

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
vs.)	No. 90517
)	
JAMES R. BAKER,)	
)	
Appellant.)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF WEBSTER COUNTY, MISSOURI
30th JUDICIAL CIRCUIT, DIVISION I
THE HONORABLE DONALD CHEEVER, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant, James Randall Baker, was jury tried and convicted of statutory rape in the first degree, § 566.032,¹ in the Circuit Court of Webster County (L.F. 95-96).² The trial court sentenced Baker as a prior offender to fifteen years in the Department of Corrections (L.F. 95-96).

This appeal does not involve any issue reserved for the exclusive appellate jurisdiction of this Court; therefore, jurisdiction originally was in the Missouri Court of Appeals, Southern District. Article V, Section 3, Mo. Const. (as amended 1982); § 477.060, RSMo 2000. On October 9, 2009, the Court of Appeals issued a *per curiam* opinion. On December 22, 2009, this Court transferred this cause, pursuant to Rule 83.02.

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

² The record consists of a legal file (L.F.), transcript (Tr.) and exhibits (Ex.).

STATEMENT OF FACTS

Based on allegations of thirteen year old H.B., the State charged James Randall Baker,³ appellant, with statutory rape in the first degree, § 566.032 and child molestation in the first degree, § 566.067 (L.F. 14-15).

During voir dire, the State told jurors photographs of H.B.'s vagina would be admitted (Tr. 129). In his opening, the prosecutor explained that these photographs, taken when H.B. was examined at the Child Advocacy Center, were evidence of penetration and attempted penetration (Tr. 189-90).

At trial, the State introduced evidence to support its allegations. H.B. said that on August 14, 2006, she was playing in the swimming pool at her apartment complex in Rogersville, Missouri (Tr. 194-95, 209). H.B. was there with her mother, Teri,⁴ her sister, Kacie, her mom's friend, Shannon, and a couple of her friends (Tr. 209, 235-36, 306, 320). Jeff Morris and Baker were also there (Tr. 209, 235-36, 306, 320). Other tenants were there too, including a mother with her two boys (Tr. 209, 235-36, 320). Teri's friend, Tim Salkil, played basketball on a court near the pool (Tr. 211, 236, 282 Ex. M). He could see the pool from the basketball court (Tr. 292).

³ At trial, witnesses referred to Mr. Baker as Randy, his middle name (Tr. 205, 286, 305, 360-61).

⁴ Appellant uses first names since H.B. and her family share the same surname.

H.B. had met Baker through Morris (Tr. 205, 209, 210, 307). H.B. played football in the pool with Morris and Baker (Tr. 210, 236). Eventually, everyone left the pool except H.B., Baker and Morris (Tr. 211-12, 237). Salkil still was at the basketball court (Tr. 212). Morris got out of the pool and sat on the side (Tr. 212). H.B. said that Baker sat her on his lap while they were in the pool and rubbed his fingers on her vagina (Tr. 213-14, 237, 238). He then allegedly touched her vagina with his fingers underneath her bathing suit (Tr. 231, 238).

H.B. said that Morris left to go to his father's apartment (Tr. 215, 239). Baker then started kissing her in the pool and said she was beautiful (Tr. 239). She claimed that she and Baker went to the other end of the pool and Baker tried to put his penis inside of her while she sat on his lap with her legs around him (Tr. 215-16, 239-40). Baker told her it was not working and she agreed, saying it was not working (Tr. 217, 240).

Baker then told her to go to the bathroom (Tr. 217). She did not really want to, but did (Tr. 217-19). They both used the bathroom and took off their swimming shorts and trunks (Tr. 220-21, 242). She told Baker that he better not get her pregnant (Tr. 220-21, 245). H.B. said that Baker sat her on the sink and they had sexual intercourse as she wrapped her legs around his waist (Tr. 221-23, 244-45). She said the intercourse lasted ten minutes and hurt her (Tr. 223, 245). They put their clothes back on (Tr. 223, 246). Baker said they could not stay in there all day (Tr. 224, 245).

H.B. said she left the bathroom first and jumped back in the pool (Tr. 224-25, 246). Morris returned and asked where Baker was (Tr. 225, 246-47). She told him he was in the bathroom (Tr. 225). Baker came out of the restroom (Tr. 225). Baker told her, “we will have to do it again sometime.” (Tr. 226). H.B. then left with Salkil, who gave her a ride home in his car (Tr. 225-26, 248, 287). Salkil thought Baker’s statement seemed odd (Tr. 287, 295-96). When he asked her about it, she did not respond (Tr. 287).

H.B. told several people she had sex with Baker – her sister, Kacie (Tr. 227, 249, 359-60, 362, 370-72); a family friend, Dewayna (Tr. 228); and her mother (Tr. 232, 256-57, 312, 326). When H.B. told her sister, Kacie responded that she had sex that day too (Tr. 254, 367). H.B. asked Dewayna if she could get her a morning after pill (Tr. 228, 255). Teri was upset and did not believe H.B. at first (Tr. 232, 257). Teri cried and cursed at her daughter (Tr. 232). Salkil was angry too (Tr. 232, 262, 263). H.B. claimed Salkil said he wanted to kick Baker’s ass and kill him (Tr. 262-63). Salkil said he was upset and mad, but he did not threaten Baker in front of H.B. (Tr. 288, 297-98).

As a result of the allegations, they called the police (Tr. 264, 311, 327).⁵

⁵ The witnesses disagreed on the date the police were called. H.B. and her family said they called the night of the incident, but Officer Martin indicated that he responded to the apartment the following day, August 15, 2006 (Tr. 408-09, 414-15). H.B. told Martin she did not tell anyone for a day because she was scared

H.B. repeated the allegations to a police officer (Tr. 228, 264, 408-11, 416). She wrote a statement (Tr. 228-29, 268, Ex. 1).⁶

H.B. went to a hospital (Tr. 229, 264-65, 289, 298, 312, 327). There, she repeated the allegations to a nurse, Jennifer Burk (Tr. 229, 266, 375, 381-82). She told Burk that the incident happened on August 14th and she had since showered, changed her clothes and been in the pool again (Tr. 383, 389-90, 391). Since she had showered and bathed, they did not do a rape kit at the hospital (Tr. 384).

H.B. also spoke to Libby Brill, a social worker at the hospital (Tr. 395-97). She repeated her allegations, saying Baker fondled her in the pool and had sexual intercourse with her in the bathroom (Tr. 399-400, 405-06).

The next day, August 16, 2006, H.B. went to the Child Advocacy Center (CAC) in Springfield, Missouri (Tr. 229-30, 267, 315, 329, 504, 515-16). She repeated the allegations to Micki Lane, a forensic interviewer (Tr. 504, 506, 515-

(Tr. 416, 419). Hospital records also show that H.B. went to the hospital at 10:30 p.m. on August 15th and left at 2:37 a.m. on August 16th (Tr. 375-79).

⁶ H.B. returned to the police department to give a second statement where she added the allegation that while she was in the pool with Baker, he took her hand and put it on his penis (Tr. 268-69, 272-73, Ex. 2). This statement was made after she had gone to the Child Advocacy Center and had denied such touching (Ex. E).

16, Ex. E). H.B. claimed that Baker had fondled her while they were in the pool and then they went into the bathroom and had sexual intercourse (Ex. E). H.B. claimed that this was the first time she had sexual intercourse, but that statement was edited from the tape (Ex. E). An edited tape of the CAC interview was played at trial (Ex. E, Tr. 532).

Kim Chapman, a nurse practitioner at CAC, examined H.B. (Tr. 429-434, 441, 468). She took pictures of H.B.'s vagina (Tr. 441-453, Exs. B, C, D). Chapman found sub-epithelial hemorrhaging, bleeding underneath the skin (Tr. 445, 454, 462). Her vagina was tender (Tr. 457-58). Chapman said the hemorrhaging was indicative of some sort of relatively forceful event (Tr. 446, 472, 476). One cause could be sexual intercourse and sexual abuse (Tr. 455, 460). The hemorrhages were consistent with H.B.'s allegations (Tr. 447, 449). The hemorrhages would heal in three to eight days after the forceful event (Tr. 449, 458). Chapman also found a transection of H.B.'s hymen (Tr. 470). This old injury had healed and could not have happened in the time frame of the allegations (Tr. 471, 476).

Chapman discussed her findings with Dr. Redfern (Tr. 458-60, 462, 481-82). Dr. Redfern reviewed Chapman's photos and her report (Tr. 482, Exs. B, C, and D). He found the sub-epithelial hemorrhages (Tr. 483-86). He, too, indicated that this injury would be caused from some type of forceful trauma (Tr. 484). The injury could be caused by fondling, attempted penetration, or actual penetration from a finger, penis or foreign object (Tr. 485). The hemorrhage would heal in

three to seven days (Tr. 486). Since H.B. said this happened on August 14th, the findings supported her allegations (Tr. 486, 492-93).

Dr. Redfern said that the hemorrhages alone could not establish penetration, since other causes could account for them (Tr. 487). Other findings diagnostic of penetration would include pregnancy, semen, and the presence of some sexually transmitted diseases (Tr. 489-90, 498). Sexually transmitted diseases like Chlamydia and Gonorrhea would establish penetration (Tr. 489).

On cross-examination, defense counsel attempted to ask Dr. Redfern if his findings suggested prior vaginal penetration (Tr. 493). The State objected, arguing that it violated the rape shield statute (Tr. 494-95). Defense counsel countered that the State had opened the door by introducing the pictures of H.B.'s vagina and asking about the physical findings (Tr. 494-96). The State specifically objected to any mention of H.B.'s sexually transmitted disease (Tr. 496). Defense counsel proffered that Dr. Redfern could testify that they found HPV (human papilloma virus) which could not have been present from sexual intercourse just two days earlier, the date of the allegation against Baker (Tr. 496). The court sustained the State's objection to any reference to the sexually transmitted disease (Tr. 496).

Dr. Redfern testified about findings other than the sexually transmitted disease, including the transection of the posterior hymen and the sub-epithelial hemorrhages (Tr. 497, 499). The hymen injury was not consistent with the time frame for this allegation, but the hemorrhages were (Tr. 497, 499, 501).

The defense called Jeff Morris, who was at the pool on August 14, 2006 (Tr. 544, 546, 565). Morris swam with Baker and H.B. (Tr. 546). He left briefly to go to his apartment to get some drinks (Tr. 546-48, 551). He never saw Baker and H.B. kissing (Tr. 548, 565, 566). H.B. did not sit on Baker's lap (Tr. 548-49, 565-66). He did see H.B. follow Baker into the pool house, but they were only gone long enough to use the bathroom, about a minute (Tr. 550, 566). They walked out of the pool house at the same time (Tr. 550, 566). Morris thought H.B. was flirty around Baker and she had a crush on him (Tr. 551, 553-54). She followed him around and tried to get attention from him (Tr. 553-54).

In his closing argument, the prosecutor told jurors that H.B. told the truth (Tr. 576). He said, "lies do not exist with this family, with Teri and [H.B.] and Kacie" (Tr. 578). The prosecutor suggested H.B. was unbiased and had no reason to lie (Tr. 578-79). He showed the jurors the photos of H.B.'s vagina and emphasized the hemorrhages (Tr. 582, 583). The pictures were "physical objective facts" (Tr. 584). He said:

Those photos don't lie, folks. They're there. They tell you what it was, consistent with what [H.B.]'s telling us.
(Tr. 584).

Later, the State 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). The State then argued:

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 jury found Baker not guilty of child molestation, but convicted him of statutory rape (Tr. 604, L.F. 90-91). The trial court sentenced Baker to fifteen years (Tr. 621, L.F. 95-96). This appeal follows.

POINTS RELIED ON

I. Sexually Transmitted Disease Was Relevant

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 that could not have been caused by Baker, because this ruling violated Baker's rights to due process, to present a defense, and to a fair trial, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that this evidence fell within an exception to the rape shield statute, § 491.015, since it was evidence of the immediate surrounding circumstances of the alleged crime and provided an alternative source for the injuries to H.B.'s vagina. The State opened the door to this evidence, showing the jury the photographs of H.B.'s vagina to prove that Baker caused her injuries.

Baker was prejudiced since this evidence showed H.B. lied when she said that she had never had sexual intercourse before she claimed to have sex with Baker and the evidence showed an alternative source for her injuries. Had Baker been able to present this evidence, the jury likely would have found Baker not guilty of statutory rape, especially since H.B.'s credibility was critical to the State's case and the State relied on the photographs as proof that Baker had sexual intercourse with H.B.

State v. Douglas, 797 S.W.2d 532 (Mo. App. W.D. 1990);
State v. Samuels, 88 S.W.3d 71 (Mo. App. W.D. 2002);
State v. Gibson, 636 S.W.2d 956 (Mo. banc 1982); and
State v. Gerhart, 129 S.W.3d 893 (Mo. App. W.D. 2004).

II. Improper Closing Argument

The trial court plainly erred in failing to *sua sponte* instruct the jury to disregard the State's improper closing arguments that jurors heard about no other source for H.B.'s injuries and that H.B. told the truth, because this violated Baker's right to due process of law, to a fair trial, and to present a defense, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the defense had attempted to present evidence of H.B.'s sexually transmitted disease caused by sexual intercourse with someone other than Baker, but this evidence was excluded because of the State's objection.

The prosecutor selectively introduced the physical findings of H.B.'s exam, objecting to evidence of her sexually transmitted disease. He then argued, that if H.B. was lying, he was dying, even though he knew she had lied about her sexual activity. He told the jurors they had heard no evidence of alternative sources when the State had objected to evidence of other sexual activity.

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.

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).

ARGUMENT

I. Sexually Transmitted Disease Was Relevant

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The State emphasized H.B.'s physical examination and the pictures showing her injuries. The prosecutor emphasized the pictures in voir dire, in his opening, projected them on a screen when two witnesses, Kim Chapman, a nurse practitioner, and Dr. Redfern testified, and showed them again in closing (Tr. 127, 189-90, 429-476, 477-502). The State introduced the photos themselves into evidence and passed them to jurors (Exs. B, C, D, Tr. 443, 451, 454).

Chapman found sub-epithelial hemorrhaging, bleeding underneath the skin, indicative of some sort of relatively forceful event (Tr. 445, 446, 454, 462, 472, 476). The hemorrhages were consistent with H.B.'s allegations and would heal in three to eight days after the forceful event (Tr. 447, 449, 458).

Chapman discussed her findings with Dr. Redfern (Tr. 458-60, 462, 481-82). Dr. Redfern reviewed Chapman's photos and her report (Tr. 482, Exs. B, C, and D). He also found the subepithelial hemorrhages (Tr. 483-86). He, too, indicated that this injury would be caused by some type of forceful trauma (Tr. 484). Fondling, attempted penetration, or actual penetration from a finger, penis or foreign object could cause the injury (Tr. 485). The hemorrhages would heal in three to seven days (Tr. 486). Since H.B. said this happened on August 14, the findings supported her allegations (Tr. 486, 492-93).

Dr. Redfern said that the hemorrhages alone could not establish penetration, since other causes could account for them (Tr. 487). Other findings diagnostic of penetration would include pregnancy, semen, and the presence of some sexually

transmitted diseases (Tr. 489-90, 498). Sexually transmitted diseases like Chlamydia and Gonorrhea would establish penetration (Tr. 489).

On cross-examination, defense counsel attempted to ask Dr. Redfern if his findings suggested prior vaginal penetration (Tr. 493). The State objected, arguing that it violated the rape shield statute (Tr. 494-95). Defense counsel countered that the State had opened the door by introducing the pictures of H.B.'s vagina and asking about the physical findings (Tr. 494-96). The State specifically objected to any mention of H.B.'s sexually transmitted disease (Tr. 496). Defense counsel proffered that Dr. Redfern could testify that they found HPV (human papilloma virus) which could not have shown up from sexual intercourse just two days earlier, the date of the allegation against Baker (Tr. 496). The court sustained the State's objection to any reference to the sexually transmitted disease (Tr. 496).

The trial court abused its discretion in sustaining the State's objection and disallowing Baker's cross-examination regarding the surrounding circumstances of the criminal offense. H.B. had sexual intercourse with someone other than Baker and had contracted a sexually transmitted disease through the sexual intercourse. Since the State had put the pictures of the physical examination and questioned witnesses about their findings consistent with Baker having sexual intercourse with H.B., the court should have allowed Baker to question the witnesses about the findings inconsistent with H.B. and Baker having sexual intercourse. This was evidence of the immediate circumstances surrounding the alleged crime. It also provided an alternative source for her injuries.

The State knew that during H.B.’s interview at the Child Advocacy Center, she lied saying she never had sex before the alleged incident with Baker. The evidence of her sexually transmitted disease showed otherwise. The jury should have been allowed to consider this evidence to determine whether she was lying when she made the allegations against Baker.

Standard of Review

Whether evidence is relevant is a matter for the trial court and reviewable only for an abuse of discretion. *State v. Kelley*, 83 S.W.3d 36, 39 (Mo. App. W.D. 2002). This Court reviews trial court decisions regarding the admissibility of evidence “for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial.” *State v. Tokar*, 918 S.W.2d 753, 761 (Mo. banc 1996).

The rape shield statute, Section 491.015, creates a presumption that evidence of a victim’s prior sexual conduct is irrelevant to prosecutions for sex crimes. *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. Sloan*, 912 S.W.2d 592, 598 (Mo. App. E.D. 1995). Two of the exceptions are:

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;

Section 491.015.1(2) and (3).

This statute must be applied consistently with a defendant's constitutional rights. *State v. Douglas*, 797 S.W.2d 532, 535 (Mo. App. W.D. 1990). "The Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 688 (1986) (citing, *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984)); *Olden v. Kentucky*, 488 U.S. 227 (1990). Due process requires that a defendant be permitted to offer testimony of witnesses in his defense. *Washington v. Texas*, 388 U.S. 14 (1967). "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). The right of cross-examination is derived from the Sixth Amendment's language guaranteeing the right of the accused to confront the witnesses against him. *Chambers*, 410 U.S. 284. The Sixth Amendment has been held applicable to the States. *Pointer v. Texas*, 380 U.S. 400 (1965).

In *Douglas*, the Court reversed, holding that the rape shield statute did not bar the defendant's cross-examination of his stepdaughter with respect to her alleged sexual activity with her boyfriend after the defendant's alleged assaultive conduct, but before she was examined by a doctor. 797 S.W.2d 532. There, the State presented testimony of Dr. Maria Teresa Esquivel, a pediatrician who had examined the victim, Tracy, upon reference by the Division of Family Services.

Id. at 534. Dr. Esquivel's examination disclosed the absence of hymeneal tissue. *Id.* This could be indicative of sexual intercourse and was consistent with penile penetration of the vagina. *Id.* The trial court disallowed the defense's proposed cross-examination about her other sexual activity during the time intervening between Douglas' alleged intercourse and her physical examination. *Id.* That she was sexually active with her boyfriend provided an alternative source for the absence of her hymen. *Id.* Had the State not put on the medical testimony, the evidence of other sexual activity would not have been admissible. *Id.* at 534-35. But, having chosen to adduce this evidence, it would be unconstitutional not to allow the defense to rebut it with relevant evidence showing an alternative source for the injury. *Id.* at 535.

Similarly, in *State v. Samuels*, 88 S.W.3d 71, 78 (Mo. App. W.D. 2002), the State presented medical evidence of one of the victim's vaginal abnormalities. The State presented Dr. Hegenbarth's observations of the vaginal area – it was red, inflamed, and bled very easily; the hymen appeared thickened or had rolled edges; and the urethra gaped wide open. *Id.* Since the trial court allowed the State to present this medical evidence to suggest that the victim had engaged in sexual intercourse with Samuels, the defense was entitled to present evidence showing another source of that condition. *Id.* The State had emphasized in its argument the compelling nature of the medical evidence. *Id.*

Just like *Douglas* and *Samuels*, here, the State presented medical evidence of H.B.'s injuries. The defense was entitled to show all of the medical evidence

surrounding the examination, not just those portions consistent with the State's theory. The defense was entitled to show that H.B. had sexual intercourse with another to establish an alternative source for these injuries. Like *Samuels*, Baker was prejudiced since the State emphasized this medical evidence to prove H.B.'s allegations of sexual intercourse. On the child molestation count, the jury only heard H.B.'s allegations of the fondling, and found Baker not guilty. But, on the statutory rape charge, the State argued physical evidence corroborated her allegations:

Those photos don't lie, folks. They're there. They tell you what it was consistent with what [H.B.]'s telling us.

(Tr. 584). The State argued there were no alternative sources for hemorrhages; the only source was Baker's penis (Tr. 597). The State reiterated the importance of the physical evidence saying:

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). Given the State's emphasis on this evidence, it was fundamentally unfair to prohibit defense counsel's cross-examination of Dr. Redfern about the sexually transmitted disease showing an alternative source for the injury. The

physical findings were part of the surrounding circumstances of the alleged offense, and an alternative source for the injuries.

In a similar case, this Court ruled that prior sexual conduct was admissible. *State v. Gibson*, 636 S.W.2d 956 (Mo. banc 1982). In *Gibson*, the defendant testified that the complainant told him at the time of the alleged rape, that she was having sexual problems with her boyfriend. *Id.* at 958. Gibson sought to introduce evidence at trial that the complainant told the attending physician and nurse who examined her that she had sexual relations with her boyfriend at approximately 10:30 p.m. *Id.* The rape allegedly occurred 45 minutes to two and one-half hours later. *Id.* The defense argued that this evidence showed her motive to have sex, lie and go to the hospital (due to fear of pregnancy). *Id.* at 958-59.

This Court ruled the trial court erred in refusing the proffered evidence because it was “evidence of immediate surrounding circumstances.” *Id.* at 959. Most rape cases generally turn upon whom a jury believes. *Id.* Here, testimony that corroborated the defendant’s testimony came from complainant’s own mouth within two or three hours of the alleged rape. *Id.* The statement to the physician was “the single shred of evidence available to appellant that came from a third party, one who had no apparent reason to lie, and this evidence was part of the immediate surrounding circumstances.” *Id.*

Similarly, here, the evidence that H.B. had sexual intercourse with another and had contracted a sexually transmitted disease showed that she lied

to Lane when she said in her videotaped interview that she had never had sex before Baker allegedly had sexual intercourse with her. The physical finding of a sexually transmitted disease, was part of the immediate surrounding circumstances.

In *State v. Gerhart*, 129 S.W.3d 893, 894-95 (Mo. App. W.D. 2004), the defendant was convicted of four counts of statutory rape and one count of felonious restraint. The trial court excluded evidence that the victim had told another that she had been pregnant with Gerhart's child but had miscarried after five months. *Id.* at 895. Gerhart wanted to adduce evidence showing that the victim had made this statement and the statement was false to challenge the credibility of the victim, upon which the State's case was based. *Id.*

On appeal, the Court ruled the trial court erred in excluding the evidence under the rape shield statute. *Id.* at 896-97. In some instances, prior sexual activity of the victim is irrelevant. *Id.* at 897. But, where the evidence is relevant to impeach the complaining witness, it must be admitted. *Id.* That the victim may have lied about becoming pregnant did not necessarily disprove that she was lying about Gerhart sexually abusing her. *Id.*, n. 4. But, her untruthful statements were intertwined with the circumstances of her story. *Id.* Thus, the jury should have been allowed to assess her credibility in deciding whether she was truthful in accusing the defendant of sexual abuse. *Id.* at 897.

The Court found prejudice. *Id.* at 900. "The erroneous exclusion of evidence in a criminal case creates a presumption of prejudice which 'can only be

overcome by a showing that such erroneous exclusion was harmless error beyond any reasonable doubt.” *Id.*, quoting, *State v. Bowlin*, 850 S.W.2d 116, 118 (Mo. App. S.D. 1993). The State bears the burden of showing the exclusion was harmless beyond a reasonable doubt. *Gerhart*, 129 S.W.3d at 900. Since the State’s case hinged almost entirely on the credibility of the victim, and Gerhart’s lone defense was that she was not credible, the exclusion of the evidence was prejudicial. *Id.* Accordingly, the Court reversed and remanded for a new trial. *Id.*

Here, too, H.B.’s credibility was key to the State’s case. The jury obviously had some questions about her credibility as it found Baker not guilty of the molestation charges based on her fondling allegations. When telling her story accusing Baker of sexual abuse, she stated it “hurt like hell” because she had never had sex before (Ex. E). The untruthful statements were intertwined with the circumstances of her story. Thus, Baker should have been able to elicit evidence of her sexually transmitted disease to show that she had lied and was not credible.

The trial court abused its discretion in excluding evidence of the sexually transmitted disease. It was part and parcel of Chapman’s physical examination upon which Dr. Redfern relied. It was part of the immediate surrounding circumstances of the alleged crime. It showed an alternative source for her condition. It showed she was not telling the truth. The evidence was relevant and critical to Baker’s defense. This Court should reverse and remand for a new trial.

II. Improper Closing Argument

The trial court plainly erred in failing to *sua sponte* instruct the jury to disregard the State's improper closing arguments that jurors heard about no other source for H.B.'s injuries and that H.B. told the truth, because this violated Baker's right to due process of law, to a fair trial, and to present a defense, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the defense had attempted to present evidence of H.B.'s sexually transmitted disease caused by sexual intercourse with someone other than Baker, but this evidence was excluded because of the State's objection.

The prosecutor selectively introduced the physical findings of H.B.'s examination, objecting to evidence of her sexually transmitted disease. He then argued, that if H.B. was lying, he was dying, even though he knew she had lied about her sexual activity. He told the jurors they had heard no evidence of alternative sources when the State had objected to evidence of other sexual activity.

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 chose to introduce and display pictures of H.B.'s injuries to establish that she was truthful when she said she had sexual intercourse with Baker (Exs. B, C, and D). But, what the jury did not know was that H.B. had sexual intercourse with someone other than Baker and had contracted a sexually transmitted disease. The State had successfully excluded any mention of these findings. The State also had reviewed a videotape of H.B.'s interview at CAC in which she claimed to never had sex before the alleged encounter with Baker (Ex. E). Given the results of her examination, the prosecutor knew that H.B. had lied in that interview. She had engaged in sexual intercourse with someone other than Baker.

In spite of this knowledge, the prosecutor argued H.B. told the truth (Tr. 576). He said, "lies do not exist with this family, with Teri and [H.B.] and Kacie" (Tr. 578). The prosecutor suggested H.B. was unbiased and had no reason to lie (Tr. 578-79). The prosecutor 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). He continued, saying:

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) (emphasis added).

During the closing, the prosecutor showed the jurors the photos of H.B.'s injuries noting their importance and characterizing them as "physical objective facts" (Tr. 582, 584). He said: "Those photos don't lie, folks. They're there. They tell you what it was consistent with what [H.B.]'s telling us." (Tr. 584).

The prosecutor intentionally misrepresented the facts to the jury. He knew that H.B. had lied about not having had sexual intercourse and that lies did exist in the family. But, the jury never learned about H.B.'s lies because the prosecutor successfully argued for the exclusion of the evidence of her sexually transmitted disease and had edited her false statements out of her videotaped interview. Defense counsel attempted to present evidence of all the physical findings, not just those consistent with the State's case. Defense counsel tried to present an alternative source for her injuries, but the court excluded that evidence because of the State's objections. The court should not have allowed such an argument.

Standard of Review

The trial court has broad discretion in determining the scope of closing arguments. *State v. Nicklasson*, 967 S.W.2d 596, 615 (Mo. banc 1998). Unless an abuse of that discretion prejudices the defendant, an appellate court will not disturb the trial court's ruling on such matters. *State v. Rousan*, 961 S.W.2d 831, 851 (Mo. banc 1998). "[A] conviction will be reversed for improper argument only if it is established that the comment of which appellant complains had a decisive effect on the jury's determination. . . . The burden is on the defendant to prove the decisive significance." *State v. Schnelle*, 7 S.W.3d 447, 456 (Mo. App. W.D. 1999), *quoting State v. Parker*, 856 S.W.2d 331, 333 (Mo. banc 1993).

Prosecutorial misconduct in argument may become unconstitutional when it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

"Prosecuting officials have the duty to prosecute cases with vigor, but they have the duty to do so within the bounds of rules of evidence and within the procedural boundaries prescribed for the conduct of criminal trials." *State v. Greene*, 820 S.W.2d 345, 348 (Mo. App. S.D. 1991) (Parrish, J., concurring).

Defense counsel did not object to the improper argument, and did not include the issue in the motion for new trial, thus it is not preserved for appellate review. *State v. Phelps*, 965 S.W.2d 357, 358 (Mo. App. W.D. 1998). But plain error review is warranted where "the alleged error so substantially affects the rights of the accused that a manifest injustice or a miscarriage of justice inexorably

results, if left uncorrected.” *State v. Hadley*, 815 S.W.2d 422, 423 (Mo. banc 1991); Rule 30.20. Baker requests such review.

In *State v. Weiss*, 24 S.W.3d 198, 200 (Mo. App. W.D. 2000), the prosecutor successfully prevented the defense from offering evidence of an alternate source for money in the defendant’s checking account, which was relevant to show his mistake in accessing another person’s bank account. The prosecutor then argued that there was no evidence regarding the alternate source of funds. *Id.* at 202. Even though there was no objection to the prosecutor’s closing argument, the Court reversed and remanded for a new trial. *Id.*, at 204. “It is well-settled in Missouri that it is error for a prosecutor to ‘comment on or refer to evidence or testimony that the court has excluded.’ ” *Id.*, citing *State v. Hammonds*, 651 S.W.2d 537, 539 (Mo. App., E.D. 1983).

In *Hammonds*, the trial court sustained the State’s objection and excluded the defendant’s alibi witness as a sanction for failing to disclose him as a witness. 651 S.W.2d at 538. The prosecutor then argued that “no one . . . would testify for this man because they don’t want to perjure themselves” about the defendant’s alibi. *Id.*, at 539. The Court held that this was reversible error. *Id.* The prosecutor knew that the defense tried to present an alibi defense, but objected because of nondisclosure. The State could not then falsely argue no alibi witnesses were available.

Similarly, in *State v. Luleff*, 729 S.W.2d 530, 535-36 (Mo. app. E.D. 1987), the trial court excluded a receipt for a tractor, sustaining the prosecutor’s objection

that it was hearsay evidence. Then, in closing argument, the prosecutor repeatedly asked, “where’s the receipt.” *Id.* at 535. Defense counsel did not properly preserve the error for review. *Id.* at 535-536. But, the Eastern District found the argument was plain error. The prosecutor cannot deliberately exclude evidence and then argue the defense’s failure to present that evidence proves his guilt. Such an argument is patently unfair and creates a manifest injustice.

Here, the prosecutor prevented Baker from showing that H.B. had contracted a sexually transmitted disease from having sexual intercourse with someone other than Baker. Then, the State argued that the jury had heard no evidence of any alternate source for her injuries. According to the State, the only explanation was that Baker had put his penis in her vagina. The State suggested she had not lied and should be believed. In his words, “if she was lying, he was dying . . .” (Tr. 598). This was inexcusable, and the trial court had a duty to act, even *sua sponte*, “to control obvious prosecutorial misconduct” and ensure that Baker received a fair trial. The trial court had heard the proposed evidence of a sexually transmitted disease and had edited her videotape to remove her claims denying other sexual activity. The court, thus, knew the argument was improper and untruthful.

This Court should grant a new trial to remove this injustice. This error, as in *Weiss*, *Hammonds*, and *Luleff*, was so egregious that it caused a manifest injustice and was therefore plain error. This Court should reverse his conviction 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 7,048 words, which does not exceed the 31,000 words allowed for an appellant's 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 January, 2010. According to that program, these disks are virus-free.

On the 19th day of January, 2010, two true and correct copies of the foregoing brief and a floppy disk containing a copy thereof were mailed, postage prepaid, to the Office of the Attorney General, Criminal Appeals Division, 221 W. High Street, Jefferson City, MO 65102.

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