No. SC86190

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

JAMES A. BEINE,

Appellant.

APPEAL FROM ST. LOUIS CITY CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
THE HONORABLE TIMOTHY J. WILSON, JUDGE

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

Appellant appeals from a St. Louis City Circuit Court judgment convicting him of four counts of sexual misconduct involving a child for which he was sentenced to a total of twelve years imprisonment. Although this appeal was originally filed in the Missouri Court of Appeals, Eastern District, the court of appeals transferred this case to this Court on the ground that this case involved the validity of a statute. MO. CONST. art V, § 11. To the extent that Appellant has properly preserved his claim that this case involves the validity of a state statute, jurisdiction lies in this Court. MO. CONST. art. V, § 3.

STATEMENT OF FACTS

In June 2002, Appellant was indicted on four counts of sexual misconduct involving a child by indecent exposure (§ 566.083.1(1), RSMo 2000). (L.F. 1, 26-28). Appellant was tried by a jury on June 16-19, 2003, before Judge Timothy J. Wilson. (L.F. 5-7). Appellant contests the sufficiency of the evidence to support his convictions. Viewed in the light most favorable to the verdict, the evidence at trial showed that:

Appellant was employed as a school counselor at Patrick Henry Elementary School in St. Louis City during the 2000-2001 school year. (Tr. 341, 593-94). Sometime in Spring 2001, ten-year-old Kevin Lattimore and nine-year-old Charles Marble, both of whom attended the fourth grade at Patrick Henry, were using the urinals in the boys' bathroom located on the school's ground floor next to the gym. (Tr. 380, 382, 387-88, 395-97, 403, 448, 450, 455, 468). Although there was a unisex bathroom for adults located a few feet away from the boys' bathroom, (Tr. 343, 456, 593), Appellant entered the boys' bathroom to use a urinal next to Kevin and Charles. (Tr. 387-88, 457-58, 473). No one else was present when Appellant entered the bathroom. (Tr. 387). Appellant used the urinal even though there were toilets stalls in the bathroom. (Tr. 385).

After initially standing next to the urinal, Appellant backed up three to five feet away from the urinal,[1] exposed his penis, and urinated in an arc toward the urinal. (Tr. 386, 389, 391, 403, 413, 457-58, 473). Both boys saw Appellant's exposed penis and his urinating toward, or on top of, the urinal while standing three to five feet away. (Tr. 391, 415, 458, 464). Appellant urinated in the same fashion on one other occasion in Spring of 2001 in front of Charles. (Tr. 460-62, 465).

Kevin testified that he felt embarrassed by what Appellant had done and that he told both his teacher and his mother. (Tr. 391-93, 405-06). He also said that Appellant looked at him when Kevin left the bathroom after Appellant began urinating. (Tr. 393-94). Kevin would not use the bathroom when Appellant was there, and if Appellant came into the bathroom when he was there, Kevin would leave (Tr. 392-93).

Charles testified that he thought Appellant's actions were unusual and wrong, that what Appellant had done made him feel

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[1]Kevin said Appellant was four to five feet away from the urinal, (Tr. 386, 389, 416), while Charles testified that Appellant was three to four feet away. (Tr. 457-58, 460, 473).

uncomfortable, and that he was scared when Appellant came into the bathroom with him. (Tr. 457, 459, 464). Charles also told his teacher and mother about the incidents he witnessed. (Tr. 466). Charles's teacher testified that Charles began refusing to use the bathroom, especially if Appellant was present. (Tr. 602-03). Charles said that he was scared to go to the bathroom when Appellant was there and that Appellant would watch him use the urinal. (Tr. 457).

On another occasion in Spring 2001, Jeremy Marble, who was then in the third grade, was in the boys' bathroom when Appellant came in to use the urinal. (Tr. 338). As Jeremy was washing his hands, Appellant turned around–the urinals were on the wall opposite of the sinks–and with his penis exposed and hands on his stomach told some children who were being loud to "shut up." (Tr. 350-51, 374). Appellant then put his penis inside his pants and zipped his pants up. (Tr. 351). Although Appellant did not talk to Jeremy, he did smile at him. (Tr. 356). Jeremy said that this made him feel disgusted and that after this incident he would not use the bathroom if Appellant was present. (Tr. 552). He testified that he had never seen another teacher's "private part" and that the sight of Appellant's "private part" upset him. (Tr. 375). Jeremy told his mother about this incident. (Tr. 552).

Testimony from the victims and other school staff members revealed that adults did not normally use the boys' bathroom and that the students were not allowed to use the adult bathrooms, which were located on the ground and main floors, including one near Appellant's office. (Tr. 397-98, 594, 597-99, 679). The school's general practice was that children were to use their own bathrooms and that adult staff members were to use bathrooms reserved for them. (Tr. 600). The school's principal testified that adult staff members may have used the children's bathrooms if no children were there, but that it would constitute inappropriate for an adult staff member to use the children's bathrooms, especially the urinals, if children were present (Tr. 683-86). The principal also testified that it would be "serious misconduct" for a staff member to stand four or five feet away from a urinal to urinate. (Tr. 686).

An inmate, who was incarcerated with Appellant at the Madison County, Illinois, Jail after Appellant was arrested on these charges, testified that while in jail Appellant said that he was in jail being punished by God because he was a serpent in the grass and that the grass was little children. (Tr. 573-76). Appellant told this inmate that he had been arrested for exposing himself to a couple of children who were brothers and admitted that he was "drawn" to these

children for whatever reason. (Tr. 579-80). Appellant admitted that if no one else was around he would follow these children into the bathroom and expose his penis to them. (Tr. 581). Appellant said it would not have been a problem if not for the boys' mother. (Tr. 581).

The State also presented evidence that Appellant refused to answer the door to his residence when police arrived to serve the arrest warrant issued in this case. (Tr. 539-65). Evidence showed that despite several hours of attempting to contact Appellant, who was inside his residence, police had to obtain a search warrant and after entering Appellant's house found him sitting in a closet. (Tr. 539-65).

Appellant did not testify at trial, but presented testimony from his landlord (Tr. 715-23), from the principal of the elementary school where these incidents took place (Tr. 672-708), and from an instructional coordinator who worked for St. Louis City public schools, (Tr. 724-40). The instructional coordinator testified that another student (Ray Moss) also complained about Appellant urinating in an arc in front of him. (Tr. 731, 739).

The jury found Appellant guilty on all counts. (L.F. 137-40, 148). The trial court later followed the jury's recommendation and

sentenced Appellant to three consecutive four-year terms of imprisonment on Counts I (Jeremy Marble), II (Charles Marble), and IV (Kevin Lattimore), and imposed a four-year sentence on Count III (Charles Marble) to be served concurrently with Count II, for a total of twelve years imprisonment. (L.F. 162-65).

ARGUMENT

I.

Appellant's claim that § 566.083.1(1), RSMo, is unconstitutional is not preserved for appellate review because Appellant failed to timely raise this constitutional challenge in that he did not assert a constitutional violation "at the earliest opportunity" but waited until the filing of his motions for judgment of acquittal and for a new trial, which motions did not specify the constitutional provisions he claimed the statute violated.

Alternatively, the trial court did not err in overruling Appellant's motion for judgment of acquittal at the close of all the evidence and his motion for new trial because § 566.083.1(1) is not unconstitutionally overbroad in that its language does not implicate any First Amendment concerns; and because the statute, which makes it a crime to expose one's genitals to a child under 14 years old "in a manner that would cause a reasonable adult to believe that the conduct is likely to cause affront or alarm to a child" under 14, is not unconstitutionally vague in that this language conveys what is prohibited in words and terms understandable by people of ordinary intelligence.

Appellant contends that the statute he was convicted of violating, § 566.083.1(1), RSMo 2000 (sexual misconduct involving a child), is unconstitutionally overbroad and vague. The statutory provision at issue in this case states:

A person commits the crime of sexual misconduct involving a child if the person:

(1) Knowingly exposes the person's genitals to a child less than fourteen years of age in a manner that would cause a reasonable adult to believe that the conduct is likely to cause affront or alarm to a child less than fourteen years of age;

Section 566.083.1(1).[2]

A. Appellant has failed to preserve his constitutional challenge.

Before addressing the merits of Appellant's constitutional claim, this Court must determine whether Appellant's constitutional challenge was timely and properly raised. Appellant states that his constitutional claim was first raised in a written motion supplementing his oral motion for judgment of acquittal at the close of the State's case, and that he again raised this claim in another written motion supplementing his oral motion for a directed verdict after both sides had rested. App. Br. 14. Appellant also states that this issue was raised in his motion for new trial. App. Br. 14.

In his supplemental written motions, however, Appellant simply

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[2]This statute was amended effective August 28, 2004, but the amendment did not affect the provisions at issue in this case.

claims that the statutory language ("would cause a reasonable adult to believe that the conduct is likely to cause affront or alarm to a child less than 14") was "vague, overbroad and therefore unconstitutional." (L.F. 98, 102). Appellant's written motion does not identify even one specific constitutional provision that he claimed the statute violated. Even in his motion for new trial, Appellant does not identify any constitutional provision that was violated but simply reasserts his claim that the statutory language was "vague, overbroad and therefore unconstitutional." (L.F. 153).

To preserve a constitutional claim, the party must "specifically" identify "the constitutional provisions claim to have been violated, such as by explicit reference to the article and section or by quotation of the provision itself." *Callier v. Director of Revenue*, 780 S.W.2d 639, 641 (Mo. banc 1989); *see also State v. Flynn*, 519 S.W.2d 10, 12 (Mo. 1975) ("the sections of the constitution claimed to have been violated must be specified"). By failing to identify any specific constitutional provision in any of these motions, Appellant has waived his constitutional claim on appeal. To the extent that Appellant is raising a specific constitutional challenge to the statute for the first time on appeal, it is not preserved for review. *See State v. William*, 100 S.W.3d 828, 831 (Mo. App. W.D. 2003)

Even if this deficiency is overlooked, Appellant's constitutional claim is also not preserved for review because it was not timely raised. "As a general rule, a constitutional claim must be raised at the earliest opportunity and preserved at each stage of the judicial process." *State v. Hadley*, 815 S.W.2d 422, 425 (Mo. banc 1991); *see also Adams by Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 908 (Mo. banc 1992). "In the context of a criminal proceeding, 'Rule 24.04 prescribes the proper time to raise such fundamental questions as the constitutionality of statutes upon which prosecutions are based.'" *William*, 100 S.W.3d at 831, *quoting State v. Turner*, 48 S.W.3d 693, 696 (Mo. App. W.D. 2001); *see also State v. Flynn*, 519 S.W.2d 10, 12 (Mo. 1975) (holding that the earliest opportunity for a defendant to raise a constitutional challenge to a criminal statute on vagueness and overbreadth grounds is in a motion to dismiss or quash the indictment). A constitutional challenge to a statute made for the first time in a motion for judgment of acquittal or in a motion for new trial is not preserved for review. *See Hadley*, 815 S.W.2d at 425 ("[A] constitutional challenge to a statute which is not made prior to motion for new trial is not preserved for review."); *Flynn*, 519 S.W.2d at 12 ("The constitutional issue cannot be preserved for appellate review by mentioning it for the first time in motion for new trial."); *Turner*, 48

S.W.3d at 697 (holding that a constitutional challenge to the statute under which the defendant was being prosecuted that was first asserted in a motion to dismiss after the state presented its case was not preserved for review); *State v. Danforth*, 654 S.W.2d 912, 917-18 (Mo. App. W.D. 1983) (holding that a defendant who first raised constitutional challenge to statute she was charged with violating in motion for judgment of acquittal at the close of the state's case did not preserve the constitutional issue for review). Civil cases involving the timeliness of constitutional challenge, to statutes have reached comparable holdings. *See Hollis v. Blevins*, 926 S.W.2d 683, 684 (Mo. banc 1996) (holding that the proper time to raise a constitutional challenge to the joint and several liability statute would have been in the answer to the tort petition and not in a motion for new trial); *Adams by Adams*, 832 S.W.2d at 907-08 (holding that a constitutional challenge to statute regarding pre-judgment interest was not preserved when first made in post-trial motions); *Land Clearance for Redevelopment v. Kansas Univ. Endowment Ass'n*, 805 S.W.2d 173,175-76 (Mo. banc 1991) (holding that constitutional challenge to interest-rate statute first made in a motion to amend judgment was not raised at the earliest opportunity and was thus not preserved for review).

The purpose of requiring that constitutional issues be raised at the earliest opportunity is to prevent surprise and to ensure that party opponents have an opportunity to offer an evidentiary response to the constitutional challenge and that the trial court has a full opportunity to identify and rule on the issue. *Land Clearance*, 805 S.W.2d at 175; *Adams by Adams*, 832 S.W.2d at 908. Moreover, "[a]n attack on the constitutionality of a statute is of such dignity and importance that the record touching such issues should be fully developed and not raised as an afterthought in a post-trial motion or on appeal." *Land Clearance*, 805 S.W.2d at 684; *see also Adams by Adams*, 832 S.W.2d at 908; *Hollis*, 926 S.W.2d at 684. *But cf. Call v. Heard*, 925 S.W.2d 840, 847 (Mo. banc 1996) (holding that a constitutional challenge to a punitive damage award under wrongful death statute was timely raised when the issue of punitive damages did not arise until the day of trial). Appellant's constitutional claim was not timely or properly preserved for review and he has, therefore, waived appellate review of that claim.

Even if he had properly preserved his constitutional challenge, Appellant's claims that the statute is unconstitutionally overbroad and void for vagueness are without merit.

Standard of review.

"A statute is presumed to be constitutional and will not be invalidated unless it 'clearly and undoubtedly' violates some constitutional provision and 'palpably affronts fundamental law embodied in the constitution.'" *Board of Educ. v. State*, 47 S.W.3d 366, 368-69 (Mo. banc 2001), *quoting Linton v. Missouri Veterinary Med. Bd.*, 988 S.W.2d 513, 515 (Mo. banc 1999) and *State v. Stokely*, 842 S.W.2d 77, 79 (Mo. banc 1992). Any doubt concerning a statute's constitutionality must be resolved in favor of its validity. *See State v. Mahurin*, 799 S.W.2d 840, 842 (Mo. banc 1990), *cert. denied*, 502 U.S. 825 (1991); *State v. Condict*, 65 S.W.3d 6, 17 (Mo. App. S.D. 2001). Courts presume statutes are constitutional and will find otherwise only when they plainly contravene some constitutional provision. *Id.*

Appellant's claim that the statute is overbroad is not applicable.

Appellant's claim that the statute is overbroad does not apply in this case because Appellant concedes that no First Amendment issue is involved. App. Br. 36. Unlike the statutory provision at issue in *State v. Moore*, 90 S.W.3d 64 (Mo. banc 2002), which made it unlawful to solicit or request that another person engage in sexual conduct under circumstances which the actor knows is likely to cause affront or alarm (§ 566.095, RSMo 2000), *Id.* at 65-66, the statute at issue in

this case implicates no conduct protected by the Free Speech Clause. On the contrary, the statute only makes it unlawful to expose one's genitals to a child under age 14 in a manner in which a reasonable adult would believe would likely cause affront or alarm to a child of that age. A claim that a statute is unconstitutionally overbroad is a concept appropriate only for First Amendment cases. *See Mahurin*, 799 S.W.2d at 842 (holding that a claim that a statute is overbroad is not appropriate in cases in which the First Amendment is not at issue); *State v. Prowell*, 834 S.W.2d 852, 855 (Mo. App. E.D. 1992) (holding that overbroadness is a concept appropriate only in First Amendment cases).

In *State v. Mahan*, 971 S.W.2d 307 (Mo. banc 1998), the defendants claimed that a statute, which made it unlawful for a person knowingly infected with HIV to "deliberately create a grave and unjustifiable risk of infecting another with HIV through sexual or other contact," was constitutionally overbroad. *Id.* at 309. This Court rejected the defendants' argument that the statute prohibited or chilled any activity protected by the First Amendment and held that neither defendant had "standing to bring a claim of unconstitutional overbreadth." *Id.* at 312. Similarly, because no free speech issues are involved in this case, Appellant's claim that the statute is

unconstitutionally overbroad is irrelevant and without merit.

The statute is not unconstitutionally vague.

"The standard for determining whether a statute is void for vagueness is whether the terms or words used are of 'common usage and are understandable by persons of ordinary intelligence.'" *Board of Educ*, 47 S.W.3d at 369, *quoting Mahurin*, 799 S.W.2d at 842; *see also State v. Bratina*, 73 S.W.3d 625, 628 (Mo. banc 2002) ("The standard for determining whether a statute is void for vagueness is whether the terms or words used in the statute are of common usage and are understandable by persons of ordinary intelligence."). Only when the statutory terms are of such uncertain meaning, or so confused that the courts cannot discern with reasonable certainty what is intended, will a court declare a statute void. *See Mahan,* 971 S.W.2d at 312; *Condict*, 65 S.W.3d at 17. The void-for-vagueness doctrine serves two goals. First, it ensures that laws give fair and adequate notice of proscribed conduct. *See Mahan*, 971 S.W.2d at 312; *State v. Brown*, 140 S.W.3d 51, 54 (Mo. banc 2004). Second, it protects against arbitrary and discriminatory enforcement. *Id.*

Section 566.083.1(1) is not unconstitutionally vague because it gives fair and adequate notice of what conduct is unlawful. The simple act of knowingly exposing oneself to a child under age 14 is

not sufficient under the statute to warrant a prosecution. Rather, it is exposing oneself "in a manner that would cause a reasonable adult to believe that the conduct is likely to cause affront and alarm to a child" under 14 that is prohibited and made unlawful under the statute.[3] Section 566.083.1(1).

In *Moore*, this Court rejected a First Amendment challenge to the sexual misconduct statute because that statute did not prohibit all solicitations or requests for sexual conduct, but only those made under circumstances in which the actor knows "that his requests or solicitation is likely to cause affront or alarm." *Moore*, 90 S.W.3d at 67. "The words 'affront or alarm' convey, respectively, a deliberate offense or a feeling of danger. At the least, real emotional turmoil must result." *Id.* In deciding *Moore*, this Court referred to the statute at issue in this case and noted that it "prohibit[ed] conduct that is known or believed 'likely to cause affront or alarm,' presumably to distinguish a criminal act of exposing oneself from conduct that is accidental, inadvertent, or otherwise done without intent to do harm."

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[3]The language "likely to cause affront or alarm" is apparently borrowed from provisions contained in the Model Penal Code. *See State v. Bauer*, 337 N.W.2d 209, 211 (Iowa 1983).

Id. at 68. This language all but precludes a challenge to the statute on vagueness grounds.

Appellant argues that the statute in this case is void because it has no scienter requirement. But the statute here prescribes the knowing exposure of one's genitals in a manner that would cause a reasonable adult to believe that the conduct is likely to cause affront or alarm. In fact, it is the scienter element found in § 566.083.1(1) that saves the statute from any serious challenge on vagueness grounds. *See State v. Dale*, 775 S.W.2d 126, 131 (Mo. banc 1989) ("The requirement of knowledge is the saving grace of the criminal statute."); *State v. Shaw*, 847 S.W.2d 768, 776 (Mo. banc 1993) (holding that the scienter requirement found in the unlawful merchandising practice act cured any claim that the statute was unconstitutionally vague). In other cases involving vagueness claims, this Court has held that statutory language not unlike the language used in the statute at issue here was not unconstitutionally vague. *See Mahurin*, 799 S.W.2d at 842 (holding that the phrase "substantial risk" as used in the involuntary manslaughter statute was not unconstitutionally vague because those words "have a plain and ordinary meaning cognizable by a person of ordinary intelligence"); *Dale*, 775 S.W.2d at 130-31 (holding that the phrase "knowingly

abuses or neglects a resident" as used in the nursing home abuse and neglect statute was not unconstitutionally vague); *see also Shaw*, 847 S.W.2d at 774-76 (holding that the phrase "unfair practices" when coupled with a scienter requirement was not unconstitutionally vague).

At least one court in another state has determined that the phrase "likely to cause affront or alarm" is not unconstitutionally vague. In *People v. Randall*, 711 P.2d 689 (Colo. 1985), the defendant made a void-for-vagueness challenge to an indecent exposure statute that made it a crime to expose one's genitals "under circumstances in which such conduct is likely to cause affront or alarm." *Id.* at 691. The Colorado Supreme Court concluded that this "statute sets forth a readily identifiable objective standard for measuring the conduct proscribed by its terms." *Id.* at 692. The court held that the legislature's use of the words "likely," "affront," and "alarm" was not "so imprecise that they fail to provide an identifiable standard of conduct to a person of reasonable intelligence." *Id.* at 693.

Appellant's reliance on *State v. Young*, 695 S.W.2d 882 (Mo. banc 1985), is entirely misplaced. In that case, the statute prohibited the simple act of being in a place that had been used for cockfighting, even if no cockfight was currently underway. *Id.* at 886. The fatal

blow to the cockfighting statute in *Young* was its failure to include a scienter element, a defect that does not affect the statute at issue in Appellant's case. The lack of a scienter element in the cockfighting statute did not inform law enforcers of the proper standards for enforcement of the statute. *Id.* at 886. This Court's later opinions have recognized the limitation of the holding in *Young*. *See Dale*, 775 S.W.2d at 130.

Finally, Appellant employs a slippery-slope argument by describing hypothetical situations in which he contends that the statute at issue here would apply. But using hypothetical or imagined situations is not an appropriate vehicle for challenging a statute on vagueness grounds:

> It may be possible to hypothesize conduct that would not clearly fall either in or out of the statutory
> prohibition . . . . Nevertheless, on a challenge that a statute is unconstitutionally vague, "it is not necessary to determine if a situation could be imagined in which the language used might be vague or confusing." Rather, the language is to be evaluated by "applying it to the facts at hand."

Mahan, 971 S.W.2d at 312, *quoting Young*, 695 S.W.2d at 883-84.

The examples Appellant includes in his brief do not fall under

the statute's plain language. The man taking a shower at the YMCA could not be prosecuted by the mere fact that he is in the shower while children under the age of 14 are present. To be prosecuted under the statute, the exposure must be done in a manner that a reasonable adult would believe is likely to cause affront or alarm to a child under 14. Similarly, the skinny-dipping teenagers have no fear of prosecution since the simple act of taking off one's clothes to swim is not conduct likely to cause affront and alarm, even if other skinny-dippers under age 14 are present. Compare *State v. Kalama*, 8 P.3d 1223 (Haw. 2000) (holding that a defendant, who was arrested for nude sunbathing, did not violate the indecent exposure statute, which made it unlawful to intentionally expose one's genitals under circumstances likely to cause affront, by exposing himself to another nude sunbather).

By contrast, Appellant knowingly exposed himself in a manner that any reasonable adult would have believed would cause affront or alarm to the young children present in the boys' bathroom. This was not exposure for the limited purpose of urinating in a normal fashion into a urinal. No prosecution would have occurred if Appellant, in the course of urinating, had simply exposed himself to use the urinal–even if school officials, or even most adults, might believe

that doing so is not an appropriate or wise choice. Appellant not only knowingly expose himself, but he chose to do so in a circus-like manner by stepping back from the urinal three to five feet and urinating next to, or in between, young children who were also using the bathroom–one designated for them alone. Appellant's intent was that these children see his exposed penis. Any reasonable adult would believe that such conduct–especially by a school counselor–would likely cause affront or alarm to the children viewing it.

Appellant's claim that § 566.083.1(1) is void on vagueness grounds, to the extent that it is preserved for appellate review, is without merit and should be rejected.

II.

The trial court did not err in overruling Appellant's motion for judgment of acquittal at the close of all the evidence because the record contains sufficient evidence from which a reasonable juror could find that Appellant exposed himself in a manner that would cause a reasonable adult to believe that such conduct was likely to cause affront or alarm to a child less than 14 years old in that Appellant, a school counselor, entered the boys' bathroom, even though an adult bathroom was nearby, and while children were present, exposed himself and began urinating from a distance of three to five feet away from the urinal.

Appellant argues that the evidence was insufficient to support his conviction for violating § 566.083.1(1) because the State did not present sufficient evidence that his conduct was likely to cause affront or alarm. Contrary to Appellant's claim, however, the record contains sufficient evidence that he exposed himself in a manner in which a reasonable adult would believe would likely cause affront or alarm to a child under 14 years old.

A. Standard of Review

In reviewing sufficiency of evidence claims, this Court is limited to determining whether the evidence is sufficient for a reasonable juror to find each element of the crime beyond a reasonable doubt. *State v. O'Brien*, 857 S.W.2d 212, 215-16 (Mo. banc 1993). Appellate courts do not review the evidence de novo, rather they consider the record in the light most favorable to the verdict:

> To ensure that the reviewing court does not engage in futile attempts to weigh the evidence or judge the witnesses' credibility, courts employ "a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution." Thus, evidence that supports a finding of guilt is taken as true and all logical inferences that support a finding of guilt and that may reasonably be drawn from the evidence are indulged. Conversely, the evidence and any inferences to be drawn therefrom that do not support a finding of guilt are ignored.

Id. at 215-16 (citations omitted).

Appellate courts do not act as a "super juror with veto powers," instead they give great deference to the trier of fact. *State v. Grim*, 854 S.W.2d 403, 405 (Mo. banc 1993), *cert. denied*, 510 U.S. 997 (1993);

State v. Chaney, 967 S.W.2d 47, 52 (Mo. banc 1998), *cert. denied*, 525 U.S. 1021 (1998). Appellate courts may neither determine the credibility of witnesses, nor weigh the evidence. *State v. Villa-Perez*, 835 S.W.2d 897, 900 (Mo. banc 1992). It is within the trier of fact's province to believe all, some, or none of the witnesses' testimony in arriving at the verdict. *State v. Dulany*, 781 S.W.2d 52, 55 (Mo. banc 1989).

The record contains sufficient evidence of guilt.

The verdict director in this case provided:

> As to Count I, if you find and believe from the evidence beyond a reasonable doubt:
>
> First, that on or between September 1, 2000 and April 30, 2001, in the City of St. Louis, State of Missouri, defendant knowingly exposed his genitals to Jeremy Marble, and
>
> Second, that defendant did so in a manner that would cause a reasonable adult to believe that such conduct was likely to cause affront or alarm to a child less than fourteen years of age, and
>
> Third, that at the time Jeremy Marble was less than fourteen years of age,
>
> then you will find the defendant guilty under Count I of sexual

misconduct involving a child by indecent exposure.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

(L.F. 110).[4]

Appellant does not dispute that he knowingly exposed his genitals or that the children present during his exhibition were under 14 years old. Appellant's sole sufficiency claim is that the State failed to prove that the manner in which he exposed himself would cause a reasonable adult to believe that the conduct was likely to cause affront or alarm to a child under 14 years old. Although Appellant contends that he only used the urinal to relieve himself and that no other offensive conduct occurred, the record in this case paints a far different picture.

Appellant entered the boys' bathroom when Kevin Lattimore (age 10) and Charles Marble (age 9) were present, even though a unisex bathroom for adults was only a few feet away, and instead of

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[4]The verdict directors for the other counts were identical to the one quoted here except for the count number and victim's name. (L.F. 112, 114, 116).

using a toilet with a stall around, he proceeded to urinate in a urinal in front of the two fourth graders in a most unusual manner. (Tr. 380, 416, 456, 468). Appellant stood four or five feet away from the urinal and while the boys were present he urinated in an arc into the urinal from that distance. (Tr. 387-89, 457-58, 460). The boys, who were using the other urinals, could see Appellant's penis and the stream of urine he aimed at the urinal. (Tr. 391, 403, 415, 464). Charles Marble testified that this happened two different times during the Spring of the 2000-2001 school year when he was in fourth grade, hence two of the counts (Counts II and III). (Tr. 460-62, 465)

Jeremy Marble, then a third grader, testified that Appellant entered the bathroom when he was present, which made him feel uncomfortable since adults did not normally use the boys' bathroom, and began to use the urinal. (Tr. 343, 345-49). While Jeremy was using the sink on the opposite wall from the urinals, Appellant turned around to tell some children who were being loud to "shut up." (Tr. 350, 357). When Appellant turned around, Jeremy saw Appellant's hands on his stomach and Appellant's penis hanging out of his pants. (Tr. 351, 364, 374). After that incident, Jeremy would not use the bathroom at school if Appellant was present. (Tr. 352).

This Court has defined "affront" as "a deliberately offensive act

or utterance; an offense to one's self-respect." *Moore*, 90 S.W.3d at 67, *quoting* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 36 (1993). "Alarm" has been defined as "apprehension of an unfavorable outcome, of failure, or dangerous consequences; an occasion of excitement or apprehension. *Id.* The manner in which Appellant, a school counselor, relieved himself in front of these nine- and ten-year old boys was conduct that any reasonable adult would likely believe would cause affront or alarm to anyone, especially to young children. None of these boys testified that they thought what Appellant had done was funny or amusing–one boy testified that he didn't think it was funny–and they all stated that it made them feel either embarrassed or uncomfortable and that they told their teacher and mothers. (Tr. 374, 392-93, 464).

Whether the State proved that the victims in this case suffered actual affront or alarm from Appellant's actions is immaterial, though such insult or injury was shown in this case. *See Moore*, 90 S.W.3d at 67-68 ("While experiencing "affront or alarm" can be found after a defendant's . . . behavior has occurred, application of the statute cannot depend on the idiosyncratic reaction of the person" involved.). What is important is whether a reasonable adult should know that such conduct is likely to cause affront or alarm to a child under the

age of 14. "Regardless of how the conduct is characterized–in this statute "likely to cause affront or alarm"–an adult is deemed under the law to know that such conduct is likely to cause such an experience." *Id.* at 68. No reasonable adult could believe that exposing himself in front of third- and fourth-graders and either turning to address loud children while still exposed, or stepping back four or five feet to urinate in an arc into a urinal while a child was using the other urinal, was not behavior that would cause affront or alarm to a child under age 14.

Even more compelling was the testimony by adult educators concerning Appellant's bathroom habits. Although any reasonable adult would know that the manner in which Appellant relieved himself in front of these children was conduct likely to cause affront and alarm, the testimony from others at trial confirmed that Appellant should have known this was unacceptable behavior. The adult staff members at the school had their own designated bathroom and the children had theirs. (Tr. 593, 597, 600). In fact, one adult restroom was located right next to the children's bathroom where Appellant committed the unlawful acts in this case. (Tr. 599). Adults were not to use the children's bathroom, especially the urinals, when there were children present. (Tr. 685). The school's principal testified that

it would constitute "serious misconduct" for a staff member to relieve himself in the manner in which Appellant did in this case. (Tr. 686).

The record contains sufficient evidence from which a reasonable juror could conclude that the manner in which Appellant relieved himself would cause a reasonable adult to believe that such conduct was likely to cause affront or alarm to a child less than 14 years old. The trial court did not err in overruling Appellant's motion for judgment of acquittal at the close of all the evidence.[5]

[5]Appellant also complains about the indictment's use of such a wide time frame (September 1, 2000 to April 30, 2001) and the trial court's failure to sustain his motion for a more definite statement. But Appellant was not prejudiced by the time frame included in the indictment because the record shows that Appellant deposed each victim before trial. (Tr. 353, 409, 468, 480).

III.

The trial court did not abuse its discretion or plainly err in failing to sequester the jury, in overruling Appellant's motions for a change of venue or continuance, and in not *sua sponte* striking a veniremember for cause because the record does not support these claims of error in that any publicity surrounding the trial did not warrant sequestering the jury; Appellant's motion for a change of venue was untimely and a change of venue was unnecessary since the jury pool was not so tainted that the trial had to be moved; Appellant was not prejudiced by not getting a continuance on the unavailability of a witness because the witness, in fact, testified at trial; and, Appellant cites to nothing in the record showing that the veniremember Appellant claims should have been struck, in fact, served on his jury, and, in any event, the veniremember stated during voir dire that she could be fair and impartial.

In a single point, Appellant contends that the trial court erred in denying his motions for a change of venue and for a continuance, and that it erred in not sequestering the jury and in not sua sponte removing an allegedly biased juror. None of these claims has any merit.

Appellant's claims are not preserved for review.

Including several claims of error and multiple allegations into a single point relied on violates Rule 84.04(d), and renders such claims

not preserved for appellate review. *See In re D.L.W.*, 133 S.W.3d 582 (Mo. App. S.D. 2004). Separate claims of error should be stated in separate points relied on. *See Thummel v. King*, 570 S.W.2d 679, 688 (Mo. banc 1978). Even if these claims are preserved for review, the record reflects that the trial court did not abuse its discretion or plainly err in ruling on these various issues.

Standard of review.

Plain errors may be considered in the discretion of the court when the court finds that manifest injustice or a miscarriage of justice has resulted therefrom. Rule 30.20. The plain error rule should be used sparingly and does not justify a review of every alleged trial error that has not been properly preserved for appellate review. *State v. Hibler*, 21 S.W.3d 87, 96 (Mo. App. W.D. 2000).

Plain error review is essentially a two-step process. First, the court must determine whether the claim for review "facially establishes substantial grounds for believing that manifest injustice or miscarriage of justice has resulted." *Id.* If this is not found, then the court should decline to exercise its discretion to review a claim of error under Rule 30.20. *Id.* But not all prejudicial or reversible error is plain error. Plain errors are those which are "evident, obvious and clear." *Id.* If the court finds plain error, then the second step requires

the court to determine whether the claimed error resulted in manifest injustice or a miscarriage of justice. *Id.* A plain error is one that "must impact so substantially upon the rights of the defendant that manifest injustice or a miscarriage of justice will result if uncorrected." *State v. Driscoll*, 711 S.W.2d 512, 515 (Mo. banc 1986).

It was unnecessary to sequester the jury.

Appellant complains that the trial court erred in not sequestering the jury because of publicity surrounding his trial. But Appellant cites to nothing in the record showing that he made a motion to sequester the jury. Appellant's first mention about sequestration occurred well after voir dire began, when he moved for a mistrial based on news accounts of the trial and the fact that the jury had not been sequestered. (Tr. 225). Appellant made at least one other motion for a mistrial based on news accounts appearing during trial. (Tr. 429-31). But the declaration of a mistrial is a drastic remedy which should only be employed in the most extraordinary circumstances. *State v. Sidebottom*, 753 S.W.2d 915, 919-920 (Mo. banc 1988), *cert. denied*, 488 U.S. 975 (1988); *State v. Drewel*, 835 S.W.2d 494, 498 (Mo. App. E.D. 1992). The fact that Appellant did not seek any relief other than a mistrial cannot aid him on appeal; a defendant cannot build error into a case by not requesting lesser relief that may

be more appropriate. *State v. Thurlo*, 830 S.W.2d 891, 894 (Mo. App. S.D. 1992). By asking only for a mistrial, Appellant has waived this claim for appellate review.

In any event, the record shows that the trial court went to great lengths to ensure that the publicity surrounding the trial did not affect the outcome of this case. First, before voir dire began, the trial court asked the venire whether any one of them had heard of Appellant, and separated those who had from those who had not (Tr. 12-13). Second, the trial court individually questioned the jurors who said they had heard of Appellant to determine whether they could set aside what they had heard and be impartial. (Tr. 13). The trial court erred on the side of striking for cause those jurors who had heard of Appellant, but who were indecisive about their ability to be impartial. (Tr. 15-102). Third, the trial court also gave several admonitions to the jury about avoiding news accounts concerning Appellant or the trial, whether those appeared in the newspaper or on television. (Tr. 215-16,). Each time Appellant directed the trial court's attention to news accounts published during the course of the trial, the trial court addressed the jury panel asking whether anyone had heard or read any news accounts of Appellant or the trial. (Tr. 223-28, 429-34, 709-13). In all cases, none of the jurors said that they had heard or

read anything.

The trial court did not abuse its discretion in failing to sequester the jury or in overruling Appellant's motion for mistrial on this ground. *See State v. Brown*, 443 S.W.2d 805, 809 (Mo. banc 1969) (holding that it was not err to fail to sequester the jury when the record does not show that any juror saw or read newspaper accounts of trial); *State v. Belcher*, 805 S.W.2d 245, 252 (Mo. App. S.D. 1991) (holding that a trial court does not abuse its discretion in refusing to sequester the jury when the record shows that no juror had been exposed to any news coverage of the trial).[6]

A change of venue was unnecessary.

Appellant also complains about the trial court's failure to order a change of venue. But Appellant's motion for a change of venue was filed more than ten days after he entered his initial plea (L.F. 2, 5), making it untimely under Rule 32.04(b).

The decision to order a change of venue lies within the

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[6]Appellant's Brief also implies that the trial court was concerned about "a reporter snooping around the jury." App. Br. 45. But the trial court was simply speaking hypothetically (Tr. 10-11); nothing in the record suggests that any particular reporter approached jurors.

discretion of the trial court. *State v. Baumruk*, 85 S.W.3d 644, 648 (Mo. banc 2002). "This discretion is abused when the record shows that the inhabitants of the county are so prejudiced against the defendant that a fair trial cannot occur in that county." *Id.* "[T]he question is not whether the community remembers the case but whether the actual jurors of the case have fixed opinions such that they could not judge impartially whether the defendant was guilty." *Id.* "There must be a 'pattern of deep and bitter prejudice' or a 'waive of public passion' such that the seating of an impartial jury is impossible." *Id.*

As discussed above, the record does not reflect that the jurors selected for this case, or even the entire venire panel from which these jurors were selected, had such fixed opinions that they could not be impartial. Although several news accounts about Appellant and his trial had been disseminated, none of the veniremembers or jurors who remained after the court's initial individual voir dire (Tr. 13-119) had been influenced by news reports to the extent that Appellant could not receive a fair trial. *See State v. Davis*, 107 S.W.3d 410, 417 (Mo.App. W.D.2003) (trial court did not err in refusing to grant change of venue where there was no evidence that any juror in the case had been affected by the media accounts in such a way as to cast doubt on the objectivity of the jury or any evidence that any

actual jurors were biased against the defendant).

The failure to grant a continuance was not prejudicial.

Although Appellant complains that the trial court abused its discretion in overruling his motion for a continuance, he does not identify the particular continuance motion that the trial court should have sustained or the grounds sought for the continuance. As best as can be discerned, Appellant is apparently complaining about a motion for continuance he filed because of his inability to subpeona a witness for trial (Lloyd Washington, the principal of Patrick Henry Elementary School). (L.F. 83-86; Tr. 8-10). But the trial court issued a writ of body attachment and Mr. Washington was arrested and held so that he would appear for trial. (Tr. 8-10, 217). Moreover, Mr. Washington testified on Appellant's behalf during trial. (Tr. 671-707).

The decision to grant or deny a continuance is within the sound discretion of the trial court, and the ruling will be reversed only upon a very strong showing of abuse of discretion. *State v. Thompson*, 985 S.W.2d 779, 785 (Mo. banc 1999). If the court denies a defendant's motion for continuance, the defendant must demonstrate that the denial prejudiced his case. *State v. Taylor*, 944 S.W.2d 925, 930 (Mo.

banc 1997). "A motion for continuance or recess during trial is directed toward the sound discretion of the trial court." *State v. Murray*, 580 S.W.2d 555 (Mo. App. E.D. 1979). Appellant has failed to explain either how the trial court abused its discretion in denying his motion for continuance or how he was prejudiced by the court's action.

Failure to strike veniremember for cause.

Appellant's final complaint concerns the trial court's failure to strike veniremember Mason for cause because she had a social relationship with the elected prosecuting attorney and the St. Louis police chief and his wife. During voir dire, this veniremember stated that she knew Jennifer Joyce, the St. Louis City Prosecuting Attorney, and that she had a social relationship with the police chief's wife. (Tr. 127, 229-30). But this veniremeber also unequivocally stated that her relationship with these individuals would not affect her ability to be impartial. (Tr. 229-30, 297).

Although Appellant contends that the trial court committed plain error by not striking this juror, he cites to nothing in the record showing that he made such a motion and that the trial court denied it. The record shows when the trial court selected the final members of the jury, but it does not identify which persons were selected. (Tr.

321-22). Appellant does not even claim that this veniremember served on his jury; and he provides no citation to the record showing that she did, in fact, do so. The trial court's failure to *sua sponte* strike this juror for cause was not plain error.

IV.

The trial court did not abuse its discretion in admitting evidence concerning the circumstances of Appellant's arrest because this evidence was admissible to show consciousness of guilt in that Appellant refused to answer the door or come out of his residence, even though police had seen him inside the house; the police spent hours attempting to get Appellant's attention; and, when police eventually obtained a search warrant and entered Appellant's house, Appellant was found sitting in a walk-in closet.

Appellant's final claim is that the trial court erred in admitting evidence concerning the circumstances of Appellant's arrest. Under the facts of this case, however, the trial court did not abuse its discretion in admitting evidence that Appellant avoided arrest.

Standard of Review.

The trial court is vested with broad discretion to admit and exclude evidence at trial. Error will be found only if this discretion was clearly abused. *State v. Simmons*, 955 S.W.2d 729, 737 (Mo. banc 1997). On direct appeal, this Court reviews the trial court "for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial." *State v. Morrow*, 968 S.W.2d 100, 106 (Mo. banc 1998), *cert. denied*, 525 U.S. 896 (1998).

The circumstances surrounding Appellant's arrest.

During the middle of Appellant's trial, after the trial court had taken evidence–outside the presence of the jury–and overruled Appellant's motion in limine (Tr. 496-506), the trial court permitted the State to present evidence concerning Appellant's arrest at his home in Highland, Illinois.

Two St. Louis City Police detectives traveled to Appellant's residence in Highland with a warrant for Appellant's arrest and contacted the Highland Police Department to arrange for Appellant's arrest. (Tr. 522-24, 541). Officers from both the St. Louis and Highland Police Departments went to Appellant's residence on 9th Street at 10:45 p.m. and knocked on the front and back doors for half an hour. (Tr. 542-43). Officers also yelled for Appellant to answer the door, but received no response. (Tr. 544). After Appellant's vehicle was spotted at the residence of the family from whom Appellant rented his house, officers went to that address. (Tr. 544-45).

Later that night, police received a report that the lights were on and that someone was seen in the window at Appellant's 9th Street residence; officers returned there at 2:30 a.m. (Tr. 546). The lights had not been on when the officers were there earlier in the evening.

(Tr. 546).

Officers saw an older male who resembled Appellant walk past the window on three occasions. (Tr. 547, 569-70). The officers, many of whom wore police uniforms, attempted to contact the person in the house by banging on the door for fifteen minutes and illuminating the front of the house with a spotlight mounted on a police car. (Tr. 548, 551). The officers also called by telephone and attempted to contact the individual inside by using a police car's P.A. system and identifying themselves as police officers, but they still received no response. (Tr. 549, 550-51). The officers' efforts to contact the person in the house woke up the neighbors several houses away from Appellant's residence. (Tr. 549-50). Two marked police cars were in front of Appellant's house and two other marked units were stationed in the back. (Tr. 552).

The officers tried to make contact with Appellant until 4 a.m. when a search warrant and K-9 unit arrived. (Tr. 552). Armed with the search warrant, the officers entered the house continually calling for Appellant. (Tr. 553). They found no one on the first floor. (Tr. 552). When they went to the second floor, where the lights were on, officers found Appellant in a walk-in closet; he was the only person in the house. (Tr. 561-62).

Evidence of Appellant's arrest was admissible.

Although evidence of the circumstances surrounding a defendant's arrest is not generally admissible, such evidence is admissible if it shows an attempt to resist, evade, escape, or avoid arrest. *State v. Jones*, 583 S.W.2d 212, 216 (Mo. App. W.D. 1979); *State v. Campbell*, 533 S.W.2d 671, 675 (Mo. App. K.C.D. 1976); *State v. Scott*, 687 S.W.2d 592, 593 (Mo. App. E.D. 1985). The defendant's "conduct at the time of . . . arrest, which shows such attempts, has long been held to be admissible as having probative value on the issue of defendant's guilt and to constitute proper evidence for a jury's consideration." *Campbell*, 533 S.W.2d at 675. "Whether from the scene or elsewhere unexplained flight is relevant and admissible as indicating consciousness of guilt if the purpose of the flight is to avoid arrest or prosecution." *Scott*, 687 S.W.2d at 593.

Here, evidence that Appellant refused to answer the door despite the repeated entreaties by the police for him to do so was proper evidence for the jury's consideration. The evidence showed that anyone inside the house would have heard the police, even neighbors several houses away were awakened by the police presence. When he was finally apprehended, Appellant was found "cowering" in a walk-in closet. (Tr. 565). The conclusions to be

drawn from this evidence were for the jury, and the trial court did not abuse its discretion in admitting this testimony into evidence.

Appellant complains that this constituted evidence of bad acts or other crimes. But nothing in the officers' testimony revealed that Appellant had committed any bad act. Although this evidentiary doctrine is not strictly limited to evidence of criminal acts, neither does it apply to all possible evidence concerning a defendant:

> [A]lthough the term "crime" is used, neither a prior conviction nor a charge is required; the principles cover any wrongdoing that could have been the subject of a criminal charge and probably covers *other wrongful acts and conduct to the extent that it conveys to the jury the type of prejudice that accompanies a disclosure that the defendant has engaged in criminal conduct*.

State v. Sladek, 835 S.W.2d 308, 313 n.1 (Mo. banc 1992) (Thomas, J., concurring) (emphasis added); *see also State v. Cole*, 887 S.W.2d 712, 714 n.2 (Mo. App. E.D. 1994). In *State v. Bernard*, 849 S.W.2d 10 (Mo. banc 1993), this Court confirmed that the application of the rule on evidence of other crimes required, at the very least, a wrongful act by the defendant:

> The general rule concerning the admission of uncharged crimes, wrongs, or acts is that evidence of *prior uncharged misconduct* is

inadmissible for the purpose of showing the propensity of the defendant to commit such crimes.

Id. at 13 (emphasis added; citation omitted).

The principal danger of evidence of other crimes and uncharged misconduct–and the reason for more stringent limitations upon its admissibility–is the tendency of such evidence to raise "a legally spurious presumption of guilt in the minds of the jurors." *State v. Reese*, 274 S.W.2d 304, 307 (Mo. 1954); *see also Bernard*, 849 S.W.2d at 16. In the relatively rare instances in which the rule on evidence of other crimes has been applied to noncriminal conduct, the acts in question have generally been "misconduct" or "bad acts" that could lead the jurors to infer that the defendant was likely to commit crimes. In other cases, courts have not applied the evidence-of- other-crimes doctrine to acts that were not criminal because they were not misconduct or because no such inference of propensity existed. Appellant's failure to answer the door when the police were outside does not, by any definition, constitute either an uncharged crime , "misconduct," or a wrongful act. In any event, this evidence was admissible and probative on the issue of Appellant's consciousness of guilt.

Appellant also relies on *State v. Watson*, 968 S.W.2d 249 (Mo.

App. S.D. 1998) and *State v. Myrick*, 473 S.W.2d 402 (Mo. 1971). But in *Watson* the evidence that the defendant assaulted his mother had nothing to do with his arrest for leaving the scene of an accident, which had occurred some hours earlier, and it was not direct evidence of flight or evading arrest. *Watson*, 968 S.W.2d at 253-54. Similarly, in *Myrick*, evidence concerning why the police went to the apartment where the defendant was arrested, the details about the call to the apartment, and that the defendant had put the apartment's occupants in fear was not relevant. In Appellant's case, on the other hand, evidence that he avoided arrest by refusing to answer the door despite the repeated attempts by the police to contact him and Appellant's forcing the police to obtain a search warrant to enter his residence was probative on the issue of Appellant's consciousness of guilt.

Appellant also contends that other evidence showed that he slept in the walk-in closet and that it was difficult to hear outside noises when inside that closet. But this is not sufficient to keep out admissible evidence on the issue of whether Appellant avoided arrest. The trial court properly allowed Appellant to present evidence rebutting the inference that he avoided arrest. (Tr. 714-720). "The law is settled that when evidence of flight or avoidance of arrest is

admitted, a defendant has the right to explain and rebut any incriminating circumstances which might otherwise raise an inference of consciousness of guilt." *State v. Martin*, 755 S.W.2d 337, 340 (Mo. App. E.D. 1988).

The trial court did not abuse its discretion in admitting evidence of Appellant's efforts to avoid arrest. Such evidence was admissible under the facts of this case and the trial court properly allowed Appellant to rebut the State's evidence with evidence of his own.

CONCLUSION

The trial court did not commit reversible error in this case. Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned assistant attorney general hereby certifies that:

(1) That the attached brief complies with the limitations contained in Rule 84.06 in that it contains 10,297 words, excluding the cover, this certification and any 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 on September 27, 2004, to:

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