

### **Summary of SC99469, *State of Missouri v. Daviune C. Minor***

Appeal from the Jackson County circuit court, Judge Patrick W. Campbell  
Argued and submitted March 30, 2022; opinion issued June 14, 2022

**Attorneys:** Minor was represented by Rosemary E. Percival of the public defender's office in Kansas City, (816) 889-7699. The state was represented by Garrick Aplin of the attorney general's office in Jefferson City, (573) 751-3321.

*This summary is not part of the opinion of the Court. It is provided by communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** A man appeals from a judgment convicting him of three counts of first-degree statutory sodomy and three counts of incest. In a decision written by Judge George W. Draper III and joined by 4 other judges, the Supreme Court of Missouri affirms the judgment. The man failed to preserve most of his arguments regarding the admission of propensity evidence, and the state's fleeting remarks regarding the propensity evidence in its closing argument were not prejudicial. The forensic interviewer was an expert qualified to testify regarding delayed disclosure of child abuse, and the admission of demonstrative exhibits depicting diagrams of sexual acts were not inaccurate, inflammatory or shocking. Furthermore, there was sufficient evidence from which the jury could find the man touched the child's anus with his penis.

In an opinion joined by four judges, Judge W. Brent Powell concurs. He agrees with the principal opinion but writes separately to warn of the inherent risks in admitting allegations of unadjudicated, propensity evidence and the futility of continuing objections to propensity evidence in child sexual abuse cases.

Judge Zel M. Fischer also concurs. He agrees with the principal opinion's analysis regarding most of the issues but would not review the man's point relied on pertaining to propensity evidence because the multifarious point relied on violates Rule 84.04's mandatory briefing requirements, preserving nothing for appellate review.

**Facts:** In 2013, Daviune Minor was living with his mother and then seven-year-old child. The child shared a bedroom with Minor and other siblings. One night, the child awoke to Minor touching her vagina. Minor later attempted to put his penis in her vagina and anus. Following a presentation at school, the child disclosed Minor had touched her inappropriately. After the child started therapy, allegations that Minor sexually abused another child came to light. Prior to trial, the state sought, pursuant to article I, section 18(c) of the Missouri Constitution, to introduce propensity evidence of Minor's alleged abuse of two other minor females, L.W. and D.J. While the allegations regarding D.J. were adjudicated in a juvenile proceeding, Minor never was charged with or stood trial for the allegations regarding L.W. At a hearing regarding the matter, Minor sought to exclude the evidence at trial. Before jury selection, the circuit court granted Minor a continuing objection to the admission of propensity evidence. At trial, the court permitted testimony from L.W., as well as her mother and brother, regarding the unadjudicated allegations of sexual abuse by Minor. Minor did not object to the mother's and brother's testimony. Additionally, a forensic interviewer testified regarding delayed disclosures in child

sexual abuse cases. And, during a pediatrician's testimony, the state introduced as demonstrative exhibits two diagrams depicting sexual acts. The jury found Minor guilty of three counts of first-degree statutory sodomy and three counts of incest. The circuit court sentenced him to a total of 87 years in prison. Minor appeals.

**AFFIRMED.**

**Court en banc holds:** (1) Minor's multifarious point relied on regarding propensity evidence fails to comply with Rule 84.04's mandatory briefing requirements. Rule 84.04(d) prohibits a point relied on that groups together multiple contentions not related to a single issue, and such a point is subject to dismissal. In a single point relied on, Minor challenges the circuit court's admission of three witnesses' testimony and five exhibits as well as the state's use of such evidence in its closing argument. Although the Court will exercise its discretion to review Minor's claims of error regarding propensity evidence, his briefing deficiencies were more than just technical violations.

(2) Minor failed to preserve his challenges to the admission of propensity evidence at trial. Merely objecting to the admission of evidence in a pretrial motion is insufficient to preserve any trial error for appeal. Only an objection made timely at trial will preserve an issue for appeal. Additionally, for an allegation of error to be considered preserved and to receive more than plain error review, it must be objected to during the trial and presented to the circuit court in a motion for new trial. While Minor made references to objecting to propensity evidence pretrial, he fails to point this Court to any specific objection he made regarding the admission of testimony from L.W., her mother or her brother at trial. To the extent Minor challenges the admission of the state's exhibits containing propensity evidence, he either failed to object to the admission of such exhibits at trial or made objections unrelated to the propensity issue. Even if he is entitled to plain error review regarding the admission of some exhibits, he cannot establish manifest injustice or a miscarriage of justice occurred because the state and defense counsel repeatedly reminded the jury Minor was on trial only for his actions against his child, not any of his actions against any other person; the circuit court specifically instructed the jury that Minor was on trial only for the offenses against his child; and the jury was admonished it could not find Minor guilty only because it believed he may have been involved in or committed other offenses or bad acts in the past.

(3) Minor was not prejudiced by the state's closing arguments in which it referred to him as a "sexual predator" whose "reign of terror" began in 2001. When prosecuting a sexual offense against a minor child, article I, section 18(c) allows the admission of prior criminal acts to demonstrate a defendant's propensity to commit the crime for which he or she currently is charged. The state's comments were made within the larger context of Minor's history as brought to light by the evidence presented at trial. The three brief references to him and his past conduct were fleeting, brief and isolated comments. The state reminded the jury it was to evaluate Minor's actions toward his child rather than any other minor in his past. Further, the state's comments were based on the evidence presented and not merely gratuitous comments meant to inflame the jury.

(4) The circuit court did not error in admitting the forensic interview's expert testimony. Under section 490.065.2(1), RSMo, an expert can be qualified based solely on training or experience.

The forensic interview's experience in conducting more than 2,000 interviews in her 10-year career and her specialized, on-the-job training qualified her to testify as an expert regarding the disclosure process, including delayed disclosure, and assisted the jury in understanding the evidence presented. Furthermore, Minor did not preserve his argument that the expert's testimony was inadmissible because she relied on faulty literature, and he failed to demonstrate how the expert's generalized testimony regarding the disclosure process was so prejudicial the circuit court should have intervened on its own motion.

(5) The diagrams of sexual acts introduced as demonstrative exhibits during the pediatrician's testimony were not prejudicial. When offered for the limited purpose of demonstration, evidence may be admitted properly even if it is not connected with the defendant or offense charged so long as it is relevant, is a fair representation of what it is demonstrating, and is not inflammatory, deceptive or misleading. The pediatrician referred to both exhibits as visual representations to assist in explaining why the victim's examination would not reveal any physical manifestation of abuse. The exhibits were accurate diagrams, neither of which were inflammatory and could be considered shocking only in that the exhibits depicted sexual acts.

(6) There was sufficient evidence to establish Minor's penis touched the child's anus. The state was not required to prove penetration because the circuit court allowed the state to amend the information from "penetration" to "touching." Although the amended information was not filed electronically, Minor had notice of the circuit court's ruling allowing the state to amend its information, and both the state and Minor proceeded as if the amended information were filed. Additionally, although evidence that a defendant touched a victim's buttocks is insufficient to show the defendant touched the victim's anus because they are separate body parts, children often use unsophisticated language when describing body parts because they may lack the technical language for an accurate description. Courts have allowed an inference of contact when a child is able to describe specific circumstances indicating there was contact with his or her anus. The child testified Minor tried to "stick" his penis "in" her "butt" and stated her "butt" hurt when Minor tried to put his penis in it. Despite the lack of anatomical specificity, the jury could infer Minor touched the child's anus from such evidence.

**Concurring opinion by Judge Powell:** The author agrees with the principal opinion but writes separately to address the inherent risks in admitting allegations of unadjudicated propensity evidence and the futility of continuing objections to propensity evidence in child sexual abuse cases. He would find the confusion and unfair prejudice that results from the mounting extrinsic and collateral evidence necessary to prove unadjudicated allegations weighs heavily against the probative value of the originating unadjudicated allegation; therefore, courts rarely should admit evidence of such allegations at trial. He further warns trial attorneys using a continuing objection is futile to preclude admission of propensity evidence because the underlying objection involves balancing the probative value of accumulating evidence against its prejudicial effect.

**Concurring opinion by Judge Fischer:** The author concurs with the principal opinion's analysis of most issues but would not review Minor's multifarious point relied on because it fails to comply with Rule 84.04 and, therefore, preserved nothing for appellate review. He notes allowing briefing deficiencies without enforcing any consequences implicitly condones violations and undermines the rule's mandatory nature.