

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI,

Respondent,

v.

ROBERT E. SMITH,

Appellant.

DOCKET NUMBER WD71277

Date: September 30, 2011

Appeal from:
Jackson County Circuit Court
The Honorable Robert M. Schieber, Judge

Appellate Judges:
Division Four: Lisa White Hardwick, Chief Judge, Presiding, Karen King Mitchell,
Judge and Donald Norris, Special Judge

Attorneys:
Frederick J. Ernst, Kansas City, MO, for appellant.
Timothy A. Blackwell, Jefferson City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY
COURT OF APPEALS -- WESTERN DISTRICT

STATE OF MISSOURI

v.

ROBERT E. SMITH,

Respondent,

Appellant.

WD71277

Jackson County

Before Division Four: Lisa White Hardwick, Chief Judge, Presiding, Karen King Mitchell, Judge and Donald Norris, Special Judge

Robert Smith appeals his conviction by jury on five counts of first-degree statutory sodomy. Smith contends the circuit court erred in admitting evidence of his alcohol use and instructing the jury on voluntary intoxication. He also contends the evidence was insufficient to support two of the sodomy convictions because there was no evidence of penetration.

REVERSED IN PART AND AFFIRMED IN PART.

Division Four holds:

(1) Evidence of Smith's alcohol-related behavior was admissible as part of the *res gestae* to present a more complete and coherent picture of Smith's alleged involvement in the crime.

(2) Given the admissibility of evidence regarding Smith's alcohol use, the trial court was obligated to instruct the jury that it could not consider Smith's voluntary intoxication as a defense to the sodomy charges.

(3) The Count I conviction for first-degree statutory sodomy must be reversed because there was no evidence of penetration, but there was sufficient

evidence to enter a conviction on the lesser-included offense of first-degree child molestation.

(4) The Count IV conviction for first-degree statutory sodomy must be reversed because the jury was not instructed on the element of penetration, but the evidence and jury findings were sufficient to enter a conviction on the lesser-included offense of first-degree child molestation.

Accordingly, the convictions on Counts I and IV are reversed, and those counts are remanded to the circuit court for entry of conviction and sentencing on first-degree child molestation. In all other respects, the judgment is affirmed.

Opinion by: Lisa White Hardwick, Chief Judge

September 30, 2011

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