IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SC96696
	)	
	)	
JUSTIN WARD,	)	
	)	
Respondent.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF POLK COUNTY, MISSOURI
THIRTY-FIRST JUDICIAL CIRCUIT
THE HONORABLE WILLIAM J. ROBERTS, JUDGE

RESPONDENT'S BRIEF
(REDACTED)

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JURISDICTIONAL STATEMENT

Respondent contests jurisdiction. See Respondent's Motion to Dismiss Appeal, filed in this Court March 28, 2018. The State of Missouri is attempting to appeal a finding of "not guilty," which is not authorized by Section 547.200.2, RSMo 2000.

STATEMENT OF FACTS

Respondent, Justin Ward, adopts Appellant's Statement of Facts, with the following corrections and additions. Appellant states that the judgment found that Justin "committed an act constituting sexual misconduct involving a minor, but that the statute was unconstitutionally overbroad." (App. Br. 8). Respondent notes that the judgment raises that implication, but does not explicitly find that Justin committed such an act, but only that it was not illegal for him to have done so (D21P1).

In her statement to the Polk County Sheriff's Department, M.B. said that she met Justin at church camp and they had been "very close" since then (D17P11). She started bringing him home and they "willingly did things under our clothes with our hands." (D17P11). According to M.B., this was the "first and only thing we did after he turned 18." (D17P11). M.B.'s mother looked at M.B.'s text messages and called the police (D17P7).

Because it was not illegal for Justin and M.B. to engage in sexual intercourse or deviate sexual intercourse, the Polk County prosecutor charged him with sexual misconduct involving a child by indecent exposure, Section 566.083, alleging that he knowingly exposed his genitals to M.B. for the purpose of gratifying his sexual desire (D15). After a bench trial with stipulated facts, the Honorable William J. Roberts found Justin not guilty (D21P1).

ARGUMENT

I.

This Court should dismiss appellant's appeal.[1]

Respondent, Justin Ward, was charged by information with sexual misconduct involving a child by indecent exposure, pursuant to Section 566.083, for having consensual sexual contact with M.B. - a teenage girl about three and a half years younger than he (D15, D16). The fourteen-year-old girl told authorities that she and Justin had been going steady since church camp; that they had done this before; and that this was the only occurrence after Justin turned eighteen (D17P11).

The Class E felony charges were tried without a jury before the Honorable William J. Roberts, Judge of the Circuit Court of Polk County (D13P8). The parties presented their case by stipulation (D16), and both attorneys filed suggestions (D20). Defense counsel requested the court enter a verdict of not guilty – nowhere did counsel request dismissal (D20). In fact, defense counsel requested a *factual* determination of guilt, wherein he argued that Justin's "exposure of his genitals to MKB was not for the purpose of gratifying his sexual desires" … . (D20P3).

On September 13, 2017, the trial court entered its judgment; "Defendant is found not guilty. Costs to Polk County. Case and record ordered closed." (D21).[2] The State of Missouri filed a notice of appeal on September 25, 2017 (a Monday) (D22).

In its jurisdictional statement, Appellant State of Missouri argues that Judge Roberts' final judgment was "not an acquittal" and "akin to dismissal." (App. br.

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[1] Respondent has also filed a pending motion to dismiss this appeal.

[2] The docket entry reads "Tried by Court – Not Guilty" (D13P8).

at 5-6). But the trial court never used the word "dismissal," nor was he asked to. Judge Roberts found Justin "not guilty."[3]

In ***Sanabria v. United States***, 437 U.S. 54 (1978), judgment of acquittal was entered by the trial court based on an evidentiary ruling that was later held to be erroneous. The Government filed a timely appeal. ***Id***. at 2177. The United States Supreme Court held that a retrial, and therefore an appeal, was barred by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, which commands that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb" ***Sanabria***, 437 U.S. at 63.

The ***Sanabria*** Court addressed the question raised by the State of Missouri in this case – whether appeal by the State is barred where the legal rulings underlying the acquittal were erroneous.[4] ***Id***. at 64. The Court held that such an appeal *is* in fact so barred by the Double Jeopardy Clause.

That 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." ***Sanabria***, 437 U.S. at 64, *citing* ***United States v. Martin Linen Supply Co.,***, 430 U.S. 564, 571 (1977). "The fundamental nature of this rule is manifested by its explicit extension to situations where an acquittal is 'based upon an egregiously erroneous foundation.'" ***Sanabria***, 437 U.S. at 64; *citing* ***Fong Foo v. United States***, 369 U.S. 141, 143 (1962). There is no exception permitting retrial once the defendant has been acquitted. ***Id***.

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[3] In Point I of its brief, appellant argues that respondent has "waived" any challenge that the statute was overbroad as applied to him. Appellant misapprehends the nature of preservation – Justin is the *respondent*. Judge Roberts' reasoning aside, he made a factual finding of not guilty, which is what Justin's attorney requested.

[4] Respondent does not concede that the trial court's ruling was erroneous. See Points II and III.

The Missouri cases relied on the State to invoke this Court's jurisdiction are inapposite – they are uniformly cases in which judgment of acquittal is granted after a jury's guilty verdict, or where charges are dismissed before a verdict is entered. Allowing the State's appeal to proceed in a case where Justin Ward has been tried and found not guilty, whatever the finder of fact's reasoning, is a step too far. Double Jeopardy bars such an appeal and retrial.

II.

Section 566.083 is overbroad as applied to Justin.

Standard of review

Constitutional challenges to a statute are issues of law to be reviewed de novo. ***State v. Young***, 362 S.W.3d 386, 390 (Mo. banc 2012).

Facts

Respondent, Justin Ward, was charged by information with sexual misconduct involving a child by indecent exposure, pursuant to Section 566.083, for having consensual sexual contact with M.B. - a teenage girl about three and a half years younger than he (D15, D16). The fourteen-year-old girl told authorities that she and Justin had been going steady since church camp; that they had done this before; and that this was the only occurrence after Justin turned eighteen (D17P11).

The Class E felony charges were tried without a jury before the Honorable William J. Roberts, Judge of the Circuit Court of Polk County (D13P8). The parties presented their case by stipulation (D16), and both attorneys filed suggestions (D20).

The stipulation read in pertinent part:

> 1. That on July 3, 2016 [M.B.] [was] a child less than 15 years of age, having been born on October 23, 2001.
>
> 2. That on July 3, 2016 [Justin Ward] was 18 years of age having been born on February 20, 1998.
>
> ***
>
> 6. [M.B. and Justin] did engage in foreplay and that after each removed their clothing and each performed oral sex on the other …

(D16P1).

At the bench trial, both parties filed written closing arguments and suggestions (D19, D20). Defense counsel argued that Justin was not guilty because exposing his genitals to M.B. was not for sexual gratification, but rather in

preparation for the lawful and consensual sexual encounter (D20P2). In its written verdict, the trial court agreed and found Justin not guilty (D21).

Overbroad

Both defense counsel's suggestions and the trial court's order relied on ***State v. Beine***, 162 S.W.3d 483 (Mo. banc 2005). Although since somewhat limited to its facts, ***Beine*** also involved an overbreadth analysis of Section 566.083 by indecent exposure.

Mr. Beine was an employee at an elementary school in St. Louis. ***Beine***, 162 S.W.3d at 484. His duties included monitoring the hallways and boys' restrooms for disruptive behavior. ***Id***. He was allowed to use the boys' restroom when he needed to relieve himself. ***Id***. After several students saw his genitals in the restroom, he was convicted of sexual misconduct involving a minor under Section 566.083.1(1).[5] ***Id***. At that time, the statute read as follows:

> A person commits the crime of sexual misconduct involving a child if the person:
>
> (1) Knowingly exposes the person's 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. ***Beine***, 162 S.W.3d at 484-485.

Beine argued that the statute was unconstitutional for three reasons: (1) it punished innocent conduct; (2) the "affront or alarm" element provided no *mens rea* requirement; and (3) it did not advise a person in the position of Beine as to what he must do to avoid violation of the statute when his conduct was otherwise lawful. ***Beine***, 162 S.W.3d at 486. After listing these three arguments, the Supreme Court summed them up by adding, "[i]n essence, Mr. Beine contends that the statute is overbroad." ***Id***. The court proceeded to analyze the arguments as a group, rather than individually. ***Id***.

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[5] Respondent was charged under a different subsection of Section 566.083.

When a statute prohibits conduct a person has no right to engage in and conduct a person has a right to engage in, the statute is unconstitutionally overbroad. ***Beine***, 162 S.W.3d at 486 (citing ***City of St. Louis v. Burton***, 478 S.W.2d 320, 323 (Mo.1972); ***Christian v. Kansas City***, 710 S.W.2d 11, 12–14 (Mo. App., W.D. 1986)). The court reasoned that a person must expose himself in many situations, such as when using the restroom, and the right to do so is certainly protected. ***Beine***, 162 S.W.3d at 486. This holds true even if a reasonable person might think that the exposure of one's genitals in a restroom would cause affront or alarm to another person. ***Id***. A child's potential affront or alarm cannot, by itself, criminalize otherwise protected conduct. ***Id***.

Furthermore, the court did not fully arrive at the question of whether Beine himself was engaging in protected conduct. ***Beine***, 162 S.W.3d at 487. Such a determination was not necessary because under the doctrine of overbreadth, the appellant's conduct itself need not have been protected. ***Id***. A statute that punishes both protected and unprotected conduct is unconstitutional regardless of the individual's own conduct. ***Id***. The court noted that although Beine's arguments were not based on the First Amendment, the doctrine of overbreadth could still be applied because the overall purpose of the doctrine is to prevent statutes from criminalizing innocent conduct. ***Id***. Pointing to Beine's third argument, the court emphatically stated, "Section 566.083.1(1) leaves adults in a state of uncertainty about how they may take care of their biological needs without danger of prosecution when a child is present in the same public restroom." ***Id***. The court proceeded to invalidate the statute. ***Id***. at 488.

As Mr. Beine had the right to use a public restroom, so did Justin and M.B. have the right to engage in consensual sexual intercourse. Consensual sexual intercourse or consensual deviate sexual intercourse for an eighteen-year- old is only criminalized with a person under the age of fourteen. Sections 566.032; 566.062. Consensual sexual contact for an eighteen-year-old is only criminalized where the person subjected to the contact is under the age of fourteen. Section

566.067.[6] And just as argued by defense counsel in his written suggestions, Justin's exposure of his genitals was incident to his lawful activity – a sexual encounter with his fourteen-year-old girlfriend.

Judge Roberts agreed with this analysis and found Justin not guilty of the charges. His ruling was that "it is not illegal for [Justin] to have [M.B.] perform fellatio on him … [a]s all was consensual and that act cannot be accomplished without [his] exposing his penis to her." (D21). This appeal should be dismissed, or in the alternative, affirmed.

[6] There is an "over 21, under 17" gap for second degree offenses – often called the "Romeo and Juliet" exception. Sections 566.034, 566.064.

III.

Due process right to privacy.

Respondent acknowledges that ***State v. Beine***, 162 S.W.3d 483 (Mo. banc 2005), was limited by ***State v. Jeffrey***, 400 S.W.3d 303 (Mo. banc 2013), and ***State v. Richard***, 298 S.W.3d 529 (Mo. banc 2009), to the First Amendment context.[7] But the trial court's judgment in this case can be sustained on any grounds cited. ***State v. Merritt***, 467 S.W.3d 808 (Mo. banc 2015). Respondent asserts that the charged offense was not only overbroad as applied to him, but violated his substantive due process right to privacy. ***Lawrence v. Texas***, 539 U.S. 558 (2003).

Privacy

The right to privacy is the right of an individual to be free from unwarranted governmental intrusion into the "personal intimacies of the home." ***Caesar's Health Club v. St. Louis County,*** 565 S.W.2d 783, 787 (Mo. App., E.D. 1978) (quoting ***Paris Adult Theatre I v. Slaton***, 413 U.S. 49 (1973)).

As more fully discussed in Point II, Justin and M.B. had the right to engage in consensual sexual intercourse. Consensual sexual intercourse or consensual deviate sexual intercourse for an eighteen-year- old is only criminalized with a person under the age of fourteen. Sections 566.032; 566.062. Consensual sexual contact for an eighteen-year-old is only criminalized where the person subjected to the contact is under the age of fourteen. Section 566.067. The "Romeo and Juliet exception" is an "over 21, under 17" gap for second degree offenses. Sections 566.034, 566.064. Yet in an attempt to criminalize otherwise lawful behavior, the Polk County prosecutor charged Justin with sexual misconduct involving a child

[7] While acknowledging those cases, respondent does not intend to concede Point II. While the statute may not be overbroad on its face, ***Beine*** still stands for the proposition that Justin could not perform a lawful act without exposing himself to this charge, making the statute overbroad as applied to him.

by indecent exposure, Section 566.083, alleging that he knowingly exposed his genitals to M.B. for the purpose of gratifying his sexual desire (D15).

In ***Lawrence v. Texas***, 539 U.S. 558 (2003), the United State Supreme Court recognized the privacy interest of adults to engage in private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Court overturned a Texas statute criminalizing consensual deviate sexual intercourse between adults, noting that the statute sought "to control a personal relationship that … is within the liberty of persons to choose without being punished as criminals." 539 U.S. at 567. The statute at issue touched "upon the most private human conduct, sexual behavior, and in the most private of places, the home." ***Id***.

And while the private, consensual sexual behavior at issue in ***Lawrence*** was between adults, the Court cited to the case of ***Carey v. Population Services Int'l***, 431 U.S. 678 (1977), concerning a New York law forbidding sale or distribution of contraceptive devices to persons under 16 years of age. The Court noted that the reasoning of ***Griswold v. Connecticut*** 381 U.S. 479 (1965), describing the protected interest of the right to privacy, could not be confined to the protection of rights of married adults. ***Lawrence***, 539 U.S. at 566.

In ***Carey***, the Court held that the right of privacy in this context extends to minors as well as to adults. 431 U.S. at 693 (examining abortion and contraception cases). Justin had a protectable liberty interest and a substantive due process right to privacy, because the sexual acts he and M.B. engaged in, while disapproved of by her mother, were *not unlawful* under Chapter 566.

The state has back-doored an attempt at a felony sex conviction for a young man for whom sex with his girlfriend was not unlawful. The trial court's finding of "not guilty" in this context was correct and must be upheld.

CONCLUSION

For the reasons presented, respondent respectfully requests that this appeal be dismissed, or in the alternative, affirmed.

Respectfully submitted,

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Certificate of Compliance

I, Ellen H. Flottman, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word in Times New Roman size 13 point font. Excluding the cover page, the signature block, and this certificate of compliance, the brief contains 2,878 words, which does not exceed the 27,900 words allowed for a respondent's brief.

/s/ Ellen H. Flottman

Ellen H. Flottman