IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. ED 98377
	)	
	)	
GENE M. JEFFREY,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
FROM THE CIRCUIT COURT OF WARREN COUNTY, MISSOURI
12TH JUDICIAL CIRCUIT, DIVISION I
THE HONORABLE GAEL D. WOOD, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Appellant was convicted following a jury trial in the Circuit Court of Warren County, Missouri, of two counts of sexual misconduct involving a child under 15, class D felonies under Section 566.083,[1] and two counts of attempting to commit the same offense. The Honorable Gael D. Wood sentenced him to a total of 130 days in jail and a total of $500 in fines. Jurisdiction currently lies in the Missouri Court of Appeals, Eastern District. Article V, Section 3, Mo. Const. (as amended 1982); Section 477.050. However, if this Court determines that appellant's constitutional challenge to Section 566.083 is more than merely colorable, then appellant requests that this Court transfer this cause to the Missouri Supreme Court because appellant challenges the constitutionality of Section 566.083.

[1] Statutory citations are to RSMo 2000 unless otherwise indicated.

STATEMENT OF FACTS

Gene Jeffrey lived in a residential neighborhood in Marthasville (Tr. 173). As a retiree in his seventies, his daily routine included taking a shower around three o'clock in the afternoon (State's Ex. 5). He lived alone, so it was not uncommon for him to go from room to room while drying off (State's Ex. 5). He would then get dressed, and during hunting season, drive to his wooded property, which was an hour away (State's Ex. 10).

One evening in January, Mr. Jeffrey received a knock at the door (Tr. 173, State's Ex. 5). To his surprise, it was a police officer (State's Ex. 5). Officer Jenkins informed Mr. Jeffrey that two girls had seen a nude man through the glass storm door as they were walking down the sidewalk on their way home from school (Tr. 173, State's Ex. 5). Mr. Jeffrey told Officer Jenkins that he did not remember exactly what he did while he was drying off, but he may have shut the front door if it was open (State's Ex. 5). He told the officer that he did not see anyone outside (State's Ex. 5). Officer Jenkins recorded the conversation, and the State played the audio recording to the jury during trial (Tr. 175-177, State's Ex. 5).

It turns out that only one girl saw the nude man that day (Tr. 148, 156). She told police, and testified to the jury, that she turned to look at the house as she was walking by and noticed the man through the storm door (Tr. 156-158). She glanced away for a moment, and when she looked back, the opaque front door behind the storm door was closed (Tr. 156-158, State's Ex. 3). She turned to tell

her friend, and the friend replied that she had seen a nude man in the same house about a week before (Tr. 145, 158, State's Ex. 3).

Ten months later, the first girl told her mother that it had happened again (Tr. 191). This time she saw the nude man through a bedroom window (Tr. 158). The mother grabbed her daughter and jumped in her car to confront the man (Tr. 192). The mother testified that when she pulled up in front of the house, a man stepped in front of the window, and most of his nude body was visible below the partially drawn blinds (Tr. 192-195). The mother stepped on the gas to prevent one of her daughter's classmates, who was coming up the opposite sidewalk, from seeing the man (Tr. 192-195). When the mother looked back at the house, there was no one in the window (Tr. 202). When pressed by defense counsel, the mother admitted that the man in the window was not waving, pointing, gesturing, or touching himself in any way (Tr. 201).

Several days later, Lt. Schoenfeld stopped by Mr. Jeffrey's house to investigate (Tr. 223). Mr. Jeffrey told him that he did not specifically remember the day in question, but he had taken a shower around three o'clock every afternoon that week before going hunting (Tr. 225-226, State's Ex. 10). Lt. Schoenfeld recorded the conversation, and the State played the audio recording for the jury (Tr. 230-231, State's Ex. 10).

Prior to trial, defense counsel filed "Defendant's Motion to Dismiss Due to Unconstitutionality of the Statute," arguing that the statute under which Mr.

Jeffrey was charged was held unconstitutional (L.F. 11-12). The trial court denied the motion (L.F. 4).

Defense counsel also filed a motion for judgment of acquittal at the close of the State's evidence (L.F. 6, Tr. 241). The trial court heard argument on the motion, and the following transpired:

> **Ms. Clay**: In addition to what's laid out in my motion, Judge, I would submit to the Court that my client has a constitutional right to privacy in his own home, that there's been no evidence whatsoever that he's gone outside his home or done anything that's not constitutionally protected by his right of free speech, especially within the right to privacy protected by our Constitution and the Missouri Constitution.
>
> Judge, I think that—you know, Judge, I think that pretty much sums it all up. I think he's got a right to be in his house naked as a jaybird if he wants to be.
>
> **Ms. King**: I agree that he has a right to be naked as a jaybird in his house. I disagree that he has a right to stand in front of the window as 12-year-old girls are walking by.
>
> **The Court**: Yeah, I—you might find some strict constructionists who would agree with your interpretation. I'm not one of them, I'm afraid. If his house was out in the middle of the woods, that would be one thing, but when you're in the confines of

urban or semi-urban areas, I think your conduct must be somewhat more proscribed. (Tr. 241-242)

The trial court then denied the motion (L.F. 6).

Mr. Jeffrey was convicted on four counts: two counts of sexual misconduct involving a child under 15, class D felonies under Section 566.083, and two counts of attempting to commit the same offense in regard to the two girls who walked by the house but did not see anything (L.F. 13-14, 50-51). This appeal follows.

POINTS RELIED ON

I.

The trial court erred in denying appellant's "Motion to Dismiss Due to Unconstitutionality of the Statute" because by punishing both protected and unprotected conduct, Section 566.083 is unconstitutionally overbroad in violation of appellant's Fourteenth Amendment right to privacy and appellant's First Amendment right to freedom of expression, incorporated to the states by the Fourteenth Amendment, in that appellant's conduct of being nude in his own home is protected, the statute punishes other protected conduct, and the statute does not make clear when appellant's otherwise lawful conduct becomes unlawful.

State v. Beine, 162 S.W.3d 483 (Mo. banc 2005);

Griswold v. Connecticut, 381 U.S. 479 (1965);

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975);

Osborne v. Ohio, 495 U.S. 103 (1990);

U.S. Const., Amends. I, IV and XIV;

Sections 565.253 and 566.083;

2005 Mo. Legis. Serv. H.B. 972 (VERNON'S);

2008 Mo. Legis. Serv. S.B. 758 (VERNON'S); and

2012 Mo. Legis. Serv. S.B. 628 (VERNON'S).

II.

The trial court erred in denying appellant's "Motion for Judgment of Acquittal at the Close of State's Evidence" and in entering judgment and sentence against appellant for two counts of sexual misconduct and two counts of attempted sexual misconduct because these rulings violated his right to due process of law, guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the State did not present legally sufficient evidence from which a jury could decide beyond a reasonable doubt that appellant knew or was aware that children were present such that his conduct was likely to cause affront or alarm, and in denying the motion, the trial court based its decision on an erroneous interpretation of the law, which lowered the mens rea required to convict from knowing to reckless and caused the court to determine that legally insufficient evidence was enough to submit the case to the jury.

State v. Brown, 360 S.W.3d 919 (Mo. App., W.D. 2012);

State v. Beine, 162 S.W.3d 483 (Mo. banc 2005);

State v. Moore, 90 S.W.3d 64 (Mo. banc 2002);

State v. Whalen, 49 S.W.3d 181, 184 (Mo. banc 2001);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, Sec. 10; and

Sections 562.016, 566.083 and 566.093.

ARGUMENT

I.

The trial court erred in denying appellant's "Motion to Dismiss Due to Unconstitutionality of the Statute" because by punishing both protected and unprotected conduct, Section 566.083 is unconstitutionally overbroad in violation of appellant's Fourteenth Amendment right to privacy and appellant's First Amendment right to freedom of expression, incorporated to the states by the Fourteenth Amendment, in that appellant's conduct of being nude in his own home is protected, the statute punishes other protected conduct, and the statute does not make clear when appellant's otherwise lawful conduct becomes unlawful.

Standard of review

Constitutional challenges to a statute are issues of law to be reviewed de novo. ***State v. Young***, 362 S.W.3d 386, 390 (Mo. banc 2012). "A statute is presumed to be constitutional and will not be invalidated unless it clearly and undoubtedly violates some constitutional provision and palpably affronts fundamental law embodied in the constitution." ***Bd. of Educ. of St. Louis v. State***, 47 S.W.3d 366, 368–369 (Mo. banc 2001). "When alternative readings of a statute are possible, [the Court] must choose the reading that is constitutional." ***The Stroh Brewery Co. v. State***, 954 S.W.2d 323, 326 (Mo. banc 1997).

"The person challenging the validity of the statute has the burden of proving the act clearly and undoubtedly violates the constitutional limitations." ***Franklin Cnty. ex rel. Parks v. Franklin Cnty. Comm'n***, 269 S.W.3d 26, 29 (Mo. banc 2008) (citing ***Trout v. State***, 231 S.W.3d 140, 144 (Mo. banc 2007)).

"Where the language of a statute is clear and unambiguous, there is no room for construction." ***Ryder Student Transp. Serv., Inc. v. Dir. of Revenue***, 896 S.W.2d 633, 635 (Mo. banc 1995). "Courts cannot add words to a statute under the auspice of statutory construction." ***Sw. Bell Yellow Pages, Inc. v. Dir. of Revenue***, 94 S.W.3d 388, 390 (Mo. banc 2002).

Facts

Mr. Jeffrey was nude in his own home (Tr. 148, 151, State's Ex. 5, 10). Girls who were walking home from school and one of their mothers saw him through his window and storm door (Tr. 148, 151, 192-195). He was not waving, gesturing, or touching himself in any way (Tr. 201).

Mr. Jeffrey was charged with four counts of sexual misconduct or attempt involving a child under 15, class D felonies under Section 566.083 (L.F. 13-14).

Prior to trial, defense counsel filed "Defendant's Motion to Dismiss Due to Unconstitutionality of the Statute," arguing that the statute under which Mr. Jeffrey was charged was held unconstitutional (L.F. 11-12). The trial court denied the motion but provided no reason for its decision (L.F. 4).

Defense counsel renewed the unconstitutionality argument at the time the trial court heard argument on Mr. Jeffrey's motion for judgment of acquittal at the close of the State's evidence:

> **Ms. Clay**: In addition to what's laid out in my motion, Judge, I would submit to the Court that my client has a constitutional right to privacy in his own home, that there's been no evidence whatsoever that he's gone outside his home or done anything that's not constitutionally protected by his right of free speech, especially within the right to privacy protected by our Constitution and the Missouri Constitution.
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> Judge, I think that—you know, Judge, I think that pretty much sums it all up. I think he's got a right to be in his house naked as a jaybird if he wants to be.
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> **Ms. King**: I agree that he has a right to be naked as a jaybird in his house. I disagree that he has a right to stand in front of the window as 12-year-old girls are walking by.
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> **The Court**: Yeah, I—you might find some strict constructionists who would agree with your interpretation. I'm not one of them, I'm afraid. If his house was out in the middle of the woods, that would be one thing, but when you're in the confines of urban or semi-urban areas, I think your conduct must be somewhat more proscribed. (L.F. 6, Tr. 241-242)

The trial court then denied the motion (L.F. 6).

Analysis

Recent History of the Statute

This is not the first time Section 566.083 has been challenged. In 2005, the Missouri Supreme Court held that the statute was unconstitutionally overbroad in ***State v. Beine***, 162 S.W.3d 483 (Mo. banc 2005).

Mr. Beine was an employee at an elementary school in St. Louis. ***Beine***, 162 S.W.3d at 484. His duties included monitoring the hallways and boys' restrooms for disruptive behavior. ***Id***. He was allowed to use the boys' restroom when he needed to relieve himself. ***Id***. After several students saw his genitals in the restroom, he was convicted of sexual misconduct involving a minor under Section 566.083.1(1). ***Id***. At that time, the statute read as follows:

> A person commits the crime of sexual misconduct involving a child if the person:
>
> (1) Knowingly exposes the person's genitals to a child less than fourteen years of age in a manner that would cause a reasonable adult to believe that the conduct is likely to cause affront or alarm to a child less than fourteen years of age. ***Beine***, 162 S.W.3d at 484-485.

Beine argued that the statute was unconstitutional for three reasons: (1) it punished innocent conduct; (2) the "affront or alarm" element provided no mens

rea requirement; and (3) it did not advise a person in the position of Beine as to what he must do to avoid violation of the statute when his conduct was otherwise lawful. ***Beine***, 162 S.W.3d at 486. After listing these three arguments, the Supreme Court summed them up by adding, "[i]n essence, Mr. Beine contends that the statute is overbroad." ***Id***. The court proceeded to analyze the arguments as a group, rather than individually. ***Id***.

When a statute prohibits conduct a person has no right to engage in and conduct a person has a right to engage in, the statute is unconstitutionally overbroad. ***Beine***, 162 S.W.3d at 486 (citing ***City of St. Louis v. Burton***, 478 S.W.2d 320, 323 (Mo.1972); ***Christian v. Kansas City***, 710 S.W.2d 11, 12–14 (Mo.App.1986)). The court reasoned that a person must expose himself in many situations, such as when using the restroom, and the right to do so is certainly protected. ***Beine***, 162 S.W.3d at 486. This holds true even if a reasonable person might think that the exposure of one's genitals in a restroom would cause affront or alarm to another person. ***Id***. A child's potential affront or alarm cannot, by itself, criminalize otherwise protected conduct. ***Id***.

Furthermore, the court did not fully arrive at the question of whether Beine himself was engaging in protected conduct. ***Beine***, 162 S.W.3d at 487. Such a determination was not necessary because under the doctrine of overbreadth, the appellant's conduct itself need not have been protected. ***Id***. A statute that punishes both protected and unprotected conduct is unconstitutional regardless of the individual's own conduct. ***Id***. The court noted that although Beine's arguments

were not based on the First Amendment, the doctrine of overbreadth could still be applied because the overall purpose of the doctrine is to prevent statutes from criminalizing innocent conduct. ***Id***. Pointing to Beine's third argument, the court emphatically stated, "Section 566.083.1(1) leaves adults in a state of uncertainty about how they may take care of their biological needs without danger of prosecution when a child is present in the same public restroom." ***Id***. The court proceeded to invalidate the statute. ***Id***. at 488.

The legislature quickly moved to remedy Section 566.083.1. In 2005, it added a mens rea requirement to the "affront or alarm" element by making the following change:

> (1) Knowingly exposes ~~the person's~~ his or her genitals to a child less than fourteen years of age ~~in a manner that would cause a reasonable adult to believe that the conduct is likely to cause affront or alarm to a child less than fourteen years of age~~ under circumstances in which he or she knows that his or her conduct is likely to cause affront or alarm to the child. 2005 Mo. Legis. Serv. H.B. 972 (VERNON'S).

The legislature continued to make changes to the statute in subsequent sessions. For the current version of the statute, *See* 2012 Mo. Legis. Serv. S.B. 628 (VERNON'S).

From January 2010, when the first instance of Mr. Jeffrey's conduct occurred, through April 2012, when the trial court entered judgment against Mr.

Jeffrey, the pertinent portion of the statute read (and continues to read)[2] as follows: (1) Knowingly exposes his or her genitals to a child less than fifteen years of age under circumstances in which he or she knows that his or her conduct is likely to cause affront or alarm to the child[.]" 2008 Mo. Legis. Serv. S.B. 758 (VERNON'S).

The Revised Statute is Still Overbroad

Although the post-***Beine*** revisions addressed Beine's second argument, his other two arguments remain unremedied by the new statute and apply also to Mr. Jeffrey's case. As it stands today, Section 566.083.1 continues to punish protected conduct, and it does not advise a person in the position of Mr. Jeffrey as to what he must do to avoid violation of the statute when his conduct is otherwise lawful. The statute is overbroad as it applies to Mr. Jeffrey and on its face.

Mr. Jeffrey's conduct was protected by the Fourteenth Amendment right to privacy. In denying Mr. Jeffrey's motion for judgment of acquittal, the trial court explained that Mr. Jeffrey could have been nude with his blinds open if his house were in a rural area but not in a semi-urban neighborhood. This reasoning has no legal basis. By differentiating between rural and urban areas, the trial court's test fails to take into account the special status the law bestows on a person's home.

[2] The 2012 amendments altered other portions of the statute, but the portion pertinent to Mr. Jeffrey's case remains the same.

The right to privacy is the right of an individual to be free from unwarranted governmental intrusion into the "personal intimacies of the home." ***Caesar's Health Club v. St. Louis County,*** 565 S.W.2d 783, 787 (Mo. App., E.D. 1978) (quoting ***Paris Adult Theatre I v. Slaton***, 413 U.S. 49 (1973)). In Mr. Jeffrey's case, the government may not intrude on his personal intimacy of being nude in his own home. As explained in a public nudity case, "[o]ne may not go nude in public, whether or not one intends thereby to convey a message, and similarly one may go nude in private, again whether or not that nudity is expressive." ***Barnes v. Glen Theatre, Inc.***, 501 U.S. 560, 575, fn. 3 (Scalia, J. concurring).

While Mr. Jeffrey's nudity occurred in his own home, it was visible to the public through his window if passersby chose to look in his windows from the sidewalk. The State could argue by analogy that under the plain view doctrine regarding searches and seizures, anything an individual knowingly exposes to public view, even in his or her own home, involves no reasonable expectation of privacy and is not a subject of Fourth Amendment protection. ***Texas v. Brown***, 460 U.S. 730, 741 (1983); ***Katz v. United States***, 389 U.S. 347, 351 (1967). However, the right to privacy is distinguishable from the protection against unreasonable searches given the differing purposes behind the two protections and the contexts in which the issues arise.

Plain view is an exception to the warrant requirement, which is designed to deter the police from being overzealous to the point of tyranny in their search for

crimes and contraband. The plain view doctrine simply represents the practical reality that police do not need to go out of their way to ignore blatant contraband right before their eyes. On the other hand, the right to privacy exists not to deter the police from imposing tyranny, but to acknowledge that issues regarding sexuality are personal and to ensure dignity by preventing the government from embarrassing and ostracizing individuals. It is designed to profess that intimate, personal issues are of no business to the government.

One does not have the right to possess illegal drugs. Instead, one's right to be free from illegal searches may give him the opportunity to hide the illegal drugs. On the other hand, one has the right to privacy—not simply the right to hide something illegal. If a private act is inadvertently and momentarily exposed to the public, the government has not discovered something illegal that the person had been trying to conceal.

Other laws having to do with privacy acknowledge that an individual maintains his right to privacy even when he does not do a perfect job concealing himself from another's view. For example, "Section 565.253.1(1) provides that a person commits the crime of second-degree invasion of privacy if such person "knowingly views, photographs or films another person, without that person's knowledge and consent, while the person being viewed, photographed or filmed is in a state of full or partial nudity and is in a place where one would have a reasonable expectation of privacy[.]" ***State v. Browning***, 357 S.W.3d 229, 235 (Mo. App., S.D. 2012). Similarly, in tort law, "Three elements encompass the

claim for unreasonable intrusion upon the seclusion of another: (1) the existence of a secret and private subject matter; (2) a right in the plaintiff to keep that subject matter private; and (3) the obtaining by the defendant of information about that subject matter through unreasonable means." ***Crow v. Crawford & Co.***, 259 S.W.3d 104, 120 (Mo. App., E.D. 2008). Implicit in both such cases would be the fact that the person expecting privacy was not as concealed as he thought.

Mr. Jeffrey's conduct was also protected by the First Amendment right to freedom of expression. Mr. Jeffrey certainly has the right to be nude in his own home. The question is whether he can do so with the blinds open.

Erznoznik v. City of Jacksonville makes clear that no law could constitutionally prevent Mr. Jeffrey from playing a film containing nudity on his television, even if his blinds were open and his television was visible to people in the street. 422 U.S. 205 (1975). In that case, the Supreme Court of the United States struck down an ordinance prohibiting drive-in movie theaters from showing movies with nudity when the screens were visible from public areas outside the theaters. ***Id***. The Court first noted that the statute prohibited both obscene nudity, which receives no protection, as well as non-obscene nudity, which is protected by the First Amendment. ***Id***. at 208. In Mr. Jeffrey's case, it is important to note that he was not gesturing, touching himself, or doing anything else that could be considered obscene. He was simply standing nude in his house.

The Court in ***Ernoznik*** then explained the difficulty in balancing a person's right to express himself against the government's interest in protecting other

citizens from offensive subject matter. 422 U.S. at 208. The government may use time, place, and manner restrictions if they are irrespective of the content of speech, but when the government attempts to censor types of speech it deems offensive, it invites strict scrutiny. ***Id***. Such statutes are upheld only in the narrow circumstances when the speaker invades the privacy of the home or when the degree of captivity makes it impractical for the audience to avoid exposure. ***Id***. Absent these narrow circumstances, "the burden normally falls upon the viewer to 'avoid further bombardment of (his) sensibilities simply by averting (his) eyes.'" ***Id***. at 208 (quoting ***Cohen v. California***, 403 U.S. 15, 21 (1971)). In Mr. Jeffrey's case, his being nude was not crossing the threshold of the girls' homes. Rather, *they* were looking in the windows of *his* home. Similarly, the degree of captivity was extremely low, as the girls could avoid seeing Mr. Jeffrey simply by not looking in his windows.

The Supreme Court was not persuaded by the argument that the purpose of the drive-in movie theater ordinance was to protect minors. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." ***Erznoznik***, 422 U.S. at 213-214. The ordinance was also overbroad as to minors because "it sweepingly forb[ade] display of all films containing any uncovered buttocks or breasts, irrespective of context or pervasiveness." ***Id***. at 213. "Thus it would [have] bar[red] a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a

culture in which nudity is indigenous. The ordinance also might [have] prohibit[ed] newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach." ***Id***. The Court makes clear that not all nudity is sexually explicit, and that which is sexually explicit not cannot be prohibited based on content, even to protect minors. ***Id***. at 213-214.

The "nudity, without more" exception in child pornography cases is analogous. The government can prohibit sexually explicit images of children, but it cannot prohibit parents or others from taking photos of nude children when there is no sexual component: "We have stated that depictions of [child] nudity, without more, constitute protected expression." ***Osborne v. Ohio***, 495 U.S. 103, 112 (1990). To determine whether a nude image of a child is innocent or sexually explicit, federal courts use a non-exhaustive seven-factor test. ***United States v. Wallenfang***, 568 F.3d 649, 657, 660 (8th Cir.2009). The factors include (1) whether the focal point is on the minor's genitals or pubic area; (2) whether the picture's setting is sexually suggestive, i.e. in a place associated with sexual activity; (3) whether considering the minor's age, the minor is depicted in an unnatural pose or in inappropriate attire; (4) whether the minor is fully or partially clothed, or nude; (5) whether the picture suggests sexual coyness or a willingness to engage in sexual activity; (6) whether the picture is intended or designed to elicit a sexual response in the viewer; and (7) whether the picture depicts the minor as a sexual object. ***Id***.

A nude person behind a glass window is no different than a nude person behind a glass video screen. A court could apply all seven factors apply to either scenario. Nor does it make a difference whether the nude person is the child or the adult because both types of conduct may be prohibited when the nudity is sexual, and both are protected when the nudity is innocent. In Mr. Jeffrey's case, the record is clear that he was not waving, pointing, gesturing, or touching himself in any way. He was simply walking and standing. There was no sexual component. His conduct was "nudity, without more."

There is no reason why the "nudity, without more" exception should not apply to other conduct, so long as the conduct is otherwise protected. It would be different if Mr. Jeffrey was nude in public—the prohibition against public nudity is ancient, and public nudity is not protected expression under the First Amendment. ***Barnes v. Glen Theatre, Inc.***, 501 U.S. 560, 567-568 (1991). But Mr. Jeffrey was not in public. He was in his own home. He was visible to members of the public only if they looked through his window. As stated in ***Erznoznik***, the members of the public could avoid further bombardment of their sensibilities simply by averting their eyes. 422 U.S. at 208. For these reasons, Mr. Jeffrey's conduct was protected expression under the First Amendment.

The statute is overbroad on its face because it punishes other protected conduct. As the court noted in ***Beine***, the overbreadth doctrine applied whether Mr. Beine's own conduct was protected or not, so long as the statute could punish protected conduct. 162 S.W.3d at 487; *See* ***Grayned v. City of Rockford***, 408 U.S.

104, 114 (1972) (If a statute is overbroad on its face and deters otherwise privileged activity, an appellant has standing to raise such a challenge even if the statute has not punished protected activity as applied to him). This type of analysis usually centers on the First Amendment, but the United States Supreme Court has also extended the overbreadth doctrine to the Fourteenth Amendment right to privacy. ***Griswold v. Connecticut***, 381 U.S. 479 (1965).

Therefore, even if the Court finds that Mr. Jeffrey's conduct was not protected by the First Amendment right to free expression or the Fourteenth Amendment right to privacy, the Court may nonetheless consider whether Section 566.083.1(1) deters other conduct protected by either of those constitutional guarantees.

First, the Court need not dwell on whether Mr. Jeffrey's conduct was inadvertent and therefore innocent. The current statute would punish Mr. Jeffrey's conduct whether it was innocent or not. To illustrate this, one need only assume that Mr. Jeffrey's conduct was innocent and notice that it would still meet each element under the current Section 566.083.1(1).

The first part of the subsection, "knowingly exposes his or her genitals to a child less than fifteen years of age," contains three elements: his genitals being exposed to a child less than fifteen years of age, knowledge that his genitals are exposed, and knowledge that the child is less than fifteen years of age. As to the November incident, each of these elements would be met even assuming that Mr. Jeffrey was innocently walking around his house nude, not meaning to show his

genitals to anyone. First, the child would be able to see his genitals through the window, thus satisfying the exposure element. Second, he would know that he was nude, and if he was careless with leaving his blinds up, he could reasonably foresee that people outside would see him, thus satisfying the first knowledge requirement. *See* ***State v. Brown***, 360 S.W.3d 919, 923 (Mo. App., W.D. 2012) (Defendant had knowledge, constructive or otherwise, that people could see him because he was masturbating in a well-lit parking lot surrounded by apartments with windows). Finally, he would know the girls were under the age of fifteen because Officer Jenkins had told him they were ten and eleven following the January incident.

He would also satisfy the revised final element, knowledge that the exposure would cause affront or alarm, because Officer Jenkins also told him back in January that the girls were traumatized when they saw him nude through the window.

In this way, Mr. Jeffrey would still be punished under the current wording of the statute even if everyone agreed that he was innocently walking around his house after taking a shower, rather than purposely exposing himself to the public through the window.

One can imagine many other ways in which innocent conduct could be punished under the post-***Beine*** version of Section 566.083.1. Examples include situations in which parents are nude in their own homes when their children are present. Mothers and fathers certainly have the right to walk from the shower to

the bedroom while drying off, regardless of whether it causes affront or alarm to the children present in the house. Similarly, adults may leave the bedroom door open while changing or even climb nude into the bathtub themselves to bathe their young children.

Innocent nudity among children and adults is natural in family situations, and it has been natural in community situations since the beginning of time. It is only recently in our history that some segments of society have begun to teach children to feel uncomfortable about nudity. This recent and unnatural change brings about situations in which children feel affront or alarm even though adults are engaging in perfectly innocent conduct. Simply visit the locker room, sauna, shower, or changing room at any local gym, public swimming pool, YMCA, or waterpark, and one will notice a stark contrast between the generations. The senior citizens freely walk around nude, whereas the adolescents appear affronted and alarmed, choosing themselves to wear their swimming trunks while they shower and changing their clothes under a towel—or even more extreme, changing clothes not in the locker area at all, but in the toilet stalls.

These situations illustrate that a "knowingly" mens rea element is not enough to prevent the statute from punishing innocent and protected conduct. One can be perfectly aware, i.e. "knowing," that children today, unlike those of the past, are likely to be affronted or alarmed by innocent nudity. Even with such knowledge, an adult's choice to go about his daily bathing, restroom, and dressing habits in the innocent way he has always done so does not make his conduct

criminal. The affront or alarm must be done with *purpose* in order to be criminal. Otherwise, Section 566.083.1 cannot continue to exist without punishing innocent and protected conduct.

The ordinance in ***Erznoznik*** was overbroad because "[i]ts effect [was] to deter drive-in theaters from showing movies containing *any* nudity, however innocent or even educational." 422 U.S. at 211 (emphasis added). Similarly, the current version of Section 566.083.1 punishes *any* nudity that the nude person knows will cause affront or alarm to a child. As explained above, innocent or educational nudity can still cause affront or alarm.

Even ***Beine*** would result in the same outcome under the current statute as it did in 2005. The legislature addressed Beine's second point by adding a mental state to the "affront or alarm" element, but the revised statute would still punish Beine's conduct today whether it was innocent or not, and it would continue to leave people in his position in the dark as to whether otherwise lawful conduct was illegal under this statute. In other words, the current statute is still unconstitutionally overbroad under the Court's analysis in ***Beine***.

As in Mr. Jeffrey's case, the parties in ***Beine*** disagreed as to whether Beine's conduct was innocent. ***Beine***, 162 S.W.3d at 487-488; *See* 162 S.W.3d at 492-497 (Stith, J. concurring in part and dissenting in part). Either he was innocently using the restroom, his purpose being to relieve himself, or his true motivation was to show the boys his genitals, his purpose being to cause affront or alarm. ***Id***. The keyword is purpose. As the Court explained, "[e]ven if a reasonable

person might think that in some of these restroom situations a child is likely to suffer affront or alarm from witnessing such exposure, that alone cannot make the exposure criminal." ***Id***. at 486. The new language of the statute does not change the outcome under this reasoning. Even if the man using the urinal *knows* that a child is likely to suffer affront or alarm from witnessing such exposure, that alone cannot make the exposure criminal. This follows from the Court's basic premise in ***Beine***, that using a public urinal is a natural occurrence that men innocently engage in. ***Id***.

A man's knowledge of evolving sensibilities does not change the fact that he must expose himself in the restroom. Even with the *knowledge* that exposing his genitals at the urinal will cause affront or alarm to the children in the restroom, thus satisfying the new mens rea requirement, the man's decision to heed nature's call and proceed to use the restroom is an innocent one, not a perverted one. On the other hand, if his *purpose* in exposing himself was to cause affront or alarm, it would tip the scale toward perversion. The line between knowledge and purpose precisely represents the point at which the statute would no longer punish innocent conduct, and it precisely represents the point at which a person in the position of Mr. Jeffrey would know whether his otherwise lawful conduct is illegal.

The statute does not advise a person in the position of Mr. Jeffrey as to what he must do to avoid violation of the statute when his conduct is otherwise lawful. After ***Beine***, it is clear that a person must expose himself in many situations. 162 S.W.3d at 486. In addition to when using the restroom, a person

must also expose himself when taking a shower. He must continue to expose himself while drying off and getting dressed. These activities normally occur in one's bedroom, but a person's post-shower routine might also take him from one room in the house to another. Such activities are certainly lawful, regardless of whether they cause affront or alarm to a child, but other activities relating to nudity around children are not. The legislature is faced with a difficult problem because statutes must draw a clear distinction between what is lawful and what is not.

Legislatures have faced the same problem with child pornography statutes. To draw a distinction between innocent photographs of children in the bathtub and perverted images of children in sexual contexts, states have qualified their definitions of nudity in child pornography statutes with language such as "lewd exhibition of the genitals" or "where such nudity…involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged." ***Osborne***, 495 U.S. at 113-114. This type of qualifier cures the overbreadth problem because it limits the statute's applicability to nudity involving a sexual component.

On the other hand, the qualifier in Section 566.083.1, "under circumstances in which he or she knows that his or her conduct is likely to cause affront or alarm to the child," fails to adequately cure the overbreadth problem. This is because innocent conduct may nonetheless cause affront or alarm to another person. A parent innocently taking a picture of her nude child may be aware, i.e. "knowing,"

that showing the photo to her friends will cause affront or alarm—but it is the parent's sexual motive or lack thereof in taking the picture that determines whether her conduct is criminal.

Similarly, whether Mr. Jeffrey is guilty of "sexual misconduct" under Section 566.083.1 should necessarily depend on whether his nudity included a sexual component. As quoted in ***Beine***, the Court in ***State v. Moore*** undertook great pains to define the terms "affront" and "alarm." 90 S.W.3d 64, 67–69 (Mo. banc 2002). "Affront" is "a deliberately offensive act or utterance; an offense to one's self respect," and "alarm" is "apprehension of an unfavorable outcome, of failure, or dangerous consequences; an occasion of excitement or apprehension." ***Id***. These terms do not adequately distinguish between innocent conduct and "sexual misconduct"—the very name of the Section 566.083. Non-sexual, innocent nudity may also cause affront and alarm. In constructing Section 566.083.1(1), the Court cannot interpret that statute to mean only sexual affront and sexual alarm. *See* ***Sw. Bell Yellow Pages, Inc. v. Dir. of Revenue***, 94 S.W.3d 388, 390 (Mo. banc 2002) ("Courts cannot add words to a statute under the auspice of statutory construction").

As described above, sensibilities regarding nudity are evolving and vary between the generations. What one person considers innocent and inadvertent may be considered affronting and alarming by another. In such an environment, a statute that determines guilt based on the actor's speculation as to another's reaction fails to clarify what is lawful and what is not. The legislature could easily

remedy this problem by either changing the mens rea element to "purposely causing affront or alarm" or by requiring that the genitals be exposed in a lewd, lascivious, or otherwise sexual context.

II.

The trial court erred in denying appellant's "Motion for Judgment of Acquittal at the Close of State's Evidence" and in entering judgment and sentence against appellant for two counts of sexual misconduct and two counts of attempted sexual misconduct because these rulings violated his right to due process of law, guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the State did not present legally sufficient evidence from which a jury could decide beyond a reasonable doubt that appellant knew or was aware that children were present such that his conduct was likely to cause affront or alarm, and in denying the motion, the trial court based its decision on an erroneous interpretation of the law, which lowered the mens rea required to convict from knowing to reckless and caused the court to determine that legally insufficient evidence was enough to submit the case to the jury.

Standard of review

In reviewing a challenge to sufficiency of the evidence this Court considers whether, in light of the evidence, the factfinder could reasonably have found appellant guilty beyond a reasonable doubt of the charged offenses. ***State v. Dawson***, 985 S.W.2d 941, 951 (Mo. App., W.D. 1999). In applying this standard, this Court must look to the elements of the crime and consider each in turn, taking

the evidence in the light most favorable to the verdict and granting the State all reasonable inferences from the evidence. ***State v. Grim***, 854 S.W.2d 403, 411 (Mo. banc 1993). The facts and reasonable inferences from such facts are considered favorably to the trial court's ruling, and contrary evidence and inferences are disregarded unless the contrary inferences are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. ***State v. Johnson***, 354 S.W.3d 627, 631-32 (Mo. banc 2011); ***Grim,*** 854 S.W.2d at 411. Nevertheless, this Court may not supply missing evidence or give the State the benefit of unreasonable, speculative or forced inferences. ***State v. Whalen***, 49 S.W.3d 181, 184 (Mo. banc 2001).

Facts

One evening in January 2012, Gene Jeffrey, a retiree in his seventies, received a knock at the door (Tr. 173, State's Ex. 5). To his surprise, it was a police officer (State's Ex. 5). Officer Jenkins informed Mr. Jeffrey that two girls had seen a nude man through the glass storm door as they were walking down the sidewalk on their way home from school (Tr. 173, State's Ex. 5). Mr. Jeffrey told Officer Jenkins that he did not remember exactly what he did while he was drying off, but he may have shut the front door if it was open (State's Ex. 5). He told the officer that he did not see anyone outside (State's Ex. 5). Officer Jenkins recorded the conversation, and the State played the audio recording to the jury during trial (Tr. 175-177, State's Ex. 5).

It turns out that only one girl saw the nude man that day (Tr. 148, 156). She told police, and testified to the jury, that she turned to look at the house as she was walking by and noticed the man through the storm door (Tr. 156-158). She glanced away for a moment, and when she looked back, the opaque front door behind the storm door was closed (Tr. 156-158, State's Ex. 3). She turned to tell her friend, and the friend replied that she had seen a nude man in the same house about a week before (Tr. 145, 158, State's Ex. 3).

Ten months later, the first girl told her mother that it had happened again (Tr. 191). This time she saw the nude man through a bedroom window (Tr. 158). The mother grabbed her daughter and jumped in her car to confront the man (Tr. 192). The mother testified that when she pulled up in front of the house, a man stepped in front of the window, and most of his nude body was visible below the partially drawn blinds (Tr. 192-195). The mother stepped on the gas to prevent one of her daughter's classmates, who was coming up the opposite sidewalk, from seeing the man (Tr. 192-195). When the mother looked back at the house, there was no one in the window (Tr. 202). When pressed by defense counsel, the mother admitted that the man in the window was not waving, pointing, gesturing, or touching himself in any way (Tr. 201).

Several days later, Lt. Schoenfeld stopped by Mr. Jeffrey's house to investigate (Tr. 223). Mr. Jeffrey told him that he did not specifically remember the day in question, but he had taken a shower around three o'clock every afternoon that week before going hunting (Tr. 225-226, State's Ex. 10). Lt.

Schoenfeld recorded the conversation, and the State played the audio recording for the jury (Tr. 230-231, State's Ex. 10).

Mr. Jeffrey was charged with four counts: two counts of sexual misconduct involving a child under 15, class D felonies under Section 566.083, and two counts of attempting to commit the same offense in regard to the two girls who walked by the house but did not see anything (L.F. 13-14, 50-51). Both the choate and inchoate offenses required that the State prove that the exposure or attempted exposure be "under circumstances in which he . . . knows that his . . . conduct is likely to cause affront or alarm." Section 566.083.

At the close of the State's evidence, defense counsel filed a motion for judgment of acquittal (L.F. 6, Tr. 241). The trial court denied the motion, and in doing so explained, "[i]f his house was out in the middle of the woods, that would be one thing, but when you're in the confines of urban or semi-urban areas, I think your conduct must be somewhat more proscribed." (Tr. 241-242).

Analysis

The trial court's rule, differentiating between rural and urban areas, would impose a "reckless" mens rea requirement. A person drying off and getting dressed would be required to check his surroundings and tailor his innocent nudity accordingly. The determinative factor would become whether a person getting dressed fulfilled his duty to check his surroundings rather than his conduct of

being nude itself. Section 566.083.1(1) clearly establishes a "knowingly" level of culpability, which is greater than a "reckless" standard.

The evidence presented at trial supports an inference that Mr. Jeffrey recklessly exposed himself to passersby by being nude in his house with the blinds open, but the State presented no evidence to support the inference that Mr. Jeffrey had knowledge that his conduct was likely to cause affront or alarm to a child, which Section 566.083.1 requires. The trial court based its decision to submit the case to the jury based on the plausibility of the former inference, rather than the latter.

State v. Brown was similar in that the defendant was not directing his nudity toward any specific person. 360 S.W.3d 919, 921-922 (Mo. App., W.D. 2012). In that case, Brown was masturbating in a parking lot surrounded by duplexes in the middle of the night. He was convicted of sexual misconduct in the second degree, Section 566.093.1. ***Id***. at 922. The elements of that offense are identical to the elements of 566.083.1, except that the latter offense has the additional element that the person be a child.

Brown argued that, because he did not know anyone was looking out of their window at him in the parking lot, he did not have knowledge that his conduct would cause affront or alarm. In rejecting Brown's argument, the court referred to the Missouri Supreme Court's analysis of "likely to cause affront or alarm in ***State v. Moore***, 90 S.W.3d 64, 68 (Mo. banc 2002). ***Brown***, 360 S.W.3d at 922. In ***Moore***, the court first noted that the legislature included the word "likely,"

"presumably to distinguish a criminal act of exposing oneself from conduct that is accidental, inadvertent, or otherwise done without an intent to do harm." 90 S.W.3d at 68. The court in ***Moore*** continued, "[w]hile the application of the statute cannot "depend on the idiosyncratic reaction" of the victim, it does fall "to the courts to ascertain, by reference to the statute's words, what the person should know in advance of his conduct. . . . An adult is presumed to know that certain behavior is criminal." ***Id***. at 67-68. The court in ***Brown*** likened its own facts to the analysis in ***Moore***:

> In *Moore*, the court held that adults should know that soliciting oral sex from a thirteen-year-old is a crime likely to cause affront or alarm…Similarly, in this case, the trial court found that Brown should know that masturbating in public on a well-lit residential street of multi-home residences on a Friday evening, in a college town, leaning against a car parked in front of an "eight-plex" and in clear view of bedroom windows on the multi-residence building, would likely cause similar affront or alarm. ***Brown***, 360 S.W.3d at 923.

In analyzing Section 566.093.1, as in ***Brown***, or Section 566.093.1 here, it is easy to confuse the two knowledge elements with each other, and it is easy to confuse "knows that his conduct is likely" with "should have known." Brown's conviction was affirmed because he *should have known* that someone could see him and because he *knew* that if someone did see him, his conduct was likely to cause affront or alarm. The "should have known" reasoning is erroneous in that it

applies a reckless level of culpability rather than actual knowledge to the first mens rea element, not to the "affront or alarm" element. Unfortunately, ***Brown*** only analyzed the mens rea for the "affront or alarm" element, when the real error was that he had only recklessly, rather than knowingly, exposed himself *to a person*. Due to the language of the statutes, it is impossible to analyze the second knowledge element without the first. The defendant must have knowledge that he is exposing himself to a person, and he must have knowledge that, if a person does seem him, his conduct is likely to cause that person affront or alarm. The second piece of knowledge cannot be present without the first. In Mr. Jeffrey's case, the State presented insufficient evidence that he knew a child could see him, which also means he could not have known he was likely to cause affront or alarm to the child.

Even if the reasoning in ***Brown*** was sound, the facts presented at trial surrounding Mr. Jeffrey's nudity fit better with the court's sufficiency analysis in ***State v. Beine***, 162 S.W.3d 483, 485-486 (Mo. banc 2005). In that case, the court noted that "[t]he state is not required to show that any child was actually affronted or alarmed." ***Id***. at 485. Rather, under the current statute, the State is required to show that Mr. Jeffrey knew his conduct was likely to cause affront or alarm. Here, the State provided evidence of the former but none of the latter.

It is true that knowledge is difficult to prove, and it can be inferred from circumstantial evidence. ***State v. Holleran***, 197 S.W.3d 603, 611 (Mo. App., E.D. 2006); ***State v. McKinney***, 718 S.W.2d 583, 586 (Mo. App., E.D. 1986). However,

this does not mean that the trial court can automatically give the State a pass on the knowledge element. The court cannot supply missing evidence. ***Whalen***, 49 S.W.3d at 184. The State must provide at least some evidence that Mr. Jeffrey knew that his conduct was likely to cause affront or alarm in a child. The only circumstantial evidence here was that Mr. Jeffrey was not pointing, gesturing, or touching himself in any way. Furthermore, he had a reasonable explanation to the officers in the recordings: that he walks around his home naked sometimes because he lives alone, and on the two dates in question he may have forgotten to close the front door, or the blinds, respectively. *See* State's Exs. 5 and 10.

In denying Mr. Jeffrey's motion for judgment of acquittal, the trial court erroneously explained that reckless behavior, being nude in a semi-urban house with the blinds up, was enough to make Mr. Jeffrey's conduct criminal. In other words, Mr. Jeffrey should have known that children outside could see him, and if they could, his conduct was likely to cause affront or alarm. A "should have known" standard is not enough to satisfy actual knowledge. A person acts knowingly, "(1) [w]ith respect to his conduct or to attendant circumstances when he is aware of the nature of his conduct or that those circumstances exist; or (2) [w]ith respect to a result of his conduct when he is aware that his conduct is practically certain to cause that result." Section 562.016, RSMo. On the other hand, a person acts recklessly, "when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a

reasonable person would exercise in the situation." *Id*. The State's evidence tends to prove only that Mr. Jeffrey fell below a reasonable standard of care when he did not close the blinds, and being nude with the blinds open was a substantial and unjustifiable risk that children walking down the sidewalk might see him.

CONCLUSION

For these reasons, appellant respectfully requests that this Court reverse his convictions, or in the alternative, transfer his case to the Missouri Supreme Court.

Respectfully submitted,

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Certificate of Compliance and Service

I, Ellen H. Flottman, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b) and Special Rule 360. The brief was completed using Microsoft Word in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 9,325 words, which does not exceed the 15,500 words allowed for an appellant's brief.

On this 6th day of February, 2013, electronic copies of Appellant's Brief and Appellant's Brief Appendix were placed for delivery through the Missouri e-Filing System to Shaun Mackelprang, Assistant Attorney General, at Shaun.Mackelprang@ago.mo.gov.

/s/ Ellen H. Flottman

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