IN THE
MISSOURI SUPREME COURT

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| STATE OF MISSOURI, | ) | |
| | ) | |
| RESPONDENT, | ) | |
| | ) | NO. SC93851 |
| V. | ) | |
| | ) | ST. LOUIS CITY NO. 1022-CR06599 |
| SYLVESTER PORTER, | ) | |
| | ) | |
| APPELLANT. | ) | |

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APPEAL TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT,
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS,
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 23,
THE HONORABLE TIMOTHY J. WILSON, JUDGE

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# APPELLANT'S SUBSTITUTE BRIEF

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# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

*CONSTITUTIONAL PROVISIONS*



*STATUTES*



*RULES*

## JURISDICTIONAL STATEMENT

A jury found appellant Sylvester Porter guilty, as charged, of first-degree statutory sodomy, §566.062, Counts 1 and 2, and first-degree child molestation, §566.067, Count 3. Notwithstanding the jury's verdict, the trial court, the Hon. Timothy J. Wilson, entered judgment of acquittal on Count 3. On Counts 1 and 2, Judge Wilson sentenced Porter to concurrent terms of 25 years' imprisonment for a total of 25 years' imprisonment and granted him leave to appeal *in forma pauperis*. Mr. Porter timely appealed. On October 15, 2013, the Missouri Court of Appeals, Eastern District, affirmed Mr. Porter's convictions; on November 25, 2013, that court denied Mr. Porter's timely filed motion for rehearing and alternative application for transfer.

On February 4, 2014, this Court granted Mr. Porter's timely filed application for transfer.

## STATEMENT OF FACTS

The state charged Sylvester Porter under §566.062, RSMo.[1] with two counts of first-degree statutory sodomy. LF 16-17.[2] In Count 1, the state charged Porter committed this offense by having deviate sexual intercourse with K.W., then less than 12, "by touching K.W.'s vagina" with his hand. LF. 16. In Count 2, the state charged Porter committed this offense by having deviate sexual intercourse with K.W., then less than 12, "by touching K.W.'s vagina" with his tongue. LF. 17. The evidence presented was as follows:

During the first week of October, 2010, 3-year-old K.W. and her mother, A.L., moved into a room A.L. rented from Sylvester Porter[3] at a rooming

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[1] Statutes cited are RSMo. 2000 unless otherwise noted.

[2] LF 75-77, 85, 89-96. Appellant cites the record as follows: LF – Legal File; SLF – Supplemental Legal File; Tr. – Trial Transcript; StEx – State Exhibit; DefEx – Defense Exhibit.

[3] K.W. and her family knew defendant, Sylvester Porter, as "J-Money." Tr. 30-31, 216. The record refers to him as, *e.g.*, Sylvester, Porter, Mr. Porter, J-Money, and those names may be used in this brief. Appellant may use full, first, or last names, or nicknames, to refer to people involved in this case and in so doing intends no disrespect to anyone.

house on Belle Glade in the City of St. Louis. Tr. 247-48, 251-53. Porter maintained a room at the property and was there daily. Tr. 249. He bought a few things for K.W.: "a Princess tea set, maybe some candy... ." Tr. 250.

A.L. spent the weekend of October 29-31, 2010, at her boyfriend's house leaving K.W. at the rooming house in the care of B.Y. – A.L.'s alcoholic mother and K.W.'s grandma. Tr. 250-51, 256, 264-65.

There was no dispute at trial that on Sunday, October 31st, A.L. was still away, that B.Y. was drinking beer, and that she and K.W. fell asleep in the back room. Tr. 267, 271. When B.Y. woke, K.W. was not there; B.Y. found her in Porter's room. Tr. 267, 274-75.

The remainder of the evidence presented concerning what occurred that day comprised K.W.'s testimony, B.Y.'s testimony, and the testimony of B.Y. and other witnesses who heard K.W.'s out-of-court statements. For purposes of the evidentiary issues raised in this appeal, this evidence is best presented witness by witness.

K.W.'s trial testimony:

*K.W.'s direct exam*:

Porter "[t]ouch[ed]" her "private part" with his hand.[4] Tr.241-42.

[4] Identifying a "private part," K.W. drew a circle on the crotch area of a

Porter "did not" touch her private part with any other part of his body. Tr. 242.

Afterward, K.W. told her granny; she did not remember telling anyone else. Tr. 243.

*K.W.'s cross-exam*:

Her grandma told her to say these things. Tr. 245.

*K.W.'s redirect exam*:

Porter did not really touch her. Tr. 245.

Porter did touch her. Tr. 245-46.

B.Y.'s trial testimony – what she saw and what she heard K.W. say:

*B.Y.'s direct exam*:

B.Y. woke up; she found K.W. "up in the room with" Porter. Tr. 267.

K.W. "was laying back on the bed and he was, like, in front of her with his head down in her private area." Tr. 267.

K.W. "was half clothed... the top part she had on... ." Tr. 267.

Porter's head was "[d]own where, like, her torso area, down there where, you know." Tr. 267, 268.

B.Y. never saw Porter touch K.W.'s body: just "his head in that

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drawing of a girl. St.Ex 2; Tr. 242-43.

position... ." Tr. 267.

Porter's shirt and pants were off. Tr. 268.

B.Y. took K.W. out of the room and asked her what happened. Tr. 268.

K.W. told B.Y. that Porter "was smelling." Tr. 269. She said Porter put her on the bed and his head was between her legs. Tr. 270. The "[o]nly thing [K.W.] said [was] that he was just sniffing around her area down there." Tr. 268-70.

B.Y. never saw Porter do anything to K.W. – never saw him "physically, like, putting his hands, you know, nothing like that, but... [saw] his head down between her legs... ." Tr. 272.

*B.Y.'s cross exam*:

B.Y. saw Porter blowing on K.W.'s stomach and remembered saying that she saw him blowing on K.W.'s stomach. Tr. 275-76.

B.Y. did not say if she remembered saying, previously, that Porter was giving K.W. a "raspberry on her stomach."[5] Tr. 275.

B.Y. "didn't see Porter doing [anything] physically to [K.W.]... . like, trying to penetrate her or nothing like that." Tr. 276.

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[5] At the 491.075 hearing, A.L. testified B.Y. told her "Porter was blowing raspberries on K.W.'s stomach" and B.Y. "didn't see any of that... ." Tr. 39.

B.Y. was not drunk that day. Tr. 274.

A.L.'s trial testimony – what she heard K.W. and B.Y. say:

On the 31st, "at 6:00 something," A.L. received a call from B.Y. saying there was a problem and to come back. Tr. 251, 256.

A.L. returned; K.W. said Porter "had touched her kookoo" – "kookoo" being a word A.L. used with K.W. to refer to "vagina." Tr. 251-52.

"[T]he only thing K.W. told [A.L.] was that she was touched" Tr. 259.

K.W. said nothing else. Tr. 257.

A.L. took K.W. to Porter's room and asked him if he had touched K.W.; Porter said, "no." Tr. 252-53. K.W. said, "Yes, you did, you touched my kookoo." Tr. 253.

B.Y.'s only statement to A.L. was that she had seen Porter "with his face on [K.W.'s] belly button." Tr. 257. "That was it." Tr. 257.

A.L. called the police and, as directed, kept K.W. in the same clothes and took her right to the hospital that day. Tr. 253, 257.

A.L. spoke to K.W. about the incident the week before trial; K.W. said Porter "touched her but she had her underwear on." Tr. 253-54.

K.W. did not say anything else. Tr. 254.

K.W.'s statements at the CAC:

A couple of weeks after the alleged incident, Beverly Tucker, a "forensic

interview specialist" interviewed K.W. at the Children's Advocacy Center (CAC); the interview was recorded on videotape. Tr. 282, 288-89; StEx 1. Tucker testified that during the interview, K.W. "disclose[d] some touching that [Tucker] believe[d] would be deemed inappropriate" and that K.W. said Porter was the person who touched her. Tr. 291.

Defense objections notwithstanding, the CAC videotape of Tucker's interview of K.W. was admitted and played for the jury. Tr. 292; StEx1. Relevant portions of the CAC video, StEx 1, are summarized below[6]:

Tucker showed K.W. drawings depicting the front and back of a girl's body and asked her if she could identify various body parts.

Tucker pointed to the crotch area:

K.W. called it a "leg."

Tucker asked if K.W. had another name for that area:

K.W. said "no."

Tucker said she didn't think it was a leg – it was the part she (the girl in

[6] Undersigned counsel has attempted to accurately reproduce pertinent portions of the CAD interview in this brief. The copy of the DVD recording that counsel has is unintelligible at several points. The video has been forwarded to the Court.

the picture) "goes pee with."

Pointing to an area on the girl's back, Tucker asked what it was:

K.W. said, "Uhhmmm, a booty."

Again pointing to the girl's crotch, Tucker asked, "what's this part?"

K.W. said "I don't know," then said "peenies," or "pennies," or "penis."

Tucker asked, "Did somebody else call that something?" and asked what K.W.'s mommy called it.

K.W.'s answer was difficult to understand; she may have said "kooblet."[7]

Tucker asked K.W., "Did "somebody touch your body someplace?"

K.W. shook her head "no."

Tucker named several body parts – K.W.'s mouth, stomach, side, "peenies," "booty" – and with each one asked K.W. if somebody had touched that part:

K.W. responded negatively each time.

Showing K.W. the drawing of a boy, Tucker pointed to the boy's penis and asked, "What about this part on a boy? What's that part called?"

[7] Phonetic spelling.

K.W. said, “I don’t know.”

Tucker asked, “Have you ever seen one of those parts?”

K.W. said, “No.”

Tucker asked, “Have you seen somebody’s?

K.W. said nothing.

Tucker asked K.W. if she knew someone named J-Man;

K.W. said, “J-Money’s in jail.”

Tucker asked, “How come?” “How come J-Money’s in jail? What did he do?”

K.W. said, “He touched my -- he put his hands in my private part.”

Tucker asked K.W., “What’s a private part?”

K.W. pointed to a place on her body – not visible because she was behind a table – and said, “right there.”

Tucker asked, “So what happened to your private part?”

K.W. said “he put his hands in it, but I say ‘Stop, stop.’

Tucker asked what happened when K.W. said “Stop.”

K.W. said he kept on doing it.

Tucker asked K.W. where she was when that happened:

K.W. answered, “I say Stop, stop, stop; stop, stop, stop.” He kept doing it, but she said, “Don’t touch my stuff, don’t touch my private part no more.”

Tucker asked if J-Money said something:

K.W. replied that her mother saw him.

Tucker asked K.W. what her mother saw J-Money doing:

K.W. replied, "I say, 'Stop it.'"

Tucker asked K.W. what J-Money had touched her private part with:

K.W. said, "His hand."

Tucker asked K.W. how her clothes were when that happened:

K.W. said J-Money made her pull her pants down.

Tucker asked K.W. if J-Money had on some clothes:

K.W. said he took his clothes off and he kept on doing it, and she told him, "I tell my mama on you."

Tucker asked if J-Money did something else:

K.W. said he didn't touch her private part.

Tucker repeated, "He touched your private part?"

K.W. shook her head and said, "mm-mm" indicating "no."

Tucker said, "Hmmm?"

K.W. reiterated, "mm-mm" again indicating "no."

Tucker asked, "I thought you said he touched your private part with his hand?"

K.W. said, "With him tongue."

Tucker asked, "With his tongue?"

K.W. nodded.

Tucker asked, "What did his tongue do?"

K.W showed her tongue to show Tucker saying, "That's my tongue."

Tucker asked, "So what did J-Money's tongue do?"

K.W. responded, "Him touched my private part with him tongue."

Tucker asked K.W. if she was standing up, sitting down, or some other kind of way when he touched her private part with his tongue.

K.W. said she was standing up.

Tucker asked how was J-Money – standing up or sitting or another way:

K.W. said he was sitting.

Tucker asked, "What was he sitting on?"

K.W.'s answer, partly unintelligible, may have been that he was sitting, or trying to sit, or probably sitting, on the bed. Tucker did not repeat K.W.'s answer.

Tucker asked where K.W. was when Porter touched her private part with her tongue – whose house?

K.W. said, "My house."

Tucker asked, "Was somebody else there?"

K.W. said, "No."

Tucker asked, "Where was your mama?"

K.W. said, "With me."

Tucker asked, "Was somebody else over there?"

K.W. shook her head, indicating "no."

Tucker asked, "What room were you in?"

K.W. answered, "My room" and that she was eating french fries and chicken.

Tucker asked, "Did J-Money say something when he did that?"

K.W. shook her head indicating "no."

Tucker asked, "Did he give you something?"

K.W. said he gave her some doughnuts.

Tucker asked, "Did J-Money touch your private part—Did he do that one time or some more?"

K.W. said "One time."

Tucker asked, "Did you tell someone?

K.W. said, "I tell my Mama."

Tucker asked, "Did you tell somebody else?

K.W. said "I tell my Granny, too."

Tucker asked, "What'd your Granny say?"

K.W. said that her Granny said he did touch K.W.'s private part.

Tucker asked, "Did somebody else touch your private part?"

K.W. said "nobody."

Tucker asked, "Did you see somebody else's private part?

K.W. said "No."

Tucker asked, "Did you see J-Money's private part?"

K.W. said yes. He showed it to her; she could not say how he did that; he put it on her face on her eye.

Tucker asked K.W. what J-Money's private part looked like;

K.W. said, "Like mine."

(From StEx 1).

Other pertinent evidence:

Dr. Caddell, performed "a physical exam and a genital exam" on K.W. at the hospital and, for a rape kit, took swabs of K.W.'s mouth, vaginal area, and rectal area. Tr. 360, 362-63; DefEx A. K.W.'s physical exam showed no abnormalities: her hymen was intact; there was no erythemia, tenderness, bleeding, redness, swelling, or discharge around or from the vagina. Tr. 361-62. Dr. Caddell's notes of the exam showed that K.W. had "no apparent stress" and was "comfortable." Tr. 364. Detective Paulitsch took the rape kit to the police lab for analysis. Tr. 315.

At the St. Louis Crime Lab, Erik Hall examined, tested, and analyzed

K.W.'s clothing and the rape kit for blood and for amylase – "a component of saliva." Tr. 319-22. Hall's examination and testing of K.W.'s clothing, showed there was no seminal fluid or acid phosphatase – a component of seminal fluid – present. Tr. 320-26.

Hall also checked all of K.W.'s clothes for the presence of saliva by looking for amylase – a substance found in high concentrations in saliva. Tr. 321-22. He tested K.W.'s underwear for amylase: there was none. Tr. 326. He found a "weak positive for amylase" on K.W.'s shirt. Tr. 321. He found "one possible stained area on the lower front of [K.W.'s] shirt" that he cut out and put in an envelope for DNA analysis. Tr.322.

Pamelo Calogero, St. Louis Crime Lab employee, used the rape kit samples and "known" samples from K.W. and Porter for DNA analysis of the stain on K.W.'s shirt and of the rape kit swabs. Tr. 332-33. Analysis of the stain on K.W.'s shirt showed no DNA from Porter was present; the stain "was a mixture of DNA from K.W. and an unknown male." Tr. 333-37. All vaginal swabs were tested and showed only K.W.'s DNA was present. Tr. 337.

St. Louis City Children's Division investigator, Alicia Davis, spoke to A.L. and B.Y., separately, about the allegations. Tr. 339-41. On November 5, 2010, 5 days after the incident, Davis spoke to A.L. Tr. 340. Davis testified A.L.

said that K.W. had told her, "Grandma made me say that." Tr. 340.[8] A.L. also stated she believed B.Y. was drunk at the time of the incident. Tr. 340.

On January 13, 2011, Davis interviewed B.Y. Tr. 341. Davis testified that B.Y. "said" – in B.Y.'s own words – that "`she saw [Porter] going down on her grand baby, he was eating her pussy between her legs." Tr. 341. B.Y. also said "she didn't do anything about it." Tr. 341.

Forensic interviewer Jordan Pytlinski interviewed A.L. at the Children's Advocacy Center (CAC) in 2010. Tr. 346. A.L. told Pytlinksi "that she believed that her mother [B.Y.] had something to do with why K.W. was making the allegations but that she was unsure why." Tr. 348. A.L. also told Pytlinksi, "that when the police arrived K.W. saw Porter... be arrested and that K.W. was upset and cried" and took back the allegations. Tr. 348.

B.Y. was kicked out of the building on Belle Glade the weekend of the alleged incident. Tr. 255. At trial, B.Y. acknowledged that she did not have a good relationship with Porter. Tr. 280. She acknowledged he had asked her to leave the building because she wasn't paying rent and said that was not until after "this incident happened." Tr. 280.

At the close of all evidence, Porter moved for judgment of acquittal. Tr.

[8] A.L. denied this at trial. Tr. 258-59.

376; LF 58-59. As to Counts 1 and 2, Porter argued that, "based on what K.W. said yesterday, that nothing happened and that grandma made her say that," the State did not make "a submissible case... ." Tr. 377. The trial court denied the motion. Tr. 378; LF 58.

Jury deliberations began at 11:15 a.m. Tr. 406. At 4:25 p.m., the jury returned verdicts finding Porter guilty as charged. Tr. 409-11; LF 75-77. On August 23, 2012, the trial court granted Porter's motion for judgment of acquittal as to Count 3, denied it as to Counts 1 and 2, and sentenced Porter to concurrent terms of 25 years imprisonment on Counts 1 and 2 for a total term of 25 years. Tr. 417-18, 427-28; LF 89-90. Mr. Porter appealed.

If necessary, additional facts may be presented in the argument.

## POINTS RELIED ON

### POINT 1

**The trial court erred in overruling Porter's motion for judgment of acquittal at the close of all evidence and convicting him of Count 1, first-degree statutory sodomy, because, unsupported by sufficient evidence, this conviction violated due process, U.S. Const., Amend's V & XIV; Mo. Const., Art. 1, §10, in that K.W.'s inconsistent and contradictory trial testimony – Porter didn't touch her / he touched her with his hand / he touched her with his tongue; her pants were off / her underpants were on; grandma told K.W. to say he touched her – required corroboration to support conviction, but there was no sufficient, substantive, corroborating evidence: K.W.'s out-of-court statements were inconsistent and contradictory – not probative, substantive, corroborative, evidence supporting conviction; no one else witnessed the alleged, charged, act; no other evidence corroborated the alleged hand to genital touching.**

*Jackson v. Virginia*, 443 U.S. 307 (1979);

*State v. Kuzma*, 751 S.W.2d 54 (Mo.App., W.D. 1987);

*State v. Bursley*, 548 S.W.2d 586 (Mo.App., K.C.D. 1976);

*State v. Davis*, 566 S.W.2d 437 (Mo. banc 1978).

## POINT 2

**The trial court erred in overruling Porter's motion for judgment of acquittal at the close of all evidence and convicting him of Count 2, first-degree statutory sodomy, because this conviction, unsupported by sufficient evidence, violated due process, U.S. Const., Amend's V and XIV; Mo. Const., Art. 1, §10, in that at trial K.W. recanted and denied that the charged element of tongue to vagina touching occurred; no other evidence corroborated her, sole, unsworn, out-of-court statement that Porter touched her vagina with his tongue; neither Porter's saliva nor his DNA was found on K.W., her underwear, or her other clothes; her out-of-court statement that Porter touched her with his tongue was inconsistent with, contradicted, and not corroborated by, her other out-of-court statements that nobody touched any part of her body, Porter touched her only with his hand, and he touched her only once.**

*Jackson v. Virginia*, 443 U.S. 307 (1979);

*State v. Pierce*, 906 S.W.2d 729 (Mo.App., W.D. 1995);

*State v. Bursley*, 548 S.W.2d 586 (Mo.App., K.C.D. 1976);

*State v. Garner,* 14 S.W.3d 67 (Mo.App., E.D. 1999).

## POINT 3

**The trial court erred or plainly in granting the deliberating jury's request and sending StEx 1 – K.W.'s CAC interview with forensic interview specialist Tucker – to the jury room for the jury to review and replay some or all of the videotape as it wished, without supervision or limiting instructions, because this violated Porter's rights to a fair jury, due process, of law, and fundamental fairness, U.S. Const., Amend's V, VI, & XIV; Mo. Const., Art. 1, §§ 10 & 18(a) in that K.W.'s statements on those tapes are, and were admitted as, testimonial evidence under §491.075.1 and giving the jury license to listen to that testimony as often as desired created a presumption that this evidence was to be given more weight than other evidence admitted at trial. Allowing the jury unrestricted opportunity to rehear this state's evidence – K.W.'s statements – created an unfair, manifestly unjust, advantage for the state.**

*DeBella v. People*, 233 P.3d 664 (Colo. 2010);

*State v. Partain*, 310 S.W.3d 765 (Mo.App., E.D. 2010);

*State v. Parker*, 208 S.W.3d 331 (Mo.App., S.D. 2006);

*State v. Burr*, 948 A.2d 627 (N.J. 2008).

## ARGUMENT

*Standard of review for Points 1 and 2 challenging the sufficiency of the evidence to support statutory sodomy convictions on Counts 1 and 2*:[9]

A conviction not supported by proof beyond a reasonable doubt violates due process of law. U.S. Const., Amend's V and XIV; *In re Winship*, 397 U.S. 358, 363-64 (1970). The relevant question "is whether... viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). This standard demands "subjective... near certitude of guilt of the accused... ." *Id*. at 315. "There cannot be a conviction except upon evidence that is sufficient to support a conclusion that every element of the crime has been established beyond a reasonable doubt." *State v. Burton*, 320 S.W.3d 170, 174 (Mo.App., E.D. 2010); citations and quotation marks omitted. A court reviewing a claim of insufficient evidence must view "the evidence in the light most favorable to the State... grant[ing] the State all reasonable inferences from the evidence..."

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[9] Porter preserved Points 1 and 2 for review by timely filing a motion for judgment of acquittal at the close of all evidence and including the trial court's denial of acquittal in the motion for new trial. LF 58-59; SLF 5.

and ignoring "contrary inferences, unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them." *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc 2001); internal quotation marks and citations omitted. "The Court may not supply missing evidence or give the [State] the benefit of unreasonable, speculative or forced inferences." *Whalen* at 184 quoting *Bauby v. Lake,* 995 S.W.2d 10, 13 n. 1 (Mo.App., E.D. 1999)); internal quotation marks omitted.

Substantive or substantial evidence is probative evidence "show[ing] the truth of the matters asserted... ." *State v. Davis*, 566 S.W.2d 437, 445 (Mo. banc 1978). That "no substantial evidence... support[s] the verdict... means that the facts constituting the crime have not been proven." *State v. Miller*, 300 S.W. 765,766 (Mo.1927). Substantive or substantial evidence is probative evidence "show[ing] the truth of the matters asserted... ." *State v. Davis*, 566 S.W.2d 437, 445 (Mo. banc 1978). That "no substantial evidence... support[s] the verdict... means that the facts constituting the crime have not been proven." *State v. Miller*, 300 S.W. 765,766 (Mo.1927).

*A brief review of the corroboration rule, the destructive contradictions doctrine, and similar rules.*

A victim's testimony, alone, may be sufficient to sustain a conviction, *State v. Baker*, 23 S.W.3d 702, 709 (Mo.App., E.D. 2000). Over the years, however,

several, somewhat similar, rarely-applied rules have evolved to determine when, in certain circumstances, substantive evidence sufficient to support conviction exists. This case having been transferred "for the purpose of re-examining the law concerning the corroboration rule and the destructive contradictions rule – also known as the destructive testimony rule," it is appropriate to set out these, and other, similar, rules here.

One, known as the "physical facts rule," provides that the "[t]estimony of a witness, although not directly controverted, which is opposed to the unquestioned laws of nature that lie within the court's judicial knowledge or which is clearly in conflict with scientific principles as established by the laws of physics or mechanics is of no probative value" and that the reviewing appellate court "may ignore the testimony or reverse the case for lack of evidence sufficient to sustain the verdict... ." *State v. Duncan*, 540 S.W.2d 130, 134 (Mo.App., St.L.D. 1976). ***The 'physical facts' rule applies only when the conflicting testimony goes to some vital issue in the case" and "does not apply to the credibility of witnesses, which is for the jury***." *Id.*; emphasis added. Or, as succinctly stated in *State v. Gartrell*, 71 S.W. 1045 (Mo. 1903), "This court has again and again ruled that neither courts nor juries are bound to accept testimony which is contrary to well–known physical laws or the common experience of mankind." *Id.* at 1055.

Similarly, the destructive contradictions doctrine holds that the testimony of any witness, whether or not a victim, is not probative evidence when it is "***strikingly inconsistent and contradictory***" or when the statements made while testifying at trial are "***so inconsistent, contradictory, and diametrically opposed to one another that they rob the testimony of all probative force***." *State v. Uptegrove*, 330 S.W.3d 586, 590 (Mo.App., W.D. 2011); emphasis added; internal quotation marks and citations omitted. Under the destructive contradictions doctrine, "*trial* testimony must be corroborated if it is so inherently incredible, self-destructive or opposed to known physical facts on a vital point or element that reliance on the testimony is necessarily precluded." *Id*. at 590-91; emphasis in original; internal quotation marks and citations omitted. *See also State v. Perdue*, 317 S.W.3d 645, 650 (Mo.App., S.D. 2010).

In *State v. Baldwin*, 571 S.W.2d 236 (Mo. banc 1978), this Court set out the corroboration rule and described the limited circumstances in which it was to be applied: "It is only in those cases where the evidence of the prosecutrix is of a contradictory nature ***or***, when applied to the admitted facts in the case, her testimony is not convincing and leaves the mind of the court clouded with doubts, that she must be corroborated or a judgment cannot be sustained." *Id*. at 239; emphasis added; citing *State v. Burton*, 355

Mo. 467, 196 S.W.2d 621, 622-23 (1946). Subsequently, the three lower appellate courts modified and elaborated on the rule.

In 1975, adopting *Baldwin*'s version of the corroboration rule, the Southern District Court of Appeals explained that the function and purpose of the rule was to determine whether there was substantial evidence sufficient to submit the case to the jury:

> There are a good many cases which hold that when the evidence of the prosecutrix is of a contradictory nature, or when applied to the admitted facts of the case her testimony is not convincing but leaves the mind of the court clouded with doubt, she must be corroborated, or the judgment cannot be sustained..., but ***these rulings are, in our opinion, only specific applications of the more general principle that it is an appellate judicial function to determine whether evidence is substantial as a matter of law and warrants inferences sufficient for submission of the case to the jury***... .

*State v. Bohannon*, 526 S.W.2d 861, 863 (Mo.App., Spf. D. 1975).

Subsequently, the Western District further explained that when evidence is not substantial or substantive, "[c]orroboration is required not because the testimony of the victim cannot stand alone, but because the law does not allow an inference of fact from evidence not substantial or probative of that

fact." *State v. Kuzma*, 751 S.W.2d 54, 58 (Mo.App., W.D. 1987) "[T]o enable the jury to find defendant's guilt beyond a reasonable doubt, the purported corroboration [must] itself [be] substantial evidence" meaning "evidence from which the jury reasonably could have determined which of the [victim's] conflicting [statements] was true. *Kuzma*, 751 S.W.2d at 59-60. Contradictory evidence is not corroborative; the "opportunity to commit the offenses does not corroborate that the crimes did occur." *Id*. at 59; *State v. Bursley*, 548 S.W.2d 586, 590 (Mo.App., K.C.D. 1976).

In *State v. Griggs*, the Western District held: "the corroboration rule is triggered where the victim's testimony is "so contradictory or inconsistent as to deprive it of all probative force." 999 S.W.3d 235, 241 (Mo.App., W.D. 1995). And *State v. Nelson*, 818 S.W.2d 285 (Mo.App., E.D. 1991), provided an extensive description of the operation of the rule and added a requirement that several different factors all be present to trigger the rule: "Corroboration is not mandated unless the victim's testimony is so contradictory and in conflict with physical facts, surrounding circumstances and common experience, that its validity is thereby rendered doubtful."*Id*. at 289; emphasis added. Corroboration is required only for "inconsistencies in the victim's statements" – not for "inconsistencies between the victim's statements and the statements of other witnesses" – and only when the

victim's inconsistencies "bear on a proof essential to the case... ." *Id*. But in *State v. Greenlee*, 943 S.W.2d 316 (Mo.App., E.D. 1997), the Eastern District described the rule as requiring that just one of alternative triggering factors be present: "when the victim's testimony is of a contradictory nature ***or***, when applied to the admitted facts of the case, the testimony is not convincing and leaves the court's mind clouded with doubt, there must be corroboration or the judgment cannot be sustained." *Id*. at 318; emphasis added.

In a recent case, the Western District adopted an unprecedented version of the corroboration rule providing that it "applies *only* where the victim's trial testimony is in conflict with physical facts, surrounding circumstances, and common experiences [such] that its validity is doubtful... ." *State v. Wadel*, 398 S.W.3d 68, 79 (Mo.App., W.D. 2013).

Appellant respectfully suggests that the Court consider adopting a single rule to replace and update the somewhat duplicative corroboration rule and destructive contradictions doctrine. Such a rule should require that when the testimony of a witness is inconsistent or contradictory as to one or more elements of an offense, the testimony may not be treated as substantive evidence unless corroborated; this avoids the extreme measure of the destructive contradictions rule under which there is no opportunity for the inconsistent or contradictory testimony of a witness to be treated as

substantive by means of corroborating it with other evidence. Further, if warranted by the circumstances of the case, the rule should be applicable regardless of the nature of the charged crime; likewise, applicability of the rule should not be conditioned or limited by the age or sex of the testifying witness. Finally, what constitutes corroboration will necessarily depend on the circumstances and facts of the case. Not all offenses have "surrounding circumstances, not all surrounding circumstances are the same, not all witnesses will be corroborative.

For the reasons that follow, the current corroboration rule, the destructive contradictions doctrine, and undersigned counsel's attempted formulation of a workable, simplified, and updated rule should all apply to the instant case. Under any of these rules, appellant's convictions should be reversed and the case remanded for a new trial.

**<u>As to Point 1</u>: The trial court erred in overruling Porter's motion for judgment of acquittal at the close of all evidence and convicting him of Count 1, first-degree statutory sodomy, because, unsupported by sufficient evidence, this conviction violated due process, U.S. Const., Amend's V & XIV; Mo. Const., Art. 1, §10, in that K.W.'s inconsistent and contradictory trial testimony – Porter didn't touch her / he touched her with his hand / he touched her with his tongue; her pants were off / her underpants were on; grandma told K.W. to say he touched her – required corroboration to support conviction, but there was no sufficient, substantive, corroborating evidence: K.W.'s out-of-court statements were inconsistent and contradictory – not probative, substantive, corroborative, evidence supporting conviction; no one else witnessed the alleged, charged, act; no other evidence corroborated the alleged hand to genital touching.**

K.W. testified at trial that Porter touched her "private part" (vagina) with his hand; inconsistently, she testified at trial that Porter did ***not*** really touch her private part. Tr. 241, 245. Further clouding the matter, K.W. testified

that her grandma told her "to say these things." Tr. 245.[10]

K.W.'s trial testimony – that Porter did touch her, did not touch her, and Grandma told her to say those things – was so "strikingly" inconsistent and contradictory as to be self-destructive concerning the "touching" element of the charged offense. *Uptegrove*, *supra*; *State v. Cook*, 339 S.W.3d 523, 529 (Mo.App., E.D. 2011). As such, it was not substantive, probative evidence of the requisite hand-to-genital-touching element of the first-degree statutory sodomy charged in Count I. LF 16[11]; *Miller*, 300 S.W. at 766; *Paulson*, 220

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[10] *See* Statement of Facts, *supra*, App.Br. 7-8.

[11] "A person commits the crime of statutory sodomy in the first degree if he has deviate sexual intercourse with another person who is less than fourteen years old." §566.062.1, R.S.Mo. (Supp. 2009). "Statutory sodomy in the first degree... is a felony for which the authorized term of imprisonment is life imprisonment or a term of years not less than five years, unless... the victim is less than twelve years of age, in which case the authorized term of imprisonment is life imprisonment or a term of years not less than ten years." §566.062.2, RSMo. (Supp. 2009). "Deviate sexual intercourse" includes "any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person... done for the purpose of arousing or gratifying the sexual

S.W.3d at 833; *Baker*, 23 S.W.3d at 709; *Kuzma*, 751 S.W.2d at 58-60. Without corroborating evidence, K.W.'s trial testimony is insufficient to support Porter's conviction on Count 1. *Cook*, *Baker*, *Paulson*, and *Kuzma*, *supra*; *see also State v. Baldwin*, 571 S.W.2d 236, 239 (Mo. banc 1978) (when contradictory or, as to "the admitted facts in the case... not convincing and leaves the mind of the court clouded with doubts..." the victim's testimony "must be corroborated or a judgment cannot be sustained.").

And other evidence presented at trial falls short of the substantive, sufficient evidence needed to corroborate K.W.'s trial testimony and salvage this conviction. K.W.'s out-of-court statements comprised much of this evidence; like her trial testimony, her out-of-court statements were too inconsistent and contradictory concerning the element of hand-to-vagina touching to be substantive, corroborating evidence.

B.Y., the only witness who saw K.W. and Porter together, did not confirm K.W.'s statement that Porter touched or attempted to touch K.W.'s vagina with his hand. A.L. testified that K.W. said Porter touched her "koo-koo" (private part), but A.L. also testified that K.W. later said Porter touched her,

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desire of any person or for the purpose of terrorizing the victim... ." §566.010(1), RSMo. (Supp. 2009).

but she had her underpants on. Tr. 251-54.

K.W's statement to Tucker – that J-Money touched her private part with his hand – was made almost immediately after K.W. told Tucker that nobody touched her body and, specifically, that nobody had touched what K.W. called a "penis" or "peenies" or "pennies." StEx 1.

No "physical" evidence supports Porter's conviction. The testing and analysis of K.W.'s bodily samples, swabs for the rape kit, and her clothing, did not contain Porter's saliva, amylase, or DNA. The testing and analysis excluded Porter as the source of the male DNA found on K.W.'s shirt. Tr. 333-37. It did not link Porter to the alleged touching.

The record, itself, best illustrates the inconsistencies and contradictions in the evidence; it best proves that K.W.'s testimony, alone, was insufficient to support Porter's conviction on Count 1 and that other evidence in the case failed to provide sufficient, substantive, corroboration to support conviction. The record shows the following:

*K.W.'s trial testimony: inconsistent and contradictory concerning the "hand to genital" touching element of the sodomy charged in Count 1*

On direct exam, K.W. testified that Porter touched her private part with his hand and did not touch her private part with any other part of his body. Tr. 241-42. K.W. told her granny about this; she did not remember telling

anyone else. Tr. 243.

On cross-exam, K.W. testified that her grandma, B. Y. told her to say these things. Tr. 245.

On redirect, K.W. testified that Porter did not really touch her, Tr. 245, and that Porter did touch her. Tr. 245-46.

*B.Y.'s trial testimony: what she saw; what K.W. told her*

B.Y. found K.W. lying on her back on the bed in Porter's room. Tr. 267. Porter's head was "[d]own where, like, her torso area, down there where, you know... ." Tr. 267. B.Y. did not see him touch K.W.'s body. Tr. 267. Asked about previous testimony that she saw Porter giving K.W. "a raspberry" on her stomach, B.Y. testified Porter was "blowing around" K.W. – blowing on her stomach. Tr. 275-76. "He was blowing on her, but I didn't see him, like, trying to penetrate her or nothing like that." Tr. 276. B.Y. described Porter "look[ing] like he was smelling around... ." Tr. 279. His "head [was] between [K.W.'s] legs," but B.Y. "didn't see him performing any acts or whatever." Tr. 280. B.Y. testified, "I just seen him with his head down there. I didn't see him physically, like, putting his hands, you know, nothing like that, but I seen him with his head down between her legs, I did do that." Tr. 272, 275-76.

B.Y. testified she told A.L. that Porter "was, like, down there in between her legs and [B.Y. didn't] know what happened." Tr. 268.

B.Y. testified that she asked K.W what happened, and K.W. said "he was just sniffing around her down there"; that was all K.W. said. Tr. 268-70.

*A.L.'s testimony: what K.W. and B.Y. told A.L.*

A.L. testified to statements made by K.W. and B.Y. Tr. 251-57. K.W. told A.L., after A.L. returned home, that Porter "had touched her kookoo" – meaning "vagina." Tr. 251-52. A.L. took K.W. to confront Porter; denied it, and K.W. said, "Yes, you did, you touched my kookoo." Tr. 252-53.

A.L. also testified that a week before trial she spoke to K.W. about going to court; K.W. said Porter "touched her, but she had her underwear on." Tr. 253-54. That was all K.W. said. Tr. 254.

A.L. testified that when she returned home, all B.Y. said was that she saw Porter "with his face on [K.W.'s] belly button" – nothing more. Tr. 257.

K.W.'s out-of-court statement to A.L. – that Porter" touched her, but she had her underwear on" – contradicts, and is inconsistent with, her trial court testimony, *supra*, and her other, out-of-court, statements, *infra*, that Porter touched her private part (vagina) and that he did not touch her.[12] It also

[12] Touching genitals through clothing is not "deviate sexual intercourse." *State v. Peeples*, 288 S.W.3d 767, 771 (Mo.App., E.D. 2009); §566.010(1) & (2). At most, K.W.'s statement that her underwear was on when Porter touched

contradicts and is inconsistent with K.W.'s trial testimony, *supra*, and her other, out-of-court, statements, *infra*, that Porter touched her private part (vagina) and also that he did not touch her.

K.W.'s trial testimony that her grandma, B. Y., told her to say these things, Tr. 245, contradicts all of K.W.'s own testimony and all of the statements K.W. made to others concerning the alleged, charged, offense.

B.Y.'s trial testimony that the only thing K.W. said was that Porter "was just sniffing around her down there" is inconsistent with K.W.'s trial testimony that Porter touched her private part with his hand and did not touch her private part with any other part of his body. Tr. 141-43, 268-70. It is also inconsistent with K.W.'s trial testimony that she told B.Y. that Porter touched her. Tr. 243.

B.Y.'s statement to A.L. – that she saw Porter "with his face on [K.W.'s] belly button" – nothing more, Tr. 257, contradicts and is inconsistent with K.W.'s testimony and her out-of-court statements (to A.L. and Tucker) that Porter touched her private part. It also contradicts, and is inconsistent with, B.Y.'s trial testimony that she saw Porter's head between K.W.'s legs and

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her shows sexual contact; it is insufficient to prove the "deviate sexual intercourse" element of statutory sodomy under §566.062.1. *Peeples*, *supra*.

that he was smelling her "down there." Tr. 268-80.

*CAC video*: *K.W.'s out-of-court statements to forensic interviewer Tucker*

The CAC video, StEx 1, provides evidence of specific statements K.W. made to Tucker relevant to the alleged, touching charged in Count 1:

> Shown a drawing of the front of a girl, K.W. called the crotch area "a leg," said she did not have another name for it, then called it a "peenies," or "pennies," or "penis."
>
> K.W. shook her head "no" when asked, "Did somebody touch your body someplace?" Asked if somebody had touched specific body parts – mouth, stomach, side, "peenies," and "booty" – K.W. said or indicated "no" for each. K.W. also said "no" when Tucker asked if someone had touched *any* part of her body.
>
> Tucker asked if K.W. knew someone named J-Man; K.W. said, "J-Money's in jail." When Tucker asked why he was in jail – what did he do? K.W. said, "He touched my -- he put his hands in my private part."
>
> K.W. identified the crotch area of the girl drawing as a private part.
>
> Tucker asked, "So what happened to your private part?" K.W. responded, "He put his hands in it, but I say 'Stop, stop... . I say Stop, stop, stop, stop, stop.'" He kept doing it, but she said, "'Don't touch my stuff, don't touch my private part no more.'"

Asked what J-Money had touched her private part with, K.W. said, "His hand."

K.W. said J-Money made her pull her pants down.

Tucker asked if J-Money did something else, and K.W. said he didn't touch her private part.

Tucker specifically asked, "He touched your private part?" K.W. shook her head and said, "mm-mm" indicating "no."

Tucker said, "Hmmm?" Again indicating "no," K.W. said, "mm-mm."

Tucker specifically asked, "I thought you said he touched your private part with his hand?" This time, correcting Tucker, K.W. responded, "With him tongue."

Tucker asked, "With his tongue?" and K.W. nodded.

Tucker asked, "What did his tongue do... . what did J-Money's tongue do?" K.W. replied, "He touched my private part with his tongue."

Tucker asked, "Did J-Money touch your private part—Did he do that one time or some more?" K.W. said "One time."

Tucker asked, "Did you tell someone? K.W. said, "I tell my Mama."

Tucker asked, "Did you tell somebody else? K.W. said "I tell my Granny, too."

Tucker asked, "What'd your Granny say?" K.W. said that her Granny

said he did touch K.W.'s private part.

Tucker asked, "Did you see J-Money's private part?" K.W. said yes. She could not say how he did that; he put it on her face by her eye.

Tucker asked K.W. what J-Money's private part looked like; K.W. said, "Like mine."

StEx 1.

Many of the statements that K.W. made to Tucker during the CAC interview concerning the alleged touching charged in Count 1 are contradictory and inconsistent. These contradictory and inconsistent CAC statements, StEx 1, fall into three groups – each contradicting the other:

K.W.'s statements that she ***was not*** touched:

K.W. shook her head "no" when Tucker asked if somebody touched her body "someplace." Tucker then asked, specifically, if somebody touched K.W.'s "peenies" – a name K.W. gave to the crotch area of the drawing of a girl – and K.W. said "no." K.W. also said "no" when Tucker asked if someone had touched *any* part of her body.

K.W.'s statements that ***Porter touched her with his hand***:

Inconsistently, when Tucker asked K.W. about J-Man (Porter), K.W. said "He touched my -- he put his hands in my private part." K.W. identified the crotch area of the girl drawing as a private part and said Porter touched her

private part with his hand.

K.W.'s statements that ***Porter touched her with his tongue – not his hand***:

After K.W. said Porter touched her private part with his hand, Tucker asked if he did something else: K.W. said he didn't touch her private part. Tucker queried, "He touched your private part?" K.W. shook her head and said, "mm-mm" indicating "no." Tucker said, "Hmmm?" K.W. reiterated, "mm-mm" again indicating "no."

Tucker then asked, "I thought you said he touched your private part with his hand?" K.W. responded, "With him tongue." Tucker repeated, "With his tongue?" and K.W. nodded.

Tucker asked, "What did his tongue do... . So what did J-Money's tongue do?" K.W. replied, "He touched my private part with his tongue."

Before concluding the interview, Tucker asked, "Did J-Money touch your private part—Did he do that one time or some more?" K.W. said "One time." Tucker confirmed, "One time?" and K.W. said, "Yup."

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Evidence of K.W.'s out-of-court statements to Tucker concerning the charged element of hand to genital touching "falls far below the standard" required for corroborating evidence. *Kuzma*, *supra*, 751 S.W.2d at 59-60.

K.W.'s statements – she was not touched; Porter touched her private part with his hand; Porter did not touch her private part with his hand; Porter touched her private part with his tongue; Porter only touched her private part one time – are so "inconsistent, contradictory, and diametrically opposed to one another" concerning the "essential element" of hand to genital touching as to "preclude reliance thereon and rob the testimony of *all* probative force." *State v. Helmig*, 924 S.W.2d 562, 565 (Mo.App., E.D. 1996); *Paulson*, 220 S.W.3d at 833. The inconsistencies, going to an element of the offense, are critical and destroy any corroborative value of the evidence. *Id.*; *Kuzma*, *supra*, *Bursley*, *supra*.

*Conclusion*:

The record in this case speaks for itself. Because K.W.'s trial testimony on the element of hand-to-vagina touching was contradictory, corroboration was required to support conviction on Count 1. But there was no substantive corroborative evidence sufficient to support conviction. *Miller*, *supra*; *Kuzma*, *supra*. K.W.'s out-of-court statements suffer from the same inconsistencies and contradictions as her trial testimony; there was no physical evidence supporting conviction; no one else saw the alleged touching; the trial testimony and out-of-court statements of B.Y., the only person who could conceivably corroborate K.W., were hopelessly inconsistent and contradictory.

For these reasons, and as shown in more detail, *supra*, the state failed to make a submissible case on Count 1, and the evidence was insufficient to prove beyond a reasonable doubt that Porter was guilty of the first-degree statutory sodomy charged in Count 1. Porter's conviction on Count 1must be reversed and he must be discharged.

**<u>As to Point 2</u>: The trial court erred in overruling Porter's motion for judgment of acquittal at the close of all evidence and convicting him of Count 2, first-degree statutory sodomy, because this conviction, unsupported by sufficient evidence, violated due process, U.S. Const., Amend's V and XIV; Mo. Const., Art. 1, §10, in that at trial K.W. recanted and denied that the charged element of tongue to vagina touching occurred; no other evidence corroborated her, sole, unsworn, out-of-court statement that Porter touched her vagina with his tongue; neither Porter's saliva nor his DNA was found on K.W., her underwear, or her other clothes; her out-of-court statement that Porter touched her with his tongue was inconsistent with, contradicted, and not corroborated by, her other out-of-court statements that nobody touched any part of her body, Porter touched her only with his hand, and he touched her only once.**

At trial, K.W. recanted her previous statement that Porter had touched her vagina with his tongue. K.W. testified that Porter "[t]ouch[ed]" her "private part" with his hand.[13] Tr. 241. Pressed by the prosecutor, she

[13] K.W. identified the place that Porter touched as her "private part," and

explicitly denied that Porter touched her private part with any other part of his body:

Q [Prosecutor] Do you remember J-Money doing anything to you?

A Yes.

Q What did J-Money do to you?

A Touch my private part... .

Q Do you know what he touched it with?

A His hand.

Q His hand. ***Do you know if he touched your private part with any other part of his body?***

A ***No***.

Q ***You don't know or he did not?***

A ***He did not***.

Tr.241-42; emphasis added.

After K.W. testified that Porter touched her private part with his hand, the prosecutor asked K.W. if she had told anyone "after J-Money did this to

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located it by drawing a circle around the vaginal area of a drawing of a girl. StEx 2; Tr. 241-42. As the state charged "tongue-to-vagina" touching in Count 2, appellant will use the charging terminology in this point. LF 17.

you?" Tr. 242-43. K.W. said she had told B.Y. and did not remember telling anyone else.[14] Tr. 243-44.

K.W. also testified that B.Y. had told her to say these things. Tr. 245.

The sole evidence of the tongue-to-vagina touching element of the sodomy charged in Count 2 was K.W.'s statement to Tucker during the CAC interview. StEx 1; *see*, *supra*, App.Br. 11 to 17.

Because K.W.'s trial testimony recants, denies, contradicts, and refutes her unsworn, out-of-court statement, it is insufficient, without corroboration, to support Porter's conviction of sodomy on Count 2. *State v. Pierce*, 906 S.W.2d 729, 735 (Mo.App., W.D. 1995).

In *State v. Pierce*, *supra*, DFS (Department of Family Services) worker "Harms" testified that she had learned from defendant's Richard Pierce's live-in girlfriend, Redman, that she and Pierce had a son, Sam, and that she "wanted to get Sam out of the house because of the events occurring between Pierce and KJB." *Id*. at at 730-32. Based on what Redman said, Harms and deputy sheriff Hubbs interviewed KJB. *Id*. at 732.

Harms testified that after "interview[ing] KJB, who was quite hostile, for

[14] The state, in its closing argument, argued that this touching referred to the hand-to-vagina touching charged in Count 1. Tr. 383-85; LF 16.

30 to 45 minutes... KJB then told her about the sexual intercourse between she and Pierce." *Id.* KJB was not under oath during this initial interview with Harms nor during KJB's subsequent statement at the sheriff's office. *Id.* The latter statement was videotaped, but "the audio refused to work, so there was no sound recorded... ." *Id.*

Hubbs testified at trial; his testimony was consistent with Harms's. *Id.*

KJB testified on direct exam that she only told Harms and Hubbs that she had sex with Pierce because they said "if she told them what they wanted to hear, they would let her go and would do nothing to her." *Id.* KJB testified that all her statements to Harms and Hubbs about having sex with Pierce, including the videotaped statement, were lies. *Id.* Asked about a letter sent to Pierce, then in jail, KJB was uncertain she had written that letter and did not remember asking him in the letter if he would still marry her when he got out; that letter was not admitted into evidence. *Id.* A letter from KJB to Pierce's daughter, Cindi, in which KJB wrote, "I will try to get Richard out of jail, I will even lie about what happened," was admitted into evidence. *Id.* "When asked about what the 'I will lie' referred to, she said she was not lying on the stand and reiterated that Pierce never had intercourse with her." *Id.*

KJB had a physical exam "within seventy-two hours of the last alleged sexual intercourse between Pierce and KJB" – when "evidence of sperm could

still be discovered." *Id.* at 733. The state neither presented the results of the exam nor did the examining physician testify. *Id.* KJB, however, testified she was told by the doctor that "no sperm [was] found inside her" and that "she did not have Trichomonas[15]... ." *Id.* KJB further testified she "never, at any time, had a sexually transmitted disease." *Id.*

The Western District Court of Appeals found the sole evidence supporting Pierce's conviction was KJB's "out-of-court statement... that sex had indeed taken place between herself and Pierce." *Id.* But other evidence showed that KJB had thereafter denied having sex with Pierce, and at trial again denied having sex with Pierce. *Id.* at 733-34.

The Court held that Pierce's conviction could not be upheld based solely on KJB's uncorroborated, out-of-court, unsworn, statement to authorities. *Id.* at 733-35. Corroboration was necessary because KJB's "trial testimony was 180 degrees opposite of and contradictory to her out-of-court statements on the absolutely essential element here, intercourse." *Id.* at 735.

And there was no corroboration: "There was no physical fact evidence" or "evidence of [the] results of KJB's medical exam, or any other evidence to

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[15] Redman testified that when she spoke to Harms, she and Pierce both "had a sexually transmitted disease, Trichomonas." *Id.* at 731.

corroborate her inherently conflicting testimony on the essential element [of the charged offense.]" *Id*. In these circumstances, reversal of Pierce's conviction was "require[d]." *Id*. at 735.

The Court also ruled that in the "absence of adequate safeguards to assure reliability, a conviction based solely on a prior statement, though admissible via statute, falls short of due process protection." *Id*. Stating, "Convictions should be founded on competent evidence, they should not be founded solely on unsupported intuition," the Court ordered Pierce discharged. *Id*. at 736-37.

*State v. Werneke*, 958 S.W.2d 314 (Mo.App., W.D. 1997), explained that although the out-of-court statements made by KJB, which she subsequently recanted, before and at trial, were admissible, substantive evidence, "*Pierce* simply recognized that such out-of-court statements were not sufficient in and of themselves to make a submissible case, where the victim recants and there is no other evidence of the charged offense at trial." *Id*. at 319. *See also State v. Garner,* 14 S.W.3d 67, 72 (Mo.App., E.D. 1999) (stating that the "ruling" in *Pierce* "is an exception to the rule that a prior inconsistent statement can serve as the sole basis for a finding of guilt, carved out for circumstances in which the witness's testimony is contradictory... ."); *State v. Duley*, 219 S.W.3d 842, 844 (Mo.App., W.D. 2007) (noting that "the rule set out in *Pierce* has been restricted to its 'unique factual situation.'").

The instant case is on all fours with *Pierce*, and the *Pierce* rule should apply here. Here, as in *Pierce*, K.W., while under oath, "recant[ed]" her unsworn, out-of-court, statement to Tucker of tongue-to-vagina touching. 906 S.W.2d at 733; Tr. 241-42. And here, as in *Pierce*, no substantive evidence corroborates K.W.'s out-of-court, unsworn, statement to Tucker.

Indeed, K.W.'s out-of-court statements are in conflict with the physical facts, surrounding circumstances and common experience.

First, there was no evidence that K.W. told her mother, A.L., or grandmother, B.Y., or anyone but Tucker, that Porter touched her (K.W.'s) vagina with his tongue.

Second, there was no evidence that A.L., B.Y., or anyone else saw the alleged tongue-to-vagina touching. B.Y., in particular, who claimed to have seen Porter "blowing" on K.W., denied seeing him touch her or do anything "physical" to her.

Perhaps most significant, there was no physical evidence corroborating K.W.'s out-of-court statement. A.L. testified that she kept K.W. in the same clothes and took her to the hospital that same day. Tr. 257. But neither Porter's amylase, nor his saliva, nor his DNA was found on the swabs taken

from K.W.'s vagina, or on her underwear, or on any of her clothes.[16] Tr. 319-26, 332-37, 360, 362-63; DefEx A. Even if – as the state, unsupported by evidence, suggested at trial – K.W. urinated after the alleged touching thus "wash[ing] and wip[ing] away" any saliva or amylase on her body before swabs were taken at the hospital, Tr. 262, 366-70, this does not explain the absence of Porter's saliva, amylase, or DNA on K.W.'s underwear. B.Y. testified that when she saw K.W.in Porter's room, K.W.'s underwear was off; B.Y. took K.W. out of the room. Tr. 267-68. Presumably B.Y., or A.L. after she got home, put underwear or a "brief" back on K.W. Tr. 267-68. A.L. testified that she came home, and after being told that Porter had touched K.W., called the police and "took [K.W.] right to the hospital as directed... [i]n the same clothes." Tr. 257. Had Porter touched K.W.'s vagina with his tongue, it is likely that his DNA, saliva, or amylase would have transferred to her underwear. The state never elicited from A.L. or K.W. or B.Y. and evidence that K.W. did, in fact, urinate at any time after the alleged touching and before she was examined at the hospital. And although Porter's DNA, saliva, or amylase might have been washed or wiped off K.W.'s ***body*** if she had

[16] The DNA of another male, unidentified, was found on the inside of K.W.'s shirt. Tr. 333-37.

urinated and wiped herself, these substances would not have been "washed away" from her underwear or clothing. These substances would have been found during testing. *See State v. Stahlnecker*, 690 S.E.2d 565, 568-69, n.1 (S.C. 2010); *Webster v. State*, 151 Md.App. 527, 827 A.2d 910, 911-14 (Md.App. 2003).

Other surrounding circumstances tending to require corroboration include both K.W.'s testimony that B.Y. had told her to say these things, Tr. 245, and, K.W.'s other out-of-court statements concerning the alleged incident which contradict, not corroborate, her out-of-court statement to Tucker alleging tongue-to-vagina touching:

1. According to B.Y., K.W. said that Porter was "smelling or sniffing her." Tr. 269-70. But K.W.'s direct exam testimony indicates that she had told B.Y. that Porter touched her with his hand. Tr. 242-43. In closing, the state argued that this touching referred to the hand-to-vagina touching charged in Count 1. Tr. 383-85; 402-03.

2. When A.L. returned home, K.W. told her that Porter "had touched her kookoo" – "kookoo" being a word A.L. used with K.W. to refer to "vagina." Tr. 251-52. "[T]he only thing K.W. told [A.L.] was that she was touched" Tr. 259. K.W. said nothing else. Tr. 257. The state, in its closing argument, argued that this touching referred to the hand-to-vagina touching charged in Count

1. Tr. 383-85; 403.

3. Shortly before trial, A.L. told K.W. that the trial was coming up. Tr. 253. K.W. said she understood and could answer questions. Tr. 253. At that time, K.W. said that when Porter touched her she had her underwear on. Tr. 254. But although K.W. talked with A.L. about the trial and told her something different about what had happened, K.W. did not tell A.L. that Porter had touched her vagina with his tongue.

4. During the CAC interview, first K.W. told Tucker that no one had touched her body anywhere. StEx 1. Tucker then named various body parts that K.W. had previously identified – her mouth, stomach, side, "peenies[17]," "booty" – and, one by one, asked K.W. if somebody had touched that part. StEx 1. Each time, K.W. responded negatively. StEx 1. K.W. said no one had touched her "peenies." Later in the CAC interview, K.W. said that Porter had touched her private part with his hand. StEx 1. Still later in the interview, K.W. said that Porter did not touch her private part with his hand – he touched her private part with his tongue. These out-of-court statements are so inconsistent and contradictory as to be inherently self-destructive – not probative. *Paulson*, *supra*; *Uptegrove*, *supra*.

[17] K.W. used "peenies" and "private part" for "vagina."

5. At the end of the CAC interview, Tucker asked K.W., "Did J-Money touch your private part—Did he do that one time or some more?" StEx 1. K.W. replied, "One time."

"One time" is inconsistent with K.W.'s statements that Porter touched her with his hand and touched her with his tongue. If Porter touched her at all, according to this statement, he only touched her once – but which time was that? A case should not be submitted to a jury to decide the facts by guessing. *Pierce*, *supra*, 906 S.W.2d at 735: "The jury here should not have been merely free to decide which time KJB [K.W.] was telling the truth, without the benefit of corroborating evidence."

But most of all, K.W.'s CAC statements – nobody touched her; Porter put his hands on her private part; he did not touch her with his hand; he touched her private part with his tongue; he touched her one time and not more than one time, StEx 1 – are inconsistent and contradictory. Although admissible, these statement are "not sufficient in and of themselves to make a submissible case, where the victim recants and there is no other evidence of the charged offense at trial." *Werneke*, *supra*, 958 S.W.2d at 319.

The witness most likely to have corroborated K.W.'s out-of-court statement was B.Y. who testified she found K.W. with Porter. But B.Y's trial testimony does not corroborate K.W.'s out-of-court statement.

B.Y. did not testify that she saw Porter touch K.W.'s vagina with his tongue. B.Y. never said anything about seeing Porter's tongue. B.Y. testified at trial that she saw K.W. lying down with Porter's head between her legs, but did not see him touch K.W.'s body or do anything to her.[18] Tr. 267, 271-72. Inconsistent with and contradicting the foregoing, B.Y. also testified at trial that what she saw was Porter "blowing" on K.W.'s stomach. Tr. 276-77.

That B.Y.'s testimony is too inconsistent, contradictory, and unreliable to constitute substantive, probative evidence is further established by A.L.'s trial testimony. A.L. testified that on the day of the alleged offense, when she returned home, B.Y. said that she saw Porter "with his face on [K.W.'s] belly button" – nothing more. Tr. 257. This testimony contradicts, is inconsistent with, and undermines B.Y.'s trial testimony that she saw Porter's head between K.W.'s legs and that he was smelling her "down there." Tr. 268-80.

B.Y.'s testimony establishes nothing more than that Porter had an opportunity to commit the offense charged in Count 2; it is not evidence supporting commission of that offense. *Bursley*, *supra*, 548 S.W.2d at 590; *see also State v. Gordon*, 915 S.W.2d 393, 396 (Mo.App., W.D. 1996) ("[M]ere

[18] B.Y.'s testimony actually contradicts K.W.'s CAC statement that she was standing up when Porter touched her vagina with his tongue. StEx 1.

presence and the opportunity to commit a crime alone are not enough to support a conviction.").

The instant case is thus on all fours with *Pierce* and distinguishable from cases in which the victim recanted at trial but there was substantive evidence sufficient to corroborate the out-of-court statement. Such cases include *State v. Johnson*, 262 S.W.3d 257 (Mo.App., W.D. 2008), for example, in which the complainant, "M.M.," recanted at trial, but there was sufficient corroboration of M.M.'s out-of-court statements to support conviction: two police officers – who separately interviewed M.M. – testified at trial to her out-of-court statements that the defendant had assaulted her; "physical evidence that M.M. had been assaulted was substantial." *Id.* at 259-60. In *Duley*, *supra*, "the jury heard the prior inconsistent statements of six witnesses who all" although recanting at trial, had previously "said that they had seen Duley shoot a gun at the party"; the prior statements of each of the six witnesses strengthened and corroborated those of the others. 219 S.W.3d at 844. In *Garner, supra*, the out-of-court statements of the witnesses who recanted at trial was not the only evidence of Garner's guilt presented at trial. 14 S.W.3d at 72. And in *State v. Blue*, 811 S.W.2d 405, 409-10 (Mo.App., E.D. 1991), the out of court statement of the victim, who at trial denied the alleged rape had occurred, was corroborated by evidence that she was so upset she could not

speak with a male detective, by medical evidence – the doctor who did the victim's physical exam testified that her "injuries were consistent with a ten year old girl having sexual intercourse with an adult male," and by the testimony of three other witnesses – a nurse, a detective, and the victim's mother – who all testified the victim had said the defendant raped her.

The State must prove "each and every element of the charged offense beyond a reasonable doubt." *Burton*, *supra*, 320 S.W.3d at 174 citing *State v. Ecford*, 239 S.W.3d 125, 127 (Mo.App., E.D. 2007). Without probative substantive evidence, "the facts constituting the crime have not been proven." *Davis*, *supra*, 566 S.W.2d at 445; *Miller*, *supra*, 300 S.W. at 766.

When corroborating evidence is required to prove "defendant's guilt beyond a reasonable doubt, the purported corroboration [must] itself [be] substantial evidence... ." *Kuzma*, 751 S.W.2d at 59-60. Contradictory evidence is not corroborative, *Id*., and "mere opportunity to commit the offenses does not corroborate that the crimes did occur." *Id*. at 59; *Bursley*, *supra*, 548 S.W.2d at 590 (Physical evidence tending to show that the defendant and the alleged victim of sodomy were together "at the Green Crest Motel would show at best only opportunity to commit the offenses and does not corroborate that the crimes did occur.").

As in *Pierce*, K.W.'s trial testimony – that Porter touched her private part

with his hand but did not touch it with any other part of his body – "was 180 degrees opposite of and contradictory to her out-of-court statements on the absolutely essential element... ." *Pierce*, 906 S.W.2d at 735. Here, that "absolutely essential element" was the tongue-to-vagina touching charged by the state. As shown above, K.W.'s "out-of-court statement" as to that element "was uncorroborated, unreliable, and insufficient to prove [Porter's] guilt beyond a reasonable doubt." *Johnson*, *supra*, 262 S.W.3d at 259 citing *Pierce*, 906 S.W.2d at 735; *Burton*, *supra*; *Jackson v. Virginia,* supra.

For the foregoing reasons, evidence of the tongue-to-vagina touching element of the offense of sodomy charged in Count 2 was insufficient. Porter's conviction on Count 2 must be reversed and he must be discharged.

**<u>As to Point 3</u>: The trial court erred or plainly in granting the deliberating jury's request and sending StEx 1 – K.W.'s CAC interview with forensic interview specialist Tucker – to the jury room for the jury to review and replay some or all of the videotape as it wished, without supervision or limiting instructions, because this violated Porter's rights to a fair jury, due process, of law, and fundamental fairness, U.S. Const., Amend's V, VI, & XIV; Mo. Const., Art. 1, §§ 10 & 18(a) in that K.W.'s statements on those tapes are, and were admitted as, testimonial evidence under §491.075.1 and giving the jury license to listen to that testimony as often as desired created a presumption that this evidence was to be given more weight than other evidence admitted at trial. Allowing the jury unrestricted opportunity to rehear this state's evidence – K.W.'s statements – created an unfair, manifestly unjust, advantage for the state.**

*Additional Facts and Preservation*:

The record reflects that the jury, shortly after it began deliberating, sent a note requesting, among other items, the video of K.W.'s CAC interview with Ms. Tucker. LF 74. The trial court's response, "Here are the items requested," and the trial court's signature appear below the jury's note. LF 74. But nowhere in the record – neither in the trial transcript, the handwritten trial

minutes, the docket entries nor any other part of the record – is it shown that defense counsel was made aware of the jury's request for the video or given an opportunity to object to the video being sent to the jury. LF 5, 74, 83.

In the motion for new trial, Mr. Porter, through counsel, asserted that the trial court erred in allowing the jury, while to deliberating, to have access to the CAC videotape of Tucker's interview of K.W. and "to control" the exhibit, thus being able to "replay certain portions of the tape" as desired. SLF 6. The trial court had "admitted [the CAC videotape] as testimonial evidence and by allowing the jury to listen to that testimony again during deliberations and to listen to it as often as [it] desired," the trial court "creat[ed] a presumption that those statements were to be given more weight in the jury's deliberations than the other evidence presented during trial." SLF 6. In ordering that the videotape be sent to the jury, the trial court denied Porter "his right to a fair and impartial jury and to due process of law" under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 1, Sections 10 and 18(a) of the Missouri Constitution. SLF 6.

Whether the trial court notified the attorneys for the state and the defense that it planned to allow the jury to have unlimited, unsupervised control of the CAC DVD – StEx 1 – or discussed this matter with them is not apparent from the record. It is simply not known whether Mr. Porter's trial counsel

was made aware of the note from the jury in time to object on the record. Should this Court find, however, that Mr. Porter's trial counsel failed to preserve this matter for review, Mr. Porter respectfully requests plain error review. Rule 30.20.

*Standard of Review*:

"It is within the trial court's sound discretion whether a properly admitted exhibit will be shown to the jury during deliberations." *State v. Partain*, 310 S.W.3d 765, 768 (Mo.App., E.D. 2010). "This discretion is abused only when allowing an exhibit to go to the jury was untenable and clearly against reason, and [works] an injustice." *State v. Parker*, 208 S.W.3d 331, 338 (Mo.App., S.D. 2006); citations and internal quotation marks omitted.

*Analysis*:

"Generally, exhibits that are testimonial in nature cannot be given to the jury during its deliberation, for the reason that such exhibits tend to unduly emphasize some of the testimony, raising the possibility the jury would afford it undue weight." *Partain*, 310 S.W.3d at 768 citing *Parker*, 208 S.W.3d at 338, n.8. In *State v. Justus*, 205 S.W.3d 872 (Mo. banc 2006), the Missouri Supreme Court held that tapes of forensic interviews of children –at the behest of a government agency, where the statements from the children concern past events, are elicited in a question-and-answer format," in non-

emergency circumstances, "and are preserved on tape for future use - are testimonial in nature. *Id*. at 880-81.

On the surface, *Partain* and *Parker* appear similar to the instant case because those cases also involved deliberating juries viewing a forensic videotape of a child victim. Unlike the instant case, however, in *Partain* and *Parker*, the jurors were brought back into the courtroom while the videotape was played for them, and the videotape was played only once. This Court found no error in *Partain*, because "[t]he trial court below controlled the jury's exposure to [the videotape] during deliberation by having it view the videotape in the courtroom and by playing the recording only once." 310 S.W.3d at 769. So too, in *Parker*, the Southern District held that because "[t]he trial court took steps to ensure that the videotape was not given undue repetition by controlling the jury's exposure to the videotape; the jury viewed it in the courtroom; and the tape was played only one time for the jury... [there was] no trial court error or abuse of trial court discretion in permitting the jury to view the videotape in question... . 208 S.W.3d at 339.

Here, sending the recorded CAC interview to the jury room during jury deliberations and allowing the jury to play and replay it at will creates circumstances distinct from those in cases such as *Partain* and *Parker*.

A recent Colorado case, *DeBella v. People*, 233 P.3d 664 (Colo. 2010),

provides additional insight into the issues arising from the admission of DVD exhibits. In *DeBella*, "[a]t trial, the prosecution presented two videotapes of the victim describing the incidents underlying [defendant] DeBella's charges to a detective and counselor." *Id*. at 665. "Portions of the first videotape and the entirety of the second were admitted into evidence and played for the jury in open court."[19] *Id*. "The victim also testified during trial as to his memory of the incidents and was subject to cross-examination." *Id.*

"At the close of the trial, the trial court announced its intent to provide the jury with a TV and the second videotape" thereby allowing the jury unconstrained access to the tape during its deliberations." *Id*. at 665-66. Overruling defense objections – that, absent "restrictions on the jury's access to the second tape, the jury's ability to review the tape might result in undue prejudice to the defendant – the trial court found no "basis... for prohibiting juror access during deliberations to ... videotapes," unless such access was "infeasible." *Id*. at 666. "The hour-long tape was provided to the jury, which

[19] It is not clear from the opinion whether the first tape recorded the victim speaking to the detective and the second tape recorded the victim speaking to the counselor or, whether the first and second tapes both recorded the victim speaking to both the detective and the counselor.

deliberated for seven hours before finding DeBella guilty." *Id*. DeBella appealed, asserting the trial court erred in allowing his jury to have unrestricted, "unfettered access to a videotape of a child sexual assault victim's interview with a detective and counselor." *Id*. at 665, 666.

The appeal reached the Colorado Supreme Court which, first, reaffirmed that "control over the use of exhibits during jury deliberations remains firmly within the discretion of the trial court," *Id*. at 666. The Court then held that the trial court must "assess whether the exhibit will aid the jury in its proper consideration of the case, and even if so, whether a party will nevertheless be unfairly prejudiced by the jury's use of it." *Id*. at 668. The trial court in *DeBella* had failed to make "such assessment," and that "failure to assess the potential for undue prejudice with respect to the jury's access to the tape was a failure to exercise its discretion, and so an abuse of discretion." *Id*. citing *People v. Darlington,* 105 P.3d 230, 232 (Colo. 2005) ("failure to exercise discretion is itself an abuse of discretion").

Next, finding that the trial court's failure to exercise its discretion meant the record was devoid of any assessment by the trial court, or other indication, of the probative value and prejudicial effect of allowing the jury unlimited access to the videotape, *DeBella* rejected the state's argument that to presume the jury had actually watched the video and had "[given] it undue

weight or emphasis" was nothing more than speculation:

> To so hold would be to undermine the very purpose of appellate review. Where holes in the record are the result of the trial court's error and pertinent inquiries on appeal are reduced to exercises in speculation, the lack of record support should not weigh against the defendant's interests.

*Id*. at 668 citing *Wellons v. Hall,* 130 S.Ct. 727, 731 (2010) (finding that when the reason a federal habeas petitioner's claims appeared speculative to the appellate court was due to the lack of a record, and the lack of a record was, in part, attributable to the trial court's error, the lack of a record is not grounds to deny the claims).

Of significance to the instant case is *DeBella*'s assessment of the effect of "the jury's unencumbered access to the tape during its deliberations." *Id*. The Court stated:

> [T]he nature of the video and its importance to the resolution of the trial leave us with "grave doubts" as to whether the jury's unencumbered access to the tape during its deliberations adversely affected the fairness of the trial proceedings.... The videotape in question contained the victim's detailed account of the sexual assaults, including some aspects the victim could not remember at trial.

> DeBella's principle theory of defense was that the victim was not credible. As emphasized by DeBella's lawyer at trial, the victim's account of the assaults as recorded in the video and as he testified to at trial were at times inconsistent... . Moreover, as the only complete recounting of the assaults, the videotape was the linchpin of the prosecution's case against DeBella.

233 P.3d at 668-69.

The Colorado Supreme Court outlined procedures a trial court could follow "to assure the jury does not use trial exhibits in a manner that is unfairly prejudicial to a party... .' *Id*. at 669. These included "wait[ing] for a jury's request to review such testimonial exhibits before providing the jury access... admonish[ing] the jury not to give the exhibit undue weight or emphasis, instruct[ing] the jury that it watch the video no more than a specific number of times, or even requir[ing] that the video be viewed in open court or under the supervision of a bailiff." *Id*. "[A]bsent such a record and in light of how the inconsistencies of the tape's content with trial testimony were central to the resolution of the case, we cannot say that the trial court's failure to exercise its discretion was harmless."

Because the *DeBella* court could not find, from "this nearly silent record," that the trial court had taken steps to prevent unfair prejudice to a party

from the jury's use of trial exhibits, and because "the nature of the video and the importance of the discrepancies between its contents and the victim's trial testimony leave us with grave doubts as to whether the error adversely affected the fairness of the trial proceedings," the Colorado Supreme Court reversed DeBella's conviction for a new trial. *Id*.

In *State v. Burr*, 948 A.2d 627 (N.J. 2008), the New Jersey Supreme Court was also faced with the question of the effect of replaying a pretrial, videotaped statement. The Court was "concern[ed] that allowing a jury unfettered access to videotaped witness statements could have much the same prejudicial effect as allowing a jury unrestricted access to videotaped testimony during deliberations." *Id*. at 636. Specifically, the Court found that the "danger" from such uncontrolled jury access was "that the jury may unfairly emphasize [the victim's] videotaped statements over other testimony presented at trial, including her own cross-examination." *Id*.

Although reversing on other grounds, the Court cautioned:

> if on remand... the jury persists in its request to view the videotape again, then the court must take into consideration fairness to the defendant. The court must determine whether the jury must also hear a readback of any direct and cross-examination testimony that the court concludes is necessary to provide the proper context for the video

> playback... . And, finally, any playback of the videotape must occur in open court, along with the readback of related testimony that the court shall require.

*Id*.

*Conclusion*:

*Partain*, *Parker*, *DeBella*, and *Burr* are instructive here. Unlike *Partain* and *Parker*, and contrary to the holdings of *DeBella* and *Burr*, the trial court in this case took no steps to ensure that Porter's jury would not have "uncontrolled access" to a videotape of K.W.'s pretrial, unsworn, out-of-court statements. Inexplicably, instead of playing the videotape for the jury in the courtroom, the trial court here sent the tape to the jury to play all or part of it as often as it wished.

The trial court here could easily have precluded the possibility that, with no restrictions on playing and replaying the videotape, Porter's jury "unfairly emphasize[d] [K.W's] videotaped statements over other testimony presented at trial, including her own cross-examination." *Burr*, 948 A.2d at 636. The court's failure to do so in the instant case was a manifest abuse of its discretion. And as in *DeBella*, from the "nearly silent record" in the instant case, it is simply not possible for this Court to find that the trial court took any steps to prevent unfair prejudice to Porter from the jury's unrestricted,

uncontrolled, and unlimited use of the CAC videotape.

"[T]he nature of the video and the importance of the discrepancies between its contents and the victim's trial testimony" should give this Court "grave doubts as to whether the error adversely affected the fairness of the trial proceedings." *DeBella*, 233 P.3d at 669. Sending the videotape to the jury, allowing them to play parts of it, or all of it, as many times as they wished, unfairly invited the jury to emphasize that evidence. The trial court's decision to do so was manifestly unreasonably and manifestly unjust. Rule 30.20.

For all the foregoing reasons, the judgment below must be reversed and the cause remanded for a new trial.

## CONCLUSION

Wherefore, for the foregoing reasons, appellant prays that the Court will reverse the judgment of the court below and, as to Points 1 and 2, discharge him, or, in the alternative, as to Point 3, remand for a new trial.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that the foregoing brief comprises 14,067 words according to Microsoft word count, was submitted via Missouri's eFiling System to the Missouri Supreme Court on February 25, 2014, and should be served via the eFiling System on Timothy Blackwell, Assistant Attorney General, counsel for respondent, at tim.blackwell@ago.mo.gov.

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