In the
Missouri Court of Appeals
Western District

STATE OF MISSOURI,	)	
	)	
Respondent,	)	**WD87798**
	)	
V.	)	**OPINION FILED:**
	)	**JULY 28, 2026**
GERALD L. SMITH, JR.,	)	
	)	
Appellant.	)	

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Charles H. McKenzie, Judge

Before Division One: Gary D. Witt, Presiding Judge, Mark D. Pfeiffer, Judge and Thomas N. Chapman, Judge

On November 8, 2024, Gerald L. Smith, Jr. was convicted after a bench trial[1] in the Circuit Court of Jackson County ("trial court") of one count of first-degree statutory sodomy, section 566.062[2] (Count 1), one count of first-degree assault, section 565.050 (Count 2), and one count of first-degree endangering the welfare of a child, section 568.045 (Count 3). Smith was sentenced to twenty years in the Department of Corrections on Count 1, fifteen years on Count 2, and seven years on Count 3. The

[1] Smith waived his right to a jury trial in writing.

[2] All statutory references are to the Revised Statutes of Missouri (2016) as updated by the 2024 Cumulative Supplement, unless otherwise indicated.

sentences for Counts 1 and 2 were ordered to run consecutively while the sentence on Count 3 was ordered to run concurrently to the sentences for Counts 1 and 2, for a total sentence of thirty-five years. Smith timely appealed, raising two points of error.

In Point I, Smith alleges that the trial court erred when it entered a conviction for statutory sodomy in the first degree because there was insufficient evidence to support beyond a reasonable doubt that the offense occurred on or about September 13, 2019, the charged date of the offense. In Point II, Smith alleges that the trial court plainly erred when it ordered Smith's sentences on Counts 1 and 2 to run consecutively because it was done under "the materially false belief" that the trial court was required to run the sentences consecutively as a matter of law pursuant to the consecutive sentencing directive in section 558.026.

We affirm the sentence and judgment of the trial court.

Factual Background[3] and Procedural History[4]

In the early morning hours of September 13, 2019, a Good Samaritan was driving to work when he noticed a young girl ("Victim")[5] on the side of the road near Brush

[3] "[T]he evidence and all reasonable inferences are viewed in the light most favorable to the verdict, and all contrary evidence and inferences are ignored." *State v. Tate*, 708 S.W.3d 483, 488 (Mo. banc 2025) (internal citation omitted).

[4] The trial court conducted a 491 Hearing prior to trial relating to the potential introduction of out-of-court statements of the Victim at trial. *See* section 491.075. Officer Morse, Whaley (CMH nurse), Parrish (hotline investigator), Corona (therapist), and Varner (forensic investigator) all testified at the 491 hearing and were subject to cross-examination by Smith's counsel. The trial court found that all of the witnesses' statements had sufficient indicia of reliability to satisfy the requirements of section 491.075 and ordered that the witnesses would be allowed to testify as to the contents of the Victim's statements at trial.

[5] Pursuant to section 595.226, we protect the identity of Victim.

Creek. She was alone, naked, dirty, her hair wet and messed up, and she looked scared. When he saw Victim, Good Samaritan made a U-turn and pulled over next to Victim. He asked Victim if she was okay, and Victim began crying. Good Samaritan called 911 and stayed with Victim until police arrived.

Police Officer Loren Morse arrived and observed that Victim was naked, her hair was wet, she was crying, and she had bruising and scratch marks on her neck. Victim told Officer Morse that she had been in a small, black car with her mother, Jamie Scott ("Mother"), and mother's friend, and that Mother and her friend had gotten into an argument. Victim said she was taken from the vehicle and put into "the water" (Officer Morse understood Victim to be referring to Brush Creek). Mother told Victim she was leaving and drove away. Victim chased after the vehicle as it drove off. Officer Morse called for an ambulance and Victim was transported to Children's Mercy Hospital ("CMH").

Surveillance footage[6] from the night Victim was assaulted showed a black SUV with silver chrome roof racks stopped near Brush Creek at 3:11 a.m. In the surveillance footage, the vehicle stops, turns off its lights, a figure gets out of the vehicle, and then there is a disturbance in the water. The vehicle leaves shortly thereafter. The vehicle was later identified based on traffic cameras as a black Kia Sorento belonging to Smith's then girlfriend, Alyson Golladay. Golladay testified that Smith was living with her, had

[6] At trial, the State admitted video and photographic evidence from multiple surveillance cameras—including private businesses and a city camera—all covering the same area of Brush Creek.

permission to use her vehicle, and was using it on the night of September 13, 2019. Golladay also testified that she awakened in the night to find that Smith was not at home and repeatedly tried calling him between 3:00 a.m. and 4:00 a.m. on the morning of September 13, 2019; Smith did not answer until 4:00 a.m. Cell phone records place Smith at or near Mother's home from 10:00 p.m. until 3:00 a.m. and again briefly just before 4:00 a.m.; his cell phone then returns to Golladay's residence.

Victim was four years old on September 13, 2019. In addition to the witnesses who testified at the 491 hearing and replicated their testimony at trial, the State called Victim,[7] Good Samaritan (the driver), and Potter (DNA analyst).

Nurse Alyssa Whaley ("Whaley") was the first CMH employee to have contact with Victim. Whaley testified that while they were coloring together, Victim told Whaley to "draw the water and the man who threw me in." Victim told Whaley the man's name was Jared[8] and that he had thrown Victim into the water. When Whaley asked Victim who Jared was, Victim replied that he was in Mother's car but wasn't there anymore. Whaley left to request a social worker and went back to check on Victim about an hour later. By that time, Victim was drawing a "scary picture" of what Victim described as "slender man."[9] Victim told Whaley that Jared had told Victim if she talked

[7] At trial, Victim testified that she remembered what happened to her on the night of September 13, 2019, but that she did not want to talk about it. Victim did not testify further as to any of the events of September 13 on direct examination or cross-examination.

[8] Whaley testified that she relied on phonetic spelling of the name because Victim, at age four, could not spell.

[9] *Slender Man* is a horror movie that was released in 2018.

to anybody that "slender man would come get her." During the same conversation, Victim also told Whaley that Jared said he didn't love Victim anymore and that she was not his sweetheart. Further, Victim shared with Whaley that Jared was in Mother's car and Jared was the person who took off Victim's clothing, choked Victim, and put Victim in the water.

Around 7:00 a.m. on September 13, 2019, while still in the CMH ER, Victim spoke with Tara Parrish, a hotline investigator and facilitator. Victim told Parrish that the scratches on her body were from the bushes, and that she got them after Ajaron[10] threw her in the water. Victim also told Parrish that Ajaron did not like Victim and that after she was thrown in the water, Mother and Ajaron drove away.

On the afternoon of September 13, 2019, Victim was examined by Dr. Emily Killough, a CMH pediatrician specializing in child abuse cases. Dr. Killough documented that Victim's legs, torso and upper extremities were covered in red abrasions. Victim also had extensive red and purple bruising around her neck; some of the bruising extended onto Victim's clavicle and the top part of her chest. Petechiae encircled Victim's eyes and were on her eyelids, across her nasal bridge, and behind her ears, and there was bleeding in the white part of Victim's right eye. Dr. Killough testified that, in her medical opinion, Victim's petechiae were caused by strangulation.

After speaking with an emergency room physician who had treated Victim earlier that morning and noted abrasions on Victim's labia, Dr. Killough attempted to conduct a

[10] Ajaron was the name Parrish understood Victim to be saying. Parrish did not know how to spell the name Victim used.

genital exam. Dr. Killough stopped the exam because Victim had an "extreme reaction" and did not want the exam to happen.

Later that evening, now accompanied by a sexual assault nurse practitioner and a child life specialist, Dr. Killough again attempted to conduct a genital exam of Victim. Even after Victim was administered intravenous anti-anxiety medication, Victim screamed, kicked, and yelled at Dr. Killough to stop and not to hurt her. Dr. Killough again stopped the exam. The following morning, after sedating Victim, Dr. Killough successfully conducted the genital exam even though Victim again kicked, yelled, screamed, and cried throughout the exam. Dr. Killough testified that Victim had one of the most extreme reactions to a genital exam Dr. Killough had ever experienced.

Dr. Killough testified that Victim had abrasions on the lower part of her abdomen and labia, as well as cuts to her inner thigh. She also had labial adhesions which precluded an internal vaginal exam. As part of the genital exam, Dr. Killough obtained swabs of Victim's genitals, anus, and rectum. Ultimately, Dr. Killough diagnosed Victim with child physical abuse, neglect, and psychological or emotional maltreatment, and possible sexual abuse.

Belinda Potter, a DNA Analyst with the Kansas City Police Crime Laboratory, tested the swabs and detected male DNA on the rectal swabs. Potter determined that there were three DNA contributors found on the rectal swab and opined that there were two possible ways in which the DNA could have three contributors. The first scenario was that Victim and two unknown individuals might have contributed to the DNA. The second and statistically much more likely scientific theory was that Smith, Victim, and

one unknown individual contributed to the DNA. Potter testified that the DNA results were thirteen trillion times more likely to be observed if Smith was a contributor rather than two unknown individuals contributing to the DNA.

Victim received weekly counseling with Leah Corona, a licensed child therapist, from December 2019 through November 2021. Corona testified that initially Victim did not want to discuss the September 13, 2019 incidents. As time passed and therapy continued, Victim grew more comfortable with Corona. Sometime in January 2020, Victim started referring to the incidents as "the walk alone." Over the course of more sessions Victim relayed to Corona that Mother did not like Victim anymore, did not want Victim anymore, and that was why Victim was thrown into the water. In a therapy session in June 2020, Victim grabbed a handful of colored pencils and squatted down on top of them. In another session, Victim peed on the floor and licked inedible objects. Victim's foster parent told Corona that Victim had put a crayon into foster parent's biological daughter's bottom. During yet another session, Victim told Corona that Mother had inappropriately touched Victim and put a book in Victim's bottom. Victim said the book was hard and that it hurt. Corona testified that all these behaviors and disclosures indicated Victim had undergone a traumatic sexual experience and was attempting to process that experience.

As Victim and Corona continued to work on trauma-related processing, Victim provided more information to Corona. During a therapy session when they talked about personal space and appropriate versus inappropriate touching, Victim said there was a time a man had touched her inappropriately. Victim said she was playing in the living

room and a man told her to go to the car, and she did not trust him. In another session shortly thereafter, Victim told Corona that on more than one occasion the man had taken her to the car, taken her clothes off, and left her. Victim said that on some of the occasions Mother was there and tried to stop the man.

In February of 2021, as therapy continued, Corona gave Victim a diagram with a male and female figure and had Victim identify their private parts. Victim told Corona that the man who hurt her had hurt her with his body parts. She drew lines from the male diagram to the female diagram indicating which of the man's body parts hurt Victim's body parts. Victim drew lines from the male's chest to the female's chest, the male's bottom to the female's bottom, and the male's penis to the female's vagina. During this same session, Victim said the man was the same one who threw her in the water.

Victim also participated in two interviews with Ann Varner, a forensic investigator. At the time of the first interview, Varner was called in to investigate possible child abuse. During the first interview, Victim said her Mother had previously thrown Victim out a window as a "test throw."

About six weeks after the first interview, after getting a profile on the DNA results from the Victim's rectal swab, Varner returned to Victim's foster home to conduct an interview to investigate possible sexual abuse. During this interview, Victim stated that "a big grown man" had touched her private parts; she pointed to her genital region. Victim described the touching as a hard thing that was put inside of her and "[i]t was hard, he was pushing me, I didn't like it and so I tried to push back." Varner testified that Victim said the touching occurred in the car when Mother was present.

The trial court found Smith guilty of all three counts. Prior to sentencing, the court stated to the State:

> [I]n aid of my preparation, I did review the superseding indictment and want to make sure that it's accurate that whatever the sentence is on this case, that there is a requirement, if it's imprisonment, that he serve, what, no less than ten years on Count 1 at 85 percent, and five to fifteen on Count 2 at 85 percent, those are to be required consecutive. And in Count 3 is maximum of seven. Is that right?

The State replied, "That's correct. My understanding is that Counts 2 and 3 may run concurrent to each other, but they must run consecutive to Count 1." The trial court sentenced Smith to a term of twenty years on Count 1, fifteen years on Count 2, and seven years on Count 3; Counts 1 and 2 were to run consecutively and Count 3 was to run concurrently to Counts 1 and 2.

Point I - Sufficiency of the Evidence

Smith argues in his first point on appeal that the trial court erred when it entered a conviction for statutory sodomy in the first degree because there was insufficient evidence that the charged offense occurred on or about September 13, 2019.

Standard of Review

"When reviewing the sufficiency of the evidence, the standard of review on appeal from a bench-tried case is the same as the standard used on appeal of a case tried to a jury." *State v. Shaw*, 592 S.W.3d 354, 357 (Mo. banc 2019). "In making that determination, great deference is given to the trier of fact, and an appellate court will not weigh the evidence anew." *State v. Tate,* 708 S.W.3d 483, 488 (Mo. banc 2025) (internal quotation omitted).

Analysis

When reviewing a sufficiency challenge, this Court considers "whether, in light of the evidence most favorable to the State, any rational fact-finder could have found the essential elements of the crime beyond a reasonable doubt." *State v. Marks*, 670 S.W.3d 135, 139 (Mo. App. W.D. 2023) (internal quotation omitted). Smith does not contest that the evidence was sufficient to prove Victim, age four at the time, was sodomized. Rather, Smith argues that the evidence was insufficient to prove beyond a reasonable doubt that the sodomy occurred on the charged date, "on or about September 13, 2019."

Where, as here, the charge is for statutory sodomy committed against a child, "time is not essential . . . because it can be impossible to ascertain specific dates of the sexual abuse." *State v. Miller*, 372 S.W.3d 455, 464 (Mo. banc 2012). Nonetheless, "the State should not be permitted to secure a conviction with respect to specific conduct occurring during a *broadly stated* yet *substantially different period of time* from that stated in the information and instruction." *Id.* at 465 (emphasis added) (reversing conviction because the evidence was insufficient to prove defendant committed statutory sodomy within the year in which the offense was charged when the evidence at trial related to a completely different year-long time frame). Indeed, as the *Miller* court noted, the State could have charged Miller with two counts of statutory sodomy based on the two distinct time frames; thus, if the convictions were allowed to stand, Miller could later be charged with another offense arising out of the same circumstances for which he had already been convicted. *Id.* at 468.

Smith's reliance on *Miller* is misdirected. Unlike the completely different time frames at issue in *Miller*, here the evidence at trial was sufficient to prove that the acts of sodomy occurred within the time frame alleged in the information—"on or about September 13, 2019." The evidence at trial was that Victim was playing in the living room in the early morning hours of September 13, 2019, when Smith told her to go to the car. While they were in the car Smith touched Victim under her clothes in her rectal area. Victim described the touch as feeling hard and it hurt. Smith's DNA was found in the Victim's rectum at the hospital the next day and Smith had no contact with Victim between the evening of September 13 and when the DNA was recovered from Victim's body. The evidence also established that during the same early morning hours of September 13, 2016, Smith removed Victim's clothing, choked her, threw her into Brush Creek, and abandoned her. The evidence at trial was sufficient for a rational fact finder to reasonably find that the offence occurred on September 13, 2019.

Point I is denied.

Point II - Plain Error in Sentencing

In his second point on appeal, Smith asserts that the trial court plainly erred when it ran Smith's sentences on Counts 1 and 2 consecutively because Smith asserts the trial court was under a "materially false belief" that it had to run the two sentences consecutively as a matter of law. Smith concedes that his claim was unpreserved and is reviewable only for plain error.

Standard of Review

"[A]ppellate courts generally do not review unpreserved claims of error." *State v. Jones*, 725 S.W.3d 577, 582 (Mo. banc 2025) (interpreting and applying Rule 30.20[11]). This Court may exercise its discretion to provide plain error review where the appellant establishes both facially substantial grounds of an error that is evident, obvious, and clear *and* that manifest injustice or miscarriage of justice will result from the failure to correct the alleged error. *Id.* at 582-83. Thus, the error must be so obvious and clear that the trial court is obligated to step in even though no party has raised the issue or requested the court do so. *Id.* at 583.

Further, the obvious error must affect substantial rights—those rights that could result in manifest injustice or miscarriage of justice. *Id.* Manifest injustice requires the appellant show that his rights will suffer so substantially from the error that a miscarriage of justice or manifest injustice will occur if the error is not corrected. *Id.*

Analysis

Section 558.026 governs the requirements concerning concurrent and consecutive terms of imprisonment in this matter. It provides that "[m]ultiple sentences of imprisonment shall run concurrently unless the court specifies that they shall run consecutively." Section 558.026.1.[12] As relevant here, the statute goes on to require

[11] Rule references are to the Missouri Supreme Court Rules (2024), the version applicable to Smith's criminal trial, unless otherwise noted.

[12] The version of section 558.026 applicable to Smith's 2019 charge was the version in effect from August 28, 2013 to August 27, 2021. Although section 558.026 was amended in 2021, the language in section 558.026.1 was unchanged.

consecutive sentencing for defendants who commit the offense of statutory sodomy in the first degree *and another offense at the same time.* Section 558.026.1(4). Missouri courts have consistently held the statute to be both constitutional and to require consecutive sentencing "both when multiple sentences are imposed for any offense committed during or at the same time as the listed sexual offenses [and] also when multiple sentences are imposed for multiple offenses of the listed felonies." *State v. Contreras-Cornejo*, 526 S.W.3d 146, 153 (Mo. App. W.D. 2017) (internal quotation omitted); *see also State v. Cruz-Basurto*, 581 S.W.3d 51, 59 (Mo. App. W.D. 2019) (discussing the 2013 amendment to section 558.026 as designed to resolve any ambiguity and make clear that the statute *requires* consecutive terms of imprisonment for the enumerated offenses when they are proven to have occurred at the same time); *accord State v. Yocco*, 698 S.W.3d 819, 840 (Mo. App. E.D. 2024).

Here, as analyzed in Point 1, despite Smith's argument that the sodomy charge should have been severed from the assault charge, we agree with the trial court that the State presented sufficient evidence showing all of the charged acts occurred during the same early morning time frame on September 13, 2019. Based on Smith's conviction for first-degree statutory sodomy and first-degree assault, the trial court relied on section 558.026 to require consecutive sentences for the counts of first-degree statutory sodomy and first-degree assault. Specifically, the trial court asked the State to clarify the trial court's understanding that the sentences on Count 1 and Count 2 were "required consecutive." The State responded that the trial court was "correct" and that "Counts 2 and 3 could run concurrently but they must run consecutive to Count 1." Immediately

after this exchange, the trial court announced that it would take "this" under advisement. After a recess, the trial court returned to announce Smith's sentence. As the trial court explained before sentencing,

> [I]n keeping with the verdict of the Court finding the defendant guilty on Counts 1, 2, and 3 beyond a reasonable doubt, this Court is considering the ultimate decision here. And in my reflection, I have held innumerable hearings on this case. I have read everything presented, I have reviewed every exhibit, I've heard and listened keenly and with unwavering focus on every word spoken in this courtroom. The Court has given its attention to this case not only while it was in the courtroom, but certainly on many instances when it was not in court but had an opportunity to reflect on the case. It has considered it all. These crimes are grave and were committed against one of our community's children. It is [an] extremely serious case. It's an extremely serious and grave crime.

This Court need not engage in a lengthy plain error review. Here, the trial court based Smith's sentence on Smith's three convictions for egregious treatment of a four-year-old child along with a careful review of the Sentencing Assessment Report. All three convictions were based on evidence proving beyond a reasonable doubt that Smith sodomized the Victim, choked the Victim, and tossed the Victim into Brush Creek in the early hours of September 13, 2019. The same judge heard the evidence at the 491 hearing and the bench trial and entered a verdict finding Smith guilty beyond a reasonable doubt of all three offenses charged. Indeed, the record indicates that the trial court's sentence was a product of the trial court's own valid considerations.

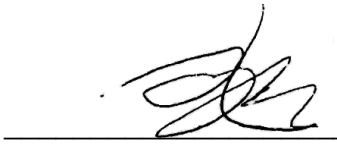
Missouri courts generally refuse to remand for resentencing—on plain error review or otherwise—when the record shows the trial court imposed sentence based on valid considerations "unaffected by any mistaken belief." *State v. Pierce,* 548 S.W.3d 900, 905 (Mo. banc 2018). Section 558.026 specifies that if a defendant is convicted of

one of the enumerated sex offenses and other offenses committed during or at the same time as the sex offense, the sentence on the sex offense shall run consecutively to the other offenses. *See Yocco*, 698 S.W.3d at 840. Smith was convicted of statutory sodomy, one of the enumerated sex offenses, as well as assault and child endangerment.[13] There was sufficient evidence that the sexual offense and the first-degree assault occurred at the same time on the same day. We find no error, plain or otherwise.

Point II is denied.

Conclusion

The trial court's sentence and judgment are affirmed.



Gary D. Witt, Presiding Judge

All concur

[13] Neither party raises any argument as to the sentence on Count 3 or the judgment that this sentence is to be served concurrently with Counts 1 and 2, therefore we do not address it further.