

2) Preservation

Mr. Ellison filed a pretrial Motion in Limine (L.F. 16-18). That motion moved the trial court to enter an order *in limine* prohibiting the state or any witness from referring to or offering evidence that Mr. Ellison had touched women and/or children, other than J.G., in an inappropriate manner (L.F. 16). This evidence would violate Mr. Ellison's rights to due process, a fair trial, and to be tried for only charged crimes, as guaranteed under United States and Missouri Constitutions (L.F. 16, 18). The prejudicial impact of such evidence would substantially outweigh any probative value it may have (L.F. 16). The jury would give such evidence undue weight (L.F. 16). Such evidence should not be admitted under **§ 566.025**, *citing* ***State v. Johnson***, 161 S.W.3d 920 (Mo. App. S.D. 2005)

(L.F. 17).

On the morning of the first day of trial, Mr. Ellison noted that the state intended to use Mr. Ellison's prior sexual abuse conviction under **§ 566.025** as substantive evidence to show to the jury his propensity to commit the charged crime (Tr. 10-11). Mr. Ellison said that after the statute had been found to be unconstitutional by the Missouri Supreme Court in "*State versus Burns*,"[8] the legislature had "revamped it," adding that the evidence had to be more probative than prejudicial (Tr. 11). Mr. Ellison argued that his prior conviction was more prejudicial than probative (Tr. 11). Mr. Ellison was concerned that the jury would convict him based solely upon his prior conviction (Tr. 12).

The state argued that the prior conviction had probative value (Tr. 12). The state attempted to distinguish the ***Burns*** case by arguing that the prior conviction here was "charged" and had "been proven through [Mr. Ellison's] own plea of guilty" (Tr. 13). Apparently the state was referring to the fact that Mr. Ellison was alleged to be a prior offender as a result of this prior conviction (L.F. 22-23). Both the prior and present versions of § 566.025 deal with "other charged or uncharged crimes." Clearly the prior conviction is not the charged offense as used in other parts of the criminal code. E.g., **§ 556.046** ("A defendant may be convicted of an offense included in an offense charged in the indictment or information."). As will be noted below, other prior convictions have held to come within the general

[8] *See*, ***State v. Burns***, 978 S.W.2d 759 (Mo. banc 1998).

prohibition against the admission of evidence of uncharged crimes.

The state also argued that under the statute the state could introduce the prior conviction to show "propensity" unless the trial court found "that the prejudicial value outweighs the probative value" and that the burden was on Mr. Ellison to show that the prejudice outweighed the probative value (Tr. 13). This last statement appears to be contrary to Missouri Supreme Court cases which have held if the court does not clearly perceive logical relevancy, the defendant should be given the benefit of the doubt and the evidence should be rejected. E.g., ***State v. Sladek***, 835 S.W.2d 308, 312 (Mo. banc 1992).

Mr. Ellison reiterated that the jury would likely convict him based upon the prior conviction and that it was more prejudicial than probative (Tr. 14).

The trial court without really engaging in any meaningful balancing required by **§ 566.025** ruled:

> The Court notes that State versus Burns had to do with uncharged crime, found that that was unconstitutional based on that. However, this is not only a charged crime but one of which the defendant admitted that he was guilty of. So under 566.025 the Court is going to overrule defendant's motion in limine. The Court is going to find that the evidence of a prior conviction is more probative than prejudicial and will therefore allow the state to adduce the evidence of the prior conviction in Howell County.

(Tr. 14-15).

The first piece of evidence that the jury heard or saw was State's Exhibit No. 1, which was a copy of Mr. Ellison's 1992 conviction for the class C felony of sexual abuse in the first degree, **§ 566.100**, for subjecting a thirteen-year-old girl, L.K.C., "to sexual contact without her consent by the use of forcible compulsion and in the course of such offense [Mr. Ellison] inflicted serious physical injury" to L.K.C. (Tr. 127; State's Exhibit 1; Appendix). Mr. Ellison objected to that exhibit (Tr. 127). He incorporated by reference all of the arguments that he had previously made (Tr. 127-28). This violated his constitutional rights (Tr. 128). The prior conviction was not probative; rather, it was highly prejudicial (Tr. 128). The trial court overruled the objection, and Exhibit No. 1 was admitted into evidence (Tr. 128). Photocopies of the exhibit were passed to the jury (Tr. 128).

During the instruction conference, Mr. Ellison objected to the giving of Instruction No. 7, which was patterned after MAI-CR3d 310.12 and read, "If you find and believe from the evidence that the defendant pled guilty to sexual abuse, an offense other than the one for which he is now on trial, *you may consider that evidence on the issue of the propensity of the defendant to commit the crime with which he is charged* (emphasis added) (Tr. 207; L.F. 35). Mr. Ellison stated that he had filed a written motion and had objected at the time the prior conviction was offered into evidence (Tr. 207). Mr. Ellison incorporated by reference all of his arguments made in the written motion (Tr. 207-08). Mr. Ellison objected that the instruction violated his constitutional right to a fair trial (Tr. 208-09). The trial court overruled the objections (Tr. 208).

In Mr. Ellison's timely for new trial, he included a claim that the trial court erred when it overruled Mr. Ellison's motion to exclude evidence of his prior conviction for "sexual assault" (sic) because the evidence of that prior conviction violated Mr. Ellison's rights to due process, a fair trial, and to be tried for only the crime for which he was charged (L.F. 40-41).

3) Standard of Review

The trial court has broad discretion in deciding whether to admit evidence, and this Court will declare error only when it deems the trial court to have abused its discretion. ***State v. Berwald***, 186 S.W.3d 349, 358 (Mo. App. W.D. 2006). An abuse of discretion occurs when no reasonable jurist would concur with the trial court's ruling. ***State v. Henderson***, 105 S.W.3d 491, 495 (Mo. App. W.D. 2003).

But it has long been established that a defendant has the right to be tried only for the offense for which he is on trial, and that evidence of other crimes committed by the defendant is normally inadmissible. ***Berwald***, 186 S.W.3d at 358. Countervailing the breadth of the trial court's discretion in identifying whether evidence of this sort is admissible is the highly prejudicial nature of evidence of uncharged illegal conduct. ***Henderson***, 105 S.W.3d at 495. In considering such evidence, the trial court must be rather strict and circumspect and should rule it admissible only when it is clearly so. ***Id***. This is because this evidence may cause a jury to convict a defendant on the basis of perceived propensities rather than on the basis of substantial and competent evidence. ***Id***. "Only when evidence of uncharged misconduct clearly is logically and legally

relevant to establishing the defendant's guilt of the crime for which he is on trial is it admissible." ***Id***., *citing* ***State v. Barriner***, 34 S.W.3d 139, 144 (Mo. banc 2000).

4) Analysis

In ***State v. Bernard***, 849 S.W.2d 10 (Mo. banc 1993), the Missouri Supreme Court noted that the general rule concerning the admission of evidence of uncharged crimes is that evidence of prior uncharged misconduct is *inadmissible for the purpose of showing the propensity* of the defendant to commit such crimes. ***Id***. at 13. However, evidence of prior misconduct of the defendant, although *not admissible to show propensity*, is admissible if (1) the evidence is logically relevant, in that it has some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial, and if (2) the evidence is legally relevant, in that its probative value outweighs its prejudicial effect. ***Id***.

Generally, evidence of other, uncharged misconduct has a legitimate tendency to prove the specific crime charged, i.e., is logically relevant on some other issue other than the defendant's propensity to commit crimes, when it tends to establish: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; or (5) the identity of the person charged with the commission of the crime on trial. ***Id***. Evidence of prior misconduct that does not fall within one of the five enumerated exceptions may nevertheless be admissible if the evidence is logically and legally relevant. ***Id***. As will be noted below, two other categories have since been added.

The ***Bernard*** court noted that in cases involving sexual abuse of children, the more recent trend in Missouri had been to liberally allow the admission of evidence of prior sexual misconduct by the defendant. ***Id***. The cases required that the sexual misconduct be similar in nature but did not require a showing that the prior sexual misconduct was so "unusual and distinct" as to be a signature of the defendant and his activities. ***Id***. at 15. The Missouri Supreme Court rejected that line of cases. ***Id***. at 15-16. The Missouri Supreme Court also rejected cases holding that evidence of repeated acts of sexual abuse of children demonstrated, *per se*, a propensity for sexual aberration and a depraved sexual instinct and should be recognized as an additional distinct exception to the rule against the admission of evidence of uncharged crimes. ***Id***. at 16. In doing so, the ***Bernard*** court noted that "[a] blanket rule allowing evidence of any recent misconduct by the defendant with a child of the same sex as the victim may encourage the jury to convict the defendant because of his propensity to commit such crimes without regard to whether he is actually guilty of the crime charged." ***Id***.

The ***Bernard*** court did, however, adopt a signature *modus operandi*/corroboration exception to the rule prohibiting evidence of prior uncharged misconduct. ***Id***. at 17. If the identity of the wrongdoer is at issue, the identity exception permits the state to show the defendant as the culprit who has committed the sexual crime charged by showing that the defendant committed other uncharged sexual acts that are sufficiently similar to the crime charged in time, place and method. ***Id***. For the prior conduct to fall within the identity

exception, the charged and uncharged crimes must be nearly "identical" and their methodology "so unusual and distinctive" that they resemble a "signature" of the defendant's involvement in both crimes. ***Id***. In the context of corroboration, evidence of prior crimes is logically relevant in that it has a legitimate tendency to prove a material fact in the case by corroborating the testimony of the victim as to the sexual assault. ***Id***. Evidence of prior crimes in such situations, is, therefore, probative. ***Id***. Evidence of prior crimes is legally relevant, thus admissible, however, only if the probative value of the evidence outweighs its prejudicial effect. ***Id***. For corroboration evidence to be of sufficiently increased probative value so as to outweigh its prejudicial effect, the evidence must be more than merely similar in nature to the sexual assault for which the defendant is charged. ***Id***. "Evidence of prior sexual misconduct that corroborates the testimony of the victim should be nearly identical to the charged crime and so unusual and distinctive as to be a signature of the defendant's *modus operandi*. [citation omitted] This is a threshold requirement that must be met before the trial court can proceed to weigh any additional factors in determining the question of admissibility." ***Id***.

Following ***Bernard***, the Legislature in 1994 enacted **§ 566.025, RSMo 1994 (effective 1-1-1995)**:

> In prosecutions under Chapter 566 or 568 involving a victim under fourteen years of age, whether or not age is an element of the crime for which the defendant is on trial, evidence that the defendant has committed

other charged or uncharged crimes involving victims under fourteen years of age shall be admissible for the purpose of showing the propensity of the defendant to commit the crime or crimes with which he is charged, provided that such evidence involves acts that occurred within ten years before or after the act or acts for which the defendant is being tried.

This law was enacted despite the Missouri Supreme Court's warning in ***State v. Bernard***, 849 S.W.2d 10, 16 (Mo. banc 1993), that evidence of prior uncharged misconduct is inadmissible for the purpose of showing the propensity of the defendant to commit such crimes. ***Id***. at 13-16. In essence, the Legislature sought to overrule the Missouri Supreme Court. That attempt was short-lived.

On October 20, 1998, the Missouri Supreme Court of Missouri held **§ 566.025, RSMo 1994**, was unconstitutional. ***State v. Burns***, 978 S.W.2d 759 (Mo. banc, 1998). The ***Burns*** court held that statute's declaration that evidence of other charged and uncharged crimes "shall be admissible for the purpose of showing the propensity of the defendant to commit the crime or crimes with which he is charged" offends **Article I, §§ 17 and 18(a) of the Missouri Constitution**. ***Id.***, at 760. Those sections of the Missouri Constitution guarantee a criminal defendant the right to be tried only on the offense charged. ***Id***. "Evidence of uncharged cries, when not properly related to the cause on trial, violates a defendant's right to be tried for the offense for which he is [charged]." ***Id***. The Missouri Supreme Court further stated that "this Court has recognized that showing the defendant's propensity to commit a given crime is not a proper

purpose for admitting evidence, because such evidence 'may encourage the jury to convict the defendant because of his propensity to commit such crimes without regard to whether he is actually guilty of the crime charged.'" ***Id.***, at 761 *citing* ***Bernard***, 849 S.W.2d at 16. The court in ***Burns*** stated that "section 566.025 makes no provision for consideration of whether evidence is logically or legally relevant. Rather, its language is mandatory, requiring that propensity evidence 'shall be admissible for the purpose of showing the propensity of the defendant' to commit the charged crime or crimes. The language stands in disregard of article I, sections 17 and 18(a)" thus in violation of the Missouri Constitution. ***Id.***, at 761.

In apparent response to ***Burns***, in 2000 the legislature amended **§ 566.025** to now require, along with some other changes, that the trial court must determine whether the probative value of such evidence is outweighed by the prejudicial effect:

> In prosecutions pursuant to this chapter or chapter 568, RSMo, of a sexual nature involving a victim under fourteen years of age, whether or not age is an element of the crime for which the defendant is on trial, evidence that the defendant has committed other charged or uncharged crimes of a sexual nature involving victims under fourteen years of age shall be admissible for the purpose of showing the propensity of the defendant to commit the crime or crimes with which he or she is charged unless the trial court finds that the probative value of such evidence is outweighed by the prejudicial effect.

Id.

Mr. Ellison has found no cases wherein evidence was admitted or rejected pursuant to the amended version of **§ 566.025**. The Southern District of this Court in ***State v. Johnson***, 161 S.W.3d 920 (Mo. App. S.D. 2005), noted that the prior version of **§ 566.025**, which did not require the trial court to determine whether the probative value of such evidence is outweighed by the prejudicial effect, was declared unconstitutional by the Missouri Supreme Court in ***Burns***. ***Johnson***, 161 S.W.3d at 926 n. 6. But the ***Johnson*** court noted that the defendant in that case did not challenge the constitutionality of the latest enacted version of § 566.025. ***Id***. The facts of that case also show that the statute would not be available there because the alleged "other uncharged crimes" victim was fifteen years old whereas the statute only allows the evidence if other victims are under fourteen years of age. **§ 566.025**.

The newly amended statute probably has not been tested because it too is unconstitutional. While Missouri courts have held without exception that propensity evidence is never admissible, newly amended **§ 566.025** alters this rule and allows propensity evidence in certain situations. Consequently, the statute permits evidence of prior crimes to be used in a manner contrary to the Missouri Constitution. Although the statute that was declared unconstitutional in ***Burns*** was mandatory in nature and did not require the trial court to determine whether the probative value of such evidence is outweighed by the prejudicial effect,

portions of the ***Burns*** opinion seem to indicate that the newest version of **§ 566.025** violates the Missouri Constitution.

The Missouri Supreme Court in ***Burns*** noted that "showing the defendant's propensity to commit a given crime is not a proper purpose for admitting evidence." ***Burns***, 978 S.W.2d at 761. Evidence of prior misconduct of the defendant is "not admissible to show propensity." ***Id***. The ***Burns*** court also noted that there was a "long line of Missouri cases declaring that the admission of evidence to prove propensity violates the defendant's right to be tried only for the offense charged." ***Id***. at 762. So, although the amended statute now requires the trial court to weigh the probative value of such evidence against its prejudicial effect, the statute unconstitutionally allows evidence to be admitted "for the purpose of showing the propensity of the defendant to commit the crime or crimes with which he or she is charged." *See* ***State v. Gilyard***, 979 S.W.2d 138, 144 (Mo. banc 1998), Limbaugh, dissenting, "this Court has today [in ***Burns***] ruled that section 566.025 is unconstitutional to the extent that it authorizes the admission of propensity evidence." Further, the statute makes no provision for consideration of whether evidence is logically relevant, it only adds the evidence must be legally relevant. This is unconstitutional under ***Burns***, 978 S.W.2d at 761.

Here, as in ***Johnson***, it does not appear that defense counsel made a direct constitutional challenge to **§ 566.025** as nowhere did counsel use the words "unconstitutional" when referring to that section. Defense counsel's motion *in limine* did state, however, that the evidence would violate Mr. Ellison's rights to

due process, a fair trial, and to be tried for only the crime for which he is charged (L.F. 16). The motion also noted that the propensity to commit a crime is not a proper purpose for the admission of evidence (L.F. 17). Further, **§566.025** does not allow the admission of such evidence to show the propensity of the defendant (L.F. 17). The motion concluded that any evidence of uncharged acts committed by Mr. Ellison should be excluded because the admission of such evidence would deny Mr. Ellison's his rights to due process, a fair trial, and to be tried for only the crime for which he is charged (L.F. 18). If this Court believes that this motion *in limine* sufficiently challenges the constitutionality of **§ 566.025**, then this Court should transfer this case to the Missouri Supreme Court, unless this Court believes that it can dispose of the case without determining the constitutionality of the statute. *See*, ***Gilyard***, 979 S.W.2d at 140 ("The admission of S.W.'s testimony must be addressed first, as this Court will not address constitutional issues when a case can be otherwise resolved.").

In any event, whether or not **§ 566.025** is constitutional or not does not matter in this case because the evidence was not logically or legally relevant. **§ 566.025** requires that before the trial court can admit evidence that the "defendant has committed other charged or uncharged crimes of a sexual nature involving victims under fourteen years of age" for the "purpose of showing the propensity of the defendant to commit the crime or crimes with which he or she is charged", the court still must find that "the probative value of such evidence is outweighed by the prejudicial effect." Of course this is nothing more than the ***Bernard*** test for

legal relevance. 849 S.W.2d at 13. As noted above, the statute appears to omit a requirement that the evidence must also be logically relevant, but for evidence to be admissible it still must be logically relevant. ***State v. Sladek***, 835 S.W2d 308, 312-13 (Mo. banc 1992).

As the Missouri Supreme Court noted in ***Bernard***, the general rule concerning the admission of evidence of uncharged crimes is that evidence of prior uncharged misconduct is inadmissible for the purpose of showing the propensity of the defendant to commit such crimes. ***Id***. However, evidence of uncharged crimes, although not admissible to show propensity, is admissible if (1) the evidence is logically relevant, in that it has some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial, and if (2) the evidence is legally relevant, in that its probative value outweighs its prejudicial effect. ***Id***.

Bernard recognized five categories of where, generally, evidence of other, uncharged misconduct is logically relevant on some issue other than the defendant's propensity to commit crimes, and added a sixth one: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; (5) the identity of the person charged with the commission of the crime on trial; or (6) a signature modus operandi where nearly identical incidents are so unusual an distinctive as to corroborate the victim's testimony. ***Johnson***, 161 S.W.3d at 924-25. A seventh category

permitting evidence of a continuation of a sequence of events that assist in painting a coherent picture of the crime has also been added. ***Id***. at 925. This list of exceptions is not exclusive. ***Id***. Still, such evidence is highly prejudicial and should be received only when there is strict necessity. ***Id***. at 928. If evidence of prior crime is not admissible under any of these exceptions, the admission is presumed to be prejudicial. ***Id***.

The challenged evidence in this case does not fit under any of these exceptions. Thus, it is not logically relevant. ***Berwald***, 186 S.W.3d at 360-61. It did not show motive, intent, absence of mistake or accident, common scheme or plan, identity, signature/*modus operandi*/corroboration or a continuation of a sequence of events that assisted in painting a coherent picture of the crime. Its sole use was to show propensity or character. Thus its admission is presumed to be prejudicial. ***Id***.

Nor was the evidence legally relevant, i.e., the probative value was outweighed by the prejudicial effect. ***State v. Nelson***, 178 S.W.3d 638, 644 (Mo. App. E.D. 2005). Similar cases dealing with the admission of other defendants' prior convictions have held that such evidence was not legally relevant.

In ***State v. Dudley***, 912 S.W.2d 525 (Mo. App. W.D. 1995), the defendant was charged with possession of codeine. The state was allowed to introduce into evidence the defendant's prior conviction for the sale of codeine. This Court held that the admission of the prior conviction was reversible error. ***Id***. at 528-30. "While a defendant's propensity to commit a crime may be logically relevant, it is

not legally relevant because the prejudicial effect of such evidence outweighs its probative value." ***Id***. at 528. "It is only where the evidence of other crimes is offered to prove an issue other than propensity that the probative value of such evidence tends to increase." ***Id***. The prior conviction was not highly probative of anything other than the fact of defendant's bad character as a person previously convicted of selling drugs. ***Id***. at 529. And the prejudicial effect of admitting the evidence was very substantial. ***Id***. It suggested that since the defendant was convicted ten years before of sale of codeine, he was a drug dealer by character and propensity and was therefore guilty. ***Id***. at 530. The evidence of the conviction had relatively low legitimate probative value, which the prejudicial effect was quite strong. ***Id***. at 531.

In ***State v. Chiles***, 847 S.W.2d 807 (Mo. App. W.D. 1992), the defendant was charged with sexual abuse in the first degree of an eleven-year old boy. ***Id***. at 808. The state was allowed to introduce evidence concerning acts leading up to the defendant's prior conviction for sexual abuse of a nine-year old boy. ***Id***. at 808-10. This Court reversed finding that defendant's prior conviction that occurred approximately seven years before the crime being tried was too remote to be admissible. ***Id***. at 810-11.[9]

[9] The Missouri Supreme Court in ***Bernard*** did note, however, that under the signature *modus operandi*/corroboration exception, it rests in the sound discretion of the trial court to determine whether the passage of time between incidents is so

In ***Nelson***, *supra*, the defendant was charged with first degree child molestation of a thirteen-year old girl, wherein he allegedly touched her breast, over her bra, with his hand. 178 S.W.3d at 640-41. At trial, the state was allowed to introduce evidence of the defendant's commission of a prior crime, specifically a 1999 conviction for statutory sodomy involving a sixteen-year-old victim. ***Id***. at 641. The state was allowed to introduce this evidence through the other victim and a police officer who had taken the defendant's confession in that prior case. ***Id***. at 641-42. The ***Nelson*** court reversed for a new trial holding that the evidence of the prior crime outweighed anything presented in support of the crime on trial. ***Id***. at 644.

In ***State v. Blackmon***, 941 S.W.2d 526 (Mo. App. E.D. 1996), the defendant was convicted of second-degree drug trafficking PCP, and the state was allowed to introduce evidence that the defendant had prior convictions for possession of PCP and trafficking in PCP. In reversing for a new trial, the ***Blackmon*** court held that such evidence might have been logically relevant but they were not legally relevant because the probative valued of the prior convictions did not outweigh their prejudicial effect. ***Id***. at 528-29.

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lengthy that the prejudice or other "cost" of the evidence outweighs the probative value of the signature *modus operandi*. 849 S.W.2d at 19. A prior crime nearer in time to the charged crime is clearly more relevant. ***Id***.

In ***State v. Helm***, 892 S.W.2d 743 (Mo. App. E.D. 1994), the defendant was charged with burglary and the appellate court held that the state had improperly introduced evidence concerning the defendant's prior convictions in two burglaries. ***Id***. at 745-46. The court held that if the defendant had testified the convictions would have been admissible to impeach credibility but that the introduction of the convictions in the prosecution's case in chief to show intent was unduly prejudicial. ***Id***.

In ***State v. McCoy***, 175 S.W.3d 161 (Mo. App. E.D. 2005), the defendant was convicted of attempting to manufacture a controlled substance and unlawful use of drug paraphernalia. The state was allowed to admit evidence that the defendant had a prior conviction for creation of a controlled substance based on his possession of precursor ingredients of methamphetamine with the intent to manufacture methamphetamine. In reversing, the ***McCoy*** court found that the evidence of the prior conviction was slight and was outweighed by its highly prejudicial effect of alluding defendant's propensity to commit the crime and his bad character. ***Id***. at 164.

Here, just like these other cases, the uncharged crime evidence, a 1992 sexual abuse conviction of a thirteen-year old girl, was not logically relevant nor was it legally relevant as its probative value was outweighed by its prejudicial effect, and it did not qualify under any of the recognized exceptions. "[I]t is not enough to show that a person on trial committed one or more other crimes of the same general nature as the crime for which he is on trial." ***State v. Sladek***, 835

S.W.2d 308 (Mo. banc 1992). The admission of this evidence to show Mr. Ellison's propensity therefore was error.

This does not end this Court's inquiry. This Court will not reverse simply because error is found. ***State v. Douglas***, 131 S.W.3d 818, 826 (Mo. App. W.D. 2004) Prejudice must also be shown. ***Id***. Error in admitting evidence is not prejudicial requiring reversal, unless it is outcome-determinative. ***Id***., citing, ***State v. Barriner***, 34 S.W.3d 139, 150 (Mo. banc 2000).

As stated by the Missouri Supreme Court in ***Barriner***:

> There is a distinction between evidence-specific and outcome-determinative prejudice. When the prejudice resulting from the improper admission of evidence is only evidence-specific and the evidence of guilt is otherwise overwhelming, reversal is not required. In contrast, when the prejudice resulting from the improper admission of evidence is outcome-determinative, reversal is required. A finding of outcome-determinative prejudice expresses a judicial conclusion that the erroneously admitted evidence so influenced the jury that, when considered with and balanced against all of the evidence properly admitted, there is a reasonable probability that the jury would have reached a different conclusion but for the erroneously admitted evidence.

34 S.W.3d at 150.

"In other words, the mere fact that there is overwhelming evidence of guilt is not the test; the test is whether there is a reasonable probability the jury relied on

the improperly admitted evidence in convicting the defendant and that it would have reached a different result but for its admission." ***Douglas***, 131 S.W.3d at 825. In making such a determination, the state is not entitled to the benefit of all reasonable inferences from the evidence, as in a review for the sufficiency of the evidence. ***Berwald***, 186 S.W.3d at 362. Other crimes evidence is presumed to be prejudicial. ***Johnson***, 161 S.W.3d at 928.

Here, such outcome-determinative prejudice should be found. The prejudice to Mr. Ellison from this violation of his constitutional rights was significant. There were no witnesses to corroborate J.G.'s story; in fact, in some respects her brother's testimony somewhat disputed parts of her allegations (Tr. 153, 196-97). There was no physical evidence adduced to support her claims that Mr. Ellison had repeatedly raped her for a couple of years, possibly as much as 15-20 times (Tr. 160, 163-64, 189-90). There were serious concerns about J.G.'s credibility. She first said that she was raped three times (Tr. 142, 151, 153). Then she said that it happened many times, possibly as much as 15-20 times (Tr. 160-64). Then there was a SAFE examination, which was apparently normal and showed no evidence of sexual abuse (Tr. 16-21). There also was a deposition wherein apparently she backtracked, possibly as a result of the normal SAFE examination, and at the deposition she no longer maintained that she had been raped, rather she only said that Mr. Ellison had tried to rape her (Tr. 179, 230). As a result, the State dismissed rape charges and filed the charged count of child molestation in the first degree (Tr. 7-8; L.F. 22-23). The state said it was filing the

amended charge "based on testimony or evidence received at the deposition of [J.G.] and is intended to conform with the evidence that she gave at that time" (Tr. 7). The state then used the amendment of charges in an attempt to exclude evidence that the SAFE examination was normal (Tr. 16-21). As a result, the jury did not hear evidence that the SAFE examination was normal even though J.G. testified at trial that Mr. Ellison had raped her several times. The prior conviction was the first evidence that the jury heard in the case and each juror was given a copy of the conviction to read (Tr. 127-28). That conviction told the jury that in 1992 Mr. Ellison had a sexual abuse conviction of a thirteen-year old girl wherein he subjected her "to sexual contact without her consent by the use of forcible compulsion and in the course of such offense 'Mr. Ellison] *inflicted serious physical injury*" to that girl (Tr. 127; State' Exhibit No. 1; Appendix). Finally, the jury was instructed that it could consider Mr. Ellison's prior conviction "on the issue of propensity of the defendant to commit the crime with which he is charged" (L.F. 35).

There is a reasonable probability the jury relied on the improperly admitted evidence in convicting Mr. Ellison and that it would have reached a different result but for its admission. ***Douglas***, 131 S.W.3d at 825. He is entitled to a new trial without this improper evidence. His conviction must be reversed and the cause remanded for a new trial.

II.

The trial court plainly erred in overruling Mr. Ellison's objections to the giving of Instruction No. 7, which was based on MAI-CR3d 310.12, because that instruction violated Mr. Ellison's rights to due process, a fair trial, and his right to be tried for the offense with which he is charged as guaranteed by 6th and 14th Amendments to the United States Constitution and Article I, §§ 10, 17 and 18(a) of the Missouri Constitution, resulting in a manifest injustice, in that the instruction told the jury that it could consider Mr. Ellison's prior conviction to sexual abuse "on the issue of the propensity of the defendant to commit the crime with which he is charged."

1) The instruction

The following instruction was offered by the state and given by the trial court over Mr. Ellison's objection:

Instruction No. 7

> If you find and believe from the evidence that the defendant pled guilty to sexual abuse, an offense other than the one for which he is now on trial, you may consider that evidence on the issue of the propensity of the defendant to commit the crime with which he is charged.

MAI-CR3d 310.12 (L.F. 35).[10]

2) Preservation

During the instruction conference, Mr. Ellison objected to the giving of Instruction No. 7, which was patterned after MAI-CR3d 310.12 and read, "If you find and believe from the evidence that the defendant pled guilty to sexual abuse, an offense other than the one for which he is now on trial, you may consider that evidence on the issue of the propensity of the defendant to commit the crime with which he is charged (Tr. 207; L.F. 35). Mr. Ellison stated that he had filed a written motion and had objected at the time the prior conviction was offered into evidence (Tr. 207). See, Point I. Mr. Ellison incorporated by reference all of his arguments made in the written motion (Tr. 207-08). Mr. Ellison objected that the instruction violated his constitutional right to a fair trial (Tr. 208-09). The trial court overruled the objections (Tr. 208). The objection to the instruction was not included in the motion for new trial.

[10] Mr. Ellison is objecting to the giving of this instruction. He would also note that even if the instruction had been proper it omits the phrase "You may not consider such evidence for any other purpose" as required by Note on Use No. 3(8) to MAI-CR3d 310.10, which is applicable pursuant to Note on Use No. 2 to MAI-CR3d 310.12

3) Standard of Review

Mr. Ellison concedes that because he failed to include a challenge to Instruction No. 7 in his motion for new trial, this Court, in its discretion, reviews a claim of error in regard to the submission of the instruction only for plain error. **Rule 28.03**; ***State v. Beck***, 167 S.W.3d 767 (Mo. App. W.D. 2005)***; State v. Derenzy***, 89 S.W.3d 472, 475 (Mo. banc 2002). Unpreserved claims of plain error may still be reviewed under **Rule 30.20** if manifest injustice would otherwise occur. ***Derenzy***, 89 S.W.3d at 475. **Rule 30.20** provides, in pertinent part, that "plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom."

Instructional error constitutes plain error when it is clear that the trial court so misdirected or failed to instruct the jury as to cause manifest injustice or miscarriage of justice. ***State v. Farris***, 125 S.W.3d 382, 390 (Mo. App. W.D. 2004). A manifest injustice occurs as a result of instructional error where it is apparent to this Court that the instructional error affected the jury's verdict. ***Id***. The erroneous giving of an instruction patterned after MAI-CR3d 310.12 result in a manifest injustice. ***State v. Frankenberg***, 876 S.W.2d 286 (Mo. App. S.D. 1994).

4) Analysis

The Missouri Supreme Court in ***State v. Burns***, 978 S.W.2d 759, 760 (Mo. banc, 1998) held former **§ 566.025, RSMo 1994**, was unconstitutional because of

that statute's declaration that evidence of other charged and uncharged crimes "shall be admissible for the purpose of showing the propensity of the defendant to commit the crime or crimes with which he is charged." That language offended **Article I, §§ 17 and 18(a) of the Missouri Constitution**, which guarantee a criminal defendant the right to be tried only on the offense charged. ***Id.***, at 760. The ***Burns*** Court further stated that "this Court has recognized that showing the *defendant's propensity to commit a given crime is not a proper purpose* for admitting evidence…" (emphasis added) ***Id.***, at 761 *citing* ***State v. Bernard***, 849 S.W.2d 10, 16 (Mo. banc 1993). Evidence of prior misconduct of the defendant is "not admissible to show propensity." ***Id***. The ***Burns*** court also noted that there was a "long line of Missouri cases declaring that the admission of evidence to prove propensity violates the defendant's right to be tried only for the offense charged." ***Id***. at 762.

Yet Instruction No. 7 allowed the jury to consider Mr. Ellison's prior conviction for what the Missouri Constitution prohibits when it provided that the jury "may consider that evidence *on the issue of the propensity* of the defendant to commit the crime with which he is charged" (L.F. 35).

MAI-CR3d 310.12 provides:

> If you find and believe from the evidence that the defendant (was involved in) (was convicted of) (was found guilty of) (pled guilty to) (pled nolo contendere to) (an offense) (offenses) other than the one for which he is now on trial (and other than the offense mentioned in Instruction No.

___), you may consider that evidence on the issue of (identification) (motive) (intent) (absence of mistake or accident) (presence of a common scheme or plan) ([*Specify other purpose for which the evidence was received as substantive evidence of guilt.*]) of the defendant (and you may also consider such evidence for the purpose of deciding the believability of the defendant and the weight to be given to his testimony). (You may not consider such evidence for any other purpose.)

Apparently the state and the trial court believed that the jury could be instructed that the jury could consider Mr. Ellison's prior conviction "on the issue of the propensity of the defendant to commit the crime with which he is charged" because of the language "([*Specify other purpose for which the evidence was received as substantive evidence of guilt.*])" used in **MAI-CR3d 310.12**. There is nothing in either the Notes on Use to that instruction, or to the companion instruction, **MAI-CR3d 310.10** that would lead to such a conclusion. In fact, the history of **MAI-CR3d 310.12** would lead to the opposite result.

The 1987 version of **MAI-CR3d 310.12** had the language in the body of the pattern instruction ([*Specify other purpose for which the evidence was received as substantive evidence of guilt.*]) (See Appendix for the 1987, 1995, and 1999 versions of **MAI-CR3d 310.12**). After former **§ 566.025, RSMo 1994**, was enacted, that language still appeared in the body of the instructions, but the Notes on Use to **MAI-CR3d 310.12** were changed. Notes on Use No. 3 was changed to read, in pertinent part:

> MAI-CR 3d 310.12 *should not be given when evidence of another crime has been admitted under Section 566.025 to show propensity*. If evidence of another crime is admitted to show motive, intent, etc. and is not admissible to show propensity, and if this instruction is given with reference to the non-propensity crime, the instruction should be modified to specify the non-propensity crime. See Notes on Use 3(f) to MAI-CR3d 310.10 for an example of such modification.

(emphasis added). Thus, under the prior Notes on Use the instruction should not have been given in this case.

It is true that the language in this note is no longer in the present version of the instruction, which was revised in 1999, but that is because it was removed after the Missouri Supreme Court declared former **§ 566.025, RSMo 1994**, unconstitutional in ***Burns*** in 1998. Apparently the withdrawn Note on Use was forgotten after the legislature amended **§ 566.025** in 2000.

But even if there was no Note on Use, "MAI-CR and its Notes on Use are 'not binding' to the extent they conflict with the substantive law." ***State v. Carson***, 941 S.W.2d 518, 520 (Mo. banc 1997); ***Farris***, 125 S.W.3d at 390-91. As noted above, the instruction conflicts with the Missouri Supreme Court's decision that evidence cannot be admitted for propensity purposes.

Further, under the facts of this case, a manifest injustice has resulted. Mr. Ellison has detailed the problems with the state's case during his prejudice argument in the argument portion of Point I of this brief, and he incorporates by

reference that argument here. In addition, Instruction No. 7 told the jury that it could do what it constitutionally could not do: "consider [evidence of Mr. Ellison's prior conviction] on the issue of the propensity of the defendant to commit the crime with which he is charged." (L.F. 35). In other words, the jury was told by the court that it could consider Mr. Ellison's prior conviction on the theory that if he committed one sex crime he might have committed the charged one.

The trial court plainly erred in overruling Mr. Ellison's objections and in giving Instruction No. 7. A manifest injustice has resulted. This Court should reverse Mr. Ellison's judgment of conviction, and remand the cause for a new trial.

III.

The trial court erred in overruling Mr. Ellison's motion for judgment of acquittal at the close of all the evidence, in accepting the jury's guilty verdict as to child molestation in the first degree, § 566.067, and in sentencing him for that offense, because the state did not prove beyond a reasonable doubt that Mr. Ellison touched the genitals of J.G. with his genitals, as it was charged in the verdict director, in violation of Mr. Ellison's rights to due process and to be tried for the offense with which he is charged, as guaranteed by the 14th Amendment to the U.S. Constitution and Art. I, §§ 10, 17, and 18(a) of the Missouri Constitution, in that when asked to describe what happened regarding the charged act, J.G. testified that while Mr. Ellison was naked he pulled her pants, down, "he *tried* to stick his penis in me, and he said it *would* go in about that far (indicating)", J.G. did not see whether or not "it was going in," she did not know whether or not "it went in," she could feel him "pushing on" her, and it hurt when he did "that," so her testimony did not establish that his genitals touched her genitals.

1) Standard of Review & Preservation

The due process clause protects a defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. ***In re Winship,*** 397 U.S. 358, 364 (1970). The state is held to proof of the elements of the offense it charged, not the ones it might have

charged. ***State v. Keeler,*** 856 S.W.2d 928, 931 (Mo. App. S.D. 1993). Where the act constituting the crime is specified, the state is held to proof of that act; and a defendant may be convicted only on that act. ***State v. Jackson***, 896 S.W.2d 77, 82-83 (Mo. App. W.D. 1995).

In reviewing a challenge to sufficiency of the evidence, this Court accepts as true all evidence and its inferences in a light most favorable to the verdict. ***State v. Botts***, 151 S.W.3d 372, 375 (Mo. App. W.D. 2004). This Court disregards contrary inferences, unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. ***State v. Grim***, 854 S.W.2d 403, 411 (Mo. banc 1993). Conjecture and speculation will not support a criminal conviction. ***State v. Dawson***, 985 S.W.2d 941, 948 (Mo. App. W.D. 1999)**.** While reasonable inferences may be drawn from both direct and circumstantial evidence, the inferences must be logical, reasonable and drawn from established fact. ***Id***. This same standard of review applies when this Court reviews a motion for a judgment of acquittal. ***Botts***, 151 S.W.3d at 375.

After the evidence was presented at trial, the trial court overruled Mr. Ellison's motion for judgment of acquittal at the close of the evidence (Tr. 205). After Mr. Ellison was convicted, the trial court gave him twenty-five (25) days in which to file a motion for new trial (Tr. 249). On August 30, 2005, Mr. Ellison timely filed his Motion for Judgment of Acquittal or in the Alternative, Motion for New Trial (L.F. 40-41). That motion claimed that the trial court erred when it overruled Mr. Ellison's motions for judgment of acquittal because the evidence

was insufficient to convict him of child molestation in the first degree (L.F. 40-41). Even if that claim was not in the motion for new trial, a claim that the evidence was insufficient to support a conviction need not be included in the motion for new trial. **Rule 29.11(d)(3)**. This point is properly preserved for appeal.

2) The Charge

Mr. Ellison was charged by amended information with the class A felony of child molestation in the first degree in the first degree, **§ 566.067** (L.F. 22-23; Tr. 7-8). The state said it was filing the amendment "based on testimony or evidence received at the deposition of the complaining witness and is intended to conform with the evidence that she gave at that time" (Tr. 7).[11] It was alleged that between June 1, 2003, and August 31, 2003, Mr. Ellison subjected J.G., who was less than fourteen years old, to sexual contact (L.F. 22). It was later specified in the verdict director that Mr. Ellison touched the genitals of J.G. with his genitals (L.F. 33).

3) Relevant facts

Regarding the charged offense, J.G. testified that in the summer of 2003, Mr. Ellison told her to sit on his bed, he walked in naked, he pulled her pants down, and "he tried to stick his penis in me, and he said it would go in about that

[11] During closing argument, defense counsel told the jury that at the deposition J.G. did not say that J.G. had raped her, rather the most that she said had happened was that Mr. Ellison tried to place his penis in her vagina (Tr. 230).

far (indicating)" (Tr. 177). J.G. did not see whether or not "it was going in" (Tr. 177). She did not know whether or not "it went in" (Tr. 177). She could feel him "pushing on" her (Tr. 177). It hurt when he did "that" (Tr. 177). She told him to stop, but he did not stop (Tr. 177).

4) Analysis

A person commits the crime of child molestation in the first degree if he or she subjects another person who is less than fourteen years of age to sexual contact. **§ 566.067.1**. "Sexual contact" is defined as "*any touchin*g of another person *with the genitals or any touching of the genitals* or anus of another person, or the breast of a female person, or such touching through the clothing, for the purpose of arousing or gratifying sexual desire of any person." **§ 566.010.(3)** (emphasis added). Here the amended information alleged that between June 1, 2003, and August 31, 2003, Mr. Ellison subjected J.G., who was less than fourteen years old, to sexual contact (L.F. 22). It was specified in the verdict director that Mr. Ellison *touched the genitals* of J.G. *with his genitals*, which is a hybrid of the definition of sexual contact because it charges two separate ways to have sexual contact – a touching "with the genitals" and a touching "of the genitals" (L.F. 33).

At the time J.G. testified she was eleven years old (Tr. 166). She knew that "raped" meant when "a guy would stick his penis in a girl's vagina and she didn't want him to" (Tr. 171-72). Thus, she was able to testify with specificity, if asked, what Mr. Ellison did to her concerning the charged offense. Yet her testimony did not establish either that Mr. Ellison touched her with his genitals or that he

touched her genitals, and the state was required to prove both since that was what it had charged.

J.G. testified that Mr. Ellison "tried to stick his penis in me, and he said it would go in about that far (indicating)" (Tr. 177). This testimony does not establish touching with Mr. Ellison's genitals or a touching of J.G.'s genitals. Mr. Ellison could have tried to put his penis in her while saying that it "would go in about that far" without actually any contact of their genitals. J.G. further said that she did not see whether or not his penis "was going in" and she did not know whether or not "it went in" (Tr. 177). Again, this does not establish touching of her genitals or a touching with his genitals. The closest her testimony came to establishing the charge was when she testified that she could feel him "pushing on" her and that it hurt when he did "that" (Tr. 177). But she did not say where the "pushing" occurred or what Mr. Ellison was pushing with. Courts have allowed a little bit of vagueness when dealing with alleged child victims but here we were dealing with an eleven year old who knew the terminology and could answer questions directly and clearly when asked. While reasonable inferences may be drawn from the evidence, the inferences must be drawn from established fact. ***Dawson***, 985 S.W.2d at 948. This Court should not speculate as to what Mr. Ellison pushed with or what he pushed on. That would be improper. ***Id***.

Because the state did not prove beyond a reasonable doubt what the verdict director required it to prove, this Court must reverse Mr. Ellison's conviction for child molestation in the first degree and discharge him.

CONCLUSION

For the reasons presented in Points I and II, Mr. Ellison requests that this Court reverse his conviction and remand for a new trial. For the reasons presented in Point III, Mr. Ellison requests that this Court reverse his conviction and discharge him.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Craig A. Johnston, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13-point font. I hereby certify that this brief includes the information required by Rule 55.03. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 13,511 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using McAfee VirusScan, which was updated on June 22, 2006. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this _____ day of June, 2006, to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

_____

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