No. 85934

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

MOHSIN BAGHAZAL,

Appellant.

Appeal from the Circuit Court of St. Louis County, Missouri
21st Judicial Circuit, Division 15
Honorable John A. Ross, Judge

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from convictions for three counts of child molestation in the first degree, § 566.067, RSMo 2000, obtained in the Circuit Court of St. Louis County, and for which appellant was sentenced to consecutive terms of fifteen years in the custody of the Department of Corrections. The Missouri Court of Appeals, Southern District, affirmed appellant's convictions and sentences pursuant to Rule 30.25(b). State v. Baghazal, ED81292, order and memorandum opinion (Mo. App., E.D. January 27, 2004). On May 25, 2004, this Court sustained appellant's application for transfer pursuant to Supreme Court Rule 83.04, and therefore has jurisdiction over this case. Article V, § 10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Mohsin Baghazal, was charged by indictment with five counts of child molestation in the first degree (L.F. 11-13).[1] This cause went to trial by jury beginning on April 9, 2002, in the Circuit Court of St. Louis County, the Honorable John A. Ross presiding (L.F. 6).

The sufficiency of the evidence is not at issue in this appeal. Viewed in the light most favorable to the verdict, the following evidence was adduced: Appellant was a teacher at the Al-Salam Day School, located at 517 Weidman Road in St. Louis County, Missouri (Tr. 451-452, 576, 677, 1133). In April 2000, the victims, 10-year-olds Y.R. and S.N.[2], were students in appellant's fourth grade math and religion classes (Tr. 451-452, 576, 677).

On April 17 and April 18, 2000, appellant told Y.R. that he needed to look at bruises that Y.R. had gotten while playing soccer at recess (Tr. 459-460, 465-466, 682, 685, 870, 906, 1018, 1020). Appellant took the victim to the computer lab, located on the third floor of the school, and locked the victim inside with him (Tr. 453, 577-578, 686, 693, 870, 905, 1018-1021). Appellant told the victim to take his pants off, but the victim tried to refuse, saying that he had to go to class (Tr. 453, 683, 871, 905, 1020). Appellant told the victim to calm down, relax, and "just do it," so the victim took his pants off (Tr. 453-454, 683-684,

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[1]An information in lieu of indictment, which was later amended, was filed changing the dates of the allegations contained in Counts I, II, and IV (L.F. 14-23).

[2]In the transcript, his name is spelled [redacted].

1020). Appellant laid a blanket on the floor and told Y.R. to lie down on the blanket on his stomach, which he did (Tr. 454, 456, 684, 871, 905, 1022). Appellant then gave Y.R. an electronic skiing or snowboarding game and told Y.R. not to look behind him (Tr. 454, 684, 871, 907-908, 1023). Appellant took a cloth, wiped white stuff on it, and wiped it on the victim's buttocks (Tr. 454, 871). Appellant then got on top of the victim and put his penis "into" the victim's "back private spot," or buttocks (Tr. 456, 683, 871, 905, 1022-1023). Appellants' head was down next to the victim's head while appellant moved up and down, moving his penis "in and out" (Tr. 456, 871, 906-907,). When he was done, appellant wiped the victim's buttocks off with the cloth (Tr. 462, 685, 872, 907, 1023). Appellant then told the victim to put on his clothes and leave, telling the victim not to tell (Tr. 872, 907-908, 1023).

On April 18, 2000, appellant also told S.N. that he needed to look at bruises S.N. got during recess (Tr. 757, 912, 1047, 1050, 1057, 1131). Appellant took S.N. to the computer lab and told him to pull down his pants and underwear (Tr. 577-578, 912, 1050, 1131). After doing that, appellant laid down a quilt and a T-shirt and told the victim to lie down (Tr. 578, 912, 915-916, 1048, 1050-1051, 1131). S.N. lay down on the quilt on his belly (Tr. 580, 913, 1131). The victim heard appellant's zipper go down and pants go off, and then appellant laid on top of the victim (Tr. 580-581, 913, 1051-1052, 1131). Appellant gave the victim a hand-held game to play so he would not look back (Tr. 581, 913, 1050-1051, 1131). Appellant then put his penis between the victim's legs (Tr. 582, 913-914, 1052, 1132). It felt "slippery" because appellant had put some cream on the victim's legs before lying on top (Tr.

582, 913, 1051, 1131). Appellant laid on the victim's back and gave him advice on how to play the game (Tr. 583). Eventually, appellant said he was done (Tr. 584, 1052). He took water from a plate and put it on the victim's legs to clean the cream, and then wiped him off (Tr. 584, 915, 1132). The victim then put his pants on, and appellant told him to go (Tr. 584, 915, 1052).[3]

Later that day, both of the victims and their friend F.S. talked about what appellant had done to them (Tr. 585-586, 458, 781-782, 909, 1014-1015, 1026-1027, 1049). After school that day, F.S. called Y.R. at home, and told Y.R. he would tell his mother about it (Tr. 679-680, 783-785). F.S. spoke to Y.R.'s mother, telling her that appellant had made the victim take off his pants at school (Tr. 680, 785). Y.R.'s mother hung up the phone and asked appellant what happened (Tr. 681-682). Y.R. told his mother what appellant did to him (Tr. 682-687). Y.R.'s mother then called the school's secretary in an attempt to contact the principal (Tr. 687-689). After calling the principal, she called the police (Tr. 689-690).

Officer Tom Noonan of the St. Louis County Police Department came to Y.R.'s home and spoke with victim, who disclosed appellant's abuse (Tr. 870-872). Noonan then contacted Sex Crimes Unit Detective Gary Guinn, who told him to take Y.R. to Children's Hospital (Tr. 873).

At the hospital, Guinn met with the victim and his mother, and from that meeting, learned that S.N. may have also been molested (Tr. 1129-1130). Guinn went to S.N.'s home

[3]S.N. testified that this occurred more than once (Tr. 585).

where he spoke to S.N., who disclosed appellant's abuse (Tr. 1131-1132). S.N. also went to Children's Hospital, where both he and Y.R. were interviewed about the abuse by social worker Margie Batek (Tr. 896, 903-923).

The next morning, Guinn went to the school at 6:30 a.m. to meet with appellant (Tr. 1133-1134). At 8:00 a.m., the school secretary arrived and told Guinn that appellant had been suspended and would not be at the school, and then gave him appellant's address (Tr. 1133-1135).

Guinn, his supervisor, and a member of the Edwardsville, Illinois, Police Department went to appellant's apartment in Edwardsville (Tr. 1136). Appellant's brother opened the door, and when asked if he was "Mr. Baghazal," said, "Yes, but you are probably looking for my brother" and pointed to the back bedroom (Tr. 1136-1137). Appellant came out of the room and agreed to go back to St. Louis County to speak with the police (Tr. 1140-1141).

In the police car, Guinn advised appellant of his Miranda rights and told appellant he did not want appellant to talk about what happened until they got back to the station (Tr. 1146). However, appellant immediately started talking, saying that he had taken Y.R. to the computer lab and removed his shirt to help him clean spilled ink off of the shirt (Tr. 1147). There were no further comments in the car (Tr. 1147).

At the police station, appellant was again advised of his rights (Tr. 1147-1148). Appellant understood his rights and agreed to waive them and make a statement (Tr. 1148-1150). Guinn then told appellant that Y.R. said that appellant had taken him to the computer lab and put his penis in the victim's buttocks (Tr. 1151). Appellant leaned forward and hung

his head down for several minutes (Tr. 1152). Eventually, Guinn asked appellant if he was going to deny that, and appellant said, "I'm going to deny that I did what he said I did" (Tr. 1151). Guinn then asked if appellant was going to deny any sexual contact with Y.R. (Tr. 1152). Appellant said, "No, I'm not going to deny that" (Tr. 1152). Appellant was placed under arrest (Tr. 1152).

Appellant testified in his own defense, denying any sexual contact with the victims (Tr. 1367-1418).

At the close of the evidence, instructions, and arguments of counsel, appellant was found not guilty of counts I and II, but guilty of all remaining counts (L.F.124-128). The court followed the recommendation of the jury and sentenced appellant to three consecutive terms of fifteen years in the custody of the Department of Corrections (L.F. 126-128, 138-140; Sent.Tr. 13). This appeal follows.

ARGUMENT

I.

THIS COURT SHOULD NOT REVIEW APPELLANT'S BATSON CLAIM AS THAT CLAIM WAS NOT PRESERVED FOR APPEAL AND APPELLANT CANNOT ESTABLISH THAT HE SUFFERED MANIFEST INJUSTICE, WHICH IS OUTCOME-DETERMINATIVE, FROM THE FACT THAT CERTAIN VENIRE MEMBERS DID NOT SERVE ON HIS JURY.

SHOULD THIS COURT GRANT REVIEW, THE TRIAL COURT DID NOT PLAINLY ERR IN OVERRULING APPELLANT'S BATSON CHALLENGES TO FIVE OF THE STATE'S PEREMPTORY STRIKES BECAUSE HE DID NOT PROVE THAT THE STRIKES WERE RACIALLY MOTIVATED AND THAT THE STATE'S REASONS WERE PRETEXTUAL IN THAT THE REASONS OFFERED FOR ALL OF THE STRIKES WERE RACE-NEUTRAL, APPELLANT FAILED TO CHALLENGE THOSE REASONS AT TRIAL, AND THE EXPLANATIONS HE NOW CHALLENGES ON APPEAL WERE NOT PRETEXTUAL.

Appellant claims that the trial court erred in allowing the State to use five of its six peremptory challenges to "exclude all of the African American venire panelists" (App.Br. 21). Appellant argues that the strikes were racially motivated and the prosecutor's race-neutral explanations were pretextual (Tr. 22-29).

A. Facts

After voir dire, the parties met in chambers to discuss the State's peremptory strikes (L.F. 77-89; Tr. 398-407). Appellant raised Batson challenges to four of the State's strikes: venire members Lewis, Banks, Williams, and Wells (L.F. 78; Tr. 398-399). The prosecutor stated that his reasons for striking Lewis were that she was an investigator for the National Labor Relations Board and thus had specialized legal training and experience, including taking of statements of witnesses and doing legal research, and based on his experience, that experience may have made her more likely to second guess police investigators; that she had a stepbrother in jail for a drug offense and a sister who did time for bad checks, which based on his experience would tend to make a potential juror less sympathetic to the State; and she had visited someone in the penitentiary (L.F. 78-80; Tr. 399-401). Appellant responded that Lewis believed her relatives were treated fairly and that she did not say that would prejudice her against the state (L.F. 80; Tr. 401). The court upheld the strike as race-neutral (L.F. 80-81).

The prosecutor stated that he struck Mr. Banks because he had a "brother" serving time for "assault of a law enforcement officer" and officer credibility was an issue in this case, and also because Banks had fought a traffic ticket and won (Tr. 402-403). The prosecutor reiterated that his main concern was that he has a "family member" who was sent to jail "because of something he did to a police officer (Tr. 403). When asked if he had any response, appellant's counsel stated "Mr. Banks, no" (Tr. 403). The court found the reasons race-neutral (Tr. 403).

The prosecutor struck Mr. Williams because he was the principal of Normandy High School, and as such expressed 1) a belief that children can get together and fabricate the same story, and 2) stated that he wanted to hear from a teacher before resolving student conflicts, leading the prosecutor to believe Williams might favor the word of the defendant, a teacher, over two of his students, especially in light of evidence that the boys talked about the case amongst themselves before reporting it (Tr. 369-373, 403-404). Appellant argued that Williams' answers did not establish that he was going to be favorable to the defense (Tr. 404-405). The court noted that appellant's argument was more suitable to challenging a strike for cause, and upheld the strike, finding that Williams' statements about students lying and getting their friends to support their stories provided a "basis for the prosecutor to be concerned" (Tr. 405).

Finally, the prosecutor explained that he struck Mr. Wells because 1) he was unemployed, and the prosecutor preferred jurors who worked in the community because, based on his training and experience, the prosecutor believed working jurors "have a stake in the community and are part of it"; and 2) he had been arrested for selling liquor without a license and felt he was treated unfairly by the police and by the same prosecutor's office prosecuting appellant (Tr. 405-407). Appellant responded that it may be that Wells had sold his restaurant and did not need to work, so his unemployment may not mean that he did not have a stake in the community (Tr. 407). The court found the strike race-neutral, noting that the State had also tried to strike Mr. Wells for cause based on his bias against the prosecutor's office (Tr. 407).

In his motion for new trial, appellant claimed for the first time that the State's reasons for the strikes were pretextual, actually added another venire member, Mr. Neal, to the list of improperly struck venire members, and claimed that all five of the challenged venire members were African-American (L.F. 130). The State responded by filing a "Motion to Correct the Record," arguing that the was no evidence that Mr. Neal was African-American, and stating that it struck Mr. Neal because he had a pending St. Louis County criminal case (L.F. 136-137).

B. Misstatement of the Record

Much of appellant's argument is based on assertions of "fact" that are completely unsupported by the record. Appellant repeatedly claims that the State used its strikes to "exclude all of the African-American venire panelists" (App.Br. 21, 23, 25, 31, 35). Appellant presents no citation to the record for his claim that "only five prospective jurors were African-American" or that the State struck "all" African-Americans or "as many as possible" (App.Br. 23, 25, 31, 35). See Supreme Court Rule 84.04(i). Even appellant's motion for new trial did not make such an allegation, alleging only that the five venire members the motion mentioned were "all African-American"[4] (L.F. 130). The Eastern

[4]Not even this allegation appears to be supported by the record, as the State filed a motion to correct the record in response to appellant's attempt to argue that venire member Neal was an African-American, claiming that the record did not support that conclusion (L.F. 136-137). Regardless, such an allegation is not a "fact" to be relied on, as allegations in a

District, when faced with appellant's allegation that the State used five of its six strikes to "eliminate blacks for the jury," found that "these claims cannot be substantiated from the record on appeal[.]" State v. Baghazal, ED81292, memo op. at 4-5.

Further, appellant repeatedly refers to "similarly situated white venire members" who were not challenged by the State (App.Br. 21, 21, 26, 28-29, 31). However, nowhere in the record on appeal before this Court is the racial composition of the venire panel or of any member of the panel other than the four African-American venire members to which appellant made Batson challenges following voir dire. Appellant includes venire member Blevins among the white venire members (App.Br. 26). Once again, as the Eastern District found below, "there is no way to definitively determine Blevins' race from the record on appeal." Id. at 5. Because the record, as reviewed by respondent and verified by the learned judges of the Eastern District, provides no support for appellant's claims regarding the races of venire member Neal or any of the venire members who were not challenged by appellant after voir dire, appellant's claims that the State used its peremptory challenges to strike every member of the panel should be disregarded.

C. Preservation & Standard of Review

Appellant claims that the standard of review for his claim is for an abuse of discretion (App.Br.). However, a review of the record shows that appellant's Batson claims are not

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motion for new trial are not self-proving. State v. Henderson, 954 S.W.2d 581, 586 (Mo.App., S.D. 1997).

preserved for appeal. To preserve a Batson claim for appeal, a defendant must make more than general allegation that the reasons given by the prosecution for the strike were pretextual. State v. Costello, 101 S.W.3d 311, 312 (Mo. App., E.D. 2003); State v. Garner, 976 S.W.2d 57, 61 (Mo. App., W.D. 1998). Here, as to three of the four challenges appellant made at trial, appellant did not make any claim that the strikes were pretextual, let alone a general one, and on two of those three strikes argued that the reasons given by the prosecution did mean that struck veniremembers could not be fair (Tr. 401, 404-405, 407). These arguments were insufficient to preserve appellant's Batson claims. Further, as to the strike of venire member Banks, appellant made no argument at all regarding the State's explanation, stating "Mr. Banks, no" when asked if he had anything to say regarding the State's proffered reasons (Tr. 403). Therefore, appellant has completely failed to preserve his Batson claims. Therefore, review is available, if at all, only for plain error. Supreme Court Rule 30.20.

Relief under the plain error standard is granted only when an alleged error so substantially affects a defendant's rights that a manifest injustice or miscarriage of justice would occur if the error was left uncorrected. State v. Williams, 97 S.W.3d 462, 470 (Mo. banc 2003). Plain error does not embrace all trial error, and this Court's discretion to reverse a conviction based on plain error should be utilized sparingly. State v. Williams, 46 S.W.3d 35, 40 (Mo. App., E.D. 2001). Appellant bears the heavy burden of demonstrating manifest injustice or a miscarriage of justice. State v. Haughton, 97 S.W.3d 533, 534 (Mo. App., E.D. 2003).

D. Analysis

1. Plain Error Review of Batson Challenges Should Not Be Available

Missouri courts has repeatedly refused to grant plain error review of unpreserved Batson claims, as the failure to properly preserve the claim is fatal to that claim. State v. Shaw, 14 S.W.3d 77, 84 (Mo. App., E.D. 1999); State v. Bennett, 907 S.W.3d 374, 377 (Mo. App., E.D. 1995); State v. Childs, 876 S.W.2d 781, 784 (Mo.App., E.D. 1994); State v. Tims, 865 S.W.2d 881, 884 (Mo. App., E.D. 1993); State v. Sutherland, 859 S.W.2d 801, 803 (Mo. App., E.D. 1993); State v. Shelton, 871 S.W.2d 598, 599-600 (Mo.App., E.D. 1994). The rationale behind those cases is that review is unavailable as a Batson claim addresses the rights of the excluded venire persons, not whether a defendant has received a fair trial. Sutherland, 859 S.W.2d at 803.

Regardless of that rationale, a far more compelling rationale for refusing plain error review of a Batson claim comes from the precedent of this Court. It should be obvious that appellant could not succeed in establishing manifest injustice from the trial court's failure to sustain a Batson challenge, as "plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative[.]" Deck v. State, 68 S.W.3d 418, 427 (Mo. banc 2002); State v. Armentrout, 8 S.W.3d 99, 110 (Mo. banc 1999), cert. denied 529 U.S. 1120 (2000). Appellant cannot establish that he would have been acquitted if the challenged jurors had served on his jury instead of some other jurors—to even suggest so would endorse the very racial prejudice Batson seeks to eradicate. Such reasoning comports with the finding of this Court that the failure of counsel to mount a Batson

challenge cannot constitute ineffective assistance of counsel as a post-conviction movant cannot establish Strickland prejudice from that failure. Morrow v. State, 21 S.W.3d 819, 827 (Mo. banc 2000), cert. denied 531 U.S. 1171 (2001)("The wisdom of the motion court's findings" that there could not be prejudice from the failure to mount a Batson challenge "speaks for itself"). If the failure to raise a Batson claim cannot result in Strickland prejudice, it clearly cannot constitute a manifest injustice, as manifest injustice requires a greater showing of prejudice than does Strickland prejudice. Deck, 68 S.W.3d at 425-29. Because appellant cannot show that the court's failure to sustain the challenges affected the outcome of his trial, he cannot demonstrate manifest injustice. Therefore, plain error review of appellant's Batson claim should not be granted.

2. Appellant Failed to Demonstrate That Strikes Were Not Race-Neutral

Using a peremptory challenge to strike a potential juror based solely on that juror's race violates the Equal Protection Clause of the United States Constitution. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). For defendant to challenge the State's peremptory strike at trial, the defendant must object to the prosecutor's use of peremptory challenges and identify the racial or gender group to which the stricken person belongs. State v. Brown, 998 S.W.3d 531, 541 (Mo. banc), cert. denied 528 U.S. 979 (1999). The State then must provide explanations for the peremptory challenges which are race-neutral. Id. The State's reason need not rise to the level of a challenge for cause, nor need it even be a persuasive or plausible explanation. Id.; Purkett v. Elam; 514 U.S. 765, 115 S.Ct. 1769, 1770, 131 L.Ed.2d 834 (1995). The reason is deemed race-neutral unless

discriminatory intent is inherent in the explanation. State v. Marlowe, 89 S.W.3d 464,468 (Mo. banc 2002). Once the prosecutor articulates a reason, the burden shifts to the defendant to show the State's proffered reason was merely pretextual and that the strike was actually based on race. State v. Cole, 31 S.W.3d 163,172 (Mo.banc), cert. denied 537 U.S. 865 (2002).

In determining pretext, the Court considers the totality of circumstances, including the presence of similarly situated white jurors not struck (a crucial factor), degree of logical relevance between the proffered reason and the case, the prosecutor's credibility (based on his demeanor/statements during voir dire and the court's prior experience with the prosecutor), and the demeanor of excluded venire members. Marlowe, 89 S.W.3d at 469-470. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. Purkett, 514 U.S. at 769. The defendant may not challenge an explanation on appeal that he did not properly challenge before the trial court. Id.

In this case, appellant has not carried his burden to demonstrate that these strikes were racially motivated. A review of appellant's claim as to each venire member reveals the inadequacies of appellant's efforts to mount proper Batson challenges and to establish racial prejudice in the State's strikes.

a. Venire Members Neal and Wells

A Batson challenge must be made before the venire is excused and the jury is sworn. State v. Parker, 836 S.W.2d 930, 935 (Mo. banc), cert. denied 506 U.S. 1014 (1992). In this

case, appellant did not raise a Batson challenge to Mr. Neal until his motion for new trial (L.F. 130). The failure to raise a timely Batson claim is fatal to such a claim. State v. Gray, 887 S.W.2d 369, 385 (Mo. banc 1994), cert. denied 514 U.S. 1042 (1995). Therefore, appellant's claim regarding Mr. Neal must fail. Further, appellant makes no attempt on appeal to explain how the strikes of Mr. Neal or Mr. Wells were race-neutral in his argument. Failure to develop argument for his claims as to Neal and Wells as to why these strikes were racially motivated or why the State's explanations (that Neal had a pending criminal case in St. Louis County and that Wells stated that he had previously been treated unfairly by the St. Louis County prosecutor's office and was unemployed) were pretextual constitutes an abandonment of appellant's claim. See State v. Bradshaw, 81 S.W.3d 14, 25 n. 9 (Mo. App., W.D. 2002); State v. Winrod, 68 S.W.3d 580, 587 (Mo.App., S.D. 2002); State v. Giaimo, 968 S.W.2d 157, 159 (Mo. App., E.D. 1998). As appellant has failed identifying any fact that demonstrates how these strikes were racially motivated or the explanations pretextual, the court could not have abused its discretion in finding that they were not pretextual. Therefore, appellant has failed to meet his burden as to these two strikes.

b. Venire Member Williams

As to the strike of venire member Williams, the prosecutor explained that Mr. Williams was a school principal, had worked with kids and, based on arguments "set up" by defense counsel, Williams said that "kids will sometimes get. . . their story together," was concerned that Williams might be "extremely sympathetic to the defense theory of the case," as there was evidence that the victims "talked among themselves before they informed the

adults what had occurred" (Tr. 403-404). This explanation was completely race neutral and no discriminatory intent was inherent in that explanation. Because appellant failed to challenge this explanation as pretextual, the fact that the explanation was race neutral is all that is required, as in the second stage of the Batson challenge the explanation need not even be persuasive—it is not until the third stage that persuasiveness becomes relevant. Marlowe, 89 S.W.3d at 468-69, citing Purkett, 514 U.S. at 768. Therefore, the strike of Williams was properly upheld.

Even if appellant had properly raised a pretext challenge to the strike of Williams, the strike still would have been valid. The State's explanation was highly relevant to the case, in that Williams's belief that school students could get together and fabricate a story was a valid concern for the State, as the evidence did show that the victims talked to each other and one of their friends about the molestation prior to reporting it (Tr. 458-459, 585-586). Appellant's defense was based on a claim that the victims "created" stories about being molested (Supp.Tr. 190, 206). Further, there were not any similarly-situated white venire members who served on the jury.[5] On appeal, appellant identifies venire members Bonham,

[5]The transcript only identifies five of the twelve jurors by name, and, to the best of respondent's knowledge, a full list of jurors is not part of the record on appeal. See Supreme Court Rule 30.04(c). Because the actual makeup of the jury, including the racial composition, is unknown, this should defeat appellant's claim. For purposes of responding to appellant's claims, respondent will treat appellant's claims of similarly-situated white

a school administrator, and Wall, who worked as a summer camp counselor, as similarly situated.[6] However, neither expressed the same regarding the defense theory that children could get together to create a false story. As defense counsel was the first to breach this subject with Williams and did not question either Bonham or Wall about it, and as the prosecutor was given no opportunity to follow up following appellant's voir dire examination, the State cannot be faulted for failing to discover a similar bias on Bonham of Wall's behalf (Tr. 369-374, 384). Because the reason for the strike was relevant to the case and because there were no similarly-situated white jurors, appellant failed to demonstrate that the State's reasons for the strikes were pretextual.

c. Venire Member Lewis

The prosecutor explained that he struck venire member Lewis because she had legal training and experience in her role as a field investigator for the National Labor Relations Board, including taking sworn statements, interviewing witnesses, and conducting legal

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jurors on their face, without conceding that such venire members were either actually white or on the jury.

[6]Appellant's failure to raise these similarly-situated jurors at trial puts respondent at a disadvantage, in that appellant's failure to make a pretext argument at trial prevented the prosecutor from explaining why Williams was not similarly situated to Bonham or Wall, as there was no indication the State would be required to make such an explanation. Appellant should not be able to rely on his arguments of pretext raised for the first time on appeal.

research, and believed, based on his prior experience, that investigators may second-guess the police (Tr. 399-400). He also said he struck her because she had close relatives who served time in jail for criminal offenses and had also visited people in the penitentiary, and believed such jurors typically were not sympathetic to the State (Tr. 400-401). Once again, because appellant did not make an argument that these explanations were pretextual at trial, they must be upheld simply because they are race-neutral. Marlowe, 89 S.W.3d at 468-69, citing Purkett, 514 U.S. at 768. Further, even at the third step, had it been reached, her legal experience and investigative career alone would have been a valid race-neutral reason, as there were police witnesses as well as other witness who were engaged in interviewing techniques, thus making the reason case-related. No one other than Lewis said they had such legal training (Tr. 240). Further, appellant's allegedly similarly-situated veniremembers Bonham (a former social worker), Wall and Myers (nurses), were not similarly situated, as the social work or medical training of those venire members (which did not involve the diagnosis or treatment of child victims of sexual abuse) did not equate to the legal experience possessed by Lewis (Tr. 233-235, 239-240).

Appellant argues that being related to someone who had committed a crime is inherently discriminatory because "many" of the African-Americans in prison or on probation or parole are from St. Louis City and "the concept that a black resident of [St. Louis] County would be related to or acquainted with a black resident of [St. Louis] City is not only logical but probable" (App.Br. 30). This argument, in addition to being patently offensive to the African-American communities of the County and City for its suggestion that

black people from St. Louis City must by definition have violated the law, is also inapplicable for two reasons. First, even accepting appellant's insulting proposition, a reason is not inherently discriminatory even if it has a disparate impact on minority venire persons. Marlowe, 89 S.W.3d at 468. Second, numerous courts, including this one, have found that having a relative convicted of a crime or incarcerated is a valid race-neutral reason. State v. Taylor, 18 S.W.3d 366, 372 (Mo. banc), cert. denied 531 U.S. 901 (2000); Hightower v. Schofield, 365 F.3d 1008, 1034 (11th Cir. 2004); Williams v. Runnels, 312 F.Supp. 1266, 1273 (C.D. Cal. 2004); Edmonds v. State, 812 A.2d 1034, 1044-45 (Md. 2002)(and cases cited therein); United States v. Lampkin, 47 F.3d 175, 178 (7th Cir. 1995); State v. Fuller, 812 A.2d 389, 394 (N.J.Super. 2002); Emerson v. State, 851 S.W.2d 269, 272 (Tex.Crim.App. 1993). Therefore, this reason would survive not only a facially race-neutral challenge, but a "relevant-to-the-case" challenge in step three. Further, even though appellant identifies two other jurors, Hendricks and Blevins, who were allegedly similarly situated, neither of those had legal training and both had also been related to or acquainted with a victim of sexual abuse, setting them apart from Lewis (Tr. 262-264, 283-284). Therefore, appellant has failed to demonstrate that the strike of Lewis was racially motivated.

d. Venire Member Banks

Even though appellant's failure to even make a cursory attempt to challenge the State's explanations for the strike of Banks should preclude appellant from raising this claim at all, a review of appellant's argument shows that the strike of Banks was also valid. Appellant first argues that the prosecutor "completely fabricated" the first rationale for

striking Banks (App.Br. 24). The prosecutor incorrectly stated that Banks's "brother" was serving time for "assault of a law enforcement officer" (Tr. 402-403). Mr. Banks actually testified that it was his nephew serving time, not his brother, and Banks did not specifically identify the crime as "assault of a law enforcement officer," instead saying that the type of offense was "something with the police" (Tr. 299). While the record shows the prosecutor was not completely correct in his statement, the fact that Mr. Banks was related to someone who committed a crime involving police officers and that, just prior to the Batson hearing, the parties had an in-depth discussion regarding venire person Neal's pending charges, which included assault of a law enforcement officer, indicates that the prosecutor's misstatement was more likely a mistake than the "deception and ill-motive" that appellant insinuates (App.Br. 24). Further, as the prosecutor did clarify that the fact that Banks was related to someone who committed a crime involving officers led to the strike, and because Mr. Banks was in fact related to someone who committed a crime involving officers, the fact that the prosecutor misspoke alone does not establish that the strike was pretextual (Tr. 299, 403). Even where the prosecutor makes a mistake as to the reason for a strike, even the mistaken reason will be considered valid as long as it is race-neutral. State v. Bass, 81 S.W.3d 595, 611-12 (Mo. App., W.D. 2002); see State v. Bolton, 49 P.3d 468, 480 (Kan. 2002); Ford v. State, 1 S.W.3d 691, 693-94 (Tex.Crim.App 1999); Davidson v. State, 792 So.2d 1153, 1155 (Ala.Crim.App. 1998).

Appellant also now argues that pretext is shown for two reasons. First, he again argues that Blevins and Hendricks were similarly situated to Mr. Banks due to relatives with

criminal trouble. As stated before, these venire members also were related to or acquainted with abuse victims, unlike Banks (Tr. 262-264, 283-284). Further, these jurors were not similarly situated as they had never fought a traffic ticket and won, unlike Banks (Tr. 337). The prosecutor must have believed this was an important reason for the strike, as he also struck venire member Emery, the only other venire member who had done so (Tr. 338).

This leads to appellant's second claim of pretext—that previously defeating a traffic ticket was relevant to the case, as he claims that "it is entirely unclear how a traffic citation in *any* way relates to" the charged offenses (App.Br. 27). However, appellant must have believed that successfully fighting a traffic ticket was relevant to being a qualified juror, as he is the one who asked about it during voir dire (Tr. 337). The relevance can be seen by the question appellant asked, trying to equate appellant's decision to go to trial with the right to fight a traffic ticket (Tr. 337). That the State could not rely on the same reason to strike a venire member that the defense would rely on as a reason to keep a venire member is illogical.[7] Therefore, because there were no similarly-situated venire members not struck by

[7]Appellant also claims that the prosecutor's statement that Banks "got off" was an "[e]qually offensive. . . assumption that Banks was guilty and managed to hoodwink the judge" (App.Br. 27). Any offense that appellant may have about the phrase "got off" should be directed towards Mr. Banks, not the prosecutor, as Mr. Banks specifically used those exact same words to describe his experience (Tr. 337).

the State and the reasons were reasonably related to the trial, appellant again failed to demonstrate pretext.

3. Appellant's "Tainted vs. Dual Motivation" Argument is Irrelevant

Appellant concludes his argument with a call for this Court to adopt the "tainted analysis" of Batson claims as opposed to the "dual motivation" analysis (App.Br. 29-41). However, this claim is irrelevant. Even according to cases cited by appellant, the question of "tainted vs. dual motivation" analysis for strikes deals only with the "mixed motive" strike—where the State relies on a racially-motivated reason for the strike as well as a race-neutral reason. State v. Lucas, 18 P.3d 160, 162-63 (Az.App. 2001); Payton v. Kearse, 495 S.E.2d 205, 209-210 (S.C. 1998). In this case, all of the reasons given by the prosecutor were race-neutral—there was no racially motivated strike with which to evaluate on either a tainted or dual motivation analysis. Therefore, appellant's final argument is pointless.

For the foregoing reasons, appellant's first point on appeal must fail.

II.

THE TRIAL COURT DID NOT CLEARLY ABUSE ITS DISCRETION IN DENYING APPELLANT'S REQUEST FOR A MISTRIAL WHEN THE PROSECUTOR'S OFFICE'S VICTIM ADVOCATE SPOKE TO THE VICTIM DURING A BREAK IN HIS TESTIMONY BECAUSE THE PROSECUTOR'S OFFICE DID NOT ACT IN BAD FAITH AND APPELLANT WAS NOT PREJUDICED BY THE BRIEF CONVERSATION, IN THAT THE VICTIM WAS ABLE TO REMEMBER THE ANSWERS TO THE VAST MAJORITY OF DEFENSE COUNSEL'S QUESTIONS, THE ADVOCATE SIMPLY TOLD THE VICTIM TO TELL THE TRUTH, AND APPELLANT WAS ABLE TO CROSS-EXAMINE THE VICTIM REGARDING THE CONVERSATION.

Appellant claims that the trial court erred in failing to declare a mistrial when the victim's advocate, an employee of the prosecutor's office, spoke with victim Y.R. during a break in his testimony, after the court had told the prosecutor not to speak with the victim during the break (App.Br. 42-43). Appellant argues that this "interference" caused him to lose his "equal opportunity to confront the State's chief witness," especially when "the case against the accused relies exclusively on the credibility of the State's witnesses" (App.Br. 51-52). Appellant hypothesizes, without any evidence, that the prosecutor's office may have committed the crime of witness tampering (App.Br. 52). Appellant alleges prejudice because the advocate's "impermissible communications" with the victim had a "profound 'shaping' effect on his testimony" (App.Br. 56).

A. Facts

After Y.R. testified on direct examination, with said testimony only covering 19 pages of trial transcript, defense counsel started his cross-examination of the victim (Tr. 449-468). Early in the cross-examination, defense counsel told the victim not to guess "or anything like that" when answering questions (Tr. 468). The first part of the victim's cross-examination covered 25 pages of transcript (Tr. 468-493). In that testimony, the victim answered defense counsel with "I don't know" about three times, "I don't remember" about thirteen times, and asked counsel to repeat himself about eight times (Tr. 452-454, 458, 470, 473-474, 476-479, 483-484, 486, 488, 490, 492). At that point, the parties approached the bench and prosecutor requested a recess, which appellant objected to, and appellant requested that the court instruct the prosecutor not to speak to the witness during the recess (Tr. 494). The prosecutor agreed, and the court took a recess (Tr. 494).

After coming back from the recess, the victim at first stated that he did not "talk to anybody" during the break, but later remembered speaking to "Ellen" in the prosecutor's office (Tr. 495, 503). Ellen told him that if he did not know the answer to a question, to say he did not know, and if he did not remember the answer, to say he did not remember, and not to guess at the answers (Tr. 503).

The cross-examination continued on from the recess, taking up another fifty-four pages of trial transcript (Tr. 495-548). In this portion of the testimony, the victim answered "I don't know" about three times, said "I don't remember" between fifty and sixty times, and asked counsel to repeat himself about 18 times (Tr. 496-548). Many of the questions the

victim answered "I don't remember" to included whether he remembered what he told other witnesses or certain questions and answers in prior interviews and depositions, which appellant then used against the victim (Tr. 499-500, 510-511, 517, 529, 531, 533, 535, 544, 547-548) or were questions repeated several times or in several different ways, each receiving the same "I don't remember" answer, which would be the expected answer if the witness did not remember the answer the first time the question was asked (Tr. 496-497, 502, 506-508, 512, 530-531, 541-542, 546-548). In comparison, the victim directly answered about 200 questions during the cross-examination following the break (Tr. 495-548).

Following the victim's testimony, appellant moved for a mistrial, claiming that the State had violated the court's ruling about speaking with witnesses, and arguing that the victim said "I don't know" or "I don't remember" more often after the break (Tr. 568-569). The court denied the request, finding that the prosecutor himself did not talk to the victim, that appellant had the opportunity to examine the victim about the statements, and the appellant suffered no prejudice (Tr. 569-571).

B. Standard of Review

Mistrial is a drastic remedy, reserved for only the most extraordinary circumstances, and reversal is only required where denying a mistrial prevents a fair trial. State v. Gilbert, 103 S.W.3d 743, 752 (Mo. banc 2003). Because the trial court is in the best position to observe the impact the impact from a problematic incident, the decision to grant the mistrial is left in the trial court's sound discretion, and that decision will not be disturbed absent a

clear showing of the abuse of that discretion. State v. Boyd, 91 S.W.3d 727, 731 (Mo.App., S.D. 2002).

C. Analysis

The trial court may impose restrictions on an attorney's contact with witnesses during trial, not only to prevent unethical coaching, but simply to preserve the status quo during breaks in testimony. U.S. v. Calderon-Rodriguez, 244 F.3d 997, 985 (8th Cir. 2001).[8] Where there is a violation of such a restriction, the trial court has wide discretion in deciding how to respond to the violation. Id. Without a showing of prejudice, there is no abuse of discretion in denying relief for such a violation. Id.

In this case, appellant alleges an intentional act by the prosecutor's office, calling the victim's answers "evasive and scripted," accuses the office of a crime, and claimed that the State "dipped into its trick bag" and instructed the victim "how to answer questions during the remaining cross-examination" (App.Br. 51-54). Appellant's vitriolic accusations are completely baseless—there is absolutely no evidence in this record to suggest that the

[8]While appellant cites to State v. Futo, 932 S.W.2d 808 (Mo. App., E.D. 1996), in his argument, that case dealt with the refusal of the trial court to allow the defendant to communicate with counsel during a recess in violation of the Sixth Amendment, not with whether communications with a witness by a third party violates of an order preventing contact with that witness. Id. at 812-15. Respondent has not identified a Missouri case directly on point, so relies on well-reasoned cases from other jurisdictions.

prosecutor's office acted in bad faith. The record reveals that, following the request for the recess, the rest of the discussion was conducted at the bench, not in open court, and so the admonition to counsel was almost certainly unheard by the victim advocate (Tr. 494). Further, the court remarked that the victim was walked out of the courtroom by a couple of people without any contact from the prosecutor (Tr. 569).

Whether or not there was a technical violation of the court's order in this case is irrelevant, as nothing in the record demonstrates that appellant was prejudiced by the victim's brief conversation with the advocate. The record shows that the victim answered almost four times as many of the hundreds of questions put to him as those he answered, "I don't remember" (Tr. 495-548). This does not take into account the numerous repetitions of the same question just to bolster the number of "I don't remember" count, as well as questions asking if the victim remembered individual questions asked of him in a 118-page deposition held about seven months earlier (Tr. 549). An honest review of the record of the victim's testimony shows that the eleven-year-old boy answered all of counsel's questions to the best of his ability.

Further, it is difficult to understand how appellant could have been prejudiced from the advocates recommendation that the victim say he didn't know if he did not know the answer, or to say he didn't remember if he did not remember the answer (Tr. 503). In other words, the advocate told Y.R. to tell the truth, which is exactly what defense counsel asked for when he told the victim not to guess, and what the court stated when it swore the victim in (Tr. 468). Unless appellant is ready to add the judge and his own trial counsel into his

grand conspiracy to thwart his cross-examination, he cannot show prejudice from the advocate's brief admonition to tell the truth.

Finally, appellant was able to cross-examine the victim as to the alleged coaching. This factor mitigates against a finding of prejudice for a technical violation of a witness sequestration order. Calderin-Rodriguez, 244 F.3d at 985; State v. Osborn, 490 N.W.2d 160, 165 (Neb. 1992). In light of all of these factors, it is clear that appellant suffered no prejudice from the court's decision.

Because there is no evidence of bad faith by the prosecutor's office, and because appellant was not prejudiced by the advocate's statement to the victim to tell the truth, as appellant was able to cross-examine regarding the statement and answered the vast majority of appellant's cross-examination questions, the trial court did not clearly abuse its discretion in denying appellant's motion for a mistrial. Therefore, appellant's second point on appeal must fail.

III.

THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE SURROUNDING APPELLANT'S STATEMENTS TO POLICE BECAUSE 1) THE TRIAL COURT DID NOT ADMIT EVIDENCE OF APPELLANT'S INVOCATION OF HIS RIGHT TO REMAIN SILENT; AND 2) APPELLANT COULD BE CROSS-EXAMINED AS TO WHY HE DID NOT PROVIDE THE SAME EXPLANATION TO POLICE THAT HE PROVIDED AT TRIAL IN THAT APPELLANT HAD WAIVED HIS RIGHT TO REMAIN SILENT WHEN MAKING HIS STATEMENT TO POLICE, THUS MAKING HIS FAILURE TO MENTION HIS TRIAL EXCUSE AT THAT TIME ADMISSIBLE.

Appellant contends that the trial court erred in admitting evidence that he requested an attorney during his interrogation (App.Br. 59-61). Appellant also claims that the trial court "Compounded the Violation of Appellant's Fifth Amendment Rights" when allowing the prosecutor to question appellant in cross-examination about his failure to tell Detective Guinn about his trial testimony explanations while in the car riding back to St. Louis County (App.Br. 61). Appellant argues that, once appellant invoked his right to counsel, his previous waiver of rights was "revoked" (App.Br. 62).

A. Facts

At a pretrial hearing on appellant's motion to suppress, Detective Guinn testified that he picked up appellant at his apartment in Edwardsville, Illinois, to bring him back to St. Louis County (Supp.Tr. 46). Guinn advised appellant of his Miranda rights and appellant

said that he understood (Supp.Tr. 49-50). Guinn told appellant he did not want to question appellant about the charges until they got back to Clayton (Supp.Tr. 50-51). In response, appellant told Guinn that he was aware of the allegation by Y.R. and the only thing that happened was that Y.R. had spilled ink on himself in his classroom, so he took Y.R. to the computer lab and removed his shirt to try to get the ink out of the shirt (Supp.Tr. 51). No other statements were made at that time (Supp.Tr. 51).

After Guinn brought appellant back to St. Louis County, he started to interview appellant after appellant waived his Miranda rights for a second time (Supp.Tr. 51-54). Guinn told appellant that Y.R. had said appellant took him to the computer lab and put his penis in the victim's rectum (Supp.Tr. 54). After appellant hung his head meekly for several minutes, the following occurred, according to Guinn's testimony:

> [Detective Guinn]: Are you going to deny that you put your penis in his rectum." At that point he said, "I'm going to deny that I did what he said I did."
>
> [Prosecuting Attorney]: Then what happened?
>
> A: I said, "Are you going to deny that you had any sexual contact with this boy." He said, "No, I'm not going to deny that. Before I say anything else, I'm going to call my brother to see about a lawyer."
>
> Q: What did you do once he said that?
>
> A: I let him make a phone call.

Q: After he made a phone call, did you have any further conversation with him?

A: Yes.

Q: What was that conversation?

A: After he returned to the room, after he got off the phone, he said, "My brother said I shouldn't say anything else without a lawyer. I'd like to talk to you, but my brother says I need to get a lawyer. I'm not going to say anything else."

Q: Was that the end of you trying to talk to him about what happened?

A: Yes.

(Supp.Tr. 54-55).

In addition to a boilerplate motion to suppress statements, appellant filed two motions in limine requesting that appellant's statement, "No, I'm not going to deny that. Before I say anything else, I'm going to call my brother to see about a lawyer," be ruled inadmissible (L.F. 26-28, 55-58). The court overruled the motion to suppress and the portion of the motion in limine regarding appellant's statement that he was not denying sexual contact, but granted that part of the motion in limine referring to appellant calling his brother (L.F. 54, 58).

At trial, Detective Guinn testified about appellant's initial statement in the car and to appellant's statements in the police station up to "No, I'm not going to deny that." (Tr. 1146-

1152). However, Guinn, in accordance with the trial court's ruling, never testified about appellant's efforts to contact an attorney or his invocation of his right to remain silent (Tr. 1125-1204).

During his direct examination testimony, appellant testified that he had taken Y.R. up to the computer lab, not to clean ink off of the shirt, but to see if the network server was working so that he could run a program for the class (Tr. 1379-1382). He claimed that, if the server was working, he was going to send Y.R. to get the rest of the class (Tr. 1381). Appellant testified that the server was slow, so he did not send for the class (Tr. 1383). While in the lab, Y.R. was upset about ink on his shirt, so appellant tried to wipe it off with a paper towel (Tr. 1385). He denied taking the shirt off (Tr. 1385). He also testified that he was going to make S.N. stay inside when the rest of the class went outside because he was acting up, but when S.N. came along anyhow, he had to take S.N. back into the building (Tr. 1387-1389). Finally, he testified that he told Guinn about the ink spill because Guinn asked if he knew what the allegations were about (Tr. 1399).

Prior to the cross-examination of appellant, the prosecutor advised the court that he would be asking appellant about the fact that he did not say anything to Guinn about the computer program or about S.N. being in trouble while talking to Guinn in the car (Supp.Tr. 105). Appellant objected, claiming it was a comment on his right to remain silent (Supp.Tr. 105-106). The court ruled that appellant could be asked about the failure to mention the computer program while in the car, as appellant had waived his rights at that point and

actually made a statement about Y.R., but did not allow the prosecutor to comment about S.N. (Supp.Tr. 106-107).

The prosecutor questioned appellant about his failure to mention the computer program:

> Q: You were with Detective Guinn in the car ride back from Edwardsville?
>
> A: Yes.
>
> Q: You never told him at that time that you took Y.R. into the computer lab to do math problems, did you?
>
> A: He told me not to speak until we get to the police station.
>
> Q: After he said that, then you started to talk to him about taking Y.R. to the computer lab; is that correct?
>
> A: He said that he wanted to continue the conversation at the police station.

(Supp.Tr. 110).

> Q: He put you in the car, advised you of your rights, then he tells you he doesn't want to talk about it until he gets back to Clayton?
>
> A: Yes.

Q: ***Then*** you started to talk to Detective Guinn, and you told him why you took Y.R. to the computer lab to clean ink off of him; is that correct?

A: Say that again?

Q: You told Detective Guinn that you took Y.R. to the computer lab to clean ink off of him, isn't that what you told Detective Guinn ***in the car***?

A: That I took Y.R. to the computer lab to clean ink off him.

Q: Yes, you didn't tell Detective Guinn that you took Y.R. to the computer lab to do math problems, did you?

A: At that time, I was in complete shock, and I didn't know what this was all about.

Q: Sir, yes or no, did you tell Detective Guinn ***at that time*** that you took Y.R. to the computer lab to do math problems?

A: No.

Q: Did you tell Detective Guinn ***at the time*** that you took Y.R. to the computer lab to log onto the internet?

A: No.

Q: Did you mention to Detective Guinn anything about math facts ***at that time***?

A: Our conversation was very short.

(Supp.Tr. 111-112)(emphases added).

Q: Did you tell Detective Guinn ***at the time*** that it was your intention to have Y.R. bring the class back up to the classroom; did you tell Detective Guinn that ***on the car ride back to St. Louis County***?

A: We did not have a detailed conversation.

Q: You started talking, though, the detective didn't cut you off, did he?

A: Well, he asked me if I knew who it was about. I said it was I think Y.R.

Q: And but he didn't stop you from talking at that point. Let me ask you this, when Detective Guinn told you that he wanted to talk to you at Clayton, ***you started talking after that***; is that correct?

A: Uh-huh.

Q: ***And you started talking***, but you never mentioned that you wanted the 4th grade class to come up to the computer lab, did you; yes or no, did you tell that to Detective Guinn?

A: I did not, but if he asked me, I would have answered.

(Supp.Tr. 112-113)(emphases added).

Q: Let me ask you this. Was the only reason that you gave Detective Guinn ***at the time*** for taking Y.R. down to the computer lab -- was the only reason you gave him was to clean ink off of him?

A: I mentioned I attempted to clean off ink off him.

Q: Did you mention you took the child up to the computer room for any other reason?

A: He didn't ask me why I took him up for it.

(Supp.Tr. 122).

B. No Reference to Appellant's Request For Counsel at Trial

The main portion of appellant's argument involves appellant's claim that the court admitted evidence that he requested a lawyer and invoked his right to remain silent (App.Br. 57-61). He argues that his other claim, regarding the cross-examination of the appellant, must be viewed "in concert" with this claim (App.Br. 63). However, appellant's claim is simply incorrect. As explained above, Guinn's testimony about appellant asking to speak with his brother, his brother advising him to get a lawyer, and his refusal to answer any more questions was ***not*** admitted at trial (L.F. 54, 58; Tr. 1125-1204). Appellant's citation to pages 46-47 of the Supplemental Transcript cites to Guinn's motion hearing testimony, not his trial testimony (Supp.Tr. 1, 46-47). Therefore, appellant's invocation of counsel and of

his refusal to answer any more questions was not admitted at trial and was never presented to the jury. Thus, this part of appellant's claim (and the self-professed bedrock of his entire argument) must fail.

C. Standard of Review

As to appellant's claim of improper use of post-Miranda silence in the cross-examination of appellant, the extent of cross-examination generally rests largely within the discretion of the trial court, and an appellate court will not interfere unless that discretion is abused. State v. Ogle, 967 S.W.2d 710, 712 (Mo.App., S.D. 1998). However, that discretion does not apply if the trial court's decision if the cross-examination of a defendant violates constitutional guarantees. Id.

D. The Cross-Examination was Permissible

Generally, the State may not use a defendant's post-Miranda silence against him, either as substantive evidence of guilt or as impeachment evidence. Id. However, when the defendant elects not to remain silent, but instead waives that right, all speech, or nonsilence, by him may be admitted into evidence an remarked on. Id. at 713. Even testimony describing certain "silence" is fair subject for comment until the right to remain silent is reinvoked. State v. Tims, 865 S.W.2d 881, 885 (Mo. App., E.D. 1993).

In this case, appellant's failure to tell Guinn about the computer program was admissible, and thus available to the prosecutor for cross-examination. All of the testimony about appellant's failure to provide this information was limited to appellant's statements in the car, after appellant had been advised of his rights and decided to make a statement, and

well before appellant revoked his waiver and reinvoked his right to remain silent (Supp.Tr. 110-113, 122, 130). The prosecutor did not at any time refer to appellant's silence while at the police station, where he eventually revoked his waiver (Supp.Tr. 54-55). Therefore, all of the evidence of appellant's post-Miranda "silence" was to that time when appellant had waived his right to remain silent, and was admissible.

Because the record shows that the trial court did not admit evidence of appellant's request for counsel and invocation of his right to remain silent, as that evidence was only elicited at the suppression hearing and was never presented to the jury, and because all cross-examination references to appellant's "silence" was restricted to that time when appellant had waived his right, the trial court did not err in admitting the evidence surrounding appellant's statements. Therefore, appellant's third point on appeal must fail.

IV.

THIS COURT SHOULD REFUSE TO REVIEW APPELLANT'S CLAIMS OF ERROR AS TO THE TRIAL COURT'S FAILURE TO SUBMIT INSTRUCTIONS C, D, AND E TO THE JURY AS APPELLANT PRESENTS THOSE CLAIMS IN HIS SUBSTITUTE BRIEF ALTHOUGH HE DID NOT INCLUDE THEM IN HIS ORIGINAL BRIEF IN THE COURT OF APPEALS, IN VIOLATIONS OF SUPREME COURT RULE 83.08(b).

FURTHER, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FAILING TO SUBMIT APPELLANT'S PROPOSED JURY INSTRUCTIONS A AND B, PURPORTING TO SUBMIT THE ALLEGED LESSER INCLUDED OFFENSE OF SEXUAL MISCONDUCT INVOLVING A CHILD BY INDECENT EXPOSURE AS TO COUNTS III, IV, AND V BECAUSE APPELLANT WAS NOT ENTITLED TO THOSE INSTRUCTIONS IN THAT SEXUAL MISCONDUCT INVOLVING A CHILD BY INDECENT EXPOSURE IS NOT A LESSER INCLUDED OFFENSE OF CHILD MOLESTATION IN THE FIRST DEGREE AND THERE WAS NO EVIDENTIARY BASIS FOR THE JURY TO ACQUIT OF CHILD MOLESTATION AND CONVICT OF SEXUAL MISCONDUCT.

Appellant claims that the trial court erred in failing to submit his proposed instructions C, D, and E, verdict directors for what he claims is a lesser included offense of first-degree child molestation, sexual misconduct involving a child by indecent exposure (App.Br. 66-

73). Appellant argues that sexual misconduct involving a child is a lesser included offense because, "under the facts of this case," it was "impossible" for appellant to commit child molestation without exposing his genitals or having the victims expose their genitals, anuses, or buttocks (App.Br. 73).

A. Facts

At the instructions conference, the court noted that appellant had presented proposed instructions A, B, C, D, and E, all patterned after MAI-CR 3d 320.29.1, in an effort to have the jury consider the charge of sexual misconduct involving a child, § 566.083, RSMo 2000, for each of the five counts (Supp.Tr. 164). Those instructions were correlated to each of the five counts of child molestation: Instruction A related to the verdict director on Count I, B related to Count II, and so on (L.F. 19-20, 96, 98, 100, 102, 104, 110-119). Instructions C, D, and E, relating to Counts III-V, read, in relevant part, as follows:

> If you do not find the defendant guilty of child molestation in the first degree as submitted in Instruction No. ____, you must consider whether he is guilty of sexual misconduct involving a child by indecent exposure under this instruction.
>
> If you find and believe the evidence beyond a reasonable doubt:

> First, that [on or about April 18, 2001/between April 6, 2001, and April 17, 2001][9], in the County of St. Louis, State of Missouri, the defendant knowingly exposed his genitals to [S.N./Y.R.] and
>
> Second, the defendant did so for the purpose of gratifying the sexual desire of any person, and
>
> Third, that at the time [S.N./Y.R] was less than fourteen years of age,
>
> then you will find the defendant guilty under Count [III/IV/V] of sexual misconduct involving a child by indecent exposure.

(L.F. 114-119).

The court refused to submit the proposed instructions to the jury, believing there was no evidence to acquit appellant of child molestation and convict on sexual misconduct (Supp.Tr. 164-165).

B. Appellant's Claim Should Not Be Reviewed

In his original brief before the Court of Appeals, appellant did not raise any claim of error regarding the failure to submit of Instructions C, D, or E. Instead, appellant raised

[9]Instructions C, D, and E are identical other than the dates and the name of the appropriate victim as relates to each of the counts (L.F. 114-119). Those differences are indicated within the brackets.

claims of error as to the refusal to submit Instructions A and B, the proposed lesser included offense instructions as to Counts I and II (ED81292 App.Br. 52-61). A defendant may not raise new claims nor alter the basis of any claim contained in his original brief in his substitute brief. Supreme Court Rule 83.08(b).[10] The failure to raise a claim before the Court of Appeals prevents this Court from reviewing such a claim made in a substitute brief. Blackstock v. Kohn, 994 S.W.2d 947, 953 (Mo. banc 1999); Linzenni v. Hoffman, 937 S.W.2d 723, 727 (Mo. banc 1997). Because appellant's claims of error as to Instructions C, D, and E were not included in his original brief before the Court of Appeals, this Court should not review appellant's claims.

C. Appellant Was Not Entitled to the Instructions

A defendant is entitled to an instruction on any theory the evidence establishes. State v. Pond, 131 S.W.3d 792, 794 (Mo.banc 2004). However, trial judges are not required to instruct on a lesser offense unless the jury has a basis to: 1) acquit of the offense charged, and 2) convict of the lesser offense. Id. at 793; § 556.046.2, RSMo 2000. An offense is included in another offense when it is established by proof of the same or less of all facts required to establish the charged offense—that is, when the statutory elements of the included offense are all contained in the charged offense; when the included offense is specifically denominated by statute as a lesser degree of the offense; or when the included offense consists of an attempt to commit the charged offense or another included charge.

[10]Rule 83 governs the transfer of criminal appellate cases. Supreme Court Rule 30.27.

§ 556.046.1, RSMo 2000; State v. McTush, 827 S.W.2d 184, 187-88 (Mo. banc 1992). To determine whether an offense is a lesser included offense, the focus is on the statutory elements of the offense charged and the proposed lesser included offense, not on the evidence adduced at trial. McTush, 827 S.W.2d at 188; State v. Hagan, 79 S.W.3d 447, 454 (Mo.App., S.D. 2002); State v. Elliot, 987 S.W.2d 418, 421 (Mo. App., W.D. 1999).

A person commits child molestation in the first degree if: 1) he touches the genitals, anus, or breast of the victim, touches the victim with his genitals, or causes the victim to touch his genitals; 2) he does so for the purpose of arousing or gratifying the sexual desire of any person; and 3) the victim is less than fourteen years old. §§ 566.010(3), 566.067, RSMo 2000; MAI-CR 3d 320.17. As submitted in Instructions C, D, and E, a person commits sexual misconduct involving a child by indecent exposure for the purpose if: 1) he knowingly exposes his genitals to the victim; 2) he did so for the purpose of arousing or gratifying the sexual desire of any person; and 3) the victim is less than fourteen years old. § 566.083(2), RSMo 2000; MAI-CR 320.29.1.

Appellant contends that "the essential question is whether it is impossible for Appellant to 'put his front private spot in [the Victim's] back private spot' . . . (1) without Appellant exposing his genitals, or (2) without the victim concurrently exposing his genitals, anus, or buttocks" (App.Br. 73).[11] Appellant is mistaken, as his "essential question" focuses

[11]Appellant did not request an instruction for sexual misconduct involving a child by coercion, and therefore whether or not either of the victims' genitals, buttocks or anuses were

on the evidence admitted at trial, not on the statutory elements. Under the statutory elements test, the essential question is whether all of the elements of the lesser offense are contained within the greater, i.e. whether it is impossible for anyone to commit child molestation without committing sexual misconduct by indecent exposure. Hagan, 79 S.W.3d at 454. The answer to this question is no, because the offense of sexual misconduct requires an element not required for child molestation—exposure of the genitals. Despite appellant's assertions, it is possible to commit sexual contact without exposing the genitals. As "expose" is means "to cause to be visible or open to view: display: as. . . to engage in indecent exposure of (oneself)," any situation where a molester could engage in sexual contact with a child without making his genitals visible or open to view would be guilty of molestation but not of sexual misconduct. "Expose," Merriam-Webster Online Dictionary, www.m-w.com. For example, a molester could: touch the victim's genitals while he was fully clothed; keep his genitals covered with a blanket, sheet, robe, towel, etc., while touching the victim with his genitals; place a victim's hand, arm, leg, foot, etc., inside his pants, causing a touching of the genitals. Therefore, because sexual misconduct contains an element that child molestation does not, it is not a lesser included offense of child molestation in the first degree, and appellant was not entitled to his proposed instructions.

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exposed is irrelevant (L.F. 114-119). Further, under the elements test, that would not be an included offense as the "lesser" offense requires a finding of coercion not required for child molestation. §§ 566.067, 566.083(3), RSMo 2000; MAI-CR 3d 320.17, 320.29.2.

Further, appellant was not entitled to Instructions C, D, or E, because there was no basis to acquit of child molestation and convict of sexual misconduct by exposure. The evidence showed that appellant instructed both victims not to turn around while he molested them, and neither child testified that they saw appellant's penis, but that they only felt appellant's penis (Tr. 454-457, 581-583). Therefore, the only evidence that the jury could have relied on to find beyond a reasonable doubt that appellant had "exposed" his penis was that the victims felt the penis when it made contact with their skin. At that point, however, appellant had already completed the offense of child molestation by touching the victims with his genitals (L.F. 100, 102, 104). Even if appellant "exposed" his penis, the only evidence of that exposure provided no basis to acquit him of the "greater" offense of child molestation ***and*** convict him of the "lesser" offense of sexual misconduct by indecent exposure. Therefore, appellant was not entitled to Instructions C, D, and E, and the court could not have erred in refusing to submit them.

For the foregoing reasons, appellant's fourth claim on appeal must fail.

V.

ALL OF APPELLANT'S CLAIMS REGARDING THE ADMISSIBILITY OF THE VICTIMS' OUT-OF-COURT STATEMENTS WERE WAIVED AS APPELLANT FAILED TO OBJECT TO ALLEGED HEARSAY, VIOLATED SUPREME COURT RULES AS TO THE PRESENTATION OF MULTIFARIOUS CLAIMS IN A SINGLE POINT RELIED ON, AND FAILED TO PRESENT HIS CLAIM THAT § 491.075, RSMo 2000, IS UNCONSTITUTIONAL PRIOR TO APPEAL.

ALTERNATIVELY, THE TRIAL COURT DID NOT PLAINLY ERR IN ADMITTING EVIDENCE OF THE VICTIMS' OUT-OF-COURT STATEMENTS TO VARIOUS WITNESSES BECAUSE THOSE STATEMENTS WERE NOT OBJECTED TO AND WERE ADMISSIBLE UNDER § 491.075, RSMo 2000 IN THAT THE VICTIMS TESTIFIED AT TRIAL AND THE STATEMENTS BORE SUFFICIENT INDICIA OF RELIABILITY. FURTHER, THE CORROBORATION RULE WAS NOT APPLICABLE TO THIS CASE, AND APPELLANT'S CLAIM THAT § 491.075 IS UNCONSTITUTIONAL IS MERELY COLORABLE.

Appellant claims that the trial court erred in admitting evidence of the victims' out-of court statements to various other witnesses pursuant to § 491.075, RSMo 2000 (App.Br. 76-77). Appellant argues that the statements did not bear sufficient indicia of reliability to render them admissible (App.Br. 78-82). Appellant asserts that there was no judicial finding

that victim Y.R. was unavailable to testify at trial, claiming he was made "constructively unavailable" due to "tampering" by the prosecution (App.Br. 82-88). Appellant argues that the corroboration rule should apply to this case, requiring independent corroboration was required for the victims' trial testimony (App.Br. 88-89). Finally, appellant complains that, in the alternative, § 491.075, RSMo 2000, is unconstitutional (App.Br. 89-90).

A. Facts

Prior to trial, the State filed a motion to admit the out-of-court statements of the two victims, as well as a number of other child witnesses (L.F. 47-50). A pretrial hearing was held on these statements[12] (Supp Tr. 1-104; Tr. 2-180).

Officer Thomas Noonan of the St. Louis County Police Department testified that, on April 18, 2001, he interviewed Y.R. in the kitchen of his home with no one else present in the room (Supp.Tr. 3- 6). Noonan testified that Y.R. told him that, that day at school, appellant said Y.R. had been playing rough and got a couple of bruises on his legs (Supp.Tr. 6). Y.R. told Noonan that appellant said he needed to look at the bruises to make sure Y.R. was okay, so appellant took Y.R. to the computer room of the school and locked the door behind him (Supp.Tr. 6-7). Appellant took a sheet and laid it on the floor, then told Y.R. to lie on the sheet (Supp.Tr. 7). Appellant told Y.R. to pull his pants down and gave him a video game to play (Supp.Tr. 7-8). Appellant then rubbed "like a lotion or something" on

[12]The hearing on this motion was combined with a hearing on appellant's motions to suppress, and testimony was received by the court on two different dates (Tr. 2; Supp Tr. 1).

Y.R.'s buttocks, got on top of the victim, and "put his thing in his butt" (Supp.Tr. 7). Y.R. told Noonan that appellant was on top of the victim from behind while Y.R. was lying face down, and was moving on top of the victim in a "back and forth motion" (Supp.Tr. 8). After a short time, appellant got off of Y.R., got a towel, wiped off the victim's buttocks, wrapped the sheet and towel together, and placed those in a bag (Supp.Tr. 9). Appellant told Y.R. not to tell anybody (Supp.Tr. 9). Noonan testified that he did not prompt Y.R. other than asking him to tell what happened, asked no leading questions, and offered no prompting or encouragement (Supp.Tr. 10). Noonan later testified that Y.R. said that this had also happened on a previous day (Supp.Tr. 27).

Detective Gary Guinn testified that he went to the home of victim S.N. that same night between 7:30 and 8:00 p.m. and spoke with S.N. alone in the living room (Supp.Tr. 39-40). S.N. told Guinn that earlier that day, appellant had taken him into the computer lab to check for bruising because he had been playing hard outside (Supp.Tr. 40). In the lab, appellant laid a sheet and a shirt on the floor and told the victim to pull his pants and underwear down and lie face down on the sheet (Supp.Tr. 40). After the victim did that, appellant gave him a hand-held skiing video game to play (Supp.Tr. 40). S.N. heard appellant undo his belt and zipper and then felt appellant rub lotion on his upper leg and buttocks (Supp.Tr. 40-41). Appellant then laid down on top of the victim and put his "private" between the victim's legs, making it go "a little bit where I poo-poo" (Supp.Tr. 41). After a few minutes, appellant asked the victim if he was winning the game, then got off of the victim, used a towel to wipe S.N. down, and got dressed (Supp.Tr. 41). S.N. told Guinn that it had occurred not only that

day, but at least three other times that month (Supp.Tr. 41). Guinn said he did not ask any leading questions because he did not have to ask any direct questions at all (Supp.Tr. 41-42).

Y.R.'s mother [13] , testified that, after Y.R. came home from school that day, he spoke with his friend F.S. on the telephone and then gave the phone to Y.R.'s mother (Tr. 5). F.S. told Y.R.'s mother that appellant had taken the victim into the computer lab at school and pulled his pants down (Tr. 6). Y.R.'s mother asked the victim what happened (Tr. 6). Y.R. told her that he had been playing soccer and had a bruise (Tr. 6, 29). Appellant took Y.R. to the computer lab, locked the door behind him, and told the victim that he was going to make the bruise go away (Tr. 6-7, 29-30, 33-34). He told Y.R. to take down his pants, which he did (Tr. 6-7, 32). When Y.R. hesitated and wanted to leave, appellant told him not to worry about it (Tr. 32). Appellant told her that this had happened at least once before, but he did not remember when, and was able to take Y.R. out of class by leaving F.S. in charge (Tr. 7, 10, 30). Appellant took a blanket out of a Famous Barr bag, laid it on the floor and told Y.R. to lay down on the floor, which he did (Tr. 7, 36-38). Y.R. then heard appellant undo his belt and take down his pants (Tr. 7-8, 40). Appellant told Y.R. not to look behind him and gave him a Gameboy game to play (Tr. 8, 38-39). Appellant got on top of the victim and the victim felt something hard "like a bone" between his legs "like in his butt" (Tr. 8-9, 42). After about five minutes, appellant wiped the victim with a towel or cloth and felt water

[13]The transcript of the motion hearing refers to Y.R.'s mother as [redacted] (Tr. 3).

and lotion (Tr. 43-44). Appellant told the victim to get up, so Y.R. puled up his pants and went to class (Tr. 43).

Margie Batek, a social worker at St. Louis Children's Hospital, interviewed both victims when they came in that evening (Tr. 61, 67). Y.R. told Batek that, after lunch that day, appellant had put another student in charge of the class and taken Y.R. to the computer lab (Tr. 73). Appellant put a blanket down in the computer lab and told the victim to take off his pants and underwear and lie down on his tummy (Tr. 69-70, 72). The victim tried to refuse to lie down, but appellant told him to relax and do it (Tr. 73). Appellant gave the victim a "ski game" and told Y.R. not to tell anyone and not to look back (Tr. 72-74). The victim heard appellant's belt make noise as appellant took off his pants and laid on top of Y.R. (Tr. 69-70). When on top of Y.R., appellant's face was right next to his (Tr. 73). Appellant moved up and down on top of appellant for about 4-5 minutes (Tr. 73-74). Appellant then got a cloth out of the bag the blanket had been in, put "white stuff" on the cloth, wiped the victim's "butt" with the cloth, then put water on the cloth and wiped again (Tr. 73-74). Appellant told the victim to put on his clothes and go (Tr. 74).

Batek also interviewed S.N., asking him why he was at the hospital that night (Tr. 77-78). S.N. told her that appellant took him to the computer lab and lays him down "on a cloth" on top of which he puts a gray shirt with red stripes (Tr. 78). Appellant told the victim that he was looking for bruises, told him to take off his pants and underwear, and told him to lie face down (Tr. 79). Appellant gave him a hand-held ski game to play with and told him not to look back (Tr. 79). S.N. told Batek that he heard appellant's zipper and belt come off,

and then felt appellant put cream on his legs, and indicated to Batek that he meant his upper thighs on the rear part of his legs (Tr. 79). Appellant then put his "private part" between the victim's legs, which came up to the victim's genital area (Tr. 79). The victim said that appellant "puts it a little bit in where [I go] poo-poo" and takes it out" (Tr. 80). Appellant would ask S.N. during the assault how he was doing with the game (Tr. 80). When done, appellant threw water from a plate where the cream was (Tr. 81). Appellant then told the victim to put his pants on (Tr. 81). The victim said that appellant had done this to him more than three times but less than ten times, and that, on some of those occasions, appellant wipes him off (Tr. 81). The victim said the blanket, which he described as a blue quilt with stripes and plaid, and the shirt were in the same white Famous Barr bag (Tr. 82-83). S.N. said that, that day, he thought that the same thing happened to Y.R. because appellant took Y.R. out of class, so he talked to Y.R. and found out that the same thing and same process that happened to him happened to Y.R. (Tr. 82). Batek described both boys as articulate and willing to talk, and said their demeanors were subdued and quiet (Tr. 89, 96).

Nancy Duncan, a pediatric nurse practitioner at Children's Hospital, conducted videotaped forensic interviews with each child the next day (Tr. 121-123, 126, 129). No one else was in the room during each interview, she refrained from leading questions, and both victims would correct her during the interview if she got something wrong (Tr. 130). In his interview, Y.R. told Duncan that he had gotten some bruises while playing soccer, and that appellant told him to come to the computer lab, which had a lock that required a code to open the door (Tr. 1018-1019, 1021). In the lab, appellant took out a sheet and spread it on the

floor (Tr. 1019-1020). Appellant told the victim to take off his pants (Tr. 1020). Y.R. said he tried to refuse, but appellant told him to "just do it, calm down and just do it" (Tr. 1020). The victim laid down on the sheet (Tr. 1022). Appellant told the victim not to look back, took off his pants and underwear, and laid on top of Y.R. (Tr. 1022). Appellant put his "front private" in the victim's "back private" (Tr. 1023). Appellant than took a cloth with "white stuff" and water and washed the victim's "butt" (Tr. 1023). Appellant told the victim to leave and not tell anybody about the skiing game he had played (Tr. 1023). Y.R. also told Duncan that appellant had done this to S.N., which he knew because appellant had taken S.N. out of class and because S.N. said that appellant was "trying to heal your bruises" (Tr. 1027). Appellant had said that to Y.R. (Tr. 1026-1027). The victim told Duncan that this had happened on April 17 and 18 (Tr. 1020).

S.N. told Duncan that appellant had started doing this to him one to two months earlier, and had done it on April 18 (Tr. 1047). When the class went out to play, appellant called the victim inside and took him upstairs to the computer lab (Tr. 1048, 1050). Appellant pulled out the quilt and grayish T-shirt with red stripes and told the victim he was going to check for bruises on his legs (Tr. 1050, 1057). Appellant told S.N. to pull down his pants and to not look back, and gave S.N. a hand-held electric game to play with (Tr. 1050-1051). S.N. heard appellant's zipper going down, belt being loosened, and pants going down (Tr. 1050-1051). Appellant put cream between S.N.'s legs, laid on top of the victim, and rubbed the victim with his private part (Tr. 1051-1052). When done, appellant would tell the victim to pull up his pants and go (Tr. 1052). S.N. said this happened more than three times,

the first time happening a month or two ago (Tr. 1049). S.N. said he had told Y.R. and F.S. that day, and that the same thing had happened to Y.R. (Tr. 1049).

The trial court found that the statements of all child witnesses evidenced sufficient indicia or reliability and thus ruled the statements admissible (L.F. 54). Each of the witnesses testified at trial to statements made by the victims without any objection that those statements were hearsay or did not bear sufficient indicia of reliability (Tr. 682-687, 870-872, 905-909, 912-916). State's Exhibits 12 and 13, Nancy Duncan's videotaped interviews with the victims were admitted and played for the jury after defense counsel stated, "No objection, Your Honor" to their admission (Tr. 998-1002).

B. Appellant's Claims are Waived

Appellant claims that these statements were admitted "over objections by defense counsel" and that he filed "a motion opposing its admission" (App.Br. 76-77). A review of the record clearly shows that appellant is incorrect. First, the motion in limine appellant cites in his brief only contains objections to "[a]ny reference to police interviews with" other child witnesses, not the victims, and makes no reference to any claim that the statements did not bear sufficient indicia of reliability (L.F. 56-59). Further, even if the motion could be construed as raising such an objection prior to trial, appellant did not raise any objection at trial to the introduction of these statements, and specifically stated, "No objection" to the introduction of the videotaped interviews (Tr. 682-687, 870-872, 905-909, 912-916, 998-1002). A motion in limine, in and of itself, preserves nothing for appeal, and the failure to

object at the earliest opportunity at trial to the admission of evidence constitutes a waiver of the claim. State v. Baker, 23 S.W.3d 702, 715 (Mo. App., E.D. 2000).

Further, appellant's corroboration rule claim is out of place in this point on appeal. While the vast majority of the point of the relied on and argument deals with the admissibility of the victims' out-of-court statements, a claim saying that corroboration of victim testimony is required to support a conviction is a claim of sufficiency of the evidence, not admissibility. See State v. Sladek, 835 S.W.2d 308, 310 (Mo. banc 1992). Because appellant seems to have included claims of both admissibility of evidence and sufficiency in the same point relied on (and subsequent argument), he is in violation of Supreme Court Rules 30.06 and 84.04, which would justify the dismissal of an appeal. DeCota Electric & Industrial Supply, Inc. v. Continental Casualty Co., 886 S.W.2d 940, 941 (Mo. App., S.D. 1994).

Finally, appellant's claim that § 491.075 is unconstitutional is raised for the first time on appeal. Failure to raise a constitutional claim at the earliest opportunity constitutes a waiver of that claim. State v. Sexton, 75 S.W.3d 304, 309 (Mo.App., S.D. 2002). Therefore, because appellant's claims are waived, this Court should deny them without review.

C. Standard of Review

Due to appellant's failures to object at trial and preserve the issues for appeal, should this Court decide to review appellant's claims, it may do so only for plain error. Supreme Court Rule 30.20. Relief under the plain error standard is granted only when an alleged error so substantially affects a defendant's rights that a manifest injustice or miscarriage of justice

would occur if the error was left uncorrected. State v. Williams, 97 S.W.3d 462, 470 (Mo. banc 2003). Appellant bears the heavy burden of demonstrating manifest injustice or a miscarriage of justice. State v. Haughton, 97 S.W.3d 533, 534 (Mo. App., E.D. 2003).

D. Analysis

1. The Victims' Out-of-Court Statements were Admissible

As a preliminary matter, the statements in this case were admissible simply because appellant did not object to their introduction at trial. Hearsay statements, if not objected to, are admissible and may be considered by the trier of fact along with other evidence. State v. Albarado, 6 S.W.3d 197, 203 (Mo. App., S.D. 1999). However, even if this were not true, the statements were still admissible under the statute allowing for the admission of a child witness' out-of-court statements.

Section 491.075, RSMo 2000, allows the out-of-court statements of a child twelve years or younger to be admitted at trial if:

> (1) The court finds, in a hearing conducted outside the presence of the jury that the time, conduct and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2)(a) The child testifies at the proceedings;
>
> . . . .

§ 491.075.1, RSMo 2000. Among the non-exclusive factors considered in evaluating whether or not there were "sufficient indicia of reliability" include: 1) spontaneity and consistent repetition; 2) the mental state of the declarant; 3) the lack of a motive to fabricate;

and 4) knowledge of subject matter unexpected of a child of similar age. State v. Porras, 84 S.W.3d 153, 157 (Mo. App., W.D. 2002). The court looks at the totality of the circumstances in reaching its decision. Id. While the State bears the burden of producing evidence supporting the admission of the statements, it does not need to prove that the statements are reliable—once the State presents sufficient indicia of reliability, the statements are presumptively admissible. Id. at 158.

a. Y.R. was "Available" and Testified at Trial

At the outset, the statements of both victims were eligible for admission under this statute because both boys testified at trial (Tr. 449-670). Appellant's argument that Y.R. was somehow made "constructively unavailable for cross-examination" due to prosecutorial "interference" with his testimony is meritless. While an in-depth discussion of the issue of "interference" with the Y.R.'s testimony is unnecessary in light of respondent's discussion of Point II, supra, a review of Y.R.'s testimony reveals that he did not refuse to answer defense counsel's questions, but rather did his best to answer all of the questions he knew the answers to. Appellant argues that the victim answered "I don't know" or "I don't remember" on numerous occasions (App.Br. 83). However, respondent has only located three "I don't know" answers following the break that appellant complains about (Tr. 509, 513, 534), and of the "I don't remember" answers, many were about whether he remembered what he told other witnesses or certain questions and answers in prior interviews and depositions, which appellant then used against the victim (Tr. 499-500, 510-511, 517, 529, 531, 533, 535, 544, 547-548, 561, 562), or were questions repeated several times or in several different ways,

each receiving the same "I don't remember" answer, which would be the expected answer if the witness did not remember the answer the first time the question was asked (Tr. 496-497, 502, 506-508, 512, 530-531, 541-542, 546-548, 561-562).

Further, appellant gave over 250 answers other than "I don't know," "I don't remember," or asking counsel to repeat the question in the cross-examination and recross following the break alone (Tr. 495-548, 553-564). In light of defense counsel's own admonition that he did not want the victim to "guess" when answering questions, it is clear that Y.R. answered the defenses questions as well as he possibly could. Thus, appellant's claim of "constructive unavailability" is completely devoid of merit. Therefore, because Y.R. was available and did testify at trial, his out-of-court statements were eligible for admission under § 491.075, RSMo 2000.

b. There Were Sufficient Indicia of Reliability

Examining the totality of the circumstance surrounding the victims' statements, it is clear that the statements of both victims bore sufficient indicia of reliability to justify admission. First, the statements were spontaneous and consistent. Statements of a child witness simply responding to questions asked of the child are considered spontaneous so long as the statements are not prompted, coaxed, or cajoled from the witness. State v. Gillard, 986 S.W.2d 194, 197 (Mo.App., S.D. 1999). The statements here from both witnesses were simply in response to questions, and most often the questions no more probing than "What happened?" (Supp.Tr. 6, 41-42; Tr. 6, 29, 69, 77-78). As Detective Guinn testified, neither boy needed direct questioning to relate their statements (Tr. 41).

Further, the statements of each witness are very consistent with the other statements. Most or all of Y.R.'s statements included details about appellant saying he was looking for bruises, that he told the victim to lay on the sheet, that he told the victim to calm down or relax when the victim tried to refuse, that he was given a hand-held game to play, that this happened in the computer lab, that appellant laid on the victim's back, that appellant cleaned him before having him leave, and that appellant told the victim not to look back or tell anyone, and that it lasted about five minutes (Supp. Tr. 6-9; Tr. 6-10, 29-44, 69-75, 1014-1023). Likewise, S.N.' statements were very consistent including details such as: the assaults happened in the computer lab, appellant said he was looking for bruises, he heard appellant loosen his belt and zipper, appellant made him lay face down on the gray shirt with red stripes, appellant put cream on the victim's legs, appellant said "don't look back," and appellant gave him a hand-held skiing game during the molestation (Supp. Tr. 40-41; Tr. 77-83, 1048-1057). Therefore, the first factor, spontaneity and consistency, weighs in favor of admission.

The second factor, mental states of the declarants, also favors admission. Both witnesses were described as articulate and willing to share what happened to them, and both were subdued when talking about embarrassing subjects (Tr. 89, 96). The third factor, motive to fabricate, also favors admission, as testimony established that the victims liked appellant prior to the assaults, and S.N. was not afraid of him even after the assaults (Tr. 57-59, 83, 451-452, 576). This evidence clearly refutes appellant's argument that the children hated appellant simply because of the "inherently tension-ridden dynamic" between them

because appellant was their teacher, or, as appellant puts it, their "unyielding instrument of socialization into whose hands they have been involuntarily thrust" (App.Br. 81). Finally, as to the fourth factor, it is obvious the children had unusual knowledge of subject matter unexpected for their age. Both boys gave detailed descriptions of appellant's performance of a sexual act, including the use of lubrication, the relative placements of their bodies with appellants, the "up and down" or "back and forth" motions, and the need to cleanse when finished (Supp.Tr. 7-9, 40-41; Tr. 8-9, 41-43, 72-74, 79-81, 1022-1023, 1050-1052). Therefore, the fourth factor also supported the admission of the statements.

Because the statements of the victims were spontaneous and consistent, there was no problem with the boys' mental states, there was no evidence of a motive to fabricate, and the statements contained unexpected knowledge of sexual activity, they contained sufficient indicia of reliability, and were therefore admissible.

2. Corroboration Rule was Inapplicable

The uncorroborated testimony of a victim in a sex offense case is sufficient to sustain the conviction for that offense. State v. Sladek, 835 S.W.2d 308, 310 (Mo. banc 1992). Corroboration is not required unless the victims's testimony is so contradictory and in conflict with physical facts, surrounding circumstances, and common experience that the validity of the testimony is doubtful. Id. For corroboration to be required, the victim's testimony as to one of the essential elements of the offense must leave the mind "clouded with doubts." State v. Davis, 903 S.W.2d 930, 934 (Mo. App., W.D. 1995). While this "corroboration rule" has been treated with disfavor by the courts because it places a

requirement on the victims of sex offenses that is not placed on other witness, the "much maligned" rule still appears to be followed in a very restricted manner. See State v. Greenlee, 943 S.W.2d 316, 318 (Mo. App., E.D. 1997); State v. Nelson, 818 S.W.2d 285, 288-89 (Mo.App., E.D. 1991).

The first restriction on the rule is that the rule only applies to contradictions within the trial testimony; the rule does not apply to inconsistencies between the victim's trial testimony and the victim's out-of-court statements. State v. Benwire, 98 S.W.3d 618, 623 n. 2 (Mo. App., W.D. 2003); State v. Kuhlenberg, 981 S.W.2d 617, 621 (Mo.App., E.D. 1998); State v. George, 921 S.W.2d 638, 643 (Mo.App., S.D. 1996). Second, the rule is not triggered by inconsistencies between the victim's testimony and the testimony of other witnesses. Kuhlenberg, 981 S.W.2d at 621. Third, the rule is not triggered by inconsistencies in the testimony that address minor points of a nonessential nature–the inconsistencies must go directly to the essential elements of the charge. Kuhlenburg, 981 S.W.2d at 621.

Here, appellant only points out one alleged inconsistency he claims required corroboration. He argues that the boys' allegations that appellant anally penetrated them is contradicted by the lack of any medical evidence of penetration (App.Br. 89). This argument must fail. Y.R. testified that appellant put his "private spot" into my "back private spot," which Y.R. said is used to "poop" (Tr. 456-457). S.N. testified that appellant put his private part between his legs "where you poo poo" (Tr. 582). While these statements could potentially be interpreted to mean that the boys were saying that appellant anally penetrated them, it could just as easily mean that appellant placed his penis between the victim's thighs

near the buttocks, where it made contact with the anus. However, this distinction is irrelevant in this case, as whether the boys were anally penetrated in this case does not matter. To prove child molestation, the State simply had to prove "sexual contact," which includes any touching of the victims by appellant with his genitals. §§ 566.010(3), 566.067.1, RSMo 2000. Therefore, penetration was not an essential element, and any inconsistency that may exist as to whether or not the victims were anally penetrated does not trigger the corroboration rule.

3. Appellant's Constitutional Claim is Meritless

Finally, appellant's claim that § 491.075 is unconstitutional due to the "recent" amendment of the statute to allow admission of statements under the "vague and ambiguous standard" of unavailability because the victim might suffer "significant emotional or psychological trauma" is meritless. First, appellant did not raise this claim until appeal, Second, this Court has previously ruled that § 491.075 is constitutional in response to claims that it violates a defendant's federal or state due process, equal protection, and confrontation rights in those situations where the victims are available and testify at trial. State v. Wright, 751 S.W.2d 48, 51-53 (Mo. banc 1988); State v. Hester, 801 S.W.2d 695, 696-697 (Mo. banc 1991). Here, both of the victims were available and testified at trial, so this Court's prior ruling of constitutionality should control (Tr. 449-672). Finally, whether or not the portion of the statute dealing with the admission of statements when the victim is unavailable to testify at trial is irrelevant, because, as the victims testified at his trial, appellant was not affected by this portion of the statute (App.Br. 89-90). Therefore, appellant has no standing

to attack this portion of the statute. State v. Stottlemyer, 35 S.W.3d 854, 861-62 (Mo. App., W.D. 2001). Therefore, appellant's constitutional claim is meritless.

Because the out-of-court statements of the victims were not objected to and bore sufficient indicia of reliability, because the corroboration rule was not applicable in this case, and because appellant's constitutional attack on § 491.075 is without merit, the trial court did not plainly err in admitting those out-of-court statements. Therefore, appellant's fifth point on appeal must fail.

VI.

THE TRIAL COURT DID NOT PLAINLY ERR IN PERMITTING THE STATE TO FILE AN AMENDED INFORMATION SHORTENING THE RANGE OF POSSIBLE DATES OF THE ALLEGATIONS CONTAINED IN COUNTS I AND II BECAUSE APPELLANT COULD NOT HAVE SUFFERED MANIFEST INJUSTICE FROM THE AMENDMENT IN THAT APPELLANT WAS ACQUITTED OF COUNTS I AND II.

Appellant claims that the trial court erred in allowing the State to amend the information in lieu of indictment during trial shortening the range of possible dates of the offenses charged in counts I and II (App.Br. 92-93).[14] He claims, alternatively, that the range of time charged in the offense is not specific enough, and that the amendment affected his right to present an alibi defense (App.Br. 93-94). Appellant claims that this resulted in "a presumption of unfair prejudice which cannot be overcome (App.Br. 94).

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[14]Appellant's point relied on in the "Points Relied On" section of his brief, alleging that the court erred in excluding appellant's testimony about an alibi for dates contained in the original information in lieu of indictment but excluded from the amended information, is different from that contained in the argument portion of his brief, alleging that the court erred in allowing the State to amend the information (App.Br. 20, 90-91). As appellant's argument focuses on the amendment of the information, and not the exclusion of evidence, it is this argument which respondent addresses (App.Br. 91-95).

A. Facts

Appellant was originally charged with five counts of child molestation as follows: Count I for sexual contact with S.N. between February 1, 2001 and April 17, 2001; Count II for sexual contact with S.N. between February 1, 2001 and April 17, 2001; Count III for sexual contact with S.N. on or about April 18, 2001; Count IV for sexual contact with Y.R. on or about April 17, 2001; and Count V for sexual contact with Y.R. on or about April 18, 2001 (L.F. 11-13). Appellant filed a notice of alibi, claiming he left for Saudi Arabia on March 9, 2001, was gone until April 3, and did not return to the school until April 6, 2001 (L.F. 52-53).

On April 3, 2002, the week before trial, the State filed an information in lieu of indictment, broadening the range of time for Counts I and II to January 1, 2001-April 17, 2001, and Count IV to April 6, 2001-April 17, 2001 (L.F. 14-18). Appellant did not object to the information as to the final three counts, acknowledging that all of the original and amended dates were outside the time frame of his alibi, but noted his concerns as to Counts I and II (Tr. 189-190).

On April 11, during appellant's trial, the State was granted leave to file an amended information, changing the time range of Counts I and II to January 1, 2001-March 8, 2001, "conceding" appellant's alibi (Tr. 1207; L.F. 19-20). Appellant initially objected to the "expansion" of the time period, but realized that was wrong upon the court reminding counsel that the time had actually been shortened (Tr. 1208).

B. Standard of Review

Appellant did not object to the amendment of the information on the basis he now raises—that the amendment "effectively denied Appellant his right to assert an exculpatory defense," namely, an alibi defense (App.Br. 94). Therefore, his claim is unpreserved, and review is only available for plain error. Supreme Court Rule 30.20. Relief under the plain error standard is granted only when an alleged error so substantially affects a defendant's rights that a manifest injustice or miscarriage of justice would occur if the error was left uncorrected. State v. Williams, 97 S.W.3d 462, 470 (Mo. banc 2003).

C. Appellant was Acquitted of Counts I and II

An information may be amended at anytime prior to a verdict as long as no additional or different offense is charged or a defendant's substantial rights are not prejudiced. Supreme Court Rule 23.08. Therefore, to succeed on a claim that the amendment was improper, appellant must have suffered some prejudice. He cannot do so in this case because he was acquitted of the charges in the only two counts he claims were wrongfully amended (App.Br. 92-93; L.F. 124-125).

Because he was not convicted of counts I or II, appellant could not have suffered manifest injustice from the amendments of these counts. Therefore, the trial court did not plainly err in permitting the amendment, and appellant's final point on appeal must fail.

CONCLUSION

In view of the foregoing, the respondent submits that 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(b) and contains 17,672 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 October, 2008, to:

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RESPONDENT'S APPENDIX