In the Missouri Court of Appeals
Eastern District

DIVISION ONE

STATE OF MISSOURI,	)	No. ED93919
	)	
Respondent,	)	
	)	Appeal from the Circuit Court of
v.	)	the City of St. Louis
	)	Cause No. 0822-CR05437-01
DANIEL M. PRIMM,	)	Honorable Bryan L. Hettenbach
	)	
Appellant.	)	Filed: November 16, 2010

Facts

Appellant Daniel M. Primm appeals his conviction on ten counts of sexual abuse involving his grandniece, T.B. We affirm

At trial, T.B testified to four separate incidents of sexual abuse by her great uncle. T.B. was fourteen years old at the time of the abuse. One incident occurred when Appellant was driving T.B. home. On the way to her house, Appellant stopped his truck in a parking lot. He instructed T.B. to pull down her pants and he pulled down his pants. He told her to touch his penis. Next, as T.B. testified at trial, "…he started doing it."

Appellant abused T.B. a second time in the same parking lot. During this encounter, Appellant again told T.B. to pull down her pants. Appellant penetrated T.B.'s vagina with his finger and penis, touched her breasts and instructed T.B. to touch his penis. Two additional incidents occurred when Appellant was alone with T.B. at her

house. During one encounter, Appellant asked T.B. "[d]o you want to do it?" and told her to pull down her pants. Appellant penetrated T.B.'s vagina with both his penis and his finger. During the second incident, Appellant told T.B. "[l]et's do it" and then proceeded to penetrate T.B.'s vagina with his penis, kiss T.B. on the lips and, touch T.B.'s vagina with his hands.

After trial, a jury convicted Appellant of four counts of second-degree statutory rape, three counts of second-degree sodomy, and three counts of misdemeanor second-degree child molestation, all relating to the acts committed by Appellant against T.B.[1] The trial court sentenced Appellant to serve concurrent prison terms of fifteen years for each of the statutory rape counts; one year jail terms for each count of the child molestation, to be served concurrently with the statutory rape sentences; and five-year terms on each second-degree sodomy count, to be served concurrently with each other but consecutively with the sentences for the statutory rape and child molestation counts. Appellant raises three points on appeal.

Discussion

I. Appellant's Conviction on Count 1 – Second-Degree Statutory Rape

In his first point on appeal, Appellant claims there was insufficient evidence to support conviction of one of the counts of statutory rape, the count related to the first incident in the parking lot between Appellant and T.B. Appellant avers the record is void of any direct or circumstantial evidence of penetration constituting sexual intercourse - an element of statutory rape - during this encounter. All evidence about this encounter came from T.B.'s testimony. Appellant claims that T.B.'s testimony directly contradicts the

[1] Appellant was originally charged with sexual abuse of another grandniece, R.C., but the jury acquitted him on those counts. R.C.'s testimony will be discussed only as it relates to the points on appeal.

proposition that penetration occurred. His claim is based on the following exchange between T.B. and the prosecutor:

> Q: And after he touched his mouth to your vagina, did he touch you with any other parts of his body?
>
> A: No.

A. Standard of Review

Review of a claim challenging the sufficiency of the evidence is limited to a determination of whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt. *State v. Grim*, 854 S.W.2d 413, 411 (Mo. banc 1993). We review the evidence in the light most favorable to the verdict, considering all favorable inferences and disregarding all evidence and inferences contrary to the verdict. *Id.*

In a criminal case, the state has the burden to prove every element of every count. *State v. Taylor*, 126 S.W.3d 2, 4 (Mo. App. E.D. 2003). When reviewing a conviction, the appellate court must determine whether there was sufficient evidence of *each* element. *State v. Smith*, 108 S.W.3d 714, 718 (Mo. App. W.D. 2003) (emphasis added). However, the appellate court does not act as a "super juror," but gives deference to the trier-of-fact. *State v. Bateman*, 318 S.W.3d 681, 687 (Mo. banc 2010). If the jury's conclusion is plausible in light of the entire record, this Court will not substitute its opinion even if convinced it would have weighed the evidence differently. *State v. Milliorn*, 794 S.W.2d 181, 184 (Mo. banc 1990).

B. Merits of Appeal

Jurors were required to find sufficient evidence of three elements in order to

convict Appellant of statutory rape. One, that Appellant had sexual intercourse with T.B. Two, that at the time, T.B. was less than seventeen years old. Three, that at the time, Appellant was twenty-one years old or older. Appellant does not contest the sufficiency of evidence relating to elements two and three, but only to element one.

"Sexual intercourse" is defined as "any penetration, however slight, of the female sex organ by the male sex organ, whether or not emission results." RSMo § 566.010(4) (2000). The state presented sufficient evidence which, taken with reasonable inferences therefrom, enabled a reasonable juror to conclude that Appellant had sexual intercourse with T.B. during that encounter. Sexual intercourse may be proven by the uncorroborated testimony of the victim. *State v. Hill*, 808 S.W.2d 882, 890 (Mo. App. E.D. 1991). Slight proof of penetration is sufficient. *Id.* During her testimony, regarding this encounter, T.B was asked what happened after she touched Appellant's penis. She responded: "Then that's when he started doing it then. He had --, that's when he started doing like kissing me and stuff…" There are no magical words to describe penetration. *State v. Elmore*, 723 S.W.2d 418, 420 (Mo. App. W.D. 1986). A review of T.B.'s entire testimony supports the inference that when she testified to "doing it," she was referring to sexual intercourse. At least two other times during her testimony, T.B. used the phrase "doing it" to refer to vaginal intercourse. T.B.'s reference to "doing it" was sufficient to support the jury's conclusion that she and Appellant engaged in sexual intercourse. Point Denied.

II. Clerical Error in Trial Court's Written Judgment

In his second point on appeal, Appellant claims that the trial court's written judgment does not conform to its oral pronouncement and results in an extra year to his

sentence.

A. Standard of Review

Appellant did not properly preserve his second point as he failed to object at sentencing or raise the issue in his motion for a new trial. As such, reversal is appropriate only if there was plain error by the trial court. *State v. Tabor*, 193 S.W.3d 873, 878 (Mo. App. S.D. 2006). Plain error occurs when the trial court's action results in manifest injustice or a miscarriage of justice. Supreme Court Rule 30.20.

B. Merits of Appeal

At the sentencing proceedings on 29 October 2009, the court ordered Appellant to serve his sentence in the following manner: "Counts One, Three, Four, Six, Seven, Eight and Ten will run concurrent with each other.[2] Counts Two, Five and Nine will run concurrent with each other but will run consecutive to the other counts.[3]" The court clarified "So, he's got five on top of fifteen." The transcript establishes that Appellant was sentenced to serve a total of twenty years. The court's written judgment conforms with the oral sentence in all respects but one; the written judgment states that Count Ten shall be served *consecutive* with Counts One, Three, Four, Six, Seven, Eight and Ten. This would result in Appellant being sentenced to serve a total of twenty-one years.

Oral sentences control over inconsistent writings because the judgment derives its force from the judicial act of rendition, not the ministerial act of its entry upon the record. *State v. McGee*, 284 S.W.3d 690, 712 (Mo. App. E.D. 2008). The State concedes that the written order is a mistake which should be corrected by this Court. Failure to correct this

[2] Counts One, Four, Six and Eight were the second degree statutory rape charges for which Appellant was sentenced to fifteen years. Counts Three, Seven and Ten were the second degree child molestation charges for which Appellant was sentenced to one year.

[3] Counts Two, Five and Nine were the second degree sodomy charges for which Appellant was sentenced to five years.

mistake would result in manifest injustice.

Supreme Court Rule 29.12(c) authorizes the court to correct clerical errors in entering the rendered judgment with a nunc pro tunc order if such error is clear from the record. *Moore v. State*, 318 S.W.3d 726, 737 (Mo. App. E.D. 2010). Failure to accurately record the trial court's judgment as announced in open court is a clerical error. *State v. Johnson*, 220 S.W.3d 377, 384 (Mo. App. E.D. 2007). The court's error in memorializing its judgment is clear from the record as discussed above. We remand this case with an order to the trial court to enter a corrected judgment and sentence in the underlying criminal case that conforms to the sentence declared in open court.

III. Admission of Evidence of Uncharged Crimes

In his final point, Appellant claims the trial court abused its discretion by allowing in evidence that Appellant had committed uncharged sex crimes against T.B. and R.C. in St. Louis County and that Appellant gave R.C. marijuana.

A. Standard of Review

The standard of review for the admission of evidence is abuse of discretion. *State v. Reed*, 282 S.W.3d 835, 837 (Mo. banc 2009). Judicial discretion is abused when the trail court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *State v. Stephens*, 88 S.W.3d 876, 881 (Mo. App. W.D. 2002).

B. Merits of Appeal

Generally, evidence of crimes separate and distinct from the ones for which defendant is standing trial is inadmissible. *State v. Mallett*, 732 S.W.2d 527, 534 (Mo. banc 1987). However, there are several exceptions under which otherwise inadmissible

evidence may be admitted. One exception to the general rule exists for evidence of prior sexual misconduct by defendant towards the victim. *State v. Thurman*, 272 S.W.3d 489, 495 (Mo. App. E.D. 2008). This evidence may be admitted as it tends to establish motive – the defendant's sexual desire for the victim. *Id.* Therefore, evidence of uncharged abuse against T.B. was properly admitted.

Another exception exists for evidence of sexual misconduct by the defendant of a child other than the victim. *State v. Bernard*, 849 S.W.2d 10, 17 (Mo. banc 1993). For such evidence to be admissible, the evidence of the other sexual misconduct must be nearly identical to the charged crime and so unusual and distinctive as to be a signature of the defendant's modus operandi. *Id.* The similarities between the testimony given separately by R.C. and T.B. about sexual abuse by Appellant satisfy this requirement. R.C. and T.B. were of a similar age when the abuse occurred, fifteen and fourteen years old respectively. Both victims were female. Both stood in the same relationship to the Appellant. Appellant gave both the same "compliment," that they were getting "thick." Both described the same method of abuse, in that Appellant would tell each to take off her pants and then initiate contact between either his mouth, finger, or penis and the victims' vagina. Both testified that Appellant gave them "gifts," money or pot, in an attempt to buy their silence about the abuse. The trial court did not abuse its discretion by admitting this evidence.

Appellant further argues that evidence that he gave R.C. marijuana was inadmissible as evidence of an uncharged crime. Evidence of uncharged crimes may also be admissible when its purpose is provide the trier-of-fact with a more complete and coherent picture of the events that transpired. *State v. Harris*, 870 S.W.2d 798, 810 (Mo.

banc 1994). Appellant gave R.C. marijuana in an attempt to persuade her not to disclose the abuse. The State used this evidence to explain why T.B. and R.C. did not immediately expose the sexual misconduct of Appellant, not to show that he had a general propensity to commit crimes. Thus, the evidence was probative in that it provided a clearer picture of the crimes and helped explain the delay of R.C. and T.C. in reporting the sexual misconduct to the authorities. As such, it was admissible. Point denied.

Conclusion

The judgment of the trial court is affirmed in all respects except its entry of written judgment. The case is remanded with directions to correct the clerical mistake in the written judgment and sentence form to conform to the court's oral pronouncement of judgment and sentence.

_____

Kenneth M. Romines, J.

Roy L. Richter, C.J., and Gary G. Wallace, Sp., J., concur.