In the Missouri Court of Appeals
Western District

STATE OF MISSOURI,	)	
Respondent,	)	
v.	)	**WD78556**
	)	
JAMES RAULERSON,	)	
Appellant.	)	**FILED: June 21, 2017**

APPEAL FROM THE CIRCUIT COURT OF CLAY COUNTY
THE HONORABLE JANET L. SUTTON, JUDGE

BEFORE DIVISION TWO: CYNTHIA L. MARTIN, PRESIDING JUDGE, LISA WHITE HARDWICK AND ALOK AHUJA, JUDGES

James Raulerson appeals from his conviction of first-degree child molestation. He contends the circuit court erred in admitting certain evidence and in sentencing him based on a materially false understanding of the possible range of punishment. For reasons explained herein, we affirm Raulerson's conviction but vacate his sentence and remand for resentencing.

FACTUAL AND PROCEDURAL HISTORY

The sufficiency of the evidence to support Raulerson's conviction is not at issue. In January 2014, Raulerson was living with his girlfriend, Paula Malloy, in the home of Malloy's daughter, Candacee Funk, Funk's husband, and their children. Funk operated a small daycare center out of her home. One of the children in the

daycare was M.M., who was seven years old. M.M. was in Funk's care before and after school on weekdays, and she spent Friday nights at Funk's house. M.M. was very close to the Funk family and referred to Raulerson as "Poppa."

On January 3, 2014, the children in the daycare were taking naps, with M.M. and another girl lying on a sectional couch in the Funks' living room. M.M. was covered with a blanket. Malloy was lying down in another room. When Malloy later got up and went into the living room, she saw M.M. lying on the couch and Raulerson standing behind the couch. His hands were in the front of M.M.'s pants, and M.M.'s blanket was pulled down around her feet.

When Raulerson noticed Malloy was in the room, he was startled. He walked out of the living room and into another room. Malloy followed him and told him to take his stuff and get out. While Raulerson was packing, Malloy told him to say something to Funk about what happened. Before he left, Raulerson told Funk he was leaving to go to Texas to find work.

After Raulerson left, Funk asked M.M. if he touched her, and M.M. indicated that he had. Funk asked M.M. if he had touched her under her clothes or on top of her clothes. M.M. reported that he touched her on top of her clothes. Malloy called the police. The police came and obtained information about Raulerson and the incident from the adults in the home.

An officer later apprehended Raulerson at a bus stop. He said that he was going to a truck stop to hitch a ride to Florida. Raulerson agreed to go to the police station with the officer. Once at the police station, the officer noticed that

Raulerson put hand sanitizer on his hands and started aggressively scrubbing his hands with it. He used the sanitizer several times, rubbing each finger individually and then picking under his fingernails. Raulerson did this for several minutes, even though his overall hygiene appeared poor. The officer had never seen anybody in the station use so much hand sanitizer or scrub so aggressively.

Meanwhile, an investigating officer at the Funk house asked Funk to talk to M.M. about the incident again. During this conversation, M.M. said that Raulerson touched her under her clothes and put a finger inside of her. After this disclosure, M.M. was taken to the hospital, where a nurse, Miriam Crandall, performed a SAFE exam on her. The examination revealed two lacerations to M.M.'s internal genitalia. The doctor who evaluated these results found her injuries consistent with sexual abuse and inconsistent with accident, as there were no corresponding injuries to the external genitalia.

M.M. was later interviewed by a forensic psychologist at a child advocacy center. The interview was recorded. During the interview, M.M. described the incident, saying that she was sleeping on the couch in the living room when Raulerson woke her up by putting his finger in her "private." She also reported several other occasions during which he had touched her "private," forced her to touch his "private," licked her "private," licked her chest, and used a "buzzer" sex toy to touch her "private." Police searched Raulerson's belongings and found a "cock ring" sex toy, conducted DNA tests on it, and determined that the DNA on it was M.M.'s.

The State subsequently charged Raulerson, as a prior and persistent offender, with first-degree child molestation. A jury found him guilty of the charge. The court sentenced Raulerson as a prior and persistent offender to a term of 20 years in prison. Raulerson appeals.

STANDARD OF REVIEW

Nine of Raulerson's ten points on appeal allege error in the admission of evidence. Only one of those claims of error is preserved. In reviewing the preserved claim, we recognize that the circuit court has broad discretion to admit or exclude evidence at trial and will reverse only if we find an abuse of discretion. *State v. Pennington*, 493 S.W.3d 926, 931 (Mo. App. 2016). An abuse of discretion occurs when the ruling is "'clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration.'" *State v. Kemp*, 212 S.W.3d 135, 145 (Mo. banc 2007) (citation omitted). On direct appeal, we are to review "for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial. Trial court error is not prejudicial unless there is a reasonable probability that the trial court's error affected the outcome of the trial." *Id*. at 145–46 (internal citations and quotation marks omitted).

Raulerson concedes that he did not preserve his eight remaining claims challenging the admission of evidence and another claim challenging his sentence. He requests plain error review under Rule 30.20. Plain error will be found only where the alleged error facially establishes "substantial grounds for believing a

manifest injustice or miscarriage of justice occurred." *State v. Tisius*, 362 S.W.3d 398, 405 (Mo. banc 2012) (internal quotation marks and citations omitted). Review for plain error review is a two-step process. *State v. Horton*, 325 S.W.3d 474, 477 (Mo. App. 2010). First, we look to whether the circuit court committed an evident, obvious, and clear error that affected Raulerson's substantial rights. *Id*. Then, if we find such an error, we determine whether the error resulted in a manifest injustice or miscarriage of justice. *Id*.

ANALYSIS

In Point I, Raulerson contends the circuit court plainly erred in admitting Crandall's testimony regarding M.M.'s credibility. During Raulerson's cross-examination of Crandall, defense counsel and Crandall had the following exchange:

> Q. [Defense counsel]: You're calling these abrasions. You do no[t] know how they got there?
>
> A. [Crandall]: I go based on the patient's story and her story -- she actually disclosed personally to me which is unusual and it matched the abrasions.
>
> Q. [Defense counsel]: You were not present when they occurred?
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> A. [Crandall]: No.
>
> Q. [Defense counsel]: Do you believe everything children tell you?
>
> A. [Crandall]: Typically in sexual assault cases, yes.

Raulerson argues that Crandall's testimony constituted an improper expert opinion on M.M.'s credibility and usurped the jury's decision-making power.

We need not determine whether the admission of Crandall's testimony constituted plain error because Raulerson elicited the testimony. A "defendant is not entitled to complain about matters brought into the case by his own questions or take advantage of self-invited error." *State v. Fritz*, 480 S.W.3d 316, 329 (Mo. App. 2016) (citing *State v. Campbell*, 122 S.W.3d 736, 742 (Mo. App. 2004)). This prohibition on claims of invited error includes claims of error when the defendant elicits testimony on cross-examination about the credibility of children in sexual assault cases. *State v. Ellis*, 512 S.W.3d 816, 837 (Mo. App. 2016). In *Ellis*, the defendant elicited testimony on cross-examination from a child behavior expert that "children do not lie hardly at all, very seldom, about child sexual abuse." *Id.* On appeal, we rejected the defendant's request for plain error review of the admission of this testimony on the basis that the defendant could not "take advantage of invited error to seek a reversal of his conviction." *Id*.

As in *Ellis*, Raulerson intentionally and directly elicited Crandall's challenged testimony by asking her if she believed everything that children tell her. Raulerson was clearly attempting to elicit evidence to demonstrate Crandall's bias in favor of children and to show that Crandall rejected the possibility of accidental injury because she relied on M.M.'s story associated with the injury. Because Raulerson elicited this testimony, he may not now seek plain error relief based on its admission. "While plain error review is discretionary, an appellate court should not use it to impose a *sua sponte* duty upon a trial court to correct mistakes of a

defendant's own making." *State v. Shockley*, 410 S.W.3d 179, 201 (Mo. banc 2013). Point I is denied.

In Points II and III, Raulerson contends the court plainly erred in admitting State's Exhibit 9, a redacted version of M.M.'s forensic interview. He argues that the portions of M.M.'s interview that were redacted would have provided exculpatory evidence by showing that he denied molesting M.M. and also that M.M. was biased.

We need not reach the merits of his claims in either of these points because, when the State moved to admit Exhibit 9 into evidence, defense counsel stated, "No objection." "There is a fundamental difference in appellate review of the admission of evidence in a case where no objection is made and where a party apparently consents to the admission." *State v. Woods*, 357 S.W.3d 249, 255 (Mo. App. 2012). When defense counsel made the statement "No objection" in response to the State's admission of Exhibit 9, this was "equivalent to affirmatively waiving appellate review." *Id*. "Under those circumstances, even plain error review is not warranted." *State v. Bennett*, 466 S.W.3d 561, 564 (Mo. App. 2015) (internal quotation marks and citations omitted). Because Raulerson stated "No objection" to the admission of the redacted interview, he affirmatively waived all appellate review, including plain error review, of these claims. Points II and III are denied.

In Point IV, Raulerson contends the court plainly erred in admitting the sex toy that police found in his belongings because this particular sex toy, a "cock

ring," was different from the "buzzer" sex toy that M.M. said he used on her. Although tests on the "cock ring" showed that M.M.'s DNA was present on it, Raulerson argues the "cock ring" was not logically relevant because it could not have been used to commit the crime of molestation with which he was charged and was not legally relevant because it was highly inflammatory.

We need not address the merits of Raulerson's point. At trial, when the State offered the "cock ring" into evidence as State's Exhibit 4, defense counsel stated, "No objection." As discussed *supra*, defense counsel's pronouncement is fatal to Raulerson's claim of error. Raulerson affirmatively waived appellate review, including plain error review, of the admission of the sex toy. *Id*. Point IV is denied.[1]

In Point V, Raulerson contends the court plainly erred in admitting evidence of his prior uncharged misconduct against M.M. This evidence includes: (1) testimony regarding the discovery, identification, and DNA testing of the "cock ring" found in Raulerson's belongings; and (2) testimony regarding M.M.'s disclosures that Raulerson had sexually abused her on multiple occasions.[2] He

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[1] In his point relied on, Raulerson also challenges the admission of testimony about the discovery and identification of the "cock ring." While he sets forth the challenged testimony in the argument section of his brief, he does nothing to develop his contention that the court erred in allowing it. Thus, his challenge to the admission of the testimony presents nothing for review and is deemed abandoned. *State v. Edwards*, 280 S.W.3d 184, 190 (Mo. App. 2009); *see also State v. Hill*, 812 S.W.2d 204, 208 (Mo. App. 1991) (noting that "[t]his court is not obligated to make appellant's arguments for him").

[2] In this point, Raulerson also alleges that State's Exhibit 9, which was M.M.'s forensic interview during which she described other sexual abuse that Raulerson had committed against her, and State's Exhibit 4, the "cock ring" that had M.M.'s DNA on it, constituted inadmissible uncharged misconduct evidence. As discussed *supra*, Raulerson waived appellate review as to all claims that

argues that this evidence was inadmissible because it was neither logically nor legally relevant to the charged crime, and it constituted improper propensity evidence.

Generally, evidence of other uncharged crimes or misconduct is inadmissible "'unless such proof has some legitimate tendency to directly establish the defendant's guilt of the charge for which he is on trial.'" *Shockley*, 410 S.W.3d at 193 (citation omitted). Evidence has a legitimate tendency to establish guilt for the crime charged when it shows:

> (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; or (5) the identity of the person charged with commission of the crime on trial.

State v. Thompson, 489 S.W.3d 312, 325 (Mo. App. 2016) (internal quotation marks and citation omitted).

"Numerous cases in Missouri involving sexual crimes against a child have held that 'prior sexual conduct by a defendant toward the victim is admissible as it tends to establish a motive, that is satisfaction of defendant's sexual desire for the victim.'" *State v. Primm*, 347 S.W.3d 66, 70–71 (Mo. banc 2011) (quoting *State v. Thurman*, 272 S.W.3d 489, 495 (Mo. App. 2008) and citing numerous other cases with the same holding). The evidence about which Raulerson complains was admissible to show his motive, which was his sexual desire for M.M.

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the circuit court erred in admitting these exhibits because he stated "No objection" when the State offered them.

Nevertheless, Raulerson argues that evidence of intent and motive was not necessary because the nature of the act alone provided motive, as there was no other reason for him to put his hand down M.M.'s pants. This argument ignores the fact that he denied having committed the act, as he claimed that M.M. was lying and that Malloy, who saw his hand in M.M.'s pants, was mistaken and unreliable because she was on pain medication and may not have been wearing her glasses. Because of Raulerson's denials, evidence that he was sexually attracted to M.M. and, therefore, had the motive to use her to gratify his desires was highly relevant to establish that he committed the crime, that Malloy saw him commit the crime, and that the victim's description of the crime was accurate. Therefore, the court did not plainly err in admitting evidence of Raulerson's uncharged misconduct against M.M. Point V is denied. Because we find that this evidence was admissible to show motive and did not constitute propensity evidence, we need not address Raulerson's claims in Points VI, VII, and VIII that the admission of this purported propensity evidence violated his constitutional rights. Points VI, VII, and VIII are denied.

In Point IX, Raulerson contends the court abused its discretion by overruling his objections to Officer Andy Warner's testimony about his use of hand sanitizer. During the State's direct examination, Warner testified that Raulerson's use of hand sanitizer at the police station was unusual and that he had never seen anyone use the hand sanitizer in the same manner as Raulerson. He testified that Raulerson used a lot of sanitizer, scrubbed his hands and fingers aggressively, and

picked under his fingernails with it. Warner also testified that Raulerson's actions were "[b]ehavior you normally don't do when you use hand sanitizer," and that it was "odd" and "not normal." When Warner testified that it appeared as if Raulerson was scrubbing with soap, Raulerson objected to that statement as speculative. The court overruled that objection. Warner further noted that Raulerson's hygiene was otherwise poor. When Warner then testified that it appeared that Raulerson was attempting to wash his hands "from something," the court sustained Raulerson's objection that the statement was speculative.

Raulerson did not object to the entirety of Warner's testimony about the hand sanitizer. He objected to two statements within that testimony, and one of those objections was sustained. Thus, the only portion of the testimony to which he made a preserved objection was Warner's statement that Raulerson was using the sanitizer "almost like he was scrubbing with soap." Raulerson argues that this testimony was speculative and had no probative force because it did not assist the jury in deciding whether he was guilty of first-degree child molestation. We disagree.

Warner's testimony was not improperly speculative but was permissible "lay opinion" testimony. Although a lay witness is not generally permitted to offer his opinion on a matter in dispute, a lay witness "'who personally observed events may testify to his matter of fact comprehension of what he has seen in a descriptive manner which is actually a conclusion, opinion or inference, if the inference is common and accords with the ordinary experiences of everyday life.'"

State v. Hutson, 487 S.W.3d 100, 107 (Mo. App. 2016) (citation omitted). This testimony is "justified by convenience as a 'short-hand rendition of a composite situation' and by necessity to avoid losing evidence where it would be extremely difficult or impossible for the witness to convey an accurate sense of his or her observations if limited to a statement of facts in the traditional sense." *Id*. (citation omitted).

In this case, Warner's testimony was within the ordinary experience of everyday life. Warner personally observed Raulerson using hand sanitizer and related his matter-of-fact observations to the jury. *See State v. Hill*, 812 S.W.2d 204, 208 (Mo. App. 1991) (finding that an officer's testimony that the defendant's behavior was "rather combative" was admissible when the officer had personally observed the defendant and was relaying those matter-of-fact observations to the court). Most people are familiar with hand sanitizer and would recognize that the common usage would not involve using excessive amounts of the product, aggressively scrubbing one's hands and fingers, and picking underneath one's fingernails with it. That Raulerson used the product in an unusual manner was, therefore, the proper subject of Warner's opinion that it was odd or unusual. Moreover, because the ordinary person would recognize the difference between using hand sanitizer and scrubbing with soap, Warner's comparison helped the jury understand what they would have seen had they witnessed it. Thus, Warner's testimony provided the jury helpful information in a descriptive manner that conveyed the unusual nature of Raulerson's actions.

Warner's testimony on this subject was relevant to the charged offense. "'A permissible inference of guilt may be drawn from acts or conduct of an accused subsequent to an offense if they tend to show a consciousness of guilt by reason of a desire to conceal the offense or [the] accused's role therein.'" *State v. Morse*, 498 S.W.3d 467, 471 (Mo. App. 2016) (citation omitted). Raulerson had been seen with his hand in the front of M.M.'s pants approximately one hour prior to his using the hand sanitizer. M.M. also reported that Raulerson had touched her private parts under her clothes and had inserted his finger in her genitals. Thus, it was reasonable to infer that Raulerson, knowing that he had used his hands to touch M.M.'s genitals, feared that biological evidence was on his hands and could possibly be retrieved and tested. Therefore, his rigorous and unusual use of the hand sanitizer supported an inference that he was attempting to conceal his involvement in the molestation by destroying the biological evidence that he feared was on his hands. Because Warner's hand sanitizer testimony was relevant to demonstrating Raulerson's consciousness of guilt, the court did not err in overruling Raulerson's objection to it. Point IX is denied.

In Point X, Raulerson contends the circuit court plainly erred in sentencing him to a term of 20 years in prison. He argues that the court's sentence was based on a materially false understanding of the possible range of punishment; specifically, the court misunderstood the range of punishment to be ten to 30 years or life when the correct range of punishment was five to 30 years or life.

Raulerson was found guilty of first-degree child molestation, which is a class B felony. Before trial, the circuit court found that he was a prior and persistent offender. His status as a persistent offender subjected him to "an extended term of imprisonment." § 558.016.1.[3] The total authorized maximum term of imprisonment for a persistent offender for a class B felony is any sentence authorized for a class A felony. § 558.016.7. Section 558.016 "only extends the maximum sentence but does not alter the minimum sentence." *State v. Cowan*, 247 S.W.3d 617, 619 (Mo. App. 2008). The range of punishment for a B felony is five to 15 years. § 558.011.1(2). The range of punishment for an A felony is ten to 30 years or life in prison. § 558.011.1(1). Accordingly, Raulerson's range of punishment, as a prior and persistent offender for the class B felony of first-degree child molestation, was five to 30 years or life in prison.

Raulerson asserts that the court had a materially false understanding of this available range of punishment. During the sentencing hearing, the court stated that its finding that Raulerson was a prior and persistent offender extended his range of punishment "up to that of what would be an A felony which is 10 to 30 years and or up to life in prison." Additionally, during defense counsel's argument at the close of the sentencing hearing, the court and defense counsel had the following exchange:

[3] All statutory references are to the Revised Statutes of Missouri 2000, as updated by the 2013 Cumulative Supplement.

> [Defense counsel]: . . . Your Honor, we are asking you to impose the minimum sentence which I think is still on the B range at 5 years in prison. I understand that that sounds extremely low --
>
> THE COURT: -- I don't think that's -- the minimum is 10.
>
> [Defense counsel]: Well I think that when it's a prior and persistent offender actually you keep the low level of the - - because he hasn't been proved as a prior and persistent sex offender. That could be different but as a prior and persistent offender you actually keep the bottom low level. It can certainly go all the way up to 30 yes and so we are asking for 5 years. Those are our arguments for sentencing.
>
> THE COURT: I didn't mean to interrupt you if you have anything more.
>
> [Defense Counsel]: No, I was almost done.

The court subsequently sentenced Raulerson to 20 years in prison. Raulerson did not object to the sentence on the ground that it was based on a materially false understanding of the possible range of punishment, which is why he now seeks plain error review.

Looking first at whether there was evident, obvious, and clear error that affected Raulerson's substantial rights, we note that the State acknowledges that the court misstated the minimum punishment applicable to Raulerson on these two occasions during his sentencing. Nevertheless, the State argues that, because defense counsel corrected the court after the second misstatement, Raulerson cannot prove he was sentenced under a mistaken belief about the range of punishment. To support this argument, the State relies heavily on *State v. Berry*, 506 S.W.3d 357 (Mo. App. 2016).

Like Raulerson, the defendant in *Berry* was found guilty, as a prior and persistent offender, of a class B felony of first-degree burglary. *Id*. at 365. At the sentencing hearing, the prosecutor argued that, because the defendant was found to be a prior and persistent offender,[4] he was subject to the class A felony punishment range of ten years to life. In response, defense counsel argued that the minimum sentence of five years was still available to the defendant and only the maximum sentence was increased due to his status as a prior and persistent offender. *Id*. The court sentenced the defendant to 30 years in prison.

On appeal, the defendant in *Berry* argued that he was "entitled to resentencing because the trial court based his sentence on a materially false foundation as to the range of punishment." *Id*. at 366. We rejected that claim, finding that it was the *prosecutor*, not the court, that misinterpreted the minimum range of punishment, and there was nothing in the record that indicated that the court misunderstood the range of punishment when it pronounced the defendant's sentence. *Id*.

In this case, *the court*, and not the prosecutor, misstated the minimum range of punishment on two separate occasions during the sentencing hearing. Thus, unlike in *Berry*, there is support in the record to indicate that the court misunderstood the range of punishment when it pronounced its sentence. Therefore, *Berry* is not persuasive.

[4] More precisely, the prosecutor argued that the defendant was a "prior sex offender," but we found that to be a misstatement. *Berry*, 506 S.W.3d at 365 n.10.

This case is more akin to *Cowan*, 247 S.W.3d 617. In *Cowan*, the defendant pled guilty to a class B felony. *Id*. at 618. Defense counsel subsequently filed a motion to set aside the guilty plea. *Id*. At the hearing on the motion, the court explained that setting aside the guilty plea would result in the State's charging the defendant as a prior and persistent offender, "which would increase the range of punishment for the B felony to an A felony, subjecting him to a sentence of ten to thirty years or life imprisonment." *Id*. The court set aside the guilty plea and a jury found him guilty. *Id*. During sentencing, defense counsel argued that the court had the authority to impose a five-year, as opposed to ten-year, sentence as the minimum sentence. *Id*. The State objected but cited no authority. *Id*. The court did not respond to the parties' arguments on this issue and sentenced the defendant to ten years in prison for the class B felony. *Id*.

On appeal, this court vacated the sentence and remanded to the circuit court for resentencing, finding that the sentence was based on a materially false foundation. *Id*. at 619. In so holding, we found that the circuit court misinterpreted the minimum range of punishment applicable to the defendant during the hearing on the motion to set aside the guilty plea. *Id*. Even though there was a "significant amount of time between" the court's misstatement regarding the range of punishment and the sentencing hearing, we noted that the circuit court "never acknowledged that a mistake was made" and did not ever state that the "sentence was based on the correct range of punishment." *Id*.

Here, it is evident that the circuit court misinterpreted the minimum range of punishment available to Raulerson. Moreover, as in *Cowan*, defense counsel attempted to correct the court as to the minimum range of punishment, but the court never acknowledged that a mistake was made and did not ever state that the sentence was based on the correct range of punishment. Accordingly, we find that the sentence pronounced by the circuit court was based on a materially false foundation as to the available range of punishment.

Having found evident, obvious, and clear error, we must now determine whether a manifest injustice or miscarriage of justice will result if the court's error in sentencing is left uncorrected. Rule 30.20. Raulerson was sentenced to 20 years in prison. As the State points out, this sentence is "well in excess of the minimum sentence regardless of whether the court thought that the minimum [was] five years or ten years." Thus, the State argues that Raulerson did not suffer a manifest injustice or miscarriage of justice because he cannot demonstrate that any mistaken belief the court may have had about the minimum range of punishment had any effect on his sentence. We disagree.

"When . . . a court sentences a defendant based on a mistaken belief of the available range of punishment, it commits evident, obvious, and clear error, and such error results in a manifest injustice if left uncorrected." *State v. Williams*, 465 S.W.3d 516, 519 (Mo. App. 2015). *See also State v. Troya*, 407 S.W.3d 695, 701 (Mo. App. 2013). "A sentence passed on the basis of a materially false foundation lacks due process of law and entitles the defendant to a reconsideration

of the question of punishment in the light of the true facts, regardless of the eventual outcome." *Wraggs v. State*, 549 S.W.2d 881, 884 (Mo. banc 1977). This is true "even if it is likely the court will return the same sentence." *Cowan*, 247 S.W.3d at 619. Raulerson was entitled to be sentenced by the court based upon the court's correct understanding of the minimum range of punishment available. Point X is granted.

CONCLUSION

Raulerson's sentence is vacated, and the cause is remanded to the circuit court for resentencing. The judgment is affirmed in all other respects.

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LISA WHITE HARDWICK, JUDGE

ALL CONCUR.