

No. SC88553

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In the  
Supreme Court of Missouri

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STATE OF MISSOURI,

Respondent,

v.

SHANE VORHEES,

Appellant.

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Appeal from Crawford County Circuit Court  
Forty-Second Judicial Circuit  
The Honorable William Camm Seay, Judge

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RESPONDENT'S BRIEF

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....4

JURISDICTIONAL STATEMENT .....7

STATEMENT OF FACTS .....8

ARGUMENT .....14

    Point I .....14

        A. Standard of review .....15

        B. Evidence that Appellant committed similar sexual acts with a different victim was admissible under the “modus operandi/corroboration” exception to the rule barring prior misconduct evidence .....15

    Point II .....25

        A. Standard of review .....25

        B. The history of § 566.025 .....26

        C. Section 566.025, as amended, does not violate article I, section 17 of the Missouri Constitution .....30

        D. Section 566.025, as amended, does not violate art. I, § 18(a) of the Missouri Constitution .....38

    Point III .....41

        A. Standard of review .....41

B. The evidence presented was sufficient for a rational juror to find Appellant  
guilty of first-degree statutory sodomy beyond a reasonable doubt .....42

CONCLUSION .....48

CERTIFICATE OF COMPLIANCE AND SERVICE .....49

APPENDIX .....50

## TABLE OF AUTHORITIES

### Cases

<i>Elliott v. State</i> , 215 S.W.3d 88 (Mo. banc 2007).....	15
<i>Planned Parenthood of Kansas v. Nixon</i> , 220 S.W.3d 732 (Mo. banc 2007) .....	26
<i>State v. Bernard</i> , 849 S.W.2d 10 (Mo. banc 1993) .....	14, 16, 17, 19, 26, 27, 28, 36
<i>State v. Boulware</i> , 923 S.W.2d 402 (Mo. App. W.D. 1996) .....	31, 33
<i>State v. Burns</i> , 978 S.W.2d 759 (Mo. banc 1998) .....	26, 28, 29, 31, 32, 38
<i>State v. Cason</i> , 252 S.W. 688 (Mo. 1923) .....	26
<i>State v. Driscoll</i> , 711 S.W.2d 512 (Mo. banc 1986).....	32, 33
<i>State v. Dudley</i> , 912 S.W.2d 525 (Mo. App. W.D. 1995) .....	37
<i>State v. Forrest</i> , 183 S.W.3d 218 (Mo. banc 2006).....	36, 45
<i>State v. George</i> , 921 S.W.2d 638 (Mo. App. S.D. 1996) .....	27, 31, 33
<i>State v. Gilyard</i> , 979 S.W.2d 138 (Mo. banc 1998) .....	16, 17, 18, 20, 23, 32, 36, 37
<i>State v. Johnson</i> , 161 S.W.3d 920 (Mo. App. S.D. 2005) .....	27
<i>State v. Johnson</i> , 201 S.W.3d 551 (Mo. App. S.D. 2006) .....	21
<i>State v. Jones</i> , 914 S.W.2d 852 (Mo. App. E.D. 1996).....	31, 34
<i>State v. Keeler</i> , 856 S.W.2d 928 (Mo. App. S.D. 1993).....	45
<i>State v. King</i> , 119 S.W.2d 277 (Mo. 1938).....	26
<i>State v. Lachterman</i> , 812 S.W.2d 759 (Mo. App. E.D. 1991).....	26, 27
<i>State v. Miller</i> , 220 S.W.3d 862 (Mo. App. W.D. 2007).....	16

<i>State v. Palmer</i> , 822 S.W.2d 536 (Mo. App. S.D. 1992).....	45
<i>State v. Pope</i> , 733 S.W.2d 811 (Mo. App. W.D. 1987).....	46
<i>State v. Price</i> , 980 S.W.2d 143 (Mo. App. E.D. 1998) .....	45
<i>State v. Reed</i> , 181 S.W.3d 567 (Mo. banc 2006).....	41, 44
<i>State v. Sexton</i> , 890 S.W.2d 389 (Mo. App. W.D. 1995) .....	28
<i>State v. Sladek</i> , 835 S.W.2d 308 (Mo. banc 1992) .....	16, 27, 31, 33, 36
<i>State v. Smith</i> , 377 S.W.2d 241 (Mo. 1964) .....	26

Statutes

§ 566.010.1, RSMo 2000 .....	42
§ 566.025, RSMo 1994 .....	28, 32
§ 566.025, RSMo 2000 ...	7, 11, 12, 14, 15, 20, 25, 26, 29, 30, 31, 32, 34, 37, 38, 40
§ 566.032, RSMo 2000 .....	7
§ 566.062, RSMo 2000 .....	7, 42
§ 566.147, RSMo 2000 .....	34
§ 589.400, RSMo 2000 .....	34
§ 632.480 et al., RSMo 2000 .....	34
2000 Mo. Laws 725 .....	29, 30, 32

Other Authorities

*Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association 4th ed. 2000).....35

Michael L. AtLee, *Kansas v. Hendricks: Fighting for Children on the Slippery Slope*, 49 Mercer L. Rev. 835 (1998).....34

Mo. Const. art. I, § 17 .....30

Mo. Const. art. I, § 18(a)..... 7, 29, 30, 38, 40

Mo. Const. art. V, § 3.....7

Robert Teir and Kevin Coy, *Approaches to Sexual Predators: Community Notification and Civil Commitment*, 23 New Eng. J. on Crim. & Civ. Confinement 405 (1997) .....35

Rules

Supreme Court Rule 83.01.....7

## **JURISDICTIONAL STATEMENT**

This appeal is from convictions of first-degree statutory rape, § 566.032, RSMo 2000, and first-degree statutory sodomy, § 566.062, RSMo 2000, obtained in the Circuit Court of Crawford County, for which Appellant was sentenced to two consecutive terms of thirty years imprisonment. This appeal involves the constitutionality of a state statute, § 566.025, which is being challenged as violating article I, §§ 17 and 18(a) of the Missouri Constitution. Therefore, the Supreme Court of Missouri has exclusive appellate jurisdiction. Mo. Const. art. V, § 3. Notice of appeal was originally filed in the Missouri Court of Appeals, Southern District, but that court transferred this case to this Court prior to opinion. *See* Rule 83.01.

## **STATEMENT OF FACTS**

Appellant, Shane Vorhees, was charged as a persistent offender with the unclassified felonies of first-degree statutory rape and first-degree statutory sodomy. (L.F. 56-57).<sup>1</sup> Beginning on November 17, 2006, Appellant was tried before a jury in Crawford County Circuit Court, with the Honorable William Camm Seay presiding. (L.F. 7; Tr. 48).

Appellant contests the sufficiency of the evidence to support his conviction for first-degree statutory sodomy. The evidence presented at trial, viewed in the light most favorable to the verdict, is as follows.

Between the years of 2003 and 2005, S.W. (born on October 25, 1991) lived in a trailer in Steelville, Missouri, with Gena Vorhees, her mother; Appellant, her step-father; and her two brothers. (Tr. 213-215). During this time frame, Appellant repeatedly touched S.W. “between [her] legs” and “in [her] butt” with his hands or his penis. (Tr. 216). In preparing to place his penis in S.W.’s “butt,” Appellant habitually “spit in his hand and rubbed it on his penis.” (Tr. 217). Appellant also placed his penis in S.W.’s mouth and tried to place it in her “private” after spitting on his hand and rubbing the spittle on his penis. (Tr. 217, 225).

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<sup>1</sup> The record on appeal consists of a trial and sentencing transcript (Tr.), a supplemental transcript (Supp. Tr.), and a legal file (L.F.).

S.W. testified that Appellant placed his penis in her mouth “about five” times. (Tr. 217). These acts occurred in the hallway, in S.W.’s bedroom, in her mother’s bedroom, and in the bathroom. (Tr. 217-218). While Appellant’s penis was in S.W.’s mouth, he “pushed on [her] head and told [her] to go faster.” (Tr. 221). Once, when Appellant placed his penis in S.W.’s mouth, he urinated a great deal; other times, a “clearish, milkish looking” substance came from his penis that reminded S.W. of “spoiled milk.” (Tr. 218). When these events occurred, S.W.’s mother was either at work or across the street at the neighbor’s house. (Tr. 218).

S.W. recalled one specific incident in which she was sitting on the sink in the bathroom upon Appellant’s instruction and Appellant placed his mouth on S.W.’s “private.” (Tr. 219). Her mother had been at the neighbor’s house, and when she returned, she nearly caught Appellant in the act, but Appellant and S.W. managed to redress before S.W.’s mother found them. (Tr. 219).

Another time, when S.W.’s mother was at work during the day, Appellant told S.W. to go into S.W.’s bedroom. (Tr. 219-220). Appellant went in with her, closed the door, and instructed her to pull her pants down. (Tr. 220). Appellant, after pulling his own pants down, placed his “private in [her] butt.” (Tr. 220). S.W. testified that this act occurred twice in her bedroom. (Tr. 220).

S.W. also said that on another occasion, she was in her mother's bedroom with Appellant and that he closed the door, spit on his hand, rubbed it on his penis, and then placed his penis in S.W.'s "butt." (Tr. 220-221).

In October 2005, Appellant and S.W. were arguing in her bedroom. (Tr. 222, 245). During the argument, S.W. threatened to tell her mother what Appellant had been doing to her. (Tr. 222). She said, "if mom only knew what you did, Shane," or "Shane, if mom only knew what you did." (Tr. 245). Her mother overheard the comment and confronted S.W. (Tr. 222, 245). Initially, S.W. did not want to tell her mother what she meant because she did not think her mother would believe her. (Tr. 245). Eventually, S.W. told her mother that Appellant "raped her." (Tr. 245).

S.W.'s mother confronted Appellant, but he denied ever touching S.W. (Tr. 246). She asked Appellant if he was willing to take a lie detector test, and Appellant said he would. (Tr. 246). She asked S.W. if she was sure the allegations were true; S.W. said they were. (Tr. 246). S.W.'s mother told Appellant to leave the home, but he refused. (Tr. 246). Consequently, she packed up all three children and left. (Tr. 246).

S.W.'s mother testified that often, during her sexual relationship with Appellant, he would lick his hand and rub it on his penis for lubrication. (Tr. 247-248). Appellant also frequently requested her to engage in anal sex. (Tr. 249).

Before trial, the prosecutor filed a motion under § 566.025, RSMo 2000, to endorse witnesses who would “provide evidence that the defendant has committed other charged or uncharged crimes of a sexual nature involving victims under fourteen years of age.” (L.F. 47). The trial court informed counsel that it would overrule the motion and sustain a corresponding motion in limine “unless counsel for the State makes an offer of proof on the record indicating that the probative value outweighs the prejudice in accordance with 566.025.” (L.F. 5). The trial court set the matter for a hearing on November 16, the day before trial was to begin. (L.F. 5). The next day, Appellant filed a motion asking the court to declare section 566.025 unconstitutional. (L.F. 5, 50-53).

On November 16, the prosecutor filed a second motion to endorse witnesses, specifically Jacqueline and Nathalie Wright, to “testify that Jacqueline was the victim of prior charged/uncharged crimes of the defendant.” (L.F. 22). All the witnesses identified in both motions to endorse were listed in police reports as persons having made allegations against Appellant before. (Tr. 31). Appellant received those reports five to six months before trial. (Tr. 29).

At the hearing, the State adduced testimony from Jacqueline Wright, stating that she was the only prior victim the prosecution could locate who was willing to testify. (Tr. 30). Jacqueline testified that when she was six years old, she lived in a trailer park in Pulaski County. (Tr. 32). Appellant was a friend of the family who frequently

visited her home. (Tr. 32). One night, Appellant entered Jacqueline's bedroom, placed a cloth over her mouth and sat on top of her. (Tr. 33). Appellant began to fondle Jacqueline with his hands, then he spit on his hand and rubbed it on his penis and tried to insert his penis inside Jacqueline. (Tr. 34-35). After that, Appellant urinated a substantial amount inside Jacqueline's mouth. (Tr. 35).

The prosecutor sought to endorse Jacqueline's testimony under two theories: as propensity evidence pursuant to § 566.025 and as evidence of Appellant's *modus operandi*. (Tr. 39). The trial court reviewed the child advocacy center tape of S.W. and compared it with Jacqueline's testimony to determine how similar they were. (Tr. 42, 49). The trial court determined that the numerous similarities between S.W.'s testimony and Jacqueline's outweighed any potential prejudicial effect of Jacqueline's testimony, and it sustained the State's motion to endorse Jacqueline and her mother as witnesses. (Tr. 49).

At trial, Jacqueline testified that in 1991, when she was six years old, she lived in Pulaski County. (Tr. 279). Appellant was an acquaintance of the family who lived in the same trailer park. (Tr. 279). Appellant was a frequent visitor in Jacqueline's home. (Tr. 280). One night, while Jacqueline was asleep in her bedroom, Appellant entered, climbed on top of her, and put a towel over her mouth. (Tr. 280). Appellant fondled her with his hand, then he spit on his hand and rubbed it on his penis and tried to place his penis inside her. (Tr. 281). Appellant then moved closer towards

Jacqueline's face where he urinated a great deal in her mouth. (Tr. 281). Appellant then left through Jacqueline's bedroom window. (Tr. 282).

Jacqueline immediately told her mother what had happened, and her mother called more family and Jacqueline was taken to a hospital for a rape kit which indicated that she had been penetrated. (Tr. 282).

Jacqueline had never met S.W. or her mother before trial, and she had no connection with the family, except for the incident involving Appellant. (Tr. 283).

Jacqueline's mother, Nathalie Wright, also testified for the prosecution. (Tr. 289). She testified that Jacqueline told her what had happened and that Jacqueline was taken to the hospital where an examination revealed signs that Jacqueline had been "sexually messed with." (Tr. 290). Nathalie contacted the police, and criminal charges were brought against Appellant. (Tr. 291).

Appellant did not testify and offered no other evidence on his behalf other than a request to publish State's exhibits 1 and 2 to the jury. (Tr. 303-304). The jury found Appellant guilty on both counts. (Tr. 327). The court sentenced Appellant to two consecutive terms of thirty years imprisonment. (Tr. 338). This appeal followed.

## **ARGUMENT**

### **Point I**

**The trial court did not abuse its discretion in admitting into evidence testimony from Jacqueline Wright regarding Appellant’s prior illicit sexual acts against her when she was six years old because the evidence was admissible under the “modus operandi/corroboration” exception to the rule against the admission of other crimes evidence in that Appellant’s actions of using his own saliva as lubrication and of urinating in the mouths of both the victim and Jacqueline were sufficiently unique to constitute a “signature” of Appellant. (Responds to Appellant’s Point II).**

Although Appellant presents a constitutional challenge to the admission of this evidence pursuant to § 566.025, this Court need not reach the constitutional question because the evidence was admissible under the “modus operandi/corroboration” exception to the admission of other crimes evidence identified by this Court in *State v. Bernard*, 849 S.W.2d 10 (Mo. banc 1993). In seeking to endorse Appellant’s previous victim as a witness in this case, the prosecutor argued that her testimony was admissible as both “modus operandi” evidence and under the provisions of § 566.025, RSMo 2000. Because the evidence was admissible as “modus operandi” evidence under *Bernard*, this Court need not determine whether its admission under § 566.025 violated the Missouri Constitution.

### **A. Standard of review.**

“The determination of whether to admit evidence is within the sound discretion of the trial court.” *Elliott v. State*, 215 S.W.3d 88, 92 (Mo. banc 2007). “A trial court will be found to have abused its discretion when a ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.” *Id.*

### **B. Evidence that Appellant committed similar sexual acts with a different victim was admissible under the “modus operandi/corroboration” exception to the rule barring prior misconduct evidence.**

Appellant’s point II incorrectly states that Jacqueline’s testimony was admitted pursuant to § 566.025, and that “[t]he state did not attempt to introduce the evidence under the general rule regarding uncharged crimes.” (App. Br. 31). Contrary to Appellant’s claim, the prosecutor argued that S.W.’s statement of events was “identical enough to those of [Jacqueline] that they would be admitted as a modus operandi *and* in connection with 566.025.” (Tr. 38-39) (emphasis added). Thus, the prosecutor presented the court with alternative theories of admissibility – modus operandi *or* propensity evidence under § 566.025.<sup>2</sup>

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<sup>2</sup> The trial court’s ruling as to which theory it was admitting the evidence under is not clear from the transcript; the court merely sustained the State’s motion to endorse

“[T]his Court will not address constitutional issues when a case can be otherwise resolved.” *State v. Gilyard*, 979 S.W.2d 138, 140 (Mo. banc 1998). Because “a trial court’s ruling on the admissibility of evidence will be upheld if it is sustainable on any theory,” *State v. Miller*, 220 S.W.3d 862, 868 (Mo. App. W.D. 2007), and because this evidence was admissible under *Bernard*, this Court need not reach the constitutional issue.

Generally, “[e]vidence of prior uncharged misconduct is inadmissible for the sole purpose of showing the propensity of the defendant to commit such acts.” *Gilyard*, 979 S.W.2d at 140. “However, evidence of prior uncharged misconduct is admissible to show motive, intent, absence of mistake or accident, common scheme or plan, or a signature *modus operandi*.” *Id.* at 140-141.

In *State v. Bernard*, 849 S.W.2d 10 (Mo. banc 1993), this Court adopted the “modus operandi/corroboration” exception suggested by Judge Thomas’s concurring opinion in *State v. Sladek*, 835 S.W.2d 308 (Mo. banc 1992). *Bernard*, 849 S.W.2d at 17. This Court held that “[i]n 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.* This Court previously recognized that “the secretive nature of the crime in most cases

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Jacqueline and Nathalie Wright as witnesses, finding that the probative value of the evidence outweighed any prejudicial effect. (Tr. 49).

involving sexual abuse or molestation of a child by an adult” leaves only the defendant and the victim as eyewitnesses to the crime. *Id.* Because of those circumstances, the trial generally evolves into a “credibility contest” between the defendant and the victim. *Id.* Since credibility becomes such a central issue at trial, “[e]vidence of prior crimes in such situations, is, therefore, probative.” *Id.*

This Court again emphasized the importance of victim corroboration in *Gilyard*, when it noted that, “[i]n a rape case, corroborative evidence can be highly probative of victim credibility and may even be essential, such as where the victim’s testimony is unconvincing or contradictory.” *Gilyard*, 979 S.W.2d at 141. Corroborative evidence is especially probative in cases, such as this one, where the defendant’s actions are extremely unusual. “Unusual and distinctive conduct of the attacker may actually make the victim seem less believable.” *Id.* “However, when two or more victims independently report the same distinctive acts during or preliminary to separate sexual assaults by a defendant, the earlier acts are probative of the veracity of the last victim.” *Id.*

In this case, the State’s substantive evidence on the crimes charged consisted solely of the testimony of the victim and her mother. (Tr. 213, 243). There were no physical findings of abuse or other witnesses to the events. (Tr. 218, 241, 276). Appellant’s defense consisted of attacking the credibility of the State’s witnesses through cross-examination, and implying certain motives to lie.

Appellant’s cross-examinations of S.W. and her mother implied that S.W. fabricated the abuse allegations because she was angry at Appellant and jealous of the time he spent with her mother. (Tr. 227-228, 230-231, 233, 267). Appellant’s cross-examination also implied that someone had coached S.W.’s testimony and that she was making the accusations because she liked the attention. (Tr. 229, 232, 233, 261-262). Appellant further implied that S.W. had made prior false accusations against Appellant and was generally an untruthful person. (Tr. 238-239, 240, 263-265). Appellant’s questioning implied that S.W.’s sexual knowledge came from her mother or her biological father. (Tr. 256-257, 261).

Because there were no physical findings of abuse or other witnesses, and because Appellant’s primary defense was to attack S.W.’s credibility, this case presented the type of situation contemplated by this Court in *Bernard*. Additionally, because S.W.’s description of Appellant’s practice of using his saliva as lubrication and in urinating inside S.W.’s mouth were unusual and distinctive, it may have detracted from her credibility, thereby increasing the need for corroborative evidence.<sup>3</sup> *Gilyard*, 979 S.W.2d at 141.

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<sup>3</sup> In his brief, Appellant repeatedly cites to testimony involving the word “peed,” implying that the victim’s and Jaqueline’s use of the word “peed” meant something besides “urinated” – presumably “ejaculated.” (App. Br. 6, 8, 19, 20, 30, 33, 40). Contrary to Appellant’s implication, the record reflects that S.W. distinguished

“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.” *Bernard*, 849 S.W.2d at 17. Here, Jacqueline’s testimony regarding Appellant’s prior illicit sexual activities was nearly identical to S.W.’s testimony, which made it sufficiently similar for it to be admissible pursuant to the “modus operandi/corroboration” exception.

Although Appellant admits that the prosecutor argued the applicability of the modus operandi exception, he fails to appreciate the prosecutor’s full argument for admissibility. Appellant’s brief indicates that the prosecutor’s argument for application of the exception was based *only* on the similarity in Appellant’s method of lubrication with both girls. (App. Br. 32). Contrary to Appellant’s assertion, the prosecutor argued not only the unusual method of lubrication (Appellant’s saliva applied to his penis by way of his hand), but also the fact that Appellant urinated in the mouths of both girls during his sexual assaults upon them. (Tr. 39). The prosecutor specifically argued both actions as “distinctive” to the trial court:

And the two points that I would have her [Jacqueline] testify to and that she has previously indicated is, she explained to the interviewer that [Appellant] would

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between urine and ejaculate (noting that Appellant did both), and Jacqueline testified that the liquid going from Appellant’s penis into her mouth was urine. (Tr. 34-35, 218).

put spit on his hand, rub it on his private and then use that lubricated private then to penetrate her. In addition, she indicated that it was his habit to place his penis within her mouth and pee in her mouth to the extent that it would overflow her mouth and drip down onto the floor and her chest. Those two points are distinctive enough that they do fit the modus operandi exception to other uncharged or charged crimes. And in addition, they make it more probative than prejudicial under 566.025. Those are very peculiar, unusual traits in this type of assault that stand out and just leap out as being distinctive.

(Tr. 39).

Here, Jacqueline had never met S.W. prior to trial, and she was unaware of the facts of Appellant's assaults upon S.W. (Tr. 283-284). Her only connection to S.W.'s family was her previous familiarity with Appellant. (Tr. 283). Thus, the fact that Jacqueline's account of Appellant's sexual assault involved unusual and distinctive characteristics that were nearly identical to the characteristics of the assault upon S.W. gave Jacqueline's testimony an extremely high probative value in supporting S.W.'s veracity as to the charged crimes. *Gilyard*, 979 S.W.2d at 141.

Because of the extreme similarities between, and the distinctive nature of, the assaults upon both S.W. and Jacqueline, Jacqueline's testimony as to Appellant's prior misconduct was admissible under *Bernard's* "modus operandi/corroboration"

exception to the bar on other crimes evidence. Therefore, the trial court did not abuse its discretion in admitting this evidence at trial.

Additionally, Appellant was not unduly prejudiced by the admission of this evidence. “Any prejudice to Defendant in this case can be attributed to the very probativeness of the challenged evidence.” *State v. Johnson*, 201 S.W.3d 551, 557 (Mo. App. S.D. 2006). Appellant was able to cross-examine Jacqueline and her mother in such a manner as to imply that Jacqueline had fabricated the allegations and, at one point, had even recanted them. (Tr. 286-287, 294).

Appellant argues that he was prejudiced because S.W.’s testimony “was inarticulate and inconsistent,” that S.W. “had once before told her parents that appellant was raping her, but when questioned by a caseworker, she said she made it up,” that S.W. “was angry with appellant and wanted him out of the house,” and that there was no physical evidence of abuse.<sup>4</sup> (App. Br. 34-35).

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<sup>4</sup> Appellant’s prejudice arguments under his points I and II also refer to questions and responses of certain venire panel members during *voir dire*, without explanation. (App. Br. 25, 34). These venirepersons were struck for cause and did not serve on Appellant’s jury. (Tr. 196, 197). Appellant has lodged no complaint related to the jury or *voir dire* in this appeal; thus, the questions and answers cited are irrelevant to his claims.

Appellant fails to specifically identify in the record any inconsistencies in S.W.'s testimony. Furthermore, the jury had the information about S.W.'s prior allegation and the fact that there was no physical evidence, yet it apparently did not find that this evidence outweighed the evidence of Appellant's guilt.

Appellant also argues that he was prejudiced because "the jury was encouraged to convict appellant of the charged offenses because of Jacqueline's testimony about the uncharged offenses." (App. Br. 34). While the prosecutor did argue the utility of Jacqueline's testimony in the jury's determination of guilt, he argued it for the proper purpose of corroborating S.W.'s testimony, not for the improper purpose of showing Appellant's bad character.

In arguing for S.W.'s credibility, a proper purpose of closing argument, the prosecutor told the jury that S.W.'s story was credible because it was corroborated by Jacqueline:

And you may find – I'm sure they will argue, she's not credible. But, folks, we were lucky in this case because we got corroboration. We've got another girl that, when she was six years old, the defendant did the very same thing to her. And, folks, these families have no connection. In order for you to find this defendant not guilty you would have to believe that two girls independently came up with a story, coincidentally against the same man, and contained two very specific details, one of which is fairly unusual, spitting in the hand,

lubricating in that fashion, the other of which is b[i]za[rre]. A sexual practice where one obtains gratification from peeing in the other person's mouth. That's b[i]za[rre]. That's not something a six year old and a twelve year old would both make up independently about the very same man. You would have to believe they're both making it up. You would have to find a motivation for that. You'd have to believe that without consulting they made up these very same details. And, folks, we didn't pick you as jurors to come in and discard your common sense and say, well it could happen. The reason you're here is we want you to use your common sense. Common sense tells you that's not the way it works. Absolutely one story corroborates the other, and they never could have consulted with each other before telling the authorities what happened to them. And it would be a very startling coincidence if two girls came up with the same unusual details about the very same man.

(Tr. 311-312).

The prosecutor's argument was directly in line with this Court's opinion in *Gilyard*, where it recognized that "when two or more victims independently report the same distinctive acts during or preliminary to separate sexual assaults by a defendant, the earlier acts are probative of the veracity of the last victim." *Gilyard*, 979 S.W.2d at 141. Consequently, Appellant was not unduly prejudiced by the admission of this evidence. This evidence was properly admitted under the "modus

operandi/corroboration” exception to the rule barring evidence of uncharged or prior misconduct.

## Point II

**The trial court did not err in overruling Appellant’s motion to declare section 566.025, RSMo 2000, unconstitutional, or in admitting evidence of Appellant’s prior crimes of a sexual nature against a victim under the age of fourteen, because section 566.025, which authorizes the admission of such evidence, is constitutional in that the Missouri Legislature amended the statute (after it was previously declared unconstitutional by this Court) in a manner curing its prior defects. (Responds to Appellant’s Point I).**

Although it is not clear under what theory of admissibility the trial court admitted testimony related to Appellant’s prior uncharged crimes or misconduct, there was no error in admitting it under § 566.025 because the amendment to that statute, enacted in 2000, cured any prior defects that led this Court to declare the previous version unconstitutional.<sup>5</sup>

### **A. Standard of review.**

“The constitutionality of a statute is a question of law, the review of which is *de novo*.” *Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732, 737 (Mo. banc

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<sup>5</sup> For purposes of Point II only, Respondent will treat the evidence as if the trial court admitted it pursuant to § 566.025. Respondent, however, does not concede that this was the case, as the trial court may have admitted it pursuant to the “modus operandi/corroboration” exception under *Bernard* as explained in Point I of this brief.

2007). “A statute’s validity is presumed, and a statute will not be declared unconstitutional unless it clearly contravenes some constitutional provision.” *Id.* “This Court is bound to adopt any reasonable reading of the statute that will allow its validity and to resolve any doubts in favor of constitutionality.” *State v. Burns*, 978 S.W.2d 759 (Mo. banc 1998).

### **B. The history of § 566.025.**

Missouri courts have historically struggled with the admissibility of prior crimes evidence in child sex-abuse cases. While acknowledging that evidence of other crimes is typically inadmissible, Missouri courts have recognized that child sex cases are different and unique. *State v. King*, 119 S.W.2d 277, 283 (Mo. 1938); *State v. Cason*, 252 S.W. 688, 690 (Mo. 1923); and *State v. Smith*, 377 S.W.2d 241, 246 (Mo. 1964). Over time, two exceptions to the ban on other crimes evidence were typically relied upon in child sex cases: motive (satisfaction of sexual desire for the particular child) and a common scheme or plan (“to fulfill the deviate sexual instinct, proclivity, propensity, or disposition to engage in sexual conduct with children”). *State v. Lachterman*, 812 S.W.2d 759, 766-767 (Mo. App. E.D. 1991), overruled in part by *State v. Bernard*, 849 S.W.2d 10 (Mo. banc 1993).

Today, courts still rely on the motive exception to allow evidence of prior crimes with respect to the same victim. “Our courts have consistently recognized that prior uncharged acts of sexual misconduct between the defendant and victim indicate

the defendant's sexual desire for that particular victim and tend to establish the defendant's motive for committing the charged crimes, i.e., satisfaction of sexual desire for the victim." *State v. George*, 921 S.W.2d 638, 649 (Mo. App. S.D. 1996). The courts allow this evidence to demonstrate a defendant's "propensity" to commit the charged crimes. *See State v. Johnson*, 161 S.W.3d 920, 925 (Mo. App. S.D. 2005) ("in Missouri, the prosecution may show a defendant's propensity for illicit sexual relations with the prosecuting witness").

The common scheme or plan exception, however, has become disfavored as it grew to be grossly distorted throughout the years. *Lachterman*, 812 S.W.2d at 767; *Bernard*, 849 S.W.2d at 16. Courts typically took a very liberal view of the various exceptions to the ban on other crimes evidence in child sex cases – liberal to the point of "forcing a square peg into a round hole." *Lachterman*, 812 S.W.2d at 768.

The *Lachterman* court recognized that, in practice (though not in word), the courts of this State effectively recognized an additional exception – the "depraved sexual instinct" exception – to the rule against the admission of uncharged crimes. *Id.* That exception, however, was explicitly rejected by this Court in *Bernard*. *Bernard*, 849 S.W.2d at 16.

In *Bernard*, this Court embraced a different solution – recognition of the "modus operandi/corroboration" exception first proposed by Judge Thomas in his concurrence in *State v. Sladek*, 835 S.W.2d 308 (Mo. banc 1992). *Id.* at 17. In

*Bernard*, this Court used that exception to allow evidence in that case that the defendant had a “preference for naked or partially clothed boys in motion on or around an automobile,” but rejected other evidence of prior sexual misconduct as insufficiently similar to the charged crimes to overcome its prejudicial effect. *Id.* at 19.

In 1994, the Missouri Legislature, responding to *Bernard*, enacted § 566.025, presumably to overrule *Bernard*’s exclusion of other evidence of the defendant’s prior sexual misconduct with minors. *State v. Sexton*, 890 S.W.2d 389, 391 (Mo. App. W.D. 1995). The original version of the statute provided that:

In prosecutions under chapters 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.

Section 566.025, RSMo 1994.

In *State v. Burns*, 978 S.W.2d 759 (Mo. banc 1998), this Court addressed a constitutional challenge to the initial language of the statute. The defendant alleged

that the statute violated article I, sections 17 and 18(a) of the Missouri Constitution, as well as various federal constitutional provisions. *Id.* at 759. This Court agreed with the defendant’s analysis under the Missouri Constitution. *Id.* at 760.

After determining that “[t]he common law of this state with regard to propensity evidence is rooted in article II, sections 12 and 22 of the 1875 Constitution, the predecessors to the present provisions[,]” this Court found that the evidence authorized under the statute violated a defendant’s right to be tried for only the offense for which he was indicted. *Id.* at 760-761.

This Court noted that the statute made “no provision for consideration of whether evidence is logically or legally relevant[,]” and instead mandated the admission of propensity evidence. *Id.* at 761. The State argued that the Constitution was not violated because the defendant was not “on trial” for the uncharged conduct, as he could only be convicted of the formally charged crime. *Id.* This Court rejected the State’s argument based on the fact that where propensity evidence was admitted, “the defendant is forced to defend against the uncharged conduct in addition to the charged crime.” *Id.* at 761-762.

Following the decision in *Burns*, the Missouri Legislature amended § 566.025, by adding a balancing test for legal relevance, and specifying that both the charged crimes and the other crimes evidence had to be “of a sexual nature.” 2000 Mo. Laws 725. The amendment also removed the prior language regarding the timing of the

prior crime. *Id.* The current version of the statute, which is the subject of this appeal, provides that:

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.

Section 566.025, RSMo 2000.

In this appeal, Appellant argues that the legislative amendment was insufficient to cure the prior constitutional deficiencies, and that the current version of the statute continues to be in violation of article I, sections 17 and 18(a) of the Missouri Constitution.

**C. Section 566.025, as amended, does not violate article I, section 17 of the Missouri Constitution.**

Article I, section 17 of the Missouri Constitution provides, in pertinent part, “[t]hat no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information[.]”

In *Burns*, this Court found § 17 to be violated by former § 566.025 insofar as admitting evidence pursuant to the statute “amount[ed] to trying the defendant for crimes not designated in the indictment” because “[e]vidence of uncharged crimes, *when not properly related to the cause on trial*, violates a defendant’s right to be tried for the offense for which he is indicted.” *Id.* at 760-761 (emphasis added).<sup>6</sup> In so

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<sup>6</sup> It also bears noting what *Burns* did *not* hold. *Burns* did not hold that the admission of other crimes evidence was *per se* unconstitutional. If such were the case, there could be absolutely no exceptions to the rule barring such evidence. Although its admission is limited, allowing evidence of other crimes does not offend the Constitution.

*Burns* also did not determine that the admission of any kind of propensity evidence is unconstitutional; had it done so, it would have effectively overruled well-established precedent allowing the admission of evidence involving other crimes perpetrated against the same victim to demonstrate the defendant’s motive and propensity to engage in such acts with that victim. *See State v. Boulware*, 923 S.W.2d 402, 405 (Mo. App. W.D. 1996); *State v. George*, 921 S.W.2d 638, 649 (Mo. App. S.D. 1996); and *State v. Jones*, 914 S.W.2d 852, 859 (Mo. App. E.D. 1996). Furthermore, in *Sladek*, this Court recognized that propensity evidence is admissible so long as there is a sufficient “nexus between the other crimes and the crime for which [the defendant] was on trial.” *Sladek*, 835 S.W.2d at 312.

holding, this Court noted that prior § 566.025 made “no provision for consideration of whether evidence is logically or legally relevant.” *Id.* at 761.

The former version of § 566.025 mandated that the trial court admit *any* “evidence that the defendant has committed other charged or uncharged crimes involving victims under fourteen years of age” “[i]n prosecutions under chapters 566 or 568 involving a victim under fourteen years of age[.]” Section 566.025, RSMo 1994. To that extent, the only relationship between the charged and uncharged crimes was the age of the victim. Theoretically, this would have allowed evidence that the defendant failed to support, or abandoned, his minor child in a prosecution for statutory sodomy (or vice versa), so long as both victims were under the age of fourteen. Clearly such evidence would not be logically relevant because it would not tend “to prove or disprove a fact in issue or to corroborate evidence which itself is relevant and bears on the principal issue.” *State v. Driscoll*, 711 S.W.2d 512, 516 (Mo. banc 1986). Due to a lack of logical relevance, it would also lack legal relevance because the prejudicial effect would substantially outweigh the probative value. *Gilyard*, 979 S.W.2d at 141. The only purpose of such evidence would be to show the defendant’s generally bad character.

The 2000 amendment cured this deficiency, however, by adding language that would require both the charged and uncharged crimes to be “of a sexual nature,” and by adding a legal relevance balancing test. 2000 Mo. Laws 725. The additional

language in the current version of the statute provides that the uncharged crimes must now be *related* in subject matter to the charged crimes. While the addition of the phrase “of a sexual nature,” alone, does not amount to legal relevance, it certainly amounts to logical relevance, and the addition of the balancing test serves to ensure that the evidence is also legally relevant.

“[E]vidence is relevant if it logically tends to prove or disprove a fact in issue or to corroborate evidence which itself is relevant and bears on the principal issue.” *Driscoll*, 711 S.W.2d at 516. The reason this propensity evidence regarding sex offenders is logically relevant is because (1) it tends to establish the defendant’s motive to commit the charged offenses against the victim, and (2) it supports the victim’s credibility regarding the occurrence of the charged crimes.

Our courts have already recognized that propensity evidence tends to be logically relevant, especially to establish motive. *Sladek*, 835 S.W.2d at 314 (Thomas, J., concurring) (“Crime statistics readily demonstrate that commission of a prior crime by a defendant is logically relevant to the issue of whether the defendant committed the crime charged simply because recidiv[ist] statistics demonstrate that prior offenders commit more crimes than persons who have not previously committed a crime.”); *State v. Boulware*, 923 S.W.2d 402, 405 (Mo. App. W.D. 1996) (“Evidence of uncharged sexual conduct with the same victim is admissible to establish motive”); *State v. George*, 921 S.W.2d 638, 649 (Mo. App. S.D. 1996) (“prior uncharged acts of

sexual misconduct between the defendant and victim indicate the defendant's sexual desire for that particular victim and tend to establish the defendant's motive"); and *State v. Jones*, 914 S.W.2d 852, 859 (Mo. App. E.D. 1996) ("evidence of prior acts of sexual misconduct between a defendant and the victim is admissible to show a defendant's motive").

Society as a whole recognizes the highly recidivistic tendencies of child sex offenders, as evidenced by the existence of sex offender registries, sexually violent predator civil commitment proceedings, residency restrictions for sex offenders, and, in some states, chemical castration of sex offenders. Michael L. AtLee, *Kansas v. Hendricks: Fighting for Children on the Slippery Slope*, 49 Mercer L. Rev. 835, 842 (1998); § 566.147, RSMo 2000; § 589.400, RSMo 2000; and § 632.480 et al., RSMo 2000. By its amendment to § 566.025 limiting the evidence to crimes "of a sexual nature," the Missouri Legislature also recognized the high recidivism rate of sex offenders, and the logical connection that fact bears on their guilt of subsequent offenses.

While our courts currently recognize that a defendant's propensity with respect to the same victim is logically and legally relevant to prove his motive to engage in sexual acts with that particular victim, the courts do not treat evidence with respect to different victims the same way. Yet, evidence of sex offenses against other victims also tends to establish a defendant's motive to satisfy his sexual desire.

The same-victim/different-victim distinction appears to be based on either a legal fiction or a simple misperception that pedophilia involves a child-specific desire (i.e. a lust for a particular child). However, the research and statistics do not support this belief; rather, they support the fact that when sex offenders molest children, they are satisfying their motive to engage in sexual relations with children *generally*, as opposed to that specific victim. In one study it was determined that a child sex offender has, on average, *twenty-three* child victims. Robert Teir and Kevin Coy, *Approaches to Sexual Predators: Community Notification and Civil Commitment*, 23 New Eng. J. on Crim. & Civ. Confinement 405, 408 (1997). Another study, conducted by the National Institute of Mental Health, determined that each pedophile molested an average of *fifty-two* girls or *one hundred and fifty* boys. *Id.* Yet another study reported an average of *seventy-two* victims per pedophile. *Id.*

The research shows that a pedophile's motive to molest a child is a continuing one, and is not satiated when a prior victim for some reason becomes unavailable. In those cases, the pedophile typically seeks out another child victim. "By definition, the fantasies and urges associated with [pedophilia] are recurrent." *Diagnostic and Statistical Manual of Mental Disorders*, 568 (American Psychiatric Association 4th ed. 2000). "Sexual offenses against children constitute a significant proportion of all reported criminal sex acts, and individuals with Exhibitionism, Pedophilia, and Voyeurism make up the majority of apprehended sex offenders." *Id.* at 566.

The distinction between same-victim and different-victim cases is a meaningless one because evidence of other sex offenses committed by the defendant is equally relevant to establish motive in both scenarios, as the motive remains the same.

This propensity evidence is also relevant to the determination of a material issue in the case – namely, the credibility of the victim of the charged crimes. This Court has previously recognized the vital importance of the victim’s credibility in child sex cases and the role that corroboration evidence plays in this arena. *Bernard*, 849 S.W.2d at 17; *Gilyard*, 979 S.W.2d at 141; and *Sladek*, 835 S.W.2d at 317 (Thomas, J., concurring). As the *Gilyard* decision noted, corroboration is especially needed where the alleged acts are unusual and distinct (such as Appellant urinating in the mouths of his victims and using his saliva as lubrication). *Gilyard*, 979 S.W.2d at 141.

The fear, however, is that this propensity evidence is *too* logically relevant – so much so that we fear juries may misuse it.<sup>7</sup> *State v. Dudley*, 912 S.W.2d 525, 528

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<sup>7</sup> To some degree, this fear is in conflict with the long-standing presumption that jurors follow the instructions. *See State v. Forrest*, 183 S.W.3d 218, 229 (Mo. banc 2006). To fear that a jury may convict a defendant on the basis of his prior crimes, rather than the charged crimes, ignores this presumption since jurors, like the ones in

(Mo. App. W.D. 1995). Consequently, the legislature also added the legal relevance balancing test to ensure that any potential prejudice is outweighed by the probative value of the evidence before it is admissible.

The addition of the legal relevance balancing test makes the statute consistent with this Court's opinion in *Bernard*. Although the statute is broader in scope than *Bernard* with respect to the types of other crimes evidence it would permit, trial courts, when employing the legal relevance balancing test, will likely find the test satisfied by the same situations outlined by *Bernard* and its progeny – particularly where, as here, the prior crimes are similar enough to the charged crimes to constitute the defendant's *modus operandi*.

In his dissent in *Gilyard*, Judge Limbaugh noted that he was “unable to reconcile the rejection of propensity evidence under *Burns* with the admission of propensity evidence under *Bernard*'s signature m.o. exception.” *Gilyard*, 979 S.W.2d at 144 (Limbaugh, J., dissenting). The additional language under the current version of § 566.025 reconciles the two decisions by ensuring that the other crimes evidence is sufficiently similar to the charged crime so as to outweigh its prejudicial effect. Because the 2000 amendment cured this Court's prior constitutional concerns by ensuring that the evidence of other crimes would properly relate to the charged crimes,

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this case, are instructed to find guilt on the basis of *only* the charged crimes, and they are not provided with verdict-directors involving the uncharged crimes. (L.F. 64-73).

the current version of § 566.025 does not violate art. I, § 17 of the Missouri Constitution.

**D. Section 566.025, as amended, does not violate art. I, § 18(a) of the Missouri Constitution.**

Article I, § 18(a) provides “[t]hat in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county.”

The *Burns* decision did not specifically address how former § 566.025 violated art. I, § 18(a), but the decision expressed concern that a defendant would be forced to defend against evidence of which he had no advanced warning. *Burns*, 978 S.W.2d at 762 (citing cases wherein courts held that a defendant should not be saddled with the burden of defending against evidence he could not reasonably anticipate).<sup>8</sup>

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<sup>8</sup> This Court also expressed a concern in *Burns* about the mandatory admission of the evidence under the former § 566.025. *Burns*, 978 S.W.2d at 761. Although the word “shall” remains in the amended version of the statute, it has been effectively nullified by the addition of the legal relevance balancing test. Trial courts are now vested with the discretion to exclude such evidence if they deem it more prejudicial than probative. Consequently, admission of the evidence is no longer mandatory.

The addition of the legal relevance balancing test cures this deficiency generally, and in this case, specifically. By forcing courts to evaluate the probative value versus the prejudicial effect of such evidence before it becomes admissible, trial courts must necessarily consider the substance of the evidence before it is offered at trial to determine whether the defendant's prior crimes are of sufficient logical and legal relevance to his guilt of the charged crimes. In the case of witness testimony, as in this case, courts can hold a pre-trial hearing to learn the substance of the testimony before it is presented to a jury. The necessity of an advanced evaluation of the evidence, coupled with the ordinary discovery process, will put defendants on notice that the State intends to introduce such evidence at trial. Thus, as in this case, defendants will have time to prepare to meet the allegations presented by the other crimes evidence and defend against them, or, at a minimum, to request a continuance in which to do so.

In this case specifically, Appellant received prior notice of, and was able to meet and defend against, the other crimes evidence. Despite trial counsel's claims to the contrary, he was apparently prepared to defend against Jacqueline's testimony as evidenced by his cross-examinations wherein he attacked her credibility by implying that she had previously indicated that the allegations against Appellant were fabricated. (Tr. 36-37, 286-287, 294). Trial counsel was in possession of documents that appear in the record to be police reports, stating that Jacqueline's mother did not

believe the accusations, and that Jacqueline denied being touched and had changed her story three times. (Tr. 36-37). Additionally, trial counsel acknowledged that he had received the police reports indicating the existence of other victims and the fact of Appellant's past crimes against them five to six months prior to trial. (Tr. 29). The State indicated its intent to endorse witnesses pursuant to § 566.025 four days before trial (L.F. 47), and Appellant specifically denied wanting a continuance. (Tr. 29).

Because the amendment cures the prior deficiencies under art. I, § 18(a) generally, and as applied to Appellant specifically, the revised version of § 566.025 does not offend the Missouri Constitution.

### **Point III**

**The trial court did not err in overruling Appellant’s motion for judgment of acquittal, nor in imposing judgment and sentence against him for first-degree statutory sodomy, because the evidence presented at trial was sufficient for a rational juror to find Appellant guilty of first-degree sodomy beyond a reasonable doubt in that S.W. testified that Appellant touched her “between [her] legs” with his hands.**

Appellant argues that there was insufficient evidence for the jury to convict him of first-degree statutory sodomy. Because the evidence was sufficient for a rational juror to find beyond a reasonable doubt that Appellant touched S.W.’s genitals with his hand, Appellant’s claim must fail.

#### **A. Standard of review.**

“When a criminal defendant challenges the sufficiency of the evidence to support a conviction, this Court’s review is limited to determining whether sufficient evidence was admitted at trial from which a reasonable trier of fact could have found each element of the offense to have been established beyond a reasonable doubt.” *State v. Reed*, 181 S.W.3d 567, 569 (Mo. banc 2006). “This Court accepts as true all evidence favorable to the verdict and disregards all evidence and inferences to the contrary.” *Id.*

**B. The evidence presented was sufficient for a rational juror to find Appellant guilty of first-degree statutory sodomy beyond a reasonable doubt.**

“A person commits the crime of statutory sodomy in the first degree if he has deviate sexual intercourse with another person who is less than fourteen years old.” Section 566.062, RSMo 2000. Deviate sexual intercourse is defined, in pertinent part, as “any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person[.]” Section 566.010.1, RSMo 2000.

In order for the jury to convict Appellant of first-degree statutory sodomy, they had to find the following, beyond a reasonable doubt:

First, that on or about and between the dates of 1 February 2003 and 21 October 2005, in the County of Crawford, State of Missouri, the defendant performed an act involving defendant’s hand and S[.]W[.]’s genitals, and

Second, that such conduct constituted deviate sexual intercourse, and

Third, that at that time S[.]W[.] was less than fourteen years old[.]

(L.F. 70).

Appellant argues that the evidence was insufficient with respect to the manner of deviate sexual intercourse (hand to genital contact) “because [S.W.] did not testify that appellant touched her genitals with his hand, nor could the jury infer such conduct from other evidence.” (App. Br. 36).

Contrary to Appellant's assertions, S.W. *did* testify that Appellant touched her "between [her] legs" with "his hands." (Tr. 216). S.W.'s testimony indicated that her "private" was "between her legs," where she had an opening in addition to the one she used to go "number two" with. (Tr. 215, 223). This testimony leads to a reasonable inference that S.W. was discussing her genitals.

During direct examination, S.W. specifically indicated that Appellant touched her genitals with his hands:

Q. [prosecutor] Has anybody ever touched you in a bad way?

A. Yes.

Q. And who was that?

A. Shane Vorhees.

Q. And where did he touch you?

A. He touched me *between my legs* and my butt.

Q. What did he touch you with?

A. *His hands* or his private.

(Tr. 216) (emphasis added).

Appellant acknowledges the above testimony from S.W., but places an undue emphasis on the word "or" as if this word in some way negates S.W.'s testimony that Appellant touched her with his hands. (App. Br. 37, 40). Appellant fails to explain to

this Court how S.W.'s use of the word "or" has any effect on the veracity or substance of her statement.

S.W. testified to numerous and repeated acts of sodomy, committed in a variety of different manners. The only reasonable inference as to her use of the word "or" in the above-quoted statement is that sometimes Appellant used his hands, and other times he used his penis.

For S.W.'s use of the word "or" to support Appellant's claim, her use of the word had to have meant that Appellant touched her, but she was unsure whether it involved his hands or his penis. S.W.'s testimony gives absolutely no indication whatsoever that she was unsure about the manner in which Appellant was abusing her. To indulge such an inference is contrary to the verdict, and thus, the standard of review on a sufficiency claim. *Reed*, 181 S.W.3d at 569.

Appellant argues that "[t]he prosecutor argued in closing that the deviate sexual intercourse that the jury must find to convict appellant of statutory sodomy was 'peeing' in [S.W.]'s mouth." (App. Br. 40). In closing, the prosecutor never specified the manner of deviate sexual intercourse that the jury had to find in order to convict Appellant, although he did argue that Appellant's act of urinating in the victims' mouths was deviate:

There's no doubt about this case. This defendant did exactly what the state has charged him with. He had sexual intercourse with a girl under fourteen, and he

had deviate sexual intercourse with a girl under fourteen in Count II. And, God knows, this was definitely deviate. This is not a common sexual practice, urinating in her mouth. I don't know how much more deviate you can get. (Tr. 313). While the prosecutor did state that urinating in a person's mouth is deviate, he *never* told the jury that the act of urinating was the form of deviate sexual intercourse underlying the sodomy charge, nor that the jury could convict Appellant of sodomy solely because of the urination act.

In any event, the verdict-director specified that to find Appellant guilty, the jury had to believe beyond a reasonable doubt that Appellant "performed an act involving [his] hand and [S.W.]'s genitals," not that Appellant urinated in S.W.'s mouth. (L.F. 70). Because it is presumed that jurors follow the instructions, *Forrest*, 183 S.W.3d at 229, the prosecutor's statements regarding the deviate aspect of urinating in another person's mouth are irrelevant to Appellant's sufficiency claim.

The cases Appellant cites in support of his claim are all distinguishable. In *State v. Price*, 980 S.W.2d 143 (Mo. App. E.D. 1998), *State v. Palmer*, 822 S.W.2d 536 (Mo. App. S.D. 1992), and *State v. Keeler*, 856 S.W.2d 928 (Mo. App. S.D. 1993), the evidence was insufficient to support the convictions because the trial was wholly devoid of *any* evidence to support an element of each of the respective offenses. As shown in the above-quoted transcript passage, S.W. did testify that Appellant touched her genitals with his hands. Thus, unlike *Price*, *Palmer*, and

*Keeler*, there was evidence in Appellant's case to support each of the elements of his crimes.

Appellant also relies on *State v. Pope*, 733 S.W.2d 811 (Mo. App. W.D. 1987), but *Pope* involved a claim of instructional error, not insufficient evidence. Pope was charged with sodomy of two girls under the age of fourteen. *Id.* at 812. With respect to the first victim, the State charged that Pope had placed his penis into the victim's mouth. *Id.* As to the second victim, the State charged that Pope forced her to masturbate him. *Id.* The verdict-directing instructions, however, failed to follow the indictment and specify the manner in which Appellant engaged in deviate sexual intercourse with either victim. *Id.* Because both victims testified to other acts which would constitute deviate sexual intercourse in addition to the charged methods, there was no assurance that the jury unanimously agreed as to which acts the defendant had committed. *Id.* at 812-813.

Appellant's case is unlike *Pope*. First, Appellant never challenged the verdict-director at trial, and has made no such claim on appeal. (Tr. 307). Second, Appellant was charged with hand-to-genital contact, the verdict-director specified hand-to-genital contact, and S.W. testified that there was hand-to-genital contact. (L.F. 57, 70; Tr. 216). Therefore, unlike *Pope*, there is no reason to doubt that Appellant's jury unanimously agreed that Appellant engaged in deviate sexual intercourse with S.W. by means of hand-to-genital contact.

Because there was sufficient evidence for a rational juror to find beyond a reasonable doubt that Appellant touched S.W.'s genitals with his hand, Appellant's claim of insufficient evidence must fail. His convictions and sentences should be affirmed.

**CONCLUSION**

The trial court did not commit reversible error in this case. Appellant's convictions and sentences should 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 and contains 9,616 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this \_\_\_\_\_ day of September, 2007, to:

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**APPENDIX**

Sentence and Judgment.....A1