No. SC93851

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

SYLVESTER PORTER,

Appellant.

Appeal from St. Louis City Circuit Court
Twenty-Second Judicial Circuit
The Honorable Timothy J. Wilson, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATE OF MISSOURI

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STATEMENT OF FACTS

This is an appeal from a St. Louis City Circuit Court judgment convicting Appellant (Defendant) of two counts of first-degree statutory sodomy, for which he was sentenced to a total of 25 years' imprisonment.

Defendant was indicted in St. Louis City Circuit Court as a persistent offender on two counts of first-degree statutory sodomy (Counts I and II) and one count of child molestation (Count III). (L.F. 16–17). Count I alleged that Defendant touched Victim's genitals with his hand; Count II alleged that he touched Victim's genitals with his tongue; and Count III alleged that he touched Victim's head with his penis. (L.F. 16–17). Before trial began, Defendant stipulated that he was a persistent offender. (Tr. 49–50). Defendant was tried by a jury on July 9-10, 2012, before Judge Timothy J. Wilson. (L.F. 81–83). The jury found Defendant guilty as charged on all three counts, but the trial court later entered a judgment of acquittal on the child-molestation charge (Count III). (Tr. 417; L.F. 85). The court gave Defendant concurrent sentences of 25 years each on Counts I and II. (Tr. 428; L.F. 89–91).

Defendant challenges the sufficiency of the evidence to support his convictions. Viewed in the light most favorable to the verdict, the evidence presented at trial showed the following:

In early October 2010, Victim's mother (Mother) rented a room at a boarding house where Defendant was the landlord. (Tr. 247–48). Mother lived there with three-year-old Victim, who was born in May 2007. (Tr. 247–48). Defendant, whose nickname was "J-Money," kept a room at the boarding house and was there most every day. (Tr. 249). Victim called Defendant by his nickname. (Tr. 249). Defendant was nice to Victim and took her places and bought things for her, including a "princess tea set," candy, and food. (Tr. 250, 266).

While Mother was away on the weekend of October 29-31, 2010, she left Victim at the boarding house in the care of her mother (Grandmother).[1] (Tr. 250, 264–65). On Sunday, October 31, while Mother was still away, Victim and Grandmother fell asleep together. (Tr. 267). When Grandmother awoke, Victim was gone. (Tr. 267). Grandmother went through the house looking for Victim and eventually found her in Defendant's room. (Tr. 267). Victim's pants were off and Defendant, who was shirtless, had his head between Victim's legs. (Tr. 268, 272, 280). Grandmother would later tell a Children's

[1] There was conflicting evidence about whether Grandmother lived with Mother and Victim at the boarding house or just stayed there while babysitting Victim. (Tr. 255, 264, 272).

Division employee that Defendant was "going down on her grandbaby; he was eating her pussy between her legs." (Tr. 278–79, 341).

Grandmother took Victim out of the room. (Tr. 268). Victim told Grandmother that she had gone with Defendant to his room and that Defendant had laid her across the bed and had his head between her legs. (Tr. 270). She told Grandmother that Defendant was "messing with her bottom part," "smelling," and "sniffing around her down there." (Tr. 268–69).

About a half hour after the incident, Mother returned to the boarding house, and Grandmother informed her about what had happened.[2] (Tr. 268). Victim told Mother that Defendant ("J-Money") had touched her "kookoo," which was Victim's word for her vagina. (Tr. 252). Mother carried Victim into Defendant's room and asked him whether he had touched Victim; Defendant denied that he had. (Tr. 252–53). Upon hearing Defendant's denial, Victim

[2] There was conflicting evidence about whether Grandmother called Mother to have her return to the boarding house or whether Mother happened to return at that time. Mother testified that Grandmother called her and told her to come home because there was a problem. (Tr. 251). Grandmother testified that she did not call Mother, but told her about the incident after Mother returned to the boarding house. (Tr. 268).

told Defendant, "yes you did, you touched my kookoo." (Tr. 252–53). Mother then called the police. (Tr. 253).

Although Grandmother and Defendant had gotten along before this incident occurred, Grandmother testified that after it happened Defendant did not like her. (Tr. 270–71, 280). After Grandmother caught Defendant with Victim in his room, Defendant told her that Grandmother should not have been there. (Tr. 270–71). Defendant later told Grandmother that she had to leave the boarding house because she had not paid rent. (Tr. 273, 280).

A forensic interviewer with the Children Advocacy Services (CAC) of Greater St. Louis interviewed Victim on November 12, 2010, 12 days after the incident occurred. (Tr. 288). The interview was recorded, and the recorded interview was admitted into evidence as State's Exhibit 1 and played for the jury during trial. (Tr. 291–92).

During the interview, Victim initially said that she did not know anyone named "Sylvester" (Defendant's first name). (State's Ex. 1). But when asked if she knew someone named "J-Man," Victim corrected the interviewer and said she knew someone named "J-Money." (State's Ex. 1). She then volunteered that "J-Money" was in jail and that he had put his hand on her "private part." (State's Ex. 1). Victim said that she told him to "stop, stop," but he kept doing it. (State's Ex. 1). When asked where this happened, Victim emphatically repeated that she told him to "stop, stop, stop, stop," but that he kept doing it.

(State's Ex. 1). Victim added that she told him not to touch her "private part no more." (State's Ex. 1).

When asked where she was touched, Victim said that Defendant touched her private part with his hand, and she pointed to a drawing of a female to indicate where she had been touched. (State's Ex. 1). Victim said Defendant made her pull her pants down and when he kept "doing it, she told him that she was going to tell her mother. (State's Ex. 1).

When the interviewer clarified that Defendant had touched Victim with his hand, Victim volunteered that he touched her private part with his tongue. (State's Ex. 1). She said that this occurred at her house and that she was eating some food, french fries and chicken. (State's Ex. 1). She also said that "J-Money" had given her some doughnuts. (State's Ex. 1). Victim said that "J-Money" had only touched her this one time and no one else had touched her private part. (State's Ex. 1). Finally, Victim reported that Defendant put "hot sauce" on her "kookoo," that it burnt, and that she was crying.[3] (State's Ex. 1).

[3] Victim also told the interviewer that Defendant's private part touched her eye. (State's Ex. 1). This formed the basis for the child-molestation count (Count III) on which the trial court granted a judgment of acquittal following the jury's verdict. (Tr. 417; L.F. 85).

Victim was five years old when she testified at trial on July 10, 2012. (Tr. 238). Although she said that she knew "J-Money," she said that she did not see him in the courtroom. (Tr. 241). Victim said that he had touched her "private part" when she was younger and that this occurred in a different place than where she was then living. (Tr. 241). Victim said that Defendant touched her with "his hand" and that he did not touch her private part with any other part of his body. (Tr. 242). She circled the crotch area of a drawing (State's Ex. 2) to show where her private part was. (Tr. 242–43).

Defendant did not testify, but he called several witnesses. (Tr. 355–57). He called a detective to testify that Mother told him that Grandmother was living at the boarding house. (Tr. 313–14). A witness from the St. Louis Police Department's crime laboratory testified that he did not find seminal fluid on Victim's clothes, but that he found a trace amount of amylase, which is found in high concentrations in saliva, on Victim's shirt. (Tr. 320–21, 329). The witness said that he could not definitively say that the amylase found on Victim's shirt came from saliva, since amylase is found in many other bodily fluids. (Tr. 329).

Although a trace amount of acid phosphatase, which is used as a presumptive test for the presence of semen, was found on Victim's vaginal swab, a confirmatory test did not reveal the presence of any sperm. (Tr. 324–25). The witness explained that while nothing in the record suggested that

any ejaculation or penetration had occurred, whenever there is any report of an exposed penis, tests for the presence of semen and sperm are conducted. (Tr. 328).

Another witness from the crime lab testified that DNA testing on the shirt showed the presence of DNA from an unknown male. (Tr. 332–33, 337). She could not identify the unknown male's age—it could have come from any male, whether a child or an elderly person—and she could not say how the DNA got there. (Tr. 337–38).

A witness from the Children's Division testified that when she spoke with Mother five days after the incident, Mother told her that Victim had said that Grandmother had made her say that. (Tr. 339–40). She also testified that Mother told her that Grandmother had been drinking.[4] (Tr. 340). Finally, she said that Grandmother had told her that she saw what had occurred but did not do anything about it. (Tr. 341).

A CAC forensic examiner who interviewed Mother (not the same person who interviewed Victim) testified that Mother told her that when Victim saw Defendant being arrested she cried and "recanted." (Tr. 346–48). Mother also told her that she believed Grandmother had something to do with making the

[4] Grandmother testified that she had two beers on the day of the incident. (Tr. 271).

allegations, but she was unsure why. (Tr. 348). On cross-examination, the interviewer conceded that it was possible a child might recant upon seeing someone get arrested, notwithstanding whether or not the incident occurred. (Tr. 351).

The pediatrician who performed Victim's genital examination and rape kit testified that a hospital social worker informed her that Victim had been touched on her "kookoo" by a hand and a tongue. (Tr. 358, 373). She said that she performed Victim's examination sometime after 10 p.m. on the night of the incident and that Victim's genitals and hymen appeared normal; there was no redness or swelling around Victim's vagina. (Tr. 360–62, 366–67). But she said that physical findings would not be expected from the mere touch of a hand or tongue. (Tr. 368–69). In addition, she said that if it was assumed the incident occurred around 6 p.m., she would have expected that a three-year-old child would have urinated sometime during the four hours between the incident and the examination. (Tr. 366–67). If the child had urinated and wiped after a touching, she said that there was a very good chance that any DNA present would have been wiped or washed away. (Tr. 369–70).

ARGUMENT

I (sufficiency).

The trial court did not err in overruling Defendant's motion for judgment of acquittal because the record contains sufficient evidence that Defendant touched Victim's genitals with his hand and tongue. (Responds to Defendant's Points I and II).

Defendant does not strictly claim that insufficient evidence was presented to support his first-degree-statutory-sodomy convictions. The record contains substantial evidence from which the jury could find that Defendant touched Victim's genitals both with his hand and tongue. In the face of this record, Defendant urges the application of two interrelated doctrines—the corroboration rule and the doctrine of destructive contradictions—that he contends allows this Court to reweigh the evidence and to find it insufficient to support his convictions notwithstanding the jury's contrary verdict.

This Court should reject Defendant's invitation and instead abolish these archaic and dubious doctrines that purport to carve out exceptions to the general standard of review on sufficiency claims and that permit an appellate court to substitute its judgment for that of the jury in sex-crime cases. Both the corroboration rule and destructive-contradictions doctrine, which are contrary to the modern standard of appellate review for sufficiency claims, have been roundly criticized by the Court of Appeals. The modern standard of

review for sufficiency claims, which this Court has repeatedly and emphatically pronounced, applies to all criminal cases without exception, leaves issues regarding the credibility of the evidence in the jury's hands, and does not permit an appellate court to substitute its judgment on those matters. This standard provides an adequate framework to review sufficiency claims in any criminal case, and exceptions to that rule for sex-crimes cases is an unjustified, needless, and confusing attribute of Missouri law that should be extinguished.

Alternatively, even if these doctrines were applied in this case, Defendant cannot prevail. The inconsistent testimony given by a five-year-old victim recounting sexual abuse perpetrated on her when she three years old simply involves the normal credibility determinations made by any jury and does not invoke either the corroboration rule or destructive-contradictions doctrine.

A. Standard of review.

When considering sufficiency-of-evidence claims, this Court's review is limited to determining whether the evidence is sufficient for a reasonable juror to find each element of the crime beyond a reasonable doubt. *State v. Nash*, 339 S.W.3d 500, 508–09 (Mo. banc 2011); *State v. Freeman*, 269 S.W.3d 422, 425 (Mo. banc 2008). "This is not an assessment of whether the [appellate court] believes that the evidence at trial established guilt beyond a reasonable doubt but [is] rather a question of whether, in light of the

evidence most favorable to the State, any rational fact-finder 'could have found the essential elements of the crime beyond a reasonable doubt.'" *Nash*, 339 S.W.3d at 509 (quoting *State v. Bateman*, 318 S.W.3d 681, 687 (Mo. banc 2010)). "In reviewing the sufficiency of the evidence, all evidence favorable to the State is accepted as true, including all favorable inferences drawn from the evidence." *Nash*, 339 S.W.3d at 509. "All evidence and inferences to the contrary are disregarded." *Id. See also State v. O'Brien*, 857 S.W.2d 212, 215–16 (Mo. banc 1993) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (To ensure that the reviewing court does not engage in futile attempts to weigh the evidence or judge the witnesses' credibility, courts employ "a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution.").

"An appellate court 'faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *State v. Chaney*, 967 S.W.2d 47, 54 (Mo. banc 1998) (quoting *Jackson v. Virginia*, 443 U.S. at 326); *see also Freeman*, 269 S.W.3d at 425 (holding that an appellate court should "not weigh the evidence anew since 'the fact-finder may believe all, some, or none of the testimony of a witness when considered with the facts, circumstances

and other testimony in the case'") (quoting *State v. Crawford*, 68 S.W.3d 406, 408 (Mo. banc 2002)); *see also Nash*, 339 S.W.3d at 509.

Appellate courts do not act as a "super juror with veto powers"; instead they give great deference to the trier of fact. *State v. Grim*, 854 S.W.2d 403, 405 (Mo. banc 1993); *State v. Chaney*, 967 S.W.2d at 52; *Nash*, 339 S.W.3d at 509; *Freeman*, 269 S.W.3d at 425. Appellate courts may neither determine the credibility of witnesses, nor weigh the evidence. *State v. Villa-Perez*, 835 S.W.2d 897, 900 (Mo. banc 1992). It is within the trier of fact's province to believe all, some, or none of the witnesses' testimony in arriving at the verdict. *State v. Dulany*, 781 S.W.2d 52, 55 (Mo. banc 1989). Circumstantial evidence is given the same weight as direct evidence in considering the sufficiency of the evidence. *Grim*, 854 S.W.2d at 405–06.

B. The evidence was sufficient to sustain the first-degree statutory sodomy convictions.

"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. Section 566.062.1, RSMo Cum. Supp. 2013. The record shows that Victim was only three years old when Defendant touched her genitals with his hand and his tongue. Victim, who was only five years old when she testified at trial, said that Defendant touched her "private part" with his hand. (Tr. 242). Although she testified that Defendant did not touch her

private part with any other part of his body (she was not asked a leading question regarding whether she had been touched with his tongue), evidence of her out-of-court statements, which were admitted under § 491.075, made during her recorded CAC interview, showed that she had disclosed that Defendant had also touched her genitals with his tongue. (State's Ex. 1). These and other out-of-court statements showed that Defendant took Victim to his room, made her pull her pants down, and laid her on the bed. (Tr. 241–42, 270; State's Ex. 1). When Victim heard Defendant deny to Mother that he had touched her, Victim immediately retorted that Defendant had touched her "kookoo," Victim's word for vagina. (Tr. 252–53).

Section 491.075 states that a "statement made by a child under the age of fourteen…relating to an offense under chapter 565, 566, 568 or 573, performed by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of this state as *substantive evidence* to prove the truth of the matter asserted…." Section 491.075.1, RSMo Cum. Supp. 2013 (emphasis added). The trial court conducted a pretrial hearing as required under § 491.075.2 and ruled that Victim's out-of-court statements were admissible. In making this ruling the trial court observed that "on balance the trier of fact, the jury, should be allowed to evaluate the testimony of these witnesses…and give it such weight and value as they deem appropriate…. Again, they can accept all of it, reject

all of it, accept it in part. I think as the trier of fact people with common sense following the Court's instructions should be allowed to do that." (Tr. 227–28). Defendant does not challenge either this ruling or the admissibility of Victim's out-of-court statements.

Victim's in-court testimony and out-of-court statements constituted "direct evidence" proving the charge of first-degree statutory sodomy. *State v. Bewley*, 68 S.W.3d 613, 617 (Mo. App. S.D. 2002) (finding the evidence sufficient to support a second-degree statutory rape conviction when the victim testified that the defendant had sexual intercourse with her). "Direct evidence is testimony as to the existence or nonexistence of an element of the crime concerning which the witness claims personal knowledge." *Id.* (quoting *State v. Butler*, 951 S.W.2d 600, 604 (Mo. banc 1997)). "When confronted with direct evidence, the only function of the trier of fact is to weigh the credibility of the witness." *Id.* at 617–18 (citing *Grim*, 854 S.W.2d at 418). And an appellate "court 'does not determine credibility of witnesses, resolve conflicts in testimony, or weigh evidence, as these tasks are quite properly left to the jury.'" *State v. Simpson*, 315 S.W.3d 779, 783 (Mo. App. W.D. 2010) (quoting *State v. Butler*, 24 S.W.3d 21, 27 (Mo. App. W.D. 2000)).

Defendant's sufficiency attack focuses on the inconsistencies within Victim's trial testimony and the inconsistency of that testimony and out-of-court statements she made. But "inconsistent or contradictory statements by

a young child relating a sexual experience does not, in itself, deprive the testimony of all probative force." *State v. Silvey*, 894 S.W.2d 662, 673 (Mo. banc 1995). The testimony of a single witness is sufficient to support a conviction, even if that testimony is inconsistent. *State v. Bell*, 936 S.W.2d 204, 207 (Mo. App. W.D. 1996). Any inconsistencies are for the jury to resolve. *Id.* Similarly, contradictions in a witness's testimony do not inherently make the evidence insubstantial. *Id.* The appellate court presumes the jury resolved any inconsistencies in favor of the prosecution, and defers to that resolution. *See State v. Chaney*, 967 S.W.2d at 54. "The jury…resolves all conflicts in the evidence, and [an appellate court] will not second guess the jury's judgment." *State v. Taylor*, 373 S.W.3d 513, 518 (Mo. App. E.D. 2012).

Moreover, other evidence was presented from which the jury could reasonably infer that Defendant committed first-degree statutory sodomy with both his hand and tongue. First, Grandmother caught Defendant with his head between Victim's legs when Victim was unclothed from the waist down. (Tr. 268, 272, 275, 280). Grandmother described it to a Children's Division employee as Defendant "going down" on Victim. (Tr. 278–79). Victim told Grandmother that Defendant was smelling or sniffing her "down there." (Tr. 268–70). Defendant testified at trial, told the CAC interviewer, and exclaimed to her mother in front of Defendant, that Defendant had touched her vagina with his hand. (Tr. 252–53; State's Ex. 1).

Additionally, this Court may also consider incriminating evidence presented by Defendant during the defense case. *See State v. Miller*, 139 S.W.3d 632, 635 (Mo. App. S.D. 2004). Defendant presented the testimony of the Children's Division employee, who testified that Grandmother told her that she saw Defendant "going down" on Victim and "eating her pussy between her legs." (Tr. 341).

This evidence was sufficient to prove both first-degree statutory sodomy offenses under this Court's prevailing standard of review. But instead of challenging the sufficiency of the evidence under the modern standard of review applicable to such claims, Defendant instead seeks to invoke the corroboration rule and the doctrine of destructive contradictions, which, contrary to the modern standard, permits an appellate court to substitute its judgment on credibility matters for that of the jury.

C. The corroboration rule.

A formal "corroboration rule," which appears in cases decided just after the turn of the twentieth century, originally provided that "a conviction in cases of either incest or rape may be had upon the uncorroborated evidence of the prosecutrix, but when the evidence of such prosecutrix is of a contradictory nature, or when applied to the admitted facts in the case her testimony is not convincing but leaves the mind of the court clouded with doubts, she must be corroborated, or the judgment cannot be sustained."

State v. Tevis, 136 S.W. 339, 341 (Mo. 1911) (citing *State v. Brown*, 107 S.W. 1068 (Mo. 1908)).

Although no specific corroboration rule is set out in *Brown*, the court in that case effectively applied one when it reversed the defendant's incest conviction and discharged him. The *Brown* court not only discounted the credibility of the alleged victim's testimony that her father had had sexual intercourse with her, but it also found no credibility in the corroborating testimony of her brother, who testified that he witnessed a sexual act take place.

In *Brown*, the defendant's 17-year-old daughter testified that her father had sex with her in July 1906 and that this had occurred since she was 11 years old. *Brown*, 107 S.W. at 1069. Her testimony was corroborated by her younger brother, who said that he surreptitiously witnessed his sister and father having sex. *Id.* In finding the evidence insufficient, the *Brown* court noted that the daughter was "shown by her own testimony to be a very ignorant, illiterate, and unruly girl, and, by her admissions to other witnesses who testified in the case, to be lewd and unchaste, and unworthy of belief." *Id.* at 1070. The court further noted that "she had been criminally intimate with several young men in the neighborhood." *Id.* The court discounted her brother's corroborating testimony by noting that he failed to immediately report what he saw. *Id.* at 1071. The court reassessed the

evidence, expressed approval of the testimony of the defendant's character witnesses, and concluded that the record showed that the daughter's charge was motivated by "malice or ill will against her father." *Id.*

The *Brown* opinion thus shows that when the corroboration rule is applied, it not only permits the appellate court to assess the credibility of the alleged victim's testimony, but also allows it to reweigh the credibility of any corroborating testimony. As explained below, Defendant repeatedly attacks the credibility of not only the victim's testimony, but also the corroborating testimony and evidence under the guise of applying the corroboration rule.

The impetus behind Missouri's corroboration rule in rape and incest cases appears to derive from an "admonition of Lord Hale that 'it must be remembered that this is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent.'" *State v. Goodale*, 109 S.W. 9, 11 (Mo. 1908); *see also State v. Burgdorf*, 53 Mo. 65 (Mo. 1873); *State v. Wadel*, 398 S.W.3d 68, 79 (Mo. App. W.D. 2013); *State v. Peters*, 186 S.W.3d 774, 779 n.4 (Mo. App. W.D. 2006).

The *Goodale* opinion then outlines two conflicting principles for reviewing the sufficiency of the evidence in such cases. One principle provides that "a conviction for rape may be sustained upon the uncorroborated evidence of the outraged female." 109 S.W. at 11. The second principle provides that an "appellate court will closely scrutinize the testimony upon which the

conviction was obtained," and will reverse the conviction if it appears incredible and too unsubstantial to make it the basis of a judgment." *Id.* at 11. The court went on to note that in these cases "the character" of both the accused and the accuser is a "prime consideration." *Id.* While the first principle fits within the modern standard of review for sufficiency claims, the second principle obviously does not.

Additional impetus for the corroboration rule apparently derived from the presumption that in rape cases "outraged innocence would compel the woman to denounce the ravisher at the first opportunity." *State v. Wade*, 268 S.W. 52, 54 (Mo. 1924); *State v. Witten*, 13 S.W. 871 (Mo. 1890) (holding that [a]n outcry and resistance are important elements of evidence, and a want of these circumstances, where they may reasonably be expected, go far to disprove the charge of rape" and that "concealment of the injury, where there is an opportunity for early disclosure, may lead to a like inference"). *See also Goodale*, 210 S.W. at 12–13 (reversing rape and incest convictions when the record showed that the "prosecutrix" had a bad reputation for "chastity" and truthfulness and failed to timely report the crime); *Peters*, 398 S.W.3d at 779 n.4. In other words, the law presumed that a raped woman would immediately and publicly denounce her rapist and that her failure to do so rendered a later accusation unworthy of belief. Again, this archaic view of

how sexual-abuse victims behave does not comport with modern understanding.

In 1981, this Court held that the corroboration rule applied only when 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." *State v. Harris*, 620 S.W.2d 349, 355 (Mo. banc 1981) (citing *State v. Wood*, 199 S.W.2d 396, 398 (Mo. 1947)). This is a decidedly more restrictive version of the corroboration rule than the one outlined in *Tevis*. But this Court applied the *Tevis* version of the corroboration rule in rejecting a sufficiency claim in a rape case as late as 1991. *See State v. Evans*, 802 S.W.2d 507, 514 (Mo. banc 1991). In *State v. Sladek*, 835 S.W.2d 308 (Mo. banc 1992), this Court applied the restrictive definition of the rule as set out in *Harris*. *Id.* at 310. The present consensus among the Court of Appeals districts is to apply the restricted version of the rule as outlined in *Sladek* and *Harris*. *See Wadel*, 398 S.W.3d at 79; *State v. Cook*, 339 S.W.3d 523, 529 (Mo. App. E.D. 2011); *State v. Griffith*, 312 S.W.3d

413, 425 n.9 (Mo. App. S.D. 2010) (noting that some courts have rejected the broader definition of the corroboration rule).[5]

Under Missouri law it is well-settled that the uncorroborated testimony of the victim in a sexual-abuse case is sufficient to sustain the conviction. *See Sladek*, 835 S.W.2d at 310; *State v. Paulson*, 220 S.W.3d 828, 833 (Mo. App. S.D. 2007); *Peters*, 186 S.W.3d at 778. The most recent incarnation of the corroboration rule states that it should be applied only if 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." *Sladek*, 835 S.W.2d at 310; *Peters*, 186 S.W.3d at 778; *Griffith*, 312 S.W.3d at 424. The rule applies only to "*gross* inconsistencies and contradictions" that "relate directly to an essential element of the case." *Peters*, 186 S.W.3d at 778 (emphasis added). The corroboration rule is triggered only by contradictions occurring within the victim's trial testimony. *Peters*, 186 S.W.3d at 778.

"[I]nconsistent or contradictory statements by a young child relating a sexual experience does not, in itself, deprive the testimony of all probative

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[5] Defendant seeks to apply the broadly worded version of the rule found in *Tevis*, and he rejects the restrictive version of the rule currently employed by this Court and the Court of Appeals as "unprecedented." Deft's Brf. 31.

force." *Silvey*, 894 S.W.2d at 673. The fact that a witness gives inconsistent or contradictory answers does not require application of the corroboration rule unless those answers "conflict with physical facts, surrounding circumstances, and common experience." *Id.* Any such inconsistencies are for the jury to resolve. *Id.* "Conflict between the testimony of the victim and other witnesses does not require application of the corroboration rule." *Sladek*, 835 S.W.2d at 310; *State v. Kelley*, 83 S.W.3d 36, 43 (Mo. App. W.D. 2002). "Most cases citing the corroboration rule either find it inapplicable or easily met under the facts of that case." *Griffith*, 312 S.W.3d at 425.

D. The destructive-contradictions doctrine

The destructive-contradictions doctrine appears to have originated from dictum in *State v. Gregory*, 96 S.W.2d 47 (Mo. 1936). After generally explaining the standard of review for sufficiency claims in criminal cases, the *Gregory* court held that it was not "departing from the rule announced in [a] long line of… cases…that this court will not weigh the evidence in a criminal case if the verdict below was supported by substantial evidence." *Id.* at 143. After announcing that this was the law in Missouri, the court speculated that "the cases in which the court will set aside a conviction *supported by evidence are rare*." *Id.* at 144 (emphasis added). It then hypothesized that one of those rare cases may occur when "the state's evidence is inherently incredible, self-destructive, or opposed to known physical facts." *Id. Gregory* did not involve

this hypothesized situation, and the court determined that the evidence was sufficient to support the defendant's robbery conviction. *Id.* at 53.

In later cases, this Court has acknowledged the statement made in *Gregory*, but it has never formally adopted that language as an independent doctrine applicable to sufficiency claims. It does not appear that this Court has ever relied on the "inherently-incredible" or "self-destructive" language in *Gregory* to reverse a conviction for lack of sufficient evidence. *See State v. Cohen*, 100 S.W.2d 544, 547 (Mo. 1936); *State v. Dupepe*, 241 S.W.2d 4, 7 (Mo. 1952); *State v. Cody*, 379 S.W.2d 570, 573 (Mo. 1964); *State v. Goacher*, 376 S.W.2d 97, 102-03 (Mo. 1964); *State v. Story*, 646 S.W.2d 68, 72 n.3 (Mo. banc 1983). *But see City of Kansas City v. Oxley*, 579 S.W.2d 113 (Mo. banc 1979) (citing *Gregory's* "substantial evidence" language in reversing a speeding conviction supported only by the officer's uncorroborated testimony estimating that the defendant was going ten miles per hour over the limit). Moreover, it also does not appear that the Court of Appeals has ever applied the destructive-contradictions doctrine from *Gregory* to reverse a criminal conviction. Defendant has not cited a case suggesting otherwise.

Like the corroboration rule, the "destructive contradictions doctrine" is a narrow and seldom-used exception to the general standards of appellate review; it is applicable only under limited circumstances. *State v. Wright*, 998 S.W.2d 78, 81 (Mo. App. W.D. 1999); *Wadel*, 398 S.W.3d at 80 (noting that

this doctrine "has very limited application"). This doctrine permits an appellate court to disregard testimony only when it is inherently incredible, self-destructive, or opposed to known physical facts with respect to an element of the crime. *State v. Wright*, 998 S.W.2d at 81; *see also State v. West*, 939 S.W.2d 399, 403 (Mo. App. W.D. 1996) (testimony will be disregarded only when the inconsistencies and contradictions are "so diametrically opposed to one another as to preclude reliance thereon and rob the testimony of all probative force"); *Wadel*, 398 S.W.3d at 80 (the "destructive contradictions doctrine" "'provides that a *witness's testimony* loses probative value when his or her statements at trial are so inconsistent, contradictory, and diametrically opposed to one another that they rob the testimony of all probative force'" (emphasis in original) (quoting *State v. Uptegrove*, 330 S.W.3d 586, 590 (Mo. App. W.D. 2011)).[6]

The reason the doctrine is seldom used can be seen from three important limitations on its use. First, "mere discrepancies or conflicts in the witness's

[6] At least one court has apparently conflated the corroboration rule with the destructive-contradictions doctrine and has held that corroboration is required only to "inherently self-destructive" contradictions or inconsistencies in the victim's trial testimony. *State v. Paulson*, 220 S.W.3d 828, 833 (Mo. App. S.D. 2007).

trial testimony are insufficient to invoke the doctrine; rather, such inconsistencies in testimony simply create questions for jury resolution." *State v. Fears*, 217 S.W.3d 323, 329 (Mo. App. S.D. 2007) (internal quotation marks omitted); *see also Uptegrove*, 330 S.W.3d at 591 (the doctrine "does not apply to contradictions as to collateral matters, or to inconsistencies not sufficient to make the testimony inherently self-destructive"). Second, the doctrine "specifically does not apply to contradictions between the victim's trial testimony and prior out-of court statements, whether sworn or unsworn, or to inconsistencies not sufficient to make the testimony inherently self-destructive." *State v. Wright*, 998 S.W.2d at 81; *State v. West,* 939 S.W.2d at 403. Third, the doctrine does not apply when the inconsistencies occur between the victim's statements and those of other witnesses. *State v. Wright*, 998 S.W.2d at 81. These limitations are designed to safeguard the prerogative of the jury to believe or disbelieve the evidence put before it. *Id.*

The reluctance by appellate courts to invoke the destructive-contradictions doctrine is even more heightened in sexual-abuse cases involving children:

> [I]mprecise expression by a young child regarding the date, time, or exact details of a sexual experience is not self-destructive. It may affect the fact-finder's evaluation of credibility, but where the testimony includes a description of the elements essential to the offense, the prima facie case is made.

State v. Durbin, 834 S.W.2d at 839. In holding that the doctrine should not apply in these cases, the courts have found that a child's testimony may be confused and even contradictory at times because of immaturity, intimidation generated by being in court, and the sensitive nature of the subject matter itself:

> It is well-established that, because a young child is less skilled in articulation and can become understandably confused in a court setting, a child can contradict herself in some respects without leaving a reasonable juror unconvinced as to the veracity of her testimony. This is especially true when inconsistent or contradictory statements are made by a young child relating a sexual experience.

State v. Wright, 998 S.W.2d at 82 [citations omitted]. *See also State v. Collins*, 150 S.W.3d 340, 347 (Mo. App. S.D. 2004) ("Missouri courts have recognized that statements of children are inherently more likely to seem contradictory, simply because children are less skilled in articulation.") (quoting *State v. Griggs*, 999 S.W.2d 235, 241 (Mo. App. W.D. 1998)).

E. This Court should abolish the corroboration rule and destructive-contradictions doctrine.

This Court should abolish these archaic and dubious exceptions to the modern standard of review applicable to sufficiency claims.[7] These exceptions to the general standard applicable to sufficiency claims purportedly permit an appellate court to usurp the jury's function to weigh the evidence and judge the credibility of witnesses. This methodology is directly contrary to the repeated pronouncements by this Court in *Grim* and *Chaney*, and more recently in *Freeman* and *Nash*, that an appellate court must not weigh the evidence "anew" or make credibility determinations appropriately left for the jury to resolve.

Nearly 140 years ago this Court rejected a sufficiency challenge in a child-rape case and held that "whether there were impossibilities or contradictions in the story of the [victim], these are matters which…must be left to the triers of fact by whom alone the degree of credibility which should attach to her testimony [should] be weighed and determined." *State v. Jones*, 61 Mo.

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[7] In *State v. Jankiewicz*, 831 S.W.2d 195 (Mo. banc 1992), this Court determined that since a remand had been ordered on a separate issue, the record did not permit it to rule on the State's request to "renounce the 'corroboration rule.'"

232 (Mo. 1875) (rejecting a challenge to the sufficiency of the evidence and holding that a 14-year-old rape victim "was not of…mature years" and was raped at a remote spot). Nearly 125 years ago, this Court rejected the notion that corroboration was required in child-rape cases. *See State v. Wilcox*, 20 S.W. 314, 315–16 (Mo. 1892). *See also State v. Gruber*, 285 S.W. 426 (Mo. 1926) (rejecting a claim that the jury should have been instructed on the fact that the 15-year-old statutory-rape victim failed to immediately complain about the crime since the victim was incapable of consent and force was not an element of the crime); *State v. Sechrist*, 126 S.W. 400, 402–03 (Mo. 1910) (rejecting a sufficiency challenge in a rape case involving the defendant's 16-year-old daughter and deferring to the credibility findings of the jury, which "had the opportunity to see and hear the testimony of the prosecutrix"). Over 80 years age, this Court held in a child-rape case that it was the "peculiar province of the jury to determine…which witnesses it would believe" and that it was not the "province" of an appellate court to "weigh the evidence. *State v. Barnes*, 29 S.W.2d 156, 159 (Mo. 1930); *see also State v. Nelson*, 818 S.W.2d 285, 289 (Mo. App. E.D. 1991). Fifty years ago, this Court, in considering a statutory-rape case, rejected the corroboration requirement set out in *Tevis* and *Goodale* and held that *Wilcox* provided the proper standard of review for sufficiency cases involving such crimes. *See State v. Langston*, 382 S.W.2d 612, 615 (Mo. 1964).

These holdings juxtaposed with the contrary holdings outlined in the sections above have caused considerable confusion about the continued viability of the corroboration rule and destructive-contradictions doctrine. *See Peters*, 186 S.W.3d at 779 (noting "the inconsistent and sometimes confusing evidentiary and appellate review rules that have evolved in sex offense cases"); *Griffith*, 312 S.W.3d at 425 (outlining the conflicting authority and noting that "the corroboration rule has never been overruled"); *Nelson*, 818 S.W.2d at 289 (noting conflicting authority on the existence of the corroboration rule); *Wadel*, 398 S.W.3d at 80 n.8 (same). This confusion has led the Court of Appeals to conclude that it has no authority to either reject or refuse to apply these doctrines. *See Peters*, 186 S.W.3d at 779–80 (holding that "we have no authority to plow up a field previously planted with decisions of a higher court").

All three districts of the Court of Appeals have roundly criticized the corroboration rule and the destructive-contradictions doctrine. *See Nelson*, 818 S.W.2d at 290 (noting that "there seems to be no logical basis for a separate [corroboration] rule, even a restricted one, which relates solely to the review of the testimony of a victim of a sexual offense"); *Griffith*, 312 S.W.3d at 424 (noting that this Court and the Court of Appeals districts "have criticized the corroboration rule"); *Wadel*, 398 S.W.3d at 80 n.9 ("The continued validity of both the corroboration rule and the destructive

contradictions doctrine may be ripe for reexamination."); *Kelly*, 83 S.W.3d at 43 ("The corroboration rule is viewed with disfavor by Missouri courts and is restrictively applied only in cases where there are gross inconsistencies and contradictions which bear on proof essential to a case.") (internal quotation marks omitted). The Western District recently noted that "Given both nature of their creation and their limited application, these rules may be nothing more than vestiges of the antiquated and biased notion that women and children are not credible witnesses in sexual offenses." *Wadel*, 398 S.W.3d at 80 n.9.

The Court of Appeals has also questioned whether the corroboration rule, which "hails from antiquity," has any application under the modern rules for appellate review of sufficiency claims. *Peters*, 186 S.W.3d at 779 n.4; *see also Griffith*, 312 S.W.3d at 425. Moreover, application of a separate corroboration rule "to sex offenses involving minors has no logical or clear historical basis." *Peters*, 186 S.W.3d at 779 n.4. *See also Story*, 646 S.W.2d at 72 n.3 (noting that this Court had "found no non-rape case that imposes the corroboration requirement").

The modern standards for appellate review of sufficiency-of-evidence claims are sufficient without resort to the corroboration rule:

> Inconsistencies affecting credibility are for the trier of fact to resolve. The real question is whether, despite any inconsistencies, there is substantial

> evidence with probative force sufficient to establish facts from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.

Peters, 186 S.W.3d at 779 n.4. "An appellate court should not usurp the proper functions of the trial court and jury and set the conviction aside merely because it may disagree with the jury as to the truthfulness of the story told by the [alleged victim], or think the trial court should have set the verdict aside as against the weight of the evidence." *Id.* (quoting *State v. Barnes,* 325 Mo. 545, 29 S.W.2d 156, 158 (1930)); *see also Wadel*, 398 S.W.3d at 80 n.8 (holding that "it may be difficult to imagine a case where, consistent with our standard of review for sufficiency of the evidence, we could reverse a conviction premised upon nothing more that inconsistencies (either in testimony or with known physical facts) described by the complaining witness").

Defendant's argument also seeks a dramatic expansion of the corroboration rule. Much of his brief is spent attacking the credibility of the evidence corroborating Victim's testimony and asking this Court to find it insufficient to corroborate the direct evidence of guilt. Deft's Brf. 33–57. This is the type of analysis in which the *Brown* court employed in 1908 to find not only was the complaining witness's testimony not credible and in need of corroboration, but also that the testimony of her corroborating witness was

incredible as well. While application of the corroboration rule requires the production of corroborative evidence, the law does not permit an appellate court to then reweigh the corroborative evidence and to decide for itself whether it is credible enough to corroborate the victim's testimony. Defendant's argument would do substantial violence to the prevailing standard of review, which does not permit an appellate court to engage in such fact finding. The mischief that Defendant's expansion of the rule would create is yet another reason why the corroboration rule and the destructive-contradictions doctrine should be repudiated.

One standard of review should apply to sufficiency claims in criminal cases. The modern standard of review is both an adequate and constitutionally acceptable process for considering sufficiency claims in any criminal case. There is no need for the continued existence of rules that seldom, if ever, apply and offer no benefit that cannot already be had by the general standard of review. The downside to keeping these rules is considerable. They do nothing more than inject appellate courts into a fact finding role that is the sole province of the jury (or trial court in a bench-tried case). Considering the murky and dubious nature of their origins and the purpose behind their creation, neither the corroboration rule nor the destructive-contradictions doctrine has any place in modern Missouri law. In light of the inconsistent statements appearing in cases decided for well over

the past 100 years regarding the continued validity of these rules, this Court should take this opportunity to resolve the confusion regarding the existence of these rules and to simply abolish both of them.

F. Neither the corroboration rule nor the destructive-contradictions doctrine applies to the facts of this case.

Although Victim's trial testimony was arguably inconsistent, it neither required corroboration nor was inherently self-destructive. At most, Victim's testimony reflected nothing more than the confusion of a five-year-old child testifying in open court and attempting to recount something that happened to her when she was three years old. When viewed in this manner, any inconsistencies in Victim's testimony should come as no surprise, and they did not rise to the level of invoking the corroboration rule or destructive-contradictions doctrine.

Defendant focuses on the fact that at one point during her testimony, Victim testified that Defendant touched her private part with his hand, (Tr. 241–42), but then on cross-examination she said, "Yeah," when asked if "grandma told you to say these things," (Tr. 245). Whether Grandmother told Victim to report what had happened to her, which is a reasonable interpretation from the context, does not demonstrate that Victim made false allegations at Grandmother's behest or that the touching she reported did not happen. In fact, Grandmother expressly testified that she "never, never" told

Victim to make up any lies against Defendant. (Tr. 281). This does not demonstrate contradictory testimony in conflict with physical facts or surrounding circumstances to warrant application of the corroboration rule. Neither does it establish inherently-incredible or self-destructive testimony warranting application of the destructive-contradictions doctrine. These were matters left for the jury's discretion.

Defendant then seizes on testimony Victim gave on redirect to argue that application of these doctrines was warranted. But this testimony simply evidenced initial confusion on Victim's part with the prosecutor's question; she immediately corrected herself and said that Defendant touched her:

Q: [Victim], can you say whether J-Money really touched you?

A: Huh-huh.

Q: Did he really touch you or not?

A: Not.

Q: He didn't touch you?

A: (Shakes head.)

Q: Or he did touch you?

A: He did.

Q: He did.

A: (Nods head.)

(Tr. 245–46). Again, this testimony does not warrant application of either the corroboration rule or destructive-contradictions doctrine. It was simply a matter of inconsistent or contradictory testimony from a young child that was for the jury to resolve. *See Wright*, 998 S.W.2d at 82. "It is well-established that, because a young child is less skilled in articulation and can become understandably confused in a court setting, a child can contradict herself in some respects without leaving a reasonable juror unconvinced as to the veracity of her testimony." *Id.* (citing *Silvey*, 894 S.W.2d at 673).

Next, Defendant argues that Victim essentially "recant[ed]" her out-of-court statement on the charge of genital-to-tongue contact alleged in Count II and thus required corroboration. Deft's Brf. 48. Victim testified at trial that Defendant did not touch her private part with any other part of his body. (Tr. 242). But during the CAC interview, she clearly states that Defendant touched her private part with his tongue. (State's Ex. 1). Other evidence presented at trial, including Grandmother's testimony that she saw Defendant's head between Victim's legs and Victim's statements to Grandmother that Defendant was "smelling" or "sniffing" "down there," (Tr. 267–70, 278–79, 341), corroborated Victim's statement to the CAC interviewer.

There are other problems with Defendant's argument. First, it does not appear that Victim actually recanted her previous out-of-court statement

about tongue-to-genital contact. The definition of "recant" is "to withdraw or repudiate (a statement or belief) formally and publically." *State v. Hayes*, 169 S.W.3d 613, 622 n.3 (Mo. App. S.D. 2005) (citing MERRIAM–WEBSTER'S COLLEGIATE DICTIONARY, 11th ed. (2003)). Victim's statement obviously is not a formal and public withdrawal of her previous statement. *See Hayes*, 169 S.W.3d at 622 (holding that a 14-year-old girl's testimony did not involve a recantation, but merely constituted inconsistencies in her testimony).

Second, Defendant's trial testimony, at most, contradicts an out-of-court statement she made. As noted above, neither the corroboration rule nor the destructive-contradictions doctrine apply to inconsistencies between in-court and out-of-court testimony.

Third, even in cases of recanted testimony by a child witness repudiating an earlier out-of-court statement, the courts have held that neither the corroboration rule nor destructive-contradictions doctrine applied. *See K.A.R. v. Juvenile Officer*, 412 S.W.3d 475, 485–86 (Mo. App. W.D. 2013) (holding that neither the corroboration rule nor the destructive-contradictions doctrine applied when a child-victim recants at trial, especially when the sodomy conviction was supported by the victim's out-of-court statements and other evidence showing that the crime was in fact committed); *Wadel*, 398 S.W.3d at 79–82 (refusing to apply the corroboration rule or destructive-contradictions doctrine when both victims recanted their out-of-court

statements that the defendant had sexually abused them and testified at trial that no abuse occurred).

Defendant relies on *State v. Pierce*, 906 S.W.2d 729 (Mo. App. W.D. 1995), for application of the corroboration rule under the facts of this case. Not only is Defendant's case readily distinguishable, but the continued viability of *Pierce* is doubtful based on its subsequent treatment by Missouri courts.

In *Pierce*, the defendant was convicted of first-degree sexual assault. *Id.* at 730. During trial, the 14-year-old victim recanted her previous statement to a Division of Family Services worker that the defendant had had sexual intercourse with her. *Id.* at 732. Nevertheless, the defendant was convicted of statutory rape based solely on the victim's prior inconsistent statements that sexual intercourse had occurred without any corroborating evidence. *Id.* at 733.

Applying the "corroboration rule," the court held that while the prior inconsistent statement was properly admitted, the conviction could not be based solely on that statement in the absence of corroborating evidence. *Id.* at 733, 735. Although the corroboration rule applies only to the testimony of the victims of sexual offenses, the court in dicta stated its belief that, generally, a

conviction cannot be upheld where the only evidence is a prior inconsistent statement that was uncorroborated and repudiated at trial. *Id.* at 735.[8]

The court in *Pierce* described that case as involving "unusual circumstances" and described the factual situation as "unique to Missouri courts." *Id.* at 730, 733. Later cases, including several from the Western District itself, have either questioned *Pierce's* holding or limited its application to cases in which the complaining witness recants at trial and no other corroborating evidence is offered.

In *Wadel*, the court not only found that *Pierce* was applicable to only to its "unique" factual situation, but that it also "does not stand for the proposition that corroboration is required in every sexual offense case where the victim subsequently recants." *Wadel*, 398 S.W.3d at 82. The court found that to the extent *Pierce* "could be so read, it would be contrary to section 491.074 (allowing for the admission or prior inconsistent statements as substantive evidence), Missouri Supreme Court caselaw, …and the standard of review applicable to sufficieny…cases" *Id.* In addition, such a holding would be

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[8] The majority view is that an uncorroborated prior inconsistent statement may provide the sole support for a conviction. *People v. Chavies*, 593 N.W.2d 655, 661 (Mich. Ct. App. 1999) (collecting cases), *overruled on other grounds by People v. Williams*, 716 N.W.2d 208 (Mich. 2006).

contrary to § 491.075, which also provides that a child-witness's out-of-court statements shall constitute "substantive evidence to prove the truth of the matter asserted." Section 491.075.1. *See also Hayes*, 169 S.W.3d at 623–24 (finding *Pierce* inapplicable when the jury observed both the victim's trial testimony and her out-of-court CAC videotaped interview); *State v. Benwire*, 98 S.W.3d 618, 623 n.1 (Mo. App. W.D. 2003) (holding that *Pierce* was distinguishable in part because in *Pierce* not only did the victim recant, but every other witnesses called at trial had recanted as well and the victim's statement in *Pierce* was admitted under § 491.074, the general statute pertaining to an inconsistent statement of any witness rather than § 491.075, "which specifically allows an out-of-court statement of a child under twelve as substantive evidence.").

Missouri courts have otherwise distinguished or criticized *Pierce*. *See State v. Johnson*, 262 S.W.3d 257, 259 (Mo. App. W.D. 2008) (distinguishing *Pierce* as limited to its unique factual situation); *Collins*, 150 S.W.3d at 348–49 (distinguishing *Pierce* as a case involving the express recantation of prior testimony, which was the sole evidence of the offense);*State v. Porras*, 84 S.W.3d 153 (Mo. App. W.D. 2002) (holding that *Pierce*, which involved a single uncorroborated prior inconsistent statement by a recanting witness, did not apply when the record contained corroborating evidence attesting to the prior inconsistent statement); *State v. Garner*, 14 S.W.3d 67 (Mo. App.

E.D. 1999) (holding that *Pierce* did not apply because the prior inconsistent statement was not the only proof of guilt); *State v. Crumley*, 971 S.W.2d 368 (Mo. App. S.D. 1998) (holding that *Pierce* applies only to convictions based solely on a prior inconsistent statement); *State v. Werneke*, 958 S.W.2d 314, 319 (Mo. App. W.D. 1997) ("*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."); *State v. Brown*, 953 S.W.2d 133 (Mo. App. W.D. 1997) (holding that *Pierce* applied only when the prior inconsistent statement unsupported by corroborating evidence is the State's sole evidence of the crime); *State v. Archuleta*, 955 S.W.2d 12, 15 (Mo. App. W.D. 1997) ("The *Pierce* holding is inapplicable where corroborating evidence exists to support the prior inconsistent statements upon which the conviction is based.").

Defendant also relies on *State v. Kuzma*, 751 S.W.2d 54 (Mo. App. W.D. 1987), to support application of the corroboration rule. Again, Defendant's case is readily distinguishable. In *Kuzma*, the five-year-old alleged sexual-abuse victim admitted during cross-examination that she had previously told her mother and grandmother that her father had molested her, not the defendant. *Id.* at 55. This victim also admitted that she had forgotten what body parts the defendant touched. *Id.* at 55-56. Another alleged victim in that case, who was eight years old, testified on direct that he had been anally

sodomized, but he later changed his story on cross-examination and redirect examination. *Id.* at 56. These rather extreme facts, which directly related to an essential element of the offenses charged in *Kuzma* (sexual abuse and sodomy), also make it distinguishable from the Defendant's case. *See also Peters*, 186 S.W.3d at 778-79 (distinguishing *Kuzma* from the facts of that case). In addition, the *Kuzma* court applied the broader or clouded-with-doubt version of the corroboration rule rather than the more restricted version Missouri courts currently apply. *See Griffith*, 312 S.W.3d at 424; *Peters*, 186 S.W.3d at 789.

The record contains sufficient evidence supporting the Defendant's convictions for first-degree statutory sodomy. The record does not support application of either the corroboration rule or the destructive-contradictions doctrine. Moreover, both these doctrines are contrary to an appellate court's modern standard of review and should be abolished by this Court.

II (exhibit sent to jury).

The trial court did not plainly err in sending the recorded CAC interview (State's Exhibit 1) to the jury during deliberations because Defendant has waived appellate review of this claim by urging the jury in closing argument to ask for the recording of this interview and to view it and by failing to object to the sending of this exhibit to the jury when the record suggests there was an opportunity to do so.

Alternatively, Defendant failed to demonstrate that any error, much less plain error, occurred because nothing in the record before this Court supports Defendant's claim that the jury had the equipment to view the exhibit, that it viewed the exhibit repeatedly or replayed it at will, or that any viewing of the exhibit was to Defendant's detriment.

A. The record regarding this claim.

Victim was interviewed by a forensic interviewer employed by the Children's Advocacy Center of Greater St. Louis. (Tr. 282, 288). The DVD recording of that interview was admitted into evidence as State's Exhibit 1 and played for the jury during the forensic interviewer's testimony. (Tr. 291–92).

During defense counsel's closing argument, she urged the jury to request the recorded interview: "I want you to ask for the Children's Advocacy Center

video." (Tr. 390). Counsel then argued that the video would show that Victim at first said she was touched and then later said she was not. (Tr. 390). Moments later, defense counsel repeated her request that the jury ask for the recorded interview: "I want you to ask for the CAC interview because I think it's important to see the answer that [Victim] gave to [the forensic interviewer]'s questions." (Tr. 393). Counsel urged the jury yet again to watch the interview while making an argument about the interviewer's questions and Victim's answers: "Watch the DVD, you'll see." (Tr. 397). Finally, defense counsel also urged the jury to ask for the exhibit containing the lab reports. (Tr. 397).

At 11:30 a.m., about 15 minutes after deliberations began, the jury sent a note asking for "all defense & state exhibits, videos, lab reports, etc." (L.F. 74). The court's written response—the time of which does not appear in the record—was, "Here are the items requested." (L.F. 74). The trial transcript shows that at 12:10 p.m., the court held an on-the-record conference pertaining to defense counsel's hearsay objection to providing the jury with certain documents contained within the medical records. (Tr. 406-08). The court noted that while the objection was preserved, it was overruled. (Tr. 408–09). No other objection regarding any of the other exhibits that the jury was to be given appears in the transcript.

Defendant's motion for new trial alleges that the "trial court erred in allowing the jury, during deliberations, to listen to State's Exhibits [sic] 1, the recorded testimony of [Victim], and to have access to control the exhibits so that the jury could replay certain portions of the tapes [sic] as often as they desired." (Supp. L.F. 6). Defendant's motion complains that by allowing the jury to listen to those "tapes…as often as they desired the court was creating a presumption that those statements were to be given more weight in the jury's deliberations than the other evidence presented during trial." (Supp. L.F. 6). Defendant did not present evidence or offer argument on this claim during the hearing on the motion for new trial. (Tr. 413–18).

B. Defendant's claim is not preserved for appellate review.

"[I]t is axiomatic that a defendant may not take advantage of self-invited error or error of his own making." *State v. Mayes*, 63 S.W.3d 615, 632 n.6 (Mo. banc 2001) (quoting *State v. Wise*, 879 S.W.2d 494, 519 (Mo. banc 1994)). "No criminal trial or judgment should be affected, in any manner, by an error committed at the instance of the defendant." *State v. Campbell*, 122 S.W.3d 736, 742 (Mo. App. S.D. 2004) (quoting *State v. Williams*, 118 S.W.3d 308, 313 (Mo. App. S.D. 2003)). *See also State v. Uka*, 25 S.W.3d 624, 626 (Mo. App. E.D. 2000) (A defendant may not take advantage of self-invited error, or complain of matters he injected into the case); *State v. Carollo*, 172 S.W.3d 872, 876 (Mo. App. S.D. 2005) (holding that a "[d]efendant cannot seek to

utilize evidence in the pursuit of reasonable trial strategy, and then, turn around on appeal and claim that same evidence was inadmissible and prejudicial.").

The fact that during his closing argument, Defendant repeatedly urged the jury to request and view the recorded DVD interview during its deliberations demonstrated that his claim is not preserved for appellate review because "self-invited error cannot be the basis for overturning the judgment" in a criminal case. *State v. Hoy*, 219 S.W.3d 796, 811 (Mo. App. S.D. 2007) (holding that a trial court will not be convicted of plain error for admitting scientific evidence when the defendant "affirmatively invited the trial court not to" conduct a *Frye* inquiry during trial). *See also State v. Price*, 165 S.W.3d 568, 575-76 (Mo. App. S.D. 2005) (defendant waived appellate review of claim relating to an expert's testimony when, after initially objecting to the testimony, defense counsel stated that he was withdrawing the objection after a bench discussion was held); *State v. Franklin*, 751 S.W.2d 128, 129–30 (Mo. App. E.D. 1988) (holding that defendant's objection to the giving of the "hammer" instruction during trial constituted a binding waiver of appellate review of his claim that the trial court plainly erred in not giving that instruction); *State v. Coleman*, 660 S.W.2d 201, 209 (Mo. App. W.D. 1983) (holding that the defendant waived appellate review of her claim that the trial court erred in failing to give a first-degree murder instruction when

counsel expressly refused such an instruction when the trial court directly asked counsel about submitting it); *State v. Young*, 610 S.W.2d 8, 12–13 (Mo. App. E.D. 1980) (same); *State v. Philpott*, 242 Mo. 504, 146 S.W. 1160, 1162 (Mo. 1912) (holding that defendant waived appellate review of claim that trial court erred in failing to give manslaughter instruction when counsel "insisted" that such an instruction not be given).

Another reason Defendant's claim is not preserved for appellate review is that he failed to adduce evidence showing that the jury had equipment to review the recording or that the jury repeatedly viewed the recording during deliberations. Although Defendant's motion for new trial alleges that this occurred, this is insufficient to preserve the matter for appellate review. "Factual allegations in a motion for new trial are not self-proving." *State v. Smith*, 944 S.W.2d 901 (Mo. banc 1997). *See also State v. Williams*, 652 S.W.2d 102, 111 (Mo. banc 1983) (holding that "an unverified allegation…does not prove itself and cannot be considered unless substantiated by the record").

In addition, the record suggests that Defendant had the opportunity to object to giving the jury the exhibit since it shows that after the jury sent the note requesting all the exhibits, Defendant objected to providing the jury with certain portions of the medical records he offered into evidence and argued the matter before the trial court. Defendant's assertion on appeal that

he had no opportunity to object to giving the jury the recorded CAC interview is not supported by this record. In fact, the record militates against such an inference. Consequently, to the extent that this claim is not waived and may be reviewed, it may be reviewed only for plain error.

C. Standard of review.

"An unpreserved claim of error can be reviewed only for plain error, which requires a finding of manifest injustice or a miscarriage of justice resulting from the trial court's error." *State v. Celis-Garcia*, 344 S.W.3d 150, 154 (Mo. banc 2011); *see also* Rule 30.20 ("[P]lain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom."). "Rule 30.20 is no panacea for unpreserved error, and does not justify review of all such complaints, but is used sparingly and limited to error that is evident, obvious, and clear." *State v. Phillips*, 319 S.W.3d 471, 476 (Mo. App. S.D. 2010) (quoting *State v. Smith*, 293 S.W.3d 149, 151 (Mo. App. S.D. 2009)). An appellate court is not required to grant plain-error review; it does so solely within its discretion. *Id.*

"In general, once 'an exhibit has been properly admitted into evidence, it is within the sound discretion of the trial court whether the exhibit will be sent to the jury during deliberations' and [an appellate court] will overturn the lower court's decision only if [it] determine[s] that the trial court abused that

discretion." *State v. Talley*, 258 S.W.3d 899, 911 (Mo. App. S.D. 2008) (quoting *State v. Skillicorn*, 944 S.W.2d 877, 896 (Mo. banc 1997)). "Such an abuse of discretion only occurs when the decision to exclude or allow an exhibit into the jury room for deliberations "was clearly against reason and resulted in an injustice to defendant." *Talley*, 258 S.W.3d at 911.

"A criminal defendant seeking plain error review bears the burden of showing that plain error occurred and that it resulted in a manifest injustice or miscarriage of justice." *State v. Lemons*, 294 S.W.3d 65, 71 (Mo. App. S.D. 2009). *See also State v. Middlemist*, 319 S.W.3d 531, 538–39 (Mo. App. S.D. 2010) (finding that the defendant failed to demonstrate that any plain error occurred when the defendant presented no proof that a police report was actually contained in a binder that was admitted as an exhibit at trial without objection and sent to the jury during deliberations).

D. Defendant has failed to demonstrate that he suffered any manifest injustice.

The overarching flaw with Defendant's claim is his failure to provide any evidence or to make a record supporting that what he alleges occurred in his motion for new trial actually occurred. Other than his own self-serving allegations, Defendant points to nothing in the record demonstrating that the jury had the equipment to view the exhibit, that it actually did so, and that it repeatedly viewed it "at will." *See State v. Bluitt*, 592 S.W.2d 752, 753 (Mo.

banc 1980) (refusing to grant relief when the "record does not provide an evidentiary basis upon which appellant's point on appeal could be considered and ruled in his favor"). Moreover, he points to nothing showing that he suffered any prejudice, much less manifest injustice simply by the jury being sent the exhibit. *State v. Williams*, 329 S.W.3d 700, 705 (Mo. App. S.D. 2010) (holding that an appellate court "cannot base a determination of prejudice upon mere speculation"). Defendant's own conduct in urging the jury to view the recording because it supported Defendant's defense, belies any finding of prejudice. Defendant cannot prove prejudice simply because the jury returned guilty verdicts.

Defendant relies on *State v. Justus*, 205 S.W.3d 872, 874 (Mo. banc 2006), in arguing that the CAC interview was testimonial, but in *State v. Partain*, 310 S.W.3d 765, 768 (Mo. App. E.D. 2010), the court held that a videotape of a CAC interview did not fall within the exception for testimonial exhibits not being given to the jury during deliberations. In *Partain*, the court held that the trial court had not plainly erred in allowing the jury to see the video during deliberations. *Id.* at 768-69.

Defendant contends that *Partain* and *State v. Parker*, 208 S.W.3d 331 (Mo. App. S.D. 2006), upon which the *Partain* court relied, are distinguishable because in each of those cases the video was played for the jury only once during deliberations, but here no restriction was placed on the playing of the

video. But whether there was no restriction on the playing of the recording does not aid Defendant in proving his claim. First, Defendant did not object when the record reasonably shows he had sufficient opportunity to do so. Second, nothing in the record shows that any viewing occurred, much less unrestricted or repeated viewing. Further, as the Court found in *Parker*, 208 S.W.3d at 338, a child's video-recorded statements "do not improperly bolster a victim's live testimony where they are informal and not planned as a substitute for the victim's testimony. Such statements, taken as a whole, do not have the effect of allowing the victim to testify twice."

Defendant relies primarily on two out-of-state cases, *Debella v. People*, 233 P.3d 664 (Colo. 2010), and *State v. Burr*, 948 A.2d 627 (N.J. 2008).

In *Debella*, 233 P.3d at 667-68, the defendant objected to the trial court providing the jury with a television to allow unrestricted viewing of a videotape of a child-sexual-assault victim's interview with a detective and a counselor, which had been admitted into evidence and shown to the jury during trial. *Id.* at 665–66. The court found that the trial court had abused its discretion because it had proceeded upon the misconception that it could not limit jury access to the tapes. In Defendant's case there was no objection and no indication that the trial court labored under any misconception about its authority under the law. *Id.* at 666–68. In addition, there was no evidence

presented that the jury in Defendant's case had a television and playback equipment.

In *Burr*, 948 A.2d at 634–36, the Court reversed the conviction on other grounds and thus found no need to "overanalyze" the exhibit issue, but it nevertheless gratuitously noted that in the future, the trial court should ask whether the jury would be satisfied with a playback of the victim's testimony, and if the jury asked to view the video again, the trial court should determine whether the jury must also hear a readback of any direct and cross-examination testimony that the court concluded was necessary to provide proper context for the video playback.

In Missouri, the law is well-settled, and the trial court acted accordingly. *See Partain*, 310 S.W.3d at 768-69; *Parker*, 208 S.W.3d 331. The trial court did not err, plainly or otherwise, in sending the recorded CAC interview to the jury during deliberations.

CONCLUSION

The trial court committed no reversible error. Defendant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 12,752 words, excluding the cover, certification, and appendix, as determined by Microsoft Word 2007 software; and that a copy of this brief was sent through the electronic filing system on April 8, 2014, to:

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