MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,

Respondent,

v.

ROBERT L. BROWN,

Appellant.

DOCKET NUMBER WD81873

Date: March 3, 2020

Appeal from:

Johnson County Circuit Court
The Honorable William B. Collins, Judge

Appellate Judges:

Division Three: Lisa White Hardwick, Presiding Judge, Alok Ahuja and Anthony Rex Gabbert, Judges

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Attorneys:
Carol D. Jansen, Columbia for appellant.
Evan J. Buchheim, Jefferson City for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI, Respondent,
v.
ROBERT L. BROWN, Appellant.

WD81873 Johnson County

Before Division Three Judges : Lisa White Hardwick, Presiding Judge, Alok Ahuja and Anthony Rex Gabbert, Judges

Robert Lee Brown appeals from his convictions on nine counts of first-degree statutory sodomy and two counts of victim tampering. He contends the circuit court plainly erred in instructing the jury on two of the first-degree statutory sodomy counts because the verdict directors violated his right to a unanimous verdict. Brown also argues the court plainly erred in allowing propensity evidence.

AFFIRMED.

Division Three holds:

(1) The circuit court did not plainly err in instructing the jury on the first-degree statutory sodomy counts charged in Counts I and V. The evidence with regard to Count V showed that the act supporting that charge occurred only one time. To the extent that the victim's descriptions of that one act were inconsistent, the inconsistency went to her credibility and did not constitute multiple acts evidence; therefore, Brown's right to a unanimous verdict on Count V was not violated. Likewise, with regard to Count I, the victim's inability to remember which of three activities she was doing when Brown sodomized her went to her credibility and did not constitute multiple acts evidence. Additionally, to the extent that the victim's testimony with regard to where he ejaculated when he committed the act charged in Count I could be interpreted as describing two separate acts of anal sodomy that occurred within hours of each other, those acts constituted repeated, identical sexual acts committed at the same location during a very short time span. The evidence indicates that the victim was unable to sufficiently distinguish between the two acts; consequently, the jury had no evidentiary basis for distinguishing between them. Brown's right to a unanimous verdict on Count I was not violated.

(2) The circuit court plainly erred in allowing all of the propensity evidence admitted in this case. While some evidence concerning the fact of Brown's prior uncharged rapes of the two victims was admissible as propensity evidence, the court

plainly erred in allowing graphic and emotional descriptions of the manner in which the prior rapes occurred, the fact that Brown was never prosecuted or punished for those prior rapes, the ongoing adverse effects on the victims arising from the rapes, and a reference to a potential third prior rape victim. The court also plainly erred in allowing the State to use the propensity evidence to repeatedly refer to Brown as a "pedophile" in its rebuttal closing argument. Under these circumstances, the probative value of the propensity evidence was substantially outweighed by the danger of unfair prejudice. Nevertheless, Brown is not entitled to relief because he has failed to demonstrate that he suffered a manifest injustice or a miscarriage of justice. The other evidence at trial overwhelmingly established Brown's guilt of the charged crimes, and Brown does not challenge the admissibility or sufficiency of any of that evidence. Thus, he has failed to meet his burden of showing that the plain error was outcome determinative.

Opinion by: Lisa White Hardwick, Judge March 3, 2020

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