

No. WD66013

**IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI,

Respondent,

v.

DONALD J. ELLISON,

Appellant.

**Appeal from the Circuit Court of Livingston County, Missouri
Forty-Third Judicial Circuit
The Honorable Warren L. McElwain, Judge**

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from a conviction for child molestation in the first degree, §566.067, RSMo 2000, obtained in the Circuit Court of Livingston County, for which appellant was sentenced to twenty years imprisonment. This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. Therefore, jurisdiction lies in the Missouri Court of Appeals, Western District. Article V, §3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Donald J. Ellison, was charged via information with one count of statutory rape in the first degree (LF 3, 13-14). An amended information was subsequently filed, amending the charge to child molestation in the first degree and charging appellant as a prior offender (LF 5, 22-23). On August 4, 2005, this cause went to trial before a jury in the Circuit Court of Livingston County, the Honorable Warren L. McElwain presiding (LF 5-6; Tr. 23).

Appellant challenges the sufficiency of the evidence to support his conviction. Viewed in the light most favorable to the verdict, the evidence adduced at trial showed the following:

Tawanda Jewell lived in Chillicothe and had two children, J.G. (born June 11, 1994) and Jimmy Graves (Tr. 130). Tawanda had known Tena Ellison since they were kids; Tena was married to appellant (Tr. 131). Appellant and his wife lived in Wheeling (Tr. 131).

In the summer of 2003, Tawanda was employed at Dairy Queen; later that summer, Tena Ellison got a job there as well (Tr. 132). When Tena wasn't working she watched Tawanda's children, but when they were both working the same shift, appellant watched the children at the Ellisons' home (Tr. 132, 168, 176). Sometimes the children would spend the night at the Ellisons' home (Tr. 132-133). They would spend the night up to four times a week (Tr. 133). Once school started in the fall, Tawanda had no need to use the Ellisons as babysitters (Tr. 133-134).

That summer, while appellant was watching J.G., he told her to go in and sit on his bed (Tr. 177). Appellant came in with no pants on, and he tried to stick his penis in her (Tr. 177). Appellant said it would go in “about that far.” (Tr. 177). J.G. could feel appellant pushing on her (Tr. 177). It hurt, but when J.G. would tell appellant to stop, he wouldn’t stop (Tr. 177). J.G. did not tell anyone for a year because appellant said that if she told anyone, he would kill her (Tr. 174). J.G. was also embarrassed and afraid she would get into trouble (Tr. 179).

On August 19, 2004, J.G. was at a slumber party at the home of her best friend, Glenda, who lived next door (Tr. 134, 168). Glenda, J.G., and the other two girls at the party started talking about things that made people sad, and some of the girls indicated that they “had kind of a rough life.” (Tr. 169). J.G. said that they did not know how it felt to be molested or raped (Tr. 169-170). The girls told J.G. she was lying, and J.G. began to cry (Tr. 170). Glenda told her mother (Tr. 170). Glenda’s mother brought J.G. back to Tawanda’s home between 10:30 and 11:00 p.m. (Tr. 135, 170). J.G. was crying so hard she was almost hyperventilating (Tr. 135). J.G. told her mother that appellant had raped her (Tr. 139, 171).

After J.G. told her mother what had happened, Tawanda called her brother, Russell Lawson (Tr. 136). A friend of Tawanda’s then took J.G. and Tawanda to the sheriff’s office (Tr. 136, 172). They arrived between 11:30 p.m. and midnight (Tr. 137). Deputy Kurt Reith was there (Tr. 137, 150). Deputy Reith tried to talk to J.G. about what had happened, but J.G. was upset and reluctant to talk (Tr. 137, 151). J.G. told Deputy Reith that appellant had raped her (Tr. 151, 172). J.G. said it happened three times (Tr. 153). J.G. said this would

happen when Tena Ellison was not present (Tr. 153). Appellant would send the other children to the park to play (Tr. 153). J.G. was embarrassed to talk to Deputy Reith because he was a male (Tr. 173). Deputy Reith asked J.G. if she would be more comfortable talking to a female deputy and J.G. indicated that she would (Tr. 138, 152, 174-175). Arrangements were made for her to talk to Deputy Kim Valbracht the following day (Tr. 138).

The next day, Deputy Valbracht came to J.G.'s house, and she and J.G. went back in her bedroom to talk (Tr. 138, 156, 175). J.G. was very upset, and cried as she told Deputy Valbracht what had happened (Tr. 157). J.G. was very nervous and scared (Tr. 157). J.G. said that the abuse began after her sixth or seventh birthday and continued until her ninth birthday, which would have been the preceding summer (Tr. 157). J.G. said that the acts occurred at appellant's residence at 509 N. Grant in Wheeling (Tr. 157). J.G. said that something sexual happened just about every time she went over there (Tr. 160). J.G. asserted that appellant showed her pornography on videotapes and on the computer (Tr. 161-162). J.G. said that appellant masturbated in her presence, that they engaged in oral sex in the bathroom, and that appellant ejaculated in her presence (Tr. 162). J.G. said that appellant wanted her to drink the ejaculate, and that it made her gag and spit up (Tr. 162-163). J.G. said that they engaged in vaginal intercourse in appellant's room, his daughter's room, the bathroom, and on a couch in the living room (Tr. 163-164). J.G. said that appellant videotaped it one time (Tr. 164). Many of these acts occurred before the summer of 2003 (Tr. 178).

Appellant did not testify in his defense, but presented the testimony of the victim's brother, Jimmy Graves (Tr. 194-200, 203).

At the close of evidence, instructions, and argument by counsel, the jury, after deliberation, found appellant guilty of child molestation in the first degree (LF 7, 39; Tr. 245). At the sentencing hearing, evidence was put on that appellant had shown pornographic movies to his nieces and nephews (Tr. 266-271). A friend of appellant's daughter testified that appellant had touched her in her pubic area with his finger (Tr. 277). Another friend testified that appellant touched her buttocks with his foot and asked if she was scared of his touching (Tr. 288). Another friend testified that she was alone with appellant in a car, and appellant asked her that if he pulled out in the middle of nowhere and he gave her two choices, to either have sex with him or run, what would she do? (Tr. 292). When she said she would run, appellant told her that she was a smart girl (Tr. 292). The trial court, having previously found appellant to be a prior offender (LF 5; Tr. 10), sentenced appellant to 20 years (LF 9, 42-44; Tr. 342).

I.

The trial court did not abuse its discretion in allowing the state to introduce evidence of appellant's 1992 felony conviction for sexual abuse in the first degree of another child because §566.025 allows for admission of such evidence when the trial court has made a determination that its probative value outweighs the prejudicial effect. Appellant's claim that Section 566.025 is unconstitutional is unpreserved.

Appellant contends that Section 566.025, which allows admission of evidence of prior acts of sexual crimes against children under 14 to show a defendant's propensity to commit such crimes, is unconstitutional because it allows for admission of propensity evidence. Thus, the trial court purportedly erred in allowing the state to admit evidence of appellant's 1992 felony conviction for sexual abuse in the first degree. Appellant also contends that the probative value of the prior conviction was outweighed by the prejudicial effect and the evidence was not relevant.

A. Relevant facts.

Prior to trial, appellant, who was charged with child molestation in the first degree, filed a motion in limine to prevent the state from adducing any evidence that appellant touched women and/or children other than the victim in an inappropriate manner (LF 5, 16-18). Appellant asserted that such evidence would violate his right to be tried for only the crime for which he was charged (LF 16). Appellant further asserted that the prejudicial impact of the evidence would outweigh any probative value because the jury would overlook

whether the state had actually proven whether he violated the law in the present case, and he would be made to defend against the prior crimes as well (LF 16).

Pretrial, defense counsel explained that her only objection was to the state's use of appellant's prior conviction as substantive evidence to show the jury appellant's propensity to commit the crime in the present case (Tr. 10-11). Defense counsel asserted that she was concerned that it would encourage the jury to convict appellant simply because of his propensity to commit such crimes without regard to whether he was actually guilty in the present case (Tr. 12).

The prosecutor argued that the evidence had probative value, noting essentially that the legislature had made such a determination (Tr. 12-13). While the prosecutor noted that the former version of §566.025 had been overturned as unconstitutional in *State v. Burns*, this was because it allowed for the introduction of uncharged misconduct (Tr. 13). The prosecutor noted that he was offering conduct that had been proven through the defendant's own guilty plea to the prior crime (Tr. 13). The prosecutor noted that the prejudice did not outweigh the probative value where the state was only introducing the fact of the conviction itself and was not bringing in the prior victim or offering any testimony or evidence of any nature as to the actual details of the prior crime (Tr. 13-14). Rather, the state was simply offering the document establishing the prior conviction (Tr. 14).

The trial court noted that *State v. Burns* had to do with uncharged crimes and had found the statute unconstitutional based on that (Tr. 14-15). The trial court further found that the state was introducing evidence of a crime to which appellant had already admitted his

guilt (Tr. 15). The trial court then overruled appellant's motion in limine, finding that the evidence of the prior conviction was more probative than prejudicial (Tr. 15).

During jury selection, defense counsel voir dired on the issue of whether any of the prospective jurors would believe that a person who had a prior felony conviction for a similar offense would be guilty of the present offense (Tr. 101). Juror No. 11 said that he would, but Juror No. 11 did not sit on the jury (Tr. 101, 119). Juror 26 said that he hoped he would not lower the standard of proof because of the prior conviction, but it was a possibility; Juror 26 did not sit on the jury (Tr. 101-102, 119). Juror No. 32 said that he agreed with Juror 26; Juror 32 did not sit on the jury (Tr. 102).

Defense counsel then asked, "If the state did not convince you beyond a reasonable doubt of the defendant's guilt but you knew that they had a prior conviction for a similar offense, would that cause you to lower the standard of proof" (Tr. 102). Juror 32 said he would not lower the standard of proof (Tr. 103). Juror 20 opined that he might lower the standard; Juror 20 did not sit on the jury (Tr. 103, 119). Juror 6 also said that he would be more apt to believe that the defendant was guilty; Juror 6 did not sit on the jury (Tr. 103, 119).

In short, none of the jurors who indicated that they would be more likely to find the defendant guilty because of the prior conviction, regardless of whether the state met its burden of proof otherwise, sat on the jury.

The state began its case-in-chief by putting into evidence State’s Exhibit 1, a certified copy of appellant’s prior conviction for sexual abuse (Tr. 127-128). The state did not adduce any other evidence regarding the prior conviction.

The jury was given Instruction No. 7, based on MAI-CR3d 310.12, which stated that if the jury found that appellant had pled guilty to sexual abuse, an offense other than the one for which he was then on trial, the jury could consider that evidence on the issue of the propensity of the defendant to commit the crime with which he was charged in the present case.

The state did not make any argument in closing that the prior conviction proved appellant’s guilt. The state referenced the prior conviction only in noting that J.G.’s mother “was compelled to admit that she was aware of the fact the defendant had the prior conviction, but she trusted him. She didn’t think he could possibly do it to her kids. She expected that her kids would be safe with him. So she entrusted them to Mr. Ellison’s care during that summer.” (Tr. 213). This comment was prompted by defense counsel’s cross-examination of J.G.’s mother.¹

¹During cross-examination of J.G.’s mother, defense counsel asked whether she was aware that appellant had a prior conviction for a sex offense (Tr. 148). Defense counsel asked J.G.’s mother if appellant had told her that when they first met, and J.G.’s mother testified that “They didn’t keep it a secret.” (Tr. 148). On redirect, J.G.’s mother acknowledged that J.G. did not know about the prior conviction (Tr. 149).

Defense counsel did bring up the prior conviction in closing:

I know it will be easy when you get back to the jury room to look at Donald's conviction and decide the case based on that. I know it will be easy for you to say, well, he did this in the past and I don't want to take any chances with a child molester. But I ask that you look at all of the evidence, including his conviction. It was 13 years ago. It was a long time ago. He now has a family, and he has moved past that. I ask that you look at all of the evidence. . . . If you do not believe all of Jennifer's story, then you know that she lied. And if she lied, the more grandiose the story got, the more reasonable doubt you have. If you believe that she lied about any of this story, then you have a reasonable doubt, and you are obligated to find Donald Ellison not guilty.

(Tr. 233-234).

B. Analysis.

Appellant asserts that the trial court erred in admitting appellant's prior conviction because, notwithstanding the fact that §566.025 allows for such evidence to be admitted where the trial court finds that the probative value of the evidence is outweighed by the prejudicial effect, appellant believes that the prejudicial effect outweighed the probative value of the prior conviction.

A trial court is vested with broad discretion over questions of relevancy and the admissibility of evidence. *State v. Dunn*, 817 S.W.2d 241,245 (Mo.banc 1991). A trial court typically has broad discretion in deciding whether to admit evidence and, as such, a

reviewing court will not disturb its decision unless a clear abuse of discretion is shown. *State v. Berwald*, 186 S.W.3d 349, 358 (Mo.App.W.D. 2005). The decision to admit evidence is an abuse of discretion where it is clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that the decision shocks the sense of justice and indicates a lack of careful deliberate consideration. *State v. Kennedy*, 107 S.W.3d 306, 310 (Mo.App.W.D. 2003). If reasonable persons can disagree about the propriety of the trial court's decision, the trial court did not abuse its discretion. *State v. Tyra*, 153 S.W.3d 341, 345 (Mo.App.S.D. 2005). *Id.*

The trial court admitted the evidence in question pursuant to §566.025, which provides as follows:

In prosecutions pursuant to this chapter [566] 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.

In admitting the evidence in the present case, the trial court found that the probative value of such evidence was outweighed by the prejudicial effect. In making such a

determination, the court by necessity had to find the probative value of the evidence which, in essence, is the logical relevance of the evidence.

For evidence to be logically relevant, it must tend to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. *State v. Polson*, 145 S.W.3d 881, 889 (Mo.App.W.D. 2004). Does the fact that appellant previously admitted to a criminal sexual act with a child tend to make it more or less probable that the defendant committed a sexual crime against the child in the case at hand? Yes.

It is well established that there is a high potential of recidivism among sex offenders whose crimes involve the exploitation of young children. As the United States Supreme Court stated in *McCune v. Lile*,

Sex offenders are a serious threat in this Nation. . . . Between 1980 and 1994, the population of imprisoned sex offenders increased at a faster rate than for any other category of violent crime [citation omitted]. As in the present case, the victims of sexual assault are most often juveniles. In 1995, for instance, a majority of reported forcible sexual offenses were committed against persons under 18 years of age. [citation omitted]. When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault. [citation omitted].

McCune v. Lile 536 U.S. 24, 32-33, 122 S.Ct. 2017, 2024 (U.S.,2002)

The United States Congress and federal courts have recognized the relevancy of propensity evidence in child sex cases, and under the federal rules, such evidence is admissible. *See, e.g.*, Federal Rules of Evidence 413-415; *United States v. Guidry*, 456 F.3d 493 (5th Cir. 2006). Other states have allowed such evidence as well, either by rule or by statute. *See, e.g.*, Arizona Rules of Evidence 404(c); *State v. Williams*, 99 P.3d 43 (Ariz.App. Div. 1 2004); California Evidence Code §1108; *People v. Falsetta*, 986 P.2d 182 (Cal. 1999); 725 Illinois Compiled Statutes Annotated 5/115-7.3; *People v. Reed*, 838 N.E.2d 328 (Ill.App.4 Dist. 2005).

Appellant does not appear to ever argue that this is not true, that is, that evidence that a person has committed prior sexual crimes against children makes it more likely that he would commit the crime in the present case. Thus, appellant never asserts that the evidence in question does not meet the definition of “logically relevant.”

Appellant, however, argues that the prior conviction in this case cannot be logically relevant because it does not fall within any of the categories set out in *State v. Bernard*, 849 S.W.2d 10 (Mo.banc 1993); it does not show motive, intent, the absence of mistake or accident, a common scheme or plan, the identify of the person, or a signature modus operandi. (App.Br. 38-39). But *Bernard* is not exclusive (and appellant acknowledges this (App.Br. 39)). In fact, *Bernard* expressly states: “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.* at 13.

Essentially, what *Bernard* recognizes is a general evidentiary rule that the admission of uncharged prior misconduct is inadmissible for the purpose of showing the propensity of the defendant to commit such crimes. *Id.* at 13. *Bernard* cites to *State v. Reese*, 274 S.W.2d 304, 307 (1954), for this “general rule,” which is stated therein as: “The well established general rule is that proof of the commission of separate and distinct crimes is not admissible, *unless such proof has some legitimate tendency to directly establish the defendant’s guilt of the charge for which he is on trial.*” *Reese*, at 307 (emphasis added).

The Missouri General Assembly, in passing §566.025, recognized what the United States Congress has recognized, what other state legislatures have recognized, and what other courts around the country have recognized: that, in fact and in law, prior crimes of a sexual nature involving children can be logically relevant to proving that any given defendant has repeated his offense and again sexually violated a child.

This is not to say that every prior bad act involving a sex act with a child will always be logically relevant and thus admissible. Section 566.025 requires the trial court to determine whether the probative value of the evidence (that is, the logical relevancy) is outweighed by the prejudicial effect of the evidence. Appellant asserts that this does not require the court to find that the evidence is also logically relevant (App.Br. 36, 38). Obviously, the statute *does* require the court to find that the evidence is logically relevant, inasmuch as the court cannot even engage in the required weighing of the probative value of the evidence against the prejudicial effect without first making a determination of the probative value which, by definition, is the logical relevance of the evidence.

Thus, the question then becomes whether the logical relevance of this prior conviction outweighed the prejudicial effect. The evidence in question was that appellant had previously pled guilty and admitted that he had subjugated a 13-year-old girl to sexual contact without her consent by the use of forcible compulsion and in the course thereof inflicted serious physical injury, for which he received a suspended execution of sentence, 30 days shock time, three years probation, and required attendance of a sex offender program (St.Exh. 1). This evidence was logically relevant to show that appellant had the intent and propensity to engage in sexual acts with young girls, as he was charged with doing in the present case.

The evidence was not particularly prejudicial. No details were elicited. No witnesses were called to describe the event. The previous victim did not testify. There was no indication as to the type of sexual contact, or what the injury was, or whether this was a one-time incident or an ongoing sexual relationship, or the long-term effects on the victim. The jury was simply presented with an impersonal document. The evidence presented was no more than would have been presented had appellant testified. The evidence was not such that it was likely that the jury would be inflamed by it or that the jury would confuse the evidence with the evidence regarding the acts for which appellant was then being tried.

In addition, it must be noted that the jury had been thoroughly voir dired on the issue and those potential jurors who indicated that they would be swayed by the conviction and not hold the state to its standard of proof were removed. Moreover, the prosecution did not

emphasize the prior conviction in any way. It was not emphasized in the state's case-in-chief nor in the state's closing argument.

There are no cases in Missouri addressing the admissibility of evidence under the current version of §566.025. However, looking at cases from jurisdictions with similar legislation allowing such evidence, one can see that the evidence in this case was admissible as the probative value was not outweighed by the prejudicial effect.

For example, in *United States v. Granbois*, 119 Fed.Appx. 35 (9th Cir. 2004), the Ninth Circuit found that evidence of Granbois's prior convictions for abusive sexual contact were properly admitted in his trial for aggravated sexual abuse of a minor. In so ruling, the Ninth Circuit noted that the prior acts were similar to the charged conduct in that they involved abusive sexual conduct toward minors. *Id.* at 37. This, in combination with the present charges, showed a pattern of conduct involving sexual abuse of minors. *Id.* The evidence was necessary because the prosecution's case rested on the testimony of the victim whose credibility was attacked by the defense. *Id.* Also weighing in favor of admitting the evidence was the fact that the evidence was highly reliable because Granbois had pled guilty to the prior charges. *Id.* at 38. Finally, there was little prejudice beyond the probative nature of the evidence, given that the prior acts were not introduced through emotional and highly charged testimony of a victim or a victim's relative, but rather through the testimony of a criminal investigator. *Id.*

Similarly, in the present case, the prior act was similar in that it involved sexual misconduct with a minor. The evidence was necessary because the state's case rested on

J.G.'s testimony and appellant challenged her credibility. The evidence was highly reliable because appellant had pled guilty to the prior charge. And the evidence, as presented, was not unduly prejudicial in that it was not introduced through emotional testimony from a victim or a victim's relative, or frankly, from any testimony at all, but rather through admission of a cold, matter-of-fact court document.

Appellant cites numerous Missouri cases wherein prejudice from the evidence of a prior conviction was found to outweigh the probative value of said evidence (App.Br. 39-42). Most of appellant's cases do not involve child sex crimes, and thus are not particularly helpful by way of comparison, especially in light of the fact that the courts in those cases did not have to consider §566.025 and the legislature's determination regarding the admissibility of prior bad acts in child sex cases.

Appellant cites some cases dealing with sex crimes, but these are also inapposite. *State v. Chiles*, 847 S.W.2d 807 (Mo.App.W.D. 1992), predates the passage of §566.025, and found the evidence inadmissible because it was too remote to fall within the common scheme exception of *Bernard* and was not unique enough to fall within the modus operandi exception.

State v. Nelson, 178 S.W.3d 638 (Mo.App.E.D. 2005), which does not deal with admissibility under §566.025, is distinguishable in that in *Nelson*, the state called the victim from the prior crime and the police officer who questioned Nelson regarding the prior crime, and entered into evidence Nelson's written confession from the prior crime. *Id.* at 641. In addition, the state played Nelson's 1-hour videotaped confession to the prior crime. *Id.* at

641-642. As a result, the Eastern District, having reviewed the testimony and the confessions detailing the prior crime, determined that the state “literally tried the earlier crime to the jury in this case.” *Id.* at 644. The Eastern District found that the State “used the seriousness and level of graphic detail characterizing the earlier conviction to bolster the relative weakness of this case.” *Id.*

It can hardly be said that the same happened in the present case. The prosecution in the present case did not present any details or witnesses at all with regard to the prior conviction. It only entered into evidence the legal documents signifying that appellant had been convicted before. The level of prejudice from the evidence of the prior conviction in the present case is substantially less than the prejudice from the evidence in *Nelson*.

In short, appellant’s prior conviction was admissible under §566.025 and any prejudice from admission of State’s Exhibit 1, the court documents showing appellant’s prior conviction, did not outweigh the probative value of the evidence.

C. Constitutional claim is unpreserved.

Alternatively, appellant argues that the evidence was not properly admitted because §566.025 is unconstitutional. This claim is not preserved.

To preserve a constitutional claim for appellate review, such claim must be made at the first opportunity with citations to specific constitutional sections. *State v. Chambers*, 891 S.W.2d 93, 103-104 (Mo. banc 1994); *State v. Parker*, 886 S.W.2d 908, 924 (Mo. banc 1994), *cert. denied*, 514 U.S. 1098 (1995); *State v. Pullen*, 843 S.W.2d 360, 364 (Mo. banc 1992), *cert. denied*, 510 U.S. 871 (1993). The matter must also be preserved at each stage

of the judicial process, including the motion for new trial. *Pullen, supra*; *State v. Blankenship*, 830 S.W.2d 1, 12 (Mo. banc 1992); *State v. Hadley*, 815 S.W.2d 422, 425 (Mo. banc 1991); *State v. Sumowski*, 794 S.W.2d 643, 647 (Mo. banc 1990). "A constitutional question is waived if not raised at the earliest opportunity". *State v. Plummer*, 860 S.W.2d 340, 351 (Mo.App. E.D. 1993). *See also State v. Sullivan*, 935 S.W.2d 747, 754 (Mo.App. S.D. 1996).

Appellant concedes that defense counsel never made a direct constitutional challenge to §566.025 as nowhere did counsel use the words "unconstitutional" when referring to that section (App.Br. 36). Appellant's motion in limine, which generally addressed evidence that appellant had touched women and/or children, other than the alleged victim, stated that the evidence would violate his rights to due process, a fair trial, and effective assistance of counsel under the 5th, 6th and 14th Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. But appellant never stated that §566.025 was unconstitutional, and did not, when raising the claim to the trial court, reference any specific constitutional sections of either the United States or Missouri Constitutions that he believed §566.025 violated (Tr. 10-12).

In fact, when appellant raised this issue to the trial court, defense counsel noted that §566.025 had been revamped and that now the trial court had to find the evidence in question more probative than prejudicial (Tr. 11). Defense counsel then argued simply that the evidence was more prejudicial than probative (Tr. 11-12). Defense counsel did not argue that §566.025 was unconstitutional.

When appellant's prior conviction was actually offered into evidence, appellant objected, stating that he incorporated by reference all the arguments he had made in his previously filed motion and stating that it violated "his constitutional rights." (Tr. 227-228). Later, appellant objected to the giving of Instruction No. 7 about appellant's prior conviction, stating that it violated "several of [his] constitutional rights, the most important being the right to a fair trial, effective assistance of counsel, and also the confrontation clause." (Tr. 207-208). Appellant also raised the claim in his motion for new trial (LF 40-41).

Because appellant failed to raise his constitutional issue, with citations to specific constitutional sections, at the earliest opportunity, there is no issue for review before this Court. *State v. Roberds*, 820 S.W.2d 621, 622 (Mo.App. W.D. 1991).

Moreover, if appellant had preserved his claim and it was a substantial constitutional claim, as opposed to merely colorable, this Court should transfer the case to the Missouri Supreme Court. *State v. Stottlemire*, 35 S.W.3d 854, 861 (Mo.App.W.D. 2001). But where, as here, the claim is not preserved, this Court may not transfer. *State v. Belcher*, 805 S.W.2d 245, 251 (Mo.App.S.D. 1991) ("Because this issue has not been preserved for review, [this Court] can neither consider the issue nor transfer the appeal to the Supreme Court.") And since appellant's claim is unpreserved, it is merely colorable and thus without merit. *Stottlemire, supra*.

Gratuitously, respondent will briefly address appellant's claim that §566.025 could not be used to admit appellant's prior conviction. At the beginning of his analysis, appellant relies on *State v. Bernard*, 849 S.W.2d 10 (Mo.banc 1993), for the proposition that the

general rule concerning the admission of evidence of uncharged crimes is that such evidence is inadmissible for the purpose of showing propensity to commit such crimes (App.Br. 30). Appellant also notes that the Supreme Court in *Bernard* rejected a trend towards liberally allowing the admission of evidence of prior sexual misconduct by the defendant and rejected cases holding that evidence of repeated acts of sexual abuse demonstrated a propensity for sexual aberration (App.Br. 31, citing *Bernard* at 15-16). But *Bernard* does not hold that the admission of propensity evidence is unconstitutional. *Bernard* does not control what the legislature may opt to pass as legislation. And so, while *Bernard* set forth a general evidentiary rule, it is certainly within the General Assembly's prerogative to legislate evidentiary rules, even when the statute essentially overrules a Missouri Supreme Court case.

Perhaps the most well-known example, in the criminal context, of such legislation is *State v. Seever*, 733 S.W.2d 438 (Mo.banc 1987), and §492.304. In *Seever*, the Missouri Supreme Court ruled that §492.304, RSMo 1986 did not allow the state to both put on a child's videotaped statement and call the child to testify, because this would result in improper bolstering. In response to the *Seever* opinion, the General Assembly amended §492.304, so that the statute now explicitly states that a recording of a child's statement is admissible if the child testifies, even if the videotaped statement repeats or duplicates the child's testimony. §492.304.3, RSMo 2000. *State v. Skipper*, 101 S.W.3d 350, 352 (Mo.App.S.D. 2003) (noting changes in statute since *Seever*).

Indeed, the General Assembly has legislated a substantial number of topics with reference to the admissibility of evidence, including the following:

§302.745 - implied consent law

§490.660 - Uniform Business Records as Evidence law

§491.015 - rape shield statute

§491.074 - prior inconsistent statements may admissible as substantive evidence

§491.075 - admissibility of statements of children under 12

§491.680 - video recording of child victims

§492.304 - admissibility of visual and aural recordings of children under 12

Chapter 552 - legislating the admissibility of mental health evidence.

§563.033 - making evidence of battered spouse syndrome admissible on the issue of self-defense

§569.094 - computer printouts usable as evidence of computer software

Thus, the mere fact that there is Missouri caselaw that states propensity evidence is inadmissible does not render §566.025 impotent, as it is within the realm of the General Assembly to pass a statute rendering such evidence admissible under certain circumstances. Indeed, the legislature's recognition that a defendant's prior sexual crimes against children is relevant to a determination of whether a defendant may have again committed such an act is no different than the courts' recognizing other exceptions allowing for prior bad acts to come in – to show motive, intent, common scheme or plan, modus operandi, etc.

In the next portion of appellant's analysis, he turns to *State v. Burns*, 978 S.W.2d 759 (Mo.banc 1998), the case which found the 1994 version of §566.025 unconstitutional. In *Burns*, the defendant asserted that the statute was unconstitutional under article I, sections

17 and 18(a) of the Missouri Constitution.² Respondent again notes in the present case that appellant has *never* alleged that §566.025, RSMo 2000, is unconstitutional, and has never mentioned Article I, section 17 of the Missouri Constitution at any time until this appeal.

The Missouri Supreme Court found that §566.025, RSMo 1994, was unconstitutional under article I, Sections 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. Critical to the court’s ruling was the fact that the 1994 version of §566.025 made no provision of consideration of whether the evidence was logically or legally relevant, but rather provided for the mandatory admission of propensity evidence. *Id.* at 761.

In response to this ruling, the General Assembly amended §566.025, and the statute now provides for consideration of whether the evidence was logically or legally relevant. Appellant states that this statute is also unconstitutional (App.Br. 35). Appellant states that “Missouri courts have held without exception that propensity evidence is never admissible” (App.Br. 35). This is not true.

The traditional case law of Missouri includes a rule which allows propensity evidence in certain circumstances in sex offense prosecutions. Thus, in *Bernard*, the Missouri Supreme Court noted that early decisions “consistently recognized that evidence of prior

²Burns also asserted that the statute violated the Fifth, Sixth, and Fourteenth Amendments of the Constitution, but the Missouri Supreme Court did not decide the case on these grounds.

sexual misconduct between the defendant and the victim was admissible despite the general rule prohibiting evidence of prior misconduct of the defendant.” *Id.* At 13, n. 1. The Court did not question the consistency of these precedents with the Missouri Constitution, and further recognized that the traditional rule for sex offense cases had not been dependent on the authorization to admit uncharged offense evidence for non-character purposes. *See id.* at 13 n. 1 (sex offense rule does not rely on the *Sladek* exceptions). Rather, the rule straightforwardly admits evidence of other sexual acts against the victim for such purposes as establishing an antecedent probability (that is, a propensity) that the defendant would commit the charged offense, and showing a disposition of the defendant to commit the charged offense. In *State v. Bascue*, 485 S.W.2d 35 (Mo.banc 1972), the Missouri Supreme Court explained:

Appellant argues that the acts of “messaging around” and playing with [the victim’s] private parts are not so interrelated with the charge of rape as to come within the exception to the general rule of inadmissibility of other crimes, under which exception evidence of other offenses is admissible when their proof may tend to establish motive or intent, or a common scheme or plan . . . Appellant maintains that the prior acts in question constitute nothing more than child molestation, are not reasonably related to the charge of statutory rape . . . and are remote in point of time, that by their admission in evidence appellant was placed on trial for acts with which he was not charged, in violation of his rights under state and federal constitutional provisions.

The acts in question are reasonably related to the charge. In cases of statutory rape not only are prior acts of intercourse between accused and prosecutrix admissible in evidence as tending to show the relationship between the parties and the probability that the parties committed the specific act charged . . . but evidence of prior acts of “lascivious familiarity between the parties, not amounting to sexual intercourse” . . . is admissible for the same reasons In State v. Cooper, Mo.Sup., 271 S.W. 471, 474 (7) . . . evidence of prior acts of fondling the person of prosecutrix . . . was held properly admitted . . . to show the disposition and inclination of prosecutrix and defendant to commit the act charged in the information The rule has recent application in State v. Garner, Mo.Sup., 481 S.W.2d 239(4), a child molestation case The objection that evidence of prior acts . . . placed [the accused] on trial for acts with which he was not charged . . . is not well taken

State v. Bascue, supra, 485 S.W.2d at 36-37.

The view that the Missouri Constitution categorically prohibits propensity evidence is inconsistent with the Missouri Supreme Court’s recognition and application of this traditional sexual propensity evidence rule in *Bascue* and numerous other decisions. Moreover, there is not significant precedent supporting a constitutional preclusion of sexual propensity evidence, even taking account of the two sex offense cases cited in the *Burns* opinion, *State v. Harris*, 222 S.W. 420 (Mo. 1920) and *State v. Wellman*, 161 S.W.2d 795

(Mo. 1913). Insofar as these cases might be thought to declare a categorical prohibition of propensity evidence under the Missouri Constitution, it is clear that they are aberrant decisions which have not been good law in this state for 75 years, if they ever were. In *State v. Cason*, 252 S.W. 668 (Mo. 1923) the Missouri Supreme Court explained:

The majority opinion in the Harris Case is not only contrary to the uniform previous rulings of this court, but contrary to the universal rulings of all other courts of this country. In prosecutions for statutory rape . . . evidence of prior criminal acts between the same parties is admissible as tending to prove the crime charged. This is an exception to the general rule that other crimes than the one for which the prisoner is on trial may not be shown

There is no authority for the ruling in the Harris Case. The doctrine in this state prior to that case appears in the following cases: [citing Missouri precedents] The following cases from other states illustrate the rule: [citing 24 other decisions from other states] The cases above cited cover many of the states, and many of them cite numerous other cases. Decisions from other states than those cited above could be cited. In fact, I have been unable to find any state where the doctrine announced in the Harris Case now prevails The generality of the rule that such evidence is admissible is noted by many of the cases.

State v. Cason, supra, 252 S.W. at 689-690, *see State v. Cooper*, 271 S.W. 471, 474 (Mo. 1925) (rule is well established that evidence of prior sexual acts is admissible to show “disposition and inclination” to commit the charged acts; *Harris* was overruled in *Cason*).

In *Bernard, supra*, the Missouri Supreme Court held that “[e]vidence of prior sexual misconduct that corroborates the testimony of the victim” may be admitted if it is “so unusual and distinctive as to be a signature of the defendant’s modus operandi.” 849 S.W.2d at 17. This realistically allows evidence of propensity so long as the propensity shown is a disposition to commit sexual offenses in a sufficiently distinctive manner. This point was explicitly recognized in *Bernard*, which observed that “[a]lthough we have called this exception corroboration, it really involves reasoning from the signature modus operandi based upon the propensity of the defendant to commit this type of crime to the conclusion that the defendant committed the crime charged.” *Id.* (quoting from the concurrence in *Sladek*).

A third area in which the Supreme Court has expressly upheld the admission of propensity evidence is homicide cases in which the defendant claims that he acted in self-defense. *See State v. Robinson*, 130 S.W.2d 530, 531-532 (Mo. 1939) (allowing evidence of character of accused for violence). *State v. Schlup*, 785 S.W.2d 796, 801-802 (Mo.App.W.D. 1990) (same).

It should be clearly understood that this exception is not limited to allowing rebuttal by the state where the defendant chooses to place his own character in issue by presenting “good character” witnesses. Rather, it independently allows the state to present evidence of

the defendant's violent character where he claims self-defense and attacks the character of the victim, though he has presented no evidence concerning his character. *See State v. Robinson, supra*, 130 S.W.2d at 531-532. The rationale of the exception is essentially that it would not be conducive on balance to the achievement of just results if the jury only heard part of the evidence about who was likely to be the aggressor. *See id.*

This exception further illustrates that the decision whether to allow propensity evidence in defined areas has traditionally been regarded as a matter of policy in this state, which turns on judgments of an essentially legislative character. It is not an all-or-nothing proposition, and not a matter that is determined one way or the other by the Missouri constitution.

Appellant states that *Burns* noted 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." *Burns, supra*, at 762. The cases cited by *Burns* do not state that propensity evidence is unconstitutional. In *State v. Reese*, 274 S.W.2d 304 (Mo.banc 1954), the Missouri Supreme Court held that the details of an uncharged robbery were improperly admitted in a homicide prosecution because they were not logically relevant to the charge. *Id.* at 306-307. In *State v. Leonard*, 182 S.W.2d 548 (Mo. 1944), the Missouri Supreme Court found error in vituperative allegations by the prosecutor concerning a wide range of uncharged misconduct in a prosecution for selling liquor without a license, and noted that evidence of other crimes would violate the state constitution "when not properly related to the cause on trial." *Id.* at 548-551. The Court had no occasion to decide what

range of purposes could constitutionally establish a “proper” relationship to charged crimes. Likewise, *State v. Holbert*, 416 S.W.2d 129, 132-133 (Mo.1967) and *State v. Spray*, 74 S.W. 846 (Mo. 1903), held only that evidence of other acts was inadmissible because it was not within the scope of a recognized exception to the general exclusionary rule for uncharged acts.

These cases involved no challenge to the constitutionality of admitting evidence of uncharged acts or propensity. *Spray* did not refer to the constitution at all, and plainly did not provide an exhaustive enumeration of purposes for which uncharged offense evidence may properly be admitted. *See State v. Cooper, supra* 271 S.W. at 474 (*Spray* does not constrain admission of evidence in cases within the scope of case law rule allowing evidence of sexual disposition and inclination). In *Holbert*, as in *Leonard* and *Reese*, the only references to the constitution were dicta which remarked in passing that evidence of the uncharged offense would violate the state constitution if not “properly related” to the cause on trial.

None of these decisions stated – much less held – that evidence of character, propensity, or disposition cannot be admitted consistent with the Missouri Constitution. None of them even mentioned – much less decided – the question of the validity of rules that allow propensity evidence in defined areas such as those recognized in *State v. Bascue, supra*, 485 S.W.2d at 37; *State v. Bernard, supra*, 849 S.W.2d at 17; *State v. Robinson, supra*, 130 S.W.2d at 531-532, and §566.025, RSMo 2000. None of them provide any support for the proposition that our constitution categorically prohibits such rules.

In the present case, the legislature has made a determination that, in certain types of cases, a defendant's prior bad acts involving child sex acts are admissible to show propensity. In any given case, it is within the discretion of the trial judge whether or not the evidence is admissible or whether it is too prejudicial. Thus, for example, where the evidence might consist of numerous witnesses from the prior act, resulting in the jury having to make a determination whether the prior act in fact occurred, and where such evidence might be confused with or outweigh the evidence of the crime for which the defendant is on trial, the trial judge might find such evidence inadmissible. But where, as in this case, the prior bad act has been established as a matter of fact, in that appellant had already pled guilty to the prior bad act, and where no details of the prior act are elicited, it cannot be said that the prejudice of the prior act outweighed the probative value. Nor can it be said that appellant was being "tried" for a crime to which he had already pled guilty.

Simply put, while the Missouri Constitution provides that a defendant can only be tried for the crimes with which he is charged, the mere fact that evidence of prior bad acts comes in at trial does not mean that the defendant is being "tried" for the other crime. The courts have carved out numerous exceptions, allowing prior acts in because they are determined to be relevant. In some cases, such as modus operandi or self-defense, the prior bad acts are allowed in to show "propensity." They are allowed in such cases because the courts have determined that in such circumstances, the evidence is particularly relevant. The legislature is also entitled to make this determination, and has done so in §566.025.

D. Any error was harmless.

Ultimately, even if there were any error in admitting appellant's prior conviction, this court will only reverse if there is a reasonable probability that the outcome of the trial would have been different had the evidence not been admitted. *State v. Slater*, 193 S.W.3d 800, 804 (Mo.App.W.D. 2006). Here it cannot be said that the outcome would have been different but for admission of appellant's prior conviction.

J.G. consistently maintained that appellant put his penis at least partially into her vagina (Tr. 139, 151, 163-164, 171-172, 177). Appellant asserts that J.G. backtracked in a deposition, and no longer said that appellant raped her, but merely that he had had tried to rape her (App.Br. 44). Respondent does not see that appellant ever put into evidence what it was J.G. said in this regard at the deposition; while appellant argued this in closing argument, this does not appear to be supported by the evidence, and of course, the jury is instructed that closing argument is not evidence (LF 38). In any event, whether J.G. said that appellant "raped" her or merely "tried to rape" her is of no consequence. An 11-year-old girl may not realize that legally, even partial insertion constitutes rape; and an 11-year-old girl may believe that if appellant failed to gain complete insertion, this only constituting "trying to rape."

Much of appellant's argument in his brief that J.G. was not raped is actually based on matters that were not before the jury. In addition to references to deposition testimony that was not before the jury and to pretrial matters which were not before the jury (App.Br. 44, citing Tr. 7-8), appellant, in his brief, refers to a SAFE exam which showed no evidence of sexual abuse (Tr. 16-21). The SAFE exam apparently occurred a year after the rape (Tr. 16),

and in any event, respondent is not aware that any evidence of the SAFE exam was presented to the jury, so what the SAFE exam showed or didn't show is irrelevant to the jury's decision. Appellant's argument about the SAFE exam being kept from the jury has nothing to do with the evidence that was presented to the jury and on which they relied in making their decision.

The question is not what evidence the jury didn't hear. The question is would the jury have reached a different result had they not heard about the prior conviction. Appellant relies on the fact that the prior conviction was the first evidence the jury heard. But, as discussed above, it must be noted that the prior conviction was not emphasized by the state and was not argued by the state as a reason to find appellant guilty in the present case. Nor was the evidence particularly prejudicial, given that it was merely a document, not live testimony regarding the details of the prior assault. The fact of the matter is that defense counsel made more reference to the prior conviction than the state did, as set out above.

Moreover, the jury was voir dired on the issue of whether knowledge of a prior conviction for a similar crime would lead the jury to convict appellant. Those jurors who indicated they would be more likely to find him guilty were removed from the jury. Defense counsel expressly asked, "If the state did not convince you beyond a reasonable doubt of the defendant's guilty but you knew that they had a prior conviction for a similar offense, would that cause you to lower the standard of proof" (Tr. 102). It can be assumed that the jurors who did not respond felt that they would not convict appellant based on the prior conviction, even where the state did not establish its case beyond a reasonable doubt. It thus can be

assumed that the jurors found that the state proved its case beyond a reasonable doubt, even without the prior conviction.

Again, J.G. consistently maintained in her trial testimony and in her statements to her mother, to Deputy Reith and Deputy Valbracht that appellant put his penis at least partially into her vagina (Tr. Tr. 139, 151, 163-164, 171-172, 177). While appellant states that J.G.'s brother's testimony "somewhat" disputed her allegations (App.Br. 44), he only testified that he only recalled one time that he went to the park without his sister (Tr. 197), while J.G. told Deputy Reith that appellant had raped her three times and that this would occur when appellant would send the other children to the park to play (Tr. 153). Whether or not the other children were at the park or just outside playing is not crucial to J.G.'s story.

In short, J.G.'s testimony was consistent, and the prior conviction was not prejudicial, was not emphasized, and was not argued as evidence of guilt. The jurors had indicated in voir dire that they would not convict based on the prior conviction where the state had not proven its case beyond a reasonable doubt. Thus, it cannot be said that there is a reasonable probability that the jury relied on admission of the prior conviction, even if erroneous, in convicting appellant.

II.

The trial court did not plainly err in overruling appellant's objection to Instruction No. 7, based on MAI-CR3d 310.12 because the instruction did not conflict with substantive law.

Appellant contends that the trial court plainly erred in giving the following instruction:

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.

(LF 35).

During the instruction conference, appellant objected to the above instruction:

And also we would object to the giving of Instruction No. 7, the one about the defendant's prior conviction. Your Honor, I believe I've already made a written motion, and I believe I made the proper objection at the time that it was presented to the jury. I would incorporate by reference all of the arguments that I made in the written motion. But just for the record, I would object that this violates several of my client's constitutional rights, the most important being the right to a fair trial, effective assistance of counsel, and also the confrontation clause.

(Tr. 207-208). Respondent assumes that the “written motion” refers to appellant’s initial motion in limine (LF 16-18). If there was another written motion, it has not been provided as part of the legal file. Appellant did not object to the instruction on the grounds that it did not comply with MAI. Appellant did not include this claim in his motion for new trial (LF 40-41).

A. Standard of review.

Appellant’s claim is reviewable only for plain error, as appellant concedes (App.Br. 48). Instructional error constitutes plain error when it is clear the trial court so misdirected or failed to instruct the jury that it is apparent the error affected the verdict. *State v. Beeler*, 12 S.W.3d 294, 300 (Mo. banc 2000). Appellant bears the burden of showing manifest injustice. *State v. Williams*, 976 S.W.2d 1, 3 (Mo.App.W.D. 1998).

B. Analysis.

Appellant’s argument, essentially, is that Instruction No. 7 conflicts with the substantive law. This is not so. Instruction No. 7 complies with §566.025, which provides the following:

In prosecutions pursuant to this chapter [566] 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.

Here, appellant was being prosecuted under Chapter 566 for a sexual crime involving a victim under age 14. Thus, evidence that appellant had pled guilty to a prior crime of a sexual nature involving a victim under age 14 was admissible for the purpose of showing the propensity of appellant to commit the crime with which he was charged. Instruction No. 7 instructed the jury that they could consider the prior conviction on the issue of appellant's propensity to commit the crime with which he was charged. As such, Instruction No. 7 completely complied with the substantive law as stated in §566.025, RSMo 2000.

While appellant cites to *State v. Burns*, 978 S.W.2d 759 (Mo.banc 1998), which held the prior version of §566.025 unconstitutional, the fact remains that §566.025, RSMo 2000 postdates *Burns* and changes the substantive law. Section 566.025, RSMo 2000 has not been held unconstitutional and currently represents the substantive law in this state on this issue. Since Instruction No. 7 complies with the current version of §566.025 (and indeed, appellant makes no argument that it doesn't), it cannot be maintained that Instruction No. 7 conflicts with the substantive law.

Appellant argues that Instruction No. 7, based on MAI-CR3d 310.12, was not properly given because the Notes on Use did not contemplate that the instruction would be used in such a situation (App.Br. 50). Respondent again notes that appellant never argued to the trial court that the instruction did not comply with MAI.

In any event, an instruction based on MAI-CR3d 310.12 could be given. MAI-CR3d 310.12 reads as follows:

310.12 OTHER OFFENSES BY DEFENDANT TO SHOW INTENT, ETC., AND, IN ADDITION, FOR IMPEACHMENT WHERE HE TESTIFIES

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.)

The instruction requires the drafter to “specify other purpose for which the evidence was received as substantive evidence of guilt.” Under §566.025, the evidence can be received for the purpose of showing propensity. Hence, it was proper for the state to include this

language in the instruction. There is no language in the instruction, or in the relevant Notes on Use³, which indicate that this Instruction could not be given.

Appellant points to the history of MAI-CR3d 310.12 and Note on Use 3, as it read from 1994 to 1999, to support his unpreserved argument that the instruction should not be given (App.Br. 50-51). Inasmuch as the Note on Use to which appellant cites no longer exists, it is not authority to bar the instruction in the present case.

Appellant also notes, in a footnote, that the Instruction did not comply with the Notes on Use No. 3(8) to MAI-CR3d 310.10, which would be applicable pursuant to Note on Use No. 2 to MAI-CR3d 310.12 (App.Br. 47, n. 10). Respondent agrees that the instruction properly should have ended with the sentence, “You may not consider such evidence for any other purpose.” MAI-CR3d 310.10, MAI-CR3d 310.12. But there was no plain error from the lack of this language. The instruction clearly directed the jury for what purpose they could consider the evidence in question, and appellant has not suggested for what improper purpose the jury might have considered the evidence.⁴

In short, the instruction complied with substantive law, was allowed by the MAI, and to the extent any language was missing from the instruction, it did not result in plain error. Appellant’s claim is without merit and should be denied.

³The Notes on use to MAI-CR3d 310.12 and 310.10 are relevant to this Instruction.

⁴Except, of course, to argue that they should not have been able to consider the evidence for propensity, which §566.025 plainly allows.

III.

The trial court did not err in overruling appellant's motion for judgment of acquittal at the close of all the evidence because there was sufficient evidence from which a reasonable finder of fact could find that appellant committed first degree child molestation, in that there was sufficient evidence from which a reasonable finder of fact could find that appellant touched J.G.'s genitals with his genitals.

Appellant asserts that there was insufficient evidence that appellant touched J.G.'s genitals with his genitals, and thus there was insufficient evidence of first degree child molestation. Since there was evidence that appellant partially inserted his penis in J.G., there was sufficient evidence to support a conviction of first degree child molestation.

A. Standard of review.

In determining the sufficiency of the evidence, a reviewing court accepts as true all the evidence favorable to the state, including all favorable inferences drawn from the evidence, and disregards all contrary evidence and inferences. *State v. Silvey*, 894 S.W.2d 662, 673 (Mo.banc 1995); *State v. Grim*, 854 S.W.2d 403, 405 (Mo.banc 1993), *cert. denied*, 510 U.S. 997 (1993). An appellate court neither weighs the evidence, *State v. Villa-Perez*, 835 S.W.2d 897, 900 (Mo.banc 1992), nor determines the eligibility or credibility of the witnesses, *State v. Marlow*, 868 S.W.2d 417, 421 (Mo.App.W.D. 1994), but rather limits its determination to whether there is substantial evidence from which a reasonable jury might have found the defendant guilty beyond a reasonable doubt. *Silvey, supra*. "Substantial evidence" is evidence from which the trier of fact reasonably can find the issue in harmony

with the verdict. *State v. Gomez*, 863 S.W.2d 652, 655 (Mo.App.W.D. 1993); *State v. Martin*, 852 S.W.2d 844, 849 (Mo.App.W.D. 1992).

In *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), the United States Supreme Court emphasized the deference given to the trier of fact. The Court stated: “[T]his inquiry does not require a court to ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* at 318-319, 99 S.Ct. at 2789.

B. Analysis.

Appellant was charged via amended information with child molestation in the first degree, in that between June 1, 2003 and August 31, 2003, appellant subjected J.G., who was less than fourteen years of age, to sexual contact.⁵

The verdict director submitting the crime to the jury stated, in pertinent part, as follows:

First, that between June 1, 2003 and August 31, 2003 . . . the defendant
touched the genitals of J.G. with his genitals, and

⁵The crime was charged as a Class A felony because appellant had previously been convicted of the crime of sexual abuse. See §566.067.2, RSMo 2000.

Second, that he did so for the purpose of arousing his own sexual desire, and

Third, that J.G. was then less than fourteen years old,

then you will find the defendant guilty of child molestation in the first degree.

(LF 33).

Appellant contends that there was insufficient evidence to prove that appellant touched J.G.'s genitals with his genitals. The evidence, viewed in the light most favorable to the verdict, showed the following:

That summer, while appellant was watching J.G., he told her to go in and sit on his bed (Tr. 177). Appellant came in with no pants on, pulled down J.G.'s pants, and tried to stick his penis in her (Tr. 177). J.G. would not watch, but Appellant told her his penis would go in "about that far." (Tr. 177). J.G. could feel appellant pushing on her, but could not tell if the penis went in (Tr. 177). It hurt, but when J.G. would tell appellant to stop, he wouldn't stop (Tr. 177). J.G. did not tell anyone for a year because appellant said that if she told anyone, he would kill her (Tr. 174). J.G. was also embarrassed and afraid she would get into trouble (Tr. 179).

J.G. eventually told her mother and the police that appellant had raped her (Tr. 139, 151, 171, 172). J.G. knew that rape meant that a man stuck his penis in a girl's vagina when she did not want him to (Tr. 172). J.G. asserted that appellant showed her pornography on videotapes and on the computer (Tr. 161-162). J.G. said that appellant masturbated in her presence, that they engaged in oral sex in the bathroom, and that appellant ejaculated in her

presence (Tr. 162). J.G. said that appellant wanted her to drink the ejaculate, and that it made her gag and spit up (Tr. 162-163). J.G. said that they engaged in vaginal intercourse in appellant's room, his daughter's room, the bathroom, and on a couch in the living room (Tr. 163-164). J.G. said that appellant videotaped it one time (Tr. 164). Many of these acts occurred before the summer of 2003 (Tr. 178).

To prove child molestation, one need only show that the defendant subjected the child to sexual contact, which is defined as any touching of another person with the genitals *or* any touching of the genitals or anus of another person, or the breast of a female person, for the purpose of arousing or gratifying sexual desire of any person. Thus, to prove child molestation, all the state had to prove was that appellant touched J.G. with his genitals *or* that he touched her genitals.

There was certainly sufficient evidence from which the jury could find that appellant touched J.G. with his genitals. J.G. reported that she had been raped, she knew what the word "rape" meant, and she reported that appellant tried to insert his penis but it would only go in part of the way. Since appellant partially inserted his penis into J.G., this by necessity means that he touched her with his genitals. This is child molestation.

Appellant, however, notes that the instruction that submitted the crime to the jury required the jury to find that appellant touched J.G.'s genitals with his genitals (App.Br. 56). In other words, as submitted, it would be insufficient to show merely that appellant touched J.G. with his genitals.

A similar argument was made in *State v. Bullock*, 179 S.W.3d 413 (Mo.App.S.D. 2005). In that case, the defendant was charged with first degree statutory sodomy. *Id.* at 414. This charge was based on his licking the victim's vagina, which is what the evidence showed. *Id.* However, Bullock argued there was insufficient evidence because the verdict director submitted that he inserted his tongue into the vagina and there was no evidence that he had done so. *Id.* at 416. The Court of Appeals, Southern District, first noted that touching the vagina with the tongue met the definition of deviate sexual intercourse. *Id.* The Court went on to hold that any language in the verdict director regarding actual insertion of the tongue was "immaterial and constituted mere surplusage and amounted to assumption of an unnecessary burden by the State." *Id.* Ultimately, the Court found sufficient evidence of first degree statutory sodomy, based on touching the vagina with the tongue. The Court did not require evidence of penetration.

In the present case, appellant was charged with child molestation in the first degree, which would only require a showing that appellant touched the victim with his genitals (among other ways to commit the crime). There is sufficient evidence that he did so. The fact that there is language in the verdict director requiring something more and unnecessary (that is, touching the child's genitals with his genitals) is mere surplusage and is of no account in determining the sufficiency of the evidence.

Of course, even if it *were* necessary to prove that appellant touched J.G.'s genitals with his genitals, there was sufficient evidence of that as well. Again, as noted above, J.G. reported that she had been raped by appellant, that rape means when a man inserts his penis

into a girl's vagina against her wishes, and that appellant, while not fully penetrating her, did slightly penetrate her. This slight penetration is evidenced by her testimony that he tried to penetrate her, he told her that it went in "so far," she could feel him pressing on her, and she felt pain. Penetration, of course, is not an element of child molestation in the first degree, and thus not necessary to prove. *State v. Pond*, 131 S.W.3d 792, 793 (Mo.banc 2004). Certainly where, as here, there is evidence of penetration, albeit slight, this is sufficient evidence of child molestation. Indeed, any penetration, however slight, is sufficient to show rape, (See §566.030; *State v. Hill*, 808 S.W.2d 882 (Mo.App.E.D. 1991) (penetration shown when victim said there was "just a little" contact between penis and vagina). Certainly, slight penetration, as described here, is sufficient to show that appellant touched J.G.'s genitals with his genitals.

Appellant's arguments to the contrary, that the evidence is somehow insufficient, is based on asserting contrary inferences to be drawn from the evidence. For example, appellant asserts that appellant could have tried to put his penis in J.G. and saying it "would go about that far" without actually any contact of the genitals. Arguments such as these ignore the standard of review. In determining the sufficiency of the evidence, a reviewing court accepts as true all the evidence favorable to the state, including all favorable inferences drawn from the evidence, and disregards all contrary evidence and inferences. *State v. Silvey*, 894 S.W.2d 662, 673 (Mo.banc 1995); *State v. Grim*, 854 S.W.2d 403, 405 (Mo.banc 1993), *cert. denied*, 510 U.S. 997 (1993).

The evidence shows that J.G. reported repeatedly that she was raped, she knew what raped meant, and she described how appellant came in the bedroom, with his pants down, pulled her pants down, tried to insert his penis, causing her pain and telling her that the penis went in a little bit. This is sufficient evidence that appellant touched her with his genitals (and, while not necessary, sufficient evidence that he touched J.G.'s genitals as well), and thus is sufficient evidence of child molestation in the first degree. Appellant's claim is thus without merit, and should be denied.

CONCLUSION

In view of the foregoing, respondent submits that appellant's conviction and sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains 12,455 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ____ day of September, 2007, to:

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RESPONDENT'S APPENDIX

Sentence and Judgment A1