No. SC96696

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Appellant,

v.

JUSTIN L. WARD,

Respondent.

Appeal from the Circuit Court of Polk County
Thirty-First Judicial Circuit
The Honorable William J. Roberts, Judge

APPELLANT'S BRIEF
(Redacted)

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JURISDICTIONAL STATEMENT

This is an appeal from a Polk County Circuit Court judgment finding the defendant "not guilty" under section 566.083, RSMo[1] because the statute was unconstitutionally overbroad. The case was tried on stipulated facts, and the trial court found that the defendant was "not guilty" because the defendant committed an act of indecent exposure as prohibited by the statute, but that this factual situation caused the statute criminalizing sexual misconduct involving a minor to be unconstitutionally overbroad. This was a final judgment because it "had the practical effect of terminating the litigation." *State v. Davis*, 348 S.W.3d 768, 770 n.3 (Mo. banc 2011) (citing *State v. Brown*, 140 S.W.3d 51, 53 (Mo. banc 2004); *State v. Smothers*, 297 S.W.3d 626, 630-31 (Mo. App. W.D. 2009)).

The State is permitted an appeal in any criminal case except where the possible outcome of the appeal would result in double jeopardy to the defendant. Section 547.200.2, RSMo. "That '[a] verdict of acquittal . . . [may] not be reviewed . . . without putting [the defendant] twice in jeopardy, and thereby violating the Constitution, has recently been described as the most fundamental rule in the history of double jeopardy jurisprudence." *Sanabria v. United States*, 437 U.S. 54, 64 (1978) (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977); *United States v. Ball*, 163 U.S. 662, 671 (1896)). "Thus when a defendant has been acquitted at trial, he may not be retried on the same offense, even if the legal rulings underlying the acquittal were erroneous." *Id.*

But "where an indictment is dismissed *after* a guilty verdict is rendered, the Double Jeopardy Clause [does] not bar an appeal since the

[1] All statutory citations are to RSMo 2000, updated through the 2016 supplement.

verdict could simply be reinstated without a new trial if the Government were successful." *Id.* (citing *United States v. Wilson*, 420 U.S. 332 (1975) (emphasis in original)). The Double Jeopardy Clause of the Missouri Constitution also is not implicated when a court enters a judgment of acquittal after a jury verdict of guilty because that clause only applies to cases in which a defendant was acquitted by a jury. *State v. Magalif*, 131 S.W.3d 431, 434 (Mo. App. W.D. 2004) (citing Mo. Const. art. I, § 19).

Here, although the trial court found the defendant "not guilty," the court did not acquit the defendant of the charge. An acquittal is "a resolution, correct or not, of some or all of the factual elements of the offense charged." *Sanabria*, 437 U.S. at 71 (quoting *Lee v. United States*, 432 U.S. 23, 30 n.8 (1977); *Martin Linen Supply Co.*, 430 U.S. at 571). In this case, the trial court found that the facts, as stipulated by the parties, met the elements of the offense. The trial court then found the defendant "not guilty" because it found that the statute was overbroad.

The trial court's judgment in this case is akin to a dismissal following a guilty verdict because the trial court found the facts necessary for a finding of guilt and those findings of fact would still apply as a finding of guilt upon reversal if the State were successful in its appeal of the constitutional issue. In other words, no additional fact finding would be necessary. This is true even though the trial court stated that Defendant was "not guilty" because "the substance of the trial court's ruling, rather than its form, is examined to determine its precise nature." *State v. Neher*, 213 S.W.3d 44, 48 (Mo. banc 2007) (citations omitted)). The substance of the trial court's judgment shows that its precise nature was a finding of guilt followed by a dismissal on constitutional grounds. Therefore, the State has the statutory authority to appeal. *See* section 547.200.2, RSMo.

Finally, jurisdiction lies in the Supreme Court of Missouri because "[t]he supreme court shall have exclusive appellate jurisdiction in all cases involving the vaidity . . . of a statute or provision of the constitution of this state[.]" Mo. Const. art. V § 3.

STATEMENT OF FACTS

This is an appeal by the State of Missouri following a Polk County Circuit Court judgment finding that Respondent, Justin L. Ward (Defendant), committed an act constituting sexual misconduct involving a minor, but that the statute was unconstitutionally overbroad.

The State charged Defendant with one count of the class D felony of sexual misconduct involving a child by indecent exposure under section 566.083, RSMo. (L.F. 15:1.) On August 3, 2017, a bench trial was held on stipulated facts. (L.F. 18:1.)

The stipulated facts were as follows:

1. That on July 3, 2016 [Victim] is a child less than 15 years of age, having been born on [redacted].
2. That on July 3, 2016 the Defendant was 18 years of age having been born on February 20, 1998.
3. That the events took place on July 3, 2016, in Polk County, Missouri [ ].
4. That [Victim] would testify that she did have text messages to and from the defendant during the late evening hours of July 2, 2016 and early morning hours of July 3, 2016.
5. That in those text messages she did tell the defendant to come to her window and that about 1:00 am on July 3rd, 2016 the defendant did go to the residence of [Victim] and did crawl through the window of her bedroom.
6. That after arriving at her house they did engage in foreplay and that after each removed their clothing and each performed oral sex on the other with the defendant's penis being placed

in the mouth of [Victim] and that the Defendant did place his mouth and tongue on and inside of her vagina.

7. That the defendant was interviewed by [a detective] after being read his Miranda rights, and his agreement to talk to [the detective] and he stated that he knew [Victim] was 14 years of age. He did go to her house about 1:00 am on July 3, 2016. That he and [Victim] did have sex in the floor of her bedroom. He further stated that he did not use a condom.
8. That the Court shall admit into evidence the probable cause statement, Marked Exhibit 1 and attached hereto.
9. That the Court shall admit into evidence the report created by the Polk County Sheriff's Office, including all attached statements, Marked Exhibit 2 and attached hereto.
10. That the Court shall admit into evidence the video of interview of the Defendant by [the detective], Marked Exhibit 3, and attached hereto.

(L.F. 16:1-2.)

The trial court took the case under advisement, and on September 13, 2017, it issued the following judgment:

> [Victim] was 14 years old. Defendant was 18 years old. It is not illegal for him to have her perform fellatio on him as all was consensual and that act cannot be accomplished without him exposing his penis to her. The statute he is charged with makes it illegal to expose his penis to her because of her age only, under 15.
>
> One act is legal by statute, and the other illegal by statute. The latter statute in this factual situation only, is

unconstitutionally overbroad, State v. Beine, 162 S.W.3d 483 (Mo. Banc 2005).

Defendant is found not guilty. Costs to Polk County. Case and record ordered closed.

(L.F. 21:1.)

POINTS RELIED ON

I. The trial court erred in finding that section 566.083.1(2), RSMo was unconstitutionally overbroad because Defendant waived his constitutional claims in that he failed to raise them at the earliest time in a motion to dismiss or to quash the information under Rule 24.04.

State v. Parker, 886 S.W.2d 908, 925 (Mo. banc 1994)

Rule 24.04

State v. Newlon, 216 S.W.3d 180, 184 (Mo. App. E.D. 2007)

II. The trial court erred in finding that section 566.083.1(2), RSMo was unconstitutionally overbroad because the statute is not unconstitutional as applied to Defendant in there are circumstances in which the statute can be constitutionally applied, including the facts of this case, and Defendant has no constitutional right to expose his genitals to a child.

Section 566.083.1(2), RSMo

State v. Jeffrey, 400 S.W.3d 303 (Mo. banc 2013)

State v. Richard, 298 S.W.3d 529 (Mo. banc 2009)

New York v. Ferber, 458 U.S. 747 (1982)

Ferris v. Santa Clara County, 891 F.2d 715 (9th Cir. 1989)

ARGUMENT

I. (Waiver)

The trial court erred in finding that section 566.083.1(2), RSMo was unconstitutionally overbroad because Defendant waived his constitutional claims in that he failed to raise them at the earliest time in a motion to dismiss or to quash the information under Rule 24.04.

A. Standard of review

"Whether a statute is constitutional is an issue of law that this Court reviews *de novo*." *State v. Jeffrey*, 400 S.W.3d 303, 307 (Mo. banc 2013) (citing *State v. Vaughn*, 366 S.W.3d 513, 517 (Mo. banc 2012)). "'Statutes are presumed constitutional and will be found unconstitutional only if they clearly contravene a constitutional provision.'" *Id.* (quoting *Vaughn*, 366 S.W.3d at 517). "'The person challenging the validity of the statute has the burden of proving the act clearly and undoubtedly violates the constitutional limitations.'" *Id.* (quoting *Vaughn*, 366 S.W.3d at 517).

B. Defendant waived his constitutional claims

Constitutional claims are waived if they are not presented to the trial court at the first opportunity. *See State v. Parker*, 886 S.W.2d 908, 925 (Mo. banc 1994). The purpose of this requirement is to prevent surprise, to ensure that the parties have an opportunity to make a record and offer an evidentiary response to the constitutional challenge, and to give the trial court a full opportunity to identify and rule on the issue. *Adams by Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 908 (Mo. banc 1992) (overruled on other grounds by *Watts v. Lester E. Cox Med. Ctrs*, 376 S.W.3d 633 (Mo. banc 2012)).

"In the context of a criminal proceeding, 'Rule 24.04 prescribes the proper time to raise such fundamental questions as to the constitutionality of statutes upon which prosecutions are based.'" *State v. William*, 100 S.W.3d 828, 831 (Mo. App. W.D. 2003) (quoting *State v. Turner*, 48 S.W.3d 693, 696 (Mo. App. W.D. 2001)). The "earliest opportunity" to raise a constitutional challenge to the charging statute is by a pretrial motion to quash the indictment. *State v. Newlon*, 216 S.W.3d 180, 184 (Mo. App. E.D. 2007); *State v. Gonzalez*, 253 S.W.3d 828, 831 (Mo. App E.D. 2008) (holding that "the earliest opportunity defendant had to raise [a] constitutional challenge [to the charging statute] was before trial in a motion to quash the amended information"); *State v. Perkins*, 680 S.W.2d 331, 334 (Mo. App. S.D. 1984) ("[O]rdinarily a challenge to the constitutionality of the statute under which the accused is being prosecuted must be raised by motion as provided in Rule 24.04(b)(2); otherwise it will be regarded as having been waived."). Because Defendant did not raise the overbreadth issue until trial, the State had no opportunity to defend the challenge until after the trial court made its ruling finding Defendant "not guilty" as a result of the alleged overbreadth. The trial court should not have ruled on the constitutional issue at the conclusion of the trial because Defendant's constitutional claim was waived.

II. (Constitutionality of section 566.083.1(2), RSMo)

The trial court erred in finding that section 566.083.1(2), RSMo was unconstitutionally overbroad because the statute is not unconstitutional as applied to Defendant in there are circumstances in which the statute can be constitutionally applied, including the facts of this case, and Defendant has no constitutional right to expose his genitals to a child.

A. Standard of review

"Whether a statute is constitutional is an issue of law that this Court reviews *de novo*." *State v. Jeffrey*, 400 S.W.3d 303, 307 (Mo. banc 2013) (citing *State v. Vaughn*, 366 S.W.3d 513, 517 (Mo. banc 2012)). "'Statutes are presumed constitutional and will be found unconstitutional only if they clearly contravene a constitutional provision.'" *Id.* (quoting *Vaughn*, 366 S.W.3d at 517). "'The person challenging the validity of the statute has the burden of proving the act clearly and undoubtedly violates the constitutional limitations.'" *Id.* (quoting *Vaughn*, 366 S.W.3d at 517).

B. Section 566.083.1(2) is not facially unconstitutional

Section 566.083.1(2), RSMo provides that "[a] person commits the offense of sexual misconduct involving a child if such person . . . [k]nowingly exposes his or her genitals to a child less than fifteen years of age for the purpose of arousing or gratifying the sexual desire of any person, including the child[.]" The trial court in this case found that Defendant was not guilty of sexual misconduct involving a minor because the statute was "unconstitutionally overbroad." (L.F. 24:1.)

The trial court's finding that section 566.083.1(2) was overbroad was error.

"The overbreadth doctrine was born in the First Amendment jurisprudence of the United States Supreme Court." *Jeffrey*, 400 S.W.3d at 308 (citing *New York v. Ferber*, 458 U.S. 747, 768 (1982)). "An overbreadth challenge is a facial challenge to a statute." *Id.* "Generally, to prevail in a facial challenge, the party challenging the statute must demonstrate that no set of circumstances exists under which the statute may be constitutionally applied." *Id.* (citing *State v. Perry*, 275 S.W.3d 237, 243 (Mo. banc 2009)).

"Acknowledging the importance of the right to free expression and the danger of statutes that chill protected speech, the overbreadth doctrine 'allow[s] persons to attack overly broad statutes even though the conduct of the person making the attack is clearly unprotected and could be proscribed by a law drawn with the requisite specificity.'" *Id.* (quoting *Ferber*, 458 U.S. at 769). Therefore, both this Court and the United States Supreme Court have held that the overbreadth doctrine is limited to the context of the First Amendment. *State v. Richard*, 298 S.W.3d 529, 531 (Mo. banc 2009) (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)).

Here, section 566.083.1(2) is not facially overbroad. The statute, which makes it a crime to expose ones genitals to a child less than fifteen years of age for the purposes of sexual arousal or gratification does not chill protected speech. *See Jeffrey*, 400 S.W.3d at 311. Further, the statute is constitutional in that it prevents activity such as masturbation and genital exposure in front of a child with or without consent. *See State v. Howell*, 454 S.W.3d 386 (Mo. App. E.D. 2015) (The defendant masturbated on camera to a police officer posing as a 13-year-old girl); *State v. Miller*, 372 S.W.3d 455, 468-69 (Mo. banc 2012) (The victim saw the defendant's penis when he pulled down his shorts and "stuck his penis between [her] legs[;]" and when he made the

victim "put his penis in her mouth and perform oral sex on numerous occasions."). Therefore, section 566.083.1(2) is not facially overbroad.

C. Section 566.083.1(2) is not unconstitutional as applied

"The application of the overbreadth doctrine solely to First Amendment cases, however, should not be taken to undermine the importance of the rights guaranteed by other constitutional provisions." *Jeffrey*, 400 S.W.3d at 308. "While these rights receive constitutional protection, statutes infringing on them may not be challenged on overbreadth grounds." *Id.* "They may, however, be challenged on an *as applied* basis." *Id.*

Although the trial court found only that Defendant was not guilty because the statute was overbroad, Defendant also argued that the statute did not apply because Defendant "had a right to engage in the consensual, lawful sexual encounter with [Victim]." (L.F. 20:3.) But Defendant did not have a constitutional right to engage in sexual activity with a minor.

The overbreadth doctrine is unavailable in the Fourteenth Amendment context, but "[t]he United States Supreme Court has recognized that the Fourteenth Amendment guarantees a right to privacy for 'personal rights that can be deemed "fundamental" or "implicit in the concept of liberty"'" *Jeffrey*, 400 S.W.3d at 311 (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973)). "'This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing.'" *Id.* (quoting *Slaton*, 413 U.S. at 65.) "This right is not absolute, however, and activities are not protected from regulation simply because they occur in the home." *Id.* at 312. This is especially true in regards to minors. *See Ferber*, 458 U.S. at 756-57; *Ferris v. Santa Clara County*, 891 F.2d 715, 717 (9th Cir. 1989).

In *Ferber*, the United States Supreme Court stated that "a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling'" *Ferber*, 458 U.S. at 756-67 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)). Based on this compelling interest, the Court noted that it had upheld legislation "aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *Id.* at 757 (citing *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) (upholding the prohibition of using a child to distribute literature on the street); *Ginsberg v. New York*, 390 U.S. 629, 637-43 (1968) (upholding the prohibition of children being exposed to nonobscene literature); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (upholding special treatment of indecent broadcasting received by adults and children). The Court also noted that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Id.*

More directly on point, the Ninth Circuit held in *Ferris*, relying on *Ferber*, that California's statutory rape statutes did not violate Ferris's substantive due process rights because "[e]ven if we assume that Ferris may have a constitutional right to engage in consensual sexual activities with females, the State may nonetheless regulate this conduct insofar as it pertains to minors." *Ferris*, 891 F.2d at 717.

Similarly, here, the State may regulate the sexual conduct of minors,[2] and Defendant does not have a constitutional right to engage in sexual relations with a minor. The trial court found that "[i]t is not illegal for [Defendant] to have [Victim] perform fellatio on him. As all was consensual

[2] Courts also have found that "there is no privacy right among minors to engage in consensual sexual intercourse." *In re T.A.J.*, 62 Cal.App.4th 1350, 1361 (Cal Ct. App. 1998).

and that act cannot be accomplished without him exposing his penis to her. . . . One act is legal by statute, and the other illegal by statute." But the trial court's logic is incorrect. The fact that the legislature has not criminalized Defendant's act of putting his penis in Victim's mouth does not create a constitutional right to engage in such conduct.

Defendant also argued to the trial court that he was not guilty of sexual misconduct because his "genitals were not exposed to [Victim] for the purpose of gratifying Defendant's sexual desires, but rather for the purpose of participating in a consensual sexual encounter;" and because "there are no criminal statutes in Missouri that prohibit such conduct." (L.F. 20:1.) But Defendant's conduct falls under the plain language of the sexual misconduct statute, and, although Victim and Defendant's ages exempt Defendant from prosecution under the statutory rape and sodomy statutes, the sexual misconduct statute properly criminalizes Defendant's conduct to a lesser degree than those other statutes do for people of more disparate ages.

First, this Court has found that the fact that a defendant exposes himself to a victim for the purpose of engaging in sexual contact is sufficient to prove that the defendant exposed himself for the purpose of arousing or gratifying the sexual desire of any person. *Miller*, 372 S.W.3d at 469. The trial court here found that Defendant exposed himself for the purpose of having Victim "perform fellatio on him." (L.F. 21:1.) The exposure in this case was solely for the purpose of arousing or gratifying the sexual desire of Defendant. Therefore, section 566.083.1(2) applies to Defendant's conduct in this case.

Next, the fact that the statutory rape and sodomy statutes exempt Defendant's conduct from punishment under those specific statutes does not mean that the legislature cannot criminalize the conduct (or part of the

conduct) in another way. Here, the legislature determined that Defendant's conduct (due to his relatively young age) should not constitute statutory rape or sodomy with a five-year minimum prison sentence. *See* sections 566.032; 566.034; 566.060; 566.061, RSMo. The legislature instead determined that Defendant's conduct violated the sexual misconduct involving a child statute, which makes his act a class D felony requiring a sentence of no more than four years in prison.[3] *See* sections 566.083.4; 558.011.1(4), RSMo. "The function of police power is to preserve the health, welfare and safety of the people by regulating all threats harmful to the public interest[;] and "[t]he legislature is afforded wide discretion to exercise its police power." *Richard*, 298 S.W.3d at 532 (citing *Craig v. City of Macon*, 543 S.W.2d 772, 774 (Mo. banc 1976)).

Here, the legislature exercised its discretion in exempting people under the age of twenty-one from being guilty of statutory rape and sodomy for having sexual relations with a person over the age of fourteen. The legislature, however, determined that any person who exposes his or her genitals to a child under fifteen years old for the purpose of arousing or gratifying sexual desire is guilty of sexual misconduct. The legislature did not approve of sexual contact between an eighteen-year-old and a child under fifteen, it criminalized the contact at different levels in order to preserve the health, welfare, and safety of the people.

Defendant's conduct, which was stipulated to at trial, falls within the plain language of section 566.083.1(2), RSMo. Therefore, Defendant is guilty of sexual misconduct involving a child, and the trial court erred in finding that section 566.083.1(2) was unconstitutional.

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[3] Sexual misconduct involving a child is an E felony as of January 1, 2017. The punishment remains the same. *See* sections 566.083.4; 558.011.1(5), RSMo 2017.

CONCLUSION

For the foregoing reasons, the trial court erred and its decision should be reversed and remanded.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) in that it contains 4167 words excluding the cover, certificate required by Rule 84.06(c), and signature block.

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