No. SC90517

In the

Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

JAMES R. BAKER,

Appellant.

Appeal from the Webster County Circuit Court
Thirtieth Judicial Circuit
The Honorable Donald Cheever, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

James Randall Baker was found guilty of first-degree statutory rape following a jury trial in Webster County Circuit Court and was sentenced to a 15-year term of imprisonment. He now appeals.

Baker claims that the trial court erred in refusing to allow him to present evidence suggesting that, at some undetermined time in her life, 13-year-old Victim had contracted the human papilloma virus ("HPV") from an unidentified source. Baker also claims that the trial court erred in failing to *sua sponte* intervene when the prosecutor argued in summation that no evidence had been presented to explain the injuries to Victim's vagina other than evidence that Baker had engaged in sexual intercourse with her.

Baker's conviction was affirmed by the Court of Appeals, Southern District, in *State v. Baker*, No. SD29319 (Mo. App. S.D. Oct. 9, 2009). This Court sustained Baker's application for transfer on December 22, 2009. Therefore, jurisdiction lies in this Court. MO. CONST. art. V, § 10; Supreme Court Rule 83.04.

STATEMENT OF FACTS

Baker was charged as a prior felony offender in Webster County Circuit Court with one count of statutory rape in the first degree, § 566.032, RSMo 2000,[1] and one count of child molestation in the first degree, § 566.067 (L.F. 14). On May 1st-2nd, 2008, Baker was tried by a jury before the Honorable Donald Cheever (L.F. 12; Tr. 51).

Baker does not challenge the sufficiency of the evidence to support his conviction. Viewed in the light most favorable to the guilty verdict, the evidence showed:

On August 14th, 2006, 13-year-old Victim H.B. went swimming in the pool at the apartment complex where she lived (Tr. 193, 208-09, 284, 306). Victim's mother and sister were there, as were several other friends and neighbors, including Baker (Tr. 209). Baker was a friend of one of Victim's neighbors, Jeff Morris, and had visited Victim's apartment a few times to eat with the family (Tr. 205, 307). Victim's mother considered Baker a friend of hers, too (Tr. 311). At the pool, Baker and Morris were drinking and tossing a football around with Victim (Tr. 210, 236, 320, 546, 548). One by one, everyone left the pool area except Morris, Baker, and Victim (Tr. 211-12).

When just the three of them remained at the pool, Morris got out and sat on one end, while Baker sat with Victim on the other (Tr. 212-13, 217; St. Ex. F). Baker had Victim sit on his lap with her back to him and started rubbing her vagina with his fingers (Tr. 213-14,

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[1] All statutory references are to RSMo 2000 unless otherwise indicated.

237-38).[2] Then Morris left, leaving Baker alone with Victim (Tr. 215, 239, 547). Baker and Victim swam to the other side of the pool (Tr. 215, 239).

Baker kissed Victim and told her that she was beautiful (Tr. 215, 239). He pushed her swimsuit to the side, exposing her vagina (Tr. 215-16). Then he pulled the front of his shorts down and took out his penis (Tr. 216). Baker tried to put his penis into Victim's vagina while they were in the pool, but he was unsuccessful (Tr. 217). He told Victim that it was not working (Tr. 217). She repeated what he said, that "it wasn't working" (Tr. 217).

There were bathrooms in the pool house nearby (Tr. 195-203; St. Ex. G, H, I, J, K, L). Baker told Victim to go into the bathroom (Tr. 217, 312, 399). Victim told Baker that she did not want to, but Baker said, "Just go, it will be alright" (Tr. 217). Victim was scared, and she complied (Tr. 217, 399).

Baker followed Victim into the bathroom (Tr. 219). Victim and Baker removed their shorts, leaving them both naked from the waist down (Tr. 220-21, 242). Baker propped Victim against the sink and wrapped her legs around his waist (Tr. 221-22, 244). He kissed her, and Victim told him that he had "better not" get her pregnant (Tr. 221, 245). Baker inserted his penis into Victim's vagina and had intercourse with her (Tr. 222-23, 245). Victim thought that it lasted for ten minutes (Tr. 223). While he was having sex with her, Baker asked Victim whether it hurt (Tr. 223). It did (Tr. 223).

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[2] Ultimately, the jury returned a not-guilty verdict with respect to the child molestation charge. The pertinent facts are recounted herein to the extent that they are also relevant to Baker's conviction for statutory rape.

When Baker was finished, he and Victim put their clothes back on (Tr. 224). He said, "We can't stay in here all day," and Victim left (Tr. 224). Baker came out afterward (Tr. 226). As Victim left the pool area, her mother's friend Tim Salkil pulled up in his car (Tr. 225, 283, 286-87). Victim asked Salkil if he would give her a ride home, and he said that he would (Tr. 287). As Victim climbed into Salkil's car, Baker walked by and said to Victim, "We will have to do it again sometime" (Tr. 227, 287, 295). Salkil recalled that the comment struck him as an odd thing for a 32-year-old man to say to a 13-year-old girl (Tr. 287, 295-96).

Later, Victim told her sister what had happened (Tr. 227, 362). Victim's mother found out and called the police (Tr. 228, 232, 312). Victim went to the hospital, where the triage nurse and a social worker spoke to her briefly (Tr. 229, 379-81, 397-400). Because of Victim's young age and because she said that she had showered since her sexual encounter with Baker, no rape kit was conducted (Tr. 383-85, 413). Victim also spoke with a worker from the Child Advocacy Center ("CAC") (Tr. 229-30, 504, 524).

On August 16th, following Victim's forensic interview, a CAC nurse performed a sexual assault forensic examination ("SAFE") on Victim (Tr. 434, 443). The nurse discovered subepithelial hemorrhaging, which is bleeding underneath the skin, during Victim's vaginal examination (Tr. 445-46, 483; St. Ex. B, C, D). The hemorrhaging indicated forceful trauma to the vagina within the previous eight days (Tr. 446, 458, 486). One possible source of trauma that could cause hemorrhaging like Victim's is sexual intercourse or attempted sexual intercourse (Tr. 455, 484-85). After consulting with a collaborating physician, the nurse concluded that the physical findings were consistent with

Victim's report that she had engaged in sexual intercourse two days prior to the exam (Tr. 462, 492-93).

After hearing all the evidence, the jury found Baker guilty of first-degree statutory rape (Tr. 604; L.F. 90). The jury returned a not guilty verdict on the charge of child molestation (Tr. 604, L.F. 91). Baker was sentenced by the court to a 15-year prison term (Tr. 621; L.F. 95-96).

ARGUMENT

I. (evidence of HPV)

The trial court did not err in prohibiting Baker from introducing evidence that Victim was infected with HPV. Even if the record supported Baker's assertion that Victim had HPV, which it does not, Baker's attempt to use the purported infection to insinuate that Victim was not a virgin when Baker raped her was irrelevant and barred by the rape-shield statute.

Baker argues that the trial court erred when it forbade him from eliciting testimony that Victim was infected with HPV prior to her sexual encounter with Baker. App.Sub.Br. at 17-26. He claims that evidence of Victim's disease proved that she had engaged in sexual intercourse "with someone other than Baker" and that the rape-shield statute did not bar the evidence because it pertained to the immediate surrounding circumstances of the charged offense and provided an alternative source for Victim's physical injuries. App.Sub.Br. at 19. Baker also argues that the HPV evidence could have been used to show that Victim lied when she told a forensic interviewer that she had not had sexual intercourse before having sex with Baker. App.Sub.Br. at 20, 24-26.

Baker misunderstands both the rape-shield statute and the evidence presented in this case. Assuming that there was evidence that Victim had been infected with HPV at some point in her past, an assumption that is not supported by the record, it would have been irrelevant. Evidence that Victim was infected with HPV would not, in any respect, have been inconsistent with Victim's allegations or with the evidence adduced by the State. The only conceivable purpose of introducing evidence that Victim had HPV would be to impugn

her character by suggesting that she was sexually promiscuous. The trial court's decision to exclude the purported HPV evidence was correct. Baker's point should be denied.

A. Additional Facts

Kim Chapman, the CAC nurse who conducted Victim's SAFE exam on August 16th, 2006, testified that the vaginal hemorrhaging that she found had an expected healing time of three to seven or eight days (Tr. 429, 440-43, 449, 458). Thus, the trauma that caused the injuries could have occurred anytime between August 8th and August 16th, 2006 (Tr. 458). Victim reported that Baker had sexual intercourse with her on August 14th, 2006, two days before the examination (Tr. 445). Because sexual intercourse was a possible cause of the type of injuries Victim exhibited, and because Victim alleged that she had engaged in sexual intercourse two days prior to the exam—within the healing window—Chapman concluded that the physical findings were consistent with Victim's allegations (Tr. 445-47, 455, 458). The State did not adduce any evidence regarding any injury to Victim aside from the subepithelial hemorrhaging about which Chapman testified (Tr. 429-68).

During the State's examination of Chapman, defense counsel objected that by introducing evidence of physical findings that were consistent with Victim's allegations, the State had opened the door to cross-examination regarding "all the findings on the hymen" (Tr. 463-64). Defense counsel claimed that the collaborating physician, Dr. Redfern, examined Victim's case because the findings showed a transection of the hymen and a sexually transmitted disease ("STD") (Tr. 464). Defense counsel argued that these additional findings were relevant because they were "not consistent with the timeframe given"—that is, the transection and the STD were inflicted before Victim's encounter with Baker (Tr. 465-

67). The court pointed out that the presence of old injuries "still doesn't mean that these findings were not within the time frame" (Tr. 466-67). Nevertheless, the court ruled that defense counsel would be allowed to ask Chapman whether she found anything "inconsistent with the time frame given" (Tr. 468).

Defense counsel did ask Chapman whether she found "any inconsistencies on the hymen that were inconsistent to the time frame given" (Tr. 469). Chapman said that she found a transection of the hymen in an area that would be consistent with sexual abuse (Tr. 470). Chapman said that the transection was "an old finding" that had healed (Tr. 471). Defense counsel concluded, "Therefore, it didn't happen in the time frame given, is that correct?" (Tr. 471). Chapman agreed (Tr. 471).

On redirect, the prosecutor asked Chapman whether the hymen was more likely to tear in a younger child (Tr. 474-75). Defense counsel interjected, and threatened that if the State elicited any evidence to try to explain why Victim had a transected hymen, the door would be "wide open" for Baker to pursue his theory that Victim was sexually active prior to her encounter with Baker (Tr. 475). The defense did not explain why such evidence would be relevant (Tr. 475). The State did not ask any further questions about the possible causes of the transection (Tr. 475-76).

Like Chapman, Dr. Redfern testified that the hemorrhaging exhibited by Victim indicated forceful trauma within eight days prior to the examination (Tr. 482-83, 486). He said that the hemorrhaging was consistent with Victim's allegations that she had engaged in sexual intercourse two days before (Tr. 486, 492-93). During the State's inquiry, Redfern did not mention anything about any older injuries or about any STDs (Tr. 477-93).

On cross-examination, defense counsel said, "And these subepithelial hemorrhages are not the significant findings you found; is that correct?" (Tr. 493). Redfern responded that in addition to the hemorrhaging, "there were findings that suggested prior vaginal penetration" (Tr. 493). Defense counsel asked what those findings were, and the State objected (Tr. 493-94). The following exchange occurred at the bench:

> [DEFENSE COUNSEL]: They've opened the door as to what was consistently found. Now I'm asking him what was inconsistent. It's only fair to the jury that (indiscernible). They've opened the door.
>
> THE COURT: Yeah, I think -- Yeah, I think –
>
> [PROSECUTOR]: Judge, we did not –
>
> THE COURT: -- you can ask him what inconsistent findings he – if he made any findings that were inconsistent.
>
> [DEFENSE COUNSEL]: They put those pictures into evidence; they've opened the door (indiscernible).
>
> [PROSECUTOR]: If I can respond just one time. We did not open the door, she did when she asked Kim Chapman that. We did not go into anything about the transection. She's the one who put it on, not us. The transections will give an inference of prior sexual conduct, which is a violation of the rape shield statute. This is—the jury instructions allow for an inference.
>
> THE COURT: She asked about consistent findings, and I'm going to allow it.
>
> [PROSECUTOR]: Consistent findings with the 14th; not anything else. That was it. We limited our questions to the 14th.

THE COURT: But you asked about findings consistent with the time frame.

[PROSECUTOR]: Of the 14th.

THE COURT: I going [*sic*] to allow her to ask about findings that were not consistent with—

[PROSECUTOR]: Show my objection, Your Honor.

THE COURT: All right.

. . .

THE COURT: And I'm not—just going to allow you to beat this to death.

[DEFENSE COUNSEL]: No, Your Honor. What—what we—they have given the impression that he reviewed this because of the significant positive findings. The consistent positive findings were the posterior hymen transection and the—and the evidence of what looked like to be an STD. He would not have reviewed it based on the subepithelial hemorrhages alone. And that's the impression that they've given the jury, that these were so significant that that's why he reviewed it.

THE COURT: All right.

[PROSECUTOR]: I'm going to object to any mention of an STD. He never said anything about that. He said—

[DEFENSE COUNSEL]: He said that there was (indiscernible), which is consistent with HPV, and they would like the girl to come back and get an HPV test. And he also testified that HPV would not be present with the time frame given, that it's only—

THE COURT: What's HPV?

[DEFENSE COUNSEL]: Human papilloma virus, genital warts. That it could not have shown up that frequently [*sic*] from my client.

THE COURT: I'm going to sustain the objection to that.

(Tr. 494-96).

When defense counsel resumed Redfern's cross-examination, Redfern testified that he had seen a transection of Victim's hymen that was "not consistent with the time frame of this allegation." (Tr. 497). Defense counsel offered, "So it lended [*sic*] no—no credibility to the—the time frame you were given?" (Tr. 498). Redfern repeated that "It was not consistent with the time frame of this allegation" (Tr. 498-99). On redirect, the prosecutor clarified that the doctor did not know how old the transection injury was (Tr. 501). With regard to the hemorrhaging that he observed, however, that injury was consistent with Victim's allegation that she had had sexual intercourse on August 14th (Tr. 502). Neither Redfern nor any other witness ever testified that Victim showed any signs that she was infected with HPV.

B. Standard of Review

Baker's claim is not preserved for review because he failed to make an adequate offer of proof during trial. "An offer of proof must show three things: (1) what the evidence will be; (2) the purpose and object of the evidence; and (3) each fact essential to establishing the admissibility of the evidence." *State v. Tisius*, 92 S.W.3d 751, 767 (Mo. banc 2002). The offer of proof is necessary to allow the trial court to "consider the testimony in context and to

make an informed ruling as to its admissibility." *State v. Sanchez*, 186 S.W.3d 260, 264 (Mo. banc 2006). "The offer should be specific and in sufficient detail to demonstrate [the evidence's] admissibility; mere conclusions of counsel will not suffice." *State v. Townsend*, 73 S.W.2d 191, 192 (Mo. banc 1987).

The preferred method of "presenting and preserving an offer of proof is to place the witness upon the stand and question him outside the presence of the jury." *Id*. In certain circumstances, however, Missouri courts have held that a narrative offer made by counsel may be sufficient to preserve an evidentiary claim. *See id*. A narrative offer of proof may be adequate "so long as the offer is definite, is specific, is not mere conclusions of counsel, and sets out sufficient facts to demonstrate the admissibility of the evidence." *State v. Comte*, 141 S.W.3d 89, 93 (Mo. App. S.D. 2004). "When a party fails to provide the offer in question and answer form, the risk is present that a reviewing court will find the offer insufficient." *Id*.; *see also Townsend*, 737 S.W.2d at 192 ("When counsel uses the narrative offer of proof he runs a greater risk that the court will find the offer insufficient.").

Here, defense counsel's narrative offer was inadequate to preserve his evidentiary claim because it failed to definitely and specifically identify what the proffered evidence would have been. In Baker's recitation of the facts, he claims that "Defense counsel proffered that Dr. Redfern could testify that they found HPV. . . ." App.Sub.Br. at 10 (citing Tr. 496). But Baker did not call Dr. Redfern to testify for an offer of proof. Instead, the only information in the record about Victim's purported infection came from statements by defense counsel (Tr. 463-68, 496). And counsel's representations about the expected testimony were inconsistent. At one point, counsel stated that Dr. Redfern reviewed the

SAFE exam because of "the presence of an STD" (Tr. 464). But later, counsel said that Dr. Redfern would testify that the SAFE exam revealed something "consistent with HPV," and that the doctor wanted Victim to return for a HPV test (Tr. 496). Thus, it is not clear from Baker's offer of proof whether Victim actually *had* HPV or whether she merely exhibited a symptom that *might have been* caused by HPV. And nothing in Baker's offer of proof suggested that Baker could show when or how Victim contracted HPV—facts essential to determining the relevance of the purported infection—if she had contracted the disease at all. Because no adequate offer of proof was made to permit this Court to evaluate the admissibility of the purported evidence, Appellant's claim was not preserved and may be reviewed, if at all, for plain error only. *See e.g. State v. Kinder*, 942 S.W.2d 313, 329 (Mo. banc 1996); Rule 30.20.

"The plain error rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review." *State v. Edwards*, 116 S.W.3d 511, 546 (Mo. banc 2003). The assertion of plain error places a much greater burden on a defendant than when he asserts prejudicial error. *State v. Hunn*, 821 S.W.2d 866, 869 (Mo. App. E.D. 1991). To justify plain error review, the defendant's claim "must facially establish substantial grounds for believing that manifest injustice or a miscarriage of justice resulted from the error." *Edwards*, 116 S.W.3d at 547.

If this Court finds that Baker has properly preserved his claim, it should review for abuse of discretion. Trial courts are vested with broad discretion over the admissibility of evidence, and appellate courts will not interfere with a trial court's evidentiary rulings unless there has been a clear abuse of discretion. *State v. Winfield*, 5 S.W.3d 505, 515 (Mo. banc

1999). The trial court abuses its discretion when a 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. Brown*, 939 S.W.2d 882, 883 (Mo. banc 1997).

C. Analysis

Baker's claim that the trial court erred in refusing to allow him to adduce evidence that Victim was infected with HPV fails for the following reasons: 1) Baker's proffered evidence did not definitely state that Victim actually had HPV, 2) any evidence that Victim had contracted HPV prior to her encounter with Baker was irrelevant to the charged offense and was inadmissible under the rape-shield statute, and 3) evidence that Victim may have contracted HPV was not admissible to attack Victim's credibility. The trial court neither plainly erred nor abused its discretion in excluding the purported evidence.

1. Proffered evidence did not show that Victim had HPV

First, and most importantly, the fundamental premise of Baker's claim—that Victim had contracted HPV prior to her encounter with Baker—is without support in the record. Based on defense counsel's narrative offer of proof, it cannot be definitely determined that Dr. Redfern would have testified that Victim had HPV. At one point in the trial, counsel represented that Dr. Redfern reported that he reviewed Victim's physical exam information "because of the transection of the hymen and the presence of an STD" (Tr. 464). But later, counsel stated as follows: "[Redfern] said that there was (indiscernible), which is consistent with HPV, and they would like the girl to come back and get an HPV test" (Tr. 496).

From these narrative offers, it cannot be determined whether or not Dr. Redfern actually found that Victim had contracted HPV. Apparently, Dr. Redfern would have testified that he saw a symptom consistent with HPV and wanted more tests, but never diagnosed Victim with HPV because the tests were never done (Tr. 496). Obviously, testimony that Victim exhibited a symptom associated with HPV does not establish that Victim actually had HPV. Thus, Baker's unequivocal representations throughout his brief that Victim had contracted a sexually transmitted disease (App.Sub.Br. at 10, 13, 15, 17, 19-20, 23-29, 32) are unsupported by the record and are misleading. The trial court thus did not err in excluding evidence of Victim's "sexually transmitted disease" because, as the record indicates, the evidence did not establish that Victim was actually infected.

2. Relevance and rape shield

Assuming *arguendo* that Baker's evidence would have shown that Victim had actually contracted HPV prior to her sexual encounter with Baker, such evidence would have been irrelevant and barred by the rape-shield statute. "A trial court does not abuse its discretion when it excludes irrelevant evidence." *State v. Wilkins*, 229 S.W.3d 204, 209 (Mo. App. S.D. 2007) (quoting *State v. Ecford*, 198 S.W.3d 156, 159 (Mo. App. E.D. 2006). "Evidence is relevant when it tends to confirm or refute a fact in issue, establishes motive or intent, or corroborates other relevant evidence which bears on the principal issue." *Wilkins*, 229 S.W.3d at 209. "The probative value of evidence must also outweigh its prejudicial effect." *Id*.

Whether or not Victim had contracted HPV in the past was completely irrelevant to the principal issue at Baker's trial—whether Baker engaged in sexual intercourse with

Victim. Nothing about Victim's alleged disease refutes Victim's testimony that Baker had sex with her in the pool-house bathroom (Tr. 222-23, 245), nor does it undermine the physical evidence showing that, within the previous eight days, Victim had suffered vaginal trauma consistent with having sexual intercourse (Tr. 446, 455, 458, 484-86). If, prior to her injury, Victim had contracted HPV in some manner or another,[3] it shed no light on any disputed issue at trial.

Moreover, the purported HPV evidence was inadmissible pursuant to Missouri's rape-shield statute. Under the rape-shield statute, evidence of the victim's prior sexual conduct is presumptively irrelevant. *State v. Cowles*, 203 S.W.3d 303, 310 (Mo. App. S.D. 2006) (*citing State v. Smith*, 996 S.W.2d 518, 522 (Mo. App. W.D. 1999)). "The statute renders evidence of prior sexual conduct inadmissible unless it falls within one of four specific exceptions, and the trial court finds the conduct relevant to a material fact or issue." *State v. Kelley*, 83 S.W.3d 36, 39 (Mo. App. W.D. 2002). The statute reads, in pertinent part:

> [E]vidence of specific instances of the complaining witness' prior sexual conduct or the absence of such instances or conduct is inadmissible, except where such specific instances are:

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[3] Although Baker assumes that Victim's purported HPV infection proved that she had engaged in prior sexual intercourse (*See* App.Sub.Br. at 13, 15, 17, 19-20, 24-29, 32), nothing in the record supports this assumption. Without medical testimony in the record, it is unknown whether it is possible to contract HPV without engaging in sexual intercourse.

(1) Evidence of the sexual conduct of the complaining witness with the defendant to prove consent where consent is a defense to the alleged crime and the evidence is reasonably contemporaneous with the date of the alleged crime;

(2) Evidence of specific instances of sexual activity showing alternative source or origin of semen, pregnancy, or disease;

(3) Evidence of immediate surrounding circumstances of the alleged crime; or

(4) Evidence relating to the previous chastity of the complaining witness in cases where, by statute, previously chaste character is required to be proven by the prosecution.

§ 491.015. Under the rape-shield statute, any evidence relating to specific instances of the victim's prior sexual conduct that does not fall within one of these four exceptions is "necessarily" "of no material significance in the case and is not pertinent to the issues developed and, thus, is irrelevant and collateral." *Smith*, 996 S.W.2d at 522.

Baker contends that the purported HPV evidence was relevant and admissible because it fell within two of the enumerated exceptions to the rape-shield statute—that the evidence established an alternative source for Victim's injuries and that it was "part of the surrounding circumstances of the alleged offense." App.Sub.Br. at 19-25. Neither contention has merit.

a) <u>HPV evidence did not show alternative source of injury</u>

First, evidence that Victim was infected with HPV, as proffered by Baker, would not have shown an alternative source for Victim's injuries. At trial, the State introduced medical evidence showing that, at some point between August 8th and August 16th, 2006, Victim

suffered vaginal trauma resulting in subepithelial hemorrhaging (Tr. 429, 440-43, 449, 458). Baker argues that he "was entitled to show that [Victim] had sexual intercourse with another to establish an alternative source for these injuries." App.Sub.Br. at 23.

But Baker had no evidence showing that Victim engaged in sexual activity with anyone other than him between August 8th and August 16th—the span of time during which Victim's injuries were inflicted. Instead, Baker's proffered evidence showed only that Victim *might* have been infected with HPV. Such evidence was utterly irrelevant. Baker's proffered evidence did *not* establish that: (1) Victim was actually infected with HPV; (2) if she was, that she had contracted the disease through sexual intercourse; or (3) if she had, the intercourse had taken place between August 8th and August 16th.

To the contrary, the record suggests that any HPV infection would have been contracted well-before the date in question—in defense counsel's narrative offer of proof, she said that Redfern would have testified that "HPV would not be present with the time frame given." (Tr. 496). In other words, Victim could not have contracted HPV during the time frame that she suffered the subepithelial hemorrhaging that was presented in evidence by the State. Furthermore, Baker repeatedly emphasized evidence that Victim's hymen was transected (Tr. 470-71, 497-98). But the transection of the hymen was an "old injury" that had healed (Tr. 471). If, as Baker implied, the injury to Victim's hymen was a result of prior sexual activity and Victim contracted HPV at the same time, then the HPV infection was too remote in time to provide a possible alternative source for Victim's injuries.

Baker relies on *State v. Douglas*, 797 S.W.2d 532 (Mo. App. W.D. 1990), and *State v. Samuels*, 88 S.W.3d 71 (Mo. App. W.D. 2002), to support his contention that he should have

been permitted to establish an alternative source for Victim's physical injuries. Both *Douglas* and *Samuels* are distinguishable from Baker's case, however, because in each of the cited cases the defendants provided *specific instances* of prior sexual activity to suggest an alternative source of the injuries presented by the state. *See Douglas*, 797 S.W.2d at 534 (testimony that victim was sexually active with boyfriend provided alternative explanation for damage to victim's hymen); *Samuels*, 88 S.W.3d at 78-79 (testimony that victim's "Uncle Joe" (not the defendant) had raped her provided alternative explanation for victim's vaginal injuries).

Baker, unlike the defendants in *Douglas* and *Samuels*, has *no evidence* that Victim ever engaged in any specific sexual act with any specific person at any specific time. Instead, he could show only that Victim might have had HPV, and therefore she might have engaged in sexual intercourse at some point in the past (Tr. 496). Such speculation would have had no probative value and would only have distracted the jury and improperly implied that Victim was sexually promiscuous. The trial court did not plainly err in keeping the evidence out.

b) <u>HPV evidence did not relate to immediate surrounding circumstances</u>

Baker's argument that the purported HPV evidence was part of the "immediate surrounding circumstances" of the alleged offense fails for the same reason—there is no evidence that, even if Victim had HPV, she contracted it near the time that Baker had sex with her. Baker cites *State v. Gibson*, 636 S.W.2d 956 (Mo. banc 1982), where this Court held that the defendant should have been able to adduce evidence that the victim told a nurse

that she had engaged in sexual relations with her boyfriend just hours before the alleged rape. *Id*. at 958. In *Gibson*, the defendant testified that the victim had told him that she was having sexual problems with her boyfriend. *Id*. The Court found that the victim's statement was "evidence of immediate surrounding circumstances" and was "highly probative of the issue of consent and [the defendant's] mental state." *Id*. at 959.

The purported HPV evidence in Baker's case, on the other hand, was not evidence of "immediate surrounding circumstances" nor was it "highly probative" of any material issue. Any suggestion that the alleged HPV infection was in any sense part of the immediate surrounding circumstances is entirely speculative—there is nothing in the record that provides any hint as to when Victim contracted HPV, if ever. And, as argued above, the alleged HPV infection was not probative of any fact at issue. Neither Victim's testimony regarding her intercourse with Baker nor the physical evidence that Victim had suffered trauma to her vaginal area within eight days before August 16th, 2006, could be refuted by the insinuation that, at some point in her life, Victim contracted HPV. The trial court did not err in excluding this speculative, irrelevant evidence.

3. Impeachment

Baker also argues that the purported HPV evidence was admissible to "show that [Victim] lied" when she said that she was a virgin before she had sex with Baker. App.Sub.Br. at 17, 20, 24-26. This argument is incorrect both as a matter of fact and as a matter of law.

First, Baker assumes that Victim's statement to the CAC interviewer that she was a virgin before she had sexual intercourse with Baker was false. But Baker's assumption is

faulty. He claims that Victim's purported HPV infection proves that Victim was sexually active before August 2006, but nothing in the record supports Baker's claim. As noted above, Baker presented no evidence to suggest that the only way to contract HPV is through sexual intercourse. Thus, even if Victim *did* have HPV, it cannot be assumed that she was lying when she told the CAC interviewer that she was a virgin prior to having sexual intercourse with Baker.

Furthermore, the issue of Victim's sexual experience was not placed before the jury, so there was nothing for Baker to impeach with the HPV evidence. The jury did not see the entire CAC interview—the State played a redacted version (Tr. 524, 532). In the redacted version, Victim's references to sex with Baker being her "first time" and to losing her virginity were removed (St. Ex. E). Victim did not testify that she was a virgin prior to having sex with Baker—the issue never arose (Tr. 192-279). Thus, any evidence implying prior sexual experience by Victim could not be used to impeach an assertion that Victim was a virgin before Baker had sex with her because that assertion was never made to the jury.

Finally, Baker argues that he should have been permitted to show that Victim "lied" about her virginity as a means to attack her credibility. App.Sub.Br. at 25-26. But the rape-shield statute prevents defendants from trying to paint a victim as a liar simply by introducing evidence that the victim had lied in the past about her sexual experiences.

This Court rejected an argument similar to Baker's in *State v. Madsen*, 772 S.W.2d 656 (Mo. banc 1989). In *Madsen*, the victim in a forcible rape and sodomy prosecution originally reported to the police that she had not had sex with anyone but the defendant within 24 hours of the assault. *Id*. at 661. In her first deposition, the victim extended the

time to "48 hours." *Id*. The victim was deposed again, and she finally admitted that neither statement was true. *Id*. The trial court refused to permit defense counsel to cross-examine the victim on the inconsistencies. *Id*. This Court found no error, holding that the attempted impeachment would have been "inadmissible under the rape-shield statute." *Id*.

Similarly, in *State v. Smith*, the Western District Court of Appeals held that the rape-shield statute barred the defendant in a statutory-sodomy prosecution from attacking the victim's credibility using her inconsistent statements regarding her prior sexual conduct. 996 S.W.2d at 522. In *Smith*, the victim was asked at a deposition whether she had ever "allowed a boy to go up her shirt or down her pants." *Id*. at 520. At first, the victim said no. *Id*. Later in the deposition, however, she admitted that she lied in response to those questions. *Id*. At trial, defense counsel wanted to ask the victim whether she lied in her deposition, but said that he would not ask about the subject matter of the questions. *Id*. The trial court refused to allow the defense to do so. *Id*.

On appeal, the Court of Appeals found no error in so limiting the scope of cross-examination. *Id*. at 521-22. The Court noted that, as a general proposition, "the credibility of witnesses is always a relevant issue," but observed that "attacks on credibility in criminal proceedings are subject to limitations, and not every attack will be allowed." *Id*. at 521. The rape-shield statute, which bars the admissibility of evidence of a victim's prior sexual conduct unless it falls within a specific exception, sets forth one such limitation. *See id.* at 521-22. As the Court said, "[e]vidence regarding whether [the victim] had ever allowed a boy to go up her shirt or down her pants is evidence of specific instances of her prior sexual conduct which did not fall within the four exceptions of the rape-shield statute." *Id*. at 522.

"Thus. . . the evidence was irrelevant and inadmissible such that the trial court did not err and abuse its discretion in preventing the appellant from inquiring whether the victim lied in her deposition concerning these matters." *Id*.

Like the defendants in *Madsen* and *Smith*, Baker was properly forbidden, pursuant to the rape-shield statute, from attacking Victim's credibility by introducing evidence that Victim had told the CAC interviewer that she was a virgin before having sex with Baker, and then trying to impeach that statement with the purported HPV evidence. The purported HPV evidence was "irrelevant and inadmissible" and was properly excluded.

Baker relies on *State v. Gerhart*, 129 S.W.3d 893 (Mo. App. W.D. 2004), to support his argument that a victim's credibility may be attacked with evidence of prior false statements regarding her sexual history. App.Sub.Br. at 25. But Baker's reliance on *Gerhart* is misplaced. In *Gerhart*, the defendant was found guilty of first-degree statutory rape. 129 S.W.3d at 895. At trial, the State introduced evidence that the defendant had begun having sexual intercourse with the victim on a regular basis when the victim was eight years old. *Id*. at 896. The defendant sought to prove that the victim had falsely told a third-party that she had become pregnant by the defendant when she was 12 or 13. *Id*. The trial court excluded the proffered evidence as inadmissible pursuant to the rape-shield statute. *Id*. at 895.

But the Western District Court of Appeals held that the defendant should have been permitted to pursue this line of inquiry. *Id*. at 896-97. The Court noted that the defendant's proffered evidence would not have improperly introduced any evidence of prior sexual conduct because the State had already placed all that evidence before the jury. *Id*. at 897. Further, the Court found that the victim's allegedly untruthful statements about having been

impregnated by the defendant were "so intertwined with, and part of her account of the background and circumstances of her 'story'" that they permitted an inference regarding the credibility of her allegations against the same defendant. *Id*. at 897 n.4.

Baker's case is distinguishable in several critical respects. First, unlike the excluded evidence in *Gerhart*, which would not have implied any prior sexual experience that was not already in evidence, the purported HPV evidence was intended to suggest that Victim had engaged in sexual intercourse with at least one other, unidentified person on some prior occasion. Thus, while the rape-shield statute was not implicated by the proffered evidence in *Gerhart*, in Baker's case the statute squarely barred the admission of the purported HPV evidence.

Further, the evidence in *Gerhart* would have shown that the victim had allegedly made a false statement directly relating to her sexual activity with the defendant. *Id*. at 897. In Baker's case, on the other hand, the purported HPV evidence was unrelated to Victim's allegations against Baker. As the *Gerhart* court acknowledged, a defendant may not impeach a witness with a prior inconsistent statement if the impeachment concerns only "an immaterial or collateral matter." *Id*. at 897 n. 3. "A matter is considered to be collateral if the fact in dispute is of no material significance in the case or is not pertinent to the issues developed." *Id*. Here, whether the Victim had contracted HPV at some point was entirely insignificant. The trial court did not abuse its discretion, let alone plainly err, in excluding Baker's proffered evidence.

II. (closing argument)

The trial court did not plainly err in declining to *sua sponte* instruct the jury to disregard the prosecutor's remarks in closing argument emphasizing that the physical evidence supported Victim's allegations of abuse because the argument was proper in light of the existing evidence. Baker's accusation that the prosecutor improperly exploited the exclusion of the HPV evidence is groundless because (1) there was no evidence that Victim had HPV and (2) even if there was, that evidence was irrelevant to any material issue.

Baker's second point follows closely from his first, in that he complains that the exclusion of the purported HPV evidence worked to his detriment. As explained at length above, Baker insists that Victim had HPV and that her condition proves that she had been sexually active prior to her sexual encounter with Baker. In his second point, Baker argues that the prosecutor committed misconduct by successfully arguing that the HPV evidence should be excluded and then arguing in summation that no alternative sources for the hemorrhaging had been presented. App.Sub.Br. at 27-32. Because this point, like Baker's first point, depends on both the existence and relevance of evidence that Victim had contracted HPV at some point in her life, and because such evidence is both non-existent and irrelevant, Baker's point fails.

A. Additional Facts

During Baker's cross-examination of Dr. Redfern, defense counsel informed the trial court that something in Victim's physical examination was consistent with HPV and that the doctors wanted Victim to return for an HPV test (Tr. 496). She also suggested that Victim could not have contracted HPV from Appellant on August 14th because the infection would

not have been detectible just two days later when Victim was examined (Tr. 496). The State objected to any mention of HPV, and the court sustained the objection (Tr. 496).

In closing argument, the prosecutor argued that the evidence presented at trial supported the credibility of Victim's allegations (Tr. 576-82). He explained that the physical evidence of vaginal hemorrhages was consistent with Victim's allegations of sexual activity within a week of the examination (Tr. 583-84). He pointed out that while hemorrhages may have different potential causes, one cause is vaginal penetration (Tr. 583). The prosecutor reminded the jury that they had seen the photos of the hemorrhages, and said "those photos don't lie, folks. They're there. They tell you what it was, consistent with what [Victim's] telling us." (Tr. 584).

The defense argued that the physical findings were inconclusive (Tr. 589). Defense counsel stated that the finding that the doctors were concerned about was "the old transection of the hymen and prior injury, not something consistent with the timeframe she gave them. The only thing consistent are [*sic*] these bruises that they said came from many multiple sources" (Tr. 592).

In rebuttal, the prosecutor responded to defense counsel's argument as follows:

> Yes, Dr. Redfern 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 about 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).

B. Standard of Review

Baker admits that he did not object to the argument that he now characterizes as improper, nor did he include the issue in his motion for new trial. App.Sub.Br. at 30. Accordingly, the issue is not preserved and is reviewable for plain error only. Rule 30.20; *State v. Blackwell*, 978 S.W.2d 475, 478-79 (Mo. App. E.D. 1998) (review limited to plain error analysis where no objection was made and point not raised in motion for new trial). To prevail on a claim of plain error, Baker must demonstrate that a manifest injustice or miscarriage of justice will occur if the error is not corrected. *State v. Tokar*, 918 S.W.2d 753, 769-770 (Mo. banc 1996).

Statements made in closing argument rarely give rise to plain error. *State v. Clayton*, 995 S.W.2d 468, 478 (Mo. banc 1999). A defendant is entitled to relief only where he demonstrates that the improper remarks had a decisive effect on the verdict. *State v. McDaniel*, 254 S.W.3d 144, 148 (Mo. App. E.D. 2008). "Relief should rarely be granted on assertions of plain error as to closing argument because, in the absence of an objection and request for relief, the trial court's options are narrowed to uninvited interference with summation and a corresponding increase of error by such intervention." *State v. Silvey*, 894 S.W.2d 662, 670 (Mo. banc 1995) (citations omitted). Furthermore, claims of plain error as to closing argument are disfavored due to the risk of sandbagging—a defendant cannot "fail to request relief, gamble on the verdict, and then if adverse, request relief for the first time." *State v. McGee*, 848 S.W.2d 512, 514 (Mo. App. E.D. 1993). Trial strategy "looms as an important consideration" during closing argument, and assertions of plain error are

"generally denied without explanation." *State v. Kinder*, 942 S.W.2d 313, 329 (Mo. banc 1996).

C. Analysis

The prosecutor's closing argument, in which he reviewed the evidence and argued reasonable inferences therefrom, was proper and appropriate. The trial court did not plainly err in declining to interrupt *sua sponte*.

When determining the legitimacy of the prosecutor's comments in closing argument, the arguments must be viewed in light of the entire record. *State v. Taylor*, 298 S.W.3d 482, 510 (Mo. banc 2009) (quoting *State v. Johnson*, 284 S.W.3d 561, 573 (Mo. banc 2009)). The comments are not analyzed in isolation. *Id*. The State may "make reasonable inferences from the evidence and may argue the credibility of witnesses as long as the arguments are based upon the evidence presented at trial." *State v. Vanlue*, 216 S.W.3d 729, 734 (Mo. App. S.D. 2007) (citation omitted). When the challenged comments appear in the prosecutor's rebuttal closing argument, the court may consider whether the argument was "invited." *State v. Murphy*, 739 S.W.2d 565, 570 (Mo. App. E.D. 1987). A prosecutor may respond to an argument raised by the defense even if the prosecutor's comment, absent instigation by defense counsel, would have been improper. *Id*.; *Clayton*, 995 S.W.2d at 479.

In Baker's case, the prosecutor's comments regarding Victim's credibility were based upon the evidence presented at trial, particularly the physical evidence that Victim had experienced vaginal hemorrhaging caused by trauma within seven or eight days of her

examination (Tr. 583-84). It was defense counsel, not the prosecutor, who misrepresented the evidence when she said that "[t]he only thing consistent are [*sic*] these bruises that *they said came from many multiple sources*" (Tr. 592) (emphasis added). No witness ever said that Victim's bruising came from multiple sources. Instead, the evidence showed, and the prosecutor acknowledged, that many different things *could* cause bruising like Victim's (Tr. 455, 472, 484-86, 583). But because one potential cause was vaginal penetration, and Victim had reported sexual intercourse with Baker two days prior to her examination, the prosecutor argued that the hemorrhaging supported Victim's account (Tr. 458, 486, 583-84). To clear things up, the prosecutor pointed out in rebuttal that while there are other possible sources of hemorrhaging, the only source in evidence was Baker's sexual intercourse with Victim (Tr. 597).

Baker accuses the prosecutor of engaging in misconduct by arguing that there was no other source for Victim's injuries after preventing Baker "from showing that [Victim] had contracted a sexually transmitted disease from having sexual intercourse with someone other than Baker." App.Sub.Br. at 32. But Baker's proffered evidence did not show that (1) Victim had actually contracted a sexually transmitted disease, (2) the disease at issue (HPV) could be contracted only through sexual contact, or (3) even if Victim had contracted HPV through sexual intercourse with someone other than Appellant, it was sufficiently recent to have provided an alternative source of the injuries at issue in this case. *See* Point I, *supra*.

The Southern District Court of Appeals rejected a claim similar to Baker's in *Lebbing v. State*, 242 S.W.3d 761 (Mo. App. S.D. 2008). In *Lebbing*, the defendant alleged that

counsel was ineffective for failing to object during the State's closing argument. *Id*. at 767. The defendant was on trial for the rape and sodomy of his stepdaughter, and evidence was presented of physical injury to the victim's genitalia. *Id*. at 762-64. During the trial, the defense sought to introduce evidence that the victim had gotten a lipstick cap lodged in her vagina. *Id*. at 786. The defense hoped to use the lipstick-cap incident to suggest that the victim had injured herself while masturbating. *Id*. at 768-69. During the defendant's offer of proof, a doctor testified that the victim's injuries were severe enough that they must have been caused by the repetitive entry of something of "significant diameter" with "a lot of force." *Id*. at 768. The expert testified that she did not think that the lipstick cap could have caused the injuries. *Id*. The trial court ruled that, in light of the witness's testimony, the evidence was irrelevant and would be excluded. *Id*.

In closing argument, the *Lebbing* prosecutor called the jury's attention to the victim's injuries, then said, "Was there any evidence ever presented that there was someone else in the picture that did this? No. . . There was no one else, and there was no evidence presented to you that would lead you to believe that there was someone else responsible for this behavior, for these findings. And that's because there was no one. It was [the defendant]." *Id*. at 766. In a motion for post-conviction relief, the defendant claimed that counsel was ineffective for failing to object when the prosecutor "commented on [the defendant's] failure to present evidence that had been specifically excluded by the trial court." *Id*. at 767. The Court of Appeals rejected the defendant's claim as follows:

> This Court fails to see how the previously mentioned recitals by the State could realistically be construed as a comment on [the defendant's] "failure to present

> evidence that had been specifically excluded by the [trial] court." Furthermore, there was no evidence by either side that a third-party abused Victim or that she had had sexual intercourse with anyone other than [the defendant] during the time period at issue. [The defendant] had no evidence to present that there was anyone else who could have caused the injuries to Victim. It is well settled that the State "may point out to the jury an absence of evidence to support a theory suggested by the defendant."

Id. at 769.

Baker's case presents an analogous situation. Like the defendant in *Lebbing*, Baker had *no evidence* that a third-party had abused Victim or caused the vaginal hemorrhaging at issue. The purported HPV evidence, upon which Baker exclusively relies, was indefinite and devoid of probative value for the reasons outlined in Part I. The prosecutor's argument that there was nothing to suggest an alternative cause for the hemorrhaging accurately described the evidence.

Baker cites three cases in which Missouri courts have found plain error when a prosecutor falsely suggested in closing argument that excluded evidence did not exist. App.Sub.Br. at 31-32 (citing *State v. Weiss*, 24 S.W.3d 198 (Mo. App. W.D. 2000); *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)).

In *Weiss*, the prosecutor argued to the jury that the defendant had no documents to support his defense that he thought the money that he was accused of stealing had been given

to him by his employer. *Weiss*, 24 S.W.3d at 199-201. But the defendant had offered such documents—they had been excluded as hearsay. *Id*.

In *Hammonds*, the defendant's uncle, an alibi witness, was excluded because he was untimely disclosed. *Hammonds*, 651 S.W.2d at 538. Then, in closing argument, the prosecutor pointed out that the defendant's uncle was present in the courtroom and suggested that the uncle did not want to testify on the defendant's behalf because he did not want to commit perjury. *Id*. at 539.

Finally, in *Luleff*, the defendant attempted to present a receipt for the purchase of a tractor to rebut allegations that he had stolen it. *Luleff*, 729 S.W.2d at 535. The prosecutor objected on the basis of hearsay, and the receipt was excluded. *Id*. Then, in closing argument, the prosecutor asked the jury, "Where's the receipt?" *Id*.

Weiss, *Hammonds*, and *Luleff* are distinguishable from Appellant's case in several respects. First, and most fundamentally, the evidence at issue in *Weiss*, *Hammonds*, and *Luleff* actually existed—the *Weiss* and *Luleff* defendants possessed the documents that were excluded, and the *Hammonds* defendant was prepared to put his uncle on the stand. In the present case, on the other hand, there is *no evidence* in the record that Victim had sexual intercourse with anyone other than Baker during the eight-day window in which her injuries were sustained. Baker merely assumes, from the purported HPV evidence, that Victim was sexually active and that the prior sexual activity could have resulted in injury. And the only reference to HPV comes from defense counsel, who stated that the doctors wanted Victim to submit to an HPV test (Tr. 496). Thus, not only is it unclear whether Victim contracted HPV

through sexual activity, it is unclear whether Victim contracted HPV at all. The prosecutor correctly argued that there was no evidence of an alternative source for the injuries.

Furthermore, unlike the excluded evidence in the cases upon which Baker relies, the excluded HPV evidence was irrelevant to any material issue in the case. As argued above, even if Victim did have HPV, there is no evidence that she contracted it sexually or that any prior sexual intercourse could have caused the hemorrhaging that was discovered in the August 16th medical exam. *See* Point I, *supra*. Thus, while the prosecutors in *Weiss*, *Hammonds*, and *Luleff* presented a false impression of the facts to the jury, the prosecutor in Baker's case told the truth—there was no evidence available to suggest an alternative source of the vaginal hemorrhaging. The trial court did not plainly err in declining to intervene *sua sponte* in the State's closing argument.

CONCLUSION

The trial court did not commit reversible error in this case. Baker's conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 9,343 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 9th day of February, 2010, to:

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APPENDIX

Judgment..... A1