

No. SC90332

*In the
Supreme Court of Missouri*

STATE OF MISSOURI,

Respondent,

v.

ANTOINE TERRY,

Appellant.

**Appeal from Cole County Circuit Court
Nineteenth Judicial Circuit
The Honorable Patricia S. Joyce, Judge**

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant Antoine Terry was convicted in Cole County Circuit Court of statutory rape in the first degree. He was sentenced to seven years of imprisonment.

Terry's conviction was affirmed by the Western District Court of Appeals in *State v. Terry*, No. WD69672 (Mo. App. W.D. May 26, 2009). This Court granted Terry's application for transfer on October 6, 2009. Therefore, jurisdiction lies in this Court. MO. CONST. art. V, § 10; Supreme Court Rule 83.04.

STATEMENT OF FACTS

Antoine Terry was indicted in Cole County Circuit Court for first-degree statutory rape, § 566.032, RSMo 2000 (L.F. 10).¹ On February 6, 2008, Terry was tried by a jury, with the Honorable Patricia S. Joyce presiding (L.F. 5; Tr. 22). Before the trial began, Terry waived his right to jury sentencing (Tr. 22).

Terry challenges the sufficiency of the evidence to support his conviction. In the light most favorable to the jury's verdict, the evidence showed:

In May 2007, twelve-year-old victim A.W. moved from St. Louis to Jefferson City with her family (Tr. 84-85). That summer, she met seventeen-year-old Terry, who lived nearby (Tr. 85, 120-122). At first, Terry and A.W. would just "talk and hang out" around the neighborhood (Tr. 86). Their relationship quickly became sexual, and over the course of the summer Terry had sex with A.W. at least six times (Tr. 87-88).

One night in August, A.W. stayed over late at Terry's residence (Tr. 91-92). Her mother, who had thought she was at a friend's house, called the police (Tr. 91-92). Fearful that Terry would get into trouble, A.W. lied to police about where she had been (Tr. 92-93). Later, however, A.W. discovered she was pregnant (Tr. 93, 114-15). She spoke with police a second time, and disclosed that she and Terry had had sex numerous times that summer (Tr. 93, 108). When investigators questioned Terry about A.W.'s allegations, Terry admitted that he had had sex with the twelve-year-old girl (Tr. 106).

¹ All statutory references herein are to RSMo 2000 unless otherwise noted.

Terry was charged with statutory rape in the first degree, § 566.032 RSMo 2000, in Cole County Circuit Court (L.F. 10). By the time of the trial, A.W. was visibly pregnant (Tr. 23). A.W. testified that she and Terry had engaged in sexual intercourse at least six times during the summer of 2007 (Tr. 87-88). The prosecutor asked whether there was “anyone else during the course of the summer that you were having sex with?” (Tr. 88). A.W. said “no.” (Tr. 88). She said that she believed Terry was the father of her unborn baby (Tr. 95).

Jefferson City Police Detective Barret Wolters also testified at Terry’s trial (Tr. 103). Wolters testified that he had taken A.W.’s report regarding her sexual activity with Terry (Tr. 103). He said that he confronted Terry about A.W.’s allegations, and that Terry admitted that he had had sex with A.W. (Tr. 106). According to Wolters, Terry thought he could not get in trouble for having sex with A.W. because he was not yet eighteen years old (Tr. 107). Terry told Wolters that he had not used a condom when he had sex with A.W. (Tr. 107).

Terry also testified at trial (Tr. 119). He claimed that he had never had sexual intercourse with A.W., and that Detective Wolters had probably just misunderstood him (Tr. 119, 132). Terry’s story was that he had “almost had sex with [A.W.],” but that his sister had interrupted them (Tr. 123). Terry’s sister allegedly said, “you all ain’t about to do that,” and sent Terry and A.W. outside (Tr. 123). The prosecutor asked Terry why his sister would think that he was going to have sex with a child (Tr. 128-29). Terry answered, “because my sister knows me” (Tr. 128-29).

On February 6, 2008, the jury found Terry guilty of statutory rape (L.F. 5, 24, 27-28; Tr. 161-62). On May 6, 2008, the trial court overruled Terry’s motion for new trial (Tr. 167).

At Terry's May 6th sentencing hearing, A.W.'s mother testified that A.W.'s baby had been born (Tr. 168). The prosecutor argued that Terry had "sentenced" A.W. to eighteen years with the baby, and suggested that this burden should be taken into consideration in determining Terry's punishment (Tr. 171). Terry, on the other hand, argued that if he was out of prison, able to work and financially provide for the child, the baby would be better off (Tr. 172). He said that "to put [him] away for ten years during this child's early child rearing period without a father and without the material support of the father is not going to do the child any good" (Tr. 172). The trial court sentenced Terry to seven years of imprisonment (L.F. 27-28; Tr. 173). Terry filed a notice of appeal with the Western District Court of Appeals on May 9, 2008 (L.F. 6, 30).

At some point after A.W.'s baby was born, a paternity test was performed. App. Br. at A3-A4.² According to the purported results, dated September 12, 2008, Terry is not the baby's biological father. App. Br. at A3-A4.

On October 15, 2008, Terry filed a motion for remand with the Court of Appeals requesting that his case be remanded for new trial or for a hearing on the purported paternity test. The Court of Appeals took Terry's motion with the case and, after consideration on the merits, overruled it. *State v. Terry*, No. WD69672, slip op. at 4-10 (Mo. App. W.D. May 26,

² The paternity test was not included in the record before the Western District Court of Appeals, nor does it appear in the record before this Court. A copy of it was merely attached as an exhibit to Terry's original "Motion to Remand" filed with the Western District and was included in the appendix to his original brief at A3 and A4.

2009). The Court of Appeals addressed the merits of Terry's remaining points and affirmed his conviction. *Id.* at 10-19. This Court granted transfer.

ARGUMENT

I. (sufficiency of the evidence)

The trial court did not err in overruling Terry’s motion for acquittal or in entering judgment and sentence for first-degree statutory rape because the evidence adduced by the State and the reasonable inferences therefrom were sufficient for a reasonable jury to find that Terry engaged in sexual intercourse with the twelve-year-old victim.

In his first point, Terry argues that the evidence adduced at trial was insufficient to prove, beyond a reasonable doubt, that he had sexual intercourse with A.W. App. Br. at 15. Relying on evidence that is not part of the record, Terry asserts that a post-trial paternity test established that he was not the father of A.W.’s baby. App. Br. at 15, 18-19. Thus, Terry claims, A.W.’s testimony “is contradicted by known physical facts and reliance thereon is necessarily precluded.” App. Br. at 15. Terry’s challenge to the sufficiency of the evidence fails because the evidence adduced at trial was sufficient for the jury to conclude beyond a reasonable doubt that Terry engaged in sexual intercourse with twelve-year-old A.W.³

³ Appellant argues “in the alternative” that this Court “must remand this cause to the trial court for action on the newly discovered evidence.” App. Br. at 15, 19-30. This argument is premised entirely on a paternity test that Appellant alleges established that he is not the father of A.W.’s child—Appellant claims that this new evidence “is highly probative of innocence” and requires that he receive a new trial. But the purported paternity test was not part of the trial record, nor has it been included in the legal file (*See* L.F. 1-35). For this

A. Standard of Review

Appellate review is limited to a determination of whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt. *State v. Crawford*, 68 S.W.3d 406, 408 (Mo. banc 2002). In applying this standard, this Court accepts as true all of the evidence favorable to the state, including all favorable inferences drawn from the evidence, and disregards all evidence to the contrary. *Id.* Reasonable inferences may be drawn from both direct and circumstantial evidence, and circumstantial evidence alone can be sufficient to support a conviction. *State v. Grim*, 854 S.W.2d 403, 405 (Mo. banc. 1993). The Court considers not only the State's evidence, but also any portions of Terry's evidence which would support a guilty finding, "because defendant, by putting on evidence, takes the chance of aiding the State's case." *State v. Johnson*, 447 S.W.2d 285, 287 (Mo. 1969).

The reliability, credibility, and weight of witness testimony are for the fact-finder to determine. *State v. Sumowski*, 794 S.W.2d 643, 645 (Mo. banc 1990). The credibility and the effects of conflicts or inconsistencies in testimony are questions for the jury, and the appellate court will not interfere with the jury's role of weighing the credibility of witnesses. *State v. Dulany*, 781 S.W.2d 52, 55 (Mo. banc 1989). "It is within the jury's province to

reason alone, Appellant's claim should be dismissed. *See State v. Jackson*, 248 S.W.3d 117, 124 (Mo. App. S.D. 2008) ("An appellate court is limited to consideration of evidence in the record.").

believe all, some, or none of the witness' testimony in arriving at their verdict." *Id.* As this Court explained in *Grim*,

If an appellate court sets itself up to select between two or more acceptable inferences, it ceases to function as a court and functions rather as a juror, actually a 'super juror' with veto powers. It is not the function of the court to decide the disputed facts; it is rather the court's function to assure that the jury, in finding the facts, does not do so based on sheer speculation.

854 S.W.2d at 414.

In *Jackson v. Virginia*, 443 U.S. 307 (1979), the United States Supreme Court emphasized the deference given to the trier of fact:

This inquiry does not require a court to ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Id. at 318-319.

B. Analysis

1. Evidence was sufficient to prove each necessary element

To obtain a conviction of first-degree statutory rape, the State must prove beyond a reasonable doubt that the defendant: 1) had sexual intercourse, 2) with another person who was less than fourteen years old. § 566.032.1. "Sexual intercourse" is statutorily defined as

“any penetration, however slight, of the female sex organ by the male sex organ, whether or not an emission results.” § 566.010(4).

It is undisputed that A.W. was twelve-years-old during the summer of 2007, when the events at issue occurred (Tr. 84, 100-01, 105). Further, ample evidence was adduced that Terry engaged in sexual intercourse with A.W. that summer. First, A.W. herself testified that after she moved to Jefferson City in May 2007, she and Terry had sexual intercourse more than six times (Tr. 87-88, 102). This unequivocal testimony alone provided a sufficient basis for the jury to conclude that Terry committed first-degree statutory rape. *See State v. Silvey*, 894 S.W.2d 662, 673 (Mo. banc 1995) (holding that child victim’s uncorroborated testimony was sufficient to sustain the defendant’s conviction).

Additionally, Detective Wolters, the police detective who interviewed Terry, testified that Terry admitted that he had had sex with A.W. (Tr. 106-07). Terry told Detective Wolters that A.W. was a “willing participant” in the sex and that he had not used a condom (Tr. 107). Terry said that he thought he could not get in trouble for having sex with A.W. because he was not yet eighteen years old (Tr. 107). Detective Wolters also noted that A.W. reported to him that during one sexual encounter, Terry “partially penetrated” her (Tr. 110). The State presented medical testimony indicating that, when she was examined in August 2007, A.W. had injuries to her hymen that were consistent with sexual penetration within the previous seventy-two hours (Tr. 114). Thus, Detective Wolters’s testimony regarding Terry’s confession and the medical testimony indicating penetration both support the jury’s verdict.

Finally, Terry's own testimony provided evidence relevant to a finding of guilt. While he denied actually engaging in sexual intercourse with A.W., he told the jury that he was "about to have sex with her," but stopped when his sister walked in on them (Tr. 123). This admission demonstrates that Terry was sexually interested in the twelve-year-old victim and was willing to have sex with her—the jury easily could have believed that Terry was only telling part of the story and had, in fact, had sex with A.W. This reasonable inference was strengthened by Terry's subsequent comment that his sister may have believed that he was about to have sex with A.W. because, as he put it, "my sister knows me" (Tr. 128-29). Terry also admitted that he told Detective Wolters that he "thought it was okay to mess with [A.W.] until [he] turned eighteen," but claimed that A.W. had lied to him about her age (Tr. 131).

In light of A.W.'s unequivocal assertion that Terry had sex with her when she was twelve years old, Terry's confession to Detective Wolters that he had engaged in sexual intercourse with A.W. during the summer of 2007, the medical examination that revealed injury to A.W.'s hymen consistent with sexual penetration, and Terry's trial testimony in which he stated that he "almost" had sex with A.W. and that he thought he could not get in trouble for "messing with her" because he was not yet eighteen, the evidence was more than sufficient to sustain Terry's conviction.

2. *Destructive contradictions rule does not apply*

Terry concedes that "[A.W.] testified that she had sex with [him]," but argues that A.W.'s testimony was insufficient to support Terry's conviction under the doctrine of

destructive contradictions. App. Br. at 17. This argument relies on a fundamental misapplication of the doctrine.

Under Missouri law it is well-settled that the uncorroborated testimony of the victim in a sexual abuse case is sufficient to sustain the conviction. *See Silvey*, 894 S.W.2d at 673; *State v. Sladek*, 835 S.W.2d 308, 310 (Mo. banc 1992); *State v. Paulson*, 220 S.W.3d 828, 833 (Mo. App. S.D. 2007); *State v. Peters*, 186 S.W.3d 774, 778 (Mo. App. W.D. 2006). The doctrine of destructive contradictions “provides that when a witness’s inconsistent and contradictory statements at trial are so diametrically opposed to one another as to preclude reliance thereon and rob the testimony of all probative force, his testimony loses probative value.” *State v. Beckett*, 858 S.W.2d 856, 857 (Mo. App. W.D. 1993) (declining to find in victim’s trial testimony “destructive contradictions” because the jury could have determined reasonable explanations for the apparent inconsistencies).

In the context of sexual offense cases, this doctrine is accompanied by the “corroboration rule,” which Terry also wishes this Court to invoke. App. Br. at 17. The corroboration rule “is mandated only when the victim’s testimony is so contradictory and in conflict with physical facts, surrounding circumstances and common experience, that its validity is rendered doubtful such that corroboration of the victim’s testimony is required to sustain the conviction.” *State v. Paxton*, 140 S.W.3d 226, 230 (Mo. App. S.D. 2004); *Silvey*, 894 S.W.2d at 673.⁴ But corroboration is necessary “only when the witness’s trial testimony

⁴ All districts of the Missouri Court of Appeals recognize that this exception is disfavored. *See, e.g., State v. Nelson*, 818 S.W.2d 285, 289-290 (Mo. App. E.D. 1991); *State v. Davis*,

itself is inconsistent and/or contradictory in major respects. . . .” *See State v. Marley*, 257 S.W.3d 198, 200 (Mo. App. W.D. 2008).

Terry does not contend that A.W.’s trial testimony contained inherently contradictory statements. App. Br. at 15-19. Instead, he invokes the destructive contradictions doctrine based on his assertion that “the scientific tests absolutely demonstrated that [A.W.’s] testimony was false.” App. Br. at 18. Terry’s reliance on the doctrine of destructive contradictions is flawed and should be rejected for at least four reasons.

First, the doctrine applies only when a witness’s testimony is internally contradictory, not when it conflicts with other evidence. *See e.g. State v. Davison*, 46 S.W.3d 68, 80 (Mo. App. W.D. 2001). In *Davison*, the defendant argued that a witness’s testimony was deprived of probative value under the doctrine of destructive contradictions because photographs showed that portions of the witness’s testimony was physically impossible. *Id.* The Court of Appeals held that the doctrine of destructive contradictions was improperly invoked because “the photograph is not testimony, and the doctrine only applies when a witness’ own

903 S.W.2d 930, 934 (Mo. App. W.D. 1995); *State v. Gardner*, 849 S.W.2d 602, 604 n. 2 (Mo. App. S.D. 1993). “[T]here seems to be no logical basis for a separate rule, even a restricted one, which relates solely to the review of the testimony of a victim of a sexual offense. The standards for reviewing the testimony of any witness in a criminal case should be sufficient to assess the testimony of a victim of a sexual offense.” *Nelson*, 818 S.W.2d at 289.

testimony contains inherently contradictory statements.” *Id.* The Court continued, “at best, the photograph impeaches the credibility of [the witness]. Issues of credibility such as this are not sufficient to invoke the doctrine of destructive contradictions.” *Id.* Likewise, in Terry’s case, the purported “scientific tests” are at best extrinsic evidence that may impeach the credibility of A.W.’s testimony. This is not sufficient to invoke the doctrine of destructive contradictions and overcome the default rule that a complaining witness’s testimony is sufficient to sustain the conviction.

Second, the “scientific tests” upon which Terry exclusively relies are not available for any purpose on this appeal, whether to invoke the doctrine of destructive contradictions or simply to discredit A.W., because the “tests” are not part of the record. Although Terry talks about “DNA tests” throughout his brief (App. Br. at 15, 18-20, 25, 30), no DNA test was presented at trial, nor has it been provided to this Court as part of the record (L.F. 1-35). Matters that are not included in the transcript or record on appeal are improper for consideration on appeal. *State v. Strong*, 142 S.W.3d 702, 729 (Mo. banc 2004) (citing *State v. Burrington*, 371 S.W.2d 319, 320-21 (Mo. 1963)). Terry’s inclusion of the paternity test result in his appendix does not fix the problem—the material is still not in the record and therefore cannot be considered. *See Strong*, 142 S.W.3d at 729 (striking portions of the appellant’s brief and appendix that contained matters outside the record). Because Terry’s sufficiency challenge rests entirely on the paternity test, which is a matter outside the record, his point must fail.

Third, even if the paternity test report was within the record, it would be insufficient to deprive A.W.’s testimony of all probative force because it contradicted only a single,

immaterial statement made by A.W.—that she had not had sex with anyone but Terry during the summer of 2007. The destructive contradictions doctrine only applies to inconsistencies within a witness’s testimony regarding *a material element* of the charge. *State v. Wright*, 998 S.W.2d 78, 81 (Mo. App. W.D. 1999). Here, the alleged inconsistency was immaterial because whether A.W. had sex with anyone else that summer does not contradict the evidence that Terry had sex with her.

Terry claims, without citation to the record, that, “[a]t its most elemental, [A.W.’s] testimony was that she had sex that summer with one person—the father of the child.” App. Br. at 18. This mischaracterizes A.W.’s testimony. She did not testify that she had sex with only “the father of her child,” but instead that she had sex with only *Terry*, whom she believed was her child’s father (Tr. 87-88, 95, 102). At best, the purported paternity test establishes only that A.W. had sex with at least one person *other than* Terry. While this inconsistency may reduce her credibility, it does not conflict with her testimony that she had sex with Terry (Tr. 87-88). More importantly, whether twelve-year-old A.W. had sex with people other than Terry is immaterial to the charged offense—the State was only required to prove that she had sexual intercourse with Terry. § 566.032. Therefore, any impeachment value the paternity test might have on the collateral issue of the identity of the father is insufficient to render A.W.’s testimony susceptible to destructive contradictions.

Fourth, assuming *arguendo* that A.W.’s testimony lost its probative value as a result of the purported paternity test, the evidence would still be sufficient to sustain Terry’s conviction because A.W.’s testimony was corroborated. *See State v. Fears*, 217 S.W.3d 323, 332 (Mo. App. S.D. 2007) (observing that if the doctrine of destructive contradictions

applies, “it merely requires that the witness’[s] testimony be corroborated”) (citing *Silvey*, 894 S.W.2d at 673).

In the case at bar, A.W.’s testimony that Terry had sexual intercourse with her was corroborated by Terry’s confession to the police. Detective Wolters testified that when he told Terry that he was investigating a rape complaint by a twelve-year-old girl, Terry asked if it was A.W. (Tr. 105). Terry told the detective that he had had sex with A.W. without using a condom, and that A.W. was a “willing participant” (Tr. 106-07). Further, the doctor who examined A.W. reported injuries to A.W.’s hymen consistent with sexual penetration within seventy-two hours prior to the examination (Tr. 114). The jury was entitled to credit Detective Wolters’s testimony, in conjunction with the medical evidence, and conclude that Terry had engaged in sexual intercourse with twelve-year-old A.W.

Terry argues that Detective Wolters’s testimony regarding Terry’s confession cannot be considered corroborating evidence because Terry denied that he made the incriminating statements to the detective. App. Br. at 18. Terry cites no authority nor provides a logical explanation for his novel proposition that evidence loses corroborative value simply because the defendant contests it. The jury was entitled to believe Detective Wolters’s testimony despite Terry’s denials. *See e.g. State v. Butler*, 24 S.W.3d 21, 30 (Mo. App. W.D. 2000) (“The jury is entitled to believe all, some, or none of the witnesses’ testimony in arriving at its verdict.”); *see also Dulany*, 781 S.W.2d at 55 (same).

For the reasons outlined above, Terry has no basis to challenge the sufficiency of the evidence or invoke the doctrine of destructive contradictions. His point should be denied.

II. (rape-shield)

The trial court did not abuse its discretion in excluding evidence that victim A.W. had engaged in prior sexual conduct with two unidentified individuals in the fall of 2006 because this evidence was inadmissible pursuant to the Missouri rape-shield statute, § 491.015.

In his second point, Terry claims that the trial court erred in refusing to allow him to introduce evidence that victim A.W. had had sex with two boys in the fall of 2006. App. Br. 32-38. Because this evidence related to specific instances of the victim's prior sexual conduct and did not fall within any of the four enumerated statutory exceptions, it was inadmissible pursuant to the rape-shield statute, § 491.015. Accordingly, Terry's claim of error should be denied.

A. Additional Facts

Prior to trial, the State filed a motion in limine seeking to prevent Terry from presenting evidence at trial regarding victim A.W.'s sexual history (Tr. 23-29). In response, Terry made an offer of proof (Tr. 24-25). According to Terry, when A.W. and her mother first spoke with police about the charged offense, A.W. said that she had never had sex with anyone before having sex with Terry (Tr. 25). During a subsequent police interview, A.W. admitted that she had had sex with two boys during the fall of 2006, nearly a year earlier (Tr. 24-25). A.W. reportedly lied the first time because she did not want to admit her sexual activity in front of her mother (Tr. 25). Terry argued that because A.W. was pregnant in February 2008 at the time of the trial, her sexual activity with the boys in 2006 fell within an exception to the rape-shield statute as an alternative source of pregnancy (Tr. 25, 27).

The trial court refused to allow Terry to present evidence of A.W.’s sexual conduct in the fall of 2006, observing that the prior conduct did not occur during the time period when A.W. became pregnant and therefore could not provide an alternative source of pregnancy (Tr. 26-27). However, the court stated that Terry was free to question A.W. and the investigating officer about A.W. making inconsistent statements to police, so long as the sexual details were left out (Tr. 27-28).

B. Standard of Review

This Court reviews a trial court’s decision to admit evidence for abuse of discretion. *State v. Hutchison*, 957 S.W.2d 757, 763 (Mo. banc 1997) (recognizing that trial courts “retain broad discretion over issues of relevancy and admissibility of evidence”). A trial court does not abuse its discretion unless the ruling is “clearly against the logic and circumstances 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). “[I]f reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.” *Id.*

C. Analysis

“The rape-shield statute, § 491.015, creates a presumption that evidence of a victim’s prior sexual conduct is irrelevant to prosecutions for sex crimes.” *State v. Kelley*, 83 S.W.3d 36, 39 (Mo. App. W.D. 2002). “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.” *Id.* 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:

(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." *State v. Smith*, 996 S.W.2d 518, 522 (Mo. App. W.D. 1999).

The evidence Terry sought to elicit, that in the fall of 2006 victim A.W. had sex with two boys (and then lied about it to police), involved specific instances of her prior sexual conduct that did not fall within any of the four exceptions enumerated in the rape-shield statute. The first exception did not apply because the prior sexual conduct at issue was not

with Terry (Tr. 24-25), nor is consent a defense to statutory rape. *See State v. Stokely*, 842 S.W.2d 77, 81 (Mo. banc 1992) (“The law regarding statutory rape provides that a person protected under the statute is incapable of consenting to sexual intercourse and, therefore, consent is no defense.”). The third exception did not apply because the prior conduct occurred in the fall of 2006, whereas the charged crime occurred nearly a year later in the summer of 2007 (Tr. 24-26, 84-88, 102). Thus, the prior sexual conduct was not an “immediate surrounding circumstance” of the crime. The fourth exception did not apply because the previous chastity or chaste character of the victim is not required to be proved by the state in a prosecution for statutory rape. *See* § 566.032.

Finally, despite defense counsel’s argument on the motion in limine (Tr. 23-25), the second exception did not apply because the prior sexual conduct could not show “an alternative source or origin of semen, pregnancy, or disease.” The presence of semen or disease was not at issue in this case, but A.W. was pregnant at the time of trial and she testified that she believed Terry was the baby’s father (Tr. 95). But evidence that A.W. had engaged in sex with two unknown boys in the fall of 2006 had no relevance to her pregnancy because the prior activity was too remote in time—if either of the boys had impregnated A.W. in the fall of 2006, she would have given birth long before Terry’s trial in February 2008. Therefore, the second exception enumerated in the rape-shield statute did not apply. Because the evidence Terry sought to introduce regarding specific instances of the victim’s past sexual conduct did not fall within any of the four exceptions, it was inadmissible. The trial court did not abuse its discretion in enforcing the statute.

Terry suggests that the evidence “did not violate § 491.015” because it was “highly relevant to [A.W.’s] credibility” and would have accomplished several goals of his defense, primarily discrediting A.W. by showing her willingness to lie about her sexual history. App. Br. at 35-37.

This Court rejected an argument strikingly similar to Terry’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*, Terry was properly forbidden, pursuant to the rape-shield statute, from using A.W.’s inconsistent statements regarding her prior sexual conduct to attack her credibility. The evidence he sought to introduce indicated that when A.W. first spoke with police, she told them that Terry was the first person with whom she had sex, but she later admitted that she had had sex with two boys a year before (Tr. 23-27, 84-85). Despite the applicability of the rape-shield law, Terry argues that he should have been able to impeach A.W. using her inconsistent statements because “credibility was always relevant.” App. Br. 34-37. But, as *Madsen* and *Smith* instruct, evidence that runs afoul of the rape-shield statute is inadmissible irrespective of its potential value to the defendant as impeachment material. *See Madsen*, 772 S.W.2d at 661; *Smith*, 996 S.W.2d at 521-22.

Relying on *State v. Long*, 140 S.W.3d 27 (Mo. banc 2004), Terry argues that his constitutional right to present a defense required that he be permitted to introduce evidence of A.W.'s past sexual conduct, which he characterizes as "highly relevant" to her credibility. App. Br. at 36-37. Terry's reliance on *Long* is misplaced. In *Long*, the defendant in a forcible-rape prosecution was prevented from introducing evidence that the complaining witness had made previous false allegations of sexual or physical assault. *Long*, 140 S.W.3d at 29-30. This Court reversed, noting that whether the complainant's current allegations were false was the central issue in the case, and past instances of making false allegations were "highly relevant" to determining this crucial issue. *Id.* at 30. Thus, the Court concluded, "an evidentiary rule rendering *non-collateral, highly relevant* evidence inadmissible must yield to the defendant's constitutional right to present a full defense." *Id.* (emphasis added). The Court explicitly noted, however, that the rape-shield statute was not implicated because it does not bar inquiry into prior *false allegations* of sexual assault. *Id.* at 30, n.3. In situations where the evidence sought to be introduced involved prior sexual conduct, "the trial court would have to consider the applicability of section 491.015." *Id.*

Terry's case is fundamentally different from *Long*. Critically, unlike the evidence held to be admissible in *Long*, the evidence Terry sought to introduce did not show that A.W. had previously made false allegations of sexual assault against anyone (Tr. 23-27). Instead, the evidence was about the victim's actual prior sexual conduct (Tr. 23-27). Terry wanted to insinuate that because A.W. had multiple sexual partners in the past it was likely that she continued to have sex with other people, any of whom could have impregnated her. *See* App. Br. at 35. This evidence fits squarely within the limitations of the rape-shield statute,

which *presumes* that such evidence is “necessarily . . . irrelevant and collateral.” *Smith*, 996 S.W.2d at 522. Terry’s constitutional right to present a defense does not entail an absolute privilege to present any evidence that he deems material. *See Madsen*, 772 S.W.2d at 661. A.W.’s statements about her sexual conduct in 2006 were immaterial to Terry’s case. The trial court did not abuse its discretion in excluding the inadmissible evidence.

III. (improper cross-examination)

The trial court did not plainly err in failing to *sua sponte* intervene when the State asked Terry on cross-examination whether Detective Wolters was lying because such questioning did not create a manifest injustice or miscarriage of justice, in that the prejudicial effect of such questioning was minimal due to the stark differences in the testimony presented by the detective and Terry, the evidence of Terry's guilt was substantial, and no exceptional circumstances existed to require intrusion by the court.

Terry argues that the trial court erred by failing to *sua sponte* intervene in the State's cross-examination of Terry. App. Br. 39-42. As Terry admits, however, this claim of error was not preserved by timely objections, nor was it included in his motion for new trial. App. Br. at 41. Because Terry has failed to demonstrate that the trial court's non-interference in the State's cross-examination resulted in manifest injustice or a miscarriage of justice, his point must be denied.

A. Additional Facts

During the State's case-in-chief, Detective Wolters testified that Terry admitted during an interview that he had engaged in unprotected sexual intercourse with twelve-year-old A.W. (Tr. 106-07). The detective said that Terry claimed he thought he could not get in trouble because he was not yet eighteen (Tr. 107).

Subsequently, Terry took the stand (Tr. 119). During direct examination, Terry testified that he had never had sex with A.W. (Tr. 119). Defense counsel asked him directly, "And you heard the officer say that you told him that you had sex with her?" (Tr. 123). Terry responded, "Yes, sir" (Tr. 123). Defense counsel asked, "Okay. Did you tell the

officer you had had sex with her at one time or another?” (Tr. 123). Terry replied, “No, sir” (Tr. 123).

On cross-examination, the prosecutor asked Terry about his interview with Detective Wolters:

Q [by the Prosecutor]: Do you remember talking to Detective Wolters? Do you remember that?

A [by Terry]: Yes, ma’am.

Q: And that was at the police station, right?

A: Yes, ma’am.

Q: And he told you you didn’t have to talk to him, and you decided to talk to him?

A: Yes, ma’am.

Q: And you heard him testify that you told him that you didn’t have sex with her on the 10th but you had three days earlier on Tuesday? Do you remember telling him that?

A: No.

Q: So if he testified to that, is he lying?

[Defense counsel]: Object to that as—It’s speculation on the part of the witness as to whether or not the officer knows he’s lying.

[Prosecutor]: That’s not my question. My question is is Detective Wolters lying.

[Defense counsel]: And I object to that. She can’t ask him what’s in the mind of Detective Wolters.

The Court: All right. I'll allow that—I'll sustain that part of the objection. Do you want to rephrase, Miss Gandhi?

Q [by the Prosecutor]: Detective Wolters said you told him straight out that you had sex with [A.W.] on Tuesday. Is that a lie, or is that the truth?

A: That's a lie.

Q: Okay. And you heard him testify that you went further and said while you were having sex you didn't even use a condom. Is that a lie, or is that the truth?

[Defense counsel]: Wait a minute. It's not clear—It's not clear who she is asking committed the lie, whether it's he lied or whether she's asking if Detective Wolters lied.

[Prosecutor]: I'll rephrase the question.

The Court: Okay. She's going to rephrase then.

[Prosecutor]: Did you hear Detective Wolters testify that you told him even further that when you had sex with [A.W.] you did not wear a condom? Did you hear him say that?

A: Yes, I heard him say that.

Q: And is that a lie, or is that the truth?

A: That's a lie, because I never told him I had sex with her.

[Defense counsel]: Wait a minute, I object. . . . Again, it's the same kind of question. It calls for whether or not he thinks that Detective Wolters is lying.

The Court: I'll sustain that objection.

Q [by the Prosecutor]: Did you hear Detective Wolters testify that you told him you thought it was okay to mess with her until you turned eighteen; you didn't realize you could get in trouble when you were seventeen?

A: Yes, I told him that.

Q: So you didn't know you could get in trouble for having sex with a twelve-year-old when you were only seventeen?

A: That's not the point. The point is I didn't know she was twelve. She lied to me about her age.

Q: Do you remember Detective Wolters testifying that he said when he first started interviewing you, "A twelve-year-old has said that you guys had sex," and the first thing you said was, "Oh, [A.W.]?" Do you remember that?

A: Yes, I remember.

Q: Do you remember saying that to Detective Wolters?

A: No. I remember him saying her name, and I repeated it after he said it.

Q: So pretty much the gist of everything Detective Wolters testified to was false?

A: Pretty much.

[Defense counsel]: Wait a minute. No. I have the same objection again. She's trying –

The Court: All right, I'll sustain that objection.

[Defense counsel]: I'll ask –

The Court: That will be stricken from the record.

[Prosecutor]: I have nothing further.

[Defense counsel]: Thank you.

(Tr. 129-32).

B. Standard of Review

Terry acknowledges that his claim was not preserved for appellate review by timely objections or inclusion in his motion for new trial. App. Br. at 41; (L.F. 25-26). Except for questions concerning jurisdiction, sufficiency of the charging instrument, and sufficiency of the evidence, allegations of error in a jury-tried case must be included in a motion for new trial to be preserved for review. Rule 29.11(d). A claim of error not included in a new trial motion can only be reviewed for plain error. Rule 30.20. Plain error review is to be used sparingly, and Terry bears the burden of showing plain error. *State v. Miller*, 162 S.W.3d 7, 16 (Mo. App. E.D. 2005). Relief under the plain error rule is granted only when the alleged error so substantially affects the rights of the accused that a manifest injustice or miscarriage of justice inexorably results. *State v. Hadley*, 815 S.W.2d 422, 423 (Mo. banc 1991).

C. Analysis

An attorney may not directly ask one witness if another witness was lying because such questions are argumentative and “there are proper and more effective ways to reveal inconsistencies in witnesses’ testimony.” *State v. Savory*, 893 S.W.2d 408, 411 (Mo. App. W.D. 1995). As this Court observed more than a century ago, “Witnesses should not give their opinions on the truth of a statement by another witness, though they may do the same thing in effect by denying the fact stated.” *Holliman v. Cabanne*, 43 Mo. 568 (Mo. 1869)

(holding that although a witness's comment on the truth of another witness's testimony was improper, it could not have materially affected the case). Despite the impropriety of the examination technique, no manifest injustice has been found from a prosecutor asking a witness during cross-examination if certain State's witnesses were lying. *See e.g. Savory*, 893 S.W.2d at 411; *State v. Roper*, 136 S.W.3d 891, 903 (Mo. App. W.D. 2004). In both cases, the Court of Appeals found that the prejudicial effect of the questioning was lessened because there was a dramatic difference between the testimony presented on behalf of the State and the defendant, so that the disagreement between the prosecution and defense witnesses would have been readily apparent to the jury irrespective of the prosecutor's questions. *Savory*, 893 S.W.2d at 411; *Roper*, 136 S.W.3d at 903.

That reasoning applies to this case. Detective Wolters testified that Terry admitted having had sexual intercourse with twelve-year-old A.W., and that Terry explained that he thought he would not get in trouble because he was under eighteen (Tr. 107). The detective testified that Terry characterized A.W. as a "willing participant," and said he did not use a condom (Tr. 107). Terry's version of his police interview was entirely different. He said that he never told Detective Wolters that he had sex with A.W. (Tr. 123). He claimed that he told the detective that he "almost had sex" with A.W., but that his sister intervened while A.W. was still fully clothed and he was removing his shirt (Tr. 123). Thus, any prejudice arising from the prosecutor directly asking Terry if Detective Wolters was lying was minimal, as it was obvious given the conflicting testimony already before the jury that either Detective Wolters or Terry had not been truthful.

Further, plain error does not occur where the defendant opens the door to the State's cross-examination. *State v. Schlup*, 785 S.W.2d 796, 802 (Mo. App. W.D. 1990); *State v. Hill*, 17 S.W.3d 157, 158 (Mo. App. E.D. 2000). Through the following exchange, Terry opened the door to the questions about whether Detective Wolters was lying when he testified that Terry admitted that he engaged in sex with A.W.:

Q [by Defense counsel]: And you heard the officer say that you told him that you had sex with her?

A: Yes, sir.

Q: Okay. Did you tell the officer you had had sex with her at one time or another?

A: No, sir.

(Tr. 123). In his responses to these two questions, Terry implicitly told the jury that Detective Wolters had testified falsely. Terry complains that he was “deprived of a great deal of any credibility the jury may have been willing to grant him” when the prosecutor “made” him “call Wolters a liar.” App. Br. at 48. But the prosecutor did not “make” Terry say anything. Terry testified that he did not make the inculpatory statements that the detective attributed to him (Tr. 123). That Terry was directly contradicting the detective's testimony could not have escaped the jury's attention. No manifest injustice resulted from the prosecutor directly asking what Terry had already implied.

The court in *Roper* also found no manifest justice because the evidence of the defendant's guilt was substantial. *Roper*, 136 S.W.3d at 903. Likewise, in this case, the jury heard A.W testify that Terry had sex with her at least six times during the summer of 2007 (Tr. 87-88, 102). Further, a physical examination revealed injuries to A.W.'s hymen and

surrounding tissue that indicated sexual penetration within the previous seventy-two hours; A.W. reported that her last sexual encounter with Terry had been just one day before the examination (Tr. 106, 114-15). Terry himself admitted that he told the police he thought it was okay to “mess with [A.W.]” because he was under eighteen and claimed that she had lied to him about her age (Tr. 131). Based on this evidence, there is no reasonable probability that the jury’s verdict would have been different if the challenged cross-examination had not taken place. *See Roper*, 136 S.W.3d at 903.

Finally, it cannot be said that the trial court plainly erred in failing to *sua sponte* intervene in this case because a trial court’s uninvited interference in cross-examination is disfavored and should be limited to only the most extraordinary circumstances. The Court of Appeals in *Roper* articulated the difficulty that this type of claim poses:

Missouri courts have been reluctant to criticize a trial court when it has declined to take action on its own motion on behalf of a party during the examination of a witness. Indeed, such invitations have been rejected in all but the most unusual circumstances. There is sound reasoning behind such hesitance to require a trial court to take *sua sponte* corrective action Uninvited interference by the trial judge in trial proceedings is generally discouraged, as it risks injecting the judge into the role of a participant and invites trial error. In certain circumstances, a trial judge’s intervention in the proceedings may be unwelcome, as the failure to raise an objection may be a matter of trial strategy . . . [T]he trial court should only take independent action in the most unusual and exceptional circumstances.

Roper, 136 S.W.3d at 902-03 (internal citations omitted). The trial court sustained Terry's objections when objections were made (Tr. 129-32). This case does not present the type of unusual and exceptional circumstances that would have compelled the trial court to put itself in the untenable position of further injecting itself as a participant and inviting trial error. Terry did not suffer a manifest injustice when the trial court refused to intervene *sua sponte*.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached substitute brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 8,494 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and
2. That the floppy disk filed with this substitute 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 substitute brief, and a floppy disk containing a copy of this brief, were mailed this 13th day of November, 2009, to:

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APPENDIX

Judgment..... A1

State v. Terry, No. WD69672 (Mo. App. W.D. May 26, 2009)..... A3