No. SC91948

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,
Respondent,

v.

DAVID BRYAN MILLER,
Appellant.

APPELLANT'S SUBSTITUTE BRIEF

KENT E. GIPSON, #34524
LAW OFFICE OF KENT GIPSON, LLC
121 East Gregory Boulevard
Kansas City, Missouri 64114
816-363-4400 • FAX 816-363-4300
kent.gipson@kentgipsonlaw.com

ATTORNEY FOR APPELLANT

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JURISDICTIONAL STATEMENT

David Bryan Miller, appellant herein, was convicted after a trial by jury in the Circuit Court of Harrison County, Missouri, of the unclassified felony of statutory sodomy in violation of § 566.062 R.S.Mo. (2000); the Class B felony of child molestation in the first degree in violation of § 566.067 R.S.Mo. (2000); the Class C felony of deviate sexual assault in violation of § 566.070 R.S.Mo. (2000); the Class D felony of sexual misconduct involving a child in violation of § 566.083 R.S.Mo. (2000); the Class C felony of endangering the welfare of a child in the first degree in violation of § 568.045 R.S.Mo. (2000); and, the Class D felony of incest in violation of § 568.020 R.S.Mo. (2000). On June 18, 2009, Harrison County Circuit Judge, Jack Peace, sentenced appellant to concurrent terms of imprisonment on the six charges of fifty years, ten years, seven years, four years, five years, and four years, respectively. Appellant filed a timely notice of appeal on June 25, 2009.

This appeal was originally heard by the Missouri Court of Appeals, Western District, who issued an opinion on June 21, 2011, affirming in part and reversing in part appellant's convictions. On December 6, 2011, this Court granted appellant's application for transfer. As a result, this Court has jurisdiction over this appeal. Rule 83.04; Mo. Const., Art. V, § 10.

STATEMENT OF FACTS

Appellant, David Bryan Miller, was charged by way of information filed on March 18, 2008 with ten counts alleging that he sexually molested, raped and sodomized his natural daughter, E.M.M., over an eight year period between December 3, 1997 and January 22, 2006 at the Miller family's residence in Harrison County, Missouri. (L.F. 13-15). Count I charged appellant with the Class C felony of statutory rape in the second degree in violation of § 566.034 R.S.Mo. (2000), alleging that appellant had sexual intercourse with his daughter between January 21, 2006 and January 22, 2006 when the victim was less than seventeen years old. (*Id.* 13). Count II charged appellant with the Class C felony of sexual assault in violation of § 566.040 R.S.Mo. (2000), alleging that appellant had sexual intercourse with his daughter between January 21, 2006 and January 22, 2006 without her consent. (*Id.*) Under Count III, appellant was charged with the unclassified felony of statutory sodomy in the first degree in violation of § 566.062 R.S.Mo. (2000), which alleged that appellant had deviate sexual intercourse with his daughter between December 3, 2004 and December 3, 2005 at a time when E.M.M. was less than fourteen years of age. (*Id.*) Under Count IV, appellant was charged with the Class B felony of child molestation in the first degree in violation of § 566.067 R.S.Mo. (2000), which alleged that appellant subjected his daughter

to sexual contact between December 3, 1997 and December 3, 1998 when she was less than fourteen years of age. (*Id.*) Under Count V, appellant was charged with the Class C felony of deviate sexual assault in violation of § 566.070 R.S.Mo. (2000), which alleged that appellant had deviate sexual intercourse with his daughter between December 3, 2004 and December 3, 2005 without her consent. (*Id.* 14). Under Count VI, appellant was charged with the Class D felony of sexual misconduct involving a child in violation of § 566.083 R.S.Mo. (2000), which alleged that appellant knowingly exposed his genitals to his daughter between December 3, 1997 and December 3, 1998 when she was less than fourteen years of age, for the purpose of arousing or gratifying the sexual desire of any person. (*Id.*) Under Count VII, appellant was charged with the Class D felony of incest in violation of § 568.020 R.S.Mo. (2000), which alleged that between January 21, 2006 and January 22, 2006 appellant had sexual intercourse with his daughter, who was his descendent by blood. (*Id.*) Under Count VIII, appellant was charged with the Class C felony of endangering the welfare of a child in the first degree in violation of § 568.045 R.S.Mo. (2000), which alleged that between December 3, 2004 and December 3, 2005 appellant engaged in sexual conduct with his daughter who was less than seventeen years of age, over whom appellant was a parent. (*Id.*) Under Count IX, appellant was charged with the Class D felony of incest in

violation of § 568.020 R.S.Mo. (2000), which alleged that between December 3, 2004 and December 3, 2005 appellant engaged in sexual intercourse with his daughter, whom appellant knew to be his descendant by blood. (*Id.*) Finally, under Count X, appellant was charged with the unclassified felony of statutory rape in the first degree in violation of § 566.032 R.S.Mo. (2000), which alleged that appellant had sexual intercourse with his daughter between January 30, 2004 and January 31, 2005 when his daughter was less than fourteen years of age. (Id.)

Appellant pleaded not guilty to the charges and retained Independence, Missouri attorney Richard Jacoby to represent him. (*Id.* 3). The case proceeded to trial in the Circuit Court of Harrison County, Missouri on May 5, 2009, before Circuit Judge Jack Peace and a jury. (*Id.* 54-59). On May 6, 2009, after due deliberation, the jury returned verdicts finding appellant not guilty under Counts I, II, VII, and X. The jury, however, found appellant guilty as charged under Counts III, IV, V, VI, VIII, and IX. (Tr. 300-303). On June 18, 2009, after overruling appellant's timely motion for judgment of acquittal or in the alternative a new trial, sentenced appellant to concurrent terms of imprisonment of fifty years on Count III, ten years on Count IV, seven years on Count V, four years on Count VI, five years on Count VII, and four years on Count IX. (Supp. Tr. 79; L.F. 118-122).

Appellant filed a timely notice of appeal on June 25, 2009. (*Id.* 123-124). After the Court of Appeals issued its opinion, this Court granted appellant's application for transfer, pursuant to Rule 83.04, on December 6, 2011.

THE EVIDENCE PRESENTED AT TRIAL

The only evidence supporting appellant's convictions came through the testimony of his daughter, E.M.M., who was seventeen years old at the time she testified against her father at his 2009 trial. (Tr. 20-77). E.M.M., who was born on December 3, 1991, testified, in a nutshell, that her father assaulted, raped and anally and orally sodomized her many times between her sixth birthday on December 3, 1997 and January 22, 2006. (*Id.*) All of these alleged incidents of sexual abuse took place, according to E.M.M., at the Miller family farmhouse outside of Hatfield, Missouri in Harrison County. (*Id.*) There was no physical or medical evidence or any other corroborating testimony offered by the prosecution to substantiate E.M.M.'s allegations of sexual abuse. In fact, medical testimony presented by the defense from Lachelle Williams, a nurse at Children's Mercy Hospital who conducted the sexual abuse forensic examination ("SAFE") of E.M.M. on February 24, 2006, indicated that the victim's vaginal and anal areas were normal and consistent with a normal fourteen year old girl who was not sexually active. (Tr. 202-208).

E.M.M. testified that the first instance of sexual abuse took place when she was six years old in the living room of the farmhouse on a loveseat during the middle of the night. (Tr. 33-34). When this event allegedly happened, one of appellant's friends, Monte Parkhurst, was passed out on the living room floor in front of her. (*Id.* 34). While she was on the loveseat, E.M.M. testified that her father inappropriately touched her. (*Id.*) When asked to elaborate, E.M.M. testified that her father placed his hands "on my hip, my butt, he really didn't touch my vagina then." (*Id.*) E.M.M. testified that appellant pulled down her shorts and then he pulled down his pants and stuck his penis in between her legs. (*Id.*) E.M.M. testified that appellant slowly moved his penis back and forth for a short period of time and then got up and went back to his room or to the bathroom. (*Id.* 35). When this event allegedly occurred, Mr. Parkhurst did not wake up and E.M.M.'s mother was asleep in an adjoining bedroom. (*Id.*). E.M.M. testified that her father told her not to tell anybody about this incident and she did not do so at the time because she was afraid. (*Id.*) This testimony formed the basis for the two charges brought under Counts IV and VI of the information charging appellant with child molestation in the first degree and sexual misconduct involving a child. (L.F. 13-14).

The next incident of abuse allegedly occurred when E.M.M. was seven years old. (*Id.* 37). Although she could not recall a particular date, E.M.M. testified that appellant stuck his finger in her vagina at the farmhouse. (*Id.*) E.M.M. did not remember whether anyone else was present at the house, including her mother, because it happened a long time ago. (*Id.*) This allegation purportedly provided the factual basis for the charges under Counts III and V of the information which charged appellant with the offenses of statutory sodomy and deviate sexual assault. (L.F. 13-14).

Next, E.M.M. testified that when she was between the ages of six and twelve, she performed oral sex on her father on numerous occasions. (*Id.* 38). During this same time period, E.M.M. testified that her father attempted to have sexual intercourse with her but was unable to penetrate her. (*Id.* 38-39). During some of these incidents, no one else was in the house. Other times these incidents occurred while her grandfather and brother were asleep in the living room of the house. (*Id.*)

E.M.M. later testified that when she was twelve years old, appellant began having sexual intercourse with her. (*Id.* 40). Between the ages of twelve and fourteen, E.M.M. testified that her father had sexual intercourse with her at the farmhouse at least once a week and sometimes two to three times a week. (*Id.* 41).

During that same time period, E.M.M. also testified that her father forced her to engage in both oral and anal sex. (*Id.* 42-43). E.M.M. also testified that after she turned thirteen, and began having her period, her father would use a condom when having sex with her because he feared she would become pregnant. (*Id.* 43). This testimony apparently provided the basis for Counts XIII, IX and X of the information charging appellant with endangering the welfare of a child in the first degree, incest, and statutory rape. (L.F. 14).

In August of 2005, E.M.M. testified that she told one of her friends, Mary Bethel, about what her father was doing. (*Id.* 44). This conversation was contemporaneous with the August, 2005 divorce between her father and mother. (*Id.*) In December of 2005, E.M.M., her mother, and her brother, Bryan, moved out of the Hatfield farmhouse and moved into a different residence between Eagleville and Ridgeway. (*Id.*)

Over appellant's objection, E.M.M. testified that her father used to beat her mother and her brothers. (*Id.* 46-47). She testified that she personally observed her father hit her mother on numerous occasions. (*Id.*) E.M.M. testified that because she observed her father hit her mother and brothers on numerous occasions she was afraid to tell anyone about the sexual abuse. (*Id.* 48-51).

After E.M.M. moved out of the house in December of 2005, she continued to visit the Hatfield farmhouse and her father on weekends. (Tr. 51). She testified that she usually brought one of her friends along in order to be safe from her father's sexual advances. (*Id.*) E.M.M. testified that on the weekend of January 21 and 22, 2006, she stayed at the farmhouse. (*Id.*) During that weekend, she did not have any of her friends with her like she normally did when she visited her father. (*Id.* 51-52). On this weekend, E.M.M. testified that her father had sexual intercourse with her for the last time. (*Id.* 51). E.M.M. testified that during this incident, appellant threw blankets down on the floor of the bedroom and had sexual intercourse with her. (*Id.* 52). This testimony provided the basis for Counts I, II, and VII of the information charging appellant with statutory rape in the second degree, sexual assault, and incest. (L.F. 13-14).

Approximately a week later, E.M.M. testified that she told her friend Mary Bethel about what her father was doing to her. (*Id.* 52-53). Miss Bethel called E.M.M.'s mother and told her about what E.M.M. told her. (*Id.* 53). Thereafter, E.M.M., her mother, and a friend went to the police station to report these sexual abuse allegations. (*Id.* 54).

On cross-examination, E.M.M. reiterated that Monte Parkhurst was present when she was first sexually abused when she was six years old and that Mr.

Parkhurst later became her mother's boyfriend. (*Id.* 57, 66). E.M.M. could not remember any particular dates when her father purportedly had anal sex with her. (*Id.* 66-67).

Regarding the charges that allegedly occurred on January 21-22 of 2006, E.M.M. testified that she did not have a friend with her named Amber Bowman and did not remember whether Don Shenberger was staying at the farm that weekend. (*Id.* 68). In this regard, E.M.M. testified: "As far as I know [appellant has] never had Don at the house." (*Id.*) E.M.M. could also not recall any particular dates on which she first had oral sex with her father. (*Id.* 71-72).

The second witness called by the State was Alanna Miller, the ex-wife of appellant and the mother of Erin Miller. (*Id.* 76). She testified that she was married to appellant from September 24, 1987 until their divorce in August of 2005. (*Id.* 78). She moved out of the farmhouse in Hatfield in December of 2005 with her daughter Erin and son Bryan. (*Id.*) She and appellant had three children: Chris, who was twenty at the time of trial, Bryan, who was nineteen at the time of trial, and Erin, who was seventeen at the time of trial. (*Id.* 79). Mrs. Miller testified that she lived at the Hatfield farmhouse with her husband and three children between 1995 and 2005. (*Id.* 79). During that time period, she tended to

the farm work because her husband was unable to work because he was on social security disability for a back injury. (*Id.* 79-84).

Mrs. Miller never noticed anything unusual involving the relationship between her daughter and her husband. (*Id.* 84-85). Mrs. Miller and her husband began having marital difficulties in 2004 and both of them began dating other people. (*Id.* 83-87).

During cross-examination, Mrs. Miller admitted that Monte Parkhurst could not have stayed at the house during 1997 because the Miller family did not become acquainted with him until approximately 1999. (*Id.* 92-96). She also admitted that she did not take a job or work outside of the farm until around 2003 or 2004. (*Id.* 94, 99-100). Mrs. Miller also testified she never suspected anything was going on between her husband and daughter and never observed anything that would make her suspicious. (*Id.* 96-97, 103-104).

Before the State rested its case, the prosecution also called Deputy Sheriffs Eric Rimmer and Josh Eckerson as witnesses. Deputy Rimmer testified that he interviewed E.M.M. and Alanna Miller at the Sheriff's Office in January, 2006 regarding the sexual abuse case. (*Id.* 107). During that interview, a DFS worker was also called who sat in on that interview. (*Id.*) The following day Rimmer and

Deputy Eckerson went to the Miller farmhouse in Hatfield to serve appellant with an order of protection. (*Id.* 108).

After arriving at the farmhouse to serve the order of protection, Deputy Rimmer told appellant about the sexual abuse allegations made against him by his daughter. (*Id.* 108). While Deputy Eckerson searched the house after appellant gave his consent to do so, Deputy Rimmer read appellant *Miranda* warnings at the kitchen table. (*Id.* 109-110). After receiving his *Miranda* warning, appellant invoked his right to remain silent. (*Id.* 110).

After the search of the house was finished, appellant agreed to come down to the Sheriff's Department to be interviewed regarding the sexual abuse allegations. (*Id.* 110-111). After arriving at the station, appellant was again Mirandized and, thereafter, told Deputy Rimmer that because his wife and he had recently divorced, he believed his ex-wife had "put [her daughter] up to it." (*Id.*)

Deputy Josh Eckerson testified that he accompanied Deputy Rimmer to the farmhouse on January 31, 2006. (*Id.* 117). After receiving appellant's consent to search the house, he began looking for child pornography, condoms, blankets and any other physical evidence that might substantiate the sexual abuse allegations. (*Id.* 119-121). During this search, Mr. Miller retrieved a box of condoms from

underneath the vanity in the bathroom and gave them to Eckerson. (*Id.* 121). Eckerson did not find any pornography. (*Id.* 120).

Eckerson accompanied appellant and Deputy Rimmer back to the station for questioning. (*Id.* 123). Deputy Eckerson was present when appellant was Mirandized at the Sheriff's Department and when appellant stated that he believed the allegations were fabricated at the behest of his ex-wife. (*Id.*) Appellant was then placed in custody on a twenty-four hour investigative hold for the sexual assault charges. (Supp. Tr. 31).

After the State rested, the defense attempted to call Don Shenberger as its first witness. (Tr. 129-131). The prosecution objected because Mr. Shenberger had not been formally endorsed as a witness by the defense. (*Id.* 131-132). Defense counsel's failure to file the written endorsement in the court file and serve the prosecutor was an apparent oversight on his part. (*Id.* 133). Mr. Jacoby argued to the trial court that, despite his oversight in failing to formally endorse Mr. Shenberger, the State was not prejudiced because they were aware of the substance of Shenberger's testimony through their interview of appellant's father, Forrest Miller. (*Id.* 134). The trial court, thereafter, sustained the prosecution's objection and refused to allow Mr. Shenberger to testify as a sanction for this discovery

violation resulting from defense counsel's failure to endorse this witness. (*Id.* 139).

Thereafter, defense counsel called Mr. Shenberger as a witness, out of the presence of the jury, to make an offer of proof regarding the substance of his testimony. (*Id.* 140). Mr. Shenberger testified that he lived in Kansas City, Missouri and was a friend of appellant's father, Forrest Miller. (*Id.*) Mr. Shenberger testified that in January of 2006, he traveled up to the Miller farmhouse in Hatfield to work on the farm that weekend. (*Id.* 141). Mr. Shenberger arrived at the farm on Friday evening, January 20, 2006. (*Id.*) When he arrived, Forrest Miller, appellant, and appellant's two sons were present at the farmhouse. (*Id.* 141-142).

Mr. Shenberger did not see E.M.M. until the next day when a car dropped her and one of her girlfriends off at the farmhouse on Saturday, January 21, 2006. (*Id.* 142). Mr. Shenberger, appellant, his father, and two sons all worked on the farm all day Saturday until 5:30-6:30 in the evening. (*Id.* 142-143). E.M.M. and her girlfriend were at the house when they stopped working on Saturday evening. (*Id.* 143). That evening, Mr. Shenberger slept in the living room of the house and the girls slept in the bedroom downstairs toward the basement. (*Id.* 143-144).

Appellant's two sons also slept with him in the living room and he assumed that appellant slept in his bedroom. (*Id.*)

On Sunday, January 22, 2006, Mr. Shenberger and appellant again worked on the farm all day long with appellant's father and two sons. (*Id.* 144-145). After spending Sunday night at the farmhouse, Mr. Shenberger left the next morning. (*Id.* 145-146). After this offer of proof was concluded, the trial court reaffirmed its previous ruling that Mr. Shenberger would not be allowed to testify because the defense did not disclose him as a witness pursuant to Supreme Court Rule 25. (*Id.* 150-153).

After the jury returned to the courtroom, the first witness for the defense was Christopher Miller, appellant's oldest son. (*Id.* 154-155). Mr. Miller testified that he lived at the farmhouse near Hatfield, Missouri with his mother, father and siblings from approximately 1995 until January of 2006, when the sexual abuse allegations arose. (*Id.* 156-157). Mr. Miller testified regarding the layout of the farmhouse and indicated that because of the small size and layout of the house he usually slept on a couch in the living room. (*Id.* 160-161). A kids' bedroom was located downstairs from the living room. (*Id.* 161-162). The kids' bedroom was located directly under the master bedroom that was upstairs. (*Id.* 163).

During the time period of 1997 and 1998, Mr. Miller and his brother and sister all slept downstairs in the kids' room. In 2004 and 2005, his brother and sister also slept downstairs in the kids' room and he sometimes slept down there and sometimes slept upstairs in the living room. (*Id.* 165). Because the area between the living room and the kid's bedroom was all open space, it was very easy to hear everything that was going on from one room to the other. (*Id.* 170-171).

Mr. Miller also testified that the Miller family did not become acquainted with Monte Parkhurst until 1999 or 2000, after his mother suffered an aneurysm. (*Id.* 171-173). As a result, it would not have been possible that he would have been staying at their house during the calendar years of 1997 or 1998. (*Id.* 173). During the entire time period that they lived in the house, Mr. Miller testified that he never recalled his sister being alone in his father's room with the door locked. (*Id.* 176).

Christopher Miller also testified about the weekend of January 21 and 22, 2006. (*Id.* 176-177). On Friday evening, his grandfather Forrest and his friend Don arrived that night and they built a fence the following day. (*Id.* 177-179). On Saturday, his sister's friend's father dropped off E.M.M. and her friend at the farmhouse. (*Id.* 180). The two girls went into the farmhouse and the others did not

see them until that evening. They all spent Saturday night at the farmhouse and E.M.M. and her friend spent the night in the downstairs bedroom. (*Id.* 180-181). On Sunday, Mr. Miller testified that appellant had to work that evening and after they finished working on the farm, appellant fell asleep on a chair in the living room. (*Id.* 183-184). At about 10:00 in the evening, appellant woke up and took E.M.M. and her friend to his mother Alanna Miller's house before appellant went to work. (*Id.* 184). Finally, Mr. Miller testified that, during the approximately eleven year period in which he lived at the house with the family, he never observed or heard anything inappropriate between his father and his sister. (*Id.* 184).

The second witness called by the defense was Lachelle Williams, a pediatric nurse practitioner at Children's Mercy Hospital in Kansas City. (*Id.* 197). Ms. Williams performed the SAFE examination of E.M.M. (*Id.* 198). This examination took place on February 24, 2006. (*Id.* 202). As part of the SAFE examination, a full head to toe physical examination of E.M.M. was conducted. (*Id.* 204-205). During the examination of E.M.M., Ms. Williams conducted a complete examination of her external genitalia and a pelvic examination. (*Id.* 205-206). This examination revealed no abnormal findings. (*Id.* 206-207). Ms. Williams also performed an anal examination of E.M.M., which also revealed no

abnormalities. (*Id.* 207). Cultures were collected for laboratory tests which came back negative for any sexually transmitted diseases. (*Id.*) Ms. Williams finally testified that her examination of E.M.M. was consistent with a fourteen year old girl who had never had sexual intercourse. (*Id.* 208). Furthermore, there were no physical findings, such as scarring or tearing of the genitalia or anal areas that were consistent with sexual abuse or assault. (*Id.*)

The final witness for the defense was appellant, David Bryan Miller. (*Id.* 211). After echoing the testimony of prior witnesses regarding his family, the length of time he lived with his family on the farm, and the layout of the farmhouse, appellant denied that he ever molested his daughter. (*Id.* 239-240). Appellant also corroborated the testimony of other witnesses that his family did not know Monte Parkhurst before 1999 and that it was not possible that Parkhurst would have slept in the living room of their house during the years of 1997 and 1998. (*Id.* 230-231).

During cross-examination, the prosecutor asked appellant if he continued to receive social security disability checks while he was able to work. (*Id.* 248). The prosecutor continued this line of inquiry, suggesting to the jury that appellant committed some sort of social security fraud because he did not send those checks back. (*Id.* 248-249). The trial court overruled defense counsel's lack of relevance

objection to this line of questioning. (*Id.* 248). The prosecution's line of questioning also suggested to the jury that appellant received social security checks of over $500.00 per month for several months when he was not disabled. (*Id.* 249-250).

The prosecutor's next area of cross-examination concerned appellant's encounters with Deputy Rimmer and Deputy Eckerson on January 31, 2006. During this line of inquiry, the prosecutor asked appellant: "At that time did you give those police officers the names of all of these witnesses who would have been able to vouch for the fact that you were working all weekend?" (*Id.* 251). Appellant replied that the police officers never asked him any details about the allegations or who was there or what was going on. (*Id.*) The prosecutor continued by asking appellant: "And wouldn't you agree that would have been the time for you to speak up and say hey, I couldn't have done anything . . . I had people with me all weekend. I was working?" (*Id.*) The prosecutor then asked appellant: "Well you were Mirandized not once but twice, correct . . . You were taken over to the law enforcement center and they sat down and talked to you, correct?" (*Id.*)

After that, the following colloquy took place at the conclusion of the cross-examination of appellant:

Q. "And you had an opportunity to talk to those police officers and tell them your side of the story, correct?"

A. "Yes."

Q. "But you chose not to say hey, I couldn't have done that that weekend, I was doing this, I was working putting in fence and I've got lots of witnesses. You didn't tell the police that at that time, did you?"

A. "No I didn't."

(*Id.* 252).

During her cross-examination, the prosecutor also attempted to attack appellant's credibility regarding what the temperature was on the weekend of January 21 and 22, 2006. In her questioning of appellant, the prosecutor suggested that the temperature nearby was 27 or 28 degrees in an attempt to contradict appellant's prior testimony that he believed the temperature was in the 50's that weekend. (*Id.* 241). However, the prosecutor never presented any independent evidence from the National Weather Service or any source documenting what the actual temperature was during that weekend. (*Id.* 241-244). As a result, the trial court sustained defense counsel's objection to this line of inquiry, noting that there was an insufficient foundation for this line of questioning unless the prosecution

presented some evidence regarding the temperature from an independent source. (*Id.* 244).

During closing argument, the prosecution again mentioned the alleged temperature discrepancy brought out during appellant's cross-examination despite the fact that no evidence regarding the actual temperature was introduced into evidence at trial. (*Id.* 266-267). The prosecution also argued that E.M.M. did not report the allegations sooner because appellant was brutal to her mother and brothers. (*Id.* 264-265). The prosecution also told the jury during argument that appellant was receiving social security disability payments to which he was not legally entitled because he was working on the farm. (*Id.* 287). Finally, the prosecution reiterated that it was brought out in cross-examination that appellant did not tell the police, after he was Mirandized, about the events that occurred on the weekend of January 21 and 22, 2006. (*Id.* 286). Defense counsel's objection to this last argument was overruled. (*Id.* 287).

The jury retired to deliberate at 4:44 p.m. on May 6, 2009. Shortly thereafter, the jury sent several written questions to the court, most notably whether they could see a copy of appellant's statement to police. (*Id.* 292). The court, in response to that question, told the jury that they could not see that piece of evidence because appellant's statement was not admitted into evidence. (*Id.*)

At 9:45 p.m., the jury reached a verdict finding appellant not guilty under Counts I, II, VII, and X. (*Id.* 300-303). The jury, as noted earlier, found appellant guilty as charged under Counts III, IV, V, VI, VIII, and IX. (*Id.*) Because appellant had previously waived his right to jury sentencing (L.F. 52-53), the trial court sentenced appellant to concurrent sentences totaling 50 years, as outlined above, on June 18, 2009. (Supp. Tr. 79; L.F. 118-122). Appellant, thereafter, filed a timely notice of appeal. (L.F. 123-124). Further facts will be developed, as necessary, in the argument sections of this brief.

POINTS AND AUTHORITIES

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF ALL THE EVIDENCE, BECAUSE THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTIONS UNDER COUNTS III AND V FOR THE OFFENSES OF STATUTORY SODOMY AND DEVIATE SEXUAL ASSAULT, BECAUSE THE STATE FAILED TO PRESENT ANY EVIDENCE TO SUPPORT THE ESSENTIAL ELEMENT OF THE OFFENSE THAT APPELLANT PUT HIS FINGER IN E.M.M.'S VAGINA EITHER WITH OR WITHOUT HER CONSENT BETWEEN THE DATES OF DECEMBER 3, 2004 AND DECEMBER 3, 2005 AS CHARGED IN THE INFORMATION AND SUBMITTED TO THE JURY IN INSTRUCTIONS NO. 7 AND 10, WHICH DEPRIVED APPELLANT OF HIS FOURTEENTH AMENDMENT RIGHT TO BE ACQUITTED UNLESS THE EVIDENCE ESTABLISHED PROOF OF EVERY ELEMENT OF THE OFFENSE THAT WAS CHARGED AND SUBMITTED TO THE JURY BEYOND A REASONABLE DOUBT.

State v. Bisans, 104 S.W.3d 805 (Mo. App. W.D. 2003)

State v. Edsall, 781 S.W.2d 561 (Mo. App. S.D. 1989)

Cole v. Arkansas, 333 U.S. 196 (1948)

Jackson v. Virginia, 443 U.S. 307 (1979)

POINT II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF ALL THE EVIDENCE BECAUSE THE EVIDENCE ADDUCED AT TRIAL WAS LEGALLY INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION UNDER COUNT IV OF CHILD MOLESTATION IN THE FIRST DEGREE, BECAUSE THE STATE DID NOT PRESENT EVIDENCE SUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THE ESSENTIAL ELEMENT OF THE OFFENSE THAT APPELLANT TOUCHED THE GENITALS OF E.M.M. EITHER INSIDE OR THROUGH HER CLOTHING BETWEEN DECEMBER 3, 1997 AND DECEMBER 3, 1998, AND BECAUSE TOUCHING THROUGH THE CLOTHING DID NOT CONSTITUTE "SEXUAL CONTACT" AT THE TIME OF THE ALLEGED OFFENSE, WHICH DEPRIVED APPELLANT OF HIS FOURTEENTH AMENDMENT RIGHT TO BE ACQUITTED UNLESS THE EVIDENCE ESTABLISHES PROOF OF EVERY ELEMENT OF THE OFFENSE BEYOND A REASONABLE DOUBT.

State v. Bisans, 104 S.W.3d 805 (Mo. App. W.D. 2003)

State v. Edsall, 781 S.W.2d 561 (Mo. App. S.D. 1989)

Jackson v. Virginia, 443 U.S. 307 (1979)

State v. Euer, 910 S.W.2d 352 (Mo. App. S.D. 1995)

POINT III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF ALL THE EVIDENCE BECAUSE THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION UNDER COUNT VI OF SEXUAL MISCONDUCT INVOLVING A CHILD, BECAUSE THE STATE DID NOT PRESENT SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THE ESSENTIAL ELEMENT OF THE OFFENSE THAT APPELLANT KNOWINGLY EXPOSED HIS GENITALS TO THE VICTIM, WHICH DEPRIVED APPELLANT OF HIS FOURTEENTH AMENDMENT RIGHT TO BE ACQUITTED UNLESS THE EVIDENCE ESTABLISHES PROOF OF EVERY ELEMENT OF THE OFFENSE BEYOND A REASONABLE DOUBT.

State v. Parker, 738 S.W.2d 566 (Mo. App. E.D. 1987)

State v. Bisans, 104 S.W.3d 805 (Mo. App. W.D. 2003)

State v. Bouse, 150 S.W.3d 326 (Mo. App. W.D. 2004)

Jackson v. Virginia, 443 U.S. 307 (1979)

POINT IV

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF ALL THE EVIDENCE BECAUSE THE EVIDENCE ADDUCED AT TRIAL WAS LEGALLY INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION UNDER COUNT VIII OF THE OFFENSE OF ENDANGERING THE WELFARE OF A CHILD IN THE FIRST DEGREE, BECAUSE THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THE ESSENTIAL ELEMENT OF THE OFFENSE THAT APPELLANT'S CONDUCT CONSTITUTED SEXUAL CONTACT WITH THE VICTIM BETWEEN DECEMBER 3, 2004 AND DECEMBER 3, 2005 AS CHARGED IN THE INFORMATION AND SUBMITTED TO THE JURY IN INSTRUCTION NO. 12, WHICH DEPRIVED APPELLANT OF HIS FOURTEENTH AMENDMENT RIGHT TO BE ACQUITTED UNLESS THE EVIDENCE ESTABLISHES PROOF OF EVERY ELEMENT OF THE OFFENSE BEYOND A REASONABLE DOUBT.

State v. Bisans, 104 S.W.3d 805 (Mo. App. W.D. 2003)

State v. Edsall, 781 S.W.2d 561 (Mo. App. S.D. 1989)

Jackson v. Virginia, 443 U.S. 307 (1979)

§ 566.010 R.S.Mo. (2000)

POINT V

THE TRIAL COURT PLAINLY ERRED IN SUBMITTING INSTRUCTION NO. 8, THE VERDICT DIRECTING INSTRUCTION FOR THE CLASS B FELONY OF CHILD MOLESTATION IN THE FIRST DEGREE IN VIOLATION OF § 566.067 R.S.MO. (2000) CHARGED UNDER COUNT IV OF THE INFORMATION AND FURTHER ERRED IN ENTERING A JUDGMENT OF CONVICTION AND SENTENCING APPELLANT TO A TERM OF IMPRISONMENT OF TEN YEARS FOR THAT OFFENSE BECAUSE THIS INSTRUCTION ALLOWED THE JURY TO CONVICT APPELLANT OF A CRIME THAT DID NOT EXIST BETWEEN THE DATES OF DECEMBER 3, 1997 AND DECEMBER 3, 1998 WHEN THIS OFFENSE ALLEGEDLY OCCURRED AS CHARGED IN THE INFORMATION AND ALLOWED A CONVICTION BASED UPON THE ELEMENT OF TOUCHING THE GENITALS THROUGH THE CLOTHING, WHICH WAS NOT PROSCRIBED BY THE PRIOR VERSION OF THE STATUTE BECAUSE THE DEFINITION OF SEXUAL CONTACT UNDER §§ 566.010(3) AND 566.067 R.S.MO. (1994) DID NOT ENCOMPASS TOUCHING THE GENITALS OF AN UNDERAGE VICTIM

THROUGH THE CLOTHING, WHICH PERMITTED THE JURY TO CONVICT APPELLANT OF A CRIME THAT DID NOT EXIST AT THE TIME IT WAS ALLEGEDLY COMMITTED IN VIOLATION OF THE *EX POST FACTO* CLAUSES OF ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 13 OF THE MISSOURI CONSTITUTION. THE TRIAL COURT ALSO PLAINLY ERRED IN SENTENCING APPELLANT TO TEN YEARS IN PRISON FOR A CLASS B FELONY UNDER COUNT IV BECAUSE, UNDER § 566.067 R.S.MO. (1994), THIS CRIME WAS A CLASS C FELONY AT THE TIME IT WAS ALLEGEDLY COMMITTED AND THE MAXIMUM TERM OF IMPRISONMENT WAS SEVEN YEARS, WHICH ALSO DEPRIVED APPELLANT OF HIS RIGHTS SECURED BY THE *EX POST FACTO* CLAUSE BY IMPOSING A SENTENCE IN EXCESS OF THE MAXIMUM PUNISHMENT IN EFFECT AT THE TIME THE CRIME WAS ALLEGEDLY COMMITTED.

State v. Griffin, 172 S.W.3d 861 (Mo. App. S.D. 2005)

State v. Heckenlively, 83 S.W.3d 560 (Mo. App. W.D. 2002)

Kelly v. Gammon, 903 S.W.2d 248 (Mo. App. W.D. 1995)

Weaver v. Graham, 450 U.S. 24 (1981)

POINT VI

THE TRIAL COURT PLAINLY ERRED IN FAILING TO, *SUA SPONTE*, DECLARE A MISTRIAL AFTER THE PROSECUTION INJECTED INADMISSIBLE EVIDENCE DURING THE DIRECT EXAMINATION OF DEPUTY RIMMER, THE CROSS EXAMINATION OF APPELLANT, AND DURING CLOSING ARGUMENT THAT REFERRED TO APPELLANT'S POST-ARREST SILENCE AND HIS FAILURE TO VOLUNTEER AN EXCULPATORY EXPLANATION TO HIS DAUGHTER'S ALLEGATIONS AFTER HE HAD RECEIVED MIRANDA WARNINGS, WHICH VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS AND AGAINST SELF INCRIMINATION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 19 OF THE MISSOURI CONSTITUTION.

State v. Dexter, 954 S.W.2d 332 (Mo. banc 1997)

State v. Stuart, 456 S.W.2d 19 (Mo. banc 1970)

Doyle v. Ohio, 426 U.S. 610 (1976)

State v. Nolan, 595 S.W.2d 54 (Mo. App. S.D. 1980)

POINT VII

THE TRIAL COURT ERRED IN SUSTAINING THE PROSECUTION'S OBJECTION AND PRECLUDING DEFENSE WITNESS DON SHENBERGER FROM TESTIFYING AT TRIAL BEFORE THE JURY AS A DISCOVERY SANCTION UNDER RULE 25 BECAUSE SHENBERGER WAS NOT TIMELY OR FORMALLY ENDORSED AS A WITNESS BY DEFENSE COUNSEL BECAUSE THE STATE ALREADY HAD NOTICE REGARDING THE SUBSTANCE OF HIS TESTIMONY AND WAS NOT SUFFICIENTLY PREJUDICED TO JUSTIFY THIS SEVERE DISCOVERY SANCTION, WHICH DENIED APPELLANT HIS SIXTH AND FOURTEENTH RIGHT TO PRESENT A COMPLETE DEFENSE TO THE CHARGES.

State v. Simonton, 49 S.W.3d 766 (Mo. App. W.D. 2001)

State v. Walkup, 220 S.W.3d 748 (Mo. banc 2007)

State v. Martin, 103 S.W.3d 255 (Mo. App. W.D. 2003)

LaJoie v. Thompson, 217 F.3d 663 (9th Cir. 2000)

POINT VIII

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE DURING THE DIRECT EXAMINATION OF E.M.M. AND DURING THE CROSS-EXAMINATION OF APPELLANT, OVER APPELLANT'S

OBJECTION, EVIDENCE OF OTHER BAD ACTS THAT DID NOT RESULT IN CONVICTION INVOLVING APPELLANT'S ALLEGED PRIOR ASSAULTIVE BEHAVIOR TOWARD HIS WIFE AND SONS AND IN PERMITTING QUESTIONING DURING APPELLANT'S CROSS-EXAMINATION THAT SUGGESTED THAT APPELLANT ENGAGED IN SOCIAL SECURITY FRAUD, WHICH DENIED APPELLANT HIS DUE PROCESS RIGHT TO A FAIR TRIAL BY INVITING THE JURY TO CONVICT BASED UPON IRRELEVANT AND INADMISSIBLE CRIMINAL PROPENSITY EVIDENCE IN VIOLATION OF ARTICLE I, SECTIONS 17 AND 18(A) OF THE MISSOURI CONSTITUTION.

State v. Burns, 978 S.W.2d 759 (Mo. banc 1998)

State v. Dunn, 577 S.W.2d 649 (Mo. banc 1979)

State v. Bernard, 849 S.W.2d 10 (Mo. banc 1993)

State v. Chism, 252 S.W.3d 178 (Mo. App. W.D. 2008)

POINT IX

THE TRIAL COURT PLAINLY ERRED IN FAILING TO, *SUA SPONTE*, DECLARE A MISTRIAL DURING CLOSING ARGUMENT WHEN THE PROSECUTOR INJECTED AND ARGUED FACTS NOT IN EVIDENCE AS EVIDENCE OF GUILT REGARDING THE PURPORTED TEMPERATURE AT THE SCENE OF THE CRIME ON THE DATES OF

JANUARY 21 AND 22 OF 2006 BECAUSE THESE ARGUMENTS WERE BASED UPON FACTS NOT IN EVIDENCE AND WERE CLEARLY CALCULATED TO PREJUDICE APPELLANT BY UNDERMINING HIS CREDIBILITY IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE UNITED STATES AND MISSOURI CONSTITUTIONS.

State v. Storey, 901 S.W.2d 886 (Mo. banc 1995)

State v. Taylor, 216 S.W.3d 187 (Mo. App. E.D. 2007)

State v. Mayfield, 506 S.W.2d 363 (Mo. 1974)

State v. Heinrich, 492 S.W.2d 109 (Mo. App. W.D. 1973)

POINT X

THE TRIAL COURT ERRED IN FAILING TO SUSTAIN APPELLANT'S MOTION FOR NEW TRIAL BECAUSE THE CUMULATIVE EFFECT OF EACH OF THE AFOREMENTIONED ERRORS SO INFECTED THE PROCEEDINGS WITH UNFAIRNESS THAT ELEMENTARY PRINCIPLES OF JUSTICE DEMAND THAT APPELLANT RECEIVE A SECOND AND UNTAINTED TRIAL.

State v. Burnfin, 771 S.W.2d 908 (Mo. App. W.D. 1989)

State v. Whitman, 788 S.W.2d 328 (Mo. App. E.D. 1990)

Kyles v. Whitley, 514 U.S. 419 (1995)

ARGUMENT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF ALL THE EVIDENCE, BECAUSE THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTIONS UNDER COUNTS III AND V FOR THE OFFENSES OF STATUTORY SODOMY AND DEVIATE SEXUAL ASSAULT, BECAUSE THE STATE FAILED TO PRESENT ANY EVIDENCE TO SUPPORT THE ESSENTIAL ELEMENT OF THE OFFENSE THAT APPELLANT PUT HIS FINGER IN E.M.M.'S VAGINA EITHER WITH OR WITHOUT HER CONSENT BETWEEN THE DATES OF DECEMBER 3, 2004 AND DECEMBER 3, 2005 AS CHARGED IN THE INFORMATION AND SUBMITTED TO THE JURY IN INSTRUCTIONS NO. 7 AND 10, WHICH DEPRIVED APPELLANT OF HIS FOURTEENTH AMENDMENT RIGHT TO BE ACQUITTED UNLESS THE EVIDENCE ESTABLISHED PROOF OF EVERY ELEMENT OF THE OFFENSE THAT WAS CHARGED AND SUBMITTED TO THE JURY BEYOND A REASONABLE DOUBT.

The standard of review applicable to a defendant's challenge to the sufficiency of the evidence to convict him requires a reviewing court to determine if the state presented sufficient evidence from which a reasonable juror could have

found defendant guilty beyond a reasonable doubt. *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc 2001). In applying this standard of review, courts:

> must look to the elements of the crime and consider each in turn. . . . [The court is] required to take the evidence in the light most favorable to the state and grant the state all reasonable inferences from the evidence. [The court] disregards contrary inferences, unless they are such natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. Taking the evidence in this light, [the court] considers whether a reasonable juror could find each of the elements beyond a reasonable doubt.

State v. Bates, 70 S.W.3d 532, 534 (Mo. App. W.D. 2002) (quoting *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993). Although this standard is deferential to the state's evidence, reviewing courts have been cautioned not to "'supply missing evidence, or give the [state] the benefit of unreasonable, speculative or forced inferences.'" *Id.* (quoting *Bauby v. Lake*, 995 S.W.2d 10, 13 n.1 (Mo. App. E.D. 1999). This standard of review echoes the due process standard announced by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307 (1979). As the Missouri Supreme Court has stated, to comport with the due process minimum, "a conviction must be supported by enough evidence that a reasonable juror, taking

all evidence in the light most favorable to the state, would be convinced beyond a reasonable doubt [of defendant's guilt]." *Grim*, 854 S.W.2d at 406.

Count III of the information charging appellant with the ungraded felony of statutory sodomy, alleged that appellant had deviate sexual intercourse with E.M.M. between December 3, 2004 and December 3, 2005 at a time when E.M.M. was less than fourteen years of age. (L.F. 13). Count V of the information charging appellant with the Class C felony of deviate sexual assault alleged that appellant had deviate sexual intercourse with E.M.M. without her consent between December 3, 2004 and December 3, 2005. (*Id.* 14). In Instruction No. 7, the verdict director for Count III, the jury was instructed:

> "As to Count III, if you find and believe in the evidence beyond a reasonable doubt:
>
> First, that between December 3, 2004 and December 3, 2005, in the County of Harrison, State of Missouri, the defendant put his finger in E.M.M.'s vagina, and
>
> Second, that such conduct constituted deviate sexual intercourse, and
>
> Third, that at the time E.M.M. was less than fourteen years old, then you will find the defendant guilty under Count III of statutory sodomy in the first degree under this instruction."

(*Id.* 75).

Similarly, Instruction No. 9 submitted to the jury, the verdict directing instruction for the Class C felony of deviate sexual assault, stated:

> "As to Count V, if you find and believe from the evidence beyond a reasonable doubt:
>
> First, that between December 3, 2004 and December 3, 2005, in the County of Harrison, State of Missouri, defendant put his finger in E.M.M.'s vagina, and
>
> Second, that such conduct constituted deviate sexual intercourse, and
>
> Third, that defendant did so without the consent of E.M.M., and
>
> Fourth, that defendant knew that he did not have the consent of E.M.M.,
>
> then you will find the defendant guilty under Count V of deviate sexual assault.

(*Id.* 78).

In light of the foregoing language from the charging document and the verdict directing instructions for Counts III and V, it was necessary for the State to prove beyond a reasonable doubt the element of the offense that appellant put his finger in E.M.M.'s vagina between the dates of December 3, 2004 and December

3, 2005. E.M.M.'s testimony at trial indicated that the only act of digital penetration allegedly perpetrated upon her by her father at the Harrison County farmhouse occurred when she was seven years old. (Tr. 37). Because the evidence also established that E.M.M.'s date of birth was December 3, 1991, this act of digital penetration allegedly occurred, according to E.M.M.'s testimony, between the dates of December 3, 1998 and December 3, 1999. (*Id.* 21, 79).

As charged in the information and as submitted to the jury, the State was required to prove that an act of digital penetration occurred between the dates of December 3, 2004 and December 3, 2005, a time when E.M.M. was thirteen years old. (L.F. 13-14, 75, 78). During this time period, according to E.M.M.'s testimony, the only sexual acts that occurred with appellant were sexual intercourse, and oral and anal sex. (Tr. 40-43). Because the record is devoid of any evidence indicating that an act of digital penetration either with or without E.M.M.'s consent occurred between December 3, 2004 and December 3, 2005, the evidence was legally insufficient to support appellant's convictions under Counts III and V of the information because the State failed to prove an essential element of the crime charged beyond a reasonable doubt. *See, e.g., State v. Givens*, 917 S.W.2d 215, 216-217 (Mo. App. W.D. 1996).

It is of no legal consequence that the State could have possibly charged appellant with committing the same crimes by alleging different acts of deviate

sexual intercourse involving oral or anal sex during the relevant time period set forth under Counts III and V of the information. Similar arguments advanced by the State were rejected in *State v. Bisans*, 104 S.W.3d 805 (Mo. App. W.D. 2003), and *State v. Edsall*, 781 S.W.2d 561 (Mo. App. S.D. 1989).

In *Bisans*, the Court of Appeals overturned a conviction for the misdemeanor of making a false report where the defendant was charged under subsection 1 of § 575.080 that required as an element of the offense that the false statement must implicate another individual in a crime. 104 S.W.3d at 807. The evidence adduced at trial, while indicating that appellant did make a false statement that may have constituted a crime under a different subsection of the same statute, did not establish that Bisans had the purpose of implicating another individual in a crime. *Id.* at 807-808. However, the verdict directing instruction in *Bisans* also instructed the jury on the unproven element under subsection 1 of § 575.080, which requires the implication of another in a crime. *Id.*

In reversing *Bisan's* conviction, the Court of Appeals noted that: "While the record may have supported a finding by the jury that appellant provided false information to Officer Brown intending to corroborate K.H.'s allegations that J.J. had made threatening statements to her, appellant was not charged with, and the jury was not instructed on, appellant making a false report with the intent to implicate J.J. in any crime that J.J. might have been charged with in connection

with those alleged threats." *Id.* at 808. A similar situation is presented here. Appellant was clearly charged with and the jury was instructed on the crimes of statutory sodomy and deviate sexual assault based upon an act of digital penetration alleged to have occurred when the victim was thirteen years old. Because there was absolutely no evidence that any such act occurred during the time period charged in the information and as set forth in the verdict directing instructions, appellant's convictions under Counts III and V cannot stand under *Bisans*. As the Court of Appeals has stated more recently: "*Bisans* stands, *inter alia*, for the proposition that even if proof would establish the offense charged, if the conviction is based solely on a method not charged or submitted to the jury, the conviction will not stand." *State v. Young*, 172 S.W.3d 494, 499 (Mo. App. W.D. 2005).

The Southern District in *Edsall* reversed a conviction for a misdemeanor assault upon a jail guard where the information alleged the defendant caused the guard injury because he was struck by appellant's fists. 781 S.W.2d at 564-565. However, the evidence adduced at trial did not provide any evidence to support the statutory element as charged in the information that the victim's injury was caused by Edsall striking the guard with his fists. *Id.* at 562-563. Instead, the testimony indicated that the injuries sustained by the guard were the result of him falling to

the ground after either being pushed or slipping during an altercation with the defendant. *Id.*

In reversing this conviction, the court in *Edsall*, citing *State v. Lusk*, 452 S.W.2d 219, 223 (Mo. 1970), stated: "when a crime may be committed by any of several methods, the information or indictment must charge one or more of the methods, the method or methods submitted in the verdict directing instruction must be among those alleged in the information, and when submitted in the disjunctive each must be supported by the evidence." 781 S.W.2d at 564. In other words, where a particular act is alleged in the information and specified in the verdict directing instruction, "the state is held to proof of that act and a jury can convict only on that act." *Id.* (quoting *State v. Pope*, 733 S.W.2d 811, 813 (Mo. App. W.D. 1987).

Under similar circumstances, the United States Supreme Court held that a conviction based upon a violation of a different subsection of a state statute that was not charged in the information or submitted to the jury violated due process. *Cole v. Arkansas*, 333 U.S. 196, 200-202 (1948). In striking down this conviction, the court in *Cole* stated:

> "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the

case as it was tried and as the issues were determined in the trial court."

Id. at 202.

The Court of Appeals' opinion below, in affirming appellant's convictions under Counts III and V for offenses distinct from those submitted the jury, also violated procedural due process under *Cole* and its progeny. Similar *Cole*/procedural due process issues have arisen most often in modern times in post-*Furman* capital cases where an appellate court upholds a death sentence based upon an aggravating circumstance that had not been submitted to nor found by the sentencing jury. *See Presnell v. Georgia*, 339 U.S. 14, 16-17 (1978).

Although all of the previously cited Missouri cases such as *Edsall* and *Bisans* do not explicitly mention procedural due process or the *Cole* decision, it is clear that this line of Missouri cases has due process underpinnings. In fact, the Missouri Court of Appeals, Eastern District, in a recent opinion, implicitly recognized that a procedural due process violation would occur under *Edsall* and *Cole* when it declined the state's invitation, in a direct appeal where the evidence was insufficient to convict the defendant of burglary, to enter a conviction of defendant on a distinct trespass offense that was not charged nor submitted to the jury. *State v. Smith*, ___ S.W.3d ___, at *4 (Mo. App. E.D. Dec. 27, 2011).

Since it is clear that appellant did not put his finger in E.M.M.'s vagina either with or without her consent[1] when she was thirteen years of age, Mr. Miller's conviction violates due process under *Cole* and *Jackson*. *See also In re Winship*, 397 U.S. 358, 364 (1970). Appellant's convictions under Counts III and V should, therefore, be reversed because no evidence was presented to support a necessary element of the charged offense as submitted to the jury. *See State v. Price*, 980 S.W.2d 143, 144 (Mo. App. E.D. 1998). *See also DeJonge v. Oregon*, 299 U.S. 353, 362 (1937) ("Conviction upon a charge not made would be sheer denial of due process."). Mr. Miller's convictions under Counts III and V for the offenses of statutory sodomy and deviate sexual assault should be vacated and he should be discharged.

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[1] Because there was no evidence presented through E.M.M.'s testimony that the charged act of digital penetration was carried out without her consent, this fact presents a separate and distinct ground for reversing appellant's conviction under Count V.

ARGUMENT II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF ALL THE EVIDENCE BECAUSE THE EVIDENCE ADDUCED AT TRIAL WAS LEGALLY INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION UNDER COUNT IV OF CHILD MOLESTATION IN THE FIRST DEGREE, BECAUSE THE STATE DID NOT PRESENT EVIDENCE SUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THE ESSENTIAL ELEMENT OF THE OFFENSE THAT APPELLANT TOUCHED THE GENITALS OF E.M.M. EITHER INSIDE OR THROUGH HER CLOTHING BETWEEN DECEMBER 3, 1997 AND DECEMBER 3, 1998, AND BECAUSE TOUCHING THROUGH THE CLOTHING DID NOT CONSTITUTE "SEXUAL CONTACT" AT THE TIME OF THE ALLEGED OFFENSE WHICH DEPRIVED APPELLANT OF HIS FOURTEENTH AMENDMENT RIGHT TO BE ACQUITTED UNLESS THE EVIDENCE ESTABLISHES PROOF OF EVERY ELEMENT OF THE OFFENSE BEYOND A REASONABLE DOUBT.

Appellant also contends that the evidence adduced at trial was legally insufficient to support his conviction under Count IV for the offense of child molestation in the first degree. Like Argument I above, the standard of review for

appellant's sufficiency of the evidence claim challenging his conviction under Count IV requires a reviewing court to determine "'whether the evidence was sufficient for reasonable persons to have found the defendant guilty as charged beyond a reasonable doubt.'" *State v. Bisans*, 104 S.W.3d 805, 807 (Mo. App. W.D. 2003) (quoting *State v. May*, 71 S.W.3d 177, 183 (Mo. App. W.D. 2002)).

Count IV of the information that charged appellant with the Class B felony of child molestation in the first degree in violation of § 566.067 R.S.Mo., alleged that appellant subjected E.M.M. to sexual contact when she was less than fourteen years of age between the dates of December 3, 1997 and December 3, 1998. (L.F. 13). In Instruction No. 8, the verdict director for Count IV, the jury was instructed:

> "As to Count IV, if you find and believe from the evidence beyond a reasonable doubt:
>
> First, that between December 3, 1997 and December 3, 1998, in the County of Harrison, State of Missouri, the defendant touched the genitals of E.M.M. through the clothing, and
>
> Second, that he did so for the purpose of arousing his own sexual desire, and
>
> Third, that E.M.M. was less than fourteen years old,
>
> then you will find the defendant guilty under Count IV of child molestation in the first degree . . ."

(*Id.* 77).

In light of the foregoing language from the charging document and the verdict directing instruction for Count IV, it was necessary for the State to prove beyond a reasonable doubt as an element of the offense that appellant touched E.M.M.'s genitals through the clothing between December 3, 1997 and December 3, 1998. According to E.M.M.'s testimony, the only incident of sexual contact that occurred during this time period as set forth in the Statement of Facts, was an incident where appellant approached her while she was sleeping on a loveseat in the farmhouse living room where appellant allegedly pulled down her shorts and then pulled down his pants and stuck his penis in between her legs. (Tr. 34). E.M.M. testified that appellant slowly moved his penis back and forth for a short period of time and then stopped and left to go back to his room or to the bathroom. (*Id.* 35).

There was no evidence presented through E.M.M.'s testimony that appellant touched her vagina either under or through her clothing at that time. When asked to provide particular details as to how appellant inappropriately touched her when she was six years old, E.M.M. testified that her father placed his hands "on my hip, my butt, he really didn't touch my vagina then." (*Id.* 34). Because E.M.M.'s testimony did not provide any evidence indicating that appellant touched her vagina either under or through her clothing between December 3, 1997 and

December 3, 1998, the evidence was clearly insufficient to support appellant's conviction under Count IV of the information because the State failed to prove this element of the offense beyond a reasonable doubt. *See State v. Euer*, 910 S.W.2d 352, 354 (Mo. App. S.D. 1995).

As was the case under Argument I, the decisions in *Bisans* and *Edsall* preclude the Court from upholding the conviction on the ground that the State could have possibly charged appellant with the same crime committed in a different manner that was not submitted to the jury, involving sexual contact between the penis of the accused and the E.M.M.'s genitals. In light of the language in the verdict directing instruction, the jury was not given the definition of sexual contact as was done with some of the other counts. (L.F. 77). As a result, the jury could not have possibly convicted appellant, despite the language of the verdict director, by finding the element of sexual conduct by penis to genital contact. *See* § 566.010 R.S.Mo. (1994). Thus, appellant's conviction should be reversed because it was based upon sexual contact that allegedly occurred in a manner that was not charged or submitted to the jury. *State v. Edsall*, 781 S.W.2d 561, 564 (Mo. App. S.D. 1989); *State v. Bisans*, 104 S.W.3d 805, 807-808 (2003). Since it is clear that appellant did not touch E.M.M.'s vagina either through or under her clothing between the dates charged under Count IV in the information and as submitted in the verdict directing instruction, Mr. Miller's conviction of the

offense of child molestation in the first degree violates due process under *Jackson v. Virginia*, 443 U.S. 307 (1979). Appellant's conviction under Count IV should, therefore, be reversed because no evidence was presented to support a necessary element of the charged offense.[2] *Bisans*, 104 S.W.3d at 808. Appellant's conviction under Count IV for the offense of child molestation in the first degree should be vacated and he should be discharged.

[2] As more fully explained under Argument V, *infra*, this conviction should also be reversed because a "touching through the clothing" was not included in the statutory definition of "sexual contact" during the time period the offense allegedly occurred. *See* §§ 566.010(3) and 566.067 R.S.Mo. (1994).

ARGUMENT III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF ALL THE EVIDENCE BECAUSE THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION UNDER COUNT VI OF SEXUAL MISCONDUCT INVOLVING A CHILD, BECAUSE THE STATE DID NOT PRESENT SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THE ESSENTIAL ELEMENT OF THE OFFENSE THAT APPELLANT KNOWINGLY EXPOSED HIS GENITALS TO THE VICTIM, WHICH DEPRIVED APPELLANT OF HIS FOURTEENTH AMENDMENT RIGHT TO BE ACQUITTED UNLESS THE EVIDENCE ESTABLISHES PROOF OF EVERY ELEMENT OF THE OFFENSE BEYOND A REASONABLE DOUBT.

Appellant also contends that the evidence adduced at trial was legally insufficient to support his conviction under Count VI for the offense of sexual misconduct involving a child. Like Arguments I and II above, the standard of review for appellant's sufficiency of the evidence claim challenging his conviction under Court VI requires this Court to determine "whether the evidence was

sufficient for reasonable persons to have found the defendant guilty as charged beyond a reasonable doubt." *Bisan,* 104 S.W.3d at 807.

Count VI of the information charged appellant with the Class D felony of sexual misconduct involving a child in violation of § 566.083 R.S.Mo., alleging that between the dates of December 3, 1997 and December 3, 1998, appellant knowingly exposed his genitals to E.M.M., who was less than 14 years of age for the purpose of arousing or gratifying the sexual desire of any person. (L.F. 14). In instruction No. 10, the verdict directing instruction for Count VI, the jury was required to find, as an essential element of the offense, that the "defendant knowingly exposed his genitals to E.M.M." (L.F. 80). It was, therefore, necessary that the State prove beyond a reasonable doubt, as an essential element of the offense, that appellant exposed himself to E.M.M. to make a submissible case to support the conviction for this offense.

However, the record is devoid of any evidence, presented through the testimony of E.M.M., that she saw appellant's penis during the incident at the farmhouse that occurred when E.M.M. was six years old. (Tr. 34-36). As noted in the statement of facts and under Argument II, E.M.M. testified that the incident that occurred in the farmhouse happened in the middle of the night while she was sleeping. (*Id.*) E.M.M.'s entire testimony regarding this incident does not provide any factual basis for the element of the offense that she observed or saw

appellant's penis before the alleged sexual contact occurred. (*Id.* 34-36). In this regard, E.M.M. testified that appellant stuck his penis in between her legs and slowly moved it back and forth. (*Id.* 34-35). E.M.M. was asked whether she remembered whether or not appellant's penis was erect or not. (*Id.* 34). Her response was that she did not remember. (*Id.*).

Prior to January 1, 1995, the crime of sexual misconduct was labeled as indecent exposure. *See* § 566.130 R.S.Mo. (1986). In 1997, the General Assembly created the offense of sexual misconduct involving a child under § 566.083, which slightly modified and expanded the prior sexual misconduct and indecent exposure crimes to criminalize the act of exposing genitals with the purpose of arousing or gratifying the sexual desire of either the perpetrator or of the victim. *See State v. Bouse*, 150 S.W.3d 326, 333-334 (Mo. App. W.D. 2004). Under both the prior and present versions of these Missouri indecent exposure statutes, it is clear that a necessary element of the offense is that some other person must actually see the defendant's exposed genitals. *See State v. Parker*, 738 S.W.2d 566, 569-570 (Mo. App. E.D. 1987) (citing *State v. Pedigo*, 176 S.W. 556, 557 (Mo. App. S.D. 1915)).

The decision in *Parker* is particularly instructive in analyzing this sufficiency of the evidence issue. In that case, the court rejected Parker's argument that indecent exposure was a lesser included offense of attempted rape. 738 S.W.2d at 569-570. In reaching this conclusion, the court found that these two

offenses had distinct elements. To sustain a conviction for indecent exposure, it is required that the perpetrator's genitals be seen by the victim. *Id.* To sustain a conviction of rape, attempted rape or any other sexual offense, the court noted that it is not necessary to establish that the perpetrator's genitals were actually observed by the victim, citing cases where rapes have occurred while the victim was asleep or unconscious. *Id.* at 570.

As noted earlier, the circumstances surrounding the alleged incident that occurred when E.M.M. was six, which happened in the middle of the night while she was sleeping, coupled with the fact that E.M.M. never testified that she actually observed appellant's penis during that encounter, clearly indicates that the evidence was legally insufficient to support an essential element of the charged offense. Thus, Mr. Miller's conviction under Count VI of the offense of sexual misconduct involving a child violates due process under *Jackson v. Virginia*, 443 U.S. 307 (1979). Appellant's conviction under Count VI should be vacated and he should be discharged because the state failed to present any evidence to support a necessary element of the charged offense.

ARGUMENT IV

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF ALL THE EVIDENCE BECAUSE THE EVIDENCE ADDUCED AT TRIAL WAS LEGALLY INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION UNDER COUNT VIII OF THE OFFENSE OF ENDANGERING THE WELFARE OF A CHILD IN THE FIRST DEGREE, BECAUSE THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THE ESSENTIAL ELEMENT OF THE OFFENSE THAT APPELLANT'S CONDUCT CONSTITUTED SEXUAL CONTACT WITH THE VICTIM BETWEEN DECEMBER 3, 2004 AND DECEMBER 3, 2005 AS CHARGED IN THE INFORMATION AND SUBMITTED TO THE JURY IN INSTRUCTION NO. 12, WHICH DEPRIVED APPELLANT OF HIS FOURTEENTH AMENDMENT RIGHT TO BE ACQUITTED UNLESS THE EVIDENCE ESTABLISHES PROOF OF EVERY ELEMENT OF THE OFFENSE BEYOND A REASONABLE DOUBT.

Appellant also contends that the evidence adduced at trial was legally insufficient to support his conviction under Count VIII for the offense of endangering the welfare of a child in the first degree. Like Arguments I through

III above, the standard of review for appellant's sufficiency of the evidence claim challenging his conviction under Count VIII requires this Court to determine "whether the evidence was sufficient for reasonable persons to have found the defendant guilty as charged beyond a reasonable doubt." *Bisans,* 104 S.W.3d at 807.

Count VIII of the information charged appellant with the Class C felony of endangering the welfare of a child in the first degree in violation of § 568.045 R.S.Mo., alleging that between the dates of December 3, 2004 and December 3, 2005, the defendant knowingly engaged in sexual conduct with E.M.M. when she was under seventeen years old "over whom defendant was a parent." (L.F. 14). Under Instruction No. 12, the jury was instructed as follows:

"As to Count VIII, if you find and believe from the evidence beyond a reasonable doubt:

> First, that between December 3, 2004 and December 3, 2005, in the County of Harrison, State of Missouri, the defendant engaged in sexual conduct with E.M.M., and

Second, that this conduct constituted sexual contact, and

Third, that E.M.M. was then less than seventeen years of age, and

Fourth, that the defendant was the parent of the child, and

Fifth, that the defendant acted knowingly with respect to the facts and circumstances submitted in this instruction,

then you will find the defendant guilty under Count VIII of endangering the welfare of a child in the first degree . . .

As used in this instruction, the term "'sexual contact'" means any touching of another person with the genitals or any touching of the genitals or anus of another person or the breast of a female person, or such touching through the clothing, for the purpose of arousing or gratifying sexual desire of any person."

(L.F. 82-83).

In light of the foregoing language from the charging document and the verdict directing instruction for Count VIII, it was necessary for the State to prove beyond a reasonable doubt as an element of the offense, that appellant engaged in conduct with the victim that meets the statutory definition of sexual contact between the dates of December 3, 2004 and December 3, 2005. During this time period, according to E.M.M.'s testimony, the only sexual acts that occurred between her and appellant were sexual intercourse and deviate sexual intercourse involving oral and anal sex. (Tr. 40-43). Thus, because the record is devoid of any evidence indicating that any act of sexual conduct distinct from sexual intercourse or deviate sexual intercourse occurred during this time period, the evidence was

legally insufficient to support appellant's conviction under Count VIII of the information because the State failed to prove an essential element of the crime charged beyond a reasonable doubt. *See State v. Givens*, 917 S.W.2d 215, 216-217 (Mo. App. W.D. 1996).

Under § 566.010 R.S.Mo. (2000), the Missouri Legislature provided separate definitions of "deviate sexual intercourse," "sexual intercourse," and "sexual contact." This statutory language clearly indicates that acts constituting "sexual contact" are distinct from "sexual intercourse" and acts defined as "deviate sexual intercourse." It is clear, therefore, that "sexual contact" is a subset of the broader category of "sexual conduct" that is limited to other sexual acts other than sexual intercourse or deviate sexual intercourse. Under settled rules of statutory construction, if the definition of "sexual contact" included acts of sexual intercourse and deviate sexual intercourse, the legislature would have said so in § 566.010(3) as it did in defining "sexual conduct" under § 566.010(2). *See, e.g., Middleton v. Mo. Dep't of Corr.*, 278 S.W.3d 193, 196 (Mo. banc 2009); *Spradlin v. City of Fulton*, 982 S.W.2d 255, 261 (Mo. banc 1998). Although "sexual conduct" encompasses all three of these types of sexual activity as defined under § 566.010(2), the jury was instructed in this case that it could convict Under Count VIII only if it found that an act of sexual contact, distinct from sexual intercourse

or deviate sexual intercourse, occurred when E.M.M. was thirteen years old. (L.F. 82-83).

As was the case under Arguments I and II, the conviction under Count VIII cannot be upheld merely because the State could have possibly charged appellant with committing the same crime in a different manner that was not submitted to the jury, by defining sexual conduct as either sexual intercourse or deviate sexual intercourse. *State v. Bisans*, 104 S.W.3d 805, 807-808 (Mo. App. W.D. 2003); *State v. Edsall*, 781 S.W.2d 561, 564 (Mo. App. S.D. 1989). Since it is clear that appellant did not engage in sexual contact as defined under § 566.010(3) with the victim during this time period, between the dates charged under Count VIII in the information and as submitted in the verdict directing instruction, appellant's conviction of the offense of endangering the welfare of a child in the first degree violates due process under *Jackson v. Virginia*, 443 U.S. 307 (1979). Appellant's conviction under Count VIII should, therefore, be reversed and he should be discharged.

ARGUMENT V

THE TRIAL COURT PLAINLY ERRED IN SUBMITTING INSTRUCTION NO. 8, THE VERDICT DIRECTING INSTRUCTION FOR THE CLASS B FELONY OF CHILD MOLESTATION IN THE FIRST DEGREE IN VIOLATION OF § 566.067 R.S.MO. (2000) CHARGED UNDER COUNT IV OF THE INFORMATION AND FURTHER ERRED IN ENTERING A JUDGMENT OF CONVICTION AND SENTENCING APPELLANT TO A TERM OF IMPRISONMENT OF TEN YEARS FOR THAT OFFENSE BECAUSE THIS INSTRUCTION ALLOWED THE JURY TO CONVICT APPELLANT OF A CRIME THAT DID NOT EXIST BETWEEN THE DATES OF DECEMBER 3, 1997 AND DECEMBER 3, 1998 WHEN THIS OFFENSE ALLEGEDLY OCCURRED AS CHARGED IN THE INFORMATION AND ALLOWED A CONVICTION BASED UPON THE ELEMENT OF TOUCHING THE GENITALS THROUGH THE CLOTHING, WHICH WAS NOT PROSCRIBED BY THE PRIOR VERSION OF THE STATUTE BECAUSE THE DEFINITION OF SEXUAL CONTACT UNDER §§ 566.010(3) AND 566.067 R.S.MO. (1994) DID NOT ENCOMPASS TOUCHING THE GENITALS OF AN UNDERAGE VICTIM THROUGH THE CLOTHING, WHICH PERMITTED THE JURY TO CONVICT APPELLANT OF A CRIME THAT DID NOT EXIST AT THE

TIME IT WAS ALLEGEDLY COMMITTED IN VIOLATION OF THE *EX POST FACTO* CLAUSES OF ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 13 OF THE MISSOURI CONSTITUTION. THE TRIAL COURT ALSO PLAINLY ERRED IN SENTENCING APPELLANT TO TEN YEARS IN PRISON FOR A CLASS B FELONY UNDER COUNT IV BECAUSE, UNDER § 566.067 R.S.MO. (1994), THIS CRIME WAS A CLASS C FELONY AT THE TIME IT WAS ALLEGEDLY COMMITTED AND THE MAXIMUM TERM OF IMPRISONMENT WAS SEVEN YEARS, WHICH ALSO DEPRIVED APPELLANT OF HIS RIGHTS SECURED BY THE *EX POST FACTO* CLAUSE BY IMPOSING A SENTENCE IN EXCESS OF THE MAXIMUM PUNISHMENT IN EFFECT AT THE TIME THE CRIME WAS ALLEGEDLY COMMITTED.

In the unlikely event that this Court does not reverse appellant's conviction under Count IV for the Class B felony of child molestation in the first degree due to the insufficiency of the evidence under Argument II, there is a separate and distinct ground for reversing that conviction. Both the underlying judgment of conviction and appellant's sentence of ten years were imposed in violation of the *ex post facto* clauses of Article I, Section 10 of the United States Constitution and Article I, Section 13 of the Missouri Constitution because the charging document

and verdict directing instruction allowed the jury to convict appellant for that offense based upon touching through the clothing, conduct that was not a crime in 1997 and 1998 because the definition of sexual contact was not expanded to include touching through the clothing until August 28, 2002. *Compare* § 566.010(3) R.S.Mo. (1994) *with* § 566.010(3) R.S.Mo. Cum. Supp. (2003). In addition, before the 2000 amendment to § 566.067, the offense of child molestation in the first degree was a Class C felony. *Compare* § 566.067.2 R.S.Mo. (1994) *with* § 566.067.2 R.S.Mo. (2000); *see also State v. Hurst*, 195 S.W.3d 537, 539-540 (Mo. App. E.D. 2006). Thus, there are two Constitutional violations impacting both the underlying conviction and sentence imposed under Count IV. Because this Constitutional violation involving the *ex post facto* clause was not preserved at trial, appellant seeks review of this issue for plain error under Rule 30.20. *See State v. Heckenlively*, 83 S.W.3d 560, 568-569 (Mo. App. W.D. 2002); *State v. Jackson*, 896 S.W.2d 77, 84 (Mo. App. W.D. 1995).

The *ex post facto* clause of the United States and Missouri Constitutions prohibits any law that "provides for punishment for an act that was not punishable when it was committed or that imposes an additional punishment to that in effect at the time the act was committed." *Kelly v. Gammon*, 903 S.W.2d 248, 250 (Mo. App. W.D. 1995); *Cooper v. Mo. Bd. of Prob. & Parole*, 866 S.W.2d 135, 137-138 (Mo. banc 1993); *Weaver v. Graham*, 450 U.S. 24, 28 (1981). To establish an *ex*

post facto violation, the Court in *Kelly* noted that two elements must be established: the challenged law must be retrospective and it must disadvantage the defendant. 903 S.W.2d at 250.

There can be no legitimate dispute that applying the 2000 and 2002 amendments to §§ 566.067 and 566.010 to crimes committed in 1997 or 1998 is retrospective because the alleged crime was obviously committed before the effective dates that these statutes were amended. *Id.* It is also self evident that retroactively applying legislation enacted in 2000 and 2002 to a crime committed in either 1997 or 1998 disadvantaged appellant by permitting his conviction for conduct not encompassed by the prior statute and by increasing the length of his sentence. *Id.*

As noted earlier in the Statement of Facts and under Argument II, Count IV of the information charged appellant with the Class B felony of child molestation in the first degree, alleging that appellant subjected E.M.M. to sexual contact when she was less than fourteen years of age between the dates of December 3, 1997 and December 3, 1998. (L.F. 13). In Instruction No. 8, the jury was instructed, regarding the first element of the offense, that it could convict appellant as charged if it found beyond a reasonable doubt that the allegation of sexual contact involved appellant touching the genitals of E.M.M. through the clothing for the purpose of arousing his own sexual desire. (*Id.* 77).

Before the 2000 amendment to § 566.067 R.S.Mo. (1994), this offense was a Class C felony requiring the state to prove that the defendant subjected a person under twelve years old to sexual contact. (*Id.*) Before August 28, 2002, sexual contact was defined as "any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, for the purpose of arousing or gratifying sexual desire of any person." § 566.010(3) (1994). In 2002, the definition of sexual contact was expanded to include the act of touching of the genitals, anus, or breast of a female underage victim "through the clothing." § 566.010.(3) R.S.Mo. Cum. Supp. (2003). These amendments to the definition of sexual contact are highlighted in Note 7 of the Notes on Use under MAI-CR 3d. 320.17, indicating that the "through the clothing" definition of sexual contact should not be used for offenses committed between January 1, 1995 and August 28, 2002 because the expanded definition of sexual contact to include touching through the clothing was not included in the definition of sexual contact during that time period.

In light of the foregoing facts and applicable law, it is crystal clear that appellant's conviction under Count IV for the offense of child molestation in the first degree in violation of § 566.067 R.S.Mo. (2000) must be set aside because the conviction was imposed in violation of the Constitutional prohibition against *ex post facto* laws because appellant's conviction was based upon the conduct of

touching through the clothing that did not meet the statutory definition of sexual contact at the time the crime was alleged to have been committed. Thus, this case presents a textbook case of an *ex post facto* violation involving retroactive punishment for an act that was not punishable at the time it was committed. *See State v. Griffin*, 172 S.W.3d 861, 865 (Mo. App. S.D. 2005).

In *Griffin*, the Southern District confronted a situation similar to that presented here where the defendant was charged and convicted of a sex offense that carried a greater penalty based upon amendments to Chapter 566 enacted after his crime was allegedly committed. *Id.* The court in *Griffin* declined to reverse the conviction under the plain error rule because the facts proven at trial indicated that appellant committed a sex offense containing a lesser range of punishment during the charged time period. *Id.* However, the court granted Griffin sentencing phase relief under the plain error rule, citing *State v. Heckenlively*, 83 S.W.3d 560 (Mo. App. W.D. 2002), because the retroactive application of the amended version of the statute imposing a greater penalty on Griffin violated the *ex post facto* clause. *Id.*

Although the facts noted above clearly justify reversal of appellant's underlying conviction, it is also undeniable that appellant's sentence of ten years imprisonment for a crime constituting a Class C felony at the time of the offense is plain error under *Griffin* and *Heckenlively* because this sentence exceeded the

statutory maximum punishment of seven years in existence when the crime was allegedly committed. Therefore, appellant's conviction and sentence of ten years imprisonment under Count IV should be reversed.

ARGUMENT VI

THE TRIAL COURT PLAINLY ERRED IN FAILING TO, *SUA SPONTE*, DECLARE A MISTRIAL AFTER THE PROSECUTION INJECTED INADMISSIBLE EVIDENCE DURING THE DIRECT EXAMINATION OF DEPUTY RIMMER, THE CROSS EXAMINATION OF APPELLANT, AND DURING CLOSING ARGUMENT THAT REFERRED TO APPELLANT'S POST-ARREST SILENCE AND HIS FAILURE TO VOLUNTEER AN EXCULPATORY EXPLANATION TO HIS DAUGHTER'S ALLEGATIONS AFTER HE HAD RECEIVED MIRANDA WARNINGS, WHICH VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS AND AGAINST SELF INCRIMINATION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 19 OF THE MISSOURI CONSTITUTION.

It is well settled that a violation of the self-incrimination and due process clauses of the Fifth and Fourteenth Amendments occurs where the prosecution utilizes a defendant's silence, at the time of his arrest and after he received warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), as either affirmative proof of a defendant's guilt or to impeach the credibility of the defendant during his testimony. *See, e.g.*, *Doyle v. Ohio*, 426 U.S. 610, 619-620

(1976). It also constitutes a *Doyle* violation where the state presents evidence or arguments that a defendant failed to volunteer an exculpatory statement or deny or explain an incriminating fact after his arrest where law enforcement did not ask the defendant any questions on this subject. *Id.* at 613-614; *see also State v. Stuart*, 456 S.W.2d 19, 22 (Mo. banc 1970); *State v. Richardson*, 724 S.W.2d 311, 314-315 (Mo. App. S.D. 1987).

As previously noted in the Statement of Facts, appellant has alleged three separate *Doyle* violations that occurred during the direct examination of Deputy Rimmer (Tr. 109-110), the cross-examination of appellant (*Id.* 251-252), and during the prosecution's closing argument. (*Id.* 286-287). Because these *Doyle* violations were not properly preserved by trial counsel through contemporaneous objections and the motion for a new trial, this Court must review this claim under the plain error rule embodied in Rule 30.20. *State v. Dexter*, 954 S.W.2d 332, 340-343 (Mo. banc 1997).

During Deputy Rimmer's testimony, the prosecutor elicited testimony from Rimmer that he read appellant his *Miranda* rights at the kitchen table at the farmhouse while Deputy Eckerson searched the residence. (Tr. 109-110). Deputy Rimmer testified that he advised appellant of his right to remain silent, as well as his right to talk to a lawyer and have a lawyer present while being questioned. (*Id.*) In response to the prosecutor's question whether appellant elected to waive

his Constitutional rights to counsel and to remain silent, Deputy Rimmer indicated that appellant declined to waive his *Miranda* rights. (*Id.* 110). It is clear that this line of inquiry constituted a *Doyle* violation by creating an inference of guilt due to the fact that the defendant invoked his *Miranda* rights and refused to speak to police regarding the accusations against him. *State v. Benfield*, 522 S.W.2d 830, 834-835 (Mo. App. S.D. 1975); *see also State v. Zindel*, 918 S.W.2d 239, 241-244 (Mo. banc 1996) (plain error case).

The second and third *Doyle* violations occurred during the prosecution's cross-examination of appellant and during closing argument. In both instances, the prosecution suggested that appellant was guilty and that his entire trial testimony was not believable because appellant did not give the police specific details about his activities on the weekend of January 21 and 22 of 2006. (Tr. 251-252; 286-287). Undoubtedly, the prosecution raised the inference in the jury's mind that because appellant did not tell the police that he was working on the farm that weekend with his father, sons, and Don Shenberger, that the defense evidence in this vein that cast doubt on E.M.M.'s credibility, was fabricated. (*Id.*)

This line of questioning and closing argument violated appellant's Constitutional rights under *Doyle* in light of the fact that the police never asked appellant any specific questions or provided him any details regarding the allegations that he was accused of sexual abuse that occurred in the farmhouse on

that weekend. (*Id.* 251). Thus, the substance of this cross-examination and subsequent argument violated appellant's Constitutional rights by using his failure to deny or explain, after his arrest, an incriminating fact about which no question was asked. *Stuart*, 456 S.W.2d at 22; *State v. Roth*, 549 S.W.2d 652, 653-655 (Mo. App. W.D. 1977).

Under the plain error rule, this Court has stated that: "Once a *Doyle* violation has been found . . .," reversal is required under the plain error rule if "the evidence had a decisive effect on the jury." *State v. Dexter*, 954 S.W.2d at 340. In determining the prejudicial effect of a *Doyle* violation upon the jury, this Court in *Dexter* stated that four factors must be considered: "(1) whether the government made repeated *Doyle* violations, (2) whether any curative effort was made by the trial court, (3) whether the defendant's exculpatory evidence is transparently frivolous, and (4) whether the other evidence of the defendant's guilt is otherwise overwhelming." *Id.*; *see also State v. Brooks*, 304 S.W.3d 130, 137 (Mo. banc 2010).

In considering all of these factors in the context of the record in this case, it is clear that all four factors weigh heavily in favor of reversal of appellant's convictions under Rule 30.20. Under the first factor, there were three separate *Doyle* violations by the prosecution which occurred during prosecution's case, during the defense's case, and during closing argument. Under the second factor,

no curative efforts were made to lessen the prejudice of these Constitutional violations by the trial court. In fact, the trial court overruled defense counsel's objection to the *Doyle* and *Stuart* violations during closing argument. (Tr. 287).

Under the third and fourth factors, it is clear from the totality of the record that appellant put on a strong defense that resulted in his acquittal on nearly half the charges against him and that the prosecution's evidence of guilt was far from overwhelming. As noted earlier, there was absolutely no physical evidence to corroborate E.M.M.'s allegations that she had been repeatedly raped, sodomized and sexually abused by the defendant over a period of eight years when she was between the ages of six and fourteen. In fact, the medical evidence, provided by the testimony from Nurse Williams, was exculpatory. (Tr. 197-208). Thus, the verdict in this case boiled down to whether the jury believed the testimony of E.M.M. or appellant. *See State v. Nolan*, 595 S.W.2d 54, 56-57 (Mo. App. S.D. 1980) (plain error found in rape case due to *Doyle* violation where jury's verdict hinged upon credibility of prosecutrix and defendant).

As this Court concluded in *Dexter*, reversal under the plain error rule is warranted in this case because of multiple and repeated *Doyle* violations and the lack of curative efforts by the court. 954 S.W.2d at 340-342. Coupled with the inescapable conclusion that the jury considered the improperly admitted *Doyle*

evidence to be significant[3] and the fact that, in light of the exculpatory evidence, the evidence of appellant's guilt was not overwhelming, reversal is required under the plain error rule. *Id.* at 343.

Like the *Dexter* and *Brooks* cases, the repeated *Doyle* violations here resulted in a manifest injustice. Thus, appellant's convictions must be reversed and a new trial should be ordered.

[3] As noted earlier, the jury, during deliberations, asked the trial court for a copy of appellant's statement to the police. (Tr. 292-293).

ARGUMENT VII

THE TRIAL COURT ERRED IN SUSTAINING THE PROSECUTION'S OBJECTION AND PRECLUDING DEFENSE WITNESS DON SHENBERGER FROM TESTIFYING AT TRIAL BEFORE THE JURY AS A DISCOVERY SANCTION UNDER RULE 25 BECAUSE SHENBERGER WAS NOT TIMELY OR FORMALLY ENDORSED AS A WITNESS BY DEFENSE COUNSEL BECAUSE THE STATE ALREADY HAD NOTICE REGARDING THE SUBSTANCE OF HIS TESTIMONY AND WAS NOT SUFFICIENTLY PREJUDICED TO JUSTIFY THIS SEVERE DISCOVERY SANCTION, WHICH DENIED APPELLANT HIS SIXTH AND FOURTEENTH RIGHT TO PRESENT A COMPLETE DEFENSE TO THE CHARGES.

Appellant contends that the trial court erroneously excluded the material testimony of defense witness Don Shenberger, which deprived appellant of his due process right to present a complete defense by preventing him from further undermining the credibility of E.M.M.'s testimony in the eyes of the jury. As a general rule, the decision to exclude evidence as a sanction for the violation of discovery rules is left to the discretion of the trial court. *See, e.g., State v. Walkup*, 220 S.W.3d 748, 757 (Mo. banc 2007). However, this Court in *Walkup* stated: "The sanction [of witness exclusion] is to be used sparingly against a defendant in

a criminal case because of the trial court's duty to ensure a fair trial by allowing the defendant to put on a defense. A defendant in a criminal case has a constitutional right to present a complete defense. When it comes to applying evidentiary principles or rules, the erroneous exclusion of evidence in a criminal case creates a rebuttable presumption of prejudice. The State may rebut this presumption by proving that the error was harmless beyond a reasonable doubt." *Id.* (citations omitted).

In reviewing the propriety of the discovery sanction of exclusion of testimony by a trial court, a reviewing court must examine the effect of the ruling on both the state and the defense. *State v. Simonton*, 49 S.W.3d 766, 775 (Mo. App. W.D. 2001). Appellate review of such a sanction involves a two part process in which a reviewing court must first address any prejudice suffered by the state as a result of the late disclosure of the witness and whether the sanction of exclusion of testimony resulted in fundamental unfairness to the defendant. *Id.* at 781.

Under the facts presented here, it is clear that, in assessing the prejudice to both the State from the failure to endorse Shenberger and to the defense resulting from the trial court's exclusion of Shenberger's testimony, the trial court abused its discretion in excluding the testimony in its entirety. There is absolutely no evidence that the State was caught by surprise by the late endorsement of Mr. Shenberger. There was evidence in the record that the State was aware of the

substance of Mr. Shenberger's testimony well in advance of trial through its pre-trial interview of appellant's father, Forrest Miller. (Tr. 134). In addition, the State cannot claim unfair surprise because E.M.M. was cross-examined by defense counsel about the events of the weekend of January 21-22, 2006 and E.M.M. was explicitly asked by defense counsel whether Don Shenberger was present at the farm that weekend. (*Id.* 68). Thus, this is not a case of "trial by ambush," where the trial court was completely within its discretion to exclude a defense witness where the identity and the subject matter of the proposed testimony of the unendorsed witness came as a complete surprise to the state and prejudiced the prosecution's ability to present its case. *See State v. Martin*, 103 S.W.3d 255, 260-261 (Mo. App. W.D. 2003).

Instead, this case presents a situation more analogous to situations addressed in *Simonton* and *Walkup*, where it was clear that the prosecution knew of the identity and the subject matter of the testimony of the witness whose testimony was excluded as a sanction under Rule 25 due to a purported discovery violation. Rather than impose the draconian remedy of exclusion of this testimony, the trial court here did not even consider whether the State's right to a fair trial could have been preserved by allowing a brief continuance in order to allow the State to interview Mr. Shenberger before he delivered his testimony. *Simonton*, 49 S.W.3d at 782-783. This Court has held that where the prejudice to the State is either

nonexistent or negligible, the imposition of the drastic sanction of witness exclusion is inappropriate. *Martin*, 103 S.W.3d at 260. As in *Simonton*, the state "was fully aware that [Don Shenberger] was a potential witness." 49 S.W.3d at 783

Since the State cannot provide any argument as to how the preparation or presentation of its case was prejudiced by trial counsel's failure to formally endorse Mr. Shenberger, reversal is warranted if appellant can establish that he was prejudiced by the exclusion of Shenberger's testimony. *Id.* at 783. As the Missouri Supreme Court stated in *Walkup*, the erroneous exclusion of evidence in this situation creates a rebuttable presumption of prejudice and the state may rebut this presumption by proving that the error was harmless beyond a reasonable doubt. *Walkup*, 220 S.W.3d at 757-758. Viewing Mr. Shenberger's testimony as presented in the offer of proof, coupled with the fact that Mr. Shenberger was a disinterested witness who had no reason to lie to help appellant's defense, it is clear that appellant was prejudiced because, apart from the medical testimony, Shenberger provided the only additional testimony from a non-relative undermining E.M.M.'s credibility.

In assessing prejudice, it is also important to keep in mind that this Court cautioned that the wholesale exclusion of a defense witness' testimony is an extreme remedy that should be rarely invoked because doing so may violate a

defendant's due process right to present a complete defense to the charges. *See State v. Mansfield*, 637 S.W.2d 699, 703 (Mo. banc 1982). The Sixth and Fourteenth Amendments also preclude state trial courts from mechanistically or arbitrarily applying state court rules of evidence or criminal procedure to preclude a defendant from presenting relevant and material evidence in his own defense. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 690-691 (1986); *Michigan v. Lucas*, 500 U.S. 145, 146, 149-153 (1991); *Taylor v. Illinois*, 484 U.S. 400, 414-415 (1988). The rule in *Taylor* requires reversal if a "balancing of interests" test reveals that a state discovery sanction involving exclusion of testimony, as here, is arbitrary or disproportionate to the purposes this sanction was designed to protect. *LaJoie v. Thompson*, 217 F.3d 663, 670-672 (9th Cir. 2000).

Under this analytical framework, Mr. Shenberger's testimony would have, when viewed in conjunction with the other admissible evidence, including the medical evidence, cast further doubt upon the believability of E.M.M.'s story that she was repeatedly sexually assaulted by her father over an eight year period. Thus, there is a reasonable probability that the jury would have reached a different outcome had they heard Mr. Shenberger's testimony. *Walkup*, 220 S.W.3d at 758. Appellant's convictions must be reversed and a new trial should be ordered.

ARGUMENT VIII

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE DURING THE DIRECT EXAMINATION OF E.M.M. AND DURING THE CROSS-EXAMINATION OF APPELLANT, OVER APPELLANT'S OBJECTION, EVIDENCE OF OTHER BAD ACTS THAT DID NOT RESULT IN CONVICTION INVOLVING APPELLANT'S ALLEGED PRIOR ASSAULTIVE BEHAVIOR TOWARD HIS WIFE AND SONS AND IN PERMITTING QUESTIONING DURING APPELLANT'S CROSS-EXAMINATION THAT SUGGESTED THAT APPELLANT ENGAGED IN SOCIAL SECURITY FRAUD, WHICH DENIED APPELLANT HIS DUE PROCESS RIGHT TO A FAIR TRIAL BY INVITING THE JURY TO CONVICT BASED UPON IRRELEVANT AND INADMISSIBLE CRIMINAL PROPENSITY EVIDENCE IN VIOLATION OF ARTICLE I, SECTIONS 17 AND 18(A) OF THE MISSOURI CONSTITUTION.

This point of error alleges that, during its case in chief, cross-examination of appellant, and in argument, the State committed reversible error by injecting evidence of uncharged bad acts. During its direct examination of E.M.M. and during argument, the State elicited evidence that appellant had allegedly assaulted his ex-wife and sons and that this explained why E.M.M. did not come forward earlier with her allegations of sexual abuse against her father. (Tr. 48-51). Based

upon this testimony, the prosecution contended during closing arguments that this abuse was not reported earlier by E.M.M. because appellant "was brutal to her mother and brothers." (*Id.* 264-265).

During the cross-examination of appellant, the prosecutor asked appellant if he received social security disability checks while he was physically able to work, suggesting that he committed some sort of fraud against the federal government by receiving benefits to which he was not legally entitled. (*Id.* 248-250). During closing argument, the State again mentioned that appellant was receiving social security disability payments, suggesting that he was not legally entitled to them because he was physically able to work on the farm. (*Id.* 287).

The prosecution's use of these uncharged crimes or other acts of misconduct, as noted above, violates the well settled rule embodied in the Missouri Constitution that prior bad acts are inadmissible, absent a few well delineated exceptions, because this evidence tends to allow the jury to convict by showing a defendant's criminal propensity. *See, e.g., State v. Ellison*, 239 S.W.3d 603, 608 (Mo. banc 2007). In reviewing this claim, this Court must consider whether the trial court has abused its discretion in admitting this evidence. Evidence of uncharged bad acts are inadmissible unless they are both logically and legally relevant to establish directly the accused's guilt of the charges for which he is on trial. *State v. Burns*, 978 S.W.2d 759, 760 (Mo. banc 1998); *State v. Reese*, 274

S.W.2d 304, 307 (Mo. banc 1954). Where such evidence is not logically and/or legally relevant, the trial court abused its discretion in admitting this evidence and reversal is required unless a reviewing court determines that this error was harmless. *State v. Chism*, 252 S.W.3d 178, 185 (Mo. App. W.D. 2008).

This Court has stated that evidence of other bad acts are admissible to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) identity. Unless the evidence falls within one of these five categories or is otherwise logically and legally relevant to some issue in the case, prior uncharged misconduct is inadmissible. *State v. Bernard*, 849 S.W.2d 10, 13 (Mo. banc 1993).

Neither the evidence of appellant's alleged assaultive behavior toward members of his family, nor the allegations of social security fraud fall within any of these five recognized exceptions for admissibility under *Bernard* and other prevailing caselaw. Regarding the prior alleged assaults against his ex-wife and sons, the State will undoubtedly argue that the evidence was logically relevant because it would tend to explain why E.M.M. did not report the alleged crimes for several years because she was afraid of her father. However, even if this evidence was logically relevant, it is clear that this evidence was not legally relevant because its prejudicial effect outweighed its probative value. *See Burns*, 978 S.W.2d at 760. The general rule in cases involving prior acts alleging physical or sexual

abuse is, that even if the evidence is logically relevant, the evidence does not meet the legal relevance test when intent is not a legitimate issue in the case. *State v. Wallace*, 943 S.W.2d 721, 724 (Mo. App. W.D. 1997). Another factor weighing against a finding of legal relevance here is the fact that the defense did not offer any evidence or make any argument suggesting that the delay in reporting the alleged acts of sexual abuse gave the jury a reason to doubt E.M.M.'s believability and credibility. (Tr. 269-282). Instead, defense counsel argued to the jury that E.M.M. lied because she was upset about her parents' divorce, her brothers' preferences to live with appellant, and because appellant was dating a woman E.M.M. hated. (*Id.* 269).

Regarding the State's injection of evidence that appellant committed some sort of social security fraud, the argument is much stronger that this evidence lacked any logical or legal relevance to the crimes for which appellant was charged. Whether the suggestion that appellant somehow received federal disability benefits to which he was not entitled was true or not, the State's behavior in injecting this irrelevant issue before the jury was a pernicious tactic to unfairly impugn appellant's character and destroy his credibility through the use of inadmissible criminal propensity evidence suggesting that appellant was an immoral person. *See, e.g., State v. Spencer*, 472 S.W.2d 404, 405 (Mo. 1971). This use of prior uncharged misconduct evidence clearly violates Article I,

Sections 17 and 18(a) of the Missouri Constitution. *Burns*, 978 S.W.2d at 760; *see also State v. Vorhees*, 248 S.W.3d 585 (Mo. banc 2008).

The prejudice arising from this line of inquiry suggesting that appellant engaged in social security fraud is unquestionable. The admission of irrelevant evidence of prior bad acts is presumed to be prejudicial because it presents the danger of allowing the jury to use it for the unconstitutional purpose of showing the propensity of the defendant to commit crimes. *State v. Barriner*, 34 S.W.3d 139, 144 (Mo. banc 2000). Where such evidence is injected through a question to the defendant in cross-examination, a prosecutor commits reversible error simply by asking a question with sufficient detail to allow a jury to infer that the prosecutor has a basis for his knowledge of a prior crime committed by the defendant. *See State v. Dunn*, 577 S.W.2d 649, 651-653 (Mo. banc 1979). Thus, even if the defendant denies committing the prior bad act during cross-examination, the damage is done. *Id.*

The prejudice arising from both the evidence of the prior assaultive behavior and the suggestion of social security fraud was exacerbated by the fact that the prosecution referred to both of these alleged instances of uncharged misconduct during closing argument. (Tr. 264-265, 287). Coupled with the fact that E.M.M.'s testimony was not corroborated in any manner by any other witnesses or physical evidence, appellant was clearly prejudiced in light of the amount of the erroneously

admitted evidence and "the extent to which the evidence was [referenced] during the trial." *State v. Blakey*, 203 S.W.3d 806, 815 (Mo. App. S.D. 2006). The volume and emphasis placed upon the prior bad acts evidence distinguishes this case from *Chism,* where the court found harmless error because the inadmissible evidence was not mentioned during the state's closing argument and the victim's testimony was corroborated with physical evidence and by other witnesses. 252 S.W.3d at 186. Appellant's convictions should be reversed.

ARGUMENT IX

THE TRIAL COURT PLAINLY ERRED IN FAILING TO, *SUA SPONTE*, DECLARE A MISTRIAL DURING CLOSING ARGUMENT WHEN THE PROSECUTOR INJECTED AND ARGUED FACTS NOT IN EVIDENCE AS EVIDENCE OF GUILT REGARDING THE PURPORTED TEMPERATURE AT THE SCENE OF THE CRIME ON THE DATES OF JANUARY 21 AND 22 OF 2006 BECAUSE THESE ARGUMENTS WERE BASED UPON FACTS NOT IN EVIDENCE AND WERE CLEARLY CALCULATED TO PREJUDICE APPELLANT BY UNDERMINING HIS CREDIBILITY IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE UNITED STATES AND MISSOURI CONSTITUTIONS.

It is axiomatic that the State, during closing argument, may not argue facts outside of the record because such arguments amount to unsworn testimony by the prosecutor that is not subject to cross-examination. *See, e.g.*, *State v. Storey*, 901 S.W.2d 886, 900-901 (Mo. banc 1995) (citing Mo. Sup. Ct. R. 4.3.4 and *Berger v. United States*, 295 U.S. 78, 88 (1935)). The prosecution's closing arguments must comport with the evidence and the reasonable inferences that can be drawn therefrom. *State v. Lawson*, 627 S.W.2d 901, 903 (Mo. App. W.D. 1982). It is also improper for the prosecutor to express opinions implying awareness of facts not available for the jury's consideration. *State v. Moore*, 428 S.W.2d 563, 566

(Mo. 1968). There have been several cases where this Court has found that prosecution arguments bringing up and emphasizing facts outside of the evidentiary record constitutes reversible error. *See, e.g., State v. Williams*, 646 S.W.2d 107, 109-110 (Mo. banc 1983); *State v. Mayfield*, 506 S.W.2d 363, 364-365 (Mo. 1974).

In addition to the improper arguments the prosecution delivered regarding post-arrest silence and uncharged misconduct, the prosecution also attempted to attack appellant's credibility by arguing about the temperature during the weekend of January 21-22, 2006. (Tr. 266-267). The prosecutor delivered this argument despite the fact the trial court sustained defense counsel's objection to this line of inquiry during the cross-examination of appellant because the prosecution did not present any admissible evidence regarding the actual temperature. (*Id.* 241-244).

Because defense counsel did not object to this improper argument regarding the temperature, nor include it in the motion for new trial, this Court may review this claim for plain error under Rule 30.20. Although a finding of plain error resulting from improper prosecution arguments is unusual, it is certainly not unprecedented. *See State v. Taylor*, 216 S.W.3d 187, 195 n.11 (Mo. App. E.D. 2007); *State v. Stockbridge*, 549 S.W.2d 648 (Mo. App. W.D. 1977); *State v. Heinrich*, 492 S.W.2d 109 (Mo. App. W.D. 1973).

Under this legal framework, it is clear that the prosecutor, in utter disregard of the trial court's prior evidentiary ruling, attempted to inject facts outside the record to attack appellant's credibility in the eyes of the jury. In light of the trial court's prior ruling, coupled with the fact that the verdict in this case boiled down to a credibility contest between E.M.M. and appellant, the trial court should have taken the extraordinary step of intervening to prevent this irrelevant and extraneous factor from being considered by the jury in assessing whether to believe appellant's testimony. Thus, even under the deferential plain error rule, this improper argument, particularly when coupled with the other improper arguments, likely had a decisive impact in the case necessary to establish appellant's right to a new trial under the plain error rule. *See State v. Burnfin*, 771 S.W.2d 908, 912-913 (Mo. App. W.D. 1989). Thus, appellant's convictions must be reversed.

ARGUMENT X

THE TRIAL COURT ERRED IN FAILING TO SUSTAIN APPELLANT'S MOTION FOR NEW TRIAL BECAUSE THE CUMULATIVE EFFECT OF EACH OF THE AFOREMENTIONED ERRORS SO INFECTED THE PROCEEDINGS WITH UNFAIRNESS THAT ELEMENTARY PRINCIPLES OF JUSTICE DEMAND THAT APPELLANT RECEIVE A SECOND AND UNTAINTED TRIAL.

In appropriate circumstances, courts of this state have recognized that a criminal defendant is entitled to a reversal of his conviction because the cumulative effect of multiple errors injected sufficient prejudice into the case to warrant a new trial. *State v. Burnfin*, 771 S.W.2d 908, 912-913 (Mo. App. W.D. 1989); *State v. Whitman*, 788 S.W.2d 328, 336 (Mo. App. E.D. 1990). The United States Supreme Court has also recognized the vitality of a cumulative error analysis in *Kyles v. Whitley*, 514 U.S. 419 (1995). In *Kyles*, the Supreme Court granted a capital prisoner a new trial based upon the cumulative prejudice resulting from multiple violations of due process resulting from the state's failure to reveal exculpatory evidence to defense counsel. *Id.* at 436-440. Similarly, the Court of Appeals granted a new trial in the *Burnfin* case because of the prejudice resulting from multiple instances of prosecutorial misconduct. 771 S.W.2d at 913.

The facts of this case cry out for the application of a cumulative error analysis on the ultimate question of prejudice. As the discussion of the aforementioned nine points of error illustrate, appellant's trial was a comedy, or more appropriately, a tragedy of errors. There were several clearcut and obvious errors in the manner in which the charges were brought and the jury was instructed, which undermined the integrity of the fact finding process and the reliability of the jury's verdict. In addition, there were multiple instances of governmental misconduct involving improper comments upon appellant's post-arrest silence, improper use of prior bad acts/propensity evidence, and improper arguments for guilt based upon impeaching evidence that was previously ruled to be inadmissible by the trial court during appellant's trial testimony.

Even if this Court cannot conclusively determine that the prejudice flowing from each of these errors would individually warrant a new trial, their cumulative impact resulted in substantial prejudice to appellant's due process right to a fair trial. To allow these convictions to stand despite these numerous and glaring errors would be a travesty of justice. This Court should, therefore, reverse appellant's convictions and order a new trial.

CONCLUSION

For the reasons advanced under Arguments I through IV, appellant's convictions under Counts III, IV, V, and VIII should be reversed and appellant should be ordered discharged. For the reasons advanced under Arguments V through X, all of appellant's remaining convictions should be reversed and the case should be remanded for a new trial.

Respectfully submitted,

/s/ Kent E. Gipson
KENT E. GIPSON, #34524
Law Office of Kent Gipson, LLC
121 East Gregory Blvd.
Kansas City, Missouri 64114
816-363-4400 • FAX 816-363-4300
kent.gipson@kentgipsonlaw.com

ATTORNEY FOR APPELLANT

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 17,169 words, excluding the cover, table of contents, table of authorities, jurisdictional statement, this certification and the appendix, as determined by Microsoft Word software; and,

2. I electronically filed the foregoing with the Clerk of the Missouri Supreme Court using the CM/ECF system.

3. That an electronic notification of the filing of this substitute brief was sent to all counsel of record.

/s/ Kent E. Gipson
KENT E. GIPSON, #34524
LAW OFFICES OF KENT GIPSON, LLC
121 East Gregory Blvd.
Kansas City, Missouri 64114
816-363-4400 • FAX 816-363-4300
kent.gipson@kentgipsonlaw.com

ATTORNEY FOR APPELLANT