No. SC96696

IN THE

Supreme Court of Missouri

STATE OF MISSOURI,

Appellant,

v.

JUSTIN L. WARD,

Respondent.

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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

JURISDICTIONAL STATEMENT

Respondent contests jurisdiction and makes reference to his separately filed Motion to Dismiss (Resp.Br. 4). He asserts that "[t]he State of Missouri is attempting to appeal a finding of 'not guilty,' which is not authorized by Section 547.200.2, RSMo 2000" (Resp.Br. 4). Respondent makes the same argument in his Point I (*see* Resp.Br. 6-8). He observes that "the trial court never used the word 'dismissal,' nor was [it] asked to," and he observes that the trial court "found [him] 'not guilty' " (Resp.Br. 7). Relying primarily on *Sanabria v. United States*, 437 U.S. 54 (1978), respondent argues that the Double Jeopardy Clause bars an appeal, even "where the legal rulings underlying the acquittal were erroneous" (Resp.Br. 7). He observes that the principle "[t]hat a verdict of acquittal may not be reviewed without putting the defendant twice in jeopardy has been described as 'the most fundamental rule in the history of double jeopardy jurisprudence' " (Resp.Br. 7).

As outlined in its opening brief, the State acknowledges—and does not disagree with—the general principles stated in *Sanabria* (*see* App.Br. 5). However, while the trial court purported in respondent's case to find respondent "not guilty" of the charged offense, the basis for its conclusion was its legal determination that § 566.083 was "unconstitutionally overbroad" (*see* L.F. 21:1). The trial court made no finding that respondent was "not guilty" as a matter of fact (*see* L.F. 21:1). Or, in other words, it did not enter "an

acquittal for insufficient evidence." *See Sanabria*, 437 U.S. at 68-69.

To the contrary, in its judgment, the trial court recited the facts of the case, observing that Victim was fourteen years old, and that respondent was eighteen years old (L.F. 21:1). The trial court stated that it was "not illegal for [respondent] to have [Victim] perform fellatio on him *as all was consensual* and that act cannot be accomplished without him exposing his penis to her" (L.F. 21:1, emphasis added). The court's finding that the acts were "all . . . consensual" makes plain that the trial court found that the acts occurred. In addition, inasmuch as the court also found that the act of fellatio "cannot be accomplished without [respondent] exposing his penis to her," it is apparent that the court found that respondent committed the charged conduct of exposing his penis to Victim for the purpose of having her perform fellatio, which by definition is "oral stimulation of the penis." (*see* https: // www .Merriam-webster.com/dictionary/fellatio) (last accessed June 29, 2018).

There was no indication that the trial court found any evidentiary insufficiency. Rather, having found that the charged conduct occurred, the court concluded that section 566.083, "*in this factual situation only*, is unconstitutionally overbroad" (LF. 21:1, emphasis added). Thus, it is evident that the trial court found respondent "not guilty" for legal (as opposed to factual) reasons. Accordingly, it cannot be said that respondent was, in fact, acquitted of the charged offense—notwithstanding the trial court's use of the

phrase "not guilty." *See generally State v. Neher*, 213 S.W.3d 44, 48 (Mo. 2007) (after the court stated that it would find the defendant "not guilty" as to one count, the court then clarified that it had only believed the evidence to be insufficient as to one element of the offense, and it found the defendant guilty of a lesser included offense that lacked that one element); *see also United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) (in conducting a double jeopardy analysis after an "acquittal," the court "must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged").

The trial court's "not guilty" ruling in respondent's case differs significantly from the acquittal in *Sanabria*. In that case, the government charged the defendant (along with other defendants) with a federal offense based on "horse betting and numbers betting" that was alleged to be a violation of state law. *Sanabria*, 437 U.S. at 57. At the close of the government's case, the defendant moved for judgment of acquittal, arguing that the state had failed to prove that there was a violation of the state statute because the state statute "did not prohibit numbers betting but applied only to betting on 'games of competition' such as horse races." *Id.* at 57-58. The government argued that "that 'violation of the State law is a jurisdictional element of [the federal] statute' and that 'not every [defendant]

must be found to be violating this State law.' " *Id.* at 58. The trial court accepted the government's theory and concluded that the defendant only had to have joined in the illegal enterprise in some way. *Id.* Defendant then asked that the evidence of the "numbers betting" be excluded from the case, but the trial court denied that request. *Id.* After the defendant had rested, however, the trial court changed its ruling and excluded the evidence of "numbers betting," concluding that "numbers betting" was not prohibited by the state law in question. *Id.* at 58-59. Defendant then moved for a judgment of acquittal, arguing that there was no evidence that connected him to the "horse betting." *Id.* at 59. The government disagreed with defendant's assessment of the evidence, but it also repeated its earlier argument that defendant only had to be connected to the illegal enterprise in some way. *Id.* The trial court disagreed with the government and stated that the defendant had to have been connected to the enterprise as charged in the indictment, namely, the "horse [betting] operation." *Id.* The trial court concluded, " 'I don't think you've done it.' " *Id.* The trial court then granted the defendant's motion for judgment of acquittal. *Id.*

The government appealed, and the Court of Appeals for the First Circuit concluded that the trial court had effectively dismissed the "numbers betting" aspect of the charge (while granting an acquittal for insufficient evidence on the "horse betting" aspect of the charge). *Id.* at 60-61. The Court

of Appeals held that the dismissal of the "numbers betting" charge was erroneous, and it remanded the case for a new trial on the "numbers betting" charge. *Id*. at 62.

The United States Supreme Court reversed. In analyzing whether the defendant had been acquitted, the Court observed, "While form is not to be exalted over substance in determining the double jeopardy consequences of a ruling terminating a prosecution, . . . neither is it appropriate entirely to ignore the form of order entered by the trial court[.]" *Id*. at 66. The Court observed that the trial court had "issued only two orders, one excluding certain evidence and the other entering a judgment of acquittal on the single count charged." *Id*. The Court observed that "[n]o language in the indictment was ordered to be stricken," and that the indictment was not amended. *Id*. With regard to the trial court's ultimate order, the Court observed that "[t]he judgment of acquittal was entered on the entire count and found petitioner not guilty of the crime [charged], without specifying that it did so only with respect to one theory of liability[.]" *Id*. at 66-67. The Court further observed that, in its notice of appeal, even the government had characterized the trial court's order as " 'a decision and order . . . excluding evidence and entering a judgment of acquittal.' " *Id*. at 67.

The Court then assumed that "the trial court's interpretation of the indictment was erroneous," but it pointed out that "not every erroneous

interpretation of an indictment for purposes of deciding what evidence is admissible can be regarded as a 'dismissal.' " *Id.* at 68. The Court observed that the trial court had not found that the indictment "failed to charge a necessary element of the offense . . . ; rather, it found the indictment's description of the offense too narrow to warrant the admission of certain evidence." *Id.* Accordingly, the Court held, "we believe the ruling below is properly to be characterized as an erroneous evidentiary ruling,[] which led to an acquittal for insufficient evidence." *Id.* at 68-69. The Court continued, "That judgment, however erroneous, bars further prosecution on any aspect of the count and hence bars appellate review of the trial court's error." *Id. See also Martin Linen Supply Co.*, 430 U.S. at 572 ("As in *Fong Foo*[*v. United States*, 369 U.S. 141 (1962)], the ruling as to the charged offenses that terminated the trial was an acquittal 'in substance as well as form': for the judge 'evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction.' ").

Here, in contrast to *Sanabria*, evidence was not erroneously excluded at trial, and, as outlined above, the trial court gave no indication that its finding of "not guilty" was based on any perceived evidentiary insufficiency. There was no indication, for instance, as implied by respondent (*see* Resp.Br. 6), that the trial court found that respondent's exposing his penis to Victim for the purpose of having her perform fellatio on him "was not for the purpose

of gratifying his sexual desires." Rather, the trial court found that the charged conduct occurred, but it concluded that, in light of its consensual nature, the statute was "unconstitutionally overbroad" (L.F. 21:1).

The propriety of that ruling can be reviewed without running afoul of the Double Jeopardy Clause because a finding of guilt consistent with the trial court's factual findings can be entered without a new trial if the State is successful in its arguments on appeal. *See United States v. Wilson*, 420 U.S. 332, 344-45, 351-53 (1975) ("We therefore conclude that when a judge rules in favor of the defendant after a verdict of guilty has been entered by the trier of fact, the Government may appeal from that ruling without running afoul of the Double Jeopardy Clause.").[1]

In sum, while the trial court purported to find respondent "not guilty," the substance of the court's judgment shows that the court believed that respondent committed the charged conduct but that he was "not guilty" based

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[1] Had the trial court not made factual findings, the Double Jeopardy Clause could prohibit the State's appeal. *See United States v. Jenkins*, 420 U.S. 358 (1975) (holding that appeal of an order dismissing an indictment after jeopardy had attached, but before verdict, was barred because a successful appeal would require "further proceedings . . . devoted to the resolution of factual issues going to the elements of the offense charged.").

on the perceived unconstitutionality of the statute. Accordingly, the court's judgment was not an acquittal, and the State's appeal is not barred by the Double Jeopardy Clause.

ARGUMENT

I.

In a footnote, in response to Point I of appellant's brief—which asserted that the trial court erred in finding section 566.083.1(2) unconstitutional due to respondent's having failed to assert the claim at the earliest opportunity—respondent asserts that the State "misapprehends the nature of preservation" (App.Br. 7 n. 3). Respondent reminds the court that he "is the *respondent*" (App.Br. 7 n. 3) (emphasis in original).

But the material point was not that respondent failed to preserve his claim for appellate review; rather, the point was that respondent did not raise his claim in accordance with established rules, and that the trial court, therefore, erred in granting relief on respondent's claim at that time. Indeed, the trial court's erroneous ruling exacerbated the question burdening its ultimate ruling, namely, whether the ruling was an acquittal on evidentiary grounds, or whether it was a ruling akin to a dismissal on constitutional grounds. Had the issue been timely asserted before trial, and had the trial court been given an opportunity to resolve the constitutional issue at that time, the charge could have been dismissed, and *both* parties would have had a fair opportunity to have its arguments considered (and later reviewed), unfettered by the Double Jeopardy implications discussed above.

II.

In response to appellant's Point II, part C, respondent first asserts that § 566.083 was unconstitutionally overbroad as applied to him (Resp.Br. 9). He relies on the analysis in *State v. Beine*, 162 S.W.3d 483 (Mo. 2005) (Resp.Br. 10-11). But respondent's reliance on *Beine* is misplaced.

The defendant in *Beine* was charged under a different subdivision of § 566.083. There, the defendant was charged with knowingly exposing his genitals "to a child less than fourteen years of age in a manner that would cause a reasonable adult to believe that the conduct is likely to cause affront or alarm to a child less than fourteen years of age." *Id.* at 484-85 (citing § 566.083.1(1)). Here, respondent was charged under subdivision (2), which criminalizes knowingly exposing the 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." *See* § 566.083.1(2), RSMo Cum. Supp. 2013. In *Beine*, the Court expressly noted that "[t]he constitutionality of subdivisions (2) and (3) of section 566.083.1 is not addressed." 162 S.W.3d at 486 n. 2. In short, the opinion in *Beine* has no bearing on whether subdivision (2) was unconstitutionally overbroad as applied to respondent.

In addition, although the Court in *Beine* analyzed the constitutionality of subdivision (1) of the statute and stated that "under the doctrine of overbreadth," "a person may contest the constitutionality of a statute even if

he was not engaging in constitutionally protected conduct," the Court's analysis along those lines was *dicta*. *See State v. Richard*, 298 S.W.3d 529, 531 (Mo. 2009) ("The constitutional analysis in *Beine* was unnecessary to resolve the case and, as a result, is dicta."). Moreover, this Court has also made plain that *Beine* should not be relied on to extend the overbreadth doctrine outside of the First Amendment arena. *See State v. Jeffrey*, 400 S.W.3d 303, 309 (Mo. 2013) ("Not only is *Beine*'s expansion of the overbreadth doctrine dicta, but it is bad dicta.").

Respondent ultimately acknowledges that the decision in *Beine* was "limited" by the decisions in *Jeffrey* and *Richard* (Resp.Br. 13). But he asserts that he had the right to engage in consensual deviate sexual intercourse with Victim and, thus, that the statute was unconstitutional as applied to him (Resp.Br. 11, 13). But for the reasons outlined in appellant's opening brief, respondent had no constitutionally protected right to engage in deviate sexual intercourse with a minor (*see* App.Br. 16-19). In short, the mere fact that the general assembly has not criminalized respondent's act of putting his penis in a minor's mouth does not mean that he has a constitutionally protected right to do so.

Respondent cites to the United States Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), but he acknowledges that the Court in that case "recognized the privacy interest of adults to engage in private

conduct in the exercise of their liberty under the Due Process Clause . . . ." (Resp.Br. 14). *See generally State v. S.F.*, 483 S.W.3d 385, 389 (Mo. 2016) ("In *Lawrence*, the United States Supreme Court held that a state could not criminalize the 'private sexual conduct' of 'two adults' who had 'full and mutual consent from each other' under circumstances in which no persons 'might be injured or coerced.'). Thus, *Lawrence* does not support respondent's argument that § 566.083.1(2) as applied to him violated his due process right to privacy.

Respondent also cites *Carey v. Population Services Int'l*, 431 U.S. 678 (1977), and he asserts that there, "the Court held that the right of privacy in this context extends to minors as well as to adults" (Resp.Br. 14). But as the Court observed in *Lawrence*, there "was no single opinion for the Court" in *Carey*. 539 U.S. at 566. Moreover, while *Carey* (along with other cases) "confirmed that the reasoning of *Griswold*[*v. Connecticut*, 381 U.S. 479 (1965)] could not be confined to the protection of rights of married adults," *Carey* did not hold that a person has a protected liberty or privacy interest to engage in deviate sexual intercourse with a minor child.

The relevant issue in *Carey* was whether a law prohibiting the sale or distribution of contraceptives to minors under 16 was unconstitutional. The Court observed that "[t]he decision whether or not to beget or bear a child is at the very heart of [a] cluster of constitutionally protected choices" that fall

under the right to privacy. 431 U.S. at 685. The Court observed that "where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." *Id*. Here, however, respondent's act of exposing his penis to Victim and putting his penis in Victim's mouth did not bear upon his decision "to bear or beget a child"; thus, *Carey* is inapposite.[2]

In short, because respondent had no protected liberty or privacy interest in engaging in deviate sexual intercourse with a minor or exposing his genitals to a minor, the statute he violated was not unconstitutional as applied to him. The Court should grant appellant's Points I and II.

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[2] In another part of the lead opinion, some members of the Court recognized that "[t]he question of the extent of state power to regulate conduct of minors not constitutionally regulable when committed by adults is a vexing one, perhaps not susceptible of precise answer." *Carey*, 431 U.S. at 692. The Court continued, "We have been reluctant to attempt to define 'the totality of the relationship of the juvenile and the state.' " *Id*.; *see also Carey*, 431 U.S. at 706 (observing, "Restraints on the freedom of minors may be justified 'even though comparable restraints on adults would be constitutionally impermissible.' ") (Powell, J., concurring).

CONCLUSION

The Court should reverse the trial court's purported acquittal that was based on constitutional grounds and direct the trial court to enter a judgment of guilt consistent with its factual findings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Rule 84.06(b) and contains 3,152 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word.

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