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JURISDICTIONAL AND FACT STATEMENTS

Appellant, James Randall Baker, adopts the Jurisdictional Statement and the Statement of Facts in his original brief.

POINTS RELIED ON

I. Sexually Transmitted Disease Was Relevant

Mr. Baker's claim that the trial court abused its discretion in sustaining the state's objection to defense counsel's cross-examination of Dr. Redfern about H.B.'s physical examination showing a sexually transmitted disease is preserved for review, because counsel made a specific offer and demonstrated the relevance of the evidence. Evidence of the sexually transmitted disease was relevant to prove an alternative source for the injuries to H.B.'s vagina and was evidence of the immediate surrounding circumstances of the alleged crime. The evidence was key to jurors' assessment of H.B.'s credibility and her allegations against Baker.

State v. Douglas, 797 S.W.2d 532 (Mo. App. W.D. 1990); and

State v. Gibson, 636 S.W.2d 956 (Mo. banc 1982).

II. Improper Closing Argument

The prosecutor objected to evidence of a sexually transmitted disease showing an alternative source for the complainant's injuries. The prosecutor also requested the complainant's videotaped statement be edited to exclude her false denials of prior sexual activity. Having successfully excluded any evidence of a sexually transmitted disease and the complainant's lies about her sexual activity, the prosecutor then argued, that "if H.B. was lying, he was dying," even though he knew she had lied and had successfully kept these lies from the jury. He told the jurors they had heard no evidence of alternative sources for her injuries when the State had successfully excluded such evidence.

Allowing Baker's conviction to stand in the face of this prosecutorial misconduct would amount to a miscarriage of justice, especially since H.B.'s credibility was called into issue and the jury found Baker not guilty on the child molestation allegations, where no physical evidence corroborated her allegation.

Lebbing v. State, 242 S.W.3d 761 (Mo. App. S.D. 2008);

State v. Hammonds, 651 S.W.2d 537 (Mo. App. E.D. 1983);

State v. Luleff, 729 S.W.2d 530 (Mo. App. E.D. 1987); and

State v. Weiss, 24 S.W.3d 198 (Mo. App. W.D. 2000).

ARGUMENT

I. Sexually Transmitted Disease Was Relevant

Mr. Baker's claim that the trial court abused its discretion in sustaining the state's objection to defense counsel's cross-examination of Dr. Redfern about H.B.'s physical examination showing a sexually transmitted disease is preserved for review, because counsel made a specific offer and demonstrated the relevance of the evidence. Evidence of the sexually transmitted disease was relevant to prove an alternative source for the injuries to H.B.'s vagina and was evidence of the immediate surrounding circumstances of the alleged crime. The evidence was key to jurors' assessment of H.B.'s credibility and her allegations against Baker.

At issue, is whether the trial court erred in sustaining the State's objection to defense counsel's cross-examination of Dr. Redfern about his examination of H.B. and his physical findings. Specifically, counsel wanted to question the doctor about H.B.'s sexually transmitted disease (Tr. 496).

Claim is Preserved for Review

The State argues that defense counsel's offer of proof regarding the proposed questioning was inadequate (Resp. Br. at 18). According to the State, counsel's narrative offer was inadequate. (Resp. Br. at 18-19). The State's argument should be rejected.

The purpose of an offer of proof is to insure the trial court and opposing counsel understand what evidence is being offered and its relevance to the case.

Stipp v. Tsutomi Karasawa, 318 S.W.2d 172, 175 (Mo. 1958); *State v. Comte*, 141 S.W.3d 89, 93-94 (Mo. App. S.D. 2004). An offer also provides the appellate court with a record with which to determine whether the exclusion was erroneous and whether it created prejudice to the appellant. *State v. Bowlin*, 850 S.W.2d 116, 118 (Mo. App. S.D. 1993). If an offer makes clear to both the court and counsel exactly what the proponent proposes to adduce, the appellate court should review the claim on the merits. *Stipp, supra* at 175.

The preferred method of making an offer of proof is to question the witness on the stand out of the jury's hearing. *Comte, supra* at 93-94. But, counsel's narrative is permissible if it is definite, specific and not conclusory. *Id.* Such an offer must have sufficient facts to establish the admissibility of the evidence in question. *Id.* An adequate offer of proof should demonstrate relevance, be specific and definite. *State v. Gibson*, 636 S.W.2d 956, 958-59 (Mo. banc 1982). Further, if the State does not object at trial to an inadequate offer of proof, it should not be heard to complain on appeal. *State v. Boyd*, 143 S.W.3d 36, 45-46 (Mo. App. W.D. 2004).

Here, the State made no objection to defense counsel's offer of proof at trial. Both the trial court and the prosecutor knew exactly what defense counsel proposed, to cross-examine Dr. Redfern about his findings, specifically his findings of a sexually transmitted disease. The presence of a sexually transmitted disease first came up during Kim Chapman's testimony (Tr. 465). Chapman, a nurse practitioner, performed H.B.'s SAFE examination (Tr. 429-33). During

Chapman's testimony, defense counsel argued that since the State elicited findings of subepithelial hemorrhages in the vagina, the State had opened the door to other physical findings (Tr. 463-64). According to Baker's counsel, Dr. Redfern only reviewed the case "because of the transection of the hymen and the presence of an STD." (Tr. 464). The State improperly left the impression that the subepithelial hemorrhages were the only significant finding (Tr. 464). Instead, the transection of the hymen and the presence of a sexually transmitted disease were the significant findings (Tr. 464). When the State argued that H.B.'s prior sexual activity was inadmissible, defense counsel stated:

Judge, Dr. Redfern said he only reviewed it because of the positive findings for the transection and the presence of an STD. The subepithelial hemorrhages were so insignificant that if that's all they had found, he would not have reviewed it. They have given the impression to the jury that they're so significant, there's positive findings, but they only allowed her to talk about one. One that was consistent with their story. They don't want to go into what was inconsistent with their story. And that's - - they put these pictures in evidence.

(Tr. 465-66). Counsel referenced the medical report and told the trial judge he could look at it (Tr. 466). Defense counsel told the court that Dr. Redfern testified in his deposition as follows:

The only positive findings I found were the transection of the hymen and the presence of an STD. If it had just been the subepithelial hemorrhages, I wouldn't have done that, because it's not diagnostic of sexual abuse. Those are his words exactly.

(Tr. 467). The trial court suggested that counsel question Dr. Redfern, not Chapman, about those findings (Tr. 467).

Then, when Dr. Redfern testified, counsel attempted to cross-examine him about his findings, as follows:

Q. And these subepithelial hemorrhages are not the significant findings you found; is that correct?

A. They were - - there- - there are those findings, and there are also findings that suggested prior vaginal penetration.

Q. Okay. And what were those findings?

MR. TYRRELL: I'm going to object, Your Honor, again this - - I think this is a violation of a prior ruling. We ask that you sustain the objection and withhold this testimony.

(Tr. 493-94). Counsel approached the bench, and again argued that the State had opened the door by putting the pictures of H.B.'s vagina into evidence (Tr. 494). The State specifically objected to any mention of an STD (Tr. 496). Defense counsel countered that evidence of HPV (human papilloma virus), was relevant and it could not have shown up that quickly from Mr. Baker (Tr. 496). The court sustained the objection to the sexually transmitted disease (Tr. 496).

Surely, given this extensive record, the parties and the court (first, the trial court and now, this Court) know exactly what counsel proposed – to question Dr. Redfern about his findings of a sexually transmitted disease, one of the physical findings which indicated another source for H.B.’s injuries. This evidence was relevant, because the State adduced evidence of subepithelial hemorrhages in the vagina, suggesting they were caused by penetration by Baker. This opened the door to Dr. Redfern’s other findings which suggested that another person could have caused these hemorrhages. As defense counsel argued at trial, it was unfair to allow only the findings consistent with the State’s theory that corroborated H.B.’s allegations, but to disallow those findings that contradicted the theory and showed she was untruthful.

Defense counsel’s offer was sufficient and was almost identical to the offer made in *State v. Douglas*, 797 S.W.2d 532, 534 (Mo. App. W.D. 1990). There, defense counsel asked the Court’s permission to cross-examine a witness with respect to other sexual activity during the time intervening between defendant’s alleged intercourse and in the summer of 1987 and Dr. Esquivel’s examination on May 9, 1988. *Id.* In making a proffer, defense counsel quoted from Dr. Esquivel’s report. *Id.* Defense counsel did not question the witness outside of the jury’s presence. *Id.* The reviewing court reviewed the proposed cross-examination and found reversible error. *Id.* at 534-36. The court ruled: “[t]o allow the State to show that Tracy’s hymen was absent, with the clear and calculated implication that its absence was caused by intercourse with the

defendant, then to forbid defendant to show that Tracy had had intercourse with another, was violative of defendant's right to a fair trial." *Id.* at 535-36.

Here, too, the State presented selective findings with the clear and calculated implication that the hemorrhages were caused by intercourse with Baker. Had defense counsel been able to show the other findings indicating H.B.'s intercourse with another, the jury would have been able to assess the relevant evidence and determine whether H.B. was truthful when she made the allegations against Baker. This was critical to Baker's right to confront witnesses and to a fair trial.

Proffered Evidence of a Sexually Transmitted Disease

The State argues that the record does not support the presence of a sexually transmitted disease (Resp. Br. at 21). The record shows otherwise. As noted, defense counsel repeatedly informed the trial court that Dr. Redfern reviewed the case, "because of the transection of the hymen and *the presence of an STD.*" (Tr. 464) (emphasis added). Counsel repeated: "Dr. Redfern said he only reviewed it because of the positive findings for the transection and *the presence of an STD.*" (Tr. 465) (emphasis added). The record specified Dr. Redfern's deposition in which he testified:

The only positive findings I found were the transection of the hymen
and *the presence of an STD.*

(Tr. 467). Counsel quoted from the doctor's deposition, saying "[t]hose are his words exactly (Tr. 467). Later, counsel again referenced the "positive findings"

from the SAFE examination: “posterior hymen transection and the *evidence of what looked like to be an STD.*” (Tr. 495). The prosecutor recognized that counsel wanted to introduce evidence of the sexually transmitted disease, stating, “I’m also going to object to any mention of an STD.” (Tr. 496). Defense counsel explained that the physical findings were consistent with HPV (human papilloma virus) and this sexually transmitted disease was inconsistent with the time frame of the allegations against Baker (Tr. 496).

Despite this record, the State argues that since Dr. Redfern wanted to give a HPV test (Tr. 496), the record does not establish any evidence that H.B. contracted a sexually transmitted disease (Resp. Br. at 21-22). The State’s argument is contrary to the record. Defense counsel, the State’s prosecutor and the trial judge all recognized that Dr. Redfern had found a sexually transmitted disease. The only issue was whether the State had opened the door to this evidence by eliciting other physical findings to show H.B.’s sexual activity and by introducing pictures of her injuries.

Relevance

The State suggests that evidence of a sexually transmitted disease did not prove that H.B. had engaged in prior sexual intercourse and might have contracted the disease without engaging in intercourse (Resp. Br. at 23, n. 3). But, as the name suggests, a sexually transmitted disease is transmitted during a sexual encounter. At trial the State did not argue that the sexually transmitted disease was irrelevant because it likely did not come from sexual contact. The State

argued the opposite, that the sexually transmitted disease proved H.B. had engaged in prior sexual intercourse and should be excluded under the rape shield statute.

Alternative Source of Injury

The State suggests that the proffered evidence of a sexually transmitted disease would not provide an alternative source of injury (Resp. Br. at 25-26). The State argues that Baker had to show “specific instances” of prior sexual activity to suggest an alternative source of the injuries. Had H.B. admitted her sexually activity, perhaps the defense could have shown a specific source for her injuries. But, that did not make the sexually transmitted disease less relevant. It still showed an alternative source for the injuries, but it did not identify the person who transmitted the disease. That H.B. had sexual contact at or near the time of the injuries was the critical issue, not the identity of the person with whom she had sexual contact.

Immediate Surrounding Circumstances

The State argues that the physical findings from H.B.’s safe examination are not part of the immediate surrounding circumstances in the case (Resp. Br. at 27-28). Instead, the State can selectively adduce those findings that support a complainant’s allegations against the accused, but the defense cannot counter with the other physical findings from that very examination that refute her allegations. *State v. Douglas*, 797 S.W.2d at 535, held otherwise, ruling that when the State introduces the results of a physical examination as proof of the sexual allegation, the defense is entitled to introduce evidence of other sexual activity to explain the

physical findings. *See also State v. Samuels*, 88 S.W. 3d 71, 78 (Mo. App. W.D. 2002) (where the State presented medical evidence to support its allegation, the defense was entitled to show another source caused the injuries to the vagina).

Contrary to the State's argument (Resp. Br. at 27-28), this Court's opinion in *State v. Gibson*, 636 S.W.2d 956 (Mo. banc 1982) supports the admission of the physical findings of the SAFE examination. In *Gibson*, the evidence at issue was complainant's sexual relations with her boyfriend within two or three hours of the alleged rape. *Id.* at 957. This evidence "was relevant to motive: motive to have sex, motive to lie, and motive to go to a hospital (fear of pregnancy)."

Here, too, the sexual activity was relevant. The complainant had engaged in sexual activity and feared pregnancy. She tried to obtain a morning-after pill. She delayed reporting her sexual activity, so no evidence could conclusively establish the identity of the perpetrator. And, she lied to her care givers, saying she never had sexual relations before the alleged incident with Baker.

That H.B. had a sexually transmitted disease was "evidence of the immediate surrounding circumstances." If she made false allegations against Baker to cover up her sexual activity with another, the jury should have heard this evidence. As in *Gibson*, the evidence from Dr. Redfern, a physician, "was the single shred of evidence available to appellant that came from a third party, one who had no reason to lie." *Id.* at 959. Relevance is the touchstone of due process. *Id.* at 958. This Court has recognized the "special urgency of this proposition where the evidence in question might tend to prove innocence." *Id.*

Here, the State wanted the jury to consider the injuries found during the SAFE examination as proof that her allegations against Baker were true. But, the State wanted to hide from the jury any findings that cut the other way and showed H.B. had prior sexual activity with someone other than Baker. That these findings were made in the very examination first proffered by the State during its direct examination of Nurse Chapman and Dr. Redfern show that the sexually transmitted disease was part of the surrounding circumstances. The disease proved that H.B. had sexual intercourse with another and that could account for the condition of her vagina. The State chose to present the physical examination. It is not free to pick and choose only the findings helpful to prove guilt and exclude those which establish Baker's innocence.

H.B.'s Credibility

The State suggests that the sexually transmitted disease was not relevant to prove that H.B.'s accusations against Baker were false and she had lied (Resp. Br. at 28-33). Baker recognizes that often, an alleged rape victim's prior sexual activity and her lies about that activity are not relevant to the charged offense. But, here the sexually transmitted disease did not simply show prior sexual activity and H.B.'s effort to hide it. The disease showed an alternative source of her injuries and why she feared she might be pregnant.

"Rape cases generally turn upon whom a jury believes." *Gibson*, 636 S.W.2d at 959. Jurors rejected H.B.'s allegations that Baker had fondled her in the pool, showing they had questions regarding her truthfulness. But, the State

kept physical evidence from the jury and then assured them that the physical findings of her examination proved she was truthful. The prosecutor vouched for the complainant, saying, “if she’s lying, I’m dying” (Tr. 598). He convinced the jurors that hemorrhages could not “magically appear” (Tr. 598). Had the jurors known all the facts, they could have accurately assessed H.B.’s credibility and her allegations against Baker.

This Court should reverse and remand for a new trial.

II. Improper Closing Argument

The prosecutor objected to evidence of a sexually transmitted disease showing an alternative source for the complainant's injuries. The prosecutor also requested the complainant's videotaped statement be edited to exclude her false denials of prior sexual activity. Having successfully excluded any evidence of a sexually transmitted disease and the complainant's lies about her sexual activity, the prosecutor then argued, that "if H.B. was lying, he was dying," even though he knew she had lied and had successfully kept these lies from the jury. He told the jurors they had heard no evidence of alternative sources for her injuries when the State had successfully excluded such evidence.

Allowing Baker's conviction to stand in the face of this prosecutorial misconduct would amount to a miscarriage of justice, especially since H.B.'s credibility was called into issue and the jury found Baker not guilty on the child molestation allegations, where no physical evidence corroborated her allegation.

The State argues that the State's closing argument was proper, because there was no evidence that H.B. had a sexually transmitted disease and even if she did it was irrelevant to any material issue (Resp. Br. at 34). As discussed in Point I, defense counsel detailed Dr. Redfern's findings of a sexually transmitted disease (Tr.464, 465, 466, 467, 496). Counsel offered for the judge to review the medical report itself, showing the disease (Tr. 466). Counsel referenced Dr. Redfern's

deposition and his finding of the presence of a sexually transmitted disease (Tr. 467). This Court should reject the State's argument that there was no evidence that H.B. had a sexually transmitted disease. The State's claim is refuted by the record.

The State also suggests that the prosecutor's closing argument was proper, relying on *Lebbing v. State*, 242 S.W.3d 761 (Mo. App. S.D. 2008) (Resp. Br. at 40-41). *Lebbing* involved a claim of counsel's ineffectiveness for failing to object to the prosecutor's closing argument. *Id.* at 767. The State had successfully objected to evidence that the victim had injected a lipstick cap into her vagina. *Id.* at 767-68. Expert testimony indicated the cap caused no significant injury and could not have accounted for the victim's vaginal injuries. *Id.* Thus, the evidence was not relevant. *Id.* at 768. The prosecutor properly argued "was there any evidence ever presented that there was someone else in the picture that did this? No." *Id.* Defense counsel did not object to this argument, because he did not have any evidence to point to any individual who could have caused the victim's injuries. *Id.* at 769.

By contrast, here, the prosecutor kept out evidence of H.B.'s sexually transmitted disease, evidence that certainly suggested another person placed his penis in her vagina and could have caused the subepithelial hemorrhages shown to the jury. The prosecutor also successfully objected to portions of H.B.'s videotaped statement. He edited the videotape to remove her untruthful assertion

that she had not engaged in sexual activity before the alleged incident. Having kept this evidence from the jury, the State then argued:

Yes, Dr. Redfern told us and Kim Chapman told us there are other sources for hemorrhages. *Did we hear anything about other sources? No, we did not.* The only – only source we heard about was that man’s penis and that little girl’s vagina. That’s what we heard about, how he attempted to put it in there, that prior to doing that, he was fondling her and touching her vagina with his hand for his own sexual arousal. That’s what we heard about. *We didn’t hear about anything else.*

(Tr. 597) (emphasis added). Perhaps more egregious was the prosecutor’s vouching for the complainant when he knew that she lied in a videotaped statement and the prosecutor had successfully edited out the portion relating to her prior sexual activity.

Folks, if she’s lying, I’m dying. She’s not lying, folks. You can’t make hemorrhages there. They’re there. They were there that day on the 16th, two days after she was - - two days after this happened. She was examined two days later. They can’t be, poof, magically appear. They were there because that man’s penis put them there. (Tr. 598).

The prosecutor knew that H.B. had lied about not having had sexual intercourse and that the jury did not know about H.B.’s lies because he successfully argued for

the exclusion of the evidence of her sexually transmitted disease. Defense counsel tried to present an alternative source for her injuries, but that evidence was excluded only because of the State's objections. The prosecutor should not have been allowed to argue that such evidence did not exist.

Appellate courts have consistently condemned prosecutors who successfully object to evidence and then refer to the lack of that evidence in argument. *State v. Hammonds*, 651 S.W.2d 537 (Mo. App. E.D. 1983); *State v. Luleff*, 729 S.W.2d 530 (Mo. App. E.D. 1987); and *State v. Weiss*, 24 S.W.3d 198 (Mo. App. W.D. 2000). A prosecutor should not "intentionally misrepresent the facts." *Id.* at 203. Here, the prosecutor could have fairly argued the evidence admitted at trial. But, he could not fairly reference the failure to present evidence that he knew existed, but he had excluded. He could not fairly vouch for the witness' credibility when he knew she made false statements and he had successfully edited them out of a videotape.

"The ethical norm that the state attorney's role is to see that justice is done" and "not necessarily to obtain or to sustain a conviction" applies here. *State v. Terry*, ___ S.W.3d ___, 2010 WL 454862, n. 5 (Mo banc 2010), citing *Rule 4-3.8* and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Mr. Baker asks this Court to condemn this unfair argument and remand for a new trial.

CONCLUSION

Based on the foregoing arguments, Mr. Baker respectfully requests a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Melinda K. Pendergraph, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06(b).

The brief was completed using Microsoft Word, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 4,118 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using McAfee VirusScan, updated in March, 2010. According to that program, these disks are virus-free.

On the 3rd day of March, 2010, two true and correct copies of the foregoing brief and a floppy disk containing a copy thereof were hand-delivered to the Office of the Attorney General, Criminal Appeals Division, 221 W. High Street, Jefferson City, MO 65102.

Melinda K. Pendergraph