No. SC96524

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

JORDAN L. PRINCE,

Appellant.

Appeal from the Circuit Court of St. Charles County
Eleventh Judicial Circuit
The Honorable Nancy L. Schneider, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Defendant was convicted following a jury trial in the Circuit Court of St. Charles County of first-degree murder, the class A felony of abuse of a child, and forcible sodomy. (Tr. 798; Sent. Tr. 7; LF 111-113, 146-148). Defendant waived jury sentencing and was sentenced by the court to life imprisonment without the possibility of parole for murder, and to life imprisonment for felony child abuse and forcible sodomy, with the sentences to be served consecutively. (Tr. 1-3, Sent. Tr. 7; LF 146-148).

The sufficiency of the evidence to convict is not at issue. Viewed in the light most favorable to the verdicts, the evidence at trial and reasonable inferences therefrom established the following facts:

On December 2-3, 2012, Defendant's girlfriend and her four-month-old baby girl ("Victim") spent the night in Defendant's bedroom. (Ex. 28A). At some time prior to 12:30 p.m. on December 3, Defendant sexually assaulted Victim in her anus, inflicted multiple bruises, and strangled her to death. (Tr. 691-693, 696, 697, 698). According to the medical examiner, Victim died from strangulation but would have died from the internal injuries inflicted by the sexual assault had she not died from strangulation first. (Tr. 701, 732). As the result of anal penetration by something longer than 6 cm, Victim lost more than a third of her blood supply. (Tr. 699-700, 712). Victim suffered asphyxiation from neck pressure applied consistently for a minimum of two

to three minutes less than an hour before paramedics temporarily resuscitated her. (Tr. 696, 708-709; Ex. 47b). The asphyxiation and sexual assault were close in time to one another. (Tr. 704).

Victim had petechial hemorrhages to the lower face, neck, chest, and back. (Ex. 47b). Victim had contusions to the right upper neck under her chin, six on the right side and one on the left. (Ex. 47b). She also had a contusion to the thymus. (Ex. 47b). In addition, she had hemorrhages over the right thyroid lobe, and to the mucosa of her larynx and trachea. (Ex. 47b).

Victim suffered seven tears to the skin and mucosa of her anus. (Ex. 47b). Victim had a "massive" laceration to the anorectal mucosa and muscular walls 6 cm deep into her rectum. (Ex. 47b). Victim had a "massive" hematoma in the soft tissue around her rectum, bladder, uterus and adnexa with 100 ml of blood in her peritoneal cavity, and Victim suffered a hemorrhage in the walls of her pelvis. (Ex. 47b).

Victim also suffered blunt trauma injuries, resulting in contusions to her mid-chest, right lateral middle abdomen, mid-right and lower-midline of her back, her left knee, her left lower thigh, her lateral right upper thigh, and two to the left antecubital fossa. (Ex. 47b). Victim suffered a subgaleal hemorrhage to her left temporal area, and a laceration to the posterior superior pinna of her left ear. (Ex. 47b; Tr. 702).

In 2004, Defendant was convicted of committing lewd and lascivious conduct for manual to genital contact with his 6-year-old niece at a time when he was 15. Defendant served time in a juvenile correctional facility for this offense from the ages of 15-18. (Ex. 48a1; Tr. 467-471). This was a felony crime under the Idaho code, with violators subject to up to life imprisonment. (Tr. 470).

Prior to the crime in the case at bar, Defendant and his girlfriend exchanged text messages in which she expressed her desire that Defendant have sex with her daughter. (Ex. 32d). Police also found that multiple pornographic sites concerning incest and "pre-teen hard core" had been viewed, searched, or downloaded on Defendant's computer, including on the morning of the crime. (Ex. 34a-d).

Defendant told police that sexual acts within his family as he grew up were common, that his older sister had been victimized, and that he had been raped by both of his brothers. (Ex. 28A). Defendant said that "pretty much his whole family" was abused but that he "was the one that acted out." (Ex. 28A).

Defendant said that he had last seen Victim alive at 11:30 a.m. (Ex. 28A). When his roommate woke up around 12:20 or 12:30 p.m., Defendant asked him as he walked past Defendant's bedroom door if he had heard Victim crying and if he had woken up because the baby cried. (Ex. 28A; Tr.

286). When the roommate said he had not, Defendant pushed the roommate to the side, and walk "really quickly" or ran past the roommate to reach Victim's body first, and started "screaming something wrong with the baby." (Ex. 28A; Tr. 270, 286-288).

The roommate[1] thought that it was odd that Defendant met him at the door as he was walking down the hallway. (Tr. 289). Defendant's roommate had never before seen the child sleep alone in the living room while Defendant and his girlfriend were in the bedroom. (Tr. 291).

When the roommate began walking back to his room, he stopped by Defendant's room and told Defendant's girlfriend (Victim's mother), who was lying in bed naked, that something was wrong with her child. (Tr. 289, 293-

[1] Defendant had a second roommate who was not present that night as he was sleeping at his baby's mother's residence. (Tr. 298-299, 309, 323-324). This roommate stopped by briefly to pick up juice for his baby early that morning and was interviewed by police after the fact. (Tr. 298-299, 323-324). This roommate heard Victim crying around 7:00 a.m. and believed the sound was coming from Defendant's bedroom. (Tr. 310, 326). This roommate then returned to his girlfriend's residence. (Tr. 310, 311, 325). This roommate confirmed that the door was locked that morning and that there was no crib in the house, which "wasn't really set up for a baby." (Tr. 311, 319-320).

294). When told that something was not right with her baby, Defendant's girlfriend did not get up right away. (Tr. 293). She draped a blanket over her and kind of meandered to the living room. (Tr. 293-294).

Defendant began CPR as both the roommate and Defendant's girlfriend called 911 from separate rooms. (Ex. 28A; Tr. 270, 286-288).

Police arrived and took over CPR. (Tr. 271). Victim was not breathing and did not have a pulse when police took over CPR from Defendant, who was having instructions relayed to him from his girlfriend in a "[v]ery calm" manner. (Tr. 271, 278). Although it was December, the baby was wearing nothing except a diaper. (Tr. 283).

Victim's "face, limbs, arms and legs were purplish in color" but the "core of the body was still white, warm, pink, warm to the touch." (Tr. 271, 280-281). The officer performing CPR was a trained CPR instructor. (Tr. 275). In the officer's experience, this indicated that "there was some type of obstruction that was not allowing the child to breathe." (Tr. 272). The temperature of the core of Victim's body indicated the obstruction had taken place recently; the officer estimated it had happened roughly "five to ten minutes" prior. (Tr. 272). Had it been as long as thirty minutes to two hours, the body would have started to turn cold from not receiving oxygen. (Tr. 281-282). Approximately two minutes later after the officer performing CPR

arrived, a paramedic from the fire department arrived and took over CPR. (Tr. 272).

Defendant told police who responded to the 911 calls that Defendant found Victim face down on the couch and that the baby had not been breathing. (Tr. 273, 331). Defendant said he had last seen the baby alive when he had laid the baby down at 11:30 a.m. (Tr. 273, 329). Defendant said that he fed the child and laid her down on the couch on her back with her head against the cushion, with two cushions on either side with a blanket draped over them. (Tr. 330). According to Defendant, the child's head was facing towards the ceiling. (Tr. 330). Defendant said he then went into the back bedroom with his girlfriend for about 30 minutes. (Tr. 330-331).

Defendant told the officer that he was the last person who saw the child alive. (Tr. 331). Defendant said that after talking to his roommate who was walking down the hallway and learning that he had not heard the baby crying, he went to check on the baby and found her face down on the couch. (Tr. 331). Officers found it "suspicious" that a baby that age and that size, wedged between two cushions, could have flipped over like that. (Tr. 332, 334; Ex. 28A).

There were no signs of forced entry to the trailer where Defendant lived, and Defendant later told police that the doors were locked, and he would have heard had anyone entered because they were noisy and his

roommate's dog would have alerted them, and no one had access to the baby in the relevant time period other than him. (Tr. 273, 285-286; Ex. 28A).

There was no crib in the house at the time. (Tr. 273, 335). According to Defendant's roommate, a crib showed up at the residence later that day and prior to that time when officers arrived to conduct a re-enactment despite the fact that there was no other infant living there that needed one. (Tr. 302-303, 515). The crib was brought in after Victim was already dead. (Tr. 306, 515).

Victim was taken to St. Joseph's hospital and then flown to Cardinal Glennon and placed in the PICU (pediatric intensive care unit). (Tr. 345). Several doctors and nurses tried to "get in as much blood as possible" into Victim's body, but "[j]ust as fast as the blood was going into [Victim's] body, it was coming out of her anal area." (Tr. 345). The blood was "pooling out" of Victim's body. (Tr. 345). Victim was "laying like lifeless on the bed" and there was bruising on her back and bruising and lacerations visible on the back of Victim's left ear. (Tr. 346-347, 365-366). Victim's heart stopped at least four times. (Tr. 400).

At the hospital, Defendant told a licensed social worker that Victim had fallen out of bed onto carpet the previous night. (Tr. 349). Defendant "said there was absolutely no bruising or bleeding on her body from that fall." (Tr. 349). Defendant said he made a bed for Victim at the foot of their bed and checked on her at 2 a.m., 5 a.m., 8 a.m. and 10 a.m. and took her into the

living room and placed her on the couch on the back of her head at 10 a.m. so that he and his girlfriend could get some sleep (Tr. 349-350, 369). Defendant told the social worker that at 11:20-11:30 a.m., his roommate walked past his door, Defendant asked the roommate if he had heard Victim, the roommate said no, and Defendant then walked to the living room and found Victim lying face down and unresponsive. (Tr. 350-351, 369). Those times were included in the social worker's report. (Tr. 351). At the time, the social worker was unaware that the ambulance hadn't been called until 12:20 p.m. (Tr. 351-352). 911 was, in fact, not called until 12:20 p.m. (Tr. 459). Defendant said that he alone had taken care of the child and that no one else was with the child during that time frame. (Tr. 377).

When the social worker confronted Defendant with the laceration and bruising on Victim's left ear, Defendant looked at the floor with a flat affect and "came up with the story" that Victim "possibly" fell off the bed and there was a work boot next to her that perhaps she had fallen on and perhaps that had caused the injuries. (Tr. 352-353, 376). Prior to that time, Defendant had made eye contact with the social worker and had been pretty direct in his answers. (Tr. 376-377). However, the first time he had told the story about Victim falling out of bed, Defendant said he had found "[a]bsolutely no bruising and no bleeding." (Tr. 353). Defendant also told a St. Charles detective at the hospital that the child had fallen out of bed but that he didn't

notice any bruising or cuts at the time and it was "easy for him to see as the child was in a diaper only." (Tr. 385). Defendant told the detective that the fall from the bed did not cause any bruises. (Tr. 385).

Defendant told the social worker that he had placed Victim on a raised surface despite the fact that he claimed she had fallen off another raised surface earlier that night, because she had fallen off of raised surfaces a total of six times prior to the incident and had always been fine, so he thought she would be fine again. (Tr. 352).

Defendant "struggled to come up with an answer" to this question when interviewed by the detective but told the detective that Victim "had slept there before" and later claimed that Victim "was sensitive to light and there was less light in the living room." (Tr. 387-388, 409-410). Detectives later determined this statement was "[a]bsolutely not" true as the bedroom had a black cloth that prevented light from coming in, whereas the living room had "thin light blinds" that were almost transparent with "a lot more light in there." (Tr. 388, 392-393, 410).

Defendant told the detective that he changed the child's diaper prior to 11 a.m. and placed the child on the couch propped up with two pillows and then returned to his bedroom that was too bright for the baby and went back to sleep. (Tr. 393-394). Defendant told the detective that his conversation with the roommate took place at 11:30 and that when the roommate said the

child hadn't woken him up and he didn't even know Victim was in the living room area, Defendant "immediately became concerned and ran to the couch[.]" (Tr. 394-395). Defendant claimed he saw the baby on her stomach and not breathing. (Tr. 395). Defendant told the detective that he "was the only one who had contact" with Victim. (Tr. 395). Defendant told the detective that he found the baby unresponsive at 11:30 a.m. (Tr. 406).

Asked how Victim had sustained her injuries, Defendant told the detective at the hospital that perhaps she struck a boot when she fell off the bed at midnight, and he later claimed that when he bounced her on his knee, she had bounced and slipped with his knee striking her back on the previous day. (Tr. 395-396).

The detective noticed there was "a deep laceration" on the left ear, "much more significant when I saw it in person as opposed to the photographs or when someone was talking about it." (Tr. 397).

Defendant exhibited unusual demeanor at the hospital in that the parents were not consoling one another or being very active in wanting to understand what was going on with the child medically. (Tr. 354-355). In fact, there were several times where Victim's health "started to decline pretty quickly" and the hospital had to use the intercom to try to locate Defendant and his girlfriend and could not do so because they had left the premises. (Tr. 355, 361, 374). This seemed "very unusual." (Tr. 355). The hospital had

trouble finding Defendant and his girlfriend as Victim fought for her life. Hospital workers had to call Defendant on a cell phone to give them a chance to say goodbye. (Tr. 421-422). Defendant's demeanor when he received the call seemed like he didn't care. (Tr. 421-423).

After being informed that Victim could be passing away within a couple of minutes, Defendant and his girlfriend stood "back in the corner away from her body" whereas normally parents would hold the child or get as close as possible. (Tr. 355). When Victim died, Defendant and his girlfriend had "a very fairly flat [a]ffect, non-emotional." (Tr. 355, 372). He and Victim's girlfriend "were very far removed[.]" (Tr. 355).

After Victim died at the hospital, Defendant turned to Victim's grandfather and said, "we don't need an autopsy, do we?" (Tr. 424).

When Defendant and his girlfriend returned home from the police station, Defendant was a "[l]ittle angry" and Defendant's roommate overheard Defendant and his girlfriend saying that they had to "get their story straight." (Tr. 289-290). Defendant and his girlfriend were "mad" because they were going to get blamed for what happened. (Tr. 290). At no time did the roommate hear either Defendant or his girlfriend say that they just needed to tell the truth. (Tr. 302).

Ten blood spots were found on the quilt that Victim was covered with at the time she was found, two of which were consistent with Defendant's DNA and five of which were consistent with Victim's. (Tr. 651-657, 672-673).

During a re-enactment of the incident for police, Defendant said that he saw Victim "laying on her stomach with the quilt over her head" at "approximately noon" and that "she wasn't breathing." (Tr. 438-439, 442).

Defendant agreed to a voluntary interview with police, which was conducted after Defendant was dropped off at the police station the day after the crime. (Ex. 28A). Defendant eventually admitted causing the death of Victim after allowing his "frustration" to get the best of him and that he "went overboard" but claimed Victim's injuries were the accidental result of rough attempts to "burp" her. (Ex. 28A). While the police were out of the room, Defendant appeared to mimic or practice bouncing a baby on his knee, the explanation he gave for Victim's rectal injuries. (Ex. 28A; Tr. 474-475).

Defendant denied the sexual assault, but cleared the only other persons present during the time frame he established for the crime. (Ex. 28A; Tr. 476-481). Defendant admitted that Victim spent the night in his bedroom with Defendant and his girlfriend, and he said that she started out in their bed on a pillow but later slept on the floor after falling off the bed. (Ex. 28A). Defendant said he moved Victim to the living room at approximately 10 a.m. so that his girlfriend could sleep; Defendant claimed to have checked on

Victim at approximately 10:45 a.m. and 11:30 p.m. and that she had been fine both times. (Ex. 28A). Defendant admitted that he was the last person to see her breathing, at 11:30 a.m. on December 3. (Ex. 28A).

Defendant initially said he placed Victim on her back, but once informed that Victim could not have rolled over onto her stomach of her own accord at that age, Defendant admitted that he had lied to police about that, both in an interview and during a reenactment of the incident, because he was "scared"; Defendant then claimed that he had placed Victim on her side. (Ex. 28A; Tr. 445). Defendant's statements on when he last saw Victim alive varied from 10:45 a.m. to 11:30 a.m. (Tr. 456). Defendant said he got the times from his cell phone and used the phrase, "according to my timeline," which the interviewing officer thought "was out of the ordinary." (Tr. 456-457). Defendant said it had been approximately thirty minutes since he had last seen the child asleep when he found her unresponsive in the living room. (Tr. 457).

Defendant said his girlfriend was in the bedroom asleep and provided an alibi for the other roommate as well, saying his door squeaked so loudly he would have heard it had that roommate gotten up. (Tr. 458, 538-539, 552). Defendant said no one else could have come into the house. (Tr. 459, 539, 552). Defendant said it couldn't have been the two roommates and called his girlfriend "a great mother." (Tr. 476-477, 553).

Defendant eventually admitted by demonstrating on an officer that he had grabbed Victim's neck or throat with his thumb on one side and placed his fingers on the other and squeezed, the same pattern the medical examiner observed on the neck. (Ex. 28A; Tr. 482). Defendant admitted seeing the same marks the medical examiner saw from this. (Tr. 482).

Defendant admitted that he did not perform CPR until his roommate was present. (Tr. 483).

Computer forensics found communications from Defendant's girlfriend to Defendant saying that she would understand if Defendant cheated on her because she had cheated on him, and that "I could just kill her and we will move on." (Tr. 633-634). The communication ended with Defendant saying, "I love you, too." (Tr. 634).

The medical examiner testified the act had to have been intentional, was sustained for two to three minutes, caused death by strangulation, and took place close in time to the anal assault, which damaged the baby's insides so badly that it would also have been fatal had Victim not died from the strangulation first. (Tr. 696, 701).

At sentencing, the court described the case as "one of the most difficult cases that I have ever served on in my twenty-four years on the bench" because of the "inhumanity of the defendant[,]" the "cruelty and the lack of remorse, and the lack of moral consciousness for what he did to this innocent

young child[,]" and the "most cruel and inhumane manner" in which Victim had to "suffer and die at the hands of the defendant[.]" (Sent. Tr. 6-7).

ARGUMENT

I.

Evidence of Defendant's prior act of lewd and lascivious conduct based on an act of sodomy perpetrated on his 6-year-old niece, including the Idaho record of his juvenile plea of "true," was admissible under Article I, Section 18(c) of the Missouri Constitution to demonstrate his sexual appetite for young, female family members, his motive for the charged crimes, to show his propensity to have sex with female children, and to rebut Defendant's claim of mistake or accident in the death of the infant daughter of his overnight girlfriend during the acting out of a sexual fantasy the couple had that Defendant have (what they viewed as) incestuous sex with Victim, and that once Defendant had avenged the infidelity his girlfriend had committed against him, the Victim was to be killed. (Addresses Defendant's Points I-II)

Defendant's first point contends that his prior plea of "true" to molesting his 6-year-old niece in 2004 was not admissible under Article I, Section 18(c) of the Missouri Constitution because it was not "logically relevant" in that it was remote in time, was based on a dissimilar act, and was technically not a "criminal" act since he was a juvenile (15) at the time of the offense and the plea was in a juvenile adjudication.

Defendant further contends in Point I that the records of the Idaho juvenile court did not constitute "evidence" because they were not "lawful or proper evidence" under Section 211.271, RSMo (2000), which governs records of Missouri juvenile courts.

Defendant's second point contends the same evidence was inadmissible because it was not "legally relevant" in that it was substantially more prejudicial than probative.

A. Standard of review

Appellate courts review a trial court's decision on the admission of evidence for abuse of discretion. *State v. Reed*, 282 S.W.3d 835, 837 (Mo. banc 2009). "This standard gives the trial court broad leeway in choosing to admit evidence[.]" *Id.* An abuse of discretion occurs where the trial court's ruling was "clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration." *State v. Winfrey*, 337 S.W.3d 1, 5 (Mo. banc 2011) (internal quotation marks and citation omitted).

Even if error is found, the appellate court reverses only where it "was so prejudicial that it deprived the defendant of a fair trial." *Id.* "Trial court error is prejudicial if there is a reasonable probability that the court's error affected the outcome of the trial." *Id.* "A conviction will not be reversed due to admission of improper evidence unless the defendant has proven that prejudice resulted by showing there is a reasonable probability that in the

absence of such evidence the verdict would have been different." *State v. Adams*, 443 S.W.3d 50, 56 (Mo. App. E.D. 2014). "Defendant bears the burden of showing that the trial court abused its discretion and that he was prejudiced as a result." *Id.*

B. Article I, Section 18(c) authorizes admission of evidence of prior criminal acts in prosecutions for crimes of a sexual nature, whether charged as crimes or not.

In 2014, the Missouri Constitution was amended to include the following provision:

> Notwithstanding the provisions of sections 17 and 18(a) of this article to the contrary, in prosecutions for crimes of a sexual nature involving a victim under eighteen years of age, relevant evidence of prior criminal acts, whether charged or uncharged, is admissible for the purpose of corroborating the victim's testimony or demonstrating the defendant's propensity to commit the crime with which he or she is presently charged. The court may exclude relevant evidence of prior criminal acts if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.

MO. CONST., art. I, § 18(c) (1945) (as amended 2014).[2]

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[2] Federal case law now clearly permits such evidence under the U.S. Constitution and has upheld Federal Rules of Evidence 413 and 414, which provide that evidence of prior acts of sexual assault (Rule 413) and child molestation (Rule 414) are admissible in prosecutions for such crimes. *See*, *e.g.*, *U.S. v. Mound*, 149 F.3d 799, 800-801 (8th Cir. 1998) (upholding Federal Rules of Evidence 413-414); *U.S. v. LeCompte*, 131 F.3d 767 (8th Cir. 1997) (trial court abused its discretion in excluding evidence of defendant's prior uncharged sex offenses in prosecution for abusive sexual contact with minor niece in light of strong legislative judgment that evidence or prior sexual offenses should ordinarily be admissible, as evidenced by separate rule); *U.S. v. Eagle*, 137 F.3d 1011, 1015-1016 (8th Cir. 1998) (admission of evidence of defendant's prior carnal knowledge conviction for sexual abuse of a minor); *U.S. v. Schaffer*, 851 F.3d 166, 179-180 (2nd Cir. 2017) (FRE 413-414 do not violate the Due Process Clause); *U.S. v. LeMay*, 260 F.3d 1018, 1026-1027 (9th Cir. 2001) (same); *U.S. v. Enjady*, 134 F.3d 1427, 1432 (10th Cir. 1998) (same). Moreover, as *amicus*, Missouri Association of Prosecuting Attorneys points out, every state in the Union now has a rule permitting such evidence. *See, Brief of Amicus Curiae, Missouri Association of Prosecuting Attorneys* at 6 n. 2 (listing citations for each).

C. Defendant's claim that the juvenile adjudication was not "evidence" is not preserved for argument in this Court where Defendant repeatedly characterized it as "evidence" in the Court below and raised no such point.

The claim that the juvenile records were not "evidence" was not raised in Defendant's brief below; indeed, below, Defendant argued that "evidence" of the adjudication should not have been admitted because "propensity evidence" is inadmissible (Court of Appeals Point I); and that the court abused its discretion in allowing the State to introduce "evidence" of the juvenile adjudication "in that propensity evidence" is inadmissible when its probative value is substantially outweighed by the danger of unfair prejudice (Court of Appeals Point II). In the body of his brief below, Defendant stated that he had alleged at trial that this "evidence" was not relevant. Brief for Appellant in Court of Appeals at 33. Defendant also stated, in reference to the juvenile records, that that "evidence was inadmissible because it was propensity evidence…." *Id.* at 36. Defendant said that the "evidence" was neither relevant nor a criminal act. *Id.* at 42-43. Defendant cited Section 211.271.1-.2 solely for the proposition that the prior act was not "criminal" and never contended under the act that the records were not "evidence." *Id.* at 45. Defendant contended that the record did not demonstrate that the jury was not influenced by the allegedly improper "evidence." *Id.* at 47. He sought

a new trial "without this improper evidence." *Id.* at 47-48. In the argument under Defendant's second point below, he again said this "evidence" was inadmissible because it was "propensity evidence,...." *id.* at 52, or "pure propensity evidence....", *id.* at 57, that this "evidence" had no probative value and was not legally relevant, *id.* at 59, that "the juvenile adjudication evidence" was not legally relevant, *id.* at 61, and repeated that it could not be said that the jury was not influenced by the allegedly improper "evidence." *Id.* at 63.

Indeed, even Defendant's brief in this Court begins Point I by claiming error in allowing the state to introduce "***evidence*** of Prince's 2004 juvenile adjudication for lewd & lascivious conduct with a minor, because this propensity ***evidence***" was not relevant evidence of criminal acts. Brief for Appellant at 19 (emphasis added).

Rule 83.08(b) prohibits altering "the basis of any claim that was raised in the court of appeals brief[.]" Supreme Court Rule 83.08(b) (2017). Thus, the claim that the juvenile records from Idaho were not "evidence" must be denied as waived.

D. The juvenile adjudication was "evidence."

Prior to being encouraged by the Court of Appeals' opinion to disavow the obvious, Defendant acknowledged that the records of the juvenile

adjudication and Defendant's statements concerning the same were "evidence." Defendant had it right the first time.

The phrase used in Article I, Section 18(c) discussing what is admissible is "relevant evidence . . . of prior criminal acts, whether charged or uncharged," which is "admissible for the purpose of … demonstrating the defendant's propensity to commit the crime with which he or she is presently charged." MO. CONST., ART. I, SEC. 18(C) (as amended December 4, 2014).

"Propensity evidence has been defined as 'evidence of uncharged crimes, wrongs, or acts used to establish that a defendant has a natural tendency to commit the crime charged.'" *State v. Thigpen*, 2017 WL 3388977 (Mo. App. E.D. Aug. 8, 2017), at *4 (quoting *State v. Joyner*, 458 S.W.3d 875, 886 (Mo. App. W.D. 2015) and *State v. Shockley*, 410 S.W.3d 179, 193 (Mo. banc 2013)).

Here, both the records and Defendant's statement demonstrated, at a minimum, "uncharged crimes, wrongs, or acts" and were "used to establish that" Defendant had "a natural tendency to commit the crime charged." *Id*. As further discussed *infra*, they demonstrated a charged crime, wrong, or act in violation of Idaho law. But "whether charged or uncharged," evidence of the crime, wrong, or act was admissible for the purpose provided by Article I, Section 18(c). MO. CONST., ART. I, SEC. 18(C) (as amended December 4, 2014).

In this Court, but not in the Court of Appeals, Defendant relies upon Section 211.271.3, RSMo (2000), to argue that the records and Defendant's adult statement to police investigating this crime were not "evidence" of prior acts because a statute predating the Constitutional amendment under which the evidence was admitted—which was trumped by the Constitutional amendment and its policy—ostensibly characterized such material as not "lawful and proper evidence." Defendant relies on the following language of the statute:

> After a child is taken into custody as provided in section 211.131, all admissions, confessions, and statements by the child to the juvenile officer and juvenile court personnel and all evidence ***given in cases under this chapter***, as well as all reports and records of the juvenile court, are not lawful or proper evidence against the child and shall not be used for any purpose whatsoever in any proceeding, civil or criminal, other than proceedings under this chapter.

Id. (emphasis added).

This statute plainly governs, and can govern, only juvenile court proceedings in Missouri "in cases under this chapter." *Id*. The evidence admitted in the case at bar was not from a juvenile court governed by Section 211.271, and was not from a case "under this chapter" but, rather, from an Idaho proceeding. Section 211.271 therefore does not apply.

Indeed, under IDAHO CODE, SEC. 20-525 (2015), records of "juvenile courtroom proceedings and records shall be open to the public" in "all proceedings against a juvenile offender of the age of fourteen (14) years or older and who is petitioned or charged with an offense which would be a felony if committed by an adult including the court docket, petitions, complaints, information, arraignments, trials, sentencings, probation violation hearings and dispositions, motions and other papers filed in any case in any district, transcripts of testimony taken by the court, and findings, verdicts, judgments, orders, decrees and other papers filed in proceedings before the court of any district." IDAHO CODE ANN., SEC. 20-525 (1) (2015).

The "records of judicial proceedings of any court of the United States, or of any State," properly documented, "shall have faith and credit given to them in this state as they would have at the place whence the said records come." Section 490.130, RSMo (2000). Notably, this statute is labeled, "Certified records of courts to be evidence." Section 490.130, VAMS (2001).

Because Defendant was 15 at the time he molested his 6-year-old niece, the records were therefore open records of "judicial proceedings" of another State, admissible under the Missouri Constitution, the Missouri rules of evidence governing records from another State, and under the law of the State in which the juvenile proceeding took place. They were therefore lawful and proper evidence.

Moreover, Defendant's statements to the police as an adult are not governed by Section 211.271 and are evidence of admissions of "prior criminal acts, whether charged or uncharged" demonstrating Defendant's propensity or "natural tendency" to sexually abuse young girls. They were therefore admissible under Article I, Sec. 18(c), regardless of whether the records of the juvenile court proceeding were.

E. Even if the argument that the Missouri juvenile-records statute rendered the records and statements something other than "evidence" were preserved, and if the statute applied, a less specific statute cannot trump a more specific Constitutional provision subsequently adopted to remove barriers to such evidence.

Article I, Sec. 18(c) the Missouri Constitution obviously trumps a preexisting statute, or any statute, if there is a conflict. *See*, *Lewellen v. Franklin*, 441 S.W.3d 136, 142-145 (Mo. banc 2014). This is particularly true where the purpose of the Constitutional amendment was to remove barriers to this form of evidence which existed in preexisting rules.

Moreover, even when two constitutional provisions are deemed to be in conflict, under the canons of construction, the specific controls over the general. *See, e.g., Brandsville Fire Protection Dist. v. Phillips*, 374 S.W.3d 373, 378 (Mo. banc 2012) (quoting *Younger v. Missouri Pub. Entity Risk Mgmt. Fund*, 957 S.W.2d 332, 336 (Mo. banc 1997)). This is especially true

where a "notwithstanding" clause eliminates conflicts with earlier law by eliminating the conflict that would have occurred in the absence of the law. *See, Earth Island Institute v. Union Electric Company*, 456 S.W.3d 27, 33-34 (Mo. banc 2015). The people made plain their intent to overrule prior constitutional (as well as any statutory) limitations on such evidence by specifying in such a "notwithstanding" clause that the new provision trumped Sections 17 and 18(a) of Article I. MO. CONST., art. I, §18(c); *Earth Island*, 456 S.W.3d at 33-34.

Here, Defendant does not contend that the constitutional provision conflicts with other constitutional provisions, but that a prior statute that is more general should somehow trump a subsequently adopted constitutional measure designed to admit just such evidence. This claim should be rejected. *See, Hester v. Ballard*, 679 Fed. Appx. 273, 280-282 (4th Cir. 2017) (upholding admission of out-of-state juvenile adjudication in child sex case under Federal Rules of Evidence 413-414 despite statutory provisions generally requiring exclusion of juvenile records in future criminal proceedings in the forum state).

F. The Idaho conviction was evidence of a prior criminal act, charged or uncharged.

Defendant also contends (in Point I) that his Idaho conviction was not admissible because it was not charged as a "criminal act" but rather as a

"delinquent act" committed by a juvenile. Defendant ignores the provision of Article I, Section 18(c) that permits admission of "relevant evidence of prior criminal acts, *whether charged or uncharged*" for the purpose of "demonstrating the defendant's propensity to commit the crime with which he or she is presently charged." MO. CONST., art. I, § 18(c) (1945) (as amended 2014) (emphasis added).

State's Exhibit 48a(1) established that Defendant admitted to committing "LEWD AND LASCIVIOUS CONDUCT WITH A MINOR" by "willfully and lewdly" committing such acts "upon the body of a minor, [G.K.], under the age of sixteen years, to-wit: of the age of 6 years during the time of the incidents, by having manual/genital contact with the said minor child, with the intent to appeal to the sexual desire of the Defendant and/or the minor child." Ex. 48a(1) at 1, 3.[3] Defendant was "15 years of age at the time of the incidents." *Id.* at 1. The charging petition cited "Fel., I.C. 18-1508[,]" which established that the conduct was a felony under the Idaho criminal code. *Id.* at 1.

Section 18-1508 of the Idaho Code provides (and provided in 2004) that:

[3] Defendant told police in a statement played for the jury that he had abused his niece when he was 12 and she was four and that he went to "prison" or a juvenile correctional center from ages 15-18. (Ex. 28A, clips 7-8).

> *Any person* who shall commit any lewd or lascivious act or acts upon or with the body or any part or member thereof of a minor child under the age of sixteen (16) years, including but not limited to, genital-genital contact, oral-genital contact, anal-genital contact, oral-anal contact, manual-anal contact, or manual-genital contact, whether between persons of the same or opposite sex, or who shall involve such minor child in any act of bestiality or sado-masochism as defined in section 18-1507, Idaho Code, when any of such acts are done with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person, such minor child, or third party, *shall be guilty of a felony* and shall be imprisoned in the state prison for a term of not more than life.

IDAHO CODE ANN. § 18-1508 (West 1992) (emphasis added); Respondent's Brief Appendix at 1 (emphasis added).

Because Defendant was "[a]ny person" at the time of the crime, and committed an act specifically defined by the criminal statute referenced in the charging document as "a felony[,]" the voluntary plea "of true" in what Defendant concedes was an adjudication constituted "relevant evidence of prior criminal acts, *whether charged or uncharged*" under Article I, Section 18(c) of the Missouri Constitution. *State v. Thigpen*, 2017 WL 3388977 at *10-11 ("'criminal acts, whether charged or uncharged' may include … conduct in

violation of the law, whether this act has been charged or is capable of being charged as a criminal offense or not" and "delinquent acts" of juveniles who may not be charged with a crime "fall within the purview of uncharged criminal acts, so as to be allowed as propensity evidence under Article I, section 18(c)"). *See also, State v. Doss*, 394 S.W.3d 486, 494-497 (Mo. App. W.D. 2013) (juvenile records were evidence of prior criminal acts).

G. The evidence was legally, as well as logically, relevant.

Defendant contends that his manual/genital contact with his 6-year-old niece was dissimilar from his sexual contact with the four-month-old female daughter of his girlfriend, and therefore inadmissible. Prior Missouri cases involving the same victim do not draw fine distinctions between particular sexual acts, but recognize that "prior sexual conduct by a defendant toward the victim is admissible as it tends to establish a motive, that is satisfaction of defendant's sexual desire for the victim." *State v. Primm*, 347 S.W.3d 66, 70-71 (Mo. banc 2011) (quoting *State v. Thurman*, 272 S.W.3d 489, 495 (Mo. banc 2008)).

The passage of Article I, Section 18(c) reflects the reality that pedophiles who commit sex crimes against minor victims have a similar "motive, that is satisfaction of defendant's sexual desire for the [minor] victim." *See, id*. Indeed, all prior "criminal acts, charged or uncharged" which demonstrate "the defendant's propensity to commit the crime with which he

or she is presently charged" may be admissible. As acts against the same victim were already admissible, the purpose of the Constitutional amendment was to make prior acts of pedophilia against other victims admissible.

Here, Defendant was charged with, *inter alia*, sodomy performed on a young, female child. Defendant's prior act would also constitute sodomy of a young, female child under Missouri law. *See,* V.A.M.S. §566.062 (2017) (deviate sexual intercourse with person less than 14 years of age constitutes statutory sodomy); §566.010(3) (deviate sexual intercourse includes "any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the penis, female genitalia, or the anus by a finger, instrument or object done for the purpose of arousing or gratifying the sexual desire of any person or for the purpose of terrorizing the victim"); §566.060.1 (a person "commits the offense of sodomy in the first degree if he or she has deviate sexual intercourse with another person who is incapacitated, incapable of consent, or lacks the capacity to consent, or by the use of forcible compulsion"). The fact that it is charged as forcible sodomy rather than statutory sodomy is of no import, since minors cannot consent as a matter of law, and consent was not

an adjudicated element in the Idaho charge.[4] Indeed, under Section 566.060.1, they are the same crime in Missouri. Defendant has a propensity and a motive to have sexual contact with, and sodomize, very young, minor females; the satisfaction of his pedophilia was his motive in both crimes. In both instances, he chose either an extremely young female relative or a young girl he deemed a relative. "Under the amendment, evidence is logically relevant if it has any tendency to make the existence of a material fact to the case more or less probable than it would be without such evidence." *State v. Jones*, No. ED104796 (Mo. App. E.D. September 5, 2017), slip op. at 6; *Thigpen*, 2017 WL 3388977 at *7-*8. "This is a very low-level test that is easily met." *Id.* "Crime statistics readily demonstrate that commission of a prior crime by a defendant is logically relevant to the issue of whether the defendant committed the crime charged simply because [recidivism] statistics demonstrate that prior offenders commit more crimes than persons who have not previously committed a crime." *Id.* (quoting *State v. Vorhees*, 248 S.W.3d 585, 591 (Mo. banc 2008)). The brief of *amicus*, MAPA, cites research that established that "50% [of adult sex offenders] reveal their first sexual offense

[4] Nor, for that matter, since Defendant killed his Victim in the case at bar, can it be known that Defendant's acts against Victim did not include manual/genital contact.

occurred when they were in their teens or younger" and that "those who begin offending early are more likely to offend more seriously and persistently." Brief of Amicus Curiae, Missouri Association of Prosecuting Attorneys, at 10 (citing studies). This is precisely the type of evidence the Missouri Constitution deems important and admissible. Defendant's claim of a material dissimilarity should be rejected.

Nor is the fact that Defendant was 15 when he was sent to a Correctional facility for 3 years for sexual contact with his niece, and was 24 at the time of the crime in the case at bar material. By his own account, Defendant spent three years in a correctional facility from ages 15-18. (Ex. 28A).[5] During that time in which he was, by his own account, subject to intensive therapy, and, if common sense prevailed, for some period afterward, Defendant was denied access to young female family members. (Ex. 28A). When he established a new intimate relationship with a girlfriend who had a young daughter, he reoffended. Notably, he chose a girlfriend who fantasized about the type of crime he wished to commit. (Ex. 32d).

[5] An anonymous survey of sex offenders indicated that they had committed two to five times more sex crimes than those for which they had been arrested. Groth, A.N., Longo, R.E. & McFadin, J.B. *Undetected recidivism among rapists and child molesters*, 28 Crime & Delinquency 450 (1982).

"The historical notes to the rules and congressional history" pertaining to the similar Federal Rules of Evidence "indicate there is no time limit beyond which prior sex offenses by a defendant are inadmissible." *U.S. v. Meacham*, 115 F.3d 1488, 1492 (10th Cir. 1997). "No time limit is imposed on the uncharged offenses for which evidence may be admitted; as a practical matter, evidence of other sex offenses by the defendant is often probative and properly admitted, notwithstanding very substantial lapses of time in relation to the charged offense or offenses." *Id.*; *United States v. Reynolds*, 720 F.3d 665, 671 (8th Cir. 2013) (quoting statement of Rep. Molinari, 140 CONG. REC. H8992 (daily ed. Aug. 21, 1994)). *See, e.g., United States v. Hadley*, 918 F.2d 848, 850-51 (9th Cir. 1990) (evidence of offenses occurring up to 15 years earlier admitted); *State v. Plymate*, 345 N.W.2d 327 (Neb. 1984) (evidence of defendant's child molestations more than 20 years earlier admitted). Moreover, as in *United States v. LeCompte*, 131 F.3d 767 (8th Cir. 1997), "the time lapse between incidents may not be as significant as it appears at first glance, because defendant was imprisoned for a portion of the time between" incidents "which deprived defendant of the opportunity to abuse any children." *Id.* at 769-770 (internal quotation marks omitted).

Defendant attempts to rebut Ex. 32d by arguing that he refused to cooperate with his girlfriend's fantasies, which he thought would make him a "monster." (Ex. 32b). His prior offense impeaches that argument and

demonstrates that he was not only not offended by them, he had in fact violated the societal taboo against sexual contact with minor female relatives before, and had such desires himself. This tended to prove that, in the end, Defendant cooperated with his girlfriend's fantasy, shared it, and acted on it, resulting in the death of Victim.

The evidence was therefore not more "substantially" more prejudicial than probative as a matter of law, and the trial court did not abuse its broad discretion by following the public policy announced in the constitutional amendment codified as Article I, Section 18 (c). *See*, *LeCompte*, *supra*, 131 F.3d at 769-770 (trial court abused its discretion in excluding evidence of defendant's prior uncharged sex offenses in prosecution for abusive sexual contact with defendant's 11-year-old niece under rule permitting court to exclude relevant evidence if its probative value is outweighed by other concerns, in light of strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible, as evidenced by creation of separate rules, despite the fact that they are subject to Rule 403 balancing test).[6] As

[6] "In child molestation cases, for example, a history of similar acts tends to be especially probative because it shows an unusual disposition of the defendant—a sexual or sadosexual interest in children—that simply does not exist in ordinary people. Moreover, such cases require reliance on child

noted in *LeCompte*, the danger of unfair prejudice from evidence of prior child sexual abuse "is one that all propensity evidence in such trials presents" but "it is precisely such holdings that Congress intended to overrule." *Id.*, 131 F.3d at 770. *See also, United States v. Larson*, 112 F.3d 600, 604 (2d Cir. 1997) (holding that the sponsors stated that the "presumption is that the evidence admissible pursuant to these rules is typically relevant and probative, and that its probative value is not outweighed by any risk of prejudice").

Here, as in *LeCompte*, *supra*, "it is precisely such holdings"--that the prejudicial effect outweighs the probative value of propensity evidence in child sex cases--that the people of the State of Missouri intended to overrule

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victims whose credibility can readily be attacked in the absence of substantial corroboration. In such cases, there is a compelling public interest in admitting all significant evidence that will illumine the credibility of the charge and any denial by the defense." 140 CONG. REC. H8991-92 (daily ed. Aug. 21, 1994) (Floor Statement of the Principal House Sponsor, Rep. Susan Molinari, Concerning the Prior Crimes Evidence Rules for Sexual Assault and Child Molestation Cases). *See*, *U.S. v. Meacham*, 115 F.3d at 1491-1492 (citing Rep. Molinari's statement in interpreting Fed. R. Evid. 414); *Reynolds*, 720 F.3d at 671 (same).

by adoption of the Constitutional Amendment. Moreover, "[t]he balancing of the evidence's probative value against its prejudicial effect on the jury rests within the sound discretion of the trial court." *State v. Campbell*, 143 S.W.3d 695, 700 (Mo. App. W.D. 2004).

H. The evidence was admissible to show motive, intent, and absence of mistake or accident.

In this case, the State's theory was that Defendant's motive was to act out a joint sexual fantasy between his girlfriend and himself, documented in electronic exchanges, that Defendant engage in sex with his girlfriend's daughter, whom both thought of as his *de facto* stepdaughter. The defense theory was that Defendant was responsible for Victim's death, but that it was a mistake or accident. The evidence was therefore admissible even under traditional "other bad acts" analysis to show Defendant's motive and intent, and the absence of mistake or accident. *See, e.g., State v. Winfrey*, 337 S.W.3d 1, 11 (Mo. banc 2011) (evidence of prior bad acts is admissible "to establish motive, intent, the absence of mistake or accident, a common scheme or plan, or to identify the alleged perpetrator").

I. Defendant was not prejudiced.

Defendant shows no unfair prejudice from the less serious prior crime that would have influenced the jury's judgment in the face of his admission that he caused Victim's death and the medical examiner's finding that the

killing and the sexual assault (which also would have killed her) took place in a close proximity in time. For that reason, even if one assumes, *arguendo*, that there was error, it was harmless beyond a reasonable doubt. Defendant admitted to police that he was the only one with access to Victim during the relevant time frame and his blood was found on the quilt that Victim died on. Defendant and the baby's mother seemed unconcerned and disappeared for long stretches as the baby was dying. Defendant's immediate reaction to the death was to suggest to a relative that there was no need for an autopsy. Defendant exhibited consciousness of guilt by lying to police about rocking the baby to death on his knee and by purchasing a crib to cover up the crime after the baby was dead. There is no reasonable likelihood of a different verdict.

Defendant's Points I and II should be rejected.

II.

The trial court did not abuse its broad discretion and Defendant was not prejudiced when the court overruled Defendant's objections to admission of evidence of Defendant viewing pornography with incest and preteen themes, and his text communications with his girlfriend fantasizing about anal sex and father/daughter sex, because, in light of evidence that Defendant's girlfriend had a specific sexual desire that Defendant have sex with her daughter (whom he viewed as his stepdaughter), the evidence was admissible to show Defendant's motive for the crime, which was to act out the shared fantasy of anal penetration of Victim; to paint a complete picture of the crime charged; and to show the absence of mistake or accident (as claimed by Defendant). Defendant was not prejudiced where he admitted causing the death to police and admitted that he was the only person with access to Victim in the relevant time frame. (Addresses Defendant's Point III)

Defendant's final point contends that evidence that he viewed pornography was more prejudicial than probative. The trial court found the evidence relevant, particularly in light of the State's evidence that Victim's mother "was encouraging or had some interest in certain sexual activities before this happened"—namely that Defendant have sex with Victim as the

equivalent of father/daughter sex. (Tr. 505). The evidence therefore went to Defendant's motive and intent—to act out this shared fantasy—and rebutted Defendant's claim of mistake or accident (i.e., his statement to police that Victim died accidentally as the result of overly aggressive burping or bouncing on his knee). Moreover, the evidence established that Defendant was worked up over such material on the very morning that he killed Victim, during a time he contended he was asleep in another room or checking on Victim. The evidence therefore painted a complete picture of the charged crime.

The standard of review for alleged errors in the admission of evidence is as outlined in the argument on Points I and II, *supra*.

In general, "evidence of uncharged misconduct or prior bad acts is inadmissible to show that the defendant has a propensity to commit such acts." *State v. Campbell*, 143 S.W.3d 695, 700 (Mo. App. W.D. 2004). "Such evidence is admissible, however, if it is both logically and legally relevant to prove the crime charged." *Id.* "Evidence is logically relevant if it has a legitimate tendency to establish guilt where the tendency is based on something other than the idea that the defendant has poor character, and therefore, is likely guilty of the offense charged." *Id.* "Evidence is legally relevant if its probative value outweighs its prejudicial effect." *Id.* "The

balancing of the evidence's probative value against its prejudicial effect on the jury rests within the sound discretion of the trial court." *Id*.

Evidence of other, uncharged misconduct has a legitimate tendency to prove the specific crime charged when it "tends to establish: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; [or] (5) the identity of the person charged with the commission of the crime on trial." *State v. Sladek*, 835 S.W.2d 308, 311 (Mo. banc 1992). "Evidence of prior misconduct that does not fall within one of the five enumerated exceptions may nevertheless be admissible if the evidence is logically and legally relevant." *State v. Bernard*, 849 S.W.2d 10, 13 (Mo. banc 1993).

For example, "The State may paint a complete picture of the crime charged and need not sift and separate evidence." *State v. Johnson*, 201 S.W.3d 551, 556 (Mo. App. S.D. 2006); *State v. Coutee*, 879 S.W.2d 762, 768 (Mo. App. S.D. 1994).

"A conviction will not be reversed due to admission of improper evidence unless the defendant has proven that prejudice resulted by showing there is a reasonable probability that in the absence of such evidence the verdict would have been different." *State v. Adams*, 443 S.W.3d 50, 56 (Mo.

App. E.D. 2014). "Defendant bears the burden of showing that the trial court abused its discretion and that he was prejudiced as a result." *Id*.

A. The evidence at issue

The State admitted evidence that pornography was accessed from Defendant's cell phone on the morning at 9:14 a.m. on the morning Victim was killed. (Tr. 580).[7]

The State further admitted evidence that the week before Victim was killed, someone was using Defendant's cell phone to view "a large amount of web sites" that "related to pornography." (Tr. 581-582). These included searches for MILFs or "mothers I would love to fuck"; "beautiful teens swallow old guys' come"; "Alice sucks and fucks in Wonderland"; teen sex videos; "she sucks and fingers her son-in-law"; "sexy MILFs teach girls how to become women"; and "moms bang teens," all within "just days" before Victim was killed. (Tr. 582-584).

The State also admitted evidence of text conversations between Defendant and his girlfriend of a sexual nature. (Tr. 585). Defendant referred to himself as "daddy" and to his girlfriend as "baby girl, his little precious and his little girl." (Tr. 585-586). Victim's name was "thrown into the

[7] Defendant told police that he was the last person to see Victim alive and that that took place at 11:30 a.m. that morning.

communications" at one point as well. (Tr. 586). Exhibit 32E was admitted documenting those text conversations. (Tr. 586-589). The conversations referenced and discussed their mutual desire for anal sodomy or anal intercourse. (Tr. 587-588).

Another series of texts was admitted in which defendant's girlfriend discussed her "attachment toward father figures," including Defendant. (Tr. 589-590). Defendant's girlfriend (Victim's mother) said that she "can honestly say if my father were a different man, I would have sex with him because I love fathers, and technically you are a stepfather to my kids. So, yeah, and if love is followed to the bedroom, then probably why I have the father, daughter fantasy, even without the fact of it being based on my not having an attraction to my own father, is because my father is the only male who I have let myself love unconditionally because he loves me unconditionally, flaws and all." (Tr. 590-591). Victim's mother goes on to tell Defendant that their "relationship works so well because you understand why I am twisted and accept it, and I love the idea that if you were my father, you would fuck me[.]" (Tr. 591).

Victim's mother then texted: "[Victim] will have it too, because I won't let her settle for second best[.]" (Tr. 592). Defendant protests, "No, baby, I won't have sex with our daughter." (Tr. 592). Victim's mother says, "And the reason I say you and [Victim] is because I want to protect her, give her

everything she needs until she finds a good guy to take over[.]" (Tr. 592). When Defendant says, "No baby, I can't[,]" Victim's mother said, "It is what it is, and I won't press the issue, but I understand NTM, that would be hottest as fuck, you going from me to her[.]" (Tr. 592).

In this September 16 conversation, Defendant says, "I just can't baby, makes me feel like a monster." (Tr. 592). Victim's mother says, "But if you finger her she gets a little wet because of it, well, I didn't see anything." (Tr. 592).

Defendant said, "Baby, stop, I love you" but when Victim's mother asked if he wasn't texting anymore, Defendant asked, "How old you think I am going to spank her til." (Tr. 592). Victim's mother responded, "I don't know, but if she is anything like me, she might like it." (Tr. 592).

Victim's mother asked Defendant, "Would you have fucked me when I was twelve?" and Defendant responded, "Maybe, baby." (Tr. 593). He asked how old he would be and she responded 24. (Tr. 593). Defendant said, "IDK" and "[m]akes me feel like a monster." (Tr. 593). Victim's mother argued "souls are infinite when recycling into our next life, age never is a factor, so if we are soul mates and age issue is there then the only thing that makes it bad is the issue of legalities[,]" to which Defendant responded, "I know." (Tr. 593). The two concluded the conversation which included the discussion of Defendant having sex with Victim by agreeing they were soul mates. (Tr. 594).

Police also found remnants of inactive peer-to-peer file-sharing programs on Defendant's computer, which are used for sharing files that aren't necessarily legal, including child pornography. (Tr. 600-601). The State established that the limeware program was "uninstalled" on December 2, 2011, a year before Victim was killed. (Tr. 602). There were file names on Defendant's computer indicating search terms, including "incest" and "pedo pre-teen hard core" but no actual videos could be accessed. (Tr. 603-604). These file names included "taboo incest-Anna and Marina, two sisters real rape their young brother pedo PTHC porn." (Tr. 606). "Pedo" indicates to police that "child victims between the ages of infant up to the age of seventeen" are involved. (Tr. 606). "Pre-teen hard core" typically "refers to young females or males under the age of thirteen." (Tr. 606-607). This file was downloaded on May 29, 2010, which the prosecution told the jury was "substantially before the killing of [Victim]" in December of 2012. (Tr. 607).

On another day, Defendant downloaded from a search for "taboo, family incest" titles including descriptions such as "[a] family's teenage daughter sneaks in bed, fucks dad while mom sleeps" and "Dad fucks mom after daughter filled to ecstasy." (Tr. 608, 609). Other videos involved mother/son sex. (Tr. 609-610).

Other videos were created by an account using Defendant's nickname ("Spud," a reference to his Idaho heritage) on June 5, 2010. (Tr. 284-285, 308,

610-611). A saved file in this directory included "incest, son fucks mom." (Tr. 610-612).

Victim was born in July or August of 2012. (Tr. 616). On August 28, 2012, Defendant's computer visited a site dedicated to "providing you with only the best incest, hintai manga" categorized "by relations" including "brother, sister, family, aunt, nephew, daughter, father, niece, uncle, mother, son, cousins, inlaws, stepmother, step siblings, twins and grandparent." (Tr. 615-616).

Defendant had also visited a website "http colon, galleries dash incest sex." (Tr. 616). In addition, Defendant had been to incest.com-3D plan net "where parents ground their naughty kids by a good fuck, followed by mutual intense orgasm, realistic looking family members know how to come at the same time as they have the same blood running in their veins, nothing feels better than wild family sex." (Tr. 617-618).

Defendant had photographs on his cell phone showing Defendant and Victim, but none of his girlfriend. (Tr. 585, 619).

C. The evidence was admissible to show motive, to paint a complete picture of the charged crime, and to rebut Defendant's claims that he had been normalized by previous treatment and that the anal injuries and death were accidentally caused by rocking Victim on his knee and attempting to "burp" her.

The State's theory was that Defendant was motivated by a desire for sex with young girls who are family members, that he and his girlfriend were focused on anal sex, that Defendant considered Victim his stepdaughter, and that his girlfriend encouraged Defendant to: a) have sex with Victim; and b) avenge the girlfriend's earlier infidelity and then the Victim could just be killed and they could move on. The evidence admitted established Defendant's motive—to act out a shared fantasy that Defendant have sex with Victim—and went to his intent. It was therefore both logically and legally relevant.

Moreover, the evidence established that despite the gap of years between charges, Defendant continued to be sexually motivated by incest and preteen girls. This rebutted Defendant's claim to police that he was "over" what happened when he lived in a sexually dysfunctional family. It rebutted Defendant's claim that his 2004 offense was only minimally probative as a result.

Finally, the evidence was admissible to show the absence of mistake or accident. The evidence rebutted Defendant's claim that Victim's rectum was accidentally injured when he rocked her too roughly on his knee, and that the strangulation was accidental during an attempt to burp her. The computer evidence established that Defendant had sexual fantasies such as that he indulged in during the crime for years, that his girlfriend specifically

encouraged him to have sex with her daughter, that they both fixated on anal sex, such as that involved in the crime, and that Defendant had been viewing pornography and getting worked up just prior to the crimes on the morning of the crimes, during a time in which he claimed to have been either checking on Victim or sleeping with his girlfriend. The evidence further established that girlfriend urged Defendant to cheat on her as she had cheated on him, and that the person he "cheated" with could then be killed and they could "move on." This also made the evidence admissible to paint a complete picture of the charged crime.

D. No prejudice

"Finding that 'the trial court erred in admitting evidence does not end the inquiry.'" *State v. Bell*, 488 S.W.3d 228, 249 (Mo. App. E.D. 2016) (quoting *State v. Barriner*, 34 S.W.3d 139, 149 (Mo. banc 2000). This Court reverses only "if we determine the improper admission was outcome determinative." *Bell*, 488 S.W.3d at 249; *State v. Barriner*, 34 S.W.3d at 150. "A finding of outcome-determinative prejudice 'expresses a judicial conclusion that the erroneously admitted evidence so influenced the jury that, when considered with and balanced against all of the evidence properly admitted, there is a reasonable probability that the jury would have reached a different conclusion but for the erroneously admitted evidence.'" *Id.* (quoting *Barriner*, 34 S.W.3d at 150).

"In determining whether outcome-determinative prejudice exists, we consider several factors: the overwhelming nature of the properly admitted evidence, the similarity of the charged offenses to the improperly admitted evidence, the amount of improperly admitted evidence, the extent the prosecution relied on or highlighted the improperly admitted evidence, and the prosecution's intention—whether deliberate or inadvertent—in eliciting the improper evidence." *Barriner*, 34 S.W.3d at 150-151; *Bell*, 488 S.W.3d at 249.

There is no reasonable probability of a different verdict had some or all of the pornography evidence been excluded. The jury already knew Defendant was a pedophile with a previous incarceration for sexual contact with a young girl who was a family member. Defendant discussed the frequency of intrafamily sex in his family growing up in his statement to police and his prior act of incest with a very young girl.

Moreover, Defendant admitted that he was the last person to see Victim alive, and excluded all other potential suspects in his statement to police. Defendant said he was the only person with access to Victim in the relevant time frame. Defendant admitted causing her death, although he claimed it was accidental, when he became "frustrated" and "went overboard."

The medical examiner established that the anal penetration (so severe that it would have killed Victim) happened in the same time frame as the murder, and Defendant's blood was found on the quilt Victim was lying on at the time of her death.

Defendant and his girlfriend were distant and disappeared for long stretches during the process of Victim dying. Defendant's immediate reaction to the death was to suggest to a family member that there was no need for an autopsy.

Defendant exhibited consciousness of guilt by lying to police about rocking the baby to death on his knee and by purchasing a crib to cover up the crime after the baby was dead.

There was no reasonable probability of a different verdict in light of the overwhelming evidence of guilt. *Bell*, 488 S.W.3d at 251.

Defendant's final point should be rejected.

CONCLUSION

Defendant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached brief complies with Supreme Court Rule 84.06(b) and contains 11,497 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word 2010.

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