IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
RESPONDENT	)	
	)	
vs.	)	Case No. SC86802
	)	
JOHN VANDEVERE.	)	
	)	
APPELLANT	)	

APPEAL FROM THE CIRCUIT COURT
OF TANEY COUNTY
HONORABLE JUDGE JOHN WATERS

APPELLANT'S SUBSTITUTE BRIEF

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

JURISDICTIONAL STATEMENT

Jurisdiction is vested in the Missouri Court of Appeals, Southern District, pursuant to

Article 5, Section 3 of the Missouri constitution and Section 477.060 RSMo. 2000. This is an appeal from a non-jury criminal trial in which the Appellant, John Vandevere was convicted of Felony Sexual Abuse. This appeal does not involve the validity of a treaty or statute of the United States or a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title to any state office or where the punishment imposed is death.

STATEMENT OF FACTS

Defendant/Appellant, John Vandevere, appeals from his conviction of Felony Sexual Abuse (Sect. 566.100 RSMo.). The case was tried before the Honorable Judge John Waters in

Christian County, Missouri (by agreement) as a non-jury case on April 29, 2004. (Tr. p. 2, l. 1-5, 20-23).

On July 17TH, 2002, 16-year old Bridgette Hinds was at the Branson USA Amusement Park for the national talent competition for the American Kids Organization - She was there to help her mother in a flower-sales booth. (Tr. p. 28, l. 7-9, p. 221, l. 1, 2, p. 27, l. 5). The booth was in a theater at the park. (Tr. p. 29, l. 3-5).

Defendant/Appellant, John Vandevere, is a 59-year old, self-employed sportswear salesman. (Tr. p. 220, l. 17-19, p. 219, l. 21, p. 2, l. 3, 4). Vandevere also had a booth in the theater, selling sportswear. (Tr. p. 33, l. 10-11, p. 33, l. 21-22). Vandevere got to know Hinds over the week - Vandevere purchased flowers at Hinds' booth and Hinds and her mother would go to his booth and converse with him. (Tr. p. 32, l. 24,25, p. 33, l.25, p. 34, l. 1-3).

Vandevere's wife was the director of Showstoppers, a Mississippi youth performing group, and of Mississippi Kids, a similar group. (Tr. p. 221, l. 6-9, p. 36, l. 5, 6, p. 250, l. 18-21, p. 142, l. 21-24). Mr. Vandevere was co-director of the group, helping his wife with performances and competitions. (Tr. p. 136, l. 2-5, p. 221, l. 19-23). Vandevere lives in Yazoo City, Mississippi. (Tr. p. 219, l. 17).

Prior to Vandevere's trip to Branson, the Showstoppers had their final rehearsal before selecting their travel outfits for performances. (Tr. p. 22, l. 10-14). Vandevere had asked the members of the group which outfit they liked best and the group could not agree. (Tr. p. 222, l. 14-16, p. 221, l. 8-16).

Vandevere had the outfits with him at the national competition in Branson.(Tr. p. 222, l.

8-23). He wanted to get someone to try on the outfits, choose one of them, and be "done with it" [the decision on the outfits]. (*Id).*

Vandevere asked Hinds if she would like to try on the outfits and pick her favorite for the Showstoppers travel outfit. (Tr. p. 222, l. 8-23, p. 223, l. 9-16). Hinds asked her mother for permission - her mother said yes, but she had to be back by lunch. (Tr. p. 38, l. 25, p. 39, l. 1-19). It was between 10:00 a.m. and 11:00 a.m. at the time. (*Id).*

They drove to the Radisson Hotel where Vandevere was staying. (Tr. p. 41, l. 14, 15).

They entered the hotel room and Vandevere brought out several outfits for Hinds to try on. (Tr. p. 23, l. 8-25, p. 47, l. 5-25). During their time there, Hinds tried on two pairs of pants and five tops. (Tr. p. 47, l. 12-21, p. 54, l. 21-23, p. 79-82).

For each outfit combination, Hinds would go into the hotel room bathroom and change into the outfits. (Tr. p. 47, l. 25, p. 48 - 58). Hinds would exit the bathroom and go stand in front of Vandevere, who was sitting on the end of one of the beds. (*Id*). Vandevere never got up off the end of the bed during the modeling of the outfits, except one time when he kind of "got up", but didn't move his feet. (Tr. p. 94, l. 12-16, p. 96, l. 9-13). Hinds ends up sitting on Vandevere's lap - Hinds says Vandevere pulled on her arm "just a tad bit" to get her on his lap. Vandevere says that didn't happen. (Tr. p. 49, l. 11-13, p. 51, l. 20-24, p. 52, l. 15-21, p. 56, l. 25, p. 57, l. 1-2, p. 228, l. 7-8).

There was sexual contact between Hinds and Vandevere - Vandevere lifted up Hinds' shirt at one point, and kissed her breast. (Tr. p. 232, l. 9-16, p. 57, l. 13-15). Hinds testified that Vandevere slid his hand down her back to her "butt" and he was rubbing her leg, and "was

headed" toward her vagina at one time. (Tr. p. 53, l. 19-20, p. 50, l. 23-25).

Hinds testified that she never resisted Mr. Vandevere in any manner, nor asked him to stop. (Tr. p. 101, l. 25, p. 102, l. 1, p. 104, l. 20-24, p. 108, l. 23-25, p. 109, l. 1, 2, p. 99, l. 25, p. 100, l. 1-3). Hinds testified that Vandevere never threatened or intimidated her. (Tr. p. 109, l. 18-20). Hinds testified that she never gave Vandevere any indication that the sexual touching was bothersome to her. (Tr. p. 123, l. 1-4). Hinds was totally compliant with Vandevere's requests to try on different outfits. (Tr. p. 109, l. 3-5).

Hinds gives Vandevere her opinions about which outfit she liked the best. (Tr. p. 98, l. 22-25, p. 99, l. 1-2, p. 103, l. 25, p. 104, l. 1, 2, p. 110, l. 4-11).

Vandevere and Hinds then go back to the theater at Branson USA Amusement Park. (Tr. p. 238, l. 12-16).

The Court found Vandevere guilty of the Class C Felony of Sexual Abuse for having sexual contact with Hinds by forcible compulsion, a violation of Sect. 566.100 RSMo. 2000. (LF p. 5, 7, 12).

POINTS RELIED ON

1. The trial court erred in finding the defendant, John Vandevere, guilty of the Class C Felony of Sexual Abuse (Sect. 566.100 RSMo. 2000) because that was against the weight of the evidence in that, in order to find the defendant guilty, the court had to find the defendant Vandevere had sexual contact with the victim by "forcible compulsion" - "forcible compulsion" is defined in Sect. 556.061(12) RSMo. 2000 as either: "(a)

Physical force that overcomes reasonable resistance; or (b) a threat, express or implied, that places a person in reasonable fear of death, serious physical injury or kidnapping of such person...". In this case, the defendant did not use "forcible compulsion" on the victim - the only physical force used was pulling on the victim's arm "just a tad bit" and the victim did not resist in any manner whatsoever or even indicate the sexual touching was bothersome - this was not "reasonable resistance" as defined in Missouri statutes and case law under these circumstances. The victim testified that the defendant did not intimidate or threaten her. The victim was totally a compliant, if not willing, participant in any sexual touching.

2. Respondent raises, for the first time, in its Application for Transfer, the argument that the Court of Appeals should have entered a conviction of misdemeanor Sexual Misconduct under Sect. 566.090 RSMo. 2000 - this argument is without merit as Sexual Misconduct is not a lesser-included offense of Sexual Abuse under Sect. 566.100 RSMo. 2000; prior Missouri cases have had the same outcome as the Southern District Court of Appeals did in this one; and there is little or no evidence that the touching was non-consensual and the defendant knew that, which are elements of Sexual Misconduct.

3. The Respondent states, for the first time, in its Application for Transfer, that the Southern District Court of Appeals should have entered a conviction of misdemeanor Sexual Misconduct against the defendant - this would be in error because the Information charging the defendant is insufficient to provide notice to the defendant of the elements of the crime of Sexual Misconduct, or that he was being tried for Sexual

Misconduct, and therefore deprives him of his due process rights under the U. S. and Missouri Constitution.

ARGUMENT

1. The trial court erred in finding the defendant, John Vandevere, guilty of the Class C Felony of Sexual Abuse (Sect. 566.100 RSMo. 2000) because that was against the weight of the evidence in that, in order to find the defendant guilty, the court had to find the defendant Vandevere had sexual contact with the victim by "forcible compulsion" - "forcible compulsion" is defined in Sect. 556.061(12) RSMo. 2000 as either: "(a) Physical force that overcomes reasonable resistance; or (b) a threat, express or implied, that places a person in reasonable fear of death, serious physical injury or kidnapping of

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The standard of review in a court-tried case is that the judgment will be sustained unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. **SEE**, Murphy v. Carron, 536 S.W.2d 30 (Mo. Banc 1976). "In reviewing the sufficiency of the evidence to support a criminal conviction, we view the evidence, together with all reasonable inferences drawn therefrom, in the light most favorable to the State and disregard all evidence and inference to the contrary." State v. Silvey, 894 S.W.2d 662, 673 (Mo. Banc 1995).

The relevant statutory Missouri law in this case:

Sexual Abuse, penalties - "A person commits the crime of sexual abuse if he subjects another person to sexual contact by the use of forcible compulsion...". Sect. 566.100 RSMo. 2000.

"Forcible Compulsion" is defined in Sect. 556.061(12) RSMo. 2000 as either:

(A) Physical force that overcomes reasonable resistance; or

(B) A threat, express or implied, that places a person in reasonable fear of death, serious

physical injury or kidnapping of such person or another person;

With that in mind, let's look at the facts and circumstances surrounding this matter:

Vandevere and Hinds both worked booths at the Branson USA Amusement Park at the national competition for American Kids - Hinds helped at her mother's flower-sales booth, Vandevere was selling sportswear. (Tr. p. 28. l. 3-13, 22-25, p. 32, l. 23-25, p. 33, l. 1-22). Hinds and her mother got to know Vandevere over the week - Vandevere bought flowers from them and they would converse with Vandevere at his booth. (Tr. p. 33, l. 23-25, p. 34, l. 1-3).

Vandevere, a resident of Yazoo City, Mississippi, was involved with Showstoppers, a youth performing group in Mississippi. (Tr. p. 219, l. 16, 17, p. 221, l. 6-9). The group was squabbling over which outfit to choose for their travel outfit. (Tr. p. 222, l. 8-23). Vandevere wanted to get one girl to choose the outfit and "be done with it" [the decision on the outfit]. (*Id*).

Vandevere asked Hinds to try on the outfits and choose one for the Showstoppers Group. (*Id*, Tr. p. 223, l. 8-16). Hinds got permission from her mother to go try on the outfits, as long as she was back by lunch (it was between 10:00 and 11:00). (Tr. p. 38, l. 25, p. 39, l. 1-19).

Hinds was flattered that Vandevere had asked her to model the outfits, and she was "happy" to go with him. (Tr. p. 88, l. 13-19). Hinds knew they were going to leave the amusement park grounds to do this. (Tr. p. 86, l. 22-24, p. 88, l. 2-4).

Vandevere and Hinds went out to Vandevere's car and drove to the Radisson Hotel in Branson. (Tr. p. 40, l. 22-25, p. 41, l. 1-15, p. 42, l. 1-2).

When they got out of the car, Hinds says that Vandevere grabbed her hand as they walked into the hotel (Vandevere denied that). (Tr. p. 42, l. 15-18, p. 225, l. 13-15). There is no evidence he tugged or pulled on her hand, just "grabbed" it. (*Id*). Regardless, Hinds did not resist, protest, or pull away at this point. (Tr. p. 91, l. 6-91). Nor is there any evidence that she protested about going to a hotel with Vandevere.

Vandevere and Hinds enter the hotel - Hinds does not resist or question Vandevere. (Tr. p. 91, l. 13-25, p. 92, l. 1-2). They get on the elevator, get off on the second floor, walk to Vandevere's room and go in the room - Hinds does not protest or resist. (Tr. p. 43, l. 7-10, p. 92, l. 3-15).

Vandevere goes to the second bed (there were two beds side-by-side), takes out some outfits and says he wants her to try these on. (Tr. p. 93, l. 4-25). He directs her to the bathroom, where she changes into the first outfit. (Tr. p. 94, l. 2-7).

She comes out of the bathroom in the first outfit, and Vandevere is sitting on the end of the bed. (Tr. p. 94, l. 8-11). Note: At no time during all of these outfit changes, did Vandevere stand up from sitting on the bed, except one time when he would "slightly stand up to grab [her] hand", but he didn't move his feet - just shift his weight. (Tr. p. 94, l. 12-16, p. 96, l. 9-13).

Hinds stands in front of Vandevere, who is sitting on the end of the bed. (Tr. p. 96, l. 9-13, p. 94, l. 8-11). Hinds says Vandevere pulled on her hand to get her to sit on his lap. (Tr. p. 94, l. 20-22). This is, presumably, the "physical force" - How does the victim describe the pull on the hand? - In her deposition, she said: "Question: He [Vandevere] was kind of more guiding you than actually a jerk? Answer: Right". (Tr. p. 95, l. 5-11).

Hinds, in response to my deposition question "How much force did he use?" - answered "He didn't have a lot - He didn't use a whole lot of force" - not enough to pull her over and make her fall. (Tr. p. 96, l. 1-4).

Vandevere didn't pull her off balance. (Tr. p. 96, l. 5-6). Hinds didn't resist. (Tr. p. 96, l. 7-8). In the direct examination, Hinds said Vandevere jerked her hand "just a tad bit" to get her to come over there [on his lap]. (Tr. p. 49, l. 17-21). That's it! - a "tad bit" of force, by the victim's own words.

Hinds says Vandevere started rubbing her legs, and slid his hand down her back to her "butt", while she sat on his lap wearing the first outfit. (Tr. p. 50, l. 15-25, p. 51, l. 1). Hinds didn't say anything when Vandevere rubbed her. (Tr. p. 59, l. 2-4).

Vandevere again flatters Hinds - he told her she looked good in the outfit. (Tr. p. 49, l. 3-6). Hinds gives Vandevere her opinion of the outfit, then goes into the bathroom and changes into the second outfit. (Tr. p. 94, l. 4-7, p. 98, l. 22-25, p. 99, l. 1-8).

Hinds leaves the bathroom wearing the second outfit, comes and stands in front of Vandevere within arm's length. (Tr. p. 99, l. 10-15). She could have stopped farther away from Vandevere, outside an arm's length, but she didn't - she went up to him, he didn't come up to her - Vandevere never gets up from the end of the bed. (Tr. p. 99. l. 16-24). She ends up on his lap again, but does not protest or pull away. (Tr. p. 99, l. 25, p. 100, l. 1-3). Hinds said her mind was going too crazy to object or say "stop". (Tr. p. 101, l. 21-23). Vandevere started rubbing her again. (Tr. p. 51, l. 25, p. 52, l. 1-5). Vandevere tells her she looks great in the outfit. (Tr. p. 228, l. 22-25).

Hinds said, during these times on his lap, he was touching her "butt" and feeling her legs, but she never pulled away, pushed his hand away, or said "Stop. I'm uncomfortable". (Tr. p. 10, l. 24-25, p. 102, l. 1, p. 50, l. 23-25, p. 51, l. 1, p. 51, l. 25, p. 52, l. 1-5).

Hinds returns to the bathroom, tries on the third outfit, comes out and stands, once again, in front of Vandevere, within an arm's length of him. (Tr. p. 103, l. 10-16). Hinds is on Vandevere's lap again, and she does not tell him to stop. (Tr. p. 103, l. 17-21). Hinds again tells Vandevere her opinion of the outfit. (Tr. p. 103, l. 25, p. 104, l. 1-5).

Hinds goes back into the bathroom, tries on the fourth outfit, and again walks out and stands, within an arm's length, in front of Vandevere, who is sitting on the bed - even though she could have stopped farther away from him. (Tr. p. 104, l. 6-19).

At this time, on the 4TH outfit, although she says that Vandevere has pulled her onto his lap each time she modeled a different outfit, Hinds has still never told Vandevere to stop, nor has she physically pulled away - Vandevere has never gotten up from the end of the bed. (Tr. p. 104, l. 20-25, p. 105, l. 1-3). Hinds says Vandevere didn't pull her off balance and she didn't pull back from him. (Tr. p. 105, l. 7-13). She again gives Vandevere her opinion of the outfit. (Tr. p. 106, l. 3-7).

Vandevere gives her outfit #5 to try on - she returns to the bathroom, changes and comes out and again stands in front of Vandevere within an arm's length - Vandevere has still not gotten up from the end of the bed. (Tr. p. 108, l. 3-16).

We are on outfit #5 and Hinds has never resisted in any way - never pulled away from him, never told him to stop, or said she was uncomfortable, although she says he was touching

her in a sexual manner. (Tr. p. 108, l. 23-25, p. 109, l. 1-2).

Hinds says that, on outfit #5, Vandevere "guided" her onto his lap "again". (Tr. p. 109. l. 21-24).

Hinds admits she was "compliant" with everything Vandevere asked her to do! (Tr. p. 109, l. 3-5). She did everything he asked of her and never resisted.

Vandevere asks her to try on outfit #6 - Once again, Hinds gets the outfit, goes into the bathroom, changes clothes, comes out and walks right up, within an arm's length, to Vandevere sitting on the end of the bed. (Tr. p. 111, l. 14-17, p. 115, l. 7-10). She had the chance to tell him to stop, but she didn't say anything. (Tr. p. 111, l. 21-23). Hinds didn't pull away or anything like that. (Tr. p. 111, l. 24, 25, p. 112, l. 1).

Hinds tells Vandevere what her favorite outfit was. (Tr. p. 117, l. 14-21).

At one point, Vandevere lifts her shirt and kisses her breast - Vandevere said it was during outfit #3, Hinds said it was a time she modeled a tank top and was standing between his legs, "leaned in on him", in front of Vandevere. (Tr. p. 232, l. 1-16, p. 57, l. 4-25). Hinds was not sure exactly what happened on what outfit change. (Tr. p. 101, l. 12-17, p. 105, l. 14-25, p. 106, l. 1, 22-24).

There is no evidence Vandevere forced her to lean in on him. Leaning in on him certainly does not suggest she was resisting or avoiding contact. To the contrary, it seems she is sticking her chest into his face!

Nevertheless, Hinds did not pull away, brush Vandevere's face away, tell him to stop, or resist in any way. (Tr. p. 119, l. 7-19). When Vandevere kissed Hinds' breast, Hinds didn't say

anything to Vandevere - she "didn't know what was going on", it was "just new to [her], different". (Tr. p. 58. l. 4-7). Vandevere stopped kissing her breast and put her top down on his own, without any resistance from Hinds. (Tr. p. 119, l. 20-22).

Hinds says that Vandevere kissed her while she was in the hotel room. (Tr. p. 120, l. 4-6). Hinds did not pull away from him at that time, either. (Tr. p. 120, l. 17-19). There is no evidence she told him to stop kissing her or resisted in any way.

Before leaving the hotel room, Vandevere gives Hinds some sportswear samples to keep. (Tr. p. 58, l. 14-25, p. 59, l. 1). Vandevere and Hinds leave the hotel and go back to Branson USA Amusement Park. (Tr. p. 70, l. 17-21).

Hinds never saw any indication from Vandevere that Vandevere thought he was bothering Hinds. (Tr. p. 122, l. 23-25). Hinds acted as if it was consensual contact.

In fact, **Hinds testified she never gave Vandevere any indication that she was bothered by his actions!** (Tr. p. 123, l. 1-4). The next day, Hinds even wore one of the shirts Vandevere had given her. (Tr. p. 123, l.24-25, p.124, l.1). That's it - that's the physical force - jerking on the arm "just a tad bit" - guiding her onto his lap. And that's the supposed "reasonable resistance" from Hinds - no resistance whatsoever - she never asked him to stop or resisted in any way! She never even indicated the touching was bothersome.

It's easy to think of ways she could have put up some "reasonable resistance". How about: 1. Ask him to stop; 2. Say "I have to leave"; 3. Stand outside of arm's length from the end of the bed when modeling clothes; 4. Pull away from him, however slightly; 5. Say she had a stomach ache; 6. Say "I don't want to try on any more clothes"; 7. Walk out the door of the

hotel room; 8. Call her mother; 9. Just stay in the bathroom; 10. Indicate in any manner whatsoever that his touching was bothering her... - the point is, she was totally compliant, she offered no resistance whatsoever, despite having numerous opportunities to do so. She was not too intimidated to converse with Vandevere about which outfit she liked the best.

How was Vandevere to figure out this was not consensual, if indeed it wasn't? Vandevere testified that if he had known this was offensive or objectionable to Hinds, he would have quit! (Tr. p. 242, l. 6-13). There is no evidence beyond a reasonable doubt that Vandevere had the required mens rea to be guilty.

The State will argue that the overall atmosphere was coercive or intimidating because of the size and age difference between the parties and thus, "no resistance" was "reasonable resistance". Or, the State will argue there was an express or implied threat under Sect. 556.061(12)(b) RSMo. 2000. The evidence does not support that. Remember, Hinds was "flattered" to be asked to model the outfits, and was "happy" to go with Vandevere. (Tr. p. 88, l. 13-19).

Hinds testified that Vandevere never intimidated or threatened her, either during the week they got to know each other, or at the hotel. (Tr. p. 109, l. 15-20). She thought Vandevere was a "pretty nice guy". (Tr. p. 109, l. 9-14). She referred to him as "John" during the trial, despite the fact that she was 18, and he was 59. (Tr. p. 124, l. 8-11, p. 27, l. 1-2, p. 219, l. 20, 21). She thought of Vandevere as a peer. (Tr. p. 29, l. 23-25). Hinds had been dating a man in the Army, nine years older than her. (Tr. p. 125, l. 13-23).

There is no evidence to show that Hinds was threatened or intimidated, expressly or

impliedly - to the contrary, the evidence shows she was compliant, willing, flattered and happy to be with him. There is no evidence to suggest that the sexual contact would not have stopped if Hinds objected, or that Hinds could not have left the room if she wanted or requested. There is no evidence that the tone of Vandevere's requests that she try on outfits was anything other than polite.

Vandevere was convicted of Sexual Abuse by forcible compulsion, a violation of Sect. 566.100 RSMo. 2000, a class C Felony.

Let's apply those facts to Missouri law.

Sect. 556.061(12)(a) RSMo. 2000 defines "forcible compulsion" as: "Physical force that overcomes reasonable resistance" - admittedly, there was minimal "physical force" used by Vandevere against Hinds. "Physical force is simply "[f]orce applied to the body." **SEE,** State v. Kilmartin, 904 S.W.2d 370, 374 (Mo. App. 1995). Vandevere pulled on Hinds' arm "just a tad bit". (Tr. p. 49, l. 17-21). He "didn't use a whole lot of force". (Tr. p. 96, l. 1-4).

The question becomes: "Was there 'reasonable resistance' under Sect. 556.061(12)(a) RSMo. 2000"?

[T]he law does not require or expect utmost resistance to a sexual assault when it appears that such resistance would be futile or would provoke a more serious injury. **SEE**, State v. R_D_G, 733 S.W.2d 824, 827 (Mo. App. 1987).

"In determining if the force used is sufficient to overcome reasonable resistance, the court does not look to any single fact, but to the totality of the circumstances." Kilmartin at 374. Among the factors taken into account in considering the totality of the circumstances are

whether violence or threats precede the sexual act; the relative ages of the victim and accused; the atmosphere and setting of the incident; the extent to which the accused was in a position of authority, domination and control over the victim; and whether the victim was under duress. **SEE,** State v. Neiderstadt, 66 S.W.3d 12 (Mo. Supreme Ct. 2002), MO0000047, para. 25 (Versuslaw).

Let's analyze this situation by that criteria:

1. Whether violence or threats precede the sexual act: No violence here, and Hinds testified Vandevere did not threaten or intimidate her. (Tr. p. 109, l. 15-20).

2. The relative ages of the victim and accused: There was a big age difference - Vandevere was 59 at the time of trial, Hinds 18. (Tr. p. 27, l. 2, p. 219, l. 21). However, Hinds gives this little deference - she thought of Vandevere as a peer, and referred to him as "John". (Tr. p. 124, l. 23-25, p. 125, l. 1-5). There is no direct testimony or reasonable inference to indicate this effected Hinds at all. Hinds had dated a man 9 years older than her. (Tr. p. 125, l. 13-23)

3. The atmosphere and setting of the incident: There is no evidence that Vandevere was anything but polite with Hinds. The State may argue that being alone in a hotel room itself was coercive, but that would be only an inference, contradicted by her direct testimony that Vandevere did not intimidate or threaten her. (Tr. p. 109, l. 15-20). Vandevere stated he would have stopped the contact if he had known she didn't want it. (Tr. p. 242, l. 6-8). Again, Hinds was "happy" to go with Vandevere and she was "flattered" he had asked her to try on the outfits. (Tr. p. 88, l. 13-19). Vandevere continued to compliment and flatter Hinds in the hotel room -

telling her she looked good and felt good in the outfits. (Tr. p. 49, l. 3-6, p. 228, l. 22-25). The inferences are that the atmosphere was quite positive.

4. The extent to which the accused was in a position of authority, domination and control over the victim: Vandevere was not in a position of authority over the victim - he was not a parent, counselor or teacher as you find in Missouri case law. **SEE**, State v. Spencer, 50 S.W.3d 869 (2001). There is no evidence that he was in a position of domination or control over Hinds. Hinds was "totally compliant" with Vandevere, (Tr. p. 109, l. 3-5), but there is no evidence or inference this was because of fear or threats as opposed to being consensual, voluntary or done to get more attention and compliments from Vandevere.

5. Whether the victim was under duress: There is no evidence that she was under duress. No threats or violence preceded the touching. Hinds was flattered and, by reasonable inference, anxious and happy to choose the outfit. Hind's mother even gave her permission to leave with Vandevere. (Tr. p. 39, l. 4-17).

The totality of the circumstances show that at least some resistance was warranted to constitute "reasonable resistance" and thus constitute "forcible compulsion" by Vandevere. In this case, there is the danger that Vandevere thought the sexual contact was consensual because Hinds didn't resist and because Hinds gave him no indication the contact was bothersome. (Tr. p. 123, l. 1-4). This is simply not a case where "no resistance" was "reasonable resistance" - such Missouri cases are discussed below.

As Judge Garrison asked the Respondent's counsel at oral argument- "If there is no requirement for resistance at all, doesn't that make the 'reasonable resistance' part of the

statute meaningless?"

This case is very similar to State v. Daleske, 866 S.W.2d 476 (W.D. Mo. 1993). In Daleske, the defendant was convicted of forcible sodomy, which required "forcible compulsion". The Appellate Court overturned the conviction, finding there was no "forcible compulsion". An examination of the facts in Daleske show that the evidence of "forcible compulsion" was even greater there than in this case.

In Daleske, the defendant was the step-father of the victim. Daleske had been regularly sexually abusing his step-daughter since she was 7 years old (she was 17 at the time of trial). One time, Daleske went into the bathroom, physically picked up the victim, sat her on the sink, performed cunnilingus on her - the victim objected and began to cry.

In another instance, Daleske was driving with the victim, stopped the car, unzipped his pants, took her head and "guided" her head down onto his penis. Daleske, at 478. Yes, the Court uses the word "guided" - the same language used by Hinds, in deposition and in trial, to describe how she got on Vandevere's lap! (Tr. p. 95, l. 2-11, p. 109, l. 21-24).

In Daleske, the defendant told the victim if she continued to comply with his sexual demands, he would let her come and go as she pleased. On one occasion, the defendant said if she complied, she would be relieved of a grounding her mother had imposed. He had to ask her to comply 3 or 4 times before she acquiesced to the sexual touching in one instance.

The Court said all of this was not "physical force that overcame reasonable resistance". Daleske, at 478. The Court found that the promise to keep intact the grounding did not amount to a threat of kidnapping. "It strains credulity to believe that a reasonable juror could find such

evidence sufficient to find Daleske guilty beyond a reasonable doubt....A parental threat to ground a child is not kidnapping." Daleske, at 478.

The court noted that "there was no evidence for forcible compulsion, this is not to say that Daleske employed no compulsion" and went on to discuss the long history of sexual abuse that drained the victim of self-respect. Daleske, at 478. "However, this kind of compulsion...fails to attain the level contemplated by the definition of 'forcible compulsion' in the statute." Daleske, at 479. The court reversed the conviction and released the defendant.

Compare Daleske with the facts of this case - Daleske "guided" the victim's head onto his penis - Vandevere "guided" Hinds onto his lap (or at best, pulled on her arm "just a tad bit"). (Tr. p. 95, l. 2-11, p. 49, l. 17-21, p. 109, l. 21-24). Daleske physically picked up the victim and sat her on the bathroom counter - Vandevere did nothing remotely near that. The victim in Daleske objected to him performing cunnilingus on her - Hinds never objected or indicated the contact was bothersome at all. (Tr. p. 123, l. 1-4). Daleske was in a position of authority over the victim - Vandevere was not. Daleske had threatened to ground the victim - Vandevere never threatened or intimidated the victim. (Tr. p. 109, l. 15-20).

In another uncanny similarity - the court in Daleske mentioned a type of compulsion did occur (just not "forcible compulsion"), facilitated by methodically draining a person of self-respect. **SEE**, Daleske at 479. Vandevere noticed that Hinds apparently had low self-esteem and wanted to help her improve her self-esteem. (Tr. p. 60, l. 17-21, p. 61, l. 6-12).

If there was no "forcible compulsion" in Daleske, then there certainly wasn't any "forcible compulsion" in this case.

The Kilmartin case is "near the outer limits of what constitutes forcible compulsion". Kilmartin, at 374. In Kilmartin:

-The victim was 11 years old, the defendant 30 years old.

-The defendant was a "floor guard" at the skating rink the victim frequented.

-The defendant and victim had lifted weights prior to the sexual contact.

-The defendant showed the 11-year old karate moves before sexually assaulting him.

-The defendant asked the victim if he wanted a "penis massage" twice and the victim said "no" both times.

-The defendant grabbed the victim's crotch and said "I could force you [to have a penis massage], but I'm not that kind of guy". Kilmartin, at 373 and footnote 2.

-The defendant again asked if the victim wanted a penis massage 2-3 more times, the victim said "no" before finally relenting.

-The sexual contact was same-sex contact.

-The victim initially refused to pull down his pants after the defendant told him to lay on the bed. After the second demand, the victim relented, pulled down his pants and closed his eyes.

The court said "Kilmartin, while exerting his physical force, threatened further force in no uncertain terms. He repeatedly asked for [the victim's] consent, to the point that coupled with the threat, it became demanding". Kilmartin, at 374. "Kilmartin reinforced his physical force - grabbing the boy and holding him - with many psychological factors intended to instill fear and wear down the boy's resistance." Kilmartin, at 374.

If the Kilmartin case is "near the outer limits" of what constitutes "forcible compulsion" - Vandevere is outside the limits. Hinds never said "no", never protested and she was never threatened. Vandevere never mentioned force.

The State will cite Missouri cases where "no resistance" was found to be "reasonable resistance". But an analysis of those cases shows very different circumstances.

In Neiderstadt, the court found that "no resistance" was "reasonable resistance", primarily because the victim was sleeping at the time of the assault, the degree of resistance expected of a sleeping person is much lower than a person awake and because the defendant had given the victim savage whippings before.

In Neiderstadt, the victim was 16 years old, the defendant was 40 years old. The victim was living with the defendant and the defendant was in a position of control. The defendant had sexually assaulted the victim while she was sleeping - the victim woke up during the assault and did not resist. The defendant began sexually assaulting the victim in 1991 (the crime happened in 1992). The defendant had regularly administered whippings to the victim's buttocks, back and legs. The beatings were so severe the victim found it hard to walk or participate in physical education at school. The defendant, after one beating, squeezed the victim's neck and said, "I could kill you right now". Neiderstadt, para. 15 (Versuslaw).

In State v. Thiele, 935 S.W.2d 726 (Mo. App. 1996), the victim complied with the defendant's requests to try on various pairs of shoes and to listen to his heart through a stethoscope while attempting to sexually assault her. But, because the victim thought the defendant had a gun; used an assertive tone of voice; the defendant became agitated; the

defendant grabbed the victim's arm and squeezed it hard to force her to touch his penis; and the victim initially pulled away from the defendant - this amounted to "forcible compulsion".

In State v. Dee, 752 S.W.2d 942 (Mo. App. 1988), the defendant grabbed the victim, held her while he unbuttoned her clothes, pushed her down to the floor and raped her. The victim tried to pull away. Then the defendant forced her to engage in fellatio, with his knees across her arms. The victim offered no further resistance to the defendant's sexual attack, in part because she had suffered a mild stroke and could not fight back. The defendant attacked the victim once again after that, and the victim did not resist because of the previous attack and because he threatened to take away custody of the victim's daughter if she resisted. The Court found no resistance was "reasonable resistance" under those circumstances.

Neiderstadt, Thiele, Kilmartin and Dee present very different factual scenarios from this case. There are glaring differences between those cases and this one - night and day differences. However, in admirable advocacy that is near the outer limits of credibility, the State, in its Application for Transfer, states that the Southern District's opinion is "contrary to previous decisions of this Court and other appellate court of this state...". The Southern District's opinion follows well-established Missouri case law and is the correct decision.

"Forcible compulsion" also includes "A threat, express or implied, that places a person in reasonable fear of death, serious physical injury or kidnapping of such person or another person." Sect. 556.061(12)(b) RSMo. 2000.

That was answered directly by Hinds. Hinds testified that Vandevere never intimidated or threatened her, either during the week they got to know each other, or at the hotel. (Tr. p. 109, l.

15-20). Her testimony statement covers any threat, express or implied. There's no evidence to suggest she was scared she was going to die, be seriously injured, or kidnaped. Daleske contains good verbiage about the "kidnapping" definition - and how the legal definition of kidnapping is "extremely legalistic and highly technical and it simply cannot be believed that a reasonable juror would have concluded based on the common understanding of the word 'kidnapping', that the evidence supported such a finding." Daleske, para. 31 (Versuslaw). Hinds thought Vandevere was a "pretty nice guy". (Tr. p. 109, l. 9-14).

In this case, the Appellant included the State's letter of May 11, 2004 in the Legal File (LF p. 24), because he found it significant. After trial, even the State did not argue that the defendant forced the victim to have sexual contact. The State argued that the defendant was successful in "manipulating" and "dominating" the victim. (*Id.)*. This is not "forcible compulsion" under Missouri law.

The State will also argue that the victim was scared - "I was kind of scared" (Tr. p. 51, l. 4), "I was scared, nervous..." (Tr. p. 106, l. 1). The record shows no facts why she would be in "reasonable fear of death, serious physical injury, or kidnapping". The victim may have been scared or nervous due to her youth and inexperience, but not because she thought she was in the type of danger the statute envisions. Especially since she was not threatened or intimidated. (Tr. p. 109, l. 15-20).

2. Respondent raises, for the first time, in its Application for Transfer, the argument that the Court of Appeals should have entered a conviction of misdemeanor Sexual Misconduct under Sect. 566.090 RSMo. 2000 - this argument is without merit as

Sexual Misconduct is not a lesser-included offense of Sexual Abuse under Sect. 566.100 RSMo. 2000; prior Missouri cases have had the same outcome as the Southern District Court of Appeals did in this one; and there is little or no evidence that the touching was non-consensual and the defendant knew that, which are elements of Sexual Misconduct.

Sect. 566.090 RSMo. 2000 reads:

> (1) A person commits the crime of sexual misconduct in the first degree if he has deviate sexual intercourse with another person of the same sex or he purposely subjects another person to sexual contact or engages in conduct which would constitute sexual contact except that the touching occurs through the clothing without that person's consent.

(definitions are located at the beginning of chapter 566 RSMo.) According to the jury instructions, the "through the clothing" part is for crimes committed after August 28, 2002. (MAI-320.21.1). This crime occurred before that. (LF, p. 7).

The elements of Sexual Abuse are as follows:

> 1. First, the defendant touched the anus or breast of (the victim), and
>
> 2. Second, that he did so for the purpose of arousing his own sexual desire, and
>
> 3. Third, that he did so by the use of forcible compulsion, and
>
> 4. Fourth, that defendant did so knowingly.
>
> MAI-320.27 (modified)

The elements of Sexual Misconduct in the First Degree are:

> 1. First, the defendant touched the anus or breast of the victim, and

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

3. Third, that he did so without the consent of the victim, and

4. Fourth, that the defendant knew or was aware that such touching was being accomplished without the consent of the victim.

MAI-320.21.1 (modified)

Lesser-included offenses are covered by Sect. 556.046 RSMo. 2000. The relevant portions of that statute read:

556.046. Conviction of included offenses. -

"1. A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when

(1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged;... Sect. 556.046 RSMo. 2000."

Under Sect. 556.046, Sexual Misconduct cannot be a lesser-included offense of Sexual Abuse because it does not require proof of the same or less facts. Sexual Misconduct requires the proof of different facts - (1) that the touching was not consensual and (2) the defendant knew it. The last two elements of the crimes are different.

"This has long been the law in Missouri:

'The statement of the general rule necessarily implies that the lesser crime must be included in the higher crime with which the accused is specifically charged, and that the averment of the indictment describing the manner in which the greater offense was committed

must contain allegations essential to constitute a charge of the lesser, to sustain a conviction of the latter offense.'" State v. Hibler, 5 S.W.3d 147 (Mo. Sup. Ct. 1999).

If a Court finds the defendant did not use forcible compulsion, is it necessarily true that the touching was non-consensual and also that the defendant knew it? Of course not.

The Southern District Court of Appeals found that the defendant did not commit the sexual touching by forcible compulsion. The opinion states: "[T]here is very little evidence of any kind of resistance. It was the victim's own testimony that she did not say 'no', that she did not say anything to communicate resistance, and specifically, that she did not pull away or resist.". (Opinion, p. 12, App. for Transfer). In fact, **Hinds testified she never gave Vandevere any indication that she was bothered by his actions!** (Tr. p. 123, l. 1-4). Even if it is a lesser-included offense, there is insufficient evidence to convict the defendant of Sexual Misconduct.

A person convicted of Sexual Abuse, a "C" felony, may arguably, also be guilty of Sexual Misconduct because the "forcible compulsion" communicated lack of consent. But, is a person absolved of Sexual Abuse necessarily guilty of Sexual Misconduct? No, they are not. Especially in this case, where the Appellate Court found "reasonable resistance" did not take place. If not by reasonable resistance, how was it communicated to the defendant that the touching was non-consensual? It simply was not. How was Vandevere supposed to know Hinds did not consent? The defendant very well could have thought, and did think, the touching was consensual. By the victim's own admissions, she never communicated to Vandevere this was unwelcome, nor did the victim see any indication that Vandevere knew this was unwelcome. (*Id,*

Tr. p. 122, l. 23-25). Vandevere stated that he would have stopped if he had thought this was bothering her. (Tr. p. 242, l. 6-13).

If a person touches another person sexually, and does not use forcible compulsion, does that necessarily mean that the touching was non-consensual? Of course not. The touching still could have been either consensual or non-consensual. The Court is not asked to make that determination when deciding if Sexual Abuse occurred.

If a person touches another person sexually, and does not use forcible compulsion, does that necessarily mean the defendant knew the touching was non-consensual? Of course not. The Court is not asked to make that determination when deciding if Sexual Abuse occurred.

THERE SIMPLY IS NO EVIDENCE THAT HINDS COMMUNICATED TO VANDEVERE THE TOUCHING WAS NOT CONSENSUAL. There is no evidence that Vandevere knew this was non-consensual.

Without the reasonable resistance required of Sexual Abuse, and with no verbal resistance by the victim, the Sexual Misconduct charge should fail also. The State admits the victim did not physically resist (p. 17, Respondent's Brief). There is nothing in the record of any verbal resistance.

If a person does not consent to something and has ample opportunity to object, but does not object and keeps it totally to herself and continues to comply, can a person presume implied consent after a reasonable time? They can under these circumstances. The Court should not require people to read minds, or allow a person who engaged in consensual sex to later change the story to non-consensual. There are no brutal beatings, no history of abuse, no guns,

nor threats as in the other cases cited.

In it's application for transfer, the State argues that the Appellate Court went against previous Missouri decisions in Niederstadt, Kilmartin, and Spencer. We disagree. Not only do those cases have very different circumstances, but in the cases where the defendant was acquitted, like Kilmartin and Daleske, the defendants were discharged, just like Vandevere - not convicted of a lesser-included offense. The Appellate Court followed established Missouri case law when it discharged Vandevere.

3. The Respondent argues, for the first time, in its Application for Transfer, that the Southern District Court of Appeals should have entered a conviction of misdemeanor Sexual Misconduct against the defendant - this would be in error because the Information charging the defendant is insufficient to provide notice to the defendant of the elements of the crime of Sexual Misconduct, or that he is being tried for Sexual Misconduct, and therefore deprives him of his due process rights under the U. S. and Missouri Constitution.

Defense counsel cries "foul" on this one. Had he known the defendant was also on trial for Sexual Misconduct, he would have conducted the trial very differently.

With Felony Sexual Abuse, this trial focused mainly on the physical actions of the parties - was there forcible compulsion or not? The victim stated that Vandevere did not threaten or intimidate her. (Tr. p. 109, l. 15-20). There was not much dispute as to what happened here physically, and the defense counsel tried to conduct discovery and elicit testimony to make a full and complete record as to the degree of force used, any resistance,

etc. etc..

But, on the other hand, a Sexual Misconduct trial would have focused mainly on the mental state of the parties - was the touching consensual, and did the defendant know it? Defense counsel would have provided more evidence on the mens rea of both of the parties had defendant been aware he was on trial for Sexual Misconduct.

A defect in the information may be used for the first time on appeal. State v. Sparks, 916 S.W.2d 234 (Mo. E. D. 1995). "The purpose behind the rule that all essential elements of the crime must be pleaded to prevent a defendant from being hindered in preparation of his defense...". *Id*, Versuslaw para. 25.

Rule 23.01 of Missouri Rules of Criminal Procedure state that, for felonies and misdemeanors, the Information or Indictment shall: "(2) State plainly, concisely, and definitely the essential facts constituting the elements of the offense charged...".

Nowhere in the Information does it mention non-consensual touching, nor that the defendant knew the touching was non-consensual - both elements for a conviction of Sexual Misconduct. The Information only mentions forcible compulsion. (LF. p. 7). The Information is deficient.

If the parties' mental states were on trial, that would have opened up hearsay evidence that was otherwise not admissible. Defense counsel could have presented evidence about what either party had said about the case. Did the victim tell friends she allowed him to do this? Did the defendant tell others he thought it was consensual touching? We will never know because that was not admissible evidence under the crime charged, nor was it foreseeable to be

admissible evidence from the Information.

Article 1, Sect. 10 of the Missouri Constitution, and the 14th Amendment, paragraph 1, to U. S. Constitution guarantee that the State shall not deprive "any person of life, liberty or property without due process of law...".

The felony Information did not put the defendant on notice that he was being tried for Sexual Misconduct. This Court should not impose a conviction of this crime on the defendant. To do so would deprive Mr. Vandevere of due process of law.

CONCLUSION

In order to convict Vandevere of Sexual Abuse, the Court had to find he used "forcible compulsion" against Hinds. There is simply no evidence of "forcible compulsion" in this case. Vandevere did not use "forcible compulsion" to have sexual contact with Hinds.

Vandevere may have seduced, charmed, manipulated, or enticed Hinds by feeding her low self-esteem. Or, he may have thought he was having, or did have, consensual sexual contact with her. But he did not use "forcible compulsion" on Hinds.

Hinds testified she never resisted Vandevere or asked him to stop. She never pulled away or brushed away his hand. HINDS WAS TOTALLY COMPLIANT WITH VANDEVERE. HINDS NEVER INDICATED TO VANDEVERE HIS ACTIONS WERE BOTHERSOME TO HER. (Tr. p. 123, l. 1-4). Vandevere never used physical force that overcame reasonable resistance - there was no resistance.

The only force applied to Hinds was tugging on her arm "just a tad bit". (Tr. p. 49, l. 17-21). Or, "guiding" her into his lap. (Tr. p. 95, l. 5-11, p. 109, l. 21-24). "He didn't use a whole

lot of force". (Tr. p. 96, l. 1-4).

Hinds, by her own admission, was never threatened or intimidated by Vandevere. (Tr. p. 109, l. 15-20). She thought of him as a peer. (Tr. p. 29, l. 23-25). She was "flattered" and "happy" to go with him to the hotel room. (Tr. p. 88, l. 13-19). She referred to him as "John", not Mr. Vandevere. (Tr. p. 124, l. 8-11). She thought he was a pretty nice guy. (Tr. p. 109, l. 9-14). Vandevere fed her low self-esteem with compliments on how good she looked. (Tr. p. 49, l. 3-6).

There is no proof beyond a reasonable doubt that Vandevere knowingly used "forcible compulsion" - no mens rea. Hinds acted as if the touching was consensual. She allowed Vandevere to touch her, and complained about it later. Some resistance was warranted from her. If Vandevere had known this was offensive, he would have stopped! (Tr. p. 242, l. 6-13).

Vandevere may be slick, he may be naive, or, he may have reasonably concluded that, due to lack of resistance or protest, his sexual overtures were not unwelcome - but he did not use forcible compulsion on Hinds.

Misdemeanor Sexual Misconduct is not a lesser-included offense of felony Sexual Abuse. Sect. 556.046 says a lesser-included offense must require proof of the same or less facts than the crime charged. But, the jury instructions show that Sexual Misconduct requires different elements to be proven. If the defendant touched the victim without forcible compulsion, it is not necessarily true that the touching was non-consensual, or that he knew it was non-consensual. That was not an issue before the Court in a felony Sexual Abuse trial.

The Information does not put the defendant on notice of the elements of Sexual

Misconduct as required under Rules. There are different elements to the crimes. A person exonerated of Sexual Abuse is not necessarily guilty of Sexual Misconduct.

The Appellate Court found that the victim here did not put up reasonable resistance. It found "very" little evidence of "any" resistance. To be guilty of Sexual Misconduct, the touching had to be (1) non-consensual and (2) the defendant had to have known it was non-consensual. With the victim here admitting she never communicated in any way that the sexual contact was unwelcome, the victim admitting she saw no indication that Vandevere thought it was unwelcome, and the defendant testifying he didn't think it was unwelcome - there is simply no evidence of the final two elements of Sexual Misconduct - that (1) the touching was not consensual and (2) the defendant knew it.

In previous Missouri cases, Daleske and Kilmartin, the defendants were found not guilty, and completely discharged. The decision by the Southern District Court of Appeals should be upheld.

The Trial Court's conviction should be reversed and the defendant released as in Daleske.

Respectfully submitted,

_____

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CERTIFICATION/CERTIFICATE OF SERVICE

The undersigned attorney certifies that:

1. This brief complies with the limitations contained in rule 84.06(b).

2. Floppy Disk was scanned for viruses and is virus-free.

3. Contains 736 lines of monospaced type in the brief.

4. That 10 copies were filed with the Supreme Court of Missouri, 2 copies were served on opposing counsel, Rodney Daniels, P.O. Box 849, Forsyth, Missouri, 65653, and two copies to the Missouri Attorney General, P.O. Box 899, Jefferson City, MO 651020, by-U.S. Mail on the ____ day of _____, 2005.

_____

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APPENDIX