

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**STATE OF MISSOURI,
RESPONDENT
vs.**

**DAVID BRYAN MILLER,
APPELLANT**

DOCKET NUMBER WD71175

DATE: JUNE 21, 2011

Appeal from:

The Circuit Court of Harrison County, Missouri
The Honorable Jack N. Peace, Judge

Appellate Judges:

Division Two: Karen King Mitchell, P.J., Joseph M. Ellis and Victor C. Howard, JJ.

Attorneys:

Shaun J. Mackelprang, for Respondent

Kent E. Gipson, for Appellant

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI, RESPONDENT

v.

DAVID BRYAN MILLER, APPELLANT

WD71175

Harrison County, Missouri

Before Division Two Judges: Karen King Mitchell, P.J., Joseph M. Ellis and Victor C. Howard, JJ.

David Miller appeals from his convictions on one count each of statutory sodomy, § 566.062; child molestation in the first degree, § 566.067; deviate sexual assault, § 566.070; sexual misconduct involving a child, § 566.083; endangering the welfare of a child in the first degree, §568.045; and incest, § 568.020.

REVERSED IN PART; AFFIRMED IN PART.

Division Two holds:

- (1) Appellant's convictions for statutory sodomy and deviate sexual assault were supported by sufficient evidence that Appellant had placed his finger in the victim's vagina when she was under the age of fourteen and without her consent. That the evidence reflected that this activity occurred outside of the time frame referenced in the instruction did not matter because time is not an element of the sex offense crimes charged.
- (2) Unlike the time of the offense, which is not an essential element thereof, the method of the charged offense, as prescribed by statute, is an essential element of the crime. Where the jury was instructed that it could find Appellant guilty of child molestation in the first degree if it found he touched the victim's genitals through her clothing and there was no evidence of this method of committing the offense, Appellant's conviction was not supported by the evidence and must be reversed.
- (3) Moreover, the child molestation verdict director was improper because it allowed Appellant to be convicted for actions, touching genitals through clothing, that did not constitute child molestation during the period charged in the information and the instruction. In addition, he was improperly sentenced in excess of the statutory maximum sentence allowed at the time the alleged offenses occurred. Accordingly, even if sufficient evidence had been presented to support Appellant's conviction of the

crime as charged, his conviction and sentence would need to be reversed on the basis of this ex post facto violation.

- (4) The evidence sufficiently supported Appellant's conviction for sexual misconduct involving a child where, based upon evidence that Appellant frequently forced the victim to perform oral sex upon him and repeatedly attempted to have sexual intercourse with her, it was reasonable to infer that on at least one of those occasions Appellant exposed his genitals to the victim.
- (5) The evidence sufficiently supported Appellant's conviction for endangering the welfare of a child where testimony reflected that Appellant had sexual intercourse, oral sex, and anal sex with the victim. Appellant's contention that these acts did not fall within the statutory definition of "sexual contact" is wholly unpersuasive.
- (6) Even if the State violated *Doyle v. Ohio*, no manifest injustice or miscarriage of justice occurred because Appellant was acquitted of the charges argument and testimony went to prove.
- (7) As a matter of law, the trial court could not have abused its discretion in excluding from evidence the testimony of a defense witness after Appellant failed to endorse him as a witness where the testimony would have been cumulative to that of other witnesses that did testify. Moreover, Appellant was acquitted of the charges to which the witnesses testimony would have related and, therefore, suffered no apparent prejudice.
- (8) The trial court did not abuse its discretion in allowing the victim to testify about Appellant's physical abuse of her mother and brothers solely for the purpose of explaining the reason for her delay in reporting Appellant's sexual abuse.
- (9) The trial court did not plainly err in allowing the State to question Appellant about his receipt of Social Security checks despite having returned to work where Appellant offered similar evidence and could not have been prejudiced thereby.
- (10) Where Appellant was acquitted of all of the charges related to a certain weekend, he could not establish that improper argument by the State about facts not in evidence related to the weather that weekend had a decisive effect upon any of his convictions. Perceiving no manifest injustice, we decline to review for plain error the trial court's failure to *sua sponte* declare a mistrial when the State offered that argument.
- (11) Having found only one claim of error meritorious, there can be no cumulative effect to consider.

Opinion by Joseph M. Ellis, Judge

Date: June 21, 2011

This summary is *UNOFFICIAL* and should not be quoted or cited.