No. SC95481

In the
Missouri Supreme Court

STATE OF MISSOURI,

Respondent,

v.

ANGELO JOHNSON,

Appellant.

Appeal from the St. Louis County Circuit Court
21st Judicial Circuit
The Honorable Thomas J. Prebil, Judge

SUBSTITUTE RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Appellant, Angelo R. Johnson, was charged by indictment (LF 6). A superseding indictment was subsequently filed, adding new charges (LF 7). Ultimately, an information in lieu of indictment was filed, charging appellant, as a predatory sexual offender, with four counts of first degree statutory rape, six counts of first degree statutory sodomy, and three counts of incest (LF 10, 21-25). Appellant waived jury sentencing (LF 10; Tr. 39-42). On May 5, 2014, appellant's case went to trial before a jury in the Circuit Court of St. Louis County, the Honorable Thomas J. Prebil presiding (Tr. 8, 30).

Viewed in the light most favorable to the verdict, the evidence adduced at trial showed the following:

DP was born in June, 1988 (Tr. 299). Appellant was her stepfather (Tr. 300). DP was less than five years old when appellant became a part of the family (Tr. 300). When DP was about five or six years old, appellant started touching her sexually although he did not penetrate her at that time (Tr. 302). Appellant put his mouth on her vagina (Tr. 304). He also put his penis in her mouth (Tr. 305). He also used his fingers and lubrication to touch her sexually (Tr. 305). Eventually, he put his penis in her vagina (Tr. 303).

One time RJ, DP's younger sister, walked in on appellant and DP having sexual intercourse (Tr. 229). DP was in a "dog position" and appellant

was on his knees, behind her, having sex with her (Tr. 230). RJ was in the third or fourth grade when she witnessed this (Tr. 230). DP was less than ten years old when this happened (Tr. 230). DP did not have her own bed; she slept with appellant (Tr. 230-231, 306). RJ and her younger sister, LJ, had bunk beds in appellant's room (Tr. 231, 306).

DE was appellant's oldest biological son and was older than the girls (Tr. 363-364). DE left home when he was 19 (Tr. 364). DE was not biologically related to any of the girls except the youngest, LJ, who were both fathered by appellant (Tr. 365). DE said there had always been rumors about appellant and DP having sex (Tr. 367). Once when DE was in eighth grade, he was outside playing (Tr. 367-368). He came in the house for something and found appellant in the house alone with DP (Tr. 368). DE could hear sexual noises coming from appellant's bedroom; he could hear the bed hitting the wall and could hear DP moaning (Tr. 368). DE recognized his sister's voice (Tr. 377). DE said that people from the Children's Division would come to the house to investigate allegations of molestation and sexual abuse, but the children always denied it taking place (Tr. 369-370).

When DP was 13, appellant impregnated her (Tr. 303, 306). He took her to Granite City, Illinois to get an abortion (Tr. 303). Appellant told her not to say that he did it because it would tear the family apart and the whole

family would hate her (Tr. 304). After the abortion, appellant got a vasectomy "so he wouldn't make any more mistakes." (Tr. 307).

Appellant told DP that he had sex with her because he did not want her to go out and "mess with young boys" and so, if she had any sort of sexual urge, she should come to him (Tr. 305-306). DP left the home when she was sixteen because of the abuse (Tr. 301).

After DP left, appellant would get angry when RJ talked about her (Tr. 233). Appellant told RJ not to cry over that "bitch" because she was trying to break up the family (Tr. 233).

RJ was also one of appellant's stepdaughters; she was born in February, 1991 (Tr. 225-226). The girls' mother was "in and out of the house" and "was never around." (Tr. 227). Appellant started molesting RJ when she was in sixth grade (Tr. 228). The first time it happened, appellant called RJ into the room (Tr. 228). Appellant started kissing her and then had RJ strip down (Tr. 229). Appellant touched her "all over" in her private area and also put his mouth on her vagina (Tr. 229). He also put his penis inside her vagina and her mouth (Tr. 231). This took place in appellant's room (Tr. 231).

One time, RJ's younger sister, LJ, walked in on RJ and appellant (Tr. 232, 390). She saw RJ, naked, propped up on pillows, lying on her stomach (Tr. 232, 390). Appellant was behind her, his pants were down, and his shirt

was off (Tr. 232, 390). Appellant pushed LJ out of the room and then went back to bed (Tr. 232). Appellant asked RJ if she thought LJ saw them (Tr. 232). RJ said she thought LJ had seen them. Appellant called LJ back into the room and told her to take her pants off (Tr. 232, 391). Appellant then acted like he was putting medicine in LJ so she would think that that was what he had been doing to RJ (Tr. 232, 391). Appellant put his fingers in RJ's genitals in a sexual way more than once (Tr. 293).

RJ said that she told her eighth grade teacher what was happening and that her friends' mothers knew, but no one did anything (Tr. 234). RJ said that they would get in trouble if appellant heard they were talking to anyone outside the family about what was going on in their house (Tr. 234). Appellant would beat them and tell them that what happened inside of the house stayed in the house (Tr. 235). Appellant told the girls that everyone else would "try to mess up the family." (Tr. 235). When RJ was about 13 or 14 years old, she left home and went to California to live with her mother because appellant was molesting her (Tr. 227, 241).

LJ was born in June, 1992 (Tr. 386). She was the biological daughter of appellant (Tr. 386). Appellant would come up behind her while she was doing the dishes, come in the bathroom when she was showering and "feel on" her, and come in her bedroom while she was changing (Tr. 388). LJ would sleep in appellant's room, and he would "touch on" her while she slept (Tr.

388). Three days after Thanksgiving in 2008, when she was 16 years old, LJ was in her bedroom changing when appellant made her come in his room (Tr. 387, 388). Appellant told LJ to take off all of her clothing; she complied (Tr. 388-389). LJ lay down on her stomach and cried (Tr. 389, 392). Appellant inserted his penis in her vagina (Tr.389). After this, appellant had intercourse with LJ about every other day; LJ cried every time (Tr. 389).

LJ left home at age 16 because she was being molested (Tr. 387). LJ told a friend of hers what was happening (Tr. 392). The friend told LJ's boyfriend, who told his mother (Tr. 392). They then filed a police report (Tr. 392). LJ and DP talked to the police; the police also called RJ out in California (Tr. 393).

A police detective, Barb Lane, asked LJ if she would be willing to telephone appellant and try to get him to admit to anything (Tr. 393). LJ called appellant on her cell phone, and the call was recorded (Tr. 393-394). Appellant never denied having sex with LJ (Tr. 394). Appellant had previously apologized to LJ for having sex with her, but did not do so in the phone call (Tr. 400). Appellant said that he never did anything with LJ against her will (Tr. 400).

After the close of evidence, instructions, and argument by counsel, the jury found appellant guilty on 12 of 13 counts (LF 11, 90-102). The jury

acquitted appellant of the count of statutory sodomy in the first degree for placing his fingers on the genitals of RJ (LF 79, 99).

On July 10, 2014, the trial court found appellant to be a prior offender and a predatory sexual offender (LF 12, 105-106). Specifically, the trial court found that between June 14, 1996 and February 10, 2003, appellant committed the crimes of statutory rape and statutory sodomy in the first degree by having sexual intercourse with DP and by placing his penis in DP's mouth (LF 105). The trial court also found that appellant was a predatory sexual offender because he committed the crime of first degree statutory rape and first degree statutory sodomy by having sexual intercourse with RJ and by placing his penis in RJ's mouth between February 11, 2002 and February 10, 2003 (LF 105). Appellant was sentenced to concurrent life sentences on all of the first degree statutory rape and sodomy counts pursuant to §558.018(2)(3) (LF 12, 110-113). The trial court ruled that appellant would not be eligible for parole until he had served 25 years on those counts (LF 110-113). Appellant was sentenced to four years on the incest charges and seven years on the second degree statutory rape count (LF 111-113).

ARGUMENT

The trial court did not err, plainly or otherwise, in sentencing appellant as a predatory sexual offender (In response to Appellant's Points I and II).

Appellant contends that the trial court erred in sentencing him as a predatory sexual offender because the trial court failed to make such a finding prior to submission of the case to the jury (App.Br. 12).

A. Standard of review.

Appellant did not object to the timing of the trial court's finding regarding his predatory sexual offender status. Specifically, he did not object on the grounds that the trial court did not comply with the procedural timing requirements of §558.021, RSMo, which require such a finding of predatory sexual offender to be made prior to submission of the case to the jury. This claim is therefore unpreserved for review and can be considered only for plain error.

And while appellant did argue to the trial court that §558.018 did not apply to appellant because he did not have a prior offense, he did not raise the arguments he now raises in his brief, namely, that a finding of predatory sexual offender status was an element of the offense that would have had to have been found by the jury. Thus, this claim too is unpreserved and reviewable only for plain error. *See State v. Deck,* 303 S.W.3d 527, 541 (Mo.banc 2010). (holding that where a claim differs from the objection made

at trial, it is not preserved for appellate review and is entitled only to plain error review)

Issues that were not preserved may be reviewed for plain error only, which requires the reviewing court to find that manifest injustice or a miscarriage of justice has resulted from the trial court error. *State v. Baumruk*, 280 S.W.3d 600, 607 (Mo.banc 2009). Review for plain error involves a two-step process. *Id.* The first step requires a determination of whether the claim of error facially establishes substantial grounds for believing that manifest injustice or miscarriage of justice has resulted. *Id.* All prejudicial error, however, is not plain error; plain errors are those which are evident, obvious, and clear. *Id.* If plain error is found, the court then must proceed to the second step and determine whether the claimed error resulted in manifest injustice or a miscarriage of justice. *Id.* at 607-608. Plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative. *State v. Baxter*, 204 S.W.3d 650 (Mo.banc 2006).

The plain error rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review. *State v. Mayes*, 63 S.W.3d 615, 633 (Mo.banc 2001). Unless a claim of plain error facially establishes substantial grounds for believing that manifest injustice or miscarriage of justice has resulted, an

appellate court will decline to exercise its discretion to review for plain error under Rule 30.20. *State v. Chaney*, 967 S.W.2d 47, 59 (Mo.banc 1998).

B. Relevant facts.

In the information in lieu of indictment, appellant was charged in pertinent part as follows:

> Count 1: first degree statutory rape between June 14, 1998 and June 13, 2000 for having sexual intercourse with DP who was less than 12 years old;
>
> Count 2: first degree statutory sodomy for having deviate sexual intercourse with DP between June 14, 1998 and June 13, 2002, when DP was less than 14 years old;
>
> Count 3: first degree statutory sodomy for having deviate sexual intercourse with DP, who was less than 14 years old, between June 14, 1998 and June 13, 2002;
>
> Count 4: first degree statutory rape for having sexual intercourse with DP, who was less than 14 years old, between June 14, 2001 and April 25, 2002.
>
> Count 6: Statutory rape in the first degree for having sexual intercourse with RJ, who was less than 12 years old, between February 11, 2002 and February 10, 2003;

Count 8: Statutory sodomy in the first degree for having deviate sexual intercourse with RJ, who was less than 12 years old, between February 11, 2002 and February 10, 2003;

Count 9: Statutory sodomy in the first degree for having deviate sexual intercourse with RJ, who was less than 12 years old, between February 11, 2002 and February 10, 2003;

Count 10: Statutory sodomy in the first degree for having deviate sexual intercourse with RJ, who was less than 12 years old, between February 11, 2002 and February 10, 2003;

Count 11: Statutory sodomy in the first degree for having deviate sexual intercourse with RJ, who was less than twelve years old, between February 11, 2002 and February 10, 2003.

(LF 22-23).

Appellant was charged as a predatory sexual offender in that, between June 14, 1998 and February 10, 2003, in St. Louis County, he committed the crime of statutory rape in the first degree and statutory sodomy in the first degree in that he had sexual intercourse with DP who was less than twelve years old and he subjected DP to sodomy by placing his penis in DP's mouth when she was less than fourteen years old (LF 23).

Appellant was also charged as a predatory sexual offender in that, between February 11, 2002 and February 10, 2003, he committed the crime of

statutory rape in the first degree and statutory sodomy in the first degree by having sexual intercourse with RJ, who was less than 12-years old, and by subjecting RJ to sodomy by placing his penis in her mouth when she was less than 12-years old (LF 25-26).

Appellant waived jury sentencing (LF 10; Tr. 39-42).

After the close of evidence and the instructions conference, the court observed that the State had a request before the court that appellant be determined to be a predatory sexual offender pursuant to §558.018, RSMo. (Tr. 596). The prosecutor observed that it called for a hearing, but then said that the court had already heard the whole trial and all of the evidence had been adduced (Tr. 596). The prosecutor said that appellant needed to be present (Tr. 597). The trial court agreed and said that they would reconvene after lunch (Tr. 597).

Subsequently, an in-chambers conference was held:

> THE COURT: Ms. Whirley [the prosecutor], you have a motion that you wanted to present in the defendant's presence and outside of the hearing of the jury.
>
> MS. WHIRLEY: Yes, Your Honor. And the State has presented all its evidence and the defendant has rested. And I understand the defense has presented its evidence and will be rested on the record. And so the State is asking based on the

evidence adduced that you find the defendant to be a predatory sexual offender pursuant to 558.018 punishable by sentence to extended term life imprisonment and you would set the minimum time required to be served if he is found guilty by the jury. And that would be for DP and for RJ.

THE COURT: Okay.

MS. WHIRLEY: As pled by the State.

THE COURT: All right. I reread the statute after we had our instruction conference on the relevant part. And Section 5 of that statute pertains to a predatory sexual offender. Part 1 and Part 2, Subpart 1 and Subpart 2 in my opinion don't apply.

Subpart 3 says, for the purposes of this section a predatory sexual offender is a person who, 3, has committed an act or acts which -- excuse me -- has committed an act or acts against more than one victim which would constitute an offense or offenses listed in Subsection 4 of this section. I don't see how I can make this finding since there's no prior criminal convictions on the part of the defendant. I don't see how I can make this finding prior to a determination by the jury if one is made that he has committed these acts that he is alleged to have committed.

MS. WHIRLEY: Well, I think the statute says, and I don't have it in front of me, I see that you do, that Section 5 pertains to acts that are not convictions even if he was not a conviction [sic] or tried for those. In this case there has been a hearing of a full trial.

THE COURT: Yeah, I get that. But it says for purposes of this subsection -- Excuse me Section says, for purposes of this section a predatory sexual offender is a person who – and then Subparagraph 3 says, who has committed an act or acts against more than one victim which would constitute an offense or offenses.

MS. WHIRLEY: The offense or offenses are the statutory rape in the first degree and statutory sodomy in the first degree. Those are the offenses in Subsection 4 that apply in this case.

THE COURT: Mr. Bailey, do you want to weigh in on this?

MR. BAILEY: Your Honor, I kind of agree with the Court. The way it's laid out here given that Subsection 3 states that it has committed an act or acts against more than one victim. But however, given the fact that we are in trial and there hasn't been a decision here, we don't know whether or not he has committed these acts. Because again he hasn't been found guilty on

anything as of yet. So based on this I would say he hasn't committed any acts against anyone.

MS. WHIRLEY: I have a case, I found my case law, Your Honor, that I don't know if you looked at this case or not. This is State v Bent Rogers (phonetic) 95 S.W.3d 181, 2003, case. I think this is the one. Let's see. We would agree that 1 doesn't apply. 2 I think we have a difference of opinion. But 3 would certainly apply. And Your Honor, you'll see in the head notes I think it's Page 2 of 6 if we're looking at the same thing, I think I just have the 2. . . .

MS. WHIRLEY: I think it's 2 of 8. Let's see. It says for purposes of Missouri Revised Statute 558.018 and 558.0185 which is the one we're looking at sets out three options and it talks about predatory sexual offender. And it says it provides that a person's a predatory sexual offender who has previously committed an act which would constitute an offence listed in Subsection 4 which is the statutory rape verse [sic] and statutory sodomy verse [sic] whether or not the act resulted in a conviction. Now, of course, if you make a finding then the jury finds him not guilty then that would be moot. But this is saying it doesn't have to be a prior conviction in order for you to find him to be a

predatory sexual offender is what that is saying. It does not provide that the prior committed act alleged to classify a person as a predatory sexual offender -- Well, it does provide that it be proven beyond a reasonable doubt. Which is what the state has submitted to the Court.

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THE COURT: In this case that you gave me, Ms. Whirley, the defendant was accused of a sexual offense with a person identified as DW but they brought in evidence of another –

MS. WHIRLEY: Person

THE COURT: -- another person who was not involved with the case at issue who had testified about sexual misconduct.

MS. WHIRLEY: That was never charged, that he was never tried for but they had a hearing with that person and the judge found based on that hearing that there was evidence beyond a reasonable doubt that the person was a predatory sexual offender.

MR. BAILEY: When did they have that hearing? After he was found guilty?

MS. WHIRLEY: The State requested it says that as to the appellate's charge status as a predatory sexual offender the State

requested and was granted a continuance to present evidence. The hearing was subsequently held during a recess in the State's case in chief. Well, in this case the judge said he wanted to hear your evidence, too. So they did it after the state's case in chief in this case. And this is during the hearing. State called a witness.

THE COURT: All right. I'll give that back to you. Look, I think my judgment tells me that this statute does not apply to the facts of this situation. I think that it's not -- I think the statute is designed to contemplate conduct of a defendant of a prior time and not to consider the evidence of the charges for which the defendant is on trial at this time and to also have those constitute other acts which would support a finding of predatory sexual offender. The more I think about it the more I think it's not proper to do that. So I'm going to deny the State's motion to have the defendant determined to be a predatory sexual offender under Section 558.018.

MS. WHIRLEY: All right, Your Honor.

(Tr. 597-603).

The jury found appellant guilty on 12 of 13 counts (Tr. 660). The jury acquitted appellant on Count 10, statutory sodomy for placing his fingers in RJ's genitalia (Tr. 661).

At the sentencing hearing, the prosecutor argued in pertinent part as follows:

> During the trial and after the State has [sic] completed its evidence I asked that you find the defendant to be a predatory sexual offender pursuant to 558.018.5 and Sections 2 and 3 which don't require conviction. It just means that the person has perpetrated against a victim, one or more victims, whether or not there is a conviction, prior conviction. And at that time you decided not to do that but you revisited that statute. And we're asking again that you find him to be a predatory sexual offender as you determine sentencing.

(Tr. 676). Defense counsel again argued that the statute referred to prior incidents and there were no incidents prior to the charges in the case (Tr. 677). The trial court then ruled as follows:

> Okay. Mr. Bailey, you're right, we did talk about that earlier. And I have given it thought. And the statute doesn't really give us full guidance about all of the particulars.
>
> I've changed my mind about this. And I think that Section 558.018 Section 53 [sic] is applicable here. And it allows for a determination of a person as a predatory sexual offender if the Court finds that he has committed an act or acts against more

than one victim which would constitute an offense as set forth in the statute.

The jury has found Mr. Johnson guilty of a large number of sexual offenses against three separate victims. And the Court does make a determination of Mr. Johnson, Mr. Angelo Johnson, to be a predatory sexual offender and finds that Mr. Johnson is such an offender under the section of the statute and that this is punishment that having made this determination punishment will be imposed under this statute and that the Court is also authorized to and must set the minimum amount of time that the defendant is required to serve in the penitentiary prior to his release.

And so that will be the determination that the Court has made here. And this is based on the evidence that was presented at trial, the testimony that was presented by the three victims and, of course, by the verdicts that were returned by the jury in this number of counts. I believe it was twelve counts of the thirteen. And these were offenses of statutory rape, statutory sodomy and incest.

(Tr. 677-678). The trial court then sentenced appellant as a predatory sexual offender.

C. Analysis.

The trial court did not plainly err in sentencing appellant as a predatory sexual offender. While the trial court's finding was not made prior to submission of the case to the jury, the timing of the trial court's finding did not cause a manifest injustice or miscarriage of justice to appellant, and appellant received all due process required in being found to be and sentenced as a predatory sexual offender.

Section 558.021 sets out the procedure for finding a defendant to be a predatory sexual offender.[1] The charging document must plead all essential facts warranting a finding that the defendant is a predatory sexual offender. §558.021.1(1), RSMo. Evidence must be introduced establishing sufficient facts to warrant finding beyond a reasonable doubt that the defendant is a predatory sexual offender. §558.021.1(2), RSMo. The court must make findings of fact that warrant a finding beyond a reasonable doubt that the defendant is a predatory sexual offender §558.21.1(3), RSMo. In a jury trial, the facts shall be pled, established, and found prior to submission to the jury outside of its hearing. §558.221.2, RSMo.

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[1] The statute also applies to prior offenders, persistent offenders, dangerous offenders, and persistent sexual offenders. §558.021.1, RSMo.

A "predatory sexual offender" is a person who has committed an act or acts against more than one victim which would constitute first degree statutory rape or first degree statutory sodomy, whether or not the defendant was charged with an additional offense or offenses as a result of such act or acts.[2] §558.018.5(3), RSMo Cum.Supp. 2013.

A defendant found to be a predatory sexual offender shall be imprisoned for life with eligibility for parole; the trial court shall set a minimum time to be served before eligibility for parole. §558.018.6-.7, RSMo Cum.Supp. 2013.

Thus, under the statutory language, the trial court was to make a finding as to appellant's predatory sexual offender status prior to submission of the case to the jury. But the United States Supreme Court held, in *Alleyne v. United States*, 133 S.Ct. 2151 (2013), that any fact that increases the mandatory minimum sentence for a crime is an "element" of the crime, not merely a "sentencing factor," and therefore must be submitted to the jury. In the present case, finding a defendant to be a predatory sexual offender increases the mandatory minimum sentence because the defendant must be

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[2] There are, of course, other predicate offenses which would warrant a finding of predatory sexual offender status, (e.g., forcible rape, forcible sodomy) but respondent has only included the offenses relevant to the facts in the present case.

sentenced to life imprisonment. Therefore, under *Alleyne*, the issue of whether appellant was a predatory sexual offender as charged in this case had to be submitted to the jury. It would have been unconstitutional to take from the jury the job of finding the facts underlying the finding of predatory sexual offender status and require the judge alone to make that finding. Thus, it cannot be said that the trial court plainly erred in protecting appellant's 6th Amendment and Due Process rights by waiting for the jury to make the necessary factual findings and then making the finding that appellant was a predatory sexual offender based upon what the jury had found.

The trial court ruled, in pertinent part, as follows:

> And I think that Section 558.018 Section 53 [sic] is applicable here. And it allows for a determination of a person as a predatory sexual offender if the Court finds that he has committed an act or acts against more than one victim which would constitute an offense as set forth in the statute.
>
> *The jury has found Mr. Johnson guilty of a large number of sexual offenses against three separate victims. And the Court does make a determination of Mr. Johnson, Mr. Angelo Johnson, to be a predatory sexual offender and finds that Mr. Johnson is such an offender under the section of the statute* and that this is

> punishment that having made this determination punishment will be imposed under this statute and that the Court is also authorized to and must set the minimum amount of time that the defendant is required to serve in the penitentiary prior to his release.

(Tr. 677-678) (emphasis added).

In the present case, the issue was presented to the jury and the jury found the facts necessary to establish appellant as a predatory sexual offender. Appellant was charged as a predatory sexual offender based on the offenses of statutory rape and statutory sodomy that he committed against DP and RJ, the same offenses the jury found appellant guilty of in Counts 1, 2, 6, and 8.

Appellant contends that the state could not use the same crimes to both convict appellant and to find him to be a predatory sexual offender (App.Br. 24-27). But the state relied on the language in §558.018.5(3), which states that a defendant can be found to be a predatory sexual offender if he "[h]as committed an act or acts against more than one victim which would constitute [statutory rape or statutory sodomy] whether or not the defendant was charged with an additional offense or offenses as a result of such act or act." The plain language of subparagraph 5(3) does not require that the defendant have "previously" committed the acts; that provision is in

§558.018.5(2), which states that the defendant "previously committed an act." To require, as appellant would, that the acts charged under subparagraph 5(3) be "previously" committed would render subparagraph 5(3) superfluous as "previously" committed acts – regardless of who the victim might be – are already covered by subparagraph 5(2).

Rather, what subparagraph 5(3) requires is that the defendant have committed an act or acts against more than one victim. The state charged appellant in two separate paragraphs as a predatory sexual offender – one predicated on crimes committed against DP and the other predicated on crimes committed against RJ. The jury (and subsequently the judge) found that appellant committed these crimes. The offenses against DP made appellant a predatory sexual offender with respect to the charges in which RJ was the victim, and the offenses against RJ made appellant a predatory sexual offender with respect to the charges in which DP was the victim. The state did not use the same offenses to both convict appellant and find him a predatory sexual offender with regard to a single victim. Appellant was a predatory sexual offender because he had committed sexual misconduct against multiple victims.

Appellant argues that the use of the word "has" in subparagraph 5(3) requires that the events to have occurred in the past (App.Br. 25). "Has" is used in the perfect tense, to indicate an action that has been completed.

Obviously, an action has to have been completed in order for it to be the subject of a criminal charge. The mere use of the word "has" does not indicate that the acts referenced in subparagraph 5(3) had to occur previously to the acts on which the charges are based. And as explained above, to read the statute that way would render subparagraph 5(3) as mere surplusage because subparagraph 5(2) already addressed "previously" committed acts. "[U]nder the rules of statutory construction statutes should not be interpreted in a way that would render some of their phrases to be mere surplusage." *State v. Graham*, 149 S.W.3d 465, 467 (Mo.App.E.D. 2004).

Appellant further argues that an interpretation allowing charged conduct to also serve as the basis of a finding of a predatory sexual offender would be problematic because it would violate his right to have each element of the crime proven to a jury beyond a reasonable doubt (App.Br. 25-26). It is not the nature of the underlying conduct that creates such a problem. Under *Alleyne*, appellant is entitled to have the acts rendering him a predatory sexual offender found by a jury, regardless of whether they are prior acts under subparagraph 5(2) or acts committed against more than one person under 5(3). Moreover, none of the acts supporting a finding of predatory sexual offender need to have resulted in a prior conviction. The interpretation of the language in subparagraph 5(3) does not "force the trial court" to find facts in violation of *Alleyne* (App.Br. 27). Rather, it is the fact

that a finding of predatory sexual offender status increases the minimum sentence that requires the jury, not the judge, to find the facts supporting such a finding, and this happened in the present case.

It must be conceded, however, that the trial court did not comply with the timing procedures required by §558.021, which states that the finding of predatory sexual offender status (or any other prior or persistent offender status) be made prior to submission of the case to the jury. But inasmuch as appellant did not object to the failure to comply with §558.021, his claim is only reviewable for plain error, as discussed above. And appellant has not shown that he suffered a manifest injustice or miscarriage of justice under the circumstances in this case.

In determining whether a manifest injustice or miscarriage of justice occurred, the purpose of the timing element of §558.021 must be considered in order to determine whether those purposes were thwarted by the failure to following the statutory requirements. The primary reason for requiring the finding of prior offender status, persistent offender status, predatory sexual offender status, etc., before submission to the jury is to determine whether sentencing will be done by the judge or the jury, inasmuch as finding of a prior offender status takes sentencing away from the jury.

In the present case, however, appellant waived jury sentencing prior to trial (Tr. 39-42). Thus, as far as this aspect of the timing element, there can

be no plain error as a result of the trial court's error. For example, in *State v. Sprofera*, 427 S.W.3d 828, 839 (Mo.App.W.D. 2014), the Court of Appeals found no manifest injustice in the trial court's erroneous determination that the defendant was a prior offender because the defendant had waived his statutory right to jury-recommended sentencing. "[W]here, as here, a defendant has waived his statutory right to jury-recommended sentencing, the defendant cannot later claim that manifest injustice resulted from the trial court determining his sentence." Similarly, in the present case, appellant cannot demonstrate that the timing of the trial court's finding deprived him of jury sentencing because he waived it.

The other reason for the timing element of §558.021 is to prevent the jury from being presented with and having them consider in deliberation on issues of guilt highly prejudicial evidence of prior offenses. This was not an issue in the present case because the evidence of appellant's predatory sexual offender status was necessarily submitted to the jury because it was for the jury to find whether appellant was a predatory sexual offender, and the evidence of appellant's predatory sexual offender status was the same evidence used to establish his guilt of the charged offenses, inasmuch as he was charged with having committed acts against more than one victim. Thus, as a practical matter in the present case, appellant cannot show a

manifest injustice or miscarriage of justice --- that is, a likelihood of a different outcome had the time frame of §558.021 been complied with.

Appellant, in his brief, cites several cases which were reversed because the trial court did not make the requisite offender finding prior to the case being submitted to the jury. In *State v. Wilson*, 343 S.W.3d 747 (Mo.App.E.D. 2011), the state introduced exhibits of prior convictions before the case was submitted to the jury, but the trial court did not make a finding as to whether the defendant was a chronic DWI offender. *Id.* at 750. After the jury returned its verdict, the trial court announced that because of the priors, the jury would not be doing the sentencing. *Id.* In *Wilson*, the Court of Appeals found that the trial court never made a finding of chronic offender status. This is distinguishable from the present case, where both the jury and the judge found all of the facts necessary to find appellant to be a predatory sexual offender. And unlike *Wilson*, appellant in the present case was not deprived of jury sentencing as he had waived it.

In *State v. Starnes*, 318 S.W.3d 208 (Mo.App.W.D. 2010), the defendant was sentenced as a chronic DWI offender. The Court of Appeals found plain error because the trial court failed to hear evidence and make a finding that Starnes had four or more intoxicated related offenses prior to the case being submitted to the jury. *Id.* at 210. *Starnes* is distinguishable because *Starnes* involved a situation where the trial court heard evidence on the aggravated

offender status after submission to the jury, essentially extending the time for the state to present evidence. In the present case, all of the evidence was heard prior to submission of the case to the jury. *Starnes* is also distinguishable because *Starnes* required a finding solely by the judge regarding his aggravated offender status whereas, in the present case, the factual finding also had to be made by the jury.

Finally, the Court of Appeals in *Starnes* found plain error because Starnes was sentenced to a punishment greater than the maximum allowable sentence as a matter of law. *Id.* at 216. But merely failing to abide by the time frame of the aggravated offender provisions did not prejudice appellant in the present case (or the defendant in *Starnes* for that matter). The purpose of the timing provision is not to establish whether or not a defendant can be sentenced as an aggravated offender. As discussed above, the purpose of the timing provision is to protect other rights of the defendant, namely the right to jury sentencing and the right to not have prejudicial evidence of prior offenses put before the jury and considered in deliberating on the defendant's guilt.[3]

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[3] Appellant may argue that the present case is like *Starnes* because the trial court initially found the evidence to be insufficient. But in the present

For example, in *State v. Teer*, 275 S.W.3d 258, 262 (Mo.banc 2009), prejudice was found because the defendant was deprived of jury sentencing. *Teer* involved a situation where the case was submitted to the jury, the jury recommended a sentence, and then the trial court subsequently found the defendant to be a prior offender and sentenced the defendant to a greater sentence than that recommended by the jury. This Court found that Teer was prejudiced because the jury had sentenced him to only four years in the county jail while the circuit court sentenced him to 20 years in the Department of Corrections. *Id.* at 262. Thus, Teer was prejudiced because he was deprived of the jury's leniency due to the failure to find his prior offender status prior to submission of the case to the jury. In the present case, however, appellant waived jury sentencing; it cannot be said that the failure to make the finding prior to submission to the jury deprived him of the right the timing provision is designed to protect.[4]

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case, the trial court did not find the evidence lacking; it initially found, erroneously, that the predatory sexual offender statute was inapplicable.

[4] Appellant also argues that *Teer* holds that the plain language of §558.021.2 imposes a mandate that prior offender status be pleaded and proven prior to the case being submitted to the jury (App.Br. 14, citing *State v. Teer*, 275 S.W.3d 258, 261 (Mo.banc

Finally, appellant cites *State v. Collins*, 328 S.W.3d 705 (Mo.banc 2011). In *Collins*, the state conceded that it had failed to prove that the defendant was a chronic offender, and the question was what the proper remedy would be. *Id.* at 708. Unlike *Collins*, here the state did present evidence to establish appellant's status as a predatory sexual offender. *Collins* is also distinguishable because it did not require a jury finding as to the facts supporting the defendant's aggravated offender status.

Unlike all of the above cases, the present case required submitting the case to the jury in order to have make a factual finding as to whether appellant was a predatory sexual offender. Under the facts of this case, appellant did not suffer a manifest injustice by the timing of the finding of predatory sexual offender status because appellant had waived jury sentencing, all of the evidence came in prior to submission to the jury and thus the state was not given an extended opportunity to prove its case.

Appellant maintains that he suffered a manifest injustice because he was sentenced to life in prison (App.Br. 17-21). Appellant relies on *State v.*

2009)). *Teer*, however, was decided prior to *Alleyne*, which requires that any fact that increases the mandatory minimum sentence for a crime is an "element" of the crime, not merely a "sentencing factor," and therefore must be submitted to the jury.

Troya, 407 S.W.3d 695 (Mo.App.W.D. 2013), to argue that plain error occurs when the trial court makes a mistake as to the minimum sentence (App.Br. 18). In *Troya*, the defendant was convicted of a class B felony and found to be a persistent offender. *Id.* at 700-01. The trial court, however, had mistakenly believed that the defendant faced the minimum sentence for a class A felony. *Id.* at 701. The Court of Appeals remanded the case for resentencing because the defendant's sentenced had been "passed on the basis of a materially false foundation." *Id.* at 700.

Troya is distinguishable because in *Troya* the trial court had a mistaken belief about the range of punishment the defendant faced; the trial court had no such mistaken belief in the present case. And the timing provisions of §558.021 do not exist to serve as a technicality to avoid a more serious sentence. Appellant cannot show that the failure to follow the timing provisions of §558.021 resulted in a manifest injustice in a case such as his where he waived jury sentencing, the requisite findings were made by the judge and jury, and he was not deprived of any substantive right.[5]

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[5] Appellant also suggests that he was prejudiced because if he had not been classified as a predatory sexual offender, he would have been eligible for parole when he turned 70 under §558.019.3, after 21 years in prison (App.Br. 20). But the trial court said that he would have to serve 25 years before being eligible for parole under §558.018.7, which

Nor does the fact that the trial court was unwilling to make a finding that appellant had committed the crimes before the case was submitted to the jury indicate that appellant suffered a manifest injustice (App.Br. 19). The judge was unwilling to make this finding initially based on its incorrect conclusion that the statute did not apply. There was no suggestion by the court that the evidence was insufficient. Appellant cannot have suffered a manifest justice by the jury making findings first in the present case, as required by the Sixth Amendment and the Due Process Clause. The timing of the trial court's finding was merely a procedural error, and as this Court stated in *Teer*, procedural errors in prior offender hearings require reversal only if the defendant is shown to have been prejudiced. *Teer, supra,* at 260. Appellant must show prejudice like that found in *Teer*, wherein Teer was able to show actual prejudice because the failure to follow the timing elements resulted in Teer being subjected to a much longer sentence that that recommended by a jury of his peers.

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allows the trial court to set the minimum time a predatory sexual offender must serve before being eligible for parole. Parole eligibility is a collateral consequence of a conviction, and appellant cannot show that he was prejudiced where it is entirely speculative that he would ever be released on parole.

In sum, the trial court did not plainly err in sentencing appellant as a predatory sexual offender because the jury found the facts necessary to convict him as a predatory sexual offender, and the timing of the trial court's finding did not result in a manifest injustice or miscarriage of justice. Appellant's claim is without merit and should be denied.

CONCLUSION

In view of the foregoing, respondent submits that appellant's conviction and sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 7,506 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2007 software; and

2. That a true and correct copy of the attached brief, was sent through the eFiling system on this 13th day of April 2016, to:

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